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A COMPARATIVE ANALYSIS OF GUILTY PLEA INQUIRIES IN FEDERAL CIVILIAN AND MILITARY PRACTICE

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

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United States Army

39TH JUDGE ADVOCATE OFFICER GRADUATE COURSE

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A COMPARATIVE ANALYSIS OF GUILTY PLEA INQUIRIES IN FEDERAL CIVILIAN AND MILITARY PRACTICE

by Major Terry L. Elling

ABSTRACT: This thesis compares the guilty plea providence inquiry at courts-martial with the guilty plea inquiry in Federal district courts. The thesis offers a history of the recent evolution of both practices, followed by an analysis of similarities and differences. The paper examines the advice to accused concerning the nature of the charge to which they pleaded guilty and the manner in which military and civilian judges develop the factual basis to support a guilty plea. The paper concludes that specific legislative and judicial revisions of military practice should be considered to modernize military practice, to avoid unnecessary appellate action, and most importantly, to accord sufficient respect to an accused's voluntary and intelligent decision to plead guilty.

TABLE OF CONTENTS

page

I. Introduction. 1

II. Historical Development of the Guilty Plea Inquiry 5

A. The Federal Experience 5

1. Early History 5

2. The Warren Court. 8

3. The Burger Court. 14

4. The Harmless Error Rule 23

B. The Military Providence Inquiry. 26

1. Early History 26

2. Concerns of Adequacy Under the UCMJ . 30

3. CMA's Early Concerns. 35

4. Judge Ferguson's Judicial Reform. . . 40

5. Rule for Courts-Martial 910 46

III. Comparison of Federal and Military Practices .47

A. Advice to Accused 48

1. Federal Practice. 49

2. Military Practice 53

B. The Factual Basis Requirement. 56

1. In General 56

2. Sources of the Factual Basis. 58

3. What Standard of Proof Applies. . . . 61

C. The Duty to Resolve Inconsistent Matters . 62

1. Federal and Military Practices. . . . 62

2. The Impact of Article 45(a), UCMJ . . 65

IV. Reform of Military Practice. 72

A. Legislative and Executive Reforms. 72

1. Revision of Article 45(a) 73

2. Adoption of a Harmless Error Rule . . 78

3. Revision of Article 63. 79

B. Judicial Reforms 80

1. Overrule or Modify Care 80

2. Strictly Construe "Inconsistencies" . 83

V. Conclusion 85

Endnotes 88

Appendix A A-1

Appendix B B-1

Appendix C C-1

"Frequently, the issue of whether a plea of guilty is provident or improvident is anything but clear. The military judge is caught between Scylla and Charybdis and must chart his passage carefully. . . ."[1]

I. INTRODUCTION

No one can seriously dispute that disposition of cases through pleas of guilty is the mainstay of criminal trial practice. Within the Army, for example, over 60 percent of the records of trial received at the Army Court of Military Review involve pleas of guilty.[2] Guilty pleas are even more prevalent in Federal district court, where close to 90 percent of the cases are resolved through guilty pleas.[3]

As the foregoing passage indicates, however, the military providence inquiry presents substantial and, as the following pages will show, unnecessary opportunities for error for both military judges and counsel.

An avowed purpose of guilty pleas is to maximize the effective use of legal resources by foregoing lengthy trials in cases where an accused is willing to admit guilt.[4] The military defense counsel, having gone through the process of investigating a case, consulting with the client, negotiating a pretrial agreement, and preparing the client for the providence inquiry, may well dispute whether military guilty plea practice actually results in any savings in time and energy.

Any trial counsel or military judge who has experienced a reversal on appeal for failure to resolve an "inconsistency" that went unnoticed at trial (probably due to overwhelming evidence of the accused's guilt developed through a stipulation of fact, witnesses, or other evidence introduced during the sentencing phase of the trial) or for a "formal" violation of Rule for Courts-Martial 910,[5] may well have similar misgivings as to military guilty plea practice.

A casual reader may conclude that, except for minor differences attributable to uniquely military considerations, R.C.M. 910 and its counterpart, Federal Rule of Criminal Procedure 11[6] provide the same essential requirements for accepting a guilty plea. Indeed, R.C.M. 910 is purportedly based upon Rule 11.[7] In fact, however, the procedure followed in Federal district courts is substantially different.

Most notably, district court judges are not necessarily required to reject a guilty plea when an accused claims he is innocent or asserts a matter that is inconsistent with guilt,[8] as military judges must under the mandate of article 45(a) of the Uniform Code of Military Justice.[9] Similarly, although guilty pleas in both fora must be supported by a sufficient factual basis,[10] district court judges enjoy great flexibility as to the method through which the factual basis is developed and are not strictly required to question the accused to establish the accuracy of the plea as are military judges under United States v. Care.[11]

The following will show that Federal courts have evolved standards that accord substantial respect to a defendant's decision to plead guilty upon advice of competent counsel, while military courts are constrained to meet unnecessarily strict and antiquated requirements. In large part, this difference in approaches stems from the fact that Federal civilian courts have confronted the issue from the standpoint of ensuring that minimal constitutional standards for a waiver of the defendant's right to a trial are satisfied. Rule 11 is only a means for implementing and safeguarding these basic, underlying rights.

Military courts, on the other hand, have primarily concerned themselves with interpreting and applying legislative and regulatory requirements that far exceed constitutional requirements and result in inconsistent and confusing judge-made law. This paper will show that the requirements of article 45(a) and its judicial progeny, United States v. Care, have caused military appellate courts to approach the providence issue from the perspective of whether a matter contained in a record of trial can be interpreted as inconsistent with

guilt. In many instances, it will be seen that the same matters are clearly reconcilable with guilt.

The purpose of this paper, therefore, is to compare these aspects of guilty plea inquiries in courts-martial and in Federal district courts to determine whether there are any lessons that the Armed Forces might learn and adapt to military practice.[12] The following pages will examine the history of guilty plea inquiries as they have developed over this century, compare the current federal civilian and military practices, and offer some specific legislative and judicial reforms of military guilty plea practice.

II. HISTORICAL DEVELOPMENT OF THE GUILTY PLEA INQUIRY[13]

A. The Federal Experience and the Evolution of Rule 11.

1. Early history.

Very few reported cases appear which discuss the prerequisites for a valid guilty plea in Federal courts

prior to the 1940's, and those that do appear seem to reflect a strong policy of upholding the finality of pleas once accepted.[14]

The modern standard for determining the legitimacy of waivers of constitutional rights, including the Fifth and Sixth Amendment rights waived by a plea of guilty, originated in Johnson v. Zerbst.[15] In reviewing the lower courts' denial of Johnson's petition for habeas corpus, the Supreme Court ruled that a waiver of Johnson's right to counsel could not be presumed where there was no request for counsel by the defendant, nor any offer of counsel by the court at trial.[16] Rather, the trial judge has the duty to specifically determine whether a defendant has made an "intentional relinquishment of a known right or privilege," and further, "the determination of whether there has been an intelligent waiver . . . must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."[17]

The Supreme Court subsequently applied the Zerbst waiver test in examining the constitutional validity of guilty pleas. In Waley v. Johnston,[18] the Court held that Waley's allegations that he was coerced to plead guilty by threats and intimidation of FBI agents warranted an evidentiary hearing on his habeas corpus petition even though "petitioner's allegations in the circumstances of this case may tax credulity." The Court, citing Johnson v. Zerbst, stated that if the allegations of coercion were true, the guilty plea could not operate as a waiver of Waley's right to attack his conviction.[19]

Against this judicial development of the waiver doctrine and its application in analyzing the validity of guilty pleas, an examination of the procedural guidance extended to the district courts becomes pertinent. Rule 11, as adopted in 1944, consisted of a scant three sentences:

> A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a

> defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.[20]

Rule 11 existed in this form until 1966 and, while its provisions clearly were consistent with the concept of ensuring valid waivers of constitutional rights by defendants who plead guilty, it provided essentially no guidance as to the procedure and form that a court's inquiry into the voluntariness and intelligence of a plea should take. The absence of detailed guidance was to provide a fertile ground for judicial interpretation in later years.

2. The Warren Court: Heightened Scrutiny of Guilty Pleas.

Consistent with its well-known concern for, and extension of, individual rights, the Supreme Court, under Chief Justice Earl Warren, subjected guilty pleas to considerable scrutiny. In Machibroda v. United States,[21] the Court vacated and remanded the lower courts' denial of petitioner's claim that his guilty pleas to two bank robbery charges were involuntary.

Machibroda claimed his pleas were induced by an unkept promise by the Assistant United States Attorney to limit his sentence to twenty years, as opposed to the forty years he received subsequent to his pleas. While noting that this case was not "not far from the line" of cases where a hearing could be denied, the Court ruled that Machibroda had stated a sufficient allegation of involuntariness to warrant a hearing.[22]

In an extremely critical dissent, Justice Clark noted inter alia, that Machibroda was represented by counsel when he pleaded, he stated that he was pleading guilty voluntarily, he testified at the trial of a codefendant where he admitted to committing the robberies in great detail, and, most notably, he waited until nearly three years after his incarceration at Alcatraz to raise his allegation of an unkept plea bargain. Further, the dissent noted that the prosecution in the case vigorously denied the alleged plea bargain.[23] Justice Clark concluded "Alcatraz is a maximum security institution housing dangerous incorrigibles, and petitioner wants a change of scenery. The Court has left the door ajar...."[24]

These concerns were not to receive much attention in subsequent cases under the Warren Court.

Subsequently, in Brookhart v. Janis,[25] the Court held that the Zerbst test for determining a defendant's voluntary and knowing waiver was not satisfied where counsel persuaded his client to agree to a prima facie trial,[26] even though the defendant proclaimed his innocence during the course of the trial, and the trial judge did not ascertain from the defendant personally whether he understood and, in fact, consented to the abbreviated procedure which was tantamount to a plea of guilty.

In a first step towards providing greater guidance to trial judges, the Supreme Court prescribed several significant changes to Rule 11 in 1966.[27] Although the new Rule 11 was only one sentence longer than the prior Rule, it added some significant requirements: that the trial judge address the defendant personally to determine if the plea is made knowingly and voluntarily; that the judge ensure that the defendant understands the consequences of the plea; and, that

the trial court not accept a guilty plea unless satisfied that a factual basis supports the plea.

The requirement to address the defendant personally perhaps was borne by the concern expressed in cases such as Janis where an interrogation of the defendant about the understanding of the plea at trial could eliminate many unnecessary appeals and further was intended to settle the confusion that existed at that time over whether an accused who was represented by competent counsel should be addressed personally regarding the plea.[28]

The factual basis requirement sought to avoid the possibility that a defendant, though pleading voluntarily and with knowledge of the nature of the offense, was nonetheless not guilty because the conduct did not meet all of the elements of the charged offense.[29] The Advisory Committee to the 1966 Amendments to the Rule contemplated that, where a factual basis could not be developed, the guilty plea would be set aside and a plea of not guilty would be entered.[30]

United States v. Jackson[31] addressed the issue of voluntariness of a guilty plea in bold fashion. This case involved an indictment under the Federal Kidnapping Act[32] which, at the time, provided that defendants who pleaded guilty could avoid exposure to a possible death penalty, whereas defendants who contested the case risked capital punishment which only a jury could impose. The Court invalidated this provision, reasoning that a statute of this nature had the effect of impermissibly coercing waivers of a defendant's right to plead not guilty.[33]

The Warren Court indicated an intention to strictly enforce the new requirements of Rule 11 in McCarthy v. United States.[34] McCarthy involved a defendant who pleaded guilty to a charge of income tax evasion. Although the trial judge inquired as to the defendant's understanding of the possible sentence and waiver of his right to a jury trial, the judge did not address the defendant personally about the nature of the charges. To make matters worse, McCarthy's counsel maintained at the sentencing hearing that his client's

failure to pay income tax was due to poor health, alcoholism, and poor record keeping. Chief Justice Warren, in an opinion in which seven Justices joined and Justice Black concurred, reversed and remanded the case. The Court reasoned that strictly following Rule 11's requirements will not only establish the validity of guilty pleas, but will build a record that is much more complete and less subject to post-conviction attack.[35] It is important to note, for purposes that will be addressed later in this paper, that the Court was careful to indicate that its decision was based solely upon its construction of Rule 11, and not upon any constitutional arguments.[36] The Court very clearly implied, however, that establishing the defendant's understanding of the relation of the facts of his case to the applicable law on the record in the manner required by Rule 11 was essential to a valid waiver under the Zerbst standard.[37]

The Court made a more sweeping pronouncement of what it would require of trial judges in determining a defendant's understanding about the effect of the plea of guilty in Boykin v. Alabama.[38] Boykin pleaded

guilty to five counts of armed robbery. The trial judge made no inquiry concerning his pleas and Boykin made no statements in the course of the proceeding. A jury sentenced him to death on each of the five counts. Although the Court appeared to stop short of imposing the requirements of Rule 11 on State courts, it stated that a valid, knowing waiver of due process rights could not be presumed from a silent record, citing McCarthy, and implying that the Rule 11 procedure was perhaps necessary in order for guilty pleas to be constitutionally acceptable.[39]

Against this backdrop of growing scrutiny of guilty pleas, Chief Justice Warren E. Burger assumed office upon Chief Justice Warren's retirement in 1969.

3. The Burger Court: A Retreat From Strict Enforcement of Rule 11?

A series of cases early in the Burger Court's tenure that has become known as the Brady trilogy[40] marked a substantial shift from the strict standards applied to guilty pleas by the Warren Court.

Brady v. United States involved a defendant who had pleaded guilty under the same fear of captial punishment under the Federal Kidnapping Act as had the defendant in Jackson.[41] Unlike Jackson, which involved a direct appeal of the district court's finding that the statute was unconstitutional, the record in Brady indicated that the defendant made a deliberate decision to plead guilty following the decision of his codefendant to plead guilty and testify against him. In the majority opinion, Justice White also found that the trial judge had adequately determined the voluntary and understanding nature of the plea required by the pre-1966 Rule 11 then in effect.[42] The Court rejected Brady's contention that he would have pleaded not guilty "but for" the chilling effect of a possible death penalty. The Court applied, instead, the more traditional Johnson v. Zerbst analysis, which focuses only on the more limited issue or the voluntary and knowing nature of the guilty plea at trial, and found that statutory schemes that encourage guilty pleas do not, alone, invalidate an otherwise voluntary and intelligent guilty plea.[43]

McMann v. Richardson, the second case in the Brady trilogy, involved defendants who were attacking their convictions through habeas petitions on the grounds that their pleas of guilty were the result of confessions that clearly were coerced illegally.[44] The Court, in rejecting this contention, based its ruling, in part, on a finding that the availability of counsel between the time the confessions were compelled and the time the pleas were entered served to attenuate any taint on the plea that might be attributable to the confessions. More importantly, however, the Court unequivocally established the principle that an uncompelled decision to plead guilty based upon "reasonably competent" legal advice will not be set aside simply because a defendant misjudges the strength of the prosecution's case.[45]

The final case in the Brady trilogy was Parker v. North Carolina. Parker, a fifteen year-old who pleaded guilty to burglary, alleged that his plea was involuntary because it was induced by a North Carolina statute that subjected those who pleaded not guilty to

a possible death penalty (as did the statute in Jackson and Brady) and that his lawyer misinformed him that his confession would be admissable at trial.[46] Citing Brady and McMann, the Court reinforced the concept that if a statutory encouragement exists to plead guilty and "even if Parker's counsel was wrong in his assessment of Parker's confession, it does not follow that his error was sufficient to render the plea unintelligent and entitle Parker to disavow his admission in open court that he committed the offense with which he was charged."[47]

In each of these three cases, the Court placed considerable weight upon the fact that the defendants entered the guilty pleas with assistance of counsel. From these cases, the inference can be drawn that adequate representation will cure a number of ills if a defendant's guilty plea is otherwise accurate and voluntary.[48] In Brady, the Court specifically cited Miranda v. Arizona[49] for the proposition that the presence of a competent attorney provides adequate protection against an accused making unintelligent or

involuntary decisions with regard to his options under the criminal justice system.[50]

In each of the Brady trilogy cases, no real question existed as to the factual basis or "accuracy" of the guilty pleas in question. Considerable, uncontroverted evidence was present in each case establishing that the defendant committed the crime to which he had pleaded and the focus was on the intelligent and voluntary waiver aspect of the pleas. The Burger Court stretched the requisites for a factual basis for pleas in one of its more controversial and interesting cases, North Carolina v. Alford.[51]

Alford again involved a defendant who pleaded guilty to a homicide in order to avoid a possible death penalty. He entered the plea on advice of counsel and was as steadfast in his desire to plead guilty as he was in protesting that he was not actually guilty of the crime. The Court held that, although denials of guilt should cause grave concern and ordinarily should result in rejection of the plea, the guilty plea could be accepted if it truly represented "a voluntary and

intelligent choice among the alternative courses of action open to the defendant."[52] Justice White, again writing for the majority, held that the trial court had established a sufficient factual predicate for the plea through considerable evidence. The record included the testimony of witnesses who had seen Alford leaving his home with a gun proclaiming his intention to kill and who later heard Alford announce that he had carried out his plan.[53]

The Court also found support for its decision in a number of Federal and State cases that implied that, though there is no absolute right to plead guilty, judges should be wary of forcing a defendant to pursue defenses or factual issues that they knowingly and voluntarily decide to forego.[54] Further, the Court reasoned that no constitutionally significant distinction existed between an otherwise valid guilty plea accompanied with a protestation of innocence and a plea of nolo contendere where an accused can be convicted and sentenced with no admission of guilt or factual basis for his plea.[55]

The Court was clear that the reasoning behind Alford and the Brady trilogy would prevail or even be extended in its subsequent review of guilty pleas. In Tollett v. Henderson,[56] the Court reviewed the habeas challenge of a black defendant who pleaded guilty to a murder indictment returned by a grand jury from which blacks had been systematically excluded. Although the Court could have denied Tollett's petition for other reasons, including the fact that the constitutional violation he was alleging had not even been pronounced when he originally pleaded guilty in 1948, it went much farther. The Court specifically held that a guilty plea represents a significant "break in the chain of events which has proceeded it" and that collateral attacks upon the voluntariness or intelligence of pleas will be permitted only where the advice of counsel to plead guilty falls outside the standards set out in McMann.[57]

In the wake of these judicial developments, several changes were implemented to Rule 11 in 1975.[58] The new rule retained the requirement that the trial judge address the defendant personally, as mentioned in

McCarthy, and for the first time Rule 11(c) specified the elements that must be covered in order to determine whether a guilty plea was entered knowingly. Rule 11(c)(1) retained the requirement that defendants must understand the nature of the charge to which they are pleading and the Advisory Committee recommended that this could be accomplished by reading the indictment and listing the elements of the offense.[59]

The new Rule 11(c)(1) also clarified the mandate of the former rule to ensure that defendants understand the "consequences" of their guilty pleas by providing simply that the judge ensure that the defendant is aware of any mandatory minimum and maximum penalties for the offense(s). Although the Committee conceded that it might be desirable to advise a defendant of other consequences of the plea, such as ineligibility for parole, an increased sentence due to previous convictions, or other matters significant to an individual defendant, it determined it would simply not be feasible to impose such obligations on the judge.[60] Rule 11(c)(2) and (c)(3) required the court to advise

the defendant of the right to counsel at every stage of the proceeding.

Also, Rule 11 now elaborated the specific constitutional rights waived by a guilty plea that must be explained to an accused in order to establish a knowing and intelligent waiver under Boykin v. Alabama.[61] The Rule mandated that defendants be advised that their plea waived their Fifth Amendment right against self-incrimination, as well as their Sixth Amendment rights to a trial of the facts and to confrontation of their accusers.[62]

For the first time, in Rule 11(g), district courts were required to prepare a verbatim record of all guilty plea inquiries to provide a meaningful record to appellate courts reviewing post-conviction challenges.[63] The 1975 Amendments also contained significant provisions mandating the disclosure of, and requiring detailed advice to defendants concerning, the existence and nature of any plea bargains.[64]

This consideration of the development of the current guilty plea inquiry in Federal court will end with a discussion of the strictness (or lack thereof) with which these changes in Rule 11 have been applied.[65]

4. Application of the Harmless Error Rule.

In its present form, Rule 11 bears little resemblance to the three sentences prescribed in 1945 (the complete text of current Rule 11 appears at Appendix A). Rule 11 now requires judges to conduct far more specific and detailed inquiries than its predecessors simple command for judges to ensure only that a guilty plea is "made voluntarily with understanding of the nature of the charge."

Despite Federal Rule of Criminal Procedure 52(a)'s[66] provision that any deviation from the Rules that does not affect the substantial rights of a defendant shall be disregarded, considerable confusion arose over whether this harmless error rule applied to Rule 11 violations.[67] This confusion was attributable

to McCarthy v. United States, which was, and continues to be, cited for the notion that unless Rule 11 is adhered to scrupulously, a guilty plea is invalid.[68] It soon become apparent, however, even before Rule 11(h) expressly incorporated the harmless error rule, that formal violations of Rule 11 would not render guilty pleas invalid.

Many of the foregoing cases involved collateral attacks on pleas through petitions for writs of habeas corpus. The Supreme Court finally acted to forestall most such challenges in United States v. Timmreck.[69] In Timmreck, the Court stated that collateral challenges of pleas based upon violations of Rule 11, such as the judge's failure in the case to explain a mandatory special parole term, would not result in reversal unless other aggravating circumstances accompanied the failure.[70]

In a steady stream of cases on direct appeal, a series of circuit courts of appeal decisions have had the effect of limiting McCarthy to the pre-1975 Rule 11 and have upheld a harmless error analysis.[71]

Consequently, pleas will not be invalidated unless the alleged Rule 11 violation is accompanied with a specific showing of prejudice that directly effects the "core concerns" of Rule 11, such as actual coercion or misunderstanding concerning the nature of the charge or consequence of the plea, indicating that the defendant would otherwise have pleaded not guilty.[72] These cases will be discussed in detail in Part II, infra, which will compare the current Federal practice with the military providence inquiry.

The Supreme Court has also ruled that the two-part test of Strickland v. Washington[73] for evaluating claimed ineffectiveness of counsel will govern its review of guilty pleas that are challenged on the basis that the plea was the product of incompetent or incomplete legal advice. In Hill v. Lockhart,[74] the Court ruled that the appellant was not entitled to relief even though his counsel failed to advise him of a mandatory minimum period of confinement he would have to serve as a repeat offender in the absence of any showing that he would have pleaded not guilty had he been properly advised.

Having reviewed the development of the procedure applied by Federal district courts, a similar review of the development of the guilty plea providence inquiry at courts-martial is now in order.

B. Development of the Military Providence Inquiry

1. Early History - Practice Under The Articles of War (A.W.) and the Early Manuals for Courts-Martial, U.S. Army.

Military courts, in apparent contrast with civilian courts, have a long history of exercising care not to accept a guilty plea that may be the result of coercion, lack of knowledge as to the plea's effects and consequences, or misunderstanding as to the nature of the charged offense.

Colonel William Winthrop, in describing the established practice by the late nineteenth century, admonished that judge advocates should make no attempts to induce an accused to plead guilty and that the court

should advise an accused to withdraw his plea if it has any reason to believe that the plea was "not both voluntary and intelligent, or that the accused does not appreciate its legal effect, or is misled as to its influence upon the judgement of the court...."[75]

Of particular concern throughout early courts-martial practice was the possibility, especially at courts-martial without judge advocates and where the accused appeared without benefit of counsel,[76] that a guilty plea would be made "improvidently" in situations where the accused's actual conduct did not support guilt or where the accused had a valid defense or was guilty of only a lesser included offense.[77] Consequently, even the earliest courts-martial manuals provided that the guilty plea should be withdrawn and a plea of not guilty entered where it appeared that the plea was entered by the accused without knowledge of the effect of the plea or where the accused made a statement that was inconsistent with guilt.[78] Although the lack of a comprehensive reporting system for cases prior to the 1950's affords much difficulty in commenting on the actual practice concerning guilty

plea inquiries, many references can be found to cases where The Judge Advocate General took corrective action in cases when it appeared that an accused misunderstood the effect of the plea or when the court did not resolve an inconsistent statement made by the accused.[79]

Apparently, military authorities especially were concerned that relatively uneducated enlisted men might plead guilty to desertion when they, in fact, had no intention to remain away permanently or that they might plead guilty to larceny with no intention to permanently deprive the owner of the property taken.[80]

The A.W. revisions in 1920 expressly included these concerns as to the legitimacy of guilty pleas. A.W. 21, as revised in 1920, provided:

> When an accused arraigned before a court-martial fails or refuses to plead, or answers foreign to the purpose, or after a plea of guilty makes a statement inconsistent with the plea, or when it appears to the court that he entered a plea of guilty improvidently or through a lack of understanding of its meaning and effect, the court shall proceed to trial and judgment as if he had pleaded not guilty.[81]

Further, the Manual for Courts-Martial, U.S. Army, 1921, provided a fairly extensive form to be used in explaining the meaning and effect of a guilty plea to an accused.[82] The form specifically required the law officer or president to explain: the plea was an admission that the accused had, in fact, committed the charged offense; the charged offense by reading the specification and explaining each element in simple terms; the intent required for offenses such as desertion, larceny, burglary, etc.; and each element of the maximum punishment. This explanation was to be made to the accused personally and the accused's responses were to be made on the record.[83]

Hence, even before the enactment of the UCMJ and the Supreme Court's development of standards for determining the constitutionality of guilty pleas in Federal civilian courts, military tribunals had significant, detailed guidance in this area.

2. Concerns Over The Adequacy of Providence Inquiries Under the UCMJ.

Guilty plea practice did not escape scrutiny during the period of intense criticism to which the military justice system underwent following World War II.[84]

The Report and Recommendations of the General Court-Martial Sentence Review Board,[85] (popularly referred to as the Keeffe Board, after its president, Professor Arthur John Keeffe), a report which was to be given considerable attention during the congressional debates leading up to the enactment of the UCMJ and in the Court of Military Appeals' judicial expansion of the providence inquiry, levelled some specific criticisms and recommendations at the Navy's practice. The Keeffe Board expressed considerable concern over the large number of cases it reviewed in which young men, unrepresented by counsel and perhaps ignorant or unaware of the legal consequences of their pleas, pleaded guilty to most or all of the charges against them.[86] Further, the Navy "guilty plea inquiry" at

that time consisted only of advising accused that by pleading guilty they were giving up the benefits of a regular defense.[87]

The Keeffe Board expressed approval of the requirement instituted by the Army within the European Theater during World War II which required that the judge advocate explain to the accused in all general courts-martial that a plea of guilty admits the offense as charged and makes conviction mandatory; the permissible sentence that could be imposed; and, that the plea will not be accepted if the accused later sets up a defense or if the accused fails to admit guilt to the charged offense.[88]

The Keeffe Board specifically recommended:

(1) That the plea of guilty shall not be received in capital cases;

(2) That the accused in every case be represented by counsel appointed for or selected by him, and that a plea of guilty be received only after an accused has had an opportunity to consult with counsel;

(3) That in every case the judge advocate explain to the accused the meaning and effect of a plea of guilty, such explanation to include the following:

(a) That the plea admits the offense, as charged (or in a lesser degree, if so pleaded), and makes conviction mandatory.

(b) The sentence which may be imposed.

(c) Unless the accused admits doing the acts charged, or if he claims a defense, a plea of guilty will not be accepted.

(4) That the judge advocate determine whether a plea of guilty should be accepted, and rule on all special pleas.[89]

The Advisory Committee to the Secretary of Defense on the UCMJ specifically endorsed these recommendations in its draft of Article 45(a).[90] In his testimony in support of Article 45(a) before the House Armed Services Committee, Felix Larkin, assistant general counsel of the Department of Defense and member of both the Advisory Committee to the Secretary of Defense and the Keeffe Board, urged the adoption of the article.[91] Mr. Larkin further stated that the inquiry recommended by the Keeffe Board was necessary to ensure "an added amount of protection to the innumerable cases where pleas of guilty are taken, particularly among the younger men," and that a verbatim record of this colloquy between the court and the accused would eliminate "the continually [sic] complaint of accused

that they did not understand what they were doing when they took their plea."[92]

Curiously, this discussion of guilty pleas under the newly-enacted Article 45(a) generated no significant changes in the corresponding provisions of the Manual for Courts-Martial. The first Manual adopted following the enactment of the UCMJ, the M.C.M., 1951, added a subparagraph prescribing the actual advice to be given an accused upon entry of a plea of guilty in conformity with the recommendations of the Keeffe Board.[93] The procedural guide contained in the new Manual, however, set forth advice to the accused quite similar to that contained in the 1949 and earlier Manuals.[94] Strangely, the form procedure in the 1951 Manual eliminated the express requirement to recite the elements of the offense to the accused that was contained in the 1949 Manual.[95]

This potential "failure" of the 1951 Manual to stress and delineate the requirements for a provident plea, particularly to advise accused of the elements of the offense and obtain their admissions that describe

their conduct, as advised by the Keeffe Board and the Advisory Committee, may be due to a number of factors. At least one writer has noted that the UCMJ was not much different, quantitatively, from the Army's practice under the 1948 A.W. and, consequently, the Army judge advocates who led the effort to draft the 1951 Manual did not deem it necessary to make many changes.[96] An alternative possibility, at least in the author's opinion, is that given the Keeffe Board's favorable endorsement of the Army practice (indeed, their criticisms were aimed directly and solely at the Navy's practice), the drafters of the 1951 Manual could have reasonably concluded that 1949 Manual's provisions were otherwise adequate.

The next question to be faced was: What action would the newly-created Court of Military Appeals take in reviewing guilty plea challenges?

3. The Court of Military Appeals' (CMA) Early Concerns.

In some of its earliest cases, the CMA appeared to endorse the providence inquiry set forth in the 1951 Manual and to indicate that procedural errors in taking a guilty plea would not result in reversal unless a substantial harm to the accused could be shown. For example, in United States v. Lucas,[97] the court held that reversal was not warranted where an accused pleaded guilty and received the "boilerplate" advice from the court as to the effect of the plea, but the court-martial thereafter failed to instruct its members and vote on findings as then required.

In United States v. Kitchen,[98] however, the court was to embark on what has, over the years, become a flood of cases scrutinizing what constitutes an "inconsistent" statement. Kitchen, charged with desertion, pleaded guilty to the lesser included offense of unauthorized absence, but was found guilty of desertion to the period of absence as charged. During his testimony on findings, the accused mentioned

an alleged attempt to surrender to a recruiter one and a half months prior to the date military police apprehended him. The court found that the law officer should have withdrawn the guilty plea because of the accused's assertion, inconsistent with his plea, that his absence ended at an earlier date.[99]

In one of many dissents in cases where the court reviewed the adequacy of a providence inquiry, Judge Latimer criticized the majority in Kitchen for failing to accord guilty pleas the finality they ordinarily deserve and pointed to some very practical considerations ignored by the majority. These considerations were that: the practical effect of requiring the withdrawal of the guilty plea would, in fact, make the accused guilty of two unauthorized absences; the accused was represented by counsel and there were any number of tactical reasons for foregoing the possible defense; and, most importantly, the accused at no time at trial or on appeal contended that at the time he contacted the recruiter, he was actually prepared to surrender to military authorities. "At best he merely dropped in at a recruiting station as it

was closing up and informed some sergeant that he was absent. . . He did not ask to be taken into custody or sent to a nearby installation."[100] Hence, Kitchen's statement simply was not inconsistent with his plea.

In United States v. Welker,[101] the CMA held that an accused had pleaded improvidently to larceny of a government rifle where a stipulation of fact, in the court's view, only established that he was guilty, at most, of receiving stolen property by going and taking possession of the rifle after another soldier informed him of its theft and location. In his dissent, Judge Latimer contended that the stipulation clearly established the accused's intent to retain the rifle and clearly set forth all of the elements necessary for a larceny by withholding.[102]

Despite the implication of Kitchen and Welker that the court would subject perceived "inconsistent" matters to considerable scrutiny, some cases that closed out the court's first decade seemed to indicate the opposite.

In United States v. Lemieux,[103] Private Lemieux pleaded guilty at trial to, inter alia, false claim and false official document offenses that involved obtaining allowances for a woman not his wife. Although no other evidence was offered at trial, the staff judge advocate, in his post-trial review, quoted Lemieux as stating during a post-trial interview that he had been told that living with a woman for at least two years created a common-law marriage, but that he never verified this information. The Court ruled, however, that this matter was not "inconsistent" with his pleas because the accused's statement did not relate the necessary elements of a common-law marriage.[104]

United States v. Brown[105] involved an accused who pleaded guilty, inter alia, to three larcenies involving a camera, a radio, and a coat. Three days after the convening authority's action in the case, the accused presented an unsworn statement to the convening authority wherein he averred that the camera had been "pawned" to him by the owner earlier and that the radio was only borrowed. The court stated that a motion for

a new trial under Article 73[106] was the appropriate manner to raise such challenges after action has been taken by the convening authority, and, further, that the accused's statements were not clearly inconsistent with his pleas under the facts of the case.

In a dissent that foreshadowed later developments, Judge Ferguson specifically cited what he perceived as shortcomings in the procedural guide contained in the 1951 Manual.[107] Judge Ferguson concluded that the pro forma explanation to the accused contained in the Manual did not carry out the Keeffe Board's recommendation that pleas should not be accepted unless the accused admits doing the acts charged, and urged law officers to "interrogate the accused upon his plea in simple, nontechnical language and determine if he understands it in fact admits the allegations involved in the specifications and that he is pleading guilty because he is in fact guilty."[108]

4. Judge Ferguson's Judicial "Reform" of the Providence Inquiry.

A clear indication of the CMA's direction in examining guilty pleas appears in United States v. Richardson.[109] This case involved an accused who pleaded guilty to dishonorably failing to maintain sufficient funds to pay checks under Article 134[110] and, in extenuation and mitigation, presented evidence of extensive indebtedness, but offered nothing concerning the circumstances surrounding the bad checks themselves. During a post-trial interview, however, Richardson claimed that the checks were dishonored because checks he had deposited earlier, received from friends for payment of gambling debts owed him, had bounced.[111] Judge Ferguson, writing for a unanimous court, ruled that the inconsistency required that the court reverse and remand the case.[112]

In Richardson, the CMA found that inconsistent "post-trial" statements of an accused constituted strong evidence that the accused did not understand the meaning and effect of the plea. The court relied upon

the plain language of article 45(a) concerning inconsistent matters raised "after a plea of guilty" and on the Congressional intent to eliminate improvident pleas to require that pleas be rejected in such situations.[113] The court reasoned, using what many would consider to be at best shaky logic, that a post-trial claim of innocence was more reliable than a pre-trial claim of innocence. Prior to trial, accused may be asserting their innocence in circumstances where they are unaware of the weight of the government's case or where they have not yet been overwhelmed by "consciousness of guilt."[114] Further, Judge Ferguson once again criticized the pro forma advice to the accused in the 1951 Manual and commented that a more extensive record would resolve many of these cases.[115]

Hand in hand with the evolution of the providence inquiry, the CMA developed the occasionally troublesome standard that any "inconsistency" raised during the inquiry must be absolutely repudiated by the accused if the guilty plea is to stand. For example, in United States v. Fernengel,[116] the accused pleaded guilty to desertion. During the sentencing phase of the trial,

the defense counsel made an "ambiguous" reference to the difficulty of proving, under the facts of the case, that the accused had an intention to return to the Army at some point.[117] The court reversed the case, holding that even an ambiguous reference to a possible defense must be resolved on the record or the plea of guilty must be withdrawn.[118]

In United States v. Chancellor,[119] Judge Ferguson took the occasion to indicate that the procedural guide was simply inadequate to ensure that an accused understood the nature and elements of the offense and to ensure that actual guilt was established on the record. Like Richardson, Chancellor involved an accused who pleaded guilty to a bad check offense, received the pro forma advice as to the plea's effect and raised nothing inconsistent with the plea at trial, but claimed in a post-trial clemency interview that the check was dishonored because of irregularities in his pay.[120] Judge Ferguson specifically admonished law officers to develop a more detailed inquiry of the accused and advised the services to take remedial action to institute better procedures to ensure factual

guilt.[121] Judge Ferguson made the dubious prediction that upon adopting such procedures "the haunting issue of improvident pleas would become rare indeed."[122]

Although the procedural guides in both the short-lived 1968 Manual and the 1969 Manual contained expanded providence inquiries,[123] this action was apparently too little, too late.

United States v. Care[124] marks the watershed of the development of the providence inquiry. The court actually affirmed the conviction in Care, stating that the law officer's failures in the case to explain the elements and to determine the factual basis for the plea were cured by overwhelming evidence of guilt that otherwise appeared in the record.[125] The more important holding in Care, however, was the court's pronouncement that, effective 30 days after the date of the opinion, all records of trial involving guilty pleas must contain not only an explanation of the elements of the offense by the military judge, but also must include a personal interrogation of the accused as to what he actually did "to make clear the basis for a

determination by the military judge . . . whether the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty."[126] Military judges were also directed to ensure that the accused understood the Fifth and Sixth Amendment rights waived by a plea of guilty.[127]

Judge Darden, in the court's opinion in Care,[128] cited not only Chancelor's reference to the inadequate procedures being followed by law officers as a basis for the court's sweeping action, but placed great weight upon its interpretation of the recent Supreme Court cases of McCarthy v. United States and Boykin v. Alabama.[129] McCarthy was cited for its implication that personally addressing accused to determine their understanding of the plea, as required by Rule 11, is consistent with the constitutional prerequisites for a valid waiver of the right to plead not guilty. Boykin served as authority for the court's imposition of the requirement to advise accused of the constitutional rights waived by a plea of guilty.

Without doubt, the CMA should be lauded for its concern and protection extended to the accused who pleads guilty.[130] The requirement that the accused be personally questioned in detail about the offense and that this interrogation support all elements of the offense, however, has proven to be troublesome and simply has not had the desired effect of reducing the number of "improvident" pleas requiring action on appeal.[131]

Further, the CMA has not substantively reconsidered the necessity or desirability of what has come to be called the "Care inquiry" despite a number of factors that support reconsideration. These factors include the Federal courts' own interpretation of McCarthy as not requiring nearly as exhaustive a personal inquiry of the accused as is required in military courts and, of equal importance, the evolution of an independent trial judiciary and defense bar, which should alleviate many of the concerns that accused were not acting with full knowledge and independent advice concerning their pleas.

5. The Promulgation of R.C.M. 910.

The remainder of this paper primarily will be concerned with comparing the current military and Federal guilty plea inquiries. Before turning to this effort, an exposition of the current Manual provisions relating to the providence inquiry is in order.

The M.C.M., 1984, involved a sweeping reorganization of the Manual's format. Concerning the aspects of the providence inquiry addressed in this paper, the changes were matters more of form than substance. The requirements for acceptance of a plea of guilty were set forth in the new R.C.M. 910 (the complete text of R.C.M. 910 appears as Appendix B).

As noted in the introduction to this paper, R.C.M. 910 was patterned after Rule 11.[132] Indeed, the relevant portions of R.C.M. 910(c), Advice of accused, are very similar in its language of to Rule 11(c).[133] In practice, the application of the rules is not nearly as similar.

R.C.M. 910(e), Determining accuracy of the plea, requires the judge to question the accused under oath about the offense.[134] Its counterpart, Rule 11, establishes the requirement that the judge be satisfied that a factual basis supports the plea, but does not strictly require that the factual basis be established through questioning the defendant personally.[135]

R.C.M. 910(h) sets forth the requirement to reject a guilty plea when an accused sets up an inconsistent matter. This provision has no counterpart in Rule 11.

Having examined how both the military and Federal civilian guilty plea inquiries have evolved over this century, it is now appropriate to compare and contrast the current practices.

III. COMPARISON OF FEDERAL CIVILIAN AND MILITARY PRACTICES.

The focus of this section is a comparative analysis of military and federal guilty plea inquiries, specifically concerning the required advice to the

accused about the nature of the charge and the requirement that the guilty plea be supported by a sufficient factual basis. These requirements, with their obvious link to the actual relationship between the facts and the charge, offer considerable contrast between federal civilian and military practices.

A. Advice to the Accused of the Nature of the Charge.

The duty of a trial judge under both R.C.M. 910(c)(1) and Rule 11(c)(1) to determine whether the accused understands the nature and elements of the charge against him is of long-standing and constitutional dimension.[136] It is axiomatic that an accused cannot begin to make an intelligent waiver of his right to plead not guilty without "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process...."[137] Further, an understanding of the law as it relates to the facts of the particular case is an essential element of due process as it applies to the decision of an accused regarding the plea.[138]

The plain language of R.C.M. 910 and Rule 11 is identical; both require the judge to determine from accused personally that they understand "the nature of the charge to which the plea is offered...."[139] In practice, however, district court judges enjoy much greater flexibility and discretion in the manner in which this requirement may be satisfied.

1. Federal Practice Under Rule 11(c)(1).

In Federal district court, the judge normally satisfies the standard of Rule 11(c)(1) by merely reading the indictment or information to the defendant, provided the indictment is properly drafted and sets forth all elements of the offenses.[140] In cases involving relatively simple offenses, such as illegal possession of drugs, a simple "yes, sir" in response to a judge's reading of the charge and query whether the defendant understands the nature of the charge is sufficient.[141]

Even where the judge completely omits a reading of the indictment, the harmless error provision of Rule 11(h) precludes action on appeal where some recitation of the facts or elements of the offense, with the defendant's acknowledgement that he understands or agrees, appears on the record. For example, in United States v. Ray,[142] the judge failed to read the indictment or discuss the nature of the conspiracy, mail fraud, and transmission of altered postal money order charges with the defendant, but the Seventh Circuit held the error to be harmless. The record did, however, contain a detailed summary by the prosecutor of the evidence he intended to offer to prove each charge, though evidence of each element was not specifically recited for each charge. The defendant also stated that he agreed with the prosecutor's statements and that he had read the indictment and discussed it with his attorney.[143]

The foregoing, however, should not be taken to imply that action will not be taken where a defendant makes a colorable showing that he, in fact, was unaware of a critical element of a charge, and would have

pleaded not guilty if he had been properly advised of an element.[144] Hence, in Henderson v. Morgan,[145] the Court reversed the case of a defendant who pleaded guilty to second degree murder as a lesser-included offense to a first degree murder charge, but where neither the trial judge nor counsel explained to the accused that second degree murder required an intent to kill.[146] Critical to the Court's holding, however, were the facts that the accused was mentally retarded and, in pleading to a lesser-included offense, was never formally indicted for second degree murder, which indictment would have contained the scienter element.[147] On these facts, the defendant may have actually been guilty only of manslaughter, and might have prevailed on this point at trial.[148]

The cases following Henderson, however, clearly show that a judge's failure to explain the nature and elements of an offense will not result in reversal unless the defendant can demonstrate that he was never advised of the nature of the offense and, further, that this failure affected his decision to plead guilty.

Compare Henderson with Harrison v. Warden,[149] where the defendant similarly challenged his Alford plea to second degree murder for the judge's failure to enunciate the specific intent to kill element of the offense. The Fourth Circuit ruled that reversal was not proper because the defendant stated on the record that he had discussed the plea with his counsel and his counsel testified at a post-conviction hearing that he had discussed the nature of the offense with the defendant. The court further reasoned that the fact that the defendant entered an Alford plea, denying specific intent to kill, yet pleading guilty, strongly indicated that he understood this element.[150]

2. The Military Practice Under R.C.M. 910(c)(1).

Although the CMA has offered some indication that a "flexible" approach to explaining the elements of the offense might be acceptable,[151] in practice, military judges rely on the litany contained in the Military Judges' Benchbook,[152] which mandates a detailed explanation of each element, including important definitions, and eliciting the accused's response to each element and definition.[153]

In United States v. Kilgore,[154] the first case to consider the issue in the aftermath of Care, the CMA held that the judge's failure to separately detail the elements of, inter alia, the unauthorized absence offense to which the accused pleaded guilty did not violate Care where it appeared from the record that the judge questioned the accused extensively concerning the offenses and the questions were carefully tailored to the technical elements of the offenses.[155] Similarly, in United States v. Crouch,[156] the court ruled that the appellant's assertion that the military judge did not

adequately explain the intent necessary for guilt as an aider or abettor did not render the plea improvident where the accused's answers to questions posed during the Care inquiry clearly established guilt.[157]

Subsequently, however, in United States v. Pretlow,[158] the CMA appeared to severely curtail the holding of Kilgore by implying that a failure to specifically enumerate all elements of the offense to the accused will be excused only in the "simplest of all military offenses."[159] In Pretlow, the military judge failed to explain any of the elements of the underlying offense of robbery to an accused who pleaded guilty to conspiracy to commit robbery.[160]

Consequently, Kilgore and its progeny have been limited to situations where a military judge's duty to specifically delineate the nature and elements of the offense is otherwise discharged. For instance, questions and explanations propounded to the accused during the Care inquiry, which are tailored to, and which show the accused was in fact aware of the elements of the offense is sufficient.[161] Indeed, even

the "service discrediting" and "prejudicial to good order and discipline" elements of an article 134 offense must be explained to an accused and he or she must specifically admit to each, in order for the plea to be provident.[162]

From the foregoing, some conclusions may be made concerning the differences and similarities between the military and civilian practice. Though both fora work under facially the exact same rule, Federal district court judges are permitted much greater leeway in developing the accused's understanding of the nature of the offense to which he is pleading guilty.

Federal appellate courts again apply deference where it appears on the record that an accused made the decision to plead guilty with adequate assistance of counsel.[163] By its very terms, however, Care requires the military judge to explain the elements of the offense to the accused and obtain the accused's acknowledgement regardless whether he or she has discussed them with counsel. Care permits no digression.[164]

The areas of ensuring that guilty pleas are supported by a factual foundation and resolving inconsistent matters, however, provide the greatest differences between the two practices.

B. The Factual Basis or "Accuracy" Requirement.

1. In General.

Unlike advice to the defendant about the nature of the charge, the requirement that a plea of guilty be in accordance with the facts is not constitutional in nature. Although the Supreme Court has not expressly ruled on the issue, dicta in several cases clearly indicate the requirement is one of statutory and regulatory origin and is not based upon any constitutional mandate.[165]

The recent Supreme Court case of United States v. Broce[166] serves by analogy to underscore the very different manner in which federal civilian and military courts regard the necessity that guilty pleas be

"accurate." In Broce, the defendants pleaded guilty to two counts of conspiracy relating to bid-rigging on two different construction projects. Defendants in a related case, however, pleaded not guilty, were acquitted, and won dismissal of a later indictment for bid-rigging in connection with other construction projects on the grounds that the alleged conspiracies were all part of one overarching conspiracy to rig bids and, hence, the double jeopardy doctrine barred further prosecution.[167] The Court rejected Broce's argument that double jeopardy required that his second conspiracy charge be set aside. It held that Broce's guilty plea, followed by a colloquy with the judge that fully complied with Rule 11, including Broce's admission that he was guilty of two conspiracies, waived such a defense and did not render his guilty plea invalid.[168] The point is that the Court upheld the guilty plea even though compelling evidence existed to show that the defendant could not "legally"[169] be guilty of two different offenses! The Court placed far greater importance on the finality of pleas where the guilty plea is entered voluntarily, intelligently, and in compliance with the "core concerns" of Rule 11.

2. Sources of the Factual Basis.

Under the military rule, evidence establishing that an accused is guilty must be developed from the accused's own testimony, regardless of whatever other evidence may be presented in the course of the case.[170] R.C.M. 910(e) specifically mandates that the military judge question the accused under oath to establish the factual predicate for the plea, whereas Rule 11(f) does not require the judge to elicit the factual basis from the defendant personally.[171]

Rule 11 certainly does not discourage questioning the defendant. It recognizes that an inquiry of the defendant will often be the best means of establishing whether the defendant in fact committed the acts alleged in the charge.[172] Rule 11 does, however, provide great leeway and permits establishing the evidentiary basis for the plea through such alternatives as a proffer of proof from the prosecutor, inquiry of law enforcement officials who investigated the case, and presentencing reports.[173] A district

court judge may even rely upon the factual predicate developed in accepting the guilty plea of a codefendant, provided this intention is placed on the record and is not disputed.[174]

In sum, a Federal district court may use virtually any reliable information at its disposal to ensure a guilty plea is consistent with the facts. Only where the record fails to contain some information supporting an essential element of the offense will appellate courts take corrective action.[175]

Military courts, in contrast, must demonstrate a factual foundation for every element of the offense by direct examination of the accused notwithstanding any other evidence presented in the course of the providence inquiry.[176] This rule generally requires that accused attest to their guilt to all elements of the offense from their own knowledge and the CMA permits only minor departure.

The only real permissable deviation from Care exists in the situation where an accused admits to

being in fact guilty, but is unable to recall or is not personally aware of all of the facts establishing guilt. Accordingly, accused may plead guilty if they sincerely believe they are guilty through reviewing witness statements or other evidence, even though they can not personally recall or were not physically present when the event(s) establishing guilt occurred. In United States v. Penister,[177] for example, the CMA ruled that the accused's inability to specifically recall shooting his victim because of intoxication at the time did not, standing alone, preclude pleading guilty where the accused was convinced of his guilt through other evidence.[178]

This deviation from Care in no way abrogates the essential requirement that an accused be convinced of, admit to, and describe facts supporting each element of the offense. It merely affords very limited leeway to establish a part of the factual predicate for the plea from other sources to which the accused must certify his or her agreement.[179]

3. What Standard of Proof Applies?

It is somewhat perplexing that neither R.C.M. 910 nor Rule 11 provide any burden or standard of proof that the factual predicate for a guilty plea must meet. Under Rule 11, Federal courts have stated that the standard for evaluating whether a sufficient factual basis exists is "whether the trial court was presented with evidence from which it could reasonably find that the defendant was guilty."[180] The key issue is whether the factual basis for the plea reasonably supports the trial judge's determination that the defendant is in fact guilty and this determination will be reversed only where an abuse of discretion is present.[181] Consequently, Rule 11 gives Federal district court judges broad discretion in determining whether a sufficient factual predicate exists and they need not fear being overruled so long as some reliable information appears supporting each element of the offense.

The standard applied at courts-martial is far stricter. The duty placed upon military courts to

resolve inconsistent matters, with the other requirements that must be met, has the practical effect of requiring that the accused's guilt be established to a virtual, if not absolute, certainty.[182]

C. The Duty to Resolve Inconsistent Matters Raised During the Guilty Plea Inquiry.

1. The Federal Civilian and Military Practices.

As noted earlier in this article, the mandate that military courts reject guilty pleas where the accused raises some inconsistency is firmly entrenched in courts-martial practice.[183]

Federal civilian courts, on the other hand, have never operated under an express rule to this effect. Nonetheless, the normal practice when a defendant claims his innocence or raises another matter inconsistent with his guilty is to permit the defendant to withdraw his plea and plead not guilty. Judges are admonished to exercise special care in such situations

to ensure that the defendant is, in fact, guilty before accepting his plea.[184]

A district court judge may accept a plea of guilty despite any number of "inconsistencies" if an adequate factual basis appears from which the judge can reasonably conclude that the defendant is actually guilty.[185] "There is no requirement . . . that there be uncontroverted evidence of guilt. Instead, there must be evidence from which a court could reasonably find that the defendant was guilty -- a factual basis for the plea."[186]

The ABA Standards Relating to Pleas of Guilty seem to go even farther. They take the position that a judge should not reject a guilty plea solely because a defendant refuses to admit culpability, but should reject a guilty plea only where a separate, specific reason exists for doing so, such as a lack of evidence otherwise establishing guilt.[187]

A military judge, conversely, must reject any guilty plea where an unresolved inconsistency arises.[188]

Unless an accused absolutely disavows a possible defense or matter inconsistent with an element of the offense, the plea must be withdrawn.[189]

A slight deviation from this rule is the very limited situation where the factual basis elicited during the Care inquiry demonstrates that the accused is guilty of a different, but closely related, offense that carries about the same maximum punishment.[190] In such cases, the matters raised by the accused are only inconsistent with guilt to the precise offense charged; they are not inconsistent with guilt in the broader sense and they involve no denials of guilt or assertion of a possible defense by the accused.

A similar variance is found in a few cases involving illegal drug use, where the accused believed he was ingesting one illegal substance but, in fact, was ingesting a combination of, or different, controlled substances.[191] The accused must believe the conduct was wrongful and the substance possessed must, in fact, have been illegal. Hence, the accused's

statements are not inconsistent with guilt, but only with the precise "form" of his or her guilt.

A detailed examination of the impact on courts-martial practice of the requirement that inconsistent matters raised by the accused must ordinarily result in rejection of the guilty plea follows.

2. The Impact of Article 45(a), UCMJ.

A considerable volume of dicta exists to the effect that article 45(a) does not require accused to raise implausible defenses or matters that they intelligently elect to forego in light of a strong government case or a desire to benefit from a pretrial agreement.[192] This notion, however, conflicts with the rule that once an accused makes a comment or offers any other matter that reasonably raises a possible defense, the military judge must, sua sponte, explain the possible defense to the accused personally and either obtain the accused's disavowal of the matter or reject the plea.[193] In practice, the accused and counsel must flatly repudiate the existence of any matter that is

inconsistent with guilt (even the tactical possiblity of a defense) in order to persist in a guilty plea.[194]

The mandate of article 45 places the military judge in a similarly tenuous position: the judge must not only ensure that the accused admits a sufficient factual basis for the plea and raises nothing inconsistent, but the judge must take care not to reject a provident plea through perhaps an overzealous desire to resolve inconsistencies.[195]

A few examples will demonstrate that the duty under article 45(a) to reject guilty pleas when an inconsistency arises results in confusing, if not simply inconsistent, holdings. Confusion runs rampant not only as to the actions a military judge must take when an inconsistency is reasonably raised, but it is, at times, extremely difficult to determine if the accused has raised an "inconsistency" in the first place.

For instance, a number of drug distribution cases involving guilty pleas have seen action on appeal

because of relatively far-fetched "inconsistencies" involving possible entrapment defenses. Compare, by way of illustration, United States v. Clark[196] with United States v. Williams.[197] In Clark, a civilian defense counsel argued on sentencing that the accused had been "set up" through repeated phone calls and pressure from an informant to obtain cocaine, but the CMA ruled that this did not require rejection of the guilty plea because the defense counsel had denied the viability of an entrapment defense when it arose during the providence inquiry and the evidence presented did not fairly raise the defense.[198] In Williams, however, the Army Court of Military Review reversed the accused's conviction for distributing marijuana because the judge failed to resolve the accused's assertion during the providence inquiry that he felt "rather reluctant" to obtain marijuana for an NCO, despite the fact that the defense counsel specifically denied the existence of the defense, and both the accused and counsel stated they had discussed the issue of entrapment![199]

Another example is found in a series of cases in which the accused is purported to have raised the defense of duress. Compare United States v. Logan,[200] in which the CMA ruled that the accused's statements that threats made against his family in the United States were insufficient to raise the defense of duress as to larcenies of government property committed in Korea, despite the judge's apparent failure to resolve the issue, with United States v. Jemmings,[201] where the court ruled the issue of duress was raised and not sufficiently resolved when the accused asserted that he would not have committed the housebreaking to which he pleaded guilty had threats not been made against himself and his children.[202] In his dissent in Jemmings, Judge Cook criticized the majority, by citing (1) the accused's own statements at trial that he did not fear injury to himself or his children at the time he actually committed the offense and (2) the accused's intent and resolve to commit the housebreaking displayed by his assaulting a guard with a piece of lumber to affect entry as showing that duress was not reasonably raised.[203]

More recently, a similarly disturbing development has arisen in guilty plea cases involving the issue of voluntary abandonment of attempted crimes. In a series of cases in which the CMA noted that it was questionable, as a threshold matter, whether the defense even exists in military criminal law, the accused's testimony nonetheless raised inconsistencies requiring reversal.

In United States v. Byrd,[204] the accused pleaded guilty, inter alia, to attempted distribution of marijuana but the CMA ruled that the record of trial was insufficient to show more than mere preparation for commission of the offense and, further, that Byrd's answers during the providence inquiry raised the possibility he had voluntarily abandoned the venture.[205] Subsequently, in United States v. Walther,[206] and in United States v. Rios[207] the Navy and Army Courts of Military Review, respectively, ruled that the judges in those cases failed to resolve possible abandonment defenses raised by the accused's comments that, at some point, they elected to give up their endeavours. In Walther, the accused averred that he changed his mind

about stealing a stereo after he had broken into the car in which it was located. In Rios, the military judge failed to resolve whether the accused, who fled from the scene of his attempted robbery after a store clerk failed to comply with his "stick-up" note, did so from fear of apprehension or through an honest change of heart, or for other reasons.

These are but a few examples of the confusion that article 45(a), in conjunction with Care's mandate to elicit the factual predicate from the accused, has generated in military practice. Other similarly confounding examples can be found in "bad check" cases wherein accused equivocate when confronted with the issue of whether they intended to defraud at the time the check was presented or thereafter dishonorably failed to maintain sufficient funds;[208] in larceny and false claim cases where the accused's assertions raise the possibility that the accused merely accepted an overpayment from the government;[209] in unauthorized absence cases where the accused makes some statement averring to an inability or attempt to return to military control;[210] in cases where an accused makes

some allusion to a possible lack of mental responsibility at the time of the offense;[211] in cases involving article 134 violations where the accused appears to equivocate on the "service discrediting" or "prejudicial to good order" elements;[212] and, in article 133 cases where the accused avers the possibility that the conduct was not "unbecoming an officer" or contrary to a custom of the service.[213]

The author does not mean in any way to denigrate the decisions of military appellate courts in addressing these issues. The ensuing disarray is directly related to the basic problem of reconciling the mandate of article 45(a) to resolve inconsistencies with the notion that an accused, with advice of counsel, should be permitted to make reasonable tactical decisions not to raise a defense. The basic tendency of most human beings to try to rationalize or minimize the criminal nature of their conduct is another, equally responsible, factor. As Judge Cox has stated, "one aspect of human beings is that we rationalize our behavior and, although sometimes the rationalization is "inconsistent with the plea," more

often than not it is an effort by the accused to justify his misbehavior."[214]

In light of these problems, it seems odd that no serious effort appears ever to have been undertaken to modify or rescind some of the requirements of article 45(a) and Care. The remainder of this article, therefore, will focus on possible revisions of military guilty plea practice that might be made in light of lessons learned from both the historical development and current practice in Federal civilian courts.

IV. REFORM OF MILITARY PRACTICE.

A. Legislative and Executive Reforms.

Military jurisprudence has a mandate under article 36, UCMJ,[215] that court-martial procedures shall, so far as practical "apply the principles of law . . . generally recognized in the trial of criminal cases in the United States district courts . . .." Although no significant discussion of the foregoing aspects of military pleading practice appears to have been

undertaken on the point of whether it should conform with Federal civilian practice, bringing military practice into such conformity would certainly be consistent with article 36. The following revisions of military practice are offered in the hope of bringing the most adaptable and enlightened aspects of Federal civilian practice into the court-martial arena.

1. Article 45(a), UCMJ, and R.C.M. 910(h)(2).

By far the simplest and most direct solution to the problem of inconsistent matters raised by an accused would be to delete the words "or after a plea of guilty sets up a matter inconsistent with the plea," from Article 45(a). A complimentary change to R.C.M. 910(h)(2) should then be made to the effect that a statement or other matter inconsistent with the plea should not ordinarily result in rejection of the guilty plea unless there is insufficient evidence to find, beyond a reasonable doubt, that the accused is in fact guilty of the offense. A text of the proposed changes appears at Appendix C.

As demonstrated above, the relatively rigid requirement that a court-martial reject a guilty plea upon entry of an inconsistent matter is an historical anomaly unique to military practice.[216] The provision dates back to an era in which lawyers had little direct involvement in the actual conduct of courts-martial and even further predates the advent of an independent trial judiciary and defense bar. One could clearly maintain that the increased participation of lawyers in the process has had the indirect effect of increasing the quantity of conceivable "inconsistencies" raised at trial through more zealous sentencing presentations and advocacy generally, though this is a point on which it would be difficult, if not impossible, to gather empirical evidence.

The requirement has not resulted in any real decline in allegations of "improvident" pleas on appeal and has the detrimental effect of directing military and appellate judges' attention to severely scrutinizing possible perceivable "inconsistencies" in a record. Military judges are, arguably, operating

under a rule that stresses producing a clean, uncontroverted record over examining the totality of the circumstances to address the more essential, constitutional concern whether the accused made a voluntary, intelligent decision to plead guilty.

Indeed, the view could be taken that current military practice in a given case impermissibly forces an accused to plead not guilty and risk a trial on an implausible, but "unrepudiable" defense. Military accused could quite possibly receive greater punishment in a situation where they are otherwise perfectly willing to plead guilty and accept responsibility for their conduct. Several cases mentioned above have involved situations that differ only in degree from this scenario, wherein the military judge improperly rejected an accused's guilty pleas.[217]

These revisions would mean that a military judge should still reject a guilty plea in most cases where it appears on the record that an accused has a valid defense or other matter barring trial. The revision would leave it to the military judge's discretion

whether a matter raised by the accused, though inconsistent, was so contrary to the plea and credible as to warrant rejecting the guilty plea.

Similarly, Revisions of R.C.M. 910(c)(5) and 910(e) should be made eliminating the strict requirement that the accused be interrogated under oath (see Appendix C). Questioning the accused under oath would still be the most desirable and expeditious manner to establish the factual basis for the plea in most cases.[218] The decisions as to the method of establishing and the sufficiency of the factual basis should be committed to the military judge's discretion. These changes would recognize that the military judge is in the best position to regulate the flow of the case and to make findings on the record that an accused is guilty beyond a reasonable doubt despite any inharmonious matters that may have been raised.

No changes should be made to R.C.M. 910(c)(1). The military judge should be obligated to enumerate the elements of the offense in simple terms. The accused should be required to attest that he understands the

elements and that he is guilty. This obligation is constitutional in nature.[219] The requirement that the record be "uncontroverted" is not.[220] Logically, it appears that requiring the military judge to enunciate the elements of the offense and to explain important definitions is the simplest and easiest manner through which to ensure the accused understands the offense and to avoid problems that arise in Federal civilian courts when such an explanation is omitted as occurred in Henderson v. Morgan.

The foregoing should not be taken to mean that the military should adopt what have come to be called "Alford pleas." There are compelling practical reasons for rejecting this practice, apart from the disdain many place on sending a person to jail upon a guilty plea while he is protesting his innocence. The point is properly made that accused who are convicted upon Alford pleas pose serious problems in the correctional setting where many decisions concerning disposition of offenders relate to whether they have admitted responsibility for their conduct.[221]

The intent of the recommended changes is not to permit acceptance of a guilty plea in the case of an accused who flatly refuses to accept responsibility for his conduct; the intent is to permit him to make an intelligent, voluntary, decision to plead guilty where he is convinced it is in his best interests to forego possible defenses. The benefits to the military justice system in dispensing with unnecessary contested trials could be considerable.[222]

2. Adoption of a Harmless Error Rule.

Consideration should also be given to incorporating a specific harmless error rule into R.C.M. 910 (see Appendix C). The effect of this rule would be to preclude the need for corrective action unless an appellant can show that a violation of R.C.M. 910 materially prejudiced a substantial right and, additionally, that the accused in fact would not have pleaded guilty had the error not occurred and that the accused intends to plead not guilty if a rehearing is directed. Such a rule appears to have had some success in forestalling challenges to guilty pleas in Federal

district courts.[223] Further, it seems logically absurd to take corrective action on appeal when the error did not effect the accused's basic decision to plead guilty.[224]

3. Article 63, UCMJ.

Consistent with the foregoing revisions, the provision of article 63(b) which limits the maximum sentence on retrial to that imposed in the original trial should be eliminated. Though not directly relevant to pleading practice, this provision appears to provide a strong incentive to attack the validity of a guilty plea on appeal. If the appellant prevails, he or she has nothing to lose because at a retrial, the accused cannot receive a greater sentence and, as a practical matter, will normally receive a lesser sentence. This proposal has been written upon elsewhere and the reader is commended to examine the proposal in greater detail.[225] As a practical matter this measure would provide a strong disincentive to raising inventive or spurious challenges to guilty pleas.

B. Judicial Reforms.

In the absence of the foregoing reforms by the Congress or the President, the courts can take substantial action to improve this area. The change in membership of the CMA[226] will afford an excellent opportunity to revisit these issues.

1. Overrule or Modify United States v. Care.

As former Senior Judge Raby of the Army Court of Military Review commented "perhaps the provisions of Care should be relaxed."[227] The time is long overdue to reconsider the judicial fiat of Care that requires an extensive narrative colloquy from the accused that establishes guilt to each element of the offense. As we have seen, this protracted discussion frequently has the counterproductive and unwelcome result of affording the accused an extended opportunity to equivocate, express moral (though not legal) doubts as to culpability, and to otherwise raise spurious matters that might conceivably amount to "inconsistencies."[228]

Compelling reasons for reconsidering Care can be found by examining the opinion itself. The CMA's conclusions that the providence inquiry then employed by most law officers or presidents of courts-martial did not comport with the mandate of the Keeffe Board, as endorsed by Congress, are suspect.[229] In any event, the inquiry since developed under the 1969 and 1984 Manuals and in the Military Judge's Benchbook into the accused's understanding about the nature of the offense and consequences of the plea more than satisfies Judge Ferguson's original concerns.

Additionally, the CMA placed great reliance in Care upon the then recent Supreme Court McCarthy decision for its holding that an extensive personal interrogation of the accused was strongly advisable if not constitutionally necessary. The Supreme Court and Federal circuit courts of appeal, however, have strictly limited the edict of McCarthy that Rule 11 violations of any nature require reversal to the essential, "core" concerns of Rule 11. The CMA has simply not kept pace with these developments and the time has come to revisit Care in light of later

constitutional and statutory interpretations that have severely limited the effect of McCarthy.

The effect of Care's continued vitality is to place an unfair and constitutionally unnecessary burden upon military judges and counsel to "ferret-out" all facts necessary to establish guilt from an accused personally and to resolve complex if not imperceptible "inconsistent matters" averred by the accused. The CMA has recognized this problem,[230] but has not yet acted to alleviate it.

Consequently, the court should specifically overrule Care to the extent that it requires a personal interrogation of the accused establishing guilt to each element of the offense in a narrative fashion. A showing on the record that the accused understands and admits each element of the offense, pursuant to R.C.M. 910(c)(1), and the inclusion of evidence presented through any number of reliable sources[231] establishing the factual basis for guilt are all that are necessary and all that should be required.

The complimentary changes to R.C.M. 910(c)(5) and 910(e) discussed above are also advisable to eliminate the requirement, based upon Care, to elicit the factual basis for the plea by questioning the accused (see Appendix C). This change will render courts-martial consistent with federal civilian practice, which permits the judge to use any reliable information to establish the factual predicate for the plea.[232] Although the accused will frequently be the best source of information concerning his or her conduct, in many instances he or she is personally unaware or unable to recall key facts and, under R.C.M. 910(e) and Care, must testify to hearsay or matters of belief that are probably not as reliable as the original information presented through witnesses, documents, or stipulations.

2. Strict Construction of "Inconsistencies."

Short of other measures, appellate courts seem to enjoy considerable leeway in what they may construe to be an inconsistent matter raised by the accused.[233] It can clearly be asserted, as Judge Latimer did in many

of his dissents,[234] that a matter one judge may perceive as inconsistent may well be reconcilable with guilt. The author suggests that appellate judges should be particularly wary of construing a matter as being inconsistent with guilt in the absence of an allegation by the appellant that he or she, in fact, would have pleaded not guilty had he or she appreciated the effect of the "inconsistency" before deciding to plead guilty.

In many of the foregoing cases, the military appellate courts appear to approach the providence issue from the perspective of whether a matter contained in the record can be interpreted as inconsistent with guilt. The author contends that the more advisable approach is to take corrective action on appeal only when a matter cannot reasonably be reconciled with guilt.

Considerable hope exists that the CMA will view such challenges to guilty pleas in a stricter fashion. Judge Cox has indicated in several cases that considerably more deference should be given to a military judge's findings "on the record" that an

accused is in fact guilty and that the court should not lose sight of the more essential constitutional prerequisites for a valid guilty plea.[235] Perhaps Judge Cox signals the future course of the court in construing article 45(a) in a more realistic fashion by stating that in guilty plea cases:

> It is sufficient that:
>
> > [The accused] knowingly and voluntarily admits his guilt;
> >
> > [The accused] knowingly and voluntarily gives up his rights; and
> >
> > [The accused] knowingly and voluntarily gives up his defenses to the charges.[236]

V. CONCLUSION.

The time has come to modernize military guilty plea practice. The courts-martial practice inherited from the last century requiring resolution of any inharmonious matters raised by the accused has the unforseen and unfortunate effect of exalting the form of the plea over the substance: the "form" being the duty to avoid the appearance of any inharmonious items on the record; the "substance" being whether the accused is in fact guilty and should the accused and

the court enjoy the benefits of an enlightened, considered decision to plead guilty. The result is that courts-martial focus on the antiquated statutory concern that no inconsistencies appear on the record as much, if not more, than on the more fundamental constitutional requisites for a legitimate waiver of the right to a trial.

Further, it is difficult to articulate any "uniquely military" concerns that justify applying a pleading practice at courts-martial so substantially different from that applied in other federal courts. The era in which courts-martial lacked significant direct involvement of trained judge advocates is gone, eliminating the need for such a paternalistic, solicitous practice. The time is ripe for serious reconsideration of article 45(a) and its judicial progeny.

Adoption of the proposed reforms is advisable for not only constitutional and practical reasons. They are necessary to accord sufficient deference to the right of the accused to enter a guilty plea and to

grant proper respect for the military judge's and counsel's interpretation and superior knowledge of the law and the facts.

ENDNOTES

1. United States v. Clark, 26 M.J. 589, 593 (A.C.M.R. 1988), affirmed, 28 M.J. 401 (C.M.A. 1989).

2. In Fiscal Year 1990, 60.8 percent of general courts-martial and 64.3 percent of special courts-martial empowered to adjudge a Bad Conduct Discharge involved guilty pleas. In Fiscal Year 1989, these figures were 63 percent and 63.5 percent, respectively. This information was provided by Ms. Nancy Silva, Office of the Clerk of Court, Army Court of Military Review (ACMR). It appears that this proportion is similar to that experienced at earlier times. For example, in the Report to the Honorable William M. Brucker by the Committee on the Uniform Code of Military of Justice Good Order and Discipline in the Army (popularly referred to as the "Powell Report") in 1960, at page 111, it was reported that about 60 percent of all cases going before the ACMR involved pleas of guilty.

3. During the year ending June 30, 1989, of 44,524

defendants convicted in Federal district courts, 37,973 pleaded guilty and 708 pleaded nolo contendere, for a rate of about 87 percent. Annual Report of the Director of the Administrative Office of the U.S. Courts, Appendix I, Table D-4 (1989).

4. See, generally, Santobello v. New York, 404 U.S. 257, 260 (1971); Brady v. United States, 397 U.S. 742, 752-53, (1970); and ABA Standards Relating to Pleas of Guilty (1980), Introduction.

5. Manual for Courts-Martial, United States, 1984 [hereinafter M.C.M., 1984], Rule for Courts-Martial 910 [hereinafter R.C.M.].

6. 18 U.S.C. Fed. R. Crim. P. 11 [hereinafter Rule 11].

7. See M.C.M., 1984, R.C.M. 910 analysis, app. 21 at A21-51-54.

8. See North Carolina v. Alford, 400 U.S. 25 (1970).

9. 10 U.S.C. §845(a) (1982) [hereinafter, the Uniform Code of Military Justice is referred to as the UCMJ].

10. Compare Fed. R. Crim. P. 11(f) and R.C.M. 910(e).

11. 40 C.M.R. 247 (C.M.A. 1969).

12. The intent of this article is to focus strictly on the basic aspects of guilty plea inquiries necessary to

establish the validity of the plea. Consequently, a detailed discussion of related topics such as plea bargaining, conditional guilty pleas, collateral uses of an accused's testimony during the inquiry, and withdrawal of pleas is beyond the scope of this paper.

13. An article providing an alternative version of the development of guilty plea practice before federal and military practice, and which provided background for this thesis is Vickery, The Providency of Guilty Pleas: Does the Military Really Care?, 58 Mil. L. Rev. 209 (1972).

14. See Kercheval v. United States, 274 U.S. 220 (1927); United States v. Bayaud, 23 Fed. 721 (1883).

15. 304 U.S. 458 (1938).

16. Id. at 460. Petitioner, interestingly, was a Marine who was on leave in Charleston, South Carolina, at the time of his arrest and trial.

17. Id. at 464-65.

18. 316 U.S. 98, 103 (1942) (per curiam).

19. Id. at 104. See also Von Moltke v. Gillies, 332 U.S. 708 (1948) where Justice Black, in an opinion in which only three justices joined, with Justices Frankfurter and Jackson concurring in the result, ruled

that a petitioner's allegations that her guilty plea and waiver of right to counsel were induced by coercion and misrepresentation by FBI agents warranted an evidentiary hearing. (Frederick Bernays Wiener, a noted military jurist, argued the Respondent's case.)

20. 327 U.S. 842 (1944).

21. 368 U.S. 487 (1962).

22. Id. at 495-96.

23. Id. at 496-501. See also United States v. Shelton, 356 U.S. 26 (1958), where the Warren Court, in a very brief per curiam opinion which did not discuss the merits of the case, reversed the Fifth Circuit Court of Appeal's decision (246 F.2d 571 (5th Cir. 1957)) finding that the appellant had voluntarily pleaded guilty despite allegations of an unkept plea bargain.

24. Id. at 501.

25. 384 U.S. 1 (1965).

26. This is a procedure that formerly existed under Ohio law whereby a defendant, though technically pleading not guilty, agreed that the prosecutor was only required to establish a prima facie case, and that

he would not cross-examine or present any evidence of his own.

27. 383 U.S. 1097 (1966). The new Rule provided:

> A defendant may plead not guilty, guilty, or with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

28. 1966 Advisory Committee Note to Rule 11. Compare, e.g., United States v. Diggs 304 F.2d 929 (6th Cir. 1962) where the Sixth Circuit indicated that presence of counsel alone did not necessarily relieve the trial judge of his duty to determine the legitimacy of a plea from the defendant personally, with Nunley v. United States 294 F.2d 579 (10th Cir. 1961); where the Tenth Circuit implied that a trial court need not make any express determination from the defendant in the absence of any indication that he is not aware of the nature and effect of his plea or is being coerced.

29. Advisory Committee Note to Rule 11, supra.

30. Id.

31. 390 U.S. 570 (1968).

32. 18 U.S.C. §1201 (1956).

33. United States v. Jackson, 390 U.S. at 582-83. It will be seen, however, that although Jackson has never been expressly overruled, its implication that statutes that encourage guilty pleas by subjecting defendants to lesser punishments are invalid has been severely limited by subsequent cases. See pp. 14-17, infra.

34. 394 U.S. 459 (1969).

35. Id. at 465-67. Interestingly, in United States v. Halliday, 394 U.S. 831 (1969), the Court declined to apply McCarthy retroactively, due to the large number of otherwise valid convictions that might be overturned.

36. Id. at 464. See also pp. 54-60, infra.

37. Id. at 466.

38. 395 U.S. 238 (1969).

39. Id. at 243-44. Note that the McCarthy and Boykin cases were to figure prominently in the Court of Military Appeals' decision in United States v. Care, infra.

40. Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970); and, Parker v. North Carolina, 397 U.S. 790 (1970). See also 8 James Moore, Moore's Federal Practice, 11-70 to 11-73.

41. Brady, 397 U.S. at 743.

42. Id. at 749.

43. Id. at 749-52.

44. McMann, 397 U.S. at 760.

45. Id. at 766-68.

46. Parker v. North Carolina, 790 U.S. at 794.

47. Id. at 795-97.

48. See Brady v. United States, , 397 U.S. at 793-94; McMann v. Richardson, 397 U.S. 770-71; and Parker v. North Carolina, 397 U.S. at 796-97.

49. 384 U.S. 436 (1966).

50. Brady v. United States, 397 U.S. at 754. As will be seen, is it questionable whether the Court of Military Appeals holds defense counsel in similar esteem.

51. 400 U.S. 25 (1970).

52. Id. at 31-32.

53. Id. at 32.

54. Id. at 33-34.

55. Id. at 35-37.

56. 411 U.S. 258 (1973).

57. Id. at 266-67.

58. As amended, Rule 11 now provided:

> Rule 11. Pleas.
>
> (a) Alternatives. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.
>
> (b) Nolo contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.
>
> (c) Advice to defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:
>
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and
>
> (2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and
>
> (3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to assistance of counsel, the right to confront and

cross examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if his plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) if the court questions the defendant under oath, on the record, and in the presence of counsel about the offense to which he has pleaded, that his answers may later be used against him in a prosecution for perjury or false statement.

(d) Insuring that the plea is voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

(e) Plea agreement procedure.

[Omitted]

(f) Determining accuracy of the plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea

agreement, and the inquiry into the accuracy of a guilty plea.

18 U.S.C Rule 11 (1976).

59. 1975 Advisory Committee Note to Fed. R. Crim. Proc. 11.

60. Id.

61. Id.

62. See text of Rule 11(c)(3) and (c)(4) at note 59, supra.

63. Id.

64. See Rule 11(d) and (e) at note 59, supra. These changes were prompted by the court's holding in Santobello v. United States 404 U.S. 257 (1971), which indicated that unkept plea bargains could render guilty pleas involuntary and urged the adoption of safeguards to ensure that defendants were treated fairly. As the concern of this thesis is the more basic requirements for valid guilty pleas, a detailed discussion of this very important subject is beyond its scope.

65. Rule 11 was substantively amended in 1979 (clarifying circumstances in which a plea bargain may be accepted); 1980 (providing withdrawn guilty pleas and related plea discussions are inadmissable); 1982

(requiring advice to defendant of possible special parole terms); 1983 (authorizing conditional guilty pleas and expressly adopting harmless error rule to Rule 11; 1985 (requiring advice to defendant when an order of restitution may be included in sentence); and in 1989 (requiring advice to defendant that the court is required to consider sentencing guidelines). See 1979, 1980, 1983, 1985, and 1989 Advisory Committee Notes to Rule 11. Only the 1983 adoption of the harmless error rule, however, is directly relevant to this article.

66. 18 U.S.C. Fed R. Crim. Proc. 52(a) (1975).

67. See 1983 Advisory Committee Note to Rule 11.

68. Id.

69. 441 U.S. 780 (1979).

70. Id. at 783-85. Citing Hill v. United States, 368 U.S. 424 (1975), the Court implied that the violation of Rule 11 must have resulted in a "complete miscarriage of justice" or amount to "an omission inconsistent with the rudimentary demands of fair procedure."

71. See, e.g., United States v. Lovett, 844 F.2d 487 (7th Cir. 1988); United States v. Dayton, 604 F.2d 940

(5th Cir. 1979), cert. denied, 445 U.S. 904 (1980); United States v. Scarf, 551 F.2d 1124 (8th Cir. 1977).

72. See United States v. Dayton, supra, 604 F. 2d at 940.

73. 466 U.S. 668 (1983).

74. 474 U.S. 52 (1985).

75. William Winthrop, Military Law and Precedents, (2d. rev. ed., 1920), p. 270.

76. Note that the Army did not require law officers at general courts-martial until 1920 (See M.C.M., U.S. Army, 1921, paras. 81a and 89), and the Navy did not require judge advocates at courts-martial until after the Uniform Code of Military Justice was adopted in 1951 (See M.C.M., 1951, para. 4.e). The requirement of a lawyer as defense counsel at general courts-martial also did not appear until 1951 (See M.C.M., 1951, para. 6.b.). See generally, William T. Generous, Jr., Swords and Scales, 40-43, 107 (1973).

77. Winthrop, supra., at 277-78.

78. See M.C.M., U.S. Army, 1893, pp. 39-40; M.C.M., U.S. Army, 1901, p. 32; M.C.M., U.S. Army, 1908, p. 33. Each of the foregoing provided:

> When the accused pleads "guilty" and, without any evidence being introduced, makes a statement inconsistent with his plea, the statement and plea will be considered together, and, if guilt is not conclusively admitted, the court will direct the entry of a plea of "not guilty," and proceed to try the case . . .

79. See, e.g., cases referred to in Winthrop, Digest of Opinions of The Judge Advocate General of the Army (hereinafter Digest), pp. 376-379 (1880); Winthrop, Digest, pp. 588-90, (1895); Winthrop, Digest, pp. 553-555 (1901).

80. Winthrop, supra. The M.C.M., U.S. Army, 1893, at p. 39, made specific reference to the "embarrassing" lack of evidence frequently found supporting desertion convictions.

81. M.C.M., U.S. Army, 1920, app. 1, p. 500.

82. M.C.M., 1921, Appendix 9, Form 3.

83. It is curious that this form for the providence inquiry was omitted from later editions of the Manual for Courts-Martial. It does not appear in the 1928 or 1949 editions. Most notably, a much-abbreviated form of the inquiry appears in the 1951 edition, which was the first M.C.M. to apply to all of the services following the adoption of the Uniform Code of Military Justice.

84. An excellent summary of the criticisms leveled at the military justice system and the events leading up to the adoption of the UCMJ can be found in William T. Generous, Jr., Swords and Scales, 14-34 (1973).

85. John A. Keeffe, et. al., General Court Martial Sentence Review Board, "Report and Recommendations" (1947) (available in the Navy Judge Advocate General's Library, Arlington, Virginia). This board was convened for the purpose of reviewing general courts-martial conducted during World War II, and to report findings and recommendations concerning any deficiencies in the naval military justice system.

86. Id. at pp. 140-41.

87. Id. at p. 140.

88. Id. at pp. 141-42.

89. Id. at pp. 142-43.

90. Edmund M. Morgan, et. al., Uniform Code of Military Justice: Text, References and Commentary based on the Report of the Committee on a Uniform Code of Military Justice to The Secretary of Defense (popularly referred to as the "Morgan" draft of the UCMJ), pp. 63-65. (1950). Article 45(a), in both the Morgan draft and as enacted in 1951, provided:

Article 45. Pleas of the Accused.

> (a) If an accused arraigned before a court-martial makes any irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.

Except for a minor amendment under the Military Justice Act of 1968 (Pub. L. No. 90-632, 82 Stat. 1335-43 (1968)) that substituted "after arraignment" for "arraigned before a court-martial," Article 45(a) has not been altered.

91. Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcommittee of the Committee on the Armed Services, House of Representatives, 81st Congress, 1st Session, pp. 1052-55 (1949).

92. Id. at pp. 1055-56.

93. M.C.M., 1951, para. 70.b.

94. Compare M.C.M., U.S. Army, 1949, app. 5, p. 340, with M.C.M. 1951, app. 8a, p. 509.

95. This omission would be of considerable concern to the Court of Military Appeals in the Chancellor and Care cases, infra.

96. See William T. Generous, Swords and Scales, supra., pp. 55-58.

97. 1 C.M.R. 19 (C.M.A. 1952). See also United States v. Messenger, 6 C.M.R. 21 (C.M.A. 1952) (Article 45(a) did not require rejection of a guilty plea where the accused presented evidence in extenuation that the property he pleaded guilty to stealing was damaged and of little value, implying that evidence would not be "inconsistent" with the plea of guilty unless it actually showed the property taken was worthless); United States v. Trede, 10 C.M.R. 79 (C.M.A. 1955), (Testimony of a defense witness, a psychiatrist, that the accused was acting under an irresistible impulse at the time of the theft, but who stopped short of testifying that the accused otherwise suffered from a mental disease or defect did not render an accused's plea of guilty to larceny improvident); and, United States v. Hinton, 23 C.M.R. 263 (C.M.A. 1955) (Statements by accused and defense counsel that accused was suffering from a mental condition at time of larcenies were not sufficient to render guilty pleas improvident).

98. 18 C.M.R. 165 (C.M.A. 1955).

99. Id. at 171.

100. Id. at 172-73.

101. 25 C.M.R. 151 (C.M.A. 1958).

102. Id. at 154-55.

103. 27 C.M.R. 84 (C.M.A. 1958).

104. Id. at 86. This decision is difficult to reconcile with Kitchen and Welker, especially since the court did not address whether Lemieux's belief that he had entered into a common-law marriage might constitute a mistake of fact defense.

105. 29 C.M.R. 23 (1960).

106. 10 U.S.C. §873 (1956).

107. Brown, 29 C.M.R. at 31.

108. Id.

109. 35 C.M.R. 372 (C.M.A. 1965).

110. 10 U.S.C. §934 (1956).

111. Richardson, 35 C.M.R. at 373.

112. Id. Note that Judge Latimer left the Court in 1960.

113. Id. at 374-75.

114. Id. at 374. Note that the sentencing limitation on rehearings contained in Article 63(b) (10 U.S.C. 863(b) (1956)) provides an excellent incentive to

accused and counsel to raise claims of inconsistent matters. See Cargill, The Article 63 Windfall, The Army Lawyer, Dec. 1989, 26-32.

115. Id. at 375-76.

116. 29 C.M.R. 351 (C.M.A. 1960).

117. Id. at 252-53.

118. Id. at 253-54. See also United States v. Vance, 38 C.M.R. 242 (C.M.A. 1968); United States v. Lewis, 39 C.M.R. 261 (C.M.A. 1969); and United States V. Lee, 16 M.J. 278 (C.M.A. 1983).

119. 36 C.M.R. 453 (C.M.A. 1966).

120. Id. at 454.

121. Id. at 456.

122. Id.

123. See M.C.M., 1968, app 8a, pp. A8-9 and A8-10; M.C.M., 1969, app. 8a, pp. A8-14 to A8-16.

124. 40 C.M.R. 247 (C.M.A. 1969).

125. Id., at 252-53.

126. Id. at 253.

127. Id.

128. Not surprisingly, Judge Ferguson dissented, stating that the case should be reversed and remanded.

129. Id. at 250-51. See McCarthy v. United States and Boykin v. Alabama, discussion at pp. 12-14, supra.

130. The requirements set forth in United States v. Care were imposed six years before similar amendments were made to Rule 11.

131. Though no precise statistics are available on this point, a Westlaw search for cases appearing in 1-31 M.J. for cases wherein issues concerning improvident guilty pleas appeared revealed a total of 513 cases. The specific search terms were: Improviden** /p "guilty plea*."

132. M.C.M., 1984, R.C.M. 910 analysis at A21-52 to A21-54.

133. Compare Fed. R. Crim. P. 11(c) and R.C.M. 910(c).

134. M.C.M., 1984, R.C.M. 910(e), and analysis at A21-53.

135. Id.

136. See generally, Henderson v. Morgan, 426 U.S. 237 (1976); Smith v. O'Grady, 312 U.S. 329 (1941); United States v. Care, 40 C.M.R. 247.

137. Smith v. O'Grady, 312 U.S. at 334.

138. McCarthy v. United States, 394 U.S. at 466; United States v. Broce, 488 U.S. 563, at 570 (1989).

139. See R.C.M. 910(c)(1) and Rule 11(c)(1).

140. 1975 Advisory Committee Note to Rule 11.

141. See United States v. Dayton, 604 F.2d 931 at 941-43, cert. denied, 445 U.S. 904 (1979).

142. 828 F.2d 399 (7th Cir. 1987), cert. denied, 485 U.S. 964 (1988).

143. Id. at 406-410. See also Harvey v. United States, 850 F. 2d 388 (8th Cir. 1988) (Harmless error for judge to fail to personally address defendants as to nature of charge where he asked them if they had read the indictments, and where defendants stated they had received indictment, and defense attorney stated he had explained the charges to the defendants and believed the defendant understood the charge).

144. See p. 24, supra, for a brief discussion of the distinction between violations of "core concerns" relating to fundamental requirements of a valid guilty plea versus technical violations of 1975 Amendments to Rule 11.

145. 426 U.S. 237 (1976).

146. Id. at 640.

147. Id. at 640-46.

148. Id.

149. 890 F.2d 676 (4th Cir. 1989), cert. denied, ___ U.S. ___, (1990).

150. Id. at 678-79.

151. See United States v. Kilgore and United States v. Crouch, infra.

152. Dep't of Army, Pam. 27-9, Military Judges' Benchbook, (1 May 1982) [hereinafter Benchbook]; See also M.C.M., 1984, app. 8, pp A8-6 to A8-7.

153. Benchbook, paras. 2-12 and 2-13.

154. 44 C.M.R. 89 (C.M.A. 1971).

155. Id. at 91. Because the court held that the inquiry was sufficient, they did not rule on the other certified issue, whether the harmless error rule of article 59(a), applies to providence inquiry errors. This remains an open question.

156. 11 M.J. 128 (C.M.A. 1981).

157. Id. at 129-30. In an interesting dissent, Judge Fletcher noted a key distinction between Crouch and Kilgore: In Kilgore, the record indicated both the accused's guilt and a correct explanation of the elements; in Crouch, the judge, arguably, failed to properly explain the element of intent for guilt as an accessory.

158. 13 M.J. 85 (C.M.A. 1982).

159. Id. at 88.

160. Id. at 86-88. Further, there was a lack of evidence on the record to indicate specific intent on the part of the accused to take by force.

161. See United States v. Mervine, 23 M.J. 801 (N.M.C.M.R. 1986), reversed on other grounds, 26 M.J. 842 (C.M.A. 1987) (Military judge did not explain elements of larceny to an accused who pleaded guilty to attempted larceny, but this omission was not harmful where questions posed to accused addressed elements of larceny, and accused stated that he understood the elements of larceny); United States v. Peterkin, 14 M.J. 660 (A.C.M.R. 1982), petition denied 17 M.J. 197 (Military judge's failure to list elements of attempted murder not prejudicial where questions addressing elements and accused's understanding of the elements established that the accused was aware of the nature and elements of the offense).

162. See United States v. Thatch, 30 M.J. 623 (N.M.C.M.R. 1990); United States v. Hitchman, 29 M.J. 951 (A.C.M.R. 1990); United States v. Stener, 14 M.J. 972 (A.C.M.R. 1982); but see United States v. Finn, 20

M.J. 697 (N.M.C.M.R. 1985) (Service-discrediting and prejudicial nature of drug distribution are so well established and known that specific advice to accused of article 134-unique elements not necessary).

163. See United States v. Broce, 488 U.S. at 563; United States v. Harvey, 850 F.2d at 388; and United States v. Ray, 828 F.2d at 399.

164. United States v. Care, 40 C.M.R. at 253.

165. See McCarthy v. United States, 394 U.S. at 465; North Carolina v. Alford. Further, the clear weight of authority among the Federal Circuit Courts of Appeal, primarily in reviewing habeas challenges to the adequacy of the factual basis of guilty pleas, is that the factual basis requirement is purely a product of Rule 11 or similar state rules, not the constitution, and that absent a showing that a plea was, in fact, involuntarily or unknowingly, mere failure to develop a proper factual basis on the record will not result in reversal. See, e.g., United States v. Newman, 912 F.2d 1119 (9th Cir. 1990); Willbright v. Smith, 745 F.2d 779 (2d Cir. 1984); Roddy v. Black, 516 F.2d 1380 (6th Cir. 1975), cert. denied, 423 U.S. 917 (1975); Wade v. Coiner, 468 F.2d 1059 (4th Cir. 1972).

166. 488 U.S. 563 (1989).

167. Id. at 566-67.

168. Id. at 571-74.

169. i.e., Double jeopardy precluded two convictions for the same conspiracy, see Braverman v. United States, 317 U.S. 49 (1942).

170. United States v. Care, 40 C.M.R. at 247.

171. Compare R.C.M. 910(e), which contains a second sentence stating "The accused shall be questioned under oath about the offenses." with Rule 11(f), which contains no such requirement.

172. See 1966 Advisory Committee Notes to Rule 11; ABA Standards Relating to Pleas of Guilty, Standard 14-1.6(b); Santobello v. New York, 404 U.S. at 261.

173. 1966 Advisory Committee Notes to Rule 11; See United States v. Dayton, 604 U.S. at 540 (prosecutor's statement of available evidence established factual basis for plea).

174. See United States v. Thompson, 680 F.2d 1145 (7th Cir. 1982), cert. denied, 459 U.S. 1089.

174. See United States v. Goldberg, 862 F.2d 101 (6th Cir. 1988) (Case remanded due to absence of evidence indicating intent to actively conceal mail fraud in

case of defendant who pleaded guilty to misprision of a felony); United States v. Fountain, 777 F.2d 351 (7th Cir. 1985) (Defendant pleaded guilty to murder as an accessory, but only evidence of codefendant's actual commission of offense as principal appeared on record. The factual basis was insufficient because no evidence was presented on the record of defendant's role as accessory).

176. United States v. Davenport, 9 M.J. 364 (C.M.A. 1980); R.C.M. 910 (e); See United States v. Frederick, 23 M.J. 561 (A.C.M.R. 1986) (Where military judge's inquiry of accused elicited "nearly monosyllabic" responses concerning his guilt of two specifications of distributing cocaine, the inquiry was insufficient to meet the mandate of United States v. Care requiring detailed interrogation of accused to support guilt).

177. 25 M.J. 148 (C.M.A. 1987).

178. Id. at 152. See also United States v. Moglia, 3 M.J. 217 (C.M.A. 1977) (Accused's inability to testify from personal knowledge that heroin he distributed to victim was same heroin which caused victim's death did not render guilty plea to involuntary manslaughter

improvident where accused was convinced of and admitted to guilt through other sources); United States v. Luebs, 43 C.M.R. 315 (C.M.A. 1971) (Accused pleaded guilty providently to sodomy and assault with intent to commit rape despite inability to recall events because of intoxication at time, where accused was convinced of guilt through discussions with witnesses and review of other evidence); United States v. Butler, 43 C.M.R. 87 (C.M.A. 1971).

179. In United States v. Butler, supra, 43 C.M.R. at 88, Chief Judge Quinn made the intriguing remark that "even a personal belief by an unremembering accused, that he did not commit the offense, does not preclude him from entering a plea of guilty because he is convinced that the strength of the Government's case against him is such as to make assertion of his right to trial an empty gesture," citing North Carolina v. Alford. The author has found no later military case, apart from United States v. Luebs, supra, which refers to this dicta. All subsequent cases appear to state that an accused must be convinced of his or her own guilt.

180. United States v. Lopez, 907 F.2d 1096, 1100 (11th Cir. 1990); United States v. Dayton.

181. See United States v. Lopez, 907 F.2d at 100-02 (Former police officers' guilty pleas to RICO narcotics charges supported by sufficient factual basis despite judge's failure to elicit defendants' admissions to all factual predicates for the RICO violations); United States v. Owen, 858 F.2d 1514 (11th Cir. 1988) (Evidence sufficient to establish factual basis for guilty pleas to tax evasion charges despite defendant's protestations after entry of pleas that nonpayment of taxes was not willful); See also United States v. Dayton, 604 F.2d at 938.

182. See, generally, R.C.M. 910, discussion.

183. See pp. 24-28, supra.

184. 1966 Committee Note to Rule 11; ABA Standards Relating to Pleas of Guilty (1980), Standard 14-1.6(c) and Commentary.

185. See North Carolina v. Alford, United States v. Owen, United States v. Dayton.

186. United States v. Owen, 858 F.2d at 1516-17.

187. ABA Standards Relating to Pleas of Guilty, Standard 14-1.6(c) and Commentary.

188. R.C.M. 910(h)(2); United States v. Lee, 16 M.J. at 280.

189. See, e.g., United States v. Stener 14 M.J. 972 (A.C.M.R. 1982) (Accused initially disagreed with military judge's explanation of Article 134 element (service-discrediting or prejudicial to good order and discipline) of drug importation offense, but later agreed with judge's explanation of the element without disavowing his earlier inconsistent statement. Held: findings and sentence set aside because accused's mere agreement with judge's explanation did not have the effect of repudiating his earlier statement).

190. United States v. Jones, 30 M.J. 127 (C.M.A. 1990) (Accused pleaded guilty to involuntary manslaughter by culpable negligence but record of providence inquiry indicated accused was actually guilty of manslaughter while perpetrating battery); United States v. Hubbard, 28 M.J. 203 (C.M.A. 1989) (Accused, an NCO with custody of government property, pleaded guilty providently to larceny though providence inquiry indicated he may in fact have been guilty of receiving stolen property); See also United States v. Epps, 25 M.J. 319 (C.M.A.

1987); United States v. Wright, 22 M.J. 25 (C.M.A. 1986).

191. United States v. Mance, 26 M.J. 244, 254 (C.M.A. 1988); United States v. Fitchett, 32 M.J. ___, (A.F.C.M.R. 1990); United States v. Stringfellow, 31 M.J. 697 (N.M.C.M.R. 1990) (Accused pleaded providently to wrongful use of cocaine and methamphetamine even though, at time of ingestion, he believed substance contained only cocaine), but see United States v. Dominingue, 24 M.J. 766 (A.F.C.M.R. 1987) (Rejecting "different substance" analysis).

192. See United States v. Clark, 28 M.J. 401, 406-7 (C.M.A. 1989); United States v. Logan, 47 C.M.R. 1, 3 (C.M.A. 1973); United States v. Butler, 43 C.M.R. at 88.

193. See United States v. Taylor, 26 M.J. 127 (C.M.A. 1988); United States v. Jemmings, 1 M.J. 414 (C.M.A. 1976).

194. The dilemma counsel and accused face in this situation is not new. During the floor debate on article 45(a), in discussing the duty to reject a guilty plea when an inconsistent matter is raised,

Congressman Foster Furcolo, Massachusetts, offered the following comment:

> there is a clause in there, and it is in all the court-martial books, which is supposed to be in there for the benefit of the defendant pointing out if after a plea of guilty the defendant sets up a matter inconsistent with the plea, you have to have a trial. I think probably you have to have that provision, but I do know that very often in a matter of mitigation or extenuation--I have had it happen to myself when representing one of these fellows--you may have a matter that is inconsistent with the plea of guilty, but the defendant then has to go through a trial which often results in a greater punishment to him because he did not plead guilty. I do not know how you would handle the situation, but I think the committee ought to give it some consideration.

95 Cong. Rec. 5286 (Comment of Rep. Furcolo, p. 29). [No subsequent discussion or consideration of the requirement to reject guilty pleas where an inconsistency is raised appears in the legislative history of the UCMJ].

195. See United States v. Penister, 25 M.J. at 148 (Military judge abused his discretion in rejecting a guilty plea to the offense of assault with a dangerous weapon through a misapplication of the law relating to intoxication as a possible defense); United States v. Clayton, 25 M.J. 888 (A.C.M.R. 1988) (Military Judge improperly rejected guilty plea by not sufficiently

determining whether accused was reasonably raising entrapment defense, entitling accused to benefit of original pretrial agreement sentence limitation).

196. United States v. Clark, 28 M.J. at 401.

197. 27 M.J. 671 (A.C.M.R. 1988).

198. United States v. Clark, 28 M.J. at 407. Curiously, it appears that the judge made no inquiry of the accused personally whether he believed he had been entrapped into distributing cocaine.

199. United States v. Williams, 27 M.J. at 673. See also United States v. Brooks, 26 M.J. 930 (A.C.M.R. 1988).

200. 47 C.M.R. 1 (C.M.A. 1973).

201. 1 M.J. 414 (C.M.A. 1976).

202. Id. at 416-418. See also United States v. Pinkston, 39 C.M.R. 261 (C.M.A. 1969).

203. Id. at 418-19.

204. 24 M.J. 286 (C.M.A. 1987).

205. Id. at 292.

206. 30 M.J. 829 (N.M.C.M.R. 1990).

207. 32 M.J. 501 (A.C.M.R. 1990).

208. See United States v. Duval, 31 M.J. 650 (A.C.M.R. 1990) (Accused's mere agreement that his conduct was

dishonorable was insufficient to support his guilty plea where he asserted on sentencing that he was unable to maintain a sufficient balance due to financial inability).

209. See United States v. Dean, 32 M.J. ___ (A.F.C.M.R. 1990); United States v. Watkins, 32 M.J. 527 (A.C.M.R. 1990); United States v. Mervine.

210. United States v. Lee, 16 M.J. at 278.

211. See United States v. Hinton, 23 C.M.R. at 265; United States v. Logan, 31 M.J. 910 (A.F.C.M.R. 1990).

212. See United States v. Thatch, 30 M.J. 623 (N.M.C.M.R. 1990); United States v. Hitchman 29 M.J. 951 (A.C.M.R. 1990); United States v. Stener (14 M.J. 972).

213. See United States v. Arthen, 32 M.J. 541 (A.F.C.M.R. 1990).

214. United States v. Penister, 25 M.J. at 153.

215. 10 U.S.C. 836 (1956).

216. See pp. 26-29, supra.

217. See United States v. Penister, 25 M.J. at 148; United States v. Clayton, 25 M.J. at 888.

218. The proposed revisions would, however, eliminate the requirement that an inquiry of the accused must

support each element of the offense in an uncontroverted manner. See also the proposal to overrule or modify the holding of United States v. Care, below.

219. See pp. 46-55, supra.

220. See pp. 54-64, supra.

221. See 1975 Committee Note to Rule 11(f).

222. Although empirical evidence on this point is not possible, the author is personally aware of a number of cases that have been contested at trial where an accused was willing to plead guilty and accept responsibility and punishment for his acts, but through moral or personal considerations, was unwilling or unable to recite sufficient facts to support guilt. The possibility that military judges might, on occasion, be overzealous in rejecting guilty pleas because of "inconsistencies" developed through an unnecessarily rigorous examination of the accused is even more difficult to develop.

223. See pp 23-25, supra.

224. Note that the proposed harmless error rule would affect only R.C.M. 910 violations, it would not preclude, for example, a rehearing on sentencing due to

erroneous admission of evidence in violation of R.C.M. 1001(b) or M.R.E. 404(b).

225. See Cargill, The Article 63 Windfall, supra.

226. The composition of the CMA was recently increased from three to five judges (See 103 Stat. 1570-1572, codified at 10 U.S.C. 941-945 (1989)). This factor, together with Chief Judge Everett's assumption of senior judge status upon expiration of his term, appears to offer an opportunity to reconsider some of the court's earlier cases in this area.

227. United States v. Frederick, 23 M.J. at 564.

228. See 64-72, supra.

229. See pp. 29-35, supra.

230. See, e.g., United States v. Penister, 25 M.J. at 152; United States v. Byrd, 24 M.J. at 286.

231. Such sources include stipulations of fact or of testimony, witnesses, and documentary evidence, in addition to any testimony rendered by the accused personally.

232. See pp. 56-58, supra.

233. See, e.g., United States v. Clark, 28 M.J. at 401; United States v. Logan, 47 C.M.R. at 1.

234. See the discussion of United States v. Brown, United States v. Welker, and United States v. Kitchen, at pp. 35-39, supra.

235. See, e.g., United States v. Penister, 25 M.J. at 153 (Cox, J., concurring).

236. Id.

APPENDIX A

Federal Rule of Criminal Procedure 11

Rule 11. Pleas.

(a) Alternatives.

(1) In General. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(2) Conditional Pleas. With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

(2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and

(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against self-incrimination; and

(4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement.

(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally and in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such a recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the

agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to the trial, as may be fixed by the court.

(6) Inadmissibility of Pleas, Plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who hade the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) Determining the Accuracy of the Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

(h) Harmless Error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

APPENDIX B

Rule for Courts-Martial 910

Rule 910. Pleas.

(a) Alternatives.

(1) In General. An accused may plead not guilty or guilty. An accused may plead by exceptions or by exceptions and substitutions, not guilty to an offense as charged, but guilty to an offense included in that offense. A plea of guilty may not be received as to an offense for which the death penalty may be adjudged.

(2) Conditional Pleas. With the approval of the military judge and the consent of the government, an accused may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on further review or appeal, to review the adverse determination of any specified pretrial motion. If the accused prevails on further review or appeal, the accused shall be allowed to withdraw the plea. The Secretary concerned may prescribe who may consent for the government; unless otherwise prescribed by the Secretary concerned, the trial counsel may consent on behalf of the government.

(b) Refusal to Plead; Irregular Plea. If an accused fails or refuses to plead, or makes an irregular plea, the military judge shall enter a plea of not guilty for the accused.

(c) Advice to Accused. Before accepting a plea of guilty, the military judge shall address the accused personally and inform the accused of, and determine that the accused understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law;

(2) in a general or special court-martial, if the accused is not represented by counsel, that the accused has the right to be represented by counsel at every stage of the proceedings;

(3) that the accused has the right to plead not guilty or to persist in that plea if it has already been made, and that the accused has the right to be tried by a court-martial and at that at such court-martial the accused has the right to confront and cross-examine witnesses against the accused, and the right against self-incrimination;

(4) that if the accused pleads guilty there will not be a trial of any kind as to those offenses to which the accused has so pleaded, so that by pleading guilty the accused waives the rights described in subsection (c)(3) of this rule; and

(5) That if the accused pleads guilty, the military judge will question the accused about the offenses to which the accused has pleaded guilty and, if the accused answers these questions under oath, on the record, and in the presence of counsel, the accused's answers may later be used against the accused in a prosecution for perjury or false statement.

(d) Ensuring That the Plea is Voluntary. The military judge shall not accept a plea of guilty without first, by addressing the accused personally, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement under R.C.M. 705. The military judge shall also inquire as to whether the accused's willingness to plead guilty results from prior discussions between the convening authority, a representative of the convening authority, or trial counsel and the accused or defense counsel.

(e) Determining the Accuracy of the Plea. The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea. The accused shall be questioned under oath about the offenses.

(f) Plea Agreement Inquiry.

(1) In General. A plea agreement may not be accepted if it does not comply with R.C.M. 705.

(2) Notice. The parties shall inform the military judge if a plea agreement exists.

(3) Disclosure. If a plea agreement exists, the military judge shall require disclosure of the entire agreement before the plea is accepted, provided that in trial before military judge alone the military judge shall not examine any sentence limitation contained in the agreement until after the sentence of the court-martial has been announced.

(4) Inquiry. The military judge shall inquire to ensure:

(A) that the accused understands the agreement; and

(B) that the parties agree to the terms of the agreement.

(g) Findings. findings based upon a plea of guilty may be entered immediately upon acceptance of the plea at an Article 39(a) session unless:

(1) Such action is not permitted by regulations of the Secretary concerned;

(2) The plea is to a lesser included offense and the prosecution intends to proceed to trial on the offense as charged; or

(3) Trial is by special court-martial without a military judge, in which case the president of the court-martial may enter findings based on the pleas without a formal vote except when subsection (g)(2) of this rule applies.

(h) Later Action.

(1) Withdrawal by the accused. If after acceptance of the plea but before the sentence is announced the accused requests to withdraw a plea of guilty and substitute a plea of not guilty or a plea of guilty to a lesser included offense, the military judge may as a matter of discretion permit the accused to do so.

(2) Statements by the accused inconsistent with the plea. If after findings but before sentence is announced the accused makes a statement to the court-martial, in testimony or otherwise, or presents evidence which is inconsistent with a plea of guilty on which a finding is based, the military judge shall inquire into the providence of the plea. If, following such inquiry, it appears that the accused entered the plea improvidently or through lack of understanding as to its meaning and effect a plea of not guilty shall be entered as to the affected charges and specifications.

(3) Pretrial agreement inquiry. After sentence is announced the military judge shall inquire into any parts of the pretrial agreement which were not previously examined by the military judge. If the military judge determines that the accused does not understand the material terms of the agreement, or that the parties disagree as to such terms, the military judge shall conform, with the consent of the government, the agreement to the accused's understanding or permit the accused to withdraw the plea.

(i) Record of proceedings. A verbatim record of the guilty plea proceedings shall be made in such cases in which a verbatim record is required under R.C.M. 1103. In other special courts-martial, a summary of the explanation and replies shall be included in the record of trial. As to summary courts-martial, see R.C.M. 1305.

(j) Waiver. Except as provided in subsection (a)(2) of this rule, a plea of guilty which results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt of the offense(s) to which the plea was made.

APPENDIX C

Proposed Revisions to Article 45(a), UCMJ, and R.C.M. 910

Article 45. Pleas of Accused.

(a) If an accused after arraignment before a court-martial makes any irregular pleading, ~~or after a plea of guilty sets up matter inconsistent with the plea,~~ or if it appears tht he has entered the plea of guilty through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.

Rule for Courts-Martial 910.

Substitute the following for the current R.C.M. 910(c)(5), (e) and (h)(2):

(c)(5) That if the accused pleads guilty, the military judge may question the accused about the offenses to which the accused has pleaded guilty and, if the accused answers these questions under oath, on the record, and in the presence of counsel, the accused's answers may later be used against the accused in a prosecution for perjury or false statement.

(e) Determining the accuracy of the plea. The military judge shall not accept a plea of guilty without making such inquiry as shall satisfy the military judge that there is a factual basis for the plea. If the military judge questions the accused to determine the accuracy of the plea, the accused will be placed under oath.

(h)(2) Statements by accused inconsistent with plea. If an accused makes a statement to the court-martial, in testimony or otherwise, or presents evidence which is inconsistent with guilt, the military judge may as a matter of discretion enter a plea of not guilty to the affected charges and specifications.

Discussion

A guilty plea should not be rejected because of an inconsistent matter raised by the accused, however, where the military judge finds that the available evidence establishes the accused's guilt beyond a reasonable doubt.

after R.C.M. 910(j), add the following:

(k) Harmless Error. Any variance from the procedures required by this rule which does not affect substantial rights, and in the case of a plea of guilty, does not affect the accused's decision to plead guilty, shall be disregarded.