

LET'S
MAKE
A
DEAL



Plea Agreements Under the UCMJ: A Comparative Service Approach

LTC Steven Dray, JA, USA

LCDR Shannon Gearhart, JAGC, USN

Col E. Dane Horne, USAF

CAPT Robert Monahan, JAGC, USN (Ret.)

Disclaimer

- Disclaimer: The views in this presentation are those of the authors and do not necessarily reflect the official policy or position of the United States Court of Appeals for the Armed Forces, Department of War, or the United States Government.

Historical Perspective



Historical Perspective

- No statutory or regulatory provisions governing the use of plea agreements until 1984. (MJRG Report)
- In 1953, Assistant Judge Advocate General of the Army MG Franklin Shaw proposed the use of plea agreements to clear a glut of cases arising when the UCMJ was enacted during the Korean War. (Jackson, 2004)
- Court of Military Appeals (CMA) initially provided a non-committal acknowledgement of plea agreements. (*United States v. Gordon*, 2 C.M.A. 632, 634, 10 C.M.R. 130, 132 (1953))
- CMA later cautioned about the use of plea agreements. (*United States v. Allen*, 8 C.M.A. 504, 507, 25 C.M.R. 8, 11 (1957))

Historical Perspective

- Plea bargaining adopted by the Navy and Coast Guard by end of the 1950s. (Jackson, 2004)
- Air Force adopted the practice in 1975. (Jackson, 2004)
- Unique role of the convening authority in MILJUS practice caused rules and procedure of military plea agreements to develop much differently than the civilian federal system. (MJRG Report)
- Resulted in a system where plea agreement (“pre-trial agreement”) was divided into two parts: Part I—terms and conditions; Part II—sentencing cap. (MJRG Report)
 - “Beat the deal”

Historical Perspective

- Military Justice Review Group (MJRG) proposed a series of UCMJ reforms, some of which pertained to plea agreements.
- The proposal, later enacted as Article 53a, UCMJ, called for the military judge to adjudge a sentence within an agreed upon sentencing range or sentence limitation that was negotiated by the parties. (MJRG Report)
 - This change also allowed plea agreements to set the specific sentence that the military judge must adjudge. (R.C.M. 705(d))

Historical Perspective

- Subsequently, in NDAA FY-22 Congress mandated military judge alone sentencing in all non-capital cases and placed limits on military judges' discretion through the establishment of sentencing parameters and criteria. (Pub. L. No. 117-81)
- A military judge is required to sentence the accused pursuant to the terms of the agreement, regardless of whether the terms of confinement depart from the parameter range. (Reyes, 2024)
 - But, if the plea agreement departs from the range, the military judge may reject the plea if the sentence is plainly unreasonable. (Art. 53a(b), UCMJ)

Historical Perspective

- In NDAA FY-22 Congress also created the position of special trial counsel with the power to refer specific “covered” offenses and to enter into plea agreements regarding those offenses. (Art. 24a(c)(3)(C), UCMJ)
 - Convening authorities continue to exercise authority to enter into plea agreements except in those cases where the authority to refer charges and enter into plea agreements is withheld to a special trial counsel.

Sea Services



Sea Services

- **Benefits vs. Downsides of a Model Plea Agreement (MPA)**
 - **Benefits:**
 - **Uniformity & Consistency:** Ensures a standard of justice across a global force. A deal in Spain is the same as a deal in San Diego.
 - **Training:** Acts as an essential checklist and guide for junior counsel, preventing inadvertent errors.
 - **Appellate Durability:** Incorporates language that has withstood judicial review, reducing the risk of a plea being overturned.
 - **Efficiency:** Streamlines negotiations by providing a standard, pre-approved starting point.

Sea Services

- Benefits vs. Downsides of a Model Plea Agreement
 - Potential Downsides
 - Over-reliance: Can stifle creative lawyering if used as a rigid template rather than a flexible tool.
 - “One-Size-Fits-All”: Risks a generic approach if counsel fail to tailor it to the unique facts of a case.

Sea Services

- **Process & Practical Use**

- Updating the Model Agreement

- The OJAG Criminal Law division (Code 20) leads the process.

- A collaborative effort, incorporating feedback from trial counsel, defense, and the judiciary.

- Last update in 2024. This version integrated major changes from the 2023 UCMJ reforms, including the new role of the Special Trial Counsel (STC).

- Use by Special Trial Counsel (STC)

- All STC offices use the 2024 MPA, which was specifically updated to reflect their authority and procedures.

Sea Services

- **Key Terms in the MPA**

- **Waiver of Admin Board:** The accused agrees to waive a post-trial administrative separation board, saving significant time and resources.
- **Future Misconduct Clause:** Allows the Convening Authority to vacate a suspended sentence if the accused commits new offenses.
- **Detailed Sentencing Terms:** Provides a clear, structured format for outlining confinement, forfeitures, and suspended punishments.
- **Comprehensive Notifications:** Advises the accused of critical collateral consequences like sex offender registration and firearm prohibitions.

Sea Services

- **Flexibility & Customization**

- Not rigid. The MPA is a foundation, not a set of mandatory clauses.
- Appendices offer a “menu” of optional provisions that can be added or modified.
- Counsel are free to draft unique terms or strike non-essential ones to fit the case.

Sea Services

- **What Problem Does the MPA Solve?**
 - Comprehensive solution addressing:
 - Speed & efficiency
 - Uniformity & consistency
 - Risk reduction & appellate durability
 - Training for junior counsel
- **Who Drives Deviations from the Model?**
 - Defense Counsel: To protect client interests (e.g., preserving appeal rights).
 - Trial Counsel (STC): To secure cooperation agreements or complex restitution.
 - Victims' Legal Counsel (VLC): To advocate for victim interests.

Sea Services

- The One Clause Each One Includes Under the MPA
 - Sex Offender Registration Notification (found in Appendix 4).
- **Why It's Essential: Lessons from Case Law**
 - A direct response to appellate court decisions that found pleas to be unknowing or “improvident” when the accused was not advised of this severe collateral consequence.
 - Key cases like *United States v. Riley*, 72 M.J. 115 (C.A.A.F. 2013) established that failure by counsel to advise, and failure by the judge to ensure advisement, on sex offender registration can jeopardize a conviction.
 - Including this clause is a critical risk-management measure to protect the finality of the conviction on appeal.

Army



Army

- BLUF: There is no Model Plea Agreement but there have been efforts toward standardization within Circuits.
 - *For example*, the Sixth Circuit (JBLM, AK, CA) created a model agreement and obtained buy-in from TDS.
- Most significant impediment to full adoption:
 - Ownership and Control issues, with a side of institutional inertia.

Army

Ownership considerations.

1. For covered cases, a plea agreement is between the accused and the Judge Advocate referral authority.
2. For non-covered cases, a plea agreement is between the accused and the (almost always) non-Judge Advocate convening authority.

So, who controls a Model Plea Agreement? What's the mechanism for forcing use? For keeping it updated?

- LSTC, for covered offenses?
- SJA, for non-covered offenses?
- Chief, Criminal Law Division, OTJAG, for all offenses?
- Chief, Trial Judiciary, for all offenses?

Army

Other considerations:

- Plea Agreements already risk reinforcing the perception the justice system is too rigid.
 - Does a Model Plea Agreement exacerbate this? Does it foster a “take it or leave it” attitude from the government?
- How many case-specific changes or edits can parties make to a Model Plea Agreement before it is no longer “Model”?
 - Would changes outside the MPA require owner (LSTC, SJA, other?) approval prior to execution or effect?

Army

How might a Model Plea Agreement Benefit—

- Client: Clearly defines exposure; limits potential unenforceable ambiguities; likely provides all necessary notifications.
- Trial Defense Service: Limit IAC (many terms seem superfluous, *for example*, notification of Sex Offender Registration; “my attorney was so good.”).
- Military Judge: Facilitate plea proceedings; limits reversal.
- Prosecutor: Guaranteed, known result; plug-and-play terms increase understanding (“why am I adding or subtracting this?”).
- Referral Authority: Sustainable conviction—less likely to miss something.

Air Force/ Space Force



Air Force/Space Force

- DAF Approach:
 - Plea agreement use must preserve a military justice system that promotes good order and discipline, and is fair, timely, and transparent to the military community and the public at large.
- Covered Offenses
 - Office of Special Trial Counsel (OSTC) ensures plea agreements contain what is needed in individual cases
 - OSTC may bind convening authorities, separation authorities, and other commanders to take follow-on actions
- Non-Covered Offenses
 - Local Staff Judge Advocate, and Government Trial and Appellate Counsel Division (JAJG) (when requested), ensure plea agreements contain what is needed in individual cases

Air Force/Space Force

- Current Stance on Model Plea Agreement
 - DAF does not utilize one
- Templates available within our various litigation communities
 - Office of Special Trial Counsel (OSTC)
 - Government Trial and Appellate Counsel Division (JAJG)
 - Trial Defense Division (JAJD)
 - Virtual Military Justice Deskbook
- Oversight, training, checklists, and informal norms promote consistency across the field.

Air Force/Space Force

- Considerations For Model Plea Agreement:
 - Model ensures agreement contains essential terms and is legally sufficient
 - Avoid mistakes in cases in which OSTC and/or JAJG is not advising
- Considerations Against Model Plea Agreement:
 - Various organizations with hand in court-martial litigation creates concern about who owns the model and its required updates
 - Lack of model provides opportunity for full and fair negotiations between parties to plea agreement
 - Desire to maintain Military Justice Law and Policy Division (JAJM) as a neutral entity

Air Force/Space Force

- Considerations Moving Forward
 - Review whether Model Plea Agreement should be adopted
 - Fewer courts for junior counsel to learn intricacies of plea agreements
 - What, if any effect, does a model plea agreement have on:
 - Parties' ability to negotiate
 - The appearance of a fair, timely, and transparent military justice system
 - If adopted, which office should own the model to ensure JAJM neutrality in product pushed to the field?
- No data to suggest that current model has led to appellate courts finding systemic issues with legality of DAF plea agreements

Questions?

