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ARTICLE, ESSAY & NOTE: THE NEED FOR SENTENCING REFORM IN MILITARY COURTS-MARTIAL

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BIO:

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LEXISNEXIS SUMMARY:

... If the military judge (or the members in a members' sentencing case with a pretrial agreement) adjudges less time than the confinement cap in the pretrial agreement, the defendant "beats the deal" and receives only what the sentencing authority has adjudged. ... Under Article 66, UCMJ, an appeal to the service court of criminal appeals occurs only when the sentence approved by the convening authority extends to a punitive discharge or a year or more of confinement. ... Even an exhaustive review of the military justice reporters provides no answer to the question of how many general courts-martial convict servicemembers of serious felony-level offenses (and what types) and then adjudge a sentence of less than a year in confinement without a punitive discharge. ... In 1989, shortly after the United States Supreme Court announced its decision in *Mistretta*, then upholding the constitutionality of the Federal Sentencing Guidelines, the Coast Guard Court of Military Review -- in the context of multiplicity -- discussed some hypothetical situations and the "obvious absurdity" of the results permitted by a system which calculates the maximum punishment as a sum of the sentences imposed for all charges of which the accused is convicted. ... Navy Reserve, Navy Operational Support Center Earle, Colts Neck, New Jersey, on active duty, did, at or near Jacksonville, Florida, on divers occasions, from on or about 1 July 2002 to on or about 31 August 2002, rape (b)(6) (PLEA - NOT GUILTY) (FINDING - NOT GUILTY) Charge II: Violation of the UCMJ, Article 125 (PLEA - NOT GUILTY) (FINDING - GUILTY) Specification 1: In that Damage Controlman First Class James R. ... Robinson's penis into the mouth of the said (b)(6) by force and without the consent of the said (b)(6) (PLEA - NOT GUILTY) (FINDING - GUILTY, except for the words "that the act was done by force and without the consent of (b)(6) Charge III: Violation of the UCMJ, Article 134 (PLEA - NOT GUILTY) (FINDING - GUILTY) Specification 1: In that Damage Controlman First Class James R.

TEXT:

[*39] **INTRODUCTION**

A military court-martial is unlike any other federal criminal jury trial in the United States for many reasons. Principal among those reasons are that it only takes two-thirds concurrence of the members to convict an accused of noncapital offenses, and the members adjudge the sentence. n1 While military courts-martial may function very well in correctly determining the innocence or guilt of the accused, n2 the present method of sentencing is inadequate for a rather

counterintuitive reason: there are no statutory or procedural safeguards to protect against unreasonably light sentences for serious crimes. In fact, "no punishment" is an authorized sentence for any crime apart from premeditated murder, certain types of felony murder, and spying. n3 Consequently, the present system of members' sentencing makes possible wildly inconsistent results, permitting unreasonably light sentences for very serious crimes.

This article will propose statutory reforms to the court-martial sentencing system in order to reduce the potential for inappropriately light sentences. This article argues that making the court-martial sentencing process more congruent with the federal criminal justice system will decrease the number of misdemeanor-level sentences adjudged for felony-level offenses at courts-martial. Part I will examine the historical underpinnings of the court-martial sentencing system. Part II will describe the court-martial sentencing process in detail, examining the many levels of protection built into the system to prevent a convicted servicemember from serving an inappropriately severe sentence, and pointing out the lack of remedies for an inappropriately light [*40] sentence. Part III will argue that statutory reforms are necessary in order to better serve the needs of the military specifically and of society generally, and that this can be accomplished without any loss of constitutional protections for the individual servicemember.

This Article advances three proposals. First, the system by which the members determine the punishment should be abandoned in favor of sentencing by a military judge. Second, a system of sentencing guidelines for felony-level crimes should be adopted in order to assist the military judge (or the members if they remain the sentencing authority) in selecting an appropriate sentence. Finally, the United States should be permitted to appeal an unreasonably light sentence.

I. THE HISTORY OF MEMBERS SENTENCING IN MILITARY COURTS-MARTIAL

It is well-established that "a court-martial is a temporary court, called into existence by a military order and dissolved when its purpose is accomplished." n4 A military court-martial is, and has always been, a judicial system by which military persons who commit crimes may be punished without a civilian trial. The constitutionality of courts-martial derives from congressional authority to govern the armed forces. n5 A court-martial is convened by an officer senior enough to be vested with court-martial jurisdiction -- the authority to convene courts-martial. n6 That officer (the convening authority) refers (sends) charges to a panel of officers (the members) for trial. n7

Historically, the officers comprising a particular court-martial adjudged the sentence following a conviction, which then had to be approved or ratified by the officer who appointed the court-martial. Prior to 1920, the highest ranking officer on a court-martial served as president of the court-martial and ruled on evidence and procedure. In 1920, Congress amended the Articles of War to require a "law member" to rule on evidence and procedure. Although Congress enacted the Uniform Code of Military Justice (UCMJ) in 1951 to standardize courts-martial throughout the military services, it was not until 1968 that Congress changed the requirement that the "law member" be a "military [*41] judge." n8 What has not changed, however, in several hundred years of courts-martial, is the requirement that when court-martial members enter findings of guilty, the members -- not the military judge -- must adjudge the sentence.

The 1928 U.S. Army Manual for Courts-Martial articulated the guidance and procedures for Army court-martial sentencing. n9 Its 1928 guidance for determining a sentence was general: "To the extent that punishment is discretionary, the sentence should provide for a legal, appropriate, and adequate punishment." n10 In contrast, the procedures by which members voted on a sentence were detailed. Members voted by secret written ballot. n11 In accordance with the then-existing Articles of War, two-thirds concurrence was required if the sentence included less than ten years in confinement, three-fourths if the sentence included more than ten years, and unanimous if the sentence was death. n12 The same procedures remain in effect today in cases where the accused elects to be tried (or sentenced) by members rather than by a military judge. n13

II. THE STRUCTURE OF A MODERN COURT-MARTIAL UNDER THE UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. §§ 801-946

A present-day court-martial looks very much like a federal jury trial. n14 A trial counsel (prosecutor) n15 presents the Government's case, and a defense attorney (or more than one) represents the accused servicemember. n16 A military judge presides over the trial, ruling on matters of evidence and procedure. n17 At [*42] the election of the accused, a panel of members (a jury) decides his guilt or innocence. The standard for determination of innocence or guilt is beyond a reasonable doubt. The Military Rules of Evidence closely track, often word for word, the Federal Rules of Evidence. Defense counsel may be a military lawyer (usually more than one) provided to the defendant for free, or a civilian attorney hired by the accused, or both. The trial counsel and military judge are lawyers as well. n18

There is mandatory appellate review of convictions -- even guilty pleas -- to the service courts of criminal appeals when an approved sentence includes more than one year of confinement or a punitive discharge. n19 The military services have separate courts of criminal appeals: the Air Force, Army, and Coast Guard each have a court of criminal appeals. The Navy-Marine Corps Court of Criminal Appeals acts on appeals for both the Navy and the Marine Corps.

A convicted servicemember may petition the Court of Appeals for the Armed Forces (C.A.A.F.), an appellate court in Washington, D.C., comprised of five civilian judges, to review a decision by a service court for "good cause." n20 The C.A.A.F. Rules of Practice and Procedure state that a factor in determining if "good cause" exists for discretionary review is whether the service court of criminal appeals "adopted a rule of law materially different from that generally recognized in the trial of criminal cases in the United States district courts." n21 There is ultimately the potential for further appellate review of the C.A.A.F. decision to the United States Supreme Court. n22 C.A.A.F. must review capital cases. n23 Additionally, the service Judge Advocate General may send a service decision to C.A.A.F. for review, regardless of whether the defense or government prevailed. n24

Notwithstanding similarities, there are also dramatic differences between courts-martial and federal jury trials. A members panel for a general court-martial in a noncapital case is comprised of five (or more) members, rather [*43] than twelve. A special court-martial only requires three (or more) members. n25 In noncapital cases, a concurrence of only two-thirds of the members is required to convict, rather than a unanimous vote. n26 Capital cases require a unanimous vote of twelve members. n27 The standard for a determination of innocence or guilt in a court-martial mirrors that of a civilian trial -- beyond a reasonable doubt -- which means that in a court-martial, a minimum of two-thirds of the members must find, beyond a reasonable doubt, that the accused committed a charged offense in order to convict.

In a members trial, the sentencing proceeding usually begins immediately after the return of a guilty verdict. Members hear witnesses and receive evidence in aggravation, extenuation and mitigation, receive further instructions on sentencing by the military judge, and deliberate on sentencing. n28 It is the members' sentencing process -- a holdover process stemming from hundreds of years of tradition -- that is antiquated and requires statutory correction.

A. While many layers of protection exist to remedy an unduly severe sentence, none exist to prevent an inappropriately light sentence.

Following conviction in a noncapital criminal trial in the United States district courts and in many state courts, the defendant is sentenced by a judge. n29 In other words, federal civilian juries do not determine the length of confinement a defendant should serve after a conviction. A rationale for judge sentencing is avoidance of wildly inconsistent results in similar cases. Federal judges are more likely to have the knowledge and experience to assess the "worth" of a particular criminal case and determine the appropriate amount of confinement.

[*44] Moreover, unlike military judges and members' panels, federal district court judges are guided by the Federal Sentencing Guidelines, n30 which are designed to ensure that sentences for similar crimes are reasonably consistent. The Federal Sentencing Guidelines are advisory in nature. n31 The advisory guideline range is based on both the nature of the offense and a probation report on the defendant. n32 The guideline range is commonly broad. The United States Supreme Court has stated, "We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory scheme." n33 However, it is also clear that the Federal Sentencing Guidelines were enacted for the purpose of moving the sentencing system "in the direction of increased uniformity." n34

The military, in stark contrast, retains its anachronistic method by which the members determine the sentence, including the length of confinement in prison, with absolute discretion and little guidance. They can adjudge anything from "no punishment" to the aggregate statutory maximum sentences for all offenses of which the accused is convicted. Admittedly, for purely military offenses, such as unauthorized absence, failing to obey an order, or dereliction of duty, members might be reasonably qualified to assess an appropriate punishment. Further, with their understanding of military society, members are able to comprehend the ramifications of uniquely military punishments such as reduction in paygrade (demotion), punitive letters of reprimand, and punitive discharges, the latter of which potentially result in a total loss of future retirement benefits, even if vested. Yet, members often lack sufficient experience with the criminal justice system to determine reasonable lengths of prison terms in the absence of guidance such as a specific range of terms from which to select a sentence. For example, suppose a Soldier or Sailor were found guilty of distribution of cocaine for sharing a small amount with a friend. If members convicted the accused, they would be free to select confinement time ranging from nothing to 15 years. n35 If this Soldier shared his cocaine with two friends, the maximum sentence would increase to thirty years. n36 If the Soldier instead distributed five hundred pounds of cocaine to a person who further distributed the drug to others, the maximum sentence would [*45] remain fifteen years with no requirement at all that *any* punishment be imposed. n37

Historically, members presumably adjudged sentences for crimes resulting from circumstances within their unique experiences as military officers. In 1987, the United States Supreme Court expanded the jurisdiction of courts-martial to include crimes committed by servicemembers that lacked any military connection. n38 As a result, military members today are routinely court-martialed for violations of federal statutes other than the military and common law crimes listed in the punitive articles of the UCMJ, some with little or no factual service connection. n39 This expansion has exacerbated inconsistency in sentencing because members are not, by and large, aware of sentences imposed in similar cases and often lack the perspective necessary to accurately determine appropriate confinement time. The sentencing instructions read to the members on rehabilitation, punishment, good order and discipline, and protection of society are general and presented to them in a vacuum with respect to other similar cases. Thus, members have little frame of reference to put the offense into context relative to other offenders. n40

The military justice system recognizes the potential for aberrant members sentencing -- at least in part -- and Congress has enacted several layers of protection for servicemembers convicted at court-martial if the adjudged sentence is inappropriately severe.

1. The servicemember's rights during court-martial sentencing

One military appellate judge has noted,

The military justice system, as it is currently designed and has developed -- with its post-World War II philosophy, [*46] revisions, and implementation of the Uniform Code of Military Justice -- is quite paternalistic in some regards, with its numerous built-in safeguards to protect the individual servicemember in his or her quest to navigate, in his or her best interests, the treacherous waters of military discipline. n41

In other words, as a matter of policy, the system is slanted in favor of the convicted servicemember.

For example, a pretrial agreement -- the military equivalent of a plea bargain -- is an agreement between the accused servicemember and the officer who convened the court-martial. During a judge-alone guilty plea with a pretrial agreement, a military judge conducts a "providence inquiry" to ensure the defendant is really guilty, and announces a sentence without knowing the punishment limitations of the pretrial agreement between the defendant and the officer convening the court-martial. n42 If the military judge (or the members in a members' sentencing case with a pretrial agreement) adjudges less time than the confinement cap in the pretrial agreement, the defendant "beats the deal" and receives only what the sentencing authority has adjudged. On the other hand, if the judge sentences the defendant to more confinement time than contained in the agreement, the excess is typically either suspended or disapproved. A military judge is not permitted to remedy a pretrial agreement he perceives as too lenient but may make a clemency recommendation to the Convening Authority to reduce an adjudged sentence. n43

The paternalistic nature of military criminal procedure is especially evident during the sentencing proceedings. Of course, as in federal court, n44 the servicemember may testify on his own behalf during either trial or sentencing or both, but during sentencing proceedings the defendant may make an "unsworn statement" without being subject to cross examination by the prosecution, the military judge, or the members. n45 The contents of the unsworn statement are largely unfettered and may even include statements about outcomes of other cases or punishments that other people have received n46 or a request for a [*47] particular sentence. Unsworn statements also often address the financial impact of the case on the defendants' dependents that would result from forfeiture of pay or a punitive discharge, or address collateral consequences of the conviction, including the onerous nature of sex offender registry when applicable.

Additionally, the defense may ask the military judge to relax the rules of evidence with respect to extenuation and mitigation, allowing the defense to present letters, affidavits and other evidence -- all of which could be hearsay -- without the test of cross examination on either foundation or reliability. n47 In this regard, the military system is similar to the federal system whereby the rules of evidence do not apply at sentencing. n48

These various procedures operate in concert to give a convicted servicemember every opportunity to persuade the members (or the judge in a bench trial) to give a light sentence. The government may submit matters in aggravation as well but cannot be certain of any confinement time, even for serious felonies like unpremeditated murder, rape, major drug distribution, robbery, theft, or extortion. Under the Articles of War, a court-martial could *increase or decrease* the severity of its sentence upon reconsideration, prior to authentication of the record, unless the increase was induced by an incorrect statement of the law by the prosecution. n49 Currently, however, a court-martial may reconsider a sentence *only* before it is announced in open court. n50

The only crimes for which there is a mandatory minimum sentence are spying (not to say espionage, which is a separate crime from spying) and premeditated and felony murder. n51 Further, where a servicemember is prosecuted for a crime under Title 18 of the United States Code (for example, distribution of child pornography), the members are never instructed on the sentencing guideline range applicable in the district courts.

2. Post-trial and appellate review of the sentence

After a court-martial has adjudged a sentence, the convicted servicemember has several opportunities to have the sentence reduced. There is no mechanism, however, to increase an adjudged sentence, though any suspended portion may be vacated in the event of subsequent misconduct. n52 [*48] This is in stark contrast to the federal system, where the United States may appeal a sentence as unreasonable. n53

In *United States v. Gall*, the defendant had pleaded guilty to conspiracy to distribute ecstasy, a Schedule I controlled substance. The district judge sentenced him to thirty-six months' probation. The United States appealed the sentence on numerous grounds, including that the district judge "incorrectly concluded that a sentence of probation reflects the seriousness of the offense" and that it "created unwarranted sentencing disparities among defendants with similar records who committed similar crimes." n54 The Eighth Circuit held that departures from the Sentencing Guidelines, though permitted, must be supported by "extraordinary circumstances" and reversed the sentencing decision, remanding the case for resentencing. n55 On writ of certiorari, the United States Supreme Court reversed the Eighth Circuit, holding that because the Sentencing Guidelines are only advisory, appellate review of sentencing decisions is limited to determining whether they are reasonable. Now, appellate courts may review a district judge's sentence "whether inside, just outside, or significantly outside the Guidelines range," albeit under a deferential abuse of discretion standard. n56 The important point is that the United States has a mechanism to appeal an unreasonably low sentence in the federal system, but not in the military system. Under the statute governing criminal appeals in the military, a service court of criminal appeals "may act only with respect to the findings and sentence approved by the convening authority." n57

a. Clemency: An accused's "best hope" for sentence relief.

After trial, a convicted servicemember may petition the officer who convened his or her court-martial for clemency. n58 Military appellate courts across the services have repeatedly noted that clemency by the convening authority is "an accused's best hope for sentence relief," n59 because the convening authority, as a military commander, has wide discretion when taking "action" on a sentence and may reduce a sentence for any reason at all. As the Court of Appeals for the Armed Forces has noted, "Action on the sentence is not [*49] a legal review." n60 Rather, a convening authority considers numerous factors in determining a sentence that is "warranted by the circumstances of the offense and appropriate for the accused." n61 The convicted servicemember has a right to "an individualized, legally appropriate, and careful review of his sentence by the convening authority." n62

The right to request clemency is so jealously guarded by military appellate courts that a convening authority will be disqualified -- often on appeal -- from taking "action" in a case where he or she has demonstrated an "inelastic attitude" toward consideration of clemency. n63 In *United States v. Davis*, an Air Force Airman petitioned his convening authority for clemency following his conviction. The Air Force General who convened Davis' court-martial had publicly commented that people caught using illegal drugs would be "fully prosecuted," and should "not come crying to him about their situations or their families." That Air Force General was chastised by the Court of Appeals for the Armed Forces for conducting the review of Airman Davis' clemency petition, and his "action" approving the sentence of three months' confinement and a bad-conduct discharge was set aside. n64

The clemency power is a meaningful chance for several types of relief. A convening authority is empowered to defer and waive forfeitures of pay in favor of a convicted servicemember's dependents. n65 A convening authority may reduce, suspend or disapprove reduction in paygrade, a fine, a punitive discharge and any portion of confinement. In fact, a convening authority may vacate a conviction altogether by disapproving the findings. n66 The accused's right to submit a request for clemency is considered to be so important that a defense counsel's failure to submit matters can constitute ineffective assistance of counsel with only a colorable showing of possible prejudice, rather than a showing of actual prejudice. n67

The Rules for Courts-Martial, however, specifically prohibit a convening authority from increasing the severity of the punishment when taking action on a sentence. n68 One notable exception to this rule is that "a bad-conduct discharge adjudged by a special court-martial could be changed to confinement [*50] for up to one year (but not vice versa)." n69 The exception stems from the military's perception that a punitive discharge is more "severe" than a term of confinement. Military appellate courts agree that "a bad-conduct discharge is recognized as the most serious punish-

ment a special court-martial may adjudge." n70 Nevertheless, this is a counterintuitive form of relief inasmuch as most servicemembers would consider a year in confinement at a military prison more severe than a bad-conduct discharge. In any event, this is the only way under military law by which a convening authority can, after trial, punish a servicemember by imposing confinement not adjudged by the court-martial. Oddly enough, neither the Rules for Courts-Martial nor the Discussion to those rules clarify how much confinement time would equate to a dishonorable discharge or dismissal. n71

This exception is not designed to be a mechanism for the government to remedy a light sentence. It is, instead, a mechanism for mitigation -- and likely absurd enough not to be seriously contemplated by those military officers who have the discretion to impose it. n72 In this regard, disapproval of a bad-conduct discharge and imposition of 364 days of confinement would have a significant collateral effect as well: the "relief" would deprive a convicted servicemember of the statutory appeal to the service court of criminal appeals. n73 Surprisingly, there is only limited caselaw addressing whether this action -- provided for in the discussion section of the rule -- is permissible and under what circumstances. n74

A second, unrelated, form of clemency is available to convicted servicemembers, separate and apart from the convening authority's clemency. Under the UCMJ, Congress has granted the four service secretaries clemency and parole powers. n75 The instructions governing the Navy Clemency and Parole Board state a policy of promoting "uniformity and consistency of application of [*51] military justice." n76 The Secretary of the Navy may lessen any punishment, reduce any confinement, and even substitute an administrative discharge for a punitive discharge. n77 This is a powerful protection for a convicted servicemember, and a term of a pretrial agreement that would deprive a convicted servicemember of clemency consideration is unenforceable. n78

b. Military appellate courts have broader powers than civilian appellate courts to protect the defendant from an unfair result.

A convicted servicemember's right to appeal to the service courts of criminal appeals is significantly broader than that of any other federal appellant in most respects. Although "clemency" is a power reserved for the convening authority, military service courts of criminal appeals have the discretion to reduce an inappropriately severe sentence. n79 Further, a servicemember's mandatory appeal is based on the sentence approved, which must include at least one year of confinement and/or a punitive discharge of any sort. n80 Thus, a servicemember does not waive his right to appellate review by pleading guilty. In fact, although an accused may withdraw from appellate review during the appellate process, the Rules for Courts-Martial prohibit any term of a pretrial agreement that would deprive the accused "of the complete and effective exercise of post-trial and appellate rights." n81

Article 66, UCMJ, governs appellate review by the service courts of criminal appeals. A servicemember may appeal his or her court-martial conviction on the basis of factual sufficiency. n82 The service court of criminal appeals has broad fact-finding powers and undertakes a *de novo* review of the findings and sentence. n83 The statute provides significant protection for servicemembers wrongfully convicted at court-martial. The test for factual sufficiency is whether, after weighing the evidence at trial and making allowances for not having personally observed the witnesses, the judges of the [*52] appellate court are convinced of the appellant's guilt beyond a reasonable doubt. n84 *By statute*, the court may judge the credibility of witnesses, determine controverted questions of fact, and substitute its judgment for that of the military judge or court-martial members. n85 This provision reflects the importance placed by Congress on independent *de novo* review of courts-martial.

Service courts of criminal appeals take this obligation seriously and do exercise this robust power. *United States v. Triplett* was a contested case in which members convicted a soldier of conspiracy to commit rape, rape, forcible sodomy, larceny (of money from the victim's wallet after the rape), and false official statement for a gang rape of an intoxicated female soldier in Korea. Members sentenced him to a dishonorable discharge, reduction to paygrade E-1, total forfeitures of pay, and fifteen years' confinement. n86 In conducting its *de novo* factual sufficiency review of the appellant's larceny conviction, the Army Court of Criminal Appeals stated,

While we find [the victim's] testimony about the rapes and other sexual assaults to be very credible, we cannot discount the possibility, given her intoxication, the money she spent on drinks, and the trauma in the aftermath of her gang rape, that she simply lost track of how much money she had left. Upon the limited facts in the instant case, we cannot conclude that the government's evidence excludes "every fair and rational hypothesis except that of guilt." n87

Article 66(c), UCMJ, also provides servicemembers protection from inappropriately severe sentences. The statute requires that the service court approve only that part of a sentence that it finds "should be approved." n88 Thus, an appellate court independently evaluates the sentence by giving individualized consideration to an appellant, including the nature and seriousness of the offenses and the character of his service. n89 Military courts of criminal appeals may, but are not required to, consider and compare other court-martial sentences for "sentence appropriateness and relative uniformity." n90 Military appellate courts are only *required* to engage in sentence comparison "in those rare instances in which sentence appropriateness can be fairly determined only by [*53] reference to disparate sentences adjudged in closely related cases." n91 In *Triplett*, the Army Court of Criminal Appeals held that PFC Triplett's sentence was "disproportionately severe," and reduced the confinement portion of PFC Triplett's adjudged sentence of fifteen years to ten years' confinement, because his two co-conspirators who were convicted of the rape and conspiracy to commit rape of the same female soldier received sentences which included five and six years' confinement, respectively. n92

Again, although a service court of criminal appeals may *reduce* a severe sentence, nothing in the statutes allows an appellate court to *increase* an unreasonably light sentence. Therefore, the allowable sentence comparison is obviously one sided. The United States should have some mechanism to appeal an unreasonably low sentence under an abuse of discretion standard. Moreover, the lack of safeguards against inappropriately light sentences could be remedied *at the trial level*. Members should not engage in sentencing. Alternatively, if the system continues to permit members sentencing, the members should have less discretion and more guidance in formulating an appropriate sentence within a reasonable range.

B. Allowing the members to determine the sentence can produce irrational and inconsistent results which call into question the efficacy of the military justice system.

In stark contrast to the civilian system of random selection for jury duty, court-martial members are personally selected by the convening authority. They are members of the armed forces who "in [the convening authority's] opinion, are best qualified for the duty by reason of age, education, training, experience, length of service and judicial temperament." n93 However, they do not ever receive specialized training in how to sentence offenders. In fact, they only receive generalized guidance on sentencing in the form of instructions by the military judge following conviction. n94 Members, therefore, must adjudge a sentence in a vacuum with respect to other cases. This problem is compounded by the lack of sentencing guidelines for specific offenses. There are maximum sentences for each offense, but no minimum sentence for most offenses.

Members' treatment of rape and other sexual assault cases provides the best illustration of this problem. Rape is not a military-specific crime (in contrast to unauthorized absence, disobeying an order, etc.). It is cognizable in the civilian world. It is proscribed by Article 120, UCMJ, for military members. [*54] The maximum punishment that a court-martial may adjudge for rape is life in prison without the eligibility for parole, but there is no mandatory minimum sentence. n95 In contrast, a conviction for aggravated sexual abuse (rape) n96 under the Federal Sentencing Guidelines would yield a probable sentence to confinement ranging *between* 91 and 121 months, assuming the defendant had no criminal record. n97

Because UCMJ offenses are not divided into misdemeanors and felonies, the military sentencing instructions do not offer any indication about the gravity of a rape conviction, apart from stating the maximum allowable punishment. n98 Further, convictions of sexual assault offenses, especially when the accused has raised either consent or mistake of fact as a defense, are especially liable to the imposition of light sentences because they are often the result of divided decisions. Members who vote for acquittal are unlikely to vote for a severe sentence, remaining unconvinced of the accused's guilt. Thus, compromise verdicts and sentences can lead to puzzling results.

This problem is endemic in the system and across the services. Although rape is a felony in every state system that differentiates between misdemeanors and felonies, members commonly give misdemeanor-type sentences (sentences which include less than a year in jail) because they lack any instructions indicating the severity of rape in comparison to other offenses. The problem is that the system -- in its current form -- permits members to sentence servicemembers for rape to the same punishment commonly adjudged for marijuana use.

In *United States v. Coates*, officer and enlisted members at a general court-martial sentenced the accused, a junior enlisted Marine, to *confinement for 90 days*, forfeiture of \$ 500 pay per month for a period of three months, reduction to paygrade E-1, and a bad-conduct discharge from the service for raping a fellow Marine. n99 In *United States v. Willis*, a general court-martial at Langley Air Force Base, officer members sentenced that defendant to a dishonorable discharge, hard labor *without* confinement for three months, and reduction to pay grade E-1 for raping a seventeen-year-old high school [*55] student. n100 In another Air Force general court-martial, officer members convicted and sen-

tenced an Airman to a bad-conduct discharge and confinement for three months for raping a fellow Airman. n101 And at a special court-martial (where there was then a cap on confinement of six months based on the forum) officer members sentenced a Coast Guard petty officer to a bad-conduct discharge and only two months' confinement for raping a fellow petty officer. n102

The sentences in these cases mirror those often adjudged in courts-martial for misdemeanor level drug offenses. In one case, Air Force members sentenced an Airman to confinement for three months and a bad-conduct discharge for a single use of marijuana. n103 In another case, Army members sentenced a soldier to six months' confinement and a bad-conduct discharge for marijuana use. n104

A system of sentencing that permits such results embarrasses the military justice system. Sentencing reform of some sort is therefore necessary. Statistics illuminating the full extent of this problem are not available in publicly accessible electronic databases because of the statutory nature of the military appellate system. Under Article 66, UCMJ, an appeal to the service court of criminal appeals occurs only when the sentence approved by the convening authority extends to a punitive discharge or a year or more of confinement. n105 The mechanism for appealing general court-martial cases with a lesser sentence is set forth in Article 69, UCMJ, which provides for legal review by a judge advocate within the office of the service Judge Advocate General. The Judge Advocate General of the convicted servicemember's military department may take corrective action or may refer the case to the service court of criminal appeals, which is the only way the case would ever be reported in the Military Justice Reporter. n106

For example, in *United States v. Datz*, a general court-martial of officer and enlisted members convicted the accused of, among other things, raping a female Coast Guard petty officer at her townhouse. n107 The members sentenced him to confinement for only three months and reduction in paygrade from E-5 to [*56] E-3. The members did not adjudge a punitive discharge. n108 Upon Article 69 review of the case, the Acting Judge Advocate General of the Coast Guard directed the Coast Guard Court of Criminal Appeals to review the record, which is the only reason the case was published in the Military Justice Reporter. The Court of Appeals for the Armed Forces then reversed Petty Officer Datz's conviction as to the rape charge. n109

Even an exhaustive review of the military justice reporters provides no answer to the question of how many general courts-martial convict servicemembers of serious felony-level offenses (and what types) and then adjudge a sentence of less than a year in confinement without a punitive discharge. Yet, this type of finding-sentencing disparity unquestionably occurs. For example, in November 2007, members in a general court-martial held in Groton, CT, convicted a first class petty officer of repeatedly sodomizing and taking indecent liberties with a minor in violation of Articles 120 and 134, UCMJ. n110 The members sentenced the defendant to only 90 days' confinement, a reprimand, and reduction to paygrade E-4, without discharging him from the Navy. n111 Because the sentence did not include either a punitive discharge or confinement in excess of a year, the case will not be appealed under Article 66, UCMJ and will not appear in the military justice reporters absent action by the Judge Advocate General under Article 69(d), UCMJ. Thus, this type of problem -- a felony-level conviction and a sub-jurisdictional sentence -- remains largely invisible for statistical purposes.

The Court of Appeals for the Armed Forces' "Annual Report of the Code Committee on Military Justice" for 2007 provides some limited information on sub-jurisdictional sentences, but more is needed. In fiscal year 2007, for example, the Army Judge Advocate General received 221 records of trial of general courts-martial for Article 69 review; the Navy Judge Advocate General received 32; the Air Force Judge Advocate General received 52; and the Coast Guard Judge Advocate General received 2. n112 Thus, there were 307 records of general courts-martial received for which the sentence did not include a punitive discharge or greater than one year in confinement. It does not appear that anyone has conducted a review of these records to determine whether or not they substantiate the imposition of unreasonably low sentences for the charges upon which the accused were convicted.

[*57] III. STATUTORY REMEDIES ARE NECESSARY TO REFORM THE COURT-MARTIAL SENTENCING PROCESS TO A SYSTEM WHICH IS BOTH FAIR TO THE DEFENDANT AND SERVES THE NEEDS OF THE MILITARY AND SOCIETY.

The 1928 U.S. Army Manual for Courts-Martial recognized that "[t]he imposition by courts-martial of inadequate sentences upon officers and others convicted of crimes which are punishable by the civil courts would tend to bring the Army, as to its respect for the criminal laws of the land, into disrepute." n113 Given the number of puzzlingly light sentences for serious felony level crimes adjudged in courts-martial by members, particularly in sexual assault cases, it is clear that some structural reform to the sentencing process is necessary. There are several possible solutions which,

alone or in some combination, could restore a proper balance -- and some credibility -- to the court-martial sentencing process.

In 1989, shortly after the United States Supreme Court announced its decision in *Mistretta*, then upholding the constitutionality of the Federal Sentencing Guidelines, the Coast Guard Court of Military Review -- in the context of multiplicity -- discussed some hypothetical situations and the "obvious absurdity" of the results permitted by a system which calculates the maximum punishment as a sum of the sentences imposed for all charges of which the accused is convicted. n114 The court concluded, "[P]ossibly some sort of sentencing guidelines for military courts would assist judges and juries in arriving at fair and just sentences, especially where multiple offenses are involved." n115 The concern of this article is not with excessive sentencing but rather the opposite, and the solution is either the elimination of members sentencing altogether or, at bare minimum, the provision of specific guidelines to members if they are to continue adjudging sentences.

The problem of compromise findings and sentences begins with members determining a sentence in a vacuum without the benefit of guidelines, particularly in the case where the findings were not unanimous. Specifically, most members lack adequate knowledge of the military justice system and the ranges of sentences being imposed in similar cases. Moreover, during voir dire the members are instructed that they must be able to consider the full range of sentences for a given offense, to include a sentence of "no punishment" -- even for serious felonies. In fact, a member who states that he or she cannot consider "no punishment" in the event of a conviction could be successfully challenged for cause if the member displayed an "inelastic attitude" toward sentencing, [*58] albeit a predisposition to impose some punishment is not automatically disqualifying. n116 The Court of Appeals for the Armed Forces has noted that "[i]t is not surprising that the notion of 'no punishment' has bedeviled this Court for most of its history. A punishment of no punishment appears to be an oxymoron, but it is a valid punishment." n117 The court further noted, in the same case, that "the Supreme Court observed that 'Congress does not create criminal offenses having no sentencing component.'" n118 In short, it is a defect that members are instructed that they must consider "no punishment," even in serious felony-level cases such as unpremeditated murder (apart from felony murder), manslaughter, rape, narcotics distribution, fraud, arson, and child molestation.

Sentencing proceedings conducted before a military judge alone would at least solve the problem of members adjudging wildly inconsistent sentences. Military judges are experienced in military law and have at least a frame of reference within which to judge the worth of a case. Military judges also have a clear understanding of the collateral consequences of a conviction, including the potential for sex offender registration, loss of retirement benefits, administrative processing for discharge, the impact of a reduction in pay grade on high year tenure, etc. Thus, sentencing by a military judge would further the process of the "civilianization" of military courts-martial without any erosion in fairness to the accused.

There are other reforms that would dramatically improve the sentencing process as well, irrespective of whether the sentence was adjudged by members or by a military judge. Sentencing guidelines should be promulgated, and members (and judges) should be instructed to consider them. As part of creating guidelines for punishment, the criminal offenses listed in the UCMJ should be divided into three categories: misdemeanors, felonies, and purely military offenses. A sentence of "no punishment" should not be available for a felony level offense. Further, when a military member is prosecuted for a violation of Title 18 of the United States Code, such as distribution of child pornography under 18 U.S.C. 2252A (and related statutes), the members should be instructed to consider as a factor the Federal Sentencing Guidelines' range of confinement. n119 Finally, Congress should create a statutory mechanism for the convening authority or the United States to appeal an unreasonably low sentence.

[*59] It bears repeating that none of these proposed structural reforms to the sentencing process would erode the constitutional rights of servicemembers convicted at court-martial, because they would only bring the military justice system into alignment with the federal criminal justice system. In fact, decreasing the number of differences between a court-martial and a federal criminal trial arguably only enhances a military accused's due process and equal protection rights. A court-martial must be fair, both substantively and procedurally, to the accused and the government. Punishments should also be fair to both the accused and the government. Since courts-martial are open to the public, and the results are public records, the military justice system must be able to withstand public scrutiny. There is no compelling argument, apart from tradition, for member sentencing, but if members are to continue determining sentences, they should at least have the benefit of specific sentencing guidelines to assist them in differentiating between those offenses that deserve significant imprisonment and those that do not.

COMMANDER
NAVY REGION, MID-ATLANTIC
1510 GILBERT ST.
NORFOLK, VA 23511-2737

IN REPLY REFER TO:

DNA PROCESSING REQUIRED 10 U.S.C. § 1565

GENERAL COURT-MARTIAL ORDER NO. 5-08

Before a general court-martial convened at Region Legal Service Office Mid-Atlantic Detachment Groton, Connecticut, pursuant to Commander, Navy Region, Mid-Atlantic General Court-Martial Convening Order 01-07 of 24 January 2007, and as amended by Commander, Navy Region, Mid-Atlantic General Court-Martial Amending Order 011-07 of 5 November 2007, Damage Controlman First Class James R. Robinson, U.S. Navy, (b)(6) was arraigned and tried on the following offenses and the following findings or other dispositions were reached:

Charge I: Violation of the UCMJ, Article 120

(PLEA - NOT GUILTY) (FINDING - NOT GUILTY)

Specification 1: In that Damage Controlman First Class James R. Robinson, U.S. Navy Reserve, Navy Operational Support Center Earle, Colts Neck, New Jersey, on active duty, did, at or near Virginia Beach, Virginia, on divers occasions, from on or about June 1999 to on or about June 2001, rape (b)(6) a person who had attained the age of 12 years, but was under the age of 16 years.

(PLEA - NOT GUILTY) (FINDING - NOT GUILTY)

Specification 2: In that Damage Controlman First Class James R. Robinson, U.S. Navy Reserve, Navy Operational Support Center Earle, Colts Neck, New Jersey, on active duty, did, at or near Jacksonville, Florida, on divers occasions, from on or about 1 July 2002 to on or about 31 August 2002, rape (b)(6)

(PLEA - NOT GUILTY) (FINDING - NOT GUILTY)

Charge II: Violation of the UCMJ, Article 125

(PLEA - NOT GUILTY) (FINDING - GUILTY)

Specification 1: In that Damage Controlman First Class James R. Robinson, U.S. Navy Reserve, Navy Operational Support Center Earle, Colts Neck, New Jersey, on active [*61] duty, did, at or near Virginia Beach, Virginia, on divers occasions, from on or about June 1999 to on or about June 2001, commit an indecent act upon the body of (b)(6)

(b)(6) a female under 16 years of age, not the wife of the said Damage Controlman First Class James R. Robinson, by fondling the breasts of the said (b)(6)

(b)(6) with the intent to gratify the sexual desires of the said Damage Controlman First Class James R. Robinson.

(PLEA - NOT GUILTY) (FINDING - GUILTY)

Specification 2: In that Damage Controlman First Class James R. Robinson, U.S. Navy Reserve, Navy Operational Support Center Earle, Colts Neck, New Jersey, on active duty, did, at or near Virginia Beach, Virginia, on divers occasions, from on or about June 1999 to on or about June 2001, commit an indecent act upon the body of (b)(6)

(b)(6) a female under 16 years of age, not the wife of the said Damage Controlman First Class James R. Robinson, by fondling and digitally penetrating the vagina of the said (b)(6) with the intent to gratify the sexual desires of the said Damage Controlman First Class James R. Robinson.

(PLEA - NOT GUILTY) (FINDING - NOT GUILTY)

Specification 3: In that Damage Controlman First Class James R. Robinson, U.S. Navy Reserve, Navy Operational Support Center Earle, Colts Neck, New Jersey, on active duty, did, at or near Virginia Beach, Virginia, on or about November 1998, take indecent liberties with (b)(6)

(b)(6) a female under 16 years of age, not the wife of the said Damage Controlman First Class James R. Robinson, by displaying a movie of men and women engaging in sexual acts to the said (b)(6) with the intent to gratify the sexual desires of the said Damage Controlman First Class James R. Robinson.

(PLEA - NOT GUILTY) (FINDING - NOT GUILTY)

[*62] duty, did, at or near Jacksonville, Florida, on divers occasions, from on or about 1 July 2002 to on or about 31 August 2002, commit sodomy with (b)(6)

(b)(6) by inserting the said Damage Controlman First Class James R. Robinson's penis into the mouth of the said (b)(6) by force and without the consent of the said (b)(6)

(PLEA - NOT GUILTY) (FINDING - NOT GUILTY)

Specification 2: In that Damage Controlman First Class James R. Robinson, U.S. Navy Reserve, Navy Operational Support Center Earle, Colts Neck, New Jersey, on active duty, did, at or near Virginia Beach, Virginia, on or about April 2005, commit sodomy with (b)(6) by inserting the said Damage Controlman First Class James R. Robinson's penis into the mouth of the said Ms. (b)(6) by force and without the consent of the said (b)(6)

(PLEA - NOT GUILTY) (FINDING - NOT GUILTY)

Specification 3: In that Damage Controlman First Class James R. Robinson, U.S. Navy Reserve, Navy Operational Support Center Earle, Colts Neck, New Jersey, on active duty, did, at or near Virginia Beach, Virginia, on divers occasions, from on or about June 2000 to on or about June 2001, commit sodomy with (b)(6) a person who had attained the age of 12 years, but was under the age of 16 years, by inserting the said Damage Controlman First Class James R. Robinson's penis into the mouth of the said (b)(6) by force and without the consent of the said (b)(6)

(PLEA - NOT GUILTY) (FINDING - GUILTY, except for the words "that the act was done by force and without the consent of (b)(6)

Charge III: Violation of the UCMJ, Article 134

(PLEA - NOT GUILTY) (FINDING - GUILTY)

Specification 1: In that Damage Controlman First Class James R. Robinson, U.S. Navy Reserve, Navy Operational Support Center Earle, Colts Neck, New Jersey, on active

[*63] This record is forwarded to the Navy-Marine Corps Appellate Review Activity (Code 40.31), Office of the Judge Advocate General, Washington Navy Yard, 1014 N Street, S.E., Suite 401, Washington Navy Yard, DC 20374-5047 for review under Article 69a, UCMJ.

The results of the foregoing case are hereby approved, and promulgated in accordance with R.C.M. 1114, MCM (2008 Ed.)

M. S. BOENSEL

Rear Admiral, U.S. Navy

Commander, Navy Region, Mid-Atlantic

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Legal Topics:

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

Criminal Law & Procedure Criminal Offenses Miscellaneous Offenses Espionage & Treason General Overview Criminal Law & Procedure Guilty Pleas General Overview Criminal Law & Procedure Sentencing Guidelines General Overview

FOOTNOTES:

n1 *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 921(c), 1006 (2008) [hereinafter MCM]. In courts-martial, the jurors are called "members" and the jury is the "members panel."

n2 Military members panels are permitted to call witnesses, recall witnesses, and examine witnesses -- even witnesses not called by either the trial counsel (prosecutor) or defense counsel. *See* MCM, *supra* note 1, MIL. R. EVID. 614. Either counsel may object to members' questions based on the rules of evidence. *Id.*

n3 *See* MCM, *supra* note 1, R.C.M. 1002.

n4 *United States v. Weiss*, 36 M.J. 224, 228 (C.M.A. 1992) (citing Articles 22-24, Uniform Code of Military Justice (UCMJ)).

n5 *Id.* (citing U.S. CONST. art. 1, § 8, cl. 14).

n6 *See* UCMJ art. 22 (2008).

n7 *See* MCM, *supra* note 1, R.C.M. 400-407. If the accused person is an enlisted person, he or she has the right to enlisted representation on the members panel. *See* UCMJ art. 25(c)(1) (2008).

n8 The Military Justice Act of 1968 changed the title of "Law Officer" to "military judge." 282 Stat. 1335, 1336 (1968) (current version at UCMJ art. 26 (2008)).

n9 MANUAL FOR COURTS-MARTIAL, U.S. ARMY, ch. XV, § 80, at 67 (1928).

n10 *Id.*

n11 *Id.* at 68.

n12 *Id.* (citing Articles of War, Art. 43, 41 Stat. 787 (1920) (repealed 1951). Prior to 1920, only a majority of members were required to concur in a sentence, except that two-thirds were required to concur in a death sentence. See MANUAL FOR COURTS-MARTIAL, U.S. ARMY, ch. VII, § IV, at 145 (1917).

n13 See UCMJ art. 52 (2008); see also MCM, *supra* note 1. R.C.M. 1006. The accused at a court-martial elects a members trial or a bench trial. The Government cannot impose a particular forum.

n14 See Lieutenant Michael J. Marinello, JAGC, USN, *Convening Authority Clemency: Is It Really An Accused's Best Chance at Relief?*, 54 NAVAL L. REV. 169, 171 (2007) (noting that "as it currently stands, our nation's military justice system 'in more ways than not, closely resembles trial in federal district court'"). In 1979, the Navy Court of Military Review decried the increasing congruity between military and civilian law practice, noting that "[m]any have certainly taken to so-called 'civilianization' of the United States military justice system like ducks to water." *United States v. Jones*, 7 M.J. 806, 808 (N.M.C.M.R. 1979). In fact, the phrase "like ducks to water" has, in Latin translation, "*Anates Ad Aquae.*" been incorporated into the seal of the Navy-Marine Corps Appellate Defense Division, along with an image of three ducks.

n15 Military prosecutors are termed "trial counsel." See UCMJ art. 27 (2008).

n16 UCMJ art. 27 (2008).

n17 UCMJ art. 26 (2008).

n18 At a special court-martial the trial counsel is not required to be a lawyer (but almost always is). The lead trial counsel at a general court-martial must be a lawyer. The defense counsel must be a lawyer at either forum. UCMJ art. 27(b) (2008).

n19 See UCMJ art. 66 (2008).

n20 See UCMJ art. 67(a)(3) (2008).

n21 C.A.A.F.R. PRAC. P. 21 (b)(5)(C). In a noncapital case, an appellant must petition C.A.A.F. for review of a service court's decision. However, the Judge Advocate General may also order that a service court decision be reviewed by C.A.A.F. without a petition. See UCMJ art. 67 (2008).

n22 See UCMJ art. 67, 67a (2008).

n23 See UCMJ art. 67(a)(1) (2008).

n24 See UCMJ art. 67(a)(2) (2008).

n25 See UCMJ art. 16 (2008). A special court-martial is a lesser forum than a general court-martial and may only adjudge a maximum of one year of confinement and a bad-conduct discharge, rather than a dishonorable dis-

charge and confinement limited to the combined maximum sentences for all offenses of which an accused has been convicted, which may be adjudged by a general court-martial.

n26 *See* UCMJ art. 52 (2008).

n27 *Id.*

n28 *See* MCM, *supra* note 1, R.C.M. 1006.

n29 Some states retain a system by which a jury recommends a sentence within a statutory range. *See e.g. Ark. Code Ann. § 5-4-103* (2007) (noting that if a defendant is charged and found guilty of a felony by a jury, the jury "shall fix the punishment in a separate proceeding"). In fact, the Arkansas Supreme Court once vacated a sentence of three years' imprisonment imposed by a judge because the jury recommended a verdict of zero years' imprisonment and a fine of zero dollars following a defendant's conviction of second degree battery, a class D felony, for stabbing someone in the abdomen with a knife. *See Donaldson v. State of Arkansas, 257 S.W.3d 74, 78-79 (Ark. 2007).*

n30 18 U.S.C.S. app. (LexisNexis 2009).

n31 *United States v. Gall, 128 S.Ct. 586, 594 (2007); United States v. Booker, 543 U.S. 220, 253 (2005).* Prior to the *Booker* decision, the Federal Sentencing Guidelines were mandatory. *See Mistretta v. United States, 488 U.S. 361 (1989).*

n32 *See Gall, 128 S. Ct. at 600-602.*

n33 *Booker, 543 U.S. at 233.*

n34 *Id. at 253.*

n35 *See* MCM, *supra* note 1, app. 12.

n36 *Id.*

n37 *Id.*

n38 *See Solorio v. United States, 483 U.S. 435 (1987).*

n39 *Id.* Richard Solorio's general court-martial was convened in New York, where he was serving in the Coast Guard, to try him for the sexual abuse of another Coastguardsman's minor daughters. He had abused these girls in his privately owned residence in Alaska during a prior assignment. A military judge granted Solorio's motion to dismiss on the ground that it lacked jurisdiction under *O'Callahan v. Parker, 395 U.S. 258 (1969)*, which held

that a military tribunal may not try a serviceman charged with a crime that has no "service connection." On appeal, the United States Coast Guard Court of Military Review reversed the trial judge's order and reinstated the charges. On further appeal, the United States Court of Military Appeals affirmed, holding that the crimes were indeed service connected. The U.S. Supreme Court ultimately held that "service connection" was not necessary for jurisdiction.

n40 See U.S. DEPT OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK, Ch. 8 (1 Apr. 2001) [hereinafter BENCHBOOK].

n41 *United States v. Sunzeri*, 59 M.J. 758, 763 (N-M. Ct. Crim. App. 2004) (Villemez, J., concurring in part and dissenting in part).

n42 See MCM, *supra* note 1, R.C.M. 910(f)(3).

n43 See MCM, *supra* note 1, R.C.M. 1106(d)(3).

n44 See *Fed. R. Crim. P. 32(i)(4)*.

n45 See MCM, *supra* note 1, R.C.M. 1001(c)(2). The unsworn statement is an important right of the accused and military appellate courts have vigorously protected it. See *United States v. Grill*, 48 M.J. 131, 132 (C.A.A.F. 1998); *United States v. Rosato*, 32 M.J. 93, 96 (C.M.A. 1993). Federal defendants have a similar right to address the court under Fed. R. Crim. P. (32)(i)(4).

n46 See *United States v. Sowell*, 62 M.J. 150 (C.A.A.F. 2005). The holding in *Sowell* was narrow, based on the particular facts of that case: the trial counsel had opened the door to this type of statement by referring to one of the accused's "co-conspirators" who had, in fact, been acquitted on the same evidence as presented in *Sowell*.

n47 See MCM, *supra* note 1, R.C.M. 1001(c)(3).

n48 See generally *FED. R. EVID. 1101*.

n49 CONRAD D. PHILOS, HANDBOOK OF COURT-MARTIAL LAW (Callaghan rev. ed. 1951).

n50 See MCM, *supra* note 1, R.C.M. 1009.

n51 See UCMJ art. 106, 106a, 118(1), and 118(4) (2008).

n52 See MCM, *supra* note 1, R.C.M. 1109.

n53 See *United States v. Gall*, 446 F.3d 884 (8th Cir. 2006).

n54 *Id.* at 888.

n55 *Id.* at 889-890.

n56 *See Gall*, 128 S. Ct. at 591.

n57 UCMJ art. 66 (2008).

n58 *See* UCMJ art 60 (2008); *see also* MCM, *supra* note 1, R.C.M. 1105.

n59 *United States v. Davis*, 58 M.J. 100, 102 (C.A.A.F. 2003). For an excellent discussion of the history of the convening authority's power to grant clemency for a convicted servicemember, *see* Marinello, *supra* note 14.

n60 *Davis*, 58 M.J. at 101-2.

n61 *Id.* at 102 (citing R.C.M. 1107(d)(2)).

n62 *Id.*

n63 *Id.*

n64 *Id.*

n65 *See* UCMJ art. 58b(b) (2008).

n66 *See* MCM, *supra* note 1, R.C.M. 1107(c).

n67 *See United States v. Rosenthal*, 62 M.J. 261, 263 (C.A.A.F. 2005).

n68 *See* MCM, *supra* note 1, R.C.M. 1107(d).

n69 *Id.*, Discussion. In 2002, the jurisdictional maximum of a special court-martial increased from six months' confinement to one year. Thus, the discussion following R.C.M. 1107(d)(1) prior to the 2002 edition of the Manual for Courts-Martial specifically stated that a bad-conduct discharge is more severe than six months' confinement. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1107(d)(1), Discussion (2000).

n70 *United States v. Cassity*, 36 M.J. 759, 766-7 (N.M.C.M.R. 1992) (Welch, J., concurring).

n71 The Court of Military Appeals has opined in *dicta* that "it seems to follow that a bad-conduct discharge imposed by a general court-martial could properly be commuted into substantially more than six months' confinement." *Waller v. Swift*, 30 M.J. 139, 144 (C.M.A. 1990).

n72 See e.g. *United States v. Mahers*, No. 200700324, n.1 (N-M. Ct. Crim. App. July 17, 2008).

n73 *Id.*; see also UCMJ art. 66 (2008).

n74 See e.g. *Waller*, 30 M.J. at 139. *Waller* came before the court on a petition for extraordinary relief in the nature of a writ of habeas corpus.

n75 See UCMJ art. 74 (2008).

n76 See DEPT OF THE NAVY, SEC'Y OF THE NAVY INSTR. 5815.3J, DEPT OF THE NAVY CLEMENCY AND PAROLE SYSTEMS pt. 2, para. 203 (12 June 2003).

n77 See UCMJ art. 74 (2008).

n78 *United States v. Tate*, 64 M.J. 269 (C.A.A.F. 2007); *United States v. Framness*, No. 200500152, 2007 CCA LEXIS 150 (N-M. Ct. Crim. App. Apr. 26, 2007).

n79 See UCMJ art. 66 (2008); see e.g. *United States v. Byard*, No. 200602288, 2007 CCA LEXIS 173, at *6-7 (N-M. Ct. Crim. App. May 22, 2007) (denying sentencing relief, stating that "granting sentence relief at this point would be to engage in clemency, a prerogative reserved for the convening authority").

n80 See UCMJ art. 66 (2008).

n81 See MCM, *supra* note 1, R.C.M. 705(c)(1)(B).

n82 Some state criminal appellate courts also allow a limited review of factual sufficiency on appeal. See e.g. *Watson v. State*, 204 S.W.3d 404 (Tex. Ct. Crim. App. 2006).

n83 See UCMJ art. 66(c) (2008).

n84 See *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

n85 See UCMJ art. 66(c) (2008); see also *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).

n86 See *United States v. Triplett*, 56 M.J. 875 (Army Ct. Crim. App. 2002).

n87 *Id.* at 884 (quoting U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK, at 53 (30 Sept. 1996)).

n88 UCMJ art. 66(c) (2008).

n89 See *United States v. Joyner*, 39 M.J. 965, 966 (A.F.C.M.R. 1994); see also *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

n90 See *United States v. Wacha*, 55 M.J. 266, 267 (C.A.A.F. 2001).

n91 *United States v. Southen*, 54 M.J. 294, 296 (C.A.A.F. 2001).

n92 See *Triplett*, 56 M.J. at 885.

n93 UCMJ art. 25 (2008).

n94 See BENCHBOOK, *supra* note 40, at ch. 8, § III.

n95 The maximum punishment for rape, as listed in the 2005 Manual for Courts-Martial, is "[d]eath or such other punishment as a court-martial may direct" although rape is never referred to as a capital offense. Thus, members are instructed that the maximum punishment is confinement for life without eligibility for parole. MCM, *supra* note 1, pt. IV, P 45.f (1).

n96 See 18 U.S.C.S. § 2241 (LexisNexis 2009).

n97 See 18 U.S.C.S. app., ch. 5, pt. A (LexisNexis 2009). To be tried in a federal district court, the crime would have had to occur in an area of federal jurisdiction.

n98 See BENCHBOOK, *supra* note 40, at ch. 8, § III.

n99 *United States v. Coates*, No. 200000920, 2003 CCA LEXIS 124 (N-M. Ct. Crim. App. May 12, 2003).

n100 See *United States v. Willis*, 41 M.J. 435 (C.A.A.F. 1995).

n101 See *United States v. Morgan*, 40 M.J. 389 (C.M.A. 1994).

n102 *United States v. Webster*, 40 M.J. 384 (C.M.A. 1994).

n103 *United States v. Augspurger*, 61 M.J. 189 (C.A.A.F. 2005).

n104 *United States v. Moore*, 36 M.J. 329 (C.M.A. 1993).

n105 *See* UCMJ art. 66 (2008).

n106 *See* UCMJ art. 69 (2008). Article 69 review provides a procedural protection for a convicted servicemember who would be otherwise deprived of an appeal to the appellate courts by a light sentence. Under Article 69, the service Judge Advocate General must review general courts-martial when the sentence does not provide for Article 66 review by the service court of criminal appeals. The service Judge Advocate General may send the case to the court of criminal appeals for review.

n107 *United States v. Datz*, 61 M.J. 37 (C.A.A.F. 2005).

n108 *See id.*

n109 *See id.*

n110 *See* Commander, Navy Region Mid-Atlantic, Gen. Order No. 5-08 (18 March 2008) (attached as Appendix A).

n111 *See id.* at 4.

n112 COURT OF APPEALS FOR THE ARMED FORCES, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 1 OCT. 2006-30 SEPT. 2007 (2007).

n113 MANUAL FOR COURTS-MARTIAL, U.S. ARMY, ch. XV, § 80, at 67 (1928).

n114 *United States v. Turner*, 28 M.J. 556 (C.G.C.M.R. 1989).

n115 *Id.* at 560.

n116 *United States v. Rolle*, 57 M.J. 187 (C.A.A.F. 2000) ("The test is whether the member's attitude is of such a nature that he will not yield to the evidence presented and the judge's instructions"); *United States v. McGowan*, 7 M.J. 205, 206 (C.M.A. 1979). "[A]n inflexible member is disqualified; a tough member is not." *United States v. Schlamer*, 52 M.J. 80, 93 (C.A.A.F. 1999).

n117 *Rolle*, 57 M.J. at 191.

n118 *Id.* (citing *Ball v. United States*, 470 U.S. 856, 861 (1985)).

n119 Because a court-martial is a federal criminal trial, the constitutional protection against double jeopardy applies and a servicemember who is adjudged an unreasonably light sentence by a court-martial cannot be re-prosecuted by the United States in federal district court.