ONE "GET OUT OF JAIL FREE" CARD: SHOULD PROBATION BE AN AUTHORIZED COURTS-MARTIAL PUNISHMENT?

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I. Introduction

First Afghanistan. Then Iraq. Now Iraq . . . again. He was distraught—not because of the hardships of yet another deployment—that's what Soldiers do. He could handle another deployment, but his wife could not . . . not for fifteen months. His wife responded just like he thought she would. She left. She left him alone to take care of their two young children. With no friends and family to leave them with, he feared what would happen to his children. Maybe he should get out of the Army for lack of a family care plan? But he loved the Army, and his achievements reflected it. Maybe he could stay in the rear. No, as a team leader, he would not feel right staying behind while his men were in the fight. Plus, his command frowned upon such requests as a sign of cowardice although they never stated such. Believing that he had no other recourse, he absented himself without leave. When he returned three months later, he was court-martialed. His only sentence was a bad-conduct discharge with a recommendation from the military judge to the convening authority that the discharge be suspended.

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Some say he got off easy. After all, he did not have to go back to Iraq. But he stood ready to serve. His record was otherwise unblemished. What was the likelihood that the convening authority would suspend his bad-conduct discharge? Slim to none? But what if the military judge had the option of sentencing him to probation instead of only making a recommendation to the convening authority to suspend his sentence?[1]

Today, the only authorized punishments that a court-martial (special courts-martial[2] and general courts-martial[3]) may adjudge are a reprimand, forfeiture of pay and allowances, a fine, reduction in pay grade, restriction to specified limits, hard labor without confinement, confinement, and a punitive discharge.[4] While this list initially sounds expansive, affording the military judge or panel much room for creativity in fashioning an appropriate sentence for a particular accused, a military

[1] Although this story is fictitious, it represents a not-uncommon scenario in military justice practice.
[2] A "special court-martial may try any person subject to the code for any noncapital offense made punishable by the code and, as provided in this rule, for capital offenses." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 201(f)(2) (2008) [hereinafter MCM]. The maximum punishment that it may adjudge is one year confinement, hard labor without confinement for three months, two-thirds forfeiture of pay for twelve months, a reprimand, reduction to the lowest pay grade, and a fine. *Id*. A special court-martial empowered to adjudge a bad-conduct discharge may adjudge the aforementioned punishments as well as a bad-conduct discharge. *Id*. Today, most special courts-martial are empowered to adjudge a bad-conduct discharge. Last year, the Army tried 535 special court-martials. Of those, 526 were empowered to adjudge a bad-conduct discharge. U.S. Army Judiciary, Office of the Clerk of Court, Army Wide Statistics for FY 2007 (2008) (Excel spreadsheet) [hereinafter Army Wide Statistics].
[3] A general court-martial may try any person subject to the Uniform Code of Military Justice (Code) for any offense under the Code. MCM, *supra* note 2, R.C.M. 201(f)(1). It may adjudge the maximum prescribed punishment for any offense under the Code including a reprimand, total forfeitures of all pay and allowances, a fine, reduction in pay grade, restriction to specified limits, hard labor without confinement, confinement, punitive separation, and, in some cases, death. *Id*. Last year, the Army tried 1269 general court-martials. Army Wide Statistics, *supra* note 2.
[4] MCM, *supra* note 2, R.C.M. 1003(b).

judge or panel is not authorized to adjudge probation. When one considers that probation is the most common criminal sentence adjudged in U.S. federal and state courts today,[5] but is not available for the convicted servicemember, this expansive list suddenly seems more restrictive.

Then, when one considers the rapid rate that the military is allowing ex-convicts to enter the military under moral waivers, the question becomes even more perplexing. Since October 2006, "more than 8,000 of the roughly 69,000 recruits have been granted waivers for offenses ranging in seriousness from misdemeanors such as vandalism to felonies such as burglary and aggravated assault."[6] Almost twelve percent of new active duty and Army Reserve troops in 2007 received "moral waivers."[7] With the prolonged wars in Iraq and Afghanistan, and others potentially brewing, do these numbers really reflect a belief that these individuals have been rehabilitated or do they reflect the amount of risk the Army is willing to accept to satisfy the simple economic principle of supply versus demand?[8]

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[5] *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS*,* PROBATION AND PAROLE STATISTICS*, available at* http://www.ojp.usdoj.gov/bjs/pandp.htm (last visited Dec. 3, 2008) [hereinafter BUREAU OF JUSTICE STATISTICS]. The U.S. Department of Justice collects all probation and parole data nationwide annually. For yearend 2006, 463 agencies including "the federal system, 33 central State reporters, the District of Columbia, and 428 separate State country, or court agencies" responded to the Department of Justice Annual Probation Survey. *Id.* According to those statistics, of the 7,211,400 individuals under correctional supervision, 4,237,023 were sentenced to probation. *Id.*; *see also* JOAN PETERSILIA, REFORMING PROBATION AND PAROLE IN THE 21ST CENTURY 1 (2002) (stating that "[p]robation is the most common form of criminal sentencing in the United States" in 2002).

[6] Bryan Bender, *Entering Army with Criminal Records*, BOSTON GLOBE, July 13, 2007, at A1, *available at* http://www.boston.com/news/nation/washington/articles/2007/07/13/more_entering_army_with_criminal_records/. These are only the Army's statistics concerning the number of moral waivers granted in 2006.

[7] *Id.*

[8] *See Criminal Force: The Military Is Admitting More Ex-Convicts*, PITTSBURG POST-GAZ., Feb. 16, 2007, at B-6, *available at* http://www.post-gazette.com/pg/07047/762556-192.stm [hereinafter *Criminal Force*].

Though we publicly claim that the increase in moral waivers is not based on mission accomplishment,[9] public sentiment favors the latter—criticizing the armed forces for "scraping the bottom of the barrel"[10] to meet recruitment needs. But does motive really matter? At the end of the day, we must all agree that "[a] volunteer army—even one including ex-convicts—will fight . . . ."[11]

Why is the military willing to give civilian ex-convicts[12] a chance to prove that they have indeed been rehabilitated, yet we have no such formal system that affords a convicted accused the same opportunity? Why does the Army take more risks on others than on its own Soldiers? This article argues for empowering a court-martial to sentence a convicted accused to probation, a form of punishment that provides a meaningful opportunity to rehabilitate while satisfying the simple principle of supply versus demand.[13]

Since a formal probation system would be new in the military, section two of this article begins with an overview of the civilian probation system. Section three examines the current military justice system—the derivation of authorized punishments and their competing objectives. Section four addresses the pros and the cons of implementing a formal probation system in the military. Section five discusses how to empower a court-martial to adjudge a sentence that includes probation. Finally, section six suggests an alternative to empowering courts-martial to adjudge probation—empowering courts-martial to suspend punishment.

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[9] Bender, *supra* note 6 (quoting a statement from the Army Recruiting Command, Fort Knox, Ky., that "[t]he Army does not rehabilitate enlistees who receive waivers; they have already overcome their mistakes"); *see also* Frank Main, *Army Recruits Have Records: Number Allowed in with Misdemeanors More Than Doubles*, CHI. SUN-TIMES, June 19, 2006 (quoting S. Douglas Smith of the Army's Recruiting Command as stating, "the rising number of misdemeanor and medical waivers has occurred randomly and was not set into motion by any Army policies that have relaxed qualifications for recruits. . . . [A]pproval of waivers is not based on mission accomplishment.").
[10] *See Criminal Force*, *supra* note 8.
[11] *Id.*
[12] The term "ex-convict" refers to those that have been convicted of either a misdemeanor or a felony.
[13] While this article argues that a court-martial should be empowered to adjudge probation in lieu of any of the permissible punishments, it is contemplated that probation is the most viable alternative in lieu of extended confinement and a punitive discharge.

II. The U.S. Federal Probation System[14]

A. The Road to the Modern-Day Federal Probation System

In August 1841, Boston boot maker John Augustus, a religious and wealthy man, posted bail for a man accused of drunkenness.[15] Augustus urged the Boston Police Court to defer sentencing the man for three weeks.[16] Augustus, having had experience working with alcoholics, also urged the court to release the man into his custody in the meantime.[17] Augustus called the act "probation," derived from the Latin term *probatio*, which means "period of proving or trial."[18] Despite the brevity of his probationary period, the man convinced the judge that he had been rehabilitated and was ordered only to pay a fine at the end of his probation.[19]

Over the next fifteen years, Augustus similarly assisted more than 1900 individuals.[20] Augustus did, however, screen his applicants—mainly assisting "those who were indicted for their first offense, and whose hearts were not wholly depraved, but gave promise of better

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[14] Surprisingly, there are no national guidelines or uniform structure concerning state probation systems. Hence, this article is primarily limited to a discussion of the federal probation system only. *See* PETERSILIA, *supra* note 5, at 36, 50 (quoting the National Institute of Corrections); *see also* CAROL MELLOR, CRIMINAL DEFENSE TECHNIQUES: DECISION TO GRANT OR DENY PROBATION § 47.03 (2008) ("The mechanics of adjudication of a sentence of probation are not uniform between, or sometimes, within jurisdictions.").

[15] CHARLES CHUTE & MAJORIE BELL, CRIMES, COURTS, AND PROBATION 36–38 (1956); *see also* PETERSILIA, *supra* note 5, at 17–18.

[16] PETERSILIA, *supra* note 5, at 17–18.

[17] *Id*. Augustus was a member of the Washington Total Abstinence Society. CHUTE & BELL, *supra* note 15, at 38. It is likely that Augustus was at the Boston Police Court "to promote temperance and to reclaim drunkards." *Id*. For the first year of his charitable work, he limited his assistance to males only. Charles Linder, *John Augustus, Father of Probation, and the Anonymous Letter*, FED. PROBATION NEWSL. (Dec. 2006), *available at* http://www.uscourts.gov/fedprob/June_2006/augustus.html. But then, Augustus' "attention was called to claims of women who were common inebriates" as well as children and others accused of petty crimes. *Id*. Augustus was also involved in the anti-slavery movement and other reform groups. CHUTE & BELL, *supra* note 15, at 39.

[18] PETERSILIA, *supra* note 5, at 17–18.

[19] *Id.*

[20] ANDREW R. KLEIN, ALTERNATIVE SENTENCING, INTERMEDIATE SANCTIONS, AND PROBATION 68 (1997).

things."[21] In addition to making an impartial report to the court, Augustus helped his charges with housing, employment, and education.[22]

Augustus' probationers performed remarkably well and seemingly reformed their lives.[23] Even then, Augustus frustrated law enforcement officials "who wanted the offenders punished, not helped."[24] Nevertheless, it was difficult to argue with his success and his ideas spread.[25] "In 1878, Massachusetts was the first state to adopt a formal probation law for juveniles."[26] By 1910, twenty-one states had probation statutes[27] and "[b]y 1956, all states had adopted adult and juvenile probation laws."[28]

In 1925, Congress passed the Federal Probation Act which authorized courts of original jurisdiction to place a convicted defendant on probation when it found "that the ends of justice and the best interests of the public, as well as the defendant, will be subserved."[29] The Act

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[21] PETERSILIA, *supra* note 5, at 17 (quoting Augustus in 1939); *see also* CHUTE & BELL, *supra* note 15.

> Great care was observed of course, to ascertain whether the prisoners were promising subjects for probation, and to this end it was necessary to take into consideration the previous character of the person, his age, and the influences by which he would in future be likely to be surrounded, and although these points were not rigidly adhered to, still they were the circumstances which usually determined my action.

Id. at 40 (quoting Augustus also).

[22] PETERSILIA, *supra* note 5, at 17. Augustus completely shaped the structure of today's probation system by giving modern-day probation the basic ideas of presentence reports, supervised conditions, social casework, and probation revocation. *Id.* at 18.

[23] MICHAEL D. BURKHEAD, THE TREATMENT OF CRIMINAL OFFENDERS 36 (2007); *see also* PETERSILIA, *supra* note 5, at 17.

[24] PETERSILIA, *supra* note 5, at 17; *see also* CHUTE & BELL, *supra* 15, at 44.

[25] According to an anonymous letter entitled "The Labors of Mr. John Augustus, the Well-Known Philanthropist, From One Who Knows Him," Augustus is praised for "raising the fallen—reforming the criminal," and "that, out of nearly two thousand persons for whom he was responsible, only ten have proved ungrateful for his goodness, and by absconding suffered him to be defaulted and to be sued (four times, I believe,) for the amounts for which he had become bail." Linder, *supra* note 17.

[26] PETERSILIA, *supra* note 5, at 18; *see also* KLEIN, *supra* note 20, at 68.

[27] DAVID DRESSLER, PRACTICE AND THEORY OF PROBATION AND PAROLE 20 (1959).

[28] PETERSILIA, *supra* note 5, at 18; *see also* NEIL COHEN, THE LAW OF PROBATION AND PAROLE 1-8 (1999).

[29] Federal Probation Act of 1925, 18 U.S.C. §§ 724–727 (1925), *available at* http://heinonline.org/HOL/Page?colletion=statute&handle=hein.statute/sal043&id=1293.

gave great discretion to the court—allowing the court to fashion the terms and conditions of probation "for such period and upon such terms and conditions as they may deem best."[30] Furthermore, the Act allowed the court to modify the terms of probation or revoke probation with no parameters.[31] Probation officers were charged with informing the court of the probationers' compliance of the imposed conditions.[32] Though the Act mandated that probation officers serve free of charge,[33] it gave probation officers a great deal of power over probationers, giving them the power of arrest without a warrant and authorizing them to "use all suitable methods, not inconsistent with the conditions imposed by the court, to aid persons on probation and to bring about improvements in their conduct and condition."[34]

The Federal Probation Act of 1925 also provided that the defendant's offense could not be punishable by imprisonment for life or death. *Id.*

[30] *Id.*

[31] *Id. See* Burns v. United States, 287 U.S. 216, 220 (1932). In *Burns*, the trial court sentenced Burns to imprisonment for a year on one count, to pay a $2000 fine on the second count, and to a suspended sentence of five years imprisonment in favor of probation on the third count. *Id.* at 217. The court subsequently received information that Burns had absented himself from jail for a couple of hours over the course of several days in violation of his probation conditions. *Id.* at 218. The court summarily revoked his probation and the Circuit Court of Appeals affirmed the revocation. *Id.* at 219. On appeal to the Supreme Court, Burns alleged that he was entitled to notice of his alleged probation violation and to a hearing. The Court held that the Act did not provide "limiting requirements as to the formulation of the charges, notice of the charges, or manner of hearing or determination" and affirmed his probation revocation. *Id.* at 221.

[32] 18 U.S.C. §§ 724–727 (1925).

[33] *Id.*

> All such probation officers shall serve without compensation except that in case it shall appear to any such judge that the needs of the service require that there should be a salaried probation officer, such judge may appoint one such officer and shall fix the salary of such officer subject to the approval of the Attorney General in each case.

Id. Apparently, the Act contemplated that probation officers serve out of a heart of genuine goodwill for the rehabilitation of their neighbor. *Cf.* PETERSILIA, *supra* note 5, at 18 (stating that the only criteria that Augustus required from those that volunteered to assist him in his philanthropic endeavors was that the individual "just needed to have a good heart").

[34] 18 U.S.C. §§ 724–727 (1925).

Concerned with the virtually unfettered discretion granted to federal trial courts under the Federal Probation Act of 1925, the National Commission on Reform of Federal Criminal Laws (National Commission) began urging in 1971 for greater certainty and uniformity in sentencing and for a more comprehensive sentencing law.[35] On March 3, 1983, Senator Kennedy presented a proposal to the Subcommittee on Criminal Law, based in part on the National Commission's recommendations.[36] That proposal, the Sentencing Reform Act of 1983 (SRA), [37] later became "the first comprehensive sentencing law for the federal system."[38] A discussion of the impact of the SRA on our modern-day federal probation system follows.

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[35] S. REP. NO. 98-225, at 37–38 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3220–3221. *See generally* Gary Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61 (1993) (providing a counter argument for less uniformity in sentencing).

[36] S. REP. NO. 98-225, at 37. The committee noted the following:

> [E]very day Federal judges mete out unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances. One offender may receive a sentence of probation, while another—convicted of the very same crime and possessing a comparable criminal history—may be sentenced to a lengthy term of imprisonment. . . . These disparities . . . can be traced directly to the unfettered discretion the law confers on those judges and parole authorities responsible for imposing and implementing the sentence. This sweeping discretion flows from the lack of any statutory guidance . . . .

Id. at 38.

[37] Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C.) The SRA is part of the Comprehensive Crime Control Act of 1984.

[38] S. REP. NO. 98-225, at 37.

B. The Modern-Day Federal Probation System[39]

One of the most noteworthy achievements of the SRA[40] is that it created the United States Sentencing Commission, an independent

[39] In modern-day terms, probation is defined as "[a] court-ordered disposition alternative through which an adjudicated offender is placed under the control, supervision, and care of a probation staff member in lieu of imprisonment, so long as the probationer meets certain standards of contact." PETERSILIA, *supra* note 5, at 3 (quoting the DICTIONARY OF CRIMINAL JUSTICE TERMS, AMERICAN CORRECTIONAL ASSOCIATION (1998)). In discussing modern-day federal probation, it is important to note several things. First, probation is not synonymous with a suspended sentence. Probation entails supervision while a suspended sentence does not.

> The law distinguishes the suspension of a sentence from the imposition of probation. Both probation and suspension of sentence involve the trial court's discretionary, and conditional, release of a convict from the service of a sentence within the penal system; however, a probated sentence is served under the supervision of probation officers, whereas a suspended sentence is serviced without such supervision, but on such legal terms and conditions as are required by the sentencing judge.

21A AM. JUR. 2D *Criminal Law* § 904 (2007). It is also important to note that parole is not synonymous with probation. Parole is defined as "the release from jail, prison or other confinement facility after actually serving part of sentence." BLACK'S LAW DICTIONARY 1116 (6th ed. 1990); COHEN, *supra* note 28, at 1–4 (describing parole as an administrative procedure, as opposed to a judicial procedure like probation, where a parole board allows an offender to serve the rest of his sentence in the community under conditions). Note also that the SRA repealed parole for the federal system. 18 U.S.C.S. § 3551 Notes (LexisNexis 2008). Congress abolished federal parole to create "honesty in sentencing" so that an offender would actually serve his adjudged time. U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 intro. cmt. (1990). But since 1987, Congress has continued to extend federal parole for those who were serving under parole before the SRA's implementation. *See* § 3551 Notes; Pub. L. No. 101-650, § 316, 104 Stat. 5115 (1990); Parole Commission Phaseout Act of 1996, Pub. L. No. 104-232, § 2(a), 110 Stat. 3055, 18 U.S.C.S. § 4202 Notes; 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11017(a), 116 Stat. 1758 (2002); Pub. L. No. 109-76, § 2, 119 Stat. 2035 (2005). Parole has been replaced with supervised release which is beyond the scope of this paper. *See* U.S. SENTENCING GUIDELINES MANUAL § 5D1.1 (1987) [hereinafter 1987 U.S. SENTENCING GUIDELINES MANUAL].

[40] The SRA made several other notable changes. The SRA clearly delineated the goals of federal sentencing. Section 3553 (a) states that:

> The court shall impose a sentence sufficient, but not greater than necessary . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; and to provide the defendant with needed educational or vocational training . . . or other

commission within the judicial branch, to establish sentencing policies, practices, and guidelines for federal courts.[41] The other particularly noteworthy thing that the SRA did was to make the application of the Federal Sentencing Guidelines (Guidelines) binding on federal courts.[42]

> correctional treatment in the most effective manner . . . .

Id. It also established a number of mandatory factors that every federal court had to consider in deciding what punishment to impose. The sentencing courts were obligated to consider the following:

> (1) [T]he nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed . . . ; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . .; (5) any pertinent policy statement issued by the Sentencing Commission; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense.

§ 3553(a)(2).

[41] *See* Pub. L. No. 98-473, 98 Stat. 2018; 28 U.S.C.S. § 992 (LexisNexis 2008). The Sentencing Commission consists of eight members, seven voting members and one non-voting member. The Sentencing Commission's guidelines are to:

> [A]ssure the meeting of the purposes of sentencing set forth in *section 3553 (a)(2) of Title 18, United States Code*; provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.

28 U.S.C.S. § 991; *see also* United States Sentencing Commission, Overview of the United States Sentencing Commission, *available at* http://www.ussc.gov/general/USSC_Overview_Dec07.pdf (last visited Dec. 3, 2008).

[42] § 3553(b).

> [T]he court *shall* impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating 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. In determining whether a

Though the SRA marked great change in federal sentencing as a whole, there are several things provided under the Federal Probation Act of 1925 that still ring true today under the SRA, the Guidelines,[43] and recent Supreme Court decisions.

1. The Probation Officer and the Presentence Report

Similar to the Federal Act of 1925, the SRA relies heavily on probation officers to make modern-day probation work. Beginning at the point of arrest, a probation officer is appointed to a defendant to conduct a presentence investigation and report.[44] The presentence report must identify the applicable Guidelines, the defendant's offense level and criminal history category, the sentencing range and the sentences available, matters relating to the appropriate sentence, and matters such as the defendant's history, characteristics, and financial condition.[45] Except in very limited instances, a judge may not impose a sentence, probation or otherwise, unless a presentence report is conducted.[46] A

> circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2).

Id. (emphasis added). *See generally* United States v. Minstretta, 488 U.S. 361 (1989) (holding that the Federal Sentencing Guidelines are binding on courts). But note that in *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that 18 U.S.C. § 3553(b)(1) violated the Sixth Amendment and that the Federal Sentencing Guidelines were advisory only. The impact of *Booker* on federal probation will be discussed in section two under this subheading.

[43] The Guidelines were effective November 1, 1987. 1987 U.S. SENTENCING GUIDELINES MANUAL, *supra* note 39, § 1A1.1 cmt. n.1. Computation of the Sentencing Guidelines could be a thesis in itself. "The Offense Level (1-43) forms the vertical axis of the Sentencing Table. The Criminal History Category (I-VI) forms the horizontal basis of the Table. The intersection of the Offense Level and Criminal History Category displays the Guideline Range in months of imprisonment." U.S. SENTENCING GUIDELINES MANUAL § 5A cmt. n.1 (2007) [hereinafter 2007 U.S. SENTENCING GUIDELINES MANUAL]; *see also* INGA PARSONS, US NITA COMMENTARY ON FED. R. CRIM. P. 32.1 (LEXIS 2008) (stating that "[i]n its most basic form the federal guideline range is the result of a fact-generated assessment of the defendant's offense characteristics charted against the defendant's criminal history.").

[44] § 3602; FED. R. CRIM. P. 32; *see* PETERSILIA, *supra* note 5, at 25–26.

[45] FED. R. CRIM. P. 32(d).

[46] *Id.* 32(c)(1)(A). The Federal Rules of Criminal Procedure require that a presentence report be submitted to the court before sentencing unless: "18 U.S.C. § 3593 (c) or

probation officer must serve a copy of the presentence report on the defendant, his attorney, and the prosecutor at least thirty-five days before sentencing.[47] The court can order the probation officer not to disclose his recommendation to anyone except the court.[48]

2. *Making the Decision*

Despite the SRA's goal of uniformity in sentencing, probation is still a matter of the court's discretion though that discretion is no longer completely unfettered. According to the SRA, a court may not sentence a defendant to probation in cases involving a Class A or B felony, in cases where probation is expressly precluded as an authorized sentence by the nature of the offense, or in cases where the defendant is sentenced to imprisonment at the same time for the same or a different offense.[49] The Guidelines, in conformity with the SRA, reiterate this provision but also provide further guidance to sentencing courts, specifically authorizing, but not requiring, probation in cases where the minimum imprisonment specified in the guideline range is in Zone A (zero months).[50] In cases where the minimum imprisonment specified in the guideline range is in Zone B (between one month and six months), the Guidelines authorize probation if the court imposes conditions of community confinement, home detention, or intermittent confinement.[51] In cases where the minimum term of imprisonment is in Zone C or D (eight months or more), probation is not authorized under the Guidelines.[52]

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another statute requires otherwise; or the court finds that the information enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record." *Id*. Interestingly enough, a defendant cannot waive a presentence report. *See* 2007 U.S. SENTENCING GUIDELINES MANUAL, *supra* note 43, § 6A.1.1(b); *see also* MOORE'S FEDERAL PRACTICE § 632.02 *Presentence Investigation and Report* (2007) (providing a synopsis of the presentence investigation and report).

[47] FED. R. CRIM. P. 32 (e); 2007 U.S. SENTENCING GUIDELINES MANUAL, *supra* note 43, § 6A1.2(a).

[48] *Id*.; *see* ROGER HAINES ET AL., FEDERAL SENTENCING GUIDELINES HANDBOOK 1679–80 (2008) (citing United States v. Humphrey, 154 F.3d 668 (7th Cir. 1998); United States v. West, 15 F.3d 119 (8th Cir. 1994); United States v. Baldrich, 471 F.3d 1110 (9th Cir. 2006)).

[49] 18 U.S.C. § 3561 (a), *in accord with* 2007 U.S. SENTENCING GUIDELINES MANUAL, *supra* note 43, § 5 B1.1(b).

[50] *See* 2007 U.S. SENTENCING GUIDELINES MANUAL, *supra* note 43, § 5B1.1(a) cmt. n.1.

[51] *Id.*

[52] *See id.* § 5B1.1(a) cmt. n.2.

Up until 12 January 2005, the application of the Guidelines was mandatory.[53] However, in *United States v. Booker*[54] the Supreme Court held that "the Sixth Amendment requires juries, not judges, to find facts relevant to sentencing,"[55] and that the Guidelines violated the Sixth Amendment because the Guidelines required judges to increase a defendant's maximum sentence based on facts not proven to a jury beyond a reasonable doubt.[56] The Court then concluded that the best remedy was to simply excise section 3553(b) (1) of the SRA, the provision that makes the Guidelines mandatory, instead of invalidating the entire SRA.[57] With this excision, the Guidelines become advisory instead of mandatory.[58] The Court also held that appellate courts would review sentences for "unreasonableness."[59] On December 10, 2007, the Supreme Court applied its holding in *Booker* to *Gall v. United States*,[60] a

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[53] *See* 18 U.S.C. § 3553(b).

[54] 543 U.S. 220 (2005). In *Booker*, the jury found that Booker possessed 92.5 grams of crack cocaine with the intent to distribute. *Id*. at 227. Based on these facts and Booker's criminal history, Booker's guideline range was between 210 months and 262 months imprisonment. *Id*. In a post-trial sentencing proceeding, the judge found by a preponderance of the evidence that Booker possessed 566 grams of crack cocaine. *Id*. As such, the Guidelines mandated that judge the sentence Booker between 360 months imprisonment and life imprisonment. The Supreme Court granted review to determine

> Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a conviction) that was not found by the jury or admitted by the defendant.

Id. at 230. The Court relied on its holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), wherein it held that "the statutory maximum for *Apprendi* purposes is the maximum sentence that a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Booker*, 543 U.S. at 232. Hence, the Court ruled that the Guidelines had to be advisory to satisfy the Sixth Amendment. *Id*. at 264.

[55] *Booker*, 543 U.S. at 245.

[56] *See id*. at 228.

[57] *Id*. at 264.

[58] *Id*.

[59] *Id*. at 261 (excising § 3742 (e) to create a reasonableness standard for appellate review). Note also that in *Rita v. United States*, 127 S. Ct. 2456 (2007), the Court held that appellate courts could, but were not required to, apply a presumption of reasonableness when sentence was within the Guidelines but that such a presumption was not binding. 127 S. Ct. at 2463. The Court also held that a "reasonableness" standard equated to an abuse of discretion standard. *Id*. at 2465.

[60] 128 S. Ct. 586 (2007). As a college student, Gall and his friend agreed to distribute ecstasy. *Id*. at 592. Two months later he withdrew from the conspiracy. *Id.* He graduated from college, got a job, and never used drugs again. *Id.* Three years after his

case involving a sentence to probation.[61] The Supreme Court upheld the trial court's sentence of thirty-six months probation despite the Guidelines' advisory range of thirty months imprisonment for his offense.[62]

So what is the practical implication of *Booker* on federal probation?[63] Essentially, federal courts are back to where they started—using their discretion, as they did before the SRA, in deciding to sentence a defendant to probation.[64] Federal judges now have almost unfettered discretion[65] in sentencing a defendant to probation. But two years after

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distribution, Gall was indicted for conspiracy to distribute controlled substances. *Id.* He pled guilty to conspiracy. *Id.* The district judge sentenced Gall to thirty-six months probation. *Id.* at 593. The court of appeals reversed the district judge's sentence stating that probation in Gall's case was a "100% downward departure" and that probation was "extraordinary" in light of the thirty months imprisonment advised by the Guidelines. *Id*. at 594 (quoting *Gall*, 446 F.3d 884, 889 (2006)). The Supreme Court rejected the Government's argument that there needed to be "extraordinary circumstances" to vary from the advisory Guidelines. *Id*. at 595. The Supreme Court applied an abuse of discretion standard and reversed the Court of Appeal's decision. *Id*. at 597, 602; *see also* Nicholas Rudman, Casenote: *A "Galling" Approach to Reasonableness Review: The Eight Circuit's Sentencing Review in* United States v. Gall *Exemplifies the Agony (and Ecstasy) Facing the Post-*Booker *Federal Judiciary*, 40 CREIGHTON L. REV. 353 (2007) (highlighting the complexities brought about in sentencing by *Booker*).

[61] *Gall*, 128 S. Ct. at 593.

[62] *Id*. at 602.

[63] 18 U.S.C.S. section 3551(b)(1) Note has not been amended to reflect the Supreme Court's decision in *Booker*. *See* 18 U.S.C.S. § 3551(b)(1). In 2006, Chairman of the House Judiciary Committee F. James Sensenbrenner stated that "[u]nrestrained judicial discretion [referring to the Court's holding in Booker] has undermined the very purposes of the Sentencing Reform Act." *Sentencing Experts Navigate a Post-*Booker *World*, CHI. LAW. (June 2006), at 20032. He further stated that the Judiciary Committee "intends to pursue legislative solutions to restore America's confidence in a fair and equal federal criminal justice system." *Id*. Nevertheless, federal courts are applying the Supreme Court's holding. *See* United States v. Crobsy, 397 F.3d 103 (2d. Cir. 2005) (applying *Booker* but noting that the Guidelines, while not mandatory, have not been discarded); United States v. Boone, 2005 U.S. App. LEXIS 16868 (11th Cir. 2005) (finding that appellant's Sixth Amendment rights had been violated but that the error was harmless beyond a reasonable doubt).

[64] *See* Erica Hashimoto, Symposium*: Sentencing Guidelines Law and Practice in a Post-*Booker *World: Reactions to* Booker*: The Under-Appreciated Value of Advisory Guidelines*, 37 MCGEORGE L. REV. 577, 582 (2006) (stating, "In light of the Court's conclusion that the current guidelines scheme is unconstitutional if mandatory, Congress is back to where it was in 1984 . . . .").

[65] Probation is granted by statute and is not a constitutional right. *See* Burns v. United States, 287 U.S. 216, 220 (1932) (stating that probation is "conferred as a privilege and cannot be demanded as a right."); *see also* COHEN, *supra* note 28, at 2–3 ("It is widely held that there is no constitutional right to probation."). Hence, Congress can effectively

Booker, reality tells a different story. Most judges, unlike the judge in *Gall*, are still adhering to the Guidelines.[66] Nevertheless, the important point for judges is that they need not feel reluctant to adjudge probation because *Booker* has given them their power back. For practitioners, particularly defense counsel, the important point is that *Booker* again opens the possibility of probation that the Guidelines had previously foreclosed; and counsel should craft their arguments accordingly.[67]

3. Setting and Enforcing the Conditions

If the judge decides to grant probation, the next step is determining what conditions to impose. The SRA provides a list of mandatory conditions that a sentencing judge must impose once he has determined that probation is appropriate. At a minimum, a defendant must be instructed that he must (1) commit no other crimes; (2) possess no controlled substances; (3) attend rehabilitation, in the case of domestic violence crimes; (4) submit to drug testing unless determined to be a low risk for substance abuse; (5) make restitution and pay an assessment when required by statute; (6) notify the court of any change in financial conditions; (7) comply with the Sex Offender Registration and

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preclude a class of offenses or offenders from being eligible for consideration of probation. *Booker* did not invalidate the SRA. It only excised the aforementioned sections. Consequently, it appears to this author that judges are still precluded by the SRA, and not the Guidelines, from granting probation to those listed under the SRA at 18 U.S.C. § 3561(a): (1) those individuals convicted of a Class A felony (maximum sentence is life imprisonment) or a Class B felony (maximum sentence is twenty-five years or more), see 18 U.S.C. § 3559; (2) those cases where the offense listed in the Federal Criminal Code precludes consideration of probation; and (3) those cases where "the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense that is not a petty offense." *Id.* Therefore, though judges have broad discretion under *Booker*, their discretion is not totally unfettered.

[66] *See* United States Sentencing Commission, Overview of the United States Sentencing Commission, *available at* http://www.ussc.gov/general/USSC_Overview_Dec07.pdf (last visited Dec. 3, 2008). According to these statistics, judges' sentences both pre-*Booker* and post-*Booker* have been consistent. *See also Sentencing Experts Navigate a Post-*Booker *World*, *supra* note 63. According to U.S. District Judge Paul Cassell of Utah, "Since the Supreme Court's decision in United States v. Booker, the most notable fact about the federal system is how little things have changed." *Id.*

[67] *See* Alan Ellis, *Federal Sentencing*, 21 CRIM. JUST. 36 (2007). Allan Ellis, a nationally recognized authority in sentencing, conducted an interview with Tess Lopez, a mitigation specialist with a national practice. *Id.* Lopez was a probation officer for thirteen years. *Id.* In that interview, Lopez noted that "[u]nfortunately, the data indicate that federal sentences are not lower post-*Booker*. Once again, it is up to the defense bar to bring about change through creative advocacy." *Id.*

Notification Act and/or the DNA Analysis Backlog Elimination Act of 2000, if required; and (8) pay any court-ordered fines.[68]

Again, similar to the provisions of the Federal Probation Act of 1925, the SRA grants sentencing judges great discretion in fashioning probation conditions; a court may "impose such other condition[s]"[69] as appropriate. However, additional conditions must meet two requirements under the SRA. First, the condition must reasonably relate to the specified factors delineated under section 3553(a)(1) and (a)(2).[70] Second, the condition can involve "only such deprivations of liberty or property as are reasonably necessary" to carry out the purposes of sentencing set forth in section 3553 (a)(2).[71] In February 2007, the Court of Appeals for the Fourth Circuit examined the constitutionality of a discretionary probation condition in *United States v. Midgette.*[72] The court held that "a warrantless search by police conducted pursuant to the conditions of his probation and supported by reasonable suspicion satisfied the Fourth Amendment."[73] Despite public ridicule, other appellate courts have upheld probation conditions that allow warrantless

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[68] 18 U.S.C.S. § 3563(a) (LexisNexis 2008); 2007 U.S. SENTENCING GUIDELINES MANUAL, *supra* note 43, § 5B1.3. Under § 3563 (a)(2) a judge is also required to impose at least one of three conditions in felony cases unless extraordinary circumstances exist. Those conditions are to pay restitution to a victim, to give notice to a victim if required by statute, or to restrict a defendant from a specified area. *Id*.

[69] 18 U.S.C.S. § 3563(b)(22).

[70] THOMAS HUTCHINSON ET AL., FEDERAL SENTENCING LAW AND PRACTICE 1439 (2008) (distilling 18 U.S.C. § 3563(b) into a two-part test).

[71] *Id*. The SRA also provides a list of twenty-three discretionary conditions. The list is rather exhaustive but includes conditions such as supporting dependents, working a suitable job, refraining from a particular job, refraining from drinking alcohol, remaining home during non-working hours, reporting to probation officer as directed, answering inquiries by probation officer, and satisfying any other conditions that the court may impose, etc. *Id*. Note also that the Guidelines provide a list of fourteen recommended "standard" conditions. *See* 2007 U.S. SENTENCING GUIDELINES MANUAL, *supra* note 43, § 5B1.3(c).

[72] 478 F.3d 616 (4th Cir. 2007). Midgette pled guilty to resisting a public officer and was sentenced to thirty-six months probation. *Id*. at 619. As part of the terms of his probation, Midgette had to submit to warrantless searches by his probation officer. *Id*. In addition to other conditions, Midgette was also ordered to refrain from possessing a firearm. *Id*. During one of his probation visits, the probation officer directed a police officer to search Midgette's vehicle. *Id.* The officer found ammunition in Midgette's vehicle. *Id*. The officer then recommended to the probation officer that they search Midgette's home. *Id*. Upon searching Midgette's home, the officer found multiple firearms and marijuana. *Id.* at 620. Midgette filed a motion to suppress the evidence claiming that the search violated his Fourth Amendment rights. *Id*.

[73] *Id.* (quoting United States v. Knight, 534 U.S. 112, 122 (2001)).

searches,[74] that limit a probationer's right to procreate,[75] that require a probationer to submit to computer monitoring,[76] and that require a probationer to submit to DNA collection.[77] Once the judge sentences a defendant to probation and delineates his conditions, probation begins immediately.[78]

Who supervises the probationer and enforces these conditions? Like the Federal Probation Act of 1925, the SRA places the sole responsibility for the supervision and enforcement of probation conditions on the probation officer.[79] However, since 1925, the probation officer's primary duties have shifted. In the formative years of probation, "It was envisaged that a probation officer would supervise the daily life of an offender but would also befriend him and give him good counsel."[80] While it is still true that probation seeks to steer probationers down the right path and to "normalize"[81] them, normalizing practices (i.e., probation conditions) have to be enforced to be the most effective.[82] Consequently, the probation officer, once "a friend," should probably more aptly be referred to today as "the enforcer."[83] A probation officer's

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[74] *See* David Reindl, *Bargain or Unconstitutional Contract? How Enforcement of Probation Orders as Contract Could Take the Reasonableness out of Probation Searches*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 123 (2007). *See generally* Matthew Roberson, *Don't Bother Knockin' . . . Come on In!: The Constitutionality of Warrantless Searches as a Condition of Probation*, 25 CAMPBELL L. REV. 181 (2003) (citing several cases where warrantless searches of probationers as a probation condition was upheld)..

[75] *See* Devon A. Corneal, *Limiting the Right to Procreate:* State v. Oakley *and the Need for Strict Scrutiny of Probation Conditions*, 33 SETON HALL L. REV. 447 (2003).

[76] *See* United States v. Lifshitz, 369 F.3d 173 (2d Cir. 2004).

[77] *Id*. at 187 (citing to Roe v. Marcotte, 193 F.3d 72 (2d Cir. 1999); Boling v. Romer, 101 F.3d 1336 (10th Cir. 1996); Jones v. Murray, 962 F.2d 302 (4th Cir. 1992)).

[78] 18 U.S.C.S. § 3564 (LexisNexis 2008). Note also that the maximum authorized terms of probation are between one and five years in felony cases, not more than five years in misdemeanor cases, and not more than one year for infractions. *Id.* § 3561.

[79] *Id.* § 3601.

[80] CYNDI BANKS, PUNISHMENT IN AMERICA 68 (2005).

[81] *Id*. at 67 (quoting DAVID GARLAND, PUNISHMENT AND WELFARE: A HISTORY OF PENAL STRATEGIES 238 (1985), that "Probation and community supervision has been described as 'normalizing practices,' that is, their aim was the inculcation of definite norms and practices, and in this sense they sought (and continue to seek) to refashion an offender into a good citizen.").

[82] *See* KLEIN, *supra* note 20, at 355 (stating that "[v]igorous enforcement of alternative sentences can lessen recidivism.").

[83] *See* PETERSILIA, *supra* note 5, at 30.

duties are many,[84] and his powers are broad.[85] One of the most important, and probably less desirable, duties is to inform the court when a probationer fails to comply with the terms of probation.[86]

4. Probation Revocation

One thing that the Federal Probation Act of 1925 failed to provide that the SRA does provide is a procedure for revocation hearings.[87] Under the Federal Probation Act of 1925, probation was "considered an act of grace that could be given and taken away with equal ease . . . .[88] In the 1940s, commentators began clamoring for a "re-examination of the revocation process."[89] The Supreme Court first began by re-examining the parole revocation process. In *Morrissey v. Brewer*,[90] the Supreme Court held that a parolee is entitled to notice of his alleged parole violation, disclosure of the evidence against him, opportunity to be heard and to present evidence in his favor, a limited right to cross-examine witnesses, a hearing by a "neutral and detached" body, and a written decision.[91] The Court also ruled that the hearing should be held within a reasonable time and should be flexible enough to consider

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[84] *See* 18 U.S.C.S. § 3603 (delineating the ten duties of a federal probation officer which include supervising the probationer, keeping informed of his compliance of probation conditions, and keeping a record of his work with the probationer, etc.)

[85] Under § 3603(3), a probation officer may "use all suitable methods, not inconsistent with the conditions specified by the court to aid a probationer or a person on supervised release who is under his supervision, and to bring about improvements in his conduct and condition." Title 18 U.S.C. § 3604 specifically grants a probation officer the authority to arrest a probationer with or without a warrant.

[86] § 3603(8)(B); *see also* 2007 U.S. SENTENCING GUIDELINES MANUAL, *supra* note 43, § 7B1.2.

[87] *See* § 3565.

[88] KLEIN, *supra* note 20, at 319.

[89] COHEN, *supra* note 28, at 18-8.

[90] 408 U.S. 471 (1972). Morrissey was convicted of drawing or uttering false checks and was placed on parole after serving some amount of confinement. *Id*. at 472. His parole was revoked seven months after his release from confinement primarily on the basis that he had purchased a vehicle under false pretenses. *Id*. His parole was revoked without a hearing, and Morrissey subsequently filed a habeas corpus petition. *Id.* at 474.

[91] *Id*. at 489. The Court began with the proposition that "the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations." *Id.* at 480. The Court further stated that "[r]evocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on the observance of special parole restrictions." *Id.*

evidence ordinarily not admissible during a criminal trial.[92] The following year, the Supreme Court in *Gagnon v. Scarpelli*[93] extended those same rights to probationers.[94] As a result, once a court has been notified that a probationer has violated the conditions of probation, the court must conduct a probation revocation hearing.[95]

The SRA embodies the Supreme Court's decisions in *Morrissey* and *Scarpelli* and requires a hearing before probation can be revoked.[96] If the judge is "reasonably satisfied"[97] that the probationer has violated the conditions of his probation, then he must consider the goals of sentencing and the factors set forth under section 3553(a)[98] and determine whether to continue his probation, with or without modification of his terms or conditions or to revoke his probation and resentence him.[99] While there are limited instances where probation *must* be revoked,[100] the SRA leaves

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[92] *Id*. at 488.

[93] 411 U.S. 778 (1973). Scarpelli was convicted of armed robbery and placed on probation for seven years. *Id*. at 779. Scarpelli was caught in the actual commission of a burglary. *Id*. at 780. His probation was revoked without a hearing. *Id*. Three years after the revocation, he submitted a writ of habeas corpus to the district court. *Id*. The district court held that Scarpelli was denied due process, and the court of appeals affirmed. *Id*.

[94] *Id*. at 782. *Scarpelli* went a step further than *Morrissey* in that it extended the right to counsel on a case-by-case basis when required for fundamental fairness. *Id*. at 790.

[95] *Id*. at 782; *see also* KLEIN, *supra* note 20, at 319.

[96] 18 U.S.C.S. § 3565; *see also* FED. R. CRIM. P. 32.

> Unless waived by the person, the court must hold the revocation hearing within a reasonable time in the district having jurisdiction. The person is entitled to: (A) written notice of the alleged violation; (B) disclosure of the evidence against the person; (C) an opportunity to appear, present evidence, and question, any adverse witness unless the court determines that the interest of justice does not require the witness to appear; (D) notice of the person's right to counsel or to request that counsel be appointed if the person cannot obtain counsel; and opportunity to make a statement and present any information in mitigation.

Id.

[97] The SRA does not provide an evidentiary standard in determining if a violation has been committed. *See* § 3565(a) ("If the defendant violates . . . ."). Most, if not all, jurisdictions apply a "reasonably satisfied" standard. *See* MOORE'S FEDERAL PRACTICE, *Revocation Hearing* § 632.1.05 (2007).

[98] *See supra* note 39.

[99] 18 U.S.C. § 3565(a).

[100] *Id*. § 3565(b). Probation revocation is mandatory if the defendant

> (1) possesses a controlled substance in violation of the condition set forth in section 3563(a)(3) . . . (2) possesses a firearm . . . in

the matter of revocation largely in the judge's discretion, stating that he *may* revoke probation after the probationer has been afforded a revocation hearing.[101] According to Department of Justice statistics, each year a number of probationers fail to successfully complete their probationary period.[102] Some judges are opting to revoke their probation and incarcerate them,[103] causing critics to ask, "Does probation work?"[104]

C. Criticism of the U.S. Probation System

In assessing the pragmatism of the probation system, studies often look at the rate of recidivism among probationers.[105] Some studies have concluded that probation is successful, while others have concluded that probation is unsuccessful.[106] No study has reported a one hundred

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> violation of Federal law, or otherwise violates a condition of probation prohibiting the defendant from possessing a firearm . . . (3) refuses to comply with drug testing, thereby violating the condition imposed by section 3563(a)(4) . . . or (4) as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year . . . .

Id.; *see also* MOORE'S FEDERAL PRACTICE, *supra* note 97, § 632.1.105 (2007). For these reasons stated in note 65 *supra*, this provision raises no *Booker* implications.

[101] 18 U.S.C. § 3565(a). While the Guidelines address probation revocation under Guideline § 7B1.3, it addresses probation revocation as a policy statement when even the Commission, at the time that it drafted the Guideline, intended that Guideline to be advisory only. *See* HAINES ET AL., *supra* note 48, at 1783 (stating that "[t]hese policy statements will provide guidance . . ."). Hence, *Booker* at this time has no implication on probation revocation proceedings. *But see* PARSONS, *supra* note 43 (stating that "[a]lthough the entire Chapter 7 is promulgated as policy statements and therefore only advisory, given the roller coaster ride of *Booker*, it would be prudent for attorneys to state for the record any objection to the application of probation or supervised release in the event the law changes if there is an application of a provision that requires mandatory revocation"). Note also that either the government or defendant may appeal a sentence to probation (including the conditions of the probation sentence) or the revocation of a sentence to probation under § 3742.

[102] *See* BUREAU OF JUSTICE STATISTICS, *supra* note 5. According to these statistics, "[n]early 1 in 5 probationers who exited from supervision in 2006 were incarcerated." *Id*.

[103] *Id.*

[104] *See* PETERSILIA, *supra* note 5, at 55.

[105] *Id*.

[106] *See id.* (contrasting the studies of the Manhattan Institute's Center for Civic Innovation, which found probation to be unsuccessful, with those of a study conducted by Clear and Braga, which found that "up to 80 percent of all probationers complete their terms without arrest.").

percent recidivism rate.[107] The Bureau of Justice statistics indicate that probation is at least moderately successful.[108] Statistics are subject to debate and criticism, but the bottom line is, no jurisdiction has abolished probation.[109] The inference is that a significant number of probationers are being rehabilitated.

Even casting aside the argument that some individuals are indeed being rehabilitated, probation has merit if for no other reason than the simple economic principle of supply versus demand. Our prisons are full to capacity,[110] and each year the United States spends billions of dollars housing these prisoners.[111] We have neither the capacity nor the funding to provide for probationers if probation were abolished. American society recognizes the benefit of a probation system—granting individuals the opportunity to rehabilitate while addressing the need of supply versus demand. Perhaps the military justice system should recognize the benefits of a formal probation system as well.

III. The Military Justice System

In 1950, Congress approved the Uniform Code of Military Justice (UCMJ),[112] "the sole statutory authority embodying both the substantive

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[107] *See id.*

[108] *See* BUREAU OF JUSTICE STATISTICS, *supra* note 5. According to these statistics, only "nine percent [of the probationers who exited supervision] were incarcerated due to a rule violation and [only] four percent were incarcerated because of new offense." *Id.* Almost sixty percent either completed their probationary period or were released early. *Id.*

[109] *Id.*; *see* COHEN, *supra* note 28, at 1-37.

[110] *See* Drug War Facts: Prisons, Jails, and Probation—Overview, http://www.drugwarfacts.org/prison.htm (last visited Dec. 3, 2008) (citing Bureau of Justice statistics that "[a]t yearend 2006, 23 States and the Federal system operated at more than 100% of their highest capacity. Seventeen States operated between 90% and 99% of their highest capacity. The Federal prison system was operating at 37% above its rated capacity at yearend 2006.").

[111] *Id.*

> The average daily cost per state prison inmate per day in the US is $67.55. State prisons held 249,400 inmates for drug offenses in 2006. That means it cost states approximately $16,846,970 per day to imprison drug offenders, or $6,149,144,050 per year.

Id. (quoting the American Corrections Association).

[112] DAVID SCHLUETER, MILITARY CRIMINAL JUSTICE PRACTICE AND PROCEDURE 33 (1999). Congress enacted the UCMJ pursuant to its power "to raise and support Armies," "to provide and maintain a Navy," "to provide for calling forth the Militia to execute the

and procedural law governing military justice and its administration."[113] Like the SRA, and as its name implies, the UCMJ was enacted by Congress to create uniformity among the services in courts-martial procedure.[114] The UCMJ applies to the entire armed forces[115] and mandates certain procedural protections for servicemembers.[116] Under Article 36 of the UCMJ, Congress has authorized the President to prescribe "pretrial, trial, and post-trial procedures, including modes of

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Laws of the Union" and "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers . . . ." U.S. CONST. art I, § 8, cl. 12, 13, 14, 18; *see also* Honorable Walter Cox III, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 3 (1987). Judge Cox originally delivered this article on the development of the military justice system as a speech during the celebration of the Bicentennial of the Constitution.

[113] INDEX AND LEGISLATIVE: HISTORY UNIFORM CODE OF MILITARY JUSTICE 1950–2000, at 599 (William S. Hein & Co. 2000).

[114] *Id.* at 600.

> There will be the same law and the same procedure governing all personnel in the armed services. . . . In the same way that all persons in this country are subject to the same Federal laws and triable by the same procedure in all Federal courts, so it will be in the armed forces.

Id. War World II left many Americans disgruntled with the military justice system. *See* John Cooke, *Military Justice and the Uniform Code of Military Justice,* ARMY LAW., Mar. 2000, at 1, 2. It is estimated that over sixteen million men and women served during World War II. *Id.* (citing John Willis, *The United States Court of Military Appeals: Its Origin, Operation, and Future,* 55 MIL. L. REV. 39 (1972)). But it is also estimated that there were over two million courts-martial. *Id.* To many that served, "[t]he system appeared harsh, arbitrary, with too few protections for the individual and too much power for the commander." *Id.*

[115] Article 2, UCMJ provides:

> The following persons are subject to this chapter: Members of a regular component of the armed forces . . . . Cadets, aviation cadets, and midshipmen. Members of a reserve component while on active-duty training, but in the case of members of the Army National Guard of the United States of the Air National Guard of the United States only when in Federal service. Retired members of a regular component of the armed forces who are entitled to pay. . . . Persons in custody of the armed forces serving a sentence imposed by a court-martial. . . . Prisoners of war in custody of the armed forces. In time of war, persons serving with or accompanying an armed force in the field . . . .

UCMJ art. 2 (2008).

[116] SCHLUETER, *supra* note 112, at 7. For example, Article 31 provides that no servicemember may be questioned without informing him of his alleged violation and of his right to remain silent when he is suspected of an offense. UCMJ art. 31.

proof" for courts-martial.[117] Based on his delegated powers, the President has promulgated the Manual for Courts-Martial (MCM) mandating "specific Rules for Courts-Martial (RCM), maximum punishments, and rules for imposition of nonjudicial punishment"[118] which limit the punishments that may be adjudged on rehearings, new trials, and other trials.[119]

According to RCM 1003 (b), the only authorized punishments that a court-martial may adjudge are a reprimand,[120] forfeiture of pay and allowances,[121] a fine,[122] reduction in grade,[123] restriction to specified

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[117] UCMJ art. 36; *see* SCHLUETER, *supra* note 112, at 7.
[118] SCHLUETER, *supra* note 112, at 7.
[119] *Id.* at 713 (referencing MCM, *supra* note 2, R.C.M. 810(d)(1)).
[120] "A reprimand adjudged by a court-martial is a punitive censure." MCM, *supra* note 2, R.C.M. 1003(b)(1) discussion.
[121] "A forfeiture deprives the accused of the amount of pay (and allowances) specified as it accrues." Allowances are only subject to forfeiture when the sentence includes forfeiture of all pay and allowances. *Id.* R.C.M. 1003(b)(2). "Forfeitures accrue to the United States." *Id.* R.C.M. 1003(b)(2) discussion. Generally speaking, both adjudged and automatic forfeitures begin fourteen days after an adjudged sentence or when the convening authority approves the sentence, whichever is earlier. UCMJ art. 57. Note that automatic forfeitures are not part of an authorized punishment but occur by operation of law under Article 58b. MCM, *supra* note 2, R.C.M. 1003(b)(2) discussion. If a general court-martial adjudges both confinement and a punitive discharge or adjudges only confinement but the confinement is greater than six months, total forfeitures automatically result under Article 58b during confinement. *Id.* There are no automatic forfeitures under Article 58b if only a punitive discharge is adjudged. *Id.* If a special court-martial adjudges both confinement and a punitive discharge or adjudges only confinement but the confinement is greater than six months, automatic forfeitures of two-thirds pay only result during confinement. *Id*. Similar to a general court-martial, there are no automatic forfeitures under Article 58b if only a punitive discharge is adjudged at a special court-martial. *Id*. Note also that even without automatic forfeitures, an accused may still be subject to adjudged forfeitures. *Id.* Under Articles 57 and 58b (b), UCMJ, an accused may request a deferment of automatic and adjudged forfeitures as well as a waiver of automatic forfeitures for a period of six months. UCMJ art. 57 (a)(2).
[122] "A fine is in the nature of a judgment, and when ordered executed, makes the accused immediately liable to the United States for the entire amount of money specified in the sentence." MCM, *supra* note 2, R.C.M. 1003(b)(3) discussion. A fine is different from restitution because the money inures to the benefit of the United States. *Id*. Restitution is not an authorized punishment but may be the subject of a pretrial agreement. *See* David M. Jones, *Making the Accused Pay for His Crime: A Proposal to Add Restitution as An Authorized Punishment Under Rule for Courts-Martial 1003(b)*, 52 NAVAL L. REV. 1, 4 (2005). A court-martial should adjudge a fine only when an accused has been unjustly enriched. MCM, *supra* note 2, R.C.M. 1003(b)(3) discussion.
[123] "Except as provided in R.C.M. 1301(d), a court-martial may sentence an enlisted member to be reduced to the lowest or any intermediate pay grade." MCM, *supra* note 2,

limits,[124] hard labor without confinement,[125] confinement, punitive separation,[126] and death.[127] Most of the court-martial sentences authorize punishment "as a court-martial may direct,"[128] affording the military judge or panel great discretion in rendering its sentence.

R.C.M. 1003(b)(4). Note that similar to forfeitures, a reduction to the lowest enlisted grade may result by operation of law. According to Army regulation,

> Reduction to the lowest enlisted pay grade will be automatic only in a case in which the approved sentence includes, whether or not suspended, either—[a] dishonorable or bad-conduct discharge, or *confinement in excess of 180 days (if the sentence is awarded in days) or in excess of 6 months (if the sentence is awarded in months.)*

U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 5-29(e) (16 Nov. 2005) [hereinafter AR 27-10] (emphasis added.). Generally speaking, reduction in pay grade begins fourteen days after an adjudged sentence or when the convening authority approves the sentence, whichever is earlier. UCMJ art. 57 (a)(2).

[124] A court-martial may sentence the accused to restriction to specified limits "for no more than 2 months for each month of authorized confinement and in no case for more than 2 months." MCM, *supra* note 2, R.C.M. 1003(b)(5). An accused may still be required to perform his military duties even when restricted to specified limits. *Id.* R.C.M. 1003(b)(5) discussion. A court-martial may not specify the details of the performance of hard labor. *Id.* R.C.M. 1003(b)(6). The immediate commander typically prescribes the conditions of the hard labor without confinement. *Id.*

[125] A court-martial may adjudge confinement subject to the jurisdictional limits of the court and that authorized for a particular offense under the *MCM*. SCHLUETER, *supra* note 112, at 712 (stating that "[t]he maximum permissible punishment will generally be the lowest of the jurisdictional limits of the court-martial hearing the case, the nature of the proceeding, or the maximum punishments authorized in the Manual for Courts-Martial for the offense.").

[126] A court-martial may adjudge one of three types of punitive separation depending on the jurisdiction of the court and the status of the accused. Only a general court-martial may sentence a commissioned officer, a commissioned warrant officer, a cadet, or a midshipman to a dismissal. MCM, *supra* note 2, R.C.M. 1003(b)(8)(A). Only a general court-martial may sentence either an enlisted person or a warrant officer who is not commissioned to a dishonorable discharge. *Id.* R.C.M. 1003(b)(8)(B). Either a special court-martial or general court-martial may sentence an enlisted member to a bad-conduct discharge. *Id.* R.C.M. 1003(b)(8)(C) (stating "[a] bad-conduct discharge is less severe than a dishonorable discharge and is designed as punishment for serious offenses of either a civilian or military nature. It is also appropriate for an accused who has been convicted repeatedly of minor offenses and who punitive separation appears to be necessary.").

[127] A general court-martial may adjudge death only when specifically authorized under part IV of the *MCM* or when authorized under the law of war. *Id.* R.C.M. 1003(b)(9), 1004(a)(1) .

[128] *See* Parker v. Levy, 417 U.S. 733, 750 (1974).

The Preamble to the MCM states 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."[129] The Court of Appeals of the District of Columbia aptly stated, "The provision of the Uniform Code of Military Justice with respect to court-martial proceedings represent a congressional attempt to accommodate the interests of justice, on the one hand, with the demands for an efficient, well-disciplined military on the other."[130] It is the competing interests of promoting justice while ensuring a well-disciplined military that makes sentencing in courts-martial difficult.

The only guidance given to military judges and panels in balancing these competing interests is found in the Military Judge's Benchbook instruction:

> In adjudging a sentence, you are restricted to the kinds of punishment which I will now describe or you may adjudge no punishment. There are several matters which you should consider in determining an appropriate sentence. You should bear in mind that our society recognizes five principal reasons for the sentence of those who violate the law. They are rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of his/her crime(s) and his/her sentence from committing the same or similar offenses. The weight to be given any or all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion.[131]

According to United States Army Trial Judge (Colonel) James L. Pohl,[132] "The hardest thing that judges do is sentencing because the range is so

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[129] MCM, *supra* note 2, pt. I, para. 3.
[130] SCHLUETER, *supra* note 112, at 3 (quoting Curry v. Sec'y of Army, 595 F.2d 873, 877 (D.C. Cir. 1979)).
[131] U.S. DEP'T OF THE ARMY, PAM. 27-9, MILITARY JUDGE'S BENCHBOOK para. 2-5-21 (1 July 2003); *see also* Captain Denise Vowell, *To Determine an Appropriate Sentence: Sentencing in the Military Justice System*, 114 MIL. L. REV. 87 n.5 (1986).
[132] Telephone Interview with Colonel James L. Pohl, U.S. Army, Trial Judge (Jan. 8, 2008) [hereinafter Pohl Telephone Interview]. Judge Pohl has been in the U.S. Army for

large. We have to balance the individual's needs with the needs and interests of the command and then arrive at a number."[133] Panels seem to struggle particularly hard with deciding whether to sentence an accused to a punitive discharge.[134]

Despite the agony that a panel or military judge may endure in determining an appropriate sentence for an accused, a court-martial's sentence is simply a "recommendation" to the convening authority[135] and "is merely the upper limit on the sentence which is ultimately imposed."[136] Article 60, UCMJ allows the convening authority, "in his sole discretion,"[137] to dismiss any charge or any specification of a charge with or without cause or change a finding of guilty to an offense to a finding of guilty to a lesser-included of that offense with or without cause.[138] "The convening authority may for any or no reason disapprove a legal sentence in whole or 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."[139]

In addition to his power to approve or disapprove or reduce any finding of guilty, the convening authority also has the absolute discretion

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twenty-seven years and has been a military judge for eight years. He is currently the trial judge at Fort Stewart, Georgia. Judge Pohl has tried between 400 and 500 cases, many of them in a deployed environment.

[133] *Id.*

[134] *Id.*

[135] Bridging the Gap Session with Lieutenant Colonel (Retired) Donna Wilkins, Bamberg, Germany (2001). A "bridging the gap session" is a term used for a mentoring session that a military judge holds with counsel after a case has concluded. The military judge makes recommendations to counsel to help them improve in future trials without revealing his or her specific deliberative process.

[136] Vowell, *supra* note 131, at 105.

[137] UCMJ art. 60(b)(3) (2008).

> [The convening authority] in his sole discretion may dismiss any charge or specification by setting aside a finding of guilty thereto; or change 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.

Id.

[138] *Id.*

[139] Major Steven M. Immel, *Development, Adoption, and Implementation of Military Sentencing Guidelines*, 165 MIL. L. REV. 159, 172 (2000) (referencing MCM, *supra* note 2, R.C.M. 1107(c), R.C.M. 1007(d)(1)).

to suspend any part or all of adjudged punishment except death.[140] "Suspension grants the accused a *probationary period*."[141] Should an accused successfully complete his probationary period, his punishment is remitted.[142] Neither a court-martial nor military appellate courts have the power to suspend punishment.[143]

The convening authority must specify his conditions in writing and a copy must be served upon the accused.[144] At a minimum, the convening authority should specify that the accused will not engage in any criminal activity under the UCMJ.[145] Any condition imposed cannot be unreasonably long.[146] When the period of suspension expires, the suspended portion of any sentence must be remitted unless earlier vacated.[147] The UCMJ affords an accused the right to a revocation proceeding before the convening authority may vacate his suspension.[148]

IV. The Pros and Cons of a Probation System in the Military

The military could benefit from a probation system. First, similar to the civilian system, a formal probation system in the military could help with supply versus demand. According to the Government Accountability Office's testimony before the Subcommittee on Tactical Air and Land Forces on 4 April 2006:

> The Army has made some progress meeting modular personnel requirements in the active component by shifting positions from its noncombat force to its operational combat force but faces significant challenges reducing its overall end strength while increasing the size of its modular combat force. . . . [T]he Army plans to increase the number of Soldiers in its combat force

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[140] MCM, *supra* note 2, R.C.M. 1108(c).
[141] *Id.* R.C.M. 1108(a) (emphasis added). Note that as used in this article, the term "probation" entails supervision, and is therefore used in a different manner than the term "probationary period" in the Rules for Courts-Martial. *See* 21A AM JUR. 2D *Criminal Law* § 904 (2007).
[142] MCM, *supra* note 2, R.C.M. 1108(a).
[143] *See* UCMJ art. 72(a); *see also* SCHLUETER, *supra* note 112, at 817.
[144] MCM, *supra* note 2, R.C.M. 1108(c)(1).
[145] *Id.* R.C.M. 1108(c)(3).
[146] *Id.* R.C.M. 1108(d).
[147] *Id.* R.C.M. 1108(e).
[148] *Id.* R.C.M. 1109.

> from approximately 315,000 to 355,000 in order to meet the increased personnel requirements of its new larger modular force structure.[149]

Senator Chuck Hagel, a Republican from Nebraska, accurately stated what most of America realizes: "the war in Iraq has stretched U.S. forces to the breaking point." [150] In December 2006, Senator Hagel sat on a board with Senator Ben Nelson, a Democrat from Nebraska and also a member of the Senate Armed Services committee, and Senator Jack Reed, a Democrat from Rhode Island, which proposed legislation increasing the size of the Army by 30,000 Soldiers and the Marine Corps by 5000 Marines. [151] When asked about the increase, Senator Nelson stated that "I don't *think* we're anywhere near looking at a draft situation." [152] He also stated that "the military could remain an all-volunteer force *if* recruitment and retention goals are met."[153]

"*If* recruitment and retention goals are met"[154] fails to assure Americans that the United States will not revert to a draft. One of the lessons learned from Vietnam was that "an unpopular war waged by draftees will come to a bitter, messy end quickly."[155] Even the most adamant supporters of the war in Iraq would likely withdraw their

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[149] *Force Structure Capabilities and Cost of Army Modular Force Remain Uncertain: Gov't Accountability Office Testimony Before the Subcomm. on Tactical Air and Land Forces of the H. Comm. on the Armed Services* (2006) (statement of Janet St. Laurent, Director, Defense Capabilities and Management). According to the testimony, the Army has personnel challenges in manning its new force structure. *Id*. To meet the challenges, the Army planned to convert several positions ordinarily held by servicemembers to positions filled by civilians. *Id*. However, there was uncertainty that the initiative would work.

> If the Army is unable to transfer enough active personnel to its combat forces while simultaneously reducing its overall end strength, it will be faced with a difficult choice. The Army could accept the increased risk to its operational units or nonoperational units that provide critical support, such as training. Alternatively, the Army could ask DOD to seek an end strength increase and identify funds to pay for additional personnel . . . .

Id.
[150] *Senator Blasts $99.7B Supplemental Request*, ASSOC. PRESS, Dec. 21, 2006, *available at* http://www.armytimes.com/legacy/new/1-292925-2437653.php.
[151] *Id.*
[152] *Id.* (emphasis added).
[153] *Id.* (emphasis added).
[154] *Id.*
[155] *Criminal Force*, *supra* note 8.

support if a draft were instituted.[156] Establishing a probation system increases the likelihood that Soldiers can be rehabilitated and retrained, and will help meet retention aims, thereby decreasing the likelihood of a potential draft.[157]

Second, establishing a formal probation system may increase Soldiers' perception of fairness in the military justice system and give them a meaningful opportunity to rehabilitate after a conviction. In describing the interplay between the military justice system and military discipline, General John Galvin, then Commanding General of VII Corps, stated, "Most importantly, morale and discipline are enhanced when the troops understand that they are being treated with dignity, fairness, and equality under the law. For lack of a better description, it is the 'American' way of doing things." [158]

More and more, the "American" way of doing things seems to favor "forgiving" civilians for their convictions and waiving them into military ranks. In 2006, the Army granted 8129 moral waivers—901 for felony convictions. That same year, the Marine Corps granted 20,750 moral waivers, 511 for felony convictions.[159] The Army and Marine Corps are not alone. In 2006, the Navy granted 3502 waivers and the Air Force granted 2095 waivers. [160] Why are Soldiers not granted the same "forgiveness" as recruits? Do Soldiers believe that they are afforded the same opportunity to prove that they have been rehabilitated? At least one convicted Soldier does not believe so. He urges, "[T]he military judge should have the option to establish or adjudge a probationary sentence to a defendant since most court-martials deal with first time offender[s]. The reality that most accuseds do not become repeat offenders should be a consideration for this authorization."[161]

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[156] *Id.* (stating that "[t]he Bush administration knows full well that if it restarts the draft, that will spell the end to its war in Iraq").

[157] A number of Soldiers would potentially be salvaged. In FY 2007, of the 624 Soldiers found guilty at special courts-martial, 366 received a sentence that included a bad-conduct discharge. In FY 2007, of the 779 Soldiers found guilty by general courts-martial, 562 received a sentence that included a punitive discharge. Army Wide Statistics, *supra* note 2. These are only the Army's statistics.

[158] Cox, *supra* note 112, at 29 (citing General John Galvin, then Commanding General of VII Corps.)

[159] Rick Maze, *Rise in Moral Waivers Troubles Lawmaker*, ARMY TIMES, Feb. 20, 2007, *available at* http://www.armytimes.com/news/2007/02/apWaivedRecruits070213/.

[160] *Id.*

[161] REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE (2001) [hereinafter COX REPORT], *available at* http://www.nimj.org/

Undoubtedly, there are many others who share this Soldier's viewpoint.[162] Establishing a formal probation system may increase Soldiers' perception of the fairness of the military system.

Third, establishing a formal probation system may also increase the public's perception of the fairness of the military justice system.[163] The converse—public skepticism of the military justice system—began as early as World War II.[164] Though the military justice system has undergone great reform since World War II, organizations such as Citizens Against Military Injustice[165] highlight public sentiment that military justice is still unfair and that "military discipline and justice are inconsistent dimensions . . . ."[166] "Suspicion, distrust, iron-fisted, secretive, out of control, fearful, not to be trusted, arrogant, single minded, tyrannical. . . . These words are being used throughout this country to describe the current conditions and beliefs held by its citizens about the military justice system."[167] Recent articles such as "Is Military Justice Broken?"[168] "Accountability, Transparency, and Public

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documents/Cox_Comm_Report.pdf. The Honorable Walter T. Cox III led a commission to conduct a survey regarding the fairness of the military justice system. This report contains the commission's findings and recommendations.

[162] This is based on the author's time spent as a trial defense attorney, a defense appellate attorney, and branch chief at the U.S. Army Defense Appellate Division.

[163] *See* COX REPORT, *supra* note 161, at 2 (stating that "our military justice cannot be viewed solely from the vantage point of the military; it must also be viewed from the perspective of the people and the politicians.").

[164] Cooke, *supra* note 114; *see also supra* note 112.

[165] Citizens against Military Injustice (CAMI), a non-profit organization, was established in May 2000. Its mission is to

> [p]rovide pertinent information, resources, help and support to all military personnel who have been or about to be charged with a crime under the Military System of Justice and further, to assist inmates, loved ones and family members whose lives have been affected by the justice system of the United States Military.

COX REPORT, *supra* note 161.

[166] SCHLUETER, *supra* note 112, at 3.

[167] COX REPORT, *supra* note 161.

[168] Gary Solis, *Is Military Justice Broken?*, L.A.TIMES, Sept.10,2007, *available at* http://www.latimes.com/news/opinion/la-oe-solis10sep10,0,1253257.story?coll=la-opinion-center. While Solis says that the military system is working, his article does not lend credence to that. He asks questions about the tragedy in Haditha but leaves them unanswered, such as, "Why are court-martial convictions hard to come by? Did they let culpable participants walk? Should the process be allowed to work through to verdict?" *Id.*

Confidence in the Administration of Military Justice,"[169] and "Who is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice"[170] echo further proof that many citizens are still skeptical of the military justice system. In a letter written to the Cox Commission, the wife of a convicted servicemember wrote:

> My husband was sentenced to serve 12 years at the USDB [United States Disciplinary Barracks located at Fort Leavenworth, Kansas] on January 15th 1998. . . . My complaint is this. That had he been a civilian he would have more than likely only gotten *probation* or maybe 3 years imprisonment. . . . Why is it a person who has served without incident for 18 years of their lives [sic], and has accepted full responsibility for his actions, is sentenced so harshly?[171]

A concerned parent of an accused wrote,

> My son was willing to lay down his life for OUR country, OUR freedom, OUR way of life, and OUR justice system. If my child was willing to die for OUR country, then shouldn't he be entitled to the SAME justice system that he would lay down his life for?[172]

When one considers that probation is available in every civilian federal or state court, that the military criminalizes conduct that would be legal in the civilian system, and that probation is unavailable to servicemembers, the perception that military discipline and justice are inconsistent has some credence. Establishing a formal probation system might increase the public's perception of fairness in the military justice system.

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[169] Eugene Fidell, *Accountability, Transparency, & Public Confidence in the Administration of Military Justice*, 9 GREEN BAG 2D 361, 362 (2006) (stating that "formal military justice process seems to have been employed only to prosecute enlisted personnel")

[170] Lindsy Alleman, *Who Is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice*, 16 DUKE J. COMP. & INT'L 169, 189 (2006) (comparing the role of U.S. military commanders in military justice to the role of Canadian military commanders and Israeli commanders in military justice and concluding that "the perception argument, therefore, is a noteworthy justification for limiting the role of the U.S. military commander in the military justice context").

[171] COX REPORT, *supra* note 161 (emphasis added).

[172] *Id.*

Fourth, establishing a formal probation system might ensure that the Army gets value from its investment. According to Department of Army budget estimates for fiscal years 2008 and 2009, the Army alone spent $3,251,321,000 in accession training, basic skill and advanced training (including specialized skill training and professional development education, etc.), and other related training and education (including recruiting and advertising, off-duty and voluntary education, etc.) .[173] The Department of the Army estimates spending $4,011,752,000 in Fiscal Year (FY) 08 and $4,697,252,000 in FY 09.[174]

According to the Army Human Resources Command, the average cost to train a new Soldier from the recruiting station until he reached his first duty station in FY 07 was $67,100.[175] It cost $1093 to process one Soldier through the military entrance processing station (MEPS) alone.[176] The per-Soldier estimated cost of basic training was $16,000. [177] The average cost of advanced individual training was $28, 000 and one station training cost $31,600.[178]

Despite the pros of having a formal probation system in the military, there are certainly cons. First, commanders may see probation as a limit on their command authority. A sentence to probation as contemplated by this article would be binding on the convening authority and would limit

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[173] U.S. DEP'T OF ARMY, FISCAL YEAR 2008/2009 BUDGET ESTIMATES, OPERATION AND MAINTENANCE, ARMY JUSTIFICATION BOOK (Feb. 2007), *available at* http://www.asafm.army.mil/budget/fybm/fy08-09/oma-v1.pdf.
[174] *Id.*

> [T]his budget requests supports our ability to recruit and train the force, to enhance the Army's relevant and ready Land Force capability, and to provide educational opportunities for Soldiers and civilians . . . . To meet Army accession requirements for the Active, National Guard, and Reserve officers, this budget includes an increase of $113.1 million for FY 2008 . . . to provide scholarships and additional incentives such as completion bonuses and stipends . . . . The Army's assertive Army Strong advertising campaign, along with an increase in the number of Active Duty and contract recruiters, will target the eligible population in the overall Army effort to recruit to a 489.4 thousand base force in FY 2008.

Id. at 5.
[175] Dep't of Army, Army Human Resources Command, *Cost of a New Recruit* (Feb. 22, 2008) (information sheet provided by Colonel Ralph Gay, Army Accessions Research).
[176] *Id.*
[177] *Id.*
[178] *Id.*

the convening authority's discretion in maintaining discipline. Many commanders today believe, just as Honorable John Kenney, the Under Secretary of the Navy stated in 1949, that "[t]o subtract from the commanding officer's powers of discipline through courts-martial can only result in a diminution of his effectiveness as a commander."[179] Former battalion commander Colonel Richard Bezold, recalling a particularly troublesome Soldier, adamantly believes that a probation system would undermine command authority.[180] He believes that other Soldiers will perceive probation as getting over.[181] " [Soldiers] know exactly what is going on in the unit and what folks can get away with and that could have a detrimental impact on unit discipline and morale."[182]

Second, even apart from the restriction on their command authority, commanders may see the commitment to a formal probation system as extra burdensome for an Army already extremely taxed. Command attention and commitment at all levels would be required.[183] Duties such as the day-to-day supervision of the probationer would fall under the purview of the command. According to Judge (Colonel) Patrick J. Parrish, Army Trial Judge at Fort Bragg, North Carolina, "Commanders will likely see a probation system as just adding another bureaucratic level."[184]

Judge Parrish is not alone in this criticism. Former brigade commander Colonel David Clark has "a hundred reasons" why the military should not have a formal probation system.[185] Colonel Clark believes that "our legal system is pretty efficient in comparison to the civilian system. From flash to bang—it's pretty quick. The overhead

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[179] INDEX AND LEGISLATIVE HISTORY: UNIFORM CODE OF MILITARY JUSTICE, *supra* note 113.
[180] E-mail from Colonel Richard Bezold, U.S. Army, to author (Mar. 2, 2008, 10:00 EST) (on file with author). Colonel Richard Bezold is the former commander of 2d Forward Support Battalion, 2d Infantry Division, Camp Casey Korea from 2003–2005. Colonel Bezold also led his battalion to war in the Al Anbar Province in Iraq from August 2004 through August 2005.
[181] *Id.*
[182] *Id*.
[183] See Section V for a discussion of statutes and regulations that would require presidential approval and Department of Defense action.
[184] Telephone Interview with Judge (Colonel) Patrick J. Parrish, U.S. Army, Military Judge, Fort Bragg, N.C. (Jan. 15, 2008) [hereinafter Parrish Telephone Interview].
[185] Telephone Interview with Colonel David Clark, U.S. Army, Commander, Training Support Brigade, Fort Sam Houston, Tex. (Feb. 29, 2008). Colonel Clark, an infantry officer, is also the former commander of 1/506th, 2d Brigade Combat Team, 2d Infantry Division in Korea and Iraq.

[i.e., manpower required to supervise the Soldier] would be debilitating. We don't have the overhead to monitor Soldiers."[186] Brigade commander Colonel Tommy Mize sees limited utility in a formal probation system and believes that "certain aspects of the UCMJ [like non-judicial punishment under Article 15 and a suspended sentence] provide the same sort of flexibility that probation does in the civilian courts."[187] Furthermore, according to Brigadier General Gary S. Patton, the military's graduated disciplinary system usually means that if a case actually goes to court-martial, it is likely that the offense did not merit probation in the first place.[188] Undoubtedly, many commanders would be concerned about the potential blemished image of military service. After all, "military service is an honor and not a right."[189]

A formal probation system might also be criticized as just another attempt to civilianize the military, which is a "specialized society separate from civilian society."[190] In *United States v. Ralston*, Judge Raby of the Army Court of Military Review feared that the "civilianization" of the military justice system would spell its end. He stated:

> [I] wish to muse whether we gatekeepers of military law are not inadvertently finding more and more novel ways in which gradually to ease line officers and commanders out of the military system—moving it ever closer to the civilian justice model. *Quarere*: If this trend continues, could we reach a point, *in futuro*, where the military justice system is no longer unique, and thus no longer necessary?[191]

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[186] *Id.*

[187] E-mail from Colonel Tommy Mize, Chief, Theater, Master Plans and Construction, U.S. Forces Korea, to author (Mar. 10, 2008, 17:53 EST) (on file with author). Colonel Mize, an engineer officer, is the former Commander, 44th Engineer Battalion, 2d Brigade, 2d Infantry Division, Korea and Ramadi, Iraq. In July 2008, he took command of 1st Engineer Brigade at Fort Leonard Wood, Mo.

[188] E-mail from Brigadier General Gary Patton, U.S. Army, Chief of Staff, 25th Infantry Division, to author (Mar. 14, 2008, 10:00EST). Brigadier General Patton is the former Commander, 2d Brigade Combat Team, 2d Infantry Division, Korea and Ramadi, Iraq, 2002–2005.

[189] Interview with Lieutenant Colonel Stephen Stewart, U.S. Marine Corps, Professor, Criminal Law Dep't, TJAGLCS, Charlottesville, Va. (Nov. 20, 2007).

[190] Parker v. Levy, 417 U.S. 733, 743 (1974).

[191] SCHLUETER, *supra* note 112, at 5 (quoting Judge Raby in United States v. Ralston, 24 M.J. 709 (A.C.M.R. 1987)) (emphasis added). Note also that Schlueter recognized that

In *United States v. Jones*,[192] the U.S. Navy Court of Military Review was even more critical of perceived attempts at "civilianization," stating, "Many have certainly taken to so-called 'civilianization' of the United States military justice system like ducks to water. Yet the truth of the matter appears to be that this timorous and undisciplined spirit of conformism may be fraught with some serious problems."[193] The court further stated that "the military cannot adopt the language, thinking, and legalisms of the civilian legal sector without ultimately breaking down the fixed and accepted beliefs, values and distinctions which enable us, effectively and militarily, to relate our conduct to each other."[194]

V. Proposal to Implement

Admittedly, a formal probation system in the military would be difficult to implement and would garner criticism, but it could work. Although this concept might seem novel to some, it certainly is not new. Major General Kenneth J. Hodson, the Judge Advocate General of the Army from 1967 to 1971,[195] believed that military judges should be empowered to adjudge probation, stating that "military judges of general courts-martial . . . [should] be authorized to impose sentences, *including probation*, in all except capital cases . . . ."[196] Major General Hodson also believed that commanders should be largely removed from the military justice system.[197]

"[a]ssuming that Judge Raby is correct and that the military justice system is becoming civilianized and no longer unique, it does not necessarily follow that it would become unnecessary." *Id.*

[192] 7 M.J. 806, 808 (N.M.C.M.R. 1979).

[193] *Id.* at 808.

[194] *Id.*

[195] Kenneth J. Hodson, *Courts-Martial and the Commander*, *in* 3A CASES AND MATERIALS ON THE ANALYSIS OF THE MILITARY JUSTICE LEGAL SYSTEM: COMMAND AND CONTROL 627 (1975). Major General Hodson was also the Chief Judge of the U.S. Army Court of Military Review and the former Chairman and Secretary of the American Bar Association. *Id.*

[196] Kenneth J. Hodson, *Military Justice: Abolish or Change?*, *in* 3A CASES AND MATERIALS ON THE ANALYSIS OF THE MILITARY JUSTICE LEGAL SYSTEM: COMMAND AND CONTROL 775 (1975).

[197] *Id.* Specifically, Major General Hodson recommended that "commanders, at all levels, be completely relieved of the responsibility of exercising any function related to courts-martial except, acting through their legal advisors, to file charges with a court for trial, to prosecute, and, in the event of conviction, to exercise executive clemency by restoring the accused to duty." *Id.*

A. Mechanics

1. The Probation Officer and the Presentence Report

Similar to the federal scheme, a probation system in the military will need probation officers to make it work.[198] Either an officer of the accused's command or a military correction specialist[199] would be tasked to draft the presentence report,[200] to supervise and enforce the conditions of probation, and to notify the convening authority and the court if the probationer fails to comply.

The suggestion of a probation officer is not completely unheard of or farfetched. While not mandated by the UCMJ, the U.S. Navy Court of Military Review upheld the convening authority's designation of a probation officer. In *United States v. Figueroa*,[201] the convening authority suspended the accused's sentence of a bad-conduct discharge, total forfeitures, and any unexecuted hard labor at the date of his action for a period of ten months unless sooner vacated. In suspending his punishment, the convening authority appointed a probation officer and required the accused to report to the probation officer at least once a week.[202]

On appeal, the accused alleged that "the convening authority exceeded his authority in appointing a probation officer and in requiring appellant to report to such an officer at least once a week."[203] Relying on a slip opinion issued by the Court of Military Appeals,[204] the Navy Court of Military Review upheld the convening authority's appointment of a probation officer for the accused and required the accused to report to his probation officer.[205] The court commended the convening authority, stating that "the Court considers the convening authority's action a commendable effort to assure the appellant a fair and realistic

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[198] *See* Section II. B.1, *supra*.
[199] *See* Major Russell W.G. Grove, *Sentencing Reform: Toward a More Uniform, Less Uninformed System of Court-Martial Sentencing*, ARMY LAW., July 1988, at 26, 31 n.72 (reasoning that Army, Navy, and Marine Corps military corrections personnel are equipped to do this because they get five weeks of training in addition to many subcourses relating to penology, correctional report writing, sentence computation).
[200] The suggested contents of the presentence report will be discussed *infra*.
[201] 47 C.M.R. 212 (N.M.C.R. 1973).
[202] *Id*.
[203] *Id*.
[204] *Id*. (relying on United States v. Lallande, 46 C.M.R. 170 (1973)).
[205] *Id*. at 213.

opportunity to redeem himself in the Marine Corps."[206] While commendable, the designation of a probation officer is not likely the norm even under today's suspension procedure. To ensure that it is a norm, and that the accused has a fighting chance at rehabilitation, the designation of a probation officer will be vital to the successful implementation of a formal probation system.

If a probation system in the military is going to work, it must also have "truth in sentencing."[207] The factfinder should have a presentence report to aid in deciding what punishment to impose.[208] Right now, the defense primarily "holds the key" as to what evidence is presented at a sentencing.[209] Courts should have "a better picture of an accused—for good or for bad"[210] when considering whether to adjudge probation.[211] Such information would be incorporated into a presentence report. The presentence report should include the following:

> [D]etailed information about the offense or offenses for which sentence is to be imposed. This would include a prosecution version; defense version; statement of financial, physical, and psychological impact on any victim; codefendant information, including relative culpability; and statement of summaries of witnesses and complainants. The report should feature personal and family data. The accused's early life influences, home and neighborhood environment, and family cohesiveness should be included. The accused's criminal and disciplinary history is a very significant component, and available information relating to juvenile delinquency, truancy, and running away from home should be noted. Accomplishments, special talents and interests, and significance of religion in the accused's life are also pertinent.[212]

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[206] *Id.*
[207] Pohl Telephone Interview, *supra* note 132. Judge Pohl coined this phrase during the interview.
[208] *Id*.
[209] *Id*.
[210] *Id*.
[211] *Id.*
[212] Grove, *supra* note 199, at 32 (referencing the Presentence Investigation Report 1984 by the Administrative Office of the U.S. Courts, Probation Division).

2. Making the Decision

Probation will be within the sole discretion of the factfinder.[213] The factfinder will continue to rely on the aims of sentencing in determining an appropriate sentence for an accused.[214] To assist the panel in determining what conditions may be appropriate based on the presentence report and on evidence presented at presentencing, panel members would be given a worksheet tailored by the military judge with the input of the trial counsel and the defense counsel to aid them in determining discretionary conditions of probation.[215] Some conditions will be mandatory.[216] Trial counsel and defense counsel should have freedom to present evidence and argument to the military judge of appropriate conditions to be included in the worksheet.

3. Supervision and Enforcement

As described above, a probation officer will be tasked with supervising and enforcing probation conditions and may exercise broad discretion in ensuring that a probationer complies with the conditions of probation. The probation officer should immediately inform the convening authority when he receives credible information that the probationer may have violated the terms of his probation.[217]

4. Probation Revocation

Before a term of probation may be revoked, the convening authority will hold a revocation proceeding.[218] The proceedings would be less

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[213] *Cf.* note 59.
[214] *See supra* note 131 (referencing the aims of sentencing given in the *Benchbook* instruction.).
[215] *See* Pohl Telephone Interview, *supra* note 132.
[216] Mandatory conditions would include that the probationer commit no other crimes, that he report to his probation officer weekly, that he attend structured rehabilitation classes geared to his offenses, that he submit to random drug testing, that he pay restitution, and that he notify his probation officer of any change in financial condition. *Cf.* 18 U.S.C.S. § 3653(a)–(b) (LexisNexis 2008) (providing mandatory and discretionary probationary conditions for federal cases).
[217] *Cf.* 18 U.S.C. § 3603(3) (describing the duties of federal probation officers).
[218] This process should be similar to the vacation of suspension process in Article 72, UCMJ that convening authorities are already familiar with. *See* UCMJ art. 72 (2008); *see also* Telephone Interview with Judge (Colonel) Lisa Schenck, Chief Judge, U.S. Army

formal than a trial, but the probationer would be entitled to counsel. The probationer would also be allowed to present evidence in his favor.[219] The convening authority must be reasonably satisfied that the probationer has violated the terms of his probation.[220] The convening authority may decide to impose additional probation conditions, extend the probationary period, or revoke his probation.[221] The accused should also have the right to waive his revocation proceeding.[222]

B. Statutory Amendments

To establish a probation system, Rule for Courts-Martial 1003(b) would have to be amended to include probation as an authorized punishment. The amendment might read:

> Any court-martial may adjudge probation in lieu or in addition to any other authorized punishment under this subsection. Probation may be adjudged for any offense of which a commissioned officer, commissioned warrant officer, cadet, midshipman, warrant officer who is not commissioned or enlisted person has been found guilty.
>
> In determining whether to adjudge probation, it is appropriate to consider (1) whether the accused is charged with multiple counts, (2) whether the accused has had previous convictions pursuant to Article 15 or any other proceeding, (3) whether the offense involved drugs, (4) whether the accused seriously injured anyone and (5) whether he used a weapon.[223] The court shall determine the conditions of probation and shall issue the condition in writing and shall cause a copy of the conditions to be served on the accused.

Court of Criminal Appeals, Arlington, Va. (Jan. 8, 2008) [hereinafter Schenck Telephone Interview]. Judge Schenck recommended that the revocation proceeding be left in the convening authority's hands. *See id.*

[219] *Cf.* FED. R. CRIM. P. 32 (describing the rights of a probationer at a revocation hearing).

[220] *See supra* note 97. This is the same standard used in federal courts.

[221] *Cf.* 18 U.S.C.S. § 3565 (giving the options the court has when probationer violates terms of probation.)

[222] Schenck Telephone Interview, *supra* note 218. Judge Schenck recommended providing the probationer the right to waive his revocation hearing. *See id.*

[223] *Cf.* PETERSILIA, *supra* note 5, at 27 (suggesting factors for courts to consider in deciding whether to impose confinement or punishment).

> Probation shall be for a reasonable time necessary to ensure that the sentencing aims of rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of his/her crime(s) and his/her sentence from committing the same or similar offenses. Upon the successful completion of his probationary period, the suspended part of any sentence shall be remitted.[224]

Department of Defense directives[225] would have to be amended to preclude Soldiers from being administratively separated based solely on a court-martial conviction when probation is adjudged.[226] Otherwise, probation's goal of rehabilitating the offender may be thwarted by a command that might want to take the easier route and separate the Soldier.[227] Army Regulation 600-8-2, *Suspension of Favorable Personnel Actions (FLAGS)*,[228] would need to be amended to provide that Soldiers will continue to be monitored (i.e., flagged) upon a permanent change of station.[229]

VI. An Alternative to Probation: Suspension of Punishment by Courts-Martial

While the fundamental premise of implementing a probation system (i.e., rehabilitating the Soldier while meeting the needs of the Army) is

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[224] This recommendation is based on a combination of examining (1) the language for current authorized punishments provided in RCM 1003, (2) factors discussed by Petersilia, *supra* note 5, (3) the sentencing aims of the military justice system, and (4) suspension and remission of unexecuted punishment in RCM 1108.
[225] U.S. DEP'T OF DEFENSE, DIR. 1332.30, SEPARATION OF REGULAR AND COMMISSIONED OFFICERS (14 Mar. 1997); U.S. DEP'T OF DEFENSE, DIR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS (21 Dec. 1997).
[226] Telephone Interviews with Judge (Colonel) Stephen Henley, Chief Trial Judge, U.S. Army Trial Judiciary, Arlington, Va. (Dec. 26, 2007 & Jan. 7, 2008) [hereinafter Henley Telephone Interviews].
[227] *See id.*
[228] U.S. DEP'T OF ARMY, REG. 600-8-2, SUSPENSION OF FAVORABLE PERSONNEL ACTIONS (FLAGS) (23 Dec. 2004). This regulation describes the process of marking (i.e., "flagging") a Soldier's personnel records to prevent favorable action from being taken toward the Soldier while he is pending an unfavorable action.
[229] Henley Telephone Interviews, *supra* note 226. Judge Henley recommended that Soldiers be flagged to ensure that the probationer completes his probationary period.

generally believed to be an "interesting idea with some merit,"[230] implementing a probation system may be "too big of a leap,"[231] "too drastic,"[232] "too difficult to administer,"[233] and "unworkable in a deployed environment."[234] Consequently, an alternative argument is offered. Courts-martial should be empowered to suspend all or part of a court-martial punishment.[235]

Empowering a court-martial to suspend punishment accomplishes many of the aims of a formal probation system.[236] It addresses the supply versus demand dilemma—more Soldiers might be retained to help in the Global War on Terror. It enhances the public's perception of fairness as well as the Soldier's perception of fairness—the public and the Soldier will perceive suspension as a second chance. Additionally, to a more limited degree than probation, it considers the accused's rehabilitation needs—the accused is given the *opportunity* for rehabilitation but not necessarily the *tools*[237] needed for rehabilitation as suggested by a formal probation system.

Furthermore, empowering court-martials to suspend punishment would require very little statutory changes[238] and would only require that RCM 1003(b) be amended to include suspension. The vacation proceedings set forth under Article 72, UCMJ[239] would remain the same.[240] Commanders would likely view empowering court-martials to

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[230] *Id.*
[231] *Id.*
[232] Parrish Telephone Interview, *supra* note 184.
[233] Henley Telephone Interviews, *supra* note 226.
[234] *Id.*; *see also* Pohl Telephone Interview, *supra* note 132.
[235] Every military judge interviewed suggested binding suspension as an alternative to probation. This alternative suggestion is a result of their collaborative recommendations.
[236] *See* Henley Telephone Interviews, *supra* note 226.
[237] The term "tools" contemplates that the conditions placed on probationers such as drug counseling, financial counseling etc., will enhance the probationers' chances for rehabilitation.
[238] Henley Telephone Interviews, *supra* note 226.
[239] *See* UCMJ art. 72 (2008). The accused's special court-martial convening authority would hold a hearing concerning the alleged violation. The probationer would have the right to counsel. The general court-martial convening authority will receive a record of the hearing and the special court-martial convening authority's recommendation. Should the court-martial convening authority decide to vacate the probation, then the accused will serve any portion of his unexecuted sentence.
[240] Schenck Telephone Interview, *supra* note 218.

suspend punishments as less bureaucratic since they are already familiar with vacation proceedings under Article 72, UCMJ.[241]

Empowering a court-martial to adjudge a suspended sentence would also give the sentencing authority more options at sentencing. According to Judge (Colonel) Patrick Parrish, trial judge at Fort Bragg, North Carolina, "I can think of a number of cases where I would have liked to have had the authority to suspend a punishment."[242]

The Advisory Commission to the Military Justice Act of 1983 considered the related topic of empowering military judges and the Courts of Military Review (but not panels) to suspend punishment and recognized the advantages to binding suspension. The Commission stated:

> Just as civilian courts use the probation system to rehabilitate an offender, military courts could use a suspension to give an offender a chance for rehabilitation and to enable the offender to demonstrate that he can render useful military service. This power is one of compassion as well as one that enables the military to retain errant personnel who might well be good Soldiers, sailors, or airmen. Since the convening authority can suspend a discharge, suspension is not a new concept. Placing authority to suspend in the hands of judge is consistent with the way that most civilian jurisdictions proceed.[243]

While the Commission ultimately denied the proposal (for reasons already discussed), two of the nine members dissented from the recommendation.[244]

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[241] *See* UCMJ art. 72.
[242] Parrish Telephone Interview, *supra* note 184. Judge Parrish stated that he would have liked to have had the option of suspended punishment when sentencing a senior non-commissioned officer who is close to retirement or any other servicemember who is close to the end of his term of service.
[243] The MILITARY JUSTICE ACT OF 1983, ADVISORY COMMISSION REPORT (1985) [hereinafter ADVISORY COMMISSION REPORT] (on file at TJAGLCS). Note also that the Cox Commission made a similar recommendation. *See* COX REPORT, *supra* note 161.
[244] ADVISORY COMMISSION REPORT, *supra* note 243, para. VI. Mr. Honigman and Mr. Ripple dissented in this recommendation. The report does not say why these gentlemen dissented, but the inference is that they believed that the advantages cited outweighed the disadvantages.

Commanders may still believe that binding suspension infringes on their power to maintain good order and discipline. In addition to the above comments, Advisory Commission further stated:

> The decision to suspend a discharge reflects a belief that an individual can benefit his service despite a conviction of conduct serious enough to warrant a discharge. Decisions to retain or discharge a person have enormous potential impact on command. These are the kinds of decisions, that commanders, who are responsible for the morale and mission readiness of their commander, must make.[245]

While the accused would be given an opportunity to redeem himself, the studies of the civilian probation system generally conclude that "the intensity of the supervision, rather than the quality of treatment, was essential in reducing recidivism."[246] Suspension does not entail supervision.[247] Under a formal probation system, a specific person is tasked with (1) identifying the treatment needs, if any, of the accused; (2) ensuring that the Soldier is complying with conditions; and (3) enforcing the conditions of probation. Furthermore, a presentence report, a function of a probation system, provides the court with a complete picture of the accused to use in fashioning effective conditions for his rehabilitation. Hence, probation is preferred above suspension. Nevertheless, both a formal probation system and a system that allows courts-martial to suspend all or any part of a sentence provide an accused the opportunity for rehabilitation while satisfying the simple principle of supply versus demand.

VII. Conclusion

In spite of the military judge's recommendation that the bad-conduct discharge be suspended, the convening authority approved the convicted Soldier's discharge and separated him from the Army. For the sake of his children's stability, and because he loved simply being around the Army even though he was not a Soldier, he stayed in the area—close to post. With his bad-conduct discharge, he was able to secure a job at the

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[245] *Id.*
[246] KLEIN, *supra* note 20, at 355–56.
[247] *See* 21A AM. JUR. 2D *Criminal Law* § 904 (2007).

local grocery store as a stocker. Often times while stocking the shelves, he thinks, what if he had been given the opportunity to redeem himself. What if . . . ?

As chance would have it, one day the military judge stops by the grocery store. As he grabs an item off the shelf, he hears a courteous and respectful "Hi, Sir." The military judge responds back with a "Hello." The judge remembers this former Soldier and asks how his children are doing. The children are doing well. The military judge cannot help but note that this former accused still looks like, sounds like, and acts like a Soldier. The judge also cannot help but notice that the convening authority denied his recommendation. Like the Soldier, the military judge walks away wondering, what if . . . ?

Appendix

MORAL WAIVERS

Across the Defense Department, the number of "moral waivers" approved for military recruits with prior felony or misdemeanor crimes on their records has risen in recent years. The number of moral waivers by category since 2003:

ARMY	2003	2004	2005	2006
Moral waivers	**4,918**	**4,529**	**5,506**	**8,129**
Felony	411	360	571	901
Serious nontraffic	2,731	2,560	4,054	6,158
Minor nontraffic	100	113	123	169
Serious traffic	742	844	124	35
Minor traffic	5	6	4	1
Drug	929	646	630	865

NAVY	2003	2004	2005	2006
Moral waivers	**4,207**	**3,846**	**3,467**	**3,502**
Felony	56	40	109	190
Serious nontraffic	2,844	2,340	1,872	2,340
Minor nontraffic	548	677	911	481
Serious traffic	116	131	119	66
Minor traffic	139	134	108	98
Drug	504	524	348	327

MARINE CORPS	2003	2004	2005	2006
Moral waivers	**19,195**	**18,669**	**20,426**	**20,750**
Felony	352	234	481	511
Serious nontraffic	3,443	3,504	4,239	4,636
Minor nontraffic	530	424	523	515
Serious traffic	271	241	321	315
Minor traffic	1,315	1,268	1,142	987
Drug	13,284	12,998	13,720	13,786

AIR FORCE	2003	2004	2005	2006
Moral waivers	**2,632**	**2,530**	**1,123**	**2,095**
Felony	5	4	2	3
Serious nontraffic	1,306	831	358	761
Minor nontraffic	646	1,319	283	1,281
Serious traffic	570	197	365	50
Minor traffic	105	179	115	0
Drug	0	0	0	0

DEFENSE DEPARTMENT	2003	2004	2005	2006
Moral waivers	**30,952**	**29,574**	**30,522**	**34,476**
Felony	824	638	1,163	1,605
Serious nontraffic	10,324	9,235	10,523	13,895
Minor nontraffic	1,824	2,533	1,840	2,446
Serious traffic	1,699	1,413	929	466
Minor traffic	1,564	1,587	1,369	1,086
Drug	14,717	14,168	14,698	14,978

Source: Defense Department

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