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Quinnipiac Law Review

2006

*25 Quinnipiac L. Rev. 401***LENGTH:** 7111 words

Article: Sentencing Disparity in Desertion and Absent Without Leave Trials: Advocating a Return of "Uniform" to the Uniform Code of Military Justice

**NAME:** By Scott Sylkatis n1**LEXISNEXIS SUMMARY:**

... On November 11, 1944, the U.S. Army convicted Private Edward "Eddie" Slovik of desertion in time of war. ... Section IV examines desertion and absent without leave ("AWOL") cases to show that a sentencing disparity exists. ... The last major change to the Manual for Courts-Martial took place in 1969 when sentencing uniformity was removed as a sentencing goal. ... The maximum punishment that can be adjudged by the sentencing authority is life if desertion is done during a time of war, five years if done with the intent to avoid hazardous duty or shirk important service, three years if desertion is terminated by apprehension, or two years if terminated by other means. ... Next, Article 86, AWOL, has a maximum punishment of one month if not absent for more than three days, six months if absent more than three days but not more than thirty days, one year if gone for more than thirty days and one year and six months if gone for more than thirty days with absent status terminated by apprehension. ... For example, for a soldier who deserts for fifteen months and is apprehended, the sentence will range from fourteen to sixteen months, allowing some discretion on the part of the sentencing authority, plus six months because of the aggravating factor. ...

**TEXT:**

[\*401]

## I. Introduction

On November 11, 1944, n2 the U.S. Army convicted Private Edward "Eddie" Slovik of desertion in time of war. n3 The Army had listed Private Slovik as a deserter for only one day when he turned himself into the Military Police. n4 In a trial lasting one hour and forty minutes, the Army convicted and sentenced him to death. n5

In contrast, on November 3, 2004, almost sixty years to the day after Private Slovik's trial, Sergeant Charles Jenkins pleaded guilty to charges of desertion n6 and aiding the enemy. n7 The charges of aiding the enemy and desertion carry a maximum punishment of death or confinement for life. n8 The Army had listed Sergeant Jenkins as a [\*402] deserter for over thirty-nine years before he finally turned himself in to military custody. n9 During his court-martial, the U.S. Army sentenced him to thirty days in prison. n10 The Army released Jenkins early for good behavior n11 after he served only twenty-five days in the brig. n12

Normally, a simple mathematical equation n13 assists in showing sentencing disparity. In this case, the calculation is not possible and not needed. Slovik deserted for one day and was executed; Jenkins deserted for thirty-nine years and served twenty-five days in prison: anyone can see the vast disparity in punishment there.

While this is the most drastic example available, sentencing disparity exists regularly. n14 The disparity exists because the sentencing authority has a high degree of latitude when fashioning the sentence. n15 One would think that with such a degree of latitude given there would be a corresponding amount of guidance provided, but this is not the

case. n16 In an organization that stresses uniformity from the first day of basic training to the last day of discharge, it is baffling that the military would choose to dismiss uniformity in an area it is most needed.

In the beginning, uniform sentences were a factor the sentencing authority was to consider when fashioning a sentence. n17 The 1969 version of the Manual for Courts-Martial (the "Manual") n18 removed sentence uniformity as a factor to consider because sentence uniformity [\*403] proved difficult to administer. n19

Since 1969, the young men and women of our Armed Forces have been treated unfairly and subjected to the passions of the sentencing authority. As a result, service members who commit similar crimes can receive vastly different sentences. Our nation's best and brightest should be guaranteed that justice is dispensed fairly and uniformly for like crimes.

This Note advocates a return of uniform sentences. Section II discusses the history and background of uniform sentences, providing the historical use of uniform sentences in the Uniform Code of Military Justice ("UCMJ") and the Manual, including background on why uniform sentences were removed from the Manual. Section III discusses why the military administers punishment and the current military sentencing guidelines. Section IV examines desertion n20 and absent without leave n21 ("AWOL") cases to show that a sentencing disparity exists. That section also analyzes desertion cases on the high and low ends of the sentencing spectrum to determine whether there are just reasons why a disparity exists. Section V proposes the plan for returning the military to uniform sentences. This Note concludes in section VI that the military should adopt the presented plan to combat the problem of sentencing disparity.

## II. History and Background of Uniform Sentences

### A. History of Military Sentencing Practices

The precursor to the modern day Manual for Courts-Martial was the Articles of War of 1775 ("Code of 1775" or "Code"). n22 The military courts using the Code of 1775 had a great deal of latitude when fashioning sentences. While types of punishments were provided n23 in [\*404] the Code of 1775, the severity of the punishment was not detailed for the courts with any specificity. n24 The punishment was only detailed "as a general (or regimental) court-martial might order ... according to the nature of the offense [or] in the court's discretion." n25 The American Articles of War of 1776 continued to allow the court's discretion, stating that the character of the offense should be considered when determining a punishment. n26 Although the Code was revised several times, the way punishment was adjudged remained basically unchanged until 1890. n27

In an 1890 amendment the phrase that punishment should be "left to the discretion of the court-martial" n28 was eliminated from the Code of 1874. n29 The phrase was replaced with guidance that the court's punishment may not, in time of peace, exceed a limit that the President prescribes. n30 An Executive Order issued on February 26, 1891, included a table prescribing the maximum punishments allowed for violating each article. n31 Military sentencing remained fairly consistent from the Code of 1775 until the enactment of the Uniform Code of Military Justice in 1950. n32

In the 1949 version of the Manual for Courts-Martial, n33 the sentencing authority was instructed to include uniformity of sentences as a factor n34 for consideration n35 when fashioning a sentence. As a result of World War II, the military was criticized for conducting too many courts-martial and was criticized because many of the punishments were unjust. n36 This prompted the Military Justice Act of 1950 n37 which resulted in the UCMJ and the modern Manual for Courts-Martial of [\*405] 1951. n38 The last major change to the Manual for Courts-Martial took place in 1969 when sentencing uniformity was removed as a sentencing goal. n39 While the military has dramatically changed since its inception in 1775, the removal of sentencing uniformity in 1969 makes the modern Manual for Courts-Martial little better than its predecessor, the Articles of War of 1775.

### B. Why Uniform Sentencing was Removed

The elimination of uniform sentences began in the case of *United States v. Mamaluy*. n40 The court in *Mamaluy* concluded that the use of sentencing uniformity by the sentencing authority was improper. n41 The *Mamaluy* court further stated "that accused persons are not robots to be sentenced by fixed formulae but rather, they are offenders who should be given individualized consideration on punishment." n42 As a rule of law, the court stated, sentences in other similar cases could not be given to the sentencing authority for comparative purposes. n43 As a result of the rule of law and the inability of the sentencing authority to compare similar cases, coupled with the fact that "military courts have little continuity," the court concluded the sentencing authority did not possess the required information to adequately adjudge a

uniform sentence. n44 Consequently, the court argued paragraph 76, which states that uniform sentences are a sentencing goal of the Manual of Courts-Martial, should be discarded and replaced with instructions of more value. n45

Today, while sentencing uniformity is no longer considered by the sentencing authority, the court of criminal appeals has been given the task of maintaining "relative" sentencing uniformity. n46 The United States Court of Appeals for the Armed Forces has defined sentencing uniformity very narrowly and only as sentences arising from cases involving co-actors involved in the same criminal act. n47 The result of Mamaluy and the United States Court of Appeals for the Armed Forces' [\*406] narrow interpretation of sentencing uniformity is that there is virtually no uniformity in sentences adjudged by the sentencing authority.

### III. Reasons for Punishment and Military Sentencing Practices

#### A. Why the Military Punishes

The military punishes an offender for basically the same reasons all offenders have been disciplined throughout history. n48 The five principal reasons include: (1) rehabilitation, (2) punishment, (3) protecting society from the offender, (4) deterrence, and (5) maintaining military order and discipline. n49 For any military to properly function, it must possess the tools to compel soldiers to perform tasks they would rather not perform. n50 This differs from civilian law which was essentially created to deter people from performing certain acts. Why the military punishes is consistent with the purpose of military law: To promote justice, maintain good order and discipline, and to promote efficiency and effectiveness within the military. n51

#### B. Current Military Sentencing Practices

Current military sentencing practices consist of the court informing the sentencing authority of the maximum punishment available and then allowing the sentencing authority to fashion the sentence with little [\*407] further guidance n52 which often times leads to a sentencing disparity.

When the sentencing authority fashions a sentence, it is given a great deal of discretion as to its severity. This distinction is in stark contrast to the relatively little guidance afforded them by the military court. n53 The instructions given the sentencing authority are limited to the types of punishment available and the maximum punishment the accused may receive. n54 Except when a mandatory minimum sentence is required, n55 the sentencing authority may prescribe any punishment, from no punishment at all, up to and including the maximum punishment allowed with no intervention from the court. n56 Beyond the court informing the sentencing authority of the maximum sentence allowed, the sentencing authority is free to give what weight it wants to the five reasons for punishment, n57 and to take any mitigating, extenuating, and aggravating factors into account. Other than the above stated directions, the sentencing authority has no further guidance from the court in fashioning the sentence. The result of this practice leads to sentences of dramatically different lengths, while the facts remain consistent, thus creating a sentencing disparity.

### IV. Analysis of Articles 85 and 86 cases n58

Disparity in sentences adjudged can be proven statistically by showing the vast standard deviation present. Then, by comparing cases on the high and low end of the sentencing spectrum, thereby showing they share similar mitigating factors and that the high end cases contain no aggravating factors, it will be demonstrated that no justification exists for the sentencing disparity.

[\*408]

#### A. Statistical Breakdown

By using statistics to breakdown the sentences adjudged it becomes clear that a sentencing disparity exists. By focusing on a specific article, such as desertion or AWOL, and showing that a high standard deviation exists, a sentencing disparity is consequently proven. n59 A sentencing disparity can be shown by reviewing the standard deviation results. n60 The standard deviation is the average of the difference from the mean. n61 Thus, the further the standard deviation number result is from zero, the greater the disparity that exists. n62

First, Article 85 desertion cases were analyzed. n63 The maximum punishment that can be adjudged by the sentencing authority is life if desertion is done during a time of war, five years if done with the intent to avoid hazardous duty or shirk important service, three years if desertion is terminated by apprehension, or two years if terminated by

other means. n64 In the cases analyzed, the sentencing range was between three months and sixty months. n65 The average sentence imposed was 26.35 months and the cases had a standard deviation of 17.4 months. n66

Next, Article 86, AWOL, has a maximum punishment of one month if not absent for more than three days, six months if absent more than three days but not more than thirty days, one year if gone for more than thirty days and one year and six months if gone for more than thirty days with absent status terminated by apprehension. n67 The cases analyzed had a sentencing range between 39 days and 450 days n68 with an average sentence of 146.7 days. n69 The standard deviation for AWOL [\*409] cases is 107.1 days. n70

By focusing the disparity analysis on specific articles and not on articles as a whole, the standard deviation calculation is not just a general indicator that a disparity exists; but in fact supports the conclusion that a disparity does exist. n71 This is because if articles as a whole were used, the differences among sentences of the various articles would not be taken into account. n72

#### B. Analysis of Cases on High and Low End of the Spectrum

The following two cases, one on each end of the spectrum from Article 85, desertion, are analyzed to illustrate that no compelling distinguishing factors existed to justify the disparity in the sentences. In analyzing the desertion cases, the focus was whether mitigating factors were present in the low end case and conversely aggravating factors present in the high end case that would justify them being so far removed from the average sentence of 26.35 months. After review of the desertion cases, mitigating factors did exist in the case on the low end, but mitigating factors that were just as compelling existed in the case on the high end of the spectrum. Thus, there does not appear to be any logical reason justifying a sentencing disparity.

The low end case, n73 where the sentence adjudged was three months, involved a sailor who jumped overboard shortly after his ship set sail. n74 His reason for jumping was that his wife of three months learned the day prior to his departure that she was pregnant but in grave danger of losing the baby. n75 Her doctor had confined her to bed because she was hemorrhaging and feared a miscarriage; this was to be their first child. n76 The sailor was gone for only one day before he turned himself into Coast Guard authorities. n77

In the high end case, n78 where the sentence adjudged was five years, [\*410] the soldier in question left his unit to return home and assist his family, which had fallen upon grim times. Prior to his departure, he had served in combat for eleven months in Korea, participated in two offensives, and received two bronze stars, after which he had rotated back to the states and was preparing to deploy to Europe. n79 His father, who owned a 138 acre farm and had been ill for fifteen months, recently had surgery for cancer; in addition, his mother was physically unable to perform the necessary work. n80 As a result, the soldier's assistance was needed or the family would lose the farm, and they would be unable to pay the father's medical bills. n81 The soldier stated that he had no intention of shirking his deployment to Europe and had every intention of returning. He had also attempted to obtain a hardship discharge, but it was not approved. n82 In this instance the soldier was gone for a little less than six months before he turned himself into the Army. n83

The analysis, as previously stated, will focus on whether reasons exist to justify the vast disparity in the sentence adjudged. In the low end case there were several mitigating factors present: the sailor was gone only one day, he had spoken to his commander about the situation, and his pregnant wife was ill. Thus, it was reasonable for the sentencing authority to justify a light sentence. Similarly, though, in the high end case there were mitigating factors present: the soldier's father was very ill, the family was in risk of losing their farm, he was a Korean War veteran with two bronze stars, he intended to return after he had assisted his family, and he had attempted to obtain a hardship discharge. In both cases the service member intended on returning and had serious family problems that, if not resolved, could have negatively impacted their performance.

In summation, while the soldier in the high end case was away longer, there are no other aggravating factors to justify such a severe sentence; but there were several mitigating factors that would have warranted a reduction in the sentence adjudged. Thus, because the cases are similar, the mitigating factors are comparable, and there were no aggravating factors present to warrant the high end sentence, there is no justification for the sentencing disparity.

[\*411]

#### V. Replacing the Current Punishment with Uniform Sentencing Guidelines

Uniform sentences in desertion and AWOL cases can improve military discipline, creating a just system whereby all service members will be treated equally and not subject to the passions of the sentencing authority. n84 This section presents new sentencing guidelines for desertion and AWOL and explains why these guidelines create a more uniform system.

First, Article 85 desertion guidelines will be presented. The current Manual for Courts-Martial only details the maximum punishment the sentencing authority may give the accused. n85 Currently, it allows for death or life in prison for desertion in time of war, five years for the intent to avoid hazardous duty or shirk important service, three years when the accused intended never to return to military control with desertion terminated by apprehension, and finally, two years when desertion is terminated by means other than apprehension. n86

First, the proposed guidelines differ from the current in that they remove death and life imprisonment as sentences. Second, the guidelines separate desertion into two categories: the first is desertion with the intent to remain away permanently n87 and the second is desertion with the goal to avoid hazardous duty ("AHD") or shirk important service ("SIS"). n88

In regular desertion cases where the service member deserts and intends to remain away permanently, a simple formula was created to determine a sentence. The length of time the service member is away from military control is matched with the corresponding heading in the proposed sentencing matrix, as seen in appendix A, to determine the range of the proposed sentence. Next, if desertion is terminated by apprehension, this fact will be seen as an aggravating factor and a mandatory additional six months would be imposed on the sentence adjudged. For example, for a soldier who deserts for fifteen months and is apprehended, the sentence will range from fourteen to sixteen months, allowing some discretion on the part of the sentencing authority, plus six [\*412] months because of the aggravating factor. Therefore, the sentence adjudged will be between twenty and twenty-two months.

Because most desertions in AHD and SIS cases occur when units are deploying to hostile territory or to avoid combat missions, n89 the accused is not normally away from military control for an extended period. As a result, the formula is adjusted to compensate so as not to allow these service members a lighter sentence. In determining a sentence, the length of time away is again taken from the matrix. Those months are then added to the number of months the unit will be deployed. n90 Finally, twelve months are added to the sentence as a deterrent factor and if desertion was terminated by apprehension, an additional six months will be applied to the overall sentence. For example, a soldier who deserts when his unit is deploying for twelve months and is gone for one month will have a sentence as follows: two to four months for the time away, plus twelve months for the time his unit was deployed, with an additional twelve months added as the deterrent factor. As the soldier was not apprehended, the total sentence would be between twenty-six and twenty-eight months.

Next, Article 86 AWOL guidelines will be presented. The current guidelines call for one month if the accused is gone not more than three days, six months if the accused is gone more than three days but not more than thirty, one year if gone for more than 30 days, and one year and six months if gone for more than thirty days and terminated by apprehension. n91 Under the current guidelines, there is no incentive for a service member to return to military control if gone for more than thirty days. Additionally, someone gone for thirty-one days could receive a stiffer sentence than someone gone for 250 days.

Under the proposed changes, as shown in Appendix B, the time away is graduated to give service members who go AWOL an incentive to return, as well as providing uniformity to sentences. With the proposed changes, two service members that are gone for 180 days will both receive between six and seven month sentences. No longer will a service member gone for four years receive a sentence similar to a service member gone for one month. n92

[\*413] The benefit of the proposed guidelines is that sentencing uniformity will be achieved while upholding the long standing rule that other cases' sentences not be given to the sentencing authority. n93 Under the proposed guidelines, the length of time the service members remain away and whether they are apprehended are the factors determinative of the amount of time the sentencing authority adjudges. With the proposed guidelines, service members will know the penalties they face before they go AWOL or desert and will not be misguided by the few cases where the penalty was very light. Finally, at long last, the punishment will fit the crime.

## VI. Conclusion

Returning sentencing uniformity to the Uniform Code of Military Justice will punish the accused based on the severity of the crimes they commit, not based on the passions of the sentencing authority. As desertion and, to a lesser extent,

AWOL, are crimes service members actively choose to commit, n94 knowing the severity of the sentence may in itself prevent the crimes from happening. The guidelines created will also encourage service members to return to military control voluntarily, thus avoiding apprehension and the resulting longer sentence. The military prides itself on uniformity and treating everyone equally. Just because a crime is committed does not mean the service member should suddenly be an individual once more. [\*414]

#### Appendix A

##### Proposed Sentence Matrix

Time Away From Military Control	Proposed Sentence
1 day - 6 months:	2 - 4 months in prison
6 months - 12 months:	8 - 10 months in prison
12 months - 18 months:	14 - 16 months in prison
18 months - 24 months:	20 - 22 months in prison
More than 24 months:	26 months in prison

##### Aggravating Factors

Apprehension	Add 6 months to sentence
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##### Example 1: Normal Desertion Case

Gone 8 months and apprehended.

(Length of Proposed Sentence from Matrix + Aggravating Factors)

Proposed Sentence from Matrix:	8 - 10 months
PLUS Aggravating Factors:	6 months
Total Sentence:	14 - 16 months

##### Example 2: AHD/SIS Cases

Gone 3 days, unit deployed 12 months, no apprehension.

(Length of Proposed Sentence from Matrix + Time Unit is Deployed + 12 month Deterrent Factor + Aggravating Factors)

Proposed Sentence from Matrix:	2 - 4 months
PLUS Time Unit Deployed:	12 months
PLUS Deterrent Factor:	12 months
Total Sentence:	26 - 28 months

[\*415]

#### Appendix B

##### Proposed Sentence Matrix

Time Away From Military Control	Proposed Sentence
Less than 30 days:	1 month
31 days - 90 days:	2 - 3 months
91 days - 150 days:	4 - 5 months
151 days - 210 days:	6 - 7 months
211 days - 290 days:	8 - 9 months
291 days - 365 days:	10 - 11 months
More than 365 days:	18 months

##### Aggravating Factors

Apprehension	Add 3 months to sentence
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##### Example 1: AWOL Case

Gone 180 days and apprehended.

(Length of Proposed Sentence from Matrix + Aggravating Factors)

Proposed Sentence from Matrix:	6 - 7 months
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PLUS Aggravating Factor: 3 months  
 Total Sentence: 9 - 10 months

### Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Criminal Offenses Homicide Criminal Abortion Penalties Criminal Law & Procedure Sentencing Capital Punishment General Overview Criminal Law & Procedure Sentencing Guidelines General Overview

### FOOTNOTES:

n1. Scott Sylkatis holds a commission as a First Lieutenant in the US Army. J.D., Cleveland-Marshall College of Law, expected May 2007; B.A., California State University San Bernardino, 2000. The author is grateful to Barbara Tyler and Darylann Sylkatis for helpful comments on drafts of this paper.

n2. The Execution of Private Slovik (NBC television broadcast Mar. 13, 1974). See also William Bradford Huie, *The Execution of Private Slovik* (Westholme Pub. 1954).

n3. Wikipedia, Eddie Slovik, [http://en.wikipedia.org/wiki/Eddie\\_Slovik](http://en.wikipedia.org/wiki/Eddie_Slovik). The United States was an active participant in World War II from December 7, 1941 to August 15, 1945. Officially, war was not declared until December 8, 1941 and formal peace with Japan was not signed until September 2, 1945.

n4. See *The Execution of Private Slovik*, *supra* note 2.

n5. *Id.* Private Slovik was one of forty-nine soldiers sentenced to death in WWII, but his was the only death sentence carried out. He holds the distinction of being the only soldier since the Civil War executed for desertion.

n6. *10 U.S.C. §885* (2000). This code section details the elements required for a service member to be charged with desertion. Although Private Slovik was convicted of desertion, *10 U.S.C. §885* was not enacted until May 5, 1950.

n7. *Id.* §904. This code section describes what elements must be present to be charged with aiding the enemy.

n8. Manual For Courts-Martial, app. 12, art. 104 (2002 ed.) [hereinafter Manual 2002] (displaying a chart detailing the maximum punishment available for each article), available at [http://www.uscg.mil/legal/mj/Flowcharts/MCM\\_Excerpts/App12.pdf](http://www.uscg.mil/legal/mj/Flowcharts/MCM_Excerpts/App12.pdf).

n9. Seattle Times Staff and News Services, U.S. to Defer Charges Against Former Soldier, *The Seattle Times*, July 20, 2004, at A6.

n10. Corky Siemaszko, Deserter Tells Horrific Tales of Life in N. Korea, *Daily News* (New York), Nov. 7, 2004, at News 46. The military judge hearing Jenkins' case stated that Jenkins had suffered enough living in North Korea thereby justifying the short sentence given.

n11. Army Deserter to be Released, *The Dallas Morning News*, Nov. 26, 2005, at A24.

n12. Tribune News Services, Army Deserter Freed After 25 days in Brig, Chicago Tribune, Nov. 27, 2004, at C10.

n13. The mean, average, and deviation of sentences would normally be used to determine if there was a disparity.

n14. Major Steven M. Immel, Development, Adoption, and Implementation of Military Sentencing Guidelines, *165 Mil. L. Rev.* 159, 186-90 (2000).

n15. See Manual 2002, *supra* note 8; Rules for Courts-Martial (R.C.M.) 1002 at II-125, available at [http://www.uscg.mil/legal/mj/Flowcharts/RCMs/RCM1001\\_1009.pdf](http://www.uscg.mil/legal/mj/Flowcharts/RCMs/RCM1001_1009.pdf). The sentencing authority, either a military judge or fellow service members, is given the latitude to fashion any sentence from no punishment to the maximum authorized by the Manual for that article.

n16. Dept. of the Army, Pamphlet 27-9, Legal Services: Military Judges' Benchbook 60-61 (Sept. 15, 2002) [hereinafter Benchbook].

n17. Manual For Courts-Martial, P 76(a)(4) (1951 ed.) [hereinafter Manual 1951].

n18. Manual of Courts-Martial, P 76 (1969 ed.) [hereinafter Manual 1969].

n19. See *infra* Section II(B).

n20. *10 U.S.C.* §885 (2000).

n21. *Id.* §886. This code section details the elements required for a service member to be charged with being absent without leave.

n22. Colonel Robert O. Rollman, Of Crimes, Courts-Martial and Punishment - A Short History of Military Justice, *11 A.F. L. Rev.* 212, 215 (1969) (discussing the early American Code of 1775).

n23. Types of punishments adjudged during the time were imprisonment, degrading, whipping, fines, carrying weights, shaving the head, standing on a barrel and being tied up by the thumbs. *Id.* at 215-16.

n24. *Id.* at 215.

n25. Compare *id.* (the statement "in the court's discretion") with Manual 2002, *supra* note 8 ("a court-martial may adjudge any punishment authorized in this Manual, including the maximum or any lesser punishment"). With the exception of adding a maximum punishment the court has little more restraint than it did in 1775.

n26. See Rollman, *supra* note 22.

n27. *Id.* at 218.

n28. *Id.*

n29. *Id.* at 217-18.

n30. Rollman, *supra* note 22, at 217-18.

n31. *Id.*

n32. See Immel, *supra* note 14, at 165.

n33. Manual of Courts-Martial (1949 ed.) [hereinafter Manual 1949].

n34. *Id.* at P 80(a). In addition, the sentencing authority is to consider the accused's character, previous convictions, and extenuating or aggravating circumstances.

n35. *Id.*

n36. See Immel, *supra* note 14, at 165. Eighty-five percent of the sentences adjudged during World War II were reduced or remitted. *Id.*

n37. *Id.*

n38. See Manual 1951, *supra* note 17.

n39. Compare Manual 1969, *supra* note 18, P 76, with Manual 1951, *supra* note 17, P 76(a)(4).

n40. *27 C.M.R. 176 (1959)*.

n41. *Id. at 180*.

n42. *Id.*

n43. *Id.*

n44. *Mamaluy, 27 C.M.R. at 180*.

n45. *Id. at 181*.

n46. See Immel, *supra* note 14, at 172.

n47. *United States v. Lacy, 50 M.J. 286, 288 (1999)*.

n48. Ekow N. Yankah, Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment, *25 Cardozo L. Rev. 1019, 1052-54 (2004)*.

n49. See Benchbook, *supra* note 16, at 61.

You should bear in mind that our society recognizes five principal reasons for the sentence of those who violate the law. They are rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of his/her crime(s) and his/her sentence from committing the same or similar offenses.

Id.

n50. See Gary L. Wells, Cover Story: Eyewitness Identification Evidence: Science and Reform, 29 *The Champion* 12, 13 (April 2005) (describing the theory of fight-or-flight). It is in human nature to seek protection when in danger, also known as fight-or-flight, yet it is the military's nature to seek that danger for that is where the enemy is located. While some are motivated by simple bravado to seek that danger others must be compelled into action by knowing the consequence of failing to act.

n51. See Manual 2002, *supra* note 8, at I-1.

n52. See Benchbook, *supra* note 16.

n53. Id.

n54. See Manual 2002, *supra* note 8; R.C.M. 1005(e)(2) at II-133.

n55. See Manual 2002, *supra* note 8, at app. 12. The offenses that carry mandatory minimum sentences are spying, premeditated murder or death that occurs during the commission or attempted commission of burglary, sodomy, rape, robbery, or aggravated arson. Spying carries a minimum mandatory sentence of death, while the others are mandatory minimum life with parole. Id.

n56. See Manual 2002, *supra* note 8.

n57. See *supra* Section III(A).

n58. Article 85 is desertion and article 86 is AWOL.

n59. This article will analyze cases without regard to which branch the service member belonged. This is because the UCMJ is applied to all branches of the military and nowhere does it state that one branch should impose stiffer sentences than another.

n60. Interview with John P. Holcomb, Jr., Ph.D., Associate Professor, Department of Mathematics, in Cleveland, Oh. (Nov. 10, 2005).

n61. Id.

n62. Id.

n63. Data on file with the author.

n64. See Manual 2002, *supra* note 8, at app. 12, art. 85.

n65. Data on file with the author.

n66. Id.

n67. See Manual 2002, *supra* note 8, at app. 12, art. 86.

n68. The author used days in article 86 cases because many of the sentences are adjudged in days and not in complete months. Additionally, by using days when the sentences are shorter it allows the reader to better visualize the disparity through the use of standard deviation.

n69. Data on file with the author.

n70. Id.

n71. See Immel, *supra* note 14, at 189.

n72. Id.

n73. *United States v. Buren C. Wimp*, 4 C.M.R. 509 (1952).

n74. On appeal, the court concluded that the trial court erred in finding that the accused had the intent or frame of mind necessary to constitute the charge of desertion. The court instead found the accused guilty of the lesser charge of absence without leave. *Id.* at 511-12.

n75. *Id.* at 510.

n76. Id.

n77. *Wimp*, 4 C.M.R. at 511.

n78. *United States v. Private Calvin Guthrie*, 12 C.M.R. 299 (1953).

n79. *Id.* at 300-01.

n80. Id.

n81. Id.

n82. *Guthrie*, 12 C.M.R. at 300-01.

n83. Id.

n84. See Benchbook, *supra* note 16.

n85. See Manual 2002, *supra* note 8, at app. 12.

n86. *Id.*

n87. Major Wayne Anderson, Unauthorized Absences, *1989 Army Law*. 3, 12 (June, 1989).

n88. This category will include cases that arise during the time of war. *Id.* at 11-12.

n89. *Id.*

n90. This is done so a service member does not receive a lighter sentence when the unit is in hostile territory. If the service member could receive a lighter sentence, it might seem like a better choice for some to desert.

n91. See Manual 2002, *supra* note 8, at app. 12, art. 86.

n92. Compare *United States v. Andre A. Williams*, 21 M.J. 360 (1986) (adjudging an original sentence of two months confinement when the service member had been AWOL for three years), with *United States v. Private Milton B. Coglein*, 10 M.J. 670, 671 (1981) (adjudging an original sentence of four months confinement when the service member had been AWOL for 19 weeks).

n93. *United States v. Mamaluy*, 27 C.M.R. 176, 180 (1959).

n94. See Anderson, *supra* note 87 (explaining the elements required for Article 85 and Article 86).