



DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600



31 MAY 2002

The Honorable Bob Stump
Chairman, Committee on Armed Services
U. S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

On behalf of the Secretary of Defense, I am providing the report of the Department's review of a proposal for military judge "sitting alone sentencing" in courts-martial. The Conference Report to the National Defense Authorization Act for Fiscal Year 2002, dated December 12, 2001, acknowledged that the Joint Service Committee on Military Justice (JSC) was then engaged in an ongoing review of whether a convicted accused at a court-martial with service members should be permitted to elect sentencing by military judge sitting alone, rather than by the members. The conferees did not adopt proposed legislation to this effect and instead requested that the Secretary of Defense report the results of the review to the Committees on Armed Services of the Senate and House of Representatives.

Consistent with its role and responsibilities under DoD Directive 5500.17, and in accordance with the General Counsel's June 2001 request, the JSC considered the proposal during its annual review of the Manual for Courts-Martial and military justice system. This review process normally is completed by May of each year and may result in proposed changes by executive order to the Manual for Courts-Martial or recommendations for legislative changes to the Uniform Code of Military Justice. The Chair of the JSC requested additional time to complete the review because of intervening military commitments affecting the JSC membership due to other military justice issues resulting from the September 11th terrorist attacks and matters associated with OPERATION ENDURING FREEDOM. On April 10, 2002, the General Counsel provided you an interim report explaining the reasons why the JSC review and report would not be completed in the time initially contemplated.

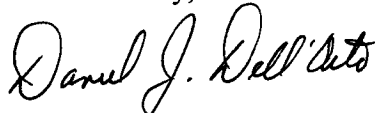
The Department endorses the JSC report and recommendation that the proposed legislation to create Article 52a, UCMJ, not be adopted. For the various reasons stated in the report, the proposal unnecessarily would alter the basic framework of military justice sentencing procedures and would create a system unique unto the military. Standing alone, the proposal would create inconsistencies and ambiguities with other UCMJ provisions, while placing the convicted in control of the proceedings and the manner in which the judicial system will apply in his or her specific case. The proposal, without apparent justification, would allow the convicted accused in sentencing to dismiss those personnel best situated to adjudge an appropriate sentence as the "voice of the local community" where the crime was committed – a function which military appellate courts have described as an important aspect of military justice and significant to military good order and discipline. The proposal would also encourage the accused and defense counsel to engage in more frequent, and perhaps more questionable or high-risk,



litigation tactics, knowing that should the fact finders react negatively to those tactics, the accused will be able to dismiss them summarily from further participation in the case.

For the reasons stated in the enclosed report, the Department recommends against making this amendment to the Uniform Code of Military Justice. I am sending a similar letter to the Chairman of the Senate Committee on Armed Services.

Sincerely,

A handwritten signature in cursive script, reading "Daniel J. Dell'Orto".

Daniel J. Dell'Orto
Acting General Counsel

cc: The Honorable Ike Skelton
Ranking Member

DOD JOINT SERVICE COMMITTEE
ON MILITARY JUSTICE

**REPORT ON THE RIGHT OF AN ACCUSED CONVICTED BY MEMBERS TO
REQUEST SENTENCING BY MILITARY JUDGE**

Report to
The General Counsel of the Department of Defense

REPORT OF THE DOD JOINT SERVICE COMMITTEE ON THE RIGHT OF AN
ACCUSED CONVICTED BY MEMBERS TO REQUEST SENTENCING BY MILITARY
JUDGE

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I. INTRODUCTION

a. Establishment. On 22 June 2002, the National Institute of Military Justice sponsored Cox Commission (Cox Commission) recommendations regarding changes to the Uniform Code of Military Justice were forwarded to the Joint Service Committee on Military Justice (JSC) for consideration as to whether specific topics should be subjects for the annual review of the Manual for Courts-Martial (Manual). One of the specific recommendations under review was the proposed military judge alone sentencing option and its application within the respective services. Subsequently, in the National Defense Authorization Act of 2002, House of Representatives Conference Report that accompanied S. 1438, P. L. 107-107, the conferees directed that the Secretary of Defense report the results of the JSC review of the military judge alone sentencing option to the Committees of the Armed Services of the Senate and the House of Representatives no later than March 1, 2002.

b. Delay in Submission. On March 15, 2002, the JSC requested additional time to prepare its report. This request was approved and the report submission date extended to May 31, 2002.

c. Purpose. The JSC did not form an *ad hoc* working group to study the specific recommendations of the Cox Commission. Rather, the JSC reviewed the recommendations consistent with its Manual review responsibilities to be concluded annually by May under the Department of Defense Directive 5500.17. The subject of military judge alone sentencing was only tangentially discussed under the Cox Commission recommendation that the entire sentencing process be reviewed; specifically, that military judge alone sentencing be considered for all cases with authority to suspend sentences. This review substantively changed with the House Conference Report requiring a report by March 1, 2002, on the proposal to modify Article 52a of the Uniform Code of Military Justice (UCMJ), wherein the accused would have the right to elect judge alone sentencing after the announcement of a finding of guilty by members.

d. Objective. Under the JSC Standard Operating Procedures, the goal of the JSC is to arrive at a consensus view of

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recommendations to change the Manual practice with a view to ensure that the Manual remains uniform, practical and flexible across the spectrum of circumstances in which courts-martial are conducted, including combat conditions.

e. JSC Membership/Support

Chairman

R. GARY SOKOLOSKI, Lieutenant Colonel, USMC
Head, Military Law Branch, Judge Advocate Division

Executive Secretary

DERWIN T. BRANNON, Major, USMC
Military Law Branch, Judge Advocate Division

Members

WILLIAM T. BARTO, Lieutenant Colonel, USA
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Office of the Judge Advocate General

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Attorney Advisor,
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JAMES MONGOLD, Captain, USCG
Chief, Military Justice Division
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Office of the Judge Advocate General

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Attorney Advisor
Department of Defense General Counsel

CRAIG A. SMITH, Colonel, USAF
Chief, Military Justice Division
Office of The Judge Advocate General

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Working Group Members

Chairman

ERIC B. STONE, Major, USMC
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Criminal Law Division
Office of the Judge Advocate General

GENELLE VACHON, Commander, USCG
Military Justice Division
Office of the Commandant

II. COMMITTEE METHODOLOGY, INFORMATION AND PRODUCTS

The JSC generally met monthly, consistent with the regular course of business. Initially, each Service worked on providing information and regulations regarding the desirability and feasibility of the military judge alone sentencing option.

Law review articles, former Process Action Team (PAT) reports, position papers, and The Military Justice Act of 1983 Advisory Commission Report were researched and reviewed. The 1983 report examined the identical question of military judge alone sentencing and considered responses from judges, commanders and Staff Judge Advocates (SJA). The JSC decided to allow each Service to informally question the field on the proposal and formulate a Service position. Additionally, each Service

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provided the most recent courts-martial data. As a JSC, our objective was to find a consensus on the subject.

The JSC reviewed the information and data gathered and discussed at length exactly what views and conclusions would be drawn from the information. Based upon this review, and significant debate, the JSC reached the views and recommendations contained in this report.

The JSC used their individual staffs to conduct the required research. In addition, input was received from various trial judges through respective Service representatives (although, it should be further noted that the JSC retains significant military judge expertise in LTCOL Barto, Cmdr Redcliff, LtCol Sokoloski and Maj Stone). Meetings were generally conducted monthly at the Army Judge Advocate General conference room on the tenth floor, 1777 North Kent St., Rosslyn, VA.

III. BACKGROUND

The mission of the military is unique and worldwide. The composition of the active-duty Services includes mostly American youth between the ages of 18 and 20. The Supreme Court of the United States has previously recognized this uniqueness, for example in *Chappell v. Wallace* the Court stated:

The need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion; no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting. 103 S.Ct. 2362, 2365 (1983).

The military justice system, as designed, contributes to military readiness. Unlike any civilian counterpart, leadership within the Services and military justice are inextricably intertwined. Thus, historically, commanders, officers and, more recently, enlisted service members have played a critical role in the administration of military justice. One of the ways in which military service members participate in the administration of justice is through participation as members of courts-martial.

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The subject of service members (or the jury) determining an appropriate sentence is not new. However, the subject is generally debated from the perspective of the civilian model as to whether sentencing by military judge alone is appropriate. Previously, Congress, pursuant to the Military Justice Act of 1983, directed the Defense Department to conduct a study of several issues, one of those subjects was whether sentencing should be by military judge alone at all courts-martial constituted with a military judge.

That Commission, which consisted of five active duty members and four civilians, took almost 12 months to gather their "evidence" and conduct their study. The gathering of evidence included soliciting public comment from a variety of sources and conducting hearings with testimony from numerous witnesses, including commanders and civilian experts. Ultimately, the Commission recommended that the sentencing authority should not be exercised by military judge where the court-martial consists of members. The advantages and disadvantages identified by that Advisory Commission are similar to those identified by the JSC in its current study.

IV. JSC Views

The UCMJ works very well, as demonstrated every day, in every clime and place where our armed services perform their various missions. These missions range from peacekeeping operations to the execution of full combat operations. We are not convinced that there is reason to disturb the current sentencing practice. Accordingly, we recommend against adoption of the proposed amendment.

We make the following observations in support of our recommendation.

- No other jurisdiction in the American system of justice allows the accused to choose between sentencing by jury or judge after trial by jurors.
- Military court-martial panel members have historically been identified favorably as the "voice of the community" in the sentencing phase of courts-martial. The proposal could

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have the effect of silencing, at the sole discretion of the convicted, this important voice during a critical stage of the court-martial process. We firmly believe that if this amendment were to be adopted, panel members will determine fewer sentences.

- Active participation in military justice proceedings ensures officers (and specifically commanders) have a tangible sense of maintaining good order and discipline through the military justice system.
- Obviously, courts-martial are not convened for the sole purpose of training commissioned officers and other potential panel members in the military justice system. However, their involvement as members in the court-martial process - particularly the sentencing phase - serves as a logical extension of their development as leaders. These same officers will later be called upon to determine the proper disposition for offenses under Rule for Court-Martial 306, conduct nonjudicial punishment proceedings, serve as Summary Courts-Martial, or make decisions as a court-martial convening authority.
- While military judge alone sentencing may be correctly defended under the premise of more consistency in sentences, a principal "object" of sentencing in the military is to maintain order and discipline of the unit. Only the local community, and particular Service, knows what discipline is necessary to accomplish the mission.
- One of the assumptions made justifying the proposal is that military judges have a sound sense of community and disciplinary norms and mores as court members because they typically preside over many cases at a single installation.
- Military judges are frequently assigned regionally. Within each region or circuit, multiple types of commands may be assigned, including support types organizations and deploying/combat organizations. An experienced military judge typically offers predictability through a consistent sentencing philosophy for particular types of offenses, regardless of the community that the accused resides.

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- For example, the U.S. Coast Guard's sole designated general court-martial judge is assigned to Washington, D.C.; for each of the Services, in many instances, the military judge is brought from outside the community and not likely to be attuned to the needs or capable of expressing the voice of that specific community. Also, within a circuit of multiple military judges, certain judges develop reputations regarding sentencing depending upon numerous factors including experience, background and sentencing philosophy.
- Two illustrations: (1) an unauthorized absence at a deployed, combat or operational unit is a qualitatively different offense than if it occurs within an administrative or logistical support unit; (2) a particular judge may believe that certain offenses do not merit confinement or punitive discharge, regardless of the circumstances, whereas the remaining judges within the circuit regularly adjudge more severe sentences under similar circumstance. In the first illustration, the community standards are different and in the second, individual sentencing philosophies differ.
- Making it a right of an accused to elect judge-alone sentencing after the announcement of findings by members allows the accused to solely control the trial process.
- It should be reasonably expected that the accused, with advice of counsel, would elect the forum that he or she perceives will be more lenient in sentencing. As a result, defense counsel will forum shop and this forum shopping will disrupt the orderly process of trials. Counsel will wait until the military judge of choice rotates into the community to conduct trials. Furthermore, as drafted, this election will disrupt the orderly processing of cases as members, military judges and other trial personnel try to anticipate the sentencing forum election.
- Delay in election may lead the Government to order or invite the travel of witnesses whose live testimony will be unnecessary before an experienced military judge.

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- This delay would also cause the military judge to divide attention between presiding and fact-finding functions, a burden demanded of few (if any) judges in the civilian sector.
- As drafted, the proposal will encourage an accused to attempt high-risk trial strategies with low probabilities of success, believing that he or she can do so with virtual impunity by dismissing those panel members sought to be misled, while counting on the military judge to be constrained in sentencing.
- Given control of the sentencing proceedings, it may be anticipated that the accused will request members more frequently and contest more cases and charges, particularly at special courts-martial.
- It is foreseeable that such trials will take longer and operate to defeat any objective that this proposal might save the expense of sentencing relative to the loss of members' duties to the command.
- The requirement for additional members in findings, as a minimum, would likely increase the current number of judge-in-trial days (given longer litigated trials) and members-capable courtrooms than currently possessed within the Services. Increased funding for courtrooms and additional judges and support staff may be necessary.
- Frequently, as with civilian criminal prosecutions, multiple theories of criminal liability may be presented to the members for a single offense during findings. Whether the members agree on the theory of liability is not relevant to the finding of guilty although they are likely discussed during deliberation; however, the judge is never aware of those deliberations.
- Current military sentencing requirements avoid this dilemma by requiring the sentencing authority to be the same authority that determined guilt. Many see this as a specific benefit for the accused, otherwise not available in other jurisdictions.

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V. INTERNAL INCONSISTENCY

Under the current UCMJ, service members have four variations of forum options when tried by special and general courts-martial. The accused may elect to: (1) be tried by members on merits, and if convicted, the members would determine an appropriate sentence; (2) be tried by a military judge alone (with military judge approval); (3) plead guilty before a military judge and be sentenced by members; or, (4) plead guilty before a military judge and be sentenced by the military judge (with military judge approval).

The proposed legislative change to Article 52a, UCMJ, as drafted, is inconsistent with the UCMJ as it currently exists, specifically, Articles 16, 29, 51 and 53, UCMJ. Currently, military legal precedent provides that an accused does not have the right to request military judge alone sentencing after announcement of findings by members and that such a request violates Articles 29, 51, and 53, UCMJ. Thus, the proposed Article 52a alone is insufficient to accomplish the proponent's desire; further modification to Articles 16, 29, 51, and 53 would be required prior to or contemporaneous with modification of Article 52a, UCMJ.

Article 16, UCMJ, is established with a view that a court-martial is composed of officer members, unless the accused otherwise elects enlisted members or trial by military judge alone subject to the approval of the military judge.

Article 29, UCMJ. Once assembled, no member may be absent or excused except for a challenge for cause or excused by the convening authority for good cause.

Article 51, UCMJ. In essence requires voting on findings and sentence by the members

Article 53, UCMJ, requires the court to announce findings and sentence as soon as determined.

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VI. RECOMMENDATIONS

The JSC recommends against the proposed legislation to enact Article 52a, UCMJ.

However, should the proposed legislation proceed, the JSC further recommends:

- 1) That additional conforming changes to the UCMJ, as specified above, be made;
- 2) That an effective date of any change to implement the sentencing election option be delayed in order to publish conforming changes to the Manual, to include 1 year after implementation if standard public notice and comment procedures are not desired, or 2 years if public notice and comment procedures are desired (DoD Dir 5500.17); and
- 3) That the current statutory change to Article 52a be amended to require an accused to elect judge alone sentencing (a) before the assembly of the court, which is the same time that the accused is currently required to elect court-martial by judge alone or, if enlisted, court-martial with enlisted members and (b), as is consistent with current practice in electing trial by military judge alone, the military judge be required to approve the election.

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United States v. Thorpe, 5 M.J. 186 (C.M.A. 1978).

United States v. Hutchinson, 15 M.J. 1056 (N.M.C.R. 1981).

United States v. Norris, 43 C.M.R. 1000 (A.F.C.M.R. 1971).

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APPENDIX

- A. Materials: Service regulations concerning the detailing of military judges to courts-martial.
- B. Summary: Comparison of Military Sentencing Practice with Civilian Sentencing Practices.
- C. Summary: Current Military Sentencing Procedures
- D. Summary: Responses from Senior Judge Advocates "In the Field."
- E. Vogel, Colonel Richard L., *Sentencing Process at Courts-Martial*, Library, Naval War College, Newport, Rhode Island, June 1987.



DEPARTMENT OF THE NAVY
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WASHINGTON NAVY YARD
1322 PATTERSON AVENUE SE SUITE 3000
WASHINGTON DC 20374-5066

IN REPLY REFER TO

JAGINST 5813.4F
JAG 05
21 August 2000

JAG INSTRUCTION 5813.4F

From: Judge Advocate General

Subj: NAVY-MARINE CORPS TRIAL JUDICIARY

Ref: (a) SECNAVINST 1640.9B
(b) SECNAVINST 5400.40
(c) JAGINST 5800.7C CH-3

Encl: (1) Judicial Circuits

1. Purpose. To implement the provisions of references (a) through (c) as regards the Navy-Marine Corps Trial Judiciary (hereinafter referred to as the "Trial Judiciary").

2. Cancellation. JAG Instruction 5813.4E

3. Mission and Functions. The Trial Judiciary shall:

a. Provide certified military judges for all general and special courts-martial. The Trial Judiciary shall ensure each referred general and special court-martial is speedily tried. The Trial Judiciary shall coordinate with appropriate authorities with a view to ensuring all cases referred to trial are received by the Trial Judiciary as soon as possible after referral. Records of trial shall be expeditiously, but carefully, authenticated upon receipt.

b. Provide certified military judges to serve as Article 32 investigating officers in all cases in which competent authority requests such service, unless this may cause a conflict under Article 26(d), UCMJ. General and special courts-martial shall take precedence.

c. Provide certified military judges to serve as summary courts-martial when requested by competent authority and authorized by the circuit military judge in the cognizant circuit. General and special courts-martial and Article 32 investigations shall take precedence.

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21 August 2000

d. Provide certified general court-martial judges for hearings required under section 7407 of reference (a) for the psychiatric transfer of prisoners.

e. Counsel and train participants in judicial proceedings.

f. Participate in regional planning regarding the provision of legal services.

g. Perform other duties as prescribed by the Chief Judge of the Navy-Marine Corps Trial Judiciary.

4. Authority and Responsibility. In order to accomplish the missions and functions of the Trial Judiciary, authority and responsibility are prescribed for specified personnel as follows:

a. Chief Judge

The Chief Judge of the Navy-Marine Corps Trial Judiciary, (hereinafter referred to as "Chief Judge"), as the Judge Advocate General's representative, is the Officer-in-Charge of the Trial Judiciary and shall exercise command over the Trial Judiciary. The Chief Judge is also the designee of the Judge Advocate General as that term is used in Article 26, UCMJ; R.C.M 108; and R.C.M 502(c), MCM. The Chief Judge shall administer the Trial Judiciary, supervise and coordinate the activities of all personnel, ensure the effective interchange of information and services among military judges, and perform other duties as may be directed by the Judge Advocate General. The Chief Judge may reassign the responsibilities of other judges on a temporary basis. The Circuit Military Judge for the Atlantic Judicial Circuit shall be the Deputy Chief Judge and, with his staff, assist the Chief Judge in the performance of his responsibilities.

b. Circuit Judge

The Chief Judge shall designate the Circuit Military Judge of each judicial circuit. The Circuit Military Judge details military judges to courts-martial as provided in paragraph 6. The Circuit Military Judge is responsible for the administration

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and internal organization of that circuit and shall assist the Chief Judge as required.

5. Establishment of Judicial Circuits and Branch Offices. The judicial circuits of the Trial Judiciary are established to provide military judges within the defined geographic areas of responsibility. The descriptive name, location of the principal office, and the geographic limits of the judicial circuits are shown in enclosure (1). The geographic limits of the several judicial circuits are established to effect a division of work and responsibility. They shall in no way affect the jurisdiction of any court-martial. The creation or deletion of circuits or the temporary reassignment of areas of responsibility may be accomplished by the Judge Advocate General without change to this directive.

6. Detailing Military Judges to Courts-Martial

a. Section 0130 of reference (c) provides the authority to detail military judges to general and special courts-martial. To be detailed, a Naval or Marine Corps Officer must meet the qualifications prescribed in R.C.M. 502(c), MCM and must be assigned permanently or temporarily to the Trial Judiciary. The Chief Judge is authorized to further limit which judge may be detailed to courts-martial and under what circumstances.

b. The Circuit Military Judge (or a designee) assigned to a geographic area details military judges within that geographic area. If a court-martial is to assemble at a geographic location not within the area of any judicial circuit, the Chief Judge is authorized to assign the responsibility for the detailing of a military judge. No one outside the Trial Judiciary may influence the detailing of any military judge to any particular case. Within each judicial circuit, it is the responsibility of the circuit military judge to ensure adherence to this principle.

c. No military judge shall be detailed to a court-martial that is to convene in a judicial circuit other than the circuit to which the military judge is assigned, except by the direction of the Chief Judge.

d. Noncompliance with paragraph 6(b) and (c) of this instruction shall in no way affect the jurisdiction of any court-martial.

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21 August 2000

7. Rules of Court. The Chief Judge may establish such rules of court as are appropriate for trials throughout the Naval Service and may authorize circuit military judges to establish additional rules to accommodate practice within their circuits. The Chief Judge shall forward copies of all local rules of court to the Judge Advocate General in accordance with R.C.M. 108, MCM.

8. Training. The Chief Judge shall establish a program for the continuing education and professional development of members of the Trial Judiciary. This program shall include professionally presented programs of continuing legal education and periodic organizational meetings.

9. Field Inspections. The Chief Judge shall make such periodic visits to the principal and branch offices of the various circuits as deemed appropriate.

10. Funding. Funds allocated by the Judge Advocate General for the operation of the Trial Judiciary shall be expended at the discretion of the Chief Judge in the furtherance of his responsibilities.



D. J. GUTER

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JAG Special List 40
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JAGINST 5813.4F
21 August 2000

JUDICIAL AREAS AND CIRCUITS OF NAVY-MARINE CORPS TRIAL JUDICIARY

Circuit Name	Principal Office	Normal Areas of Responsibility
Atlantic	Washington, D.C.	Maine; New Hampshire; Vermont; Ohio; Massachusetts; Rhode Island; Connecticut; New York; New Jersey; Pennsylvania; Delaware; Maryland; Naval District Washington; Marine Corps Combat Center, Quantico, Virginia; Naval Weapons Station Dahlgren, Virginia; and all Atlantic Ocean areas not assigned to a circuit.
Tidewater	Norfolk, VA	Virginia (except those areas designated as within the Atlantic Circuit); North Carolina (except those areas designated as within the Piedmont Circuit); West Virginia; and Iceland.
Piedmont	Camp LeJeune, NC	All Marine Corps bases, air stations, camps, depots and logistics bases within the states of North and South Carolina.
Southeast	Jacksonville, FL	Alabama; Florida; Mississippi; Louisiana; Georgia; South Carolina (except those areas designated as within the Piedmont Circuit); the Caribbean Sea to include Panama, Guantanamo Bay, Cuba; and Puerto Rico.
Midwest	Great Lakes, IL	Illinois; Michigan; Minnesota; Wisconsin; Indiana; Kentucky; Nebraska; North Dakota; Tennessee; South Dakota; Texas; Arkansas; and Missouri.

JAGINST 5813.4F
21 August 2000

JUDICIAL AREAS AND CIRCUITS OF NAVY-MARINE CORPS TRIAL JUDICIARY

Circuit Name	Principal Office	Normal Areas of Responsibility
Southwest	San Diego, CA	Arizona; New Mexico; Nevada; California; Oklahoma; Kansas; Colorado; and Utah (except those areas designated as within the Sierra Circuit).
Sierra	Camp Pendleton, CA	All Marine Corps bases, air stations, camps, depots and logistics bases within the Southwest Judicial Circuit.
Northwest	Bremerton, WA	Alaska; Washington; Oregon; Idaho; Montana; and Wyoming.
Island	Pearl Harbor, HI	Hawaii; New Zealand; and Australia.
Keystone	Okinawa, Japan	Okinawa and Iwakuni, Japan.
Westpac	Yokosuka, Japan	Japan (except Okinawa and Iwakuni); Korea; Asia; Guam, Philippines; Diego Garcia; and areas of Asia and the Pacific and Indian Oceans not included within the Island, Northwest, and Transatlantic Circuits.
Transatlantic	Naples, Italy	Europe; Africa; and countries of the Middle East and Southwest Asia, the Persian Gulf, the Mediterranean and Red Seas.

Enclosure (1)

APPENDIX A

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
Washington, DC 20310-2200

PERMANENT ORDERS 1-1

12 February 1999

1. Following organization/unit action directed.

Action: Judicial Circuits are reorganized, and duty stations of military judges are redesignated as follows:

FIRST JUDICIAL CIRCUIT

Area: Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, Puerto Rico, and Republic of Panama.

Duty Stations of Military Judges: Appropriate military installations in National Capital Region and Northeast U.S.

SECOND JUDICIAL CIRCUIT

Area: Alabama, Florida, Georgia, Illinois, Indiana, Kentucky, Michigan, Mississippi, North Carolina, South Carolina, and Tennessee.

Duty Stations of Military Judges: Fort Bragg, North Carolina; Fort Benning, Georgia; Fort Stewart, Georgia; and Fort Campbell, Kentucky.

THIRD JUDICIAL CIRCUIT

Area: Arkansas, Arizona, Colorado, Iowa, Kansas, Louisiana, Minnesota, Missouri, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Wisconsin, and Wyoming.

Duty Stations of Military Judges: Fort Carson, Colorado; Fort Leavenworth, Kansas; Fort Bliss, Texas; and Fort Hood, Texas.

FOURTH JUDICIAL CIRCUIT

Area: Alaska, California, Hawaii, Idaho, Montana, Nevada, Oregon, Utah, and Washington.

Duty Stations of Military Judges: Fort Lewis, Washington.

FIFTH JUDICIAL CIRCUIT

Area: Africa, Europe, the Middle East, and Southwest Asia.

Duty Stations of Military Judges: Appropriate military installations in U.S. Army, Europe.

SIXTH JUDICIAL CIRCUIT

Area: Far East

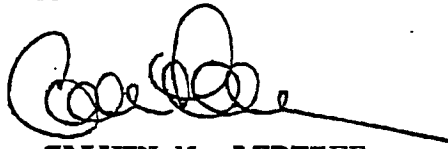
Duty Stations of Military Judges: Appropriate military installations in Korea.

Assigned to: US Army Legal Services Agency (WOKEAA), Falls Church, VA 22041-5013
Mission: To make military judges available for detail as judges of general and special courts-martial
Effective date: 4 January 1999
Authority: Para 8-3, AR 27-10
Additional instructions: NA
Format: 740

2. Following order is revoked or rescinded as indicated.

Action: Rescind
So much of: Permanent Orders, Office of The Judge Advocate General, Department of the Army, 4 January 1993
Pertaining to: Reorganization of Judicial Circuits and redesignation of duty stations of military judges (Para 1)
Authority: Not applicable
Format: 740

FOR THE JUDGE ADVOCATE GENERAL:


CALVIN M. LEDERER
Colonel, JA
Executive

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USAF TRIAL JUDICIARY AREAS OF RESPONSIBILITY

Eastern Circuit--Headquartered at Bolling AFB, DC. Five active duty military judges and two reserve military judges covering 24 Air Force Bases in Massachusetts, New Jersey, Delaware, Maryland, The District of Columbia, Virginia, North Carolina, South Carolina, Florida, Ohio, Illinois, Tennessee, Alabama, Georgia, and Mississippi.

Central Circuit--Headquartered at Randolph AFB, Texas. Six active duty military judges and two reserve military judges covering 24 Air Force Bases in Louisiana, Arkansas, Missouri, North Dakota, Nebraska, Kansas, Oklahoma, Texas, New Mexico, Colorado, and Wyoming.

Western Circuit--Headquartered at Travis AFB, California. Four active duty military judges and one reserve military judge covering 17 Air Force Bases in South Dakota, New Mexico, Arizona, Utah, Idaho, Montana, Washington, Nevada, California, and Alaska.

Pacific Circuit--Headquartered at Yokota Air Base, Japan. Two active duty military judges covering nine Air Force Bases in Hawaii, Guam, Japan, Korea, Singapore, and Diego Garcia.

European Circuit--Headquartered at Ramstein Air Base, Germany. Two active duty military judges covering 15 air bases in England, the Azores, Germany, France, Italy, Bosnia, Turkey, Saudi Arabia, and Kuwait.

3.H. COURT-MARTIAL PERSONNEL

3.H.1. Detailing Military Judges to Courts-Martial

The following procedures shall be followed for detailing military judges for general and special courts-martial.

3.H.1.a. Request for Detail of Military Judges to Courts-Martial

The OEGCMJ, or the convening authority, if trial counsel is on the convening authority's staff, shall request that the Chief Trial Judge detail a military judge by submitting a letter, e-mail, or message request to Commandant (G-L-4), copy to Commandant (G-LMJ). This request shall contain the following information:

- (1) Convening authority and type of court;
- (2) Case name;
- (3) Trial location;
- (4) Preferred trial date, and backup date if any;
- (5) Estimated trial duration;
- (6) General nature of charges or UCMJ Article numbers;
- (7) Names, telephone numbers, facsimile numbers, and email addresses of both trial and defense counsel;
- (8) State whether the accused is in pretrial confinement and date confined; and,
- (9) Speedy trial deadline under RCM 707.

3.H.1.b. Detail Pursuant to RCM 503(b)(1)

The Chief Trial Judge shall detail military judges to general and special courts-martial. During periods of unavailability due to leave or illness, the next senior general court-martial judge may detail judges. If a next senior general court-martial judge is not assigned, the Chief Counsel will designate a certified military judge to so act.

3.H.1.c. Docket Control

The Chief Trial Judge, with the assistance of Commandant (G-LPD), shall maintain the docket for all general and special court-martial military judges. The Chief Trial Judge will forward a copy of the docket monthly to Commandant (G-LMJ). The Chief Trial Judge (Commandant (G-L-4)) may establish additional procedures for docketing courts-martial.

3.H.1.d. Restrictions

(1) A part-time special court-martial military judge shall not be detailed to a special court-martial if he or she is assigned to the staff of the convening authority or the OEGCMJ over the command of the convening authority or is in the performance evaluation or reviewing chain for any participating counsel.

(2) By policy, a Coast Guard special court-martial must have a military judge detailed.

3.H.1.e. Continuances

Once detailed, the military judge has sole authority to grant continuances.

Subj: Comparison of Military Sentencing Practice with Civilian Sentencing Practices

The sentencing procedure of American states was surveyed for the purpose of comparing civilian sentencing procedure to the sentencing procedure devised by Congress for military commanders in the UCMJ. The findings are as follows:

- The vast majority of states have adopted the practice of mandatory judge sentencing.
- Eight states currently sentence by jury. As set forth below. The sentencing rules of practice of these states vary widely.

Kentucky - The trier of fact is the sentencing authority unless the sentence is fixed by statute.

Arkansas - The jury determines the sentence, unless: (1) the defendant pleads guilty; (2) elects trial by judge alone; (3) the jury fails to agree on a punishment; (4) the prosecution and defense agree to judge alone sentencing.

Missouri - The jury is instructed on the possible punishments and provides a sentence to the judge who is the sentencing authority. The judge imposes the recommended sentence unless, the jury cannot decide on a sentence, or if the offender is a prior, persistent, or dangerous offender. Even in those cases where the jury deliberates and successfully recommends a sentence, the judge is the ultimate sentencing authority. That being said, the judge must treat the sentence recommended by the jury as a ceiling on his or her discretion. This is true unless the recommended sentence is below a mandatory minimum. The defendant may elect to be tried by judge alone.

Oklahoma - The defendant must make a request to be sentenced by the jury. If the jury fails to agree on a sentence, the judge will determine the sentence.

Texas - The defendant must make a written request to be sentenced by the jury, before voir dire.

Tennessee - The jury determines a range of punishment within which the judge may decide the actual punishment.

Virginia - This system most resembles the military system. Jury sentencing is limited to those cases tried by a jury. However, unlike the military system, the right to sentencing by jury requires the consent of the prosecutor and the judge. The Virginia Code sets minimum and maximum sentences.

Subj: Military Sentencing Procedure

Sentencing hearings in the military are governed by Rules for Courts-Martial (R.C.M.) 1001 through 1011.

The prosecution is allowed to present the personnel records of the accused, evidence in aggravation, and evidence of rehabilitative potential of the accused. The prosecution case may be presented through documentary evidence and the presentation of live witnesses who are subject to cross-examination.

After the prosecution case is presented, the accused is allowed to present matter in extenuation and mitigation, and, if the accused so chooses, he may make a sworn or an unsworn statement. Like the prosecution case, the defense case may be presented through documentary evidence and the presentation of live witnesses who are subject to cross-examination. Additionally, the accused may request that the rules of evidence be relaxed. If such a request is granted, the accused may then present evidence that would not ordinarily be admissible under the normal rules of evidence, such as unsworn statements from parties not present, unattested to copies of certain documentary evidence, etc.

After the presentation of the evidence by both sides, the court-martial panel members are temporarily excused. At this time counsel for both sides and the military judge discussed the instructions that the military judge proposes to read to the court-martial panel members.

The instructions that are read to the court-martial members include detailed instructions on: the principles of sentencing; how to properly evaluate an unsworn statement made by a convicted accused; the evaluation of witness credibility; the permissible uses of evidence that has only partial admissibility; the impermissibility of influence through rank or position. The instructions also include a detailed explanation of the numerous types of punishment available, the permissible and impermissible combinations of these punishments; the effect of each punishment on the accused, as well as, numerous cautions against certain impermissible sentencing behaviors such as anticipation of mitigation by the convening or appellate courts. The members are instructed on the procedure for proposing and voting on sentences. The senior member is instructed on the procedure regarding how to properly record and announce the sentence.

Subj: Response from Senior Judge Advocates "In the Field"

Senior Judge Advocates from the Army, Navy, Air Force, Marine Corps and Coast Guard were informally surveyed concerning proposed sect. 852, Art. 52a, UCMJ.

The opinions were wide-ranging. Few senior Judge Advocates strongly opposed the proposal. Many senior Judge Advocates believed that the proposal could be beneficial if adopted with minor adjustments. Several senior Judge Advocates opined that sentencing by panel of members should be eliminated entirely.

- Opinions Supporting

Interest in consistency that theoretically could be served by going to the judge.

Finally, are sentencing guidelines then going to be next? It seems to me that a lot of the arguments we've used to avoid sentencing guidelines might evaporate if it becomes common practice for judges to sentence.

Anything that permits an accused to maximize the benefits of the system, the availability of alternate sentencing forums, improves both the appearance and reality of fairness.

We now permit an accused to plead before a military judge and then elect members for sentencing. This appears to offer an accused a similar opportunity to have one forum for findings and another for sentencing. To the extent it encourages an accused to seek factual findings from his peers without fear that his sentencing case will be crippled by findings of guilty by the members, it is positive.

We might want to include an opportunity to plead not guilty before a military judge and then, if there are guilty findings, seek sentencing from members. This is just an extension of the current right to plead before a MJ and have members for sentencing. It would round out the possibilities.

- Opinions supporting with reservations

One senior judge advocate supports the concept with the reservation that a definitive forum election to include sentencing forum be required at the outset of the trial. The reasoning for the early selection of sentencing forum is to provide notice to the prosecution and the military judge.

- Opinions opposing

Section 572 represents an attempt in an on-going and external effort to transform the UCMJ from a Congressionally devised and military requirement-driven system of discipline enforcement to a civilian-modeled system of law enforcement. The proposal to allow judge-alone sentencing after conviction by a jury reflects the criminal sentencing procedure of the majority of civilian jurisdictions. However, the civilian law enforcement model does not suit the needs of the American military. Congress recognized this mismatch and refrained from designing the UCMJ as a civilian-style law enforcement system. Rather, Congress designed a system of discipline specifically tailored for use by military commanders in their leadership of combat forces. In doing so, Congress, and later CAAF, recognized the unique need for the "community's" [some legal scholars reasonably argue, "military community's"] sense of justice to be expressed in the sentencing of convicted service members. Sentencing by jury, after conviction by jury, ensures that the community's sense of justice is expressed. Allowing judge-alone sentencing after conviction by jury, even as a convicted service member's option, allows the public misperception that punishment is being controlled by the military commander vice the community's sense of justice.

Further, there is little doubt that counsel, if given the opportunity to avail themselves of judge alone sentencing, will request members in every contested case. This has the potential to create problems with our dockets. Additional members cases could overflow the current number of judge days and members-capable courtrooms we currently possess. Increased funding for courtrooms and additional judges and support staff would be necessary.

It will inevitably lead to a push to go to sentencing guidelines, as in federal court. In any event, if this is likely to pass, we should try to attach changes to our sentencing powers that will allow us to suspend portions of adjudged sentences, as well as to see the pretrial agreement sentence limitations before imposing sentence.

The trier of fact should be the entity that sentences the accused. For an effective military justice system in general, it is important to keep the populace (not just the lawyers) fully engaged. That means determining guilt or innocence and appropriate sentences if guilty.

We all don't have military judge organizations in which military judges live and work in the local military community of the trial site. The premise seems to be that military judges are necessarily the best gauges of the local community standards and interests. Isn't this premise somewhat flawed, especially as the cited cases emphasize that it is the local community and not the Service-wide community or culture, that is the focus of "the voice of the community." In *Wheeler*, the quote refers to "the Fort Lewis community"; in *Bramel*, the quote refers to "the needs of the local military community (underline added)", not the judicial philosophy or view of how the status of discipline should be applied throughout the judge's Military Service or armed forces. An example of a judicial circuit with 4 judges assigned to Bolling AFB, DC, annually handling a total of 10 cases at Dover AFB, DE, makes the point of how much "sense of the local community" a judge may have acquired during his average 2 or 3 annual TDY trips to Dover. There is a better chance if the judge was permanently stationed at Dover, but in some Services this situation of a judge living or experiencing the local community interests or conscience is the exception rather than the rule. To the extent that we allow their better-situated argument to bolster their legislative view, we miss the opportunity to illustrate that their premise might not be so conclusive or necessarily accurate.

Additionally, the military system of sentencing by jury after conviction by jury has the little discussed, but substantial jurisprudential benefit, of ensuring that the accused is sentenced based on the theory of liability of which he was convicted. As is the case in civilian jurisdictions, prosecutors in the military often present at two, if not three alternative theories of action under which an accused person could have committed the crime. This is because, in many cases, the facts are only known to the accused, and the jury only knows, beyond reasonable doubt that the accused did the crime. For example, in murder conviction where it is the case that there were no witnesses, but through circumstantial evidence, the jury is convinced beyond reasonable doubt that the accused committed the murder, the prosecutor may present one or more alternative theories regarding *actus rea*. In this case, there may be equally strong evidence that the victim suffered greatly and the accused did not suffer greatly. In these cases, the jury, behind closed doors, reaches a verdict based on, presumably, a single theory of liability, yet they return the same verdict of guilty whether the victim suffered horribly or not. Thus, when the sentence is determined by someone other than the jury that convicted him, the accused suffer may receive

a lesser or greater punishment than he is due. It should be remembered that the military judge is not allowed to be present during deliberations. Neither may the military judge consult with the jury during their deliberations. The only way to avoid the windfall or unjustly severe punishment of judge alone sentencing after conviction by jury would be to rewrite the military judge exclusionary from deliberations rule presently set forth in the Manual for Courts-Martial. This rewrite would have further repercussions in the area of constitutional guarantee to trial by jury and also in the area due process in regards to jury selection.

- Opinions going further

Some senior judge advocate argued that there should be no right to sentencing by members. The bases for these opinions included:

1. It's the standard used in all federal courts. We are a federal court.
2. Judge alone sentencing would speed up the sentencing process considerably, with no adverse effect for the Government or for the accused.
3. Judges are trained in sentencing and are in the best position to award appropriate punishment for the crime. They are far more experienced than court members in adjudging sentences. We all know that even judges vary sometimes in the sentence they would give for a particular case, but sentencing by court members is often much more unusual, the result of compromises by numerous untrained individuals.
4. If sentencing were by judge alone, then RCM 1001 could and should be substantially changed to allow far more information into the sentencing process. Federal judges are given much greater information about sentencing than are judges and members in a court - martial.
5. Judges could even be given the authority to suspend sentences - though there is no parole in the federal system.
6. Judge alone sentencing could allow for minimum mandatory sentences like the federal courts.

7. Doubts that an accused will elect to be sentenced by a judge.

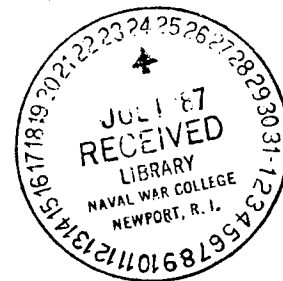
The Army SJA Poll Results

The Army JAG provided a comprehensive summary of its poll results and is included *en toto* next below.

The majority of legal advisors to Army major commands had no legal objection to the proposal to allow an accused to elect sentencing by military judge alone after being found guilty by members. However, the overwhelming majority of responses, pro and con, asserted that if such a proposal is adopted, the accused should be required to make the election prior to the entry of pleas. The reasons cited for this boiled down to concerns about economy: judges will monitor the evidence on the merits more efficiently and effectively if they know that they will be called upon to pass sentence upon the accused if convicted; better planning by members and the command is facilitated if everyone knows up front who will be doing the sentencing; counsel will be better able to structure the case in sentencing, i.e., fewer witnesses, if the judge is to do the sentencing. A number of senior leaders and staff judge advocates, particularly from large commands, expressed concern that the proposal would increase the number of contested trials with members, a situation that the Army may not be currently resourced to support. A significant minority of respondents to our survey observed that this proposal may be a big step toward judge-alone sentencing in all trials and "civilianization" of sentencing, to include sentencing guidelines; a recurring observation among individuals voicing this concern was that the members would better represent the conscience of the military community and understand the disciplinary component of sentencing better than a military judge.



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Executive Summary of
THE SENTENCING PROCESS AT COURTS-MARTIAL

This research project is an analysis of the current sentencing process at United States courts-martial, with emphasis upon theories of punishment and certain aspects of the system itself. Four specific areas are studied in detail and specific recommendations are made that would fundamentally revise the manner in which sentences are adjudged.

At present, the purposes of sentencing have not been defined by either the Congress, through the Uniform Code of Military Justice, or by the President, through the Manual for Courts-Martial. Potential sentencing objectives are explored, including deterrence, both general and specific, rehabilitation, incapacitation, retribution in the sense of adjudging deserved punishment rather than seeking vengeance, and punitive surveillance. It is concluded that all of these sentencing objectives are valid bases for a military sentencing system, and that general deterrence, which is the punishment of one individual in order to deter others from committing similar crimes, is the most important because of the military's unique requirement to maintain a disciplined force. The need to sentence in a fair and equitable manner is also recognized as a prerequisite to any sentencing system, so that similarly situated individuals are not treated in a markedly disparate manner.

The issue of whether sentencing at all special and general

1 1
courts-martial should be exclusively by military judge alone is resolved in the affirmative. Advantages of this change to current practice are considered to be: avoidance of instructional error and most instances of reversible error based upon improper argument by trial counsel; avoidance of mistrials as to sentence when the requisite percentage of members cannot agree; less perceived and actual susceptibility to improper command influence; the saving of court members' time and increased operational flexibility; the elimination of sentences which are patently inappropriate; a relative reduction in sentence disparity overall; and the imposition of sentence by an individual who by virtue of education, training, and experience in the field is an expert, with a broad frame of reference.

The present system regarding authorized punishment where a ceiling is placed upon the court's discretion but where no other guidance is given is considered to be unsatisfactory because it allows for excessive disparity. Statistics from four judicial circuits for Calendar Years 1985 and 1986 in five areas of criminal conduct were examined and reflect the disparity inherent to the current system. The recent innovations to federal criminal law establishing a determinate sentencing system through the Sentencing Reform Act of 1984 are examined in detail. It is concluded that similar changes will be beneficial to the courts-martial process: the establishment of a Sentencing Commission to promulgate guidelines for general

courts-martial sentencing based on the crime committed and the offender's prior record wherein the judge, using a table with a vertical and horizontal axis, would sentence within a relatively narrow range at the point of intersection on the table; the abolishment of parole while retaining credit in prison for good behavior; and an appeal of any sentence adjudged outside of the guidelines by either side.

Further recommendations include suspension power for the military judge, as well as the convening authority, a relaxation of current evidentiary constraints for the prosecution during sentencing, so that a more complete picture of the accused can be provided to the military judge, and the adoption of a less stringent form of punitive discharge for officers in addition to a dismissal.

Research consisted primarily of periodical articles and books by criminologists, and legal personnel, as well as the American Bar Association's Standards on Sentencing and the 1984 report of the Military Advisory Commission which, pursuant to the Military Justice Act of 1983, was convened by Congress to study certain aspects of military law, including judge-alone sentencing and suspension authority.

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THE SENTENCING PROCESS AT COURTS-MARTIAL

CHAPTER I

INTRODUCTION

A court-martial has two primary responsibilities: the determination of guilt or innocence and, if the verdict is guilty as to any offense, the determination of an appropriate sentence after presentation by the prosecution and defense of evidence designed to assist the sentencing agency in its decision. After enactment of the Uniform Code of Military Justice¹ in 1950, most scholarly writing and analytical thought has been concerned with issues related to jurisdiction and to the determination of guilt or innocence; nevertheless, because sentencing plays a vital role in the court-martial process as well as in the broader concept of military discipline, it is an important subject for analysis.

The relationship between military discipline and punishment at court-martial is a fundamental one, and it is expositive of the unique responsibilities of the armed forces within our society. Because those responsibilities include the defense of our nation and participation in combat, instant obedience and unfailing execution of orders are necessary. Such requirements are achieved by maintaining a high state of discipline, a quality that exists within a military organization from the coalescence of a number of factors, both tangible and intangible, one of which is

punishment emanating from the sentencing portion of the court-martial process.² It follows, therefore, that a servicemember can be punished before a court-martial for an offense under the UCMJ which is based upon status, such as unauthorized absence or disobedience of an order, crimes which have no parallel within the civilian society. Even though civilian courts sentence offenders for some of the same reasons as do courts-martial, such as the deterrence of other potential offenders, the unique military environment requires that the formulation of a proper sentencing structure must be grounded in the need to maintain discipline and must be sufficiently flexible to function in operational and combat environments.

The first step in formulating a sentencing system is the identification of its goals in order to provide a conceptual framework for the development of the specifics designed to achieve those goals within certain parameters of fundamental fairness and operational flexibility. Neither the UCMJ or the 1984 Manual for Courts-Martial³ contain any guidance as to the purposes of sentencing, however. British regulations provide a concise example of the type of philosophy which could be promulgated:

In deliberating on their sentence a court-martial should remember that the object of awarding punishment is the maintenance of discipline The proper amount of punishment to be inflicted is the least amount by which discipline can efficiently be maintained [T]he whole force should be in a position to realize that the punishment awarded to any individual is not more than is necessary in the interests of the force itself and for the

maintenance of that discipline without which all bodies of troops become irresponsible mobs and useless for the purpose for which they exist. It must be the object of all concerned to aim at that high state of discipline which springs from a military system administered with judgment and impartiality, and to induce in all ranks a feeling of confidence that, while no offenses will be passed over, no offender will in any circumstance suffer injustice.⁴

The failure of both the Congress, through the UCMJ, or the President, through the MCM, to articulate sentencing goals has led to the occasional promulgation by the appellate courts of their own notions in this area.⁵ Ultimate responsibility for establishing sentencing goals should rest with the legislative body, which can in turn delegate all or part of this responsibility to the executive. This concept is recognized by Article I of the United States Constitution which gives to the Congress the rulemaking power for naval and military forces and by the President's status as the Commander-in-Chief with authority delegated to him by Congress to prescribe procedural rules for military justice.⁶

In order to identify sentencing goals of a military court-martial system, a study can be made of various traditional sentencing philosophies to determine their relevance, and those which are found to be relevant can be balanced in order to establish their relative priority. Once this process has been accomplished and the goals identified, not only can the substance of these goals be incorporated into written guidance in order to give direction to the

sentencing agency, but certain specifics of the system can be analyzed in view of these objectives, and the need for change can be identified and implemented.

This paper will first discuss certain well-recognized sentencing theories to determine the content and relevance of their particular goals to the military system. Once these goals have been identified, certain critical aspects of the present system will be analyzed to determine whether or not they are properly designed and whether they meet the system's objectives. Attention will be focused upon the following issues: whether sentencing at a special or general court-martial should be accomplished by court members or by military judge alone;* whether the discretion of the sentencing agency should be reduced by limiting the range of punishment which can be adjudged; whether a military judge should have the power to suspend the sentence; whether current procedural rules regarding the manner in which the prosecution can present information concerning the accused and the circumstances of the crime to the court are properly suited to that purpose; and whether an additional punitive discharge for officers at general court-martial is desirable, one designed to be commensurate with less serious misconduct than that which warrants a dismissal.

*The summary court-martial, as a means of administering punishment without the participation of legally trained personnel, is considered more akin to nonjudicial punishment and beyond the scope of this paper.

CHAPTER II

SENTENCING THEORIES

Deterrence. Perhaps the most widely recognized sentencing theory is that of deterrence, which punishes offenders to deter future crime on the theory that individuals will avoid committing acts which they know in advance might result in eventual punishment of a more disagreeable nature than any gain to be derived from the proscribed act. For the concept to work, the individual must be rational and capable of exercising control over his own acts, must be aware of the threatened punishment should he commit the unlawful act, and, as a result of that awareness, must perceive the risk involved.¹ Deterrence appears to have a certain logical appeal as it is grounded in an elemental aspect of human nature: that one will avoid unpleasantness when the risk/reward ratio is weighted in favor of abstention. Nevertheless, deterrence has been criticized as a basis for the imposition of punishment:

Given [the] assumption of the primacy of the individual's fundamental rights, no utilitarian account of punishment, deterrence included, can stand alone. While deterrence explains why most people benefit from the existence of punishment, the benefit to the many is not by itself just basis for depriving the offender of his liberty and reputation The penalty is thus not just a means of crime prevention but a merited response to the actor's deed . . . expressing moral reprobation for the wrong. In other words, while deterrence accounts for why punishment is socially useful, [it does not] explain why that utility may justly be pursued at the offender's expense.²

Other criticisms of deterrence include its inability to prevent impulsive acts which, by their very nature, are committed

without a logical assessment of consequence and, on a more practical level, that it does not work because crimes are constantly being committed. On the other hand, these criticisms may be too facile, as undoubtedly some people are deterred from acting impulsively, notwithstanding their temporary inclination to the contrary, because they do think of the potential consequence before they consummate the act, and some people who never commit a crime may do so because they are not willing to risk punishment. The difficulty of accurately measuring deterrence is an obvious one: individuals who in fact refrain from criminal behavior because of a disinclination to risk punishment do not come forward to be counted, nor do they acknowledge their motivation for lawful behavior.

Deterrence consists of more than one type. Specific deterrence means to impose punishment upon an offender so that he, specifically, will not commit similar offenses in the future. According to this aspect of the theory, an offender who commits a crime which is less serious than another but more susceptible to being repeated may warrant more severe punishment.* General deterrence supports punishing an individual to prevent others from committing like offenses. Deterrence can be absolute, by deterring an individual throughout his lifetime from committing a certain act, because he perceives the risk involved. It can also be restrictive, in

*An example would be sentencing a burglar more severely than an individual who seriously injured another under extraordinary and perhaps provocative circumstances unlikely to reoccur.

that an individual will curtail the type or magnitude of his violation, believing that the curtailment will reduce either the likelihood or degree of punishment. Examples are the motorist who, rather than ignoring the stop sign altogether, reduces his speed significantly while never coming to a stop, or the thief who commits a burglary of a dwelling house by day rather than at night, because he knows the penalty for the latter is significantly more severe.

The question of whether punishment must swiftly follow the act, or at least the apprehension for the act, is controversial. One theory is, at least with respect to specific deterrence of the individual, that swift punishment is critical to the point where the amount of punishment imposed diminishes in comparison.³ Another attitude is that the importance of swift punishment is minimal because individuals conceptualize experiences over extended periods of time and, in some cases, because "the delay in legal punishment [is] no less discomforting than the punishment itself,"⁴ and therefore provides an added deterrent.

Another point of view is that the certainty of punishment, rather than its quantity or speed, provides the most potent deterrent. More likely, it is a combination of certainty, quantity, and celerity of punishment which creates the most effective preventive of crime. At any rate, notwithstanding the difficulty of measuring deterrence and its presumptive reliance upon certain assumptions of rationality, its logically

grounded base and potential benefit to society warrant its consideration as a cornerstone of any sentencing system. Moreover, deterrence is even more important to the military than to civilian jurisdictions because the military, as a result of its requirement to maintain discipline, can tolerate crime to a lesser degree. Because most court-martial sentences for serious crimes include punitive discharges which have the practical effect of removing the offender from the military environment, general deterrence appears to be an even more important goal than specific deterrence designed to prevent individual recidivism.

Before deterrence can work, sentences must be published to the community using means such as the local military newspaper and unit formations so that the risk will be perceived. Further, the type of sanction ultimately imposed must be sufficiently unpleasant to outweigh any perceived advantage of committing the crime. This is not to suggest that punishment reach extremes in either nature or quantity; however, if, for example, a naval brig is perceived as a place of relative comfort compared to conditions outside, it is questionable whether confinement would be perceived by many as a risk in any sense.

Incapacitation. If an individual, after conviction, is sentenced to confinement, he will necessarily be removed for some time from the environment in which he committed the crime and will generally be unable to commit additional crimes

against that community.* He can then be considered as incapacitated in the above sense. To the extent that an individual undergoing confinement would be inclined to commit additional offenses were he not confined, the concept is a valid sentencing objective. However, the conceptual quarrel with incapacitation is twofold: first, the difficulty of predicting which individuals are prone to commit additional crimes and, second, that some would be jailed longer than others for the same offense based solely on predictive estimates of future criminality which, of course, has not yet occurred.⁵ One possible solution is to use an objective methodology to make the necessary prediction by focusing strictly on the individual's arrest record, length of criminal career, and nature of offenses rather than on more subjective factors such as education and psychological profile.⁶ Although, as is the case with specific deterrence, the concept has little relevance to a crime committed under circumstances which suggest repetition would be unlikely, because a prisoner's ability to commit crime is clearly reduced, societies which are concerned about crime rates can emphasize incapacitation as a valid sentencing objective which is less speculative than deterrence.⁷ The value of incapacitation through confinement to the military services is not entirely clear. As previously discussed, most persons convicted of serious crimes by court-martial receive a

*Some crimes can still be committed in prison against that community, however, such as conspiracy.

punitive discharge as part of the sentence. In theory, this could render superfluous additional incapacitation in the form of extended confinement past the date of actual discharge. Nevertheless, for felonies which are also crimes in the civilian community, incapacitation is a valid sentencing objective for a military court to prevent the individual from committing additional offenses against the civilian community to which he will return after the execution of his punitive discharge.

Rehabilitation. Until quite recently, rehabilitation of criminals has been considered the primary purpose of the criminal justice and penological systems in the United States. This theory is grounded in the belief that most crimes are committed by individuals as a result of factors which are beyond their control, so that the function of sentencing is primarily to allow the system to cure the defect rather than to punish the wrongdoer for what may not be his own fault. Rehabilitation seeks to render individuals convicted of crimes fit for return to society through sentencing policies which expose them to treatment and programs designed to accommodate their particular needs. As an example, if one thief is considered likely to respond to prison-based treatment while another is believed more amenable to community-based programs, this is thought to be valid reason for imprisoning the one and suspending the other's sentence to confinement in entirety, conditioned on his participation in the appropriate

rehabilitative program.⁸ Thus, rehabilitation's primary goal is the alteration of behavior through means which are essentially non-punitive in nature, even though the individual will normally receive some form of punishment from a court which exposes him to the particular program or treatment.⁹ As indicated in the example of the two thieves, above, courts which sentence according to their assessment of criminals' needs will adjudge widely disparate sentences for similar offenses. The disparity is usually rationalized as required "for the protection of the public: the two [thieves] will be less likely to return to crime if each is given treatment suited to his particular need. That explanation holds, however, only if the programs work. Unless the programs can demonstrably prevent recidivism, the discrepancy in the two dispositions remains unaccounted for."¹⁰ A sentencing theory whose goal is to alter behavior is quite costly because of the perceived need to employ various specialists and to establish disparate programs both within prisons and without. The emphasis on rehabilitation has recently been questioned, largely because of dissatisfaction with recidivist statistics and increased skepticism that enough is known about human behavior to allow accurate judgment as to when rehabilitation occurs and lingering doubt that it can ever be meaningfully achieved in a prison setting.¹¹

Nevertheless, rehabilitation of certain offenders must clearly be the object of courts-martial sentences. Frequently

at special court-martial the accused has no prior record and has committed a purely military offense, such as missing movement or disrespect to a superior. Although the military could not function without criminal sanctions for these acts, an accused convicted at special court-martial for this type of offense has usually not demonstrated immoral or sociopathic behavior; he has often acted or failed to act as a result of immaturity, poor judgment, and lack of a sense of responsibility. The services should usually attempt to rehabilitate this type of offender, because rehabilitation in this type of case can be achieved and because manpower constraints may, at certain times, require it. On the other hand, because the military is neither equipped nor intended to act as a social welfare organization, members convicted of serious offenses at general court-martial are usually unfit for further service, and the military should not be responsible for their rehabilitation.

Retribution. The essence of this theory of punishment is that a wrongdoer is punished because he deserves punishment, not, as the term unfortunately connotes, that punishment is imposed for its own sake or for revenge. Retribution is grounded in the belief that, when an individual unfairly violates another's rights or society's standards, punishment is appropriate because the wrongdoer deserves a reaction from the system which merits just compensation for the unfairly obtained advantage.¹² Another basis for this theory is

society's responsibility to adequately punish its constituents for committing crimes so that citizens do not seek vengeance on their own, which in itself generates additional crimes and an anarchistic environment. The decline of personal vengeance in modern times is a result of crimes' victims generally being satisfied with the prospect of the society punishing the offender through established legal means.¹³ Retribution is a valid sentencing purpose for any jurisdiction, including the military, because it prevents vengeance, as indicated above, and because the imposition of punishment for infractions of the laws is deserved, both from a moral and logical point of view. In order to be applied equitably, the punishment must be commensurate with the crime.

Punitive Surveillance. Whenever punishment of any type causes the behavior of an offender to become more visible to authorities, that individual will be the subject of surveillance to some extent. Probation may prevent some crimes, assuming that the individual's awareness of the surveillance may cause him to reduce or eliminate criminal actions.¹⁴ In the military, a suspended sentence results in the accused undergoing a form of probation and is common. It can provide an impetus for refraining from further criminal acts, not only because the individual may realize detection is more likely due to closer scrutiny, but also because he may wish to avoid the vacation of the suspended portion of his sentence. Consequently, punitive surveillance in the military

is very much a valid objective of sentencing, assuming that the accused is capable of taking advantage of the clemency afforded by suspended punishment through improved performance and behavior.

Other Theories.

Reformation is the alteration of behavior through punishment so that an offender no longer commits offenses, not because of fear of punishment or because he has responded to rehabilitative programs, but simply because he no longer contemplates criminal acts. True instances of reformation are undoubtedly very few.

Enculturation theory provides that some will refrain from actions known to be illegal simply because of an almost automatic obedience to the law, rather than the desire to avoid punishment.¹⁵ Consequently, this theory depends upon the individual's knowledge or awareness of the law, which, in certain more obscure areas, can be largely dependent upon the publicity those laws have received.

Stigmatization involves the public identification of an individual as a criminal, due to conviction and sentence, and results in social condemnation. The validity of this objective depends in large part upon the individual's societal orientation, in that conviction for crimes can be condemned or condoned depending upon the perspective of the observer.¹⁶ Also, this concept applies only to crimes of a certain level of seriousness, since some violations or misdemeanors are either

so minor or so commonly committed by others that they are accepted as normal behavior notwithstanding their technical illegality.

As we have seen, most of the theories discussed above have at least general applicability as a basis for the imposition of punishment, yet no one theory is so clearly superior that it should stand alone as a basis for the imposition of criminal sentences. Moreover, certain deficiencies exist within each theory:

Incapacitation and rehabilitation cannot, standing alone, serve as the basis for a just sentencing system, the first on the grounds that some of the guilty would completely escape punishment, and the second because of its present general ineffectiveness. Individual deterrence . . . can be criticized based on our inability to predict . . . what punishments change behavior, or indeed, when an individual's behavior has been sufficiently modified General deterrence also suffers from a lack of predictability, as well as its lack of focus on the wrongdoer. [Retribution fails] to consider the culpability of the offender and [his] degree of dangerousness [to] society¹⁷

Deterrence, general and specific, incapacitation, rehabilitation, retribution, and punitive surveillance all have a place as objectives for the imposition of punishment by court-martial, with general deterrence as the most important because of disciplinary requirements.* Accordingly, the above sentencing objectives should be officially identified so that those responsible for adjudging sentences will have standards upon

*Reformation, enculturation, and stigmatization are not included because of the relative obscurity of their principles.

which to fashion them, and so that the sentencing system itself can be analyzed to ensure it is consistent with these objectives.

CHAPTER III

THE SYSTEM

Once convicted, a military accused faces the sentencing portion of the trial, during which his counsel presents matter to the court with the objective of obtaining as lenient a sentence as possible. The prosecutor, on the other hand, is charged with presenting to the court evidence of previous convictions, matters in aggravation, and available evidence which may bear upon the accused's lack of potential for future service. The proceeding, like the trial on the merits of the case, is adversarial in nature, in that the prosecution and defense are expected to present opposing points of view, and both have the option through motions and objections, to seek to exclude the opposing side's evidence. The sentence is determined by the same forum which found the accused guilty, either a military judge or a court composed of members, according to a choice made by the accused before the trial started. This portion of the trial is usually not lengthy and normally commences immediately after the guilty finding is announced. Although an adjudged sentence can be reduced by reviewing authorities, it can never be made more severe.¹ The significance of the process from the accused's point of view is readily apparent; the military's concern, based on many of the considerations discussed in the preceding chapter, is no less significant. In addition to achieving the goals of deterrence,

incapacitation, rehabilitation, retribution, and punitive surveillance, a just sentencing system should attempt, as is presently being done in the federal system, to "provide certainty and fairness in sentencing practices by avoiding unwarranted sentencing disparities among offenders with similar characteristics convicted of similar crimes, while permitting sufficient judicial flexibility to take into account relevant aggravating or mitigating factors."² It is the thesis of this paper that certain aspects of the current military sentencing system warrant modification in order to more effectively achieve these objectives, as discussed below.

The Sentencing Agency.

As previously indicated, a military accused has the option of being tried by military judge alone or by a court composed of members; whichever forum he chooses determines guilt or innocence and, upon conviction, the sentence. According to statute, the members shall, in the opinion of the convening authority, be those "best qualified . . . by reason of age, education, training, experience, length of service, and judicial temperament."³ The members will be commissioned or warrant officers, and, if an enlisted accused requests in writing, the convening authority must detail enlisted members from a different unit than the accused to constitute at least one-third of the total membership.⁴ In addition to receiving evidence submitted by both the prosecution and defense, the members receive instructions from the military judge, prior to

their deliberations in closed session, which describe the procedural aspects of voting on sentence and which briefly recapitulate the evidence presented during the sentencing portion of the trial.⁵ A military judge "shall be a commissioned officer of the armed forces who is a member of the bar of a Federal Court or . . . the highest court of a State and who is certified to be qualified for duty . . . by the Judge Advocate General"⁶ Consequently, all military judges are law school graduates, members of a bar in good standing, generally in the grades of 0-4 and 0-5 for special courts-martial and 0-5 and 0-6 for general courts-martial, with active service as a judge advocate ranging from five to twenty-five years. Some of these officers have extensive experience on the bench, as much as ten years or more, while most serve intermittently as a military judge between other tours both within and without the legal services field. All services require these officers to attend a special course of study at a service school which is specifically designed to prepare them for judicial duties, and many during the course of their tour attend additional, often quite sophisticated schools in related subjects both at military and civilian institutions.⁷ Military judges report operationally to a chief trial judge, usually through a circuit judge with regional responsibilities. Military judges are typically attached for administrative purposes only to a local command. They receive performance evaluations from other, more senior military judges or, in the case of a chief trial judge,

from the Judge Advocate General or his deputy. With this background in mind, the question of whether military judges should sentence in all cases must be analyzed in view of its potential impact on the military justice system as it presently exists, both in general and in regard to certain specific issues.

A procedural dilemma which can result, albeit infrequently, when court members determine sentence is the "hung jury." Sentence is determined by concurrence of two-thirds of the members present when the vote is taken, although no accused can be sentenced to confinement for more than ten years unless three-fourths of the members present concur, and the death penalty requires a unanimous vote.⁸ The Manual for Courts-Martial provides that it is the duty of each member to vote for an appropriate sentence regardless of his opinion or vote as to the accused's guilt, and that if the required number of members fail to agree after a reasonable effort to do so, a mistrial may be declared by the military judge and a rehearing on sentence may then be convened.⁹ The problem is most likely to occur when the law requires a certain mandatory sentence, as in premeditated and felony murder, where the punishment must be either life imprisonment or death.¹⁰ Because life imprisonment, the mandatory minimum sentence, requires the concurrence of at least three-quarters of the members and death, the maximum, requires unanimity, assuming that the conviction was obtained by the minimum number of votes, which is two-thirds, our procedural rules normally require in this situation that

one or more of the members who voted for acquittal on the merits must concur in the vote on sentence.* One respected commentator's point of view is that having members vote on sentence in spite of their prior vote of acquittal is justified because the guilty finding once tendered by the panel as a unit becomes a fixed fact not subject to opinion.¹¹ However, the procedure is illogical, inconsistent with human nature, and decidedly biased in favor of the accused. The vesting of sentencing authority exclusively in the military judge would prevent this problem.

A frequent criticism of the military justice system is that the convening authority has the potential to exercise undue influence over the process because he can appoint members whom he perceives will vote to convict notwithstanding the evidence or will vote to impose sentence at or near the maximum notwithstanding mitigating or extenuating circumstances. Command influence is not prevalent; to the contrary, recorded cases and practical experience demonstrate it is most uncommon. Nevertheless, its spectre still exists and it provides a basis of criticism for those who seek to disparage military justice, so that procedural changes which diminish the perception of its existence, from points of view both within and without the military, are desirable. "It is likely that skepticism

*Another example would be conviction of an offense by the minimum two-thirds vote, or four, in a case with six members, with one member who voted for conviction joining the two who voted to acquit in favor of no confinement, contrary to the remaining three who insist on it.

regarding the impartiality of the military justice system will continue so long as there exists structural susceptibility to pressures from command authorities."¹² The designation of the military judge as the sole sentencing authority would be a positive step toward eliminating this skepticism, because, as mentioned above, a judge is not part of the convening authority's operational chain of command and his performance is evaluated by other military judges.

Other attendant benefits would result from the elimination of members from the court-martial process. Because the military judge is required to instruct the members on sentencing procedures and to summarize the evidence presented, an error is occasionally made in this process which requires disapproval of the sentence and a rehearing as to that portion of the trial. Additionally, counsel for the government, when arguing his point of view to the court, is required to stay within certain bounds, and if he exceeds those limitations error can result. If the court is constituted with members, the appellate authorities that review records of trial have been decidedly more inclined to find that the improper argument of the trial counsel constituted reversible, rather than non-prejudicial error,* once again requiring disapproval of the

*The rationale for the distinction is usually that a military judge, as an experienced professional, is much less likely to be affected by improper argument than a court composed of laymen.

sentence and a new proceeding. Although it should be stressed that instructional error by the military judge and improper argument by the trial counsel resulting in reversible error is infrequent, sentencing by military judge alone would entirely obviate the one issue and would significantly reduce the likelihood of the other's occurrence.

The ancillary benefits of sentencing exclusively by military judge alone notwithstanding, the principal issue is whether or not a military judge can be expected to do a better job of sentencing than can members, and whether or not the military justice system would gain from such a change, keeping in mind the goal of maintaining a sentencing system which applies the relevant theories of punishment while avoiding disparity as much as possible.

The question has necessarily been considered by other jurisdictions within the United States, and at present the federal courts and 43 states sentence through a judge. The following seven states have jury sentencing: Arkansas, Kentucky, Missouri, Oklahoma, Tennessee, Texas, and Virginia.¹³ The issue has also been studied in depth by the American Bar Association which has posited the following bases for its determination that sentencing is a judicial function which is beyond the scope of the civilian jury's role:¹⁴

1. Sentencing requires an expertise that a jury cannot possess nor develop for the one occasion it may be used.
2. Jury sentencing may result in the undercutting of the

determination as to guilt beyond a reasonable doubt, where in difficult cases a compromise might result in conviction with an unduly light sentence.

3. Sentencing disparities will necessarily result from jury sentencing because juries have no knowledge of the manner in which similar cases were previously disposed.

The study also mentions two themes that have been used as a justification for jury sentencing: that juries provide a link between community standards and the criminal justice system, and that juries are blessed with more compassion, fairness and understanding than a judge.¹⁵ In discounting these two themes, the American Bar Association concludes that they are based upon assumptions, undocumented by evidence, and that even if the themes were correct any benefits from jury sentencing would still be outweighed by the costs of inconsistency and the lack of development of a rational body of law concerning sentencing.¹⁶

A study of considerably more relevance to the military has been conducted. The Congress, pursuant to the Military Justice Act of 1983, directed the Defense Department to conduct a study of several specified legal issues, one of which was whether or not sentencing should be by military judge alone at all courts-martial constituted with a military judge. The study was conducted by an Advisory Commission of five senior active duty judge advocates and four civilian attorneys recognized as experts in military law. The Advisory Commission's report,

which warrants detailed consideration here, recommended against changing the present system, and found the following advantages and disadvantages of retaining the member-sentencing option:¹⁷

1. Advantages of retaining member sentencing:

- a. No persuasive evidence was received which convinced the Commission that judge sentencing produces more consistent sentencing. The Commission noted that in the military because a judge typically serves for a single tour of duty of approximately three or four years, he generally does not serve long enough to develop significant expertise.
- b. Because military personnel have long had the option of member sentencing, its elimination would deprive them of a valued right.
- c. Court members bring to the courtroom a sense of the community's punishment norms and, by their participation, develop respect for and knowledge of the system.
- d. Court member sentencing provides important feedback to military judges of the community's standards, thereby assisting military judges when they impose sentence.
- e. Significant numbers of accuseds prefer sentencing by members.
- f. Because judge alone sentencing might result in more sentences to confinement, operating costs would increase.
- g. No persuasive evidence was received that significant amounts of members' time would be saved by eliminating them from the sentencing process.

h. Under present evidentiary rules, the members receive the same information as does the military judge, and discipline is enhanced when members impose sentence.

i. Because a military judge travels on a circuit, he may be unaware of a particular command's concerns and standards.

2. Advantages of judge-alone sentencing:

a. The judge renders a quicker decision than members whose time away from their regular duties would be reduced.

b. Judges develop an expertise which promotes uniformity, and they are schooled in the law and sentencing rationales.

c. A judge can more equitably receive volatile evidence than can members.

d. A judge is less likely than members to sentence based on the concerns of others and is more likely to do what justice requires.

e. Relatively few trials in the Navy and Marine Corps are tried by members, so that a change would have little institutional impact.

Numerous senior line officers and judge advocates, both active duty and retired, testified before the Commission, and questionnaires were received from convening authorities and judge advocates on the issue. The following table depicts the results of the latter survey:¹⁸

TABLE I
PERCENTAGE OF RESPONDENTS FAVORING MILITARY JUDGE SENTENCING

	Army	Navy	Marine Corps	Air Force	Coast Guard	Total%	# Responses
Convening Authority	23	40	27	30	50	33	142
Staff Judge Advocate	46	67	71	62	100	62	470
Military Trial Judge	71	88	83	60	86	77	137
Military Appellate Judge	67	40	N/A	83	100	63	30
Trial Counsel	57	57	56	67	83	58	322
Defense Counsel	31	29	22	38	56	33	404

Although the written survey includes no reasons for the positions taken, the live testimony before the Commission generally favored retaining sentencing by members as an option, primarily because of a perception that this procedure constituted an important right to an accused and because command participation in the entire process of military justice enhances unit cohesion and discipline.¹⁹

As to whether or not trials by members occur with sufficient frequency to warrant consideration as a potentially significant right, the following table reflects the statistics considered by the Commission.²⁰

TABLE II
PERCENTAGE OF SPECIAL AND GENERAL COURTS-MARTIAL WITH MEMBERS

	Army	Air Force	Navy
CY 1982			
GCM	39.3	43	Not Available
SPCM: BCD/non-BCD	33/32	39 ^a	Not Available
CY 1983			
GCM	32	43	27
SPCM: BCD/non-BCD	24/32	40 ^a	8/7

^aAir Force special courts-martial statistics not available by category of BCD/non-BCD.

With the exception of Navy special courts-martial in 1983, the statistics do reflect a significant number of trials by members. This does not necessarily mean, however, that the choice was made because of a preference for member sentencing, as many accuseds choose member courts because they prefer to have members determine guilt or innocence. Moreover, a criminal defendant's interest in fairness as to sentencing is to have a knowledgeable, fair, and experienced forum making that determination. There is little doubt that a military member court, as a kind of "blue-ribbon jury" with intelligence, education, and judgment significantly exceeding that which would normally be found among a civilian jury of a defendant's peers, has the potential to fulfill those requirements, but it does not necessarily follow that the use of a military judge in all cases who ostensibly would possess those characteristics to an equivalent or even greater degree would in any way diminish this perception. To the contrary, because of a military judge's greater independence from the command structure, an accused's perception of fairness could well be enhanced. Moreover, it is unlikely the question of the sentencing forum at special and general courts-martial is a topic that is of much interest to most young servicemen. For those few who are concerned about the issue, their concern may well be because they believe that they have a better chance of manipulating a more lenient sentence from members, so that "the right to members sentencing is no more than the right to gamble

on a group of inexperienced or overly sympathetic laymen reaching a less severe sentence than a professional judge."²¹

The question of whether or not military judge sentencing in all cases will adversely affect the interests of command and will concomitantly deprive the system of the commands' input warrants discussion. It is clear that the military judge is not a member of a local command in the operational sense, nor can it be refuted that he must frequently try cases at locations well removed from the area where he lives and primarily works. Nevertheless, in the military the sense of community to which a sentencing agency should be sensitive is the sense of belonging to a military service as a whole, as opposed to a certain organization or base, and being able to assess the seriousness of an offense from that broad perspective. As a result, it may well be that the military judge's exposure to diverse locations is an advantage to gaining this broader sense of perspective. With respect to particular types of crime being frequently committed at a particular location or within a particular unit of which the military judge is not a part, this information can be brought to the attention of the court through evidence presented by the trial counsel. Although the proposed change would limit the participation of service members in the military justice system to some extent, because, as we have seen,* most trials are by judge alone, the limitation would not be significant, nor would

*See Table II, p. 27.

it necessarily limit member participation in determining guilt or innocence. Moreover, certain courts are presently tried with members from a different unit, as, for example, when a notorious crime is committed aboard ship thereby disqualifying all the ship's officers because of the actual knowledge they have of the incident.²² Also, because a special or general court-martial is an actual criminal trial, as well as an instrument of discipline, it is not practical to regard it as a training vehicle;²³ training can be achieved in a different setting prior to service as a court member, just as operational training prepares one for the actual conflict.

In formulating its opposition to judge sentencing, the Commission indicated it received "no persuasive evidence" that military judges sentence more consistently than members.²⁴ Although this lack of evidence may well be attributable to a incomplete method of receiving such evidence or the inability of available statistics to provide meaningful data, there is no question that disparity exists among judges' sentences as well as among members'. It is also correct, as pointed out in the Report, that military judges do not serve as long as their civilian counterparts and do not, as a rule, have the same catalogue of experience available.²⁵ The point, however, with respect to disparity is twofold: first, that sentencing similarly situated accuseds in a disparate manner is both unjust and disruptive of the system and, second, that military judges' sentences will be less disparate than members over the

long term because they will necessarily have more exposure than members to the sentencing process, because they will be aware of the need for a measure of consistency, and because they, as professionally trained and experienced professionals in the law, will be able to apply certain principles consistently to varying fact situations. The degree of consistency sought is not absolute; it is simply to achieve it more reliably and informatively and by doing so to eliminate the aberrative sentence, either on the excessively low or high end of the scale, which has on occasion been observed as the hallmark of member sentencing by experienced observers of military justice over a period of many years.²⁶ Moreover, the aberrative sentence is more frequently at the low end of the scale, perhaps because of members' uncertainty over their responsibilities or a tendency to disproportionately resolve sentencing issues in an accused's favor as a kind of recompense for a close decision on the merits with which they are uncomfortable. Military judges, more accustomed to resolving contested issues at courts-martial, including the ultimate issue of guilt or innocence, should have less difficulty. Another aspect of undesirable disparity that has been manifest over the years with respect to member sentencing has been a variance of sentences for similar offenses between different elements of the same service, such as the air and ground communities or some of the medical commands as compared with all other units.²⁷

Some of the pitfalls of collective decision-making, or "groupthink," are that:

1. Feelings and wishes can take the form of social pressure to conform to a popular though less effective solution.
2. An early solution that is acceptable can preclude search for a superior solution.
3. A dominant individual can impose a less-than-ideal solution through persuasiveness while a better solution may be ignored when it comes from a less persuasive source.*
4. The ego involvement of participants in solutions they advocate can lead to more effort to prevail than to seek the best solution.²⁸

Arguably, these considerations apply to group sentencing, perhaps even more so than most other endeavors because of unfamiliarity with the subject matter and a tense atmosphere prevailing because of the task's gravity.

On balance, sentencing by military judge alone has significantly greater advantages than disadvantages and should be adopted at all special and general courts-martial. During a wartime environment, the savings of members' time could be of critical importance, especially in zones where movement is difficult.²⁹ A military judge will be able to understand the sentencing objectives discussed above in Chapter II more clearly than members and should be able to more effectively apply those tenets. If somewhat more rigorous sentences result than is presently the case, the primary military sentencing goal of general deterrence--in support of discipline--is well served. Concern for the fairness of military justice from outside the

*Relative seniority in military grade can aggravate this tendency.

Department of Defense should be alleviated by adopting a system which prevails in 43 states and the federal courts and which allows for a legally-trained professional to sentence based on "a sophisticated and informed judgment which takes into account a vast range of . . . factors, from the likelihood that the defendant will commit other crimes to types of programs and facilities which may induce a change in the pattern of activity which led to the offense.³⁰

Sentencing Guidelines.

The present system regarding authorized punishment at courts-martial places a ceiling upon the discretion of the sentencing agency through the Table of Maximum Punishments, which provides the most punishment authorized by law for each offense listed.³¹ This Table exists independently of the jurisdictional maximum for summary and special courts-martial which in turn provides limits for punishment at those forums notwithstanding that a greater amount may be authorized by the Table. Except for a small number of extremely serious offenses,* military law has no provision for mandatory sentences upon conviction of a crime, and the maximum punishment provided for is simply a ceiling upon the court's discretion, leaving it free to impose any sentence between the range of no punishment, at the bottom of the scale, and the

*Spying in wartime carries a mandatory death sentence. Premeditated murder and murder committed during the course of five felonies (aggravated assault, burglary, rape, robbery, and sodomy) carry a mandatory minimum sentence to life imprisonment. UCMJ, Arts. 106, 118.

maximum authorized, at the upper end. Typically, the authorized maximums are set quite high and may not function as a realistic limitation upon the court's discretion.³² The current system, therefore, focuses maximum discretion upon the sentencing agency in a given case, potentially allowing for wide disparity between penalties imposed for the same crime committed under similar circumstances and by offenders with relatively similar criminal histories. Obviously, a certain degree of variance is desirable to the system, as no case is precisely the same. Variables do exist in each case, even when the crime is similar: the precise circumstances of the crime, the accused's prior record, the plea, the courtroom demeanor of the accused, the capability of his defense counsel, and the quality and vigor of the prosecution, among others. Moreover, whether sentences are imposed by members or military judge, a certain potential for disparity exists simply because sentences are adjudged by a variety of individuals who, as a result of varied backgrounds and personalities, assess the seriousness of the crimes from different perspectives and emotional orientations. Even assuming that sentencing agencies strive for a measure of consistency, basically different values, personalities, and experience among them constitute an inherent bias which, although in no sense blameworthy, constitutes bias nevertheless.³³ It should also be recognized that the court system exists within a bureaucracy and consequently is susceptible to its decisions being influenced by managerial

factors such as the caseload, fiscal constraints, pressures resulting from political factors and law enforcement agencies, and others.³⁴

Although some disparity, then, is inherent to any system, given that excessive disparity is counter-productive to just and efficient sentencing, statistical data within a particular system can be examined in order to determine whether or not some change to the system might be appropriate as a result of excessive disparity. Case reports of Navy and Marine Corps courts-martial are on file at the Navy-Marine Corps Trial Judiciary located at the Washington Navy Yard. The reports are prepared by the military judge in each case and contain, in addition to various administrative data, the offenses of which the accused was convicted and the sentence imposed. Certain relevant information, however, such as the circumstances of the offense, the accused's prior record, and the evidentiary material presented to the court are not contained in the case reports; this information is available only within the record of trial. Records of Calendar Years 1985 and 1986 have been examined according to a sampling of four representative judicial circuits thought to provide a balanced example of current trends within the Naval Department: Atlantic, which comprises the greater Washington, D.C. area; Piedmont, which includes all Eastern Marine Corps Bases south of Quantico, Virginia; Tidewater, which includes the Norfolk, Virginia vicinity; and Southwest, which encompasses the greater San

Diego area. A total of 270 general courts-martial case reports were used: Atlantic - 40; Piedmont - 114; Tidewater - 84; Southwest - 32. The 270 reports comprise five different crimes, which were selected to reflect a representative sampling of the type of offenses which are currently being referred to general courts-martial: robbery, which is a wrongful taking of property through force, whether threatened or applied; larceny, which is the wrongful taking of property; drug distribution, the wrongful transfer of controlled substances to another, with or without remuneration; desertion, unauthorized absence with the intent to permanently remain away; and sexual assault upon a child under the age of 16. Although the sentences imposed often included reduction and forfeiture in addition to punitive discharge and confinement, only the latter two more significant punishments have been considered for the sake of comparison. The robbery category consisted of 13 cases, as set forth by the following table.

TABLE III
RANGE OF PUNISHMENTS IN ROBBERY CASES

CY	Low Sentence	High Sentence	<u>Imprisonment</u>			<u>Discharge^a</u>		
			less than 1yr	1-5yr	more than 5yr	DD	BCD	None
1985	no Disch, 18 months	DD, 14yrs	0	4	5	7	1	1
1986	DD, 1 year	DD, 12yrs	0	3	1	2	2	0

^aA dismissal imposed upon an officer has been reflected as a unit under the dishonorable discharge column.

The following 95 cases comprised the larceny category.

TABLE IV

RANGE OF PUNISHMENT IN LARCENY CASES

CY	Low Sentence	High Sentence	None less than	<u>Imprisonment</u>			<u>Discharge</u>		
				lyr	1-3yr	more than 3yr	DD	BCD	None
1985	1 grade reduction	DD, 10yrs	4	24	21	8	17	30	10
1986	1 grade reduction, \$250 fine	DD, 9yrs	4	10	15	9	9	23	6

The drug distribution category included 100 cases.

TABLE V

RANGE OF PUNISHMENT IN DRUG DISTRIBUTION CASES

CY	Low Sentence	High Sentence	less than	<u>Imprisonment</u>			<u>Discharge</u>		
				lyr	1-5yr	more than 5yr	DD	BCD	None
1985	BCD, 4mos	DD, 25yrs	3	32	21		31	25	0
1986	BCD, no confinement	DD, 32yrs	5	24	15		30	12	2

The desertion category consists of 28 cases.

TABLE VI

RANGE OF PUNISHMENT IN DESERTION CASES

CY	Low Sentence	High Sentence	less than	<u>Imprisonment</u>			<u>Discharge</u>		
				6mos	6mos-lyr	more than 1yr	DD	BCD	None
1985	DD, 56days	DD, 16mos	5		11	2	8	9	1
1986	BCD, 4mos	DD, 2yrs	3		6	1	3	7	0

Finally, the category of sexual assault upon a child under the age of 16 years consisted of 30 cases.

TABLE VII

RANGE OF PUNISHMENT IN SEXUAL ASSAULT UPON A CHILD UNDER 16 YEARS

CY	Low Sentence	High Sentence	<u>Imprisonment</u>			<u>Discharge</u>		
			less than	3yrs 3-10 yrs	More than 10yrs	DD	BCD	None
1985	BCD, 2yrs	DD, 37yrs	6	6	7	16	3	0
1986	No disch, lyr	DD, 12yrs	3	5	3	7	3	1

Although, as stated above, these statistics cannot be considered definitive or dispositive of the issue of disparity in sentencing, they seem to confirm a belief, based upon experience, that wide disparity exists. Even allowing for broad differences among individuals and their crimes, a range of confinement between one year and 14 years for robbery, between none and 10 years for larceny, between none and 32 years for drug distribution, even between 56 days and 2 years for desertion, and between one year and 37 for sexual abuse of a minor child is excessive. Moreover, as to discharge, considering the elements of robbery, desertion, and sexual abuse of a child, it is unlikely that any amount of extenuation and mitigation might warrant retention in cases of this nature.

Any system which delegates discretion to a sentencing agency in an unbridled manner increases the potential for disparity. The fact that the judgment of court-members or a military judge represents a diligent, good faith effort to

conscientiously determine an appropriate sentence is not a satisfactory rationale for an ill-advised result or a system which relies upon unguided, subjective judgments which undermine the structure of the sentencing process. The response should not be to condemn the individuals who participate in the process but rather to take action to effect change in a way that strikes a reasonable balance between a system which, pursuant to legislative or administrative action, fixes punishment in advance of trial and one, such as we have at present, which leaves the decision almost entirely to the unfettered discretion of the sentencing agency.

The federal criminal system, reflecting a long-standing concern with the issue of sentencing, has conducted studies concerning sentence disparity and has in fact taken action designed to cure the problem. A close examination of the result is warranted, and this paper will conclude that a similar response from the military is appropriate.

At a workshop conducted in 1967 for federal trial and appellate judges from the Midwest, participants were given the same presentencing reports for five defendants and requested to determine appropriate sentences. One defendant, convicted of income tax evasion, was fined by three judges, given probation by 23 others, and sentenced to confinement by the remaining 23 for terms ranging from one to five years. For a bank robber, 28 judges recommended commitment to a mental institution, three recommended supervised probation, and 14 gave prison terms

ranging from five to 20 years.³⁵ A similar study that involved 50 federal judges of the Second Circuit, which encompasses New York, Vermont, and Connecticut, asked them to each impose sentence upon 20 different hypothetical defendants charged across a broad spectrum of offenses with each judge given the same information regarding the defendant and the crime and which yielded a:

. . . wide range of disagreement Even if the extremes of sentence distribution are excluded, significant differences remain. For the most part, the pattern displayed is not one of substantial consensus with a few sentences falling outside the area of agreement. Rather, it would appear that absence of consensus is the norm.

In terms of the crucial threshold decision of incarceration versus nonincarceration, the judges disagreed on a staggering 16 of the 20 cases.

Considerable disparity also existed in the lengths of probation terms and amounts of fines.

The distribution of the sentences bore no relationship to the length of a judge's service. No evidence was found that experience on the Federal bench tends to bring judges closer together in their sentences.³⁶

Although informal sentencing seminars have been conducted in the military, most typically within judicial circuits or at schools designed to train military judges, no comprehensive study has been compiled. Nevertheless, there is no reason to believe the results would differ appreciably from the federal model. Moreover, this type of study is highly reliable because the scientific method employed ensures that each participant is given precisely the same information concerning the circumstances of the crime and the characteristics of the defendant upon which to base the hypothetical sentence.

The recent changes in the federal courts represent a shift

in emphasis from an indeterminate to a determinate sentencing system. A system can be indeterminate in either of two senses: first, if the sentencing forum exercises unfettered discretion and second, if a parole board, frequently acting many years after the sentence was adjudged, determines the actual date of release. Both of these conditions presently exist within the military. The rationale for indeterminate systems has generally been an exclusive emphasis on rehabilitation through a perceived need to "individualize" the sentence and the actual period of incarceration to the needs of the offender, so that he might be cured of whatever defect caused him to commit the crime.

Skeptical of the rehabilitative concept as a single goal of sentencing and concerned with sentencing disparity, the Congress passed the Sentencing Reform Act of 1984³⁷ designed to effectuate just punishment, deterrence, incapacitation, as well as rehabilitation, in a manner which avoids unwarranted disparity in sentences without eliminating all flexibility, and to provide honesty in sentencing by causing the adjudged sentence to be the one actually served.³⁸

The Sentencing Reform Act, as a means to achieving its goals, created a seven-member commission, composed of federal judges, attorneys, and law professors to promulgate sentencing guidelines for each federal offense tried in federal district court. The United States Sentencing Commission has issued its report to the Congress with the provisions becoming binding on

federal judges unless the Congress takes action either to change or disapprove them by 1 November 1987, and the Commission itself intends to monitor closely the results of its effort and maintains the authority to amend or add to its guidelines. The Commission has produced a stepped, structured process* wherein the individual judge will make a number of objective calculations prior to imposing a sentence within a relatively narrow range. Specifically, as reflected in Appendix I, federal crimes are broken down into 43 offense levels, numbered consecutively in ascending order of seriousness, along the vertical axis of the sentencing table. The horizontal axis contains six levels representing the accused's prior criminal history, also numbered consecutively to reflect increasing levels of prior involvement with the criminal system. The point of intersection on the table represents the range, in number of months, within which the judge has the discretion to impose sentence, noting that this range is generally relatively narrow, with the minimum figure approximately 20% less than the maximum. Other factors, however, may require an adjustment to the offense level reflected on the vertical axis of the table as follows:³⁹

1. Certain offenses which are determined to be committed under specific circumstances can adjust the offense level

*Because the Commission's final product was not available when this paper was written, the ensuing description of the Commission's work product is based upon the Revised Draft Sentencing Guidelines issued in January 1987.

either up or down a specified number of levels. As an example, with respect to certain firearms possession crimes, the level is adjusted up if the weapon was stolen and down if the possession was intended for sport or collection.⁴⁰

2. If certain general provisions exist with respect to the circumstances of the crime, the offense level will be adjusted up or down, either within the judge's discretion or within a specified number of levels. Examples of the former are unusually cruel conduct toward the victim or a diminished mental capacity on the part of the defendant, and examples of the latter are crimes committed against particularly vulnerable victims or crimes committed by defendants under a threat not amounting to a defense.⁴¹

3. If the defendant's role in the offense was either that of a leader or of a minor participant, the offense level will be adjusted up or down a specified amount accordingly.⁴²

4. If the court determines that after the offense's commission the defendant obstructed justice or committed perjury, the offense level will be adjusted upward within a specified range of one to four levels. If, on the other hand, the defendant, after the crime, has empirically demonstrated an acceptance of responsibility by, for instance, surrendering before the criminal investigation focused upon him, the court may reduce the offense level by one to three units.⁴³

Once the requisite adjustments, if any, are made, and the requisite sentence is determined from the limited range

available on the table, the last essential step is to determine the type of sentence to be imposed. Probation may generally be adjudged under the guidelines only if the minimum term of the applicable range is six months or less.⁴⁴ The process is repeated for each offense, with sentences for separate offenses to run concurrently, unless the court determines that the general purposes of sentencing are served only by a consecutive running of the periods of confinement.* Other aspects of the system are that the court can deviate from the guidelines only if extraordinary circumstances warrant; that the judge must articulate upon the record his reasons for imposing any sentence; that a sentence outside the guideline range can be appealed by either side, and that since parole is abolished, the defendant will serve the full sentence, less only a modest reduction for good behavior while incarcerated.

Although the UCMJ was specifically excluded from the new federal sentencing laws, there appears to be every reason to make similar adjustments at the general court-martial level where excessive disparity exists. At the special court-martial level, however, where punishment is limited to a bad conduct discharge, confinement and forfeiture for six months, and other attendant punishments, the range appears to be sufficiently narrow at present without requiring further restriction;

*Sentences run concurrently when the longest term of confinement for any one of multiple offenses is the actual term served; sentences for multiple offenses run consecutively when the confinement terms for each offense are added together.

moreover, a change to sentencing by military judge alone in all cases should be adequate to achieve consistency within that forum as it presently exists. Certain aspects of the federal innovations are undoubtedly controversial, but this does not necessarily imply unsuitability. For instance, the requirement for judges to articulate the reasons for imposing a particular sentence would undoubtedly encounter bureaucratic opposition and would be criticized by some as undignified and susceptible to being misperceived as an excuse, rather than as a rationale, for their actions;⁴⁵ nevertheless, this requirement increases the perception of equity within the system, may in fact increase the prestige of the judiciary through the demonstration of a reasoned elaboration on the record, and, most importantly, encourages a disciplined judicial thought process and analysis.⁴⁶

The concept of appealing a sentence to an appellate court is subject to criticism because of its potential to unduly increase the appellate workload and, perhaps, because the appellate courts lack expertise in the area of sentencing. Yet, assuming that the vast majority of sentences would fall within the guidelines, the impact of allowing appeal only for sentences that fall outside should be minimal on the appellate courts, whose corrective action would be limited to reassessment of the sentence, based on the verbatim record of

trial, to a sentence within the guidelines.*

The abolishment of parole would be a major step. Each military department, in a manner similar to the federal system, has established a system of clemency and parole which is typical of the indeterminate sentencing system, and which is exercised by an independent administrative body responsible to the Secretary. Its elimination would undoubtedly cause concern about lack of individualization in the penal process and the probability of increased prison populations beyond current capacities. As to the former objection, this paper has discussed the unacceptability of a system which emphasizes rehabilitation through indeterminacy to the exclusion of other sentencing objectives, and, as is presently the case, the officer exercising general court-martial jurisdiction over the accused should retain his authority to remit or suspend unexecuted punishment,⁴⁷ so that, for instance, if manpower requirements during wartime required prisoners to be released early from confinement, this could be accomplished through a command decision rather than an administrative one. As to prison overcrowding, guidelines of the type discussed above may well result in a greater percentage of offenders receiving terms of confinement; however, some sentence lengths may be

*A study of sentences imposed under Pennsylvania's sentencing guidelines in 1983 found that 88% of all sentences fell within the recommended ranges. J. Kramer and R. Lubitz, "Pennsylvania's Sentencing Reform: The Impact of Commission-Established Guidelines," Crime and Delinquency, October 1985, p. 481.

shorter as a reflection, in part, of sentencing agencies no longer adjudging very lengthy sentences in order to take into account the parole system* while seeking to avoid premature release.⁴⁸ As to the issue of prison population, a 1983 study of North Carolina's first year experience under a determinate sentencing law concluded that the new system "probably will not increase the prison population and may even reduce it somewhat,"⁴⁹ based upon more frequent, albeit shorter, sentences to confinement. Moreover, in 1984 Air Force, Navy, and Marine Corps prisons had the following percentiles of normal capacity, respectively: 90, 79, and 49, indicating that there is room for increased population should this occur.⁵⁰

Another concern with sentencing guidelines is that they are susceptible to circumvention by prosecutorial discretion, the decision as to the precise charge that will be brought to trial, and by plea bargaining, a process in the military where the accused agrees with the convening authority pursuant to a written pretrial agreement to a sentence limitation in exchange for a guilty plea. If the sentencing forum's discretion is significantly reduced by contracting the range of potential punishment, it follows that the prosecutorial decision as to charging "may well give prosecutors more influence over the disposition, because the choice of charge will more nearly

*At present in the military, a convict is eligible for parole after he serves one-third of his sentence or ten years, whichever is less. Eligibility for parole is not the same thing, of course, as being paroled.

determine actual sentencing outcome."⁵¹ Nevertheless, the fact that the charging decision will become more proportionately influential over the sentence adjudged does not mean that the prosecution will abuse this process by purposeful manipulation designed to achieve a certain sentence in a given case or by inartful decisions which might militate against the desired decrease in disparity by charging offenders who have committed similar offenses in a dissimilar manner. Moreover, in the unlikely event that prosecutorial actions become enough of a problem to warrant a response from the system, consideration could be given to issuing prosecutorial guidelines as well, although no such action should be taken unless experience under the new system clearly demonstrates a need.⁵² Pretrial agreements should continue in use, but only to the extent that the sentence limitation is within the guideline range for the offense to which the accused pleads guilty and for his prior criminal record. If this procedure results in more not guilty pleas because of a perception among accuseds that they do not receive adequate consideration for a guilty plea, this is not necessarily undesirable as the system should be able to accommodate such an increase. On the other hand, because under a guideline system confinement is assured for most offenses, as opposed to the current procedure where a court-martial can literally impose "no punishment" for all but a very few offenses, many accuseds may reason that a bargain for the lower end of the range is wise in view of the certainty of

confinement upon conviction.

None of these controversial areas provide good reason for not going forward. Either the Congress or the President should act to create a sentencing commission for United States general courts-martial composed of one active duty judge advocate in the grade of O-6 or above from each armed service who has a military justice background, one active or former member of the Court of Military Appeals, two unrestricted line officers in the grade of O-6 or higher who have exercised court-martial convening authority and who have extensive experience as general court-martial members, and two civilian law professors or practitioners who have demonstrated expertise in military law. The entity which creates the commission must provide it with policy guidance concerning the sentencing objectives discussed earlier so that a balance can be achieved among those objectives in the guidelines themselves, with emphasis upon general deterrence. The commission must conduct among others, two critical analyses: first, its own determination of the relative severity of offenses triable by general court-martial on a basis of the inherent blameworthiness of each offense in a military setting; second, a determination of what should be the ranges of confinement and discharge for a given offense, or grouping of offenses considered to be of equal blameworthiness. The federal model will provide some basis for going forward but should not be considered as necessarily constituting a persuasive example. Because the guidelines would be

prescriptive and therefore susceptible to exception in extraordinary cases, the maximum deviation permissible would have to be set forth on both ends of the range. Of particular importance to a reduction of excessive disparity is the need for the system to provide guidance as to when an offender must be confined and when a sentence can be suspended, in whole or in part. The resultant product would ensure that individual cases are decided "on legal grounds of general application--applicable alike to all judges as well as all defendants . . . [which] means to regulate the subject according to law" not by individual judicial whim,⁵³ and that accuseds will know upon being confined when their term of confinement will end, subject to good time credits, since parole and its attendant uncertainty will be abolished. The Commission should be kept in existence after the guidelines are initially promulgated, with personnel changes as necessary, and should be required on at least a biennial basis to review the empirical results of its work and to implement changes as appropriate.

Suspended Sentences.

Military law at present provides that the convening authority, as well as certain other persons designated by the Secretary concerned, has the authority to suspend sentences.⁵⁴ A military judge and court members do not possess this power, although they can recommend to the convening authority that the sentence be suspended in whole or in part, either at the

request of counsel or on their own volition. The recommendation, however, is simply that; the convening authority is under no obligation to implement the recommendation, although he is obliged to consider it.

Assuming that sentencing authority is vested exclusively in a military judge, he should exercise suspension powers in addition to the convening authority, as do all civilian judges, both federal and state. It follows logically that if any official is empowered to suspend, certainly the officer who imposed the sentence to begin with should be the first with that authority. Suspension is rarely used for sentences at general courts-martial, but for special courts-martial, where rehabilitation and punitive surveillance can be significant goals, suspension would be a most effective tool.

The Advisory Commission established by the Military Justice Act of 1983 also studied this issue. In its recommendation to not give suspension power to military judges, the Commission noted the following disadvantages and advantages of suspension power:⁵⁵

Disadvantages.

1. Commanders are better situated to make the decision because they are responsible for morale and readiness and have access to those who have the best information regarding the accused.

2. Disruption to command and animosity between judges and commanders would result from cases where the judge

suspended a discharge that the commander wished to execute.

Advantages.

1. Allowing a judge to impose a suspended discharge would give him another option to adjudging no discharge or a discharge with a recommendation for suspension and might be a more just sentence from the judge's point of view in a given case.

2. Suspension power would improve the courts' ability to achieve rehabilitation, is consistent with civilian court procedure and is not a new concept anyway, since convening authorities presently have the authority.

The cited disadvantages do not appear to be of critical significance and are not necessarily valid. The officer who convenes a court-martial is typically in command of a large organization, such as a brigade, air group, station, or base. He, very likely, may not know the accused and may never have seen him, so that the commander's information regarding the accused relevant to the suspension decision will often come from more junior officers and noncommissioned and petty officers who know the accused. All of these individuals can provide the military judge at trial with their personal opinions of the accused's potential for rehabilitation; moreover, the military judge during the course of the trial will necessarily have had some personal exposure to the accused upon which an opinion as to his character and potential can be legitimately based. The risk of animosity arising between a

commander and military judge if the latter suspends a sentence in a case where the former would not is probably less of risk than under the present system when a judge, in a case where he believes a suspended discharge is appropriate, imposes no discharge whatsoever because he cannot be sure that his recommendation for suspension of the discharge will be followed by the convening authority.

The convening authority should retain his power to suspend sentences, so that in cases where the military judge did not suspend, the convening authority is assured of being able to effect his preference. Moreover, the convening authority should retain his authority to vacate suspended sentences based upon subsequent misconduct by the accused during the probationary period. He should exercise this power both with respect to sentences he suspends, as well as those suspended by a military judge, primarily because the decision to vacate suspended punishment is not necessarily judicial in nature and because the convening authority is much more apt to be co-located in the probationer's vicinity than the military judge.

Suspension authority for the military judge is designed to be used primarily at special court-martial where, as discussed above, rehabilitation is an important goal. At general court-martial, assuming that sentencing guidelines are in effect, the system should allow for suspension of all confinement and the discharge only for selected, less serious offenses. For more serious cases, neither suspension of the discharge nor

suspension of confinement below the point where the accused would serve less than the minimum portion of the range of confinement should be authorized. Similar rules regarding suspension should apply with respect to pretrial agreements* and convening authorities' actions on the case whether or not a pretrial agreement exists. A general court-martial convening authority, however, should be able to suspend unexecuted sentences to confinement and discharge when extraordinary exigencies of the service, most usually manpower requirements in wartime, justify such actions, whereupon the reasons for the suspension should be specifically set forth in the written order directing it.**

Pre-sentencing Procedure and Punishment.

The purpose of the pre-sentencing phase of any criminal trial is to provide the sentencing authority with information regarding the accused and, if not brought out during the trial on the merits of the case, the circumstances of the offense which are relevant to the kind and amount of punishment to be imposed. Although the accused, under present procedure, is given very broad latitude in presenting evidence to the court, including specific, prior acts of good conduct which have no direct relation to the offenses of which he has been convicted, the prosecution is limited as to what it can offer. The trial

*see text, p. 48.

**see text, p. 46.

counsel can present evidence of prior military and civilian convictions⁵⁶ without any limit as to how recent they are, prior personnel records including those reflecting nonjudicial punishment,⁵⁷ and evidence or circumstances which aggravated the commission of the offense.⁵⁸ By "aggravation" is meant evidence which relates directly to the circumstances of the offense's commission and evidence which demonstrates the impact that the crime may have had on the victim or the community. Additionally, trial counsel is allowed to present opinion testimony regarding the quality of the accused's prior duty performance and the accused's potential for rehabilitation independently of any evidence to the contrary submitted by the defense, although evidence of specific acts of the accused that might form the basis of this opinion testimony can only be elicited through cross examination by the defense counsel.⁵⁹ In general, normal rules of evidence apply to the prosecution's sentencing presentation, although they are relaxed with respect to defense evidence,⁶⁰ and this portion of the trial, like the trial on the merits, is conducted as an adversary proceeding, with each counsel having the discretion to object to the opposing side's evidence and argument, and each counsel taking a position which is usually opposed to the other's. No provision allows the trial counsel to present evidence of specific acts of misconduct by the accused which cannot be categorized under one of the specifically authorized provisions, notwithstanding that these acts may be helpful to

the court in determining the character of the accused.

Evidentiary restrictions severely limiting the introduction of misconduct not charged on the question of guilt or innocence are based upon a disinclination to get involved with collateral issues and an apprehension that the court may infer from this type of evidence that the accused is a criminal type and is therefore more likely to have committed the offenses with which he is presently charged. That rationale contains merit when the issue is guilt or innocence; however, once the determination of guilt has been made, the fact that the accused previously committed prior misconduct is no longer collateral and may be highly relevant to an assessment of the accused's character by the court.⁶¹

Consequently, the rules governing admissibility of prosecution evidence concerning sentence should be modified as follows:

1. Witnesses testifying as to the accused's prior service and potential for rehabilitation should be allowed to state on direct examination the basis for their opinions, including specific acts, in addition to the opinion itself.

2. The trial counsel should be able to present evidence of prior acts of misconduct which have not resulted in a prior conviction or nonjudicial punishment and do not fit within the technical definition of aggravation evidence, defined above, if the military judge, in his discretion, determines that those

acts are sufficiently relevant to warrant admission,* and that the evidence setting forth the evidence of those acts is reliable.⁶²

3. Evidentiary restrictions regarding the format of the prosecution's evidence should be relaxed, as they are for the defense, to allow for the introduction of documentary evidence in lieu of testimony in court, based on a recognition that an accused's rights regarding confrontation and cross-examination of witnesses against him after conviction by due process of law are considerably less than beforehand; moreover, practical benefits from this procedure would be less time spent as witnesses by senior members of the accused's command and enabling victims of crime to avoid the often difficult experience of testifying on sentence.

Punishments at courts-martial include death, various deprivations of liberty, financial sanctions, reduction, reprimand, and punitive separation, and these are generally adequate. Officer separation by court-martial, however, can be effected only at general court-martial and pursuant to a dismissal, which is generally considered the equivalent of a dishonorable discharge; there is no discharge for an officer which is the equivalent of a bad conduct discharge.⁶³ As a result, in some cases officers have not been separated at general courts-martial because the misconduct was not assessed

*The relevancy requirement, for instance, would exclude acts too remote in time, such as some juvenile misconduct, and too remote in culpability, such as a minor uniform discrepancy.

as sufficiently serious, where separation would have been adjudged if a less rigorous form of punitive separation existed.* Accordingly, another form of punitive separation should be added to the range of punishment presently available at general courts-martial** in addition to a dismissal⁶⁴ and could be called, quite simply, "a punitive separation for substandard conduct as an officer."

*Often, as a result, the command will initiate administrative discharge proceedings against the officer based upon his conviction, a lengthy and costly process.

**The proposal does not extend to special court-martial which is not considered to be an appropriate forum to punitively separate an officer, considering the seriousness of that decision.

CHAPTER IV

CONCLUSION

The sentencing function at courts-martial is of critical importance to the military justice system and, because of that system's direct relationship to the maintenance of discipline, to the military as an institution. Sentencing must not be considered as merely an adjunct to the determination of guilt or innocence, but rather as a process carrying equivalent significance.

The identification of sentencing objectives for the system as a whole would allow the military judge to balance their priority in a particular case as a guide to adjudging sentence in a reasonable, ordered manner.

The choice of a military judge as the sentencing agency in all special and general courts-martial would reduce but not in itself eliminate disparity. It would, however, ensure the sentencing decision is made by an officer who, because of education, experience, and orientation is an expert in a complex field whose expertise would be taken advantage of.

The desired elimination of disparity would be accomplished through the creation of a military sentencing commission, similar to the federal model, which would be tasked to establish sentencing guidelines for military judges at general courts-martial which, without eliminating all judicial discretion, would channel it more narrowly and would require all judges to at least consider the same general conceptual

guidelines and standards of culpability during the sentencing process. The power to suspend sentences, increased latitude given to the prosecution concerning its presentation of evidence, and the adoption of a less severe punitive discharge for officers would allow the military judge to utilize more effectively the discretion that he retains and would provide a sounder base upon which to make sentencing decisions. Ultimately, the maintenance of discipline will be enhanced through a sentencing process which functions in an equitable and systematic manner.

APPENDIX I

Guideline Range in Months of Imprisonment

Offense Level	Criminal History Category					
	I (0)	II (1 or 2)	III (3 or 4)	IV (5 or 6)	V (7 or 8)	VI (9 or more)
1	0 - 1	0 - 2	0 - 3	0 - 4	0 - 5	0 - 6
2	0 - 2	0 - 3	0 - 4	0 - 5	0 - 6	0 - 7
3	0 - 3	0 - 4	0 - 5	0 - 6	2 - 8	3 - 9
4	0 - 4	0 - 5	0 - 6	2 - 8	4 - 10	6 - 12
5	0 - 5	0 - 6	1 - 7	4 - 10	6 - 12	9 - 15
6	0 - 6	1 - 7	2 - 8	6 - 12	9 - 15	12 - 18
7	1 - 7	2 - 8	4 - 10	8 - 14	12 - 18	15 - 21
8	2 - 8	4 - 10	6 - 12	10 - 16	15 - 21	18 - 24
9	4 - 10	6 - 12	8 - 14	12 - 18	18 - 24	21 - 27
10	6 - 12	8 - 14	10 - 16	15 - 21	21 - 27	24 - 30
11	8 - 14	10 - 16	12 - 18	18 - 24	24 - 30	27 - 33
12	10 - 16	12 - 18	15 - 21	21 - 27	27 - 33	30 - 37
13	12 - 18	15 - 21	18 - 24	24 - 30	30 - 37	33 - 41
14	15 - 21	18 - 24	21 - 27	27 - 33	33 - 41	37 - 46
15	18 - 24	21 - 27	24 - 30	30 - 37	37 - 46	41 - 51
16	21 - 27	24 - 30	27 - 33	33 - 41	41 - 51	46 - 57
17	24 - 30	27 - 33	30 - 37	37 - 46	46 - 57	51 - 63
18	27 - 33	30 - 37	33 - 41	41 - 51	51 - 63	57 - 71
19	30 - 37	33 - 41	37 - 46	46 - 57	57 - 71	63 - 78
20	33 - 41	37 - 46	41 - 51	51 - 63	63 - 78	70 - 87
21	37 - 46	41 - 51	46 - 57	57 - 71	70 - 87	77 - 96
22	41 - 51	46 - 57	51 - 63	63 - 78	77 - 96	84 - 105
23	46 - 57	51 - 63	57 - 71	70 - 87	84 - 105	92 - 115
24	51 - 63	57 - 71	63 - 78	77 - 96	92 - 115	100 - 125
25	57 - 71	63 - 78	70 - 87	84 - 105	100 - 125	110 - 137
26	63 - 78	70 - 87	78 - 97	92 - 115	110 - 127	120 - 150
27	70 - 87	78 - 97	87 - 108	100 - 125	120 - 150	130 - 162
28	78 - 97	87 - 108	97 - 121	110 - 137	130 - 162	140 - 175
29	87 - 108	97 - 121	108 - 135	121 - 151	140 - 175	151 - 188
30	97 - 121	108 - 135	121 - 151	135 - 168	151 - 188	168 - 210
31	108 - 135	121 - 151	135 - 168	151 - 188	168 - 210	188 - 235
32	121 - 151	135 - 168	151 - 188	168 - 210	188 - 235	210 - 262
33	135 - 168	151 - 188	168 - 210	188 - 235	210 - 262	235 - 293

APPENDIX I

Guideline Range in Months of Imprisonment

Criminal History Category

(Continued)

Offense Level	I (0)	II (1 or 2)	III (3 or 4)	IV (5 or 6)	V (7 or 8)	VI (9 or more)
34	151 - 188	168 - 210	188 - 235	210 - 262	235 - 293	262 - 327
35	168 - 210	188 - 235	210 - 262	235 - 293	262 - 327	292 - 365
36	188 - 235	210 - 262	235 - 293	262 - 327	292 - 365	324 - 405
37	210 - 262	235 - 293	262 - 327	292 - 365	324 - 405	360 - life
38	235 - 293	262 - 327	292 - 365	324 - 405	360 - life	360 - life
39	262 - 327	292 - 365	324 - 405	360 - life	360 - life	360 - life
40	292 - 365	324 - 405	360 - life	360 - life	360 - life	360 - life
41	324 - 405	360 - life	360 - life	360 - life	360 - life	360 - life
42	360 - life	360 - life	360 - life	360 - life	360 - life	360 - life
43	life	life	life	life	life	life

NOTES

Chapter I

1. U.S. Laws, Statutes, etc., "General Military Law," U.S. Code, Title 10--Armed Forces, 1982 ed. (Washington: U.S. Govt. Print. Off., 1982), Sec. 801-940 [hereinafter UCMJ].
2. As to an individual offender, it should be noted that the court-martial's role comes into play after the proscribed act has been committed and discipline has broken down within him to some extent. H. H. Brandenburg, "Discipline Requires More than Courts," The JAG Journal, Aug. 1958, p. 4.
3. Manual for Courts-Martial, United States, 1984 [hereinafter MCM].
4. Manual of Military Law, United Kingdom, 1951, Ch. 3, p. 85.
5. D. K. Vowell, "To Determine an Appropriate Sentence: Sentencing in the Military Justice System", 114 Mil. L. Rev. 2 (1986).
6. UCMJ, art. 36.

Chapter II

1. J. P. Gibbs, Crime, Punishment, and Deterrence (New York: Elsevier Scientific, 1975), p. 7.
2. A. Von Hirsch, Doing Justice (New York: Hill and Wang, 1976), p. 51.
3. H. L. Hooper, "Punishment Isn't Negative," Marine Corps Gazette, October 1979, p. 38.
4. Gibbs, p. 131.
5. J. Cohen, "Incapacitating Criminals," National Institute of Justice Research Brief, December 1983, p. 2.
6. Ibid.
7. Gibbs, pp. 32 and 34.
8. Von Hirsch, p. 12.
9. Gibbs, p. 73.

10. Von Hirsch, p. 12
11. E. M. Kennedy, "The Sentencing Reform Act of 1984," Federal Bar News & Journal, February 1985, p. 62.
12. Von Hirsch, p. 49.
13. Gibbs, pp. 82 and 83.
14. Ibid., pp. 65 and 66.
15. Ibid., p. 68.
16. Ibid., p. 85.
17. D. K. Vowell, "To Determine An Appropriate Sentence! Sentencing in the Military Justice System," 114 Mil. L. Rev. 98 (1986).

Chapter III

1. UCMJ, art. 62b.
2. U.S. Sentencing Commission, Revised Draft Sentencing Guidelines, (Washington: 1987), p. 1.
3. UCMJ, art. 25(d)(2).
4. UCMJ, art. 25(c)(1).
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12. H. E. Moyer, Jr., Justice and the Military (Washington: Public Law Education Institute, 1972), p. 784.

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56. MCM, Rule 1001(b)(3)(A).
57. MCM, Rule 1001(h)(2). In the Navy and Marine Corps, admissibility is limited to those nonjudicial punishments reflecting offenses committed within 2 years of the commission of any offense of which the accused has been convicted at the current trial.
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