THE USE OF PLEA STATEMENT WAIVERS IN PRETRIAL AGREEMENTS

MAJOR ALEXANDER FARSAAD*

I. Introduction

In *United States v. Mezzanatto*,[1] the Supreme Court upheld the use of a pretrial waiver of Federal Rule of Evidence (FRE) 410 and Federal Rule of Criminal Procedure (FRCP) 11(e)(6) ("federal Rules").[2] The federal Rules provide that statements made in the course of (1) guilty pleas that are later withdrawn or (2) plea negotiations that do not result in a guilty plea are inadmissible against the defendant who made the statements.[3] After Gary Mezzanatto was charged with possession of methamphetamine with intent to distribute, he and his attorney attempted to enter into plea negotiations with the prosecutor.[4] Before the negotiations began, the prosecutor told Mezzanatto that he "would have to agree that any statements he made during the meeting could be used to impeach any contradictory testimony he might give at trial" if negotiations fell through.[5] When negotiations did not result in a guilty plea and the case went to trial, the prosecutor cross-examined Mezzanatto on his inconsistent statements during the plea negotiations, arguing that Mezzanatto had waived the protections of the federal Rules.[6] In a 7-2 decision, the Supreme Court upheld the practice of demanding a waiver of the federal Rules before entering into plea negotiations. Since

---

* U.S. Marine Corps. Presently assigned as Assistant Deputy Director, Judge Advocate Division, Community Development Strategy & Plans, Headquarters, Marine Corps. This article was submitted in partial completion of the Master of Laws requirements of the 61st Judge Advocate Officer Graduate Course at The Judge Advocate General's Legal Center and School, U.S. Army. The author would like to thank Major Rebecca Kliem, U.S. Army, who helped tremendously in the preparation of this article.

1 United States v. Mezzanatto, 513 U.S. 196 (1995).

2 FED. R. EVID. 410; FED. R. CRIM. P. 11. At the time of *Mezzanatto*, the language of the Federal Rules of Civil Procedure (FRCP) 11(e)(6) was identical to Federal Rule of Evidence (FRE) 410. In 2002, FRCP 11(e)(6) was renumbered as FRCP 11(f) and the text was amended to refer the reader to FRE 410. *See infra* note 48 and accompanying text.

3 FED. R. EVID. 410. Military Rule of Evidence (MRE) 410 is substantially identical. *See infra* Part II.C.

4 *Mezzanatto*, 513 U.S. at 198.

5 *Id.*

6 *Id.* at 199.

that decision, commentators have widely criticized both the case and the practice.[7]

Although *Mezzanatto* dealt with a waiver that allowed a prosecutor to use plea negotiation statements only for impeachment, federal prosecutors have since expanded the practice to include demands for a waiver of the federal Rules in order to allow the prosecutor to use the accused's statements in rebuttal or in the government's case-in-chief. Federal courts of appeals have uniformly upheld these expanded uses of federal Rules waivers.[8] Nevertheless, despite the extensive use of federal Rules waivers in federal courts, the military justice system has not adopted this practice. The implementation of such waivers is long overdue in military practice. Using a waiver of Military Rule of Evidence (MRE) 410 and Rule for Courts-Martial (RCM) 705(e) ("military Rules")[9] in courts-martial comports with notions of freedom of contract, is required by the UCMJ, and improves both the efficiency and reliability of military criminal prosecutions.

Part II of this article covers the legal background and the current state of the law. It discusses the context of plea bargaining, including the recognition of pretrial agreements (PTAs)[10] as contracts, and the

---

[7] *See, e.g.*, Michael S. Gershowitz, *Waiver of the Plea-Statement Rules*, 86 J. CRIM. L. & CRIMINOLOGY 1439 (1996); Eric L. Dahlin, Note, *Will Plea Bargaining Survive* United States v. Mezzanatto*?*, 74 OR. L. REV. 1365 (1995); Julia A. Keck, Note, United States v. Sylvester*: The Expansion of the Waiver of Federal Rule of Evidence 410 To Allow Case-in-Chief Use of Plea Negotiation Statements*, 84 TUL. L. REV. 1385 (2010); Pamela Bennett Louis, Note and Comment, United States v. Mezzanatto*: An Unheeded Plea to Keep the Exclusionary Provisions of Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6) Intact*, 17 PACE L. REV. 231 (1996); Christopher P. Siegle, Note, United States v. Mezzanatto*: Effectively Denying Yet Another Procedural Safeguard to "Innocent" Defendants*, 32 TULSA L. J. 119 (2006); Note, *Waiver—Plea Negotiation Statements*, 109 HARV. L. REV. 249 (1995).

[8] *E.g.*, United States v. Rebbe, 314 F.3d 402 (9th Cir. 2002) (rebuttal); United States v. Mitchell, 633 F.3d 997 (10th Cir. 2011) (case-in-chief). *See infra* Part II.E.

[9] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 410 (2012) [hereinafter MCM]; *id.* R.C.M. 705. Throughout this article, the term "federal Rules" will be used for FRE 410 and FRCP 11(e), and the term "military Rules" will be used for MRE 410 and RCM 705(e). However, when generically referring to both federal and military Rules, the article will use the term "Rules."

[10] Both the UCMJ and the Manual for Courts-Martial refer to "pretrial agreements." *See, e.g.*, UCMJ art. 63 (2012); MCM, *supra* note 9, R.C.M. 705. Civilian practice refers to pre-trial agreements (PTAs) as "plea agreements." *See, e.g.*, FED. R. CRIM. P. 11. The drafters of RCM 910 and its analysis left the term "plea agreement" in place through almost all of the rule when adapting it from the FRCP. *See* MCM, *supra* note 9, R.C.M. 910; *id.* R.C.M. 705 analysis at A21-40–42. Consistent with military usage, this article

different types of agreements made. Part II also addresses the history behind the federal and military Rules, as well as guilty plea procedures in the military. Part III of this article delves into the controversy surrounding the use of Rules waivers, advancing three main arguments for allowing the practice and discussing some procedural protections. Finally, Part IV offers a means of analyzing waivers of the military Rules in military courts.

II. Background

A. Plea Bargaining, Pretrial Agreements, and Contract Law

Beginning in the 1970s, the Supreme Court stressed the importance of plea bargaining because, among other things, the practice allows for a "prompt and largely final disposition of most criminal cases."[11] To arrive at an agreement that results in a final disposition, the parties must engage in negotiations. These negotiations do not occur in a vacuum, but in the context of the potential sentence and charges. These two situations are referred to as penalty bargaining and cooperation bargaining.[12]

---

uses the term pretrial agreement or PTA throughout.

[11] Santobello v. New York, 404 U.S. 257, 261 (1971) ("Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons."); *accord* Blackledge v. Allison, 431 U.S. 63, 71 (1977) ("[T]he guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned."); Brady v. United States, 397 U.S. 742, 752 (1970) (listing the benefits to both the accused and the government in guilty pleas); Michael D. Cicchini, *Broken Government Promises: A Contract-Based Approach to Enforcing Plea Bargains*, 38 N.M. L. REV. 159, 161–62 (2008) ("The reality is that the prosecutor, the government, and society in general reap tremendous benefits from plea bargaining . . ."); *see also* Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012) ("[C]riminal justice today is for the most part a system of pleas, not a system of trials."); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992) ("To a large extent . . . horse trading determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system."). In federal district court in fiscal year 2012, 89% of all accused pled guilty and 97.6% of convictions resulted from guilty pleas. *See* ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS tbl.D-4 (2012), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/D04Sep12.pdf.

[12] Eric Rasmussen, Mezzanatto *and the Economics of Self-Incrimination*, 19 CARDOZO L. REV. 1541, 1552–54 (1998); *see also* Transcript of Oral Argument, United States v. Mezzanatto, 513 U.S. 196 (1995) (93-1340), *available at* http://www.supremeobserver.com/cases/US/513/513US196/oat-513us196-19941102.htm (argument of Solicitor General) (describing charge bargaining and cooperation bargaining).

Penalty bargaining is where the prosecutor either agrees to dismiss charges, sometimes called charge bargains, or agrees to some form of sentence limitation, sometimes called sentence bargains.[13] Penalty bargaining generally occurs when the accused does not have any information that the government would need or find useful.[14] Thus, negotiations revolve entirely around the charges, sentence limitations, and avoidance of the risk and cost of trial.[15]

Cooperation bargaining involves situations where the accused has information valuable to the government, often for use in another case.[16] Here, the negotiations focus on the accused attempting to get the best result in exchange for his information, testimony, or other support, such as undercover activities.[17] So while penalty bargaining results in a "compromise sentence," cooperation bargaining can result in immunity from prosecution.[18]

Whether engaged in penalty or cooperation bargaining, agreements mainly occur in two scenarios. The first is the standard PTA with which criminal justice practitioners are familiar. The second type of agreement, used in civilian federal practice, occurs before the accused makes a proffer.[19] The prosecutor will require that the accused sign a "proffer agreement"[20] before the prosecutor will listen to the proffer and allow the

---

[13] *See, e.g.*, United States v. Carrigan, 778 F.2d 1454, 1462 (10th Cir. 1985); United States v. Miller, 722 F.2d 562, 563 (9th Cir. 1983); Louis, *supra* note 7, at 234. Of course, an agreement may involve both dismissal of charges and sentence limitations, but rejection of either part invalidates the entire agreement. *E.g.*, United States v. Self, 596 F.3d 245, 249 (5th Cir. 2010); United States v. Perron, 58 M.J. 78, 82 (C.A.A.F. 2003).

[14] Rasmussen, *supra* note 12, at 1552.

[15] *Id.*

[16] *Id.*; *see also* Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 2 (1992) ("In cooperation agreements the defendant trades information and testimony, with the promise of enabling the State to make a case against other defendants . . . .") (footnotes omitted); Miriam Hechler Baer, *Cooperation's Cost*, 88 WASH. U. L. REV. 903, 920 (2011).

[17] Hughes, *supra* note 16, at 2–3; Baer, *supra* note 16, at 905. Cooperation agreements can go against one of the benefits of plea bargaining in that they can prevent a quick disposition of the case because the government will wait for the accused to complete his cooperation before sentencing. *See* Hughes, *supra* note 16, at 2–3.

[18] Rasmussen, *supra* note 12, at 1552–53.

[19] Courts also recognize a third scenario called a post-trial agreement. *See, e.g.*, United States v. Smith, 56 M.J. 271, 279 (C.A.A.F. 2002); United States v. Reyes-Bosque, 596 F.3d 1017, 1025 (9th Cir. 2010).

[20] "A 'proffer agreement' is generally understood to be an agreement between a defendant and the government in a criminal case that sets forth the terms under which the defendant will provide information to the government during an interview, commonly

plea negotiations to begin.[21] These proffer agreements serve as a waiver of the Rules and allow the prosecutor to use the accused's statements against the accused at trial. Proffer agreements generally arise in cooperation cases because if the accused does not have valuable information, he has no need to speak personally in the plea negotiations and can rely on his attorney to negotiate a lesser sentence.[22]

Since the 1970s, the Supreme Court has also recognized PTAs as essentially commercial contracts, but subject to constitutional constraints.[23] A PTA, at its most basic level, is an exchange of promises between the accused and the government.[24] As part of those promises, the Court has recognized that the accused can waive even the most fundamental rights.[25] When looking at constitutional, statutory, or

---

referred to as a 'proffer session.'" United States v. Lopez, 219 F.3d 343, 345 n.1 (4th Cir. 2000).

[21] *See, e.g.*, United States v. Mezzanatto, 513 U.S. 196, 198 (1995); United States v. Rebbe, 314 F.3d 402, 404 (9th Cir. 2002); *see also* United States v. Orm Hieng, 679 F.3d 1131, 1138 (9th Cir. 2012) (recognizing that "prosecutors will routinely require, as a condition for holding a proffer meeting, that suspects agree that their statements may be used for impeachment").

[22] Rasmussen, *supra* note 12, at 1553; Transcript of Oral Argument, *supra* note 12 (argument of Solicitor General) (arguing that a proffer agreement will be used in cooperation cases, but that "it is a waste of time" in a charge bargaining case since the defense attorney will simply call the prosecutor to negotiate).

[23] *See, e.g.*, Puckett v. United States, 556 U.S. 129, 137 (2009) ("Although the analogy may not hold in all respects, plea bargains are essentially contracts."); Ricketts v. Adamson, 483 U.S. 1, 16 (1987) (recognizing that "the law of commercial contract may in some cases prove useful," but that such "constitutional contracts . . . must be construed in light of the rights and obligations created in the Constitution"); Blackledge v. Allison, 431 U.S. 63, 75 n.6 (1977) ("An analogy is to be found in the law of contracts."); *see also* Mabry v. Johnson, 467 U.S. 504, 508 (1984) ("[B]ecause each side may obtain advantages when a guilty plea is exchanged for sentencing concessions, the agreement is no less voluntary than any other bargained-for exchange.") (footnote omitted); Cicchini, *supra* note 11, at 173–74 ("[A] plea bargain is not *like* a contract; it *is* a contract."); Derek Teeter, Comment, *A Contracts Analysis of Waivers of the Right to Appeal in Criminal Plea Bargains*, 53 U. KAN. L. REV. 727, 729–38 (2005) (summarizing contract law background and analysis of PTAs).

[24] *See* MCM, *supra* note 9, R.C.M. 705(b); FED R. CRIM. P. 11; *Mabry*, 467 U.S. at 508; Santobello v. New York, 404 U.S. 257, 262 (1971); Cicchini, *supra* note 11, at 160–61, 173; Teeter, *supra* note 23, at 733.

[25] *See, e.g.*, United States v. Ruiz, 536 U.S. 622 (2002) (impeachment evidence); *Ricketts*, 483 U.S. at 1 (double jeopardy); Boykin v. Alabama, 395 U.S. 238 (1969) (self-incrimination, jury trial, and confrontation); Singer v. United States, 380 U.S. 24 (1965) (public trial); Johnson v. Zerbst, 304 U.S. 458 (1938) (counsel); Shutte v. Thompson, 82 U.S. (15 Wall.) 151, 159 (1872) ("A party may waive any provision, either of a contract or of a statute, intended for his benefit."); *see also* United States v. McFadyen, 51 M.J. 289 (C.A.A.F. 1999) (pretrial punishment); United States v. Weasler, 43 M.J. 15

evidentiary rules, there is a "presumption of waivability," and the accused has the responsibility of identifying the basis for departing from that presumption.[26] However, the Supreme Court has recognized that some rules are so "fundamental to the reliability of the factfinding process that they may never be waived."[27]

Military courts took longer to adopt the contract analogy,[28] but the Court of Appeals for the Armed Forces (CAAF) eventually made the transition.[29] Consistent with the Supreme Court, the CAAF has held that PTAs are contracts subject to the Due Process Clause.[30] Despite both academic and public opposition to plea bargaining, courts are content to

---

(C.A.A.F. 1995) (unlawful command influence).

[26] *Mezzanatto*, 513 U.S. at 200–02.

[27] *Id.* at 204; *accord* United States v. Rivera, 46 M.J. 52, 54 (C.A.A.F. 1997). In *Mezzanatto*, the Court listed the "right to conflict-free counsel" and the right not to be tried by of a jury of "12 orangutans" as examples of non-waivable rights. 513 U.S. at 204 (citing Wheat v. United States, 486 U.S. 153, 162 (1988) and United States v. Josefik, 753 F.2d 585, 588 (7th Cir. 1985)); *see also* Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994) ("[S]hort of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want . . ."); Michael J. Saks, *Enhancing and Restraining Accuracy in Adjudication*, LAW & CONTEMP. PROBS., Autumn 1988, at 243, 245 ("[W]e could submit our cases to an oracular examiner of chicken entrails. An answer would emerge. But such decision processes would quickly erode public confidence . . .").

[28] *See generally* Major Mary M. Foreman, *Let's Make a Deal! The Development of Pretrial Agreements in Military Criminal Justice Practice*, 170 MIL. L. REV. 53 (2001) (summarizing the evolution of PTAs and the military justice system's history of paternalistic approaches to the subject).

[29] *See, e.g.*, United States v. Acevedo, 50 M.J. 169, 172 (C.A.A.F. 1999) ("A pretrial agreement is created through the process of bargaining, similar to that used in creating any commercial contract. As a result, we look to the basic principles of contract law when interpreting pretrial agreements."). This change came after years of resistance. *See, e.g.*, *Weasler*, 43 M.J. at 21 (Sullivan, C.J., dissenting) ("[T]he 'contract' rationale proffered by the majority is dead wrong."); United States v. Kazena, 11 M.J. 28, 33–34 (C.M.A. 1981) ("Contract-law principles or the letter of the contract will not be permitted to operate in the military justice system in a manner unaffected by . . . important public interests."); United States v. Dawson, 10 M.J. 142, 150 (C.M.A. 1981) ("This Court on numerous occasions has attempted to discourage a marketplace mentality from pervading the plea-bargaining process and to prevent contract law from dominating the military justice system.").

[30] United States v. Lundy, 63 M.J. 299, 301 (C.A.A.F. 2006); *Acevedo*, 50 M.J. at 172. *But cf.* Teeter, *supra* note 23 (arguing for a contracts-only analysis, as opposed to a contracts-Due Process hybrid analysis, for waivers of the right to appeal). The Due Process requirements are codified in RCM 705 and 910, which prohibit involuntary terms or terms that deprive the accused of certain rights and require certain actions by the military judge during the providence inquiry. *See* MCM, *supra* note 9, R.C.M. 705; *id.* R.C.M. 910; United States v. Smead, 68 M.J. 44, 59 (C.A.A.F. 2009).

allow the practice to continue under the general principles of contract law, where the parties are free to bargain for those terms they see fit.[31] Given that the military Rules are modeled after the federal Rules,[32] the history surrounding the federal Rules provides valuable background in understanding why the military Rules are waivable.

B. Federal Plea Statement Rules

The Supreme Court prescribed the FRE in November 1972.[33] As originally drafted, FRE 410 was only one sentence long and prohibited the use of withdrawn guilty pleas, offers to plead guilty, and "statements made in connection" with such pleas or offers.[34] Exclusion of withdrawn guilty pleas arose from the case of *Kercheval v. United States*, which held that when a judge allows the accused to withdraw a plea, that plea is "held for naught," and allowing its admission would be "in direct conflict with that determination."[35] However, excluding plea discussions did not have such case law to support it. The drafting committee added it to the federal Rules as a policy matter to promote "disposition of criminal cases by compromise" because "free communication is needed, and security against having an offer of compromise or related statement admitted in evidence effectively encourages it."[36]

The House of Representatives was content with the rule as proposed by the Supreme Court, but added the phrase, "[e]xcept as otherwise provided by Act of Congress," to "preserve congressional policy

---

[31] *See* Scott & Stuntz, *supra* note 11, at 1909–13; Louis, *supra* note 7, at 249–50; *see also* H.R. REP. NO. 94-247, at 6 (1975) (House Judiciary Committee Report on amendments to FRCP) ("No observer is entirely happy that our criminal justice system must rely to the extent it does on negotiated dispositions of cases. However, crowded court dockets make plea negotiating a fact that the Federal Rules of Criminal Procedure should contend with."), *reprinted in* 1975 U.S.C.C.A.N. 674, 678.

[32] *See infra* notes 51–52 and accompanying text.

[33] Order of November 20, 1972, 409 U.S. 1132, 56 F.R.D. 183 (1972); H.R. DOC. NO. 93-46 (1973).

[34] Order of November 20, 1972, 56 F.R.D. at 228–29; H.R. DOC. NO. 93-46, at 9.

[35] Kercheval v. United States, 274 U.S. 220, 224 (1927).

[36] FED. R. EVID. 410 advisory committee's note; *see also* FED. R. CRIM. P. 11 advisory committee's note ("[T]he purpose of [the federal Rules] is to permit the unrestrained candor which produces effective plea discussions."); United States v. Barunas, 23 M.J. 71, 76 (C.M.A. 1986) ("The general purpose of Mil.R.Evid. 410 and its federal civilian counterpart, Fed.R.Evid. 410, is to encourage the flow of information during the plea-bargaining process and the resolution of criminal charges without 'full-scale' trials.").

judgments" on the use of pleas in antitrust cases.[37] The Senate, concerned that there would be an absolute bar on the use of statements, added exceptions for impeachment and in prosecutions for perjury or false statement.[38] The Conference Committee adopted the Senate version, but added that FRE 410 would not take effect immediately and would be "superseded by any subsequent Federal Rule of Criminal Procedure or Act of Congress with which it is inconsistent."[39]

While Congress was considering the FRE, the Supreme Court transmitted changes to the FRCP.[40] The changes to FRCP 11 included a new subdivision (e)(6) that exactly mirrored the original FRE 410 proposal from the Supreme Court.[41] The House added an exception for prosecution of perjury and false statement, but left out the exception for impeachment.[42] The Conference Committee adopted the House version of FRCP 11(e)(6),[43] and then Congress enacted an amendment to FRE 410 to make it identical to FRCP 11(e)(6), that is, with only an exception for perjury and false statement prosecutions, but no exception for impeachment.[44]

In 1979, the federal Rules were amended to add another exception for when plea statements are admissible.[45] The new exception allowed admission of the accused's statements when other "statement[s] made in the course of the same plea or plea discussions [have] been introduced."[46] Except for a stylistic amendment, FRE 410 remains the same,[47] while FRCP 11(e)(6) is now 11(f) and its text merely refers the

---

[37] H.R. REP. NO. 93-650 (1973) (citing 15 U.S.C. § 16(a)), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7082.

[38] S. REP. NO. 93-1277 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7057–58.

[39] H.R. REP. NO. 93-1957, at 6–7 (1974) (Conf. Rep.), *reprinted in* 1974 U.S.C.C.A.N. 7098, 7100.

[40] Order of April 22, 1974, 416 U.S. 1001, 62 F.R.D. 271 (1974); H.R. DOC. NO. 93-292 (1974).

[41] Order of April 22, 1974, 62 F.R.D. at 286; H.R. DOC. NO. 93-292, at 6.

[42] H.R. REP. NO. 94-247, at 7 (1975), *reprinted in* 1975 U.S.C.C.A.N. 674, 679.

[43] H.R. REP. NO. 94-414, at 10 (1975) (Conf. Rep.), *reprinted in* 1975 U.S.C.C.A.N. 713, 714.

[44] Pub. L. No. 94-149, 89 Stat. 805 (1975). Without explanation, Congress changed the language at the beginning of the rule to "Except as otherwise provided in this rule." *Id.*

[45] *See* Order of April 30, 1979, 441 U.S. 987, 992, 77 F.R.D. 507, 533 (1979); H.R. DOC. NO. 96-112 (1979).

[46] Order of April 30, 1979, 441 U.S. at 992, 77 F.R.D. at 533; H.R. DOC. NO. 96-112, at 19.

[47] H.R. DOC. NO. 112-28, at 19 (2011). Among the stylistic changes was the removal of the "Except as otherwise provided" language at the beginning of the rule. *Id.*

reader to FRE 410.[48] On the military side, MRE 410 is nearly identical to FRE 410, but the military equivalent to FRCP 11(f) is somewhat different.

C. Military Plea Statement Rules

Article 36(a) of the Uniform Code of Military Justice (UCMJ) requires the military to follow the "law and rules of evidence generally recognized" in federal courts to the extent practicable and not inconsistent with the UCMJ.[49] Following the enactment of the FRE, work began on the MRE, leading to their promulgation in 1980.[50] Based on Article 36, the guidance was to make the MRE "as similar to civilian law as possible."[51] To ensure that this link to civilian law remained, MRE 1102 requires amendments to the FRE to apply automatically to the MRE after eighteen months, unless contrary action is taken.[52]

Besides terminology changes specific to military practice, MRE 410 is almost identical to FRE 410.[53] The only substantive difference is an additional paragraph in MRE 410 that extends the rule's protection to requests for administrative discharge in lieu of court-martial.[54] The Court of Military Appeals (CMA), precursor to the CAAF, adopted an expansive interpretation of this provision, finding that the rule applies to any request "for disposition of charges outside formal plea negotiations."[55] The CMA repeatedly stated that it will not apply an

---

[48] *See* Order of April 29, 2002, 535 U.S. 1157, 207 F.R.D. 89 (2002); H.R. DOC. NO. 107-203 (2002).

[49] UCMJ art. 36(a) (2012).

[50] Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (Mar. 12, 1980). *See generally* Frederic I. Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation*, 130 MIL. L. REV. 5 (1980) (summarizing the history and drafting of the MRE); Fred L. Borch, *The Military Rules of Evidence: A Short History of Their Origin and Adoption at Courts-Martial*, ARMY LAW., June 2012, at 1 (same).

[51] Lederer, *supra* note 50, at 12–13; *accord* Borch, *supra* note 50, at 1.

[52] MCM, *supra* note 9, MIL. R. EVID. 1102.

[53] *Compare* FED. R. EVID. 410, *with* MCM, *supra* note 9, MIL. R. EVID. 410.

[54] MCM, *supra* note 9, MIL. R. EVID. 410(b). This additional protection was added because such requests require a confession. *Id.* MIL. R. EVID. 410 analysis, at A22-35; Lederer, *supra* note 50, at 20.

[55] United States v. Barunas, 23 M.J. 71, 75 (C.M.A. 1986) (letter to commanding officer admitting guilt, expressing regret, requesting forgiveness, and asking for punishment short of court-martial excluded under MRE 410); *see also* United States v. Brabant, 29 M.J. 259, 261 (C.M.A. 1989) (spontaneous statement by accused that he will "take an Article 15, lose a stripe, whatever it takes" excluded under MRE 410). *But see* Lederer,

"excessively formalistic or technical approach" to MRE 410.[56]

The closest military equivalent to FRCP 11(f) is RCM 705(e). Rule 705(e) reflects military-specific differences by prohibiting the panel members from being notified of the existence of a PTA or of any statements made in connection with a plea or providence inquiry.[57] This provision was new in the 1984 Manual for Courts-Martial and has never been amended.[58] To better understand the effects of the federal and military Rules, one must be familiar with the other procedural rules relating to pretrial agreements and plea inquiries.

D. Federal and Military Pretrial Agreement and Plea Inquiry Rules

Federal Rule of Criminal Procedure 11 deals with pleas in general, covering all aspects of guilty pleas, including PTAs.[59] Originally, the FRCP 11 limited itself to listing the types of pleas, requiring the court to personally address the accused, and requiring a factual basis for the plea.[60] The rule received extensive modification during the 1974–1975 amendments.[61] These changes had "two principal objectives," (1) to describe "the advice that the court must give" before accepting a plea; and (2) to provide "a plea agreement procedure."[62] This plea agreement procedure lays out in general the matters that can be bargained for, the requirement for disclosing the agreement to the court, and rules on acceptance or rejection of the PTA.[63] Rule 11 has gone through numerous changes since then, but its general outline and two objectives have remained the same.[64]

---

supra note 50, at 20 n.58 ("We did not discuss, nor did we intend to reach, the type of conduct that the Court of Military Appeals subsequently has protected via Rule 410.").

[56] *E.g.*, United States v. Grijalva, 55 M.J. 223, 227 (C.A.A.F. 2001); United States v. Vasquez, 54 M.J. 303, 305 (C.A.A.F. 2001); *Barunas*, 23 M.J. at 76.

[57] MCM, *supra* note 9, R.C.M. 705(e).

[58] *See id.* R.C.M. 705 analysis, at A21-40–42.

[59] *See* FED. R. CRIM. P. 11.

[60] *See* Order of February 28, 1966, 383 U.S. 1087, 1097, 39 F.R.D. 69, 171–72 (1966).

[61] *See* Order of April 22, 1974, 416 U.S. 1001, 62 F.R.D. 271, 277 (1974); H.R. DOC. NO. 93-292, at 27 (1974).

[62] FED. R. CRIM. P. 11 advisory committee's note.

[63] FED. R. CRIM. P. 11.

[64] The rule has been amended nine times since 1975. *See* FED. R. CRIM. P. 11 advisory committee's note.

The military has divided these two objectives into two rules: RCM 910 and RCM 705. Rule for Courts-Martial 910 deals with the providence inquiry, including the military judge personally addressing the accused, the voluntariness of and the factual basis for the plea, and the military judge inquiring into the terms of the PTA.[65] The rule is similar to FRCP 11, but with changes that are unique to the military.[66] Some of these changes reflect the higher standards for military judges accepting a guilty plea than for federal court judges.[67] The basis for this higher standard is statutory,[68] reflecting the unique nature of the military and the desire to "enhance[] public confidence in the plea bargaining process."[69] The primary difference is the military judge's added responsibility when inquiring into the factual basis of the plea.[70] Additionally, case law prohibits a military judge from accepting any terms in a PTA that violate public policy or basic notions of fundamental fairness.[71]

Rule for Courts-Martial 705 deals specifically with PTAs by regulating the terms and conditions, the procedure for arriving at the agreement, and the circumstances under which each party can withdraw.[72] However, RCM 705 has no precise equivalent in the FRCP. Although parts of FRCP 11 and RCM 705 are similar, RCM 705 reflects very specific military practices. In particular, the rule explicitly prohibits certain terms and conditions and specifies that neither party can propose

---

[65] MCM, *supra* note 9, R.C.M. 910.

[66] *See id.* R.C.M. 910 analysis, at A21-60 (including references to FRCP 11 throughout and stating that RCM 910 is based on and follows the format of FRCP 11).

[67] *See* United States v. Soto, 69 M.J. 304, 306 (C.A.A.F. 2011) ("It is axiomatic that '[t]he military justice system imposes even stricter standards on military judges with respect to guilty pleas than those imposed on federal civilian judges.'") (quoting United States v. Perron, 58 M.J. 78, 81 (C.A.A.F. 2003)).

[68] *See* UCMJ art. 45 (2012).

[69] *Soto*, 69 M.J. at 307 (citing United States v. King, 3 M.J. 458, 459 (C.M.A. 1977)); *see also Perron*, 58 M.J. at 81–82; United States v. Outhier, 45 M.J. 326, 331 (C.A.A.F. 1996).

[70] *Soto*, 69 M.J. at 306–07; *Perron*, 58 M.J. at 81–82. When the UCMJ was being drafted, the requirement for inquiring into a factual basis for an accused's guilty plea was added into Article 45 to provide additional protection to an accused, who was often a young man, and to avoid future complaints by the accused that he did not understand what he was doing. *See* United States v. Chancelor, 36 C.M.R. 453, 455-56 (C.M.A. 1966); *Uniform Code of Military Justice: Hearings Before a Subcomm. of the H. Comm. on Armed Services on H.R. 2498*, 81st Cong. 1052–57 (1949).

[71] *See infra* note 177 and accompanying text.

[72] MCM, *supra* note 9, R.C.M. 705.

any terms or conditions prohibited by law or public policy.[73] Assuming the parties can waive the federal and military Rules described so far, to what extent can the prosecutor use the statements made by the accused?

E. Extent of Waiver

Federal prosecutors have taken three approaches to the extent of an accused's waiver of the federal Rules.[74] These three approaches to waiver can appear in either a proffer agreement or a PTA. The first approach is to allow the prosecutor to use the accused's plea statements to impeach him if he takes the stand during trial.[75] The second is to allow the prosecutor to use the plea statements in rebuttal to anything that the accused, any witness, or his counsel says or argues.[76] The third and final type is a waiver that allows the prosecutor to offer the plea statements in the government's case-in-chief.[77] The text of the waivers will also include language allowing the government to use the accused's statements for other purposes, including investigation.[78] No military

---

[73] *Id.*

[74] Rasmussen, *supra* note 12, at 1546–47.

[75] *E.g.*, United States v. Mezzanatto, 513 U.S. 196 (1995).

[76] *E.g.*, United States v. Roberts, 660 F.3d 149 (2d Cir. 2011); United States v. Hardwick, 544 F.3d 565 (3d Cir. 2008); United States v. Rebbe, 314 F.3d 402 (9th Cir. 2002); United States v. Krilich, 159 F.3d 1020 (7th Cir. 1998); United States v. Artis, 261 F. App'x 176 (11th Cir. 2008) (unpub).

[77] *E.g.*, United States v. Mitchell, 633 F.3d 997, 1006 (10th Cir. 2011); United States v. Sylvester, 583 F.3d 285 (5th Cir. 2009); United States v. Young, 223 F.3d 905 (8th Cir. 2000); United States v. Burch, 156 F.3d 1315 (D.C. Cir. 1998); United States v. Stevens, 455 F. App'x 343 (4th Cir. 2011) (unpub).

[78] Prosecutors likely use this provision to protect against a finding that derivative use immunity applies to plea related statements, whether under the Rules, or under *de facto* or informal immunity. *See, e.g.*, United States v. Plummer, 941 F.2d 799 (9th Cir. 1991); United States v. Jones, 52 M.J. 60 (C.A.A.F. 1999). The federal witness immunity statute, 18 U.S.C. § 6002 (2012), prohibits the use or derivative use of any information obtained pursuant to a grant of immunity. *See* Kastigar v. United States, 406 U.S. 441 (1972); *cf.* MCM, *supra* note 9, R.C.M. 704; United States v. Mapes, 59 M.J. 60 (C.A.A.F. 2003). The federal circuit courts that have addressed the issue have found that derivative use immunity does not apply to the federal Rules. *See, e.g.*, United States v. Rutkowski, 814 F.2d 594 (11th Cir. 1987); United States v. Cusack, 827 F.2d 696 (11th Cir. 1987); United States v. Ware, 890 F.2d 1008 (2d Cir. 1989); United States v. Rivera, 6 F.3d 431 (7th Cir. 1993); United States v. Millard, 235 F.3d 1119 (8th Cir. 2000).

For military practitioners, however, the CMA has found that derivative use immunity does apply to MRE 410. *See* United States v. Ankeny, 30 M.J. 10 (C.M.A. 1990); *cf.* 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 410.09[4] (Joseph M. McLaughlin ed., 2d ed. 2012) ("It would seem that, to enforce the policy underlying Rule 410, the better approach would be to import the 'fruit of the

court has addressed the issue of using the statements for other purposes.

III. Analysis

The case for allowing waivers of the military Rules is relatively straightforward. It is justified by the principle sometimes referred to as the freedom of contract.[79] This freedom lies unspoken at the heart of permitting any waiver and allows a person to exercise control over his own life and maximize his benefits. Although no public policy arguments outweigh the existence of this right, its exercise is not absolute and protections are present to protect the accused. Before evaluating the technical legal and public policy arguments, one must examine the broader context of U.S. society and the legal system as reflected in the somewhat abstract notion of freedom of contract.

A. Freedom of Contract

The foundation of the U.S. adversarial system is the ability of parties to control the legal process.[80] The ability to control the process takes its shape in the form of the freedom to contract, or more broadly, to exchange entitlements. The freedom to contract and exchange entitlements lies within the value of autonomy or individual freedom.[81]

---

poisonous tree' doctrine into this area."). *But see* United States v. Anderson, No. 9900586, 2000 WL 339943 (N-M. Ct. Crim. App. 2000) (unpub) (stating that MRE 410 does not prohibit derivative use, without discussing *Ankeny*), *aff'd on other grounds*, 55 M.J. 182 (C.A.A.F. 2001).

[79] This phrase may cause some to hark back to the Supreme Court's decision in *Lochner v. New York*, 198 U.S. 45 (1905). The intent is not to argue that there is a constitutional right to freedom of contract, though one can certainly make the case. *See generally* DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011); DAVID N. MAYER, LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT (2011).

[80] *See generally* MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS (1986) (describing the "reactive state" that tends to enforce parties' bargains and allow them broad control over the legal process). *See also* Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 1, 17 n.53 (2002) (collecting sources); John W. Strong, *Consensual Modification of the Rules of Evidence: The Limits of Party Autonomy in an Adversary System*, 80 NEB. L. REV. 159, 160–61 (2001).

[81] Scott & Stuntz, *supra* note 11, at 1913; Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1969 (1992); *cf.* Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970, 971 (1985) (arguing that individual freedom

For autonomy to be meaningful, one's entitlements have to include the right to exploit and trade them.[82] If denied such a right, there is an "unnecessary constraint" on one's choices.[83] On the other hand, the more entitlements that one is able to exchange, the greater his autonomy. In the plea bargaining context, each side has a number of entitlements or rights. The greater the number of entitlements that an accused has to freely trade, the lower the sentence (or charges) he can get—he can maximize his bargaining power.[84] Ultimately, the freedom to contract, and the surrounding body of contract law, is better at protecting an individual's rights in plea bargaining than constitutional rights.[85]

However, the question is not whether the accused should be prohibited from waiving any rights, but only whether the accused is prohibited from waiving one specific right, that provided by the Rules. One could easily cast aside the freedom to exchange entitlements argument above "by simply redefining the entitlement."[86] In other words, the protection of the Rules are not entitlements that are subject to an exchange, either because they are an inalienable right, or because they are a right that belongs to society and are not subject to individual trading.

The very nature of rights in this system, and specifically the rights under the Rules, argues against inalienability. The rights protected by the Rules differ significantly from those rights considered inalienable.

---

prohibits alienation of property).

[82] Scott & Stuntz, *supra* note 11, at 1915; Timothy Sandefur, *In Defense of Plea Bargaining*, REGULATION, Fall 2003, at 28, 30 ("Once each side possessed those rights and liabilities, they had the right to exchange them.").

[83] Scott & Stuntz, *supra* note 11, at 1913.

[84] United States v. Mezzanatto, 513 U.S. 196, 208 (1995) (arguing against "any arbitrary limits on [the parties'] bargaining chips" because "[a] defendant can 'maximize' what he has to 'sell' only if he is permitted to offer what the prosecutor is most interested in buying"); United States v. Gansemer, 38 M.J. 340, 342 (C.M.A. 1993) ("If we take away an important bargaining chip of an accused, . . . what have we accomplished other than denying an accused the right to bargain for his or her freedom?"); Easterbrook, *supra* note 81, at 1975 ("Defendants have many rights that they sell off, receiving concessions they esteem more highly than the rights surrendered. . . . Defendants can use or exchange their rights, whichever makes them better off."); Rasmussen, *supra* note 12, at 1549; Scott & Stuntz, *supra* note 11, at 1909–17.

[85] *See* Cicchini, *supra* note 11, at 173–74 (listing three primary reasons why contract law "is the superior body of law to apply in the enforcement of plea bargains"); *cf.* Teeter, *supra* note 23, at 752–66 (arguing for a pure contract law approach to analyzing waivers of the right to appeal).

[86] Scott & Stuntz, *supra* note 11, at 1915.

Some rights are undoubtedly inalienable, such as life, liberty, and the pursuit of happiness.[87] Rights such as conflict-free counsel and the human composition of a jury are also not waivable because they are required for proper factfinding.[88] The Rules are simply not on the same level as these rights. First, unlike life, liberty, and property, the Rules are civil rights, not natural rights.[89] The protection of one's plea-related statements is not inherent in nature or such that it exists outside of what is granted by government. Second, a lack of protection for one's plea-related statements does not destroy the reliability of the factfinding process in a court; it enhances it.[90]

On the other hand, one could argue that the rights under the Rules are inalienable because they belong to society instead of to the accused.[91] The protection of the Rules is like the right to vote; individuals control its exercise, but the right belongs to society and one cannot trade it.[92] Taking a step back, one must ask why some rights are inalienable. The only sound justification is to prevent negative externalities, that is, costs imposed on third parties.[93] A waiver of the Rules does not impose such costs because an accused who waives his rights does not waive the rights of all other accused. It only makes sense that the parties are internalizing any risks and costs.[94] Looking at it differently, what costs would be

---

[87] *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); B.A. Richards, *Inalienable Rights: Recent Criticism and Old Doctrine*, 29 PHIL. & PHENOMENOLOGICAL RES. 391 (1969) (arguing that the founding fathers saw inalienable rights as not being subject to waiver); *see also* Sandefur, *supra* note 82, at 28 ("[A]lthough some natural rights are inalienable, most rights only make sense if they can be bought and sold.").

[88] *Mezzanatto*, 513 U.S. at 204; United States v. Rivera, 46 M.J. 52, 54 (C.A.A.F. 1997).

[89] *See* Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 442–52 (2004).

[90] *See infra* notes 154–60 and accompanying text.

[91] *See, e.g.*, *Mezzanatto*, 513 U.S. at 214 (Souter, J., dissenting); Gershowitz, *supra* note 7, at 1455–56; Dahlin, *supra* note 7, at 1379; Keck, *supra* note 7, at 1397–98.

[92] *See* 18 U.S.C. § 597 (2006); Epstein, *supra* note 81, at 987–88; Scott & Stuntz, *supra* note 11, at 1916.

[93] *See* Epstein, *supra* note 81, at 970–71; Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113 (1999); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 316 (1983); Scott & Stuntz, *supra* note 11, at 1916; *see also* JOHN STUART MILL, ON LIBERTY 22 (2d ed. 1859) ("[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."). *But cf.* Jonathan H. Adler, *Conservative Principles for Environmental Reform*, 23 DUKE ENVTL. L. & POL'Y F. 253, 260 n.33 (2013) (arguing that externalities do not automatically justify government intervention).

[94] *See* Gannett Co. v. DePasquale, 443 U.S. 368, 383 (1979) ("In an adversary system of criminal justice, the public interest in the administration of justice is protected by the

imposed by allowing waiver? The only possible cost is that the plea negotiation will be chilled,[95] causing the case to go to trial. The fact that a case goes to trial cannot be a negative externality in a system where the presumption is that cases will go to trial.[96]

The argument that the Rules are rights that belong to society also conflicts with the U.S. criminal justice system, which presumes that rights belong to the accused.[97] The nature of the adversarial process and belief in individual autonomy means that most rights in this system are personal and subject to waiver.[98] Party control over the evidentiary process is widely recognized and occurs regularly, resulting in a "presumption of waivability."[99] Without some indication from Congress or the President, evidentiary rules are subject to waiver.[100] The accused can even forfeit the most basic rights without knowing, merely by failing to object.[101]

---

participants in the litigation.").

[95] This, of course, is subject to dispute. *See infra* Part III.C.

[96] *See* Rasmussen, *supra* note 12, at 1571–72. *But cf.* Lafler v. Cooper, 132 S. Ct. 1376, 1385–86 (2012) (having a full and fair trial does not cure deficient performance by defense counsel in advising accused to refuse a PTA).

[97] Scott & Stuntz, *supra* note 11, at 1917.

[98] *See* United States v. Mezzanatto, 513 U.S. 196, 200–02 (1995); Shutte v. Thompson, 82 U.S. (15 Wall.) 151, 159 (1872); Note, *Contracts to Alter the Rules of Evidence*, 46 HARV. L. REV. 138, 139–40 (1933). That personal rights are waivable is a long-standing rule in military courts as well. *See* United States v. Hounshell, 21 C.M.R. 129, 132 (C.M.A. 1956) ("The right to a speedy trial is a personal right which can be waived."). An accused even has the constitutional right to waive his constitutional right to counsel under the Sixth Amendment. *See* Faretta v. California, 422 U.S. 806 (1975).

[99] *See Mezzanatto*, 513 U.S. at 202–03 ("[E]videntiary stipulations are a valuable and integral part of everyday trial practice. Prior to trial, parties often agree in writing to the admission of otherwise objectionable evidence, either in exchange for stipulations from opposing counsel or for other strategic purposes."); United States v. Rivera, 46 M.J. 52, 53–54 (C.A.A.F. 1997) (finding that "the rules of procedure and evidence," including "evidentiary objections," are "presumptively waivable" in a PTA, subject to those terms "expressly prohibited" by rule); *see also* United States v. Gibson, 29 M.J. 379 (C.M.A. 1990) (upholding a PTA with a waiver of "any and all evidentiary objections based on the Military Rules of Evidence"); Gold v. Death, 79 Eng. Rep. 325 (K.B. 1616); Strong, *supra* note 80, at 160–61; Note, *supra* note 98, at 139–40.

[100] *See Mezzanatto*, 513 U.S. at 201 ("[A]bsent some affirmative indication of Congress' intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement . . . .").

[101] MCM, *supra* note 9, MIL. R. EVID. 103 (without timely objection or offer of proof, error is forfeited, unless plain error); *id.* R.C.M. 905(e) (failure to raise objection, other than to jurisdiction or failure to allege an offense, constitutes waiver); Salinas v. Texas, 133 S. Ct. 2174, 2183 (2013) (opinion of Alito, J.) ("[I]t is settled that forfeiture of the privilege against self-incrimination need not be knowing.") (citing Minnesota v. Murphy,

In *Mezzanatto*, the Court found that the text of FRE 410, identical to that of MRE 410, reflected a presumption of party control over the rule.[102] The plain language of the rule only prohibits plea-related statements introduced "against" the accused, thus allowing the accused to introduce the plea-related statements if it fits the defense's trial strategy.[103] Additionally, one of the exceptions within both FRE 410 and MRE 410 allows admission of plea-related statements when other parts of the statements have been introduced, "contemplat[ing] a degree of party control that is consonant with the background presumption of waivability."[104]

Since there is an infinite number of ways to order one's life, society allows parties to make arrangements among themselves, a form of private lawmaking.[105] If the parties fail to regulate one of the infinite

---

465 U.S. 420, 427-28 (1984) and Garner v. United States, 424 U.S. 648, 654 n.9 (1976)); Peretz v. United States, 501 U.S. 923, 936 (1991) (collecting cases); Yakus v. United States, 321 U.S. 414, 444 (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal . . . cases by the failure to make timely assertion of the right . . . ."); United States v. Joseph, 11 M.J. 333, 335 (C.M.A. 1981) ("[N]onjurisdictional errors are normally waived when they are not timely raised at trial . . . ."). The important difference here is that with forfeiture, you still get appellate review for plain error, but with waiver, you get no review on appeal. *See* United States v. Olano, 507 U.S. 725, 732–33 (1993); United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009).

[102] *Mezzanatto*, 513 U.S. at 205–06.

[103] MCM, *supra* note 9, MIL. R. EVID. 410; *Mezzanatto*, 513 U.S. at 205. The federal circuit courts that have considered this issue have prohibited the defense from introducing statements made during plea negotiations, except when the statement is a refusal of a grant of immunity. *See, e.g.*, United States v. Verdoon, 528 F.2d 103 (8th Cir. 1976) (refusing to allow defense use); United States v. Biaggi, 909 F.2d 662 (2d Cir. 1990) (allowing defense use when accused refused grant of immunity). *Compare* Colin Miller, *Deal or No Deal: Why Courts Should Allow Defendants to Present Evidence that They Rejected Favorable Plea Bargains*, 59 U. KAN. L. REV. 407 (2011) (arguing for allowing defense use), *with* Mark T. Pavkov, Note, *Closing the Gap: Interpreting Federal Rule of Evidence 408 to Exclude Evidence of Offers and Statements Made by Prosecutors During Plea Negotiations*, 57 CASE W. RES. L. REV. 453 (2007) (arguing against defense use).

The CAAF has not directly addressed this question, although it has indirectly suggested that defense use of providence statements would not be permitted unless the military judge independently advises the accused on the rights he gives up. *See* United States v. Resch, 65 M.J. 233, 237 (C.A.A.F. 2007) (finding that the military judge did not sufficiently obtain a waiver of the right against self-incrimination, despite the defense's request to consider the accused's statements). *But see infra* note 169 (discussing two unpublished Navy-Marine Court of Criminal Appeals (NMCCA) cases that seem to go against this reasoning).

[104] *Mezzanatto*, 513 U.S. at 205–06; FED. R. EVID. 410; MCM, *supra* note 9, MIL. R. EVID. 410.

[105] *See* Friedrich Kessler, *Contracts of Adhesion-Some Thoughts About Freedom of*

number of possibilities in an agreement, any default rules established by the legislature will apply.[106] For plea-related statements, the default rule is that they are inadmissible. However, that does not speak to when the parties agree to waive the Rules. The fact that a default rule exists does not preclude the parties from agreeing to alter it.[107] In addition to this broad notion of freedom of contract, more practical, legal reasons support a rule that accused can waive their protections under the military Rules.

B. Parity Between Federal and Military Systems

Military courts should allow waivers of the military Rules because it would be consistent with practice in federal courts. Article 36(a) allows the President to prescribe rules that shall "apply the principles of law and the rules of evidence generally recognized" in federal courts.[108] The only deviations allowed are if the federal rules are either found not "practicable" by the President, or are "contrary to or inconsistent with" the UCMJ.[109] Since waivers of the federal Rules are both generally recognized in federal courts and practicable and consistent with the UCMJ, Article 36(a) requires that an accused be allowed to waive his rights under the military Rules.

From the initial creation of the MRE, the driving force was to make them as similar as possible to the FRE.[110] The drafters made sure to incorporate uniformity with federal practice wherever they could.[111] They included MRE 101(b)(1) to require the use of "the rules of evidence generally recognized" in federal court as a secondary source.[112]

Contract, 43 COLUM. L. REV. 629, 641 (1943).

[106] *See id.* at 629; Scott & Stuntz, *supra* note 11, at 1913.

[107] *Cf. Mezzanatto*, 513 U.S. at 208 n.5 ("The Advisory Committee's Notes *always* provide some policy justification for the exclusionary provisions in the Rules, yet those policies merely justify the default rule of exclusion; they do not mean that the parties can never waive the default rule.").

[108] UCMJ art. 36(a) (2012).

[109] *Id.*; *see also* MCM, *supra* note 9, MIL. R. EVID. 101 analysis, at A22-2 ("[T]o the extent to which the Military Rules do not dispose of an issue, the Article III Federal practice when practicable and not inconsistent or contrary to the Military Rules shall be applied.").

[110] Lederer, *supra* note 50, at 12–13; Borch, *supra* note 50, at 1.

[111] *See* MCM, *supra* note 9, MIL. R. EVID. analysis; Lederer, *supra* note 50.

[112] MCM, *supra* note 9, MIL. R. EVID. 101(b)(1); *see also id.* MIL. R. EVID. 101 analysis, at A22-2.

To require future uniformity with the FRE, the drafters also included MRE 1102(a) to mandate that amendments to the FRE automatically apply to the MRE unless contrary action is taken.[113] The CMA, both before and after the enactment of the MRE, has recognized the need to maintain uniformity of practice with the federal courts.[114]

Initially, there is the question of whether waiver of the federal Rules is generally recognized in federal courts. The uniform holdings by federal courts allowing waivers demonstrate that this principle is generally recognized.[115] However, the extent of the prosecution's use of the waived statements is not generally recognized—does a waiver extend to use of the statements for impeachment, for rebuttal, or for use in the case-in-chief? At the very least, it is generally recognized in federal courts that the accused can waive the federal Rules for use in rebuttal. Five circuits have recognized such use, and five circuits have gone further and allowed it for use in the case-in-chief.[116] Surely, those circuits that allow case-in-chief waivers would allow a more limited rebuttal waiver. Of course, this does not foreclose the adoption of a case-in-chief waiver by the CAAF, as it is free to do in interpreting and applying the MRE.

The next question is whether the text of MRE 410 contains a presidential determination under Article 36(a) that allowing waiver is not practicable.[117] The plain language of the rule is the place to begin this examination.[118] Rule 410 only has two listed exceptions, one for when

---

[113] *Id.* MIL. R. EVID. 1102(a); *see also* Lederer, *supra* note 50, at 13 ("Colonel Alley intended not just that the codification reflect the Federal Rules of Evidence, but that all *future* military evidentiary law echo it as well, unless a valid military reason existed for departing from it.").

[114] United States v. Clemons, 16 M.J. 44, 45–46 (C.M.A. 1983) (admonishing trial judge for his insufficient "deference to the application of Article III Federal court precedent"); United States v. Weaver, 1 M.J. 111, 117 (C.M.A. 1975); United States v. Knudson, 16 C.M.R. 161, 164–65 (C.M.A. 1954).

[115] *See supra* Part II.E; United States v. Orm Hieng, 679 F.3d 1131, 1138 (9th Cir. 2012) (finding waivers of the federal Rules are so generally recognized that the judge "would not be surprised if a defendant does not object to the government's use" of plea related statements).

[116] *See supra* notes 76–77 and accompanying text.

[117] Courts should give "complete deference" to the President's practicality determination. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 623 (2006). However, in *Hamdan* the Supreme Court found that Article 36(b)'s requirement that the prescribed rules must be "uniform insofar as practicable" can act as a limit on the President's rule-making authority. *See id.* at 620.

[118] United States v. Custis, 65 M.J. 366, 370 (C.A.A.F. 2007).

another part of the statement is admitted, and another for perjury or false statement.[119] Arguably, because there is no waiver exception, waiver should not be allowed.[120] However, this only addresses the default rule of what happens when the parties do not agree otherwise; the argument does not address whether the accused can waive the default rule.[121] In other words, the fact that the Rules do not have the word "waiver" in them does not mean that the accused cannot waive them. The parties have deviated from the default by exercising the common law presumption of waivability.[122]

One could look at the introductory language, "[e]xcept as otherwise provided in this rule," to argue for an intent to preclude waiver.[123] This argument fails for three reasons. First, it restates the argument about the existence of only two exceptions. The language lays out the default position; it does not speak to whether the parties can consensually modify it. Second, that language cannot carry the weight attributed to it because it has been removed from both the FRE and the MRE.[124] If the "except as otherwise" language actually intended to limit waivers, it would have a substantive meaning and would not have been removed by a stylistic amendment. Finally, as discussed above, the House originally inserted that language to prevent the rule from interfering with a statute on pleas in antitrust cases.[125] There is nothing in the text of MRE 410 that shows an intent by the President to foreclose waivers.

---

[119] MCM, *supra* note 9, MIL. R. EVID. 410.

[120] *See, e.g.*, Gershowitz, *supra* note 7, at 1451–54; *see also infra* notes 123–25 and accompanying text.

[121] *See supra* note 105–07 and accompanying text.

[122] United States v. Mezzanatto, 513 U.S. 196, 200–03 (1995); *see also* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 587–88 (1993) (stating that federal courts look to the background common law in interpreting the FRE); MCM, *supra* note 9, MIL. R. EVID. 101(b)(2).

[123] *See, e.g.*, Gershowitz, *supra* note 7, at 1451–54; Dahlin, *supra* note 7, at 1367 n.9. In *Crosby v. United States*, the Supreme Court relied in part on "except as otherwise provided" language in FRCP 43 to find that an accused could not be tried *in absentia*. 506 U.S. 255, 258–59 (1993). Although both the Court and FRCP 43 used the word "waiver," the case was one of forfeiture since the accused had not affirmatively waived his right to be present. *See id.* at 256. Additionally, FRCP 43 specifically discusses the issue of waiver, so Congress had replaced the common law rule presuming waivability with the procedure spelled out in FRCP 43. *Id.* at 258–59. The analysis in this article deals with an explicit, knowing waiver of the military Rules, not forfeiture. Also, MRE 410 does not discuss "waiver," or even use the term, so the President has not modified or replaced the common law presumption of waivability.

[124] FED. R. EVID. 410; MCM, *supra* note 9, MIL. R. EVID. 410; *see supra* note 47 and accompanying text.

[125] *See supra* note 37 and accompanying text.

Finally, the last question is whether waiver would be contrary to or inconsistent with the UCMJ. There is nothing unique about the UCMJ that would prevent waiver. The CAAF has recognized that all manner of rights are waivable, except those listed in RCM 705.[126] However, Article 45 is important if a waiver allows use of the accused's statements during the providence inquiry.[127] The CMA has stated that allowing evidence from a rejected providence inquiry "would violate the spirit, if not the letter, of Article 45(a)."[128] However, that merely restates the general policy behind the existence of Article 45. It does not answer the question of whether a waiver would be inconsistent with Article 45. As the CMA recognized, nothing in the letter of Article 45 prohibits the subsequent use of providence statements. Besides, like any other statute, Article 45 is susceptible to waiver.

The only remaining issue is whether anything in RCM 705(e) alters this analysis. After all, what good is a waiver if the evidence cannot be "disclosed to the members"?[129] Initially, RCM 705(e) expressly refers to MRE 410.[130] If an accused can waive MRE 410, then the provisions in RCM 705(e) should not apply. More importantly, RCM 705(e) is a rule designed to protect the accused, making it his personal right and within the presumption of waivability. There is nothing different from the analysis of the waivability of MRE 410.

C. Waiver Encourages Settlement

Perhaps the most consistent argument made by opponents to a waiver of the federal Rules in a proffer agreement is the supposed negative effect it will have on plea negotiations.[131] Since proffer

---

[126] *E.g.*, United States v. Gladue, 67 M.J. 311, 314 (C.A.A.F. 2009).

[127] UCMJ art. 45 (2012); United States v. Hayes, 70 M.J. 454, 457 (C.A.A.F. 2012) (Article 45 of the UCMJ "includes procedural requirements to ensure that military judges make sufficient inquiry to determine that an accused's plea is knowing and voluntary, satisfies the elements of charged offense(s), and more generally that there is not a basis in law or fact to reject the plea.").

[128] United States v. Shackelford, 2 M.J. 17, 20 n.6 (C.M.A. 1976) (citing United States v. Kercheval, 274 U.S. 220 (1927)).

[129] MCM, *supra* note 9, R.C.M. 705(e).

[130] *Id.*

[131] *See, e.g.*, United States v. Mezzanatto, 513 U.S. 196, 214–15 (1995) (Souter, J., dissenting); Gershowitz, *supra* note 7, at 1455–56; Benjamin A. Naftalis, Note, *"Queen for a Day" Agreements and the Proper Scope of Permissible Waivers of the Federal Plea-Statement Rules*, 37 COLUM. J.L. & SOC. PROBS. 1, 35–39 (2003).

agreements act as a gateway to negotiations, conditions at this point in the process will arguably reduce plea bargaining. The CMA has stated that the purpose of MRE 410 is to encourage the free flow of information during negotiations to resolve cases without trials.[132] Instead of taking a formal or technical approach, courts should "broadly construe th[e] rule so as to encourage plea negotiations."[133] By broadly construing the military Rules to allow for waivers, military courts will be encouraging settlement in the right cases.

In plea negotiations, both sides are trying to avoid the costs and risks of going to trial.[134] From a practical perspective, prosecutors would not seek Rules waivers if they impeded PTAs.[135] Waivers of the Rules do not make cases more likely to go to trial because both sides have an incentive to waive the default application of the Rules. While this is more likely to be true in cooperation bargaining, it is also true in penalty bargaining.

In large part, plea bargaining is driven by the trustworthiness of the parties.[136] The government has an incentive to maintain a good reputation because it is constantly involved in negotiations.[137] For an

---

[132] *See* United States v. Ankeny, 30 M.J. 10, 15 (C.M.A. 1990); *cf. supra* note 36 and accompanying text.

[133] *Ankeny*, 30 M.J. at 15; *cf.* Easterbrook, *supra* note 81, at 1975 ("Plea bargains are preferable to mandatory litigation . . . because compromise is better than conflict.").

[134] *See generally* Easterbrook, *supra* note 81; Easterbrook, *supra* note 93; Rasmussen, *supra* note 12.

[135] *See* United States v. Mezzanatto, 998 F.2d 1452, 1458 (9th Cir. 1993) (Wallace, C.J., dissenting) ("Given the mutual benefits achieved through plea bargaining, should we expect the government continually to require waivers if such requirements significantly reduce the number of plea agreements reached?"). In fiscal year 1997, 81.8% of all accused pled guilty, whereas in fiscal year 2011, 89% pled guilty. *See* ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS tbl.D-4 (2012), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/D04Sep12.pdf; ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 214 (1998).

[136] *See* Cicchini, *supra* note 11, at 162–63; Easterbrook, *supra* note 81, at 1971; Rasmussen, *supra* note 12, at 1562–63. Although the military has a higher turnover rate of convening authorities, prosecutors, and defense counsel than civilians, the institutional and reputational concerns remain the same.

[137] *See* Rasmussen, *supra* note 12, at 1563. This argument assumes that the government will not abuse its power. In the end, courts must rely on the good faith of prosecutors and invalidate abusive agreements. *See* United States v. Mezzanatto, 513 U.S. 196, 210 (1995); Cicchini, *supra* note 11, at 182; *see also* Rasmussen, *supra* note 12, at 1573 ("The goal of plea bargaining is not for a litigant to do better than his opponent, or to reduce his opponent's welfare, but to do as well for himself as possible."). The U.S.

accused, however, each case is a one-time event, so he does not have the same incentive.[138] He also has the right to withdraw from the PTA at any time, while the government is more limited in its withdrawal options.[139] Given this starting position, in a penalty bargaining scenario, an accused would be willing to waive the Rules in order to increase the credibility of his proffer and obtain access to a busy prosecutor.[140]

In cooperation bargaining, the dilemma becomes especially difficult for a prosecutor. Since he is going to rely on the information provided by the accused in his case against another individual, the prosecutor needs some way to ensure that the information is reliable. This is a real concern because once the accused has a deal in place, he has little incentive to cooperate fully.[141] Additionally, if the prosecutor provides protected information at the negotiations to convince the accused to plead guilty, the accused can end the negotiations and then use that information to alter his testimony at trial. That is precisely what Mezzanatto did when he changed his trial testimony from what he said at the negotiations to make it consistent with the information he learned during the negotiations.[142] Finally, as a precaution, the prosecutor would want a waiver to ensure that derivative use immunity did not apply.[143]

---

adversarial system assumes that each side will zealously pursue its position and prevent overreaching by the other party. For example, an accused can refuse to waive the Rules or negotiate for immunity. *See, e.g.*, United States v. Palumbo, 897 F.2d 245, 247 (7th Cir. 1990); United States v. Stein, No. 04-269-9, 2005 WL 1377851, at *4 (E.D. Pa. June 8, 2005); *see also* David P. Leonard, *Waiver of Protections Against the Use of Plea Bargains and Plea Bargaining Statements After* Mezzanatto, CRIM. JUST., Fall 2008, at 8; Jon May, *Queen for a Day From Hell: How to Handle a Troubling Proffer Letter*, CHAMPION, Sept.–Oct. 2006, at 16. The analysis may be different if the command requires waiver in all cases. *See infra* notes 150–53 and accompanying text.

[138] Rasmussen, *supra* note 12, at 1563. The reputation of the accused's attorney, however, can improve the accused's reputational position. *See* Easterbrook, *supra* note 81, at 1971.

[139] MCM, *supra* note 9, R.C.M. 705(d)(4).

[140] *See* United States v. Krilich, 159 F.3d 1020, 1024–25 (7th Cir. 1998); King, *supra* note 93, at 118–19; Rasmussen, *supra* note 12, at 1569–81; Transcript of Oral Argument, *supra* note 12 (argument of Solicitor General) (arguing that prosecutors have a finite amount of time and need some incentive to divert that time to listen to the accused).

[141] *See* Rasmussen, *supra* note 12, at 1563–66 (describing various means in which an accused could fail to fully cooperate, including minimizing his own role, performing poorly as a witness, or not revealing negative information in his background that the individual against whom he is testifying would know).

[142] Brief for the United States, *Mezzanatto*, 513 U.S. 196 (No. 93-1340), 1994 WL 234577 at *29 n.9.

[143] *See supra* note 78.

Thus, the government has to either delay the accused's sentencing until after he finishes cooperating, or attempt to vacate the sentence and re-try the accused if he fails to fully cooperate.[144] Knowing all this, the prosecutor will be hesitant to spend his time negotiating without some assurance that the information is reliable. He would be safer seeking a sure conviction against the accused.[145] The prosecutor will ask for a waiver of the Rules as an incentive to enter into negotiations and as a form of punishment if the accused fails to provide truthful information or to cooperate fully.[146] The accused would agree to waive the Rules to obtain a more favorable sentence than what he would get at trial.[147]

The discussion so far has focused on waiving the protection of the Rules in a proffer agreement. The question remains about waivers in the PTA itself. Here, the result is straightforward. When a waiver is located in the PTA itself, plea negotiations are already over, so the waiver could not have had a chilling effect.[148] At the time the accused made his statements during the plea negotiations, MRE 410 fully protected them. In the PTA, a waiver only serves to provide another incentive for the accused not to withdraw.[149]

The possibility remains that some prosecutors may want to make a waiver of the military Rules a mandatory provision of any proffer or

---

[144] *See* Ricketts v. Adamson, 483 U.S. 1 (1987). Although the Supreme Court has held that this does not violate Double Jeopardy, *id.* at 9, the time and expense involved in such a process makes this course of action a difficult and cost-prohibitive one to follow.

[145] *See* United States v. Mezzanatto, 513 U.S. 196, 207–08 (1995); *Krilich*, 159 F.3d at 1025; *see also* Easterbrook, *supra* note 93, at 310.

[146] *See* Rasmussen, *supra* note 12, at 1563.

[147] *See* Easterbrook, *supra* note 93, at 297; Rasmussen, *supra* note 12, at 1573; *see also id.* at 1580 ("If plea bargaining would be unsuccessful without the waiver and successful with it, then both prosecutor and defendant gain from the waiver, because both prosecutor and defendant payoffs are bigger from successful settlement than from trial.").

[148] *See*, *e.g.*, United States v. Mitchell, 633 F.3d 997, 1005–06 (10th Cir. 2011); United States v. Burch, 156 F.3d 1315, 1321–22 (D.C. Cir. 1998).

[149] That the accused has an *incentive* not to withdraw does not prevent his withdrawal "at any time." MCM, *supra* note 9, R.C.M. 705(d)(4). It merely allows the government to present evidence it could not otherwise if he chooses to withdraw. *See* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable—and permissible—attribute of any legitimate system which tolerates and encourages the negotiation of pleas.") (citation and internal quotations omitted); *see also* United States v. Velez, 354 F.3d 190, 196 (2d Cir. 2004) (no violation of constitutional right to present a defense, to effective assistance of counsel, or to a fair trial from a waiver of the federal Rules).

PTA.[150] Not only would such a mandatory provision possibly be coercive,[151] but the CAAF has indicated it will strike down mandatory terms.[152] From a practical perspective, the defense can simply refuse to proffer and submit a PTA.[153] Since the convening authority makes the ultimate decision, he can approve an acceptable deal put forth by the defense without any proffer. Also, with no sentencing guidelines, the defense is not dependent on the prosecutor for a reduction in sentence and can always plead guilty without a PTA or force the prosecutor to put on his case at trial.

To encourage settlement, the parties must trust each other. Rules waivers allow for deception by the accused to be punished, increasing trust and improving the chances for a settlement. By punishing deception, Rules waivers also enhance the truth-seeking function of the courts. One of the functions of courts, and trials in particular, is to ascertain the truth.[154] If an accused contradicts his earlier statements at a later trial through his own testimony, testimony elicited from witnesses, or counsel's argument, the accused would be allowed to use "false evidence."[155] A waiver of the Rules helps avoid that potential fraud by allowing the government to point out the inconsistency.[156] Unlike a coerced confession, a voluntary statement, in the presence of counsel, to a prosecutor while in negotiations, or to a judge at a providence inquiry, is inherently likely to be reliable.[157] Defense counsel would also face tricky issues of candor to the court and suborning perjury.[158]

---

[150] *See Mezzanatto*, 513 U.S. at 217–18 (Souter, J., dissenting); Rasmussen, *supra* note 12, at 1582.

[151] *Cf. infra* notes 170–76 and accompanying text.

[152] United States v. Felder, 59 M.J. 444 (C.A.A.F. 2004); United States v. Zelenski, 24 M.J. 1 (C.M.A. 1987).

[153] *See supra* note 137.

[154] *See Mezzanatto*, 513 U.S. at 204; Lopez v. United States, 373 U.S. 427, 440 (1963); United States v. Romano, 46 M.J. 269, 274 (C.A.A.F. 1997) ("[T]he purpose of a criminal trial is truthfinding within constitutional, codal, Manual, and ethical rules."); MCM, *supra* note 9, MIL. R. EVID. 102 (stating the purpose of the MRE is so "that the end that the truth may be ascertained").

[155] *See* Nix v. Whiteside, 475 U.S. 157, 173 (1986).

[156] *See Mezzanatto*, 513 U.S. at 205; United States v. Roberts, 660 F.3d 149, 157 (2d Cir. 2011); United States v. Mitchell, 633 F.3d 997, 1005 (10th Cir. 2011); United States v. Sylvester, 583 F.3d 285, 293–94 (5th Cir. 2009); United States v. Rebbe, 314 F.3d 402, 408 (9th Cir. 2002); Note, *supra* note 98, at 142–43.

[157] *See* Withrow v. Williams, 507 U.S. 680, 703 (1993) (O'Connor, J., concurring in part and dissenting in part) (stating that "involuntary or compelled statements . . . are of dubious reliability," but that "*voluntary* statements are 'trustworthy'" and "their

One commentator has argued that trials do not convey truth accurately because they are filled with rules that inhibit full disclosure of information. If deception can be penalized, bargaining is better at arriving at the truth because the parties can consider all the evidence, admissible or not, and the lawyers involved are more knowledgeable than jurors.[159] This argument serves as a separate justification for allowing waivers of the military Rules. By increasing the evidence in front of the factfinder, a waiver helps alleviate the disparity between bargaining and trial, bringing trials closer to the ideal.[160]

D. Procedural Protections

Although this article has so far dismissed arguments against Rules waivers, in the military the MCM and the courts provide a number of procedural protections that help safeguard the accused against abuse by the government. These protections exist throughout the process, from the requirement of defense counsel to the procedures for accepting the guilty plea. Together, they ensure that any waiver of the military Rules is voluntary and knowing, and limit any abuse.

Perhaps the most important protection that an accused has is counsel. Since the Supreme Court sanctioned plea bargaining, it has required that counsel be part of the process, unless waived, to ensure the plea and its terms are knowing and voluntary.[161] Counsel must give competent but candid advice to the accused,[162] and can negotiate for better terms in the

---

suppression actually *impairs* the pursuit of truth by concealing probative information from the trier of fact").

[158] *See* MODEL RULES OF PROF'L CONDUCT R. 3.3 (1983); *Nix*, 475 U.S. at 173 ("[T]he right to counsel includes no right to have a lawyer who will cooperate with planned perjury. A lawyer who would so cooperate would be at risk of prosecution for suborning perjury, and disciplinary proceedings, including suspension or disbarment."); *Velez*, 354 F.3d at 192.

[159] *See* Easterbrook, *supra* note 81, at 1971; Easterbrook, *supra* note 93, at 316–17; *Krilich*, 159 F.3d at 1025.

[160] *See generally* Saks, *supra* note 27 (describing increased importance of factfinding and offering suggestions to improve accuracy).

[161] *See* Brady v. United States, 397 U.S. 742, 748 n.6, 758 (1970).

[162] *See Mitchell*, 633 F.3d at 1002 (plea voluntary when competent counsel candidly advised "you would be a fool not to take this offer"); United States v. Carr, 80 F.3d 413, 417 (10th Cir. 1996) (finding guilty plea voluntary despite accused's claim that he was "hounded, browbeaten and yelled at," as well as called "stupid" and "a f[]ing idiot," by his attorney, who thought the government's offer was a good one).

waiver.[163] However, ineffective assistance of counsel can render the accused's plea involuntary and force it to be set aside.[164] If counsel fails to advise the accused on his rights under the military Rules and the consequences of a waiver, then the accused would have a promising claim for ineffective assistance of counsel and withdrawal from the waiver.[165]

Another valuable protection is the military judge and his role in the providence inquiry and review of the PTA. Under RCM 910, the military judge must personally advise the accused of his rights, ensure that the plea is voluntary, obtain a factual basis for the accused's guilt, and inquire into the PTA and its terms.[166] Having the military judge conduct this process ensures not only that the plea is voluntary and knowing, but that the terms of the PTA, including any waivers, are also voluntary and knowing.[167] While obtaining the factual basis for the plea,

---

[163] *See supra* note 137. Additionally, the defense may have the option of introducing the accused's plea-related statements at trial. *See supra* note 103 and accompanying text.

[164] *See* Hill v. Lockhart, 474 U.S. 52, 57 (1985) ("Where [an accused] is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'") (citation omitted); Tollett v. Henderson, 411 U.S. 258, 267 (1973) ("[An accused] may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards" of competence.); United States v. Rose, 71 M.J. 138 (C.A.A.F. 2012).

[165] *See* Lafler v. Cooper, 132 S. Ct. 1376 (2012); Missouri v. Frye, 132 S. Ct. 1399 (2012). There is also the issue of counsel with an actual conflict of interest, which is non-waivable. *See supra* notes 27, 88 and accompanying text.

[166] MCM, *supra* note 9, R.C.M. 910. The purpose of the providence inquiry is to provide "judicial scrutiny" for "reasonableness" due to the possibility of overreaching by the prosecutor. Easterbrook, *supra* note 93, at 320. *But see* Allison D. Redlich, *False Confessions, False Guilty Pleas: Similarities and Differences*, *in* POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS 49, 62 (G. Daniel Lassiter & Christian A. Meissner eds., 2010) (arguing that the inquiry may be "a formality that better protects the court than the defendant").

This "elaborate oral exchange" has been compared to a "statute of frauds" because "[i]t is very costly to reopen a case after a plea" due to lost evidence. Easterbrook, *supra* note 93, at 317–18. In this respect, a Rules waiver helps lessen that cost. This is even more relevant in the military because of the nature of the providence inquiry, where the military judge delves deeply into the factual basis of the charges. This will, of course, work to the disadvantage of the accused if the military judge rejects his guilty plea. Should a waiver of the military Rules be contemplated in a particular case, defense counsel must ensure that the accused can plead providently to the charges and specifications, or negotiate a plea by exceptions and/or exceptions and substitutions.

[167] *See* United States v. Soto, 69 M.J. 304, 306–07 (C.A.A.F. 2011); *Mitchell*, 63 F.3d at

the military judge must personally ensure that the accused understands the extent of his waiver of the right against self-incrimination.[168] Thus, the military judge must explain that if the accused answers the questions, but the plea is either not accepted or withdrawn, a waiver of the military Rules would allow the government to use his statements from the inquiry, and any negotiations, against him at a later trial.[169]

Some argue that the government's gross disparity in bargaining power makes waivers of the federal Rules involuntary. This argument relies primarily on the application of the federal Sentencing Guidelines.[170] However, this argument fails to properly apply the Supreme Court's statements regarding what is considered a voluntary and knowing waiver. The voluntary and knowing requirement entails a case-by-case analysis to look for fraud or coercion.[171] A waiver is voluntary if it is "the product of a free and deliberate choice," and it is knowing if "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[172]

1002; United States v. Burch, 156 F.3d 1315, 1323 (D.C. Cir. 1998). *But see* Allison D. Redlich & Alicia Summers, *Voluntary, Knowing, and Intelligent Pleas: Understanding the Plea Inquiry*, 18 PSYCHOL. PUB. POL'Y & L. 626, 640 (2012) (finding that "a significant portion" of accused "may not fully understand and appreciate" their rights when questioned after pleading guilty).

168 *See, e.g.*, United States v. Resch, 65 M.J. 233, 237 (C.A.A.F. 2007).

169 In a case not involving a pretrial waiver of MRE 410, the NMCCA found error, but that it was harmless, when the judge allowed the government to use statements from a rejected providence inquiry during trial because the accused's waiver of the right against self-incrimination during that rejected inquiry did not extend to such use. United States v. Cross, No. 200602310, 2007 WL 2846918, at *1–4 (N-M. Ct. Crim. App. 2007) (unpub). However, the court found that the accused had waived the government's use of the earlier PTA, and thus MRE 410, "when, through counsel, he affirmatively declined to object." *Id.* at *5; *see also* United States v. Burch, No. 200700047, 2007 WL 2745706, at *2–3 (N-M. Ct. Crim. App. 2007) (unpub) (finding waiver of MRE 410 when accused agreed that providence inquiry could be used at sentencing, after which judge asked accused about an inquiry from six months earlier), *rev'd on other grounds*, 67 M.J. 32 (C.A.A.F. 2008).

170 *See, e.g.*, United States v. Mezzanatto, 513 U.S. 196, 209 (1995); Dahlin, *supra* note 7, at 1381–82; Naftalis, *supra* note 131, at 39–43. *But see* Parker v. North Carolina, 397 U.S. 790, 809 (1970) (opinion of Brennan, J.) (explaining that in "the give-and-take negotiation common in plea bargaining," the parties "arguably possess relatively equal bargaining power"); United States v. Velez, 354 F.3d 190, 196 (2d Cir. 2004) ("[T]o the extent there is a disparity between the parties' bargaining positions, it is likely attributable to the Government's evidence of the defendant's guilt."); Rasmussen, *supra* note 12, at 1574 (arguing that disparity in bargaining power does not concern whether an accused gets a benefit, but "only how much it benefits him").

171 *Mezzanatto*, 513 U.S. at 210.

172 Moran v. Burbine, 475 U.S. 412, 421 (1986).

The accused does not need to know "every possible consequence,"[173] as long as "he fully understands the nature of the right and how it would likely apply *in general* in the circumstances—even though [he] may not know the *specific detailed* consequences."[174] If gross disparity in bargaining power makes a Rules waiver involuntary, then under that reasoning, all waivers would be invalid. That is why this "dilemma . . . is indistinguishable from any of a number of difficult choices that criminal defendants face every day. The plea bargaining process necessarily exerts pressure on defendants . . . to abandon a series of fundamental rights."[175] Regardless, this argument has little traction in the military because there are no sentencing guidelines and an accused can attempt to get a lower sentence than that in the PTA.[176]

Another layer of protection provided by the military courts is the military judge's duty to ensure that the terms in a PTA do not violate public policy or basic notions of fundamental fairness.[177] However, since the adoption of RCM 705(c)(1), the CAAF has routinely refused to find waivers of rights in pretrial agreements as violating public policy.[178] In fact, the CAAF has stated that the question of whether a term in a pretrial agreement violates public policy is limited to whether the term is specifically prohibited in RCM 705; otherwise, the case will turn on whether the waiver is knowing and voluntary.[179] None of the rights

---

[173] Colorado v. Spring, 479 U.S. 564, 574 (1987).

[174] United States v. Ruiz, 536 U.S. 622, 629 (2002); *see also* United States v. Krilich, 159 F.3d 1020, 1026 (7th Cir. 1998).

[175] *Mezzanatto*, 513 U.S. at 209–10.

[176] *See* MCM, *supra* note 9, R.C.M. 1002; United States v. Kinman, 25 M.J. 99, 101 (C.M.A. 1987).

[177] United States v. Soto, 69 M.J. 304, 307 (C.A.A.F. 2011); United States v. Green, 1 M.J. 453, 456 (C.M.A. 1976) (holding that military judge should strike any PTA provisions that "violate either appellate case law, public policy, or the trial judge's own notions of fundamental fairness"). *United States v. Cassity* provides an excellent explanation of the analysis required in determining whether a provision of the PTA violates public policy or notions of fundamental fairness. 36 M.J. 759, 761–63 (N.M.C.M.R. 1992).

[178] *See, e.g.*, United States v. Gladue, 67 M.J. 311 (C.A.A.F. 2009); United States v. McFadyen, 51 M.J. 289 (C.A.A.F. 1999); United States v. Weasler, 43 M.J. 15 (C.A.A.F. 1995).

[179] United States v. Edwards, 58 M.J. 49, 52 (C.A.A.F. 2003). In *Edwards*, the court cited to RCM 705(c)(1)(B) as listing the terms that violate public policy, then stated that "when pretrial agreements are challenged based upon alleged violations of public policy, the cases invariably discuss the issue in the context of waiver." *Id.* This same process was repeated in *Gladue*, where the court dismissed a public policy argument by stating that the rights in question were not ones specifically prohibited in RCM 705(c)(1)(B). 67 M.J. at 314; *see also* Kessler, *supra* note 105, at 630–31 (stating that courts should not

listed in RCM 705(c)(1)(B) come close to being violated by a waiver of the military Rules.[180] Thus, public policy is coextensive with the knowing and voluntary requirement and RCM 705, neither of which prohibits a waiver of the military Rules.[181] By reviewing for ineffective assistance of counsel and ensuring compliance with RCM 705 and 910, courts are providing sufficient procedural safeguards to protect the accused.[182] All of the preceding arguments can be summarized into a straightforward test for courts to apply.

IV. Proposed Means of Analysis

This article proposes a simple three-part test for military courts to use in evaluating waivers of the military Rules. Although the federal circuit courts have limited their analysis solely to the question of whether the waiver was knowing and voluntary, existing military case law and the spirit of Article 45 suggest a slightly more rigorous test for the

---

declare contracts void because "public policy requires . . . that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced") (citation and internal quotations omitted).

[180] The listed rights are the right to counsel, to due process, to challenge the jurisdiction, to speedy trial, to complete sentencing proceedings, and to post-trial and appellate rights. MCM, *supra* note 9, R.C.M. 705(c)(1)(B). These are essentially rights that the President has determined are essential to the credibility of courts-martial and cannot be waived. *See Mezzanatto*, 513 U.S. at 204.

The only possible argument against a waiver of the military Rules would be that it violates due process, but even that argument does not survive scrutiny. First, the accused's due process rights relating to pleas are codified in RCM 705 and 910. *See supra* note 30. Second, due process attacks carry an extremely high burden. *See* United States v. Wright, 53 M.J. 476, 481 (C.A.A.F. 2000) (upholding the admission of evidence under MRE 413 by stating that a exclusion under due process would require a violation of "those fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency") (citations and quotation marks omitted). If RCM 705 and 910 are complied with, admitting evidence at a subsequent trial of plea-related statements, with an accused's waiver, does not violate a fundamental notion of justice or offend notions of fair play and decency.

[181] Apart from these reasons, it is also perfectly reasonable for judges to be hesitant to strike terms on public policy or fairness grounds. Judges suffer from "informational poverty" in criminal cases because they do not have access to all of the evidence or knowledge of the accused's motives or calculations in deciding to enter into the PTA. *See* Easterbrook, *supra* note 93, at 322. In an adversarial system, the parties are generally responsible for managing their own case. *See supra* notes 80, 98, 137 and accompanying text.

[182] *See* King, *supra* note 93, at 131.

military.[183] The proposed test has three parts: (1) that the plea is voluntary and knowing; (2) that the text of waiver is unambiguous; and (3) that the waiver does not violate notions of fundamental fairness.[184]

First, the court must review the circumstances surrounding the waiver to ensure that it is voluntary and knowing.[185] This is done through a rigorous application of RCM 705 and 910 and allowing release from the waiver through a valid claim of ineffective assistance of counsel.[186] In particular, a detailed colloquy where the military judge ensures that the accused fully understands the rights that he is waiving and the possible consequences if the accused withdraws or the military judge refuses to accept the plea is necessary.[187] Due to the right against self-incrimination, any waiver that includes a right to use statements from the accused's providence inquiry faces a higher burden. The military judge will have to include the government's ability to use the statements against the accused in a future proceeding when he is obtaining the waiver of the right against self-incrimination.[188]

---

[183] *See* United States v. Grijalva, 55 M.J. 223, 227 (C.A.A.F. 2001); United States v. Shackelford, 2 M.J. 17, 20 n.6 (C.M.A. 1976). Such a heightened test is not unheard of. *See McFadyen*, 51 M.J. at 291 (holding that for Article 13 waivers, "the judge should inquire into the circumstances of the pretrial confinement and the voluntariness of the waiver, and ensure that the accused understands the remedy to which he would be entitled"); *Edwards*, 58 M.J. at 53 (applying *McFadyen* test to a waiver of the accused's right to discuss his interrogation in his unsworn statement during sentencing).

[184] This test is borrowed, in a modified form, from the various tests applied by the federal circuit courts as to appellate waivers. *See, e.g.*, United States v. Hahn, 359 F.3d 1315, 1324–27 (10th Cir. 2004) (en banc); United States v. Andis, 333 F.3d 886, 889–92 (8th Cir. 2003) (en banc); United States v. Teeter, 257 F.3d 14, 21–26 (1st Cir. 2001). *But see* Teeter, *supra* note 23 (arguing against such tests and for a contract law-only analysis).

[185] Of course, a waiver only becomes an issue if the accused withdraws, the military judge rejects the guilty plea, or the case is overturned on appeal, after which the case goes to trial and the government attempts to use the plea-related statements. However, the military judge must ensure that he obtains the waiver of the right against self-incrimination and does a detailed colloquy in case these circumstances come to pass.

Although one could argue that if the military judge refuses to accept the PTA, the waiver provision is also invalid since it is a part of the PTA, this argument does not fare well since the government still retains its remedy for a breach of contract. *See* United States v. Scruggs, 356 F.3d 539, 544–46 (4th Cir. 2004).

[186] *See supra* Part III.D; *cf. Andis*, 333 F.3d at 890.

[187] *See* United States v. Mitchell, 63 F.3d 997, 1002 (10th Cir. 2011); United States v. Burch, 156 F.3d 1315, 1323 (D.C. Cir. 1998); *cf. Hahn*, 359 F.3d at 1325–27; *Andis*, 333 F.3d at 890–91; *Teeter*, 257 F.3d at 24; FED. R. CRIM. P. 11 advisory committee's note.

[188] *See* United States v. Cross, No. 200602310, 2007 WL 2846918, at *1–4 (N-M. Ct. Crim. App. 2007) (unpub). However, use of statements from outside the providence inquiry do not face such a high burden and can be waived. *Id.* at *5. The change to the

Second, the language of the waiver must be clear and unambiguous as to the proposed use by the government. The courts should interpret any ambiguity in favor of the accused.[189] This is a relatively straightforward proposition and exists because of the significant rights of the accused.[190] Nevertheless, courts must be wary not to use this rule as an excuse to create an ambiguity that does not exist in order to arrive at a just result.[191]

Finally, as required by case law, judges should consider whether the provision violates basic notions of fundamental fairness.[192] This broad category allows for consideration of any illegal actions or any egregious case of bargaining disparity.[193] This analysis must be specific to the facts of the particular case, and is to be used rarely.[194] For example, if the government's breach causes the accused's withdrawal, the court could void the waiver.[195] Under this part of the test, the military judge could also evaluate whether the parties freely negotiated the waiver or whether it was a mandatory provision from the government.[196] The military judge

---

providence inquiry will require modifying the trial guides to have the military judge obtain the additional waiver when discussing the waiver of the self-incrimination rights.

The military judge should be careful not to send any contradictory messages about the impact of the waiver to the accused during the colloquy. *Cf. Teeter*, 257 F.3d at 24–25. *But cf.* Untied States v. Partin, 7 M.J. 409, 412–13 (C.M.A. 1979) (holding that military judge's incorrect interpretation of PTA term and advice to accused did not bind either party or make the accused's plea improvident).

189 *See, e.g.*, United States v. Davis, 20 M.J. 903, 905 (A.C.M.R. 1985); United States v. Newbert, 504 F.3d 180, 185 (1st. Cir. 2007); United States v. Artis, 261 F. App'x 176 (11th Cir. 2008) (unpub). *But see* United States v. Krilich, 159 F.3d 1020, 1025 (7th Cir. 1998) (rejecting "argument that waivers should be construed against prosecutors" and noting that courts should give waivers "a natural reading, which leaves the parties in control through their choice of language").

190 *See, e.g.*, *Newbert*, 504 F.3d at 185 n.3; *Andis*, 333 F.3d at 890.

191 *See* Kessler, *supra* note 105, at 633 (describing disadvantages of courts "reaching 'just' decisions by construing ambiguous clauses against their author even in cases where there was no ambiguity").

192 *See supra* note 177. Several of the federal circuit courts refer to whether there would be a "miscarriage of justice." *See, e.g.*, *Hahn*, 359 F.3d at 1327; *Andis*, 333 F.3d at 891; *Teeter*, 257 F.3d at 25–26.

193 *See, e.g.*, *Hahn*, 359 F.3d at 1327; *see also* United States v. Sylvester, 583 F.3d 285, 294 (5th Cir. 2009).

194 *See* United States v. Cassity, 36 M.J. 759, 762 (N.M.C.M.R. 1992); *Andis*, 333 F.3d at 891; *Teeter*, 257 F.3d at 26; *cf.* Carlisle v. United States, 517 U.S. 416, 425–26 (1996) (district court may not use "inherent supervisory power" to correct perceived unfairness if it would "circumvent or conflict with" the existing rules).

195 *See, e.g.*, United States v. Rosa, 123 F.3d 94, 98 (2d Cir. 1997).

196 *See supra* notes 150–53 and accompanying text.

could consider the MRE 403 balancing test here.[197]

V. Conclusion

The use of waivers of MRE 410 and RCM 705(e) within the military not only complies with the Constitution and the UCMJ, but also satisfies our notions of individual freedom. Perhaps what gives the validity of such waivers their greatest strength is the sheer weight of authority that supports them. All federal circuit courts that have considered the issue have upheld a waiver in some form. Particularly, they all agree that courts should enforce a knowing, voluntary waiver of the federal Rules. There is no reason for the military to ignore this collective wisdom[198] From a practical perspective, the use of waivers in the right cases will improve both the efficiency and reliability of criminal prosecutions.

Every day, accused waive both constitutional and statutory rights. They waive their right against self-incrimination, their right to jury trials, their protections under certain evidentiary rules, and a host of other rights, in PTAs and guilty pleas. They give up these rights in order to achieve what they feel is a better result; they like what the convening authority has to offer better than the right they are giving up. If an accused feels that he is better off by not exercising a right, the military should defer to his sovereignty as an individual.[199] A fundamental part of any entitlement is the ability to trade it, and a right that cannot be traded is worth significantly less than one that can.[200] For an accused, one less bargaining tool means a potentially longer sentence.[201]

---

197 *See* MCM, *supra* note 9, MIL. R. EVID. 403.

198 *Cf. Teeter*, 257 F.3d at 23.

199 *See* MILL, *supra* note 93, at 22; Easterbrook, *supra* note 81, at 1976 ("Why is liberty too important to be left to the defendant whose life is at stake? Should we not say instead that liberty is too important to deny effect to the defendant's choice?"); King, *supra* note 93, at 131 ("Banning waiver altogether . . . resembles drafting the accused as an unwilling soldier in the fight against error in the criminal process, forcing him to assume a risk that he may have preferred to minimize through a negotiated settlement.").

200 *See* Easterbrook, *supra* note 81, at 1975 ("Rights that may be sold are more valuable than rights that must be consumed.").

201 *See* Adams v. United States *ex rel.* McCann, 317 U.S. 269, 280 (1942) ("[T]o deny [an accused] in the exercise of his free choice the right to dispense with some of [his Constitutional] safeguards . . . is to imprison a man in his privileges . . . .").