LexisNexis®

Copyright (c) 2011 Air Force Judge Advocate General School
The Air Force Law Review

2011

Air Force Law Review

67 A.F. L. Rev. 245

LENGTH: 12922 words

MILITARY JUSTICE EDITION: THIS COURT-MARTIAL HEREBY (ARBITRARILY) SENTENCES YOU: PROBLEMS WITH COURT MEMBER SENTENCING IN THE MILITARY AND PROPOSED SOLUTIONS

NAME: CAPTAIN MEGAN N. SCHMID *

BIO:

* Captain Megan N. Schmid (B.S., University of Nebraska-Lincoln; J.D., Villanova University) currently serves as Chief, Training Program at Joint Base McGuire-Dix-Lakehurst, New Jersey. Prior to entering law school through the Funded Legal Education Program, she worked as an Executive Officer and Contracts Officer at Dover AFB, Delaware.

LEXISNEXIS SUMMARY:
... The panel is instructed that the five reasons for sentencing are rehabilitation, punishment, protection of society, preservation of good order and discipline, and deterrence of the wrongdoer and those who know of his crimes and his sentence from committing the same or similar offenses. ... The UCMJ states that age, education, training, experience, length of service, and judicial temperament are reasons for qualification. ... A survey of various convening authorities, military judges, prosecution and defense counsel, and military prisoners revealed the commonly held belief that judges are less likely to impose disparate sentences. ... Creating Military Sentencing Guidelines One approach to counter the disadvantages of the current court-martial sentencing procedures is to create military sentencing guidelines. ... States with jury sentencing do not allow their juries to review sentencing guidelines or sentencing statistics, thus preventing the temptation to craft a sentence comparable to those given by other juries for like offenses. ... Limiting the reach of military sentencing guidelines to confinement would leave many decisions to the panel such as punitive discharge, fines, forfeitures, and reductions in rank. ... Eliminating court members from sentencing will remedy many of the earlier cited disadvantages: concerns about fairness in the court member selection process, unlawful command influence, sentence disparity, compromise verdicts, and forum shopping.

TEXT:
[*246] I. THE RISKS OF ARBITRARY SENTENCING BY COURT MEMBERS

The military has stood surprisingly still in a time when the federal government and many state governments have recognized the problems inherent in unbridled sentencing discretion and undertaken reform efforts through sentencing guidelines and presumptive sentencing schemes. n1 In contrast, the military allows court members, similar to civilian juries, to sentence defendants in non-capital cases with virtually no guidance about how to formulate an appropriate sentence. n2 Perhaps most striking about this lack of guidance is that it sharply contrasts the "decades of efforts to control arbitrary behavior by jurors in capital cases." n3

Today, only six of the fifty states utilize jury sentencing in noncapital cases: Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia. n4 Kentucky's sentencing statute allows juries to impose sentences; however, this statute is interpreted as creating non-binding jury sentences. n5 In Oklahoma, if the jury does not agree on a sentence, the judge creates the sentence. n6 Remarkably, jury sentencing in non-capital cases has received [*247] only limited consideration despite the fact that each year the number of defendants sentenced by juries in non-capital cases greatly exceeds the number of defendants sentenced by juries in capital cases. n7

In the military, sentencing by court members occurs when the accused elects to be tried by court members instead of a military judge. n8 The panel has the discretion to impose any sentence they determine is appropriate including the maximum punishment authorized by the Manual for Courts-Martial (MCM), any lesser punishment, or no punishment. n9 Scholars have described many shortcomings of the court member sentencing process, which can produce arbitrary results: sentence disparity, unlawful command influence, and forum shopping. n10 These problems can cause military members and the public to distrust the fairness of the military justice system. n11 Accordingly, this article argues that sentencing by military court members, in general and special courts-martial, is so fraught with [*248] problems that reform is needed and proposes three alternatives to prevent prejudicial arbitrariness in court-martial sentencing.

Part II summarizes the history of military court-martial sentencing and today's system for forum selection, sentencing discretion, and the official reasons for court-martial sentencing. n12 Part III critiques the court-martial system by analyzing the impact of court member sentencing on the accused and the government. n13 Part IV presents and evaluates three proposals to resolve the problems associated with court member sentencing: creating sentencing guidelines, allowing waiver of court member sentencing, and eliminating court member sentencing entirely. n14 Finally, Part V recommends putting an end to arbitrary court-martial sentences by combining the first and third alternatives: abolishing court member sentencing, and investing all sentencing authority in legally-trained military judges but constraining their discretion through sentencing guidelines. n15

II. THE EVOLUTION OF COURT-MARTIAL SENTENCING

The sentencing procedures for military courts-martial are governed by the Uniform Code of Military Justice (UCMJ) and the MCM. n16 The military justice system has undergone a series of changes through legislative acts and military appellate court decisions over the years which have formed today's sentencing procedures. n17 Currently, an accused's choice of forum for trial determines the sentencing authority. n18 Many factors influence this decision including anticipated leniency and the discretion and information available to the sentencing authority. n19

[*249] A. History of Sentencing in the Military Justice System

The first military code in the United States was the Articles of War of 1775. n20 After World War II, criticism of military justice and demand for a uniform system among the three branches led to the formation of a committee to draft the UCMJ. n21 The Military Justice Act of 1950 n22 enacted the UCMJ, which was implemented by the 1951 MCM. n23 The UCMJ provides substantive and procedural law for the military justice system. n24 Although an accused is tried before a court-martial in his or her respective branch of service, the procedures are the same among all services. n25 The MCM is issued through Executive Order and contains the Rules for Courts-Martial (R.C.M.), Military Rules of Evidence, and punitive articles.

Originally, uniformity in sentences was a goal included in the MCM. n26 In the 1969 Manual, however, uniformity was eliminated as a sentencing goal based on the 1959 Court of Military Appeals decision in *United States v. Mamaluy*. n27 The *Mamaluy* case involved nine specifications including various types of offenses. n28 The court explained that it would be impossible for the court members to find a similar case combing the same or similar nine offenses. n29 Thus, the court stated that panel members do not have the needed information in order to formulate uniform sentences. n30 Additionally, the court referred the military's old "rule of law that the sentences in other cases cannot be given to court-martial members for comparative purposes." n31

[*250] In 1957, the Court of Military Appeals also put an end to the practice of allowing panel members to consult the MCM in their sentencing deliberations. n32 In *United States v. Rinehart*, the prosecution referenced two paragraphs of the MCM in closing argument at sentencing. n33 The court members then "discovered" these paragraphs in the MCM during their deliberations, despite having been fully informed of the law by the law officer (the predecessor to military judge). n34 The court concluded that allowing members to search the MCM was prohibited because: (1) several passages of the MCM have been invalidated since it was written, (2) the law officer (military judge) is the only appropriate source of law, and (3) the majority of court members have no legal training. n35 Hence, members are not instructed to seek uniformity nor are they permitted to use the MCM as a reference should they attempt to do so. n36

B. Sentencing in the Military Today

Today, an accused's decision about the composition of the court-martial determines the sentencing authority. n37 The accused's options include: (1) trial by members on both the merits and sentencing; (2) trial by military judge on both the merits and sentencing; (3) guilty plea before a military judge and sentencing by members; or (4) guilty plea and sentencing before a military judge. n38 Thus, a member's choice of forum for the trial on the merits determines who serves as the sentencing authority, court members or military judge. n39 Additionally, if the accused is an enlisted member, he or she may request that enlisted members serve on the panel, in which case at least one-third of the panel must be enlisted. n40

Notably, the majority of courts-martial are tried by military judge alone. n41 If the defense has a technical legal argument they want to make in findings, the accused might choose a judge over members for the trial [*251] forum. The defense might believe a judge will appreciate the legal argument whereas members may see it as a weak loophole. Although the defense may think that the judge is a harsher sentencing authority, they may risk the higher sentence for the benefit of an audience more receptive to their technical legal argument.

Often, an accused will choose the forum he or she perceives as the most lenient. n42 This choice reflects the belief among military practitioners that "if convicted by members, the accused often stands a greater risk of being punished severely by the same members during sentencing." n43 Hence, an important consideration is that a court-martial has a broader range of sentencing options than is available in civilian systems, including reprimand, forfeiture of pay and allowances, fine, reduction in pay grade, restriction to specified limits, hard labor without confinement, confinement, punitive separation, and death (for specific offenses). n44 Additionally, the sentencing authority in a court-martial exercises wide discretion in selecting the sentence. n45 The judge or panel is authorized to adjudge any sentence ranging from the maximum punishment to no punishment (except when a mandatory minimum sentence is required by the UCMJ). n46

Despite granting court members this vast discretion, the court gives the panel very few instructions on sentencing. n47 The panel is instructed that the five reasons for sentencing are rehabilitation, punishment, protection of society, preservation of good order and discipline, and deterrence of the wrongdoer and those who know of his crimes and his sentence from committing the same or similar offenses. n48 After articulating these purposes, however, the military judge informs the panel that "[t]he weight to be given any or all of these reasons, along with all other sentencing matters [*252] in this case, rests solely within [the panel's] discretion." n49 To make matters even more challenging, the members are only instructed on the maximum punishment for all of the offenses as a cumulative whole. Members never know that one offense carries a greater or lesser maximum than another. Thus, with little guidance and a wide range of sentencing options at hand, the court members are left to the "daunting task" of formulating an individualized sentence for a collection of potentially unrelated offenses. n50

Unlike the federal system and many state systems, the military does not use presentencing reports and requires the presentation of only a limited amount of information before the panel begins sentence deliberations. n51 Finally, as previously discussed, the military does not permit court members to receive information on sentences from other cases for comparison purposes. n52 If, however, the defense first introduces comparative information from another trial, trial counsel may be able to add additional comparative information in rebuttal. n53 The military judge, on the other hand, has the benefit of substantial military justice experience and more likely knows the types of sentences typically imposed for various offenses. n54 Considering their relative inexperience and lack of legal training, it should come as no surprise that court members complain that they are not equipped to adjudge a fair sentence. n55

III. THE SHORTCOMINGS OF COURT MEMBER SENTENCING

Court member sentencing is criticized for many of the same reasons that jury sentencing is including, sentence disparity, compromise verdicts, forum shopping, and public confidence in the system. n56 However, unique aspects of the military raise concerns specific to the military such as the selection process for court members, the administrative burden of that selection process, unlawful command influence, and evidentiary safeguards. n57 Likewise, arguments in favor of court member sentencing [*253] mirror those of jury sentencing, specifically, the value of participation by community members. n58 A contention unique to the military context is that court member sentencing provides a forum for training future leaders. n59 Finally, the Sixth Amendment right to a public trial by an impartial jury is also an argument in favor of court member sentencing. n60

A. Rolling the Dice: Effect on the Accused

One of the most frequently criticized aspects of the military justice system is the convening authority's selection of a court-martial. n61 The court members are selected by the same officer who decided to refer the case for trial by court-martial. n62 The convening authority is tasked with choosing members who, in his or her opinion, are best qualified to serve on a court-martial. n63 The UCMJ states that age, education, training, experience, length of service, and judicial temperament are reasons for qualification. n64 One scholar contends that these criteria are inherently subjective and the system fails to account for the fact that the convening authority may not know the members in his or her command well enough to apply them. n65 Thus, he recommends changing to random selection of court members to eliminate the perception of unfairness and judge-only sentencing to ensure the sentencing authority is qualified to impose a fair sentence. n66

[*254] Another criticism of the current system is that court-martial sentencing results in striking sentence disparity among factually similar cases. n67 Likewise, studies of non-military criminal justice systems demonstrate that juries sometimes impose more severe and more variable sentences than judges. n68 In addition to the statistical disparity, military members view court-martial panels as less consistent than military judges. n69 A survey of various convening authorities, military judges, prosecution and defense counsel, and military prisoners revealed the commonly held belief that judges are less likely to impose disparate sentences. n70

Yet another objection to court-member sentencing is that the panel may be tempted to make compromise verdicts. n71 In a compromise verdict the jury resolves uncertainty about guilt by agreeing to impose a lighter sentence. n72 However, the extent to which actual sentencing juries make compromise verdicts has little supporting evidence because the only studies are based upon mock civilian juries. n73 Furthermore, these studies focused on individual decision-making and do not reflect the reality that jury decisions are made as a group. n74 Still, the very fact that a risk of compromise verdicts may exist in a system based on the standard of proof beyond a reasonable doubt should cause us to pause. n75

Some commanders view court member participation in sentencing as a valuable avenue for training future military leaders. n76 Their argument is that members develop respect for and understanding of the military justice [*255] system by participating in a court-martial. n77 One must question, however, whether training members at the expense of the accused is fundamentally unfair. n78 While members might learn to "appreciate" the system, they do not learn how to review mitigation and aggravation evidence before dispensing punishment. Arguably, members can gain appreciation for the military justice system by participating in the merits portion of the trial without performing the sentencing function.

Proponents of jury sentencing also contend that jury members are better able to express the community's outrage at an offender's violation of its norms. n79 However, judge-imposed sentences can reflect the community sentiment because, to the extent permitted under R.C.M. 1001, sentencing witnesses express that sentiment to military judges, who will grow more familiar with it over time. n80 Yet another argument made for jury sentencing is that judges and politicians are influenced by politics, but a jury does not face similar election pressures. n81 This argument carries little to no weight in the military context because militaiy judges are not elected and they report through a separate chain of command from the convening authority. n82 Also, the only politicians that play a role in military justice are members of the legislature. Given that the last major amendment to the UCMJ was in 1983, one can hardly claim that Congress's approach to military justice is considerably affected by the politics of elections. n83

Lastly, whether the Sixth Amendment's guarantee of a right to a public trial by an impartial jury includes the merits phase of the trial and the sentencing phase, or simply the former, is subject to debate. n84 The Supreme Court's recent decisions in this area have muddied the issue. n85 The one clear takeaway is that legislatures cannot deprive the defendant of the Sixth [*256] Amendment right to a jury trial by classifying elements as sentencing factors. n86 Whether this means the Court will ultimately rule that jury sentencing is constitutionally required is difficult to predict and unless (or until) it does so, the constitutional argument for court member sentencing is not conclusive. n87

B. The Dangers of Member Sentencing: Implications for the Government

Opponents of court member sentencing cite forum shopping as one disadvantage to the government. n88 As previously described, the majority of cases are tried by judge alone. n89 The defense may choose a judge for the trial portion with the plan of making a technical legal argument they expect the judge will more likely appreciate than a panel. On the other hand, the accused might elect trial by a panel members with the assumption that members will sentence more leniently than a judge. Opponents of court member sentencing argue that this forum option may lead judges to sentence more leniently than appropriate in order to encourage future accused to choose judge-only sentencing. n90 In

contrast, supporters contend that the statutory right to choose member sentencing is too valuable to take away. n91 Presumably the accused makes the choice between forums as part of his or her trial strategy based on the advice of defense counsel. n92 Still, even if the forum option is a right of the accused it is at most a statutory one, not a constitutional one. n93

Critics also point to the administrative burden of member sentencing. n94 In order to staff a panel, commanders must take members away from their regular duties and training. n95 The response to this argument is that the court members are already present for the guilt phase of the trial [*257] and sentencing usually takes only a few more hours. n96 One scholar predicts that "[i]nitially, adopting judge-only sentencing may lead to more contested trials than is presently the case." n97 This change is predicted because military judges do not have much of a track record in sentencing contested cases and the defense may pursue a trial in the hopes of obtaining a better sentence than is offered in a plea bargain. "This issue should disappear once military judges start sentencing in cases litigated before court members and defense counsel and accused are convinced that military judges will reward them for pleading guilty." n98

The government also risks losing the confidence of military members and the American public when courts-martial produce arbitrary sentences. n99 Some military members believe that judicial sentencing is more predictable than member sentencing. n100 Studies of court-martial sentences revealed great sentencing disparity exists among individuals convicted of similar crimes. n101 While these studies did not compare member and judge sentencing, a study of civilian systems revealed greater sentence disparities in cases with jury sentencing than in those with judge sentencing. n102 The authors concluded that the variance likely results from jurors, unlike judges, lacking information about sentencing in similar cases. n103 Notably, sentencing court-martial panels also lack information about sentencing in similar cases. n104 Thus, court members might also sentence with more disparity than military judges.

[*258] Another disadvantage of member sentencing is that it requires protection against unlawful command influence on the court members by convening authorities and commanders. n105 Unlawful command influence occurs when superior officers influence the findings or sentence of a court-martial. n106 Many members of the military and the public distrust the military justice system because they "believe courts-martial are routinely rigged, although little evidence exists to suggest it." n107 Still, this skepticism is understandable because instances of unlawful command influence do occur. n108 For example, in a recent case, a commander ordered a senior enlisted member to not testify on behalf of the accused in the sentencing phase of the trial. n109 In another case, trial counsel implied to court members that unnamed commanders preferred the sentence he was proposing. n110 Certainly the risk of unlawful command influence also exists with military judges. However, the risk is arguably less because military judges have a separate reporting chain (and assignment system) from the convening authority whereas court members do not. n111

[*259] Finally, court member sentencing requires evidentiary safeguards to ensure members are not exposed to information which they might use improperly. n112 The Court of Military Appeals recognized that rules for sentencing procedure are narrower than those of the federal district courts and attributed this difference to the involvement of court members. n113 The military judge is responsible for ensuring court members are not improperly influenced by evidence that arouses hostility or prejudice. n114 In contrast to court members, military judges are trained in the law. They are able to rule on the admissibility of evidence and disregard inadmissible evidence when crafting their decisions. n115 Also, unlike court members, military judges are trusted in their ability to navigate relevant, albeit prejudicial, evidence. n116 "Military and civilian judges are routinely tasked with hearing facts for limited purposes, which they later disregard if consideration would be improper." n117

IV. PROPOSALS FOR A NEW APPROACH TO COURT-MARTIAL SENTENCING

Scholars have proposed several solutions to the problems arising from the current procedures for court-martial sentencing. Some commentators recommend limiting the sentencing authority's discretion by implementing sentencing guidelines akin to those used in the federal system. n118 Another approach is to permit the accused to waive court member sentencing, a method used in some jury sentencing states. n119 Finally, some argue that the only approach to eliminate the problems created by court member sentencing is to remove members from the sentencing process altogether. n120

[*260] A. Creating Military Sentencing Guidelines

One approach to counter the disadvantages of the current court-martial sentencing procedures is to create military sentencing guidelines. Currently, military court members with no legal training have vast discretion in formulating court-martial sentences. n121 This discretion rightfully causes concern about the appropriateness of court-martial sentences when the process results in sentencing disparity. n122 As one scholar in favor of jury sentencing conceded,

"[e]ven the most dedicated supporters of jury sentencing should not be comfortable with jurors having unlimited discretion in the fashion of federal judges before the Guidelines." n123 Constraining the panel's discretion with sentencing guidelines would also address two other often cited shortcomings of jury sentencing--sentence variability and excessive harshness. n124

Congress created the United States Sentencing Commission and tasked it with creating the federal sentencing guidelines to reduce sentence disparity among federal judges. n125 Although the Supreme Court made the sentencing guidelines effectively advisory in *United States v. Booker*, the sentencing court is still required to consider the guidelines. n126 Similarly, thirty-three states use sentencing guidelines to limit the sentencing authority's discretion. n127 Thus, implementing military sentencing guidelines would bring the military into line with the federal system and several state [*261] systems while preserving the rule that the sentencing authority not compare sentences from other cases. n128

Also particularly relevant to the debate about court member sentencing are the practices of states with jury sentencing. Five states with jury sentencing in non-capital cases use legislatively defined ranges to constrain the jury's discretion. n129 States with jury sentencing do not allow their juries to review sentencing guidelines or sentencing statistics, thus preventing the temptation to craft a sentence comparable to those given by other juries for like offenses. n130 For example, in Virginia the jury is not given the sentencing guidelines to review; however, the judge considers the guidelines in determining whether to uphold the jury's sentence. n131 In contrast, the military judge has no authority to modify the sentence imposed by the court members. n132 The convening authority and the appellate courts, however, can modify a guilty finding or sentence in favor of the accused. n133

Sentencing guidelines are not always well-received for many reasons. First, when the legislature delegates the drafting of sentencing guidelines to an agency or commission, the democratic representation of the legislature is arguably lost. n134 Nonetheless, the Supreme Court approved Congress' delegation of authority to the United States Sentencing Commission to create the federal sentencing guidelines. n135 Secondly, critics argue that sentencing guidelines inhibit the individualization needed in sentencing. n136 It is difficult to anticipate and capture the unique [*262] circumstances of every potential offense in guidelines. n137 While the military generally takes an individualized approach to sentencing, allowing members to know in advance the severity range of the sentence may prevent disparity from occurring. n138 Moreover, flexibility in sentencing guidelines can allow for the requisite individualization of sentences. n139

Congress could customize the military sentencing guidelines in several ways. For instance, one scholar recommended that military sentencing guidelines apply only to general courts-martial, not summary or special courts-martial, and affect only length of confinement. n140 Such limits would reduce the impact of the guidelines because summary and special courts-martial are more frequent than general courts-martial. n141 Limiting the reach of military sentencing guidelines to confinement would leave many decisions to the panel such as punitive discharge, fines, forfeitures, and reductions in rank. n142 Another approach is to implement sentencing guidelines for only particular offenses. n143 This approach would allow Congress to select articles from the UCMJ that it determines are worthy of uniform treatment.

B. Allowing Waiver of Court Member Sentencing

Another possible solution is to permit the accused to waive court member sentencing similar to the practice in some jury sentencing states. Under the current system, an accused who is concerned that a panel will impose a harsher sentence than a judge must choose whether to forgo his right to a jury trial on the merits. n144 The difficulty of this choice is not merely hypothetical. In *United States v. Sherrod*, the appellant's challenge for cause against the military judge was denied. n145 Nevertheless, the appellant felt compelled to choose trial by that same judge in order to avoid [*263] a severe sentence by court members. n146 Despite any concerns an accused might have about sentencing by court members, the military judge has the discretion of whether to approve a request for trial by judge alone. n147 Thus, in *Sherrod*, the military judge was able to deny the appellant's request for judge-alone trial. n148

To protect the accused from this dilemma, Congress could change the MCM to allow the accused to elect trial by court members but then waive sentencing by the panel. This approach is similar to the waiver procedures used in jury sentencing states. n149 The six jury sentencing states use various methods to allow a defendant to waive jury sentencing. The procedures depend on the timing of the waiver and who, if anyone must consent to the waiver. n150

Arkansas allows the defendant to waive jury sentencing either before or after the guilt phase of the trial. n151 If waived before the guilt phase, the prosecution must consent. n152 If waived after the jury finds the defendant guilty,

both the court and the prosecution must consent. n153 In contrast, Oklahoma and Virginia require the consent of the court and the prosecution regardless of when the request is made. n154 Missouri uses a bifurcated trial and allows the defendant to waive the second stage of trial, jury sentencing, by submitting a written request before voir dire. n155 In [*264] Kentucky, the defendant may not waive jury sentencing without the consent of the prosecution. n156 Finally, in Texas, the defendant is sentenced by the court unless he or she requests jury sentencing before the trial begins. n157 The defendant may also change the sentencing authority choice after a finding of guilty, but only with the consent of the prosecutor. n158 Thus, Congress could pattern military procedures to waive court member sentencing after one of these state systems or it could develop an entirely new procedure specifically designed for the military justice system.

Despite the benefits to an accused, critics of waivers contend that allowing defendants to forgo jury sentencing could effectively eliminate the practice entirely. n159 However, the impact that a waiver procedure may have on the frequency of court member sentencing is not the appropriate focus. In the military, the ability to elect sentencing by court members is considered a right. n160 The primary concern should be protecting the rights of the accused. Thus, the accused should have the choice of whether to exercise or forgo that right regardless of the potential impact on the practice of court member sentencing.

Additional objections lodged against jury sentencing waivers are that it prevents the community from participating in sentencing and permits defendants to forum shop. n161 The first of these arguments requires acceptance of the premise that sentencing is more appropriately performed by community members than by judges. n162 Even conceding that point, the defendant's rights to a fair trial must override the interests of the community in participating in sentencing. n163 As to the second argument, the option between judicial and court member sentencing allegedly causes forum shopping already. n164 Once again, the decision comes down to whether the [*265] accused's rights should prevail. In this situation, individual rights must be paramount because of the potential impact of the court-martial on the accused's life and liberty.

C. Implementing Military Judge-Only Sentencing

While the problems with court member sentencing could be addressed through various efforts to limit the panel's discretion, the better solution is to abolish the panel's role entirely and make military judges solely responsible for sentencing. n165 Eliminating court member sentencing would address many of the previously cited disadvantages to the accused and the government. n166 First, it will allow an accused to choose a trial forum based on "the more important and constitutionally protected issue of guilt or innocence" rather than fears about an unduly harsh sentence by court members. n167 Second, with judge-only sentencing, court-martial sentences are more likely to be consistent. n168 Military judges are more likely to focus on disparity between similar cases than members and will "develop an expertise which works to promote uniformity with respect to their cases." n169

Judge-only sentencing has many advantages attributable to the judges' unique position as compared to court members. Sentencing by military judges provides the greatest protection against unlawful command influence because the military judges report to a chain of command that is entirely independent from the convening authority and commanders who refer cases to trial. n170 A military judge has less reason than court members to be concerned with how others will respond to their sentencing decisions. n171 Moreover, unlike court members, independent judges do not have to participate in group decision-making, a potentially lengthy and cumbersome process. n172 Judge-only sentencing would also improve the [*266] public's perception of the military justice system's fairness because most civilian systems also use trained, independent judges. n173

Additionally, certain benefits arise from the qualifications of military judges over the average military member. Judges are more efficient at sentencing due to experience and knowledge of military law. n174 Military judges are arguably better equipped to disregard overly prejudicial information than are panel members. n175 Trained in procedural and evidentiary rules, the military judge is trusted to sort through evidence and disregard inflammatory information. n176

As with the other proposed solutions, proponents of jury sentencing raise a variety of challenges to the proposal of eliminating jury participation in sentencing. For example, one commentator argues that giving the public a role in sentencing educates them about the law and increases the perceived legitimacy of the legal institution. n177 Similar arguments are made in the military context. n178 The Advisory Commission formed as a result of the 1983 Military Justice Act concluded that a change to judge-only sentencing was not necessary. n179 In its recommendation to Congress, the Commission specifically noted the benefits of military member participation in court-martial sentencing as "foster[ing an] understanding of military justice by all service members and belief in the fairness of the system." n180

While these are persuasive arguments standing alone, they must be considered in context. In the twenty-eight years since the Commission conducted its assessment the military has undergone considerable change. n181 Although the overarching purpose of military justice has not changed, that reason alone does not justify stagnation of sentencing procedures. While the military has undergone change, the position of the military judge has also developed. The status of the military judge has increased among all stakeholders in the military justice system: Congress, the President, military [*267] appellate courts, and most importantly, the "vast majority of [military members] who prefer to be tried and sentenced by a military judge." n182 Simultaneously, the focus of sentencing in the military has become more individualized. n183 Individualization of sentences requires more information about the offense and the accused, information which military judges are experienced and trained to try to navigate whereas court members are not. n184

V. THE ROAD AHEAD: PUTTING UNIFORMITY BACK INTO THE SENTENCING OF MEMBERS OF THE UNIFORMED SERVICES

The uncontrolled sentencing discretion of court members and the inability of the military judge to alter a sentence imposed by those members may help encourage guilty pleas and bench trials. n185 One scholar contends that jury discretion in sentencing allows prosecutors to credibly claim that a jury sentence is more unpredictable than one imposed by a judge or included as part of a plea bargain. n186 For prosecutors, legislators, and judges "[t]he unpredictability of jury sentencing is a blessing, not a curse; the more freakish, the better." n187 Likewise, participants in the military justice system have little incentive to demand change in the "wild-card aspect" of court member sentencing because this unpredictability sometimes leads to faster and easier disposition of cases. n188 Even proponents of jury sentencing agree that jurors must be provided with more information, such as sentencing statistics and guidelines, in order to prevent unwarranted sentence disparities. n189

Thus far, the military has rejected the former approach--providing information about sentencing outcomes of similar cases to court members is not permitted. n190 Allowing the accused to waive court member sentencing is only a partial solution. n191 Although it might be possible to reduce the risks of arbitrary sentencing by court members through procedural remedies such [*268] as sentencing guidelines, the more effective solution is to abolish court member sentencing entirely. n192

Eliminating court members from sentencing will remedy many of the earlier cited disadvantages: concerns about fairness in the court member selection process, unlawful command influence, sentence disparity, compromise verdicts, and forum shopping. n193 With members no longer responsible for sentencing, concerns about court members trying to satisfy their commanders through their sentence decisions are gone. n194 Also, the government will know that forum selection is no longer driven by the accused's concerns about sentencing fairness. n195 Members will still learn about the military justice system through participation in the guilt phase of the trial. n196

On the other hand, a change to judge-only sentencing would leave a significant disadvantage intact. For example, giving military judges unfettered sentencing discretion does not guarantee that they will sentence more uniformly than court members. Thus, even the discretion of military judges needs some constraint. Sentencing guidelines can provide this constraint by giving judges a range for an appropriate sentence. Additionally, the convening authority and the appellate courts could retain the discretion to modify the sentence after trial. n197

Twenty-eight years have passed since Congress requested an advisory commission review and provide recommendations to improve the military justice system. n198 The time has come for Congress to initiate another broad review to ensure that the system, and its sentencing procedures, is best designed to ensure an effective, disciplined fighting force. Just as the military continually improves its capabilities and personnel readiness, the military justice system needs to continually improve its ability to support the mission.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsCriminal ProcessRight to Jury TrialCriminal Law & ProcedureGuilty PleasGeneral OverviewCriminal Law & ProcedureDefensesGeneral Overview

FOOTNOTES:

n1 *See* Nancy J. King, *Capital Jury: How Different is Death? Jury Sentencing in Capital and Noncapital Cases Compared, 2 OHIO ST. J. CRIM. L. 195, 196 (2004)* (noting trend in many jurisdictions to limit judicial discretion in sentencing through sentencing guidelines and presumptive sentencing schemes).

n2 *See* Colonel James A. Young III, *Revising the Court Member Selection Process, 163 MIL. L. REV. 91, 111 (2000)* (explaining limited instructions given to court members). Colonel Young stated that during his service as a staff judge advocate and military judge, court members expressed concerns about their ability to perform the sentencing role. *See id. at 111, n. 112* (describing complaints from court members about lack of guidance for determining appropriate sentences).

n3 *See* King, *supra* note 1, at 196 (contrasting sentencing reform in capital cases with lack of similar reform in non-capital cases).

n4 *See* ARK. CODE ANN. § 5-4-103(a) (1987) ("If a defendant is charged with a felony and is found guilty of an offense by a jury, the jury shall fix punishment in a separate proceeding as authorized by this chapter."); *KY. REV. STAT. ANN. § 532.055(2)* (West 2008) ("Upon return of a verdict of guilty or guilty but mentally ill against a defendant, the court shall conduct a sentencing hearing before the jury, if such case was tried before a jury."); *Mo. REV. STAT. § 557.036* (2003) (If the jury at the first stage of a trial finds the defendant guilty of the submitted offense, the second stage of the trial shall proceed ... The jury shall assess and declare the punishment as authorized by statute."); *OKLA. STAT. ANN. tit. 22, § 926.1* (West 2003) ("In all cases of a verdict of conviction for any offense against any of the laws of the State of Oklahoma, the jury may, and shall upon the request of the defendant assess and declare the punishment in their verdict within the limitations fixed by law . . . . "); *TEX. CODE CRIM. PROC. ANN. § 37.07(2)(b)* (Vernon 2007) ("[W]here the defendant so elects in writing before the commencement of the voir dire examination of the jury panel, the punishment shall be assessed by the same jury . . . . "); *VA. CODE ANN. § 19.2-295* (2009) ("Within the limits prescribed by law, the term of confinement in the state correctional facility or in jail and the amount of fine, if any, of a person convicted of a criminal offense, shall be ascertained by the jury ... ").

n5 *See Murphy v. Commonwealth, 50 S.W. 3d 173, 178 (Ky. 2001)* (stating jury sentence recommendation has no mandatory effect).

n6 *See OKLA. STAT. ANN. tit. 22, § 927.1* (West 2003) (designating judge as sentencing authority when jury fails to agree on punishment).

n7 *See* King, *supra* note 1, at 195 (noting lack of scholarship on jury sentencing). Each year, juries sentence about 4,000 defendants in felony non-capital cases. *See* Nancy J. King and Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study, 57 VAND. L. REV. 885, 887 n.4 (2004)* (estimating number of felony sentences imposed by juries annually). Per the Bureau of Justice Statistics, an estimated 3,200 defendants were convicted of murder and nonnegligent homicide (capital and non-capital) nationwide in 2003, but only about 4% of these were sentenced to death. *See* King, *supra* note 1, at 195 n.2 (comparing jury sentencing statistics). Jury sentencing in non-capital cases in Texas is so common that "[t]he number of felons sentenced by juries in Texas alone exceeds the number of federal defendants convicted annually by jury, for misdemeanors or felonies, in all districts combined." *See* King & Noble, *supra*, at 887 (relating extent of jury sentencing).

n8 *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, RULES FOR COURTS-MARTIAL (R.C.M.) 1006 & 1007 [hereinafter MCM]. The court members comprise what is called the "panel" and the term "jury" is not used in the military. *See* Young, *supra* note 2, at 94 (explaining military justice terms). Additionally, a panel is not a representative cross-section of the military community. *See United States v. Lewis, 46 M.J.*

338, 341 (C.A.A.F. 1997) ("In courts-martial, an accused is not entitled to a panel that represents a cross-section of the eligible military population.").

n9 *See* MCM, *supra* note 8, R.C.M. 1002 (describing authorized sentences).

n10 *See* Marlene Higgins, Note, *The Air Force Academy Scandal: Will the "Agenda for Change" Counteract the Academy's Legal and Social Deterrents to Reporting Sexual Harassment and Assault?, 26 WOMEN'S RIGHTS L. REP. 121, 126 n.75 (2005)* (citing cases of unlawful command influence in court-martial sentencing); Steven M. Immel, *Development, Adoption, and Implementation of Military Sentencing Guidelines, 165 MIL. L. REV. 159, 186-87 (2000)* (concluding that military sentencing data indicates high degree of disparity); James K. Lovejoy, *Abolition of Court Member Sentencing in the Military, 142 MIL. L. REV. 1, 29-30 (1994)* (contending the option between sentencing by military judge or court members causes forum shopping). Article 66(c) of the Uniform Code of Military Justice provides a unique safeguard by providing a reviewing court, the court of criminal appeals, broad authority to adjust courts-martial sentences. Recently, one scholar argued that this extensive authority to determine sentence appropriateness is almost too great. *See* Lieutenant Colonel Jeremy Stone Weber, *Sentence Appropriateness Relief in the Courts of Criminal Appeals, 66 A.F. L. REV. 79, 132-33 (2010).*

n11 *See* Higgins, *supra* note 10, at 124-25 (2005) (explaining how potential biases in military justice system may deter victims from reporting); Lovejoy, *supra* note 10, at 56-57 (explaining how public perception of military justice system is influenced by court member sentencing).

n12 For a historical and current overview of court-martial sentencing, see *infra* notes 20-55 and accompanying text.

n13 For a discussion of the shortcomings of court-member sentencing, see *infra* notes 56-117 and accompanying text.

n14 For an analysis of proposed alternatives to court-member sentencing, see *infra* notes 118-84 and accompanying text.

n15 For an explanation of the approach this author recommends, see *infra* notes 185-98 and accompanying text.

n16 For a brief summary of the adoption of the UCMJ and MCM, see *infra* notes 20-25 and accompanying text.

n17 *See* Part II.A. For a history of the development of the military justice system see Colonel Robert O. Rollman, *Of Crimes, Courts-Martial and Punishment -- A Short History of Military Justice, 11 A.F. L. REV. 212 (1969)* and Library of Congress, *Uniform Code of Military Justice Legislative History, available at* http://www.loc.gov/rr/frd/Military_Law/UCMJ_LHP.html (last visited Mar. 28, 2011).

n18 *See* MCM, *supra* note 8, R.C.M. 903 (detailing procedure for military judge to ascertain choice of forum).

n19 *See* Part II.B.

n20 *See* Rollman, *supra* note 17, at 215 (describing Articles of War of 1775).

n21 *See* Library of Congress, *The Uniform Code of Military Justice* at 1, *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/UCMJ_summary.pdf (last visited Mar. 28, 2011) (providing legislative summary of UCMJ).

n22 *See* The Military Justice Act of 1950, Pub. L. No. 81-506, *64 Stat. 107* (implementing 1950 UCMJ).

n23 *See* Rollman, *supra* note 17, at 220 (explaining legislative development of military justice system).

n24 *See* Library of Congress, *supra* note 21, at 2 (describing purpose of UCMJ).

n25 *See id.* (noting uniformity in court-martial procedure among service branches).

n26 *See* Immel, *supra* note 10, at 164 (reviewing the history of military sentencing). "The 1949 version of the Manual for Courts-Martial directed [court] members to consider the accused's background, uniformity in sentencing, general deterrence, and discipline." *Id.*

n27 *See id.* at 166 (linking abandonment of uniformity in sentencing with the Court of Appeals decision in United States v. Mamaluy).

n28 *See United States v. Mamaluy, 27 C.M.R. 176, 180 (C.M.A. 1959)* (noting multiple specifications).

n29 *See id.* (rejecting uniformity of sentences requirement). Moreover, the court noted that military courts lack the continuity needed for them to fashion uniform sentences because military courts are specifically convened for each court-martial. *See id.*

n30 *See id. at 180.* In a court-martial, all offenses are combined and the accused receives one sentence. *See* Young, *supra* note 2, at 110 (describing military's unitary system of sentencing).

n31 *Id.* at 180.

n32 *See United States v. Rinehart, 24 C.M.R. 212, 216 (C.M.A. 1957)* (holding that court members are not permitted to "rummage through a treatise on military law, such as the Manual [for Courts-Martial].").

n33 *See id. at 213-14* (relating trial counsel's statements).

n34 *See id. at 216* (describing court members actions).

n35 *See id. at 216-17* (providing rational for holding).

n36 For an explanation of the elimination of uniformity as a sentencing goal, see *supra* notes 26-31 and accompanying text.

n37 *See* MCM, *supra* note 8, R.C.M. 903 (detailing procedure for choice of forum).

n38 *See* Lovejoy, *supra* note 10, at 7 (describing forum choices available in courts-martial).

n39 *See* MCM, *supra* note 8, R.C.M. 1006 & 1007 (outlining procedure for sentence deliberations and sentence announcement).

n40 *See* MCM, *supra* note 8, R.C.M. 503(a)(2) (explaining process for detailing members to courts-martial).

n41 *See* Lovejoy, *supra* note 10, at 28-29 (noting trend for selection of trial by military judge alone). Major Lovejoy concludes that because two-thirds of courts-martial are tried by military judge alone, the ability to choose sentencing by court members is not that important to military members. *See id.*

n42 *See id.* at 28 (providing rationale for court-martial forum choices).

n43 *Id.* at 8. Defense counsel also noted that the accused stands a greater chance of receiving a lenient sentence from court members than from a military judge. *See id.* (summarizing comments from survey of military defense counsel).

n44 *See* MCM, *supra* note 8, R.C.M. 1003 (providing authorized punishments).

n45 *See* Young, *supra* note 2, at 111 (explaining "unfettered discretion" of court-martial sentencing authority).

n46 *See* MCM, *supra* note 8, R.C.M. 1002 (describing sentence determination).

n47 *See* MCM, *supra* note 8, R.C.M. 1005(e) (listing statements required in sentencing instructions). The military judge is required to inform the panel of the maximum authorized punishment and any mandatory minimum punishment, the effect that certain sentences will have on the accused's entitlement to pay and allowances, and the procedures for deliberation and voting. *See id.* The judge must also inform the members that they are solely responsible for selecting an appropriate sentence, an instruction aimed at preventing unlawful command influence, which is discussed in *infra* notes 102-03 and accompanying text. *See id.* Finally, the judge directs the members to consider all factors in aggravation, extenuation, and mitigation. *See id.*

n48 *See* U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK, 60-61 (2010) [hereinafter BENCHBOOK] (providing sample instructions for courts members). Despite providing these sentencing goals in the instructions to members, the MCM and Benchbook do not provide any guidance on how to apply them. *See* Immel, *supra* note 10, at 195 (criticizing lack of guidance).

n49 BENCHBOOK, *supra* note 48, at 61.

n50 Young, *supra* note 2, at 110-11.

n51 *See* Lovejoy, *supra* note 10, at 10 (noting disparity between military and federal/state presentencing procedures). The only evidence that the prosecution must provide is the accused's pay and service data along with the duration and nature of pretrial restraint, if any. *See* MCM, *supra* note 8, R.C.M. 1001(b)(1) (listing matters for presentation by prosecution).

n52 *See supra* notes 19-23 and accompanying text.

n53 *See United States v. Grill, 48 M.J. 131, 133 (C.A.A.F. 1998).*

n54 Major General Jack L. Rives & Major Steven J. Ehlenbeck, *Civilian Versus Military Justice in the United States: A Comparative Analysis, 52 A.F. L. REV. 213, 224 (2002)* (describing military judges).

n55 *See* Young, *supra* note 2, at 111 n. 112, 114 (describing feedback from court members on their abilities to sentence). Given the lack of information and guidance provided to court members, "[n]o wonder [they] readily admit they are uncomfortable with the sentencing function." *Id.* at 114.

n56 *See* Parts III.A and III.B.

n57 *See* Parts III.A and III.B.

n58 For a discussion of value of community involvement in sentencing, see *infra* note 79-83 and accompanying text.

n59 For an overview of the military-specific argument about court member sentencing as training, see *infra* notes 76-78 and accompanying text.

n60 For a brief summary of the constitutional argument about jury sentencing, see *infra* notes 84-87 and accompanying text.

n61 *See* Dwight H. Sullivan, *Playing the Numbers: Courts-Martial Panel Size and the Military Death Penalty, 1 MIL. L. REV. 1, 15 n.68 (1999)* (citing articles that are critical of court-member selection process); *see also* Young, *supra* note 2, at 91 (noting criticism of court-member selection is long-standing). The method for selecting members to serve on courts-martial has previously come under scrutiny during periods of conflict when political, media, and public attention is centered on the military. *See* Young, *supra*.

n62 *See* Young, *supra* note 2, at 94 (stating that court-members are selected by convening authority).

n63 See Rives & Ehlenbeck, *supra* note 54, at 225 (describing convening authority's responsibility for court-member selection).

n64 *See* UCMJ, art. 25(d)(2) (2008). (listing factors for convening authority to consider).

n65 *See* Young, *supra* note 2, at 103-05 (describing subjectivity of selection criteria and incongruity between criteria and reality). Colonel Young points out, for example, that the UCMJ and MCM do not indicate whether the reference to age implies that an older member is more qualified than a younger one. *See id.* at 103 (criticizing lack of guidance). Additionally, a general court-martial convening authority may command several installations throughout the world and is not capable of knowing all potential members on a personal level. *See id.* at 104-05 (noting difficulty of applying criteria).

n66 *See id.* at 107-08 (proposing alternative approach to court-member selection).

n67 *See, e.g.*, Scott Sylkatis, *Sentencing Disparity in Desertion and Absent Without Leave Trials: Advocating a Return of "Uniform " to the Uniform Code of Military Justice, 25 QUINNIPIAC L. REV. 401, 407-09 (2006)* (finding sentencing disparity in cases involving specific articles). Sylkatis examined sentences in cases involving Article 85 desertion and Article 86 absence without leave and found a high disparity among sentences. *See id.*

n68 *See, e.g.*, Nancy J. King and Rosevelt L. Noble, *Jury Sentencing in Noncapital Cases: Comparing Severity and Variance with Judicial Sentences in Two States, 2 J. EMPIRICAL LEGAL STUD. 331, 331 (2005)* (stating for most offenses studied jury sentences were more severe and more varied than judges' sentences); Robert A. Weninger, *Jury Sentencing in Noncapital Cases: A Case Study of El Paso County, Texas, 45 WASH. U.J. URB. & CONTEMP. L. 3, 37 (1994)* (concluding that "juries imposed longer and more variable prison terms than judges.").

n69 *See* Young, *supra* note 2, at 112 (noting survey participants believed judges were more likely to sentence consistently in similar cases than court members).

n70 *See* Lovejoy, *supra* note 10, at 27 n.167, 30 n.180 (reporting results of survey).

n71 *See* Adriaan Lanni, Note, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?, 108 YALE L.J. 1775, 1797 (1999)* (describing compromise verdicts as one source of criticism about sentencing juries).

n72 *See id. at 1797* (explaining compromise verdicts).

n73 *See* Morris B. Hoffman, *The Case for Jury Sentencing, 52 DUKE L.J. 951, 989 (2003)* (describing shortcomings of mock jury studies).

n74 *See* Lanni, *supra* note 71, at 1797 (cautioning against drawing conclusions from mock jury studies on compromise verdicts).

n75 *See* Lovejoy, *supra* note 10, at 50 (arguing that the risk of compromise verdicts alone is enough to eliminate practices that allow them).

n76 *See id.* at 39-40 (noting commanders believe court members benefit from experiencing fairness of military justice system).

n77 *See* ADVISORY COMM'N REPORT, MILITARY JUSTICE ACT OF 1983 5 (1984), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/ACR-1983-I.pdf (presenting arguments for retaining court member sentencing). Similarly, deliberative democracy theory extols the benefits of jury participation as advancing the common interest, legitimizing the result, and revitalizing participation in the political process. *See* Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, *89 VA. L. REV. 311, 341-42 (2003)* (applying deliberative democracy theory to jury sentencing).

n78 *See* Lovejoy, *supra* note 10, at 40 (stating that training junior leaders through courts-martial is "grossly unfair to the accused").

n79 *See* Lanni, *supra* note 71, at 1782 (contending juries are better situated than judges or politicians to sentence).

n80 *See* Lovejoy, *supra* note 10, at 38-39 (responding to argument that court members are needed to provide community input in sentencing).

n81 *See id.* (stating juries are free from extrinsic concerns).

n82 *See* Rives & Ehlenbeck, *supra* note 54, at 226 (describing reporting structure for military judges).

n83 *See* The Library of Congress, *The Military Justice Act of 1983*, http://www.loc.gov/rr/frd/Military_Law/MJ_act-1983.html (last visited Mar. 28, 2011) (providing materials related to last major amendment to UCMJ).

n84 *See* U.S. CONST. amend. XIV.

n85 *See* Hoffman, *supra* note 73, at 976-81 (describing recent Supreme Court case law on sentencing factors).

n86 *See id.* at 982.

n87 *See id.* at 982-83.

n88 *See* Lovejoy, *supra* note 10, at 29-30 (stating that the choice between judge alone and court member sentencing leads to forum shopping).

n89 For an analysis of the accused's forum choice, see *supra* notes 41-46 and accompanying text; *see also* ADVISORY COMM'N REPORT, *supra* note 77, at 14 (noting forum option enables forum shopping).

n90 *See* ADVISORY COMM'N REPORT, *supra* note 77, at 23 (presenting arguments against member sentencing).

n91 *See id.* at 5 (describing right to choose court member sentencing).

n92 *See id.* at 22 (concluding choice of forum is "not a mere 'gamble'").

n93 *See id.* at 15 (stating forum option "is not required by . . . constitutional law or military due process").

n94 *See* Lovejoy, *supra* note 10, at 29 (describing administrative burden of arranging members for courts-martial); *see also* ADVISORY COMM'N REPORT, *supra* note 77, at 5 (noting judge-alone sentencing reduces burden of serving on courts-martial).

n95 *See* Lovejoy, *supra* note 10, at 29 (explaining that member participation in courts-martial disrupts training). There is also the administrative burden of identifying and organizing members for participation. *See id.* noting burdens).

n96 *See* ADVISORY COMM'N REPORT, *supra* note 77, at 22 (asserting sentencing phase takes insignificant amount of time).

n97 Young, *supra* note 2, at 112-13 (describing potential impact of changing to military judge-only sentencing).

n98 *Id.* (suggesting impact of changing to judge-only sentencing will be temporary).

n99 The importance of military members' confidence in the military justice system is obvious. The public's perception of the system also matters as recognized by the Military Court of Appeals. *See* Captain Teresa K. Hollingsworth, *Unlawful Command Influence, 39 A.F. L. REV. 261, 265* (citing military cases emphasizing importance of public confidence injudicial system).

n100 *See* Lovejoy, *supra* note 10, at 31 (reporting surveyed military members perceive member sentencing as more unpredictable than judge sentencing).

n101 *See* Immel, *supra* note 10, at 186-87 (concluding from statistical analysis of courts-martial sentencing data that "the military suffers from a high degree of sentence disparity); Sylkatis, *supra* note 67, at 409 (concluding from analysis of sentences for specific articles that sentencing disparity exists).

n102 *See* King & Noble, *supra* note 68, at 354 (finding greater sentence disparity in cases with jury sentencing than those with judge sentencing). In both Arkansas and Virginia, sentences imposed by judges after bench trial or plea were more consistent than those imposed by juries. *See id.* (explaining results of statistical analysis).

n103 *See id.* at 360-61 (stating that lack of information may explain disparity among jury sentences).

n104 *See supra* notes 29-33 and accompanying text.

n105 *See* Lovejoy, *supra* note 10, at 32 (noting member sentencing requires protecting the panel from unlawful command influence).

n106 *See* UCMJ, Art 37(a) (2008) (prohibiting unlawful influencing of court action). Article 37(a) states:

No authority convening a . . . court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

n107 Young, *supra* note 2, at 125 (noting suspicion of military justice system).

n108 *See* Higgins, *supra* note 10, at 127 (contending that cases of unlawful command influence occur so often that military courts have developed two tests for it). The Court of Military Appeals has tests for both actual and apparent unlawful command influence. *See United States v. Allen, 31 M.J. 572, 589-90 (N.M.C.M.R. 1990)* (describing both tests).

n109 *See United States v. Gore, 60 M.J. 178, 178-79 (C.A.A.F. 2004)* (summarizing postural background of case). The Court of Appeals for the Armed Forces affirmed the dismissal of the charges with prejudice by the military judge. *See id. at 187* (holding that dismissal of charges with prejudice was not an abuse of discretion). However, courts rarely dismiss charges with prejudice due to unlawful command influence. *See* Lieutenant Colonel Patricia A. Ham, *Revitalizing the Last Sentinel: The Year in Unlawful Command Influence, 2005 ARMY LAW. 1, n.5* (explaining rehearing is usually ordered in cases of unlawful command influence).

n110 *See United States v. Mallett, 61 M.J. 761, 764-65 (A.F. Ct. Crim. App. 2005)* (holding trial counsel's comments violated Art. 37, unlawful command influence). The appeals court concluded the military judge's curative instruction was insufficient to render the comments harmless. *See id.* (concluding that impact of unlawful command influence was not erased).

n111 *See* Rives & Ehlenbeck, *supra* note 54, at 226 (explaining chain of command for military judges).

n112 *See* Lovejoy, *supra* note 10, at 34-35 (stating that court member involvement necessitates Military Rules of Evidence to protect against improper influence from inadmissible evidence).

n113 *See United States v. Boles, 11 M.J. 195, 198 (C.M.A. 1981)* (contending that court members necessitate procedural protections).

n114 *See id. at 201* (describing role of military judge to ensure integrity in system).

n115 *See* Lovejoy, *supra* note 10, at 34-35 (arguing military judges are able to rule on evidence and render proper decisions).

n116 *See, e.g.*, *United States v. Howard, 50 M.J. 469, 470-71 (C.A.A.F. 1999)* (holding a military judge properly determined he was not required to recuse himself after considering evidence from previous courts-martial); *United States v. Oakley, 33 M.J. 27, 34-35 (C.M.A. 1991)* (holding military judge properly determined recusal was not required after presiding over trials of two coconspirators).

n117 *Howard, 50 M.J. at 471*.

n118 *See infra* notes 119-40 and accompanying text; *see e.g*. Immel, *supra* note 10, at 198 (proposing the adoption of military sentencing guidelines); Sylkatis, *supra* note 67, at 411 (contending adoption of sentencing guidelines would lead to more uniform sentences).

n119 *See infra* notes 144-64 and accompanying text; *see e.g*. Hoffman, *supra* note 73, at 1006 (describing partial waiver procedures in some states with jury sentencing); Iontcheva, *supra* note 77, at 376 n.330 (noting states that permit waiver of jury sentencing).

n120 *See infra* notes 165-84 and accompanying text; *see e.g*. Lovejoy, *supra* note 10, at 65 (arguing removing court members from sentencing is most effective way to prevent improper sentences); Young, *supra* note 2, at 108 (proposing military judges perform sentencing function to eliminate perceptions of unfairness).

n121 *See* Young, *supra* note 2, at 111 (noting the wide discretion granted to courts-martial sentencing authority).

n122 *See* Immel, *supra* note 10, at 196 (discussing whether sentencing disparity is justified). Major Immel concludes that the sentences needed to maintain good order and discipline or effectiveness in various units and duty stations may vary despite the similarity of individual cases. *See id.* at 196-97 (presenting examples of hypothetical crimes in differing units). Such disparity is less justified, however, when the crime is unrelated to these military purposes. *See id*. at 197. For example, two individuals in distinctly different units who commit similar sexual assaults should receive similar sentences. *See id.*

n123 Hoffman, *supra* note 73, at 1003.

n124 *See* Hoffman, *supra* note 73, at 1003 (noting common criticisms of jury sentencing).

n125 *See* Immel, *supra* note 10, at 160-61 (summarizing origins of federal sentencing guidelines). Notably, the sentencing goals of the federal and military systems are quite similar because both seek "just punishment, deterrence, incapacitation, and rehabilitation." *See id.* at 161. The military also has the purpose of maintaining good

order and discipline. *See* BENCHBOOK, *supra* note 49, at 60-61 (providing sample jury instructions on purposes of sentencing).

n126 *See United States v. Booker, 543 U.S. 220, 245-46 (2005)* (holding that portions of the federal sentencing statute which make the guidelines mandatory are severed).

n127 *See* Immel, *supra* note 10, at 161 n.13 (listing states that use sentencing guidelines).

n128 *See* Sylkatis, *supra* note 67, at 413 (citing *United States v. Mamaluy, 27 C.M.R. 176, 180 (C.M.A. 1959)).*

n129 *See* Hoffman, *supra* note 73, at 1003-04, n. 186 (detailing nonfelony classifications in states with sentencing guidelines and jury sentencing). Hoffman notes that the ranges within some classifications are wide, such as a first degree felony that ranges from five to ninety-nine years. *See id.* (citing *TEX. PENAL CODE ANN. § 12.32*). *See also VA. CODE ANN. § 18.2-10* (Michie Supp. 2002) (providing sentencing range for class two felonies as twenty years to life imprisonment).

n130 *See* Iontcheva, *supra* note 77, at 355 (describing information available to sentencing juries). The sentencing jury is provided only the maximum and minimum sentences available and must reach a unanimous verdict. *See id.*

n131 *See* Rives & Ehlenbeck, *supra* note 54, at 229 (describing discretionary sentencing guidelines used in Virigina). In Virginia the jury's sentence is advisory only but is usually given considerable deference by the judge in formulating the final sentence. *See* Iontcheva, *supra* note 77, at 374 (explaining the advisory role of sentencing juries in Virginia). Still, neither the judge nor the jury can depart below the mandatory minimum sentence required by law for certain offenses. *See* Rives & Ehlenbeck, *supra*, at 229.

n132 *See* Rives & Ehlenbeck, *supra* note 54, at 229 (noting military judge has no authority to modify sentence imposed by panel).

n133 *See id.* (noting the ability of convening authority to modify results of trial).

n134 *See* Iontcheva, *supra* note 77, at 350 (arguing against delegating authority to draft sentencing guidelines).

n135 *See Mistretta v. United States, 488 U.S. 361, 379 (1989)* (holding that Sentencing Reform Act satisfies the "intelligible principle" standard for legislative delegation of authority).

n136 *See* Iontcheva, *supra* note 77, at 351 (contending that sentencing guidelines "are an inadequate substitute for individualized moral judgment).

n137 *See id.*, at 344-45 (contending that sentencing requires consideration of many factors making it better suited to careful deliberation rather than "rigid categories of guidelines.").

n138 *See, e.g.*, Sylkatis, *supra* note 67, at 413 (arguing that sentencing guidelines may prevent offenses).

n139 *See, e.g.*, Immel, *supra* note 10, at 180 (quoting charter of United States Sentencing Commission to "[a]void[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted . . . ").

n140 *See* Immel, *supra* note 10, at 200-01 (describing proposed plan for implementing military sentencing guidelines). Summary and special courts-martial are the lowest levels of proceedings against military members and involve relatively limited punishments. *See* Greg McCormack, *The Difference Between Levels of Courts-Martial, available at* http://www.militarylawyers.org/court-martial-levels-difference.htm (last visited Mar. 28, 2011).

n141 *See* Immel, *supra* note 10, at 200 (asserting that special courts-martial exceed general courts-martial).

n142 *See id.* at 201 (listing forms of punishment available in addition to confinement).

n143 *See, e.g.*, Sylkatis, *supra* note 67, at 411-13 (proposing sentencing guidelines for articles covering desertion and absence without leave).

n144 *See United States v. Sherrod, 26 M.J. 30, 31 (C.M.A. 1988).*

n145 *See id. at 31* (summarizing procedural background of case).

n146 *See id.* (noting appellant's reason for choosing trial by military judge). The court remarked "[t]he appellant's instincts seem to have been valid since the members of this general court-martial sentenced him to the literal maximum punishment allowed by law: dishonorable discharge, confinement for 29 years, total forfeitures, and reduction to Private E-l." *Id. at 31, n3.* The appellate court subsequently reduced the confinement to twenty years. *See id.*

n147 *See* MCM, *supra* note 8, R.C.M. 903(c)(2)(B) ("[u]pon receipt of a timely request for trial by military judge alone the military judge shall . . . [a]pprove or disapprove the request, in the military judge's discretion.").

n148 *See Sherrod, 26 M.J. at 31* (observing that military judge denied appellant's request). The Court of Military Appeals reversed holding that because the trial judge was disqualified all of his subsequent actions were void, including his denial of the appellant's request for trial by judge alone. *See id. at 33.*

n149 *See e.g.* Hoffman, *supra* note 73, at 1006 (describing partial waiver procedures).

n150 *See id.* (surveying waiver procedures in five jury sentencing states); *see also* Iontcheva, *supra* note 77, at 376-77 (stating that two states allow unconditional waivers and citing case law in three other states addressing waiver of jury sentencing).

n151 *See* ARK. CODE ANN. §§ 5-4-103(b)(4), 16-97-101(5) (1987) (providing requirements for waiver of jury sentencing).

n152 *See* ARK. CODE ANN. § 5-4-103(b)(4) (1987) (providing that court may determine the punishment if prosecution and defense agree).

n153 *See* ARK. CODE ANN. § 16-97-101(5) (1987) (providing that after jury finding of guilt defendant may waive jury sentencing if prosecution agrees and court consents).

n154 *See VA. CODE ANN. § 19.2-257* (2009) (stating that trial may proceed without jury at defendant's request and with consent of prosecution and court); *Case v. Oklahoma, 555 P.2d 619, 625 (Okla. Crim. App. 1976)* (holding that court and prosecutor must consent to defendant's waiver of jury).

n155 *See Mo. REV. STAT. § 557.036(4)(1)* (2003) (providing waiver procedures for court to assess punishment after jury finding of guilty).

n156 *See Commonwealth v. Collins, 933 S.W.2d 811,819 (Ky. 1996)* (holding that prosecution is entitled to have jury assess punishment after guilty finding).

n157 *See TEX. CODE CRIM. PROC. ANN. art. 37.07* § 2(b) (Vernon 2007) (stating that court shall assess punishment unless defendant requests jury sentencing before commencement of voir dire).

n158 *See id.* (stating that prosecutor must consent to change in sentencing authority after guilty finding is rendered).

n159 *See* Hoffman, *supra* note 73, at 1007 (expressing concern that partial waivers might be fatal to jury sentencing).

n160 For an analysis of the accused's right of forum choice, see *supra* notes 88-93 and accompanying text.

n161 *See* Iontcheva, *supra* note 77, at 376 (presenting arguments against defendants to waive jury sentencing).

n162 *See generally id.* (contending that jury sentencing is conducive to deliberative democratic approach). Iontcheva argues that "[t]he American jury is the quintessential deliberative democratic body." *Id.* at 346.

n163 *Cf. id.* at 376-77 (noting tension between defendant's rights and jury autonomy). One solution is to allow jury waivers with the consent of the prosecution and to permit the judge to adjust an excessively harsh or weak sentence. *See id.* at 377.

n164 *See* Lovejoy, *supra* note 10, at 29-30 (contending that option between sentencing by military judge or court members causes forum shopping); *see also* ADVISORY COMM'N REPORT, *supra* note 77, at 14 (noting that ability of accused to elect court members or military judge enables forum shopping).

n165 *See* Lovejoy, *supra* note 10, at 3 (stating that removing court members from the sentencing role entirely is more effective than "piecemeal changes" to procedural rules governing court member participation).

n166 For arguments that court member sentencing has disadvantages for the accused and the government, see *supra* Parts III.A and III.B.

n167 Lovejoy, *supra* note 10, at 57 (arguing for military judge-only sentencing).

n168 *See id.* at 57-58 (contending that judge-only sentencing will produce more consistent results).

n169 ADVISORY COMM'N REPORT, *supra* note 77, at 5 (describing ability of military judges' to ensure uniformity in sentencing).

n170 *See* Rives & Ehlenbeck, *supra* note 54, at 226 (explaining military judges' separate chain of command from convening authorities).

n171 *See* ADVISORY COMM'N REPORT, *supra* note 77, at 6 (suggesting that military judges are less likely than court members to be influenced by what others think of their sentence).

n172 *Cf.* Iontcheva, *supra* note 77, at 341-43 (contending that deliberation in group decisionmaking has distinct advantages). Sentence deliberation by a jury is argued to form more informed decisions, legitimate the sentencing outcome, and improve the political system by involving the community. *See id.* (outlining advantages to jury sentencing deliberations).

n173 *See* Young, *supra* note 2, at 110 (contending that judge-only sentencing would improve public perception of court-martial fairness). "Civilians are used to having trained, professional, independent judges impose sentences." *Id.*

n174 *See* ADVISORY COMM'N REPORT, *supra* note 77, at 5 (presenting advantages of judge-only sentencing). "It is recognized that military judges are professional sentencers who are better qualified by reason of education, training, experience, and knowledge to adjudge appropriate sentences." *Id.* at 24.

n175 *See, e.g.*, ADVISORY COMM'N REPORT, *supra* note 77, at 5 (noting that military members might be more likely to be influenced by "volatile information" than judges).

n176 *See supra* notes 112-17 and accompanying text.

n177 *See* Iontcheva, *supra* note 77, at 345, 348-49 (describing valuable outcomes of public participation in sentencing).

n178 *See supra* notes 77-78 and accompanying text.

n179 *See* ADVISORY COMM'N REPORT, *supra* note 77, at 6 (concluding "[t]he present procedure . . . has served the military justice system well and no compelling reason exists for change.").

n180 *Id.* (recommending that member participation in courts-martial remain unchanged).

n181 For example, the military has fought in numerous conflicts and has become more diverse and technologically advanced than it was in 1983.

n182 *See* Lovejoy, *supra* note 10, at 65 (contending that stature of military judges has increased over time).

n183 *See id.* (noting trend towards individualization in court-martial sentencing); *see also* Young, *supra* note 2, at 110 (stating that military uses individualized approach to sentencing).

n184 *See* Lovejoy, *supra* note 10, at 65 (reasoning that as sentencing information increases, risk that court members will be unduly prejudiced by that information also increases).

n185 *See* King, *supra* note 1, at 198 (explaining how unpredictability in jury sentencing increases guilty pleas and bench trials).

n186 *See id.* (arguing that uncertainty generated by jury discretion in sentencing leads to more plea bargains).

n187 *Id.*

n188 *Id.*

n189 *See* Iontcheva, *supra* note 77, at 359 (conceding that structural devices are needed to prevent disparate results by sentencing juries).

n190 *See supra* notes 29-33 and accompanying text.

n191 In cases where the accused does not waive sentencing by court members, the earlier cited disadvantages will still exist.

n192 *See* Lovejoy, *supra* note 10, at 3 (contending that abolishing court member sentencing is most effective and efficient solution to problems created by their participation).

n193 *See* Parts III.A and III.B.

n194 *See supra* notes 102-04 and accompanying text; *see also* Lovejoy, *supra* note 10, at 62-63 (contending that military judges are "better insulated from the influence of command").

n195 *See* Lovejoy, *supra* note 10, at 60 (reasoning that judge-only sentencing will eliminate forum shopping based on undue sentencing concerns).

n196 *See supra* notes 77-78 and accompanying text.

n197 *See supra* note 133 and accompanying text.

n198 *See generally* ADVISORY COMM'N REPORT, *supra* note 77, at v (explaining background for formation of 1983 Advisory Commission on matters related to military justice).