THE USE OF PLEA STATEMENT WAIVERS IN PRETRIAL AGREEMENTS

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I. Introduction

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 The federal Rules provide that statements made in the course of (1) guilty pleas that are later withdrawn or (2) plea negotiations that do not result in a guilty plea are inadmissible against the defendant who made the statements.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

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

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

4 Mezzanatto, 513 U.S. at 198.

5 Id.

6 Id. at 199.
that decision, commentators have widely criticized both the case and the practice.\(^7\)

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

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

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

\(^9\) *Manual for Courts-Martial, United States, Mil. R. Evid. 410* (2012) [hereinafter MCM]; id. R.C.M. 705. Throughout this article, the term “federal Rules” will be used for FRE 410 and FRCP 11(e), and the term “military Rules” will be used for MRE 410 and RCM 705(e). However, when generically referring to both federal and military Rules, the article will use the term “Rules.”

\(^10\) Both the UCMJ and the Manual for Courts-Martial refer to “pretrial agreements.” See, e.g., UCMJ art. 63 (2012); MCM, supra note 9, R.C.M. 705. Civilian practice refers to pre-trial agreements (PTAs) as “plea agreements.” See, e.g., Fed. R. CRIM. P. 11. The drafters of RCM 910 and its analysis left the term “plea agreement” in place through almost all of the rule when adapting it from the FRCP. See MCM, supra note 9, R.C.M. 910; id. R.C.M. 705 analysis at A21–40–42. Consistent with military usage, this article
different types of agreements made. Part II also addresses the history behind the federal and military Rules, as well as guilty plea procedures in the military. Part III of this article delves into the controversy surrounding the use of Rules waivers, advancing three main arguments for allowing the practice and discussing some procedural protections. Finally, Part IV offers a means of analyzing waivers of the military Rules in military courts.

II. Background

A. Plea Bargaining, Pretrial Agreements, and Contract Law

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


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

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

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

\begin{footnotes}
\item[13] See, e.g., United States v. Carrigan, 778 F.2d 1454, 1462 (10th Cir. 1985); United States v. Miller, 722 F.2d 562, 563 (9th Cir. 1983); Louis, supra note 7, at 234. Of course, an agreement may involve both dismissal of charges and sentence limitations, but rejection of either part invalidates the entire agreement. E.g., United States v. Self, 596 F.3d 245, 249 (5th Cir. 2010); United States v. Perron, 58 M.J. 78, 82 (C.A.A.F. 2003).
\item[14] Rasmussen, supra note 12, at 1552.
\item[15] Id.
\item[16] Id.; see also Graham Hughes, Agreements for Cooperation in Criminal Cases, 45 VAND. L. REV. 1, 2 (1992) (“In cooperation agreements the defendant trades information and testimony, with the promise of enabling the State to make a case against other defendants . . . .") (footnotes omitted); Miriam Hechler Baer, Cooperation’s Cost, 88 WASH. U. L. REV. 903, 920 (2011).
\item[17] Hughes, supra note 16, at 2–3; Baer, supra note 16, at 905. Cooperation agreements can go against one of the benefits of plea bargaining in that they can prevent a quick disposition of the case because the government will wait for the accused to complete his cooperation before sentencing. See Hughes, supra note 16, at 2–3.
\item[18] Rasmussen, supra note 12, at 1552–53.
\item[19] Courts also recognize a third scenario called a post-trial agreement. See, e.g., United States v. Smith, 56 M.J. 271, 279 (C.A.A.F. 2002); United States v. Reyes-Bosque, 596 F.3d 1017, 1025 (9th Cir. 2010).
\item[20] “A ‘proffer agreement’ is generally understood to be an agreement between a defendant and the government in a criminal case that sets forth the terms under which the defendant will provide information to the government during an interview, commonly
Plea negotiations to begin. These proffer agreements serve as a waiver of the Rules and allow the prosecutor to use the accused’s statements against the accused at trial. Proffer agreements generally arise in cooperation cases because if the accused does not have valuable information, he has no need to speak personally in the plea negotiations and can rely on his attorney to negotiate a lesser sentence.

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

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

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

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

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

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

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


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

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

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

United States v. Lundy, 63 M.J. 299, 301 (C.A.A.F. 2006); Acevedo, 50 M.J. at 172. But cf. Teeter, supra note 23 (arguing for a contracts-only analysis, as opposed to a contracts-Due Process hybrid analysis, for waivers of the right to appeal). The Due Process requirements are codified in RCM 705 and 910, which prohibit involuntary terms or terms that deprive the accused of certain rights and require certain actions by the military judge during the providence inquiry. See MCM, supra note 9, R.C.M. 705; id. R.C.M. 910; United States v. Smead, 68 M.J. 44, 59 (C.A.A.F. 2009).
allow the practice to continue under the general principles of contract
law, where the parties are free to bargain for those terms they see fit.\textsuperscript{31} Given that the military Rules are modeled after the federal Rules,\textsuperscript{32} the
history surrounding the federal Rules provides valuable background in
understanding why the military Rules are waivable.

B. Federal Plea Statement Rules

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

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

\textsuperscript{31} See Scott & Stuntz, supra note 11, at 1909–13; Louis, supra note 7, at 249–50; see
also H.R. REP. NO. 94-247, at 6 (1975) (House Judiciary Committee Report on
amendments to FRCP) (“No observer is entirely happy that our criminal justice system
must rely to the extent it does on negotiated dispositions of cases. However, crowded
court dockets make plea negotiating a fact that the Federal Rules of Criminal Procedure

\textsuperscript{32} See infra notes 51–52 and accompanying text.

\textsuperscript{33} Order of November 20, 1972, 409 U.S. 1132, 56 F.R.D. 183 (1972); H.R. DOC. NO.

\textsuperscript{34} Order of November 20, 1972, 56 F.R.D. at 228–29; H.R. DOC. No. 93-46, at 9.

\textsuperscript{35} Kercheval v. United States, 274 U.S. 220, 224 (1927).

\textsuperscript{36} Fed. R. Evid. 410 advisory committee’s note; see also Fed. R. CRIM. P. 11 advisory
committee’s note (“[T]he purpose of [the federal Rules] is to permit the unrestrained
candor which produces effective plea discussions.”); United States v. Barunas, 23 M.J.
71, 76 (C.M.A. 1986) (“The general purpose of Mil.R.Evid. 410 and its federal civilian
counterpart, Fed.R.Evid. 410, is to encourage the flow of information during the plea-
bargaining process and the resolution of criminal charges without ‘full-scale’ trials.”).
judgments” on the use of pleas in antitrust cases. The Senate, concerned that there would be an absolute bar on the use of statements, added exceptions for impeachment and in prosecutions for perjury or false statement. The Conference Committee adopted the Senate version, but added that FRE 410 would not take effect immediately and would be “superseded by any subsequent Federal Rule of Criminal Procedure or Act of Congress with which it is inconsistent.”

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

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

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44 Pub. L. No. 94-149, 89 Stat. 805 (1975). Without explanation, Congress changed the language at the beginning of the rule to “Except as otherwise provided in this rule.” Id.
47 H.R. Doc. No. 112-28, at 19 (2011). Among the stylistic changes was the removal of the “Except as otherwise provided” language at the beginning of the rule. Id.
reader to FRE 410. On the military side, MRE 410 is nearly identical to FRE 410, but the military equivalent to FRCP 11(f) is somewhat different.

C. Military Plea Statement Rules

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

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

49 UCMJ art. 36(a) (2012).
51 Lederer, supra note 50, at 12–13; accord Borch, supra note 50, at 1.
52 MCM, supra note 9, MIL. R. EVID. 1102.
53 Compare FED. R. EVID. 410, with MCM, supra note 9, MIL. R. EVID. 410.
54 MCM, supra note 9, MIL. R. EVID. 410(b). This additional protection was added because such requests require a confession. Id. MIL. R. EVID. 410 analysis, at A22-35; Lederer, supra note 50, at 20.
55 United States v. Barunas, 23 M.J. 71, 75 (C.M.A. 1986) (letter to commanding officer admitting guilt, expressing regret, requesting forgiveness, and asking for punishment short of court-martial excluded under MRE 410); see also United States v. Brabant, 29 M.J. 259, 261 (C.M.A. 1989) (spontaneous statement by accused that he will “take an Article 15, lose a stripe, whatever it takes” excluded under MRE 410). But see Lederer,
“excessively formalistic or technical approach” to MRE 410.56

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

D. Federal and Military Pretrial Agreement and Plea Inquiry Rules

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

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

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

\(^{65}\) MCM, supra note 9, R.C.M. 910.

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

\(^{67}\) See United States v. Soto, 69 M.J. 304, 306 (C.A.A.F. 2011) (“It is axiomatic that ‘[]the military justice system imposes even stricter standards on military judges with respect to guilty pleas than those imposed on federal civilian judges.’”) (quoting United States v. Perron, 58 M.J. 78, 81 (C.A.A.F. 2003)).

\(^{68}\) See UCMJ art. 45 (2012).


\(^{71}\) See infra note 177 and accompanying text.

\(^{72}\) MCM, supra note 9, R.C.M. 705.
any terms or conditions prohibited by law or public policy. Assuming the parties can waive the federal and military Rules described so far, to what extent can the prosecutor use the statements made by the accused?

E. Extent of Waiver

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

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73 Id.
74 Rasmussen, supra note 12, at 1546–47.
76 E.g., United States v. Roberts, 660 F.3d 149 (2d Cir. 2011); United States v. Hardwick, 544 F.3d 565 (3d Cir. 2008); United States v. Rebbe, 314 F.3d 402 (9th Cir. 2002); United States v. Kralich, 159 F.3d 1020 (7th Cir. 1998); United States v. Artis, 261 F. App’x 176 (11th Cir. 2008) (unpub).
77 E.g., United States v. Mitchell, 633 F.3d 997, 1006 (10th Cir. 2011); United States v. Sylvester, 583 F.3d 285 (5th Cir. 2009); United States v. Young, 223 F.3d 905 (8th Cir. 2000); United States v. Burch, 156 F.3d 1315 (D.C. Cir. 1998); United States v. Stevens, 455 F. App’x 343 (4th Cir. 2011) (unpub).
78 Prosecutors likely use this provision to protect against a finding that derivative use immunity applies to plea related statements, whether under the Rules, or under de facto or informal immunity. See, e.g., United States v. Plummer, 941 F.2d 799 (9th Cir. 1991); United States v. Jones, 52 M.J. 60 (C.A.A.F. 1999). The federal witness immunity statute, 18 U.S.C. § 6002 (2012), prohibits the use or derivative use of any information obtained pursuant to a grant of immunity. See Kastigar v. United States, 446 U.S. 43 (1980); cf. MCM, supra note 9, R.C.M. 704; United States v. Mapes, 59 M.J. 60 (C.A.A.F. 2003). The federal circuit courts that have addressed the issue have found that derivative use immunity does not apply to the federal Rules. See, e.g., United States v. Rutkowski, 814 F.2d 594 (11th Cir. 1987); United States v. Cusack, 827 F.2d 696 (11th Cir. 1987); United States v. Ware, 890 F.2d 1008 (2d Cir. 1989); United States v. Rivera, 6 F.3d 431 (7th Cir. 1993); United States v. Millard, 235 F.3d 1119 (8th Cir. 2000).

For military practitioners, however, the CMA has found that derivative use immunity does apply to MRE 410. See United States v. Ankeny, 30 M.J. 10 (C.M.A. 1990); cf. Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 410.09[4] (Joseph M. McLaughlin ed., 2d ed. 2012) (“It would seem that, to enforce the policy underlying Rule 410, the better approach would be to import the ‘fruit of the
court has addressed the issue of using the statements for other purposes.

III. Analysis

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

A. Freedom of Contract

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

poisonous tree’ doctrine into this area.

79 This phrase may cause some to hark back to the Supreme Court’s decision in Lochnerv. New York, 198 U.S. 45 (1905). The intent is not to argue that there is a constitutional right to freedom of contract, though one can certainly make the case. See generally David E. Bernstein, Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform (2011); David N. Mayer, Liberty of Contract: Rediscovering a Lost Constitutional Right (2011).


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

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

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

\textsuperscript{82} Scott & Stuntz, supra note 11, at 1915; Timothy Sandefur, \textit{In Defense of Plea Bargaining}, \textit{REGULATION}, Fall 2003, at 28, 30 (“Once each side possessed those rights and liabilities, they had the right to exchange them.”).

\textsuperscript{83} Scott & Stuntz, supra note 11, at 1913.

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

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

\textsuperscript{86} Scott & Stuntz, \textit{supra} note 11, at 1915.
Some rights are undoubtedly inalienable, such as life, liberty, and the
pursuit of happiness. Rights such as conflict-free counsel and the
human composition of a jury are also not waivable because they are
required for proper factfinding. The Rules are simply not on the same
level as these rights. First, unlike life, liberty, and property, the Rules are
civil rights, not natural rights. The protection of one’s plea-related
statements is not inherent in nature or such that it exists outside of what
is granted by government. Second, a lack of protection for one’s plea-
related statements does not destroy the reliability of the factfinding
process in a court; it enhances it.

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

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87 See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); B.A. Richards,
Inalienable Rights: Recent Criticism and Old Doctrine, 29 PHIL. & PHENOMENOLOGICAL
RES. 391 (1969) (arguing that the founding fathers saw inalienable rights as not being
subject to waiver); see also Sandefur, supra note 82, at 28 ("[A]lthough some natural
rights are inalienable, most rights only make sense if they can be bought and sold.").
89 See Randy E. Barnett, The Proper Scope of the Police Power, 79 NOTRE DAME L. REV.
90 See infra notes 154–60 and accompanying text.
91 See, e.g., Mezzanatto, 513 U.S. at 214 (Souter, J., dissenting); Gershowitz, supra note
7, at 1455–56; Dahlin, supra note 7, at 1379; Keck, supra note 7, at 1397–98.
92 See 18 U.S.C. § 597 (2006); Epstein, supra note 81, at 987–88; Scott & Stuntz, supra
note 11, at 1916.
93 See Epstein, supra note 81, at 970–71; Nancy Jean King, Priceless Process:
Nonnegotiable Features of Criminal Litigation, 47 UCLA L. REV. 113 (1999); Frank H.
Easterbrook, Criminal Procedure as a Market System, 12 J. LEGAL STUD. 289, 316
(1983); Scott & Stuntz, supra note 11, at 1916; see also JOHN STUART MILL, ON LIBERTY
22 (2d ed. 1859) ("[T]he only purpose for which power can be rightfully exercised over
any member of a civilized community, against his will, is to prevent harm to others.").
But cf. Jonathan H. Adler, Conservative Principles for Environmental Reform, 23 DUKE
ENVTL. L. & POL’Y F. 253, 260 n.33 (2013) (arguing that externalities do not
automatically justify government intervention).
94 See Gannett Co. v. DePasquale, 443 U.S. 368, 383 (1979) ("In an adversary system of
criminal justice, the public interest in the administration of justice is protected by the
imposed by allowing waiver? The only possible cost is that the plea negotiation will be chilled,\textsuperscript{95} causing the case to go to trial. The fact that a case goes to trial cannot be a negative externality in a system where the presumption is that cases will go to trial.\textsuperscript{96}

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

\textsuperscript{95} This, of course, is subject to dispute. See infra Part III.C.


\textsuperscript{97} See United States v. Mezzanatto, 513 U.S. 196, 200–02 (1995); Shutte v. Thompson, 82 U.S. (15 Wall.) 151, 159 (1872); Note, Contra" variability of Evidence, 46 HARV. L. REV. 138, 139–40 (1933). That personal rights are waivable is a long-standing rule in military courts as well. See United States v. Hounshell, 21 C.M.R. 129, 132 (C.M.A. 1956) ("The right to a speedy trial is a personal right which can be waived."). An accused even has the constitutional right to waive his constitutional right to counsel under the Sixth Amendment. See Faretta v. California, 422 U.S. 806 (1975).

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

\textsuperscript{99} See Mezzanatto, 513 U.S. at 201 ("[A]bsent some affirmative indication of Congress' intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement. . . .")

\textsuperscript{100} MCM, supra note 9, MIL. R. EVID. 103 (without timely objection or offer of proof, error is forfeited, unless plain error); id. R.CM. 905(e) (failure to raise objection, other than to jurisdiction or failure to allege an offense, constitutes waiver); Salinas v. Texas, 133 S. Ct. 2174, 2183 (2013) (opinion of Alito, J.) ("[I]t is settled that forfeiture of the privilege against self-incrimination need not be knowing.") (citing Minnesota v. Murphy,
In *Mezzanatto*, the Court found that the text of FRE 410, identical to that of MRE 410, reflected a presumption of party control over the rule.\(^{102}\) The plain language of the rule only prohibits plea-related statements introduced “against” the accused, thus allowing the accused to introduce the plea-related statements if it fits the defense’s trial strategy.\(^{103}\) Additionally, one of the exceptions within both FRE 410 and MRE 410 allows admission of plea-related statements when other parts of the statements have been introduced, “contemplat[ing] a degree of party control that is consonant with the background presumption of waivability.”\(^{104}\)

Since there is an infinite number of ways to order one’s life, society allows parties to make arrangements among themselves, a form of private lawmaking.\(^{105}\) If the parties fail to regulate one of the infinite numbers of ways to order one’s life, society allows parties to make arrangements among themselves, a form of private lawmaking.\(^{105}\) If the parties fail to regulate one of the infinite numbers of ways to order one’s life, society allows parties to make arrangements among themselves, a form of private lawmaking.\(^{105}\) If the parties fail to regulate one of the infinite numbers of ways to order one’s life, society allows parties to make arrangements among themselves, a form of private lawmaking.\(^{105}\) If the parties fail to regulate one of the infinite numbers of ways to order one’s life, society allows parties to make arrangements among themselves, a form of private lawmaking.\(^{105}\) If the parties fail to regulate one of the infinite numbers of ways to order one’s life, society allows parties to make arrangements among themselves, a form of private lawmaking.\(^{105}\) If the parties fail to regulate one of the infinite numbers of ways to order one’s life, society allows parties to make arrangements among themselves, a form of private lawmaking.\(^{105}\) If the parties fail to regulate one of the infinite numbers of ways to order one’s life, society allows parties to make arrangements among themselves, a form of private lawmaking.\(^{105}\) If the parties fail to regulate one of the infinite numbers of ways to order one’s life, society allows parties to make arrangements among themselves, a form of private lawmaking.\(^{105}\) If the parties fail to regulate one of the infinite numbers of ways to order one’s life, society allows parties to make arrangements among themselves, a form of private lawmaking.\(^{105}\) If the parties fail to regulate one of the infinite numbers of ways to order one’s life, society allows parties to make arrangements among themselves, a form of private lawmaking.\(^{105}\) If the parties fail to regulate one of the infinite numbers of ways to order one’s life, society allows parties to make arrangements among themselves, a form of private lawmaking.\(^{105}\) If the parties fail to regulate one of the infinite numbers of ways to order one’s life, society allows parties to make arrangements among themselves, a form of private lawmaking.\(^{105}\) If the parties fail to regulate one of the infinite numbers of ways to order one’s life, society allows parties to make arrangements among themselves, a form of private lawmaking.\(^{105}\)
number of possibilities in an agreement, any default rules established by the legislature will apply. For plea-related statements, the default rule is that they are inadmissible. However, that does not speak to when the parties agree to waive the Rules. The fact that a default rule exists does not preclude the parties from agreeing to alter it. In addition to this broad notion of freedom of contract, more practical, legal reasons support a rule that accused can waive their protections under the military Rules.

B. Parity Between Federal and Military Systems

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

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

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See id. at 629; Scott & Stuntz, supra note 11, at 1913.  
Cf. Mezzanatto, 513 U.S. at 208 n.5 (“The Advisory Committee’s Notes always provide some policy justification for the exclusionary provisions in the Rules, yet those policies merely justify the default rule of exclusion; they do not mean that the parties can never waive the default rule.”).  
Id.; see also MCM, supra note 9, MIL. R. EVID. 101 analysis, at A22-2 (“[T]o the extent to which the Military Rules do not dispose of an issue, the Article III Federal practice when practicable and not inconsistent or contrary to the Military Rules shall be applied.”).  
Lederer, supra note 50, at 12–13; Borch, supra note 50, at 1.  
See MCM, supra note 9, MIL. R. EVID. analysis; Lederer, supra note 50.  
MCM, supra note 9, MIL. R. EVID. 101(b)(1); see also id. MIL. R. EVID. 101 analysis, at A22-2.
To require future uniformity with the FRE, the drafters also included MRE 1102(a) to mandate that amendments to the FRE automatically apply to the MRE unless contrary action is taken.\textsuperscript{113} The CMA, both before and after the enactment of the MRE, has recognized the need to maintain uniformity of practice with the federal courts.\textsuperscript{114}

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

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

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{113} Id. Mit. R. Evid. 1102(a); see also Lederer, supra note 50, at 13 (“Colonel Alley intended not just that the codification reflect the Federal Rules of Evidence, but that all future military evidentiary law echo it as well, unless a valid military reason existed for departing from it.”).
\item\textsuperscript{115} See supra Part II.E; United States v. Orm Hieng, 679 F.3d 1131, 1138 (9th Cir. 2012) (finding waivers of the federal Rules are so generally recognized that the judge “would not be surprised if a defendant does not object to the government’s use” of plea related statements).
\item\textsuperscript{116} See supra notes 76–77 and accompanying text.
\item\textsuperscript{117} Courts should give “complete deference” to the President’s practicality determination. See Hamdan v. Rumsfeld, 548 U.S. 557, 623 (2006). However, in Hamdan the Supreme Court found that Article 36(b)’s requirement that the prescribed rules must be “uniform insofar as practicable” can act as a limit on the President’s rule-making authority. See id. at 620.
\item\textsuperscript{118} United States v. Custis, 65 M.J. 366, 370 (C.A.A.F. 2007).
\end{enumerate}
\end{footnotesize}
another part of the statement is admitted, and another for perjury or false
statement.119 Arguably, because there is no waiver exception, waiver
should not be allowed.120 However, this only addresses the default rule
of what happens when the parties do not agree otherwise; the argument
does not address whether the accused can waive the default rule.121 In
other words, the fact that the Rules do not have the word “waiver” in
them does not mean that the accused cannot waive them. The parties
have deviated from the default by exercising the common law
presumption of waivability.122

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

119 MCM, supra note 9, MIL. R. EVID. 410.
120 See, e.g., Gershowitz, supra note 7, at 1451–54; see also infra notes 123–25 and
accompanying text.
121 See supra note 105–07 and accompanying text.
to the background common law in interpreting the FRE); MCM, supra note 9, MIL. R.
EVID. 101(b)(2).
123 See, e.g., Gershowitz, supra note 7, at 1451–54; Dahlin, supra note 7, at 1367 n.9. In
Crosby v. United States, the Supreme Court relied in part on “except as otherwise
provided” language in FRCP 43 to find that an accused could not be tried in absentia.
506 U.S. 255, 258–59 (1993). Although both the Court and FRCP 43 used the word
“waiver,” the case was one of forfeiture since the accused had not affirmatively waived
his right to be present. See id. at 256. Additionally, FRCP 43 specifically discusses the
issue of waiver, so Congress had replaced the common law rule presuming waivability
with the procedure spelled out in FRCP 43. Id. at 258–59. The analysis in this article
deals with an explicit, knowing waiver of the military Rules, not forfeiture. Also, MRE
410 does not discuss “waiver,” or even use the term, so the President has not modified or
replaced the common law presumption of waivability.
124 FED. R. EVID. 410; MCM, supra note 9, MIL. R. EVID. 410; see supra note 47 and
accompanying text.
125 See supra note 37 and accompanying text.
Finally, the last question is whether waiver would be contrary to or inconsistent with the UCMJ. There is nothing unique about the UCMJ that would prevent waiver. The CAAF has recognized that all manner of rights are waivable, except those listed in RCM 705.\(^\text{126}\) However, Article 45 is important if a waiver allows use of the accused’s statements during the providence inquiry.\(^\text{127}\) The CMA has stated that allowing evidence from a rejected providence inquiry “would violate the spirit, if not the letter, of Article 45(a)”\(^\text{128}\). However, that merely restates the general policy behind the existence of Article 45. It does not answer the question of whether a waiver would be inconsistent with Article 45. As the CMA recognized, nothing in the letter of Article 45 prohibits the subsequent use of providence statements. Besides, like any other statute, Article 45 is susceptible to waiver.

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

C. Waiver Encourages Settlement

Perhaps the most consistent argument made by opponents to a waiver of the federal Rules in a proffer agreement is the supposed negative effect it will have on plea negotiations.\(^\text{131}\) Since proffer


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


\(^\text{129}\) MCM, supra note 9, R.C.M. 705(e).

\(^\text{130}\) Id.

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

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

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

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133 Ankeny, 30 M.J. at 15; cf. Easterbrook, supra note 81, at 1975 (“Plea bargains are preferable to mandatory litigation . . . because compromise is better than conflict.”).
134 See generally Easterbrook, supra note 81; Easterbrook, supra note 93; Rasmussen, supra note 12.
136 See Cicchini, supra note 11, at 162–63; Easterbrook, supra note 81, at 1971; Rasmussen, supra note 12, at 1562–63. Although the military has a higher turnover rate of convening authorities, prosecutors, and defense counsel than civilians, the institutional and reputational concerns remain the same.
137 See Rasmussen, supra note 12, at 1563. This argument assumes that the government will not abuse its power. In the end, courts must rely on the good faith of prosecutors and invalidate abusive agreements. See United States v. Mezzanatto, 513 U.S. 196, 210 (1995); Cicchini, supra note 11, at 182; see also Rasmussen, supra note 12, at 1573 (“The goal of plea bargaining is not for a litigant to do better than his opponent, or to reduce his opponent’s welfare, but to do as well for himself as possible.”). The U.S.
accused, however, each case is a one-time event, so he does not have the same incentive.\textsuperscript{138} He also has the right to withdraw from the PTA at any time, while the government is more limited in its withdrawal options.\textsuperscript{139} Given this starting position, in a penalty bargaining scenario, an accused would be willing to waive the Rules in order to increase the credibility of his proffer and obtain access to a busy prosecutor.\textsuperscript{140}

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

\textsuperscript{138} Rasmussen, \textit{supra} note 12, at 1563. The reputation of the accused’s attorney, however, can improve the accused’s reputational position. See Easterbrook, \textit{supra} note 81, at 1971.

\textsuperscript{139} MCM, \textit{supra} note 9, R.C.M. 705(d)(4).

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

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

\textsuperscript{142} Brief for the United States, \textit{Mezzanatto}, 513 U.S. 196 (No. 93-1340), 1994 WL 234577 at *29 n.9.

\textsuperscript{143} See \textit{supra} note 78.
Thus, the government has to either delay the accused’s sentencing until after he finishes cooperating, or attempt to vacate the sentence and re-try the accused if he fails to fully cooperate.\footnote{See Ricketts v. Adamson, 483 U.S. 1 (1987). Although the Supreme Court has held that this does not violate Double Jeopardy, \textit{id.} at 9, the time and expense involved in such a process makes this course of action a difficult and cost-prohibitive one to follow.} Knowing all this, the prosecutor will be hesitant to spend his time negotiating without some assurance that the information is reliable. He would be safer seeking a sure conviction against the accused.\footnote{See United States v. Mezzanatto, 513 U.S. 196, 207–08 (1995); \textit{Krilich}, 159 F.3d at 1025; see also Easterbrook, \textit{supra} note 93, at 310.} The prosecutor will ask for a waiver of the Rules as an incentive to enter into negotiations and as a form of punishment if the accused fails to provide truthful information or to cooperate fully.\footnote{See Rasmussen, \textit{supra} note 12, at 1563.} The accused would agree to waive the Rules to obtain a more favorable sentence than what he would get at trial.\footnote{See Easterbrook, \textit{supra} note 93, at 297; Rasmussen, \textit{supra} note 12, at 1573; see also \textit{id.} at 1580 (“If plea bargaining would be unsuccessful without the waiver and successful with it, then both prosecutor and defendant gain from the waiver, because both prosecutor and defendant payoffs are bigger from successful settlement than from trial.”).}

The discussion so far has focused on waiving the protection of the Rules in a proffer agreement. The question remains about waivers in the PTA itself. Here, the result is straightforward. When a waiver is located in the PTA itself, plea negotiations are already over, so the waiver could not have had a chilling effect.\footnote{See, e.g., United States v. Mitchell, 633 F.3d 997, 1005–06 (10th Cir. 2011); United States v. Burch, 156 F.3d 1315, 1321–22 (D.C. Cir. 1998).} At the time the accused made his statements during the plea negotiations, MRE 410 fully protected them. In the PTA, a waiver only serves to provide another incentive for the accused not to withdraw.\footnote{That the accused has an \textit{incentive} not to withdraw does not prevent his withdrawal “at any time.” MCM, \textit{supra} note 9, R.C.M. 705(d)(4). It merely allows the government to present evidence it could not otherwise if he chooses to withdraw. See Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (“While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices \textit{[is]} an inevitable—and permissible—attribute of any legitimate system which tolerates and encourages the negotiation of pleas.”) (citation and internal quotations omitted); see also United States v. Velez, 354 F.3d 190, 196 (2d Cir. 2004) (no violation of constitutional right to present a defense, to effective assistance of counsel, or to a fair trial from a waiver of the federal Rules).}

The possibility remains that some prosecutors may want to make a waiver of the military Rules a mandatory provision of any proffer or
PTA.  Not only would such a mandatory provision possibly be coercive, but the CAAF has indicated it will strike down mandatory terms. From a practical perspective, the defense can simply refuse to proffer and submit a PTA. Since the convening authority makes the ultimate decision, he can approve an acceptable deal put forth by the defense without any proffer. Also, with no sentencing guidelines, the defense is not dependent on the prosecutor for a reduction in sentence and can always plead guilty without a PTA or force the prosecutor to put on his case at trial.

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

150 See Mezzanotto, 513 U.S. at 217–18 (Souter, J., dissenting); Rasmussen, supra note 12, at 1582.
151 Cf. infra notes 170–76 and accompanying text.
153 See supra note 137.
154 See Mezzanotto, 513 U.S. at 204; Lopez v. United States, 373 U.S. 427, 440 (1963); United States v. Romano, 46 M.J. 269, 274 (C.A.A.F. 1997) (“[T]he purpose of a criminal trial is truthfinding within constitutional, codal, Manual, and ethical rules.”); MCM, supra note 9, MIL. R. EVID. 102 (stating the purpose of the MRE is so “that the end that the truth may be ascertained”).
156 See Mezzanotto, 513 U.S. at 205; United States v. Roberts, 660 F.3d 149, 157 (2d Cir. 2011); United States v. Mitchell, 633 F.3d 997, 1005 (10th Cir. 2011); United States v. Sylvester, 583 F.3d 285, 293–94 (5th Cir. 2009); United States v. Rebbe, 314 F.3d 402, 408 (9th Cir. 2002); Note, supra note 98, at 142–43.
157 See Withrow v. Williams, 507 U.S. 680, 703 (1993) (O’Connor, J., concurring in part and dissenting in part) (stating that “involuntary or compelled statements ... are of dubious reliability,” but that “voluntary statements are ‘trustworthy’” and “their
One commentator has argued that trials do not convey truth accurately because they are filled with rules that inhibit full disclosure of information. If deception can be penalized, bargaining is better at arriving at the truth because the parties can consider all the evidence, admissible or not, and the lawyers involved are more knowledgeable than jurors. This argument serves as a separate justification for allowing waivers of the military Rules. By increasing the evidence in front of the factfinder, a waiver helps alleviate the disparity between bargaining and trial, bringing trials closer to the ideal.

D. Procedural Protections

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

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

\[\text{suppression actually impairs the pursuit of truth by concealing probative information from the trier of fact.}^{158}\]

\[\text{See Model Rules of Prof'L Conduct R. 3.3 (1983); Nix, 475 U.S. at 173 (“[T]he right to counsel includes no right to have a lawyer who will cooperate with planned perjury. A lawyer who would so cooperate would be at risk of prosecution for suborning perjury, and disciplinary proceedings, including suspension or disbarment.”); Velez, 354 F.3d at 192.}^{159}\]

\[\text{See Easterbrook, supra note 81, at 1971; Easterbrook, supra note 93, at 316–17; Krilich, 159 F.3d at 1025.}^{160}\]

\[\text{See generally Saks, supra note 27 (describing increased importance of factfinding and offering suggestions to improve accuracy).}^{161}\]

\[\text{See Brady v. United States, 397 U.S. 742, 746 n.6, 758 (1970).}^{162}\]

\[\text{See Mitchell, 633 F.3d at 1002 (plea voluntary when competent counsel candidly advised “you would be a fool not to take this offer”); United States v. Carr, 80 F.3d 413, 417 (10th Cir. 1996) (finding guilty plea voluntary despite accused’s claim that he was “hounded, browbeaten and yelled at,” as well as called “stupid” and “a f[@]ing idiot,” by his attorney, who thought the government’s offer was a good one).}^{163}\]
However, ineffective assistance of counsel can render the accused’s plea involuntary and force it to be set aside. If counsel fails to advise the accused on his rights under the military Rules and the consequences of a waiver, then the accused would have a promising claim for ineffective assistance of counsel and withdrawal from the waiver.

Another valuable protection is the military judge and his role in the providence inquiry and review of the PTA. Under RCM 910, the military judge must personally advise the accused of his rights, ensure that the plea is voluntary, obtain a factual basis for the accused’s guilt, and inquire into the PTA and its terms. Having the military judge conduct this process ensures not only that the plea is voluntary and knowing, but that the terms of the PTA, including any waivers, are also voluntary and knowing. While obtaining the factual basis for the plea, an accused’s plea-related statements at trial. See supra note 103 and accompanying text.

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

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

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

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

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

167 See United States v. Soto, 69 M.J. 304, 306–07 (C.A.A.F. 2011); Mitchell, 63 F.3d at
the military judge must personally ensure that the accused understands the extent of his waiver of the right against self-incrimination. Thus, the military judge must explain that if the accused answers the questions, but the plea is either not accepted or withdrawn, a waiver of the military Rules would allow the government to use his statements from the inquiry, and any negotiations, against him at a later trial.

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


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

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

171 Mezzanatto, 513 U.S. at 210.

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

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

174 United States v. Ruiz, 536 U.S. 622, 629 (2002); see also United States v. Krilich, 159 F.3d 1020, 1026 (7th Cir. 1998).
175 Mezzanatto, 513 U.S. at 209–10.
179 United States v. Edwards, 58 M.J. 49, 52 (C.A.A.F. 2003). In Edwards, the court cited to RCM 705(c)(1)(B) as listing the terms that violate public policy, then stated that “when pretrial agreements are challenged based upon alleged violations of public policy, the cases invariably discuss the issue in the context of waiver.” Id. This same process was repeated in Gladue, where the court dismissed a public policy argument by stating that the rights in question were not ones specifically prohibited in RCM 705(c)(1)(B). 67 M.J. at 314; see also Kessler, supra note 105, at 630–31 (stating that courts should not
listed in RCM 705(c)(1)(B) come close to being violated by a waiver of the military Rules.  Thus, public policy is coextensive with the knowing and voluntary requirement and RCM 705, neither of which prohibits a waiver of the military Rules. By reviewing for ineffective assistance of counsel and ensuring compliance with RCM 705 and 910, courts are providing sufficient procedural safeguards to protect the accused. All of the preceding arguments can be summarized into a straightforward test for courts to apply.

IV. Proposed Means of Analysis

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

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

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

182 See King, supra note 93, at 131.
The proposed test has three parts: (1) that the plea is voluntary and knowing; (2) that the text of waiver is unambiguous; and (3) that the waiver does not violate notions of fundamental fairness.

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

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

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

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

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

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

186 See supra Part III.D; cf. Andis, 333 F.3d at 890–91; Teeter, 257 F.3d at 24; Fed. R. Crim. P. 11 advisory committee’s note.

187 See United States v. Cross, No. 200602310, 2007 WL 2846918, at *1–4 (N-M. Ct. Crim. App. 2007) (unpub). However, use of statements from outside the providence inquiry do not face such a high burden and can be waived. Id. at *5. The change to the
Second, the language of the waiver must be clear and unambiguous as to the proposed use by the government. The courts should interpret any ambiguity in favor of the accused. This is a relatively straightforward proposition and exists because of the significant rights of the accused. Nevertheless, courts must be wary not to use this rule as an excuse to create an ambiguity that does not exist in order to arrive at a just result.

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

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

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

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

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

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

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

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

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

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

See supra notes 150–53 and accompanying text.
V. Conclusion

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

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

197 See MCM, supra note 9, MIL. R. EVID. 403.
198 Cf. Teeter, 257 F.3d at 23.
199 See Milit., supra note 93, at 22; Easterbrook, supra note 81, at 1976 (“Why is liberty too important to be left to the defendant whose life is at stake? Should we not say instead that liberty is too important to deny effect to the defendant's choice?”); King, supra note 93, at 131 (“Banning waiver altogether . . . resembles drafting the accused as an unwilling soldier in the fight against error in the criminal process, forcing him to assume a risk that he may have preferred to minimize through a negotiated settlement.”).
200 See Easterbrook, supra note 81, at 1975 (“Rights that may be sold are more valuable than rights that must be consumed.”).
201 See Adams v. United States ex rel. McCann, 317 U.S. 269, 280 (1942) (“[T]o deny [an accused] in the exercise of his free choice the right to dispense with some of [his Constitutional] safeguards . . . is to imprison a man in his privileges . . . .”)