

148. What are the potential benefits or disadvantages to eliminating sentencing by military panel members and implementing judge-alone sentencing? Please provide the Services' position on this topic.

USA	<p>It is important to note that there is no empirical evidence that either forum adjudges substantially disparate sentences that would require a change to the current system. In a fact-based sentencing system, such as the military's system, sentences depend on the unique facts and circumstances of the evidence admitted at court on the merits along with evidence in aggravation, mitigation, and extenuation. The right of the accused Soldier to elect a sentencing forum has been a part of the military system for over 60 years and should not be altered without careful study and consideration.</p> <p>One potential benefit of judge-alone sentencing is that the sentencing authority is a trained senior judge advocate, with knowledge and expertise in military justice, specifically the Uniform Code of Military Justice, the Rules of Courts-Martial and Military Rules of Evidence. A sitting military judge may also provide greater consistency as he will or she will have a frame of reference as to what other accused have been sentenced to in similar cases, either based on his own experience or by talking to other military judges. However, that consistency may not achieve uniformity across jurisdictions. While most judges are generally consistent within their own philosophies, they may not be consistent with the philosophies of judges from other jurisdictions.</p> <p>There would also be disadvantages to eliminating sentencing by panel members. First, panel members are arguably best situated to adjudge sentences that address all the purposes of the military law listed in the preamble to the Manual for Court-Martial, including maintenance of good order and discipline. A panel provides for a sentence for the accused Soldier by individuals who have similar backgrounds and experiences, and who may be best suited to understanding the real impact of the behavior on the unit. Second, panel members bring a diversity of views from different ranks, units, genders, races, and branches of the Army, allowing each to evaluate and discuss a fair sentence from a unique cross-section of the Army. More voices, debate, and discussion arguably lead to better and more informed decisions on sentencing.</p>
USAF	<p>Air Force JAG Corps leadership recommends that the concept of judge-alone sentencing be forwarded to the Judicial Proceedings Panel (JPP) and the Military Justice Review Group (MJRG) for further study in the context of any other proposed changes to the court-martial process. At this point, the Air Force does not have an official position on eliminating sentencing by military panel members as a stand-alone proposition.</p> <p>Military good order and discipline is not maintained by courts-martial alone. So much of that responsibility falls instead on the shoulders of the commanders and other leaders in the chain of command. As such, we have a responsibility to expose our leaders and future leaders to the court-martial process so that they may become more capable of dispensing justice where the severity of the offense falls short of requiring a</p>

	<p>court-martial (nonjudicial punishment or adverse administrative action), and making appropriate decisions and recommendations for allegations that may be headed toward court-martial. Historically, the option of court members sentencing has effectively involved the voice of the military community in determining the appropriate sentence post-conviction and exposed our military members to the process of adjudging a sentence that is fair and just at the time it is adjudged.</p> <p>If this reform is made as a stand-alone proposition, it is also important to consider the effect such a change could have on the overall fairness and perception of fairness of the military court-martial process to the accused. There is no Constitutional right to members sentencing. However it is a right that has been extended to all military accused for decades. The European Human Rights Commission determined that it is a violation of a military accused's human rights to have the court-martial members be appointed by the same commander who referred the charges to trial. The U.S. Supreme Court, however, determined that the U.S. military court-martial system is fair to the accused because any unfairness, perceived or otherwise, is counterbalanced by all of the additional rights the accused has in our system. We must be mindful that one day in the future, a similar balancing test will be accomplished. Any changes made to the military justice system that compromise any of the rights of the accused will factor into that balancing test and potentially change the equation. We will not know if we have done too much to compromise the rights of the accused until that balancing test is re-performed. Therefore, in the meantime, we must tread lightly regarding any changes perceived to have limited the rights we afford military accuseds.</p> <p>On the other hand, there are several potentially positive aspects to judge-alone sentencing. Air Force court members routinely have less experience in the courtroom than Air Force trial judges. By design, court-martial members are also deprived of any basis for knowing what an offense is "worth" at sentencing. Eliminating members sentencing will likely lead to increased predictability and consistency of sentences in courts-martial based on the unique training and experience of military judges.</p>
USN	<p>We do not have a Service position on this matter at this time.</p> <p>Whether any changes are seen as potential "benefits" or "disadvantages" depends on perspective and on the goal of any suggested changes. The UCMJ presents a system of carefully crafted, interrelated processes, and without some understanding of exactly what one might change, and even more importantly, what the purpose of the change might be, labeling the impact as favorable or unfavorable is problematic at best. Federal District Court experiences with widely disparate sentences from sitting Article III judges gave rise to the Federal Sentencing Commission, Federal Sentencing Guidelines, and ultimately, years of litigation regarding whether the guidelines would be mandatory or advisory before the Federal system ultimately returned to discretionary sentencing by judges. Without some empirical data to support both that there is a systemic inconsistency or deficiency with members sentencing and that judge-alone sentencing would resolve the issue, consideration should be given to the</p>

	<p>objective sought by such a change and whether executing a change in sentencing would achieve this objective.</p> <p>There are obvious aspects of judge alone sentencing which would differ from members sentencing. Judges have far more experience than lay persons in sentencing and in evaluating evidence for consideration. The potential impact of "split verdicts" on sentences (outside of capital cases, unanimous verdicts and unanimous sentencing decisions are not required under the UCMJ) would be eliminated, as the judge's sentencing would be guided by balancing with the verdict. Appellate review of sentencing would likely be different, since members would no longer be subject to error potential in sentencing. However, judges are not necessarily as familiar with the impact of some crimes on specific military communities, or segments of military communities (no judge resides in a 90-man berthing space on an aircraft carrier, for example), which may influence sentences in either direction. Thus, while one might expect that sentencing proceedings would be shorter, it is likely that in some cases, the proceedings would be longer as counsel try to educate a judge regarding matters that would be second nature to some audiences in the fleet.</p> <p>Because of the need to ensure predictable impacts of changes, careful consideration must be given to a proposal for military judge sentencing. It may be useful to forward this issue as a matter for consideration by the Judicial Proceedings Panel to study more closely.</p>
USMC	<p>The Marine Corps believes that the concept merits further study by the UCMJ Comprehensive Review Group and the Judicial Proceedings Panel (JPP). Without further, comprehensive study of this proposed change and empirical evidence to support such a change, it is difficult to opine on the efficacy of modifying our sentencing procedures.</p> <p>Sec. 576(d)(2)(C) of the FY13 NDAA requires the JPP to “[i]dentify any trends in punishments rendered by military courts, including general, special, and summary courts-martial, in response to sexual assault, including the number of punishments by type, and the consistency of the punishments, based on the facts of each case compared with the punishments rendered by Federal and State criminal courts.” Under this mandate, the JPP should take up this issue.</p> <p>Additionally, SecDef ordered the Military Justice Review Group (MJRG) to conduct an eighteenth-month comprehensive review of the structure and operation of the UCMJ and the Manual for Courts-Martial. The MJRG which has a very broad mandate and has the authority to consider massive overhauls to the military justice system. Eliminating sentencing by military members would be the kind of massive overhaul in the Military Justice Review Group’s purview.</p> <p>While the Marine Corps supports additional, deliberate study of the possibility of eliminating sentencing by military members, it offers the following initial considerations. The opinions of academics on the subject of sentencing reform have</p>

	<p>been mixed.⁵</p> <p>Potential benefits with eliminating sentencing by military members include aligning the military justice system more with federal practice, potentially more uniform and consistent results, decreases in the administrative burden of a court-martial on a command (no panel members for sentencing means those Marines are back at work), and making military justice more expeditionary (eliminating the burden on a command to produce a qualified pool of members means that a convening authority may convene a court with fewer personnel). However, there is no empirical data to suggest that there is a problem with members sentencing that needs to be corrected or that judge alone sentencing will produce “more just” sentences. Additionally, eliminating sentencing by military members has the real possibility of further whittling away the rights of the accused in a time that many rights of an accused are being revised or eliminated. The military justice system works because of the delicate balance between the authority that a commanding officer has over it and the rights and protections that our laws and regulations afford an accused. Sentencing by military members is an important right of an accused that counterbalances the power of the convening authority.</p> <p>Moreover, sitting as a court-martial member is a formative event for many Marine leaders. By sitting through a trial and sentencing during a court-martial, Marines are fully immersed in the military justice system for that period of time. Anecdotally, when members agree to debrief counsel after a court-martial, they often express that their experience as a member was positive, illuminating, and changed their perception of the military justice process for the better. They take those experiences back to their units and it makes them better Marines and leaders, and enables them to better interact with the legal community and make military justice decisions with greater confidence and deliberation. Removing members from this part of the process would be a break from tradition and would remove the line community from the military justice process. As good order and discipline is one of the most important goals of military justice, having the fleet intimately involved in the process helps protect this underlying principle.</p>
USCG	<p>A military panel has the discretion to impose any sentence it determines is appropriate including the maximum punishment authorized by the Manual for Courts-Martial (MCM), any lesser punishment, or no punishment. Disadvantages of military-panel sentencing are that members can produce arbitrary or disparate sentences, be more subject to unlawful command influence than a military judge, or that members may reach a compromise “verdict” or “sentence”. A compromise verdict is one in which the members resolve uncertainty about guilt by agreeing to impose a lighter sentence (such as no confinement for an otherwise felony-level offense). Compromise verdicts may be of particular concern in sexual assault cases, especially a case that involves difficult</p>

⁵ See generally James A. Young III, *Revising the Court Member Selection Process*, 163 Mil. L. Rev. 91 (March 2000); Colin Kisor, *The Need for Sentencing Reform in Military Courts-Martial*, 58 Naval L. Rev. 39 (2009); John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 Mil. L. Rev. 1 (June 1998).

decisions regarding the credibility of the accused and the victim within the context of the overall facts of the case.

Advocates for sentencing by members, rather than by military judge alone, argue that panel members are better able to express the military community's view regarding the severity of a crime. It has also been suggested that sentencing by members affords the members an opportunity to be further involved in the military justice process and to develop as future military leaders.

An advantage to judge-alone sentencing is that it should lead to sentences that are more consistent with similar cases, although it has been argued that this will only really be achieved through the use of sentencing guidelines. The current practice in the Federal courts is for the judge to decide a sentence in consultation with a sentencing guideline. Military judges are not in the same chain-of-command as the convening authority, and are likely less subject to Undue Command Influence (UCI) than a panel of members – another possible advantage of judge-alone sentencing.

The Coast Guard is still in the process of formulating its policy with respect to sentencing by members or by military judge alone, but takes this opportunity to reiterate the advantages of judge-alone sentencing with non-mandatory sentencing guidelines. Sentencing by judge in consultation with sentencing guidelines would follow the historical progression of the UCMJ towards affording members, in certain situations, similar substantive and procedural due process rights afforded in other Federal forums.

However, the structure of Title 18 offenses and sentencing guidelines must be carefully evaluated in the context of the structure and purpose of military justice, which differ considerably. Sentencing by judge alone would preclude compromise verdicts or sentences of no punishment for felony level crimes. This is especially relevant in the context of public reaction to the disposition of sexual assault cases. Sentencing by military judge alone may also bring more cases to trial (instead of a plea), especially in those cases in which the accused is concerned that the members may act arbitrarily.