THE COMMAND ACCUSES AND THE COURT DECIDES: SELF-EXECUTING JUDGMENTS AND THE CONVENING AUTHORITY'S ROLE IN JUDICIAL SENTENCING

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I. A New Procedure for Sentencing

This paper proposes a change in the authority of commanders in relation to military courts. The change is intended to free convening authorities to speak out against crime and disobedience. Currently, commanders make prosecutorial decisions to refer cases and also make judicial decisions in the review and approval of court-martial results. The need to act neutrally throughout the court-martial process reduces commanders' substantive and procedural input into criminal proceedings while saddling them with a significant burden of review.[1] The historical justifications for the split role of the commander have been overcome by the development of a robust and independent trial judiciary. If commanders are[2] moved firmly into a prosecutorial role whereby they both select charges and recommend sentences, they will be able to deter criminal behavior more effectively. Vesting the power to recommend a sentence with commanders, requires shifting the final determination of sentence into the hands of the independent military trial judiciary.[3] The differences in procedure are imagined in the hypothetical that follows.

In a courtroom on Fort Campbell, a trial is underway for sexual assault. The members are determining the guilt or innocence of a Soldier. The military judge states, "Specialist Johnson, while the members are

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[1] *See infra* pp. 14–16.

[2] *See infra* p. 30.

[3] *See infra* pp. 40–41.

deliberating, I wish to address some matters with you. If the members return with an acquittal, the court will be adjourned and you will be free to go about your business. However, if you are convicted of any offense, we will conduct a presentencing hearing. Under Rule for Courts-Martial (RCM) 1001, the convening authority who referred this case has the right to submit a Commander's Disciplinary Recommendation. The government previously gave notice of their intention to present a commander's disciplinary recommendation. Once you are presented with the recommendation, you have five days to request any new witnesses. Counsel for both sides indicated in an RCM 802 session that a presentencing date in three weeks on November 18 will provide adequate time for all parties.[4]

After the court finds Specialist Johnson guilty of sexual assault, the Staff Judge Advocate (SJA) presents the convening authority with a concise summary of the offense. The Commanding General then provides a written disciplinary recommendation outlining the nature of the offense and specific sentence he finds appropriate to the severity of the offense and needs of the command. This is the last time the Commanding General will act on the case. The trial counsel presents the recommendation in court on November 18. After considering the recommendation and all other evidence, the judge announces a sentence including confinement and a punitive discharge. Specialist Johnson is transferred to Army Corrections Command. Save for the punitive discharge, the sentence is self-executing. The military judge would prepare the record of trial and transfer it to the superior court, in this case, the Army Court of Criminal Appeals.

Following Specialist Johnson's trial, the commander finds himself briefing new incoming Soldiers at Fort Campbell. He speaks frankly about the need for mutual respect and appropriate behavior both at work and play. He condemns sexual assault. He tells the Soldiers, "Anyone accused will receive a fair shake, but if the court finds you guilty, I will recommend the harshest of penalties. Sexual assault is my number one disciplinary priority. You will regulate your behavior or find yourself subject to my sentencing guidelines." Under a revised Article 37, UCMJ,[5] his discussion about sentencing and his intentions concerning his

[4] The commander's disciplinary recommendation is command's formal position on the appropriate sentence following conviction.

[5] UCMJ art. 37 (2016), *See also* Appendix A.

recommendation are perfectly legal and perfectly clear to those in his command.

The Army and the Department of Defense have spent years fighting sexual assault with mixed results.[6] Unfortunately, the solutions proposed so far largely involve diminishing the role of convening authorities. The solution is empowering commanders. Commanders should have more involvement in the process of sentencing. Currently, Article 37 of the UCMJ bars direct command involvement in the justice process whenever the involvement is not authorized in the rules.[7] Many members of Congress believe military commanders are not serious about eliminating sexual assault.[8] These members fail to appreciate the structure of the law that prevents commanders from influencing outcomes. While Congress is willing to curtail a military career for the lenient execution of post-trial duties under the UCMJ,[9] Congress has not empowered commanders to appropriately influence trial judgments. If Congress wants to hold commanders accountable for indiscipline and criminal activity within commands, commanders must first possess the tools to accomplish disciplinary control of their commands.

Congress should provide the legal instruments necessary for success. A convening authority with prosecutorial responsibility should be able to explain his disciplinary priorities to his formation with the same direct language used to describe the command's positions on combat effectiveness, safety, or training. In addition, a convening authority should

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[6] Mark Thompson, *Military's War on Sexual Assault Proves Slow Going*, TIME MAGAZINE (Dec. 4, 2014), http://time.com/3618348/pentagon-sexual-assault-military (explaining the apparent increases in sexual misconduct from 2012 through 2014 despite numerous reforms).

[7] UCMJ art. 37 (2016).

[8] Robert Draper, *The Military's Rough Justice on Sexual Assault*, THE NEW YORK TIMES MAGAZINE (Nov. 26, 2014), http://nyti.ms/1tjeRSi (discussing lost faith in commanders' willingness to prosecute crime and quoting Sen. Gillibrand as saying, "For the past 25 years, going back to when Dick Cheney was defense secretary, we've had the military telling us that there's zero tolerance for sexual assault . . . [a]nd all we've seen is zero accountability.").

[9] Craig Whitlock, *General's promotion blocked over her dismissal of sex-assault verdict*, WASHINGTON POST (May 6, 2013), https://www.washingtonpost.com/world/national-security/generals-promotion-blocked-over-her-dismissal-of-sex-assaultverdict/2013/05/06/ef853f8c-b64c-11e2-bd07-b6e0e6152528_story.html (reporting that Lieutenant General Susan Helms' promotion was held up by Senator Claire McCaskill after she exercised her authority to set aside a verdict under UCMJ Article 60, which was the second time in recent history a General's promotion has been held up over an authorized exercise of post-trial judicial action.).

be able to recommend a sentence. Discipline in the Army will improve if Congress and the President impose a structured system allowing each convening authority to recommend specific sentences and outline his sentencing priorities. It is time to completely remove the convening authority from a judicial role and grant him stronger prosecutorial powers.

II. History of the Judicialization of Military Justice

Understanding the importance of command control and the impact of the loss of command input in court sentencing requires an appreciation of the many historical alterations to American military justice. Overlapping reforms enacted throughout the latter half of the 20th century created a bewildering set of coexisting prosecutorial and judicial responsibilities in a single individual, the convening authority. To address tensions in military justice between the disciplinary needs of the organization and the individual rights of the servicemember, Congress iteratively increased judicialization in the 20th Century.[10] Prior to the 20th Century, American military justice grew the powers of the command, culminating in the 1916 Articles of War.[11] The experiences of the World Wars, however, brought fundamental changes.

A. Beginnings of American Military Justice

The Continental Congress passed the Articles of War on June 30, 1775.[12] These Articles were taken straight from the British Articles of War, which in turn mirrored ancient Roman military legal codes.[13] In the

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[10] General William Westmoreland & Major General George Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 3 HARV.. J. L. & PUB. POL'Y 1, 60 (1980).

[11] JOHN LINDLEY, A SOLDIER IS ALSO A CITIZEN: THE CONTROVERSY OVER MILITARY JUSTICE, 1917–1920, at 69 (1990). The effect of the changes in 1916 was to give significant new statutory authority to the concept of the military law not as a system of justice akin to a court, but as an instrumentality of the executive. *Id*.

[12] THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, THE BACKGROUND OF THE UNIFORM CODE OF MILITARY JUSTICE 2 (1959), https://www.loc.gov/rr/frd/Military_Law/pdf/background-UCMJ.pdf [hereinafter UCMJ BACKGROUND].

[13] John Adams, *Adams Papers* (Aug. 19, 1776). Adams encouraged Congress to adopt the Articles of War, arguing,

ancient Roman system, the commander was firmly in charge of not only the process but also the disciplinary outcome.[14] In the first Articles of War, commanders in the field selected the court members, the charges, and the location of trial.[15] The verdicts were subject to the approval of the commander and there were no requirements for qualified legal personnel or provisions for delay in the interests of justice.[16] From 1775 until 1920, the Articles of War allowed U.S. military commanders to send acquittals back for retrial.[17] Likewise, sentences could be returned for review and possible upward revision.[18] All of these early features placed discipline first.[19] George Washington wrote, "Discipline is the soul of an army. It makes small numbers formidable; procures success to the weak, and

> There was extant one System of Articles of War, which had carried two Empires to the head of Mankind, the Roman And the British: for the British Articles of War were only a litteral [*sic*] Translation of the Roman: it would be in vain for Us to seek, in our own Inventions or the Records of Warlike nations for a more compleat [*sic*] System of military discipline: it was an Observation founded in undoubted facts that the Prosperity of Nations had been in proportion to the discipline of their forces by Sea and Land: I was therefore for reporting the British Articles of War, totidem Verbis.

Id.

[14] C.E. BRAND, ROMAN MILITARY LAW 59 (1968). The iron discipline mentality of Roman commanders is epitomized by the story of Manlius Torquatus and his son Titus Manlius told by Livy, Dionysius, Cassius Dio, and other Roman historians. Titus fell under his consul father's command in a legion. The young Manlius was sent with cavalry to reconnoiter the enemy. He had strict orders not to engage. He encountered a barbarian chieftain who challenged him to single combat. Manlius killed the barbarian. Upon hearing the news, his father turned away from his son and sounded the assembly. Declaring to his legion his love for his son and his admiration of his son's bravery, he nevertheless told his legionnaires the authority of consul required imposition of the law. It would either be established by the execution of his son or forever abrogated by his impunity. He then proceeded to personally behead the younger Manlius.

[15] Articles of War (June, 30, 1775), in 2 JOURNALS OF THE CONTINENTAL CONGRESS: 1774-1789, at 111 (Worthington Chauncey Ford ed., 1905), https://memory.loc.gov/ammem/amlaw/lwjc.html.

[16] *Id.*

[17] MANUAL FOR COURTS-MARTIAL, page VI (1921).

[18] *Id.*

[19] LINDLEY, *supra* note 11, at 106. As late as 1918, the office in charge of military justice matters in the War Department was called the Military Discipline Division vice the Military Justice Division. Further, convening authorities with the American Expeditionary Force in France where still making significant use of their authority to reject acquittals. During their stay in France, American General Court-Martial convening authorities returned 149 acquittals for renewed proceedings.

esteem to all. . . ."[20] He helped draft the Articles of War,[21] and he used them to keep the Continental Army disciplined through the cold winters of the revolution.

B. 19th Century American Military Justice

Throughout the 19th Century, the authority of a commander in the field was not subject to judicial oversight.[22] The Articles of War provided for no courts of review or any form of judicial scrutiny. The Articles predated the Constitution and were not accompanied by debate.[23] The founders did not draft Federalist Papers of war debating the need to balance executive and judicial powers in courts-martial authority. In fact, the only consideration of the servicemember's rights in the Constitution is a denial of rights.[24] In the nineteenth century, the Supreme Court ultimately determined the courts of the armed forces were not even courts but mere executive instruments.[25] As such, they were not part of Article III powers and only subject to the level of review provided by Congress. This legal view flows from a theory concerning the necessity of unity of control in an Army. General William T. Sherman testified to Congress in 1879:

> The object of the civil law is to secure to every human being in a community all the liberty, security and happiness possible, consistent with the safety of all. The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the nation.

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[20] Letter from George Washington, to Captains of Companies, General Instructions (July 29, 1757), http://founders.archives.gov/documents/Washington/02-04-02-0223.
[21] UCMJ BACKGROUND, *supra* note 12, at 2.
[22] Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857).
[23] UCMJ BACKGROUND, *supra* note 12, at 2.
[24] U.S. CONST. amend. V (denying members of the armed forces a right to jury trial).
[25] Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857). The case involved a seaman convicted of attempting to desert who challenged his conviction in a habeas writ. The Court ruled a court-martial need only follow the statute governing its procedure and would not be subject to further review under Article III as the court was an executive exercise pursuant to statute and not a regular court.

> These objects are as wide apart as the poles, and each requires its own separate system of laws, statute and common. An army is a collection of armed men obliged to obey one man. Every enactment, every change of rules which impairs the principle weakens the army, impairs its values, and defeats the very object of its existence. All the traditions of civil lawyers are antagonistic to this vital principle, and military men must meet them on the threshold of discussion, else armies will become demoralized by even grafting on our code their deductions from civil practice.[26]

The national experience of civil war reinforced General Sherman's understanding that the fate of the nation can hinge on the performance of the Army both in the field and in occupation.[27] For civil justice to exist, there must be a government with the authority to decide facts and enforce the law. The military exists to safeguard the existence of the government. This view ultimately elevates the interest of the command over the individual. It was a view widely reflected in military legal theory and practice in nineteenth century America.[28]

C. Change Takes Root

The First World War marked the first rejection of the usages and theories behind traditional military justice. The public did not like stories of severe, unfair, and arbitrary proceedings that were coming back from servicemembers and the press.[29] The first serious advocate for change came from inside the War Department. As Assistant Judge Advocate General, General Samuel T. Ansell became aware of extreme abuses of command authority and fought a battle with Judge Advocate General

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[26] Letter to General W. S. Hancock, President of Military Serv. Inst., from W.T. Sherman (Dec. 9, 1879), *reprinted in* WILLIAM T. SHERMAN, MILITARY LAW 130 (1880) (quoted in David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1, 21 (2013).

[27] *See* GREGORY P. DOWNS, AFTER APPOMATTOX: MILITARY OCCUPATION AND THE ENDS OF WAR (2015), 249.

[28] *See generally* WILLIAM WINTHROP, MILITARY LAW (1886).

[29] Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3, 15 (1970).

Enoch Crowder over the right of review and correction of error.[30] Nevertheless, Judge Advocate General Crowder prevented him from asserting a right to review records.[31] Then Brigadier General Ansell took his indictment of military justice directly to Congress.[32] He proposed clearly defining elements of crimes,[33] the creation of mandatory legal

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[30] *Id*. (noting shocking examples of severe sentences, including the summary execution of 13 black Soldiers, 40 years at hard labor for 20 days' absence without leave and escape from confinement, 30 years for insulting a non-commissioned officer, and 10 years' confinement for unlawful possession of a pass). *See* John S. Cooke, *Introduction: Fiftieth Anniversary of the UCMJ Symposium Edition*, 165 MIL. L. REV. 1, 6 (2000).

[31] LINDLEY, *supra* note 11, at 74. Brigadier General Ansell was acting as the Judge Advocate General because Major General Crowder was focused on his additional duties as the Provost Marshall General. During this time over a hundred Soldiers were court-martialed for mutiny in Houston, Texas. Many of these African-American Soldiers were executed with no outside review of their record. In addition a number of non-commissioned officers were court-martialed at Fort Bliss, Texas, for mutiny. A review of the Bliss record revealed the charge of mutiny was supported by an order to drill while under arrest. The order to drill violated a standing Army regulation that prohibited arrested individuals from drilling. Brigadier General Ansell concluded there was no basis for the finding of guilt in the facts. He argued to Secretary of War Newton Baker, urging him to recognize a general right of review and revision for the Office of the Judge Advocate. Major General Crowder intervened and wrote a counter-memo to the Secretary. The head of the Military Discipline Division initially supported the memo of Brigadier General Ansell but changed his mind after Major General Crowder became involved. The Secretary attempted to resolve the dispute by granting clemency as to the sentence under his own authority. Brigadier General Ansell believed very strongly that a legal system administering punishments must be accountable to the law and subject to correction on the grounds of legal error alone. Brigadier General Ansell believed any system not subject to correction on the grounds of legal error was unjust. He therefore continued his argument on the need for additional authority and created a rift within the Office of the Judge Advocate. *Id.*

[32] *Trials by Courts-Martial: Hearings on S. 5320 Before the Senate Comm. On Military Affairs*, 65th Cong. 48-52 (1919) (statement of Brig. Gen. Samuel T. Ansell):

> Army officers, acting on a mistaken sense of loyalty and zeal, are accustomed to say, somewhat invidiously, that "courts-martial are the fairest courts in the world." The public has never shared that view . . . . This is not a pleasant duty for me to perform. I realize, if I may be permitted to say it, that I am arraigning the institution to which I belong, not the institution, but the system and practices under it, an institution which I love and want to serve honestly and faithfully always. Yet an institution has got to be based on justice, and it has got to do justice if it is going to survive, and if it is going to merit the confidence and approval of the American people. Indeed, if our Army is going to be efficient, justice has to be done within it, whether in war or in peace.

[33] Sherman, *supra* note 29, at 19.

advice in referral,[34] mandatory panel sizes with judicial selection of panel members,[35] enlisted panels for enlisted members,[36] unanimous verdicts for death sentences,[37] the use of qualified attorneys as judges and defense counsel, use of the federal rules of evidence, and finally, substituting commander approval of sentences with automatic federal court review of sentences in excess of six months or involving a discharge.[38] His vision encompassed all the elements of modern military justice. While Congress did not adopt most of his proposals, in 1920 Congress did prohibit the practice of returning acquittals to courts for reconsideration and returning sentences for possible upward revision.[39] Also, Congress required unanimous verdicts for death cases.[40] For the first time, the Articles of War expressed a preference for the use of non-judicial punishment rather than court-martial.[41] Pre-trial investigation improved as the accused was given a right to cross-examination.[42] Legal advice prior to post-trial action became mandatory.[43] For the first time in American history, Congress and the War Department limited command authority over courts-martial in favor of procedural rights for Soldiers. The reforms would be severely tested in the Second World War.

D. The Uniform Code of Military Justice

1. Motivation for Implementation—The Second World War

When large numbers of citizens were called up to service in WWII, they encountered a system of justice very unfamiliar to them.[44] During

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[34] *Id.* at 20.
[35] *Id*. at 21.
[36] *Id*.
[37] *Id.*
[38] *Id*. at 22–24.
[39] *Id*. at 27.
[40] *Id*. at 26.
[41] UCMJ BACKGROUND, *supra* note 12 at 2.
[42] *Id.*
[43] *Id.* at 5.
[44] Sherman, *supra* note 29, at 29 ("The emotions suppressed during the long, tense period of global warfare were now released by peace, and erupted into a tornado-like explosion of violent feelings, abusive criticism of the military, and aggressive pressures for reforms in the court-martial system." (quoting Rear Admiral Robert White)).

the war, 1.7 million courts-martial occurred.[45] Courts again handed down severe sentences for apparently minor crimes.[46] Command control of the outcome was a central complaint.[47] Although Congress eliminated the ability to return a verdict for revision following World War I, commanders found other methods to influence the disciplinary environment in their units. Through public exhortation and direct influence, many convening authorities convinced subordinates to deliver heavy sentences.[48] These sentences in turn were whittled down to suit the commander's purposes through his power to take action on the court-martial results.[49] In addition, there were other abuses, such as the assignment of blatantly unqualified personnel as defense counsel.[50] The congressional record concerning the need for reform spans hundreds of pages and covers multiple sessions.[51] Many in Congress wanted to remove all inputs of the commander except the selection of charges.[52]

2. The Reform

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[45] *Id.* at 28 (citing Letter from New York Bar Association Committee on Military Justice, Jan. 29, 1949, at 5, in VI papers of Professor Edmund Morgan on the UCMJ, on file in Treasure Room, Harvard Law School Library).

[46] *Id.*

[47] George S. Prugh, *Observations on the UCMJ: 1954 to 2000*, 165 MIL. L. REV. 21, 22 (2000).

[48] 2 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 15-80.00 (4th ed. 2015):

> The history of military justice prior to the Uniform Code of Military Justice is filled with examples of court members attempting to comply with the real or perceived desires of the convening authority (their commander) as to findings or sentence or both. During World War II, it was customary in many commands to sentence the accused to the maximum to permit the convening authority to do as he wished with the offender.

[49] *Id.*

[50] Beets v. Hunter, 75 F. Supp. 825, 826 (D. Kan. 1948) (*Habeas* relief granted following conviction at court-martial wherein defense counsel announced on record he was unqualified, unprepared, and not the choice of the accused).

[51] U.S. DEPT. OF THE NAVY, CONGRESSIONAL FLOOR DEBATE ON THE UNIFORM CODE OF MILITARY JUSTICE (1950), https://www.loc.gov/rr/frd/Military_Law/Cong-floor-debate-on-UCMJ.html.

[52] Sherman, *supra* note 29, at 29.

The public outcry and congressional record overwhelmed the institutional resistance to reform and resulted in the Uniform Code of Military Justice of 1950.[53] Dwight D. Eisenhower and many others testified to Congress in support of the Articles of War.[54] Eisenhower expressed the same basic view as Generals Washington and Sherman.[55] All three agreed courts-martial should serve first and foremost the disciplinary needs of the command. As discussed, Generals Washington and Sherman could influence outcomes by returning unsuitable sentences for upward revision. General Eisenhower relied on harsh sentences from the courts and the judicious use of clemency power.[56] Congress enacted Article 37 of the UCMJ to prevent commanders from requesting high sentences through any informal means. Outside of court, the accused was given important rights against self-incrimination.[57] Congress protected the legal independence of judge advocates by placing them in a separate system of promotion and subjecting them to oversight of their respective Judge Advocate Generals.[58] However, Congress maintained a commander's right to select panel members and continued the practice of sentencing by command-selected members.[59]

3. Further Development of the UCMJ

Continued interference with panel sentencing discretion led to judicial action.[60] In *United States v. DuBay*, the Court of Military Review created

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[53] *Id.*

[54] H.R. REP. NO. 80-1034 (1947) (noting General Eisenhower's opposition to any reductions in command authority).

[55] STAFF OF S. COMM. ON ARMED SERVICES, COURTS MARTIAL LEGISLATION 5 (Comm. Print 1948) ("General Eisenhower attempted to present the problem from the field commander's point of view. . . . He was attempting to show how the military courts charged with the responsibility of trying soldiers in the battle areas were responsible only secondarily for incarcerating felons, and primarily for maintaining the morale of the men who fought. If these military courts had . . . imposed extremely light punishment or suspended sentences, General Eisenhower's expedition might have become an undisciplined mob instead of the fighting force with high morale which eventually defeated the Germans.").

[56] *Id.*

[57] UCMJ art. 31 (2016).

[58] UCMJ art. 6 (2016).

[59] UCMJ art. 25 (1950).

[60] *See, e.g.*, United States v. DuBay, 37 C.M.R. 411 (C.M.A. 1967). *DuBay* involved pervasive use of *ex parte* command influence, which required detailed factual review

special hearings to revisit widespread court-packing allegations at a particular post.[61] Since the *DuBay* decision, the courts of appeal have been willing and able to revisit facts surrounding court-packing and to undo settled decisions of military courts. On the heels of *DuBay*, the 1968 Congress passed additional reforms establishing an independent judge in all general courts-martial,[62] reinforcing the courts of review as courts of appeals, and allowing servicemembers to elect trial by judge alone.[63] Since 1968, judges are appointed by the service branch Judge Advocate General and rated by no one connected to the convening of a court-martial.[64] Congress also expanded Article 37, UCMJ, to prohibit any reference to judicial performance in an evaluation report of a servicemember.[65] For the first time, an accused could opt out of his commanding general's panel by choosing the Judge Advocate General's military judge.[66] By 1972, the use of special courts-martial fell by half while the use of summary and general courts-martial remained steady.[67] Given the decline in discipline in the Army during this period,[68] it is clear many commands ultimately decided not to use the courts as a tool to further discipline in the ranks. Because the controls on court-packing are very tight and other means of influencing a panel are illegal, the commander has little control over sentencing. The commander still selects charges, creates a forum, and grants clemency, but his input into the court itself is highly diffused and closely checked.

The arc of the development in military justice created a system that insulates the fact-finder in criminal cases from the commander and thereby maintains the impartiality required of a civilian criminal court.[69] The system heavily limits a commander's disciplinary input into the court-

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years after the relevant courts-martial. This case is more famous for the fact-finding hearings it created, now referred to as *DuBay* hearings.

[61] *Id*.

[62] UCMJ art. 27 (2016).

[63] UCMJ art. 16 (2016).

[64] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 104 (2016) [hereinafter MCM].

[65] The Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968).

[66] *Id.* (allowing accused to select a military judge).

[67] Westmoreland & Prugh, *supra* note 10, at 92. Major General Prugh notes that the period from 1969 to 1972 saw a widespread decrease in discipline and morale. *Id*.

[68] *Id.*

[69] *See* Irvin v. Dowd, 366 U.S. 717, 722 (1960) ("[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors.").

martial process. Her ability to select the panel is controlled[70] and he cannot force an accused to accept trial by his panel.[71] His ability to speak on a specific sentence is non-existent.[72] His ability to speak on the severity of a type of crime is subject to control; misuse of the authority can lead to dismissal of charges.[73] The piecemeal nature of the reforms left the military with a procedurally complex post-trial system with interlocking and overlapping protections. These post-trial protections were created for a system that routinely gave maximum punishments at court and relied on the convening authority for determination of the actual sentence.[74] Military justice has not worked like this since before 1968. Recent developments have increased the disconnect between post-trial convening authority responsibility and authority. The 2014 National Defense Authorization Act (NDAA) severely limited a convening authority's ability to mitigate the results of a court-martial.[75] The entire method of command input is ripe for restructuring.

III. Restoration of Command Influence

If commanders had a more direct and precise role in the sentencing process, they could use it to reduce crime and improve discipline in both peace and wartime. In order to deter crime, convening authorities must be able to make public comments on the relative severity of offenses in general and to make specific sentencing recommendations in individual cases. Efficiency can be maintained by substituting the post-trial action with the sentencing recommendation. Relieved of post-trial judicial responsibility, the commander would no longer be bound to impartiality as it relates to sentencing. This reform will restore the commander's historic role in framing both the high and low sides of the sentencing range.[76]

A. Impact on the Law

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[70] United States v. Redmon 33 M.J. 679 (A.C.M.R. 1991).
[71] UCMJ art. 16 (2016).
[72] GILLIGAN & LEDERER, *supra*, note 48.
[73] United States v. Biagase, 50 M.J. 143 (C.A.A.F. 1999).
[74] GILLIGAN & LEDERER, *supra*, note 48.
[75] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013) (making changes to RCM 1107 that largely removed a convening authority's ability to modify the sentence and findings in serious cases) [hereinafter NDAA FY 2014].
[76] *See supra* Section II.

To place the commander in a position to recommend a sentence, Articles 16, 37, 56a, 57, 57a, 58a, and 60 would require modification. Modifications would be required to RCMs 705 (Pretrial agreements), 903 (Accused's elections on composition of court-martial), 1001 (Presentencing procedure), 1003 (Punishments), 1005 (Instructions on sentence), 1008 (Impeachment of sentence), 1009 (Reconsideration of sentence), 1010 (Notice concerning post-trial and appellate rights), 1101 (Report of result of trial; post-trial restraint; deferment of confinement; forfeitures and reduction in grade; waiver of Article 58b forfeitures), 1102 (Post-trial sessions), 1104 (Records of trial, Authentication; service; loss; correction; forwarding), 1105 (Matters submitted by the accused), 1106 (Recommendation of the staff judge advocate or legal officer), 1107 (Action by the convening authority), 1108 (Suspension of execution of sentence; remission), and 1109 (Vacation of suspension of sentence).

Modification of the underlying articles would be tailored to maintain the judicial independence of the court while relieving the commander of judicial obligations of impartiality. The court is a forum for justice. The commander is a party alleging wrongdoing. This is not a neutral position. The commander should be moved out of the role of directly administering justice through post-trial action and into a more natural role of making allegations and requesting redress. If the commander retains any responsibility for reviewing and approving formal courts, he cannot act (or appear to act) partially prior to action.[77] The convening authority's new role would be akin to a public prosecutor. Public prosecutors are expected to use prosecutorial discretion and expected not to keep the use of the discretion or their philosophy toward justice a secret. They can publically urge harder time for certain classes of crime and make individual sentencing recommendations in court. What prosecutors cannot do is suggest an individual accused is guilty prior to trial.[78]

The first step is providing a form for the commander's disciplinary recommendation. The proposed form for the commander's disciplinary recommendation[79] is modeled on the new RCM 1001A,[80] which provides

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[77] United States v. Davis, 58 M.J. 100, 103 (C.A.A.F. 2003) (noting that an inflexible disposition on punishment or clemency generally disqualifies a convening authority from taking action on the case).

[78] MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM.BAR ASS'N 1983).

[79] Appendix B, Model RCM 1001B.

[80] MCM, *supra* note 64, R.C.M. 1001A.

a victim the ability to inform the court's decision without making himself a witness at trial. The convening authority's recommendation will only include a summary of the offenses and a specific recommended sentence. Preparing the recommendation will require Staff Judge Advocate advice. Like the pretrial referral advice, the judge advocate and convening authority are not limited in their consideration of matters.[81] A convening authority could poll officers or her enlisted advisor, review the service record of the accused, or read a victim's statement. The only information that must be considered is the offense or offenses. A judge advocate and convening authority might also consider military exigencies such as untestable drug abuse in a combat zone, the fragging of officers, or the loss of local support due to crimes against civilians.[82] The proposed form is purposely vague to avoid entangling the convening authority in error. The form does not allow argument or narrative because a narrative might make the convening authority a witness. Language excluding the convening authority as a witness is taken from the new RCM 1001A.

The procedure to admit the recommendation requires the trial counsel to serve the convicted servicemember with a copy of the recommendation five days prior to the presentencing proceeding. The procedure further provides the defense a meaningful chance to rebut any statement of fact presented in the disciplinary recommendation. It also presents the convicted with a chance to call witnesses to show the convening authority's view of the proposed sentence is not universal. The trial counsel would place the recommendation of the convening authority into evidence using authority granted in a new paragraph under RCM 1001.[83] The trial counsel would be responsible for placing the recommendation in context with admissible aggravation and mitigation evidence and convincing the military judge to accept the recommendation. If the convening authority indicates through the trial counsel no recommendation will be made, the court can move directly from findings to presentencing. A military judge might require notice of the commander's intentions prior to findings through a requirement in the

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[81] MCM, *supra* note 64, R.C.M. 601. In making the referral decision, "The convening authority or judge advocate may consider information from any source." *Id*.

[82] Westmoreland & Prugh, *supra* note 10 at 57-62 (indicating that fragging, drug use and war crimes all figured into the military exigencies of the Vietnam conflict and could be relevant command concerns in the future.).

[83] Appendix C.

local rules of court.[84] Although the delay is a minimum of five days, the arrangement of witness travel will likely result in a delay of two to three weeks from the merits to the presentencing phases of courts-martial.[85] This would mirror federal civilian practice, which normally involves a delay of around twenty-one to thirty-five days from the end of their equivalent of the merits phase until sentencing.[86]

To prevent a conflict with caselaw, the results will no longer be acted on by the convening authority.[87] Article 60, UCMJ, which provides for approval of court-martial results, will be entirely eliminated. If there is no Article 60, there is no need for RCM 1105, 1105a, 1106 or 1107. All of these rules concern the service of the proposed result of trial and the supporting record to the accused and victim for comment and to the convening authority for approval. Without convening authority involvement, records would move directly to higher courts. Historically, Article 60 acted as a safety valve for overly harsh results.[88] Presumably, a convening authority would not recommend a sentence that exceeds his desires in a case. Moreover, if the sentence is severe, a service branch's appeals court will still review the sentence for appropriateness.[89] Any clemency required in fairness would then be delivered by a professional judicial body, that is able to view the full spectrum of sentencing decisions in their respective service.

The need to eliminate post-trial action is not just a convenient and logical outgrowth of the proposed change. The convening authority would disqualify himself as an approving authority if he made sentencing recommendations in advance of approving the results of the trial under RCM 1107.[90] This persistent disqualification would greatly complicate post-trial processing. The normal remedy for disqualification is

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[84] MCM, *supra* note 64, R.C.M 108 (providing authority for military judges to promulgate rules at the trial-judge level).

[85] Currently a court-martial goes directly to sentencing. This means many witnesses called only for sentencing are brought to court only to find they will not testify because the Soldier is acquitted of the offense they were supposed to testify about. The proposed division of proceedings will ensure only those needed at the hearings are brought to the hearings.

[86] FED. R. CRIM. P. 32.

[87] *See* text accompanying note 77.

[88] GILLIGAN & LEDERER, *supra* note 48 ("During World War II, it was customary in many commands to sentence the accused to the maximum to permit the convening authority to do as he wished with the offender.").

[89] UCMJ art. 67 (2016).

[90] United States v. Davis, 58 M.J. 100, 102 (C.A.A.F. 2003).

transferring the entire casefile to another convening authority and detailing outside judge advocates.[91] The convening authority must be relieved from the responsibility of taking "judicial acts"[92] in a case to maintain her new ability to make prosecutorial sentencing recommendations.

Without Article 60 authority, possible obligations in pretrial agreements under RCM 705 would have to change significantly. As with a U.S. Attorney,[93] a convening authority would not guarantee a minimum sentence, but only recommend a sentence to the judge. Under the current system a pretrial agreement consists of two halves. The first half is a document the military judge reviews and which contains most of the material promises between the parties; in particular, it contains the accused's promise to plead guilty. The second half is often called the quantum. This portion dictates the disapprovals the convening authority will make to frustrate a high sentence from the court. It outlines what portions of confinement, a fine, forfeiture, reduction or discharge she promises to disapprove. It may contain other terms from the convening authority, such as an agreement to present no evidence on a charge.[94]

In the new system, the convening authority would not be able to disapprove action taken by the court; therefore, her ability to control the sentence would be limited to making a sentencing recommendation under RCM 1001 and directing the trial counsel not to request a sentence in excess of the recommendation. Of course she could still agree to dismiss the charges. Moreover, the new quantum portion would no longer be unknown to the court during sentencing. The recommendation on sentence would simply be presented during sentencing proceedings pursuant to the new RCM 1001.[95]

A new rule would be required to cover the disposition of a convicted individual in the time between announcement of findings and the presentencing proceeding. The status of the convicted is different from the status of someone who merely has been accused. He is no longer innocent. In an organization built on trust, it is difficult to argue a unit should be forced to receive the convicted back into its ranks pending

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[91] *Id.*
[92] UCMJ art. 37 (2016).
[93] FED. R. CRIM. P. 11.
[94] MCM, *supra* note 64, R.C.M 705 (2016).
[95] *See* Appendix C.

sentence. The current authority to hold him in confinement without a sentence comes from Article 10 of the UCMJ. Article 10 provides broad statutory authority to hold the accused, "as circumstances may require."[96] Detention prior to the merits phase of trial is controlled by RCM 304 and 305. A new rule would be needed to cover the gray zone between conviction and sentencing. The new rule would grant a commander the authority to order the convicted into confinement on the ground that the convicted is unlikely to appear for sentencing without significant and burdensome monitoring. The convicted could appeal the order to the military judge, but the new rule would create a presumption in favor of confinement for serious offenses. The new rule would assume that a conviction for a serious offense creates a flight risk. Such a presumption would give the government an advantage in arguing the necessity of confinement if the matter were appealed to the military judge. Once there is a conviction, no presumption of innocence will remain in the unit. Any commander would struggle to get his subordinates to treat a servicemember convicted of a serious offense with the same inclusiveness as someone who is innocent. In the close military environment, a determination of whether such treatment is practical should be left in the hands of the commander who is responsible for the whole unit.

In the place of Article 60 and the associated provisions is proposed a rule that would authorize the military judge to order a sentence into execution except for those portions of the sentence subject to the provisions of Article 71, UCMJ. The provisions of Article 71 relate to the management of discharges and the execution of prisoners. Eliminating the sentence approval under Article 60 requires a large number of conforming changes throughout the MCM and in the UCMJ. Thus, RCM 1113 (Execution of sentences) must change to make execution upon announcement of sentence the general rule.[97] The movement of the record and the execution of sentences should be brought in line as closely as possible to federal practice, consistent with the Secretary of Defense's request to bring the UCMJ into conformity with civilian practice as far as is practicable.[98]

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[96] UCMJ art. 10 (2016).
[97] *See* Appendix F.
[98] MILITARY JUSTICE REVIEW GROUP, REPORT OF THE MILITARY JUSTICE REVIEW GROUP PART I: UCMJ RECOMMENDATIONS 5 (Dec. 22, 2015), http://ogc.osd.mil/images/report_part1.pdf.

Further, the underlying statutes related to convening authority action would need to be repealed. Article 57 governs the effective dates of sentences and would cease to have any mention of action by the convening authority.[99] Deferment of a sentence by the convening authority would qualify as a judicial act and thereby entangle the commander in a role inconsistent with one who recommends a sentence. Also, because the case would move directly to the appeals court, there would be no logical reason the convening authority would maintain control over the length of confinement. Deferment and clemency is useful in conditions of full mobilization when it may be necessary to keep deficient Soldiers on the front.[100] However, the Army is currently a highly professional body and not a massive conscripted organization. Even if deferment and clemency authority is taken away from commanders, it could be restored to support full mobilization by regulations issued under Article 74.[101] For simplicity's sake, Article 74 should be made the sole power of clemency in the service. The secretaries could use this authority in the event of a national crisis to keep convicted Soldiers fighting for the Army. The proposed changes in the appendix suggest a format for change to Article 57a.[102]

The other changes needed relate to the composition of the courts under Article 16 (Courts-martial classified) and Article 26 (Military judge of a general or special court-martial). In fairness to the accused, judges must be the sentencing authority. While convening authorities have no control over the assignment, evaluation, and promotion of military judges, they have substantial control over their own personnel. Commanders acting in prosecutorial role cannot remain in charge of selecting any individual that would act in the role of a military judge. For this reason, the option for a special court-martial without a lay judge should be deleted from Article 16, UCMJ. In addition to the problem of subordination, a court-martial

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[99] *See* Appendix D.

[100] DAVID R. SNYDER, SEX CRIMES UNDER THE WEHRMACHT 72-81] (2007). This study of punishment in the German army during World War II explores the Reich's use of deferred confinement to maintain maximum manning right up until total surrender. The decision to avoid the use of prisons was made at the General Headquarters of the Armed Forces and then delegated to field commanders. *Id.*

[101] UCMJ art. 74 (2016). The present article allows for immediate remission and suspension of sentences in most cases, but currently there is no delegation to commanding officers in the field. Snyder reveals through a close analysis how Germany used a suspension of normal punishment processing to maintain the fight on the German Eastern Front. SNYDER, *supra* note 100 at 72. *Id.*

[102] *See* Appendix E.

without a professional judge lacks the professional experience needed to weigh the various sentencing factors.

Likewise, Article 26's description of the military judge's role would require a new final paragraph. This new paragraph would strip the panel of sentencing authority in non-capital cases. The proposed new paragraph reads as follows:

> The military judge alone will preside over all non-capital sentencing proceedings. The appropriate sentence in a non-capital case will be determined by military judge alone in accordance with the interests of justice and the need for discipline within the military organization. Subject to other provisions of law, the military judge will order the sentence to be executed.

In this way, the convening authority will no longer be able to influence sentencing through the selection of panel members.[103] Instead, he will influence sentencing as an interested party with a special right to recommend a sentence. A judicial officer, the military judge, will take this recommendation into consideration when arriving at a proper sentence. If this change is made, conforming changes in Articles 51 and 52 and some RCMs will be necessary to remove unnecessary discussion of non-capital sentence voting procedures. The proposed sentencing reform would reduce manning requirements for courts-martial, bring the procedure in line with civilian practice, and enhance lawful influence in the sentencing process.

Once all of the changes and conforming modifications discussed above are in place, the code will reflect the convening authority as a kind of prosecutor and not as someone charged with taking judicial acts. Given his new role and the proposed judge-alone sentencing, the law related to command influence, Article 37, would have to change. As discussed in Section II, the prohibitions against command influence arose as a means to keep the jury pool impartial. This was particularly difficult to do in sentencing.[104] Article 37 has two basic types of prohibitions. First, there

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[103] While the convening authority would still select panel members, these members would no longer control the sentencing. Their vote would be limited to the matter of guilt or innocence. Any attempt to wrongly convict an individual is already a crime and would remain criminalized under these proposed reforms.

[104] GILLIGAN & LEDERER, *supra* at note 48.

is a restriction against adverse actions against subordinates for their participation in a court whether as a member of the court. Secondly, all persons subject to the code are prohibited from influencing a court through any unauthorized means. Since the recommendation on sentence would be provided for in the rule, the recommendation itself becomes an authorized means. However, Article 37's restrictions interfere with the intent behind the reform. Moreover, the article is drafted as a clumsy double negative. The statute orders persons subject to the code not to influence a court in a way that is not authorized.

While the protections against adverse actions should remain unchanged,[105] it would be easier and more direct to prohibit those specific forms of influence that are injurious to justice. Influence requires communication, either overt or implied. The current prohibition on general influence bars a broad range of both private and public communication. Private communications made with the intent to influence court members should remain prohibited.[106] However, the ban on public communications should be limited to that which tends to materially prejudice the accused's rights to a fair trial. The proposed change models the proscriptions on certain communications and unfair pretrial publicity found in the Model Rules of Professional Conduct 3.6 and 3.8.[107] The changes also remove all references to the judicial acts of the convening authority. The changes reflect the convening authority's expanded prosecutorial role and the abandonment of her judicial role.

With the proposed change, the defense will have to demonstrate a likelihood public comments have tangibly prejudiced the proceedings. With panel members removed from sentencing, this will be very difficult to do unless the comments extend to questions concerning guilt or innocence or the reliability of witnesses. The heightened standard will allow commanders leeway to discuss disciplinary and judicial priorities. In so much as the old standard insulated servicemembers from the opinions and desires of the convening authority, it also deprived servicemembers of the benefit of clearly knowing the expectations of their commander. The change in Article 37 is meant to allow the communications necessary for deterrence. The old prohibition on "influence"[108] is simply too broad. Any communication given to convince subordinates of the gravity of

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105 *See* Appendix A.
106 *Id*.
107 MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 1983).
108 UCMJ art. 37 (2016).

specific crimes is also a communication given to change or influence possible panel members who are drawn from the same pool of subordinates. By eliminating the prohibition on mere public influence and substituting an effects-based test, the commander can now deter and prevent crime by explaining the seriousness of certain types of crime. In conjunction with the change to Article 37, RCM 104 (unlawful command influence) will require conforming modification to reflect the altered language.

B. Impact on the Court-Martial Participants

These changes to the law will impact the players in the court-martial system in a variety of ways. All impacts are positive except for the impact on the accused, which is largely neutral but has a distinct potential to result in increased penalties.

1. Impact on the Convening Authority

This reform's greatest benefit to the convening authority is increased input in outcome with reduced application of effort. The commander's time is a factor, which is often overlooked in proposals for reform. Nowhere in the recent 1300-page Military Justice Review Group's report is there any mention of trying to conserve the commander's time or trying to conserve any resource.[109] A commander is focused on running a large and complex organization dedicated to national defense. Currently, a commander has a minimum of two interactions with a successful prosecution. She first refers the case and then later approves or disapproves the result.

Under this proposed reform, the commander would still only participate at two decision points. She would make the prosecutorial decision to refer a case, and she would have to decide what sentence to recommend based on any guilty findings. Commanders are already well versed in both tasks. The majority of recent cases result in guilty pleas.[110] These pleas contain an agreed cap on sentence. Each agreement

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[109] MILITARY JUSTICE REVIEW GROUP, *supra* note 98.

[110] Approximately seventy percent of Army General Courts-Martial from 1995 to 2015 ended with guilty pleas (Notes on file with the Clerk of the United States Army Court of Criminal Appeals).

presumably reflects the sentence a commander believes is appropriate for the offense. When commanders sign pretrial agreements they look at the offenses and consider the advice of judge advocates. The procedure in the commander's disciplinary report is very similar to the manner in which an offer to plead is considered; only instead of agreeing to facts prior to trial, a trial produces the predicate facts required to make a recommendation.

The changes will save time because the only required item for review prior to disciplinary recommendation on a sentence is the court's finding. Acting on a record following a court-martial currently requires a commander to, in theory, consider the complete record, the matters provided by the servicemember convicted, and any matters provided by the victims.[111] He can reread the whole verbatim record or decide to rely primarily on the judge advocate's advice. Because the commander is trapped in this quasi-judicial role, anytime a prosecution is successful, he must not form or state any opinion about the best outcome in a case or in classes of cases.[112] Following the recent implementation of the 2014 NDAA, commanders are also unable to provide any significant clemency in post-trial action.[113] With the reform proposed in this article, commanders can leave the balancing of competing interests in the sentencing to an independent body without running the risk they will exceed the severity of sentence needed for the interests of the command. It would be the court's responsibility to balance the professional recommendation of the commander against the individual needs and circumstances of the accused and of any victims in the case. The command saves time by fully transferring the responsibility to make a just determination to the court.

The change would also put the commander in firmer control in the case of a guilty plea. Under this new system, the commander and his trial counsel would merely recommend a sentence to a court. The court would be free to revise that upward or downward. This would remove commanders from the business of disapproving sentences in excess of the pretrial agreement. A commander would be able to consistently communicate to the court the commander's desires for sentencing and have those desires incorporated into the court's findings.

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[111] MCM, *supra* note 64, R.C.M 1107 (2012).

[112] United States v. Davis, 58 M.J. 100, 103 (C.A.A.F. 2003) (indicating that an inflexible disposition on punishment or clemency generally disqualifies a convening authority from taking action on the case.).

[113] NDAA FY 2014, *supra* note 75.

Finally, because the commander would no longer have to review matters in the post-trial phase impartially, it would not be necessary for him to pretend all offenses are created equal. Acting as a prosecutor for crime in his jurisdiction, the commander would naturally be able to speak like a prosecutor. He would be able to make clear what types of crimes he considered most serious, and he would be able to explain to the servicemembers under his command whether findings of guilty for certain offenses would result in harsh sentencing recommendations. The reform would abrogate the rulings of *United States v. Martinez*,[114] and the ban on disposition guidelines that comes from *United States v. Hawthorne*.[115] The education of servicemembers should deter crime and improve the public image of the military by firmly and publicly addressing consequences for criminality.[116]

Finally, and most importantly, any commander would be able to tailor his recommendations to the military exigencies[117] that exist at the time. In this way, the command can ratchet up consequences in response to problems with obedience or when the consequences of mistakes are higher, such as in a deployed environment.

2. Impact on the Court

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[114] United States v. Martinez, 42 M.J. 337 (C.A.A.F. 1995).

[115] United States v. Hawthorne, 22 C.M.R. 83 (C.M.A. 1956).

[116] LINDLEY, *supra* note 11, at 37. The expression of desired punishments by senior leaders was common at least as late as the World War I. So also was a harsh stance on sexual assault. Following a 30-year sentence of an American private convicted of rape in France, Brigadier General Ansell, the Acting Judge Advocate of the War Department, told the *New York Times* the Army believed death would be the sentence for rape going forward. *30-Year Sentence for U.S. Soldier in France*, N.Y. TIMES MAG., Sept. 30, 1917, at 3. Further in approving the sentence of 30 years, the Soldier's commander noted the sentence was necessary to uphold "that standard of honor and chivalrous conduct which it has always been the glory . . . of American Soldiers to maintain." *Id*. It would certainly be helpful now if Department of Defense leaders could clearly and openly express their views of deterrence to the representatives of the American people and make it clear opinions on sexual assault remain largely unchanged over the last 100 years.

[117] Westmoreland & Prugh, *supra* note 10, at 51 (The decisive consequence of misconduct must be such as to reinforce with unmistakable clarity a conscious decision for proper conduct.)

The military judge's authority is enhanced, as is consistent with the long historical progression toward civilianization.[118] The court is no longer part of an archaic staff action wherein the court is making a recommendation to the convening authority; the court is the approval authority.[119] Because the sentence is fixed in court, the concerns of the victim, the commander, and the accused can all be balanced there in accordance with the needs of justice. Judicial sentencing is the method used by the federal system[120] and by courts in Australia,[121] Great Britain,[122] Canada,[123] Russia,[124] China,[125] and most civil law nations.[126] Moreover, using this method should improve public confidence in the military justice system. Scholars in the last 30 years expended a tremendous volume of ink discussing panel sentencing. The primary advantage put forward has been that the panel serves as a reflection of the shared disciplinary sense of the military leadership in the community.[127] This view sees the panel as a cross-section of the convening authority's best lay judges. Through careful selection, the panel may represent the convening authority's own judicial temperament and his way of lawfully influencing the proceeding.[128]

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[118] Sherman, *supra* note 29, at 15.

[119] *Id.* This is what Brigadier General Ansell envisioned nearly 100 years ago with his 1919 reform proposals.

[120] FED. R. CRIM. P. 32.

[121] David Biles, *Australia*, *in* BUREAU OF JUSTICE STATISTICS, THE WORLD FACTBOOK OF CRIMINAL JUSTICE SYSTEMS (1993), http://www.bjs.gov/content/pub/ascii/WFBCJAUS.TXT.

[122] Correta Phillips, G. Cox, & K. Pease, *England and Wales*, *in* BUREAU OF JUSTICE STATISTICS, THE WORLD FACTBOOK OF CRIMINAL JUSTICE SYSTEMS (1993), http://www.bjs.gov/content/pub/ascii/WFBCJENG.TXT.

[123] Debra Cohen &Sandra Longtin, *Canada*, *in* BUREAU OF JUSTICE STATISTICS, THE WORLD FACTBOOK OF CRIMINAL JUSTICE SYSTEMS (1993), http://www.bjs.gov/content/pub/ascii/WFBCJCAN.TXT.

[124] Ilya Nikiforov, *Russia*, *in* BUREAU OF JUSTICE STATISTICS, THE WORLD FACTBOOK OF CRIMINAL JUSTICE SYSTEMS (1993), http://www.bjs.gov/content/pub/ascii/WFBCJRUS.TXT.

[125] Jianan Guo et al., *China*, *in* BUREAU OF JUSTICE STATISTICS, THE WORLD FACTBOOK OF CRIMINAL JUSTICE SYSTEMS (1993), http://www.bjs.gov/content/pub/ascii/WFBCJCHI.TXT.

[126] *See* JAMES G. APPLE & ROBERT P. DEYLING, A PRIMER ON THE CIVIL-LAW SYSTEM 28 (1995).

[127] *See* Major Christopher Behan, *Don't Tug on Superman's Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 MIL. L. REV. 190, 243 (2003).

[128] *See id.* at 293.

The loss of panel sentencing substitutes a general sense of the community for the judgment of a centrally selected military judge. In exchange, the commander is allowed to tell the judge her sense of community appropriateness. For the panel members in courts-martial, the change gives them their time back. The savings in military manpower are worth noting. The military judge is placed under increased pressure because all the pressures to reach a correct decision on sentence are placed on him. The integrity of the court-martial rests in his hands. The judge advocates in the Department of Defense are excellently prepared to handle this responsibility. Military judges are specially selected for the bench by a fellow attorney and three-star flag officer, namely the judge advocate general of the service involved.[129] Their qualifications and selection under statute[130] and the enforcement of Federal standards for impartiality[131] have maintained the impartiality of the bench and will continue to do so under the proposed reform.[132]

3. Impact on the Accused

An accused loses no privileges or rights. Once convicted, however, an individual loses some privileges, but no substantive rights under this proposed reform. Specifically, he loses his ability to plead for post-trial clemency in front of the commander. In remanding cases for new action[133] and finding ineffective assistance of counsel,[134] the military appellate courts have noted that review by the convening authority is the most likely place for a convicted servicemember to find relief. In the proposed system, convicted servicemembers cannot appeal to the commander for a lighter sentence.

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[129] UCMJ art. 26 (2016).
[130] *Id.*
[131] United States v. Martinez, 19 M.J. 652 (C.M.R. 1984) (Applying Article III judicial standards when evaluating the impartiality of a military judge.).
[132] *But see* Fredric I. Lederer & Barbara S. Hundley, *Needed: An Independent Military Judiciary—A Proposal to Amend the Uniform Code of Military Justice*, 3 WM. & MARY BILL RTS. J. 629 (1994) (arguing the inadequacy of current protections for the military trial judiciary). While no court has ruled courts-martial to be inherently unfair, Lederer and Hundley call for more insulation of the military trial judiciary. *Id.*
[133] United States v. Fisher, 45 M.J. 159, 161 (C.A.A.F. 1996).
[134] United States v. Gilley, 56 M.J. 113, 125 (C.A.A.F. 2001).

Under the proposed reform, convicts will no longer be guaranteed a sentencing cap in a guilty plea. They might find a judge sentencing them to a punishment in excess of a convening authority's recommendation. Nonetheless, none of these losses will deprive the accused of any substantive rights. None of these changes will impair access to an impartial fact-finder or the opportunity to present evidence on one's own behalf. The accused still will have the right to contest the charges and a right to an impartial determination of guilt or innocence. The convicted will still have the chance to respond in their sentencing hearings to the commander's recommendation. In the case of more serious sentences, the convict's case will still be automatically reviewed for appropriateness.[135] The sentencing hearing will remain a lively contested proceeding rather than a severely constrained process that matches the accused to a sentence determined by a table.[136] In the federal system, the sentencing guidelines focus primarily on the offense and not on the individual circumstances.[137] Under this proposed reform, the convicted will still be able to call witnesses and present and plead their case in full to the court.

The accused is likely to face increased psychological pressure to enter a plea deal. Currently, the accused's counsel might, in negotiation, learn the position of the convening authority on a proper sentence. The accused is safe knowing the convening authority cannot express her sentencing desires to the court even if the accused is found guilty. Under the proposed system, the trial counsel would give the court the precise sentence recommendation. The knowledge of a possible harsh recommendation following a finding of guilty will be a burden in the mind of anyone who, while guilty, wishes to exercise the right to plead not guilty. In addition, all members of the command, to include an accused, will probably know the commander's general disciplinary outlook. In this way, the system will be more transparent to military members including the accused. However, the fear of a high disciplinary recommendation also increases pressure on the not guilty to plead guilty in order to receive a more lenient and secure sentence. The continuation of a robust plea inquiry should continue to deter anyone wrongly accused from attempting to enter a fraudulent plea.

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135 UCMJ art. 67 (2016).

136 FED R. CRIM. P. 32.

137 Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*, *in* GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING 119 (Gene Healy ed., 2004) (noting the whole federal sentencing regime is "a convoluted, hypertechnical, and mechanical system that saps moral judgment from the process of punishment").

The accused also will lose the ability to plea-bargain for continued financial support for dependents. The convening authority's lack of control over deferments and waiver of forfeiture prevents any agreement on deferment or waiver. While this may seem harsh to our sensibilities, all current methods of deferral rely on the use of post sentencing modification of the effect of the court's judgment. Without the ability to modify the judgment of the court, the convening authority will not have access to these powers. In addition, the new system favors confinement between conviction and sentencing. Although not intended to punish the convicted servicemember, this confinement will be just as real and as painful as confinement served pursuant to a sentence. However, it is possible many servicemembers will not complain about the confinement in the case of a serious offense because it offers a chance to begin serving a probable sentence while the member is still guaranteed pay. The desire to continue to receive pay will be particularly strong under the new system because the convening authority will have no means of mitigating the financial impact of a sentence. She will not be able to stop automatic or adjudged forfeitures because such decisions would be judicial acts. To those familiar with the existing military system, this new result may appear harsh.

This perceived harshness imposed by the reform does not exceed the harshness present in the federal criminal system for civilian convicts. As to monetary penalties, the federal court may also adjudge a fine for any felony conviction.[138] It is normal for federal felons to pay a fine.[139] The majority of fines go to finance a permanent victim's fund.[140] The federal district courts also can cause forfeitures of property for criminal defendants.[141] These forfeitures are fundamentally different from those found in RCM 1003. Military forfeitures are prospective losses of pay governed by Articles 57 and 58b of the UCMJ. A military forfeiture

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[138] Fines can be ordered in most federal cases. *See* 18 U.S.C. § 3571 (2012); FED R. CRIM. P. 32. Unlike fines under RCM 1003(b), federal fines are not generally limited to circumstances of unjust enrichment.

[139] 18 U.S.C. § 3571 (2012) (providing that anyone convicted of a felony in a federal district court may be fined up to $250,000, with lesser fines authorized for those convicted of a misdemeanor).

[140] 42 U.S.C.A. § 10601 (West 2013 & Supp. 2017).

[141] U.S. DEP'T OF JUSTICE, A GUIDE TO EQUITABLE SHARING OF FEDERALLY FORFEITED PROPERTY FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES 31 (2009), https://www.justice.gov/criminal-afmls/file/794696/download [hereinafter DOJ FORFEITURE GUIDE].

sentence does not affect any pay until two weeks after the sentence is announced.[142] Criminal forfeiture in the federal system is retrospective, it applies to property possessed prior to the commission of the crime.[143] Forfeitures in the federal criminal system require a special jury finding tying the property to the crime.[144] In short, the federal criminal system favors monetary penalties while the military system applies fines to only certain classes of cases and limits the entire system of forfeiture to future government pay. Therefore, although the proposed reform will likely result in reduced payments to military members convicted of crimes, this impact does not affect substantive rights. None of the negative impacts of the reform place the convicted servicemember in a position inferior to the one held by a federal defendant.

4. Impact on Immediate Command

The impact on the immediate command will be felt in the presentencing phase. The convening authority will require time to staff the disciplinary recommendation back to the convicted and the court. The convict and his counsel require time to prepare a rebuttal to the recommendation. It will likely take a month between announcement of findings and announcement of sentence. The command might be saddled with a dejected and unmotivated convict still assigned to a unit whose members may not wish to work with him. The simplest resolution is ordering the convict into confinement pending the sentencing proceeding. Because the command has to support the accused, the initial decision should fall not to an attorney, but to the commander. As outlined in the proposed revision to RCM 1000,[145] the law already allows confinement, subject to some limits on discretion. The proposed rule respects these limits but creates presumptions that support a decision to confine anyone convicted of a serious offense. There remains a possibility that military judges would curtail the discretion of the commander if they were to consistently view the confinement as punishment under Article 13. The new presumptions in RCM 1000 are meant to prevent this outcome.

Article 13 remains a bar against unreasonable decisions to order confinement such as orders to confinement upon conviction for minor

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142 UCMJ art. 57 (2016).
143 *See* DOJ FORFEITURE GUIDE, *supra* note 141 at 31.
144 *See id.*.
145 *See* Appendix H.

offenses. For example, a servicemember accused of adultery and sexual assault is convicted of adultery and acquitted of sexual assault. Adultery is a minor offense normally handled below the summary court-martial level. A commander who disagrees with the acquittal might be tempted to order the convict into confinement pending the sentencing hearing. Because the offense is clearly minor, there is no reason under RCM 1000 to suspect the convict will not be present. Appeal of the confinement should result in a finding the commander abused his discretion and confined for the purpose of punishing in violation of Article 13 rather than for the purpose of maintaining accountability under RCM 1000. So long as serious offenders can be ordered to confinement pending sentencing, the immediate command will not have any significant new burdens.

5. Impact on Staff Judge Advocate's Office

The preparation of the post-trial action and promulgation of the result is a technical and time-consuming task that dominates the schedule of the lead prosecutor serving any convening authority. Army judge advocates receive approximately 8 hours of specific instruction in preparing these documents during their Graduate Course[146] and normally an additional 13 hours of instruction at the Military Justice Manager's Course.[147] It is hard to know exactly how much prosecutorial time will be saved by these reforms, but it is not difficult to claim the time saved by eliminating post-trial processing will yield a substantial reduction in effort within legal offices in all branches. Notably, RCMs 1105, 1105a, 1106, and 1107 alone compose eleven pages of detailed procedural rules. Under the proposal, they will be replaced by RCM 1001B, which is not even a page long. The change will allow military justice managers to focus more on the training and management of personnel and less on the management of technical approvals and the collating of post-trial submissions and staffing. The shift in focus should help the services sustain and build on gains in advocacy instruction and resourcing generated by the new Special Victims' Prosecutor programs within the Department of Defense.

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[146] The Graduate Course is a specializing judge advocate training program that runs nine months and results in the granting of an LL.M. It is attended by active duty Army judge advocates following their selection for promotion to the rank of major (syllabus on file with the Judge Advocate General's Legal Center and School).

[147] The Military Justice Manager's Course is a 40-hour block of instruction administered by the Judge Advocate General's Legal Center and School in Charlottesville, VA (syllabus on file with the Judge Advocate General's Legal Center and School).

While the overall burdens on the players are limited and arguably reduced in this reform, the new system will increase the command's direct input into the sentencing process. Because commanders will receive less information on the individual circumstances of an accused and are more likely to look to the institutional issues affecting their command, there is a reasonable chance the recommendations will be more harsh and lead to a higher sentences. There is justice and no profit in allowing a command to demand more unless such demands are reasonably likely to improve discipline and reduce crime in military communities.

IV. The Impact on Crime and Discipline

Any attempt to change the UCMJ must be dedicated to perfecting the goals of the code. The goals are unchanged. "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."[148] History is the best guide to foreseeing the practical result in advancing a sentencing recommendation from a convening authority. Given the history[149] of sentencing prior to the development of the unlawful command influence concept, it is reasonable to expect the proposed reforms will result in many commanders recommending and obtaining higher sentences. Draconian sentencing drove most of the major UCMJ review efforts, notably the Crowder-Ansell Dispute and the passage of the UCMJ.[150] Further, given the vast responsibilities of a commander, it is reasonable to assume a commander will favor the general interests of discipline and deterrence over an individual need for mercy and ask for higher sentences. When originally implemented, the UCMJ granted commanders the authority to grant mercy,[151] while denying them the power to seek severity. The danger of the new system is a delivery of higher sentences without a reduction in crime or indiscipline. Such a change would be inconsistent with the goals of the code because it would unnecessarily harm the convicted. Further, if the change generally undermines servicemembers' faith in the system of military justice, it would be a failure.

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[148] MCM, Preamble, I-1, para. 3 (2016).
[149] *See generally supra* Section II.
[150] *See generally supra* Section II.
[151] UCMJ art. 60 (2016).

Thankfully, there are strong indications that increased sentences will deter crime, especially if the likelihood of such sentences is known to servicemembers prior to the commission of an offense. Dr. Steven D. Levitt, author of the popular book *Freakonomics*,[152] published a study confirming the deterrent effect of increased sentences.[153] If an increased role for commanders generates harsher sentencing, it should aid discipline in the units so long as the likely punishments are understood in advance.

Punitive measures reduce criminal activity through deterrence and through incapacitation. [154] Incapacitation works to reduce crime by removing the individual from the community: If a person is not located in a community, he lacks the opportunity to commit crime in that community. In the United States, incapacitation primarily includes arrest, imprisonment, and even execution. All methods remove a person either temporarily or permanently from a community. Historically, many ancient systems used exile as an additional means to exclude individuals from the community.[155] The military justice system exercises several modes of incapacitation. An offender can be confined pending trial,[156] imprisoned by sentence,[157] executed on the approval of the President,[158] or permanently excluded from the military community by punitive discharge.[159]

The ability to make a recommendation directly on sentence increases the likelihood of discharge, one of the primary modes of incapacitation. Although most offenders do not commit a second crime, any given offender is more likely to commit further criminal acts than an individual selected at random.[160] Because incapacitation within the military community is possible without additional confinement, any increase in

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[152] STEVEN D. LEVITT & STEPHEN J. DUBNER, FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING (2005).
[153] Daniel Kessler & Steven D. Levitt, *Using Sentencing Enhancements to Distinguish Between Deterrence and Incapacitation*, 42 J.L. & ECON. 343, 343 (1999).
[154] *Id.* at 345.
[155] BRAND, *supra* note 14 at 59.
[156] MCM, R.C.M. 305 (2016).
[157] UCMJ art. 56 (2016).
[158] UCMJ art. 71, (2016).
[159] UCMJ art. 57 (2016).
[160] Andrew D. Leipold, *Recidivism, Incapacitation, and Criminal Sentencing Policy*, 3 UNIV. ST. THOMAS L.J., 536–58, 546 (analyzing studies of recidivism demonstrating that offenders as a group are much more likely to commit crime than non-offenders).

discharges will have a positive impact on crime reduction within the military community.[161] Given the special nature of the military environment and the narrow goals of military law, incapacitation theory justifies recommendations for more punitive discharges.

If incapacitation within the military community can be accomplished without confinement, incapacitation theories do not strongly support increases in confinement. Rather, deterrence justifies harsher confinement recommendations. Commanders do not wish to deal with problems solely as they arise. Ideally, commanders want misconduct deterred. Deterrence is a psychological event.[162] An individual is deterred when he decides to refrain from misconduct based on an understanding of the consequences.[163] Military deterrence is similar to deterrence in civil society. The inevitability of capture and inevitability and degree of punishment drive deterrence.[164] One of the historic problems with measuring deterrence versus incapacitation comes from the linked nature of the two. In the civilian world, higher sentences increase incapacitation because they lengthen the time of segregation from the free community. Dr. Levitt's study created a model for measuring deterrence independent of incapacitation. He did so by focusing on the immediate drop in crime for specific serious offenses covered by a broadly enforced sentence enhancement law in California.[165] The sentence enhancements covered only offenses for which a sentence would already be given. The enhancement increased the overall sentence, but in the early years of implementation there was no additional incapacitating impact. The study confirmed that the threat of higher sentences deterred crime.[166]

Deterrence is incomplete without clear expectation guidance from the convening authorities. The theory underpinning deterrence is an economic theory of rational choice.[167] The more information a potential offender has about consequences, the more likely there will be deterrence. Allowing,

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[161] Although incapacitation through discharge no doubt aids the military in accomplishing its mission by isolating criminals from the military community, it must be admitted discharge does nothing to prevent the discharged from committing crimes in the civilian community.

[162] Kessler & Levitt, *supra* note 153 at 348.

[163] *Id.*

[164] Leipold, *supra* note 160 at 539.

[165] Kessler & Levitt, *supra* note 153, 352-59.

[166] *Id.*

[167] *Id*. at 348.

even encouraging, convening authorities to comment on proper punishments for classes of crimes and to make specific recommendations has the potential to reduce crime.[168] The ability to speak is just as important as the ability to recommend. Unless the commander is allowed to inform his subordinates of the likely consequences of misbehavior, there is little chance for deterrence. The subordinates would lack the information needed to make a rational choice. As with any rational choice, improved information transfer improves decision making.[169]

The use of harsh sentencing recommendations paired with clear expectation management will reduce crime in the military through psychological means and through incapacitation. Input into sentencing allows a commander to follow through on his announced sentencing philosophy. The deterrent effect of following through is positive.[170] The additional harshness introduced in the system is justified by expected improvements in discipline and reductions in crime and will be guarded against by the independent trial judiciary.

Prior to the completion of this article, the Military Justice Review Group published a study calling for a different form of sentencing.[171] The overall work of the group is admirable and replete with excellent suggestions. The Group's proposals on sentencing parallel some of the material in this article. The primary difference between this article's proposal and the Group's is the basis for sentencing determinations. Rather than empowering commanders to influence sentencing in their respective jurisdictions, the group proposes to consolidate sentencing with universal standards issued by the Command in Chief. Sentencing terms for a large range of crimes would be closely governed by parameters implemented by executive order.[172]

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[168] Westmoreland & Prugh, *supra* note 10, at 51 (The decisive consequence of misconduct must be such as to reinforce with unmistakable clarity a conscious decision for proper conduct.)

[169] *See* MICHAEL ALLINGHAM, CHOICE THEORY: A VERY SHORT INTRODUCTION (2002).

[170] *See* Francesco Drago, *The Deterrence Effect of Prison: Evidence from a Natural Experiment*, 117 J. POL. ECON. 257 (2009) (showing that after individuals in Italy who were released early from prison were told they would suffer greatly increased penalties if they committed any new offenses, their recidivism rate was much lower than expected).

[171] MILITARY JUSTICE REVIEW GROUP, *supra* note 98, at 503.

[172] *See id.* at 32.

The Group's proposed parameters create a problem of overbreadth in sentencing. All proposals in the United States for guidelines, parameters, and enhancements in the last century increased sentences.[173] The courts in the military can currently assign no punishment to most offenses, therefore parameters may be intended to reduce discretion for lenient sentences in addition to making sentencing predictable. Under the Group's proposal, the parameters would be derived largely from practical experience. Sentences derived now may be inadequate for the many special circumstances convening authorities encounter when they take servicemembers outside the country and place them into combat conditions. The problem of military exigency and the need for variable pressure is well known to military commanders, officers, leaders and judge advocates.[174] The Group's approach does not directly support the achievement of a commander's mission. The approach furthers the expansion of a civilianized system of justice that works well in usual and expected conditions but is unadaptable to enforcing discipline in the face of a breakdown in order such as the Army faced in the late 1960s.

In addition to being unadaptable to the disciplinary needs of individual jurisdictions, the system proposed by the Group is likely to be dictated in greater part by a manual of parameters. Currently, a servicemember is sentenced for criminal acts, but the severity is judged in the context of events and circumstances. If a servicemember is sentenced according to a table of parameters, the judgment will be based on what is listed in the parameters. The decision to mention a weapon, specify an amount of drugs, or allege a higher mens rea will impact the parameters. With careful charging, prosecutors will box judges into minimum sentences and create tremendous pressure to plead guilty. The sentences handed down would vary based not on the outlook of commanders or even on the specific acts of an accused, but on the outlook of the judge advocates determining the wording of the charge sheets.[175] For comparison, the use of guidelines in the federal system also relies on the discretion of professional prosecutors.

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[173] *See* Kessler & Levitt, *supra* note 153 at 350; *see also* TAMASAK WICHARAYA, SIMPLE THEORY, HARD REALITY: THE IMPACT OF SENTENCING REFORMS ON COURTS, PRISONS, AND CRIME 157 (1995) ("The nominal goal of sentencing reform legislation in the United States [is] to deter crime by increasing the rates of incarceration for a variety of high priority crimes").

[174] *See* Westmoreland & Prugh, *supra* note 10 at 40.

[175] *See* WICHARAYA, *supra* note 177 at 167 (1995) ("Removal of human elements in decision making—that is, official discretion in sentencing—requires remarkable effort and a body of knowledge theorists have not yet discovered.").

That system has rather infamously resulted in massive racial and ethnic sentence disparity.[176] Guidelines have a troubling pattern of not producing the consistency in sentencing they promise. Judges find ways to deviate from or resist compulsory models of sentencing.[177] As the Army attempts to control for variance, it is easy to imagine the parameters system suggested by the Military Justice Review Group will suffer the same expansion in complexity which sent the Federal Guidelines Manual from just over 300 pages in 1987[178] to nearly 1500 pages of advice, tables, appendices and data by 2015.[179] Ultimately, the Group's suggested approach strives for a universal consistency that will be difficult to attain and may not yield helpful reductions in crime. This article proposes to instead accept that disciplinary conditions and needs vary in time, location, and circumstance. It is a proposal to empower commanders to address the direct disciplinary problems before them both in word and action.

VI. Conclusion

Commanders remain responsible for discipline in their formations and need to have continued input in judicial outcomes. As the system is increasingly civilianized, it must be actively reformed to maintain a meaningful role for the commander. The U.S. military won the Revolution, the Civil War, the First World War, and the Second World War while using court-martial systems that deferred heavily to commanders' wishes. John Adams advocated using the British Model with its extensive commander's control.[180] The Articles of War were adopted

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[176] *See* DOUGLAS C. MCDONALD & KENNETH E. CARLSON, SENTENCING IN THE FEDERAL COURTS: DOES RACE MATTER?: THE TRANSITION TO SENTENCING GUIDELINES, 1986–90, at 177 (1993), https://www.ncjrs.gov/pdffiles1/bjs/145332.pdf (indicating that the application of the guidelines drove black/white sentencing disparity from 8% to upwards of 40%); *see also* Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 8 J. EMPIRICAL LEGAL STUD. 729 (2012) (noting ongoing racial disparity despite numerous alterations to sentencing laws and guidelines and suggesting restoration of judicial discretion as the remedy).

[177] *See id.* at 164 ("[T]he assumption that a statute can turn judges into mindless robots, who can be programmed in advance to do what legislators tell them to do with strict obedience, is naïve.") In analyzing all jurisdictions in the United States that had implemented sentencing guidelines, the author found wide variance in the application of even the presumptive guidelines in the statistical data. *Id.*

[178] U.S. SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL (1987).

[179] U.S. SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL (2015).

[180] UCMJ BACKGROUND, *supra* note 12 at 2.

on his recommendation and used by General George Washington to maintain discipline[181] even under the harsh conditions of Valley Forge. General Sherman likewise believed strongly in the need for a commander-centric system of justice adaptable to individual commanders.[182] He spoke at length in support of keeping commanders in the center of military justice.[183] Likewise, General Dwight Eisenhower spoke with Congress against limits on commanders and in favor of retaining command influence.[184] These commanders—all of whom led American forces to victory against equal or even superior adversaries—believed in commander control over military justice.

Even today, commanders at the highest levels are keen to maintain a voice in military justice.[185] General Raymond Odierno "want[s] the commander fully involved in the decisions that have an impact on the morale and cohesion of the unit, to include punishment, to include UCMJ. That's their responsibility. It's not too much responsibility."[186] Increasing control is in line with the wishes of Generals Washington, Sherman, Eisenhower, and Odierno.

The input given by Article 60 of the UCMJ was never adequate and has been gutted by the 2014 NDAA. The long judicialization of the court-martial process in the 20th Century created the independence needed for allow direct commander input into sentencing. If the convening authority surrenders his ability to act judicially, he can move into a prosecutorial role, making the decisions to refer matters to court and making the recommendation for sentence. The new system eliminates approval procedures under Article 60, UCMJ. This reform creates significant time savings for the convening authority and his staff judge advocate. Victims will no longer worry about whether the result of the trial will be overturned in part by a commander. Sentences will be largely self-executing and convicted Soldiers will receive a faster appeal. Although sentences may become harsher, they will still be regulated by independent judges. Any additional harshness is likely to deter crime and disobedience so long as

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181 *Id.*

182 Schlueter, *supra* note 26..

183 *Id.*

184 H.R. REP. NO. 80-1034 (1947).

185 *Top Brass Reject Overhauling Military Justice System to Reduce Sexual Assault,* PBS NEWSHOUR (Jun. 4, 2013), http://www.pbs.org/newshour/bb/military-jan-june13-sexualassaults_06-04 (presenting Gen. Raymond Odierno, U.S. Army Chief of Staff, discussing his belief that commander involvement is the solution to indiscipline and that removal of commanders will worsen the sexual assault problem).

186 *Id.*

the commander use his new authority under Article 37 to make his likely recommendations and prosecutorial philosophy clear to his subordinates.

Appendix A. Revised Article 37

(a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceedings. *A* person subject to this chapter may neither attempt *to influence the action of any court-martial, military tribunal or military judge through communications with the members or military judge, nor attempt to undermine the ability of a court-martial or military tribunal to fairly try the accused through public statements.*

(b) In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the army forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.

Appendix B. RCM 1001B Commander's Disciplinary Recommendation

a) In general. The convening authority will be promptly informed of the findings announced under RCM 922. In a non-capital case, the convening authority may submit a commander's disciplinary recommendation in writing under this rule. The convening authority is not considered a witness for purposes of Article 42(b). Trial counsel shall ensure the court is promptly informed of whether the convening authority wishes to submit a recommendation. The military judge will establish a date for the presentencing hearing consistent with judicious application of this rule.

b) Content of commander's disciplinary recommendation. The convening authority responsible for the court-martial will recommend a specific sentence. A written summary of the offenses as known to the commander will be included in the commander's disciplinary recommendation, the commander will not consider any charges or specifications accompanied by a finding of not guilty. The recommendation must be prepared with the assistance of a Staff Judge Advocate. The convening authority and his judge advocate may consider information from any source. The recommendation will only include a sentence and a summary of the offenses.

c) Service Upon the Convicted. The commander's disciplinary recommendation will be served upon the convicted individual and the presiding military judge. The convicted will be provided adequate time to object to any misstatement of fact in the commander's disciplinary recommendation and to call for additional witnesses to rebut the recommendation under RCM 703. In no circumstance will the court-martial reconvene for sentencing proceedings until five days have elapsed following the service of the recommendation upon the convicted.

Appendix C. RCM 1001 (redacted)

(a) *In general.*

Procedure. After findings of guilty have been announced, the prosecution and defense may present matter pursuant to this rule to aid the court-martial in determining an appropriate sentence. Such matter shall ordinarily be presented in the following sequence—

(A) Presentation by trial counsel of:

(i) service data relating to the accused taken from the charge sheet;

(ii) personal data relating to the accused and of the character of the accused's prior service as reflected in the personnel records of the accused;

(iii) evidence of prior convictions, military or civilian;

(iv) evidence of aggravation;

(v) evidence of rehabilitative potential; and

(vi) the commander's disciplinary recommendation.…

Appendix D. Article 57, Effective Date of Sentences

(a) ~~(1)~~ Any forfeiture of pay or allowances or reduction in grade that is included in a sentence of a court-martial takes effect ~~on the earlier of—~~

~~(A)~~ the date that is 14 days after the date on which the sentence is adjudged~~; or~~

~~(B) the date on which the sentence is approved by the convening authority.~~

~~(2) On application by an accused, the convening authority may defer a forfeiture of pay or allowances or reduction in grade that would otherwise become effective under paragraph (1)(A) until the date on which the sentence is approved by the convening authority. Such a deferment may be rescinded at any time by the convening authority.~~

~~(3) A forfeiture of pay or allowances shall be applicable to pay and allowances accruing on and after the date on which the sentence takes effect.~~

~~(4) In this subsection, the term "convening authority", with respect to a sentence of a court-martial, means any person authorized to act on the sentence under section 860 of this title (article 60).~~

(b) Any period of confinement included in a sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial, but periods during which the sentence to confinement is suspended ~~or deferred~~ shall be excluded in computing the service of the term of confinement.

(c) All other sentences of courts-martial are effective on the date ordered executed.

Appendix E. Article 57a

(a) ~~On application by an accused who is under sentence to confinement that has not been ordered executed, the convening authority or, if the accused is no longer under his jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned, may in his sole discretion defer service of the sentence to confinement. The deferment shall terminate when the sentence is ordered executed. The deferment may be rescinded at any time by the officer who granted it or, if the accused is no longer under his jurisdiction, by the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned.~~

(~~b~~*a*) (1)

In any case in which a court-martial sentences a person referred to in paragraph (2) to confinement, the *Secretary concerned* may defer the service of the sentence to confinement, without the consent of that person, until after the person has been permanently released to the armed forces by a State or foreign country referred to in that paragraph.

(2) Paragraph (1) applies to a person subject to this chapter who—

(A) while in the custody of a State or foreign country is temporarily returned by that State or foreign country to the armed forces for trial by court-martial; and

(B) after the court-martial, is returned to that State or foreign country under the authority of a mutual agreement or treaty, as the case may be.

(3) In this subsection, the term "State" includes the District of Columbia and any commonwealth, territory, or

(~~c~~*b*) In any case in which a court-martial sentences a person to confinement and ~~the sentence to confinement has been ordered executed, but in which~~ review of the case under section 867(a)(2) of this title (article 67(a)(2)) is pending, the Secretary concerned may defer further service of the sentence to confinement while that review is pending.

Appendix F. RCM 705 (Pretrial Agreements)

a. *In general.* Subject to such limitations as the Secretary concerned may prescribe, an accused and the convening authority may enter into a pretrial agreement in accordance with this rule.

b. *Nature of agreement.* A pretrial agreement may include:

(1) A promise by the accused to plead guilty to, or to enter a confessional stipulation as to one or more charges and specifications, and to fulfill such additional terms or conditions which may be included in the agreement and which are not prohibited under this rule; and

(2) A promise by the convening authority to do one or more of the following:

(A) Refer the charges to a certain type of court-martial;

(B) Refer a capital offense as noncapital;

(C) Withdraw one or more charges or specifications from the court-martial;

(D) Have the trial counsel present no evidence as to one or more specifications or portions thereof; and

(E) ~~Take specified action on the sentence adjudged by the court-martial.~~ *Agree to recommend a specific sentence under RCM 1001B and have the trial counsel argue for no greater sentence.*

c. *Terms and conditions.*

(1) *Prohibited terms or conditions.*

(A) *Not voluntary.* A term or condition in a pretrial agreement shall not be enforced if the accused did not freely and voluntarily agree to it.

(B) *Deprivation of certain rights.* A term or condition in a pretrial agreement shall not be enforced if it deprives the accused of: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete sentencing proceedings; the complete and effective exercise of post-trial and appellate rights.

(2) *Permissible terms or conditions.* Subject to subsection (c)(1)(A) of this rule, subsection (c)(1)(B) of this rule does not prohibit either party from proposing the following additional conditions:

(A) A promise to enter into a stipulation of fact concerning offenses to which a plea of guilty or as to which a confessional stipulation will be entered;

(B) A promise to testify as a witness in the trial of another person;

(C) A promise to provide restitution;

(D) A promise to conform the accused's conduct to certain conditions of probation before action by the convening authority as well

as during any period of suspension of the sentence, provided that the requirements of R.C.M. 1109 must be complied with before an alleged violation of such terms may relieve the convening authority of the obligation to fulfill the agreement; and

(E) A promise to waive procedural requirements such as the Article 32 preliminary hearing, the right to trial by court-martial composed of members or the right to request trial by military judge alone, or the opportunity to obtain the personal appearance of witnesses at sentencing proceedings.

(d) Procedure.

(1) *Negotiation.* Pretrial agreement negotiations may be initiated by the accused, defense counsel, trial counsel, the staff judge advocate, convening authority, or their duly authorized representatives. Either the defense or the government may propose any term or condition not prohibited by law or public policy. Government representatives shall negotiate with defense counsel unless the accused has waived the right to counsel.

(2) *Formal submission.* After negotiation, if any, under subsection (d)(1) of this rule, if the accused elects to propose a pretrial agreement, the defense shall submit a written offer. All terms, conditions, and promises between the parties shall be written. The proposed agreement shall be signed by the accused and defense counsel, if any. ~~If the agreement contains any specified action on the adjudged sentence, such action shall be set forth on a page separate from the other portions of the agreement.~~

(3) *Acceptance.* The convening authority may either accept or reject an offer of the accused to enter into a pretrial agreement or may propose by counteroffer any terms or conditions not prohibited by law or public policy. The decision whether to accept or reject an offer is within the sole discretion of the convening authority. When the convening authority has accepted a pretrial agreement, the agreement shall be signed by the convening authority or by a person, such as the staff judge advocate or trial counsel, who has been authorized by the convening authority to sign.

(4) *Withdrawal.*

(A) *By accused.* The accused may withdraw from a pretrial agreement at any time; however, the accused may withdraw a plea of guilty or a confessional stipulation entered pursuant to a pretrial agreement only as provided in R.C.M. 910(h) or 811(d), respectively.

(B) *By convening authority.* The convening authority may withdraw from a pretrial agreement at any time before the accused begins performance of promises contained in the agreement, upon the failure

by the accused to fulfill any material promise or condition in the agreement, when inquiry by the military judge discloses a disagreement as to a material term in the agreement, or if findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review.

(e) *Nondisclosure of existence of agreement.* ~~Except in a special court-martial without a military judge~~, no member of a court-martial shall be informed of the existence of a pretrial agreement. In addition, except as provided in Mil. R. Evid. 410, the fact that an accused offered to enter into a pretrial agreement, and any statements made by an accused in connection therewith, whether during negotiations or during a providence inquiry, shall not be otherwise disclosed to the members.

Appendix G. 1113 (Execution of Sentences)

(a) *In general.* A sentence of a court-martial will be executed upon order of the military judge.

(b) A dishonorable or bad-conduct discharge may be ordered executed only by a final judgment within the meaning of R.C.M. 1209.

(c) *Dismissal of a commissioned officer, cadet, or midshipman.* Dismissal of a commissioned officer, cadet, or midshipman may only be ordered executed only by the Secretary concerned or such Under Secretary or Assistant Secretary as the Secretary concerned may designate.

(d) *Sentences extending to death.* A punishment of death may be ordered executed only by the President.

(d) *Self-executing punishments.* Under regulations prescribed by the Secretary concerned, a dishonorable or bad conduct discharge that has been approved by an appropriate convening authority may be self-executing after final judgment at such time as:

(1) The accused has received a sentence of no confinement or has completed all confinement;

(2) The accused has been placed on excess or appellate leave; and,

(3) The appropriate official has certified that the accused's case is final. Upon completion of the certification, the official shall forward the certification to the accused's personnel office for preparation of a final discharge order and certificate.

d. *Other considerations concerning the execution of certain sentences.*

(1) *Death.*

(A) *Manner carried out.* A sentence to death which has been finally ordered executed shall be carried out in the manner prescribed by the Secretary concerned.

(B) *Action when accused lacks mental capacity.* An accused lacking the mental capacity to understand the punishment to be suffered or the reason for imposition of the death sentence may not be put to death during any period when such incapacity exists. The accused is presumed to have such mental capacity. If a substantial question is raised as to whether the accused lacks capacity, the convening authority then exercising general court-martial jurisdiction over the accused shall order a hearing on the question. A military judge, counsel for the government, and counsel for the accused shall be detailed. The convening authority shall direct an examination of the accused in accordance with R.C.M. 706, but the examination may be limited to determining whether the accused understands the punishment to be suffered and the reason therefore. The military judge shall consider all evidence presented, including evidence provided by the accused. The accused has the burden of proving such

lack of capacity by a preponderance of the evidence. The military judge shall make findings of fact, which will then be forwarded to the convening authority ordering the hearing. If the accused is found to lack capacity, the convening authority shall stay the execution until the accused regains appropriate capacity.

(2) *Confinement.*

(A) *Effective date of confinement.* Any period of confinement included in the sentence of a court- martial begins to run from the date the sentence is adjudged by the court-martial, but the following shall be excluded in computing the service of the term of confinement:

(A) Periods during which the sentence to confinement is suspended or deferred;

(B) Periods during which the accused is in custody of civilian authorities under Article 14 from the time of the delivery to the return to military custody, if the accused was convicted in the civilian court;

(C) Periods during which the accused is in custody of civilian or foreign authorities after the convening authority, pursuant to Article 57a, has postponed the service of a sentence to confinement.

(D) Periods during which the accused has escaped or is absent without authority, or is absent under a parole which proper authority has later revoked, or is erroneously released from confinement through misrepresentation or fraud on the part of the prisoner, or is erroneously released from confinement upon the prisoner's petition for a writ of habeas corpus under a court order which is later reversed; and

(E) Periods during which another sentence by court-martial to confinement is being served. When a prisoner serving a court-martial sentence to confinement is later convicted by a court-martial of another offense and sentenced to confinement, the later sentence interrupts the running of the earlier sentence. Any unremitted remaining portion of the earlier sentence will be served after the later sentence is fully executed.

(e) Nature of the confinement. The omission of "hard labor" from any sentence of a court-martial which has adjudged confinement shall not prohibit the authority who orders the sentence executed from requiring hard labor as part of the punishment.

(f) Place of confinement. The authority who orders a sentence to confinement into execution shall designate the place of confinement under regulations prescribed by the Secretary concerned, unless otherwise prescribed by the Secretary concerned. Under such regulations as the Secretary concerned may prescribe, a sentence to confinement adjudged by a court-martial or other military tribunal, regardless whether the

sentence includes a punitive discharge or dismissal and regardless whether the punitive discharge or dismissal has been executed, may be ordered to be served in any place of confinement under the control of any of the armed forces or in any penal or correctional institution under the control of the United States or which the United States may be allowed to use. Persons so confined in a penal or correctional institution not under the control of one of the armed forces are subject to the same discipline and treatment as persons confined or committed by the courts of the United States or of the State, Territory, District of Columbia, or place in which the institution is situated. When the service of a sentence to confinement has been deferred and the deferment is later rescinded, the convening authority shall designate the place of confinement in the initial action on the sentence or in the order rescinding the deferment. No member of the armed forces, or person serving with or accompanying an armed force in the field, may be placed in confinement in immediate association with enemy prisoners or with other foreign nationals not subject to the code. The Secretary concerned may prescribe regulations governing the place and conditions of confinement.

(4) *Confinement in lieu of fine.* Confinement may not be executed for failure to pay a fine if the accused demonstrates that the accused has made good faith efforts to pay but cannot because of indigency, unless the authority considering imposition of confinement determines, after giving the accused notice and opportunity to be heard, that there is no other punishment adequate to meet the Government's interest in appropriate punishment.

(5) *Restriction; hard labor without confinement.* When restriction and hard labor without confinement are included in the same sentence, they shall, unless one is suspended, be executed concurrently.

(6) *More than one sentence.* If at the time forfeitures may be ordered executed, the accused is already serving a sentence to forfeitures by another court-martial, the military judge may order the later forfeitures executed when the earlier sentence to forfeitures is completed.

Appendix H. RCM 1000

(a) *In general* A commander may order a convicted Soldier, not already in confinement pursuant to RCM 305, into confinement pending a sentencing hearing.

(b) *Factors* When making a decision to order an individual into confinement, the commander must determine confinement is necessary to ensure the individual's presence. The commander should foresee significant burdens associated with ensuring the presence of the convicted person at the sentencing hearing. The commander may presume an individual convicted of an offense or offenses normally tried at summary court-martial will be present at the sentencing hearing. The commander may presume individuals convicted of more serious offenses have a strong motivation to absent themselves.

(c) *Review* An order to confinement may be appealed to the military judge.