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PRETRIAL AGREEMENTS IN THE MILITARY
PAST AND FUTURE

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the individual author and do not necessarily represent the views of either The Judge Advocate General's School, United States Army, or any other governmental agency.

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37TH JUDGE ADVOCATE OFFICER GRADUATE COURSE

April 1989

PRETRIAL AGREEMENTS IN THE MILITARY PAST AND FUTURE

by Captain Carlton L. Jackson

ABSTRACT: This thesis examines the development of negotiated guilty plea practice in the military from 1953 to the present, and makes proposals for future development. This thesis concludes that the present restrictions on initiation of pretrial agreement negotiations are unnecessary, and that restrictions on the terms or conditions in such agreements are overbroad.

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I.

INTRODUCTION

The practice of negotiating guilty pleas in the military is generally accepted to have begun in 1953.[1] Since that time the practice has become an indispensable part of military justice.[2] In the thirty-six years that have elapsed since the practice was first introduced, many issues have arisen and been resolved. Several questions, however, remain unanswered. This thesis examines the development of negotiated guilty plea practice in the military from 1953 to the present, and advances three proposals for its future development.

First, eliminate the requirement that pretrial agreement negotiations be initiated by the defense.[3]

Second, eliminate "[d]eprivation of certain rights"[4] from the list of prohibited terms or conditions found in Rule for Courts-Martial 705, and the discussion thereto.[5]

Third, require military judges to inquire of counsel and the accused, whether any deprivation of the rights discussed above, is a condition of any pretrial agreement, and if so, the reason why this was in the best interest of the accused.[6]

Adoption of these proposals would bring the military in line with federal practice,[7] and bring much needed flexability and reality to guilty plea practice in the military.

II.

THE DEVELOPMENT OF NEGOTIATED GUILTY PLEA PRACTICE IN THE MILITARY 1953 TO THE PRESENT

A.

"THE GUILTY PLEA PROGRAM," 1953-1959[8]

Prior to 23 April 1953, less than ten percent of general court-martial cases involved pleas of guilty.[9] Even where pleas of guilty were entered, in most cases the accused did not plead guilty to all charges and specifications, and the Government introduced evidence on the remaining charges.[10] As a result less than one percent of Army cases were disposed of solely on the accused's pleas.[11] This fact, plus a ninety-five percent conviction rate in contested cases resulted in an enormous expenditure of time, effort and manpower, to resolve unnecessary issues at the trial and appellate level.[12] Civilian practice on the other hand had for years used negotiated guilty pleas to dispose of ninety-five percent of its criminal cases.[13]

Sometime prior to 19 January 1953, Major General Shaw, the Assistant Judge Advocate General, U.S. Army, initiated a study to determine how civilian guilty plea practice could be implemented in Army courts-martial.[14] This action was tasked to the Chief, Military Justice Division, Office of the Judge Advocate General, U.S. Army.[15] After consulting the Chief, Defense Appellate Division; Chief, Government Appellate Division; and Chief, New Trial Division, among others, a memorandum was prepared for Major General Shaw's attention.[16] All of the individuals discussed above, supported the

initiative,[17] however, as might be expected they did have divergent views on specific proposals.[18]

The memorandum recommended among other things that the plan be tested in a busy jurisdiction,[19] and that when fully implemented, no "formal written instructions" from "the Secretary of the Army or by lower headquarters" be used to avoid allegations of "'command influence.'"[20] This final recommendation reflects the heightened sensitivity to command influence issues brought by the enactment of the Uniform Code of Military Justice in 1951.[21] It also provides some explanation of why until recently the subject of pretrial agreements was not discussed in detail in Army publications,[22] or the Manual for Courts-Martial for that matter.[23]

Major General Shaw apparently adopted this last recommendation in full as he initiated the program in a personal letter to all staff judge advocates.[24] Except for Major General Shaw's directive that any pretrial agreement "must emanate from [defense counsel] and the accused";[25] the letter simply exhorted the various staff judge advocates to develop their own programs and report back to his office on their experiences.[26] The initial reaction to this letter was mixed.[27] Some commands embraced the program enthusiastically,[28] others with deep reservations.[29] In fact one Corps Commander "refused totally to deal with those 'G-D-Crooks.'"[30] Nevertheless, by the end of the decade, most jurisdictions had guilty plea programs in place, and the program was considered a success.[31] During the period 1953-1959, the percentage of guilty pleas in general courts-martial rose to sixty percent.[32] This drastic reduction in the number of contested cases allowed the

U.S. Army Board of Military Review to eliminate three of its seven panels of appellate judges.[33] Finally, processing times for general courts-martial were substantially reduced.[34]

This change did not occur without problems. While the ad hoc manner in which the program was implemented made it easy to spread the benefits experienced in one jurisdiction to the others, it also made it difficult to identify, isolate and solve problems before they came to the attention of the appellate courts.

For example, shortly after the program was initiated four problems developed. The first was the failure of some staff judge advocates to clearly indicate in their post-trial reviews, whether, the accused's pleas of guilty were based upon a pretrial agreement, so that reviewing and appellate authorities could perform their functions.[35]

The second problem was a practice by some staff judge advocates to insist on a provision in the pretrial agreement, in which the accused agreed "to forego his right to present to the court matters in extenuation or mitigation of the offense charged."[36] The reasoning behind this clause was the belief of some staff judge advocates, that once a deal was struck, the defense should be precluded from trying to beat the deal.[37]

The third problem was the reverse of the second, that is the view by some staff judge advocates and the Chief, Military Justice Division, that after a plea of guilty is received, the Government should be precluded

from presenting aggravation evidence, because the plea established the Government's prima facie case.[38]

The fourth problem concerned the practice of some staff judge advocates promising to recommend a sentence limitation to the convening authority, in exchange for a plea of guilty, without any assurance that the convening authority would abide by the recommendation.[39]

In an attempt to solve these problems, The Judge Advocate General directed that a notice be published in the JAG Chronicle.[40] The notice instructed judge advocates that (1) the Staff Judge Advocate's review should demonstrate whether the plea was entered with or without a pretrial agreement; (2) it was not good policy to include waivers of extenuation and mitigation evidence in pretrial agreements; (3) trial counsel in appropriate cases could introduce aggravation evidence; and (4) staff judge advocates should enter into pretrial agreements only in those cases where the proposed sentence limitation fell within the convening authority's guidelines, or has been personally approved by the convening authority in advance.[41]

This action, however, failed to put these matters to rest, or even begin to deal with the multitude of issues that would arise over the next few years. On 28 September 1953, the Army Judge Advocate Conference convened at Charlottesville, Virginia.[42] As you might expect the new "guilty plea program" was a hot topic.[43] On the first day of the conference a panel discussion attended by Major General Ernest M. Brannon, The Judge Advocate General; Major General Shaw, The Assistant Judge Advocate General; and Brigadier General James L.

Harbaugh, Jr., the Assistant Judge Advocate General for Military Justice was held on the topic.[44]

The panel consisted of Colonel James Garnett, U.S. Army Forces, Far East; Lieutenant Colonel Waldemar A. Solf, U.S. Army, Europe; and Lieutenant Colonel Laurence W. Lougee, U.S. Army, Alaska.[45]

Colonel Garnett presented a seven step procedure in use in IX Corps, for initiating, negotiating and administering pretrial agreements at the trial level.[46]

Under the IX Corps procedure the defense counsel initiates the process by expressing his client's willingness to plead guilty.[47] The staff judge advocate then dictates the terms he will recommend to the convening authority.[48] This proposal did not appear to offend either General Harbaugh or The Judge Advocate General, as long as the staff judge advocate has previously consulted with the convening authority and been given "carte blanche."[49] It is interesting to note there was no discussion as to whether such a procedure would raise an issue of delegation of non-delegatable duties.[50]

Lieutenant Colonel Lougee also agreed the first step was for the defense to approach the Government "regarding [its] position if a plea of guilty is submitted."[51] But unlike the IX Corps plan, trial counsel would negotiate the terms, not dictate them as the IX Corps Staff Judge Advocate would.[52]

No other proposals regarding this issue were made.[53] There was also no dissent voiced by The Judge

Advocate General on this point.[54] Thus in keeping with The Judge Advocate General's comment: "It depends on what the convening authority wants to do";[55] we can surmise that either proposal was acceptable to him.

The next area of disagreement was over whether trial counsel should present aggravation evidence. Under Colonel Garnett's plan, the Government would not present evidence in aggravation after the plea is accepted.[56] In fact it is arguable from his comments whether IX Corps used a confessional stipulation of fact to provide independent evidence to support the plea.[57] Under the IX Corps plan, however, the trial counsel would have the witnesses available for the court to call if desired.[58]

Lieutenant Colonel Solf, strongly disagreed with the IX Corps practice and suggested that stipulations of expected testimony be placed in the record before findings.[59] This practice according to Lieutenant Colonel Solf, usually appeased the members enough so that they would not insist upon the live witnesses being brought into court to testify.[60]

Lieutenant Colonel Lougee also rejected the IX Corps procedure of not putting in aggravation evidence unless the members called for it.[61] In his view, such a position allowed the defense to keep "the sordid details of the crime" from the members.[62]

Again no particular approach was endorsed by The Judge Advocate General.[63] So it should be safe to assume all of these proposals were acceptable to him.

Colonel Garnett's proposal that defense counsel keep a log regarding their pretrial negotiations, met with mixed reviews, primarily because of concerns for client confidentiality.[64] One solution proposed was to reduce the agreement to writing and have the accused acknowledge that he discussed the agreement with his counsel and believed it to be in his best interest.[65] The agreement would then be made a part of the record.[66] This discussion did not resolve all of the issues lurking in the dark, but is a clear indication that judge advocates were considering a need to build a record to head off allegations of ineffective assistance of counsel, and improvident pleas.

The issue of waiving defense presentation of evidence during sentencing, was skirted by a discussion on what the law officer must do if the defense puts on evidence inconsistent with the plea during sentencing.[67] Colonel Garnett took the position the plea must be rejected.[68] Lieutenant Colonel Lougee, however, opined that the provisions of the Manual for Courts-Martial should be changed to make the acceptance of the plea final.[69] Again there was no resolution of this issue.

Several other issues were discussed, all with the same result, no further guidance from The Judge Advocate General.[70]

On 28 July 1954, the first appellate court decision involving the program, was issued in United States v. Smith.[71] Smith was convicted pursuant to his pleas of a short absence without leave, breach of arrest, and of violating a lawful general order issued by his company commander.[72] The Army Board of Review took little time

to reverse Smith's lawful general order conviction, and then turned to the question of Smith's pretrial agreement.[73] Since the sentence limitation in the agreement was based upon an erroneous calculation of the maximum punishment, the Board reaccessed Smith's sentence in light of the error, and reduced the period of confinement.[74]

In this decision the Army Board of Review sub silentio approved of the practice of negotiating pretrial agreements; and made reassessment of sentence an appropriate remedy where there is a material misunderstanding between the parties of as to the sentence limitation in the agreement.[75]

On 20 September 1954, the Army Judge Advocate Conference convened once again at Charlottesville, Virginia.[76] Pretrial agreements were again a topic of discussion.[77] There was a new Judge Advocate General, Major General Eugene M. Caffey, but there is no indication that he participated in the discussion.[78] Consequently, many issues were raised and left unresolved.[79]

It was made clear during the conference that no all-encompassing directive on the subject would be forthcoming.[80] The general feeling was to leave it up to the local staff judge advocates to tailor the program to suit the local command.[81]

It was, however, conveyed to the assembly that the new Judge Advocate General did not like the term negotiate because it implied that the Government was approaching the accused asking for favors.[82] It was also

conveyed to the conference that the Judge Advocate General did not favor agreements just to move cases along, or those limiting the maximum punishment.[83] Other matters were discussed, but with the tone set by the above remarks one could hardly expect much of substance to be accomplished.[84]

It is interesting to note, that the U.S. Army Europe, Judge Advocate, had been given carte blanche to approve pretrial agreements without first consulting with the Commander;[85] and that in Europe, law officers conducted out-of-court hearings into the nature of the accused understanding and acceptance of his pretrial agreement.[86] The latter action was done to build a record for appellate review.[87]

There were no major developments in the guilty plea program between the 1954 and 1956 Army Judge Advocate Conferences, except a notice informing all judge advocates that absent a defense request, rejected pretrial agreements were not to be included in records of trial.[88] When the 1956 conference convened the only problems discussed, were the recurring problem of agreements requiring the accused to forego presentation of evidence in extenuation and mitigation;[89] a new problem of agreements which provided for early release from service after an affirmance by the Army Board of Review, thereby cutting off appeal to the Court of Military Appeals;[90] and an administrative double jeopardy problem which was arising in officer cases.[91] The conferees were advised that the first two problems could be solved simply by not entering into agreements in which the accused waived fundamental due process rights, and the third by inserting a clause in pretrial agreements

that informed the accused that, while the convening authority would disapprove any dismissal, the Government was in no way precluded from administratively separating the accused for the same conduct.[92]

Shortly after the conference adjourned, the issue of waiving evidence in extenuation and mitigation as part of a pretrial agreement reached the Army Board of Review.[93] In United States v. Callahan, the appellant alleged that he had been prejudiced by such a provision in his pretrial agreement.[94] It seems, notwithstanding the 4 September 1953 notice to all judge advocates not include such provisions in pretrial agreements, sometime prior to Callahan's 17 May 1956 sentencing at Fort Meade, Maryland, the defense apparently included the clause in appellant's pretrial agreement.[95] The court agreed that this was error,[96] but limited the appellant's remedy to reassessment of sentence. Upon reassessment the court affirmed the appellant's bad conduct discharge, and total forfeitures, but reduced the adjudged confinement from one year to nine months.[97]

In another case from Fort Meade, United States v. Banner, the Army Board of Review struck down a provision in a pretrial agreement which required the accused to waive litigation of a jurisdiction motion.[98] Although, the court disposed of the case on the Government's inability to establish jurisdiction over the accused,[99] the court went further and observed that "neither law nor policy could condone" such a clause and that the "such an 'agreement' would be void."[100]

About the same time the Banner opinion was handed down, the Coast Guard became the second service to

negotiate pretrial agreements.[101] This action transformed the Army initiative into a military justice initiative.

The year 1957 brought four significant developments in negotiated guilty plea practice in the military. First, on 8 May 1957, The Judge Advocate General sent out a message to the field.[102] This message was the first detailed guidance since the September 1953, JAG Chronicle notice previously discussed.[103]

The message contained several instructions: (1) multiplicious charges will not be used to induce pretrial agreements; (2) offers to plead guilty must originate with the accused; (3) trial counsel will be consulted before any pretrial agreement is approved; (4) pretrial agreements will only be accepted in cases where the evidence of guilt is convincing and the sentence limitation is appropriate; (5) the agreement must be reduced to an unambiguous writing which contains no term limiting the accused's rights; (6) the members should be made aware of the aggravating, extenuating, and mitigating circumstances of the offense; (7) the law officer must conduct an inquiry into the providence of the plea and pretrial agreement; and (8) the terms of the agreement must be scrupulously executed by the Government.[104]

The second major development came on 11 September 1957, when the Navy adopted a guilty plea program in general courts-martial.[105] This program was similar to the Army's and was a great success.[106]

The third major development came on 13 December 1957, when the Court of Military Appeals addressed for

the first time, issues arising from the Army program. In United States v. Hamill,[107] the Court of Military Appeals addressed a question similar to that faced by the Army Board of Review in United States v. Smith,[108] that is: What is the appropriate remedy when an honest mistake as to the terms of a pretrial agreement is discovered on appeal?[109] The mistake in Hamill, centered around a difference between the appellant's understanding of the agreement and the convening authority's understanding. The appellant understood the agreement to provide that if his behavior was appropriate in confinement, his discharge would be automatically remitted and he would be restored to duty.[110] The convening authority, however, apparently understood the agreement to allow certain officials to restore the appellant to duty as a matter of clemency, if they determined such action appropriate.[111] The court, however, elected to resolve the doubt in favor of the appellant, and ordered the remission of the discharge and the appellant be returned to active duty, provided his behavior had been good.[112] "Otherwise a rehearing was ordered."[113] Note the court's solution to this problem potentially could have invalidated the findings and sentence, and was thus materially different in character than that of the Army Board of Review, which only affected the sentence.[114]

The fourth major event was the decision by Court of Military Appeals in United States v. Allen.[115] Allen involved an allegation of ineffectiveness of counsel, for failing to present matters in extenuation and mitigation of appellant's desertion offense, following a plea of guilty.[116] While it is clear from the majority opinion that there was a pretrial agreement in the

case,[117] it is unclear whether counsel's failure to present evidence on behalf of his client was pursuant to that agreement, a sub rosa agreement, a tactical decision, incompetence of counsel, or an innocent mistake.[118] One point did come through loud and clear, pretrial agreements cannot be allowed to transform a court-martial "into an empty ritual."[119]

These four developments, taken as a whole, set the tone for future:

First the Army now had clear guidelines applicable to all commands;

Second, the program was not simply an Army initiative but a military justice initiative; and

Third, the Court of Military Appeals sent a strong message to the field that pretrial agreements would not be allowed to trample upon the fundamental rights of the accused or the integrity of the military justice system.

The year 1958 brought a mixed bag of developments. In that year, two of the first challenges to the Army program to reach the Court of Military Appeals, were United States v. Kilgore,[120] and United States v. Hood.[121] Both challenges were based upon allegations of misconduct by defense counsel, and both were resolved against the appellant.

In Kilgore, appellant alleged that his counsel had misinformed him of the maximum confinement period that would be approved by the convening authority.[122] This allegation was quickly and effectively rebutted by an

affidavit of the defense counsel and a true copy of the agreement which contained counsel's correct advice on the maximum punishment and bore the appellant's signature.[123]

In Hood, appellant alleged that his counsel and the law officer pressured him into pleading guilty pursuant to a pretrial agreement.[124] What is remarkable about this case is that the appellant testified before the Court of Military Appeals on this issue.[125] His testimony, however, was unpersuasive, and in fact was a key point in the defeat of his appeal.[126]

Both, cases illustrate an important point for defense counsel, keep good records, because, often the record of trial is insufficient to protect you from allegations of ineffective assistance of counsel.

Two other challenges, also merit discussion. In United States v. Darring,[127] and United States v. Harrison,[128] the Court of Military Appeals came to opposite conclusions as to whether waiver of appellate review was permissible in guilty plea cases. In both cases, waiver of appellate review appears not to be based upon any clause in the pretrial agreement, but upon counsel's post-trial advice that under the circumstances an appeal would be useless.[129] Nevertheless, the court reversed Darring because the appellant was informed by counsel of Army policy discouraging appeals in guilty plea cases, and affirmed Harrison, because the same advice was rooted in counsel's personal belief appeal would be fruitless.[130]

One other development in 1958 merits discussion. On 4 April 1958, the Judge Advocate General, directed that in all Army courts-martials, the members were not to be informed of the existance of any pretrial agreements in the case.[131]

There being no major developments in 1959, the decade closed with the "Guilty Plea Program" firmly entrenched in military practice with a few questions answered and many more to be resolved.

B.

A DECADE OF JUDICIAL SKEPTICISM, 1960-1969

During the sixties, the Court of Military Appeals took the lead in the development of negotiated guilty plea practice in the military.[132] The period, however, was marked by a general tone of increasing displeasure with some of the provisions judge advocates were inserting into pretrial agreements.

In United States v. Scoles,[133] the court was faced with a pretrial agreement which reduced a Government witness's sentence by one year for each occasion he testified against his accomplices.[134] The court held this provision to be contrary to public policy, because "[i]t offers an almost irresistible temptation to a confessedly guilty party to testify falsely in order to escape the adjudged consequences of his own misconduct."[135]

The next case United States v. Winborn,[136] addressed a related issue of disqualification of convening authority because of a pretrial agreement with a prosecution witness. In Winborn, the court held that

where the accomplice's testimony was critical to the prosecution, and the accomplice probably would not have testified without a pretrial agreement, the convening authority was disqualified from taking final action because of his personal involvement with the prosecution.[137]

These two decisions involve scenarios where the Government was anxious for a pretrial agreement, and offered exceedingly good deals to secure vital evidence. This point will be discussed again, later in this paper.[138] It suffices to say at this point, that when this situation arises, defense counsel should press for every advantage, and all counsel involved should be wary of the court's concern for ensuring a fair trial for all accused.[139] A lack of sensitivity to this issue may result in not only reversal of the accused conviction but also invalidation of the witness's sentence limitation.[140]

In the next two cases, United States v. Monett,[141] and United States v. Stovall,[142] the court returned to an old subject: What is the proper remedy for a misunderstood pretrial agreement?[143] In Monett the court found that a sentence limitation which required the convening authority to disapprove a sentence exceeding a bad conduct discharge and one year of confinement, did not preclude approval of a sentence which provided for only a reduction in grade and partial forfeitures for one year, because, the approved sentence was less severe than the sentence limitation in the pretrial agreement.[144] On the other hand in Stovall, the court in a per curiam decision, returned the record to the Board of Review, for reassessment of sentence, because, the convening authority suspended the appellant's bad-conduct discharge

for "the period of confinement [six months] and an additional period of six months"; where the pretrial agreement simply provided for a six month suspension.[145] In the court's view this was a "substantial variation from the pretrial understanding . . . and was prejudicially erroneous."[146]

Over the years this issue has arisen several times and in many different forms, in each case the appellate courts have strived to ensure that the parties receive the benefit of their bargain.[147]

This brings us to the most significant decision in this area, of the sixties, United States v. Cummings.[148] The issue presented in Cummings was whether a provision waiving speedy trial and due process issues could be included in a pretrial agreement.[149] The majority held that such a provision was void because:

(1) A plea of guilty does not waive speedy trial or due process issues;[150]

(2) Attempts to secure similar waivers had been previously condemned by the court;[151]

(3) Inclusions of such provisions in pretrial agreement would "transform the trial into an empty ritual";[152]

(4) the effect of the clause was to render the record inadequate for appellate review;[153]

(5) the provision appeared to violate service regulations;[154] and

(6) the court found as a factual matter that the inclusion of this clause in pretrial agreements "might not be command policy, but it was certainly at least one local staff judge advocate's policy. . . ."[155]

Chief Judge Quinn in his dissent, however, saw things quite differently.

(1) In his view, the decision in Cummings was inconsistent with that in United States v. Dudley[156]. (In Dudley, the court denied petition, despite the fact that Dudley's pretrial agreement contained a waiver of any speedy trial issue);[157]

(2) The Chief Judge accepted the Government's evidence that there was no command policy to include this provision in pretrial agreements;[158]

(3) He was persuaded by evidence from the Chief of the local Defense Section, that the clause was intended to convey that the appellant was aware of the speedy trial issue, but affirmatively decided not to raise it, and thus had no "evil purpose";[159]

(4) The agreement as a whole was beneficial to the appellant;[160] and

(5) There was no indication in the record, or presented during the appeal, that appellant "if given another opportunity, . . . would challenge the validity of the pretrial proceedings."[161]

For these reasons, the Chief Judge would have affirmed the findings and sentence.[162] Although Chief Judge Quinn's arguments did not carry the day in Cummings, they may ultimately become the guide to future practice.[163]

The Cummings decision is also remembered for the admonition, pretrial agreements "should concern themselves with nothing more than bargaining on the charges and sentence, not with ancillary conditions regarding waiver of fundamental rights."[164] This admonition set the tone of appellant decisions for the first half of the next decade.

The close of the decade was also marked by the passage of the Military Justice Act of 1968,[165] and the promulgation of a revised edition of the Manual for Courts-Martial.[166] Some of the more significant changes brought by these developments were: replacement of law officers by military judges, which allowed an accused to elect trial by military judge alone; provisions which increased the participation of counsel in the military justice process; and replacement of the Boards of Review with Courts of Military Review.[167]

C.

TEN YEARS OF FEVERED ACTIVITY, 1970-1979

When compared with the previous decade, litigation in this area more than tripled.[168] Nevertheless, the expansion was uneven. The biggest expansion occurred in litigation before the Army and Navy Courts of Military Review.[169] While litigation in the Court of Military

Appeals and the Coast Guard Court of Military Review increased only slightly.[170]

The seventies were also marked by the expansion of the guilty plea program to the Air Force.[171] In 1975, the Air Force became the final service to adopt the practice of negotiating pretrial agreements. Prior to this time the Air Force had prohibited the use of this practice, and all attempts to employ it had been struck down by the Air Force Court of Review.[172]

Outside the courtroom, the seventies were unfortunately marked by a lack of official guidance on negotiated guilty plea practice.[173] Consequently, guidance on issues yet to be resolved by the courts could only be found in periodicals.[174]

While there were significant appellant decisions rendered by the Courts of Military Review during this period,[175] the most far reaching decisions in this area were announced in the Court of Military Appeals. These decisions came in three areas: permissible terms and conditions in pretrial agreements; trial procedure in guilty plea cases; and the effect of a guilty plea on appellate review.

The first case to address the issue of permissible terms and conditions in pretrial agreements was United States v. Troglin.[176] Troglin involved "an unwritten oral agreement" between the accused and the convening authority "that defense counsel would not raise the issues of double jeopardy or lack of speedy trial."[177] Troglin is an interesting case for several reasons. First, the court drew a distinction between the waiver

of speedy trial issues and the waiver of double jeopardy issues; the former can not be waived by a plea of guilty, however, the latter may be freely and intelligently waived.[178] Second, the court, relied heavily upon the undisclosed nature of the agreement, which frustrated any effort by the trial court to inquire into the terms of the agreement and establish the providence of the accused's plea.[179] Finally, the court made an effort to point out that the staff judge advocate was aware of this agreement, but failed to insure that full litigation of these issues at the trial level.[180]

Troglin, like Cummings[181] before it expresses the court's extreme dislike for pretrial agreements in which the accused bargains away rights to obtain a favorable sentence limitation. While the Cummings and Troglin preserve the integrity of the military justice system, they do so at a cost to the accused whose only bargaining chip is the waiver of a speedy trial or due process issue which may not provide him meaningful relief at trial or on appeal. In fact, blind application of Troglin and Cummings could encourage litigation of meritless issues in cases where both the Government and the defense would prefer to reach a pretrial agreement and be done with it.[182]

The next major case in this area was United States v. Cox.[183] Following his trial, and before the convening authority's action, Private Cox committed three assaults.[184] Although there was no term or condition in the pretrial agreement in the case addressing post-trial misconduct by the accused, the staff judge advocate advised the convening authority that he was no longer bound by the agreement because of the appellant's post-

trial misconduct.[185] The convening authority then approved the sentence as adjudged.[186] On appeal, however, both the Army Court of Military Review and the Court of Military Appeals refused to infer that good post-trial behavior by the appellant was a condition of the agreement.[187] Consequently, both courts affirmed the findings and only so much of the sentence as was provided for in the agreement.[188] The Cox opinion then left decision on the enforceability of post-trial misconduct clauses for another day.[189]

In United States v. Lallande,[190] the Court of Military Appeals addressed an issue closely related to the validity of post-trial misconduct clauses in pretrial agreements. In Lallande the court was called upon to enforce a probation clause in a pretrial agreement.[191] Under the terms of the agreement the convening authority agreed to suspend parts of the sentence with a provision for automatic remission, provided the appellant complied with the terms of his probation.[192] These terms "with inconsequential changes in phraseology," were set out in the pretrial agreement.[193] On appeal the Lallande challenged three of the five conditions attached to his probation, the most controversial of which subjected the appellant to search and seizure at any time by his Commander or authorized representative.[194] In affirming Lallande's conviction and sentence, the majority focused upon four points:[195]

(1) The terms were proposed by the defense and not the Government.

(2) Sentenced prisoners on probation have traditionally been held to have lessor expectations of privacy than the normal population.

(3) Lallande was a drug abuser.

(4) The conditions were reasonably related to his rehabilitation.

While the majority recognized that such clauses could be used by unscrupulous commanders to harass or punish the appellant during his probation, having no evidence before them that this was the case, they refused to declare the provision overbroad or otherwise unconstitutional.[196]

Judge Duncan, largely concurred with the majority's resolution of the case, but dissented with respect to the search and seizure provision. In his opinion, legislative action was needed to make the search and seizure provision lawful and enforceable.[197]

The next case to come before the court in this area was United States v. Schmeltz.[198] Schmeltz involved a defense authored provision of a pretrial agreement requiring the accused to request trial by military judge alone.[199] The court reluctantly affirmed the conviction, but reiterated their warnings in Troglin[200] and Cummings[201] "that pretrial agreements should concern themselves only with bargaining on charges and sentence."[202] Fortunately for the Government, the provision originated with appellant, and was not the product of command influence, so relying upon Lallande,[203] the court held the appellant was not entitled to relief and affirmed.[204]

Shortly after deciding Schmeltz, the court was faced with a provision in a pretrial agreement which required the accused to enter pleas before raising motions.[205] The practical effect of the clause was to waive appellate review of the rulings on some of appellant's motions.[206] In United States v. Holland, the provision was struck down because of the orchestrating effect it had on court-martial proceedings.[207] Holland, however, like Troglin[208] and Cummings[209] before it, did not finally resolve the issue of waivers of motions in pretrial agreements.[210]

Leaving the area of permissible terms and conditions in pretrial agreements there were several important decisions rendered in the seventies on trial procedure in negotiated guilty plea cases.

The first significant case was United States v. Villa.[211] In Villa a majority of the Court of Military Appeals held that is was not error for a military judge in the Coast Guard to examine the quantum portion of a pretrial agreement, before announcing sentence in a trial by military judge alone.[212] Judge Ferguson strongly dissented and noted that Army policy and case law condemned this practice, and urged the court to follow the Army's lead.[213] Six years later, and after a complete change in the court's personnel, Villa was called into question although not expressly overruled on this point by United States v. Green.[214]

In Green the court was presented with disturbing statistical evidence which led it to recommend adoption of the Army practice, so as to "enhance the perceived

fairness of the sentencing process."[215] This recommendation is carried forth in the Rules for Courts-Martial, which provides "that in a trial by military judge alone the military judge ordinarily shall not examine any sentence limitation contained in the agreement until after the sentence of the court-martial has been announced."[216]

United States v. Green is also an important case because the court announced in that decision that military judges would now be required to conduct an on the record inquiry into the pretrial agreement before accepting the accused's pleas.[217] This requirement injected the military judge further into negotiated guilty plea practice. As a result a new area of appellate concern was established, that of defining the proper role for the military judge in the pretrial agreement process.

In a case predating Green, a similar issue arose from remarks made by the military judge in sentencing.[218] In United States v. Wood,[219] the court held that a military judge erred by characterizing the accused's testimony and his counsel's argument as "a fraud upon the court members";[220] when they informed the members that the accused would prefer "five years in jail"[221] instead of a dishonorable discharge, knowing that the pretrial agreement precluded the convening authority from approving punishment in excess of a "bad conduct discharge (suspended), confinement . . . for one year, and [total forfeiture]."[222]

Wood is also a significant decision because it recognizes the accused's option under military practice

to try to beat the deal struck in the pretrial agreement. This is an important point, as the sentence limitation in a pretrial agreement, represents the best deal the accused could get from the convening authority, not necessarily the sentence he hopes to receive.[223]

Four other decisions in this area require discussion. In United States v. Lanzer,[224] the court held that "[o]nce a pretrial agreement is made it should not be modified except by judicial order, i.e. the trial judge."[225] In United States v. Caruth,[226] the court then cautioned military judges that "intervention into the plea bargaining process has been severely criticized because his mere presence can exert an improper influence upon the accused's decision to plead guilty and we specifically disapprove of the procedure."[227] In United States v. Myles,[228] the court reassured military judges that if they followed the inquiry mandated in Green they would not be held responsible for counsel's failure to reveal sub rosa agreements.[229] Finally, in United States v. Partin,[230] the court recognized the military judge's authority and duty to modify pretrial agreements to ensure that they complied "with statutory and decisional law as well as adhered to basic motions of fundamental fairness."[231] The court in Partin, however, cautioned that if such modifications require "addition by implication of new terms not agreed upon by the accused and the convening authority," any in-court modification without the convening authorities consent would not be binding upon the parties or the appellate courts.[232]

Read as a whole these four decisions basically define the role of the military judge in negotiated guilty plea practice. First and foremost he is not a

party to the agreement. Second, his role in the process is to ensure that the parties disclose all agreements in connection with the plea on the record. Third, in the event the agreement violates law or public policy, it is the military judge's duty to ensure that the proper modifications are made, before he accepts the plea. If this requires renegotiation between the parties, so be it.[233]

The final case of the decade requiring discussion is United States v. Dunsenberry.[234] In Dunsenberry, the court held that a provident plea of guilty waives rulings on the admission of evidence.[235] The rationale behind this doctrine "is that no legal or practical purpose can be served by reviewing the propriety of alleged illegal police conduct which only produces some evidence of a fact now conclusively established and judicially admitted by an accused in his plea of guilty."[236]

This is an important decision to counsel in the field. For the defense Dusenberry should be a strong motivator for seeking a conditional guilty plea in cases where the defense's only bargaining chip is a case dispositive suppression motion.[237] Likewise, government counsel should think hard about recommending acceptance of a conditional guilty plea in cases, where the disputed evidence is the only or most significant evidence in the case.[238] From the Government's perspective, a conditional guilty plea is only a good idea when the motion preserved is dispositive.[239]

At the close of the decade of the 1970s, what had begun as an Army initiative was now accepted practice in all of the military services. While negotiated guilty

plea practice was not uniform amongst the services, the opinions of the Court of Military Appeals had brought some measure of coherence to the process, in terms of the content of pretrial agreements, trial procedure, and the effect of a guilty plea on appellate review.

D.

RECENT HISTORY, 1980 - April 1989

The past nine years have brought many developments which affect the practice of negotiating pretrial agreements in the military. First, the decade was marked by a flood of administrative publications, and appellate court opinions, which impact on the practice. Second, the year 1980 will be remembered as the year the Army established an independent military defense bar.[240]

On the administrative front, the year, 1980, was marked by the promulgation of the Military Rules of Evidence.[241] With the enactment of these rules, the military adopted "federal practice to the greatest extent possible, while still allowing for the necessities of a world wide criminal practice."[242] With regard to guilty plea practice, however, the rules simply continued or extended existing practice.[243]

On 1 May 1982, the Army totally replaced its Military Judges' Guide,[244] with the Military Judges' Benchbook.[245] The new benchbook contained a procedural outline for the pretrial agreement inquiry[246] mandated by United States v. Green[247] and its progeny. Over the years this portion of the procedural guide has been modified twice.[248] But from day one, the new script was a

tremendous improvement over the general guidance contained in the Military Judges' Guide.[249]

In October 1982, the Army published a handbook for trial and defense counsel.[250] This handbook contained a sample pretrial agreement.[251] While the standard form pretrial agreements had existed in the past,[252] this suggested format appears to be the first officially sanctioned format in an Army publication.[253]

The most important military administrative publication of the decade was of course, the 1984 edition of the Manual for Courts-Martial. With, the promulgation of Rule for Courts-Martial 705, the manual for the first time contained guidance (applicable to all services) on the practice of negotiating pretrial agreements in guilty plea cases.[254]

Two other administrative publications of the decade also deserve mention. They are the Army's Trial Procedure pamphlet[255] and the Army/Navy-Marine Rules of Professional Conduct.[256] The Army Trial Procedure pamphlet contains an excellent discussion of pretrial agreements,[257] and is a useful research tool in the area. The Rules of Professional Conduct on the other hand address among other things the ethical considerations in negotiated guilty plea practice.[258]

On the appellate front, during the 1980s, courts also made major contributions to the development of negotiated guilty plea practice. These contributions came in four areas: (1) the nature of the agreement; (2) permissible terms and conditions in pretrial agreements; (3) procedures for negotiating and enforcing

pretrial agreements; and (4) the impact of pretrial agreements on appellate review.

In United States v. Schaffer,[259] the Court of Military Appeals sent a clear signal to the field that it had distanced itself from its earlier pronouncements "'that pretrial agreements should concern themselves only with bargaining on the charges and sentence.'"[260] In affirming a conviction based upon a Navy pretrial agreement which contained a clause waiving the pretrial investigation, the court signaled its willingness to accept more complex pretrial agreements under certain circumstances.[261]

Several factors were critical to the court's decision:

(1) The pretrial investigation is not a jurisdictional requirement of a general court-martial;[262]

(2) Analogous proceedings in federal and most state courts could be waived;[263]

(3) Appellant did not claim that inclusion of the waiver provision was a general practice in the command;[264]

(4) Appellant was not prejudiced by the agreement;[265]

(5) The terms of the agreement originated with the accused;[266]

(6) The court had previously upheld a similar waiver provision, which was proposed by the defense;[267]

(7) Civilian practice was moving in the direction of accepting more complex pretrial agreements;[268] and

(8) The added protection of the military inquiry into the providence of guilty pleas, "helps assure that plea bargaining does not result in the conviction of innocent persons."[269]

In short, the court expanded upon many of the points made by Chief Judge Quinn, in his dissent in Cummings, and reached the same conclusion; i.e., absent prejudice to the appellant, or a violation of public policy concerns, such agreements are lawful.[270]

Three other appellant court decisions on the general nature of pretrial agreements also merit discussion. They are United States v. Cook,[271] United States v. Forbes,[272] and United States v. Shepherd.[273]

In Cook the Court of Military Appeals held that withdrawal of charges pursuant to a pretrial agreement, did not automatically preclude renewal of those charges at a rehearing, where the pleas were found improvident on appeal.[274]

In reaching this conclusion the court observed that the original pretrial agreement was silent on the point of improvidence discovered during appellant review.[275] Thus the question before the court was one of fairness.[276] Cook is an important decision in many respects, but in the area of negotiated guilty plea practice, it primarily affords the Government needed prosecutorial flexibility.[277] On the other hand, the court in Cook

recognizes that an accused in this situation, could not be prejudiced as to his sentence, as the provisions of Article 66(b), Uniform Code of Military Justice, limits the sentence imposed after retrial to that of the original trial.[278]

United States v. Forbes is one of two cases interpreting Rule for Courts-Martial 910(a)(2). Conditional guilty pleas pursuant to Rule 910(a)(2) allow an accused to preserve case dispositive motions for appellate review, which would otherwise be waived by his plea.[279] In Forbes, the accused's pleas were conditioned upon the preservation of two suppression motions.[280] One motion involved a confession, the other urinalysis results.[281] At trial Forbes moved to suppress his confession, but not the urinalysis results.[282] The Air Force Court of Military Review, held that the confession issue was preserved but the urinalysis issue was waived.[283] In reaching this conclusion the court held that R.C.M. 910 requires "an accused [to] first challenge by pretrial motion the legal issue he wishes to preserve for appeal."[284] This ruling is in accord with the language of the rule, and the analysis.[285]

In United States v. Shepherd, the Air Force Court of Military Review, was again faced with interpreting Rule 910(a)(2). Before entering a conditional plea Shepherd moved to suppress the results of a urine test.[286] The motion was denied.[287] On appeal, however, the court found the test results were erroneously admitted, and dismissed the two specifications which were based solely on them.[288] Sheperd reflects what a radical departure R.C.M. 910(a)(2) is from prior practice. Under

Dunsenberry, the guilty plea would have waived this error.[289]

Turning to the area of permissible terms or conditions in pretrial agreements, the eighties brought a wealth of appellate guidance on the subject, though at times confusing.

One of the first provisions to raise its ugly head in the 1980s, was the post-trial misconduct clause. Post-trial misconduct clauses have been a problem for many years.[290] In United States v. Dawson,[291] and United States v. Connell,[292] the Court of Military Appeals struck down post-trial misconduct clauses in pretrial agreements which did not contain adequate safeguards against arbitrary revocation of the pretrial agreement.[293]

Subsequent to these decisions, however, Rule for Courts-Martial 1109(c)(4) was promulgated. Rule 1109(c)(4) sets up new procedures for vacating suspended courts-martial sentences, based upon federal law governing probation revocations;[294] it is also consistent with United States v. Lallande,[295] which recognized the convening authority's power to set probation requirements in a pretrial agreement.[296]

In light of this development the Army Trial Procedure pamphlet contains a suggested format for post-trial misconduct clauses in pretrial agreements.[297] This clause and Rule 1109(c)(4), however, have apparently not been tested in any appellate court decision. Thus, the practicality of such clause is still in doubt.

The 1980s were also marked by considerable litigation over the validity of restitution clauses in pretrial agreements. Restitution provisions have been recognized as permissible in pretrial agreements since 1980.[298] Nevertheless, like post-trial misconduct clauses, if not properly drafted they can be unenforceable.[299] The Manual (based upon an Army Court of Military Review opinion), takes the position that such clauses may be unenforceable "if the accused, despite good faith efforts, is unable to comply."[300] This position was recently rejected by the Army Court of Military Review in United States v. Foust.[301] In Foust the court took a hard line approach, and held that "[e]ven assuming indigence, without some showing of government-induced misconduct [restitution provisions in pretrial agreements are] not against public policy."[302] In reaching this conclusion the court distinguished cases where the accused suffered additional confinement for failure to pay court ordered restitution.[303] The court's rationale for distinguishing these cases, was that in Foust the accused controlled his own destiny, he proposed the restitution provision, whereas, in the cited cases, the contingency in the sentence was not part of a plea agreement, but a result of the sentence announced by the court.[304] Regardless of which approach is taken, it is imperative that a restitution clause contain easily understood language, governing its execution.[305] For example: Who is to receive the restitution? What is considered full restitution? When is restitution to be made? How and when will any indigence determination be made?

The Army Trial Procedure pamphlet suggests that restitution should be a pre-condition to the agreement.[306]

Short of that, the cases support the conclusion that restitution should be required to take place before the convening authority's action.[307]

In this regard, United States v. Jones,[308] is a particularly interesting case. In Jones, the accused offered to plead guilty to making two false statements, and a false claim against the Government, in exchange for an eight month limitation on confinement.[309] The staff judge advocate replied that the accused must make restitution to the Government in the amount of $400.00 before he would recommend approval of the agreement.[310] When the accused claimed he could not pay $400.00, his proposal was rejected.[311] Coincidentally, on the same day the convening authority rejected the proposed agreement, the Army involuntarily collected $400.00 from the accused pay.[312] The majority held that this was not fair dealing and reduced the adjudged confinement to 8 months.[313] Judge Robblee dissented and accused the majority of "inappropriately equat[ing] involuntary recoupment responsibility, and administrative and accounting function[s], to voluntary restitution [as] a lawful incident of [the] pretrial negotiation process."[314]

Judge Robblee makes a good point, for it is clear that when Jones refused to make voluntary restitution, he had the means to do so.[315] His lack of good faith justifies both the convening authority's rejection of the proposed agreement, and the independent collection action. As Judge Robblee aptly states:[316]

> Far from fairness, the result in this case confers an unwarranted windfall on the appellant and those who will follow him while undercutting long-settled law relative to the military plea bargaining process.

The next significant area of litigation involving pretrial agreements centered on an old problem of staff judge advocates inhibiting defense counsel from trying to beat the deal at trial. As you may recall, shortly after the Army guilty plea program began in 1953, some judge advocates were insisting upon waivers of defense evidence in extenuation and mitigation as part of a pretrial agreement.[317] Such clauses, however, were contrary to Army policy[318] and struck down by the appellate courts as contrary to public policy.[319]

In the second round of this battle the Court of Military Appeals recognized the defense's right to try and beat the deal, and held that it was error for a military judge to characterize a defense argument for substantial confinement in lieu of a dishonorable discharge as "a fraud upon the court members";[320] where the defense had negotiated a pretrial agreement which only allowed for a bad conduct discharge and a minimal amount of confinement.[321]

Undaunted by these early defeats, in the mid-1980s Army judge advocates found a new way to limit the defense in this area by devising an escape clause which released the convening authority from the limitation on confinement, if no punitive discharge was adjudged.[322] In a series of six published opinions, two panels of the Army Court of Military Review approved of the clause, finding it did not offend public policy.[323] Senior Judge Wold, however, did not agree and either dissented or concurred in the result only, in five of the six cases.[324] The crux of Judge Wold's disagreement was the inhibiting

effect such clauses have on the defense during sentencing.[325]

Only two of these cases reached the Court of Military Appeals, in each case petition was denied.[326] Nevertheless, in United States v. Cross, Chief Judge Everett made a point to signal his agreement with Judge Wold's "misgivings" about the clause.[327] Judge Everett, however, would not go so far as Judge Wold and grant appellant relief because of two factors: (1) the accused bargained for the clause; and (2) the approved sentence was less than that provided in the pretrial agreement.[328]

In light of these decisions, the Army's Trial Procedure pamphlet now recommends that:[329]

> [U]se of a punitive discharge clause should be limited to those situations where its inclusion results from actual bargaining between the parties. The Government counsel should ensure that the military judge determines, on the record, that the accused freely and voluntarily entered into the clause. In any case, it should be removed from the standard preprinted pretrial agreement to prevent appellant argument that it is a contract of adhesion.

The Army Trial Procedure pamphlet also contains a suggested inquiry to be used by military judges when confronted by such clauses.[330] This inquiry, however, is not included in the Army's Military Judges' Benchbook.[331]

The future of this escape clause is unclear. There have been no published opinions on the subject since Cross. As such, the guidance in the Army Trial Procedure pamphlet charts the safest course for those

who insist upon using the clause. Why the defense would ever bargain for such a clause is another question, the answer to which may explain the lack of litigation on this point since 1985.

In a similar vein, clauses in which the accused forgoes the personal appearance of sentencing witnesses, have been affirmed only where the record demonstrates that the accused actively bargained for a favorable sentence limitation in exchange for the clause.[332] Once again, the courts have demonstrated unwillingness to release the appellant from the terms of the agreement without a showing of prejudice, even if the appellate court has misgivings about some of the provisions contained therein.

Waiver of motions as a part of a pretrial agreement was an issue which would dominate the appellate docket of the 1980s. Beginning with United States v. Morales,[333] the various Courts of Military Review, wrestled with this issue for the first half of the decade,[334] until the Court of Military Appeals gave them further guidance in United States v. Kitts,[335] and United States v. Jones.[336]

The issue simply put was: Do pretrial agreements which include clauses waiving motions violate public policy? In Cummings,[337] Troglin,[338] Schmeltz,[339] and Holland[340] the Court of Military Appeals, had either struck down such clauses, or expressed extreme reservations about them.

In Morales the Army Court of Military Review was faced with a pretrial agreement which did not expressly

forbid pretrial motions.[341] The problem was one of the specifications the accused had agreed to plead guilty to, apparently did not state an offense.[342] The parties agreed to amend the specification, and waive swearing and service.[343] The accused then plead guilty in accordance with his agreement and was sentenced.[344] His sentence, however, was less than that provided for in his pretrial agreement.[345]

Given these facts the court in Morales did not have to deal directly with Cummings and its progeny. The court distinguished this line of cases by observing that the most recent case in this line of authority, United States v. Holland, did "not require that the accused be permitted to claim the benefits of a pretrial agreement while pleading guilty to less than the agreement requires."[346] Accordingly, an accused may not successfully challenge a defective specification by motion, which he had agreed to plead guilty to, and still claim the benefit of his agreement.[347]

In United States v. Wesley, the Navy-Marine Court of Military Review was presented with a pretrial agreement in which the accused waived a statute of limitations objection in return for a favorable sentence limitation.[348] It is interesting that the court in this decision failed to cite Cummings and its progeny in the opinion.[349] Instead the court relied upon United States v. Troxell,[350] an early pretrial agreement case which had held that an accused could waive the statute of limitations as part of a pretrial agreement.[351] Troxell, however, is consistent with United States v. Troglin,[352] a post Cummings decision.

The third case on this issue was not so easily resolved. In United States v. Jones, the Army Court of Military Review was faced with a pretrial agreement in which the accused agreed not to litigate motions to suppress evidence obtained by a search and seizure, and out-of-court identification, in exchange for a very favorable limitation on confinement.[353]

To fully understand the Jones decision, it is illustrative to discuss some of the evidence of record which was not detailed in the court's opinion.[354]

Between 30 April 1981 and 22 May 1982, the accused had nonjudicial punishment imposed upon him five times.[355] In August of 1982, the accused was tried by general court-martial, for robbery, assault with intent to commit rape, unauthorized absence, willful disobedience, escape from custody and larceny.[356] The accused, however, was acquitted of all charges except the unauthorized absence and willful disobedience.[357] The approved sentence included, confinement for six months, forfeiture of $300 per month for six months, reduction to Private E-1, and a bad conduct discharge.[358]

On 28 January 1983, the accused was released from confinement.[359] Two days later, he kidnapped, raped, and robbed a female sergeant, before departing on appellate leave.[360]

On 6 March 1983, while still on appellate leave, the accused kidnapped, robbed, raped, and sodomized two women in a fashion similar to his 30 January 1983 offenses.[361] The accused was later apprehended and convicted in state court of the 6 March 1983 offenses.[362]

At the time of his trial the accused was serving his sentence on the civilian charges.[363] His minimum release date was 11 March 1988.[364]

Prior to trial, the defense filed motions to suppress evidence obtained by search and seizure, and evidence of out-of-court identification.[365] The Government on the other hand served notice that it intended to introduce evidence of the 6 March 1983 offenses in its case in chief, pursuant to Military Rule of Evidence 404(b).[366] The Government was also prepared to call the victim of 30 January 1983 offenses, to testify on the merits and introduce a photograph, placing the accused at the scene near the time of the kidnapping.[367] Sometime thereafter the defense submitted an offer to plead guilty. On 15 June 1984, the offer containing a provision limiting the sentence to not more than confinement for eight years, total forfeitures, and a dishonorable discharge was approved.[368]

The maximum punishment authorized for the accused's offenses, given the non-capital referral, was confinement for life.[369] To obtain this favorable sentence limitation the accused agreed to forego his motions.[370]

On 19 June 1984, the accused entered pleas in accordance with his agreement and was sentenced to thirty-five years confinement, total forfeitures, and a dishonorable discharge.[371]

The convening authority reduced the period of confinement to eight years, and otherwise approved the

findings and sentence with the proviso that confinement would not begin until after the accused had completed his civilian confinement.[372]

It should also be noted that appellate review on the first court-martial was completed on 15 September 1983.[373] For unstated reasons the Army Court of Military Review reduced the approved confinement to 3 months, but otherwise affirmed finding and sentence.[374] Execution of the bad conduct discharge was stayed for disposition of the new charges.[375]

Against this backdrop it is easy to see why the Army Court of Military Review found that:[376]

> In this case, it takes little imagination to understand the defense's strategy for offering to waive evidentiary motions. The appellant was no stranger to the criminal legal process at the time of trial in this case. . . .
>
> With this background, it is not surprising that the appellant's negotiated guilty plea strategy was unique. Faced with a sordid military and civilian record, a grim future and extremely serious court-martial charges, the appellant decided to plead guilty and literally throw himself on the mercy of the convening authority. As a bargaining chip, he offered not to make any motions concerning the legality of any search and seizure or any out-of-court identification. Pretrial strategy takes many forms in the military community. Here the appellant tried to gain favor with the convening authority by announcing that he would not raise certain motions. The record shows the convening authority did not request the waiver; he merely acceded to it. We do not doubt that, given the terms of the preferred agreement, the convening authority was more favorably inclined to approve the appellant's offer. However, the fact that

> appellant initiated the offer assuages any concern that the agreement impermissibly deprived appellant of any fundamental right.
>
> The appellant profited greatly by his strategy. He received 8 rather than a possible 35 years' confinement. We do not believe any public policy concern was triggered when the appellant in this case voluntarily exercised his right to obtain the best that he could from the criminal process by offering to waive the specified motions. Accordingly, appellant's assignment of error is without merit.

In reaching this conclusion the Army Court of Military Review considered the decisions of the Court of Military Appeals,[377] and noted that they "have not been models of clarity."[378] Nevertheless, recognizing the recent willingness of the Court of Military Appeals to "accept more complex pretrial agreements, especially when that complexity is proposed by an accused and his counsel"[379] the Army Court of Military Review affirmed the findings and sentence.[380]

Shortly after Jones was decided another panel of the Army Court of Military Review, in United States v. Corriere,[381] sent out a conflicting signal by observing that pretrial agreements that contained waivers of command influence issues and constitutional issues concerning the admissibility of evidence, would appear to be void against public policy.[382] This observation, however, was dicta, as the court had insufficient evidence before it to decide the question on the merits, and returned the record for a limited hearing.[383]

Confusion in this area persisted as the Navy-Marine Court of Military Review, in United States v. Jennings,[384] relied upon United States v. Schaffer,[385] and

the Army court's opinion in Jones to uphold a provision in a pretrial agreement waiving a motion based upon alleged illegal pretrial confinement.[386] The Air Force Court of Military Review, on the other hand, in United States v. Hobart,[387] relied upon United States v. Cummings,[388] to support dicta in Hobart, that pretrial agreements should not include waivers of speedy trial issues.[389]

The Court of Military Appeals then weighed into this morass, in United States v. Kitts.[390] Kitts involved a Navy pretrial agreement and an allegation that the staff judge advocate coerced the defense counsel into waiving various motions to include a command influence motion by requiring a list of motions the defense intended to make be submitted before that pretrial agreement was concluded.[391] Citing Corriere, the court observed that "it is against public policy to require an accused to withdraw an issue of command control in order to obtain a pretrial agreement. Similarly, tactical machinations to achieve the same result will not be tolerated."[392]

Kitts seems to resolve cases where the Government "require[s] an accused to withdraw an issue of unlawful command control [and perhaps other issues which are not ordinarily waived by a plea of guilty], in order to obtain a pretrial agreement."[393] It does not, however, necessarily control cases where the accused elects not to pursue such issues at the trial level, as an inducement to the convening authority to enter into a pretrial agreement.[394] Again both the origin of the provision, or tactical maneuver, and the substance of the right given up (i.e., is the issue waived by a

provident plea of guilty) appear to be key factors in the court's determination.

This somewhat confusing state of affairs set the stage for the final resolution of United States v. Jones.[395] The Court of Military Appeals granted petition in Jones, "to determine whether [a provision waiving suppression motions based upon allegations of an illegal search and seizure and improper out-of-court identification], violates the 'public interest' to such an extent that inclusion of its terms in [a pretrial] agreement renders the entire instrument void."[396] The court held that such a pretrial agreement was not void, provided the following conditions were met.[397]

First, the waiver provision must voluntarily originate with the accused;[398]

Second, the waiver provision must be "a freely conceived defense conduct;[399]

Third, the issues to be waived must be "waivable at [the accused's] election";[400] and

Fourth, the waiver provision must be advanced by the defense "to induce the convening authority to accept the overall proposal."[401]

The court went on to observe that some "Advocates" suggest "that it is better to litigate concerns of counsel and at least in appearance purify the record, rather than concede into the shadows of a pretrial agreement."[402] This approach, however, did not play a major role in the resolution of the issue presented in

Jones, as the court was convinced, that the defense considered the waiver provision to be "in the best interest of the accused."[403] Moreover, in light of the well executed inquiry into the terms and conditions of pretrial agreements by the military judge, the court concluded that there was little reason to apply this paternalistic view of pretrial agreements, to the facts of the case before them.[404]

Before leaving this issue some comments are in order. First, the court's comments regarding litigating the concerns of counsel, must always be tempered by the best interest of the accused.[405] Failure to do so would certainly raise ethical problems,[406] as well as allegations of ineffective assistance of counsel.[407] Second, one of the reasons negotiated guilty plea practice was adopted by the military was to reduce litigation of needless issues at trial and appeal.[408] Thus, litigating counsel's concerns simply to "purify the record"[409] would both violate counsel's legal and ethical duties to his client, and run counter to a basic tenant of negotiated guilty plea practice.

The role of defense counsel in negotiated guilty plea practice is critical. For it is the defense counsel who must assess the strength of the Government's case, and after consultation with the accused develop the defense strategy for concluding a pretrial agreement which is in the best interest of the accused.

Of equal importance is the inquiry of the military judge into the terms of the pretrial agreement. If conducted properly, any reservations the appellate courts may have should be allayed.

In the Army at least, there is both an independent trial judiciary[410] and defense bar.[411] Thus if the military judge and defense counsel do their jobs properly, the appellate courts should have little reason to be paternalistic in this area.

A brief discussion of the concurring opinion by Judge Cox in Jones is in order. In his opinion, Judge Cox distanced himself "from any implication in the majority opinion that the point of origin or 'sponsorship' of any particular term of a pretrial agreement is outcome determinative."[412] As this is a focal point of this thesis, Judge Cox's views on this subject will be discussed again later in this paper. For now, however, it suffices to say that subsequent to the Jones trial, the Rules for Courts-Martial were promulgated,[413] and the analysis to those rules adopts a position similar to Judge Cox's concurrence.[414]

Accordingly, the majority's reliance on the waiver provision being a "freely conceived defense product,"[415] may not be required in cases tried under the provisions of the Rules for Courts-Martial.

After the Kitts and Jones decisions, the various Courts of Military Review, again took off in different directions, at times, stretching or avoiding the principles laid down in those two opinions.

The first case to be decided was United States v. Corriere.[416] As previously discussed, Corriere involved an alleged sub rosa agreement between defense counsel and the staff judge advocate. The alleged agreement

provided that if the convening authority approved the sentence limitation in the offer to plead guilty, the defense would not pursue discovery, command influence and suppression motions.[417] Because these allegations were made for the first time on appeal, the Army Court returned the record for a limited hearing.[418]

The limited hearing was held, and the record returned to the court for final disposition.[419] In the interim, Kitts and Jones were decided.

With the benefit of those decisions, and the record of the limited hearing, the Army Court concluded that although "an implied agreement as described above existed"[420] the terms of the agreement did not offend public policy, because, "the accused knew of, and was a party to, the decision to waive the pretrial motions."[421]

In reaching this decision, the court sub silento distinguished Kitts by stressing that the decision to waive the motions in Corriere was a 'strategic defense initiative'[422] as opposed to a Government imposed "requirement."[423] The court then stressed that although it was preferable that the existence of the agreement be disclosed at trial, in light of the evidence presented at the limited hearing, they were able to conclude that Captain Corriere received a fair trial.[424]

Captain Corriere later appealed this decision to the Court of Military Appeals.[425] His petition, however, was dismissed.[426]

The Corriere case is an important decision in this area for several reasons.

First, it demonstrates how well intentioned judge advocates can easily slip into sub rosa agreements;

Second, it illustrates how strict application of Cummings,[427] and its progeny, can hamper defense counsel and encourage sub rosa agreements;

Third, it illustrates a situation where full disclosure at trial, would have revealed that such agreements can be in an accused best interest, and at the same time not render ineffective the trial or appellate process;[428] and

Finally, Corriere represents the first appellate decision sanctioning an accused's election not to pursue an issue which is not waivable by his plea of guilty as a legitimate tactic in a pretrial agreement. This last point makes Corriere both a significant extension of Jones, and a departure from Kitts.

As with the discussion of United States v. Jones, a summarization of the evidence of record, some of which is not contained in the published opinion, is necessary to a full understanding of the opinion.[429]

On 25 March 1983, Captain Corriere was apprehended during the infamous Pinder Barracks roundup.[430] His "numerous offenses" included leaving his place of duty, unlawful possession of drug abuse paraphernalia, improper safeguard of classified information, conduct unbecoming of an officer and a gentleman, and wrongful use, possession and distribution of marijuana.[431]

Sometime after his apprehension the accused served pretrial motions on the Government.[432] The most significant of which were a notice to suppress the accused's confession, and a motion for appropriate relief based upon alleged command influence over the pretrial process.[433] Nevertheless, even without the accused's confession, the Government's evidence on the merits was strong.[434] As for sentencing, defense evidence would only "open the door" to damaging rebuttal.[435]

Faced with these realities, the accused with the assistance of his two trial defense counsel, considered his limited options.

Paramount in the minds of the accused and his counsel was "limiting his losses as much as [they] . . . could".[436] Thus, an offer to plead guilty was considered as a means of obtaining a sentence limitation.[437] When the Government was advised of the accused's desire to negotiate a pretrial agreement, it initially took the position that it would recommend that only a ten year limitation on confinement be granted, in exchange for his pleas.[438] This proposal was discounted by the defense,[439] who made a counter-proposal of a twelve or thirteen month limitation on confinement.[440] The Government refused this proposal, and one of the accused's two defense counsel, sought the advice of his regional defense counsel on how to get the negotiations moving again; this conversation took place sometime during the "last two weeks in June," 1983.[441] The regional defense counsel advised counsel that he might offer to waive his previously filed motions in exchange for a more favorable sentence limitation.[442] Pursuant to this advice, both counsel consulted with the accused and

obtained his approval of the bargaining strategy outlined above.[443]

Thereafter, the SJA, trial counsel and both defense counsel met face-to-face on or about 17 July 1983, and negotiated the terms of appellant's pretrial agreement.[444] During this negotiation session an impasse was reached when the Government proposed an eighteen month limitation on confinement and the defense continued to hold out for a thirteen month limitation.[445] At this point defense counsel proposed a fifteen month limit on confinement and indicated the defense would not litigate the aforementioned motions.[446] The SJA immediately responded "that can't be part of the deal unless we write it in the deal."[447]

The SJA then took a few moments to reflect on the accused's proposed sentence limitation, and accepted the proposal for two reasons: (1) "I wanted a clean deal cut"; and (2) he didn't "know what happened at Pinder Barracks during the bust.[448] Having reached an agreement in principle on the terms of the pretrial agreement, the accused's counsel then consulted with him and obtained his approval of the terms of the proposed agreement.[449] The accused was also again advised by his counsel that litigating the motions would not afford him any substantial benefit and the accused agreed not to litigate these issues at trial.[450]

At trial, however, the alleged waiver provision was not included in the pretrial agreement, and counsel assured the military judge that the withdrawal of the defense motions, was a tactical decision which was not a part of the pretrial agreement.[451] This contention was

maintained by the parties post-trial,[452] but the Army Court was unpersuaded that they had successfully walked "a legal tight rope to avoid a sub rosa agreement."[453]

From the foregoing it is easy to see how the parties in this case ended up in a sub rosa agreement. As in any pretrial agreement the parties entered the negotiations with some common ground. First they were convinced the accused was guilty.[454] Second, they were convinced that the Government had sufficient admissible evidence to establish his guilt beyond a reasonable doubt.[455] Third, the Government desired to proceed as expeditiously as possible, and was willing to give the accused some consideration for his pleas of guilty.[456] In simple cases, all that is at issue is bargaining over charges and the sentence. But in a case like Corriere where the accused is clearly guilty, facing lengthy confinement, but wants an exceedingly lenient sentence limitation, he must come forward with something more than his pleas, to sweeten the deal so that the staff judge advocate can sell it to the convening authority.

In Corriere, the defense used a tactic which is well accepted in civilian plea bargaining.[457] First, they served their motions to put the Government on notice that if the case was contested they were in for a protracted battle.[458] Next, they signaled their willingness to plead guilty, thus offering the Government a way out of protracted litigation.[459] Third, they bargained in good faith until the parties were only three months apart on the sentence limitation,[460] before offering up the waiver of motions, to encourage the Government to accept the defenses final proposal.[461]

At this point, the parties all realized, that litigation of these motions would only muddy the record, but not change the ultimate outcome of the trial; a conviction and lengthy confinement for the accused.[462] Nevertheless, disposing of the case in an expeditious fashion, with a clean record after nearly three months of pretrial delay, was worth enough to the Government, to give up three months confinement, and accede to the defense proposed sentence limitation.[463]

In United States v. Jones, the court held that no public policy concern should be triggered where an accused (in "his best interest, and presumably that of society as well") offered to waive his suppression motion in exchange for a favorable sentence limitation.[464] The result should have been no different with the offer to waive the suppression motion in Corriere. As the Army Court observed: "[t]he existence of an undisclosed agreement does not, per se, render void the plea bargain . . ., or vitiate the providence of a guilty plea."[465] Thus, since the substance of the agreement was lawful, its sub rosa nature should make no difference, once the true facts were revealed on appeal.

Similarly, Captain Corriere's informed tactical decision to forego litigation of his command influence motion, on the advice of counsel should not offend public policy, so long as it can be established that he received a fair trial. While command influence issues are not waived by a plea of guilty,[466] and may be "the mortal enemy of military justice,"[467] public policy does not dictate that all command influence issues be litigated at trial, but rather, that all accuseds must receive a fair trial.[468] Thus, if Captain Corriere received a fair

trial, it is of little consequence that he failed to litigate a command influence issue that he and his counsel believed would afford him no substantial relief.

The Corriere case in the final analysis, should stand for the proposition that the accused and his counsel are in the best position determine his best interest. If he elects to forego any right to obtain a pretrial agreement, he and his counsel should be able to articulate on the record a rational basis for the decision, which should satisfy both the military judge and the appellate courts.

The Army Court was correct in recognizing the problem in the case was not the substance of the agreement, but its secretive nature.[469] That aspect prevented the trial and appellate courts from assuring the providence of the accused pleas, until the full truth was disclosed during the limited hearing.[470] Once disclosed, however, the court had no reason to grant relief on these grounds, as the fairness of the proceedings were conclusively established.[471] In short, Captain Corriere was not entitled to a windfall, because he offered too good of a deal to the convening authority.[472]

In United States v. Phillips,[473] the Air Force Court of Military Review was faced with a rather unique provision in a pretrial agreement, whereby the accused waived his right to counsel, in futuro.[474] The clause, was an adjunct to a an agreement to testify truthfully in future cases for the Government.[475] As the clause had no impact on the present appeal, the court's observations are dicta.[476] Nevertheless, the opinion continues the Air

Force's conservative bent in this area, which is for the most part fostered by regulatory guidance which limits the scope of pretrial agreements in that service.[477]

Subsequently, in United Stats v. Dorsey,[478] the Air Force Court, considered a defense initiated provision similar to that approved of in United States v. Jones, in which the accused waived a suppression motion as part of a pretrial agreement.[479] The majority, however, held the provision violative of Air Force regulatory guidance, and set aside the findings and sentence.[480] The dissenting Judge, citing Jones and other decisions observed that although the provisions of agreement violated Air Force regulations, the appellant was not prejudiced and thus not entitled to relief.[481] Upon rehearing, the court reversed itself because in a previously undisclosed post-trial hearing, the military judge had stricken the clause from the agreement.[482] Citing United States v. Brickey,[483] Rule for Courts-Martial 1102, and a change to the Air Force regulation (which was incidentally not in force at either the time of trial or the post trial hearing), the Court broke with its prior decisions (that such agreements were void ab initio, and thus, could not be modified), and held agreement as modified was valid and affirmed the findings and sentence.[484] The majority, however, gave no clue as to how they would resolve future cases.[485] The dissenting judge, relied on his earlier dissent.[486]

The latest case on point is United States v. Gibson.[487] In Gibson the Army Court of Military Review was faced with a defense initiated agreement waiving all evidentiary objections.[488] Relying on Jones, and the pretrial agreement inquiry in the case, the court

"scrutinized [the agreement] for propriety,"[489] and approved the agreement, because, it was mutually beneficial to the Government and the accused.[490] Gibson follows the majority position in Jones that a "pretrial agreement must be a 'freely conceived defense product.'"[491]

On another front, waiver of sentencing before members, as part of a pretrial agreement, was a hot topic in the 1980s.[492] In United States v. Zelinski,[493] the Court of Military Appeals, reexamined its decision in United States v. Schmeltz.[494] In Schmeltz, the "court did not condone inclusion of such a provision in military plea agreements. However, it also refused to invalidate a guilty plea on this basis alone where it 'was a freely conceived defense product.'"[495] In reaffirming Schmeltz, the majority in Zelenski, made a special effort to remind the field that:[496]

> Our reluctance to fully accept this provision in all guilty plea cases without regard to its point of origin is not chimerical. It is grounded instead on Congress' decision to provide the military accused a viable option to be tried by members or by military judge alone. Accordingly, service or local command policy which might undermine this legislative intent through the medium of standardized plea agreements will be closely scrutinized.

Judge Cox, however, concurred in result only, citing his separate opinion in Jones.[497]

The Army, Air Force and Navy-Marine Courts of Military Review have all followed Zelenski, with slight differences between them.

In United States v. Campos,[498] the Air Force Court of Military Review, was faced with a command initiated waiver of members clause.[499] The Air Force Court held that the agreement was void ab initio, because it violated both Air Force Policy (which forbidded such clauses no matter who initiated them) and Zelinski (which forbidded command sponsored clauses).[500] Later, however, in United States v. Reed,[501] the Air Force Court approved of a defense initiated clause waiving members, because: (1) Air Force policy had changed and no longer forbidded such clauses and (2) since the clause was defense initiated, Zelenski was not offended.[502]

In United States v. Ralston,[503] the Army Court strictly followed Zelenski and reluctantly approved of such a clause because the inquiry by the military judge revealed that the agreement "was a freely conceived defense product."[504]

The Navy-Marine Court of Military Review, also approved of such a clause in United States v. Bray.[505] Bray, however, is unique because the court affirmed using a harmless error analysis, after concluding the inquiry by the military judge was inadequate.[506] The court, nevertheless, affirmed the findings and sentence, based upon extra-record evidence that the clause was defense initiated, and a lack of any allegation by appellant, that he would have elected to proceed with members absent the clause.[507]

The Coast Guard Court of Military Review, on the other hand, has approved of a command initiated clause waiving members in a pretrial agreement. In United States v. Sanchez,[508] the court without any mention of

Zelenski, approved of the clause because it was their view the source of the provision was not critical.[509] Instead the court focused solely upon evidence that the accused had "freely negotiated away [his right to sentencing by members] in return for a desired sentence limitation."[510] As of this date, the Court of Military Appeals has yet to consider this decision, and it has not been followed by any of the remaining Courts of Military Review.

The last major area of litigation during the 1980s, in the area of terms and conditions in pretrial agreements involved clauses requiring the accused to enter into a confessional stipulation. Inclusion of such clauses in military pretrial agreements have been accepted for some time.[511] Nevertheless, "[c]onflicts between prosecutors and trial defense counsel over the contents of stipulations of fact arising from pretrial agreements have provided a fertile field of litigation in the appellate arena for many years."[512]

Fortunately, in the last year, the Court of Military Appeals in United States v. Glazier,[513] and the Army Court of Military Review in United States v. Enlow,[514] and United States v. DeYoung[515] have brought some consistency to this area of the law.

In Glazier, the stipulation of fact required by the pretrial agreement contained uncharged misconduct directly relating to or resulting from the offenses of which appellant was found guilty of.[516] While the accused admitted the truthfulness of the facts contained therein, he objected to the admissibility of the uncharged misconduct.[517] The military judge, however,

ruled that the disputed facts were admissible.[518] The Court of Military Appeals agreed, and affirmed.[519]

The court, however, did make a special point to observe, that even inadmissible evidence could be contained in such a stipulation provided "the accused is willing to stipulate to [such evidence] in return for a concession favorable to him from the Government, assuming no overreaching by the Government."[520]

Thus, the following general observations can be made, regarding the contents of stipulations required by pretrial agreement. First, the parties must agree the facts contained in the stipulation area true. Second, the parties may include even inadmissible evidence in the stipulation, provided there is no Government overreaching. Third, if the defense objects to the admissibility of any fact therein, the military judge must rule on the admissibility of that evidence.

In United States v. Enlow, the Army Court was faced with confessional stipulation of fact, which was originally part of a pretrial agreement.[521] The agreement, however, fell apart, when the accused withdrew his pleas and enter pleas of not guilty to all charges.[522] Thereafter, in a trial by military judge alone, the Government sought readmission of the stipulation, and upon inquiry by the military judge, the accused and counsel concurred.[523]

After advising the accused that he would not "necessarily . . . allow [the accused] to stipulate to facts which may amount to a judicial confession";[524] the military judge accepted only those parts of the

stipulation which the accused still agreed to, and informed the Government that they could withdraw from the modified stipulation.[525] The Government did not withdraw, and presented one witness.[526]

On appeal the Army Court found that the modified stipulation, amounted to "'a de facto plea of guilty.'"[527] Thus additional inquiry by the military judge into the providence of this de facto plea was required.[528] Nevertheless, after testing for prejudice, the court dismissed only one specification and reassessed the sentence.[529] Enlow, presents a reasoned approach to unique facts. It is consistent with Glazier, in that it focuses upon the military judge's duty ensure the accused's right to a fair trial.

In the final case in this trilogy, United States v. DeYoung, the Army Court was faced with the more familiar issue of a dispute over the admissibility of facts in a stipulation.[530] The stipulation, in DeYoung, unlike the one in Glazier, contained a clause wherein the accused and counsel agreed that the facts contained therein were both true and admissible.[531] In Glazier, you may recall, the parties stipulated only to the truthfulness of the facts.[532]

After reviewing all of the relevant cases on point,[533] the court concluded the military judge, committed harmless error by not ruling on defense objections to uncharged misconduct contained in the stipulation, for several reasons:

First, the accused had stipulated to both the truthfulness and admissibility of the facts discussed in the stipulation;[534]

Second, the evidence was in fact admissible as evidence of past military performance;[535] and

Third, even if the evidence was inadmissible, it was properly included in the stipulation, because, there was no evidence of Government overreaching.[536]

The Court, did warn trial counsel who would force unnecessary inadmissible evidence upon the accused and the court, that they could be "charged with unethical conduct."[537] DeYoung, is a well written opinion, wholly consistent with Glazier, and one which should be followed in the future.

As the analysis to the Rules for Courts-Martial makes clear, the list of permissible terms or conditions contained in Rule 705(c)(2) is not exhaustive.[538] Consequently, several unique clauses have been developed.

For example, in United States v. Hicks,[539] the Army Court of Military Review was faced with a provision in a pretrial agreement which required the convening authority to suspend any confinement for one year, and in return required the accused to request excess (unpaid) leave at the time of approval of any punitive discharge.[540] The accused's sentence included confinement, total forfeitures, reduction to the lowest grade and a bad-conduct discharge.[541] Shortly after trial, the confinement was deferred, and the accused

placed on excess leave.[542] The convening authority later took action in accordance with the pretrial agreement.[543]

On appeal, the Court requested briefs from both parties on whether the convening authority erred by approving total forfeitures, where all confinement was suspended.[544] Both appellate counsel asserted that the convening authority had not erred.[545] The court, however, disagreed, because the discussion to Rule for Courts-Martial 1107(d)(2) provides: "[w]hen an accused is not serving confinement, the accused should not be deprived of more than two-thirds pay for any month -- unless requested by the accused."[546]

The court then approved only partial forfeitures,[547] for two reasons: First, military judge failed to inquire of the accused if he requested "total forfeitures even if he were returned to duty";[548] and second the court refused to presume waiver from a silent record."[549] Hicks is a remarkable decision, one that proves there really is a Santa Claus. The rationale in Hicks, however, was rejected by the Coast Guard Court of Military Review in United States v. Cunningham.[550]

Finally, another unique clause, can be found in death penalty cases. In United States v. Covington,[551] the Navy-Marine Court of Military Review approved of a clause, in which in exchange for the accused's plea of guilty, the convening authority referred the case non-capital, and placed a fifty year limit on confinement.[552] Relying on primarily Supreme Court opinions the court found the provision to be lawful, because, the accused made a decision not to risk the death penalty, and

voluntarily offered the pretrial agreement, nothing more is required.[553]

As the decade draws to a close, many changes in military guilty plea practice have occurred. Many of these changes have brought the military closer to federal practice and in so doing brought consistency to federal practice as a whole. Nevertheless, in some respects military guilty plea practice remains unique.

E.
LESSONS OF THE PAST

By examining the development of negotiated guilty plea practice in the military from a historical perspective, it is easy to see that four basic tenets have taken root, and now serve as the cornerstones of modern practice.

First, pretrial agreements are encouraged in the military for two reasons: they allow the military justice system to work at maximum efficiency; and even if the military had unlimited resources, in most cases it would still be in the best interest of the accused to seek a pretrial agreement.[554]

Second, as negotiated guilty plea practice in the military has evolved over the years, it has to the greatest extent possible followed federal practice and that of the majority of the states. In so doing, military practice has become less paternalistic, and more open to innovation.[555]

Third, the recent willingness of the Court of Military Appeals to accept innovative pretrial agreements, has always been tempered with concern that such agreements not be allowed to adversely effect the course of trial and appellate proceedings.[556]

Fourth, while negotiated guilty plea practice in the military depends upon defense counsel and the accused to determine what course of action is in the accused's best interest, it relies primarily upon the inquiry of the military judge, to ensure the legality or fairness of the terms or conditions contained in the agreement between the parties.[557]

With these precepts in mind, it is time to turn our attention to the future.

III.
PROPOSED CHANGES

At the outset of this thesis three proposals were made. First, to eliminate the requirement that negotiations on pretrial agreements be initiated by the defense; second, that deprivations of certain rights be eliminated from Rule 705(c)(1)'s list of prohibited terms or conditions and that the discussion to that rule be eliminated as well; and third, to require military judges to specifically inquire of counsel and the accused, whether any deprivation of these rights is a term or condition of the accused's pretrial agreement. These proposals are based on federal practice, and it is expected that their adoption will afford counsel much needed flexibility, and allow military guilty plea practice to advance and evolve in a productive manner.

Federal guilty plea practice is governed by Federal Rules of Criminal Procedure 11 and 32. Under the federal model, the prosecutor is not precluded from initiating guilty plea discussions.[558] This affords, federal prosecutors, the flexibility to at least communicate to defense that "if there are to be any plea discussions, they must be concluded prior to a certain date well in advance of the trial,"[559] something the express language of the Rules for Courts-Martial seems to forbid.[560] This can be very important, when operational or other concerns known only to the Government, dictate that negotiations must be concluded by a date certain (i.e., the accused's cooperation is needed in an undercover investigation or testimony is needed in another trial).[561]

Recently, "[t]he Joint Services Committee on Military Justice has . . . referred to its Working Group a proposal to amend R.C.M. 705, which would allow the prosecution to initiate offers and terms of pretrial agreements."[562] This proposal makes sense not only for the reasons discussed above, but also, because, "[i]t is of no legal consequence whether the accused's counsel or someone else conceived of the idea for a specific provision as long as the accused, after through consultation with qualified counsel, can freely choose whether to submit a proposed agreement and what it will contain."[563]

Moreover, the historical context from which the present requirement developed, at least in the Army, no longer exist. When Major General Shaw, first proposed this limitation in 1953, defense counsel in the Army

worked for the same superior as did the trial counsel, the staff judge advocate, who in turned worked for the convening authority.[564] Thus, a Government initiated pretrial agreement would certainly have raised concerns of at least an appearance of command influence.

Since 1980, however, the Army has removed defense counsel from the supervision and control of the staff judge advocate and convening authority, and provided a separate chain of command up to the general officer level, to insulate defense counsel from command influence.[565] Finally, with the promulgation of tough ethical rules governing counsels' professional conduct, defense counsel now more ever should be motivated by their client's interest, rather than that of the command.[566]

As for the proposal, that deprivations of rights be removed from the list of prohibited terms in pretrial agreements, a few initial observations are in order. Rule for Courts-Martial 707(C)(1)(B) provides:

> A term or condition in a pretrial agreement shall not be enforced if it deprives the accused of: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete sentencing proceedings; the complete and effective exercise of posttrial and appellate rights.

This rule has no counterpart in federal practice and is based upon military case law.[567] This case law, however, has been undercut, by subsequent decisions. As a result Rule 705(c)(1)(B) is overbroad and at a minimum should be strictly construed. The rule also stifles

creativity, and encourages sub rosa agreements in cases where the defense's only bargaining chip seems to offend the rule.[568]

In the federal system, however, there is no need for such a rule. It is well settled in the federal system absent a breach of the agreement by the Government, that a counseled accused who enters a provident plea of guilty, may only raise jurisdictional issues on appeal.[569] Thus in the federal system, the only issues that need be addressed on appeal are -- Is the plea provident?[570] Was the accused represented by counsel?[571] If so, was counsel competent?[572] Did the Government breach the agreement?[573] and; Does the appeal raise a jurisdictional issue?[574]

While there has been some confusion in the past over just what is a jurisdictional error in the federal system,[575] the definition of a jurisdictional issue now appears to be an error which is both apparent from the record of trial and demonstrates that the Government could not constitutionally prosecute the accused for the offense charged.[576]

Accordingly, there is no problem with agreements in the federal system where the accused bargains away a procedural right such as those listed in Rule 705(c)(1)(B) to get a favorable plea bargain, because, all of the issues discussed in that rule will be precluded on appeal unless a clear constitutional infirmity appears on the record itself.[577]

Moreover, the provisions of Rule 705(c)(1)(B) should be eliminated because, as previously alluded to,

subsequent case law has undercut some of the foundations of the rule. For example, the right to counsel is both a fifth and sixth amendment concept.[578] A suspect has a fifth amendment right to counsel during custodial interrogation.[579] Failure to provide such counsel is a violation of the fifth amendment.[580] The remedy for such a violation, however, is suppression of evidence not dismissal of charges.[581] As an evidentiary question the violation can be waived by a provident plea of guilty.[582] Accordingly, if an accused may forego this right and enter a naked plea of guilty and not offend public policy, he may also use the threat of suppression as a bargaining chip as leverage in pretrial agreement negotiations, to obtain a sentence limitation more to his liking.[583]

A more difficult situation to envision is a waiver of the sixth amendment right to counsel in pretrial agreement which does not offend the twin concepts of benefit to accused and fair trial previously discussed. Nevertheless, assume the following facts. An accused is overseas and on trial for espionage, the maximum penalty for which is death. The accused is represented by detailed counsel, but has the means to retain civilian counsel. Civilian counsel has consulted with the accused and is willing to take the case, however, he will not be available for some time do to other major litigation in the United States. The defense has filed a motion for continuance until such time as the civilian counsel is available. The command, while concerned that many of its witnesses who are third country nationals may depart the area and be unavailable at the time of trial, has taken the precaution of deposing them or

recording their testimony verbatim at the pretrial investigation.

The defense proposes the following agreement in return for a non-capital referral and a substantial cap on confinement, the accused will plead guilty to all charges and specifications and enter into a confessional stipulation of fact including the aggravating circumstances of the offense. The proposal further provides that, if the convening authority agrees to these terms, the accused will withdraw his continuance motion and proceed with detail counsel alone. Assume further, that this part of the agreement as with all other parts of the agreement were drafted by the defense with the full concurrence of the prospective civilian counsel and the accused. In essence if it is to be a contest the accused wants the civilian counsel. If, however, the convening authority agrees to his terms he has sufficient faith and confidence in his detail counsel to proceed with him alone for sentencing.

How would such an agreement would violate either the best interest test (assume even without the third country witnesses the Government has a reasonable chance of getting a conviction and the death penalty) or the fair trial test (assume that all of the above is reduced to writing in the agreement and disclosed on the record)? I submit it would not violate either of these tests. Moreover, given the accused constitutional right to waive counsel and proceed pro se[584] he should be able to use the waiver of this right the counsel as a bargaining chip to get a favorable pretrial agreement.[585] Accordingly, if the foregoing analysis is correct, Rule 705(1)(B) as to the right to counsel is overbroad and

could be interpreted in such a manner that hampers the accused and the system of justice it was designed to serve.

As previously indicated the pre-preferral right to counsel, is a due process right, and in the context of an evidentiary matter a guilty plea waives a violation of this right.[586] Thus, again the rule is overbroad. The concept of due process can also include issues such as unlawful command influence, and illegal pretrial punishment.[587] These rights, while important, do not necessarily require dismissal of charges, when they are violated.[588] As we have seen in the Corriere case, sometimes from the perspective of the accused he has more to gain by the threat of litigation than by actual litigation.[589] Thus it may be more beneficial to the accused to threaten such litigation and gain a favorable pretrial agreement, as opposed to litigating the issue getting a new referral, some credit on any sentence adjudged, and then having to go to the new convening authority with no leverage in subsequent plea negotiations.[590] Again, provided these factors are disclosed on the record, the accused is not denied a fair trial, and the integrity of the trial and appellate process is preserved.[591]

While a lack of jurisdiction may raised at any time, and if found will result in dismissal of the affected charges, it may not always be in the accused interest to raise the issue. In United States v. Lockwood,[592] the Court of Military Appeals observed, that while jurisdictional questions are not waived by failure to litigate them at trial "at the very least, [an] appellant's express refusal to contest [jurisdiction]

justifies drawing any reasonable inferences against him with respect to factual matters not fully developed in the record of trial."[593] In this statement and others that follow, the Court recognized that often for personal reasons an accused may wish to avoid litigation of a jurisdictional issue at trial, and that this tactical decision is the accused's prerogative.[594]

Thus, if an accused is willing to explain on the record why he is willing to forego, not waive, this issue at trial, after being advised by the military judge that the appellate courts will resolve all factual disputes in the record in favor of the Government, no public policy concerns should be raised by allowing the accused to make such an agreement with the convening authority.

Speedy trial motions if not made before adjournment are waived.[595] Consequently, whether a speedy trial issue is waived by a plea of guilty is a mixed question of law and fact.[596] In other words, unless there is some evidence of record, raising the issue, the issue is waived.[597]

Again while speedy trial violations result in dismissal of the affected charges, they do not necessarily afford an accused complete relief.[598] Thus, again an accused may use the threat of this motion to obtain a favorable pretrial agreement, provided full disclosure of the terms of the agreement is made on the record, without violating public policy.[599] Moreover, if an accused can waive the statute of limitations in a pretrial agreement, speedy trial issues should certainly be permitted as bargaining chips.[600]

As to the accused's right to a full sentencing proceeding, the cases demonstrate an accused can be compelled to enter into a confessional stipulation of fact, to include the aggravating circumstances of his offense. An accused may also offer to stipulate to the testimony of government witnesses, defense witnesses and to inadmissible but relevant evidence in order to receive a favorable pretrial agreement.[601] While these matters do not "transform the trial into an empty ritual"[602] they do encompass something less than "complete sentencing proceedings"[603] in the broadest sense of that phrase, again the rule is overbroad.

The last category of deprivation of rights discussed in Rule 205(c)(1)(B) (the exercise of post-trial and appellate rights) presents the most difficult area to conceive of a clause which would not render ineffective the trial and appellate processes or diminish the integrity of the courts.[604] Nevertheless, in United States v. Harrison, the Court of Military Appeals approved of post-trial personal advice by counsel that an appeal was a waste of time in view of the accused lenient sentence.[605] If counsel can give such advice post-trial, he may be able to give it pretrial, provided it is limited to pretrial matters. (Counsel of course do not have a crystal ball and cannot foresee events which will occur at trial).[606] In other words, if the agreement was well thoughtout and followed by all parties after trial there is little reason for appeal save spite or fancy. On the other hand, if the convening authority does not live up to the agreement, the accused can certainly raise that issue on appeal, and if the issue has any merit the appellate courts are

not likely to rely on the waiver provision to avoid the appeal.

Accordingly, Rule 705(c)(1)(B) is overbroad and should be eliminated. The discussion to this rule also is overbroad in light of the appellate decisions heretofore discussed, in that it indicates that provisions prohibiting the accused from making motions may be improper. Accordingly, it should be eliminated as well.

As for the third proposal, it is a natural outgrowth of the second, by requiring the military judge to inquire into this area, the rules would promote innovation but only under the watchful eye of the military judge. As a result the practice of negotiated guilty pleas in the military would continue to grow and evolve under controlled conditions, rather than stagnate, because of paternalistic prohibitions of the past.

IV.
CONCLUSION

The process of negotiating pretrial agreements in the military has come a long way in the past thirty-six years. In the future, it will undoubtedly grow and evolve. The modest proposals in this paper will hopefully contribute favorably to this development.

ENDNOTES

1. On 19 January 1953, the Chief, Military Justice Division, of the Office of the Judge Advocate General, U.S. Army, prepared a memorandum for The Assistant Judge Advocate General, Major General, Franklin P. Shaw. See Memorandum, JAGJ 1953/1278, 19 January 1953, subject: Pleas of Guilty in Trials by Courts-Martial (on file at the Judge Advocate General's School, U.S. Army Library) [hereinafter TJAGSA library]. After receiving this memorandum, General Shaw dispatched a letter to all staff judge advocates encouraging them to adopt in their jurisdictions the civilian practice of negotiating guilty pleas. See Letter JAGJ 1953/1278, 23 April 1953 (on file at TJAGSA library). This action by General Shaw is viewed by commentators as being the first step in the development of negotiated guilty plea practice in the military. See, e.g., Gray, Pretrial Agreements, 37 Fed. Bar J. 49 (1978); and Hickman, Pleading Guilty for a Consideration in the Army, 12 JAG J. 11 (1957) (on file at TJAGSA library). This conclusion is largely correct, however, it appears that a procedure similar to that outlined in the Shaw letter, supra, had been used in Alaska with great success, for a year before the Shaw initiative. See Letter, HQ, U.S. Army, Alaska, 15 May 1953 (on file at TJAGSA library). See also infra notes 45, 51-52, and 61-62, and accompanying text.

2. See Manual for Courts-Martial, United States, 1984 Rule for Courts-Martial 705 [hereinafter R.C.M.]; and R.C.M. 705 analysis, app. 21 at A21-35.

3. R.C.M. 705(d)(1) and (2).

4. R.C.M. 705(c)(1)(B).

5. R.C.M. 705(c) and discussion thereto.

6. By substituting a requirement that the military judge inquire into these areas, a record can be developed for review at the trial and appellate level, without stifling the creativity of counsel, and the development of the law.

7. Federal practice has no counterpart to R.C.M. 705(c)(1)(B). See generally Fed. R. Crim. P. 11 and R.C.M. 705 analysis at A21-35.

8. General Shaw's initiative has come to be known as the "The Guilty Plea Program." See, e.g., Bethany, The Guilty Plea Program, at 1 (1959) (unpublished treatise) (on file at TJAGSA Library).

9. Hughes, Pleas of Guilty - Why So Few? The Judge Advocate Journal, Bulletin No. 13, at 1 (April 1953) (on file at TJAGSA library).

10. Shaw letter, supra note 1 at 3.

11. Id.

12. See generally Hughes, supra note 9, and Shaw letter, supra note 1.

13. Hughes, supra note 9 at 1, and Shaw letter, supra note 1 at 2-3.

14. Memorandum, supra note 1 at 1.

15. Id.

16. Id. at 7; see also id. at enclosures 1-7 (note enclosures 3, 6, and 7 were either illegible or missing and are thus not on file at the TJAGSA library).

17. Id.

18. Id.

19. Id. at 1.

20. Id. at 1 and 7.

21. See Everett, Military Justice in the Armed Forces of the United States, at 11-15 (1956).

22. Compare Dep't of Army, Pam 27-173, Military Justice: Trial Procedure, para. 14-4b (25 April 1978) with its successor, DA Pam 27-173, chap. 11 (15 February 1987).

23. See supra note 2.

24. Shaw letter, supra note 1.

25. Id. at 6.

26. Compare the memorandum, supra note 1 with the Shaw letter, supra note 1.

27. See Memorandum, JAGJ 1953/1278, 5 January 1954, subject: Pleas of Guilty in Trials by Courts-Martial, at 1 (on file at TJAGSA library). See also United States v. Gordon, 10 C.M.R. 130, 131 (C.M.A. 1953) ("While we express no view relative to the desirability or feasibility of such a practice before courts-martial, we observe that it has the sanction of long usage before the criminal courts of the Federal and state jurisdictions").

28. Memorandum, supra note 27.

29. Id.

30. Letter, Staff Judge Advocate, Fort Leonard Wood, 7 August 1956 at 1 (on file at TJAGSA library).

31. Bethany, supra note 8 at 1-10 and 89-94. See also Hickman, supra, note 1 at 11.

32. Bethany, supra note 8 at 8; Hickman, supra note 1 at 11.

33. Bethany, supra note 8 at 8-9; Hickman, supra note 1 at 11.

34. Bethany, supra note 8 at 9; Hickman, supra note 1 at 11.

35. Agreements as to Pleas of Guilty, 36 JAG Chronicle 183 (4 Sep 1953) (on file at TJAGSA library).

36. Id.

37. Letter, Staff Judge Advocate, 82d Airborne Division, 9 August 1956 at 2 (on file at TJAGSA library).

38. Memorandum, supra note 1 at 7; see also notes 56-63 infra.

39. 36 JAG Chronicle, supra note 35, at 183. The JAG Chronicle was a forerunner to The Army Lawyer.

40. Id.

41. Id.

42. Report of Proceedings, Army Judge Advocate Conference, 1953 at i (on file at the TJAGSA library).

43. Id. at 77-87 (on file at TJAGSA library).

44. Id. at 86-87, 263, and 267.

45. Id. at 77-87, and 264 (note Lieutenant Colonel Lougee's guilty plea program was in existence a year before the Shaw letter. See supra note 1).

46. Id. at 77-78.

This procedure is reprinted below:

> Step 1 - The defense counsel consults with the accused. If the evidence indicates that a plea of guilty would be appropriate and the accused indicates that he desires to plead guilty, a conference is then held with the staff judge advocate several days prior to the trial.
>
> Step 2 - After an analysis of the case and an examination of the service record, report of investigation, and all facts (including prevalent problems of discipline within the command), a recommendation is made to the convening authority that, upon a plea of guilty made by the accused, the sentence as approved by the convening authority will not exceed a certain period of confinement.
>
> Step 3 - After the approval by the convening authority, the defense counsel is advised of the maximum sentence which will be approved if a plea of guilty is made to a designated charge or charges.
>
> Step 4 - The law officer is advised of the agreement reached, but the members of the court are not so advised in order that there will be no influence, direct or indirect, exerted upon the court in violation of Article 37.
>
> Step 5 - The trial counsel has all essential witnesses available, but he is instructed to offer no evidence, and he is not required to establish a prima facie case. However, after the plea of guilty and at the appropriate place in the proceedings, the trial counsel informs the court that the

witnesses are available and calls any witnesses desired by the court or the law officer.

Step 6 - The defense counsel maintains a log showing the time spent conferring with the accused in connection with the case and setting out in detail the procedure followed as to the plea of guilty and the decision of the convening authority as to the maximum sentence which will be approved if such a plea is decided upon by the accused. This log is not made a matter of record but is placed in the office file in the case. This procedure is set out to meet the objection of commanders who feel that an agreement as to sentence based upon a plea of guilty by an accused may, in some cases, result in a later complaint by the accused that he was "railroaded" or forced into a plea and that he otherwise would not have pleaded guilty. In the event of such complaint (congressional or otherwise), reference to this log will permit a staff judge advocate, for the convening authority, to answer any and all complaints relative to the case.

Step 7 - There will be included in the review a detailed statement of the agreement reached as to he plea of guilty and the maximum punishment that is to be approved, which is in compliance with a recent letter from the Office of The Judge Advocate General.

47. Id. at 77 and 85.

48. Id.

49. Id. at 77, 85, and 87.

50. Id. The only case directly on point is United States v. Crawford, 46 C.M.R. 1007 (A.C.M.R. 1972). Crawford holds the these powers are nondelegatable. But see United States v. Manley, 25 M.J. 346, 347-351 (C.M.A. 1987) (trial counsel can orally bind the convening

authority at trial to modifications of the pretrial agreement). See also R.C.M. 705 analysis at A21-35 and A21-36 (While adopting Crawford the analysis makes provision for oral modifications at trial, with the consent of the parties).

51. Id. at 83.

52. Compare id. at 83 with id. at 77 and 85.

53. Id. at 77-87.

54. Id. at 85-87.

55. Id. at 87.

56. Id. at 77.

57. Id.

58. Id. This issue latter arose in United States v. Duncan, 26 C.M.R. 245, 248 (C.M.A. 1958) (C.M.A. held the members could call witnesses, despite the plea of guilty).

59. Report, supra note 42 at 81 and 85.

60. Id. at 81.

61. Id. at 84.

62. Id.

63. Id. at 77-87. It is also safe to assume that the advice given in the memorandum supra note 1 at para. 7 (trial counsel should not put on aggravation evidence), was almost universally rejected within the Judge Advocate General's Corps.

64. Report, supra, note 42 at 78 and 85-86.

65. Id. at 86.

66. Id.

67. Id. at 79 and 84.

68. Id. at 79.

69. Id. at 84.

70. Id. at 79-87.

71. 16 C.M.R. 344 (A.B.R. 1954).

72. 16 C.M.R. at 345.

73. 16 C.M.R. at 345-46.

74. 16 C.M.R. at 346.

75. See also e.g., United States v. Emerson, 20 C.M.R. 482 (A.B.R. 1956); and United States v. Proctor, 19 C.M.R. 435 (A.B.R. 1955).

76. Report of Proceedings, Army Judge Advocate Conference, 1954, at i (on file at TJAGSA library).

77. Id. at 82-93.

78. Id. at 82-93, 231 and 236.

79. Id. at 82-93.

80. Id. at 84.

81. Id.

82. Id.

83. Id. at 84-93.

84. Id.

85. Id. at 85. See also supra notes 47-55 and accompanying text.

86. Id. at 85-86.

87. Id. at 86.

88. JAGJ 1956/6550, 20 August 1956, TJAG Letter, JAGS 250 24/56, subject: A Chronicle of Recent Developments in Military Law of Immediate Importance to Army Judge Advocates, at 12 (on file at TJAGSA library).

89. Report of Proceedings, Army Judge Advocate Conference, 1956, at 228 (on file at TJAGSA library).

90. Id.

91. Id. at 229.

92. Id.

93. United States v. Callahan, 22 C.M.R. 443 (A.B.R. 1956).

94. 22 C.M.R. at 447-48.

95. Compare 22 C.M.R. at 445 ("Sentence adjudged 17 May 1956.") with 22 C.M.R. at 447 (discussing 4 Sept. 1953 notice). See also 22 C.M.R. at 446-48.

96. 22 C.M.R. at 448; see also JAGJ 1956/7801, 24 October 1956, TJAG Letter, JAGS 250 28/56, subject: A Chronicle of Recent Developments of Immediate Importance to Army Judge Advocates, at 6-7 (Callahan in

accord with prior TJAG guidance) (on file at TJAGSA library).

97. 22 C.M.R. at 448.

98. 22 C.M.R. 510, 520 (A.B.R. 1956).

99. 22 C.M.R. at 519.

100. Id.

101. In United States v. Rinehart, 26 C.M.R. 815, 816 (C.C.B.M.R. 1958), the opinion makes reference to a 1956 pretrial agreement. This is the first reference to pretrial agreements in a case involving the Coast Guard. See also United States v. Villa, 42 C.M.R. 166 (C.M.A. 1970), for the earliest substantive discussion of pretrial agreements in the Coast Guard.

102. Message, HQ, Dep't of Army, 525595, 8 May 1957. The original of this message apparently no longer exist. A copy is reprinted in Bethany, supra note 8, at Appendix I.

103. See supra note 39.

104. See supra note 102.

105. SECNAVINST 5811.1 (11 September 1957), reprinted in Pretrial Agreements as to Guilty Pleas in General Courts-Martial, 11 JAG. J. 3 (1957). This program was extended to special courts-martials by SECNAVINST 5811.2 (17 December 1957), reprinted in Seagoing Navy's Greatest Opportunity for "TAPECUT" Pretrial Agreements as to Guilty Pleas Extended to Special Courts-Martial, 12 JAG. J. 17-18 (1957). Note volumes 1-33 of the JAG Journal are on file at the TJAGSA library.

106. Bethany, supra note 8 at 10.

107. 24 C.M.R. 274 (C.M.A. 1957).

108. See supra notes 71-75, and accompanying text.

109. 24 C.M.R. at 275-76.

110. 24 C.M.R. at 276.

111. Id.

112. Id.

113. Id.

114. Compare 24 C.M.R. at 276 with 16 C.M.R. at 346; 19 C.M.R. at 438; and 20 C.M.R. at 484. See also United States v. Castrillon-Moreno, 7 M.J. 414 (C.M.A. 1979) (C.M.A. vacated pleas where accused misadvised as to maximum punishment).

115. 25 C.M.R. 8 (C.M.A. 1957).

116. 25 C.M.R. at 10-12.

117. 25 C.M.R. at 10.

118. 25 C.M.R. at 10-12; see also 25 C.M.R. at 12-17 (Latimer, J. dissenting) (Note the final resolution of this issue by the Army Board was unpublished).

119. 25 C.M.R. at 11; cf. 25 C.M.R. at 17 (counsel's duties don't end at findings) (Latimer, J. dissenting). See also United States v. Welker, 25 C.M.R. 151, 153 (C.M.A. 1958) (failure by the defense to present sentencing evidence may signal to members the existence of an agreement); and JAGJ 1957/3748, 4 April 1958, TJAG Letter, JAGS 250 14/58, subject: A Chronicle of Recent

Developments in Military Law of Immediate Importance to Army Judge Advocates at 11-12 (TJAG announces policy not to inform members of existence of pretrial agreements and to instruct the members "especially in guilty plea cases . . . the determination of a proper punishment rest with the discretion of the court and that court members must not impose a sentence relying upon reviewing authorities to grant clemency to the accused") (on file at TJAGSA library).

120. 25 C.M.R. 137 (C.M.A. 1958).

121. 26 C.M.R. 339 (C.M.A. 1958).

122. 25 C.M.R. at 138.

123. 25 C.M.R. at 138-39.

124. 26 C.M.R. at 339-42.

125. 26 C.M.R. at 342.

126. 26 C.M.R. at 342-43.

127. 26 C.M.R. 431 (C.M.A. 1958).

128. 26 C.M.R. 511 (C.M.A. 1958).

129. Compare 26 C.M.R. at 433-35 with 26 C.M.R. at 512-13.

130. See 26 C.M.R. at 435; 26 C.M.R. at 513; and 26 C.M.R. at 513-14 (Ferguson, J. dissenting) (counsel's personal advice was based in part on Army Policy).

131. See supra note 119.

132. The Army issued no significant new guidance on the subject during the period 1960-1969. See DA Pam 27-173,

para. 11-1, n. 2 (15 February 1987). The Navy similarly did not promulgate new directives, but instead incorporated existing procedures into the Manual of the Judge Advocate General of the Navy. See Infante, Avoiding the Pitfalls of Pretrial Agreements, 22 JAG J. 3 (1967) (on file at TJAGSA library).

133. 33 C.M.R. 226 (C.M.A. 1963).

134. 33 C.M.A. at 232.

135. Id. See also United States v. Gilliam, 48 C.M.R. 263, 264 (C.M.A. 1974) (the agreement should not discuss the scope of the expected testimony).

136. 34 C.M.R. 57 (C.M.A. 1963).

137. 34 C.M.R. at 59-60.

138. See infra notes 558-61, and accompanying text.

139. See United States v. Garcia, 1 M.J. 26, 29-31 (C.M.A. 1975) (This concern can be satisfied by evidence that the witness agreed to testify truthfully and did so).

140. Scoles, 33 C.M.R. at 232.

141. 36 C.M.R. 335 (C.M.A. 1966).

142. 36 C.M.R. 447 (C.M.A. 1966).

143. See 36 C.M.R. at 338; and 36 C.M.R. at 447.

144. 36 C.M.R. at 338.

145. 36 C.M.R. at 447 (emphasis in original).

146. Id.

147. See, e.g., United States v. Manley, 25 M.J. 346 (C.M.A. 1987); United States v. Olson, 25 M.J. 293 (C.M.A. 1987); United States v. Penster, 25 M.J. 148 (C.M.A. 1987); United States v. Cunningham, 27 M.J. 899 (C.G.C.M.R. 1989); United States v. Carter, 27 M.J. 695 (N.M.C.M.R. 1988); United States v. Clayton, 25 M.J. 888 (A.C.M.R.), pet. denied, 27 M.J. 18 (C.M.A. 1988); and United States v. English, 25 M.J. 819 (A.F.C.M.R.), rev'd in part, 27 M.J. 400 (C.M.A. 1988). See also Criminal Law Notes, The Army Lawyer, Jan. 1989 at 63. But see United States v. Christian, 20 M.J. 966, 969-70 (A.C.M.R. 1985) (latent ambiguity waived by failure to object in post-trial submissions. Christian, however, does not appear to be good law. See, e.g., United States v. Cabral, 20 M.J. 269 (C.M.A. 1985).

148. 38 C.M.R. 174 (C.M.A. 1968).

149. 38 C.M.R. at 175-76.

150. 38 C.M.R. at 176.

151. 38 C.M.R. at 176-77.

152. 38 C.M.R. at 177 (quoting United States v. Allen, 25 C.M.R. 8, 11 (C.M.A. 1957)). See also supra notes 115-19 and accompanying text.

153. 38 C.M.R. at 177-78.

154. 38 C.M.R. at 178.

155. 38 C.M.R. at 179. This finding is quite interesting since C.M.A. has no fact finding power. See, e.g., United States v. Stair, 22 M.J. 172, 172-73 (C.M.A. 1986) (summary disposition); and United States v. Schick, 22 C.M.R. 209, 214 (C.M.A. 1956).

156. 38 C.M.R. at 179 (Quinn, C.J., dissenting) (discussing United States v. Dudley, Docket No. 20,688 (December 20, 1967) (unpub. order denying petition)).

157. Id.

158. 38 C.M.R. at 179 (Quinn, C.J., dissenting).

159. 38 C.M.R. at 179-80 (Quinn, C.J., dissenting).

160. 38 C.M.R. at 180 (Quinn, C.J., dissenting).

161. Id.

162. Id.

163. See, e.g., United States v. Brady, 38 C.M.R. 412 (C.M.A. 1968); United States v. Lipousky, 38 C.M.R. 308 (C.M.A. 1968); United States v. Curtis, 38 C.M.R. 276 (C.M.A. 1968); and infra notes 259-70 and accompanying text.

164. 38 C.M.R. at 177. But see 38 C.M.R. 412; 38 C.M.R. 308, and 38 C.M.R. 276. As you might expect Cummings had a profound effect on Navy-Marine practice. But for a pre-Cummings discussion of Navy-Marine practice - see Infante, Avoiding the Pitfalls of Pretrial Agreements, 22 JAG J. 3 (1967), and Melhorn, Negotiated Pleas in Naval Courts-Martial, 16 JAG J. 103 (1962) (both on file at TJAGSA library).

165. Pub. L. No. 90-362, 1968 U.S. Code Cong. & Admin. News (82 Stat.) 1335.

166. Manual for Courts-Martial, United States, 1969 (Rev. ed.) [hereinafter M.C.M. 1969].

167. M.C.M., 1969, appendix 2, at A2-1 thru A2-26 (** indicates changed or new provisions).

168. Using WESTLAW it appears the number of military opinions in which pretrial agreements were discussed in any substantive manner increased from seventy in the 1960s to two-hundred and twenty-three in the 1970s.

169. The increase in ACMR opinions on the subject jumped from thirty opinions in the 1960s to one-hundred and six in the 1970s. This increase can be explained by three factors: (1) the Army was the first service to adopt the practice consequently it had more cases in pipe line; (2) the Army is the largest of the military services and consequently generates more military justice cases than its sister services; and (3) the fall out from the decision in United States v. Holland, 1 M.J. 58, 59-60 (C.M.A. 1975), where C.M.A. rejected a widely used clause in Army pretrial agreements. The Navy increase was from eleven opinions in the 1960s to sixty-eight in the 1970s.

170. CMA increase was modest, twenty-five opinions in the 1960s to thirty-eight in the 1970s. Similarly CGCMR increased its output from two cases in the 1960s to five cases in the 1970s.

171. See United States v. Avery, 50 C.M.R. 827, 829 (A.F.C.M.R. 1975). See also Air Force Pretrial Agreement Restrictions Declared Invalid, 10 The Advocate 214-15 (July-Aug. 78) (Restrictions imposed requiring the Air Force TJAG's approval before negotiating pretrial agreements were held invalid in 1 May 1978 special court-martial).

172. 50 C.M.R. at 829.

173. See DA Pam 27-9, Military Judge's Guide, para. 3-1 n.3 (19 May 1969) (C2 14 May 1970); DA Pam 27-173, para. 14-4b (23 April 1978); and Letter, DAJA-CL 1978/5512, 12 May 1978, subject: Informal Pretrial Agreements (on file at TJAGSA library).

174. See, e.g., Gray, supra note 1; Pleading Guilty and Negotiating a Pretrial Agreement, The Advocate, Mar.-Apr. 1976, at 14; Hunter, A New Pretrial Agreement, The Army Lawyer, Oct. 1973, at 23; Della Maria, Negotiating and Drafting the Pretrial Agreement, 25 JAG J. 117 (1971); and Some Thoughts on Plea Bargaining, The Advocate, Jan.-Feb. 1970, at 1. Note some of the advice given the Hunter article cited above was rejected by the Court of Military Appeals. See United States v. Holland, 1 M.J. 58, 59-60 (C.M.A. 1975); and DA Pam 27-173, para. 11-1, n.5 (15 February 1987).

175. See generally DA Pam 27-173, Chapter 11, notes 50-124 (15 February 1987).

176. 44 C.M.R. 237 (C.M.A. 1972).

177. 44 C.M.R. at 238.

178. 44 C.M.R. at 241.

179. 44 C.M.R. at 242.

180. Id.

181. 38 C.M.R. 174 (C.M.A. 1968).

182. This is a point which will be examined in more detail in the discussion of United States v. Corrierre,

24 M.J. 701 (A.C.M.R. 1987), infra notes 416-72 and accompanying text.

183. 46 C.M.R. 69 (C.M.A. 1972).

184. 46 C.M.R. at 70.

185. Id.

186. Id.

187. 46 C.M.R. at 70-72.

188. 46 C.M.R. at 72.

189. 46 C.M.R. at 71 n.2. But see R.C.M. 705(c)(2)(D) and DA Pam 27-173, para. 11-3(d)(5) (15 February 1987). Post-trial misconduct clause may be enforceable if adequate safeguards are provided. A suggested format for such a clause can be found in DA Pam 27-173, at 73 n.70 (15 February 1987).

190. 46 C.M.R. 170 (C.M.A. 1973).

191. 46 C.M.R. at 171.

192. 46 C.M.R. at 171-72.

193. Id.

194. 46 C.M.R. at 172-73.

195. 46 C.M.R. at 173-74.

196. Id.

197. 46 C.M.R. at 175-79 (Duncan, J., concurring in part and dissenting in part).

198. 1 M.J. 8 (C.M.A. 1975).

199. 1 M.J. at 9-11.

200. 44 C.M.R. 237 (C.M.A. 1972).

201. 38 C.M.R. 174 (C.M.A. 1968).

202. 1 M.J. at 11.

203. 46 C.M.R. 170 (C.M.A. 1973).

204. 1 M.J. at 11-12. This, however, was not the end of the case or this issue. In Schmeltz v. United States, 1 M.J. 273 (C.M.A. 1976), the court reconsidered their prior decision in light of United States v. Holland, 1 M.J. 58 (C.M.A. 1975), and set aside the findings and sentence. This issue, however, was relitigated in United States v. Zelenski, 24 M.J. 1 (C.M.A. 1987), where C.M.A. returned to the rationale of the first Schmeltz decision and refused to grant relief because the provision was "a freely conceived defense product." See 24 M.J. at 2 (quoting Schmeltz, 1 M.J. at 12).

205. United States v. Holland, 1 M.J. 58 (C.M.A. 1975).

206. See Hunter, A New Pretrial Agreement, The Army Lawyer, Oct. 1973, at 27 n. 5.

207. 1 M.J. at 60. See also United States v. Mills, 12 M.J. 1 (C.M.A. 1981) (agreement inhibited appellate review); and United States v. Arnold, 8 M.J. 806 (N.C.M.R.) (mixed plea provision discourage), pet. denied, 9 M.J. 143 (C.M.A. 1980).

208. 44 C.M.R. 237 (C.M.A. 1972).

209. 38 C.M.R. 174 (C.M.A. 1968).

210. Compare United States v. Kitts, 23 M.J. 105, 108 (C.M.A. 1986); United States v. McCray, 7 M.J. 191 (C.M.A. 1979); and United States v. Brundidge, 1 M.J. 152 (C.M.A. 1975) with United States v. Jones, 23 M.J. 305 (C.M.A. 1987); and United States v. Corriere, 24 M.J. 701 (A.C.M.R. 1987).

211. 42 C.M.R. 166 (C.M.A. 1970).

212. 42 C.M.R. at 166-70.

213. 42 C.M.R. at 170-75 (Ferguson, J., dissenting).

214. 1 M.J. 453 (C.M.A. 1976).

215. 1 M.J. at 455. See also United States v. Hall, 26 M.J. 739 (N.M.C.M.R.) (military judge may not reject pretrial agreement because he views the sentence limitation as too lenient), pet. denied, 26 M.J. 290 (C.M.A. 1988).

216. R.C.M. 910(f)(3).

217. Such an inquiry was not new to Army practice. See, e.g., Memorandum, JAGJ 1953/1278, supra note 1 at para. 5a; Report of Proceedings, Army Judge Advocate Conference, 1954, supra note 76 at 86; United States v. Care, 40 C.M.R. 247 (C.M.A. 1969); and United States v. Elmore, 1 M.J. 262 (C.M.A. 1976). Since the Green decision full compliance with the Green procedure has become a fixture in military practice. See United States v. King, 3 M.J. 458 (C.M.A. 1977); and R.C.M. 910(h)(3).

218. United States v. Wood, 48 C.M.R. 528 (C.M.A. 1974).

219. Id.

220. 48 C.M.R. at 533.

221. 48 C.M.R. at 529.

222. Id.

223. See United States v. Kinman, 25 M.J. 99, 101 (C.M.A. 1987).

224. 3 M.J. 60 (C.M.A. 1977).

225. 3 M.J. at 62.

226. 6 M.J. 184 (C.M.A. 1979).

227. 6 M.J. at 186.

228. 7 M.J. 132 (C.M.A. 1979).

229. 7 M.J. at 133.

230. 7 M.J. 409 (C.M.A. 1979).

231. 7 M.J. at 412.

232. Id.

233. Note these observations are in accord with the Army Judge Advocate General's views on informal pretrial agreements. See generally Letter, DAJA-CL 1978/5512, supra note 173 (on file at TJAGSA library).

234. 49 C.M.R. 536 (C.M.A. 1975). See also United States v. King, 27 M.J. 664, 669-70 (A.C.M.R. 1988).

235. 49 C.M.R. at 538-39.

236. 49 C.M.R. at 539.

237. R.C.M. 910 analysis at A21-52.

238. Id.

239. Id.

240. See generally Howell, TDS: The Establishment of the U.S. Army Trial Defense Service, 100 Mil. L. Rev. 4 (1983). See also The Guilty Plea: A Symposium, Parts One and Two, 13 The Advocate 4 and 5 (1981), for an excellent discussion of guilty, plea practice up to 1981, from a defense perspective.

241. Exec. Order No. 12,198 (March 12, 1980).

242. Saltzburg, Schinasi and Schlueter, Military Rules of Evidence Manual 1 (2d ed. 1986).

243. Id. at 144, 201, 321, and 397-98.

244. DA Pam 27-9, Military Judges' Guide (19 May 1969) (C4, 9 Jan. 1973).

245. DA Pam 27-9, Military Judges' Benchbook (1 May 1982).

246. DA Pam 27-9, Section III (1 May 1982).

247. 1 M.J. 453 (C.M.A. 1976).

248. See DA Pam 27-9 (C1, 15 Feb. 1985); and DA Pam 27-9 (C3, 15 Feb. 1989).

249. Compare DA Pam 27-9, Section III (1 May 1982) with DA Pam 27-9, para. 3-1 n.3 (19 May 1969).

250. DA Pam 27-10, Military Justice Handbook for the Trial Counsel and Defense Counsel (1 Oct. 1982) (C1, 1 Mar. 1983) (Note C1, only corrected printer errors).

251. Id. at 3-145 and 3-146.

252. See, e.g., Hunter, A New Pretrial Agreement, The Army Lawyer, Oct. 1973, at 23-27.

253. See The Army Lawyer, Oct. 1973, at 1 ("By-lined articles represent the opinions of the authors and do not necessarily reflect the views of The Judge Advocate General or the Department of the Army.").

254. R.C.M. 705 analysis of A21-35. Note also that just prior to the promulgation of the M.C.M., 1984, OTJAG sent out a letter to the field emphasizing that R.C.M. 705(c)(1)(B) was intended to preclude inclusions of waivers of appellate rights in pretrial agreements. See Letter, DAJA-CL, 11 July 1984, subject: Inclusion of Waivers of Appellate Rights in Pretrial Agreements (on file at TJAGSA library).

255. DA Pam 27-173, Trial Procedure (15 Feb. 1987).

256. See DA Pam 27-26, Rules of Professional Conduct for Lawyers (31 December 1987); and Navy JAG INSTR. 5803.1, subject: Professional Conduct of Judge Advocates (26 Oct. 1987), at Enclosure 1 (Rules of Professional Conduct), Note the Navy-Marine and Army Rules are substantially the same. The Navy-Marine Rules, however, were issue without comments. The Air Force and the Coast Guard have yet to adopt these rules, and rely upon the Model Code of Professional Responsibility (1980).

257. DA Pam 27-173, Chap. 11 (15 Feb. 1987).

258. See, e.g., DA Pam 27-26, Rule 1-4 comment; Rule 1.7 comment (Lawyer's Interests); and Rule 3.2 comment (31 Dec. 1987).

259. 12 M.J. 425 (C.M.A. 1982).

260. 12 M.J. 427 (quoting United States v. Schmeltz, 1 M.J. 8, 11 (C.M.A. 1975). See also 12 M.J. at 427 n.3; and United States v. Mitchell, 15 M.J. 238, 241 (C.M.A. 1983) (Everett, C.J., concurring) ("As long as the trial and appellate processes are not rendered ineffective and their integrity is maintained . . . some flexibility and imagination in the plea-bargaining process have been allowed by our court") (citations omitted).

261. 12 M.J. at 425-30. Note the Army Court of Military Review had reached a similar conclusion two months before the Schaffer opinion was published. See United States v. Miller, 12 M.J. 836, 840-41 (A.C.M.R. 1982), aff'd, 16 M.J. 169 (C.M.A. 1983).

262. 12 M.J. at 427.

263. 12 M.J. at 427 n.1.

264. 12 M.J. at 427 n.2.

265. 12 M.J. at 427 n.4; see also generally 12 M.J. at 428.

266. 12 M.J. at 426.

267. 12 M.J. at 427 (discussing United States v. Schmeltz).

268. 12 M.J. at 427-29.

269. 12 M.J. at 428.

270. See 38 C.M.R. 174, 179-80 (Quinn, C.J. dissenting).

271. 12 M.J. 448 (C.M.A. 1982).

272. 19 M.J. 953 (A.F.C.M.R. 1983).

273. 24 M.J. 596 (A.F.C.M.R., pet. denied 25 M.J. 238 (C.M.A. 1987).

274. 12 M.J. at 454.

275. 12 M.J. at 452.

276. Id.

277. See generally 12 M.J. at 454-55.

278. 12 M.J. at 455-56 & n. 13.

279. R.C.M. 910 analysis at A21-52.

280. 19 M.J. at 954.

281. Id.

282. Id.

283. Id.

284. Id.

285. Compare 19 M.J. at 954 with R.C.M. 910(a)(2) and R.C.M. 910 analysis at A21-52.

286. 24 M.J. at 597-98.

287. Id.

288. 24 M.J. at 599.

289. Compare Sheperd, 24 M.J. at 599 with Dusenberry, 49 C.M.R. at 538-31. But see United States v. Brown, 12 M.J. 420 (C.M.A. 1982) (stipulation used to preserve issue).

290. See Faulkner, The Pretrial Agreement Misconduct Provision: United States v. Dawson, The Army Lawyer, Oct. 1981, at 1.

291. 10 M.J. 142 (C.M.A. 1981).

292. 13 M.J. 156 (C.M.A. 1982).

293. See 3 M.J. at 156, and 10 M.J. at 145-46.

294. See R.C.M. 1109 analysis at A21-75.

295. 46 C.M.R. 170 (C.M.A. 1973).

296. 46 C.M.R. 173-74.

297. DA Pam 27-173, para. 11-3 n. 70 (15 Feb. 1987).

298. See, e.g., United States v. Olson, 25 M.J. 293 (C.M.A. 1987); United States v. Koopman, 20 M.J. 106 (C.M.A. 1985); United States v. Jones, 26 M.J. 650 (A.C.M.R.), pet. denied, 27 M.J. 472 (C.M.A. 1988); United States v. Foust, 25 M.J. 647 (A.C.M.R. 1987); and United States v. Callahan, 8 M.J. 804 (N.C.M.R. 1980).

299. See, e.g., Olson, 25 M.J. at 296-99.

300. R.C.M. 705 analysis at A21-35 (citing United States v. Brown, 4 M.J. 654 (A.C.M.R. 1977)).

301. 25 M.J. 647, 649 (A.C.M.R. 1987).

302. 25 M.J. at 649.

303. Id. See also United States v. Soriano, 22 M.J. 453 (C.M.A. 1986); and Jackson, Execution of Additional Confinement for Failure to Pay a Fine, The Army Lawyer, July 1987, at 41.

304. 25 M.J. at 649.

305. See Olson, 25 M.J. 293; and Koopman, 20 M.J. 106. Cf. Jackson, supra note 303 (discussing the uncertainties of executing additional confinement for failure to pay fines).

306. DA Pam 27-173, para. 11-3 n. 69 (15 Feb. 1987).

307. After the convening authority takes action, enforcement of a restitution clause could be a nightmare. Compare Olson 25 M.J. 293 with Jones, 26 M.J. 650; Foust, 25 M.J. 647; and Callahan, 8 M.J. 804. Cf. United States v. Mills, 12 M.J. 1, 2-4 (C.M.A. 1981) (enforcement of a poorly drafted clemency provision, with an escape clause contingent upon outcome of any appeal).

308. 26 M.J. 650 (A.C.M.R. 1988).

309. 26 M.J. at 650-51.

310. 26 M.J. at 651.

311. Id.

312. Id.

313. Id.

314. 26 M.J. at 652 (Robblee, J., dissenting).

315. See generally 26 M.J. at 651.

316. 26 M.J. at 652 (Robblee, J., dissenting). See also 26 M.J. 652 n. 1 ("there is no indication that the government sought restitution plus recoupment in the case at bar").

317. See supra notes 36-41, 89, 93-97 and 115-19 and accompanying text.

318. Id.

319. See, e.g., United States v. Allen, 25 C.M.R. 8 (C.M.A. 1957); and United States v. Callahan, 22 C.M.R. 443 (A.B.R. 1956).

320. United States v. Wood, 48 C.M.R. 528, 533 (C.M.A. 1974).

321. 48 C.M.R. at 529.

322. See generally DA Pam 27-173, para. 11-3(e)(2) (15 Feb. 1987).

323. See United States v. Wordlow, 19 M.J. 981 (A.C.M.R. 1985); United States v. Costa, 19 M.J. 980 (A.C.M.R. 1985); United States v. Sanders, 19 M.J. 979 (A.C.M.R. 1985); United States v. Witherspoon, 19 M.J. 978 (A.C.M.R. 1985); United States v. Cross, 19 M.J. 973 (A.C.M.R. 1985); and United States v. Castleberry, 18 M.J. 826 (A.C.M.R. 1984).

324. See, e.g., 19 M.J. at 974-77 (Wold, S.J. dissenting); and 19 M.J. at 982-83 (Wold, S.J., concurring in part and dissenting in part).

325. See, e.g., 19 M.J. at 974-77 (Wold, S.J. dissenting).

326. See United States v. Cross, 21 M.J. 87 (C.M.A. 1985) (order denying petition for review); and United States v. Sanders, 21 M.J. 38 (C.M.A. 1985) (order denying petition for review).

327. 21 M.J. at 88.

328. 21 M.J. at 88-89.

329. DA Pam 27-173, para. 11-3(e)(2) (15 Feb. 1987) (footnote omitted).

330. DA Pam 27-173, para. 11-3(e)(2) n. 93.

331. See DA Pam 27-9, paras. 2-17 & 2-18 (C3 15 Feb. 1989).

332. See, e.g., United States v. Mills, 12 M.J. 1 (C.M.A. 1981); United States v. Bray, 26 M.J. 661, 663-64 (N.M.C.M.R. 1988); United States v. Callaway, 21 M.J. 770, 774-75 (A.C.M.R. 1986); United States v. Rodriquez, 12 M.J. 632 (N.C.M.R. 1981), pet. denied, 21 M.J. 97 (C.M.A. 1985); United States v. Bradley, 11 M.J. 598 (A.F.C.M.R.), aff'd, 12 M.J. 297 (C.M.A. 1981); and United States v. Krautheim, 10 M.J. 763 (N.C.M.R. 1981).

333. 12 M.J. 888 (A.C.M.R. 1982).

334. See, e.g., United States v. Hobart, 22 M.J. 851 (A.F.C.M.R. 1986); United States v. Jennings, 22 M.J. 837 (N.M.C.M.R. 1986); United States v. Corriere, 20 M.J. 905 (A.C.M.R. 1985); United States v. Jones, 20 M.J. 853 (A.C.M.R. 1985); and United States v. Wesley, 19 M.J. 534 (N.M.C.M.R. 1984).

335. 23 M.J. 105 (C.M.A. 1986).

336. 23 M.J. 305 (C.M.A. 1986).

337. 38 C.M.R. 174 (C.M.A. 1968).

338. 44 C.M.R. 237 (C.M.A. 1972).

339. 1 M.J. 8 (C.M.A. 1975).

340. 1 M.J. 58 (C.M.A. 1975).

341. 12 M.J. at 889.

342. Id.

343. Id.

344. Id.

345. Id.

346. 12 M.J. at 890.

347. Id.

348. 19 M.J. 534, 536 (N.M.C.M.R. 1984).

349. See generally 19 M.J. at 535-41.

350. 30 C.M.R. 6 (C.M.A. 1960).

351. 19 M.J. at 540. See also 30 C.M.R. at 8.

352. Compare 30 C.M.R. at 8 with 44 C.M.R. at 241-42 (statute of limitations like former jeopardy may be waived).

353. 20 M.J. 853 (A.C.M.R. 1985).

354. The record of trial has been retired. Access to the record can be obtained from the Clerk of Court, U.S. Army Judiciary, Nassiff Building, Room 204A, 5611 Columbia Pike, Falls Church, VA 22041-5013.

355. Prosecution Exhibits 2, 4, 5, 6, and 7 (Records of Non-Judicial Punishment). See also 20 M.J. at 855.

356. Prosecution Exhibit 9 (Promulgating Order and Action).

357. Id. See also 20 M.J. at 855.

358. Prosecution Exhibit 9 (Promulgating Order and Action). See also 20 M.J. at 855.

359. Prosecution Exhibit 1 (Stipulation of Fact).

360. Id.

361. See Prosecution Exhibit 1 (Stipulation of Fact); Prosecution Exhibit 9 (Promulgating Order and Action); and Appellate Exhibit XI (Government Memorandum Re: Military Rule of Evidence 404(b)). See also 20 M.J. at 855.

362. Appellate Exhibit VI (Prison Release Order); Appellate Exhibit VII (Letter from Prison Warden, discussing offenses and minimum release date); and Appellate Exhibit XI (Government Memorandum supra note 361). See also 20 M.J. at 855.

363. See supra note 361. See also 20 M.J. at 855.

364. Letter, supra note 362.

365. Appellate Exhibit IX (Defense Motion to Suppress Seizure of Evidence); and Appellate Exhibit X (Defense Motion to Suppress Eyewitness Identification).

366. Appellate Exhibit XI, supra note 361.

367. The victim testified during sentencing of the aggravating circumstances of the offenses (R. 87-99). The photograph is discussed in Appellate Exhibit IX, supra note 365.

368. Appellate Exhibits II and III (Pretrial Agreement). See also 20 M.J. at 853.

369. (R. 53-55) (Providence Inquiry).

370. Appellate Exhibits II and III (Pretrial Agreement). See also 20 M.J. 853-54.

371. 20 M.J. at 853.

372. Convening Authority's Action, dated 20 July 1984. See also 20 M.J. at 853.

373. Prosecution Exhibit 10 - United States v. Jones, CM 443231 (A.C.M.R. 15 Sep. 1983) (unpub.).

374. Id.

375. Prosecution Exhibit 13 (General Court-Martial Order No. 15, Headquarters 101st Airborne Division (Air Assault) and Fort Campbell (6 Mar. 1984). Note, appellant's bad conduct discharge has been remitted (General Court-Martial Order Number 38, Headquarters 101st Airborne Division (Air Assault) and Fort Campbell, 17 Nov. 1987).

376. 20 M.J. at 855-56.

377. 20 M.J. at 854-55.

378. 20 M.J. at 855.

379. Id.

380. 20 M.J. at 855.

381. 20 M.J. at 905 (A.C.M.R. 1985).

382. 20 M.J. 908.

383. 20 M.J. at 908-09.

384. 22 M.J. 837 (N.M.C.M.R. 1986).

385. 12 M.J. 425 (C.M.A. 1982).

386. 22 M.J. at 839.

387. 22 M.J. 851 (A.F.C.M.R. 1986), modified and affirmed on other grounds, 24 M.J. 428 (C.M.A. 1987).

388. 38 C.M.R. 174 (C.M.A. 1968).

389. 22 M.J. at 853-54.

390. 23 M.J. 105 (C.M.A. 1986), pet. for reconsideration denied, 26 M.J. 57 (C.M.A. 1988).

391. 23 M.J. at 107-08.

392. 23 M.J. at 108 (citation omitted). Kitts, however, did contain dicta that venue motions could be waived as part of a pretrial agreement. 23 M.J. at 108.

393. 23 M.J. at 108.

394. See United States v. Corriere, 24 M.J. 701 (A.C.M.R. 1987).

395. 23 M.J. 305 (C.M.A. 1987).

396. 23 M.J. at 305-06.

397. 23 M.J. at 306.

398. Id.

399. Id.

400. 23 M.J. at 307 and n. 1.

401. 23 M.J. at 307.

402. Id.

403. 23 M.J. at 307 and n. 3.

404. See generally 23 M.J. at 307-08.

405. "Obviously a plea should be avoided if there is a good chance of suppressing vital evidence, unless in the opinion of counsel the agreement offered is sufficiently advantageous when balanced against the chances of winning through suppression of evidence." 25 Am. Jur. Trials § 25 (1978) (emphasis added). In Jones following through with these motions would not preclude the Government from introducing the victim's testimony, her in-court identification of the accused, the incriminating photo of the accused, or the damaging evidence of the similar kidnappings, rapes, and robberies. It would also have undercut the defense negotiation strategy, because the threat of these motions was the only leverage the defense had over the Government. Once litigated the threat is removed. See also Bond, Plea Bargaining & Guilty Pleas, §§ 4.18 and 4.19 (2d ed. 1982).

406. DA Pam 27-26, Rule 1.7 comment (Lawyer's Interest); and Rule 3.2 comment.

407. In Jones the only reason to pursue the motions where a favorable pretrial agreement was possible would be to protect the defense counsel from an allegation of ineffective assistance of counsel. Protecting oneself from such allegations, however, is not a good reason to forego the client's best interest. Cf. Ruffin v. Kemp, 767 F.2d 748 (11th Cir. 1985) (conflict of interest prevented counsel from seeking a plea bargain). Accord United States v. Newak, 24 M.J. 238 (C.M.A. 1987).

408. Shaw Letter, supra note 1 at 1-3.

409. 20 M.J. at 307.

410. Army Reg. 27-10, Legal Services: Military Justice, para. 8-1 (1 Jan. 1989) [hereinafter AR 27-10].

411. AR 27-10, para. 6-3. See also Howell, supra note 240.

412. 23 M.J. at 308 (Cox, J., concurring in result).

413. 23 M.J. at 308 n.5.

414. R.C.M. 705 analysis, at A21-36.

415. 23 M.J. at 306.

416. 20 M.J. 905 (A.C.M.R. 1985), opinion on further review, 24 M.J. 701 (A.C.M.R. 1987).

417. See 20 M.J. at 907; and 24 M.J. at 703 and n.2.

418. See 20 M.J. at 907; and 24 M.J. at 703. But see United States v. Muller, 21 M.J. 205, 206-07 (C.M.A. 1986) (where appellant personally assures the military judge that there are no sub rosa agreements, neither the Court of Military Review or Court of Military Appeals, need consider inconsistent post-trial assertions. In Corriere, however, appellant said nothing as his counsel assured the military judge that there were no sub rosa agreements, then claimed on appeal that he learned of such an agreement after trial. See 20 M.J. at 907 and 24 M.J. at 703-04 and 706.

419. 24 M.J. at 703.

420. 24 M.J. at 704.

421. 24 M.J. at 707.

422. Id.

423. 24 M.J. at 706.

424. 24 M.J. at 707-08.

425. 25 M.J. 395 (C.M.A. 1987) (pet. filed).

426. 26 M.J. 65 (C.M.A. 1988) (motion to dismiss granted).

427. 38 C.M.R. 114 (C.M.A. 1968). See also discussion of the Cummings line of cases in 20 M.J. at 907-08.

428. See United States v. Mitchell, 15 M.J. 238, 241 (C.M.A. 1983) (Everett, C.J., concurring).

429. The record of trial has been retired. Access to the record can be obtained from the Clerk of Court, U.S. Army Judiciary, Nassif Building, Room 204A, 5611 Columbia Pike, Falls Church, VA 22041-5013.

430. See generally Corriere, 20 M.J. at 908, and 24 M.J. at 702; and United States v. Cruz, 20 M.J. 873, 875-78 (A.C.M.R. 1985), reversed in part, 25 M.J. 326, 328-29 and Appendices 1-2 (C.M.A. 1987).

431. See 20 M.J. at 906-07.

432. 24 M.J. at 704. R. 74 and 77.

433. R. 74 and 77. Note all citations are to the record of the limited hearing unless otherwise indicated. See also 24 M.J. at 702-03 n. 1-2.

434. Pretrial advice at 3-4, allied papers, original record. See also 24 M.J. at 705-06 n.5.

435. 24 M.J. at 703.

436. R. 45, 72, and 152-53. See also 24 M.J. at 705-06 n.5.

437. See supra note 436.

438. R. 68-69, 152, and 230.

439. R. 230.

440. R. 72, 103 and 153.

441. R. 212-13. See also 24 M.J. at 707 n.6.

442. R. 213. See also 24 M.J. at 707 n.6.

443. R. 70-71, 152-53 and 193.

444. R. 61 and 101.

445. R. 103 and 153. See 24 M.J. at 704-05.

446. 24 M.J. at 703, and 704-05.

447. Id.

448. Id.

449. 24 M.J. at 704, 705-06 and n. 5 and 707.

450. Id.

451. 24 M.J. at 705-08.

452. 24 M.J. at 703-05.

453. 24 M.J. at 705.

454. 24 M.J. at 704, and 705-06 n.5.

455. Id.

456. 24 M.J. at 704-05.

457. See Bond, Plea Bargaining & Guilty Pleas §§ 4.18 and 4.19 (2d ed. 1982).

458. 24 M.J. at 704.

459. Id.

460. 24 M.J. at 704-05.

461. Id.

462. 24 M.J. at 704, and 705-06 n.5.

463. 24 M.J. at 704-05.

464. 23 M.J. at 308.

465. 20 M.J. at 908. Accord United States v. Pegg, 16 M.J. 796 (C.G.C.M.R. 1983), pet. denied, 18 M.J. 28 (C.M.A. 1984).

466. See, e.g., United States v. Thomas, 22 M.J. 388, 393-94 (Preliminary Observations), 394-96 (Findings Based on Pleas of Guilty), and 397 (Sentencing) (C.M.A. 1986).

467. 22 M.J. at 393.

468. See generally 22 M.J. at 393-94.

469. 24 M.J. at 704 n.3, and 707-08.

470. 24 M.J. at 707-08.

471. 24 M.J. at 708.

472. Cf. Shaffer, 12 M.J. at 428.

> One such peril is that prosecutors confronted with heavy dockets and inadequate resources will trade away too much to an accused. While a bargained waiver of the pretrial investigation may be attractive to some convening authorities, we cannot perceive that it presents any unique problem. Moreover, an appellant who has benefited from a favorable plea bargain should not be heard now to complain that he was favored at the expense of others who had offered less to the convening authority.

473. 24 M.J. 812 (A.F.C.M.R. 1987).

474. 24 M.J. at 813.

475. Id.

476. Id.

477. See generally 24 M.J. at 813-14 (discussing Air Force Reg. 111-1, Military Justice Guide (1 August 1984)) [hereinafter AFR 111-1].

478. 25 M.J. 728 (A.F.C.M.R. 1987), opinion on reconsideration, 26 M.J. 538 (A.F.C.M.R. 1988).

479. 25 M.J. at 728.

480. 25 M.J. at 728-30.

481. 25 M.J. at 730 (Bloomers, J., dissenting).

482. 26 M.J. at 539-42.

483. 16 M.J. 258, 264-265 (C.M.A. 1983).

484. 26 M.J. at 540-42.

485. 26 M.J. at 541-42.

486. 26 M.J. at 542 (Bloomers, J. dissenting).

487. 27 M.J. 736 (A.C.M.R. 1988).

488. 27 M.J. at 737.

489. Id.

490. 27 M.J. at 737-39.

491. 27 M.J. at 737 (quoting Jones, 23 M.J. at 306).

492. See generally Criminal Law Notes, The Army Lawyer, Jan. 1989 at 63-64.

493. 24 M.J. 1 (C.M.A. 1987).

494. 1 M.J. 8 (C.M.A. 1975).

495. 24 M.J. at 2 (explaining and quoting Schmeltz, 1 M.J. at 12).

496. 24 M.J. at 2 (citations omitted).

497. 24 M.J. at 2 (Cox, J., concurring in result).

498. 24 M.J. 645 (A.F.C.M.R. 1987).

499. 24 M.J. at 646.

500. Id. Note this case was decided before the reconsideration in Dorsey, 26 M.J. 538. See supra notes 478-86 and accompanying text.

501. 26 M.J. 891 (A.F.C.M.R. 1988).

502. 26 M.J. at 892-94. Note this case was decided after the reconsideration in Dorsey, 26 M.J. 538. See 26 M.J. at 892.

503. 24 M.J. 709 (A.C.M.R. 1987), pet. denied, 26 M.J. 65 (C.M.A. 1988).

504. 24 M.J. at 710.

505. 26 M.J. 661 (N.M.C.M.R. 1988).

506. 26 M.J. at 663-64.

507. Id.

508. 26 M.J. at 564 (C.G.C.M.R. 1988).

509. 26 M.J. at 566.

510. 26 M.J. at 576.

511. See, e.g., United States v. Bertelson, 3 M.J. 314 (C.M.A. 1977); United States v. Sharper, 17 M.J. 803 (A.C.M.R. 1984); and United States v. Thomas, 6 M.J. 573 (A.C.M.R. 1978).

512. United States v. DeYoung, 27 M.J. 595, 597-99 (A.C.M.R. 1988).

513. 26 M.J. 268 (C.M.A. 1988).

514. 26 M.J. 940 (A.C.M.R. 1988).

515. 27 M.J. 595 (A.C.M.R. 1988).

516. 26 M.J. at 269 and 271.

517. 26 M.J. at 269.

518. Id.

519. 26 M.J. at 270-71.

520. 26 M.J. at 270.

521. 26 M.J. at 942.

522. Id.

523. Id.

524. Id.

525. 26 M.J. at 942-43.

526. Id.

527. 26 M.J. at 943 (quoting United States v. Bertelson, 3 M.J. 314, 315 n.2 (C.M.A. 1977).

528. 26 M.J. at 943-45.

529. 26 M.J. at 945-46.

530. 27 M.J. at 596-97.

531. Compare 27 M.J. at 597 with 26 M.J. at 270.

532. 26 M.J. at 270.

533. DeYoung is an excellent starting point for research in this area. See 27 M.J. at 597-99. There is a miscite on page 599. The full citation for United States v. Mullens, is 24 M.J. 745 (A.C.M.R. 1987), set aside, 25 M.J. 307 (C.M.A. 1987), on remand, 25 M.J. 708 (A.C.M.R. 1987), pet. granted, 27 M.J. 3 (C.M.A. 1988), set aside, 27 M.J. 400 (C.M.A. 1988). Although, cited by the court, as an example of litigation in this area. The court in DeYoung did not expressly rely on Mullens for support for its decision. See 27 M.J. at 597-600. Mullens was set aside because of its inconsistency with Glazier. See 27 M.J. 400. See also United States v. Robinson, 25 M.J. 528 (A.F.C.M.R. 1987), pet. denied, 26

M.J. 47 (C.M.A. 1988). Although not cited by the court in DeYoung, Robinson is an interesting case where the Air Force Court of Military Review, affirmed an conviction involving stipulated aggravation testimony in a child abuse case.

534. 27 M.J. at 600.

535. Id.

536. Id.

537. 27 M.J. at 599 n.2. See also United States v. Wingart, 27 M.J. 128 (C.M.A. 1988) (Evidence of uncharged misconduct admitted upon sentencing found to be error).

538. R.C.M. 705, analysis, at A21-36.

539. 26 M.J. 935 (A.C.M.R. 1988).

540. 26 M.J. at 937.

541. Id.

542. Id.

543. Id.

544. Id.

545. 26 M.J. at 937-38.

546. 26 M.J. at 938.

547. 26 M.J. at 940.

548. 26 M.J. at 939. See also, e.g.,

549. Id.

550. 27 M.J. 899, 903 (C.G.C.M.R. 1989). See also Hollywood v. Yost, 20 M.J. 785 (C.G.C.M.R. 1985); United States v. Stach, 11 M.J. 868 (N.M.C.M.R. 1981); and United States v. Schaller, 9 M.J. 939 (N.C.M.R. 1980).

551. 12 M.J. 932 (N.M.C.M.R.), pet. denied, 13 M.J. 480 (C.M.A. 1982).

552. 12 M.J. at 934-35.

553. 12 M.J. at 935-36.

554. See, e.g., Shaw letter, supra note 1. Accord Standards for Criminal Justice § 14-3.1 commentary at 67 (2d ed. Supp. 1986); and 25 Am. Jur. Trials § 5 (1978). Note the latest statistics for Army courts-martial reveal that 94.8% of all accused tried by general or special court-martial are convicted, 62.9% of those are based upon pleas of guilty. Army Quarterly GCM/SPCM Report for cases tried between October and December 1988 (information obtained from the Clerk of Court, U.S. Army Judiciary, Nassif Building, Room 204A, 5611 Columbia Pike, Falls Church, VA 22041-5013). These figures also reveal the percentage of convictions and guilty pleas in the Army are approximately the same as they were in 1959. Compare the statistics above with supra notes 12 and 32 and accompanying text.

555. See, e.g., United States v. Schaffer, 12 M.J. 425 (C.M.A. 1982).

556. United States v. Mitchell, 15 M.J. 238, 241 (C.M.A. 1983) (Everett, C.J., concurring). See also, e.g., United States v. Zelinski, 24 M.J. 1, 2 (C.M.A. 1987); and United States v. Gibson, 27 M.J. 736, 737-39 (A.C.M.R. 1988).

557. See, e.g., United States v. Green, 1 M.J. 453 (C.M.A. 1976).

558. See generally Fed. R. Crim. Proc. 11(e).

559. U.S. Department of Justice Principles of Federal Prosecution (28 July 1980), reprinted in Bond, supra note 457, Appendix D, at D-7.

560. See R.C.M. 705(d)(1) and (2).

561. See Cook v. Orser, 12 M.J. 335 (C.M.A. 1982); and United States v. Kershaw, 26 M.J. 723 (A.C.M.R. 1988). While both these cases involve improper actions by Government agents, the demonstrate situations where the Government may be willing to grant immunity or a favorable pretrial agreement, in return for cooperation by the accused in ongoing investigations. In these situations, the Government should be free to contact the defense and initiate negotiations before the investigation becomes widely known, and the usefulness of the accused as an informant is diminished. See also supra notes 133-140 and accompanying text.

562. Criminal Law Notes, supra note 492 at 64.

563. R.C.M. 704 analysis at A21-36. See also United States v. Jones, 23 M.J. 305, 308-09 (C.M.A. 1987) (Cox, J., concurring).

564. Howell, supra note 240 at 5.

565. Id. at 6, and 30-31.

566. Rules of Professional Conduct, supra note 256.

567. See Fed. R. Crim. P. 11; and R.C.M. 705 analysis at A21-35.

568. See, e.g., United States v. Jones, 23 M.J. 305 (C.M.A. 1987); and United States v. Corriere, 24 M.J. 701 (A.C.M.R. 1987).

569. See, e.g., United States v. Broce, 109 S.Ct. 757, 762-766 (1989); Oleary v. United States, 856 F.2d 1142 (8th Cir. 1988); and Hayle v. United States, 815 F.2d 879 (2d Cir. 1987).

570. See generally Bond, supra note 457, §§ 7.1 thru 7.16.

571. Id. at § 7.17.

572. Id.

573. Id. at §§ 7.18 thru 7.20.

574. Id. at §§ 7.21 and 7.22.

575. See generally id. at § 7.21(g).

576. See, e.g., United States v. Broce, 109 S.Ct. 757 (1989); Menna v. New York, 423 U.S. 61 (1975); Blackledge v. Perry, 417 U.S. 21 (1974); Oleary v. United States, 856 F.2d 1142 (8th Cir. 1988); Mack v. United States, 853 F.2d 585 (8th Cir. 1988); and Hayle v. United States, 815 F.2d 879 (2d Cir. 1987).

577. See supra note 569.

578. See United States v. King, 27 M.J. 664 (A.C.M.R. 1988).

579. Miranda v. Arizona, 384 U.S. 436 (1966).

580. See generally 27 M.J. at 665-69.

581. See Mil. R. Evid. 304(d)(2), and R.C.M. 905-907.

582. 27 M.J. at 669-70.

583. United States v. Corriere, 24 M.J. 701, 706-07 (A.C.M.R. 1987). Cf. United States v. Jones, 23 M.J. 305, 307 (C.M.A. 1987) (suppression issues are waivable at the accused election).

584. See, e.g., Faretta v. California, 422 U.S. 806 (1975); United States v. Williamson, 806 F.2d 216 (10th Cir. 1986); and Wabasha v. Solem, 694 F.2d 155 (8th cir. 1982).

585. Cf. United States v. Zelinski, 24 M.J. 11 (C.M.A. 1987) (the right to counsel, like the right to trial by members is waivable at the election of the accused).

586. Supra notes 578-83 and accompanying text.

587. See United States v. Levite, 25 M.J. 334, 339 (C.M.A. 1987); and United States v. Corriere, 24 M.J. 701, 702 (A.C.M.R. 1987).

588. See, e.g., United Staets v. Cruz, 25 M.J. 326, 329-32 (C.M.A. 1987).

589. See supra notes 416-72 and accompanying text.

590. Id. See also Cruz, 25 M.J. at 331-32.

591. Corriere, 24 M.J. at 707-08. But see United States v. Williams, 27 M.J. 710 (A.C.M.R. 1988) (guilty plea does not waive defense of privilege).

592. 15 M.J. 1 (C.M.A. 1983).

593. 15 M.J. at 7.

594. Id. Note this position is in accord with federal practice. See United States v. Broce, 109 S.Ct. 757, 763-66 (1989).

595. See R.C.M. 905(e) and 907(b)(2)(A).

596. United States v. Britton, 26 M.J. 24, 26-27 (C.M.A. 1988).

597. Id. This position is also in accord with federal practice. See United States v. Almaguer, 632 F.2d 1265, 1266 (5th Cir. 1980), cert. denied, 452 U.S. 907 (1981).

598. See, e.g., United States v. McCallister, 27 M.J. 138 (C.M.A. 1988).

599. Cf. supra notes 416-72 and accompanying text (Corriere discussion).

600. See United States v. Troxell, 30 C.M.R. 6 (C.M.A. 1960); and United States v. Wesley, 19 M.J. 534, 540 (N.M.C.M.R. 1984).

601. See supra notes 511-37 and accompanying text.

602. United States v. Allen, 25 C.M.R. 8, 11 (C.M.A. 1957).

603. R.C.M. 705(c)(1)(B).

604. United States v. Mitchell, 15 M.J. 238, 241 (C.M.A. 1983) (Everett, C.J. concurring).

605. 26 C.M.R. 511, 513 (C.M.A. 1958).

606. Federal court decisions in this area are in conflict, in part because of state laws involved in the litigation. See, e.g., Barnes v. Lynach, 817 F.2d 336

(5th Cir. 1987); Massie v. Sumner, 624 F.2d 72 (9th Cir. 1980); and Jordan v. Slayton, 344 F. Supp. 818 (W.D.V.A. 1972).