1-1-1985

Choosing Ones Fate Varieties of Olive Green Plea Bargaining

Gary N. Keveles

Occasional Paper No. 8509
December, 1985

Occasional Papers

The Center for International Studies of the University of Missouri-St. Louis issues Occasional Papers at irregular intervals from ongoing research projects, thereby providing a viable means for communicating tentative results. Such "informal" publications reduce somewhat the delay between research and publication, offering an opportunity for the investigator to obtain reactions while still engaged in the research. Comments on these papers, therefore, are particularly welcome. Occasional Papers should not be reproduced or quoted at length without the consent of the author or of the Center for International Studies.

Choosing One's Fate: Varieties of Olive Green Plea Bargaining

by

Gary N. Keveles

Choosing One's Fate

Varieties of Olive Green Plea Bargaining

By

Gary N. Keveles, Ph.D.
Center for International Studies
Department of Administration of Justice
University of Missouri-St. Louis
8001 Natural Bridge Road
St. Louis, Missouri 63121

*This research was supported, in part, by the Center for International Studies and by a research fellowship from the Office of Research Administration, University of Missouri-St. Louis

ABSTRACT

Plea bargaining research has been bountiful in the last decade. One plea bargaining setting that has escaped inquiry, however, is the military. This study focuses on military plea bargaining by examining its many forms. Plea bargaining occurs throughout the military court system's judicial and nonjudicial components. The six levels within these components are compared. Negotiated arrangements are reflections of the organizational structure, restraints and role relationships developed at each of these levels. The analysis suggests that the outcomes for similarly situated accused show significant variance. Further, one type of judicial plea bargaining practice should be a model for civilian courts while one form of nonjudicial plea bargaining should be abolished as it is contrary to congressional intent.

While disposing of law violators is a complex issue for any society, it is even more problematic for one with diverse ideological norms and commitments. In a democracy, an important indicator of the quality of life emerges in the way it responds to those charged with crimes. One measure that has generated controversy is plea bargaining. This is an exchange process involving an accused's admission of guilt to a criminal charge in return for some consideration from the government. Through its use, adjudication if not sentencing questions are resolved. More than eighty percent of all criminal offenses are disposed of by means of plea bargains rather than combative trial (Feeley, 1979a). Propriety questions have been raised over its use however (Sudnow, 1965), and the National Advisory Commission (1973) has called for its abolition. Abolition, nevertheless, is exceedingly difficult to achieve. The prevailing decision mode in processing criminal cases is negotiation (Springer, 1983), and those involved in adjudication learn early in their careers to resolve disputes through informal means (Heumann, 1977). Research suggests that even those jurisdictions claiming to have eliminated or restricted plea bargaining have merely terminated one method in favor of another (Church, 1976; Cohen & Tonry, 1983; Farr, 1984; Rubinstein et al., 1980). Some kind of plea bargaining operates in almost all jurisdictions.

Plea negotiation arrangements come in many packages. They are put together by various actors who are restrained by the organizational environment in which they work (Eisenstein & Jacob, 1977). Prosecutors and judges, separately or in collaboration, mold agreements with defense counsel and the accused. The shaping of the arrangements as well as the recognition that what is being done is plea bargaining reflect the legitimacy of the practice in a jurisdiction. One class of cases may be almost automatically bargained out on a "take-it-or-leave-it basis". Another set may involve

intensive give and take. The deals put together may involve many or few parts, obligating each party to perform more or less acts. Besides an admission of guilt, an accused may be required to testify in other cases or otherwise cooperate in criminal investigations. In turn, the government may be required to reduce charges or make a sentence recommendation. A judge would be expected to lessen punishments. Finally, the fruits of their labor may be recorded in writing and placed on the court record or concluded "under the table" (Miller et al., 1978).

Plea bargaining is not limited to criminal justice. Other American justice systems use it as well. While plea bargaining research in juvenile justice has been enlightening (Ewing, 1978; Rubin, 1979), unfortunately, discerning scholarship has not been extended to military justice. In fact, relatively little empirical research has been conducted on any facet of military justice (Kourvetaris & Dobratz, 1977). The paucity of research is both surprising and a liability.

More than two million Americans are under military justice jurisdiction (Department of Defense [DOD], 1983), a number larger than the populations of sixteen of our states (Bureau of the Census [BOC], 1983). Further, more service personnel are in the crime-prone risk group, 18-24 years, than 43 states (BOC, 1980; DOD, 1981). The system of military justice is a complex decision network, developed to control violative acts in military society. Its responsiveness to law violations has been great. In 1983 alone, for example, more than 400,000 dispositional actions were taken by the system against active duty personnel (see Annual Report, 1984). And if the critics of military justice are correct, our citizens in uniform are subject to a second class system of justice (Sherrill, 1970).

This research examines military plea bargaining, a critical process which

affects the entire military justice system. It is the dominant safety valve by which criminal cases are settled through nonadversary means. The paper's premise is that risks and uncertainties are managed at every level of middle stage processing of military justice through some form of plea bargaining. A central problem for complex organizations is reduction of uncertainty (Thompson, 1967). Military justice has features which impede monolithic decision making, a characteristic which many observers inaccurately attribute to military institutions generally (Janowitz, 1971).[1] Plea bargaining is used to lessen unpredictability in both the nonjudicial and judicial components of military justice, enabling the system to function with greater stability. The forms that plea bargaining takes are described both within and across each setting according to commonalities of process and outcome.

The paper is divided into three sections: 1) bargaining in the military; 2) nonjudicial bargaining, and 3) judicial bargaining. The paper is further broken down by examining plea bargaining separately at each of the three nonjudicial levels (nonpunitive measures, Article 15 proceedings, and summary court-martials). Judicial plea bargaining is viewed at all three judicial forums (straight special, BCD special, and general court-martials) by examining its overt and covert forms. One of the nonjudicial and both judicial plea bargaining arrangements receive close attention. The nonjudicial form has been condemned by a congressionally sponsored investigation. The judicial arrangements have been monitored by military appellate courts. These appellate courts have recognized and regulated explicit arrangements. Implicit bargaining, however, has generated a firestorm of criticisms. Military plea bargaining, then, is an issue of topicality and policy significance to the justice community.

Harris & Springer (1984: 245-246), in reviewing the difficulties

associated with empirical research on plea bargaining, note the failure to develop sufficient data sets. They observe: "The processes of generating, weighing, and adopting differing 'deals' typically are not documented." The arrangements classified here not only reveal a great deal about military justice, but by approaching a common justice problem, they also help us to more fully understand the variations in plea bargaining from one jurisdiction to another, and the dimensions of plea bargaining in American society (Casper, 1979). Further, examination of what one legal control system is doing provides the advantage of assessing similar applications in other justice systems.

Study Method

The analysis is based on a variety of military documents, in-depth interviews with military attorneys assigned to justice duties, and previous studies. Interviews were conducted initially in 1978 and then again in 1984. The 1978 contacts involved daily interactions, both formal and informal, sometimes for weeks at a time as part of a large field project on military justice. Additionally, semi-structured interviews were conducted by telephone in 1984 to follow up on changes in law and practice. More than 60 military justice (prosecutorial, defense, and judicial) agents were involved. Much of the research is grounded on procedures and practices found in the Army. Nevertheless, because all services operate under one basic law, the Uniform Code of Military Justice (UCMJ, 1950), one set of procedural rules, the Manual for Courts-Martial (MCM, 1969)[2] and are accountable to one military supreme court, the Court of Military Appeals (COMA), generalizations are not limited to Army justice.

I. Bargaining in the Military

Plea bargaining may be conceptualized as a two-party game. Each party has something of value to trade with the other side. Unlike, the well known "zero-sum game" where one side's loss is the other side's gain, plea bargaining is a "positive-sum" variation where both parties work out a solution which, it is argued, satisfies some of their interests. Perceived benefits accrue to both sides (Harris & Springer, 1984). Negotiating in the armed forces follows this model.

Commanders exercise prosecutorial discretion in the military. Depending on their rank and duty status, these officers have a range of options available to them under military law to respond to a servicemember charged with a crime. They can decline to prosecute, initiate nonjudicial action, or refer the case to a judicial forum. Nonjudicial processing is distinguished from a judicial one by 1) the complexity of the proceeding; 2) the rules governing decision making; 3) the legal training mandated for decision making; and 4) the role functions of participants. A commander's decision is dependent on a weighing of such factors as: 1) the nation's status--war or peace (Westermoreland & Prugh, 1980); 2) the military justice resources available--time, money and personnel (English, 1977); 3) the goals to be served--deterrence, rehabilitation or retribution; and 4) the characteristics of the case--offense seriousness, evidence strength and accused attributes (Perry, 1977).

Whether a nonjudicial or judicial route is taken depends not only on the decision by the commander. The accused has the authority to block the commander from using most significant nonjudicial actions, forcing the commander to either take no action, or refer the case to a judicial body. The

nonjudicial selection decision is bilateral and open to negotiations. While the accused's decision to negotiate a nonjudical outcome is greatly influenced by military law, policies, and command practices, the final choice belongs to the servicemember. The accused alone must decide the fate which awaits him or her. Command decisions to refer a case directly to a judicial body are unilateral. Unless the accused can convince the commander not to go the judicial route, the accused has no control over the judicial selection decision. But once a case is in a judicial forum, the plea negotiation decision rests ultimately with both the commander and the accused. Bargaining occurs, as a result, throughout the middle stages of military justice. The product may be a formal plea bargain agreement scrutinized in a judicially supervised court arena or its functional equivalent in an administrative setting.

Workgroups carry out plea bargaining tasks. Judges, prosecutors and defense attorneys are the primary actors in civilian negotiating workgroups. Eisenstein and Jacob (1977) suggest that stable workgroups yield greater interaction and mutual dependence among workgroup members, reducing uncertainty about knowing each member's norms and expectations. Plea bargaining is enhanced under conditions of familiarity among workgroup members. Military plea bargaining differs from this conceptualization of the workgroup in that both accused in nonjudicial arenas and commanders in nonjudicial as well as judicial settings play an active role. Further, legally schooled defense counsel play a small part and trained judges are not required to play any role in nonjudicial processing. Lawyer-judges, defense counsel, and government trial lawyers, however, work together in judicial forums. Commanders marginally interact with these other judicial members though, relying on their prosecutorial staff to report on and work out the

details of agreements. Two outcomes follow this organizational arrangement. The judicial workgroup is larger and relatively stronger (more cohesive) than the nonjudicial one. Plea bargaining occurs less frequently in military judicial proceedings than in many civilian court systems (Keveles, 1984).

Minimizing uncertainty of trial outcomes and processing costs are concerns of all parties underpinning the use of plea bargaining in the military. An additional incentive, however, encourages command use of plea bargaining: uncertainty over how their leadership is going to be evaluated. Commanders are judged by the way they solve problems. Solving problems through nondirective counseling and cooperation is promoted over nonjudicial processing, nonjudicial processing is preferred to judicial proceedings, and nonadversary processing is more desirable than contested proceedings. In short, an effective leader is one who solves most personnel problems at the lowest level and with the least conflict (Radine, 1977).

II. Nonjudicial Bargaining

Nonjudicial actions are disciplinary devices. They are used by commanders to correct or eject violators in a fairly quick and effective manner. Procedures tend to be flexible and relatively simple. Defense, prosecutorial, and judicial functions are performed by nonlawyers with one officer sometimes performing all three roles. Penalties range from the informal and mild to the formal and severe. Because serious consequences may result, an accused may refuse most types of nonjudicial processing and request that the case be handled judicially.

Three nonjudicial alternatives are available to the military: 1) nonpunitive measures; 2) Article 15 proceedings; and 3) summary court-martials, the lowest trial court. In the tightly knit military society,

these administrative dispositional mechanisms are closely bound up with the judicial system, offering alternative ways to serve many of the same purposes and outcomes of judicial processing and affecting intimately core military justice practices. At each of these levels a form of plea bargaining occurs, some of which are virtually identical to the behavioral practices and consequences underpinning negotiated guilty pleas in judicial forums. Figure 1 identifies these three alternatives as well as the outcomes that will be discussed below.

Insert Figure 1 about here

A functional equivalent to judicial plea bargaining minimally consists of a process which is triggered only when there is a detected violation of military law, requires the accused's consent for using it as a substitute to judicial processing, and has judicial sanctions attached to it. The government cannot impose the nonjudicial alternative over the accused's objection. Nonjudicial plea bargaining is an exchange process that avoids the uncertainties of judicial processing. A nonjudicial equivalent, however, should ideally include an admission of guilt. This definition of plea bargaining is inclusive. It is not limited to guilty pleas. As McDonald (1979: 388) has argued, restricting plea bargaining to guilty pleas is "arbitrary," and ignores other practices that do the same job as a guilty plea bargain. McDonald (1979: 385), as an alternative, suggests:

> The concept of plea bargaining should not be restricited to either pleas or bargains. The fundamental phenomenon is the state's use of coercion to obtain the legal grounds for imposing a penalty.

Civilian plea bargaining agents, prosecutors and defense attorneys, use the term plea bargaining not only to refer to charge and sentence modifications in return for a guilty plea. They also consider negotiations over charge

dismissal and trial without an exchanged guilty plea to be plea bargaining. Even pretrial diversion falls under the umbrella of plea bargaining, especially when defendants are required to admit guilt informally before charges are dropped (Feeley, 1979b; Feeley, 1979c; McDonald, 1979; Maynard, 1984). In short, plea bargaining is the generic term for a range of transactions often resulting in imposed punishments during the middle stages of justice processing.

A. Nonpunitive measures: Administrative discharges

Nonpunitive measures simply refer to a class of administrative actions. The term does not mean that the military is not sanctioning acts of misbehavior. Known, harmful consequences do flow from their use (Erwin, 1972). Included under the title are such responses as extra training, transfer in assignment, denial of privileges, criticisms (censure, admonition or reprimand), and administrative elimination from service (Byrne, 1981). The most serious nonpunitive action by far is service termination.

An administrative discharge expeditiously processes out "unqualified" servicemembers.[3] It is used frequently by military authorities. Nearly 76,000 servicemembers were administratively eliminated for performing below par in fiscal year 1979 alone. This represents approximately 14 percent of all those discharged from the services in that year (General Accounting Office (GAO), 1980a). From the military's point of view, the nonpunitive discharge is a useful substitute for a court-martial. It is cost effective because it avoids the court-martial requirements of burden of proof and procedural protections. The military escapes the difficulties that follow serious trial--protracted statutory appellate processing, litigation, and possible reversals. Manpower, time, and effort are conserved (English, 1977).

Concomitantly, such a separation imposes powerful economic and social liabilities on servicemembers (Asher, 1979; Erwin, 1972).

Servicemembers are eliminated for "adverse reasons." The four most often cited rationales are: 1) marginal performance; 2) unsuitability; 3) misconduct; and 4) in lieu of court-martial (GAO, 1980a). The last one, formally called "discharge for the good of the service in lieu of trial," comes the closest to being functionally equivalent to the behavioral practices and consequences underpinning bargained guilty pleas at court-martials. This discharge differs from other administrative ones in that the servicemember must formally initiate the request for discharge. It also focuses on those charged with serious violations of military law who show little rehabilitative value. More than 150,000 members of the armed forces received this form of discharge over a ten year period (1967-1976). The discharge has not been expressly approved by the Congress nor is it rooted in military tradition. Instead it is a modern invention of the armed forces to get rid of problem servicemembers expeditiously.

The "good of the service" discharge is not simply a diversionary mechanism from the adjudicatory process with the accused's consent. Rather, unlike diversionary schemes found in current civilian systems, the accused's removal is from the society whose laws he violated, a practice comparable to events in the past in which, for example, criminals were exiled to various wilderness regions within the country or shipped abroad to survive in hostile places. Alternatively, a less severe analogy views the discharge as equivalent to being fired from a job when the supervisor judges the employee's work record as so undesirable as to render that person unworthy of retention. Nevertheless, such a representation fails to account for the stigma attached as well as the wide range of benefits lost.

Every discharge is designated a label which further describes the nature of the separation. The discharge character assigned in about ninety percent of the good of the service cases is "under other than honorable conditions," the most stigmatizing form of administrative discharge (Comptroller General of the United States, 1978).[4] This discharge character is considered a "badge of infamy" which seriously interferes with employment opportunities and eligibility for veterans' benefits. Perhaps more importantly, the public appears to equate this discharge character with a court-martial conviction and punitive discharge, a discharge given exclusively by general or special court-martials (English, 1977; Lance, 1978). Such a punishment is attached to more serious offenses such as striking an officer, rape or robbery. A punitive discharge (dishonorable or bad conduct) is designed to disgrace, to brand a servicemember as unworthy. Yet because no court-martial has been held, the servicemember with "bad papers" loses pretrial, trial and appellate protections afforded to those processed through the courts (Effron, 1974; Erwin, 1972; Lasseter and Thwing, 1982).

1. Chapter 10 Separations.

Differences do exist among the services in the requirements for using this discharge in lieu of trial. The discharge for enlisted persons in the Army is under provisions of Chapter 10, Army Regulation 635-200 (Department of the Army, 1973). Chapter 10 can be used only after four conditions are met: 1) the accused is charged with an offense which is so serious that a court-martial could adjudge a punitive discharge[5]; 2) the accused requests the discharge; 3) the accused formally acknowledges his guilt of the charges; and 4) the commander authorized to grant Chapter 10 discharges approves the elimination. Command disapproval effectively returns the case to trial (Hansen, 1976).

Should the government be willing to accept the request, military authorities require the accused to sign a document, an application for discharge, in which the accused acknowledges his guilt of the charges. Typically, the specific request form signed by the accused contains the following statement:

> By submitting this request for discharge, I acknowledge that I am guilty of the charge(s) against me or of (a) lesser included offense(s) therein contained which also authorize(s) the imposition of a bad conduct or dishonorable discharge.
>
> I have been advised and understand the possible effects of an undesirable discharge and that, as a result of such discharge, I will be deprived of many or all Army benefits, that I may be ineligible for many or all benefits administered by the Veterans Administration, and that I may be deprived of my rights and benefits as a veteran under both Federal and State law. I also understand that I may expect to encounter substantial prejudice in civilian life because of an undesirable discharge.

The commander's decision to approve the discharge request almost always terminates further court-martial action against the accused. The accused then bypasses the judicial process. A request for discharge can be accepted anytime, even prior to final action after trial (English, 1977). Commanders convene and review all court-martials. Without convening authority approval, no court-martial's findings of guilt or sentence may be executed. Since the approving authority for Chapter 10s is often the same commander who convenes and reviews serious court-martials, an accepted Chapter 10 request can defeat the court's decisions. Nevertheless, the convening authority need not disapprove court findings whenever he or she accepts the Chapter 10. The judicial and administrative actions are considered separate and distinct (Hansen, 1976). Commanders are not generally receptive to letting the accused "off the hook" through an administrative discharge after expending the time, energy and money prosecuting and adjudicating him or her. Most Chapter 10s

then occur prior to trial.6

2. Plea Bargaining

This discharge process and outcome is a consensual accommodation practice, an essential element of plea bargaining. Unlike most other forms of administrative discharge, the individual has control over whether he or she will receive this type of discharge. While military authorities must wait for the soldier to officially request the discharge, they can still informally suggest to an accused that submission of a request would be received favorably. The admission of guilt, however, is not a court plea. The discharge, therefore, lacks a core attribute of traditional plea bargaining practices. Nevertheless, the documented admission is certainly a "formal response of a defendant to the charge," a central component of any plea (Gilmore, 1973: 229).

Although servicemembers with a Chapter 10 secured prior to trial will not be sentenced by a court, these soldiers elect to be sentenced administratively. Agreeing to the voluntary "kick," pretrial Chapter 10 accused avoid the potential federal conviction, confinement or punitive discharge outcomes of a judicial proceeding. Nevertheless, instead of facing adverse findings of a court, accused automatically accept such punishment as an unfavorable discharge with the concomitant loss of veteran's benefits and the increased possiblity of experiencing stigma in civilian life--especially securing attractive employment opportunities. Military authorities, in turn, get rid of problem personnel, while avoiding court-martial and appellate review or a hearing by a discharge board (Comptroller General of the United States, 1978).

Military justice agents were asked whether Chapter 10s were functionally equivalent to court-martial plea bargaining. The respondents' reactions were

mixed. Some said yes, others said definitely no, and still others could not make up their minds (Interviews, 1978). Hansen (1976:126) suggests that when an accused submits a request for discharge, "He is in some respects engaging in plea bargaining." This high ranking Army lawyer sees value in equating the discharge to a plea of nolo contendere since the discharge procedure includes no formal inquiry into the factual basis of the admission of guilt. Hansen conducted a 1972 survey of 39 general court-martial jurisdictions. He sent questionnaires to military prosecutors, staff judge advocates (SJAs), who are advisors to commanders. Few of his respondents, however, viewed Chapter 10 as functionally equivalent to a court-martial plea bargain. In contrast, civilian researchers are unequivocal in their view. Effron (1974: 293) asserted that the administrative discharge process "provides an alternative system of plea bargaining without the judicial supervision" required by military law. A report issued by the General Accounting Office (GAO)(Comptroller General of the United States, 1978) argues that the discharge is without doubt a form of plea bargaining. The GAO found that plea bargaining involves:

> the exchange of a guilty plea for reduced charges or a specific maximum sentence. As used in this report, it also includes exchanging an admission of guilt to an offense punishable by a bad conduct or dishonorable discharge imposed by a military court for the assurance that the accused will not be brought to trial but instead will be administratively discharged.

Chapter 10's and other armed service equivalents were analyzed and then attacked in the GAO report. The GAO studied all cases in which the accused's unit commanders recommended court-martial in 1976. It found that more than half were disposed of by plea bargaining. Close to ninety percent of the plea bargains, moreover, were discharges in lieu of trial. The GAO asserted that the majority of offenses which result in discharges in lieu of court-martial

are unique to the military. Yet those who choose the administrative route are below age 20 and do not understand that the stigma of a bad discharge remains for life.

The GAO also researched a group of servicemembers charged with a military offense.[7] It found that approximately half were court-martialled. The other half received a discharge in lieu of court-martial. Of those court-martialled, slightly more than 60 percent received a punitive discharge.[8] On the other hand, more than 90 percent of the administrative discharges were under other than honorable conditions. Court-martial decision makers were less likely than discharge authority commanders to issue negative discharges for the same offense. In short, identically charged accused were treated differently. The GAO suggested that were the administrative discharge procedure nonexistent, three other alternatives, more favorable to the accused, would be available:

1. not trying the accused (insufficient evidence)
2. trying the accused at a court lacking punitive discharge authority (summary or straight special); or
3. trying the accused at a court authorized to impose a punitive discharge, but the court declines to adjudge that punishment.

The GAO concluded by calling for the abolition of the administrative dischrge procedure. The GAO argued that its use is contrary to congressional intent, and that its procedures lack the protections afforded accused by court-martial. Congress did not design a military justice system through the Uniform Code of Military Justice (UCMJ) so that criminal offenses would be disposed of outside of judicial processes. The UCMJ provides the safeguards required to protect the rights of accused and the interests of society. Under the administrative discharge process, however, no neutral party evaluates the wisdom of the discharge request nor determines whether the accused adequately

comprehends the consequences of the discharge action. The GAO's strong assault on the discharge and the dearth of studies of a procedure which affects thousands of Americans indicate that it is ripe for further empirical examination.

B. Article 15 proceedings

A second administrative mechanism which has elements of court-martial plea bargaining is Article 15, Commanding Officer's Nonjudicial Punishment (UCMJ, Article 15).[9] Like the Discharge for the Good of the Service, the initial grounds for Article 15 action also is the alleged commission of a crime under military law. In contrast to the discharge though, the crime allegedly committed is usually of a minor nature, an act similar to a misdemeanor.[10] Servicemembers, however, have received Article 15's for allegedly committing serious offenses (U.S. v. Fretwell, 1960).

An Article 15 can be imposed upon any military person who is offered it by a commander within an accused's chain of command and does not demand trial by court-martial. An accused has the statutory authority to refuse to accept punishment under Article 15 and to choose instead trial by court-martial with the attendant fifth and sixth amendment protections (Rivkin and Stichman, 1977; United States v. Booker, 1977).[11] An assertion of the right to trial by court-martial terminates an Article 15 proceeding. The commander then must decide whether or not to initiate court-martial proceedings against the accused (DOA Regulation 27-10, 1980:3-12[2][d]).

At an Article 15 session, an accused has the right to present evidence in defense, extenuation or mitigation. The servicemember may also call witnesses in defense, request the proceedings be open to the public, and have a person represent his interest. Nevertheless, because the Article 15 proceeding is

characterized as nonadversary, the representative need not be an attorney, nor may the accused or his or her agent question or cross examine witnesses except if the commanding officer grants such a request. The representative acts merely as a spokesperson for the accused raising issues before the commander that will enhance the accused's findings and sentence (DOA Regulation 27-10, 1980:3-4). If the commander is "convinced" that the accused committed the offense, the commander then can impose punishment (DOA Regulation 27-10, 1979:E-4).

Depending on the grade of the commander and the accused, permissible punishments include restriction, extra duties, correction custody,[12] forfeiture or detention of pay, and reduction in grade. For example, a field grade commander can impose the following punishments on members in the third enlisted grade (E-3) or below:

> Admonition or reprimand and 60 days restriction or 45 days extra duties or 30 days correction custody and forfeiture of one-half of one month's pay for two months or detention of one-half of one month's pay for three months and reduction of one or more grades (Department of the Army Pamphlet 27-18, 1974b: 3-4).

Since an Article 15 accuser also has the authority to determine guilt and to impose sentence, the Article 15 proceeding and outcome does not parallel processes existing in civilian criminal justice, though similarities with juvenile justice are evident (Keveles, 1985). A rationale for Article 15 proceedings is to provide commanders with "paternalistic" powers to correct minor offenders without the necessity of using formal court processes (Note, 1973: 1491). Commanders explained this Article 15 policy objective in Senate hearings by analogizing the proceeding to that of a father chastising an erring subordinate: to "correct a youngster by taking him out to the woodshed" without being forced to court-martial him (Bernard, 1976: 319, 322). Because imposition of an Article 15 is not a court-martial conviction, it does not

create a permanent criminal conviction of record (Moyer, 1972; Note, 1973). No prohibition exists, however, against making the record of Article 15 punishment a permanent part of a soldier's file (Army Times, 1977a, 1977b), influencing the direction and duration of a military career. Following the paternalistic analogy then, by not allowing the servicemember to redeem himself or herself, it is as if a father intends to hurt his son or daughter permanently for his own good.

An Article 15 proceeding is by far the most frequently used procedure in military justice. Twelve Article 15s were imposed for every court-martial held in 1983 in the armed services (340,418 Article 15 vs. 29,887 court-martials, see Annual Report, 1984). Article 15s popularity with commanders is assured since it can be administered rather quickly and simply at an informal hearing.[13] Those commanders unhappy with its impact on a servicemember are not prevented from resorting to court-martial. Imposition of an Article 15 for a serious offense does not bar a subsequent court-martial for the same offense (UCMJ, Article 15(f); U.S. v. Fretwell, 1960). Despite the risk of exposure to a kind of double jeopardy, there is little chance that servicemembers would be receptive to exercising their right to trial with its threat of potentially harsher punishments (Note, 1973).

1. Plea Bargaining

The Article 15 procedure is another vehicle of consensual accommodation to military law violations, particularly in those cases in which the accused does not dispute the allegations. Discussions with military justice personnel revealed, however, that most did not view an Article 15 as essentially like plea bargaining. They offered several reasons. First it is not an admission of guilt, but rather "merely accepting an allegation." Secondly, by waiving the right to demand trial, the accused is just "consenting to the procedures."

Thirdly, Article 15 acceptance does not necessarily lead to punishment. Finally, unlike the discharge in lieu of trial which must be initiated by the accused and responded to by the government, the Article 15 originates with the state (Interviews, 1978).

Even though the participants disagreed, the Article 15 route does involve negotiation and carries guilt admission consequences. What appears to be an absence of negotiation still reflects a complex bargaining sequence in many cases.[14] Some servicemembers use the Article 15 session with the intent of explaining themselves out of trouble. If successful, their unit commanders tear up the Article 15 or perhaps line out some of the charges. The accused's failure to persuade, however, means that they either demand trial or agree to accept punishment at this level (Interview, 1984; MCM, para. 132). Working out a solution of the charge problem through Article 15 is advantageous to the accused and the commander. Referral of charges to a court-martial increases the accused's risk of receiving the greater punishments found at court-martial. On the other hand, the court-martial system is not prepared to handle hundreds of thousands of minor offenses. Too many referrals to court-martial may indicate that a commander cannot control his or her personnel with leadership methods attuned to less severe responses (Radine, 1977).

As to the guilty plea issue, the authors of a note in the Yale Law Journal (1973: 1486) suggest that an Article 15 is analogous to a plea of nolo contendere. They argued that the practical outcome of consenting to an Article 15 is "a waiver of the right to trial--the essence of a guilty plea," invariably followed by punishment.[15] Moreover, while the accused may not be admitting guilt to an offense, an Article 15 punishment may be admissible at a subsequent court-martial to aggravate punishment (MCM, para. 127c). Its

record at a court-martial is evidence of the commission of a previous offense.[16] An Article 15 punishment is treated as a prior conviction (U.S. v. Johnson, 1970). In other words, an accused at an Article 15 proceeding is functionally pleading guilty to the commission of an offense for purposes of increasing punishment at any later court-martial.

Article 15s have been used as a "secret" alternative to a court-martial plea bargain arrangement. Commanders have offered accused an Article 15 in return for some assistance from the accused. Only occassionally, when an accused fails to get what he was promised, will concealed agreements be exposed. In one case, for example, an accused initially relied upon his commander's promise to impose an Article 15 instead of court-martialing him in exchange for the accused's cooperation with an investigation. The accused, however, was in fact later court-martialled.[17]

C. Summary court-martials.

The third nonjudicial arena that uses plea bargaining is the summary court-martial. The summary accused, like an Article 15 accused, must agree to being processed at this level. Servicemembers who decline summary proceedings may then face trial in a judicial setting, one which offers greater due process protections. But judicial courts also provide greater possible punishments.

A summary court is considered an administrative proceeding. The U.S. Supreme Court has ruled that it is a disciplinary mechanism which is not an adversary, punitive proceeding (Middendorf v. Henry, 1976). Because it is the lowest trial forum, similar to a police court in civilian settings (Salisbury, 1982), its jurisdiction is limited. It cannot try any capital offense nor servicemembers who are officers. Sanctions are also limited. Punishments are

restricted to confinement for 30 days, hard labor for 45 days, restriction for two months, forfeiture of two-thirds pay for one month, or reduction to the lowest grade. Conviction at a summary court, however, can be used to aggravate the sentence imposed at a higher court (MCM, para. 127c).

Summary procedures, in contrast to other court-martials, are simplified, with fewer legal rules mandated. A commissioned officer without formal legal training presides (UCMJ, Art. 16). The lay officer is required to play judicial, prosecutorial and defense roles. The accused lacks the statutory right to the appointment of military counsel at a summary court, though servicemembers may still retain a civilian attorney at their own expense.[18] Defendants may, however, cross-examine witnesses, testify and present evidence (MCM, para. 137). Direct appeal is only to the officer who convened the summary court. The officer who convened the summary court may review, suspend, or vacate the sentence (MCM, para. 88), and his superior may do the same (MCM, para. 94).

Summary courts attempt to correct violating servicemembers through punishment (Lermack, 1974). As a mechanism designed to encourage servicemembers' conformity to military standards, it is not unlike the goals underpinning Article 15s. Approximately 40 percent of all court-martials in the Army, Navy and Marine Corps are summary courts.[19] Many critics have urged its abolition (Lermack, 1974). Commanders are said to use summary courts when they have weak evidence and only are concerned with immediate punishment (Asher, 1979). The possiblity of command influence also is increased because the person making the accusation can convene the court and choose the presiding officer (MCM, para. 5c). Its one officer court has been viewed as making it a 'kangaroo court' (Radine, 1977: 188). Article 15 proceedings should replace summary courts, some have argued, since the punishments

available at both levels are quite similar (Lermack, 1974). Congress has thought about its use for years, but has declined to eliminate it (Asher, 1979).

1. Plea Bargaining

Very little is known by civilians about plea bargaining at the summary court. The Department of the Army, for example, requires field commanders to submit quarterly reports on summary courts, limited to such aggregate statistics as the number of persons tried and convicted (Lermack, 1974). From annual reports from the four service branches, we know that the conviction rate at the summary court is approximately 95 percent (Annual Report, 1984). But we cannot discern the proportion of guilty pleas from these sources.

Lermack (1974), in the only empirical research in this area, examined 751 summary court-martials in 1969 at a single Army reservation in Maryland. He found that 88.2 percent of the summary accused pleaded guilty. He attributed the high rate to the relatively noncontroversial nature of the cases. Only seven percent of all accused were charged with civilian type offenses, acts punishable under state criminal codes. The overwhelming majority were accused of purely military offenses, conduct unknown in civilian codes. These were offenses which were relatively easy to prove. For example, AWOL is an offense in which the facts are typically not contested. Proof is based primarily on documentary evidence. In the face of these circumstances, defendants have an incentive to plead guilty and hope for lenient treatment from the court. The Lermack analysis is similar to Mather's (1974) "dead-bang" cases in which the evidence is strong and the offense is not serious.

What Lermack does not discuss in connection with guilty pleas, however, is the very important legal role of the commander after a court-martial. As mentioned earlier, commanders take final action on court-martial cases. They

have the discretion to disapprove the findings or sentence of the court. Their disapproval authority of the sentence is limited to suspending or reducing any punishment adjudged (UCMJ, Arts. 60, 64). The accused then may also hope or expect that the reviewing commander will also show sentencing leniency. Commanders, in fact, regularly modified court sentences in Lermack's sample. But he argues that the inexperienced summary officer had a tendency to impose the highest possible sentence, requiring the reviewing commander to ameliorate the punishment. Lermack never deals with the possiblity that these summary pleas may be based on an informal understanding that guilty pleas will be rewarded. Neither does he discuss weak evidence cases. His data analysis, limited to the presentation of frequency counts, is of limited value. Nevertheless, Lermack does provide the first systematic glimpse of summary courts.

Despite the paucity of research, plea bargaining does occur at summary courts. From my own work on summary courts, plea bargaining appears to be as informal as the proceedings themselves. By virtue of agreeing to a summary court, servicemembers waive their right to a judicial determination of their case. Since most servicemembers do not contest the charges, the summary court functions similarly to undisputed Article 15 proceedings. In fact, many of those who turn down Article 15s in favor of pleading guilty at summary courts are motivated by a belief that they would get a "better shake from summary officers than their commanders" (Interview, 1984). Some servicemembers have greater confidence in summary officers than their commanders.

One Army justice agent recently questioned about plea bargains at summary courts suggested that because a prosecutor may not be present at trial, the only way to directly affect the summary court outcome would be to reduce the charges. In return for a guilty plea, a commander would agree to lessen the

number or the seriousness of the charges (Interview, 1984). But the maximum punishments attached to offenses either equal or exceed the available punishments at the summary. Other than characterizing the convicted offense, it would appear that charge reduction would have a minor effect. Instead it would seem that the plea bargaining process is less visible and direct.

Most plea bargaining appears either as a result of agreements initially made at a higher court level, or an implicit understanding between the accused and the summary adjudicator or reviewing authority. A case referred to a higher court may be settled by a pretrial agreement, a instrumentality addressed in the judicial plea bargaining section below. The parties would agree to adjudication at the lower court in return for a guilty plea (English, 1977; Interviews, 1984). Alternatively, a case initially referred to a summary court would be disposed of through implicit plea bargaining. The accused pleads guilty in an expectation, real or imagined, that the summary officer or reviewing authority will show sentencing mercy.

III. Judicial Bargaining

Commanders may resort to a judicial forum when nonjudicial avenues are considered inappropriate in particular cases. Commanders have three choices. They may refer cases to either of the two types of special courts or to the general court-martial. Methods of plea bargaining, however, do not appear to be substantially different whichever judicial court is used. Figure 2 identifies the alternatives as well as the outcomes that will be discussed below.

Insert Figure 2 about here

Military judicial forums are entities formally independent of command control. Legal professionalism permeates judicial courts, requiring legally

trained servicemembers to play judicial, prosecutorial and defense roles. Both in goals and procedures, these military courts resemble criminal courts. They are adversary in nature, follow strict rules of evidence, and offer similar defenses to crime. Military accused are provided with some of the same rights that civilian defendants have. For example, there are sixth amendment equivalent rights to notice of charges (UCMJ, Art. 35), confrontation of adverse witnesses (UCMJ, Art. 39), compulsory process for obtaining favorable witnesses (UCMJ, Art. 46), and assistance of defense counsel (UCMJ, Art. 27). Other rights, however, are withheld to servicemembers, such as right to indictment by grand jury (fifth amendment), pretrial bail (UCMJ, Art. 9, 10, 13; Horner v. Resor, 1970), and trial by jury (O'Callahan v. Parker, 1969).

A. Special courts

A special courts-martial is an intermediate level court. More civilian type crimes are processed here than at summary courts, offenses which would be considered lesser felonies and misdemeanors in civilian justice systems (Kadish et al., 1980). Special courts process over 52 percent of all court-martials (Annual Report, 1984). These courts have the authority to try any case involving noncapital offenses as well as, under certain circumstances, capital offenses other than spying (UCMJ, Art. 19; MCM, para. 15). There are two types of special court-martials, "straight" specials and bad conduct discharge specials (BCD Specials). A straight special is a lesser court than a BCD special. A straight special can impose confinement for not more than six months, hard labor for not more than three months, restriction, forfeiture of two-thirds pay for not more than six months, and reduction to the lowest enlisted grade (UCMJ, Art. 19). A BCD special can impose these

same punishments, and, in addition, can punitively discharge an accused with a bad conduct discharge (UCMJ, Art. 23).

Greater procedural requirements are required at a BCD special than at a straight special. At both specials, an accused may be tried by judge alone or court members. Court members have many duties that are the same as civilian jurors. If servicemembers do not request trial by judge alone, they will be automatically tried by court members. At least three members are required to proceed to trial by court members. A BCD special must be presided over by a trained military judge. The only exemption to this requirement is because of "physical conditions or military exigencies" (UCMJ, Art. 19). In such cases, the president of the court, who is the highest ranking member, presides. Special courts, however, are rarely held without a military judge (Bishop, 1974). Both a prosecutor and lawyer defense counsel are appointed to a BCD special (UCMJ, Art. 27). The BCD special accused has the same rights to a qualified attorney as a GCM defendant. The straight special accused is entitled to trained military counsel, however, unless such trained counsel is unavailable. Appointment of a military defense counsel who is an attorney is provided Army accused unless certain documented emergencies exist (See Lermack, 1974; UCMJ, Art 27c). A formal record of the proceeding, a complete and verbatim transcript, must only be made in a BCD special (UCMJ, Art. 19). Review of special courts are by the commanders who convened the court. A service's Court of Military Review will automatically review cases in which a bad conduct discharge is adjudged (UCMJ, Art. 67).

B. General Courts

A general court-martial (GCM) is the highest trial forum in military law. Its jurisdiction extends to any person subject to the UCMJ for any offense

made punishable by the Code. A GCM may impose any sanction not prohibited by military law up to and including death. Lesser punishments include a dishonorable or bad-conduct discharge or a dismissal for officers. Civilians charged with committing war crimes also may be tried by GCM (UCMJ, Art. 18; MCM, para. 14).

The GCM offers the most procedural protections prior to and during the trial. Before the GCM can be convened certain steps must be followed. A legal opinion as to the disposition of the charges must be given to the convening authority. The written advice is given by the staff judge advocate, a convening authority's chief legal counsel (UCMJ, Art. 34). Although seldom done, a convening authority may take action contrary to the staff judge advocate's recommendation (Kadish et al., 1980). A pretrial hearing called an Article 32 investigation must also be held (UCMJ, Art. 32; MCM, para. 34). The objective of this hearing is to provide convening authorities with nonbinding recommendations that will help them to decide how to dispose of the charges (Kadish et al., 1980). The Article 32 investigation reviews the factual basis of the charges and determines whether probable cause suppports them. This hearing has been traditionally compared to a grand jury proceeding required under federal law and in some states (Moyer, 1972).[20]

At the trial, a trained military judge must preside and rule on questions of trial procedure and admissibility of evidence. A complete trial record must be made. The accused has a right to the appointment of trained military defense counsel, to civilian counsel at their own expense, or military counsel of their own selection if such counsel is reasonably available (UCMJ, Art. 38[b]). A GCM tried by court members must consist of five or more members. A GCM conviction is reviewed by the convening authority and his legal officer. A Court of Military Review will automatically review sentences involving a

punitive discharge or confinement over one year (UCMJ, Art. 67).

C. Plea Bargaining

Both explicit and implicit plea bargains occur in judicial courts. Explicit bargaining involves visible adversariness between the parties. Resolution of cases is accomplished through direct compromises over the facts, charges, and sentence. Implicit bargaining focuses on regularized practices in the courts that result in mitigation of punishment. Going rates are established as a matter of course for classes of offenses without much, if any, consideration for the particular characteristics of a case (Feeley, 1979c; Mather, 1979; Maynard, 1984). Explicit bargaining in the military is a formal arrangement between the accused and the commander, memorialized in a written form, titled a pretrial agreement. Implicit plea bargaining for the most part centers on unregulated, standardized understandings between the defense attorney and the judge. Military appellate courts have approved the former and condemned the latter.

1. Overt plea bargaining.

Explicit plea bargaining begins with a formal offer by the accused and defense counsel to negotiate a guilty plea with representatives of the commander who referred the case to a court-martial (Gray, 1978). This military commander not only has the power to convene a court-martial, but, as indicated above, he or she reviews the sentence of the court. The convening authority, then is also the reviewing authority. The reviewing authority has the power to disapprove the entire sentence by reducing it in quantity and/or quality, suspend the execution of any part of or all the sentence by changing the type of punishment as long as he does not increase the severity of the sentence (UCMJ, Art. 64). Because of this sentencing reduction power, the

accused bargains with the convening authority.

The contemplated arrangement may involve one or more concessions from each party. The accused, in addition to agreeing to plead guilty, may also be asked to testify against other codefendants. The convening authority, on the other hand, may agree to any one or a combination of the following: 1) sending the case to a lower court-martial for adjudication; 2) approving only a certain maximum sentence; 3) trying the accused only on certain charges and specifications; 4) dismissing or withdrawing particular charges and specifications; and 5) guaranteeing that the government trial counsel will not object to the accused's pleading guilty to a lesser included offense (The Advocate, March-April 1976; Bryne, 1981; U.S. v. Fleming, 1969).

Negotiations are usually administered by the representatives of the accused and the convening authority. The defense counsel usually meets with the convening authority's legal advisor or staff. Once the plea bargain arrangement is worked out, the agreement is reduced to a final written document. With the signatures of the principal parties (the accused and the convening authority) and defense counsel, the document becomes a binding contract and is formally the pretrial agreement. The agreement becomes enforceable once the judge accepts the accused's guilty plea. Typically, in return for an accused's guilty plea, the convening authority promises to extend to the accused sentencing relief if the court sentence is more severe than that agreed to in the contract. If the court adjudges a less severe sentence than the pretrial agreement, then the accused "beats the deal" and the court sentence is implemented. In a sense, the accused has "two bites of the apple" (Interviews, 1978).

Pretrial agreements commonly consist of two parts. The first section is the offer to plead guilty as well as a series of acknowledgements that the

servicemember understands what he or she is doing through consultation with defense counsel and what must be done to insure that the agreement is kept. Although variations exist among and within the services, Army pretrial agreements examined were found to often have fifteen different acknowledgement provisions, many designed to protect the rights of the accused. The section also contains an agreement to enter into a stipulation of fact with the government. Since there isn't any presentence investigation report in the military to inform the court-martial sentencing authority, a stipulation may become a paramount focal point in sentencing negotiations. The stipulation may be the only information the court has about the accused and the offense. The second section, a much shorter document, describes the convening authority's promises.

Pretrial agreements have been formally recognized and institutionalized in the Army since 1953 (McMenamin, 1971), in the Navy since 1957 (Della Maria, 1971) and in the Air Force since 1975 (U.S. v. Avery, 1975). Its use grew quickly in the Army. Less than 10 percent of all Army GCM offenders pleaded guilty before the initiation of the Army program. By 1956, however, the rate of guilty pleas for Army offenders jumped to about 60 percent (Everett, 1956). This contractual bargaining has been closely monitored by military officials and military appellate courts (See, for example, U.S. v. Care, 1969; U.S. v. King, 1977). Over time, substantive and procedural problems found in such agreements have been lessened (Gray, 1978; Vickery, 1972).

Military justice's ameliorative efforts stand in stark contrast to civilian justice's more passive policing of plea agreements. Serious problems still remain in civilian plea bargaining. Many are still products of verbal understandings among the parties, yielding differing interpretations of whether a specific promise was made and its meaning and effect (Jones, 1979).

Others which are reduced to writing often lack specificity in detailing the purpose and consequences of the agreement. To the extent that unambiguous, comprehensive documents form the basis for mutual accommodation in the military legal system, the guilty plea process is an open, formally countenanced practice which protects the accused's due process rights. Rosett and Cressey (1976: 172) suggest that formalizing plea bargaining by written agreements "attempt to reduce the welshing and potential corruption that accompany secret negotiations." To be sure, as Rosett and Cressey point out, such a procedural device is not a panacea for all the discretionary decision making issues that can be raised about plea bargaining. The nonjudicial alternatives available in the military make this clear. But it does respond, sometimes very effectively, to one critical problem. Ironically, military justice which has suffered from a terrible reputation may have something of value to offer civilian criminal justice.

Empirical research on pretrial agreements is almost nonexistent. From figures supplied in the Sourcebook of Criminal Justice Statistics (Flanagan & McLeod, 1983: 493-498), calculations were performed which showed that 71.9 percent of all general and BCD special court-martials in the Army, Navy and Marine Corps resulted in guilty pleas in fiscal year 1979. Negotiated guilty pleas represent 63.7 percent of all guilty pleas. Reliance on guilty pleas and plea bargaining are certainly not as great in the military as it is in the civilian sector (Miller et al., 1978). Nevertheless, great variation exists within the services and between court-martial levels (See Table 1). For example, there were fewer guilty pleas at the higher court than the lower one across the services, a finding which is understandable given the potential for a much more severe punishment at the GCM level. The Army was much more willing to negotiate than the Navy: 92.1 percent of all GCM guilty pleas and

76.3 percent of all BCD special guilty pleas in the Army were negotiated. Navy percentages for negotiated guilty pleas were 72.7 and 45.2 respectively.

Insert Table 1 about here

These differences represent the discretion given to each service branch to mold its own plea bargaining policy. For example, in my own contacts with Air Force personnel (Interviews, 1978), they indicated that their low guilty plea rate was related to prohibitions on negotiations mandated by Air Force policymakers. The highest authorities in the Air Force justice system must approve the use of the pretrial agreement route in a case. Approval is only granted in unusual circumstances (national security, child victim cases). Nevertheless, other service branches believe that without its regular use military justice would be faced with a crisis, particularly involving a heavy backlog of cases (Gray, 1978).

The few studies that have been done in this area have been limited in scope to analysis of variables, often missing contextual aspects of decision making (Maynard, 1982). Call, England and Talarico (1983) looked at the effects of eliminating plea bargaining at special courts in the Coast Guard and found, using time series analysis, that its abolition did not make much of a statistical difference to its justice system. Their research, however, is problematic given the small number of cases and unique characteristics of the Coast Guard, an arm of the Department of Transportation. Keveles (1984) examined plea bargaining at general and BCD special courts in the Army and demonstrated, using discriminant function analysis, that number of charges had the most discriminating power. His research, however, was limited to Army cases in Europe. Only Pitkin (1977), a Naval lawyer, questioned participants about plea bargaining. Nevertheless, his participants were incarcerated military offenders.

2. Covert plea bargaining.

As Table 1 made clear, not all guilty pleas are the result of negotiations. A number of possible reasons may help to explain servicemember guilty pleas without the protections offered by a pretrial agreement. Lermack (1974), in addition to studying summary courts, also examined straight specials. He found in his sample of 2,637 that 97 percent of the accused were charged with military crimes only. Nearly 94 percent of the accused pleaded guilty to all charges. His interpretation, limited to these summary statistics, is almost identical to that offered for summary court: in the majority of cases involving purely military offenses, the facts are not in dispute. Consequently, there is little reason for contesting the case. Other cases that result in guilty pleas at straight specials, Lermack asserts, are probably due to the commander or his agents offering the accused trial by straight special as an alternative to trial by general court-martial in return for a guilty plea. Lermack's failure to even mention pretrial agreements, however, may indicate that the cooperative arrangement is informal. On the other hand, Lermack found that 47 percent of all general court-martials at his sample site disposed of civilian type offenses. He suggests that civilian type offenses involve complex factual situations which explains the lower rate of guilty pleas in general courts. His interpretations explain some nonnegotiated guilty plea cases. But they don't even begin to explain plea bargaining.

I conducted field research on Army general and BCD special courts during the late seventies, and found accused pleading guilty without an agreement in several jurisdictions. Finding this puzzling, court-martial participants were questioned. It was discovered that there were informal agreements between the defense counsel and military judges. Some judges were much more predisposed

toward those who pleaded guilty without a pretrial agreement, making their views known by their sentencing decisions and informal interactions with defense counsel. These judges regularly rewarded nonnegotiated accused with sentence leniency.

The judges reasoned, according to these informants, that straight guilty pleas would help them manage their caseload better. Straight guilty pleas require less judicial work and time than do negotiated guilty pleas during the providency inquiry, the judges' questioning of the accuseds' understanding of the meaning and effect of the guilty plea and pretrial agreement. By regulation (DOA, 1969) and military appellate court decision (U.S. v. Care, 1969), a judge's providency inquiry had to stand up to elaborate "boiler plate" (checklist) standards of interrogation when a servicemember pleaded guilty pursuant to an agreement. Trial judges were required by the Court of Military Appeals (COMA), the supreme court of military justice, to play an aggressive role in policing the use of pretrial agreements by making the judge responsible for fully exposing the terms of the agreement in court. Judges were also required to show on the record that they secured from the defense counsel as well as the prosecutor positive confirmation that the written agreement "encompasses all the understandings of the parties and that the judge's interpretation of the agreement comports with their understanding of the meaning and effect of the plea bargain" (U.S. v. Elmore, 1976: 81; U.S. v. Green, 1976; U.S. v. King, 1977).

The necessity of making the trial judge responsible for a line by line investigation of almost every facet and consequence of pleading guilty resulted in a perception that the acceptance of a negotiated guilty plea was taking as much time as trying a contested case. In the typical words of one military justice decision maker who literally threw up his hands:

> COMA (the military supreme court) is insane. It has gotten to the point where everyone but the accused is responsible for his actions. The defense counsel must make sure that the accused is protected, the judge must make sure that the defense counsel protects the client, and the government trial counsel is responsible for insuring that the judge makes sure that the language he uses with regard to defense counsel's understanding of his client's wishes is correct (Interview, 1978).

The escape hatch was the less regulated nonnegotiated guilty plea. The providency inquiry would be expedited by encouraging accused to offer straight guilty pleas. A "gentlemen's understanding" developed among the parties. Standardized sentences emerged for those who entered a straight guilty plea. Prosecutorial and defense counsel suggested that even bringing fairly serious cases to a GCM judge would generally result in no more than a bad conduct discharge and nine months confinement.

Rarely in research does a situation present itself which confirms an informal, almost invisible process known only to the principal agents involved. While in the field, however, this pattern of judge centered plea bargaining became public, adversity developed, and a scandal was born. A military defense counsel, unaware of one of these judge's sentencing predilections, pleaded his client guilty with a pretrial agreement. The accused received what the defense counsel believed to be an unacceptably high punishment. According to third parties, the defense counsel then quizzed the judge privately about the sentence. The judge allegedly expressed surprise that the defense counsel lacked understanding of sentencing practices in his courtroom and suggested that he act differently in the future. The defense counsel's reaction was to "blow the whistle" on the judge's behavior by appealing the case and its sentencing outcome to military appellate courts (U.S. v. Caruth, 1979; U.S. v. Newburn, 1977; U.S. v. Jenkins, 1977; U.S. v. Gonzales, 1977). Although subsequently COMA did not find in favor of the

accused nor affirm the allegations of impropriety, it did chastise the judge for creating the appearance of an implicit arrangement and improper sentencing policy (U.S. v Caruth, 1979). The judge, a full bird colonel, later resigned his commission and retired. It is not known what happened to the whistle blowing defense counsel.

After my field research, COMA decisions continued to monitor guilty pleas pursuant to agreements, reaffirming specific guidelines for military judges to follow (U.S. v. Crowley, 1978; U.S. v. Hendon, 1979). Trial judges, in turn, continued to respond to pretrial agreement cases by ritualisticly adhering to a mechanistic application of rules, padding the record and hindering judicial efficiency and economy (Lause, 1979; U.S. v. Kraffa, 1980). A judicial perception that they had to run a "guilty plea 'gauntlet'" was fostered (Moriarty, 1981). Despite some relaxation of a hypertechnical enforcement of the plea inquiry requirements by COMA,[21] judges in the 1980s still have to exercise inordinate care and sensitivity in negotiated guilty plea cases. Canned answers to rote questions have not been eliminated (Moriarty, 1981).

Recent telephone discussions with military justice officials indicate that judges remain formalistic and cautious in negotiated guilty pleas cases (Interviews, 1984). But they still continue to accept nonnegotiated guilty pleas, seemingly imposing punishments reflective of the value of such pleas (Gray, 1981). As one high ranking Army administrator stated:

> As a rule of thumb, a judge will knock off one or two months from a BCD special while in a GCM, the amount of slack cut is less clear (Interview, 1984).

An Army GCM judge, however, offered no such assurances. Well aware of the judge who got into appellate trouble, this judge said:

> what happened with him is in the past. He was involved in docketing sequence...plea guilty at arrangement session which isn't used too much now. I've seen guilty pleas with or without a pretrial agreement in AWOL

> offenses....Just need three slips of paper. A plea of guilty with or without a pretrial agreement is the same thing, no difference if made early or finally, I don't consider that. But as a practical matter, I give more of a break for guilty pleas because it shows he did it, contrition, sorry and grown up. But judicial economy, I don't play that game. Three guilty plea or contested cases, I follow a take it as you come credo. Otherwise, as my grandmother said, 'you're pissing up wind.' We received straight forward pronouncements from TJAG [The Judge Advocate General of the Army, the chief Army justice commander] about that judge. Don't have any great ideas (Interview, 1984).

Like others recently questioned, this judge understood the message from higher ups to avoid using creative means to expedite cases. The career costs were too high. He intended to do nothing out of the ordinary. He wouldn't have any predetermined notions about the cases before him. Yet the judge did indicate that guilty plea defendants will receive a break, though he offered no differentiation between straight guilty pleaders and negotiated ones.

A third Army administrator suggested that straight guilty pleas are unusual and judges "know no bottom line" in sentencing. Straight guilty pleas that do occur, however, are the result of government refusals to negotiate. Commanders would not deal in some military cases because it would be easier and faster to prove the case at trial than to successfully take the case through providency. "The accused throws himself on the mercy of the court" in such cases (Interview, 1984). Another Army judge added that the defense counsel makes sure the judge knows there is no pretrial agreement, hoping to get a favorable sentencing outcome (Interview, 1984). A Navy administrator disclosed a slightly different view: there is an "expectation without articulation" by the parties that sentencing leniency will follow straight guilty pleas. "Maverick judges" are treated to defense tactics which impede their efficient management of cases:

> No one talks about it. There is a premium on judges being consistent punishers. Otherwise defense counsel will request trial by members [jurors] which slows the process down by a factor of five (Interview, 1984).

Unless one is in the field, constantly observing and interacting with the military legal community, one really doesn't know the degree to which judge centered plea bargaining has changed. Telephone discussions don't promote candid responses, especially in the absence of a previous familiar relationship. One interviewee suggested that judges don't know if their remarks will be personally attributed to them. Disclosure concerns, a perennial problem in most organizations, is particularly acute in military settings. What is known, however, is that allegations of covert plea bargaining still reach the appellate courts. Unwritten agreements that are not brought out at trial appear to happen even in pretrial agreement cases (See U.S. v. Cooke, 1981; U.S. v. Joseph, 1981). It is not unreasonable to suspect, in light of these circumstances, that implicit plea bargaining continues, perhaps, with some variation in form.

Conclusion

Discretion in the administration of justice is a fixed quantity. It cannot be removed, only moved around (Alschuler, 1978; Morris & Hawkins, 1977). Discretionary exchange processes permeate justice systems. The fulcrum of juvenile justice, for example, consists not only of juvenile courts but an earlier intake (nonjudicial) stage as well.[22] Efforts are typically made by the parties involved to work out agreements at the nonjudicial level. Juveniles are required to make an admission of guilt and agree to the disposition proposed by intake officers. Those who refuse may ask for a judicial hearing. The juvenile court route, however, involves a greater risk of a more severe disposition.[23] Intake officers, on the other hand, may urge

acceptance of nonjudicial intervention as a way to reduce judicial caseloads or because of their uncertainty that there is sufficient evidence to sustain delinquency complaints at judicial proceedings (Krisberg & Austin, 1978; Pettibone et al., 1981). In the middle stages of juvenile justice processing then, bargaining practices solve the problem of disposing of many cases.

Much has been said about Alaska's successful ban on plea bargaining (Rubinstein et al., 1980). But as later scholars have suggested, the Alaskan research most likely overestimated the effects of the abolition (See Casper & Brereton, 1984; Cohen & Tonry, 1983). Call, England & Talarico (1983) found that the abolition of plea bargaining in the Coast Guard did not make much of a difference to that small justice system. Nevertheless, the focus of their study was special court-martial pretrial agreements. Keveles (1984: 408-409) also limited his analysis of Army plea bargaining to general and BCD special court-martials. He concluded that the relatively low rate of guilty pleas and negotiated agreements means that the military is "an institution of trials." Both military studies' restrictive context, however, predetermined the possible interpretations drawn. Feeley (1979b: 200) has remarked:

> If plea bargaining is the generic term for negotiation in the criminal process, then we need a richer vocabulary for generating typologies and exploring in greater detail the process of nontrial.

Plea bargaining in the military takes many forms. They may occur at the nonjudicial or the judicial level. We have seen that at the nonjudicial level plea bargaining involves agreements in which the accused has considerable control. An accused who consents to nonjudicial processing is also agreeing to punishment. We have also found that the accused's agreement is minimally equivalent to a nolo contendere plea. Chapter 10 servicemembers, however, are required to make an admission of guilt and summary accused must plead guilty. Many of the procedures and penalities at the nonjudicial level are as informal

as those existing in juvenile justice, particularly at the intake stage. To protect against the abuse of discretion, the sanctions that many be imposed are strictly limited, and servicemembers, just as juveniles, are given the right to opt out of the nonjudicial processing and demand judicial referral under most circumstances.

Judicial plea bargaining is a more familiar process. Unlike many civilian jurisdictions, negotiated guilty pleas are a result of formal, legal contracts. The relatively high percentage of nonnegotiated guilty pleas is, in part, tied to implicit plea bargaining practices. Two kinds of covert plea bargaining have been identified: the accused and their defense counsel having an understanding with 1) the commander to process the case at a lower court-martial, lowering the ceiling on the potential sentence, or 2) the judge to limit his or her punishment. Processing an accused through a nonjudicial route, especially an administrative discharge, does not appear to be in the interest of the charged servicemember. Disposing of a case through a pretrial agreement works toward insuring that the rights of the servicemember are protected.

Finally, this analysis challenges the recent picture of crime in the armed forces. The military has claimed that its crime problem is diminishing. Military authorities base their conclusion on the lowering of the rate of court-martials. They argue that a better breed of recruits has entered the service (Interviews, 1984). The image, however, is suspect given the evidence of multilayered responses available outside of judicial processing.

NOTES

[1] The military is frequently viewed as the paradigm of bureaucratic organization with an emphasis on centralized decision-making and hierarchy (Kourvetaris & Dobratz, 1977). Yet that perspective has been strenuously challenged by Miewald (1970). Another approach is to consider the military organization as an open-system. It is dependent on and continuously interacts with its many parts and environment (Segal et al., 1974). Decision making reflects an attempt to deal with the uncertainties inherent in open systems.

[2] The Military Justice Act of 1983 (Public Law 98-209--December 6, 1983) amended the UCMJ. Subsequently, the President modified the MCM (Executive Order 12473) effective August 1, 1984. The changes, however, do not materially affect the issues discussed in this paper.

[3] The military has long had the authority to eliminate servicemembers judged unqualified for retention, irrespective of whether the failure to measure up involves acts subject to trial by court-martial (Comptroller General of the United States, 1980; Erwin, 1972).

[4] There are three types of administrative discharges: honorable, general, and under other than honorable conditions. The under other than honorable discharge character was formerly termed "undesirable." Although the label has changed, the negative results are the same.

[5] The preferred charge need not have already been referred to a court-martial that can impose a punitive discharge; it is sufficient that the charge is serious enough that if found guilty at an appropriate court-martial, the soldier's punishment could include a discharge (Hansen, 1976).

[6] A post-trial Chapter 10 discharge does have attractive features for the military under certain circumstances. A court punishment that does not include a punitive discharge and a substantial period of confinement will trigger its more ready use at that late stage. Commanders have even been urged to disapprove an adjudged punitive discharge and accept a request for discharge for the good of the service in those cases where substantial incarceration has not been adjudged. Military authorities consider such a response to be an indicator of sensible management. Every case involving an approved punitive discharge or confinement of one year or more requires appellate review before a conviction becomes final. Review typically takes two or more years. Administrative discharge action, however, may only take a few weeks. Delays and expenses are minimized, conservation goals stressed by the highest military leaders (English, 1977).

[7] The GAO reported on its research of a randomly selected group (n = 1,094) of servicemembers charged with absence without leave for over 30 days, an offense punishable by a dishonorable discharge and up to one year's incarceration.

[8] Every one of these punitive discharge cases was a bad conduct discharge rather than the more severe dishonorable discharge.

[9] In the Navy and Coast Guard, nonjudicial punishment is called "Captain's Mast," in the Marine Corps, "Office Hours," and in the Army and Air Force, "Article 15." The discussion below will refer to nonjudicial punishment by its Army and Air Force name.

[10] The term "minor" generally means an offense for which an individual can receive a maximum punishment of confinement for one year or less and does not include a dishonorable discharge (Department of the Army [DOA] Pamphlet, 1974:3-1; MCM, para. 128b).

[11] Servicemembers attached to or embarked in a vessel, however, may not refuse an Article 15 (DOA Regulation 27-10, 1980: 3-11).

[12] Correctional custody is physicial restraint which has been compared to being in jail. See Rivkin and Stichman, 1977.

[13] Servicemembers have a right to appeal their Article 15 punishments. The appeal, however, is limited to the next superior commander in the chain of command (UCMJ, Art. 15[e]). Few servicemembers exercise their limited appeal right. Some believe that it would be a waste of time. Others fear that commanders would retaliate (Radine, 1977).

[14] Maynard (1984) suggests that a typical view of plea bargaining is that cases that are strong but not serious are handled routinely, without really negotiating:

> The trouble with this characterization is that it makes the negotiation process appear to be more automatic and less contingent than it actually is. ...Yet the lesson from foregoing analysis is that a bargaining opener can be initiated in different ways and, once produced, can be handled through diverse responses and replies, so that a routine outcome of final decision still reflects strategic and systematic negotiation efforts (104). ...In conclusion, the "routineness" of a case does not mean there is an absence of negotiation, but only that it is conducted so as to focus on what should be done and focus off why it should be done and how prosecution and defense view the case (107).

[15] The Yale authors relied on a principle enunciated in the U.S. Supreme Court decision of North Carolina v. Alford, (1970:25) '... while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite.'

[16] An Article 15 is evidence of the commission of a previous offense only when the accused, prior to the Article 15 acceptance, was formally notified of his or her right to confer with independent counsel about waiver of trial (U.S. v. Booker, 1977). A record of an uncounseled Article 15 is inadmissible at sentencing.

[17] The accused was referred to a court-martial in which he entered into a formal plea bargain agreement. The servicemember, however, failed to raise the claim of immunity at trial when the judge asked whether the written plea

bargain agreement encompassed all the understandings of the parties. On appeal, the military appellate court refused to consider the post-trial assertion of an alleged Article 15 agreement since it contradicted the accused's representations at trial (U.S. v. Joseph, 1981).

[18] Defendants without counsel, however, cannot have the conviction used later at a higher court to impose a punitive discharge unless they knowingly waive counsel (UCMJ, Art. 27, 38[b]; MCM, para. 79d; Middendorf v. Henry, 1976; U.S. v. Booker, 1978).

[19] Summary courts, however, represent less than two percent of all Air Force court-martials. See Annual Report, 1984.

[20] Article 32 investigations and grand jury proceedings are both used to determine whether a person is brought to trial. Nevertheless, unlike a grand jury which consists of from 12 to 23 members, an Article 32 is composed of one commissioned officer. The Article 32 investigating officer (IO) is selected by the convening authority (MCM, para. 34a). Also, both federal and state grand jury proceedings are carefully kept secret, and the accused and his defense counsel are excluded (Moyer, 1970). In contrast, Article 32 proceedings are generally open, defendants are present, and defendants have a right to representation by appointed military lawyer counsel or, if they prefer, by hired civilian counsel. Although from the defendants' perspective, Article 32 investigations may be favorably compared to a grand jury, in reality, it is very much like a preliminary hearing which has one judge and which the accused attends and participates. An important difference, however, is that decisions by a grand jury or preliminary hearing judge are binding on a prosecutor while they are not in the military. The IO may only recommend action for or against referral to trial to the convening authority. The convening authority may disregard without comment the IO recommendation (MCM, para. 35). An Article 32 then cannot be an effective screening device.

[21] Recent case law no longer requires a total commitment to conclusively demonstrating on the record an itemized discussion of the exact terms of agreements. See U.S. v. Crouch, 1981; U.S. v. Akin, 1980; U.S. v. Crawford, 1981; U.S. v. Griego, 1981; U.S. v. Hinton, 1981; U.S. v. Hunt, 1981]

[22] Intake is the first stage in juvenile court processing. It is an administrative screening device which disposes of cases either informally, without court intervention, or by referral to a judge.

[23] Intake probation officers are granted discretionary powers by juvenile court judges. Intake officers may dismiss complaints against children. Cases may be also adjusted nonjudicially through unofficial hearings without formal charges being filed. Nonjudicial responses include admonitions, informal probation, and referral to diversionary program. Final nonjudicial actions usually require the voluntary consent of the children and their parents, and the approval of judges. But juveniles handled informally are still vulnerable to court processing later on. Those who do not cooperate with the intake officers' efforts, by denying the complaints or treatment proposed, may ask for a formal hearing. Nevertheless, children choosing the judicial route risk an incarceration disposition (Krisberg & Austin, 1978; Pettibone et al., 1981).

REFERENCES

The Advocate (1976) "Pleading guilty and negotiating a pretrial agreement." 8(March-April)2:14-28.

Alschuler, A. W. (1978) "Sentencing reform and prosecutorial power: A critique of recent proposals for 'fixed' and 'presumptive' sentencing," in National Institute of Law Enforcement and Criminal Justice (ed.), Determinate Sentencing: Reform or Regression. Washington, D.C.: U.S. Government Printing Office.

Annual Report of the U.S. Court of Military Appeals and the Judge Advocates General of the Armed Forces and the General Counsel of the Department of Transportation (1984) "For the Period October 1, 1982-September 30, 1983." Washington, D.C.: U.S. Government Printing Office.

Army Times (1977a) "Present Article 15 Reg Problem for EM, COs." 1 August, p. 4.

Army Times (1977b) "Readers Respond." 22 August, p. 17.

Asher, S.E (1979). "Reforming the summary court-martial." Columbia Law Review, 79:173-197.

Bernard, K.S. (1976) "Structure of American military justice." University of Pennsylvania Law Review 125(2):307-336.

Bishop, J.W., Jr. (1974) Justice Under Fire: A Study of Military Law. New York: Charterhouse.

Bureau of Justice Statistics, U.S. Department of Justice (1984) The Prevalence of Guilty Pleas. Rockville, MD: National Criminal Justice Reference Service.

Bureau of the Census (1983) Statistical Abstract for the United States, 1984 Washington, D.C.: U.S. Government Printing Office.

Bureau of the Census (1980) 1980 Census of Population. Washington, D.C.: U.S. Government Printing Office.

Byrne, E.M. (1981) Military law (3rd ed.). Annapolis, MD.: Naval Institute Press.

Call, J.E., England, D.E., & Talarico, S.E. (1983) "Abolition of Plea Bargaining in the Coast guard." Journal of Criminal Justice 11:351-358.

Casper, J.D. (1979) "Reformers v. abolitionists: Some notes for further research on plea bargaining." Law & Society Review 13(Winter)2:567-572.

Casper, J.D & Brereton, D. (1984) "Evaluating criminal justice reform." Law & Society Review 18:1:121-144.

Church, T.W. (1976) "Plea Bargaining, Concessions, and the Courts: An Analysis of a Quasiexperiment" Law and Society Review 10(Spring):377-401

Cohen, J. & Tonry, M. (1983) "Sentencing Reforms and their Impacts," in A. Blumstein, J. Cohen, S.E. Martin & M.H. Tonry (eds.), Research on Sentencing, Vol. II. Washington, D.C.: National Academy Press.

Comptroller General of the United States (1980). Report to the Congress of the United States: Military discharge polices and practices result in wide disparities: Congressional review is needed (FPCD-80-13). Washington, DC: U.S. General Accounting Office.

Comptroller General of the United States (1978). Report to the Congress of the United States: Eliminate administrative discharges in lieu of court-martial: Guidance for plea agreements in military courts is needed (FPCD-77-48). Washington, DC: U.S. General Accounting Office.

Della Maria, J.P., Jr. (1971) "Negotiating and Drafting the Pretrial Agreement." The JAG Journal 25(February-April)4:117-132,141.

Department of the Army Pamphlet 27-9 (1969) Military Judges' Guide

Department of the Army Pamphlet 27-18 (1974) Desk Book for Special Court-Martial Convening Authorities (January).

Department of the Army Regulation 635-200 (1973) Personnel Separations-Enlisted Personal Chapter 10, Change 42 (14 December).

Department of the Army Regulation 27-10 (1979) Military Justice: Legal Services. Change 18.

Department of the Army Regulation 27-10 (1980) Military Justice: Legal Services. Change 20.

Department of Defense (1983) Defense '83 - Special Almanac Issue. Arlington, Virginia: American Forces Information Service.

Department of Defense (1981) Defense '81 - Special Almanac Issue. Arlington, Virginia: American Forces Information Service.

Eisenstein, J. & Jacob, H. (1977) Felony Justice: An Organizational Analysis of Criminal Courts. Boston: Little, Brown.

Effron, A.S. (1974) "Punishment of enlisted persons outside the UCMJ." Harvard Civil Rights-Civil Liberties Law Review. 9:227-324.

English, G.B. (1977) "The impact of cost-effectiveness considerations upon the exercise of prosecutorial discretion." The Army Lawyer. 27-50-60(December):21-28.

Erwin, S.J (1972) "Military administrative discharges: Due process in the doldrums." San Diego Law review. 10:9-35.

Everett, R.O. (1956) Military Justice in the Armed Forces of the United

States. Harrisburg, Pennsylvania: Military Service Publishing Company.

Ewing, D. (1978) "Juvenile plea bargaining: A case study." American Journal of Criminal Law. 6(May)2:167-191.

Farr, K.A. (1984) "Maintaining balance through an institutionalized plea negotiation process." Criminology 22(August)3:291-319.

Feeley, M.M. (1979a) The Process Is the Punishment: Handling Cases in a Lower Criminal Court. New York: Russell Sage Foundation.

Feeley, M.M. (1979b) "Perspectives on plea bargaining." Law & Society Review 13(Winter)2:199-209.

Feeley, M.M. (1979c) "Pleading guilty in lower courts." Law & Society Review 13(Winter)2:461-466.

Flanagan, T. & McLeod, M. (Eds.)(1983) Sourcebook of Criminal Justice Statistics-1982 (NCJ-86483). Washington, D.C.: U.S. Government Printing Office.

General Accounting Office, U.s. (1980a) Faster Processing of Discharges for Adverse Reasons Could Save Millions of Dollars (FPCD-80-57). Washington, D.C.: U.S. General Accounting Office.

General Accounting Office, U.S. (1980b) Better Administration of the Military's Article 15 Punishments for Minor Offenses is Needed (FPCD-80-19). Washington, D.C.: U.S. General Accounting Office

Gilmore, W. (1973) Cochran's Law Dictionary: Criminal Justice Edition. (Rev. 5th ed.) Cincinnati: Anderson Publishing Co.

Gray, G.D. (1981) "The professional responsibilities of defense counsel in uncontested courts-martial." The Advocate 13(September-October)5:318-332.

Gray, K.D. (1978) "Negotiated pleas in the military." Federal Bar Journal 37(Winter):49-60.

Hansen, D.W. (1976) "Discharge for the Good of the Service: An Historical, Administrative and Judicial Potpourri." Military Law Review 74(Fall):99-185.

Harris, R.A. & Springer, J.F (1984) "Plea bargaining as a game: An empirical analysis of negotiated sentencing decisions." Policy Studies Review 4(November)2:245-258.

Heumann, M. (1977) Plea Bargaining: The Experience of Prosecutors, Judges, and Defense Attorneys. Chicago: University of Chicago Press.

Horner v. Resor, 19 C.M.A. 285, 41 C.M.R. 285 (1970).

Janowitz, M. (1971) The Professional Soldier New York: The Free Press.

Jones, D.A. (1979) Crime Without Punishment. Lexington, Massachusetts: Lexington Books.

Kadish, M.J., Roberts, G.B., Romano, J.F. & Kadish, R.S. (1980) "Representing the military defendant." Trial 16(10):50-57.

Kadish, S.H., & Paulsen, M.G. (1969) Criminal Law and Its Processes (2nd ed.). Boston: Little, Brown.

Keveles, G.N. (1985) "The Third System of Justice: Military Justice." In S.M. Talarico (ed.), Crime and Criminal Justice: Emerging Issues. Beverly Hills, California: Sage Publication.

Keveles, G.N. (1984) "Analysis of Decision Criteria in Military Plea Negotiations." Justice Quarterly 1(September)3:385-411.

Kourvetaris, G.A. & Dobratz, B.A. (1977) "The present state and development of sociology of the military." In G.A. Kourvetaris & B.A. Dobratz (eds.), World Perspectives in the Sociology of the Military. New Brunswick, New Jersey: Transaction Books.

Krisberg, B. & Austin, J. (1978) The Children of Ishmael: Critical Perspectives on Juvenile Justice. Palo Alto, CA: Mayfield.

Lance, C.E. (1978) "A criminal punitive discharge - An effective punishment?" Military Law Review 79(Winter):1-133.

Lasseter, E.F. & Thwing, J.B. (1982). Military justice in time of war. American Bar Association Journal. 68(May):566-569.

Lause, G.D. (1979). Crowley: The Green inquiry lost in appellate limbo. The Army Lawyer. 27-50-77(May):10-13.

Lermack, P. (1974) "Summary and Special Courts-Martial: An Empirical Investigation." Saint Louis University Law Journal 18:329-379.

Manual For Courts-Martial, The United States. (rev. ed.) Executive Order 11476. Washington, D.C.: Government Printing Office, 1969.

Mather, L.M. (1979) Plea bargaining or Trial. Lexington, Massachusetts: D. C. Heath and Company.

Maynard, D.W. (1982) "Defendant Attributes in Plea Bargaining: Notes on the Modeling of Sentencing Decisions." Social Problems 29(April)4:347-360.

Maynard, D.W. (1984) Inside Plea Bargaining: The Language of Negotiation. New Yor,: Plenum Press.

McDonald, W.F. (1979) "From Plea Negotiation to Coercive Justice: Notes on the Respecification of a Concept." Law & Society Review 13(Winter)2:385-392.

McMenamin, B. (1971) "Plea Bargaining in the Military." The American Criminal Law Review (July):93-105.

Middendorf v. Henry, 425 U.S. 25 (1976).

Miewald, R.D. (1970) "Weberian bureaucracy and the military model." Public Administration Review 30(March-April):129-133.

Miller, H.S., McDonald, W.F., & Cramer, J.A. (1978) Plea Bargaining in the United States. Washington, D.C.: U.S. Government Printing Office.

Moriarty, P.J. (1981) "The providence inquiry: A guilty plea gauntlet?" The Advocate 13(July-August)4:251-267.

Morris, N. & Hawkins, G.J. (1977) Letter to the President on Crime Control Chicago: University of Chicago Press.

Moyer, H.E., Jr. (1972) Justice and the Military. Washington D.C.: Public Law Institute.

Moyer, H.E., Jr. (1970) "Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant." Maine Law Review 22:105-140.

National Advisory Commission on Criminal Justice Standards and Goals (1973) Courts. Washington, D.C.: U.S. Government Printing Office.

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

Note (1973) "The Unconstitutional Burden of Article 15." Yale Law Journal 82:1481-1494.

O'Callahan v. Parker, 395 U.S. 258 (1969).

Perry, R. J. (1977) Racial Discrimination and Military Justice. New York: Praeger Publishers.

Pettibone, J.M, Swisher, R.G., Kurt, H.W., Christine, E.W., & White, J.L. (1981) Major Issues in Juvenile Justice Information and Training. Washington, D.C.: U.S. Government Printing Office.

Radine, L.B. (1977) The Taming of the Troops. Westport, CT: Greenwood Press.

Rivkin, R.S. & Stichman, B.F. (1977) The Rights of Military Personnel. New York: Avon Books.

Rosett, A & Cressey, D.R. (1976) Justice By Consent: Plea Bargaining in the American Courthouse. New York: Harper and Row.

Rubin, H.T. (1979) Juvenile Justice: Policy, Practice, and Law. Santa Monica, California: Goodyear Publishing Company.

Rubinstein, M., Clarke, S., White, T. (1980) Alaska Bans Plea Bargaining. Washington, D.C.: U.S. Department of Justice, National Institute of Justice.

Salisbury, W.R. (1982) "Nonjudicial punishment under article 15 of the Uniform Code of Military Justice." San Diego Law Review 19:839-875.

Santobello v. New York, 404 U.S. 257 (1971)

Segal, D., Blair, J., Newport, F. & Stephens, S. (1974) "Convergence, isomorphism, and interdependence at the civil-military interface." Journal of Political and Military Sociology. 2(Fall):157-172.

Sherrill, R. (1970) Military Justice is to Justice as Military Music is to Music. New York: Haper & Row.

Springer, J.F. (1983) "Burglary and robbery plea bargaining in California: An organizational perspective." The Justice System Journal 8(Summer)2:157-185.

Sudnow, D. (1965) "Normal crimes: Sociological features of the penal code in a public defender office." Social Problems 12(Winter):255-276.

Thompson, J.D. (1967) Organizations in Action: Social Science Bases of Administrative Theory. New York: McGraw-Hill.

Uniform Code of Military Justice. Title 10, U.S.C. Sections 801-940 (Articles 1-140) (1950).

U.S. v. Akin, 9 M.J. 886 (ACMR), pet. denied, 10 M.J. 191 (CMA 1980).

U.S. v. Avery, 50 C.M.R. 827 (AFCMR 1975).

U.S. v. Booker, 3 M.J. 443 (1977), reversed in part, 5 M.J. 246 (1978).

U.S. v. Care, 18 C.M.A. 535, 40 C.M.R. 247 (1969).

U.S. v. Caruth, 6 M.J. 184 (CMA 1979).

U.S. v. Cooke, 11 M.J. 257 (CMA 1981).

U.S. v. Crawford, 11 M.J. 336 (CMA 1981).

U.S. v. Crouch, 11 M.J. 128 (CMA 1981).

U.S. v. Crowley, 4 M.J. 272 (CMA 1978).

U.S. v. Elmore, 24 C.M.A. 81, 51 C.M.R. 254, 1 M.J. 262 (1976).

U.S. v. Fleming, 18 C.M.A. 524, 40 C.M.R. 236 (1969).

U.S. v. Fretwell, 11 C.M.A. 377 (1960).

U.S. v. Gonzales, CM 435929, defense brief filed with ACMR (1977).

U.S. v. Green, 24 C.M.A. 299, 52 C.M.R. 10, 1 M.J. 453 (1976).

U.S. v. Griego, 10 M.J. 385 (CMA 1981).

U.S. v. Hendon, 6 M.J. 171 (CMA 1979).

U.S. v. Hinton, 10 M.J. 136 (CMA 1981).

U.S. v. Hunt, 10 M.J. 222 (CMA 1981).

U.S. v. Jenkins, CM 435855, defense brief filed with ACMR, panel 4 (1977).

U.S. v. Johnson, 19 C.M.A. 464 (1970).

U.S. v. Joseph, 11 M.J. 333 (CMA 1981).

U.S. v. Kemp, 22 C.M.A. 152, 46 C.M.R. 152 (1973).

U.S. v. King, 3 M.J. 458 (CMA 1977).

U.S. v. Kraffa, 9 M.J. 643, 646 (NCMR 1980), 11 M.J. 453 (CMA 1981)

U.S. v. Newburn, CM 435929, defense brief filed with ACMR (1977).

U.S. v. Weaver, 13 C.M.A. 147, 32 C.M.R. 147 (1962).

Vickery, A.A. (1972) "The Providency of Guilty Pleas: Does the Military Really Care?" Military Law Review 58:209-241.

Westmoreland, W.C. & Prugh, G.S. (1980) "Judges in command: The judicialized Uniform Code of Military Justice in combat." Harvard Journal of Law and Public Policy 3:1-93.

Figure 1
Command Nonjudicial Alternatives and Outcomes

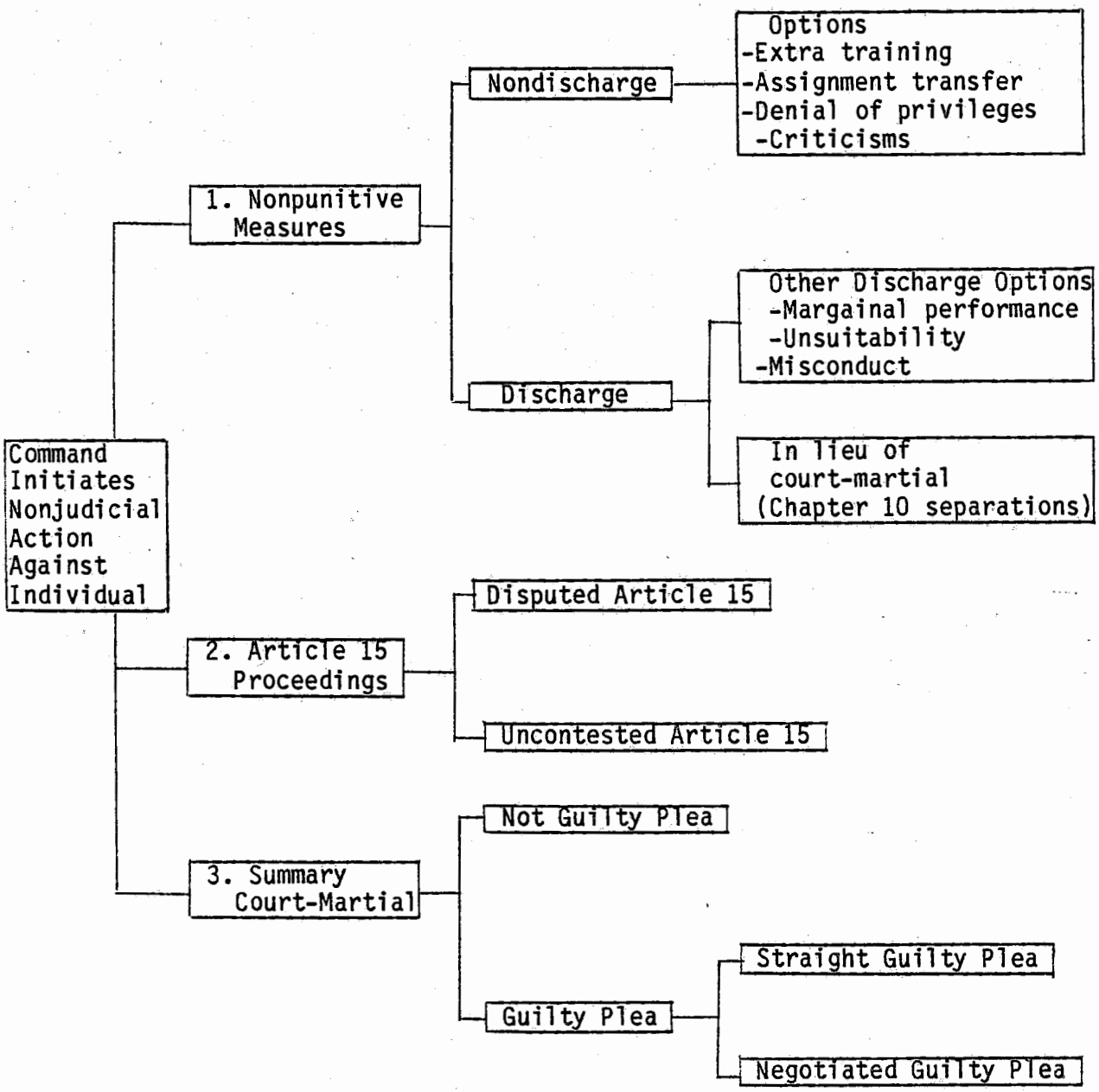

Figure 2
Command Judicial Alternatives and Outcomes

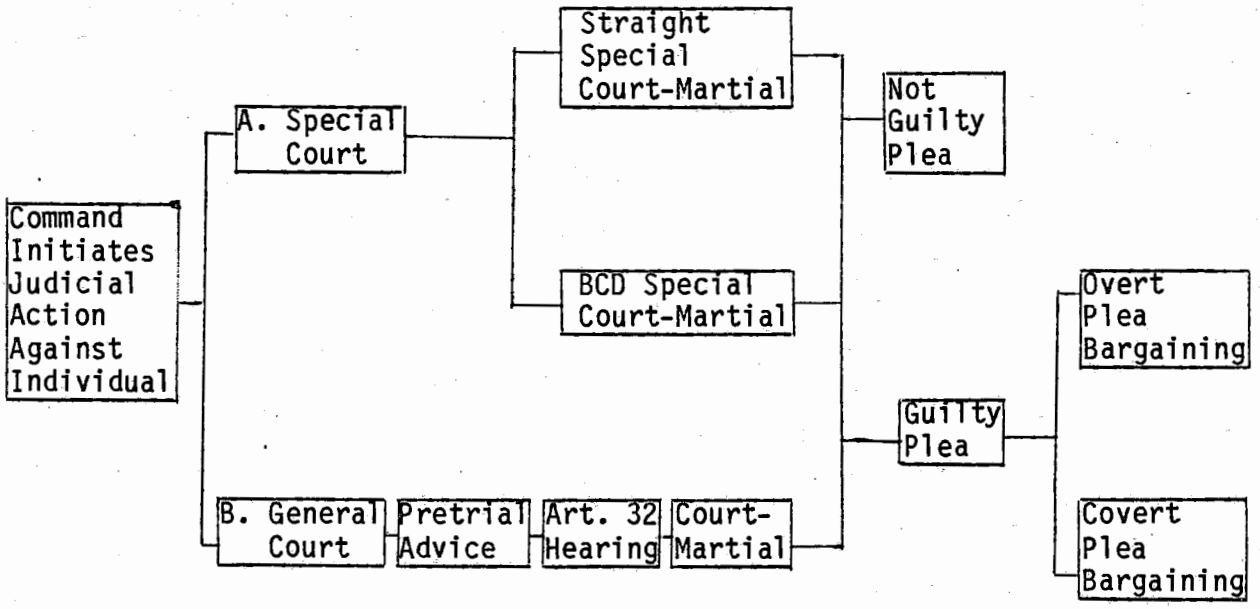

Table 1
Guitly Pleas in the Armed Forces During Fiscal Year 1979[a]
(Percent)

	GCMs		BCDs	
	Guilty Pleas	Guilty Plea Percentaged Negotiated	Guilty Pleas	Guilty Plea Percentaged Negotiated
SERVICE				
Army (1,108)[a] (660)[b]	51.6 (572)	92.1 (526)	70.5 (465)	76.3 (355)
Navy (134)[b] (1,033)[c]	65.7 (88)	72.7 (64)	87.9 (1,036)	45.2 (468)
Marine Corps (158)[b] (583)[c]	65.2 (103)	84.5 (87)	82.7 (482)	51.5 (248)
Air Force (202)[b] (1033)[c]	34.2 (69)	[d]	49.8[e] (514)[e]	[d]

[a] Table based on data provided in the 1982 Sourcebook of Criminal Justice Statistics
[b] Total number of GCMs
[c] Total number of BCD specials
[d] Data unavailable
[e] Both straight and BCD specials