DEVELOPMENT, ADOPTION, AND IMPLEMENTATION OF MILITARY SENTENCING GUIDELINES

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

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ABSTRACT: This thesis proposes that the military adopt a unique form of sentencing guidelines. While the military and federal sentencing system pursue almost identical sentencing goals, the two systems do so in a divergent manner. The federal system uses sentencing guidelines while the military pursues its sentencing goals through sentencing discretion and individual sentencing. This thesis contends that the military sentencing system creates unwarranted sentence disparity. Unwarranted sentence disparity was one of the primary factors that led to the creation of federal sentencing guidelines. Similarly, the military should adopt unique sentencing guidelines to increase sentence uniformity and satisfy the goals of military sentencing. Two factors support the adoption of military sentencing guidelines. First, Congress has directed that the military justice system should mirror the federal system where practicable. Second, the appellate courts have declared that sentence uniformity is applicable to the military.
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I. Introduction

The U.S. Army convicted Private Reece of unpremeditated murder and sentenced him to 516 months of confinement.\(^1\) The U.S. Army similarly convicted a second soldier, Sergeant First Class McGee, of unpremeditated murder and adjudged him confinement for 244 months.\(^2\) The difference in adjudged confinement was 272 months.

Sergeant Smith, U.S. Marine Corps, was convicted of rape at a general courts-martial and sentenced to 12 months of confinement.\(^3\) Similarly, the U.S. Navy successfully prosecuted Petty Officer Jones for rape, but he was sentenced to 324 months of confinement.\(^4\) The difference in adjudged confinement was 312 months.

\(^1\) Data from Joseph Neurauter, Clerk of Court, U.S. Army Court of Criminal Appeals, Arlington, Va. (22 Feb. 2000) [hereinafter Army Data]. The Data consisted of rank of the accused, findings, and adjudged sentence during the calendar year 1999. The data was used to calculate an average sentence and sentencing range for the various punitive articles. It is interesting that while all of the four branches (Army, Navy, Air Force, Marine Corps) maintained sentencing records and a sentencing data base, not one of the branches kept any records regarding sentence uniformity.

\(^2\) Id.

\(^3\) Data from Lieutenant Commander Steve Jamozy, USN, Navy-Marine Corps Trial Judiciary, Washington, D.C. (21 Jan. 2000) [hereinafter USMC/USN Data].

\(^4\) Id.
The U.S. Air Force convicted Airman First Class Johnson of five specifications involving methamphetamine and marijuana use and distribution. He was sentenced to 13 months of confinement.\(^5\) U.S. Army Private Goodenough was convicted of two specifications involving possession and distribution of methamphetamines. He was sentenced to 61 months of confinement.\(^6\) The difference in adjudged confinement was 48 months.

The problem that this paper addresses is unwarranted sentence disparity. To solve this problem, this paper proposes military sentencing guidelines. Military sentencing guidelines will reduce sentence disparity while retaining much of the current military sentencing system.

Unwarranted sentence disparity exists when individuals convicted of similar crimes receive unequal sentences.\(^7\) Congress determined that unwarranted sentencing disparity does not promote the goals of federal sentencing.\(^8\) To remedy this,

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\(^6\) Army Data, supra note 1.

\(^7\) UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL (1998) [hereinafter USSG].
Congress created the United States Sentencing Commission and tasked the Commission with developing a sentencing system that reduced sentence disparity. The Commission told the Commission to create a sentencing system that reduced sentence disparity by “formulat[ing] federal trial judges in their sentencing decisions.” The Commission created the federal sentencing guidelines to satisfy its mandate to reduce sentence disparity.

Currently, the federal system and thirty-three of the states employ some form of sentencing guidelines to combat unwarranted sentence disparity. By contrast, the military justice system does not use sentencing guidelines. Instead,
the military uses a system that allows the sentencing authority almost complete discretion. This divergent approach to sentencing is troublesome considering that the sentencing goals of the federal system and the military system are remarkably alike. Both systems promote the goals of just punishment, deterrence, incapacitation, and rehabilitation. The military pursues the additional goal of maintaining good order and discipline.

This paper will propose military sentencing guidelines through seven sections in addition to this introductory section. Section II provides the reader information regarding the military sentencing process while section III provides similar information for the federal system. Both sections are

14 Neither the Sentencing Reform Act of 1984 nor the United States Sentencing Commission expressly applies to the military justice system.

15 MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 903 (1998) [hereinafter MCM]. This text defines sentencing authority in the military context to be the person or persons who determine the sentence. The sentencing authority may be a military judge, officer members, or a panel made up of officer and enlisted members.

16 Id. R.C.M. 1002.


18 Id.
divided into a history subsection and a subsection explaining the current sentencing process.

Sections II and III are included for two reasons. First, they provide the reader with a basic understanding of the workings of both sentencing systems. This is critical because the proposed military sentencing guidelines are a hybrid of the federal and military sentencing system. Second, Sections II and III illustrate that while the sentencing goals of the military and federal system are almost identical,¹⁹ the approaches employed by the two systems are dissimilar.²⁰ Sections II and III will highlight that the federal system makes sentence uniformity a priority while the military system does not.

Section IV will illustrate the degree of sentence disparity which currently pervades the military justice system. Section IV discusses sentencing data collected from all four branches of the military.²¹ It then calculates the

¹⁹ Compare 18 U.S.C.S. § 3553; 28 U.S.C.S. § 991, with BENCHBOOK, supra note 17, at 64. The goals of sentencing in the federal system are: just punishment, deterrence, incapacitation, and rehabilitation. The military justice system employs the same four goals plus the goal of discipline.

²⁰ Compare MCM, supra note 15, with USSG, supra note 7.

²¹ The United States Army, United States Navy, United States Air Force, and the United States Marine Corps. The United States Coast Guard is not
standard deviation\textsuperscript{22} for a variety of punitive articles. This section will discuss the standard deviation that attaches to several punitive articles in order to demonstrate the wide range of confinement that currently exists within the military.

Section V of the paper proposes that the military adopt sentencing guidelines and advances a unique military sentencing matrix. This section provides the framework under which sentencing guidelines would be implemented and applied to the military.

\textsuperscript{22} MICROSOFT ENCARTA ENCYCLOPEDIA (1999) [hereinafter ENCARTA].

The standard deviation of a set of measurements \( x_1, x_2, \ldots, x_n \), with the mean \( \bar{x} \) is defined as the square root of the mean of the squares of the deviations; it is usually designated by the Greek letter sigma (\( \sigma \)). In symbols

\[
\sigma = \sqrt{\frac{1}{n} \left[ (x_1 - \bar{x})^2 + (x_2 - \bar{x})^2 + \ldots + (x_n - \bar{x})^2 \right]}
\]

The square, \( \sigma^2 \), of the standard deviation is called the variance. If the standard deviation is small, the measurements are tightly clustered around the mean; if it is large, they are widely scattered.

\textsuperscript{Id.}
Section VI addresses various criticisms commonly levied against the federal sentencing guidelines. This section argues that the proposed military sentencing guidelines overcome these criticisms through a number of aspects that are unique to the proposed military sentencing guidelines.

Section VII proposes the legislative and executive changes necessary to implement military sentencing guidelines. Most of the recommended changes will be modifications to existing Rules for Courts-Martial. The changes to the Rules for Courts-Martial preserve the bulk of the current military sentencing system.

This paper will conclude that the military adopt the proposed sentencing guidelines as a possible solution to the problem of unwarranted sentence disparity.

II. Summary of Military Sentencing Procedures

The goal of section II of this paper is to orient the reader to the workings of the military sentencing system. This will enable the reader to compare and contrast the military and federal sentencing system. Comparing and

23 MCM, supra note 15, R.C.M. 1001-1010.
contrasting the two systems will be important when assessing the viability of adopting military sentencing guidelines.

A. History of Military Sentencing

The military code of discipline for the Colonial Army of United States was the American Articles of War of 1775. The American Articles were born from the British Code. The British Code can trace its lineage to General Adolphus' 1621 Code of Articles. The Articles of War outlined military court-martial procedures and were the precursor to the Manual for Courts-Martial. The Articles of War of 1775 gave panel members great latitude in fashioning a sentence. Court-martial sentencing remained remarkably consistent from 1775 until the enactment of the Uniform Code of Military Justice in 1951.

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25 Winthrop, supra note 24, at 907-918. The family tree of military justice in the United States can be traced to The Code of Articles signed by Swedish General Gustavus Adolphus in 1621. Similar to the Uniform Code of Military Justice of today, the code of the 17th Century gave the sentencing authority near complete sentencing discretion.

26 See Winthrop, supra note 24, at 907-918. See also Colonel William F. Fratcher, History of the Judge Advocates General's Corp, United States Army, 4 Mil. L. Rev. 89 (1966).


28 See supra notes 24-27 and accompanying text.
Before the enactment of the Manual for Courts-Martial in 1951, a separate sentencing hearing was not a formal part of a court-martial. Evidence presented on the merits was used to form the sentence when an individual was found guilty. An exception was the guilty plea which incorporated a quasi-hearing to assist the sentencing authority in forming a sentence. A sentencing hearing was necessary in order to provide the sentencing authority with the information required to fashion an appropriate sentence. This information was often mitigation evidence in the form of good military character.

The pre-1951 Manuals for Courts-Martial gave the members general guidance regarding sentencing determinations. The Manual for Courts-Martial of 1928 told members to consider former discharges, previous convictions, and circumstances that tend to mitigate, extenuate, or aggravate either the


30 Id. at 109-110 (quoting S. BENET, A TREATISE ON MILITARY LAW AND THE PRACTICE OF COURTS-MARTIAL (1862)).

31 See WINTHROP, supra note 24, at 278-280.


33 See WINTHROP, supra note 25, at 278-280, 396-400. Character evidence could also serve as a defense on the merits.
offense or collateral consequences of the offense.\textsuperscript{34} The 1949 version of the \textit{Manual for Courts-Martial} directed members to consider the accused's background, uniformity in sentencing, general deterrence, and discipline.\textsuperscript{35} Of particular note is the fact that sentence uniformity was a sentencing goal of the 1949 \textit{Manual}.\textsuperscript{36}

The Military Justice Act of 1950\textsuperscript{37} resulted in the Uniform Code of Military Justice (1951) and the \textit{Manual for Courts-Martial} of 1951.\textsuperscript{38} Much of the emphasis behind the Military Justice Act surrounded concerns about the ability of the military justice system to fashion just sentences.\textsuperscript{39} So suspect were the sentences awarded during World War II that the Secretary of War remitted or reduced 85\% of the sentences submitted to the clemency board of review.\textsuperscript{40}

\begin{thebibliography}{99}
\bibitem{34} \textit{Manual for Courts-Martial, United States} (1928) [hereinafter 1928 \textit{Manual}].
\bibitem{35} \textit{Manual for Courts-Martial, United States} (1949) [hereinafter 1949 \textit{Manual}]. See also Vowell, supra note 29, at 118.
\bibitem{36} See 1949 \textit{Manual}, supra note 36; Vowell, supra note 29, at 118.
\bibitem{38} \textit{Manual for Courts-Martial, United States}, (1951) [hereinafter 1951 \textit{Manual}].
\bibitem{39} See Arthur E. Farmer and Richard H. Wels, \textit{Command Control-or Military Justice?}, 29 N.Y.U.L. Rev. 263 (Apr. 1949). See also DeVico, supra note 24, at 66; Major Kevin Lovejoy, Abolition of Court Member Sentencing, 142 Mil. L. Rev. 1, 17. The focus of the post World War II criticisms was that the military conducted too many courts-martial and that the resulting punishment were, at times, unjust.
\end{thebibliography}
The 1951 Manual made a number of changes to the military justice system in an attempt to better protect the rights of the individual soldier and to more closely mirror the civilian criminal justice system. The Manual for Courts-Martial of 1951 developed a distinct sentencing hearing for every court-martial. Sentencing hearings were adversarial. The government could present aggravation evidence subject to defense cross-examination. The defense enjoyed wide discretion in presenting extenuation and mitigation evidence, to include the accused making a statement. The changes implemented in 1951 are the genesis of the current sentencing procedures.

The 1951 Manual for Courts-Martial gave members general guidance on what to consider when fashioning an appropriate


42 1951 MANUAL, supra note 38, ¶ 75 (1951).

43 1951 MANUAL, supra note 38; Lovejoy, supra note 39, at 18.

44 1951 MANUAL, supra note 38.

45 Id. ¶ 75; Lovejoy, supra note 39, at 18-19.
sentence. The 1951 Manual urged members to limit the use of
the maximum sentence. The Manual further mandated that
members use their own discretion when fashioning a sentence. Additionally, sentence uniformity was retained as a sentencing
goal.

The next major change to the Manual occurred in 1969.
The 1969 version of the Manual for Courts-Martial removed
sentence uniformity as a sentencing goal. The abandonment of
sentence uniformity has its origin in the Court of Military
Appeal case of United States v. Mamaluy. In Mamaluy, the law
officer instructed the members that they could consider
sentence uniformity when fashioning a sentence. The Mamaluy

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46 1951 MANUAL, supra note 38, ¶ 76. See also Lovejoy, supra note 39, at 19; Vowell, supra note 29, at 35-36.
47 1951 MANUAL, supra note 38, ¶ 76a.
48 1951 MANUAL, supra note 38, ¶ 76. See also Vowell, supra note 39, at 120.
49 Compare 1951 MANUAL, supra note 38, ¶ 76 (a)(4) (members were instructed
that when fashioning a sentence they should strive for sentence
uniformity. "Among other factors which may properly be considered are the
penalties adjudged in other cases for similar offenses. With due regard
for the nature and seriousness of the circumstances attending each
particular case, sentences should be relatively uniform throughout the
armed forces . . . ." Id. (emphasis added) with 1949 MANUAL, supra note 35,
¶ 80 (that also included an instruction that made sentence uniformity a
sentencing goal).
50 MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 76 (1969) [hereinafter 1969 MANUAL].
52 The law officer was the predecessor of the military judge.
court determined that instructing the members as to sentence uniformity was inappropriate. The court found the sentence uniformity instruction faulty because panel members do not have knowledge of the requisite information necessary to adjudge a uniform sentence. The Mamaluy court did not say that sentence uniformity was an inappropriate goal of sentencing. Rather, the Mamaluy court found that court-martial members were not adequately prepared to consider sentence uniformity.

The Mamaluy court explained that court-martial members do not have exposure to a wide enough spectrum of cases to apply sentence uniformity. Further, the Mamaluy court found that, "Military Courts have little continuity, and confusion would result if they sought to equalize sentences without being fully informed." Because the panel could never be "fully informed", sentence uniformity could not be applied to a court-martial by a military panel. Accordingly, the Mamaluy court advised that Article 76(a) of the 1951 Manual for

54 Id. at 180.
55 Id. at 179-181.
56 Id. at 180.
57 Id.
Courts-Marital should delete any mention of sentence uniformity.\textsuperscript{58}

The Manual for Courts-Martial experienced additional modifications in 1981, 1984, 1995, and 1998.\textsuperscript{59} Like the 1969 Manual, these did not mention sentence uniformity. The result of these modifications is the sentencing procedures used in the military today.

B. The Current Military Sentencing Process

This subsection will discuss the current military sentencing system in five parts. Part 1 will summarize the current sentencing process while part 2 will discuss the wide degree of sentence discretion that is given to the sentencing authority. Next, Part 3 will discuss the military's treatment of sentence uniformity. Part 4 of this subsection will briefly discuss the stated goals of military sentencing while part five will explain that 10 U.S.C. § 836\textsuperscript{60} has not had an impact on military sentencing.

\textsuperscript{58} Id. at 181.

1. Overview of Military Sentencing

The overview of the military sentencing system will begin with forum selection. If the accused is enlisted, he may elect a panel of all officers, a panel that is comprised of at least one-third enlisted representation, or, the accused may request a trial by military judge alone. If the accused is an officer, he may request trial by either officer members or military judge alone.

Upon a finding of guilty, the court-martial must follow the procedures outlined in Chapter X of the Manual for Courts-Martial. The sentencing procedures are adversarial. The trial counsel is allowed to present 5 types of evidence, information taken from the charge sheet, personal data

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61 MCM, supra note 15, R.C.M. 903. This rule grants the accused the right to request trial by military judge. This right is not absolute and the judge may deny the request for good cause.

62 Id. An accused may elect members for both merits and sentencing, a military judge for both merits and sentencing, plead guilty before a military judge but have members determine the sentence, or pled guilty before a military judge and have the military judge determine the sentence.

63 Id.

64 Id. Ch. X.

65 Id. R.C.M. 1001.
contained in the official personnel records of the accused, evidence of any prior military or civilian criminal convictions, evidence relating to (or resulting from) the offense of which the accused was found guilty, and opinion evidence regarding the accused's rehabilitative potential. 66 The government may not solicit from a witness whether an accused should or should not receive a punitive discharge. 67 The Military Rules of Evidence govern the trial counsel's presentation. 68 The trial counsel's entire sentencing case is often called, (and will be referred to in this paper as), the case in aggravation.

Upon the conclusion of the case in aggravation, the accused is permitted to present matters in extenuation and mitigation. 69 Matters in extenuation attempt to explain the circumstances surrounding the crime. 70 Matters in mitigation are an attempt to lessen punishment or create a record for

66 Id. R.C.M. 1001(a)(1)(A); (b)(1)-(5). The trial counsel is prohibited from presenting evidence that fall outside of these strictly construed parameters. The Government is prohibited from soliciting details from the witnesses as to why a witness may believe that an accused does not possess rehabilitative potential.

67 Id. R.C.M. 1001(b)(5)(D).

68 Id. Pt. III.

69 Id. R.C.M. 1001; BENCHBOOK, supra note 17, at 62-63.

70 MCM, supra note 15, R.C.M. 1001.
clemency purposes. Mitigation evidence can include any positive trait that relates to the accused. Upon a request from the accused, the military judge may relax the rules of evidence. If the rules are relaxed, the defense may present extenuation and mitigation evidence that would not be admissible on the merits. If the judge relaxes the rules of evidence, the rules remain relaxed for the government's case in rebuttal.

Regardless of whether or not the judge relaxed the rules of evidence, the accused may make an in court statement part of his mitigation case. The accused can make (1) a sworn statement, (2) an unsworn statement, or (3) a combination of the two. A sworn statement is subject to cross-examination while an unsworn statement is not subject to cross-

71 Id. R.C.M. 1001(c)(1)(B).
72 Id. R.C.M. 1001(c).
73 Id. R.C.M. 1001(c)(3); 1001(e). For example, if the judge determines that the production of a witness is not necessary, the judge may receive testimony through alternate means, (i.e., telephone, video conferencing, and affidavit).
74 Id. R.C.M. 1001(c)(3); R.C.M. 1001(d).
75 Id. R.C.M. 1001(c)(2).
76 Id.
77 Id. R.C.M. 1001(c)(2)(B); BENCHBOOK, supra note 17, at 58.
examination.\textsuperscript{78} The accused may make an unsworn statement orally, in writing, through her counsel, or a combination of the above.\textsuperscript{79} The government may rebut any statement of fact presented in the accused's unsworn statement.\textsuperscript{80}

Upon the conclusion of the defense's sentencing case, the government may rebut the defense case. Likewise, the defense may surrebut the government's rebuttal case. Rebuttal and surrebuttal may continue at the discretion of the military judge.\textsuperscript{81}

Upon conclusion of rebuttal and surrebuttal, the government and defense may present sentencing arguments.\textsuperscript{82} While the trial counsel may not claim to speak for the convening authority (or for higher authorities),\textsuperscript{83} the trial counsel may argue for a specific lawful sentence.\textsuperscript{84} The trial counsel may relate the specific sentence to the sentencing

\textsuperscript{78} MCM, supra note 15, R.C.M. 1001(c)(2)(C).
\textsuperscript{79} Id. R.C.M. 1001(c).
\textsuperscript{80} Id. R.C.M. 1001(c)(2)(C); BENCHBOOK, supra note 17, at 58.
\textsuperscript{81} MCM, supra note 15, R.C.M 1001(d).
\textsuperscript{82} Id. R.C.M. 1001(g).
\textsuperscript{83} Id.
\textsuperscript{84} Id. R.C.M. 1001(g); R.C.M. 1003.
goals of rehabilitation of the accused, specific deterrence of the accused, social retribution, and general deterrence.\textsuperscript{85} The trial counsel may not make sentence uniformity a part of his argument.\textsuperscript{86}

2. Sentencing Discretion

Upon the conclusion of argument, the sentencing authority has the freedom to fashion any lawful sentence.\textsuperscript{87} Every crime under the Manual for Courts-Martial has an attendant maximum punishment.\textsuperscript{88} The maximum punishment for multiple offenses is determined by aggregating the maximum punishment for each violation of the Manual for Courts-Martial.\textsuperscript{89} The sentencing authority is obligated to adjudge a mandatory minimum sentence in the rare circumstance where the accused is found guilty of Article 106, Spying or Article 118, Murder.\textsuperscript{90}

\textsuperscript{85} Id. R.C.M. 1001(g); BENCHBOOK, supra note 17 at 64.


\textsuperscript{87} MCM, supra note 15, R.C.M 1002.

\textsuperscript{88} See Id. pt. IV. See also Id. app. 12 (displaying a chart which demonstrates the maximum punishment allowable for each offense).

\textsuperscript{89} Id. R.C.M. 1003.

\textsuperscript{90} 10 U.S.C.S. § 918 (LEXIS 2000). Imprisonment for life is the mandatory minimum sentence for violation of Article 118(1) premeditated murder and Article 118(4) felony murder.
The sentencing authority, be it military judge or members, has a wide range of options available when fashioning an appropriate sentence. The sentencing authority may adjudge no punishment. If the sentencing authority determines that punishment is appropriate, the sentencing authority may adjudge any combination of the following: reprimand, forfeiture of pay and allowances, fine, reduction in pay grade for enlisted members, restriction, hard labor without confinement, confinement, dismissal in

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91 MCM, supra note 15, R.C.M. 1002. The sentencing authority may not exceed the maximum punishment. Only spying and murder carry a mandatory minimum sentence.

92 Id.

93 Id. R.C.M. 1003(b)(1). A court-martial may only recommend a reprimand. The approval and wording of a reprimand is left to the discretion of the convening authority.

94 Id. R.C.M. 1003(b)(2).

95 Id. discussion accompanying R.C.M. 1003(b)(3). Fines should only be adjudged when the accused was unjustly enriched because of the offense committed.

96 Id. R.C.M. 1003(b)(5).

97 Id. R.C.M. 1003(b)(6). Restriction may be substituted for confinement but not more than two months restriction may be substituted for every one month of confinement and in no case may a member be sentenced to more than two months of confinement.

98 Id. R.C.M. 1003(b)(7). Hard labor without confinement may be substituted for confinement but not more than 45 days of hard labor without confinement may be substituted for every 30 days of confinement and in no case may a member be sentenced to more than 90 days of hard labor without confinement.

99 Id. R.C.M. 1003(b)(8).
the case of officers, punitive discharge in the case of enlisted, and death when authorized by the punitive articles.

While the sentencing authority has a wide range of sentencing options available, it has little guidance as to how to actually form a sentence. The primary guidance the

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100 Id. R.C.M. 1003(b)(9)(A).

101 Id. R.C.M. 1003(b)(9)(B), (C). Punitive discharges for enlisted members may be either a dishonorable discharge or a bad conduct discharge. A dishonorable discharge is the more severe of the two discharges and may only be awarded at a general court-martial when authorized by the Manual for Courts-Martial.

102 Id. R.C.M. 1003(b)(10). (Death may be adjudged for violations of Article 85 (desertion in time of war), Article 90 (disobeying a superior commissioned officer in time of war), Article 94 (mutiny and sedition), Article 99 (misbehavior before the enemy), Article 100 (subordinate compelling surrender), Article 101 (improper use of countersign), Article 102 (forcing safeguard), Article 104 (aiding the enemy), Article 106 (spying), Article 106a(a)(1)(A)-(D) (espionage), Article 110 (Willfully and wrongfully hazarding a vessel), Article 113 (misbehavior of sentinel or lookout in time of war), Article 118(1) or (4) (murder), and Article 120 (rape)).

103 BENCHBOOK, supra note 17 at 64, states:

In adjudging a sentence, you are restricted to the kinds of punishment which I will now describe or you may adjudge no punishment. There are several matters which you should consider in determining an appropriate sentence. You should bear in mind that our society recognizes five principal reasons for the sentence of those who violate the law. They are rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of his/her crime(s) and his/her sentence form committing the same or similar offenses. The weight to be given any or all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion.

Id.
sentencing authority receives is direction as to the maximum sentence that may be adjudged.\textsuperscript{104} In addition, the members receive guidance on the effect that adjudging a punitive discharge and confinement (or confinement in excess of six months) has on the accused's pay and allowances.\textsuperscript{105} The members also receive instructions on the voting procedures that should be followed and that the members are "solely responsible for selecting an appropriate sentence and may not rely on the possibility of any mitigating action by the convening or higher authority."\textsuperscript{106}

After the sentence is adjudged, the accused may submit matters to the convening authority and request that the convening authority set aside or lessen the severity of the sentence.\textsuperscript{107} The convening authority's Staff Judge Advocate will make a recommendation to the convening authority as to what action the convening authority should take.\textsuperscript{108}

\textsuperscript{104} Id.
\textsuperscript{105} Id. at 66-68.
\textsuperscript{106} MCM, supra note 15, R.C.M. 1005(e)(4).
\textsuperscript{107} Id. R.C.M. 1105.
\textsuperscript{108} Id. R.C.M. 1106.
The convening authority also enjoys a wide degree of discretion and can take any action that decreases the effect of either the findings or sentence adjudged by the court-martial. This includes the authority to "[c]hange a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification." "The convening authority may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased."

109 MCM, supra note 15, R.C.M. 1107.

110 MCM, supra note 15, R.C.M. 1107(c)(1)

111 MCM, supra note 15, R.C.M. 1007(d)(1). In addition to review by the Convening Authority, each accused is entitled to appellate defense counsel unless the accused knowingly waives that right. The military appellate defense counsel is provided at no cost to the accused. The appellate defense counsel represents the accused before either the Court of Criminal Appeals, the Court of Appeals for the Armed Forces, or the United States Supreme Court. The appellate defense counsel has the duty to identify and raise appellate issues affecting the accused.

Upon the conclusion of appellate review, the accused is either granted a form of relief or the court-martial is finalized. The accused may request a new trial by petitioning the appropriate Judge Advocate General. The accused must petition the Judge Advocate General within two years of the approval of the court-martial sentence by the convening authority. The grounds for a new trial are (1) newly discovered evidence or (2) fraud on the court-martial.
3. Sentence Uniformity

The sentencing authority does not receive guidance regarding sentence uniformity. As discussed previously, sentence uniformity was not included as a sentencing goal in the 1969 Manual for Courts-Marital. The Mamaluy court recommended the elimination of the sentence uniformity instruction largely because of lack of confidence in the ability of members to apply the uniformity instruction.

While sentence uniformity is no longer a sentencing goal addressed in the Manual for Courts-Martial, sentence uniformity is a matter subject to review by the Court of Criminal Appeals. Congress has tasked the Courts of Criminal Appeals with maintaining "relative" sentence uniformity. The U.S. Court of Appeals for the Armed Forces and the Courts of Criminal Appeals have defined relative uniformity very narrowly. Relative uniformity is limited to addressing sentence uniformity between cases that arise out of


the same criminal act (i.e., three accused convicted of a sexual assault on the same victim at the same time). The accused may challenge his sentence by arguing that other closely related cases resulted in sentences which were much more lenient than the sentence he received. If he successfully argues that his sentence is disparate, then the burden shifts to the government to show that a rational basis exists for the sentence disparity.

Very few sentences will be determined to be disparate by either the Court of Criminal Appeals or the United States Court of Appeals for the Armed Forces. The U.S. Court of Appeals for the Armed Forces will review a lower court on two grounds, whether the lower court abused its discretion, or whether the ruling of the lower court resulted in an obvious miscarriage of justice. Compounding this already high standard is the fact that in determining whether the lower court abused its discretion (or resulted in a miscarriage of justice) the court compares the adjudged sentence to the

117 Id. at 289; United States v. Fee, 50 M.J. 290, 291 (1999).
118 Lacy, 50 M.J. at 288.
119 Id.
120 Id.
maximum sentence authorized for the crime.\textsuperscript{121} Since the military system aggregates the maximum confinement for each specification that the accused is convicted of, the attendant maximum confinement often far exceeds the adjudged sentence.\textsuperscript{122}

4. The Goals of Military Sentencing

As discussed previously, the military employs a unique sentencing process. While the process is unique, the goals of the military system are not unique.\textsuperscript{123} In its most basic form, the military seeks to balance the needs of the military, to include good order and discipline, against the individual rights of the service member.\textsuperscript{124} The desire to balance good order and discipline against individual rights was one of the primary factors that led to the Manual for Courts-Martial of

\textsuperscript{121} Id.

\textsuperscript{122} MCM, supra note 15, R.C.M. 1003. See also Army Data, supra note 1; USN/USMC Data, supra note 3; Air Force Data supra note 5.

\textsuperscript{123} MCM, supra note 15, pt. I. "The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."

\textsuperscript{124} Id. See also DeVico supra note 24; Uniform Code of Military Justice: Hearings on H.R. 2498 Before the Subcom. On Armed Services, 81\textsuperscript{st} Cong. 37 (1949) (Statement of James Forrestal, Secretary of Defense and Prof. Edmund Morgan Jr., Harvard Law School).
1951. The Manual for Courts-Martial of 1951 led to the sentencing procedures that we follow today.

The goals of the current military sentencing system are "rehabilitation of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of his/her crime(s) and his/her sentence from committing the same of similar offense." The sentencing authority does not receive any further explanation of what is meant by "rehabilitation" or the other sentencing goals. The sentencing authority does not receive any instructions regarding sentence uniformity. Like other aspects of the military sentencing system, the members are given complete discretion as to how to apply the above sentencing goals.


The military employs a sentencing system that is very different than the federal sentencing system and the

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125 See DeVico, supra note 24, at 66.
126 See BENCHBOOK, supra note 17, at 64.
127 Id. The military judge instructs the members that the weight to be given to the sentencing goals "along with all other sentencing matters in this case, rests solely within your discretion." Id.
sentencing systems employed by a majority of the states.\textsuperscript{128}

While the current military sentencing system is unique, Congress and the President have demonstrated a desire that the military criminal justice system approximate the federal justice system.\textsuperscript{129} Congress has tasked the President, where practicable, to apply federal "principles of law and rules of evidence" to the military justice system.\textsuperscript{130}

The President has taken steps to ensure that the military justice system approximates the federal justice system. Most notably, he has ensured that the Military Rules of Evidence closely mirror the Federal Rules of Evidence.\textsuperscript{131} The President has not taken similar action to create a military sentencing system that approximates the federal sentencing system. The military sentencing system fashions individualized punishment by granting the sentencing authority a large degree of sentencing discretion.\textsuperscript{132} Conversely, the present federal system attempts to maximize sentence uniformity by constraining judicial sentencing discretion with

\textsuperscript{128} Lanni, supra note 12, at n. 14.

\textsuperscript{129} 10 U.S.C.S. § 836 (LEXIS 2000); MCM, supra note 15.

\textsuperscript{130} 10 U.S.C.S. § 836.

\textsuperscript{131} Compare MCM, supra note 15, pt. III with the Federal Rules of Evidence. See also MCM, supra note 15, App. 22.

the use of sentencing guidelines. The next section will discuss the federal system and how sentencing guidelines where implemented.

III. SUMMARY OF FEDERAL SENTENCING GUIDELINES

Like the military system, the federal justice system has its own unique sentencing history. When the needs of the state warrant punishing an individual, the federal system employs sentencing guidelines. This section discusses the history of federal sentencing and the development and implementation of federal sentencing guidelines.

A. Federal Sentencing Prior to Guidelines

Before the Sentencing Reform Act of 1984, trial judges in the federal system had almost unfettered sentencing discretion. The sentencing discretion enjoyed by federal

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133 USSG, supra note 7, at 2.

134 Id.

judges was very similar to the sentencing discretion presently enjoyed in the military system. The only barrier that the federal judge encountered when fashioning punishment was statutory maximum sentences.

The statutory maximum sentence was historically the only limit imposed on federal judges. Before sentencing guidelines, a federal trial judge's sentence was subject to judicial review only if the sentence exceeded the statutory maximum. The standard of review surpassed the already high abuse of discretion standard. The standard of appellate review was whether the sentence was lawful.

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137 MCM, supra note 15, R.C.M. 903. A military accused may be sentenced by either military members or by a military judge.


141 See Hoelter et. al., supra note 140, at 1078.

142 See Stith, supra note 136, at 1251-53.
Sentencing in the 20th Century was the subject of much debate.\textsuperscript{143} The primary focus of the debate was what should be the primary goal of sentencing.\textsuperscript{144} Some argued that the sentence should punish the individual.\textsuperscript{145} Others thought that confinement could correct behavior and rehabilitate the wrongdoer.\textsuperscript{146} A third camp urged that sentencing should operate to remove the convicted from free society.\textsuperscript{147}

At the turn of the last century, the \textit{Old Testament}\textsuperscript{148} values of retribution and restitution were the dominant sentencing philosophy.\textsuperscript{149} The trial judge enjoyed almost complete discretion to fashion “the punishment that fit the crime.”\textsuperscript{150} With the growth of the social sciences that accompanied the first quarter of the twentieth century, the sentencing goals of retribution and restitution came under

\begin{itemize}
\item \textsuperscript{143} Id.
\item \textsuperscript{144} Id.
\item \textsuperscript{145} See Ogletree, supra note 139, at 1941-1942.
\item \textsuperscript{146} Id.
\item \textsuperscript{147} See Hoelter et. al., supra note 140, at 1075.
\item \textsuperscript{148} Exodus 21:24-25, “If her eye is injured, injure his; if her tooth is knocked out, knock out his; and so on—hand for hand, foot for foot, burn for burn, wound for wound, lash for lash.”
\item \textsuperscript{149} See Ogletree, supra note 138, at 1940.
\item \textsuperscript{150} Id. The only constraint placed on a trial judges sentence was the statutory maximum punishment allowed.
\end{itemize}
attack.\textsuperscript{151} The social sciences argued that they could cure society's problems through intervention in the socio-economic fabric of American life.\textsuperscript{152}

Eager to cure the problems that plagued criminal justice, the government looked to the social sciences to fix the criminal justice system.\textsuperscript{153} The sentencing philosophy of this period was deterrence and rehabilitation.\textsuperscript{154} Poverty and social forces were considered the root cause of crime.\textsuperscript{155} The prisons created workshops, vocational training, and other avenues of social engineering to defeat these negative social forces.\textsuperscript{156} The rehabilitation theory advocated that once the criminal "graduated" his course of study at the correctional facility, he was fit for return to society.\textsuperscript{157} The social sciences promised that the graduate of the correctional


\textsuperscript{152} Id.


\textsuperscript{154} Id.

\textsuperscript{155} See Green, supra note 151, at 1920-1921.

\textsuperscript{156} See Hoelter et. al., supra note 140, at 1078-1080.

\textsuperscript{157} See Green, supra note 151, at 1921.
facility would have a low probability of recidivism.\textsuperscript{158} Penitentiaries were renamed correctional facilities to illustrate this shift from penitence to correction.\textsuperscript{159}

The rehabilitative model spawned growth in the parole system.\textsuperscript{160} The Parole Commission determined the amount of confinement actually served by the convict.\textsuperscript{161} Before 1974, the bulk of sentences were indeterminate sentences.\textsuperscript{162} An indeterminate sentence gave the Parole Commission the authority to parole a prisoner at any time. The Parole Commission could parole someone within days of being confined. A judge also had the option of adjudging a "straight sentence."\textsuperscript{163} With a "straight sentence", the prisoner was eligible for parole after serving one-third of her sentence.\textsuperscript{164}

\textsuperscript{158} See Tagliareni, supra note 135, at 416.
\textsuperscript{159} See Hoelter et. al., supra note 140, at 1079.
\textsuperscript{163} See Hoelter et. al., supra note 140, at 1078.
\textsuperscript{164} Id.
In either case, the Parole Commission determined when an individual was "cured" and released.\footnote{165}

While the parole officer influenced the amount of confinement served, the probation officer affected the adjudged sentence.\footnote{166} The probation officer is an employee of the judiciary\footnote{167} and is responsible for providing a presentencing report to the bench.\footnote{168}

Before the implementation of guidelines, the presentencing report contained a summary of the case on the merits, status of codefendant trials, application of parole to the case, and the personal history of the defendant.\footnote{169} The personal history included "family background, education, military service, work history, criminal record, dependents, and activities in the community."\footnote{170} The probation officer would also recommend a sentence to the judge.\footnote{171} Only the

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\footnote{165}{See Green, supra note 151, at 1689.}
\footnote{166}{See Stith, supra note 136, at 1249.}
\footnote{167}{Id. at 1249-1250.}
\footnote{168}{Id.}
\footnote{169}{Id.}
\footnote{170}{Compare Id. at 1249 with USSG, supra note 7, pt. H (which largely eliminates the ability of the federal court to consider the personnel history traits of the defendant).}
judge received the sentencing recommendation portion of the report.\textsuperscript{172} This portion was advisory and the judge was free to give it great weight or no weight at all.\textsuperscript{173} The prosecution and the defense received the remainder of the report.\textsuperscript{174}

Political pressure and disappointment with the rehabilitative model eventually resulted in the development and implementation of the federal sentencing guidelines.\textsuperscript{175} Disappointment with the rehabilitative model grew out of concern with the ability of prisons to rehabilitate.\textsuperscript{176} Experts also questioned the ability of parole boards to evaluate a prisoner's state of rehabilitation.\textsuperscript{177}

Pat Brown,\textsuperscript{178} Former Governor of California, chaired a commission responsible for reporting to Congress on the state

\textsuperscript{171} Id. 1249-1250.


\textsuperscript{173} Stith, supra note 59, at 1249-1250.

\textsuperscript{174} Id.

\textsuperscript{175} Id.

\textsuperscript{176} Tagliareni, supra note 135, at 416.

\textsuperscript{177} See Id.; See also Hoelter et. al., supra note 140, at 1079-1080.

\textsuperscript{178} Currently the Mayor of the City of Oakland, California.
The Brown Commission cited sentence disparity as one of the major defects of federal sentencing. The Commission stated that the unfettered sentencing authority of federal trial judges was the primary cause of sentence disparity. The Brown Commission concluded that the federal judicial system needed major reform.

B. Federal Sentencing Post Guidelines

The political call for sentencing reform gained momentum through the 1980's. The growing crime rate, disparity in sentencing, early release of criminals, and constituents urging their representatives to be "tough on crime" led to bipartisan support for sentencing reform. Senator Strom Thurman (Republican) and Senator Edward Kennedy (Democrat) sponsored the Comprehensive Crimes Control Act of 1984.

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179 See Hoelter et. al., supra note 140, at 1078-1082.

180 Id.

181 Id.

182 Id.

183 See Hoelter et. al., supra note 140, at 1074; Wright supra note 159 at 1361.

184 See Freed supra note 162, at 1689.

This act resulted in the Sentencing Reform Act of 1984\textsuperscript{186} and created the United States Sentencing Commission.\textsuperscript{187} The United States Sentencing Commission published the first federal sentencing guidelines in November of 1987.\textsuperscript{188} Those guidelines became fully effective January of 1989.\textsuperscript{189}

The charter of the United States Sentencing Commission is to; \textsuperscript{190}

\begin{quote}
\begin{quote}
[P]rovide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices. \\
\end{quote}
\end{quote}

The United States Sentencing Commission is an eight member independent section of the judicial branch.\textsuperscript{192} The Attorney General (or her designee) is a nonvoting member. The

\begin{flushleft}
\textsuperscript{187} 28 U.S.C.S. §991(a) (Lexis 2000).
\textsuperscript{188} See Witten, supra note 161, at 701.
\textsuperscript{189} See Tagliareni, supra note 135.
\textsuperscript{190} 28 U.S.C.S. § 991(b)(1)(B).
\textsuperscript{191} See Id.
\textsuperscript{192} See Id. § 991(a).
\end{flushleft}
President appoints the remaining seven members after consultation with the criminal justice community and the Senate. The panel must contain members of both political parties. The United States Sentencing Commission develops and monitors the federal sentencing guidelines.

As discussed in the introduction, the goals of criminal punishment in the federal system are deterrence, incapacitation, just punishment, and rehabilitation. These four goals are identical to four of the five military sentencing goals. The additional goal in the military is

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193 Id.
194 Id.
195 USSG, supra note 7, ch. 1, pt. A.
197 Compare, 18 U.S.C.S. § 3553; 28 U.S.C.S. § 991, with BENCHBOOK, supra note 17 at 64. The goals of sentencing in the Federal system are: just punishment, deterrence, incapacitation, and rehabilitation. The military justice system employs the same four goals plus the goal of discipline.
maintaining good order and discipline.198 The military pursues its sentencing goals using sentencing discretion and individual sentencing.199 The federal system pursues its goals through the United States Sentencing Commission and the use of sentencing guidelines. Sentencing goals should not be confused with sentencing objectives.200 Sentencing goals relate to why an individual is punished.201 Sentencing objectives relate to the goals of the sentencing system in meting out that punishment.202

The Sentencing Commission’s mission is to satisfy the sentencing objectives of honesty, uniformity, and proportionality by using sentencing guidelines. The first objective, honesty in sentencing, was accomplished through the abolition of parole.203 Since the implementation of guidelines, the sentence adjudged is the sentence served with

198 BENCHBOOK, supra note 17, at 64.

199 MCM, supra note 15, R.C.M. 1002.

200 Compare USSG, supra note 7, ch. 1, pt. A. (the sentencing objectives of the federal system are honesty, uniformity and proportionality) with MCM, supra note 15, pt. 1, ¶ 3 (the purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States).


203 Id.
the exception of good time credit. Inmates may not receive parole.

The second objective is sentence uniformity. The Sentencing Commission believes that by decreasing sentence disparity it increases sentence uniformity. The Commission argues that sentencing guidelines increase sentence uniformity. A primary goal of the federal sentencing guidelines is to avoid unwarranted sentence disparity by “setting similar penalties for similarly situated offenders.” The sentencing guidelines were created by studying “10,000 presentence investigations, the differing elements of various crimes as distinguished in substantive criminal statues, The United States Parole Commission’s guidelines, and statistics, and data from other relevant sources. . . .”

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204 See OVERVIEW, supra note 11, Inmates can receive up to 54 days good time credit per year.
205 Id.
206 USSG, supra note 7, ch. 1, pt. A, § 3.
207 Id., ch. 1.
208 Id.
209 UNITED STATES SENTENCING COMMISSION, ANNUAL REPORT, (1999) [hereinafter REPORT].
210 See USSG, supra note 7, ch. 1, pt. A.
The sentencing guidelines are encapsulated in a sentencing table.\textsuperscript{211} The horizontal axis of the sentencing table applies to the defendant's criminal history.\textsuperscript{212} The vertical axis of the table relates to the seriousness of the offense.\textsuperscript{213} The Federal Sentencing Table's vertical axis lists the forty-three "Offense Levels."\textsuperscript{214} The horizontal axis lists the six "Criminal History Categories."\textsuperscript{215} The relevant criminal distinctions are taken into account through the interplay of the horizontal and vertical axis of the sentencing table.\textsuperscript{216} A copy of the Federal Sentencing Table is contained in appendix A.

Proportionality is the third objective of federal sentencing. Proportionality allows for "appropriately different sentences for criminal conduct of differing severity."\textsuperscript{217} The Sentencing Commission believes that the

\footnotesize
\textsuperscript{211} See Id. ch. 5, pt. A. See also app. A of this paper.
\textsuperscript{213} Id.
\textsuperscript{214} USSG, supra note 7, ch. 5, pt. A.
\textsuperscript{215} Id.
\textsuperscript{216} Id., ch. 1, pt. A, § 3.
\textsuperscript{217} Id., ch. 1.
sentencing guidelines realize proportionality by combining offense levels, sentence adjustments, and criminal history.\textsuperscript{218}

Offense levels relate to the seriousness of the crime. The offense levels range from one to forty-three.\textsuperscript{219} An offense level of one corresponds to minor offenses while an offense level of forty-three relates to the most serious offenses.\textsuperscript{220} Calculation of the offense level starts with determining the base offense level.\textsuperscript{221} Each type of crime has a corresponding base offense level.\textsuperscript{222} For example, all trespasses have a base offense level of four while all kidnappings have a base offense level of twenty-four.\textsuperscript{223}

Most crimes have specific offense characteristics.\textsuperscript{224} These characteristics can work to increase or decrease the base offense level. As an example, robbery has a base offense level of twenty. Robbery also applies specific offense

\textsuperscript{218} See OVERVIEW, supra note 11.
\textsuperscript{219} See USSG, supra note 7, ch. 1.
\textsuperscript{220} See PUBLIC DEFENDERS, supra note 212.
\textsuperscript{221} See USSG, supra note 7, ch. 1.
\textsuperscript{222} Id.
\textsuperscript{223} Id.
\textsuperscript{224} See OVERVIEW, supra note 11.
characteristics when a firearm is used in the robbery. For example, if a gun is discharged during a robbery, a seven level increase is imposed and the offense level is twenty-seven (i.e., 20 + 7 = 27). If a gun is shown but not discharged, a five level increase is in order. The corresponding offense level is increased from twenty to twenty-five.\(^\text{225}\)

The offense level can also be modified by adjustments.\(^\text{226}\) Adjustments are similar to specific offense characteristics in that they can either increase or decrease the offense level.\(^\text{227}\) Adjustments are dissimilar to specific offense characteristics in that they may be applicable to any offense. The three types of adjustments are: victim related adjustments, offender's role in the crime adjustments, and obstruction of justice adjustments.\(^\text{228}\) A young, aged, physically impaired, or mentally impaired victim may warrant a two level increase.\(^\text{229}\) Minimal participation in the crime warrants a four level increase.

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\(^{225}\) See USSG, supra note 7, ch. 1.

\(^{226}\) See OVERVIEW, supra note 11.

\(^{227}\) Id.

\(^{228}\) See USSG, supra note 7, ch. 3, pt. A, B, & C.

\(^{229}\) See OVERVIEW, supra note 11.
decrease. Obstruction of justice may similarly result in a
two level increase.

Adjustment may also apply if the defendant is convicted
of multiple counts or accepts responsibility for his acts. An
accused convicted of multiple counts may have his offense
level increased by up to five levels. The increase depends on
the number of additional offenses and the seriousness of those
offenses. If the trial judge believes that the defendant
accepts responsibility for his crime, the judge may make a
downward adjustment of two offense levels. The judge may
consider; "whether the offender truthfully admitted his ... role in the crime, whether the offender made restitution
before there was a guilty verdict, and whether the offender
pled guilty."

230 Id.

231 Id.

232 See USSG, supra note 7, ch. 1, pt. A, ¶ 3. See also USSG, supra note 7, app. D.

233 USSG, supra note 7, ch. 1, ch. 3, & pt. E.

234 OVERVIEW, supra note 11. "Offenders who qualify for the two-level
deduction and whose offense levels are greater than 15, may be granted an
additional one-level deduction if: (1) they provide complete and timely
information about their involvement in their offense, or (2) in a timely
manner, they declare their intention to plead guilty." Id.
As opposed to the vertical axis, which relates to offense levels, the horizontal axis defines the six criminal history categories.\textsuperscript{235} Criminal history looks to past criminal behavior of the offender and how close in time the current crime is to the past criminal behavior.\textsuperscript{236} Category I is the least severe category and is applied primarily to first time offenders.\textsuperscript{237} Category VI is the most severe category and applies to criminals with lengthy criminal records.\textsuperscript{238}

Criminal history is determined by awarding past convictions a numerical score.\textsuperscript{239} The numerical scores are tallied and a corresponding criminal history category is determined.\textsuperscript{240} Severe crimes and recent crimes rate the highest score.\textsuperscript{241} For example, if an offender had a 60-day sentence for a prior offense he committed as an adult less than 10 years from the date of the current offense, he would receive two points.\textsuperscript{242} If the offender committed the current

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{235} See OVERVIEW, supra note 11.
  \item \textsuperscript{236} See USSG, supra note 7, ch. 4, pt. A.
  \item \textsuperscript{237} Id.
  \item \textsuperscript{238} Id. ch. 4, pt. A & app. D.
  \item \textsuperscript{239} Id.
  \item \textsuperscript{240} Id. ch. 4, pt. A.
  \item \textsuperscript{241} Id.
\end{itemize}
\end{footnotesize}
offense while on parole, the offender would receive an additional two points for a total of four points.\textsuperscript{243} Four points corresponds to a category III criminal history.\textsuperscript{244}

After determining the offense level and the criminal history category a sentence range may be determined. To determine the sentence range, find the intersection of the criminal history category and the offense level.\textsuperscript{245} Once the intersection is determined, simply read the sentencing range displayed in the sentencing matrix.\textsuperscript{246} The range is given in months.\textsuperscript{247} The sentencing table excerpt below illustrates this procedure. (Figure 1). For example, if the offense level was 20 and the criminal history category was IV, the sentence range would be fifty-one to sixty-three months.\textsuperscript{248}

\textsuperscript{242} Id.
\textsuperscript{243} Id.
\textsuperscript{244} Id. ch. 1 & app. D.
\textsuperscript{245} Id. ch. 4, pt. B.
\textsuperscript{246} Id.
\textsuperscript{247} Id.
\textsuperscript{248} Id.
FIGURE 1
SENTENCING TABLE EXTRACT
Criminal History Category (Criminal History Points)

<table>
<thead>
<tr>
<th>OFFENSE LEVEL</th>
<th>I (0 OR 1)</th>
<th>II (2 OR 3)</th>
<th>III (4,5,6)</th>
<th>IV (7,8,9)</th>
<th>V (10,11,12)</th>
<th>VI (13 or more)</th>
</tr>
</thead>
<tbody>
<tr>
<td>19</td>
<td>30-37</td>
<td>33-41</td>
<td>37-46</td>
<td>46-57</td>
<td>57-71</td>
<td>63-78</td>
</tr>
<tr>
<td>20</td>
<td>33-41</td>
<td>37-46</td>
<td>41-51</td>
<td>51-63</td>
<td>63-78</td>
<td>70-87</td>
</tr>
</tbody>
</table>

Under rare circumstances, the trial judge may depart from the guidelines. The judge may depart from the guidelines if she believes there are issues in the sentencing case that the guidelines did not adequately consider. If the departure increases the sentence above the guideline cap then the offender may appeal. If the departure lessens the sentence,

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249 USSG, supra note 7.

250 18 U.S.C.S. §3553(b) (LEXIS 2000). A court may depart if it finds "an aggravation or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulation the guidelines that should result in a sentence different form that described." Id. See also USSG, supra note 7, ch. 1, pt. A. "[T]he Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's data indicate made a significant difference in pre-guidelines sentencing practice." Id.

251 USSG, supra note 7, ch. 1, pt. A.

252 OVERVIEW, supra note 11.
the government may appeal. The trial judge must state her reason for departure on the record.

The preceding two sections provided an overview of military and federal sentencing procedures. This overview demonstrated that while the sentencing goals of both systems are similar, the method employed to achieve those goals are dissimilar. The preceding two sections also illustrated that before the adoption of federal sentencing guidelines, the federal system allowed trial judges almost unfettered sentencing discretion. Such unfettered discretion, while no longer enjoyed by federal judges, is exercised by today's military judges.

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253 Id.
254 Id.
255 Compare, 18 U.S.C.S. § 3553; 28 U.S.C.S. § 991 (LEXIS 2000), with BENCHBOOK, supra note 17, at 64. The goals of sentencing in the Federal system are: just punishment, deterrence, incapacitation, and rehabilitation. The military justice system employs the same four goals plus the goal of discipline.
258 See discussion supra pp. 14-35.
IV. Sentence Disparity in the Military

Before the adoption of federal sentencing guidelines, the federal system suffered from unwarranted sentence disparity. The pre-guidelines system used judicial sentencing discretion to fashion individual sentences. The Sentencing Commission replaced judicial sentencing discretion and individual sentencing with sentencing guidelines and sentence uniformity.

Congress enacted federal sentencing guidelines, in large part, to decrease unwarranted sentence disparity. This section will explore to what degree sentence disparity exists within the military. This step is important because if an unwarranted amount of sentence disparity exists within the military, then sentencing guidelines may be necessary to decrease military sentence disparity.

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259 Freed, supra note 162, at 1688-1691.
260 Stith, supra note 136, at 1251-1253; Hoelter et. al., supra note 140.
261 USSG, supra note 7, ch. 1, pt. A.
261 OVERVIEW, supra note 11.
262 Witten, supra note 161, at 697.
This section will show that the military suffers from a high degree of sentence disparity. Sentence disparity is illustrated by comparing data collected from the Army, Navy, Air Force, and Marine Corps. The data is formulated to calculate the sentencing range, average sentence, and population standard deviation for the various punitive articles. These statistics are calculated for both the services as a whole and each individual service.

A. Military Sentencing Data

Representatives for the Army, Navy-Marine Corps, and Air Force provided raw data regarding the sentences awarded at general courts-martial during the previous year.\textsuperscript{263} The data was tallied to discover the degree of sentencing disparity that exists within the armed forces.\textsuperscript{264} The primary

\textsuperscript{263} Army Data, supra note 1; USN/USMC Data, supra note 3; and Air Force Data supra note 5.

\textsuperscript{264} Army Data, supra note 1; USN/USMC Data, supra note 3; and Air Force Data supra note 5. The data collected from the four services illustrated that it is a rare occurrence when an accused is convicted of a single punitive article. It is much more common for an accused to be convicted of several violations, even if all of these violations arise from a single act. For example, an accused might be charged with illegal drug use and unauthorized absence when the accused attempts to avoid a drug test. Alternatively, an accused might be charged with rape and an orders violation for being in the barracks room of the victim after posted hours. This dilemma (i.e., one adjudged sentence applying to multiple punitive articles) mandates that confinement be discounted to take into consideration when an accused is convicted of several punitive articles.
calculations performed were the average, range, and population standard deviation. For the purposes of this paper, the most important calculation is the population standard deviation.

The population standard deviation is the square root of the population variances.\textsuperscript{265} The standard deviation is an important calculation because it illustrates the degree of sentence disparity that exists within a population.\textsuperscript{266} A large

\begin{quote}
The formula employed first divided the punitive articles into three categories: major, moderate, and minor crimes. Major crimes are articles; 100, 104, 106, 106a, 110, 114, 118, 119, 120, 121, 122, 124, 125, 126, 128, 129, 130, and 133. Moderate crimes are articles; 85, 90, 94, 99, 101, 102, 105, 108, 109, 112(a), 113, 116, 123, and 123(a) and 134. Minor crimes are articles; 83, 84, 86, 87, 88, 89, 91, 92, 93, 95, 96, 97, 98, 103, 107, 111, 112, 115, 117, 131, and 132. If the accused was found guilty of two or more major crimes, the confinement was evenly divided between the major punitive articles. If the accused was found guilty of 3 or more major crimes 33\% of the sentence would be assigned to each article. One minor crime decreased the sentence by 10\%, 2 minor crimes decreased the sentence by 15\%, 3 or more minor crimes resulted in a 20\% decrease. If two punitive articles covered the same basic criminal act, (i.e., 108 and 121, or 120 and 125) 90\% of the sentence would be assigned to each article. A major crime combined with a moderate crime would employ the following discount, one moderate crime would reduce the sentence 15\% while 2 or moderate crimes would reduce the sentence by 25\%. Conviction of 3 or more moderate crimes would reduce the sentence by 33\%. If the accused is convicted of only multiple moderate crimes, the sentence is equally distributed amongst the various moderate crimes.

While the Federal Sentencing Commission employs an entire staff to study sentencing data and calculate statistical information, the author did not enjoy that luxury. The data is accurate and the discounting formula was applied uniformly throughout the analysis. The author is aware that different discounting methods could be employed and that some might have an advantage over the one used here. While the discounting method might be improved by brighter minds, the results provided are accurate and significant to illustrate the main point of this section, namely, that various punitive articles suffer from a high population standard deviation and that this high population standard deviation is evidence of unwarranted sentence discrepancy.

\textsuperscript{265} ENCARTA suprana note 22. See also ROBERT D. MASON, STATISTICAL TECHNIQUES IN BUSINESS AND ECONOMICS (6th ed. 1986).
population standard deviation indicates a high degree of sentence disparity within that population. In other words, the standard deviation illustrates how closely each individual sentence is to the mean sentence. The closer each individual sentence is to the mean sentence, the lower the standard deviation. A low standard deviation equates to a high degree of sentence uniformity because individual sentences are closer to the mean sentence. Alternately, the more each individual sentence varies from the mean sentence, the higher the standard deviation. As the standard deviation increases, sentence disparity increases because individual sentences are further from the mean sentence.

266 See ENCARTA supra note 22. See also Theresa Walker Karle & Thomas Sager, Article: Are the Federal Sentencing Guidelines Meeting Congressional Goals?: Empirical and Case Law Analysis, 40 EMORY L.J. 393 (1991). (This article compared pre-guideline federal sentences to post-guideline federal sentences. The statistic used to compare sentences was the standard deviation (s/d). It is interesting to note the following pre-guideline s/d to determine what the federal system saw as significant sentence disparity. Marijuana distribution had a s/d of 54 months, cocaine distribution had a s/d of 104 months, robbery had a s/d of 128 months and larceny had a s/d 43 months). See also ROBERT D. MASON, STATISTICAL TECHNIQUES IN BUSINESS AND ECONOMICS (6th ed. 1986).

267 ENCARTA supra note 22. As an example, if you wanted to compare the confinement awarded to two separate populations, one population consisting of four Marines and one population consisting of four Soldiers, you could calculate the population standard deviation. If the sentences awarded the four Marines in months were 12, 11, 13, and 12, the average would be 12 and the population standard deviation would be .8. This low value of standard deviation indicates a low degree of sentence disparity. If the sentence of the four Sailors was 24, 4, 14, and 6, the average would be 12 but the standard deviation would be 7.9. The value for the population standard deviation is higher for the Sailors then the Marines because the sentences for the Sailors have a higher degree of sentence discrepancy.
The first calculation performed was to determine the average confinement for the four branches of service. The average confinement adjudged by the Army was thirty-five months. The average confinement imposed by the Navy was thirty-four months. The average length of confinement awarded by the Air force was twenty-two months while the Marine Corps adjudged average confinement of forty-eight months. The combined average confinement for the four services was thirty-three months.

The next calculation was determining the population standard deviation for all sentences awarded at general courts-martial during the previous year. The confinement standard deviation for the four services was eighty-one months. The standard deviation for the Army was ninety-six months as compared to fifty-two months for the Navy. The

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268 Army Data, supra note 1.
269 USMC/USN Data, supra note 3.
270 Air Force Data, supra note 5.
271 USN/USMC Data, supra note 3.
272 Army Data, supra note 1; USN/USMC Data, supra note 3; Air Force Data supra note 5.
273 Army Data, supra note 1; USN/USMC Data, supra note 3; Air Force Data supra note 5.
274 Army data, supra note 1.
standard deviation for the Air Force was fifty-six months\textsuperscript{276} while the Marine Corps had a standard deviation of eighty months.\textsuperscript{277}

The high standard deviation calculated above is some evidence that an unwarranted amount of sentence disparity exists both within and between the services. It is some evidence because sentences varied, on average, eighty-one months from the mean sentence. The evidence is, at best, a general indicator because the calculations were performed without accounting for the differences between sentences for different punitive articles.

What the above data does illustrate is that the four branches of service had individual population standard deviations of between fifty-two months (Navy) and ninety-six months (Army).\textsuperscript{278} If the four branches prosecuted a similar proportion of punitive articles, (i.e., 20\% of the cases were Article 112a, 10\% were Article 121, etc.) this value would be

\textsuperscript{275} USN/USMC data supra note 3.
\textsuperscript{276} Air Force data, supra note 5.
\textsuperscript{277} USN/USMC data supra note 3.
\textsuperscript{278} Army Data, supra note 1; USN/USMC Data, supra note 3; Air Force Data supra note 5.
some evidence that the Army had more sentence disparity than the Navy.\textsuperscript{279}

The more valuable calculation is determining the population standard deviation for particular punitive articles. If the punitive articles have an accompanying high population standard deviation, that high standard deviation supports a conclusion of significant sentencing disparity.\textsuperscript{280}

The next subsection will explore the standard deviation and average sentences that attach to various punitive articles.

\subsection*{B. Sentencing Data Relating to Specific Punitive Articles}

This subsection will calculate the standard deviation that attaches to rape, murder, and illegal drug distribution. If these articles have a high corresponding standard

\textsuperscript{279} ENCAR TA \textit{supra} note 22. As an example, if you wanted to compare the confinement awarded to two separate populations, one population consisting of four Marines and one population consisting of four Sailors, you could calculate the population standard deviation. If the sentences awarded the four Marines in months were 12, 11, 13, and 12, the average would be 12 and the population standard deviation would be .8. This low value of standard deviation indicates a low degree of sentence disparity. If the sentence of the four Sailors was 24, 4, 14, and 6, the average would be 12 but the standard deviation would be 7.9. The value for the population standard deviation is higher for the Sailors then the Marines because the sentences for the Sailors have a higher degree of sentence discrepancy.

\textsuperscript{280} ENCAR TA \textit{supra} note 22.
deviation, this deviation is evidence of sentence disparity. While this subsection discusses three punitive articles, similar calculations were completed for each punitive articles contained in appendix B.

The first example is Article 120, rape, which has a sentencing range between 3 months and 324 months. The average for all four services was 101 months with a corresponding population standard deviation of 155 months. The average confinement for the Army was 101 months while the Navy had an average of 73 months. The Air Force awarded average confinement of 79 months while the average in the Marine Corps was 55 months.

The overall population standard deviation for the crime of rape was 155 months. The service standard deviations broke down as follows: Army 222 months, Navy 80 months, Air

\[\text{Army Data, supra note 1; USN/USMC Data, supra note 3; Air Force Data supra note 5.}\]

\[\text{Id.}\]

\[\text{Army data, supra note 1.}\]

\[\text{USN/USMC Data, supra note 3.}\]

\[\text{Air Force Data, supra note 5.}\]

\[\text{Army Data, supra note 1.}\]

\[\text{USN/USMC Data, supra note 3.}\]
Force 114 months,$^{288}$ Marine Corps 42 months.$^{289}$ Some may argue that convictions for Article 120 include date rape, thereby inflating the standard deviation. The data does not support this criticism. If sentences of 24 months or less are eliminated from the equation, the overall population standard deviation increases to 196 months.$^{290}$ The individual service standard deviations have the same result. For example, when you discard sentences of 24 months or less, the standard deviation in the Army increases to 239 months.$^{291}$ These large population standard deviations are strong evidence that a high degree of sentencing disparity exists in the military for the crime of rape.$^{292}$

$^{288}$ Air Force Data, supra note 5.

$^{289}$ USN/USMC Data, supra note 3.

$^{290}$ Army Data, supra note 1; USN/USMC Data, supra note 3; and Air Force Data supra note 5.

$^{291}$ Army Data, supra note 1.

$^{292}$ ENCUAR T A supra note 22. As an example, if you wanted to compare the confinement awarded to two separate populations, one population consisting of four Marines and one population consisting of four Soldiers, you could calculate the population standard deviation. If the sentences awarded the four Marines in months were 12, 11, 13, and 12, the average would be 12 and the population standard deviation would be .8. This low value of standard deviation indicates a low degree of sentence disparity. If the sentence of the four Sailors was 24, 4, 14, and 6, the average would be 12 but the standard deviation would be 7.9. The value for the population standard deviation is higher for the Sailors than the Marines because the sentences for the Sailors have a higher degree of sentence discrepancy.
The next crime to consider is Article 118, murder.\textsuperscript{293} Murder also has a high population standard deviation. The average sentence for Article 118 (that do not have life as a mandatory sentence) is 283 months.\textsuperscript{294} The sentencing range is 61 to 547 months.\textsuperscript{295} The population standard deviation is 172 months.\textsuperscript{296} If you eliminate sentences of 15 years or less from the equation, the standard deviation decreases to 144 months.\textsuperscript{297} Thus, even when you remove relatively lenient sentences from the equation, the standard deviation for confinement remains significant.\textsuperscript{298} This high standard deviation is evidence that the crime of murder suffers from a high degree of sentence disparity.

The final punitive article addressed in this section is Article 112a (3), wrongful distribution of a controlled substance.\textsuperscript{299} The confinement range for the four branches was

\textsuperscript{293} MCM, supra note 15, pt. IV, ¶ 43.
\textsuperscript{294} Army Data, supra note 1.
\textsuperscript{295} Id.
\textsuperscript{296} Id.
\textsuperscript{297} Army Data, supra note 1; USN/USMC Data, supra note 3; Air Force Data supra note 5.
\textsuperscript{298} Army Data, supra note 1; USN/USMC Data, supra note 3; Air Force Data supra note 5. See also Karle, supra note 266, at 406-408.
\textsuperscript{299} MCM, supra note 15, pt. IV, ¶ 37b(3).
1-180 months. The average confinement adjudged by all four services was 29 months. The confinement deviated from the mean by an average of 31 months.

The Marine Corps had the highest degree of internal sentence disparity. The standard deviation in the Marine Corps for illegal drug distribution was fifty-six months. The Air Force had a standard deviation of twenty-one months, followed by twenty months for the Army and ten months for the Navy.

The overall standard deviation for illegal drug distribution, and the individual standard deviations for all of the branches except for the Navy, is significant. The fact that the average sentence deviated by more than thirty months from the mean sentence is evidence that Article 112a(3) suffers from significant sentence disparity.

300 Army Data, supra note 1; USN/USMC Data, supra note 3; Air Force Data supra note 5.

301 Army Data, supra note 1; USN/USMC Data, supra note 3; Air Force Data supra note 5.

302 Army Data, supra note 1; USN/USMC Data, supra note 3; Air Force Data supra note 5.

303 USN/USMC Data, supra note 3.

304 Army Data, supra note 1; USN/USMC Data, supra note 3; and Air Force Data supra note 5.
The large population standard deviations detailed in each example above provide evidence that sentence disparity exists within the military justice system. The next section will contrast how the military sentencing system all but ignores sentence uniformity while the federal sentencing system promotes sentence uniformity.

C. Federal Sentencing Versus Military Sentencing:
Two Divergent Views of Sentence Uniformity

The military justice system largely abandoned sentence uniformity as a sentencing goal in the 1950's. Abandonment of sentencing uniformity is one factor that led to the sentencing disparities that exist within the military today. Other factors that likely increased sentencing disparity include, the wide discretion given the sentencing authority,

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306 See Mamaluy C.M.R. 176; United States v. Lacy, 50 M.J. 286 (1999). When the military system removed sentence uniformity from the Manual for Courts-Martial, the military system chose to rely upon the appellate court to ensure sentence uniformity. The appellate courts review a sentence only if the cases are closely related and highly similar. The standard of review is abuse of discretion or preventing an obvious miscarriage of justice. The end result is that the appellate courts review very few cases on sentence uniformity issues. Since the appellate courts review very few cases on sentence uniformity grounds, and when they do review a case the standard of review is very high, the vast majority of sentences are left in tact. Since the wide range of sentences adjudged remain in force, they lend themselves to sentence disparity.
the option of being sentenced by a military judge or military members,\textsuperscript{308} and the sentencing goal of maintaining "good order and discipline."\textsuperscript{309}

Unlike the current military system, the federal system found sentence disparity to be counter to the goals of federal sentencing.\textsuperscript{310} Promoting sentence uniformity is a critical part of the federal criminal justice system.\textsuperscript{311} Unwarranted sentence disparity was a major reason for the creation and adoption of federal sentencing guidelines.\textsuperscript{312}

The current version of the \textit{Manual for Courts-Martial} states that "The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, [and] to promote efficiency and effectiveness in the military establishment. . . ."\textsuperscript{313} The \textit{Manual for Courts-Marital} does not provide any definitions of what is meant by "promoting justice", "maintaining good order

\textsuperscript{307} MCM, supra note 15, R.C.M. 1002.
\textsuperscript{308} MCM, supra note 15, R.C.M. 903. \textit{See also} discussion supra pp. 14-27.
\textsuperscript{309} MCM, supra note 15, pt. I, ¶ 3.
\textsuperscript{310} 28 U.S.C.S. §991(b) (LEXIS 2000).
\textsuperscript{311} Id.; USSG, supra note 7, ch. 1 pt. A.
\textsuperscript{312} 28 U.S.C.S. §991(b); USSG, supra note 7, ch. 1 pt. A.

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and discipline”, or promoting “efficiency and effectiveness” in the military.\textsuperscript{314} The Manual gives the sentencing authority sole discretion to fashion a sentence that fulfills the purposes of military law.\textsuperscript{315} The only meaningful instruction the sentencing authority receives is that they may consider the sentencing goals of rehabilitation, punishment, deterrence, protection of society, and preservation of good order and discipline when fashioning a sentence.\textsuperscript{316}

While the sentencing authority receives instruction that they may consider rehabilitation, punishment, deterrence, and protection of society when fashioning a sentence, neither the

\textsuperscript{314} Id.

\textsuperscript{315} Compare MCM, supra note 15, R.C.M. 1002 with BENCHBOOK, supra note 17 at p. 64. It is interesting that the BENCHBOOK never refers to the purposes of military justice. The BENCHBOOK instead tells the members that,

There are several matters which you should consider in determining an appropriate sentence. You should bear in mind that our society recognizes five principal reasons for the sentence of those who violate the law. They are rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of his/her crime(s) and his/her sentence from committing the same or similar offense. The weight to be given any or all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion.

\textsuperscript{316} BENCHBOOK, supra note 17, at p. 64.
Manual for Courts-Martial nor the Judges’ Benchbook provides any concrete guidance on how the sentencing goals are to be applied in order to fulfill the purposes of military law.\(^3\)\(^1\)\(^7\)

In the end, the military judge informs the members that they can do whatever they want when fashioning a sentence as long as they do not exceed the maximum sentence authorized by law for that court-martial.\(^3\)\(^1\)\(^8\)

Unlike the vague direction provided to the sentencing authority in the military, the Federal Sentencing Guidelines Manual provides detailed guidance on how to sentence a criminal.\(^3\)\(^1\)\(^9\) The cornerstone of this guidance is the federal sentencing guidelines.\(^3\)\(^2\)\(^0\) A primary goal of the federal sentencing guidelines is uniformity.\(^3\)\(^2\)\(^1\) Sentence uniformity seeks to set similar “penalties for similarly situated offenders.”\(^3\)\(^2\)\(^2\) Thus, in the federal system, sentence

\(^{317}\) MCM, supra note 15, R.C.M. 1001-1010; BENCHBOOK, supra note 17, at p. 64.

\(^{318}\) BENCHBOOK, supra note 17, at p. 64. “The weight to be given any or all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion.” Id.

\(^{319}\) USSG, supra note 7.


\(^{322}\) USSG, supra note 7, ch. 1.
uniformity is achieved through the use of sentencing guidelines.323

This paper has demonstrated that the military and federal sentencing systems pursue almost identical sentencing goals.324 While the goals are similar, the method for achieving those goals is very different. The military allows the sentencing authority great discretion and does not actively pursue sentence uniformity. The federal system strongly curtails sentence discretion with sentencing guidelines and embraces sentence uniformity as the means by which it satisfies the federal sentencing goals.

D. Is Sentence Disparity Ever Justified

The data discussed earlier demonstrated that sentencing disparity exists within the military.325 The preceding subsection also illustrated that the military and federal system take divergent approaches to the issue of sentence


324 Compare, 18 U.S.C.S. § 3553; 28 U.S.C.S. § 991, with BENCHBOOK, supra note 17, at 64. The goals of sentencing in the Federal system are: just punishment, deterrence, incapacitation, and rehabilitation. The military justice system employs the same four goals plus the goal of discipline.

325 See Army Data, supra note 1; USN/USMC Data, supra note 3; and Air Force Data supra note 5. See also discussion supra pp.48-58.
uniformity. The next issue to be addressed is whether sentencing disparity equates to "injustice." Put differently, does a high degree of sentencing disparity equal a failure of the military to fulfill the purposes of military law?\textsuperscript{326}

As discussed earlier, the purposes of military law are to promote justice, assist in maintaining good order and discipline, and increase the efficiency and effectiveness of the military.\textsuperscript{327} This subsection will suggest that the above purposes necessitate that the military retain the ability to sentence in a disparate fashion when the purposes of military law warrant.

Proponents of the current military sentencing regime may argue that sentence disparity exists because of the military's focus on the individual accused.\textsuperscript{328} The current system allows the sentencing authority to fashion a sentence that focuses both on the crime committed by the accused and on the circumstances surrounding the accused.\textsuperscript{329} For example, an

\textsuperscript{326} MCM, supra note 15, pt. I, ¶ 4. The purposes of military justice are to promote justice, assist in maintaining good order and discipline, and to increase the efficiency and effectiveness of the military.

\textsuperscript{327} Id.

\textsuperscript{328} Id. R.C.M. 1002.

\textsuperscript{329} Id. R.C.M. 1001.
aircraft mechanic who uses illegal drugs may receive a sentence that is more severe than the sentence received by an administrative clerk who uses the same drug. The primary, and perhaps only reason for this disparity would be the job of the accused. The commander of the aircraft mechanic could argue that a mechanic who uses illegal drugs is a major threat to good order and discipline within his unit. Mechanics who use illegal drugs may cause pilots to lose confidence in the maintenance of their aircraft. Similarly, mechanics under the influence may make errors that result in the loss of life and machine. This loss would decrease the effectiveness of the unit.

The commanding officer of the administrative clerk would not face the same threat to good order and discipline as that faced by the commander of the flight mechanic. The potential consequences of a clerk working under the influence of narcotics are less severe than those posed by the mechanic. Accordingly, the purposes of maintaining good order and discipline and effectiveness of the service may justify disparate sentences.330

330 Id. pt. I, ¶ 3.
Similarly, the type of command and duty station of an individual may be a reason for sentence disparity. A training command may have different military justice needs than an operational command. The military justice needs of an operational command may vary depending on whether they are in garrison or in the field. Like the illegal drug use example, sentence disparity is more likely to be warranted when the impact of the crime depends on the type of command to which the accused belongs.

When the victim of a crime is the military, a larger degree of sentence disparity may be warranted. A larger degree of sentence disparity is justified because of differing needs or missions of various commands. For example, good order and discipline may warrant that a Marine Platoon Sergeant, convicted of being disrespectful to his Platoon Commander in front of his platoon, receive more confinement than a Marine Private who commits a similar offense. The disparity in sentence is warranted because of the increased impact the Platoon Sergeant’s misconduct has on good order and discipline within that unit.331

331 A Platoon Sergeant is the link between the Platoon Commander and his Marines. The Platoon Commander must rely upon the Platoon Sergeant to carry out his orders. If the Platoon Sergeant is disrespectful in front of the platoon, his misconduct is more severe than that of the Privates because of the leadership role of the Platoon Sergeant.
Sentence disparity is less warranted when the crime does not relate to good order and discipline or the effectiveness of the military. For example, an aircraft mechanic convicted of raping a woman should receive a similar sentence as an administrative clerk who commits a similar rape. National security, efficiency and effectiveness of the service, good order and discipline, and the promotion of justice, do not justify two similar rapists receiving disparate sentences.\textsuperscript{332}

In order to be effective, military sentencing guidelines must allow courts-martial to adjudge disparate sentences when either good order and discipline or military efficiency warrant. The proposed sentencing guidelines attempt to accomplish this task through the use of sentencing categories. The proposed sentencing guidelines will be discussed in detail in the next section of this paper.\textsuperscript{333}

V. Adopting Military Sentencing Guidelines

Sentencing guidelines can improve military sentencing by increasing sentence uniformity while simultaneously satisfying

\textsuperscript{332} MCM, supra note 15, pt. I, ¶ 3.

\textsuperscript{333} See discussion infra pp. 75-95.
the purposes of military sentencing.\textsuperscript{334} Adopting military sentencing guidelines would also bring the military sentencing system in line with the federal system and a majority of the state criminal justice systems.\textsuperscript{335}

This section will propose a unique form of military sentencing guidelines. The first subsection will contend that in order for military sentencing guidelines to be effective, the proposed guidelines should retain the positive aspects of the current sentencing system. The second subsection will provide a systematic discussion of how the military sentencing matrix is created. The final subsection will discuss departure from the sentencing guidelines.

A. Developing Military Sentencing Guidelines

For sentencing guidelines to be effective, they must result in a system that is superior to the one that currently

\textsuperscript{334} MCM, supra note 15, pt. I, ¶ 3.

exists. The primary benefit of sentencing guidelines is sentence uniformity.\textsuperscript{336} The price of sentence uniformity should not be the many positive aspects of the current system. Any proposed system must incorporate the strengths of the present system with the benefits of guidelines. Strengths that must be preserved are, confidence in the system by the military community, efficiency, and use of the adversarial process in sentencing.

The active duty military community has confidence in the current military sentencing system. A Department of Defense survey revealed that when servicemen were asked whether civilians or the military is better at ensuring the "fair administration of justice" 16 percent said the civilians were better, 28 percent said the military was better, and 54 percent said there was no difference.\textsuperscript{337}

The second strength of the current military sentencing system is efficiency. The military justice system does not


use probation officers.\textsuperscript{338} Most sentencing cases consume less than a half of day of court time.\textsuperscript{339} Additionally, the accused is not constrained by the Military Rules of Evidence in presenting his sentencing case.\textsuperscript{340}

Closely related to efficiency is the military's use of the adversarial sentencing process.\textsuperscript{341} The military employs the adversarial system instead of probation officer and their attendant presentencing reports.\textsuperscript{342} The military believes that the adversarial process provides the same type of information contained in the federal presentencing report, but provides that information within the protections of the adversarial process.\textsuperscript{343}

Through an adversarial process, the parties are able to present their sentencing case.\textsuperscript{344} The military system allows the accused to present a wide range of sentencing evidence and

\begin{itemize}
\item \textsuperscript{338} MCM, supra note 15.
\item \textsuperscript{339} Interview with Major M. Sitler, Vice Chair, Criminal Law Department, at The Judge Advocate General's School, Charlottesville, Va. (Apr. 7, 2000).
\item \textsuperscript{340} MCM, supra note 15, R.C.M. 1001.
\item \textsuperscript{341} Id. See also discussion supra pp. 14-27.
\item \textsuperscript{342} MCM, supra note 15, R.C.M. 1001 analysis, app. 21.
\item \textsuperscript{343} Id.
\item \textsuperscript{344} Id. R.C.M. 1001.
\end{itemize}
attack the evidence presented by the trial counsel. The military system puts the defendant in control of the evidence that he offers.

Considering the above, if the military is to incorporate sentencing guidelines, the guidelines should be designed to retain the strengths of the current system. The proposed sentencing guidelines seek to preserve confidence in the military justice system, the efficiency of the sentencing system, and the adversarial process.

First, the proposed military sentencing guidelines have limited application. The proposed military sentencing guidelines only affect the confinement adjudged at general courts-martial. The sentencing guidelines will not be applicable to either summary or special courts-martial.345

Sentencing guidelines are not necessary for special courts-martial.346 The maximum punishments currently authorized at special courts-martial are relatively narrow, (i.e., the maximum punishment allowed is, six months of

345 Id. R.C.M. 204.

346 Id. Sentencing guidelines would not apply to summary courts-martial for the same reason. The maximum confinement allowed at a summary courts-martial is one month.
confinement,\textsuperscript{347} forfeiture of $2/3$ pay per month for six months, a fine, and a bad conduct discharge).\textsuperscript{348} The narrow sentencing range ensures that special courts-martial will always have a low standard deviation and that the sentences will be sufficiently uniform.\textsuperscript{349}

Special courts-martial make up the majority of all courts-martial.\textsuperscript{350} Retaining the current special court-martial system would preserve more than one half of the present military sentencing system. Additionally, maintaining the present special courts-martial system would ease the burden the military justice system would face in incorporating the proposed military sentencing guidelines.\textsuperscript{351}

\textsuperscript{347} Congress has recently authorized the increase of confinement from six months to twelve months. The president has yet to implement this change.

\textsuperscript{348} MCM, supra note 15, R.C.M. 201(f)(2)(B).

\textsuperscript{349} Id. The maximum confinement disparity that can exist between two individuals convicted by a special courts-martial is six months.


\textsuperscript{351} The adoption of military sentencing guidelines would be a revolutionary change to the military sentencing system. To reduce the potential turmoil that may surround the adoption of the proposed military sentencing guidelines, the proposed guidelines seek to impact only a minority of all courts-martial.
Further, the proposed military sentencing guidelines would only affect confinement. Military sentencing guidelines would not influence punitive discharges, fines, reductions/dismissals, or forfeitures of pay and allowances.\(^{352}\) These forms of punishment would be applied as detailed by the current Manual for Courts-Martial.\(^{353}\)

The next section will introduce the proposed military sentencing guidelines. The section will explain how the military sentencing guideline matrix (appendix B) was created. Further, the section will discuss the application of the guidelines to the military.

B. Proposed Military Sentencing Guidelines Matrix

Sentencing guidelines could be implemented through the use of a sentencing matrix (See appendix B). The matrix consists of a vertical and a horizontal axis. The vertical axis lists the punitive articles.\(^{354}\) The horizontal axis contains the

\(^{352}\) MCM, supra note 15, R.C.M. 1003.


five categories that operate to determine the confinement range.\(^{355}\)

1. The vertical Axis of the Military Sentencing Matrix

The vertical axis lists the punitive articles. When appropriate, the punitive articles are divided into classifications. The classifications relate to the various sentencing subdivisions within many of the punitive articles.\(^{356}\) For example, the Manual divides Article 119, manslaughter, into two classifications, voluntary manslaughter and involuntary manslaughter. This division is illustrated in figure 2 below.

\[
\begin{array}{|c|c|c|c|c|}
\hline
\text{ART. 119} & \text{I} & \text{II} & \text{III} & \text{IV} & \text{V} \\
\hline
\text{Class. 1} & 0-48 & 48-56 & 57-71 & 72-83 & 84-180 \\
\text{Class. 2} & 0-12 & 13-20 & 21-40 & 41-72 & 73-120 \\
\hline
\end{array}
\]

\(^{355}\) See discussion infra pp. 76-84.

\(^{356}\) MCM, supra note 15, pt. IV, ¶¶ 1-113. For example, Article 119 is divided into two classifications, voluntary manslaughter and involuntary manslaughter. Each classification has a unique maximum sentence.
2. The Horizontal Axis of the Military Sentencing Matrix

The horizontal axis will be comprised of five categories. Category I is the least severe category while category V is the most severe category. The horizontal axis appears above in figure 2.

The sentencing matrix categories are configured to maximize sentence uniformity while taking into consideration the need to increase or decrease confinement as aggravation, extenuation, and mitigation warrant. The sentencing categories also allow, when warranted, disparate sentences. The sentencing categories allow the flight mechanic who uses illegal drugs on the job to be sentenced more severely than the administrative clerk who commits the same crime.

The proposed military sentencing matrix increases sentence uniformity for two primary reasons. First, the judge always determines the sentencing category. Second, the

357 Id. R.C.M. 1003; pt. I, ¶3. The purposes of military justice necessitate the option of adjudging disparate sentences in certain situations.

358 See Major Lawrence J. Morris, Keystones of the Military Justice System: A Primer for Chiefs of Justice, Army Law., Oct. 1994, 22-23, "Trial by judge alone is viewed as reducing the risk of extreme sentences, while a panel generally is thought to carry a higher chance of acquittal but much less
use of sentencing categories increases sentence uniformity by assigning similar offenders similar ranges of confinement.

The judge will assign the sentencing category regardless of the forum selected. 359 Judges have the necessary training and experience to uniformly assign sentencing categories. 360 Because of the judges training and experience, they are uniquely qualified to ensure that the sentencing categories are evenly applied throughout the circuit. 361

Having military judges assign sentencing categories overcomes the criticism raised by Mamaluy. 362 As discussed earlier, the court in Mamaluy recommended that sentence uniformity be removed as a sentencing goal from the Manual for predictability on sentencing.” Id. See also Lovejoy, supra note 39, at 6, n. 167, n. 180, & n. 187. (Major Lovejoy conducted a survey of convening authorities, military judges, trial and defense counsel, and military inmates serving a sentence at Fort Leavenworth. His data illustrates, at least the perception, that judges are less likely to sentence in a disparate fashion).

359 MCM, supra note 15, R.C.M. 903. An enlisted accused may be tried by officer members, officer members with enlisted representation (i.e., at least 1/3 enlisted members), or by a military judge with the judge’s permission. An officer accused may only be sentenced by officer members or a military judge.

360 Lovejoy, supra note 39, at n.180, n.187. Major Lovejoy conducted a survey of convening authorities, military judges, trial and defense counsel, and military inmates serving a sentence at Fort Leavenworth. His data supports the proposition that judges sentence in a more uniform manner than do military members.

361 Id.; Morris, supra note 358, at 22-23.

The court made this recommendation because they did not believe that military members had the requisite knowledge and information necessary to apply the sentence uniformity instruction to an individual case. The Mamaluy court conceded that sentence uniformity was an appropriate sentencing goal. While an appropriate goal, the court determined that sentence uniformity was not practical for the military system. The lack of sentencing uniformity that exists in the military today supports the conclusion of the 1959 Mamaluy court.

The concerns raised by the Mamaluy court can be avoided through the proposed military sentencing guidelines. The confinement ranges listed on the military sentencing matrix are based on sentencing data. Once the data is studied, appropriate confinement ranges are determined for each category and each punitive article. These confinement ranges work to enhance sentence uniformity.

364 Id. at 181-182.
365 Id. at 182.
366 Id. at 181-182.
367 See discussion supra pp 48-58.
The military judge, upon hearing all aggravation, extenuation, and mitigation evidence, applies his knowledge and experience to the case and assigns the appropriate sentencing category. The members then determine confinement based on the sentencing range contained in the sentencing matrix. The members do not need special knowledge or training to accomplish this task. Under the proposed military guidelines, the members do not have to concern themselves with the sentences awarded in other cases because the sentencing categories reflect this information.

Critics may argue that using the judge to determine sentencing categories is an excessive expansion of judicial power and strips court-martial members of their authority. Entrusting military judges to assign the sentencing categories is not an unreasonable expansion of judicial authority. Judges currently award sentences in the majority of general courts-martial. The federal criminal system uses trial

368 See infra p. 94. If the sentencing authority, be they members or judge, believes that the sentencing matrix results in confinement that is too harsh, they may state so on the record and recommend that the convening authority reduce confinement via his clemency powers.

369 See MCM, supra note 15, Ch. X; Lovejoy, supra note 39.

370 Army Data, supra note 1; USN/USMC Data, supra note 3; and Air Force Data supra note 5.
judges to award sentences in all cases that are not capital.\textsuperscript{371}

Similarly, 45 of the states use judges for criminal sentencing.\textsuperscript{372}

Additionally, requiring the military judge to assign sentencing categories will not strip the members of their sentencing authority. Members will have complete discretion to determine all other lawful punishments that apply.\textsuperscript{373}

Members may award any confinement that falls within the range suggested by the sentencing matrix. Additionally, when warranted, the panel can recommend that the convening authority reduce confinement under her clemency powers.\textsuperscript{374} The judge’s role in assigning sentencing categories assists members because it makes sentence uniformity determinations that the members are unable to make.\textsuperscript{375}

The second way the sentencing matrix will increase sentence uniformity is by using sentencing categories. The

\textsuperscript{371} USSG, supra note 7, §5.K1.1-§5.K1.2.16.

\textsuperscript{372} Lanni, supra note 12, at 1790.

\textsuperscript{373} MCM, supra note 15, R.C.M. 1003. The members will have the sole discretion to determine whether a punitive discharge should be adjudged, and if so, the type of punitive discharge to award, whether forfeitures and fines apply, and any reduction in rank that might be imposed.

\textsuperscript{374} Id. R.C.M. 1107(d).

categories ensure that a majority of the courts-martial will be sentenced under either category II, III, or IV. By funneling sentences into the middle three categories, similar crimes will receive similar sentences, and sentence uniformity will be increased.

Category III is the appropriate category when aggravating, mitigating, and extenuating circumstances tend to cancel each other out. It is the default setting. For example, assume that the military judge found the mitigating fact that the accused had good military character. Also, assume the judge found the aggravating fact that the crime was committed against the accused’s roommate. If the judge finds that the mitigating and aggravating factors are equal, (i.e., cancel each other out) the judge should assign category III to the crime.

Category II offers less confinement than categories III, IV, or V. The military judge must mandate sentencing under category II when he finds that extenuation and/or mitigation evidence outweighs aggravation evidence. As an example,

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376 Category III also applies if no evidence in aggravation, extenuation, or mitigation is presented.
assume the government presents aggravation evidence that the accused's absence without leave resulted in a second airman having to work an extra shift to make up for her absence. Also, assume that the defense presents as extenuation evidence that the accused was absent without leave because she had just been notified that her grandfather had died. In this case, the judge might find that the extenuation evidence outweighs the aggravation evidence and apply category II.

Category IV is the opposite of category II. Category IV is applied when the military judge determines that aggravating factors outweigh mitigating and extenuating factors. For example, assume the same example in the preceding paragraph except the reason that the accused was absent without leave was because she wanted to visit Sea World. Under these facts, the judge can find that the aggravation outweighs the mitigation and assign category IV to the accused.

Category I applies when evidence in extenuation and/or mitigation is so overwhelming that it would be unjust to

377 MCM, supra note 15, R.C.M. 1001, 1002. The practice of considering extenuation and mitigating factors is part of the current military justice system. Extenuating and mitigating factors can relate to the commission of the crime. They may also relate to circumstances that surround the crime or the personal history of the accused.

378 Id. R.C.M 1001.
sentence the accused under any other category. Category I will always have no confinement as an option. Upon a finding that category I applies, the military judge will be required to read into the record the factors that warrant a category I determination. The military judge should only apply category I in rare circumstances.

Category V is the opposite of category I. Category V applies when evidence in aggravation is so strong that to sentence under any other category would be unjust. Category V will always contain the maximum confinement allowed. As an example, assume that the judge found aggravating the fact that the victim lost sight in one eye and will never be able to taste food again, all the result of the vicious assault committed upon him by the accused. As mitigation evidence, the defense counsel presents evidence that the accused recently received a Letter of Commendation for doing well during an inspection. Under this scenario, the judge may find that the aggravation rose to such a level that justice demands sentencing under category V. Like category I, the judge will be required to read into the record the factors that warrant a category V determination.

379 This paper envisions this process to be very similar to current motion practice. The judge would be obligated to read into the record the facts that support sentencing under either category I or V.
3. The Military Sentencing Matrix Shell

The sentencing matrix is established when the categories (horizontal axis) are combined with the punitive articles (vertical axis). An excerpt of the sentencing matrix shell follows in figure 3.

**FIGURE 3**

<table>
<thead>
<tr>
<th>ARTICLE</th>
<th>111</th>
</tr>
</thead>
<tbody>
<tr>
<td>ARTICLE</td>
<td>116</td>
</tr>
<tr>
<td>ARTICLE</td>
<td>118</td>
</tr>
<tr>
<td>ARTICLE</td>
<td>120</td>
</tr>
</tbody>
</table>

The next step necessary to complete the sentencing matrix is to determine the confinement range. The sentencing matrix displays a confinement range at the intersection of each punitive article and sentencing category.
4. Determining the Sentencing Range

This section will illustrate how the sentencing range was determined for several of the punitive articles. This section will not discuss the individual process used for every punitive article because that process would be too voluminous. While this section covers only a sampling of the punitive articles, all of the punitive article listed in appendix B underwent the same process.

This paper determined the proposed confinement ranges by utilizing three primary sources. First, when the military crime had a federal counterpart (i.e., murder), the Federal Sentencing Guidelines Manual was consulted to see how the federal government treated the criminal conduct. Second, military sentencing data was collected and studied to determine historic sentencing practices. Third, the Manual for Courts Martial was used to determine the maximum authorized confinement. The information provided by these three sources was combined to determine the sentencing range. The examples below illustrate this process.

380 USSG, supra note 7, §5.K1.1-§5.K1.2.16.
381 Army Data, supra note 1; USN/USMC Data, supra note 3; Air Force Data supra note 5.
Article 118, murder, is a good illustration of the process of determining the confinement range.\textsuperscript{383} It demonstrates the process of calculating a confinement range when the federal system and military system address almost identical crimes.

The Manual for Courts-Martial identifies four classifications of murder.\textsuperscript{384} Premeditated murder (classification one) and felony murder (classification four) carry a maximum sentence of death and a minimum sentence of confinement for life.\textsuperscript{385} The remaining two classifications, intent to kill or inflict great bodily harm (classification two) and acts inherently dangerous to another (classification three), carry a maximum sentence of confinement for life. Neither classification two or three has a minimum sentence.

Intent to kill or inflict great bodily harm and acts inherently dangerous to another (i.e., murder which does not have a mandatory sentence of life imprisonment) have an

\textsuperscript{383} Id. pt. IV, § 43.

\textsuperscript{384} Id.

\textsuperscript{385} Id. pt. IV, § 41. Capital cases will not be sentenced under sentencing guidelines. Capital cases will continue to be sentenced in accordance with R.C.M. 1004.
average military sentence of 291 months.\textsuperscript{386} The sentencing range is 60 months to 516 months.\textsuperscript{387}

The federal sentencing guidelines assign first degree murder an offense level of forty-three.\textsuperscript{388} Level forty-three offenses have a mandatory sentence of life imprisonment.\textsuperscript{389} Second degree murder is a level thirty-three offense.\textsuperscript{390} A level thirty-three offender, who does not have a criminal history, faces a sentencing range of 135-168 months.\textsuperscript{391}

When you combine the above information the following sentencing matrix is created for the crime of murder. The numbers relate to months of confinement.

\begin{figure}
\centering
\begin{tabular}{|c|c|c|c|c|c|}
\hline
\textbf{CATEGORY} & \textbf{I} & \textbf{II} & \textbf{III} & \textbf{IV} & \textbf{V} \\
\hline
\textbf{ART. 118} & Life-death & Life-death & Life-death & Life-death & Life-death \\
\hline
Class. 1 & 0-84 & 85-131 & 132-168 & 169-240 & 241-life \\
\hline
Class. 2 & 0-84 & 85-131 & 132-168 & 169-240 & 241-life \\
\hline
Class. 3 & Life-death & Life-death & Life-death & Life-death & Life-death \\
\hline
Class. 4 & Life-death & Life-death & Life-death & Life-death & Life-death \\
\hline
\end{tabular}
\end{figure}

\textsuperscript{386} Army Data, supra note 1; USN/USMC Data, supra note 3; Air Force Data supra note 5.

\textsuperscript{387} Id.

\textsuperscript{388} USSG, supra note 7, §2.A1.1.

\textsuperscript{389} Id. §2.A1.1; ch. 5, pt. A.

\textsuperscript{390} Id. §2.A1.2

\textsuperscript{391} Id. §2.A1.1; USSG; ch. 5, pt. A.
The next article that illustrates the process of determining the sentencing range is Article 119 manslaughter.\textsuperscript{392} The Uniform Code of Military Justice splits manslaughter into two classifications.\textsuperscript{393} The first classification is voluntary manslaughter. Voluntary manslaughter has an attendant maximum punishment of fifteen years of confinement.\textsuperscript{394} The second classification is involuntary manslaughter. Involuntary manslaughter may be punished by up to ten years of confinement.\textsuperscript{395}

During the past year, the average confinement for a service member convicted of voluntary manslaughter was eighty-three months.\textsuperscript{396} The average confinement adjudged by the military for involuntary manslaughter was forty-one months.\textsuperscript{397}

The federal system divides manslaughter into three categories. The first federal category is voluntary

\textsuperscript{392} MCM, supra note 15, pt. IV, ¶ 44.

\textsuperscript{393} Id.

\textsuperscript{394} Id.

\textsuperscript{395} Id.

\textsuperscript{396} Army Data, supra note 1; USN/USMC Data, supra note 3; & Air Force Data supra note 5.

\textsuperscript{397} Id.
manslaughter. It has a base offense level of twenty-five and a sentencing range of fifty-seven to seventy-one months.\textsuperscript{398}

The second category is involuntary manslaughter. Involuntary manslaughter has a base offense level of fourteen and a confinement range between fifteen and twenty-one months.\textsuperscript{399} The final federal category is criminally negligent manslaughter.\textsuperscript{400} This category has an offense level of ten.\textsuperscript{401} Those convicted under this category face a confinement range of between six and twelve months.\textsuperscript{402}

In light of the data discussed above, the following sentencing matrix is created for Article 119.

\begin{figure}[h]
\centering
\begin{tabular}{|c|c|c|c|c|c|}
\hline
\textbf{ART. 119} & \textbf{I} & \textbf{II} & \textbf{III} & \textbf{IV} & \textbf{V} \\
\hline
Class. 1 & 0-48 mos. & 48-56 mos. & 57-71 mos. & 72-83 mos. & 84-180 mos. \\
Class. 2 & 0-12 mos. & 13-20 mos. & 21-40 mos. & 41-72 mos. & 73-120 mos. \\
\hline
\end{tabular}
\end{figure}

\begin{itemize}
\item \textsuperscript{398} USSG, supra note 7, §2.Al.3; ch. 5, pt. A.
\item \textsuperscript{399} Id. §2.Al.4; ch. 5, pt. A.
\item \textsuperscript{400} Id. §2.Al.4.
\item \textsuperscript{401} Id.
\item \textsuperscript{402} Id. §2.Al.4; ch. 5, pt. A.
\end{itemize}
The third crime addressed in this section is Article 112a, wrongful use, possession, etc., of controlled substances. It demonstrates the process of calculating a confinement range when the federal system and military system address similar crimes, but address those crimes in a different manner.

Article 112a splits drug offenses into four sentencing classifications. Generally, the only distinctions the military applies to these drug classifications is that crimes involving less than 30 grams of marijuana (or any amount of Phenobarbital or a Schedule IV and V controlled substances) carry less confinement than offenses involving drugs such as cocaine and heroine. The average sentence and sentencing range was determined for each of these classifications through the process described earlier in this paper.

The federal system uses much more detail than the military system to sentence drug offenders. The Federal Sentencing Guidelines Manual devotes 40 pages to drug

403 MCM, supra note 15, pt. IV, ¶ 37.
404 Id. pt. IV, ¶ 37.e.
405 Id.
406 See discussion supra pp. 85-95.
Generally, the federal system increases punishment as the quantity of the drug increases. The federal system also increases punishment for the type of drug. A drug equivalency table illustrates the varying severity of different drugs. Marijuana is the common currency that illustrates this severity. For example, 1 gram of heroin is equivalent to 1 kilogram of marijuana while 1 gram of methamphetamine equates to 2 kilograms of marijuana.

The federal sentencing guidelines employ dozens of different sentencing ranges. It is not necessary to reiterate every permutation. Instead, the following examples illustrate the federal confinement ranges that are most relevant for comparison to the military.

A defendant convicted of distributing more than 250 grams but less than 1000 grams of marijuana has a base offense level of eight and a sentencing range of 0 to 6 months. Distribution of between 2 grams and 3 grams of crack cocaine has a base offense level of twenty and a sentencing range of 33-41 months. Unlawful possession of cocaine has a base offense level of six and a corresponding confinement range of 0-6 months.

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When you combine the above the below sentencing matrix is created.

**FIGURE 6**

<table>
<thead>
<tr>
<th>CATEGORY I</th>
<th>CATEGORY II</th>
<th>CATEGORY III</th>
<th>CATEGORY IV</th>
<th>CATEGORY V</th>
</tr>
</thead>
<tbody>
<tr>
<td>ART. 112a</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Class. 1(a) 0-5</td>
<td>6-11</td>
<td>12-23</td>
<td>24-47</td>
<td>48-60</td>
</tr>
<tr>
<td>Class. 1(b) 0-3</td>
<td>1-3</td>
<td>4-9</td>
<td>10-17</td>
<td>18-24</td>
</tr>
<tr>
<td>Class. 2(a) 0-11</td>
<td>12-23</td>
<td>24-48</td>
<td>49-119</td>
<td>120-180</td>
</tr>
<tr>
<td>Class. 2(b) 0-5</td>
<td>6-11</td>
<td>12-23</td>
<td>24-47</td>
<td>48-60</td>
</tr>
</tbody>
</table>

The final example will illustrate how the sentencing range is determined for a crime that is unique to the military. Article 90, assaulting or willfully disobeying a superior commissioned officer, is one such crime. For sentencing purposes, the *Manual for Courts-Martial* divides Article 90 into three classifications. Classification one is for "striking, drawing, or lifting up any weapon or offering any violence to superior commissioned officer in the execution of office."\(^{408}\) Classification one has a maximum punishment of 10 years. The average military sentence for classification one is 32 months.

\(^{408}\) *MCM*, supra note 15, pt. IV, § 14.e.(1).
Classification two is for disobeying the lawful order of a superior commissioned officer.\textsuperscript{409} The maximum punishment for classification two is 60 months. The average confinement adjudged at a general court-martial for this classification is 8 months.

The final classification relates to the above offenses in the time of war.\textsuperscript{410} The maximum punishment for classification 3 is death. There was insufficient data to calculate an average sentence for violations of this classification.

When you combine the data for Article 90, the sentencing matrix below is created.

\begin{figure}
\centering
\textbf{FIGURE 7}
\begin{tabular}{|c|c|c|c|c|}
\hline
\textbf{ART. 90} & \textbf{I} & \textbf{II} & \textbf{III} & \textbf{IV} & \textbf{V} \\
\hline
Class. 1 & 0-18 & 18-23 & 24-36 & 37-47 & 48-120 \\
Class. 2 & 0-3 & 3-5 & 6-18 & 19-35 & 36-60 \\
Class. 3 & 0-11 & 12-23 & 24-59 & 60-179 & 180-death \\
\hline
\end{tabular}
\end{figure}

\textsuperscript{409} Id. pt. IV, ¶ 14.e.(2).

\textsuperscript{410} Id. pt. IV ¶ 14.e.(3).
The above provided a sample of the analysis involved in determining the sentencing range. This process is repeated for each punitive article contained in appendix B.

C. Departure from Military Sentencing Guidelines and the Role of the Convening Authority

The sentencing authority could not depart from the proposed military sentencing guidelines. The sentencing authority will be required to adjudge confinement from the range defined by the military sentencing matrix. The sentencing authority could recommend a guideline departure, on the record, to the convening authority. Only the convening authority (or superiors in his chain of command) can authorize departure from the proposed military sentencing guidelines.\(^{411}\)

The convening authority will retain his clemency authority.\(^{412}\) Accordingly, the convening authority may depart from the sentencing guidelines by reducing the sentence in

\(^{411}\) Id. R.C.M. 1107.

\(^{412}\) Id. The convening authority must take action in order for a court-martial to be final. The convening authority may reduce any sentence or set aside a conviction that was awarded at a courts-martial that she convened.
While the convening authority may reduce any sentence, he may never increase a sentence.

Additionally, the convening authority may agree to depart from sentencing guidelines (and any adjudged sentence) through the use of a pretrial agreement. The convening authority may agree to exercise his power to limit a sentence in return for some concession on the part of the accused. This concession often takes the form of a guilty plea.

By retaining the present role of the convening authority, much of the current military justice system will remain in place. The accused retains his ability to bargain with the convening authority for any sentence. The convening authority retains his present position in the military justice system.

The next section will address the major criticisms levied against the federal sentencing guidelines. The section will illustrate how the proposed military sentencing

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413 Id.
414 Id.
415 Id. R.C.M. 705.
416 Id.
guidelines overcome the criticisms made against the federal sentencing guidelines.

VI. Major Criticisms of The Federal Sentencing Guidelines

The federal sentencing guidelines were a major change to the federal sentencing process.\(^{417}\) The guidelines have been in effect since surviving constitutional challenge in Mistretta v. United States.\(^{418}\) The federal guidelines have been used to sentence nearly one-half of a million defendants.\(^{419}\) While the guidelines are firmly entrenched, they have been widely criticized.\(^{420}\) This section will discuss the primary criticisms leveled against the federal sentencing guidelines. It will also illustrate how the proposed military sentencing guidelines avoid many of these criticisms.

The criticisms most often raised are that: (1) the federal sentencing guidelines have reduced the moral force and

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\(^{417}\) See supra notes 185-252 and accompanying discussion.

\(^{418}\) Mistretta v. United States, 488 U.S. 361 (1989). The constitutionality of the Sentencing Reform Act and the federal sentencing guidelines were challenged on improper legislative delegation and separation of powers grounds. The court rejected the challenge on 18 January 1989. Since Mistretta, federal sentencing guidelines have been used to sentence almost one-half of a million federal defendant's.

\(^{419}\) See REPORT, supra note 209.

\(^{420}\) See infra notes 421-427.
significance of the sentencing ritual,\textsuperscript{421} (2) the federal sentencing guidelines encourage sentence entrapment,\textsuperscript{422} (3) the results of sentencing guidelines are sentences that are too severe,\textsuperscript{423} (4) the federal sentencing guidelines are too rigid and formalistic,\textsuperscript{424} (5) the probation officer plays too prominent of a role in determining the sentence,\textsuperscript{425} (6) sentencing discretion has shifted from the trial judge to the prosecutor,\textsuperscript{426} and (7) the sentencing guidelines greatly reduce the opportunity for the sentencing authority to consider and weigh aggravating, extenuating, and mitigating factors.\textsuperscript{427} Each of these criticisms is discussed below.

Critics of the federal sentencing guidelines complain that sentencing guidelines reduce the moral impact of

\textsuperscript{421} See Sith, supra note 136, at 1252-1253. See also Wright supra note 160, at 1366 (quoting Kate Sith & Joes A. Cabranes, Fear of Judging: sentencing Guidelines in Federal Courts (1998)).
\textsuperscript{422} See Witten, supra note 161. See also Marcia G. Stein, Sentencing Manipulation and Entrapment, CRIM. JUST., Fall 1995, 25.
\textsuperscript{424} See Sith, supra note 136, at 1253. See also Wright supra note 160, at 1366-1377.
\textsuperscript{425} See Sith, supra note 136, at 1256-1263.
\textsuperscript{426} See Lanni, supra note 12, at 1786. See also Freed, supra note 162.
\textsuperscript{427} See Ogletree, supra note 145, at 1953.
sentencing. Before guidelines, the interaction between the federal trial judge and the accused was the focus of the sentencing process. The judge had wide discretion to fashion a sentence that he believed satisfied the goals of sentencing. The statutory maximum sentence was the only check upon judicial discretion.

Before the adoption of sentencing guidelines, the judge ruled the courtroom. The victim of the crime looked to the judge to fashion a sentence that satisfied punishment and retribution. Those close to the defendant hoped the judge would be merciful. The public looked for sentences that would either remove the defendant from society or rehabilitate the wrongdoer.

428 See Sith, supra note 136, at 1252-1253.


430 See Freed, supra note 162, at 1687-1688.

431 See Sith, supra note 136, at 1250-1253

432 See Tagliareni, supra note 135, at 416.

433 See Hoelter et. al., supra note 140. See also Sith, supra note 136.

434 See Ogletree, supra note 145, at 1940-1945.
When it came time to announce the sentence, the defendant rose and faced the judge. The judge represented the vast power of both state and society. The judge announced the sentence. The defendant was judged. The judgment had moral force because the judge applied the goals of sentencing to the facts of the case and determined an individual sentence for the defendant. It was the creation of the individual sentence that was the cornerstone of the moral authority of the bench.

Critics argue that the sterile sentencing environment produced by sentencing guidelines reduces the moral authority of the bench. They argue that a predetermined sentence evaporates the authority of the sentencing judge. The sentencing judge is not the Solomon-like figure of the pre-guideline era. The judge is reduced to a bureaucrat who

435 See Sith, supra note 136, at 1253.
436 Id. at 1248.
438 See Sith, supra note 136, at 1253.
439 Id. at 1263-64.
440 See Ogletree, supra note 145, at 1953. See also Sith, supra note 136; Hoelter et. al., supra note 140.
441 See Ogletree, supra note 145, at 1953. See also Sith, supra note 136; Hoelter et. al., supra note 140.
calculates a sentence by applying rigid standards to a chart. Critics argue that sentencing guidelines minimize the moral authority of the bench because they reduce the ability of the judge to relate to the defendant and fashion an individual sentence.

Critics further argue that the accused and all interested parties are either aware of the predetermined sentencing range or so confused by the process that the sentencing ritual loses its impact. The decision to increase or decrease an offense level is predetermined by the facts of the case, the way the prosecutor charges the crime, and the probation officer's sentencing report. Since the sentence is largely predetermined, the moral authority of the bench to fashion an individual sentence is greatly reduced.

Critics of sentencing guidelines argue that the impact of the entire sentencing process is diminished when the real and

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442 See Sith, supra note 136, at 153-1254.

443 See Ogletree, supra note 145, at 1953. See also Sith, supra note 136; Hoelter et. al., supra note 140.

444 See Ogletree, supra note 145, at 1953. See also Sith, supra note 136; Hoelter et. al., supra note 140.

445 See Ogletree, supra note 145, at 1953. See also Sith, supra note 136; Hoelter et. al., supra note 140.
perceived authority of the sentencing judge is reduced. They argue that the trial judge must sentence with moral and societal authority. The judge must truly judge the offender. It is by judging that society morally condemns an individual and his acts. The trial judge must retain his ability to judge in order for the sentence to be effective. Critics of the guidelines complain that the guidelines strip the trial judge of his moral authority by reducing his ability to directly relate to the defendant and fashion an individual sentence.

The proposed military sentencing guidelines preserve the moral authority of the military sentencing ritual. The sentencing authority is either the military judge or the court-martial members. The military judge determines the sentencing category. After the category is established, the sentencing authority determines the sentence after considering

446 See Sith, supra note 136, at 1263-1272.
447 Id. at 1252-1253.
448 Id.
449 Id.
450 See Ogletree, supra note 145, at 1953. See also Sith, supra note 136; Hoelter et. al., supra note 140.
451 See discussion supra pp. 75-85.
452 MCM, supra note 15, R.C.M. 903.
the evidence presented by both the government and the defense. The sentence is not predetermined. The sentencing authority retains its moral authority to judge the accused. The sentencing authority retains its moral authority because it is allowed to consider the case in aggravation and matters in extenuation and mitigation. Only after considering these matters, will the sentencing authority fashions a complete sentence that judges the individual accused.

Once the sentence is determined, the sentencing ritual will retain the same moral significance as the present system. The accused will rise to face the sentencing authority. The sentencing authority will look the accused in the eye and announce the sentence. The sentence will carry the same type of moral impact as that provided for by the current military sentencing system.

The next major criticism of the federal sentencing guidelines is that the sentencing guidelines encourage

\[453\] Id. R.C.M. 1001.
\[454\] See BENCHBOOK, supra note 17, at 105-106.
\[455\] Id.
\[456\] Id.
\[457\] Id.
sentence entrapment. Sentencing entrapment occurs when criminal investigators organize an investigation (i.e., sting) in a fashion that results in a prosecution at a high offense level. Most of the federal crimes escalate the offense level when certain aggravating factors are present. Critics argue that investigators "set up" suspects by tailoring the investigation (sting) in a manner that increases the offense level. They argue that investigators take steps to increase the offense level, not because the steps are necessary for the investigation, but because the increase will assist the prosecution or help gain investigative assistance from the suspect. These critics complain that when a suspect is prompted by investigators to engage in criminal acts with aggravating factors, the accused is a victim of entrapment. This is especially true when the suspect would not have committed the aggravating factors but for the prompting of the investigator.

458 See Witten, supra note 161. See also Hoelter et. al., supra note 140, at 1085-1086.

459 Recall that the amount of confinement increases as the offense level increases.

460 USSG, supra note 7, Ch. 2

461 See Hoelter et. al., supra note 140, at 1085-1086.

462 See Witten, supra note 161; Hoelter et. al., supra note 140.

463 See Witten, supra note 161; Hoelter et. al., supra note 140.
As an example, if an undercover agent requests that a suspect transforms powder cocaine to crack cocaine the offense level can increase dramatically.\textsuperscript{465} In United States v. Shephard\textsuperscript{466} the investigators did exactly this and the suspects sentencing range increased from 27-33 months to 121-151 months.\textsuperscript{467} Critics argue that when the government knowingly prompts a suspect to engage in acts solely to increase the offense level, the government is unjustly entrapping the suspect.\textsuperscript{468}

The proposed military sentencing matrix avoids sentence entrapment. The proposed sentencing matrix does not utilize the federal offense levels. Instead, the proposed military sentencing matrix relies on a combination of sentencing categories and punitive article classifications.


\textsuperscript{465} USSG, supra note 7, §2D1.1.

\textsuperscript{466} United States v. Shepherd, 4 F3d 647 (8\textsuperscript{th} Cir. 1993).

\textsuperscript{467} Id. Mr. Shepherd converted powder cocaine into crack cocaine at the request of the undercover agent. Since the federal sentencing guidelines apply a 100:1 ratio to crack cocaine, i.e., a person who sells 2 grams of crack cocaine falls under the same guideline as a person who sells 200 grams of powder cocaine, Mr. Shepherd faced an approximately five fold increase in his sentencing range.

\textsuperscript{468} See Witten, supra note 161, at 716.
Sentencing categories avoid sentence entrapment by allowing the military judge discretion in assigning the sentencing category. The military judge determines the sentencing category that applies to every court-martial. The judge has complete discretion to select any of the five sentencing categories. The sentencing categories cover every confinement option, from no confinement to the maximum confinement allowed. The investigator does not know which category the judge will apply to a particular case thus, the investigator will not be able to influence the sentencing range in the same manner that he is able to in the federal system. For example, a military investigator cannot predetermine a sentencing range by "entrapping" the accused to sell five grams of crack cocaine instead of 20 grams of powder cocaine.

The use of classifications further reduces the risk of sentencing entrapment. The classifications relate to the type of crime committed. Long-standing criminal distinctions

469 See discussion infra pp. 75-85.
470 Id.
471 Id.
472 MCM, supra note 15, pt. IV.
determine classifications. For the most part, the Manual for Courts-Martial does not dramatically increase punishment based solely on quantity or type distinctions. Even for crimes where quantity or type function to increase punishment, the nature or circumstances that surround the crime determine the increase in punishment. For example, possession of more than 30 grams of marijuana increases the maximum punishment from two years to five years. This quantity distinction does not apply to cocaine, heroine, methamphetamines, or a host of other narcotics. Similarly, larceny only increases the maximum punishment based on whether; the value of the theft was more than $100, the crime involved a vehicle, ammunition, or a firearm, or the crime was committed against the military.

473 Id.
474 Id.
475 Id.
476 Id. pt. IV, ¶ 37.
477 Id.
478 Id. pt. IV, ¶ 46.
479 Id. The maximum allowable punishment increases as the value of the larceny increases or if the larceny is committed against the military or involves a motor vehicle, aircraft, vessel, firearm, or explosive. Unlike the federal sentencing guidelines that has a host of sentencing range based on the value of the larceny, the military primarily uses the categories of more than or less than $100.00 and whether or not the larceny was committed against the military.
The next criticism levied against the federal sentencing guidelines is that the guidelines result in sentences that are too severe. Critics point to the fact that the United States has the highest incarceration rate in the world.\textsuperscript{480} Since sentencing guidelines went into effect, the federal prison population has increased by more than three fold.\textsuperscript{481} This population increase is due, in large part, to a combination of an increase in severity of sentences and the elimination of parole.\textsuperscript{482} Critics argue that the increase in sentence severity is due, in part, to the inflexibility of the federal sentencing guidelines.

The most prevalent complaint regarding severity of sentencing in the federal system involves the sentencing of drug cases.\textsuperscript{483} In the federal system, the sale of one gram of crack cocaine falls under the same offense level as the sale of one hundred grams of powder cocaine.\textsuperscript{484} This distinction

\textsuperscript{480} See Hoelter et. al., supra note 140, at 1083 (The United States has approximately 1.5 million people in confinement).

\textsuperscript{481} Id. at 1087. (In 1987 there were approximately 35,000 inmates in federal prisons. In 1998 this figure increased to approximately 110,000 inmates).

\textsuperscript{482} See Stith, supra note 136, at 1254-1270.

\textsuperscript{483} See Whiteside, supra note 430, at 1581-1582.

\textsuperscript{484} See USSG, supra note 7, §2D1.1.
raises particular criticism on the issue of race. \textsuperscript{485} Critics argue that crack cocaine is most prevalent amongst minorities while powder cocaine is most prevalent in Caucasian society. \textsuperscript{486} Thus, the sentence for a minority who sells one gram of crack is similar to the sentence for a person that sells one hundred grams of powder cocaine. Critics complain that this distinction between crack and powder cocaine results in sentences that are too severe.

Additionally, critics complain that the federal sentencing guidelines increase sentence severity by eliminating judicial discretion. Since the federal sentencing guidelines mandate a sentencing range, the judge is normally unable to fashion a sentence that falls below the minimum sentence suggested by the guidelines. \textsuperscript{487} Because the judge is limited in her sentencing options, critics contend that the sentencing guidelines result in sentences that are too severe.

The military sentencing matrix avoids this criticism. Punitive articles are not assigned offense levels. The range

\textsuperscript{485} See Whiteside, supra note 430, at 1582.

\textsuperscript{486} Id.

\textsuperscript{487} See USSG, supra note 7, §§5K1.1-5K2.16. (The trial judge is allowed to depart from the sentencing guidelines in rare circumstances).
of confinement does not automatically increase due to aggravating factors. Under the proposed military sentencing guidelines, the military judge determines the appropriate sentencing category while the sentencing authority determines the actual confinement. The accused may argue for, and receive, any lawful sentence. The accused can present extenuation and mitigation evidence in an attempt to convince the military judge to assign the offense a low sentencing category (i.e., category I or II). If the accused is persuasive, the accused may receive no confinement.

The next criticism leveled against the federal sentencing guidelines is that the guidelines are too rigid and formalistic. Critics argue that rigid sentencing guidelines reduce to almost zero the discretion that the trial judge has when fashioning a sentence. They complain that the rigid nature of the federal sentencing guidelines make departure

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488 See MCM, supra note 15, R.C.M. 1001, 1002, 1003.
489 Id. R.C.M. 1001, 1002, 1003.
490 See Sith, supra note 136, at 1253.
491 See Witten, supra note 161, at 702-704.
rare. 492 Departure normally requires the concurrence of the prosecutor.493

Critics complain that the application of the federal sentencing chart is formalistic in the sense that sentencing guidelines reduce the judge to a human calculator.494 The judge determines the sentencing range through calculus instead of through principled reasoning.495 This state of affairs has led federal judges to refer to themselves as "notary publics" and "accountants."496

The proposed military sentencing matrix overcomes this criticism. While the military sentencing matrix is formal, the judge retains discretion as to which of the five sentencing categories apply to the accused. Both the military judge and the sentencing authority are required to fully consider extenuation, mitigation, and the case in

492 18 U.S.C.S § 3553 (LEXIS 2000); Witten, supra note 161, at 704.
493 See USSG, supra note 7, § 5K1.1; Sith, supra note 136, at n. 24.
494 See Sith supra note 136, at 1255-56.
495 See Sith supra note 136, at 1254.
aggravation before determining the sentence. The ability of the sentencing judge to fully consider a wide array of sentencing evidence and appoint the appropriate sentencing category ensures that the military judge does much more than read a chart. The proposed military sentencing guidelines require complete participation by the military judge and the sentencing authority. The involvement of the judge and members in the application of the sentencing guidelines is what overcomes the criticism that the proposed military sentencing guidelines are too rigid.

Additionally, the proposed military sentencing guidelines only influence confinement. The current military sentencing system awards all other forms of punishment. Thus, any formality or rigidity that applies to the military sentencing guidelines is tempered by the fact that the military sentencing guidelines only relate to adjudged confinement.

The fifth criticism of the federal sentencing system is that probation officers play too prominent of a role in determining the sentence. In the federal system, the

497 MCM, supra note 15, R.C.M. 1001.

498 Id. R.C.M. 1001-1005.
probation officer prepares the pre-sentence report, applies her understanding of the facts to the sentencing guidelines, and performs the sentencing calculations. The probation officer provides the federal trial judge a proposed sentencing range.

The probation officer is considered the sentencing guideline expert. The pre-sentencing report normally becomes the focus of the sentencing hearing. Federal trial judges often accept the probation officers report as gospel. The result is that the probation officer may determine the sentencing range applied to the defendant.

Critics complain that probation officer's have become a third adversary in the courtroom. They argue that probation

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499 See Sith, supra note 136, at 1257-1258.
500 Id.
501 Id. at 1257.
502 Id. at 1258.
503 Id. at 1259.
505 See Sith, supra note 136, at 1259. See also Weinstein, supra note 504, at 364; Cook, supra note 511.
506 See Sith, supra note 136, at 1260-1261.
The role of probation officer as investigator often results in defense counsel advising the defendant, and those close to the defendant, not to cooperate with the probation officer. Defense counsel proffer this advice out of fear that the probation officer will discover facts that will operate to increase the offense level. The result is that the probation officer may have a one-sided view of the offense. The probation officer's view is one-sided because the defense does not participate. This one-sided view may result in a faulty pre-sentencing report. If the trial judge

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508 See Sith, supra note 136, at 1257-1258.


510 Id.

511 Id.

512 Id.
relies upon a faulty pre-sentencing report, the trial judge may misapply the sentencing guidelines.\textsuperscript{513}

The proposed military sentencing matrix avoids the issues raised by the employment of a probation officer. The military system does not use a probation officer. The sentencing authority determines the sentence by applying the facts presented by both parties at the sentencing hearing. The prosecution and defense present their case in an adversarial setting.\textsuperscript{514}

The adversarial process allows the accused to present a host of sentencing evidence.\textsuperscript{515} Upon conclusion of the sentencing case, the judge translates the totality of the sentencing hearing into a sentencing category. The sentencing authority does this by weighing the government's case in aggravation against the extenuation and mitigation evidence presented by the defense. After the judge determines the sentencing category, the sentencing authority applies the same evidence to fashion an appropriate sentence.

\textsuperscript{513} See Sith, supra note 136, at 1262-1263.

\textsuperscript{514} See discussion supra pp. 14-27.

\textsuperscript{515} Id.
The adversarial sentencing hearing fulfills the role performed by the probation officer in the federal system. The military system avoids many of the pitfalls of the federal system because the adversarial process places the accused in control of the information he wants to present to the court-martial.

The next criticism is that the federal sentencing guidelines have shifted sentencing discretion from the military judge to the federal prosecutor. The critics claim that sentencing guidelines all but eliminate judicial sentencing discretion. They argue that the current federal system replaces judicial sentencing discretion with prosecutorial sentencing discretion.Prosecutors can exercise sentencing discretion by manipulation the sentencing guidelines to prosecute similar criminal conduct in a disparate fashion. For example, assume that two different men engage in unrelated criminal conduct. The conduct involves fraudulently depositing money into their bank account and then transferring that money to a different bank.

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516 See Freed, supra note 162.
517 Id. at 1697.
518 Lanni, supra note 12, at 1786.
519 See Id. at 1696-1697. See also Witten, supra note 161, at 708-709.
The prosecution has the option of charging the offender with either bank fraud or money laundering. Bank fraud carries a base offense level of seventeen while money laundering carries a base offense level of twenty-three. Critics of sentencing guidelines argue that the prosecutor can promote sentence disparity by charging one offender with bank fraud and the other with money laundering. This disparate charging results in the prosecutor exercising sentencing discretion by deciding which of the sentencing guidelines will be applied to the case at hand.

The proposed military sentencing guidelines overcome this criticism through use of the judge. The military judge operates as a check on the prosecution. The military judge determines the sentencing category. If the prosecution attempts to unjustly increase punishment, the judge can check the prosecution by assigning a sentencing category that provides a confinement range that is appropriate for the criminal conduct.

520 See Hoelter et. al., supra note 140, at 1085-1086.
521 Id.
522 See USSG, supra note 7, §2.s.1.1 & §2.s.1.2.
523 See Hoelter et. al., supra note 140, at 1085-1086.
524 Id.
The final criticism is that the federal sentencing guidelines greatly reduce the opportunity for the sentencing authority to consider and weigh aggravating, extenuating, and mitigating factors. This final criticism embraces many of the issues discussed in the previous six criticisms.

The federal sentencing guidelines consider only three of the defendant’s character traits. These traits are, (1) criminal history, (2) dependence upon criminal activity for a livelihood, and (3) acceptance of responsibility for his wrongdoing. Critics of the federal guidelines argue that this narrow view does not adequately address the many character traits that factor into a sentence. For example, the federal sentencing guidelines largely dismiss; age, education and vocational skills, mental and emotional conditions, physical condition, substance dependence or abuse, employment record, family and community ties, military, civic, and charitable work, and lack of guidance as a youth as

525 See Ogletree, supra note 145, at 1953.
526 See discussion supra 96-116.
527 See USSG, supra note 7, §5H1.1-§5H1.12.
528 See USSG, supra note 7, §3E1.1 & §5H1.7-§5H1.9; Ogletree, supra note 145, at 1953.
529 See Ogletree, supra note 145, at 1953.
character traits to be considered when forming a sentence.\textsuperscript{530} The federal sentencing guidelines mandate an offense level and criminal history category based upon a narrow view of the defendant.

Military sentencing allows the defense to present almost any information that would tend to explain the circumstances surrounding the commission of the offense.\textsuperscript{531} Additionally, the accused may present personal background and character evidence in an attempt to secure a lenient sentence.\textsuperscript{532}

The military sentencing matrix does not ignore the personal background of the accused. The proposed military sentencing matrix allows the judge to consider a wide range of sentencing evidence to determine the appropriate sentencing category. The sentencing categories incorporate the impact of aggravating, extenuating, and mitigating evidence into their sentencing range. The proposed military sentencing matrix allows the sentencing authority to fashion a sentence that gives proper weight to the myriad of issues that influence the

\textsuperscript{530} See USSG, supra note 7, §5H1.1-5H1.6; 5H1.9-5H1.12. \textit{See also} Ogletree, supra note 145, at 1951-1953.

\textsuperscript{531} MCM, supra note 15, R.C.M. 1001.

\textsuperscript{532} Id.
severity of a crime. The sentencing matrix reflects all confinement options, from no confinement to the maximum lawful confinement, authorized for the crime committed.

This section has illustrated how the proposed military sentencing matrix will avoid many of the criticisms levied against the federal sentencing guidelines. The proposed military sentencing scheme will incorporate the use of guidelines to enhance the largely effective military sentencing system. The next section will discuss the legislative and executive modifications necessary to incorporate sentencing guidelines in the military.

VI. Legislative and Executive Modifications Necessary to Implement Military Sentencing Guidelines

The Constitution vests in Congress the authority to create the laws that govern the armed forces. Further, the Congress has exercised the bulk of this authority in Title 10 of the United States Code. The Congress defines criminal acts in the punitive article.

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533 U.S. Const. art. I, § 8. "To make Rules for the Government and Regulation of the land and naval Forces" Id.

Particularly relevant to this discussion is 10 U.S.C. § 856. This section delegates, from Congress to the President, the authority to determine the maximum punishment allowed at courts-martial. 10 U.S.C. § 856 is titled "Maximum limits" and states, "The punishment which a court-martial may direct for an offense may not exceed such limit as the President may prescribe for that offense." 535

The President, as Commander and Chief 536 and through the authority delegated to him by Congress, creates the rules that govern the military justice system. These rules are contained in the Manual for Courts-Martial. 537

Several legislative and executive acts must occur in order to implement sentencing guidelines. First, Congress would have to modify 10 U.S.C. § 856. 10 U.S.C. § 856 should be re-titled "Maximum sentences, minimum sentences, and sentencing guidelines." The amended text should read,

The President has the authority to establish maximum sentences, minimum sentences, and sentencing guidelines. A court-martial may not


536 U.S. CONST. art. II, § 2.

537 MCM, supra note 15.
direct a punishment that exceeds the maximum limit prescribed by the President. A court-martial may not direct a punishment that is less than the minimum limit prescribed by the President. A court-martial must apply the confinement range mandated by the sentencing guidelines when the sentencing guidelines are applicable.

Modifying 10 U.S.C. § 856 as above will give the President the authority to implement sentencing guidelines. Sentencing guidelines could be applied through the Rules for Courts-Martial.538

The title of R.C.M. 1002 is "Sentence determination." Modification of R.C.M. 1002 is necessary to establish sentencing guidelines. R.C.M. 1002 currently reads,

Subject to limitations in this Manual, the sentences to be adjudged is a matter within the discretion of the court-martial; except when a mandatory minimum sentence is prescribed by the code, a court-martial may adjudge any punishment authorized in this Manual, including the maximum punishment or any lesser punishment, or may adjudge a sentence of no punishment.539

The proposed modification would have to split R.C.M. 1002 into two sub-paragraphs, one for special courts-martial and

538 Id. R.C.M 1001-1011.
539 Id. R.C.M. 1002.
the other for general courts-martial. The rule would also provide sentencing guidance for convictions of multiple specifications. Below is the proposed modification to R.C.M. 1002:

(a) Special Courts-Martial. Subject to limitations in this Manual, the sentence to be adjudged is a matter within the discretion of the court-martial; except when a mandatory minimum sentence is prescribed by the code, a court-martial may adjudge any punishment authorized in this Manual, including the maximum punishment or any lesser punishment, or may adjudge a sentence of no punishment.

(b) General Courts-Martial.

(1) Subject to the limitations in this Manual, the sentence to be adjudged, except for confinement, is a matter within the discretion of the court-martial. The court-martial must adjudge confinement consistent with the sentencing range determined by the sentencing guidelines. The sentencing range is determined by finding the appropriate intersection between the punitive article and the offense category. The military judge has complete discretion to assign the sentencing category. The military judge shall instruct the members which punitive article, classification, and sentencing category applies. The members, or military judge if appropriate, have complete discretion to choose any confinement from the confinement range mandated by the sentencing guidelines.

(2) If the accused is found guilty of two or more punitive articles, the following rules shall be applied when determining the sentencing range.

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(A) The military judge will first determine those crimes that are so closely intertwined that they cover the same criminal act. For all closely intertwined criminal acts the sentencing range for the most serious of the crimes shall be the sentencing range for all of the intertwined crimes. The judge may consider the additional crimes for determining the category to apply to the most serious offense.

(B) If the judge determines that the crimes are not closely intertwined, then the judge will first determine the sentencing category that applies to each punitive article. Next, the judge will determine the most serious crime. The judge will then multiply the high and low value of the sentencing range(s) that apply to the lesser crimes by .25 and add that amount to the high and low value of the sentencing range for the most serious crime.

(3) The sentencing guideline matrix will be contained in Appendix 26 of the Manual for Courts-Martial.

The next Rule for Courts-Martial that requires modification in order to implement the sentencing guidelines is R.C.M. 1005. The title of R.C.M. 1005 is "Instructions on sentence." Modification of R.C.M. 1005 is necessary in order to provide instructions that are consistent with sentencing guidelines. The proposed modification would follow R.C.M. 1005(e) and read as follows.

(1) Special Courts-martial. A statement of the maximum authorized punishment that may be adjudged.
(2) General Courts-martial. A statement of the sentencing range that applies to the case. A statement of both the maximum and minimum confinement that may be adjudged. A statement that the members must sentence the accused to confinement within the sentencing range specified by the military judge. A statement as to which sentencing category is to be applied to the crime(s) and instruction on how to apply the sentencing guidelines.

R.C.M. 1006 "Deliberations and voting on sentence" must also be modified. R.C.M. 1006 should include language that explains how the members are to apply the sentencing guidelines. R.C.M. 1006 should include a new paragraph (d) that reads,

(d) Fashioning a sentence by using the sentencing guideline matrix in Appendix 26.

(1) The sentencing guideline matrix contained in Appendix 26 must be used to determine the amount of confinement, if any, which is to be adjudged. The military judge will instruct the members as to the use of the sentencing guidelines contained Appendix 26. The military judge will determine the category that applies to each general courts-martial. Confinement, whether adjudged by members or judge, shall fall within the sentencing range determined by sentencing guideline matrix.

(2) Once a confinement range is determined, each member will propose a sentence in writing and in secret. Each proposed sentence will contain confinement that falls within the range determined by the sentencing matrix. The junior
member will collect the sentences and arrange them from the sentence which contains the least confinement to the sentence that contains the most confinement. The members will next vote on the sentences from least severe to most severe. The members shall vote in secret. The members shall vote until at least two-thirds agree on a sentence.

Finally, Part IV of the MCM, Punitive Articles, must be modified to indicate the interplay between sentencing guidelines and maximum punishment. Each punitive article should include language that states that if the accused is tried by a general courts-martial, the punishment shall be in accordance with that directed by R.C.M. 1001-1008 and Appendix 26 of the MCM.

For example, Article 123, Forgery will substitute the following language at paragraph (e) Maximum punishment.

(e) Punishment.

(1) If tried before a summary or special courts-martial, the maximum punishment allowed at those forums.

(2) If tried before a general courts-martial the accused shall be sentenced in accordance with R.C.M. 1001-1008 and Appendix 26 of this Manual.
The above legislative and executive modifications would implement the proposed sentencing guidelines and apply those guidelines to the armed forces. If the above modifications were made, sentencing guidelines would be a part of the military justice system. Once a part of the system, the sentencing guidelines could be studied and monitored to increase their effectiveness.

III. Conclusion

Before World War II, military commanders exercised primary control over the military justice system. Today, commanders share control of the military justice system with judge advocates and military judges. This shared control is an outgrowth of the 1951 Manual and the maturing of the military justice system into a modern criminal justice system.

The military justice system has evolved with every change to the Manual for Courts-Martial. The system has developed from a system of discipline to a highly developed criminal justice system. What was once a system that focused on crimes

541 Lovejoy, supra note 39, at 5.
unique to the military now includes punitive articles that cover every conceivable crime.\textsuperscript{542}

While the military justice system has expanded to a point where almost any criminal conduct is punishable under the Manual, the military sentencing system has remained remarkably similar to the system that was in place before World War II. Similarly, while the federal system, and a majority of the states, seeks sentence uniformity, the military system largely abandoned sentencing uniformity as a goal in the 1950's. Further, where the federal system has implemented sentencing guidelines to control sentencing discretion, the military allows almost unchecked sentencing discretion.

It is curious that the military chooses to cling to its unique method of sentencing at a time when other areas of military justice strive to mirror the federal system.\textsuperscript{543} Congress has directed the President, when practicable, to adopt the practices of the federal criminal justice system.\textsuperscript{544}

\textsuperscript{542} MCM, supra note 15, pt. IV. Not only can the crimes specifically listed in the Manual be prosecuted at a courts-martial, but, state and federal crimes can be prosecuted under the assimilated crime provision of Article 134.

\textsuperscript{543} 10 U.S.C.S. §836 (LEXIS 2000). "[The President shall apply were practicable] the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts. . . ." Id.
Adopting military sentencing guidelines would fulfill this mandate.

This paper has demonstrated that sentence disparity exists within the military sentencing system. The adoption of the military sentencing guidelines proposed by this paper will decrease sentence disparity. The proposed sentencing guidelines reduce sentence disparity while maintaining, and perhaps enhancing, the positive aspects of the current military sentencing system. The proposed guidelines could be implemented with minor modifications to the existing Rules for Courts-Martial.

Military sentencing guidelines will improve an already effective justice system. This paper proposed a method for establishing military sentencing guidelines. Whether the model proposed by this paper, or some other sentencing guidelines system, the military sentencing system can be improved by sentencing guidelines.

544 Id.
APPENDIX A

Federal Sentencing Guidelines
# SENTENCING TABLE

(in months of imprisonment)

<table>
<thead>
<tr>
<th>Offense Level</th>
<th>I (0 or 1)</th>
<th>II (2 or 3)</th>
<th>III (4, 5, 6)</th>
<th>IV (7, 8, 9)</th>
<th>V (10, 11, 12)</th>
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APPENDIX B

Proposed Military Sentencing Matrix

This appendix illustrates how the proposed sentencing matrix relates to twenty-three of the punitive articles. If military sentencing guidelines were adopted, this matrix would be expanded to cover every punitive article.

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Note: The table above illustrates the proposed military sentencing matrix for various articles, with categories ranging from Class 1 to Class 2, and sentences from months to years depending on the severity of the offense.
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| ART. 127 | 0-5 | 6-17 | 18-26 | 27-36 | 37-36 |
| ART. 128 |     |     |     |     |     |

| ART. 129 | 0-11 | 12-23 | 24-30 | 31-60 | 61-120 |
| ART. 130 |     |     |     |     |     |
| ART. 131 | 0-2 | 2-5 | 6-9 | 10-16 | 17-60 |
| ART. 134 | 0-17 | 18-24 | 25-36 | 37-48 | 49-84 |