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Plea bargaining in the military involves the exchange of a guilty plea for reduced charges or a specific minimum sentence. It also includes exchanging an admission of guilt to an offense punishable by a bad conduct or dishonorable discharge imposed by a military court for the assurance that the accused will not be brought to trial but instead will be administratively discharged. The Uniform Code of Military Justice does not cover plea agreements or discharges in lieu of court-martial, and they are not addressed in the Manual for Courts-Martial in which the President establishes procedural rules. Findings/Conclusions: Disparities in service policies and regulations governing the results of plea bargaining mean that people charged with the same crimes often are treated differently. The option of a discharge in lieu of court-martial also allows similar cases to be disposed of either administratively or under the judicial process which further contributes to the nonuniform treatment of individuals. The services often use the discharge in lieu of court-martial as an expedient way to get rid of people. Such discharges have risen from less than 500 in 1967 to almost 27,000 in fiscal year 1976. About 90% result in the most severe type of administrative discharge -- a discharge under other than honorable conditions. Although not designated punitive, this discharge has the same effect in terms of restricting eligibility for veteran benefits and limiting civilian employment opportunities. Military courts appear more hesitant to impose punitive discharges than are discharge authorities to approve requests for discharges which are potentially as harmful. Recommendations: Because discharges

in lieu of court-martial limit the effectiveness of the military service and allow symptoms of a problem to be treated rather than its root cause, the Secretary of Defense should revise the directive on administrative discharges to eliminate discharges in lieu of court-martial and direct the services to dispose of criminal charges in a manner consistent with the Uniform Code of Military Justice and the Manual for Courts-Martial. The President, in the Manual for Courts-Martial, should provide policy guidance, procedures, rules, standards, and format on the use of plea agreements in military courts. (RBS)

6169

BY THE COMPTROLLER GENERAL

Report To The Congress

OF THE UNITED STATES

Eliminate Administrative Discharges In Lieu Of Court-Martial: Guidance For Plea Agreements In Military Courts Is Needed

Plea bargaining in the military involves the exchange of an admission of guilt for reduced charges, a specific maximum sentence, or a discharge in lieu of court-martial. The most frequent result--a discharge in lieu of court-martial--is not subject to judicial safeguards.

Contrary to congressional intent, criminal offenses are often not dealt with under the Uniform Code of Military Justice and disparities exist in the administration of military justice. The discharge in lieu of court-martial, which allows for administrative handling of offenses outside of military courts, is an important cause of this.

GAO recommends that:

--The President, under authority delegated to him by law, provide guidance on the use of plea agreements.

--The Secretary of Defense direct the services to stop using the discharge in lieu of court-martial and to deal with alleged criminal wrongdoing in a manner consistent with the Uniform Code of Military Justice.

FPCD-77-47
APRIL 28, 1978

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-186183

To the President of the Senate and the
Speaker of the House of Representatives

This report discusses plea bargaining in the military. One result of plea bargaining--the discharge in lieu of court-martial--is used outside the protections of military courts. We are recommending that the Secretary of Defense direct the services to stop using this type of discharge and that the President revise the Manual for Courts-Martial to provide guidance for plea agreements in military courts.

Our authority for making this review is the Budget and Accounting Act, 1921 (31 U.S.C. 53), and the Accounting and Auditing Act of 1950 (31 U.S.C. 67).

We did not obtain formal agency comments. However, the report was discussed with representatives of the Office of the Secretary of Defense and each service, and their comments were considered.

We are sending copies of this report to the President of the United States; the Director, Office of Management and Budget; the Attorney General of the United States; and the Secretaries of Defense, Transportation, the Army, the Navy, and the Air Force; the Chairman, Civil Service Commission; and other interested parties.

Comptroller General
of the United States

COMPTROLLER GENERAL'S REPORT TO THE CONGRESS

ELIMINATE ADMINISTRATIVE DISCHARGES IN LIEU OF COURT-MARTIAL: GUIDANCE FOR PLEA AGREEMENTS IN MILITARY COURTS IS NEEDED

D I G E S T

Plea bargaining in the military involves the exchange of a guilty plea for reduced charges or a specific maximum sentence. As used in this report, it also includes exchanging an admission of guilt to an offense punishable by a bad conduct or dishonorable discharge imposed by a military court for the assurance that the accused will not be brought to trial but instead will be administratively discharged. One result of this bargaining, an agreement to reduced charges or a specific maximum sentence, is subject to review and approval by a military judge. But bargaining which results in discharges in lieu of court-martial is done much more frequently and is not subject to judicial safeguards.

The Uniform Code of Military Justice--the sole statutory authority establishing the means and processes to use in dealing with military people accused of crimes (see p. 3)--does not cover plea agreements or discharges in lieu of court-martial; nor are they addressed in the Manual for Courts-Martial, in which the President establishes procedural rules. (See pp. 4 and 17.)

Disparities in service policies and regulations governing the results of plea bargaining mean that people charged with the same crimes often do not have the same rights which inevitably leads to differing treatment. (See p. 31.) Also, the option of a discharge in lieu of court-martial allows similar cases to be disposed of either administratively or under the judicial process. This further contributes to the nonuniform treatment of individuals and is contrary to congressional intent. (See p. 26.)

The Congress intended that all criminal offenses be dealt with under the provisions of the Uniform Code of Military Justice. (See

pp. 4, 13, 14, and 15.) This is necessary to safeguard the rights of the accused and to protect the interests of society as a whole.

The services use the discharge in lieu of court-martial as an expedient way to get rid of problem people. But the legislative history of the Uniform Code of Military Justice does not support that the Congress intended this to be done in instances involving criminal offenses. In GAO's opinion, the administrative discharge system should be used only to discharge from the service individuals who clearly demonstrate they are unqualified for retention, not to dispose of alleged criminal offenses.

Accordingly, GAO recommends that the President, in the Manual for Courts-Martial, provide policy guidance, procedures, rules, standards, and format on the use of plea agreements in military courts. Any restriction on the use of plea agreements should be specified.

GAO further recommends that the Secretary of Defense

--revise the directive on administrative discharges to eliminate discharges in lieu of court-martial and

--direct the services to dispose of criminal charges in a manner consistent with the Uniform Code of Military Justice and the Manual for Courts-Martial. (See p. 29.)

DISCHARGES IN LIEU OF COURT-MARTIAL

Discharges in lieu of court-martial have increased dramatically from less than 500 in 1967 to almost 27,000 in fiscal year 1976. About 90 percent result in the most severe type of administrative discharge--a discharge under other than honorable conditions. Although not designated punitive, this discharge can have the same effect in terms of restricting eligibility for veteran benefits and limiting civilian employment opportunities. (See pp. 17 and 18.)

A discharge in lieu of court-martial can only be imposed at the request of the accused and upon approval by the discharge authority. In requesting this type of discharge, the accused waives his right to protections guaranteed under the Uniform Code of Military Justice, which include the right to trial and appellate review. Before a discharge can be imposed by a military court, charges must be filed and legally admissible evidence must be developed to judicially establish the person as guilty beyond a reasonable doubt. Punitive discharges (bad conduct and dishonorable) can only be imposed by special and general military courts and do not become effective until reviewed and approved by a court of military review. (See pp. 19 and 20.)

The Congress has warned against the use of the administrative discharge system to impose punishment. If an administrative discharge is not punishment, then the discharge in lieu of court-martial does not allow for any form of punitive action. GAO believes this does not serve the interests of society. It is also unfair to those who are criminally charged with similar offenses but are forced to face court-martial. (See p. 27)

Military courts appear far more hesitant to impose punitive discharges than are discharge authorities to approve requests for discharges, which are potentially as harmful. GAO's test of 1,094 cases showed that a punitive discharge was included in the sentences imposed in 13 percent of the cases tried by court-martial. In contrast, 92 percent of those opting to be discharged in lieu of court-martial received a discharge under other than honorable conditions. (See pp. 24, 25, and 26.)

Many cases, in which a discharge in lieu of court-martial was approved, may never have gone to trial or may have been tried in a court which did not have the authority to impose a punitive discharge. (See p. 26)) This is because service regulations do not require that

--a decision be made to refer the case to a court having the authority to impose a punitive discharge before a discharge can be requested or

--a strong case be developed against the accused before a discharge in lieu of court-martial can be approved. (See p. 27.)

GAO believes that discharges in lieu of court-martial:

--Limit the effectiveness of military courts. These courts must enforce the law and also protect the rights of individual service members. They cannot accomplish these objectives if a major portion of criminal offenses are dealt with outside the judicial process.

--Allow symptoms of a problem to be treated rather than its root cause. This possibility for misuse is of concern because of the increasing rate at which this type of discharge is being used.

Most offenses leading to discharges in lieu of court-martial are peculiar to the military. The majority of those affected by the stigma of a bad discharge are young people--most below age 20. GAO questions whether many of the people electing a discharge in lieu of court-martial understand its potential long-term consequences. (See pp. 28 and 29.)

PLEA AGREEMENTS IN MILITARY COURTS

The Army, Navy, and Marine Corps encourage the use of plea agreements in military courts based on the belief that they are advantageous to both the Government and the accused.

The Air Force disagrees, however, and permits their use only in exceptional circumstances. In doing so the Air Force has created an important policy difference among the services. (See pp. 31 and 32.)

Military appellate courts have approved the use of plea agreements in military courts but have expressed the need for caution. Problems found by these courts support the need for the President to establish policy guidance for the use of plea agreements.

AGENCY COMMENTS

GAO did not obtain formal agency comments. However, the report was discussed with Department of Defense and service judge advocate general representatives. They generally agreed that uniform guidance covering the use of agreements in military courts would be useful. The reaction was mixed, however, regarding GAO's proposal to discontinue the administrative separation of individuals to avoid trial by court-martial. Some supported its discontinuance because it compromises the process by which the Congress intended criminal offenses should be dealt with. Others voiced concern that its elimination would increase the workload of military courts.

Contents

ABBREVIATIONS

DOD	Department of Defense
GAO	General Accounting Office

CHAPTER 1

INTRODUCTION

Plea bargaining in the military involves the exchange of a guilty plea for reduced charges or a specific maximum sentence. As used in this report, it also includes exchanging an admission of guilt to an offense punishable by a bad conduct or dishonorable discharge imposed by a military court 1/ for the assurance that the accused will not be brought to trial but instead will be administratively discharged. A plea (also known as pretrial agreement) results from bargaining for reduced charges or a specific maximum sentence and is subject to review and approval by a military judge. But bargaining for a discharge in lieu of court-martial is done much more frequently and the result is not subject to judicial safeguards.

To understand how plea bargaining works it is necessary to understand the role of the commander in the military criminal law system, and how the discharge system is used to deal with criminal offenses.

ROLE OF THE COMMANDER

Commanders have important responsibilities and functions administering the military criminal law system. Each commander is responsible for both enforcing the law and protecting the rights of the accused individual. He has the duty of promptly investigating the circumstances of an alleged crime. From this preliminary investigation he will determine whether administrative action, nonjudicial punishment, or court-martial action is appropriate. Such factors as the seriousness of the offense, the past record of the individual, and the state of morale and discipline in his unit will determine whether he refers the matter up the chain of command or deals with it himself. If the unit commander forwards the case to his superior, that officer will apply the same criteria in deciding whether to take appropriate action himself or to forward the case to a higher authority.

1/In this report, the terms court-martial and military court are used interchangeably. Also, effective January 1, 1977, an undesirable discharge was redesignated a discharge "under other than honorable conditions." Because of this change, it has not always been possible to refer to this type of discharge by its current designation.

The commanding officer who approves the trial of the accused is referred to as the convening authority. The code requires that after trial he review the record and approve a finding of guilty and the sentence imposed. He may exercise clemency in the form of disapproval, mitigation, commutation, or suspension of the sentence, or he may order a rehearing. This authority enables him to honor the terms of any plea agreement he enters into.

RELATIONSHIP OF THE DISCHARGE SYSTEM TO CRIMINAL WRONGDOING

The military often deals with criminal offenses through the discharge system. In desending order of desirability, discharges are characterized as (1) honorable, (2) general, (3) under other than honorable conditions, (4) bad conduct, and (5) dishonorable. The first three characterizations are handled under an administrative process; the latter two can be imposed only by a military court.

Under Department of Defense (DOD) Directive 1332.14, the services have the right and duty to administratively separate members who clearly demonstrate they are unqualified for retention. At the same time, such members have rights which are to be protected. For example, this directive states that no individual is to receive a discharge under other than honorable conditions--the most severe type of administrative discharge--unless he is given the right to present his case with the advice and assistance of counsel before an administrative discharge board composed of at least three officers. Any such discharge imposed must be supported by an approved board finding and recommendation. An individual can waive his right to board action; he must waive this right in requesting a discharge in lieu of court-martial.

Service regulations call for an individual requesting a discharge in lieu of court-martial to receive a discharge under other than honorable conditions unless a less severe discharge can be justified. A discharge under other than honorable conditions can also be imposed for reason of misconduct. To be separated for misconduct, the board must determine from the member's military record in the current enlistment period that he is unqualified for further military service based on patterns of conduct and certain acts or conditions. Acts or conditions which would warrant a discharge for reason of misconduct include convictions in both civil and military courts. In contrast, the discharge in lieu of court-martial is intended for use in a manner indicated by its designation--to dispose of specific criminal charges outside of court.

Discharges imposed for criminal offenses by military courts are punitive and do not become effective until reviewed and approved by a court of military review. A general court can impose both bad conduct and dishonorable discharges. A special court can only impose a bad conduct discharge.

The chart below shows the major reasons why people are discharged and the type of discharges authorized for each reason.

	Administrative discharges			Punitive discharges	
Reason	Honorable	General	Other than honorable conditions	Bad conduct	Dishonorable
General grounds (including end of enlistment)	yes	Yes	No	No	No
Unsuitability	Yes	Yes	No	No	No
Misconduct	Yes	Yes	Yes	No	No
In lieu of court-martial	Yes	Yes	Yes	No	No
Court-martial	No	No	No	Yes	Yes

Service members administratively separated under trainee discharge and marginal performer programs receive either an honorable or general discharge. Only discharges awarded by a court-martial or in lieu of a court-martial can involve plea bargaining.

UNIFORM ADMINISTRATION OF JUSTICE IS THE OBJECTIVE OF THE CODE

The Uniform Code of Military Justice (10 U.S.C. 801-940) (Code) was enacted in 1950 and serves as the basis for the military criminal justice system. With the enactment of the code, the services became subject to the same law. The legislative history 1/ shows that this law was to provide a new and better system of justice by insuring that there would be no disparities in the administration of justice among the military services. It set forth the fundamental rights of military people in the three main steps of criminal prosecution: pretrial proceeding, trial, and appellate review.

1/81st Cong., 1st Sess., S. Rep. No. 486, June 10, 1949, on H.R. 4080.

Shortly before passage of the code in 1950, a member of the Committee on Armed Forces made the following comments on the Senate floor concerning its intended role in achieving uniformity in the administration of justice among the services. 1/

> "* * * the code will be the sole statutory authority embodying both the substantive and the procedural law governing military justice and its administration. There will be the same law and the same procedure governing all personnel in the armed services. That this should be so is the settled conviction of most people, and I believe no argument is necessary to demonstrate its validity.
>
> "* * * The procedure before trial, at the trial, and on review will be the same as if the case had occurred in any of the other armed forces. * * * The objective is to make certain not only that justice be done to the accused, but that there be no disparities between the services. * * *" (Underscoring added.)

In commenting on the code during its debate in the Congress, the Secretary of Defense highlighted the importance of the protection and equality of treatment it would provide individuals in all the services. 1/ He stated:

> "* * * it represents a great advance in military justice in that it provides the same law and the same procedures for all persons in the armed forces. By its terms, the same rights, privileges, and obligations will apply to Army, Navy, Air Force, and Coast Guard. I cannot emphasize too much the importance of this equality and the fact that I believe it will be an item which will enhance the teamwork and cooperative spirit of the services." (Underscoring added.)

Articles 36 and 56 of the code delegate authority to the President to establish procedural rules and maximum punishments. In exercising this delegation, the President, by Executive order, issued the Manual for Courts-Martial. Article 36 states that the President should

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1/Vol. 96, "Congressional Record," 81st Cong., 2d Sess., Part 1, p. 1,355.

"* * * 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 * * *."

PLEA BARGAINING IS DONE WITHOUT DEFINITIVE GUIDANCE

Although not addressed in the code or covered in the Manual for Courts-Martial, the services engage in plea bargaining in cases triable by court-martial, frequently with one of two results.

1. A plea agreement used in a military court-martial when a guilty plea is exchanged for reduced charges or a specific sentence. This agreement is authorized by the individual services.

2. An administrative separation, at the request of the individual, in lieu of a court-martial. Each of the services has its own regulations covering this process under broad authority from DOD.

The most significant difference between the two results is that one--an agreement used in courts-martial--is part of the judicial process and the other--discharge in lieu of court-martial--is an administrative action. The latter does not give the accused the safeguards and protections guaranteed under the judicial process. There are also important differences in service policies and regulations governing plea bargaining.

A guilty plea is an essential component of a plea agreement used in military court. The responsibilities of a trial judge in determining whether a guilty plea should be accepted are set forth in article 45 of the code and section 70 of the Manual for Courts-Martial.

RESULTS OF PLEA BARGAINING

Of the 57,749 cases triable by court-martial in fiscal year 1976, 29,909 (52 percent) were affected by plea bargaining. Some involved plea agreements but the great majority (87 percent) were administrative discharges in lieu of court-martial.

Process	Number of cases	Number involving plea bargaining
Administrative discharges in lieu of court-martial	26,940	26,940
Courts-martial without authority to impose punitive discharges	14,862	(b)
Courts-martial with authority to impose punitive discharges	a/15,947	2,969
Total	57,749	29,909

a/Includes 982 Army courts-martial for which the number of plea agreements was not available.

b/The number of plea agreements for this category of court-martial is not available. A DOD study shows, however, that they are used less frequently in courts-martial without authority to impose punitive discharges than those with this authority.

CHAPTER 2

CARE IS NEEDED IN PLEA BARGAINING

Military appellate courts have approved the use of plea agreements in military courts. However, they have expressed the need to exercise caution in their use.

Since discharges in lieu of court-martial are used outside of the military court system, they are not subject to review by the military appellate courts. The Congress has warned against taking administrative actions to circumvent the constitutional rights of service personnel, including the use of the administrative discharge system to impose punishment.

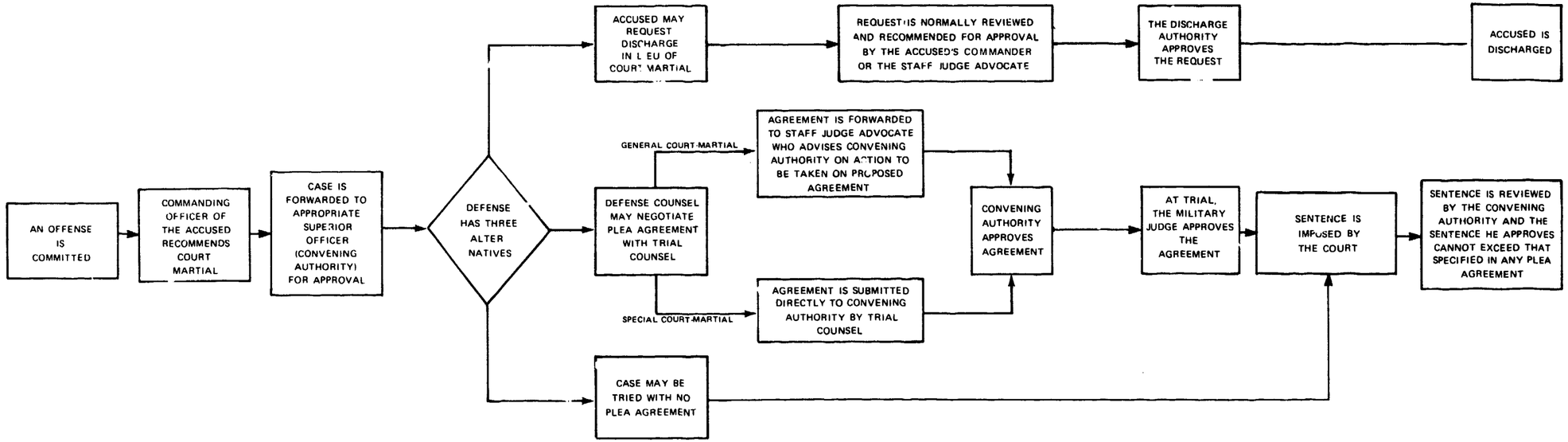
THE PLEA BARGAINING PROCESS

After consulting with his defense counsel, the accused decides whether he wants to plea bargain. Agreements used in a court-martial must be negotiated between the trial counsel and defense counsel, put in writing, and approved by the convening authority. These agreements have two parts. The first part contains the guilty plea and the second, the sentence agreed upon. The judge examines the first part of the agreement and determines from his questioning of the accused whether the agreement is acceptable. In a jury trial, the judge may look at the second part of the agreement at any time. If the trial is by judge alone, the judge must wait until he has announced sentence before looking at the second part.

The process for getting a discharge in lieu of court-martial is much simpler. Once the accused requests the discharge, approval is needed only by the discharge authority (normally an officer having the authority to convene a general court).

Although the practices and procedures vary somewhat between the services, the following chart generally outlines this process.

ALTERNATIVES FOR DISPOSING OF CRIMINAL OFFENSES TRIABLE BY COURT-MARTIAL



AGREEMENTS USED IN MILITARY COURTS

The accused benefits from plea agreements in military courts by making certain that in exchange for a guilty plea the sentence will be less than the authorized maximum that could be imposed by a court. But there are possible dangers involved in the use of these agreements.

The opportunity to plea bargain may induce an improvident confession of guilt from the accused. In highlighting this potential effect, the Air Force Court of Military Review recently noted that a judge must bear in mind that an individual's freedom of choice could easily be compromised when there is a plea agreement. 1/ This court stated:

> "* * * the military judge must be finely attuned to the obvious fact that the convening authority is in a greatly advantageous position in the negotiations, and a great danger exists that the freedom of choice of the accused may be easily overborne * * *."

The code and Manual for Courts-Martial contain guidance to insure the integrity of guilty pleas. Article 45 of the code states that if the accused has entered the plea of guilty improvidently or through a lack of understanding, the court shall proceed as though he had pleaded not guilty. The Manual for Courts-Martial, paragraph 70.b.(3), states:

> "A plea of guilty will not be accepted unless the military judge, * * * after the accused has been questioned, is satisfied not only that the accused understands the meaning and effect of his plea and admits the allegations to which he has pleaded guilty but also that he is voluntarily pleading guilty because he is convinced that he is in fact guilty."

In 1969 the U.S. Court of Military Appeals--the highest appellate court in the military judicial system--enunciated the exhaustive interrogation required by the judge before accepting the agreement. 2/ It stated that the record of trial

> "* * * must reflect not only that the elements of each offense charged had been explained to the accused but also that the military trial

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1/United States v. Avery, 50 C.M.R. 827 (1975).

2/United States v. Care, 40 C.M.R. 247 (1969).

judge or the president has questioned the accused about what he did or did not do, and what he intended (where this is pertinent), to make clear the basis for a determination by the military trial judge or president whether the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty. This requirement will not be satisfied by questions such as whether the accused realizes that a guilty plea admits every element charged and every act or omission alleged and authorizes conviction of the offenses without further proof. * * * We believe the counsel, too, should explain the elements and determine that there is a factual basis for the plea, but his having done so earlier will not relieve the military trial judge or the president of his responsibility to do so on the record."

* * * * *

"Further, the record must also demonstrate the military trial judge or president personally addressed the accused, advised him that his plea waives his right against self-incrimination, his right to a trial of the facts by a court-martial, and his right to be confronted by the witnesses against him; and that he waived such rights by his plea. Based upon the foregoing inquiries and such additional interrogation as he deems necessary, the military trial judge or president must make a finding that there is a knowing intelligent and conscious waiver in order to accept the plea."

Even with this guidance the U.S. Court of Military Appeals has continued to express concern over the use of plea agreements in two general areas.

--The providence of the guilty plea, that is, the prudence or wisdom of the plea.

--The contents of the agreements.

In a 1975 decision this court staced: 1/

1/United States v. Holland, 50 C.M.R. 461 (1975).

"* * * Indeed, the many and varied schemes that have been employed in disposing of charges by way of the guilty plea route have demanded our continued scrutiny of the plea bargaining process. That this effort under the guise of efficiency and expedition is on-going is demonstrated by the circumstances of the present case." (Underscoring added.)

In a 1976 decision this court stated: 1/

"* * * trial judges must share the responsibility, which until now has been borne by the appellate tribunals, to police the terms of pretrial agreements to insure compliance with statutory and decisional law as well as adherence to basic notions of fundamental fairness."

The concerns expressed by appellate courts regarding the use of plea agreements are discussed in detail in appendix I.

DISCHARGES IN LIEU OF COURT-MARTIAL

Discharges in lieu of court-martial are used outside of court and the protections of the judicial process. The accused is faced with the decision of whether it is better to be expeditiously discharged with virtual certainty of receiving the most severe form of administrative discharge, or face a trial which could be lengthy and may result in a more serious consequence--a Federal conviction, confinement, and a bad conduct or dishonorable discharge.

A February 18, 1975, letter from the Army Judge Advocate General to field commanders and staff judge advocates stated the many advantages to the Government of administratively disposing of offenses. This letter indicates that the use of the administrative process should be encouraged whenever appropriate. It states in part:

"* * * I am transmitting this letter to enlist your personal aid and attention in insuring that court-martial action is resorted to only in those cases where fully warranted and where alternative administrative measures are clearly not suitable.

1/United States v. Green, 52 C.M.R. 10 (1976).

"* * * This leads me to suggest that, in considering the appropriate course of action in dealing with such individuals, commanders take into account that court-martial processes must inevitably consume a considerable amount of manpower, time, and effort, often requiring that the individual be retained on duty in a pay status until protracted statutory appellate processes are completed."

* * * * *

"I can assure you that every effort is being made to reduce processing time in the court-martial process. However, the requirements of the Uniform Code of Military Justice cannot be short circuited, and * * * a fairly long period elapses from the initial date of charges or apprehension until the final step in the appellate process is completed. As an illustration, it takes an average of slightly more than one year for 'not guilty' plea cases and over nine months for 'guilty' plea cases to process from the beginning through decision by the Court of Military Review. If action by the Court of Military Appeals follows, another three to five months will be necessary. All during this period, the individual is carried on the rolls and charged against the Army strength. Unless he is in confinement or on excess leave, the individual will be carried as a duty soldier, probably drawing full pay and allowances after any forfeiture, fine, or confinement portion of the sentence has been served. There are currently about 1,400 general or BCD [bad conduct discharges] special court-martial cases in some stage of appellate processing. It is obvious that, as this number is reduced, effective Army strength can be proportionately increased."

* * * * *

"* * * If these numbers could be reduced by employing alternative administrative actions where appropriate, there would be fewer people tied up in the trials and the processing of trials, fewer persons in confinement, and more rapid return of the individual to useful duty or else his early departure from the service so that a more effective soldier can promptly take his place. * * *"

The main advantage of using the discharge system to deal with criminal offenses is that it is expedient. However, it lacks safeguards guaranteed under the code. There is no judge or other neutral party involved when a discharge is given in lieu of court-martial. As discussed earlier regarding plea agreements used in court, appellate courts warn that the accused is at a great disadvantage even with the presence of a judge. The judge must be certain that the accused knowingly and voluntarily entered into the agreement and his actions are subject to appellate review.

The Congress has expressed concern about the administrative process and its lack of fundamental protections and due process guaranteed under the code. In its report on hearings in 1962, the Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate made it clear that the use of an administrative system to circumvent the protections provided by the code would be viewed as an encroachment on the rights of military people. The report 1/ states:

> "* * * to the extent that the armed services use administrative action to circumvent protections provided by the Uniform Code, the intent of Congress is thwarted and the constitutional rights of service personnel are jeopardized."

A 1971 report 2/ on legislation proposed by the House Armed Services Committee stated that over the years many individual Members of Congress as well as congressional committees and bar associations have been concerned about repeated complaints of administrative discharge practices. Cases were reported alleging that administrative separations were being used as a substitute for punitive action. This Committee was concerned about this problem because of the serious consequences of discharges under conditions other than honorable.

PLEA AGREEMENTS IN FEDERAL COURTS

The U.S. Supreme Court views plea agreements as an important element in the judicial process, provided they are

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1/Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, Constitutional Rights of Military Personnel/Summary-Report of Hearings, Pursuant to S. Res. 58, 88th Cong., 1st Sess., pp. IV and V (1963).

2/H. Rept. No. 92-496, 92d Cong., 1st Sess., 1971.

properly administered. In a 1977 decision 1/ this court stated:

> "Whatever might be the situation in an ideal world, the fact is that the guilty plea and often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned. The defendant avoids extended pretrial incarceration and the anxieties and uncertainties of a trial; he gains a speedy disposition of his case, the chance to acknowledge his guilt, and a prompt start in realizing whatever potential there may be for rehabilitation. Judges and prosecutors conserve vital and scarce resources. The public is protected from the risks posed by those charged with criminal offenses who are at large on bail while awaiting completion of criminal proceedings."

1/Blackwedge, Warden, et al. v. Allison, 431 U.S. 63 (1977).

CHAPTER 3

ADMINISTRATIVE DISCHARGES IN LIEU OF COURT-MARTIAL SHOULD BE ELIMINATED

Administrative discharges in lieu of court-martial are not addressed in the code or Manual for Courts-Martial. A number of laws refer to one or more of the conditions under which administrative discharges are characterized, but none specifically mentions a type of discharge.

Department of Defense Directive 1332.14 prescribes the policies, standards, and procedures for discharging enlisted personnel under the administrative discharge program. It states that the services may discharge individuals "under certain circumstances or conditions to meet the needs of the Services and members." In the directive three discharge characterizations are authorized--honorable, general, and under other than honorable conditions. An administrative discharge is authorized for individuals accused of crimes when

--punishment for the crime under the code includes a bad conduct or dishonorable discharge which can only be imposed by a court-martial and

--the accused requests an administrative discharge in lieu of court-martial.

The directive does not specifically require that a decision be made to court-martial or that the court which would try the case have the authority to impose a discharge before a discharge can be requested.

FREQUENCY

As can be seen from the following schedule, the use of the discharge in lieu of court-martial has rapidly increased in recent years.

Fiscal year	Number of discharges in lieu of court-martial				
	Army	Marine Corps	Navy	Air Force (note a)	Total
1967	294	1	0	129	424
1968	384	7	0	370	761
1969	532	471	0	425	1,428
1970	6,993	3,351	0	386	10,730
1971	12,041	4,704	214	557	17,516
1972	25,515	1,825	1,363	915	29,618
1973	21,066	1,684	1,657	475	24,882
1974	17,672	2,728	2,266	285	22,951
1975	14,784	3,437	2,790	601	21,612
1976	16,055	7,976	2,446	463	26,940

a/Includes administrative discharges given for other reasons.

ADVERSE EFFECTS OF BAD DISCHARGES

If warranted, discharges in lieu of court-martial can be honorable or general. About 90 percent, however, are under other than honorable conditions. There are serious long-term consequences of a bad discharge, whether it is labeled punitive and imposed by a court-martial or granted under the administrative discharge system. Bad discharges adversely affect eligibility for veterans benefits and carry a stigma which may limit opportunities for civilian employment. 1/

The services recognize the stigma of a discharge in lieu of court-martial. For example, the Army's application for a discharge in lieu of court-martial contains the following statement:

> "I understand that, if my request for discharge is accepted, I may be discharged under other than honorable conditions and furnished an Undesirable Discharge Certificate. I have been advised and understand the possible effects of an undesirable discharge and that, as a result of the issuance of such a discharge, I will be deprived of many or all Army benefits, that I may be ineligible for many or all benefits administered by the Veterans Administration, and that I may be deprived of many rights and benefits as a veteran under both

1/See our report to the Chairman, Committee on Armed Services, United States Senate, "Need for and Uses of Data Recorded on DD Form 214 Report of Separation From Active Duty," FPCD-75-126, Jan. 23, 1975.

Federal and State law. I also understand that I may expect to encounter substantial prejudice in civilian life because of an undesirable discharge." (Underscoring added.)

For purposes of establishing eligibility for benefits, the Veterans Administration subjects the discharge under other than honorable conditions to the same type of review as a bad conduct discharge. If the discharge under other than honorable conditions is given to escape trial by general court-martial, it is considered to have been imposed under dishonorable conditions and benefits are automatically denied as if it were a dishonorable discharge.

WAIVER OF RIGHTS UNDER THE CODE

The code provides service members fundamental rights in each of the three main steps in criminal prosecution--pretrial proceeding, trial, and appellate review. When the accused chooses the alternative of a discharge in lieu of court-martial, he waives his right to a trial and any accompanying appellate review.

In a judicial proceeding, a neutral party (military judge) presides over the court. If a plea agreement is involved, the judge rules on its wisdom and acceptability. He is required to be satisfied that the agreement was knowingly and voluntarily entered into.

Without a trial in a military court there can be no appellate review. Such a review is made to determine if court-martial proceedings are correct and the sentence is not unduly harsh. Criminal cases are subject to two levels of courts--the courts of military review (the Army, Navy, and Air Force have separate courts) and the U.S. Court of Military Appeals. Both types of courts have the authority to set aside sentences.

Before a punitive discharge can be imposed, the code and Manual for Courts-Martial require that:

--The accused be assigned qualified legal counsel to prepare and defend the case.

--The accused be tried by a special or general court-martial which upon finding the accused guilty must decide that an appropriate sentence should include a punitive discharge.

--The record of trial be reviewed by a staff judge advocate or legal officer who must make a written recommendation to the convening authority on the action he should take.

--The findings and sentence of the court-martial be reviewed and approved by a general court-martial convening authority.

--The findings and sentence of the court-martial be reviewed and approved by a court of military review.

Upon appeal by the accused, the case may be reviewed by the U.S. Court of Military Appeals.

In contrast, the DOD directive and implementing service regulations governing administrative discharges in lieu of court-martial require only that:

--The accused be assigned qualified legal counsel prior to initiating the request.

--The accused sign a statement that he understands the adverse nature and possible consequences of a discharge under other than honorable conditions.

--The discharge authority decide whether to approve the request and if so, the type of discharge.

DIFFERENCES AMONG SERVICES' REGULATIONS

Regulations covering discharges in lieu of court-martial differ among the services in the issues they address.

	Contained in regulations of			
	Army	Air Force	Marine Corps	Navy
Requirements:				
Filing of charges	Yes	No	No	Yes
Admission of guilt	Yes	No	Yes	Yes
Guidance on:				
Evidence of guilt	No	No	Yes	No
Circumstances justifying approval	yes	No	Yes	No

Also, there are important differences in what these regulations say about the matters addressed and what actions must be completed before the accused is eligible to request

a discharge in lieu of court-martial. It is likely that these differences will produce inconsistencies in the outcome of similar cases.

The most important actions that occur from the time a person is accused of a crime until trial by court-martial are summarized below.

--The immediate commander of the accused will make, or cause to be made, a preliminary inquiry into the suspected offenses sufficient to enable him to make an intelligent disposition of them.

--When the preliminary inquiry shows that offenses punishable by the code have been committed, the immediate commander will prefer appropriate charges for those offenses which he believes cannot properly be disposed of under nonjudicial punishment. In deciding whether to file charges, the commander will consider the evidence and past behavior of the accused. However, conclusive proof is not needed. All that is generally needed is an honest belief that a crime was committed and that the accused was the person who committed it. The amount and nature of the evidence necessary to prefer charges is not the same as that required to obtain a conviction. After the charges are prepared, the accuser must personally appear before an officer authorized to administer oaths and swear to the charges.

--If the immediate commander believes trial by court-martial is in order, he will forward the charges and related papers through the chain-of-command until the decision to court-martial is approved by the proper convening authority (or the case is returned to the immediate commander for nonjudicial punishment).

--If a decision is made to recommend the accused be tried by general court-martial, an article 32 investigation must accompany the charges and related papers to the general court-martial convening authority. An article 32 investigation is conducted by a field grade officer independent of the case to inquire into the truth of the matters set forth in the charges and to determine what disposition should be made of the case. At the conclusion of the investigation, a formal report is prepared by the investigating officer with his recommendations as to what disposition should be made of the case.

--Before the convening authority can direct trial by general court-martial, he must refer the case to his staff judge advocate for review and advice. The staff judge advocate or legal officer must give the convening authority a signed opinion about whether (1) each allegation is identified as a crime by the code, (2) there is sufficient evidence to support each allegation, and (3) the article 32 investigation largely complies with legal requirements.

--As soon as the decision is made to try the case in a special or general court-martial, a trial counsel is assigned. It is the trial counsel's responsibility to prepare the Government's case. In preparing the case, he may, among other things, recommend to the convening authority (1) dismissal of all charges, (2) dismissal of some charges, (3) preferring of additional charges, (4) a different level of court-martial, or (5) what action should be taken on any plea agreements initiated by the accused.

Filing of charges

None of the services requires that the decision be made to refer a case to a court having the authority to impose a punitive discharge before a discharge can be requested. The Army and the Navy are the only services that require court-martial charges to be filed; but the Army regulation states that the request may be made "regardless of the type of court-martial to which the charges are referred." Air Force regulations, however, state that the request may be initiated "regardless of whether formal charges have been preferred"; and Marine Corps regulations do not mention whether charges must be preferred.

Admission of guilt

As part of the request for a discharge in lieu of court-martial, Army and Marine Corps regulations require that the accused admit guilt; Navy regulations require that the individual acknowledge misconduct; and the Air Force does not require any expression of wrongdoing.

Service regulations require that the following language be made a part of the request:

--Army. "By submitting this request for discharge, I acknowledge that I am guilty of the charge(s) against me or of (a) lesser included offense(s) therein contained which also authorize(s) the imposition of a bad conduct or dishonorable discharge."

--Marine Corps. "This request is based on my commission of the following offense(s) in violation of the Uniform Code of Military Justice." (In setting forth the philosophy behind the requirement, the regulation states "Since a prerequisite for the issuance of a discharge * * * is conduct triable by court-martial, the submission of such request must contain an acknowledgement by the member that he has committed the offense resulting from such conduct.")

--Navy. "The basis for my request for undesirable discharge for the good of the service stems from my misconduct contained in the court-martial charges preferred against me as indicated in enclosure (1)."

--Air Force. "I hereby request discharge under AFM 39-12, paragraph 2-78 (authorizing discharge in lieu of court-martial) for the good of the service."

Evidence of guilt

Only the Marine Corps provides guidance to the discharge authority on how to evaluate the evidence against the accused. But the Marine Corps does not require that a case be perfected. Its regulation states:

"Acceptance of a request for discharge for the good of the service and a resultant discharge based thereon does not require that a case be perfected against a member. Nor is it required that the discharge authority have available to him legally admissible evidence sufficient to judicially establish the member's guilt of the alleged offense(s) beyond a reasonable doubt. An offense(s) shall not be considered to be not triable because, before a court-martial, the member would have available to him one or more motions in bar of trial."

Circumstances justifying appproval

Only the Army and Marine Corps provide the discharge authority guidance in determining whether a discharge in lieu of court-martial should be approved. However, this guidance differs materially.

The Army regulation instructs the discharge authority to be selective in approving discharges in lieu of

court-martial. Such discharges are not to be approved when a punitive discharge and confinement are considered appropriate. The regulation states:

> "The discharge authority should not be used when the nature, gravity, and circumstances surrounding an offense require a punitive discharge and confinement, nor when the surrounding facts do not establish a serious offense, even though the punishment in the particular case, under the Uniform Code of Military Justice, may include a bad conduct or dishonorable discharge. Consideration should be given to the member's potential for rehabilitation and his entire record should be reviewed prior to taking action pursuant to this chapter. Use of this discharge authority is appropriate and encouraged when the commander determines that the offense charged is sufficiently serious to warrant elimination from the Service and the individual has no rehabilitation potential."

In contrast, the Marine Corps regulation states that such a discharge should be approved only if the discharge authority would, under the circumstances, approve a punitive discharge as part of a sentence imposed by court-martial.

> "In determining whether to approve an undesirable discharge for the good of the service, the discharge authority should not do so unless, in acting as the convening authority of a court-martial upon a conviction of the offense(s) for which the discharge for the good of the service is requested, he would approve an unsuspended punitive discharge as part of the sentence awarded by the court."

Thus, the Army regulation prohibits discharges in lieu of court-martial when a punitive discharge and confinement are considered appropriate. In contrast, the Marine Corps regulation only allows such discharges if a punitive discharge would be approved as part of the sentence for the offense.

COMPARISON OF SEVERITY OF DISCHARGES IMPOSED IN LIEU OF COURT-MARTIAL WITH DISCHARGES IMPOSED BY COURT-MARTIAL

A study we made showed that for the same offense military courts appear more hesitant to impose punitive

discharges than are discharge authorities to approve requests for discharges which can have the equivalent effect. We randomly selected a study group of Army, Navy, and Marine Corps people accused of the same military crime--absence without leave for over 30 days--who returned during the 12-month period ending March 31, 1975. When individuals in this group received a discharge as a result of this offense, we wanted to know the severity of discharges being given administratively in lieu of court-martial compared to those imposed by court-martial. Absence without leave for over 30 days is punishable by confinement up to 1 year and a dishonorable discharge.

Of the 1,094 cases included in this study which were triable by court-martial: 1/

--577 received an administrative discharge in lieu of court-martial; 532 (92 percent) of these discharges were under other than honorable conditions.

--517 were tried by court-martial; 60 (12 percent) were given a bad conduct discharge and confinement; and 6 (1 percent) received a bad conduct discharge and no confinement. A total of 219 received a sentence of confinement only. None received a dishonorable discharge.

This test confirmed DOD statistics which show that a person requesting a discharge in lieu of court-martial has about a 90 percent chance of receiving the most severe type of administrative discharge--a discharge under other than honorable conditions. In contrast, only 13 percent of those tried by court-martial received a punitive discharge in the sentence imposed. The discharge awarded in every case was the least severe the court trying the case could award--a bad conduct discharge.

1/A total of 1,547 were in the study group which was selected in connection with our ongoing study dealing with unauthorized absence. Of the 453 cases not triable by courts-martial, 307 were dealt with using nonjudicial action. The remaining 146 cases included incidences where no action was taken; action may have been taken but was not recorded in personnel records; action was not directly related to the incident (i.e., finalization of administrative or punitive discharge in process at time of the incident); and action may have been delayed pending return from subsequent absence.

Many of the cases in which a discharge in lieu of court-martial was approved would probably not have gone to trial or would have been tried in a court which did not have the authority to impose a punitive discharge. Of the 517 in our study group tried by court-martial, 91 were tried in a summary court, which does not have the authority to impose any discharge. Only 11 cases were tried in a general court, which is authorized to give either a bad conduct or dishonorable discharge.

CONCLUSIONS

We believe that discharges in lieu of court-martial are not in the best interests of the accused or society for the following reasons.

Criminal offenses are dealt with contrary to congressional intent

The code was adopted to provide the same law and procedures for all military persons accused of crimes. But the discharge in lieu of court-martial results in the nonuniform treatment of individuals because:

--Disparities in service policies and regulations deny people who request a discharge in lieu of court-martial the same rights and protections.

--Similar cases can be disposed of either administratively or under the judicial process which produces wide variances in how a case is disposed of. Under the administrative process the accused always receives a discharge, whereas under the judicial process a discharge is only one of many options for dealing with an offense.

Disposing of criminal wrongdoing outside the judicial process is contrary to congressional intent. The discharge in lieu of court-martial lacks the safeguards provided under the code to protect the rights of the accused and the interests of society. In return for assurance that he will not receive a Federal conviction, confinement, or a punitive discharge, the accused waives his right to trial and appellate review or a hearing by a discharge board. No judge or other neutral party rules on the providency of the discharge request or determines that the accused fully understands the consequences of the actions he is about to take. The type of discharge imposed in virtually every case is a discharge

under other than honorable conditions--the most severe form of administrative discharge. Such a discharge can restrict eligibility for veterans benefits and limit civilian employment opportunities the same as a punitive discharge.

Before a discharge can be imposed by a military court, charges must be filed and legally admissible evidence developed to judicially establish the person guilty beyond a reasonable doubt. Punitive discharges can be imposed by only special and general military courts and do not become effective until reviewed and approved by a court of military review.

The main advantage of the discharge in lieu of court-martial is that the services can expeditiously get rid of problem people. However, the legislative history of the code does not support that the Congress intended such expediency. The Congress has specifically warned against using the administrative discharge system to impose punishment. But if no administrative discharge constitutes punishment, then the system does not allow any form of punitive action to be taken against individuals accused of crimes. This does not serve the interests of society, nor is it fair to those who are charged with similar offenses, but are forced to face court-martial.

Avoiding trial is usually not in the best interests of the accused

In most cases a discharge in lieu of court-martial is not a bargain for the accused in the long run. Our test of cases triable by court-martial showed that military courts are far more hesitant to impose a sentence which includes a punitive discharge than are discharge authorities to approve discharges in lieu of court-martial.

Many cases in which a discharge in lieu of court-martial is approved may not have gone to trial or would have been tried in a court which did not have the authority to impose a punitive discharge. This is because service regulations do not require that (1) the convening authority decide whether the case will be referred to a court having the authority to impose a punitive discharge before a discharge can be requested or (2) a strong case be developed against the accused before a discharge in lieu of court-martial can be approved.

The DOD directive authorizing discharges in lieu of court-martial states that individuals can only request such

a discharge when they have committed an offense punishable by a punitive discharge. But the Air Force regulation states that a request for a discharge in lieu of court-martial may be initiated regardless of whether formal charges have been preferred. And the Army regulation states that the request may be made regardless of the type of court-martial to which the charges are referred.

Further, policies and regulations are inconsistent among services. For example, only the Marine Corps has a regulation which provides guidance on how to evaluate the evidence against the accused; the Air Force is the only service which does not require an expression of wrongdoing as part of the request for a discharge in lieu of court-martial; and the Army and Marine Corps regulations which set forth the circumstances justifying approval of the discharge in lieu of court-martial differ materially.

Effectiveness of military courts is limited

Offering the accused an option of a discharge in lieu of court-martial limits the effectiveness of military courts. On the one hand, these courts must enforce the law; on the other, they must protect the rights of individual service members. These responsibilities cannot be accomplished if a major portion of criminal offenses are dealt with outside the judicial process.

Allows for treatment of symptoms rather than disease

The option of a discharge in lieu of court-martial allows commanders to treat the symptoms of a problem without attempting to cure its root cause. To illustrate, the incidence rate for the crime of absence without leave can be reduced by allowing individuals accused of this offense to request a discharge in lieu of court-martial. But this in turn leads to a higher attrition rate which is costly and harmful to mission effectiveness. Thus, the only real solution would be to determine why people are committing this crime and to work on eliminating the causes.

Most offenses which lead to administrative discharges in lieu of court-martial, such as absence without leave, are peculiar to the military. Yet the stigma of a bad discharge stays with the individual in civilian life. The majority of those affected are young people--most below age 20. We

suspect that many who elect a discharge in lieu of court-martial do not understand the potential long-term consequences of a bad discharge.

RECOMMENDATIONS

To help insure that criminal offenses are dealt with under the safeguards and protections of the judicial process, the Secretary of Defense should

--revise the directive on administrative discharges to eliminate discharges in lieu of court-martial and

--direct the services to dispose of criminal charges in a manner consistent with the code and Manual for Courts-Martial.

DOD and service judge advocate general representatives generally agreed that uniform guidance covering the use of agreements in military courts would be useful. The reaction was mixed, however, regarding our proposal to discontinue the administrative separation of individuals to avoid trial by court-martial. Some supported its discontinuance because it compromises the process by which the Congress intended criminal offenses should be dealt with. Others voiced concern that its elimination would increase the workload of military courts.

CHAPTER 4

PLEA AGREEMENTS IN MILITARY COURTS

Under broad authority granted by the code, the convening authority may enter into a plea agreement regarding charges and specifications under which the accused will be tried and/or the maximum sentence which will be approved if the accused pleads guilty.

There is no single authoritative guide for the use of plea agreements in military courts. Most of the existing guidance is contained in individual service publications and case law (decisions of the courts of military review and the U.S. Court of Military Appeals). The code and Manual for Courts-Martial address (1) the responsibilities of a trial judge in accepting guilty pleas and (2) maximum punishments.

FREQUENCY

Service statistics for fiscal year 1976 show that for military courts with the authority to impose punitive discharges, plea agreements are used far more frequently in general courts-martial, which try the most serious cases.

	General courts-martial			Special courts-martial		
	Total cases	Plea agreements	Percent	Total cases	Plea agreements	Percent
Air Force	227	9	4	1,136	0	-
Army	1,457	752	52	a/799	239	30
Navy	240	99	41	4,893	845	17
Marine Corps	401	172	43	5,812	853	15
Total	2,325	1,032	44	a/12,640	1,937	15

a/Does not include 982 courts-martial for which the number of plea agreements was not available.

DIFFERENCES IN SERVICE POLICY GUIDANCE

The following service publications contain policy guidance on plea agreements.

Air Force	"Military Justice Guide," AFM 111-1
Army	"Staff Judge Advocate Handbook," DA Pamphlet 27-5 "Military Justice Handbook," DA Pamphlet 27-10 "Desk Book for Special Court Martial Convening Authorities," DA Pamphlet 27-18 "Military Justice Trial Procedure," DA Pamphlet 27-173
Navy (also applies to Marine Corps)	"Manual of the Judge Advocate General"

In comparing this guidance we found differences in

--what issues the guidance addresses (app. II);

--what the guidance says about similar issues (app. III); and

--the clauses contained in the suggested service formats for plea agreements (app. IV).

We made no attempt to assess the effect of the differences found either in the overall quality of justice or the outcome of cases. However, we believe that differences in service policies and procedures inevitably lead to differences in the way similar cases are handled.

The Army has been using plea agreements since about 1953 when the Acting Judge Advocate General suggested their use, at the discretion of the convening authority, after observing that they would be mutually advantageous to the Government and the accused. The Secretary of the Navy authorized the use of negotiated pleas in 1957. The benefits of such agreements, from the Navy viewpoint, are stated in the Navy Manual of the Judge Advocate General:

> "Experience has shown that opportunities for advanced planning, savings in money and manpower, and a more expeditious administration of justice can be effected by such agreements."

In 1975 the Secretary of the Air Force authorized the use of plea agreements, but only in specific situations and when approved by his Judge Advocate General. The Air Force takes the position that plea agreements are not in

the best interests of the Government or the accused and allows their use only when there is an overriding reason to avoid trial of all or a part of the issues. Four possible justifications for the use of plea agreements are stated in the Air Force "Military Justice Guide."

--When a traumatic examination of a child, whether a victim or otherwise, would be required.

--When a public trial in which exposure of national security matters or evidence of sensational misconduct would be involved.

--When essential or important witnesses are at exceptional distances, are not amenable to process, or are not available because of serious illness, invalid condition, or other comparable reason.

--When several accused are involved and the testimony of one is required in the trial of one or more of the others. In this case, a plea agreement may be a desirable alternative to granting immunity.

CONCLUSIONS

We believe that the lack of definitive guidance governing the use of plea agreements has contributed to the differences we found in service policies and regulations. These differences mean that individuals are treated unequally among the services, which is clearly not intended by the code. The code was adopted to provide that the law and procedures for individuals in all the services are uniform before trial, during trial, and during review. Of particular concern is Air Force policy which places limitations on the use of plea agreements by convening authorities.

The convening authority is able to enter into plea agreements under broad authority conferred by the code, yet, the Secretary of the Air Force permits the use of plea agreements only in specific instances and with his Judge Advocate General's prior approval. In doing so he has created an important policy difference among the services.

Military appellate courts have approved the use of plea agreements in military courts but over the years have continued to express the need for caution in how they are used. We believe that policy guidance by the President is needed to alleviate problems found by these courts and to help eliminate differences in service policy.

RECOMMENDATIONS

To help insure that military people accused of crimes are given the same rights, we believe the President should revise the Manual for Courts-Martial to

--provide policy guidance, procedures, rules, standards, and format on the use of plea agreements in military courts and

--specify any restrictions or limitations on the use of plea agreements.

CHAPTER 5

SCOPE

The objective of this review was to determine whether plea bargaining in the military conforms with the intent of the Congress. We examined and compared

--pertinent laws including the Uniform Code of Military Justice and its legislative history,

--DOD and service regulations,

--congressional hearings on the administrative discharge system and the constitutional rights of military personnel,

--court cases, and

--articles in legal periodicals.

We discussed at length the matters addressed in the report with Office of Secretary of Defense and service representatives responsible for administering the justice system. In addition, we considered information developed in other military justice reviews. For example, to compare the frequency in which administrative versus punitive discharges are imposed in similar situations, we selected a study group of 1,547 individuals accused of the same military crime--absence without leave for over 30 days. This data was developed in connection with our ongoing review of unauthorized absence.

We made no attempt to assess the effect of the differences found either in terms of the overall quality of justice or the outcome of cases. However, we believe that differences in service policies and procedures inevitably lead to differences in the way similar cases are handled.

CONCERNS OF APPELLATE COURTS OVER THE USE OF PLEA AGREEMENTS

The courts of military review and the Court of Military Appeals have expressed concern over the use of plea agreements. These concerns have centered on two principal areas:

--The providence of the guilty plea.

--The contents of the agreements.

PROVIDENCE OF THE GUILTY PLEA

Over the years, the appellate courts have been fearful that an accused may improvidently enter into a plea agreement out of a desire to establish a limit on his punishment. Although the Manual for Courts-Martial does not deal specifically with plea agreements, it clearly sets forth the requirements for a trial judge to accept a guilty plea. Appellate court decisions strongly encourage the trial judge to play a more active and critical role in his evaluation of the agreement and the circumstances surrounding its evolution.

In a 1968 decision--United States v. Cummings, 38 C.M.R. 174 (1968)--the Court of Military Appeals observed that it was continuing to have to reverse and remand cases because of improvident pleas.

> "This case raises an important question concerning the administration of military justice in the area of pretrial agreements to plead guilty. They have been employed in military trials since 1953, and this Court has approved of their use, though not without reservations. * * * The benefit to the accused is the ceiling which is set absolutely on his punishment in return for the plea. The danger inherent in the arrangement is the entry of an improvident plea in order to insure that ceiling, as evidenced by the many cases in which we have been required, on that basis, to reverse and remand. Hence, we have noted the need for the law officer to make a most painstaking inquiry into the question of providence and the effect of the agreement prior to taking the plea. * * * This process, we have said, establishes providence upon the record and gives the lie to later, extra-record claims of impropriety in the case." (Underscoring added.)

APPENDIX I

In a 1969 decision--United States v. Care, 40 C.M.R. 247 (1969)--the Court of Military Appeals elaborated on the exhaustive interrogation it believed was required of the military judge before accepting a pretrial agreement as provident, even though it recognized the defense counsel will have previously made a similar determination. The Court stated the record of trial:

> "* * * must reflect not only that the elements of each offense charged had been explained to the accused but also that the military trial judge or the president has questioned the accused about what he did or did not do, and what he intended (where this is pertinent), to make clear the basis for a determination by the military trial judge or president whether the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty. This requirement will not be satisfied by questions such as whether the accused realizes that a guilty plea admits 'every element charged and every act or omission alleged and authorizes conviction of the offenses without further proof.' * * * We believe the counsel, too, should explain the elements and determine that there is a factual basis for the plea, but his having done so earlier will not relieve the military trial judge or the president of his responsibility to do so on the record."
>
> * * * * *
>
> "Further the record must also demonstrate the military trial judge or president personally addressed the accused, advised him that his plea waives his right against self-incrimination, his right to be confronted by the witnesses against him; and that he waived such rights by his plea. Based upon the foregoing inquiries and such additional interrogation as he deems necessary, the military trial judge or president must make a finding that there is a knowing, intelligent and conscious waiver in order to accept the plea."

The Air Force Court of Military Review, in its first case involving pretrial agreements, which occurred in 1975, expressed its reservations about such agreements--United States v. Avery, 50 C.M.R. 827 (1975)--because of the potential for an improvident plea.

"We, too, have our reservation about the propriety of plea bargaining. A reading of the authorities cited in the body of this decision teaches not only that there are great risks of improvident pleas being entered under the pressure of a desire to have a limit on the punishment, but also there is real danger that trial personnel, particularly defense counsel, will become lax in their attention to detail and the fidelity of their advocacy. We intend to be extremely vigilant to any abuse of the accused's rights and protections and will closely scrutinize every case in which a negotiated plea has been entered." (Underscoring added.)

In two 1976 decisions, the Court of Military Appeals further expounded on the role expected of a trial judge in determining the providence of the guilty plea and determining the legality of the agreement.

1. In United States v. Elmore, 51 C.M.R. 254 (1976), the Chief Judge stated, in a concurring opinion:

"The ambiguity and apparent hidden meanings which lurk within various pretrial agreement provisions such as the one presently before us as well as those in * * * [past cases] lead me to conclude that hence-forth, as part of the * * * [providence] inquiry, the trial judge must shoulder the primary responsibility for assuring on the record that an accused understands the meaning and effect of each condition as well as the sentence limitations imposed by an existing pretrial agreement. * * *

"In addition to his inquiry with the accused, the trial judge should secure from counsel for the accused as well as the prosecutor their assurance that the written agreement encompasses all of the understandings of the parties and that the judge's interpretation of the agreement comports with their understanding of the meaning and effect of their plea bargain. For * * * [providence] inquires conducted after the date of this opinion, I will view a failure to conduct a plea bargain inquiry as a matter affecting the providence of the accused's plea." (Underscoring added.)

2. In a later case--United States v. Green 52 C.M.R. 10 (1976)--the Chief Judge further observed that trial judges must begin sharing with the appellate courts the burden of policing pretrial agreements.

> "Our discussion thus far has focused upon limitations on the trial judge's inquiry into the terms of a pretrial agreement. Of equal importance are his affirmative obligations insofar as negotiated pleas are concerned. In a concurring opinion in United States v. Elmore * * * I observed that trial judges, as part of their inquiry into the providence of a guilty plea, should carefully inquire into the terms and conditions of any existing pretrial agreement."
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> * * * * *
>
> "We are not unmindful of the additional burden such an inquiry would place on the trial judiciary. Nevertheless, the propriety and meaning of various plea bargain provisions remains a fertile source of appellate litigation. * * * Judicial scrutiny of plea agreements at the trial level not only will enhance public confidence in the plea bargaining process, but also will provide invaluable assistance to appellate tribunals by exposing any secret understanding between the parties and by clarifying on the record any ambiguities which lurk within the agreements. More importantly, a plea bargain inquiry is essential to satisfy the statutory mandate that a guilty plea not be accepted unless the trial judge first determines that it has been voluntarily and providently made. See Article 45 (a), Uniform Code of Military Justice, 10 U.S.C. S 845(a). Finally, we believe trial judges must share the responsibility, which until now has been borne by the appellate tribunals, to police the terms of pretrial agreements to insure compliance with statutory and decisional law as well as adherence to basic notions of fundamental fairness." (Underscoring added.)

CONTENTS OF THE AGREEMENT

Appellate courts have also expressed concern over conditions included in plea agreements that would deny the accused a fair trial by interfering with his trial rights. As

shown in appendixes III and IV the services have issued guidance on preparation of the agreement and clauses that may be negotiated and included in plea agreements. But the extent of guidance provided varies among the services and may not be sufficiently definitive and complete in any service. Appellate court decisions have provided additional guidance in a number of areas including

1. The inclusion of conditions precluding the accused from raising the issue of

   --jurisdiction (United States v. Banner, 22 C.M.R. 510 (1956));

   --speedy trial (United States v. Cummings, 38 C.M.R. 174 (1968) and United States v. Troglin, 44 C.M.R. 237 (1972));

   --denial of due process (United States v. Cummings); and

   --double jeopardy (United States v. Troglin).

2. The suggestion that the Navy format for pretrial agreements should be amended to provide the agreement be cancelled if the military judge rejects the guilty plea. (United States v Harness, 48 C.M.R. 846 (1974)).

3. The determination that contingent provisions are contrary to public policy and void if they require an accused to waive fundamental rights, or if they may induce the accused to commit perjury. (United States v. Evans, 49 C.M.R. 86 (1974)).

4. The requirement that the accused elect trial by military judge alone (United States v. Schmeltz, 50 C.M.R. 83 (1975)).

5. The finding that the agreement cannot limit the order or timing when certain motions might be made at trial. (United States v. Holland, 50 C.M.R. 461 (1975)).

In the latter decision, the Court provided the following explanation for its decision (quoting a paragraph from one of its prior decisions (United States v. Cummings).

"Attempting to make them into contractual type documents which forbid the trial of collateral

> issues and eliminate matters which can and should be considered below, as well as on appeal, substitutes the agreement for the trial and, indeed, renders the latter an empty ritual. We suggest, therefore, that these matters should be left for the court-martial and appellate authorities to resolve and not be made the subject of unwarranted pretrial restrictions.
>
> "Under this particular standard, as well as the more general one implicit in opinions dealing with command control, extra-judicial infringement or interference with the trial and its procedures is forbidden. Even though well-intentioned, the limitation on the timing of certain motions controlled the proceedings. By orchestrating this procedure, there was an undisclosed halter on the freedom of action of the military judge, who is charged with the responsibility of conducting the trial; it also might have hampered defense counsel in his function of faithfully serving his client. Being contrary to the demands inherent in a fair trial, this restrictive clause renders the agreement null and void."

In a subsequent decision, the Chief Judge encouraged trial judges to take a more active and critical role in evaluating the propriety of the pretrial agreement conditions (United States v. Elmore). He stated:

> "Where the plea bargain encompasses conditions which the trial judge believes violate either appellate case law, public policy, or the trial judge's own notions of fundamental fairness, he should, on his own motion, strike such provisions from the agreement with the consent of the parties."

Again, the Chief Judge elected to emphasize the need for trial judges to actively participate in policing the conditions of pretrial agreements (United States v. Green). He stated:

> "Finally, we believe trial judges must share the responsibility, which until now has been borne by the appellate tribunals, to police the terms of pretrial agreements to insure compliance with statutory and decisional law as well as adherence to basic notions of fundamental fairness."

To show the controversial nature of the inclusion of various conditions in pretrial agreements, the senior judge in a recent dissenting opinion observed that very narrow limitations should be placed on the legality of such conditions (United States v. Elmore). He stated:

> "Why the military perpetuates its sequential forays into control of the trial proceedings via pretrial agreements is beyond my understanding, but I, for one, refuse to condone nonjudicial restriction of the due course of judicial process. Pretrial agreements have been employed in the military since 1953 and this Court has permitted their use, though not without certain reservations. However, in my opinion, inclusion in the agreement of any conditions other than those addressing the nature of the plea and the limitation on maximum sentence poses an intolerable risk of jading military justice. Therefore I respectfully dissent."

APPENDIX II

ITEMS INCLUDED IN SOME, BUT NOT ALL, MILITARY SERVICE GUIDELINES FOR THE USE OF PLEA AGREEMENTS

Items	Is item included in the following service regulations? Air Force	Army	Navy
1. An unreasonable multiplication of charges which might tend to induce an accused to enter into a plea agreement will be avoided.	No	Yes	Yes
2. An accused shall not be induced to plead guilty to a lesser included offense by the preferring of more serious charges.	No	No	Yes
3. In no instance should an accused who indicates that he believes himself innocent of the offenses charged be permitted to enter a plea of guilty.	No	Yes	No
4. If it is the desire of the accused that defense counsel attempt to procure an agreement with the convening authority, the defense counsel is obligated to see that the accused's wishes are conveyed to the convening authority.	No	Yes	No
5. The defense counsel should not permit the accused to submit any proposal until all the terms of the proposed agreement have been fully explained to the accused and the latter has made an informed and unqualified request that such proposal be prepared and submitted.	No	Yes	No
6. The accused should be apprised fully of the reaction of the convening authority to any proposals made on behalf of the accused.	No	Yes	No

APPENDIX II

Items	Is item included in the following service regulations? Air Force	Army	Navy
7. If the convening authority rejects the accused's offer to plead guilty, the written offer should not be included in the allied papers unless the defense requests inclusion.	No	Yes	No
8. The sentence to be approved by the convening authority pursuant to the agreement must be appropriate for the offense(s).	No	Yes	Yes
9. The Government can withdraw from the agreement any time prior to arraignment.	Yes	Yes	No
10. Once entered, the Government must scrupulously carry out the agreement.	No	Yes	No
11. The plea agreement should never be used as a substitute for hard work and thorough preparation of a case. The sole consideration for a defense counsel should be the best interest of the accused.	Yes	Yes	No
12. Defense counsel has a continuing duty, despite a plea agreement, to vigorously represent the accused before the court with respect to the sentence to be adjudged.	No	No	Yes
13. The trial judge should pass on the legality of the agreement and include it in the record as an appellate exhibit.	Yes	No	No

Items	Is item included in the following service regulations? Air Force	Army	Navy
14. The judge is authorized to examine the sentence provisions of the plea agreement at any time at his own discretion.	No	a/Yes	No
15. During the trial (in a reported out-of-court hearing) the judge should			
--determine whether the accused understands the agreement,	Yes	Yes	No
--advise the accused that the plea of guilty may be withdrawn at any time before sentence is announced,	Yes	Yes	No
--determine whether the accused is satisfied with his counsel,	No	Yes	No
--determine from the accused personally whether he is pleading guilty because he is guilty,	No	Yes	No
--and again advise him of the meaning and effect of the guilty plea.	No	Yes	No
16. The members of a court must not be informed of the existence of a plea agreement.	Yes	No	Yes
17. The court must be made sufficiently aware of the circumstances of the offense to adjudge an appropriate sentence.	Yes	Yes	No
18. Post-trial misconduct by the accused will not be grounds for withdrawal from or failure to comply with the agreement.	Yes	No	No

a/In 1976, the Court of Military Appeals overruled this procedure.

DIFFERENCES IN WHAT SERVICE GUIDANCE SAYS ABOUT PLEA AGREEMENTS

Guidance	Guidance is included in regulations of: Air Force	Army	Navy
1. A plea agreement is an agreement between the accused and the convening authority.	Yes	Yes	Yes
2. The agreement must be unambiguous and in writing.	Yes	Yes	Yes
3. The suggested format must be modified as appropriate to include all the agreement made between the accused and the convening authority. No matters "understood" between the parties should be omitted from the written agreement.	Yes	No	Yes
4. In plea agreements the accused agrees to plead guilty to specified offenses and the convening authority agrees to one or more of the following:			
--The sentence approved will not exceed the sentence agreed upon.	Yes	Yes	Yes
--The offense charged will be reduced to a lesser included offense.	Yes	Yes	No
--The remaining charges and specifications will be withdrawn.	Yes	Yes	No
--The case will be referred to a certain level of court-martial.	Yes	No	No
--In very unusual cases, other clearly stated terms.	Yes	No	No
5. The guidance provided is general in nature and not intended to be definitive.	No	Yes	No

Guidance	Guidance is included in regulations of Air Force	Army	Navy
6. Variations of such agreements may take the form of disapproval, suspension, or reduction of any adjudged confinement; disapproval, reduction in quality, or suspension, of an adjudged punitive discharge; disapproval, suspension, or reduction of adjudged forfeitures; or a combination of any of the foregoing.	No	Yes	No
7. For the purpose of an agreement, the sentence is considered to be in these parts: the punitive discharge, period of confinement or restraint, amount of forfeiture or fine, and reduction in rank or grade.	No	No	Yes
8. The sentence which will ultimately be approved by the convening authority should, considering the circumstances of the particular case, be appropriate for the offense(s).	Yes	Yes	Yes
9. The agreement must not waive the accused's right to present evidence in extenuation and mitigation.	Yes	Yes	Yes

APPENDIX III

Guidance	Guidance is included in regulations of: Air Force	Army	Navy
10. The agreement must not contain any provision circumscribing the rights of the accused.	Yes	Yes	No
11. Any provision of the agreement which purports to waive the accused's right to due process is contrary to public policy and void.	No	Yes	No
12. The agreement must not prohibit the parties from making the court sufficiently aware of the offense's surrounding circumstances to enable the court to adjudge an appropriate sentence.	No	Yes	No
13. There should not be any agreement, expressed or implied, that the accused will forego his right to be represented by counsel during appellate review.	No	Yes	No
14. Normally, the agreement should contain a provision for a written stipulation of facts entered into by both counsels and the accused concerning the commission by the accused of the offense(s) as a means of furnishing the members of the court-martial with a basic frame of reference within which to adjudge an appropriate sentence.	Yes	Yes	No
15. Suggested form for the plea agreement shows the following signatures are required:			
--accused.	Yes	Yes	Yes
--defense counsel.	Yes	Yes	Yes
--trial counsel.	No	Yes	No
--staff judge advocate.	Yes	No	No
--convening authority.	Yes	Yes	Yes
--another witness.	No	No	Yes

COMPARISON OF CLAUSES CONTAINED IN AIR FORCE, ARMY, AND NAVY SUGGESTED FORMATS FOR PLEA AGREEMENTS

CLAUSES IN ALL THE SERVICES' FORMATS

I (the accused), (the Navy format contains the added words: "for good consideration and") after consultation with my counsel do agree to offer a (the Navy format contains the words: "enter a voluntary") plea of Guilty to the charges and specifications listed below, provided the sentence as approved by the convening authority will not exceed the sentence hereinafter indicated by me.

That I am satisfied with my defense counsel (the Navy format contains the added words: "in all respects.")

That this offer to plead guilty originated with me (the Air Force and Navy format contains the added words: "and my counsel") that no person or persons whomsoever have made any attempt to force or coerce me into making this offer or pleading guilty.

That my counsel has fully advised me of the meaning and effect of my guilty plea and that I fully understand and comprehend the meaning thereof (the Air Force format contains the added words: "and the consequences of this plea"; the Navy format contains the added words: "and all of its attendant effects and consequences").

That I understand that I may withdraw this plea at any time before sentence but not after sentence is announced.

That I understand this offer and agreement.

CLAUSES IN AIR FORCE AND ARMY FORMATS ONLY

I (the accused) have read (the Army clause states: "had an opportunity to examine") the charge(s) and specification(s) alleged against me.

I am aware that I have a legal and moral right to plead Not Guilty to the Charge(s) and Specification(s) under which I am about to be tried and to place upon the prosecution the burden of proving my guilt (the Air Force clause contains the following additional words: "beyond reasonable doubt by legal and competent evidence").

APPENDIX IV

I further understand that this agreement will be automatically cancelled upon the happening of any of the following events:

Failure of agreement with the trial counsel on the contents of the stipulation of facts.

The withdrawal by either party from the agreement prior to trial.

The changing of my plea by anyone during trial from guilty to not guilty.

The refusal of the court to accept my plea of guilty.

CLAUSES IN AIR FORCE FORMAT ONLY

The Charge(s) and Specification(s) have been explained to me (the accused) by my defense counsel.

I understand the Charge(s) and Specification(s).

I understand that this offer, when accepted by the convening authority, will constitute a binding agreement. I assert that I am in fact guilty of the offense(s) to which I am offering to plead guilty and I understand that this agreement will permit the Government to avoid presentation in court of sufficient evidence to prove my guilt. I offer to plead guilty only because it will be in my best interest that the convening authority grant me the relief set forth in Appendix A. I understand that I waive my right to a trial of the facts and to be confronted by the witnesses against me, and my right to avoid self-incrimination so far as a plea of guilty will incriminate me.

In making this offer, I state that:

My counsel has fully advised me of the nature of the charges against me, the possibility of my defending against them and any defense which might apply.

I understand that the signature of the convening authority to this offer and to Appendix A, or to any modified version of Appendix A which I also sign, will transform this offer into an agreement binding upon me and the Government.

I understand that, if this agreement is cancelled for any reason stated above, this offer for an agreement cannot be

used against me in any way at any time to establish my guilt of the offense(s), and the limitations upon disposition of my case set forth in Appendix A will have no effect.

This document and Appendix A include all of the terms of this pre-trial agreement and no other inducements have been made by the convening authority or any other person which affect my offer to plead guilty.

Also, defense counsel is required to complete the following certification:

> I certify that I have given the accused the advice referred to above, that I have explained to him the elements of the offense(s) and that I have witnessed his voluntary signature to this offer for a pretrial agreement. I am a member of the bar of (_____) (and I am a judge advocate) (certified/not certified under Article 27(b)).

CLAUSES IN AIR FORCE AND NAVY FORMATS ONLY

I (the accused) consider my defense counsel qualified (the Air Force format contains the word: ("competent") to represent me in this court-martial.

CLAUSES IN ARMY FORMAT ONLY

I (the accused) have had the opportunity to examine the investigating officer's report and all statements of witnesses attached thereto.

And I agree upon acceptance of this offer to enter into a written stipulation with the trial counsel of facts as to the circumstances of the offense(s). This stipulation is to be used only in pursuance of this agreement to inform the members of the court of matters pertinent to an appropriate sentence.

In offering the above agreement, I should like to state that:

> I understand that I have agreed to enter into the stipulation of facts as set out above. If my plea is not accepted, this offer to stipulate is null and void.

I further understand that this agreement will automatically be cancelled upon the happening of any of the following events:

Modification at any time of the agreed stipulation of facts without the consent of all parties to the stipulation.

CLAUSES IN NAVY FORMAT ONLY

I (the accused) do hereby certify:

That should the court award a sentence which is less, or a part thereof is less, than that set forth and approved in the agreement, then the convening authority, according to law, will only approve the lesser sentence.

That I have been advised this offer cannot be used against me in the determination of my guilt on any matters arising from the Charges and Specifications made against me in this court-martial.

That it is expressly understood that, for the purpose of this agreement the sentence is considered to be in these parts, namely: the punitive discharge, period of confinement or restraint, amount of forfeiture or fine, and reduction in rate or grade.

APPENDIX V

PRINCIPAL OFFICIALS

RESPONSIBLE FOR ADMINISTERING

ACTIVITIES DISCUSSED IN THIS REPORT

	Tenure of office	
	From	To
DEPARTMENT OF DEFENSE		
SECRETARY OF DEFENSE:		
Dr. Harold Brown	Jan. 1977	Present
Donald H. Rumsfeld	Nov. 1975	Jan. 1977
DEPUTY SECRETARY OF DEFENSE:		
Charles W. Duncan, Jr.	Jan. 1977	Present
William P. Clements	Jan. 1973	Jan. 1977
ASSISTANT SECRETARY OF DEFENSE (MANPOWER, RESERVE AFFAIRS, AND LOGISTICS):		
John P. White	May 1977	Present
Carl W. Clewlow (acting)	Jan. 1977	May 1977
David P. Taylor	July 1976	Jan. 1977
DEPARTMENT OF THE ARMY		
SECRETARY OF THE ARMY:		
Clifford Alexander	Jan. 1977	Present
Martin R. Hoffman	Aug. 1975	Jan. 1977
DEPARTMENT OF THE NAVY		
SECRETARY OF THE NAVY:		
W. Graham Claytor, Jr.	Feb. 1977	Present
J. William Middendorf II	Apr. 1974	Feb. 1977
COMMANDANT OF THE MARINE CORPS:		
Gen. Louis H. Wilson	July 1975	Present
DEPARTMENT OF THE AIR FORCE		
SECRETARY OF THE AIR FORCE:		
John C. Stetson	Apr. 1977	Present
Thomas C. Reed	Jan. 1976	Apr. 1977

APPENDIX V

	Tenure of office	
	From	To
DEPARTMENT OF TRANSPORTATION		
SECRETARY OF TRANSPORTATION:		
Brock Adams	Jan. 1977	Present
William T. Coleman	Mar. 1975	Jan. 1977