GIVING THE REFEREE A WHISTLE: INCREASING MILITARY JUSTICE LEGITIMACY BY ALLOWING MILITARY JUDGES TO REJECT PLEA AGREEMENTS WITH PLAINLY UNREASONABLE SENTENCES

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I. Introduction

This paper recommends legislative and executive modifications to Article 53a, Uniform Code of Military Justice (UCMJ),[1] and Rules for Courts-Martial (RCM) 705[2] and 910[3] (collectively, the "Article 53a Framework") to allow military judges to reject plea agreements with plainly unreasonable sentencing provisions. These modifications would enable military judges to ensure plea agreements result in reasonable, accurate, and consistent sentences. In addition, these modifications would allow military judges to protect the interests of the accused and society.

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[1] UCMJ art. 53a (2019).

[2] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 705 (2019) [hereinafter 2019 MCM].

[3] 2019 MCM, *supra* note 2, R.C.M. 910.

The end result of these modifications would be to strengthen a paramount concept in military justice—legitimacy.

Although the proposed modification to the Article 53a Framework would provide military judges with a powerful authority, military judges would likely use that power infrequently—only under exceptional circumstances that reside on the fringes of military justice practice. Nevertheless, the proposed changes are necessary to protect the legitimacy of the military justice system whenever possible.

To demonstrate the importance of the proposed changes to the Article 53a Framework, it is helpful to view plea agreement proceedings from the perspective of military judges. As of January 1, 2019, military judges must sentence the accused in accordance with the sentencing provision of a plea agreement.[4] Additionally, military judges cannot reject the agreed-upon sentence in a plea agreement because they believe the sentence is too high or too low.[5] The following two hypothetical cases reveal how these limitations of military judges' discretion may frustrate military judges' ability to ensure fair, accurate, and reasonable sentences.

In the first hypothetical case, the plea agreement requires the military judge to sentence the accused to several years' confinement. The judge considers the facts of the case, sentences in similar cases (based on the judge's extensive military justice experience as a prosecutor, defense attorney, and on the bench) and the record and character of the accused. The judge thinks the agreed-upon sentence is too high. During sentencing, the defense offers powerful evidence, which convinces the judge that the accused agreed to an unreasonably high sentence. Despite being the most experienced and only neutral criminal law practitioner in the courtroom, there is very little the military judge can do about it.[6] The judge must approve the agreed-upon sentence.

In the second hypothetical case, the military judge believes the government agreed to an unreasonably low sentence: thirty days' confinement for a violent assault. Because the accused has a history of similar violent acts, the judge does not believe this short sentence will

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[4] UCMJ art. 53a (2019); 2019 MCM, *supra* note 2, R.C.M. 705.
[5] 2019 MCM, *supra* note 2, R.C.M. 705, 910.
[6] Military judges may recommend (but not require) suspension of "any portion of the sentence." 2019 MCM, *supra* note 2, R.C.M. 1101(a)(5).

prevent the accused from hurting others upon release from confinment.[7] Rather than deter the accused from committing more misconduct, the short sentence might only serve to make the accused angrier. The accused will shortly rejoin civilian society, where the accused will remain a threat to the public. In other, very similar cases, the judge has seen much higher sentences. In this hypothetical case, as in the first, the military judge must approve the agreed-upon sentence.

In each of these hypothetical cases, the military judge could not prevent the military justice system from producing an unreasonable result—a plainly unreasonable sentence. The judges wanted to stop play, but the Article 53a Framework did not give them a whistle to do so.

To understand how these hypothetical cases represent a new challenge in military justice, Part II of this paper addresses the evolution of guilty pleas in the military. Part II discusses factors that prompted the initial use of guilty pleas, the guilty plea "Legacy System,"[8] key features of the Military Justice Review Group's (MJRG)[9] proposed Article 53a, and, finally, as enacted, Article 53a and the Article 53a Framework.

Next, Part III defines legitimacy and discusses its importance in military justice. Part III also discusses how the Article 53a Framework reduces military judges' discretion during sentencing, which undermines legitimacy in military justice. Part III proposes allowing military judges

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[7] In military courts, there are established considerations for an appropriate sentence. They include, among others, the nature and circumstances of the offense, the history and characteristics of the accused, the impact of the offense on any victim of the offense, and the need for the sentence to promote adequate deterrence of misconduct and protect others from further crimes by the accused. UCMJ art. 56(c) (2019).

[8] The Legacy System, which military justice practitioners also referred to as the "Beat the Deal" system, was the military justice process governing pretrial agreements effective immediately before January 1, 2019.

[9] In 2013, the Secretary of Defense "directed the [Department of Defense] General Counsel to conduct a comprehensive review of the UCMJ and the military justice system with support from military justice experts provided by the military services." MILITARY JUSTICE REVIEW GROUP, REPORT OF THE MILITARY JUSTICE REVIEW GROUP: PART I: UCMJ RECOMMENDATIONS 5 (Mar. 25, 2015) [hereinafter MJRG REP.]. This resulted in the establishment of the Military Justice Review Group [hereinafter the MJRG], whose review was "to include an analysis of not only the UCMJ, but also its implementation through the Manual for Courts-Martial and service regulations." *Id.*

to reject plea agreements with plainly unreasonable agreed-upon sentences in order to reduce legitimacy risk, which this paper defines as any perceived or actual reduction of the legitimacy of the military justice system.

Part IV proposes the specific modifications to the Article 53a Framework that would allow military judges to reject plainly unreasonable agreed-upon sentences.

Finally, Section V offers approaches military justice practitioners can consider in order to reduce legitimacy risk in the current Article 53a Framework.

II. The Evolution of Guilty Pleas in the Military

A. The Origin of Guilty Pleas in Military Courts

When the UCMJ was enacted in 1951,[10] plea bargaining did not exist in the military[11] despite the high prevalence of plea bargaining in civilian practice.[12] There were no provisions regarding plea-bargaining or pretrial agreements (PTA) in the Manual for Courts-Martial (MCM), and no guidance concerning negotiated agreements was available for military justice practitioners.[13] At that time, a court-martial meant only a contested trial.

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[10] *See* Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950).

[11] "While this may surprise current judge advocates, there was simply no precedent for plea-bargaining in the military in 1950-1951." Colonel Carlton L. Jackson, *Plea-Bargaining in the Military: An Unintended Consequence of the Uniform Code of Military Justice*, 179 MIL. L. REV. 1, 2 (2004).

[12] *Id.* at 15. (noting "pleas of guilty or *nolo contendre* disposed of ninety-four percent of the 33,502 convictions obtained in federal courts in FY 1950" and that "in FY 1951, federal prosecutors again disposed on ninety-four percent of their cases with plea bargaining").

[13] Neither the 1951 nor 1969 *MCM* referred to pretrial agreements and "the scripts provided in the 1958 *Military Justice Handbook* and the 1969 *Military Judges Guide* were cursory at best." Major Mary J. Foreman, *Let's Make a Deal! The Development of Pretrial Agreements in Military Justice Criminal Practice*, 170 MIL. L. REV. 53, 60 (2001). It was not until 1982 that the guilty plea script was formalized in *the Military Judges' Benchbook. Id.* at 53. RCM 705, which authorizes pretrial agreements, did not exist until 1984. *Id*.

However, in 1953, the acting Judge Advocate General of the Army, Major General Franklin P. Shaw, disseminated a letter to all Army Staff Judge Advocates encouraging their use of pretrial agreements.[14] In doing so, "the Army became the first service to officially encourage plea-bargaining."[15] By the end of the 1950s, the Coast Guard and Navy adopted plea-bargaining, followed by the Air Force in 1975.[16]

Major General Shaw's endorsement of pretrial agreements changed the game:

> Major General Shaw's plea bargaining initiative was ingeniously devised and flawlessly executed. Between 23 April 1953 and 31 December 1959, Army judge advocates laid the foundation for contemporary plea-bargaining in the military. By introducing negotiated guilty plea practice to courts-martial, these judge advocates broke ranks with the scorched-earth approach to military justice that had dominated military practice for 175 years. Gone were the days when uncontested courts-martial punished virtually all misconduct. In so doing, they developed a military jurisprudence that favors dispensing the vast majority of misconduct with nonjudicial punishment, administrative separation, and guilty pleas. Thus, staff judge advocates may focus their attention on complex contested trials.[17]

Granted, Major General Shaw's encouragement of plea bargaining was pragmatic.[18] By providing the Army with a practice "commonly employed in all civilian jurisdictions,"[19] and the accused with the ability

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[14] Jackson, *supra* note 11, at 4; Letter from Major General Franklin P. Shaw, the Assistant Judge Advocate General, U.S. Army, to All Staff Judge Advocates (Apr. 23, 1953) (on file with the Judge Advocate General's Legal Center and School Library) [hereinafter MG Shaw Letter].

[15] Jackson, *supra* note 11, at 4.

[16] *Id.*

[17] *Id.* at 43.

[18] *Id.* at 4.

[19] MG Shaw Letter, *supra* note 14.

to get a "break," Major General Shaw catalyzed the use of plea bargaining "to avoid drowning in a sea of litigation."[20]

Initially, pretrial agreements concerned appellate courts due to "three of the greatest dangers" pretrial agreements posed: "first, that an accused may plead guilty without establishing that he is, in fact, guilty; second, that the convening authority may inadvertently usurp the discretion of the court to adjudge a sentence; and third that the pretrial agreement may, in effect, effectively weaken the trial process."[21] Since 1953, however, the law and practice of negotiated guilty pleas in the military have significantly evolved. Although plea bargaining initially "developed as a matter of trial practice,"[22] since the Court of Military Appeals approved the use of pretrial agreements in *United States v. Allen*,[23] extensive appellate decisions have shaped their development and execution.[24]

B. The Legacy System

Until recently, over sixty years of trial practice, policy guidance, and case law manifested itself as the Legacy System. Although the Legacy System ended on January 1, 2019, it is still important that military justice practitioners understand it. The Legacy System embodied decades of judicial-shaping that balanced the administrative efficiency of pretrial agreements, on one hand, and the need to prevent the erosion of the military justice system, on the other. Current military justice practitioners and appellate courts will consider legal precedent from, and processes of, the Legacy System in evaluating whether the Article 53a Framework will continue to maintain this balance.

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[20] Jackson, *supra* note 11, at 2. In 1952, "less than one percent of [the 9,383] general courts-martial convictions were based solely on the accused's pleas," resulting in a "grueling procession contested cases [that was] largely unnecessary given the Army's ninety-five percent conviction rate." *Id*. at 11–12.

[21] Foreman, *supra* note 13, at 58.

[22] Pretrial agreements "initially developed as a matter of trial practice, with no independent legislative or judicial authority." *Id*. at 54.

[23] 25 C.M.R. 8 (C.M.A. 1957) (expressly approving use of pretrial agreements as a means "to avoid the strain and the problems of a trial on the merits" and cautioning that the "agreement cannot transform the trial into an empty ritual").

[24] *See infra* note 28. Although appellate decisions have significantly shaped the practice of negotiating and executing pretrial agreements, the full extent of the appellate courts' contribution exceeds the scope of this paper.

In the Legacy System, an accused entered into a PTA with the convening authority.[25] In the PTA, the accused agreed to plead guilty to some or all charges and specifications.[26] In exchange, the convening authority agreed to limit the military judge's sentence with a sentencing "cap" or quantum. Article 60, UCMJ, gave the convening authority the power to limit the sentence in this way.[27] The Legacy System PTA often also included the accused's agreement to make other concessions, such sentencing by a military judge or agreeing to a stipulation detailing the misconduct.[28]

After the accused and the convening authority entered into a PTA, the military judge conducted guilty plea proceedings. In guilty plea proceedings, a military judge first conducted a providence inquiry to establish the accused was pleading guilty because they were, in fact,

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[25] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 705 (2016) [hereinafter 2016 MCM]. A convening authority "includes a commissioned officer in command for the time being and successors in command." 2019 MCM, *supra* note 2, R.C.M. 103(6).

[26] 2016 MCM, *supra* note 25, R.C.M. 910.

[27] Article 60, UCMJ, provided "the authority to approve, disapprove, commute, or suspend the sentence adjudged by a court-martial in whole or in part pursuant to the terms of [a] pretrial agreement." MJRG REP., *supra* note 9, at 481. Article 60, in conjunction with Articles 30 and 34, which provided convening authorities the discretion to dispose of charges "in the interest of justice and discipline," were "the basis of all agreements concerning the disposition of the charges and specifications in a particular manner or to a particular forum in exchange for the accused's plea [of guilty] and other concessions." *Id*.

[28] *Id.* at 483 (citing the following cases: United States v. Thomas, 6 M.J. 573 (A.C.M.R. 1978) (term in pretrial agreement requiring the accused to enter into a stipulation not an illegal collateral condition); United States v. Reynolds, 2 M.J. 887, 888 (A.C.M.R. 1976) (permissible to include provision requiring the accused to testify truthfully in other proceedings); United States v. Dawson, 10 M.J. 142, 150 (C.M.A. 1982) (approving no misconduct provision in plea deal); United States v. Schaffer, 12 M.J. 425 (C.M.A. 1982) (permissible to waive the Article 32 investigation as part of a pretrial agreement); United States v. Schmeltz, 1 M.J. 8 (C.M.A. 1975) (permissible to include term requiring the accused to request trial by judge alone); United States v. Mills, 12 M.J. 1 (C.M.A. 1981) (permissible to require the accused waive production of sentencing witnesses as part of pretrial agreement)).

guilty.[29] Military judges then confirmed the accused understood and agreed to the terms of the PTA.[30] After they found the accused provident and accepted their pleas, military judges conducted sentencing proceedings. During sentencing, the accused could present matters in extenuation and mitigation, and the government could present matters in aggravation.[31] Victims[32] could provide sworn testimony[33] or offer an unsworn statement[34] regarding "victim impact or matters in mitigation."[35] Military judges, at the conclusion of sentencing, announced their sentence. Then, for the first time, military judges reviewed the convening authority's sentencing cap.[36] If the military judge's sentence was less severe than the cap, then the accused "beat the deal" and benefitted from the lower sentence. If, however, the military judge's sentence exceeded the cap, then the accused benefited from the sentencing limitation. Military judges could not "remedy a pretrial agreement [they] perceive[d] as too lenient but [they could make] a clemency recommendation to the Convening Authority to reduce an adjudged sentence."[37] The Legacy System lasted until the Article 53a Framework took effect on January 1, 2019. Before that occurred, the MJRG explored how to improve the Legacy System.

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[29] 2016 MCM, *supra* note 25, R.C.M. 910(e) ("The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea.").

[30] *See* U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 2-2-6 (10 Sept. 2014) [hereinafter DA PAM. 27-9].

[31] 2016 MCM, *supra* note 25, R.C.M. 1001. Pursuant to RCM 1001, the parties could also introduce evidence of the accused's rehabilitative potential. *Id*.

[32] For the purposes of RCM 1001A, "a 'crime victim' is an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty." 2016 MCM, *supra* note 25, R.C.M. 1001A(b)(1).

[33] 2016 MCM, *supra* note 25, R.C.M. 1001A(d).

[34] 2016 MCM, *supra* note 25, R.C.M. 1001A(e).

[35] 2016 MCM, *supra* note 25, R.C.M. 1001A(c).

[36] "To accommodate this, plea agreements [were] divided into two parts: the first part of the agreement contain[ed] the agreement's terms and conditions; the second part contain[ed] the sentence limitations (the 'cap' or 'quantum')." MJRG REP., *supra* note 9, at 483. "The military judge was prohibited from examining [the quantum] until after announcing the adjudged sentence." *Id*. This practice ostensibly prevented "the convening authority's view on an appropriate sentence" from influencing the sentencing authority "in violation of Article 37's prohibition on unlawful command influence." *Id*.

[37] 2016 MCM, *supra* note 25, R.C.M. 1106(d)(3).

C. Article 53a—Plea Agreements: The MJRG's Proposal

The MJRG proposed a new UCMJ article, Article 53a, because the Legacy System did not include an article dedicated to "Plea Agreements."[38] The MJRG intended Article 53a to assume the authority for plea agreements from Article 60 and "provide basic rules concerning" the construction and negotiation of plea agreements, the military judge's determination of whether to accept a plea agreement, and "the operation of plea agreements containing sentence limitations with respect to the military judge's sentencing authority."[39] Under the proposed Article 53a, the military judge must accept an otherwise lawful plea agreement[40] unless the "military judge determines that the proposed sentence is plainly unreasonable."[41] The pertinent text of the proposed Article 53a provides:

> Acceptance of Plea Agreement.—Subject to subsection (c), the military judge of a general or special court-martial shall accept a plea agreement submitted by the parties, except that—(1) in the case of an offense with a sentencing parameter under section 856 of this title (article 5), the military judge may reject a plea agreement that proposes a sentence that is outside the sentencing parameter if the military judge determines that the proposed sentence is plainly unreasonable; and (2) in the case of an offense with no sentencing parameter under section 856 of this title (article 56), the military judge may reject a plea agreement that proposes a sentence if the military judge determines that the proposed sentence is plainly unreasonable.[42]

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[38] MJRG REP., *supra* note 9, at 481.
[39] *Id*.
[40] The MJRG's proposed Article 53a requires the military judge to reject a plea agreement that "(1) contains a provision that has not been accepted by both parties; (2) contains a provision that is not understood by the accused" or (3) subject to certain exceptions, contains a sentencing provision under the mandatory minimum sentence for certain offenses. *Id*. at 489.
[41] *Id*. at 487.
[42] *Id*. at 488-89.

The MJRG proposed the "plainly unreasonable" standard to "ensure military judges are appropriately constrained in their ability to reject sentence agreements" while "providing military judges the authority to reject agreements they determine are unacceptable, consistent with federal civilian practice."[43] In addition, to "better aligning military plea-bargaining practices" with civilian practice, the MJRG intended the plainly unreasonable standard to generate "increased efficiencies and greater bargaining power for" the accused and the convening authority.[44] The plainly unreasonable standard, importantly, would allow military judges to prevent inconsistent and unreasonable results without undermining the increased efficiencies of the improved, more transparent Article 53a plea agreement process. Although Congress enacted much of the proposed Article 53a, it left out certain portions. Specifically, Congress did not adopt the MJRG's proposal to allow military judges to reject plainly unreasonable agreed-upon sentences.

The following section discusses how the enacted Article 53a changed the military justice system and the consequences of Congress not fully adopting the MJRG's proposed Article 53a.

D. The Article 53a Framework

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[43] *Id*. at 487. Significantly, the MJRG proposed Article 53a in connection to the MJRG's proposed modification of Article 56, which would have implemented sentencing parameters "to guide the discretion of the military judge in determining a sentence for each finding of guilty." *Id*. at 503. Sentencing parameters, according to the MJRG, would "establish a more structured sentencing system that draws upon the practice and experience in the civilian sector, including under the U.S. Sentencing Guidelines, while utilizing an approach that reflects that an effective military justice system requires a range of punishments and procedures that have no direct counterpart in civilian criminal trials." *Id*. at 511.

[44] *Id*. at 487.

As enacted, Article 53a[45] and the Article 53a Framework significantly changed the plea agreement system.[46] Article 53a replaced the Legacy

[45] Article 53a in its entirety follows:

> (a) IN GENERAL.— (1) At any time before the announcement of findings under [Article 53, UCMJ], the convening authority and the accused may enter into a plea agreement with respect to such matters as – (A) the manner in which the convening authority will dispose of one or more charges and specifications; and (B) limitations on the sentence that may be adjudged for one or more charges and specifications. (2) The military judge of a general or special court-martial may not participate in discussions between the parties concerning prospective terms of a plea agreement.
> (b) LIMITATION ON ACCEPTANCE OF PLEA AGREEMENTS.—The military judge of a general or special court-martial shall reject a plea agreement that—(1) contains a provision that has not been accepted by both parties; (2) contains a provision that is not understood by the accused; (3) except as provided in subsection (c), contains a provision for a sentence that is less than the mandatory minimum sentence applicable to an offense referred to in section 856(b)(2) of this title (article 56(b)(2)).; (4) is prohibited by law; or (5) is contrary to, or is inconsistent with, a regulation prescribed by the President with respect to the terms, conditions, or other aspects of plea agreements.
> (c) LIMITED CONDITIONS FOR ACCEPTANCE OF PLEA AGREEMENT FOR SENTENCE BELOW MANDATORY MINIMUM FOR CERTAIN OFFENSES.—With respect to an offense referred to in [Article 56(b)(2)]—(1) the military judge may accept a plea agreement that provides for a sentence of bad conduct discharge; and (2) upon recommendation of the trial counsel, in exchange for substantial assistance by the accused in the investigation or prosecution or another person who has committed an offense, the military judge may accept a plea agreement that provides for a sentence that is less than the mandatory minimum sentence for the offense charged.
> (d) BINDING EFFECT OF PLEA AGREEMENT.—Upon acceptance by the military judge of a general or special court-martial, a plea agreement shall bind the parties and the court-martial.

System with a system in which the accused and the convening authority (the "parties") directly negotiate a specific sentence or sentencing range.[47] Consistent with the MJRG's proposed Article 53a, the parties now enter into a plea agreement regarding the "limitations on sentence," which include a minimum sentence, a maximum sentence, or both.[48] The parties' ability to require a military judge to approve their agreed-upon sentence results in a major power shift between military judges and convening authorities.

Under the Legacy System, the parties could not agree to a minimum sentence and military judges were generally allowed to sentence the accused to as little as no punishment.[49] As a result, under the Legacy System, military judges controlled the minimum sentence. Under the Article 53a Framework, however, the parties—notably the convening authority who approves a plea agreement—control the minimum sentence. Thus, the Article 53a Framework increases the convening authority's power while decreasing that of the military judge.

For example, if the parties agree to a definite sentence, i.e. a specific term of confinement, military judges have no sentencing discretion. If the agreed-upon sentence is five years' confinement, the military judge must sentence the accused to five years' confinement. If the agreed-upon sentence is a range, military judges retain some discretion, but they may only adjudge a sentence within the agreed-upon range.

UCMJ art. 53a (2019).

[46] *Id*.; 2019 MCM, *supra* note 2, R.C.M. 705; 2019 MCM, *supra* note 2, R.C.M. 910.

[47] UCMJ art. 53a (2019).

[48] *Id*. Rule for Courts-Martial 705 implements Article 53a and expressly authorizes plea agreements that contain limitations on both the maximum and minimum sentence. 2019 MCM, *supra*, note 2, R.C.M. 705. RCM 910 reinforces that military judges must sentence the accused to the agreed-upon sentence. 2019 MCM, *supra* note 2, R.C.M. 910(f)(5) ("If a plea agreement contains limitations on the punishment that may be imposed, the court-martial . . . shall sentence the accused in accordance with the agreement."). There is no provision in RCM 705 or RCM 910 that authorizes military judges to reject the agreement because they find the sentencing provision to be plainly unreasonable. *See* 2019 MCM, *supra* note 2, R.C.M. 705, 910.

[49] *See* 2016 MCM, *supra* note 25, R.C.M. 1003.

In sum, the Article 53a Framework requires military judges to determine whether plea agreements are lawful[50] but does not allow them to reject plea agreements with agreed-upon sentences that are plainly unreasonable. As discussed in the next section, the complete absence of judicial authority to reject agreed-upon, unreasonable sentences may negatively affect the military justice system by creating legitimacy risk.

III. Giving the Referee a Whistle—Increasing Legitimacy by Allowing Military Judges to Reject Plea Agreements with Plainly Unreasonable Agreed-Upon Sentences

Not allowing military judges to reject plainly unreasonable agreed-upon sentences diminishes the legitimacy of the military justice system. Legitimacy is the "popular acceptance of a government, political regime, or system of governance."[51] Although legitimacy is essential to criminal justice in general, it is even more critical to military justice. Plea agreement proceedings, like all criminal justice processes, are composed of attributes that enhance legitimacy. This Part discusses how the Article 53a Framework impedes these attributes, which include judicial discretion, transparency, accuracy, and consistency, thus undermining the legitimacy of military justice. This Part concludes with a recommendation to allow military judges to reject plainly unreasonable agreed-upon sentences to safeguard legitimacy when, on the fringes of practice, the Article 53a Framework would otherwise permit an unreasonable result.

A. Legitimacy and Criminal Justice

"Legitimacy is an essential feature of an effective system of criminal justice."[52] A system's legitimacy depends on its ability to maintain a

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[50] RCM 705 provides that a term or condition in a plea agreement "shall not be enforced" if the accused did not "freely and voluntarily agree to it" or if it deprives the accused of the right to counsel, to due process, to challenge jurisdiction, to a speedy trial, to complete presentencing proceedings, or to "the complete and effective exercise of post-trial and appellate rights." 2019 MCM, *supra* note 2, R.C.M.705(c).

[51] ENCYCLOPAEDIA BRITANNICA, *legitimacy*, https://www.britannica.com/search?query=legitimacy+ (last visited Dec. 23, 2018).

[52] "In order to maintain authority over those it regulates, a criminal justice system must remain legitimate in the eyes of those people." Note, *Prosecutorial*

popular perception that it is fair and the public should accept it. Popular acceptance is essential because "[w]hen people perceive the criminal process as fair and legitimate, they are more likely to accept its results as accurate and are more likely to obey the substantive laws that the system enforces."[53] Put another way, legitimacy ensures a judicial system can maintain good order and discipline in any context, whether civilian or military. Moreover, legitimacy makes a criminal justice system more effective by securing the trust and cooperation of the community.[54] However, while certain attributes of a criminal justice system increase legitimacy, others diminish it.[55]

First, procedures that ensure accurate results enhance legitimacy.[56] The attribute of accuracy in sentencing means "[i]ndividualized sentencing [that] tailors a sentence to the accused and the particular circumstances of his or her crime."[57] In determining guilt, accuracy reassures participants in the criminal justice process and the public that the system convicts the guilty and exonerates the innocent.

Second, procedures that support consistent results also increase legitimacy. "Consistency in sentencing (similar offenses by similar accused receiving similar sentences) may serve to increase deterrence, predictability, and public confidence in criminal sentences."[58]

Power and the Legitimacy of the Military Justice System, 123 HARV. L. REV. 937, 941 (2010).

[53] *Id*.

[54] *Id*.

[55] *Id*. at 942.

[56] "Procedures that enhance the truth-seeking dimension of criminal adjudication can reassure observers that the system is reaching legitimate results." *Id*.

[57] MJRG REP., *supra* note 9, at 511.

[58] *Id. See* James E. Baker, *Is Military Justice Sentencing on the March? Should it be? And if so, Where should it Head? Court-Martial Sentencing Process, Practice, and Issues*, 27 FED. SENT. R. 72, 72-87 (2014) (addressing issues in military sentencing and summarizing arguments supporting the military's use of sentencing guidelines). According to the then Chief Judge of the United States Court of Appeals for the Armed Forces, "the third rail of the military sentencing debate revolves around the question of sentence consistency—between services and between offenders—and thus, whether the military justice system should include some form of sentencing guidelines." *Id*. at 77. In describing the arguments in support of guidelines, Chief Judge Baker noted, "First, and perhaps foremost, is the argument that in what is supposed to be a uniform system of

Conversely, a judicial system that fails to prevent inconsistent results has the opposite effect and reduces legitimacy. "Disparate treatment of similarly situated defendants . . . can harm popular faith in the criminal justice system."[59] Although consistency and accuracy are arguably "competing goals,"[60] maintaining legitimacy requires both.

Third, procedures that promote transparency enhance the perception of the exercise of legitimate authority. Enabling the community and the defendant to participate in the criminal justice process and "limiting secrecy" create transparency.[61] In sum, attributes of a legitimate criminal justice framework include accuracy, consistency, and transparency.

B. Legitimacy and Military Justice

Legitimacy is especially important in military justice. The history of military justice is, in fact, intertwined with its search for legitimacy—the military justice system has evolved largely in reaction to concerns related to its perceived unfairness.[62] Developed as a mechanism to ensure commanders' authority over their subordinates,[63] the military justice system had historically afforded commanders "virtually unchecked control."[64] Until the end of World War II, military justice had relatively low public visibility and, perhaps as a result, the American public did not question the vast power of commanders. During World War II, however, the military conducted two million courts-martial, resulting in

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military justice, like sentences should be meted out for like offenses regardless of service component or grade." *Id*. at 80. "Second, and related to this first argument, is the concern regarding the disparate treatment between officers, especially senior officers, and enlisted personnel. This is colloquially referred to as 'different spanks for different ranks.'" *Id.* Chief Judge Baker concluded, "a system of justice that is perceived to treat offenders differently based on grade alone will be viewed as a less credible system that one that treats like offenders in like manner, and is perceived to do so." *Id*.

[59] Note, *supra* note 52, at 942.

[60] MJRG REP., *supra* note 9, at 511.

[61] Note, *supra* note 52, at 942–43.

[62] *Id*. at 937.

[63] *Id*. at 939. "Historically, the maintenance of discipline as a means of reinforcing the military's combat function was the primary purpose of military justice." *Id*. (citing *inter alia* United States *ex rel*. Toth v. Quarles, 350 U.S. 11, 17 (1955)).

[64] Note, *supra* note 52, at 940.

approximately 80,000 American Soldiers returning home as felons.[65] Mass public protests followed, which threatened the legitimacy of the military justice system the public believed was too narrowly focused on maintaining discipline.[66] The public's concerns catalyzed the creation of the UCMJ.[67]

In adopting the UCMJ in 1951,[68] Congress sought to address the military justice system's legitimacy problem and "strike a balance between the individual rights of service members and fairness, on the one hand, and the interest in maintaining discipline and command authority, on the other."[69] The Military Justice Act of 1968 further "sought to improve the perceived fairness of courts-martial by creating the position of military judge and requiring that a military judge be detailed for every general court-martial."[70] Despite these significant efforts to enhance military justice's legitimacy, the military justice system remains vulnerable to the public's concerns.[71]

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[65] Randy James, *A Brief History of the Court Martial*, TIME (Nov. 18, 2009), http://content.time.com/time/nation/article/0,8599,1940201,00.html.

[66] Note, *supra* note 52, at 940.

[67] According to Brigadier General Patrick Finnegan:

> The significant changes [in military justice] began after sixteen million citizens served in uniform during World War II and returned to their cities and towns with the correct perception that the military criminal law system may have been related to discipline—arbitrary, swift, and kangaroo-court like at times—but it was not concerned particularly with either fairness or justice. Their concerns ultimately resulted in the Uniform Code of Military Justice, the first major step toward a system based on principles of fairness and justice crucial to our nation and its citizens.

Brigadier General Patrick Finnegan, *Today's Military Advocates: The Challenge of Fulfilling Our Nation's Expectations for a Military Justice System That Is Fair and Just*, 195 MIL. L. REV. 190, 192 (2008).

[68] Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950).

[69] Note, *supra* note 52, at 940.

[70] *Id*.

[71] For example, Senator Kirsten Gillibrand's proposed Military Justice Improvement Act would have a transformative effect on the military justice system by moving "the decision over whether to prosecute serious crimes [such as sexual assault]" from commanders "to independent, trained, professional military prosecutors, while leaving uniquely military crimes within the chain of

Although it is necessary to ensure the public—people who are not subject to the jurisdiction of military courts—believes military justice is legitimate, it is also essential to ensure service members share this belief. Military justice is a powerful manifestation, on and off the battlefield, of command authority. Service members who question the fairness of their own justice system may lose respect for command authority. If Soldiers do not believe they will be treated fairly if accused or convicted of a crime, they are less likely to trust the commanders who wield disciplinary authority. If Soldiers do not trust their commanders, they are less likely to follow their orders, which could jeopardize their mission. There is, therefore, a causal relationship between criminal justice processes and the functioning of the military that does not exist, at least to the same degree, in civilian justice systems.[72]

Thus, both the public and service members must believe that military justice is legitimate. Service members must accept the military justice system as legitimate in order for commanders to maintain good order and

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command." *Military Justice Improvement Act: Comprehensive Resource Center for the Military Justice Improvement Act*, https://www.gillibrand.senate.gov/mjia (last visited Jan. 25, 2019). Senator Gillibrand's proposal would address a perceived lack of legitimacy in the military justice system and "remove the systemic fear that survivors of military sexual assault describe in deciding whether to report the crimes committed against them" due to "the bias and inherent conflicts of interest posed by the military chain of command's sole decision-making power over whether cases move forward to a trial." *Id.*

[72] Dissatisfaction with civilian criminal processes is also common. *See, e.g.*, Elias Leight, *Jay-Z, Meek Mill Launch 'The Avengers' of Criminal Justice Reform Organizations*, ROLLING STONE (Jan. 23, 2019), http://www.rollingstone.com/music/music-features/jay-z-meek-mill-reform-alliance-criminal-justice-783228/ (discussing the formation and goals of the Reform Alliance, "a new initiative dedicated to changing an 'illogical law that make no sense,' but rules the lives of the estimated 4.5 million Americans currently on parole or probation."). Nevertheless, dissatisfaction may have a greater, negative effect in the military. For example, "[e]xperiences during [World War II] had revealed that rather than reinforcing discipline, harsh military justice bred resentment among the troops and undermined public confidence." Note, *supra* note 52, at 940. Resentment due to an illegitimate exercise of disciplinary authority, especially in a combat environment, undermines command authority. This is not, however, resentment resulting from the legitimate exercise of authority, which reinforces command authority and deters other misconduct.

discipline. The public must accept the military justice system as legitimate in order to ensure the military justice system continues to exist.

C. Reduced Legitimacy of the Article 53a Framework

1. Reduced Judicial Discretion

In reducing judicial discretion, the Article 53a Framework undermines the legitimacy of military justice. Because there is a positive correlation between legitimacy and judicial discretion, providing more power to military judges increases legitimacy. The following reasons support this conclusion.

First, Congress introduced military judges into the military justice system for the very purpose of addressing legitimacy concerns—the perception of unfairness.[73] Simply put, Congress created the position of military judges as a legitimacy-enhancing tool.

Second, Congress gave military judges, as the impartial, "presiding officer[s] in a court-martial,"[74] the statutory responsibility and authority to "ensur[e] proceedings are conducted in a *fair* and orderly manner."[75] In plea agreement proceedings, military judges reinforce key attributes of legitimacy in several respects.[76] Military judges increase the accuracy of

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[73] *See supra* note 70 and accompanying text.

[74] 2019 MCM, *supra* note 2, R.C.M. 801(a).

[75] 2019 MCM, *supra* note 2, R.C.M. 801(a) discussion (emphasis added).

[76] This paper focuses on legitimacy in plea agreement proceedings. The military justice system, however, has adopted several evidentiary and procedural safeguards that promote fairness in other processes. For example, "because great discretion for the convening authority was consciously built into the military justice system, mechanisms such as the Article 32 investigation were created to provide a more substantive check on that discretion than can be found in the civilian system." Note, *supra* note 52, at 949. Also, the prohibition against unlawful command influence is an important check on the convening authority's actual and perceived improper influence on the judicial process. UCMJ art. 37(a) (2019) ("No authority convening a general, special, or summary court-martial . . . may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding . . ."). This paper does not argue that the Article 53 Framework, in allowing convening authorities to compel military

the adjudicated sentence by ensuring the parties properly apply procedural and evidentiary rules.[77] When they have the discretion to adjudge sentences, military judges' training and experience allow them to ensure their sentences are accurate and consistent. Military judges promote transparency by conducting a rigorous providence inquiry in every guilty plea[78] and marshalling the parties through an elaborate, public sentencing process.[79] Finally, military judges eliminate secrecy, the concern that backroom deals compromise justice, by precluding the application of *sub rosa* agreements.[80] For those reasons, providing more power to military judges increases legitimacy.

However, in the military justice system, it is more precise to consider legitimacy as a function of judicial power relative to that of the convening authority. As the military judge's relative power increases, the greater the system is perceived as legitimate. While empowering the military judge has increased legitimacy in military justice, the historically-perceived unchecked power of convening authorities has had the opposite effect.[81]

Under the Article 53a Framework, military judges continue to preserve legitimacy. They are, however, restrained from doing so fully. Under the Legacy System, military judges could limit convening authorities' power in plea agreement proceedings by adjudging low—or

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judges to adjudicate a specific sentence, in compliance with the law, implicates *unlawful* command influence.

[77] *See, e.g.*, 2019 MCM, *supra* note 2, R.C.M. 1001.

[78] "The civilian system adopts a permissive approach to guilty pleas that primarily serve interests in administrative efficiency. By contrast, the military justice system's more searching inquiry into guilty pleas communicates the greater institutional value that it places on the perceived accuracy of those pleas." Note, *supra* note 52, at 950.

[79] "More elaborate proceedings mitigate the perception that the system treats guilty pleas casually or arbitrarily, creating an enhanced sense of confidence in the system." *Id*. at 952.

[80] Plea agreements are required to contain in writing "[a]ll terms, conditions, and promises between the parties." 2019 MCM, *supra* note 2, R.C.M. 705(e)(2). Military judges confirm the parties' compliance with this requirement during the inquiry concerning the pretrial agreement. *See* DA PAM. 27-9, *supra* note 30, at 21 (advising military judges to ask, "Has anyone made promises to you that are not written into this agreement in an attempt to get you to plead guilty?").

[81] *See supra* notes 66–68 and accompanying text.

even no—punishment notwithstanding the confinement cap.[82] This allowed military judges to prevent excessive sentences. In fact, by adjudging sentences below the confinement cap, military judges signaled they believed convening authorities overestimated the value of cases and sought inaccurate results. This feature of the Legacy System reinforced the fundamental notion of fairness. Military judges' sentences below the quantum signaled to the public that military judges were independent and empowered to diverge from the wishes of convening authorities. On the other hand, military judges' sentences more severe than the quantums reinforced the convening authorities' reasonableness. In each case, the independence of military judges from convening authorities enhanced military justice legitimacy.

However, this type of independence does not exist in the Article 53a Framework. By limiting military judges' discretion in sentencing, the Article 53a Framework invites a perception of systemic, reduced legitimacy. The fact that the Article 53a Framework, at the same time, increases the power of the convening authority—whose great power has historically been vulnerable to legitimacy concerns[83]—increases the legitimacy risk.

2. Military Judges' Diminished Role as Gatekeepers for the Accused

Under the Article 53a Framework, because military judges cannot reject plea agreements with excessively severe sentences, they have a substantially reduced ability to serve as gatekeepers for the accused. Especially because this is a significant change from the Legacy System in which military judges could generally adjudge no punishment, the public may perceive the judges' diminished gatekeeping role as a dilution of the military justice system's fairness. The public may also accurately perceive the convening authorities as wielding the true power in the proceeding—control of the sentence. Military judges' inability to prevent governmental overreaching is perhaps the most salient manifestation of the Article 53a Framework's legitimacy risk.

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[82] *See supra* note 49 and accompanying text.

[83] *See* Note, *supra* note 52, at 946 ("The tremendous power vested in the convening authority is not without negative effects on perceived legitimacy" and "concerns that his vast power might be wielded arbitrarily threaten the perceived fairness of the system.").

On the other hand, some might contend that the Article 53a Framework does not reduce military judges' ability to protect the accused or, in even if it does, the Framework otherwise sufficiently protects the accused. Those arguing the Article 53a Framework generates little or no legitimacy risk would point to the several, remaining procedural safeguards against government overreaching.

Among such safeguards, initially, is the fact the accused still controls whether or not he or she wants to plead guilty. Further, even if the accused decides to plead guilty, they can still decide whether to enter into a plea agreement or agree to a sentence.

Additionally, accused who enter into plea agreements may still offer unsworn statements and request military judges to relax the rules of evidence to facilitate the admission of evidence of extenuation and mitigation.[84] "These various procedures operate in concert to give a convicted servicemember every opportunity to persuade the members (or the judge in a bench trial) to give a light sentence."[85]

Further, those who see little or no risk in the Article 53a Framework will point to the Framework's heightened transparency. Compared to the Legacy System, the Article 53a Framework provides accused with greater predictability concerning the sentences they will receive. The Legacy System aspiration to "beat the deal" was replaced by a contractual term—the agreed-upon sentencing provision—that better informs the accused's decision to plead guilty. This constrains the government against overreaching.

In addition, those who believe the Article 53a Framework sufficiently protects the accused will note the accused has the right to consult an attorney regarding the plea agreement and the agreed-upon sentence. Effectively represented accused with a clear understanding of the plea agreement are unlikely to agree to an unreasonably high sentence. Moreover, military judges will confirm the accused understand that the court cannot deviate from the agreed-upon sentence.[86]

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[84] 2019 MCM, *supra* note 2, R.C.M. 1001.

[85] Colin A. Kisor, Note, *The Need for Sentencing Reform in Military Courts-Martial*, 58 NAVAL L. REV. 39, 47 (2009).

[86] In a military judge's colloquy with the accused concerning the plea agreement, the military judge should first confirm that the accused agreed to the

Although many will contend that these safeguards eliminate all risk of government overreaching, some might concede that there remains some risk. Those acknowledging risk will point to the remaining fail-safe—clemency action—which, they will argue, eliminates any residual risk of government overreaching causing plainly unreasonable, excessive sentences.[87]

However, most of these safeguards, which effectively prevented unreasonably excessive sentences under the Legacy System, are now virtually meaningless. First, offering an unsworn statement and relaxing the rules of evidence have no effect on agreed-upon, definite sentences, and provide only limited protection for the accused when the agreed-upon sentences are a range.

Second, although competent defense attorneys can usually prevent government overreaching, even the most experienced attorneys make mistakes and convening authorities overreach. When these errors converge, military judges remain the only safeguard for the accused at the trial level.

Third, clemency action is unlikely to correct an unreasonably excessive sentence and, in any event, it is not meant to do so. Although convening authorities might reduce a sentence through clemency action if the defense provides them with new information, this is unlikely to happen often. Under the Article 53a Framework, in order to secure a favorable sentence for their clients, defense counsel should provide the government up front with as much mitigating and extenuating evidence as possible. It is, thus, unlikely in most cases that clemency matters will contain new information sufficient to change convening authorities' minds concerning the same sentences they found appropriate.[88] Moreover, even if the

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sentence. The military judge should then ensure the accused understand that the military judge cannot deviate from the agreed-upon sentence, that the accused nonetheless has the right to full sentencing proceeding, and that, notwithstanding the evidence presented during the sentencing, the military judge will remain bound to adjudge the agreed-upon sentence.

[87] *See* 2019 MCM, *supra* note 2, R.C.M. 1109–10.

[88] Perhaps convening authorities should consider exercising clemency power *more* frequently under the Article 53a Framework than they had under the Legacy System. Because convening authorities agree to sentences before the accused presents sentencing evidence, convening authorities' exercising clemency demonstrate a willingness to revisit their decisions once they possess

convening authority believes clemency is appropriate, clemency action can only provide very limited relief.[89] Finally, clemency authority is not meant to prevent excessive sentences. "Sentence appropriateness involves the judicial function of assuring justice is done and that the accused gets the punishment he deserves. Clemency involves bestowing mercy—treating an accused with less rigor than he deserves."[90]

In sum, the Article 53a Framework still protects the accused by providing them with significant procedural protections. The accused are, however, less protected than they were under the Legacy System. A change to Article 53a allowing military judges to reject agreements with unreasonably excessive agreed-upon sentences would partially restore military judges' ability to protect the accused. In addition to allowing military judges to effectively stop play on the fringes of practice, this change would provide several other advantages.

3. Appellate Risk

Allowing military judges to reject plea agreements with plainly unreasonable agreed-upon sentences would reduce the likelihood of appellate courts taking action on cases due to inappropriately severe sentences.[91] Although appellate courts may defer to the fact the accused

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all pertinent information. This would also encourage defense counsel to engage in meaningful sentencing proceedings and be diligent in their post-trial submissions.

[89] *See* 2019 MCM, *supra* note 2, R.C.M. 1109.

[90] United States v. Healy, 26 M.J. 394, 395 (C.A.A.F. 1988).

[91] The Court of Criminal Appeals "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, the Court may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." UCMJ art. 66(d)(1); *see* Kisor, *supra* note 85, at 52 (noting appellate court independently evaluates sentences); United States v. Joyner, 39 M.J. 965, 966 (A.F.C.M.R. 1994) (finding sentence not inappropriate on review and applying test to determine whether "when viewed as a whole, the approved sentence is inappropriate for this appellant based on the appellant's character and circumstances surrounding the offense"); United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982) ("Sentence appropriateness is determined by the sentencing authority at the trial level, the convening authority or supervisory authority, and

agreed to the sentences they received, appellate courts will nonetheless continue to review sentences. In doing so, appellate courts may find an agreed-upon sentence to be inappropriately severe[92] or disproportionally severe compared to sentences in similar cases.[93] Such an appellate finding could be problematic for the convening authority and the defense.

Initially, an appellate court's finding that an agreed-upon sentence is inappropriately severe might subject the convening authority's judgment to scrutiny and call the defense counsel's competence into question. Additionally, if an appellate court remands the case to the trial court for resentencing, the parties must renegotiate or litigate a previously settled matter. This would reduce the efficiency of the Article 53a Framework. Further, an appellate court's finding that an agreed-upon sentence is inappropriate could unpredictably alter the parties' bargaining power, disrupting current and future negotiations, also reducing efficiency. In a specific case remanded due to an inappropriately severe sentence, the accused would only agree to a less severe sentence. In negotiating other cases, the defense would use the appellate court's decision as leverage to bargain for lower sentences. If negotiations break down, the parties would have to try cases that they otherwise would have resolved through plea agreements. While trying more cases is not, itself, a negative consequence of appellate scrutiny, trying more cases due to the appellate court's perceived undermining of the convening authority's power might be.

However, allowing military judges to reject agreements with plainly unreasonably agreed-upon sentences would reduce concerns of appellate

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the Court of Military Review. Generally, sentence appropriateness should be judged by 'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'") (quoting United States v. Mamaluy, 10 U.S.M.A. 102, 106–07 (1959)); United States v. Humphries, 2010 CCA LEXIS 236, at *10 (A.F. Ct. Crim. App. May. 24, 2010) (sentence excessively severe and remanded for sentence reconsideration).

[92] *Id.*

[93] *Compare Snelling*, 14 M.J. at 267, 268 (stating sentence comparison is an aspect of sentence appropriateness) *with* United States v. Blair, 72 M.J. 720, 723 (A. Ct. Crim. App. 2013) (citing United States v. Lacy, 50 M.J. 286, 288 (C.A.A.F. 1999)) (quoting United States v. Ballard, 20 M.J. 282, 293 (C.M.A. 1985)) ("We are not required to engage in sentence comparison with specific cases 'except in those rare instances in which sentence appropriateness can be fairly determines only by reference to disparate sentences adjudged in closely related cases.'").

scrutiny. For several reasons, frontloading the responsibility to military judges to assess sentence reasonableness would reduce the likelihood appellate courts would find agreed-upon sentences inappropriate.

If military judges find agreed-upon sentences unreasonably severe, that is, plainly unreasonable, the appellate courts would likely agree. By serving as a screen for the appellate courts, military judges would increase the efficiency of military justice. Military judges' rejections of agreements would prompt the parties to resolve the cases immediately. Regardless whether the parties renegotiate the case or proceed to a contested court-martial, either option is more efficient than the parties having to litigate the case in the future, for a second time, due to appellate intervention. Litigating the same case twice, alone, is inefficient. Litigating the same case a second time is even more inefficient because witnesses or evidence might not be readily available.

Conversely, if military judges approve the agreed-upon sentences, that is, find them not plainly unreasonable, it is more likely appellate courts will agree than had the military judges merely served as powerless conduits, adjudging pre-determined sentences. This, too, would increase efficiency by reducing the likelihood of appellate action.

Incidentally, allowing military judges to reject plainly unreasonable agreed-upon sentences would also enhance the efficiency of the appellate process. In determining whether to approve agreed-upon sentences, military judges would generate a record supporting their findings that the sentences are appropriate.[94] By creating a road map for the appellate courts that support the reasonableness of approved, agreed-upon sentences, military judges make it easier for the appellate courts to reach the same conclusion.

Finally, every time military judges approve agreed-upon sentences, they provide a protective barrier between the parties and the appellate courts. Even if the appellate courts ultimately determine that approved sentences are inappropriate, the military judges' initial approvals of the agreed-upon sentences support the parties' competence and judgment.

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[94] *See* United States v. Hutchinson, 57 M.J. 231, 234 (C.A.A.F. 2001) ("The power to review the entire record for sentence appropriateness includes the power to consider the allied papers, as well as the record of trial proceedings.").

4. Military Judges as Gatekeepers for Society

In addition to not allowing military judges to reject agreements with unreasonably high agreed-upon sentences, the Article 53a Framework also prevents military judges from rejecting agreed-upon sentences that are unreasonably low. As discussed, not allowing military judges to reject plainly unreasonable *high* sentences reduces the legitimacy of military justice because it concerns the reduction, perceived or actual, of protections afforded to the accused. Not allowing military judges to reject plainly unreasonable *low* agreed-upon sentences in order to protect society, however, also generates legitimacy risk. The key consideration is how the public would perceive military justice if they were aware that military judges cannot reject sentences of minimal confinement for violent or other serious offenses.

Although military judges could not reject PTAs resulting in low sentences (due to low quantums) under the Legacy System,[95] military judges' inability to reject plea agreements with plainly unreasonable low agreed-upon sentences under the Article 53a Framework creates a greater legitimacy risk. Under the Legacy System, military judges could publically adjudge a more severe sentence than the quantum. Thus, the Legacy System allowed military judges—the presiding officers in courts-martial—to inform the public they believed the accused's crimes warranted more punishment than the convening authorities' sentencing caps allowed. Under the Article 53a Framework, however, if military judges disagree with the agreed-upon sentences, they cannot adjudge publically a sentence commensurate with their own views. Current public perception is that the military judge and the convening authority speak with the same voice concerning the appropriateness of a sentence.

[95] In *United States v. Hall*, 26 M.J. 739 (N.M.C.M.R. 1988), the appellate court addressed the military judge's discussion with counsel concerning whether the military judge had the power to reject a pretrial agreement if the quantum was insufficient to protect society. *Id.* at 740. The appellate court confirmed that the military judge had no duty or right to review quantum portion for appropriateness despite the fact that "Federal District Court Judges regularly reject plea agreements which do not adequately protect society." *Id.* at 740–41. In so finding, the appellate court stated, "In the military justice system . . . the convening authority is the party with the discretion to accept or reject the accused's offer and not the trial judge." *Id.* at 742. The appellate court found no support for such an exercise of discretion in appellate case law or the *MCM*, noting that "[t]he list of prohibited terms and conditions [of RCM 705] does not include a sentence limitation which does not adequately protect society." *Id.*

Because members of the public will have no way of knowing whether military judges considered their interests, the public is more likely to question the legitimacy of the court-martial process.

However, allowing military judges to reject unreasonably low sentencing provisions, similar to federal judges,[96] would benefit the military justice system in several respects. Each of these benefits would increase the legitimacy of military justice.

First, allowing military judges to consider public safety would promote the public's confidence in military justice, strengthening their belief that military justice is legitimate. By enabling military judges "to prevent the transfer of criminal adjudication from the public arena [a trial] to the prosecutor's office for the purpose of expediency at the price and confidence in the effectiveness of the criminal justice system,"[97] the military would demonstrate it values public safety over administrative expedience. Additionally, allowing military judges to reject plainly unreasonable low agreed-upon sentences would further increase public confidence by decreasing the public's concerns that the military justice system unjustly "takes care of its own." Giving this authority to military judges, therefore, would increase the legitimacy of military justice

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[96] Rule 11 of the Federal Rules of Criminal Procedure establishes the federal plea agreement procedure. *See* FED. R. CRIM. PROC. 11(c). Upon consideration of the plea agreement, pursuant to Fed. R. Crim. Proc. 11, "the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report." *Id*. *See* United States v. Miller, 722 F.2d 562, 563 (9th Cir. 1983) (noting Rule 11 "also contemplates the rejection of a negotiated plea when the district court believes that the bargain is too lenient, or otherwise not in the public interest."); United States v. Bean, 564 F.2d 700 (5th Cir. 1977) ("A decision that a plea bargain will result in the defendant's receiving too light a sentence under the circumstances of the case is a sound reason for a judge's refusing to accept the agreement.").

[97] United States v. Walker, 2017 U.S. Dist. LEXIS 98233 at *1 (S.D. W. Va. Jun. 26, 2017). In *Walker*, the district court judge stated that "courts should reject a plea agreement upon finding that the plea agreement is not in the public interest" as "[t]here is no justice in bargaining against the people's interest," and in making this determination, courts should consider "the cultural context surrounding the subject criminal conduct," "weigh the public's interest in the adjudication of the criminal conduct," and "consider whether 'community catharsis can occur' without the transparency of a public jury trial." *Id*. at 21–22.

because—certainly as far as the public is concerned—accurate sentences must reflect the public's interest.

Second, allowing military judges to reject plainly unreasonable low agreed-upon sentences will often result in more trials. The transparency and "cathartic" effect of additional public trials[98] would further enhance the legitimacy of military justice.

Third, allowing military judges to reject plainly unreasonable low agreed-upon sentences would harmonize military justice with federal criminal law.[99] Historically, the public has expected that the court-martial process "employ the standards and procedures of the civilian sector."[100] Meeting this expectation—making military justice to the extent possible consistent with federal criminal practice—legitimizes military justice.

On the other hand, the following are two cogent arguments against allowing military judges to reject agreed-upon sentences because military judges believe they are plainly, unreasonably low.

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[98] *Id*.

[99] *See supra* notes 95–96 and accompanying text.

[100] MJRG REP., *supra* note 9, at 91. In conducting its review, the MJRG identified "key considerations to provide operational guidance for [its] analysis and to provide a framework for any MJRG proposals." *Id*. at 90. One key consideration was "Democratic Values," which states:

> History has also demonstrated that in our democratic society, servicemembers, their families, and the public to expect the court-martial process to: employ the standards and procedures of the civilian sector as far as practicable; and counterbalance the limitation of rights available to members of the armed forces and the hierarchical nature of military service with procedures to ensure protection of rights provided under military law.

Id. at 91. Further, among the "guiding principles and operational considerations of the MJRG" was "[w]here they differ with existing military justice practice, consider the extent to which the principles of law and the rules of procedure and evidence used in the trial of criminal cases in the United States district courts should be incorporated into military justice practice." *Id*. at 89; *see* United States v. Valigura, 54 M.J. 187, 191 (C.A.A.F. 2000) (finding "that Congress intended that, to the extent 'practicable,' trial by court-martial should resemble a criminal trial in a federal district court").

First, military judges exercising this power inappropriately would improperly limit convening authorities' discretion. Convening authorities must generally be able to dispose of cases with relatively low sentences for a variety of reasons, including to maintain good order and discipline, secure a conviction quickly in view of military exigencies, honor the victim's wishes, and to avoid a likely acquittal.[101] It follows Congress should not provide military judges with *unlimited* discretion to second-guess the judgment and power of convening authorities.

For example, in a hypothetical case involving only non-violent, drug-related offenses, a convening authority may agree to a low sentence. It would be improper if the military judge could reject the sentence simply because the judge believes drugs are a more significant threat to good order and discipline than does the convening authority. It is therefore necessary to distinguish between a difference of opinion and convening authorities' objectively unreasonable exercise of judgment.

Setting a standard that allows military judges to reject only plainly unreasonable sentences provides this distinction. The plainly unreasonable standard would reduce the risk of judges inappropriately limiting the judgment of convening authorities by allowing military judges to reject sentences only in exceptional cases.

Second, the accused's ability to reap the benefit of a favorable agreement—no matter how favorable—was an important feature of the Legacy System.[102] Allowing military judges to disapprove agreements benefitting the accused therefore invites the perception that military judges undermine an important protection to which the accused have been accustomed.

5. Empty Rituals

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[101] *See* UCMJ Appendix 2.1 (2019). In all cases, the UCMJ advises convening authorities to consider "interests of justice and good order and discipline," which include "mission-related responsibilities of the command," the effect of the offense on "good order and discipline," "whether admissible evidence will likely be sufficient to obtain and sustain a conviction in a trial by court-martial," and the "views of the victim as to disposition." *Id*.

[102] *See supra* note 36 and accompanying text.

The Article 53a Framework also increases the likelihood of sentencing proceedings becoming less meaningful—and possibly empty—rituals.[103] Because sentencing proceedings have limited, if any, effect on agreed-upon sentences, the parties have little to gain by offering sentencing evidence.[104] In fact, offering sentencing evidence might be against the parties' interests. The defense risks both invalidating the plea agreement [105] and needlessly having the accused admit guilt. The government risks generating appellate issues. Since the parties have little to gain and potentially something to lose during sentencing, sentencing will likely be underdeveloped or undeveloped, empty proceedings. Empty proceedings both prevent appellate courts from conducting thorough reviews and reduce the legitimacy of military justice. As a result, without a meaningful incentive to conduct sentencing proceedings, the parties might transform sentencing—historically, a robust and transparent legitimacy-enhancing process—into a shadow of its former self.

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[103] *See* United States v Allen, 25 C.M.R. 8, 11 (C.M.A. 1957) (cautioning against pretrial agreements "transform[ing] the trial into an empty ritual."). In *Allen*, the court underscored the importance of sentencing proceedings, describing them as "an integral part of the court-martial trial." *Id*. A sentencing proceeding devoid of substance prevents a board of review from making "an informed judgment as to the appropriateness of the sentence affirmed by the convening authority." *Id*. at 12.

[104] There are several reasons, however, besides securing a particular sentence to engage in sentencing proceedings. For the accused, sentencing offers an opportunity to demonstrate remorse, apologize to those affected by their crimes, and begin rehabilitation. It is also an opportunity to generate a record sufficient for appellate review of the sentence. For the government, sentencing offers the opportunity to raise awareness of the full effect of the accused's misconduct on the victim and society in order to deter future misconduct. S*ee* DA PAM. 27-9, *supra* note 30, at para. 64 (general deterrence an appropriate sentencing consideration). For victims, sentencing in a guilty plea proceeding offers perhaps the only opportunity to be heard in a public forum. *See* UCMJ art. 6b (2019).

[105] "If after findings but before the sentence is announced the accused makes a statement to the court-martial, in testimony or otherwise, or presents evidence which is inconsistent with a plea of guilty on which a finding is based, the military judge shall inquire into the providence of the plea. If, following such inquiry, it appears that the accused entered the plea improvidently, or through a lack of understanding of its meaning and effect, a plea of not guilty shall be entered as to the affected charges and specifications." 2019 MCM, *supra* note 2, R.C.M. 910(h)(2).

However, allowing military judges to reject plainly unreasonable agreed-upon sentences could provide the parties with that incentive. If, in determining whether to reject plea agreements due to plainly unreasonable agreed-upon sentences, military judges could consider sentencing evidence, the parties would present sentencing evidence to demonstrate the agreed-upon sentences are reasonable.[106] For this reason, victim input would also remain meaningful.[107] By informing military judges of their support for plea agreements during sentencing, victims would assist both the trial and appellate courts in evaluating the reasonableness of agreed-upon sentences.[108] Thus, allowing military judges to consider sentencing evidence in determining whether to accept agreed-upon sentences would import the Legacy System's legitimacy-enhancing ritualism into the more efficient Article 53a Framework.

6. Accuracy and Consistency

Allowing military judges to reject plea agreements with plainly unreasonable agreed-upon sentences would also enhance sentence accuracy and consistency—other hallmarks of legitimacy.[109]

Of all the participants in the military justice system, military judges generally have the greatest perspective of what constitutes an appropriate

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[106] If, for example, the government offers significant aggravation evidence but the defense fails to provide evidence of extenuation or mitigation, the defense risks the military judge rejecting the agreed-upon sentence as too lenient. On the other hand, if the government fails to provide meaningful sentencing evidence, yet the defense offers powerful evidence of extenuation and mitigation, the government risks the military judge rejecting the agreed-upon sentence as too severe. Both parties would thus have an interest in ensuring military judges have sufficient information to evaluate the agreed-upon sentence.

[107] *See* UCMJ art. 6b (2019).

[108] RCM 705(e)(3)(B) provides that "[w]henever practicable, prior to the convening authority accepting a plea agreement the victim shall be provided an opportunity to submit views concerning the plea agreements terms and conditions . . ." 2019 MCM, *supra* note 2, R.C.M. 705(e)(3)(B). In many cases, however military judge may not be aware of whether victims support a plea agreement until sentencing. In the event victims do not support plea agreements, sentencing proceedings might offer the only opportunity for them to inform the court.

[109] *See supra* notes 56–58 and accompanying text.

sentence in a particular case and the greatest awareness of sentences imposed in similar cases. Because military judges have the superior perspective necessary to identify plainly unreasonable sentences—those which are highly inaccurate (i.e. excessively lenient or severe) or inconsistent—military judges should be allowed to prevent them.[110]

Moreover, once a guilty plea begins, military judges have access to more information than the parties had when they agreed to a sentence. During sentencing proceedings, military judges evaluate all of the evidence, including that which was not previously provided to the convening authority or the defense. Military judges also have the opportunity to determine the weight of the evidence and the credibility of witnesses.

Because military judges have the greatest perspective, knowledge-base, and access to information, they are the most qualified individuals to identify and correct highly inaccurate or inconsistent sentences. Military judges should be allowed—not necessarily to "call the play" and control sentences—but to stop play by rejecting plainly unreasonable agreed-upon sentences when a player is out of bounds. In fact, relying on military judges to do so, especially given the absence of sentencing guidelines, might be the only check against the plainly unreasonable sentences that might occur on the fringes of practice.

7. Cost-Benefit Analysis

Allowing military judges to reject plainly unreasonable agreed-upon sentences would enhance the legitimacy of military justice, but it would do so at a cost. Military judges' rejections of plea agreements could appear to reduce efficiency by requiring additional litigation and introducing uncertainty into negotiations, as well as to undermine the convening authority's power. For the following reasons, however, the benefits of allowing military judges to reject plainly unreasonable agreed-upon sentences outweigh its costs.

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[110] This argument also supports mandating judge-alone sentencing. "A rationale for judge sentencing is avoiding wildly inconsistent results in similar cases. Federal judges are more likely to have the knowledge and experience to assess the 'worth' of a particular criminal case and determine the appropriate amount of confinement." Kisor, *supra* note 85, at 43.

First, allowing military judges to reject agreed-upon sentences minimally limits the power of convening authorities. Because convening authorities generally execute reasonable agreements and military judges usually exercise their discretion appropriately, rejections would occur on the fringes of practice. On the infrequent occasions on which military judges consider rejecting agreed-upon sentences, the judges must follow the plainly unreasonable standard, which is highly deferential to convening authorities. Even if military judges occasionally reject agreed-upon sentences, the long-term effect would be to increase the power of convening authorities. By ensuring the military justice system produces reasonable, accurate, and consistent sentences, military judges increase the legitimacy of military justice. This, in turn, increases the power of convening authorities whose disciplinary authority is derived from military justice's legitimacy.[111]

Second, although allowing military judges to reject agreed-upon sentences would reduce the parties' ability to predict the outcome of the case, this cost is minimal and would not likely affect negotiations. Civilian systems dispose of the vast majority of their cases through plea agreements [112] despite a virtually universal requirement of judicial approval.[113]

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[111] Military judges' rejection of agreed-upon sentences would not be the only instance in which a result that seems inconsistent with the convening authority's intent increases the legitimacy of military justice. Every case referred to a court-martial by a convening authority might end up as an acquittal. An acquittal, however, does not mean the system failed. To the contrary, in many cases, acquittals are the result of the military justice system functioning properly.

[112] "In 2015, only 2.9% of federal defendants went to trial, and, although the state statistics are still being gathered, it may be as low as less than 2%." Jed S. Rakoff, *Constitutional Foundation: Institutional Design and Community Voice: Why Prosecutors Rule the Criminal Justice System—And What Can Be Done About It*, 111 NW. U.L. REV. 1429, 1432 (2017).

[113] *See, e.g.*, Ala. R. Crim. P. 14.3b ("the court may accept or reject the [plea] agreement or may defer its decision as to acceptance or rejection until receipt of a presentence report"); Alaska R. Crim. P. 11(e)(1) (court may accept or reject the [plea] agreement, or defer its decision); Ariz. R. Crim. P. 17.4; Ark. R. Crim. P. 25.3(b); Cal. Penal Code § 1192.5 (court's approval of plea not binding); Colo. Crim. P. R. 11(f)(5) ("Notwithstanding the reaching of a plea agreement between the district attorney and defense counsel of defendant, the judge in every case should exercise an independent judgment in deciding whether to grant charge and sentence concessions."); Conn. Practice Book § 39-8; Howard v. State, 458 A.2d 1180, 1185 (Del. 1983) (courts have discretion to reject a plea agreements made pursuant to Del. Super. Ct. Crim. R. 11); Fl. Crim. P. R. 3.172

Third, allowing judges to reject agreed-upon sentences would have little, if any, effect on the efficiency of military justice. Initially, these judicial rejections should be rare. Further, although sentence rejections, in the short run, would require the parties to expend additional effort, in the long run, military judges would likely be saving the parties valuable time, effort, and resources. By addressing red flags, military judges would prevent needless, additional litigation due to appellate reviews of sentence appropriateness.

Thus, the benefits of allowing military judges to reject plainly unreasonable agreed-upon sentences outweigh its costs. In the next Part, this paper proposes specific changes to the Article 53a Framework to allow military judges to exercise this authority.

IV. Proposed Modifications to the Article 53a Framework

Part IV proposes modifying the Article 53a Framework to (1) allow military judges to reject plea agreements due to their sentencing provisions; (2) establish plainly unreasonable as the standard under which military judges may reject such agreements; and (3) provide the procedure under which military judges may exercise this authority. Part IV, specifically, discusses modifications to Article 53a, RCM 705, and RCM 910.

(requiring trial judge concurrence with plea offer or negotiation and allowing plea to be withdrawn if the trial judge does not concur); Ga. Unif. Super. Ct. 33.10 (if trial court intends to reject a plea agreement, trial court must inform defendant that the plea agreement does not bind the trial court, it intends to reject the agreement, the disposition may be less favorable than that contemplated by agreement, and defendant has the right to withdraw his or her guilty plea); Haw. R. Penal. R. Rule 11(f)(1); I.C.R. Rule 11(f)(2) (court may accept, reject, or defer decision as to acceptance or rejection of plea agreement until consideration of presentence report); Ill. Sup. Ct., R. Rule 402(d)(2) (court may withdraw concurrence or conditional concurrence with tentative plea agreement).

A. Article 53a

1. Proposed Modification

This section proposes inserting the following paragraph into Article 53a as paragraph 5(c): "ACCEPTANCE OF PLEA AGREEMENT. – Subject to subsection (b), the military judge of a general or special court-martial shall accept a plea agreement submitted by the parties, except that the military judge may reject a plea agreement when the agreed-upon sentence is plainly unreasonable." Under this proposal, subsection (b) of Article 53a would remain as presently drafted, and the current subsections (c) and (d) would be changed, respectively, to subsections (d) and (e).

2. Discussion

This modification largely adopts the MJRG proposal.[114] The proposed Article 53a would explicitly allow military judges to reject plea agreements due to their sentencing provisions, establishing "plainly unreasonable" as the standard military judges must follow. Allowing military judges to reject plea agreements would provide military judges with a powerful, discretionary authority. However, the plainly unreasonable standard would limit that authority, balancing judicial discretion with the power of the convening authority. This limited discretion, as discussed in Part III, would increase the legitimacy of the military justice system. A more in-depth discussion of aspects of the proposed Article 53a follows.

Initially, the Article 53a this paper proposes establishes that military judges' rejections of plea agreements are an *exception* to the general rule. If enacted, the proposed Article 53a would require military judges to approve lawful plea agreements unless the agreed-upon sentences are plainly unreasonable. Because the intent of the proposed Article 53a is to ensure military judges provide a limited degree of oversight in plea agreements without subjugating the power of the convening authorities, allowing military judges to reject plea agreements only under exceptional circumstances reinforces that they should do so rarely. Moreover, the plainly unreasonable standard is deferential to the convening authority.[115]

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[114] *See supra* note 42.

[115] *See* 2019 MCM, *supra* note 2, R.C.M. 1117(e); *see also* United States v. Hardison, 614 Fed. Appx. 654, 659 (4th Cir. 2015) (citing United States v.

"A sentence is plainly unreasonable if no reasonable sentencing authority would determine such a sentence in view of the record before the sentencing authority at the time the sentence was announced . . ."[116] The plainly unreasonable standard thus further reinforces that rejections should occur only on an exceptional basis.

Alternatively, Congress could enact Article 53a without including any standard. This would provide military judges with even greater discretion than would the Article 53a this paper proposes. The alternative Article 53a would simply read as follows: "Subject to subsection (b), the military judge may reject a plea agreement submitted by the parties." This alternative would more closely resemble Rule 11[117] and state procedural rules governing the acceptance of plea agreements.[118] The plainly unreasonable standard, however, is the better option for military courts for several reasons.

First, the plainly unreasonable standard complements the greater predictability and bargaining power that the Article 53a Framework provides to the parties. In providing the parties with a greater level of confidence that military judges will approve agreed-upon sentences, the plainly unreasonable standard allows the parties to negotiate more efficiently. Efficient negotiations facilitate prompt outcomes, which support convening authorities' ability to maintain good order and discipline.

Thompson, 595 F.3d 544, 548 (4th Cir. 2010)) ("A sentence can only be plainly unreasonable if the sentencing error is 'clear' or 'obvious,' in that the sentence runs afoul of clearly settled law.").

[116] 2019 MCM, *supra* note 2, R.C.M. 1117(e).

[117] *See supra* note 96. The drafters of Rule 11 intended the trial court to possess discretion in accepting plea bargains. "The plea agreement procedure does not attempt to define criteria for the acceptance or rejection of a plea agreement. Such discretion is left to the discretion of the individual trial judge." FED. R. CRIM. P. 11 advisory committee's note to 1974 amendments. *See* United States v. Walker 2017 U.S. Dist. LEXIS 98233 at *6–7 (noting the broad discretion afforded to judges to accept or reject a plea agreement, stating that "[o]ther than granting the court broad discretion to accept or reject a plea agreement, Rule 11 provides no further guidance for the court").

[118] *See supra* note 113.

Second, the fact that the plainly unreasonable standard is deferential to the prosecution, although generally appropriate in any context, [119] is necessary in the military. Military justice prosecutorial choices are often based on operational considerations, many of which have no civilian equivalent. For example, convening authorities might, in agreeing to a sentence in a plea agreement, consider whether a trial requires revealing sensitive or confidential information. Convening authorities might also consider how a trial would affect training or deployment. In short, military judges should afford greater deference to convening authorities in view of the objective and operational realities of military justice. The plainly unreasonable standard supports this deference.

Third, the plainly unreasonable standard invites the same standard for appellate review, which is consistent with both RCM 1117[120] and federal jurisprudence.[121] The appellate service courts' acceptance of the same standard of review would streamline appellate review of sentence appropriateness. Moreover, consistency between military and civilian jurisprudence would allow military justice practitioners to look to federal jurisprudence as persuasive authority.

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[119] "Generally, courts should be wary of second-guessing prosecutorial choices. Courts do not know which charges are best initiated at which time, which allocation of prosecutorial resources is most efficient, or the relative strengths of various cases and charges." United States v. Miller, 722 F.2d 562, 565 (9th Cir. 1983) (citing United States v. Lovasco, 431 U.S. 783, 793-94 (1977); U.S. Ammidown, 497 F.2d 615, 621 (D.C.Cir. 1973); and *see* Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV.L.REV. 1521, 1547 (1981)).

[120] 2019 MCM, *supra* note 2, R.C.M. 1117; *see also* UCMJ art. 56(d) (2019).

[121] In *Gall v. United States*, the Supreme Court ruled that "courts of appeals must review all sentences—whether inside, just outside, or significantly outside the [sentencing] Guidelines—under a deferential abuse of discretion standard." 552 U.S. 38, 41 (2007). The Supreme Court further found that "appellate review of sentencing decisions is limited to determining whether they are 'reasonable.'" *Id*. at 46. In support of this deferential standard, the Supreme Court stated, "The sentencing judge is in a superior position to find facts and judge their import . . . The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record." *Id*. at 51. *See* United States v. Bolds, 511 F.3d 568, 573-75 (6th Cir. 2007) (noting "the plainly unreasonable standard of review was drawn directly from 18 U.S.C. § 3742, the appellate review provision in the Sentencing Reform Act" and holding supervised release revocation sentences are to be reviewed "the same way that we review all other sentences—'under a deferential abuse of discretion standard' for reasonableness.").

Fourth, as discussed, the plainly unreasonable standard provides a buffer between the parties and the appellate courts reviewing cases for sentencing appropriateness.[122] Regardless whether the appellate courts find a sentence inappropriate, the military judge's initial approval of the sentence supports the parties' judgment and competence.

B. RCM 705

1. Proposed Changes

This paper proposes adding the following provision to RCM 705(d):[123] "Sentencing Reasonableness. The military judge of a general or special court-martial shall accept a plea agreement submitted by the parties subject to this Rule and RCM subparagraph 910(f)(4)(B), except that the military judge may reject a plea agreement when the agreed-upon sentence is plainly unreasonable."

Additionally, this paper proposes modifying RCM 705(e)(4) to read as follows, with italics indicating the proposed, additional language:

> The accused may withdraw from a plea agreement at any time prior to sentence being announced. If the accused elects to withdraw from the plea agreement after the acceptance of the plea but before the sentence is announced, the military judge shall permit the accused to withdraw only for good cause shown. *The military judge's deferral of accepting a plea agreement until the completion of presentencing proceedings pursuant to R.C.M. 910(f)(6) will constitute good cause*.

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[122] Under the Legacy System, appellate courts reviewed cases for sentence appropriateness even when agreed-upon quantums limited the sentences. *See e.g.*, United States v. Deleon, 2018 CCA LEXIS 557 (N-M. Ct. Crim. App. Dec. 11, 2018) (conducting de novo review pursuant to Article 66(c), UCMJ, of sentence appropriateness of sentence of seven years' confinement where pretrial agreement required suspension of confinement in excess of 60 months). Under the Article 53a Framework, service courts will likely continue conducting such reviews on cases with agreed-upon sentences.

[123] *See* 2019 MCM, *supra* note 2, R.C.M. 705.

2. Discussion

This provision implements the proposed Article 53a and allows military judges to reject plea agreements with plainly unreasonable agreed-upon sentences. This provision, consistent with the proposed Article 53a, reinforces that military judges' rejections of plea agreements should only occur on an exceptional basis.

The proposed additional language of RCM 705(e)(4) provides the accused with the ability to withdraw from plea agreements if military judges refuse to immediately approve agreed-upon sentences. This modification would address the accused's concerns that they risk revealing their entire sentencing case, which might include evidence they would admit in a contested trial, to the government without knowing for a fact whether military judges will approve the agreement.

Finally, this provision should import or refer to RCM 1117's definition of plainly unreasonable.[124] By doing so, this provision would allow military judges to apply the plainly unreasonable standard consistently, while harmonizing military judges' standard of review with that of the appellate courts.

C. RCM 910

1. Proposed Changes

This paper recommends modifying RCM 910(f)(6)[125] to read as follows:

> After the plea agreement inquiry, the military judge shall announce on the record whether the plea is accepted and may announce on the record whether the plea agreement is accepted or defer its decision until the completion of presentencing proceedings. Upon acceptance by the military judge, a plea agreement shall bind the parties and the court-martial.

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[124] *See* 2019 MCM, *supra* note 2, R.C.M. 1117(c)(3).
[125] *See* 2019 MCM, *supra*, note 2, R.C.M. 910.

This paper also recommends modifying RCM 910(f)(7) to include the following language: "The military judge may allow the parties to submit additional evidence if the military judge announces the military judge's intent to reject a plea agreement because the agreed-upon sentence is plainly unreasonable."

2. Discussion

The proposed RCM 910 would allow military judges to access all information presented during sentencing before becoming bound to a plea agreement. Matters in aggravation, mitigation, extenuation, rehabilitative potential, as well as victim input, would permit military judges to make better-informed decisions regarding whether agreed-upon sentences are plainly unreasonable. Although military judges might not always require this information, they should have the option to consider it when necessary. The proposed RCM 910 is modeled after portions of Rule 11 that authorize federal judges to defer acceptance of a plea agreement until they have reviewed the presentencing report.[126] Not only would the proposed RCM 910 allow sentencing proceedings to have the same effect as federal presentence reports, but it would also provide military judges with substantially the same information that is provided to federal judges.[127]

Although the proposed RCM 910 authorizes military judges to defer their decision to accept the plea agreement, it does not permit them to delay acceptance of the plea. Regardless whether military judges approve the plea agreement or defer their decision until the conclusion of sentencing, the parties must begin sentencing in accordance with RCM 1001.[128] The proposed RCM 910, thus, allows military judges to consider

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[126] *See supra* note 96.

[127] Presentence Reports must "identify any factor relevant to . . . the appropriate kind of sentence," the defendant's history and characteristics, including any prior criminal record, financial condition, and "any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment." FED. R. CRIM. P. 32.

[128] 2019 MCM, *supra* note 2, R.C.M. 1001. The government may "present evidence as to any aggravating circumstance directly relating to or resulting from the offenses of which the accused has been found guilty." 2019 MCM, *supra* note 2, R.C.M. 1001(b)(4). Crime victims have a right to be reasonably heard at presentencing proceeding related to offense "of which accused has been found guilty." 2019 MCM, *supra* note 2, R.C.M. 1001(c)(1).

all available information while providing an incentive to the parties to engage in meaningful, robust sentencing proceeding.

The proposed addition to RCM 910(f)(7) would also increase efficiency by allowing the parties to present evidence to address the specific concerns of military judges who indicate that agreed-upon sentences appear plainly unreasonable. This would prevent military judges from surprising the parties by rejecting plea agreements, and allow the parties, effectively, another bite at the apple, which could—if successful—prevent unnecessary, future litigation.

V. Mitigating Legitimacy Risk Under the Article 53a Framework

Part V proposes ways military justice practitioners can reduce legitimacy risk in the current Article 53a Framework.

A. Avoiding Determinate Sentencing Provisions

Although the parties can currently agree to a definite sentence in a plea agreement, they should consider not doing so. Because those agreements completely remove military judges' discretion on sentencing, they create legitimacy risk. The reduced incentive of the parties to engage in meaningful sentencing proceedings enhances this risk. As discussed, sentencing proceedings that cannot affect the sentence might not only be futile, but could also undermine the attorneys' obligation to their clients. Guilty pleas based on an agreed-upon definite sentences would likely resemble the empty rituals that are antithetical to military jurisprudence.

Instead of a definite sentence, the parties should agree to a sentencing range. Sentencing ranges allow military judges to exercise discretion, which enhances proceedings' legitimacy. Sentencing ranges further increase legitimacy by encouraging the parties to engage in meaningful sentencing proceedings, while establishing a sufficient record for review to demonstrate defense counsels' competent representation. Because larger sentencing ranges provide military judges with more discretion, sentencing ranges should not be negligible.

Despite the advantages of sentencing ranges, convening authorities might be reluctant to forgo the opportunity to demand a precise sentence. Although definite sentencing provisions provide the greatest degree of

certainty, sentencing ranges that only impose a minimum sentence (i.e. "no less than") have substantially the same effect. Agreeing to a minimum sentence would meet the intent of most convening authorities while affording discretion to military judges. However, because sentencing ranges that contain only a minimum sentence are less favorable to the defense, the defense would likely negotiate for a lower minimum sentence.

B. Creating a Record

The government can also mitigate the Article 53a Framework's legitimacy risk by building robust records that support the reasonableness of agreed-upon sentences. Trial counsel could, for example, proffer to military judges that the agreed-upon sentences are generally consistent with others across jurisdictions or otherwise accurately represent an appropriate punishment.

Although defense counsel have little incentive to minimize the appellate risk associated with sentencing review—which can provide relief to their clients—they have an interest in establishing a record of their competence. For this reason, defense counsel should also build a record establishing that agreed-upon sentences are reasonable.[129]

[129] There are many scenarios in which defense counsel might advise their clients to agree to sentences that appear severe. However, agreeing to a severe sentence could be the best course of action for the accused. For example, extending litigation may result in the government's case becoming stronger if the government identifies additional witnesses, evidence, or misconduct. A stronger case for the government could result in a higher sentence. Additionally, a sentence following a conviction after a trial could be more severe than the agreed-upon sentence. Explaining to a military judge why a very high agreed upon sentence is not plainly unreasonable might be more challenging for the defense than for the government. Defense counsel generally may not proffer privileged or confidential matters. The defense's record to establish the reasonableness of the agreement should, therefore, be somewhat conclusory. For example, the defense might inform the military judge that they have had extensive conversations with their client concerning the plea agreement and its sentencing provision, that all terms of the plea agreement originated with the defense, and that the defense believes the agreement is in the best interest of their client. The defense may also concur with the government's assertion that the sentence is generally consistent with other, similar cases.

However, even though the government and the defense benefit from creating a record supporting the reasonableness of agreed-upon sentences, it is unclear whether, under the present Article 53a Framework, military judges will permit them to do so. Military judges, given their lack of authority to reject these sentences, have no obligation to allow the parties to create such a record. Military judges might, in fact, consider "reasonableness records" irrelevant and disallow them. On the other hand, military judges anticipating appellate review might encourage the parties to provide the reviewing court as much information as possible. Even if military judges refuse to allow the parties to build a reasonableness record during the courts' acceptance of the guilty plea, the parties should establish reasonableness during sentencing.

C. Providing the Military Judge with Rejection Discretion

The parties may also consider including a provision in plea agreements allowing military judges to reject the agreement if the military judge finds its agreed-upon sentence plainly unreasonable. This provision would provide the advantages discussed in this paper, including a reduced risk of a plainly unreasonable sentence, appellate action, and concerns about military justice's legitimacy. Although convening authorities might be reluctant to allow military judges to reject agreed-upon sentences, convening authorities might nonetheless support these "rejection" provisions in order to avoid unnecessary, future litigation, and in doing so, demonstrate their trust of military judges and the military justice system.

VI. Conclusion

Plea agreements are likely to remain one of the most important processes in military justice. Plea agreements, in fact, might become even more prevalent under the streamlined Article 53a Framework. Allowing military judges to reject only those agreements with plainly unreasonable agreed-upon sentences would result in more accurate and consistent sentences, and meaningful sentencing proceedings that reflect the military's historical priority of ensuring fairness. This would increase the legitimacy of military justice.

One of the military justice system's greatest strengths is its ability to continually reinvent itself, improving and strengthening its processes.[130] This paper does not identify a flaw that represents an existential threat to the legitimacy of military justice. To the contrary, the Article 53a Framework will likely advance military justice in many ways—but the Framework is new and can be improved. Allowing military judges to reject plainly unreasonable agreed-upon sentences would provide the system with a tool to avoid worst-case scenarios that might occur on the fringes of practice. Simply put, if the legitimacy of the military justice system can be safeguarded, even from a remote threat, it should be.

Those who disagree and believe the Article 53a Framework needs no improvement, who insist on convening authorities maintaining all of their disciplinary power at all costs, might consider the adage, "If you're good enough, the referee doesn't matter."[131] It is the convening authorities' job to wield tremendous power responsibly. Military prosecutors and defense attorneys are generally well-trained, experienced professionals. There is, as a result, a very low probability that military judges would have to intervene by rejecting agreements these professionals reach. But on the rare occasions on which military judges believe they must do so, we should let them. Even when referees do not matter, we still give them a whistle.

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[130] "The UCMJ was a crucial step, but it was only the first step, and the history of our system since 1951 has been one of change as military justice and military legal practice adapted to a different armed force and to evolving ideas concerning criminal law procedures." Finnegan, *supra* note 67, at 192-93.

[131] *Jock Stein Quotations*, https://quotetab.com/quotes/by-jock-stein#HPRRWtqkHegA4ykl.97 (last visited Mar. 12, 2019).