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Unraveling Unlawful Command Influence

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UNRAVELING UNLAWFUL COMMAND INFLUENCE

MONU BEDI[*]

ABSTRACT

Military commanders are not just officers leading soldiers into battle. In the military justice system, they also serve quasi-prosecutorial roles and decide what charges to bring and whether to accept a plea. With this responsibility comes the potential for misconduct, no different than with civilian prosecutors. Commanders too can improperly coerce witnesses or withhold favorable evidence. Enter the "unlawful command influence" doctrine, the military's response to combating this misconduct. While routinely associated with civilian prosecutorial misconduct, the military standard turns out to be very different and seems to better protect against improper influence than its civilian counterpart. What accounts for this difference, given that both standards are designed to ensure a fair and impartial trial?

This Article is the first to raise this varying treatment and explore potential explanations. It ultimately teases out the concepts of "systemic integrity" and "individual autonomy" from the respective stories. The military's focus on procedural protections and concern for the appearance of impropriety reveals a value for systemic integrity, whereas the civilian

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emphasis on defendant choice and finality of proceedings reveals a value for individual autonomy. This is not simply an academic exercise. These concepts can help frame current controversies surrounding prosecutorial and commander discretion. On the civilian side, scholars and judges alike have widely criticized courts for not doing enough to combat prosecutorial misconduct. On the military side, legislators have railed against commanders for their lack of prosecution of sexual assault crimes. Recognizing which value—individual autonomy or systemic integrity—underlies these practices can better assist necessary reforms.

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INTRODUCTION

At first blush, a civilian prosecutor and military commander may not seem to have much in common. One is a lawyer who holds wide discretionary authority over charging decisions and plea agreements, while the other is a trained officer who leads troops into battle and defends the country. But in the military justice system, commanders also serve quasi-prosecutorial roles and wield the same discretionary authority over charges and pleas. This power naturally brings with it the potential for misconduct, no different than with civilian prosecutors. The military's response to regulating commander misconduct has developed as the doctrine of "unlawful command influence."[1] This Article compares this doctrine with how prosecutorial misconduct is handled in the civilian system.[2] It turns out the two standards are very different even though they are designed to combat the same issue. I explore potential reasons for this varying treatment and ultimately deduce two different underlying frameworks from the respective practices.

The military has a unique role in our society. Its mission is to fight wars and defend against foreign threats. Military commanders, in turn, take on significant responsibility in leading troops toward these ends. Part of this responsibility includes maintaining good order and discipline

1. *See infra* Part I.B.

2. This Article focuses on federal prosecutors, rather than state prosecutors, as the natural analogue to military commanders given their common federal-based authority. *See, e.g.*, Uniform Code of Military Justice arts. 1–146, 10 U.S.C. §§ 801–946 (2014) [hereinafter UCMJ]; *see also infra* Part II.B.

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among the ranks.[3] This means commanders wear many different hats. In addition to their combat role, for example, they serve quasi-judicial roles. In this capacity, they adjudge punishment for minor offenses,[4] pick potential jurors for trial,[5] and grant post-clemency relief.[6] Another central function, and the focus of this Article, is their quasi-prosecutorial role. Commanders hold the discretion that one typically associates with civilian prosecutors. They alone decide what charges, if any, should be brought and the terms of any plea bargain.[7] This means military prosecutors—the ones actually trying the cases—ultimately take their cues from commanders on these key issues.[8]

Commanders, thus, can potentially taint a defendant's right to a fair and impartial trial—much like civilian prosecutors—by, for example, interfering with a juror or withholding favorable evidence.[9] As one military court explains, "[c]ommand influence is the mortal enemy of military justice."[10] Enter the unlawful command influence doctrine—a post-World War II law that seeks to curtail commander misconduct and its impact on the fairness of a criminal trial.[11]

The key question in raising such a misconduct claim is whether the conduct prejudiced the defendant. Four features are worth noting: the government always carries the burden of showing that there was no prejudice, courts do not consider a commander's intent in the analysis, the defendant cannot waive her right to this claim on appeal during plea negotiations, and, most notably, courts subject the conduct to an appearance of impropriety test, even if there is no actual prejudice.[12] The

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3. Lieutenant Colonel Timothy W. Murphy, *A Defense of the Role of the Convening Authority: The Integration of Justice and Discipline*, THE REPORTER, Sept. 2001, at 3; David A. Schlueter, *American Military Justice: Responding to the Siren Songs for Reform*, 73 A.F. L. REV. 193, 208 (2015).

4. This practice is referred to as non-judicial punishment and typically involves minor offenses. *See* UCMJ art. 15.

5. UCMJ art. 25; *see also infra* Part I.A.

6. UCMJ art. 60; *infra* Part III.A.3.

7. *See infra* Part I.A. It is also worth noting that soldiers can be prosecuted for any crime even if it has no connection to their military service. *See* Solorio v. United States, 483 U.S. 435 (1987). This was not always the case. In the late 1960s, the Supreme Court briefly adopted a service connection requirement for court-martial jurisdiction. *See* Relford v. Commandant, 401 U.S. 355 (1971); O'Callahan v. Parker, 395 U.S. 258 (1969).

8. *See infra* Part II.A.

9. *See infra* Part II.A.

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

11. *See* UCMJ art. 37.

12. *See infra* Part I.B–C.

combined effect is a doctrine that seems well crafted to deter a commander's improper influence over the trial process.[13]

The somewhat curious part of this doctrine has been its association with prosecutorial misconduct in the civilian system. Military courts and scholars alike have equated or otherwise likened the two types of misconduct.[14] As one military court explains, "[a] commander . . . is closely enough related to the prosecution of the case that the use of command influence by him and his staff equates to 'prosecutorial misconduct.'"[15] On one account, this association makes sense since both commanders and civilian prosecutors share the same discretionary authority. The problem, however, is that this likeness has been in name only. While civilian courts also use prejudice as the key factor, the standard turns out to be quite different. Unlike unlawful command influence, with civilian prosecutorial misconduct, the burden of showing prejudice shifts depending on the defendant's actions at trial, courts often consider a prosecutor's state of mind, a defendant can waive her ability to raise a misconduct claim on appeal during plea negotiations, and, perhaps most notably, courts do not engage in an appearance of impropriety test.[16] The combination of these differences creates a system that seems to more easily insulate instances of misconduct. To be sure, scholars and judges alike have all bemoaned the seemingly chronic problem of civilian prosecutorial misconduct and criticized courts' inability to prevent it.[17]

What explains or otherwise justifies the divergent standards? Both the military and civilian systems come from the same adversarial heritage and attempt to promote the same thing—a fair and untainted trial.[18] In fact, readers may be surprised to learn that the military provides a more robust mechanism here than the civilian system. Given the association with prosecutorial misconduct, military courts could have easily adopted the

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13. I am not making a claim based on data or evidence, as there is none on this issue. Rather, my conclusion rests on the collective force of the various features of the doctrine (e.g., the burden of proof, appearance of impropriety test) along with how courts have interpreted them. *See infra* Part I.B–C.

14. *Thomas*, 22 M.J. at 393; Major Guy P. Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three—Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1 (1998).

15. *Thomas*, 22 M.J. at 393.

16. *See infra* Part II.B.

17. *See, e.g.*, Sonja B. Starr, *Using Sentencing to Clean Up Criminal Procedure: Incorporating Remedial Sentence Reduction into Federal Sentencing Law*, 21 FED. SENT'G REP. 29, 30–31 (2008); The Editorial Board, *Rampant Prosecutorial Misconduct*, N.Y. TIMES (Jan. 4, 2014), http://www.nytimes.com/2014/01/05/opinion/sunday/rampant-prosecutorial-misconduct.html?_r=2; *see also infra* Part II.C.

18. *See infra* notes 299–300 and accompanying text.

more lax standard to police unlawful command influence.[19] They, however, did not. It won't do to simply say that commanders are not the ones trying cases, since commander misconduct can equally influence the fairness of trial proceedings.[20] If anything, this line of reasoning would only seem to suggest that civilian prosecutorial misconduct should be more heavily scrutinized.[21]

To further complicate matters, the military uses the more deferential civilian standard when assessing misconduct claims against military prosecutors, even though military courts often talk about military prosecutorial misconduct as a subset of unlawful command influence.[22] Thus, the military applies different standards to address misconduct by military prosecutors and commanders during courts-martial. First, for commanders, the military applies the "unlawful command influence" standard, and second, for military prosecutors, the military applies a "prosecutorial misconduct" standard, which is very similar to the civilian "prosecutorial misconduct" standard.[23]

This Article explores various potential explanations that may account for the varying prosecutorial misconduct and unlawful command influence standards.[24] The most obvious difference—though interestingly not discussed by military courts—is the fact that commanders, unlike prosecutors, do not have the same legal training, nor are commanders bound by professional ethical rules.[25] This lack of professional training and accountability may, in turn, explain why military courts use the more deferential misconduct standard for military prosecutors.[26] Commanders also wield significantly more authority over the military justice system—including oversight of military subordinates—compared with either civilian or military prosecutors. The historical context and idiosyncratic evolution of the respective systems can provide some additional clarification: the military justice system historically suffered from publicity problems related to unfettered command discretion, whereas the civilian system's historical trajectory may suggest a concern for a prolonged appeal process and a desire to finalize verdicts.[27]

19. *See infra* Part III.A.
20. *See infra* Parts I.B, III.A.
21. *See infra* Part III.
22. *See infra* Part II.A.
23. *See infra* Part II.
24. *See infra* Part III.A.
25. *See infra* Part III.A.1.
26. *See infra* Part III.A.1.
27. *See infra* Part III.A.4.

Working from each system's respective standard and specific evolution, I tease out the competing principles of *systemic integrity* and *individual autonomy*.[28] My focus here is on the criminal trial process itself (and not civil or other collateral remedial systems) and how these philosophies are expressed in each system. This Article uses systemic integrity to refer to protections that are intended to preserve fairness in the system.[29] The point here is to insert restraints or tests that cannot easily be circumvented so that the defendant is assured an impartial trial. Individual autonomy, on the other hand, values freedom of choice and independence.[30] This Article incorporates two values into this term: defendant choice and the independence of individual actors in the criminal justice system. The former value is relatively straightforward. Defendants should have the ability to choose the course of their trial and make choices about waiving procedural protections.[31] The second feature of autonomy fosters deregulation and allows actors of the criminal justice system (e.g., prosecutors, defense attorneys, etc.) to carry out their responsibilities without imposition of significant oversight.[32] The key here is to trust that these individuals will make the correct choices.

These competing values of *systemic integrity* and *individual autonomy* are already expressed to varying degrees in both criminal justice systems. For instance, military and civilian defendants alike are accorded a presumption of innocence, with the government always carrying the burden of proof to show guilt.[33] These constitutional features signal systemic integrity values because they are unalterable protections intended to protect the defendant and assure a fair outcome. The use of plea-

28. *See infra* Part III.B.

29. This feature shares elements of procedural and substantive justice. Procedural justice (or formal justice, as it is sometimes called) focuses on following procedures to ensure just outcomes and has been invoked in the criminal and civil contexts. *See, e.g.*, Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473 (2008); Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407 (2008); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 321 (2004); Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26 (2007). Substantive justice focuses on the actual outcome and whether it is just. *See, e.g.*, Ellen E. Sward, *Justification and Doctrinal Evolution*, 37 CONN. L. REV. 389 (2004). This Article does not seek to engage in a comprehensive analysis of these two principles. For a more thorough discussion, see, e.g., Nicholas Faso, *Civil Disobedience in the Supreme Court: Retroactivity and the Compromise Between Formal and Substantive Justice*, 75 ALB. L. REV. 1613 (2012).

30. This value can also be a central part of a procedural justice model. *See* Solum, *supra* note 29, at 275. I am simply separating the non-autonomy values relevant to procedural justice and placing them in the category of systemic integrity.

31. *See infra* Part III.B.

32. *See infra* Part III.B.

33. UCMJ art. 51(c); Taylor v. Kentucky, 436 U.S. 478, 483–86 (1978).

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bargaining, on the other hand, indicates a concern for defendant choice.[34] Defendants in both systems are in full control of whether they will forgo trial and plead guilty. Judicial recusal procedures provide a prime example of the second feature of autonomy. After a party moves to recuse a military or civilian trial judge, the judge herself decides whether her recusal is appropriate with no procedural constraints and little to no oversight.[35] More generally speaking, the adversarial system itself can be thought of as a combination of systemic integrity and individual autonomy values. Within the constraints of constitutional requirements and evidentiary rules (examples of systemic integrity), attorneys—prosecutors and defense attorneys—are free to present and develop their case as they see fit (an instance of individual autonomy).[36]

Turning specifically to the unlawful command influence doctrine, it seems that the military implicitly values systemic integrity more than individual autonomy.[37] The burden of proof on the government never changes, and defendants can't waive their right to raise such claims as part of a plea agreement.[38] These features ensure systemic fairness without regard to defendant choice. Similarly, the system does not seem to put

34. *See* UCMJ art. 45; FED. R. CRIM. P. 11; *infra* note 298 and accompanying text.

35. *See, e.g.*, 28 U.S.C. § 455(a) (2014) (noting that a district or magistrate judge disqualifies herself as appropriate); United States v. Wright, 52 M.J. 136, 141 (C.A.A.F. 1999) (citation omitted) ("The motion to disqualify a military judge may be made by a party or by the judge *sua sponte*. Once made, it is the judge who decides this issue of law."); United States v. Balistrieri, 779 F.2d 1191, 1202–03 (7th Cir. 1985) ("Section 455 clearly contemplates that decisions with respect to disqualification should be made by the judge sitting in the case, and not by another judge."); United States v. Cockerell, 49 C.M.R. 567, 574 (A.C.M.R 1974) ("Whether the judge should withdraw from the case . . . will be left to the informed discretion of the military judge."); CHIEF JUSTICE ROBERTS, 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7–8 (2011) ("All of the federal courts follow essentially the same process in resolving recusal questions. In the lower courts, individual judges decide for themselves whether recusal is warranted, sometimes in response to a formal written motion from a party, and sometimes at the judge's own initiative."); Raymond J. McKoski, *Disqualifying Judges When Their Impartiality Might Reasonably Be Questioned: Moving Beyond a Failed Standard*, 56 ARIZ. L. REV. 411, 448 (2014) (discussing how most states follow the federal system where judges decide their own recusal motions). Parties can appeal the decision, but appellate courts are very deferential, and reverals of non-recusal are thus very rare. *See* Dmitry Bam, *Recusal Failure*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 631, 652 (2015) ("While there are some exceptions, the judge's decision [to recuse herself] usually is final, subject only to appellate review. That appellate review, however, is generally highly deferential to the judge's decision, and reversals are rare."); *see also Cockerell*, 49 C.M.R. at 574 ("While his discretion is subject to review, the determination of the judge will be accorded great weight and will not be disturbed unless clearly erroneous.").

36. *See generally* Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 420 (1992) ("For example, in our adversary system the strength with which each side is able to present its case depends in large part on the freedom of the parties to ascertain and present to the trier of fact all relevant evidence.").

37. *See infra* Part III.B.

38. *See infra* Part II.B.4.

much faith in commanders' doing the right thing with no further oversight. For one thing, a commander's intent is not relevant, as the focus is solely on whether the defendant's trial was tainted. Moreover, even if there is no prejudice, courts still scrutinize a commander's actions through the public lens as a prophylactic measure to ensure confidence in the system.[39]

The civilian system's response to prosecutorial misconduct, on the other hand, underscores an emphasis on individual autonomy.[40] Defendant choice plays heavily in how (and whether) these misconduct claims are resolved. Their actions decide what the appellate standard will be or whether the claim will be waived entirely through a plea agreement.[41] As to prosecutor autonomy, the use of a more deferential standard and the fact that there is no appearance of impropriety test implicitly assume that prosecutors will dutifully carry out their jobs before the verdict is finalized.[42] This promotion of prosecutorial independence may be further explained by the fact that these individuals are theoretically already bound by professional ethical rules.[43]

Invocation of these competing principles is not simply an academic exercise. The distinction can serve normative ends by illuminating ways to reform the systems. Take the concern over widespread instances of civilian prosecutorial misconduct.[44] It would seem that the promotion of individual autonomy in this context has made it too easy for prosecutors to infect trial proceedings. Perhaps trusting that these attorneys will carry out their jobs is overly optimistic. After all, like commanders, these individuals also may become too invested in winning their cases. The civilian system needs to take a chapter out of the military playbook and impose greater structural or systemic protections into the system. This could include incorporating an appearance of impropriety test or creating a uniform burden of proof[45] or, as some scholars have suggested, changing

39. *See infra* Part I.C.

40. I am not suggesting that the civilian response to this misconduct does not share some element of systemic integrity. Prejudice remains the key test. However, the focus here is on the relative differences between the two systems beyond this shared substantive baseline. *See generally infra* Part II.B. Furthermore, outside the trial process, prosecutors are theoretically also held accountable by professional ethics boards or civil suits. While these mechanisms purportedly promote systemic integrity (albeit outside the criminal trial process and not the focus of this Article), the consensus appears to be that they are not effective. *See infra* notes 245, 272–77 and accompanying text. In any case, the focus of this Article is on the criminal trial process.

41. *See infra* Part II.B.2–3.

42. *See infra* Part III.B.

43. *See infra* Part III.A.1.

44. *See infra* Part II.C.

45. *See infra* Part III.C.

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the prejudice standard itself or otherwise (moving outside the criminal trial process) making sure prosecutors are sanctioned for their misconduct.[46]

These values may also be useful to an examination of the current controversy surrounding sexual assault in the military and what many consider a lack of prosecution by commanders.[47] The doctrine of unlawful command influence does not apply here because the issue is not interfering with the fairness of trial after charges have become official, but rather choosing not to bring charges against putative defendants in the first place. Commanders—like prosecutors in the civilian system—have wide authority on these charging decisions.[48] It may be time to rein in this autonomy—at least in the context of sexual assault crimes in the military—and impose systemic restraints on these decisions, much like military courts have done during the trial process. Potential solutions could include forcing commanders to work with military prosecutors in bringing sexual assault charges or revoking their authority to bring these types of cases and placing it with other military leaders.[49]

This Article proceeds in three Parts. Part I traces the historical development of the unlawful command influence doctrine and its unique elements. Part II focuses on prosecutorial misconduct in the civilian system and compares its relatively deferential standard to the more stringent military unlawful command influence standard. Part III explores various explanations for the disparate treatment. From the respective stories, I tease out the concepts of systemic integrity and individual autonomy and show how these principles can help frame potential reforms in both systems.

I. DEVELOPMENT OF THE UNLAWFUL COMMAND INFLUENCE DOCTRINE

A. Early Beginnings

The system of commander-centered discretion has roots in the English military system and has remained largely unchanged.[50] The original

46. *See, e.g.*, Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 669 (1972); Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421, 441–42 (1980).

47. *See, e.g.*, Eric R. Carpenter, *The Military's Sexual Assault Blind Spot*, 21 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 383 (2015); Helene Cooper, *Pentagon Study Finds 50% Increase in Reports of Military Sexual Assaults*, N.Y. TIMES (May 1, 2014), http://www.nytimes.com/2014/05/02/us/military-sex-assault-report.html?_r=0.

48. *See infra* note 97 and accompanying text.

49. *See infra* Part III.C.

50. David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L.

American military code, called the Articles of War—in place until just after World War II—gave commanding officers wide discretion in bringing and disposing of charges against their subordinates.[51] They specifically bestowed commanders with quasi-judicial and prosecutorial authority, including the ability to convene a court-martial (i.e., officially bring charges); appoint the jury, defense attorney, and prosecutor; and approve of any sentence.[52] Subsequent iterations of the Articles of War did little to change the authority of commanders.[53] The rationale here centers on the nature of the military and its unique mission as a fighting force.[54] Commanders are responsible for making sure "that a particular unit successfully performs its mission."[55] Part of this responsibility includes maintaining good order and discipline among the ranks. Breaches of discipline can undermine mission effectiveness.[56] It makes sense then that commanders, not attorneys, decide whether to bring charges and what charges should be brought against a subordinate within the command.[57]

During this period, there was, in turn, little oversight of the commander's prerogative over the military justice system. The

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REV. 1, 4–5 (2013); Luther C. West, *A History of Command Influence on the Military Judicial System*, 18 UCLA L. REV. 1, 10–11 (1970).

51. Major Donald W. Hansen, *Judicial Functions for the Commander?*, 41 MIL. L. REV. 1 (1968); West, *supra* note 50, at 7–8; *see also generally* Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953); Captain (P) David A. Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129, 145–48 (1980).

52. Act of April 10, 1806, ch. 20, 2 Stat. 359, 367; Andrew A. Bruce, *Double Jeopardy and the Power of Review in Court-Martial Proceedings*, 3 MINN. L. REV. 484, 486–87 (1918); Hansen, *supra* note 51, at 10–19; West, *supra* note 50, at 7–8.

53. Schlueter, *supra* note 51, at 150–58; West, *supra* note 50, at 28–40.

54. *See, e.g.*, Parker v. Levy, 417 U.S. 733, 743 (1974); United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955); Schlueter, *supra* note 3, at 207–11.

55. Murphy, *supra* note 3, at 4; *see also* Schlueter, *supra* note 3, at 207–11.

56. Murphy, *supra* note 3, at 4–5; Schlueter, *supra* note 3, at 208–11.

57. Other countries do not place this prosecutorial discretion in the hands of military commanders. *See, e.g.*, Boyd v. Army Prosecuting Auth., [2002] UKHL 31 (appeal taken from U.K.) (noting that in the United Kingdom, commanders recommend charges to be brought, but high-ranked attorneys outside the putative defendant's chain of command make the final decision as to whether charges are appropriate); *see also* Lindsy Nicole Alleman, *Who Is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems*, 16 DUKE J. COMP. & INT'L L. 169 (2006) (comparing the command-centered discipline in the United States with Canada and Israel, which do not place as much prosecutorial discretion in the hands of commanders but rather in separate legal bodies). Scholars have both strongly criticized and defended this commander-based model. *See generally, e.g.*, Joseph W. Bishop, Jr., *The Case for Military Justice*, 62 MIL. L. REV. 215 (1973) (rejecting calls for abandonment of the military justice system); Michael I. Spak & Jonathon P. Tomes, *Courts-Martial: Time to Play Taps?*, 28 SW. U. L. REV. 481 (1999) (criticizing the current model). For a comprehensive discussion on this topic, see Schlueter, *supra* note 50, at 14–43 (discussing whether military justice is grounded in discipline or justice and how this impacts the command-centered model). The purpose of this Article is not to challenge or otherwise question the United States' command-centered military system, but rather to accept it as it stands.

Constitution itself makes only limited reference to military justice, and many of the basic criminal rights were historically not readily applicable in a court-martial.[58] Nothing really prevented commanders from improperly influencing a court-martial.[59] And civilian courts overturned a verdict only if there was a jurisdictional problem with the trial proceeding.[60] Legislators and legal academics alike voiced their displeasure with this unfettered discretion afforded military commanders.[61] This led to some nominal restraints on a commander's discretion during the early part of the Twentieth Century, such as extensive military review of convictions and the removal of commander discretion to return an acquittal verdict for retrial.[62] However, a commander's overall authority over military justice remained largely unchecked.[63]

B. The Uniform Code of Military Justice and Commander Misconduct During the Trial Process

The Uniform Code of Military Justice ("UCMJ"), passed by Congress shortly after World War II, did not significantly change the broad authority of military commanders over the military justice system.[64] They were still responsible for convening the court-martial,[65] detailing the jury,[66] and approving any sentence,[67] as well as negotiating and approving any plea agreement with the defendant.[68] However, Congress finally got

58. *See* Earnest L. Langley, *Military Justice and the Constitution—Improvements Offered by the New Uniform Code of Military Justice*, 29 TEX. L. REV. 651 (1951); Fredric I. Lederer & Barbara S. Hundley, *Needed: An Independent Military Judiciary—A Proposal to Amend the Uniform Code of Military Justice*, 3 WM. & MARY BILL RTS. J. 629, 634 (1994); Note, *Constitutional Rights of Servicemen Before Courts-Martial*, 64 COLUM. L. REV. 127 (1964) [hereinafter *Constitutional Rights of Servicemen*]. Because Article I of the Constitution granted Congress the authority to regulate the land and naval forces, the traditional rights associated with a criminal trial (under the Fourth, Fifth, and Sixth Amendments) were not automatically applicable to courts-martial. *See* Swaim v. United States, 165 U.S. 553 (1897); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 137–38 (1866); *Constitutional Rights of Servicemen*, *supra*, at 129.

59. West, *supra* note 50, at 2. This unfettered discretion was for many years "viewed as a military matter, to be resolved by the military departments, or if necessary, by the Congress through corrective legislation. The military, in turn, accepted their prerogatives in this regard as absolutely moral, and as vital to the maintenance of military discipline." *Id.*

60. *Ex parte* Reed, 100 U.S. 13 (1879); West, *supra* note 50, at 14–15.

61. West, *supra* note 50, at 37–38.

62. *See id.*

63. *See id.*

64. *See* UCMJ arts. 1–146.

65. *Id.* arts. 22–23.

66. *Id.* art. 25(d)(2).

67. *Id.* art. 60.

68. The UCMJ itself does not address pretrial agreements, but the Manual for Courts-Martial, an executive order sanctioned by the UCMJ and the Constitution generally, makes clear that commanders

serious about regulating commander accountability and ensuring that defendants receive a level of due process in military courts.[69] In this way, the bill became a watershed moment. It finally gave military defendants the same kind of due process protections already afforded to their civilian counterparts.[70] Among other things, the UCMJ prohibited compulsory self-incrimination;[71] barred the imposition of cruel and unusual punishment;[72] allowed defendants to compel testimony of witnesses and production of evidence on their behalf;[73] protected against double jeopardy;[74] required independent trial judges, defense counsel, and prosecutors;[75] and created extensive appellate review with civilian oversight.[76] Most relevant for our purposes, Congress also passed Article 37 of the UCMJ, which specifies:

> *Unlawfully Influencing Action of Court*
>
> (a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, 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. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any

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who convene courts-martial have responsibility in entering into and approving any pretrial agreement with the defendant. *See* U.S. CONST. art. II, § 2, cl. 1; UCMJ art. 36 (discussing authority of president to promulgate additional procedural and evidentiary rules); JOINT SERV. COMM. ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL, UNITED STATES, at R.C.M. 705 (2012), *amended by* Exec. Order No. 13,593, 3 C.F.R. 13593 (2012) [hereinafter MANUAL FOR COURTS-MARTIAL]; *see also* United States v. Allen, 25 C.M.R. 8 (C.M.A. 1957) (discussing authority of commander in pretrial agreements); Major Michael E. Klein, United States v. Weasler *and the Bargained Waiver of Unlawful Command Influence Motions: Common Sense or Heresy?*, THE ARMY LAW., Feb. 1998, at 3, 5–6 (discussing history of pretrial agreements in the military).

69. *See* Lieutenant James D. Harty, *Unlawful Command Influence and Modern Military Justice*, 36 NAVAL L. REV. 231, 232 (1986); West, *supra* note 50, at 63–83.

70. *See* Joseph W. Bishop, Jr., *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 COLUM. L. REV. 40, 56–57 (1961).

71. UCMJ art. 31.

72. *Id.* art. 55.

73. *Id.* arts. 46–47.

74. *Id.* art. 44.

75. *Id.* art. 26 (specifying that commanders cannot be in the chain of command of military judges such that they have authority to review their performance); *id.* art. 27 (specifying that the respective Secretaries of the branches shall set the procedures to assign counsel and prosecutors for a court-martial); *see also infra* note 288 and accompanying text.

76. UCMJ arts. 59–76.

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> case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.[77]

The provision is broadly worded and applies to commanders and other military personnel alike.[78] The basic rationale for the law, as one military court puts it, is "that every person tried by court-martial is entitled to have his guilt or innocence, and his sentence, determined solely upon the evidence presented at trial, free from all unlawful influence exerted by military superiors or others."[79] Put differently, the statute's aim is to ensure that a soldier's procedural due process rights are protected.[80] In the military, this means separating lawful command influence, which is a necessary part of military life, from unlawful command influence, which consists of "influenc[ing] decisions that should be independent of command prerogatives and policy."[81] This type of improper influence "corrupt[s] . . . the truth-seeking function of the trial process."[82]

This separation is not always easy. Commanders are expected to influence subordinates in order to achieve mission goals.[83] As one scholar puts it, "to best understand lawful command influence, one must first understand unlawful command influence."[84] In its most straightforward application, the latter is an attempt by a commander to influence an outcome of a case "somewhat analogous to the common law crime of solicitation," where an individual tries to get someone to break the law.[85] A military court summarizes unlawful command influence as an action that "brings the commander into the deliberation."[86] More specifically,

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77. *Id.* art. 37. The terms "general, special, or summary court-martial" refer to varying levels of potential punishment, from the most severe to least severe. *See id.* arts. 18–20.

78. *See infra* Part II.B. It is important to note that the phrase "authority convening a general, special, or summary court-martial" refers to commanders generally who have the authority to constitute these courts-martial. Only highly ranked commanders can convene general courts-martial. *See generally* UCMJ arts. 22–24.

79. United States v. Rodriguez, 16 M.J. 740, 742 (A.F.C.M.R. 1983).

80. *See* United States v. Thomas, 22 M.J. 388, 393–94 (C.M.A. 1986). Military courts often use the term "military due process" to designate these statutory rights that seek to replicate the procedural rights afforded to civilian defendants by the Constitution. *See, e.g.*, United States v. Vazquez, 72 M.J. 13, 14 (C.A.A.F. 2013); *Constitutional Rights of Servicemen*, *supra* note 58, at 137–38 & n.138.

81. Captain Teresa K. Hollingsworth, *Unlawful Command Influence*, 39 A.F. L. REV. 261, 262 (1996).

82. *Thomas*, 22 M.J. at 394 (internal quotation marks omitted).

83. Lieutenant Colonel Erik C. Coyne, *Influence with Confidence: Enabling Lawful Command Influence by Understanding Unlawful Command Influence—A Guide for Commanders, Judge Advocates, and Subordinates*, 68 A.F. L. REV. 1, 2 (2012).

84. *Id.* at 6.

85. *Id.* at 7.

86. United States v. Kirkpatrick, 33 M.J. 132, 133 (C.M.A. 1991).

courts have used six factors that help differentiate between lawful and unlawful command influence:

> (1) the timing of the contact, *e.g.*, the proximity of contact to the [defendant's] case; (2) who made the contact, *e.g.*, the position of the officer alleged as attempting the influence . . . ; (3) the type of contact, *e.g.*, speech, letter, memorandum, or directive; (4) the content of the contact, *e.g.*, what and how it was said, whether mandatory, discretionary, informational; (5) who was contacted—witnesses, court members, military judge, members of the command; (6) the reasonable likelihood of prejudice to the accused at his trial.[87]

These factors seek to exclude those actions or comments that are not connected to the defendant's trial but rather squarely relate to a commander's military duties. For example, in *United States v. Lynch*, the defendant—a ship captain—was charged with and convicted of dereliction of duty and negligence in steering his ship into rocks, causing flooding and severe damage to the vessel.[88] The Commandant of the Coast Guard (in his capacity as commander of all Coast Guard personnel) shortly after the incident made general comments to all captains in the area on the importance of taking responsible actions and conducting effective training to prevent such incidents.[89] At trial, relying on the aforementioned factors, the judge denied the defendant's motion that these comments constituted unlawful command influence. The nature of the comments (safety versus disciplinary focused), the timing of the comments (six months before trial), and the lack of any prejudice all suggested that these statements were lawful comments relating to performance of military duties.[90] Overall, however, these factors do suggest a potential wide sweep of the doctrine and the need for commanders to be careful in discussing certain topics.[91]

In order to come under the purview of Article 37, military personnel must make their remarks in their official capacity. *United States v.*

87. United States v. Allen, 31 M.J. 572, 592 (N.M.C.M.R. 1990) (citations omitted).

88. United States v. Lynch, 35 M.J. 579, 582 (C.G.C.M.R. 1992), *decision set aside on other grounds*, 39 M.J. 223 (C.M.A. 1994).

89. *Lynch*, 35 M.J. at 583.

90. *Id.* at 585.

91. *See* Coyne, *supra* note 83, at 19–24 (discussing various topics where commanders should be particularly careful and providing advice on making statements in order to prevent claims of unlawful command influence).

Stombaugh provides a good example of this requirement.[92] There, a potential witness—a junior officer—was allegedly told by other officers in an informal command group that he should not testify on behalf of the defendant.[93] The court found that the group was not speaking for the command or in any official capacity, and thus the conduct did not fall under Article 37.[94] Rather, this was an informal group consisting of junior officers who decided on their own to associate with each other.[95] Any advice from its members was personal in nature and thus not with the mantle of authority.

This prohibition of command influence only applies to the adjudicative, not accusatory, phase of trial.[96] In other words, a commander's charging decisions are typically not within Article 37's purview unless they somehow impact a defendant's eventual trial. Here, commanders, like their civilian prosecutor counterparts, have wide discretion on who should be prosecuted and what charges should be brought. Both are only restricted by the narrow constitutional restraints of selective or vindictive prosecution.[97] Once the charges have become official, however, Article 37

92. United States v. Stombaugh, 40 M.J. 208 (C.M.A. 1994).

93. *Id.* at 210.

94. *Id.* at 212–13. The court noted, however, that this may constitute unlawful interference with a witness. *Id.* at 213.

95. *Id.* at 212–13. This type of informal organization is quite common in air squadrons. *Id.*

96. United States v. Weasler, 43 M.J. 15 (C.M.A. 1997); United States v. Bramel, 29 M.J. 958 (A.C.M.R. 1990); United States v. Drayton, 39 M.J. 871 (A.C.M.R. 1994); *see also* Lieutenant Colonel Lawrence Morris, *"This Better Be Good": The Courts Continue to Tighten the Burden in Unlawful Command Influence Cases*, THE ARMY LAW., May 1998, at 49, 54.

97. Vindictive prosecution—enforced through due process rights—typically involves a situation where the government brings charges based on animus toward the defendant (e.g., the defendant fails to plead guilty or otherwise cooperate). *See* United States v. Goodwin, 457 U.S. 368 (1982) (finding no vindictive prosecution under due process where prosecutor brought additional pretrial felony charge after defendant decided not to plead guilty); United States v. Argo, 46 M.J. 454 (C.A.A.F. 1997) (finding no showing of vindictive prosecution in prosecution of officer for adultery where officer was initially offered non-judicial punishment but violated additional order); United States v. Martino, 18 M.J. 526 (A.F.C.M.R. 1984). Selective prosecution—enforced through equal protection rights—typically involves a situation where the government selects the defendant for prosecution based on race or religion or another improper basis. *See* United States v. Armstrong, 517 U.S. 456, 470 (1996) (basing selective prosecution claim under equal protection analysis must show that the government failed to prosecute nonblack defendants for cocaine and crack-related offenses); *Argo*, 46 M.J. at 462–64 (finding no showing of selective prosecution where government prosecuted one officer for adultery but not another); United States v. Brown, 41 M.J. 1, 4–12 (C.M.A. 1994) (finding no showing that the prosecution of a black officer was the result of intentional or purposeful discrimination); *see also* Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393 (2001) (noting that prosecutors have wide power to bring charges, limited only by selective or vindictive prosecution).

kicks in and prevents commanders from improperly influencing the judicial process.[98]

Military courts have invoked the civilian notion of prosecutorial misconduct to justify this law. The Court of Appeals for the Armed Forces ("CAAF"), the highest military court, describes the association in the following way:

> A commander who causes charges to be . . . referred for trial [the military equivalent of indictment] is closely enough related to the prosecution of the case that the use of command influence by him and his staff equates to "prosecutorial misconduct." Indeed, recognizing the realities of the structured military society, improper conduct by a commander may be even more injurious than such activity by a prosecutor.[99]

The point here is that commanders function like civilian prosecutors because they decide what charges, if any, to bring and how to dispose of a case. Of course, commanders are not in court trying the actual cases. This is left to military prosecutors. Still, as courts and scholars alike have noticed, there is a natural parallel between commanders and civilian prosecutors and the wide authority they both have over the criminal trial process.[100]

1. Common Examples of Unlawful Command Influence: Interference with Witnesses, Jurors, and Court Personnel

One of the most common instances of unlawful command influence involves military juries.[101] The usual way it enters the picture is when commanders, who are designated with the authority to select members from the command, either personally or through their staff, improperly instruct jurors in anticipation of a court-martial.[102] Commanders cross the

98. The accusatory stage in the military consists of the time before charges are officially brought and a court-martial is convened. *See* United States v. Weasler, 43 M.J. 15, 18–19 (C.A.A.F. 1995) (discussing the difference between preferral or mere forwarding of charges and referral of charges or when charges become official). Referral of charges is analogous to indictment in the civilian criminal law system. *See* United States v. Roberts, 22 C.M.R. 112 (C.M.A. 1956).

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

100. *See, e.g.*, United States v. Meek, 44 M.J. 1, 6 (C.A.A.F. 1996) (noting that a commander and her staff occupy "quasi-prosecutorial status"); Glazier, *supra* note 14 (likening prosecutorial discretion to commander discretion).

101. *See* Major Martha Huntley Bower, *Unlawful Command Influence: Preserving the Delicate Balance*, 28 A.F. L. REV. 65, 70 (1988).

102. *See* UCMJ art. 25. Using criteria that include "age, education, training, experience, length of service, and judicial temperament," the commander sifts through his command to choose those

line when their instructions go beyond simply discussing the rules of evidence, burden of proof, and presumption of innocence.[103] In *United States v. Littrice*, for example, the commander gave verbal and written advice on the danger of inadequate sentences and how a juror's performance would be reflected on her employment reports.[104] CAAF, in vacating the sentence and ordering a new trial, found that this influence upset the independence of the jury by improperly telling them that lenient sentences are inappropriate and that their performance would impact their evaluations.[105] The pervasive risk of jury taint has led scholars and legislators alike to criticize this structure and advocate for the elimination of commander-controlled jury selection.[106]

Another frequent example of unlawful command influence occurs when a commander (directly or indirectly) interferes with a witness's testimony and, as a result, prevents favorable evidence from being introduced at the defendant's trial.[107] For instance, in *United States v. Levite*, on behalf of his commander, a soldier called a meeting of potential witnesses to an upcoming trial and provided evidence of the defendant's "bad character" from his service record.[108] CAAF found that this conduct constituted unlawful command influence that prejudiced the defendant's trial because the commander—through the actions of his subordinate—improperly intimidated witnesses, thereby preventing them from testifying on behalf of the defendant.[109] The influence over potential witnesses need

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members "best qualified" to serve on the court-martial panel. *Id.* art. 25(d)(2); Bower, *supra* note 101, at 70. Commanders may also engage in unlawful command influence if they deliberately stack the pool of potential jurors to disfavor the defendant. *See, e.g.*, United States v. Hilow, 32 M.J. 439 (C.M.A. 1991).

103. *See, e.g.*, UCMJ art. 37; United States v. Littrice, 3 C.M.A. 487, 492 (1953). Indeed, this was the central evil Congress tried to combat by passing Article 37. *See* Government's Answer to Final Brief at 35–39, United States v. Yslava, 18 M.J. 670 (A.C.M.R. 1984) (No. 50,410), *set aside by* 23 M.J. 159 (C.M.A. 1986). "The principal concern of the witnesses at the congressional hearings on the proposed Uniform Code of Military Justice was the potential for abuse by convening authorities of their considerable power over [jurors'] careers in order to influence the outcome of a court-martial." *Id.* at 35.

104. *Littrice*, 3 C.M.A. at 491–95.

105. *Id.*

106. *E.g.*, Major James T. Hill, *Achieving Transparency in the Military Panel Selection Process with the Preselection Method*, 205 MIL. L. REV. 117, 127 (2010). One proposed alternative is the random selection of jurors. *See id.*; THE HONORABLE WALTER T. COX III ET AL., NAT'L INST. OF MILITARY JUSTICE, REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE 7 (2001), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Cox-Commission-Report-2001.pdf.

107. *See* United States v. Gleason, 43 M.J. 69, 73–75 (C.A.A.F. 1995); United States v. Singleton, 41 M.J. 200, 204–07 (C.M.A. 1994).

108. United States v. Levite, 25 M.J. 334, 335–36 (C.M.A. 1987).

109. *Id.* at 340.

not be explicit. In another case, the commander—by calling the defense counsel the enemy, placing the defendant in pretrial confinement, and authorizing unexplained inspections of the barracks—created a "chilling effect" on witnesses who were contemplating testifying on behalf of the defendant.[110] Commanders can also improperly influence defense counsel or judges in their official capacity as participants in the military justice system.[111]

A commander's intent is not relevant to the analysis of a claim of unlawful command influence. For example, inadvertent actions can equally give rise to violations of Article 37.[112] As a CAAF decision puts it, "when an unlawful act of a commander . . . proximately causes coercion or other unlawful influence upon a case, that case has been tainted by unlawful command influence" even if the commander did not specifically intend that influence upon the case.[113] This feature seems to underscore a focus on procedural protections and the integrity of the system, regardless of a commander's state of mind. In fact, good intentions can lead to a case of improper influence. In one case, a commander gave what he thought were appropriate verbal instructions on sentencing considerations to a large audience.[114] CAAF, in finding an instance of unlawful command influence, nonetheless concluded that some soldiers could have misunderstood the advice, thereby causing potential bias in the defendant's trial.[115]

Command influence can infect trial proceedings even if the commander remains silent and does nothing to promote a particular position. The simple fact that a commander's opinion enters the trial process can create a successful claim of unlawful command influence. In *United States v. Fowle*, the military prosecutor read jurors a Navy commander instruction that discussed separation from the military as an appropriate disposition for larceny cases.[116] There was no evidence that the commander instructed the prosecutor to introduce the evidence.[117] Nevertheless, CAAF found that introduction of this command directive constituted unlawful command

110. *See Gleason*, 43 M.J. at 72–73 (citation omitted).

111. UCMJ art. 37(a); United States v. Lewis, 63 M.J. 405 (C.A.A.F. 2006) (unlawful command influence over military judge); United States v. Dykes, 38 M.J. 270 (C.M.A. 1993) (unlawful command influence over defense counsel).

112. Hollingsworth, *supra* note 81, at 264 n.26.

113. United States v. Jameson, 33 M.J. 669, 673 (N.M.C.C.M.R. 1991).

114. United States v. Treakle, 18 M.J. 646, 649–52 (A.C.M.R. 1984).

115. *Id.* at 650, 658–59.

116. The instruction was a Secretary of Navy Instruction, which would also fall under the purview of Article 37. United States v. Fowle, 7 C.M.A. 349, 350–52 (1956); *see also infra* Part I.B.3.

117. *Fowle*, 7 C.M.A. at 351.

influence because it likely tainted the jury's independent decision-making role after their sentence included a discharge from the military.[118] These cases suggest that unlawful command influence can arise in a variety of ways, and a commander must be vigilant to make sure she doesn't make comments or take actions that could taint a defendant's right to a fair trial.[119]

2. *Commanders Influencing Commanders*

The potential reach of unlawful command influence goes beyond the actions of the specific commander who brings the charges to trial. Commanders themselves can be victims of unlawful command influence by their superior officers. The UCMJ prescribes that "[e]ach commander in the chain of command has independent . . . discretion to dispose of offenses within the limits of that authority."[120] The rationale for this independence centers on the unique nature of military justice and the fact that a putative defendant's specific commander (and not a higher-ranked commander) is presumably in the best position to decide what charges (if any) should be brought and how best to dispose of them in light of keeping good order and discipline within the command.[121] Unlawful command influence jeopardizes this independence in two primary ways. In the first, a superior commander—after her subordinate officially drafts charges against a defendant—coerces the subordinate to withdraw the charges and bring additional charges with the potential for a more severe sentence.[122]

The second way involves plea negotiations. Unlike in the civilian justice system, commanders, not prosecutors, have the sole authority of entering into and approving any pretrial agreement.[123] Military prosecutors serve more as advocates for or advisors to commanders.[124] Improper

118. *Id.* at 351–52. Other court personnel (without explicit direction from a commander) can also improperly influence jurors by introducing command policy into the trial proceeding. *See, e.g.*, United States v. Grady, 15 M.J. 275 (C.M.A. 1983) (defense counsel improperly referred to command drug rehabilitation program during voir dire).

119. *See* Bower, *supra* note 101, at 76.

120. MANUAL FOR COURTS-MARTIAL, *supra* note 68, at R.C.M. 306(a) ("Discussion").

121. *See supra* Part I.A.

122. *See, e.g.*, United States v. Haagenson, 52 M.J. 34 (C.A.A.F. 1999). While a commander could technically commit misconduct by coercing her subordinate to bring more lenient charges—an instance of usurping the latter's independent authority—this would not, as a practical matter, be litigated, because the defendant would not be prejudiced. *See infra* Part I.B.4.

123. Note, *Prosecutorial Power and the Legitimacy of the Military Justice System*, 123 HARV. L. REV. 937, 947–48 (2010) [hereinafter *Prosecutorial Power*]; *see also supra* note 68 and accompanying text.

124. *Prosecutorial Power*, *supra* note 123, at 949.

command influence can arise when superior officers pressure their subordinate commanders to reject or otherwise modify plea deals to the detriment of the defendant.[125]

3. Civilian Leadership and Unlawful Command Influence

Military courts have suggested that civilian leaders may also fall under the purview of Article 37. It would appear that the Secretaries of the respective military branches, the Secretary of Defense, and even the President have the potential to impermissibly influence a court-martial proceeding.[126] Two recent incidents coming out of the current debate on the military's lackluster response to sexual assault highlight this issue.

The first involves a military commander who disapproved or suspended findings of guilt following a court-martial for sexual assault.[127] This outraged many senior leaders and legislators.[128] The Secretary of Defense, Secretary of the Navy, and President all made public statements emphasizing the seriousness of sexual assault and the need to punish those who are found guilty.[129] Defense Secretary Panetta, in 2012, made statements stressing the importance of holding soldiers accountable for this type of conduct.[130] In 2013, President Obama went further and publicly said that anyone found guilty should be "prosecuted, stripped of [his or her] position[], court-martialed, fired, dishonorably discharged. Period."[131] Because Obama serves as the Commander in Chief, his actions led a number of military defense attorneys to raise the specter of unlawful command influence in numerous pending sexual assault courts-martial.[132] One military trial judge in Hawaii found that the President's specific

125. *See, e.g.*, United States v. Villareal, 52 M.J. 27, 30 (C.A.A.F. 1999). A superior commander could also technically contravene this independence by coercing her subordinate commander to modify a plea deal favorable to the defendant. *See supra* note 122.

126. *See, e.g.*, United States v. Fowle, 7 C.M.A. 349, 350–52 (1956).

127. *See* Findings and Conclusions re: Defense Motion to Dismiss for Unlawful Command Influence, United States v. Johnson, N.-M. Trial Judiciary, Haw. Jud. Cir. (June 12, 2013), *available at* http://stripes.com/polopoly_fs/1.225981.1371237097!/menu/standard/file/johnson-uci-ruling.pdf [hereinafter Findings in United States v. Johnson (June 12, 2013)]. Recent changes to the UCMJ have severely narrowed a commander's authority to grant post-trial clemency relief. *See* UCMJ art. 60(c)(2)(B); National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672, 955–57 (codified as amended at 10 U.S.C. § 860(c) (2014)).

128. Findings in United States v. Johnson (June 12, 2013), *supra* note 127, at 1–3.

129. *Id.*

130. *Id.* at 2.

131. *Id.* at 3.

132. *See* Jennifer Steinhauer, *Hagel Tries to Blunt Effect of Obama Words on Sexual Assault Cases*, N.Y. TIMES (Aug. 14, 2013), http://www.nytimes.com/2013/08/15/us/politics/hagel-tries-to-blunt-effect-of-obama-words-on-sex-assault-cases.html?_r=0.

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declaration—unlike the general remarks of the Secretary of Defense—might have improperly influenced the commander in exercising his discretion or could potentially taint prospective jurors.[133] Other trial judges raised similar concerns.[134] In response, Secretary Hagel made the unprecedented move of issuing a curative instruction in an effort to blunt the effect of the President's remarks.[135] He admonished "all military personnel who are involved in any way in the military justice process to exercise their independent and professional judgment" and stated that "each military justice case must be resolved on its own facts."[136]

A more recent incident that received significant press involved a potentially broader reach of unlawful command influence. In a closely watched case, a high-ranking officer was accused of adultery and sexual assault.[137] During plea negotiations, the prosecution sent the commander responsible for bringing the charges a letter outlining the reasons why he should reject the plea offer. One of the stated reasons was the potential political fallout from not prosecuting the senior officer, as members of Congress had been critical of the Pentagon for not doing enough to crack down on sexual assault.[138] The commander thereafter rejected the plea deal. Once the details of the letter surfaced, the trial judge ruled that the commander's decision to reject the plea might have been improperly influenced by political considerations rather than based solely on the facts of the case.[139] The trial judge remanded the case to a different commander, after which a plea deal was finally reached.[140] What makes this case so interesting is the nature of the supposed pressure. It would appear that generalized political pressure—even if not coming from a specific superior commander or civilian leader—can be sufficient to constitute unlawful command influence and undermine a commander's independent discretion.[141]

133. Findings in United States v. Johnson (June 12, 2013), *supra* note 127, at 11–13.

134. *See* Steinhauer, *supra* note 132.

135. *Id.*

136. Commentary, Chuck Hagel, From the Secretary of Defense: The Integrity of the Military Justice Process (Aug. 13, 2013), *archived at* https://perma.cc/J96B-3B3Y.

137. *See* Alan Blinder & Richard A. Oppel, Jr., *Faulting Army, Judge Puts Off Assault Case*, N.Y. TIMES (Mar. 10, 2014), http://www.nytimes.com/2014/03/11/us/judge-in-generals-assault-case-weighs-claim-that-prosecution-was-tainted.html?_r=0.

138. *See id.*

139. *See id.*

140. *See* Jennifer Hlad, *Sinclair Reprimanded, Fined; Case Likely to Reignite Battle Over Military Justice*, STARS & STRIPES (Mar. 20, 2014), http://www.stripes.com/news/army/sinclair-reprimanded-fined-case-likely-to-reignite-battle-over-military-justice-1.273689, *archived at* https://perma.cc/GPK5-TUM5.

141. Unlawful command influence may also occur in the military commission context. *See, e.g.*,

4. Burden of Proof and Prejudice to the Defendant

A defendant can make an allegation of unlawful command influence at any point during trial or on appellate review.[142] Even if not raised for the first time until appeal, the claim is never waived and the burden of proof remains the same.[143] The defendant carries the initial burden of raising an unlawful command issue, but the government carries the ultimate burden of persuasion.[144] Specifically, the defendant must "(1) allege[] sufficient facts which, if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that the unlawful command influence was the proximate cause of that unfairness."[145] Courts require more than mere speculation or allegation to satisfy this burden.[146]

Once an issue has been raised, the burden shifts to the government to prove beyond a reasonable doubt that either there was no unlawful command influence or that such influence did not prejudice the proceeding.[147] When assessing prejudice, courts balance a number of factors, including "the severity of the misconduct, . . . the measures adopted to cure the misconduct, and . . . the weight of the evidence supporting the conviction."[148] The government may satisfy its burden by showing that there was overwhelming evidence of guilt that rebutted any prejudicial effect on the findings.[149] Appellate courts sometimes send parties to an evidentiary hearing to gather evidence upon which they then decide whether the defendant was prejudiced by commander misconduct.[150]

Kyndra Rotunda, *Halting Military Trials in Guantanamo Bay: Can the President Call a Time-Out?*, 19 MICH. ST. J. INT'L L. 95 (2010).

142. Because unlawful command influence cannot be waived, a defendant need not raise the issue until appeal. United States v. Blaylock, 15 M.J. 190, 193–94 (C.M.A. 1983).

143. *See id.* at 193 ("The failure of appellant's defense counsel to contest at trial the manner in which the charges were referred does not preclude appellant from raising this issue on appeal. In view of the policy clearly stated in Article 37, we have never allowed doctrines of waiver to prevent our considering claims of improper command control.").

144. United States v. Biagase, 50 M.J. 143, 150 (C.A.A.F. 1999).

145. United States v. Stombaugh, 40 M.J. 208, 213 (C.M.A. 1994) (internal quotation marks omitted); *see also Biagase*, 50 M.J. at 150.

146. United States v. Johnston, 39 M.J. 242, 244 (C.M.A. 1994). Post-trial affidavits may be sufficient to meet this burden of production. *See* Hollingsworth, *supra* note 81, at 268 n.59.

147. United States v. Simpson, 58 M.J. 368, 373–78 (C.A.A.F. 2003); *Biagase*, 50 M.J. at 151.

148. United States v. Erickson, 65 M.J. 221, 224 (C.A.A.F. 2007) (quoting United States v. Fletcher, 62 M.J. 175, 184 (C.A.A.F. 2005)).

149. *See, e.g.*, United States v. Thomas, 22 M.J. 388, 396–97 (C.M.A. 1986).

150. *See* United States v. DuBay, 37 C.M.R. 411, 412–13 (C.M.A. 1967); Hollingsworth, *supra* note 81, at 268 n.59.

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If the claim is raised at the trial level, the judge has wide discretion in fashioning the remedy.[151] She may give a curative instruction or otherwise restrict the government's ability to present evidence.[152] It is important to note that—unlike the civilian system—a court-martial consists of an adversarial merit and sentencing phase.[153] Defendants are guaranteed a sentencing hearing even if the case is resolved by a pretrial agreement.[154] After a guilty verdict (or a plea), the trier of fact hears aggravation and mitigation evidence and thereafter adjudges an appropriate sentence.[155] Depending on when the unlawful command issue is raised during these two phases, the trial judge can appropriately tailor the remedy.[156]

At the appellate stage, the available remedies are naturally more restrictive.[157] A judge can vacate a finding of guilt if she finds that the defendant's trial was prejudiced by unlawful command influence.[158] Frequently, though, the court is convinced that the merit phase was not tainted and thus focuses on whether the sentencing hearing was compromised.[159] In this situation, a judge may order a re-sentencing or reduce the sentence on her own.[160]

Entering into a plea does not prevent the defendant from raising a claim of unlawful command influence on appeal. The actual plea agreement looks a lot like the one found in the civilian system in that the defendant agrees to plead guilty to certain charges and forgo a trial in exchange for a more lenient sentence and/or charges being reduced or dismissed.[161] However, a military defendant still generally retains her right to an appeal and the ability to raise an unlawful command influence claim at that time.[162]

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151. United States v. Harvey, 64 M.J. 13, 21 (C.A.A.F. 2006).

152. *See Thomas*, 22 M.J. at 399; Hollingsworth, *supra* note 81, at 271–72.

153. *See* MANUAL FOR COURTS-MARTIAL, *supra* note 68, at R.C.M. 1001; *Prosecutorial Power*, *supra* note 123, at 953.

154. MANUAL FOR COURTS-MARTIAL, *supra* note 68, at R.C.M. 705(c)(1)(B).

155. *See supra* note 153 and accompanying text. Assuming a jury trial, the jury also sentences the defendant after hearing the relevant evidence. *See* MANUAL FOR COURTS-MARTIAL, *supra* note 68, at R.C.M. 1005–07. If there is a pretrial agreement, the defendant gets the benefit of the lesser sentence. *Id.* at R.C.M. 910(f)(3); *Prosecutorial Power*, *supra* note 123, at 953.

156. *See, e.g.*, United States v. Sullivan, 26 M.J. 442 (C.M.A. 1988).

157. *See* Hollingsworth, *supra* note 81, at 271–72.

158. United States v. Levite, 25 M.J. 334, 338–39 (C.M.A. 1987).

159. *See* Hollingsworth, *supra* note 81, at 272. In *United States v. Fowle*, for instance, the prosecutor introduced the command directive during the sentencing phase of trial, and thus the remedy focused on the sentencing of the defendant. 7 C.M.A. 349, 351–52 (1956).

160. United States v. Thomas, 22 M.J. 388, 398–99 (C.M.A. 1986).

161. *See* FED. R. CRIM. P. 11(b)(1); MANUAL FOR COURTS-MARTIAL, *supra* note 68, at R.C.M. 705(a)–(b); *Prosecutorial Power*, *supra* note 123, at 950–51.

162. *See* UCMJ art. 66(b) ("The Judge Advocate General shall refer to a Court of Criminal

C. Expansion by Courts to Apparent Unlawful Command Influence

Historically, the issue of public perception was a problem for the military justice system. As previously discussed, prior to the UCMJ, commanders had unfettered discretion with military justice matters, which not only contributed to unjust results but also undermined the public opinion of the system.[163] Indeed, mass protests after World War II helped push Congress into making reforms and passing the UCMJ.[164] Recognizing the need for the perception of justice—not simply actual justice—military courts expanded the unlawful command influence doctrine to include *apparent* unlawful command influence.[165] It turns out that Congress, when it passed the UCMJ, had contemplated the need to address both ends.[166] A member of the congressional hearing stated: "It seems to me that first, you must insure a fair trial, and second, you must maintain a belief in a fair trial . . . ."[167] The first wave of cases interpreting

Appeals the record in each case of trial by court-martial . . . in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more . . . ."); *see also* United States v. Edwards, 58 M.J. 49, 51–53 (C.A.A.F. 2003); MANUAL FOR COURTS-MARTIAL, *supra* note 68, at R.C.M. 705(c)(1)(B) ("A term or condition in a pretrial agreement shall not be enforced if it deprives the accused of . . . the complete and effective exercise of . . . appellate rights."); *id.* at R.C.M. 1110(c) ("No person may . . . induce an accused by force, promises of clemency, or otherwise to waive or withdraw appellate review."). However, a defendant may waive as part of a pretrial agreement unlawful command influence as it relates to the accusatory stage or the period before charges have become official. *See* United States v. Weasler, 43 M.J. 15, 15–16 (C.A.A.F. 1995); Morris, *supra* note 96, at 54. Under this system, defendants can still waive their rights to an appeal as long as it's not part of any plea bargain. *See* UCMJ art. 61. "This process ensures that an accused can waive his appellate review rights only when there is no way for him to get anything in return. Not surprisingly, then, appellate review waivers are exceedingly rare." *See* John F. O'Connor, *Foolish Consistencies and the Appellate Review of Courts-Martial*, 41 AKRON L. REV. 175, 180 (2008).

163. *See supra* Part I.A; *Prosecutorial Power*, *supra* note 123, at 940.

164. *See* Robinson O. Everett, *The 50th Anniversary of the Uniform Code: A Historical Look at Military Justice*, CRIM. JUST., Fall 2001, at 21. The UCMJ was not itself entirely successful in improving the perceptions of the military justice system. Congress followed with other reforms, including the Military Justice Acts of 1968 and 1983. Concomitant with these changes, the respective branches also implemented reforms, including independent chains of command for defense. *See generally* H.F. "Sparky" Gierke, *The Thirty-Fifth Kenneth J. Hodson Lecture on Criminal Law: Reflections on the Past: Continuing to Grow, Willing to Change, and Always Striving to Serve*, 193 MIL. L. REV. 178, 181–95 (2007) (summarizing reforms to the military justice system).

165. *See* Hollingsworth, *supra* note 81, at 264. Military courts have also implemented the doctrine of implied bias, which mandates that a challenge for cause be granted whenever the presence of a certain juror on a panel creates the perception that the proceedings might be unfair. *See, e.g.*, United States v. Briggs, 64 M.J. 285, 286–87 (C.A.A.F. 2007).

166. *See* United States v. Cruz, 20 M.J. 873, 880 (A.C.M.R. 1985), *reversed on other grounds*, 25 M.J. 326 (C.M.A. 1987).

167. *Cruz*, 20 M.J. at 880 (citing *Uniform Code of Military Justice: Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the Comm. on Armed Services*, 81st Cong. 87 (1949) (statement of Arthur E. Farmer, Chairman, Committee on Military Law, War Veterans Bar Association)).

Article 37 quickly followed suit and recognized the value of preserving a positive public perception of the military justice system.[168] Two early CAAF decisions express it in the following way: "[T]he court's actions and deliberations must not only be untainted, but must also avoid the very appearance of impurity. . . . When such an unhappy appearance is present, proper judicial administration often requires reversive action."[169] Further: "A judicial system operates effectively only with public confidence—and, naturally, this trust exists only if there also exists a belief that triers of fact act fairly and without undue influence."[170]

Courts, thus, have adopted a two-part analysis to assess a claim of unlawful command influence.[171] First, they ask whether the proceeding was actually tainted.[172] If the answer is "no," the next inquiry focuses on whether it may appear to have been. Here, the emphasis is on the totality of the circumstances.[173] Courts seek to answer the question "whether a reasonable member of the public, if aware of all the facts, would have a loss of confidence in the military justice system and believe it to be unfair."[174] The term "public" includes both the civilian population and military community.[175] The same burden of proof with assessing actual prejudice applies in the case of apparent unlawful command influence. The government must show beyond a reasonable doubt that the public would not find the proceedings unfair.[176]

Remedies for this type of unlawful command influence violation will naturally be different from a case of actual unlawful command influence. "Since it is the interests of the military justice system rather than those of the appellant which are endangered by the appearance of unlawful command influence, the remedy must relate to the interests of the system rather than those of the appellant."[177] Put differently, the remedy should be logically connected to the public harm and try to restore faith in the system, not target the defendant's particular situation.[178] This can make the specific remedy tricky, particularly at the appellate stage. Courts have issued a wide range of corrective actions, ranging from merely

168. *Id.*
169. United States v. Walters, 16 C.M.R. 191, 204 (C.M.A. 1954).
170. United States v. Navarre, 17 C.M.R. 32, 43 (C.M.A. 1954) (Brosman, J., dissenting).
171. United States v. Lewis, 63 M.J. 405, 413 (C.A.A.F. 2006).
172. *See supra* Part I.B.2.
173. *Cruz*, 20 M.J. at 881.
174. United States v. Allen, 31 M.J. 572, 590 (N.M.C.C.M.R. 1990).
175. *See id.*
176. *Lewis*, 63 M.J. at 415.
177. *Cruz*, 20 M.J. at 889.
178. *See* Hollingsworth, *supra* note 81, at 265–66.

acknowledging the concern in the opinion to vacating the verdict and sentence.[179]

Public statements by commanders outside the courtroom necessarily raise the potential for an appearance of unlawful command influence claim.[180] The previously mentioned controversy surrounding Obama's comments provides a recent example of this problem.[181] There, the Hawaii military trial court decided against ruling on whether the President's statements actually created an instance of unlawful command influence that tainted the proceedings. In fact, the judge was presented with an affidavit from the commander stating that he was fully aware of the President's remarks but nevertheless exercised, and would continue to exercise, his independent judgment during the trial.[182] Without deciding the issue, the court found that, at the very least, the facts raised an appearance of unlawful command influence. It found that a "disinterested and informed member of the public observing this case would believe that the Commander-in-Chief's statements about the military are significant to [a commander who brings charges against a defendant]."[183] Specifically, a member of the public would draw a connection between the President's comments about a dishonorable discharge and any resulting approval of such a sentence by the commander.[184] Because Obama's statement targeted the sentencing and not the merits phase, the court's remedy focused on this part of the trial. It ruled, as a prophylactic measure, that any punitive discharge adjudged by the jury in that case would be vacated after trial.[185]

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179. *See* United States v. Salyer, 72 M.J. 415, 428 (C.A.A.F. 2013) (finding dismissal of charges the appropriate remedy for apparent unlawful command influence due to forced recusal of military judge); *Lewis*, 63 M.J. at 416 (same); *Cruz*, 20 M.J. at 891 (finding public disclosure of appearance of impropriety in opinion sufficient to restore confidence); United States v. Sullivan, NMCCA 200800774, 2009 WL 2151157, at *7 (N-M. Ct. Crim. App. July 14, 2009) (finding that trial judge's ruling that commander's attorney advisor could no longer be part of proceeding was sufficient to remedy apparent unlawful command influence, and no further remedy was required).

180. United States v. Simpson, 58 M.J. 368, 374–75 (C.A.A.F. 2003).

181. *See supra* Part I.B.3.

182. Findings in United States v. Johnson (June 12, 2013), *supra* note 127, at 12.

183. *Id.*

184. *Id.*

185. *Id.* at 13–14. One could reasonably argue that this case is an overuse of the unlawful command influence doctrine, particularly where the commander stated that he was not affected by the President's remark. Any prophylactic measure certainly runs this risk. In any case, the purpose of this Article is not to critically evaluate the application of the doctrine, but rather to explain its overall use within the military justice system.

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II. THE (SEPARATE) CASE OF PROSECUTORIAL MISCONDUCT

A. Civilian Prosecutors vs. Military Prosecutors

Misconduct by civilian prosecutors may be more familiar to readers. The Supreme Court describes the term as "overstep[ping] the bounds of . . . fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense."[186] The aim here—not unlike in the military system—is to protect the due process rights of defendants.[187] Though not exhaustive, prosecutorial misconduct can include a host of conduct, such as withholding favorable evidence from the defense,[188] presenting false or improper evidence,[189] making improper or inflammatory remarks to the jury,[190] or preventing or otherwise interfering with witness testimony.[191] All of these actions would also constitute unlawful command influence if associated with commander misconduct.[192]

Now admittedly, each type of misconduct may sweep more broadly than its counterpart in certain areas. Outside the courtroom, for example, there are probably more ways a commander can commit unlawful command influence than a civilian prosecutor can commit prosecutorial misconduct.[193] This shouldn't be surprising given the broader

186. Berger v. United States, 295 U.S. 78, 84 (1935); *see also generally* Paul J. Spiegelman, *Prosecutorial Misconduct in Closing Argument: The Role of Intent in Appellate Review*, 1 J. APP. PRAC. & PROCESS 115 (1999) (collecting cases and instances of prosecutorial misconduct).

187. *See* Darden v. Wainwright, 477 U.S. 168, 181 (1986) (citation omitted) ("[I]t 'is not enough that the prosecutors' remarks were undesirable or even universally condemned.' The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'"); United States v. Rodriguez-Rivera, 63 M.J. 372, 378 (C.A.A.F. 2006).

188. *E.g.*, United States v. Agurs, 427 U.S. 97 (1976).

189. *E.g.*, Napue v. Illinois, 360 U.S. 264, 269 (1959).

190. *E.g.*, United States v. Martinez-Medina, 279 F.3d 105, 118–19 (1st Cir. 2002) (making inflammatory remarks to the jury about defendant by appealing to jury's emotions and its role as the conscience of the community); Gall v. Parker, 231 F.3d 265, 312 (6th Cir. 2000) (making improper remarks to jury about defense witness); United States v. Friedman, 909 F.2d 705, 708–10 (2d Cir. 1990) (making disparaging remarks to jury about defense counsel).

191. *E.g.*, United States v. Lord, 711 F.2d 887 (9th Cir. 1983) (pressuring witness not to testify at trial); United States v. Morrison, 535 F.2d 223 (3d Cir. 1976) (intimidating witness not to testify).

192. A commander's withholding exculpatory physical evidence would certainly constitute unlawful command influence as described herein, though the relevant cases on the doctrine typically deal with preventing favorable witness testimony. *See supra* Part I.B. The case of a commander's withholding physical evidence would also likely trigger disclosure obligations on the part of the military prosecutor given the commander's obvious connection to the investigation. *See generally infra* note 207 and accompanying text.

193. *See supra* notes 83–91 and accompanying text; Parts I.B.2–3, I.C. Of course, civilian prosecutorial misconduct does not necessarily have to involve improper conduct only in the courtroom; it can occur by coercing a witness or otherwise withholding favorable evidence from

responsibility of a commander as a leader of troops and someone who can communicate legally binding orders to her subordinates.[194] On the other hand, because a commander is not trying the case, there are more ways a civilian prosecutor can commit misconduct through trial errors and other related matters (e.g., improper statements to juries or presenting false evidence).[195] Regardless of the potential reach of each doctrine, however, the fact remains that both doctrines are concerned with assuring a fair and impartial trial.[196]

Military prosecutors serve a more limited role than their civilian counterparts. They do not have the same discretionary authority in bringing charges or approving plea agreements.[197] They are more aptly described as advocates for commanders who make the ultimate decisions on these issues.[198] Still, military prosecutors can advise commanders on what charges (if any) to bring and counsel them on plea agreements.[199] Perhaps most importantly, these attorneys are the ones actually prosecuting the case—they conduct voir dire, present evidence and testimony, and make opening and closing arguments.[200] With this power also comes the potential for misconduct.[201] Like civilian prosecutors, military prosecutors too can coerce witnesses, withhold evidence, or make improper statements at trial.[202] CAAF describes prosecutorial misconduct as "action or inaction by a [military] prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual [for Courts-Martial] rule, or an applicable professional ethics canon."[203]

Military prosecutorial misconduct would seemingly fall under the purview of Article 37. The statute does not distinguish between

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coming into trial. These actions would all be behind the scenes. *See infra* note 202 and accompanying text.

194. *See supra* Part I.A. Failure to obey a lawful order is punishable under the UCMJ. UCMJ art. 92 ("Failure to Obey Order or Regulation").

195. This doesn't mean unlawful command influence cannot be interjected at trial. *See supra* notes 116–19 and accompanying text.

196. *Compare* cases cited *supra* notes 187–91, *with* cases cited *supra* Part I.B.1.

197. *See supra* Part I.B.

198. *See Prosecutorial Power*, *supra* note 123, at 948.

199. *See, e.g.*, Richard B. Cole, *Prosecutorial Discretion in the Military Justice System: Is It Time for a Change?*, 19 AM. J. CRIM. L. 395, 409 (1992).

200. *See* UCMJ art. 38.

201. *See* Captain William J. Kilgallin, *Prosecutorial Power, Abuse, and Misconduct*, THE ARMY LAW., Apr. 1987, at 19, 19–23 (arguing that even though a military prosecutor has limited authority compared with her civilian counterpart, the exercise of the authority provides ample opportunity for misconduct).

202. *See id.*

203. United States v. Rodriguez-Rivera, 63 M.J. 372, 378 (C.A.A.F. 2006) (quoting United States v. Meek, 44 M.J. 1, 5 (C.A.A.F. 1996)) (internal quotation marks omitted).

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commanders and prosecutors, nor does it restrict the type of prohibited conduct. The second sentence of the Article explicitly states that "[n]o person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case."[204] Military prosecutors—because of their status as soldiers—are persons subject to the UCMJ, and the pertinent language would include misconduct relating to their responsibilities, since that conduct can also interfere with the administration of justice.[205] Military courts have also explicitly referred to military prosecutorial misconduct as a subset of unlawful command influence or otherwise associated the two terms.[206]

All of this would suggest that military prosecutorial misconduct should be treated in the same way as unlawful command influence using the same standard. But that's not what military courts have done. Instead, they have adopted the more lenient civilian prosecutorial misconduct standard when assessing actions by military prosecutors.[207]

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204. UCMJ art. 37(a).

205. *See* UCMJ arts. 1–2(a).

206. United States v. Thomas, 22 M.J. 388, 393–94 (C.M.A. 1986); United States v. Bruci, 52 M.J. 750, 752 (N-M. Ct. Crim. App. 2000) ("In his first assignment of error, the appellant claims he was the victim of 'unlawful command influence' arising from alleged prosecutorial misconduct . . . ."); United States v. Argo, No. ACM 30830, 1995 WL 686904, at *2 (A.F. Ct. Crim. App. Oct. 27, 1995) (quoting *Thomas*, 22 M.J. at 393) ("'Unlawful command influence' is treated as a subset of 'prosecutorial misconduct.'"); United States v. Smith, 33 M.J. 527, 534 (A.F.C.M.R. 1991) (discussing prosecutor's action as either prosecutorial misconduct or unlawful command influence).

207. *See infra* Part II.B. That said, it appears that the military imposes a heavier burden on the government when the misconduct relates to the disclosure of evidence. *See* United States v. Coleman, 72 M.J. 184 (C.A.A.F. 2013) (finding a heavier burden for government than in a civilian case where defense made a specific request for undisclosed information); United States v. Green, 37 M.J. 88, 90 (C.M.A. 1993) (quoting United States v. Eshalomi, 23 M.J. 12, 24 (C.M.A. 1986)) (internal quotation marks omitted) ("We have considered that, in the military, there may be a heavier burden on the Government than that imposed upon civilian prosecutors to sustain a conviction when evidence has been withheld from an accused."); Captain Elizabeth Cameron Hernandez & Captain Jason M. Ferguson, *The Brady Bunch: An Examination of Disclosure Obligations in the Civilian Federal and Military Justice Systems*, 67 A.F. L. REV. 187, 199 (2011) (footnote omitted) ("[T]he military prosecutor [compared with civilian prosecutor] may face a heavier burden to uphold a conviction if discoverable evidence has been withheld. This incredibly high standard embodied in the [reasonable probability standard] does not have a civilian counterpart; rather, it is a reflection of the expansive military discovery rights under Article 46, UCMJ."). *Compare* UCMJ art. 46, *with* FED. R. CRIM. P. 16. In both systems, these disclosure obligations would generally apply to files within the custody of the prosecutor as well as other government agencies (e.g., police departments) that are closely connected to the investigation of the defendant. *See, e.g.*, Kyles v. Whitley, 514 U.S. 419, 437–38 (1995); United States v. Williams, 50 M.J. 436, 440–41 (C.A.A.F. 1999).

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B. The More Deferential Civilian Standard

During the early part of American history, civilian prosecutors were actually appointed by the court or the governor and, in turn, had little independence or discretion.[208] Not unlike military prosecutors who consult with commanders, these early public prosecutors were also required to consult with the court or the governor before making decisions.[209] During the mid-Nineteenth Century, this model changed, and state prosecutors became elected officials with wide discretion and accountability to the public only.[210] The system of federal prosecutors evolved differently. The Judiciary Act of 1789 created the office of the Attorney General as well as individual district attorneys to prosecute in their respective territories.[211] It was not until the mid-Nineteenth Century that these attorneys came under the supervision of the Attorney General.[212] The checks and balances system was intended to ensure proper prosecutorial functions.[213] Courts and legislators became the primary means of curbing prosecutorial misconduct.[214]

In making a successful civilian or military prosecutorial misconduct claim, prejudice remains the key inquiry for courts, no different than with a claim of unlawful command influence.[215] The relevant inquiry similarly focuses on whether the conduct impacted the verdict and specifically the severity of the misconduct, the strength of the evidence of guilt, and any curative instructions.[216] However, beyond this shared substantive baseline,

208. *See* Davis, *supra* note 97, at 449–50 ("Before the American Revolution, the crime victim maintained sole responsibly for apprehending and prosecuting the criminal suspect.").

209. *See id.*

210. *Id.* at 450–51.

211. Judiciary Act of 1789, ch. 20, 1 Stat. 73, 92–93; Davis, *supra* note 97, at 451.

212. Davis, *supra* note 97, at 451.

213. *See id.*

214. Scholars have found that this system has not done enough, either at the state or federal level. *Id.* at 453; *see also infra* Part II.C.

215. Chapman v. California, 386 U.S. 18 (1967); Hein v. Sullivan, 601 F.3d 897, 905 & n.4 (9th Cir. 2010); United States v. Hornback, 73 M.J. 155, 160 (C.A.A.F. 2014).

216. *Compare* United States v. Kasenge, 660 F.3d 537, 542 (1st Cir. 2011) (noting these factors), *with Hornback*, 73 M.J. at 160 (noting same factors). *See also* United States v. Warfield, 97 F.3d 1014, 1028 (8th Cir. 1996); United States v. Hall, 47 F.3d 1091, 1098 (11th Cir. 1995); United States v. Edelin, 996 F.2d 1238, 1243 (D.C. Cir. 1993). Most types of prosecutorial misconduct do not result in reversal. *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279 (1991). A narrow group of errors, however, called structural errors, or those errors that affect the integrity of the trial, are typically considered harmful or prejudicial *per se*. These can include: (1) complete denial of counsel; (2) a biased trial judge; (3) racial discrimination in selection of a grand jury; (4) denial of self-representation at trial; (5) denial of a public trial; or (6) a defective reasonable doubt instruction. *See* Neder v. United States, 527 U.S. 1, 8 (1999); United States v. McMurrin, 70 M.J. 15, 19 (C.A.A.F. 2011) (citing *Neder* in stating that structural errors are *per se* harmful but that these errors are found in only a limited number

the prosecutorial misconduct standard (as applied in the military and civilian system) diverges in a number of ways from the unlawful command influence standard. The following sections highlight four key differences: the role of intent, the lack of an appearance of impropriety test, the varying burdens of proof, and the use of appellate waivers in the civilian system.

1. The Role of Intent and the Lack of Appearance of Impropriety

While the Supreme Court has emphatically said that bad faith is not required in a case of suppression of favorable evidence, whether intent is relevant in other instances of prosecutorial misconduct (e.g., improper arguments to jury, introduction of false evidence) remains an open question in federal courts.[217] Some circuits do incorporate intent (i.e., was the action deliberate or inadvertent?) along with the aforementioned elements when assessing prejudice,[218] while other circuits simply focus on the impact of the conduct.[219] When it comes to military prosecutorial misconduct claims, courts follow the former circuits and incorporate intent.[220]

This focus on intent or bad faith in certain cases is in sharp contrast to claims of unlawful command influence, in which a commander's state of mind is never relevant.[221] A successful instance of unlawful command influence, in fact, may arise in situations where a commander acted in good faith or not at all.[222] This difference highlights the contrasting nature

of cases); Joshua A.T. Fairfield, *To Err Is Human: The Judicial Conundrum of Curing* Apprendi *Error*, 55 BAYLOR L. REV. 889 (2003) (discussing structural errors and automatic finding of error).

217. *See* Miller v. Pate, 386 U.S. 1 (1967) (ruling that knowing use of false evidence violates due process without much explanation as to why knowledge was significant); Brady v. Maryland, 373 U.S. 83 (1963) (intent not relevant in case of suppression of evidence); Spiegelman, *supra* note 186, at 130 (discussing role of intent in misconduct claims such as improper arguments to jury or introduction of false evidence and finding that this remains an open question).

218. *See, e.g.*, United States v. Wilson, 135 F.3d 291, 299 (4th Cir. 1998); United States v. Carroll, 26 F.3d 1380, 1385–86 (6th Cir. 1994); United States v. Brown, 938 F.2d 1482, 1489 (1st Cir. 1991).

219. *See, e.g.*, United States v. Cotnam, 88 F.3d 487, 498 (7th Cir. 1996); United States v. Zehrbach, 47 F.3d 1252, 1265 (3d Cir. 1995); United States v. Edelin, 996 F.2d 1238, 1243 (D.C. Cir. 1993); United States v. Lonedog, 929 F.2d 568, 572 (10th Cir. 1991); United States v. Anchondo-Sandoval, 910 F.2d 1234, 1237 (5th Cir. 1990); United States v. Friedman, 909 F.2d 705, 709 (2d Cir. 1990); United States v. Hernandez, 779 F.2d 456, 460 (8th Cir. 1985).

220. *See, e.g.*, United States v. Grandy, 11 M.J. 270, 275 (C.M.A. 1981); United States v. Rushatz, 30 M.J. 525, 537 (A.C.M.R. 1990); United States v. Goodyear, 14 M.J. 567, 570 (N.M.C.M.R. 1982). *But see* United States v. Williams, 47 M.J. 621, 625 (A. Ct. Crim. App. 1997) (intent not relevant in prosecutorial misconduct claim based on *Brady* violation).

221. *See supra* Part I.A.

222. *See supra* notes 114, 116 and accompanying text.

of how the misconduct is conceptualized. Individual agency seems to be part and parcel of most prosecutorial misconduct claims, which explains why a prosecutor's state of mind would be relevant. On the other hand, the military seems to care only about whether the act impacted the integrity of the trial, which explains why a commander's personal motivations are not important.

Another key difference centers on the role of the appearance of impropriety when assessing misconduct claims. Civilian and military courts alike require that prosecutorial misconduct actually interfere with the defendant's rights or otherwise impact the verdict. The appearance of impropriety—however egregious—is not sufficient to warrant any relief.[223] As one civilian court explains, "appearance of impropriety does not undercut personal rights. And unless an error affects substantial rights, it is not a basis of reversal."[224]

2. *Shifting Burdens of Proof*

Unlike the case of unlawful command influence, the burden of proof for showing prosecutorial misconduct on appeal can change depending on the defendant's conduct.[225] There are two basic scenarios. First, if the defendant raises the issue at trial or the misconduct relates to constitutional errors such as withholding favorable evidence or presenting false testimony, the appellate court reviews the conduct under the harmless

223. Dick v. Scroggy, 882 F.2d 192, 199 (6th Cir. 1989) (Celebrezze, J., concurring) (finding appearance of prosecutorial impropriety insufficient to overturn criminal conviction in the absence of actual prosecutorial misconduct); United States v. McDade, Crim. A. No. 92-249, 1992 WL 187036, at *4 (E.D. Pa. July 30, 1992) (finding that appearance of impropriety by prosecutor's conduct must prejudice the defendant for relief to be granted); *cf.* United States v. Washington, 797 F.2d 1461, 1466 (9th Cir. 1986) ("We have grave doubts whether an appearance of impropriety would ever create a sufficiently serious threat to public confidence in the integrity of the judicial process to justify overriding Sixth Amendment rights."); Bd. of Educ. v. Nyquist, 590 F.2d 1241, 1247 (2d Cir. 1979) (noting that when no claim is made that trial will be tainted, "appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases"); United States v. Rodriguez-Rivera, 63 M.J. 372, 378 (C.A.A.F. 2006) (holding that prejudice is required for a successful claim of military prosecutorial misconduct).

224. United States v. Murphy, 768 F.2d 1518, 1540 (7th Cir. 1985) (citing 28 U.S.C. § 2111).

225. *See* United States v. Olano, 507 U.S. 725, 734 (1993). At the trial level, the burden is typically on the defendant if she makes a motion for mistrial based on prosecutorial misconduct, though courts often give curative instructions that are intended to neutralize any potential prejudice. *See generally* United States v. Walker, 922 F. Supp. 732 (N.D.N.Y. 1996) (discussing how defendant carries burden on various criminal motions); Scott W. Bell, *Prosecutorial Misconduct*, 88 GEO. L.J. 1408, 1409 n.1746 (2000) (collecting cases); William S. McAninch, *Unfolding the Law of Double Jeopardy*, 44 S.C. L. REV. 411, 492 (1993) (noting that the defendant makes a mistrial motion at his own risk).

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error standard, very similar to unlawful command influence claims.[226] Here, too, the government—after the defendant has made some initial showing that the misconduct affected the fairness of the trial—must show that the conduct did not prejudice the defendant's rights or otherwise adversely impact the proceeding such that there is no confidence in the verdict.[227]

In a second category are those prosecutorial errors made during trial that the defendant fails to raise at that time. On appeal, courts review the conduct for plain error.[228] Because the defendant waived the issue, she carries the burden of showing that the conduct prejudiced her trial.[229] At that point, an appellate court can correct the error if it seriously undermined the fairness or integrity of the judicial proceeding.[230] The end result of the latter inquiry turns out be a more deferential standard for the government than the harmless error standard, making remedial relief less likely.[231] This setup puts greater burden on the defense counsel to raise this claim during the trial process.

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226. *See* FED. R. CRIM. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."); Neder v. United States, 527 U.S. 1, 8–10 (1999) (discussing harmless error standard for constitutional and trial errors); Kotteakos v. United States, 328 U.S. 750, 765 (1946) (discussing nonconstitutional errors and harmless error standard); Brecht v. Abrahamson, 507 U.S. 619, 629–31 (1993) (discussing origins of harmless error test); United States v. Erickson, 65 M.J. 221, 224 (C.A.A.F. 2007); Anne Bowen Poulin, *Tests for Harm in Criminal Cases: A Fix for Blurred Lines*, 17 U. PA. J. CONST. L. 991, 1005–07 (2015) (discussing harmless error standard for constitutional and nonconstitutional errors). A select group of constitutional errors are harmful *per se*. *See supra* note 216.

227. United States v. Bagley, 473 U.S. 667, 678 (1985) (holding that to establish due process violation, defendant must first show materiality of undisclosed evidence or false testimony or that misconduct impacted trial result); *Kotteakos*, 328 U.S. at 765 (noting that the government bears the burden of showing that nonconstitutional trial error was harmless); Chapman v. California, 386 U.S. 18, 24 (1967) (noting that the government bears the burden of persuasion to show beyond reasonable doubt that constitutional error was harmless); United States v. Seschillie, 310 F.3d 1208, 1214–15 (9th Cir. 2002) (noting that the defendant must make some showing of prejudice for nonconstitutional trial error, but the government bears ultimate burden of persuasion); *see also* Poulin, *supra* note 226 (discussing burden of proof on prosecutorial misconduct errors, both constitutional and nonconstitutional).

228. FED. R. CRIM. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."); United States v. Taylor, 514 F.3d 1092, 1095–96 (10th Cir. 2008) (noting that defendant's failing to object to prosecutorial misconduct at trial results in plain error analysis); Poulin, *supra* note 226, at 999–1000.

229. Jones v. United States, 527 U.S. 373, 394–95 (1999); United States v. Olano, 507 U.S. 725, 734, 736 (1993).

230. Johnson v. United States, 520 U.S. 461, 466–67 (1997).

231. *See* Fairfield, *supra* note 216, at 895–96 (footnote omitted) ("In sum, if a defendant raises his objection at trial, on review, he will benefit from a more lenient standard of review. Under harmless error review, the prosecution bears the burden of persuasion, and an error will be reversed unless the reviewing court finds the error harmless beyond a reasonable doubt and that the defendant's substantial rights were not affected by the error.").

The same sliding scale burden of proof applies in cases of military prosecutorial misconduct and trial errors. The key to how appellate courts review errors is whether the defendant objected at trial.[232] In one Air Force case, where the defendant was convicted of possession of child pornography, the prosecutor made improper and inflammatory remarks during closing argument: he called the defendant a "sex troll" and a "perverted Peter Pan," and asked the jury to put themselves in the victim's shoes, mischaracterizing the evidence against the defendant, among other things.[233] Because the defense attorney did not object at that time, the Air Force appellate court reviewed the misconduct for plain error. It found that the defendant did not carry his burden in showing that the cumulative effect of the statements prejudiced the defendant against the overwhelming evidence of conviction.[234]

3. *Appellate Waivers of Civilian Prosecutorial Misconduct Claims*

Civilian prosecutorial misconduct is treated differently than both unlawful command influence and military prosecutorial misconduct in the context of plea negotiations. Civilian defendants can waive their right to an appeal in a plea agreement—something not allowed in the military.[235] The ability of a defendant to waive appellate review is an important facet of the civilian model, since nearly all federal cases are resolved through a plea agreement.[236] These appellate waivers in fact also often explicitly include waiving any claims of prosecutorial misconduct.[237] The end result is an agreement that very often insulates any misconduct from appellate

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232. *See* United States v. Halpin, 71 M.J. 477, 479 (C.A.A.F. 2013) (placing the burden of proof on the defendant to establish that prosecutor's remarks at sentencing were plain error because defendant did not object at trial); United States v. Mason, 59 M.J. 416 (C.A.A.F. 2004) (placing the burden of proof on the government to establish beyond a reasonable doubt that prosecutor's improper remarks regarding evidentiary standard were harmless error because the defendant objected at trial level); United States v. Chapa, 57 M.J. 140, 143 (C.A.A.F. 2002) (same). Of course, constitutional errors, similar to the civilian system, are reviewed under the harmless error standard. *See* United States v. Coleman, 72 M.J. 184, 186–87 (C.A.A.F. 2013).

233. United States v. Piolunek, 72 M.J. 830, 840–41 (A.F. Ct. Crim. App. 2013).

234. *Id.* at 841–42.

235. *See* FED. R. CRIM. P. 11(b)(1)(N). It would appear nearly all circuits allow a defendant to waive appellate or collateral review of a conviction as long as the waiver is deemed voluntary and knowing. *See* Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 223–24 (2005).

236. Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.").

237. Andrew Dean, Comment, *Challenging Appeal Waivers*, 61 BUFF. L. REV. 1191, 1221 (2013); King & O'Neill, *supra* note 235, at 246.

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review.[238] It is no surprise that scholars have argued against enforcement of such appeal waivers.[239] Defendants may potentially overcome these waivers, but only in very limited circumstances.[240]

Military courts treat unlawful command influence and military prosecutorial misconduct in the same way when it comes to plea agreements. Because soldiers have a right to appeal even if they enter into a plea agreement, they can raise either of these claims at that time.[241]

C. The Chronic Problem of Civilian Prosecutorial Misconduct

One cannot have a discussion about prosecutorial misconduct without discussing how pernicious the problem appears to be in the civilian system. Various accounts suggest that prosecutorial misconduct is rampant in criminal trials, but little has been done to curtail the problem.[242] This

238. *See* Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1061 n.2 (2009) ("Because most criminal cases are resolved by plea bargains and not subject to appeal, there is often little opportunity to discover prosecutorial misconduct."); King & O'Neill, *supra* note 235, at 245–46; Alexandra W. Reimelt, *An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal*, 51 B.C. L. REV. 871, 887 (2010).

239. Dean, *supra* note 237, at 1226–27 ("Commentators have suggested three additional solutions to the appeal waiver dilemma: (1) the courts could use their discretion and refuse to honor plea agreements containing an appeal waiver; (2) Congress could 'prohibit appeal waivers entirely'; or (3) the risk of going to trial could be reduced to discourage defendants from accepting plea agreements."); King & O'Neill, *supra* note 235, at 221–23 (putting debate about appeal waivers into historical context).

240. Courts have voided these waivers in narrow instances involving a miscarriage of justice or if the waiver itself was not voluntary and knowing. *See, e.g.*, United States v. Mezzanatto, 513 U.S. 196, 202, 210 (1995) (discussing presumption of waivability in plea agreements and need for some affirmative indication that agreement was entered into unknowingly and involuntarily); United States v. Smith, 413 F.3d 778, 780 (8th Cir. 2005) (noting that valid plea agreement and appellate waiver must be entered into knowingly and voluntarily); United States v. Andis, 333 F.3d 886, 891 (8th Cir. 2003) (explaining the various factors in miscarriage of justice and concluding that "[a]lthough we have not provided an exhaustive list of the circumstances that might constitute a miscarriage of justice, we recognize that these [appellate] waivers are contractual agreements between a defendant and the Government and should not be easily voided by the courts. As such, we caution that this exception is a narrow one and will not be allowed to swallow the general rule that waivers of appellate rights are valid."); *see also* Samuel R. Wiseman, *Waiving Innocence*, 96 MINN. L. REV. 952, 972–73 (2012).

241. *See supra* note 162 and accompanying text; *see also, e.g.*, United States v. Rivera, 46 M.J. 52, 53–54 (C.A.A.F. 1997) (distinguishing certain evidentiary or procedural rules that can be waived from those fundamental rights that cannot be waived); United States v. Bruci, 52 M.J. 750 (N-M. Ct. Crim. App. 2000). This result is further bolstered by the fact that military courts typically characterize prosecutorial misconduct as a subset of unlawful command influence. *See supra* note 206 and accompanying text.

242. Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 631 (1972); James E. Coleman, Jr. et al., *The Phases and Faces of the Duke Lacrosse Controversy: A Conversation*, 19 SETON HALL J. SPORTS & ENT. L. 181, 199 (2009) (citing a Center for Public Integrity study that found rampant prosecutorial misconduct over a thirty-year period and that courts typically do not find misconduct because of the harmless error standard); Alexandra White

kind of behavior no doubt undermines public confidence in the civilian justice system.[243]

The motivation for this type of overreach may be the result of a prosecutor's dual role as an officer of the court and advocate for the government. As an officer of the court, a prosecutor must make sure that only the guilty go to jail, but, as a participant in the adversarial system, she is also expected to zealously advocate on behalf of the government.[244] This advocacy obligation and desire to win cases can lead a prosecutor astray from her broader obligation of promoting justice.[245]

The problem seems to be that the civilian system is not able to sufficiently deter overreach by prosecutors. One of the issues is lack of punishment for these individuals—either through ethical bodies or civil suits.[246] By some estimates, prosecutorial misconduct is punished in less

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Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SURV. AM. L. 45, 46 (2005) (noting that prosecutorial misconduct has tripled in the last decade, according to the Department of Justice); Mark Curriden, *Harmless Error? New Study Claims Prosecutorial Misconduct Is Rampant in California*, A.B.A. J., Dec. 2010, at 18, 18–19 (discussing a study by the Northern California Innocence Project at Santa Clara University School of Law that evaluated the prevalence of prosecutorial misconduct in California and concluded that "prosecutorial misconduct in the nation's most populous state continues to be a problem, and that prosecutors are seldom held accountable for [that] misconduct"); Editorial Board, *Rampant Prosecutorial Misconduct*, N.Y. TIMES (Jan. 4, 2014), http://www.nytimes.com/2014/01/05/opinion/sunday/rampant-prosecutorial-misconduct.html?_r=2; *An Epidemic of Prosecutor Misconduct* 4–5 (Ctr. for Prosecutor Integrity White Paper), *available at* http://www.prosecutorintegrity.org/wp-content/uploads/EpidemicofProsecutorMisconduct.pdf (citing scholars and public opinion as to the potentially widespread instances of prosecutorial misconduct); Sidney Powell, *Breaking: Ninth Circuit Panel Suggests Perjury Prosecution for Lying Prosecutors*, N.Y. OBSERVER (Jan. 1, 2015, 10:26 PM), http://observer.com/2015/01/breaking-ninth-circuit-panel-suggests-perjury-prosecution-for-lying-prosecutors/#ixzz3PZYIpbuf, *archived at* https://perma.cc/N87G-893Y. *But see* Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 832 n.451 (1999) (arguing that misconduct itself may not be as widespread as some scholars think).

243. *See, e.g.*, Roberta K. Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 MO. L. REV. 699, 700 (1998).

244. *See* United States v. Francis, 170 F.3d 546, 553 (6th Cir. 1999) (explaining that prosecutors must be both protectors of fairness and zealous advocates for the government); United States v. Wilson, 149 F.3d 1298, 1303 (11th Cir. 1998) (same); Ross Galin, Note, *Above the Law: The Prosecutor's Duty to Seek Justice and the Performance of Substantial Assistance Agreements*, 68 FORDHAM L. REV. 1245, 1267–68 (2000) ("Many courts and legal scholars view the role of the prosecutor as having two separate, yet equal parts: a duty to convict the guilty and a duty to seek justice.").

245. *See, e.g.*, Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475 (2006); The Editors, *When Prosecutors Step Over the Line*, N.Y. TIMES (Apr. 1, 2009, 4:34 PM), http://roomfordebate.blogs.nytimes.com/2009/04/01/when-prosecutors-step-over-the-line/ (David Alan Sklansky on "Divided Roles and Allegiances"); Burke E. Strunsky, *Why Good Prosecutors Do Bad Things: Pending California Legislation on Prosecutorial Misconduct*, HUFFINGTON POST (Nov. 22, 2014), http://www.huffingtonpost.com/burke-e-strunsky/why-good-prosecutors-do-b_b_5855684.html, *archived at* https://perma.cc/5YCY-GMQD.

246. Henning, *supra* note 242, at 829 (citing scholars who found that few prosecutors are sanctioned by disciplinary authorities); Sonja B. Starr, *Sentence Reduction as a Remedy for*

than two percent of cases.[247] The other contributing factor, and the primary focus of this Article, is the deferential standard appellate courts use in assessing this type of misconduct during a defendant's appeal. Reversal is rare, and the standard allows many instances of misconduct to go unchecked.[248] As Professor Adam Gershowitz states, "even when defendants can point to a constitutional violation, they still must face the difficult task of pointing to identifiable prejudice they have suffered because of the violation."[249] Professor Bennett Gershman finds that this deferential standard has "unleash[ed] prosecutors from the restraining threat of appellate reversal" and that as a result, "many defendants have had their convictions affirmed despite clear prosecutorial overreaching."[250]

Even judges have weighed in on the issue. Judge Alex Kozinski, in a recent dissent, chastised the majority for upholding a conviction where the prosecutor intentionally withheld evidence that undermined the testimony of a key government forensic scientist.[251] He found that the evidence of guilt was otherwise not overwhelming and that this action was "not just wrong, [but] dangerously broad, carrying far-reaching implications for the administration of criminal justice."[252] The case, according to Kozinski, effectively tells prosecutors that they can withhold exculpatory evidence as long as it's "possible the defendant would've been convicted

Prosecutorial Misconduct, 97 GEO. L.J. 1509, 1517 (2009). Prosecutors currently enjoy absolute immunity from civil actions even if their conduct was intentional or malicious. *See* Connick v. Thompson, 563 U.S. 51 (2011); Kalina v. Fletcher, 522 U.S. 118, 127–29 (1997); Imbler v. Pachtman, 424 U.S. 409, 428–29 (1976). Prosecutors are also rarely criminally prosecuted for such violations. *See* David Keenan et al., *The Myth of Prosecutorial Accountability After* Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 217–18 (2011).

247. *An Epidemic of Prosecutor Misconduct*, *supra* note 242, at 7–8; Editorial Board, *supra* note 242. In the military system, Article 37 violations can carry criminal sanctions, though these types of prosecutions are extremely rare or nonexistent. *See* UCMJ art. 98; Hollingsworth, *supra* note 81, at 273.

248. *See, e.g.*, Alschuler, *supra* note 242, at 631; Henning, *supra* note 242, at 829; Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 48 (1991). Indeed, "[a]s many critics of the harmless error doctrine have observed, prosecutorial misconduct (and other errors) need not be outcome-determinative to cause meaningful harm to the defendant." Starr, *supra* note 17, at 30.

249. Gershowitz, *supra* note 238, at 1066. Gershowitz makes another proposal for stymieing misconduct that suggests the principle of sibility should be imposed on more senior prosecutors in their supervision of junior prosecutors. Geoffrey S. Corn & Adam M. Gershowitz, *Imputed Liability for Supervising Prosecutors: Applying the Military Doctrine of Command Responsibility to Reduce Prosecutorial Misconduct*, 14 BERKELEY J. CRIM. L. 395 (2009).

250. Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 427, 431 (1992); *see also* Carissa Hessick, *Prosecutorial Subornation of Perjury: Is the Fair Justice Agency the Solution We Have Been Looking For?*, 47 S.D. L. REV. 255, 263 (2002).

251. United States v. Olsen, 737 F.3d 625, 626–33 (9th Cir. 2013) (Kozinski, J., dissenting).

252. *Id.* at 630.

anyway."[253] Condoning this type of conduct, he concludes, "erodes the public's trust in our justice system."[254]

Scholars have suggested a variety of possible solutions—from the extreme to the more modest—to more effectively combat this type of misconduct. Some scholars find that nothing short of getting rid of the harmless error doctrine will work, and that courts should automatically reverse a guilty verdict if misconduct involving a constitutional right occurs.[255] Others advocate for less drastic remedies, such as adjusting the harmless error standard so that it is easier to show prejudice[256] or (moving outside the criminal system) allowing defendants to directly sue prosecutors for intentional misconduct or holding supervisory prosecutors ethically responsible for junior prosecutors.[257] Professor Sonja Starr provides a unique proposal that keeps intact the current prejudice standard. She argues that even where there was no prejudice and the guilty verdict must stand, the prosecutor's misconduct should entitle the defendant to a reduction in sentence.[258]

While there do not appear to be any reports on the rate of misconduct by military prosecutors, the structure of the military justice system would suggest the occurrence of misconduct is much lower than in the civilian system.[259] There seem to be two main reasons. First, because these prosecutors don't decide which cases to bring, military lawyers are probably not as heavily invested in the trial and thus less adamant on getting a conviction at all costs.[260] Second, the career path of a military

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253. *Id.* (emphasis omitted).

254. *Id.* at 632.

255. *See* Goldberg, *supra* note 46, at 441–42; Charles J. Ogletree, Jr., Arizona v. Fulminante*: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 167 (1991); James Edward Wicht III, *There Is No Such Thing as a Harmless Constitutional Error: Returning to a Rule of Automatic Reversal*, 12 BYU J. PUB. L. 73 (1997).

256. *See, e.g.*, ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 17–51 (1970); Jeffrey O. Cooper, *Searching for Harmlessness: Method and Madness in the Supreme Court's Harmless Constitutional Error Doctrine*, 50 U. KAN. L. REV. 309 (2002) (suggesting that error analysis should focus on effect on jury rather than on whether there was overwhelming evidence of guilt).

257. *See* Alschuler, *supra* note 242, at 669; Corn & Gershowitz, *supra* note 249; Margaret Z. Johns, *Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity*, 80 FORDHAM L. REV. 509 (2011).

258. Starr, *supra* note 17. Professor Adam Gershowitz, while not advocating for changing the current standard, advocates that, in addition to remedial relief for the defendant, courts should disclose the names of prosecutors in an effort to reduce prosecutorial misconduct. *See* Gershowitz, *supra* note 238. Professor Ellen Podgor suggests that education efforts, both during law school and in practice, can help prevent misconduct. *See* Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511 (2000).

259. *See, e.g.*, *Prosecutorial Power*, *supra* note 123, at 951.

260. *Id.* at 949 ("[B]ecause the trial counsel does not choose his cases, he has less of a personal stake in their outcomes and less incentive to push the boundaries of the law to obtain a conviction.").

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lawyer involves numerous legal assignments, including prosecution, legal assistance, and operational law.[261] Because a lawyer may only serve as a prosecutor for a single tour at a time, she may not have the same steadfast commitment to the mission that would cause her to succumb to overreach.

III. EXPLAINING THE CIVILIAN PROSECUTOR AND MILITARY COMMANDER MISCONDUCT STANDARDS

A. Are Commanders Unique or Just In Loco *Civilian Prosecutors?*

The military system seems to more heavily scrutinize commander misconduct than the civilian system does prosecutorial misconduct. What accounts for the difference, as both systems presumably care about giving a defendant a fair and impartial trial? It is important to understand here that my comparison is with the standard used to assess the impact of the relevant misconduct on the fairness of the proceeding, not whether the act constitutes misconduct in the first place. As previously mentioned, unlawful command influence and prosecutorial misconduct may sweep more broadly outside versus inside the courtroom, respectively.[262] This difference, however, only seems to go to whether an action constitutes misconduct; it does not provide an explanation for why the military employs a more robust standard when assessing unlawful command influence compared with the civilian standard for assessing prosecutorial misconduct.

The most logical starting point in explaining the varying standards is the nature of the respective systems—one is civilian, and one is military. The military plays a unique role in our society as a fighting force, and so it makes sense that its criminal justice system—in addition to enforcing law and order—should accommodate this combat function. No one would argue against this critical difference between the military and the rest of society. But it is not clear why the military's unique mission would necessarily mandate a different misconduct standard from the civilian system. The military justice system already contains key differences to account for its unique mission. Most notably, prosecutorial discretion does not reside with military attorneys but rather with commanders themselves. This is directly the result of making sure the military force maintains good order and discipline—something not necessary for the civilian

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261. *See* U.S. NAVY, GUIDE TO THE U.S. NAVY JAG CORPS 6–7 (2012), *available at* http://www.jag.navy.mil/careers_/careers/docs/JAG_Guide(May%202012).pdf.

262. *See supra* notes 193–95 and accompanying text.

population.[263] There are other procedural and evidentiary accommodations unique to the military justice system given its singular mission. To name just a few: commanders can dispose of charges through non-judicial punishment;[264] defendants are allowed to introduce evidence of good military character;[265] and defendants have the ability to raise an "obedience to order" defense to a crime.[266] That said, where military-specific needs are not implicated, the two systems are very similar: they share most of the same procedural protections, as well as the implementation of similar evidentiary rules.[267] The unlawful command influence standard seems to fall into the latter category given its criminal justice-related function.[268]

1. Commanders as Non-Lawyers

Probably the most obvious, albeit ultimately troubling, explanation for the varying standards is that commanders are not lawyers. They don't have the legal training (and thus the corresponding instincts) that civilian and military prosecutors may have[269]—nor are they subject to professional ethical rules. Prosecutors—both civilian and military—on the other hand,

263. *See supra* Part I.A.

264. *See* UCMJ art. 15.

265. *See generally* MANUAL FOR COURTS-MARTIAL, *supra* note 68, at App. 22, M.R.E. 404 ("It is the intention of the Committee . . . to allow the defense to introduce evidence of good military character when that specific trait is pertinent."); *see also* Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3368 (2014) (limiting good military character evidence in certain crimes, including sexual-assault-related offenses); MANUAL FOR COURTS-MARTIAL, *supra* note 68, at R.C.M. 1001(c)(1)(B) (allowing, for sentencing purposes, evidence of "particular acts of good conduct or bravery and evidence of the reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other trait that is desirable in a servicemember"); Nancy Montgomery, *Character Doesn't Count: Military Lawyers Lose the 'Good Soldier' Defense*, STARS & STRIPES, Feb. 16, 2015, at 1–2 (discussing new changes restricting good military character defense in sexual assault cases).

266. *See generally* Monu Bedi, *Entrapped: A Reconceptualization of the Obedience to Orders Defense*, 98 MINN. L. REV. 2103 (2014).

267. Major General Jack L. Rives & Major Steven J. Ehlenbeck, *Civilian Versus Military Justice in the United States: A Comparative Analysis*, 52 A.F. L. REV. 213, 232 (2002) ("The military justice system gives service members virtually all rights and privileges that are afforded to citizens who face prosecution in civilian courts."). The Military Rules of Evidence, applicable in military courts-martial, are for the most part based on the Federal Rules of Evidence. Lieutenant Colonel James B. Roan & Captain Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F. L. REV. 185, 209 (2002).

268. This conclusion is further bolstered by the fact that court-martial jurisdiction includes prosecution of all crimes, even if they do not have a service connection. *See supra* note 7.

269. That said, they have lawyers readily available to them for consultation and advice, suggesting that they are not completely removed from the legal perspective. Cole, *supra* note 199, at 400.

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are bound by their state rules as well as relevant federal regulations.[270] Among other things, these rules often have language indicating that prosecutors should serve the ends of justice.[271] The lack of legal expertise together with these external professional rules may help explain why a commander's conduct needs to be more heavily scrutinized than a prosecutor's actions during the criminal trial process.

But this critical difference raises the question of whether our trust in prosecutors' doing what they're trained to do has been fully realized to justify the more lax standard. The aforementioned rise of prosecutorial misconduct seems to suggest otherwise.[272] Part of the problem is the lack of enforcement of professional ethical rules. Rules of professional ethics tend to be either too vague or too specific to effectively regulate a prosecutor's behavior where it counts most.[273] For instance, while the model professional rules specify that prosecutors should "serve as a minister of justice," they do little to define what this actually means.[274] On the other extreme is the attorney subpoena rule, which restricts the circumstances under which a prosecutor may subpoena a lawyer to the grand jury to testify concerning a client (a very narrowly defined prohibition).[275] These rules also do not carry appearance of conflict or impropriety test standards as found with judicial ethics.[276] Furthermore, even if there is a violation, there is a general consensus among scholars that these ethical bodies do little to reprimand or otherwise sanction

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270. *See, e.g.*, Michael J. Lebowitz, *Anti-War & Anti-Gitmo: Military Expression and the Dilemma of Licensed Professionals in Uniform*, 43 CASE W. RES. J. INT'L L. 579, 592 (2011) (noting that military lawyers are subject to the state ethical rules pertaining to their bar membership); 28 U.S.C. § 530B (2014) (noting that federal attorneys are subject to both state and federal rules); *see also* MODEL RULES OF PROF'L CONDUCT (2016); U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL (2000), *available at* https://www.justice.gov/usam/united-states-attorneys-manual [hereinafter U.S. ATTORNEYS' MANUAL].

271. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. (2016) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); Henning, *supra* note 242, at 727 (alteration in original) (footnote omitted) ("This higher duty has been variously phrased to require the prosecutor 'to seek justice, not merely to convict,' and 'to serve as a minister of justice and not simply [as] an advocate.'").

272. *See supra* Part II.C.

273. *See, e.g.*, Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 392–98 (2002).

274. *See id.* at 399; Henning, *supra* note 242, at 727 ("The recurrent theme is justice, although the codes do not furnish any guidance about what that means or even whose perspective determines whether a particular result was just.").

275. Green & Zacharias, *supra* note 273, at 394.

276. Some scholars have, for this reason, suggested amending the professional rules to include this factor. *See* Flowers, *supra* note 243.

prosecutors.[277] The end result is a body of professional rules that does not really seem to deter prosecutorial misconduct.

2. *Commanders with Broader Authority than Prosecutors*

The broader authority of a commander over the system compared to a civilian prosecutor (and obviously a military prosecutor) may also help explain the different standards. Not only do commanders bring and dispose of charges, they also pick potential jurors and exercise post-trial clemency powers.[278] In this way, commanders serve quasi-judicial roles along with their prosecutorial functions. It is no coincidence that the appearance of impropriety is found in judicial ethical rules but not prosecutorial ethical standards.[279] Public confidence in judges may be necessary to the trial process in a way it may not be for prosecutors.

This additional authority over and above their prosecutorial role can help explain why commanders too must be cautious of making sure that their actions do not create a negative public perception. This expanded authority and any related potential fallout may be what military courts have in mind when they state that commander misconduct is worse than prosecutorial misconduct.[280] It certainly provides a compelling explanation for the stricter standard used by military courts and specifically the inclusion of the apparent unlawful command influence test.[281]

3. *Protecting Military Subordinates from Improper Influence*

Another explanation may center on the primary thrust of Article 37. The first sentence singles out commanders and prohibits them from interfering with the judicial process.[282] One can read this sentence as intending to curtail commanders from unlawfully influencing their subordinates. Military structure and efficacy depends on subordinates

277. Green & Zacharias, *supra* note 273, at 397; Henning, *supra* note 242, at 829 ("[C]ommentators point out that the professional disciplinary system has proved inadequate in addressing prosecutorial misconduct.").

278. UCMJ arts. 15, 60.

279. *Compare* MODEL CODE OF JUDICIAL CONDUCT R. 1.2 (2007), *with* MODEL RULES OF PROF'L CONDUCT R. 3.8 (2016). *See also* Flowers, *supra* note 243, at 703.

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

281. Military courts, however, could parse out these various roles and attach different standards to each of them. In other words, courts could use the unlawful command influence doctrine to regulate a commander's unique quasi-judicial prerogatives and use the prevailing civilian misconduct standard for her traditional quasi-prosecutorial functions.

282. UCMJ art. 37.

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following the orders of their commanders.[283] But the importance of obedience has no place in the military justice system, where defendants are supposed to receive fair trials based only on the evidence. Because jurors and most of the witnesses at trial will come from within the command, it is important to protect these individuals from superiors who may improperly persuade or coerce them into thinking a certain way.[284] As subordinates, they may feel obligated or otherwise pressured to agree with their superior officer's recommendation, which may jeopardize their independence in assessing the case or providing testimony.[285] Indeed, the potential of commanders' influencing juries has been a recurring theme in unlawful command influence cases.[286]

The most recent examples of civilian leadership impacting the judicial process further underscore the concern over superior/subordinate relationships. It is telling that Secretary Hagel needed to issue a curative instruction after President Obama's comments on discharging sexual assault offenders from the military.[287] There was a real worry that these comments would either influence or have the appearance of influence over military personnel (including commanders, court personnel, and witnesses) who serve under the Commander in Chief. Courts have even gone so far as to include the threat of political pressure as an improper influence.[288] While this type of influence may not, strictly speaking, constitute coercion by a superior officer, it nonetheless represents a type of oversight that shouldn't be interjected into the criminal trial process.

The foregoing examples do not mean that the doctrine only applies to situations involving a superior/subordinate situation. Other cases point to a broader application. Courts have invoked unlawful command influence in cases where commanders improperly influenced judges and defense

283. *See, e.g.*, Bedi, *supra* note 266, at 2132–33.

284. As previously stated, commanders pick the juries from their command ranks. *See supra* note 102 and accompanying text. As far as witnesses, it is quite likely that relevant testimony will come from members of the command. There are two reasons for this. First, the crime may involve members of the command, and so naturally these witnesses would be relevant to any criminal trial. The second, and perhaps more consistent, reason stems from the fact that in the military justice system, evidence of good military character can be relevant during the liability and/or sentencing phases of trial. *See supra* note 265 and accompanying text. Members of the same command as the defendant would naturally be in the best position to provide this assessment, and thus they frequently are part of one or both proceedings.

285. It is no surprise that unlawful command influence only requires introduction of commander policy or opinion, even if the commander herself did not authorize it. *See supra* note 116 and accompanying text.

286. *See supra* Part I.A.

287. *See supra* Part I.B.3.

288. *See supra* Part I.B.3.

attorneys,[289] none of whom are in the same chain of command as a commander.[290]

These command-based concerns are obviously not present in the civilian justice system, where prosecutors have no such similar positional authority over jurors or potential witnesses.[291] This may also explain why the military prosecutorial misconduct standard mimics the civilian standard.[292]

4. Historical Development and Related Concerns

Historical development of each system may provide further clarification of the two standards. The military system, at first, and unlike the civilian system, did not readily provide defendants with the same constitutional protections as their civilian counterparts.[293] Commanders also had wide discretion with little to no oversight. Article 37 changed this state of affairs. The point was to create a system that was fair to defendants without overreach by commanders. This specific concern may

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289. United States v. Lewis, 63 M.J. 405 (C.A.A.F. 2006) (finding that commander improperly influenced military judge by forcing her recusal); United States v. Dykes, 38 M.J. 270 (C.M.A. 1993) (finding that commander may have improperly influenced defense attorney by entering into *sub rosa* plea agreement).

290. *See, e.g.*, Lieutenant Colonel R. Peter Masterton, *The Defense Function: The Role of the U.S. Army Trial Defense Service*, THE ARMY LAW., Mar. 2001, at 1 (noting that Army defense counsel command structure "has a separate technical chain of supervision to ensure that a defense counsel stationed at a particular installation will not be evaluated or disciplined by the local commander responsible for prosecution of military crimes"); *see also* UCMJ art. 26(c) (prohibiting commander from being in supervisory position over military judge).

291. There is also no issue of supervisory prosecutors' impermissibly pressuring junior prosecutors in connection with bringing and disposing of charges, since US Attorneys with supervision from the Attorney General—not individual prosecutors within the district—are ultimately responsible for decisions on what cases to prosecute and how to dispose of them in their districts. *See generally* U.S. ATTORNEYS' MANUAL, *supra* note 270, § 9-2.001 ("The United States Attorney, within his/her district, has plenary authority with regard to federal criminal matters. This authority is exercised under the supervision and direction of the Attorney General and his/her delegates."). This is different from the military structure, where each commander has individual discretion in bringing charges and thus should not be influenced by higher-ranked commanders or civilian leaders. *See supra* Part I.B.1–2.

292. *See supra* Part II.A. Military prosecutors may be higher in rank than jurors or certain witnesses, but this doesn't mean that they are in the same chain of command. *See, e.g.*, *Detailing of Trial Counsel, Defense Counsel, and Article 32, UCMJ, Investigating Officers*, U.S. MARINE CORPS (July 5, 2013), http://www.marines.mil/News/Messages/MessagesDisplay/tabid/13286/Article/145657/detailing-of-trial-counsel-defense-counsel-and-article-32-ucmj-investigating-of.aspx, *archived at* https://perma.cc/6FDJ-QP2T. Nevertheless, assuming a disparity in rank, a juror or witness may unjustly think that whatever a prosecutor says must be correct, which may color the soldier's opinion, much like in the case of the commander's opinion. This potential danger bolsters the argument that Article 37 and its standard should encompass improper influence by military prosecutors, not just commanders who have positional authority over jurors or witnesses. *See supra* Part II.A.

293. *See supra* Part I.A.

explain why the unlawful command influence doctrine relied on systemic protections rather than the promotion of defendant choice and reliance on prudent command decisions. The general negative public perception of the military criminal process during the promulgation of the unlawful command influence doctrine also helps explain why courts expanded the doctrine to include an appearance of impropriety test.[294] Courts wanted to make sure that the public viewed the system as fair and impartial.

The civilian system was not saddled with these same problems. Due process was already built into the system, so overreach may not have been as salient an issue outside the military context. One might suggest that post-World War II history, and the 1970s particularly, brought with it a very different concern. Broadly speaking, courts seemed less concerned about making sure defendants received a fair trial and more worried about streamlining the criminal trial process and preventing a prolonged appeal process.[295] The goal was to create verdicts that were final and could not easily be overturned. As the Court noted, trials should be the "main event" and not simply a "tryout on the road" for later post-conviction proceedings.[296] This overarching concern may help explain why courts have not altered the more deferential harmless error standard or a defendant's ability to waive any potential prosecutorial misconduct claims during plea negotiations.

B. The Competing Values of Systemic Integrity and Individual Autonomy

The foregoing explanations provide a compelling story for the divergent standards. Taken together, they reveal two very different philosophies when it comes to dealing with this type of misconduct: systemic integrity and individual autonomy. This Article uses the phrase *systemic integrity* to refer to fundamental or key prescriptions placed on the system intended to serve procedural or substantive ends. Constitutional

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294. *See supra* Part II.C. Some scholars argue that the military justice system still has a ways to go as far as legitimacy is concerned. *E.g.*, Bower, *supra* note 101, at 66 (footnote omitted) ("Three and one-half decades after enactment of Article 37 of the Uniform Code of Military Justice (UCMJ), written to eradicate unlawful command influence, the problem continues to raise its ugly head.").

295. *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 90 (1977); Stone v. Powell, 428 U.S. 465, 493–95 (1976). Admittedly, these cases dealt specifically with ineffective assistance of counsel and restricting *habeas* relief, not prosecutorial misconduct. Nevertheless, the cases point to a basic concern for finality and using the lenient prejudice standard to avoid overturning convictions. *Wainwright*, 433 U.S. at 90.

296. *Wainwright*, 433 U.S. at 90; *see also* Michael M. O'Hear, *Bypassing Habeas: The Right to Effective Assistance Requires Earlier Supreme Court Intervention in Cases of Attorney Incompetence*, 25 FED. SENT'G REP. 110 (2012) (analyzing related Supreme Court cases).

or due process restrictions would stand as natural structural protections.[297] On the other hand, the phrase *individual autonomy* refers to procedures that promote independent choice or freedom. This consists of promoting defendant choice during the trial process, as well as the independence of various actors (e.g., lawyers, judges) in the justice system.[298]

These values are already present to varying degrees in both the military and civilian criminal justice systems. Both systems, for example, share a host of procedural protections such as the privilege against self-incrimination, the presumption of innocence, and the high burden of proof on the government to show guilt,[299] to name a few. Together, these safeguards exhibit an overall value for systemic integrity. They seek to provide unalterable protections within the criminal justice system that ensure a fair trial. Similarly, both military and civilian systems recognize the importance of promoting individual autonomy. Defendants have the choice to plead guilty and forgo trial.[300] As far as encouraging independence among actors of the justice system, trial judges have the responsibility to decide whether to recuse themselves with little oversight.[301] This deregulation suggests a reliance on judges to make the right decisions. These shared instances of individual autonomy and systemic integrity should come as no surprise since these systems come from a common adversarial heritage.[302]

297. *See, e.g.*, Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. REV. 621 (2005).

298. This value has become central to the Supreme Court's jurisprudence in a variety of other contexts, including the ability of parents to raise children, the right to travel, and First Amendment protections. *See id.* at 651.

299. UCMJ art. 51(c); Taylor v. Kentucky, 436 U.S. 478, 483–86 (1978).

300. UCMJ art. 45; FED. R. CRIM. P. 11 (2014); *see also* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1913 (1992) (claiming that autonomy considerations justify plea bargaining as a manifestation of the defendant's freedom of choice and freedom of contract). It is still up to the trial judge to accept or not accept a guilty plea. *See* UCMJ art. 45(b); North Carolina v. Alford, 400 U.S. 25, 38 n.11 (1970).

301. *See supra* note 35 and accompanying text. Some scholars have argued against this autonomous decision making and have instead suggested procedures that would place this decision in the hands of third-party judges. *See, e.g.*, Major Steve D. Berlin, *Clearing the High Hurdle of Judicial Recusal*: *Reforming RCM 902(a)*, 204 MIL. L. REV. 223, 250 (2010) ("The President should amend the recusal rules to allow an independent judge to review a disqualification motion."); Dmitry Bam, *Our Unconstitutional Recusal Procedures*, 84 MISS. L.J. 1135 (2015) (arguing that self-recusal procedures violate the due process clause of the Constitution).

302. *See* United States v. Clay, No. 49, 1951 WL 1512, at *77 (C.M.A. Nov. 27, 1951) ("There are certain standards in the military accusatorial system which have been specifically set by Congress and which we must demand be observed in the trials of military offenses."); *see also* Rogers v. Richmond, 365 U.S. 534, 541 (1961) (discussing how coerced confessions "offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system"); Chambers v. Florida, 309 U.S. 227, 236 (1940) (explaining that the Due Process Clause was intended to guarantee procedural safeguards "to protect, at all times, people charged with or suspected

Turning specifically to analyzing misconduct by commanders, however, the military's rules tend to implicitly underscore a value of systemic integrity more than individual autonomy. The military focuses on permanent procedures and rights that seek to combat or otherwise deter commander misconduct. This entails automatically placing the burden of persuasion on the government and allowing defendants to raise the issue at any point during trial or appeal. Defendants also cannot waive this right through the plea process. The collective force of these requirements ensures a fair trial for the defendant. Indeed, even if there is no prejudice and a commander has acted in good faith, courts—through the apparent unlawful command influence test—remain vigilant in making sure the public perception of fairness endures.[303] This facet downplays a commander's autonomy—even if it is administered wisely—in favor of promulgating a prophylactic measure to ensure the overall integrity of the system.

The military's unique history of unfettered discretion for commanders, the fact that commanders are not lawyers, and the protection of subordinates from undue commander influence further justify why the military would set up permanent rules to combat commander misconduct without much emphasis on promoting autonomy. All of the above pose a real danger of adversely interfering with the judicial process, particularly when one recognizes that commanders may have a vested interest in the outcome. This concern is even greater after one considers that commanders have broader authority over the justice system than civilian prosecutors (e.g., they pick juries, grant post-trial clemency relief).[304]

Civilian treatment of prosecutorial misconduct, by and large, eschews these kinds of structural protections in favor of promoting autonomy. I qualify this assessment because the civilian system also exhibits some element of systemic integrity—specifically, its use of the prejudice standard. Like the military system, the key question is whether the misconduct impacted the result at trial. From this shared baseline, the civilian system seems to favor individual autonomy. In the subcategory of defendant choice, burdens of proof vary depending on what the defendant does or does not do at trial. Defendants are also in full control of their

of crime by those holding positions of power and authority"). The nature of the adversarial system itself seems to embody a mix of these two values. *See supra* note 35.

303. Other parts of the military justice system also advance this general value of structural integrity. Defendants cannot waive their right to a sentencing hearing, and thus the possibility of a lesser sentence, even if they enter into a plea agreement. *See supra* Part I.B.4.

304. *See supra* Part III.A.3.

right to waive an appeal and challenge misconduct claims during plea negotiations. Collectively, this focus on individual choice signals a value of autonomy when it comes to dealing with prosecutorial misconduct. In short, defendants, by and large, can control if and how appellate courts will handle these claims. This connection between defendant choice and prosecutorial misconduct is indirect. We are talking about two independent actions by different actors. The connection between the two lies more in *how* and *if* the misconduct claim will be resolved, not the substance of the misconduct itself.

This value of autonomy also includes promoting the independence of prosecutors in the criminal justice system.[305] The fact that a prosecutor's intent is typically relevant and that there is no appearance of impropriety test suggest an implicit confidence that, absent bad faith, prosecutors are adequately doing their jobs, and that no further inquiry on the impact of their conduct is necessary.

The civilian system's unique evolution further bolsters this emphasis on individual autonomy. For one thing, due process protections were already in place well before military defendants benefited from them.[306] This early structural protection would allow courts greater leeway in giving prosecutors freedom to make sure they do their jobs and providing defendants the choice to decide how and if misconduct claims will be resolved. The historical concern for finality implicitly also supports these values. If we don't want appeals to linger for long periods and verdicts to be easily overturned, the natural assumption is that individual actors of the criminal justice system—judges, defense attorneys, and prosecutors—will do their job at trial,[307] and defendants will have the discretion to waive appellate rights or potentially deal with a more deferential misconduct standard.[308]

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305. *See* Máximo Langer, *The Rise of Managerial Judging in International Criminal Law*, 53 AM. J. COMP. L. 835, 851 (2005) (noting that under the adversarial system, prosecutors and defense attorneys have more procedural powers than under the inquisitorial system). The promotion of independence of defense attorneys can also be evidenced by the fact that ineffective assistance of counsel claims are subjected to the same harmless error standard as prosecutorial misconduct claims. *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 690–91 (1984); Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 50–51 (2002).

306. *Compare* Part I.A, *with* Part II.B.

307. *Cf. Strickland*, 466 U.S. at 690 ("[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.").

308. This notion of defendant choice may also be tied to promoting self-direction and avoiding paternalism. *See infra* note 320 and accompanying text.

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Furthermore, unlike military commanders, civilian prosecutors are legally trained individuals who are theoretically already bound by ethical rules. This fact may help explain why civilian courts did not develop a stricter misconduct standard or an appearance of impropriety test. Ethical rules provide a separate mechanism to deter improper behavior. This frees up the criminal justice system to promote the independence and freedom of prosecutors. To what extent this reliance may be misplaced remains an open question.[309] That said, for similar reasons, it makes sense why the military would, by and large, use the prevailing civilian standard—with its emphasis on autonomy—when assessing military prosecutorial misconduct claims, as these lawyers are also bound by their state ethical rules.[310]

These competing principles of systemic integrity and individual autonomy—or at least some version of them—have actually come up in a different criminal justice context. In *Faretta v. California*, the Supreme Court addressed the permissibility of a defendant representing herself in a criminal trial.[311] It balanced the procedural protections of the Sixth Amendment against individual autonomy or the defendant's freedom of choice.[312] The Court found that the Sixth Amendment does not simply provide that a defense shall be made for the accused, but also grants to the defendant the right to personally make her own defense.[313] The Court specifically focused on the values of autonomy and the freedom of choice as a necessary part of our legal system. "[W]hatever else may be said of those who wrote the Bill of Rights," the Court explained, "surely there can be no doubt that they understood the inestimable worth of free choice."[314] The Court seemed to recognize that this type of self-representation may not be in the best interest of the defendant and may frustrate her ability to present the most persuasive defense.[315] Nevertheless, the Court found that

309. *See supra* Part II.C.

310. I qualify this statement because the military does seem to impose a heavier burden on the government when the misconduct relates to disclosure violations, underscoring a preference instead for systemic integrity in this scenario. *See supra* note 207.

311. 422 U.S. 806 (1975).

312. *Id.* at 812–36. This case and the related scholarship did not involve the second type of individual autonomy described herein, or autonomy of the individual actors of the criminal justice system. Nevertheless, the resulting debate can still highlight how these competing principles are deployed in the criminal justice context.

313. *Id.* at 819.

314. *Id.* at 833–34.

315. *Id.* at 834 n.46 ("Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'").

"respect for the individual . . . is the lifeblood of the law," so a defendant must be afforded the right to represent herself.[316]

Scholars have debated the merits of this ruling and whether autonomy or systemic integrity should be promoted as a worthier value in the context of self-representation. Professor Robert Toone, for example, challenges the proposition that "defendant autonomy is a constitutional value that trumps, or at least counterbalances, interests such as accuracy, fairness, and efficiency."[317] He argues that self-representation has not benefited defendants and indeed empowers self-destructive impulses of many criminal defendants.[318] He argues that the rationale behind *Faretta* and the value of autonomy should be reexamined in this context. He seems to favor representation, even if the defendant objects to having an attorney present. The point here is to provide procedural protections—regardless of their impact on the defendant's autonomy—to ensure that a defendant receives a fair trial.[319]

Professor Erica Hashimoto, on the other hand, finds that autonomy should be promoted in the context of representation.[320] In addition to enjoying historical and textual support, she also thinks this makes jurisprudential sense.[321] She explains that defendants should have the ability to control their own cases since a finding of guilt will deprive them of their autonomy.[322] This means a respect for a defendant's autonomy during trial, even if it turns out to prejudice the defendant. In making her point, she argues that procedural protections promote paternalism, which is neither justified by empirical evidence nor consistent with other fundamental decisions that allow a defendant to choose whether to go to trial or whether to enter into a guilty plea.[323] My aim here is not to pick a

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316. *Id.* at 834. The Court cited to a defendant's choice as to whether she will testify at trial as an example of how "[f]reedom of choice" was integral to "the constitutional design of procedural protections." *Id.* at 834 n.45.

317. Toone, *supra* note 297, at 621.

318. Toone cites to a number of high-profile criminal cases involving defendants like Colin Ferguson and Theodore Kaczynski as instances of self-representation that had disastrous results. *Id.* at 628.

319. *Id.* at 638–50. Toone supports his position by relying on the Court's decision in *Martinez v. Court of Appeal of California*, which denied a defendant the right to represent herself on appeal. *Id.* at 627. In that case, the Court found that the government's interest in ensuring the integrity and efficiency of the appellate process outweighed a defendant's freedom to represent herself on appeal. Martinez v. Court of Appeal of Cal., 528 U.S. 152, 162 (2000).

320. *See* Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U. L. REV. 1147 (2010).

321. *Id.* at 1163–74.

322. *Id.* at 1173.

323. *Id.* at 1174–78.

side but rather to highlight the debate between the two competing principles of individual autonomy—specifically, defendant choice—and systemic integrity.

C. Lessons for the Future: Reforming Civilian and Military Misconduct Standards

Turning back to unlawful command influence and prosecutorial misconduct, we can ask the same questions as in the self-representation scenario. Are the principles of systemic integrity and individual autonomy balanced in the right mix when it comes to assessing misconduct claims? Going forward, what changes, if any, need to be made, and does it matter which system—military or civilian—we're talking about?

Take the potentially widespread occurrences of prosecutorial misconduct in the civilian system. The problem seems to be too much emphasis on prosecutorial autonomy and trusting that these individuals will dutifully do their jobs. This approach of self-regulation seems to have done little to stymie overreach by prosecutors.[324] The civilian system needs only to look to its military counterpart for guidance on addressing this issue. By all accounts, it appears that an emphasis on systemic integrity provides an effective mechanism against unlawful command influence. The military seems to implicitly recognize that commanders serve a variety of roles—quasi-prosecutorial, judicial, military, etc.—and the exercise of these competing duties, whether intentionally or accidently, can interfere with the fairness of a criminal trial. These risks are not all that different in the civilian system, even though we are dealing with legally trained individuals who may not have as broad a range of responsibilities. Civilian prosecutors are nevertheless juggling competing roles as officers of the court and advocates for the government—roles that can interfere with a defendant's right to a fair trial when prosecutors become too invested in winning a case. Instead of allowing prosecutors to essentially police themselves (as the current system seems to do), we should impose restraints that can assure proper exercise of these different roles.

There are a number of potential changes that can be made to the civilian system along these lines. In the first instance, given the fact that most trials are resolved through guilty pleas, the system may have to change the way it handles appeal waivers in plea agreements because of

324. *See supra* Part II.C.

courts' resultant inability to scrutinize prosecutorial misconduct claims.[325] In its place, and similar to military procedure, civilian defendants who enter into such agreements would still have the ability to raise misconduct claims on appeal.[326] But it is worth pointing out that there is an ongoing debate as to whether appeal waivers save on administrative costs by reducing the number of criminal appeals and thus serving the broader goal of efficiency of the criminal justice system.[327] I do not take a position here but simply note that any potential change to appeal waivers in the civilian system would have to address this issue.

Moving beyond plea agreements, the question becomes what substantive changes to the prejudice standard are necessary. One extreme solution would be to get rid of the prejudice standard altogether, such that any finding of misconduct triggers an automatic reversal.[328] This change obviously goes well beyond the military's unlawful command influence doctrine, which maintains a prejudice analysis. A more modest proposal—as some scholars have suggested—would be to change how the harmless error standard is administered so it is easier to show prejudice.[329] At the very least, it seems that we should—in line with the unlawful command influence doctrine—get rid of the shifting burdens of proof so that the government on appeal always bears the burden of showing that there was no prejudice. The current setup, while certainly an instance of promoting defendant choice, does nothing to benefit the defendant should she not object at trial.

An effective and easily implemented add-on would be the adoption of an appearance of impropriety test similar to the military system. The key question for courts would be whether the prosecutor's actions, even if not prejudicing the defendant, would undermine the perception of justice in the system if the public knew the circumstances. This measure—especially given its disassociation with intent—could help make sure prosecutors go

325. *See supra* notes 235–40 and accompanying text.

326. Defendants could then argue that the misconduct invalidated the voluntariness of the plea. *See, e.g.*, Brady v. United States, 397 U.S. 742, 757 (1970) (stating that deceptive conduct by prosecution may invalidate pleas); Miller v. Angliker, 848 F.2d 1312, 1320 (2d Cir. 1988) ("[W]e conclude that even a guilty plea that was 'knowing' and 'intelligent' may be vulnerable to challenge if it was entered without knowledge of material evidence withheld by the prosecution.").

327. *Compare* United States v. Andis, 333 F.3d 886, 889 (8th Cir. 2003) (noting speed and economy as "chief virtues" of appeal waivers), *and* David E. Carney, Note, *Waiver of the Right to Appeal Sentencing in Plea Agreements with the Federal Government*, 40 WM. & MARY L. REV. 1019, 1037 (1999) ("These agreements save the courts untold hours of work, and waivers of appellate rights would further reduce the load on an already taxed judiciary."), *with* Dean, *supra* note 237, at 1202 (arguing that appeal waivers have not reduced the number of appeals).

328. *See supra* note 255 and accompanying text.

329. *See supra* note 256 and accompanying text.

the extra mile to prevent any potential appearance of taint or bias. Adoption of this test, just as in the military context, does not mean an automatic reversal if the conduct creates an appearance of impropriety. The remedy, similarly, would need to be tailored to the interests of the system as a whole rather than the defendant. Still, even public acknowledgement of the misconduct as violating this appearance standard would do more than the current standard in helping deter improper prosecutorial behavior.[330]

Where does that leave autonomy? I think that this value has its place in this discussion, but perhaps it should be primarily focused on promoting defendant choice rather than promoting the independence of prosecutors or commanders through lenient misconduct standards.[331] Here, both systems already allow defendants to bargain away certain rights (e.g., the rights to trial and to confront witnesses) in exchange for lighter sentences.[332] The question is how far we should go in promoting this value in the commander/prosecutorial misconduct context. Some scholars think that the military system can learn something from the civilian system here. Currently, a military defendant cannot waive her right to an appeal and a potential claim of unlawful command influence—even if she wants to—as part of a pretrial agreement.[333] This restriction, according to Corey Wielert, is too rigid and may not sufficiently empower defendants during this process.[334] She argues that giving defendants the choice to bargain away this right will support "[a]utonomy and efficiency" of the plea bargain process, as it will not only allow a defendant to secure lighter sentences, but will also benefit the military in expediting the disposition of cases.[335]

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330. *Cf.* Gershowitz, *supra* note 238 (proposing that publically shaming prosecutors who commit misconduct by disclosing their names in court opinions can serve to deter future misconduct). Moving outside the criminal justice system, we could make sure prosecutors are held responsible through civil damages or do a better job prosecuting ethical violations. *See* Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 427; *supra* note 257 and accompanying text. These solutions would also promote systemic integrity, but from the outside of the criminal trial process.

331. Some degree of individual autonomy, of course, remains critical to our adversarial system, *see supra* note 36 and accompanying text, but this does not mean that review of misconduct, especially by prosecutors, should not be more highly regulated.

332. *See supra* note 161 and accompanying text.

333. The defendant is free to waive appellate review (and along with it claims of unlawful command influence), but only after a commander acts on her sentence and finalizes it. *See supra* note 162.

334. *See* Corey Wielert, *Affecting the Bargaining Process in Pretrial Agreements: Waiving Appellate Rights in the Military Justice System*, 79 UMKC L. REV. 237, 249 (2010).

335. *Id.* at 249–50. While not the subject of this Article, this discussion of the benefits of plea bargains assumes in the first instance that these bargains are successful in promoting autonomy in a

It is not clear whether this would be a favorable change based on the civilian experience with such waivers. After all, the civilian system is plagued by the fact that most instances of misconduct are not reviewed because of appeal waivers.[336] Allowing military defendants to waive their right to appeal could similarly turn out to be counterproductive and shield commander misconduct from appellate review.

In a recent proposal, Professor John Rappaport provides a provocative analysis where he takes the value of defendant choice to its natural conclusion.[337] He suggests that a defendant should have the ability to unbundle various rights and negotiate for sentencing reductions based on piecemeal agreements.[338] Instead of the all-or-nothing plea bargain currently used in both military and civilian systems, defendants could negotiate away specific rights, such as the right to confront witnesses or reduction of the government's burden of proof, in exchange for lighter sentences.[339]

The workability of such a piecemeal proposal is beyond the scope of this Article, but it can be instructive to our discussion, specifically to the issue of appellate review. Even Rappaport believes certain things shouldn't be bargained away, such as judicial impartiality or public trials, because these are necessary components of a legitimate criminal justice system.[340] This is simply another way of saying that these features support the promotion of systemic integrity. One might argue that appellate review of prosecutorial or commander misconduct claims—contrary to the current civilian practice—should also fall into this category of unalterable protections.[341] These considerations are not unlike the *Faretta* discussion and the relative importance of defendant choice versus the assurance of fairness. To fully assess the value of appeal waivers would require, among other things, ascertaining whether and to what extent defendants actually

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real way. Perhaps, as some scholars have suggested, the structural biases of the system prevent defendants from fully realizing the benefits of these bargains. *See, e.g.*, Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464 (2004); Erica Hashimoto, *Toward Ethical Plea Bargaining*, 30 CARDOZO L. REV. 949 (2008).

336. *See supra* Part II.B.3.

337. *See* John Rappaport, *Unbundling Criminal Trial Rights*, 82 U. CHI. L. REV. 181 (2015).

338. *Id.* at 181–83.

339. Rappaport lists a host of other rights (e.g., presenting a defense, the requirement of a unanimous verdict) that could be specifically bargained away. *Id.* at 189–90.

340. *Id.* at 196.

341. Rappaport himself does not take a position on appellate waivers, though his argument would probably suggest that these too can be bargained away. *See id.* at 181–99. *But see* Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219 (2013) (arguing for a constitutional right to appeal).

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get lighter sentences by entering into them.[342] Given the lack of consistent data on this issue and the competing interests involved, it is not readily apparent how this calculus ultimately should be resolved.[343] What is important for my purposes is recognizing how the values of systemic integrity and individual autonomy can help crystallize the various interests at play.

These competing principles may also be useful in the controversy surrounding how commanders have handled sexual assault cases. The issue here is not making sure defendants receive a fair trial, but rather what appears to be the lack of prosecution of these types of cases in the first instance.[344] Recent studies show that while sexual assault is rising in the military, commanders are not subsequently bringing more charges against defendants.[345] It is not clear if this undercharging arises from a sexist viewpoint, since the greater percentage of sexual assault crimes involve women victims, or some other type of discrimination against them, or perhaps favoritism for the defendant.[346] Whatever the motivation, the point here is that commanders have not effectively administered their charging discretionary authority.

Like their civilian counterparts, commanders are free to bring whatever charges they deem appropriate, with little to no restrictions.[347] And the doctrine of unlawful command influence only applies after charges have become official.[348] This lack of oversight on charging decisions may be connected to a commander's role as a military leader who is supposedly in the best position to decide what charges are necessary for good order and discipline. Thus, it would appear that the military adheres to a value of autonomy when it comes to this kind of discretion—quite different from

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342. *See generally* King & O'Neill, *supra* note 235 (noting that some defendants received lighter sentences but others did not by entering into appeal waivers). Another consideration would be whether these waivers promote the efficiency of the system. *See supra* note 327 and accompanying text.

343. *See generally* King & O'Neill, *supra* note 235. In addition to autonomy and systemic integrity, efficiency may also be a consideration. *See supra* note 327 and accompanying text.

344. *See, e.g.*, Cooper, *supra* note 47.

345. *See id.* ("The Pentagon said that of the 5,061 reported cases, 484 went to trial, and 376 resulted in convictions. The numbers, [Senator Gillibrand] said, 'should send chills down people's spines,' because less than one of 10 reported cases proceeded to trial."). The situation appears to be improving. *See* Craig Whitlock & Thomas Gibbons-Neff, *More High-Ranking Officers Being Charged with Sex Crimes Against Subordinates*, WASH. POST (Mar. 19, 2016), https://www.washingtonpost.com/world/national-security/more-high-ranking-officers-being-charged-with-sex-crimes-against-subordinates/2016/03/19/3910352a-e616-11e5-a6f3-21ccdbc5f74e_story.html (discussing recent increase in sexual assault prosecutions).

346. *See* Carpenter, *supra* note 47; Cooper, *supra* note 47.

347. *See supra* note 97 and accompanying text.

348. *See supra* note 98 and accompanying text.

the systemic integrity that underscores a commander's conduct during the trial process.

This value of autonomy—at least in the sexual assault charging context—has failed to produce just results and must be reevaluated. The solution rests on inserting systemic integrity principles or structural restraints during the accusatory stage to ensure prosecution of sexual assault cases. Probably the most straightforward and potentially most effective solution—as many scholars have argued—would be to completely remove discretion from commanders and, like the civilian model, place it in the hands of prosecutors.[349] This change would completely usurp a commander's current level of autonomy, though in the process it may raise other issues regarding the nature of justice and discipline in the military system.[350]

Legislators have proposed or recently enacted more modest structural changes to the charging process that also seek to curtail commander autonomy, at least to some degree. One proposal, which was ultimately rejected by the Senate, would have taken the discretion away from commanders in cases of sexual assault and placed it with military officials outside of the chain of command.[351] Congress did, however, recently pass legislation that amended the UCMJ such that prosecutors now serve as a check on commander discretion in sexual assault cases.[352] While the amendment does not change the commander-based prosecutorial discretion model, it inserts the prosecutor into the charging process by allowing her to raise the issue to the civilian service secretary if a commander chooses not to prosecute the case.[353]

These mandatory procedures or restrictions on commander discretion—similar to the restraints on commander conduct during trial—serve to ensure a fair and impartial criminal justice system without an emphasis on commander autonomy. Only this time the concern is not

349. *See supra* note 57.

350. *Cf.* Schlueter, *supra* note 50, at 14–43 (discussing whether military justice is grounded in discipline or justice and how this impacts the command-centered model).

351. Helene Cooper, *Senate Rejects Blocking Military Commanders from Sexual Assault Cases*, N.Y. TIMES (Mar. 6, 2014), http://www.nytimes.com/2014/03/07/us/politics/military-sexual-assault-legislation.html.

352. *See* Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292, 3371–72 (2014) (codified as amended at 10 U.S.C. § 834).

353. *See id.* Congress also passed other revisions that provide greater protections for victims of sexual assault. Matthew B. Tully, *Changes to Sexual Assault Investigations*, MILITARY TIMES (Apr. 20, 2015, 6:00 AM), http://www.militarytimes.com/story/military/crime/2015/04/20/sexual-assault-investigations-changes/25925919/, *archived at* https://perma.cc/G2A5-DY9B.

defendants receiving an unbiased trial, but defendants being brought to justice for sexual assault violations.[354]

CONCLUSION

Misconduct—whether by civilian prosecutors or military commanders—seems like a necessary evil. Any time a criminal justice system bestows an individual with prosecutorial discretionary power, there is a risk of overreach. The reason for this is that prosecutors and commanders alike have a vested interest in successful outcomes for the cases they bring. This desire may lead these individuals to do things they should not. The critical inquiry is how best to combat this risk. The military and civilian systems embody different philosophies beyond their shared prejudice baseline—one focuses more on systemic integrity and the other on individual autonomy. Given their unique features and history, this is perhaps not surprising.

But moving forward, we must ask whether each system has incorporated the values in the right mix. To this question, the civilian system can learn something from the military and, perhaps, vice versa. The point here is that using the principles of autonomy and systemic integrity can help balance the need to minimize the risk of prosecutorial taint with the ability of a defendant to make her own decisions. This kind of exercise is not simply restricted to prosecutorial or commander misconduct, the focus of this Article. Similar to the *Faretta* discussion or

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354. It is not clear whether undercharging of sexual assault plagues the civilian system to the same degree. *See, e.g.*, Johanna Lee, *The Quest for Military Sexual Assault Reform*, HARV. POL. REV. (Apr. 26, 2014, 10:14 PM), http://harvardpolitics.com/united-states/quest-military-sexual-assault-reform/, *archived at* https://perma.cc/EB8L-3NBY ("The military justice system prosecutes a smaller percentage of reported sexual assault cases than civilian courts. According to research by Cassia Spohn, professor of criminology and criminal justice at Arizona State University, civilian courts prosecute 50 percent of sexual assault cases, compared to 37 percent by military courts."). *But see* THE WHITE HOUSE COUNCIL ON WOMEN & GIRLS, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION 16–18 (2014), *available at* https://www.whitehouse.gov/sites/default/files/docs/sexual_assault_report_1-21-14.pdf (discussing the lower rates of arrests and prosecutions of sexual assaults). To the extent the civilian system does a better job, this may be due in large part to the greater public scrutiny prosecutors and their charging decisions receive compared to military commanders. *See, e.g.*, NAT'L DIST. ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS Standard 25.1 cmt. (1977) ("As a public prosecutor constantly in the public eye, it is imperative that the prosecutor . . . avoid even the appearance of professional impropriety."). Perhaps, when it comes to prosecutorial sexual assault charging decisions in the civilian system, the value of individual autonomy (at least comparatively) may still remain a good one. My point here is simply to underscore the fact that the competing principles of autonomy and systemic integrity should be applied to each system individually and the specific issue in question.

the unbundling theory described earlier, these principles potentially have a real role to play in exploring relevant reforms to our criminal justice system.