ABSTRACT

Title of Document: THE DETERMINANTS OF COURT-MARTIAL DECISIONS: AN EMPIRICAL INVESTIGATION INTO THE AIR FORCE'S CRIMINAL COURT PROCESS

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In spite of many similarities with civilian criminal courts, public debate continues about further "civilianizing" the modern court-martial process to enhance legitimacy and reduce unwarranted disparities. Unfortunately, researchers and policymakers know very little about the determinants of court-martial decisions and the influence of military culture in the process. The current study begins to address this void in the empirical literature and informs contemporary reform discussions with its examination of the legal and extra-legal factors for court-martial decision outcomes at different stages of the process. With an extension of modern courts and sentencing theoretical perspectives, this study utilized multi-level modeling techniques with Air Force court-martial data from 2005-2008 to investigate the effects of individual-level factors as well as inter-court community and inter-judge disparities. The results revealed a number of findings that were contrary to civilian court research and theoretical expectations particularly for military-specific outcomes. Additionally, the analysis detected some evidence of

disparities consistent with the influence of traditional military culture for decisions earlier in the court-martial process. The implications for the current public policy debate, courts and sentencing theoretical development, and future research are discussed.

THE DETERMINANTS OF COURT-MARTIAL DECISIONS: AN EMPIRICAL INVESTIGATION INTO THE AIR FORCE'S CRIMINAL COURT PROCESS

By

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Dedication

In memoriam, to

Colonel (Ret.) James W. Russell, III (1949-2013).

Colonel Russell served for 30 years on active duty as an Air Force Judge Advocate. After he retired from active duty, he became “Mr. Russell” and served as the Air Force Legal Operations Agency’s, Associate Chief of Military Justice—the Air Force’s military justice expert. He believed in evidence-based policy decision-making and envisioned a role for empirical research in military justice reforms and policy development.

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Chapter 1: Introduction

> *Military justice is to justice as military music is to music* (Sherrill, 1970, p. 2, quoting Georges Clemenceau).

> *[T]he U.S. military justice system will continue to operate outside the constraints of 21st-century norms for fairness and transparency in criminal justice* (Hillman & Bryant, 2014, p. 173).

Every year thousands of American men and women serving in the armed forces receive military criminal convictions and punishments that have long-lasting negative effects after they leave the service (Sampson & Laub, 1996; U.S. Court of Appeals for the Armed Forces, 2008). Consequently, public concerns about the fairness of the United States military justice system have been the impetus for numerous reforms in the 20th century (Bryant, 2013; Hagopian, 2000; Hillman, 2005; Morris, 2010, Murnane, 2006; Sherrill, 1970). Sparked by public criticism of the harsh military justice actions during both World Wars, Congress enacted the Uniform Code of Military Justice (UCMJ) in 1950. Subsequent major revisions to the UCMJ have increasingly "civilianized" the military's court process (i.e. court-martial) by engrafting civilian legal practices and enhancing the role of lawyers in every phase (Jackson, 2004; Kisor, 2009; Prugh, 2000; Roan & Buxton, 2002). In spite of commonalities with civilian criminal courts, public debate continues about reforming the remaining distinctive features of today's court-martial to enhance the legitimacy of the system and reduce disparities in punishments (e.g. Ehlenbeck, 2008; Green, 1997; Grove, 1988; Immel, 2000; Kisor, 2009; Hansen, 2010; Hillman, 2009; Schmid, 2011; Schwender, 1988; Skylkatis, 2006; Thompson, 2009; Vowell, 1986; Young, 2000).

The foundation of many reform proposals is the belief that unique aspects of the court-martial process and its legal code perpetuate inherent biases in the system. Senior military commanders, rather than legal professionals, possess unfettered discretion to make key decisions in the process such as prosecution, plea bargaining, and post-trial reductions in punishment (i.e. clemency). This senior commander also selects the military jury through a non-random process which determines guilt and punishment. The sentencing authority retains broad discretion, and the legal structure permits factors related to an offender's military performance to be considered throughout most of the court-martial process. Consequently, some military scholars contend that this process is influenced by a traditional military culture that protects the "good soldier," embraces gender and racial/ethnic stereotypes, and treats officers as a privileged social class (Hillman,1999, 2005, 2008, 2009; Katzenstein & Reppy, 1999; Morris, 1996, 1999; Spak & McCart, 2004). As a result, proposed reforms tend to target the distinctive aspects of the court-martial process and the legal structure in pursuit of reducing bias in the system.

Concerns about systemic bias in the civilian justice system are also evident in scholarly work. A vast literature on civilian courts finds that court outcomes are influenced by both legal and extra-legal factors—that is, factors that are legally permissible as well as those that are prohibited or considered legally irrelevant. Research often finds that factors pertaining to offense seriousness and a defendant's criminal history are among the strongest predictors of pretrial decisions and sentence severity (Dixon, 1995; Goldkamp, 1979; Hagan & Bumiller, 1983; Nagel, 1983; Spohn, 2000, 2009a; Petee, 1994; Zatz, 2000). Although the research literature has been mixed on systemic racial bias, numerous studies find minorities receive harsher outcomes and

females receive leniency in the court process (see Chiricos & Crawford, 1995; Daly & Bordt, 1995; Free, 2002; Spohn, 2000, 2009a; Zatz, 1987, 2000). Findings in contemporary sentencing research have led to a consensus among scholars that defendant social status characteristics exert subtle and indirect effects on punishments (Spohn, 2009a; Zatz, 1987). Finally, a small but growing literature confirms that sentencing outcomes significantly vary across local courts; however, considerably fewer studies have examined decisions prior to sentencing (e.g. Britt, 2000; Engen, Gainey, Crutchfield, & Weis, 2003; Helms & Jacobs, 2002; Johnson, 2005; Johnson, Ulmer, & Kramer, 2008; Kautt, 2002; Kramer & Ulmer, 2002; Spohn & Fornango, 2009; Steffensmeier & Demuth, 2001; Ulmer, 1997; Ulmer & Bradley, 2006; Ulmer & Johnson, 2004). In sum, findings from the courts and sentencing literature suggest that both legal and extra-legal factors determine court-decision outcomes, but they are also influenced by courts' cultural and social contexts.

Despite the extensive research on civilian courts, researchers and policymakers know very little about the determinants of court-martial decisions and the influence of military culture in the process. In fact, during the most recent political push for military justice reforms, a Congressionally-appointed panel recognized this void in the empirical literature and the lack of transparency in the military's court process (Response Systems to Adult Sexual Assault Crimes Panel [RSP], 2014).[1] A handful of court-martial studies fail to find racial disparity in punishments (Baker & Wallis, 1985; Burchett, 1983; Landis, Dansby, & Hoyle, 1997; Perry, 1977; Verdugo, 1998); however, the effects of an offender's military record are rarely considered, and officer-enlisted and gender

[1] The reason for the lack of research is likely related to the military's reluctance to grant scholars access and to provide easily accessible data.

disparities are unexplored in the court-martial literature. Finally, none of the studies have investigated whether court-martial outcomes vary between military court communities.

Most of the military empirical research suffers from data and methodological limitations that limit generalizability to contemporary court-martial decisions. The samples are typically restricted to Army enlisted males, and the research methods and study designs fail to adequately control for key variables and account for the nested nature of the data. Although a few studies use more recent data (1983 to 1992) (Baker & Wallis, 1985; Landis et al., 1997; Verdugo, 1998), several studies rely on data prior to significant UCMJ reforms in the 1980s (Burchett, 1983; Keveles, 1984; Perry, 1977). Finally, most studies do not examine earlier decisions in the court-martial process and sentence severity measures do not adequately capture the multiple types of punishments in a military sentence. In short, reform discussions and scholarly work on military culture continue to proceed without the benefit of published empirical research on the modern court-martial process, and more specifically, the determinants of court-martial decisions.

Consistent with arguments for military justice reform, contemporary theoretical perspectives of courts support the notion that court-martial outcomes are the product of a series of decisions determined by both the military's formal legal structure and its organizational context (e.g. Dixon, 1995; Johnson, 2005; Kramer & Ulmer 2009; Mears 1998; Ulmer, 1997). Uncertainty avoidance/attribution theory, focal concerns, and court community perspectives suggest that court decisions are determined by assessments of an offender's culpability, danger to society, and practical constraints and consequences (Albonetti, 1986, 1987, 1991; Kramer & Ulmer, 2009; Steffensmeier, Ulmer, & Kramer 1998). Although the court's legal code and policies are highly influential, court actors

attempt to further reduce uncertainty and increase efficiency in their decision-making by relying on past decisions, case processing norms, and societal stereotypes and biases. This decision-making mechanism is part of a social process influenced by the court community's cultural context and social organization characteristics (Eisenstein & Jacob, 1977; Eisenstein, Flemming, & Nardulli, 1988; Flemming, Nardulli, & Eisenstein, 1992; Johnson, 2006; Kramer & Ulmer, 2009; Nardulli, Eisenstein, & Flemming, 1988; Ulmer, 1997, 2012; Ulmer & Bradley, 2006; Ulmer & Johnson, 2004). Based on these civilian court perspectives, court-martial decisions should reflect the formal legal structure's distinctive characteristics, military culture, and the social organization characteristics of military court communities.

The aim of the present research is to provide a broad initial empirical examination into the effects of legal and extra-legal factors for decision outcomes in the contemporary court-martial process as part of a larger research agenda. The study, thus, makes several significant contributions. First, the investigation advances the sparse empirical literature on the military justice system and overcomes a number of data and methodological issues in prior research. The study uses contemporary court-martial data that include females, officers, and Hispanics. The statistical methods are multivariate and use hierarchical modeling techniques to address the nested nature of the data and to explore inter-base and inter-judge variation in outcomes. For the sentencing analysis, the study uses a sentence severity scale that includes multiple types of punishments and includes acquittals to address possible sample selection effects. Finally, the research examines multiple decisions in the court-martial process to explore possible indirect effects of extra-legal factors on punishments through prior decisions in the process.

Second, the study informs the current policy discussions about proposed reforms to court-martial procedures. Arguments for reform are often premised on assumptions that the distinctive features of the military's court-martial process and its legal code result in decisions influenced by biases in traditional military culture. In addition to examining effects for race and ethnicity, gender, and rank, the study develops a measure of the combat warrior concept in the military culture literature. Third, this dissertation contributes to the scholarship in courts and sentencing with its extension of contemporary theoretical perspectives to a different type of court system and social context.

This investigation into the determinants of court-martial decisions begins in the following chapter with an overview of the court-martial process and some of its key decisions. Specifically, Chapter 2 details some of the distinguishing characteristics in the military's legal structure and the court-martial process in comparison to typical civilian jurisdictions. Chapter 3 then discusses prior findings in the empirical research in the military and civilian courts. Chapter 4 presents the contemporary courts and sentencing theoretical perspectives—uncertainty avoidance/attribution, focal concerns, and court community. To extend these perspectives to the military's court-martial process, the discussion draws on the military sociological literature to develop a framework for this investigation into the effects of legal and extra-legal factors explaining court-martial outcomes.

Chapter 5 details the data sources, measures, and analytical methods used in the investigation. Because of the lack of transparency in the court-martial process, obtaining data for a study of this nature presented many challenges. This chapter details the data sources utilized and how data limitations are addressed. The results of the analyses for

pretrial stage decisions are presented and discussed in Chapter 6 and the sentencing and clemency results are presented in Chapter 7. Finally, Chapter 8 summarizes the study's findings, limitations, policy implications, and provides suggestions for future research.

Chapter 2: The Court-Martial Process

> *To maintain good order and discipline, commanders must be able to punish, rehabilitate, and discharge in short order* (Dordal, 1997, p. 3).

As part of this investigation into the effects of legal and extra-legal factors of court-martial outcomes, this chapter provides an overview of the court-martial process and highlights some of the similarities and differences with state and federal systems.[2] One of the most fundamental distinctions between civilian and military legal systems lies in their purposes. According to the Manual for Courts-Martial [MCM] (2012), the purpose of the military justice system is "to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States" (p. I-1). Formally then, the military defines the purpose of the system as a means to achieving the goals of the organization rather than the broader purposes of the criminal law in society.[3] Because of its organizational purpose, the military justice system includes an administrative disciplinary component, military commanders formally control key aspects of the process, and military members may be criminally prosecuted and punished for failing to follow the rules of the organization (Moorman, 2000; Perdue, 1999). Additionally, factors related to an offender's job performance are legal

[2] This chapter is not intended to provide a comprehensive treatment of the military justice system. For indepth discussions of the system, see the numerous scholarly works that discuss the system's history, reforms, and legal procedures (e.g. Bryant, C., 1979; Bryant, M., 2013; Cooke, 2000; Fulton, 2003; Finnegan, 2008; Gierke, 2005; Hillman, 2005; Huestis, 2003; Mooreman, 2000; Morris, 2010; Prugh, 2000; Rives & Ehlenbeck 2002; Sherrill, 1970).

[3] Salvesberg (1992) suggests that the purpose of criminal law in American society has evolved to include reducing crime, preserving social order, and promoting social justice. Military justice scholars debate whether justice and discipline are two distinct goals or inseparable (e.g. Schlueter, 1991; Sherman, 1973). Regardless, the purpose of the military justice system is to control military members' behavior so they achieve the goals of the military.

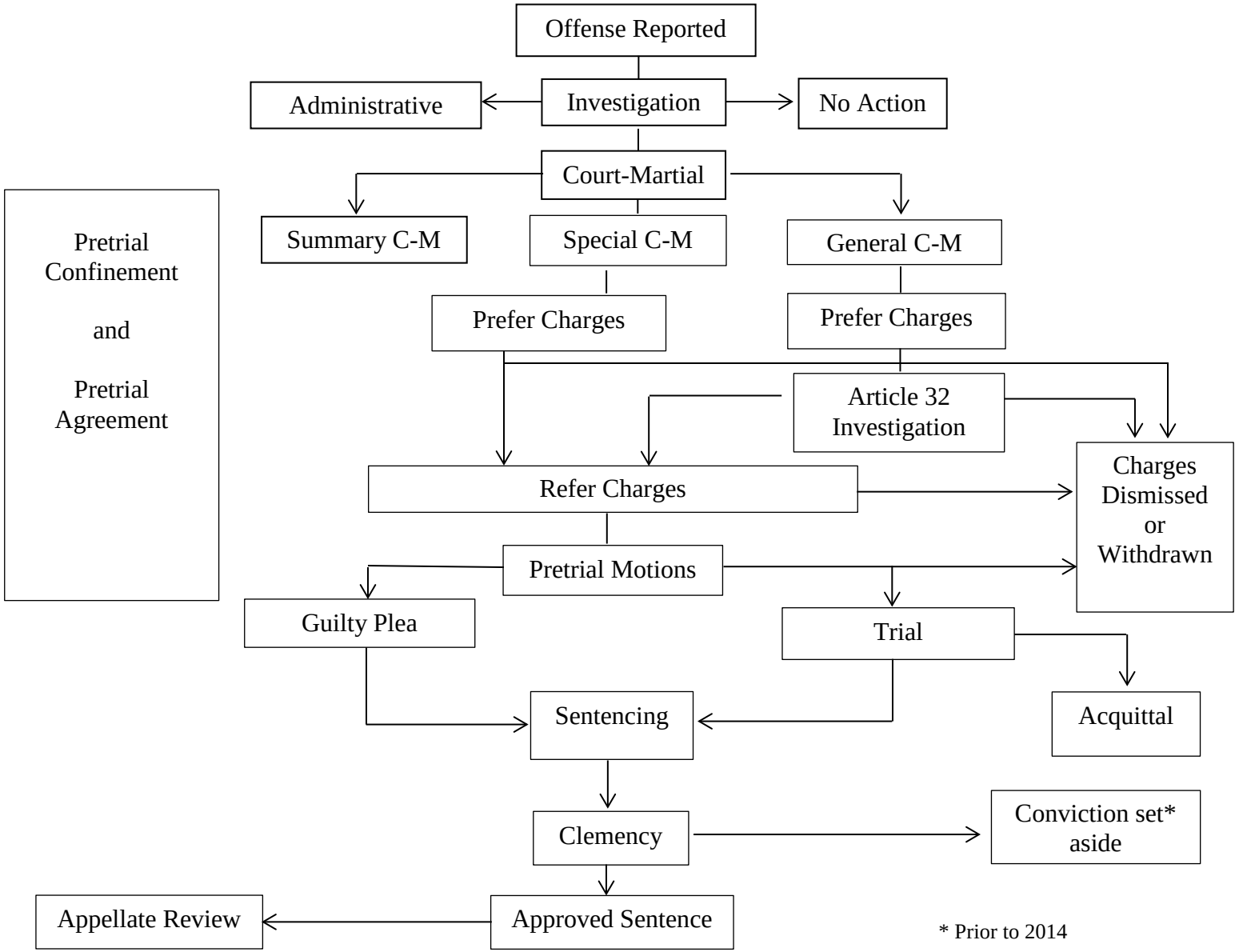
considerations in decisions throughout the military justice process and a punitive discharge from the service is among the possible punishments.

As with civilian criminal courts, the military justice process consists of numerous discretionary decisions leading up to the final punishment an offender receives. Figure 1 illustrates the court-martial process and the many decision points contained within it beginning with when a potential crime is reported and ending with appellate review.[4] After an offense is investigated, a military commander decides whether action is warranted, and if so, whether to pursue administrative disciplinary processes or other forms of corrective actions in lieu of the court-martial process.[5] Administrative actions include non-punitive actions such as counseling and reprimands as well as nonjudicial punishment (MCM, 2012, R.C.M. 306). Nonjudicial punishment procedures are specified in Article 15 of the UCMJ, but the other administrative processes vary according to individual services and are detailed in their regulations (MCM, 2012, App. 2).[6] Although the formal authority to make disciplinary decisions rests with commanders, they rely heavily on the advice of uniformed lawyers ("judge advocates") who are critical actors in the military justice system (Dickenson, 2010; Johnson, 2007; Morris, 2010).

In the court-martial process, many of these decisions are analogous to those found in civilian courts, while others are exclusive to the military context. With the civilianization efforts in UCMJ reforms, the findings phase in a court-martial and the

[4] Because of sexual assault reforms in 2004-2006, some additional steps exist for sexual assault cases at the beginning of the process that pertain to how the crime is reported and investigated. Additionally, in 2014, Congress eliminated the convening authority's ability to set aside a conviction in the clemency process.
[5] In the National Defense Appropriations Act for Fiscal Year 2014 (2013), the previously legally relevant factor of an accused's character and military service was struck from the rule regarding initial disposition.
[6] Non-punitive administrative processes are service-specific and detailed in their regulations. The UCMJ and MCM also authorize the services to develop regulations that implement or supplement the code and pertain to the administration of justice (see U.S. Department of the Air Force, 2004, 2005, 2007a, 2013a; U.S. Department of the Army, 1986, 2011, 2012; U.S. Department of the Navy, 2012).

Figure 2.1: Court-Martial Case Process



appellate review process resemble civilian courts.[7] The focus of this research is on the distinctive aspects of the pretrial, sentencing, and post-trial clemency stages which are often the subject of public debate. Thus, the following provides an overview of some of the key decision outcomes in court-martial cases that are the subject of the present study—pretrial confinement, court-martial type, sentencing, and clemency.

Pretrial Confinement

Although the military justice system does not use bail, a decision occurs early in the court process regarding whether to impose some form of pretrial restraint. Pretrial restraint includes "conditions on liberty, restriction in lieu of arrest, arrest, or confinement" (MCM, 2012, p. II-19). The purposes of pretrial restraint are to ensure the offender's presence at trial or "to prevent foreseeable serious criminal misconduct" (MCM, 2012, p. II-20). Only a commanding officer with proper authority may order pretrial restraint but he relies on the advice of a judge advocate, and when the type of restraint is confinement, the decision must be reviewed (MCM, 2012, R.C.M. 305; see also Keveles, 1980).[8]

Pretrial confinement is the most severe form of pretrial restraint and the criteria for its imposition are similar to the factors used by civilian courts to make bail and preventive detention determinations. Legal factors include the nature and circumstances of the offenses, evidence strength, flight risk, the accused's character and mental condition, the accused's military record and prior misconduct, and the likelihood of committing more offenses (MCM, 2012, R.C.M. 305). Thus, this pretrial confinement

[7] There are some legal nuances in the trial and appellate processes but they are not relevant for the present study.
[8] Some inter-service variations exist in who may perform a review of the pretrial confinement decision (Gavula, 2009).

decision involves some of the same legal factors that may also influence other case processing and punishment decisions; however, the commander makes this decision with significantly less information compared to later decisions in the process.

Court-Martial Type

Once the commander makes the decision to pursue a court-martial, he prefers the initial charges against the military member to initiate the process. Although the type of court-martial is not officially determined at this point, judge advocates consult with the court-martial convening authority—a senior commander with court-martial authority—to ensure the required preliminary procedures for a particular type of court are met.[9] After completing the necessary preliminary process, the convening authority then officially decides whether to refer the charges to a specific type of court-martial. [10]

Three different types of court-martial exist in the military justice system—summary, special, and general. The summary court-martial is the least severe type of court and is a type of administrative disciplinary action. Summary court-martial convictions are not considered criminal convictions in the civilian world because they do not conform to the constitutional requirements for criminal trials.[11] Furthermore, this type of court-martial is only permissible for enlisted members with their consent.

In contrast, convictions in special and general courts-martial may be considered convictions in civilian jurisdictions. Because of their punishment limitations, these two types of court-martial are often compared to civilian jurisdictions that designate different

[9] General courts-martial require a preliminary hearing (i.e. Article 32 hearing); see Figure 1.
[10] There are also different convening authorities depending on the court-type. That is, some convening authorities only have the ability to refer cases to summary and special courts-martial while others may refer cases to any type of court-martial.
[11] Military judges are not involved and offenders do not have a right to counsel or a jury (MCM, 2012, R.C.M. 1301(e)).

types of courts based on misdemeanor or felony classifications of offenses (Holland, 2006; Morris, 2010). The special court-martial carries a maximum punishment of 12 months confinement and the least severe punitive discharge. For the most severe type of court-martial—the general court-martial—the maximum punishment is whatever is permissible under the UCMJ for that specific offense (MCM, 2012).

With the exception of very recent changes for sexual assault offenses, the UCMJ has no requirement for non-capital offenses to be tried in a particular type of court.[12] Although summary courts should be reserved for minor offenses, the commander has the discretion to determine whether a particular offense is considered minor according to the following factors: the nature and circumstances of the offense; the offender's age, rank, assignment, record and experiences; and the maximum imposable punishment if it were tried in a general court-martial (MCM, 2012).[13] Thus, the judge advocate's advice and whether the convening authority exercises her discretion to refer the case to a particular type of court-martial have implications for the offender's criminal record.

Sentencing

In military sentencing, the sentencing authority retains wide discretion in what type of punishment to impose. In contrast to the federal system, sentencing guidelines,

[12] In the National Defense Authorization Act for Fiscal Year 2014 (2013), Congress made a dishonorable discharge/dismissal mandatory for sexual assault offenses and required referral to a general court-martial. Capital cases and offenses with a mandatory minimum punishment that exceeds the maximum punishment for a special court-martial must be tried in a general court-martial (e.g. murder, spying). Capital cases are general courts-martial to which a capital offense is referred with an instruction to treat the case as a capital case (MCM, 2012, R.C.M. 103(2)). Capital offenses are offenses where death is an authorized punishment (MCM, 2012, R.C.M. 103(3)). Thus, with a few exceptions, it is possible under the UCMJ for a typical felony-level offense in civilian jurisdictions to be tried in a summary or special court-martial.

[13] See R.C.M. 1301 in conjunction with the definition of "minor offenses" in Part V of the MCM.

probation, and restitution do not exist in the military's legal structure.[14] Additionally, several types of punishments are available and combined to provide one sentence (MCM, 2012). Some of the military punishments are analogous to civilian punishments (e.g. confinement, fines), but the punitive discharge is a punishment unique to the military. A punitive separation or discharge terminates the offender's status in the military and indicates the separation was due to bad conduct or under conditions of dishonor depending on the type of punitive discharge imposed (MCM, 2012, R.C.M. 1003(b)(8)).[15] These types of discharges, as opposed to administrative discharges, may only be imposed in a court-martial and are considered severe types of punishment.[16] Finally, in contrast to civilian sentencing, the military utilizes unitary sentencing. That is, when a defendant is convicted of multiple charges, the sentencing authority adjudges one punishment for all of the offenses rather than imposing a separate punishment for each offense and running them concurrently or consecutively.

In contrast to the majority of state courts, the military justice system provides the accused with the right to have a court-martial panel (i.e. jury) determine his punishment in non-capital cases (MCM, 2012; King & Noble, 2004). The court-martial panel consists of military members and is functionally equivalent to a civilian jury (Holland, 2006).[17] Even though the right to jury sentencing has been the subject of regular debate in UCMJ

[14] Mandatory minimum sentences are also not as prevalent in the UCMJ compared to civilian criminal codes. At the time of this study, spying and murder were the only offenses with mandatory minimum sentences. In the National Defense Authorization Act for Fiscal Year 2014 (2013), Congress made a dishonorable discharge/dismissal mandatory for sexual assault offenses but did not create a mandatory minimum for confinement length.

[15] There are three types of punitive separations—Bad Conduct Discharge (BCD), Dishonorable Discharge (DD), and Dismissal. Enlisted receive BCDs and DDs with BCD being less severe than DD. Officers may only receive a Dismissal if a punitive discharge is adjudged and is the equivalent to a DD for enlisted.

[16] Punitive discharges result in the loss of veteran and retirement benefits and block opportunities for some types of civilian employment (U.S. Department of the Army, 2010; MCM, 2012).

[17] There is a legal distinction between court-martial panels and civilian criminal juries, but they perform the same function (Holland, 2006).

reform discussions, jury sentencing remains a part of the military justice system today (Jackson, 2004; U.S. Department of Defense, 1984).

The court-martial panel for both the guilt and sentencing phases consists of active duty personnel who are designated by the convening authority. In other words, contrary to civilian juries, members of court-martial panels are not randomly selected. The convening authority selects the members from the organization in which he commands based on their rank, age, and experience (MCM, 2012, R.C.M. 503(a)(3)). The panel members must be at least the same rank as the defendant (MCM, 2012, R.C.M. 502(a)), and for enlisted offenders, the accused may require at least one-third of the court-martial panel to consist of enlisted personnel with the remainder consisting of officers. The minimum size of the military jury is smaller than in civilian criminal courts with a special court-martial only requiring three members and a general court-martial requiring five; however, court-martial panels are typically larger than the minimum (Holland, 2006). Hung juries are not possible in non-capital cases because military juries only require a two-thirds majority for sentences of ten years or less and three-fourths majority for sentences greater than ten years (MCM, 2012, R.C.M. 1006). The panel president—the senior ranking member—determines when to vote, organizes the proposed sentences in order of severity, collects the secret ballots, and completes the findings and sentencing worksheets. Finally, in contrast to when the sentencing authority is a judge, juries have no knowledge of whether a plea agreement exists prior to determining sentence after a guilty plea.

Just as the additional right of jury sentencing is provided in the military, a bifurcated trial/sentencing process also exists in military courts for non-capital cases. In

all courts-martial, a presentencing hearing is held in which mitigating and aggravating evidence is presented for the sentencing authority to consider before determining the appropriate punishment (i.e. adjudged sentence). Similar to the federal sentencing process, the prosecution and defense may enter into stipulations of fact to avoid lengthy witness testimony and presentation of physical evidence (MCM, 2012, R.C.M. 811, Vowell, 1986). Legally permissible considerations include the following: (1) offense and its circumstances, harm to the victim, impact on the military mission, and prior convictions; (2) the defendant's military record, good military character, mental or physical impairments, education, pretrial confinement, and (3) rehabilitation potential (MCM, 2012, R.C.M. 1001; U.S. Department of the Army, 2010, para 2-5-23).

Peculiar to the military is the operation of plea agreements ("pretrial agreements") in the sentencing process. Plea agreements are not for a specific sentence but instead only provide a limitation on the sentence the convening authority may approve. If the sentencing authority adjudges a sentence that is less severe than the negotiated sentence cap, then the defendant receives the less severe adjudged sentence. Contrary to civilian court practices, the sentence limitation is not revealed to the sentencing authority prior to adjudging the sentence. Thus, the adjudged sentence is determined independent of the agreed upon sentence limitation.

Clemency

In contrast to civilian courts, the convening authority has the ability to grant clemency after a sentence is adjudged. There are three types of clemency—deferments, waivers, and traditional (Novak, 2000). The first two types pertain to forfeitures of pay which may or may not result from the adjudged sentence. The primary purposes of

deferments and waivers are to mitigate the effect of automatic forfeitures from the court-martial process and to provide financial support to the accused's dependents (Novak, 2000). The purpose of the third type of clemency is to set aside, reduce severity, or suspend part of the adjudged sentence for a certain period of time (See MCM, 2012: R.C.M. 1107).[18] Criticisms of the clemency process in public debate center around traditional clemency.

Clemency is the last decision in the court-martial process at the trial level before the final sentence (i.e. approved sentence) is executed. Although the convening authority makes the ultimate decision on whether to grant clemency, the staff judge advocate provides legal advice and a recommendation to the convening authority. Typical considerations relevant to the decision to reduce sentence severity include rehabilitation potential, the deterrent effect of the sentence, and other matters pertaining to clemency such as pretrial confinement (MCM, 2012).[19] Nevertheless, "the convening authority may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased" (MCM 2012, p. II-153). Therefore, the convening authority's discretion in whether to grant clemency is fairly unregulated and broad.

Summary

Although the military's court-martial process has similarities with civilian courts, some substantial differences remain because of the system's organizational purpose to

[18] In the National Defense Authorization Act for Fiscal Year 2014 (2013), Congress mandated changes to Article 60 of the UCMJ that substantially reduce the convening authority's ability to set aside findings of guilt and reduce adjudged sentences under certain circumstances. These changes are being phased in over the course of twelve months, and they are not applicable to the data available for this study.
[19] See R.C.M. 1107 and the accompanying discussion notes in the MCM (2012).

maintain good order and discipline. Commanders have the formal authority to make many of the decisions that judges and civilian prosecutors would normally make. Commanders also have the option of utilizing administrative disciplinary processes instead of the court-martial process. Most offenses may be referred to misdemeanor or felony-level types of courts and wide discretion exists in punishment severity and types. Offenders have the right to jury sentencing with bifurcated trial and sentencing phases in non-capital cases; and in plea-bargained cases, the sentencing authority is unaware of the agreed upon sentence limitation. Even after a sentence is adjudged, the convening authority has the ability to reduce or set aside the punishment. Finally, the legal structure includes military specific offenses and punishments, and the offender's military record is a legal factor throughout most of the court process. These unique aspects of the military's legal structure and court-martial process should affect the determinants of court-martial decision outcomes. Consequently, an investigation into the effects of legal and extra-legal factors on court-martial decisions is warranted because of implications not only for scholarly research on military courts but also for current reform discussions. The following chapter provides an overview of the prior research on military courts and summarizes common findings in the civilian court literature.

Chapter 3: Prior Research

> *Different spanks for different ranks* (Smith, 2005, p. 693).

> *[I]f a perpetrator shows up at a court-martial with a rack of ribbons and has four deployments and a Purple Heart, you know, there is certainly the risk that we might be a little too forgiving of that particular crime.* – Chairman of the Joint Chiefs of Staff, General Martin Dempsey (U.S. Department of Defense, 2013).

The above statements illustrate some of the perceptions of systemic bias in the court-martial process that are derived from the unique aspects of the military justice system and its organizational culture. Although public discourse and legal scholarly work present anecdotal evidence of disparity in court-martial outcomes, a critical question remains whether there is any empirical evidence of these and other effects related to the distinctive characteristics of the military's legal structure, process and culture. This chapter begins with a summary of findings from the military justice empirical literature and a discussion of the methodological limitations and the generalizability of findings to the contemporary court-martial. Because of the small empirical literature on military courts, the chapter proceeds to a review of the civilian courts and sentencing literature to further guide this investigation. Additionally, findings in civilian court research offer an important frame of reference for prior military justice research findings and the results of this study.

Military Justice Empirical Research

Prior military justice research almost exclusively focuses on racial disparity in the military justice process. These concentrated research efforts on race effects grow from racial tensions and concerns of racial disparity in disciplinary actions that dominated the

services when they were racially integrated after World War II (e.g. Connelly, 1993; Hillman, 2005; Landis et al., 1997; Walker, 1992). As a result, the Department of Defense and the individual services have produced a number of internal technical reports on racial disparity in disciplinary actions (e.g. Beusse, 1977; Connelly, 1993; Crawford & Thomas, 1975; Culbertson & Magnusson, 1992; Klieger, Dubuisson & Sargent 1962; Walker, 1992). These reports often conclude that although black servicemen are overrepresented in the military justice system, there is no racial disparity in disciplinary actions including court-martial punishments. The internal studies tend to rely on court-martial data prior to substantial revisions made to the UCMJ at the end of the 20th century and exclude females, Hispanics, and officers. Moreover, conclusions are drawn from descriptive statistics and bivariate analyses. Thus, these internal research reports suffer from a number of data and methodological limitations that are also characteristic of the published military research literature.

Only a handful of published quantitative studies could be located in the social science literature and all but one pertained to racial disparity (Keveles, 1984; Landis et al., 1997; Perry, 1977; Verdugo, 1998). Perry (1977) examined the effects of race on sentences in the Navy and Marine Corp based on a census of enlisted prisoners in confinement during the last quarter of 1972. The study found no statistically significant differences in the mean sentence length between black prisoners and white prisoners across all four offense classes examined—major military and civilian equivalent offenses, confrontation or status offenses, unauthorized absence, and other military offenses equivalent to civilian offenses. Two other studies using Army special and general court-martial data from 1986-1992, similarly concluded there were no racial differences in

sentence severity with their bivariate analyses (Landis et al., 1997; Verdugo, 1998). Nevertheless, both studies detected some differences in plea bargaining. Black offenders were less likely to enter into plea agreements, and Verdugo (1988) found little difference between whites and blacks in their court types.

The few studies examining the effects of prior case processing decisions on military sentences find that these factors significantly affect sentencing outcomes (Keveles, 1984; Baker & Wallis, 1985). In one published study examining predictors of plea bargains in the Army, Keveles (1984) found that offenders who plead not guilty tended to have fewer charges, were older, and nonwhite compared to those who went to trial. Although the study lacked discipline history, the number and severity of charges had a positive relationship with guilty pleas. Keveles noted that less than half of the male enlisted sample resulted in guilty pleas—a notably smaller proportion than in typical civilian courts. Based on this finding, Keveles postulated that the military was an "institution of trials" because the instability and unfamiliarity among the courtroom workgroup members interfered with their ability to negotiate plea agreements.[20] Consequently, Keveles suggests that military offenders are less likely to plead guilty than their civilian counterparts.[21]

Baker and Wallis (1985), an empirical legal study in a military law journal, also warrants some discussion. In contrast to other court-martial examinations, this study

[20] Military courtroom workgroup cohesion may be weaker than typical civilian courtroom workgroups because of frequent duty and tour rotations, rank differences, and the involvement of the military commander (Keveles, 1984).

[21] Another explanation for fewer guilty pleas could be that the military is more likely to refer cases for trial with weaker evidence compared to civilian prosecutors. Military legal scholars would argue this is unlikely because the UCMJ offers more pretrial procedural protections to the accused than civilian court systems and referring cases for trial with weak evidence would cast doubt on the fundamental fairness of the military justice system (see generally Essex & Pickle, 2002). Regardless, Keveles does not empirically investigate this issue and neither does the present study because the data lack information about evidentiary strength.

examines the effects of defendant characteristics, including gender, and the sentencing authority selection. Baker and Wallis examined confinement lengths in a sample of Army enlisted personnel who were convicted in special and general courts-martial in 1983. Specifically, the study sought to determine which defendant characteristics exerted significant effects on sentence length across the two different court-types. Although the authors did not find race effects, they detected leniency for females in general-court-martial jury sentenced cases. Based on a series of linear regressions on subsamples divided by court-type, sentencing authority, and type of crime, the study found that the effects for other defendant characteristics—military performance, age, intelligence, education, marital status, pay grade—were more likely to exhibit significant relationships in jury-sentenced cases than judge-sentenced cases. The authors conclude that the choice of sentencing authority and type of crime influence defendant characteristic effects. Unfortunately, the research failed to adequately control for other legal factors related to offense seriousness and disciplinary history and other case processing decisions (e.g. mode of conviction).

Much like the technical reports, the published military research tends to have substantial methodological limitations and limited generalizability to modern court-martial decisions. Some of the studies rely on data prior to the conversion to an all-volunteer force (Perry, 1977) and substantial revisions to the UCMJ (Perry, 1977; Baker & Wallis, 1985). The more recent studies use court-martial data just prior to and during the significant downsizing of the military forces in the 1990s, which resulted in more selective recruitment policies and increased separations from the service (U.S. General Accounting Office, 1993; e.g. Baker & Wallis, 1985; Landis et al., 1997; Verdugo,

1998). In 2002, the maximum punishment limitation for a special court-martial was raised from six months to one year, which led to more cases being referred to that type of court-martial. Moreover, most studies examine Army and Navy courts-martial, the samples are limited to enlisted males, and the statistical methods do not adequately control for other theoretically relevant factors. Several studies rely on descriptive data and bivariate correlations to draw conclusions (Landis et al., 1997; Perry, 1977; Verdugo, 1998), and a study utilizing multivariate statistical techniques failed to adequately control for legal factors and prior decisions in the process (Baker & Wallis, 1985). Prior studies rarely examine decision outcomes prior to sentencing, and the samples are often restricted to the subsample of cases receiving confinement, thus, increasing the risk of sample selection bias. Even when analyses are conducted on the full convicted sample, the sentence severity measures examine the punitive discharge decision and confinement decisions separately. Consequently, these punishment measures fail to capture the full severity of the sentence. Finally, none of the studies adequately address the nesting of cases within military installation or judge.

In search of research with more rigorous statistical methods, an examination of academic research reveals an unpublished dissertation using multivariate analytical methods to investigate race effects in AWOL cases during the Vietnam Era (Burchett, 1983). Consistent with findings in the technical reports, Burchett did not find support for racial disparity in a sample of Army enlisted males from Ft. Meade. Specifically, the dissertation found little evidence of a race effect in pretrial confinement, type of court (special or general), verdict, adjudged sentence, or clemency. In fact, other than finding older offenders were more likely to be tried in a general court-martial rather than a

special court-martial, defendant characteristics had no effect on decisions in this very restricted sample of court-martial cases. Nevertheless, Burchett (1983) also possessed some methodological limitations and suffered from limited generalizability. The study did not include summary courts-martial in the court-type analyses, the sentencing analysis was limited to the convicted subsample, and confinement length and the punitive discharge were analyzed separately. Thus, selection bias may have influenced the sentencing findings and the sentencing measures did not fully capture other punishments in the sentence. Moreover, the study focused entirely on one offense at one Army installation, and the data are from a time period prior to the elimination of conscription and the implementation of many UCMJ reforms.

In sum, based on a review of the military literature, the empirical evidence is fairly limited on the effects of legal and extra-legal factors on court-martial decisions. Although the studies seem to suggest the lack of a race effect in punishments, there is some indication of racial differences in plea bargaining decisions. Prior decisions in the process also appear to influence sentence lengths and possibly the effects of defendant social characteristics. However, none of the research studies include ethnicity, gender effects are rarely examined, and rank differences are limited to within the enlisted ranks. These findings in prior military research should also be taken with caution because of their methodological limitations and limited generalizability to the modern court-martial.

Civilian Court Research

Civilian court research topics generally fall into the following categories: effects of case and defendant social characteristics, prior decisions in the court process, and cultural and social contexts. The determinants of criminal court outcomes are usually

classified as legal or extra-legal factors. Extralegal factors may include defendant social characteristics, organizational factors such as prior decisions, and the social and cultural context of the court community itself. Although more recent research focuses on court contextual effects, most of the variation in sentencing outcomes is explained at the individual case level and legal factors are the strongest predictors of pretrial and sentencing decisions (Spohn, 2009a; Zatz, 2000). Nevertheless, extra-legal disparity is also consistently detected in decisions throughout the court process. The following provides an overview of the prior research examining the effects of legal and extra-legal characteristics on pretrial decisions and sentencing outcomes as well as a brief summary of the recent contextual sentencing literature.

Offense Seriousness and Criminal History

Although what is considered "legally relevant" may vary across jurisdictions, most deem offense seriousness and criminal history as legal factors in case processing and sentencing decisions. For sentencing outcomes especially, "[f]ew would argue that legally prescribed factors such as offense and prior record are not the primary determinants of sentences" (Ulmer, 1997, p. 7). That is, defendants convicted of serious violent offenses and those with prior criminal records are more likely to receive incarceration and longer confinement sentences (e.g. Dixon, 1995; Hagan & Bumiller, 1983; Spohn, 2000; Zatz, 2000). Similarly, the more serious the offense and extensive the criminal history, the less likely an offender is to be released prior to trial (Goldkamp, 1979; Nagel, 1983; Petee, 1994).

Offense seriousness and criminal history also impact a defendant's mode of conviction. For instance, studies on plea bargaining find that offense severity and prior

criminal record increase the probability of a guilty plea disposition (Mather, 1979; Meyer & Gray 1997; Miller, 1980; Myers & Hagan, 1979). However, the effects of these legal factors on the reward offenders receive for pleading guilty may vary (Ulmer & Bradley, 2006; Ulmer, Eisenstein, & Johnson, 2010.) Thus, the research literature typically finds that the legal factors related to offense seriousness and criminal history are the strongest predictors of criminal court decisions. Nevertheless, studies also find that defendant characteristics, prior case processing decisions, and organizational and cultural contextual factors influence decision outcomes.

Defendant Social Characteristics

Although legal variables remain the strongest predictors of courtroom decisions, the prior research suggests that court actors often are influenced by defendant social status characteristics in their decision-making. Common attributes examined are race and ethnicity, gender, and social class. The following literature review summarizes the empirical relationships frequently detected between these defendant characteristics and decisions in state and federal courts.

Race and Ethnicity

A vast literature exists on race and ethnicity effects in the criminal justice system, but results remain mixed on whether unwarranted racial and ethnic disparity exists in criminal court decisions. Several narrative reviews exist of this sizable literature and generally conclude that older studies finding evidence of racial and ethnic disparity fail to control for legal variables, but even when earlier studies control for these legal variables they result in weak or inconsistent race effects (e.g. Hagan, 1974; Hagan & Bumiller,

1983; Zatz, 1987). Based on these earlier research findings, some scholars assert that although race may matter in some contexts, the empirical evidence does not indicate pervasive system-wide discrimination (see Blumstein, Cohen, Martin, & Tonry, 1983; Kleck, 1981). More recent reviews conclude that race and ethnicity impact sentencing outcomes in indirect and subtle ways (Chiricos & Crawford, 1995; Spohn, 2000, 2009; Zatz, 1987, 2000). For example, studies find more frequently that disparity occurs in the decision to incarcerate rather than sentence length decisions (e.g. Spohn, Delone, & Spears, 1981), occurs more often in certain types of cases (e.g. Mitchell, 2005; Spohn & Cederbloom, 1991; Unnever & Hembroff, 1988; Steffensmeier & Demuth 2000, 2001), and is indirect through prior case processing decisions such as prosecution decisions, bail status, type of attorney, or type of disposition (e.g. LaFree, 1985; Spohn, Gruhl, & Welch, 1987; Uhlman & Walker, 1980).[22]

The research on race/ethnicity effects in pretrial decisions is less prevalent, although a relatively sizable literature exists on these types of outcomes compared to the military literature. In Free (2002)'s review of 68 studies on race effects in presentencing decisions, he concludes evidence exists of racial bias in bail and pretrial release decisions, the decision to prosecute or dismiss charges, and capital charging decisions. For example, several studies on pretrial detention find that blacks and Hispanics receive less favorable pretrial release decisions (e.g. Chiricos & Bales, 1991; Demuth, 2003; Katz & Spohn, 1995; LaFree, 1985; Shook & Goodkind, 2009), while others find no racial

[22] Other studies report that disparity results when race and ethnicity intersect with other characteristics; thus, less favorable case processing and sentencing decisions occur when a constellation of characteristics are present (Zatz, 2000). That is, racial and ethnic disparities may be conditioned on sex, age, and social class (e.g. Albonetti, 1997; Nobiling, Spohn, & DeLone 1998; Spohn & Holleran, 2000; Spohn, Welch, and Gruhl, 1985; Steffensmeier & Demuth, 2006; Steffensmeier, Ulmer, & Kramer 1998; Warren, Chiricos, & Bales, 2012).

disparities after controlling for legally relevant factors (e.g. Albonetti, 1989; Holmes, Daudistel, & Farrell, 1987; Nagel, 1983; Wooldredge, 2012).

The research on charging decisions has produced equivocal results concerning the role of race. For example, in a study of burglary and robbery cases in Florida, Albonetti (1992) found no evidence of racial or gender differences in the decision to reduce charges, and Kingsnorth, Lopez, Wentworth, & Cummings (1998) did not detect a significant race effect at any decision point (prosecution or sentencing) in a sample of sexual assault cases from Sacramento. Other studies find some support for race effects in charging decisions. LaFree (1980) studied sexual assaults in a large Midwestern city and found that black men who assaulted white women received more serious charges, were more likely to have cases filed as felonies, and were more likely to receive lengthy sentences. Spohn et al. (1987) using data from Los Angeles county, found that Hispanic and black males were more likely to be fully prosecuted than other race/gender groups. In contrast, Albonetti and Hepburn (1996) examined diversions in felony drug cases in Arizona and found that although male offenders were less likely to be diverted, race was not a significant factor.

In summary, although earlier research on racial and ethnic disparity in sentencing leads to inconsistent conclusions, the contemporary research literature often finds the presence of some unwarranted racial and ethnic disparity. Even after controlling for legal variables, evidence remains of direct racial effects even if they are small. Additionally, research has found evidence of subtle disparity with indirect effects. That is, racial/ethnic disparity may exist in earlier points in the process and then have an indirect effect on punishments. Therefore, a review of the civilian court literature shows that defendant

race and ethnicity are important factors to investigate at multiple decision points in the court process.

Gender

A substantial research literature in civilian courts suggests that female offenders receive more lenient treatment in the court process than males (Steffensmeier, Kramer, & Streifel, 1993; Daly & Bordt, 1995; Spohn, 2000, 2009a). Females are more likely to have charges dismissed or reduced (Albonetti, 1986; Farnsworth & Teske, 1995; Shermer & Johnson, 2010; Spohn et al., 1987; cf. Albonetti, 1992), receive favorable pretrial release decisions (Daly, 1989; Demuth & Steffensmeier, 2004), and substantial assistance guidelines departures (Hartley, Maddan, & Spohn, 2007).

Most of the gender disparity research pertains to sentencing outcomes. Daly and Bordt's (1995) review of 50 studies on gender effects in sentencing revealed that about half of the studies showed females were sentenced more leniently than males, and gender differences are particular evident in the decision to incarcerate. Although gender disparity has been reduced, leniency for females remains even in jurisdictions with reduced judicial discretion through the implementation of sentencing guidelines. For instance, Steffensmeier and colleagues found in their research on Pennsylvania sentencing guidelines, that females are generally sentenced more leniently than males (Steffensmeier et al., 1993). Studies in other jurisdictions have similarly detected sentencing leniency for females. Spohn and Beichner (2000) found in their study on Chicago, Miami, and Kansas City that being female, regardless of race or jurisdiction, significantly reduced the odds of incarceration compared to being male.[23] In Minnesota,

[23] Illinois and Missouri had determinate sentencing schemes, while Florida used sentencing guidelines.

Miethe and Moore's research (1986) revealed that females were less likely to receive jail than males, but gender had no effect on sentence outcomes for cases within the guidelines range. Moreover, studies on federal courts detected evidence of leniency for females (Albonetti 1997, 2002; Mustard, 2001; Nagel & Johnson, 1994).

Similar to the race and ethnicity literature, gender differences are more likely to be present in the decision to incarcerate rather than in sentencing length. For example, although Steffensmeier et al. (1993) found females were less likely to receive incarceration, gender had no significant effect on sentence lengths among those who received incarceration. A recent study examining the incarceration decision as a trichomotous outcome of probation, jail, and prison, found that females were more likely to receive probation than prison but were equally likely to receive jail as prison (Freiberger & Hilinski, 2009). When jail and prison sentences were analyzed separately, females received shorter jail sentences while prison sentence lengths were not significantly different. Nevertheless, some studies find that females receive shorter sentence lengths than males (e.g. Albonetti, 1997; Ulmer & Kramer, 1996). Thus, overall, there is substantial evidence in the civilian court research literature that females tend to receive leniency in the criminal court process.

Social Class

The research on social class effects is inconclusive and particularly sparse given its importance in sentencing and criminological theoretical perspectives. In her review, Zatz (2000) attributes this deficiency to data limitations and poor measures for social class. For instance, race often serves as a proxy for social class even though socioeconomic status is believed to be intertwined with race (e.g. Dixon, 1995).

Moreover, controlling for class or even income is difficult because of the case filtering process in the criminal justice system which leaves little variation in socioeconomic status at the sentencing stage. Finally, court data frequently lack sufficient economic information. Thus, these data limitations have resulted in many courts and sentencing studies that exclude measures of class.

The studies that attempt to examine the effect of socioeconomic status on courtroom decisions most often use educational attainment, employment status, and occupational status as measures. In these studies, most of them find harsher treatment in sentencing for offenders who are less educated, poor, and unemployed (Spohn, 2009a). For instance, in the white collar crime studies, Wheeler, Weisburd and Bode (1982) detected a positive relationship between occupational status and the odds of incarceration (cf. Benson & Walker, 1988), and Albonetti (1997, 1998a) found that white collar crime and federal drug offenders with at least a high school diploma received less severe sentences. Similarly, studies examining employment status find that employed defendants are more likely to receive pretrial release and less severe sentencing outcomes (e.g. Chiricos & Bales, 1991; Nobling et al., 1998). The major weakness of these studies is that education, employment, and occupation may not accurately capture an offender's social class in society; regardless, there is some evidence that social class may influence court decisions.

In sum, arguably, the civilian court literature generally supports the conclusion that defendant social characteristics affect civilian court decisions, although there is less research on decisions made earlier in the process (Ulmer, 2012). More specifically, an

offender's race and ethnicity, gender, and social class are expected to impact decisions in the court process even if the effects are indirect and subtle.

Case Processing Factors

In addition to offense and offender characteristics, the prior research suggests that decisions earlier in the court process affect the final sentence offenders receive. Specifically, the effects of decisions pertaining to charging, pretrial release, mode of conviction, and type of sentencing authority (i.e. judge vs. jury) influence sentence severity; however, the literature on pre-sentencing decisions remains small in comparison to the research on judicial discretion in sentencing. The following section provides a synopsis of the research literature on case processing effects in sentencing.

Charging

In civilian courts, the offense(s) charged typically determine what type of court (e.g. magistrate court vs. district court) and whether a conviction is a misdemeanor or felony. Extant research also shows that charging decisions have an effect on sentence severity (e.g. Bushway & Piehl, 2007; Kingsnorth, MacIntosh, & Sutherland, 2002; Shermer & Johnson, 2010; Wilmot & Spohn, 2004; Wright & Engen, 2006). For example, Kingsnorth et al. examined prosecutors' decisions in how to charge domestic violence cases for offenders on probation in Sacramento County, California. When prosecutors decided to dismiss new criminal charges in lieu of seeking a probation violation, the offender's sentence was substantially reduced when compared to sentencing after a new felony criminal charge. Using data from the federal sentencing commission, Wilmot and Spohn examined the sentences of 360 drug offenders who pled

guilty to a single count and found that the prosecutor's decision to charge offenders with multiple counts increased their sentence lengths even though they were convicted of only one count. Shermer and Johnson recently investigated charge reduction decisions and their effects on the final sentence federal offenders receive. This study used a large sample of federal sentencing cases (45,678) for a variety of offenses and found that prosecutors' charge reductions reduced the final sentence length because these decisions moved cases into different presumptive guidelines cells. In sum, these recent studies suggest that prosecutor's charging decisions have a significant effect on sentence severity.

Pretrial Detention

Several studies find that pretrial detention results in more severe sentencing outcomes in state and federal courts (e.g. Ares, Rankin, & Sturz 1963; Chiciros & Bales, 1991; Goldkamp, 1980; Spohn, 2009b; Williams, 2003). Among the more recent studies, Williams (2003) examined a sample of 412 felony cases from Leon County, Florida from 1994 to 1996 to determine the effect of pretrial detention on imprisonment decisions. This research confirmed that convicted defendants were significantly more likely to receive incarceration and longer lengths of confinement. Similarly, Spohn (2009b) found in her study of federal drug offenders from three district courts that when defendants were detained prior to trial, they were more likely to be incarcerated and receive longer lengths of confinement even after controlling for legal and other extra-legal factors. Finally, in a study of sentencing decisions in Chicago, Miami, and Kansas City, Spohn and DeLone (2000) concluded that pretrial detention increased the odds of incarceration

and sentence length. This line of research suggests offenders who are detained prior to trial receive more severe sentencing outcomes even after controlling for other factors.

Type of Plea

Civilian sentencing research often finds that one of the most significant pretrial decisions in sentencing is the offender's type of plea (i.e. mode of conviction). Numerous studies confirm that offenders who plead guilty receive more lenient sentences than those who go to trial which is commonly referred to as the "trial penalty effect" (e.g. Brereton & Casper, 1982; Johnson, 2003; King, Soule, Steen, & Weidner, 2005; Uhlman & Walker, 1979; Ulmer & Bradley 2006; Ulmer et al., 2010; Walsh, 1990). Additionally, research using type of plea as a control variable often find significant positive effects for trials as opposed to guilty pleas when examining sentence severity (e.g. Dixon, 1995; Engen & Gainey, 2000; Peterson & Hagan, 1984; Spohn & Holleran, 2000; Steffensmeier & Demuth, 2000). Significantly fewer studies find that type of plea has no significant effect on the sentencing outcome, with most suggesting that the probability of acquittal negates the more severe punishments imposed after a trial (Eisenstein & Jacob, 1977; LaFree, 1985; Rhodes, 1979; Smith, 1986). Based on this latter group of studies then, the absence of acquittals is a significant data limitation in trial penalty research. Particularly important for the military courts, however, is that none of these trial penalty studies were conducted in court contexts that permit juries to decide sentences in non-capital cases. This point is particularly relevant because some scholars suggest that jury sentencing is a tool for prosecutors and judges to preserve a plea discount sentencing system (King & Noble, 2004).

Sentencing Authority

Jury sentencing in non-capital cases is permitted in a small minority of states, but only a few published empirical studies explore the effects of jury sentencing on sentence severity (Baab & Furgeson, 1967; King & Noble, 2004, 2005; Smith & Stevens, 1984; Weninger, 1994).[24] Whether jury sentencing preserves the trial penalty is still unresolved in the empirical literature because of the limited and mixed results of research in jury sentencing jurisdictions (Baab & Furgeson, 1967; King & Noble 2004, 2005; Smith & Stevens, 1984; Weninger, 1994). For jury sentencing to assist in preserving the trial penalty, prosecutors and judges need to consider jury sentences and set lower "going rates" for bench trials and guilty pleas (King & Noble, 2004). Qualitative and quantitative data from Kentucky, Virginia, and Arkansas generally support this view (King & Noble, 2004, 2005), but these jurisdictions do not permit juries to decide a sentence after a guilty plea. Thus, in these states, the defendants are forced to choose between a jury trial or judge sentencing after a bench trial or guilty plea. Only Texas allows defendants access to jury sentencing regardless of mode of conviction and the two empirical studies conducted with Texas data produced contradictory findings on whether juries imposed more severe sentences than judges across modes of conviction (Babb & Furgeson, 1967; Weninger, 1994). Therefore, the effect of the sentencing authority decision on sentence severity remains equivocal in the civilian court literature.

[24] The following states allow jury sentencing in felony non-capital cases: Virginia, Kentucky, Missouri, Arkansas, Texas, and Oklahoma (Holland, 2006). Although jury sentencing is prevalent in capital cases throughout the United States, capital juries only determine whether a defendant receives death or life in prison. At least one study has found that judges are more likely to impose death than juries (Kalven & Zeisel, 1966); however, because of the limited sentencing choices and sentencing process, judge-jury differences in capital cases are not comparable to non-capital felony cases (Haney, Sontag, Constanzo, 1994; Kalven & Zeisel, 1966; Sweeney & Haney, 1992).

Judge and Court Community Variation

A small but growing literature suggests that even after taking into account individual-level legal and extra-legal factors, court decision outcomes vary significantly between judges and local court communities (Anderson & Spohn, 2010; Johnson, 2006; Wooldredge, 2010). Some sentencing scholars suggest that sentencing decisions vary across judges (e.g. Anderson & Spohn, 2010; Frazier & Bock 1982, Hogarth, 1971; Johnson, 2006; Wooldredge, 2010), and the source of this variation is due to differences in personal attitudes, experiences, role orientations, and beliefs across judges (Gibson, 1978; Hogarth, 1971). The limited number of sentencing studies that examine judge variation use judicial background characteristics such as race, sex, age, tenure, and prior work experiences to infer judicial attitudes (e.g. Frazier & Bock, 1982; Gruhl, Spohn, & Welch, 1981; Spohn, 1990; Steffensmeier & Britt, 2001; Steffensmeier & Hebert, 1999). The earlier research in this area, however, generally finds small differences in sentencing outcomes across judges and inconsistent effects of background characteristics (Zatz, 2000). Consequently, these empirical findings led some scholars to posit that regardless of differences in personal beliefs and attitudes, judges are socialized into their roles and conform to court community norms (Eisenstein et al., 1988; Frazier & Bock 1982; Steffensmeier & Hebert, 1999; Zatz, 2000), while others suggest that judicial selection procedures create a fairly homogenous judiciary in their views (see Spohn, 2009a).

The more recent contextual studies on inter-judge disparity use more rigorous analytical techniques and find inter-judge sentence variation even after controlling for court context and individual case and offender characteristics (Anderson & Spohn, 2010; Johnson, 2006; Wooldredge, 2010). For example, in his study of inter-judge disparity

and court contextual effects in Pennsylvania sentences, Johnson found that inter-judge disparity accounted for 5 percent of the variation in sentence severity even in the presence of sentencing guidelines, and Wooldredge's study of one Ohio trial court reported that 17 percent of the variation in sentences was due to differences between judges. Thus, the recent contextual sentencing literature supports the idea that judges vary in their sentencing decisions because of differences in their beliefs and attitudes.

Sentencing contextual studies find that even though individual level case characteristics account for most of the variation in sentences, sentencing outcomes vary because of their different social contexts (e.g. Britt, 2000; Engen et al., 2003; Helms & Jacobs, 2002; Ulmer, 1997; Johnson, 2005; Johnson et al., 2008; Kautt, 2002; Kramer & Ulmer, 2002; Steffensmeier & Demuth, 2001; Ulmer & Bradley, 2006; Ulmer & Johnson, 2004; Ulmer et al., 2010). The magnitude of the variation in sentencing variations that is attributable to between-county court differences tends to be small (less than 10%) with some studies reporting as little as 2 percent for some sentencing outcomes (Engen et al., 2003; Ulmer & Johnson, 2004). This line of research recently led Jeffrey Ulmer (2012, p. 14) to state that regardless of whether the jurisdiction has sentencing guidelines or not, "*substantial evidence exists that what kind of sentence one gets, and the factors that predict why one gets it, in significant part depends on where one is sentenced*" (emphasis in original). In short, sentencing scholars tend to agree that the sentencing outcomes and their predictors significantly vary across local court communities.

More recent studies focus on which contextual characteristics explain this type of variation in sentencing outcomes. Guided by several theoretical perspectives, court

community contextual research focuses on the characteristics of the court community. For instance, organizational factors include caseloads and criminal justice resources, and the social/cultural characteristics of the larger community pertain to crime rates, the political environment, and the population demographic composition (e.g. Britt, 2000; Helms & Jacobs, 2002; Johnson, 2005, 2006; Kautt, 2002; Kramer & Ulmer, 2009; Ulmer & Johnson, 2004; Weidner et al., 2005). Overall, court contextual studies provide empirical support for arguments that sentencing variation is influenced by local court characteristics. For example, court caseloads and local jail space often have a relationship with incarceration decisions (Johnson, 2006; Johnson et al.; 2008; Kramer & Ulmer, 2009; Ulmer & Bradley, 2006; Ulmer & Johnson, 2004) and the social organization characteristics (e.g. stability) of the courtroom workgroup have been found to exert small but significant effects on some types of punishments (Haynes et al., 2010). Nevertheless, court community variation in pretrial decisions remains an area of court research to be explored. Finally, contextual sentencing studies have focused on a few state jurisdictions (Pennsylvania, Ohio, Washington) and more recently federal district courts (Johnson et al., 2008), so whether similar relationships exist in non-guidelines jurisdictions or a court system organized like the military is unknown.

Summary

The empirical evidence is sparse on the effects of legal and extra-legal factors related to the distinctive characteristics of the military's legal structure, process and culture. The effects of the military's legal factors--offense seriousness, discipline history, rank, and military performance—have not been fully examined in prior research. Moreover, the extra-legal factors of gender, career field, case processing decisions,

prosecuting base, and judge are rarely if ever examined in prior studies. Although prior military justice studies seem to suggest the lack of a race effect in punishments, there is some indication of racial differences in plea bargaining decisions. Regardless, this small amount of military research has a number of methodological issues and has limited generalizability to the modern court-martial. Therefore, little is known about the determinants of modern court-martial decisions.

On the other hand, the civilian court research literature is quite extensive. This literature shows that individual level case and defendant characteristics are the strongest predictors of criminal court decisions. Legal factors related to offense seriousness and criminal history consistently exhibit positive relationships with many pretrial decisions and sentencing outcomes. In addition to individual-level legal factors, there is considerable evidence that offender social characteristics affect court decisions. Contemporary research in civilian courts often detects some form of racial disparity in the court process even if it is small, subtle, or indirect. Despite the weak measures for social class, unemployment appears to be a predictor of pretrial detention, and a significant portion of the research finds leniency for females in pretrial and sentencing outcomes. Moreover, prior decisions in the process exert significant effects on sentence severity. Finally, a small but growing civilian court literature finds that court decisions, particularly sentencing, are not only influenced by individual-level legal and extra-legal factors, but also the judge and local court community. Therefore, findings in the civilian court literature suggest that court decisions are determined by individual-level legal and extra-legal factors and depend on the decision-maker and court community in which court decisions are made.

It is unclear, however, whether the distinctive characteristics of the military's justice system will lead to inconsistent findings with the civilian court research. The present study investigates some of these key relationships in the civilian court literature within the military context as a starting point for a larger research agenda. To further guide this investigation, Chapter 4 discusses contemporary theoretical perspectives of the criminal court process and extends these perspectives to the military context with concepts from the military sociological literature.

Chapter 4: Theoretical Perspective

Scholars have used several theoretical approaches to explain the criminal court process and its outcomes. Earlier research relies on the sociological conflict-consensus theoretical approaches (e.g. Chiciros & Waldo, 1975; Lizotte, 1978). The Marxian-based conflict perspective suggests that the criminal law is used by a dominant group in society to control subordinate groups across social, economic, and political domains (Chambliss & Seidman, 1982; Marx, 1859; Quinney, 1970). As a result, criminal court outcomes are more severe for minorities and individuals in a lower socioeconomic class. On the other hand, the Weberian and Durkheimian-inspired formal legal/consensus perspective suggests that the criminal law reflects the shared values among members of a society and these formal rules are applied in a technically rational manner (Durkheim, 1933; Weber, 1968). From this perspective, criminal court outcomes are determined by formal legal factors related to offense severity.

The empirical research, however, fails to provide strong support for either the conflict or consensus perspectives (Hagan, 1989). In addition to finding both legal and social characteristics influence outcomes, studies consistently find that pretrial decisions and organizational factors, such as efficiency and maintenance goals, impact court actor decisions. These findings in the literature have led scholars to rely on organization and decision-making theoretical perspectives for explanations of the court process (e.g. Albonetti 1986, 1991; Blumberg, 1967; Dixon, 1995; Eisenstein & Jacob, 1977; Hagan, 1989; Hagan, Hewitt & Alwin, 1979).

In general, organizational perspectives contend that punishments reflect courts' organizational decisions and goals that are influenced by their formal legal structures,

social organization characteristics, and their cultural contexts. Organizations differ from other types of social collectivities in that they are "social structures created by individuals to support the collaborative pursuit of specified goals" (Scott & Davis, 2007, p. 11). Divergent views exist in the organization literature on whether the structure is formal or informal, whether goals are common or diverse, how goals are defined and the means for achieving them, and how organizational participant behavior is controlled (see Scott & Davis, 2007; Shafritz, Ott, & Jay, 2011).

Two common theoretical approaches to organizational studies are the rational and open systems perspectives (Gouldner, 1969; Katz & Kahn 1966, Scott & Davis, 2007; Thompson, 1967). Associated with Max Weber's ideal-type bureaucracy, the rational perspective argues that an organization is similar to a machine pursuing relatively specific goals with maximum efficiency through a formalized social structure closed off from its environment (Scott & Davis, 2007). Participant behavior is controlled through formal rules and authority. In contrast, from an open systems perspective, an organization is like an organism consisting of loosely coupled and interdependent parts interacting with its environment (Katz & Kahn, 1966; Thompson, 1967). Participants may not hold common goals and those goals may or may not include preserving or maintaining the organization (Scott & Davis, 2007).[25] Moreover, through social interactions of the participants, an organizational culture may develop consisting of underlying assumptions, beliefs, and norms that influence organizational decisions and

[25] Scott and Davis (2007) delineate open systems from a third perspective, the natural system. They posit that the natural systems perspective emphasizes the informal social structure and that organizational maintenance or survival is a goal. In contrast, the open systems perspective focuses on the process rather than the social structure, and participants may not always be seeking organizational survival. Other theorists consider the natural system view to be an aspect of an open system (Gouldner, 1969; Morgan, 2006; Thompson, 1967).

behavior (Schein, 2011; Shafritz et al., 2011; Smircich, 1985).[26] Organization theorists frequently attempt to reconcile the reality that organizations exhibit both rational and non-rational characteristics (e.g. March, 1994; Mohr, 1976; Scott & Davis 2007; Thompson, 1967). That is, an organization may possess a formal structure, purpose, and goals and attempt to behave rationally, but an informal social structure and organizational culture also exist that define ambiguous goals and informally control participant behavior.

Following this integration trend in the organization literature, over the last decade the courts and sentencing literature has been dominated by three perspectives with theoretical roots in organizational theory and social psychology—uncertainty avoidance/causal attribution, focal concerns, and court community perspectives. The present study extends these perspectives of the court process to the military context and utilizes the military legal and sociological literatures to guide this investigation into the legal and extra-legal effects on court-martial decisions.

Uncertainty Avoidance/Causal Attribution

Albonetti's uncertainty avoidance and causal attribution theoretical frameworks integrate the social-psychological oriented causal attribution theory in punishment with concepts from the organization theoretical works of Simon (1947), March and Simon (1958), Cyert and March (1958), and Thompson (1967). Albonetti (1986, 1987, 1991) argues that judges and prosecutors make decisions in bounded rationality and rely on patterned responses and casual attributions to reduce uncertainty in achieving their

[26] The concept of organizational culture has sparked much scholarly debate and numerous definitions and perspectives persist (e.g. Smircich,1985; Trice & Beyer, 1993; Deal &Kennedy, 1982; Hofsted, 1991; Schein, 1990).

desired outcomes. The routinization of decision-making absorbs some of the uncertainty in achieving the preferred outcome, and creates a condition of bounded or limited rationality on decision-making.

The concept of bounded rationality originates in Simon (1947)'s, *Administrative Behavior*. In this seminal work, Simon asserts that rational choice models are unrealistic because they require perfect knowledge of the alternatives and their consequences. Human beings are incapable of engaging in rational choice because of cognitive limitations and information constraints which lead to decision-making under conditions of bounded rationality. According to Simon, organizations can overcome these limitations through the organizational structure consisting of standard operating procedures, organizational training, communication channels, and formal systems of authority. Expanding on this notion, March and Simon (1958) and Cyert and March (1958) suggest the formalized structures of organizations control participant behavior and their decisions so they achieve the goals of the organization. Moreover, rather than maximizing the likelihood of achieving their preferred outcomes with an unlimited search for alternatives, organizations engage in a limited search until they reach a satisfactory outcome or threshold (i.e. "satisficing").

Albonetti's prosecutorial and judicial decision-making theoretical frameworks also rely on Thompson's (1967) concept of uncertainty avoidance in individual decision-making within an organization. Thompson posits that discretionary decision making involves two major dimensions—beliefs about cause-effect relationships and preferences regarding the possible outcomes. According to Albonetti (1987: 295), prosecutors possess uncertainty surrounding cause-effect relationships between alternatives and their

outcomes because of "the inability to control the behavior of the defendant, the defense attorney, and the jury," but their sponsoring organizational goal or preference is highly certain.[27] Applying these concepts of organizational decision-making, Albonetti (1986, 1987) asserts that the prosecutors' decisions of whether to prosecute a case at both the pre-indictment and post-indictment stages is in the pursuit of the sponsoring organization's goal of obtaining convictions, and prosecutors attempt to reduce uncertainty in achieving that goal by relying on legal and defendant characteristics associated with past convictions.

Albonetti (1991) extends this theoretical perspective to judges' sentencing decisions and incorporates the social-psychological theory of casual attribution in punishments to explain the effect of defendant social characteristics on sentencing outcomes. According to casual attribution in punishment theory, judges draw a cause-effect relationship between social characteristics of defendants to past and future behavior through stereotypes based on social categories (see Carroll & Payne, 1976; Carroll, Perkowitz, & Weaver, 1984; Hawkins, 1981; Shaver, 1975). Integrating this perspective with organizational decision-making theory, Albonetti contends that judges are pursuing the goal of reducing the likelihood of recidivism. To achieve this goal, judges construct defendant stereotypes based on prejudices and past experiences to routinize their decision-making because they possess a great deal of uncertainty concerning the cause-effect relationship between punishment and recidivism. These "patterned responses" place limits or constraints on judges' alternatives and reduce

[27] Albonetti essentially is viewing a prosecutor as a member of one organization—the sponsoring organization—when in reality the prosecutor is also embedded within a larger organization—the court community.

uncertainty in cause-effect relationships related to recidivism outcomes. In sum, uncertainty avoidance/causal attribution theory suggest that the effects of legal factors and extra-legal factors reflect court actors' pursuit of their organizational goals.

Focal Concerns

The focal concerns perspective adopts the viewpoint that both legal and extra-legal factors affect court actor decisions and incorporates aspects of the decision-making mechanism in Albonetti's uncertainty avoidance/causal attribution theoretical framework (Ulmer & Bradley, 2006; see e.g. Steffensmeier and Demuth, 2000; Steffensmeier et al., 1993, 1998). In contrast to Albonetti's theoretical position, focal concerns proposes that court actors are pursuing multiple and ambiguous goals beyond reducing uncertainty in recidivism estimations and obtaining convictions. Even though focal concerns was originally developed to explain judicial sentencing decisions, courts and sentencing scholars have extended focal concerns to other types of decisions prior to and after sentencing. For instance, the perspective has been applied to decisions pertaining to prosecution and charge bargaining (Kramer & Ulmer, 2009; Shermer & Johnson 2010; Spohn, Beichner & Davis-Frenzel, 2001; Spohn & Holleran, 2001), pretrial detention (Demuth & Steffensmeier, 2004), and parole (Huebner & Bynum, 2006). Thus, focal concerns is a perspective that is applicable to multiple decision points in the court process.

In general, the focal concerns perspective posits that court actors' decisions pertain to three focal concerns: (1) offender blameworthiness and harm caused to the victim, (2) protection of the community, and (3) practical implications and consequences (Steffensmeier et al., 1998). Offender blameworthiness is connected to the "just deserts"

or retributive punishment philosophy reasoning that punishment severity should increase with offender culpability and the degree of harm the offender caused (Steffensmeier et al. 1998). To assess blameworthiness, court actors consider factors related to the offense and its circumstances such as offense type, offense severity, prior victimization, harm caused to the victim, and the offender's role in the offense. Protection of the community emphasizes incapacitation of the offender for specific deterrence and general deterrence goals but may also include the sentencing goal of rehabilitation. In addition to the factors related to blameworthiness, court actors frequently rely on the defendant's criminal history to assess dangerousness. Finally, the practical constraints and consequences category includes organizational maintenance goals (e.g. managing high caseloads and reducing prison populations) and individual and societal collateral consequences from court actor's decisions. Incorporating concepts from uncertainty avoidance/casual attribution, focal concerns posits that court actors rely on stereotypical beliefs about cause-effect relationships between offense and defendant characteristics and the three focal concerns. That is, stereotypical attributions become norms and routines used to reduce uncertainty in decision-making (Farrell & Holmes 1991; Steffensmeier et al., 1998).

Nevertheless, the goals reflected in the focal concerns perspective are vague and conflicting and the cause-effect relationships remain uncertain which further suggests that court actors continue to face a decision environment fraught with ambiguity and uncertainty. How is blameworthiness defined? When will concerns about jail capacity be emphasized over protection of the community? The recent contextual sentencing literature attempts to address the equivocality in the focal concerns by integrating

components of the court community perspective with focal concerns (Kramer & Ulmer, 2009). Thus, while uncertainty avoidance/causal attribution and focal concerns perspectives offer individual-level oriented perspectives on court actor decision-making, the court community perspective explains how court-actors derive their meanings and interpretations of the focal concerns from their organizational environments.

Court Community

Based on ethnographic research, the court community perspective contends that the informal social organization of courts affects case processing decisions and ultimately the punishments offenders receive (Eisenstein & Jacob, 1977; Eisenstein et al., 1988; Nardulli et al., 1988; Flemming et al., 1992, Ulmer, 1997). Applying a community metaphor, Eisenstein and colleagues argue that courts consist of interdependent participants in a shared workplace (i.e. workgroup) that are embedded in larger social and political environments. Court communities develop distinctive local organizational cultures consisting of norms, values, attitudes and informal communication systems that guide and control participants' behaviors.

As part of their organizational culture, court community members often develop a common understanding of how cases should be processed and the "going rate" or typical punishment for a case given certain characteristics. These case processing and sentencing norms arise through the social interactions of the participants and are influenced by their local community's cultural and political environments (Ulmer, 1997). For example, the community in which the court is embedded may emphasize deterrence more than rehabilitation as the means for reducing crime, or the political environment may be more conservative with a "tough on crime" philosophy. These demands from the court

community's environment influence the meanings court actors attach to punishments, goals, and defendant and offense characteristics. Thus, through their social interactions with each other and their local cultural contexts, courts develop distinctive meanings of punishments and the goals they pursue.

The social organization characteristics of court communities affect the level of discretion in individual decision-making, going rates, and the strength of the local legal culture. When court communities have high familiarity and stability in their participants, they have an increased level of interdependence which encourages the development of informal norms and going rates. As a result, individuals have less discretion in decision-making, increased accountability, increased sensitivity to local external cultural and political demands, and higher resistance to policy changes that contradict their local legal culture.[28]

In their recent statement of focal concerns, Kramer and Ulmer (2009) incorporate the court community perspective to develop a heuristic theoretical framework of court decision-making. These scholars suggest that the meaning, prioritization, and situational interpretations of the focal concerns depend upon the local organizational and community cultures, which are in turn related to larger state and society-wide influences (see also Johnson, 2006; Ulmer & Bradley 2006; Ulmer & Johnson, 2004). In other words, although court communities' definitions of blameworthiness and dangerousness are influenced by their legal structure (i.e. criminal code and policies), "[t]he ultimately

[28] For example, Ulmer (1997) found in his ethnographic study that the court community with highly stable personnel, relied heavily on sentencing norms in their local legal culture rather the sentencing guidelines, while the courts with more personnel changes relied more on sentencing guidelines. Eisenstein et al. (1988) suggest that these social organizational characteristics are associated with a court size typology. That is, small courts tend to have more familiarity and stability and stronger local legal cultures than large courts.

subjective and interpretative nature of the assessment of focal concerns makes it likely that stereotypes and biases based on race/ethnicity or other extralegal defendant characteristics can influence the sentencing process..." (Ulmer, 2012, p. 12). Finally, Kramer and Ulmer (2009) submit that individual court actor ideologies and beliefs may further influence interpretations of the focal concerns and produce individual court-actor variation in decision outcomes, although they do not explain under what conditions or social contexts this is more or less likely to occur.

Based on these contemporary theoretical perspectives, court decision outcomes reflect courts' formal legal structures, their local social and cultural contexts, as well as their state and societal-wide influences. Extending this notion to the military context, the determinants of decision outcomes in the court-martial process should be influenced by the unique aspects of the military's legal structure, the local military court community's context, and the military's organizational goals and culture. Guided by the military legal and sociological literatures, the following section presents hypothesized individual-level effects of legal and extra-legal factors on court-martial decisions at different stages of the process—pretrial, sentencing, and clemency.

Hypotheses

Although the military's formal legal structure and process have been increasingly "civilianized" over time, significant differences remain that are expected to produce findings specific to the military context. Legal factors are not only related to offense severity and prior criminal history but also an offender's military record and rank. The military permits broad discretion throughout the court-martial process which should encourage the use of extra-legal factors in decision-making. Moreover, the formal

authority for many decisions rests with commanders; plea bargaining and sentencing procedures differ from typical civilian courts; defendants have a right to jury sentencing, and court actors are centrally managed, frequently move, and change roles in the process. Finally, these legal structural and social organization differences are embedded within an organization with its own culture and goals. Guided by contemporary theoretical perspectives of courts and the military literature, the following section presents hypothesized relationships about the effects of legal and extra-legal factors in court-martial decisions.

Offense Seriousness and Discipline History

The civilian sentencing literature suggests the most significant category features related to going rates are the legal characteristics of a case such as type and severity of the offense (Eisenstein et al., 1988; Nardulli et al., 1988; Ulmer, 1997). Although routine cases consist of a constellation of offender and case characteristics, court actors frequently rely on legal characteristics to initially categorize cases (see Farrell & Holmes, 1991; Heumann, 1978; Hill, Harris & Miller, 1985; Steen, Engen, & Gainey, 2005). According to the focal concerns perspective, these case characteristics are related to assessments of blameworthiness and danger to society, and as a result, indicators of offense seriousness and criminal history exhibit positive relationships with the severity of court process and sentencing decisions (Albonetti, 1991; Eisenstein et al., 1988; Nardulli et al., 1988; Steffensmeier et al., 1988). Although military offenders do not possess extensive criminal records, in one military study a control variable measuring discipline history exerted similar aggravating effects on court-martial decisions (Burchett, 1983).

Therefore, consistent with civilian courts, the following hypotheses should be supported empirically.

> H1: Offense seriousness and discipline history will increase the likelihood of receiving more severe court-martial decision outcomes.

Military-Specific and Defendant Social Characteristics

The military's legal structure provides a great deal of discretion in court-martial decisions. According to modern courts and sentencing perspectives, when discretion is increased in the legal structure, courts are more likely to rely on stereotypes and biases to develop meanings of offender behavior and to reduce uncertainty and increase efficiency in court actor decision-making. Therefore, stereotypes and biases engrained in the military's organizational culture should be evident in court-martial outcomes.

Military performance is a legal factor in the military context, but how it affects outcomes is determined by military culture. Some military scholarship suggests that military culture promotes a good soldier stereotype (see Dunivin, 1994, 1997; Hillman, 1999, 2005; Katzenstein & Reppy, 1999; Spak & McCart, 2004). Relying on this stereotype, military members with indicators of good military performance (e.g. lengthy service, awards and medals, and combat service) are perceived as trustworthy, disciplined, and respectful of authority. The legal structure links the good soldier stereotype to criminal propensity by allowing a "good soldier defense" in the findings phase of a trial and permitting good military performance as mitigation evidence in sentencing and clemency.[29] Good military character evidence "counters wrongdoing with

[29] "Good soldier defense" evidence is admissible under MRE 404 according to case law precedent and is not statutorily created. RCM, 1001(c)(1)(B) of the UCMJ states mitigation evidence includes, "particular acts of good conduct or bravery and evidence of the reputation or record of the accused in the service for

proof that an accused has been a 'good soldier' during his or her military career," and demonstrates "the accused's loyalty to the armed forces with past military performance" (Hillman, 1999, p. 886). If an offender exhibits good military performance, then he or she is presumed to possess general good character that is inconsistent with criminal behavior. Consequently, court-martial decision outcomes are determined not only by factors related to offense seriousness and prior disciplinary history but also aspects of the offender's military record that are associated with military culture's stereotype of a good soldier. Specifically, indicators of good military performance are expected to be associated with more lenient court-martial outcomes. Therefore, in contrast to civilian courts, an offender's job performance, a military-specific legal factor--is expected to affect court-martial outcomes as follows.

> H2: Offenders with good military performance will receive more lenient court-martial decision outcomes.

The legal factor of military performance in conjunction with military culture also opens the door for defendant status characteristics to influence decision outcomes. Karen Dunivin (1994, 1997) suggests that military members often embrace a masculine combat warrior image of the professional soldier. Other scholars argue the masculine norms and values associated with the combat warrior paradigm are specifically constructed to be exclusionary features instead of desirable characteristics that are applicable to all uniformed military members (Katzenstein & Reppy 1999, Morris, 1999; Segal, 1999). Although an offender's military record is a legal factor in the court-martial process, his career field status is generally not considered legally relevant (Oler, 2005). Nonetheless, the causal attributions from the combat warrior paradigm in military culture will lead

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efficiency, fidelity, subordination, temperance, courage, or any other trait that is desirable in a servicemember" (MCM 2012, p. II-124).

decision-makers to reduce their assessments of criminal culpability and propensity for offenders who work in more combat-oriented career fields. An offender who works in a career field that is closer to the tip of the warrior spear is more likely to be perceived as a "good soldier" and lead to more lenient outcomes compared to offenders in less combat-oriented jobs.

> H3: The combat-orientation of offenders' career fields will be negatively associated with the severity of court-martial decision outcomes.

Some civilian court research suggests that court actors link social stereotypes about race/ethnicity, gender, and socioeconomic status to levels of dangerousness, culpability, and general criminal propensity (Albonetti, 1991; Farrell & Holmes, 1991; Steffensmeier & Demuth, 2000; Steffensmeier et al., 1998). For instance, relying on racial stereotypes, court actors may perceive black offenders as possessing internal characteristics that are associated with increased assessments of dangerousness. That is, black offenders are more prone to violence, disrespectful toward authority, and more likely to engage in a criminal lifestyle (Bridges & Steen, 1998; Swigert & Farrell, 1977). Similarly, Hispanics are often perceived as "hot headed" irresponsible, lazy, and possessing a generally higher propensity for committing crime than non-Hispanic whites (Bridges, Crutchfield, & Simpson, 1987; Healey, 2012). Contemporary courts and sentencing perspectives predict that these societal stereotypes and biases result in more severe court decisions for racial and ethnic minorities in comparison to whites, a prediction that has some support in the civilian court empirical literature. However, whether racial/ethnic stereotypes are embraced in the modern military context is debatable because of a possible shift in military culture and prior findings in military research.

Dunivin (1994, 1997) asserts that two competing models—traditional and evolving—of military culture co-exist in the presence of the combat masculine-warrior paradigm. Compatible with the warrior image, the traditional model of military culture favors social conservatism, separatism, hostility towards the minority, and a homogenous force with masculine values and norms. This model promotes negative assessments of military performance that are linked to societal stereotypes similar to those associated with criminal propensity (see Kier, 1999; Segal, 1999). For example, some military researchers suggest that black soldiers are perceived as disrespectful toward authority and lacking in self-discipline (Dansby, Stewart, & Webb, 2001; Moskos & Butler, 1996). If the traditional model of military culture is dominant, then similar to prior findings in civilian court research, racial/ethnic disparities should be detected in court-martial outcomes as follows.

> H4a: Minorities will receive more severe court-martial decision outcomes than whites.

Dunivin, however, argues that social change within American society and shifting military policies are responsible for the emergence of a competing model of military culture that emphasizes social egalitarianism, inclusion, tolerance, and a heterogeneous force with diverse values and norms. Consistent with Dunivin's assertion of a shifting military culture, some evidence exists that racial inequality in the military has been substantially reduced over time especially when compared to the civilian population. For instance, the military possesses higher rates of interracial marriage (Jacobson & Heaton, 2003), fewer racial/ethnic disparities in promotions (Daula, Smith, & Nord, 1990), and higher workplace satisfaction for minorities (Lunquist, 2008). Similarly, prior military

justice research typically fails to detect racial disparity in disciplinary actions (Baker & Wallis, 1985; Burchett, 1983; Landis et al., 1997; Verdugo, 1998).

According to Lundquist (2008), the military's marked improvement in racial inequality is due to a combination of social conditions within the military context. The work and living environments are racially-integrated, the military social hierarchy is built on rank rather than race, and the military population is disproportionately black in comparison to the civilian population (Mare & Winship, 1984; Moskos, 1983, 1993; see also Moskos & Butler, 1996). In other words, the changing social conditions and policies in the modern military combined with aspects of military life discourage social distinctions among members based on racial and ethnic stereotypes. If modern military culture is indeed shifting as Dunivin suggests, then despite the broad discretion in the military justice system, racial/ethnic disparities in court-martial outcomes will not be found because these stereotypes and biases are not engrained in the modern military context.

> H4b: Court-martial decision outcomes will not significantly differ between minorities and whites.

Research in civilian courts often finds that females receive more lenient decision outcomes in the criminal court process than males. Some scholars contend that these disparities exist because decision-makers rely on gender-based stereotypes. Applying causal attribution theory and focal concerns perspectives, Albonetti (1991, 1998b) and Steffensmeier and colleagues (1993, 1998) purport that judges impose more lenient sentences for females "because judges are less likely to attribute stable and enduring patterns of illegal behavior to females" (Albonetti, 1998b, p. 38). Additionally, judges often perceive the social costs associated with incarceration as higher for females than

males because of caregiving responsibilities. In other words, relying on gender-based attributions, judges reduce assessments of culpability and dangerousness and increase assessments of practical implications and social consequences for female offenders. A similar gender-based rationale is the paternalistic or chivalry hypothesis (e.g. Gruhl & Welch, 1984; Moulds, 1980; Nagel & Weitzman, 1971). According to this perspective, decision-makers perceive females as the weaker sex and thus, in need of protection from the harsh conditions of confinement and the collateral consequences associated with criminal convictions. Both of these theoretical rationales predict that traits associated with females lead to more lenient court decision outcomes.

Dunivin's assertion that the modern military is entrenched in a masculine combat-warrior paradigm and prior military research support the notion that traditional gender roles and stereotypes are embraced in the military context. Combat limitations for females are grounded in a perception that females are too physically and mentally weak for combat (Iskra, 2007; Segal, 1999) and the military elevates masculine norms and values such as aggression, risk-taking, and competition (Dunivin, 1994; Katzenstein & Reppy, 1999). Moreover, several military scholars argue that gender-based stereotypes are the source of gender disparities found in a variety of military organizational outcomes (e.g. Boyce & Herd, 2003; Hillman, 2009; Miller, 1997; Iskra, 2007; Segal, 1999, 2006). Thus, contemporary courts and sentencing theoretical perspectives and the military sociological literature predict gender disparity in court-martial decisions as follows.

> H5: Court-martial decision outcomes will be more lenient females than males.

In the military, an offender's rank is a legal factor throughout the court-martial process; however, the legal structure does not specify how rank should affect court-

martial decisions. The hierarchal rank structure produces a social class structure within the military context particularly between enlisted and officers (Segal, 1999; Steihm, 1989; Stevenson, 2010). Although civilian court research on social class is inconclusive, some research finds that offenders who are less educated, poor, and unemployed often receive more severe treatment in the criminal court process (Spohn, 2009a). In the military context, these indicators of social class are either inapplicable or explicitly tied to the military's rank structure. Because of enlistment requirements, all military offenders are employed and possess at least a high school education; officers are required to possess at least a bachelor's degree; and salary is determined by rank and length of service.

There is evidence of officer-enlisted social class distinctions in the legal structure and military culture. Officers are the decision-makers in the court-martial process, certain types of punishments are unavailable for officers (e.g. reduction in rank, hard labor without confinement), and officers cannot receive a punitive discharge in a special court-martial or be tried in a summary court-martial. Additionally, enlisted offenders may receive two types of punitive discharges that differ in severity—the Bad Conduct Discharge and the Dishonorable Discharge—while officers may only receive a Dismissal. Although the UCMJ states that a Dismissal is equivalent to a Dishonorable Discharge, the labels clearly possess different connotations. The legal structure even contains an officer-specific offense—"Conduct Unbecoming an Officer and Gentleman." Thus, arguably the legal structure promotes disparate treatment in the court-martial process based on rank.

Military culture perpetuates the higher social status of officers in several ways. For instance, rank is displayed on uniforms and the military uses customs and courtesies

such as saluting and addressing superior officers with "sir" or "ma'am" (Segal, 1999, p. 257). The officer label assigns certain character traits to the individual such as honorable, well-mannered, and disciplined (Hillman, 2008; Dunivin, 1994), and a person's rank has a positive association with assumptions about his/her performance ability (see Berger, Cohen, & Zelditch, 1972). Thus, the legal structure and military culture should encourage attributions of traits associated with being an officer that are inconsistent with criminal behaviors—officers are honorable, trustworthy, and gentlemen.[30] Applying attribution and focal concerns perspectives to the military context, the rank differentiation in the legal structure and military culture are expected to produce officer-enlisted disparities in the court-martial process as follows.

> H6: Officers will receive less severe court-martial decision outcomes compared to enlisted.

Case Processing Factors

Extant research in civilian courts finds that case processing factors such as pretrial detention, mode of conviction and sentencing authority affect offenders' punishments. Case processing factors in the court-martial process are also expected to affect military sentences. Nevertheless, the military's legal structure, social conditions, and organizational culture may produce results that are inconsistent with some rationales and findings in civilian sentencing research.

Civilian sentencing research often finds that offenders who remain detained while their cases are pending receive more severe sentences. A couple of rationales exist for the aggravating effects of pretrial detention in civilian court studies with the first focusing on

[30] Consistent with the masculine combat warrior paradigm and the traditional model of military culture, the stereotypical officer is also male.

the collateral consequences of pretrial detention. Pretrial detention may interfere with a defendant's ability to assist in the preparation of his defense and prevent him or her from engaging in activities that would mitigate sentence severity such as working, maintaining family relationships, receiving educational training, or participating in treatment programs. This rationale, however, is arguably not applicable to the military context. Military offenders remain employed and continue to be paid during pretrial confinement; the offender has access to a variety of services in local military confinement facilities; and defense counsel are granted liberal access to their clients who are often located on the same installation where defense counsel work.

The second and more plausible rationale in the military context draws on contemporary sentencing theoretical perspectives. To reduce uncertainty in their decisions, decision-makers use pretrial restraint as another indicator of culpability and dangerousness. In other words, an offender who receives pretrial confinement is perceived as more crime prone and a threat to society compared to an offender who does not receive pretrial confinement. Thus, consistent with findings in civilian court research, pretrial confinement is expected to increase the severity of subsequent decisions in the court process; however, the rationale is grounded in uncertainty avoidance/casual attribution theory rather than the collateral consequences of pretrial detention that are frequently associated with civilian courts.

> H7: Offenders who receive pretrial confinement will receive more severe court-martial decision outcomes.

Civilian sentencing research finds that offenders who assert their right to a trial are penalized with more severe sentences because the courtroom workgroup attempts to induce guilty pleas in pursuit of an organizational efficiency goal (Dixon, 1995; Engen &

Steen, 2000; Johnson, 2003; Ulmer, 1997). The offender's type of plea affects the degree to which uncertainty and the use of court resources are minimized. Plea bargaining and going rates are tools the court actors use to reward offenders with more lenient sentences when they enter a plea that is more likely to achieve the court community's goals. For instance, guilty pleas as opposed to trials provide certainty in conviction and sentence and use fewer court resources—a practical constraint in courtroom decision-making. Thus, according to uncertainty avoidance and focal concerns perspectives, guilty pleas should result in less severe sentences when compared to trials, a prediction that has found considerable empirical support in the civilian court literature.

Nonetheless, recent military research suggests the absence of a trial penalty effect in military sentencing (Breen, 2011). This finding may be attributed to the nuances in the military's legal structure and social organization characteristics of the military's court communities. Military plea bargaining and sentencing operate differently from the typical civilian court. Plea bargains are for sentence caps or upper thresholds, and even though judges know when a plea agreement exists in sentencing, the agreed upon sentence limitation is not revealed until after punishment is imposed. Moreover, jury sentencing is available in guilty pleas but the jury has no knowledge of the plea agreement. Juries are not part of the courtroom workgroup, so they have no idea what meanings and norms might have developed in the court community. If juries are unaware of going rates and the agreed upon sentence cap, then it is extremely difficult for juries to provide guilty plea discounts.

Additionally, going rates may be more difficult to establish in the military because of its social organization characteristics. According to Keveles (1984), military

courtroom workgroups have difficulty in reaching a consensus on the appropriate punishment for a case because commanders are involved in the process, rank differences between court actors hinder interactions, and frequent personnel rotations and deployments create instability in the workgroup. From a court community perspective, the instability in workgroups prevents the development of strong going rates which then leads to disagreement among workgroup members about the level of punishment severity required for a plea discount. Thus, contrary to civilian court findings and typical theoretical predictions, a trial penalty may not be detected in court-martial sentences. The following hypothesis tests whether the trial penalty effect that is predicted in civilian courts also exists in the military context.

> H8: Offenders who assert their right to a trial will receive more severe sentences than those who plead guilty.

Consistent with civilian court research, military sentence severity is expected to differ between judges and juries, but prior research is mixed on whether juries will impose more severe sentences on average (see Breen, 2011; Burchett, 1983; King & Noble, 2004, 2005; Keveles, 1984). Similar to judicial sentencing decisions, juries attempt to minimize uncertainty regarding the likelihood of an offender to recidivate and rely on factors related to blameworthiness and protection of the community such as seriousness of the offense and criminal history to arrive at an appropriate sentence (Diamond & Stalans, 1989; U.S. Department of the Army, 2010, para. 8-3-21). However, jury members do not have prior case outcomes to guide their decisions and they are unaware of case processing norms and the practical implications and collateral consequences of punishments. Juries are also subject to a group decision-making process (Kalven & Zeisel, 1966; Sandys, 1995) and are more likely than judges to be influenced

by emotions and apply the law incorrectly because of their inexperience (Bentele & Bowers, 2001; Eisenberg & Wells, 1993; King & Noble, 2004). Therefore, judge and jury sentences are expected to significantly differ in severity, but whether jury sentences are more severe than judge sentences is unresolved in the military and civilian court literature.

Some qualitative research indicates that the court community's going rates are influenced by the sentences that juries impose and that to preserve a trial penalty, the going rates are less than the sentences expected to be imposed by a jury (King & Noble, 2004). If this is the case, then uncertainty avoidance and focal concerns predict that the court community will establish going rates less than jury sentences to encourage offenders to select a judge as their sentencing authority because it maximizes efficiency and predictability in the outcomes. In other words, judges will impose less severe sentences on average compared to juries. Contrary to this civilian court-based prediction, a recent military study found that military judges impose more severe sentences on average than juries (Breen, 2011). However, an older military study examining race effects found that jury sentences were more severe than judge sentences (Burchett, 1983). Consequently, the following hypothesis predicts significant differences between judge and jury sentences, but the direction is exploratory for the military context.

H9: Jury sentences will be more severe than judge sentences on average.

The clemency decision does not have a civilian equivalent decision, and only one prior military study has examined the clemency outcome (Burchett, 1983). Although not the subject of that study, prior decisions in the process were strong predictors for reductions in confinement lengths (i.e. clemency). Specifically, offenders who asserted

their right to a trial and jury-sentenced cases were less likely to receive clemency. Focal concerns also suggests that the convening authority should be less likely to reduce trial and jury sentences (i.e. grant clemency). Because aggravating or "bad" facts are more likely to be presented in a trial and offenders who plead guilty accept responsibility for their crimes, the assessments of blameworthiness and danger to the community will be increased for offenders sentenced after a trial as opposed to a guilty plea (e.g. Ulmer & Bradley, 2006). Additionally, judge cases and guilty pleas as opposed to jury cases and trials provide more certainty in the adjudged sentence and use fewer court resources. Thus, from uncertainty avoidance and focal concerns perspectives, convening authorities should be less likely to grant clemency in jury and trial cases than in judge sentenced and guilty plea cases because the sentencing outcome is less certain and the process less efficient.

H10: Offenders sentenced after a trial will be less likely to receive clemency than offenders sentenced after a guilty plea.

H11: Jury sentences will be less likely to receive clemency than judge sentences.

Court Community and Judge Variation

Thus far, the hypothesized relationships pertain to the effects of individual-level case factors on court-martial decision outcomes. Nonetheless, the court community perspective and prior sentencing research predict that even after accounting for individual-level case effects, the court community and individual decision-maker will also influence outcomes. In contrast to civilian courts, court community and judge variations in court outcomes have never been investigated in the military context. Some of the characteristics of military court communities differ substantially from the state and

federal systems which are the subject of court contextual research. The current study conducts an initial limited investigation into court-martial outcome variation between judge and court communities to examine whether the organization characteristics of the military result in different findings from civilian court research.

The military equivalent to the civilian "local court" is the legal community responsible for processing court-martial cases at a particular military installation (e.g. base, post). Installations vary in personnel composition, missions, geographic locations, and organizational subcultures. For example, in the Air Force, some bases have support-oriented missions which translate into higher proportions of personnel in support career fields, and differences in personnel composition and missions affect caseload and jury compositions. Training bases may have a higher incidence of military-specific offenses and drug offenses may be more prevalent at installations located in civilian communities with high drug crime rates. According to the civilian research, these types of contextual differences should be associated with variation in the priorities and definitions of the focal concerns which produce variation in court outcomes between local court communities.

Nevertheless, contextual studies are limited to state and federal courts which are largely decentralized. In the military system, court decisions are made at the local installation level but they are embedded within a larger military organization with a bureaucratic structure. As a result, legal personnel for an entire branch of service are centrally managed and trained, and decisions are subjected to scrutiny at higher levels. All judge advocates, including military judges, change assignments every few years, and vary in their court process roles. Furthermore, military judges are not assigned to cases at

one particular military installation. These characteristics of legal personnel assignments in addition to the commander's role in the court-martial process may lead to high instability in the courtroom workgroup and inhibit the development of installation-specific case processing and sentencing norms (i.e. local legal culture). From a court community perspective, these social organization characteristics in the military setting may hinder the development of local court community specific norms. Thus, the following hypothesis is exploratory in nature.

> H12: The average court-martial decision outcomes will vary across military installations.

The civilian court literature finds sentence severity varies between judges even when their discretion is restricted with sentencing guidelines and they are nested within a court community (Anderson & Spohn, 2010; Johnson, 2006; Wooldredge, 2010). This variation in judicial decision-making is often associated with background characteristics and prior work experiences that reflect different attitudes and beliefs. In the military setting, the centralized assignment process and training and frequent personnel rotations across roles in the process could increase the similarities among judges. On the other hand, the legal structure does not offer strict boundaries in sentencing, and judge advocates may possess different beliefs and attitudes in spite of the military's organizational structure.[31] Thus, as with court community variation, the following hypothesis regarding inter-judge variation in the subsample of judge-sentenced cases is exploratory.

H13: Average sentence severity will significantly vary across judges.

[31] These variations are evident in the divergent perspectives about military justice presented in military justice articles (e.g. Ehlenbeck, 2008 vs. Thompson, 2009).

In sum, this investigation into the legal and extra-legal effects of court-martial decisions is guided by contemporary theoretical perspectives of civilian courts and scholarly work on the military context. The following chapter outlines the data and analytical procedures used to examine these hypothesized relationships before presenting the results of the investigation in Chapters 6 and 7.

Chapter 5: Data and Methodology

The previous chapters provided an overview of the court-martial process, summarized prior research on military and civilian courts, discussed contemporary theoretical perspectives, and presented hypothesized relationships specific to the military context. To test the hypotheses in Chapter 4, the current study utilizes an observational research design with secondary, archival data. This chapter describes the data and its sources as well as the analytical framework for this investigation into the determinants of the court-martial process.

The three military service branches under the Department of Defense are the Army, Navy, and Air Force.[32] All of the services are governed by the same criminal code and procedures—the Uniform Code of Military Justice and the Manual for Courts-Martial. Ideally, a military justice study should include data from all of the services; however, the Navy and Army's publicly available data suffered from significant data limitations. Court-martial data from the Navy and Army excluded many of the legal and extra-legal variables necessary for this study, and data were unavailable on summary courts-martial.[33] In contrast to the other services, the Air Force maintains a comprehensive military justice database that is linked to the Air Force's personnel database. Consequently, the in publicly available Air Force court-martial data contains information about the offender's military record, discipline history, as well as details about the various stages of the court-martial process and includes all three types of

[32] The Marine Corp is part of the Navy branch of service and although the Coast Guard uses the UCMJ, it is not part of the Department of Defense.

[33] Prior to conducting this particular investigation, I obtained Army and Navy/Marine Corp data by submitting the same FOIA request to these other services. Some differences exist between the Army and Navy data, but in general the data released lacked a substantial amount of information pertaining to the defendant's military record, disciplinary history, and social characteristics.

courts-martial. For these reasons, the present study examines the court-martial process within the Air Force context.

The Air Force Context

The Air Force has five core organizational missions that are part of the military's broader purpose of providing national security—air and space superiority; intelligence, surveillance, and reconnaissance; rapid global mobility; global strike, and command and control (U.S. Department of the Air Force, 2013b). The Air Force's formal organizational structure is arranged in a hierarchy based on the functions performed in these core missions. The majority of Air Force units fall within one of the ten major commands that are mainly based on these mission functions (USAF Almanac, 2013).[34] For instance, Air Combat Command's primary mission is to provide combat air power through fighter, bomber, and reconnaissance air craft, while the Air Education and Training Command is responsible for recruiting, training, and educating airmen (USAF Almanac, 2013). Every Air Force unit is attached to one of the 90 Air Force bases world-wide for their support services.

Each Air Force base has a designated legal office that is responsible for advising commanders on military justice issues and prosecuting court-martial cases involving personnel assigned to that location. A separate area defense counsel office provides defense counsel services for personnel assigned to the base and is often located on the same installation as the prosecuting base legal office. The Judge Advocate General (JAG) Corp includes approximately 1,200 active duty judge advocates (U.S. Court of

[34] There were nine major commands until the Global Strikes Command was added in 2009. Two of the major commands are geographical rather than mission focused (Pacific Air Forces and US Air Forces in Europe-Air Forces Africa).

Appeals for the Armed Forces [CAAF], 2013). All judge advocates receive their initial military justice training at the Judge Advocate General School in Alabama and duty assignments are determined by the personnel assignment division in Washington, D.C. Prior to 2007, the Air Force's military judges were assigned to one of five regional circuits responsible for docketing and detailing judges to court-martial cases prosecuted at bases primarily located within its geographical region.[35] As part of a larger Air Force JAG Corp initiative, The Judge Advocate General of the Air Force disbanded the circuits and began the transition to a centrally managed system based in Washington, DC.[36] The data used for this study include court-martial cases preferred before, during, and after this organizational change.

Data Sources

The data are from the United States Air Force's Automated Military Justice Analysis and Management System (AMJAMS) database, the Air Force Personnel Center (AFPC), and data collected from court-martial records maintained by the Military Justice Division of the Air Force Legal Operations Agency. The AMJAMS database is the Air Force Judge Advocate General Corps' (AFJAG) military justice management information system. The system is managed by the Military Justice Division (JAJM) and hosted by Legal Information Services. AMJAMS is designed to provide a complete history of all military justice actions and their component processes.[37] AMJAMS data enable the Air Force's JAG Corp to produce descriptive statistics on disciplinary rates and trends and to

[35] Judges could be detailed outside their circuit depending on judge availability and workloads, but these decisions were made at the circuit level.
[36] More information about the JAG Corp 21 initiative can be found in Wise (2006).
[37] According to Air Force Instruction (AFI) 51-201, paragraph 12.1., "[t]he purpose of AMJAMS is to collect data pertaining to investigations, nonjudicial punishment imposed pursuant to Article 15, UCMJ, trials by court-martial, and related military justice activity" (U.S. Department of the Air Force, 2013a, p. 229).

evaluate military justice involvement of Air Force personnel (U.S. Department of the Air Force, 2013a). AMJAMS provides management reports to judge advocate personnel at all levels, provides statistical data to the Department of Defense (DoD), provides raw data to the Defense Incident-Based Reporting System (DIBRS), and is utilized to reply to various military justice inquiries (e.g. congressional and media) (U.S. Department of the Air Force, 2013a). Additionally, AMJAMS feeds information to the public court-martial docket that is available on The Judge Advocate General's public website.

Although all electronically maintained data for this study are extracted through AMJAMS, the AFPC database is linked to the AMJAMS database. AFPC collects and maintains personnel data, while AFJAG collects and maintains the military justice data. The court-martial and non-judicial punishment data are entered and verified by AFJAG personnel. Court-martial records are prepared by AFJAG court reporters and paralegals and are certified for accuracy by the trial and defense counsel assigned to the case. The certified original record is sent to and maintained by the Air Force Legal Operations Agency at Joint Base Andrews in Camp Springs, Maryland. The electronic data and court-martial records released for this study include two case identification numbers assigned by the Air Force to facilitate matching with court-martial records. All data and court-martial records used in the study were either released pursuant to the Freedom of Information Act (FOIA) or were obtained from the Air Force Court of Criminal Appeal's public website.[38]

[38] This study used a combination of court-martial record data and raw electronic data extracted from a living database instead of a static dataset. Datasets provided by the Air Force represent what the database contained at the time of extraction and how the programmer designed the query. The final dataset used for the analysis was created by merging multiple datasets that were provided in response to several requests for raw data extractions and data collected from trial and appellate records.

The raw electronic data were extracted from the AMJAMS in 2010 and 2011. The original sample consists of all military justice cases that had court-martial charges preferred (i.e. filed) in calendar years 2005 through 2008 (n=3,831).[39] The Air Force did not provide offense information for cases that received an alternative disposition (case dismissed or administrative discharge) to a court-martial, which comprised approximately 12 percent of all court-martial cases preferred in 2005-2008 (n=474). Because legal variables are independent variables of interest and typically strong predictors of criminal court outcomes, the analysis and findings are limited to cases ultimately disposed through the court-martial process. This sample of court-martial cases consists of 3,357 cases including summary courts and acquittals. Eight cases are dropped from the sample making the final sample for analyses 3,349 cases. Seven of the eight dropped cases are missing court-martial outcomes and the other case is a death penalty case.[40]

For the analyses after the court-martial type decision, the sample is further restricted to special and general court-martial cases (n=2,828). The summary court-martial is a type of administrative disciplinary action and is not considered a criminal conviction because it does not conform to the constitutional requirements for criminal trials.[41] The substantial differences between the summary court-martial and special and general courts-martial processes lead to different types of case processing decisions and non-comparable outcomes.

[39] When a court-martial is initiated, the charge sheet is signed by another military member—typically the accused's immediate commanding officer—and served on the accused. This process is referred to as *preferral* and the court-martial charges are *preferred*. In other words, similar to the filing of charges in the federal system, preferring court-martial charges reflects the decision to prosecute.
[40] Death penalty cases follow a different court-martial procedure.
[41] Military judges are not utilized and offenders do not have a right to counsel or a jury.

Missing Data

Typical in court-related research, the data sources for this study contain a substantial amount of missing data in fields necessary for the variables used in the study. The largest amounts of missing data are related to pretrial agreements (34%), sentencing authority (10%), and dependents (25%).[42] For special and general courts-martial (n=2,828), pretrial agreement data are missing in approximately 25 percent of cases. Some of the missing data were obtained from available court-martial records of trial and appellate records which reduced the missing for the pretrial agreement variable to 12 percent, sentencing authority to 1 percent, and dependents to 10 percent.[43] Data are also missing in race and ethnicity, age, education level, and marital status in less than 5 percent of the cases. Although offense information is included for all 3,349 cases, some of the offense codes in the database are ambiguous which leads to missing values for offense-related variables in less than 1 percent of the sample.

Several methods are available to address missing data problems if the mechanism producing the missing is ignorable; that is, the data are either missing completely at random or missing at random (Allison, 2002; McKnight, McKnight, Sidani, & Figurerdo, 2007). The ignorability assumption is difficult to test empirically when data are missing at random, thus, sensitivity analysis with other methods is recommended (Brame, Turner, & Paternoster, 2010).

Two common and simple approaches to handling missing data are (1) only using the data available (listwise and pairwise deletion) and (2) imputation without models (e.g.

[42] Pretrial agreement information not only specifies that an agreement existed, but also the date and whether certain types of terms were included (e.g. sentencing authority selection, referred to lower court, confinement limitation).
[43] Only whether a pretrial agreement existed could be determined from other data sources.

mean substitution, dummy variables). Despite their simplicity, these methods are not recommended when regression analytical methods are used because they may lead to less precise parameter estimation and inferences, selection bias, and distort the covariances and correlations with other variables (Cameron & Trivedi, 2005). Moreover, these methods are not advisable when the amount of missing data is more than trivial (e.g. > 5%) (McKnight et al., 2007). The preferred, but more complicated, method is to impute missing values with predicted values from a linear regression or with multiple imputation, a simulation-based statistical technique. Even though single imputation methods do not drop missing values, they underestimate the variance of the parameter estimates which results in a Type I error in statistical tests (Little & Rubin, 2002). The multiple imputation (MI) command in Stata 13 addresses this problem by "creating multiple imputations and taking into account the sampling variability due to the missing data (between-imputation variability)" (Stata Corp., 2013a, p. 3). Multiple imputation methods are also robust enough to handle violations of the ignorability assumption (Schafer & Graham, 2002).

The current study examined several methods for addressing the missing data and found that the multiple imputation methods resulted in different parameter estimates particularly in models that required pretrial agreement data. Thus, given the robustness of the multiple imputation method, all analyses presented were conducted with multiple imputation datasets created in Stata 13.[44]

[44] The variables used for the MI model included all of the independent and dependent variables in the analysis models. In addition to these variables, the MI model also included variables pertaining to age, acquittals, and data collection method.

Dependent Variables

The outcomes of interest for the study are ordinal pretrial decision outcomes, and the sentencing and clemency decision outcomes. In other words, this investigation focuses on decision outcomes that can be measured in terms of severity. Although prior research suggests the mode of conviction and sentencing authority selection affect sentence severity, these outcomes are nominal in nature and intertwined with the pretrial agreement process which suffers from the data limitations previously described. Thus, the outcomes of interest for this study are limited to pretrial confinement, court type, adjudged sentence, and clemency.

Pretrial confinement is the most severe form of pretrial restraint and is measured with a dichotomous variable that indicates whether or not an offender received either confinement or a severe form of restriction that made it tantamount to confinement prior to trial. Although lesser forms of restraint may be imposed, these data are not adequately captured in the AMJAMS database and are not subject to the same level of legal scrutiny as pretrial confinement. Moreover, pretrial confinement is a more analogous outcome to civilian court studies than lesser forms of restraint. Therefore, the reference category includes cases with less severe forms of restraint as well as no restraint. Court type is measured with an ordinal variable indicating whether the case was referred to a summary, special, or general court-martial with summary as the least severe category and general as the most severe.

The adjudged sentence is the sentence imposed by the sentencing authority in the sentencing phase of a court-martial. The adjudged sentence sets the maximum sentence that an offender may ultimately receive regardless of the presence of a plea agreement.

Specifically, it provides the ceiling from which a convening authority must determine the final approved sentence. Sentencing studies frequently model the imposition of incarceration and sentencing length separately; however, the military's sentencing process incorporates multiple types of punishments that are combined to form one sentence for all of the offenses. To capture the different types of punishments contained in a military sentence and to facilitate sentence severity comparison, this variable is measured with an approximate interval scale (0-30) that is devised and adapted from sentence severity scales in the civilian literature and the Manual for Courts-Martial (e.g. Hagan, Nagel, & Albonetti, 1980; LaFree, 1985; Uhlman & Walker, 1979; Welch & Spohn, 1986; Welch, Gruhl, & Spohn, 1984).[45] These civilian sentence severity scales are variations of a severity scale developed to measure federal sentences prior to the implementation of sentencing guidelines and the abolition of parole (Tiffany, Avichai, & Peters, 1975).

The severity scale utilized in the current study first delineates the sentences based on punishment type severity and then includes gradations within each category (see Appendix A). This scale adopts a position on punishment type severity that is consistent with the UCMJ and the judges' sentencing instructions that place a punitive discharge as more severe than all other types of punishment. Although military legal professionals often debate the practical effect of the punitive discharge that is beyond the conviction itself, military law reifies the more severe nature of the punitive discharge compared to confinement (see Kisor, 2009; Lance, 1978; Lippert, 2004; Walker, 2001). Nevertheless, based on discussions with judge advocates, a perception exists that a punitive discharge sentence without confinement is not necessarily more severe than a confinement only

[45] In developing the scale, I consulted with several judge advocates who specialize in military justice.

sentence for over a year. Although a punitive discharge typically accompanies sentences for over a year, there is a small number cases where it does not. The MCM suggests that a punitive discharge may be converted to a one-year confinement sentence in clemency and appellate rights are automatic for sentences with a punitive discharge or confinement of at least one year (MCM, 2012, A2-20). After consultation with several judge advocates and examining the data, the severity scale combines confinement only sentences of 13 to 18 months with punitive discharge sentences without confinement.

The severity scale is dominated by the punitive discharge and confinement length combinations. According to the UCMJ, these are the two most severe types of punishments. In developing the scale, the other types of punishments were found to be highly correlated with the imposition of a punitive discharge and confinement length. Similarly, the different severity levels of punitive discharges were correlated with confinement length. For example, a dishonorable discharge almost always accompanied longer lengths of confinement. Acquittals and sentences with no punishment or only a reprimand are coded as 0 on the scale. Sentences without a punitive discharge or confinement but with other types of punishments are coded as financial or restriction on liberty sentences. Financial punishments include fines and forfeiture of pay and reduction in rank. Restriction on liberty punishments include hard labor without confinement and restriction to base and may also include a financial punishment.[46] Financial sentences are coded as 1 and restriction on liberty sentences are coded as 2 on the sentence severity scale. Financial punishments are automatic with either a punitive discharge or confinement for 6 months, so this increase in severity is captured with an increase from 4 to 6 on the scale for confinement sentences of 6 to 8 months. Finally,

[46] Restriction on liberty sentences often included financial punishments as well.

other adjustments to the intervals follow the severity scales in the literature and the parole eligibility rules for military offenders.

The clemency variable measures the discretionary decision outcome by the convening authority of whether to reduce the adjudged sentence in post-trial processing. Clemency does not include reductions resulting from a pretrial agreement. Military sentences often consist of several types of punishments, so there may be numerous clemency type categories. Because a relatively small proportion of cases in the sample received clemency (8%), clemency is operationalized with a dichotomous variable coded with 1 when any part of the approved sentence is less severe than the adjudged sentence and 0 otherwise.[47] Although clemency is possible in pretrial agreement cases, all of the pretrial agreement cases are coded 0. AMJAMS data do not indicate when a sentence is reduced because of clemency or a pretrial agreement; however, discussions with judge advocates suggest that clemency in pretrial agreement cases is rare.

Independent Variables

The independent variables for each of these decisions consist of legal factors, military-specific factors, defendant social characteristics, and case processing variables. Some of the prior decision outcomes are used as independent variables in subsequent decisions to examine the effects of these pretrial decisions. Finally, control variables are included that measure other offender characteristics, changes in law, and other organizational factors that are not the subject of the study but prior research suggests may

[47] It is possible that clemency cases are under-represented by the AMJAMS data because of data entry errors in the approved sentence field. In 2010-2011, I attempted to obtain copies of the promulgating court-martial orders to verify and correct the approved sentence data, but the Air Force did not respond to my FOIA request.

be related to the outcome and independent variables of interest. The Pearson correlation matrices for the dependent and independent variables are provided in Appendix B.

Offense Seriousness and Discipline History

Offense seriousness is captured with three measures that include statutory seriousness, the number of charges, and offense type. Statutory seriousness is measured with an interval scale with a range of 1 to 21 based on the maximum punishment chart in the Manual for Court-Martial. The scale captures the two most severe types of punishment—the punitive discharge as well as the confinement maximum (see Appendix C). The number of charges is the total number of charges and specifications transformed by taking the natural logarithm because each additional charge is likely to have less of an effect on an outcome than the one preceding it. Offense type is a categorical variable based in part on a conversion table in Department of Defense Directive 7730.47-M that translates UCMJ offenses to the National Incident Based Reporting System (NIBRS) classification of offenses (U.S. Department of Defense, 2003). Offense categories are person, property, drug, society, and military.[48] The person category consists of violent crimes such as adult and child sex offenses, assault, manslaughter, and murder. Property crimes consist of offenses that involve a form of wrongful deprivation of another's property through a taking or destruction such as larceny and arson; and the society category is comprised of crimes against society in general like prostitution and driving while intoxicated. The drug category includes any offense that involves the wrongful

[48] NIBRS has an additional broad category, "person, society, property," for hybrid offenses. For this study, these offenses are collapsed into either person, society, or property depending on the nature of the offense. NIBRS does not have the military or drug categories. Offenses that do not have a corresponding NIBRS code are coded as a military offense. Drug offenses are considered society offenses under NIBRS, but for this study, these offenses are made a separate category. Article 134 offenses are coded as the underlying offense they most closely resemble.

use, possession, or distribution of an illegal substance; and finally, the military category consists of crimes that are specific to the military (e.g. absence without leave, desertion, dereliction of duty). For cases with multiple charges, the offense type category for the entire case is determined by the offense with the highest statutory seriousness. Each offense type category is measured with dummy variables and property is the reference category.

Discipline history is measured with a dichotomous variable, with 1 indicating the offender has a prior court-martial conviction or a nonjudicial punishment ("Article 15") disciplinary action. [49] This measure differs from typical civilian court studies because of differences between the civilian and military populations and the court contexts. In contrast to civilian courts, a small percentage of offenders in courts-martial have a prior conviction because of military entrance requirements and the discharge process (Landis et al., 1997). For instance, in fiscal year 2003, the Air Force admitted 5 applicants with felony convictions out of approximately 32,000 recruits (U.S. Department of Defense, 2007), and in 2005-2006 less than 2 percent of Air Force offenders tried in a special or general court-martial had a prior misdemeanor, felony, or court-martial conviction (Breen, 2008). Moreover, when a military member commits a more serious offense or has several minor disciplinary actions, he is likely to be removed from the military through the discharge process (administratively or through a court-martial). Thus, military offenders in the court-martial process typically do not possess prior convictions.

[49] In a prior study of Air Force courts-martial on sentencing outcomes (Breen, 2011), data on non-punitive administrative actions (e.g. letters of reprimand) were collected from court-martial records to include in a measure of disciplinary history. Most offenders with non-punitive actions also had an Article 15 in their records and less than one percent of offenders in the sample had prior convictions. Several different measures of disciplinary history were developed including a weighted scale and none of the measures performed any better than a simple binary variable indicating the offender had prior disciplinary actions. Even with this simple measure, less than a third of the sample for the present study had a disciplinary history.

Specific to the military context, an offender's disciplinary history is a legally relevant factor. There are two types of administrative disciplinary actions in an offender's military record—nonjudicial punishments and nonpunitive corrective actions (e.g. letter of reprimand). The nonjudicial punishment forum is just below the summary court-martial in severity, uses a relaxed evidentiary standard compared to courts-martial, and offenders must consent to the forum. If the offender rejects the forum, then a commander may decide to pursue a court-martial. Unfortunately, the data do not indicate if the court-martial resulted from a rejected nonjudicial punishment action, and AMJAMS does not capture data on non-punitive corrective actions and civilian convictions. Thus, the disciplinary history measure reflects offers for nonjudicial punishment and prior court-martial convictions.

Military-Specific and Defendant Social Characteristics

For the current study, time in service is used as a proxy for military performance. The longer military members are in the service, the more likely they are to possess indicators of good military performance such as awards and medals. The strong positive correlation (.83) between time in service and awards and medals was confirmed in preliminary analyses on a subsample of court-martial cases for which awards and medals information was available.[50] Additionally, poorly performing military members leave the service earlier than members with good military performance. Time in service is measured with an interval scale with a range of 0 to 28 indicating the total number of

[50] Numerous measures were constructed and examined based on the awards and medals data in this subsample of cases before deciding to use time in service as a proxy for military performance. The awards and medals data are not available in AMJAMS. These data were obtained in 2007 from FOIA-released pages in the records of trial as part of another study. Thus, these data were only available for the 2005-2006 special and general court-martial subsample. Analyses on this subsample revealed that awards and medals measures did not contribute anything to the models beyond time in service and introduced collinearity into the models.

completed years of active duty. Time in service is coded as 0 if the member has less than one year of service.

The combat-orientation of a defendant's career field is operationalized with the defendant's career field grouped into categories on an ordinal scale ranging from 1 to 10. The highest end of the scale indicates a direct combat career field while the lowest end represents career fields that are furthest from direct combat. The scale is located in Appendix D and derived from AFPC career field classifications, descriptions contained in Air Force personnel regulations, and input from active duty Air Force members with multiple deployments (U.S. Department of the Air Force, 2007a, 2007b, 2007c, 2010).

The individual defendant characteristics obtained from the AFPC data are race, ethnicity, sex, rank, career field, and time in military service. Minority status is measured from self-report race and ethnicity data and captured with race/ethnicity dummy variables as follows with white as the reference category.[51] Black is coded 1 if the offender reported his race is black regardless of his reported ethnicity and 0 otherwise. Hispanic is coded 1 if the offender indicated his ethnicity is Hispanic and his race is white or he declined to provide race and 0 otherwise. Finally, the other race/ethnicity category consists of American Indian, Asian, and Hawaiian/Pacific Islander and is coded 1 if the offender indicated either of these race/ethnicity categories and coded 0 otherwise. These race/ethnicity categories are collapsed together because of the small percentage of offenders in each of the categories. Gender is operationalized with an offender's sex and is a dummy variable indicating the offender is female with the reference category as

[51] AFPC reports race and ethnicity separately but they are not mutually exclusive categories. That is, an offender may be both Black and Hispanic, but in these data, only 8 out of 2,862 offenders selected a racial category other than white when Hispanic was also selected. For those offenders, they are coded according to their racial category rather than their ethnicity.

male. In this sample, offenders' military ranks range from Airman Basic to Colonel and fall into one of the following categories: junior enlisted, senior enlisted (i.e. non-commissioned officer), and officer.[52] Appendix E contains a table of the Air Force ranks and their pay grades. Because officer is the independent variable of interest, rank is captured with a dummy variable for officer and junior and senior enlisted are the reference.

Case Processing Factors

The case processing factors pertain to decisions made earlier in the court-martial process. Pretrial confinement is coded as a binary variable with 1 indicating the offender received pretrial confinement or restriction that was tantamount to confinement. Sentencing authority is a dichotomous variable with jury coded as 1 and judge coded 0. Court type is a dummy variable coded 1 for cases referred to a general court-martial instead of a special court-martial. In addition to these case processing factors, type of plea is also included and measured with a dummy variable coded 1 when the case is resolved through a trial and 0 if the case is a guilty plea. A case is coded as a trial if the offender pled not guilty to the most serious offense and the case does not have a pretrial agreement. Pretrial agreement is a dummy variable with 1 indicating the case has a pretrial agreement.

Control Variables

The study controls for additional variables that are expected to influence case processing and sentencing decisions (see Spohn, 2009a; Zatz, 2000). Marital status is a dichotomous variable indicating the offender was married at the time that his case went to trial and 0 for any other type of marital status. Dependents is a dichotomous variable

[52] Although General is the highest possible rank, none of the defendants had a rank above Colonel.

indicating whether the offender had any dependent children at the time of trial. Because every military member is generally required to have a high school level of education, the education level of the offender is measured with college, a dichotomous variable coded 1 when the offender has a college degree and 0 if no college degree. Case year is captured with dummy variables with 1 indicating the case is preferred in calendar year 2006, 2007, or 2008 with 2005 as the reference category. Some civilian court studies find that whether a defendant is represented by a public defender or hires a private attorney influences plea bargaining and sentencing outcomes (e.g. Hartley et al., 2010). Although every military member receives a military defense counsel, some choose to also hire a civilian defense attorney. Thus, civilian attorney is a dichotomous variable that is coded 1 when the defendant is represented by a civilian defense attorney in addition to his military defense counsel and 0 otherwise. Some sentencing studies suggest age is also an important factor; however, this variable is omitted from the models because of its high correlation (.91) with time in service—an independent variable of interest.

Aggregated Units

In civilian court studies, the county or federal district court in which offenders are processed is a common indicator of the court community based on the organizational structure of civilian jurisdictions (e.g. Johnson et al., 2008; Kramer & Ulmer, 2009). Similarly, the Air Force base is the indicator of the military court community because the base legal office is responsible for prosecuting the case and the defense counsel is typically assigned to handle cases at a particular base. All cases in the sample are

assigned to one of 88 Air Force bases.[53] General and special court-martial cases are also assigned to one of the 81 judges in the sample, but the judges are not assigned to particular Air Force bases.

Analytical Framework

The purpose of this research is to investigate the effects of legal and extra-legal factors in the court-martial process. Prior research shows that as defendants proceed through the court process, earlier decisions can directly or indirectly affect subsequent decisions and ultimately the punishments they receive (Ulmer, 2012; Zatz, 1987). Moreover, the relevant legal and extra-legal factors may vary depending on the stage of the process. Consequently, the analytical strategy follows the temporal order of the decision outcomes within the court process that is divided into distinct stages—pretrial, sentencing and clemency. In the pretrial stage, two pretrial decision outcomes are modeled—the likelihood of receiving pretrial confinement and the likelihood of receiving a more or less severe type of court-martial. The analysis then proceeds to sentencing and examines models of adjudged sentence severity and ends with models of the likelihood of receiving clemency in post-trial processing. Within each phase of the court-martial process, the analyses examine descriptive statistics and test the hypothesized relationships with multiple regression so the effects of the variables of interest can be isolated while controlling for other factors. Indirect effects of prior decisions on the independent variables of interest are examined by presenting models with and without the prior decision(s).

[53] The sample does not contain court-martial cases for 2 of the 90 Air Force bases listed in the Air Force Almanac because those locations did not prosecute any courts-martial during the study time frame.

The study uses multilevel regression modeling rather than single-level models because of the nested nature of the data and to explore variation in the outcomes that is attributable to the aggregate units—base and judge.[54] This type of data structure poses statistical problems in single-level regression models. The nesting of decision outcomes leads to statistical dependence among the individual observations because they are clustered within judge or court community. In the military context, groups of cases are processed within the same legal office, and for judge sentenced cases, the same judge imposes several sentences. The clustering of individual-level decision outcomes results in correlation among the residual standard errors in an ordinary least squares regression model and thereby violates the model's assumption of independent errors. Consequently, the standard errors are underestimated and increase the risk of falsely rejecting the null hypothesis.

Several analytical methods are often used to address the clustering issue (Cameron & Travedi, 2005; Luke, 2004). A single level regression model may include a series of dummy variables to control for the unmeasured stable characteristics associated with the aggregated groups (i.e. judge, base), however, a large number of groups leads to reduced efficiency. Another method involves calculating robust standard errors that make adjustments for clustering.[55] Neither of these methods permits the individual predictors to be estimated independently for each group (Luke, 2004; Raudenbush &

[54] Hierarchical linear modeling (HLM) is a more specific type of multilevel model for strictly nested data structures. This study uses the broader term of multilevel model because the data structure of the sentencing outcome is cross-classified with judge and base. The pretrial confinement and court-type decisions are not determined by judges, and military judges are typically not even detailed to a court-martial until after the court-martial is referred. Additionally, military judges do not decide whether clemency is granted. Therefore, the pretrial and clemency outcomes possess nested data structures within military base and are not cross-classified with military judge.

[55] For an example, see the chapter on estimation and postestimation commands in Stata's User's Guide (Stata Corp., 2013b).

Bryk, 2002). Multilevel modeling not only overcomes the statistical problems associated with clustering, but also allows the intercepts to vary and thus determine if the decision outcomes vary across bases and judges while controlling for the effects of individual-level case variables. [56]

The present study constructs multilevel models with version 7 of the Hierarchical Linear Modeling (HLM) software package from the multiple imputed datasets generated in Stata 13. All models are run with maximum likelihood (ML) estimation rather than restricted maximum likelihood (REML) because the research question is primarily focused on the fixed effects rather than random effects (Snijders & Bosker, 2012).[57] Regardless, the number of level 2 units is relatively large (>50) so the difference in the estimates between ML and REML is immaterial (Snijders & Bosker, 2012). For Hypotheses 1-11, the fixed effects on the outcome variables are tested as they would be in single-level regression models with t-tests on the level-1 coefficients, while Hypotheses 12 and 13 are tested with a chi-square test of the residuals and an examination of the magnitude of the between-group variation (Luke, 2004; Raudenbush & Bryk, 2002).

Pretrial Decision Outcomes

The pretrial decision multilevel models are two-level hierarchical generalized linear models (HGLM) with individual court-martial cases at level 1 and base at level 2. Cases are not nested within judges for these decisions because military judges are not

[56] As a rule of thumb in social science research, if N<10 (i.e. number of groups) then the alternative methods are preferred, however if N>20, then multilevel modeling should be used particularly if some of the within group sample sizes are small (Snijders & Bosker, 2012).
[57] This choice was necessary for model testing prior to running the final models with all of the multiple imputed datasets. HLM cannot produce a deviance statistic for comparing models when multiple imputation estimation is used.

involved in the pretrial confinement or court-type decisions and judge assignments are not made until later in the court-martial process. The analyses for this stage of the court-martial process examine two outcomes that are discrete variables. Discrete dependent variables violate many of the assumptions of linear regression models including the hierarchical linear model. Consequently, generalized linear models such as logistic regression and multinomial logistic regression are more appropriate for examining these types of variables (Long, 1997; Raudenbush & Bryk, 2002).

The imposition of pretrial confinement is a binary outcome. As with single-level logistic regression, the multilevel generalized linear models for this type of outcome variable uses the logit link:

$$\eta_{ij} = \log\left(\frac{\phi_{ij}}{1-\phi_{ij}}\right)$$

where η_{ij} is the log odds of success and ϕij is the probability of success and the random intercept model takes the following general form:

Level 1 $$\eta_{ij} = \beta_0 + \beta_{1j}X_{1ij} + \cdots \beta_{Qj}X_{Qij}$$

Level 2 $$\beta_{0j} = \gamma_{00} + \mu_{0j}$$

where β_0 is average log odds of success in case *i* for group *j* , and γ_{00} is the average log odds of success across all groups. This model provides the fixed-effects of the level-1 coefficients on the outcome and allows the intercept (β_0) of each group-level regression model to vary. The random intercept model is used to test the fixed-effects and for variation in the outcome between groups (Raudenbush & Bryk, 2002). The fully specified pretrial confinement model is:

Level 1: $\eta_{ij} = \beta_0 + \beta_{1j}$ (ln charges) + β_{2j} (statutory seriousness) + β_{3j} (offense: person) + β_{4j} (offense: drugs) + β_{5j} (offense: society) + β_{6j} (offense: military other) + β_{7j} (offense: AWOL) + β_{8j} (discipline history) + β_{9j} (race: black) + β_{10j} (race: hispanic) + β_{11j} (race: other) + β_{12j} (female) + β_{13j} (officer) + β_{14j} (time in service) + β_{15j} (combat career) + β_{16j} (year: 2006) + β_{17j} (year: 2007) + β_{18j} (year: 2008) + β_{19j} (married) + β_{20j} (dependents) + β_{21j} (college) + β_{22j} (civilian defense attorney)

Level 2: $\beta_{0j} = \gamma_{00} + u_{0j}$

where η_{ij} is the log odds of pretrial confinement being imposed, β_0 is the average log odds of pretrial confinement in case *i* for base *j*, and γ_{00} is the average log odds of pretrial confinement across all bases. Because pretrial confinement is typically imposed prior to the referral of charges, case processing variables are not included as predictors in this model. The model also includes a dummy variable for AWOL/desertion cases as a measure of flight risk. The model provides the fixed-effects of individual-level case characteristics on the expected odds of the imposition of pretrial confinement net of individual factors within each base. Specifically, this model tests Hypotheses 1-6 which pertain to fixed effects, but it also is used to test for between-base variation (Hypothesis 12).[58]

The type of court-martial to which the case is referred consists of three ordered outcomes with summary court the least severe and general court-martial the most severe. A two-level multinomial logistic model rather than an ordinal logistic model is used because the data fail to meet the assumption of proportional odds (Raudenbush & Bryk,

[58] Because there is no level 1 variance component in non-linear multilevel models, the magnitude or proportion of the variance explained by level 1 and 2 cannot be calculated with the same formulation as the multilevel linear model. An alternative conception of the intraclass correlation from Snijders & Bosker, (2012) is used and calculated as follows: $\rho=\tau_{00}/(\tau_{00} + \pi^2/3)$ (see Raudenbush & Bryk, 2002, p. 334, note 2).

2002). Thus, for court type, the likelihood of a court-martial case being initially processed in a special or general court-martial is modeled with the multinomial logit link:

$$\eta_{mij} = \log\left(\frac{\phi_{mij}}{\phi_{Mij}}\right) = \log\left(\frac{\text{Prob}(R_{ij}=m)}{\text{Prob}(R_{ij}=M)}\right)$$

where R is the outcome, *m* is the outcome category with M as the reference category, and η_{mij} is the log odds of falling into court type *m* compared to M for individual case *i* in group *j*. The conditional multilevel multinomial model for court type has two level 1 equations and takes the following general form:

Level 1 $\eta_{mij} = \beta_{0j(m)} + \sum_{q=1}^{Q_1} \beta_{qj(m)} X_{qij}$ for *m*=1,…, M – 1.

Level 2 $\beta_{0j(m)} = \gamma_{00(m)} + \mu_{0j(m)}$

$\beta_{1j} = \gamma_{10} + \mu_{1j}$

The court type outcome has three categories with the special court-martial as the reference and the fully specified random intercept model is as follows for *m*=1, 2.

Prob [Summary=1| β_j] = ϕ_{1ij}

Prob [General=1| β_j] = ϕ_{2ij}

Prob [Special=1| β_j] = ϕ_{3ij} = 1 - ϕ_{1ij} - ϕ_{2ij}

Level 1: $\eta_{mij} = \log\left(\frac{\phi_{mij}}{\phi_{Mij}}\right) = \beta_{0j(1)} + \beta_{1j(m)}(\text{ln charges}_{ij}) + \beta_{2j(m)}(\text{statutory seriousness}_{ij}) + \beta_{3j(m)}(\text{offense: person}_{ij}) + \beta_{4j(m)}(\text{offense: drugs}_{ij}) + \beta_{5j(m)}(\text{offense: society}_{ij}) + \beta_{6j(m)}(\text{offense: military}_{ij}) + \beta_{7j(m)}(\text{discipline history}_{ij}) + \beta_{8j(m)}(\text{race: black}_{ij}) + \beta_{9j(m)}(\text{race: hispanic}_{ij}) + \beta_{10j(m)}(\text{race: other}_{ij}) + \beta_{11j(m)}(\text{female}_{ij}) + \beta_{12j(m)}(\text{junior enlisted}_{ij}) + \beta_{13j(m)}(\text{time in service}_{ij}) + \beta_{14j(m)}(\text{combat career}_{ij}) + \beta_{15j(m)}(\text{pretrial confinement}_{ij}) + \beta_{16j(m)}(\text{pretrial agreement}_{ij}) + \beta_{17j(m)}(\text{year: 2006}_{ij}) + \beta_{18j(m)}(\text{year: 2007}_{ij}) + \beta_{19j(m)}(\text{year: 2008}_{ij}) + \beta_{20j(m)}(\text{married}_{ij}) + \beta_{21j(m)}(\text{dependents}_{ij}) + \beta_{22j(m)}(\text{college}_{ij}) + \beta_{23j(m)}(\text{civilian defense attorney}_{ij})$

Level 2: $\beta_{0j(m)} = \gamma_{00(m)} + \mu_{0j(m)}$

The level 1 predictor variables include two case processing variables—pretrial confinement and pretrial agreement. Pretrial agreements may contain a term that requires referral to a lower court type (summary or special). In contrast to the pretrial confinement models, the rank variable is junior enlisted with officer and senior enlisted in the reference category because all officers were referred to a general court-martial. By changing the reference category, the officer cases are left in the sample and allowed to contribute to the estimates for the other variables. Thus, this model tests Hypotheses 1-5, 7, and 12.

Sentencing and Clemency Outcomes

The final sentence an offender receives at the trial level is the product of two discretionary decisions—adjudged sentence and clemency. The adjudged sentence severity and clemency models are two-level hierarchical models. The adjudged sentence severity models use the hierarchical linear model (HLM) because the dependent variable is measured with an approximate interval scale with a relatively large range of values. To test the hypotheses, the sentencing analyses are limited to special and general court-martial cases (Hypotheses 1-12). To examine variation in judge-sentenced sentences (Hypothesis 13), a hierarchical two-level model with judge at level two is modeled on the subsample of judge-sentenced cases.[59] The fully specified sentence severity hierarchical linear model is:

[59] The data structure is cross-classified rather than a hierarchical three-level structure because cases are nested within judges and nested within bases but judges are assigned to cases at multiple bases. For this reason, a cross-classified model was examined in preliminary analyses but revealed no significant variation at the base level for this subsample of cases. Additionally, the findings were no different between the two-level judge and cross-classified models. Judges do not decide the punishment in jury-sentenced cases, thus, a cross-classified model with judge and base is inappropriate for the full sample of sentenced cases. Nonetheless, cross-classification was explored with the full sample and confirmed there was no significant between-judge variation for jury sentenced cases.

Level 1: $Y_{ij} = \beta_0 + \beta_{1j}$ (ln charges) + β_{2j} (statutory seriousness) + β_{3j} (offense: person) + β_{4j} (offense: drugs) + β_{5j} (offense: society) + β_{6j} (offense: military) + β_{7j} (discipline history) + β_{8j} (race: black) + β_{9j} (race: hispanic) + β_{10j} (race: other) + β_{11j} (female) + β_{12j} (officer) + β_{13j} (time in service) + β_{14j} (combat career) + β_{15j} (pretrial agreement) + β_{16j} (pretrial confinement) + β_{17j} (general court-martial)+ β_{18j} (jury) + β_{19j} (trial) + β_{20j} (year: 2006) + β_{21j} (year: 2007) + β_{22j} (year: 2008) + β_{23j} (married) + β_{24j} (dependents) + β_{25j} (civilian defense attorney) + r_{ij}

Level 2: $\beta_{0j} = \gamma_{00} + u_{0j}$

where Y_{ij} is the adjudged sentence severity of case *i* in base *j*, β_0 is the adjusted mean sentence severity in base *j* and γ_{00} is the mean sentence severity across all bases. This model includes case processing variables and the sentencing authority.[60]

The decision to grant clemency (i.e. reduce the adjudged sentence) is a binary outcome. Thus, as with the pretrial confinement outcome, HGLM is utilized and the fully specified is:

Level 1: $\eta_{ij} = \beta_0 + \beta_{1j}$ (ln charges) + β_{2j} (statutory seriousness) + β_{3j} (offense: person) + β_{4j} (offense: drugs) + β_{5j} (offense: society) + β_{6j} (offense: military) + β_{7j} (discipline history) + β_{8j} (race: black) + β_{9j} (race: hispanic) + β_{10j} (race: other) + β_{11j} (female) + β_{12j} (officer) + β_{13j} (time in service) + β_{14j} (combat career) + β_{15j} (pretrial confinement) + β_{16j} (general court-martial) + β_{17j} (jury) + β_{18j} (trial) + β_{19j} (sentence severity) + β_{20j} (year: 2006) + β_{21j} (year: 2007) + β_{22j} (year: 2008) + β_{23j} (married) + β_{24j} (dependents) + β_{25j} (college) + β_{26j} (civilian defense attorney)

Level 2: $\beta_{0j} = \gamma_{00} + u_{0j}$

where η_{ij} is the log odds of receiving clemency, β_0 is the average log odds of pretrial confinement in case *i* for base *j*, and γ_{00} is the average log odds of clemency across all bases. The model excludes the pretrial agreement variable because the clemency measure

[60] Most pretrial agreements require the defendant to plead guilty with a judge as the sentencing authority.

used the pretrial agreement variable to determine if the reduced approved sentence reflected clemency.

Interpretation and Model Evaluation

For all models, the sign and statistical significance of the coefficients are interpreted to examine the hypothesized relationships. The generalized linear models also present the odds ratios, and to facilitate substantive interpretation, baseline predicted probabilities are also provided. Models using HGLM calculate two different types of fixed-estimates—unit-specific and population-average. Because one of the primary goals of the study is to examine the individual-level effects on decision outcomes while controlling for base effects, all of the results reflect the unit-specific estimates. All variables in the final models are grand-mean centered to facilitate interpretability of the intercept (Hox, 2002; Luke, 2004; Snijders & Bosker, 2012).[61] To obtain select predicted outcomes for some comparisons, the final models are run with the relevant dummy variable(s) uncentered. Because the group level *n* is large, the robust standard errors are reported to adjust for possible violations of the models underlying assumptions about the error distributions and covariance structures (Raudenbush & Bryk, 2002).

A disadvantage to using multiple imputed data is that several model statistics used in model selection cannot be combined (log-likelihood ratio, model chi-square, goodness-of-fit). To evaluate models prior to selecting the final models presented, model fit tests (log-likelihood ratio tests) were conducted on the single-imputed data.[62] Nevertheless, the proportion of variation explained may be calculated for multiple imputed data.

[61] In supplemental analyses, the heterogeneity in the slopes were examined with grand-mean and group-mean centering estimate comparisons and chi-square tests on the variance of the random coefficient. Although some of the slopes varied, the substantive findings were not altered. Thus, the more parsimonious models with all level 1 variables fixed and grand mean-centered are presented.
[62] HLM does not produce deviance statistics for multinomial models even in the single imputed data.

Because there is no level 1 variance component in non-linear multilevel models, the magnitude or proportion of the variance explained by level 2 cannot be calculated with the same formulation as the multilevel linear model; thus, an alternative conception of the intraclass correlation from Snijders & Bosker (2012) is used and calculated as follows: $\rho=\tau_{00}/(\tau_{00} + \pi^2/3)$ (see also Hedenker, 2003).

Sample Selection Bias

Case attrition is a typical component of the court process leading to possible sample selection bias in sentencing outcomes. For instance, a pretrial agreement may determine in which type of court-martial a case is ultimately disposed. As a result, cases that begin as a more severe type of court-martial may be referred to a lower one pursuant to a plea agreement. The referral of a special court-martial case to a summary court is treated as another form of case attrition in this study. The special and general court-martial subsample is subject to further sample selection in the adjudged sentence and clemency outcomes because some of the cases result in an acquittal.

Several methods may be utilized to deal with sample selection bias; however, selection models often require strong distributional assumptions that are commonly violated. In sentencing studies, the most frequently used selection model is the Heckman's two-step correction procedure although some studies use the Tobit model (e.g. Albonetti, 1991; Bushway & Piehl, 2001). A weakness of the Tobit model is that it assumes the same predictors of the outcome variable also predict selection. The Heckman two-step correction, on the other hand, permits different predictors. The Heckman correction compared to conducting OLS regression on the subsample is not typically preferred because of the model's sensitivity to assumption violations and high

degrees of collinearity (Bushway, Johnson, & Slocum, 2007; Kennedy, 2003; Stolzenberg & Relles, 1997). Heckman is especially vulnerable to collinearity when an exclusion restriction is not included in the selection equation that is not also present in the primary equation. [63] Additionally, for binary dependent variables, a probit model with sample selection is not properly identified in the absence of an exclusion restriction, and using the inverse Mills ratio to correct for the bias is not a valid method in the binary response model (Wooldridge, 2010). Although Heckman modeling with clustered data is feasible in Stata 13 with the cluster option, the results are limited to individual-level fixed effects.[64] Supplementary analyses in Stata confirmed that the Heckman models for the sentencing and clemency outcomes are ill-conditioned.[65]

The majority of studies examining sentencing outcomes do not account for the selection process in the decision to convict and provide conditional estimates on the convicted subsample. This particular weakness in prior research is often due to the unavailability of acquittal data. The present study includes acquittals and accounts for the selection process by coding acquittals as 0 on the sentence severity scale. Sentencing studies often examine length of incarceration, but a potential source of sample selection occurs in the decision to incarcerate because not every sentenced offender receives incarceration. The present study overcomes this weakness in prior research by using a

[63] Bushway et al. (2007) suggest that as long as the condition number is less than 20, Heckman may be preferred in the absence of an exclusion restriction.
[64] When modeling with multiple imputed data, Stata does not officially support the Heckman command; however, with the cmdok option, Stata will allow user-written programming for Heckman models.
[65] Additionally, the Heckman models examining the selection effect from acquittals did not alter the substantive findings. There were a few differences in the sentence severity models exploring selection bias from the summary court selection decision. These differences are noted in the sentencing analysis discussion in Chapter 7.

sentence severity scale that includes punishment types in addition to confinement and retains all of the cases that went to trial. [66]

Thus, the current study presents the conditional estimates on the subsamples for several reasons. First, the data do not include exclusion restrictions which are generally necessary for sample selection models. Second, supplementary analyses using the Heckman correction on the single-level models suggest the models are ill-conditioned and therefore not recommended. Third, the sample selection in the adjudged sentencing analysis is minimized with the inclusion of acquittals and punishments other than incarceration in the severity scale.

Using these data and analytical methods, the following chapters present the analyses of Air Force court-martial data to investigate the effects of legal and extra-legal factors in the court-martial process. Following the temporal order of the court-martial process, the results are first presented for the pretrial stage outcomes of pretrial confinement and court type in Chapter 6 and the sentencing and clemency results are presented in Chapter 7.

[66] Retention of acquittals for the sentencing analysis is debatable because these cases never made it to sentencing, but some scholarly research suggests that the probability of receiving an acquittal is particularly important when investigating the trial penalty effect on sentence severity (e.g. LaFree, 1985; Smith, 1986).

Chapter 6: Pretrial Decisions

This chapter presents the analyses for two decision outcomes in the pretrial stage of the court-martial process—pretrial confinement and court-martial type. As in civilian courts, the pretrial confinement decision usually occurs prior to other case processing decisions in the court-martial process. However, in the military context, a commander with advice from a base-level judge advocate makes this decision instead of a judge. Also in contrast to civilian justice systems, the military's formal legal structure rarely requires specific types of offenses to be tried in a particular type of court-martial. Consequently, the court-martial type decision requires a convening authority to exercise his discretion in making the referral decision. To investigate these decisions in the pretrial stage of the court-martial process, the following analyses examine the effects of legal factors related to offense seriousness and disciplinary history, military-specific factors, and defendant social characteristics on pretrial confinement and court-martial type outcomes.

Descriptive Statistics

Table 6.1 presents the descriptive statistics for the variables in the pretrial confinement and court-martial type analyses. Overall, criminal caseloads in the Air Force appear to be much smaller in comparison to many civilian courts and the docket size varies substantially from base to base. The number of court-martial cases disposed in four years only totaled 3,349 across 88 Air Force bases. That is, the mean number of court-martial cases per base is 38 and ranges from 1 to 179. Also in contrast to state and federal courts, pretrial confinement is imposed in only 15 percent of cases, and the ratio of general courts to summary/special courts (.49) is high compared to many

felony/misdemeanor ratios for civilian criminal court caseloads.[67] Over half of all court-martial cases were referred to a special court-martial while 33 and 16 percent were referred to general and summary courts, respectively. In other words, 84 percent of the cases were referred to a court-martial type that could have resulted in a federal conviction on the offender's civilian criminal record, and almost two-thirds of those cases were disposed in the misdemeanor-level court type.

The descriptive statistics show that court-martial caseloads are dominated by drug cases which account for almost half (48%) of all courts-martial, while only a small percentage (2%) of cases are for Absence Without Leave/Desertion (AWOL) offenses and other types of military-specific offenses (7%). Person and property offense cases account for 21 and 19 percent of all courts-martial, respectively. The average number of charges is between 2 and 3, and the mean statutory seriousness is 12 to 13 (on a scale of 1-21). That is, on average the statutory maximum punishment of the most serious charged offense was for a dishonorable discharge and 5 to 6 years of confinement. Thus, prior to the court-type selection, the vast majority of court-martial cases possess a small number of charges and the most serious charged offense is analogous to a civilian offense that carries a felony-level statutory maximum punishment.[68]

[67] According to caseload composition data from the National Center for State Courts, felony/misdemeanor ratios for 16 states ranged from .11 to .48 with an average of .30 (see National Center for the State Courts, 2010). For pretrial confinement use, the Bureau of Justice Statistics reported in 2007 that approximately 38 percent of felony defendants in state courts in the 75 largest counties were detained until the disposition of their case (Cohen & Reaves, 2007) and between 1995 and 2010, approximately 59 to 76 percent of federal defendants received pretrial detention (Cohen, 2013). Similarly, Lowenkamp, VanNostrand, and Holsinger (2013) found in Kentucky that 22 percent of defendants charged with a misdemeanor received pretrial detention and 34 percent of those charged with felonies were detained.

[68] Felony-misdemeanor distinctions vary across jurisdictions; however, the federal code defines offenses as felonies that carry a maximum punishment for more than 1 year of imprisonment (see 18 U.S. Code § 3559(a)).

The military-specific and defendant social characteristics of the sample reflect the military context. Around two-thirds of the defendants have no prior military punitive disciplinary action in their records, and most defendants are white (68%), male (89%), and junior enlisted (77%).[69] Consistent with the large percentage of junior enlisted, the typical defendant has five years of active duty military service with approximately 65 percent of defendants possessing less than 5 years of service. Finally, around 17 percent of Air Force defendants work in jobs on the higher end the combat career field scale (greater than 7 on a scale of 1-10) with the remaining in more support-oriented careers.[70] In sum, the descriptive statistics for this pretrial sample of Air Force court-martial cases suggest that the average defendant is white, male, enlisted, early in his military career, and possesses little to no prior punitive disciplinary history. The following multivariate analyses further examine how offense seriousness and disciplinary history, military-specific factors, and defendant social characteristics affect pretrial confinement imposition and the court-type selection.

[69] Although females are still underrepresented in the court-martial process (11%) compared to the Air Force population (20%), the gap is substantially narrower in comparison to state courts and the general population (17% vs. 51%) (USAF Almanac, 2008; Reaves, 2013). Similarly, black airmen are overrepresented in the court-martial process (22% vs. 13%), but this gap is also substantially narrower compared to state courts (45% vs. 13%) (U.S. Department of the Air Force, 2013c; Reaves, 2013).

[70] Some of the observations in both samples contain missing values for Pretrial Agreement, College, Dependents, Race/ethnicity, and Discipline History. To address the missing, multiple imputation was utilized. With the exception of Dependents and Pretrial Agreement, the percentage of missing for the other variables is less than 5 percent.

Table 6.1: Descriptive Statistics for Pretrial Court-Martial Outcomes, CY 2005-2008

Variables	N	Percent (%)			
Dependent Variables					
Pretrial Confinement	3349	15.47			
Court-Martial Type					
Summary	521	15.56			
Special	1728	51.60			
General	1100	32.85			
		Mean	SD	Min	Max
Independent Variables					
Number of Charges (ln)		.86	.76	0	4.19
Statutory Seriousness		12.48	3.76	1	21
Case Type					
Person		.21	.40	0	1
Property		.19	.39	0	1
Drugs		.48	.50	0	1
Society		.03	.18	0	1
AWOL		.02	.13	0	1
Other Military		.07	.25	0	1
Discipline History		.37	.48	0	1
Race/Ethnicity					
White		.68	.47	0	1
Black		.22	.21	0	1
Hispanic		.05	.22	0	1
Other Race		.05	.22	0	1
Female		.11	.32	0	1
Rank					
Junior Enlisted		.77	.42	0	1
Non-Commissioned Officer		.19	.39	0	1
Officer		.04	.19	0	1
Time in Service		4.98	4.95	0	27
Combat Career Field		5.66	2.17	1	10
Pretrial Agreement		.59	.49	0	1
Control Variables					
Year Case Preferred					
2005		.30	.46	0	1
2006		.26	.44	0	1
2007		.23	.42	0	1
2008		.21	.40	0	1
Married		.38	.49	0	1
Dependents		.44	.50	0	1
College		.10	.30	0	1
Civilian Defense Attorney		.04	.21	0	1
Level 2 Units	N				
Air Force Base	88				

Pretrial Confinement Results

Similar to pretrial detention in civilian courts, the legal criteria for imposing pretrial confinement include assessments of flight risk and danger to society. Although it is possible for this decision to occur later in the court-martial process, pretrial confinement is typically imposed before a case is referred to a court-martial.[71] Cross-classified models with the staff judge advocate and prosecuting base were initially examined because of the staff judge advocates' influence in the decision. These models revealed no variation in pretrial outcomes that could be attributed to the advising staff judge advocate after accounting for the military base. Given the preliminary findings and the limitations in utilizing cross-classified models with multiple imputed data, the analyses presented for the likelihood of receiving pretrial confinement and the court-type selection are two-level hierarchical models with the military base at level 2.

Table 6.2 shows the results for the HGLM models for pretrial confinement. On average, the probability of receiving pretrial confinement for the average offender at a typical base is .10.[72] Most of the variables measuring offense seriousness and prior disciplinary history exhibit significant and strong effects on the likelihood of an offender receiving pretrial confinement. Although the statutory seriousness is not a significant predictor, the logged number of charges and discipline history have significant and positive effects on the odds of receiving pretrial confinement. Similarly, prior disciplinary action increases the odds of receiving pretrial confinement by 68 percent. Person offenses increase the odds by a factor of 2.81 and the Absence Without Leave

[71] The pretrial restraint and referral dates were examined prior to data analysis and confirmed that pretrial restraint was imposed post-referral in less than two percent of the pretrial restraint cases.
[72] In other words, all of the independent variables are at their means and base effects are controlled. The predicted probability is calculated as follows from the intercept: Exp(b)/[1+Exp(b)] (Luke, 2004).

Table 6.2: HGLM Model of Pretrial Confinement

Fixed Effects	*b*	*SE*	*Exp(b)*
Intercept	-2.19***	.09	.11
Number of Charges (ln)	1.26***	.07	3.51
Statutory Seriousness	-.01	.02	.99
Person	1.03***	.22	2.81
Drugs	.81***	.18	2.25
Society	.29***	.41	1.33
Military Other	.79***	.25	2.20
AWOL	4.50***	.31	89.91
Discipline History	.52***	.12	1.68
Black	.41***	.14	1.51
Hispanic	.03	.24	1.03
Other Race	-.08	.28	.92
Female	-.10	.16	.90
Officer	-.38	.45	.68
Time in Service	-.09***	.02	.92
Combat Career Field	.02	.02	1.02
Y2006	.41***	.12	1.51
Y2007	.07	.15	1.07
Y2008	.19	.15	1.21
Married	-.26	.20	.77
Dependents	.14	.23	1.15
College	.22	.31	1.24
Civilian Defense Attorney	-.47	.40	.63
Random Effects	*Variance*	*SD*	
Level 2	.20***	.45	
Level 1 N = 3349			
Level 2 N = 88			

*p <.10, **p <.05, *** p<.01

(AWOL) offense exerts strong effects on the odds (factor of 90) in comparison to property offense cases. When AWOL is the most serious offense charged, the likelihood of pretrial confinement is .83 for the average offender at a typical base.[73] To further explore the effects of flight risk and danger to society assessments, select offense type contrasts are examined and shown in Table 6.3. AWOL cases are 32 times more likely than person offense cases to receive pretrial confinement while there is no significant

[73] The predicted probabilities for offense types were obtained by running the model with the offense type dummies uncentered.

effect for drugs, society, and other military offenses in comparison to person offense cases. These results suggest that legal factors—offense type, number of charges, and prior record—significantly affect the likelihood of receiving pretrial confinement; however, the military environment appears to emphasize flight risk in the pretrial confinement decision rather than dangerousness.

Table 6.3: Offense Type Comparisons for Pretrial Confinement

	b	*SE*	*Exp(b)*
AWOL vs. Person	3.47***	.37	32.04
AWOL vs. Property	4.50***	.31	89.91
AWOL vs. Drugs	3.69***	.33	40.00
Drugs vs. Person	-.22	.19	.80
Society vs. Person	-.75*	.39	.47
Military Other vs. Person	-.24	.24	.78

Note: The models contained the same independent variables in Table 6.2 with only the offense type reference category altered.
*p <.10, **p <.05, *** p<.01

In addition to these legal factors, some of the defendant characteristics also appear to play a role in assessing whether a military offender should be placed in pretrial confinement. The military offender's time in service exerts a negative effect on the odds of receiving pretrial confinement. That is, for each additional year of time in service, an offender is .92 times as likely to receive pretrial confinement. Moreover, inconsistent with prior military research, being black increases the odds of pretrial confinement by 51 percent compared to the odds for white offenders. More specifically, when the average offender is black, he has a .13 probability of receiving pretrial confinement as opposed to a .09 probability when he is white. Nevertheless, significant differences in the odds of receiving pretrial confinement are not detected for Hispanics and other minorities in comparison to whites. Moreover, combat career field and officer do not appear to be significant factors in the pretrial confinement decision because neither variable exhibited

statistically significant effects on the likelihood of pretrial confinement.[74] Contrary to the civilian court literature, there is no evidence of gender disparity in the pretrial confinement decision.[75] These results suggest that at least for gender, something specific to the military context may lead to different findings for pretrial decision outcomes.

Finally, even after controlling for individual-level case characteristics, the model finds significant base variation exists in the odds of receiving pretrial confinement. The intraclass correlation for the unconditional model is approximately 5 percent of the variation in the propensity to impose pretrial confinement. In the fully conditional model, the variance component for the prosecuting military base is statistically significant, and approximately 6 percent of the variation in the likelihood of pretrial confinement is attributed to base differences. Even though the predicted probability for the average offender receiving pretrial confinement is .10, the probability of pretrial confinement varies between .07 and .15 for one standard deviation of bases.[76] Thus, these results indicate the presence of inter-base variation in the likelihood of receiving pretrial confinement after controlling for individual-level factors.

Court-Martial Type Results

Another important pretrial stage decision is which type of court-martial the case is referred. In contrast to typical civilian courts, almost all of the offenses in the UCMJ may be referred to one of three types of court-martial. The special court-martial is often compared to misdemeanor-level courts while a general court-martial is equated to felony-

[74] Alternative models that differentiate between junior enlisted and non-commissioned officers found no significant differences once time in service is controlled.
[75] Because of possible collinearity with gender, time in service, and career field, alternative model specifications were examined, but none of them detected significant gender effects.
[76] The variation in the predicted probabilities are obtained by adding and subtracting 1 standard deviation of the average random effect to the intercept and then calculating the probability.

level courts. The summary court-martial is the least severe court type and is not considered a conviction outside of the military because of its minimal due process requirements. Summary courts-martial are only available to enlisted personnel and are intended for minor offenses. Consequently, the summary court-martial is treated as an administrative alternative disposition to the special court-martial.

Although offense severity and rank are often highly correlated with court type, discretion remains in this decision particularly between summary and special court-martial cases, and between general and special court-martial cases. Nevertheless, because the legal structure restricts the summary court forum to enlisted, officer-enlisted disparities are not examined in these analyses. This section presents the results from the multinomial models examining the likelihood of court-martial cases being referred to a summary and general court-martial in comparison to the special court-martial.

Table 6.4 shows two multinomial HGLM models for the likelihood of receiving the different court-martial types with special court-martial as the comparison category. Model 1 does not include pretrial confinement while model 2 is fully specified. In model 1, on average, the predicted probability of an average offender's case being referred to a summary court-martial rather than a special court-martial at a typical base is .11 while the probability of referral to a general court-martial in comparison to a special is .29. After taking into account the pretrial confinement decision, the average offender's predicted probability of receiving a summary court increases from .11 to .14 while the probability of receiving a general court-martial remains the same.

Table 6.4: Multinomial HGLM Models of Court-Martial Type

	Model 1						**Model 2**					
	Summary vs. Special			General vs. Special			Summary vs. Special			General vs. Special		
Fixed Effects	*b*	*SE*	*Exp(b)*	*b*	*SE*	*Exp(b)*	*b*	*SE*	*Exp(b)*	*b*	*SE*	*Exp(b)*
Intercept	-2.10***	.15	.12	-.88***	.11	.41	-2.16***	.16	.12	-.89***	.11	.41
Number of Charges (ln)	-.46***	.11	.63	.95***	.08	2.58	-.39***	.10	.68	.86***	.09	2.36
Statutory Seriousness	-.18***	.02	.83	.26***	.02	1.30	-.19***	.02	.83	.27***	.02	1.31
Person	.29	.26	1.33	1.74***	.20	5.68	.36	.26	1.43	1.68***	.20	5.35
Drugs	-.90***	.22	.40	-.04	.14	.96	-.88***	.23	.42	-.10	.15	.90
Society	.77*	.39	2.16	.52	.40	1.68	.79*	.42	2.20	.50	.40	1.64
Military	.74***	.28	2.09	.51**	.21	1.67	.97***	.28	2.65	.44**	.21	1.55
Discipline History	.25*	.14	1.28	.08	.11	1.08	.29**	.14	1.33	.03	.11	1.03
Black	.19	.19	1.21	-.28*	.16	.75	.26	.19	1.29	-.32**	.16	.73
Hispanic	.01	.31	1.01	-.21	.24	.81	.04	.31	1.04	-.18	.23	.83
Other Race	.12	.26	1.12	-.27	.23	.77	.13	.28	1.14	-.27	.23	.76
Female	-.02	.20	.99	-.34**	.16	.71	-.02	.20	.98	-.36**	.16	.70
Junior Enlisted	.79***	.30	2.21	-.54***	.20	.58	.82***	.30	2.26	-.56***	.20	.57
Time in Service	-.10***	.04	.91	.02	.02	1.02	-.11***	.04	.90	.02	.02	1.02
Combat Career Field	.08**	.03	1.08	-.08***	.03	.92	.08***	.03	1.08	-.08***	.03	.92
Pretrial Confinement							-.81***	.21	.44	.73***	.15	2.07
Pretrial Agreement	1.45***	.27	4.26	-.79***	.11	.45	1.49***	.26	4.43	-.84***	.11	.43
Y2006	.12	.19	1.13	-.39**	.17	.68	.18	.19	1.20	-.43***	.17	.65
Y2007	.33*	.19	1.39	-.64***	.21	.53	.33*	.19	1.40	-.65***	.21	.52
Y2008	.05	.23	1.05	-.65***	.19	.52	.06	.23	1.06	-.68***	.19	.51
Married	-.36	.25	.70	.02	.17	1.02	-.39	.25	.67	.04	.17	1.05
Dependents	.34	.26	1.41	.37**	.16	1.45	.35	.26	1.42	.37**	.16	1.44
College	-.54	.43	.58	1.02***	.23	2.78	-.58	.41	.56	1.04***	.23	2.84
Civ Defense Attorney	-.85	.68	.43	1.12***	.31	3.08	-.85	.71	.43	1.16***	.31	3.19
Random Effects	*Variance*	*SD*		*Variance*	*SD*		*Variance*	*SD*		*Variance*	*SD*	
Level 2	.50***	.71		.56***	.75		.49***	.70		.56***	.75	
N=3349												

*p<.10 **p<.05 ***p<.01

Whether an offender receives pretrial confinement significantly affects the odds of the case being referred to a summary and general court-martial in comparison to a special. That is, after controlling for other factors, receiving pretrial confinement significantly increases the odds of referral to a general court-martial by a factor of 2.07 while it decreases the odds of referral to a summary court by a factor of .44. The imposition of pretrial confinement has a strong significant effect on the likelihood of receiving a particular type of court-martial. An average offender who receives pretrial confinement at a typical base has a .06 probability of receiving a summary court-martial and a .43 probability of receiving a general court-martial in comparison to a special.

The significant race effect for black offenders in the pretrial confinement decision also appears to have an indirect effect on the likelihood of black offenders receiving a general court-martial. In model 1, being black has a marginally negative effect on the odds of receiving a general court-martial, but after controlling for pretrial confinement, black offenders are significantly less likely to be referred to a general court-martial in comparison to white offenders. No other statistically significant race/ethnicity differences are found in the court type referral decision.

Despite the lack of gender disparity in the pretrial confinement outcome, the models provide some empirical evidence that females receive leniency in the court type selection. For instance, in model 2, being female reduces the odds of referral to a general court-martial by a factor of .70. Nevertheless, gender has no effect on the referral decision to a summary compared to a special court-martial holding all other factors constant.

Similar to the predictors for the pretrial confinement decision, legal factors related to offense severity are significant predictors for both summary and general court-martial types. In the fully conditional model, for each increase in statutory seriousness, cases are .83 times likely to be referred to a summary court-martial than a special court-martial while the odds increase by 31 percent for referral to a general court-martial. Similarly, the logged number of charges decrease the odds of referral to a summary court and increase the odds of referral to a general court-martial.

Nevertheless, offense type effects differ somewhat between court-type contrasts. There is no significant difference in the likelihood of referral to a summary court between person and property offense cases, but for the general court-martial, person offense cases are 5.35 times more likely to be referred to a general court-martial than property offense cases. Drug cases are also significantly less likely than property cases to be referred to summary courts in comparison to specials, but there is no difference in the likelihood of referral to a general court-martial compared to a special. Society offenses and military offenses are 2.20 and 2.65 times as likely to be referred to a summary court-martial, respectively.

Contrary to expectations, discipline history is not a significant predictor in the general court-martial referral decision in either model. Additionally, discipline history *increases* the odds of receiving a summary court-martial compared to a special by a factor of 1.33 in model 2 and does not reach statistical significance in model 1. That is, discipline history appears to only be a factor in the court-type decision for relatively minor offenses, and offenders with prior disciplinary actions are *more* likely to have their

cases disposed in a summary court—an administrative disciplinary proceeding—rather than a special court-martial.

The positive effect of discipline history for summary courts in the models may be the result of data limitations. The discipline history measure is dominated by prior non-judicial punishment actions (Article 15s) which are reserved for minor infractions. The data do not specify whether the special or summary court-martial occurred because the defendant refused to agree to the Article 15 forum. Thus, the discipline history measure may incorrectly indicate a prior discipline history in some cases. Moreover, the data do not capture *sub rosa* pretrial agreements.[77] An informal understanding may exist that if the defendant pleads guilty, he will be prosecuted in a summary court-martial and be administratively discharged. For offenders who continue to engage in minor offenses that are not typically disposed via court-martial, incentives exist for both the commander, prosecution, and defense counsel to make these types of informal agreements because the process is more efficient and does not result in a criminal conviction. Thus, the positive effect of discipline history in the summary court decision is likely due to these data limitations.

Although the offender's time in service does not significantly affect the odds of referral to a general court in model 2, time in service reduces the odds of referral to a summary court-martial by 11 percent. Additionally, as offenders' career fields move closer towards direct combat on the proverbial warrior spear, the cases are more likely to be referred to a summary court-martial and less likely to be referred to a general court-martial. Specifically, for a one unit increase on the combat career field scale, the odds of

[77] These types of agreements are not permissible under the rules; however, discussions with judge advocates indicated that informal agreements pertaining to case processing and administrative discharge often occur for minor offenses.

referral to a summary court instead of a special increases by 8 percent and decreases the odds of referral to a general court-martial by a factor of .92.

Finally, consistent with the pretrial confinement results, the likelihood of receiving a particular court type varies significantly across prosecuting bases. The intraclass correlation for the unconditional model is approximately 13 and 9 percent of the variation in the propensity to refer a case to a summary court-martial and general court-martial, respectively.[78] In the fully conditional model, the variance components for the prosecuting military base remain statistically significant for both court types. Even though the predicted probability for the average offender being referred to a general court-martial is .29, for about two-thirds of military bases (1 standard deviation) the probability of receiving a general court-martial varies between .16 and .46. Similarly, for the summary court versus special court-martial decision, the probability varies between .05 and .19 for about two-thirds of the prosecuting bases. Thus, these findings suggest the presence of meaningful inter-base variation in the court type decision even after controlling for individual-level case characteristics.

Summary and Discussion of Pretrial Stage Decision Results

Modern courts and sentencing theoretical perspectives and prior research suggest that pretrial decisions in the court-martial process are substantially influenced by factors related to the military's formal legal structure, organizational culture, and social organization characteristics. As with civilian court research, the analyses for the pretrial stage decisions revealed the court-martial decisions are determined by a combination of legal and extra-legal factors, but the results reflect the military context.

[78] The ICC is calculated with the logistic formula in Snijders and Bosker (2012) for each contrast (Hedeker, 2003).

Congruent with theoretical expectations (H1), many of the individual-level case characteristics grounded in the military's legal structure are strong predictors of the severity of pretrial decision outcomes; however, some legal factors appear to be limited to a particular decision outcome. Offense type had strong significant effects on the likelihood of pretrial confinement as well as the court-type selection. This finding is consistent with the theoretical notion that court actors initially categorize cases according to offense types based on their legal structure. Additionally, the particularly large effects on the odds for the military-specific offenses in the pretrial confinement decision demonstrate the substantial influence of the military's specific legal structure. As in civilian courts, flight risk is one of the legal criteria for imposing pretrial confinement. The military-specific offense of AWOL is a strong predictor of pretrial confinement and AWOL cases are more likely to receive pretrial confinement than person offense cases. Consequently, the results suggest that military decision-makers place a great deal of emphasis on flight risk in the pretrial confinement decision.

The military context-specific meanings of blameworthiness and danger to society are evident in the offense type effects for the court type decision outcome. Person offenses are significantly more likely than property cases to be referred to a general court-martial. However, there is no significant difference in person and property cases in the likelihood of receiving a summary court after controlling for other offense seriousness indicators. Also interesting is the significant decrease in the odds of drug cases being referred to a summary court in comparison to property cases even though property cases involve crimes with victims. This effect could be a reflection of the organizational concern about drug use and its effect on accomplishing the military mission. An airman

working on an airplane while he is high on cocaine may be perceived as causing more harm to the military than an airman stealing an ipod from someone's dorm room.

The results for the other legal factors in the pretrial stage decisions are also mixed. The logged number of charges exhibit a strong positive effect on the likelihood of receiving more severe pretrial outcomes, yet the statutory seriousness had a significant effect only in the court type decision. Even though discipline history increased the likelihood of pretrial confinement consistent with theoretical expectations, there was no statistical support for its aggravating effects in the court-martial type decision.

Although not definitive, the analyses also found some evidence of a traditional military culture influence in the pretrial stage decisions. An offender's military record is a legal factor in the process, but career field status should be legally irrelevant. As predicted by Hypothesis 2, time in service decreases the odds of receiving pretrial confinement and the combat-orientation of an offender's job mitigates court-type severity (H3). There was mixed evidence of racial and gender disparity that would be indicative of racial and gender stereotypes in the military context (H4a, H5). Black offenders were significantly more likely to receive pretrial confinement than white offenders, which then had an indirect effect in the court type decision. However, no significant differences were detected between Hispanics and whites for either pretrial decision (H4b). Contrary to expectations (H5), the likelihood of receiving pretrial confinement did not significantly differ between males and females. This finding is contrary to typical findings for bail and pretrial detention decisions in civilian courts. Nevertheless, as predicted by military culture, females tend to be referred to the less severe special court-martial rather than the general court-martial. Finally, there was no evidence of officer and enlisted disparities

(H6) in the likelihood of receiving pretrial confinement. Thus, the analyses only revealed partial support for disparity in pretrial stage decision outcomes based on defendant social characteristics and military-specific factors.

There was empirical support for prior case processing effects and court community variation in pretrial outcomes in the military context. As predicted with the uncertainty avoidance/causal attribution rationale (H7), pretrial confinement increases the odds of receiving a more severe type of court-martial. The findings regarding inter-base variation are particularly interesting given the military's bureaucratic structure and its social organization characteristics (H12). As suggested by findings in civilian court research, the likelihood of receiving pretrial confinement and referral to a particular court-type varies considerably across military bases even after controlling for individual-level factors. Thus, at least for the pretrial stage decisions, the prosecuting base matters. Chapter 7 further investigates the effects of these legal and extra-legal factors and other case processing decisions on sentencing and clemency outcomes, and explores court community and judge variation.

Chapter 7: Sentencing and Clemency

At the trial level, the final approved sentence offenders receive is the culmination of several decisions in the court-martial process. Chapter 6 examined the determinants of two of the pretrial stage decision outcomes—pretrial confinement and court type selection. This chapter investigates the effects of these prior case processing decisions and other decisions in two key stages of the court-martial process leading up to the final punishment imposed—sentencing and clemency. Thus, in addition to investigating the effects of legal factors, military-specific factors, and defendant social characteristics, this chapter presents numerous multilevel models of sentence severity and clemency as part of its investigation into the effects of case processing factors.

Descriptive Statistics

Table 7.1 presents the descriptive statistics for the variables in the adjudged sentence severity and clemency analyses. As discussed in Chapter 5, the sentencing analysis is restricted to special and general court-martial cases preferred and tried between 2005 and 2008. The summary court-martial is an administrative disposition that does not result in a criminal conviction and the process is more informal with minimal due process requirements in comparison to special and general courts. For these reasons, the summary court-martial is treated as an alternative disposition in the court-martial process (Chapter 6) and these cases (approximately 16% of all court-martial cases) are excluded from the sample in the sentencing and clemency analyses.[79]

[79] Single-level Heckman sample selection models were also examined in Stata 13, but these models were ill-conditioned because they lacked an exclusion restriction. Nevertheless, the differences in the results are noted throughout this chapter.

Table 7.2 shows the adjudged sentence severity scale and its distribution. In this sample, there are 2,828 court-martial cases with a mean sentence severity at 7.58 on a scale of 0-30. In other words, the average adjudged sentence is either for a punitive discharge without confinement or confinement between 9 and 18 months without a punitive discharge. The adjudged sentence is reduced through the post-trial clemency process in only 8 percent of the convicted cases.

Although the majority of the court-martial cases are disposed via a guilty plea (72%), the guilty plea rate is much lower than the approximately 95 percent typically found in state and federal courts (Bohm & Haley, 2012). Approximately, 9 percent of cases resulted in an acquittal, no punishment, or a reprimand. Given the smaller caseloads for the military context and the frequent assignment rotations for judge advocates, the number of cases assigned per military judge is substantially smaller than in typical state and federal courts and varies considerably among judges. For this four-year sample of Air Force court-martial cases, there are 60 different military judges assigned to 2,828 cases with an average number of 46 cases per judge ranging from 1 to 136.[80] Moreover, reflecting the availability of jury sentencing, a judge is the sentencing authority in only about 64 percent of those cases.

[80] In fiscal year 2009 alone, the average number of terminated federal district court cases (civil and criminal combined) was 545 per judge with 128 criminal defendants on average (Administrative Office for the U.S. Courts, 2014). Civilian judges often handle both criminal and civil cases while military judges only handle criminal cases.

Table 7.1: Descriptive Statistics, Special and General Courts-Martial, CY 2005-2008

Variables	N	Mean	SD	Min	Max
Dependent Variables					
Adjudged Sentence Severity	2,828	7.58	.10	0	30
Clemency[a]	2,473	.08	.27	0	1
Independent Variables					
Number of Charges (ln)		.79	.74	0	4.19
Statutory Seriousness		12.60	3.46	1	21
Case Type					
Person		.21	.40	0	1
Property		.17	.38	0	1
Drugs		.51	.50	0	1
Society		.03	.16	0	1
Military		.08	.27	0	1
Discipline History		.35	.48	0	1
Race/Ethnicity					
White		.69	.46	0	1
Black		.21	.41	0	1
Hispanic		.05	.22	0	1
Other Race		.05	.22	0	1
Female		.11	.32	0	1
Rank					
Junior Enlisted		.74	.44	0	1
Non-Commissioned Officer		.21	.41	0	1
Officer		.04	.21	0	1
Time in Service		5.31	5.15	0	1
Combat Career Field		5.59	2.15	1	10
Pretrial Confinement		.16	.37	0	1
General Court-Martial		.39	.49	0	1
Pretrial Agreement		.54	.01	0	1
Jury		.36	.48	0	1
Trial		.28	.45	0	1
Control Variables					
Year Case Preferred					
2005		.31	.46	0	1
2006		.26	.44	0	1
2007		.22	.42	0	1
2008		.21	.41	0	1
College		.11	.31	0	1
Married		.40	.49	0	1
Dependents		.46	.50	0	1
Civilian Defense Attorney		.05	.22	0	1
Level 2 Units	N				
Judge	60				
Military Base	88				

[a] Excludes acquittals (n=245) and cases missing data on clemency (n=110).

Table 7.2: Adjudged Sentence Severity Scale Distribution

Code	Adjudged Sentence	Distribution	
		N	%
0	Acquittal/No Punishment/Reprimand	249	8.80
1	Financial/Reduction in Rank	44	1.56
2	Hard Labor/Restriction to Base	187	6.61
3	Confinement 1-2 months	443	15.66
4	Confinement 3-5 months	190	6.72
6	Confinement 6-8 months	101	3.57
7	Confinement 9-12 months	39	1.38
8	Discharge *or* Confinement 13-18 months	117	4.14
9	Discharge & Confinement 1-2 months	364	12.87
10	Discharge & Confinement 3-5 months	255	9.02
11	Discharge & Confinement 6-8 months	267	9.44
12	Discharge & Confinement 9-12 months	217	7.67
13	Discharge & Confinement 13-18 months	119	4.21
14	Discharge & Confinement 19-24 months	70	2.48
15	Discharge & Confinement 25-36 months	61	2.16
17	Discharge & Confinement 37-60 months	43	1.52
21	Discharge & Confinement 61-120 months	31	1.10
30	Discharge & Confinement >120 months	31	1.10

As with the full sample of court-martial cases in the Chapter 6 analyses, the majority of cases are special courts-martial (61%), and the sample is dominated by drug offense (51%) and person offense (21%) cases while only 8 percent of the cases are for military-specific offenses. The average number of convicted counts for an Air Force defendant is between 1 and 2 with statutory seriousness around 13 on a scale of 1-21. That is, on average the statutory maximum punishment of the most serious convicted offense is for a dishonorable discharge and 6 years of confinement. Thus, similar to the pretrial stage of the court-martial process, the vast majority of court-martial cases in the sentencing stage are for a small number of convicted offenses and the most serious

offense is analogous to a civilian crime with a felony-level statutory maximum punishment prior to court-type selection.

Also similar to the sample with summary courts, the typical offender in special and general courts-martial has no prior punitive disciplinary actions and is white, male and junior enlisted with an average time in service of slightly over 5 years. Over half of court-martial defendants work in jobs around the mid-point of the combat career field scale which is focused on base support and equipment maintenance jobs, while only 18 percent are in more direct combat-oriented career fields (8-10 of the combat scale). To investigate the factors influencing the adjudged sentence severity and the likelihood of receiving clemency, the following multilevel models examine the effects of the factors related to offense seriousness and prior record, military-specific factors, defendant social characteristics, and case processing decisions.

Adjudged Sentence Severity Results

The results from the HLM models of sentence severity are shown in Table 7.3.[81] Four models are presented showing how the effects of the independent variables on sentence severity are altered as each case processing decision is included in the model while the amount of explained individual-level variation increases. For model 1, the level 1 variables explain about 26 percent of the variation in sentence severity among military bases, and after including case processing variables, model 4 increases the level-1 R square to 41 percent. In the fully conditional model (model 4), the estimated sentence

[81] Judges are not the decision-makers in jury-sentenced cases, nevertheless cross-classified models with judge and base at level 2 were also examined. Cross-classified models cannot be estimated with multiple imputation datasets in HLM; thus, the cross-classified models used dummy variables and mean substitution for the missing data. Because of the large number of missing in the pretrial agreement information, the cross-classified models produce biased estimates of the coefficients. For these reasons, the two-level HLM models with base at level 2 using the MI datasets are presented.

severity for the average offender at a typical military base is 7.61 on the sentence severity scale.

The HLM models also show that the pretrial decision variables examined in Chapter 6 tend to exhibit strong effects on adjudged sentence severity. In the fully-specified model (model 4), offenders with pretrial confinement on average receive sentences that are almost two levels higher on the sentence severity scale compared to offenders without pretrial confinement. On average, referral to a general court-martial instead of a special court-martial increases sentence severity by 2.77.[82]

Model 4 results also indicate that the other case processing factors tend to influence sentence severity. Contrary to civilian court sentencing studies, after taking into account acquittals, trials exert a significant negative effect on sentence severity.[83] Moreover, significant differences in sentence severity exist between the two types of sentencing authorities. Specifically, judges, on average, impose sentences that are more severe than jury sentences.

The legal factors related to offense severity and the offenders' prior punitive disciplinary actions are significant predictors of the adjudged sentence severity. The statutory seriousness of the offense, the logged number of charges, and discipline history have significant and positive relationships with sentence severity. After controlling for all other factors in model 4, given a 100 percent change in the number of charges, the sentence severity increases by 1.57 levels on the scale.[84] That is, adding one additional

[82] Models were also examined on subsamples divided by court-martial type but there were only a few notable differences which largely reflect the differences in the court-type subsamples.
[83] A trial penalty effect is not found in the convicted subsample either, but the negative effects in the full sample of cases are no longer statistically significant in the convicted subsample or in the single-level Heckman corrected model.
[84] The expected change in Y associated with a p% increase in X is calculated as $\beta_1 * \ln([100+p]/100)$.

Table 7.3: HLM Models of Sentence Severity for Special and General Courts-Martial, CY 2005-2008

	Model 1		**Model 2**		**Model 3**		**Model 4**	
Fixed Effects	*b*	*SE*	*b*	*SE*	*b*	*SE*	*b*	*SE*
Intercept	7.59***	.10	7.60***	.10	7.59***	.09	7.61***	.10
Number of Charges (ln)	2.67***	.14	2.26***	.16	1.67***	.15	1.57***	.15
Statutory Seriousness	.33***	.04	.34***	.04	.25***	.04	.25***	.04
Person	2.02***	.35	1.66***	.34	1.32***	.31	1.56***	.31
Drugs	.49*	.27	.24	.27	.35	.27	.36	.27
Society	-.48	.48	-.70	.47	-.41	.49	-.62	.45
Military	.06	.35	-.57	.36	-.54	.36	-.53	.35
Discipline History	.58***	.21	.41*	.21	.37*	.19	.38**	.19
Black	-.47*	.25	-.59**	.24	-.36*	.22	-.19	.21
Hispanic	-.49	.43	-.47	.42	-.27	.41	-.05	.40
Other Race	-.24	.34	-.19	.36	.01	.32	-.05	.31
Female	-.01	.22	-.02	.22	.29	.20	.23	.21
Officer	-.35	.50	-.18	.47	-1.03**	.49	-1.01**	.48
Time in Service	-.04	.03	-.01	.03	-.02	.02	-.01	.02
Combat Career Field	-.10*	.05	-.11**	.05	-.07	.04	-.07	.29
Pretrial Confinement			2.63***	.30	2.12***	.29	1.94***	.28
General Court-Martial					2.68***	.21	2.77***	.20
Pretrial Agreement					2.70***	.19	.64**	.04
Jury							-1.56***	.28
Trial							-2.11***	.27
Y2006	-.49**	.24	-.60**	.23	-.44**	.21	-.43**	.22
Y2007	-.35	.31	-.38	.31	-.29	.27	-.13	.25
Y2008	-.80***	.26	-.87***	.25	-.62***	.24	-.14	.25
Married	.46	.34	.54	.34	.41	.33	.44	.31
Dependents	.05	.34	-.02	.34	-.13	.31	-.11	.31
Civilian Defense Attorney	-.20	.49	-.10	.48	-.18	.47	.27	.45

Table 7.3: HLM Models of Sentence Severity for Special and General Courts-Martial, CY 2005-2008 (con't)

	Model 1		**Model 2**		**Model 3**		**Model 4**	
Random Effects	*Variance*	*SD*	*Variance*	*SD*	*Variance*	*SD*	*Variance*	*SD*
Level 1	20.28	4.50	19.45	4.41	17.20	4.15	16.23	4.03
Level 2: Base	.14*	.37	.18**	.42	.19***	.43	.28***	.53
R^2 Level 1	.26		.29		.37		.41	
R^2 Level 2	.61		.50		.47		.22	
N=2,828								

Note: The control variable *college* was not included in the sentence severity models because of multicollinearity.
*p<.10 **p<.05 ***p<.01

charge to a case with one charge increases the sentence severity by 1.57 on the scale. Similarly, a 4 unit increase in statutory seriousness increases the sentence severity one additional level, holding everything else constant. When the most serious offense is a person offense as opposed to a property offense, the average sentence severity is increased by 1.56 on the severity scale; however, drug, society and military offense cases do not significantly differ in comparison to property cases.

Although race and ethnicity appear to have no significant effect in the fully-specified model, there is some evidence that race has an indirect effect for black defendants through the case processing decisions. In the court-type analysis in Chapter 6, black offenders were more likely to be referred to the less severe special court-martial type after controlling for the aggravating effects of pretrial confinement. A similar significant negative effect is present on sentence severity in model 2 before controlling for court type, pretrial agreement, type of plea and sentencing authority. Once these case processing factors are controlled in model 4, there is no statistically significant difference in the adjudged sentence severity for black and white defendants. This finding suggests that leniency in sentence severity for black offenders is related to these case processing variables. Although not ideal, supplementary analysis with the multiple imputed datasets modeled the mode of conviction and confirmed that black offenders are significantly more likely to assert their right to a jury trial which in turn is associated with less severe adjudged sentences compared to other modes of conviction.[85]

Similar to the race effects, the combat orientation of a defendant's career field exhibits a mitigating effect on sentence severity in model 2, but is no longer statistically

[85] The results of these models should be taken with caution because of the non-trivial amounts of missing data in the dependent variable and the lack of evidence strength measures. There were also no statistically significant race effects in the fully specified Heckman corrected model estimated in Stata.

significant after controlling for other case processing factors.[86] In contrast to the findings regarding race, the lack of a significant effect for combat career field is likely related to the inclusion of acquittals. Although not shown here, supplementary analyses on the convicted subsample found that the combat career field had a significant negative effect on adjudged sentence severity even after jury and trial were included in the model while career field was not a significant predictor for mode of conviction. Thus, in the convicted cases, combat career mitigated sentence severity.

Based on the results from all of the models, time in service appears to have no effect in sentencing. However, these findings may be reflecting selection bias from the court-martial type decision. In the court-type analyses, time in service had a positive effect on the odds of being in a special court-martial compared to a summary. That is, individuals with more time in the military were less likely to be selected out of the special and general court-martial sample. Although not presented here because of the limitations associated with the Heckman model specifications, the supplementary analyses with the Heckman correction indicated time in service exerts a significant positive effect on sentence severity. Regardless, there is no statistical evidence that time in service has a mitigating effect on sentence severity as predicted by Hypothesis 2.

In contrast to findings in the sentencing literature, no gender differences are detected in the adjudged sentence severity in any of the sentencing models. Because the court-type decision analysis in Chapter 6 showed some leniency for females, alternative model specifications, analysis on the court type subsamples, and sample selection models

[86] In the single-level Heckman model, combat career field exerted a significant negative effect on sentence severity after taking into account the summary court type selection.

were also examined. However, none of these models revealed any significant differences between males and females in the adjudged sentence severity.

In this Air Force sample, all of the officers are referred to a general court-martial regardless of offense severity and discipline history. Discussions with judge advocates confirm this finding is due to a case processing norm for officer cases derived from the punishment limitations for officers in a special court-martial. Prior to including the court-martial type in model 3, there is no significant difference between officer and enlisted sentence severity, but in models 3 and 4, officers receive less severe sentences on average.[87] After controlling for court-type, the predicted sentence severity for the average officer at the typical base is 6.65 while it is 7.66 for the average enlisted offender.

The HLM models, particularly model 4, provide some evidence of inter-base variation in the sentence severity outcome. In the unconditional model the variance component is statistically significant but the intra-class correlation is relatively small (.0127) compared to other findings in the sentencing literature. In other words, only 1.3 percent of the total variation in sentence severity is attributable to variation between bases while civilian court studies often report somewhere between 5 and 7 percent. In the fully conditional model (model 4), the average sentence severity between military bases is statistically significant, but the variance remains small. The average sentence severity varies between 7.08 and 8.16 for one standard deviation of military bases. The inclusion of individual-level variables in model 4 explains approximately 41 percent of the level 1

[87] Supplemental analyses on the different rank groups (non-commissioned officers, junior enlisted, and officers) revealed no significant differences between non-commissioned officers and junior enlisted sentences. Thus, the sentencing disparity detected in model 4 was confirmed to be between officers and enlisted in general.

variation; and 22 percent of the between-base variation in average sentence severity is attributable to case compositional differences. Thus, although there is statistical evidence that sentence severity varies between bases after controlling for individual-level variables, the variation is quite small relative to prior findings in civilian courts.

Prior sentencing research also finds inter-judge variation in sentencing outcomes within court communities. These studies, however, are concentrated in civilian jurisdictions without jury sentencing and with judges nested within court communities. To investigate whether the average sentence severity varies between military judges, cases missing sentencing authority (n=32) are dropped from the sample and the two-level HLM models of sentence severity are analyzed in the subsample of judge-sentenced cases with judge at level 2 instead of military base (n=1795).[88] In the Air Force, judges are not nested within bases, so initially cross-classified models with judge and base at level 2 were examined with the non-imputed data. Although not shown here, those models found that after the judge classification was included at level 2, the between-base variation in average sentence severity was not statistically significant in the sub-sample of judge-sentenced cases.[89] Thus, Table 7.4 presents the random effects from the two-level judge models with the multiple-imputed data for the subsample of judge-sentenced cases.[90]

In the unconditional model, the level 2 variance is statistically significant and the intra-class correlation is .05, meaning approximately 5 percent of the total variation in sentence severity is between judges. In the fully conditional model, between-judge

[88] Including the multiple imputed data creates different sample sizes across the MI datasets for this analysis which is problematic for running regression models with MI datasets.
[89] In the cross-classified model, the negative effect for officer is statistically significant (p=.02) but is not significant in the two-level judge model (p=.12). As with the cross-classified models on the full sentence sample, the cross-classified models for judge sentences used dummy variables and mean substitution for the missing data.
[90] Presenting the two-level HLM models with the multiple imputed datasets is also consistent with the models presented in Chapter 6.

variation remains statistically significant. The inclusion of individual-level variables explains approximately 44 percent of the level 1 variation, while only 7 percent of the between-judge variation in average sentence severity is attributable to case compositional differences. In the fully-specified model, the average sentence severity among judge-sentenced cases varies between approximately level 8 and 10 on the sentence severity scale for one standard deviation of judges. Thus, these results from the judge-sentenced subsample models indicate meaningful inter-judge variation in average sentence severity among judge-sentenced cases that is largely unexplained by compositional differences.

Table 7.4: HLM Models of Sentence Severity, Judge-Sentenced Subsample

	Unconditional Model		**Full Model** [f]	
Fixed Effects	*b*	*SE*	*b*	*SE*
Intercept	8.89	.20	8.81	.18
Random Effects	*Variance*	*SD*	*Variance*	*SD*
Level 1	22.72	4.77	12.75	3.57
Level 2: Judge	1.20***	1.09	1.12***	1.06
R^2 Level 1			.44	
R^2 Level 2			.07	
N=1,795				

[f] Full model includes the same independent variables as model 4.

Clemency Results

The final stage at the court-martial trial level is comprised of the clemency process. Clemency is only granted after a sentence is adjudged, thus, acquittal cases are not eligible for clemency. Given the small percentage of acquittal cases (8.6%), the lack of an exclusion restriction for a sample selection model, and the use of multiple imputed data, the clemency analyses are conducted on the convicted subsample of court-martial cases.[91] As shown in the descriptive statistics in Table 7.1, approximately 8 percent of cases receive some type of post-trial clemency.[92] Nevertheless, there are several types of clemency available as shown in Table 7.5. Over a third of clemency cases receive multiple types of clemency and around 28 percent receive a reduction in confinement only. According to these descriptive data, commanders appear to exercise their post-trial discretion for a relatively small proportion of court-martial cases. Because of the small percentage of cases that receive clemency and the various clemency types, the clemency models investigate the likelihood of receiving any form of clemency in post-trial case processing rather than the likelihood of receiving the various types of clemency.

[91] A single-level Heckman probit model was explored in Stata but the model lacked an exclusion restriction. Not surprising, the Wald test failed to reject the null hypothesis suggesting the primary and selection equations are not independent. Regardless, the results did not substantially differ from the HLM results presented. In addition to dropping the acquittal cases, approximately four percent of the convicted cases are dropped from the analysis because they are missing clemency data.

[92] For pretrial agreement cases, the data released for analysis do not specify whether the sentence is reduced because of the pretrial agreement or a combination of clemency and the pretrial agreement. According to judge advocates, clemency in pretrial agreement cases is relatively rare. Thus, cases with a pretrial agreement and a reduced sentence are coded as cases without clemency.

Table 7.5: Types of Clemency Granted in Convicted Special and General Courts-Martial, CY 2005-2008

Clemency Type	N	%
Multiple Types	66	35.1
Punitive Discharge	1	.5
Confinement	52	27.7
Reduction in Rank	12	6.4
Hard Labor	16	8.5
Restriction	8	4.3
Fine/Forfeitures	33	17.6
Total	188	

Table 7.6 presents the HGLM models for the likelihood of receiving any type of post-trial clemency in the convicted subsample of cases. Model 1 excludes the case processing variables and the adjudged sentence severity, while model 4 is the fully-specified model. The predicted probability for the average offender receiving clemency at a typical base is .07 in model 1, and after including the case processing variables (model 4), the estimated probability is .05. In other words, on average, the likelihood of receiving clemency is rather small.

With the exception of the logged number of charges, the legal factors were not significant predictors of the likelihood of receiving clemency. After controlling for case processing factors in model 4, the logged number of charges significantly decreases the odds of receiving clemency by a factor of .68. The statutory seriousness, offense type, and discipline history are not statistically significant. There is some evidence that military-specific factors have an effect on the clemency decision. Although time in service does not have a significant relationship with clemency, in model 4, the combat career field variable has a marginally significant (p=.06) negative effect.[93] The effect of

[93] Combat career field reached statistical significance in the Heckman corrected model.

rank is unequivocal after controlling for the type of court-martial. In model 4, officers are .34 times less likely as enlisted to receive clemency.

There is some evidence of racial disparity in the likelihood of receiving clemency for black offenders, although the effect is only marginally significant (p=.07). In model 4, being black decreases offenders' odds of receiving clemency by a factor of .66 in comparison to white offenders. Regardless, as with the findings in the pretrial stage, there is no statistical evidence of other types of racial/ethnic disparities. Finally, the clemency models do not detect gender disparity in the clemency decision.[94]

The significant predictors for the clemency decision are primarily case processing factors. Adjudged sentences from general courts-martial are 1.80 times more likely to receive clemency than special court-martial cases. Jury sentences are 4.87 times more likely to be reduced in post-trial clemency than judge sentences, and conviction through a trial increases the odds of clemency by a factor of 2.98.[95] Thus, even though jury-sentenced cases on average result in less severe adjudged sentences and there is no evidence of a trial penalty effect, jury and trial cases are *more* likely to receive clemency. In contrast to the other outcomes of interest in this study, pretrial confinement does not have a significant effect on the likelihood of post-trial clemency even though it is a legal factor according to the Manual for Courts-Martial.

Finally, after controlling for individual-level case factors there is little empirical evidence of between-base variation in the likelihood of receiving post-trial clemency in

[94] This finding was further confirmed in alternative model specifications that examined the possibility of multicollinearity.

[95] A supplementary model with plea and sentencing authority interactions found that defendants convicted through a trial and sentenced by a jury are 6.75 times more likely to receive clemency compared to defendants in judge-sentenced guilty pleas. These findings are consistent regardless of whether adjudged sentence severity is included in the models.

the fully conditional model. The intraclass correlation for the unconditional model is approximately .05 in the propensity for receiving clemency and the variance is statistically significant (p=.026). Nevertheless, in the fully conditional model, the variance is no longer statistically significant and the range of predicted probabilities is small in magnitude. The probability for the average convicted offender of receiving clemency varies between .03 and .06 for about two-thirds of military bases (1 standard deviation).[96] In sum, the results from the clemency models suggest that after controlling for individual level case characteristics, the likelihood of receiving post-trial clemency is consistently small across bases.

[96] The variation in the predicted probabilities are obtained by adding and subtracting 1 standard deviation of the average random effect to the intercept and then calculating the probability.

Table 7.6: HGLM Models of Clemency for Special and General Courts-Martial, CY 2005-2008

	Model 1			Model 2			Model 3			Model 4		
Fixed Effects	*b*	*SE*	*Exp(b)*	*b*	*SE*	*Exp(b)*	*b*	*SE*	*Exp(b)*	*b*	*SE*	*Exp(b)*
Intercept	-2.60***	.09	.07	-2.60***	.10	.07	-2.67***	.10	.07	-3.09***	.12	.05
Number Charges (ln)	-.45***	.12	.64	-.44***	.12	.65	-.55***	.12	.58	-.38***	.13	.68
Statutory Seriousness	.03	.03	1.03	.03	.03	1.03	.00	.03	1.00	.03	.03	1.03
Person	.22	.26	1.24	.23	.26	1.26	-.06	.29	.94	-.30	.29	.73
Drugs	-.31	.23	.73	-.30	.23	.74	-.24	.22	.79	-.28	.23	.76
Society	.72*	.44	2.06	.73*	.44	2.08	.76*	.44	2.13	.77	.50	2.16
Military	.49	.33	1.64	.53	.34	1.69	.44	.34	1.55	.30	.38	1.35
Discipline History	.05	.15	1.05	.05	.15	1.06	.04	.14	1.04	.08	.15	1.09
Black	-.08	.21	.92	-.08	.21	.93	-.06	.22	.94	-.41*	.22	.66
Hispanic	.20	.29	1.22	.20	.29	1.23	.19	.29	1.21	-.03	.31	.97
Other Race	-.04	.37	.96	-.05	.37	.96	-.01	.37	.99	-.04	.37	.96
Female	.02	.30	1.02	.02	.30	1.02	.10	.29	1.10	.03	.32	1.03
Officer	-.85	.56	.43	-.86	.56	.42	-1.21**	.54	.30	-1.09**	.49	.34
Time in Service	.01	.02	1.01	.01	.02	1.01	.01	.02	1.01	.00	.02	1.00
Combat Career	-.06	.04	.94	-.06	.04	.94	-.06	.04	.95	-.08*	.04	.93
Pretrial Confine				-.14	.21	.87	-.25	.22	.78	.06	.21	1.06
General C-M							.99***	.19	2.69	.59***	.23	1.80
Jury										1.58***	.22	4.87
Trial										1.09***	.21	2.98
Adjudged Sent Sev										.01	.02	1.01
Y2006	.08	.21	1.08	.08	.21	1.09	.16	.21	1.18	.15	.21	1.16
Y2007	-.31	.22	.73	-.31	.22	.73	-.18	.22	.84	-.31	.24	.74
Y2008	.02	.20	1.02	.02	.20	1.02	.14	.20	1.15	-.29	.23	.75
Married	-.36	.24	.70	-.37	.24	.69	-.35	.24	.70	-.33	.26	.72
Dependents	.28	.29	1.32	.28	.29	1.32	.20	.29	1.23	.14	.30	1.15

*p<.10 **p<.05 ***p<.01

Table 7.6: HGLM Models of Clemency for Special and General Courts-Martial, CY 2005-2008 (Con't)

College	.36	.35	1.43	.36	.35	1.43	.29	.35	1.34	.18	.35	1.20
Civ Defense Attorney	.72**	.29	2.05	.72**	.29	2.05	.53*	.29	1.71	.09	.29	1.09
Random Effects	*Variance*	*SD*		*Variance*	*SD*		*Variance*	*SD*		*Variance*	*SD*	
Level 2: Base	.08*	.28		.08*	.28		.08*	.29		.09	.30	
N=2,473												

*p <.10 **p<.05 ***p<.01

Summary and Discussion of Sentencing and Clemency Results

Contemporary theoretical perspectives and prior research in civilian courts suggest that court-martial outcomes are the product of a series of decisions determined by both the military's formal legal structure and its organizational context (e.g. Dixon, 1995; Johnson, 2005; Kramer & Ulmer, 2009; Mears, 1998; Ulmer, 1997). The findings from the sentencing and clemency analyses confirm the importance of examining prior decisions in the court-process and the effects of legal and extra-legal factors within the military context.

As expected (H1) and consistent with prior research on civilian courts, the formal legal structure exerts considerable influence on the sentencing decision. The number of charges, statutory seriousness, and discipline history increased sentence severity; and person offense cases consistently received more severe sentences on average compared to property cases even with the inclusion of acquittals. However, most of the factors related to offense seriousness and disciplinary history were not significant predictors of the clemency decision even without controlling for prior decisions in the process, and only the number of charges had a significant negative relationship in the fully specified model.

The military-specific factors related to military performance and the combat warrior paradigm in military culture were less evident in sentencing and clemency compared to the pretrial stage decision findings. Contrary to Hypothesis 2, time in service did not have a significant mitigating effect on sentence severity or clemency. Although the coefficient for combat career field was in the predicted direction for sentence severity (H3), after controlling for case processing factors, career field no longer exerted a statistically significant effect on sentence severity. Additionally, in the clemency

decision, combat career field was marginally significant in the opposite predicted direction. In other words, instead of increasing the likelihood of receiving clemency, there is some evidence that the combat career field actually reduces the likelihood of receiving clemency. This finding undercuts the argument that the convening authority's clemency decision rewards the combat warrior.

In general, the findings for the effects of race and ethnicity are mixed. Congruent with other military research on race effects (H4b) and contrary to Hypothesis 4a, minorities did not receive more severe sentences than whites on average, and after controlling for case processing effects, no racial and ethnic disparities were detected in sentence severity. Additionally, there was some evidence of indirect race effects that mitigate sentence severity. Black offenders appear to receive less severe sentences on average compared to white offenders, but the disparity in sentence severity dissipates completely after controlling for court type selection, type of plea, and sentencing authority. This finding, however, did not extend to the clemency decision. Although no significant race differences were detected in some of the clemency models, a disadvantage for black offenders was suppressed by their mode of conviction and sentencing authority. After controlling for these case processing factors, the race effect was marginally significant and in support of Hypothesis 4a. In spite of some evidence of racial disparities for black offenders, Hypothesis 4b garnered empirical support for the lack of disparities in the military context for Hispanics and other minorities in both sentencing and clemency decisions.

In contrast to the findings for race, the results regarding gender disparity in the sentencing and clemency decisions are more definitive (H5). There was no statistical

evidence of leniency for females in any of the sentencing and clemency models with or without the court-type selection. Alternative model specifications were also examined to explore the possibility of multi-collinearity between gender and other military-specific factors, yet, never detected a gender effect. Thus, the prediction of overall leniency for females was unsupported in the sentencing and clemency data.

Case processing factors were consistently strong predictors of adjudged sentence severity and were among the few significant predictors of the likelihood of receiving clemency. Pretrial confinement, court type, sentencing authority, and type of plea significantly influence sentence severity, and all but pretrial trial confinement have significant effects on the odds of receiving clemency. However, the civilian court-based theoretical predictions for these effects were generally unsupported in the sentencing decision. As predicted with the rationale derived from uncertainty avoidance/attribution and focal concerns perspectives (H7), receiving pretrial confinement increases offenders' adjudged sentence severity, while pretrial confinement had no effect on the clemency decision. Nonetheless, consistent with a recent military study, judge sentences were more severe, on average, than jury sentences (H9), and defendants' were not penalized for going to trial (H8). Contrary to the theoretical predictions of Hypotheses 10 and 11, the data analysis showed that convening authorities were *more* likely to grant clemency in jury and trial cases. These findings for the clemency decision also contradict Burchett's (1983) results from the sample of AWOL cases during the Vietnam era and further demonstrated the limitations of prior military research.

There is some statistical evidence of officer-enlisted disparities in both sentencing and clemency. However, based on the analyses and discussions with judge advocates,

these disparities are related to a case processing norm in the court type selection that is driven by the statutory punishment limitations for officers. As predicted by Hypothesis 6, officers receive less severe sentences on average compared to enlisted, but only after controlling for the type of court-martial. Moreover, contrary to expectations, officers were less likely to receive clemency than enlisted after taking into account the type of court. Thus, there was no empirical support for officer leniency in the clemency decision on average as suggested by some critics of the clemency process.

Finally, this exploration into inter-base and inter-judge variation in sentencing and clemency suggests the need for future research on the social organization characteristics of the courtroom workgroup in the military context. Consistent with prior civilian court research, two-level court community models detected variation in sentence severity that is attributable to between-base differences; however, the magnitude of the variation was quite small (less than 2 percent). Also contrary to court community theoretical predictions (H12), there was little evidence of between-base differences in the likelihood of receiving clemency after controlling for individual-case factors. These findings are consistent with the notion that the frequent legal personnel assignments and the commander's role in the court-martial process lead to high instability in the courtroom workgroup which inhibits the development of distinctive local legal cultures. Moreover, in the judge-sentenced cases, the inter-judge variation in average sentence severity was notable and largely unexplained by case compositional differences. This finding suggests that the legal structure's broad discretion in sentencing may permit the influence of military judges' different beliefs and attitudes despite the military's centralized management and training.

Chapter 8: Conclusion

> *Reform to the military justice system must be evidence-based and grounded in data*.—Senator Clair McCaskill (McCaskill, 2014).

The military's justice system has been reformed several times over the last 60 years to more closely resemble civilian criminal justice systems in America. Nevertheless, recent court-martial decisions have once again sparked public debate about the court-martial's remaining distinctive features and spurred speculation of systemic bias. The military's court system lacks many of the sentencing reforms that constrain judicial decision-making, is one of the few existing jury sentencing jurisdictions, and offers administrative alternatives to the criminal court. As part of the military's organizational context, its criminal code serves an organizational purpose in addition to the broader goals of the criminal justice system and is influenced by the military's organizational culture. A substantial amount of research exists on the determinants of civilian court decisions; nonetheless, the military research is sparse, suffers from methodological limitations, and often relies on data prior to significant UCMJ reforms. Given the lack of research, it is also not surprising that theoretical explanations of criminal court decision-making have focused entirely on civilian court contexts. In short, much is unknown about the criminal court process in the modern military.

Summary of Research Findings

The present research examined the effects of legal, military-specific, defendant social characteristics, and case processing factors on several court-martial decisions with the goal of increasing our overall knowledge of the modern court-martial process.

Contemporary theoretical views of civilian courts suggest that the determinants of court-martial decisions should reflect the unique aspects of the military's legal structure, the local military court community's context, and the military's organizational goals and culture.

To conduct this broad investigation into the effects of legal and extra-legal factors, the study analyzed contemporary Air Force court-martial and personnel data and overcame a number of the methodological limitations in prior military research. The study used a sentence severity measure that considers both the military-specific punitive discharge and confinement length to provide a more accurate depiction of overall sentence severity. The statistical techniques were multivariate and multilevel, and the models included variables pertaining to an offender's military record, social characteristics, disciplinary history, and offense severity. The analysis began by investigating the determinants of two pretrial stage decision outcomes, pretrial confinement and court-martial type, and then proceeded to the sentencing and post-trial clemency stages. The pretrial confinement and sentencing decision outcomes are somewhat analogous to civilian courts, while the court-martial referral and clemency stages are particular to the military's court process.

In line with civilian court research and the focal concerns perspective, legal factors pertaining to offense seriousness and discipline history were strong predictors of pretrial confinement and sentence severity. However, for the decision outcomes more specific to the military context, the effects of legal factors often did not conform to findings in civilian court studies and theoretical expectations. Although some of the offense seriousness factors influenced the court-type decision, the findings for discipline

history did not support the hypothesized effect. Discipline history was not a significant factor in the general court-martial decision, and the effects were significant in the opposite direction for the summary court. Even though the latter may be due to a data limitation, the null findings for the general court-martial decision suggests that a military offender's discipline history may be less important in the court-martial process in comparison to an offender's criminal record in civilian court decisions. Additionally, most of the legal factors were not significant in the likelihood of receiving clemency. Thus, in general, the empirical evidence did not support the importance of the culpability and danger to society focal concerns in the clemency determination.

Furthermore, the effects of the legal variables in the pretrial decisions indicated some military-specific interpretations of blameworthiness and offender dangerousness and the priorities of the focal concerns. The strong effects of AWOL/desertion compared to all other offense types suggests that flight risk is a driving factor more so than dangerousness in the military's pretrial confinement decision. Additionally, drug offenses were treated more seriously than property offenses in the summary court decision. These relationships are congruent with the military's emphasis on good order and discipline in furtherance of the military's organizational goals.

The analyses also found some evidence of a traditional military culture influence in the court-martial process. Offenders with some of the "good soldier" indicators—longer time in service and combat career status—were less likely to receive pretrial confinement and more likely to be referred to less severe types of court-martial, although the effects of these factors were isolated to one of the pretrial decision outcomes. The direct effects of these military-specific legal and extra-legal factors were not supported in

the sentencing and clemency analyses. However, there was some evidence that the combat warrior paradigm has an indirect effect in sentencing through the court-martial type decision. That is, offenders in more combat-oriented positions received less severe punishments on average because they were referred to a less severe type of court-martial. Also consistent with the traditional model of military culture, black offenders were more likely to receive pretrial confinement than whites, officers received less severe sentences than enlisted on average, and females were more likely than males to be referred to a special court-martial compared to a general court-martial. Although only marginally statistically significant, black offenders were also less likely to receive clemency than whites. These race effects are particularly interesting given the absence of racial disparity in prior military justice research.

Nevertheless, disparities predicted by a traditional military culture influence were not consistently detected in all of the court-martial decisions. There was no evidence of extra-legal disparities for Hispanics and other racial minorities in the court-martial process, and with the exception of the court-type outcome, gender disparities were notably absent in the other decisions. These findings are inconsistent with a substantial number of studies in the civilian court literature finding disadvantages for Hispanics and leniency for females in the pretrial detention/bail decisions and sentencing. Finally, contrary to public perceptions generated from recent reports of clemency in sexual assault cases, the probability of a military defendant receiving clemency was quite small and the officers in this sample of court-martial cases were actually less likely to receive clemency compared to enlisted. A possible explanation for the mixed findings of defendant social characteristic effects may be the presence of both the traditional and egalitarian models of

military culture as purported by Karen Dunivin (1994). Although the military social context has evolved a great deal since the UCMJ was enacted in 1950, there is still some evidence that the court-martial process is influenced by an organizational culture that embraces racial and gender stereotypes, rewards the combat warrior, and elevates the social status of officers.

Another theme that emerged from the analyses was the substantial influence of case processing factors in court-martial decisions. As expected pretrial confinement had a positive effect on the severity of the court type and sentence. This finding, however, undercuts the argument frequently espoused in civilian court studies for the aggravating effects of pretrial detention in sentencing. Many of the collateral consequences associated with civilian pretrial detention are typically absent in military pretrial confinement. Military offenders continue to be paid and their pretrial confinement conditions are less harsh compared to civilian offenders in many local county jails. Moreover, discussions with former military defense counsel confirmed that several do not believe that pretrial confinement interfered with their abilities to defend their clients. In fact, one former military defense attorney suggested that pretrial confinement actually made his job easier because it prevented his clients from engaging in further misconduct while their cases were pending. Given the differences between military and civilian pretrial detention conditions, the aggravating effects of pretrial confinement in sentencing are more likely based on the theoretical rationales of attribution theory/focal concerns. Specifically, the imposition of pretrial confinement increases assessments of culpability and dangerousness in the punishment decisions. Consistent with the null findings for the legal

variables in the clemency decision, pretrial confinement was also one of the few prior case processing decisions that did not also have an effect on the clemency decision.

The effects of the court-martial type referral decision also appeared to reverberate in the sentencing and clemency decisions. This is not surprising for sentencing because of the statutory maximum punishment limitations for special courts-martial. Nevertheless, the court type also had a direct effect on the clemency outcome. The analysis showed that general courts-martial were more likely to receive clemency than special court-martial cases even after controlling for the adjudged sentence severity, offense seriousness, and discipline history.

Additionally, other case processing effects were contrary to civilian court findings and their usual theoretical explanations. Not only were military offenders not penalized for asserting their rights to a trial, the inclusion of acquittals resulted in significantly less severe sentences for trial cases as opposed to guilty pleas. Civilian court-based predictions also suggested that judge sentences would be less severe on average than jury sentences to assist with preserving a trial penalty and encouraging jury waivers, however, there was no support for this notion in these military findings. The divergence in jury and judge sentences highlights the different meanings of punishment severity possessed by experienced legal professionals and court-martial members. These empirical findings are consistent with perceptions expressed in legal articles written by military judges and proponents of judge sentencing who frequently argue that military juries impose sentences that are inappropriate and too lenient (see Ehlenbeck, 2008; Grove, 1988; Lovejoy, 1994; U.S. Department of Defense, 1984).

What was particularly surprising is the increased likelihood of receiving clemency for trial and jury sentences. Based on prior civilian court research and the focal concerns perspective, a convening authority should have been less likely to grant clemency in these types of cases. In civilian courts, aggravating facts are more likely to be exposed in a trial as opposed to a guilty plea which increases culpability and dangerousness assessments related to the likelihood of recidivating. Moreover, judge sentencing minimizes uncertainty in the sentencing outcomes and reduces the use of resources associated with jury cases. For these theoretical reasons, a convening authority should have been less likely to grant clemency for trial and jury cases. As with the unexpected null findings for most of the legal factors and pretrial confinement, the findings for trial and jury effects provide additional evidence that something about the military's court process leads to results that are inconsistent with theoretical expectations developed from prior civilian court research.

Discussions with judge advocates offer some possible explanations for these findings. First, the military guilty plea inquiry is much more extensive than in civilian courts. The military judge engages in a *Care* inquiry with the accused that ultimately elicits aggravating facts and circumstances surrounding the offenses. One attorney suggested that fewer "bad facts" or admissions of guilt come from the accused in a trial compared to a guilty plea which leads to lower assessments of culpability and dangerousness. In fact, military defense counsel often use the phrase "litigate to mitigate" to describe the rationale for selecting a trial as opposed to guilty plea in order to obtain a more favorable punishment outcome for their clients. Second, jury punishments are more likely to be perceived by both the staff judge advocate and convening authority

as inappropriate because juries do not have the same level of information and experience in the military justice system as military judges. Third, organizational efficiency is not a practical constraint in the military's court process because their criminal caseloads are substantially smaller compared to civilian courts. These rationales would also explain the null findings for the plea and sentencing authority effects. Regardless, the contradictory empirical findings suggest that prior civilian court research findings and their current theoretical explanations are inadequate for military courts and further research is needed.

The examination of court type and officer-enlisted disparities in the process provided empirical evidence of a case processing norm in the military context. Even though officers may be referred to a special court, all 126 officer cases were referred to a general court-martial regardless of offense type, the number of charges, and the statutory maximum punishment for the underlying offense. Discussions with judge advocates suggest this case processing norm is driven by the unavailability of a punitive discharge for officers in a special court-martial. Only around 60 percent of the officer cases resulted in a punitive discharge, and officers received less severe sentences on average compared to the enlisted members in a general court-martial even after controlling for offense seriousness variables. Thus, the data indicate that for the officer cases that proceeded through the court-martial process, the prosecuting bases attempted to subvert the disparate treatment for officers that is perpetuated by the UCMJ in the court-type decision and in clemency.

Finally, this study's exploration into the presence of inter-court community and inter-judge variation proved fruitful and suggests further investigation is needed into the impact of the social organization characteristics in court communities. In a study of plea

bargaining in the Army, Keveles (1984) contended the higher proportion of trials in the military compared to civilian courts is the product of the social organization characteristics associated with the military environment. More specifically, military court communities have difficulty developing context-specific punishment norms because of the instability in the workgroup, the influence of rank in the process, and the role of the commander.

Although between-base variation in average sentence severity was statistically significant, consistent with Keveles' assertion, the magnitude was small compared to other findings in the civilian court contextual literature. Moreover, an examination of the judge-sentenced cases revealed notable inter-judge variation in average sentence severity which suggests the possible influence of individual beliefs and attitudes. In fact, supplementary analyses confirmed inter-judge variation even after taking into account the prosecuting base. Additionally, there was very little variation across bases in the propensity to grant clemency after controlling for individual-level factors. Nevertheless, the pretrial decision outcomes revealed meaningful inter-base variation even after controlling for individual-level case differences. Thus, even if strong punishment norms within a particular base may not exist, there is some evidence of base-specific influences for decisions earlier in the process. These findings in the pretrial stage decisions contradict the assertion that the instability in military courtroom workgroups hinders the development of case processing norms.

Study Limitations, Future Research, and Policy Implications

As with all empirical research, the present study had several limitations. First, the data only included Air Force court-martial cases; thus, the findings may not be generalizable to the Army and Navy/Marines. Even though all of the branches of service use the same criminal code and court-martial procedures, each of the services engage in different missions and may develop distinctive service cultures and case processing norms. Second, other variables related to case processing and sentencing decisions were not available for analysis. Evidence strength measures are arguably relevant to case processing decisions such as pretrial confinement and plea bargaining. Moreover, strength of the evidence may impact juries' sentencing decisions through compromise verdicts.[97] Regardless, prior sentencing research often suffers from these data limitations because of the difficulty in obtaining these types of measures.

Civilian court research also suggests that victim characteristics affect criminal court outcomes (e.g. Kingsnorth et al., 1999; Paternoster, 1984; Spohn & Spears, 1996). Unfortunately, the data do not contain information regarding victim characteristics such as race, gender, military status, victim injuries, and the victim-offender relationship. Regardless, these types of variables are typically only relevant for crimes with a victim (e.g. person and property crimes), and as with evidence strength measures, most sentencing studies do not include them (Zatz, 2000). Third, charge reductions could not be controlled in the analyses because the dataset did not include the original charges that were withdrawn or dismissed as part of a plea agreement (Piehl & Bushway, 2007).

[97] Some studies with judge sentencing have also found a significant relationship between strength of the evidence and sentence severity (e.g. LaFree, 1985).

However, based on discussions with Air Force judge advocates, charge bargaining in the Air Force is not the norm in plea bargaining practices.[98]

The missing information for pretrial agreement proved to be a challenge for this study. Pretrial agreements affect not only the final sentence an offender receives, but also other case processing factors. Although the multiple imputation methodology minimized bias in the parameter estimates, the lack of information regarding the specific terms of the agreements prevented modeling of these other pretrial decision outcomes.

One of the most noteworthy data limitations for the study was the substantial amount of missing information for cases diverted from the court-martial process. As a result of the missing data, the sample available for analyses only included cases that were referred and ultimately disposed in a court-martial.[99] Even though the results do not support leniency for females and officers in several decision outcomes, it is possible that cases for females and officers were removed from the court-martial process through administrative alternatives. In fact, many critics argue that the officer-enlisted disparities in the military justice system are in the decision to prosecute (e.g. Gaudiano, 2005; McGonigle, 1992; Montgomery, 2008; Smith, 2005). Of the 474 cases that were removed from the court-martial process through a dismissal or administrative discharge, officers were over-represented (9%), although females were not (11%). The lack of data on prosecutorial decisions is not specific to the military context. Most of the sentencing research in civilian courts possess this type of data limitation; thus research on

[98] Sentence bargaining is typically used rather than withdrawing or dismissing the most severe offenses charged. One of the reasons for the lack of charge bargaining may be because the court type is not statutorily determined by the charged offense.

[99] Over the last several years, I made attempts to obtain comprehensive data on closed investigations, but the lack of coordination among the various information gatekeepers made it impossible to construct a usable dataset without personal identifiers. Personal identifiers are withheld in FOIA responses to protect the privacy interests of the investigation subjects.

prosecutorial discretion continues to be an area ripe for future study for both military and civilian courts.

A significant limitation of this study was its reliance on official data provided through the Freedom of Information Act (FOIA). According to a retired judge advocate, "[T]he opaqueness of the military justice system itself is one very important aspect of the wider institutional failure…[R]ather than promoting transparency in the military justice context, FOIA actually works to constrain it" (Bracknell, 2014). The dataset utilized in this investigation took years to construct and suffered from the numerous data limitations previously discussed because of the FOIA process and uncooperative information gatekeepers. Even though this study found significant inter-judge variation in sentence severity, future investigations into the source of this variation may be hindered by the FOIA process.

Particularly interesting is how military crime and the military's response remain hidden from public view in contrast to civilian courts (e.g. Schogol, 2008).[100] Court filings are often withheld in the FOIA process until the case is disposed, and even though judge advocates are critical actors in the court-martial process, their advice and recommendations to commanders are hidden under the cloak of attorney-client privilege.[101] Civilian court theoretical perspectives suggest that the advice from judge advocates should reflect the cause-effect relationships established from past case dispositions. In ancillary analysis beyond the scope of this project, there was a relatively high proportion of acquittals for adult sex offense cases compared to other types of

[100] According to some of the military lawyers I spoke with, the services rejected participation in the federal courts' PACER system a few years ago.
[101] For more detailed discussions on this issue, see various commentary written by judge advocates at (http://jurist.org/hotline/2014/09/robert-bracknell-transparency-court.php; http://www.caaflog.com/category/military-justice-reform/).

violent offenses. Are acquittals in these types of cases influencing judge advocates' legal advice which then leads to convening authorities' failure to prosecute sexual assault cases? Are the outcomes of sexual assault cases due to the inexperience of prosecutors or are they a product of military culture? We simply have no way of knowing the answer to these types of questions with official data released through the FOIA. Thus, despite this study's limitations, if anything it demonstrates the need for more transparency and research with data beyond what can be obtained through the FOIA process.

Additionally, the contradictory findings to civilian court theoretical rationales suggest the need for qualitative research in the military context. The system may be officially controlled by commanders, but judge advocates are at the heart of a court process embedded within the military environment. Although not a part of the current study, I frequently relied on discussions with former and current judge advocates over the last seven years to develop some of the variables and make sense of several findings. These judge advocates were experienced military justice attorneys who had performed a variety of roles in the military justice process. They were not hand-picked by senior officials for internal research focus groups, and their statements were not vetted by public affairs to perpetuate some pre-approved organizational message. Some of the JAGs had more of a defense orientation while others were entrenched in prosecution. What they all had in common was an interest in expressing their personal views about the court-martial process. So while Congressional inquiries continue to rely on the testimony of senior officials with political agendas, the current study indicates that future investigations

would benefit greatly from externally conducted qualitative research to achieve a deeper understanding of the court-martial process and assist with theoretical development. [102]

The current study initially approached this investigation with an extension of contemporary perspectives on courts and sentencing to the military context with concepts in the military literature. The study findings, however, illustrate some of the weaknesses of current theoretical development. In general, criminal justice research continues to struggle with theoretical explanations for court decision-making as a social phenomenon. Although contemporary perspectives of the court process have been inspired by theoretical development in organizational studies, the micro and macro social processes described in focal concerns and the court community perspectives are not theoretically linked with an underlying decision-making mechanism. Ethnographic work supports the idea that local court cultures develop through social interactions which in turn influence court outcomes, and some courts have more firmly engrained norms than others. However, the current theoretical perspectives of the court process fall short of explaining how court community cultures develop and influence individual decision-making.

This study's inconsistent findings with typical theoretical predictions suggest the need for a deeper explanation of the underlying mechanism of the social process. How do courts develop specific meanings of their legal structure and arrive at their definitions of an appropriate punishment? What particular social organization characteristics affect this process and ultimately the punishments offenders receive? By adopting an organization

[102]As an advocate for preserving the current court-martial process, The Judge Advocate General of the Air Force testified, "The evidence shows that Air Force commanders and their SJAs agree on the appropriate disposition in over 99% of cases where the SJA recommends trial by court-martial" (Harding, 2013). Nevertheless, the source of this evidence remains a mystery given the lack of public access to pre-preferral and referral advice; other statistics provided in his testimony are inconsistent with the FOIA data released for this study; and many of the judge advocates I spoke to offer contradictory opinions. Finally, even two of the Sexual Assault Response Panel members discounted the value of this kind of testimony (see Hillman & Bryant, 2014, p. 173).

theoretical paradigm of the court process, mechanisms described in organizational theories such as Karl Weick's *sensemaking* process could provide the necessary theoretical link between the focal concerns and court community perspectives. Thus, future courts and sentencing studies—civilian and military—should focus on further theoretical development to explain this social phenomenon.

Finally, because of the lack of research in military courts, this study used prior civilian court research to guide the investigation and to offer a frame of reference for this study's findings. Nonetheless, whether findings from military court research can translate to public policies for civilian courts is debatable. In addition to the unique characteristics of the military's court process, the military population differs from civilian court offender populations. The military is predominately male, has a smaller proportion of Hispanics, is more educated and younger, and has a very small proportion of members with any criminal history (U.S. Department of Defense, 2007).[103] Moreover, in contrast to the civilian criminal justice system, the military has the ability to permanently remove members of its "society" after they engage in criminal behavior. Therefore, direct comparisons between civilian and military court outcomes should be performed with caution.

Conclusion

This study illustrates the importance of studying military courts to inform the current public policy debate on UCMJ reforms, future military research, and theoretical

[103] According to the 2005 Department of Defense report on Social Representation in the U.S. Military Service, females account for 15 percent of the military, 99 percent of all recruits have a high school diploma or equivalent, 47 percent of the enlisted force is between the ages of 17 and 24, and although African Americans are representative of the civilian population (13%), Hispanics are underrepresented (10%). In 2004, waivers were granted for felony convictions by the respective services as follows: Air Force 0.011%; Army 5.7%, Navy 0.1%, and Marines 0.6% (Defense Data Manpower Center, 2006).

development for criminal court processes. Politicians call for evidence-based reforms, congressional panels lament about the lack of military justice research, and military justice bloggers continue to advocate for more transparency in the system.[104] Nevertheless, without the benefit of research, the Department of Defense's Military Justice Review Group is currently crafting recommendations for significant UCMJ reforms that may be ineffective or have unintended consequences. For example, the abolishment of jury sentencing is a common reform proposal that is often premised on an argument regarding the lack of uniformity in jury sentences. Given this study's findings of significant inter-judge disparity and the differences in jury and judge sentence severity, this reform would have little impact on the disparity in judge-sentenced cases and could increase the overall severity of court-martial sentences and the costs associated with them. Moreover, while Congress eliminates the good soldier defense in the findings phase of a trial, the present study suggests that an offender's military record affects earlier decisions in the court-martial process. As public debate continues to center on the military's handling of sexual assault cases, research is lacking on the factors influencing the military's prosecutorial decisions in those types of cases and prosecutorial discretion remains hidden from public view. Unfortunately, Congress is doing very little to increase transparency in the system and to facilitate externally conducted research that could inform these types of policy decisions. Although the present study hardly addresses all of these issues, it at least offers some empirical evidence to inform the conversation.

[104] See http://www.caaflog.com/2014/09/25/continuing-the-call-for-greater-transparency; http://jurist.org/hotline/2014/09/robert-bracknell-transparency-court.php.

Appendix A: Sentence Severity Scale

Code	Adjudged Sentence
0	Acquittal/No Punishment/Reprimand
1	Financial/Reduction in Rank
2	Hard Labor/Restriction to Base
3	Confinement 1-2 months
4	Confinement 3-5 months
6	Confinement 6-8 months
7	Confinement 9-12 months
8	Discharge *or* Confinement 13-18 months
9	Discharge & Confinement 1-2 months
10	Discharge & Confinement 3-5 months
11	Discharge & Confinement 6-8 months
12	Discharge & Confinement 9-12 months
13	Discharge & Confinement 13-18 months
14	Discharge & Confinement 19-24 months
15	Discharge & Confinement 25-36 months
17	Discharge & Confinement 37-60 months
21	Discharge & Confinement 61-120 months
30	Discharge & Confinement >120 months

Appendix B: Correlation Matrices

Pretrial Decision Correlation Matrix

	PTC	SCM	SPCM	GCM	Counts	StatSer	Person	Prop	Drugs	Society	MilOth	AWOL	DiscHist
Pretrial Confinement	1.00												
Summary C-M	-.04*	1.00											
Special C-M	-.07**	-.44**	1.00										
General C-M	.11**	-.30**	-.72**	1.00									
Counts	.25**	-.13**	-.20**	.31**	1.00								
Statutory Seriousness	.00	-.36**	-.13**	.41**	.22**	1.00							
Person	.04*	-.06**	-.31**	.38**	.08**	.32**	1.00						
Property	-.04*	.02	.01	-.02	.24**	-.00	-.25**	1.00					
Drugs	-.05**	-.15**	.32**	-.23**	-.25**	.05**	-.50**	-.46**	1.00				
Society	-.04*	.18**	-.05**	-.08**	-.05**	-.28**	-.10**	-.09**	-.18**	1.00			
Military Other	.01	.17**	-.09**	-.04*	.08**	-.28**	-.14**	-.13**	-.26**	-.05**	1.00		
AWOL	.23**	.10**	-.03	-.05**	-.10**	-.23**	-.07**	-.07**	-.13**	-.03	-.04*	1.00	
Discipline History	.09**	.08**	-.03	-.03	.06**	-.06**	-.03	.03	-.01	.04*	.02	-.02	1.00
White	-.04*	-.04*	.01	.02	-.04*	.05**	-.02	-.08**	.11**	-.02	-.04*	-.01	-.05**
Hispanic	-.01	-.01	-.01	.01	-.01	.00	.04*	-.00	-.04*	.02	-.01	.02	.01
Black	.06**	.05**	-.01	-.02	.06**	-.06**	.01	.09**	-.11**	.01	.06**	.01	.08**
Race other	-.02	.00	.01	-.02	-.03	-.00	-.01	-.00	.02	.00	-.02	-.01	-.04*
Male	.01	.00	-.08**	.08**	.04*	.06**	.15**	-.04*	-.09**	.04*	-.01	-.04*	.03
Female	-.01	-.00	.08**	-.08**	-.04*	-.06**	-.15**	.04*	.09**	-.04*	.01	.04*	-.03
Jr Enlisted	.08**	.17**	.12**	-.26**	-.08**	.00	-.12**	-.00	.17**	-.02	-.15**	.05**	.13**
Officer	-.02	-.09**	-.20**	.28**	.12**	.03	.09**	-.04*	-.12**	-.01	.17**	-.03	-.10**
Sr Enlisted (NCO)	-.08**	-.14**	-.03	.14	.03	-.02	.09**	.02	-.13**	.03	.08**	-.04*	-.09**
Time in Service	-.10**	-.15**	-.13**	.25**	.08**	-.01	.13**	.02	-.19**	.05**	.12**	-.05**	-.03
Combat Career	.03	.07**	.02	-.08**	-.01	.01	.01	-.00	.00	.02	-.03	-.01	.03
Pretrial Agreement	.11**	.12**	.15**	-.21**	.12**	-.06**	-.18**	.09**	.11**	-.03	-.03	.02	.03

*p<.05, **p<.01

Pretrial Decision Correlation Matrix (Con't)

	White	Hispanic	Black	OtherRace	Male	Female	JrEnlist	Officer	NCO	TIS	Career	PTA
Pretrial Confinement												
Summary C-M												
Special C-M												
General C-M												
Counts												
Statutory Seriousness												
Person												
Property												
Drugs												
Society												
Military Other												
AWOL												
Discipline History												
White	1.00											
Hispanic	-.34**	1.00										
Black	-.77**	-.12**	1.00									
Other Race	-.34**	-.05**	-.12**	1.00								
Male	.08**	.00	-.08**	-.02	1.00							
Female	-.08**	.00	.08**	.02	-1.00	1.00						
Jr Enlisted	.08**	-.03	-.06**	-.02	-.01	.01	1.00					
Officer	.03	-.00	-.04*	.03	.02	-.02	-.36**	1.00				
NCO	-.09**	.03	.08**	.09	.01	-.01	-.89**	-.10**	1.00			
Time in Service	-.11**	.04*	.10**	.10	.03	-.03	-.74**	.20**	.70**	1.00		
Combat Career	.08**	-.01	-.06**	-.04*	.12**	-.12**	.15**	-.10**	-.12**	-.14**	1.00	
Pretrial Agreement	.06**	-.03	-.05*	-.02	.02	-.02	.16**	-.10**	-.13**	-.16**	.01	1.00

*p<.05, **p<.01

Sentencing Correlation Matrix

	SentSev	PTR	SPCM	GCM	Counts	StatSer	Person	Prop	Drugs	Soc	Mil	DiscHist	White	Hisp
Sentence Severe	1.00													
Pretrial Confine	.26**	1.00												
Special C-M	-.34**	-.11**	1.00											
General C-M	.34**	.11**	-1.00	1.00										
Counts	.41**	.27**	-.26**	.26**	1.00									
Statutory Serious	.34**	.00	-.29**	.29**	.20**	1.00								
Person	.19**	.01	-.38**	.38**	.00	.31**	1.00							
Property	.04*	-.02	.01	-.01	.28	-.03	-.24**	1.00						
Drugs	-.10**	-.04*	.31**	-.31**	-.22**	.02	-.52**	-.48**	1.00					
Society	-.10**	-.10	.05*	-.05*	-.02	-.23**	-.08**	-.08**	-.17**	1.00				
Military	-.11**	.10**	-.05*	.05*	.01	-.33**	-.15**	-.14**	-.30**	-.05*	1.00			
Discipline Hist	.07**	.10**	.01	-.01	.06**	-.02	-.02	.05**	.00	.00	-.06**	1.00		
White	.05*	-.03	-.01	.01	-.02	.07**	-.02	-.09**	.11**	-.04*	-.03	-.06**	1.00	
Hispanic	-.03	-.02	-.01	.01	-.03	-.01	.04*	-.00	-.04*	.01	.01	-.00	-.35**	1.00
Black	-.03	.06**	.01	-.01	.06**	-.08**	-.01	.11**	-.11**	.04*	.04	.09**	-.76**	-.12**
Other Race	-.01	-.04	.02	-.02	-.02	.00	.01	-.00	.01	-.01	-.02	-.05*	-.35**	-.06**
Male	.05**	.01	-.10**	.10**	.05*	.09**	.14**	-.03	-.08**	.00	-.02	.03	.07**	-.00
Female	-.05**	-.01	.10**	-.10**	-.05*	-.09**	-.14**	.03	.08**	.00	.02	-.03	-.07**	.00
Jr Enlisted	.02	.09**	.23**	-.23**	-.03	.10**	-.12**	.00	.22**	-.05**	-.21**	.12**	.08**	-.03
Officer	.00	-.02	-.27**	.27**	.08**	-.04*	.06**	-.05*	-.14**	-.00	.24**	-.10**	.02	-.00
NCO	-.02	-.09**	-.11**	.11**	-.01	-.09**	.10**	.02	-.16**	.06**	.10**	-.08**	-.10**	.04
Time in Service	-.03	-.11**	-.23**	.23**	.04	-.10**	.13**	.02	-.24**	.08**	.17**	-.02	-.12**	.04
Combat Career	-.02	.05**	.07**	-.07**	.01	.05**	.02	.00	.02	-.00	-.06**	.01	.08**	-.01
Pretrial Agrnt	.28**	.11**	.20**	-.20**	.19**	.03	-.16**	.09**	.11**	-.04	-.07**	.03	.07**	-.04
Guilty Plea	-.03	-.01	.00	-.00	-.07**	-.05*	-.13**	-.02	.11**	.03	.00	-.04*	.05**	-.03
Trial	-.27**	-.12**	-.20**	.20**	-.15**	.00	.26**	-.08**	-.19**	.02	.07**	.00	-.11**	.07**
Jury	-.29**	-.12**	-.09**	.09**	-.15**	-.03	.05**	-.05*	-.01	.00	-.00	-.05**	-.05*	.03
Judge	.29**	.12**	.09**	-.09**	.15**	.03	-.05**	.05*	.01	.00	.00	.05**	.05*	.03

*p<.05, **p<.01

Sentencing Correlation Matrix (Con't)

	Black	OthRace	Male	Female	JrEnlist	Officer	NCO	TIS	Career	PTA	GP	Trial	Jury	Judge
Sentence Severity														
Pretrial Confine														
Special C-M														
General C-M														
Counts														
Statutory Serious														
Person														
Property														
Drugs														
Society														
Military														
Discipline History														
White														
Hispanic														
Black	1.00													
Other Race	-.12**	1.00												
Male	-.07**	-.02	1.00											
Female	.07**	.02	-1.00	1.00										
Jr Enlisted	-.07**	-.02	-.03	.03	1.00									
Officer	-.04*	.03	.02	-.02	-.37**	1.00								
NCO	.09**	.01	.02	-.02	-.88**	-.11**	1.00							
Time in Service	.11**	.01	.04*	-.04*	-.74**	.20**	.69**	1.00						
Combat Career	-.06**	-.05**	.12**	-.12**	.16**	-.10**	-.12**	-.14**	1.00					
Pretrial Agrnt	-.05*	-.02	.03	-.03	.16**	-.10**	-.12**	-.15**	.01	1.00				
Guilty Plea	-.06**	.02	-.08**	.08**	.01	-.04*	.01	-.04*	-.00	-.46**	1.00			
Trial	.09**	-.01	.03	-.03	-.16**	.12**	.12**	.19**	-.01	-.71**	-.30**	1.00		
Jury	.03	.02	-.02	.02	-.12**	.04*	.11**	.12**	-.01	-.62**	.13**	.50**	1.00	
Judge	-.03	-.02	.02	-.02	.12**	-.04*	-.11	-.12**	.01	.62**	-.13**	-.50**	-1.00	1.00

*p<.05, **p<.01

Clemency Correlation Matrix

	Clem	SentSev	PTR	SPCM	GCM	Counts	StatSer	Person	Prop	Drugs	Soc	Mil	DiscHist
Clemency	1.00												
Sentence Severity	-.02	1.00											
Pretrial Confine	-.03	.24**	1.00										
Special C-M	-.12**	-.45**	-.12**	1.00									
General C-M	.12**	.45**	.12**	-1.00	1.00								
Counts	-.05*	.39**	.27**	-.28**	.28**	1.00							
Statutory Serious	.01	.46**	.01	-.26**	.26**	.23**	1.00						
Person	.05*	.33**	.03	-.35**	.35**	.02	.25**	1.00					
Property	-.00	.00	-.03	.01	-.01	.27**	-.00	-23**	1.00				
Drugs	-.06**	-.14**	-.05*	.28**	-.28**	-.22**	.07**	-.49**	-.50**	1.00			
Society	.03	-.12**	-.01	.04*	-.04*	-.02	-.23**	-.08**	-.08**	-.17**	1.00		
Military	.03	-.15**	.09**	-.06**	.06**	-.00	-.34**	-.14**	-.15**	-.31**	-.05*	1.00	
Discipline History	-.01	.07**	.10**	.01	-.01	.07**	-.03	-.01	.05*	.00	.01	-.06**	1.00
White	.02	.04	-.03	-.02	.02	-.03	.08**	-.01	-.10**	.12**	-.05*	-.03	-.05*
Hispanic	.03	-.01	-.01	-.01	.01	-.03	-.01	.02	.01	-.04*	.02	.02	.00
Black	-.04	-.03	.06**	.01	-.01	.06**	-.08**	-.00	.11**	-.12**	.05*	.03	.07**
Other Race	-.01	-.02	-.04	.02	-.02	-.02	-.00	.00	.00	.01	-.00	-.02	-.05*
Male	.02	.07**	.02	-.10**	.10**	.05**	.07**	.13**	-.02	-.08**	-.00	-.01	.03
Female	-.02	-.07**	-.02	.10**	-.10**	-.05**	-.07**	-.13**	.02	.08**	.00	.01	-.03
Jr Enlisted	-.06**	-.02	.08**	.23**	-.23**	-.04	.10**	-.12**	.01	.23**	-.06**	-.22**	.12**
Officer	.01	.02	-.01	-.27**	.27**	.08**	-.05*	.06**	-.05**	-.15**	.00	.27**	-.11**
NCO	.06**	.01	-.08**	-.11**	.11	-.00	-.09**	.10**	.02	-.17**	.06**	.10**	-.07**
Time in Service	.05**	.02	-.11**	-.22**	.22**	.05*	-.11**	.15**	.02	-.26**	.09**	.18**	-.02
Combat Career	-.04**	-.02	.05*	.06**	-.06**	.00	.07**	.02	.00	.02	.00	-.07**	.02
Guilty Plea	-.27**	-.11**	-.02	-.01	.01	-.09**	-.04	-.11**	-.04	.11**	.02	-.01	-.05*
Trial	.27**	-.07**	-.07**	-.19**	.19**	-.09**	-.06**	.21**	-.05*	-.20**	.03	.12**	.02
Jury	.25**	-.19**	-.10**	-.09**	.09**	-.11**	-.06**	.02	-.02	-.01	.02	.01	-.06**
Judge	-.25**	.19**	.10**	.09**	-.09**	.11	.06	-.02	.02	.01	-.02	-.01	.06**

*p<.05, **p<.01

Clemency Correlation Matrix (Con't)

	White	Hispanic	Black	OthRace	Male	Female	JrEnlist	Officer	NCO	TIS	Career
Clemency											
Sentence Severity											
Pretrial Confine											
Special C-M											
General C-M											
Counts											
Statutory Serious											
Person											
Property											
Drugs											
Society											
Military											
Discipline History											
White	1.00										
Hispanic	-.34**	1.00									
Black	-.77**	-.12**	1.00								
Other Race	-.35**	-.05**	-.12**	1.00							
Male	.07**	-.01	-.06**	-.02	1.00						
Female	-.07**	.01	.06	.02	-1.00	1.00					
Jr Enlisted	.08**	-.04*	-.01	-.03	-.03	.03	1.00				
Officer	.03	-.01	.03	.03	.02	-.02	-.36**	1.00			
NCO	-.11**	.05*	-.00	-.00	.02	-.02	-.89**	-.11**	1.00		
Time in Service	-.12**	.05*	.11**	.00	.04*	-.04*	-.74**	.21**	.69**	1.00	
Combat Career	.08**	.00	-.06**	-.05*	.13**	-.13**	.16**	-.10**	-.12**	-.14**	1.00
Guilty Plea	.05*	-.03	-.06**	.03	-.08**	.08**	-.01	-.04	.02	-.03	-.00
Trial	-.12**	.07**	.10**	-.01	.02	-.02	-.15**	.12**	.10**	.18**	-.02
Jury	-.04*	.03	.03	.02	-.03	.03	-.10**	.03	.10**	.11**	-.01
Judge	.04*	-.03	-.03	-.02	.03	-.03	.10**	-.03	-.10**	-.11**	.01

*p<.05, **p<.01

Clemency Correlation Matrix (Con't.)

	GP	Trial	Jury	Judge
Clemency				
Sentence Severity				
Pretrial Confine				
Special C-M				
General C-M				
Counts				
Statutory Serious				
Person				
Property				
Drugs				
Society				
Military				
Discipline History				
White				
Hispanic				
Black				
Other Race				
Male				
Female				
Jr Enlisted				
Officer				
NCO				
Time in Service				
Combat Career				
Guilty Plea	1.00			
Trial	-.27**	1.00		
Jury	.19**	.45**	1.00	
Judge	-.19**	-.45**	-1.00	1.00

*p<.05, **p<.01

Appendix C: Statutory Seriousness Scale

Code	Maximum Punishment
1	1 month
2	3 months
3	4 months
4	6 months
5	Bad Conduct Discharge, 6 months
6	Bad Conduct Discharge, 9 months
7	Bad Conduct Discharge, 1 year
8	Dismissal or Dishonorable Discharge, 1 year
9	Dismissal or Dishonorable Discharge, 1.5 years
10	Dismissal or Dishonorable Discharge, 2 years
11	Dismissal or Dishonorable Discharge, 3 years
12	Dismissal or Dishonorable Discharge, 5 years
13	Dismissal or Dishonorable Discharge, 6 years
14	Dismissal or Dishonorable Discharge, 7 years
15	Dismissal or Dishonorable Discharge, 8 years
16	Dismissal or Dishonorable Discharge, 10 years
17	Dismissal or Dishonorable Discharge, 15 years
18	Dismissal or Dishonorable Discharge, 20 years or greater, but less than Life*
19	Dismissal or Dishonorable Discharge, Life with or without parole
20	Death or Life with or without parole
21	Death, Mandatory Minimum Life with parole

*Only one offense has a maximum punishment that is greater than 20 years but less than life and federal and state crimes may be assimilated under the UCMJ that carry maximum punishments within this range.

Appendix D: Combat Warrior Scale

Code	Career Group
1	Special Duty/Training
2	Medical
3	Administrative/Base Professional
4	Base Support
5	Missile/Laboratory/Space
6	Maintenance
7	Air Power Support
8	Air Power
9	Security Forces
10	Combat

Appendix E: Air Force Ranks and Grades

Rank	Pay Grade
Junior Enlisted	
Airman Basic	E-1
Airman	E-2
Airman First Class	E-3
Senior Airman	E-4
Non-Commissioned Officer	
Staff Sergeant	E-5
Technical Sergeant	E-6
Master Sergeant	E-7
Senior Master Sergeant	E-8
Chief Master Sergeant	E-9
Officer	
2d Lieutenant	O-1
1st Lieutenant	O-2
Captain	O-3
Major	O-4
Lt Colonel	O-5
Colonel	O-6
Brigadier General	O-7
Major General	O-8
Lieutenant General	O-9
General	O-10

Note: Academy cadets are considered officers for court-martial purposes

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