

## What's the Most Defense Friendly Jurisdiction in America?The Military.

Nino C. Monea

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## **What's the Most Defense Friendly Jurisdiction in America? The Military.**

CAPTAIN NINO C. MONEA\*

### ABSTRACT

The military treats criminal defendants better than any other jurisdiction in the country. Some of these protections are straightforward improvements over civilian systems, some are inadvertent benefits for the defense. This article catalogs the benefits. They come in three main classes spread throughout the process. First, there are more substantive and logistical roadblocks for the prosecution to surmount to achieve and sustain a conviction, whether misdemeanor or felony, trial or appeal. Second, defendants are treated better on a personal level, which means more dignity in the courtroom and having their worldly needs taken care of during the entire process. And third, defense attorneys are treated better. Military defenders are paid more, have fewer cases, and have fewer obligations than their typical civilian counterparts. This article concludes by arguing the military system should incorporate aspects of the civilian justice system, but also celebrate its superior elements.

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## INTRODUCTION

The military is the most pro-defense jurisdiction in the country, possibly the world. This may sound strange, given the reputation of the armed forces. “Military justice is to justice as military music is to music” goes the old joke.<sup>1</sup> Military justice scholarship is filled with articles pointing out how the system could be more friendly to the defense.<sup>2</sup> And indeed, the military did lack important protections in the recent past.<sup>3</sup> Sensitive to these criticisms, the military has worked hard to combat them over the decades.<sup>4</sup>

Society is beginning to take notice. Criticism has been emerging that courts-martial are “too *soft* on crime.”<sup>5</sup> While this criticism is usually made

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1. Joseph W. Bishop, *Military Justice Is to Justice as Military Music Is to Music*, by Robert Sherrill, COMMENTARY (June 1971), <https://www.commentary.org/articles/joseph-bishop-2/military-justice-is-to-justice-as-military-music-is-to-music-by-robert-sherrill/>.

2. See David A. Schlueter, *American Military Justice: Responding to the Siren Songs for Reform*, 73 A.F.L. REV. 193, 196-97 n.9-18 (2015).

3. Major Jeffery D. Lippert, *Automatic Appeal Under UCMJ Article 66: Time for a Change*, 182 MIL. L. REV. 1, 14 (2004) (describing how, before 1978, defense counsel was wholly beholden to staff judge advocates who simultaneously advised the commanders that directed prosecutions). Some contemporary commentators pushed back on this criticism, however. Bishop, *supra* note 1. It is also worth remembering that the civilian justice perpetrated egregious abuses of due process in the recent past. *E.g.*, *Payne v. Arkansas*, 356 U.S. 560 (1958) (Alabama law enforcement tortured black defendants); *Rochin v. California*, 342 U.S. 165, 166 (1952) (California law enforced induced vomiting to get evidence of narcotics defendants swallowed).

4. See *Prosecutorial Power and the Legitimacy of the Military Justice System*, 123 HARV. L. REV. 937 (2010).

5. Colonel Jeremy S. Weber, *Court-Martial Nullification: Why Military Justice Needs a “Conscience of the Commander”*, 80 A.F.L. REV. 1, 2 (2019) (emphasis added).

in the context of sexual assault, the truth is that military defendants of all kinds enjoy more protections today than anyone else in America.<sup>6</sup> Some of these protections are straightforward improvements over civilian systems, like free access to appellate attorneys or a meaningful right to trial by jury.<sup>7</sup> These sorts of protections should be expanded to all. However, many other military rules offer protection not by enhancing substantive rights but by entrenching logistical walls. This can be as petty as forcing the prosecutor to fetch water bottles for the courtroom and as extreme as spending tens of thousands of dollars for even simple trials. The result is that each and every prosecution is so resource-intensive that even the largest offices can only bear a handful of cases.

Many of these rules were created by design - others by mistake - and almost all of these rules apply regardless of whether the accused is charged with murder or marijuana use. Convicting someone of a crime should be hard, but the hardship usually comes from proving allegations in the courtroom. In the military, the hardship comes from *getting* the case into the courtroom.

Past scholarship has compared the civilian and military justice systems<sup>8</sup> but has focused on the rules in the books. Although this is an important aspect to consider, arguably, the logistical differences between the two systems are more important for the day-to-day administration of criminal justice. Alternatively, comparison articles often limit themselves to one slice of the system.<sup>9</sup>

This article comprehensively shows how the military is more pro-defense than any civilian court.<sup>10</sup> It proceeds in six parts. Part I gives a brief overview of the military justice system: how prosecution offices are structured and disrupted, types of court-martial, how cases proceed, and how the byzantine web of regulations can ensnarl prosecution efforts.<sup>11</sup>

Part II zooms in on the major players in the military justice system.<sup>12</sup> Non-lawyer commanders must navigate the formidable challenges of overseeing the prosecution while protecting the rights of the defendants and victims.<sup>13</sup> Prosecutors must spend their time doing menial labor that civilian

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6. *Id.*; see also Bishop, *supra* note 1.

7. Major General Jack L. Rives & Major Steven J. Ehlenbeck, *Civilian Versus Military Justice in the United States: A Comparative Analysis*, 52 A.F.L. Rev. 213, 231-32 (2002).

8. *Id.* at 213.

9. *E.g.*, Colin A. Kisor, *The Need for Sentencing Reform in Military Courts-Martial*, 58 NAVAL L. REV. 39 (2009) (focusing on sentencing).

10. See *infra* Part VI.

11. See *infra* Part I.

12. See *infra* Part II.

13. See *infra* Section II.A.1.

courts subcontract to judicial employees.<sup>14</sup> Defense attorneys can focus a more significant share of their time vigorously representing their clients while receiving higher pay and lower caseloads than civilian public defenders.<sup>15</sup> Those accused of crimes have all their worldly needs taken care of while going through the system: full salary, healthcare, housing, employment, and no need to take off work to attend court.<sup>16</sup>

Part III concerns pretrial matters.<sup>17</sup> Military prosecutors have severely limited power due to a lack of discretion and probable cause hearings are more onerous.<sup>18</sup> Defendants enjoy stronger discovery rights, almost no pretrial confinement, and full due process protections for misdemeanors.<sup>19</sup>

Part IV is about the trial phase.<sup>20</sup> Military rights to a jury appear weaker on the surface, but in operation, they are much stronger since defendants can exercise them without crushing penalties.<sup>21</sup> As a result, cases move more quickly, dockets are less crowded (meaning more individual attention for each case), military rules of evidence are stricter, guilty pleas are more than kabuki theater, and sentences are lighter.<sup>22</sup>

Part V covers what happens after the conviction.<sup>23</sup> There is a built-in clemency process known as post-trial, where the accused can petition his or her commander for a lighter sentence.<sup>24</sup> These petitions are granted at a much higher rate than federal habeas petitions.<sup>25</sup> And military appeals are extremely thorough, completely free, and done as a matter of course.<sup>26</sup>

Part VI considers all the information preceding it and reaches a conclusion.<sup>27</sup> Some military justice features that benefit the defense are unwise, such as forcing prosecutors to be in charge of logistics on top of prosecuting the case or using untrained law enforcement who are not equipped to investigate complex crimes. However, many policies inject dignity into a system that, on the civilian side, churns through defendants as if they were broken goods, not human beings. We should do away with the former but expand the latter to every defendant in the country. Sadly,

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14. *See infra* Section II.B.1.

15. *See infra* Section II.D.1.

16. *See infra* Section II.E.1.

17. *See infra* Part III.

18. *See infra* Section III.C.

19. *See infra* Section III.D.

20. *See infra* Part IV.

21. *See infra* Section IV.A.1.

22. *See infra* Section IV.B.

23. *See infra* Part V.

24. *See infra* Section V.A.

25. *See infra* Section V.A.

26. *See infra* Section V.A.

27. *See infra* Part VI.

Congress's recent overhaul of the military justice system largely missed the mark.

As this article will show, while some military policies should be reformed, it is also imprecise to simply declare the civilian system is fairer.<sup>28</sup>

## I. OVERVIEW OF THE MILITARY CRIMINAL JUSTICE SYSTEM

### A. *How Military Offices Are Structured*

Charges are filed not by a district attorney but by a convening authority—typically a general or admiral who is not a lawyer and in the chain of command for the defendant.<sup>29</sup> Convening authorities receive advice on the legality of charges from lawyers, but it is commanders who ultimately make the call.<sup>30</sup> The top lawyer on the base who advises the commander directly is called the staff judge advocate.<sup>31</sup> They advise the commander on all legal issues, not just criminal matters.<sup>32</sup> Under the staff judge advocate is the chief of justice, who oversees the day-to-day operations of criminal cases. And at the bottom are frontline prosecutors, called trial counsel.<sup>33</sup> Defense attorneys are independent of the prosecution and work solely to represent the interests of their clients.<sup>34</sup> Defense attorneys are free for everyone: rich, poor, or somewhere in between.<sup>35</sup> Military lawyers of all stripes are part of the Judge Advocate General's Corps or JAG Corps for short.<sup>36</sup>

To analogize it to the civilian world, think of the convening authority as a state governor, the staff judge advocate as the attorney general, the chief of justice as the head of the criminal law division in the attorney general's office, and trial counsel as assistant attorneys general. But here, the governor makes the call on filing charges, accepting plea deals, and all other critical decisions in the case; the attorney general advises. Military defense attorneys may be considered public defenders, as they work on salary, do not charge, and only represent the accused.<sup>37</sup>

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28. See, e.g., Rachel VanLandingham, *FY22 NDAA: A Missed Opportunity to Improve Military Justice*, JUST SECURITY (Dec. 8, 2021), <https://www.justsecurity.org/79481/ndaa-a-missed-opportunity/> [hereinafter *A Missed Opportunity*] (“American military justice stands in stark contrast to the criminal justice gold standard in the civilian world.”).

29. See 10 U.S.C. §§ 822-24.

30. See *id.* § 834.

31. See Weber, *supra* note 5, at 29.

32. See *infra* notes 46-48.

33. See U.S. DEP'T OF ARMY, ARMY REGULATION 27-10, MILITARY JUSTICE para. 21-5, 21-2 (Nov. 20, 2020) [hereinafter AR 27-10]; Rives & Ehlenbeck, *supra* note 7, at 224.

34. *Defending Those Who Defend America*, U.S. ARMY TRIAL DEF. SERV., <https://www.jagcnnet.army.mil/TDS> (last visited Apr. 10, 2022) [hereinafter *Defending*].

35. *Id.*

36. Lt. Col. John J. Brossart & Maj. Tom Hagen, *Wartime Consigliere: Minnesota Lawyers at War*, 67 BENCH & B. MINN. 16 (2010).

37. *Defending*, *supra* note 34.

Convening authorities decide not only whether to bring charges but also what type of court will hear the case: summary court-martial, special court-martial, or general court-martial.<sup>38</sup> A summary court-martial can sentence someone to up to thirty days imprisonment.<sup>39</sup> A special court-martial can sentence someone to a year of prison or up to six months for certain bench trials.<sup>40</sup> A general court-martial can sentence defendants to the maximum penalty the crime provides, which might be as much as life imprisonment or death.<sup>41</sup> Convening authorities can also opt for non-judicial punishment, which can be up to thirty days' restriction to quarters but does not go on a person's record as a criminal conviction.<sup>42</sup>

In analogizing the military system to the civilian world, it can be helpful to describe a non-judicial punishment as a workplace disciplinary action, summary courts-martial as akin to a traffic court, special courts-martial as misdemeanor courts, and general courts-martial as felony courts. But this analogy elides important distinctions. For example, while a summary court-martial has less due process, it is not a criminal conviction, and defendants may refuse a summary court-martial and demand a proper court-martial.<sup>43</sup> Likewise, non-judicial punishment may be turned down in favor of a proper court-martial.<sup>44</sup> Thus, if a defendant believes that non-judicial punishment or summary court-martial will not provide sufficient due process, he or she can insist on a full-bore court-martial.<sup>45</sup>

Every service handles career progression and criminal justice experience differently, but in all of the services, criminal law is but one of many practice areas. Army judge advocates can be assigned to just about any job—including prosecution—and rotate on a regular basis.<sup>46</sup> In the Air Force, judge advocates may get early exposure as prosecutors or assist in prosecutions throughout their careers; however, they must apply for advanced criminal jobs, like a position as a defense attorney, appellate attorney, or judge.<sup>47</sup> The Navy has everyone rotate through prosecution and a few other jobs in the first two years before later specializing.<sup>48</sup> In all services,

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38. 10 U.S.C. §§ 822-24; *See also* Weber, *supra* note 5, at 27-29.

39. *Id.* § 820.

40. *Id.* § 819.

41. *Id.* § 818.

42. Weber, *supra* note 5, at 29; 10 U.S.C. § 815 art. 15; *id.* § 820.

43. 10 U.S.C. § 820.

44. *Id.*

45. *Id.*

46. *Judge Advocate General's Corps (JAG)*, GO ARMY, <https://www.goarmy.com/careers-and-jobs/specialty-careers/law.html> (last visited Mar. 30, 2022) [hereinafter *Go Army JAG*].

47. *Careers: Air & Space Law*, U.S. AIR FORCE, <https://www.airforce.com/careers/specialty-careers/jag/careers> (last visited Mar. 30, 2022) [hereinafter *Air Force Careers*].

48. *Path of a JAG Officer*, U.S. NAVY JUDGE ADVOCATE GEN.'S CORPS (last visited Mar. 30, 2022), [https://www.jag.navy.mil/careers\\_/careers/jagpath.html](https://www.jag.navy.mil/careers_/careers/jagpath.html) [hereinafter *Path of a JAG Officer*].



inexperienced prosecutors are a common feature, and defense attorney tends to be a more senior assignment.<sup>49</sup> So baked into the system, defense attorneys will generally be more seasoned.

*B. Turnover Is Extremely High, Which Devastates Continuity of Cases*

Like almost every other position in the military,<sup>50</sup> turnover is high in the JAG Corps.<sup>51</sup> This means not only changing jobs but moving between duty stations all over the globe. The guiding philosophy in the military is to develop baseline competency in many areas rather than expertise in a few.<sup>52</sup> This makes a degree of sense for combat. For example, suppose a squad of soldiers is deep behind enemy lines and away from reinforcements. All squad members must have a rudimentary knowledge of how to use a radio or apply a tourniquet in case the primary operator or medic is taken out.

But this logic wears thin for litigation. The law can be precise and unforgiving. A judge will not excuse a critical error in a charge sheet just because the prosecutor is inexperienced. And despite the military's boasting, practical experience has shown it is "impossible" to conduct criminal trials in combat zones.<sup>53</sup> In recognition of this fact, when crimes occur down range, defendants are sent back home for trial.<sup>54</sup>

Hence, there is never a situation where a criminal lawyer will be gunned down in combat and need colleagues to step in immediately. Regardless, lawyers must change jobs and locations every few years, sapping quality, continuity, and institutional knowledge.<sup>55</sup> It also means people with no

49. See generally *Air Force Careers*, *supra* note 47; see also OFFICE OF THE JUDGE ADVOCATE GEN., JALS PUBLICATION 1-1: PERSONNEL POLICIES 26 (2020) [hereinafter JALS].

50. U.S. DEP'T OF DEFENSE, THE MILITARY JUSTICE SYSTEM'S RESPONSE TO UNRESTRICTED REPORTS OF SEXUAL ASSAULT, ANNEX 4: ANALYSIS OF MILITARY JUSTICE REFORM 14 (Oct. 30, 2014), [https://www.sapr.mil/public/docs/reports/FY14\\_POTUS/FY14\\_DoD\\_Report\\_to\\_POTUS\\_Annex\\_4\\_OG\\_C.pdf](https://www.sapr.mil/public/docs/reports/FY14_POTUS/FY14_DoD_Report_to_POTUS_Annex_4_OG_C.pdf) [hereinafter RESPONSE TO UNRESTRICTED REPORTS].

51. U.S. DEP'T OF NAVY, COMPREHENSIVE REVIEW OF THE DEPARTMENT OF THE NAVY'S UNIFORMED LEGAL COMMUNITIES 33 (Dec. 9, 2019), <https://media.defense.gov/2020/May/18/2002301989/-1/-1/1/COMPREHENSIVE%20REVIEW%20DON%20UNIFORMED%20LEGAL%20COMMUNITIES.PDF> (noting the "the frequent rotation of first tour judge advocates, as the constant turnover and training . . . [contributed to] a lack of legal continuity and experience built over time."); THE JUDGE ADVOCATE GEN.'S CORPS RESERVE, 2019 ANNUAL REPORT 29 (2019), [https://afreserve.com/JAG/annual\\_report\\_2019.pdf](https://afreserve.com/JAG/annual_report_2019.pdf) (noting "consistent manning shortages due to turnover and deployment").

52. See generally *Go Army JAG*, *supra* note 46.

53. Major Franklin D. Rosenblatt, *Non-Deployable: The Court-Martial System in Combat from 2001 to 2009*, 2010 ARMY LAW. 12 (2010).

54. *Id.* This is true even for high profile cases, like Lt. Brian Calley, responsible for the My Lai Massacre. RICHARD HAMMER, THE COURT-MARTIAL OF LT. CALLEY 6 (1971). More recently, Sgt. Bowe Bergdahl—who infamously abandoned his post in Afghanistan—was tried at Fort Bragg, North Carolina. Corey Dickstein, *A Guilty Plea by Bergdahl on Monday Could Set Up a Unique Military Pre-Sentencing Trial*, STARS & STRIPES (Oct. 13, 2017), <https://www.stripes.com/a-guilty-plea-by-bergdahl-on-monday-could-set-up-a-unique-military-pre-sentencing-trial-1.492465>.

55. See generally *Go Army JAG*, *supra* note 46; *Air Force Careers*, *supra* note 47; *Path of a JAG Officer*, *supra* note 48.

interest or aptitude for prosecution will be forced into the role. The courtroom ends up looking like the campaign in Afghanistan where an Inspector General report noted due to high turnover, “U.S. personnel in Afghanistan were often unqualified and poorly trained . . . every agency experienced annual lobotomies as staff constantly rotated out, leaving successors to start from scratch and make similar mistakes all over again.”<sup>56</sup>

Witnesses, including law enforcement, are also constantly changing locations all over the country and world, so a typical court-martial can cost tens of thousands of dollars to realize when travel costs are factored in,<sup>57</sup> a price tag that has nothing to do with how complex the case is. Practically speaking, it is hard for prosecutors to build a case when they might have one witness in Hawaii, one in Europe, one in Asia, and another in Alaska, which can make interviewing witnesses and visiting the scene of a crime nearly impossible.

General staffing shortages in the military mean that the armed forces routinely fail to comply with federal law that mandates special victim prosecutors and investigators be assigned to cases.<sup>58</sup> Prosecutors assigned to sex assault cases tend to be junior in rank, inexperienced, and lack specialized training for the position.<sup>59</sup> It is not uncommon for military prosecutors to try cases for “one to three years” at the start of their career “and [then] never again.”<sup>60</sup> Doubtless, many civilian prosecutor offices have high turnover, but only in the military is high turnover intentional. At U.S. Attorneys’ Offices, for example, there is quite a bit more stability.<sup>61</sup>

Turnover is even more prejudicial to the effective administration of military justice because of the slapdash nature of military courts. By way of example, there is no proper docket in the military system.<sup>62</sup> In federal court, PACER keeps a running tab of who, what, and when everything was filed.<sup>63</sup>

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56. SPECIAL INSPECTOR GEN. FOR AFGHANISTAN RECONSTRUCTION, WHAT WE NEED TO LEARN: LESSONS FROM TWENTY YEARS OF AFGHANISTAN RECONSTRUCTION X (2021), <https://www.sigarmil/pdf/lessonslearned/SIGAR-21-46-LL.pdf>.

57. Jeff A. Bovarnick, *Plea Bargaining in the Military*, 27 FED. SENT’G. REP. 95, 97 (2014).

58. Sarah Martinson, *Military’s Handling of Sex Crimes Failed Victims, Report Finds*, LAW360 (Nov. 14, 2021, 8:02 PM), <https://www.law360.com/access-to-justice/articles/1439316/military-s-handling-of-sex-crimes-failed-victims-report-finds>.

59. *Id.*

60. *Id.*

61. *Career and Application Guides: The Fast Track to a U.S. Attorney’s Office*, HARV. L. SCH., <https://hls.harvard.edu/bernard-koteen-office-of-public-interest-advising/opia-job-search-toolkit/career-and-application-guides/the-fast-track-to-a-u-s-attorneys-office/> (last visited November 20, 2022) (noting a “significant portion” of AUSAs stay 5-7 years before moving on or moving up in the office).

62. REPORTERS COMM. FREEDOM PRESS, *MILITARY DOCKETS: EXAMINING THE PUBLIC’S RIGHT OF ACCESS TO THE WORKINGS OF MILITARY JUSTICE I* (Lucy A. Dalglish et al. eds., 2008), <https://www.rcfp.org/wp-content/uploads/imported/white-paper-military-dockets.pdf>.

63. See, e.g., *Sherrod v. United States*, No. 08–CV–2013, 2008 WL 5383587 (C.D. Ill. Dec. 19, 2008); see also *What is PACER?*, PACER, <https://pacer.uscourts.gov/#:~:text=What%20is%20PACER%3F,filed%20at%20all%20federal%20courts> (last visited November 20, 2022).

The military does not use PACER or anything else. The parties communicate with the judge through email.<sup>64</sup> Thus, if attorneys switch out, new attorneys do not have an easy, authoritative place to check the chronology of the case. They have to hope their predecessors kept their email inbox meticulously organized and forwarded everything to them.

Turnover applies to both sides, but it helps the defense on the net. Defense counsel are supposed to stay in their position for at least two years, and new attorneys are not supposed to have defense as their first assignment.<sup>65</sup> On the other hand, there is no guidance against making a new lawyer a prosecutor, and they are only supposed to stay for eighteen months in the role. In the author's experience, despite these guidelines, defense counsel is permitted to stay for up to three years, and prosecutors can leave after twelve months or less. In any case, the defense can get a continuance if a new defense attorney is being brought on the case, so they get up to speed,<sup>66</sup> but no such avenue is available for the prosecution.<sup>67</sup> Indeed, if a defense attorney gets removed from a case, it can result in the conviction being set aside.<sup>68</sup>

High turnover also disrupts the normal dynamics of courts in ways that help the defense. In civilian jurisdictions, the judge, prosecutor, and defense attorney are repeat players who develop a "going rate" for a given crime.<sup>69</sup> Thus, the criminal justice system transforms into a "routine and bureaucratic" process where defendants get funneled towards a pre-determined outcome,<sup>70</sup> rather than an individualistic determination of each defendant's guilt and culpability. Because military judges, prosecutors, defendants, law enforcement, supervisors, and commanders are always switching out—and no sentence guidelines exist—military justice is much more fluctuant. This means that negotiations over appropriate outcomes and sentences remain centered upon facts of each defendant's case, not the sentence received by the last hundred defendants charged with the same crime.

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64. *See, e.g.*, United States v. Rich, 79 M.J. 472, 474-75 (C.A.A.F. 2020); U.S. DEP'T OF HOMELAND SEC. & U.S. COAST GUARD, MILITARY JUSTICE MANUAL: COMDTINST M5810.1H 11-1 (2021), [https://media.defense.gov/2021/Jul/14/2002762684/-1/-1/0/CIM\\_5810\\_1H.PDF](https://media.defense.gov/2021/Jul/14/2002762684/-1/-1/0/CIM_5810_1H.PDF) [hereinafter MIL. JUST. MANUAL].

65. JALS, *supra* note 49, at 26.

66. *See, e.g.*, United States v. Khan, No. ACM 38962, 2017 WL 3309689, at \*9 (A.F. Ct. Crim. App. July 20, 2017); United States v. Lucero, No. ARMY 20020869, 2007 WL 7264779, at \*12 (A. Ct. Crim. App. Sept. 17, 2007).

67. United States v. Royster, 42 M.J. 488, 490 (C.A.A.F. 1995) ("prosecutors are fungible; and procedures are readily available to compensate for their unavoidable absences during a trial").

68. United States v. Baca, 27 M.J. 110, 118-19 (C.M.A. 1988).

69. Jeanette Hussemann & Jonah Siegel, *Pleading Guilty: Indigent Defendant Perceptions of the Plea Process*, 13 TENN. J.L. & POL'Y 459, 465 (2019).

70. *Id.*

*C. The Military Has a Vast Web of Conflicting Regulations That Complicates Prosecution*

The Manual for Courts-Martial, containing the rules of procedure, is frequently called the “Bible” of military justice practitioners.<sup>71</sup> The Manual runs on for hundreds of pages, and most of its commandments are directed at the prosecution.<sup>72</sup> Thou shalt produce witnesses for the defense.<sup>73</sup> Thou shalt not punish defendants held in pretrial restraint.<sup>74</sup> Thou shalt find a suitable room to hold court in.<sup>75</sup> But sitting atop this already vast collection of rules for the prosecution sits a superstructure of interlocking regulations that are neither included in the Manual nor referenced by it. Sometimes, these regulations conflict.<sup>76</sup> These regulations contain countless obligations for prosecutors to violate and scuttle a case.<sup>77</sup>

The services have regulations that govern military justice, such as Army Regulation 27-10, Air Force Instruction 51-201, or the Navy’s Manual of the Judge Advocate General.<sup>78</sup> These regulations do not merely flesh out or explain procedures to follow; they are chock-full of mandatory language for how the government must act.<sup>79</sup> Plucking examples from the Army regulation, if civilian authorities plan to prosecute a defendant that the military also seeks to charge, the military prosecutor must contact the civilian prosecutor’s office and write a report analyzing the expected civilian case.<sup>80</sup> If the Secretary of the Army wishes to designate a new convening authority, they must use the unit’s official name and unit identification code.<sup>81</sup> How many more binding edicts like this are there? Hard to say. The Army

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71. United States v. Morris, 15 C.M.R. 209, 212 (C.M.A. 1954); United States v. Holmes, 672 F. Supp. 2d 739, 744 (E.D. Va. 2009) (citing Gregory E. Maggs, *Judicial Review of the Manual for Courts Martial*, 160 MIL. L. REV. 96, 97 (1999)).

72. See generally MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. (2019) [hereinafter MCM].

73. *Id.* R.C.M. 405(h)(2).

74. *Id.* R.C.M. 304(f).

75. *Id.* R.C.M. 502(d)(5).

76. *E.g.*, United States v. Bartlett, 66 M.J. 426, 429 (C.A.A.F. 2008).

77. See generally MCM, *supra* note 72.

78. U.S. DEP’T OF NAVY, MANUAL OF THE JUDGE ADVOCATE GEN. (JAGMAN) sec. 0117.C.5 (Feb. 14, 2022), [https://www.jag.navy.mil/library/instructions/JAGINST\\_5800.7G\\_CH-1.pdf](https://www.jag.navy.mil/library/instructions/JAGINST_5800.7G_CH-1.pdf) [hereinafter JAGMAN].

79. *E.g.*, AR 27-10, *supra* note 33, para. 3-3, 4-2 (“[T]he procedures set forth in MCM, 2019, and in section III of this chapter must be followed.”) (“Any UCMJ action against a Soldier who has been tried by a civilian court or is facing criminal prosecution by a civilian authority, will follow with the procedures of this chapter.”).

80. *Id.* para. 4-3c. Looking at the Air Force, prosecutors are required to determine if a victim wants the case prosecuted by the military or civilian authorities, must notify the civilian authorities if the victim wants it, notify the victim of the civilian authority’s response, and must consider the victim’s views before taking action. U.S. DEP’T OF AIR FORCE, INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE, para. 10.1.3-10.1.4 (Apr. 14, 2021) [hereinafter AFI 51-201].

81. AR 27-10, *supra* note 33, para. 5-2b.

Publishing Directorate lists almost 500 “Army Regulations,”<sup>82</sup> which, despite the name, are only one breed of Army regulations. And that is to say nothing of Department of Defense policies. The Air Force Instruction also lists dozens and dozens of other statutes, regulations, and forms in its glossary.<sup>83</sup>

Outside of roadblocks to prosecution, there are miscellaneous perks for defendants sprinkled inside them. The Navy, for example, has strict rules over when and how non-judicial punishment may be announced, with an eye towards protecting the defendant’s privacy.<sup>84</sup> If a defendant is acquitted at a court-martial, their identity will also be protected.<sup>85</sup>

The United States Department of Justice has a lengthy manual that sets out detailed procedures for prosecutors to follow.<sup>86</sup> But the attorneys at the DOJ are no fools. They have an explicit disclaimer at the beginning saying that the manual does not create any substantive or procedural right for any party, nor it is enforceable in any court, nor does it impose any limitation on lawful litigation.<sup>87</sup> This sort of disclaimer against any enforceable rights being created can be found in virtually all executive orders from the president, on topics as diverse as labor agreements<sup>88</sup> to international sanctions.<sup>89</sup> Notably, even executive orders that relate to courts<sup>90</sup> or the federal criminal justice system,<sup>91</sup> or that appear to create an enforceable rule<sup>92</sup> have this disclaimer.

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82. *Army Regulations*, ARMY PUB. DIRECTORATE, <https://armypubs.army.mil/ProductMaps/PubForm/AR.aspx> (last visited Apr. 5, 2022).

83. AFI 51-201, *supra* note 80, para. 31.14-31.16.

84. JAGMAN, *supra* note 78, sec. 0115.a.

85. *Id.* sec. 0142.g.

86. *See generally Justice Manual*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/jm/justice-manual> (last visited Nov. 25, 2022.)

87. *Id.* para. 1-1.200, <https://www.justice.gov/jm/jm-1-1000-introduction#1-1.200>.

88. Exec. Order No. 14063 § 13(c), 87 Fed. Reg. 7363 (Feb. 4, 2022), <https://www.federalregister.gov/documents/2022/02/09/2022-02869/use-of-project-labor-agreements-for-federal-construction-projects>.

89. Exec. Order No. 14065 § 11(c), 87 Fed. Reg. 10293 (Feb. 21, 2022), <https://www.federalregister.gov/documents/2022/02/23/2022-04020/blocking-property-of-certain-persons-and-prohibiting-certain-transactions-with-respect-to-continued>.

90. Exec. Order No. 14023 § 6(c), 86 Fed. Reg. 19569 (Apr. 9, 2021), <https://www.federalregister.gov/documents/2021/04/14/2021-07756/establishment-of-the-presidential-commission-on-the-supreme-court-of-the-united-states>.

91. Exec. Order No. 14006 § 3(c), 86 Fed. Reg. 7483 (Jan. 26, 2021), <https://www.federalregister.gov/documents/2021/01/29/2021-02070/reforming-our-incarceration-system-to-eliminate-the-use-of-privately-operated-criminal-detention>; Exec. Order No. 14053 § 8(c), 86 Fed. Reg. 64337 (Nov. 15, 2021), <https://www.federalregister.gov/documents/2021/11/18/2021-25287/improving-public-safety-and-criminal-justice-for-native-americans-and-addressing-the-crisis-of>.

92. Exec. Order No. 13988 § 4(c), 86 Fed. Reg. 7023 (Jan. 20, 2021), <https://www.federalregister.gov/documents/2021/01/25/2021-01761/preventing-and-combating-discrimination-on-the-basis-of-gender-identity-or-sexual-orientation>; Exec. Order No. 13991 § 8(d), 86 Fed. Reg. 7045 (Jan. 20, 2021), <https://www.federalregister.gov/documents/2021/01/25/2021-01766/protecting-the-federal-workforce-and-requiring-mask-wearing>.

The military lacks a blanket disclaimer like this.<sup>93</sup> Even presidential orders related to the military justice system lack the ubiquitous disclaimer.<sup>94</sup> The negative inference is that *everything* in military regulations creates an enforceable right by defendants. Courts interpret these regulations as if they are legally binding,<sup>95</sup> or say trial judges abuse their discretion by misapplying these regulations.<sup>96</sup> Whether or not any given violation of a regulation is a fatal error, defense attorneys are more than happy to file motions asking for relief.<sup>97</sup> These sorts of gambits are not always successful, but the fact that they have made it to appellate courts hundreds of times<sup>98</sup> means the threat of having charges dismissed for violating an obscure, ancillary regulation always looms large for the government.

#### D. *The Military System Is Always Changing*

The whole complicated system is in a constant state of flux. Congress has passed 250 reforms in recent memory.<sup>99</sup> Every tweak means a new opportunity for a junior (or senior) prosecutor to misstep. Most consequential of all, a recent law mandates that sex crimes and serious felonies will be taken out of the chain of command.<sup>100</sup> For these offenses, a “special trial counsel” will decide whether to file charges, but commanders for the unit will still select jurors, grant immunity to witnesses, approve expert requests, and diffuse cases by allowing resignations in lieu of courts-martial.<sup>101</sup>

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93. Sometimes narrowly drawn disclaimers apply to small portions of the regulation, but not the entire document. *E.g.*, AR 27-10, *supra* note 33, para. 5-29c(6)(c), 17-2e; AFI 51-201, *supra* note 80, para. 11.4.7.4; JAGMAN, *supra* note 78, sec. 0177(g).

94. Exec. Order No. 14062 §§ 1-2, 87 Fed. Reg. 4763 (Jan. 26, 2022), <https://www.federalregister.gov/documents/2022/01/31/2022-02027/2022-amendments-to-the-manual-for-courts-martial-united-states>.

95. *E.g.*, United States v. Downey, No. ACM S32563, 2020 WL 1456449, at \*7 (A.F. Ct. Crim. App. Mar. 18, 2020).

96. *E.g.*, United States v. Myers, No. ACM 39234, 2017 WL 4003924, at \*8 (A.F. Ct. Crim. App. Aug. 30, 2017).

97. United States v. Heyward, 73 M.J. 904, 908 (A. Ct. Crim. App. 2014); United States v. Estrada, 69 M.J. 45, 48 (C.A.A.F. 2010); United States v. Bordelon, 43 M.J. 531, 533 (A. Ct. Crim. App. 1995).

98. A Lexis search of military cases on February 24, 2022 for “AR 27-10” yielded 186 results and a search for “AFI 51-201” brought up 185 results. *See generally* AR 27-10, *supra* note 33; AFI 51-201, *supra* note 80.

99. Sarah Martinson, *Military Justice System Problems Go Beyond Sexual Assaults*, LAW360 (Oct. 17, 2021), <https://www.law360.com/articles/1408561>.

100. *A Missed Opportunity*, *supra* note 28.

101. *Id.* As this article was on the cusp of publication, Congress announced yet another massive overhaul of the military justice system, before the previous massive overhaul could even be implemented. John M. Donnelly, *Gillibrand Calls New NDAA ‘Huge Milestone’ in Military Justice*, ROLL CALL (Dec. 7, 2022, 1:05 PM), <https://rollcall.com/2022/12/07/gillibrand-calls-new-ndaa-huge-milestone-in-military-justice/>. Together, the two laws will create a totally different system for fourteen covered offenses, primarily sex crimes. *Id.* Commanders will be cut out of the key prosecutorial decisions like jury selection or immunity grants, but it appears likely they will still have a role in the million-and-one procedural tasks that must be completed to shepherd a case to trial. *See id.* Presumably, different processes, customs,

How the new law is implemented could also lead to practical problems. No one knows exactly how “special trial counsel” will interact with commanders, or the communities they serve. Imagine if a state attorney general had to coordinate with the governor on the minutia of trial for each and every case filed. Massive changes tend to lead to chaos, and chaos tends to favor the defense.

## II. THE PLAYERS OF THE MILITARY JUSTICE SYSTEM

### A. *The Role of Commanders*

#### 1. *Commanders Make Life Harder for Prosecutors*

Commanders are integral to the military justice system. Commanders are the ones who bring charges.<sup>102</sup> Commanders are the ones who approve plea deals.<sup>103</sup> Commanders are the ones who approve requests for expert witnesses or individual military counsel.<sup>104</sup> It is a widespread fear that commanders may exert a pernicious influence on a case in favor of prosecution,<sup>105</sup> and all actors should remain vigilant against this risk. But in a number of ways, the prominence of commanders *hampers* the prosecution.

On the most basic level, the commander is not a lawyer.<sup>106</sup> This may mean exercising leniency even when legal guilt is firmly established. Conversely, commanders can force prosecutors to take unreasonable positions in court, and it will be the prosecutors, not the commander, who feel the wrath of the judge and defense. This can mean taking unwinnable cases that result in acquittals for the defense, yet consume time, energy, and resources from the prosecutor.<sup>107</sup>

The prosecutor in the military has many bosses, not just the commander.<sup>108</sup> In order to get, say, a plea deal approved, they have to go

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expectations, precedents, and regulations will arise for these two systems. This means the military will have to oversee two distinctive, parallel systems of justice under one roof—something no other jurisdiction in America must contend with. The most likely outcome will be a logistical nightmare that proves unworkable and the eventual scrapping of the traditional military justice system altogether.

102. MCM, *supra* note 72, R.C.M. 306. As noted in the previous footnote, commanders will likely have a diminished role going forward, at least for certain cases.

103. Bovarnick, *supra* note 57, at 95 (noting a military plea deal is “between a commander and a soldier”).

104. MCM, *supra* note 72, R.C.M. 703(d).

105. Tyler W. Winslow, *Reconstituting USCAAF Under Article III: Preserving Fairness, Resolving Political Tensions, and Balancing Justice and Order in American Military Justice*, 58 WASHBURN L.J. 449, 449-50, n.3 (2019).

106. See Weber, *supra* note 5, at 29.

107. DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES, FOURTH ANNUAL REPORT 2, 51-54 (March 2020), [https://daci.pad.whs.mil/images/Public/08-Reports/06\\_DACIPAD\\_Report\\_20200331\\_Final\\_Web.pdf](https://daci.pad.whs.mil/images/Public/08-Reports/06_DACIPAD_Report_20200331_Final_Web.pdf) [hereinafter 2020 DAC-IPAD] (documenting that commander routinely send losing cases to trial that predictably tank).

108. Bovarnick, *supra* note 57, at 96-97.

through their Chief of Justice, the Deputy Staff Judge Advocate, the Staff Judge Advocate, the General Court-Martial Convening Authority, and get recommendations from the Summary Court-Martial Convening Authority, and Special Court-Martial Convening Authority (and probably the defendant's direct supervisor and the victim too).<sup>109</sup> So, a prosecutor may need to get seven-odd superiors to sign off on any deal—not all of whom are lawyers.

That alone is daunting, but on a practical level, it is even worse. The prosecutor may not personally know the non-lawyer commanders or have rapport with them, and he or she may not work in the same building as them. Negotiating on behalf of seven-odd people, many of whom are effectively strangers, is awkward. What is more, commanders are extremely busy people, so merely getting on their calendar to talk about a deal can be a struggle. This creates a bottleneck for all prosecutorial actions. And virtually everything that goes to commanders need to be written in an archaic format that makes Bluebooking look simple.<sup>110</sup>

The defense attorney, in contrast, only has to answer to their client. Federal prosecutors have a “vast scope of charging discretion,”<sup>111</sup> but due to the supremacy of commanders, military prosecutors have none.<sup>112</sup>

## 2. *Unlawful Command Influence Creates Pitfalls for the Prosecution*

Unlawful Command Influence, or UCI, has been called the “mortal enemy” of military justice.<sup>113</sup> It occurs when an official uses their position or power to improperly influence the outcome or process of a court-martial.<sup>114</sup> This includes immediate supervisors as well as high officials in the chain of command, but not directly involved in the case.<sup>115</sup> UCI can occur at any time, even before charges are filed.<sup>116</sup> Most famously, a military judge threw out a sexual assault case because President Barack Obama, speaking in general

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109. *Id.*

110. *E.g.*, U.S. Dep't of Army, Army Regulation 25-50 Report of Investigation on Preparing and Managing Correspondence (Oct. 10, 2020). The regulation is over one hundred pages and sets out rules for inter-office memos that quite literally mandate precise indentation, font style, paragraph spacing, and a thousand other pieces of minutiae. Sticklers may reject a memo with even tiny deviations from the standard.

111. *United States v. Bonnett-Grullon*, 53 F. Supp. 2d 430, 431 (S.D.N.Y. 1999).

112. MCM, *supra* note 72, R.C.M. 306.

113. *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986).

114. MCM, *supra* note 72, R.C.M. 104(a)(2).

115. *United States v. Barry*, 78 M.J. 70, 79 (C.A.A.F. 2018); *United States v. Boyce*, 76 M.J. 242, 252 (C.A.A.F. 2017); *United States v. Bergdahl*, 80 M.J. 230, 236 (C.A.A.F. 2020).

116. Major Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 MIL. L. REV. 129, 146 (2014).



terms, said “I expect consequences” for sexual assault.<sup>117</sup> It is based on the assumption that if military superiors seek unjustly harsh punishment of an accused, their subordinates will be unable to stand up to them.<sup>118</sup> Military courts are so concerned with eradicating unlawful command influence that the *appearance* of improper influence *without* prejudice can be enough to nix a case.<sup>119</sup>

It is understandable to worry that military subordinates will be beholden to their superiors, but some also argue civilians are highly resistant to such pressure.<sup>120</sup> The evidence supporting the idea that servicemembers are genetically different from civilians is simply not very strong.<sup>121</sup> While federal prosecutors are reasonably independent, they are far from immune from coercion. While former President Donald Trump fired his first attorney general for being insufficiently loyal,<sup>122</sup> tried to oust a special counsel who was investigating him,<sup>123</sup> and pressured the Justice Department to declare that the 2020 election was a fraud.<sup>124</sup> Trump’s actions were boorish, but most attempts to influence prosecutors are more subtle—and effective.

Take some recent examples. As Attorney General, Jeff Sessions issued a memo directing prosecutors to seek the most serious readily provable crime

117. Erik Slavin, *Judge: Obama Sex Assault Comments ‘Unlawful Command Influence’*, STARS & STRIPES (June 14, 2013), <https://www.stripes.com/judge-obama-sex-assault-comments-unlawful-command-influence-1.225974>.

118. *What Is ‘Unlawful Command Influence’ in The Military Justice System?*, NPR (July 19, 2019, 4:09 PM), <https://www.npr.org/2019/07/19/743599276/what-is-unlawful-command-influence-in-the-military-justice-system>.

119. *Boyce*, 76 M.J. at 248.

120. Rachel E. VanLandingham, *Military Due Process: Less Military & More Process*, 94 TUL. L. REV. 1, 4-5 (2019) (“If President Trump had similarly interfered with a civilian defendant’s prosecution in the federal justice system, there would likely be little concern that such comments had tainted that system’s legitimacy, given the relative independence of U.S. Attorneys and the total independence of Article III federal judges.”).

121. Captain Richard J. Anderson & Keith E. Hunsucker, *Is the Military Nonunanimous Finding of Guilty Still An Issue?*, ARMY LAW. 57, 59 (Oct. 1986) (“[i]n other areas of [social science] research, only negligible or no differences have been found between civilian and military populations”); M. Kent Jennings & Gregory B. Markus, *The Effect of Military Service on Political Attitudes: A Panel Study*, 71 AM. POL. SCI. REV. 131, 146 (1977) (“the simple distinction between service and nonservice was too crude a cutting tool”); Edward F. Sherman, *Military Justice Without Military Control*, 82 YALE L.J. 1398, 1401 (1973) (“Sociologists have noted the gradual convergence of military and civilian social structures due to technology and the bureaucratization of military functions.”).

122. Peter Baker et al., *Jeff Sessions Is Forced Out as Attorney General as Trump Installs Loyalist*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/us/politics/sessions-resigns.html>.

123. Charlie Savage, *McGahn Affirmed That Trump Tried to Oust Mueller, Transcript Shows*, N.Y. TIMES (June 9, 2021), <https://www.nytimes.com/2021/06/09/us/politics/mcgahn-mueller-report-testimony.html>.

124. Katherine Faulders, *Newly Released Notes Show Trump Pressured DOJ to Declare Election was ‘Corrupt’*, ABC NEWS (July 30, 2021, 2:28 PM), <https://abcnews.go.com/US/newly-released-notes-show-trump-pressured-doj-declare/story?id=79172208>.

in a given case.<sup>125</sup> Attorney General Merrick Garland said “The Justice Department remains committed to holding all January 6th perpetrators, at any level, accountable under law.”<sup>126</sup> In the recent past, U.S. Attorneys have been fired for political disloyalty.<sup>127</sup> Research suggests that federal civilian prosecutors—who are appointed or hired through civil service—are responsive to political pressure.<sup>128</sup> One imagines elected prosecutors are even more political.

These examples of Attorneys General encouraging harsher prosecution were more serious than President Obama’s generalized statement about sexual assault. The Sessions memo *removed* discretion from all junior prosecutors (rather than tacitly encouraging harsher punishment) and forced them to charge the harshest offense possible.<sup>129</sup> The statement by Garland promised criminal charges related to specific, identifiable defendants.<sup>130</sup> And yet, no civilian defendant can seek redress for this.<sup>131</sup>

Other improper influences permeate the civilian justice system. Congress passes overly punitive drug laws in response to political hysteria.<sup>132</sup> Appointed judges routinely rule in cases where they have a financial interest.<sup>133</sup> Elected judges campaign that they will be the “tough[est]” on crime,<sup>134</sup> that they will “send more . . . drug dealers to jail,”<sup>135</sup> or “put[] criminals where they belong . . . behind bars.”<sup>136</sup>

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125. *Memorandum From the Attorney General to All Federal Prosecutors, Department Charging and Sentencing Policy*, DEP’T OF JUSTICE (May 10, 2017), <https://www.justice.gov/archives/opa/press-release/file/965896/download> [hereinafter *Attorney General Memo*].

126. Nicole Sganga, *Garland Says “The Actions We Have Taken Thus Far” on January 6 Rioters “Will Not Be Our Last,”* CBS NEWS (Jan. 6, 2022, 8:16 AM), <https://www.cbsnews.com/news/merrick-garland-january-6-capitol-riot-arrests-charges/>.

127. Ari Shapiro, *Timeline: Behind the Firing of Eight U.S. Attorneys*, NPR (Apr. 15, 2007, 3:07 PM), <https://www.npr.org/templates/story/story.php?storyId=8901997>.

128. Ethan D. Boldt & Christina L. Boyd, *The Political Responsiveness of Violent Crime Prosecution*, 71 POL. RES. Q. 936, 942 (2018); Eric A. Tirschwell & Theodore Hertzberg, *Politics and Prosecution: A Historical Perspective on Shifting Federal Standards for Pursuing the Death Penalty in Non-Death Penalty States*, 12 J. CONST. L. 57, 86 (2009) (noting that *federal* prosecutors are more likely to seek the death penalty in the South, which is where local prosecutors are more likely to favor the death penalty).

129. *Attorney General Memo*, *supra* note 125.

130. Sganga, *supra* note 126.

131. *United States v. Bergdahl*, 80 M.J. 230, 246 (C.A.A.F. 2020) (Sparks, J., dissenting) (explaining no good analogue for UCI exists in the civilian world).

132. Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 25 (2010).

133. James V. Grimaldi, Coulter Jones & Joe Palazzolo, *131 Federal Judges Broke the Law by Hearing Cases Where They Had a Financial Interest*, WALL ST. J. (Sept. 28, 2021, 9:07 AM), <https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial-interest-11632834421>.

134. Complaint for Plaintiff at 3, *In re Kaiser*, No. 86-515-F-10 (Wash. CJC Mar. 13, 1987).

135. *In re Frederick Spencer*, 759 N.E.2d 1064, 1065 (Ind. 2001).

136. *Inquiry Concerning a Judge*, *In re Kinsey*, 842 So. 2d 77, 80 (Fla. 2003) (No. SC96629).

If a commander said any of those things, the defense would almost certainly get dismissals. But if a civilian judge—who has more authority over the outcome of a case than a commander—does them, there is no remedy. And it should be noted that lawyers are just as terrified, perhaps more so, of standing up to judges as subordinates are of standing up to commanders.<sup>137</sup> In fact, because the commander has no role inside the courtroom, defense attorneys can freely accuse the commander of misconduct without fear of reprisal—no defense attorney in their right mind would call into question the integrity of the judge presiding over their trial. Yet only commanders get a presumption of mendacity.<sup>138</sup> Categorically assuming that military subordinates are more pliable than civilians is a stereotype.

None of this is to say we should not be concerned about unlawful command influence in the military.<sup>139</sup> Only that the same pressures exist in the civilian world, and no judicial remedy exists, nor public outcry.

### 3. *Commanders Have an Incentive to Seek Lighter Punishments*

Although commanders oversee the prosecution, their role goes far beyond this. They also occupy a quasi-judicial role where they must maintain neutral and detached from the case, act in the interest of justice, promote discipline for the unit, and protect the rights of both defendants and victims.<sup>140</sup> These obligations are awkward and contradictory. There is no official in the civilian legal system that we expect to fulfill so many conflicting goals—and these commanders lack legal training and have full-time, demanding jobs outside of the criminal justice process. It is a miracle anyone can pull this off.

Because commanders must shoulder so many responsibilities, it is a supreme headache to bring charges. Unsurprisingly, commanders will

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137. *E.g.*, David Pimentel, *The Reluctant Tattletale: Closing the Gap in Federal Judicial Discipline*, 76 TENN. L. REV. 909, 944 (2009).

138. *United States v. Chikaka*, 76 M.J. 310, 313 (C.A.A.F. 2017) (once the defense meets the “low” burden of showing “some evidence” of unlawful command influence, the burden shifts to the prosecution to rebut it by beyond a reasonable doubt).

139. Jennifer Steinhauer, *Lawmakers Reach Deal to Overhaul How Military Handles Sexual Assault Cases*, N.Y. TIMES (Dec. 7, 2021), <https://www.nytimes.com/2021/12/07/us/politics/military-sexual-assault-congress.html> (noting “years of complaints about unfairness and retaliation” by commanders). Fortunately, in modern times, documented cases of UCI have declined. Lieutenant Colonel Theodore Essex & Major Leslea Tate Pickle, *A Reply to the Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice (May 2001): “The Cox Commission”*, 52 A.F.L. REV. 233, 256 (2002) (“We have been unable to find a single case in the last 20 years that found the military trial judge was not independent.”). Similarly, years come and go where services report not a single conviction has been reversed due to UCI. *See, e.g.*, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, COMMANDER’S LEGAL HANDBOOK 27-8 11 (2019), <https://jsc.defense.gov/Annual-Reports/> (click the link “2019” and go to page 2 of the Army report) (last visited Mar. 31, 2022) [hereinafter COMMANDER’S LEGAL HANDBOOK].

140. *Id.*

frequently opt for less punitive forms of punishment to avoid the inanity of court-martial.<sup>141</sup> Nowhere is this truer than in a deployed environment. Commanders and their attorneys will do almost anything they can to avoid the “crushing burdens” of a court-martial in theater.<sup>142</sup> Commanders also did not like taking soldiers out of the fight to stand trial, so they would avoid bringing cases in the first place.<sup>143</sup> Even when charges did go forward, defendants got “combat zone discounting” on punishments.<sup>144</sup> And soldiers could get leniency if they perform well in combat.<sup>145</sup>

The commander’s obligations to care for defendants are clear and subject to judicial remedy if not followed.<sup>146</sup> The commander’s obligations to help victims are more nebulous and aspirational. For example, a majority of victims in the military perceived facing retaliation, formally or informally, after reporting a sexual assault.<sup>147</sup> It is a failure of command to allow a culture of fear to exist for victims—a culture which benefits sexual offenders—but victims do not have a clear avenue to go before a judge to rectify the situation. Only defendants do.

## *B. The Role of Prosecutors*

### *1. Prosecutors Are Responsible for Nearly All Logistical Aspects of Trial*

Historically, “[a] court martial was not a court, but simply an agency of the commanding officer.”<sup>148</sup> “It was . . . his right hand to help him maintain discipline, and was controlled not by law but by his will.”<sup>149</sup> William Winthrop wrote that “Courts-martial are not courts, but are in fact, simply instrumentalities of the executive power.”<sup>150</sup> This was true not only in America, but in the British system that inspired it,<sup>151</sup> and in the ages before

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141. See *Mattis Memo Addresses Decline in Courts-Martial*, NAT’L GUARD ASS’N U.S. (Sept. 11, 2018), <https://www.ngaus.org/about-ngaus/newsroom/mattis-memo-addresses-decline-courts-martial>.

142. Rosenblatt, *supra* note 53, at 12. See also Colonel Carlton L. Jackson, *Plea-Bargaining in the Military: An Unintended Consequence of the Uniform Code of Military Justice*, 179 MIL. L. REV. 1, 66-67 (2004) (commanders switched from courts-martial to administrative actions during wartime).

143. Rosenblatt, *supra* note 53, at 20.

144. *Id.*

145. *Id.*

146. See, e.g., *United States v. King*, 58 M.J. 110, 115 n.4 (C.A.A.F. 2003) (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 305(k)).

147. U.S. DEP’T OF DEFENSE, ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 19 (2014), <https://www.sapr.mil/reports>.

148. CHRIS BRAY, *COURT-MARTIAL: HOW MILITARY JUSTICE HAS SHAPED AMERICA FROM THE REVOLUTION TO 9/11 AND BEYOND* xiii (2016).

149. *Id.*

150. LUTHER C. WEST, *THEY CALL IT JUSTICE: COMMAND INFLUENCE AND THE COURT-MARTIAL SYSTEM* 23 (1977).

151. U.S. DEP’T OF ARMY, *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GEN’S CORPS, 1775-1975* 123 (1975) [hereinafter *THE ARMY LAWYER*].

that.<sup>152</sup> In the 1800s, the decision of a military trial was not even announced, since it would not be final until the convening authority approved it.<sup>153</sup>

As a vestige of this history, courts-martial are still creatures of the command. Commanders are still responsible for bringing charges, selecting the type of court-martial, picking jurors for the venire pool, and approving the results.<sup>154</sup> In recent years, the discretion of the commanders in performing these roles been severely reduced,<sup>155</sup> but their ultimate responsibility has not. Prosecutors, as representatives of the commanders, are the ones who must carry out these manifold tasks.<sup>156</sup> In the military system, prosecutors are known as trial counsel, which is fitting, as they are responsible for running the trial.<sup>157</sup>

The Rules of Courts-Martial direct that prosecutors must handle nearly all logistical aspect of trial.<sup>158</sup> These include: procure the room, court reporter, and equipment for trial; provide copies of all documents to the court, inform jurors and all witnesses (including defense witnesses) about the date, location, time, and uniform for trial; provide legal texts for trial; arrange for the presence of all witnesses (including defense witnesses); and handle post-trial work.<sup>159</sup> Trial counsel must ensure sure the defendant is personally informed of charges (not merely their defense attorney).<sup>160</sup> Trial counsel must produce bailiffs (who are different at every trial), train them, perform a security assessment, and take appropriate special precautions.<sup>161</sup>

Once the trial is over, the trial counsel has a slew of administrative matters to attend to.<sup>162</sup> Though not explicitly mentioned in the rule, the prosecution's obligations also include setting up meetings between the defense attorney and their client, getting bottles of water to everyone at trial, ensuring the lightbulbs in the courthouse are working, keeping the court restroom maintained, and making sure the defendant has the right uniform for trial.<sup>163</sup> If a defendant is in pretrial confinement, the prosecutor must ensure

152. JOSEPH W. BISHOP, JR., *JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW* 3 (1974).

153. *THE ARMY LAWYER*, *supra* note 151, at 89.

154. *See* RESPONSE TO UNRESTRICTED REPORTS, *supra* note 50, at 12.

155. *Id.* at 1.

156. MIL. JUST. MANUAL, *supra* note 64, at 13-3. For example, the convening authority is the one who approves a request for an individual military defense counsel, but the prosecutor is the one who has to process this request). *Id.* at 13-3, sec. B.2.d.

157. MCM, *supra* note 72, R.C.M. 502(d)(5).

158. *Id.*; *see also id.* R.C.M. 502(d)(5)-502(d)(5)(E).

159. *Id.* R.C.M. 502(d)(5)(D) - 502(d)(5)(F). *See also* NAVAL JUST. SCH., *HANDBOOK FOR MILITARY JUSTICE AND CIVIL LAW* 9.23-9.24, <https://www.newriver.marines.mil/Portals/17/Documents/HANDBOOK%20FOR%20MILITARY%20JUSTICE%20AND%20CIVIL%20LAW%20-%20NJS%202006.pdf>.

160. *Id.* at 9.23.

161. MIL. JUST. MANUAL, *supra* note 64, 13-6.

162. *Id.* at 21-1.

163. These examples come from the author's own experience and those of colleagues.

they are transported to the defense attorney's office; however, in the civilian world, defense attorneys must get themselves to prison to meet with clients.<sup>164</sup> Thus, prosecutors are responsible for (and can get in trouble for) nearly everything that happens inside the courtroom.<sup>165</sup> In other words, service as a military prosecutor is utterly miserable, as a large percentage of time is wasted on degrading, menial tasks.

But this leads to a follow-up question: if the prosecution runs everything, could they not rig the system in favor of conviction? The risk should not be dismissed out of hand. To be safe, the military should give the defense its own budget and staff to avoid even the appearance of impropriety. But a few safeguards protect the current process from being corrupted. First, most of the prosecutor's supervisors have probably served as military defense counsel previously, so they can moderate an overzealous junior prosecutor. Second, the defense, when asking for expert witnesses, are not required to reveal what the expert will say, unlike many civilian jurisdictions.<sup>166</sup> And third, Rule for Courts-Martial 906 allows the defense to file motions with the judge for appropriate relief, on topics such as denials of requests for individual military counsel, refusals by the prosecution to turn over evidence and witnesses, or just about anything else.<sup>167</sup>

In any event, in the author's experience, though some commanders are stingy, many others are happy to approve spending tens of thousands of dollars on defense experts, even for minor cases. The author is unaware of any civilian jurisdiction that happily spends that much on defense experts for misdemeanors. Prosecutorial obfuscation is unlikely to achieve anything other than angering the judge, which could end up scuttling the charges altogether. Forcing prosecutors to do everything wastes their time, spikes their cortisol, and saps their ability to prepare a compelling case at trial. The current system is advantageous to the defense.

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164. COMMANDER'S LEGAL HANDBOOK, *supra* note 139, at 14; Zoe Tillman, *A Judge Urged the Justice Department to Investigate Jail Conditions for Jan. 6 Defendants*, BUZZFEED, <https://www.buzzfeednews.com/article/zoetillman/jail-conditions-jan-6-defendants> (last updated Oct. 13, 2021, 4:40 PM).

165. For example, in one case the record of trial was such a "tangled morass" that the appellate court simply dismissed the case outright rather ordering a rehearing. *See, e.g., United States v. Honea*, 77 M.J. 181, 184-85 (C.A.A.F. 2018).

166. Many civilian jurisdictions require the defense to reveal what their experts will say in order to have them appointed, or at least justify why their expert request is valid. *See, e.g., Fed. R. Crim. P. 17(b); 2019-2020 Appropriation Act § 61.4, SCCID, https://sccid.sc.gov/docs/SCCID%20FY19-20%20Budget%20Provisos.pdf; Ex parte Jimenez*, 364 S.W.3d 866, 878 (Tex. Crim. App. 2012).

167. MCM, *supra* note 72, R.C.M. 906.

2. *Military Prosecutors Have to Work Far Harder to Try Far Fewer Cases*

The upshot of the military prosecutor's unique obligation is that they simply cannot process very many cases—the logistical burden is too crushing. How bad is this, exactly? Numbers tell the tale. The military has 2.2 million servicemembers, with majority being active duty.<sup>168</sup> The United States spends \$767 billion annually on the military, more than any other nation in the world.<sup>169</sup> New Mexico is the closest state in terms of population, at 2.1 million people.<sup>170</sup> New Mexico's budget is about \$8 billion.<sup>171</sup>

In fiscal year 2017, the military tried 1,877 courts-martial.<sup>172</sup> That figure includes 815 general courts-martial, 685 special courts-martial, and 377 summary courts-martial.<sup>173</sup> Adjusted for population, that is less than 0.85 prosecutions per 1,000 servicemembers, and 0.37 felony prosecutions per 1,000 servicemembers. In fiscal year 2018, New Mexico handled 140,493 thousand criminal cases, including 16,289 felonies, 35,862 thousand misdemeanors, and 88,342 traffic offenses.<sup>174</sup> That is 67 prosecutions per 1,000 residents, and 7.75 felony prosecutions per 1,000 residents.

New Mexico has the same population as the military, one-hundredth of the budget, yet shoulders roughly *seventy-five* times as many criminal cases, including about *twenty* times as many felonies.<sup>175</sup> Naturally, New Mexico spends money on things other than criminal justice, but so does the military. This back-of-the-envelope math simply illustrates a point: the budgets and caseloads are not even in the same ballpark, yet New Mexico does more with less. The military is simply incapable of prosecuting very many people no matter how much money it has.

168. *Military Size by Country 2022*, WORLD POPULATION REV. (2022), <https://worldpopulationreview.com/country-rankings/military-size-by-country>.

169. Erin Duffin, *U.S. Military Spending from 2000 to 2020*, STATISTA (June 21, 2022), <https://www.statista.com/statistics/272473/us-military-spending-from-2000-to-2012/> [hereinafter *Military Spending*].

170. *US States - Ranked by Population 2022*, WORLD POPULATION REV. (2022), <https://worldpopulationreview.com/states> [hereinafter *States Ranked by Population*].

171. *2022 Executive Budget Recommendation Highlights*, OFFICE OF THE GOVERNOR - MICHELLE LUJAN GRISHAM, N.M. (2022), <https://www.governor.state.nm.us/2022-executive-budget-recommendation/2022> [hereinafter *Budget Recommendation*].

172. CODE COMMITTEE ON MILITARY JUSTICE, ANNUAL REPORT (2017), <https://www.armfor.uscourts.gov/newcaaf/annual/FY17AnnualReport.pdf>. Numbers from each branch come from the statistical summary section at the following page numbers: Army: 54-55, Navy-Marine: 105-107, Air Force: 124-126, Coast Guard: 133-135.

173. *Id.*

174. N.M. Jud. Branch, *Judiciary 101*, N.M. COURTS 5 (2018) [hereinafter *Judiciary 101*].

175. *States Ranked by Population*, *supra* note 170; *Budget Recommendation*, *supra* note 171; *Judiciary 101*, *supra* note 174, at 5.

The number of inmates in each system further drives home the point. The military had 1,180 prisoners in 2020,<sup>176</sup> or 54 per 100,000 servicemembers. New Mexico had 7,073 people in state prison, or 429 prisoners per 100,000 adult residents.<sup>177</sup> This means the military has about one-eighth the number of prisoners of New Mexico when comparing relevant populations.<sup>178</sup> Likely, the military prison system would collapse if it tried to octuple its inmate population.

### C. *The Role of Law Enforcement*

Law enforcement in the military must bear many crosses. This is most acutely true for the Army. Misdemeanor cases are typically investigated by military police officers (“MPs”).<sup>179</sup> And there is a reason “military” comes before “police officer.” Aside from normal law enforcement functions, military police are also responsible for “force protection, anti-terrorism, area security, and police intelligence operations.”<sup>180</sup> These are important jobs, but they have nothing to do with investigating or prosecuting crimes. Therefore, MPs must divide their attention between traditional law enforcement and military-specific tasks.<sup>181</sup> Just as every other job in the military, MPs change jobs, duty locations, and exact job description every couple of years, so they never develop expertise in law enforcement and mastery of their geographic location.<sup>182</sup> There can never be an MP who knows the neighborhoods they serve like the back of their hand, as they will only be present for a couple of years and will only be doing policing tasks for a fraction of that time. In the author’s experience, virtually no MP has even been to trial.

Felony investigations are handled in the Army by the Criminal Investigation Division, referred to as CID.<sup>183</sup> It has its own slew of problems.

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176. Erin Duffin, *Total Number of Prisoners Under Military Jurisdiction in the United States in 2020, by Branch of Service*, STATISTA (Dec. 15, 2021), <https://www.statista.com/statistics/253041/prisoners-under-military-jurisdiction-in-the-us-by-branch-of-service/>.

177. N.M. SENTENCING COMM’N, NEW MEXICO PRISON POPULATION FORECAST: FY 2022 - FY 2031 2 (2021).

178. Might this be due to servicemembers simply committing fewer crimes? That probably explains some of it, but not all. Veterans are incarcerated in civilian prisons at *half* the rate of the non-veteran population, not *one-eighth* the rate. *Veterans in Prison and Jail*, BUREAU JUST. STAT. (Jan. 18, 2000, 4:30 PM), <https://bjs.ojp.gov/press-release/veterans-prison-and-jail>.

179. See U.S. DEP’T OF ARMY, ARMY REGULATION 195-2, CRIMINAL INVESTIGATION ACTIVITIES para. 3-3 (July 21, 2020), [https://armypubs.army.mil/epubs/DR\\_pubs/DR\\_a/ARN30062-AR\\_195-2-000-WEB-1.pdf](https://armypubs.army.mil/epubs/DR_pubs/DR_a/ARN30062-AR_195-2-000-WEB-1.pdf).

180. *Military Police*, GO ARMY (Apr. 16, 2020), <https://www.goarmy.com/careers-and-jobs/career-match/support-logistics/safety-order-legal/31b-military-police.html> (last visited Apr. 2, 2022).

181. See *id.*

182. See RESPONSE TO UNRESTRICTED REPORTS, *supra* note 50, at 14.

183. *General Questions*, U.S. DEP’T OF ARMY CRIM. INVESTIGATION DIV., <https://www.cid.army.mil/faq.html#:~:text=CID%20Special%20Agents%20primarily%20investigate,drug%20operations%20and%20war%20crimes> (last updated Oct. 21, 2022).



Although every installation has its problems, recent failures shone a light on the Fort Hood Office in particular. Investigators may lack any clerical or administrative support staff.<sup>184</sup> Military police officers run CID, and try to run it like a regular Army unit.<sup>185</sup> This means every couple of years, one can expect a CID agent to move jobs and locations, and thus never become true experts.<sup>186</sup> This also leads to an “almost debilitating lack of continuity.”<sup>187</sup> The military police in charge may care more about mundane soldiering tasks than investigative acumen, and doing things “by the book” even when the book makes no sense.<sup>188</sup> And the military police running CID have no investigative experience themselves.<sup>189</sup> Basic mistakes become unavoidable. Evidence gest lost,<sup>190</sup> or cases must be abandoned due to investigations being rote.<sup>191</sup>

CID agents are “largely inexperienced, underresourced and understaffed.”<sup>192</sup> Of course, many civilian law enforcement officers can bungle cases. But in the Army, mistakes happen by design. Typical career progression looks similar to this. After graduating law enforcement training, fresh agents are sent to a large post with other inexperienced agents. At Fort Hood, fifty-eight of sixty-three CID agents were brand new academy graduates, or ninety-two percent.<sup>193</sup> These agents are so green they are not certified to “conduct investigations solo.”<sup>194</sup> Agents are typically moved after two years, even if they are in the middle of working a complex and important investigation.<sup>195</sup> After being thrown into the deep end, agents are often pulled from field work and sent to be glorified bodyguards at the Pentagon—a job where they gain zero investigative experience and remain for years.<sup>196</sup> Up to

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184. U.S. DEP’T OF ARMY, REPORT OF THE FORT HOOD INDEPENDENT REVIEW COMMITTEE 56 (2020), [https://www.army.mil/e2/downloads/rv7/forthoodreview/2020-12-03\\_FHIRC\\_report\\_redacted.pdf](https://www.army.mil/e2/downloads/rv7/forthoodreview/2020-12-03_FHIRC_report_redacted.pdf) [hereinafter FORT HOOD REPORT].

185. Kyle Rempfer, *Army CID is Burned Out and Mismanaged by Military Police Leadership, Special Agents Say*, ARMY TIMES (Dec. 15, 2020), <https://www.armytimes.com/news/your-army/2020/12/15/army-cid-is-burned-out-and-mismanaged-by-military-police-leadership-special-agents-say/> [hereinafter *Burned Out*].

186. Kyle Rempfer, *Fort Hood Report Highlights Army CID’s Failings There, and Possibly Elsewhere*, ARMY TIMES (Dec. 9, 2020), <https://www.armytimes.com/news/your-army/2020/12/09/fort-hood-report-highlights-army-cids-failings-there-and-possibly-elsewhere/> [hereinafter *Army CID’s Failings*] (“The vast majority of agents were also subject to deployment, TDY assignments, on- and off-site training programs, protection details, ancillary duties and attendance at field training events.”).

187. FORT HOOD REPORT, *supra* note 184, at 57.

188. *Burned Out*, *supra* note 185.

189. *Id.*

190. *See, e.g.*, United States v. Clark, 79 M.J. 449, 452 (C.A.A.F. 2020) (CID lost video of the defendant confessing).

191. FORT HOOD REPORT, *supra* note 184, at 64.

192. *Army CID’s Failings*, *supra* note 186.

193. FORT HOOD REPORT, *supra* note 184, at 57.

194. *Id.*

195. *Army CID’s Failings*, *supra* note 186.

196. *Burned Out*, *supra* note 185.

a quarter of all CID agents are wasted staffing these bodyguard assignments.<sup>197</sup> Once their investigative skills have gone to rust working bodyguard duty for years, agents are returned to the field as supervisors, leading a new wave of academy graduates.<sup>198</sup> It is the blind leading the blind through murder investigations.

Results speak for themselves. Between 2018 and 2020, sexual assault charges at 22 percent success rate at court-martial; it was 33 percent for abusive sexual contact.<sup>199</sup> This explains why the Army chose to reform CID by directing it to civilianize.<sup>200</sup> In the FBI, agents can have decades of substantive investigative experience and agents with less than two years of experience are only trusted to handle simple witness interviews.<sup>201</sup> Ill-equipped law enforcement is bad for society, but it is great for the defendants trying to beat a charge. This is yet another example of how the military is inadvertently good for defendants.

Military defendants also have stronger protections when talking to the police. Miranda warnings are only required when the suspect is “in custody” which is a term of art that can be incredibly hard to prove.<sup>202</sup> Under Article 31(b) of the Uniform Code of Military Justice, military police must apprise defendants of their right any time they are acting in a law enforcement capacity and suspect them of a crime—regardless of whether anyone is in custody.<sup>203</sup>

#### *D. The Role of Defense Attorneys*

##### *1. Military Public Defenders Have Relatively High Pay and Low Caseloads*

There is perhaps no more prestigious job in the world of indigent defense than the D.C. Public Defender Service.<sup>204</sup> According to a 2015 job posting, a staff attorney starting salary is \$58,000 for an unbarred law school grad,

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197. *Id.*

198. *Id.*

199. FORT HOOD REPORT, *supra* note 184, at 64.

200. Kyle Rempfer, *CID Boss Made Army IG, Gets a Third Star, Despite Turbulent Tenure*, ARMY TIMES (Aug. 10, 2021), <https://www.armytimes.com/news/your-army/2021/08/10/cid-boss-made-army-ig-gets-a-third-star-despite-turbulent-tenure/>.

201. FORT HOOD REPORT, *supra* note 184, at 57.

202. *Howes v. Fields*, 565 U.S. 499, 514 (2012) (holding no custody where suspect where armed police showed up uninvited, interviewed suspect for up to seven hours late into the night, swore at him, and used a very sharp tone).

203. *United States v. Jones*, 73 M.J. 357, 361 (C.A.A.F. 2014).

204. Jamison Koehler, *Why I Like D.C.'s Public Defender Service*, KOEHLER L. (July 23, 2012), <https://koehlerlaw.net/2012/07/why-i-like-d-c-s-public-defender-service/>.

and roughly \$68,000 upon bar admission.<sup>205</sup> They handle about thirty felony cases at a time.<sup>206</sup> More broadly, many public defenders handle more than five-hundred felony cases a year, with a median entry salary of \$47,500, and as low as \$37,200 in Vermont.<sup>207</sup> Even more troubling than the low pay, public defenders are often paid less than prosecutors.<sup>208</sup>

Testimonials by civilian public defenders paint a bleak picture of the courtroom. Arienna Grody of Jefferson County Public Defender's Office explained that she—a brand new attorney—had been appointed to a client just so the judge could say the defendant was represented when the judge put them in jail.<sup>209</sup> Jullian D. Harris-Calvin of D.C. described a defense attorney falling asleep during a capital case, and Ajay Kusnoor, of L.A. observed arbitrary application of the death penalty.<sup>210</sup>

Appointed defense counsel are too frequently incompetent. A Texas study found that defense attorneys were appointed not based on their quality, but their ability to move cases through the system quickly.<sup>211</sup> In Alabama, attorneys appointed to capital cases were twenty times more likely to have been punished by the state bar than other attorneys.<sup>212</sup> And even if they are good attorneys, states impose hard, low fee caps.<sup>213</sup>

Compare this to the military. For one thing, all judge advocates are on the same military pay scale regardless of role. Using 2016 numbers, imagine a military defense attorney with no dependents living in D.C., who is an O-3 (a captain) with three years of service—a typical profile for a new military defense attorney. That would be \$58,190.40 in salary.<sup>214</sup> The Basic Allowance for Housing that all servicemembers receive would be \$32,400.<sup>215</sup>

205. *Vacancy Announcement # PDS-2015-17*, PUB. DEFENDER SERV. D.C. 2 (Dec. 2, 2015), [https://www.njln.org/uploads/newsletters/NewsletterJan202016/PDS-2015-17\\_JSP\\_Staff\\_Attorney.pdf?phpMyAdmin=14730ab3483c51c94ca868bccffa06ef](https://www.njln.org/uploads/newsletters/NewsletterJan202016/PDS-2015-17_JSP_Staff_Attorney.pdf?phpMyAdmin=14730ab3483c51c94ca868bccffa06ef).

206. *Careers in Public Defense*, UCLA SCH. L. OFFICE OF PUB. INTEREST PROGRAMS 13, <https://law.ucla.edu/sites/default/files/PDFs/Careers/Careers%20in%20Public%20Defense%20Guide%20UCLA%20School%20of%20Law%209517%20v2.pdf>.

207. *Id.* See also Matt Perez, *Low Pay A Deterrent To Would-Be Public Defenders*, LAW360 (Oct. 17, 2021), <https://www.law360.com/access-to-justice/articles/1430492/low-pay-a-deterrent-to-would-be-public-defenders>.

208. Perez, *supra* note 207.

209. *Careers in Public Defense*, *supra* note 206, at 4.

210. *Id.* at 5-6.

211. *Inadequate Representation*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/other/inadequate-representation> (last visited Apr. 10, 2022).

212. Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 398 (1995).

213. See, e.g., N.Y. COUNTY LAW § 722-b; HAW. REV. STAT. ANN. § 802-5; MISS. CODE ANN. § 99-15-17.

214. *Basic Pay - Effective January 1, 2016*, DEF., FIN., & ACCT. SERV. (2016), <https://www.dfas.mil/Portals/98/2016MilitaryPayChart.pdf> [hereinafter *Basic Pay*].

215. *Basic Allowance for Housing Rate Lookup*, DEF. TRAVEL MGMT OFFICE, <https://www.travel.dod.mil/Allowances/Basic-Allowance-for-Housing/BAH-Rate-Lookup/> (Enter the following: Year: 2016,

And the universal Basic Allowance for Subsistence would be \$3,043 for officers.<sup>216</sup> Add that all up to get \$93,633—double the average public defender pay, and more than what the D.C. Public Defender Service paid. All this is without taking into account the military's preferential tax treatment, free healthcare, loan repayment, or a pay bump for having dependents.<sup>217</sup>

As for caseloads, military defense attorneys have far fewer clients. In 2020, there were 148 active-duty Army defense attorneys who collectively handled 660 courts-martial, 842 administrative boards, and 22,095 non-judicial punishments.<sup>218</sup> If we consider courts-martial as felonies and separation boards and non-judicial punishments the equivalent of misdemeanors, that works out to 4.48 felonies and 154.97 misdemeanors per defense attorney. It is clear that no military defense attorney is handling 500 felonies, and maybe not even 30. Indeed, military defense attorneys are handling well below the caseload limits of 125 felonies and 250 misdemeanors per year for public defenders in Massachusetts (the most defense friendly workload standards of any state), which in turn is well below the National Advisory Commission on Criminal Justice Standards and Goals recommendation of 150 felonies and 400 misdemeanors.<sup>219</sup>

High caseloads do not just mean that civilian public defenders cannot enjoy their weekends. It compromises their ability to represent individual clients.<sup>220</sup> Rapport building is a fantasy with hundreds of clients to keep track of.<sup>221</sup> When faced with too many cases and too little time, defense attorneys may encourage clients to plead guilty simply to end the case.<sup>222</sup> Some states claim they only have one-third as many public defenders as they need,

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Zip Code: 20001; Pay Grade: O-3. Next, multiply the monthly allowance of \$2,700.00 by twelve months to equal \$32,400.00).

216. *Basic Pay*, *supra* note 214.

217. *Beyond Your Service Member's Pay: The Benefits of Military Service*, MILITARY ONE SOURCE (July 20, 2021, 6:53 AM), <https://www.militaryonesource.mil/relationships/support-community/service-members-military-benefits-package/#:~:text=The%20military%20provides%20notable%20compensation,and%20tax%20consultations%20and%20more>.

218. THE OFFICE OF THE JUDGE ADVOCATE GEN., U.S. ARMY, U.S. ARMY REPORT ON MILITARY JUSTICE FOR FISCAL YEAR 2020 5-6 (Dec. 31, 2020) [hereinafter ARMY REPORT FOR 2020]; *Annual Reports*, JOINT SERV. COMM. MIL. JUST. (2020), <https://jsc.defense.gov/Annual-Reports/> [hereinafter *2020 Annual Reports*]. All the reports of the services are available at the former source by clicking the link "2020." The numbers come from ARMY REPORT FOR 2020, *supra* note 218.

219. Bryan Furst, *A Fair Fight: Achieving Indigent Defense Resource Parity*, BRENNAN CTR. JUST. 7, 17 n.85 (2019) (citing Thomas Giovanni & Roopal Patel, *Gideon at 50: Three Reforms to Revive the Right to Counsel*, BRENNAN CTR. JUST. (2013)).

220. *Id.* at 6.

221. Hussemann & Siegel, *supra* note 69, at 497 (one defendant remarked "Most public defenders don't even know who you are until they look in your file when they see you.").

222. *Id.* at 466.

meaning “[p]ublic defenders are daily put in grave jeopardy of violating their professional responsibility to provide competent counsel.”<sup>223</sup>

There is another critical point that should not be missed. As the above data shows, military defendants get legal representation at administrative boards and non-judicial punishments.<sup>224</sup> The depth of representation for these matters is less than a court-martial, but the fact that defendants can talk to an attorney about non-criminal matters is revolutionary. Try finding a civilian court that gives free access, regardless of income, to a defense attorney to consult about traffic citations, parking tickets, or workplace discipline.

## 2. *Serving as a Defense Attorney Is Not Stigmatized*

Individual civilian public defenders are often mistreated. On a societal level, they are also underrepresented. When President Joe Biden nominated Ketanji Brown Jackson to the Supreme Court, she was the first former public defender to serve on the high court in history.<sup>225</sup> She faced harsh criticism for representing the criminally accused.<sup>226</sup> President Biden has prioritized appointing public defenders to inferior tribunals.<sup>227</sup> His actions show just how big the gulf has been: President Barack Obama only appointed five public defenders to the bench in his eight years of office.<sup>228</sup> Historically, prosecutors have been more likely to get appointed.<sup>229</sup> Prosecutors also dominate civilian institutions that make criminal justice policy, like Congress<sup>230</sup> and the United States Sentencing Commission.<sup>231</sup>

In the military, being a public defender is an ordinary job and common to see among high-ranking officials.<sup>232</sup> The Army calls defense time “a

223. Sarah Martinson, *Public Defender Shortages in West Are Nationwide Norm*, LAW360 (Jan. 23, 2022, 8:02 PM), <https://www.law360.com/access-to-justice/articles/1457317/public-defender-shortages-in-west-are-nationwide-norm>.

224. See ARMY REPORT FOR 2020, *supra* note 218.

225. Jack Queen, *How Jackson Would Shake up High Court as 1st Ex-Defender*, LAW360 (Mar. 1, 2022, 9:59 PM), <https://www.law360.com/access-to-justice/articles/1468498/how-jackson-would-shake-up-high-court-as-1st-ex-defender->.

226. Aaron Blake, *Cruz and Cotton Cut to the Chase on GOP's Suspicion of Defense Lawyers*, WASH. POST (Apr. 6, 2022, 11:36 PM), <https://www.washingtonpost.com/politics/2022/04/06/cruz-cotton-public-defender/>.

227. Sahil Kapur, *With Public Defenders as Judges, Biden Quietly Makes History on the Courts*, NBC NEWS (Oct. 18, 2021, 8:10 AM), <https://www.nbcnews.com/politics/congress/new-public-defenders-joe-biden-quietly-makes-history-courts-n1281787>.

228. *Id.*

229. *Id.*

230. Debra Cassens Weiss, *Want to Run for Political Office? Don't Work as a Public Defender First*, A.B.A. J. (June 18, 2014, 1:20 PM), [https://www.abajournal.com/news/article/want\\_to\\_run\\_for\\_political\\_office\\_dont\\_work\\_as\\_a\\_public\\_defender\\_first](https://www.abajournal.com/news/article/want_to_run_for_political_office_dont_work_as_a_public_defender_first).

231. Douglas A. Berman, *Commentary: Reviving the U.S. Sentencing Commission*, ARIZ. ST. UNIV. (Feb. 24, 2021, 8:00 AM), <https://crimeandjusticeneeds.asu.edu/commentary-reviving-us-sentencing-commission>.

232. JALS, *supra* note 49, at 26.

critical part of career development.”<sup>233</sup> The Chief Judge of the U.S. Army Court of Criminal Appeals was a military defense attorney.<sup>234</sup> The top lawyer in the Navy and his deputy had defense experience.<sup>235</sup> These officers were not trailblazers in this regard. It is unlikely that any other legal system in the country—perhaps the globe—has as many senior leaders with experience as public defenders.

More indelible than hard numbers, military prosecutorial culture is different from any district attorney’s office. It is extremely common to see military staff judge advocates, who oversee the prosecution, praising the work of military defense attorneys, thanking them for invoking procedural roadblocks, emphasizing that they only care about fair processes, not outcomes, and chastising the junior prosecutors who work for them about respecting the process. The author has never seen anything resembling this in any civilian prosecution office.<sup>236</sup>

### 3. *Military Defense Counsel Are Insulated From Outside Pressure*

Military defense attorneys are independent of the chain of command and the rest of the on-base legal office.<sup>237</sup> The Rules for Courts-Martial (“R.C.M.”) guarantee that leaders may not “[g]ive a less favorable rating or evaluation of any defense counsel . . . because of the zeal with which such counsel represented any client.”<sup>238</sup> As a consequence of this independence, in the author’s experience, military defense attorneys are exempt from virtually all non-legal tasks of the office, including holiday party planning, daily physical training in the morning, office book clubs, managing the intern program, running Article 6 visits,<sup>239</sup> hosting the annual Turkey Bowl, staffing warfighters, and other tasks.<sup>240</sup> However, military prosecutors have to plan

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233. *Id.*

234. *Assistant Judge Advocate General for Military Law and Operations (IMA) U.S. Army Reserves Brigadier General Ural D. Glanville*, JAGCNET, [https://www.jagcnet.army.mil/Sites/jagc.nsf/C8F7A4E2978A2DF3852580BB00502116/\\$File/Glanville%20BG%20Bio%20&%20Photo%20Updated%2020170202.pdf](https://www.jagcnet.army.mil/Sites/jagc.nsf/C8F7A4E2978A2DF3852580BB00502116/$File/Glanville%20BG%20Bio%20&%20Photo%20Updated%2020170202.pdf) (last visited Nov. 22, 2022).

235. *Leadership*, U.S. NAVY JUDGE ADVOCATE GEN. CORPS, <https://www.jag.navy.mil/leadership.htm> (last visited Mar. 4, 2022).

236. *Cf.* Luna & Cassell, *supra* note 132, at 26 (“[T]here should be little doubt that American prosecutors see themselves as advocates in a sometimes brutally adversarial process.”).

237. Devin Scott Michaels, *Area, Trial Defense Counsels Save U.S. Service Members’ Careers*, JOINT BASE LANGLEY-EUSTIS (July 15, 2014), <https://www.jble.af.mil/News/Features/Display/Article/844749/area-trial-defense-counsels-save-us-service-members-careers/>.

238. MCM, *supra* note 72, R.C.M. 104(b)(1)(B) (capitalization altered).

239. 10 U.S.C. § 806(a) art. 6. Article 6 of the Uniform Code states that the top lawyer in each service “shall make frequent inspections” of legal offices in the military.

240. The author has heard of one Staff Judge Advocate had the (non-defense) lawyers under his command to act as COVID screeners, taking people’s temperature as they entered the base, in addition to all their normal legal duties.

and execute these events (as do other military lawyers who do not practice criminal law), which takes away from their time to handle cases. But being able to enjoy an office BBQ that the prosecutor's office planned is only the smallest perk of defense independence. Much more important is the fact that military defense attorneys can do their job without political pressure or interference by outside forces.

In the federal government, public defenders fall under the federal judiciary.<sup>241</sup> While this is certainly better than, say, having an elected official oversee public defenders, it is not without blemish. If federal defenders experience sexual harassment on the job, they must navigate the judiciary's "unfair and biased" disciplinary system to seek redress.<sup>242</sup> Federal public defenders also lack protections under civil rights laws, due to their placement in the judiciary.<sup>243</sup> On the contrary, military anti-harassment policy protects all servicemembers.<sup>244</sup>

States have a spotty record on protecting independence of defense attorneys.<sup>245</sup> Some states make the chief public defender a gubernatorial appointee—meaning that governors can, and do, fire public defenders who criticize lack of funding.<sup>246</sup> Some states lack any kind of centralized oversight body for the provision of public defense, or else, the governing body is not independent.<sup>247</sup> In Illinois, public defenders are "beholden" to local courts, as judges are the ones who hire public defenders and determine how many staffers they can have.<sup>248</sup> If a public defender knows zealously representing their client might irritate a judge who controls their office, they cannot be an effective advocate.

Many states make local governments bear the costs of indigent representation, opening up disparities in funding.<sup>249</sup> LaSalle County, Illinois gave one desk for four part-time assistant public defenders.<sup>250</sup> Appointed

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241. Nate Raymond, *Congress to Hear From Woman Suing Over Judiciary's Harassment Policies*, REUTERS (Mar. 16, 2022, 6:12 PM), <https://www.reuters.com/legal/transactional/congress-hear-woman-suing-over-judiciarys-harassment-policies-2022-03-16/>.

242. *Id.*

243. *Id.*

244. *E.g.*, U.S. DEP'T OF ARMY, ARMY REGULATION 600-20, ARMY COMMAND POLICY para 4-19 (July 24, 2020) [hereinafter AR 600-20].

245. David Carroll, *Right to Counsel Services in the 50 States: An Indigent Defense Reference Guide for Policymakers*, in LIBERTY & JUSTICE FOR ALL: PROVIDING RIGHT TO COUNSEL SERVICES IN TENNESSEE 96, 98-99 (2017), <https://www.tncourts.gov/sites/default/files/docs/irtfreportfinal.pdf>.

246. *Id.* at 98.

247. *Id.* at 99.

248. Andrew Strickler, *In Oversight Void, Ill. Public Defenders 'Beholden' To Courts*, LAW360 (June 20, 2021, 8:02 PM), <https://www.law360.com/access-to-justice/articles/1393735/in-oversight-void-ill-public-defenders-beholden-to-courts->.

249. Carroll, *supra* note 245, at 100.

250. Strickler, *supra* note 248.

defense attorneys are usually compensated with a flat-fee for all clients.<sup>251</sup> This means defense attorneys have an incentive to do as little work as possible per client, and expenses like expert witnesses or investigations, come out of the attorney's fee.<sup>252</sup> The American Bar Association recommends banning the practice, but it is the most common payment scheme "by far."<sup>253</sup>

#### *E. Treatment of Criminal Defendants*

##### *1. Health and Welfare Benefits*

If a person is facing criminal charges, odds are, they also have non-legal problems in their life. For example, a criminal case is made all the worse by having to miss work in order to make court appearances.<sup>254</sup> A small handful of exemplary civilian public defender offices have started providing clients with representation for collateral immigration proceedings or social work needs.<sup>255</sup> Holistic representation like this not only helps with better outcomes in the cases but also with non-legal outcomes.<sup>256</sup>

Though not integrated into the public defender office, the military provides broad support to all servicemembers, including defendants.<sup>257</sup> Everyone in the military has a guaranteed paycheck.<sup>258</sup> In the military, going to court appearances is part of a defendant's job.<sup>259</sup> Active-duty military receive free health and dental care, free housing or a housing stipend, and free legal assistance for non-criminal matters.<sup>260</sup> Various counseling services are available to all, including chaplains, the Family Advocacy program, and

251. Furst, *supra* note 219, at 6.

252. *Id.*

253. *Id.*

254. Hussemann & Siegel, *supra* note 69, at 485.

255. Ginger Jackson-Gleich & Wanda Bertram, *Nine Ways That States Can Provide Better Public Defense*, PRISON POL'Y INITIATIVE (July 27, 2021), <https://www.prisonpolicy.org/blog/2021/07/27/public-defenders/>.

256. Andreea Matei et al., *Assessing a Social Worker Model of Public Defense: Findings and Lessons Learned from Genesee County, Michigan*, URBAN INST. 16 (Mar. 2021), [https://www.urban.org/sites/default/files/publication/103811/assessing-a-social-work-model-of-public-defense\\_1.pdf](https://www.urban.org/sites/default/files/publication/103811/assessing-a-social-work-model-of-public-defense_1.pdf).

257. *Defending*, *supra* note 34.

258. *Military Basic Pay*, MILITARY, <https://www.military.com/benefits/military-pay/basic-pay> (last visited Oct. 6, 2022).

259. Fort Bragg Pub. Aff. Office, *Military Court Martial Information*, DOCPLAYER 11, <https://docplayer.net/20030452-Military-court-martial-information-fort-bragg-public-affairs-office.html> (last visited Nov. 30, 2022).

260. *Active Duty*, MILITARY, <https://www.military.com/benefits/active-duty> (last visited Mar. 4, 2022); *Tricare*, MILITARY, <https://www.military.com/benefits/tricare> (last visited Nov. 23, 2022); *Tricare Dental Programs*, MILITARY, <https://www.military.com/benefits/tricare/dental> (last visited Nov. 23, 2022); *2022 Basic Allowance for Housing (BAH)*, MILITARY, <https://www.military.com/benefits/military-pay/basic-allowance-for-housing> (last visited Nov. 23, 2022); Jim Absher, *Free Military Legal Assistance*, MILITARY (July 8, 2022), <https://www.military.com/benefits/military-legal-matters/free-legal-assistance.html>.



therapy.<sup>261</sup> Zero-interest emergency loans and grants are available to help with everything from child care to vehicle costs.<sup>262</sup> Normally, civilian defense attorneys would be responsible for helping provide these services, or connecting clients to them, but in the military, the defense attorney does not have to go out of their way to find these things. If anything, it is more likely to be the prosecutor's responsibility to make sure they are getting these services.

## 2. *The Court System Does Not Prey on Defendants*

In the civilian justice system, local courts are often funded by fees.<sup>263</sup> This creates a perverse incentive to police and prosecute the citizenry, trapping them in an endless cycle of “crime” and debt.<sup>264</sup> Civilian defendants accrue fees throughout their entire process.<sup>265</sup> There are fees to enter, stay in, and exit jail.<sup>266</sup> Fees for GPS monitoring.<sup>267</sup> Fees for treatment programs.<sup>268</sup> Fees to get a jury.<sup>269</sup> Even fees to get a public defender.<sup>270</sup> And these fees may or may not be waivable.<sup>271</sup>

Contrarily, the military system is not built on fees.<sup>272</sup> At no point in the military justice process is a defendant required to pay anything, other than a fine as punishment for a conviction.<sup>273</sup> Like everything else at the Pentagon, Congress is willing to shower money on the military justice system. When Congress created a new office of special trial counsel in the 2022 National

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261. 7 *Counseling Options for Service Members and Their Families*, MILITARY ONE SOURCE (Aug. 12, 2020, 11:20 AM), <https://www.militaryonesource.mil/confidential-help/non-medical-counseling/military-and-family-life-counseling/7-counseling-options-for-service-members-and-their-families/>.

262. *Financial Assistance Programs: Zero Interest Loans and Grants*, ARMY EMERGENCY RELIEF, <https://www.armyemergencyrelief.org/assistance/> (last visited Mar. 4, 2022).

263. E.g., *In for a Penny: The Rise of America's New Debtor's Prison*, AM. CIV. LIBERTIES UNION 25 (2010), [https://www.aclu.org/sites/default/files/field\\_document/InForAPenny\\_web.pdf](https://www.aclu.org/sites/default/files/field_document/InForAPenny_web.pdf).

264. *Id.* at 5, 25.

265. *Id.* at 30.

266. *Id.*

267. Wendy Sawyer, *Punishing Poverty: The High Cost of Probation Fees in Massachusetts*, PRISON POL'Y INITIATIVE (Dec. 6, 2016), <https://123dok.org/document/yr302rlp-punishing-poverty-high-cost-probation-fees-massachusetts.html>.

268. Ebony Ruhland, *The Impact of Fees and Fines for Individuals on Probation and Parole*, U. MINN. ROBIN A. INST. (May 23, 2016), <https://robinainstitute.umn.edu/news-views/impact-fees-and-fines-individuals-probation-and-parole>.

269. Darryl K. Brown, *The Case for a Trial Fee: What Money Can Buy in Criminal Process*, 107 CAL. L. REV. 1415, 1416 (2019).

270. Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. MICH. J.L. REFORM 323, 329-30 (2009).

271. E.g., FLA. STAT. § 938.29(1)(b).

272. Absher, *supra* note 260.

273. MCM, *supra* note 72, R.C.M. 1003(b)(3).

Defense Authorization Act, it did not set a budget; it simply asked the services to estimate how much money they would need to make it happen.<sup>274</sup>

A crucial, easily overlooked point here is that military defense attorneys are free for *everyone*, not just the poor.<sup>275</sup> To qualify for a civilian public defender, one must be near the poverty line, which is \$32,000 for a family of four.<sup>276</sup> The median income for a family of four is \$67,000—more than double the poverty line.<sup>277</sup> It is “not uncommon” for criminal defense bills to quickly reach \$10,000 to \$15,000.<sup>278</sup> One doubts families making \$67,000 per year have that much sitting around. In other words, most civilians do not have a right to an attorney; they have a right to bankrupt themselves on an attorney.

### 3. *Less Racial Disparity*

As with virtually all criminal justice institutions, racial disparities exist in the military.<sup>279</sup> Black and Hispanic servicemembers are more likely to have charges referred than white servicemembers, but conviction rates are about the same for all races.<sup>280</sup> Black servicemembers are about twice as likely as white servicemembers to have their charges referred to a court-martial, and Hispanic servicemembers are about one-and-a-half times as likely.<sup>281</sup>

Of course, racial disparities of any sort should be addressed, but evidence suggests that racial bias is significantly *worse* in the civilian system.<sup>282</sup> On the civilian side, African Americans are more likely to be arrested, convicted, and imprisoned for lengthy terms than white defendants.<sup>283</sup> Black “adults are 5.9 times as likely to be incarcerated as white[] [adults,] and Hispanic[]

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274. National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 STAT. 1541, 1693 (2021).

275. Absher, *supra* note 260.

276. Adam H. Rosenblum, *Do I Qualify for a Public Defender?*, ROSENBLUM L. (Jan. 27, 2020), <https://rosenblumlaw.com/do-i-qualify-for-a-public-defender/>.

277. Emily A. Shrider et al., *Income and Poverty in the United States: 2020*, U.S. CENSUS BUREAU 2 (Sept. 14, 2021), <https://www.census.gov/library/publications/2021/demo/p60-273.html>.

278. Travis Peeler, *Criminal Defense Attorney Fees*, LEGAL MATCH (Mar. 18, 2019), <https://www.legalmatch.com/law-library/article/how-much-will-a-criminal-defense-lawyer-cost.html>.

279. See Meghann Myers, *This Report Says Black and Hispanic Service Members are More Likely to Face Trial*, MIL. TIMES (May 31, 2019), <https://www.militarytimes.com/news/your-military/2019/05/31/this-report-says-black-and-hispanic-service-members-are-more-likely-to-face-trial/>.

280. *Id.*

281. *Id.*

282. Compare *id.*, with *Report of The Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance*, SENTENCING PROJECT 1 (2018), <https://www.sentencingproject.org/wp-content/uploads/2018/04/UN-Report-on-Racial-Disparities.pdf> [hereinafter *Sentencing Project Report*].

283. *Id.*

[adults] are 3.1 times as likely.”<sup>284</sup> Pre-trial detention decisions also have racially biased outcomes.<sup>285</sup>

Military housing is based on rank and family size.<sup>286</sup> What this means is that housing is *not* based on redlining, racial covenants, or wealth. Although formal racial exclusionary zones are rare, the legacy of racist housing policies means that most American cities are heavily segregated in terms of where people live and travel each day.<sup>287</sup> Because the military bases housing on rank and family size, there are no pockets of poverty or segregation.<sup>288</sup> As a result of having integrated housing, the military is thus less susceptible to the widespread civilian issue of severely over-policing communities based on race.<sup>289</sup>

Thus, the civilian justice system has more severe racial biases, and bias appears at all stages, not just charging decisions.<sup>290</sup> Why might this be? The above-mentioned social services and free access to high quality defense attorneys may have something to do with it.

### III. PRETRIAL MATTERS

#### A. Charging Decisions

##### 1. There Are Far Fewer Criminal Offenses in the Military

It is an article of faith that military criminal code reaches more broadly than civilian ones. The Supreme Court said that civilian codes “carve[] out a relatively small segment of potential conduct and declares it criminal” while the military penalizes “a much larger segment of . . . activities.”<sup>291</sup> Does it, though?

284. *Id.*

285. *Id.* at 6.

286. *E.g., Maxwell AFB, AL Housing and Relocation Information*, MAXWELL HOUSING, <https://www.maxwellhousing.com/> (last visited Mar. 8, 2022).

287. *U.S. Cities Segregated Not Just By Where People Live, but Where They Travel Daily*, BROWN U. (Feb. 11, 2021), <https://www.brown.edu/news/2021-02-11/segregation>; Kyle Vanhemert, *The Best Map Ever Made of America’s Racial Segregation*, WIRED (Aug. 26, 2013, 6:30 AM), <https://www.wired.com/2013/08/how-segregated-is-your-city-this-eye-opening-map-shows-you/>.

288. Admittedly, lower ranked servicemembers get paid less than higher ranks, and higher ranks tend to be more racially homogenous. Tom Vanden Brook, *Where Are the Black Officers? US Army Shows Diversity in Its Ranks but Few Promotions to the Top*, USA TODAY (Sept. 1, 2020, 6:00 AM), <https://www.usatoday.com/in-depth/news/politics/2020/09/01/military-diversity-army-shows-few-black-officers-top-leadership/3377371001/>. But no one living on a military base is in abject poverty, and racial disparities by rank are not as stark as residential segregation in civilian cities.

289. *Interview: How Policing in One US City Hurts Black and Poor Communities*, HUM. RTS. WATCH (Sept. 12, 2019), <https://www.hrw.org/news/2019/09/12/interview-how-policing-one-us-city-hurts-black-and-poor-communities#>.

290. *Sentencing Project Report*, *supra* note 282, at 1.

291. *Parker v. Levy*, 417 U.S. 733, 749 (1974) (“While a civilian criminal code carves out a relatively small segment of potential conduct and declares it criminal, the Uniform Code of Military Justice

Civilian prosecutors have an all but unlimited number of crimes to charge defendants with. In North Carolina, for instance, the “Criminal Law” portion of the state’s general statutes contains 800 crimes.<sup>292</sup> There are an additional 1,600 crimes scattered across other sections of the general statutes.<sup>293</sup> Among these are “‘catch-all’ statutes [that] criminalize the rules and regulations promulgated by administrative agencies.”<sup>294</sup> Counties, cities, towns, and metropolitan sewer districts may have their own crimes as well.<sup>295</sup>

The federal government is worse: it has thousands of outright criminal statutes and thousands more criminal regulations, with offenses as specific as “trafficking in snakehead fish to selling mattresses without tags,”<sup>296</sup> and as broad as misleading speech in business transactions.<sup>297</sup> No one is even sure how many federal crimes there are.<sup>298</sup>

In addition to silly offenses, civilian jurisdictions also criminalize vague conduct.<sup>299</sup> Some states prohibit negligent assault, which is essentially a tort.<sup>300</sup> Other states criminalize negligent endangerment, which does not require injury, only the creation of risk.<sup>301</sup> Possession of burglar tools and drug paraphernalia are both criminalized, even though both of them things can include innocent implements like screwdrivers or spoons.<sup>302</sup> Altogether, civilian police can arrest as many people as “they devote the time and resources to find.”<sup>303</sup>

The military, in contrast, has fifty-seven punitive Articles.<sup>304</sup> Granted, there are vague catch-all offenses that criminalize violations of regulations<sup>305</sup> or of the standards of the service,<sup>306</sup> but the baseline the military is starting at is much, much smaller than civilians. Regulations, while numerous, at least must state on the first page that portions are punitive in order for them to be

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essays more varied regulation of a much larger segment of the activities of the more tightly knit military community.”).

292. Jon Guze, *What We Know about the State of the Criminal Law in N.C.*, JOHN LOCKE FOUND. (July 19, 2018), <https://www.johnlocke.org/what-we-know-about-the-state-of-the-criminal-law-in-n-c/>.

293. *Id.*

294. *Id.*

295. *Id.*

296. Eli Lehrer, *America has Too Many Criminal Laws*, HILL (Dec. 9, 2019, 1:00 PM), <https://thehill.com/opinion/criminal-justice/473659-america-has-too-many-criminal-laws>.

297. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 517 (2001).

298. Luna & Cassell, *supra* note 132, at 21 (reporting “about 4500 federal crimes”).

299. Stuntz, *supra* note 297, at 516.

300. *Id.*

301. *Id.*

302. *Id.*

303. Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 630 (2014).

304. MCM, *supra* note 72, pt. IV; 10 U.S.C. §§ 877-934.

305. 10 U.S.C. § 892 (failure to obey order or regulation).

306. *Id.* § 933 (conduct unbecoming of an officer and a gentleman); *id.* § 934 (general article).

used for prosecution,<sup>307</sup> and the maximum punishment for *any* regulatory violation is two years.<sup>308</sup> No such cap exists for civilian regulations.<sup>309</sup>

The broadest military offense is Article 134, which criminalizes “all disorders and neglects to the prejudice of good order and discipline.”<sup>310</sup> There is no doubt this is ambiguous, but there are a few roadblocks that make Article 134 a poor charging instrument. First, as the Supreme Court has noted, the article is not boundless, as it is limited by the customs of the service.<sup>311</sup> Second, if the government uses Article 134 for misconduct that is covered by another article, it is invalid.<sup>312</sup> Third, if the government uses a novel Article 134 charge to address something that the president has already issued guidance on, it is invalid.<sup>313</sup> Finally, the government must prove the charged misconduct brought discredit upon the armed forces, which is not a given.<sup>314</sup> Thus, while Article 134 is broad, in practice, a prosecutor who tries to use it runs the risk of having the charge dismissed. A civilian prosecutor can simply choose from any of the thousands of laws at their disposal to target almost any action, which is how people get sent to jail for illegal rainwater collection.<sup>315</sup>

In the military, there is also a concept called unreasonable multiplication of charges.<sup>316</sup> This rule says that a single criminal act cannot be charged multiple different ways.<sup>317</sup> It is founded on the assertion that military criminal offenses are more elastic than civilian ones.<sup>318</sup> Civilian prosecutors are not so bound. They can and do charge multiple, similar offenses for the same underlying offense.<sup>319</sup> Redundant civilian criminal laws are perfectly legitimate.<sup>320</sup>

## 2. Misdemeanor Defendants in the Military Get Much More Due Process

Prosecutors decide not only what charges to bring, but what type of charges: felony or misdemeanor. For the military, felonies are heard by

307. *E.g.*, AR 600-20, *supra* note 244, at i.

308. MCM, *supra* note 72, at A12-1.

309. *See, e.g.*, 14 C.F.R. § 13.23(a) (maximum penalty for violating a regulation under provisions of the Federal Aviation Act of 1958 is five years).

310. 10 U.S.C. § 934.

311. *Parker v. Levy*, 417 U.S. 733, 754 (1974); *cf. Dynes v. Hoover*, 61 U.S. 65, 82 (1857).

312. *United States v. Guardado*, 77 M.J. 90, 95 (C.A.A.F. 2017).

313. *United States v. Gleason*, 78 M.J. 473, 476 (C.A.A.F. 2019); *United States v. Reese*, 76 M.J. 297, 302 (C.A.A.F. 2017).

314. *E.g.*, *United States v. Caldwell*, 72 M.J. 137, 142 (C.A.A.F. 2013).

315. *Lehrer*, *supra* note 296.

316. *United States v. Forrester*, 76 M.J. 389, 394 (C.A.A.F. 2017).

317. *Id.*

318. *United States v. Quiroz*, 55 M.J. 334, 337-38 (C.A.A.F. 2001).

319. *E.g.*, *Stuntz*, *supra* note 297, at 518.

320. *Lehrer*, *supra* note 296.

general courts-martial, and misdemeanors are heard by special courts-martial.<sup>321</sup> Special courts-martial can only sentence an accused to up to a year—or six months for certain bench trials—which is a significant boon to the defense.<sup>322</sup> Not only does it impose a hard, low ceiling on confinement, it strengthens the defense's negotiating position by dramatically lowering the risk of going to trial. What does the prosecution get in return for this huge concession? Basically nothing.

By statute, the only meaningful difference between a special and a general courts-martial is that the former can have four jurors and does not require a probable cause hearing, and the latter must have eight jurors and does require a probable cause hearing.<sup>323</sup> Other than that, the two types of courts are nearly identical,<sup>324</sup> right down to the judges.<sup>325</sup> That means all the same due process, all the same obligations on the prosecution, all the same solemnity of proceedings, and all the same logistical pitfalls.

The “benefits” to the government of using a special court-martial are either negligible or *not* beneficial. The probable cause hearing is fairly simple to conduct, and so long as the government substantially complies with its procedures, screwing it up will not void a conviction.<sup>326</sup> Skipping this hearing saves little effort. As for the jury size, in the military, juries convict by a three-quarters majority, not by a unanimous verdict.<sup>327</sup> Thus, in a four-person jury, if two jurors vote to acquit, the case is lost for the prosecution. But for an eight-person jury, three jurors must vote to acquit to defeat a case. A four-person jury is arguably better for the defense than the prosecution in the military (though probably worse from a societal standpoint).<sup>328</sup> For a special court-martial bench trial, the government is saved the burden of empaneling a jury, but military judges can be even *more* defense friendly than juries.<sup>329</sup>

Logically, since the prosecution loses massive leverage in negotiations and sentencing by opting for a special courts-martial, and gets peanut shells

321. MCM, *supra* note 72, R.C.M. 201(f)(1)(A)(i)-(ii), 201(f)(2)(A), 201(f)(2)(B)(i).

322. 10 U.S.C. § 819.

323. *Id.* §§ 816, 832, 827(b), 827(c). The law also provides that the *prosecutor* does not have to meet the same strict qualifications to serve on a special courts-martial, but defense counsel does. In theory, a prosecutor unlearned in law could be matched up against a barred defense attorney. The author has never seen this happen, but underlines how the system is set up to favor the accused.

324. *Compare* 10 U.S.C. § 816(b), *with id.* § 816(e).

325. *Id.* § 826.

326. *Id.* § 832(g).

327. *Id.* § 852(a)(3).

328. Research suggests that small juries decide less accurately, but it is hard to predict whether this will cut in favor of the prosecution or defense in any given case. *See, e.g.*, Michael J. Saks & Mollie Weighner Marti, *A Meta-Analysis of the Effects of Jury Size*, 21 L. & HUM. BEHAV. 451, 461 (1977).

329. DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES, ANNUAL REPORT 4, 49–50 (March 2018), [https://dacipad.whs.mil/images/Public/08-Reports/DACIPAD\\_Report\\_02\\_Final\\_20180330\\_Web\\_Amen ded.pdf](https://dacipad.whs.mil/images/Public/08-Reports/DACIPAD_Report_02_Final_20180330_Web_Amen ded.pdf) [hereinafter 2018 DAC-IPAD].

in exchange, prosecutors would never use them. Alas, logic in the military is a scarce resource. In fiscal year 2020, the military had roughly as many special courts-martial as general.<sup>330</sup> Granted, special courts-martial tend to resolve faster,<sup>331</sup> potentially a modest benefit to the prosecution. But on as a whole, it is a bad tradeoff for the prosecution to select special courts-martial, at least from the perspective of trying to maximize punishment.<sup>332</sup>

Civilian prosecutors, too, can choose to bring charges as felonies or misdemeanors. Punishments for misdemeanors are capped at one year imprisonment, same as the military.<sup>333</sup> Unlike the military, however, civilian prosecutors actually get something in exchange for the lesser punishment: a radically lower burden to achieve a conviction. Most famously, misdemeanors do not require an indictment by a grand jury, at least in the federal system.<sup>334</sup> But the true difference between civilian felonies and misdemeanors runs much deeper.

Misdemeanor courts exist in a shadow realm. They are so understudied we barely know how many are filed each year.<sup>335</sup> Anything goes. “Misdemeanor courts are characterized by informality and lack of adherence to many due process protections.”<sup>336</sup> Cases are typically not heard by felony-level judges; they are shunted to lesser judges and magistrates.<sup>337</sup> Defendants might not be given attorneys, and courts treat misdemeanors as “a means of social control” or a revenue collection tool rather than as criminal charges subject to proof by beyond a reasonable doubt.<sup>338</sup> Defendants might not be guilty of anything at all, as the civilian misdemeanor process does a poor job of ensuring there is evidence of a crime.<sup>339</sup> Fewer than one misdemeanor

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330. 2020 Annual Reports, *supra* note 218; ARMY REPORT FOR 2020, *supra* note 218 (Numbers come from the statistical summaries for each service, available at the following pages within each services’ report: Army: 16–18, Marine Corps: 11–13, Navy: 13–15, Air Force: 17–19, Coast Guard: 2–3. These numbers show 724 general courts-martial tried versus 611 special.).

331. Fredric I. Lederer, *From Rome to the Military Justice Acts of 2016 and Beyond: Continuing Civilianization of the Military Criminal Legal System*, 225 MIL. L. REV. 512, 531 (2017) [hereinafter *From Rome*].

332. Perhaps military prosecutors are electing special courts-martial because they think the lighter punishment is more appropriate for the crime. If so, it would speak highly of them, for they would be voluntarily giving up leverage and punishment potential simply because it was the right thing to do.

333. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1324 (2012).

334. U.S. CONST. amend. V.

335. Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U.L. REV. 731, 733 (2018).

336. *Id.* at 735-36.

337. In the federal system, misdemeanors are largely handled by magistrate judges. 28 U.S.C. §

636. State systems vary, but using Massachusetts as an exemplar, misdemeanors are usually heard in district courts while felonies are typically heard in superior court. *What’s the Difference Between Superior Court and District Court?*, MIDDLESEX CNTY. DIST. ATT’Y OFFICE, <https://www.middlesexda.com/prosecution/faq/what%E2%80%99s-difference-between-superior-court-and-district-court> (last visited Apr. 4, 2022).

338. Stevenson & Mayson, *supra* note 335, at 736.

339. Natapoff, *supra* note 333, at 1316.

conviction in one-thousand get appealed, and defendants may not have the right to appeal at all.<sup>340</sup> Terms of imprisonment may be shorter, but all of the other consequences of a criminal conviction remain.<sup>341</sup> The lack of a grand jury is therefore the least of a defendant's concerns.

Numbers help illustrate these points. Researchers estimate that civilian prosecutors file about three times as many misdemeanors as felonies.<sup>342</sup> This makes sense, given how much easier misdemeanor cases are to prosecute. In the military, the number of misdemeanor cases is *lower* than felonies some years.<sup>343</sup> Given that misdemeanor convictions are no easier to obtain in the military than felonies but carry lighter punishments, it stands to reason there would be fewer of them.

The federal government is nowhere near as rough as the states when it comes to misdemeanor justice, but misdemeanor court is still more informal.<sup>344</sup> It has different judges, prosecutors, fewer rules, greater crowds, less deliberation, and fewer appeal rights.<sup>345</sup> Because of the crowds, defendants may face "subtle pressure to waive jury trial at the very beginning of the case."<sup>346</sup> The relatively robust due process protections for misdemeanor cases can be explained by the fact federal prosecutions have discretion to simply not charge misdemeanors: only three percent of federal cases are for misdemeanors.<sup>347</sup>

The importance of misdemeanor defendants in the military receiving almost identical due process as in felony defendants cannot be overemphasized. Civilian systems use misdemeanors to sweep up vast numbers of people in criminal dragnets, deny them most rudiments of due process, and burden them with much the same collateral consequences of a felony conviction.<sup>348</sup> Despite ten million people being charged with a misdemeanor every year, policymakers largely ignore this issue.<sup>349</sup> Because

340. Nancy J. King & Michael Heise, *Misdemeanor Appeals*, 99 B.U.L. REV. 1933, 1941, 1945 (2019).

341. Natapoff, *supra* note 333, at 1315.

342. Stevenson & Mayson, *supra* note 335, at 734.

343. *ARMY REPORT FOR 2020*, *supra* note 218; *2020 Annual Reports*, *supra* note 218 (Numbers come from the statistical summaries for each service, available at the following pages within each services' report: Army: 16–18, Marine Corps: 11–13, Navy: 13–15, Air Force: 17–19, Coast Guard: 2–3. These numbers show 723 general courts-martial tried versus 584 special.).

344. *The Ins and Outs of Misdemeanors in Federal Court*, BURNHAM & GOROKHOV, <https://www.burnhamgorokhov.com/ins-outs-misdemeanors-federal-court/> (last visited Sept. 28, 2022) [hereinafter *Ins and Outs*].

345. *Id.*

346. *Id.*

347. U.S. SENTENCING COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2020 4 (2021), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/FY20\\_Overview\\_Federal\\_Criminal\\_Cases.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/FY20_Overview_Federal_Criminal_Cases.pdf).

348. Stevenson & Mayson, *supra* note 335, at 735-36; *Ins and Outs*, *supra* note 344 (noting the collateral consequences of a misdemeanor conviction often dwarf the formal punishments).

349. Natapoff, *supra* note 333, at 1315.



far more people are charged with state misdemeanors than any other kind of crime (be it state, federal, or military), it is not unfair to say that state misdemeanor courts *are* the civilian criminal justice system—and that system runs roughshod over people’s rights.<sup>350</sup>

None of this can happen in the military. Misdemeanor courts are just about as deliberate and scrupulous as felony courts.<sup>351</sup>

### *B. Pre-Trial Confinement Almost Never Happens in the Military*

We are told defendants are innocent until proven guilty, but cavalier use of pre-trial confinement puts a lie to this maxim. Between 1970 and 2015, the number of civilian defendants held in pre-trial confinement had risen 433 percent.<sup>352</sup> A supermajority of the civilian jail population is incarcerated due to pre-trial confinement, not conviction of a crime.<sup>353</sup> Sometimes pre-trial confinement is based on the defendant being a flight risk or dangerous, but more often, it is simply because they cannot afford to post bail.<sup>354</sup> The process of setting bail is often “rushed and reckless,” perhaps no longer than a minute.<sup>355</sup> People in pretrial confinement often lose their jobs and feel pressure to plea to escape.<sup>356</sup> This means that a person is much more likely to be convicted if held in pretrial confinement.<sup>357</sup> Relatedly, states allow people to be locked up to pay off court fees and criminal fines.<sup>358</sup>

The federal government does not have the same addiction to cash bail but does heavily load the dice in favor of prosecutorial pre-trial detention requests. Judges can order people into pre-trial detention if they “may flee or pose a danger to any other person or the community.”<sup>359</sup> The defendant, not

350. *Id.* at 1314-15; Stevenson & Mayson, *supra* note 335, at 735-36.

351. Summary courts-martial and non-judicial punishments do lack significant process protections, but defendants can refuse them and demand full trials. They are not convictions, which means fewer of the collateral consequences of a criminal charge attach.

352. Matt Perez, *4 Takeaways From Civil Rights Commission’s Cash Bail Study*, LAW360 (Jan. 23, 2022, 8:02PM), <https://www.law360.com/access-to-justice/articles/1457250/4-takeaways-from-civil-rights-commission-s-cash-bail-study> [hereinafter *Takeaways*].

353. Adureh Onyekwere, *How Cash Bail Works*, BRENNAN CTR. JUST., <https://www.brennancenter.org/our-work/research-reports/how-cash-bail-works> (last updated Feb. 24, 2021).

354. *Takeaways*, *supra* note 352.

355. *Id.*

356. Jamiles Lartey, *New York Tried to Get Rid of Bail. Then the Backlash Came.*, POLITICO (Apr. 23, 2020, 5:08AM), <https://www.politico.com/news/magazine/2020/04/23/bail-reform-coronavirus-new-york-backlash-148299>.

357. *Selling Off Our Freedom: How Insurance Corporations Have Taken Over Our Bail System*, AM. CIV. LIBERTIES UNION 18 (2017), [https://www.aclu.org/sites/default/files/field\\_document/059\\_bail\\_report\\_2\\_1.pdf](https://www.aclu.org/sites/default/files/field_document/059_bail_report_2_1.pdf).

358. Anna Wolfe & Michelle Liu, *Modern Day Debtors Prison? Mississippi Makes People Work to Pay off Debt*, USA TODAY (Jan. 9, 2020, 12:53PM), <https://www.usatoday.com/in-depth/news/investigations/2020/01/09/debtors-prison-miss-still-sends-people-jail-unpaid-debt/4418001002/>; Christopher D. Hampson, *The New American Debtors’ Prisons*, 44 AM. J. CRIM. L. 1, 3-4 (2016).

359. 18 U.S.C. § 3142(d)(2).

the government, must rebut a presumption of imprisonment if *accused* with certain crimes.<sup>360</sup> Prior to the hearing, the defendant will be interviewed by the U.S. Probation Office.<sup>361</sup> The probation officer might ask about alcohol and drug use, past crimes, or other incriminating topics.<sup>362</sup> If the defendant truthfully admits to their vices, that information will be used against them.<sup>363</sup> Resultantly, two-thirds of federal defendants are confined prior to trial.<sup>364</sup>

Military pre-trial confinement looks nothing like this. Cash bail not does exist; a person's ability to pay is of no moment. A defendant may only be confined if it can be shown it is foreseeable that they will flee or engage in "serious criminal misconduct," and "[l]ess severe forms of restraint . . . [have proved] inadequate."<sup>365</sup> Pre-trial detention decisions must be reviewed 48 hours, 72 hours, and 7 days after the fact.<sup>366</sup> Defendants have a right to remain silent,<sup>367</sup> and no probation officer is gathering incriminating information. If the prosecution so much as fails to fill out the right paperwork along the way, the defendant can get bonus time-served credit.<sup>368</sup> Defendants are also eligible for bonus time-served credit if their conditions of confinement are unusually harsh.<sup>369</sup>

Arguably more important than the formal rules, there is a culture against pre-trial confinement. Regulations state that "[a]n accused pending charges should ordinarily continue the performance of normal duties within the accused's organization while awaiting trial" rather than be imprisoned.<sup>370</sup> Adding to this, the prosecution is responsible for the care and wellbeing of a defendant put pretrial confinement, which includes making sure they receive regular visits from their commander and arranging meetings with their defense attorney.<sup>371</sup> Pretrial confinement becomes a hardship for the prosecution, not just the defendant. Even if military defendants are confined,

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360. *Id.* §§ 3142(e)-(f).

361. *Detention Hearing*, OFFICE OF THE FED. DEFENDER, E. DIST. CAL., [https://cae-fpd.org/Client\\_Detention.pdf](https://cae-fpd.org/Client_Detention.pdf).

362. *Id.*

363. *Id.*

364. Thomas H. Cohen, *Pretrial Release and Misconduct in Federal District Courts, 2008-2010*, U.S. DEP'T OF JUSTICE, BUREAU JUST. STAT. 1 (2012), <https://bjs.ojp.gov/content/pub/pdf/prmfdc0810.pdf>.

365. MCM, *supra* note 72, R.C.M. 305(h)(2)(B).

366. *Id.* R.C.M. 305(h)(2)(C), (i).

367. *Id.* R.C.M. 305(e)(2).

368. *See generally* United States v. White, No. ACM 39600, 2020 WL 4006372, at \*9 (A.F. Ct. Crim. App. 2020); United States v. Stuart, 36 M.J. 747, 747-48 (C.M.R. 1993).

369. United States v. Suzuki, 14 M.J. 491, 493 (C.M.A. 1983); United States v. Avila, 53 M.J. 99, 100 (C.A.A.F. 2000); United States v. King, 61 M.J. 225, 227 (C.A.A.F. 2005).

370. AR 27-10, *supra* note 33.

371. *E.g.*, COMMANDER'S LEGAL HANDBOOK, *supra* note 139, at 14.

they keep their jobs and regular pay while imprisoned, significantly reducing the financial pressure to plea guilty that civilians in lock-up face.<sup>372</sup>

### C. Probable Cause Hearings Give Military Defendants More Rights

It is well known that civilian grand juries almost always indict.<sup>373</sup> This does not mean they are completely worthless. The prosecutor must expend time and effort to present a case to a grand jury, weed out weak cases they do not wish to risk losing on, and call live witnesses to testify.<sup>374</sup> Still, they do not give defendants much hope of non-indictment.

Probable cause hearings in the military are far from insurmountable, but still more robust. Unlike civilian grand juries, military probable cause hearings often find no probable cause.<sup>375</sup> The accused can participate in probable cause hearings, unlike a grand jury.<sup>376</sup> Ordinarily, this hearing is open to the public and media, and the defendant gets an attorney.<sup>377</sup> Witnesses do not have to be called, but if they are, the defense gets to cross examine them.<sup>378</sup> The accused may give an unsworn statement, which allows them to tell their story without being crossed by the prosecution, or call witnesses of their own.<sup>379</sup> It also gives them an early mechanism for discovery since they get copies of whatever investigative materials the prosecution uses to argue for probable cause.<sup>380</sup> So even if the defense loses at the probable cause hearing, they will have gained valuable intel.

### D. Discovery Rights Are Broader in the Military

*Brady v. Maryland*<sup>381</sup> is the seminal case on prosecutorial disclosure requirements. It requires that information be turned over as evidence that is exculpatory and material.<sup>382</sup> It also only requires disclosure before trial, or perhaps during trial.<sup>383</sup> The rule for the federal government and over a dozen

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372. *Defense / Personal Representative Services Addendum*, U.S. NAVY JUDGE ADVOCATE GEN.'S CORPS, [https://www.jag.navy.mil/legal\\_services/defense\\_services\\_addendum.htm](https://www.jag.navy.mil/legal_services/defense_services_addendum.htm) (last visited Apr. 2, 2022).

373. Gordon Griller, *Modern Grand Jury (Part II)*, NAT'L CTR. STATE COURTS, <https://cdm16501.contentdm.oclc.org/digital/collection/juries/id/282> (last visited May 1, 2019).

374. *Id.*

375. *See, e.g.*, 2018 DAC-IPAD, *supra* note 329, at 50.

376. RESPONSE TO UNRESTRICTED REPORTS, *supra* note 50, at 14.

377. An Introduction to The Uniform Code of Military Justice, NPR 4, [https://media.npr.org/documents/2009/nov/military\\_justice.pdf](https://media.npr.org/documents/2009/nov/military_justice.pdf).

378. *Id.*

379. *Id.* at 4-5.

380. *Id.* at 4.

381. *Brady v. Maryland*, 373 U.S. 83 (1963).

382. *Id.*

383. Ben Grunwald, *The Fragile Promise of Open-File Discovery*, 49 CONN. L. REV. 771, 780 (2017).

states only gives defendants a right to a few additional pieces of evidence, such as their own statements, criminal records, and things the prosecution intends to introduce.<sup>384</sup> Many other states use the American Bar Association standard rules of discovery as inspiration.<sup>385</sup> These rules are broader, recommending disclosure of all law enforcement records and all other documents that pertain to the case, among other things.<sup>386</sup>

Disclosure obligations can be weakened through a variety of ways. Civilians may be able to subvert rules like this if police fail to provide evidence to the prosecution, or if the prosecutor fails to collect or record evidence.<sup>387</sup> Numerous jurisdictions impose counter obligations on the defense to use some degree of diligence to locate exculpatory information on their own.<sup>388</sup> Until 2020 in New York, prosecutors could offer plea deals without even disclosing evidence, meaning that a defendant might have had to plea before knowing how strong the evidence was against them.<sup>389</sup>

Broader rights of discovery for defense exist in the military.<sup>390</sup> Article 46 of the Uniform Code provides that the defense shall have “equal access” to witnesses and evidence.<sup>391</sup> This means not just that the defense has a right to exculpatory evidence, but all evidence.<sup>392</sup> The prosecution has to disclose not just evidence used in its case in chief, but its rebuttal case.<sup>393</sup> And many of these discovery obligations apply well before the actual trial date.<sup>394</sup>

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384. *Id.* at 779.

385. *Id.*

386. *Criminal Justice Standards, Discovery: Part II(c)*, AM. BAR ASS'N, [https://www.americanbar.org/groups/criminal\\_justice/standards/discovery-fourth-edition/](https://www.americanbar.org/groups/criminal_justice/standards/discovery-fourth-edition/) (last visited Nov. 25, 2022).

387. Grunwald, *supra* note 383, at 791.

388. Thea Johnson, *What You Should Have Known Can Hurt You: Knowledge, Access, and Brady in the Balance*, 28 GEO. J. LEGAL ETHICS 1, 10 (2015).

389. Marco Poggio, 'Coercive' Prosecution Drives Trial Penalty, *Defense Attys Say*, LAW360 (Mar. 30, 2021, 2:21PM), <https://www.law360.com/access-to-justice/articles/1369388/-coercive-prosecution-drives-trial-penalty-defense-attys-say> [hereinafter *Coercive Prosecution*].

390. *United States v. Adens*, 56 M.J. 724, 733 (A. Ct. Crim. App. 2002) (quoting MCM, R.C.M. 701 Analysis, at A21-32).

391. 10 U.S.C. § 846. art. 46; *United States v. Garries*, 22 M.J. 288, 293 (C.M.A. 1986).

392. *Garries*, 22 M.J. at 293.

393. *Adens*, 56 M.J. at 732-33.

394. U.S. ARMY JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., CRIMINAL LAW DESKBOOK: PRACTICING MILITARY JUSTICE 11-10 (2019) [hereinafter CRIMINAL LAW DESKBOOK].

## IV. THE TRIAL PHASE

A. *Military Defendants Have Stronger Practical Jury Rights*1. *A Genuine Right to Trial by Jury*

In some respects, servicemembers have fewer jury rights than civilians. Military juries are smaller,<sup>395</sup> may convict without unanimous agreement,<sup>396</sup> and attorneys have fewer peremptory strikes.<sup>397</sup> But critically, servicemembers can actually *exercise* the jury rights they have. Contrary to just about every other jurisdiction in the western world, the rate of jury trials in the military is going up, not down.<sup>398</sup> On the civilian side, jury trials of all stripes—civil and criminal, federal and state—on are on the verge of extinction.<sup>399</sup> Roughly 98-99 percent of cases are resolved by plea.<sup>400</sup>

Civilian systems have been engineered to discourage jury trials. Defendants face a steep “trial penalty” if they take a case before a jury, enforced by strong-arm plea agreements, harsh sentencing guidelines, and judges who punish trial-goers.<sup>401</sup> Squeezed by budget cuts, courts may reduce spending on juries or even make them unavailable to litigants.<sup>402</sup> Other courts bill litigants for the cost of jurors or require defendants to submit pleas by a certain date in advance of trial.<sup>403</sup> For all the grandeur of the Sixth Amendment,<sup>404</sup> civilian defendants might as well not have jury rights.

395. 10 U.S.C. §§ 829(d), 816.

396. *Id.* § 852.

397. *Id.* § 841(b)(1) (military defendants only get one peremptory strike per waive of potential jurors). Fed. R. Crim. P. 24. In federal criminal cases, each side gets three to ten depending on the case.

398. CODE COMMITTEE ON MILITARY JUSTICE, ANNUAL REPORT 37 (2012), <https://www.armfor.uscourts.gov/annual/FY12AnnualReport.pdf> (noting the rate of contested cases spiked in the 2000s for the military); Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?*, 101 JUDICATURE 26, 27 (2017), <https://judicature.duke.edu/wp-content/uploads/2020/06/JUDICATURE101.4-vanishing.pdf> (noting that trials, especially jury trials, are disappearing in the civilian world). Foreign nations have largely abandoned juries altogether. See VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 30-31 (1986); William G. Young, *In Celebration of The American Jury Trial*, MASS. BAR ASS'N 1 (Oct. 2, 2014), <https://www.massbar.org/docs/default-source/publications-document-library/ejournal/2015-16/in-celebration-of-the-american-jury-trial.pdf?sfvrsn=2>.

399. Smith & MacQueen, *supra* note 398, at 27.

400. Marco Poggio, *Rise In Violent Crime Could Slow Resentencing Momentum*, LAW360 (Feb. 25, 2022, 8:02 PM), <https://www.law360.com/access-to-justice/articles/1467844/rise-in-violent-crime-could-slow-resentencing-momentum>.

401. Rick Jones et al., *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, NAT'L ASS'N CRIM. DEF. LAW. 3 (2018), <https://www.nacdl.org/Document/TrialPenaltySixthAmendmentRighttoTrialNearExtinct>.

402. Paula Hannaford-Agor, *Saving Money for Everyone: The Current Economic Crisis is an Opportunity to Get Serious About Improving Juror Utilization*, NAT'L CTR. STATE COURTS, <https://nscs.contentdm.oclc.org/digital/collection/juries/id/237/>.

403. *Id.*

404. U.S. CONST. amend. VI.

In sharp contrast, about a fifth of all military cases are resolved by a jury (and that does not include the additional slice of cases resolved by bench trials).<sup>405</sup> The civilian world has not seen numbers that high since the Second World War.<sup>406</sup> The introduction of federal sentencing guidelines and prosecutorial discretion appears to have brought about the demise of civilian trials.<sup>407</sup> Neither of those things are present in the military, though reforms might change that in the future.<sup>408</sup>

During COVID-19, civilian juries were treated as frivolities.<sup>409</sup> Courts around the country simply called off jury trials throughout the pandemic.<sup>410</sup> In Los Angeles, for example, there was a “complete shutdown” for the first 14 months of the pandemic, and another shutdown in early 2022.<sup>411</sup> Even worse, some jurisdictions kept defendants locked up in pre-trial confinement while the courts dithered on jury trials.<sup>412</sup> Although the number of prosecutions fell sharply during the COVID-19 pandemic, the percentage of pleas did not.<sup>413</sup> In the federal system, “jury trial rates fell as low as zero” during the pandemic: “not a single [jury] case was moving forward.”<sup>414</sup>

In the military, jury trials kept rolling along. In the fiscal year 2021 (October 1, 2020, to September 30, 2021), the Air Force had 92 jury trials, the Army had 111, the Navy had 54, and the Marine Corps had 42.<sup>415</sup> That is a total of 299. Aside from the Air Force, each service branch conducted roughly the same number of jury trials in the fiscal year 2019, the last fiscal

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405. *Annual Reports*, JOINT SERV. COMM. ON MIL. JUST. (2021), [https://jsc.defense.gov/Portals/99/Documents/FY21\\_Combined\\_146a\\_Reports.pdf?ver=S2mTvlI4E7CvozhZ98GqNQ%3d%3d](https://jsc.defense.gov/Portals/99/Documents/FY21_Combined_146a_Reports.pdf?ver=S2mTvlI4E7CvozhZ98GqNQ%3d%3d) (last visited Mar. 31, 2022) [hereinafter *2021 Annual Reports*]. The number jury trials can be found at the following pages of each service’s report: Air Force, pages 18, 20; Army, pages 15, 17; Navy, pages 14, 16; Marine Corps, pages 10, 12.

406. Smith & MacQueen, *supra* note 398, at 28.

407. *Id.* at 34.

408. *A Missed Opportunity*, *supra* note 28 (noting recent legislation will reduce, but not eliminate, the role of commanders, and create non-binding sentencing guidelines).

409. Andrea Cipriano, *Has the Pandemic Killed Jury Trials?*, CRIME REP. (Sept. 13, 2021), <https://thecrimereport.org/2021/09/13/has-the-pandemic-killed-jury-trials/>.

410. *E.g.*, *Update: Jury Trials Suspended in 18th Judicial District Until Feb. 11, 2022 due to COVID*, DOUGLAS CNTY., COLO. (Jan. 27, 2022), <https://www.douglas.co.us/jury-trials-suspended-in-18th-judicial-district-until-jan-28-due-to-increase-in-covid-cases/>; *Omicron Puts Strain on Jury Trials*, U.S. COURTS (Jan. 25, 2022), <https://www.uscourts.gov/news/2022/01/25/omicron-puts-strain-jury-trials>.

411. Michael Finnegan, *Federal Jury Trials Suspended in L.A. Amid Rapid COVID Spread*, L.A. TIMES (Jan. 4, 2022, 11:37 AM), <https://www.latimes.com/california/story/2022-01-04/federal-jury-trials-suspended-omicron-coronavirus-covid>.

412. *See, e.g.*, *Administrative Order for Court Operations During Pandemic*, UTAH SUP. CT. & UTAH JUD. COUNCIL (2020), <https://www.utcourts.gov/alerts/docs/20200320%20-%20Pandemic%20Administrative%20Order.pdf>; Matt Taibbi, *S—t Public Defenders See: The Great Covid-19 Jury Charade*, TK NEWS (Feb. 16, 2021), <https://taibbi.substack.com/p/s-t-public-defenders-see-the-great>.

413. *Coercive Prosecution*, *supra* note 389.

414. Cipriano, *supra* note 409.

415. *See 2021 Annual Reports*, *supra* note 405.

year before the COVID-19 pandemic.<sup>416</sup> In other words, the military was able to adapt and overcome the challenges of COVID to preserve a fundamental right for defendants; civilian courts did not.<sup>417</sup>

## 2. *Military Juries Are More Likely to Acquit*

Despite the fact that military juries are smaller and non-unanimous—which should make it easier to secure a conviction—data conclusively shows military juries are not pushovers for the prosecution. In the fiscal year 2020, the overall conviction rate for general courts-martial was eighty-two percent, and ninety-one percent for special courts-martial, which numbers includes cases resolved through plea.<sup>418</sup> The same dataset shows that most cases are resolved through plea, so the rate of conviction *at trial* would be lower.<sup>419</sup> For sexual assault cases, where the data is richer, the conviction rate at trial was sixty-one percent.<sup>420</sup> For sexual contact cases, the conviction rate at trial was about twenty percent in 2018.<sup>421</sup> Triers of fact (judge or jury) are skeptical of sexual assault allegations, even when the military is doing all it can to be tough on sex crimes. Additionally, military juries are more defense friendly than military judges in certain contexts.<sup>422</sup> Federal juries, which are larger and required to be unanimous,<sup>423</sup> seldom fail to convict.<sup>424</sup> Of the 80,000 federal criminal cases in the fiscal year 2018, there were only 320 acquittals at trial, a 99.6 percent conviction rate.<sup>425</sup> No one argues that civilian juries—by virtue of being civilians—cannot treat defendants fairly, yet they are significantly more likely to convict than military juries.

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416. See *Annual Reports*, JOINT SERV. COMM. ON MIL. JUST. (2019), <https://jsc.defense.gov/Annual-Reports/> [hereinafter *2019 Annual Reports*] (click the link “2019”). The number of jury trials can be found on the following pages of each service’s report: Army, page 13 (120 jury trials); Navy, page 22 (54 jury trials); Marine Corps, page 12 (43 jury trials); Air Force, page 19 (173 jury trials).

417. Cipriano, *supra* note 409.

418. *2019 Annual Reports*, *supra* note 416. All the reports of the services are available at the former source by clicking the link “2019”. Numbers come from the statistical summaries for each service, available at the following pages within each services’ report: Army: 16–18, Marine Corps: 11–13, Navy: 13–15, Air Force: 17–19, Coast Guard: 2–3).

419. See *2020 Annual Reports*, *supra* note 218 (click the link “2020”). Numbers come from the statistical summaries for each service, available at the following pages within each services’ report: Army: 10, Marine Corps: 11–13, Navy: 13–15, Air Force: 17–19, Coast Guard: 2–3.

420. U.S. DEP’T OF DEFENSE, ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 23 (2020), [https://www.sapr.mil/sites/default/files/Appendix\\_B\\_Statistical\\_Data\\_On\\_Sexual\\_Assault\\_FY2020.pdf](https://www.sapr.mil/sites/default/files/Appendix_B_Statistical_Data_On_Sexual_Assault_FY2020.pdf) [hereinafter *2020 REPORT ON SEXUAL ASSAULT*].

421. *2020 DAC-IPAD*, *supra* note 107, at 60.

422. *2018 DAC-IPAD*, *supra* note 329, at 49–50 (data shows that in various contexts, though not all contexts, military juries are more likely to acquit than military judges).

423. FED. R. CIV. P. 48.

424. John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RES. CTR. (June 11, 2019), <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/>.

425. *Id.*

### 3. *Military Juries Offer Additional Benefits to the Defense*

Military defendants (and prosecutors) only get one peremptory challenge,<sup>426</sup> but the defense has other tools at the voir dire stage. Structurally, the prosecution, not the court, is responsible for assembling the jury.<sup>427</sup> That sounds ominous. Could not the prosecution stack the deck with prosecution-friendly jurors? The fear of prosecutorial misconduct is legitimate—the appearance of misconduct is corrosive on its own—but as currently employed, the system gives key benefits to the defense. First, data shows juries are more likely to acquit on all charges than judges year after year, so the prosecution is deck stacking, it is doing a lousy job.<sup>428</sup> This data comes from sex offense cases, the same cases where the military faces the most pressure from Congress to get results.<sup>429</sup> If juries can stand up for defendants here, they can do it anywhere.

Second, judges have a mandate to liberally grant defense challenges for cause, which have no limit, but no such presumption exists for the prosecution.<sup>430</sup> Thus, the defense is well equipped to weed out zealots. Moreover, there are several reoccurring reasons why military jurors may be struck. Because military jurors are selected for their “age, education, training, experience, [and] length of service,”<sup>431</sup> they will necessarily be senior leaders.<sup>432</sup> Members of the military are required to review reports on sexual assault and serve in roles that focus on sexual assault—facts that allow them to be challenged or have convictions overturned on appeal.<sup>433</sup> Senior leaders in the military are incredibly busy, which gives a credible argument to the defense that jurors will not be able to focus on the trial. The military is a small community, so the odds that military jurors will recognize the names of litigants or witnesses—and thus be subject to challenge for cause—goes up dramatically.

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426. Walter B. Huffman & Richard D. Rosen, § 9:33 *Challenges to Members—Peremptory Challenges*, MIL. L. CRIM. JUST. & ADMIN. PROCESS (2022).

427. 10 U.S.C. § 825(e)(2) (noting the convening authority select members of the jury).

428. 2018 DAC-IPAD, *supra* note 329, at 49–50.

429. *Id.*; Weber, *supra* note 5, at 2–3.

430. *U.S. v. Clay*, 64 M.J. 274, 277 (C.A.A.F. 2007); *U.S. v. James*, 61 M.J. 132, 139 (C.A.A.F. 2005).

431. 10 U.S.C. § 825(e)(2).

432. *Id.* § 825(e)(1).

433. *See, e.g., Army Outlines Actions Taken Across the Force to Implement Fort Hood Independent Review Committee Recommendations*, U.S. DEP'T OF ARMY (Apr. 16, 2021), [https://www.army.mil/article/245330/army\\_outlines\\_actions\\_taken\\_across\\_the\\_force\\_to\\_implement\\_fort\\_hood\\_independent\\_review\\_committee\\_recommendations](https://www.army.mil/article/245330/army_outlines_actions_taken_across_the_force_to_implement_fort_hood_independent_review_committee_recommendations) (noting that information about sexual assault cases would be pushed out to the force). For examples of challenges for jurors who had served on Sexual Assault Review Boards or as victim advocates, *see United States v. Comisso*, 76 M.J. 315, 317–18 (C.A.A.F. 2017); *United States v. Riesbeck*, 77 M.J. 154, 158 (C.A.A.F. 2018).



Third, because the prosecution is responsible for assembling the jury, they must bear this “huge logistical endeavor” while simultaneously trying the case.<sup>434</sup> The prosecution must call up every potential juror, deconflict their schedules, direct them to the courthouse, have them fill out questionnaires, make seating charts, provide them with water, pens, and notebooks, swear them in, and do anything else necessary.<sup>435</sup> In a non-capital felony case, there are eight jurors.<sup>436</sup> Although the size of the venire pool is not specified because military jurors are incredibly busy, venire pools tend to be small. It is not feasible to have over 100 senior leaders milling about the courthouse in case they are needed; fourteen potential jurors showing up is closer to the norm.<sup>437</sup> If the defense can whittle the number down to below eight through the use of challenges, they have done what is known as “busting panel.”<sup>438</sup> If the defense busts the panel, the prosecution must obtain several more potential jurors, which can be lengthy and stressful in the middle of trial.<sup>439</sup> Prosecutors thus have a “common fear” of busting the panel, meaning they will not bother challenging jurors that are biased in favor of the defense because they would rather have a jury empaneled.<sup>440</sup> Thus, the prosecution has almost no practical ability to challenge jurors for cause or peremptorily without inflicting serious pain on themselves.

The military can and should expand jury rights to servicemembers by increasing panel sizes and making them unanimous. It should also make the court, not the prosecution, responsible for assembling the jury. This will remove the odious perception that the prosecution is stacking the deck, and allow prosecutors to focus on prosecution. Reforms like this will better serve the ends of justice by giving the defense *substantive* protections rather than *logistical* ones. However, the military should be commended for allowing defendants to have a jury without devastating consequences.<sup>441</sup> Strange as it may sound, military defendants have significantly stronger jury rights in

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434. See Todd C. Gately et al., *Bridging the Voir Dire Gap: A Practitioner's Guide to Winning Voir Dire*, 2021-1 ARMY L. 25, 33 (2021).

435. *Id.* at 26.

436. 10 U.S.C. § 816(b)(1).

437. See Gately et al., *supra* note 434, at 34 (throwing around fourteen panel members as a typical venire size).

438. *Id.* at 26.

439. *Id.* at 33.

440. See *id.* at 33. See also Colonel Gary J. Holland, *Tips and Observations From the Trial Bench: The Sequel*, 1995 ARMY L. 3, 7 (1995).

441. And for what it is worth, individual jurors are treated better in the military. Civilians must wait around interminably, receive poor wages, and are not compensated for childcare, transportation, or other expenses related to service. See, e.g., Hannaford-Agor, *supra* note 402, at 2. Military jurors are salaried and serve on juries as part of their normal duties, so there is no loss of income or uncompensated expense.

practice, notwithstanding the black letter law that appears prosecution friendly.<sup>442</sup>

### B. *Speedy Trial Is More Than a Catchphrase*

There is a reason the Sixth Amendment guarantees a right to a speedy trial.<sup>443</sup> If charges are filed against a person and never resolved, the stain of a criminal accusation never gets scrubbed clean, and the accused cannot rest easy knowing they might be convicted. The military gets cases resolved faster than civilian jurisdictions, granting finality to defendants.

The average time to resolve a criminal felony case in state courts is 256 days (over eight months), and 193 days for a misdemeanor (over six months).<sup>444</sup> Federal cases can take even longer.<sup>445</sup> As of 2015, in the military, the average length of a case from charges to sentencing is 173 days for felonies (under six months), and 85 days for misdemeanors (under three months).<sup>446</sup> Even military death penalty cases average a relatively quick two years.<sup>447</sup> The speed of the military is doubly impressive when one recalls the trial rate in the military is orders of magnitude higher than in the civilian world (upwards of twenty percent in the military versus about one percent in the civilian realm). Cases that result in a trial take twice as long to resolve as pleas.<sup>448</sup>

In the federal system, there can be several monthlong gaps between conviction and sentence; in the military, sentencing takes place immediately after conviction.<sup>449</sup> For example, in one child pornography case, a defendant was indicted in federal court on May 14, 2014.<sup>450</sup> The military referred charges against the same defendant for the same misconduct on September

442. There are some other miscellaneous defense friendly features of military juries, compared to civilians. Vida B. Johnson, *Silenced by Instruction*, 70 EMORY L.J. 309, 324 (2020) (noting that some civilian jurisdictions instruct the jury that if the defendant testifies, they have a vested interest in the outcome); Kisor, *supra* note 9, at 44 (noting that military defendants have a jury sentence them).

443. U.S. CONST. amend. VI.

444. Brian J. Ostrom et al., *Timely Justice in Criminal Cases: What the Data Tells Us*, NAT'L CTR. STATE COURTS 6, <https://napco4courtleaders.org/wp-content/uploads/2021/01/210121-Timely-Justice-in-Criminal-Cases-What-the-Data-Tells-Us.pdf> (last visited Oct. 1, 2022).

445. Ronald Hedding, *How Long Does It Take to Resolve a Federal Criminal Case?*, HEDDING L. FIRM (Mar. 18, 2020, 4:56 PM), <https://www.federalcriminaldefenseadvocates.com/how-long-does-it-take-to-resolve-a-federal-criminal-case/> (estimating six to twelve months to resolve a federal criminal case).

446. *From Rome*, *supra* note 331, at 531.

447. Lieutenant Commander Stephen C. Reyes, *Dusty Gallows: The Execution of Private Bennett and the Modern Capital Court-Martial*, 62 NAVAL L. REV. 103, 120 n.148 (2013).

448. *See Felony Case-Processing Time*, U.S. DEP'T OF JUSTICE, BUREAU JUST. STAT. (Aug. 1986), <https://bjs.ojp.gov/content/pub/pdf/fc-pt.pdf> (noting that in federal court, contested cases took twice as long to resolve as pleas).

449. *United States v. Rice*, 80 M.J. 36, 39 n.6 (C.A.A.F. 2020)

450. *Id.* at 38.

17, 2015.<sup>451</sup> Even though federal courts had more than a year-long head start, the military managed to convict and sentence the defendant sooner.<sup>452</sup>

Part of the delay is due to the shortage of civilian judges.<sup>453</sup> In the federal system, politicking between the executive and legislative branches means that 147 authorized judge positions were left vacant in 2018.<sup>454</sup> Of these vacancies, 74 have been called “judicial emergencies” for being absent so long.<sup>455</sup> In the states, budget cuts mean that courtrooms are chronically understaffed.<sup>456</sup> Military judges are selected through an apolitical process,<sup>457</sup> so there is no artificial shortage. Nor does the military have a judicial funding crisis.<sup>458</sup>

### C. Guilty Pleas Offer More Protections to the Accused

Pleading guilty is normally brief. Aside from affirming they understand their rights, all civilian defendants need to do to plead guilty is say that they are guilty, and maybe agree that the prosecutor’s account of the facts is accurate.<sup>459</sup> Civilian defendants do not even need to admit guilt to plead guilty.<sup>460</sup> Using what is known as an *Alford* plea, a criminal defendant can accept the legal consequences of a conviction while maintaining their innocence.<sup>461</sup> This setup may help individual defendants by making the process as painless as possible, but on a systematic level, it creates grave dangers for defendants. It allows the government to charge vast amounts of people with crimes they may or may not have committed and then plea them out in a summary manner.

Court can thus be a dehumanizing experience. The phrase “cattle call” often gets tossed around to describe the crush of people shoved into a courtroom awaiting swift justice for their criminal cases,<sup>462</sup> or perhaps

451. *Id.*

452. *Id.* at 39.

453. Ambi Biggs, *Lack of Judges Leads to Longer Litigation Times*, PILIERO MAZZA (Mar. 29, 2018), <https://www.pilieromazza.com/lack-of-judges-leads-to-longer-litigation-times/>.

454. *Id.*

455. *Id.*

456. *See, e.g.*, William C. Vickrey, *A Critical Shortage of Judges*, CAL. B.J. (Apr. 2006), [https://www.courts.ca.gov/partners/documents/California\\_Bar\\_Journal\\_A\\_Critical\\_Shortage\\_of\\_Judges.pdf](https://www.courts.ca.gov/partners/documents/California_Bar_Journal_A_Critical_Shortage_of_Judges.pdf).

457. 10 U.S.C. § 826.

458. *See generally* OFFICE UNDER SECRETARY DEF., UNITED STATES DEPARTMENT OF DEFENSE FISCAL YEAR 2022 BUDGET REQUEST (2021), [https://comptroller.defense.gov/Portals/45/Documents/defbudget/FY2022/FY2022\\_Budget\\_Request\\_Overview\\_Book.pdf](https://comptroller.defense.gov/Portals/45/Documents/defbudget/FY2022/FY2022_Budget_Request_Overview_Book.pdf).

459. *See, e.g.*, *United States v. Miller*, 3 F. Supp. 2d 376, 379 (W.D.N.Y. 1998).

460. *North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

461. *Id.*

462. *See, e.g.*, *First Class Justice vs. “The Cattle Call”*, PUB. (Sept. 2015), <http://publici.ucimc.org/2015/09/first-class-justice-vs-the-cattle-call/> (describing thirty to fifty cases being disposed of in a single session of court).

“assembly-line justice.”<sup>463</sup> In the state level, guilty pleas can last a few minutes, even for serious felonies.<sup>464</sup> At the federal level, maybe an hour.<sup>465</sup>

The military is the opposite. Judges go to great lengths to explain every aspect of the plea, pause if the accused has questions, and give many opportunities to withdraw the plea.<sup>466</sup> And most importantly, the prosecutor does not simply give a proffer of the facts; the defendant needs to have a lengthy colloquy with the judge verifying every aspect of the crime and putting things in their own words.<sup>467</sup> Judges are not supposed to conduct a cross—examination where the accused merely answers “yes” or “no.”<sup>468</sup> The accused are to “speak freely” about what they did and use their own words.<sup>469</sup>

Because so much time is allocated to each case, guilty pleas are much more extensive.<sup>470</sup> Fort Hood is one of the largest bases in the military.<sup>471</sup> Its March 2022 court calendar shows, at most, two proceedings per day per courtroom.<sup>472</sup> One proceeding per courtroom is more common, and some days have none. Therefore, there is no rush to move through cases. If a defendant needs more time to explain or consult with their attorney, the judge quite literally has all day to wait.

Admitting to every detail of the crime is surely embarrassing and searing for the defendant pleading guilty, but it ensures innocent people are not forced into guilty pleas, which potentially happens to tens of thousands of civilians a year.<sup>473</sup> On an individual level, defendants can appeal their plea as

463. Kohler-Hausmann, *supra* note 303, at 622 (2014).

464. *Sentencing Hearing – Do You Go to Jail Right After Sentencing?*, L. OFFICE KRETZER & VOLBERDING, P.C. (Dec. 4, 2018, 7:00 AM), <https://kretzerfirm.com/do-you-go-to-jail-right-after-sentencing-hearing/>; *cf.* *Pompey v. Broward Cty.*, 95 F.3d 1543, 1545 (11th Cir. 1996).

465. *See, e.g.*, Transcript of Plea Hearing at 48, *U.S. v. Sweeney*, No. 3:16-cr-00103 (W.D. Wis. Aug. 14, 2017), <https://www.courtlistener.com/docket/6501443/40/united-states-v-sweeney-patrick/>.

466. Bovarnick, *supra* note 57, Part IV.C.

467. *See, e.g.*, *United States v. Negron*, 60 M.J. 136, 138-39 (C.A.A.F. 2004) (and this is just a small snippet of the process). In addition to the defendant’s explanation of the crime, most military plea agreements have a stipulation of fact that the parties agree. Bovarnick, *supra* note 57, Part IV. B. The prosecution is involved in this, but the defendant still gets to help shape the narrative of what they did. To the extent written and agreed-upon factual predicates exist, they tend to be shorter in the civilian realm. *Compare* Bovarnick, *supra* note 57, Part IV.B (noting that even the shortest military stipulation of fact can be a couple of pages and are often much longer), *with* *United States v. Miller*, 3 F. Supp. 2d 376, 379 (W.D.N.Y. 1998) (noting the agreed upon facts were a single paragraph).

468. *Negron*, 60 M.J. at 143.

469. *Id.*

470. Bovarnick, *supra* note 57, Part IV.C.

471. *5 Largest Military Bases*, VETERAN AID (Apr. 13, 2016), <https://www.veteranaid.org/blog/2016/04/13/top-5-largest-u-s-military-bases/>.

472. *Docket Archive*, JAGCNET (Feb. 24, 2022) (on file with Ohio Northern University Law Review).

473. John L. Kane, *Plea Bargaining and the Innocent*, MARSHALL PROJECT (Dec. 26, 2014), <https://www.themarshallproject.org/2014/12/26/plea-bargaining-and-the-innocent>.

improvident if the judge does not probe every factual and legal detail deeply enough.<sup>474</sup>

A term unique to military practice is a “naked” guilty plea.<sup>475</sup> This occurs when the accused pleads guilty without a plea agreement.<sup>476</sup> Civilian defendants may plea without an agreement,<sup>477</sup> but the implications are very different. First, pleading guilty to all charges in a civilian jurisdiction is extremely dangerous if it triggers mandatory minimum sentences or other sentence enhancers. At the very least, sentencing guidelines all but guarantee a certain sentence is delivered. In the military, there are no guidelines, no sentence enhancers, and essentially no mandatory minimums.<sup>478</sup> Thus, pleading without a plea deal is much less risky. Plus, it deprives the prosecution of the ability to control the narrative since the plea is based on the defendant’s account of what happened, not the prosecution-influenced stipulation of fact.<sup>479</sup> All of this means that defendants are relatively free to reject plea offers from the prosecution, plea naked, claim they are taking responsibility for wrongdoing, and then ask the judge for a lenient sentence.<sup>480</sup>

#### *D. Military Rules of Evidence Are More Defense Friendly*

In many respects, the Military Rules of Evidence are identical to the Federal Rules of Evidence.<sup>481</sup> But in addition to traditional rules like hearsay, impeachment, or authentication, the military has rules that essentially codify Supreme Court precedent on search and seizure.<sup>482</sup> This helps the defense in at least two ways. First, it is easier to find a succinct rule of law in the evidence code rather than having to scour caselaw for it. Second, even if the Supreme Court chips away at civilian criminal defense rights, the military rules of evidence will still guarantee the same protections.

Military rules also have a few novel rights. Military Rule of Evidence 304(d) requires the prosecution to disclose all statements of the accused that the prosecution intends to introduce at trial.<sup>483</sup> By its terms, it requires the prosecution to provide these statements through discovery.<sup>484</sup> But the Army

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474. *See, e.g.*, United States v. Miller, 78 M.J. 835, 847 (A. Ct. Crim. App. 2019).

475. Dickstein, *supra* note 54.

476. *Id.*

477. United States v. Gully, 619 F. Supp. 2d 633, 635 (N.D. Iowa 2009).

478. 10 U.S.C. § 856 Art. 56.

479. *See* Bovarnick, *supra* note 57, Part IV.B.

480. *See* Dickstein, *supra* note 54 (speculation that this strategy was being employed).

481. *Compare* MCM, *supra* note 72, MIL. R. EVID., with FED. R. EVID.

482. *E.g.*, MCM, *supra* note 72, MIL. R. EVID. 311(a).

483. *Id.* MIL. R. EVID. 304(d).

484. *Id.*

practice is to specifically highlight statements by the accused in the casefile.<sup>485</sup>

### E. Sentencing

#### 1. The Military Has Virtually No Mandatory Minimums

Mandatory minimums are a fixture of civilian sentencing. Federal minimums have existed since 1790, with mandatory life sentences for murder and piracy and ten year sentences for causing a ship to run aground by a false light.<sup>486</sup> Today, dozens more such minimums exist, including two-thirds of drug crimes<sup>487</sup> and one-fifth of all federal crimes.<sup>488</sup> For example, possessing a single flake of marijuana demands a sentence of a \$1,000 fine, doing it twice demands a sentence of fifteen days confinement and a \$2,500 fine, and doing it three or more times demands ninety days and a \$5,000 fine.<sup>489</sup> Judges frequently bemoan these laws as restricting their discretion to impose a fair sentence.<sup>490</sup> Mandatory minimums are partially responsible for the average length of federal sentences doubling and the federal prison population increasing tenfold.<sup>491</sup> In addition, mandatory minimums have helped entrench racial disparities in the criminal code<sup>492</sup> and have been remarkably resilient. In 2010, then-President Barack Obama signed the Fair Sentencing Act, which “eliminated the mandatory minimum for simple possession of crack cocaine.”<sup>493</sup> In so doing, it was the first time since the Nixon Administration that a federal mandatory minimum was repealed.<sup>494</sup>

Federal mandatory minimums may draw the most attention, but they do not stand alone. Every state has some form of mandatory minimums.<sup>495</sup> Under Washington State’s three strikes, a person can get life in prison for a third unarmed robbery.<sup>496</sup> In Virginia, possessing drugs and a firearm at the

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485. CRIMINAL LAW DESKBOOK, *supra* note 394, at 11-10.

486. Luna & Cassell, *supra* note 132, at 9.

487. *Id.*

488. U.S. SENTENCING COMM’N, AN OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 29 (2017); [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711\\_Mand-Min.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf).

489. 21 U.S.C. § 844(a).

490. Stephanie Holmes Didwania, *Mandatory Minimum Entrenchment and the Controlled Substances Act*, 18 OHIO ST. J. CRIM. L. 25, 40 (2020).

491. Luna & Cassell, *supra* note 132, at 22.

492. *Kimbrough v. United States*, 552 U.S. 85, 98 (2007).

493. Luna & Cassell, *supra* note 132, at 4.

494. *Id.*

495. Claire Kebodeaux, *Rape Sentencing: We’re All Mad About Brock Turner, But Now What?*, 27 KAN. J.L. & PUB. POL’Y 30, 36 (2017).

496. Sarah Martinson, *New Wave Of Prosecutors Push For Resentencing Laws*, LAW360 (July 11, 2021, 8:02 PM), <https://www.law360.com/access-to-justice/articles/1394847/new-wave-of-prosecutors-push-for-resentencing-laws->.

same time results in a mandatory two-year sentence, in addition to any other punishment imposed.<sup>497</sup> Oregon has dozens of mandatory minimum crimes.<sup>498</sup>

These examples of long sentences not only hurt defendants by forcing them to spend long periods of time behind bars but also give prosecutors enormous leverage.<sup>499</sup> Defendants will often choose to plead guilty rather than risk a trial where a loss would guarantee a draconian sentence.<sup>500</sup> The military has virtually no minimum jail punishments.<sup>501</sup> If the defendant is convicted of a penetrative sexual assault, they must be given a dishonorable discharge.<sup>502</sup> Premeditated or certain felony murders require a life sentence, with the possibility of parole.<sup>503</sup> And that's it. Hence, military judges are free to give sentences that fit the crime.

## 2. Sentencing Hearings Are More Advantageous to the Defense

In the military, “[n]o presentencing report is prepared following a conviction, as is the norm in civilian Federal prosecutions.”<sup>504</sup> This is because of the absence of a probation office.<sup>505</sup> The Pentagon claims “the military does not have – and it is not feasible to create – an independent, judicially supervised probation service to prepare presentence reports.” This assertion is questionable. From a practical standpoint, setting up a supervised probation office would be no more complicated than overhauling the entire military criminal justice system, which has been done before.<sup>506</sup> And the Defense Department’s budget is nearly twenty times larger than the Department of Justice, yet the latter manages to run a probation office.<sup>507</sup>

Whatever the excuse for not having a pre-sentence report, the absence of one is a windfall to the defense. Sentencing reports are supposed to provide

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497. VA. CODE ANN. § 18.2-308.4(B).

498. OR. REV. STAT. § 137.700.

499. *Coercive Prosecution*, *supra* note 389.

500. *Id.*

501. *See generally*, 10 U.S.C. § 856.

502. *Id.* §§ 856(b)(1), (b)(2)(A).

503. MCM, *supra* note 72, pt. IV-78, ¶ 56.d(1).

504. RESPONSE TO UNRESTRICTED REPORTS, *supra* note 50, at 15; MCM, *supra* note 72, R.C.M. 1001, drafters’ analysis.

505. RESPONSE TO UNRESTRICTED REPORTS, *supra* note 50, at 15 n.118, (quoting MCM, *supra* note 72, R.C.M. 1001, drafters’ analysis.).

506. *Congress Announces Agreement on Transformative Military Justice Reforms to Address Military Sexual Assault Epidemic*, PROTECT OUR DEFENDERS (Dec. 7, 2021), <https://www.protectourdefenders.com/congress-announces-agreement-on-transformative-military-justice-reforms-to-address-military-sexual-assault-epidemic/> (calling a 2021 law “the most significant military justice reform in our nation’s history.”).

507. *Compare Military Spending*, *supra* note 169, with U.S. DEP’T OF JUSTICE, FY 2020 AGENCY FINANCIAL REPORT I-7 (2021), <https://www.justice.gov/doj/page/file/1338191/download>.

a factual, uncontested description of a person's life and background.<sup>508</sup> But sentencing reports tend to focus solely on the negative aspects of a person's life: their abusive upbringing, their struggles with substance abuse, past arrests, past convictions, past punishments, and past parole violations.<sup>509</sup> Sentencing reports do not contain a person's greatest accomplishments, proudest moments, or dearest ambitions.<sup>510</sup> Only the sum of the person's worst choices. So the absence of a pre-sentence report, as presently imagined, is a boon to defendants.

All military sentencing authorities have to rely on is the limited information presented at a pre-sentencing hearing.<sup>511</sup> There is no probation office to track down information for the prosecution, and the prosecution is limited in what kind of aggravation evidence it can introduce.<sup>512</sup> The defense has a relatively free hand to enter evidence in mitigation or attenuation, so much so that rules of evidence are relaxed for the defense.<sup>513</sup>

In a civilian sentencing hearing, it is perfectly common for the defense to call no witnesses.<sup>514</sup> Maybe defendants are too itinerant to put down roots, or maybe the defense attorney decides that the sorts of people who could vouch for the defendant are not of the same social strata as the judge and thus not worth calling. Or maybe they are just too busy to get around to it. The author of this article has never seen a sentencing hearing in the military where the defense did not call witnesses. It probably helps that military defendants are part of a tight-knit community of people who work for the same employer as the judge—the military—and servicemembers can be excused from work to testify without loss of pay.

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508. See generally FED. R. CRIM. P. 32(d).

509. See *id.*; U.S. PROBATION OFFICE W. DIST. N.C., THE PRESENTENCE INVESTIGATION REPORT: A GUIDE TO THE PRESENTENCE PROCESS 6-14 (2009), [https://www.ncwp.uscourts.gov/sites/default/files/general/Guide\\_to\\_the\\_Presentence\\_Process.pdf](https://www.ncwp.uscourts.gov/sites/default/files/general/Guide_to_the_Presentence_Process.pdf) [hereinafter PRESENTENCE].

510. PRESENTENCE, *supra* note 509, at 13-14. Even seemingly positive information can be used against the defendant. Vocational skills can be used to show they abused their talents to commit a crime; steady employment shows they can afford to pay a fine or restitution.

511. Captain Megan N. Schmid, *This Court-Martial Hereby (Arbitrarily) Sentences You: Problems with Court Member Sentencing in the Military and Proposed Solutions*, 67 A.F.L. REV. 245, 252 (2011).

512. *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007).

513. MCM, *supra* note 72, R.C.M. 1001(d)(3).

514. *E.g.*, Transcript of Sentencing Hearing, *U.S. v. Russo*, No. CR 00 -840 S-1 (E.D.N.Y. Jan. 16, 2013), <https://www.courtlistener.com/docket/16942541/1069/1/united-states-v-russo/>; Transcript of Sentencing Hearing, *United States v. Osman*, No. 2:02-cr-00175 (W.D. Wash. Feb. 4, 2003), <https://www.courtlistener.com/docket/20047793/51/united-states-v-osman/>; Transcript of Sentencing Hearing, *United States v. Prouty*, No. 2:07-cr-20156 (E.D. Mich. May 16, 2008), <https://www.courtlistener.com/docket/5017830/35/united-states-v-prouty/>; Transcript of Sentencing Hearing, *United States v. Suarez*, No. 1:03-cr-10384 (D. Mass. May 7, 2008), <https://www.courtlistener.com/docket/4277003/42/2/united-states-v-suarez/>.



### 3. Punishment Tends to Be Lighter in the Military

In federal court, the average sentence handed down is forty-four months.<sup>515</sup> In the military, the average term of confinement is thirty-three months.<sup>516</sup> So off the bat, courts-martial are giving 25 percent lighter sentences.<sup>517</sup> But the disparity grows larger when one considers the *types* of crimes in each pool. The federal average includes light-punishment categories of white-collar crime and immigration.<sup>518</sup> About one-third of all federal convictions were for immigration, and their average sentence was ten months.<sup>519</sup> The federal average for assault is 56 months, drug trafficking 76 months, firearm offenses 53 months, child pornography 104 months, robbery 106 months, and sexual abuse 191 months.<sup>520</sup> Court-martial sentencing data by crime is not as readily available, but one expects that it would show lighter sentences than federal counterparts, given the of overall averages.

Why might this be? Unlike many blue-collar jobs, servicemembers receive regular evaluations, awards and decorations, and frequent opportunities to demonstrate valor, patriotism, or proficiency.<sup>521</sup> The result is that nearly every military defendant can submit a “good soldier book” detailing the highlights of their service records.<sup>522</sup> Civilian defendants probably do not have employers who so scrupulously document their achievements.

Military prosecutors must also concern themselves with the discharge status, not just jail time. Presumably, a defendant could get a lower jail term in exchange for a punitive discharge. Even for people who go to confinement, a healthy chunk of their sentence is reduced due to good time credits.<sup>523</sup> This

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515. U.S. SENTENCING COMM’N, STATISTICAL INFORMATION PACKET FISCAL YEAR 2018 FIRST CIRCUIT 11 (2018), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2018/1c18.pdf> [hereinafter STATISTICAL INFORMATION PACKET].

516. Major Steven M. Immel, *Development, Adoption, and Implementation of Military Sentencing Guidelines*, 165 MIL. L. REV. 159, 188-89 (2000).

517. Compare STATISTICAL INFORMATION PACKET, *supra* note 515, with Immel, *supra* note 516, at 189.

518. STATISTICAL INFORMATION PACKET, *supra* note 515, at 11.

519. *Id.*

520. *Id.* In the not-too-distant past, averages were even higher. Among 16,000 low-level drug offenders, most of who had no criminal record, the average sentence in the early 1990s was 81.5 months. BARBARA S. VINCENT & PAUL J. HOFER, THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS 4, 10 (1994).

521. See generally U.S. DEP’T OF ARMY, ARMY REGULATION 600–8–22, MILITARY AWARDS (Apr. 5, 2019).

522. U.S. ARMY TRIAL DEF. SERV., GOOD SOLDIER BOOK, [https://8tharmy.korea.army.mil/tds/assets/info-papers/Good\\_Soldier\\_Book-170914.pdf](https://8tharmy.korea.army.mil/tds/assets/info-papers/Good_Soldier_Book-170914.pdf).

523. VINCENT & HOFER, *supra* note 520, at 9 n.39.

sort of good time reduction is not unique to the military but is not universal in the civilian world.<sup>524</sup>

The death penalty might as well be off the table. The Marine Corps has not tried a capital case in years; the Navy has not tried one in so long that none of its appellate counsel is experienced in capital litigation; the Coast Guard has never tried a capital case.<sup>525</sup>

## V. AFTER THE TRIAL

### A. *The Military Has a Unique Post-Trial Process*

The end of the trial is only the beginning. Between the announcement of the sentence and the appeal is the post-trial period.<sup>526</sup> During this time, the defendant can avail themselves to various tools to reduce their liability.<sup>527</sup> These tools apply regardless of whether the conviction is through a plea or trial, and there is no cost to the accused. Unlike civilian practice, the ratchet only moves in one direction: sentences get shorter, not longer.<sup>528</sup>

First, the defense can request that their punishment be deferred by the convening authority.<sup>529</sup> Separately, the defense may submit post-trial matters to the Convening Authority under Rule 1106 of the R.C.M.<sup>530</sup> The rule is broad, permitting “any matters that may reasonably tend to inform the convening authority’s exercise of discretion” aside from slamming the victim.<sup>531</sup> Although a crime victim may also submit matters independently,<sup>532</sup> the rules do not provide any avenue for the prosecution to submit matters. The convening authority can set aside, dismiss, or order a rehearing of convictions.<sup>533</sup> The convening authority can also commute, reduce, disapprove, or suspend a sentence<sup>534</sup> or other penalties.<sup>535</sup> While this leniency power has been limited to not apply to many serious crimes,<sup>536</sup> convening authorities retain the power over many misdemeanor convictions or

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524. *Coercive Prosecution*, *supra* note 389 (noting that New York State is trying to pass a law that would offer good time credit).

525. See *Annual Reports*, JOINT SERV. COMM. MIL. JUST. (2018), <https://jsc.defense.gov/Annual-Reports/> (click the link “2018”). The information is from the following pages of each services’ report: Marine Corps, 4; Navy, 15; Coast Guard, 3).

526. See MCM, *supra* note 72, R.C.M. 1103(a); 1111(a)(2).

527. *Id.* R.C.M. 1103; 1106(b).

528. In the civilian system, sentences can be overturned for being *too* lenient. *E.g.*, *United States v. Abu Ali*, 528 F.3d 210, 262 (4th Cir. 2008).

529. MCM, *supra* note 72, R.C.M. 1103.

530. *Id.* R.C.M. 1106.

531. *Id.* R.C.M. 1106(b)(1), (2).

532. *Id.* R.C.M. 1106(a).

533. *Id.* R.C.M. 1110(b)(2)(A)-(B).

534. MCM, *supra* note 72, R.C.M. 1110(c)(1).

535. *E.g.*, *United States v. Shea*, 76 M.J. 277, 278 n.1 (C.A.A.F. 2017).

536. MCM, *supra* note 72, R.C.M. 1109(a)-(b).

punishments from summary courts-martial.<sup>537</sup> In addition to seeking post-trial relief from the convening authority, the defense may file post-trial motions with the court.<sup>538</sup>

Statistical analysis has found that convening authorities do not grant most clemency requests—the grant rate is in the single digits.<sup>539</sup> But that is not necessarily low. The closest civilian analogy is habeas relief or executive clemency. The rate of habeas petitions granted is in the low single digits, and most of the time, the relief is merely a further judicial review, not a reduction of punishment.<sup>540</sup> Plus, it can take years for habeas proceedings to run their course.<sup>541</sup> Executive clemency is largely a mirage. Although pardons used to be dispensed liberally to ordinary defendants, in recent times, they are reserved for political cronies or not used at all.<sup>542</sup> So compared to civilian analogues, military post-trial relief is generous.

### *B. Appeal Rights Are Broader than Anywhere Else*

Once the post-trial is over, the appellate phase begins.<sup>543</sup> Many military convictions are subject to automatic appellate review: any case with a death sentence, punitive discharge, or prison sentence of two years or more.<sup>544</sup> And the kind of appellate review that military servicemembers get is more thorough.

Civilian courts make clear that they will only resolve errors raised by the parties.<sup>545</sup> In the military, appellate courts have plenary power to take up issues not raised or even forfeited.<sup>546</sup> Civilian appeals are generally moot if the defendant has already been released from prison.<sup>547</sup> Not only can military defendants continue an appeal post-release, but *most* appellate reviews of

537. 10 U.S.C. § 860b(a).

538. MCM, *supra* note 72, R.C.M. 1104.

539. Lieutenant Michael J. Marinello, *Convening Authority Clemency: Is It Really an Accused's Best Chance of Relief?*, 54 NAVAL L. REV. 169, 195-96 (2007).

540. Carol G. Kaplan, *Habeas Corpus - Federal Review of State Prisoner Petitions*, U.S. DEP'T OF JUSTICE, BUREAU JUST. STAT. (Mar. 1984), <https://bjs.ojp.gov/library/publications/habeas-corpus-federal-review-state-prisoner-petitions>.

541. *Id.*

542. Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to Be Merciful*, 27 FORDHAM URB. L.J. 1483 (2000). Some state governors have suspended all death sentences, but it is rarer to see this power used for lesser crimes. See Maeve Reston, *California Governor Signs Executive Order Stopping State's Death Penalty for Now*, CNN (Mar. 13, 2019, 6:38 PM), <https://www.cnn.com/2019/03/12/politics/gavin-newsom-california-death-penalty/index.html>.

543. 10 U.S.C. § 866(b).

544. *Id.* § 866(b)(3).

545. *Carducci v. Regan*, 714 F.2d 171, 177 (1983).

546. Major Jeremy S. Watford, *Not Harmless: C.A.A.F.'s Flawed Approach to Plain Error Review in United States v. Tovarchavez*, 229 MIL. L. REV. 49, 52, 57-59, 75 (2021).

547. *United States v. Hernandez-Lorenzo*, 792 F. App'x 667, 670 (11th Cir. 2019) (citing *United States v. Farmer*, 923 F.2d 1557, 1568 (11th Cir. 1991)).

special courts-martial also occur after the servicemember is released.<sup>548</sup> Civilian defendants typically cannot appeal adverse interlocutory rulings; military defendants can.<sup>549</sup> If a military defendant alleges an unpreserved constitutional error (no objection at trial), the *prosecution* bears the burden of proving it was harmless beyond a reasonable doubt.<sup>550</sup> The military intermediate appellate courts can determine controverted matters of fact on appeal.<sup>551</sup> Its powers are so expansive it has been called “a court of equity, not law.”<sup>552</sup>

Civilian defendants are guaranteed an attorney for their direct appeal and nothing more.<sup>553</sup> They may get less. Non-indigent (but also non-wealthy) defendants must pay the substantial costs of appeal by themselves.<sup>554</sup> Misdemeanor defendants (which are the vast majority of civilian defendants) often get no right to appeal.<sup>555</sup> Even for felonies, most civilian defendants are forced to waive their appellate rights when pleading guilty.<sup>556</sup> So civilian appellate rights are mostly theoretical.

Defendants in the military, regardless of wealth, will always have a free, competent appellate attorney.<sup>557</sup> Take, for example, the procedural journey of *United States v. Shea*.<sup>558</sup> The defendant was convicted of three misdemeanors on February 26, 2014, and given a four month prison term, along with a rank reduction and bad conduct discharge.<sup>559</sup> On May 21, 2015, the intermediate court of appeals set aside one of those convictions but kept the sentence.<sup>560</sup> On September 22, 2015, the military high court ordered the intermediate court to reassess the sentence.<sup>561</sup> On May 6, 2016, the intermediate court again affirmed that the sentence should remain the same.<sup>562</sup> Finally, on May 30, 2017, the military high court once again took up the case, this time addressing substantive challenges, and affirmed the lower court.<sup>563</sup> This defendant got three years and four appellate court opinions to fight a

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548. Lippert, *supra* note 3, at 32-33.

549. *United States v. Lewis*, 78 M.J. 447, 456-57 (C.A.A.F. 2019) (Ryan, J., concurring).

550. Watford, *supra* note 546, at 52.

551. 10 U.S.C. § 866(d)(1)(B).

552. *United States v. Claxton*, 32 M.J. 159, 165 (C.A.A.F. 1991) (Sullivan, J., concurring).

553. *Coleman v. Thompson*, 501 U.S. 722, 756 (1991); *Wainwright v. Torna*, 4 U.S. 586, 586 (1982); *Ross v. Moffitt*, 417 U.S. 600, 618-19 (1974); *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987).

554. Lippert, *supra* note 3, at 33-34.

555. King & Heise, *supra* note 340, at 1941, 1945.

556. Nancy J. King & Michael E. O’Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 211 (2005).

557. Lippert, *supra* note 3, at 2.

558. *See generally* *United States v. Shea*, 76 M.J. 277 (C.A.A.F. 2017) [hereinafter *Shea II*].

559. *United States v. Shea*, No. ACM S32225, 2016 WL 3193019, at \*1 (A.F. Ct. Crim. App. May 21, 2015) [hereinafter *Shea I*].

560. *Shea I*, 2016 WL 31930, at \*2.

561. *Shea II*, 75 M.J. at 278.

562. *Shea I*, 2016 WL 31930, at \*2.

563. *Shea II*, 75 M.J. at 282.

four-month misdemeanor sentence, and none of it cost him a dime.<sup>564</sup> There is no filing fee to appeal to the military high court,<sup>565</sup> unlike civilian appellate courts.<sup>566</sup> And going through the military's appellate system, they can seek relief in federal courts.<sup>567</sup>

Military defendants also get more flexibility in *what* they can appeal. If civilian prison conditions are deplorable, they can file a civil suit under 42 U.S.C. § 1983.<sup>568</sup> But 96 percent of prisoners will lack an attorney.<sup>569</sup> Likely because of this, the most common reason cases are dismissed is for failure to comply with court rules, not substantive issues.<sup>570</sup> These cases can take years to resolve.<sup>571</sup> Inmates may need to exhaust state administrative grievance procedures before filing.<sup>572</sup> And because these are civil suits, even if they are successful, all plaintiffs can get is money, not time.<sup>573</sup> In the military, *direct* appeals based on prison conditions are a matter of course.<sup>574</sup>

## VI. CONCLUSION

Maybe it is fitting that the Department of *Defense* is so favorable to the criminally accused. While those who answer the call to service may give up certain civil rights in their personal lives, they gain countless rights and privileges as criminal defendants. On a fundamental level, the military justice system is built *for* the accused, while the civilian criminal justice system is inflicted *upon* the accused.

This is not to say there are no pro-defense reforms left to enact in the military. For example, juries could be made unanimous and enlarged. The convening authority should not select members of the jury due to the glaring appearance of impropriety. Probable cause hearings could be made binding rather than just advisory.<sup>575</sup> Appeals to the United States Supreme Court by

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564. *Shea I*, 2016 WL 31930, at \*1, \*5; *Shea*, 75 M.J. at \*1.

565. *Goodman v. Sec'y of the Navy*, 45 C.M.R. 16 (U.S. C.M.A. 1972).

566. *E.g.*, *Northampton County Criminal Division Fee Schedule 2015*, NORTHAMPTON CNTY, VA. (last visited Oct. 1, 2022), <https://www.northamptoncounty.org/CRTSRVCS/CRIMINAL/Documents/FEE%20SCHEDULE.pdf>.

567. *E.g.*, *United States v. Gray*, 77 M.J. 5 (C.A.A.F. 2017).

568. 42 U.S.C. § 1983.

569. Roger A. Hanson & Henry W.K. Daley, *Challenging the Conditions of Prisons and Jails: A Report on Section 1983 Litigation*, U.S. DEP'T OF JUSTICE, BUREAU JUST. STAT., 22 (1994).

570. *Id.* at 20.

571. *Id.* at 33, tbl.9 (noting it takes on average 967 days to challenge living conditions if the prisoner is represented).

572. *Id.* at 40.

573. *See id.* at 36-37.

574. *E.g.*, *United States v. Guinn*, 81 M.J. 195 (C.A.A.F. 2021).

575. 10 U.S.C. § 832 (hearing officer makes a report to the convening authority about whether probable cause exists, but a finding of probable cause is not necessary to proceed with a case).

military defendants could be liberalized.<sup>576</sup> Commanders and staff judge advocates could stop filing unsupported cases that will never result in a conviction but still stigmatize defendants.<sup>577</sup> And the defense could be given more support staff, its own budget for experts, and subpoena power for witnesses.

But these anti-defendant policies pale in comparison to the multitudinous provisions that help defendants in military court: full due process for misdemeanor charges;<sup>578</sup> free, competent defense counsel for all phases of trial and appeal, regardless of income;<sup>579</sup> individualized attention for every defendant from judges and public defenders;<sup>580</sup> access to defense attorneys for the equivalence of parking tickets and workplace discipline;<sup>581</sup> lighter sentences;<sup>582</sup> almost no pretrial confinement;<sup>583</sup> full salary while awaiting charges and no need to request time off work;<sup>584</sup> no mandatory minimum jail terms;<sup>585</sup> broader discovery rights;<sup>586</sup> jury rights that are more than ink on wizened parchment;<sup>587</sup> less racial disparity;<sup>588</sup> favorable rules for sentencing hearings;<sup>589</sup> no waiver of appellate rights;<sup>590</sup> a built-in clemency process;<sup>591</sup> universal healthcare, mental health counseling, housing, employment, and sustenance.<sup>592</sup>

Any one of these features is arguably more transformational than all the commonly cited anti-defendant policies in the military combined. Put all of the pro-defense policies together and it should be beyond dispute that there is no jurisdiction in America friendlier to the criminally accused than the military.<sup>593</sup>

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576. *Id.* § 1259. Under current law, military defendants can only appeal to the Supreme Court if their case has received discretionary review by the Court of Appeals for the Armed Forces.

577. 2018 DAC-IPAD, *supra* note 329, at 52.

578. *See supra* Section III.A.2.

579. Absher, *supra* note 260; Lippert, *supra* note 3, at 2.

580. *See supra* Section II.D.1.

581. *Id.*

582. *Compare* STATISTICAL INFORMATION PACKET, *supra* note 515, with Immel, *supra* note 516, at 189.

583. MCM, *supra* note 72, R.C.M. 305(h)(2)(B).

584. *See supra* Section II.E.1.

585. 10 U.S.C. § 856 (2021).

586. *United States v. Adens*, 56 M.J. 724, 733 (A. Ct. Crim. App. 2002) (quoting R.C.M. 701 Analysis, at A21-32).

587. *See supra* Section IV.A.1.

588. *Compare* Myers, *supra* note 279, with *Sentencing Project Report*, *supra* note 282.

589. *See supra* Section IV.E.2.

590. 10 U.S.C. § 866(b)(3).

591. *See supra* Section V.A.

592. *Active Duty*, *supra* note 260; Absher, *supra* note 260.

593. Weber, *supra* note 5, at 1, 2.

Unfortunately, the military does not only help defendants through substantive rights.<sup>594</sup> It also has numerous unwise protections: intentionally having inexperienced prosecutors and law enforcement lowers conviction rates, but that does not make it positive.<sup>595</sup> Forcing the prosecutor to handle all of the logistical work of trial helps the accused in the least rational way imaginable. Having a constantly shifting, unintelligible amalgam of regulations that govern the minutiae of procedure makes efficient administration of justice impossible. A culture of fear and retaliation that prevents victims from coming forward to report crimes benefits defendants,<sup>596</sup> but no one should endorse this as part of due process.

Congress is currently wrestling with how to improve the military justice system, particularly how to ensure sex crime cases are properly prosecuted.<sup>597</sup> The body seems to believe the biggest issues are corrupt commanders and runaway juries.<sup>598</sup> To this end, a new office of a special trial counsel is being established to take criminal jurisdiction away from commanders and the ability for juries to hand down sentences is being abolished.<sup>599</sup> This setup may improve some parts of the process, but will probably not solve the core problems plaguing the military justice system.<sup>600</sup> Policymakers cannot fix the military justice system if they do not understand why it is broken.

This Article has attempted to document the root causes of the military justice system's failures, but also highlight the things it does right. Some of the proposed solutions would make the military justice system look more like civilian courts. The military should not be afraid to admit that in many ways—such as greater efficiency, proper division of labor, prosecutorial discretion, and expertise of its actors—the civilian system is superior. At the same time, we should not assume the civilian system, by its very nature, knows what justice looks like.

Of course, the government should tread carefully before reducing protections for criminal defendants of any sort. But by taking the best practices from the civilian system, while reinforcing the best existing features of the military justice system, policymakers can better serve the system's twin goals of promoting discipline and protecting the rights of the accused.

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594. *Justice Manual, Title 1: Organizations and Functions*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/jm/jm-1-1000-introduction>.

595. *See supra* Section I.A.

596. *E.g.*, 2020 REPORT ON SEXUAL ASSAULT, *supra* note 420, at 19.

597. Arlette Saenz & Brian Thurow, *Sen. Kirsten Gillibrand Renews Push for Senate Vote on Military Sexual Assault*, ABC NEWS (Dec. 2, 2014, 1:28 PM), <https://abcnews.go.com/Politics/sen-kirsten-gillibrand-renews-push-senate-vote-military/story?id=27308547>.

598. *Id.*

599. *A Missed Opportunity*, *supra* note 28.

600. *Id.*