

**149.** What is the potential impact of changing unitary sentencing with one potential maximum for all of the offenses joined together to requiring specification of the maximum sentence term for each offense separately (and requiring a finding by the sentencing authority listing punishment awarded for each offense)? Please provide the Services’ position on this topic.

USA	<p>The Army opposes a change from unitary sentencing with one potential maximum for all the offenses joined together to sentencing for each separate charge without further careful study. Potentially, the proposed change could complicate both the negotiation of pre-trial agreements and the ability of the military judge to interpret and apply the quantum portions of the pre-trial agreement to an adjudged sentence. A move away from unitary sentencing would likely complicate the strategies of both the defense and the government in negotiating the pre-trial agreement, rather than agreeing upon an appropriate maximum for the entire course of conduct. Rulings by a military judge on multiplicity could render negotiated agreements void and raise appellate issues for which there is no established precedent. A move away from unitary sentencing could also encourage the trial counsel to “overcharge” in order to obtain some sentence element for every specification.</p>
USAF	<p>Sentencing during the court-martial process under the UCMJ is obviously unique. Available sentences include a reprimand, forfeitures of pay and allowances, fines, reduction in pay grade, restriction to specified limits, hard labor without confinement, confinement, a punitive separation, and death. Not all of the above-mentioned sentences apply in each case, but the number of options makes sentencing different and perhaps more dynamic than sentencing in civilian courts where most sentencing focuses on fines and/or confinement. The breadth of possibilities in a court-martial sentence allows those issuing the sentence to well craft the punishment for the individual accused, with the need for good order and discipline of the armed forces in mind. It also allows those issuing the sentence to craft a sentence that takes into consideration the criminal scenario as a whole—rather than broken into individual acts—and to view the gravamen of the conduct, rather than just the individual steps in the overall series.</p> <p>Breaking the sentence into individual components works, to a degree, in a system in which the types of sentences are limited—confinement and fines, for example. Especially in jurisdictions where sentencing guidelines provide a narrow range of punishment for each offense, an appropriate level of confinement for that offense and the individual sentences are summed for the overall sentence can be assigned. There is still an issue with the ability to punish more subjectively the gravity of the overall crime or series of crimes, but mathematically at least, sentencing in this manner where there are limited sentencing options, is feasible.</p> <p>Under the UCMJ, however, breaking the overall sentence into individual sentences for each offense becomes problematic. If an accused is being sentenced for one-time uses of one hundred different prescription drugs, for example, an appropriate sentence for the use of each individual prescription drug might be confinement for one month. In that case, the accused might get one hundred months of confinement, but no punitive</p>

	<p>discharge or reduction in rank. When viewed as a whole, however, the fact the accused was using one hundred different drugs and was likely affecting or endangering the Air Force's mission by doing so, may clearly warrant a bad conduct or even a dishonorable discharge and a reduction in rank. But viewed in a vacuum, the individual offenses may not rise to that level of punishment. This is especially true for offenses that may appear minor individually, but major collectively.</p> <p>Given the number of possible sentencing combinations in the military (and the need for such), and given the need to be able to affect an offender's standing in the military for the sake of good order and discipline, it would be difficult to assign the <i>right</i> punishment to individual offenses. Those individual punishments may appear disproportionate, overly harsh or lengthy when awkwardly married to individual charges and specifications. Or they may be insufficient (or even unfair) if designed narrowly for a given charge or specification. In either case, the individuals involved and the system itself, suffer.</p>
USN	<p>We do not have a Service position on this matter at this time.</p> <p>As noted before, the UCMJ presents an integrated system of processes and functions that do not lend themselves to surgical alterations without careful consideration of the impact on the whole. Moving to separate sentencing for each offense, for example, while retaining members sentencing, presents the potential for creating substantial litigation on appeal regarding sentence appropriateness if individual parts of a sentence appear to be impacted by the consideration of differing maximum punishments (e.g., an offense with a relatively low maximum punishment may prompt members to increase the punishment on another offense to reach a "whole" sentence that reflects the complete nature of the misconduct, or non-unanimous verdicts and divisions in a panel as to guilt may insert substantial variation on sentencing where members "compensate" for uncertainty on one offense by increasing or decreasing the punishment on another).</p> <p>Likewise, full consideration would have to be given to how moving from a "unitary" system to an "individual" system would impact six decades of common law understanding in case law under the UCMJ. The entire system of practice is predicated on related component parts, such as unitary sentencing. Any substantial change must be gauged against anticipated impacts and potentially destabilizing litigation across the system, including, but not limited to: charging decisions (consolidating individual "bad check" offenses into a "mega-specification"); how it would impact decades of jurisprudence regarding unreasonable multiplication of charges (the concept of charging as multiple offense what is essentially one crime or one act); how it would impact pretrial agreements; how it would impact referral decisions regarding the forum (Special vs. General Courts-Martial predicated on realistic maximum punishments); how it would impact regulatory guidance that has developed among the Services (calculating "good time" credit in confinement facilities or parole eligibility); and ultimately, the impact any change would have on appellate consideration regarding the applicability of decades of "sentence appropriateness" jurisprudence once the</p>

	<p>foundational predicates of unitary sentencing are altered. Altering the fundamental nature of sentencing may be possible, but as with all changes, it carries with it some risk if the full scope of unintended consequences is not anticipated. Ultimately, any unintended uncertainty that increases appellate litigation increases the pressures on appellate courts, increases the time it takes to reach finality, and decreases the "tooth-to-tail" ratio as service members remain, post-trial, on the rolls awaiting separation as appellate authorities work through impacts that were not foreseen. The idea warrants further study.</p>
USMC	<p>The Marine Corps is not aware of any positive benefit from the proposed move away from unitary sentencing and does not support a change at this time. However, the Marine Corps supports further study by the UCMJ MJRG and the 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>
USCG	<p>The military practice of including all known charges in a single trial allows nonmultiplicious charges to be punished to the maximum allowed in combination. Therefore, the accused receives one sentence for all offenses. The larger federal practice does not follow unitary sentencing and an accused is sentenced for each offense separately. Abandoning the practice of unitary sentencing may force the sentencing authority (military judge or member panel) to directly and publicly address the punishment that fits a particular crime. This may be especially relevant when sentencing a felony level crime (such as rape) in conjunction with a series of misdemeanor level offenses (such as underage drinking). The Coast Guard is still in the process of formulating its policy with respect to advocating for the abandonment of unitary sentencing, but takes this opportunity to note some advantages of this course of action. Forcing the sentencing authority to sentence each offense separately may arguably provide more transparency in the court-martial process, especially when faced with the possibility of a compromise verdict. Abandoning unitary sentencing could potentially lead to more focused charging and trials, in which the legally relevant criminal transaction is given fuller attention in place of a series of charges that may confuse or distract the trier of fact. At the same time, abandoning unitary sentencing could complicate the trial process without commensurate benefits.</p>