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**DEVELOPMENT, ADOPTION, AND
IMPLEMENTATION OF MILITARY
SENTENCING GUIDELINES**

A Thesis Presented to The Judge Advocate General's School
United States Army in partial satisfaction of the requirements
for the Degree of Master of Laws (LL.M.) in Military Law

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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**48TH JUDGE ADVOCATE OFFICER GRADUATE COURSE
APRIL 2000**

**DEVELOPMENT, ADOPTION, AND IMPLEMENTATION OF
MILITARY SENTENCING GUIDELINES**

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DEVELOPMENT, ADOPTION, AND IMPLEMENTATION OF MILITARY SENTENCING GUIDELINES

by Major Steven M. Immel
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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 Neurauder, 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,

⁵ Data from Major Erin Hogan, USAF, Military Justice Division, U.S. Air Force, (18 Feb. 2000) [hereinafter Air Force data].

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.⁹ Congress told the Commission to create a sentencing system that reduced sentence disparity by "formulat[ing] federal trial judges in their sentencing decisions."¹⁰ The Commission created the federal sentencing guidelines to satisfy its mandate to reduce sentence disparity.¹¹

Currently, the federal system and thirty-three of the states employ some form of sentencing guidelines¹² to combat unwarranted sentence disparity.¹³ By contrast, the military justice system does not use sentencing guidelines.¹⁴ Instead,

⁸ 28 U.S.C.S. § 991 (LEXIS 2000); 18 U.S.C.S. § 3553 (LEXIS 2000). The goals of federal sentencing are: just punishment, deterrence, incapacitation, and rehabilitation.

⁹ 28 U.S.C.S. § 991.

¹⁰ *Id.*

¹¹ UNITED STATES SENTENCING COMMISSION, AN OVERVIEW OF THE FEDERAL SENTENCING GUIDELINES, (undated) [hereinafter OVERVIEW]. Truth is sentencing was another factor that led to the creation of the United States Sentencing Commission and the federal sentencing guidelines.

¹² Adriaan Lanni, *Note: Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775, 1779 n.14 (1999). Alabama, Alaska, Arizona, Arkansas, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin currently employ a form a sentencing guidelines for criminal offenses.

¹³ OVERVIEW, *supra* note 11.

the military uses a system that allows the sentencing authority¹⁵ almost complete discretion.¹⁶ This divergent approach to sentencing is troublesome considering that the sentencing goals of the federal system and the military system are remarkably alike.¹⁷ Both systems promote the goals of just punishment, deterrence, incapacitation, and rehabilitation. The military pursues the additional goal of maintaining good order and discipline.¹⁸

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.

¹⁷ Compare 18 U.S.C.S § 3553(a)(2) (Lexis 2000) (listing just punishment, deterrence, incapacitation, and rehabilitation as sentencing goals) with U.S. DEP'T OF ARMY, PAM 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK, p. 64 (30 Sept. 1996) [hereinafter BENCHBOOK] (listing punishment, deterrence, protection of society, rehabilitation, and maintaining good order and discipline as sentencing goals).

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 deviation²² 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.

included in the study due to the quasi-federal employee status of the Coast Guard due to the Coast Guard being controlled by the Department of Transportation during peace time and controlled by the Department of Defense during war time.

²² MICROSOFT ENCARTA ENCYCLOPEDIA (1999) [hereinafter ENCARTA].

The standard deviation of a set of measurements x_1, x_2, \dots, 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 (σ). In symbols

$$\sigma = \sqrt{\frac{1}{n} [(x_1 - \bar{x})^2 + (x_2 - \bar{x})^2 + \dots + (x_n - \bar{x})^2]} = \sqrt{\frac{1}{n} \sum (x_i - \bar{x})^2}$$

The square, σ^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.

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.²³ 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 1775.²⁴ The American Articles were born from the British Code. The British Code can trace its lineage to General Adolphus' 1621 Code of Articles.²⁵ The Articles of War outlined military court-martial procedures and were the precursor to the *Manual for Courts-Martial*.²⁶ The Articles of War of 1775 gave panel members great latitude in fashioning a sentence.²⁷ Court-martial sentencing remained remarkably consistent from 1775 until the enactment of the Uniform Code of Military Justice in 1951.²⁸

²⁴ See Captain Anthony J. DeVico, *Evolution of Military Law*, 21 JAG J. 63, 63-66 (1966). See also W. WINTHROP, *MILITARY LAW & PRECEDENTS* 47 (2d ed. 1920).

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).

²⁷ See Robert O. Rollman, *Of Crimes, Courts-Martial and Punishment-A Short History of Military Justice*, 11 A.F.L. REV. 213, 215 (1969).

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.²⁹ Evidence presented on the merits was used to form the sentence when an individual was found guilty.³⁰ An exception was the guilty plea which incorporated a quasi-hearing to assist the sentencing authority in forming a sentence.³¹ A sentencing hearing was necessary in order to provide the sentencing authority with the information required to fashion an appropriate sentence.³² This information was often mitigation evidence in the form of good military character.³³

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

²⁹ See Captain Denise K. Vowell, *To Determine an Appropriate Sentence in the Military Justice System*, 114 MIL. L. REV. 87, 108-109 (1986).

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.

³² See Vowell, *supra* note 29, at 109.

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.³⁴ The 1949 version of the *Manual for Courts-Martial* directed members to consider the accused's background, uniformity in sentencing, general deterrence, and discipline.³⁵ Of particular note is the fact that sentence uniformity was a sentencing goal of the 1949 *Manual*.³⁶

The Military Justice Act of 1950³⁷ resulted in the Uniform Code of Military Justice (1951) and the *Manual for Courts-Martial* of 1951.³⁸ Much of the emphasis behind the Military Justice Act surrounded concerns about the ability of the military justice system to fashion just sentences.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.⁴⁰

³⁴ MANUAL FOR COURTS-MARTIAL, UNITED STATES (1928) [hereinafter 1928 MANUAL].

³⁵ MANUAL FOR COURTS-MARTIAL, UNITED STATES (1949) [hereinafter 1949 MANUAL]. See also Vowell, *supra* note 29, at 118.

³⁶ See 1949 MANUAL, *supra* note 36; Vowell, *supra* note 29, at 118.

³⁷ The Military Justice Act of 1950, Pub. L. No. 506-169, 64 Stat. 107.

³⁸ MANUAL FOR COURTS-MARTIAL, UNITED STATES, (1951) [hereinafter 1951 MANUAL].

³⁹ See Arthur E. Farmer and Richard H. Wels, *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.

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.⁴¹ The *Manual for Courts-Martial* of 1951 developed a distinct sentencing hearing for every court-martial.⁴² Sentencing hearings were adversarial.⁴³ The government could present aggravation evidence subject to defense cross-examination.⁴⁴ The defense enjoyed wide discretion in presenting extenuation and mitigation evidence, to include the accused making a statement.⁴⁵ 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

⁴⁰ See Farmer, *supra* note 39, at 265. See also *Uniform Code of Military Justice: Hearings on S. 857 and H.R. 4080 Before the Subcom. On Armed Services, 81st Cong. 1 (1949)* (Statement of Arthur E. Farmer, Chairman, Committee on Military law, War Veterans Bar Association and Richard H. Wels, Special Committee on military justice, New York County Lawyers' Association).

⁴¹ *Uniform Code of Military Justice: Hearings on H.R. 2498 Before the Subcom. On Armed Services, 81st Cong. 37 (1949)* (Statement of James Forrestal, Secretary of Defense and Prof. Edmund Morgan Jr., Harvard Law School).

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.⁴⁶ The 1951 *Manual* urged members to limit the use of the maximum sentence.⁴⁷ The *Manual* further mandated that members use their own discretion when fashioning a sentence.⁴⁸ Additionally, sentence uniformity was retained as a sentencing goal.⁴⁹

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.⁵⁰ The abandonment of sentence uniformity has its origin in the Court of Military Appeal case of *United States v. Mamaluy*.⁵¹ In *Mamaluy*, the law officer⁵² instructed the members that they could consider sentence uniformity when fashioning a sentence. The *Mamaluy*

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].

⁵¹ *United States v. Mamaluy*, 27 C.M.R. 176 (C.M.A. 1959).

⁵² The law officer was the predecessor of the military judge.

court determined that instructing the members as to sentence uniformity was inappropriate.⁵³ 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.⁵⁴ The *Mamaluy* court did not say that sentence uniformity was an inappropriate goal of sentencing.⁵⁵ Rather, the *Mamaluy* court found that court-martial members were not adequately prepared to consider sentence uniformity.⁵⁶

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."⁵⁷ 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*

⁵³ *Mamaluy*, 27 C.M.R. at 104-107.

⁵⁴ *Id.* at 180.

⁵⁵ *Id.* at 179-181.

⁵⁶ *Id.* at 180.

⁵⁷ *Id.*

Courts-Martial should delete any mention of sentence uniformity.⁵⁸

The *Manual for Courts-Martial* experienced additional modifications in 1981, 1984, 1995, and 1998.⁵⁹ 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. § 836⁶⁰ has not had an impact on military sentencing.

⁵⁸ *Id.* at 181.

⁵⁹ MCM, *supra* note 50; MANUAL FOR COURTS-MARTIAL, UNITED STATES, (1981); MANUAL FOR COURTS-MARTIAL, UNITED STATES, (1984); MANUAL FOR COURTS-MARTIAL, UNITED STATES, (1995); and MCM, *supra* note 15.

1. Overview of Military Sentencing

The overview of the military sentencing system will begin with forum selection.⁶¹ 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.⁶² If the accused is an officer, he may request trial by either officer members or military judge alone.⁶³

Upon a finding of guilty, the court-martial must follow the procedures outlined in Chapter X of the *Manual for Courts-Martial*.⁶⁴ The sentencing procedures are adversarial.⁶⁵ The trial counsel is allowed to present 5 types of evidence, information taken from the charge sheet, personal data

⁶⁰ 10 U.S.C.S. § 836 (LEXIS 2000).

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 plead 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.⁷¹ Mitigation evidence can include any positive trait that relates to the accused.⁷² 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.⁷³ If the judge relaxes the rules of evidence, the rules remain relaxed for the government's case in rebuttal.⁷⁴

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.⁷⁵ The accused can make (1) a sworn statement, (2) an unsworn statement, or (3) a combination of the two.⁷⁶ A sworn statement is subject to cross-examination⁷⁷ 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.⁷⁸ The accused may make an unsworn statement orally, in writing, through her counsel, or a combination of the above.⁷⁹ The government may rebut any statement of fact presented in the accused's unsworn statement.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.⁸¹

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

⁷⁸ MCM, *supra* note 15, R.C.M. 1001(c)(2)(C).

⁷⁹ *Id.* R.C.M. 1001(c).

⁸⁰ *Id.* R.C.M. 1001(c)(2)(C); BENCHBOOK, *supra* note 17, at 58.

⁸¹ MCM, *supra* note 15, R.C.M. 1001(d).

⁸² *Id.* R.C.M. 1001(g).

⁸³ *Id.*

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.⁸⁵ The trial counsel may not make sentence uniformity a part of his argument.⁸⁶

2. Sentencing Discretion

Upon the conclusion of argument, the sentencing authority has the freedom to fashion any lawful sentence.⁸⁷ Every crime under the *Manual for Courts-Martial* has an attendant maximum punishment.⁸⁸ The maximum punishment for multiple offenses is determined by aggregating the maximum punishment for each violation of the *Manual for Courts-Martial*.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.⁹⁰

⁸⁵ *Id.* R.C.M. 1001(g); BENCHBOOK, *supra* note 17 at 64.

⁸⁶ *United States v. Mamaluy*, 27 C.M.R. 176, 180-181 (C.M.A. 1959).

⁸⁷ MCM, *supra* note 15, R.C.M 1002.

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

⁸⁹ *Id.* R.C.M. 1003.

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.⁹¹ The sentencing authority may adjudge no punishment.⁹² If the sentencing authority determines that punishment is appropriate, the sentencing authority may adjudge any combination of the following: reprimand,⁹³ forfeiture of pay and allowances,⁹⁴ fine,⁹⁵ reduction in pay grade for enlisted members,⁹⁶ restriction,⁹⁷ hard labor without confinement,⁹⁸ confinement,⁹⁹ dismissal in

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,¹⁰⁰ punitive discharge in the case of enlisted,¹⁰¹ and death when authorized by the punitive articles.¹⁰²

While the sentencing authority has a wide range of sentencing options available, it has little guidance as to how to actually form a sentence.¹⁰³ The primary guidance the

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 from 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.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.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. . . ." 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.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.¹⁰⁸

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 66-68.

¹⁰⁶ MCM, *supra* note 15, R.C.M. 1005(e)(4).

¹⁰⁷ *Id.* R.C.M. 1105.

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.¹⁰⁹ 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."¹¹⁰ "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."¹¹¹

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-Martial*.¹¹² 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.¹¹³

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.¹¹⁴ Congress has tasked the Courts of Criminal Appeals with maintaining "relative" sentence uniformity.¹¹⁵ The U.S. Court of Appeals for the Armed Forces and the Courts of Criminal Appeals have defined relative uniformity very narrowly.¹¹⁶ Relative uniformity is limited to addressing sentence uniformity between cases that arise out of

¹¹² See discussion *supra* pp. 12-13.

¹¹³ *United States v. Mamaluy*, 27 C.M.R. 176, 180-181 (C.M.A. 1959).

¹¹⁴ See 10 U.S.C.S. §§ 866-867 (Lexis 2000). See also *United States v. Lacy*, 50 M.J. 286, 288 (1999).

¹¹⁵ *United States v. Judd*, 28 C.M.R. 388, 394 (C.M.A. 1960).

¹¹⁶ *United States v. Lacy*, 50 M.J. 286 (1999).

the same criminal act (i.e., three accused convicted of a sexual assault on the same victim at the same time).¹¹⁷ 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.¹¹⁸ 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.¹¹⁹

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.¹²⁰ 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.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.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.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.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

¹²¹ *Id.*

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.

¹²³MCM, *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." *Id.*

¹²⁴ *Id.* See also DeVico *supra* note 24; *Uniform Code of Military Justice: Hearings on H.R. 2498 Before the Subcom. On Armed Services, 81st Cong. 37* (1949) (Statement of James Forrestal, Secretary of Defense and Prof. Edmund Morgan Jr., Harvard Law School).

1951.¹²⁵ 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."¹²⁶ 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.¹²⁷

5. *Military Sentencing and 10 U.S.C. § 836*

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

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.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.¹²⁹ Congress has tasked the President, where practicable, to apply federal "principles of law and rules of evidence" to the military justice system.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.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.¹³² Conversely, the present federal system attempts to maximize sentence uniformity by constraining judicial sentencing discretion with

¹²⁸ Lanni, *supra* note 12, at n. 14.

¹²⁹ 10 U.S.C.S. § 836 (LEXIS 2000); MCM, *supra* note 15.

¹³⁰ 10 U.S.C.S. § 836.

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

¹³² United States v. Lacy 50 M.J. 286, 287-288 (1999).

the use of sentencing guidelines.¹³³ The next section will discuss the federal system and how sentencing guidelines were 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.¹³⁴ 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 1984,¹³⁵ trial judges in the federal system had almost unfettered sentencing discretion.¹³⁶ The sentencing discretion enjoyed by federal

¹³³ USSG, *supra* note 7, at 2.

¹³⁴ *Id.*

¹³⁵ Pub. L. No. 98-473, 98 Stat. 1987 (codified at 18 U.S.C.S §§ 3551-3673 (LEXIS 2000), 28 U.S.C.S. §§ 991-998 (LEXIS 2000)). The Federal Sentencing Guidelines became effective on 1 November 1987. The guidelines overcame constitutional challenges and were fully effective January 1989. See also Tagiliareni, *supra* note 135.

judges was very similar to the sentencing discretion presently enjoyed in the military system.¹³⁷ The only barrier that the federal judge encountered when fashioning punishment was statutory maximum sentences.¹³⁸

The statutory maximum sentence was historically the only limit imposed on federal judges.¹³⁹ Before sentencing guidelines, a federal trial judge's sentence was subject to judicial review only if the sentence exceeded the statutory maximum.¹⁴⁰ The standard of review surpassed the already high *abuse of discretion* standard.¹⁴¹ The standard of appellate review was whether the sentence was lawful.¹⁴²

¹³⁶ Kate Stith & Jose A. Carbanes, *Symposium: The Federal Sentencing Guidelines: Ten Years Later: Judging Under the Federal Sentencing Guidelines*, 91 NW. U.L. REV. 1247 (1997).

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

¹³⁸ *Williams v. New York*, 337 U.S. 241 (1949).

¹³⁹ See Charles J. Ogletree Jr., *Commentary the Death of Discretion? Reflections on The Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1940-41. (1988).

¹⁴⁰ See Herbert J. Hoelter et. al., *Practicing Law in the Americas: The New Hemispheric Reality: Article: Future Trends in the United States Federal Sentencing Scheme*, 13 AM. U.J. INT'L L. & POL'Y 1069 (1998). See also Stith, *supra* note 136, at 1251-53.

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.¹⁴³ The primary focus of the debate was what should be the primary goal of sentencing.¹⁴⁴ Some argued that the sentence should punish the individual.¹⁴⁵ Others thought that confinement could correct behavior and rehabilitate the wrongdoer.¹⁴⁶ A third camp urged that sentencing should operate to remove the convicted from free society.¹⁴⁷

At the turn of the last century, the *Old Testament*¹⁴⁸ values of retribution and restitution were the dominant sentencing philosophy.¹⁴⁹ The trial judge enjoyed almost complete discretion to fashion "the punishment that fit the crime."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

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ See Ogletree, *supra* note 139, at 1941-1942.

¹⁴⁶ *Id.*

¹⁴⁷ See Hoelter et. al., *supra* note 140, at 1075.

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."

¹⁴⁹ See Ogletree, *supra* note 138, at 1940.

¹⁵⁰ *Id.* The only constraint placed on a trial judges sentence was the statutory maximum punishment allowed.

attack.¹⁵¹ The social sciences argued that they could cure society's problems through intervention in the socio-economic fabric of American life.¹⁵²

Eager to cure the problems that plagued criminal justice, the government looked to the social sciences to fix the criminal justice system.¹⁵³ The sentencing philosophy of this period was deterrence and rehabilitation.¹⁵⁴ Poverty and social forces were considered the root cause of crime.¹⁵⁵ The prisons created workshops, vocational training, and other avenues of social engineering to defeat these negative social forces.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.¹⁵⁷ The social sciences promised that the graduate of the correctional

¹⁵¹ See Thomas A. Green, *Article: Freedom and Criminal Responsibility in the Age of Pound: An Essay on Criminal Justice*, 93 MICH. L. REV. 1915, at 1920 (1995).

¹⁵² *Id.*

¹⁵³ See Stith, *supra* note 136, at FN 7 (citing Probation Div., Admin. Office of the U.S. Courts, Pub. No. 105).

¹⁵⁴ *Id.*

¹⁵⁵ See Green, *supra* note 151, at 1920-1921.

¹⁵⁶ See Hoelter et. al., *supra* note 140, at 1078-1080.

¹⁵⁷ See Green, *supra* note 151, at 1921.

facility would have a low probability of recidivism.¹⁵⁸

Penitentiaries were renamed correctional facilities to illustrate this shift from penitence to correction.¹⁵⁹

The rehabilitative model spawned growth in the parole system.¹⁶⁰ The Parole Commission determined the amount of confinement actually served by the convict.¹⁶¹ Before 1974, the bulk of sentences were indeterminate sentences.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."¹⁶³ With a "straight sentence", the prisoner was eligible for parole after serving one-third of her sentence.¹⁶⁴

¹⁵⁸ See Tagliareni, *supra* note 135, at 416.

¹⁵⁹ See Hoelter et. al., *supra* note 140, at 1079.

¹⁶⁰ See Ronald F. Wright, *Rules for Sentencing Revolutions*, 108 YALE L.J. 1355, n. 14 (1999) (reviewing KATE SITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998)).

¹⁶¹ See Todd E. Witten, *Comment: Sentence Entrapment and Manipulation: Government Manipulation of the Federal Sentencing Guidelines*, 29 AKRON L. REV. 697413, at 699 (1996).

¹⁶² See Daniel J. Freed, *Article: Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681. 1685 (1992). (An indeterminate sentence is a sentence that left the issue of parole to the sole discretion of the Parole Commission).

¹⁶³ See Hoelter et. al., *supra* note 140, at 1078.

¹⁶⁴ *Id.*

In either case, the Parole Commission determined when an individual was "cured" and released.¹⁶⁵

While the parole officer influenced the amount of confinement served, the probation officer affected the adjudged sentence.¹⁶⁶ The probation officer is an employee of the judiciary¹⁶⁷ and is responsible for providing a pre-sentencing report to the bench.¹⁶⁸

Before the implementation of guidelines, the pre-sentencing 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.¹⁶⁹ The personal history included "family background, education, military service, work history, criminal record, dependents, and activities in the community."¹⁷⁰ The probation officer would also recommend a sentence to the judge.¹⁷¹ Only the

¹⁶⁵ See Green, *supra* note 151, at 1689.

¹⁶⁶ See Stith, *supra* note 136, at 1249.

¹⁶⁷ *Id.* at 1249-1250.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Compare *Id.* at 1249 with USSG, *supra* note 7, pt. H (which largely eliminates the ability of the federal court to consider the personal history traits of the defendant).

judge received the sentencing recommendation portion of the report.¹⁷² This portion was advisory and the judge was free to give it great weight or no weight at all.¹⁷³ The prosecution and the defense received the remainder of the report.¹⁷⁴

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

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

¹⁷¹ *Id.* 1249-1250.

¹⁷² Stith, *supra* note 136, at 1250 (quoting Probation Division., Admin. Office of U.S. Courts, Pub. No. 105, The Presentence Investigative Report 6 (1978)).

¹⁷³ Stith, *supra* note 59, at 1249-1250.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Tagliareni, *supra* note 135, at 416.

¹⁷⁷ See *Id.*; See also Hoelter et. al., *supra* note 140, at 1079-1080.

¹⁷⁸ Currently the Mayor of the City of Oakland, California.

of the federal criminal system.¹⁷⁹ The Brown Commission cited sentence disparity as one of the major defects of federal sentencing.¹⁸⁰ The Commission stated that the unfettered sentencing authority of federal trial judges was the primary cause of sentence disparity.¹⁸¹ The Brown Commission concluded that the federal judicial system needed major reform.¹⁸²

B. Federal Sentencing Post Guidelines

The political call for sentencing reform gained momentum through the 1980's.¹⁸³ 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.¹⁸⁴ Senator Strom Thurman (Republican) and Senator Edward Kennedy (Democrat) sponsored the Comprehensive Crimes Control Act of 1984.¹⁸⁵

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.

¹⁸⁵ Pub. L. No. 98-473, 98 Stat. 1837, 1976 (1984) (codified as amended in several sections of Title 18 in the U.S. Code). See also Wright *supra* note 160, at 1361.

This act resulted in the Sentencing Reform Act of 1984¹⁸⁶ and created the United States Sentencing Commission.¹⁸⁷ The United States Sentencing Commission published the first federal sentencing guidelines in November of 1987.¹⁸⁸ Those guidelines became fully effective January of 1989.¹⁸⁹

The charter of the United States Sentencing Commission is to;¹⁹⁰

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

¹⁸⁶ Pub. L. No. 98-473, 98 Stat. 1837, 1987 (codified at 18 U.S.C.S. §§ 3551-3673 (LEXIS 2000), 28 U.S.C.S. §§ 991-998 (LEXIS 2000)).

¹⁸⁷ 28 U.S.C.S. §991(a) (Lexis 2000).

¹⁸⁸ See Witten, *supra* note 161, at 701.

¹⁸⁹ See Tagiliareni, *supra* note 135.

¹⁹⁰ 28 U.S.C.S. § 991(b)(1)(B).

¹⁹¹ See *Id.*

¹⁹² See *Id.* § 991(a).

President appoints the remaining seven members after consultation with the criminal justice community and the Senate.¹⁹³ The panel must contain members of both political parties.¹⁹⁴ The United States Sentencing Commission develops and monitors the federal sentencing guidelines.¹⁹⁵

As discussed in the introduction, the goals of criminal punishment in the federal system are deterrence, incapacitation, just punishment, and rehabilitation.¹⁹⁶ These four goals are identical to four of the five military sentencing goals.¹⁹⁷ The additional goal in the military is

¹⁹³ *Id.*

¹⁹⁴ *Id.*:

The President, after consultation with representatives of judges, prosecuting attorneys, defense attorney, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chair, and three of whom shall be designated by the president as Vice Chairs. At least three of the members shall be Federal judges...Not more than four members of the Commission shall be members of the same political party.

Id.

¹⁹⁵ USSG, *supra* note 7, ch. 1, pt. A.

¹⁹⁶ See 18 U.S.C. § 3553 (LEXIS 2000); 28 U.S.C.S § 991. See also 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. I, ¶ 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).

²⁰¹ 18 U.S.C.S. § 3553; 28 U.S.C.S. § 991.

²⁰² USSG, *supra* note 7, ch. 1, pt. A, ¶ 3.

²⁰³ *Id.*

the exception of good time credit.²⁰⁴ Inmates may not receive parole.²⁰⁵

The second objective is sentence uniformity.²⁰⁶ The Sentencing Commission believes that by decreasing sentence disparity it increases sentence uniformity.²⁰⁷ The Commission argues that sentencing guidelines increase sentence uniformity.²⁰⁸ A primary goal of the federal sentencing guidelines is to avoid unwarranted sentence disparity by "setting similar penalties for similarly situated offenders."²⁰⁹ The sentencing guidelines were created by studying "10,000 presentence investigations, the differing elements of various crimes as distinguished in substantive criminal statutes, The United States Parole Commission's guidelines, and statistics, and data from other relevant sources. . . ." ²¹⁰

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.²¹¹ The horizontal axis of the sentencing table applies to the defendant's criminal history.²¹² The vertical axis of the table relates to the seriousness of the offense.²¹³ The *Federal Sentencing Table's* vertical axis lists the forty-three "Offense Levels."²¹⁴ The horizontal axis lists the six "Criminal History Categories."²¹⁵ The relevant criminal distinctions are taken into account through the interplay of the horizontal and vertical axis of the sentencing table.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."²¹⁷ The Sentencing Commission believes that the

²¹¹ See *Id.* ch. 5, pt. A. See also app. A of this paper.

²¹² FEDERAL PUBLIC AND COMMUNITY DEFENDERS, AN INTRODUCTION TO FEDERAL GUIDELINE SENTENCING (Lucien B. Campbell & Henry J. Bemporad eds., 4th ed. 1999) [hereinafter PUBLIC DEFENDERS].

²¹³ *Id.*

²¹⁴ USSG, *supra* note 7, ch. 5, pt. A.

²¹⁵ *Id.*

²¹⁶ *Id.*, ch. 1, pt. A, ¶ 3.

²¹⁷ *Id.*, ch. 1.

sentencing guidelines realize proportionality by combining offense levels, sentence adjustments, and criminal history.²¹⁸

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

Most crimes have specific offense characteristics.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

²¹⁸ See OVERVIEW, *supra* note 11.

²¹⁹ See USSG, *supra* note 7, ch. 1.

²²⁰ See PUBLIC DEFENDERS, *supra* note 212.

²²¹ See USSG, *supra* note 7, ch. 1.

²²² *Id.*

²²³ *Id.*

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.²²⁵

The offense level can also be modified by adjustments.²²⁶ Adjustments are similar to specific offense characteristics in that they can either increase or decrease the offense level.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.²²⁸ A young, aged, physically impaired, or mentally impaired victim may warrant a two level increase.²²⁹ Minimal participation in the crime warrants a four level

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.²³⁰ Obstruction of justice may similarly result in a two level increase.²³¹

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.²³² If the trial judge believes that the defendant accepts responsibility for his crime, the judge may make a downward adjustment of two offense levels.²³³ 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."²³⁴

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.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.²³⁶ Category I is the least severe category and is applied primarily to first time offenders.²³⁷ Category VI is the most severe category and applies to criminals with lengthy criminal records.²³⁸

Criminal history is determined by awarding past convictions a numerical score.²³⁹ The numerical scores are tallied and a corresponding criminal history category is determined.²⁴⁰ Severe crimes and recent crimes rate the highest score.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.²⁴² If the offender committed the current

²³⁵ See OVERVIEW, *supra* note 11.

²³⁶ See USSG, *supra* note 7, ch. 4, pt. A.

²³⁷ *Id.*

²³⁸ *Id.* ch. 4, pt. A & app. D.

²³⁹ *Id.*

²⁴⁰ *Id.* ch. 4, pt. A.

²⁴¹ *Id.*

offense while on parole, the offender would receive an additional two points for a total of four points.²⁴³ Four points corresponds to a category III criminal history.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.²⁴⁵ Once the intersection is determined, simply read the sentencing range displayed in the sentencing matrix.²⁴⁶ The range is given in months.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.²⁴⁸

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.* ch. 1 & app. D.

²⁴⁵ *Id.* ch. 4, pt. B.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

FIGURE 1
SENTENCING TABLE EXTRACT²⁴⁹
Criminal History Category (Criminal History Points)

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

Under rare circumstances, the trial judge may depart from the guidelines.²⁵⁰ The judge may depart from the guidelines if she believes there are issues in the sentencing case that the guidelines did not adequately consider.²⁵¹ If the departure increases the sentence above the guideline cap then the offender may appeal.²⁵² If the departure lessens the sentence,

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.²⁵³ The trial judge must state her reason for departure on the record.²⁵⁴

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,²⁵⁵ the method employed to achieve those goals are dissimilar.²⁵⁶ The preceding two sections also illustrated that before the adoption of federal sentencing guidelines, the federal system allowed trial judges almost unfettered sentencing discretion.²⁵⁷ Such unfettered discretion, while no longer enjoyed by federal judges, is exercised by today's military judges.²⁵⁸

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.

²⁵⁶ See discussion *supra* pp. 14-27 & 35-47.

²⁵⁷ Donald P. Lay, *Rethinking the Guidelines: A Call for Cooperation*, 101 YALE L.J. 1775, 1757 (1992).

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.²⁵⁹ The pre-guidelines system used judicial sentencing discretion to fashion individual sentences.²⁶⁰ The Sentencing Commission replaced judicial sentencing discretion and individual sentencing with sentencing guidelines and sentence uniformity.²⁶¹

Congress enacted federal sentencing guidelines, in large part, to decrease unwarranted sentence disparity.²⁶² 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.

²⁵⁹Freed, *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.²⁶³ The data was tallied to discover the degree of sentencing disparity that exists within the armed forces.²⁶⁴ The primary

²⁶³ Army Data, *supra* note 1; USN/USMC Data, *supra* note 3; and Air Force Data *supra* note 5.

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.²⁶⁵ The standard deviation is an important calculation because it illustrates the degree of sentence disparity that exists within a population.²⁶⁶ A large

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.

²⁶⁵ ENCARTA *supra* 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.²⁶⁷ 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 than 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.²⁶⁸ The average confinement imposed by the Navy was thirty-four months.²⁶⁹ The average length of confinement awarded by the Air force was twenty-two months²⁷⁰ while the Marine Corps adjudged average confinement of forty-eight months.²⁷¹ The combined average confinement for the four services was thirty-three months.²⁷²

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.²⁷³ The standard deviation for the Army was ninety-six months²⁷⁴ as compared to fifty-two months for the Navy.²⁷⁵ The

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 months²⁷⁶ while the Marine Corps had a standard deviation of eighty months.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).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

²⁷⁵ USN/USMC data *supra* note 3.

²⁷⁶ Air Force data, *supra* note 5.

²⁷⁷ USN/USMC data *supra* note 3.

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.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.²⁸⁰ The next subsection will explore the standard deviation and average sentences that attach to various punitive articles.

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

²⁷⁹ 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 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 than the Marines because the sentences for the Sailors have a higher degree of sentence discrepancy.

²⁸⁰ ENCARTA *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.²⁸¹ The average for all four services was 101 months with a corresponding population standard deviation of 155 months.²⁸² The average confinement for the Army was 101 months²⁸³ while the Navy had an average of 73 months.²⁸⁴ The Air Force awarded average confinement of 79 months²⁸⁵ 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,²⁸⁶ Navy 80 months,²⁸⁷ Air

²⁸¹ Army Data, *supra* note 1; USN/USMC Data, *supra* note 3; Air Force Data *supra* note 5.

²⁸² *Id.*

²⁸³ Army data, *supra* note 1.

²⁸⁴ USN/USMC Data, *supra* note 3.

²⁸⁵ Air Force Data, *supra* note 5.

²⁸⁶ Army Data, *supra* note 1.

²⁸⁷ 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 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 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.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.²⁹⁴ The sentencing range is 61 to 547 months.²⁹⁵ The population standard deviation is 172 months.²⁹⁶ If you eliminate sentences of 15 years or less from the equation, the standard deviation decreases to 144 months.²⁹⁷ Thus, even when you remove relatively lenient sentences from the equation, the standard deviation for confinement remains significant.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.²⁹⁹ The confinement range for the four branches was

²⁹³ MCM, *supra* note 15, pt. IV, ¶ 43.

²⁹⁴ Army Data, *supra* note 1.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ Army Data, *supra* note 1; USN/USMC Data, *supra* note 3; Air Force Data *supra* note 5.

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.

²⁹⁹ MCM, *supra* note 15, pt. IV, ¶ 37b(3).

1-180 months.³⁰⁰ The average confinement adjudged by all four services was 29 months.³⁰¹ The confinement deviated from the mean by an average of 31 months.³⁰²

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.³⁰³ The Air Force had a standard deviation of twenty-one months, followed by twenty months for the Army and ten months for the Navy.³⁰⁴

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.³⁰⁵ Abandonment of sentencing uniformity is one factor that led to the sentencing disparities that exist within the military today.³⁰⁶ Other factors that likely increased sentencing disparity include, the wide discretion given the sentencing authority,³⁰⁷

³⁰⁵ See *United States v. Dowling*, 18 C.M.R. 670 (C.M.A. 1954). See also *United States v. Mamaluy*, 27 C.M.R. 176 (C.M.A. 1959); discussion *supra* pp. 14-27.

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 tack. 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,³⁰⁸ and the sentencing goal of maintaining "good order and discipline."³⁰⁹

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

The current version of the *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. . . ." ³¹³ The *Manual for Courts-Martial* does not provide any definitions of what is meant by "promoting justice", "maintaining good order

³⁰⁷ MCM, *supra* note 15, R.C.M. 1002.

³⁰⁸ MCM, *supra* note 15, R.C.M. 903. See also discussion *supra* pp. 14-27.

³⁰⁹ MCM, *supra* note 15, pt. I, ¶ 3.

³¹⁰ 28 U.S.C.S. §991(b) (LEXIS 2000).

³¹¹ *Id.*; USSG, *supra* note 7, ch. 1 pt. A.

³¹² 28 U.S.C.S. §991(b); USSG, *supra* note 7, ch. 1 pt. A.

³¹³ MCM, *supra* note 15, pt. I, ¶ 4.

and discipline", or promoting "efficiency and effectiveness" in the military.³¹⁴ The *Manual* gives the sentencing authority sole discretion to fashion a sentence that fulfills the purposes of military law.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.³¹⁶

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

³¹⁴ *Id.*

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.

Id.

See also 18 U.S.C.S. 3553(a)(2) (LEXIS) (which list the federal sentencing goals as just punishment, deterrence, incapacitation, rehabilitation).

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.³¹⁷ 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.³¹⁸

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.³¹⁹ The cornerstone of this guidance is the federal sentencing guidelines.³²⁰ A primary goal of the federal sentencing guidelines is uniformity.³²¹ Sentence uniformity seeks to set similar "penalties for similarly situated offenders."³²² 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.

³²⁰ 18 U.S.C.S. §§ 3551 et seq. (LEXIS 2000); 28 U.S.C.S. § 991 (LEXIS 2000); USSG, *supra* note 7.

³²¹ 18 U.S.C.S. §§ 3551 et seq.; 28 U.S.C.S. § 991.

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

³²³ 18 U.S.C.S. §§ 3551 et seq.; 28 U.S.C.S. § 991; USSG, *supra* note 7.

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?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.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.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.³²⁹ For example, an

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.

³²⁷ *Id.*

³²⁸ *Id.* R.C.M. 1002.

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.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.³³³

V. Adopting Military Sentencing Guidelines

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

³³² MCM, *supra* note 15, pt. I, ¶ 3.

³³³ See discussion *infra* pp. 75-95.

the purposes of military sentencing.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.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

³³⁴ MCM, *supra* note 15, pt. I, ¶ 3.

³³⁵ See 10 U.S.C.S. § 836 (LEXIS 2000). See also Lanni, *supra* note 12, at n. 14. The federal system as well as the states of Alabama, Alaska, Arizona, Arkansas, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin currently employ a form a sentencing guidelines for criminal offenses.

exists. The primary benefit of sentencing guidelines is sentence uniformity.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.³³⁷

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

³³⁶ See USSG, *supra* note 7, ch. 1, pt. A, ¶ 3. See also Ilene H. Nagel & Stephen J. Schulhofer, *Symposium on Federal Sentencing: Article: A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under The Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 503. One of the three Congressional objectives of sentencing guidelines is to increase sentence uniformity.

³³⁷ ARMED FORCES EQUAL OPPORTUNITY SURVEY, DMDC REPORT No. 97-027, August 1999.

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

Closely related to efficiency is the military's use of the adversarial sentencing process.³⁴¹ The military employs the adversarial system instead of probation officer and their attendant presentencing reports.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.³⁴³

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

³³⁸ MCM, *supra* note 15.

³³⁹ Interview with Major M. Sitler, Vice Chair, Criminal Law Department, at The Judge Advocate General's School, Charlottesville, Va. (Apr. 7, 2000).

³⁴⁰ MCM, *supra* note 15, R.C.M. 1001.

³⁴¹ *Id.* See also discussion *supra* pp. 14-27.

³⁴² MCM, *supra* note 15, R.C.M. 1001 analysis, app. 21.

³⁴³ *Id.*

³⁴⁴ *Id.* R.C.M. 1001.

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,³⁴⁷ forfeiture of 2/3 pay per month for six months, a fine, and a bad conduct discharge).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.³⁴⁹

Special courts-martial make up the majority of all courts-martial.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.³⁵¹

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

³⁴⁸ MCM, *supra* note 15, R.C.M. 201(f)(2)(B).

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

³⁵⁰ ANNUAL REPORT SUBMITTED TO THE COMMITTEES ON ARMED SERVICES OF THE UNITED STATES SENATE AND THE UNITED STATES SENATE AND THE SECRETARY OF DEFENSE, SECRETARY OF TRANSPORTATION, AND SECRETARIES OF THE ARMY, NAVY, AND AIR FORCE PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE, FOR THE PERIOD OCTOBER 1, 1997 TO SEPTEMBER 30, 1998. (During fiscal year 1998 the Army, Navy, Air Force, and Marine Corps held 1597 general courts-martial and 2613 special courts-martial).

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.

³⁵³ MCM, *supra* note 15, R.C.M. 1003; 10 U.S.C.S. §§ 856a, 858b (LEXIS 2000).

³⁵⁴ MCM, *supra* note 15, pt. IV, ¶¶ 1-113.

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.

FIGURE 2

	CATEGORY I	CATEGORY II	CATEGORY III	CATEGORY IV	CATEGORY V
ART. 119					
Class. 1	0-48	48-56	57-71	72-83	84-180
Class. 2	0-12	13-20	21-40	41-72	73-120

³⁵⁵ See discussion *infra* pp. 76-84.

³⁵⁶ MCM, *supra* note 15, pt. IV, ¶¶ 1-113. For example, Article 119 is divided into two classification, 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.³⁵⁷ 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.³⁵⁸ 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.

³⁶² See discussion *supra* pp. 12-13.

Courts-Martial.³⁶³ 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.³⁶⁴ The *Mamaluy* court conceded that sentence uniformity was an appropriate sentencing goal.³⁶⁵ While an appropriate goal, the court determined that sentence uniformity was not practical for the military system.³⁶⁶ The lack of sentencing uniformity that exists in the military today supports the conclusion of the 1959 *Mamaluy* court.³⁶⁷

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.

³⁶³ United States v. Mamaluy, 27 C.M.R. 176, 181 (C.M.A. 1959).

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.³⁶⁸ 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.³⁶⁹ Judges currently award sentences in the majority of general courts-martial.³⁷⁰ 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.³⁷¹ Similarly, 45 of the states use judges for criminal sentencing.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.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.³⁷⁴ The judge's role in assigning sentencing categories assists members because it makes sentence uniformity determinations that the members are unable to make.³⁷⁵

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

³⁷¹ USSG, *supra* note 7, §5.K1.1-§5.K1.2.16.

³⁷² Lanni, *supra* note 12, at 1790.

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.

³⁷⁴ *Id.* R.C.M. 1107(d).

³⁷⁵ *United States v. Mamaluy*, 27 C.M.R. 176, 181 (C.M.A. 1959).

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.³⁷⁶ 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.³⁷⁷ As an example,

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.³⁷⁸ 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.³⁷⁹ 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

SENTENCING MATRIX				
CATEGORY I	CATEGORY II	CATEGORY III	CATEGORY IV	CATEGORY V
ARTICLE 111				
ARTICLE 116				
ARTICLE 118				
ARTICLE 119				
ARTICLE 120				

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.³⁸⁰ Second, military sentencing data was collected and studied to determine historic sentencing practices.³⁸¹ Third, the *Manual for Courts Martial* was used to determine the maximum authorized confinement.³⁸² 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.

³⁸² MCM, *supra* note 15, pt. IV, ¶¶ 60-113.

Article 118, murder, is a good illustration of the process of determining the confinement range.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.³⁸⁴ Premeditated murder (classification one) and felony murder (classification four) carry a maximum sentence of death and a minimum sentence of confinement for life.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

³⁸³ *Id.* pt. IV, ¶ 43.

³⁸⁴ *Id.*

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.³⁸⁶ The sentencing range is 60 months to 516 months.³⁸⁷

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

FIGURE 4

	CATEGORY I	CATEGORY II	CATEGORY III	CATEGORY IV	CATEGORY V
ART. 118					
Class. 1	Life-death	Life-death	Life-death	Life-death	Life-death
Class. 2	0-84	85-131	132-168	169-240	241-life
Class. 3	0-84	85-131	132-168	169-240	241-life
Class. 4	Life-death	Life-death	Life-death	Life-death	Life-death

³⁸⁶ Army Data, *supra* note 1; USN/USMC Data, *supra* note 3; Air Force Data *supra* note 5.

³⁸⁷ *Id.*

³⁸⁸ USSG, *supra* note 7, §2.A1.1.

³⁸⁹ *Id.* §2.A1.1; ch. 5, pt. A.

³⁹⁰ *Id.* §2.A1.2

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.³⁹² The Uniform Code of Military Justice splits manslaughter into two classifications.³⁹³ The first classification is voluntary manslaughter. Voluntary manslaughter has an attendant maximum punishment of fifteen years of confinement.³⁹⁴ The second classification is involuntary manslaughter. Involuntary manslaughter may be punished by up to ten years of confinement.³⁹⁵

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

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

³⁹² MCM, *supra* note 15, pt. IV, ¶ 44.

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ Army Data, *supra* note 1; USN/USMC Data, *supra* note 3; & Air Force Data *supra* note 5.

³⁹⁷ *Id.*

manslaughter. It has a base offense level of twenty-five and a sentencing range of fifty-seven to seventy-one months.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.³⁹⁹ The final federal category is criminally negligent manslaughter.⁴⁰⁰ This category has an offense level of ten.⁴⁰¹ Those convicted under this category face a confinement range of between six and twelve months.⁴⁰²

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

FIGURE 5

	CATEGORY I	CATEGORY II	CATEGORY III	CATEGORY IV	CATEGORY V
ART. 119					
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.

³⁹⁸ USSG, *supra* note 7, §2.A1.3; ch. 5, pt. A.

³⁹⁹ *Id.* §2.A1.4; ch. 5, pt. A.

⁴⁰⁰ *Id.* §2.A1.4.

⁴⁰¹ *Id.*

⁴⁰² *Id.* §2.A1.4; ch. 5, pt. A.

The third crime addressed in this section is Article 112a, wrongful use, possession, etc., of controlled substances.⁴⁰³ 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.⁴⁰⁴ 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.⁴⁰⁵ The average sentence and sentencing range was determined for each of these classifications through the process described earlier in this paper.⁴⁰⁶

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.

offenses.⁴⁰⁷ 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.

⁴⁰⁷ USSG, *supra* note 7, §§ 2.D1.1-2.D3.5.

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

FIGURE 6

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

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 ay 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.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.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.

FIGURE 7

	CATEGORY I	CATEGORY II	CATEGORY III	CATEGORY IV	CATEGORY V
ART. 90					
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

⁴⁰⁹ *Id.* pt. IV, ¶ 14.e.(2).

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.

clemency.⁴¹³ While the convening authority may reduce any sentence, he may never increase a sentence.⁴¹⁴

Additionally, the convening authority may agree to depart from sentencing guidelines (and any adjudged sentence) through the use of a pretrial agreement.⁴¹⁵ The convening authority may agree to exercise his power to limit a sentence in return for some concession on the part of the accused.⁴¹⁶ 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

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

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

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

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)).

⁴²² See Witten, *supra* note 161. See also Marcia G. Stein, *Sentencing Manipulation and Entrapment*, *CRIM. JUST.*, Fall 1995, 25.

⁴²³ See Thomas N. Whiteside, *Symposium: The Federal Sentencing Guidelines: Ten Years Later: The Reality Of Federal Sentencing: Beyond The Criticism*, 91 *Nw. U. L. REV.* 1574, 1581 (1997).

⁴²⁴ See Sith, *supra* note 136, at 1253. See also Wright *supra* note 160, at 1366-1377.

⁴²⁵ See Sith, *supra* note 136, at 1256-1263.

⁴²⁶ See Lanni, *supra* note 12, at 1786. See also Freed, *supra* note 162.

⁴²⁷ See Ogletree, *supra* note 145, at 1953.

sentencing.⁴²⁸ Before guidelines, the interaction between the federal trial judge and the accused was the focus of the sentencing process.⁴²⁹ The judge had wide discretion to fashion a sentence that he believed satisfied the goals of sentencing.⁴³⁰ The statutory maximum sentence was the only check upon judicial discretion.

Before the adoption of sentencing guidelines, the judge ruled the courtroom.⁴³¹ The victim of the crime looked to the judge to fashion a sentence that satisfied punishment and retribution.⁴³² Those close to the defendant hoped the judge would be merciful.⁴³³ The public looked for sentences that would either remove the defendant from society or rehabilitate the wrongdoer.⁴³⁴

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

⁴²⁹ United States v. Davern, 970 F. 2d. 1940, at 1516 (6th Cir. 1992). Sentencing is a human process that requires interaction between the judge and the defendant. United States v. Naugle, 879 F. Supp. 262, at 265 (E.D.N.Y. 1995) (Weinstein, J.) Human interaction between the judge and the defendant are necessary in order for a sentence to realize its full impact.

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.⁴³⁵ The judge represented the vast power of both state and society. The judge announced the sentence.⁴³⁶ 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.⁴³⁷ It was the creation of the individual sentence that was the cornerstone of the moral authority of the bench.⁴³⁸

Critics argue that the sterile sentencing environment produced by sentencing guidelines reduces the moral authority of the bench.⁴³⁹ They argue that a predetermined sentence evaporates the authority of the sentencing judge.⁴⁴⁰ The sentencing judge is not the Solomon-like figure of the pre-guideline era.⁴⁴¹ The judge is reduced to a bureaucrat who

⁴³⁵ See Sith, *supra* note 136, at 1253.

⁴³⁶ *Id.* at 1248.

⁴³⁷ United States v. Naugle, 879 F. Supp. 262, at 265 (E.D.N.Y. 1995) (Weinstein, J).

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.⁴⁴² 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.⁴⁴³

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.⁴⁴⁴ 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.⁴⁴⁵

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

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.⁴⁴⁶ They argue that the trial judge must sentence with moral and societal authority.⁴⁴⁷ The judge must truly judge the offender. It is by judging that society morally condemns an individual and his acts.⁴⁴⁸ The trial judge must retain his ability to judge in order for the sentence to be effective.⁴⁴⁹ 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.⁴⁵⁰

The proposed military sentencing guidelines preserve the moral authority of the military sentencing ritual.⁴⁵¹ The sentencing authority is either the military judge or the court-martial members.⁴⁵² 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.⁴⁵³ 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 fashion 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.⁴⁵⁴ The accused will rise to face the sentencing authority.⁴⁵⁵ The sentencing authority will look the accused in the eye and announce the sentence.⁴⁵⁶ The sentence will carry the same type of moral impact as that provided for by the current military sentencing system.⁴⁵⁷

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.⁴⁵⁸ 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.⁴⁵⁹ Most of the federal crimes escalate the offense level when certain aggravating factors are present.⁴⁶⁰ Critics argue that investigators "set up" suspects by tailoring the investigation (sting) in a manner that increases the offense level.⁴⁶¹ 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.⁴⁶² 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.⁴⁶³ This is especially true when the suspect would not have committed the aggravating factors but for the prompting of the investigator.⁴⁶⁴

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.⁴⁶⁵ In *United States v. Shephard*⁴⁶⁶ the investigators did exactly this and the suspects sentencing range increased from 27-33 months to 121-151 months.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.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.

⁴⁶⁴ Fred Warren Bennett, *From Sorrells to Jacobson: Reflections on Six Decades of Entrapment Law, and Related Defenses in Federal Court*, 27 WAKE FOREST L. REV. 829, 831 (1992).

⁴⁶⁵ USSG, *supra* note 7, §2D1.1.

⁴⁶⁶ *United States v. Shephard*, 4 F3d 647 (8th Cir. 1993).

⁴⁶⁷ *Id.* Mr. Shephard 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 sell 2 grams of crack cocaine falls under the same guideline as a person who sells 200 grams of powder cocaine, Mr. Shephard faced an approximately five fold increase in his sentencing range.

⁴⁶⁸ See Witten, *supra* note 161, at 716.

Sentencing categories avoid sentence entrapment by allowing the military judge discretion in assigning the sentencing category.⁴⁶⁹ The military judge determines the sentencing category that applies to every court-martial.⁴⁷⁰ The judge has complete discretion to select any of the five sentencing categories.⁴⁷¹ 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.⁴⁷² Long-standing criminal distinctions

⁴⁶⁹ See discussion *infra* pp. 75-85.

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.*

⁴⁷² MCM, *supra* note 15, pt. IV.

determine classifications.⁴⁷³ For the most part, the *Manual for Courts-Martial* does not dramatically increase punishment based solely on quantity or type distinctions.⁴⁷⁴ Even for crimes where quantity or type function to increase punishment, the nature or circumstances that surround the crime determine the increase in punishment.⁴⁷⁵ For example, possession of more than 30 grams of marijuana increases the maximum punishment from two years to five years.⁴⁷⁶ This quantity distinction does not apply to cocaine, heroine, methamphetamines, or a host of other narcotics.⁴⁷⁷ Similarly, larceny⁴⁷⁸ 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.⁴⁷⁹

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.⁴⁸⁰ Since sentencing guidelines went into effect, the federal prison population has increased by more than three fold.⁴⁸¹ This population increase is due, in large part, to a combination of an increase in severity of sentences and the elimination of parole.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.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.⁴⁸⁴ This distinction

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

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).

⁴⁸² See Stith, *supra* note 136, at 1254-1270.

⁴⁸³ See Whiteside, *supra* note 430, at 1581-1582.

⁴⁸⁴ See USSG, *supra* note 7, §2D1.1.

raises particular criticism on the issue of race.⁴⁸⁵ Critics argue that crack cocaine is most prevalent amongst minorities while powder cocaine is most prevalent in Caucasian society.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.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

⁴⁸⁵ See Whiteside, *supra* note 430, at 1582.

⁴⁸⁶ *Id.*

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.⁴⁸⁸ 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.⁴⁸⁹

The next criticism leveled against the federal sentencing guidelines is that the guidelines are too rigid and formalistic.⁴⁹⁰ Critics argue that rigid sentencing guidelines reduce to almost zero the discretion that the trial judge has when fashioning a sentence.⁴⁹¹ They complain that the rigid nature of the federal sentencing guidelines make departure

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.

⁴⁹⁶ Frank S. Gilbert, *The Probation Officer's Perception of the Allocation of Discretion*, 4 FED. SENTENCING REP. 109, 109 (1991); Ellsworth A. Van Graafeiland, *Some Thoughts on the Sentencing Reform Act of 1984*, 31 VILL. L. REV. 1291, 1293-94 (1986).

aggravation before determining the sentence.⁴⁹⁷ 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.⁴⁹⁸ 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.⁴⁹⁹ 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.⁵⁰⁰ The probation officer provides the federal trial judge a proposed sentencing range.⁵⁰¹

The probation officer is considered the sentencing guideline expert.⁵⁰² The pre-sentencing report normally becomes the focus of the sentencing hearing.⁵⁰³ Federal trial judges often accept the probation officers report as gospel.⁵⁰⁴ The result is that the probation officer may determine the sentencing range applied to the defendant.⁵⁰⁵

Critics complain that probation officer's have become a third adversary in the courtroom.⁵⁰⁶ They argue that probation

⁴⁹⁹ See Sith, *supra* note 136, at 1257-1258.

⁵⁰⁰ *Id.*

⁵⁰¹ *Id.* at 1257.

⁵⁰² *Id.* at 1258.

⁵⁰³ *Id.* at 1259.

⁵⁰⁴ See Jack B. Weinstein, *A Trial Judges Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 364. See also Julian Abele Cook Jr., *The Changing Role of the Probation Officer in the Federal Court*, 4 FED SENTENCING REP. 112 (1991) (quoted in Sith *supra* note 136, at 1258).

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.

officer's act as criminal investigators.⁵⁰⁷ The focus of the investigation is the application of the sentencing guidelines to the offense. Neither the probation officer nor the sentencing guidelines focus on the character traits of the defendant.⁵⁰⁸

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.⁵⁰⁹ Defense counsel proffer this advice out of fear that the probation officer will discover facts that will operate to increase the offense level.⁵¹⁰ The result is that the probation officer may have a one-sided view of the offense.⁵¹¹ The probation officer's view is one-sided because the defense does not participate.⁵¹² This one-sided view may result in a faulty pre-sentencing report. If the trial judge

⁵⁰⁷ *Id.* at 1257-1258, (quoting PROBATION DIV., ADMIN. OFFICE OF THE U.S. COURTS, PUB. NO. 107, PRE-SENTENCE INVESTIGATION REPORTS UNDER THE SENTENCING REFORM ACT OF 1984, 3).

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

⁵⁰⁹ See Michael Piotrowski, *The Enhanced Role of the Probation Officer in the Sentencing Process*, 4 FED. SENTENCING REP. 96, 97 (1991).

⁵¹⁰ *Id.*

⁵¹¹ *Id.*

⁵¹² *Id.*

relies upon a faulty pre-sentencing report, the trial judge may misapply the sentencing guidelines.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.⁵¹⁴

The adversarial process allows the accused to present a host of sentencing evidence.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.

⁵¹³ See Sith, *supra* note 136, at 1262-1263.

⁵¹⁴ See discussion *supra* pp. 14-27.

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.⁵¹⁶ The critics claim that sentencing guidelines all but eliminate judicial sentencing discretion.⁵¹⁷ They argue that the current federal system replaces judicial sentencing discretion with prosecutorial sentencing discretion.⁵¹⁸ Prosecutors can exercise sentencing discretion by manipulation the sentencing guidelines to prosecute similar criminal conduct in a disparate fashion.⁵¹⁹ 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

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.

account.⁵²⁰ The prosecution has the option of charging the offender with either bank fraud or money laundering.⁵²¹ Bank fraud carries a base offense level of seventeen while money laundering carries a base offense level of twenty-three.⁵²² 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.⁵²³ 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.⁵²⁴

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.⁵²⁵ This final criticism embraces many of the issues discussed in the previous six criticisms.⁵²⁶

The federal sentencing guidelines consider only three of the defendant's character traits.⁵²⁷ These traits are, (1) criminal history, (2) dependence upon criminal activity for a livelihood, and (3) acceptance of responsibility for his wrongdoing.⁵²⁸ Critics of the federal guidelines argue that this narrow view does not adequately address the many character traits that factor into a sentence.⁵²⁹ 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.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.⁵³¹ Additionally, the accused may present personal background and character evidence in an attempt to secure a lenient sentence.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

⁵³⁰ See USSG, *supra* note 7, §5H1.1-5H1.6; 5H1.9-5H1.12. See also Ogletree, *supra* note 145, at 1951-1953.

⁵³¹ MCM, *supra* note 15, R.C.M. 1001.

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.⁵³³ 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.⁵³⁴

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

⁵³⁴ 10 U.S.C.S. §§ 877-934 (LEXIS 2000).

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 Chief⁵³⁶ 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

⁵³⁵ 10 U.S.C.S. § 856.

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-marital 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. 1002⁵⁴⁰,

(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.

⁵⁴⁰ Proposed R.C.M. 1002 is a combination of the Rules for Courts-Martial and §3D1 of the Federal Sentencing Guidelines Manual.

(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.⁵⁴¹ 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.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.⁵⁴³ Congress has directed the President, when practicable, to adopt the practices of the federal criminal justice system.⁵⁴⁴

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.

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)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

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.

	<i>CATEGORY I</i>	<i>CATEGORY II</i>	<i>CATEGORY III</i>	<i>CATEGORY IV</i>	<i>CATEGORY V</i>
ART. 87					
Class. 1	0-5	6-9	10-17	18-20	21-24
Class. 2	0-3	4-5	6-8	9-10	11-12
ART. 89	0-3	4-5	6-8	9-10	11-12
ART. 90					
Class. 1	0-1	18-23	24-36	37-47	48-120
Class. 2	0-2	3-5	6-18	19-35	36-60
Class. 3	0-11	12-23	24-59	60-179	180-death
ART. 111					
Class. 1	0-3	0-6	3-6	7-12	13-18
Class. 2	0-1	0-3	4-5	5-6	5-6
ART. 112a					
Class. 1(a)	0-5	6-11	12-23	24-47	48-60
Class. 1(b)	0-3	4-5	6-9	10-17	18-24
Class. 2(a)	0-11	12-23	24-48	49-119	120-180
Class. 2(b)	0-5	6-11	12-23	24-47	48-60
ART. 116					
Class.1	0-6	7-12	13-24	25-36	37-120
Class.2	0-1	0-3	4-5	5-6	5-6
ART. 118					
Class. 1	Life-death	Life-death	Life-death	Life-death	Life-death
Class. 2	0-84	85-131	132-168	169-240	241-life
Class. 3	0-84	85-131	132-168	169-240	241-life
Class. 4	Life-death	Life-death	Life-death	Life-death	Life-death
ART. 119					
Class. 1	0-48 mos.	48-56 mos.	57-71 mos.	72-83 mos.	84-180
Class. 2	0-12 mos.	13-20 mos.	21-40 mos.	41-72 mos.	mos. 73-120 mos.
ART. 120					
Class. 1	0-35	36-69	70-87	88-240	241-Death
Class. 2	0-59	60-86	87-108	109-120	121-240
Class. 3	0-47	48-79	80-135	136-360	361-Life
ART. 122					
Class. 1	0-47	48-62	63-78	79-96	97-180
Class. 2	0-17	18-32	33-41	42-60	61-120
ART. 123					
ART 123a					
Class.1(a)	0-1	0-2	2-3	3-4	5-6
Class.1(b)	0-5	6-11	12-20	21-36	37-60

Class. 2	0-1	0-2	2-3	3-4	5-6
ART. 124	0-19	20-22	23-25	26-28	29-31
ART. 125					
Class. 1	0-35	36-69	70-87	88-240	241-Life
Class. 2	0-59	60-86	87-108	109-120	121-240
Class. 3	0-47	48-79	80-135	136-360	361-Life
Class. 4	0-6	0-12	6-18	19-24	25-60
ART. 126					
Class. 1	0-2	3-4	5-6	7-8	9-10
Class. 2(a)	0-7	8-5	6-8	9-11	12-17
Class. 2(b)	0-11	12-17	18-21	22-36	37-60
ART. 127	0-5	6-17	18-26	27-36	37-36
ART. 128					
Class. 1(a)	0-1	0-2	1-2	2-3	2-3
Class. 1(b)	0-5	6-11	12-17	18-23	24-36
Class. 2	0-2	2-3	3-5	4-6	5-6
Class. 3	0-6	0-12	12-17	18-24	24-36
Class. 4	0-3	0-5	6-8	9-11	12-18
Class. 5	0-1	0-3	0-4	1-5	1-5-6
Class. 6	0-7	8-11	12-17	18-23	24-36
Class. 7	0-6	7-11	12-16	17-19	20-24
Class. 8(a)	0-35	36-70	71-91	92-160	161-36
Class. 8(b)	0-11	12-17	18-23	24-29	30-36
Class. 9(a)	0-59	60-77	78-97	98-110	111-120
Class. 9(b)	0-11	12-17	18-23	24-29	30-60
ART. 129	0-11	12-23	24-30	31-60	61-120
ART. 130	0-5	6-9	10-16	17-36	37-60
ART. 131	0-2	2-5	6-9	10-16	17-60
ART. 134 171	0-1	0-2	2-3	4-5	5-6
ART. 134 187	0-17	18-24	25-36	37-48	49-84