United States v. Weasler and the Bargained Waiver of Unlawful Command Influence Motions: Common Sense or Heresy?

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Make every bargain clear and plain, That none may afterward complain.[1]

Introduction

The centuries old advice in this quote captures perfectly the essence of bargaining. Indeed, it deftly reinforces the message with the thrift and precision of its words. However, even in a society as *legocentric*[2] as America, few people would equate the legal process involved in haggling over Mr. Ray's family cow in seventeenth century England with the legal process by which the vast majority of people who are guilty of crime end up in jail. Yet, those who are in frequent contact with the criminal justice system know that the bargain analogy is perfectly apt. Much like the buyer and seller of a cow, participants in the criminal justice system conduct their discourse through negotiation and compromise. Certainly, the bargains are distinguishable by the object of the exchange; no one would seriously equate the moral importance of trading money and a cow in the first instance with trading constitutional rights and liberty in the second. Nevertheless, the basic bargaining construct describes these two situations equally well.

Two commentators on the issue of bargaining in the criminal justice context have observed that "[plea bargaining] is not some adjunct to the criminal justice system; it is the criminal justice system."[3] Their assertion, based on analysis of both state and federal criminal justice systems,[4] holds true for the military criminal justice system as well.[5] Acknowledging the reality of a system dominated by plea bargaining does little, however, to describe the practice. How does plea bargaining work? Who are the players in the process? Why do pretrial agreements exist in the first place? What are the rules of the bargaining process? It is easy to imagine a dozen or more similarly relevant questions.[6]

This article focuses on the decision of the United States Court of Appeals for the Armed Forces (CAAF) in *United States v. Weasler*[7] to narrow the examination of military plea bargaining. *Weasler* is a useful vehicle to examine the basic premise underlying military plea bargaining—guilty pleas ben-

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1. John Ray, *English Proverb* (1670), *in* A New Dictionary of Quotations 83 (H.L. Mencken ed., 1942).

2. *See* The American Heritage Dictionary of the English Language 417 (William Morris ed., 1980) (legocentric is a mutation of the word "egocentric").

3. Robert E. Scott & William J Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992). Dean of the University of Virginia School of Law, Scott is a contract law expert who has written extensively on contracting from a law and economics perspective. Stuntz is a member of the Virginia Law Faculty, specializing in criminal law. The two make a compelling case for recognition of plea bargaining as contract and not, as most critics of plea bargaining insist, a process whose root and regulation are found in the Constitution. *Compare* Scott & Stuntz, *supra*, *with* Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 Yale L.J. 1979 (1992) *and* Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 Yale L.J. 1969 (1992).

4. Scott & Stuntz, *supra* note 3, at 1909 n.1, *citing* U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics 502 tbl. 5.25 (Kathleen Maguire & Timothy J. Flanagan eds., 1990) (where figures from 1988 and 1989 reflect disposition of cases through plea bargaining ranging between 86% in the federal system to 91% in state systems).

5. *See* Clerk of Court Notes, *Courts-Martial and Nonjudicial Punishment Rates*, Army Law., Jan. 1996, at 93. In fiscal year 1995, 58.1% of general courts-martial and 55.6% of bad-conduct discharge special courts-martial were disposed through guilty pleas. Although these numbers certainly include cases where the accused pleaded guilty without the benefit of a pretrial agreement, experience indicates that the majority of guilty pleas result from the plea bargaining process. Statistically, military practice relies less on plea bargaining than the civilian justice system does. The military, however, disposes of better than half of all courts-martial through pretrial agreements, making the practice a key component of the military system.

6. As this article's focus is to examine narrowly the resilience of military plea bargaining when that practice comes into conflict with unlawful command influence, this article does not address much of the modern debate surrounding the efficacy of plea bargaining as a practice. However fervent that debate may be, this article assumes that plea bargaining will remain a viable and dominant aspect of military practice. Because the military criminal justice system affords an accused tremendous procedural protection before a guilty plea is accepted, this article is not concerned with the prospect of innocent soldiers going to jail pursuant to a guilty plea. *See* Peter J. McGovern, *Guilty Plea—Military Version*, 31 Fed. Bar J. 88, 98 (1972) ("Few courts go so far to insure the protection of the rights of the accused and his full understanding of those rights before his guilty plea is accepted . . . . Perhaps the 'Guilty Plea' procedure of the military justice practice with its forthright pretrial agreements could be universally adopted into the civilian criminal process."). However, the debate in the civilian sector is primarily concerned with the possibility of the innocent pleading guilty, and many who practice in or study the criminal justice system have voiced their concerns. *See* John H. Langbein, *Torture and Plea Bargaining*, 46 U. Chi. L. Rev. 3 (1978); Kenneth Kipnis, *Criminal Justice and the Negotiated Plea*, 86 Ethics 93 (1976); Conrad G. Brunk, *The Problem of Voluntariness and Coercion in the Negotiated Plea*, 13 L. & Soc'y Rev. 527 (1979); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 Harv. L. Rev. 1037 (1984).

7. 43 M.J. 15 (1995). On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994) changed the names of the United States Court of Military Appeals (COMA) to the United States Court of Appeals for the Armed Forces (CAAF). The same act changed the names of the Courts of Military Review to the Courts of Criminal Appeals. This article will use the name of the court in existence at the time the decision was rendered.

efit both the accused and the government—because it tests that proposition against one of the great bogeymen of military criminal justice, unlawful command influence.[8] If the true measure of a person, institution, or idea is found by testing it against adversity, a true measure of plea bargaining is found in its response when challenged by unlawful command influence issues. *Weasler* highlights the tension between the benefit that parties can derive through artful use of plea bargaining and the potential harm to the military justice system when unlawful command influence is contractually waived.

This article will selectively track the development of both plea bargaining and unlawful command influence to the point of their most recent and significant convergence in *Weasler.*[9] Plea bargaining and unlawful command influence will be *selectively* tracked because both subjects encompass vast areas of regulatory, statutory, and case law not relevant to explaining the tension created when the two are in conflict. Therefore, Part I of this article examines the precedent for pretrial agreements in the military. It will explore the goals and the mechanics of the process as the practice grew in the military. Understanding the goals of the bargaining process not only illuminates the *Weasler* majority opinion, but also provides critical context that both anchors and explains the stridency of the concurring opinions from Chief Judge Sullivan and Judge Wiss. Similarly, examination of the mechanics of the military plea bargain help to explain why it was so important to the *Weasler* majority that the *accused* suggested waiver of unlawful command influence motions. Part I concludes by examining the boundaries of plea bargaining through a survey of case law that provides an evolutionary analysis of pretrial agreement terms that are permissible and those that are impermissible.

Considering next the unlawful command influence component of *Weasler*, Part II examines aspects of unlawful command influence jurisprudence as it impacts pretrial agreements. Because understanding the statutory basis of the jurisprudence informs the development of the case law, Article 37 of the Uniform Code of Military Justice (UCMJ) is considered. Judicial amplification of the Article 37 mandate created the conditions necessary for the tension found in *Weasler's* approach to balancing the benefit derived from plea bargains against the potential harm that unlawful command influence waiver portends for the military justice system. Therefore, a survey of relevant unlawful command influence cases since the mid-1980s illuminates the ultimate issue. Part II concludes by focusing on the cases that were precursors, either directly or by analogy, for *Weasler's* consideration of whether unlawful command influence can ever be appropriately bargained away in a pretrial agreement.

Part III establishes the facts of *Weasler* and explores the majority and concurring opinions, revealing the fullness of the court's disagreement over unlawful command influence waiver as a term in a pretrial agreement. The article ends by assessing pretrial agreement and unlawful command influence jurisprudence in light of *Weasler*.

I. Pretrial Agreements in the Military

Pretrial agreements are relatively new to the military justice system.[10] The practice did not receive official sanction and widespread use until nearly a decade after World War II.[11] Even though the military has allowed an accused to plead guilty to charges for well over a century, its willingness to confer some benefit on the accused in exchange for that guilty plea is a relatively new practice.[12] Predictably, the experience of World War II, during which the flaws, excesses, and abuses of the military justice system were exposed to the general public, prompted a dramatic overhaul of the entire system.[13] Both the Congress and the President undertook a comprehensive review of the military justice system, resulting in enactment of the UCMJ in 1950 and the *Manual for Courts-Martial (Manual)* in 1951, which implemented the UCMJ.[14] One of the beneficiaries of that overhaul was the accused, who had an opportunity

8. It is beyond the scope of this article to trace the evolution of unlawful command influence from its origins to the present. This article assumes general conversance in the historical development of unlawful command influence jurisprudence and will thus deal mainly with unlawful command influence developments in the 10-15 years prior to *Weasler. See* Martha Huntley Bower, *Unlawful Command Influence: Preserving the Delicate Balance*, 28 A.F. L. REV. 65 (1988). *See also* UCMJ art. 37 (1988) (stating that it is unlawful to influence the action of a court-martial); *id.* art. 98 (punitive article allowing punishment for violation of UCMJ art. 37 by anyone who "knowingly and intentionally" engages in unlawful command influence); United States v. Treakle, 18 M.J. 646 (A.C.M.R. 1984) (first of the 3d Armored Division cases to comprehensively address widespread command influence within a unit); United States v. Cruz, 20 M.J. 873 (A.C.M.R. 1985) (1st Armored Division case that traces the statutory as well as the judicial development of unlawful command influence from the post-WWII congressional hearings onward), *rev'd in part on other grounds*, 25 M.J. 326 (C.M.A. 1987); United States v. Thomas, 22 M.J. 388 (C.M.A. 1986) (further refinement of the *Treakle* and *Cruz* approach to unlawful command influence).

9. As will be discussed in some detail in Part II, the courts have dealt with bargaining away unlawful command influence issues prior to *Weasler. See* United States v. Corriere, 20 M.J. 905 (A.C.M.R. 1985) (holding that an agreement requiring the accused to withdraw a motion asserting unlawful command influence would be void as against public policy); United States v. Kitts, 23 M.J. 105 (C.M.A. 1986) (condemning the coercion of an accused into withdrawing an issue of unlawful command control in order to obtain a pretrial agreement).

10. *See* United States v. Cummings, 38 C.M.R. 174, 175 (C.M.A. 1968) ("[Pretrial agreements] have been employed in military trials since 1953, and this court has approved of their use, though not without reservation."). Though formally used since 1953, it is not difficult to imagine the informal use of such agreements before this time. Informal agreements persisted even after 1953, although not without the court's condemnation. *See* United States v. Peterson, 24 C.M.R. 51 (C.M.A. 1957) (accused pleaded guilty with the *understanding* that the convening authority would not pursue other charges, although the understanding was never reduced to writing).

11. *See* Bower, *supra* note 8, at 67 (citing *History of the Judge Advocate General's Corps, United States Army,* THE JUDGE ADVOC. J., 4 July 1976, at 22) ("With over 2,000,000 courts-martial convened during that wartime period, one in eight servicemen was exposed to [the] criminal code . . . .").

to bargain with the government for his guilty plea beginning in 1953.[15] Not surprisingly, the pretrial agreement practice, once established, gained widespread use in the military.[16] The reasons for this eager acceptance were quite simple—both the accused and the government benefited from the bargaining process.

Goal of the Plea Bargaining System: Everyone Benefits

In 1953, The Acting Judge Advocate General of the Army addressed the efficacy of pretrial agreements.[17] In a letter to Army staff judge advocates, Major General Shaw articulated what stand today as the most prominent, and at times incompatible,[18] themes of the pretrial agreement regime. In his letter, Major General Shaw advocated use of pretrial agreements to "encourage speedier disposition of cases and to encourage defense counsel to obtain better results for their clients in hopeless cases."[19] He also cautioned judicious use of pretrial agreements, noting that "it would be better to free an offender completely, however guilty he might be, than to tolerate anything smacking of bad faith on the part of the government."[20] In that letter, Major General Shaw posited the rationale for viewing a pretrial agreement as beneficial to both the government *and* the accused. Its use as a practical tool of expedience and certainty would benefit both parties to the bargain.[21] He cautioned, however, that its use must always preserve the integrity of the criminal system by ensuring that justice is done.

Justice

The first purpose of military law is to promote justice.[22] In criminal law, justice for an accused means assurance of a fair trial.[23] Therefore, a pretrial agreement serves the ends of justice only to the extent that it guarantees the accused a fair trial.

12. *See* Terry L. Elling, *Guilty Plea Inquiries: Do We Care Too Much?*, 134 MIL. L. REV. 195, 198 (1991). Common sense suggests that soldiers have been pleading guilty to charges as long as there have been military tribunals. However, Elling's point of reference is the modern era of military justice in which manuals, rules, and precedent guide a tribunal in the proper receipt of a guilty plea. *See generally* W. WINTHROP, MILITARY LAW AND PRECEDENTS 270 (2d rev. ed., 1920); MANUAL FOR COURTS-MARTIAL, UNITED STATES, para. 154a (1921); MANUAL FOR COURTS-MARTIAL, UNITED STATES, para. 70 (1928).

13. *See* Arnold A. Vickery, *The Providency of Guilty Pleas: Does the Military Really Care?*, 58 MIL. L. REV. 209, 231 (1972). In overhauling the military justice system, Congress relied on input from both within and without the military. Many civilian lawyers, both practicing attorneys and law school professors, were called on to help shape the new system. One such group of civilian attorneys, known as the Keefe Board, profoundly impacted the procedures military courts would later use in determining the providency of guilty pleas and the validity of the pretrial agreements that prompted those pleas. *Id. See generally* W. GENEROUS, SWORDS AND SCALES 14-34 (1973) (chronicling the attacks on the military criminal justice system prior to the adoption of the UCMJ).

14. *See* Bower, *supra* note 8, at 68-69.

15. The ability to bargain resulted from an affirmative policy decision by the Army Judge Advocate General's Corps leadership to encourage the practice. Nowhere in the new code was there a provision for pretrial agreements, and there was no other statutory or regulatory authorization for the practice. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 705 analysis, app. 21, at A21-38 (1995) [hereinafter MCM].

16. *See* Charles W. Bethany Jr., The Guilty Plea Program 4-7 (April 1959) (unpublished Advanced Course thesis, The Judge Advocate General's School) (on file in The Judge Advocate General's School Library, Charlottesville, Virginia).

17. *See* 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 12-10.00, 454 & n.2 (1991) (citing 1 CRIMINAL LAW MATERIALS 10-2 (The Judge Advocate General's School, U.S. Army, May, 1981)). Major General Shaw's support for plea bargaining was based on the benefit he saw in the federal court system. In 1950, over 94% of all convictions in federal district courts resulted from guilty pleas. In 1951, out of 34,788 convictions, 32,734 resulted from guilty pleas. By contrast, in the military, which did not sanction plea bargaining prior to 1953, only about one percent of all military convictions resulted from guilty pleas. *See* Bethany, *supra* note 16, at 4-5.

18. Few would disagree that the goals of justice, certainty, and expedience continue to motivate the criminal practice in the area of pretrial agreements, just as those goals justified the practice in the beginning. However, *Weasler* demonstrates that not everyone believes that the goals can coexist. Clearly, Chief Judge Sullivan and Judge Wiss believe that in cases where unlawful command influence is injected into the mix, justice suffers for the sake of certainty and expedience.

19. *See* GILLIGAN & LEDERER, *supra* note 17, § 12-10.00, at 454.

20. *See* Bethany, *supra* note 16, at 6 n.13 (citation omitted).

21. Above all else, a guilty accused wants the certainty of knowing his maximum sentence. It matters little whether the proceeding saves time or not, or whether the trial comports strictly with all of the rules that guarantee a just proceeding; more than anything, the accused wants the certainty of knowing the maximum number of days, months, and years he will spend in jail. The government also seeks the certainty that pretrial agreements offer. Certainty of a conviction is the ultimate benefit to the government. Even critics who claim that the plea bargaining system is unjust agree that certainty benefits both sides. *See generally* Scott & Stuntz, *supra* note 3, at 1913-17. As the military courts have focused primarily on ensuring that justice is not sacrificed for the sake of expediency in the guilty plea process, so too will this article focus on this justice/expedience interplay. Although acknowledging the motivating force of certainty for both sides, this article will not further explore that aspect of the process.

22. *See* MCM, *supra* note 15, pt. I.

Complicating the issue is the requirement that the trial be fair from both the subjective perspective of the defense and prosecution and the objective perspective of the criminal justice system, as articulated by military trial and appellate courts. Early in the military practice of plea bargaining, military appellate courts served notice that, regardless of what the parties thought fair, appellate judges would scrutinize pretrial agreements. The United States Court of Military Appeals (COMA) set the tone for judicial review by declaring that the courts would not let pretrial agreements "transform the trial into an empty ritual."[24] Appellate judges would consider unjust any agreement that interfered with the traditional function of the trial.

Although there are a number of incentives that might prompt an accused to enter into an agreement with the convening authority,[25] the accused is ultimately bargaining for one thing—the likelihood that his maximum sentence specified in the pretrial agreement will be lower than the sentence he would receive in a contested trial.[26] Early on, the appellate courts recognized that the chief motivation of the accused when negotiating a pretrial agreement is sentence limitation.[27] However, in *United States v. Cummings*,[28] the COMA condemned the propensity of pretrial agreements to cause an accused to enter a legally insufficient plea.[29] To obtain what he felt was a favorable sentence limitation, Private Cummings affirmatively waived any issues contesting his right to both a speedy trial[30] and due process.[31] Although the COMA was satisfied of his factual guilt, the waiver provision of the agreement rendered the plea improvident.[32] Declaring the waiver of such issues "contrary to public policy and void,"[33] the COMA relied on several earlier decisions that disapproved of waiver provisions in pretrial agreements.[34] Concluding that the only appropriate matters open to bargaining were charging decisions and sentence limitation, the COMA rejected inclusion of waiver provisions that imperiled fundamental rights.[35]

In *United States v. Holland*,[36] the COMA found unacceptable a pretrial agreement that contained a provision which required the accused to enter his plea of guilty prior to raising any other motions. By forgoing his opportunity to raise motions prior to pleading guilty, the accused secured a sentence limitation of ten months confinement.[37] The accused pleaded guilty, was sentenced to twenty months confinement, and the convening authority reduced the sentence to the agreed upon ten months.[38] The COMA reversed, relying on *Cummings* and the concept that certain terms of a pretrial agreement could ren-

23. *See* U.S. CONST. amends. V, VI.

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

25. *See* MCM, *supra* note 15, R.C.M. 705(b)(2). The convening authority may agree to "[r]efer the charges to a certain type of court-martial; [r]efer a capital offense as non-capital; [w]ithdraw one or more charges or specifications from the court-martial; [h]ave the trial counsel present no evidence as to one or more specifications . . . and [t]ake specified action on the sentence adjudged by the court-martial." *Id.*

26. *See id.* All of the concessions that a convening authority might make ultimately affect the maximum sentence that an accused can receive. For example, an agreement by the convening authority to refer a case to a special court-martial empowered to adjudge a bad-conduct discharge automatically limits the accused's possible sentence to the jurisdictional limit of that level court, which is six months confinement, forfeiture of two-thirds pay for a maximum of six months, reduction to the lowest enlisted grade, and a bad-conduct discharge. *See id.* R.C.M. 201(f)(2).

27. *See* United States v. Holland, 1 M.J. 58, 59 (C.M.A. 1975) ("[T]here are certainly benefits which accrue to an accused from a bargain ensuring a fixed maximum sentence.").

28. 38 C.M.R. 174 (C.M.A.1968).

29. *Id.* at 175 (citing United States v. Chancellor, 36 C.M.R. 453 (C.M.A. 1966); United States v. Drake, 35 C.M.R. 347 (C.M.A. 1965)) (condemning situations where the insufficiency of the law officer's providence inquiry lead to improvident pleas by accuseds who were intent on securing their sentence limitation)).

30. *See* U.S. CONST. amend. VI; UCMJ art. 10 (1988).

31. *Cummings*, 38 C.M.R. at 176 (noting that untimely forwarding of charges when Private Cummings was confined awaiting disposition of his charges raised potential violation of Private Cummings' right to due process).

32. *Id.* at 177 (citing United States v. Banner, 22 C.M.R. 510 (C.M.A. 1956)).

33. *Id.*

34. *Id.* (citing *Banner*, 22 C.M.R. at 519) ("[N]either law nor policy could condone the imposition by a convening authority of [waiver of issues concerning personal jurisdiction] in return for a commitment as to the maximum sentence which would be approved."); United States v. Callahan, 22 C.M.R. 443, 448 (A.B.R. 1956) (holding that a term in a pretrial agreement in which the accused forfeits his right to offer evidence in extenuation and mitigation during the presentencing phase of the trial is "an unwarranted and illegal deprivation of the accused's right to military due process.")).

35. *Cummings*, 38 C.M.R. at 176.

36. 1 M.J. 58, 59 (C.M.A. 1975).

37. *Id.* at 59.

der the entire bargain null and void. The COMA noted that even when the offending term originates with the accused,[39] if its effect is to render the trial unfair, the agreement is void.[40]

Both *Cummings* and *Holland* echoed the "trial as an empty ritual" theme identified in *Allen* as the chief evil to be guarded against any time a pretrial agreement is the subject of appellate review.[41] The clear message of these early decisions is that justice requires a trial unfettered by restriction of due process or waiver of fundamental rights.[42] The courts were not concerned that the accused concurred in, or even proposed, the offending term. Furthermore, the courts found it immaterial that the accused received significant benefit from his pretrial agreement in terms of sentence limitation.[43] Faced with validating the justness of the plea bargaining process, the highest military court defined justice not in terms of the accused's ability to limit his potential sentence—which is the measure of justness the accused cares most about—but instead by how the pretrial agreement altered the traditional processes of courts-martial. Because the COMA found that "efficiency and expedition" of cases was antithetical to a just proceeding, it declared that it would scrutinize pretrial agreement terms designed to further expedience.[44]

Expedience

The government's interest in expedience must be considered in the proper context. Conditions which made expedience desirable in 1953 may or may not persist in 1998.[45] Nevertheless, since the military first started using pretrial agreements, savings in the time it takes to try an accused have been a significant benefit to the government.[46] As a goal of the system, however, saving time is valid only if the time saved is better used elsewhere. Therefore, it is crucial to determine how participants in the criminal justice process use the time saved.

The major participants in the military justice system are: military attorneys, judges, and the chain of command. Unlike the civilian judiciary, law enforcement agencies, and criminal trial bar, whose *raison d'être* is the operation of the criminal justice system, many of the key players in the military criminal justice system (like the chain of command) are simultaneously employed in other aspects of military life. Thus, time saved in administering the military justice system translates into more time available for other duties.

The primary mission of trial counsel, defense counsel, and judges in the military, much like their civilian counterparts, is the operation of the criminal justice system.[47] That system, like its civilian analogue, depends on efficient disposition of criminal cases to be effective. Pretrial agreements are a means of promoting efficient disposition of cases. When a pretrial agree-

38. *Id.* at 58.

39. *Id*. at 59. *But see* United States v. Schmeltz, 1 M.J. 8 (C.M.A. 1975) (holding that the accused's proposal of a pretrial agreement which called for trial by military judge alone was a valid condition because the idea originated with the accused).

40. *Holland*, 1 M.J. at 60 ("Being contrary to the demands inherent in a fair trial, this restrictive clause renders the agreement null and void.").

41. *See id*. at 59; United States v. Cummings, 38 C.M.R. 174, 177 (C.M.A. 1968).

42. *But see Cummings*, 38 C.M.R. at 179 (Quinn, C.J., dissenting) (citation omitted). In his dissent, Chief Judge Quinn identifies inconsistency in the court's approach to waiver of fundamental rights by citing the court's denial of review in *Dudley*, where the COMA let stand a law officer's determination at trial that in the making his plea of guilty, Dudley had waived any speedy trial issues. *Id*.

43. *But see id*. (Quinn, C. J., dissenting) (stating that "[the] majority opinion disadvantages the accused by depriving him of the benefit of the relatively modest sentence provided for in a pretrial agreement.").

44. *See Holland*, 1 M.J. at 59.

45. Today's widespread use of administrative separations has enabled the military to separate soldiers from the service without the need for a trial. Unlike the time of Major General Shaw, where a court-martial was the primary means to punish and to separate soldiers for misconduct, commanders now use nonjudicial punishment and administrative separation to rid the unit of all but the most egregious criminals. *See* UCMJ art. 15 (1988); U.S. DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATIONS: ENLISTED PERSONNEL (17 Sept. 1990); *see also* 10 U.S.C. § 1181(b) (1994) (authorizing the administrative separation of officers for misconduct, moral or professional dereliction, or in the interests of national security). The routine cases of ill discipline that clogged courts-martial dockets in the 1950s, creating a real need for the expedience of pretrial agreements, are not common in 1998. As courts-martial dockets have been generally freed from the glut of routine cases through the use of administrative separations, more complex and serious cases have filled the dockets. Both the decrease in routine cases and the increase in more serious and complex cases may argue for a *decrease* in the use of pretrial agreements, if the goal of their use is simply to save time. The justice system is no longer required to process a large volume of simple drug use or absence without leave (AWOL) cases in which the issue of guilt is not really in question. When those cases were prevalent, the system could afford bargaining to save time with confidence that justice did not suffer for the sake of expedience. Fewer such cases today makes less compelling the need to risk justice for expedience. Similarly, because cases today generally involve complex legal issues and may result in significant confinement for an accused, the credibility of the criminal justice system might increasingly depend on litigating all issues in a contested trial. Notwithstanding an accused's compelling interest in bargaining to limit his sentence, the government might consider reining in the use of pretrial agreements, if only to preserve the integrity of the military justice system in the eyes of the public.

46. *But see* Elling, *supra* note 12, at 195 ("After investigating a case, consulting with the client, negotiating a pretrial agreement, and preparing the client for the providence inquiry, the military defense counsel probably would dispute whether military guilty plea practice actually results in any savings in time and energy. Trial counsel or military judges may have similar misgivings . . . .").

ment results in counsel and the military judge spending a fraction of the time that they would have otherwise spent had the case been fully contested, time is made available for quicker resolution of the next case.[48] Thus, pretrial agreements benefit the principal operators of the criminal justice system by allowing them more time to process more cases.[49] Assuming there are indeed more cases to try, a real benefit results from the time saved by pretrial agreements.[50] Even as counsel and military judges benefit from this process, expedience serves the chain of command to an even greater and more important degree.

The preamble to the *Manual* states that "[t]he purpose of military law is . . . to assist in maintaining good order and discipline in the armed forces, [and] to promote efficiency and effectiveness in the military establishment . . . ."[51] The military chain of command is ultimately responsible for ensuring that the purpose of military law is achieved.[52] The responsibilities of the accused's commander only begin with the preferral, forwarding, and referral of charges. Huge investments in time and energy are made by the officers and noncommissioned officers (NCOs) in a unit whenever one of their soldiers is charged and ultimately tried by court-martial. Serving as court-martial panel members[53] or investigating officers,[54] officers and NCOs outside of the unit also invest significant time and energy in the administration of military law.

Pretrial agreements help leaders to maintain good order and discipline within their units because such agreements expedite the trial process and thereby remove problem soldiers from their units sooner rather than later. A soldier who faces court-martial disrupts the normal conduct of business in a unit, affecting everything from training to morale. Thus, the plea agreement process enables leaders to fulfill one of their primary functions under military law, promotion of good order and discipline. Pretrial agreements also enhance the "efficiency and effectiveness of the military establishment . . . ."[55] Time leaders spend administering military law is time away from their primary duties of leading and training soldiers, sailors, airmen, and marines. Any mechanism that allows leaders more time to fulfill their war-fighting mission can only make them more efficient and effective in their primary role, and thus enhance combat readiness.

The goal of expediting cases appears to serve a legitimate end because the benefactors of the process (attorneys, judges, and particularly unit leaders) can put the time saved to better use than if every case resulted in a contested trial. Nevertheless, if that expedience were obtained at the price of a just proceeding, the military criminal justice system would be subject to ridicule. The *Cummings* majority and dissent framed the limits of the debate concerning the justice/expedience tension inherent in the plea bargaining process and foreshadowed the course the debate would follow over the quarter century leading to *Weasler*.[56] However, the mechanics of the plea bargaining process also evolved as the military practice grew, particularly in the years between C*ummings* and *Weasler*. Thus, a basic understanding of how parties enter into pretrial agreements and

47. *See* UCMJ art. 6 (1988).

48. Assuming a typical scenario resulting from a pretrial agreement (e.g., judge alone trial with a limited case in aggravation and a defense waiver of distant witnesses), the greatest beneficiary of the pretrial agreement, in terms of time saved, is the trial counsel. The trial counsel is responsible not only for marshaling the physical evidence and witnesses necessary to prove the charged offenses, but also for: (1) ensuring the attendance of all defense witnesses; (2) logistical support for all witnesses, government and defense; (3) ensuring that the court-martial panel is notified and on time at the appointed place of duty; (4) securing escorts and a bailiff; (5) setting up the court room; and (6) keeping the chain of command informed of the trial's progress. The trial counsel is able to eliminate or to reduce significantly these additional duties when the accused enters into a pretrial agreement. The military judge is second in time saved, as he often will be able to conduct a judge alone guilty plea in four to eight hours, whereas the contested case plus motions hearings and time spent authenticating the record of trial could take days to complete. Defense counsel derives the least benefit from a pretrial agreement, as he faces the considerable task of preparing the accused for the providence inquiry and a case in extenuation and mitigation on sentencing. Of course, defense counsel's client is the ultimate beneficiary in time saved, a period generally measured in months and years. These observations are based on the author's personal experience as both a trial counsel and senior trial counsel over a 28-month period.

49. *But see* Clerk of Court Notes, *supra* note 5, at 93. The total number of general courts-martial declined each year between 1990 and 1995, from a high of 1451 trials in 1990 to only 825 trials in 1995. A similar trend in bad-conduct discharge special courts-martial resulted in a drop from 772 cases in 1990 to 333 in 1995.

50. *Id.* This may not *currently* be a valid assumption, considering the decline in courts-martial rates during the 1990s. However, the criminal justice system must remain flexible enough to handle increased case loads during a build-up and must operate efficiently whether during war time or peace. *See also supra* note 45 and accompanying text.

51. *See* MCM, *supra* note 15, pt. I.

52. *Id.*

53. *See id.* R.C.M. 911, 912.

54. *See id.* R.C.M. 405.

55. *See id.* pt. I.3.

56. *See* United States v. Cummings, 38 C.M.R. 174, 179 (C.M.A. 1968). Chief Judge Quinn was the lone dissenter in *Cummings* but would have found himself comfortably in the majority when *Weasler* was decided. Chief Judge Quinn's interpretation of the law pertaining to permissible pretrial agreement terms tracks the modern orientation of the court and its solicitude for the accused's efforts to limit his sentence.

how that process has changed over time assists in evaluating the continued vitality of plea bargaining practice in the military.

Mechanics of the Plea Bargaining Process

When he first encouraged his subordinates to incorporate plea bargaining into their trial practice, Major General Shaw offered little guidance as to how they should accomplish the mission.[57] Besides stating that offers to plead guilty must originate with the accused[58] and that the rights of the accused would be zealously protected in whatever system was devised,[59] the Army leadership provided little procedural guidance. Senior leaders believed that staff judge advocates, working in conjunction with their convening authorities, could best devise a bargaining system which was responsive to the needs of the command.[60] This ad hoc approach to plea bargaining in the mid-1950s resulted in a remarkable change in courts-martial practice. From its one percent rate of guilty pleas prior to 1953, the Army reported that sixty percent of all convictions resulted from guilty pleas in Fiscal Year 1956.[61]

Although plea bargaining was conducted on an ad hoc basis initially, several threads of consistency wove through the system as it developed.[62] First, the convening authority became the sole authority able to bind the government to a pretrial agreement with an accused.[63] Second, by 1957, both the Army and the Navy[64] issued formal instructions which mandated that plea bargaining must originate with the accused and that any offer to negotiate a guilty plea should be in writing and signed by the accused.[65] Even as the earliest regimes recognized that only the convening authority and the accused could perfect the agreement, negotiation over terms and conditions of a plea bargain became the responsibility of the trial[66] and defense counsel.[67] In the early days of plea bargaining, the staff judge advocate served as the first-line check against excesses in the negotiation process. The staff judge advocate's responsibilities included ensuring that sufficient evidence supported the plea, that the proposed sentence was appropriate for the crime, that charging decisions did not unduly pressure the accused into proposing a deal, and that the agreement did not repress the rights of the accused.[68] The staff judge advocate was responsible for ensuring that the agreement was just, both in the sense of appropriately punishing the accused as well as guaranteeing the credibility of the criminal justice system.

The military appellate courts also played a significant role in establishing the mechanics of the plea bargaining process. They put their judicial imprimatur on the requirements that the accused initiate the bargaining process,[69] that trial and defense counsel should only negotiate over charging decisions and sentence limitations,[70] and that the agreement must be in writing.[71] Although the UCMJ provided no specific guidance, the courts relied on Article 45 to impose restrictions on the parties as they developed the practice of pretrial agreements.[72] In *United States v. Care*,[73] the COMA articulated a model providence

57. *See* Bethany, *supra* note 16, at 5.

58. *Id.*

59. *Id.* at 6.

60. *Id.* (citing Report of Proceedings, Army Judge Advocate's Conference 84 (Sept. 1954)).

61. *Id.* at 7 (citing Report of Proceedings, Army Judge Advocate's Conference 226-27 (1956)). Bethany points out that the one-percent figure represented those cases that were disposed of entirely by a guilty plea. The figure grew to nearly ten percent in mixed pleas or cases when the trial counsel opted to prove the greater charged offense. He was also careful not to attribute the entire increase in the years immediately following Shaw's letter to the use of pretrial agreements. Bethany nevertheless notes that the dramatic increase resulted from a systemic awareness of the predictability that plea bargaining injected into the courts-martial process. *Id.*

62. *See* United States v. Cummings, 38 C.M.R. 174, 178 (C.M.A. 1968) (condemning an agreement which forbade resolution of collateral issues as contrary to the accepted practice of only bargaining for charging decisions and sentence limitation). The COMA noted that "[i]t appears the type of agreement here involved is limited to the jurisdiction whence it came and is contrary to that contemplated for use by the Department of the Navy." *Id.*

63. *See* Kenneth D. Gray, *Negotiated Pleas in the Military*, 37 FED. BAR J. 49, 50 n.6 (1978) (UCMJ arts. 22-24 grant convening authorities certain judicial authority that make participation in the pretrial agreement process a natural adjunct to other statutory responsibilities).

64. *See id.* at 49 n.4 (the Air Force did not allow plea bargaining in any form until 23 January 1975, and when it initially did allow the practice, approval of The Judge Advocate General was needed on a case-by-case basis).

65. *See* Bethany, *supra* note 16, at 27 n.82. *See also* United States v. Villa, 42 C.M.R. 166 (C.M.A. 1970) (recognizing pretrial agreements in the Coast Guard for the first time).

66. *See* Bethany, *supra* note 16, at 32 (trial counsel appraises the evidence, the likelihood of conviction, and the probable sentence and then recommends to the staff judge advocate whether or not the convening authority should agree to the offer to plead guilty).

67. *Id.* at 26 (defense counsel negotiates always on behalf of his client, who has the final say in all matters regarding a pretrial agreement).

68. *Id.* at 35.

69. *See* United States v. Allen, 25 C.M.R. 8, 11 (C.M.A. 1957) (holding that only an accused could propose a pretrial agreement).

inquiry and established a requirement that all trial judges adhere to that inquiry as a means of ensuring that the accused was knowingly, voluntarily, and intelligently agreeing to the terms of the pretrial agreement.[74] During the first thirty years of plea bargaining practice in the military, The Judge Advocates General of the respective services[75] and the trial courts[76] created the rules and procedures.

The mechanics of the plea bargaining system remained largely unchanged from the time pretrial agreements were first negotiated in the 1950s until *Weasler*. However, several significant changes to the practice occurred in the 1980s and 1990s. The first important change coincided with the first major revision of the *Manual* since 1969.[77] The 1984 *Manual*[78] was the first to consolidate all of the service policies and case law pertaining to pretrial agreements and to codify the materials as a Rule for Courts-Martial (R.C.M.).[79] Rule for Courts-Martial 705 did not necessarily change the way parties plea bargained as much as it systematized the practice.[80] The new R.C.M. added predictability to the plea bargaining process by specifying both the procedures that the parties would follow and the kinds of pretrial agreement terms that the COMA found acceptable or objectionable.[81]

The second significant change to the plea bargaining process occurred when the 1991 amendments to the *Manual* included a change to R.C.M. 705.[82] The new language in R.C.M. 705(d) reflected a complete abandonment of the requirement that the accused initiate plea negotiations. According to the amended rule, "[p]retrial agreement negotiations [could] be initiated by the accused, defense counsel, trial counsel, the staff judge advocate, [the] convening authority, or their duly authorized representatives."[83] Not only did the change bring military practice in line with civilian practice on this point,[84] it also demonstrated a fundamental shift in emphasis from the agreement's form to its substance. The change was possibly prompted by Judge Cox's concurrence in *United States v. Jones*,[85] in which he advocated abandonment of the requirement that only the accused could initiate negotiations or propose terms for a pretrial agreement.[86] After this change, the COMA was much less concerned with tracing the agreement's origin than it was with ensuring that the record established that the accused completely understood the terms of his agreement.[87] However, as *Weasler* demonstrates, the CAAF will scrutinize who proposes a term for inclusion in an agreement if that term or condition suggests bad faith on the part of the government.[88]

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70. *See, e.g.*, United States v. Banner, 22 C.M.R. 510 (A.B.R. 1956); United States v. Darring, 26 C.M.R. 431 (C.M.A. 1958); United States v. Scoles, 33 C.M.R. 226 (C.M.A. 1963).

71. *See, e.g.*, United States v. Stevens, 51 C.M.R. 765 (A.C.M.R. 1975).

72. UCMJ art. 45 (1988). The judges at the appellate level viewed subsection (a) as their mandate to police plea bargaining procedures. It states:

> [i]f an accused, after arraignment, makes an irregular pleading, or after a plea of guilty sets up matters inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.

73. 40 C.M.R. 247 (C.M.A. 1969).

74. *Id.* at 248.

75. *See generally* MCM, *supra* note 15, R.C.M. 705 analysis, app. 21, at A21-38(a) (citations omitted). *See also* Joseph P. Della Maria Jr., *Negotiating and Drafting the Pretrial Agreement*, 25 JAG J. 117 (1971).

76. *But cf.* United States v. Villa, 42 C.M.R. 166, 172 (C.M.A. 1970) (Ferguson, J., dissenting) (indicating that at least one of the three members of the COMA viewed pretrial agreements as more trouble than they were worth; noting with approval the Air Force practice of not allowing bargained pleas).

77. MANUAL FOR COURTS-MARTIAL, UNITED STATES (rev. ed. 1969) [hereinafter 1969 MANUAL].

78. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1984).

79. *Id.* R.C.M. 705. *See* DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 9-2, 321 (3d ed. 1992).

80. *See* SCHLUETER, *supra* note 79, at 322.

81. *See supra* note 94 and accompanying text.

82. MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 705(d) (1984) (C5 27 June 1991) [hereinafter MCM C5].

83. *Id.*

84. *Id.* R.C.M. 705(d) analysis, app. 21, at A21-40.

85. 23 M.J. 305 (C.M.A. 1987) (Cox, J., concurring in the result).

Except for the few notable mechanical changes resulting from changes to the *Manual*, the mechanics and goals of the plea bargaining practice in the military have remained largely unchanged in the forty-two years between Major General Shaw's initiative and the CAAF's decision in *Weasler.* While ultimately concerned with ensuring justice, the participants in the plea bargaining process sought the benefits of certainty and expedience that the practice offered. However, while the procedures remained generally static and the goals unchanged, the terms and conditions that parties sought for inclusion in pretrial agreements were constantly changing. Although somewhat reluctantly, the military courts' standards also changed as they considered novel terms which the parties were increasingly including in pretrial agreements. A survey of cases from the 1950s to the 1990s demonstrates a gradual willingness to allow the parties greater leeway in crafting pretrial agreements.

Terms of a Pretrial Agreement: What Are the Boundaries?

From the time that military courts first began reviewing pretrial agreements in the mid-1950s to the present, they have struggled conceptually with classification of the plea bargaining process. Even though the terminology[89] and methodology[90] employed by the courts when reviewing pretrial agreements find their roots in contract law, the courts initially refused to recognize pretrial agreements as contracts.[91] Whether rejecting the analogy to contract law was ever appropriate,[92] military courts have increasingly recognized the benefits that pretrial agreements offer.[93] As the courts have become more comfortable characterizing the process as contractual in nature, the scope of permissible terms and conditions has expanded.

Permissible Terms and Conditions[94]

Since *United States v. Allen*[95] in 1957, the COMA has premised pretrial agreement term permissibility on one simple

86. *Id.* at 308-09. Judge Cox noted:

> I write to distance myself from any implication in the majority opinion that the point of origin or "sponsorship" of any particular term of a pretrial agreement is outcome determinative. In the first place, I anticipate that determining the point of origin will be problematic. For example if, over a period of months or years, the local defense bar comes to realize that the only pretrial agreements ever approved by a particular convening authority contain certain waiver or waivers, who has sponsored the term? I would assume that the convening authority did, regardless of who literally may have caused the language to be inscribed on a particular document and transmitted to the opposing party. Moreover, with few notable exceptions (including but not limited to, the rights to counsel, allocution, appeal, and the right to contest jurisdiction), I see no problem with the Government's sponsoring, originating, dictating, demanding, etc., specific terms of pretrial agreements (citation omitted). I take it that the convening authority's ability to refuse entirely to enter into pretrial agreements or to enter into any particular agreement is the ultimate command-sponsored limitation.

87. *See* MCM C5, *supra* note 82, R.C.M. 705(d) analysis, app. 21, at A21-40.

88. *See supra* notes 236-240 and accompanying text.

89. *See* SCHUELTER, *supra* note 79, at 322 (noting that the terminology of pretrial agreements—offer, acceptance, consideration—is the terminology of contact law).

90. *Id.* nn.6-8 and accompanying text (requirement that offers be in writing; convening authority accepts by signing; ambiguous terms construed against the convening authority). Legal commentators also have long used contract law as a construct for critique of pretrial agreements in the military. *See generally* Gray, *supra* note 63, at 51 ("[A] pretrial agreement is a contract between the convening authority and the accused."); Della Maria, *supra* note 75, at 118 ("The pretrial agreement is . . . nothing more than a contract between the convening authority and the accused.").

91. *See* United States v. Weasler, 43 M.J. 15, 21 (1995) (Sullivan, C.J., concurring in the result) ("[T]he contract rationale proffered by the majority is dead wrong."); United States v. Cummings, 38 C.M.R. 174, 178 (C.M.A. 1968) ("Attempting to make [pretrial agreements] into contractual type documents which forbid the trial of collateral issues and eliminate matters which can and should be considered below, as well as on appeal, substitutes the agreement for the trial and, indeed, renders the latter an empty ritual."). *See also* United States v. Koopman, 20 M.J. 106 (C.M.A. 1985); United States v. Lanzer, 3 M.J. 60 (C.M.A. 1977); United States v. Cox, 46 C.M.R. 69 (C.M.A. 1972).

92. *See* Scott & Stuntz, *supra* note 3, at 1967 ("The [contract] framework offers a fairly clear answer to the most basic questions policymakers (legislative or judicial) might want answered."). Although not possible to examine within the confines of this article, the contract rationale that Scott and Stuntz posit for application in the civilian plea bargaining context deserves thoughtful consideration in the military context. Because bargaining in the military context is mightily constrained by custom, regulation, statute, and case law (far more so than in the civilian system), the military's predisposition to an orderly and open process seems particularly well-suited to embrace contract law as a means of regulating that process. The continued ad hoc approach to determining which pretrial agreement terms will be enforced and which will be rejected might be unnecessary with the ready surrogate of contract law to serve as a template for systematic review.

93. *See Weasler*, 43 M.J. at 19 ("To hold [against appellant] would deprive [him] of the benefit of his bargain."). *But see id.* at 21 (Sullivan, C.J., concurring in the result) ("[T]he contract rationale proffered by the majority is dead wrong.").

94. The purpose of this section is not to recite a laundry list of pretrial agreement terms and conditions that the courts have found permissible; others have done that with great economy. *See* GILLIGAN & LEDERER, *supra* note 17, §§ 12-25.10 to 12-25.19(d); SCHLUETER, *supra* note 79, § 9-2(B)(1); MCM, *supra* note 15, R.C.M. 705(c)(2). The goal, however, is to explore the judicial process that leads to a greater liberalization of plea bargaining practice and how the judicial focus shifted somewhat from a strictly paternalistic protection of fundamental rights to a more detached appraisal of rights bargaining as a process mutually beneficial to the accused and the government.

idea: the agreement term must not derogate the courts-martial function of ensuring that justice is done. The appellate judges who first reviewed pretrial agreements had a very narrow view of what was permissible under the *Allen* standard.[96] If the terms of the pretrial agreement involved anything other than the charges to which the accused would plead guilty or the maximum sentence that the convening authority would agree to approve, the appellate courts viewed the deal with suspicion.[97]

When parties first began including waiver provisions in their pretrial agreements, the COMA would have none of it. The COMA predicated its rejection of rights waiver terms on *United States v. Ponds*[98] and *United States v. Darring*.[99] In *Ponds*, the accused had no pretrial agreement but, after pleading guilty at trial and then losing his initial appeal to the board of review, waived his appeal of right to the COMA.[100] Declaring the waiver a "legal nullity," the COMA noted that similar waivers in the future would be scrutinized to ensure that an accused was not mistakenly waiving his rights for the government's convenience.[101] The accused in *Darring* waived his right to appellate counsel based on his mistaken belief that his guilty plea at trial assured rejection of any claim on appeal.[102] Although this case also did not involve a pretrial agreement, the court rejected Darring's waiver of appellate review for the same reasons articulated in *Ponds*.[103]

The first time that an appellate tribunal reviewed a pretrial agreement containing terms that specifically called for waiver of an accused's right to present extenuation and mitigation evidence during the pre-sentencing phase of his trial, the judges relied on *Ponds* to invalidate the term. In *United States v. Callahan*,[104] the Army Board of Review (Board) held that a term which prevented the accused from offering favorable sentencing evidence was an "unwarranted and illegal deprivation of the accused's right to military due process."[105] Similarly, in *United States v. Banner*,[106] the Board dismissed the charge and upbraided the convening authority for conditioning the pretrial agreement on a term which forced the accused to waive any challenge to the court-martial's jurisdiction; the Board stated that the term was contrary to law and public policy.[107]

United States v. Cummings[108] was the high-water mark for appellate intolerance for rights waivers in pretrial agreements. Because of several unauthorized absences and subsequent periods of confinement in the Camp Pendleton confinement facility, there was a seven-month lapse between the time of Private Cumming's first confinement and the time that charges were referred to a general court-martial. As part of his pretrial agreement, Cummings waived any issues relating to his right to a speedy trial or claims that he had been denied due process under the law.[109] Overturning the conviction, the COMA chided the convening authority for attempting to secure by waiver a forfeiture of rights that was not allowed by law.[110] The COMA stated that a guilty plea could never be predicated on waiver of statutory or constitutional rights.[111] The COMA reemphasized its

95. 25 C.M.R. 8, 10 (C.M.A. 1957). The facts in *Allen* did not present the court with an onerous pretrial agreement term. The issue on review was ineffective assistance of counsel. Private Allen had a pretrial agreement with the convening authority which limited his maximum sentence to 18 months confinement at hard labor for a guilty plea to one specification of desertion. However, PVT Allen's counsel did not put on any evidence during the presentencing phase of the trial, even though plenty of favorable extenuation and mitigation evidence existed. Before addressing the effectiveness issue, the COMA addressed pretrial agreements in general and announced the "trial as an empty ritual" doctrine that provides the legal context that, to this day, underlies consideration of pretrial agreements.

96. *But see* United States v. Cummings, 38 C.M.R. 174, 179 (C.M.A. 1968) (Quinn, C.J., dissenting) (pointing out that a tactical decision to waive a fruitless speedy trial motion as part of a pretrial agreement was a sound tactical decision which the majority was wrong to condemn).

97. *Id.* at 177 (holding, in part, that pretrial agreements should cover nothing more than charging and sentencing issues).

98. 3 C.M.R. 119 (C.M.A. 1952).

99. 26 C.M.R. 431 (C.M.A. 1958).

100. *Ponds*, 3 C.M.R. at 120.

101. *Id.* at 121.

102. *Darring*, 26 C.M.R. at 434-35.

103. *Id.* at 435.

104. 22 C.M.R. 443 (A.B.R. 1956).

105. *Id.* at 448.

106. 22 C.M.R. 510 (A.B.R. 1956).

107. *Id.* at 519.

108. 38 C.M.R. 174 (C.M.A. 1968).

109. *Id.* at 176.

long-held view that only terms pertaining to sentence limitation were appropriate for inclusion in a pretrial agreement.[112]

Beginning with *United States v. Care*,[113] decided one year after *Cummings*, the COMA began to systematize judicial consideration of guilty pleas at the trial level.[114] The inquiry mandated by *Care* not only ensured that the accused demonstrated his factual guilt to the legal satisfaction of the military judge, but it also, for the first time, required the judge to inform the accused of the fundamental rights that he was waiving by pleading guilty.[115] The 1969 *Manual* also aided in formalizing the guilty plea process.[116] Refining the practice further, in *United States v. Green*,[117] the COMA announced that additional inquiry of the accused would become part of every *Care* inquiry.[118]

The aim of these rulings was to increase public confidence in the military justice system by further guaranteeing the reliability of guilty findings obtained via the plea bargaining process.[119] The result of the *Care, Elmore,* and *Green* line of cases was to shift to the trial judge much of the responsibility for determining the permissibility of pretrial agreement terms and conditions.[120]

As military courts continued formalizing the pretrial agreement process, two Supreme Court cases influenced military practice. Decided in 1971, *Santobello v. New York*[121] was important because it put the Supreme Court's imprimatur on the value of plea bargaining. By legitimizing the civilian plea bargaining practice—a system without the myriad procedural protections found in military plea bargaining—*Santobello* provided the COMA with a measure of confidence as it strove to improve the military plea bargaining practice.[122] Decided in 1978, *Bordenkircher v. Hayes*[123] went directly to issues confronting military trial judges who had to determine the legality of pretrial agreement terms. In that case, the Court upheld a prosecutor's threatened use of a capital murder charge and pos-

110. *Id.* The COMA noted, "we have expressly pointed out a guilty plea waives neither the right to speedy trial nor the right to due process in the handling of charges." *Id.* (citations omitted).

111. *Id.*

112. *Id.* at 178 ("We reiterate our belief that pretrial agreements are properly limited to the exchange of a plea of guilty for approval of a stated maximum sentence.").

113. 40 C.M.R. 247 (1969).

114. *See* Gray, *supra* note 63, at 53 (noting that the decision established the parameters of the military judge's inquiry in guilty plea cases).

115. *Care*, 40 C.M.R. at 257. Judge Darden wrote for the majority, "[t]he record must also demonstrate the military judge . . . personally addressed the accused, advised him that his plea waives his right against self incrimination, his right to a trial of the facts by a court-martial, and his right to be confronted by the witnesses against him; and that he waives such rights by his plea." *Id.*

116. 1969 MANUAL, *supra* note 77, para. 70.

117. 52 C.M.R. 10 (C.M.A. 1976).

118. *See* Gray, *supra* note 63, at 56. The ruling in *Green* requiring an expanded *Care* inquiry was premised on Judge Fletcher's concurrence in United States v. Elmore, 1 M.J. 262, 264 (C.M.A. 1976) (Fletcher, J., concurring). Pointing out the trial judge's role in cases involving negotiated pleas, Judge Fletcher noted:

> The trial judge must shoulder the primary responsibility for assuring on the record that an accused understands the meaning and effect of each condition as well as the sentence limitations imposed by an existing pretrial agreement. Where the plea bargain encompasses conditions which the trial judge believes violate either appellate case law, public policy, or the trial judge's own notions of fundamental fairness, he should, on his own motion, strike such provisions from the agreement with the consent of the parties.
>
> In addition to his inquiry with the accused, the trial judge should secure from counsel for the accused as well as the prosecutor their assurance that the written agreement encompasses all of the understandings of the parties and that the judge's interpretation of the agreement comports with their understanding of the meaning and effect of the plea bargain.

119. *See* United States v. Green, 1 M.J. 453, 456 (C.M.A. 1976) (holding that trial level scrutiny of pretrial agreements will enhance public confidence in the plea bargaining process).

120. *See* Gray, *supra* note 63, at 56.

121. 404 U.S. 257 (1971) (noting that plea bargaining is an essential and highly desirable component of the justice system which should be encouraged). After negotiations with the prosecutor, Santobello withdrew his plea of not guilty to a felony gambling charge and agreed to plead guilty to a lesser-included charge. In exchange for the plea, the prosecutor agreed to make no recommendation to the judge during sentencing. Santobello pleaded guilty as promised, and the sentencing hearing was set for several weeks later. While awaiting sentencing, a new prosecutor took over the case. When Santobello finally faced the judge for sentencing proceedings, the new prosecutor, who knew nothing of the agreement that Santobello had made with the previous prosecutor, recommended that Santobeloo be sentenced to the maximum one-year sentence for his crimes. Santobello objected, but the trial judge informed the parties that, whether or not there was such an agreement, he would sentence Santobello to the maximum sentence anyway because of Santobello's criminal history. The case went forward on appeal based on Santobello's claim that the new prosecutor's breach of the pretrial agreement impermissibly influenced the trial judge to adjudge the maximum sentence. While recognizing the legitimacy of the plea bargaining system, the Supreme Court vacated the sentence and remanded the case to the state court to determine whether Santobello was entitled to specific performance of his pretrial agreement. *Id.* at 257-60.

sible death sentence to convince the accused to plead guilty to a murder charge with a guaranteed sentence of life imprisonment. The Court observed that the tendency of such a tactic to discourage an accused from exercising his full rights in a trial setting was an "inevitable—and permissible—attribute of any legitimate system which tolerates and encourages the negotiation of pleas."[124]

Whereas *Santobello* demonstrated that plea bargaining in general suffered no constitutional infirmity, *Bordenkircher* demonstrated that the process passed constitutional muster even when used aggressively by the government. Thus, as plea bargaining entered its fourth decade of use in the military, rulings from the Supreme Court legitimized and expanded the use of the practice.

In *United States v. Mills*,[125] the COMA invalidated an agreement between the convening authority and the accused because the agreement truncated full appellate review.[126] However, the majority opinion noted that nothing prohibited parties from drafting terms that limited rights of the accused, as long as the accused fully understood the consequences of the terms and agreed to their inclusion.[127] Citing *Bordenkircher,* the COMA acknowledged the permissibility of "practices [within the plea bargaining realm] which tend to chill the assertion of a defendant's rights."[128]

United States v. Jones[129] marked the COMA's move further away from the paternalism that characterized its analysis of rights waiver terms during the 1950s and 1960s.[130] The COMA upheld a defense-proffered term which waived the accused's right to contest search and seizure and victim identification issues.[131] In his concurrence, Judge Cox drew on *Bordenkircher* to suggest that the government should be allowed to affirmatively mandate specific terms of a pretrial agreement.[132]

In *United States v. Schaffer*,[133] the COMA permitted defense-initiated waiver of the right to an Article 32 investigation.[134] Recognizing its ability to forbid the practice, the COMA noted, "[o]ur paternalism need not extend to that extreme."[135] In *United States v. Zelenski*,[136] the COMA upheld a defense-initiated waiver of the right to trial by a panel of officer and/or enlisted soldiers.[137] Six years later in *United States v. Andrews*,[138] the Army Court of Military Review (ACMR) relied on the 1991 changes to R.C.M. 705 to validate the *government's* conditioning acceptance of an offer to plead guilty on the accused's waiver of the right to trial by members.[139] The COMA came to the same conclusion two years

122. *See* Gray, *supra* note 63, at 49.

123. 434 U.S. 357 (1978).

124. *Id.* at 364 (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 31 (1973)).

125. 12 M.J. 1 (C.M.A. 1981).

126. *Id.*

127. *Id.* at 4.

128. *Id.*

129. 23 M.J. 305 (C.M.A. 1987).

130. *Id.* at 308.

131. *Id.* The COMA cautioned, however, that an identical term, proposed by the government, would not receive such willing acceptance. *Id.* As this case predated the 1991 change to the 1984 *Manual*, there still existed a prohibition against anyone but the accused originating an offer to enter into a pretrial agreement or proposing terms for inclusion.

132. *Id.* (Cox, J., concurring in the result).

133. 12 M.J. 425 (C.M.A. 1982).

134. *Id.* at 429.

135. *Id.*

136. 24 M.J. 1 (C.M.A. 1987).

137. *Id.* The COMA noted that the government could not condition acceptance of a pretrial agreement on waiver of the right to trial by members. However, because the defense had decided that the best interests of the accused favored such a waiver, the COMA found the term permissible. *Cf.* United States v. Burnell, 40 M.J. 175 (C.M.A. 1994) (noting that the 1991 changes to R.C.M. 705 make the origin of pretrial agreement term irrelevant, thus allowing the government to condition pretrial agreements on waiver of trial by members).

138. 38 M.J. 650 (A.C.M.R. 1993).

later in *United States v. Burnell*,[140] ruling that the government could make acceptance of a pretrial agreement contingent on the accused agreeing to trial by military judge alone.[141] The COMA's primary concern in reviewing pretrial agreements was to ensure that the accused entered into the agreement voluntarily and intelligently.[142]

The COMA had come a long way by the time it considered *Weasler* in 1995. The unwillingness to allow terms other than charging and sentence limitation, which characterized judicial review in the 1950s and 1960s, gave way to a standard of review which was more solicitous of the desires of the parties. The COMA was confident in the institutional safeguards that *Care* and the 1984 *Manual* imposed on pretrial agreement practice. The COMA's natural evolution,[143] coupled with the 1984 and 1991 changes to the *Manual*, enabled it to overcome its historic uncertainty and to focus on the essential judicial concern—did the accused enter into the pretrial agreement voluntarily and intelligently?[144] Nevertheless, even as the courts grew more tolerant of creative bargaining between the accused and the convening authority, certain terms remained off limits.

Impermissible Terms and Conditions[145]

Neither the *Manual* nor the COMA permit a pretrial agreement term or condition unless the accused voluntarily agrees to it.[146] Forcing an accused into such an agreement not only invalidates the agreement but probably would constitute a basis for adverse action against a convening authority for violation of the UCMJ.[147] The professionalism and independence of trial defense counsel make such an event very unlikely. Typically, it is the accused, ever willing to trade legal rights to lessen his time behind bars, who enthusiastically suggests terms and conditions which the courts refuse to embrace. Such terms fail because they threaten the fairness of the trial.[148]

Certainly, the accused has willing accomplices. If professional judgment and experience tell defense counsel that nothing is gained by litigating certain motions, they often encourage waiver of the motions (even where fundamental rights are involved), recognizing that their clients' bottom line is to minimize confinement.[149] Trial counsel are eager to support any initiative of the accused that results in foregone motions and speedy disposition of a guilty plea. The waiver provisions are typically supported by staff judge advocates and agreed to by the convening authorities because the accuseds are capitulating on the issue, and contested trials are costly in terms of personnel, time, and money. Finally, military trial judges, unlike appellate judges who never face an accused, desperately trying to remain provident to preserve favorable sentence limitations, will try to give meaning and effect to terms and conditions which the accused voluntarily agreed to and obviously wants enforced. Thus, impermissible terms find appellate scrutiny

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139. *Id.* (conditioning acceptance of pretrial agreement upon accused's waiver of right to trial by members does not violate public policy). *But see* United States v. Young, 35 M.J. 541 (A.C.M.R. 1992) (noting that government *demand* of trial by members waiver is unenforceable).

140. 40 M.J. 175 (C.M.A. 1994).

141. *Id.*

142. *Id.*

143. The judges on the COMA who wrestled with establishing an appropriate standard of review for the military were also spectators of the process as it evolved in civilian society. Not only was their approach to the task informed by the law and policy of the military, but it must necessarily have been affected by civilian practice as well. Over time, even as the COMA and the drafters of the *Manual* erected procedural safeguards to ensure that only a truly guilty accused would be allowed to plead guilty, the court—undoubtedly aware of the robust bargaining in the civilian sector—became increasingly willing to allow the guilty accused and the government to decide for themselves how best to allocate risks and resources attendant to the process.

144. *See* MCM, *supra* note 15, R.C.M. 705(c)(2) (agreement must be entered into freely and voluntarily); United States v. Burnell, 40 M.J. 175 (C.M.A. 1994) (upholding a decision to waive trial by members as long as the decision is voluntary and intelligent).

145. *See* MCM, *supra* note 15, R.C.M. 705(c)(1)(B); SCHLUETER, *supra* note 79, § 9-2(B)(2), at 330; GILLIGAN & LEDERER, *supra* note 17, § 12-25.20, at 470.

146. *See* MCM, *supra* note 15, R.C.M. 705(c)(1)(A) ("A term or condition in a pretrial agreement shall not be enforced if the accused did not freely and voluntarily agree to it."); United States v. Care, 40 C.M.R. 247 (C.M.A. 1969).

147. *See* UCMJ art. 37(a) (1988) ("No person . . . may attempt to coerce or, by any unauthorized means, [to] influence the action of a court-martial . . . in reaching the findings . . . in any case . . . .") Were it even possible, a convening authority who forced an accused to accept a term of a pretrial agreement would be guilty of exercising unlawful command influence. The convening authority would thus subject himself to prosecution for violation of article 98 of the UCMJ. *See id.* art. 138.

148. *See* SCHLUETER, *supra* note 79, § 9-2(B)(2), at 330.

149. *See* United States v. Cummings, 38 C.M.R. 174, 180 (C.M.A. 1968) (Quinn, C.J., dissenting). This tactic, often employed by defense counsel, has found some sympathy on the court, providing the judge agrees with the defense counsel's appraisal of the evidence. Judge Quinn noted that "we cannot close our eyes to the obvious 'probability that the accused and his counsel weighed the evidence and determined that it was inadequate for an effective legal defense' and, therefore, chose 'to disregard the evidence in favor of the possible advantage of a guilty plea.'" *Id.* at 180 (citing United States v. Hinton, 23 C.M.R. 263 (C.M.A. 1957)). *See also* United States v. Bertleson, 3 M.J. 314, 315-16 (C.M.A. 1977).

because the parties at the trial level have actively, though sometimes unwisely, sought their inclusion.

Although the list continues to shrink, the courts will not allow certain fundamental rights to be waived because of the perceived effect that such waiver would have on the credibility of the military justice system.[150] The right to counsel cannot be waived, whether at the trial or appellate level.[151] Due process rights are not subject to bargained waiver.[152] Parties cannot agree to waive jurisdictional issues,[153] and they cannot agree to waive speedy trial issues,[154] complete sentencing proceedings,[155] or exercise of posttrial and appellate rights.[156]

This was the legal backdrop when *Weasler* was argued on appeal. Although willing to give the parties great leeway when crafting pretrial agreements, the *Weasler* court steadfastly refused to permit terms and conditions that, when viewed through the eyes of the public, threatened the integrity of the military justice system. *Weasler* presented the CAAF with the ultimate system integrity dilemma. Invoking the specter of unlawful command influence, Weasler's appellate counsel challenged the CAAF to expand its list of fundamental rights that could not be waived. He asked the CAAF to repudiate Weasler's pretrial agreement, claiming that it forced waiver of Weasler's right to a preferral of charges that were free from unlawful command influence.[157]

II. Unlawful Command Influence

The drafters of the UCMJ were able to craft a criminal code that is responsive to the military's need for both justice and discipline.[158] The drafters recognized the command's legitimate discipline interests in administering the criminal justice system while also recognizing that too much influence could take *justice* out of the military justice system.[159] The statutory mandate of Article 37 was designed to protect the integrity of the court-martial by ensuring that none of the participants would suffer at the hands of a superior who disagreed with the results of the proceeding.[160]

Early on, the COMA sought to ensure that unlawful command influence did not affect court-martial participants, particularly panel members.[161] In *United States v. Littrice*,[162] the COMA set aside the findings and sentence because an acting commander unlawfully influenced panel members prior to their service in Private Littrice's case.[163] Over time, the COMA relied on Article 37 as its bulwark against excessive command

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150. *Compare Cummings*, 38 C.M.R. at 177 ("[Pretrial agreements] should concern themselves with nothing more than bargaining on the charges and sentence, not with ancillary conditions . . . ."), *with Bertelson*, 3 M.J. at 315-16 ("If an accused and his lawyer, in their best judgment, think there is a benefit or advantage to be gained . . . we perceive no reason why they should not be their own judges with leeway to do so.").

151. *See* MCM, *supra* note 15, R.C.M. 705(c)(1)(B); United States v. Darring, 26 C.M.R. 431 (C.M.A. 1958).

152. *See* MCM, *supra* note 15, R.C.M. 705(c)(1)(B); *Cummings*, 38 C.M.R. at 174.

153. *See* MCM, *supra* note 15, R.C.M. 705(c)(1)(B); United States v. Morales, 12 M.J. 888 (A.C.M.R. 1982).

154. *See* MCM, *supra* note 15, R.C.M. 705(c)(1)(B); *Cummings*, 38 C.M.R. at 174.

155. *See* MCM, *supra* note 15, R.C.M. 705(c)(1)(B); United States v. Callahan, 22 C.M.R. 443 (A.B.R. 1956).

156. *See* MCM, *supra* note 15, R.C.M. 705(c)(1)(B); United States v. Schaller, 9 M.J. 939 (N.M.C.M.R. 1980).

157. *See generally* Final Brief on Behalf of Appellant, United States v. Weasler, 43 M.J. 15 (1995) (No. 94-1249/AR).

158. *See* United States v. Littrice, 13 C.M.R. 43, 47 (C.M.A. 1953).

159. *Littrice*, 13 C.M.R. at 48-49 (recognizing a legitimate command interest in administering the criminal justice system, UCMJ article 25 requires the convening authority to select courts-martial members based on established criteria). *See also id.* at 47 (citing H.R. REP. NO. 81-491, at 8) ("we must avoid the enactment of provisions which will unduly restrict those who are responsible for the conduct of our military operations.").

160. *Id.* at 47. Article 37 of the Code provides:

> No authority convening a general, special, or summary court-martial, nor any other commanding officer, shall censure, reprimand, or admonish such court or any member, law officer, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this code shall attempt to coerce or, by any unauthorized means, [to] influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

UCMJ art. 37 (West 1995).

161. *See* Bower, *supra* note 8, at 70 n.34.

162. 13 C.M.R. 43 (C.M.A. 1953).

control exerted during any phase of criminal justice administration.

Evolution of Unlawful Command Influence Jurisprudence

The COMA's expansion of Article 37's reach was prompted by recognition that *apparent* and *perceived* unlawful command influence could be as harmful as the actual occurrence. In *United States v. Johnson*,[164] the COMA recognized that command actions that *appeared* to be improper could tarnish the public's perception of the integrity of the justice system just as much as those actions that actually amounted to unlawful command control.[165] Foreshadowing a theme that would figure prominently in the philosophical split of the *Weasler* court twenty years later, *Johnson* signaled increased judicial vigilance where command action threatened society's confidence in the fairness of the military criminal process.

Unlawful command influence jurisprudence expanded further with the COMA's condemnation of command actions that created a *perception* of unlawful command influence. In a series of cases arising out of the 3d Armored Division in Germany, the COMA expanded Article 37's reach to include unlawful command influence over *potential* witnesses at a court-martial. *United States v. Treakle*[166] and its progeny demonstrated the COMA's willingness to go beyond the original scope of Article 37[167] to shield not only panel members, counsel, and military judges, but also rank and file soldiers who might potentially provide favorable character evidence for an accused.[168]

If the 3d Armored Division cases in the mid-1980s represented the high-water mark for the COMA's expansive approach to unlawful command influence,[169] its tolerance for an accused's claim of prejudice based on unlawful command influence began to wane by the early 1990s. Increasingly, the COMA was confronted with soldiers who sought the windfall of appellate reversal based on technical violations of the rules governing the judicial process. Unwilling to continue Article 37's expansion, the service appellate courts decided a series of cases that revealed a profound split on the COMA.

Accusatorial v. Adjudicative Unlawful Command Influence

163. *Id.* at 49-52 (holding that a briefing about command policy on courts-martial service, retention of thieves in the Army, and ramifications of panel service on efficiency reports was prejudicial to the accused). *See* United States v. Kitchens, 31 C.M.R. 175 (C.M.A. 1961) (holding that an assistant staff judge advocate's letter to panel members pointing out sentence variances in recent cases unlawfully influenced members by suggesting appropriateness of sentence); United States v. McCann, 25 C.M.R. 179 (C.M.A. 1958) (holding that a staff judge advocate's lecture to members that the offenses for which the accused was charged were more reprehensible in the military than in civilian society is unlawful command influence); United States v. Fowle, 22 C.M.R. 149 (C.M.A. 1956) (holding that trial counsel's reading of a Secretary of the Navy Instruction pertaining to larceny to the court members is unlawful command influence); United States v. Pierce, 29 C.M.R. 849 (A.B.R. 1960) (finding that a base commander's informal comments to several panel members, suggesting that the length of trial was not important as long as the panel convicted the accused and hanged him, even if made in jest, was unlawful command influence).

164. 34 C.M.R. 328 (C.M.A. 1964) (holding that a staff judge advocate's issuance of a pamphlet entitled "Additional Instruction for Court Members" to members of the panel was guidance beyond that contemplated in Article 38 and created a rebuttable presumption of unlawful command influence).

165. *See* Bower, *supra* note 8, at 77 nn.76-80. Bower notes that the origin for apparent command influence doctrine could be traced ten years earlier to a dissenting opinion in *United States v. Navarre*, 17 C.M.R. 32 (C.M.A. 1954), and had been supported in dicta in *Fowle*, 22 C.M.R. 139. The dissent in *Navarre* articulated the appearance theory of unlawful command influence, noting, "[W]e are concerned here with much more, I believe, than the protection of an accused person named Navarre . . . . A judicial system operates effectively only with public confidence and, naturally, this trust only exists if there also exists a belief that triers of fact act fairly and without undue influence." *Navarre*, 17 C.M.R. 32. *See*, United States v. Grady, 15 M.J. 275 (C.M.A. 1983) (noting that the appearance of external influence affects public confidence in the fairness of the military system).

166. 18 M.J. 646 (A.C.M.R. 1984), *cert. granted*, 20 M.J. 131 (C.M.A. 1985) (holding that commanding general briefings that addressed testifying on behalf of soldiers convicted at courts-martial created perception in soldiers of the command that their leaders disapproved of testifying on behalf of a convicted soldier's good character and fitness for continued service, thus chilling the accused's ability to secure favorable evidence and a fair and impartial trial). *See* United States v. Thomas, 22 M.J. 388 (C.M.A. 1986) (holding that where pervasive climate of unlawful command influence is established, the government must convince the appellate court, beyond a reasonable doubt, that the findings and sentence were not affected by the unlawful action); United States v. Cruz, 20 M.J. 873 (A.C.M.R. 1985) (1st Armored Division case determining whether unlawful command influence has prejudiced the accused requires consideration of the perception of unlawful command influence within the command, as well as whether objective analysis indicates the appearance of unlawful command influence), *cert. granted*, 22 M.J. 100 (C.M.A. 1986); United States v. Stokes, 19 M.J. 781 (A.C.M.R. 1984) (holding that perception created within command that it is not career enhancing to testify on behalf of an accused's good character is not dissipated merely by removing from the judicial process the convening authority who created the perception). *See generally* Bower, *supra* note 8, at 81-86.

167. *See* Bower, *supra* note 8, at 70.

168. *See Treakle*, 18 M.J. at 646.

169. After the 3d Armored Division cases, the COMA's unlawful command influence regimen required three distinct inquiries: (1) was the accused's trial affected by *actual* unlawful command influence; (2) has the command action threatened public confidence in the military justice system by creating the *appearance* of unlawful command influence; and (3) has the command action created within the unit a *perception* of unlawful command influence, thereby chilling soldiers' willingness to testify on behalf of the accused. The real debate in *Weasler* centered on the *appearance* of unlawful command influence.

In 1990, the ACMR considered the case of Sergeant First Class Bramel.[170] Sentenced to a dishonorable discharge and twenty years confinement for engaging in forcible sodomy with a child under the age of sixteen, the accused claimed that the trial judge's denial of a motion for a new pretrial investigation denied him a fair trial. The motion was predicated on a claim that the summary court-martial convening authority, who ordered the hearing, exerted unlawful command influence over the investigating officer by ordering him to utilize a partition to shield the child victim from the accused when testifying. The ACMR agreed with the trial judge that the *Manual* authorized this order[171] and that the convening authority's actions neither affected the impartiality of the proceeding nor amounted to unlawful command influence.[172]

Expanding on the issue of unlawful command influence, the ACMR noted that pretrial investigations are part of the *accusatorial* process that serves as a predicate to the referral of charges.[173] The ACMR then considered the plain language of Article 37(a) and determined that it proscribed unlawful command influence over the *adjudicative* processes of a trial.[174] The ACMR concluded that the use of Article 37(a) was inapposite in situations like Sergeant Bramel's, where the claimed impropriety occurred during the *accusatorial* stage of a proceeding.[175]

United States v. Bramel represented the first time an appellate court distinguished the exercise of unlawful command influence based on *the point in time* at which it was exerted.[176] By determining that there was nothing unlawful about the convening authority's actions even *if* Article 37(a) applied to the accusatorial process, the ACMR provided a basis for the COMA to affirm if that court disagreed with the unique approach to trial process demarcation. The COMA summarily affirmed without addressing the unlawful command influence issue raised in *Bramel*.[177]

In 1994, the ACMR once again considered the accusatorial versus the adjudicative impact of improper command control in *United States v. Drayton*.[178] Staff Sergeant Drayton pleaded guilty to larceny from the post exchange and was sentenced to a reduction, forfeitures, and a bad-conduct discharge.[179] On appeal, Drayton alleged that his battalion commander exerted unlawful command influence over his company commander by directing the company commander to recommend a certain level of court-martial.[180] Relying on *Bramel*, the ACMR differentiated unlawful command action during the accusatorial phase from action during the adjudicative phase of a judicial proceeding. The *Drayton* court acknowledged that *Bramel* repudiated nearly thirty-five years of unlawful command influence jurisprudence;[181] however, the ACMR found that charging decisions and dispositions were clearly accusatorial processes that were not amenable to Article 37 review. The ACMR went further than *Bramel*, however, by articulating two methods for an accused to challenge accusatorial process defects.[182] Thus, while the COMA remained silent, the ACMR decided two cases that removed a whole category of unlawful command action from the purview of Article 37 analysis and provided trial judges with a paradigm for consideration of accusatorial process issues.

The COMA finally addressed the effect of unlawful command influence at different stages of a proceeding in *United States v. Hamilton*.[183] Sergeant Hamilton cut a fellow soldier

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170. United States v. Bramel, 29 M.J. 958 (A.C.M.R.), *aff'd*, 32 M.J. 3 (C.M.A. 1990) (summary disposition).

171. *See* MCM, *supra* note 15, R.C.M. 405 (authorizing the convening authority to give procedural instructions to the hearing officer).

172. *Bramel*, 29 M.J. at 967.

173. *Id.*

174. *Id.*

175. *Id.* (citation omitted). The ACMR found that, "[b]y definition, an Article 32 investigation is designed to gather evidence upon which a recommendation can be made to enable a convening authority to decide whether there is sufficient evidence to warrant referral of charges to trial." *Id.*

176. *See* Criminal Law Division Note, *United States v. Drayton: Limiting the Application of UCMJ Article 37*, ARMY LAW., Sept. 1994, at 9.

177. *Id.* at 10.

178. 39 M.J. 871 (A.C.M.R. 1994), *aff'd*, 45 M.J. 180 (1996) (upholding the ACMR's decision and specifically embracing the lower court's classification of improper command action based upon the stage of the judicial proceeding during which it is exerted). The CAAF decided *Drayton* one year after its decision in *Weasler*. Thus, the court's decision in *Drayton* had no bearing on the *Weasler* decision. However, *Drayton* demonstrates the soundness of the rationale behind the decision and validates the COMA's embrace of an adjudicative versus accusatorial distinction as articulated in *United States v. Hamilton*, 41 M.J. 32 (C.M.A. 1994).

179. *Drayton*, 39 M.J. at 872.

180. *Id.* nn. 2-3.

181. *Id.* at 873. *See generally* Criminal Law Division Note, *supra* note 176, at 7-8.

182. *Drayton*, 39 M.J. at 874 (identifying the de facto accuser doctrine and R.C.M. 401 as the proper mechanisms for challenging accusatorial process deficiencies).

with a knife and a razor blade and received a company grade Article 15 as punishment. Believing the disposition of the offense inappropriate, the division staff judge advocate recommended to Sergeant Hamilton's brigade commander that such a serious offense required a court-martial. The brigade commander ultimately preferred charges and recommended that the case be referred to a special court-martial empowered to adjudge a bad-conduct discharge. The accused was convicted of aggravated assault and sentenced to forfeitures, reduction in grade, two months confinement, and a bad-conduct discharge. On appeal, the accused claimed that the division staff judge advocate unlawfully influenced the brigade commander to prefer charges.[184]

Without acknowledging either *Bramel* or *Drayton*, the COMA adopted the rationale behind those cases and held that the critical inquiry in any unlawful command influence case is at what stage of the process the alleged unlawful command action occurred. The COMA relied on the principle of waiver to differentiate between improper actions in the preferral and forwarding of charges, and those that occur during and after referral.[185] The COMA noted that when a commander is coerced into preferring charges, those charges are considered unsigned and unsworn.[186] Similarly, any interference with a commander's independent discretion in recommending disposition of charges violates R.C.M. 401.[187] Defects in either preferral or forwarding of charges, the COMA reasoned, are waived if not raised prior to the entry of pleas.[188] Declaring such defects neither jurisdictional[189] nor the proper subject for Article 37 analysis,[190] the COMA noted that Article 37 protects against unlawful command influence during the referral, trial, and posttrial processes.[191] Without using the *Bramel* and *Drayton* terminology of "accusatorial versus adjudicative process review," *Hamilton* validated the ACMR's unique approach to the unlawful command influence issue.

Hamilton represented the COMA's first real attempt to narrowly define unlawful command influence. By anchoring the accusatorial stage analysis on waiver doctrine, the COMA essentially said that improper command *action* prior to referral, whatever one may call it, is not properly labeled as unlawful command *influence*.[192] Thus, *Hamilton* created the conditions necessary for the reevaluation of unlawful command influence waiver as part of a pretrial agreement in *Weasler.*

Precursors to United States v. Weasler

In *United States v. Corriere*,[193] the ACMR considered a pretrial agreement predicated on waiver of unlawful command influence motions. Captain Corriere pleaded guilty to drug charges and conduct unbecoming an officer, charges which arose from the famous 1st Armored Division "peyote platoon"

183. 41 M.J. 32 (C.M.A. 1994).

184. *Id.* at 33-36.

185. *Id.* at 36.

186. *Id.* (citing United States v. Miller, 31 M.J. 798, 801 (A.F.C.M.R. 1990), *aff'd on other grounds*, 33 M.J. 235 (C.M.A. 1991); United States v. Bolton, 3 C.M.R. 374 (A.B.R. 1952), *pet. denied*, 3 C.M.R. 150 (C.M.A. 1952)).

187. *See* MCM C5, *supra* note 82, R.C.M. 401 discussion.

188. *Hamilton*, 41 M.J. at 36 (citing Frage v. Moriarty, 27 M.J. 341 (C.M.A. 1988)).

189. *Id*. at 37. Citing United States v. Jeter, 35 M.J. 442 (C.M.A. 1992), the COMA reiterated that even egregious cases of unlawful command control during the preferral and forwarding of charges did not amount to jurisdictional error, and the issues would be waived if not raised at trial. *But see* United States v. Blaylock, 15 M.J. 190, 193 (C.M.A. 1990) (holding that failure to raise at trial unlawful command influence issues relating to the referral, trial, or posttrial review are not waived and may be litigated for the first time on review). The majority's seemingly inconsistent reliance on both *Blaylock* and *Jeter* can best be explained by the imprecise use of the term "unlawful command influence." *Compare* United States v. Johnston, 39 M.J. 242, 245 (C.M.A. 1994) (Crawford, J., concurring in the result) (noting that improper preferral of charges is not unlawful command influence) *with Hamilton*, 41 M.J. at 40 (Wiss, J., concurring in the result) (suggesting that it is unwise to equate unlawful command influence in the preferral process to some minor technical defect that can be waived).

190. *Hamilton*, 41 M.J. at 36.

191. *Id.* at 36-37.

192. The COMA steadfastly reaffirmed the *Blaylock* holding that unlawful command influence is never waived; yet, it also held that challenges to improper conduct of the staff judge advocate during preferral was waived if not raised at trial. For the two statements to be true, the court must necessarily view command actions that result in a defective preferral or forwarding of charges to be something other than judicially cognizable unlawful command influence. Judge Crawford's concurrence in *United States v. Johnston*, 39 M.J. 242, 245 (C.M.A. 1994) previewed the COMA's definitional sharpening in *Hamilton.* In *Johnston*, allegations that a superior improperly ordered a subordinate to prefer charges, and thus engaged in unlawful command influence, prompted Judge Crawford to note, "I have concluded that the real issue here is not whether there was unlawful command influence, but rather, whether there was an improper preferral of charges." *Johnston*, 39 M.J. at 245. Judge Crawford saw unlawful command influence and improper command actions that affect preferral of charges as two distinct issues with equally distinct remedies under the law. This concurrence not only helped to make sense of the new approach to unlawful command influence taken in *Hamilton*, but also foreshadowed the decision in *Weasler.*

193. 20 M.J. 905 (A.C.M.R. 1985).

cases.[194] He was sentenced to dismissal and fifteen months confinement.[195]

On appeal, Corriere claimed that a *sub rosa* agreement between defense counsel and the convening authority predicated government acceptance of the pretrial agreement on the accused's waiver of any unlawful command influence motions. Unable to resolve the issue on the scant trial record before it, the ACMR nevertheless noted that if a rehearing revealed a *sub rosa* agreement, such agreement would be contrary to public policy and therefore void.[196] The ACMR placed unlawful command influence issues in the first rank of fundamental protections that could not be waived in a pretrial agreement[197] and noted that such matters "are of such vital importance as to . . . require notice to the military judge and possibly litigation, or resolution during a providency inquiry, as opposed to resolution in a plea bargain."[198] Including such terms in a pretrial agreement, much less a *sub rosa* agreement, vitiated the fundamental fairness of a trial.

In *United States v. Kitts*,[199] the COMA validated *Corriere* by holding that government attempts to condition a pretrial agreement on waiver of motions that would reveal unlawful command influence were void and against public policy.[200] Pursuant to a pretrial agreement, the accused pleaded guilty to a number of drug charges. Prior to his trial on board ship, the command showed a video which informed the crew about the dangers of LSD use and that a major LSD distribution ring had been broken. At trial, Kitts planned to seek a change of venue to obviate the unlawful command influence effects of the video, but he agreed to waive the venue motion (and the certain airing of the unlawful command influence issue) in exchange for a favorable sentence limitation.[201] On appeal, Kitts claimed that the video amounted to unlawful command influence and chilled his ability to obtain favorable character testimony. The COMA reviewed his providence inquiry, found that his factual guilt had been established, and so denied relief on findings.[202] However, the COMA ordered a rehearing on the unlawful command influence issue so that the trial court could determine whether the unlawful command action, if substantiated, required a new hearing on sentence.[203]

The decisions in *Corriere* and *Kitts* demonstrated the appellate courts' intolerance for anything but complete litigation of unlawful command influence allegations at the trial level. The courts would not tolerate s*ub rosa* agreements or tactical maneuvering designed to silence an accused's claim of unlawful command influence. Concerned for the credibility of the military justice system in the aftermath of the 3d Armored Division cases, the COMA rejected bargained waiver of unlawful command influence issues.

Although *United States v. Jones*[204] did not involve waiver of unlawful command influence, the COMA employed in this case a rationale for reviewing pretrial agreement terms that figured prominently in the *Weasler* majority opinion. The COMA found waiver of search and seizure and victim identification motions to be an appropriate term in Jones' pretrial agreement. Although implicating fundamental rights, the COMA deferred to "a defense judgment that its proposal was in the best interests of the accused and a well-orchestrated effort to achieve a successful outcome."[205] The COMA allowed the accused, through aggressive bargaining, to attempt to manipulate the pretrial process to his advantage.[206] Provided the integrity of the trial itself was not jeopardized by the term or condition,[207] the COMA was willing to relax its vigilance and to allow the accused and counsel to determine what was in the accused's best interest.[208] Unlike *Corriere* and *Kitts*, this fundamental right waiver issue was fully developed at the trial level. The COMA's willingness

194. *See, e.g.*, United States v. Cruz, 20 M.J. 873 (A.C.M.R. 1985) (incident at Pinder Barracks in Germany where dozens of soldiers were publicly ridiculed at a mass apprehension resulted in tremendous appellate litigation over actual and perceived unlawful command influence issues).

195. *Corriere*, 20 M.J. at 907.

196. *Id.* at 908.

197. *Id.* (citing United States v. Schaffer, 46 C.M.R. 1089 (A.C.M.R. 1973) (requiring waiver of all motions is void as against public policy); United States v. Peterson, 44 C.M.R. 528 (A.C.M.R. 1971) (requiring waiver of search and seizure motion is void)).

198. *Id.*

199. 23 M.J. 105 (C.M.A. 1986).

200. *Id*.

201. *Id.* at 107-08.

202. *Id.* at 108.

203. *Id.* at 109.

204. 23 M.J. 305 (C.M.A. 1987).

205. *Id.* at 307.

206. *Id.* (footnote omitted).

to validate the pretrial agreement was due, in part, to its confidence that there was no undisclosed evil that would compromise the justice system's credibility. Assured that the term did not endanger the system, the COMA deferred to defense counsel's judgment that the rights waiver would benefit the accused.

The Army Court of Criminal Appeals (ACCA)[209] applied similar logic in *United States v. Griffin*[210] and upheld an accused's affirmative waiver of an unlawful command influence motion. Pursuant to a pretrial agreement, the accused pleaded guilty to charges that included wrongful drug use. Because of a policy letter from the convening authority that suggested that all drug users should be eliminated from the service, the accused reserved his right to litigate a defective referral based on the convening authority's exercise of unlawful command influence. After raising the unlawful command influence motion, but prior to litigating it, the accused and the government renegotiated the pretrial agreement, resulting in government withdrawal of the drug charge and the accused agreeing to waive the defective referral/unlawful command influence motion.[211] The judge considered the new agreement and, after all parties convinced him that the convening authority's policy letter had no effect on the referral or trial process and noting the substantial benefit which the accused gained, approved the new pretrial agreement without litigating the unlawful command influence motion.[212]

The ACCA rejected appellate defense counsel's assertion that the military judge had a sua sponte duty to litigate the unlawful command influence motion once it was raised by the defense. The ACCA stated that it would not "adopt a rule that would require a military judge to undo the benefit to the accused of an excellent bargain exacted from the government . . . ."[213] The ACCA recognized that alleged unlawful command influence implicated the adjudicative process,[214] yet found nothing wrong with defense counsel raising an objection to the command action and then, after extracting the best deal possible for his client, affirmatively waiving the issue.[215] As the COMA had in *Jones*, the ACCA approved waiver of a fundamental right because the trial record made clear that the judicial process was not threatened by the pretrial agreement. The ACCA again proved that it was willing to give effect to a term that conferred benefit on both the government and the accused.

III. The Case of *United States v. Weasler*

Specialist (SPC) Weasler wrote $8920 worth of bad checks.[216] After discussing SPC Weasler's misconduct with the battalion commander, Weasler's company commander, Captain (CPT) Morris, decided to recommend a general court-martial. As she was about to go on leave, CPT Morris briefed First Lieutenant (1LT) Hottman, who would be the acting commander while CPT Morris was on leave, about the impending preferral of charges against Weasler. Captain Morris told 1LT Hottman that if the Weasler charges appeared while she was on leave, 1LT Hottman should simply sign them. The charges appeared, and 1LT Hottman preferred[217] the charges as instructed and recommended[218] a general court-martial. Weasler's battalion and brigade commanders also recommended a general court-martial, which was ultimately the disposition directed by the convening authority in referring the case to trial.[219]

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207. *Id.* (citing United States v. Holland, 1 M.J. 58, 60 (C.M.A. 1975) (orchestrating trial through pretrial agreements shall not be allowed to turn the proceeding into an "empty ritual")).

208. *Id.* at 308. The COMA emphasized that if the government insisted, or even suggested, that the accused waive his right to litigate these issues, the agreement would fail. This reasoning is mitigated somewhat by the 1991 changes to R.C.M. 705, which permits either side to initiate plea bargaining or to propose terms of a pretrial agreement. However, when waiver of fundamental rights is implicated by a term, the CAAF still looks to the origin of the proposal and is more willing to validate the term, notwithstanding the 1991 *Manual* changes, if the accused conceives of the idea.

209. *See supra* note 7 for an explanation of change in appellate court names.

210. 41 M.J. 607 (Army Ct. Crim. App. 1994).

211. *Id.* at 609.

212. *Id.*

213. *Id.* at 609-10 ("[T]here is no good reason to impose such a duty on a judge in a case like this.").

214. *Id.* at 610 (citing United States v. Hamilton, 41 M.J. 32 (C.M.A. 1994)).

215. *Id.* The ACCA found several factors compelling. First, assurance in open court by both trial and defense counsel that the policy letter had no impact on the accused's referral or panel selection allowed the trial court to make a record, short of full litigation, that would dispel even the appearance of unlawful command influence. Second, by withdrawing the one charge that could have been implicated by the improper influence of the policy letter, the court found that the convening authority had done all he could do, as a prophylactic measure, to dissipate the effects of any possible unlawful influence.

216. United States v. Weasler, 43 M.J. 15 (1995). The recitation of facts that follow in the remainder of this paragraph are found on page 16 of the opinion.

217. *See* MCM, *supra* note15, R.C.M. 307 (establishing the proper procedures for charge preferral).

218. *See id.*, R.C.M. 401 (establishing the proper procedure for forwarding charges).

Seeking to limit his maximum punishment, Weasler entered into a pretrial agreement with the convening authority.[220] He initially agreed to plead guilty to six specifications of an Article 123a charge[221] in exchange for a maximum confinement period of seven months.[222] Unable to establish the providency of his guilty plea,[223] Weasler withdrew from his pretrial agreement and elected trial before a panel of officers.[224] Prior to panel selection, Weasler sought once again to plead guilty, this time to the lesser-included offense under Article 134.[225] The military judge found his pleas provident, and the government chose to pursue the greater charged offense before the panel.[226] While conducting *voir dire* of the panel, facts surrounding the preferral came to light, and the defense moved to dismiss the charge and its specifications because of the alleged unlawful command influence exerted by CPT Morris over 1LT Hottman during the preferral process.

After hearing testimony from CPT Morris, the military judge found that the defense had met its burden of a prima facie showing of unlawful command influence.[227] Unfortunately, 1LT Hottman was not available to testify, and, after several additional witnesses, the military judge made clear his inclination to grant the motion to dismiss based on the evidence before him. Wanting to hear from 1LT Hottman prior to ruling, the military judge instructed counsel to arrange for Hottman's presence in court or to agree to a stipulation of his expected testimony.

During the recess, the parties crafted *another* pretrial agreement which limited Weasler's maximum sentence to three months confinement and a bad-conduct discharge in exchange for his waiver of the unlawful command influence motion and plea to the lesser offense. Back in court, defense counsel explained that the idea to waive the unlawful command influence motion originated with the defense and was offered in light of the almost certain repreferral of charges that would result if the defense prevailed on the motion.[228] Defense counsel convinced the military judge of the propriety of the waiver, and the military judge ultimately agreed that the pretrial agreement was valid. Weasler was found guilty of the lesser charge and sentenced to nine months confinement.[229] Pursuant to the pretrial agreement, the convening authority disapproved confinement in excess of three months.

All five judges on the CAAF agreed that SPC Weasler suffered no harm by waiving an unlawful command influence motion in exchange for a favorable sentence limitation. However, the CAAF was badly divided over the rationale used to achieve the unanimous result. Writing for the court, Judge Crawford, joined by Judges Cox and Gierke, relied on *Hamilton* to validate Weasler's waiver. Chief Judge Sullivan and Judge Wiss, writing separate concurrences, believed the decision to be a landmark folly.

The Court's Opinion

Judge Crawford began the court's opinion by noting both the insidious nature of unlawful command influence[230] and the

219. *See id.*, R.C.M. 601 (establishing the proper procedure for referring charges).

220. *See* Final Brief on Behalf of Appellant, United States v. Weasler, 43 M.J. 15 (1995) (No. 94-1249/AR). The facts in the remainder of this paragraph are found on pages 2-7 of this brief.

221. UCMJ art. 123a (1988) (addressing the making, drawing, or uttering of a check, draft, or order without sufficient funds).

222. The maximum sentence that Weasler faced without the protection of a plea agreement was 30 years confinement, total forfeitures, reduction to the lowest enlisted grade, and a dishonorable discharge. *See* MCM, *supra* note15, app. 12, at art. 123a (table of maximum punishments).

223. *See id.*, R.C.M. 910. Rule for Courts-Martial 910 provides the procedure for considering an accused's plea. Pleading guilty to an offense is not as easy as intuition might suggest. Before a soldier is allowed to plead guilty, he must convince the military judge of his guilt in a proceeding known as a providence inquiry. The most likely forum in which a waiver of unlawful command influence motions will arise is the providence inquiry. Such was the case in SPC Weasler's trial. For a comprehensive examination of providence inquiries, see Vickery, *supra* note 13, and Elling, *supra* note 12.

224. *See* MCM, *supra* note 15, R.C.M. 910. An accused retains the right to withdraw his guilty plea and withdraw from any pretrial agreement in the event the military judge does not accept his plea as provident.

225. UCMJ art. 134 (1988) (check, worthless, making and uttering—by dishonorably failing to maintain funds).

226. The procedural posture of *Weasler* is not at all uncommon. Because of the exacting nature of the military providence inquiry, an accused often will say something, when describing the factual basis for his guilt, that is legally inconsistent with an element of the offense. Thus, the judge finds the accused's plea improvident. Left without the protection of his pretrial agreement because of his failure to deliver on his guilty plea, the accused usually scrambles to preserve his deal by either convincing the judge to allow him to recite his "recollection" of why he is guilty one more time or by convincing the government to preserve the agreement providing that the accused can successfully plead guilty to a lesser-included offense. In the latter case, the government typically reserves the right to proceed to trial on the charged offense in hope of convicting the accused of the greater offense.

227. *See* Final Brief on Behalf of Appellant, United States v. Weasler, 43 M.J. 15 (1995) (No. 94-1249/AR), at 4.

228. *See* MCM, *supra* note15, R.C.M. 905. Rule for Courts-Martial 905(b) and the discussion that accompanies the text indicate that defects in preferral or forwarding of charges are nonjurisdictional in nature and thus will not result in dismissal of charges with prejudice in the event the accused prevails on his motion.

229. The entire sentence was: confinement for nine months, reduction to the grade of E-1, and a bad conduct discharge.

measures taken by Congress and the courts to combat the evil.[231] Wasting little time, the CAAF identified *Hamilton* as the fulcrum that would provide the intellectual leverage required to legitimize bargained waiver of unlawful command influence issues. Although not a case of bargained waiver, *Hamilton* established the CAAF's new analytical approach when considering unlawful command influence issues.[232] Central to that approach was Judge Crawford's recognition of the CAAF's historical imprecision in applying the term *unlawful command influence* to a vast number of situations where superiors unlawfully fetter subordinates' actions under the UCMJ.[233] Henceforth, consideration of command improprieties would occur in the context of *Hamilton's* distinction between the different *stages* in the trial process.[234]

The CAAF had a substantial record before it due to the trial court's preliminary inquiry into the accused's claim. The judges also knew that, after raising the issue, the *accused* reinitiated negotiations with the government, resulting in a new pretrial agreement which limited his sentence in exchange for waiver of the issue. The appellate court found that the alleged unlawful command action implicated the accusatorial process.[235] Relying on *Hamilton,* the CAAF reasoned that accusatorial process defects which were not raised at trial were waived on appeal.[236] While recognizing the impropriety of government insistence on accusatorial defect waiver as a condition of a pretrial agreement,[237] the CAAF noted that Weasler proposed the waiver term.[238] Presented with these facts, the CAAF's inescapable logic, not to mention its sense of equity, called for approval of the pretrial agreement. Judge Crawford observed:

> If an accused waives an allegation of unlawful command influence in the preferral of charges by failure to raise a timely objection at trial, then surely an accused, following a timely objection, should be permitted to initiate an affirmative and knowing waiver of an allegation of unlawful command influence in the preferral of charges in order to secure the benefits of a favorable pretrial agreement. To hold otherwise would deprive appellant of the benefit of his bargain.[239]

Furthermore, the CAAF noted that the actions of the company commander did not affect the integrity of the trial process,[240] nor was there concern that public confidence in the military justice system would suffer as a result of the pretrial agreement.[241]

The CAAF also relied on *United States v. Mezzanatto*[242] to anchor its opinion. *Mezzanatto* involved a defendant who waived his right to exclude communications made during plea negotiations. When Mezzanatto and the government were unable to agree to a satisfactory plea agreement, Mezzanatto sought to stop the prosecutor from using at trial information obtained during the plea negotiations. The trial judge upheld the waiver, even though plea negotiations had failed, and allowed the prosecutor to use the otherwise privileged commu-

230. United States v. Weasler, 43 M.J. 15, 16 (1995). Citing *United States v. Thomas* (citation omitted), the CAAF used the obligatory language from the 3d Armored Division cases that came to represent the court's single-minded determination to protect the integrity of the military justice system from the evil of unlawful command influence. Both the Chief Judge and Judge Wiss take the majority to task for merely paying lip service to the court's role as the ultimate protector of the system's integrity. *Id.* at 21-22. Ironically, neither Chief Judge Sullivan nor Judge Wiss dissent in *Weasler,* which can only make one question from whence the lip service came.

231. *Id.* at 16-17 (citing Articles 37 and 98 of the UCMJ, R.C.M. 306(a), and judicial vigilance as the historical checks against unlawful command influence).

232. *But cf.* United States v. Hamilton, 41 M.J. 32, 40 (C.M.A. 1994) (Wiss, J., concurring in the result) (observing that the majority incorrectly relies on precedent supporting waiver of preferral defects if not raised at trial). The majority in *Hamilton* did not establish an entirely new regime for consideration of unlawful command influence as Judge Wiss and Chief Judge Sullivan imply. The holding is limited to improper command action that results in a defective accusatorial process (preferral, forwarding, and referral of charges). The majority did not say that commanders can never unlawfully influence a proceeding even in the earliest stages of the process. The CAAF decision in *United States v. Gleason,* 43 M.J. 69 (1995) (findings and sentence dismissed due to pervasive illegal influence of command throughout the entire proceeding) demonstrates the majority's willingness to condemn unlawful command action even when it is exerted in the accusatorial stage of a proceeding.

233. *Weasler,* 43 M.J. at 17.

234. *Id.* For the first time, the CAAF adopts the *Bramel* and *Drayton* accusatorial versus adjudicative process terminology as its own. Even though it adopted this rationale in *Hamilton,* nowhere in that decision did the court actually use the specific terminology. In *Weasler,* the CAAF did deviate from the *Bramel, Drayton,* and *Hamilton* decisions by moving command actions which implicate the referral process into the accusatorial process category of defects which are waived if not raised at trial.

235. *Id.* at 19 (citing United States v. Jeter, 35 M.J. 442 (C.M.A. 1992); *Hamilton,* 41 M.J. at 36) (including defective preferral, forwarding, and referral as accusatorial processes).

236. *Id.*

237. *Id.* The court still clung to the proposition that "it is against public policy to require an accused to withdraw an issue of unlawful command influence in order to obtain a pretrial agreement." United States v. Kitts, 23 M.J. 105, 108 (C.M.A. 1986).

238. *Weasler,* 43 M.J. at 19.

239. *Id.*

nications in the trial against the accused.[243] The Supreme Court upheld the waiver.

Whereas *Hamilton* provided an intellectual fulcrum for the COMA, the judges on the military court used *Mezzanatto* as the intellectual muscle to move the court over the historically high barrier which prohibited the waiver of unlawful command influence issues. Much like *Bordenkircher* before it, *Mezzanatto* demonstrated the Supreme Court's tolerance for aggressive government use of plea negotiations. As Judge Crawford noted, *Mezzanatto* reflected the Supreme Court's willingness to enforce waiver provisions that implicated the *adjudicative* process.[244] Even when waiver impacted the adjudication of guilt, the Supreme Court was loathe to invalidate a waiver provision entered into knowingly and voluntarily.[245]

By relying so prominently on *Mezzanatto*, the CAAF bolstered its approval of Weasler's knowing, voluntary, *defense-initiated* waiver that implicated not the adjudicative process, but the largely ministerial *accusatorial* process.[246] If the Supreme Court sanctioned a waiver in which the accused got no benefit whatsoever—indeed, a waiver that worked to his distinct disadvantage at trial—why should not the military court allow an accused to squeeze every drop of benefit from a voluntary waiver of his right to a procedurally correct preferral of charges? Chief Judge Sullivan and Judge Wiss answered that question passionately.

Concurrence Only in Result

Although he affirmed the case on a harmless error standard,[247] Chief Judge Sullivan considered the majority opinion a landmark betrayal of the CAAF's unlawful command influence jurisprudence.[248] He rejected the majority's reliance on *Hamilton* as the appropriate analytical framework to resolve the issue and insisted on a traditional Article 37 analysis instead.[249] Also relying on *Mezzanatto*, the Chief Judge warned that unlawful command influence was an issue of such fundamental importance that its waiver would jeopardize the credibility of the entire military justice system.[250] He believed that the majority unwisely elevated the interests of the individuals involved in the system over the interests of the system.[251] Allowing waiver of an unlawful command influence motion for a significant sentence limitation legitimized an accused's ability to "blackmail" a convening authority.[252] He warned that the convening author-

240. *Id.* As defense counsel acceded at trial, the company commander's actions were careless rather than malicious. The action amounted to little more than a technical irregularity in the preferral process, and both the accused and the court recognized that the likely remedy for the accused would be dismissal without prejudice to the government. The accused had every reason to believe that the government would simply reprefer the charges. Not only would the accused have lost the benefit of his new pretrial agreement, dismissal without prejudice would have obviated his original agreement. Neither the trial nor the appellate court could ignore the real possibility that the government would not agree to any deal the second time around as a way of assessing an aggravation cost upon SPC Weasler. Such a situation would create a perverse disincentive for a guilty accused who, instead of bringing command irregularities to the light of day whereby both he and the system benefit, would be better off ignoring the command action and preserving his sentence limitation in the face of a certain conviction. Common sense indicates that neither an accused nor an appellate court seeking to ensure a just system are interested in such Pyrrhic victories.

241. *Id.* The CAAF also noted that it was satisfied beyond a reasonable doubt that neither the findings nor the sentence were affected by the company commander's actions. This final pronouncement was the CAAF's fail-safe in the unlikely event that the Supreme Court ever considered the case on a grant of certiorari. *See* United States v. Thomas, 22 M.J. 388 (C.M.A. 1986) (holding that once a prima facie case is established by the defense, the government must prove beyond a reasonable doubt that the unlawful command influence did not affect the findings or the sentence).

242. 513 U.S. 196 (1995).

243. *Id.* at 199.

244. *See Weasler*, 43 M.J. at 18 (noting that the adjudicative stage is impacted by waiver of Federal Rule Evidence 410).

245. *Id.* at 18-19. *See Mezzanatto*, 513 U.S. at 200. The Supreme Court has long upheld knowing and intelligent waiver of fundamental constitutional and statutory rights. *See, e.g.*, Peretz v. United States, 501 U.S. 923, 936 (1991) (noting that most of the basic rights of an accused are subject to waiver); Ricketts v. Adamson, 483 U.S. 1, 10 (1987) (upholding waiver of double jeopardy defense via pretrial agreement); Boykin v. Alabama, 395 U.S. 238, 243 (1969) (waiving right against compulsory self-incrimination, trial by jury, and confrontation by accusers attendant to guilty plea); Johnson v. Zerbst, 304 U.S. 458, 465 (1938) (upholding waiver of Sixth Amendment right to counsel).

246. *Weasler*, 43 M.J. at 18-19.

247. *Id. at* 19 (1995) (Sullivan, C.J., concurring in the result); *see id.* at 20 n.1.

248. *Id.* at 20.

249. *Id.* Chief Judge Sullivan noted that "Article 37 of the Code does not provide for waiver or private deals between an accused and a command to cover-up instances of unlawful command influence which have been discovered at trial." *Id.* at 20-21.

250. *Id.* at 21.

251. *Id.* Chief Judge Sullivan flatly rejected the majority's analytical approach. "In view of this Court's experience with unlawful command influence for over 44 years, the 'contract' rationale proffered by the majority is dead wrong. The majority's condonation of bartered justice is not only self-defeating in an institutional sense but reneges on our traditional commitment to vigilance on this issue." *Id.*

ity's self-interest might cause him to ransom the integrity of the criminal justice system to avoid public disclosure of improper command action. Nothing less than the trust of "the American people and its military forces" was threatened by Weasler's pretrial agreement.[253] The Chief Judge's concern was not that Weasler had been prejudiced by the actions of his company commander. What he feared was the appearance of impropriety created by such deals between a heavy-handed commander and an opportunistic accused.

Judge Wiss was similarly distressed by the majority opinion. Recalling his separate opinion in *Hamilton*, he reiterated his opposition to the majority's *accusatorial versus adjudicative* classification of unlawful command influence.[254] Judge Wiss rejected the majority equation of unlawful command influence during preferral or forwarding of charges to mere "inadvertence [or] technical flaws . . . ."[255] Showing his exasperation with the majority's willingness to allow waiver of unlawful command influence motions that emanate from the accusatorial process, Judge Wiss stated:

> The *greatest* risk presented by unlawful command influence has nothing to do with the stage at which it is wielded; it has nothing to do with whether an accused is bludgeoned with it or whether, in an exercise of ironic creativity, an accused is able to turn the tables and actually use it to his advantage. Instead, it is in its insidiously pernicious character.[256]

Although he clearly thought that the system suffered under the majority rationale, Judge Wiss' primary concern was the dangerous incentive that the majority's opinion created for commanders. He feared that by suppressing full and open litigation of unlawful command influence issues through individualized deal-making, other accuseds, who did not know of the illegal command action, would suffer.[257] Like Chief Judge Sullivan, Judge Wiss condemned the majority for allowing the accused and the convening authority to place self-interest above the collective interest.

Bargained Waiver of Unlawful Command Influence: Common Sense or Heresy?

To the majority, common sense dictated allowing an accused to raise and affirmatively to waive a right that he would otherwise lose if not asserted at trial.[258] They saw this case as being primarily about the appropriate limits of plea bargaining. Although the majority recognized improper command action as the root of the problem, relying on *Hamilton*, the CAAF felt confident relegating CPT Morris' improper actions to little more than defects in the charging process that could be waived at the accused's option. The CAAF resolved to look beyond the label that the appellate defense counsel placed on improper command action and to determine whether the action truly required resolution under Article 37 analysis. Determining that it did not, and therefore did not threaten to "undermine public confidence in [the] proceedings or in military criminal law generally,"[259] the CAAF focused on the traditional pretrial agreement query of whether the term impermissibly altered the judicial process.[260]

The majority concluded that affirmative waiver of an issue the acccused would lose by default if not raised at trial did not threaten the trial process.[261] Improper command action during the accusatorial process, *whether waived by default or raised and affirmatively waived*,[262] did not implicate any fundamental rights which the CAAF traditionally placed beyond the bounds of pretrial agreements.[263] The majority concluded that the pretrial agreement was appropriate because it neither waived unlawful command influence nor imperiled the traditional function of courts-martial.

Chief Judge Sullivan and Judge Wiss viewed the concept of unlawful command influence proffered by the majority as heretical. Command influence, no matter what its stripe, demanded full and open litigation and was never appropriately waived pursuant to a pretrial agreement.[264] Interestingly, neither judge invalidated Weasler's agreement. Though vehemently opposed to waiver in theory, this particular waiver

252. *Id.*

253. *Id.*

254. *Id.* at 21 (Wiss, J., concurring in the result).

255. *See* United States v. Hamilton, 41 M.J. 32, 40 (C.M.A. 1994) (Wiss, J., concurring in the result).

256. *Weasler*, 43 M.J. at 21.

257. *Id.* at 21-22.

258. *Id.* at 19.

259. *Id.*

260. *See* United States v. Cummings, 38 C.M.R. 174, 177 (C.M.A. 1968) (citing United States v. Allen, 25 C.M.R. 8, 11 (C.M.A. 1957)).

261. *Weasler*, 43 M.J. at 19.

survived their scrutiny because both judges could find no prejudice to the accused.[265] For all their indignation over the majority's creation of a standard that subordinated the good of the system to the good of the few, both judges validated the agreement.[266] Why was neither judge able to dissent even though their concurrences were so angst-ridden?

The apocalyptic vision the two judges shared is unrealistic. First, it strains credulity to believe that a defense counsel would waive a command influence issue of such significance that the likely outcome of the issue's litigation would be dismissal. Systemically important issues will be litigated.[267] Second, because *sub rosa* agreements are illegal, affirmative waiver will necessarily result in public disclosure of potential unlawful command influence issues.[268] Therefore, the majority approach actually *lessens* the chance that an overbearing convening authority will be able to bury his misconduct.[269] Third, the military judge will ensure during the providence inquiry that the accused makes a voluntary, knowing, and intelligent waiver of his right to litigate the unlawful command influence motion.[270] The providence inquiry, therefore, enhances public confidence that the accused is not the victim of unlawful coercion. Finally, bargained waiver exacts a cost on the convening authority by lessening the maximum sentence which the accused might receive. This alone will have a self-correcting influence on commanders at all levels who have a real interest in an accused receiving the full sentence adjudged by the court-martial.[271]

Although they conjure up scary scenarios, neither Chief Judge Sullivan nor Judge Wiss backs up the rhetoric with a dissent in *Weasler.* In the final analysis, neither judge believed a procedurally perfect preferral was a fundamental, nonwaiverable right. Neither judge was willing to subordinate Weasler's real interest in plea bargaining to a greater, but speculative, systemic interest in ensuring an accusatory process free from improper command action. The common sense of the majority opinion prevailed: a just system values an accused's interest in minimizing confinement time through plea bargaining more than it does a defect-free charging process.

Conclusion

In *Weasler,* two important criminal justice system interests conflicted. The outcome expanded pretrial agreement jurisprudence and narrowed unlawful command influence jurisprudence. By allowing Weasler to waive his right to a defect-free charging process, the CAAF expanded an accused's options when bargaining with the government. The decision also benefited the justice system by creating an additional incentive for an accused to expose improper command action.[272] The CAAF showed its resolve not to be constrained by past decisions which forbade bargaining over anything but charges and sentence. However, before the majority could extend pretrial

262. *See id.* Just as clearly as the CAAF legitimized affirmative and default waiver of accusatorial defects resulting from improper command actions, the majority also reiterated its commitment to ensuring such waivers are never mandated by a command. By embracing *Hamilton,* the CAAF implicitly recognized that attempts by a commander to force an accused to waive defects in the preferral or forwarding of charges would be an unlawful attempt to influence the trial and would thus run afoul of Article 37. Defects not properly evaluated under the Article 37 regime, if waived voluntarily or by default, become amenable to such analysis when command coercion prompts their waiver. *See* United States v. Hamilton, 41 M.J. 32, 37 (C.M.A. 1994). The *Weasler* majority's reliance on *United States v. Kitts* and the proposition that "[i]t is against public policy to require an accused to withdraw an issue of unlawful command influence in order to obtain a pretrial agreement" is consistent with the view articulated in *Hamilton*. *See id*. (quoting United States v. Kitts, 23 M.J. 105, 108 (C.M.A. 1986)). Notwithstanding the 1991 changes to R.C.M. 705, which allow any party to initiate bargaining and propose terms, and regardless of the broad sweep of *Mezzanatto* (which, like *Bordenkircher* before it, invited a more aggressive use of plea bargaining by the government), the majority in *Weasler* reaffirmed the CAAF's commitment to act if presented with command action that threatens the integrity of the military justice system. *But see* Criminal Law Note, *Recent Developments in Military Pretrial and Trial Procedure*, ARMY LAW., Mar. 1996, at 42 (suggesting that the court should have used *Mezzanatto* to announce a rule allowing government mandated waiver of accusatorial defect issues).

263. *See supra* notes 145-56 and accompanying text.

264. *Weasler,* 43 M.J. at 22.

265. *See id.* at 22-23.

266. *Id.* at 21.

267. Even if the accused has a complete dolt as her defense counsel and an egregious case of unlawful command influence is either waived by failure to raise it at trial or waived pursuant to a bargain that somehow passes the military trial judge's muster, the accused has a remedy. Relying on either an ineffectiveness of counsel remedy or the court's continued adherence to *Blaylock's* holding that unlawful command influence issues that affect the fairness of a trial can always be raised, an accused will always have recourse to the appellate courts for relief. *See* United States v. Blaylock, 15 M.J. 190, 193 (C.M.A. 1983).

268. *See* MCM, *supra* note15, R.C.M. 705(d)(2).

269. *But cf. Weasler,* 43 M.J. at 22 (Wiss, J., concurring in the result).

270. *See generally id.*; United States v. Care, 40 C.M.R. 247 (C.M.A. 1969).

271. Trial counsel who have briefed commanders after trial and have had to inform them that the accused's sentence from the court was longer than that provided for in the pretrial agreement understand the disappointment that commanders feel in knowing that the accused will serve less confinement than what the sentencing authority felt was appropriate for the crime. This sentiment is particularly strong when soldiers in the command believe that the accused has gotten off easy. No commander wants to be responsible for an accused getting a particularly lenient sentence due to the commander's own inappropriate action.

agreement jurisprudence to allow waiver of improper command action, it needed to ensure that neither the accused nor the criminal justice system would be harmed by the practice.[273] This required reappraisal of unlawful command influence jurisprudence.

Beginning with Judge Crawford's concurrence in *Johnston*, the judges began to narrow their definition of unlawful command influence.[274] *Hamilton* and *Weasler* found a majority of the CAAF agreeing that the term "unlawful command influence" was used too broadly in the past.[275] No longer would the ghosts of the 3d Armored Division cases cause the court to reflexively condemn improper command action under the rubric of unlawful command influence.[276] A majority of the court, confident in the ability of the trial process to protect both the accused and the system, looked beyond the labels that the appellate counsel placed on the actions of the parties. The result was a victory of content over form.

The CAAF sharpened the focus of its unlawful command influence jurisprudence in *Weasler*, but the majority ultimately found that Weasler did not suffer from unlawful command influence. Although there was unlawful command action in the charging process, these defects did not implicate the integrity of commanders or their role in administering the criminal justice system. Thus, the CAAF had only to determine whether the defense-initiated waiver of a procedurally correct charging process waived a fundamental right that threatened to turn the trial into a sham. The CAAF found no such fundamental right at stake. Therefore, heeding Mr. Ray's centuries-old advice, the CAAF had only to satisfy itself that the pretrial agreement between SPC Weasler and the government was a "bargain clear and plain."[277] Satisfied it was; the CAAF refused to hear SPC Weasler "afterward complain."[278]

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272. The accused's incentives to raise charging defect issues prior to this decision were limited. Because the defects could be corrected prior to trial, such issues rarely resulted in tangible benefit to the accused. Forcing the government to reprefer charges or to send them back through the chain of command for proper recommendation and transmittal, though providing some sense of personal satisfaction in tweaking the command, generally would not change by one day the time an accused ultimately spent in jail. Indeed, raising such issues could actually backfire on the accused who now had to deal with an angry command. *See supra* note 240 and accompanying text. This decision gives an accused a real benefit because he can now trade his right to force the government to spend additional time in perfecting the charging process for the government's right to see him spend the entire time adjudged in confinement.

273. *See Weasler*, 43 M.J. at 19. *But see id.* at 19-22 (concurring opinions of Chief Judge Sullivan and Judge Wiss).

274. *See* United States v. Johnston, 39 M.J. 242, 245 (C.M.A. 1994) (Crawford, J., concurring in the result) (noting that defective preferral of charges is not unlawful command influence and is therefore subject to waiver if not raised at trial).

275. *See* United States v. Drayton, 39 M.J. 871 (A.C.M.R. 1994), *aff'd*, 45 M.J. 180 (1996); *Weasler*, 43 M.J. at 17; United States v. Hamilton, 41 M.J. 32, 36 (C.M.A. 1994); United States v. Bramel, 29 M.J. 958 (A.C.M.R.), *aff'd*, 32 M.J. 3 (C.M.A. 1990) (summary disposition). The ACMR had come to the conclusion that unlawful command influence analysis was being applied too broadly fully four years before the COMA.

276. However, the CAAF was still willing to enforce draconian sanctions on the government when true unlawful command influence subverted the integrity of courts-martial. *See* United States v. Gleason, 43 M.J. 69 (1995) (dismissing findings and sentence, the CAAF found the accused's battalion commander's actions unlawfully influenced witnesses and infected the entire court-martial process).

277. *See* Ray, *supra* note 1.

278. *Id.*