

DEVELOPMENT, ADOPTION, AND IMPLEMENTATION OF MILITARY SENTENCING GUIDELINES

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I. Introduction

The U.S. Army convicted Private First Class Looney of unpremeditated murder and sentenced him to 120 months of confinement.² In a case with similar facts, the U.S. Army convicted a second soldier, Private First Class Saulsberry, of unpremeditated murder and sentenced him to confinement for 360 months.³ The difference in adjudged confinement was 240 months.

Seaman (E-3) Kirkman, U.S. Navy, was convicted of rape at a general courts-martial and sentenced to eighty-nine days of confinement.⁴ In a similar factual scenario, the U.S. Navy successfully prosecuted Hospital

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2. United States v. Looney, 48 M.J. 681 (Army Ct. Crim. App. 1998). Private First Class (PFC) Looney was convicted by a military judge sitting as general court-martial. On the night of 12-13 November 1994, PFC Looney and some friends were drinking at several clubs. He got into an argument with the victim, who was a good friend. The argument turned into a fight, and PFC Looney stabbed the victim once, killing him. *Id.* at 683.

3. United States v. Saulsberry, 47 M.J. 493 (1998). Private First Class Saulsberry was convicted at a general court-martial by a panel composed of officer and enlisted members. On the day of the incident PFC Saulsberry, the victim, and other soldiers were in PFC Saulsberry's barracks room watching television. The victim and PFC Saulsberry got into an argument. The argument turned into a fight, and PFC Saulsberry stabbed the victim once, killing him.

4. United States v. Kirkman, NMCM 98 01264, 2000 CCA LEXIS 61 (N.M. Ct.

Apprentice (E-2) Iberra for rape, but he was sentenced to forty-eight months of confinement.⁵ The confinement adjudged in these two cases varied by forty-five months.

The U.S. Air Force convicted Airman First Class Johnson of five specifications involving methamphetamine and marijuana use and distribution. He was sentenced to thirteen months of confinement.⁶ U.S. Army Private Goodenough was convicted of two specifications involving possession and distribution of methamphetamines. He was sentenced to sixty-one months of confinement.⁷ Although his case involved fewer charges, Private Goodenough was adjudged forty-eight more months of confinement than Airman Johnson.

The examples above illustrate the problem of unwarranted sentence disparity. To solve this problem, this article proposes military sentencing guidelines. Military sentencing guidelines will reduce sentence disparity while retaining much of the current military sentencing system.

Unwarranted sentence disparity exists when individuals convicted of similar crimes receive unequal sentences.⁸ Congress determined that unwarranted sentencing disparity does not promote the goals of federal sentencing.⁹ To remedy this, Congress created the United States Sentencing Commission and tasked the Commission with developing a sentencing system that reduced sentence disparity.¹⁰ Congress told the Commission

4. (continued) *Crim. App.* 2000). Seaman Kirkman was convicted at a general court-martial by a panel of officer and enlisted members. At the time of the rape, the victim was drunk and regained consciousness while Seaman Kirkman was raping her.

5. *United States v. Ibarra*, 53 M.J. 616 (N.M. Ct. *Crim. App.* 2000). Ibarra was convicted at a general court-martial by a panel of officer and enlisted members. At the time of the rape, the victim was drunk and regained consciousness while Ibarra was raping her.

6. Data from Major Erin Hogan, USAF, Military Justice Division, U.S. Air Force, (18 Feb. 2000) [hereinafter *Air Force Data*]. It is interesting that while all of the four branches (Army, Navy, Air Force, Marine Corps) maintained sentencing records and a sentencing data base, not one of the branches kept any records regarding sentence uniformity.

7. Data from Joseph Neurauter, Clerk of Court, U.S. Army Court of Criminal Appeals, Arlington, Va. (22 Feb. 2000) [hereinafter *Army Data*]. The data consisted of rank of the accused, findings, and adjudged sentence during the calendar year 1999. The data was used to calculate an average sentence and sentencing range for the various punitive articles.

8. UNITED STATES SENTENCING COMMISSION, *FEDERAL SENTENCING GUIDELINES MANUAL* (1998) [hereinafter *USSG*].

9. 28 U.S.C. § 991 (2000); 18 U.S.C. § 3553 (2000). The goals of federal sentencing are: just punishment, deterrence, incapacitation, and rehabilitation.

10. 28 U.S.C. § 991.

to create a sentencing system that reduced sentence disparity by “formulat[ing] federal trial judges in their sentencing decisions.”¹¹ The Commission created the federal sentencing guidelines to satisfy its mandate to reduce sentence disparity.¹²

Currently, the federal system and thirty-three of the states employ some form of sentencing guidelines¹³ to combat unwarranted sentence disparity.¹⁴ By contrast, the military justice system does not use sentencing guidelines.¹⁵ Instead, the military uses a system that allows the sentencing authority¹⁶ almost complete discretion.¹⁷ This divergent approach to sentencing is troublesome considering that the sentencing goals of the federal system and the military system are remarkably alike.¹⁸ Both systems pursue the goals of just punishment, deterrence, incapacitation, and rehabilitation. The military pursues the additional goal of maintaining good order and discipline.¹⁹

This article discusses military sentencing guidelines in seven sections. Section II discusses the military sentencing process; while Section III gives similar information for the federal system. Both sections are

11. *Id.*

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

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

14. OVERVIEW, *supra* note 12.

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

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

17. *Id.* R.C.M. 1002.

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

19. *Compare* 18 U.S.C. § 3553(a)(2) *with* BENCHBOOK, *supra* note 18, at 64.

divided into a history subsection and a subsection explaining the current sentencing process. These sections are included for two reasons. First, they provide the reader with a basic understanding of the workings of both sentencing systems. This is critical because the proposed military sentencing guidelines are a hybrid of the federal and military sentencing system. Second, Sections II and III illustrate that while the sentencing goals of the military and federal system are almost identical,²⁰ the approaches employed by the two systems are dissimilar.²¹ Sections II and III highlight that the federal system makes sentence uniformity a priority while the military system does not.

Section IV illustrates the degree of sentence disparity that currently pervades the military justice system. Section IV discusses sentencing data collected from four branches of the military.²² It then calculates the standard deviation²³ for a variety of punitive articles. This section discusses the standard deviation that attaches to several punitive articles to demonstrate the wide range of confinement that currently exists within the military.

Section V proposes that the military adopt sentencing guidelines by advancing a unique military sentencing matrix. This section provides the

20. Compare 18 U.S.C. § 3553; 28 U.S.C. § 991 (2000), with BENCHBOOK, *supra* note 18, at 64. The goals of sentencing in the federal system are: just punishment, deterrence, incapacitation, and rehabilitation. The military justice system employs the same four goals plus the goal of discipline.

21. Compare MCM, *supra* note 16, with USSG, *supra* note 8.

22. The United States Army, United States Navy, United States Air Force, and the United States Marine Corps.

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

The standard deviation of a set of measurements x_1, x_2, \dots, x_n , where the mean is defined as the square root of the mean of the squares of the deviations; it is usually designated by the Greek letter sigma (σ). In symbols

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

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

Id.

framework under which sentencing guidelines would be implemented and applied in the military system.

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

Section VII proposes legislative and executive changes necessary to implement military sentencing guidelines. Most of the recommended changes modify existing Rules for Courts-Martial (R.C.M.).²⁴ While these changes would implement sentencing guidelines, they would also preserve the majority of the current military sentencing system.

This article concludes that the military should adopt the proposed sentencing guidelines as a solution to the problem of unwarranted sentence disparity.

II. Summary of Military Sentencing Procedures

This section provides an orientation to the military sentencing system, which, when combined with section III, will enable the reader to compare and contrast the military and federal sentencing system. Comparing and contrasting the two systems will be important when assessing the viability of adopting military sentencing guidelines.

A. History of Military Sentencing

The military code of discipline for the Colonial Army of the United States was the American Articles of War of 1775.²⁵ The American Articles were born from the British Code. The British Code can be traced to General Adolphus's 1621 Code of Articles.²⁶ The Articles of War outlined military court-martial procedures and were the precursor to the *Manual for*

24. MCM, *supra* note 16, R.C.M. 1001-1010.

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

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

Courts-Martial.²⁷ The Articles of War of 1775 gave panel members great latitude in fashioning a sentence.²⁸ Court-martial sentencing remained remarkably consistent from 1775 until the enactment of the Uniform Code of Military Justice (UCMJ) in 1950.²⁹

Before the *Manual for Courts-Martial* was enacted in 1951, a separate sentencing hearing was not a formal part of a court-martial.³⁰ Evidence presented on the merits was used to form the sentence when an individual was found guilty.³¹ An exception was the guilty plea, which incorporated a quasi-hearing, to assist the sentencing authority in forming a sentence.³² A sentencing hearing was necessary to provide the sentencing authority with the information required to fashion an appropriate sentence.³³ This information was often mitigation evidence in the form of good military character.³⁴

The pre-1951 *Manuals for Courts-Martial* gave the court members general guidance regarding sentencing determinations. The *Manual for Courts-Martial* of 1928 told members to consider former discharges, previous convictions, and circumstances that tend to mitigate, extenuate, or aggravate either the offense or collateral consequences of the offense.³⁵ The 1949 version of the *Manual for Courts-Martial* directed members to consider the accused's background, uniformity in sentencing, general deterrence, and discipline.³⁶ Of particular note is that sentence uniformity was a sentencing goal in the 1949 *Manual for Courts-Martial*.³⁷

27. See WINTHROP, *supra* note 25, at 907-18. See also Colonel William F. Fratcher, *History of the Judge Advocates General's Corp, United States Army*, 4 MIL. L. REV. 89 (1966).

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

29. See *supra* notes 26-28 and accompanying text.

30. See Captain Denise K. Vowell, *To Determine an Appropriate Sentence in the Military Justice System*, 114 MIL. L. REV. 87, 108-09 (1986).

31. *Id.* at 109-10 (quoting S. BENET, A TREATISE ON MILITARY LAW AND THE PRACTICE OF COURTS-MARTIAL (1862)).

32. See WINTHROP, *supra* note 25, at 278-80.

33. See Vowell, *supra* note 30, at 109.

34. See WINTHROP, *supra* note 25, at 278-80, 396-400. Character evidence could also serve as a defense on the merits.

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

36. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1949) [hereinafter 1949 MANUAL]. See Vowell, *supra* note 30, at 118.

37. See 1949 MANUAL, *supra* note 36; Vowell, *supra* note 30, at 118.

The Military Justice Act of 1950³⁸ resulted in the UCMJ and the *Manual for Courts-Martial* of 1951.³⁹ Much of the emphasis behind the Military Justice Act surrounded concerns about the ability of the military justice system to fashion just sentences.⁴⁰ So suspect were the sentences adjudged during World War II that the Secretary of War remitted or reduced eighty-five percent of the sentences submitted to the clemency board of review.⁴¹

The 1951 *Manual for Courts-Martial* made a number of changes to the military justice system, attempting to protect the rights of the individual soldier and to closely mirror the civilian criminal justice system.⁴² The *Manual for Courts-Martial* of 1951 developed a distinct sentencing hearing for every court-martial.⁴³ Sentencing hearings were adversarial.⁴⁴ The government could present aggravation evidence subject to defense cross-examination.⁴⁵ The defense enjoyed wide discretion in presenting extenuation and mitigation evidence, to include the accused making a statement.⁴⁶ The changes implemented in 1951 were the genesis of the current sentencing procedures.

The 1951 *Manual for Courts-Martial* gave members general guidance on what to consider when fashioning an appropriate sentence.⁴⁷ The

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

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

40. See Arthur E. Farmer & Richard H. Wels, *Command Control-or Military Justice?*, 29 N.Y.U. L. REV. 263 (Apr. 1949). See also DeVico, *supra* note 25, at 66; Major Kevin Lovejoy, *Abolition of Court Member Sentencing*, 142 MIL. L. REV. 1, 17 (1993). The focus of the post-World War II criticisms was that the military conducted too many courts-martial and that the resulting punishment were, at times, unjust.

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

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

43. 1951 MANUAL, *supra* note 39, ¶ 75 (1951).

44. *Id.*; Lovejoy, *supra* note 40, at 18.

45. 1951 MANUAL, *supra* note 39.

46. *Id.* ¶ 75; Lovejoy, *supra* note 40, at 18-19.

47. See 1951 MANUAL, *supra* note 39, ¶ 76. See also Lovejoy, *supra* note 40, at 19; Vowell, *supra* note 30, at 35-36.

1951 *Manual* urged members to limit the use of the maximum sentence.⁴⁸ The *Manual* further mandated that members use their own discretion when fashioning a sentence.⁴⁹ Additionally, sentence uniformity was retained as a sentencing goal.⁵⁰

The next major change to the *Manual* occurred in 1969. The 1969 version of the *Manual for Courts-Martial* removed sentence uniformity as a sentencing goal.⁵¹ Abandoning sentence uniformity has its origin in the Court of Military Appeal case of *United States v. Mamaluy*.⁵² In *Mamaluy*, the law officer⁵³ instructed the members that they could consider sentence uniformity when fashioning a sentence. The *Mamaluy* court determined that instructing the members as to sentence uniformity was inappropriate.⁵⁴ The court found the sentence uniformity instruction faulty because panel members do not have the requisite information necessary to adjudge a uniform sentence.⁵⁵ The *Mamaluy* court did not say that sentence uniformity was an inappropriate goal of sentencing.⁵⁶ Rather, the *Mamaluy* court found that court-martial members were not adequately equipped to consider sentence uniformity.⁵⁷

The *Mamaluy* court explained that court-martial members do not have exposure to a wide enough spectrum of cases to apply sentence uniformity. Further, the *Mamaluy* court found: “Military Courts have little continuity, and confusion would result if they sought to equalize sentences without being fully informed.”⁵⁸ Because the panel could never be “fully informed,” sentence uniformity could not be applied to a court-martial by

48. 1951 MANUAL, *supra* note 39, ¶ 76a.

49. *Id.* ¶ 76. See Vowell, *supra* note 30, at 120.

50. Compare 1951 MANUAL, *supra* note 39, ¶ 76 (a)(4) (members were instructed that when fashioning a sentence they should strive for sentence uniformity. “Among other factors which may properly be considered are the penalties adjudged in other cases for similar offenses. With due regard for the nature and seriousness of the circumstances attending each particular case, sentences should be relatively uniform throughout the armed forces . . .” (emphasis added)) with 1949 MANUAL, *supra* note 36, ¶ 80 (that also included an instruction that made sentence uniformity a sentencing goal).

51. MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 76 (1969) [hereinafter 1969 MANUAL].

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

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

54. *Mamaluy*, 27 C.M.R. at 104-07.

55. *Id.* at 180.

56. *Id.* at 179-81.

57. *Id.* at 180.

58. *Id.*

a military panel. Accordingly, the *Mamaluy* court advised Congress that Article 76(a) of the 1951 *Manual for Courts-Martial* delete any mention of sentence uniformity.⁵⁹

The *Manual for Courts-Martial* experienced additional modifications in 1981, 1984, 1995, and 1998.⁶⁰ Like the 1969 *Manual*, these modifications did not mention sentence uniformity. The result of these modifications is the sentencing procedures used in the military today.

B. The Current Military Sentencing Process

This subsection discusses the current military sentencing system in five parts. Part 1 summarizes the current sentencing process while Part 2 explains the wide degree of sentence discretion given to sentencing authorities. Next, Part 3 discusses the military's treatment of sentence uniformity. Part 4 briefly elaborates on the stated goals of military sentencing. Finally, Part 5 shows that 10 U.S.C. § 836⁶¹ has not influenced military sentencing.

1. Overview of Military Sentencing

The overview of the military sentencing system begins with forum selection.⁶² An enlisted accused may elect a panel of all officers, choose a panel comprised of at least one-third enlisted representation, or, request a trial by military judge alone.⁶³ If the accused is an officer, he may request trial by either officer members or military judge alone.⁶⁴

59. *Id.* at 181.

60. MCM, *supra* note 16; MANUAL FOR COURTS-MARTIAL, UNITED STATES, (1995); MANUAL FOR COURTS-MARTIAL UNITED STATES (1984); MANUAL FOR COURTS-MARTIAL, UNITED STATES (1981); 1969 MANUAL, *supra* note 51.

61. 10 U.S.C. § 836 (2000).

62. MCM, *supra* note 16, R.C.M. 903. This rule grants the accused the right to request trial by military judge. This right is not absolute and the judge may deny the request for good cause.

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

64. *Id.*

Upon a finding of guilty, the court-martial must follow the procedures outlined in Chapter X of the *Manual for Courts-Martial*.⁶⁵ The sentencing procedures are adversarial.⁶⁶ The trial counsel is allowed to present five types of evidence: information about the accused taken from the charge sheet, personal data contained in the official personnel records of the accused, evidence of any prior military or civilian criminal convictions, aggravating circumstances directly relating to (or resulting from) the offense of which the accused was found guilty, and opinion evidence regarding the accused's rehabilitative potential.⁶⁷ The government may not solicit from a witness whether an accused should receive a punitive discharge.⁶⁸ The Military Rules of Evidence govern the trial counsel's presentation.⁶⁹ The trial counsel's entire sentencing case is often called, (and will be referred to in this article as), the case in aggravation.

Upon the conclusion of the case in aggravation, the accused is permitted to present his case. The defense is allowed to present matters in extenuation and mitigation.⁷⁰ Matters in extenuation attempt to explain the circumstances surrounding the crime.⁷¹ Matters in mitigation attempt to lessen punishment or create a record for clemency purposes.⁷² Mitigation evidence can include any positive trait that relates to the accused.⁷³ Upon a request from the accused, the military judge may relax the rules of evidence. If the rules are relaxed, the defense may present extenuation and mitigation evidence that would not be admissible on the merits.⁷⁴ If the judge relaxes the rules of evidence, the rules remain relaxed for the government's case in rebuttal.⁷⁵

65. *Id.* ch. X.

66. *Id.* R.C.M. 1001.

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

68. *Id.* R.C.M. 1001(b)(5)(D).

69. *Id.* pt. III.

70. *Id.* R.C.M. 1001; BENCHBOOK, *supra* note 18, at 62-63.

71. MCM, *supra* note 16, R.C.M. 1001.

72. *Id.* R.C.M. 1001(c)(1)(B).

73. *Id.* R.C.M. 1001(c).

74. *Id.* R.C.M. 1001(c)(3), 1001(e). For example, if the judge determines that the production of a witness is not necessary, the judge may receive testimony through alternate means (e.g., telephone, video conferencing, and affidavit).

75. *Id.* R.C.M. 1001(c)(3), 1001(d).

Regardless of whether or not the judge relaxed the rules of evidence, the accused may make an in-court statement part of his extenuation and mitigation case.⁷⁶ The accused can make a sworn statement, an unsworn statement, or a combination of the two.⁷⁷ A sworn statement is subject to cross-examination⁷⁸ while an unsworn statement is not subject to cross-examination.⁷⁹ The accused may make an unsworn statement orally, in writing, through his counsel, or a combination of the above.⁸⁰ The government may rebut any statement of fact presented in the accused's unsworn statement.⁸¹

Upon the conclusion of the defense's sentencing case, the government may rebut the defense case. Likewise, the defense may surrebut the government's rebuttal case. Rebuttal and surrebuttal may continue at the discretion of the military judge.⁸²

Upon conclusion of rebuttal and surrebuttal, the government and defense may present sentencing arguments.⁸³ While the trial counsel may not claim to speak for the convening authority (or for higher authorities),⁸⁴ the trial counsel may argue for a specific lawful sentence.⁸⁵ The trial counsel may relate the specific sentence to the sentencing goals of rehabilitation of the accused, specific deterrence of the accused, social retribution, and general deterrence.⁸⁶ Neither the trial counsel or the defense counsel may make sentence uniformity a part of their argument.⁸⁷

2. Sentencing Discretion

Upon the conclusion of government and defense argument, the sentencing authority has the freedom to fashion any lawful sentence.⁸⁸ Every

76. *Id.* R.C.M. 1001(c)(2).

77. *Id.*

78. *Id.* R.C.M. 1001(c)(2)(B); BENCHBOOK, *supra* note 18, at 58.

79. MCM, *supra* note 16, R.C.M. 1001(c)(2)(C).

80. *Id.* R.C.M. 1001(c).

81. *Id.* R.C.M. 1001(c)(2)(C); BENCHBOOK, *supra* note 18, at 58.

82. MCM, *supra* note 16, R.C.M. 1001(d).

83. *Id.* R.C.M. 1001(g).

84. *Id.*

85. *Id.* R.C.M. 1001(g), 1003.

86. *Id.* R.C.M. 1001(g); BENCHBOOK, *supra* note 18, at 64.

87. *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959).

88. MCM, *supra* note 16, R.C.M. 1002.

crime under the *Manual for Courts-Martial* has an attendant maximum punishment.⁸⁹ The maximum punishment for multiple offenses is determined by aggregating the maximum punishment for each violation of the *Manual for Courts-Martial*.⁹⁰ The sentencing authority is obligated to adjudge a mandatory minimum sentence in the rare circumstance where the accused is found guilty of Article 106, Spying or Article 118, Murder.⁹¹

The sentencing authority, be it military judge or members, has a wide range of options available when fashioning an appropriate sentence.⁹² The sentencing authority may adjudge no punishment.⁹³ If the sentencing authority determines that punishment is appropriate, the sentencing authority may adjudge any combination of the following: reprimand,⁹⁴ forfeiture of pay and allowances,⁹⁵ fine,⁹⁶ reduction in pay grade for enlisted members,⁹⁷ restriction,⁹⁸ hard labor without confinement,⁹⁹ confinement,¹⁰⁰ dismissal in the case of officers,¹⁰¹ punitive discharge in the case of enlisted,¹⁰² and death when authorized by the punitive articles.¹⁰³

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

90. MCM, *supra* note 16, R.C.M. 1003.

91. 10 U.S.C. § 918 (2000). Imprisonment for life is the mandatory minimum sentence for violation of Article 118(1) premeditated murder and Article 118(4) felony murder. Death is the mandatory sentence for violation of Article 106 (spying).

92. MCM, *supra* note 16, R.C.M. 1002. The sentencing authority may not exceed the maximum punishment. Only spying and murder carry a mandatory minimum sentence.

93. *Id.*

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

95. *Id.* R.C.M. 1003(b)(2).

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

97. *Id.* R.C.M. 1003(b)(5).

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

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

100. *Id.* R.C.M. 1003(b)(8).

101. *Id.* R.C.M. 1003(b)(9)(A).

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

Despite having a wide range of sentencing options available, the sentencing authority has little guidance on how to actually form a sentence.¹⁰⁴ The primary guidance that the sentencing authority receives is directed to the maximum sentence that may be adjudged.¹⁰⁵ In addition, the members receive guidance on the effect that adjudging a punitive discharge and confinement (or confinement in excess of six months) has on the accused's pay and allowances.¹⁰⁶ The members also receive instructions on the voting procedures that should be followed and that the members are "solely responsible for selecting an appropriate sentence and may not rely on the possibility of any mitigating action by the convening or higher authority"¹⁰⁷

After the sentence is adjudged, the accused may submit matters to the convening authority and request that the convening authority set aside or lessen the severity of the sentence.¹⁰⁸ The convening authority's staff judge advocate will make a recommendation to the convening authority as to what action the convening authority should take.¹⁰⁹

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

104. BENCHBOOK, *supra* note 18, at 64, states:

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

Id.

105. *Id.*

106. *Id.* at 66-68.

107. MCM, *supra* note 16, R.C.M. 1005(e)(4).

108. *Id.* R.C.M. 1105.

109. *Id.* R.C.M. 1106.

The convening authority also enjoys a wide degree of discretion and can take any action that decreases the effect of either the findings or sentence adjudged by the court-martial.¹¹⁰ This includes the authority to “[c]hange a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification.”¹¹¹ “The convening authority may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased.”¹¹²

3. Sentence Uniformity

The sentencing authority does not receive guidance regarding sentence uniformity. As discussed previously, sentence uniformity was deleted as a sentencing goal in the 1969 *Manual for Courts-Martial*.¹¹³ The *Mamaluy* court recommended eliminating the sentence uniformity instruction largely because of lack of confidence in the ability of members to apply the uniformity instruction.¹¹⁴

While sentence uniformity is no longer a sentencing goal addressed in the *Manual for Courts-Martial*, sentence uniformity is a matter subject to review by the Court of Criminal Appeals.¹¹⁵ Congress has tasked the Court of Criminal Appeals with maintaining “relative” sentence unifor-

110. *Id.* R.C.M. 1107.

111. *Id.* R.C.M. 1107(c)(1).

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

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

113. See notes 51-57 and accompanying text.

114. *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959).

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

mity.¹¹⁶ The U.S. Court of Appeals for the Armed Forces and the service Court of Criminal Appeals have defined relative uniformity very narrowly.¹¹⁷ Relative uniformity is limited to addressing sentence uniformity between cases that arise out of the same criminal act (that is, three accused convicted of a sexual assault on the same victim at the same time).¹¹⁸ The accused may challenge his sentence by arguing that other closely related cases resulted in sentences that were much more lenient than the sentence he received.¹¹⁹ If he successfully argues that his sentence is disparate, the burden shifts to the government to show that a rational basis exists for the sentence disparity.¹²⁰

Very few sentences will be determined to be disparate by either the Court of Criminal Appeals or the Court of Appeals for the Armed Forces. The Court of Appeals for the Armed Forces will review a lower court decision on two grounds, whether the lower court abused its discretion, or whether the ruling of the lower court resulted in an obvious miscarriage of justice.¹²¹ Compounding this already high standard is that in determining whether the lower court abused its discretion (or rendered a decision that resulted in a miscarriage of justice) the court compares the adjudged sentence to the maximum sentence authorized for the crime.¹²² Because the military system aggregates the maximum confinement for each specification that the accused is convicted of, the attendant maximum confinement often far exceeds the adjudged sentence.¹²³

4. *The Goals of Military Sentencing*

While the military employs a unique sentencing process, the goals of the military system are not unique.¹²⁴ In its most basic form, the military seeks to balance the needs of the military, to include good order and disci-

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

117. *Lacy*, 50 M.J. at 286.

118. *Id.* at 289; *United States v. Fee*, 50 M.J. 290, 291 (1999).

119. *Lacy*, 50 M.J. at 288.

120. *Id.*

121. *Id.*

122. *Id.*

123. MCM, *supra* note 16, R.C.M. 1003. *See also* Army Data, *supra* note 7, Data from Lieutenant Commander Steve Jamozy, USN, Navy-Marine Corps Trial Judiciary, Washington, D.C. (21 Jan. 2000) [hereinafter USN/USMC Data]; Air Force Data *supra* note 6.

124. MCM, *supra* note 16, pt. I. "The purpose of military law is to promote justice,

pline, against the needs of the individual service member.¹²⁵ The desire to balance good order and discipline against individual rights was one of the primary factors that led to the *Manual for Courts-Martial* of 1951.¹²⁶ The *Manual for Courts-Martial* of 1951 led to the sentencing procedures that are followed today.

The goals of the current military sentencing system are “rehabilitation of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of [his] crime(s) and [his] sentence from committing the same or similar offense.”¹²⁷ The sentencing authority does not receive any further explanation of what is meant by “rehabilitation” or the other sentencing goals. The sentencing authority does not receive any instructions regarding sentence uniformity. Like other aspects of the military sentencing system, the members are given complete discretion as to how to apply the above sentencing goals.¹²⁸

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

The military employs a sentencing system that is very different than the federal sentencing system and the sentencing systems employed by a majority of the states.¹²⁹ While the current military sentencing system is unique, Congress and the President have demonstrated a desire that the military criminal justice system approximate the federal justice system.¹³⁰ Congress has tasked the President, where practicable, to apply federal “principles of law and rules of evidence” to the military justice system.¹³¹

124. (continued) to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.” *Id.*

125. *Id.* See DeVico, *supra* note 25; *Uniform Code of Military Justice: Hearings on H.R. 2498 before the Subcomm. On Armed Services*, 81st Cong. 37 (1949) (statement of James Forrestal, Secretary of Defense and Prof. Edmund Morgan Jr., Harvard Law School).

126. See DeVico, *supra* note 25, at 66.

127. See BENCHBOOK, *supra* note 18, at 64.

128. *Id.* The military judge instructs the members that the weight to be given to the sentencing goals “along with all other sentencing matters in this case, rests solely within your discretion.” *Id.*

129. Lanni, *supra* note 13, at n.14.

130. 10 U.S.C. § 836 (2000); MCM, *supra* note 16.

131. 10 U.S.C. § 836.

The President has taken steps to ensure that the military justice system approximates the federal justice system. Most notably, he has ensured that the Military Rules of Evidence closely mirror the Federal Rules of Evidence.¹³² The President has not taken similar action to create a military sentencing system that approximates the federal sentencing system. The military sentencing system fashions individualized punishment by granting the sentencing authority a large degree of sentencing discretion.¹³³ Conversely, the present federal system attempts to maximize sentence uniformity by constraining judicial sentencing discretion with the use of sentencing guidelines.¹³⁴ The next section discusses the federal system and how sentencing guidelines were implemented.

III. Summary of Federal Sentencing Guidelines

Like the military system, the federal justice system has its own unique sentencing history. When the needs of the state warrant punishing an individual, the federal system employs sentencing guidelines.¹³⁵ This section discusses the history of federal sentencing and the development and implementation of federal sentencing guidelines.

A. History of Federal Sentencing Prior to Guidelines

Before the Sentencing Reform Act of 1984,¹³⁶ trial judges in the federal system had almost unfettered discretion in fashioning sentences.¹³⁷ The sentencing discretion enjoyed by federal judges was very similar to the sentencing discretion presently enjoyed in the military system.¹³⁸ The

132. Compare MCM, *supra* note 16, pt. III with FED. R. EVID. See also MCM, *supra* note 16, app. 22.

133. United States v. Lacy, 50 M.J. 286, 287-88 (1999).

134. USSG, *supra* note 8, at 2.

135. *Id.*

136. Pub. L. No. 98-473, 98 Stat. 1987 (codified at 18 U.S.C. §§ 3551-3673 (2000), 28 U.S.C. §§ 991-998 (2000)). The Federal Sentencing Guidelines became effective on 1 November 1987. The guidelines overcame constitutional challenges and were fully effective January 1989. See Joan Tagliareni, Comment, *Actual Contamination in the Federal Sentencing Guidelines: To Prove or Not to Prove*, 22 B.C. ENVTL. AFF. L. REV. 413 (1995).

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

138. MCM, *supra* note 16, R.C.M. 903. A military accused may be sentenced by either military members or by a military judge.

only barrier that the federal judge encountered when fashioning punishment was statutory maximum sentences.¹³⁹

The statutory maximum sentence was historically the only limit imposed on federal judges.¹⁴⁰ Before sentencing guidelines, a federal trial judge's sentence was subject to judicial review only if the sentence exceeded the statutory maximum.¹⁴¹ The standard of review surpassed the already high abuse of discretion standard.¹⁴² The standard of appellate review was whether the sentence was lawful.¹⁴³

When fashioning a lawful sentence, the federal judge could choose from a host of sentencing theories. These sentencing theories have been the subject of much debate.¹⁴⁴ The primary focus of the debate was what should be the primary goal of sentencing.¹⁴⁵ Some argued that the sentence should punish the individual.¹⁴⁶ Others thought that confinement could correct behavior and rehabilitate the wrongdoer.¹⁴⁷ A third camp urged that sentencing should operate to remove the convicted from free society.¹⁴⁸

At the turn of the last century, the *Old Testament*¹⁴⁹ values of retribution and restitution were the dominant sentencing philosophy.¹⁵⁰ The trial

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

140. See Charles J. Ogletree, Jr., *Commentary: The Death of Discretion? Reflections on The Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1940-41 (1988). See also Ilene H. Nagel, *Supreme Court Review: Foreword: Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883 (1990) (discussing the history of Western sentencing). Of particular note is that federal sentencing has historically been dominated by judge alone sentencing. Ms. Nagel's article also provides an excellent history of the expansion of judicial discretion.

141. See Herbert J. Hoelter et al., *Practicing Law in the Americas: The New Hemispheric Reality: Article: Future Trends in the United States Federal Sentencing Scheme*, 13 AM. U.J. INT'L L. & POL'Y 1069 (1998). See also Stith & Carbanes, *supra* note 137, at 1251-53.

142. See Hoelter et al., *supra* note 141, at 1078.

143. See Stith & Carbanes, *supra* note 137, at 1251-53.

144. *Id.*

145. *Id.*

146. See Ogletree, *supra* note 140, at 1941-42.

147. *Id.*

148. See Hoelter et al., *supra* note 141, at 1075.

149. *Exodus* 21:24-25. "If her eye is injured, injure his; if her tooth is knocked out, knock out his; and so on—hand for hand, foot for foot, burn for burn, wound for wound, lash for lash."

150. See Ogletree, *supra* note 140, at 1940.

judge enjoyed almost complete discretion to fashion “the punishment that fit the crime.”¹⁵¹ With the growth of the social sciences that accompanied the first quarter of the Twentieth Century, the sentencing goals of retribution and restitution came under attack.¹⁵² The social sciences argued that they could cure society’s problems through intervention in the socio-economic fabric of American life.¹⁵³

Eager to cure the problems that plagued criminal justice, the government looked to the social sciences to fix the criminal justice system.¹⁵⁴ The sentencing philosophy of this period was deterrence and rehabilitation.¹⁵⁵ Poverty and social forces were considered the root cause of crime.¹⁵⁶ The prisons created workshops, vocational training, and other avenues of social engineering to defeat these negative social forces.¹⁵⁷ The rehabilitation theory advocated that once the criminal “graduated” his course of study at the correctional facility, he was fit for return to society.¹⁵⁸ The social sciences promised that the graduate of the correctional facility would have a low probability of recidivism.¹⁵⁹ Penitentiaries were renamed correctional facilities to illustrate this shift from penitence to correction.¹⁶⁰

The rehabilitative model spawned growth in the parole system.¹⁶¹ The Parole Commission determined the amount of confinement actually served by the convict.¹⁶² Before 1974, the bulk of sentences were indeterminate.¹⁶³ An indeterminate sentence gave the Parole Commission the authority to parole a prisoner at any time. The Parole Commission could

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

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

153. *Id.*

154. See Stith & Carbanes, *supra* note 137, at n.7 (citing Probation Div., Admin. Office of the U.S. Courts, Pub. No. 105).

155. *Id.*

156. See Green, *supra* note 152, at 1920-21.

157. See Hoelter et al., *supra* note 141, at 1078-80.

158. See Green, *supra* note 152, at 1921.

159. See Tagliareni, *supra* note 136, at 416.

160. See Hoelter et al., *supra* note 141, at 1079.

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

162. See Todd E. Witten, Comment, *Sentence Entrapment and Manipulation: Government Manipulation of the Federal Sentencing Guidelines*, 29 AKRON L. REV. 697, at 699 (1996).

parole someone within days of being confined. A judge also had the option of adjudging a "straight sentence."¹⁶⁴ With a "straight sentence," the prisoner was eligible for parole after serving one-third of the sentence.¹⁶⁵ In either case, the Parole Commission determined when an individual was "cured" and released.¹⁶⁶

While the parole officer influenced the amount of confinement served, the probation officer affected the adjudged sentence.¹⁶⁷ The probation officer, an employee of the judiciary,¹⁶⁸ is responsible for providing a presentencing report to the bench.¹⁶⁹

Before the implementation of guidelines, the presentencing report contained a summary of the case on the merits, status of codefendant trials, application of parole to the case, and the personal history of the defendant.¹⁷⁰ The personal history included "family background, education, military service, work history, criminal record, dependents, and activities in the community."¹⁷¹ The probation officer would also recommend a sentence to the judge.¹⁷² Only the judge received the sentencing recommendation portion of the report.¹⁷³ This portion was advisory and the judge was free to give it great weight or no weight at all.¹⁷⁴ The prosecution and the defense received the remainder of the report.¹⁷⁵

Political pressure and disappointment with the rehabilitative model eventually resulted in the development and implementation of the federal sentencing guidelines.¹⁷⁶ Disappointment with the rehabilitative model

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

164. See Hoelter et al., *supra* note 141, at 1078.

165. *Id.*

166. See Green, *supra* note 152, at 1689.

167. See Stith & Carbanes, *supra* note 137, at 1249.

168. *Id.* at 1249-50.

169. *Id.*

170. *Id.*

171. Compare *id.* at 1249 with USSG, *supra* note 8, pt. H (largely eliminating the ability of the federal court to consider the personnel history traits of the defendant).

172. Stith & Carbanes, *supra* note 137, at 1249-50.

173. *Id.* at 1250 (quoting Probation Division., Admin. Office of U.S. Courts, Pub. No. 105, The Presentence Investigative Report 6 (1978)).

174. Stith & Carbanes, *supra* note 137, at 1249-50.

175. *Id.*

176. *Id.*

grew out of doubt in the ability of prisons to rehabilitate.¹⁷⁷ Experts also questioned the ability of parole boards to evaluate a prisoner's state of rehabilitation.¹⁷⁸

Pat Brown,¹⁷⁹ former Governor of California, chaired a commission responsible for reporting to Congress on the state of the federal criminal system.¹⁸⁰ The Brown Commission cited sentence disparity as one of the major defects of federal sentencing.¹⁸¹ The Commission stated that the unfettered sentencing authority of federal trial judges was the primary cause of sentence disparity.¹⁸² The Brown Commission concluded that the federal judicial system needed major reform.¹⁸³

B. Federal Sentencing, Post Guidelines

The political call for sentencing reform gained momentum through the 1980s.¹⁸⁴ The growing crime rate, disparity in sentencing, early release of criminals, and constituents urging their representatives to be "tough on crime" led to bipartisan support for sentencing reform.¹⁸⁵ Senator Strom Thurman (Republican) and Senator Edward Kennedy (Democrat) sponsored the Comprehensive Crimes Control Act of 1984.¹⁸⁶ This act resulted in the Sentencing Reform Act of 1984¹⁸⁷ and created the United States

177. Tagliareni, *supra* note 136, at 416.

178. *See id.*; *see also* Hoelter et al., *supra* note 141, at 1079-80.

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

180. *See* UNITED STATES SENTENCING COMMISSION, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY (June 18, 1987) [hereinafter SUPPLEMENTARY REPORT].

181. *See* Hoelter et al., *supra* note 141, at 1078-82.

182. *Id.*

183. *See* SUPPLEMENTARY REPORT, *supra* note 180, Hoelter et al., *supra* note 140, at 1078-82.

184. *See* Hoelter et al., *supra* note 141, at 1074; Wright *supra* note 161, at 1361. *See also* Interview with Paul Hoffer, Senior Sentencing Research Associate, United States Sentencing Commission (July 20, 2000). Congress used a combination of antidotal material and various reports to conclude that unwarranted sentence disparity existed within the federal sentencing system. A primary means of testing the hypothesis that sentence disparity existed was through judicial simulation. Judicial simulation involved providing various judges with the same sentencing case, and comparing the sentences that the various judges would award. These simulations resulted in disparate sentences and supported the view that unwarranted sentence disparity existed in the federal sentencing system.

185. *See* Freed, *supra* note 163, at 1689.

186. Pub. L. No. 98-473, 98 Stat. 1837, 1976 (1984) (codified as amended in several sections of Title 18 in the U.S. Code). *See* Wright, *supra* note 161, at 1361.

Sentencing Commission.¹⁸⁸ The United States Sentencing Commission published the first federal sentencing guidelines in November of 1987.¹⁸⁹ Those guidelines became fully effective January of 1989.¹⁹⁰

The charter of the United States Sentencing Commission is to:¹⁹¹

[P]rovide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices¹⁹²

The U.S. Sentencing Commission is an eight member independent section of the judicial branch.¹⁹³ The U.S. Attorney General (or her designee) is a nonvoting member. The President appoints the remaining seven members after consultation with the criminal justice community and the Senate.¹⁹⁴ The panel must contain members of both political parties.¹⁹⁵ The U.S. Sentencing Commission develops and monitors the federal sentencing guidelines.¹⁹⁶

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

188. 28 U.S.C. § 991(a).

189. See Witten, *supra* note 162, at 701.

190. See Tagliareni, *supra* note 136.

191. 28 U.S.C. § 991(b)(1)(B).

192. See *id.*

193. See *id.* § 991(a).

194. *Id.*

195. *Id.*

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

Id.

196. USSG, *supra* note 8, ch. 1, pt. A.

As discussed in the introduction, the goals of criminal punishment in the federal system are deterrence, incapacitation, just punishment, and rehabilitation.¹⁹⁷ These four goals are identical to four of the five military sentencing goals.¹⁹⁸ The additional goal in the military is maintaining good order and discipline.¹⁹⁹ The military pursues its sentencing goals using sentencing discretion and individual sentencing.²⁰⁰ The federal system pursues its goals through the U.S. Sentencing Commission and the use of sentencing guidelines. Sentencing goals should not be confused with sentencing objectives.²⁰¹ Sentencing goals relate to why an individual is punished.²⁰² Sentencing objectives relate to the goals of the sentencing system in meting out that punishment.²⁰³

The Sentencing Commission's mission is to satisfy the sentencing objectives of honesty, uniformity, and proportionality by using sentencing guidelines. The first objective, honesty in sentencing, was accomplished through the abolition of parole.²⁰⁴ Since implementing guidelines, the sentence adjudged is the sentence served with the exception of good time credit.²⁰⁵ Inmates can no longer be paroled.²⁰⁶

The second objective is sentence uniformity.²⁰⁷ The Sentencing Commission believes that by decreasing sentence disparity it increases sentence uniformity.²⁰⁸ The Commission argues that sentencing guide-

197. See 18 U.S.C. § 3553 (2000); 28 U.S.C. § 991. See also USSG, *supra* note 8, ch. 1, pt. A.

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

199. BENCHBOOK, *supra* note 18, at 64.

200. MCM, *supra* note 16, R.C.M. 1002.

201. Compare USSG, *supra* note 8, ch. 1, pt. A (sentencing objectives of the federal system are honesty, uniformity and proportionality) with MCM, *supra* note 16, pt. I, ¶ 3 (stating that 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).

202. 18 U.S.C. § 3553; 28 U.S.C. § 991.

203. USSG, *supra* note 8, ch. 1, pt. A, ¶ 3.

204. *Id.*

205. See OVERVIEW, *supra* note 12. Inmates can receive up to 54 days good time credit per year.

206. See *id.* See also USSG, *supra* note 8, ch. 1, pt. A, ¶ 3.

207. USSG, *supra* note 8, ch. 1, pt. A, ¶ 3.

208. *Id.* ch. 1.

lines increase sentence uniformity.²⁰⁹ A primary goal of the federal sentencing guidelines is to avoid unwarranted sentence disparity by “setting similar penalties for similarly situated offenders.”²¹⁰ The sentencing guidelines were created by studying “10,000 presentence investigations, the differing elements of various crimes as distinguished in substantive criminal statutes, The United States Parole Commission’s guidelines and statistics, and data from other relevant sources. . . .”²¹¹

The sentencing guidelines are encapsulated in a sentencing table.²¹² The horizontal axis of the sentencing table applies to the defendant’s criminal history.²¹³ The horizontal axis lists the six “Criminal History Categories.”²¹⁴ The vertical axis of the table relates to the seriousness of the offense.²¹⁵ The *Federal Sentencing Table*’s vertical axis lists the forty-three “Offense Levels.”²¹⁶ Sentences are determined through the interplay of the horizontal and vertical axis of the sentencing table.²¹⁷ A copy of the *Federal Sentencing Table* is at Appendix A.

Proportionality is the third objective of federal sentencing. Proportionality allows for “appropriately different sentences for criminal conduct of differing severity.”²¹⁸ The Sentencing Commission believes that the sentencing guidelines realize proportionality by combining offense levels, sentence adjustments, and criminal history.²¹⁹

Offense levels relate to the seriousness of the crime. The offense levels range from one to forty-three.²²⁰ An offense level of one corresponds to minor offenses while an offense level of forty-three relates to the most serious offenses.²²¹ Calculation of the offense level starts with determin-

209. *Id.*

210. UNITED STATES SENTENCING COMMISSION, ANNUAL REPORT (1999) [hereinafter REPORT].

211. See USSG, *supra* note 8, ch. 1, pt. A.

212. See *id.* ch. 5, pt. A. See also *infra* Appendix A.

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

214. See USSG, *supra* note 8, ch. 5, pt. A.

215. PUBLIC DEFENDERS, *supra* note 213.

216. See USSG, *supra* note 7, ch. 5, pt. A.

217. *Id.* ch. 1, pt. A, ¶ 3.

218. *Id.* ch. 1.

219. See OVERVIEW, *supra* note 12.

220. See USSG, *supra* note 8, ch. 1.

221. See PUBLIC DEFENDERS, *supra* note 213. See also USSG, *supra* note 7.

ing the base offense level.²²² Each type of crime has a corresponding base offense level.²²³ For example, all trespasses have a base offense level of four while all kidnappings have a base offense level of twenty-four.²²⁴

Most crimes have specific offense characteristics.²²⁵ These characteristics can work to increase or decrease the base offense level. As an example, robbery has a base offense level of twenty. Robbery also applies specific offense characteristics when a firearm is used in the robbery. For example, if a firearm is discharged during a robbery, a seven level increase is imposed and the offense level is twenty-seven (that is, $20 + 7 = 27$). If a gun is shown but not discharged, a five level increase is in order. The corresponding offense level is increased from twenty to twenty-five.²²⁶

The offense level can also be modified by adjustments.²²⁷ Adjustments are similar to specific offense characteristics in that they can either increase or decrease the offense level.²²⁸ Adjustments are dissimilar to specific offense characteristics in that they may be applicable to any offense. The three types of adjustments are: victim related adjustments, offender's role in the crime adjustments, and obstruction of justice adjustments.²²⁹ A young, aged, physically impaired, or mentally impaired victim may warrant a two level increase.²³⁰ Minimal participation in the crime warrants a four level decrease.²³¹ Obstruction of justice may similarly result in a two level increase.²³²

Adjustment may also apply if the defendant is convicted of multiple counts or accepts responsibility for his acts. An accused convicted of multiple counts may have his offense level increased by up to five levels. The increase depends on the number of additional offenses and the seriousness of those offenses.²³³ If the trial judge believes that the defendant accepts responsibility for his crime, the judge may make a downward adjustment

222. See USSG, *supra* note 8, ch. 1.

223. *Id.*

224. *Id.*

225. See OVERVIEW, *supra* note 12.

226. See USSG, *supra* note 8, ch. 1.

227. See OVERVIEW, *supra* note 12.

228. *Id.*

229. See USSG, *supra* note 8, ch. 3, pt. A, B, & C.

230. See OVERVIEW, *supra* note 12.

231. *Id.*

232. *Id.*

233. See USSG, *supra* note 8, ch. 1, pt. A, ¶ 3. See also USSG, *supra* note 8, app. D.

of two offense levels.²³⁴ The judge may consider “whether the offender truthfully admitted his . . . role in the crime, whether the offender made restitution before there was a guilty verdict, and whether the offender pled guilty.”²³⁵

As opposed to the vertical axis, which relates to offense levels, the horizontal axis defines the six criminal history categories.²³⁶ Criminal history considers the past criminal behavior of the offender and how close in time the current crime is to the past criminal behavior.²³⁷ Category I is the least severe category and is applied primarily to first time offenders.²³⁸ Category VI is the most severe category and applies to criminals with lengthy criminal records.²³⁹

Criminal history is determined by awarding past convictions a numerical score.²⁴⁰ The numerical scores are tallied and a corresponding criminal history category is determined.²⁴¹ Severe crimes and recent crimes rate the highest score.²⁴² For example, if an offender had a sixty day sentence for a prior offense he committed as an adult less than ten years from the date of the current offense, he would receive two points.²⁴³ If the offender committed the current offense while on parole, the offender would receive an additional two points for a total of four points.²⁴⁴ Four points corresponds to a Category III criminal history.²⁴⁵

A sentencing range can be determined from the intersection of the criminal history category and the offense level.²⁴⁶ Once the intersection is determined, simply read the sentencing range displayed in the sentencing matrix.²⁴⁷ The range is given in months.²⁴⁸ The sentencing table excerpt

234. USSG, *supra* note 8, ch. 1, ch. 3, & pt. E.

235. OVERVIEW, *supra* note 12. “Offenders who qualify for the two-level deduction and whose offense levels are greater than 15, may be granted an additional one-level deduction if: (1) they provide complete and timely information about their involvement in their offense, or (2) in a timely manner, they declare their intention to plead guilty.” *Id.*

236. *See* OVERVIEW, *supra* note 12.

237. *See* USSG, *supra* note 8, ch. 4, pt. A.

238. *Id.*

239. *Id.* ch. 4, pt. A & app. D.

240. *Id.*

241. *Id.* ch. 4, pt. A.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.* ch. 1 & app. D.

246. *Id.* ch. 4, pt. B.

below illustrates this procedure. (Figure 1). For example, if the offense level was twenty and the criminal history category was IV, the sentence range would be fifty-one to sixty-three months.²⁴⁹

SENTENCING TABLE EXTRACT²⁵⁰
Criminal History Category (Criminal History Points)

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

FIGURE 1

Under rare circumstances, the trial judge may depart from the guidelines.²⁵¹ The judge may depart from the guidelines if he believes there are issues in the sentencing case that the guidelines did not adequately consider.²⁵² If the departure increases the sentence above the guideline cap, the offender may appeal.²⁵³ If the departure lessens the sentence, the government may appeal.²⁵⁴ The trial judge must state the reason for departure on the record.²⁵⁵

247. *Id.*

248. *Id.*

249. *Id.*

250. USSG, *supra* note 8.

251. 18 U.S.C. § 3553(b) (2000). A court may depart if it finds “an aggravation or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.” *Id.* See USSG, *supra* note 8, ch. 1, pt. A. “[T]he Commission believes that despite the courts’ legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission’s data indicate made a significant difference in pre-guidelines sentencing practice.” *Id.*

252. USSG, *supra* note 8, ch. 1, pt. A.

253. OVERVIEW, *supra* note 12.

254. *Id.*

255. *Id.*

The preceding two sections provided an overview of military and federal sentencing procedures. This overview demonstrates that while the sentencing goals of both systems are similar,²⁵⁶ the methods employed to achieve those goals are dissimilar.²⁵⁷ Before adopting the federal sentencing guidelines, the federal system allowed trial judges almost unfettered sentencing discretion.²⁵⁸ Such unfettered discretion, while no longer enjoyed by federal judges, is exercised by today's military sentencing authorities.²⁵⁹

IV. Sentence Disparity in the Military

Before adopting federal sentencing guidelines, the federal system suffered from unwarranted sentence disparity.²⁶⁰ The pre-guidelines system used judicial sentencing discretion to fashion individual sentences.²⁶¹ The Sentencing Commission replaced judicial sentencing discretion and individual sentencing with sentencing guidelines and sentence uniformity.²⁶²

Congress enacted federal sentencing guidelines, in large part, to decrease unwarranted sentence disparity.²⁶³ This section explores the degree of sentence disparity within the military justice system. This step is important because if an unwarranted amount of sentence disparity exists within the military, sentencing guidelines may be necessary to decrease military sentence disparity.

Sentence disparity is illustrated by comparing data collected from the Army, Navy, Air Force, and Marine Corps. The data is formulated to calculate the sentencing range, mean (arithmetical average), and standard deviation for various punitive articles. These statistics are calculated for both the services as a whole and each individual service. This section will

256. Compare 18 U.S.C. § 3553; 28 U.S.C. § 991 (2000), with BENCHBOOK, *supra* note 18, at 64. The goals of sentencing in the federal system are: just punishment, deterrence, incapacitation, and rehabilitation. The military justice system employs the same four goals plus the goal of discipline.

257. See discussion *supra* Sections II and III.

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

259. See discussion *supra* Section II.

260. Freed, *supra* note 163, at 1688-91.

261. Stith & Carbanes, *supra* note 137, at 1251-53; Hoelter et al., *supra* note 141.

262. USSG, *supra* note 8, ch. 1, pt. A. See OVERVIEW, *supra* note 12.

263. Witten, *supra* note 162, at 697.

show, based on the data described above, that the military suffers from a high degree of sentence disparity.

A. Military Sentencing Data

Representatives for the Army, Navy-Marine Corps, and Air Force provided raw data regarding the sentences awarded at all general courts-martial during the previous year.²⁶⁴ The data was tallied to discover the degree of sentencing disparity that exists within the armed forces.²⁶⁵ The primary calculations performed were the mean, range, and standard deviation. For the purposes of this article, the most important calculation is the standard deviation.

264. Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; Air Force Data *supra* note 6.

265. Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; Air Force Data *supra* note 6. The data collected from the four services illustrated that it is a rare occurrence when an accused is convicted of a single punitive article. It is much more common for an accused to be convicted of several violations, even if all of these violations arise from a single act. For example, an accused might be charged with illegal drug use and unauthorized absence when the accused attempts to avoid a drug test. Alternatively, an accused might be charged with rape and an orders violation for being in the barracks room of the victim after posted hours. This dilemma (i.e., one adjudged sentence applying to multiple punitive articles) mandates that confinement be discounted to take into consideration when an accused is convicted of several punitive articles.

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

While the Federal Sentencing Commission employs an entire staff to study sentencing data and calculate statistical information, the author did not enjoy that luxury. The data

The standard deviation is the square root of the population variances.²⁶⁶ The standard deviation is an important calculation because it illustrates the degree of sentence disparity that exists within a population.²⁶⁷ A large standard deviation indicates a high degree of sentence disparity within that population.²⁶⁸ In other words, the standard deviation illustrates how closely each individual sentence is to the mean sentence. The closer each individual sentence is to the mean sentence, the lower the standard deviation. A low standard deviation equates to a high degree of sentence uniformity because individual sentences are closer to the mean sentence. Alternately, the more each individual sentence varies from the mean sentence, the higher the standard deviation. As the standard deviation increases, sentence disparity increases because individual sentences are further from the mean sentence.

The first calculation performed determined the overall mean confinement, adjudged by general courts-martial, for the four branches of service. The mean confinement adjudged by the Army was thirty-five months.²⁶⁹

265. (continued) is accurate and the discounting formula was applied uniformly throughout the analysis. The author is aware that different discounting methods could be employed and that some might have an advantage over the one used here. While the discounting method might be improved by brighter minds, the results provided are accurate and significant to illustrate the main point of this section, namely, that various punitive articles suffer from a high population standard deviation and that this high population standard deviation is evidence of unwarranted sentence discrepancy.

266. ENCARTA, *supra* note 23. See ROBERT D. MASON, *STATISTICAL TECHNIQUES IN BUSINESS AND ECONOMICS* (6th ed. 1986).

267. See ENCARTA, *supra* note 23. See also Theresa Walker Karle & Thomas Sager, *Article: Are the Federal Sentencing Guidelines Meeting Congressional Goals?: Empirical and Case Law Analysis*, 40 EMORY L.J. 393 (1991). This article compared pre-guideline federal sentences to post-guideline federal sentences. The statistic used to compare sentences was the standard deviation (s/d). It is interesting to note the following pre-guideline s/d to determine what the federal system saw as significant sentence disparity. Marijuana distribution had a s/d of 54 months, cocaine distribution had a s/d of 104 months, robbery had a s/d of 128 months and larceny had a s/d 43 months. See also MASON, *supra* note 266.

268. See ENCARTA, *supra* note 23. As an example, if you wanted to compare the confinement awarded to two separate populations, one population consisting of four Marines and one population consisting of four soldiers, you could calculate the population standard deviation. If the sentences awarded the four Marines in months were 12, 11, 13, and 12, the average would be 12 and the population standard deviation would be .8. This low value of standard deviation indicates a low degree of sentence disparity. If the sentence of the four soldiers was 24, 4, 14, and 6, the average would be 12 but the standard deviation would be 7.9. The value for the population standard deviation is higher for the Soldiers than the Marines because the sentences for the soldiers have a higher degree of sentence discrepancy.

269. Army Data, *supra* note 7.

The mean confinement imposed by the Navy was thirty-four months.²⁷⁰ The mean length of confinement awarded by the Air Force was twenty-two months²⁷¹ while the Marine Corps adjudged mean confinement of forty-eight months.²⁷² The combined mean confinement for the four services was thirty-three months.²⁷³

The next calculation performed was the standard deviation for all sentences awarded at general courts-martial during the previous year. The confinement standard deviation for the four services was eighty-one months.²⁷⁴ The standard deviation for the Army was ninety-six months²⁷⁵ as compared to fifty-two months for the Navy.²⁷⁶ The standard deviation for the Air Force was fifty-six months²⁷⁷ while the Marine Corps had a standard deviation of eighty months.²⁷⁸

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

What the above data does illustrate is that the four branches of service had individual population standard deviations of between fifty-two months (Navy) and ninety-six months (Army).²⁷⁹ If the four branches prosecuted a similar proportion of punitive articles (that is, twenty percent of the cases were Article 112a, ten percent were Article 121, and the like) then this value would provide some evidence that the Army had more sentence disparity than the Navy.²⁸⁰

270. USMC/USN Data, *supra* note 123.

271. Air Force Data, *supra* note 6.

272. USN/USMC Data, *supra* note 123.

273. Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; Air Force Data *supra* note 6.

274. Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; Air Force Data *supra* note 6.

275. Army Data, *supra* note 7.

276. USN/USMC Data *supra* note 123.

277. Air Force Data, *supra* note 6.

278. USN/USMC Data *supra* note 123.

279. Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; Air Force Data *supra* note 6.

280. See ENCARTA, *supra* note 23. See also example accompanying *supra* note 268.

The more valuable calculation is determining the standard deviation for particular punitive articles. As previously discussed, if the punitive articles have an accompanying high standard deviation then that high standard deviation supports a conclusion of significant sentencing disparity.²⁸¹ The next subsection will explore the standard deviation and mean sentences that attach to various punitive articles.

B. Sentencing Data Relating to Specific Punitive Articles

This subsection calculates the standard deviation that attaches to rape, murder, and illegal drug distribution. If these articles have a high corresponding standard deviation, this deviation is evidence of sentence disparity. While this subsection discusses three punitive articles, similar calculations were completed for each punitive article contained in Appendix B.

This article proposes that if the standard deviation for a particular punitive article is more than fifty percent of the value of the mean sentence, then that high standard deviation is strong evidence that unwarranted sentence disparity exists for that punitive article. A standard deviation that is more than fifty percent of the mean sentence indicates that individual sentences deviate so greatly from their mean that it can be concluded that sentence uniformity is lacking.²⁸² For example, if a punitive article had a mean sentence of forty months and a standard deviation of twenty months, this paper would conclude that since the standard deviation is fifty percent

281. See ENCARTA, *supra* note 23. See also Paul J. Hofer et al., *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 CRIM. L. & CRIMINOLOGY 239 (1999), Paul J. Hofer & Kevin R. Blackwell, *Searching for Discrimination in Federal Sentencing* (2000) (unpublished). Mr. Hofer is a Senior Research associate for the U.S. Sentencing commission. The articles discuss the common approach of using multiple regression analysis as a means of studying unwarranted sentence disparity. Multiple regression has the theoretical advantage of allowing various factors to be controlled, thus; arguably allowing a more accurate measure of the variables that may create unwarranted sentence disparity. The two articles argue that the use of multiple regression to study sentencing guidelines is flawed because of methodological obstacles, disagreement as to which factors are legally relevant, and the "human" factor applied to each case by the sentencing judge. Multiple regression was not used in this paper for the reasons stated above. Additionally, multiple regression was not used because of a lack of assets by the author and, more importantly, the combination of case study, as outlined in Part I, and the calculations conducted in this section satisfactorily illustrate the point that unwarranted sentence disparity exists in the military.

282. See William Rhodes, *Criminology: Federal Criminal Sentencing: Some Measurement Issues With Application To Pre-Guideline Sentencing Disparity*, 81 CRIM. L.-

of the mean sentence (that is, twenty months is fifty percent of forty months) that unwarranted sentence disparity exists for that punitive article.

The first example is Article 120, rape, which has a sentencing range between 3 months and 324 months.²⁸³ The mean for all four services was 101 months with a corresponding population standard deviation of 155 months.²⁸⁴ The mean confinement for the Army was 101 months²⁸⁵ while the Navy had an mean of 73 months.²⁸⁶ The Air Force adjudged mean confinement of 79 months²⁸⁷ while the mean in the Marine Corps was 55 months.

The overall population standard deviation for the crime of rape was 155 months. The service standard deviations broke down as follows: Army 222 months,²⁸⁸ Navy 80 months,²⁸⁹ Air Force 114 months,²⁹⁰ Marine Corps 42 months.²⁹¹ Because each standard deviation exceeds the mean sentence by more than fifty percent, under the criteria established by this article, it can be concluded that the crime of rape suffers from unwarranted sentence disparity.

Some may argue that convictions for Article 120 include date rape,²⁹² thereby inflating the standard deviation. The data does not support this criticism. If sentences of 24 months or less are eliminated from the equation, the overall population standard deviation increases to 196 months.²⁹³

282. (continued) & CRIMINOLOGY 1002, 1007-08 (1991). Prior to sentencing guidelines, the federal crime of bank robbery had a guilty plea mean of 132.59 and a standard deviation of 95.47. Convictions where the individual was found guilty counter to his plea resulted in a mean sentence of 221.4 months and a standard deviation of 139.23 months. In both cases, the standard deviation was more than 50% of the mean sentence.

283. Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; Air Force Data *supra* note 6.

284. Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; Air Force Data *supra* note 6.

285. Army Data, *supra* note 7.

286. USN/USMC Data, *supra* note 123.

287. Air Force Data, *supra* note 6.

288. Army Data, *supra* note 7.

289. USN/USMC Data, *supra* note 123.

290. Air Force Data, *supra* note 6.

291. USN/USMC Data, *supra* note 123.

292. Date rape is defined as a rape where the perpetrator knows the victim. A date rape may receive a more lenient sentence because the issue of consent, or withdrawing consent, may be seen as a mitigating factor by the sentencing authority.

293. Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; Air Force Data *supra* note 6.

The individual service standard deviations have the same result. For example, when you discard sentences of 24 months or less, the standard deviation in the Army increases to 239 months.²⁹⁴ These large population standard deviations are strong evidence that a high degree of sentencing disparity exists in the military for the crime of rape.²⁹⁵

The next crime to consider is Article 118, murder.²⁹⁶ Murder also has a high population standard deviation. The mean sentence for violations under Article 118, not including those that have life as a mandatory sentence, is 283 months.²⁹⁷ The sentencing range is 61 to 547 months.²⁹⁸ The population standard deviation is 172 months.²⁹⁹ If you eliminate sentences of 15 years or less from the equation, the standard deviation is 144 months.³⁰⁰ Thus, even when you remove relatively lenient sentences from the equation, the standard deviation for confinement remains significant.³⁰¹ Because the standard deviation exceeded fifty percent of the mean, it may be concluded that murder suffers from unwarranted sentence disparity.

The final punitive article addressed in this section is Article 112a(3), wrongful distribution of a controlled substance.³⁰² The confinement range for the four branches was 1 to 180 months.³⁰³ The mean confinement adjudged by all four services was twenty-nine months.³⁰⁴ The confinement deviated from the mean by an average of thirty-one months.³⁰⁵

The Marine Corps had the highest degree of internal sentence disparity. The standard deviation in the Marine Corps for wrongful drug distribution was fifty-six months while the mean sentence was sixty-five

294. Army Data, *supra* note 7.

295. See ENCARTA, *supra* note 23. See also example accompanying *supra* note 268.

296. MCM, *supra* note 16, pt. IV, ¶ 43.

297. Army Data, *supra* note 7.

298. *Id.*

299. *Id.*

300. *Id.*; USN/USMC Data, *supra* note 123; Air Force Data *supra* note 6.

301. Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; Air Force Data *supra* note 6. See also Karle & Sager, *supra* note 267, at 406-08.

302. MCM, *supra* note 16, pt. IV, ¶ 37b(3).

303. Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; Air Force Data, *supra* note 6.

304. Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; Air Force Data *supra* note 6.

305. Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; Air Force Data *supra* note 6.

months.³⁰⁶ The Air Force had a standard deviation of twenty-one months and a mean sentence of nineteen months; the Army had a standard deviation of twenty months and a mean sentence of twenty-seven months while the Navy had a standard deviation of ten months and a mean sentence of thirty months.³⁰⁷

The overall standard deviation for wrongful drug distribution, and the individual standard deviations for all of the branches, except for the Navy, are significant. The sentences deviated by more than fifty percent of the mean sentence. This is evidence that Article 112a(3) suffers from significant sentence disparity.

The large population standard deviations detailed in each example above provide evidence that sentence disparity exists within the military justice system. The next section contrasts how the military sentencing system all but ignores sentence uniformity while the federal sentencing system promotes sentence uniformity.

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

The military justice system largely abandoned sentence uniformity as a sentencing goal in the 1950s.³⁰⁸ Abandoning sentencing uniformity is one factor that led to the sentencing disparities that exist within the military today.³⁰⁹ Other factors that likely increased sentencing disparity include;

306. USN/USMC Data, *supra* note 123.

307. Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; Air Force Data *supra* note 6.

308. *See* United States v. Dowling, 18 C.M.R. 670 (C.M.A. 1954). *See also* United States v. Mamaluy, 27 C.M.R. 176 (C.M.A. 1959); discussion *supra* Section II.

309. *See Mamaluy*, 27 C.M.R. at 176; *see also* United States v. Lacy, 50 M.J. 286 (1999). When the military system removed sentence uniformity from the *Manual for Courts-Martial*, the military system chose to rely upon the appellate court to ensure sentence uniformity. The appellate courts review a sentence on uniformity grounds only if the cases are closely related and highly similar. The standard of review is abuse of discretion or preventing an obvious miscarriage of justice. The end result is that the appellate courts review very few cases on sentence uniformity issues. Since the appellate courts review very few cases on sentence uniformity grounds, and when they do review a case the standard of review is very high, the vast majority of sentences are left intact. Since the wide range of sentences adjudged remain in force, they lend themselves to sentence disparity. *See also supra* notes 6, 7, and 123.

the wide discretion given the sentencing authority,³¹⁰ the option of being sentenced by a military judge or military members,³¹¹ and the sentencing goal of maintaining “good order and discipline.”³¹²

Unlike the military system, the federal system found sentence disparity to be counter to the goals of federal sentencing.³¹³ Promoting sentence uniformity is a critical part of the federal criminal justice system.³¹⁴ Unwarranted sentence disparity was a major reason for the creation and adoption of federal sentencing guidelines.³¹⁵

The current version of the *Manual for Courts-Martial* states that “[t]he purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, [and] to promote efficiency and effectiveness in the military establishment. . . .”³¹⁶ The *Manual for Courts-Martial* does not provide any definitions of what is meant by “promoting justice,” “maintaining good order and discipline,” or promoting “efficiency and effectiveness” in the military.³¹⁷ The *Manual* gives the sentencing authority sole discretion to fashion a sentence that fulfills the purposes of military law.³¹⁸ The only meaningful instruction the sentenc-

310. MCM, *supra* note 16, R.C.M. 1002.

311. *Id.* R.C.M. 903. *See also* discussion *supra* Section II.

312. MCM, *supra* note 16, pt. I, ¶ 3.

313. 28 U.S.C. § 991(b) (2000).

314. *Id.*; USSG, *supra* note 8, ch. 1 pt. A.

315. 28 U.S.C. § 991(b); USSG, *supra* note 8, ch. 1 pt. A.

316. MCM, *supra* note 16, pt. I, ¶ 4.

317. *Id.*

318. Compare MCM, *supra* note 16, R.C.M. 1002 with BENCHBOOK, *supra* note 18, at 64. It is interesting that the *Benchbook* never refers to the purposes of military justice. The *Benchbook* instead tells the members:

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

Id.

See 18 U.S.C. § 3553(a)(2) (2000) (listing the federal sentencing goals as just punishment, deterrence, incapacitation, rehabilitation).

ing authority receives is that they may consider the sentencing goals of rehabilitation, punishment, deterrence, protection of society, and preservation of good order and discipline when fashioning a sentence.³¹⁹

While the sentencing authority receives instruction that they may consider rehabilitation, punishment, deterrence, and protection of society when fashioning a sentence, neither the *Manual for Courts-Martial* nor the *Judges' Benchbook* provides any concrete guidance on how the sentencing goals are to be applied in order to fulfill the purposes of military law.³²⁰ In the end, the military judge informs the members that they can do whatever they want when fashioning a sentence as long as they do not exceed the maximum sentence authorized by law for that court-martial.³²¹

Unlike the vague direction provided to the sentencing authority in the military, the *Federal Sentencing Guidelines Manual* provides detailed guidance on how to sentence a criminal.³²² The cornerstone of this guidance is the federal sentencing guidelines.³²³ A primary goal of the federal sentencing guidelines is uniformity.³²⁴ Sentence uniformity seeks to set similar "penalties for similarly situated offenders."³²⁵ Thus, in the federal system, sentence uniformity is achieved through the use of sentencing guidelines.³²⁶

The above demonstrates that the military and federal sentencing systems pursue almost identical sentencing goals.³²⁷ While the goals are similar, the method for achieving those goals is very different. The military allows the sentencing authority great discretion and does not actively pursue sentence uniformity. The federal system strongly curtails sentence discretion with sentencing guidelines, while embracing sentence uniformity as the means by which it satisfies the federal sentencing goals.

319. BENCHBOOK, *supra* note 18, at 64.

320. MCM, *supra* note 16, R.C.M. 1001-1010; BENCHBOOK, *supra* note 18, at 64.

321. BENCHBOOK, *supra* note 18, at 64. "The weight to be given any or all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion." *Id.*

322. USSG, *supra* note 8.

323. 18 U.S.C.S. §§ 3551-3553, 3557-3559 (2000); 28 U.S.C. § 991 (2000); USSG, *supra* note 8.

324. 18 U.S.C.S. §§ 3551-53, 3557-59; 28 U.S.C. § 991; USSG, *supra* note 8.

325. USSG, *supra* note 8, ch. 1.

326. 28 U.S.C. § 991; USSG, *supra* note 8.

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

D. Is Sentence Disparity Ever Justified?

The data discussed earlier demonstrated that sentencing disparity exists within the military.³²⁸ The preceding subsection also illustrates that the military and the federal system take divergent approaches to the issue of sentence uniformity. The next issue to be addressed is whether sentencing disparity equates to “injustice.” Put differently, does a high degree of sentencing disparity equal a failure of the military to fulfill the purposes of military law?³²⁹

As discussed earlier, the purposes of military law are to promote justice, assist in maintaining good order and discipline, and increase the efficiency and effectiveness of the military.³³⁰ This subsection suggests that these purposes necessitate that the military retain the ability to sentence in a disparate fashion when the purposes of military law warrant.

Proponents of the current military sentencing regime may argue that sentence disparity exists because of the military’s focus on the individual accused.³³¹ The current system allows the sentencing authority to fashion a sentence that focuses on the crime committed by the accused, the impact of the crime on good order and discipline, and on the circumstances surrounding the accused.³³² For example, an aircraft mechanic who uses illegal drugs may receive a sentence that is more severe than the sentence received by an administrative clerk who uses the same drug. The primary, and perhaps only reason for this disparity would be the job of the accused. The commander of the aircraft mechanic could argue that a mechanic who uses illegal drugs is a major threat to good order and discipline within his unit. Mechanics who use illegal drugs may cause pilots to lose confidence in the maintenance of their aircraft. Similarly, mechanics under the influence may make errors that result in the loss of life and machine. This loss would decrease the effectiveness of the unit.

The commanding officer of the administrative clerk would not face the same threat to good order and discipline as that faced by the com-

328. See Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; Air Force Data *supra* note 6. See also discussion *supra* Section IV.

329. MCM, *supra* note 16, pt. I, ¶ 4. The purposes of military justice are to promote justice, assist in maintaining good order and discipline, and to increase the efficiency and effectiveness of the military.

330. *Id.*

331. *Id.* R.C.M. 1002.

332. *Id.* R.C.M. 1001.

mander of the flight mechanic. The potential consequences of a clerk working under the influence of narcotics are less severe than those posed by the mechanic. Accordingly, the purposes of maintaining good order and discipline and effectiveness of the service may, at times, justify disparate sentences.³³³

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

When the victim of a crime is the military, a larger degree of sentence disparity may be warranted. A larger degree of sentence disparity is justified because of differing needs or missions of various commands. For example, good order and discipline may warrant that a Marine platoon sergeant, convicted of being disrespectful to his platoon commander in front of his platoon, receive more confinement than a Marine private who commits a similar offense. The disparity in sentence is warranted because of the increased impact that the platoon sergeant's misconduct has on good order and discipline within that unit.³³⁴

Sentence disparity is less warranted when the crime does not relate to good order and discipline or to the effectiveness of the military. For example, an aircraft mechanic convicted of raping a woman should receive a similar sentence as an administrative clerk who commits a similar rape. Other military concerns, such as national security, efficiency and effectiveness of the service, good order and discipline, and the promotion of justice, do not justify two similar rapists receiving disparate sentences.³³⁵

To be effective, military sentencing guidelines must allow courts-martial to adjudge disparate sentences when either good order and discipline or military efficiency warrant. The proposed sentencing guidelines attempt to accomplish this task through the use of sentencing categories.

333. *Id.* pt. I, ¶ 3.

334. A platoon sergeant is the link between the platoon commander and his Marines. The platoon commander must rely upon the platoon sergeant to carry out his orders. If the platoon sergeant is disrespectful in front of the platoon, his misconduct is more severe than that of the private because of the leadership role of the platoon sergeant.

335. MCM, *supra* note 16, pt. I, ¶ 3.

The proposed sentencing guidelines will be discussed in detail in the next section of this article.³³⁶

V. Adopting Military Sentencing Guidelines

Sentencing guidelines can improve military sentencing by increasing sentence uniformity while simultaneously satisfying the purposes of military sentencing.³³⁷ Adopting military sentencing guidelines would also bring the military sentencing system in line with the federal system and a majority of the state criminal justice systems.³³⁸

This section proposes a unique form of military sentencing guidelines. The first subsection will contend that for military sentencing guidelines to be effective, the proposed guidelines should retain the positive aspects of the current sentencing system. The second subsection provides a systematic discussion of how the military sentencing matrix is created. The final subsection argues that only the convening authority would be allowed to depart from the sentencing guidelines.

A. Developing Military Sentencing Guidelines

For sentencing guidelines to be effective, they must result in a system that is superior to the one that currently exists. The primary benefit of sentencing guidelines is sentence uniformity.³³⁹ The price of sentence uniformity should not be the many positive aspects of the current system. Any proposed system must incorporate the strengths of the present system with the benefits of guidelines. Strengths that must be preserved are confidence

336. See discussion *infra* Section V.B.

337. MCM, *supra* note 16, pt. I, ¶ 3.

338. See 10 U.S.C. § 836 (2000). See also Lanni, *supra* note 13, at n.14. The federal system as well as the states of Alabama, Alaska, Arizona, Arkansas, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin currently employ a form of sentencing guidelines for criminal offenses.

339. See USSG, *supra* note 8, ch. 1, pt. A, ¶ 3. See also Ilene H. Nagel & Stephen J. Schulhofer, *Symposium on Federal Sentencing: Article: A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under The Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 503 (1992). One of the three congressional objectives of sentencing guidelines is to increase sentence uniformity.

in the system by the military community, efficiency, and use of the adversarial process in sentencing.

The active duty military community has confidence in the current military sentencing system. A Department of Defense survey revealed that when service members were asked whether the military community or the civilian community was better at ensuring the fair administration of justice, twenty-eight percent said the military was better, sixteen percent said the civilians were better, and fifty-four percent said that there was no difference.³⁴⁰

The second strength of the current military sentencing system is efficiency. The military justice system does not use probation officers.³⁴¹ Most sentencing cases consume less than four hours of court time.³⁴² Additionally, the accused is not constrained by the Military Rules of Evidence in presenting his sentencing case.³⁴³

Closely related to efficiency is the military's use of the adversarial sentencing process.³⁴⁴ The military employs the adversarial system instead of probation officers and their attendant presentencing reports.³⁴⁵ The adversarial process provides the same type of information as the federal presentencing report, but provides that information within the protections of the adversarial process.³⁴⁶

Through an adversarial process, the parties are able to present their sentencing case.³⁴⁷ The military system allows the accused to present a wide range of sentencing evidence and attack the evidence presented by the trial counsel. The military system puts the defendant in control of the evidence that he offers.

340. ARMED FORCES EQUAL OPPORTUNITY SURVEY, DMDC REPORT NO. 97-027 (Aug. 1999).

341. MCM, *supra* note 16.

342. Interview with Lieutenant Colonel S. Folsom, Military Judge, Sierra Circuit, at Camp Pendleton, Ca. (July 20, 2000); Interview with Major M. Sitler, Vice Chair, Criminal Law Department, at The Judge Advocate General's School, Charlottesville, Va. (Apr. 7, 2000).

343. MCM, *supra* note 16, R.C.M. 1001.

344. *Id.* See discussion *supra* Section II.

345. MCM, *supra* note 16, R.C.M. 1001 analysis, app. 21.

346. *Id.*

347. *Id.* R.C.M. 1001.

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

First, the proposed military sentencing guidelines have limited application. The proposed guidelines would only affect the confinement adjudged at general courts-martial. The sentencing guidelines would not apply to either summary or special courts-martial.³⁴⁸ The guidelines are not necessary for special courts-martial³⁴⁹ because the maximum punishments currently authorized at special courts-martial are relatively narrow (that is, the maximum punishment allowed is six months of confinement,³⁵⁰ forfeiture of two-thirds pay per month for six months, a fine, and a bad conduct discharge).³⁵¹ The narrow sentencing range ensures that special courts-martial will always have a low standard deviation and that the sentences will be sufficiently uniform.³⁵²

Second, special courts-martial outnumber general courts-martial by a ratio of more than 3 to 2.³⁵³ Therefore, retaining the current special court-martial system would preserve the bulk of the present military sentencing system. Additionally, maintaining the present special courts-martial system would ease the burden

348. *Id.* R.C.M. 204.

349. *Id.* Sentencing guidelines would not apply to summary courts-martial for the same reason. The maximum confinement allowed at a summary court-martial is one month.

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

351. MCM, *supra* note 16, R.C.M. 201(f)(2)(B).

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

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

354. Adopting military sentencing guidelines would be a revolutionary change to the military sentencing system. To reduce the potential turmoil that may surround the adoption

the military justice system would face in incorporating the proposed military sentencing guidelines.³⁵⁴

354. (continued) of the proposed military sentencing guidelines, the proposed guidelines seek to impact a minority of all courts-martial.

Third, the proposed military sentencing guidelines would only affect confinement. Military sentencing guidelines would not influence punitive discharges, fines, reductions or dismissals, or forfeitures of pay and allowances.³⁵⁵ These forms of punishment would be applied as detailed by the current *Manual for Courts-Martial*.³⁵⁶

The next section introduces the proposed military sentencing guidelines and explains how the military sentencing guideline matrix (Appendix B) was created. Further, the section discusses the application of the guidelines to the military.

B. Proposed Military Sentencing Guidelines Matrix

Sentencing guidelines could be implemented through the use of a sentencing matrix, as shown at Appendix B. The matrix consists of a vertical and a horizontal axis. The vertical axis lists the punitive articles.³⁵⁷ The horizontal axis contains the five categories that allow the sentencing authority to weigh extenuation, mitigating, and aggravating factors.³⁵⁸

1. The Vertical Axis of the Military Sentencing Matrix

The vertical axis lists the punitive articles. When appropriate, the punitive articles are divided into classifications. The classifications relate to the various sentencing subdivisions within many of the punitive articles.³⁵⁹ For example, the *Manual* divides Article 119, manslaughter, into two classifications, voluntary manslaughter and involuntary manslaughter. This division is illustrated in Figure 2 below.

355. MCM, *supra* note 16, R.C.M. 1003.

356. *Id.* R.C.M. 1003; 10 U.S.C. §§ 856a, 858b (2000).

357. MCM, *supra* note 16, pt. IV, ¶¶ 1-113.

358. *See* discussion *infra* Section V.B.2

359. MCM, *supra* note 16, pt. IV, ¶¶ 1-113. For example, Article 119 is divided into two classifications, voluntary manslaughter and involuntary manslaughter. Each classification has a unique maximum sentence.

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

FIGURE 2

2. The Horizontal Axis of the Military Sentencing Matrix

The horizontal axis is comprised of five categories. Category I is the least severe category and offers the most lenient confinement options. Category V is the most severe category and offers the most stringent confinement options. The horizontal axis is also depicted in Figure 2.

The sentencing matrix categories are configured to maximize sentence uniformity while considering the need to increase or decrease confinement as aggravation, extenuation, and mitigation warrant.³⁶⁰ The sentencing categories also allow, when warranted, disparate sentences. For instance, the sentencing categories allow the flight mechanic who uses illegal drugs on the job to be sentenced more severely than the administrative clerk who commits the same crime.

The military judge, upon hearing all aggravation, extenuation, and mitigation evidence, applies his knowledge and experience to the case and assigns the appropriate sentencing category. The members then determine confinement based on the sentencing range contained in the sentencing matrix.³⁶¹ The members do not need special knowledge or training to accomplish this task. Under the proposed military guidelines, the members do not have to concern themselves with the sentences awarded in other cases because the sentencing categories reflect this information.

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

361. *See infra* note 377. If the sentencing authority, be they members or judge, believes that the sentencing matrix results in confinement that is too harsh, they may state so on the record and recommend that the convening authority reduce confinement via his clemency powers.

The judge will assign the sentencing category regardless of the forum selected.³⁶² Judges have the necessary training and experience to uniformly assign sentencing categories.³⁶³ Because of the training and experience of military judges, they are uniquely qualified to ensure that the sentencing categories are evenly applied.³⁶⁴

The horizontal axis of the proposed military sentencing matrix increases sentence uniformity in two ways. First, the judge always determines the sentencing category.³⁶⁵ Second, the use of sentencing categories increases sentence uniformity by assigning similar offenders similar ranges of confinement.

Having military judges assign sentencing categories overcomes the criticism raised by *Mamaluy*.³⁶⁶ As discussed earlier, the court in *Mamaluy* recommended that sentence uniformity be removed as a sentencing goal from the *Manual for Courts-Martial*.³⁶⁷ The court made this recommendation because they did not believe that military members had the requisite knowledge and information necessary to apply the sentence uniformity instruction to an individual case.³⁶⁸ While the *Mamaluy* court conceded that sentence uniformity was an appropriate sentencing goal,³⁶⁹ the court, nonetheless, determined that sentence uniformity was not practical

362. MCM, *supra* note 16, R.C.M. 903. An enlisted accused may be tried by officer members, officer members with enlisted representation (i.e., at least one third enlisted members), or by a military judge with the judge's permission. An officer accused may only be sentenced by officer members or a military judge.

363. Lovejoy, *supra* note 40, at n.180, n.187. Major Lovejoy conducted a survey of convening authorities, military judges, trial and defense counsel, and military inmates serving a sentence at Fort Leavenworth. His data supports the proposition that judges sentence in a more uniform manner than do military members.

364. *Id.*; Major Lawrence J. Morris, *Keystones of the Military Justice System: A Primer for Chiefs of Justice*, ARMY LAW., Oct. 1994, at 22-23.

365. *See* Morris, *supra* note 364, at 22-23. "Trial by judge alone is viewed as reducing the risk of extreme sentences, while a panel generally is thought to carry a higher chance of acquittal but much less predictability on sentencing." *Id.* *See also* Lovejoy, *supra* note 40, at 6, nn.167, 180, & 187. Major Lovejoy conducted a survey of convening authorities, military judges, trial and defense counsel, and military inmates serving a sentence at Fort Leavenworth. His data illustrates, at least the perception, that judges are less likely to sentence in a disparate fashion.

366. *See supra* notes 51-59 and accompanying text.

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

368. *Id.* at 181-82.

369. *Id.* at 182.

for the military system.³⁷⁰ The lack of sentencing uniformity that exists in the military today supports the conclusion of the 1959 *Mamaluy* court.³⁷¹

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

Critics may argue that using the military judge to determine sentencing categories is an excessive expansion of judicial power and strips court-martial members of their authority. Entrusting military judges to assign the sentencing categories is not an unreasonable expansion of judicial authority.³⁷² Judges currently adjudge sentences in the majority of general courts-martial.³⁷³ The federal criminal system uses trial judges to adjudge sentences in all cases that are not capital.³⁷⁴ Similarly, forty-five of the states use judges for criminal sentencing.³⁷⁵

Additionally, requiring the military judge to assign sentencing categories will not strip the members of their sentencing authority. Members will have complete discretion to determine all other lawful punishments that apply.³⁷⁶ Members may adjudge any confinement that falls within the range suggested by the sentencing matrix. Additionally, the panel can recommend that the convening authority use clemency to reduce confinement.³⁷⁷ The role of judges in assigning sentencing categories assists members because it makes sentence uniformity determinations that the members, due to their lack of exposure to the military justice system, are unable to make.³⁷⁸

370. *Id.* at 181-82.

371. *See* United States v. Mamaluy, 27 C.M.R. 176, 179-80 (C.M.A. 1959) (finding that sentence uniformity is not practical within the context of the military sentencing system).

372. *See* MCM, *supra* note 16, ch. X; Lovejoy, *supra* note 40.

373. Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; and Air Force Data, *supra* note 6.

374. USSG, *supra* note 8, § 5.K1.1-5.K1.2.16.

375. Lanni, *supra* note 13, at 1790.

376. MCM, *supra* note 16, R.C.M. 1003. The members will have the sole discretion to determine whether a punitive discharge should be adjudged, and if so, the type of punitive discharge to award, whether forfeitures and fines apply, and any reduction in rank that might be imposed.

377. *Id.* R.C.M. 1107(d).

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

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

Category III is the appropriate category when aggravating, mitigating, and extenuating circumstances tend to cancel each other out.³⁷⁹ It is the default setting. For example, assume that the military judge found the mitigating fact that the accused had good military character. Also, assume the judge found the aggravating fact that the crime was committed against the accused's roommate. If the judge finds that the mitigating and aggravating factors are equal, (that is, cancel each other out) the judge should assign Category III to the crime.

Category II offers less confinement than Categories III, IV, or V. The military judge must mandate sentencing under Category II when he finds that extenuation or mitigation evidence outweighs aggravation evidence.³⁸⁰ As an example, assume the government presents aggravation evidence that the accused's absence without leave resulted in a second airman having to work an extra shift to make up for her absence. Also, assume that the defense presents as extenuation evidence that the accused was absent without leave because he had just been notified that his grandfather had died. In this case, the judge might find that the extenuation evidence outweighs the aggravation evidence and apply Category II.

Category IV is the opposite of Category II. Category IV is applied when the military judge determines that aggravating factors outweigh mitigating and extenuating factors.³⁸¹ For example, assume the same scenario as in the preceding paragraph, except that the reason the accused was absent without leave was because he wanted to visit Sea World. Under these facts, the judge can find that the aggravation outweighs the mitigation and assign Category IV to the accused.

379. Category III also applies if no evidence in aggravation, extenuation, or mitigation is presented.

380. MCM, *supra* note 16, R.C.M. 1001, 1002. The practice of considering extenuation and mitigating factors is part of the current military justice system. Extenuating and mitigating factors can relate to the commission of the crime. They may also relate to circumstances that surround the crime or the personal history of the accused.

381. *Id.* R.C.M 1001.

Category I applies when evidence in extenuation or mitigation is so overwhelming that it would be unjust to sentence the accused under any other category. Category I will always have no confinement as an option. Upon a finding that Category I applies, the military judge will be required to read into the record the factors that warrant a Category I determination.³⁸² The military judge should only apply Category I in rare circumstances.

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

3. *The Military Sentencing Matrix Shell*

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

<i>SENTENCING MATRIX</i>					
	CATEGORY I	CATEGORY II	CATEGORY III	CATEGORY IV	CATEGORY V
Article 118					
Article 119					
Article 120					

FIGURE 3

³⁸² This article envisions this process to be very similar to current motion practice. The judge would be obligated to read into the record the facts that support sentencing under either Category I or V.

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

4. *Determining the Confinement Range*

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

The proposed confinement ranges were determined by using three primary sources. First, when the military crime had a federal counterpart (that is, murder), the *Federal Sentencing Guidelines Manual* was consulted to see how the federal government treated the criminal conduct.³⁸³ Second, military sentencing data was collected and studied to determine historical sentencing practices.³⁸⁴ Third, the *Manual for Courts Martial* was used to determine the maximum authorized confinement.³⁸⁵ The information provided by these three sources was combined to determine the sentencing range. The examples below illustrate this process.

Article 118, murder, is a good illustration of the process of determining the confinement range.³⁸⁶ It demonstrates the process of calculating a confinement range when the federal system and military system address almost identical crimes. The *Manual for Courts-Martial* identifies four classifications of murder.³⁸⁷ Premeditated murder (classification one) and felony murder (classification four) carry a maximum sentence of death and a minimum sentence of confinement for life.³⁸⁸ The remaining two classifications, intent to kill or inflict great bodily harm (classification two) and acts inherently dangerous to another (classification three), carry a maxi-

383. USSG, *supra* note 8, § 5.K1.1-5.K1.2.16.

384. Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; Air Force Data *supra* note 6.

385. MCM, *supra* note 16, pt. IV, ¶¶ 60-113.

386. *Id.* pt. IV, ¶ 43.

387. *Id.*

388. *Id.* pt. IV, ¶ 41. Capital cases will not be sentenced under sentencing guidelines. Capital cases will continue to be sentenced in accordance with R.C.M. 1004.

mum sentence of confinement for life. Neither classification two or three has a minimum sentence.

Intent to kill or inflict great bodily harm and acts inherently dangerous to another (that is, murder which does not have a mandatory sentence of life imprisonment) have a mean military sentence of 291 months.³⁸⁹ The sentencing range is 60 months to 516 months.³⁹⁰

The federal sentencing guidelines assign first degree murder an offense level of forty-three.³⁹¹ Level forty-three offenses have a mandatory sentence of life imprisonment.³⁹² Second degree murder is a level thirty-three offense.³⁹³ A level thirty-three offender, who does not have a criminal history, faces a sentencing range of 135-168 months.³⁹⁴

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

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

FIGURE 4

The next article that illustrates the process of determining the sentencing range is Article 119 manslaughter.³⁹⁵ The Uniform Code of Military

389. Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; Air Force Data, *supra* note 6.

390. *Id.*

391. USSG, *supra* note 8, § 2.A1.1.

392. *Id.* § 2.A1.1; ch. 5, pt. A.

393. *Id.* § 2.A1.2

394. *Id.* § 2.A1.1; USSG, *supra* note 8, ch. 5, pt. A.

395. MCM, *supra* note 16, pt. IV, ¶ 44.

Justice splits manslaughter into two classifications.³⁹⁶ The first classification is voluntary manslaughter. Voluntary manslaughter has an attendant maximum punishment of fifteen years of confinement.³⁹⁷ The second classification is involuntary manslaughter. Involuntary manslaughter may be punished by up to ten years of confinement.³⁹⁸

During the past year, the mean confinement for a service member convicted of voluntary manslaughter was eighty-three months.³⁹⁹ The mean confinement adjudged by the military for involuntary manslaughter was forty-one months.⁴⁰⁰

The federal system divides manslaughter into three categories. The first federal category is voluntary manslaughter. It has a base offense level of twenty-five and a sentencing range of fifty-seven to seventy-one months.⁴⁰¹

The second category is involuntary manslaughter. Involuntary manslaughter has a base offense level of fourteen and a confinement range between fifteen and twenty-one months.⁴⁰² The final federal category is criminally negligent manslaughter.⁴⁰³ This category has an offense level of ten.⁴⁰⁴ Those convicted under this category face a confinement range of between six and twelve months.⁴⁰⁵

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

396. *Id.*

397. *Id.*

398. *Id.*

399. Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; Air Force Data, *supra* note 6.

400. *Id.*

401. USSG, *supra* note 8, § 2.A1.3; *id.* ch. 5, pt. A.

402. *Id.* § 2.A1.4; *id.* ch. 5, pt. A.

403. *Id.* § 2.A1.4.

404. *Id.*

405. *Id.* § 2.A1.4; *id.* ch. 5, pt. A.

	Category I	Category II	Category III	Category IV	Category V
Art. 119					
Class. 1	0-48	49-56	57-71	72-83	84-180
Class. 2	0-12	13-20	21-40	41-72	73-120

FIGURE 5

The third crime addressed in this section is Article 112a, wrongful use, possession, and distribution of controlled substances.⁴⁰⁶ It demonstrates the process of calculating a confinement range when the federal system and military system address similar crimes, but address those crimes in a different manner.

Article 112a splits drug offenses into four sentencing classifications.⁴⁰⁷ Generally, the only distinctions the military applies to these drug classifications is that crimes involving less than thirty grams of marijuana (or any amount of Phenobarbital or a Schedule IV and V controlled substances) carry less confinement than offenses involving drugs such as cocaine and heroine.⁴⁰⁸ The mean sentence and sentencing range was determined for each of these classifications through the process described earlier in this article.⁴⁰⁹

The federal system uses much more detail than the military system to sentence drug offenders. The *Federal Sentencing Guidelines Manual* devotes forty pages to drug offenses.⁴¹⁰ Generally, the federal system increases punishment as the quantity of the drug increases. The federal system also increases punishment for the type of drug. A drug equivalency table illustrates the varying severity of different drugs. Marijuana is the common currency that illustrates this severity. For example, one gram of heroin is equivalent to one kilogram of marijuana; while one gram of methamphetamine equates to two kilograms of marijuana.

406. MCM, *supra* note 16, pt. IV, ¶ 37.

407. *Id.* pt. IV, ¶ 37.e.

408. *Id.*

409. *See* discussion *supra* Section IV.

410. USSG, *supra* note 8, § 2.D1.1-2.D3.5.

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

A defendant convicted of distributing more than 250 grams but less than 1000 grams of marijuana has a base offense level of eight and a sentencing range of zero to six months. Distribution of between two grams and three grams of crack cocaine has a base offense level of twenty and a sentencing range of thirty-three to forty-one months. Unlawful possession of cocaine has a base offense level of six and a corresponding confinement range of zero to six months.

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

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

FIGURE 6

The final example will illustrate how the sentencing range is determined for a crime that is unique to the military. Article 90, assaulting or willfully disobeying a superior commissioned officer, is one such crime. For sentencing purposes, the *Manual for Courts-Martial* divides Article 90 into three classifications. Classification one is for “striking, drawing, or lifting up any weapon or offering any violence to superior commissioned officer in the execution of office.”⁴¹¹ Classification one has a maximum punishment of ten years. The mean military sentence for classification one is thirty-two months.

411. MCM, *supra* note 16, pt. IV, ¶ 14.e.(1).

Classification two is for disobeying the lawful order of a superior commissioned officer.⁴¹² The maximum punishment for classification two is sixty months. The mean confinement adjudged at a general court-martial for this classification is eight months.

The final classification relates to the above offenses in the time of war.⁴¹³ The maximum punishment for classification three is death. There was insufficient data to calculate a mean sentence for violations of this classification.

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

	Category I	Category II	Category III	Category IV	Category V
Art. 90					
Class. 1	0-18	19-23	24-36	37-47	48-120
Class. 2	0-3	4-5	6-18	19-35	36-60
Class. 3	0-11	12-23	24-59	60-179	180-death

FIGURE 7

The figure above provides a sample of the analysis involved in determining the sentencing range. This process is repeated for each punitive article contained in Appendix B.

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

For military sentencing guidelines to be most effective, the sentencing authority would not be allowed to depart from the proposed guidelines. The sentencing authority would be required to adjudge confinement from the range defined by the military sentencing matrix. In those cases where the sentencing authority believes the guidelines result in punishment that is too severe, the sentencing authority could recommend a guideline departure, on the record, to the convening authority. Only the convening author-

412. *Id.* pt. IV, ¶ 14.e.(2).

413. *Id.* pt. IV, ¶ 14.e.(3).

ity (or superiors in his chain of command) would be permitted to authorize a departure from the proposed military sentencing guidelines.⁴¹⁴

The authority to depart from the guidelines would be based on the convening authority's clemency powers that already exist under the current system.⁴¹⁵ Using clemency, the convening authority may depart from the sentencing guidelines and reduce the sentence.⁴¹⁶ While the convening authority may reduce any sentence, he may never increase a sentence.⁴¹⁷

Additionally, the convening authority may agree to depart from sentencing guidelines (and any adjudged sentence) through the use of a pre-trial agreement.⁴¹⁸ The convening authority may agree to exercise his power to limit a sentence in return for some concession on the part of the accused.⁴¹⁹ This concession often takes the form of a guilty plea.

Critics may argue that the proposed military sentencing guidelines would have a coercive effect on the individual accused. Those critics may argue that since only the convening authority can depart from the guidelines, that the accused would be placed in a position of weakness when negotiating with the convening authority. He would be in a position of weakness because he would have the choice of either accepting the convening authority's offer or facing the sentencing range mandated by the guidelines.

The above criticism is faulty. The accused, regardless of the plea agreement, may argue for sentencing under either Category I or II. If he is sentenced under Category I, he may receive no confinement. Additionally, the facts of the case may actual put the accused in a positive negotiation stance. If the facts surrounding the sentencing case make a Category IV or V determination remote, then the accused's exposure to maximum confinement is reduced.

By retaining the present role of the convening authority, much of the current military justice system will remain in place. The accused retains

414. *Id.* R.C.M. 1107.

415. *Id.* The convening authority must take action for a court-martial to be final. The convening authority may reduce any sentence or set aside a conviction that was adjudged at a courts-martial that he convened.

416. *Id.*

417. *Id.*

418. *Id.* R.C.M. 705.

419. *Id.*

his ability to bargain with the convening authority for any sentence. Similarly, the convening authority retains his present position in the military justice system.

VI. Major Criticisms of the Federal Sentencing Guidelines

The federal sentencing guidelines were a major change to the federal sentencing process.⁴²⁰ The guidelines have been in effect since surviving constitutional challenge in the 1989 case of *Mistretta v. United States*.⁴²¹ The federal guidelines have been used to sentence nearly a half-million defendants.⁴²² While the guidelines are firmly entrenched, they have been widely criticized.⁴²³ This section discusses the primary criticisms leveled against the federal sentencing guidelines. It will also illustrate how the proposed military sentencing guidelines avoid many of these criticisms.

The criticisms most often raised are: (1) the federal sentencing guidelines have reduced the moral force and significance of the sentencing ritual;⁴²⁴ (2) the federal sentencing guidelines encourage sentence entrapment;⁴²⁵ (3) the results of sentencing guidelines are sentences that are too severe;⁴²⁶ (4) the federal sentencing guidelines are too rigid and formalistic;⁴²⁷ (5) the probation officer plays too prominent of a role in determining the sentence;⁴²⁸ (6) sentencing discretion has shifted from the trial judge to the prosecutor;⁴²⁹ and (7) the sentencing guidelines greatly

420. See discussion *supra* Section III.B.

421. *Mistretta v. United States*, 488 U.S. 361 (1989). The constitutionality of the Sentencing Reform Act and the federal sentencing guidelines were challenged on improper legislative delegation and separation of powers grounds. The court rejected the challenge on 18 January 1989. Since *Mistretta*, federal sentencing guidelines have been used to sentence almost 500,000 federal defendants.

422. See REPORT, *supra* note 210.

423. See *infra* notes 424-430.

424. See Stith & Carbanes, *supra* note 137, at 1252-53. See also Wright, *supra* note 161, at 1366 (quoting KATE STITH & JOSE A. CARBANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN FEDERAL COURTS (1998)).

425. See Witten, *supra* note 162. See also Marcia G. Stein, *Sentencing Manipulation and Entrapment*, CRIM. JUST., Fall 1995, at 25.

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

427. See Stith & Carbanes, *supra* note 137, at 1253. See also Wright *supra* note 161, at 1366-77.

428. See Stith & Carbanes, *supra* note 137, at 1256-63.

429. See Lanni, *supra* note 13, at 1786. See also Freed, *supra* note 163.

reduce the opportunity for the sentencing authority to consider and weigh aggravating, extenuating, and mitigating factors.⁴³⁰ Each of these criticisms is discussed below.

Critics of the federal sentencing guidelines complain that sentencing guidelines reduce the moral impact of sentencing.⁴³¹ Before guidelines, the interaction between the federal trial judge and the accused was the focus of the sentencing process.⁴³² The judge had wide discretion to fashion a sentence that he believed satisfied the goals of sentencing.⁴³³ The statutory maximum sentence was the only check upon judicial discretion.

Before adopting sentencing guidelines, the judge ruled the courtroom.⁴³⁴ The victim of the crime looked to the judge to fashion a sentence that satisfied punishment and retribution.⁴³⁵ Those close to the defendant hoped the judge would be merciful.⁴³⁶ The public looked for sentences that would either remove the defendant from society or rehabilitate the wrongdoer.⁴³⁷

When it came time to announce the sentence, the defendant rose and faced the judge.⁴³⁸ The judge represented the vast power of both state and society. The judge announced the sentence.⁴³⁹ The defendant was judged. The judgment had moral force because the judge applied the goals of sentencing to the facts of the case and determined an individual sentence for the defendant.⁴⁴⁰ It was the creation of the individual sentence that was the cornerstone of the moral authority of the bench.⁴⁴¹

430. See Ogletree, *supra* note 140, at 1953.

431. See Stith & Carbanes, *supra* note 137, at 1252-53.

432. *United States v. Davern*, 970 F.2d. 1490 (6th Cir. 1992). Sentencing is a human process that requires interaction between the judge and the defendant. *United States v. Naugle*, 879 F. Supp. 262, 265 (E.D.N.Y. 1995) (Weinstein, J.). Human interaction between the judge and the defendant are necessary in order for a sentence to realize its full impact.

433. See Freed, *supra* note 163, at 1687-88.

434. See Stith & Carbanes, *supra* note 137, at 1250-53.

435. See Tagliareni, *supra* note 136, at 416.

436. See Hoelter et al., *supra* note 141. See also Stith & Carbanes, *supra* note 137.

437. See Ogletree, *supra* note 140, at 1940-45.

438. See Stith & Carbanes, *supra* note 137, at 1253.

439. *Id.* at 1248.

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

441. See Stith & Carbanes, *supra* note 137, at 1253.

Critics argue that the sterile sentencing environment produced by sentencing guidelines reduces the moral authority of the bench.⁴⁴² They argue that a predetermined sentence evaporates the authority of the sentencing judge.⁴⁴³ The sentencing judge is not the Solomon-like figure of the pre-guideline era.⁴⁴⁴ The judge is reduced to a bureaucrat who calculates a sentence by applying rigid standards to a chart.⁴⁴⁵ Critics argue that sentencing guidelines minimize the moral authority of the bench because they reduce the ability of the judge to relate to the defendant and fashion an individual sentence.⁴⁴⁶

Critics further argue that the accused and all interested parties are either aware of the predetermined sentencing range or so confused by the process that the sentencing ritual loses its impact.⁴⁴⁷ The decision to increase or decrease an offense level is predetermined by the facts of the case, the way the prosecutor charges the crime, and the probation officer's sentencing report. Since the sentence is largely predetermined, the moral authority of the bench to fashion an individual sentence is greatly reduced.⁴⁴⁸

Critics of sentencing guidelines argue that the impact of the entire sentencing process is diminished when the real and perceived authority of the sentencing judge is reduced.⁴⁴⁹ They argue that the trial judge must sentence with moral and societal authority.⁴⁵⁰ The judge must truly judge the offender. It is by judging that society morally condemns an individual and his acts.⁴⁵¹ The trial judge must retain his ability to judge in order for the sentence to be effective.⁴⁵² Critics of the guidelines complain that the

442. *Id.* at 1263-64.

443. *See* Ogletree, *supra* note 140, at 1953. *See also* Stith & Carbanes, *supra* note 137; Hoelter et al., *supra* note 141.

444. *See* Ogletree, *supra* note 140, at 1953. *See also* Stith & Carbanes, *supra* note 137; Hoelter et al., *supra* note 141.

445. *See* Stith & Carbanes, *supra* note 137, at 1253-54.

446. *See* Ogletree, *supra* note 140, at 1953. *See also* Stith & Carbanes, *supra* note 137; Hoelter et al., *supra* note 141.

447. *See* Ogletree, *supra* note 140, at 1953. *See also* Stith & Carbanes, *supra* note 137; Hoelter et al., *supra* note 141.

448. *See* Ogletree, *supra* note 140, at 1953. *See also* Stith & Carbanes, *supra* note 137; Hoelter et al., *supra* note 141.

449. *See* Stith & Carbanes, *supra* note 137, at 1263-72.

450. *Id.* at 1252-53.

451. *Id.*

452. *Id.*

guidelines strip the trial judge of his moral authority by reducing his ability to directly relate to the defendant and fashion an individual sentence.⁴⁵³

The proposed military sentencing guidelines preserve the moral authority of the military sentencing ritual.⁴⁵⁴ The only portion of the sentence that the guidelines impact is confinement. The sentencing authority is either the military judge or the court-martial members.⁴⁵⁵ The military judge determines the sentencing category. After the category is established, the sentencing authority determines the sentence after considering the evidence presented by both the government and the defense.⁴⁵⁶ The sentence is not predetermined. The sentencing authority retains its moral authority to judge the accused. The sentencing authority retains its moral authority because it is allowed to consider the case in aggravation and matters in extenuation and mitigation. Only after considering these matters will the sentencing authority fashion a complete sentence that judges the individual accused.

Once the sentence is determined, the sentencing ritual will retain the same moral significance as the present system.⁴⁵⁷ The accused will rise to face the sentencing authority.⁴⁵⁸ The sentencing authority will look the accused in the eye and announce the sentence.⁴⁵⁹ The sentence will carry the same type of moral impact as that provided for by the current military sentencing system.⁴⁶⁰

The next major criticism of the federal sentencing guidelines is that the sentencing guidelines encourage sentence entrapment.⁴⁶¹ Sentence entrapment occurs when criminal investigators organize an investigation (that is, a sting) in a fashion that results in a prosecution at a high offense level.⁴⁶² Most of the federal crimes escalate the offense level when certain aggravating factors are present.⁴⁶³ Critics argue that investigators “set up” suspects by tailoring the investigation in a manner that increases the

453. See Ogletree, *supra* note 140, at 1953. See also Stith & Carbanes, *supra* note 137; Hoelter et al., *supra* note 141.

454. See discussion *supra* Section V.B.

455. MCM, *supra* note 16, R.C.M. 903.

456. *Id.* R.C.M. 1001.

457. See BENCHBOOK, *supra* note 18, at 105-06.

458. *Id.*

459. *Id.*

460. *Id.*

461. See Witten, *supra* note 162. See also Hoelter et al., *supra* note 141, at 1085-86.

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

463. USSG, *supra* note 8, ch. 2

offense level.⁴⁶⁴ They argue that investigators take steps to increase the offense level, not because the steps are necessary for the investigation, but because the increase will assist the prosecution or help gain investigative assistance from the suspect.⁴⁶⁵ These critics complain that when a suspect is prompted by investigators to engage in criminal acts with aggravating factors, the accused is a victim of entrapment.⁴⁶⁶ This is especially true when the suspect would not have committed the aggravating factors but for the prompting of the investigator.⁴⁶⁷

As an example, if an undercover agent requests that a suspect transforms powder cocaine to crack cocaine, the offense level can increase dramatically.⁴⁶⁸ In *United States v. Shephard*⁴⁶⁹ the investigators did exactly this and the suspect's sentencing range increased from 27-33 months to 121-151 months.⁴⁷⁰ Critics argue that when the government knowingly prompts a suspect to engage in acts solely to increase the offense level, the government is unjustly entrapping the suspect.⁴⁷¹

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

Sentencing categories avoid sentence entrapment by allowing the military judge discretion in assigning the sentencing category.⁴⁷² The military judge determines the sentencing category that applies to every court-martial.⁴⁷³ The judge has complete discretion to select any of the five sentencing categories.⁴⁷⁴ The sentencing categories cover every confinement

464. See Hoelter et al., *supra* note 141, at 1085-86.

465. See Witten, *supra* note 162; Hoelter et al., *supra* note 141.

466. See Witten, *supra* note 162; Hoelter et al., *supra* note 141.

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

468. USSG, *supra* note 8, § 2D1.1.

469. *United States v. Shephard*, 4 F.3d 647 (8th Cir. 1993).

470. *Id.* Mr. Shephard converted powder cocaine into crack cocaine at the request of the undercover agent. Because the federal sentencing guidelines apply a 100:1 ratio to crack cocaine, that is, a person who sells 2 grams of crack cocaine falls under the same guideline as a person who sells 200 grams of powder cocaine, Mr. Shephard faced an approximately five fold increase in his sentencing range.

471. See Witten, *supra* note 162, at 716.

472. See discussion *supra* Section V.B.

473. *Id.*

474. *Id.*

option, from no confinement to the maximum confinement allowed. The investigator does not know which category the judge will apply to a particular case; thus, the investigator will not be able to influence the sentencing range in the same manner that he is able to in the federal system. For example, a military investigator cannot predetermine a sentencing range by “entrapping” the accused to sell five grams of crack cocaine instead of twenty grams of powder cocaine.

The use of classifications further reduces the risk of sentencing entrapment. The classifications relate to the type of crime committed.⁴⁷⁵ Longstanding criminal distinctions determine classifications.⁴⁷⁶ For the most part, the *Manual for Courts-Martial* does not dramatically increase punishment based solely on quantity or type distinctions.⁴⁷⁷ Even for crimes where quantity or type function to increase punishment, the nature or circumstances that surround the crime determine the increase in punishment.⁴⁷⁸ For example, possession of more than thirty grams of marijuana increases the maximum punishment from two years to five years.⁴⁷⁹ This quantity distinction does not apply to cocaine, heroine, methamphetamines, or a host of other narcotics.⁴⁸⁰ Similarly, larceny⁴⁸¹ only increases the maximum punishment based on whether: the value of the theft was more than \$100, the crime involved a vehicle, ammunition, or a firearm, or the crime was committed against the military.⁴⁸²

The next criticism levied against the federal sentencing guidelines is that they result in sentences that are too severe. Critics point to the fact that the United States has the highest incarceration rate in the world.⁴⁸³ Since sentencing guidelines went into effect, the federal prison population has increased by more than three fold.⁴⁸⁴ This population increase is due, in

475. MCM, *supra* note 16, pt. IV.

476. *Id.*

477. *Id.*

478. *Id.*

479. *Id.* pt. IV, ¶ 37.

480. *Id.*

481. *Id.* pt. IV, ¶ 46.

482. *Id.* The maximum allowable punishment increases as the value of the larceny increases or if the larceny is committed against the military or involves a motor vehicle, aircraft, vessel, firearm, or explosive. Unlike the federal sentencing guidelines that has a host of sentencing range based on the value of the larceny, the military primarily uses the categories of more than or less than \$100 and whether or not the larceny was committed against the military.

483. See Hoelter et al., *supra* note 141, at 1083. The United States has approximately 1.5 million people in confinement.

large part, to a combination of an increase in severity of sentences and the elimination of parole.⁴⁸⁵ Critics argue that the increase in sentence severity is due, in part, to the inflexibility of the federal sentencing guidelines.

The most prevalent complaint regarding severity of sentencing in the federal system involves the sentencing of drug cases.⁴⁸⁶ In the federal system, the sale of one gram of crack cocaine falls under the same offense level as the sale of one hundred grams of powder cocaine.⁴⁸⁷ This distinction raises particular criticism on the issue of race.⁴⁸⁸ Critics argue that crack cocaine is most prevalent amongst minorities while powder cocaine is most prevalent in Caucasian society.⁴⁸⁹ Thus, the sentence for a minority who sells one gram of crack is similar to the sentence for a person that sells one hundred grams of powder cocaine. Critics complain that this distinction between crack and powder cocaine results in sentences that are too severe.

Additionally, critics complain that the federal sentencing guidelines increase sentence severity by eliminating judicial discretion. As the federal sentencing guidelines mandate a sentencing range, the judge is normally unable to fashion a sentence that falls below the minimum sentence suggested by the guidelines.⁴⁹⁰ Because the judge is limited in sentencing options, critics contend that the sentencing guidelines result in sentences that are too severe.

The military sentencing matrix avoids this criticism. Punitive articles are not assigned offense levels. The range of confinement does not automatically increase due to aggravating factors. Under the proposed military sentencing guidelines, the military judge determines the appropriate sentencing category while the sentencing authority determines the actual confinement. The accused may argue for, and receive, any lawful sentence.⁴⁹¹ The accused can present extenuation and mitigation evidence in an attempt to convince the military judge to assign the offense a low sentencing cate-

484. *Id.* at 1087. In 1987 there were approximately 35,000 inmates in federal prisons. In 1998 this figure increased to approximately 110,000 inmates.

485. *See* Stith & Carbanes, *supra* note 137, at 1254-70.

486. *See* Whiteside, *supra* note 426, at 1581-82.

487. *See* USSG, *supra* note 8, § 2D1.1.

488. *See* Whiteside, *supra* note 426, at 1582.

489. *Id.*

490. *See* USSG, *supra* note 8, § 5K1.1-5K2.16. The trial judge is allowed to depart from the sentencing guidelines in rare circumstances.

491. *See* MCM, *supra* note 16, R.C.M. 1001, 1002, 1003.

gory (that is, Category I or II). If the accused is persuasive, the accused may receive no confinement.⁴⁹²

The next criticism leveled against the federal sentencing guidelines is that the guidelines are too rigid and formalistic.⁴⁹³ Critics argue that rigid sentencing guidelines reduce to almost zero the discretion that the trial judge has when fashioning a sentence.⁴⁹⁴ They complain that the rigid nature of the federal sentencing guidelines make departure rare.⁴⁹⁵ Departure normally requires the concurrence of the prosecutor.⁴⁹⁶

Critics complain that applying the federal sentencing chart is formalistic in the sense that sentencing guidelines reduce the judge to a human calculator.⁴⁹⁷ The judge determines the sentencing range through calculus instead of through principled reasoning.⁴⁹⁸ This state of affairs has led federal judges to refer to themselves as “notary publics” and “accountants.”⁴⁹⁹

The proposed military sentencing matrix overcomes this criticism. While the military sentencing matrix is formal, the judge retains discretion as to which of the five sentencing categories apply to the accused. Both the military judge and the sentencing authority are required to fully consider extenuation, mitigation, and the case-in-aggravation before determining the sentence.⁵⁰⁰ The ability of the sentencing judge to fully consider a wide array of sentencing evidence and appoint the appropriate sentencing category ensures that the military judge does much more than read a chart. The proposed military sentencing guidelines require complete participation by the military judge and the sentencing authority. Involving the judge and members in the application of the sentencing guidelines is what overcomes the criticism that the proposed military sentencing guidelines are too rigid.

Additionally, the proposed military sentencing guidelines only influence confinement and does not effect other forms of punishment.⁵⁰¹ Thus,

492. *Id.*

493. See Stith & Carbanes, *supra* note 137, at 1253.

494. See Witten, *supra* note 162, at 702-04.

495. 18 U.S.C. § 3553 (2000); Witten, *supra* note 162, at 704.

496. See USSG, *supra* note 8, § 5K1.1; Stith & Carbanes, *supra* note 137, at n.24.

497. See Stith & Carbanes *supra* note 137, at 1255-56.

498. See *id.* at 1254.

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

500. MCM, *supra* note 16, R.C.M. 1001.

any formality or rigidity that applies to the military sentencing guidelines is tempered because the military sentencing guidelines only relate to adjudged confinement.

The fifth criticism of the federal sentencing system is that probation officers play too prominent a role in determining the sentence.⁵⁰² In the federal system, the probation officer prepares the presentence report, applies his understanding of the facts to the sentencing guidelines, and performs the sentencing calculations.⁵⁰³ The probation officer provides the federal trial judge a proposed sentencing range.⁵⁰⁴

The probation officer is considered the sentencing guideline expert.⁵⁰⁵ The presentencing report normally becomes the focus of the sentencing hearing.⁵⁰⁶ Federal trial judges often accept the probation officers report as gospel.⁵⁰⁷ The result is that the probation officer may determine the sentencing range applied to the defendant.⁵⁰⁸

Critics complain that probation officers have become a third adversary in the courtroom.⁵⁰⁹ They argue that probation officers act as criminal investigators.⁵¹⁰ The focus of the investigation is the application of the sentencing guidelines to the offense. Neither the probation officer nor the sentencing guidelines focus on the character traits of the defendant.⁵¹¹

The role of probation officer as investigator often results in defense counsel advising the defendant, and those close to the defendant, not to cooperate with the probation officer.⁵¹² Defense counsel proffer this advice out of fear that the probation officer will discover facts that will

501. *Id.* R.C.M. 1001-1005.

502. *See* Stith & Carbanes, *supra* note 137, at 1257-58.

503. *Id.*

504. *Id.* at 1257.

505. *Id.* at 1258.

506. *Id.* at 1259.

507. *See* Jack B. Weinstein, *A Trial Judges Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 364. *See also* Julian Abele Cook, Jr., *The Changing Role of the Probation Officer in the Federal Court*, 4 FED. SENTENCING REP. 112 (1991) *quoted in* Stith & Carbanes, *supra* note 137, at 1258.

508. *See* Stith & Carbanes, *supra* note 137, at 1259. *See also* Weinstein, *supra* note 507, at 364; Cook, *supra* note 507.

509. *See* Stith & Carbanes, *supra* note 137, at 1260-61.

510. *Id.* at 1257-58 (quoting PROBATION DIV., ADMIN. OFFICE OF THE U.S. COURTS, PUB. NO. 107, PRE-SENTENCE INVESTIGATION REPORTS UNDER THE SENTENCING REFORM ACT OF 1984, 3).

511. *See* Stith & Carbanes, *supra* note 137, at 1257-58.

operate to increase the offense level.⁵¹³ The result is that the probation officer may have a one-sided view of the offense.⁵¹⁴ The probation officer's view is one-sided because the defense does not participate.⁵¹⁵ This one-sided view may result in a faulty presentencing report. If the trial judge relies upon a faulty presentencing report, the trial judge may misapply the sentencing guidelines.⁵¹⁶

The proposed military sentencing matrix avoids the issues raised by employing probation officers. The military system does not use probation officers. The sentencing authority determines the sentence by applying the facts presented by both parties at the sentencing hearing. The prosecution and defense present their case in an adversarial setting.⁵¹⁷

The adversarial process allows the accused to present a host of sentencing evidence.⁵¹⁸ Upon conclusion of the sentencing case, the judge translates the totality of the sentencing hearing into a sentencing category. The sentencing authority does this by weighing the government's case in aggravation against the extenuation and mitigation evidence presented by the defense. After the judge determines the sentencing category, the sentencing authority applies the same evidence to fashion an appropriate sentence.

The adversarial sentencing hearing fulfills the role performed by the probation officer in the federal system. The military system avoids many of the pitfalls of the federal system because the adversarial process places the accused in control of the information he wants to present to the court-martial and gives him the authority to challenge that which he does not want considered.

The next criticism is that the federal sentencing guidelines have shifted sentencing discretion from the military judge to the federal prosecutor.⁵¹⁹ The critics claim that sentencing guidelines all but eliminate judicial sentencing discretion.⁵²⁰ They argue that the current federal system

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

513. *Id.*

514. *Id.*

515. *Id.*

516. See Stith & Carbanes, *supra* note 137, at 1262-63.

517. See discussion *supra* Section II.B.

518. *Id.*

519. See Freed, *supra* note 163.

replaces judicial sentencing discretion with prosecutorial sentencing discretion.⁵²¹ Prosecutors can exercise sentencing discretion by manipulating the sentencing guidelines to prosecute similar criminal conduct in a disparate fashion.⁵²² For example, assume that two different men engage in unrelated criminal conduct. The conduct involves fraudulently depositing money into their bank account and then transferring that money to a different bank account.⁵²³ The prosecution has the option of charging the offender with either bank fraud or money laundering.⁵²⁴ Bank fraud carries a base offense level of seventeen while money laundering carries a base offense level of twenty-three.⁵²⁵ Critics of sentencing guidelines argue that the prosecutor can promote sentence disparity by charging one offender with bank fraud and the other with money laundering.⁵²⁶ This disparate charging results in the prosecutor exercising sentencing discretion by deciding which of the sentencing guidelines will be applied to the case at hand.⁵²⁷

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

The final criticism is that the federal sentencing guidelines greatly reduce the opportunity for the sentencing authority to consider and weigh aggravating, extenuating, and mitigating factors.⁵²⁸ This final criticism embraces many of the issues discussed in the previous six criticisms.⁵²⁹

The federal sentencing guidelines consider only three of the defendant's character traits.⁵³⁰ These traits are (1) criminal history, (2) dependence upon criminal activity for a livelihood, and (3) acceptance of

520. *Id.* at 1697.

521. Lanni, *supra* note 13, at 1786.

522. *See id.* at 1696-97. *See also* Witten, *supra* note 162, at 708-09.

523. *See* Hoelter et al., *supra* note 141, at 1085-86.

524. *Id.*

525. *See* USSG, *supra* note 8, § 2.S.1.1, 1.2.

526. *See* Hoelter et al., *supra* note 141, at 1085-86.

527. *Id.*

528. *See* Ogletree, *supra* note 140, at 1953.

529. *See* discussion accompanying *supra* notes 424-528.

530. *See* USSG, *supra* note 8, § 5H1.1, 1.12.

responsibility for his wrongdoing.⁵³¹ Critics of the federal guidelines argue that this narrow view does not adequately address the many character traits that factor into a sentence.⁵³² For example, the federal sentencing guidelines largely dismiss: age; education and vocational skills; mental and emotional conditions; physical condition; substance dependence or abuse; employment record; family and community ties; military, civic, and charitable work; and lack of guidance as a youth as character traits to be considered when forming a sentence.⁵³³ The federal sentencing guidelines mandate an offense level and criminal history category based upon a narrow view of the defendant.

Military sentencing allows the defense to present almost any information that would tend to explain the circumstances surrounding the commission of the offense.⁵³⁴ Additionally, the accused may present personal background and character evidence in an attempt to secure a lenient sentence.⁵³⁵

The military sentencing matrix does not ignore the personal background of the accused. The proposed military sentencing matrix allows the judge to consider a wide range of sentencing evidence to determine the appropriate sentencing category. The sentencing categories incorporate the impact of aggravating, extenuating, and mitigating evidence into their sentencing range. The proposed military sentencing matrix allows the sentencing authority to fashion a sentence that gives proper weight to the myriad of issues that influence the severity of a crime. The sentencing matrix reflects all confinement options, from no confinement to the maximum lawful confinement, authorized for the crime committed.

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

531. *See id.* §§ 3E1.1, 5H1.7-5H1.9; Ogletree, *supra* note 140, at 1953.

532. *See* Ogletree, *supra* note 140, at 1953.

533. *See* USSG, *supra* note 8, § 5H1.1-1.6, 1.9-1.12. *See also* Ogletree, *supra* note 140, at 1951-53.

534. MCM, *supra* note 16, R.C.M. 1001.

535. *Id.*

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

The Constitution vests in Congress the authority to create the laws that govern the armed forces.⁵³⁶ Further, the Congress has exercised the bulk of this authority in Title 10 of the United States Code. The Congress defines criminal acts in the punitive articles.⁵³⁷

Particularly relevant to this discussion is 10 U.S.C. § 856. This section delegates, from Congress to the President, the authority to determine the maximum punishment allowed at courts-martial. Title 10, U.S.C. § 856 is titled “maximum limits” and states: “The punishment which a court-martial may direct for an offense may not exceed such limit as the President may prescribe for that offense.”⁵³⁸

The President, as Commander in Chief⁵³⁹ and through the authority delegated to him by Congress, creates the rules that govern the military justice system. These rules are contained in the *Manual for Courts-Martial*.⁵⁴⁰

Several legislative and executive acts must occur in order to implement sentencing guidelines. First, Congress would have to modify 10 U.S.C. § 856. The new title should be: “Maximum sentences, minimum sentences, and sentencing guidelines.” The amended text would read:

The President has the authority to establish maximum sentences, minimum sentences, and sentencing guidelines. A court-martial may not direct a punishment that exceeds the maximum limit prescribed by the President. A court-martial may not direct a punishment that is less than the minimum limit prescribed by the President. A court-martial must apply the confinement range mandated by the sentencing guidelines when the sentencing guidelines are applicable

536. U.S. CONST. art. I, ¶ 8. “To make Rules for the Government and Regulation of the land and naval Forces” *Id.*

537. 10 U.S.C. §§ 877-934 (2000).

538. 10 U.S.C. § 856.

539. U.S. CONST. art. II, ¶ 2.

540. MCM, *supra* note 16.

Modifying 10 U.S.C. § 856 as above would give the President the authority to implement sentencing guidelines. Modifying various Rules for Courts-Martial would complete implementation.⁵⁴¹

The first modification to the Rules for Courts-Martial necessary to establish sentencing guidelines involves R.C.M. 1002. Currently, R.C.M. 1002, sentence determination, reads:

Subject to limitations in this Manual, the sentences to be adjudged is a matter within the discretion of the court-martial; except when a mandatory minimum sentence is prescribed by the code, a court-martial may adjudge any punishment authorized in this Manual, including the maximum punishment or any lesser punishment, or may adjudge a sentence of no punishment.⁵⁴²

The proposed modification would split R.C.M. 1002 into two subparagraphs, one for special courts-martial and the other for general courts-martial. The rule would also provide sentencing guidance for convictions of multiple specifications. Below is the proposed modification to R.C.M. 1002.⁵⁴³

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

(b) General Courts-Martial.

(1) Subject to the limitations in this Manual, the sentence to be adjudged, except for confinement, is a matter within the discretion of the court-martial. The court-martial must adjudge confinement consistent with the sentencing range determined by the sentencing guidelines. The sentencing range is determined

541. *Id.* R.C.M. 1001-11.

542. *Id.* R.C.M. 1002.

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

by finding the appropriate intersection between the punitive article and the offense category. The military judge has complete discretion to assign the sentencing category. The military judge shall instruct the members which punitive article, classification, and sentencing category applies. The members, or military judge if appropriate, have complete discretion to choose any confinement from the confinement range mandated by the sentencing guidelines.

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

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

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

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

The next Rule for Courts-Martial that requires modification is R.C.M. 1005, instructions on sentence. Modifying R.C.M. 1005 is necessary to provide instructions that are consistent with sentencing guidelines. The proposed modification would follow R.C.M. 1005(e) and read as follows.

(1) *Special Courts-martial.* A statement of the maximum authorized punishment that may be adjudged.

(2) *General Courts-martial.* A statement of the sentencing range that applies to the case. A statement of both the maximum

and minimum confinement that may be adjudged. A statement that the members must sentence the accused to confinement within the sentencing range specified by the military judge. A statement as to which sentencing category is to be applied to the crime(s) and instruction on how to apply the sentencing guidelines.

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

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

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

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

Finally, Part IV of the *Manual for Courts-Martial*, Punitive Articles, must be modified to indicate the interplay between sentencing guidelines and maximum punishment. Each punitive article should include language that states that if the accused is tried by a general courts-martial, the pun-

ishment shall be in accordance with that directed by R.C.M. 1001-1008 and Appendix 26.

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

(e) *Punishment.*

- (1) If tried before a summary or special courts-martial, the maximum punishment allowed at those forums.
- (2) If tried before a general courts-martial the accused shall be sentenced in accordance with R.C.M. 1001-1008 and Appendix 26 of this Manual.

The above legislative and executive modifications would implement the proposed sentencing guidelines and apply those guidelines to the armed forces. If the above modifications were made, sentencing guidelines would be a part of the military justice system. Once a part of the system, the sentencing guidelines could be studied and monitored to increase their effectiveness.

VIII. Conclusion

Before World War II, military commanders exercised primary control over the military justice system. Today, commanders share control of the military justice system with judge advocates and military judges.⁵⁴⁴ This shared control is an outgrowth of the 1951 *Manual* and the maturing of the military justice system into a modern criminal justice system.

The military justice system has evolved with every change to the *Manual for Courts-Martial*. The system has developed from a system of discipline to a highly developed criminal justice system. What was once a system that focused on crimes unique to the military now includes punitive articles that cover every conceivable crime.⁵⁴⁵

While the military justice system has expanded to a point where almost any criminal conduct is punishable under the *Manual*, the military sentencing system has remained remarkably similar to the system that was in place before World War II. Similarly, while the federal system and a

544. Lovejoy, *supra* note 40, at 5.

545. MCM, *supra* note 16, pt. IV. Not only can the crimes specifically listed in the *Manual* be prosecuted at courts-martial, but, state and federal crimes can be prosecuted under the assimilated crime provision of Article 134.

majority of the states seek sentence uniformity, the military system largely abandoned sentencing uniformity as a goal in the 1950s. Further, where the federal system has implemented sentencing guidelines to control sentencing discretion, the military allows almost unchecked sentencing discretion.

It is curious that the military chooses to cling to its unique method of sentencing at a time when other areas of military justice strive to mirror the federal system.⁵⁴⁶ Congress has directed the President, when practicable, to adopt the practices of the federal criminal justice system.⁵⁴⁷ Adopting military sentencing guidelines would fulfill this mandate.

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

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

546. 10 U.S.C. § 836 (2000). “[The President shall apply where practicable] the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts. . . .” *Id.*

547. *Id.*

Appendix A

Sentencing Table
(in months of imprisonment)

Criminal History Category (Criminal History Points)

Offense Level	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96

22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-Life
38	235-293	262-327	292-365	324-405	360-Life	360-Life
39	262-327	292-365	324-405	360-Life	360-Life	360-Life
40	292-365	324-405	360-Life	360-Life	360-Life	360-Life
41	324-405	360-Life	360-Life	360-Life	360-Life	360-Life
42	360-Life	360-Life	360-Life	360-Life	360-Life	360-Life
43	Life	Life	Life	Life	Life	Life

Appendix B

Proposed Military Sentencing Matrix

	Category I	Category II	Category III	Category IV	Category V
Art. 87 Class. 1 Class. 2	0-5 0-3	6-9 4-5	10-17 6-8	18-20 9-10	21-24 11-12
Art. 89	0-3	4-5	6-8	9-10	11-12
Art. 90 Class. 1 Class. 2 Class. 3	0-17 0-2 0-11	18-23 3-5 12-23	24-36 6-18 24-59	37-47 19-35 60-179	48-120 36-60 180-death
Art. 111 Class. 1 Class. 2	0-3 0-1	0-6 0-3	3-6 4-5	7-12 5-6	13-18 5-6
Art. 112a Class. 1(a) Class. 1(b) Class. 2(a) Class. 2(b)	0-5 0-3 0-11 0-5	6-11 1-3 12-23 6-11	12-23 4-9 24-48 12-23	24-47 10-17 49-119 24-47	48-60 18-24 120-180 48-60
Art. 116 Class. 1 Class. 2	0-6 0-1	7-12 0-3	13-24 4-5	25-36 5-6	37-120 5-6
Art. 118 Class. 1 Class. 2 Class. 3 Class. 4	Life-death 0-84 0-84 Life-death	Life-death 85-131 85-131 Life-death	Life-death 132-168 132-168 Life-death	Life-death 169-240 169-240 Life-death	Life-death 241-life 241-life Life-death
Art. 119 Class. 1 Class. 2	0-48 0-12	49-56 13-20	57-71 21-40	72-83 41-72	84-180 73-120

Art. 120 Class. 1 Class. 2 Class. 3	0-35 0-59 0-47	36-69 60-86 48-79	70-87 87-108 80-135	88-240 109-120 136-360	241-death 121-240 361-life
Art. 122 Class. 1 Class. 2	0-47 0-17	48-62 18-32	63-78 33-41	79-96 42-60	97-180 61-120
Art. 123	0-4	5-19	20-28	29-36	37-60
Art. 123a Class. 1(a) Class. 1(b) Class. 2	0-1 0-5 0-1	0-2 6-11 0-2	2-3 12-20 2-3	3-4 21-36 3-4	5-6 37-60 5-6
Art. 124	0-19	20-29	30-37	38-48	49-84
Art. 125 Class. 1 Class. 2 Class. 3 Class. 4	0-35 0-59 0-47 0-6	36-69 60-86 48-79 0-12	70-87 87-108 80-135 6-18	88-240 109-120 136-360 19-24	241-life 121-240 361-life 25-60
Art. 126 Class. 1 Class. 2(a) Class. 2(b)	0-17 0-2 0-11	18-23 3-5 12-17	24-41 6-8 18-24	42-63 9-10 25-36	64-240 11-12 37-60
Art. 127	0-5	6-17	18-26	27-30	31-36
Art. 128 Class. 1(a) Class. 1(b) Class. 2 Class. 3 Class. 4 Class. 5 Class. 6 Class. 7	0-1 0-5 0-2 0-6 0-3 0-1 0-7 0-6	0-2 6-11 2-3 0-12 0-5 0-3 8-11 7-11	1-2 12-17 3-5 12-17 6-8 3-4 12-17 12-16	2-3 18-23 4-6 18-24 9-11 4-5 18-23 17-19	2-3 24-36 5-6 25-36 12-18 5-6 24-36 20-24
Class. 8(a) Class. 8(b) Class. 9(a) Class. 9(b)	0-35 0-11 0-59 0-11	36-40 12-17 60-77 12-17	41-51 18-23 78-97 18-23	52-60 24-29 98-110 24-29	61-96 30-36 111-120 30-60

Art. 129	0-11	12-23	24-30	31-60	61-120
Art. 130	0-5	6-9	10-16	17-36	37-60
Art. 131	0-2	2-5	6-9	10-16	17-60
Art. 134 ¶71	0-1	0-2	2-3	4-5	5-6
Art. 134 ¶87	0-17	18-24	25-36	37-48	49-84