

**IF I HAVE TO FIGHT FOR MY LIFE—SHOULDN'T I GET TO
CHOOSE MY OWN STRATEGY? AN ARGUMENT TO
OVERTURN THE UNIFORM CODE OF MILITARY JUSTICE'S
BAN ON GUILTY PLEAS IN CAPITAL CASES**

MAJOR FRANK E. KOSTIK JR.*

You have built up a good piece of legislation here. It may not be completely free of the need for further revision in the future, but, knowing the personnel of the Committee on Armed Services, I have tremendous confidence . . . [that] you will continue your study and observation and develop further legislation of this kind when needed. . . . It is also important that Congress be ever ready to revise and improve the system in the way best illustrated by the bill H.R. 4080 now before us.¹

I. Introduction

In late 2009, the military charged Major (MAJ) Nidal Hasan of killing thirteen and wounding thirty-two unarmed soldiers as they prepared to deploy at Fort Hood, Texas.² On August 15, 2012, Major

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¹ Uniform Code of Military Justice, 95 CONG. REC. 5718 (1949) [hereinafter H.R. 4080 Debate], reprinted in Dep't. of Navy, Uniform Code of Military Justice, Congressional Floor Debate on Uniform Code of Military Justice 31–32, available at http://www.loc.gov/rr/frd/Military_Law/pdf/congr-floor-debate.pdf (statement of Congressman Thomas E. Martin in support of H.R. 4080, a bill to enact and establish the Uniform Code of Military Justice (UCMJ)).

² See *Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012); TIMES TOPICS, *Nidal Malik Hasan*, http://topics.nytimes.com/top/reference/timestopics/people/h/nidal_malik_hasan/index.html (last visited June 15, 2014).

Hasan attempted to plead guilty at his court-martial³ in contravention of Article 45(b)'s prohibition on receiving pleas "to any charge or specification alleging an offense for which the death penalty may be adjudged."⁴ The military judge denied his request, which forced the case to trial on the merits.⁵ Major Hasan was later convicted of the charged offenses and sentenced to death.⁶ In his attempt to plead guilty to the offenses charged, Major Hasan joined numerous other military capital defendants who have either attempted to plead guilty at trial or reserved the inability to plead guilty at trial as an appellate issue warranting reversal of the conviction.⁷ This example raises the question: Why does the military justice system prohibit guilty pleas in capital cases, when a large majority of death penalty states and the federal system permit them?

In *United States v. Matthews*, the Court of Military Appeals (now the Court of Appeals for the Armed Forces (CAAF)) ruled that the prohibition in Article 45(b) is constitutional.⁸ Constitutionality of a statute, however, should not end the analysis of whether a statute is the best law for a particular system of justice. The military justice system is no different and requires "continue[d] . . . study and observation" to develop legislation as needed.⁹ Article 45(b)'s prohibition on guilty pleas in capital cases presents an issue that deserves further analysis.

The statute, as drafted, rose out of frustration by convening authorities that records of trial contained little to no information for them to review. The lack of information made it nearly impossible for them to

³ See Kari Huus, *Nidal Hasan Barred from Pleading Guilty to Murder in 2009 Fort Hood Shooting*, NBC News (Aug. 15, 2012), http://usnews.nbcnews.com/_news/2012/08/15/13299644-nidal-hasan-barred-from-pleading-guilty-to-murder-in-2009-fort-hood-shooting (last visited June 15, 2014).

⁴ UCMJ art. 45(b) (2012); see Appendix A (Article 45. Pleas of the Accused) (providing complete text of UCMJ art. 45 (2012)).

⁵ See Huus, *supra* note 3.

⁶ See Billy Kenber, *Nidal Hasan Sentenced to Death for Fort Hood Shooting Rampage*, WASH. POST (Aug. 28, 2013), http://www.washingtonpost.com/world/national-security/nidal-hasan-sentenced-to-death-for-fort-hood-shooting-rampage/2013/08/28/aad28de2-0ffa-11e3-bdf6-e4fc677d94a1_story.html (last visited June 15, 2014).

⁷ See generally *United States v. Matthews*, 16 M.J. 354, 362–63 (C.M.A. 1983) (accused attempting to plead guilty to premeditated murder at trial, then raising inability to plead as an appellate issue); see also Brief for Appellant at 433, 466, *United States v. Akbar*, No. 20050514, 2012 WL 2887230 (A. Ct. Crim. App. July 13, 2012) (on file with author).

⁸ 16 M.J. 354, 362–63 (C.M.A. 1983).

⁹ See H.R. 4080 Debate, *supra* note 1.

determine what happened at trial and assess the degree of criminality of the accused or if the accused was actually guilty. This review was particularly important to the accused because it represented the only appellate process available. Even when Congress passed the Uniform Code of Military Justice (UCMJ), many of the protections provided to the accused today, like a detailed providence inquiry, increased requirements for mitigation evidence, and additional evidentiary requirements in capital cases did not exist. Thus, a rule like Article 45(b) that protected the accused by forcing information into the record through a contested case made sense.

This article argues that in light of a detailed providence inquiry,¹⁰ an increased requirement for mitigation investigations,¹¹ and the President's addition of Rule for Courts-Martial (RCM) 1004,¹² Article 45(b)'s prohibition on guilty pleas in capital-eligible cases no longer serve—nor needs to serve—as the robust protection that it once did. Therefore, Congress should amend Article 45(b) to permit a military accused to plead guilty in a capital-eligible offense.¹³ Such a change in the law would bring the UCMJ in line with the federal code and the large majority of states who permit guilty pleas in capital cases. In addition, the change would provide greater latitude to military accused to focus their efforts and strategy on simply avoiding death. A decision to plead guilty by the accused also provides ancillary benefits to the government, such as increased judicial economy, economic savings, and quicker and assured closure for military units and victims' families. This article does not argue that Article 45(b) is unconstitutional as it exists or was an irrational rule when enacted, only that Article 45(b) is an antiquated rule that has been overcome by other protections for the accused and creates needless litigation. When such situations occur in the law, common sense and logic dictate change.

¹⁰ See *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

¹¹ See Major David D. Velloney, *Balancing the Scales of Justice: Expanding Access to Mitigation Specialists in Military Death Penalty Cases*, 170 MIL. L. REV. 1, 17–26 (2001) (arguing that *United States v. Loving*, 41 M.J. 213 (C.A.A.F. 1994) and *United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999) are out of step with *United States v. Curtis*, 46 M.J. 129 (C.A.A.F. 1997), *United States v. Simoy*, 50 M.J. 1 (C.A.A.F. 1998), and *United States v. Murphy*, 50 M.J. 4 (C.A.A.F. 1998) and the legal community writ large, which tends to support a more lenient standard in granting mitigation specialists for presentencing ostensibly because of an increased requirement to ensure the panel hears all relevant mitigation evidence in capital cases).

¹² See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1004 (2012) [hereinafter MCM].

¹³ UCMJ art. 45(b) (2012).

II. Historical Purpose of Article 45(b)

Article 45(b)'s prohibition against guilty pleas in capital cases is the direct result of the convening authorities' need to review court-martial results. Prior to the passage of the UCMJ, no formal appellate courts existed to protect military accused.¹⁴ Rather, as early as 1775 with the passage of the earliest version of the Articles of War for the United States,¹⁵ only the convening authority reviewed court-martial proceedings to determine whether the process and sentence were just.¹⁶ In doing so, they reviewed the records of the proceedings and determined whether the court-martial was procedurally and substantively fair.¹⁷ If not satisfactory, they could order a new trial or grant other meaningful relief.¹⁸ As such, an accused convicted of a capital crime often went from the courtroom to the hanging post at lightning speed in comparison with today's lengthy appellate process.¹⁹

At this early period in U.S. history, courts-martial involving a plea of guilty by the accused likely took even less time, as it was common practice not to accept any evidence.²⁰ The accused, often without counsel, would simply plead guilty to the offense charged. Upon

¹⁴ See JONATHAN LURIE, *MILITARY JUSTICE IN AMERICA: THE U.S. COURT OF APPEALS FOR THE ARMED FORCES, 1775–1980*, at 13 (Univ. Press of Kan. rev. and abr. ed. 2001) (1992).

¹⁵ See 1775 Articles of War, reprinted in WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 953 (2d ed. 1920 reprint), available at http://www.loc.gov/rr/frd/Military_Law/pdf/ML_precedents.pdf (The 1775 Articles of War were enacted in 1775 and revised in 1776 by the Continental Congress.).

¹⁶ See LURIE, *supra* note 14, at 2; M. Mauer, *Military Justice Under General Washington*, 28 MIL. AFFS., no. 1, Spring 1964, at 13 (discussing General Washington's detailed review of court-martial proceeding in capital cases).

¹⁷ See Mauer, *supra* note 16, at 13.

¹⁸ See 1775 Articles of War, *supra* note 15, art. LXVII (providing “[t]hat the general, or commander in chief for the time being, shall have full power of pardoning, or mitigating any of the punishments ordered to be inflicted, for any of the offences mentioned in the foregoing articles; and every offender, convicted as aforesaid, by any regimental court-martial, may be pardoned, or have his punishment mitigated by the Colonel or officer commanding the regiment”).

¹⁹ See Mauer, *supra* note 16 (detailing that Thomas Hickey, the first soldier ordered executed by General George Washington under the Articles of War, was executed the day following his trial. Hickey was convicted for attempting to enlist soldiers from the Continental Army into British service); *United States v. Akbar*, No. 20050514, 2012 WL 2887230 (A. Ct. Crim. App. July 13, 2012) (affirming the adjudged death sentence for Hassan Akbar, who killed two military officers and wounded fourteen others while deployed, over nine years after his crimes).

²⁰ See WINTHROP, *supra* note 15, at 278–79.

acceptance of the plea, the case was complete because the court took no evidence and there was no presentencing procedure.²¹ Without taking evidence, the review by the convening authority was not an effective tool in the process.

A common example of this involved cases of desertion.²² Desertion then required, as it does today, a specific intent to remain away from one's unit permanently; the lesser offense of absence without leave did not contain this element.²³ Thus, a soldier who intended to return to his unit after a few days of debauchery was only guilty of being absent without leave and not deserting. Desertion in a time of war was, as it is today, a capital offense.²⁴

Unfortunately, many soldiers who pled guilty to desertion did not understand this legal nuance and, without representation, pled to the more serious offense of desertion without ever explaining what they did or why they did it.²⁵ Because the court-martial did not take testimony, it was impossible for the reviewing authority to determine if the soldier was actually guilty of desertion or if the sentence was appropriate.²⁶ This practice created problems early on with the reviewing authority's ability to review the findings and sentence.²⁷ With no formal appellate process and a lack of formal rules concerning a record of trial, little incentive existed for the government to prepare a record of trial detailing the evidence and testimony.

In 1829, the commanding general of the Army and lawyer Major

²¹ See generally BRIGADIER GENERAL GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES TOGETHER WITH THE PRACTICE AND PROCEDURE OF COURTS-MARTIAL TRIBUNALS 117 n.1 (John Wiley & Sons 1906) (noting "[i]n a majority of these cases [concerning deserters] in which the plea is 'guilty' the record is found to contain no testimony whatever").

²² See WILLIAM WINTHROP, A DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY 376-77 (1880), available at <http://archive.org/stream/digestofopinions000unitrich#page/n7/mode/2up>; WINTHROP, *supra* note 15, at 277 n.89.

²³ See, e.g., 1874 Articles of War art. 32 (finding violation occurs simply by absenting oneself from a unit), and art. 47 (providing violation requires intent to remain away permanently), reprinted in WINTHROP, *supra* note 15, at 988-89; UCMJ art. 85 (noting violation requires intent to remain away permanently), and *id.* art. 86 (providing violation occurs simply by absenting oneself from a unit).

²⁴ See UCMJ art. 85 (2012); 1775 Articles of War, *supra* note 15, at Additional Articles (possible punishment for desertion in time of war was death).

²⁵ See WINTHROP, *supra* note 15, at 277 n.89.

²⁶ See DAVIS, *supra* note 21, at 116.

²⁷ See *id.* at 117 n.1.

General Alexander Macomb²⁸ attempted to remedy the lack of evidence in guilty plea cases by issuing General Order from Army Headquarters, No. 60, directing that:

courts-martial in capital cases, and especially cases of desertion, not to receive the plea of guilty, but, entering for the prisoner the plea of not guilty, to, “determine the grade of the offence and quantum of guilt by the character of the evidence produced to them.”²⁹

This absolute prohibition did not last long, and Major General Macomb issued another order aimed at resolving the issue. In General Order from Army Headquarters, No. 23 in 1830, he replaced the absolute prohibition with a less stringent rule. The new order allowed guilty pleas but mandated courts-martial must receive and report evidence, as it is “essential that the facts and particulars should be known to those whose duty it is to report on the case, or who have discretion in carrying the sentence into effect.”³⁰ The 1830 order both preserved the ability to plead guilty, even to capital offenses, and ensured a record for review.

Major General Macomb never memorialized why he altered the prohibition in 1830. However, a review of law in the United States during the nineteenth century indicates states disfavored a prohibition on pleas.³¹ Macomb’s prohibition was therefore at odds with the majority rule. The 1830 order brought the military’s practice in line with that of the states. Moreover, the absolute prohibition was also inconsistent with

²⁸ See generally WILLIAM GARDNER BELL, *COMMANDING GENERALS AND CHIEFS OF STAFF 1775–2010: PORTRAITS & BIOGRAPHICAL SKETCHES OF THE UNITED STATES ARMY’S SENIOR OFFICER 76–78* (Center of Military History, U.S. Army, 2010) (Major General Macomb was the Commanding General of the Army from May 29, 1828, to June 25, 1841.).

²⁹ WINTHROP, *supra* note 15, at 278–79 (citation omitted) (quoting Headquarters, U.S. Dep’t of Army Gen. Order No. 60 (1829)) (emphasis added).

³⁰ *Id.* at 279 (quoting Headquarters, U.S. Dep’t of Army Gen. Order No. 23 (1830)).

³¹ See FRANKLIN FISKE HEARD, *THE PRINCIPLES OF CRIMINAL PLEADING* 263 (1879) (explaining that a guilty plea is to be accepted in a capital case if accused “comprehends the effects of his plea”); WM. L. CLARK, JR., *HAND-BOOK OF CRIMINAL PROCEDURE* 373 (1895) (“[T]he defendant may plead guilty in a capital case as well as any other. . . . It cannot compel him to plead not guilty, and submit to a trial, but it may and generally will, advise him to withdraw his plea and plead not guilty.”); see also Barry J. Fisher, *Judicial Suicide of Constitutional Autonomy? A Capital Defendant’s Right to Plead Guilty*, 65 ALB. L. REV. 181 (2001) (arguing that the right to plead guilty in capital cases is a fundamental right rooted in the history of our country and that prohibitions violate due process).

the authority of convening authorities, who could not properly order such a prohibition.³² After the 1830 order went into effect, Major General Macomb began disapproving courts-martial that did not follow the requirements. In doing so, he specifically referenced the needs of the reviewing officer and the “President as the pardoning power” to understand the facts and circumstances of the offense.³³ In 1840, a year before Major General Macomb died in office, he published a manual that included similar direction to the 1830 order on taking evidence in guilty pleas.³⁴ As time progressed, Congress continued amending the Articles of War, adding additional protections for the accused and various procedural obligations for the government.³⁵ However, the Articles never implemented either of Major General Macomb’s orders.³⁶ The 1830 order continued in force through the Opinions of the Judge Advocate General of the Army.³⁷ Then in 1890, the Army included the mandate to take evidence in guilty plea cases in the *Instructions for*

³² See WINTHROP, *supra* note 22, at 375–76.

³³ WINTHROP, *supra* note 15, at 279 (quoting Headquarters, U.S. Dep’t of Army Gen. Order No. 23 (1830)).

³⁴ See ALEXANDER MACOMB, *THE PRACTICE OF COURTS MARTIAL* 38–39 (Coleman, 1840). General Macomb wrote that

if the prisoner plead guilty, the Court will proceed to determine what punishment shall be awarded, and to pronounce sentence thereon. Preparatory to this, in all cases where the punishment of the offence charged is discretionary, and especially where the discretion includes a wide range and great variety of punishment, and the specifications do not show all the circumstances attending the offence, the Court should receive and report, in its proceedings, any evidence the Judge Advocate may offer, for the purpose of illustrating the actual character of the offence . . . such evidence being necessary to enlightened exercise of the discretion of the Court, in measuring the punishment, and also to those whose duty it may be to report on the case, or to carry the sentence into effect.

Id.

³⁵ See generally LURIE, *supra* note 14, at 2, 74 (explaining that the original Articles of War had little concern for due process over military discipline, then later describing additional rights, albeit not as robust as possible, such as a pretrial investigations, counsel for the accused, and a form of court-martial review vested in the Judge Advocate General’s Office).

³⁶ This information is based on a review of various versions and amendments of the United States Articles of War from 1775 through 1948.

³⁷ See, for example, cases referred to in WINTHROP, *supra* note 22, at 375–76, WILLIAM WINTHROP, *DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY* 587–88 (1885), and WILLIAM WINTHROP, *DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY* 552–53 (1901).

Courts-Martial and Judge Advocates (1890 Instructions).³⁸ The 1890 *Instructions*, citing William Winthrop's *Digest of Opinions of the Judge Advocate General of the Army (1880) (Winthrop's Digest 1880)*, provided that it is "proper for the court to take evidence after a plea of guilty in any case, except when the specification is so descriptive as to disclose all the circumstances of mitigation or aggravation that accompany the offense."³⁹

The 1890 *Instructions* also included a specific warning concerning capital cases, stating that, "it is most important that all the facts of the case be exhibited in evidence."⁴⁰ However, they never incorporated the outright prohibition previously ordered by Major General Macomb. Yet, it cites to *Winthrop's Digest 1880* that mandated the taking of evidence and makes particular note of the importance of this rule in capital cases. The purpose in the 1890 *Instructions*, to provide "full knowledge of the circumstances attending the offense" so that the reviewing authority may exercise enlightened discretion when "measuring punishment," remained consistent with the intent behind both of Major General Macomb's previous orders.⁴¹

A review of each *Instruction for Courts-Martial* and the *Manual for Courts-Martial (MCM)* from 1890 thru 1949, the last year prior to passage of the UCMJ, reveals little variation or change in the rule or its purpose, as originally outlined by Major General Macomb.⁴² However,

³⁸ CAPTAIN P. HENRY RAY, INSTRUCTIONS FOR COURTS-MARTIAL AND JUDGE ADVOCATES 24 (1890) [hereinafter 1890 INSTRUCTIONS]. The *Instructions for Courts-Martial and Judge Advocates* was the precursor to the *Manual for Courts-Martial*.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See generally LIEUTENANT ARTHUR MURRAY, INSTRUCTIONS FOR COURTS-MARTIAL INCLUDING SUMMARY COURTS 25 (1891) [hereinafter 1891 INSTRUCTIONS] ("In capital cases, particularly, it is most important that all the facts of the case be exhibited in evidence."); MANUAL FOR COURTS-MARTIAL, UNITED STATES 38-39 (1893) (remaining similar to the 1891 *Instructions*); MANUAL FOR COURTS-MARTIAL, UNITED STATES 29 (1898) (dropping the specific reference to capital cases, but retaining a provision requiring the record to contain "full knowledge of the circumstances" of the offense); MANUAL FOR COURTS-MARTIAL, UNITED STATES 31 (1902); MANUAL FOR COURTS-MARTIAL, UNITED STATES 31 (rev. ed. 1901) (remaining similar to the 1898 *MCM*); MANUAL FOR COURTS-MARTIAL, UNITED STATES 33 (1908) (remaining similar to the 1901 *MCM*); MANUAL FOR COURTS-MARTIAL, UNITED STATES 33 (1910) (remaining similar to both the 1901 *MCM* and the 1908 *MCM*); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IX, ¶ 154 (1917) [hereinafter 1917 *MCM*] (remaining similar to the 1902 *MCM*, the 1908 *MCM* and the 1910 *MCM*); MANUAL FOR COURTS-MARTIAL,

between the 1893 *MCM* and 1898 *MCM*, the drafters dropped the specific reference to accepting evidence in capital cases from the text. Even with this omission, acceptance of pleas in capital cases remained unfavorable and the prosecution was still required to present evidence.⁴³ Regardless of the rule's consistency, courts often ignored it in the field. One can find evidence of this in the numerous cases and orders that repeat the rule and in a 1919 inquiry from the Secretary of War on this subject, among others.⁴⁴

The 1919 inquiry from the Secretary of War to the Judge Advocate General after World War I serves as a good example of the scrutiny that faced the military from civilian leadership with regard to pleas in capital cases. With large-scale military operations came more courts-martial under the Articles of War. The additional courts-martial led to greater scrutiny from the public and concerns that soldiers were railroaded by the command into pleading guilty to capital offenses, without evidence, without an understanding of the charges, and without attorney representation.⁴⁵

General Crowder responded to the criticism by arguing the percentage of pleas in capital cases was small.⁴⁶ Additionally he noted that when a court-martial accepts a plea, the accused must admit the elements and the government must present evidence of the crime.⁴⁷

UNITED STATES pt. IX, ¶ 154 (1918) (remaining similar to the 1902 *MCM*, the 1908 *MCM*, the 1910 *MCM* and the 1917 *MCM*); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IX, ¶ 154 (1921) (remaining unchanged from 1918 *MCM*); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. XIII, ¶ 70 (1927) (maintaining provision but removing reasoning for the requirement); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. XIII, ¶ 70 (1936) (remaining unchanged from the 1927 *MCM*); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. XIII, ¶ 70 (1943) (remaining unchanged from the 1936 *MCM*); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. XIII, ¶ 71 (1949) [hereinafter 1949 *MCM*] (remaining substantially the same as the 1943 *MCM*). All historical *Manuals for Courts-Martial* are available on the internet at http://www.loc.gov/rr/frd/Military_Law/CM-manuals.html.

⁴³ See WINTHROP, *supra* note 15, at 279.

⁴⁴ See *id.* at 280; War Dep't, Military Justice During the War, A Letter from the Judge Advocate General of the Army to the Secretary of War 31 (1919) [hereinafter Crowder Letter], available at http://www.loc.gov/rr/frd/Military_Law/pdf/letter.pdf (Major General Enoch Crowder responding to criticism that during World War I, the Army allowed accused to plead guilty to cases in which death was a possible sentence without the taking of evidence).

⁴⁵ See Crowder Letter, *supra* note 44, at 2–3, 23, & 28–31.

⁴⁶ See *id.* at 31.

⁴⁷ See *id.*

Lastly, he argued that when this did not occur, reviewing authorities usually “disapproved the record for such legal error.”⁴⁸ General Crowder’s response makes it clear that while there was no absolute prohibition, the convening authority would not approve a finding and sentence if the record contained no information.

Post-World War II, another call for large-scale revisions to the Articles of War and the Articles for the Government of the Navy was made by returning veterans and their supporters.⁴⁹ This was, again in part, due to the large number of military men court-martialed during World War II.⁵⁰ In response, Congress and military departments formed various committees to review both the Articles of War and the Articles for the Government of the Navy.⁵¹ Commonly referenced are the committees chaired by Arthur T. Vanderbilt, the committee chaired by Arthur J. Keeffe (Keeffe Report), and the committee chaired by Edmund Morgan (Morgan Report).⁵² Findings from these reports, among others, combined to form the basis for an initial draft of the UCMJ.⁵³ Each of the committees expressed a need to prohibit guilty pleas in death-eligible cases.⁵⁴

⁴⁸ *Id.*

⁴⁹ See LURIE, *supra* note 14, at 76–80.

⁵⁰ See H.R. 4080 Debate, *supra* note 1, at 14 (indicating that 80,000 men were convicted by general courts-martial during World War II); Lurie, *supra* note 14, at 77 (stating over 1.7 million trials were held during World War II, resulting in 100 executions and some 45,000 service members imprisoned).

⁵¹ See, e.g., LURIE, *supra* note 14, at 80–100 (giving a brief summary of the various reports).

⁵² See *id.*

⁵³ See H.R. 4080 Debate, *supra* note 1, at 4–5; *Uniform Code of Military Justice: Hearing on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 599–600 (1949) [hereinafter *H.R. 2498*], available at http://www.loc.gov/rr/frd/Military_Law/pdf/hearings_01.pdf.

⁵⁴ See Committee on a Uniform Code of Military Justice, *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 64 (1949)* [hereinafter *The Morgan Draft*], available at http://www.loc.gov/rr/frd/Military_Law/pdf/morgan.pdf (“A plea of guilty by the accused shall not be accepted in a capital case.”); Report and Recommendations of the General Court Martial Review Board 10–11, 139–46 (1947) [hereinafter *The Keeffe Report*], available at http://www.loc.gov/rr/frd/Military_Law/Morgan-Papers/Vol-III_general-court-martial-sentences-review-board.pdf; *The Administration of Military Justice: A summary of Constructive Criticisms Received by the War Department’s Advisory Committee on Military Justice* 16–17 (1946), available at http://www.loc.gov/rr/frd/Military_Law/pdf/Vanderbilt-A_Summary.pdf (providing that a trial should take place even when there is a guilty plea in a capital case).

Only the Keffe Report, which studied the Navy military justice system, detailed the reasoning for prohibiting guilty pleas in death-eligible cases.⁵⁵ The Keffe Report's recommendations acknowledged that the Army did not contain an outright prohibition. However, the committee pointed out that the Navy did have the prohibition in its regulations for desertion cases and that New York did not allow guilty pleas in capital cases.⁵⁶ In commenting on those prohibitions, the committee found that the "rule is sound" and "would preclude the possibility of an unjust conviction of a serious offense on a plea of guilty by an accused who was inadequately represented by counsel, or who had no counsel, and who did not full [sic] understand the nature of the charges against him."⁵⁷ The dangers the committee listed would lead to unjust convictions because the accused might not understand what he is pleading to.

The Keffe Report's arguments for the prohibition appear to be new, but the spirit of its reasoning remains the same as General Macomb's. That is, in cases where death is a possible sentence, both the trial court and convening authority must know all the facts and circumstances of the conduct; adequate counsel and understanding the charges help achieve that ultimate goal. Macomb's original order concerning the review of desertion cases is evidence of his concern about whether the accused entered a knowing plea. Without evidence on the record, the reviewing authority could not determine whether the accused understood the elements of desertion or whether he committed the offense of desertion or the lesser included offense of absent without leave. Thus, the Keffe Report's recommendation of an absolute prohibition centered on avoiding the same problems that General Macomb was presumably trying to avoid.

In the 1949 debates on this provision, Mr. Overton Brooks and Mr. Felix Larkin responded to questions concerning the need for a prohibition on guilty pleas in capital cases.⁵⁸ During the testimony, Mr. Brooks and Mr. Larkin offered the following:

⁵⁵ See The Keffe Report, *supra* note 54, at 10–11, 139–46.

⁵⁶ See *id.* at 140.

⁵⁷ *Id.*

⁵⁸ See H.R. 2498, *supra* note 53, at 1056–57. Mr. Felix Larkin was the Assistant General Counsel of the Office of the Secretary of Defense and Mr. Overton Brooks was the chairman of the congressional subcommittee responsible for the Uniform Code of Military Justice. See Dwight H. Sullivan, *Killing Time: Two Decades of Capital Litigation*, 189 MIL. L. REV. 1, 40, 40 n.168 (2006).

Mr. Brooks: This as originally written was intended to cover a case like we had in Chicago, the Loeb case, where the defendants pleaded guilty and threw themselves on the mercy of the court.

Mr. Larkin: This is new in statute, but it has been regulations of the services for years. The intention is that you do not permit a man in a case in which the death penalty is possible to plead guilty, which is uniform practice in civil courts. You just do not let a man plead himself into the death penalty.⁵⁹

Neither response directly addressed the concerns about the inability of the convening authority to review the facts and circumstances of the case that caused Major General Macomb to issue General Orders No. 60 and 23. While Mr. Larkin could have been more detailed in his response, he appeared to simply be stating that the rule is the status quo in the majority of death penalty jurisdictions. Mr. Brooks's response was not as clear from the text.

Mr. Brook's response presumably referenced the trial of Nathan Leopold, Jr, and Richard Loeb for the murder of minor Robert Franks in 1924.⁶⁰ Leopold and Loeb, sons of wealthy Chicago businessmen, planned and executed the murder for thrill.⁶¹ They both later confessed to the crime and the state prosecutor, after having secured a substantial amount of evidence, sought the death penalty.⁶² The parents of the two accused hired Clarence Darrow to defend them.⁶³ With virtually no options, the accused pled guilty, allowing Darrow to focus the court on his presentencing case.⁶⁴ The plea did not preclude any evidence because at the time, Illinois state law required the prosecution to prove their case notwithstanding the plea.⁶⁵ Darrow then focused his presentencing case on the defendants' mental infirmity that did not reach

⁵⁹ See H.R. 2498, *supra* note 53, at 1056–57.

⁶⁰ See generally IRVING STONE, CLARENCE DARROW FOR THE DEFENSE 380–421 (1941) (providing a detailed account of the Leopold and Loeb case).

⁶¹ See Scott W. Howe, *Reassessing the Individualization Mandate in Capital Sentencing: Darrow's Defense of Leopold and Loeb*, 79 IOWA L. REV. 989–90 (1994) (citations omitted).

⁶² See *id.* at 997.

⁶³ See STONE, *supra* note 60, at 380–81.

⁶⁴ See Howe, *supra* note 61, at 999–1001.

⁶⁵ See *id.* at 1000–01.

the level required to succeed on a plea of insanity.⁶⁶ The strategy worked and the two avoided the death sentence.⁶⁷

It is unclear exactly what Mr. Brooks meant by referencing the Loeb case. The case, aside from accepting the plea, was consistent with the practice of taking evidence for the convening authority to review, except that the military lacked a true presentencing proceeding. Darrow's presentencing case was much more than throwing the defendants on the mercy of the Court. Darrow presented a strong individualized presentencing case, focusing on the mental infirmities of the defendants.⁶⁸ In 1949, such a tactic was procedurally unworkable because of the lack of a robust presentencing procedure in the military, which likely led to Mr. Brooks's rejection of the Illinois practice in favor of the clear-cut prohibition.⁶⁹

Tracing the history of the present prohibition in Article 45(b) from 1776 through the proposal of the UCMJ, illustrates that review of courts-martial, particularly in capital cases, has always been important to commanders. At its base, the goal of the various orders was to ensure a plea contained enough information for the convening authority to review the record in order for him to determine the degree of the offense and if the accused understood the crime. The various orders and regulations used prior to the UCMJ operated to place information into a record for review in order to protect the accused from issues like unknowing pleas and inexperienced counsel referenced in the Keeffe Report. When Congress drafted the UCMJ, the prohibition in Article 45(b) operated as a blunt rule to eliminate those concerns in capital cases and to ensure that a record would always exist in the most serious cases.

III. The Historical Need for Article 45(b) No Longer Exists

Without the prohibition or a mandate to include evidence, there was little for the reviewing authority and later the Judge Advocate General to review in terms of facts and circumstances, including aggravation and mitigation evidence, surrounding the offense. This information for

⁶⁶ See *id.* at 1001.

⁶⁷ See STONE, *supra* note 60, at 418–19.

⁶⁸ See generally Howe, *supra* note 61, at 1001–12 (describing in detail the evidence and theory presented by Darrow during his pre-sentencing case).

⁶⁹ See *infra* Part III.B (discussing evolution of extenuation and mitigation evidence permitted in courts-martial).

review was crucial when life hung in the balance. While life still hangs in the balance on review today, the previous concerns for which Article 45(b) was implemented have been overcome by case law, statute, and the President's rule-making authority. As such, Article 45(b) remains a vestige of another time. Specifically, a mandate for a detailed providency inquiry, requirements for increased mitigation investigations, and RCM 1004 eliminate the issues underlying the creation of Article 45(b).

A. Mandate for a Detailed Providency Inquiry

The modern guilty plea requirement to question the accused in detail concerning the elements of the offense during a guilty plea⁷⁰ eliminates the concern that reviewing authorities will be unable to understand the seriousness of the offense.⁷¹ In 1951, nothing in the UCMJ, the President's instructions, or the Trial Procedure Guide called for the detailed inquiry that exists today.⁷² Article 45(a) of the UCMJ, enacted at the same time as Article 45(b), created the requirement for the court to accept only knowing and voluntary pleas.⁷³ The original purposes of Article 45(a) and (b) are inextricably related. As such, they operate in tandem to ensure an accused enters a knowing and voluntary plea, while at the same time prohibiting pleas in capital cases.⁷⁴ Yet, even in non-capital cases, the conversation during the plea was more of a one-way conversation from the military judge⁷⁵ to the accused rather than a colloquy where the accused explains the crimes in his own words. Thus, in 1951, the prohibition played an important role in protecting the

⁷⁰ See *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969); MCM *supra* note 12, R.C.M. 910(d) (2012).

⁷¹ See generally WINTHROP, *supra* note 15, at 279 (quoting Headquarters, U.S. Dep't of Army Gen. Order No. 23 (1830) and referencing the need of the reviewing authority and the President as the pardoning authority to understand all of the facts).

⁷² *The Trial Procedure Guide* was a script used in courts-martial and was published in the 1951 *Manual for Courts-Martial*. MANUAL FOR COURTS-MARTIAL, UNITED STATES, app. 8a (1951) [hereinafter 1951 MCM].

⁷³ See UCMJ art. 45(a), 45(b) (1951).

⁷⁴ See *supra* pp. 250–51 (explaining the relationship between recommendations in the Keefe Report and the Morgan Committee in drafting the 1951 Code).

⁷⁵ Courts-martial did not have independent military judges until Congress passed the Military Justice Act of 1968. Prior to 1968, courts-martial were presided over by a law officer. Law officers were lawyers, but their authority and independence as judges was limited. See Frederic I. Lederer & Barbara S. Hundley, *Needed: An Independent Military Judiciary—A Proposal to Amend the Uniform Code of Military Justice*, 3 WM. & MARY BILL RTS. J. 629, 638–40 (1994).

accused from a factually deficient record being reviewed in the most serious cases. This is because neither the UCMJ provisions nor the implementing language explicitly required a detailed providence inquiry.⁷⁶

Over time, requirements imposed by the courts diminished the importance of the prohibition. For example, nearly fifteen years later, the relatively new Court of Military Appeals (CMA) decided *United States v. Chancellor*.⁷⁷ The *Chancellor* court used the legislative history of Article 45(a) and (b) to conclude that the drafters intended the military judge to complete a detailed providency inquiry in guilty plea cases, something not expressly stated in the UCMJ.⁷⁸

In that case, Airman Second Class Chancellor pled guilty to wrongful cohabitation and issuing worthless checks in violation of Article 134. At trial, the president's inquiry was "limited to the formula advice suggested by the Manual for Courts-Martial, United States, 1951, Appendix 8a, page 509, including the statement of the maximum punishment which might be imposed."⁷⁹ However, the pro forma advice did not contain an explanation of the elements of the offenses or a statement by the accused detailing his conduct. During Chancellor's post-trial clemency interview, he stated that he believed that he had sufficient funds to cover the check.⁸⁰ This revealed a matter inconsistent with his plea, which led the CMA to set aside the finding of guilty to that specification of the charge.⁸¹

The key to the *Chancellor* decision is the court's interpretation of the President's regulation that "the accused plea 'admits every act or omission alleged and every element of the offense charged.'"⁸² Prior to *Chancellor*, trial judges only asked if the accused admitted every element of the offense and if he understood the meaning and effect of the plea.⁸³ The CMA interpreted Article 45(a) using the congressional floor debates

⁷⁶ See UCMJ arts. 45(a) and (b) (1951); see 1951 MCM, *supra* note 72, pt. XII, ¶ 70.a and b; *but see* *United States v. Chancellor*, 36 C.M.R. 453, 455–56 (C.M.A. 1966) (holding that the legislative intent of the provision called for a detailed inquiry with the accused of the elements on the record).

⁷⁷ *Chancellor*, 36 C.M.R. at 455.

⁷⁸ *See id.*

⁷⁹ *See id.* at 454.

⁸⁰ *See id.*

⁸¹ *See id.* at 457.

⁸² See 1951 MCM, *supra* note 72, pt. XII, ¶ 70b.

⁸³ *See id.* app. 8a.

concerning the UCMJ. In doing so they interpreted the above quoted provision much more broadly than the drafters of the *Trial Procedure Guide* did in the 1951 MCM.⁸⁴ The court held that the law officer must now establish guilt-in-fact by explaining the elements of the offense and having the accused explain in his own words why he violated them.⁸⁵ While this is certainly a logical opinion, the broader rule is not as clear in the legislative history as the court opined.⁸⁶ A reading of the quoted congressional testimony in *Chancellor* leaves the reader guessing if there really was a desire for a discussion between the court and the accused concerning elements and facts or simply a verbatim record of the accused affirming that he committed the elements.⁸⁷

The failure of the trial judiciary to follow the seemingly clear guidance in *Chancellor* and the court's need to readdress the issue in *United States v. Care* is further evidence of this dissonance.⁸⁸ In *Care*, the accused pled guilty to desertion. The law officer examined the accused perfunctorily in that he "did not personally inform him of the elements constituting the offense and he did not establish the factual components of the guilty plea."⁸⁹ *Care* alleged in a post-trial affidavit that his counsel never informed him of the elements of the crime and that he never intended to remain away permanently.⁹⁰ The court ultimately found that "on the basis of the whole record"⁹¹ the plea was voluntary even though the trial judge did not personally address the accused.⁹² The court then expressed its displeasure in the failure of the armed services to follow the recommendation that it provided in *Chancellor*.⁹³

Out of frustration at the armed services' unsatisfactory attempt to implement its recommendation in *Chancellor*, the court outlined its own

⁸⁴ See *Chancellor*, 36 C.M.R. at 455–56 (The *Trial Procedure Guide* only required pro forma questions without a detailed colloquy between the law officer and the accused.)

⁸⁵ See *id.* at 456.

⁸⁶ See *id.* (articulating that the procedure for taking a plea is "so cogently outlined in House Report. No. 491").

⁸⁷ See *id.* at 455–56; The author has no quarrel with the interpretation of the provisions in *Chancellor*. The discussion is relevant to show the evolution of the providency inquiry from an undeveloped procedure in 1951 to a robust, codified, and institutionalized procedure today.

⁸⁸ See *United States v. Care*, 40 C.M.R. 247, 250 (C.M.A. 1969).

⁸⁹ *Id.* at 252.

⁹⁰ See *id.* at 249.

⁹¹ See *id.* at 251.

⁹² See *id.* at 253.

⁹³ See *id.* at 252.

rule.⁹⁴ Specifically, the court imposed a requirement on the military judge both to explain the elements of the crime to the accused and to ask the “accused about what he did or did not do, and what he intended (where this is pertinent), to make clear the basis for the determination” that the accused committed the offense.⁹⁵ The court further explained that the military judge could not meet the requirement by simply asking the accused if he understood the elements. Rather, the rule required the military judge to personally address the accused and “to question him about his actions and omissions.”⁹⁶ It is fitting that the seminal case establishing the black-letter rule for a providency inquiry would include the charge of desertion, as it was the charge of desertion that started the problem with pleas in the first place.⁹⁷

In light of the court’s view in *Chancellor* that Congress always intended a robust colloquy, Congress arguably considered and determined a need for both provisions. Such a determination suggests that even with that robust colloquy, Congress believed capital cases to be too serious for a soldier to plead. The Keeffe Report, which Professor Morgan used in creating the *Morgan Draft*,⁹⁸ strengthens this argument.⁹⁹ The Keeffe Report maintained that

[t]he board was handicapped in its review by the brevity of the record in cases with a plea of guilty. . . . To remedy this the Board recommends that the Advisory Council consider including in the record of guilty cases, first, the complainant’s testimony taken under oath before sentence, and second, the pre-trial report of

⁹⁴ See generally *id.* at 253 (expressing displeasure at the change in language in the 1969 *Manual for Courts-Martial*, seemingly making the explanation of the elements by the law officer discretionary and that no update was made to the “new Manual’s Trial Procedure Guide (Appendix 8a)”).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See *supra* note 22 and accompanying text.

⁹⁸ See LURIE, *supra* note 14, at 80–100 (noting the *Morgan Draft* is a document produced as a result of the Morgan Committee and is the basis of the modern-day UCMJ).

⁹⁹ See generally MORGAN PAPERS COMPARATIVE STUDIES NOTEBOOK A.W. 21, at 2 (Jan. 6, 1949), available at http://www.loc.gov/rr/frd/Military_Law/Morgan-Papers/Vol-II.pdf (citing recommendations of the the Keeffe Report, *supra* note 54); The Morgan Draft, *supra* note 54, at 64–65 (citing the recommendations of The Keeffe Report, *supra* note 53, to be included in the President’s instructions to Article 45(a)).

investigation.¹⁰⁰

If Congress considered and intended a more robust inquiry, the argument that the *Care* inquiry obviates the prohibition is less persuasive, because it shows a desire by Congress to have both the robust colloquy and the prohibition, regardless of overlapping purposes.

Nevertheless, Congress failed to articulate that intent in the UCMJ and the President failed to provide that requirement in his instructions, therefore weakening the robust colloquy position.¹⁰¹ Moreover, it took the courts eighteen years to ferret out a black letter rule establishing a requirement for a guilt-in-fact inquiry.¹⁰² The latter leaves the impression that while some type of colloquy was intended, it was in no way as robust as the one that existed post-*Care*. Now that the rule is firmly established, the original tandem purpose of Article 45(a) and (b) is of no value because the courts regularly guard the requirement for guilt-in-fact pleas, thus maintaining an appropriate record for review.¹⁰³

¹⁰⁰ The Keefe Report, *supra* note 54, at 14. The specific recommendations of report were:

- (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 the plea of guilty be received only after an accused has had the 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 make a 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 be accepted, and rule on all special pleas.

Id.

¹⁰¹ See *Loving v. United States*, 62 M.J. 235, 241 (C.A.A.F. 2005) (stating “[i]t is a fundamental tenet of statutory construction to construe a statute in accordance with its plain meaning”) (citations omitted).

¹⁰² See *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969).

¹⁰³ Even if Congress did desire the robust inquiry in conjunction with prohibition, the practice did not bear out that desire. Congress made no attempt to change the rule, and the President made no attempt to update the implementing instruction until post-*Care*. See *id.* at 253.

An examination of just a few cases illustrates that military appellate courts routinely address whether the military judge sufficiently explained the elements of the offense to the accused during a plea, whether the military judge established a factual basis for pleas, and whether the military judge resolved conflicts to the plea. For instance, in *United States v. Negron*, the military judge used the wrong definition of indecent when explaining the elements to the accused.¹⁰⁴ The wrong definition fundamentally changed the offense. The court set aside the findings and sentence because with the wrong definition, the plea could not be knowing.¹⁰⁵

The courts have also ensured that the accused's explanation of the offense factually establishes the elements. In *United States v. Weeks*, the Court found that while the military judge explained the elements to the accused, the accused's responses did not factually meet the elements of forgery, which caused the appellate court to set aside the finding.¹⁰⁶

Lastly, courts regularly address when the accused makes a statement inconsistent with his plea or raises a defense. Although the military judge is required to address inconsistency during the providency inquiry, on appeal, the courts require a substantial conflict in testimony or more than a mere possibility of a defense before they find the plea improvident.¹⁰⁷ In *United States v. Phillippe*, the accused, after pleading to absence without leave, stated that he attempted to return during the charged period during his presentencing unsworn statement.¹⁰⁸ The court held that the military judge abused his discretion for failing to reopen the providency inquiry and only approved the plea up to the date of return.¹⁰⁹ The accused's unsworn statement that conflicted with his statement

¹⁰⁴ See *United States v. Negron*, 60 M.J. 136 (C.A.A.F. 2004) (The military judge used the definition of "indecent" from indecent acts rather than the from the correct offense of indecent language.); see also, e.g., *United States v. Redlinski*, 58 M.J. 117 (C.A.A.F. 2003) (setting aside the finding of guilt to a specification of attempted distribution of marijuana because the military judge failed to explain the elements of attempt on the record).

¹⁰⁵ See *Negron*, 60 M.J. at 142.

¹⁰⁶ See *United States v. Weeks*, 71 M.J. 44, 48–49 (C.A.A.F. 2011); see also, e.g., *United States v. Thomas*, 65 M.J. 132, 135 (C.A.A.F. 2007) (holding accused's plea improvident because accused and government stipulated that he did not enter or know he was entering a military installation, a required fact to establish a violation introducing marijuana onto a military installation (Article 112a, UCMJ)).

¹⁰⁷ See *United States v. Phillippe*, 63 M.J. 307, 309–10 (C.A.A.F. 2006).

¹⁰⁸ See *id.* at 308.

¹⁰⁹ See *id.*

during the providency inquiry amounted to a substantial conflict with his plea. This conflict required the military judge to reopen the inquiry to resolve the conflict.¹¹⁰

In sum, the interpretation of Article 45(a) presented by *United States v. Chancellor*¹¹¹ and *United States v. Care*¹¹² ensures that the accused has knowledge of the offense, understands the plea, and builds a record. In combination, the construction eliminates the original need for Article 45(b). “The military justice system takes particular care to test the validity of guilty pleas because the facts and the law are not tested in the crucible of the adversarial system.”¹¹³ With this in mind, removal of Article 45(b)’s absolute prohibition on a plea would not affect the particular care taken and would be tempered by the military judge’s obligation to refuse the plea, if any of the requirements set forth in Article 45(a) and RCM 910 are not met.¹¹⁴ Even after acceptance of the plea, the military judge has an obligation to reopen providency if the accused later raises matters that are inconsistent with the plea.¹¹⁵ These protections prevent military accused from erroneously pleading guilty to a death-eligible offense and make Article 45(b)’s prohibition unnecessary.

B. Requirement for Mitigation Evidence

The military’s current death penalty jurisprudence also obviates the need for Article 45(b) by requiring defense counsel to submit all relevant mitigation evidence.¹¹⁶ Often, a defense attorney’s sole goal in a capital case is to avoid a death sentence. In doing so, attorneys must competently present a comprehensive presentencing case, from having all the right witnesses to reviewing all the possible evidence that they might later use. It is no surprise then that one of greatest burdens for defense counsel in a capital case is overcoming ineffective assistance of

¹¹⁰ See *id.* at 311. Because the court approved a shorter period of absent without leave, they returned the record to the Court of Criminal Appeals to perform a sentence reassessment *Id.*

¹¹¹ 36 C.M.R. 453 (C.M.A. 1966).

¹¹² See 40 C.M.R. 247, 253 (C.M.A. 1969).

¹¹³ *United States v. Pinero*, 60 M.J. 31, 33 (C.A.A.F. 2004).

¹¹⁴ See generally MCM, *supra* note 12, R.C.M. 910 (outlining the requirements to receive a plea).

¹¹⁵ See *Phillippe*, 63 M.J. at 308.

¹¹⁶ See *Velloney*, *supra* note 11, at 2 (citing *Lockett v. Ohio*, 438 U.S. 586, 604 (1976)).

counsel by presenting a robust individualized presentencing case.¹¹⁷

The rule enunciated in *Strickland v. Washington*¹¹⁸ remains the standard for ineffective assistance of counsel in capital cases, but it has arguably evolved in military capital cases, lowering appellant's burden on appeal.¹¹⁹ Even the American Bar Association recognized the difficulty that faces capital defenders by outlining increased qualifications for attorneys representing accused facing the death penalty.¹²⁰ To ensure effective representation under an individualized sentencing model, mitigation specialists have become an essential part of counsel making a "broad inquiry into all relevant mitigating evidence."¹²¹ Thus, the evolving law and increased requirements for mitigation evidence ensures a robust record for review and limits Article 45(b)'s original purpose in the death penalty scheme.

An analysis of the historical view toward sentencing is helpful in understanding why Article 45(b) served an important purpose when drafted, but is now no longer necessary. The historical procedure for sentencing in the military is starkly different from what it is today. The military has shifted from a retribution model focused on uniformity to an individualized sentencing philosophy.¹²² During the Civil War, Army trials were not bifurcated into merits and sentencing. Colonel Winthrop points out:

¹¹⁷ See Honorable Helen G. Barrigan, *The Indispensable Role of Mitigation Specialist In A Capital Case: A View From The Federal Bench*, 36 HOFSTRA L. REV. 819, 830 (2008) (citing *Wiggins v. Smith*, 539 U.S. 510, 537–38 (2003) and *Williams v. Taylor*, 529 U.S. 362, 395–96 (2000); see also, e.g., *United States v. Loving*, 517 U.S. 748 (C.A.A.F. 1996); *United States v. Curtis (Curtis II)*, 46 M.J. 129 (C.A.A.F. 1997); *United States v. Murphy*, 50 M.J. 4 (C.A.A.F. 1998); *United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999) (all addressing ineffective assistance of counsel in the context of the presentation of mitigation evidence).

¹¹⁸ See *Strickland v. Washington*, 466 U.S. 688 (1984) (setting forth a two-pronged test for ineffective assistance of counsel: (1.) that counsel performance was deficient, and (2.) that the deficiency resulted in prejudice to the appellant).

¹¹⁹ See Mary M. Foreman, *Military Capital Litigation: Meeting the Heightened Standards of United States v. Curtis*, 174 MIL. L. REV. 1, 19–21 (2002).

¹²⁰ See AM. BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES 961–62 (rev. ed. 2003), in 31 HOFSTRA. L. REV. 913 [hereinafter ABA GUIDELINES] (providing criteria for counsel to provide "high quality legal representation" in capital cases). The ABA Guidelines are also available online at <http://ambar.org/2003Guidelines>.

¹²¹ See Velloney, *supra* note 11, at 9 (quoting *Buchanan v. Angelone*, 522 U.S. 269 (1998)).

¹²² See Captain Denise K. Vowell, *To Determine an Appropriate Sentence. Sentencing in the Military Justice System*, 114 MIL. L. REV. 87, 113–14 (1986).

Basing then the sentence upon the facts as established by the evidence and ascertained by the finding, the punishment will regularly and properly be measured by the peculiar circumstances preceding and accompanying it, the intent manifested by the offender, his animus toward the aggrieved person if any, the consequences of his act, its effect upon military discipline, and etc.¹²³

The lack of a formal procedure for introducing mitigation evidence kept the focus on retribution.¹²⁴ This focus certainly limited the amount and type of information presented at trial.

The military treated guilty pleas differently, and early courts-martial contained something that at first glance appears to be a presentencing proceeding.¹²⁵ They were procedurally different, in part, because records often made it to the reviewing authority with little information to actually review.¹²⁶ As a result, it was “proper for the court to take evidence after a plea of guilty in any case, except when the specification is so descriptive as to disclose all circumstances of mitigation or aggravation that accompany the offense.”¹²⁷ However, the procedure was more of an extension of the merits than a true presentencing proceeding, as it was still improper for the sentencing authority to consider mitigation evidence.¹²⁸ Discretion to consider any evidence in extenuation and

¹²³ See *id.* at 108–09 (quoting WINTHROP, *supra* note 15, at 397).

¹²⁴ See *id.* at 109.

¹²⁵ See *id.* (citing 1890 INSTRUCTIONS, *supra* note 38, at 24); see also WINTHROP, *supra* note 15, at 279. Winthrop noted that

a court-martial was authorized, notwithstanding the plea of guilty, and even where the sentence was not discretionary, to receive evidence on the merits, with a view to determining the actual criminality of the offender and the measure of punishment which should properly be executed, in any case in which such evidence was deemed to be essential to the due administration of military justice.

Id.

¹²⁶ See *supra* Part II.

¹²⁷ See Vowell, *supra* note 122, at 109–10 (quoting WINTHROP, *supra* note 15, at 376) (emphasis added).

¹²⁸ See WINTHROP, *supra* note 15, at 396 (Evidence “of valuable service, general good character, or other extraneous circumstances favorable to the accused but foreign to the merits of the case, (although sometimes properly considered upon the Finding as material especially to question of *intent*) cannot—*strictly*—be allowed to affect the discretion of the court in imposing sentence.”); *but see* Vowell, *supra* note 122, at 109–10 (analyzing

mitigation remained with the reviewing authority.¹²⁹

In a guilty plea context, the lack of an adversarial process may have excluded mitigation evidence, leaving the reviewing authority with only the facts as presented by the government.¹³⁰ The procedure of taking evidence after a guilty plea attempted to ensure the reviewing authority had enough information to determine if the accused was guilty and if the sentence should remain. However, because the focus remained on the offense and not on the individual, it was unlikely that all mitigation made it into the record of trial.

Slowly, the military justice system began changing the way it viewed punishment at courts-martial to a more individualized approach. The 1917 *MCM* was the first to articulate how the sentencing authority might exercise their discretion.¹³¹ The manual instructed court members to consider “individual characteristics of the accused . . . as the individual factor[s] in one case may be such that the punishment of one kind would serve the ends of discipline, while in another case punishment of a different kind would be required.”¹³² The various *MCMs* from 1928–1949 continued this trend, but again failed by not providing for a robust presentencing proceeding.¹³³ In part to remedy these issues, a presentencing procedure was included in the 1951 *MCM*.¹³⁴

The shift in presentencing procedures from the pre-UCMJ 1949 *MCM* to the post-UCMJ 1951 *MCM* began a substantial sea change in the type and amount of evidence received by the court during presentencing proceedings. A comparison of a pre-UCMJ capital case with a recent capital case serves to illustrate the enormity of this change. On April 12, 1951, Private Hunter shot and killed two Korean civilians,

this procedure and concluding it was closer to the presentencing procedure held today, rather than an extension of the merits).

¹²⁹ See WINTHROP, *supra* note 15, at 396.

¹³⁰ See *id.* (Explaining that some mitigation evidence was entered properly on the merits, primarily to reduce an accused’s intent. Logically, it is this mitigation evidence that the convening authority would lose in a guilty plea).

¹³¹ See James K. Lovejoy, *Abolition of Court Member Sentencing in the Military*, 142 MIL. L. REV. 1, 14–15 (1998) (citing 1917 *MCM*, *supra* note 40, pt. XII, ¶ 342).

¹³² See Vowell, *supra* note 122, at 113–14 (quoting 1917 *MCM*, *supra* note 42, pt. XII, ¶ 342).

¹³³ See *id.* at 115 (stating that the “sentencing practices in the military did not undergo any major revisions from 1921 to 1950).

¹³⁴ See *id.* at 118.

wounded three others, and violently raped a ten-year-old girl.¹³⁵ Counsel met with the accused at least twice before trial, “the first time at least one month in advance of the hearing.”¹³⁶ The record of trial indicated that counsel for the accused was present during trial, kept hearsay out, and disclosed a good working knowledge of the law. However, the “[t]he record [was] barren of any extenuating or mitigating circumstances.”¹³⁷ Not surprisingly, the panel convicted Hunter of the charges and sentenced him to death.¹³⁸ Evidence in both extenuation and mitigation were permissible forms of evidence under the 1949 MCM.¹³⁹

Just eighteen months later, on appeal at the military’s highest court, Hunter complained that he did not receive effective assistance of counsel.¹⁴⁰ He substantiated his allegation with an unsworn statement that lacked specificity.¹⁴¹ The court disagreed and upheld the sentence. Shockingly, the court failed to address how meeting with a client only twice might have a negative impact on investigating extenuating and mitigating evidence.¹⁴² Not only did they fail to address the issue, but the court used the lack of such evidence to uphold a death sentence.¹⁴³ This is striking considering the 1949 MCM required unanimous concurrence of the members to adjudge death and a single mitigating factor might have swayed just one.¹⁴⁴ The holding illustrates that the court did not place a high value on the importance of individualized sentencing that the MCM appeared to be adopting. If they had placed

¹³⁵ See *United States v. Hunter*, 6 C.M.R. 37, 40 (C.M.A. 1952) (Hunter’s conduct occurred prior to the effective date of the Uniform Code of Military Justice (May 31, 1951), so the Court adjudged the sentence on June 27, 1951. Because Hunter’s conduct occurred prior to the effective date of the UCMJ, the command charged him under the Articles of War, and completed the trial pursuant to the 1949 MCM, but the Court of Military Appeals heard his case pursuant to procedures for appellate review outlined in the new UCMJ).

¹³⁶ *Id.* at 41.

¹³⁷ See *id.* at 45.

¹³⁸ See *id.*

¹³⁹ See 1949 MCM, *supra* note 42, pts. XV, ¶ 79, XXV, ¶ 113 (mandating evidence in extenuation and mitigation be introduced under certain circumstances); see 1951 MCM, *supra* note 72, pt. XIII, ¶ 76 (providing for evidence in extenuation and mitigating evidence post-UCMJ).

¹⁴⁰ See *Hunter*, 6 C.M.R. at 40.

¹⁴¹ See *id.*

¹⁴² See *id.* at 41.

¹⁴³ See *id.* at 45 (The court articulated that in order to prevail, appellant must show “that the proceedings by which he was convicted were so erroneous as to constitute a ridiculous and empty gesture, or were so tainted with negligence or wrongful motives on the part of his counsel as to manifest a complete absence of judicial character.”).

¹⁴⁴ See 1949 MCM, *supra* note 42, pt. XV, ¶ 80b.

value on individualized sentencing they likely would have recognized the impossibility of presenting that type of evidence after only meeting with the client twice.

By contrast, in 2012, in *United States v. Akbar*, the Army Court of Criminal Appeals (ACCA) addressed the investigation and presentation of mitigation evidence in detail.¹⁴⁵ Akbar threw grenades into several brigade staff tents at Camp Pennsylvania, Kuwait, on the eve of the Iraq war.¹⁴⁶ After throwing a grenade into the second tent, he shot and severely wounded Major KR when he ran out.¹⁴⁷ As a result, Akbar killed two officers and wounded fourteen others.¹⁴⁸ The panel convicted Akbar of two specifications of premeditated murder and three specifications of unpremeditated murder and sentenced him to death.¹⁴⁹ On appeal, the Army court addressed numerous issues, including ineffective assistance of counsel, for failing to conduct a complete investigation into the background of the appellant.¹⁵⁰

Specifically, Akbar argued “that . . . his trial defense counsel failed to adequately investigate [his] social history, ignored voluminous information collected by mitigation experts and ceased using mitigation experts, resulting in an inadequate mental health diagnosis.”¹⁵¹ On the contrary, trial defense counsel used five mitigation specialists at different times during their pre-trial preparation.¹⁵² The mitigation specialists collected life history information, including at least four boxes of documents, identified witnesses, regularly gave reports, and provided information that led to use of additional mental health assets. The defense used some of the documentary evidence and witnesses at trial.¹⁵³ The court, relying on *Loving v. United States (Loving III)*, disagreed with appellant and drew a distinction between cases “where no life history or mitigating evidence was presented and an allegation that additional life

¹⁴⁵ See *United States v. Akbar*, No. 20050514, 2012 WL 2887230, at *14–17 (A. Ct. Crim. App. July 13, 2012).

¹⁴⁶ See *id.* at *2.

¹⁴⁷ See *id.*

¹⁴⁸ See *id.*

¹⁴⁹ See *id.* at *3.

¹⁵⁰ See *id.* at *8. Appellate defense counsel raised 61 assignments of error and a petition for a new trial; the court found that five of those issues merited discussion. See *id.* at *1.

¹⁵¹ *Id.* at *14.

¹⁵² See *id.* at *15.

¹⁵³ See *id.* at *15–16.

history or mitigation evidence was available.”¹⁵⁴

The distinction illustrates that the court might have come to a different result had appellant raised information missed by the defense during the investigation.¹⁵⁵ In analyzing the issue in this way, the court sent a clear message to practitioners to investigate thoroughly. While the court ultimately ruled against appellant, the fact that they addressed this issue in light of the extensive investigation completed by trial defense counsel illustrates the court’s concern and the vast shift from *Hunter*.

Logically, defense counsel are likely to present a more robust mitigation case if they are armed with mitigating evidence. The shift from *Hunter* to *Akbar* did not occur overnight. The shift resulted primarily from a judicial recognition of an individualized sentencing mandate analyzed through the rubric of ineffective assistance of counsel.¹⁵⁶ A driving factor, then, in forcing a more robust sentencing case is the court’s willingness to overturn a case when a defense counsel fails to present a complete picture of the accused.¹⁵⁷ *United States v. Loving* affirms that the standard for ineffective assistance of counsel remains *Strickland v. Washington* and does not create a bright line rule requiring mitigation specialist.¹⁵⁸ However, *United States v. Curtis* held that the performance prong of *Strickland* should be viewed in context of a capital case, thereby lowering appellant’s burden when death is on the table.¹⁵⁹ The lower burden for an appellant on appeal translates to a higher burden on the defense counsel to produce mitigation evidence at

¹⁵⁴ *Id.* at *16 (citing *Loving v. United States (Loving III)*, 68 M.J. 1, 15–16 (C.A.A.F. 2009)) (emphasis added).

¹⁵⁵ *See id.* (explaining that documents relied on by the appellate defense counsel mitigation specialist are the same as those relied on by trial defense counsel).

¹⁵⁶ *See* Vowell, *supra* note 122, at 141–42 (citing *United States v. Burfield*, 22 C.M.R. 321 (C.M.A. 1973), *United States v. Lacey*, 49 C.M.R. 738 (C.M.A. 1975), and *United States v. Hill*, 44 C.M.R. 257 (C.M.A. 1972)); *see generally* *United States v. Curtis (Curtis II)*, 46 M.J. 129, 130 (C.A.A.F. 1997) (citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984), and holding the trial defense counsel was ineffective for failing to exploit all available mitigation evidence).

¹⁵⁷ *See, e.g.*, *United States v. Murphy*, 50 M.J. 4, 9, 12–13 (C.A.A.F. 1998) (finding ineffective assistance of counsel in part due to failure of counsel to conduct complete investigation into appellant’s life); *United States v. Kreutzer*, 61 M.J. 293 (C.A.A.F. 2005) (holding that the trial court erred in denying a mitigation specialist to the defense team); *Curtis II*, 46 M.J. at 130 (holding defense counsel ineffective for failing to exploit all available mitigation evidence).

¹⁵⁸ *See* *United States v. Loving*, 41 M.J. 213, 242, 250 (C.A.A.F. 1994).

¹⁵⁹ *See* Foreman, *supra* note 119, at 20–21 (citing *United States v. Curtis*, 48 M.J. 331, 332 (C.A.A.F. 1997) (Cox, C.J., concurring)).

trial.¹⁶⁰ Higher risk of reversal has led a variety of commentators to conclude granting a defense mitigation specialist request can avoid this pitfall.¹⁶¹

The trend to include a mitigation specialist as part of the defense team increases the likelihood that trial defense counsel will present more information to the panel in hopes of persuading one juror to vote for life imprisonment in a death-eligible case.¹⁶² Counsel still maintain discretion concerning the amount and type of information to present. However, military courts now require that counsel have that information to make the decision. It is extremely unlikely that the drafters of Article 45(b) anticipated the large amount of information offered during presentencing today. The sharp distinction between the two pre-trial meetings in *Hunter* and five mitigation specialists and two years of preparation in *Akbar* further illustrates how far capital litigation is from the drafter's temporal experience with presentencing procedures. Thus, the increased requirements for mitigation evidence eliminates the original need for Article 45(b).

C. Rule for Courts-Martial 1004's Aggravating Factor Scheme

The prohibition on guilty pleas in death-eligible cases articulated in Article 45(b) is no longer required because RCM 1004 creates additional protections for a military accused between merits and voting on the sentence.¹⁶³ The provision requires the prosecution to prove at least one

¹⁶⁰ See Major Edyle U. Moran, *New Developments in the Sixth Amendment Right to Counsel and Mental Responsibility*, ARMY LAW., Apr. 1999, at 65, 71–72.

¹⁶¹ See, e.g., Foreman, *supra* note 119, at 28–29 (arguing that “[w]hile employment of a mitigation specialist is not legally required in a capital court-martial, it is a sound means of adding capital experience to an otherwise inexperienced trial defense team); Velloney, *supra* note 11, at 26 (arguing that “[l]iberally granting requests for expert assistance [trained mitigation specialist] in death cases will help solve the unavoidable problem of inexperienced military counsel”); Dwight Sullivan et al., *Raising the Bar: Mitigation Specialist in Military Capital Litigation*, 12 GEO. MASON U. CIV. RTS. L.J. 199, 228 (2002) ([T]he military should provide service members charged in capital cases a regulatory right to the assistance of a mitigation specialist.”).

¹⁶² See generally Robin M. Maher, *The ABA and the Supplementary Guidelines for the Mitigation Function of the Defense Teams in Death Penalty Cases*, 36 HOFSTRA. L. REV. 763 (2008) (explaining the American Bar Association guidelines on mitigation and the use of mitigation evidence).

¹⁶³ See MCM, *supra* note 12, R.C.M. 1004 cmt. (“That the rule was drafted in recognition that, as a matter of policy, procedures for the sentence determination in

listed aggravating factor beyond a reasonable doubt to a military panel of at least twelve members.¹⁶⁴ Presentation of evidence by the government during this phase would easily fill any gaps in the record left from the detailed providency inquiry discussed above and create a more informed record for review. The drafters of Article 45(b) certainly did not consider such advanced protections for an accused, because RCM 1004 results from a fundamental shift in death penalty jurisprudence in the United States.¹⁶⁵

Generally, RCM 1004 requires four gates¹⁶⁶ that the government must pass through in order to secure a sentence of death.¹⁶⁷ The first gate requires the government to secure a unanimous conviction in a death-eligible offense.¹⁶⁸ Under the proposal in this article, the President must amend this provision to allow a military judge to accept a plea of guilty to a capital offense.¹⁶⁹ The second gate requires the government to prove beyond a reasonable doubt that one of the aggravating factors is present in the case.¹⁷⁰ This gate offers the greatest opportunity for the facts and circumstances of the case to become part of the record. The third gate calls for a “unanimous concurrence that the aggravating factors outweigh the mitigating factors.”¹⁷¹ The fourth gate mandates a unanimous vote for the sentence of death.¹⁷² The members are required to announce on the record the aggravating factors on which they relied in choosing death as a sentence.

The shift in capital jurisprudence that led to RCM 1004 began with *Furman v. Georgia*.¹⁷³ In a short per curiam opinion, the Supreme Court (in a 5–4 vote) invalidated the death sentences of three separate cases.

capital cases should be revised, regardless of the outcome of such litigation, in order to better protect the rights of servicemembers.”)

¹⁶⁴ See *id.*; see generally UCMJ art. 25a (2012) (requiring twelve panel members under ordinary circumstances).

¹⁶⁵ See Sullivan, *supra* note 58, at 4 (providing an excellent summary of the shift in death penalty jurisprudence and particularly its application to military death cases through 2006).

¹⁶⁶ See *Loving v. Hart*, 47 M.J. 438, 442 (C.A.A.F. 1998) (describing the requirements in RCM 1004 as gates).

¹⁶⁷ See *United States v. Simoy*, 50 M.J. 1, 2 (C.A.A.F. 1998) (citing *Loving*, 47 M.J. at 442 and listing the requirements sequentially).

¹⁶⁸ See *id.* at 2 (citing RCM 1004(a)(2)).

¹⁶⁹ See Appendix C (Recommended Changes to the Rules for Courts-Martial).

¹⁷⁰ See *Simoy*, 50 M.J. at 2 (citing RCM 1004(b)(7)).

¹⁷¹ *Id.* (citing RCM 1004(b)(4)(C)).

¹⁷² See *id.* (citing RCM 1006(d)(4)(A) which is referenced by RCM 1004(b)(7)).

¹⁷³ 408 U.S. 238 (1972) (per curiam).

Each of the justices wrote separate opinions.¹⁷⁴ However, “Furman generally has been interpreted as holding that the Eighth Amendment requires that the death penalty procedures ‘channel the discretion of sentencing juries in order to avoid a system in which the death penalty would be imposed in a ‘wanton’ and ‘freakish’ manner.’”¹⁷⁵ This ruling caused thirty-five states and the federal government to alter their death penalty statutes either by adding aggravating factors to presentencing analysis or through mandating the death penalty for some offenses.¹⁷⁶ The Supreme Court ultimately deemed some of the changes resulting from *Furman* that called for mandatory death, in certain crimes, unconstitutional.¹⁷⁷

Although Article 36 of the UCMJ gives the President authority to adopt “principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district court”¹⁷⁸ the military was slow to follow the lead of the states to change the capital punishment scheme.¹⁷⁹ President Reagan added RCM 1004 in 1984, after the Court of Military Appeals in *United States v. Matthews*¹⁸⁰ held a portion of the military death penalty scheme unconstitutional.¹⁸¹

In *Matthews*, the Court of Military Appeals determined that the military death penalty scheme did not meet the requirements set forth by the Supreme Court.¹⁸² The court reasoned, that “the lack of identified circumstances make meaningful appellate review, at any level, impossible, and we cannot be sure that the sentence was correctly imposed.”¹⁸³ The Court identified that both Congress and the President

¹⁷⁴ See *id.* at 239; see also *United States v. Matthews*, 16 M.J. 354, 370 (C.M.A. 1983) (the “nature of the diverse opinions makes brief summary impossible”).

¹⁷⁵ Sullivan, *supra* note 58, at 4 (quoting *Johnson v. Texas*, 509 U.S. 350, 359 (1993)); see also *Lockett v. Ohio*, 438 U.S. 586, 599 (1978).

¹⁷⁶ See *id.* at 4 (citing *Gregg v. Georgia*, 428 U.S. 153, 179–80 (1976)).

¹⁷⁷ See *id.* at 4 n.12 (citing *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976)).

¹⁷⁸ UCMJ art. 36(a) (2012); see also *Loving v. United States*, 517 U.S. 748, 770 (1996); *Matthews*, 16 M.J. at 380–81.

¹⁷⁹ See MCM, *supra* note 12, app. 21, at A21–76 (indicating that the rule was undergoing public comment in 1983, 10 years after the decision in *Furman v. Georgia*, 408 U.S. 238, 239 (1972)).

¹⁸⁰ 16 M.J. 354, 379–80 (C.M.A. 1983).

¹⁸¹ See 49 Fed. Reg. 3169 (Jan. 26, 1984) (containing Executive Order 12,460 adding RCM 1004).

¹⁸² See *Matthews*, 16 M.J. at 379–80 (analyzing Supreme Court precedent that interpreted capital sentencing schemes in various states).

¹⁸³ *Id.* at 380.

have the ability to remedy this defect.¹⁸⁴ Within ninety days of the *Matthews* decision, the President issued Executive Order 12,460 containing the new provision.¹⁸⁵ Seven years later the CAAF upheld the new death penalty scheme in *United States v. Curtis (Curtis I)*.¹⁸⁶ The court provided “[i]n sum, as we construe RCM 1004, it not only complies with due process requirements but also probably goes further than most state statutes in providing safeguards for the accused.”¹⁸⁷ The CAAF reaffirmed its ruling in *United States v. Loving*,¹⁸⁸ which the Supreme Court approved in *Loving v. United States*.¹⁸⁹

The approval of RCM 1004 did more than simply ensure the military death penalty scheme is constitutional; it created a more robust record for review. In that sense, RCM 1004 helps to eliminate the original need for the Article 45(b) prohibition. Arguably, when Congress passed the UCMJ, it created the largest court-martial jurisdiction to adjudge capital punishment in the country.¹⁹⁰ Although the UCMJ is widely heralded as increasing service member protections, it was only as advanced as the time allowed. At the time, Article 45(b) served as one of the few checks on a sentence of death. As articulated above, RCM 1004 resulted from a new era in death penalty jurisprudence in which the drafters of the UCMJ could have had no knowledge.

That said, Congress has not opted to change Article 45(b) in light of the President’s promulgation of RCM 1004.¹⁹¹ This is less likely from a specific intent of Congress to retain both provisions than it is from a lack of consideration of the interplay between the statute and the President’s

¹⁸⁴ *Id.* at 380–81.

¹⁸⁵ See *United States v. Curtis (Curtis I)*, 32 M.J. 252, 257 (C.M.A. 1991) *cert. denied*, 502 U.S. 952 (1991).

¹⁸⁶ *Id.* The Court in *Curtis I* split the appellate litigation into two cases. The first dealt with issues common to all capital cases tried in military courts and a second dealt with issues specific to the case. The second case ultimately led to a finding of ineffective assistance of counsel during the sentencing phase and a reduced sentence of confinement for life. These decisions have no effect on *Curtis I* as precedential value. See generally *United States v. Curtis (Curtis II)*, 44 M.J. 106 (C.A.A.F. 1996); *United States v. Curtis (Curtis III)*, 46 M.J. 129 (C.A.A.F. 1997).

¹⁸⁷ *Curtis I*, 32 M.J. at 269 (emphasis added).

¹⁸⁸ 41 M.J. 213 (C.A.A.F. 1994).

¹⁸⁹ 517 U.S. 748 (1996).

¹⁹⁰ See *id.* at 752–53 (providing a detailed history of the expansion of court-martial jurisdiction in capital cases from 1775 through adoption of the Uniform Code of Military Justice in 1950).

¹⁹¹ See UCMJ art. 45(b) (2012).

rule.¹⁹² Aside from affecting capital litigation, the statute and the rule address different underlying concerns. One ensures a record for review (Article 45(b)) and the other narrows the class of person eligible for the death penalty as required by the Eighth Amendment (RCM 1004).¹⁹³ If Congress created Article 45(b) to ensure a record for review, then a new rule like RCM 1004, which requires presentation of evidence by the prosecution, certainly diminishes the necessity of Article 45(b). The amount of evidence presented is dependent on the case, but nonetheless will increase the amount of material for the reviewing authority.

Prior to promulgation of RCM 1004, the prosecution may have voluntarily presented much of what is now required. However, with the requirement there is now a guarantee that evidence will be presented for the record and thus for the convening authority who reviews it. So while the real purpose of RCM 1004 is to narrow the class of persons eligible for death, the resulting evidence and testimony eliminate much of the concern that brought about Article 45.

IV. Article 45(b) Should Be Repealed in Part

In addition to greater protection now given to military accused,¹⁹⁴ there are several practical and tactical reasons that Congress should remove Article 45(b)'s prohibitions on guilty pleas in capital cases. This section will outline the most important of these reasons from both a defense and government perspective. This section is not an all-inclusive list of benefits, nor does it suggest that all capital litigants should plead guilty. Rather, it shows possible benefits to the accused and government if Congress granted the accused the choice to plead guilty. The benefits to both sides tip the scale in favor of repealing to Article 45(b), which has already outlived its use under the UCMJ.

¹⁹² The President does have the ability to change the requirements of RCM 1004, possibly giving Congress pause in changing Article 45(b). However, without RCM 1004, the military death penalty scheme would not pass constitutional muster, making Article 45(b) irrelevant. *See Loving*, 517 U.S. at 756, 770.

¹⁹³ *See id.* at 755 (citing *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983))).

¹⁹⁴ *See supra* Part III.

A. Defense Benefits¹⁹⁵

There are numerous benefits in allowing an accused to plead guilty at a capital trial. Currently, defense counsel can operate to achieve some of the benefits below only to a limited extent. However, the military appellate courts are cautious in how far they will let accused and counsel go in conceding elements on the merits¹⁹⁶ because the court forbids violating even the spirit of Article 45(b).¹⁹⁷ With a repeal of the prohibition in Article 45(b) the rules would permit the accused to accept the goodwill benefits of accepting responsibility; avoid any animosity from the panel by litigating a meritless case; be able to focus on the presentencing phase; and potentially limit what evidence the prosecution admits.

1. Benefits of the Accused Showing Remorse and Accepting Responsibility

Simply accepting responsibility and showing true remorse for a death-eligible offense may convince one member of the panel that an accused does not deserve death.¹⁹⁸ As Justice Scalia explained in *Minnick v. Mississippi*, “[w]hile every person is entitled to stand silent, it is more virtuous for the wrongdoer to admit his offense and accept the punishment he deserves. Not only for society, but for the wrongdoer himself, ‘admission[n] of guilt . . . , if not coerced, [is] inherently desirable.’”¹⁹⁹ Justice Scalia further explains that an admission shows

¹⁹⁵ All argument made in this section assumes that the accused is actually guilty of a capital offense and makes it through a providency inquiry.

¹⁹⁶ See Captain Joseph A. Russelburg, *Defense Concessions as a Trial Tactic*, ARMY LAW., Sept. 1983, at 22, 23 (noting the reversal of numerous military cases and arguing that there are legal limits to a concession defense, particularly when concessions appear to clash with the interest of the appellant); see also *United States v. Dock*, 28 M.J. 117, 119 (C.M.A. 1989) (citing *United States v. McFarlane*, 23 C.M.R. 320 (C.M.A. 1957) and providing “[I]t is not just the pleas that are looked to but the ‘four corners’ of the record to see if, ‘for all practical purposes,’ the accused pled to a capital offense”).

¹⁹⁷ See *McFarlane*, 23 C.M.R. at 324 (McFarlane pled not guilty to the capital offense but presented no defense and a minimal mitigation case; the court reversed the decision of the board of review and returned the case for a rehearing on the specifications.).

¹⁹⁸ See Fisher, *supra* note 31, at 201 & n.99, 202 & n.101.

¹⁹⁹ *Minnick v. Mississippi*, 498 U.S. 146, 167 (1990) (Scalia, J., and Rehnquist, C.J., dissenting) (quoting *United States v. Washington* 431 U.S. 181, 187 (1977)) (*Minnick* is a capital case dealing with the admission of a confession rather than a guilty plea; however, confessions and guilty pleas are sufficiently analogous to offer insight into how society views admissions of guilt.).

rehabilitative potential and “demonstrates a recognition and affirmative acceptance of personal responsibility.”²⁰⁰ Moreover, admissions serve to ingratiate the accused not only to the panel but also to reviewing authorities who have the power to reduce a sentence.²⁰¹ These two factors make pleading guilty to a military panel a viable option in the right case.

First, panels place remorse in high regard.²⁰² While few statistics exist, this is perhaps an even greater influence on military panels that hold integrity, honor, and personal courage to be at the core of service.²⁰³ Generally, panels are more likely to vote for life, if they can identify remorse or acceptance of responsibility prior to the accused opting to take the stand during presentencing.²⁰⁴ Thus, it is especially damaging to the accused’s chances of a life vote if he first puts on a denial defense, prior to attempting to accept responsibility.²⁰⁵ A denial defense is a strategy in which the accused proclaims his innocence during the merits portion of the trial.²⁰⁶ Of course, if the jury convicts him, then he is in the precarious position of remaining recalcitrant and appearing as though he accepts no responsibility. Alternatively, if he now accepts responsibility, then he appears disingenuous.²⁰⁷

²⁰⁰ *Id.* at 167 (Scalia, J., and Rehnquist, C.J., dissenting) (quoting *Michigan v. Tucker*, 417 U.S. 433, 448 (1974)).

²⁰¹ See Fisher, *supra* note 31, 201–02 & n.100 (providing “even in the English common law period of the mandatory death penalty, some defendant’s plead guilty to capital offenses in hope ‘that benefit-of-clergy’—a precursor of executive commutation—‘would nullify the otherwise applicable sanction.’”) (citation omitted).

²⁰² See Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1560 (noting that 65 percent of death case jurors cited lack of remorse as a reason for voting for death).

²⁰³ See U.S. DEPT’T OF ARMY, REG. 600-100, ARMY LEADERSHIP para. 1-5, fig.1-1 (8 Mar. 2007) [hereinafter AR 600-100], available at http://www.apd.army.mil/pdffiles/r600_100.pdf (providing the seven core Army values: loyalty, duty, respect, selfless service, honor, integrity, and personal courage).

²⁰⁴ See Lieutenant Colonel Eric Carpenter, *An Overview of the Capital Jury Project for Military Justice Practitioners: Aggravation, Mitigation, and Admission Defenses*, ARMY LAW., July 2011, at 17; see also Sundby, *supra* note 202, at 1587–88 (showing juries are more receptive to showing the accused accepted responsibility early).

²⁰⁵ See Carpenter, *supra* note 204, at 18 (citing Sundby, *supra* note 202, at 1586, 1573–74 and SCOTT E. SUNDBY, A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY 33–35 (2005)).

²⁰⁶ See Sundby, *supra* note 202, at 1574 (citing Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 330 (1983)).

²⁰⁷ See Sundby, *supra* note 202, at 1587.

An alternative to the denial defense is the admission defense.²⁰⁸ The admission defense is a strategy in which the accused admits a portion of the offense that does not amount to the capital offense.²⁰⁹ He then defends the remaining element with a theory like “provocation, self-defense, diminished capacity, lack of specific intent, accident, or mistake.”²¹⁰ Juries are more likely to vote for life over death when the accused shows remorse or personal responsibility, even just for the lesser offense, throughout the trial process.²¹¹

An admission defense allows a capital defendant to accept responsibility and appear remorseful.²¹² This works even better if the accused admits to some of the events prior to trial, thus making them less self-serving.²¹³ It follows that if an admission defense is likely to produce a life vote due in part to the panel believing that the accused is accepting responsibility, then a sentencing panel will hold a plea to a capital offense in similar regard. Article 45(b) takes away the former but not the latter from a military accused, forcing him to walk a tightrope of admitting some but not all of his conduct. In some cases, the plea may not appear remorseful, just the only course of action in the face of overwhelming evidence. Even if the tactic of pleading as a form of remorse is not always successful, the law should give the accused and counsel the choice.

To illustrate, imagine a military accused who confessed to a murder in a properly advised sworn statement prior to trial. Suppose, as is often the case, that the accused’s statement is unclear on the issue of premeditation. Article 45(b) prevents the accused from telling the panel that he premeditated. Therefore, while he can attempt an admission defense, if the panel disagrees with the defense on the issue of premeditation, he is stuck with only accepting responsibility for the lesser form of murder.²¹⁴ Without Article 45(b), he could plead and then use the statement to show that he accepted responsibility and showed

²⁰⁸ *See id.*

²⁰⁹ *See* Carpenter, *supra* note 204, at 18 (citing Goodpaster, *supra* note 206).

²¹⁰ *Id.* at 22.

²¹¹ *See* Sundby, *supra* note 202, at 1565 (stating that in “thirteen of nineteen cases, at least *one* juror explicitly insisted that he would have voted for life rather than death had the defendant shown remorse” (emphasis added)).

²¹² *See* Carpenter, *supra* note 204, at 18.

²¹³ *See* Sundby, *supra* note 202, at 1584.

²¹⁴ *But see id.* at 1584–85 (providing that a traditional admission defense can be highly successful in receiving a vote for life in pre-trial confession cases).

remorse from investigation through presentencing.²¹⁵ Clearly, there are no magic strategies in a capital case, but this example is consistent with the principles that make the admission defense successful and one that Article 45(b) prohibits.²¹⁶

Second, military accused have two statutory protections prior to approval of the death sentence by the President—the convening authority and mandatory appellate review.²¹⁷ The accused’s best opportunity at clemency is the convening authority.²¹⁸ By pleading guilty, the accused sends a clear message to the convening authority that he accepts responsibility. Importantly, the convening authority does not observe the trial.²¹⁹ As such, he is unlikely to draw the same possible negative impressions from appearance and demeanor of the accused that a death panel member might draw.²²⁰ Lastly, the accused has the right to present additional extenuation and mitigation evidence to the convening authority in order to assist in his decision to grant clemency.²²¹ A plea saving the government resources and reducing the impact on the unit and families in protracted litigation may be just enough for a grant of clemency from the convening authority.

The military courts of criminal appeals also have the awesome plenary authority to disapprove a portion of a sentence.²²² Article 66 of the UCMJ provides that the court “may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds

²¹⁵ See *infra* Part IV.B.2 (outlining that even considering the success rate of an admission defense an accused and counsel may opt to limit face time with the panel on the merits).

²¹⁶ Each capital case must be independently evaluated taking into consideration the accused, the extenuation and mitigation evidence available, and the circumstances of the crime. This article does not argue that pleading guilty is the best option in all or a majority of cases, merely that when death is on the table, all possible strategies to avoid death should be available to the defense team.

²¹⁷ See UCMJ arts. 60 and 66 (2012).

²¹⁸ See *United States v. Wheelus*, 49 M.J. 283, 287 (C.A.A.F. 1998) (citing *United States v. Wilson*, 26 C.M.R. 3, 6 (C.M.A. 1958)); see *Sullivan*, *supra* note 58, at 16–19 (noting that between 1984 and 2006, the convening authority commuted two of the fifteen cases with an adjudged death sentence).

²¹⁹ See *United States v. Harvey*, 64 M.J. 13, 20–21 (C.A.A.F. 2006) (questioning the prudence of the convening authority attending a court-martial and holding his presence amounted to unlawful command influence).

²²⁰ See *Sundby*, *supra* note 202, at 1561–62 (noting that juries consider the accused’s demeanor during trial above all else).

²²¹ See UCMJ art. 60(b)(1).

²²² See *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990); see also *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999).

correct in law and fact and determines, on the basis of the entire record, should be approved.”²²³ Determining sentence appropriateness is a function of the court to assure that justice is done and the accused “gets the punishment he deserves.”²²⁴ Justice is distinguished from clemency, which “involves bestowing mercy.”²²⁵ The court judges sentence appropriateness “by ‘individualized consideration’ of the particular accused ‘on the basis of the nature and seriousness of the offense and the character of the offender.’”²²⁶ In doing so, the court may disapprove a death sentence under circumstances it finds compelling. A case in which the appellant has taken responsibility and shown remorse might convince the court to exercise that authority.

2. Animosity Toward the Accused

Forcing the accused to litigate a meritless case is likely to foster a panel’s frustration or even animosity toward the accused. Two examples stand out as evidence of this premise: panel reactions to the reasonable doubt defense and panel reaction to in-court demeanor of the accused.²²⁷

“[A] death penalty trial is no ordinary criminal trial and invoking one’s presumption of innocence can prove deadly.”²²⁸ This statement is striking because it assumes that the panel will not follow the military judge’s instructions.²²⁹ Specifically, the panel is to draw no adverse inference from an accused exercising his right to plead not guilty and forcing the government to prove the elements of the offense.²³⁰ Yet, studies show that juries react poorly to a defense that argues the government did not meet their burden and then after conviction attempt

²²³ UCMJ art. 66 (2012).

²²⁴ See *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988).

²²⁵ See *id.*

²²⁶ *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180–81 (C.M.A. 1959)).

²²⁷ It is not the intent of this section to outline all possible reasons an accused may choose to plead guilty to a capital offense without a plea agreement with the convening authority. It serves only to highlight tactical options removed by Article 45(b) and how the claim appears to be supported by empirical data.

²²⁸ See *Carpenter*, *supra* note 204, 18 (quoting *Sundby*, *supra* note 205, at 33).

²²⁹ See *United States v. Loving*, 41 U.S. 213, 235 (C.A.A.F. 1994) (stating “Court members ‘are presumed to follow the military judge’s instruction’” (citation omitted)).

²³⁰ See *United States v. Paxton*, 64 M.J. 484, 487 (C.A.A.F. 2007) (panel may not draw an inference that accused is not remorseful from his plea of not guilty).

to express regret.²³¹ This is an interesting dynamic because juries indicated they felt manipulated by the tactic; in essence, they felt manipulated by an exercise of the accused's constitutional rights.²³² Permitting a guilty plea would give the defense another option; this is especially appealing if the admission defense is lacking or the prosecution case is especially strong.²³³

Panels also look to the accused's demeanor.²³⁴ Limiting the accused's exposure to the panel during the merits phase might be critical, especially if he lacks self-control and will appear agitated, amused, or angry during the prosecution case. "What struck jurors again and again was the defendant's lack of emotion during the trial, even as the prosecution introduced into evidence horrific depictions of his crimes."²³⁵ An accused who laughs during the presentation of the evidence, appears emotionless, fidgets, appears arrogant, or portrays defiance could affect his chances at a life sentence before presentencing proceedings ever begin.²³⁶ A multi-week merits phase gives the panel members hours and hours of time to observe the accused's every move, while at the same time assessing guilt. Limiting this exposure might prove a good defense tactical approach. This approach is especially appealing when one considers that the panel's first impression of the accused would then be through the lens of acceptance of responsibility rather than legal culpability.²³⁷

²³¹ See Sundby, *supra* note 202, at 1587–88.

²³² See *id.*

²³³ See *id.* at 1587 n.68 (citing Goodpaster, *supra* note 206, at 332 and stating that "Professor Goodpaster has suggested that if the prosecution's case-in-chief turns out to be very strong, then it might be strategically prudent for the defendant to admit guilt instead of allowing the reasonable doubt defense to go to the jury").

²³⁴ See *id.* at 1561–62.

²³⁵ *Id.* at 1563.

²³⁶ See *id.* at 1563–65.

²³⁷ See generally Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 *FORDHAM L. REV.* 21, 37 (1997) (stating an accused's "moral culpability for murder may be greater or lesser, depending on aggravating and mitigating circumstances, even though his legal culpability remains the same"); see also L. TIMOTHY PERRIN, H. MITCHELL CALDWELL & CAROL A. CHASE, *THE ART & SCIENCE OF TRIAL ADVOCACY* 22–23, 26 (1st ed. 2003) (describing that panel members remember what they hear first, last, and often).

3. Tactical Benefit for the Defense to Focus on Presentencing

Counsel who do not have to prepare for a merits case can focus the entire defense team's collective skills on the mitigation case and on limiting the panel's exposure to the prosecution theory and perhaps some evidence. "[D]efense team[s] must be creative and, to an extent visionary."²³⁸ The mitigation presented "must be comprehensive, consistent, coherent, and credible."²³⁹ The tightrope that counsel must walk in pleading guilty to only non-capital offenses may put off the panel, cause counsel to lose focus, or, worse, cause reversal on appeal.²⁴⁰ Avoiding slipping off that tightrope consumes a large amount of time, focus, and defense team energy. With the ability to plead, a defense team can focus its energy on the presentencing phase, while using the mitigating effect of accepting responsibility as a theme for the sentencing case. This is not possible under the current scheme, which is why Article 45(b) should be repealed in part.

One theory of presenting mitigation evidence is to frontload it during the merits phase so that the panel begins to understand why the accused committed a crime.²⁴¹ This makes sense, because without the information from the accused, the panel only hears that the accused is a cold, calculating killer until the presentencing portion of the case.²⁴² The fact remains that they still hear the prosecution theory and witnesses proving the case, sometimes for days or weeks, even when mitigation evidence is frontloaded. Even if the defense chooses an admission defense, the panel is going to hear the prosecution theory and theme often. A guilty plea would limit the exposure to the prosecution mantra

²³⁸ John H. Blume, Sheri Lynn Johnson & Scott E. Sundby, *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 HOFSTRA L. REV. 1035, 1042 (2008).

²³⁹ *Id.* at 1039.

²⁴⁰ See, e.g., *United States v. Murphy*, 50 M.J. 4, 12 (C.A.A.F. 1998) (Faced with Article 45(b)'s prohibition counsel "attempted to mount a defense to the capital murder charges. In light of numerous confessions, some with inconsistencies, the defense tried to create the belief that perhaps the confessions were untrue and the killings were actually committed by appellant's second wife . . ." The defense strategy did not work.). *Id.* See also *United States v. Dock*, 28 M.J. 117, 119 (C.M.A. 1989) (holding that appellant's pleas amounted to a plea to a capital offense in violation of Article 45(b)); *United States v. McFarlane*, 23 C.M.R. 320 (C.M.A. 1957) ("[I]t is not just the pleas that are looked to but the 'four corners' of the record to see if, 'for all practical purposes,' the accused pled guilty to a capital offense.").

²⁴¹ See Carpenter, *supra* note 204, at 17 (arguing that frontloading is a feature of the admission defense).

²⁴² See Sundby, *supra* note 202, at 1594.

to some extent and thus would limit the effects of primacy, frequency, and recency on the panel.²⁴³

Lastly, the defense may be able to limit some of the most graphic evidence by pleading guilty in a capital case. Often, the prosecution argues that autopsy photos and photos showing different angles of the victim's wounds are circumstantial evidence of premeditation or lack of self-defense. For example, a bullet wound showing a path from back to front is evidence an accused shot the victim in the back and thus limits the effects of a self-defense argument. Defense counsel generally objects to the gruesome nature of these photos pursuant to Military Rule of Evidence (MRE) 403 because the unfair prejudice to the accused substantially outweighs the probative value.²⁴⁴ Nevertheless, because the photos go to the element of premeditation, the military judge permits the evidence as relevant and the panel may view and consider them during deliberation. If permitted to plead guilty, an accused admits the elements, and possibly limits the probative value of such evidence, tilting the MRE 403 balancing test in the accused's favor.²⁴⁵

B. Government Benefits

Benefits to the government are more difficult to quantify because less empirical data is available. This is particularly true when the data set needed is very specific—like comparing contested capital cases to capital guilty pleas without a plea bargain.²⁴⁶ Even with a lack of empirical data, one can make general observations about the cost and government interest in permitting a military accused to plead guilty in any case, capital or non-capital. As such, this section outlines possible benefits to the government if Congress chooses to repeal Article 45(b)'s prohibition on pleas in death cases. Specifically, this section analyzes

²⁴³ See PERRIN ET AL., *supra* note 237, at 26 (describing that panel members remember what they hear first, last, and often).

²⁴⁴ See, e.g., *United States v. Burks*, 36 M.J. 447, 453 (C.M.A. 1993) (discussing the probative value of photographs in a murder trial offered to show violent nature of the attack versus unfair prejudice to the accused); see also MCM, *supra* note 12, MIL. R. EVID. 401–03.

²⁴⁵ Admittedly, these photos may be presented to the jury for another purpose, such as proving an aggravating factor pursuant to RCM 1004(c).

²⁴⁶ See generally JOHN ROMAN ET AL., THE COST OF THE DEATH PENALTY IN MARYLAND 5 (2008), available at http://www.urban.org/UploadedPDF/411625_md_death_penalty.pdf (describing as of 2008 only thirteen previous studies analyzed the cost of capital litigation and that they “varied widely in their scope”).

how a change in the law has the potential to reduce the cost of capital litigation, reduce the impact of protracted litigation on victims' families, and increase the effectiveness of the process on good order and discipline.

1. Significant Effects on Judicial Economy and Reduced Cost

Allowing an accused to plead guilty would likely reduce the overall cost of the trial process and ease the trial and appellate burden on the judiciary. In a 2010 report analyzing median cost of authorized²⁴⁷ capital trials, researchers found the cost for a guilty plea was half that of a case that went to trial.²⁴⁸ The report included the cost of all pleas including those that ultimately resulted in a plea for life.²⁴⁹ This does not drastically affect the premise in this article because every case that starts as death-eligible will begin in the same manner. That is to say, even military death cases that result in a plea agreement for a sentence less than death will require the parties to prepare as if it were a contested case.²⁵⁰ However, once the defense opts to plead, they will no longer need the services of numerous experts.

For example, in a murder case involving a firearm, the defense might require a forensic pathologist, a firearm, tool mark, and ballistic expert, a crime scene reconstructionist, a trace evidence expert, blood spatter expert, and a fingerprint expert.²⁵¹ The reduction in assistance applies equally to plea bargains, reducing the maximum sentence and pleas in which death remains a possibility. As it is likely that the defense front-

²⁴⁷ See JOHN B. GOULD & LISA GREENMAN, REPORT TO THE COMMITTEE ON DEFENDER SERVICES JUDICIAL CONFERENCE OF THE UNITED STATES UPDATE ON THE COST AND QUALITY OF DEFENSE REPRESENTATION IN FEDERAL DEATH PENALTY CASES 6 (2010), available at <http://www.deathpenaltyinfo.org/documents/FederalDPCost2010.pdf> (explaining that an authorized case is one that the Attorney General of the United States approves the local prosecutor to seek the death penalty); see also Memorandum from Eric H. Holder, Jr. Attorney Gen. of the United States, to All Federal Prosecutors (July 27, 2012), available at <http://www.deathpenaltyinfo.org/documents/FedDPRules2011.pdf> (explaining amended procedures for local prosecutors to seek the death penalty).

²⁴⁸ See GOULD & GREENMAN, *supra* note 247, at 2, 6, & 24 (finding that from 1998 to 2004, the median cost of a capital trial was \$465,000, and the mean cost for a plea in an authorized capital plea was \$200,933).

²⁴⁹ See *id.* at 18 n.22.

²⁵⁰ See *id.* at 25 (finding that even in a plea, attorneys must thoroughly investigate).

²⁵¹ See ABA GUIDELINES, *supra* note 120, at 952–60 (outlining the defense team approach to capital litigating including the use of numerous experts).

loaded its mitigation-investigation to determine if a plea was appropriate, additional presentencing cost should be minimal because expert's services would be needed for a much shorter period of time.

A plea of guilty would result in shorter trials, which would ease the burden on the trial judiciary. Capital cases are extremely time-consuming for all of the parties involved.²⁵² Judges in federal practice indicate that presiding over a capital trial is all-consuming, causing extensive independent study and prolonged high stress.²⁵³ A federal judge noted that one case involved over "250 pre-trial motions, some requiring many hours of hearings and three interlocutory appeals."²⁵⁴ A guilty plea would reduce preparation and in-court time on the merits, and likely reduce the number of motions filed. This, in turn, would ease the burden on the judiciary at the trial level. Of course, tactically, a defense team may choose to file all their pre-trial merits motions prior to making the decision to plead guilty, but that guilty plea would still lessen the potential future burden on the appellate judiciary.

Lack of a contested merits phase would thus also limit involvement at the appellate level. Presumably, a trial that lacks a contested merits portion would contain a shorter record for review because an unconditional plea waives most issues for appeal.²⁵⁵ A shorter record would reduce processing time as counsel and the court would spend less time examining the shorter record.²⁵⁶ Additionally, the court would consider fewer issues involving the merits portion of the trial. For example, in *United States v. Murphy*, a capital case, counsel briefed and the court considered twelve separate assignments of error dealing exclusively with the merits portion of the trial.²⁵⁷ An increase in

²⁵² See, e.g., *Hasan v. Gross*, 71 M.J. 416, 417 (C.A.A.F. 2012) (illustrating that over three years after the Fort Hood shooting, the trial on the merits had not started).

²⁵³ See GOULD & GREENMAN, *supra* note 248, at 80.

²⁵⁴ See *id.* (another judge disagreed, indicating the real stress was on the lawyers).

²⁵⁵ See Patricia A. Ham, *Making the Appellate Record: A Trial Defense Attorney's Guide to Preserving Objections—The Why and How*, ARMY LAW., Mar. 2003, at 10, 22 (citing RCM 910(j) for the proposition that many of the motions outlined in RCM 905 are waived by an unconditional plea); *but see* MCM *supra* note 12, R.C.M. 910(a)(1) discussion (providing that the government may admit evidence in support of the factual basis of the pleas prior to its acceptance by the court).

²⁵⁶ See generally UCMJ art. 66 (2012) (requiring the Court of Criminal Appeals to approve only the findings and sentence that it finds correct in law and fact, which necessarily includes a review of the entire record).

²⁵⁷ See *United States v. Murphy*, 50 M.J. 4, 16–24 (C.A.A.F. 1998) (listing all assignments of error alleged).

assignments of error dealing with the plea may limit benefits to the burden on the appellate courts. However, contrary to the innumerable potential issues arising out of a contested merits case, the law of pleas is well developed.²⁵⁸

Congress would need to modify the RCM and/or the UCMJ if it repealed the prohibition. The UCMJ contains no standard to apply for the military judge to grant a request by the accused to withdraw a plea.²⁵⁹ Under the current plea system, an accused may withdraw his plea at any time before acceptance by the military judge with permission.²⁶⁰ After the military judge accepts his plea, the accused may only withdraw that plea at the discretion of the military judge.²⁶¹ At the outset, the possibility of withdrawal of a plea limits any potential financial benefits on the government, as the prosecution must still prepare their merits case thoroughly.

While a detailed argument for a new standard for this issue is beyond the scope of this article, *Federal Rule of Procedure 11* presents a workable standard. Simply stated, the rule allows withdrawal for “a fair and just reason” after acceptance of the plea, but before imposing a sentence.²⁶² While not perfect, this at least provides factors for the judge to consider. To grant a motion to withdraw the plea, a judge must balance a series of factors, such as the time between plea and motion, whether *Rule 11* was complied with, whether the accused is claiming innocence, and whether accused had competent counsel at the plea.²⁶³ The courts review the judge’s ruling for an abuse of discretion.²⁶⁴ With the repeal of Article 45(b), the government will most likely benefit from judicial efficiency and reduced cost in litigation.

²⁵⁸ See *supra* Part III.A.

²⁵⁹ See UCMJ art. 45 (2012).

²⁶⁰ MCM, *supra* note 12, app., at A21-62.

²⁶¹ See *United States v. Silver*, 35 M.J. 834, 836 (C.M.A. 1992) (providing “[a]n accused does not have an absolute right to withdraw a guilty plea, and granting such a request is in the discretion of the military judge (citations omitted)).

²⁶² FED. R. CRIM. P. 11(d)(1)-(2); see also *United States v. Hyde*, 520 U.S. 670, 679–60 (1997).

²⁶³ See 1A FED. PRAC. & PROC. CRIM. § 181 (4th ed. 2012) (citing numerous cases from various circuits applying different balancing tests).

²⁶⁴ See *United States v. Peleti*, 576 F.3d. 377, 382 (7th Cir. 2009).

2. *Public Policy Concerns of Protracted Litigation and Impact on the Families of Victims*

Lengthy delays between a crime and trial have an adverse effect on perceptions of the justice system.²⁶⁵ The public has an interest in seeing a case go to trial in an expeditious and just manner. In addition, there is no doubt that a trial adversely affects families of victims. Recently, a series of motions and interlocutory appeals concerning the growth of a beard by the accused delayed the capital prosecution of Major Nidal Hasan.²⁶⁶ Victims expressed outrage, lamenting that the court-martial itself is part of their healing process and the delays were adversely affecting them personally.²⁶⁷ While *United States v. Hasan* is an unusually complex case because it involves multiple victims, it still serves as a good example of public discontent over protracted litigation. As victims seek finality in the process, they see the lengthy litigation as evidence that the justice system is not working well. This is especially true when the UCMJ prevents a plea even in the face of the accused's attempt to plead. Permitting guilty pleas in death-eligible cases would lessen or possibly even eliminate this perception.

3. *Speed and Justice Help Maintain Good Order and Discipline*

The military justice system must move at a pace that ensures commanders receive the benefit of the discipline it produces.²⁶⁸ Over

²⁶⁵ See generally Joe Goldeen, *Family Frustrated by Murder Trial Delay*, RECORDNET (Jan. 24, 2012), available at http://www.recordnet.com/apps/pbcs.dll/article?AID=/20120124/A_NEWS/201240318 (illustrating that discontent over trial delays, even at defense request are often held against the government) (last visited June 15, 2014).

²⁶⁶ See Megan McCloskey, *Hood Survivors Find Hasan's Beard a Mockery*, MILITARY TIMES (Oct. 29, 2012), available at <http://www.military.com/daily-news/2012/10/29/hood-survivors-find-hasans-beard-a-mockery.html> (last visited June 15, 2014); see also Jim Forsyth, *Trial Delays Vex Fort Hood Survivors Three Years After Rampage*, REUTERS (Nov. 5, 2012), available at <http://www.reuters.com/article/2012/11/05/us-usa-crime-fort-hood-idUSBRE8A403Y20121105> (last visited June 15, 2014).

²⁶⁷ See McCloskey, *supra* note 266.

²⁶⁸ See *Chapell v. Wallace*, 462 U.S. 296, 300 (1983) (citing *Parker v. Levy*, 417 U.S. 733, 743–44 (1974)) (stating, “[t]he need for special regulations in relation to military discipline, and the justification for a special and exclusive system of justice, is too obvious to require extensive discussion; no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting.”); see also Hon. Robinson O. Everett, *The First 50 Years of the Uniform Code of Military Justice: A Personal Perspective*, 47-DEC. FED. LAW. 28, 30 (2000) (citing United States Senator

time, the adage of swift, harsh punishment for even minor infractions has given way to modern concepts of justice.²⁶⁹ However, at its core, the UCMJ remains a commander's tool to maintain good order and discipline in the military community.²⁷⁰ Unnecessary delays in the court-martial process lead to a perception that the command is not disciplining soldiers for infractions. This perception can prove detrimental in a specialized society that requires "compliance with military procedures and orders . . . with no time for debate or reflection."²⁷¹ Even with an increase in a soldier's rights in the modern military, delaying a case merely for an outdated rule runs counter to the UCMJ's purpose and ultimately adversely affects the commander's ability to maintain good order and discipline. As Judge Wiss noted in *United States v. Loving*, "[j]ustice delayed is not justice—not to the accused and not to society."²⁷² Permitting an accused to plead guilty, if he so desires, helps ensure the UCMJ remains relevant for its intended purpose.

C. Bring Military Law in Line with Majority Law in Death Penalty Jurisdictions

Permitting guilty pleas in capital cases would bring the UCMJ in line with the laws of federal government and the large majority of states that permit the death penalty. Congress, currently, specifically forbids pleas in cases that are referred capital.²⁷³ However, Congress has also expressed a desire for the UCMJ to look like the criminal law practiced before the U.S. district courts. Article 36 of the UCMJ permits the President to make "regulations which shall, so far as practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the U.S. district court, but which may not be

Sam Ervin and stating "[t]here is no discipline in the Armed Forces without justice and no justice without discipline").

²⁶⁹ See Nicole E. Jaeger, *Maybe Soldiers Have Rights After All!*, 87 J. CRIM. L. & CRIMINOLOGY 895, 896–904 (1996) (discussing the evolution of military justice).

²⁷⁰ See MCM, *supra* note 12, pt. I, ¶ 3; see also *Reid v. Covert*, 354 U.S. 1, 34–35 (1957); *United States v. Loving*, 41 M.J. 213, 269 (C.A.A.F. 1994) (holding that "protection of society and preservation of good order and discipline" were permissible sentencing considerations in a capital case); see generally David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1 (2013) (outlining the various purposes for military law).

²⁷¹ *Wallace*, 462 U.S. at 300.

²⁷² *Loving*, 41 M.J. at 329 (Wiss, J., dissenting).

²⁷³ See UCMJ art. 45(b) (2012).

contrary to or inconsistent with this chapter.”²⁷⁴

The language in the statute suggests that a review of civilian law is appropriate when the President desires to make a rule pursuant to Article 36. It follows then that such a review is also useful, although not required, when arguing for a substantive change to the UCMJ. In part, this is exactly what Congress did when it considered and passed Article 45(b). As evidenced by the Morgan Report and congressional hearings, Congress considered the special needs of the military and current civilian practice.²⁷⁵ In addition to other protections overcoming Article 45(b)’s prohibition, it is not consistent with the majority view concerning guilty pleas.

Currently, the federal government and thirty of the thirty-two states that allow the death penalty permit the accused to plead guilty to the charged offense.²⁷⁶ In light of these numbers, a change in the law would be consistent with current law in the U.S. district courts and the state courts. Because Article 45(b) is no longer needed to serve its intended purpose, little reason exists for the UCMJ to be inconsistent with federal law and that of the majority of states.

²⁷⁴ *Id.* art. 36 (emphasis added).

²⁷⁵ *See H.R. 2498, supra* note 53, at 1056–57 (noting that the prohibition was nearly uniform in civilian courts); *see* The Keeffe Report, *supra* note 54, at 140 (citing military basis for the prohibition on pleas in capital cases).

²⁷⁶ *See* 18 U.S.C. § 3593 (2002); ALA. CODE § 13A-5-42 (2012); ARIZ. R. CRIM. P. 17.1 (2012); CAL. PENAL CODE § 190.4 (West 2012); COLO. REV. STAT. § 18-1.3-1201 (2012); DEL. CODE ANN. tit. 11, § 4209 (2012); FLA. STAT. ANN. § 921.141 (West 2010); GA. CODE ANN. § 17-10-32 (West 2012); IDAHO CODE ANN. § 19-2515 (West 2012); IND. CODE ANN. § 35-50-2-9(d) (West 2007); KAN. STAT. ANN. § 22-3210 (2009); KY. REV. STAT. ANN. § 532.025(1)(a) (West 2012). *See also* Chapman v. Commonwealth, 265 S.W.3d 156, 175 (2007); MISS. CODE ANN. § 99-19-101 (West 2012); MO. ANN. STAT. § 565.006 (West 2012); MONT. CODE ANN. § 46-18-301 (West 2013); NEB. REV. STAT. § 29-2520 (2012); NEV. REV. STAT. ANN. § 175.552 (West 2011); N.H. REV. STAT. ANN. § 630:5 (2013); N.C. GEN. STAT. ANN. § 15A-2000(a)(2) (West 2013); OHIO REV. CODE ANN. § 2929.02 (West 2012); OKLA. STAT. ANN. tit. 21, § 701.10 (West 2012); OR. REV. STAT. ANN. § 163.150 (West 2012); 42 PA. CONS. STAT. ANN. § 9711(b) (West 2012); S.C. CODE ANN. § 16-3-20 (2012); S.D. CODIFIED LAWS § 23A-27A-4 (2012); TENN. CODE ANN. § 39-13-205 (2012); TEX. CRIM. PROC. CODE ANN. §§ 1.13-1.15, 37.071 (Vernon 2011). *See also* Fuller v. State, 253 S.W.3d 220, 226–27 (Tex. Crim. App. 2008) (clarifying statute and holding plea in capital cases permissible); Utah CODE ANN. § 76-3-207 (West 2012); VA. CODE ANN. §§ 19.2-257, 19.2-264.4 (West 2012); WASH. REV. CODE ANN. § 10.95.050 (West 2012); WYO. STAT. ANN. § 6-2-102 (West 2012). The two states that allow the death penalty but do not allow a guilty plea are Arkansas and Louisiana. *See* ARK. CODE ANN. 5-10-101 (2013); ARK. CODE ANN., 5-4-608 (2014); LA. R.S. 14:30 & 14:113 (2012); LA. CODE CRIM. PROC. ANN. art. 557.

V. Conclusion

The UCMJ must march on with time to remain a relevant system of justice in the United States.²⁷⁷ Just as Congressman Martin said in the congressional floor debates after World War II, “You have built up a good piece of legislation here. . . . It is also important that Congress be ever ready to revise and improve the system in the way best illustrated by H.R. 4080.”²⁷⁸ This statement is more than an observational pleasantry during a hearing, but rather a warning to future generations to continue to analyze and improve the UCMJ. In fact, not just improve, but improve “in the way best illustrated by [the UCMJ].” Modifying the UCMJ in this way requires Congress to continue to balance service member rights with the requirements of discipline in the modern military. As military law advances, Congress and the services must identify protections of the past that have become hindrances for the future.

The prohibition on guilty pleas in capital cases is a glaring example of a protection that has outlived its historical purpose and has become a hindrance. The original intent ensured that the reviewing authority received enough information in a record to determine if the accused was in fact guilty and to decide if he should mitigate the sentence. However, the passage of the UCMJ, in combination with advances in military criminal law like the detailed providency inquiry, increased requirements for presentation of mitigation evidence in capital trials, and the promulgation of RCM 1004, eliminates those historical concerns.

Not only have additional rights rendered 45(b)'s original intent obsolete, but also evolving practice and complexity of capital litigation favor its change. A repeal of the prohibition will allow defense teams to focus their cases on mitigation, highlight the remorsefulness of their clients, and avoid litigating meritless cases. Even today, with Article 45(b) firmly held constitutional—capital issues like Major Nidal Hasan's

²⁷⁷ See UCMJ art. 146 (2012) (establishing an annual Code committee to report, among other items, recommended changes to the UCMJ); see Major General William A. Moorman, *Fifty Years of Military Justice: Does the Uniform Code of Military Justice Need to Be Changed?*, 48 A.F. L. REV. 185, 186 (2000) (“Our system, like all other legal systems, is subject to the dynamics of change. No legal system can remain static, each must change to reflect the needs and demands of society or risk becoming an anachronistic relic of a dead or dying society. For the reason, we are always looking for and evaluating ways to improve military justice activities.”); see also Everett, *supra* note 268 (calling for continued study to improve the UCMJ).

²⁷⁸ H.R. Debate, *supra* note 1.

attempt to plead guilty at trial and capital appellants like Hassan Akbar raise the issue on appeal.²⁷⁹ Admittedly, this may be a defense tactic to insert an issue at trial to seek reversal of a conviction later on appeal. However, the fact that litigants continue to raise the issue is evidence that Congress should at least now examine the prohibition.

The benefits of a change in the law do not solely benefit the accused. A guilty plea in a capital case would reduce the cost to the government and create less of a burden on the judiciary. Perhaps, more importantly, a plea is likely to reduce processing time of a capital case. Such a reduction would help the UCMJ meet the commander's requirement to maintain discipline by illustrating prompt and fair justice. Moreover, prompt adjudication of capital cases would increase public confidence in the military justice system and reduce the impact of protracted litigation on victims.

The aforementioned benefits, in addition to advanced rights for service members under the UCMJ, establish a strong argument that Congress should repeal Article 45(b)'s prohibition and allow an accused fighting for his life to choose his own defense strategy.²⁸⁰

²⁷⁹ See *United States v. Matthews*, 16 M.J. 354, 362–63 (C.M.A. 1983).

²⁸⁰ Additional required changes to the UCMJ and the RCM as a result of the repeal of Article 45(b)'s prohibition are contained in Appendix B and C.

Appendix A

Article 45. Pleas of the Accused

(a) If an accused after arraignment makes an 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.

(b) A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged. With respect to any ~~other~~ charge or specification to which a plea of guilty has been made by the accused and accepted by the military judge or by a court-martial without a military judge, a finding of guilty of the charge or specification may, if permitted by regulations of the Secretary concerned, be entered immediately without vote. This finding shall constitute the finding of the court unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty.

Appendix B

Recommended Changes to the Uniform Code of Military Justice

§ 818. Art. 18. Jurisdiction of general courts-martial

Subject to section 817 of this title (article 17), general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter. General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war. However, a general court-martial of the kind specified in section 816(1)(B) of this title (article 16(1)(B)) shall not have jurisdiction to ~~try~~ (sentence) any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case.

§ 845. Art. 45. Pleas of the accused

(a) If an accused after arraignment makes an 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.

(b) ~~A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged.~~ With respect to any ~~other~~ charge or specification to which a plea of guilty has been made by the accused and accepted by the military judge or by a court-martial without a military judge, a finding of guilty of the charge or specification may, if permitted by regulations of the Secretary concerned, be entered immediately without vote. This finding shall constitute the finding of the court unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty.

Appendix C

Recommended Changes to the Rules for Courts-Martial 201(f)(1)(C)

(C) Limitations in judge alone cases. A general court-martial composed only of a military judge does not have the jurisdiction to act as the sentencing authority in any case in which a finding of guilty has been entered to any offense for which the death penalty may be adjudged unless the case has been referred to trial as non-capital. A general court-martial composed only of a military judge ~~does not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been referred to trial as noncapital.~~ **(has jurisdiction to accept a plea to any charge or specification alleging an offense for which the death penalty may be adjudged).**

R.C.M. 910(a)(1)

(a) Alternatives.

(1) In general. An accused may plead as follows: guilty; not guilty to an offense as charged, but guilty of a named lesser included offense; guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any; or, not guilty. ~~A plea of guilty may not be received as to an offense for which the death penalty may be adjudged by the court martial.~~

R.C.M. 1004(a)(2):

(a) In general. Death may be adjudged only when:

(1) Death is expressly authorized under Part IV of this Manual for an offense of which the accused has been found guilty, or is authorized under the law of war for an offense of which the accused has been found guilty under the law of war; and

(2) The accused was **(either)** convicted of such an offense by the concurrence of all the members of the court-martial present at the time the vote was taken **(or a military judge accepts a knowing and voluntary plea to a death eligible offense)**; and

(3) The requirements of subsections (b) and (c) of this rule have been met.