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FOOLISH CONSISTENCIES AND THE APPELLATE REVIEW OF COURTS-MARTIAL

*John F. O'Connor**

The most pronounced adverse impact [of the Uniform Code of Military Justice] upon the military justice system appears in the intricacies and delays attending appellate review. Since convicted persons have a right to appeal they may delay the final disposition of cases although the petition for review may be entirely without merit and even when it follows an original plea of guilty. Moreover, because of delays in the appeal process, convicted persons receiving short sentences of confinement may have served their sentences before the procedure prescribed by the Code is completed. . . . This involves great expense to the taxpayer and, because of the frivolous nature of the appeal, is generally of no value to the accused.¹

I. INTRODUCTION

The post-September 11, 2001 world has highlighted an important evolution in the way that the United States military justice system is perceived by courts, legal scholars, journalists, and the public at large.² With extensive media reporting of military operations in Afghanistan and Iraq, a spotlight has been shone on the military justice system as it

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1. Secretary of Defense Charles E. Wilson, DEPARTMENT OF DEFENSE, SEMI-ANNUAL REPORT OF THE SECRETARY OF DEFENSE, 1 JANUARY TO JUNE 30, 1953, 122 (1953), *quoted in* George S. Prugh, Jr., *Observations on the Uniform Code of Military Justice: 1954 and 2000*, 165 MIL. L. REV. 21, 27-28 (2000).

2. James W. Smith III, *A Few Good Scapegoats: The Abu Ghraib Courts-Martial and the Failure of the Military Justice System*, 27 WHITTIER L. REV. 671, 693 (2006) (referencing December 2002 news article as “the first evidence that criticism of the military justice system had made its way to the mainstream press”).

has tackled a number of issues relating to these military operations.³ Journalists and legal scholars have written extensively about the reports of detainee abuse from Iraq, most notably at Abu Ghraib prison, and the court-martial proceedings flowing therefrom.⁴ Courts-martial of servicemembers refusing to deploy to Iraq, based either on their contention that the Iraq war is illegal⁵ or on their claims of conscientious objector status,⁶ have piqued the public's interest as part of the larger debate on the Iraq war. In assessing the legality of military commissions created to try detainees at Guantanamo Bay, the Supreme Court considered the due process protections inherent in the Uniform Code of Military Justice ("UCMJ"),⁷ the criminal code for trying servicemembers by court-martial.⁸

What is particularly striking is the shift in public and scholarly perceptions of the military justice system as compared to those expressed in the Vietnam War era. With the United States mired in a Vietnam War that was unpopular in many quarters, courts' and scholars' treatment of the military justice system bordered on derision.⁹ The title of a popular Vietnam-era book offered a characteristically glib put-down of the military justice system: *Military Justice is to Justice as Military Music is to Music*.¹⁰ Congress, animated by its own perceptions of the

3. See, e.g., Michael J. Davidson, *Congressional Investigations & Their Effect on Subsequent Military Prosecutions*, 14 J.L. & POL'Y 281, 325-26 & n.254 (2006).

4. See, e.g., *id.*; *U.S. Military Justice Proceedings Involving Alleged Offenses Against Protected Persons*, 99 AM. J. INT'L L. 713, 713-15 (2005); *Additional U.S. Military Justice Proceedings Against Servicemembers for Alleged Abuses in Iraq and Afghanistan*, 99 AM. J. INT'L L. 503, 503-05 (2005).

5. See, e.g., Rone Tempest, *They Also Serve Their Conscience*, L.A. TIMES, Apr. 30, 2007, available at 2007 WLNR 8121286 (referencing Army court-martial of officer who refused deployment to Iraq on grounds that deployment was illegal); *Army War Resister Takes on New Lawyers for Retrial*, SEATTLE POST-INTELLIGENCER, Apr. 6, 2007, available at 2007 WLNR 6740241.

6. See, e.g., Mary Spicuzza, *An Army of Uno*, S.F. WEEKLY, June 20, 2007, available at 2007 WLNR 12386348 (detailing court-martial of sailor court-martialed for refusing to deploy with his ship after the Navy denied his application for conscientious objector status).

7. 10 U.S.C. §§ 801-946 (2006) [hereinafter U.C.M.J.].

8. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2786-93 (2006).

9. See, e.g., ROBERT SHERRILL, *MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC* 212-13 (1970) ("Justice is too important to be left to the military. If military justice is corrupt – and it is – sooner or later it will corrupt civilian justice.").

10. *Id.*; see also Robert E. Montgomery, Jr., Comment, *God, the Army, and Judicial Review: The In-Service Conscientious Objector*, 56 CAL. L. REV. 379, 447 (1968) (questioning the ability of the military justice system to safeguard the rights of soldiers claiming conscientious objector status); Howard E. Cohen, Comment, *The Discredit Clause of the UCMJ: An Unrestricted Anachronism*, 18 UCLA L. REV. 821, 827 (1971) (criticizing court-martial system's ability to protect constitutional rights); *U.S. Military Justice on Trial*, NEWSWEEK, Aug. 31, 1970, at 18 ("The Uniform Code of

inadequacies of courts-martial, introduced a number of bills in the early 1970s that if enacted into law would have, among other things, prohibited courts-martial from trying offenses committed in the United States except for a small class of purely military crimes.¹¹ The principal sponsor of these bills, Senator Birch Bayh of Indiana, declared in 1971 that it was “a shameful fact that this nation, which prides itself on offering ‘liberty and justice for all,’ fails to provide a first-rate system of justice for the very citizens it calls upon to defend those principles.”¹² Indeed, in a 1969 decision, the United States Supreme Court characterized courts-martial as meting out “so-called military justice” and being “marked by the age-old manifest destiny of retributive justice.”¹³

By contrast, misgivings by members of the public and the academic community regarding military operations in Iraq have not, for the most part, manifested themselves in negative characterizations of the quality of justice available at courts-martial.¹⁴ If there has been one reasonably persistent recent criticism of the military justice system, it has concerned *who* was subjected to trial by court-martial, with commentators observing that detainee abuse courts-martial tended to focus on lower-ranking soldiers and not their military superiors.¹⁵ But this criticism is in itself remarkable. Where forty years ago commentators assailed the very ability of courts-martial to dispense justice, current complaints have focused on the fact that the court-martial net was not cast *wider* in order to prosecute the military superiors of those actually tried by court-

Military Justice is uniform, is a code and is military – and therefore has nothing to do with justice.”) (quoting Charles Morgan, Jr. of the American Civil Liberties Union).

11. See Frederick Bernays Wiener, *American Military Law in the Light of the First Mutiny Act's Tricentennial*, 126 MIL. L. REV. 1, 67-68 (1989) (detailing legislative attempts in the early 1970s to narrow the reach of courts-martial).

12. See Kenneth J. Hodgson, *The Manual for Courts-Martial-1984*, 57 MIL. L. REV. 1, 2 (1972) (quoting a statement by Senator Bayh in a 1971 issue of *Parade* magazine). Senator Bayh also made a statement in connection with these bills in which he opined that, in addition to problems of command influence, the court-martial system “denies a defendant other rights fundamental to a free society.” See 117 CONG. REC. S2551 (daily ed. Mar. 8, 1971).

13. *O'Callahan v. Parker*, 395 U.S. 258, 265-66 & n.7 (1969); see also *id.* at 266 (“None of the travesties of justice perpetrated under the UCMJ is really very surprising, for military law has always been and continues to be primarily an instrument of discipline, not justice.”).

14. See, e.g., Smith, *supra* note 2, at 676 (criticizing “[t]he disparate treatment between enlisted soldiers and officers”).

15. See, e.g., *id.* at 673-74; Victor Hansen, *What's Good for the Goose is Good for the Gander Lessons from Abu Ghraib: Time for the United States to Adopt a Standard of Command Responsibility Towards Its Own*, 42 GONZ. L. REV. 335, 338-41 (2007); Harold H. Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145, 1151 (2006); Christopher A. Britt, Note, *Commissioning Oath & the Ethical Obligation of Military Officers to Prevent Subordinates from Committing Acts of Torture*, 19 GEO. J. LEGAL ETHICS 551, 553 & n.25 (2006).

martial.¹⁶ Boiled down, this is an argument that implicitly acknowledges the inherent fairness of courts-martial, as the critics have urged additional courts-martial rather than seriously challenging the merits of the courts-martial actually conducted.¹⁷

Similarly, where the Supreme Court forty years ago was openly dismissive of the truth-seeking abilities of courts-martial, the Court in 2006 invalidated the President's military commission regulations based in part on its conclusion that Congress required military commissions to have the same due process as courts-martial, with the Court identifying several areas where the proposed military commissions fell short in that regard.¹⁸ The Supreme Court's holding out of courts-martial as the exemplar of due process to which military commissions must aspire is but the latest step in the rehabilitation of courts-martial as justice-dispensing entities in the eyes of the Supreme Court.¹⁹

Recent platitudes aside, there are, in this author's view, serious deficiencies in the military justice system that are, for the most part, out of the general public's view. These deficiencies concern not the conduct of courts-martial themselves, but the way that courts-martial are reviewed on appeal.²⁰ Simply put, the military appellate courts review too many cases because the system inadequately separates cases that involve litigable appellate issues from cases that do not.²¹ In particular, the military justice system requires full-blown appellate review in virtually all courts-martial in which the approved sentence exceeds a relatively modest threshold, even in cases where the accused pleads guilty and receives exactly the sentence he requests.²² Remarkably, this appellate review system allows – indeed, encourages – accuseds pleading guilty as part of a plea bargain to turn around on appeal and argue that their convictions should be overturned.²³

No civilian criminal justice system would tolerate appellate review in the circumstances in which the military regularly permits court-martial appeals.²⁴ As a result of this flawed process, court-martial

16. See, e.g., Hansen, *supra* note 15, at 676.

17. See *id.*

18. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2786-93 (2006).

19. For a discussion of the Supreme Court's evolving perception of courts-martial, see John F. O'Connor, *Statistics and Military Deference: A Response to Professor Lichtman*, 66 MD. L. REV. 668, 692-94 (2007).

20. See *infra* Part III.D.

21. See *infra* Part II.

22. See U.C.M.J., 10 U.S.C. § 866(b), art. 66(b) (2006).

23. See *infra* Part III.D.

24. See *infra* Part III.A.

proceedings actually have *less* finality than the typical civilian criminal proceeding, when the government's interest in achieving finality is considerably greater in the military justice context.²⁵

But the cost of a bloated military appellate review system is not just the abstract loss of finality; there are considerable opportunity costs imposed by this process. With such a broad class of cases subject to mandatory appellate review, it is hardly surprising that the appellate review pipeline is chock full of relatively simple guilty plea cases that present no colorable appellate issues whatsoever.²⁶ Every hour that is spent in processing these guilty-plea appeals is an hour that is diverted from the appellate review of courts-martial involving issues that were highly contested at trial. This one-size-fits-all aspect of appellate review diverts resources not only from highly contested courts-martial presenting real appellate issues, but also forces the services to devote resources to the military appellate system that, if there were a more slimmed-down appellate caseload, could be used for other military imperatives.

The crushing caseload caused by the mandatory appellate review of guilty-plea cases necessarily creates delays at every level of appellate review.²⁷ It is hardly surprising, then, that the United States Court of Appeals for the Armed Forces ("CAAF") – the civilian court sitting atop the military justice appellate structure – has encountered a number of cases involving post-trial and appellate delays of embarrassing durations.²⁸ The only durable solutions to this problem appear to be either throwing additional resources at the problem at every stage without changing the system itself, or taking a hard look at the military appellate caseload with an eye toward reducing the number of cases reviewed on appeal.²⁹ Any such effort to narrow the class of courts-martial subject to mandatory appellate review should focus on eliminating appeals where the accused has no moral right to appellate review – such as where the accused essentially raised no appealable issues at trial – while not being so overly broad as to capture cases where an accused may have legitimate issues to raise on appeal.³⁰

The thesis of this Article is that most of the vices infesting the

25. See *infra* Part III.B.

26. See *infra* Part III.D.

27. See, e.g., United States v. Moreno, 63 M.J. 129, 137 (C.A.A.F. 2006) ("While appellate defense counsel's caseload is the underlying cause of much of this period of delay . . .").

28. See *infra* Part III.E.

29. See *infra* Part IV.

30. *Id.*

military appellate system could be corrected, or at least moderated, by reforming the rules governing when, and how, a servicemember can waive his right to appellate review. Under the system as it currently exists, an accused is *prohibited* from agreeing to waive appellate review of his court-martial as part of the plea bargaining process.³¹ This process ensures that an accused can waive his appellate review rights *only when there is no way for him to get anything in return*. Not surprisingly, then, appellate review waivers are exceedingly rare.

If an accused were permitted to waive his appellate rights as part of the plea bargaining process, however, he could actually obtain something – sentencing relief – for saving the government the burden of appellate review.³² Where the accused has pleaded not guilty at trial, or pleads guilty without the benefit of a plea bargain, the accused's appellate review rights would be completely unaffected.³³ The proposed reform, then, likely would reduce the overall appellate caseload considerably, but would not eliminate the appellate review rights of accuseds who truly value those rights.³⁴ The result would be a more coherent appellate process that eliminates many of the deficiencies associated with the current system.

Part II of this Article examines the “costs” associated with the appeal of a court-martial conviction, that is, the resources that are required to bring a case through its appellate review.³⁵ When a court-martial appeal presents colorable issues that the accused has a moral right to raise (not having waived them at trial), these are “costs” that are well worth expending.³⁶ But where an appeal presents no colorable issues, or where the accused by his conduct has waived any legitimate right to pursue his arguments on appeal, these costs become an unnecessary and unwise burden to impose on the military justice system.³⁷

Part III of this Article explores the arguments in favor of reforming the military appellate review framework. An analysis of the military appellate review system demonstrates that it disserves the military's interest in finality of criminal proceedings, and gives accuseds perverse incentives to take inconsistent positions at trial and on appeal, something

31. MANUAL FOR COURTS-MARTIAL, UNITED STATES, RULES FOR COURTS MARTIAL 705(b), (c) (2005) [hereinafter R.C.M.].

32. *See infra* Part IV.

33. *Id.*

34. *Id.*

35. *See infra* Part II.

36. *Id.*

37. *Id.*

that never would be permitted in the civilian context.³⁸ Most troublesome, the military appellate review system fails to differentiate between cases that present substantial issues raised and preserved at trial and the fairly common case where the accused pleads guilty and raises no issues whatsoever at trial.³⁹ By subjecting both types of cases to the same appellate review, the military appellate system harms accuseds seeking to raise contested issues on appeal because their appeals are delayed while largely frivolous cases wind their way ahead of them in the appellate pipeline.⁴⁰

Part IV of this Article examines potential ways to address the inefficiencies of the military appellate system.⁴¹ Ultimately, the most effective reform is one that is market based, that essentially allows accuseds to self-select as to whether they will pursue an appeal of their court-martial.⁴² Rule for Court-Martial 705(c)⁴³ prohibits accuseds from dealing away their appellate rights in the plea bargaining process. Changing that rule would help separate the appellate wheat from the chaff, as accuseds who have no colorable issues to raise at trial would be highly likely to waive appellate review as part of a plea bargain.⁴⁴ Such a trend would free up appellate resources to deal with substantial appellate issues raised by accuseds who actually contested matters at trial, while taking appellate rights away from only those accuseds who value the benefits of a plea agreement over their right to pursue an appeal.⁴⁵

II. THE "COSTS" OF A COURT-MARTIAL APPEAL

Article 66(a) of the UCMJ requires that the Judge Advocate General of each service establish a Court of Criminal Appeals to hear court-martial appeals.⁴⁶ In the absence of waiver, these courts review all courts-martial where the approved sentence includes death, a punitive discharge, or confinement for one year or more.⁴⁷ In Fiscal Year 2005, the service Judge Advocates General received records of trial for 3,364 courts-martial that were subject to mandatory appellate review under

38. *See infra* Part III.A.

39. *See infra* Part III.D.

40. *Id.*

41. *See infra* Part IV.

42. *Id.*

43. R.C.M. 705(c), *supra* note 31.

44. *See infra* Part IV.

45. *Id.*

46. U.C.M.J., 10 U.S.C. § 866(a), art. 66(a) (2006).

47. *Id.* § 866(b), art. 66(b).

Article 66.⁴⁸ For every one of these courts-martial, there are significant resources expended in completing this mandatory appellate review.

Once the military judge bangs her gavel to conclude a court-martial, the appellate review process essentially begins. Where the adjudged sentence, if approved, would trigger mandatory appellate review, the court reporter must prepare a verbatim transcript of the proceedings.⁴⁹ Once completed, the record of trial is delivered to the prosecutor, called the trial counsel, who reviews the record of trial to “ensure that the reporter makes a true, complete and accurate record of the proceedings.”⁵⁰ If no unreasonable delay will result, the trial counsel also provides a copy of the record of trial to the accused’s defense counsel, before authentication, so that the defense counsel can examine the record of trial and propose any additional corrections.⁵¹ Once the record of trial has been reviewed by the trial counsel, and any appropriate corrections are made, the record of trial is delivered to the military judge who presided over the court-martial for review and authentication.⁵²

Once the military judge authenticates the record of trial, a copy is served on the accused or his defense counsel.⁵³ The authenticated record of trial also is provided to the convening authority, the military commander who referred the charges to court-martial, who has the power to approve or disapprove of the findings or sentence of the court-martial.⁵⁴ However, there are a number of procedural steps that must take place before the convening authority is permitted to take action on a record of trial.⁵⁵

First, once the accused (or his counsel) has been served with the

48. See Annual Report of the Code Committee on Military Justice, Fiscal Year 2005, § 3 at app. 1 (noting that the Army had 954 records of trial processed for Article 66 review); § 4 at app. 1 (noting that the Navy and Marine Corps had a total of 1,835 records of trial processed for Article 66 review); § 5 at app. 1 (noting that the Air Force had 543 records of trial processed for Article 66 review); § 6 at app. 1 (noting that the Coast Guard had 32 records of trial processed for Article 66 review), available at <http://www.armfor.uscourts.gov/Annual.htm>.

49. R.C.M. 1103(b)(2)(B) (setting forth instances in which a verbatim transcript must be prepared for general courts-martial); R.C.M. 1103(c) (setting forth circumstances in which a verbatim transcript is required for special courts-martial). Where an accused has been convicted, but a verbatim transcript is not required, the court reporter may prepare a “summarized report of the proceedings” for inclusion in the record of trial. R.C.M. 1103(b)(2)(C).

50. Discussion, R.C.M. 1103(i)(1)(A).

51. R.C.M. 1103(i)(1)(B).

52. R.C.M. 1104(a)(2)(A). If the military judge is unavailable to authenticate the record of trial, R.C.M. 1104(a)(2)(B) provides for alternative means of authenticating the record of trial.

53. R.C.M. 1104(b)(1)(A), (C).

54. R.C.M. 1106(a).

55. See *infra* notes 56-66 and accompanying text.

authenticated record of trial, the accused has ten days in which to submit matters for the convening authority to consider.⁵⁶ In this submission, the accused can argue that errors committed at the court-martial affect the legality of the findings or sentence, can submit materials in mitigation that were not available at the time of the court-martial, and can provide materials in support of a request that the convening authority reduce the severity of the adjudged sentence as a matter of clemency.⁵⁷ The ten-day deadline for submission of such matters by the defense may be extended by the convening authority or his staff judge advocate.⁵⁸

Once the accused has submitted post-trial materials for consideration by the convening authority, or the deadline for submitting such materials has passed, the record of trial and any submitted post-trial materials are routed to the convening authority's staff judge advocate or legal officer for review.⁵⁹ The staff judge advocate or legal officer is required to submit a report to the convening authority to assist the convening authority in taking action on the adjudged sentence.⁶⁰ This report has a number of mandatory issues to be addressed, and must include a specific recommendation as to the action to be taken by the convening authority with respect to the adjudged sentence.⁶¹ If the accused's post-trial submission alleges legal error during the court-martial proceedings, a staff judge advocate's report also must address whether corrective action should be taken.⁶² In addition to the required subjects, a staff judge advocate's recommendation can include other materials deemed appropriate by the staff judge advocate or legal officer, including material from outside the court-martial record.⁶³

Before the record of trial can be forwarded to the convening authority for action, however, the report and recommendation of the staff judge advocate or legal officer must be served on the accused and his defense counsel.⁶⁴ The accused's counsel is permitted ten days from service of the staff judge advocate or legal officer recommendation to

56. R.C.M. 1105(c)(1).

57. R.C.M. 1105(b).

58. R.C.M. 1105(c)(1).

59. R.C.M. 1106(a).

60. R.C.M. 1106(d)(1).

61. R.C.M. 1106(d)(3).

62. R.C.M. 1106(d)(4).

63. R.C.M. 1106(d)(5).

64. R.C.M. 1106(f)(1). The accused also can elect to have the report and recommendation served solely on defense counsel, and the staff judge advocate or legal officer can serve the report and recommendation solely on defense counsel, even over the accused's objection, where it is impractical to serve the accused. *Id.*

submit comments on the recommendation.⁶⁵ Once all of these procedures have been accomplished, the record of trial is forwarded to the convening authority.⁶⁶ In taking action on the record of trial, the convening authority is required to take action on the sentence, and is permitted to take action on the findings.⁶⁷ The convening authority may approve the findings as adjudged at trial, or he may change a finding of guilty to a finding of guilty to a lesser included offense, or the convening authority can set aside one or more findings of guilty and either dismiss the charges or order a rehearing on them.⁶⁸ As for the adjudged sentence, the convening authority can approve the sentence as adjudged, or can disapprove the adjudged sentence in whole or in part, or change the punishment adjudged so long as the change does not increase the severity of the accused's punishment.⁶⁹

As the foregoing discussion demonstrates, the process of readying a record of trial for a convening authority's action is a labor-intensive one, but it is just the first step in the appellate review process. Nevertheless, the convening authority's action is an important line of demarcation, particularly as it relates to an accused's right to waive appellate review of his court-martial conviction.⁷⁰ The accused's deadline for filing a waiver of appellate review is ten days after the accused or his counsel is served with the convening authority's action.⁷¹ Importantly, however, the rules for courts-martial are structured to ensure that an accused can never obtain anything of value for waiving his right to appellate review of his court-martial conviction.⁷²

65. R.C.M. 1106(f)(5). The staff judge advocate or legal officer may supplement his recommendation to address the comments submitted by the accused's defense counsel. R.C.M. 1106(f)(7). However, if this addendum contains new matter, it must be served on defense counsel and defense counsel must be provided ten days to comment on the new matter before the record of trial is forwarded to the convening authority for action. *Id.*

66. R.C.M. 1107.

67. *Id.*

68. R.C.M. 1107(c).

69. R.C.M. 1107(d). A number of cases have considered whether the convening authority's change in the sentence from one type of punishment to another had the effect of increasing the accused's punishment. Paradoxically, these cases typically arise when the change in punishment by the convening authority came at the specific request *of the accused*, such as where the accused asks the convening authority to increase the period of any confinement in return for not approving a punitive discharge from the service. *See, e.g.,* United States v. Carter, 45 M.J. 168, 170 (C.A.A.F. 1996); United States v. Lee, 43 M.J. 794, 799 (N-M. Ct. Crim. App. 1995).

70. *See* R.C.M. 1107(c).

71. R.C.M. 1110(a), (f)(1). After the deadline for waiving appellate review has passed, an accused may withdraw appellate review by filing a notice of withdrawal either with the service Judge Advocate General or with the officer exercising general court-martial jurisdiction over the accused. R.C.M. 1110(e)(2).

72. *See* United States v. Baker, 28 M.J. 121, 122 (C.M.A. 1989).

First, R.C.M. 705(c) prohibits pretrial agreements (the military term for a plea bargain) from including any provision that would deprive the accused of “the complete and effective exercise of post-trial and appellate rights.”⁷³ Second, the rule concerning waiver of appellate rights expressly provides that “[n]o person may compel, coerce, or induce an accused by force, promises of clemency, or otherwise to waive or withdraw appellate review.”⁷⁴ Given that the rules require an affirmative act by an accused to waive his right to appellate review, and yet prohibit an accused from receiving any consideration for executing such a waiver, it is hardly surprising that waivers of appellate review are exceedingly rare.⁷⁵

Excepting the rare case where an accused magnanimously waives his appellate rights, the convening authority, upon approving a sentence including a punitive discharge or confinement for one year or longer, sends the record of trial to the appropriate service Judge Advocate General.⁷⁶ The Judge Advocate General then forwards the record to the Court of Criminal Appeals for the first level of appellate review under Article 66 of the UCMJ.⁷⁷ Each service is required under the UCMJ to appoint appellate defense counsel to represent accuseds, at government expense, in their appeals to the applicable Court of Criminal Appeals.⁷⁸

Thus, in every case involving Article 66 appellate review, a government-funded appellate defense counsel reviews the record of trial in order to determine what errors, if any, can be asserted in the Court of Criminal Appeals.⁷⁹ In performing that task, “[a]ppellate defense counsel has the obligation to assign all arguable issues,” as well as to identify issues that the accused asks counsel to raise even if counsel believes that the issues raised by the accused are frivolous.⁸⁰ If appellate defense counsel identifies issues worthy of an assignment of error, or if the accused raises assignments of error that appellate defense counsel believes are frivolous, appellate defense counsel files a brief before the proper Court of Criminal Appeals, and appellate government counsel is

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

74. R.C.M. 1109(c).

75. *See Baker*, 28 M.J. at 122.

76. R.C.M. 1111(a)(1), (b)(1) (requiring that general court-martial records of trial and special court-martial records of trial be forwarded to the Judge Advocate General provided that the accused has not waived appellate review).

77. U.C.M.J., 10 U.S.C. § 866(b), art. 66(b) (2006) (requiring the service Judge Advocates General to forward to a Court of Criminal Appeals all records of trial where the approved sentence includes death, a punitive discharge, or confinement for one year); R.C.M. 1201(a) (same).

78. *Id.* § 870(a), (c), art. 70(a), (c) (2006); R.C.M. 1202(a), (b)(2).

79. *See id.*

80. *United States v. Grostefon*, 12 M.J. 431, 435-36 (C.M.A. 1982).

assigned to review the brief and record of trial in order to formulate the government's response.⁸¹

Moreover, even where the accused and his appellate defense counsel submit no allegations of error, the Courts of Criminal Appeals *still* must review the entire record of trial independently in order to satisfy itself that the findings and sentence are correct as a matter of law and fact.⁸² When appellate defense counsel and the accused identify no issues to raise on appeal, rather than having the case end there, appellate defense counsel submits the record of trial to the Court of Criminal Appeals "on the merits."⁸³ A submission on the merits is a pleading filed "without conceding the legal or factual correctness of the findings of guilty or the sentence . . . [but] which does not assign error."⁸⁴ As the United States Army Court of Criminal Appeals explains in its rules:

In cases referred to the Court for review pursuant to Article 66, U.C.M.J., the appellant, without conceding the legal or factual correctness of the findings of guilty or the sentence, may file a pleading which does not assign error, does not raise error asserted personally by the appellant, and does not request specific relief. In such cases, the Clerk will deliver the original record of trial to the Court without delay. The Court may proceed with its review and may issue a decision unless notified within seven days that the appellee intends to file a brief⁸⁵

81. *Id.*; see also § 870(b), art. 70(b) (detailing duties of appellate government counsel); *United States v. McNally*, No. ACM 28963, 1991 WL 82142, at *1 (A.F.C.M.R. Mar. 14, 1991) (noting that appellate government counsel typically is not provided a record of trial for review until such time as error has been assigned).

82. § 866(c), art. 66(c); see also *Grosteffon*, 12 M.J. at 435 (observing that the service Courts of Criminal Appeals, then known as the Courts of Military Review, have "the mandatory responsibility to read the entire record and independently arrive at a decision that the findings and sentence are correct in law and fact"). Indeed, the Courts of Criminal Appeals are unique among appellate courts in that they have *de novo* fact finding powers. § 866(c), art. 66(c) ("In considering the record, [the Court of Criminal Appeals] may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses."); *United States v. Tyler*, 34 M.J. 293, 295 (C.M.A. 1992) (commenting on the "unique fact finding power(s)" of the Courts of Criminal Appeals).

83. See *United States v. Pritchett*, No. NMCCA 9601212, 2005 WL 1656838, at *2 (N-M. Ct. Crim. App. July 14, 2005) ("[E]ach lawyer who enters an appearance has a duty to read the record and file a brief or submission on the merits in a timely manner.").

84. *United States v. Adams*, 59 M.J. 367, 369 (C.A.A.F. 2004) (omission in original); see also *United States v. Riggs*, 59 M.J. 614, 615 (C.G. Ct. Crim. App. 2003) (characterizing a merits submission as a pleading that "while not acknowledging that the findings and sentence are correct in law and fact, has assigned no error").

85. A. CT. CRIM. APP. R.15.2, available at <http://www.jagcnet.army.mil/acca>. The Air Force and Navy-Marine Corps Courts of Criminal Appeals similarly have internal rules acknowledging the existence of briefs "on the merits," where the accused and his appellate defense counsel assign

A submission “on the merits” therefore simply sends the record of trial to the Court of Criminal Appeals and requires that court to review the entire record in order to render its independent judgment as to whether there are any errors that could affect the legal and factual correctness of the approved findings and sentence, even where the accused and his appellate counsel have alleged no errors.⁸⁶ In conducting this independent review of submissions “on the merits,” the Courts of Criminal Appeals can take any number of actions, from approving the court-martial findings and sentence, to taking corrective action with respect to errors that it identifies, to addressing potential legal issues and explaining why they require no corrective action, to specifying issues to be briefed by appellate defense counsel and appellate government counsel for further consideration by the court.⁸⁷

Once the Court of Criminal Appeals has issued its decision, an accused, through his assigned appellate defense counsel, can file a petition in the CAAF, asking that court to review the decision of the Court of Criminal Appeals.⁸⁸ In cases in which CAAF grants review, the accused can file a petition for a writ of certiorari in the United States Supreme Court to the extent that the accused is aggrieved by the CAAF’s decision.⁸⁹ As with petitions for review filed with CAAF, an

no errors to the proceedings below and the court proceeds with its independent review of the record. See A.F. Ct. CRIM. APP. R.15.4, available at https://afcca.law.af.mil/content/afcca_data/cp/afccacombinedrules-05mar07.pdf (“Cases in which appellate defense counsel do not assign and the Court does not specify any issues, will be designated ‘merits’ cases. Appellate government counsel need not respond to a case submitted on its merits.”); N-M. Ct. Crim. App. R.4-1(b), available at <http://www/jag.navy.mil/documents/NMCCARules RulesPandP.doc> (adopting different filing procedures for appellate briefs assigning error and “merit submissions”).

86. See *Adams*, 59 M.J. at 369.

87. For a sampling of cases in which a Court of Criminal Appeals raised an issue on an appeal submitted “on the merits,” see, e.g., *United States v. Peele*, 46 M.J. 866, 867 n.1 (A. Ct. Crim. App. 1997); *United States v. Reynolds*, 44 M.J. 726, 727 (A. Ct. Crim. App. 1996); *United States v. Smith*, 41 M.J. 817, 818 (N-M. Ct. Crim. App. 1995); *United States v. Sanchez*, 40 M.J. 508, 509 (A.C.M.R. 1994); *United States v. Vandivel*, 37 M.J. 854, 856 (A.F.C.M.R. 1993); *United States v. Simms*, 35 M.J. 902, 903 (A.C.M.R. 1992); *United States v. Wallace*, 35 M.J. 897, 898 (A.C.M.R. 1992); *United States v. Washington*, 35 M.J. 774, 775 (A.C.M.R. 1992); *United States v. Story*, 35 M.J. 677, 677 (A.C.M.R. 1992); *United States v. Bouknight*, 35 M.J. 671, 672 (A.C.M.R. 1992); *United States v. Coleman*, 34 M.J. 1020, 1021 (A.C.M.R. 1992); *United States v. Gowadia*, 34 M.J. 714, 716 (A.C.M.R. 1992); *United States v. Simpson*, 33 M.J. 1063, 1064 (A.C.M.R. 1991); *United States v. Goodes*, 33 M.J. 888, 888 (C.G.C.M.R. 1991); *United States v. Brookins*, 33 M.J. 793, 794 (A.C.M.R. 1991); *United States v. Tenk*, 33 M.J. 765, 766 (A.C.M.R. 1991); *United States v. McCaig*, 32 M.J. 751, 752 (A.C.M.R. 1991); *United States v. Morales-Santana*, 32 M.J. 557, 557 (A.C.M.R. 1990); *United States v. Shaw*, 30 M.J. 1033, 1033 (A.F.C.M.R. 1990).

88. U.C.M.J., 10 U.S.C. § 867(b), art. 67(b) (2006) (conferring upon the CAAF discretionary jurisdiction over decisions by the Courts of Criminal Appeals); § 870(c), art. 70(c) (providing that appellate defense counsel shall represent an accused before the CAAF upon the accused’s request).

89. *Id.* § 867a(a), art. 67a(a) (2006).

accused is entitled to representation by a government-funded appellate defense counsel in connection with the filing of a petition for a writ of certiorari.⁹⁰ These are the “costs” that the UCMJ and Rules for Courts-Martial impose on the military appellate review system for each of the thousands of courts-martial each year that result in an approved sentence that includes a punitive discharge or confinement for one year or more.

It must be stressed, however, that the use of the term “costs” to describe the required appellate review procedures is not intended in a pejorative sense. The fact that the appellate review process for a given court-martial imposes a cost or burden does not necessarily mean that these costs are wasteful or unwise. When an accused is charged with a crime and contests guilt at trial, it makes perfect sense to establish procedures that allow the accused meaningfully to challenge his conviction on appeal. And the unique characteristics of the court-martial forum, with its emphasis on speed and the worldwide reach of its jurisdiction, certainly supports the notion that the government should bear the financial burden of ensuring that the accused is adequately represented on appeal.⁹¹

But every case is not *A Few Good Men* or *The Caine Mutiny*, where the accused vigorously contests the charges against him and rightfully should expect an appellate review apparatus that will allow him to pursue vindication on appeal. Rather, many courts-martial, if not most, involve no contested charges, have an accused who has agreed to plead guilty to some or all of the charges in return for sentencing relief, have no pretrial motions filed or ruled upon, and, in many cases, involve a situation where the accused has expressly asked the military judge to sentence him to a punitive discharge from the service.⁹² The military justice system’s one-size-fits-all appellate review system, which requires the same procedural steps for an essentially uncontested guilty plea case as it does for a full-blown trial on the merits, does a disservice to the accused who actually litigated issues below because it diverts resources to guilty plea cases with no contested issues that could be expended in dealing with appeals from contested courts-martial.⁹³ At a bare

90. *Id.* § 870, art. 70. Indeed, the CAAF recently issued an order directing an accused’s appellate defense counsel to continue representation of the accused where the deadline for filing a certiorari petition had not expired. Order, Lovett v. United States, No. 07-8002/AF, Daily Journal No. 07-015 (Oct. 24, 2006), available at <http://www.armfor.uscourts.gov/journal/2006Jrnl/2006Oct.htm>.

91. See Smith, *supra* note 2, at 674 (“One of the advantages of the military justice system is its ability to respond quickly to acts of misconduct.”).

92. See *infra* Part III.D.

93. *Id.*

minimum, the seeming illogic in treating contested courts-martial the same as uncontested guilty plea cases for appellate review purposes justifies an examination of the credits and debits of continuing full-blown appellate review of virtually all courts-martial reaching the punishment threshold set forth in Article 66(b) of the UCMJ.⁹⁴

III. THE CASE FOR ENDING REGULARIZED APPELLATE REVIEW OF GUILTY PLEA CASES

A. *Comparing Civilian and Military Practice*

The military justice system, as presently constructed, essentially requires the same appellate review for each and every court-martial where the approved sentence includes a punitive discharge or confinement for one year or more.⁹⁵ Indeed, the *only* cases meeting the Article 66(b) punishment threshold that are not subject to full-blown appellate review are cases in which the accused takes the affirmative step (for no consideration) of waiving or withdrawing appellate review.⁹⁶ The extent of appellate review does not depend on whether the accused pleaded guilty at trial, whether he had a pretrial agreement to plead guilty, or even whether the accused raised a single motion or objection at trial.⁹⁷ In conducting a ground-up assessment of the utility of that program, a useful starting point is consideration of the appellate review process in the civilian federal court system.

One reason why a review of civilian practice is a sensible starting point is Article 36(a) of the UCMJ, which permits the President to promulgate court-martial rules subject to the following guidance:

Pretrial, trial, and post-trial procedures . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.⁹⁸

While Article 36(a) appears to evince a legislative preference that court-martial procedures conform to civilian practice where practicable,

94. U.C.M.J., 10 U.S.C. § 866(b), art. 66(b) (2006).

95. *Id.* § 866(b), art. 66(b).

96. *Id.*

97. *See id.*

98. *Id.* § 836(a), art. 36(a).

this is hardly an inexorable command.⁹⁹ In enacting the UCMJ, Congress expressly created an appellate review system where the standards for appellate review would differ from the standards in federal court.¹⁰⁰ Therefore, one properly can surmise that, at least as of the time of the enactment of the UCMJ, Congress itself had concluded that appellate review norms for courts-martial and for civilian courts need not be congruent. Moreover, even where the UCMJ is silent on an issue of procedure, its only command is that the President apply federal court principles only so far as he determines that such principles are practicable for court-martial practice.¹⁰¹

Nevertheless, consideration of civilian practice is a crucial starting point in assessing existing court-martial appellate procedures because civilian practice sheds considerable light on the value judgments American society has made as to the appropriate appellate structure for a respectable criminal justice system. Given society's policy choices with respect to the civilian criminal justice system, it is appropriate to question why additional appellate review standards are required in the military justice system than are deemed essential in the civilian context. Of course, the fact that the military justice system might have additional procedures in one aspect or another of appellate review does not *per se* make those procedures inappropriate or excessive, but it does signal an appropriate place to stop and at least consider whether the advantages of those additional procedures justify the costs that they impose on the system.

There are four distinctions between the military and federal court criminal justice systems that, when applied together, create a remarkable difference in the appellate review procedures in each forum.¹⁰² The first such distinction is that the military justice system creates mandatory appellate review when the approved sentence reaches a relatively low threshold,¹⁰³ while there is no mandatory appellate review in the federal court system. Rather, in federal court, a criminal defendant can appeal his conviction and sentence only if he takes the affirmative step of

99. *See id.*

100. *Compare* U.C.M.J., 10 U.S.C. § 866(b), art. 66(b) (2006) (requiring, except where the accused waived appellate review, referral to a Court of Criminal Appeals of all courts-martial where the adjudged sentence includes a punitive discharge or confinement for one year) *and* § 866(c), art. 66(c) (requiring a Court of Criminal Appeals to review the record of trial of every court-martial referred to it) *with* FED. R. APP. P. 3(A) (providing that an appeal of right is taken only by filing a notice of appeal in the federal district court within the time required).

101. *Id.* § 836(a), art. 36(a).

102. *See infra* notes 103-125 and accompanying text.

103. § 866(b), art. 66(b).

timely filing a notice of appeal.¹⁰⁴ Thus, in civilian practice, inertia leads to no appeal, while in the military justice system, inertia leads to automatic appellate review.

The second distinction between the two systems of justice concerns the accused's ability to waive appellate review of his case. In federal civilian practice, an accused is permitted to waive appellate review as part of his plea bargain with the government, and therefore can use his appellate rights as a bargaining chip in plea discussions.¹⁰⁵ By contrast, while a military accused, except one facing an approved death sentence, has the power to waive appellate review, the court-martial rules promulgated by the President prohibit the accused from trading away his appellate rights as part of plea negotiations¹⁰⁶ and prohibit the government from offering the accused any inducement at all, such as

104. See FED. R. APP. P. 3 (requiring the timely filing of a notice of appeal to create appellate court jurisdiction).

105. See, e.g., *United States v. Speaks*, No. 05-4091, 2006 WL 3827002, at *1 (4th Cir. Dec. 28, 2006) (“In paragraph 5 of his plea agreement, Speaks waived his right to appeal ‘the conviction and whatever sentence is imposed.’ A defendant may waive the right to appeal if that waiver is knowing and intelligent.”); *United States v. Blick*, 408 F.3d 162, 168 (4th Cir. 2005) (“Since *Wiggins*, [905 F.2d 51 (4th Cir. 1990)], we have consistently adhered to the principle that sentencing appeal waivers generally are enforceable and we have enforced such waivers in a number of cases.”); *United States v. Cohen*, 459 F.3d 490, 494 (4th Cir. 2006) (“Generally speaking, we will uphold a defendant’s waiver of appellate rights if the waiver is valid and the issue sought to be appealed falls within the scope of the waiver.”); *United States v. Hernandez*, 170 F. App’x 606, 607 (11th Cir. 2005) (“Hernandez’s sentence appeal waiver is valid and enforceable, and it precludes from appellate review any potential sentencing issues”); *United States v. Hahn*, 359 F.3d 1315, 1318 (10th Cir. 2004) (en banc) (“[W]e generally enforce plea agreements and their concomitant waivers of appellate rights.”); *United States v. Joseph*, 38 F. App’x 985, 986 (4th Cir. 2002) (“A waiver of appeal provision in a valid plea agreement is enforceable if it resulted from a knowing and intelligent decision to forgo an appeal.”); *United States v. Anderson*, 28 F. App’x 795, 797 (10th Cir. 2001) (“The United States correctly argues that defendant waived his statutory right to appeal by knowingly and voluntarily waiving that right in his plea agreement.”); *United States v. Gamboa-Felix*, 18 F. App’x 204, 208 (4th Cir. 2001) (“We have consistently held that, with a few exceptions, a defendant may not appeal his sentence if his plea agreement contains an express and unqualified waiver of the right to appeal, unless that waiver was unknowing or involuntary.” (citations and internal quotations omitted)); *United States v. Hernandez*, 242 F.3d 110, 113 (2d Cir. 2001) (“It is by now well established that a knowing and voluntary waiver of the right to appeal is generally enforceable.”); *United States v. Aponte-Rodriguez*, 7 F. App’x 715, 715 (9th Cir. 2001) (“There is no dispute that Aponte-Rodriguez agreed to waive appellate review in exchange for a reduced sentence. Such waivers are effective even when the defendant seeks to appeal a sentence imposed as a result of an incorrect application of the sentencing guidelines” (citations and internal quotations omitted) (omission in original)); *United States v. Buchanan*, 59 F.3d 914, 917 (9th Cir. 1995) (“A defendant may waive the statutory right to appeal his sentence. . . . We look to circumstances surrounding the signing and entry of the plea agreement to determine whether the defendant agreed to its terms knowingly and voluntarily.” (citations omitted)).

106. See R.C.M. 705(c) (“A term or condition in a pretrial agreement shall not be enforced if it deprives the accused of . . . the complete and effective exercise of post-trial and appellate rights.”).

sentencing relief, in return for a waiver of appellate review.¹⁰⁷ As a result of these different rules, military accuseds almost never waive their appellate rights while civilian accuseds frequently bargain those rights away in plea negotiations.¹⁰⁸ Indeed, appellate review waivers are so ingrained into civilian practice that the Federal Rules of Criminal Procedure specifically provide that, as part of its plea colloquy, the district court “must inform the defendant of, and determine that the defendant understands . . . the terms of any plea-agreement provision waiving the right to appeal.”¹⁰⁹

A third important difference between the federal criminal justice system and the military justice system is that even when civilian criminal defendants do not expressly waive appellate review as part of a plea agreement, they generally forfeit the right to challenge a finding of guilt on appeal by pleading guilty to the charge in federal district court.¹¹⁰ Federal Rule of Criminal Procedure 52(b) limits the federal court of appeals’ review of trial court errors not raised below to “plain errors or errors affecting substantial rights.”¹¹¹ In explaining how the rule serves to limit a criminal defendant’s power to raise issues on appeal that were not raised at trial, the Supreme Court made the almost-too-obvious point that a defendant may not plead guilty at trial and then challenge the fact that he was convicted of the offense on appeal:

The first limitation on appellate authority under Rule 52(b) is that there indeed be an “error.” Deviation from a legal rule is “error” unless the rule has been waived. For example, a defendant who knowingly and voluntarily pleads guilty in conformity with the requirements of Rule 11 cannot have his conviction vacated by court of appeals on the grounds that he ought to have had a trial. Because the right to trial is waivable, and because the defendant who enters a valid guilty plea waives that right, his conviction without trial is not “error.”¹¹²

107. See R.C.M. 1110(c) (“No person may compel, coerce, or induce an accused by force, promises of clemency, or otherwise to waive or withdraw appellate review.”).

108. See *supra* note 105 (collecting representative federal court cases in which the defendant waived his appellate rights as part of the plea-bargaining process).

109. Fed. R. Crim. P. 11(b)(1)(N).

110. See Fed. R. Crim. P. 52(b).

111. Fed. R. Crim. P. 52(b).

112. *United States v. Olano*, 507 U.S. 725, 732-33 (1993). Federal Rule of Criminal Procedure 11 sets forth the inquiry required of a federal district judge in order to ensure that the defendant is pleading guilty to an offense knowingly and voluntarily. Fed. R. Crim. P. 11. See also *Kercheval v. United States*, 274 U.S. 220, 223 (1927) (“A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence.”).

Thus, a plea of guilty “is more than an admission of past conduct; it is the defendant’s consent that judgment of conviction may be entered without a trial – a waiver of his right to trial before a jury or a judge.”¹¹³ As a result, under the federal criminal system, a defendant who knowingly and voluntarily pleads guilty waives his right to challenge his conviction on appeal.¹¹⁴

By contrast, the military accused who pleads guilty – even if he pleaded guilty pursuant to a plea agreement – does not waive the right to challenge his conviction on appeal, and he need not even thread the needle of an ineffective assistance of counsel claim in order to seek reversal of his conviction on appeal.¹¹⁵ Under the military justice system, a military judge considering an accused’s guilty plea must not only ensure that the accused’s plea is knowing and voluntary, but also must engage in a colloquy with the accused – called a providence inquiry – in which the accused admits the facts that cause him to believe

113. *Brady v. United States*, 397 U.S. 742, 748 (1970); *see also* *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (“A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.”).

114. *Olano*, 507 U.S. at 733; *see also, e.g.,* *Menna v. New York*, 423 U.S. 61, 63 n.2 (1975) (“[A] counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case”); *United States v. Castillo*, 464 F.3d 988, 990 (7th Cir. 2006); *United States v. Vasquez*, 29 F. App’x 876, 877 (3d Cir. 2002) (“As a general rule, an entry of a plea of guilty waives appellate review unless the court lacked jurisdiction, the plea was invalid, or the sentence was illegal.”). While a civilian convicted pursuant to a guilty plea can maintain a habeas corpus petition alleging ineffective assistance of counsel, the standard is exceedingly high. “A guilty plea, voluntarily and intelligently entered, may not be vacated because the defendant was not advised of every conceivable constitutional plea in abatement he might have to the charge, no matter how peripheral such a plea might be to the normal focus of counsel’s inquiry.” *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). Rather, a habeas petitioner who pleaded guilty at trial “may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards [of competence demanded of attorneys in criminal cases.]” *Id.* (citing *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). In pursuing an ineffective assistance of counsel claim, a habeas petitioner who pleaded guilty must show that “there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Such a habeas petitioner is further burdened by the fact that his plea of guilty waives his right to assert “independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.” *Tollett*, 411 U.S. at 267; *see also* *New York v. Hill*, 528 U.S. 110, 117 (2000) (“We allow waiver of numerous constitutional protections for criminal defendants that also serve broader social interests.”); *United States v. Mezzanotto*, 513 U.S. 196, 201 (1995) (“A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution.”) (collecting cases); *Peretz v. United States*, 501 U.S. 923, 936 (1991) (“The most basic rights of criminal defendants are similarly subject to waiver.”).

115. *See* R.C.M. 910(e).

he is guilty of the offense charged.¹¹⁶ The CAAF has explained the difference between civilian and military plea inquiries as follows:

The record of trial when a guilty plea is entered in a court-martial generally is more detailed than the record made in a similar proceeding in federal civilian criminal court. When an accused proffers a guilty plea in a court-martial, the military judge is bound to establish on the record that there is a factual basis for the plea. [T]he accuse[d] must be convinced of, and be able to describe all the facts necessary to establish guilt. Indeed, at any time prior to sentencing, if an accused makes a statement to the court-martial, in testimony or otherwise, or presents evidence which is inconsistent with a plea of guilty on which a finding is based, the military judge shall inquire into the providence of the plea. If the military judge is unable to resolve this apparent inconsistency, he is obliged as a matter of law to set aside the guilty plea and enter a plea of not guilty.¹¹⁷

The requirement of a providence inquiry stands in stark contrast to civilian criminal practice, which requires no such inquiry¹¹⁸ and which also permits a civilian criminal defendant to enter an *Alford* plea, in which the defendant pleads guilty without even admitting his guilt.¹¹⁹

The requirement of a providence inquiry under the military justice system has significant implications for the court-martial appellate system. While the federal system treats a guilty plea as waiving the

116. R.C.M. 910(e) (“The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea. The accused shall be questioned under oath about the offenses.”).

117. *United States v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997) (internal quotations and citations omitted) (alteration in original).

118. *See* Fed. R. Crim. P. 11 (setting forth required inquiry before a federal district judge may accept a guilty plea).

119. *See* *North Carolina v. Alford*, 400 U.S. 25, 37 (1970) (“An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.”). Indeed, Robinson O. Everett explained this significant difference between military and civilian practice in an article he wrote while serving as Chief Judge of the United States Court of Military Appeals:

Article 45 of the Uniform Code provides that if, after a plea of guilty, the accused sets up matter inconsistent with his plea, then a plea of not guilty will be entered. In a number of cases that over the years reached our Court the issue was whether an accused’s testimony or other evidence in mitigation and extenuation was inconsistent with his plea. In the civil courts, it seems well-established that a guilty plea will be deemed voluntary and not improvident even though the defendant testifies during his trial that he was innocent of the offense to which he pleads guilty.

Robinson O. Everett, *Some Comments on the Civilianization of Military Justice*, *ARMY LAW.*, Sept. 1980, at 1, 4.

defendant's right to challenge his conviction on appeal,¹²⁰ this is not the case in the military justice system. The military appellate courts have long allowed accuseds who pleaded guilty at trial to argue on appeal that their conviction should be overturned because they did not admit facts in their providence inquiry to satisfy all of the elements of the offense, or because evidence adduced at some point in the court-martial was inconsistent with the accused's plea of guilty.¹²¹ While the standard for overturning a conviction based on an inadequate providence inquiry is relatively high – requiring “a substantial conflict between the plea and the accused's statements or other evidence on the record”¹²² – appellate challenges to the providence of a guilty plea are common in the military justice system and tax the resources of the military appellate courts and appellate counsel in briefing and resolving such challenges.¹²³

Finally, not only does the military justice system create a mandatory appeal of courts-martial surpassing a relatively low sentencing threshold, but the military appellate courts are also required to conduct *independent* review of the record of trial to determine

120. See *supra* notes 112-114 and accompanying text.

121. See *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991) (discussing availability of appellate challenge to sufficiency of the providence inquiry conducted at trial).

122. *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996). “A ‘mere possibility’ of such a conflict is not a sufficient basis to overturn the trial results.” *Id.* (quoting *Prater*, 32 M.J. at 436).

123. For example, a cursory search of the military justice database on Westlaw for decisions between June and December 2006, reveals a multitude of military appellate decisions in which the principal issue resolved in the appeal was whether the providence inquiry provided a sufficient basis for the military judge to accept the accused's guilty plea, or whether evidence presented by the accused was sufficiently inconsistent with the accused's plea to have required rejection of the plea. See, e.g., *United States v. Adams*, 63 M.J. 223, 225 (C.A.A.F. 2006); *United States v. Zachary*, 63 M.J. 438, 444 (C.A.A.F. 2006); *United States v. Phillippe*, 63 M.J. 307, 310 (C.A.A.F. 2006); *United States v. Flores*, No. ACM 36218, 2006 WL 3895072, at *2 (A.F. Ct. Crim. App. Dec. 15, 2006); *United States v. Lazard*, No. ACM 36430, 2006 WL 3085630, at *1 (A.F. Ct. Crim. App. Oct. 18, 2006); *United States v. Chaney*, No. ACM 36138, 2006 WL 2843492, at *1 (A.F. Ct. Crim. App. Sept. 29, 2006); *United States v. Firth*, 64 M.J. 508, 510 (A. Ct. Crim. App. 2006); *United States v. Wallace*, No. ACM 36407, 2006 WL 2548174, at *1 (A.F. Ct. Crim. App. Aug. 29, 2006); *United States v. Lewis*, No. ACM 36401, 2006 WL 2547404, at *1 (A.F. Ct. Crim. App. Aug. 25, 2006); *United States v. Stordahl*, No. ACM 36187, 2006 WL 2547873, at *1 (A.F. Ct. Crim. App. Aug. 22, 2006); *United States v. Smith*, No. ACM S30806, 2006 WL 2269035, at *1 (A.F. Ct. Crim. App. July 20, 2006); *United States v. Trott*, No. ACM 36077, 2006 WL 2269417, at *3 (A.F. Ct. Crim. App. July 18, 2006); *United States v. McLaurin*, No. ACMS 30371, 2006 WL 1976550, at *2 (A.F. Ct. Crim. App. June 30, 2006). These electronically-available decisions do not include the slip opinions rejecting providence inquiry challenges that are not selected for inclusion in the Westlaw database. In addition, the Courts of Criminal Appeals, in completing their mandatory Article 66(c) review of courts-martial, are required to consider the sufficiency of the accused's providence inquiry even when the accused and his appellate defense counsel have not even asserted that the providence inquiry was inadequate. *United States v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997) (“The Courts of Criminal Appeals must also consider the providence inquiry to ensure that findings are correct in law and fact under Article 66(c).”).

whether any issues should be addressed that were not even raised by the accused and his appellate defense counsel.¹²⁴ By contrast, the federal courts of appeals are not required to consider appellate issues not raised by the parties, and regularly hold that a defendant has forfeited a claim of error by not raising it in his papers.¹²⁵

As the foregoing discussions demonstrates, virtually every convention in the civilian criminal justice system is designed to end the fight over the defendant's guilt once he has pleaded guilty and had a judgment of conviction entered by the federal district court.¹²⁶ These conventions begin by requiring that an accused timely file a notice of appeal, and then discourage appellate litigation of guilt issues by liberally allowing plea agreements to provide for a waiver of appellate review, by providing that a guilty plea waives appeal of the conviction itself even where there has been no explicit waiver agreement, and by limiting appellate review to those issues actually raised by the defendant.¹²⁷ The military justice system could not be more different, in that it: (1) provides for mandatory review of the findings of guilt in thousands of guilty plea cases each year; (2) prohibits waiver of appellate review as part of the plea bargaining process; (3) encourages appellate challenges to convictions in guilty plea cases by providing appellate defense counsel to pursue such challenges; and (4) requires an appellate court to independently determine that the record of trial supports a finding of guilt, even when the accused himself has made no

124. See *supra* notes 82-85 and accompanying text.

125. See, e.g., *United States v. Clark*, 469 F.3d 568, 569-70 (6th Cir. 2006) ("The government is correct that an issue is deemed forfeited on appeal if it is merely mentioned and not developed."); *United States v. Alarid*, 204 F. App'x 589, 590 n.2 (9th Cir. 2006) ("[I]ssues which are not specifically and distinctly argued and raised in a party's opening brief are waived.") (quoting *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001)); *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000) ("Thus, Defendant abandoned the indictment issue by not raising it in his initial brief."); *United States v. Voigt*, 89 F.3d 1050, 1064 n.4 (3d Cir. 1996) (The "failure to raise a theory as an issue on appeal constitutes a waiver because consideration of that theory would vitiate the requirement of the Federal Rules of Appellate Procedure and our own local rules that, absent extraordinary circumstances, briefs *must* contain statements of issues presented for appeal" (quoting *Int'l Raw Materials, Ltd. v. Stauffer Chem. Co.*, 978 F.2d 1318 1327 n.11 (3d Cir. 1992))); *United States v. Jones*, 34 F.3d 495, 499 (7th Cir. 1994) ("[A]n argument not made in the opening brief is waived."); *United States v. DeMasi*, 40 F.3d 1306, 1318 n.12 (1st Cir. 1994) ("As this court has consistently held, issues raised for the first time in appellant's reply brief are generally deemed waived."); *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) (referencing the "settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."); *United States v. Blasco*, 702 F.2d 1315, 1332 (11th Cir. 1983) ("Having failed to raise this issue in their briefs or at oral argument, the appellants abandoned this ground of appeal.").

126. See *supra* notes 102-125.

127. See *id.*

such challenge on appeal.¹²⁸ If we accept that the civilian criminal justice system reflects society's conclusion that a baseline, respectable criminal justice system generally need not permit defendants who plead guilty to take the fight over the conviction itself to the appellate courts, it is a fair question whether it makes any sense to regularly impose these burdens on the military justice system. As the following discussion will explain, it is this author's view that there is no good reason to perpetuate this anachronistic aspect of the military justice system.

B. Mandatory Appellate Review Disserves the Policies Underlying the Military Justice System

The problem with the military appellate system is not merely that it is different from its civilian counterpart; rather, the problem is that the military appellate structure – with its mandatory review of all courts-martial reaching a relatively low punishment threshold – runs directly counter to the policies underlying every other aspect of the military justice system. While the rest of the military justice system reflects the military's greater need for finality and expedition, the extraordinary scope of appellate review runs against the grain to provide *less* finality and *less* certainty for courts-martial as compared to civilian proceedings.¹²⁹ It makes little sense to construct a court-martial system that furthers the military's interest in discipline, finality, and speed, and then to layer that system with an appellate review structure that undermines all of those interests.

The Supreme Court “has recognized that the military is, by necessity, a specialized society separate from civilian society.”¹³⁰ The specialized and separate nature of the military community flows from the military's constitutional duty “to fight or be ready to fight should the occasion arise.”¹³¹ In order to adequately perform “its mission, the military must foster instinctive obedience, unity, commitment, and esprit de corps.”¹³² And, unlike society at large, “[t]he military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state. . . .”¹³³ Rather, “[t]he rights of military

128. *See id.*

129. *See Middendorf v. Henry*, 425 U.S. 25, 38 (1976) (noting “the difference between the diverse civilian community and the much more tightly regimented military community”).

130. *Parker v. Levy*, 417 U.S. 733, 743 (1974); *see also Brown v. Glines*, 444 U.S. 348, 354 (1980).

131. *Greer v. Spock*, 424 U.S. 828, 838 (1976).

132. *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986).

133. *Id.*

men must yield somewhat to meet certain overriding demands of discipline and duty.”¹³⁴ As the Court has explained:

To prepare for and perform its vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life. The laws and traditions governing that discipline have a long history; but they are founded on unique military exigencies as powerful now as in the past.¹³⁵

Where the law and the military intersect, the military's enhanced needs for obedience, finality, and speed are pervasive influences in ordering the rights of servicemembers as against the United States government. Perhaps most prominently, the Court has adopted the “military deference doctrine,” a jurisprudential construct by which the Court is far more deferential to the political branches when considering certain constitutional challenges to military regulations than the Court is when considering constitutional challenges in the civilian context.¹³⁶ As an example, in *Parker v. Levy*,¹³⁷ the Court rejected First Amendment and due process “void-for-vagueness” challenges to UCMJ provisions criminalizing “conduct unbecoming an officer and a gentleman” and “disorders and neglects to the prejudice of good order and discipline in the armed forces.”¹³⁸ The Court's analysis began with a consideration of the different government interests involved in “military” and “civilian” regulation:

While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline,

134. *Brown*, 444 U.S. at 354.

135. *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975); see also *Brown*, 444 U.S. at 357 (1980) (“Because the right to command and the duty to obey ordinarily must go unquestioned, this Court long ago recognized that the military must possess substantial discretion over its internal discipline.”); *Levy*, 417 U.S. at 743 (“An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier.” (quoting *United States v. Grimley*, 137 U.S. 147, 153 (1890))).

136. For a more comprehensive analysis of the military deference doctrine, see John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161, 214-306 (2000).

137. *Levy*, 417 U.S. at 733.

138. *Id.* at 738. “[C]onduct unbecoming an officer and a gentleman” is criminalized by Article 133 of the UCMJ. See U.C.M.J., 10 U.S.C. § 933, art. 133 (2006). “[D]isorders and neglects to the prejudice of good order and discipline” are criminalized by Article 134 of the UCMJ. See *id.* § 934, art. 134.

may render permissible within the military that which would be constitutionally impermissible outside it.¹³⁹

Having made these observations, the *Levy* Court held that “[f]or the reasons which differentiate military society from civilian society, we think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter.”¹⁴⁰ Therefore, the military’s heightened need for obedience and discipline allowed criminal statutes to withstand constitutional challenge when similar statutes might not pass constitutional muster in the civilian context.¹⁴¹

Similarly, in holding that there is no constitutional right to counsel for servicemembers subjected to trial by summary court-martial,¹⁴² the Court concluded in *Middendorf v. Henry*¹⁴³ that “presence of counsel will turn a brief, informal hearing which may be quickly convened and rapidly concluded into an attenuated proceeding which consumes the resources of the military to a degree which Congress could properly have felt to be beyond what is warranted by the relative insignificance of the offenses being tried.”¹⁴⁴ Recognizing the special needs of the military, the Court further concluded that “[s]uch a lengthy proceeding is a particular burden to the Armed Forces because virtually all the participants, including the defendant and his counsel, are members of the military whose time may be better spent than in possibly protracted disputes over the imposition of discipline.”¹⁴⁵ Indeed, over the past thirty-five years, the Court repeatedly, and consistently, has invoked the military deference doctrine to defeat due process,¹⁴⁶ equal protection,¹⁴⁷

139. *Levy*, 417 U.S. at 758.

140. *Id.* at 756.

141. *Id.*

142. A summary court-martial is a court-martial presided over by a military officer appointed by the commander who convened the court. That officer acts as “judge, factfinder, prosecutor, and defense counsel.” *Middendorf v. Henry*, 425 U.S. 25, 32 (1976). The maximum sentence that can be imposed at a summary court-martial is confinement for one month, forty-five days’ hard labor without confinement, two months’ restriction, reduction to the lowest enlisted pay grade, and forfeiture of two-thirds pay for one month. U.C.M.J., 10 U.S.C. § 820, art. 20 (2006).

143. *Middendorf*, 425 U.S. at 25.

144. *Id.* at 45.

145. *Id.* at 45-46; *see also Levy*, 417 U.S. at 743 (“The differences between the military and civilian communities result from the fact that ‘it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.’” (quoting *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955))).

146. *See Weiss v. United States*, 510 U.S. 163, 177 (1994) (“Neither *Mathews* nor *Medina*, however, arose in the military context, and we have recognized in past cases that the tests and

and First Amendment¹⁴⁸ challenges to court-martial procedures or other federal regulations governing military affairs, where the same procedures and regulations would be constitutionally suspect in the civilian context.

In a similar vein, the Supreme Court has fastened onto the peculiar needs of the military in erecting judge-made barriers to litigation by servicemembers against their military leadership.¹⁴⁹ In a series of cases beginning in 1950, the Court created a judge-made exception to the United States' waiver of sovereign immunity in the Federal Tort Claims Act,¹⁵⁰ holding that Congress did not intend to permit suits by servicemembers or their survivors against the United States for injuries incident to military service.¹⁵¹ Three decades later, the Supreme Court applied similar reasoning to hold that servicemembers should not be permitted to bring a *Bivens* action¹⁵² alleging constitutional violations by their military superiors.¹⁵³ After detailing the military's need for reflexive obedience to orders, and "the peculiar and special relationship of the soldier to his superiors,"¹⁵⁴ the Court based its decision on its judgment that the special needs of the military required two separate sets

limitations [of due process] may differ because of the military context." (internal quotations omitted) (alteration in original); *Middendorf*, 425 U.S. 25, 43 (1976).

147. See *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981) ("In [the area of military affairs], as any other, Congress remains subject to the limitations of the Due Process Clause, but the tests and limitations to be applied may differ because of the military context." (citation omitted). *Rostker* involved a gender-based challenge to the Military Selective Service Act under the equal protection component of the Fifth Amendment's Due Process Clause. *Id.* at 63.

148. *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) ("These aspects of military life do not, of course, render entirely nugatory in the military context the guarantees of the First Amendment. But within the military community there is simply not the same [individual] autonomy as there is in the larger civilian community." (quotations and internal citations omitted) (alteration in original)); *Brown*, 444 U.S. at 354; *Greer*, 424 U.S. at 838.

149. See, e.g., *Feres v. United States*, 340 U.S. 135, 146 (1950).

150. 28 U.S.C. § 1346 (2006).

151. *Feres*, 340 U.S. at 146; see also *United States v. Shearer*, 473 U.S. 52, 59 (1985) (rejecting Federal Tort Claims Act suits by survivors of servicemembers injured incident to their military service); *United States v. Johnson*, 481 U.S. 681, 691 (1987) (holding that the *Feres* doctrine barred a Federal Tort Claims Act suit even where the defendant was not the servicemember's military superior, but was a civilian government employee).

152. A "*Bivens* action" is a "suit for damages against federal officials whose actions violated an individual's constitutional rights." *Chappell v. Wallace*, 462 U.S. 296, 298 (1983). Even though Congress had not expressly authorized such suits, the Supreme Court allowed such suits to proceed in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 388-389 (1971).

153. *Chappell*, 462 U.S. at 304; see also *United States v. Stanley*, 483 U.S. 669, 683-684 (1987) (rejecting *Bivens* actions by servicemembers for alleged constitutional violations relating to their military service even where the defendant is a civilian government employee).

154. *Chappell*, 462 U.S. at 300 (quoting *United States v. Brown*, 348 U.S. 110, 112 (1954)).

of rules, one for the military and one for the civilian world: “The special status of the military has required, the Constitution contemplated, Congress has created and this Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel.”¹⁵⁵ In all of these cases, the Court based its reasoning on the military’s special relationship with servicemembers, as well as the military’s need for instinctive obedience and its need to focus on national defense rather than litigation.

Indeed, the military’s heightened interest in discipline, speed, and finality of litigation pervades the court-martial system established by Congress, as virtually every difference between civilian court practice and court-martial practice can be chalked up either to furthering these interests or as a nod to historical practice in the military. Most obviously, the UCMJ allows for summary courts-martial, where an accused may be sentenced to confinement for one month and forfeiture of pay without having any right to representation by counsel.¹⁵⁶ In upholding this practice against a due process challenge, the Supreme Court observed in *Middendorf v. Henry*¹⁵⁷ that Congress’s refusal to provide counsel for summary courts-martial reflected the military’s interest in making summary courts-martial fast and informal so that the participants are not unduly diverted from their ordinary military duties.¹⁵⁸ With respect to special courts-martial and general courts-martial, where the accused has a right to counsel and the proceedings resemble civilian trials to a much greater degree, these same forces can be seen in the structure of proceedings as provided by Congress and the President.

Rule for Court-Martial 707 requires that an accused be arraigned within one hundred twenty days of the earlier of the preferral of charges or the imposition of pretrial restraint against the accused.¹⁵⁹ As the drafters’ analysis to R.C.M. 707 explains, this requirement protects not only an accused’s interest in a speedy trial, but also “protects the command and societal interest in the prompt administration of justice.”¹⁶⁰ When an accused is placed in pretrial arrest or confinement,

155. *Id.* at 303-04.

156. U.C.M.J., 10 U.S.C. § 820, art. 20 (2006).

157. *Middendorf*, 425 U.S. at 25.

158. *Id.* at 45-46.

159. R.C.M. 707(a). R.C.M. 707 does permit the exclusion of certain periods of time from the calculation of the 120-day deadline for arraigning an accused with approval of the appropriate authority. R.C.M. 707(c).

160. R.C.M. 707, Analysis; *see also* R.C.M. 707(a), Discussion (“Offenses ordinarily should be disposed of promptly to serve the interests of good order and discipline.”); *United States v.*

Article 10 of the UCMJ requires the Government to take “immediate steps” to bring the accused to trial, which can lead to a speedy trial violation even where the Government has complied with the deadline for arraignment imposed by R.C.M. 707.¹⁶¹

Court-martial rules deviate from civilian practice in important ways in order to effectuate this speedy disposition of charges.¹⁶² The UCMJ provides an accused with an absolute right to appointed military defense counsel, without regard to financial need, for all general and special courts-martial.¹⁶³ By providing all court-martial accuseds with appointed defense counsel, the military is able to ensure that an accused is represented by counsel at the earliest stages of the pretrial process, which will allow the case to proceed to trial in a quicker and more orderly fashion.¹⁶⁴ Moreover, court-martial practice allows the accused to obtain much broader discovery from the government than defendants typically are permitted in civilian proceedings.¹⁶⁵ As the CAAF has explained, this broader discovery to the defense under military practice “is designed to eliminate pretrial ‘gamesmanship,’ reduce the amount of pretrial motions practice, and reduce the potential for ‘surprise and delay at trial.’”¹⁶⁶

The actual trial of a court-martial is structured to further the military’s interest in finality and speed.¹⁶⁷ Unlike civilian trials, there

Carlisle, 25 M.J. 426, 427 (C.M.A. 1988) (“[I]t is in the Government’s interest that there be speedy disposition of charges.”).

161. U.C.M.J., 10 U.S.C. § 810, art. 10; *see* United States v. Kossman, 38 M.J. 258, 261 (C.M.A. 1993) (noting that an accused could succeed on an Article 10 speedy trial motion even where the Government has complied with the speedy trial provisions of R.C.M. 707).

162. *See* R.C.M. 707, Analysis.

163. U.C.M.J., 10 U.S.C. § 827(b), art. 27(b) (2006) (requiring that military defense counsel appointed to represent an accused at a general court-martial must be a judge advocate certified as competent to serve as defense counsel by the service judge advocate general); R.C.M. 502(d) (“Only persons certified under Article 27(b) as competent to perform duties as counsel in courts-martial by the Judge Advocate General of the armed force of which the counsel is a member may be detailed as defense counsel or associate defense counsel in general or special courts-martial or as trial counsel in general courts-martial.”)

164. *See* R.C.M. 707(a), Discussion (“Offenses ordinarily should be disposed of promptly to serve the interests of good order and discipline.”).

165. United States v. Santos, 59 M.J. 317, 321 (C.A.A.F. 2004) (“The military justice system provides for broader discovery than required by practice in federal civilian criminal trials.”); United States v. Williams, 50 M.J. 436, 439 (C.A.A.F. 1999) (“The military justice system has been a leader with respect to open discovery and disclosure of exculpatory information to the defense.”); R.C.M. 701, Analysis (“Military discovery practice has been quite liberal” with “broader discovery than is required in Federal practice.”).

166. United States v. Jackson, 59 M.J. 330, 333-34 (C.A.A.F. 2004) (quoting R.C.M. 701, Analysis).

167. *See* R.C.M. 707, Analysis.

are no hung juries in courts-martial. Article 52 of the UCMJ ensures that the court-martial members' vote will result in a verdict.¹⁶⁸ If two-thirds or more of the members vote to convict on a particular charge, the accused is found guilty; if fewer than two-thirds vote to convict, the accused is found not guilty.¹⁶⁹ Whether this departure from civilian norms favors or harms an accused is debatable. On one hand, this practice denies the accused the benefit of the "holdout juror," as the accused can be convicted on a divided vote.¹⁷⁰ On the other hand, if the Government is unable to convince two-thirds of the members of the accused's guilt, it cannot pursue a retrial based on a hung jury.¹⁷¹ What this rule does clearly favor, however, is the virtue of finality, as a verdict is going to be rendered at the court-martial regardless of whether the members reach unanimity on all, or any, of the charges.¹⁷²

The service Courts of Criminal Appeals are similarly structured to serve the interests of finality and expedition. The Courts of Criminal Appeals are not bound by the trial court's factual findings; rather, the Courts of Criminal Appeals have the power to make their own factual findings from the record of trial.¹⁷³ Moreover, in appropriate circumstances, the Courts of Criminal Appeals have the power to make their own factual findings from outside the record of trial by considering affidavits on issues not raised or developed at trial, such as claims of ineffective assistance of counsel, unlawful command influence, or claims of pretrial punishment.¹⁷⁴ This power allows the Courts of Criminal Appeals to make factual findings and resolve factual issues, in appropriate circumstances, without having to remand the case for

168. U.C.M.J., 10 U.S.C. § 852(a)(2), art. 52(a)(2) (2006). If death is a mandatory punishment for an offense, the accused may be convicted only upon a unanimous vote of guilty by the members. *Id.* § 852(a)(1), art. 52(a)(1).

169. *Id.* § 852(a)(2), art. 52(a)(2).

170. *See id.*

171. *See id.*

172. *See id.*

173. *See id.* § 866(c), art. 66(c); *United States v. Baker*, 28 M.J. 121, 122 (C.M.A. 1989); *United States v. Crider*, 46 C.M.R. 108, 111 (C.M.A. 1973) (noting that Article 66(c) allows the Courts of Criminal Appeals to conduct a "de novo trial on the record at the appellate level"); *see also* David D. Jividen, *Will the Dike Burst? Plugging the Unconstitutional Hole in Article 66(c)*, *UCMJ*, 38 A.F. L. REV. 63, 90 (1994) (analyzing service appellate courts' use of their factfinding powers on appeal); John Powers, *Fact Finding in the Courts of Military Review*, 44 *BAYLOR L. REV.* 457, 465-68 (1992) (same); Martin D. Carpenter, *Standards of Appellate Review and Article 66(c): A De Novo Review?*, *ARMY LAW.*, Oct. 1990, at 37 (describing the Courts of Criminal Appeals as conducting a de novo review of the factual findings of courts-martial).

174. *See, e.g., United States v. Johnson*, 43 M.J. 192, 194 (C.A.A.F. 1995) (approving of service appellate court's resolution of ineffective assistance of counsel claim based on affidavits rather than remanding action for factfinding at the trial level).

factfinding at the trial level.¹⁷⁵ The CAAF has described Congress's grant of factfinding powers in the Courts of Criminal Appeals as "unparalleled among civilian tribunals."¹⁷⁶

The Courts of Criminal Appeals' factfinding powers also allow them to avoid remand even where reversible error at trial requires that the adjudged sentence be vacated.¹⁷⁷ When non-constitutional error at trial has affected the adjudged sentence, the Court of Criminal Appeals is not necessarily required to remand the case for a new sentencing proceeding.¹⁷⁸ If the court can determine that, without the error, the sentence would have been of a certain magnitude anyway, the Court of Criminal Appeals can reassess the sentence itself and approve the minimum sentence that the court determines would have been adjudged in the absence of error.¹⁷⁹ If the error at trial was of constitutional magnitude, the Court of Criminal Appeals still can reassess the sentence rather than remanding the case if it is able to determine beyond a reasonable doubt the minimum sentence that would have been adjudged in the absence of the constitutional error.¹⁸⁰ As with their ordinary factfinding powers, the Court of Criminal Appeals' power to cure defective sentencing proceedings by reassessing the sentence has the benefit of reducing the circumstances in which the remand or retrial of a court-martial is required.

Thus, the military justice system generally is constructed to further the military's interest in finality and efficient resolution of charges against a servicemember.¹⁸¹ The military's interests in this regard do not flow solely from some abstract concept of the military's need for unflinching obedience, though that certainly is part of the equation.¹⁸² Trying a court-martial *once* is a burden on the military, as virtually all of the key players, with the exception of any witnesses who might be civilians, are military personnel diverted from other duties in order to

175. *Id.* (explaining the considerations that should inform the Courts of Criminal Appeals' analysis of whether it can properly resolve a disputed issue through appellate factfinding as opposed to a remand for factual development at the trial level). For a case in which the Court of Military Appeals, the predecessor to the CAAF, held that the lower court erred in making appellate findings of fact rather than remanding for an evidentiary hearing, see *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

176. *Baker*, 28 M.J. at 122.

177. See *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2001).

178. See *id.*

179. *Id.*; *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986).

180. *Doss*, 57 M.J. at 185.

181. R.C.M. 707, Analysis.

182. See *supra* notes 130-135 and accompanying text.

participate in the court-martial.¹⁸³ As a practical matter, retrials and remands are uniquely hard on the military, and the military justice system seeks to limit these burdens by allowing for non-unanimous verdicts, appellate factfinding, and sentencing reassessment on appeal.¹⁸⁴ The practical reasons why retrials and remands are particularly burdensome in the military context are not difficult to fathom.

Courts-martial have worldwide jurisdiction.¹⁸⁵ That is, military units conduct courts-martial wherever they are located, whether it is courts-martial in Vietnam during the 1960s and 1970s, or in Afghanistan or Iraq during this century. When a court-martial takes place in a combat theater, it may be impossible to conduct a retrial if victims or crucial witnesses are foreign nationals not under military control. The problem is hardly any better when the court-martial takes place in the United States. If a retrial is ordered a year or more after the original trial, it is highly likely that it will be difficult to gather all of the crucial witnesses even if they were military personnel. Military units regularly deploy overseas, taking potential witnesses with them. The key witness in last year's court-martial may be guarding convoys in Iraq this year. Moreover, a servicemember typically can expect to transfer duty stations every few years, meaning that some percentage of trial witnesses will likely be located far from the site of the court-martial a year after trial. In addition to service-related transfers and deployments, servicemembers regularly leave the service for civilian life, often returning to their hometown or at least leaving the area where they last served in the military. All of these factors combine to create a high likelihood that it will be difficult or impossible to secure the presence of important witnesses in the event that an appellate court orders a retrial of a court-martial. For all of these reasons, the military has a real, practical interest in trying offenses *once*, without the yo-yoing between the trial level and appellate level that is sometimes the cost of doing business in the civilian criminal justice system.

Given these imperatives, it is a fair question why anyone ever would have created an appellate review system that is designed to take courts-martial where there was no controversy whatsoever – where the accused pleaded guilty and raised no motions, objections, or issues at

183. See *Middendorf v. Henry*, 425 U.S. 25, 45-46 (1976) (noting that, with respect to courts-martial, “virtually all the participants, including the defendant and his counsel, are members of the military whose time may be better spent than in possibly protracted disputes over the imposition of discipline”).

184. See *supra* notes 177-180 and accompanying text.

185. U.C.M.J., 10 U.S.C. § 805, art. 5 (2006) (“This chapter applies in all places.”).

trial – and assign a government-funded appellate defense counsel to flyspeck the record to see if there is any conceivable basis for throwing out the findings and sentence and forcing a retrial. This state of affairs is particularly hard to defend when civilian society – with none of the military's unique interests in finality – would never allow defendants to plead out at the trial level and then simply continue the fight on appeal.¹⁸⁶ Of course, the short answer is that nobody really did create this system for modern-day courts-martial; it just sort of happened. Providing for mandatory appellate review of guilty plea cases may have made sense when Congress enacted the UCMJ in 1950, but changes in court-martial practice remove whatever justification existed for the expansive appellate jurisdiction Congress created. Simply put, this isn't your grandfather's military justice system.

When Congress enacted the UCMJ in 1950, the court-martial system provided therein lacked many of the safeguards that military accuseds take for granted today.¹⁸⁷ The courts-martial that existed under the UCMJ as first enacted did not even have a judge.¹⁸⁸ Rather, general courts-martial had an assigned "law officer" who would provide legal advice to the court and perform some of the functions of a civilian judge, but who had none of the independence associated with a judge.¹⁸⁹ For special courts-martial, there would not even be a law officer, with the assigned court-martial panel being expected to preside over the proceedings without the benefit of any legal advice or instruction whatsoever.¹⁹⁰ This all changed, however, with the enactment of the Military Justice Act of 1968.¹⁹¹ The Military Justice Act of 1968 amended the UCMJ to create the office of military judge and required that a military judge be assigned to all general courts-martial.¹⁹² For special courts-martial, the 1968 Act generally required appointment of a military judge if the court-martial were permitted to adjudge a punitive

186. Indeed, just thirty-five years before enactment of the UCMJ, the Judge Advocate General of the Army, General Enoch Crowder, advised the United States Senate that *any* appellate review of courts-martial was incompatible with the military mission: "In a military code there can be, of course, no provision for courts of appeal. Military discipline and the purposes which it is expected to serve will not permit of the vexatious delays incident to the establishment of an appellate procedure." S. REP. NO.130, 64th Cong., 1st Sess. 34-35, *quoted in* Wiener, *supra* note 11, at 18.

187. *See generally* Sam J. Ervin, Jr., *The Military Justice Act of 1968*, 45 MIL. L. REV. 77 (1969).

188. *Id.* at 81-82.

189. *Id.*

190. *Id.*

191. The Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968).

192. *Id.* at 1335-36.

discharge from the service.¹⁹³ This amendment to the UCMJ also provided for an independent judiciary by ensuring that military judges reported to the service Judge Advocate General and did not answer to local commanders.¹⁹⁴

The Military Justice Act of 1968 was a similar watershed as it related to an accused's right to representation at courts-martial. Prior to the 1968 amendments to the UCMJ, an accused had a right to qualified defense counsel at special courts-martial only if defense counsel was "available."¹⁹⁵ However, most of the services had taken the position that qualified defense counsel were not "available" for the defense of special courts-martial, which meant that an accused's assigned counsel for special courts-martial typically would be a non-lawyer military officer assigned to present the accused's defense.¹⁹⁶ The Military Justice Act of 1968 changed this state of affairs, and required the services to provide a qualified lawyer to represent accuseds at special courts-martial empowered to adjudge a punitive discharge.¹⁹⁷ Moreover, while the

193. The Military Justice Act of 1968 left open the theoretical possibility that a special court-martial authorized to adjudge a punitive discharge could proceed without a military judge if "a military judge could not be detailed to the trial because of physical conditions or military exigencies." *Id.* at 1336. However, that standard is so exacting that it seems virtually impossible that the government could survive appellate review of a special court-martial authorized to adjudge a punitive discharge without having detailed a military judge to the court. As R.C.M. 201 explains:

Physical conditions or military exigencies . . . may exist under rare circumstances, such as on an isolated ship on the high seas or in a unit in an inaccessible area, provided compelling reasons exist why trial must be held at that time and at that place. Mere inconvenience does not constitute a physical condition or military exigency and does not excuse a failure to detail a military judge.

R.C.M. 201(f)(2)(B)(ii)(b).

194. Military Justice Act of 1968, *supra* note 191, at § 2 (codified at U.C.M.J., 10 U.S.C. § 826(c), art. 26(c)); *see also* Wiener, *supra* note 11, at 63 (noting that, prior to the 1968 amendments to the UCMJ, law officers assigned to courts-martial in the Navy and Air Force generally were under the control of the same officer who convened the court-martial and referred the charges against the accused for trial by court-martial).

195. *See* Ervin, *supra* note 187, at 83 ("Although the Uniform Code originally provided that an accused in a general court-martial must be represented by a lawyer counsel, it provided that an accused in a special court-martial may be represented by his own hired civilian lawyer or by a military lawyer of his selection 'if reasonably available,' or, otherwise, by an appointed non-lawyer counsel." (footnote omitted)).

196. *Id.*

197. *Id.* With respect to special courts-martial not empowered to adjudge a punitive discharge, the statute still required the appointment of qualified defense counsel "unless counsel having such qualifications cannot be obtained on account of physical conditions or military exigencies." Military Justice Act of 1968, *supra* note 191, at § 2 (codified at U.C.M.J., 10 U.S.C. § 827(c)(1), art. 27(c)(1)). This "military exigency" exception for special courts-martial not empowered to adjudge a punitive discharge was intended by Congress to apply only when it was truly impossible to detail a qualified defense counsel because of geographic isolation or combat conditions, Ervin, *supra* note 189, at 86, and the statute required a detailed statement in the record of the reasons why

1968 UCMJ amendments left open the theoretical possibility that, in certain extraordinary situations, the services could decline to provide counsel at special courts-martial not authorized to adjudge a punitive discharge, military practice after the 1968 Act had been to assign qualified defense counsel for all special courts-martial.¹⁹⁸ In 1984, the President amended Rule for Court-Martial 502(d)(1) to reflect this practice and require, without exception, that qualified defense counsel be detailed to represent the accused at all general and special courts-martial.¹⁹⁹

When this evolution of the UCMJ is considered, it becomes more understandable why Congress, acting in 1950, would create an appellate review system that cut against the principles of finality and speed underlying the rest of the UCMJ.²⁰⁰ When Congress created this appellate structure, it was designing an appellate review system for courts-martial where there would be no judge, much less an independent judge, and not even a “law officer” for special courts-martial.²⁰¹ For special courts-martial, not only would there be no judge or law officer, but the accused was not even being represented by a trained lawyer.²⁰² Thus, courts-martial as they existed upon enactment of the UCMJ had a notable absence of any gatekeepers to protect the accused’s rights and to properly advise him of his options.²⁰³ In that context, one can see why Congress might view even guilty pleas as at least potentially suspect and erect an appellate review system to provide some degree of gatekeeping for all courts-martial exceeding a stated punishment threshold.²⁰⁴

But in present-day courts-martial, *every single accused* at a general

it was impossible to detail qualified defense counsel. Military Justice Act of 1968, *supra* note 191, at § 2 (codified at U.C.M.J., 10 U.S.C. § 827(c)(1), art. 27(c)(1)).

198. R.C.M. 502(d), Analysis.

199. *Id.*

200. As Colonel Wiener has observed, Congress enacted the UCMJ and created civilian appellate review of courts-martial at a time when virtually the entire English-speaking world was doing the same. Congress enacted the UCMJ in 1950, while Great Britain provided for civilian appellate review in 1951, Canada did so in 1952, New Zealand did so in 1953, and Australia followed suit in 1955. Wiener, *supra* note 11, at 37. Of course, accepting the concept of civilian review of courts-martial is not at all incompatible with the notion that the category of cases subject to such review should sensibly reflect the various policy interests underlying the military justice system, from the military’s needs to the accused’s legitimate interest in seeking appellate vindication.

201. Ervin, *supra* note 187, at 89.

202. *Id.*

203. *See id.*

204. *See Powers, supra* note 173, at 465 (opining that the mandatory appellate review of Article 66(c) “operates from a premise that the finding of guilty and the sentence reached by the trial court are incorrect”).

or special court-martial has trained legal counsel assigned to him at government expense.²⁰⁵ They also have an independent military judge who does not answer to local commanders.²⁰⁶ These enhanced procedural protections at the trial level address the reliability concerns that, in an earlier age, might have justified a bulky appellate review system even when the trial-court process was structured to enhance speed and finality.²⁰⁷ This is particularly true where American society has already concluded as a matter of policy that civilians pleading guilty in federal court have a much more limited right to appellate review of their cases.²⁰⁸ To the extent that the anomalous nature of courts-martial justified a more expansive appellate review system than that existing in federal court, those days have long passed and cannot justify providing less finality to court-martial convictions in light of the military's comparatively greater need for certainty and finality.

C. The Military's Prohibition on Negotiated Appellate Review Waivers Bucks the Trend of Allowing Accuseds to Trade Their Rights for Sentencing Relief

Article 66(c) of the UCMJ,²⁰⁹ which provides for mandatory appellate review of courts-martial where the approved punishment exceeds a statutory threshold, is not, by itself, the cause of the bloated and unwieldy appellate review process that currently exists. Rather, the real problem is the manner in which Article 66(c) interfaces with R.C.M. 705(c), which prohibits accuseds from waiving their appellate rights as part of the plea bargaining process.²¹⁰ The argument against limiting a servicemember's plea bargaining rights flows from two facts concerning the civilian and military criminal justice systems.

First, as discussed above, criminal defendants in the federal court system, unlike their military counterparts, can bargain away their right to appellate review as part of the plea bargaining process.²¹¹ Indeed, a waiver of appellate review is so standard a part of the federal court plea bargaining process that the Federal Rules of Criminal Procedure even specify the inquiry a federal court must make of a criminal defendant

205. R.C.M. 502(d)(1).

206. U.C.M.J., 10 U.S.C. § 826(c), art. 26(c) (2006).

207. See R.C.M. 707, Analysis.

208. See *supra* Part III.A.

209. § 866(c), art. 66(c).

210. See *id.*; R.C.M. 705(c).

211. See *supra* notes 105-109 and accompanying text.

when a plea agreement includes a waiver of appellate rights.²¹² Second, the rules for military practice do not even prohibit an accused from waiving his right to appeal, but only prohibit an accused from waiving his right to appeal *as part of a pretrial agreement*.²¹³ A military accused is permitted to waive appellate review, but can do so only after the military commander who convened the court-martial has taken action on the findings and sentence, meaning that a military accused can waive appellate review only at a time where it is certain that he can receive nothing of value for relinquishing this right.²¹⁴

That a military accused can waive appellate review, so long as he receives no benefit for doing so, undermines any potential policy argument for prohibiting the waiver of appellate rights as part of a pretrial agreement.²¹⁵ The basis for R.C.M. 705(c) cannot be that there is something so fundamental about the military appellate process that appellate review should be inherently unwaivable, as the rules do permit military accuseds, like their civilian counterparts, to waive appellate review; the rules merely deprive the military accused of any incentive to do so.²¹⁶ Rather, a sound policy rationale would have to point to something unique to the military plea bargaining process itself that supports allowing accuseds to waive appellate review so long as it is not done as part of plea negotiations, keeping in mind that civilians are regularly permitted to waive their appellate rights during their own plea negotiations.²¹⁷

Indeed, R.C.M. 705(c) runs counter to the trend in both civilian and military law of allowing criminal defendants to bargain away their most cherished rights during the plea bargaining process. Most notably, in *United States v. Mezzanatto*,²¹⁸ the Supreme Court held that a defendant's agreement, as a condition to entering into plea bargaining discussions, that any statement he made in the plea bargaining process would be admissible against him was enforceable against the defendant even though the Federal Rules of Criminal Procedure and Federal Rules of Evidence provide that statements made in plea discussions are not admissible against the defendant.²¹⁹ After acknowledging the general

212. FED. R. CRIM. P. 11(b)(1)(N).

213. R.C.M. 705(c).

214. Indeed, the Rules for Courts-Martial prohibit any person from offering a servicemember an inducement, such as clemency, to waive appellate review. *Id.* § 1110(c).

215. *See id.*

216. *See id.*

217. *See supra* note 105.

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

219. *Id.* at 210.

presumption that constitutional and statutory rights are waivable by a criminal defendant,²²⁰ the Court observed that eliminating constraints on the permissible subjects for a plea agreement furthers, rather than undermines, the criminal justice system's interest in encouraging settlement of criminal charges:

Indeed, as a logical matter, it simply makes no sense to conclude that mutual settlement will be encouraged by precluding negotiation over an issue that may be particularly important to one of the parties to the transaction. A sounder way to encourage settlement is to permit the interested parties to enter into knowing and voluntary negotiations without any arbitrary limits on their bargaining chips. To use the Ninth Circuit's metaphor, if the prosecutor is interested in "buying" the reliability assurance that accompanies a waiver agreement, then precluding waiver can only stifle the market for plea bargains. A defendant can "maximize" what he has to "sell" only if he is permitted to offer what the prosecutor is most interested in buying.²²¹

Apart from rights identified in R.C.M. 705(c), the military courts similarly follow this "free market" approach to plea agreements by generally allowing military accuseds to bargain away their rights in return for the benefits that they are able to obtain through the plea bargaining process.²²² For example, the military appellate courts have upheld terms in a pretrial agreement that require an accused to agree to trial before a military judge alone, thereby waiving the accused's right to trial by members.²²³ Similarly, the military courts have upheld pretrial agreements where the convening authority agreed to one sentence limitation if the accused waived trial before members but would insist upon a higher sentence limitation if the accused desired to be sentenced by members.²²⁴ Military accuseds may waive their right to challenge the legality of a search and seizure,²²⁵ or to object to hearsay evidence on sentencing,²²⁶ or to challenge venue,²²⁷ or to assert a claim of illegal pretrial punishment,²²⁸ or to confront and cross-examine witnesses,²²⁹ or

220. *Id.* at 201.

221. *Id.* at 208.

222. For an in-depth discussion of the development of military case law on waiver of rights in the plea bargaining process, see Mary M. Foreman, *Let's Make a Deal! The Development of Pretrial Agreements in Military Criminal Justice Practice*, 170 MIL. L. REV. 53, 70-84 (2001).

223. *United States v. Burnell*, 40 M.J. 175, 176 (C.M.A. 1994).

224. *United States v. Andrews*, 38 M.J. 650, 650-51 (A.C.M.R. 1993).

225. *United States v. Jones*, 23 M.J. 305, 307 (C.M.A. 1987).

226. *United States v. Gibson*, 29 M.J. 379, 382 (C.M.A. 1990).

227. *United States v. Kitts*, 23 M.J. 105, 108 (C.M.A. 1986).

228. *United States v. McFadyen*, 51 M.J. 289, 289 (C.A.A.F. 1999).

to insist on an Article 32 investigation of charges referred for trial by general court-martial, the military equivalent to a grand jury proceeding.²³⁰

What, then, is the policy rationale for prohibiting military accuseds from plea bargaining away their right to appeal when civilian defendants are permitted to do so and military accuseds are generally allowed to bargain away their other constitutional and statutory rights? The CAAF explained its view of the rationale behind R.C.M. 705(c) in its recent decision in *United States v. Tate*,²³¹ a case in which the court invalidated a pretrial agreement term whereby the accused agreed not to seek parole or clemency for twenty years.²³² The CAAF explained that the UCMJ allows the military justice system to be administered principally by local military commanders throughout the world, but vests review and clemency functions with centrally-located appellate courts and senior executive branch officials.²³³ The court viewed R.C.M. 705(c) as protecting this balance by eliminating the local commander's ability to affect the appellate review process through plea bargains that would take away appellate review.²³⁴ Based on that premise, the CAAF concluded that R.C.M. 705(c) protects the accused in a plea bargaining process where a power differential exists: "R.C.M. 705(c) recognizes that the bargaining relationship between a servicemember and the convening authority at the pretrial stage is fundamentally different from the circumstances in which rights may be waived during trial and post-trial proceedings."²³⁵

Putting aside whether this analysis is in fact the thinking that led to the promulgation of R.C.M. 705(c), does that line of reasoning really stand up to scrutiny? If R.C.M. 705(c) is really designed to keep the court-martial convening authority from using plea bargaining leverage to affect the appellate review process, the rule does an extraordinarily poor job of it. As discussed above, the military justice system allows an accused to bargain away a panoply of his constitutional and statutory rights in a way that can make appellate review in many ways a hollow exercise.²³⁶ A convening authority is even permitted to enter into a pretrial agreement whereby the accused waives claims of unlawful

229. *United States v. Hanna*, 4 M.J. 938, 940 (N-M.C.M.R. 1978).

230. *United States v. Shaffer*, 12 M.J. 425, 429-430 (C.M.A. 1982).

231. *United States v. Tate*, 64 M.J. 269 (C.A.A.F. 2007).

232. *Id.* at 272.

233. *Id.* at 270.

234. *Id.* at 271.

235. *Id.*

236. *See supra* notes 223-30 and accompanying text.

command influence by the convening authority in the charging process.²³⁷ Moreover, it hardly makes good logical sense to address perceived limitations on an accused's bargaining power with respect to his right to appellate review by taking away *all* of the accused's bargaining power, which is exactly what R.C.M. 705(c) does with respect to an accused's appellate rights.²³⁸

Perhaps the best explanation as to why it might make sense to allow an accused to bargain away many of his potential appellate arguments, but not the right to appeal itself, is that the rule protects an accused's ability to get up on appeal, out of the clutches of a nefarious convening authority, and then present evidence that he was improperly coerced into pleading guilty or waiving other important rights in the plea bargaining process. But R.C.M. 705(c) does not even really protect against that risk particularly well. For example, R.C.M. 705(c) does nothing to eliminate the theoretical risk that a convening authority might coerce an accused to waive his appellate rights through threats external to the court-martial process.²³⁹ Rather, all R.C.M. 705(c) does is prevent a convening authority using his role *within* the court-martial process to induce (or coerce) an accused to waive appellate review.²⁴⁰ A diabolical convening authority, one hell-bent to eliminate an accused's appellate rights, theoretically could, after he takes action on the court-martial record, threaten the accused with dangerous assignments or extra duties if the accused did not waive appellate review, and therefore achieve his malevolent goal that way. If the accused went along with the scheme and waived appellate review, no one would ever know because the record of trial would never go up on appeal.²⁴¹

Thus, in prohibiting plea agreement terms that waive appellate review, R.C.M. 705(c) really protects only against the possibility that a convening authority might use his legal status as the convening authority in an illegal way to coerce an accused to plead guilty and waive some of the arguments that he normally would be able to raise on appeal. One

237. *United States v. Weasler*, 43 M.J. 15, 19 (C.A.A.F. 1995).

238. R.C.M. 705(c) ("A term or condition in a pretrial agreement shall not be enforced if it deprives the accused of . . . the complete and effective exercise of post-trial and appellate rights.").

239. *See id.*

240. *Id.*

241. *See* R.C.M. 1110(g) (providing that a waiver of appellate review bars review of the court-martial by a Court of Criminal Appeals and by the service Judge Advocate General). Of course, the Rules for Courts-Martial prohibit any person from inducing or coercing an accused to waive appellate review. *See* R.C.M. 1110(c). But if R.C.M. 705(c) is a prophylactic rule designed to protect against the lawless convening authority who is determined to use his position unlawfully to coerce a waiver of appellate rights, such a convening authority presumably would feel no compunction about violating R.C.M. 1110(c) as well.

theoretical example that comes to mind is that a diabolical (and lawless) convening authority could coerce an accused to plead guilty, and to waive all issues other than those that cannot be waived under R.C.M. 705(c), by telling the accused that he will use his power as convening authority to appoint a “hanging jury” that is likely to convict the accused and sentence him harshly. R.C.M. 705(c) would offer some protection against this improbable scenario by ensuring that an accused is able, once the convening authority has acted on the court-martial record, to go up on appeal and assert a claim of unlawful command influence or otherwise seek to overturn his plea of guilty.

But there are already other protections in the military justice system against such malevolence.²⁴² An accused is assigned a defense counsel whose duties run solely to the accused and not to the service or the convening authority.²⁴³ The defense counsel negotiates a pretrial agreement on behalf of the accused, and presumably would be fully aware of any illegal threats by the convening authority to taint the court-martial process if the accused does not plead guilty and waive any waivable appellate issues.²⁴⁴ Moreover, each and every plea agreement must be examined by the military judge, who also does not answer to the convening authority, to ensure that the accused voluntarily entered into the agreement and is voluntarily pleading guilty.²⁴⁵ Included in that inquiry is a requirement that the military judge question the accused to ensure that all of the terms of the pretrial agreement, and any promises made in connection therewith, are contained in the written agreement itself.²⁴⁶

Therefore, when one unravels the rationale behind R.C.M. 705(c), the prohibition on an accused bargaining away his right to appeal at most protects an accused in only two situations. First, the rule protects the accused from having a convening authority *legally* insist that the accused waive his right to appellate review if the accused wants to obtain a plea

242. See, e.g., U.C.M.J., 10 U.S.C. §827(a), art. 27(a) (2006).

243. *Id.*

244. R.C.M. 705(d)(1) (“Government representatives shall negotiate with defense counsel unless the accused has waived the right to counsel.”).

245. See R.C.M. 910(f)(4); see also *United States v. Jones*, 23 M.J. 305, 308 (C.M.A. 1987) (noting the requirement that the military judge conduct an inquiry to ensure that the accused understands the effect of all pretrial agreement terms, that the written agreement includes all promises made as part of the pretrial agreement, and that the parties agree with the military judge’s interpretation of the agreement); *United States v. Green*, 1 M.J. 453, 456 (C.M.A. 1976) (same).

246. See R.C.M. 910(f)(4) (requiring the military judge to inquire to ensure “[t]hat the accused understands the agreement” and “[t]hat the parties agree to the terms of the agreement”); see also R.C.M. 705(d)(2) (“All terms, conditions, and promises between the parties shall be written.”).

agreement by making such negotiations illegal.²⁴⁷ Of course, an accused has no right to a pretrial agreement in the first place,²⁴⁸ so it is questionable at best whether it makes any sense to deprive the accused of a bargaining chip in the pretrial process on that basis.

Second, R.C.M. 705(c) protects an accused from being *illegally* coerced to plead guilty and waive important appellate rights. But this protection would come into play only in those instances where the accused and/or his counsel affirmatively lie to the military judge by failing to disclose at trial that the convening authority procured the pretrial agreement through illegal threats, and then only where the accused (after lying to the military judge at trial) tells the truth to the appellate courts. To protect against this improbable scenario, the military justice system erects a system of appellate review that essentially ensures that all courts-martial, even those where the accused has pleaded guilty and raised no motions at trial, are subjected to full-blown appellate review once the approved sentence exceeds a modest threshold.²⁴⁹ To say this is a case of the tail wagging the dog understates the issue, as the problem purportedly addressed by Rule 705(c) is smaller than the proverbial “tail,” and the resulting burden on the military justice system as a whole is considerably larger than the “dog.”

D. Mandatory Appellate Review of Guilty Plea Cases Encourages Undesirable Litigation Conduct

The essence of a plea bargain is that the litigants stop fighting, with the defendant relinquishing his right to contest the charges against him in return for dismissal of certain of the charges and/or sentencing relief.²⁵⁰ But that is not the way it works in the military justice system, as a plea bargain does not end the fight, but only shifts the fight to the military appellate courts, where the accused can take positions directly contrary to those he took at trial in the hopes of obtaining appellate relief. Moreover, the peculiarities of military practice impose considerable burdens on the military in those cases in which the accused is successful in this about-face strategy.

The cornerstone of a plea bargain in the military justice system is that the accused agrees to plead guilty to specified charges in return for

247. See R.C.M. 705.

248. *United States v. Straight*, 42 M.J. 244, 247 (C.A.A.F. 1995); *United States v. Conklan*, 41 M.J. 800, 804 (C.A.A.F. 1995); *United States v. Helweg*, 32 M.J. 129, 134 (C.M.A. 1991).

249. See U.C.M.J., 10 U.S.C. § 866(b), art. 66(b) (2006).

250. See, e.g., *Santobello v. New York*, 404 U.S. 257, 260-61 (1971); *Brady v. United States*, 397 U.S. 742, 752 (1970).

the convening authority's agreement to place limitations on the accused's sentence and/or to drop some of the charges against the accused.²⁵¹ That is, when the accused has a pretrial agreement, he is getting something in return for successfully pleading guilty, and the accused therefore is motivated to have the military judge accept his guilty pleas.²⁵² This process is complicated somewhat because the military does not recognize *Alford* pleas,²⁵³ where an accused can plead guilty without admitting his guilt.²⁵⁴ Rather, a military accused pleading guilty at a court-martial must admit his guilt and, in response to a providence inquiry from the military judge, admit facts sufficient to establish his guilt of the charged offense.²⁵⁵ Therefore, in order for an accused to obtain the benefits of his pretrial agreement, he must be an advocate at trial of his own guilt in convincing the military judge to accept his plea.²⁵⁶

Having made that deal, and advocated at trial that his providence inquiry establishes his guilt, an accused often has every incentive to take precisely the opposite position on appeal. Armed with a new, government-funded, appellate defense counsel, the accused is permitted under military practice to go up on appeal and argue that the military judge should not have accepted the accused's guilty pleas, the very pleas the accused urged the military judge to accept, by arguing that material came out at the court-martial that was inconsistent with the accused's guilty pleas.²⁵⁷ If the accused succeeds in convincing a military appellate court that the military judge erred in accepting his guilty pleas, the accused's conviction will be overturned and the case remanded for further proceedings.

The accused's institutional incentive to challenge his own plea of guilty on appeal is a direct product of the UCMJ. Article 63 of the UCMJ provides that on a rehearing, the approved sentence for a charge

251. R.C.M. 705(b). The convening authority also sometimes agrees to refer the charges against the accused to a particular type of court-martial in return for the accused's agreement to plead guilty to some or all of the charges preferred against him. See R.C.M. 705(b)(2)(A).

252. See, e.g., *Santobello*, 404 U.S. at 260-61 (1971).

253. *North Carolina v. Alford*, 400 U.S. 25 (1970).

254. See *supra* note 119 and accompanying text.

255. See R.C.M. 910(e) ("The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea. The accused shall be questioned under oath about the offenses.").

256. See *id.*

257. This is not a mere theoretical problem. The military justice case reporters are replete with cases of an accused contending on appeal that his guilty plea was improvident. See *supra* note 123 (citing a sample of cases in which accuseds argued on appeal that their guilty pleas at trial were improvident).

may not exceed that approved at the first court-martial.²⁵⁸ Therefore, if an accused can convince a military appellate court to throw out his guilty pleas as improvident, the accused can go back to the court-martial and plead not guilty, or he can plead guilty once again and clear up whatever defects existed in the original providence inquiry. Either way, the accused's approved sentence on rehearing can only stay the same or get better at the second court-martial.²⁵⁹

The one quasi-exception to this principle arises when the accused's approved sentence from his first court-martial was reduced from that adjudged at trial because of a pretrial agreement.²⁶⁰ In such a case, if the accused fails to abide by his pretrial agreement on rehearing, then the maximum available sentence is the sentence actually adjudged, and not the sentence as reduced by the convening authority.²⁶¹ For example, imagine an accused is charged with aggravated assault.²⁶² The accused enters into a pretrial agreement whereby he agrees to plead guilty to the charge in return for suspension of all confinement in excess of two years. The accused pleads guilty and is sentenced to five years' confinement, and the convening authority duly suspends all confinement in excess of two years. If, on appeal, the Court of Criminal Appeals finds the accused's guilty plea improvident, the approved sentence on rehearing cannot exceed that approved at the first court-martial – two years' confinement with another three years' confinement suspended – so long as the accused continues to plead guilty as required by his pretrial agreement.²⁶³ If, however, the accused decides to plead not guilty at his rehearing or otherwise breaches his pretrial agreement, he loses the benefit of his pretrial agreement but still has his confinement capped at the five years adjudged at his prior court-martial.²⁶⁴

But where the accused “beats the deal,” and is adjudged a sentence at trial that is not reduced by a pretrial agreement, he has absolutely nothing to lose by trying to overturn his prior guilty pleas and taking his shot at a rehearing.²⁶⁵ Thus, taking the example from the previous paragraph, assume the accused entered into a pretrial agreement whereby he agreed to plead guilty to the aggravated assault charge and the convening authority agreed to suspend all confinement in excess of two

258. U.C.M.J., 10 U.S.C. § 863, art. 63 (2006).

259. *Id.*

260. *Id.*

261. *Id.*; see also R.C.M. 810(d)(2).

262. See U.C.M.J., 10 U.S.C. § 928, art. 128 (2006).

263. R.C.M. 810(d)(1).

264. U.C.M.J., 10 U.S.C. § 863, art. 63; R.C.M. 810(d)(2).

265. U.C.M.J., 10 U.S.C. § 863, art. 63.

years. At trial, however, the military judge (who is not aware of the sentence limitations in the accused's pretrial agreement)²⁶⁶ sentences the accused to confinement for only one year. In that case, the pretrial agreement did not actually reduce the accused's sentence, although it provided the accused certainty that, no matter what happened at trial, his confinement would be capped at two years. After trial, however, the accused knows that the pretrial agreement did not actually reduce his sentence, and has nothing to lose by advocating on appeal that his own voluntary plea of guilty be thrown out and the case remanded, because the *worst* the accused can do on rehearing is the one year of confinement he already has, and he can do even better if he is acquitted on retrial or is convicted but sentenced to less than one year in confinement.²⁶⁷

Similarly, it is a fairly common practice for a convening authority to take relatively serious charges that ordinarily might be referred to a general court-martial and agree to refer them to a special court-martial, which cannot adjudge confinement in excess of one year,²⁶⁸ in return for the accused's agreement to plead guilty to the charges at the less severe forum.²⁶⁹ Take, for instance, an accused charged with two specifications of drug distribution. At a general court-martial, the accused could be sentenced to fifteen years' confinement for each specification, or a total of thirty years' confinement.²⁷⁰ A convening authority might agree to a "bareback special" pretrial agreement where he agrees to refer the charges to a special court-martial in return for the accused's agreement to plead guilty to the charges. Thus, even if the accused is sentenced to confinement for one year, the maximum allowed at a special court-martial, the accused *still* has obtained a significant sentencing benefit from his pretrial agreement because he capped his confinement at one year by agreeing to plead guilty at a lesser forum. In such a case, however, the UCMJ provides an institutionalized incentive for the accused to try to get his guilty pleas overturned on appeal. Having already obtained the significant sentencing benefit provided by referral of the charges to a lesser forum, the accused can keep the benefit of his pretrial agreement (which effectively capped his confinement at one

266. See R.C.M. 910(f)(3) (providing that the military judge shall not be advised of the sentence limitation terms of a pretrial agreement until he has adjudged a sentence at the court-martial).

267. R.C.M. 810(d)(1).

268. U.C.M.J., 10 U.S.C. § 819, art. 19.

269. See R.C.M. 705(b)(2)(A) (noting that a pretrial agreement may involve an agreement by the convening authority to refer the charges to a particular type of court-martial).

270. See MANUAL FOR COURTS-MARTIAL, UNITED STATES, Part IV (2005), 37(e)(2) (setting maximum punishment for a specification of drug distribution).

year) even if he decides to plead not guilty at a rehearing, as Article 63 of the UCMJ caps confinement at the one year previously adjudged even if the accused violates his pretrial agreement.

A recent case demonstrates the perverse incentives that exist even outside the context of guilty pleas and providence inquiries. In *United States v. Tate*,²⁷¹ the accused was charged with, among other serious offenses, premeditated murder. Facing the prospect of confinement for life without the possibility of parole, the accused entered into a pretrial agreement that would suspend all confinement in excess of fifty years.²⁷² The pretrial agreement included an additional term, however, one in which the accused agreed neither to seek nor accept clemency or parole for the first twenty years of his confinement.²⁷³ Presumably, this provision was inserted into the pretrial agreement in order to give assurance to the convening authority that he could provide Tate with sentencing protection while still ensuring that Tate would remain off the streets for a considerable period of time, as the rules that then existed would have made Tate eligible for consideration for clemency after only five years and for parole consideration after only ten years.²⁷⁴ At Tate's court-martial, he was convicted of premeditated murder and other offenses, and sentenced to life without the possibility of parole.²⁷⁵ As required under the pretrial agreement, the convening authority suspended all confinement in excess of fifty years.²⁷⁶

On appeal, however, Tate argued that the military appellate courts should throw out the portions of his pretrial agreement affecting the availability of clemency and parole.²⁷⁷ Tate argued that these provisions – which the accused presumably had used to induce the convening authority into capping confinement at fifty years – violated public policy and R.C.M. 705(c), which prohibits pretrial agreements from interfering with “the complete and effective exercise of post-trial and appellate rights.”²⁷⁸ The CAAF agreed, and held that the provision in the pretrial agreement affecting Tate's eligibility for clemency and parole was unenforceable, even though Tate reaped a significant benefit from

271. *United States v. Tate*, 64 M.J. 269 (C.A.A.F. 2007).

272. *Id.* at 271.

273. *Id.*

274. *Id.*

275. *Id.* at 269.

276. *Tate*, 64 M.J. at 269.

277. *Id.*

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

making that offer in dodging a sentence of confinement for life without the possibility of parole.²⁷⁹

Putting aside whether the CAAF's resolution of the legal issue in *Tate* was correct, do we really want to have a military justice system that allows an accused to urge a military judge to accept a pretrial agreement a trial and then get up on appeal and have his new appellate defense counsel argue that the very terms that the accused negotiated, accepted, and urged the military judge to accept should be thrown out? Do we really want a system that creates an institutional incentive for accuseds to plead guilty at trial, and urge the military judge to accept their pleas, and then turn around and tell an appellate court that the military judge erred in accepting the very pleas that the accused urged the military judge to accept? One could reasonably argue that these perverse incentives are overstated because the standard for trying to overturn a guilty plea as improvident is fairly high, requiring a showing that matters submitted at the court-martial are materially inconsistent with the accused's plea of guilty.²⁸⁰ But that high standard makes this process even more perverse, as countless hours are devoted to appeals of guilty plea cases – from preparation of a record of trial straight through drafting of an appellate opinion – where there is little prospect of success, and where there is “success” it seems unwarranted given the positions taken by the accused at trial. And the beauty of it all is that the United States government is footing the bill by assigning appellate defense counsel²⁸¹ to assist an accused in making arguments directly inconsistent with the positions he and his prior government-funded defense counsel asserted at trial.²⁸²

The harm suffered by the military from such conduct extends beyond the mere cost of funding an appeal. When an accused is facing trial by court-martial, the government presumably is ready to try its case on the merits. When the accused takes a pretrial agreement and pleads guilty, there is no trial on the merits. Now, fast-forward a year or two, and in those cases in which the appellate courts find the accused's plea improvident, the government is in a far worse position vis-à-vis actually trying the merits of the case than it was when the accused pleaded guilty. Years have passed. Memories fade. Witnesses scatter. In the military context, it is more than possible that key witnesses will be deployed overseas, or on a ship, or in a combat zone.

279. *Tate*, 64 M.J. at 272.

280. *See supra* notes 122-123 and accompanying text.

281. *See supra* notes 78-81 and accompanying text.

282. *See supra* Part III.D.

Indeed, the Supreme Court recognized these unique logistical difficulties in upholding the military appellate courts' power to reassess a sentence, rather than remand for new sentencing proceedings, when some but not all charges are dismissed on appeal:

[T]he nature of a court-martial proceeding makes it impractical and unfeasible to remand for the purpose of sentencing alone. Even petitioner admits that it would now, six years after the trial, be impractical to attempt to reconvene the court-martial that decided the case originally. A court-martial has neither continuity nor situs and often sits to hear a single case. Because of the nature of military service, the members of a court-martial may be scattered throughout the world within a short time after a trial is concluded.²⁸³

Thus, all of the practical realities unique to court-martial practice make it much harder for the military to try a court-martial two years down the road from when it was first ready to proceed with trial, and the only reason for the delay is that the accused agreed to plead guilty as part of a pretrial agreement in the first place.

The civilian courts have a term for the type of chicanery that the military justice system encourages, where a defendant urges the trial judge to do something and then argues to an appellate court that the trial judge erred in complying. It is called "invited error," and defendants are regularly barred from urging error under such circumstances.²⁸⁴ There is no reason why the military justice system should be constructed in a way that not only fails to discourage invited error, but regularly gives the accused an incentive to make such arguments.

283. *Jackson v. Taylor*, 353 U.S. 569, 579-80 (1957).

284. *See, e.g., United States v. Lewis*, 405 F.3d 511, 513 (7th Cir. 2005) ("A defendant cannot insist during trial that the jury be kept in ignorance yet demand after its end that he receive a lower sentence because the jury did not pass on the very issue that had been withheld at his request."); *United States v. Martin*, 119 F. App'x. 645, 649 (5th Cir. 2005) ("Though [defendant] never expressly requested that the two charges be tried together, a joint trial was the obvious consequence of counsel's request to have the charges consolidated. She therefore invited any potential joinder error in this case."); *United States v. Collins*, 372 F.3d 629, 635 (4th Cir. 2004) ("[A] defendant in a criminal case cannot complain of error which he himself has invited." (quoting *United States v. Herrera*, 23 F.3d 74, 75 (4th Cir. 1994))); *United States v. Jernigan*, 341 F.3d 1273, 1289 (11th Cir. 2003) ("Importantly, however, even plain error review is unavailable in cases where a criminal defendant 'invites' the constitutional error of which he complains."); *United States v. LaHue*, 261 F.3d 993, 1011 (10th Cir. 2001) ("The invited error doctrine prevents a party from inducing action by a court and later seeking reversal on the ground that the requested action was in error." (quoting *United States v. Edward J.*, 224 F.3d 1216, 1222 (10th Cir. 2000))).

E. Mandatory Appellate Review of Courts-Martial Diverts Resources From Court-Martial Appeals Involving Issues Actually Contested At Trial

Heretofore, the arguments offered against the appellate review of all courts-martial exceeding a particular punishment threshold have focused on the competing interests of the accused and the military. But the costs of this broad appellate review are not borne solely by the military. Rather, the current rules for appellate review impose opportunity costs that prejudice accuseds who actually contested their guilt or raised other issues at their courts-martial.²⁸⁵ Resources expended in the appellate review process for a court-martial where the accused pleaded guilty and raised no issues are resources taken away from appellate review of a court-martial where an accused raised substantial issues that he seeks to vindicate on appeal, and necessarily delays the appellate review of truly contested courts-martial.²⁸⁶ Given the extraordinary delays that have arisen in the appellate review of courts-martial in recent years, there is good reason to conclude that the appellate system should weed out some portion of these guilty-plea appeals so that cases raising substantial issues can move up in line for appellate review.

In the past few years, the CAAF and service Courts of Criminal Appeals have been confronted with a spate of cases in which the accused has alleged a due process violation resulting from the inordinate amount of time it has taken his case to proceed from the court-martial through a decision on the first level of appeal.²⁸⁷ The facts relating to the delay in some of these cases do not paint a pretty picture. In *United States v. Moreno*²⁸⁸ – one of the leading post-trial delay cases decided by CAAF – the accused was convicted of rape and sentenced to, among other things, a dishonorable discharge and confinement for six years.²⁸⁹ However, it took 1,688 days (or nearly five years) from the time of Moreno's court-martial for the Court of Criminal Appeals to issue an opinion on the first level of appellate review.²⁹⁰ By the time the CAAF ruled in Moreno's case, and incidentally reversed his conviction based on the military judge's failure to grant a challenge for cause, nearly

285. See, e.g., *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006).

286. See *id.*

287. See *id.*

288. *Id.*

289. *Id.* at 132.

290. *Id.* at 136.

seven years had lapsed from the date Moreno was sentenced.²⁹¹ By then, of course, Moreno had served his entire sentence.²⁹² The CAAF found that the post-trial delay in Moreno's case had the effect of denying him due process, and in so doing excoriated the military for the widespread nature of such delays:

Delays have been tolerated at all levels in the military justice system so much so that in many instances they are now considered the norm. The effect of this opinion is to provide notice that unreasonable delays that adversely impact an appellant's due process rights will no longer be tolerated.²⁹³

Indeed, in assessing claims of unreasonable post-trial delay, the CAAF has explained that it can constitute a denial of due process, even when the accused has not been prejudiced by the delay, when "the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system."²⁹⁴ Under that standard, the CAAF has found that delays in appellate review of a number of cases were so lengthy and indefensible that the public would view these delays as negatively affecting the fairness of the court-martial system as a whole.²⁹⁵

One of the factors causing delays in appellate review has been what the CAAF has called the "extremely large caseload" assigned to appellate defense counsel.²⁹⁶ That is, appellate defense counsel are, at times, assigned so many cases that they cannot review the records of trial and brief them all without taking multiple extensions of time, which creates much of the inordinate post-trial delay that the CAAF has found inconsistent with due process rights. But as discussed in Part II of this Article, court-martial accuseds compete against each other not only for the attention of their assigned appellate defense counsel, but also for the time spent by court reporters transcribing courts-martial proceedings; and of trial counsel, defense counsel, and military judges reviewing and authenticating the record of trial; and of defense counsel preparing

291. *Id.* at 133.

292. *See id.*

293. *Id.* at 143.

294. *United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006).

295. *See, e.g., id.*; *United States v. Haney*, 64 M.J. 101, 102 (C.A.A.F. 2006); *United States v. Gosser*, 64 M.J. 93, 99 (C.A.A.F. 2006); *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006); *see also United States v. Dearing*, 63 M.J. 478, 488 (C.A.A.F. 2006) (holding that post-trial delay amounted to a due process violation where the accused had demonstrated prejudice arising from the delay).

296. *Haney*, 64 M.J. at 108; *see also Moreno*, 63 M.J. at 137 ("While appellate defense counsel's caseload is the underlying cause of much of this period of delay . . .").

clemency packages; and of command staff judge advocates preparing recommendations for the convening authority; and of convening authorities acting on the adjudged findings and sentence; and of appellate judges considering and ruling on whatever issues are raised on appeal.²⁹⁷

Flooding the appellate review pipeline with cases where the accused pleaded guilty and raised no issues at trial, but where the accused has a statutory entitlement to the same full-blown appellate review as any other accused, unquestionably imposes costs on the government, many of which are detailed above.²⁹⁸ But the biggest victim of this one-size-fits-all appellate review process might be the accused who vigorously asserted his innocence at trial but is languishing in confinement while the appellate review process deals with unworthy appeals that are ahead of him in the appellate pipeline. While it is true that part of this problem can be fixed by devoting additional personnel and resources at all levels of the appellate review process, from court reporters to appellate judges, it would be foolish to survey the problem of post-trial delay without considering whether the appellate review system can be reformed in a way that streamlines the appellate review process while simultaneously protecting the legitimate rights of accused as recognized by American notions of criminal justice and due process.

IV. A MARKET-BASED REFORM OF THE MILITARY APPELLATE PROCESS

Two levers are at work to create the mindlessly uniform system of appellate review that currently exists. Article 66(c) of the UCMJ requires full-blown appellate review of all courts-martial where the approved punishment includes a punitive discharge or confinement for one year or more, unless the accused has waived or withdrawn appellate review.²⁹⁹ R.C.M. 705(c) ensures that virtually no accuseds will waive or withdraw appellate review because the rule prohibits the waiver of appellate review as part of a plea bargain negotiation, and instead allows an accused to waive appellate review only after the convening authority has acted.³⁰⁰ In fact, because the military provides an accused with appellate defense counsel at government expense, it is actually easier for the accused to go forward with appellate review than to waive it

297. See *supra* Part II.

298. See *supra* notes.49-90 and accompanying text.

299. U.C.M.J., 10 U.S.C. § 866(b), art. 66(b) (2006).

300. R.C.M. 705(c).

(because he doesn't have to bother himself with signing anything), and it does not cost the accused a dime to do so.³⁰¹ For that reason, even the completely ambivalent accused almost invariably goes through with appellate review because there is no effort required to do so.

Because the flood of court-martial appeals arises from the combined effect of these two rules, adjusting either the scope of appellate review provided under Article 66(b) or R.C.M. 705(c)'s prohibition on dealing away appellate rights potentially could remedy the problem. Therefore, one possibility would be to permit appellate review of a smaller universe of cases. For example, the UCMJ could be amended to conform to civilian practice and require that an accused file a notice of appeal if he desires to appeal his court-martial conviction or sentence. Such a change, however, seems likely to be both unworkable and ineffective. Courts-martial take place all over the world, but appeals are centralized in Washington, D.C., in the Courts of Criminal Appeals and CAAF. Because appeals generally take place far from the locus of the trial, it is impractical for the accused's trial defense counsel to continue with the case on appeal. When the trial defense counsel knows that the case is going to be passed off to appellate defense counsel in Washington, D.C., and that the appeal costs his client nothing in terms of time or money, why would a trial defense counsel ever counsel his client not to notice an appeal? Therefore, while requiring a notice of appeal theoretically might peel off of the appellate review rolls a few of the ambivalent accuseds, it seems more likely that their trial defense counsel would convince them to take their shot on appeal because there literally is nothing to lose. Thus, shifting to a notice of appeal system likely would accomplish little other than adding an additional piece of paperwork that an accused would execute in winding up his relationship with his trial defense counsel.

Another possible way to lighten the appellate caseload would be to increase the punishment threshold that triggers a right of appeal. For example, Congress could amend Article 66(b) to allow review by the Courts of Criminal Appeals only where the approved sentence is two years or more (instead of one year), or eliminate an appeal by right to the Courts of Criminal Appeals in guilty plea cases.

These are not new ideas. The service judge advocates general and the judges on the Court of Military Appeals (the predecessor to CAAF) made a recommendation to Congress as far back as 1953 that the UCMJ

301. U.C.M.J., 10 U.S.C. § 870(a), (c), art. 70(a), (c); R.C.M. 1202(a), (b)(2).

be amended to make appeals from guilty plea cases discretionary.³⁰² Because there is no constitutional right to appeal of a criminal conviction,³⁰³ a narrowing of the cases in which an accused has a right to appeal presumably would pass constitutional muster. While such a scheme would reduce the number of courts-martial subject to appellate review, and likely reduce the delays in post-trial review, it would slice off the wrong class of cases. Raising the punishment threshold that triggers Article 66(c) appellate review would deny appeals to accuseds who vigorously contested their cases at trial, raising substantial legal issues, but whose sentences were relatively light. In a similar vein, substantial legal issues can arise during court-martial sentencing proceedings, and a change in Article 66(b) that denies a right to appeal in guilty plea cases would effectively prevent servicemembers from challenging, through an appeal of right, irregularities in sentencing proceedings if they pleaded guilty to the charged offenses. Neither change would get at what should be the target of any reform to the court-martial appellate process, the relatively large number of cases where the accused pleads guilty *and* raises no substantial issues at his court-martial.³⁰⁴

A better candidate for reform is R.C.M. 705(c). Amending R.C.M. 705(c) to allow an accused to waive his right to appellate review as part of a pretrial agreement would not directly reduce the number of cases eligible for Article 66(c) review, but its indirect effect likely would be considerable. If pretrial agreements could include terms whereby the accused waives appellate review, it seems highly likely that convening authorities, presumably with prompting from their staff judge advocates, would seek such waivers as part of pretrial agreements, and accuseds who intended to plead guilty and had no real issues to raise at trial likely would be perfectly willing to bargain away those rights in return for sentencing relief. That is the beauty of attacking the size of the appellate caseload through R.C.M. 705(c). Where tinkering with the class of cases eligible for appellate review under Article 66(c) would *involuntarily* take appellate rights away from convicted servicemembers, amendment of R.C.M. 705(c) would eliminate appellate review only for accuseds who are volunteers. That is, elimination of the right of appeal is not forced on anyone, as any accused who truly values appellate review, and intends to raise issues at trial that ultimately could be

302. Carlton L. Jackson, *Plea-Bargaining in the Military: An Unintended Consequence of the Uniform Code of Military Justice*, 179 MIL. L. REV. 1, 32 (2004).

303. *M.L.B. v. S.L.J.*, 519 U.S. 102, 110 (1996); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956).

304. *See supra* Part III.D.

vindicated on appeal, can retain his appellate rights by refusing to bargain them away.

This minor adjustment to R.C.M. 705(c) likely would address, in large part, every one of the reasons identified in Part III of this Article for doing *something* to address the universe of cases subjected to appellate review. This change would further the military's interest in finality by eliminating appellate proceedings for a significant portion of the courts-martial where the accused agrees to plead guilty pursuant to a plea bargain.³⁰⁵ The amendment also would bring R.C.M. 705(c) more in line with civilian practice, and other aspects of military practice for that matter, by allowing criminal defendants to bargain away their rights in a way that allows them to negotiate a benefit for relinquishing those rights.³⁰⁶ Amending R.C.M. 705(c) also would eliminate much of the undesirable litigation conduct that the current appellate review system not only tolerates, but encourages.³⁰⁷ Much of the undesirable litigation conduct identified in this Article involves the accused inviting error by advocating his guilt at trial in order to keep his pretrial agreement and then taking the opposite position on appeal.³⁰⁸ If you assume that the standard practice would be that pretrial agreements would include appellate review waivers, the accused motivated to protect his pretrial agreement will plead guilty and there will be no opportunity for him to do an about-face on appeal because the typical case would not be appealable. And perhaps most important, if appellate review waivers became a fairly common provision in pretrial agreements, which seems likely if R.C.M. 705(c) were amended, it would have a considerable effect on the size of the appellate caseload, and should allow the actors in the appellate review process to focus on cases raising substantial issues and speed the overall pace of post-trial processing.³⁰⁹ Moreover, by focusing on R.C.M. 705(c), a reform of the appellate review process would affect only guilty plea cases, and only those guilty plea cases where any potential appellate issues are sufficiently insubstantial that the accused would rather have a pretrial agreement than a right to appeal.

There are two potential counterarguments against amending R.C.M. 705(c), but neither of them can overcome the substantial arguments in favor of such a change. First, the argument can be made that allowing appellate review waivers as an optional pretrial agreement clause would

305. See *supra* Part III.B.

306. See *supra* Part III.C.

307. See *supra* Part III.D.

308. *Id.*

309. See *supra* Part III.E.

have the effect of making it a mandatory clause, as convening authorities might be unwilling to enter into pretrial agreements if the accused insists on full-blown appellate review. But is that a concern really worth protecting? An accused has no right to a pretrial agreement.³¹⁰ The essence of the plea bargaining system is that the government conserves resources by not having to litigate criminal cases in return for offering the accused protection on charges and sentence.³¹¹ Why, then, should the military plea bargaining system encourage an accused to make a deal at trial and raise no issues, and then have the accused inflict considerable costs on the government through appellate review? There is nothing wrong with requiring an accused to make a consistent choice between peace and war. If he values his appellate rights, then he should decline a pretrial agreement, if one is available only upon a waiver of appellate rights, and fight with vigor at both trial and appeal. If the accused places a greater value on reducing his sentence at trial, then he should enter into the pretrial agreement and waive his right to appeal. To those who would complain that the effect of an amendment to R.C.M. 705(c) would make appellate review waivers a nearly mandatory clause in pretrial agreements, this author can only state that he would certainly hope that this would be the effect, as the current system of “peace at trial but war on appeal” is indefensible.

The other, perhaps more difficult, argument is that if appellate review waivers became a more or less mandatory provision in pretrial agreements, there would be accuseds who will get appellate relief under the current system but will get no such relief under a reformed system because they will have waived their right to appellate review. As a factual matter, this premise is undeniably true. But, again, is that an interest worth protecting? Civilian courts are well past this concern, as criminal defendants regularly waive appellate review of their convictions, and those waivers are upheld so long as they are knowing and voluntary.³¹² As a result, there are unquestionably civilian accuseds who have pleaded guilty to offenses of which they technically might not be guilty, or might not be provably guilty, and the civilian justice system nevertheless marches on with the response that accuseds desiring to

310. *United States v. Straight*, 42 M.J. 244, 247 (C.A.A.F. 1995).

311. *United States v. Perron*, 58 M.J. 78, 87 (C.A.A.F. 2003) (“There are numerous benefits to pleading guilty [in accordance with a plea agreement]. A plea of guilty ensures the prompt application of correctional measures; avoids delays; amounts to an acknowledgement of guilt and acceptance of responsibility; and avoids the risks of a contested trial. Guilty pleas also help preserve limited resources and relieve the victim[s] of the trauma of testifying.” (alterations in original) (citation omitted)).

312. *See supra* notes 105-09 and accompanying text.

vindicate themselves should not plead guilty at trial, and certainly should not agree to waive their appellate rights. Moreover, the military justice system's requirement of a providence inquiry ensures that the military accused, as opposed to his civilian counterpart, has at least convinced his trial judge of his technical guilt of the offenses to which he has pleaded guilty.³¹³

In that sense, the change in R.C.M. 705(c) proposed by this Article *still* would be more protective of military accuseds than civilian practice. While civilian practice typically finds waiver of guilt issues through entry of a plea of guilty, reforming R.C.M. 705(c) would not affect all accuseds who plead guilty, but only those who plead guilty pursuant to a pretrial agreement in which they agree to waive their appellate rights. Thus, the only affected accuseds would be those who, in assessing their own priorities, would rather have the sentencing relief of a pretrial agreement than the lottery ticket of appellate rights for accuseds who raise no substantial issues at trial. It is not too much to ask for an accused desiring to raise legal issues on appeal to raise and preserve them at trial, where the court is often better equipped to deal with any factual issues that might underlie the accused's arguments. And if the accused would rather not raise issues at trial because he wants the benefit of a pretrial agreement, does it really make any sense to leave the appellate doors open so that the accused can make those same arguments later? If an accused who would get appellate relief under the current system would lose that relief under an amended R.C.M. 705(c), the reality is that any such loss would be the accused's own choice, a consequence of his decision that he is better off declaring peace than declaring war.

V. CONCLUSION

In assessing the current state of appellate review in the military justice system, the one argument that certainly cannot be made is that "if it ain't broke, don't fix it." The military justice system recently has been plagued with egregious delays in appellate review that are a direct byproduct of an appellate review system that treats all courts-martial alike once the approved punishment exceeds a modest threshold. But all courts-martial are not alike. Sometimes, the accused pleads not guilty and raises numerous legal issues through aggressive motions practice. Sometimes, the accused pleads guilty pursuant to a pretrial agreement to

313. R.C.M. 910(e).

an offense for which he has no colorable defense, and raises no issues whatsoever at trial. Indeed, sometimes that accused even *asks* for the punishment he ultimately receives, such as the disgruntled soldier who goes absent without leave because he wants out of the service and then asks the military judge to give him a punitive discharge when he is caught and court-martialed. It makes little sense to accord both types of cases precisely the same type of appellate review.

The root cause of the bloated military appellate process is R.C.M. 705(c), which prevents an accused from bargaining away his appellate rights as part of a plea bargain. If this prohibition were removed, either by presidential amendment of R.C.M. 705(c), or a congressional amendment of the UCMJ to overrule R.C.M. 705(c), it would have a salutary effect on the military appellate system. Court-martial appeals would focus more on cases that were actually contested at trial, and would limit the extent to which cases that were uncontested at trial clogged up the appellate pipeline. And the effect of such a change on accuseds would be perfectly fair, as no accused would be denied appellate review unless he agreed to it, unless he decided that he was better off with a plea bargain than appellate review of his court-martial. The ambivalent accused almost uniformly could be expected to opt for the pretrial agreement, which is exactly what should happen. The result would be a more respectable military justice system; one that reflects the military's interest in finality and the accused's interest in an expeditious appellate review process, while ensuring that the only accused who would lose their right to appeal are those who voluntarily elect to do so.