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PLEA-BARGAINING IN THE MILITARY: AN UNINTENDED CONSEQUENCE OF THE UNIFORM CODE OF MILITARY JUSTICE

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The impact of the Uniform Code of Military Justice on the Army and on this Corps has been very great. Among its effects have been an over-worked Court of Military Appeals, over-worked boards of review, a pipeline filled with cases at various stages of progress toward final conclusion, and confinement facilities filled with prisoners in a technically "unsentenced" status. All of these must be reduced. One way to do it is to relieve trial and appellate tribunals of the burden of passing upon needless issues of law and fact.[2]

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[2] Letter from Major General (MG) Franklin P. Shaw, The Assistant Judge Advocate General, U.S. Army, to All Staff Judge Advocates (April 23, 1953) [hereinafter MG Shaw Letter]. A copy of all records pertaining to the "Guilty Plea Program" are on file with The Judge Advocate General's Legal Center and School Library, Charlottesville, Virginia (TJAGLCS Library) under file number JAGJ 1953/1278. *See* discussion *infra* App. A.

I. Introduction

When Congress enacted the Uniform Code of Military Justice (UCMJ) in 1950, neither the President nor Congress realized that the UCMJ would force the military to adopt plea-bargaining.[3] After all, Congress enacted the UCMJ to level the playing field in contested trials and enhance appellate review.[4] The UCMJ did not even mention plea-bargaining in 1950,[5] and the *Manual for Courts-Martial* (*MCM*) did not discuss the practice until 1960.[6] While this may surprise current judge advocates, there was simply no precedent for plea-bargaining in the military in 1950-1951.[7] As the drafters of both documents focused on correcting past abuses in contested cases,[8] they failed to consider the impact of suddenly expanding the due process rights in a military justice system, when the Army alone would try over 100,000 courts-martial in its first year of the UCMJ's implementation.[9]

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

[4] THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975, at 203-09 (1975) [hereinafter JAGC HISTORY]; *see also* John S. Cooke, *Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition*, 165 MIL. L. REV. 1, 8-10 (2000); George S. Prugh, Jr., *Observations on the Uniform Code of Military Justice: 1954 and 2000*, 165 MIL. L. REV. 21 (2000).

[5] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 705 analysis, at A21-39 (2002) [hereinafter MCM (2002)].

[6] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. XII, ¶ 70b, (1951), *as amended in* MANUAL FOR COURTS-MARTIAL, UNITED STATES 1959, Pocket Part, at 39-40 (1960) [hereinafter MCM (1959)].

[7] *See* Major Michael E. Klein, United States v. Weasler *and the Bargained Waiver of Unlawful Command Influence Motions: Common Sense or Heresy*, ARMY LAW., Feb. 1998, at 3-5 & n.12; William J. Hughes, *Pleas of Guilty-Why So Few?* 13 JUDGE ADVOC. J. 1, 2 (Apr. 1953).

[8] The UCMJ was drafted in response to complaints of unjust treatment raised by large numbers of World War II veterans. Many veterans who had never been in trouble in civilian life, found themselves behind bars or separated from the service with less than honorable discharges because of military offenses. After the war concluded, Congress held hearings on reforming the military justice system—the UCMJ was the result. *See* JAGC HISTORY, *supra* note 4, at 194-200.

[9] The UCMJ became effective on 31 May 1951. *See* Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950); JAGC HISTORY, *supra* note 4, at 203. Its first year of implementation crossed fiscal year (FY) 1950 and 1951. At the end of FY 1950, the active duty strength of the Army was 632,000. *See* COMMITTEE ON THE UNIFORM CODE OF MILITARY JUSTICE, AND GOOD ORDER AND DISCIPLINE IN THE ARMY, REPORT TO THE HONORABLE WILBER M. BRUCKER, SECRETARY OF THE ARMY 252 (1960) [hereinafter AD HOC COMMISSION]. During that FY, the Army tried 6,769 general courts-martial, 5,838 special courts-martial, and 59,961 summary courts-martial for a total of 72,568 courts-martial. *Id.* So in terms of courts-martial per 1000 troops, the Army tried 114.82 Soldiers for every 1000 Soldiers on active duty. *Id.* At the end of FY 1951, the active

During the 175 years that preceded the enactment of the UCMJ, the military used the Articles of War to punish misconduct.[10] Under the Articles, military justice was "command-dominated" and served the commander's will.[11] Courts-martial "had few of the procedures and protections of civilian criminal justice, and protecting the rights of the individual was not a primary purpose of the system."[12] Rather, the system was designed to "secure obedience to the commander," and to swiftly punish those who opposed him.[13]

Judged by these standards, the old system worked extremely well—it obtained convictions in better than ninety percent of contested cases.[14] Punishment was swift because there was little, if any, appellate review.[15] So from the commander's perspective, there was no need for the distasteful practice of plea-bargaining.[16] All this changed, however,

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duty strength of the Army was 859,000. *Id.* During that FY the Army tried 5,206 general courts-martial, 27,404 special courts-martial, and 79,226 summary courts-martial for a total of 111,836 courts-martial; and the rate of courts-martial per 1000 troops was 130.19. *Id.* The average active duty strength of the Army in FY 2002 was 516,599. CODE COMMITTEE ON MILITARY JUSTICE, UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES & THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES, ANN. REP., OCTOBER 1, 2001 TO SEPTEMBER 30, 2002, at 40 (2002) [hereinafter ANN. REP. (2002)]. A copy of each annual report from 1952 through 1977 is on file with United States Court of Appeals for the Armed Forces. Annual reports for 1978 and thereafter are reprinted in the *Military Justice Reporter*, or are available on line (1997-2002) *at* http://www.armfor.uscourts.gov. The average Army active duty strength for FY 2002 includes 486,500 Regular Army and 30,099 mobilized Reserve Component Soldiers. In comparison to the number of courts-martial conducted in FY 1950-1951, the FY 2002 courts-martial rate is extremely light. During FY 2002, the Army tried only 788 general courts-martial, 602 special courts-martial, and 858 summary courts-martial for a total of 2248 courts-martial; and its courts-martial rate per 1000 troops was a mere 4.35. ANN. REP. (2002), *supra* this note at 39-40. The courts-martial rate per 1000 troops was obtained by dividing the total courts-martial by the average Army strength, that is, 2,248/517 = 4.3481625.

[10] Cooke, *supra* note 4, at 2-3.

[11] *Id.* at 3.

[12] *Id.*

[13] *Id.*

[14] Based on the figures cited in AD HOC COMMISSION, *supra* note 9, at 251-52, in FYs 1945 through 1950, the conviction rate for general courts-martial averaged ninety-three percent, and never dropped below ninety percent.

[15] *See* Cooke, *supra* note 4, at 5-6; JAGC HISTORY, *supra* note 4, at 125-30. The Army instituted the first military appellate review system in January 1918. The appeal consisted of a review by the OTJAG in capital and other serious cases. This limited review was a response to the outcry that occurred when thirteen African-American Soldiers were hanged for mutiny the day after their court-martial adjourned.

[16] *Cf.* Hughes, *supra* note 7, at 1 ("In the military system [plea-bargains] are suspect. The archaic shibboleth: 'You cannot bargain with this court' still obtains.").

when the UCMJ was enacted. It broke new ground in the following areas: (1) it contained provisions to prevent commanders from "unduly influencing the justice system";[17] (2) the accused was provided with new pretrial and trial rights;[18] and (3) appellate review was substantially expanded.[19] While civil libertarians applauded these changes, practitioners quickly realized that these new due process rights came with a price tag—an immense backlog of cases at the trial and appellate levels.

In 1953, the Army became the first service to officially encourage plea-bargaining.[20] The adoption of the practice was not an altruistic act, but a pragmatic decision to avoid drowning in a sea of litigation. By the end of the decade, plea-bargaining spread to the Coast Guard and the Navy.[21] The Air Force, however, did not officially endorse the practice until 1975.[22]

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[17] JAGC HISTORY, *supra* note 4, at 205.

[18] *Id.* at 204-06.

[19] *Id.* at 207-08.

[20] *See* MG Shaw Letter, *supra* note 2. This action is viewed as the first step in the development of negotiated guilty plea practice in the military. *See* Gary N. Keveles, *Bargained Justice in the Military: A Study of Practices and Outcomes in the U. S. Army, Europe* 1, 1 (1981) (a dissertation submitted to the School of Criminal Justice, State University of New York at Albany) (on file with University Microfilms International, Ann Arbor, Michigan); Kenneth D. Gray, *Negotiated Pleas in the Military*, 37 FED. B.J. 49 (1978); Charles W. Bethany Jr., The Guilty Plea Program 1 (1959) (unpublished LL.M. thesis, The Judge Advocate General's School, U.S. Army) (on file with TJAGLCS Library); George W. Hickman, Jr., *Pleading Guilty for a Consideration in the Army*, 12 JAG J. 11 (1958).

[21] Hickman, supra note 20, at 11; *see also* United States v. Rinehart, 26 C.M.R. 815, 816 (C.G.B.M.R. 1958). In *Rinehart*, the court refers to a 1956 pretrial agreement. This is the first reference to pretrial agreements in a published case involving the Coast Guard. See also United States v. Villa, 42 C.M.R. 166 (C.M.A. 1970). This case contains one of the earliest substantive discussions of pretrial agreements in the Coast Guard. In 1957, the Navy adopted a guilty plea program in general courts-martial. *See* U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 5811.1, PRETRIAL AGREEMENTS AS TO GUILTY PLEAS IN GENERAL COURTS-MARTIAL (11 Sept. 1957) [hereinafter SECNAVINSTR 5811.1], reprinted in Pretrial Agreements as to Guilty Pleas in General Courts-Martial, 10 JAG J. 3 (1957). This program was extended to special courts-martial by U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 5811.2, PRETRIAL AGREEMENTS AS TO GUILTY PLEAS IN SPECIAL COURTS-MARTIAL (17 Dec. 1957) [hereinafter SECNAVINSTR 5811.2], 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 (1958).

[22] *See* United States v. Avery, 50 C.M.R. 827, 829 (A.F.C.M.R. 1975); *Air Force Pretrial Agreement Restrictions Declared Invalid*, 10 ADVOC. 214-15 (1978).

Between 1952 and 1956, the guilty plea rate in Army general courts-martial rose from less than one percent to sixty percent.[23] This allowed staff judge advocates to substantially reduce general courts-martial processing times,[24] enabling them to process 11,168 general courts-martial in FY 1953, and then catch their breath as the number of such trials dropped to 7,750 in 1956.[25]

By 1958, this combination of increased guilty pleas and decreased general courts-martial reduced the workload of the Army Board of Military Review (ABMR) enough to eliminate three of its seven panels of appellate judges.[26] These numbers, however, do not tell the whole story because the birth of plea-bargaining occurred in the midst of the Korean War, and the dynamics of that conflict significantly impacted the development of the practice of law in the military.[27]

Additionally, the pioneering Army judge advocates, warrant officers, legal noncommissioned officers, and civilians of the 1950s profoundly

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[23] *See* MG Shaw Letter, *supra* note 2, at 3; Jasper L. Searles, *Functioning of the Guilty Plea Program* (1956), *in* REPORT OF PROCEEDINGS, ARMY JUDGE ADVOCATE CONFERENCE 226, 226 (1956) (on file with TJAGLCS Library).

[24] Hickman, *supra* note 20, at 11; *see also* COL Mark W. Harvey, Chief, Criminal Law Division, OTJAG, U.S. Army, *Transforming Military Justice, Timely Post-Trial Processing* 16 (5 Sept. 2002) (Information Paper) (on file with the OTJAG, U.S. Army, Criminal Law Division). In FY 2002, the Army experienced its worst post-trial processing times in thirty years; and in FY 2003 post-trial delay continued to be a problem in the Army. *See* THE JUDGE ADVOCATE GENERAL OF THE ARMY, ANN. REP., OCTOBER 1, 2002 TO SEPTEMBER 30, 2003, at 1-2, 6, & 11 (2003) [hereinafter TJAG REPORT (2003)] (on file with the OTJAG, U.S. Army, Criminal Law Division). To combat the continuing post-trial delay problem the Criminal Law "Division has aggressively monitored Army post-trial courts-martial processing and reevaluated the voice recognition program currently in use by Army court-reporters." *Id.* at 1-2. The U.S. Army Trial Defense Service and Defense Appellate Division "have coordinated to monitor post-trial processing delays to ensure that their clients are receiving the very best representation throughout both the trial and appellate process, with smooth transition of counsel between our organizations." *Id.* at 6. The Judge Advocate General's Legal Center and School has continued instruction to military justice managers with a heavy emphasis on post-trial processing. The 42 students of the 9th Military Justice Managers Course received significant instruction on the practical "how to" of court-martial post-trial processing as well as substantive law instruction. As in the past two courses, justice managers received a number of resources on CD-ROM for use in the field, including examples of case tracking systems.

Id. at 11.

[25] Searles, *supra* note 23, at 226.

[26] Hickman, *supra* note 20, at 11.

[27] *See* Cooke, *supra* note 4, at 8; Prugh, *supra* note 4, at 24-25.

impacted this process. Their collective wisdom, along with astute guidance from the Army Judge Advocate General's Corps (JAGC) leadership, developed and institutionalized the basic tenants of military plea-bargaining that are used in courts-martial today.[28] In fact, the lessons they learned in the 1950s form the basis of Rules for Courts-Martial (RCM) 705, 910, and 1001; and Military Rule of Evidence (MRE) 410.[29]

II. The Implementation of the New UCMJ Brings Sweeping Changes to Courts-Martial Practice

When Congress enacted the UCMJ in 1950, it incorporated some procedures that were not generally accepted in American jurisprudence.[30] For example, Article 31 of the UCMJ provided military suspects the rights to be:

> 1. Advised of the general nature of the accusation against them;
> 2. Advised of their right to remain silent regarding the offense; and
> 3. Admonished that any statement made by them could be used against them in trial by court-martial.[31]

While the historical roots of this procedure date back to 1786, the provision had no civilian counterpart in 1950.[32] Sixteen years later, however, the Supreme Court favorably noted the military practice in its landmark decision of *Miranda v. Arizona*.[33]

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[28] *See e.g.*, *infra* notes 166-69, 175-80, 182, 187, 192-96 and 271-306, and the accompanying text.

[29] *See* MCM (2002), *supra* note 5, R.C.M. 705 (Pretrial Agreements); R.C.M. 910 (Pleas); R.C.M. 1001 (Presentencing procedure); MIL. R. EVID. 410 (Inadmissibility of pleas, plea discussions, and related statements).

[30] *See* Cooke, *supra* note 4, at 9-10.

[31] UCMJ art. 31 (2002).

[32] JAGC HISTORY, *supra* note 4, at 204.

[33] Miranda v. Arizona, 384 U.S. 436, 489-90 nn.62-63 (1966).

> Similarly, in our country the Uniform Code of Military Justice has long provided that no suspect may be interrogated without first being warned of his right not to make a statement and that any statement he makes may be used against him. Denial of the right to consult counsel during interrogation has also been proscribed by military

The UCMJ also provided the right to a formal pretrial investigation in serious cases. During this hearing, the accused could confront the witnesses against him, and present evidence in defense, extenuation, and mitigation.[34] This is in stark contrast to federal grand jury practice which to this day does not afford the accused such adversarial rights.[35]

Trial practice also significantly changed. Before the enactment of the UCMJ, line officers, with no formal legal training could prosecute and defend Soldiers before courts-martial.[36] After the UCMJ took effect, it required all appointed counsel in general courts-martial to be judge advocates in the Army or Air Force, or law specialists in the Navy or Coast Guard.[37] Service members tried by special courts-martial were also entitled to such legally trained defense counsel, if the trial counsel was so qualified.[38]

The UCMJ also changed procedures governing courts-martial. Under the UCMJ, special courts-martial can only adjudge a bad conduct discharge when a verbatim record is kept.[39] The UCMJ as enacted in 1950 also required that an appointed judge advocate serve at each

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> tribunals. There appears to have been no marked detrimental effect on criminal law enforcement in these jurisdictions as a result of these rules. Conditions of law enforcement in our country are sufficiently similar to permit reference to this experience as assurance that lawlessness will not result from warning an individual of his rights or allowing him to exercise them.

Id. (footnotes omitted). Although *Miranda* has been criticized in some circles, the Supreme Court has declined to overrule it. *See* Dickerson v. United States, 530 U.S. 428 (2000).

[34] JAGC HISTORY, *supra* note 4, at 204.

[35] *See, e.g.*, FED. R. CRIM. P. 6(d); Symposium, *If It Ain't Broke, Don't Fix It: Why the Grand Jury's Accusatory Function Should Not Be Changed*, 75 J. CRIM. L. & CRIMINOLOGY 1047 (1984).

[36] *See* United States v. Tomaszewski, 24 C.M.R.76, 80-84 (1957) (Latimer, J., dissenting); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 183, 185, & 196-99 (2d ed. 1920) (discussing the practice of appointing line officers with no formal legal training to prosecute and defend accused in trials by courts-martial under the Articles of War).

[37] UCMJ art. 27(b) (2002); *see also* Cooke, *supra* note 4, at 9 ("A parallel right would not be recognized in civilian criminal trials until the Supreme Court decided *Gideon v. Wainright* [372 U.S. 335 (1963)] some twelve years later.").

[38] UCMJ art. 27(c).

[39] *Id.* art. 19.

general court-martial as a "law officer."[40] This law officer instructed the court on the elements of offenses and court procedures, and ruled on interlocutory questions of law.[41] While not a military judge in the true sense, this requirement was a significant step in the creation of an independent trial judiciary in the military.[42]

Finally, all approved sentences affecting general or flag officers; and those including the death penalty, dismissal from the service, a dishonorable or bad conduct discharge, or confinement for one year or more; were automatically appealed to boards of review (now courts of criminal appeals).[43] These boards were composed of at least three judge advocates or civilian attorneys certified by the Service Judge Advocate General.[44] Their mandate was to review such trials for errors in both law and fact.[45]

To further ensure fairness to military personnel, the UCMJ also provided appointed counsel to represent the convicted Soldiers before the board of review.[46] The Soldiers could also appeal the board's decision to a Court of Military Appeals (COMA) (now Court of Appeals for the Armed Forces (CAAF)).[47] It was composed of three (now five) civilian judges appointed by the President, with the advice and consent of the Senate.[48] The term of these appointed judges was set at and remains at fifteen years.[49]

In many respects, these requirements still exceed the procedural guarantees used in federal criminal appeals. For example, while civilian appellants before federal courts must pay for legal services unless they are indigent, military appellants are afforded free legal counsel at all

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[40] Uniform Code of Military Justice, art. 26, Pub. L. No. 81-506, 64 Stat. 117 (1950); *see also* JAGC HISTORY, *supra* note 4, at 205.
[41] *Id.*
[42] *Id.*
[43] UCMJ art. 66(b).
[44] *Id.* art. 66(a).
[45] *Id.* art. 66(c).
[46] *Id.* art. 70(c); *see also* JAGC HISTORY, *supra* note 4, at 204.
[47] *Id.*
[48] UCMJ art. 67(a)(1), Pub. L. No. 81-506, 64 Stat. 129 (1950), *as amended by* Pub. L. No. 90-340, 82 Stat. 178, 178-79 (1968); Pub. L. No. 101-189, § 1301, 103 Stat. 1352, 1569-76, (1989); Pub. L. No. 103-337, § 924, 108 Stat. 2663, 2831-32 (1994).
[49] UCMJ art. 67(a)(1), Pub. L. No. 81-506, 64 Stat. 129 (1950), *as amended by* Pub. L. No. 90-340, 82 Stat. 178 (1968); Pub. L. No. 96-579, § 12(b), 94 Stat. 3359, 3369 (1980); Pub. L. No. 101-189, §1301(g), 103 Stat. 1352, 1575, (1989).

stages of criminal proceedings without regard to their financial means.[50] Additionally, as a general rule, federal appellate courts are limited to reviewing questions of law, and are bound by the factual determinations of the trial court.[51] Implementing such sweeping changes would have been difficult even under the best of circumstances. The task, however, became formidable in an overburdened military justice system during a time of war.[52]

III. Astronomical Courts-Martial Rates and the Korean War Force the Army to Adopt Plea-Bargaining

When North Korea crossed the 38th parallel on 25 June 1950, with eight divisions and an armored brigade,[53] the U.S. Army had ten divisions—four in the Far East, one in Germany, and five in the United States. [54] Unfortunately, the demobilization following World War II left these units unprepared to fight a major war in the Far East.[55] The occupation force in Japan was undermanned and not combat-ready; U.S. troops in Germany were indispensable to the defense of Western Europe; and most of the divisions in the United States were hollow.[56]

Consequently, as beleaguered South Korean forces fled in disarray, General Douglas MacArthur was forced to deploy an ill-equipped and undermanned force to delay the invaders and evacuate American

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[50] *Compare* FED. R. CRIM. P. 44(a), *with* UCMJ art. 70.

[51] This is a significant departure from federal appellate court practice. Generally, federal appellate courts are bound by the findings of fact at the trial, and review trials only for legal errors. Service Boards of Review, now Courts of Criminal Appeals, however, may grant the accused appellate relief after finding that the evidence supports a different factual conclusion than found by the court below. *Compare* 28 U.S.C.S. § 2254 (d)(2), *with* UCMJ art. 66(c); *see also* Arizona v. Jeffers, 497 U.S. 764, 780-84 (1990); David B. Sweet, Annotation, *Supreme Court's Construction and Application of 28 U.S.C.S. § 2254(D) Which Provides That in Federal Habeas Corpus Proceedings, State Court's Factual Determinations Must Be Presumed to be Correct*, 88 L. ED. 2D. 963 (2004).

[52] Cooke, *supra* note 4, at 8-9 ("[T]he sweeping changes made by the new code would be implemented during the height of the Korean War—a formidable task for the judge advocates of the day.").

[53] The U.S. Army Center of Military History, *An Overview of the U.S. Army in the Korean War, 1950-1953*, *available at* http://korea50.army.mil/history/factsheets/army.shtml (last visited Jan. 10, 2004) [hereinafter *Overview*].

[54] DORIS M. CONDIT, THE TEST OF WAR 1950-1953, 2 HISTORY OF THE OFFICE OF THE SECRETARY OF DEFENSE 58-59 (1988).

[55] *Id.* at 59.

[56] *Id.*

dependents.[57] The results were predictably disastrous. When Task Force Smith (a 540-man force) engaged the enemy, it was quickly outflanked, suffered 200 casualties, lost all its equipment, and broke into a disorganized retreat.[58]

After thirty-seven months of bitter combat, the border between North and South Korea was reestablished along the 38th parallel.[59] The cost, however, was high—over two million combatants on both sides were killed, wounded or taken prisoner, including 27,728 American Soldiers killed in action, and 77,596 wounded.[60] Civilian losses and property damage were also high.[61]

The demobilization after World War II also drastically reduced the size of the "world's largest law firm."[62] Between 1945 and 1950, the number of Army judge advocates on active duty was cut from 2000[63] to 650.[64] As a result, the demobilization left the Army JAGC too small to simultaneously implement the new UCMJ and respond to the spike in courts-martial that occurred at the outbreak of war.[65] In Fiscal Year (FY) 1949, the Army tried 30,651 general and special courts-martial;[66] and while the war raged, the number of such trials rose to 35,449 in FY 1950.[67] Thus, faced with increasing demands and limited resources, the Army justice system teetered on the brink of disaster.

After a year of intense warfare, and little more than a week before the effective date of the UCMJ, U.S. forces stopped the last major Communist offensive of the active phase of the war.[68] The fighting then shifted to a "static war" of patrolling and fighting small clashes along the line of contact between Communist and United Nations forces.[69]

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[57] *Overview*, *supra* note 53, at 1-2; Condit, *supra* note 54, at 59.
[58] *Overview*, *supra* note 53, at 2.
[59] *Id.* at 6.
[60] *Id.*
[61] *Id.*
[62] JAGC HISTORY, *supra* note 4, at 186.
[63] *Id.*
[64] *Id.* at 209.
[65] *Id.*; *see infra* App. E.
[66] AD HOC COMMISSION, *supra* note 9, at 252.
[67] *Id.*
[68] *Compare Overview*, *supra* note 53, at 5 (explaining that I Corps stopped the enemy attack on 20 May 1951), *with* JAGC HISTORY, *supra* note 4, at 203 (noting that the effective date of the UCMJ was 31 May 1951).
[69] *Overview*, *supra* note 53, at 5.

Although armistice talks began on 10 July 1951, the war dragged on for two more years.[70] During this period, the combatants exchanged artillery fire, ambushed each other, and engaged in costly battles along the 38th parallel in which little territory was gained or lost.[71]

During this relative lull in combat, the Army redeployed the 1st Cavalry and 24th Infantry Divisions to Japan and replaced them with the 40th and 45th Infantry Divisions.[72] As the war dragged on, Army commanders consolidated and improved defensive positions near the 38th parallel, while their staff judge advocates processed military justice actions that had been delayed during the heavy fighting.[73]

As the courts-martial rate steadily climbed, so did the requirements for law officers, trial defense counsel, defense appellate counsel, and appellate judges.[74] Consequently, in 1951 the Army began a program to commission 250 law school graduates as Reserve judge advocates and order them to active duty.[75] By May of 1952, the JAGC had grown to 1200 officers, and 750 of these attorneys [sixty-two point five percent] were "engaged full-time in criminal justice activities."[76] The 61,520 general and special courts-martial the Army tried in FY 1952, however, offset this personnel increase.[77]

Administering this huge volume of cases with such a small cadre of attorneys was hard enough, but virtually all of the serious cases were fully contested at the trial level. Army records show that less than ten percent of the 9383 general courts-martial convictions in 1952 were based on guilty pleas.[78] Even when the accused entered a guilty plea, he often plead "not guilty" to some of the charges and specifications, and

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[70] *Id.* at 5-6.
[71] *See id.*; Condit, *supra* note 54, at 124-26.
[72] *Overview*, *supra* note 53, at 5.
[73] *See generally* Condit, *supra* note 54, at 125-26.
[74] *See* AD HOC COMMISSION, *supra* note 9, at 252. The courts-martial rate for general and special courts-martial combined rose from 32,610 trials in FY 1951 to a peak of 76,715 in FY 1953, before falling to 22,663 in FY 1959. By comparison, the total number of general and special courts-martial tried in 2002 was 1390. *See* ANN. REP. (2002), *supra* note 9, at 39. Even adjusting for the size of the Army in 1953 (1,536,000) and 2002 (516,599), the disparity is striking. *See* AD HOC COMMISSION, *supra* note 9, at 252; ANN. REP. (2002), *supra* note 9, at 39.
[75] JAGC HISTORY, *supra* note 4 at 209.
[76] *Id.*
[77] *Id.* at 252.
[78] Hughes, *supra* note 7, at 1.

the government introduced evidence on those charges.[79] As a result, less than one percent of general courts-martial convictions were based solely on the accused's pleas.[80] This grueling procession of contested cases was largely unnecessary given the Army's ninety-five percent conviction rate.[81]

On the appellate front, the Army military justice system was also under siege. From June 1951 through December 1952, the caseload of the Army Board of Review (ABR) increased to 11,289 cases.[82] Defense counsel appealed roughly 181 of every 1000 of these cases to the COMA.[83] The UCMJ's increased access to appellate counsel in part caused this increase of appeals.[84] To clear the growing backlog of appeals, the five existing review boards were augmented with a sixth board in 1951 and a seventh in 1952.[85]

The backlog of special courts-martial cases involving approved bad-conduct discharges was of particular concern. As meritorious appeals of such convictions poured in, the judges of the COMA and Service Judge Advocates General recommended amending the UCMJ to prohibit special courts-martial from adjudging bad conduct discharges.[86] The rationale for this recommendation was threefold. First, there were not enough legally trained personnel in the service to serve as court members or counsel.[87] In FY 1951, the Army tried 27,404 special courts-martial,[88] and the lack of legally trained personnel resulted in a large number of reversible errors.[89] Second, the "paucity of court reporters, particularly in overseas commands," significantly delayed the convening authority's final action while he waited for verbatim records of trial to be prepared.[90]

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[79] MG Shaw Letter, *supra* note 2, at 3.
[80] *Id.*
[81] *See generally* Hughes, *supra* note 7; MG Shaw Letter, *supra* note 2.
[82] JAGC HISTORY, *supra* note 4, at 211.
[83] *Id.*
[84] *Id.* In the first year of appellate practice under the UCMJ, requests for representation by appellate defense counsel before the ABMR rose from sixty-six percent to seventy-six percent. *Id.*
[85] *Id.* at 211.
[86] CODE COMMITTEE ON MILITARY JUSTICE, UNITED STATES COURT OF MILITARY APPEALS & THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES, ANN. REP., MAY 31, 1951 TO MAY 31, 1952, at 4 (1952) [hereinafter ANN. REP. (1952)].
[87] *Id.*
[88] AD HOC COMMISSION, *supra* note 9, at 252.
[89] ANN. REP. (1952), *supra* note 86, at 4.
[90] *Id.* Two major factors, dramatic increases in AWOL and desertion cases during time of war, and a shortage of court reporters at overseas commands, caused significant

Third, the entire appellate process took so long that in most cases the accused served his sentence before the final appellate action was taken.[91] This was a major problem because the Army had to restore these Soldiers to full duty status, rank, and pay, while their appeal was pending, because in the early 1950s, Army regulations made no provision for granting excess leave to Soldiers awaiting punitive discharges.[92]

As one might imagine, these problems undermined good order and discipline in front-line units, and posed major housekeeping problems for their unit commanders and judge advocates alike.[93] As 1952 drew to a close, it was apparent that Army judge advocates were working hard—but were they working smart? After considering this question, Major General (MG) Franklin P. Shaw, The Assistant Judge Advocate, concluded that the JAGC was doing things the hard way, and the time had come for change.[94]

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backlogs of Army post-trial actions in 1952 and 2002. *See* discussion *infra* Part VI and note 172.

In FY 2002, the Army experienced its worst post-trial processing times in thirty years. COL Harvey, *supra* note 24, at 16. The primary causes of this regrettable circumstance is a fifty-seven percent increase in special and general courts-martial from FY 2000 to FY 2002, court reporter shortages, and other factors. *Id.* at 1, 14-35. There is also evidence that the global war on terrorism has sparked increase unauthorized absence and desertion cases. *See* CLERK OF COURT, ANALYSIS OF ARMY AWOL & DESERTION FY 1999 – FY 2003 1 (2003) (on file with the Office of the Clerk of Court, U.S. Army Court of Criminal Appeals). Pure AWOL and desertion cases averaged seventeen cases per year in FY 1999-2001. In FY 2002, however, 109 such cases were referred to courts-martial. The number of referrals climbed to 113 in FY 2003. In FY 2002 the total number of cases with AWOL and/or desertion charges, to include pure AWOL & desertion cases, doubled from 218 in FY 2001 to 463. In FY 2003 the total number of such cases was 471. The vast majority of these cases, however, were disposed of by pleas of guilty or administrative separations. *Id.*

Concern has also been raised that recent changes in the UCMJ and MCM expanding sentencing authority of special courts-martial may result in higher courts-martial rates and further increase post-trial processing delays. COL Harvey, *supra* note 24, at 15.

[91] ANN. REP. (1952), *supra* note 86, at 4-5.

[92] *Compare id.*, *with* U.S. DEP'T. OF ARMY, REG. 600-8-10, LEAVE AND PASSES, paras. 5-19 & 5-21 (31 July 2002).

[93] ANN. REP. (1952); *see also* Prugh, *supra* note 4, at 27-28; Letter from COL Edward H. Young, Second Army Judge Advocate, to Major General Franklin P. Shaw 1-2 (May 28, 1953) (on file with TJAGLCS Library) (expressing the commander's concern regarding the detrimental effect of restoring sentenced prisoners to their full grade and pay and placing them among Soldiers of equal or lower rank).

[94] *See* MG Shaw Letter, *supra* note 2.

IV. The Guilty Plea Plan

In late 1952, or early 1953, MG Shaw began developing a three-step plan for the OTJAG to implement civilian plea-bargaining in Army courts-martial.[95] The plan was as follows: (1) acquire statistics on guilty pleas in federal courts and compare them with guilty plea rates in courts martial;[96] (2) publish an article to "stimulate interest in a decided break from convention and tradition";[97] and (3) implement plea-bargaining in Army courts-martial.[98]

After gathering and analyzing the necessary statistics, on 19 January 1953, the Chief of the Military Justice Division prepared a decision memorandum for MG Shaw's review.[99] The memorandum recommended, among other things, to test civilian plea-bargaining in a busy jurisdiction.[100] If the initial test was successful, the memorandum recommended that the practice be expanded without the Secretary of the Army or subordinate commanders issuing written instructions to Army units.[101] This caution came as a result of the enactment of the UCMJ which had heightened the sensitivity of the JAGC to command influence issues.[102]

After MG Shaw approved the recommendations, Colonel (COL) William J. Hughes, Jr. completed step two of the plan in early to mid-April 1953, when he published an article in *The Judge Advocate Journal*,

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[95] *See generally id.*
[96] *Id.*
[97] Memorandum, COL C. Robert Bard, Chief, Military Justice Division, to Mr. Totten P. Heffelfinger, II, Office of General Counsel, Department of Defense (23 Apr. 1953) [hereinafter COL Bard Memo to OGC] (on file with TJAGLCS Library).
[98] *Id.*
[99] Memorandum, COL C. Robert Bard, Chief, Military Justice Division, to Major General Franklin P. Shaw, The Assistant Judge Advocate General (19 Jan. 1953) [hereinafter COL Bard Memo to TAJAG] (on file with TJAGLCS Library). Colonel Bard's eight-page memorandum with seven multi-page enclosures details a guilty-plea practice remarkably similar to modern procedure. *But see* Memorandum, COL M. W. Ludington, Chief, Defense Appellate Division, to COL C. Robert Bard, Chief, Military Justice Division 1-4 (16 Jan. 1953) (on file with TJAGLCS Library). Colonel Ludington recommended that stipulations of fact be used during guilty-plea proceedings to establish a *prima facie* case during a thorough inquiry into the providence of the accused pleas of guilty, which in many respects was well ahead of his times. *See id.* at 2-3.
[100] COL Bard Memo to TAJAG, *supra* note 99, at 1.
[101] *Id.*
[102] *Id.*

entitled "*Pleas of Guilty - Why So Few?*"[103] The article commented on the gridlock then plaguing the military justice system and contrasted it with the efficiency of the civilian guilty-plea practice. To make his point, COL Hughes noted that pleas of guilty or *nolo contendre* disposed of ninety-four percent of the 33,502 convictions obtained in federal courts in FY 1950; and that in FY 1951, federal prosecutors again disposed of ninety-four percent of their cases with plea-bargaining.[104] Since these statistics proved that plea-bargaining saved the government a great deal of time, effort and money, COL Hughes opined the time had come for the Army to stop tying up its courts with "interminable and utterly senseless trials."[105] Soon after COL Hughes published this article, MG Shaw moved to implement the last step of his plan.[106]

Step three of the plan was completed on 23 April 1953 when MG Shaw sent a letter to all Army staff judge advocates.[107] In the letter, MG Shaw stated that the Army could no longer afford to ignore plea-bargaining[108] because it was the obvious remedy to clear the growing backlog of courts-martial.[109]

The legal gridlock that currently beset the Army, however, was not MG Shaw's only concern. He was also concerned that the military's steadfast refusal to engage in plea-bargaining was, in effect, depriving the accused of zealous representation of counsel.[110] In this regard, MG Shaw used his letter to remind the Corps that defense counsel are

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[103] COL Bard Memo to OGC, *supra* note 97. It is worth noting that COL Hughes was a prominent attorney in Washington, D.C. and one of the Directors of the Judges Advocate's Association that published the article. *See* Hughes, *supra* note 7 (inside cover of Bulletin No. 13). It is also noteworthy that "General Shaw approved the manuscript before publication." COL Bard Memo to OGC, *supra* note 97.

[104] Hughes, *supra* note 9, at 1.

[105] *Id.* at 6.

[106] MG Shaw Letter, *supra* note 2, at 1-3.

[107] *Id.*

[108] *Id.* A copy of MG Shaw's Letter and Hughes' article were provided to the Office of the General Counsel, Department of Defense, The Honorable Frank C. Nash, Assistant to the Secretary of Defense for International Security Affairs, and The Honorable John E. Hannah, Assistant Secretary of Defense for Manpower and Personnel. *See* COL Bard Memo to OGC, *supra* note 97; Letter from The Honorable Frank C. Nash, Assistant to the Secretary of Defense for International Security Affairs, to William J. Hughes, Jr., Attorney at Law (June 26, 1953) (on file with TJAGLCS Library). In his memo, COL Bard advised the Office of General Counsel that the guilty plea plan was "being tested in the Third and Seventh Armies." COL Bard Memo to OGC, *supra* note 97.

[109] MG Shaw Letter, *supra* note 2, at 1.

[110] *Id.* at 2-5.

ethically obligated to advise the accused of the strengths and weaknesses of the government's case, and under appropriate circumstances, to advise the accused of the benefits of seeking a plea-bargain.[111] Thus, by refusing to bargain with accused, the military was in effect, denying them "a 'break' which the guilty defendant has available to him in civilian courts; and forcing defense counsel to put on a "good show" that often resulted in a heavier penalty."[112] Major General Shaw opined that the time had come to emancipate military defense counsel and allow them to seek plea bargains like their civilian counterparts.[113]

Major General Shaw, however, tempered his enthusiasm for military justice practitioners to adopt plea-bargaining with the caveat that they must carry out such agreements "with the utmost good faith."[114] In MG Shaw's view: "It would be better to free an offender completely, however, guilty he might be, than to tolerate anything smacking of bad faith on the part of the Government."[115] Major General Shaw then closed the letter with a direction to all staff judge advocates to raise the issue with their commanders and report back to his office on their experiences.[116] The only restriction he placed on establishing local guilty-plea programs was that "[a]ny action looking to securing advantage to the accused by a plea avoiding contest must emanate from [defense counsel] and the accused."[117]

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[111] *Id.* at 3-5.
[112] *Id.* at 2 & 4.
[113] *Id.* at 7.
[114] *Id.* at 6.
[115] *Id.*
[116] *Id.* at 7. MG Shaw Letter, *supra* note 2, is a remarkable document for three reasons. First, from a historical standpoint it contains the first official encouragement of plea-bargaining in the U.S. armed forces. Second, it records the thought process that led MG Shaw to initiate the guilty plea program. Third, MG Shaw's observations on the ethical duties of counsel in plea-bargain situations, closely parallels the current guidance provided in the Rules of Professional Conduct. *Compare* MG Shaw Letter, *supra* note 2, at 3-7, *with* U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS app. B, R. 1.2(1)(a) (1 May 1992) [hereinafter AR 27-26] (noting lawyers must abide by the client's decision on whether to enter into a pretrial agreement); *id.* app. B, R. 1.4(2) (stating that lawyers negotiating a pretrial agreement shall provide the client with sufficient information so that the client can make intelligent decisions); *id.* app. B, R. 3.2(1) (seeking concessions quickly is often in the client's interest).
[117] MG Shaw Letter, *supra* note 2, at 6. Given the overriding concern of the drafters of the UCMJ to create a system of military justice that would gain public confidence, and distance the system from its "drumhead justice" reputation, it was wise, if not essential, for MG Shaw to impose the limitation that plea-bargaining "must emanate from [defense counsel] and the accused." Prugh, *supra* note 4, at 25. After nearly fifty years of practice, however, the President removed this limitation in Executive Order 12,767, 56

V. The Guilty Plea Program: Initial Reaction

The initial reaction to the initiative was mixed.[118] While some Army commands embraced the program enthusiastically,[119] others had deep reservations.[120] On the positive side, Lieutenant Colonel (LTC) Laurence W. Lougee, the Staff Judge Advocate, U.S. Army, Alaska (USARAL), revealed that his office had started plea-bargaining a year before MG Shaw dispatched his letter.[121] According to LTC Lougee, the judge advocates and commanders at Fort Richardson, Alaska, supported his guilty plea program and universally praised it for expediting courts-martial.[122] The USARAL's leadership in adopting plea-bargaining was later documented in a survey of 359 general courts-martial that was conducted between 5 May 1953 and 6 November 1953.[123] The survey showed that the USARAL, and the Military District of Washington led the Army in guilty plea cases with a rate of eighty percent.[124]

Fed. Reg. 30284 (1991). The change adopts the civilian practice of allowing either party to initiate plea-bargaining. *See* MCM (2002), *supra* note 5, at A21-40 (discussing the 1991 Amendment to R.C.M. 705(d) (Procedure)).

[118] Memorandum for File, COL Stanley W. Jones, Chief, Military Justice Division 1 (5 Jan. 1954) [hereinafter COL Jones Memo for File]; *see infra* app. B; *see also* United States v. Gordon, 10 C.M.R. 130, 132 (C.M.A. 1953) (noting the first pronouncement from the Court of Military Appeals on the subject was noncommittal: "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").

[119] COL Jones Memo for File, *supra* note 118, at 1.

[120] *Id.*

[121] Letter from LTC Lawrence W. Lougee, Staff Judge Advocate, U.S. Army, Alaska, to Major General Franklin P. Shaw, The Assistant Judge Advocate General 1 (May 15, 1953) (on file with TJAGLCS).

> I think it would be of interest to you to learn that it has been the practice in this theater for the past year to follow substantially the procedure you have outlined. In the past few months we have had fourteen pleas of guilty in general court-martial cases and also two pleas of guilty to lesser-included offenses. All of these pleas were known in advance to this office and were only approved after prior ascertainment that the rights of the accused were being fully protected.

Id. This modest, but pioneering effort appears to mark the actual beginning of plea-bargaining in the U.S. armed forces.

[122] *Id.*

[123] COL Jones Memo for File, *supra* note 118, at 3, encls.

[124] *Id.* Thirty-four of forty cases in the U.S. Army, Alaska and eight of ten cases in the Military District of Washington were disposed of by guilty pleas. Only one command

On the other hand, this same study showed that many commands around the world had guilty plea rates of less than ten percent.[125] In fact, the Commander, V Corps, rejected the guilty plea initiative.[126] As his staff judge advocate would later write:

> When this program began in the spring of 1953[,] [I] was Staff Judge Advocate of V Corps, in Germany, a pretty good-sized jurisdiction with an average of about 15 general courts per month, mostly on the felony side. Being personally a bit on the conservative side, and having as Corps Commander one Major General Ira P. Swift who refused totally to deal with those "G-D-Crooks," V Corps had no deals during the period from about April 1953 thru May 1954. [127]

In the Far East, the guilty plea program received a mixed reception due to operational concerns. In particular, the unit's proximity to the battle and its tactical situation were the key factors in determining the extent that commands used plea-bargaining. In Japan, the guilty-plea program was well received.[128] Between 5 May 1953 and 6 November 1953, sixty-seven Soldiers in the 1st Cavalry Division were sentenced to confinement, and approximately seventy-three percent of those cases were guilty pleas.[129] During the same period, the 24th Infantry Division sent ninety Soldiers to prison, and seventy percent were based on guilty pleas.[130] Note that both units fought in Korea during the initial stages of

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had a higher percentage of guilty plea cases. One hundred percent of the cases at the Field Command Armed Forces Special Weapons Project were disposed of by guilty pleas. This command, however, had only one trial during this period. *Id.*

[125] *Id.* at 1-3. The guilty plea rates in the following jurisdictions were as follows: (1) Fifth Army- 8%, 11 of 138 cases; (2) 101st Airborne Division-2.6%, 1 of 39 cases; (3) 5th Armored Division -8.3%, 10 of 121 cases; (4) 40th Infantry Division- 0%, 0 of 16 cases; (5) Camp Pickett 5%, 12 of 215 cases; and (6) Fort Leavenworth- 6.5%, 3 of 46 cases. *Id.*

[126] Letter from COL H. F. McDonnell, Staff Judge Advocate, Fort Leonard Wood, Missouri, to COL J. L. Searles, Chief, Government Appellate Division, Washington, D.C. 1 (Aug. 7, 1956) (on file with TJAGLCS Library).

[127] *Id.* It should be noted, however, that the guilty plea study showed that V Corps had a thirty-four percent guilty plea rate (33 of 97 cases) during this same time frame. COL Jones Memo for File, *supra* note 118, at 1, encls. Given COL McDonnell's remarks it would appear that in these cases the accused plead guilty without the benefit of a pretrial agreement.

[128] *Id.*

[129] *Id.* at 1.

[130] *Id.*

the conflict, then redeployed in late 1951, when the 40th and 45th Infantry Divisions replaced them on the front line.[131]

In Korea, however, there was less willingness to engage in plea-bargaining. During the same period, the 40th Infantry Division imprisoned sixteen Soldiers—all of the trials were contested.[132] The 45th Infantry Division, on the other hand, sentenced eighteen Soldiers to confinement and only approximately twenty-two percent were disposed of by guilty pleas.[133] The guilty plea rates for remaining Army units serving in the war zone were also low:

Eighth Army	29.8%
I Corps	25%
IX Corps	42.5%
X Corps	30%
2nd Infantry Division	11.1%
3rd Infantry Division	20%
7th Infantry Division	38.5%
25th Infantry Division	28.6%
U.S. Army Forces Far East	0%
Korean Base Section	26%
Korean Communications Zone	12.5%[134]

While these figures suggest that units in combat have a lower rate of courts-martial and guilty pleas as units outside of the combat zone, they do not tell the whole story.

VI. The Guilty Plea Program: Early Lessons Learned From Desertion Cases

As the guilty plea program was taking form in Washington, D.C., U.S. forces fought a series of bloody battles along the 38th Parallel.[135] In March and April of 1953, North Korean and Chinese forces attacked the 2nd Infantry Division at Little Gibraltar, and the 7th Infantry Division at

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131 *Overview*, *supra* note 53, at 5.
132 COL Jones Memo for File, *supra* note 118, at 2, encls.
133 *Id.* at 2.
134 *Id.* at 1-3.
135 The U.S. Army Center of Military History, *Commemoration of the Korean War "Freedom Is Not Free," available at* http://korea50.army.mil/history/chronology/timeline_1953.shtml (last visited Jan. 10 2004).

the Old Baldy/Pork Chop Hill Complex.[136] As U.S. forces fought to hold these positions, it was vital to engage the enemy with every able-bodied Soldier. Soldiers who deserted their units, or otherwise attempted to avoid combat were understandably *persona non grata* for plea bargains.

Later, in July 1953, the Communists again attacked U.S. positions in significant numbers, this time seeking to gain leverage in the stalemated armistice talks.[137] As the war entered its final phase, on 10 July 1953, the 7th Infantry Division was ordered to abandon its defensive positions on Pork Chop Hill and withdraw after a five-day battle.[138] Ten days later, IX Corps stopped the last major Communist offensive of the war (a six-division attack) in the Battle of Kumsong River Salient.[139] On 27 July 1953, North Korea and China signed the armistice agreement ending the war.[140]

Dealing with Korean War deserters was a vexing problem under the UCMJ. Desertion in time of war is a crime punishable by death, and the death penalty was thought to effectively deter such misconduct.[141] But given the tenor of the times and the huge appellate backlog, the likelihood of swiftly imposing the death penalty was virtually non-existent in 1951-1953.[142] Thus, during the heaviest of the fighting, savvy Soldiers quickly realized that they might stand a better chance of surviving the war if they deserted. This, of course, created a dilemma for commanders and judge advocates.

While it was essential to maintaining good order and discipline to punish deserters swiftly and severely, increasing the number of guilty-pleas had become necessary to clear the huge backlog of cases.[143] To make matters worse, the numbers of cases reversed on appeal due to technical errors was on the rise.[144] As these trends combined to delay the

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[136] *Id.*
[137] *Id.*
[138] *Id.* at 2.
[139] *Id.*
[140] *Id.*
[141] UCMJ art. 85(c).
[142] See Commemoration of the Korean War "Freedom Is Not Free, *supra* note 135; COL Bard Memo to OGC, *supra* note 97.
[143] Bard Memo to OGC, *supra* note 97.
[144] Ann. Rep. (1952), *supra* note 86, at 4.

swift implementation of punishment in desertion cases, commanders and judge advocates became increasingly frustrated with the UCMJ.[145]

An example of this growing frustration was expressed in correspondence between the U.S. Army Pacific headquarters and the Department of the Army in 1953.[146] Shortly before the OTJAG announced the guilty plea program, the Staff Judge Advocate, U.S. Army Pacific was directed to write a memo to the Army Inspector General.[147] The memo asserted the commander's view that the UCMJ was preventing him from swiftly punishing Soldiers for malingering and desertion, and thus hindering him from winning the war.[148] A copy the memo was sent to The Judge Advocate General (TJAG) on 1 May 1953.[149] From the Army Pacific Commander's viewpoint, the UCMJ's lengthy post-trial and appellate process encouraged Soldiers to use the military justice system to avoid combat;[150] and he was right. It was imminently practical for Soldiers seeking to avoid the rigors of combat to choose to languish in pretrial and post-trial confinement, or on limited-duty,[151] while they waited for the appellate courts to reward them by reversing their convictions.[152]

Less than three months later, Lieutenant General (LTG) W. B. Kean, the Commanding General of the Fifth Army raised additional concerns about processing delays in desertion cases while discussing the relative merits of MG Shaw's plea-bargaining initiative.[153] In a letter to TJAG, LTG Kean wrote that he was "most reluctant to embark upon the practice which General Shaw suggest[s]."[154] This reluctance, however, was not predicated on disdain for the practice of plea-bargaining, but on two well

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[145] Memorandum, COL John A. Hall, Staff Judge Advocate, U.S. Army Pacific, to The Inspector General, U.S. Army (21 Apr. 1953) [hereinafter COL Hall Memo]. *See infra* app. C.
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] Letter from COL John A. Hall, Staff Judge Advocate, U.S. Army Pacific, to Major General Franklin P. Shaw, The Assistant Judge Advocate General (May 1, 1953) [hereinafter COL Hall Letter]. *See infra* app. D.
[150] COL Hall Memo, *supra* note 145.
[151] *Id.*
[152] *Id.*
[153] Letter from Lieutenant General W. B. Kean, Commander, Fifth Army, to Major General E. M. Brannon, The Judge Advocate General (July 9, 1953) (on file with TJAGLCS Library).
[154] *Id.* at 1.

founded concerns. First, the given the tenor of the times, LTG Kean feared that plea-bargaining would do more harm than good, because he believed the general public would regard it as a means to coerce Soldiers to plead guilty to offenses they did not commit.[155] Second, he was very uncomfortable about making commitments regarding sentence limitations or post-trial restoration to duty without complete information.[156] Most of the general courts-martial in the Fifth Army, which was then located in Chicago, Illinois, were for desertion in the Far East.[157] Under these circumstances, defense counsel were quick to take advantage of the substantial delay it took to obtain evidence necessary to prove the charge by offering a plea-bargain to the government to move the case along.[158] This placed the commander in the unenviable position of either sacrificing expediency and a guaranteed conviction by waiting for the evidence to arrive, or accepting a plea-bargain before he was certain the Soldier was deserving of it.[159]

To avoid this Hobson's choice, LTG Kean and his staff judge advocate employed the following three-step process:

> 1. Request the evidence of the offense and the accused's service record early;
> 2. Accept the accused's pleas of guilty without any commitment to grant post-trial relief; and
> 3. Review all of the information received in a post-trial clemency submission.[160]

This method of expediting desertion cases was admirable in its even-handed and pragmatic approach to the problem. Yet, it also illustrates why many Soldiers held the perception that the implementation of the UCMJ during the Korean War enabled deserters to manipulate the new due process procedures to avoid combat.[161]

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[155] *Id.*
[156] *Id.* at 2.
[157] *Id.*
[158] *Id.* at 1-2.
[159] *Id.*
[160] *Id.* at 2.
[161] *See generally* CODE COMMITTEE ON MILITARY JUSTICE, UNITED STATES COURT OF MILITARY APPEALS & THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES, ANN. REP., JANUARY 1, 1954 TO DECEMBER 31, 1954, at 21-22 (1954) [hereinafter ANN. REP. (1954)]. Major General Eugene M. Caffey, The Judge Advocate General, U.S. Army, commented on how the appellate delay and the likelihood of avoiding the death penalty encouraged desertion. *Id.* Major General Caffey's remarkable military career spanned

With these operational considerations, it was not surprising that pretrial agreements in the U.S. Army Pacific were rudimentary. The process began with a conference between the staff judge advocate and the defense counsel.[162] During the conference, the staff judge advocate would agree to withdraw one or more charges or specifications in exchange for the accused's agreement to plead guilty to the remaining charges, and in appropriate cases, to enter into stipulations of fact or testimony.[163] In cases that the accused sought a limitation on the convening authority's power to approve portions of the sentence adjudged by the court-martial, the staff judge advocate would discuss the accused's offer with the convening authority.[164] Such arrangements, however, were extremely rare given the commander's predisposition against the UCMJ in general and plea-bargaining, in particular.[165]

Nevertheless, the Army Pacific experience established the emerging tenants of military pretrial agreements. First, the agreement is struck between the accused and the convening authority, with judge advocates acting as negotiators and counselors.[166] Second, the agreement must be voluntary and mutually beneficial.[167] Third, the terms of the agreement must relate to the charges and specifications to be presented to the court-martial, and must not contain terms and conditions that would violate public policy.[168] Fourth, obtaining a pretrial agreement is not a right of an accused, and in a particular case the convening authority may reject a

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from 1918 to 1956. During World War II, he was awarded the Distinguished Service Cross for "extraordinary heroism" while commanding an engineer brigade on Utah Beach during the D-Day invasion. *See* JAGC History, *supra* note 4, at 219-20.

[162] COL Hall Letter, *supra* note 149, at 1.

[163] *Id.* at 1.

[164] *Id.*

[165] *Id.* As previously discussed, the survey showed that from 5 May 1953–5 November 1953, the U.S. Army Pacific had fifty percent guilty-plea rate (two of four convictions resulting in confinement). *See* COL Jones Memo for File, *supra* note 118, at 3, encl. This rate was higher than the 40.6% average of the Army. *Id.* at 1. It is unclear if this statistic is the result of a change of heart or change of command. It is clear, however, that by February 1954, the field commanders in the U.S. Army Pacific were "highly pleased" with the results of plea-bargaining. *See* Letter from COL Allan R. Browne, Army Staff Judge Advocate to Brigadier General Eugene M. Caffey, Acting The Judge Advocate General 2 (Feb. 3, 1954) (stating three of the last five general courts-martial, including a desertion case in which the accused had been absent for fifteen months, were disposed of by negotiated pleas of guilty) (on file with TJAGLCS Library).

[166] *See* MCM (2002), *supra* note 5, R.C M. 705(a) & (d), discussion and analysis.

[167] *Id.* R.C.M. 705(b) & (c), discussion, and analysis.

[168] *Id.*

plea bargain simply because acceptance would undermine good order and discipline.[169]

In the final analysis, the Army never found an effective way to deal with deserters under the UCMJ during the Korean War, and this would lead a future Judge Advocate General to make the following comment in a 1954 report to the Congress:

> It is doubtful whether a system that requires more than a year to complete appellate review in peacetime can be relied upon in time of war to punish offenders promptly. There is little deterrent value in a system of military justice which precludes contemporary punishment of front line deserters. Moreover, a system which permits wartime offenders to languish in stateside detention barracks while faithful soldiers fight and die in far off lands does little for the morale of fighting men, particularly when it is common knowledge within the military that when passions cool and peace descends, the public will demand clemency for those serving sentences for military offenses.[170]

To solve this problem, MG Eugene M. Caffey recommended forward deploying the boards of review in time of war to the combat zone where they could expeditiously review such convictions.[171] His recommendation, however, was not adopted,[172] perhaps because the

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[169] *See id.* R.C.M. 705(d)(3) ("The decision whether to accept or reject an offer is within the sole discretion of the convening authority.").

[170] ANN. REP. (1954), *supra* note 161, at 21-22; *see also* JAGC HISTORY, *supra* note 4, at 194-200; *supra* notes 8 & 15 (noting much of the impetus for enacting the UCMJ came from the public's perception that the administration of military justice under the Articles of War was arbitrary and capricious, and often resulted in more severe punishment than the accused deserved).

[171] ANN. REP. (1954), *supra* note 161, at 22.

[172] In the "Information Age," many of the problems noted above can be remedied. First, courts-martial rates have dropped significantly largely due to an increased use of administrative separations and nonjudicial punishment, so the pressure to move cases has been greatly reduced. *See* MAJ Klein *supra* note 7, at 7 n.45. Second, verbatim records of trial can be prepared and transmitted to the appellate courts expeditiously using modern technology. For example, by using voice recognition court reporting equipment, digital photography, and document scanning to prepare a verbatim digital record of trial, and encrypted email to transmit the record during the post-trial and appellate process, it is possible to expedite the courts-martial process in ways that were unimaginable in the 1950s. *See* COL Harvey, *supra* note 24, at 44; *see* Brigadier General Scott C. Black,

proposed solution would not really solve the problem. Except in cases when the accused was sentenced to death, speeding up the appellate review process would simply expedite the execution of the appellant's period of confinement in a stateside prison or discharge from the service. Ironically, a speedy trial in a non-capital desertion case may actually reward the individual who prefers imprisonment and a punitive discharge to the risks of combat.

VII. Lessons Learned: 1953-54 (The End of the Brannon/Shaw Era)[173]

After the Korean War ended, Army judge advocates continued their effort to increase the percentage of plea-bargains.[174] But as the guilty plea rate climbed, four recurring errors were identified in records of trial. One of the first errors brought to the attention of MG Ernest M. Brannon, TJAG, was the failure of some staff judge advocates to clearly indicate in their post-trial reviews, whether the accuseds' pleas of guilty were based on pretrial agreements.[175] This failure had the unfortunate consequence of complicating the post-trial processing of the case when allegations of a breach of the agreement or other errors were raised on appeal.[176] The second error to catch TJAG's attention was a practice by some staff judge advocates that required the accused "to forego his right to present to the court matters in extenuation or mitigation of the offense charged" in the pretrial agreement.[177] This was done to preclude the defense from

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Assistant Judge Advocate General of Military Law and Operations, Criminal Law Update, *U.S. Army Judge Advocate General's Corps 2002 World Wide Continuing Legal Education Conference* slide 14 (9 Oct. 2002) (on file with the OTJAG). Third, although the likelihood of executing Soldiers in such cases remains remote, confinement for life without eligibility for parole is now an authorized punishment for desertion and other serious cases. *See* UCMJ art. 56a.

[173] By *comparing* the discussion in Part VII *infra* (concerning the lessons learned from Korean War desertion causes), and *supra* note 65 discussion (concerning traditional spikes in courts-martial at the outbreak of major conflicts), *with* discussion *in supra* notes 24, 65, & 90 (concerning current increases in post-trial processing times), one can easily see how the lessons learned during the Korean War are paying dividends in the global war on terrorism.

[174] *See* MG Shaw Letter *supra* note 2; Searles, *supra* note 23.

[175] *See Agreements as to Pleas of Guilty*, 36 JAG CHRON. 183 (1953). Major General Brannon served as The Judge Advocate General from 26 January 1950-26 January 1954. *See* JAGC HISTORY, *supra* note 4, at 200-02.

[176] *Id.*

[177] *Id.*

trying to beat the deal in court.[178] The third error was the reverse of the second. Some staff judge advocates, and the chief, military justice division, took the position 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.[179] Finally, there was the embarrassing and troublesome tendency of some staff judge advocates to make promises regarding sentence limitations that the convening authority was unwilling to implement.[180]

To end these problems, in August 1953, MG Ernest M. Brannon, directed that a notice be published in the *JAG Chronicle*.[181] The notice was published on 4 September 1953 with the following main points:

> 1. Staff Judge Advocates were required to state in the post trial review if any or all of the accused guilty pleas were pursuant to a pretrial agreement;
> 2. Waiving extenuation and mitigation evidence in pretrial agreements was prohibited;
> 3. Trial Counsel were advised to introduce aggravation evidence in appropriate cases; and
> 4. Staff Judge Advocates were advised to ensure that the promises they made regarding sentence limitations, fell within the convening authority's guidelines, or had been personally approved by the convening authority in advance.[182]

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[178] *See, e.g.*, Letter from LTC Marion H. Smoak, Staff Judge Advocate, 82d Airborne Division, to COL J.L. Searles, Chief, Government Appellate Division 2 (Aug. 9, 1956) (on file with TJAGLCS Library) [hereinafter COL Smoak Letter].

[179] COL Bard Memo to TAJAG, *supra* note 99, at 3.

[180] *Agreements as to Pleas of Guilty*, *supra* note 175, at 183.

[181] Letter from COL James E. Goodwin, Acting Chief, Military Justice Division, to COL Charles L. Decker, Commandant, The Judge Advocate General's School (Aug. 25, 1953) (on file with TJAGLCS Library).

[182] *Id*. This advice forms the basis for several rules governing contemporary plea-bargaining in the military. *See* MCM (2002), *supra* note 5, R.C.M. 705(c)(1)(B) (A pretrial agreement may not deprive the accused of complete sentencing proceedings.); *id.* R.C.M. 705(a) & (d), II-70, & A21-40 (stating the convening authority must agree to the terms of the pretrial agreement, although he or she need not sign the agreement); *id.* R.C.M. 1001(a)(1)(A)(iv), (a)(1)(B), (b)(4), (c), II-122, II-123, A21-69 through A21-71 (finding trial counsel may present evidence of aggravation and defense counsel may present evidence in extenuation or mitigation or both.); *id.* R.C.M. 1106 (d)(3)(E), at II-149 (requiring the staff judge advocate's review to contain a statement regarding the convening authority's obligations under the pretrial agreement.).

Later that month, the Army Judge Advocate Conference convened at Charlottesville, Virginia,[183] and the timing of the conference was significant. The Korean War had recently ended and the guilty plea program was just getting underway, so both subjects were hot topics. On the first day of the conference, a panel consisting of COL James Garnett, U.S. Army Forces, Far East (AFFE); LTC Waldemar A. Solf, [184] U.S. Army, Europe (USAREUR); and LTC Laurence W. Lougee, U.S. Army, Alaska (USARAL), assembled to discuss the program.[185] Attending this discussion were: MG Brannon, TJAG; MG Shaw, The Assistant Judge Advocate General; and Brigadier General (BG) James L. Harbaugh, Jr., the Assistant Judge Advocate General for Military Justice.[186]

Colonel Garnett (AFFE) began the discussion with a presentation on the seven-step procedure that was used in by IX Corps in Korea for initiating, negotiating, and administering pretrial agreements at the trial level.[187] As the discussion began, there was general agreement that the

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[183] U.S. DEP'T OF ARMY, REPORT OF PROCEEDINGS, ARMY JUDGE ADVOCATE CONFERENCE, 28 SEPT.-2 OCT. 1953 at 1 [hereinafter JAGC CONFERENCE (1953)].

[184] Lieutenant Colonel Solf was a combat Soldier in World War II, and he spent many years as a military justice practitioner. After retirement, LTC Solf lectured at American University and served as the Chief, International Affairs Division, in the OTJAG. He also represented the United States at many international conferences, including those that drafted the 1977 Protocols to the 1949 Geneva Conventions. He served as a Special Assistant to TJAG for Law of War Matters. In 1982, The Judge Advocate General's School established The Waldemar A. Solf Lecture in International Law. *See* Michael J. Matheson, *The Twelfth Waldemar A. Solf Lecture in International Law*, 161 MIL. L. REV. 181, 181-82 & n.1 (1999).

[185] JAGC CONFERENCE (1953), *supra* note 183, at 77-87.

[186] *Id.*

[187] *Id.* at 77-79.

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. *Id.* at 77.

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. *Id.*

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. *Id.*

first step in the process was for the defense counsel to approach the government.[188] This was no surprise given the provisions in the UCMJ

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. *Id.*

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. *Id.*

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. *Id.* at 78.

Step 7: There will be included in the review a detailed statement of the agreement reached as to the plea of guilty and the maximum punishment that is to be approved, in compliance with a recent letter from the OTJAG. *Id.*

With the exceptions noted in this article, the procedure outlined in the AFFE procedure closely resembles current practice. *Compare* Step 1, *with* AR 27-26, *supra* note 116, R. 1.2(1)(a) (requiring lawyers to abide by the client's decision on whether to enter into a pretrial agreement.); *id.* R. 1.4(2) (stating that lawyers negotiating a pretrial agreement shall provide the client with sufficient information so that the client can make intelligent decisions.); *id.* R. 3.2(1) (seeking concessions and resolving matters quickly is often in the client's interest.); MCM (2002), *supra* note 5, R.C.M. 705(d)(1) (Procedure for conducting pretrial agreement negotiations). *Compare* Steps 2 & 3, *with id.* R.C.M. 705(b)(1) (stating a pretrial agreement may include a sentence limitation), *and id.* R.C.M. 705 (d)(3) *and* discussion (stating that the convening authority should consult with the staff judge advocate or trial counsel before accepting the pretrial agreement). *Compare* Steps 4 & 5, *with id.* R.C.M. 910(c)-(i) (outlining the procedure for accepting guilty pleas and entering findings of guilty), *and* R.C.M. 1001 (detailing presentencing procedure). *Compare* Step 6, *with* AR 27-26, *supra* note 116, R. 1.6(1)(c), (d) (allowing lawyers to reveal such confidential information as necessary to defend themselves allegations of misconduct or ineffective assistance). *Compare* Step 7, *with* MCM, *supra* note 5, R.C.M. 1106(d)(3)(E) (requiring the staff judge advocate's review to contain a statement regarding the convening authority's obligations under the pretrial agreement.).

[188] JAGC CONFERENCE (1953), *supra* note 183, at 80, 82-83, 85.

regarding unlawful command influence and MG Shaw's direction that pretrial agreements must emanate from the defense.[189]

The second step in the process, however, generated some debate. Some of the staff judge advocates supported the idea that an accused should be allowed to propose a binding sentence limitation in exchange for his guilty plea, and that the final agreement should be based on negotiation.[190] While others argued that once the accused signaled a willingness to plead guilty, the staff judge advocate should dictate the terms of the agreement, based on what he was willing to recommend to the convening authority.[191]

As the discussion progressed, MG Harbaugh made the following observations: (1) it was impermissible for a pretrial agreement to require the accused not to take the stand in mitigation;[192] (2) the critical factor in reaching a pretrial agreement was not who proposed the sentence limitation, but that the staff judge advocate may not negotiate in a vacuum.[193] He must consult with the convening authority, to avoid the

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[189] *See* MG Shaw Letter, *supra* note 2; UCMJ arts. 37 & 98; Pub. L. No. 81-506, 64 Stat. 120, 137 (1950).

[190] For example, LTC Waldemar A. Solf of U.S. Army Europe noted that his command accepted sentence limitations proposed by defense counsel in two serious cases. The first involved a theft of "confidential funds" by an officer in a "sensitive intelligence assignment." In return for his plea of guilty, the government agreed to an eleven-month cap on confinement, to avoid the risk of disclosure of classified information. The second case involved a cold-blooded murder and robbery of a German taxi driver that was committed by a young veteran of the Korean War. Because of his youth, obvious remorse, cooperation with authorities, "credible Korean combat record" and deference to German law, the government agreed to a non-capital referral proposed by the defense, in exchange for the accused's pleas of guilty. JAGC CONFERENCE (1953), *supra* note 183, at 81.

[191] *Id.* at 85. Colonel James Garnett, AFFE, stated the following: "The practice in my particular jurisdiction is that the defense counsel comes to me and says: The accused will plead guilty; what will you recommend? He does not tell me what he wants." *Id.* (internal quotation marks omitted). It should be noted that at the time of this discussion, both the trial counsel and trial defense counsel were subordinates of the staff judge advocate, and members of the convening authority's command. As such, the objectivity and loyalties of the appointed trial defense counsel was often questioned. In 1980, the Army established the U.S. Army Trial Defense Service (TDS) as a separate activity. "To ensure objectivity and fairness, TDS counsel are completely independent of local commands and the post legal advisors. They are supervised and rated by their superiors within TDS." Colonel Leroy C. Bryant, HQ, U.S. Army TDS, Welcome to TDS Website, *at* http://www.jagcnet.army.mil/USATDS (last modified Aug. 5, 2003).

[192] JAGC CONFERENCE (1953), *supra* note 183, at 85.

[193] *Id.* at 85. This sage advice was a precursor to the concurring opinion by Judge Walter T. Cox, III, in *United States v. Jones*, 23 M.J. 305, 308-09 (C.M.A. 1987) (Cox, J.,

"embarrassing situation" of negotiating an agreement that the convening authority would not support.[194]

Later in the conference, a judge advocate noted that his pretrial agreements were reduced to writing and contained an acknowledgement by the accused that he discussed the agreement with his counsel and believed it to be in his best interest.[195] These agreements were also signed by the accused, his counsel, trial counsel, and the staff judge advocate, and were made a part of the record.[196] As this portion of the guilty plea symposium concluded, the following question was asked: Must every offer to plead guilty be brought to the attention of the convening authority?[197] The Judge Advocate General responded that it depended on what the convening authority wants to do.[198] He may want to see every offer or give "*carte blanche*" to the staff judge advocate to act on his behalf.[199] It is interesting to note, however, that there was no discussion as to whether giving the staff judge advocate *carte blanche* to enter such agreements constituted delegating a non-delegable duty.[200]

The attendees also discussed the courtroom procedures to use in guilty plea cases, and how the government established a *prima facie* case before findings were entered.[201] In this regard, although the 1951 *MCM*

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concurring in the result) ("I write to distance myself 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.").

[194] JAGC CONFERENCE (1953), *supra* note 183, at 85.

[195] *Id.* at 86.

[196] *Id.*

[197] *Id.*

[198] *Id.*

[199] *Id.* at 87.

[200] Almost twenty years later, however, *United States v. Crawford*, 46 C.M.R. 1007, 1009 (A.C.M.R. 1972) held that these powers may not be delegated. *See also* MCM (2002), *supra* note 5, R.C.M. 705(d)(3), at II-70. This provision states the following:

> The decision whether to accept or reject an offer is within the sole discretion of the convening authority. When the convening authority has accepted a pretrial agreement, the agreement shall be signed by the convening authority or by a person, such as the staff judge advocate or trial counsel, who has been authorized by the convening authority to sign.

Id.; *see also id.* R.C.M. 705(d)(3) analysis, at A21-40 ("In some circumstances, it may not be practicable or even physically possible to present the written agreement to the convening authority for approval. The rule allows flexibility in this regard.").

[201] JAGC CONFERENCE (1953), *supra* note 183, at 85.

did not contemplate plea-bargaining, it did provide rudimentary guidance on courtroom guilty plea procedure.[202] Guilty pleas could only be entered in non-capital cases, or to a non-capital lesser-included offense in a capital case.[203] The *MCM* also required that legally trained counsel represent the accused before a guilty plea could be accepted.[204] Guilty pleas would be taken in a closed session, as an interlocutory matter, [205] and the law officer of a general court-martial, or the president of a special court-martial, was required to ensure that the accused understood the meaning and effect of his pleas.[206]

To accomplish this, the law officer or the president advised the accused that the plea admitted every element of the offense and authorized conviction without further proof.[207] The accused was also advised of the maximum sentence provided by law for the offense.[208] After being advised of these matters, the accused was required to acknowledge this advice before the guilty plea could be accepted.[209] All of these matters were recorded in a verbatim record in general courts-martial and in special courts-martial that were empowered to adjudge a bad conduct discharge.[210] In other cases, the substance of each inquiry and reply would be recorded.[211] Once the guilty plea was accepted, if the accused made a statement inconsistent with the plea, or requested to withdraw the plea, a plea of not guilty was entered, and the burden of proof shifted to the government.[212]

One quirk in the 1951 *MCM*, however, was that it made no provision for the immediate entry of findings as to the charges and specifications to which the accused had pled guilty. Instead, it required the court to reconvene and deliberate on the findings.[213]

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[202] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. XII ¶ 70b (1951) [hereinafter MCM (1951)].
[203] *Id.* ¶ 70a.
[204] *Id.* ¶ 70b(1).
[205] *Id.* ¶ 70b(4); *see also id.* ¶ 53d (stating that interlocutory questions are addressed in closed session).
[206] *Id.* ¶ 70b(2).
[207] *Id.*
[208] *Id.*
[209] *Id.* ¶ 70b(3).
[210] *Id.*
[211] *Id.*
[212] *Id.* ¶ 70b(4).
[213] *See id.* pt. XIII, ¶ 74d, at 117; CODE COMMITTEE ON MILITARY JUSTICE, UNITED STATES COURT OF MILITARY APPEALS & THE JUDGE ADVOCATES GENERAL OF THE ARMED

Under the IX Corps plan, the law officer was advised of the accused's plea and then conducted an inquiry into the providence of the plea outside of the presence of the court members. The government would not present evidence in aggravation after the plea was accepted,[214] but would have the witnesses available for the court to call if desired.[215] Lieutenant Colonel Solf (USAREUR) strongly disagreed with the IX Corps practice and suggested that stipulations of expected testimony be placed in the record before findings.[216] According to LTC Solf, this practice usually appeased the members enough so that they would not insist on the live witnesses being brought into court to testify.[217] Lieutenant Colonel Lougee (USARAL) also rejected the IX Corps procedure of not putting in aggravation evidence unless the members called for it, because it allowed the defense to keep "the sordid details of the crime" from the members, and out of the record of trial.[218] The discussion ended, however, with TJAG endorsing no particular approach.[219] Rule for Courts-Martial 1001 has since made it clear that the presentation of such evidence in oral or written form is permitted, even in guilty plea cases.[220]

The conference also discussed what the law officer must do if the defense puts on evidence inconsistent with the plea during sentencing.[221] Colonel Garnett took the position that the law officer must reject the plea.[222] Lieutenant Colonel Lougee, however, opined that the provisions of the *MCM* should be changed to make the acceptance of the plea final.[223] Again, there was no resolution of this issue.

Before adjourning, the conferees also discussed protecting defense counsel from allegations of ineffective assistance of counsel. Colonel Garnett started the discussion with a proposal that defense counsel keep a

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FORCES, ANN. REP., JUNE 1, 1952 TO DEC. 31, 1953, at 4 (1953) [hereinafter ANN. REP. (1953)]

214 JAGC CONFERENCE (1953), *supra* note 183, at 77.

215 *Id.*; *cf.* United States v. Duncan, 26 C.M.R. 245, 248 (C.M.A. 1958) (holding that a court member could ask questions before and after findings were entered, regarding the accused's guilt or innocence in guilty plea cases.).

216 JAGC CONFERENCE (1953), *supra* note 183, at 81, 85.

217 *Id.* at 81.

218 *Id.* at 84.

219 *Id.* at 87.

220 MCM (2002), *supra* note 5, at II-122.

221 JAGC CONFERENCE (1953), *supra* note 183, at 79, 84.

222 *Id.* at 79.

223 *Id.* at 84.

log regarding their pretrial negotiations that would be filed in an office file.[224] The staff judge advocate could later use this log to defend the defense counsel against claims of ineffective assistance of counsel.[225] This proposal was met with mixed reviews, primarily because of concerns for client confidentiality.[226] Although this discussion did not resolve all of the potential issues regarding client confidentiality, and ineffective assistance of counsel, it clearly shows that the judge advocates of the time were considering a need to build a record to avert allegations of ineffective assistance of counsel and improvident pleas.

A few months after the conference ended, the COMA judges and the service Judge Advocates General issued their annual report to Congress.[227] The first two recommendations of the report, if enacted, would amend the UCMJ to authorize a single officer to sit as a general or special courts-martial in non-capital cases, and authorize him to accept the accused's pleas of guilty, render findings, and impose an appropriate sentence.[228] In the case of general courts-martial, it was recommended that this officer should be a "law officer" certified by the service Judge Advocate General, with the rank of at least lieutenant colonel or commander.[229] Although, these recommendations were not adopted, the proposed procedure was a precursor to trials by military judge alone, which were authorized in the 1968 revision of the UCMJ, and the 1969 revision of the *MCM*.[230]

The report also recommended that the UCMJ be amended to limit appellate review of convictions based on guilty pleas to discretionary appeals raising questions of law to reduce a growing backlog of cases in

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[224] *Id.* at 78.
[225] *Id.*
[226] *Id.* at 85-86.
[227] ANN. REP. (1953), *supra* note 213, at 4.
[228] *Id.* at 4-5. This recommendation was also repeated in subsequent annual reports for 1954, 1955, and 1956. *See* CODE COMMITTEE ON MILITARY JUSTICE, UNITED STATES COURT OF MILITARY APPEALS & THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES, ANN. REP., JAN. 1, 1954 TO DEC. 31, 1954, at 5 (1954) [hereinafter ANN. REP. (1954)]; CODE COMMITTEE ON MILITARY JUSTICE, UNITED STATES COURT OF MILITARY APPEALS & THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES, ANN. REP., JAN. 1, 1955 TO DEC. 31, 1955, at 3 (1955) [hereinafter ANN. REP. (1955)]; CODE COMMITTEE ON MILITARY JUSTICE, UNITED STATES COURT OF MILITARY APPEALS & THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES, ANN. REP., JAN. 1, 1956 TO DEC. 31, 1956, at 3-4 & 8-10 (1956) [hereinafter ANN. REP. (1956)].
[229] ANN. REP. (1953), *supra* note 213, at 4-5.
[230] *See* UCMJ arts. 16(1)(b), 16(2)(c), 26; MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶¶ 4a, 4e, 4g, 39 (1969) [hereinafter MCM (1969)].

the appellate courts.[231] This recommendation, however, was also not adopted. Ultimately, the solution to reducing the appellate backlog was to reduce the number of trials through administrative means,[232] and detailing legal counsel and military judges to conduct special courts-martial.[233]

On 28 July 1954, the first published appellate court decision involving the guilty plea program was issued in *United States v. Smith*.[234] Private Smith was convicted under his pleas, of an eleven-day unauthorized absence from his unit in Korea that occurred after the cessation of hostilities, breach of arrest, and a violation of a lawful general order issued by his company commander.[235] Based on these findings, a general court-martial sentenced Smith to forfeiture of all pay and allowances, confinement for five years, and a dishonorable discharge.[236] The terms of the pretrial agreement between Private Smith and the convening authority were simple: In exchange for Private Smith's guilty pleas to the three offenses, the convening authority agreed to limit the accused's period of confinement to three years.[237] The convening authority complied with the sentence limitation in the pretrial agreement, but in a surprise move, disapproved the breach of arrest finding as "unwarranted."[238]

The ABR affirmed the conviction, but held that additional sentence relief was required because the "agreement was necessarily predicated upon the assumption by both parties that the accused was guilty of all three offenses."[239] Thus, when the convening authority dismissed the breach of arrest conviction, the Board opined that he should also have reduced the approved sentence as well.[240] Thus, the Board reduced the appellant's confinement by an additional six months to ensure that all parties received the benefit of their bargain.[241] In *Smith*, the ABR *sub*

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[231] ANN. REP.(1953), *supra* note 213, at 6. This recommendation was also repeated in the annual reports for 1954, 1955, and 1956. *See* ANN. REP. (1954), *supra* note 228, at 6; ANN. REP. (1955), *supra* note 228, at 3; ANN. REP. (1956), *supra* note 228, at 14-15.
[232] *See* Klein, *supra* note 7, at 7 & n.45.
[233] MCM (1969), *supra* note 230, ¶¶ 4a & 6a.
[234] 16 C.M.R. 344 (A.B.R. 1954).
[235] *Id.* at 345.
[236] *Id.*
[237] *Id.*
[238] *Id.* at 346.
[239] *Id.*
[240] *Id.*
[241] *Id.*

silentio approved of the practice of negotiating pretrial agreements. At the same time it also established reassessment of sentence as a remedy that could be used to ensure that all parties received the benefit of their bargain.[242]

VIII. Putting the Breaks on Plea Bargaining: 1954-56 (The Caffey Era)

On 20 September 1954, the Army Judge Advocate Conference convened again at Charlottesville, Virginia.[243] Although pretrial agreements were once more a topic of discussion, the new Judge Advocate General, MG Eugene M. Caffey, did not attend the discussion.[244] In fact, MG Caffey was not a fan of plea-bargaining, and to make this point clear he told the first speaker of the seminar to advise the conference of his views on the subject:[245]

> 1. He did not like the term "negotiate" because it implied that the Government was approaching the accused asking for favors;
> 2. He did not favor agreements just to move cases along, or those limiting the maximum punishment; and
> 3. He considered plea-bargains in desertion cases or long unauthorized absences "highly inappropriate."[246]

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[242] *Id.*; *cf.* United States v. Emerson, 20 C.M.R. 482, 484 (A.B.R. 1956); United States v. Proctor, 19 C.M.R. 435, 437-38 (A.B.R. 1955). In both cases, the appellate court approved a suspended bad conduct discharge, vice the suspended dishonorable discharge approved by the convening authority, to give effect to provisions of pretrial agreements that called for approving partial forfeitures of pay. The court took these actions because, by operation of law, the approval of confinement at hard labor and a suspended dishonorable discharge, as authorized by the terms of the pretrial agreement, stopped the accrual of all pay and allowances to the accused. Since approval of a suspended bad conduct discharge did not have the same financial impact, the court approved a suspended bad conduct discharge to give effect to the spirit and intent of the accused's original bargain.

[243] U.S. DEP'T OF ARMY, REPORT OF PROCEEDINGS, ARMY JUDGE ADVOCATE CONFERENCE, SEPT. 20-25, 1954, at 1 [hereinafter JAGC CONFERENCE (1954)] (on file with TJAGLCS Library).

[244] *Id.* at 82-93.

[245] Ralph K. Johnson, *The Effect Accepted Pretrial Offers to Plead Guilty Has Had on the Administration of Military Justice* (1954), *in* JAGC CONFERENCE (1954), *supra* note 243, at 82, 84-85.

[246] *Id.*

The conferees were also advised that there would be no all-encompassing directive on the subject coming from Washington.[247] This was done because there was a general feeling in the OTJAG that it was better to allow local staff judge advocates to tailor the program to suit the local command.[248] Other matters were discussed, but given the tone set by TJAG's guidance, the period set aside for questions and answers on the guilty plea program was abbreviated and unenlightening.[249]

During his tenure as TJAG (5 February 1954–31 December 1956),[250] MG Caffey's less than enthusiastic support for the guilty plea program had a significant impact on it. Although guilty plea rates rose from forty-one percent in FY 1954 to sixty percent in FY 1956,[251] there was also a decided trend toward pleading guilty "without the benefit of an agreement."[252] This change from plea-bargaining to naked guilty pleas, however, was not attributed to the remarks made at the 1954 Conference. Rather, the proffered explanation was that "accused persons [were] relying on the fact that the convening authority [would] consider his pleas of guilty as a mitigating factor, and that they [were] acquainted with the fact that certain types of offenses normally bring a certain type of punishment."[253] These shifts in guilty plea practice were praised as "good signs that the program is working very well."[254] But, the resurgence of the JAGC's ambivalence toward plea-bargaining, was not a good sign. In fact, it was a harbinger of appeals concerning *sub rosa* agreements and waivers of fundamental rights that would occupy the courts in the coming years.

Nevertheless, on 2 August 1956, the Chief of the Government Appellate Division sent a letter to all staff judge advocates advising them that the "Functioning of the Guilty Plea Program" would be discussed at the upcoming Judge Advocate Conference. [255] As one might expect, many of the responses voiced the growing sentiment in the JAGC that plea-bargaining in the military had become largely a one-way street,

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[247] *Id.* at 84.
[248] *Id*.
[249] JAGC CONFERENCE (1954), *supra* note 243, at 84-85 & 92-93.
[250] JAGC HISTORY, *supra* note 4, at 220.
[251] *See* Searles, *supra* note 23, at 226.
[252] *Id.* at 227.
[253] *Id.*
[254] *Id.*
[255] Letter from COL J.L. Searles, to All Staff Judge Advocates (Aug. 2, 1956) (on file with TJAGLCS Library).

where the government dictated the terms and defense accepted or rejected the *fait accompli*. For example, one staff judge advocate wrote:

> We have no guilty plea program. In some cases in return for a promise to enter a plea of guilty to some of the charges and specifications, we have agreed to dismiss other charges and specifications. It is contrary to our policy to agree in advance to reduce a court-martial sentence. When we make an agreement of the kind mentioned above, it is contingent upon the plea of guilty being entered in open court. After the plea is entered, the trial counsel is permitted to move for dismissal of other specifications by direction of the convening authority. This policy reflects my natural dislike for any program which involves the arbitrary reduction of sentences by any reviewing or appellate agency.[256]

Another staff judge advocate wrote:

> I personally feel that where the accused pleads guilty upon an agreed sentence, it is improper for the defense counsel to then attempt to have a lesser sentence imposed by the court. I feel that it should be understood between the Staff Judge Advocate and Defense Counsel that nothing in mitigation should be introduced.[257]

When the 1956 Conference convened there was little time spent on the subject.[258] Unlike previous conferences when multiple presenters from distant commands made extensive presentations and entertained questions, the 1956 seminar consisted only of a briefing by COL Searles and no period for questions and answers.[259] During his allotted time, COL Searles, recounted the latest statistics and then discussed the following three problem areas:

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[256] Letter from COL Howard H. Hasting, Staff Judge Advocate, U.S. Army Caribbean, to COL Jasper L. Searles (Aug. 6, 1956) (on file with TJAGLCS Library).
[257] COL Smoak, *supra* note 178, at 2.
[258] *See* Searles, *supra* note 23, at 226-29.
[259] *Compare* JAGC CONFERENCE (1953), *supra* note 183, at 77-87, *and* JAGC CONFERENCE (1954), *supra* note 228, at 82-93, *with* Searles, *supra* note 23, at 226-29.

> 1. The recurring problem of pretrial agreements that required the accused to forego presentation of evidence in extenuation and mitigation;[260]
> 2. A new problem of agreements which provided for early release from service after the appellant's case was affirmed by the Army Board of Review, thereby cutting off appeal to the Court of Military Appeals;[261] and
> 3. An administrative double jeopardy problem arising in officer cases when officers were administratively separated after concluding pretrial agreements providing the convening authority would disapprove or suspend any dismissal adjudged by the court-martial.[262]

In this regard, 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.[263]

Shortly after the conference adjourned, the ABR addressed waiving evidence in extenuation and mitigation as part of a pretrial agreement. In *United States v. Callahan*, the appellant alleged that such a provision in his pretrial agreement prejudiced him.[264] Notwithstanding the 4 September 1953 notice to all judge advocates not to include such provisions in pretrial agreements, sometime before Callahan's 17 May 1956 sentencing at Fort Meade, Maryland, the defense included the clause in the appellant's pretrial agreement.[265] The court agreed that this was error,[266] and reduced the adjudged confinement from one year to nine months.[267]

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[260] Searles, *supra* note 23, at 228.
[261] *Id.*
[262] *Id.* at 229.
[263] *Id.*
[264] 22 C.M.R. 443, 447-48 (A.B.R. 1956).
[265] *Compare id.* at 445 ("Sentence adjudged 17 May 1956."), *with id.* at 447 (discussing 4 Sept. 1953 notice). *See also id.* at 446-48.
[266] *Id.* at 448.
[267] *Id.*

In another case from Fort Meade, *United States v. Banner*, the ABR struck down a provision in a pretrial agreement that required the accused to waive litigation of a jurisdiction motion.[268] Although the court disposed of the case on the government's inability to establish jurisdiction over the accused,[269] the court observed that "neither law nor policy could condone" the clause and that "such an 'agreement' would be void."[270]

IX. The Renaissance of Plea-Bargaining: 1957-59 (The Hickman Era)

On 2 January 1957, MG George W. Hickman, Jr. was confirmed as TJAG.[271] He served in that capacity until 1961.[272] Under MG Hickman's leadership, "pleading guilty for consideration in the Army" was encouraged.[273] In fact, soon after assuming his new duties, MG Hickman sent out a message to the field[274] that contained the first detailed guidance on plea-bargaining since MG Brannon published a notice on the subject in the September 1953 *JAG Chronicle*.[275] This message not only signaled a return to the standards and tone set by MG Shaw, but also made it clear that after over four years of *ad hoc* development, the time had come to institutionalize the lessons learned.

The message contained the following 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

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[268] 22 C.M.R. 510, 520 (A.B.R. 1956).
[269] *Id.* at 519.
[270] *Id. But see* United States v. Clark, 53 M.J. 280, 283 (Army Ct. Crim. App. 2000); United States v. McLaughlin, 50 M.J. 217, 218 (Army Ct. Crim. App. 1999). Both cases hold that the appropriate remedy for impermissible terms in a pretrial agreement is not to enforce the impermissible term. Voiding the agreement is not required.
[271] JAGC HISTORY, *supra* note 4, at 225.
[272] *Id.*
[273] *See* Hickman, *supra* note 20, at 11.
[274] Message, 525595Z, 8 May 1957, Headquarters, Dep't of Army. The original of this message may no longer exist, however, a copy is reprinted in Bethany, *supra* note 20, at app. I; and the substance of the message is contained in MCM (1959), *supra* note 6, ¶ 70b. In this regard, it is worthy of note that this message established for the first time common standards for plea-bargaining in the Army, and in particular, required for the first time that all pretrial agreements in the Army, be reduced to writing, and that law officers must not only inquire into the providence of the accused's plea, but also the terms of the agreement, and the parties' understanding of such terms.
[275] *See Agreements as to Pleas of Guilty*, *supra* note 175, at 183.

only be accepted in cases when 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 government must scrupulously execute the terms of the agreement.[276]

The publication of this message was the first of four major developments in military guilty plea practice that took place in 1957. The second development came in late 1957, when the Navy issued instructions for implementing plea-bargaining in general and special courts-martial.[277] Then around the same time that the Navy instruction was issued, the third major development occurred when the COMA addressed for the first time, issues arising from the Army guilty-plea program.

In *United States v. Hamill*,[278] the COMA had to fashion an appropriate remedy when an honest mistake as to the terms of a pretrial agreement was discovered on appeal.[279] The mistake in *Hamill* centered on a difference between the appellant's understanding of the agreement and the convening authority's understanding of it. 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.[280] The convening authority, however, understood the agreement to allow certain officials to restore the appellant to duty as a matter of clemency, if they determined such action appropriate.[281] The court resolved the doubt in favor of the appellant, and ordered the remission of the discharge and the appellant's return to active duty, provided his behavior had been good.[282]

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[276] *See* JAGC CONFERENCE (1954), *supra* note 228.
[277] *See* SECNAVINSTR 5811.1 and SECNAVINSTR 5811.2, *supra* note 21 and accompanying text.
[278] 24 C.M.R. 274 (C.M.A. 1957).
[279] *Id.* at 275-76.
[280] *Id.* at 276.
[281] *Id.*
[282] *Id.*

The fourth major event was the COMA's decision in *United States v. Allen*.[283] *Allen* involved an allegation of ineffectiveness of counsel, for failing to present matters in extenuation and mitigation of the appellant's desertion offense, following a plea of guilty.[284] While it is clear from the majority opinion that there was a pretrial agreement in the case,[285] it is unclear whether counsel's failure to present evidence on behalf of his client was under that agreement, a *sub rosa* agreement, a tactical decision, incompetence of counsel, or an innocent mistake.[286] One point came through loud and clear—the COMA will not allow pretrial agreements to transform a court-martial "into an empty ritual."[287]

These four developments, taken as a whole, set the tone for the future. The Army now had clear guidelines applicable to all commands. The program was no longer simply an Army initiative but a Navy initiative as well. And the COMA had sent a strong message to the field that it would not allow pretrial agreements to trample the fundamental rights of the accused or the integrity of the military justice system.

The year 1958 brought additional challenges to the Army guilty-plea program in *United States v. Kilgore*,[288] and *United States v. Hood*.[289] Both challenges were based on allegations of misconduct by defense counsel, and both were resolved against the appellant.

In *Kilgore*, the appellant alleged that his counsel had misinformed him of the maximum confinement period that the convening authority would approve.[290] This allegation was quickly and effectively rebutted by an affidavit of the defense counsel, and a true copy of the agreement that contained counsel's correct advice on the maximum punishment, and bore the appellant's signature.[291]

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[283] 25 C.M.R. 8 (C.M.A. 1957).
[284] *Id.* at 10-12.
[285] *Id.* at 10.
[286] *Id.* at 10-12; *see also id.* at 12-17 (Latimer, J., dissenting), *aff'd*, CM393920 (A.B.R. 10 Mar. 1958) (unpublished).
[287] *Id.* at 11; *cf. id.* at 17 (noting counsel's duties do not end at findings) (Latimer, J., dissenting); *see also* United States v. Welker, 25 C.M.R. 151, 153 (C.M.A. 1958). The failure by the defense to present sentencing evidence may signal to members the existence of an agreement. Welker, 25 C.M.R. at 153.
[288] 25 C.M.R. 137 (C.M.A. 1958).
[289] 26 C.M.R. 339 (C.M.A. 1958).
[290] *Kilgore*, 25 C.M.R. at 138.
[291] *Id.* at 138-39.

In *Hood*, the appellant alleged that his counsel and the law officer pressured him into pleading guilty under a pretrial agreement.[292] What is remarkable about this case is that the appellant testified before the COMA on this issue.[293] His testimony, however, was unpersuasive, and in fact was a key point in the defeat of his appeal.[294]

Both cases illustrate an important point for defense counsel—keep good records, because the record of trial may be insufficient to protect them from allegations of ineffective assistance of counsel. Thus, defense counsel should meticulously document actions taken on the behalf of the accused and the rationale for those actions. When possible, counsel would also be well advised to prepare a memorandum for the client's signature so the client acknowledges his or her agreement with the advice and the course of action proposed by the defense counsel.

Two other appeals also merit discussion. In *United States v. Darring*,[295] and *United States v. Harrison*,[296] the COMA came to opposite conclusions as to whether waiver of appellate review was permissible in guilty plea cases. In both cases, waiver of appellate review appeared not to be based on any clause in the pretrial agreement, but on counsel's post-trial advice that the appeal would be useless.[297] In *Darring*, the court reversed the appellant's conviction because he was erroneously informed by counsel that the Army had a policy discouraging appeals in guilty plea cases; and in *Harrison*, the court affirmed the conviction because the counsel's advice was based on his personal belief the appeal would be fruitless.[298] With no major developments in 1959, the decade closed with the guilty plea program firmly entrenched in military practice with many questions answered but some unresolved.

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[292] *Hood*, 26 C.M.R. at 339-42.
[293] *Id.* at 342.
[294] *Id.* at 342-43.
[295] United States v. Darring, 26 C.M.R. 431 (C.M.A. 1958).
[296] United States v. Harrison, 26 C.M.R. 511 (C.M.A. 1958).
[297] *Compare* Darring, 26 C.M.R. at 433-35, *with* Harrison, 26 C.M.R. at 512-13.
[298] *See* Darring, 26 C.M.R. at 435; Harrison, 26 C.M.R. at 513-14 (Ferguson, J., dissenting) (holding counsel's personal advice was based in part on Army Policy).

X. Conclusion

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

The Korean War also shaped the development of the guilty plea practice by demonstrating that operational considerations should be taken into account when negotiating plea-bargains. One of the enduring lessons learned during the Korean War is that convening authorities may properly reject plea agreements proposed by wartime offenders who seek to "languish in stateside detention barracks while faithful Soldiers fight and die in far off lands."[299] And as the global war on terrorism expands, this lesson takes on renewed significance.

As a result of the guilty plea program, it is now axiomatic that pretrial agreements are struck between the accused and the convening authority.[300] The participating judge advocates are merely negotiators and counselors.[301] The agreement must be voluntary and mutually beneficial.[302] The terms of the agreement must relate to the charges and specifications to be presented to the court-martial, and must not contain terms and conditions that would violate public policy.[303] The agreement must be in writing and contained in the record of trial,[304] and clearly indicated in the staff judge advocate's post-trial reviews.[305] Provisions

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[299] ANN. REP. (1954), *supra* note 161, at 21.
[300] *See* MCM (2002), *supra* note 5, R.C.M. 705(a).
[301] *Id.*; *see also* AR 27-26, *supra* note 116, R.s 1.2(1)(a), 2.1.
[302] *See* MCM (2002), *supra* note 5, R.C.M. 705(a), (b), (c)(1)(A), (d)(3).
[303] *See id.* R.C.M. 705(c).
[304] *See id.* R.C.M. 705(d), 910(f), (h)(3) & (i).
[305] *See id.* R.C.M. 1106(d)(3)(E).

waiving the right to present evidence in extenuation or mitigation, or challenge jurisdiction are void.[306]

The creations of an independent trial judiciary and trial defense bar are also largely a result of the need to eliminate errors that arose in Korean War era guilty plea cases. Similarly, the practice of having law officers, and now military judges, conduct an inquiry into the providence of the plea and pretrial agreement began in the 1950s. The lessons learned in the1950s also established the duty of staff judge advocates and appellate courts to ensure that the government scrupulously executes the terms of the agreement. The advances made in guilty plea practice during this period were groundbreaking and paved the way for further important substantive and procedural refinements that would occupy counsel, military judges, and appellate court personnel for the next fifty years.

As we enter the third year of the Global War on Terrorism, the JAGC is poised to conduct the first military tribunals since the close of World War II. Throughout the JAGC, active component, reserve component, and in some cases, retired judge advocates, warrant officers, paralegal noncommissioned officers, and civilians are working diligently to devise and implement the rules that will govern these historic trials. At this point, it is unclear what the road ahead will entail, but it appears that the procedures promulgated for these tribunals,[307] recent Supreme Court decisions concerning the due process rights of enemy combatants,[308] and the ebb and flow of the current conflict will have an impact on the JAGC and the future of military justice that is as significant as that experienced when the UCMJ was implemented during the Korean War.

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[306] *See id.* R.C.M. 705(c)(1)(B).

[307] U.S. DEP'T. OF DEFENSE, MILITARY COMMISSION ORDER NO. 1 (21 MAR. 2002).

[308] *See* Rumsfeld v. Padilla 2004 U.S. LEXIS 4759 (2004); Rasul v. Bush 2004 U.S. LEXIS 4760 (2004); Hamdi v. Rumsfeld 2004 U.S. LEXIS 4761 (2004).

Appendix A

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON D.C.

JAG 1953/1278 3 April 1953

TO: ALL STAFF JUDGE ADVOCATES

The impact of the UCMJ on the Army and on this Corps has been very great. Among its effects have been an over-worked COMA, over-worked boards of review, a pipeline filled with cases at various stages of progress toward final conclusion, and confinement facilities filled with prisoners in a technically "unsentenced" status. All of these must be reduced. One way to do it is to relieve trial and appellate tribunals of the burden of passing upon needless issues of law and fact.

The ideal accomplishment would be to attain such perfection at the pre-trial and trial level as wholly to eliminate necessity for correction on appellate review. Of course, this can never fully be achieved, but it should be our constant aim. Substantial improvement is possible. This is a statement of self-evident fact, and should not be interpreted as an indication of any lack of appreciation of the high degree of efficiency already attained by the officers of the Judge Advocate General's Corps.

The Code is not perfect. We can never expect to have a perfect one. However, it is our duty, as the group to which the law looks primarily for attaining the high purposes of the Congress in enacting the Code, to do our utmost to make the Code the most effective instrument of justice possible. It is imperative that we adapt our practices and methods in such manner as to eliminate any unnecessarily expensive, time-consuming and nonproductive effort. The Code leaves less room for administrative amendment and adaptation of procedures than was available under the Articles of War; but there is still wide scope for effective action in this field. We owe it to the Army, to the taxpayer, to those directly affected and to ourselves constantly to strive for progressive improvement.

The outstanding trend in legislation affecting military justice since World War I, and this is particularly true of the UCMJ, has been in the direction of applying to military justice, procedures similar to those of

the criminal courts. The adversary system has to a very considerable degree displaced the paternalistic system which has heretofore characterized military procedure, and which has conditioned and continues to condition military thought. Running throughout the post World War II criticism and comment regarding military justice was the demand for adequate defense of the accused; and the Congress legislated with a view to insure that he has it. How nearly are we measuring up in practice?

We must adjust our thinking and practice to the actualities, and never lose sight of the objective. Trial and appellate procedures are means to an end. The end is the vital thing. A voluminous record, impeccable as to legal detail and immune to attack on appeal may not represent justice in the fullest and proper sense. The most skillfully conducted court room battle may not represent a good defense.

We have not availed ourselves of practices, commonly employed in all civilian criminal jurisdictions, the use of which greatly reduces the work of the criminal courts, facilitates finality of decision, reduces the expense to the taxpayer, operates to the advantage of the guilty defendant, and actually benefits the state. Striking a fair and reasonable balance between the individual and the public's interest is of the very essence in penal procedure. For some reason we appear to a considerable extent to be doing our job the hard way, the most expensive way, and in a way which deprives many military accused of a "break" which the guilty defendant has available to him in civilian courts and which his counsel there usually sees that he gets.

There have recently been brought to my attention some statistics which are highly pertinent to the subject matter of this letter. These, compiled by the Director of the Administrative Office of the U. S. Courts, 178 (1950), show that in 1950 of an aggregate of 33,502 convictions in the Federal courts, 31,739, or slightly [end of page two] over 94.4 per cent, were based on pleas of guilty or nolo contendre. Examination of the records of trial by general court-martial on file in this office for the year 1952 shows that of 9,383 convictions, in only 750 cases were there pleas of guilty to all charges and specifications, and a spot check of 73 of these shows that in 65 of them, notwithstanding the plea, evidence was introduced by the prosecution before the findings. Assuming this sample to be representative, the indication is that in only about one per cent of the cases were the

findings based wholly on the pleas. Why this great disparity between the two systems in the numbers of sentences based on contest?

Any enlightened penal system protects the citizen, not only against unjust conviction, but also against being harassed and embarrassed by being forced to defend himself against ill-founded allegations of crime. It also allows considerable scope for the guilty to benefit by means other than an attempt to "beat the case."

Lawyers generally are averse to trying hopeless causes. They adapt their methods to *the interests of their clients*. Good lawyers do not advise their clients to go to trial on the merits if other action reasonably may be expected to produce better results of the defendant. They use their knowledge of things which affect the attitude of the trial judge and prosecutor toward the guilty defendant. If relieved of the work and attendant expense of unnecessary trials those representing the state are often properly willing to make concessions; and a high percentage of the cases are settled on the basis of an agreement with the prosecutor to recommend acceptance of a plea of guilty to a lesser included offense, to dismiss some of the charges, or to recommend a lighter sentence than can reasonably be expected to result after a contested trial and a verdict of guilty. Counsel often rely on the known inclination of the trial judge to be more lenient to the defendant who gives some indication of repentance by pleading guilty and throwing himself on the mercy of the court. One or more of these and like considerations may have to be weighed in deciding how best to serve the client in any case. Such methods are perfectly legitimate. There is little room for doubt that if the courts and attorneys for the defendants in criminal cases were to follow the habitual practices of courts-martial, where contested trial on a plea of not guilty is the norm, criminal dockets in the courts of the United States and of the various states would soon be hopelessly clogged. [end of page three]

The duties of a military person acting as counsel for the accused include those which "usually devolve upon the counsel for a defendant before a civil court in a criminal case." He must guard "*the interests of the accused* by all honorable and legitimate means known to the law" (par. 48c, p. 68, MCM, 1951; underscoring supplied). The *MCM* speaks to a large extent in the terms of contest, and it is the duty of military counsel at all stages of the case to be concerned with the "interest of the accused." However, it is not only the right, but the duty of defense counsel to use "Honorable and legitimate means" for

reducing the impact of the law on the accused, however guilty he may be. He must use the most effective, honest advocacy of which he is capable if the case is contested; but he should never go to trial on the merits without weighing the possibilities of obtaining greater benefit to the accused from other methods. To provide a "good show" for the accused in the form of polished forensics, but to bring upon him a heavier penalty than might have been obtained by other legitimate methods is a poor way to protect his interests. I fear that is just what we are doing in many cases. For a guilty person to admit his offense represents some progress along the road to rehabilitation, even if he bargained for it; and it is only in the rarest and most heinous cases that there is not some legitimate scope for fair compromise with the guilty accused.

I cannot too strongly urge upon you the importance of constant and careful attention to the pre-trial and trial procedure in all cases. Our system of pre-trial practice is probably the fairest and most enlightened of any penal system known to the law. The disclosure of the prosecution's case is much more complete than in criminal jurisdictions generally. The appellate process, while important, is of much less importance than sound pre-trial and trial practice. Trial counsel and defense counsel should be very carefully selected, and if there is any difference in their relative importance that of the latter may be the greater. Defense counsel should be good lawyers and practical men, men who can and will carefully weigh all of the factors involved in each case, and never lose sight of *the interest of the accused* and of their undivided allegiance to him. Defense counsel should never advise an accused to plead guilty if he has [end of page four] reasonable doubt of his guilt. As the *MCM* promulgated by the President of the United States has stated, "It is his duty to undertake the defense regardless of his personal opinion as to the guilt of the accused," but it is also high duty, after consultation with the accused, to "endeavor to obtain full knowledge of the facts of the case," and to give the accused his 'candid opinion of the merits of the case'" (par. 48f, p. 69, MCM, 1951).

Defense of an accused is not restricted to the courtroom. It is much broader in scope, and the best real defense may employ means avoiding contest. Counsel falls short of the full discharge of his duties i[f] his advice to the accused does not extend to a frank and candid opinion as to the probable outcome of a contested trial, and as to the possibilities of effecting something better for the accused by other

legitimate means. Occasionally counsel will encounter, as does the attorney for the defendant in criminal cases, the accused who tries to deceive his counsel, has conceived a plan of action which has no merit and may well tend to aggravate his difficulties, and LB inclined to go to trial in the face of what appears to be hopeless prospects. Counsel must leave the ultimate decision as to the nature of the plea to the accused himself, but he should not allow the accused to make this decision without the benefit of sound advice. That advice should be comprehensive and should include information as to what is embraced by the "honorable and legitimate means known to the law" which he may use in protecting the interests of the accused.

There is reason to believe that among the considerations which operate to produce the resort to trial 'on the merits[']' in many court-martial cases is the desire upon the part of counsel to avoid criticism for alleged failure vigorously to defend. Just as military defense owe to the accused and to their position as officers of justice the courage vigorously and without fear to press the defense of the accused in contested cases, and to contest every case which on careful study and appraisal calls for it, they owe to the law and to the accused himself the courage to advise the guilty accused of possible benefits to him from lawfully pursuing other methods in proper cases. [end of page five]

The civilian criminal practice, with the sentencing power usually vested in the trial judge, renders disposition of a case on a plea of guilty simple. There are some jurisdictions in which the penalty is fixed by the jury, and in these it is customary for the court to recommend to the jury a sentence recommended by opposing counsel and approved by the judge. Juries habitually act accordingly. Similar methods are adaptable to the administration of military justice. Of course, a court-martial has the power, in its discretion, to adjudge a lower sentence.

The coordinated action of all concerned will be necessary to effect improvement along the lines indicated. A good defense counsel, acting for and with the approval of the accused who knows just what he is doing and why, is the key factor. He alone has the benefit of the confidential relation of attorney and client, as well as the disclosure of the prosecution's case through the report of investigation and other means of appraising its strength. Any action looking to securing advantage to the accused by a plea avoiding contest must emanate from him and the accused. Trial counsel also is important, as his attitude

may advance or block any proposal. He should be highly competent, and keep his mind open for consideration of any reasonable suggestion. He in turn must be governed by considerations of sound policy, and not just try to avoid work by encouraging pleas of guilty. The convening authority's responsibility for discipline within his command and for seeing that consideration of justice to the Government as well as to accused persons are given due weight cannot be ignored. He must lean heavily on his staff judge advocate in fixing his policy. Those who deal with the defense must carefully avoid making any commitment or entering into any understanding inconsistent with the policy of the commander. No accused can be expected to plead guilty, and competent counsel will not advise him to do so, unless some benefit to the accused is reasonably certain. And any understanding reached must be carried out with the utmost good faith. Should counsel for the Government blunderingly exceed his authority, the full power of the commander exercising general court-martial jurisdiction must be exercised to preclude any prejudice to the accused. It would be better to free an offender completely, however, guilty he might be, than to tolerate anything smacking of bad faith on the part of the Government. [end of page six]

The personnel of courts-martial must be educated in some of the principles of sound defense. The Congress did not create the Judge Advocate General's Corps and provide for trained lawyers to represent military persons accused of offenses in the expectation that the wide degree of discretion traditionally conceded to counsel for the defense in civilian criminal cases would be denied to them. What the public demanded and the Congress intended was that every accused have a real defense in the broadest and most comprehensive sense, and that cannot be realized if courts-martial deny to counsel for the defense full scope for the discharge of their duties in the interest of the accused as the defense views it. Courts must not assume that they, on the basis of a contested trial, can necessarily arrive at sounder conclusions as to how a case is to be disposed of than can a trained lawyer who has probably lived with the case for some time, and has had the benefit of everything that can be brought out in evidence and normally much more. In other words, defense counsel must be emancipated, recognized for what they are and what the law expects them to be, that is, a vital element in the judicial process whose function is of the utmost importance and must be accorded the deference and respect it requires to fulfill its mission.

Please give this matter your careful consideration. Take it up with your commander and devote your best efforts to securing effective action to the ends indicated. Put some of your best lawyers on the defense and let them defend in the fullest sense. The Lucas case, 1 CMR 19 and subsequent cases following it, indicate that much can be done.

Please inform this office of the action you take and of the results, and let us have such suggestions as your experience indicates.

Sincerely yours,

// Original signed //
FRANKLIN P. SHAW
Major General, USA
Acting The Judge Advocate General

Appendix B

JAGJ 1953/1273 5 January 1954

MEMORANDUM FOR: FILE

SUBJECT: Pleas of Guilty in Trials by Courts-Martial

1. This division has analyzed the effect of the letter of 23 April 1953, which the Acting Judge Advocate General directed to a1l staff judge advocates, encouraging pleas of guilty, when appropriate, in trials by courts-martial.

2. Comments on General Shaw's letter which have been received from staff judge advocates in the field indicate reactions varying from doubt and mild disapproval to enthusiastic comp1iance with the recommended procedure. Cases reaching the Office of The Judge Advocate General during the last seven months reveal a pronounced and steady increase in the proportionate number of p1eas of guilty. Cases received during May 1953 showed that l5% of all accused persons tried by general court-martial had pleaded guilty to all charges and specifications; in June, 18% so pleaded; in July, 26%; August, 29.3%; September, 29.5[%]; October, 34.5%; and in November, 40.6%. It appears that a "1eve1ing off" process is being effected and that this will become even clearer within the next few months. The attached table shows the ratio of pleas of guilty to persons tried in every general court-martial jurisdiction for the period 5 May 1953 to 5 November 1953. A wide disparity may be clearly seen. Obviously, if those jurisdictions which have not adopted the recommended policy would do so, a substantial over-all increase in the number of pleas of guilty would result.

3. A random survey has been completed of 359 general courts-martial (all resulting in sentences to confinement) convened at Fort Campbell, Kentucky, Korean Base Section, 4th Infantry Division, The Engineer Center and First Army, between 5 May 1953 and 6 November 1953. This survey was undertaken to provide a spot check on whether or not there has been a meaningful difference between sentences to confinement when a plea of gui1ty was entered as opposed to when the accused pleaded not guilty. The results are as follows:

a. Fort Campbell, Kentucky, 28 cases, average sentence to confinement when plea of guilty was entered: 9 months, 14 days; when plea of not guilty was entered: 28 months, 4 days.

b. Korean Base Section, 182 cases, average sentence to confinement when plea of guilty was entered: 12 months, 8 days; when plea of not guilty was entered: 16 months. (Not included in these figures are two sentences to confinement for life and one death sentence, all approved by the convening authority and adjudged upon a plea of not guilty.)

c. 4th Infantry Division, 43 cases, average sentence to confinement when plea of guilty was entered: 11 months, 26 days; when plea of not guilty was entered: 25 months, 4 days.

d. The Engineer Center, 66 cases, average sentence to confinement when plea of guilty was entered: 12 months, 10 days; when plea of not guilty was entered: 21 months, 20 days.

e. First Army, 40 cases, average sentence to confinement when plea of guilty was entered: 10 months, 12 days; when plea of not guilty was entered: 12 months, 12 days.

It must be noted that this information does not reveal whether reduced sentences following pleas of guilty resulted from pretrial agreements or were simply the result of consideration by the court of the plea of guilty as matter in mitigation. It also must be remembered that in the cases studied the types of offenses in which the accused pleaded guilty are not necessarily identical to those in which a not guilty plea is entered. Notwithstanding these limitations, it is submitted that this represents a fair sample and that from it the conclusion may be drawn that a plea of guilty, when in fact the accused is clearly guilty, is advantageous to him in terms of time which he will have to spend in confinement.

// Original signed //
STANLEY W. JONES
Colonel, JAGC
Chief, Military Justice Division

PLEAS OF GUILTY

5 May 1953 – 5 November 1953

Jurisdiction:	**Pleas of Guilty:**	**Total Persons:**	**Percentage of Pleas of Guilty:**
First Army	16	41	39
Second Army	2	17	11.9
Third Army	17	114	14.9
Fourth Army	7	33	21.2
Fifth Army	11	138	8
Sixth Army	18	35	51.4
Seventh Army	149	128	38.3
Eighth Army	28	94	29.8
I Corps	7	28	25
III Corps	0	0	0
V Corps	33	97	34
VII Corps	28	103	27.1
IX Corps	17	40	42.5
X Corps	9	30	30
XVI Corps	15	38	39.5
XVIII Airborne Corps	2	16	12.5
11th Airborne Division	19	36	52.8
82d Airborne Division	17	45	37.8
101st Airborne Division	1	39	2.6
1st Armored Division	13	109	11.9
2d Armored Division	31	62	50
3d Armored Division	0	0	0
5th Armored Division	10	121	8.3
6th Armored Division	0	0	0
7th Armored Division	63	174	36.2
1st Cavalry Division	49	67	73.1
1st Infantry Division	21	59	35.6
2d Infantry Division	4	36	11.1
3d Infantry Division	15	75	20
4th Infantry Division	21	62	33.9
5th Infantry Division	3	78	3.8

6th Infantry Division	0	0	0
7th Infantry Division	15	39	38.5
8th Infantry Division	12	28	42.9
9th Infantry Division	3	65	4.6
10th Infantry Division	15	32	46.9
24th Infantry Division	63	90	70
25th Infantry Division	10	35	28.6
28th Infantry Division	9	44	20.5
31st Infantry Division	12	67	17.9
37th Infantry Division	10	35	28.6
40th Infantry Division	0	16	0
43d Infantry Division	13	79	16.5
44th Infantry Division	6	16	37.5
45th Infantry Division	14	18	22.2
47th Infantry Division	0	0	0
Camp Atterbury	3	91	3.3
Camp Breckinridge	0	0	0
Camp Carson	13	37	35.1
Camp Gordon	31	147	66
Came Kilmer	3	129	2.3
Camp Pickett	12	215	5.6
Camp Polk	10	35	28.6
Camp Roberts	0	1	0
Camp Rucker	39	116	33.6
Fort Bragg	0	20	0
Fort Campbell	12	29	41.4
Fort Devens	63	139	45.3
Fort Huachuca	0	4	0
Fort Jackson	0	0	0
Fort Knox	5	30	16.6
Fort Leavenworth	3	46	6.5
Fort Leonard Wood	19	84	22.6
Fort Lewis	15	51	29.4
Fort MacArthur	0	9	0
Fort Meade	8	29	27.6
Fort Ord	29	72	40.2
Fort Riley	7	43	16.3

Bremerhaven POE	0	0	0
New Orleans POE	7	19	36.8
New York POE	0	1	0
San Francisco POE	0	0	0
Seattle POE	0	0	0
AAA & Guided Missile Center	7	61	11.5
The Armored Center	0	0	0
The Artillery Center	19	97	19.6
The Engineer Center	12	78	15.14
The Infantry Center	39	93	41.9
Sig Cps Center & Ft Monmouth	15	23	65.2
3d Army AAA Training Center	3	46	6.5
The Transportation Center	14	22	18.2
Berlin Command	16	30	53.3
Central Command	72	127	56.7
Northern Area Command	10	28	35.7
Ryukyus Command	3	27	11.1
Southern Area Command	58	103	56.3
Southwestern Command	88	153	57.8
Special Weapons Comd 8452d AAU	0	0	0
The Quartermaster Training Cmd	0	5	0
Trieste, U. S. Troops	0	7	0
Western Area Command	14	49	28.6
U.S. Army, Alaska	32	40	80
U.S. Army, Caribbean	1	10	10
U.S. Army, Europe	13	44	29.5
U.S. Army Forces, Far East	0	0	0
U.S. Army Pacific	2	4	50
USAF, Antilles & Mil Dist of P.R.	1	21	14.7
U.S. Forces in Austria	6	51	11.9

Aberdeen Proving Ground	0	15	0
Army Field Forces, Ft Monroe	0	0	0
373d Transp Major Port	1	2	50
Military District of Washington	8	10	80
U. S. Mi1itary Academy	0	0	0
35th AAA Brigade	0	1	0
Branch US Disciplinary Barracks	1	8	12.5
Adv Sec USAREUR Comm Zone	5	17	29.14
Base Sec USAREUR Comm Zone	33	91	36.3
Korean Base Section	64	246	26
Korean Communications Zone	3	24	12.5
U.S. Army Europe, Comm Zone	2	35	5.7
U.S. Mil Adv Grp Rep of Korea	0	9	0
32d AAA Brigade	14	27	51.8
Fld Comd Armd Forces Spec Weap Proj	1	1	100

Appendix C

HEADQUARTERS
UNITED STATES ARMY, PACIFIC
OFFICE OF THE STAFF JUDGE ADVOCATE
APO 968

21 April l953

MEMO FOR: The Inspector General, U. S. Army

1. At the request of COL Richard A. Erickson, I am confirming in writing the views of the Army Commander as expressed orally to him this date by the undersigned.

2. The Army Commander is of the firm opinion that the recent changes in the law controlling the administration of military justice have harmed rather than helped the Army in the performance of its primary function of fighting and winning battles and wars. It is his view that the injection into military justice system of the elaborate appellate reviews existing in civil life has encouraged malingering by materially delaying the swift imposition of just punishment following the commission of a military offense. Too often Soldiers are inclined to choose the comparatively safe course of prolonged confinement pending trial and final action over the immediate hazards of combat.

He further feels that, under the present UCMJ and the case law developing thereunder, the maintenance, of military discipline through the aid of courts-martial is seriously hampered by a plethora of legal technicalities which confront the personnel of a court-martial and often cause appellate reversal of convictions on other than material and substantial grounds.

Having had the opportunity personally to observe the operation and effectiveness of the court-martial systems both in World War II and today, he is convinced that the former is by far superior considering the primary mission of the Army in time of war.

3. The Army Commander desired that I present to you his views in this matter.

// Original signed //
JOHN A. HALL
Colonel, JAGC
Army Staff Judge Advocate

Appendix D

HEADQUARTERS
UNITED STATES ARMY, PACIFIC
OFFICE OF THE STAFF JUDGE ADVOCATE
APO 961

May 1953
Major General Franklin P. Shaw, USA
The Assistant Judge Advocate General
Department of the Army
Washington, D. C.

Dear General Shaw:

I have received your interesting and instructive letter of 23 April 1953 in which you stress the importance of progressive improvement in the administration of military justice at the pre-trial and trial levels to the end that the workload of appellate agencies may be materially reduced. Copies have been circulated among the Judge Advocates of this command for their information and guidance.

It has been my practice both with First Army and here personally to confer with the defense counsel of a general court-martial whenever possible before preparing an advice to the Convening Authority in a given case. Often for the purpose of bringing a case to trial at an early date and/or to reduce the length of the record, I have agreed to strike or amend specifications in exchange for pleas of guilty or stipulations of facts or the testimony of witnesses. At turns, but less frequently and only with the prior express approval of the Convening Authority, I have, for the same reasons extended a promise to counsel with respect to the maximum sentence which would be approved on review by the Convening Authority.

This procedure I am sure has resulted in mutual benefit to the accused and the Government and it is my intention to continue the practice in so far as possible. At present however I am experiencing considerable opposition in following the second course of action, for although the Commanding General is extremely critical of the present Code, he is most reluctant to enter into any pre-trial compromise with an accused with respect to his action on review. Enclosed is a copy of a report which sets forth his views and may eventually reach your office

through The Inspector General. As you can see, while emphatically deploring the results, he has not as yet at least clearly indicated the cure. I would appreciate your holding it confidential unless or until it reaches you officially.

Within the above limitation I shall endeavor to follow your instructions with sincerity. In my opinion much can be accomplished by a Staff Judge Advocate in the pre-advice stage on purely legal and technical grounds without impugning his integrity or loyalty to his Commander.

Sincerely yours,

// Original signed //
JOHN A. HALL
Colonel, JAGC
Army Staff Judge Advocate

1 Encl
Memo dtd 21 Apr 53

Appendix E

Analysis of Judge Advocate Strength and Courts-Martial Statistics

I. Judge Advocate Strength FY 1950-2003

At the outbreak of the Korean War, the ratio of lawyers to troops was 1.03 lawyers per thousand troops (650 lawyers supporting 632,000 troops).[309] This was in line with the conventional wisdom of the times that: "the *Code* requires roughly one lawyer for every one thousand servicemen."[310] As the Army grew to 1,597,000 in FY 1952, the JAGC also grew to 1,200 attorneys.[311] During this same period of time, however, the ratio of lawyers per thousand troops dropped to 0.80. In FY 2003, the average Army end strength was 493,563 Soldiers and they were supported by 1,506 judge advocates; this is a ratio of 3.05 lawyers per one thousand troops.[312] The future size of the JAGC is unclear. News reports indicate that the current Army leadership may eliminate 373 judge advocate and 638 civilian attorney positions and replace them with an indeterminate number of contract attorneys to reduce costs.[313]

II. Courts-Martial Rates following World War I

With the exception of the Persian Gulf War in 1990-1991, courts-martial rates have spiked at the outbreak and close of every major armed-conflict involving U.S. forces from the close of WWI through the start of the global war on terrorism. For example, when World War I ended, the

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[309] JAGC History, *supra* note 4, at 209; AD HOC COMMITTEE, *supra* note 9, at 252.

[310] Prugh, *supra* note 4, at 28.

[311] AD HOC COMMITTEE, *supra* note 9, at 252; JAGC HISTORY, *supra* note 4, at 209.

[312] *See* TJAG REPORT (2003), *supra* note 24, at 1 & 12; section 401(1) of the Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, 116 Stat. 2458, 2524 (2002). It should also be noted that an in-depth analysis of the reasons for the dramatic growth in the number of lawyers per one thousand troops that has occurred in the Army since 1951 is beyond the scope of this discussion. For the purposes of this article, however, it suffices to say that the practice of military law is a multidisciplinary practice that requires expertise in administrative, civil, claims, international and operational law, legal assistance, and military justice; and in the author's opinion the current staffing of the JAGC meets the needs of the Army.

[313] Sandra Jontz, *Army Studies Outsourcing; More Than 200,000 Jobs May Be Privatized,* STARS AND STRIPES, (Pacific Ed.) Oct. 12, 2002, *available at* http://www.estripes.com/article.asp?section=104&article=10484&archive=true (last visited Jan. 10, 2004).

total number of general and special courts-martial convened during the fiscal year jumped from 11,679 in FY 1917 to 27,091 in FY 1918.[314] The rate crested at 40,999 in FY 1919, then dropped to 12,607 in FY 1920.[315]

III. Courts-Martial Rates during World War II

When World War II began, the general and special courts-martial rate rose from 13,314 in FY 1941 to 42,143 in FY 1942.[316] The rate then continued to rise to 132,479 in FY 1943, and peaked at 226,938 in FY 1944.[317] The rate then dropped to 201,262 in FY 1945, and to 86,379 in FY 1946.[318] The decrease in the courts-martial rate, however, was due primarily to a dramatic drop in the special courts-martial rate, because from 1943 through 1946 the general courts-martial rate more than doubled from 14,782 to 35,977.[319]

IV. Courts-Martial Rates during the Korean War

At the outbreak of the Korean War, the number of general and special courts-martial tried in the Army went up from 30,651 in FY 1949 to 35,449 in FY 1950; then declined slightly to 32,610 in FY 1951.[320] One explanation for the rate drop from FY 1950 to FY 1951 is that most of the heavy fighting of the war took place in the first year, so there was little time to conduct courts-martial.[321] After the war ended, the rate peaked at 76,715 in FY 1953 then fell to 64,293 in FY 1954; by FY 1959, the general and special courts-martial rate had dropped to 22,663.[322]

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[314] AD HOC COMMITTEE, *supra* note 9, at 251.
[315] *Id.*
[316] *Id.*
[317] *Id.*
[318] *Id.*
[319] *Id.*; *see also* Prugh, *supra* note 4, at 21 (citing THE ADJUTANT GENERAL, U.S. DEP'T OF ARMY, THE ARMY CORRECTIONAL SYSTEM 92 (Jan. 1952) ("At its peak, in October 1945, the Army's prison population counted five men for every one thousand servicemen.").
[320] AD HOC COMMITTEE, *supra* note 9, at 252. The rate then declined slightly to 32,610 in FY 1951, before climbing to 61,520 in FY 1952, and peaking at 76,715 in FY 1953. *Id.*
[321] *Overview*, *supra* note 47, at 6.
[322] AD HOC COMMITTEE, *supra* note 9, at 252.

V. Courts-Martial Rates during the Vietnam War

During the Vietnam War, the Army general and special courts-martial rate remained constant at 20,000 to 30,000 trials per year from FY 1959 through FY 1966, then spiked to 36,337 in FY 1967; peaked at 62,079 in FY 1969: then fell to a low of 12,160 in FY 1975.[323] Establishing the start date for the Vietnam War is somewhat problematic. Although U.S. efforts to stop the spread of Communism in Vietnam began at the end of World War II, the U.S. Army had no presence in Vietnam until a small military assistance advisory group was established 1950; and the JAGC had no presence there until 1959.[324] Major formations of U.S. ground forces did not arrive in Vietnam until 1965, and the bulk of the fighting occurred in 1965 through 1968.[325] For the purposes of this discussion, the start date of the Vietnam War is set in 1959, and the lack of a spike in courts-martial between FY1959 and FY1967 is largely due in part to the slow buildup of U.S. forces in Vietnam.[326] As the numbers of troops increased, the courts-martial rate ebbed and flowed in relation to combat on the ground. In FY 1965, the Army tried 26,597 Soldiers by general or special courts-martial, the rate then dipped to 24,597 in FY 1966.[327] After two years of major combat operations, the spike in courts-martial came in FYs 1967-1969. In FY 1967, the courts-martial rate jumped to 36,637; then rose again to 46,144 in FY 1968; and peaked at 62,079 in FY 1969.[328] One reason for the peak in the courts-martial rate in 1969 is that the withdrawal of U.S. forces had begun, and many departing units were handing off pending cases to the units left behind.[329] As the United States disengaged from the conflict in 1970 to 1975, and shifted the burden of fighting to South Vietnamese forces, the overall Army courts-martial rate fell dramatically as large numbers of troops returned to the United States. In FY 1970, the

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[323] COL Mark W. Harvey, Chief, Criminal Law Division, OTJAG, U.S. Army, *Courts-Martial and Nonjudicial Punishment Trends*, 2-3 (2 June 2000) (Information Paper) (on file with the OTJAG, U.S. Army, Criminal Law Division)[hereinafter, Harvey, *Courts-Martial and Nonjudicial Punishment Trends*].

[324] FREDRIC L. BORCH III, JUDGE ADVOCATES IN VIETNAM: ARMY LAWYERS IN SOUTHEAST ASIA 1959-1975, 1-3 (2003).

[325] *Id.* at 27-30.

[326] *See generally id.* at 10, 51, 60-61, 69, and 70-71. Between 1965 and 1969, the Army tried 25,000 courts-martial in Vietnam. *Id.* at 51.

[327] Harvey, *Courts-Martial and Nonjudicial Punishment Trends, supra* note 323, at 3.

[328] *Id.*; *see also* BORCH *supra* note 324 at 51 (At the peak of the U.S. buildup in 1969, the Army tried 377 general courts-martial, 7,314 special courts-martial and 2,231 summary courts-martial).

[329] BORCH *supra* note 324 at 51.

courts-martial rate was 43,967; it then fell to 30,740 in FY 1971; 18,660 in FY 1972; and 15,472 in FY 1973.[330] In the last year of the war, however, the courts-martial rate jumped to 16,662 then fell to 12,160 in FY 1975 as the war ended.

VI. Courts-Martial Rates during the Persian Gulf War of 1990-1991

In the Gulf War, general and special courts-martial rates actually dropped from 2,619 in FY 1989 to 2,372 in FY 1990.[331] The rate then dropped again to 1,852 in FY 1991, and 1,778 in FY 1992.[332] The general and special courts-martial rates from FY 1993 through FY 1998 continued to drop from 1,287 in FY 1993 to 972 in FY 1998.[333] One explanation for the anomalous drop in courts-martial rates despite the outbreak of the Gulf War is that the United States continued to reduce the size of the Army from 762,000 Soldiers in FY 1989 to 748,000 in FY 1990 and then to 479,000 in FY 1999.[334] Another reason for the lack of increase in the courts-martial rate is the extremely short period it took for the U.S. Army to mobilize, deploy, win the war and redeploy.[335]

VII. Courts-Martial Rates during the Global War on Terrorism

As the global war on terrorism began in FY 2001 the general and special courts-martial rate rose slightly to 1,127.[336] Then as the global war against terrorism shifted to Afghanistan and the Philippines, the general and special courts-martial rate rose in accordance with the model discussed above to 1,390 in FY 2002.[337]

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330 Harvey, *Courts-Martial and Nonjudicial Punishment Trends, supra* note 323 at 2.
331 *Id.* at 1-2.
332 *Id.* at 1.
333 *Id.* at 1 & 2.
334 *Id.*
335 FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI 121-95 (2001) (U.S. operations in connection with the Gulf War of 1990-1991, began on 7 August 1990; ground combat lasted a mere 100 hours; and most U.S. troops redeployed to their pre-war duty station by late April 1991).
336 CODE COMMITTEE ON MILITARY JUSTICE, UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES & THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES, ANN. REP., OCT. 1, 2000 TO SEPT. 30, 2001, at 37 (2001).
337 ANN. REP. (2002), *supra* note 9, at 39.

In FY 2003, U.S. forces were again engaged in major combat operations, this time in Iraq. During FY 2003, the general and special courts-martial rate dropped slightly to 1,354 trials.[338] This temporary drop in trials is, however, consistent with the model discussed above in that courts-martial rates tend to dip during heavy combat, and then rise as units return to garrison duties. In his FY 2003 report to the Congress, The Judge Advocate General of the Army commented on this phenomenon in two parts of his report.

In discussing the activities of the U.S. Army Trial Defense Service (TDS), Major General Thomas J. Romig observed:

> Over the past five years, TDS has seen an overall increase in both the number of courts-martial and their complexity. During FY03, however, the upward trend line halted and the number of courts-martial decreased to the lowest number since FY99. The decrease is largely attributable to the ongoing operations associated with Operations Iraqi Freedom and Enduring Freedom.[339]

Then in a discussion of the first call up of Army Reserve judges to preside over courts-martial in combat zones since 1968, Major General Romig observed:

> In spite of massive troop deployments, the overall caseload decreased only slightly, and actually increased at many locations within the continental United States, Germany, and Korea. Trials of Soldiers in the Iraq and Kuwait areas commenced shortly after the active combat phase ended, and increased in number over the summer and fall.[340]

There is also another explanation for the slight drop in trials, when an increase might be expected. As the table reprinted below indicates, as the global war on terrorism grew in intensity, the number of administrative separation boards conducted by the Army significantly and steadily increased.[341]

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[338] TJAG REPORT (2003), *supra* note 24, app. at 1.
[339] *Id.* at 5.
[340] *Id.* at 4.
[341] *Id.* at 5.

	FY 99	FY 00	FY 01	FY 02	FY 03
Administrative Boards	698	597	826	918	1,215

Accordingly, the current increased use of administrative separations to manage a growing caseload would appear to be the modern equivalent of adopting plea-bargaining during the Korean War.

Finally, to put these numbers into better perspective, the general and special courts-martial rate per thousand troops was 30.2 in FY 1944; 50 in FY 1953; 41.06 in FY 1969; 2.51 in FY 1991; 2.34 in FY 2001, 2.85 in FY 2002, and 2.74 in FY 2003.[342] Most of the variation in these rates, however, is due to fluctuations in the rates of special courts-martial. For example, between FY 1951 and FY 1979, the rate of special courts-martial per 1000 fluctuated from a high of 67.16 in FY 1953 to a low of 5.21 in FY 1970.[343] In contrast, the rate per thousand for general courts-martial has consistently remained below ten per thousand troops since the UCMJ became effective in 1951.[344]

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[342] Harvey, *Courts-Martial and Nonjudicial Punishment Trends, supra* note 323 at 1-4; CODE COMMITTEE ON MILITARY JUSTICE, UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES & THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES, ANN. REP., OCT. 1, 1999 TO SEPT. 30, 2000, at 47-48 (2000) [hereinafter ANN. REP. (2000)], *reprinted in* 54 M.J. at CXXXI-CXXXII; CODE COMMITTEE ON MILITARY JUSTICE, UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES & THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES, ANN. REP., OCT. 1, 2000 TO SEPT. 30, 2001, at 37-38 (2001) [hereinafter ANN. REP. (2001)], *reprinted in* 56 M.J. at CIII-CIV; ANN. REP. (2002), *supra* note 9, at 39-40; TJAG REPORT (2003), *supra* note 24, app. at 1-2.

[343] Harvey, *Courts-Martial and Nonjudicial Punishment Trends, supra* note 323 at 2-3.

[344] *Id.* at 1-3; AD HOC COMMITTEE, *supra* note 9, at 252, fig. 1; ANN. REP. (2002), *supra* note 9, at 39-40 (788/517 = 1.52); TJAG REPORT (2003), *supra* note 24 app. at 1-2 (689/494 = 1.4); *see also* ANN. REP. (2002), *supra* note 9, at 39 (In FY 2002 the total number of special courts-martial empowered to adjudge a bad conduct discharge (BCD) rose 67%, and the number of non BCD special courts-martial by 233.3%. At the same time the number of general courts-martial only went up by 2.3%). In FY 2003, the number of BCD special courts-martial rose by 8.8%, and non-BCD special courts-martial increased by 110%. The number of general courts-martial on the other hand declined by12.6%. *See* TJAG REPORT (2003), *supra* note 24, app. at 1. To obtain the courts-martial rate per thousand for FY 2001–FY 2003, divide the total number of general and special courts-martial at page 1 of the appendix to the Army TJAG report, by the average active duty strength at page 2 of the appendix to the Army TJAG report.