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ARTICLE: ABOLITION OF COURT MEMBER SENTENCING IN THE MILITARY.

NAME: Major James Kevin Lovejoy *

BIO:

* Judge Advocate General's Corps, United States Army. Presently assigned as Chief, Military Justice and Operational Law, Office of the Staff Judge Advocate, 3d Infantry Division (Mechanized). B.S. 1981, University of Notre Dame; J.D., 1984, Catholic University of America; LL.M., 1992, The Judge Advocate General's School, United States Army. This article is based on a written dissertation that the author submitted to satisfy, in part, the Master of Laws degree requirements for the 41st Judge Advocate Officer Graduate Course.

LEXISNEXIS SUMMARY:

... The military judge provides the members with sentencing instructions and the court closes for deliberation on an appropriate sentence for the accused. ... The 1951 Uniform Code of Military Justice (UCMJ) brought all four services under one code; established the COMA; provided the accused the right to remain silent; prohibited double jeopardy; and guaranteed soldiers the right to counsel. ... The 1981 amendments to the 1969 *Manual for Courts-Martial* (1969 *Manual*), and the emergence of Chief Judge Robinson Everett on the COMA vastly improved the government's position with respect to sentencing. ... The sentencing body must consider far more than the effect on the military in arriving at an appropriate sentence for a soldier who physically abuses his nephew while on leave in Texas. ... Major General Sennewald, former Commander, Forces Command, summarized this perception before the Advisory Commission to the Military Justice Act of 1983 with the following comment: ... Although such sentiment is popular with commanders and senior noncommissioned officers, it is of minimal concern to the typical junior or midlevel soldier facing punishment under the UCMJ. ... During these early years of military justice the convening authority was the only one who had access to evidence about the accused that might be relevant to an appropriate sentence. ...

TEXT:

[*1] I. Introduction.

The court-martial panel has convicted the accused of an offense. Counsel for the government and for the accused present evidence in aggravation and extenuation and mitigation, respectively. The military judge provides the members with sentencing instructions and the court closes for deliberation on an appropriate sentence for the accused. The members enter the deliberation room and the following colloquy occurs:

PRESIDENT: "Alright, before we vote on a sentence, does anyone have anything they want to discuss?"

MEMBER 1: "I do. We all know the accused was lying through his teeth on the merits. I think we ought to sentence him to the maximum punishment."

MEMBER 2: "We've heard this story before about how he came from a broken home and was abused by his father. Let's not make the same mistake we did last time when we didn't give the accused a Dishonorable Discharge."

MEMBER 3: "I'm confused. We heard a lot of testimony about the accused's lack of rehabilitative potential. Just what exactly does that mean? Because he doesn't have any should we give him a longer sentence or just discharge him?"

MEMBER 4: "I don't know, I can't help but think that 'but for [*2] the grace of God go you or I.' Maybe we should be a little bit easier on the guy."

MEMBER 2: "Are you kidding? We gave him the benefit of the doubt on the charges he pleaded not guilty to, and then after we acquit him, the judge tells us that earlier he had pleaded guilty to a separate offense. That ticks me off. I think he deserves the maximum sentence."

MEMBER 6: "I kind of agree with you -- after all, he did make an unsworn statement during sentencing and the judge says that he can't be cross-examined. If he was telling the truth he would have made a sworn statement."

MEMBER 5: "I thought we had agreed during findings that because it was a really close case, we'd go ahead and convict him of the offense, but then give him a break during sentencing."

MEMBER 7: "That's right. Plus, the victim was a bum who got what he deserved. Why punish this guy, who's got a good military record, just because some degenerate started a fight that the accused decided to finish?"

MEMBER 4: "My biggest concern is how this will affect his retirement benefits. Anybody got any idea how that works?"

MEMBER 8: "Not exactly, but my brother-in-law is a parole officer, and he tells me that the average prisoner gets out on parole after serving less than a third of the adjudged sentence. So we better not be too lenient."

MEMBER 2: "That brings up another issue. If this guy pleaded guilty he must have a pretrial agreement with the general. I know that we're not supposed to concern ourselves with that, but it sure seems to make this whole process a waste of time."

MEMBER 4: "The only other thing I would like to mention is that this crime is awfully similar to the trial last week. The general sure was upset about the results of that court-martial."

MEMBER 1: "I know the judge told us to disregard it, but I can't help but think about the trial counsel asking that defense witness if he knew that the accused was an alcohol rehabilitation failure."

PRES: "Well, let's get down to business. Everybody write down what they think is an appropriate sentence . . ."

MEMBER 5: "We're supposed to vote on the least severe proposed sentence first. Does anyone know whether a Bad Conduct Discharge, eighteen months, and a fine but no forfeitures, is less than a Dishonorable Discharge and twelve months confinement, with two-thirds forfeitures?"

Although the above scenario is admittedly a bit extreme, it is intended to demonstrate the multitude of issues that may cause a panel to reach an unjust sentence for an accused. Knowing that these are the factors that court members might consider during sentencing [*3] deliberations, both the accused and the government are better served when a military judge, specifically trained in the laws and principles of sentencing, decides the sentence of the accused. Because so many inappropriate and irrelevant factors may be considered by members during their sentencing deliberations, the military must establish sentencing procedures that minimize the risks of these occurrences.

The risks of improper sentences from court members could be reduced through continued piecemeal changes to the current procedural rules governing sentencing. A far more efficient and effective change, however, is to eliminate court members from sentencing completely, and to turn the entire process over to military judges.

The normal courtroom procedure in this country is for the trial judge to determine the appropriate punishment for an offense. In the federal criminal system and in forty-two of the fifty states, judges decide the sentences in all noncapital criminal trials. n1 Jury sentencing has been criticized for a number of years. Some commentators have characterized it as "sanctified guessing," n2 "sentencing by lottery," n3 a "crapshoot," n4 and "amateur brain surgery." n5 Although he did not question the constitutionality of jury sentencing, Justice Potter Stewart did have "serious questions about the [*4] wisdom of such a practice." n6 Five of the thirteen states that at one time used the jury for sentencing have done away with that practice. n7

Criticism of the military practice of court member sentencing can be traced to the historic *Crowder-Ansell* dispute following World War I. n8 Court member sentencing has come under more recent review during the revision of the

1984 *Manual for Courts-Martial* (1984 *Manual*). Congress tasked the Advisory Commission to the Military Justice Act of 1983 to conduct an in-depth analysis of several issues related to military justice including "whether the sentencing authority in courts-martial cases should be exercised by a military judge in all noncapital cases to which a military judge is detailed." n9

Although many consider sentencing to be the most important phase of a criminal trial in terms of its impact on an accused's life, n10 it perhaps has been overshadowed by the attention given to the guilt or merits portion of a trial. Numerous statutes and rules of criminal procedure deal with proving the guilt or innocence of an accused, while very few are focused on determining an appropriate sentence once criminal guilt is proven beyond a reasonable doubt. Even the Constitution reflects a preoccupation with guilt as opposed to punishment. Of all the articles and amendments to the Constitution related to criminal trials, n11 the only restriction with respect to punishment [*5] is that it not be "cruel and unusual." n12 In a similar vein, of the twelve chapters in the Rules for Courts-Martial only one is devoted to sentencing. n13

Prior to the recent phenomenon of sentencing guidelines, federal and state court judges were entrusted with grave sentencing responsibilities with few procedural limitations. This is likely due to trained judges, as opposed to juries, performing the sentencing function in most jurisdictions. n14 The military, on the other hand, to maintain the tradition of member sentencing, has created a convoluted sentencing process that often keeps relevant sentencing evidence from the court members because they cannot be trusted to apply it properly. n15

Military justice historically has been a function of command. Much to the chagrin of commanders, control over military justice has shifted bit by bit from commanders to judge advocates and military judges. n16 Eliminating members from sentencing may be viewed as simply another step in this direction. Consequently, the decision to eliminate court members from sentencing likely depends on one's view on the much broader issue of whether courts-martial are a system of justice owned by attorneys, n17 or a tool of discipline owned by commanders. n18 Predictably, the battle lines have been drawn [*6] between lawyers and commanders. Attorneys believe military judges are better qualified to assess appropriate sentences, while convening authorities and commanders feel panels are better suited to perform this task. n19

An understanding of what constitutes an appropriate sentence is necessary before one can determine who is better suited to determine the proper punishment in a military court-martial. The civilian court system generally recognizes four purposes for sentencing: (1) punishment-retribution; (2) general deterrence; (3) incapacitation-individual deterrence; and (4) rehabilitation. n20 An additional and extremely important purpose in the military is for the sentence to aid the command's efforts to maintain good order and discipline. n21

Sentencing trends in the federal and state courts have shifted over time from strict retribution for the offense -- *an eye for an eye* -- to individualized sentences focusing more on the offender and rehabilitation. n22 However, with the demise of rehabilitation efforts, the tough anticrime legislation of the 1980s, and the emergences of sentencing guidelines, the trend has begun to turn back towards retribution for the offense and general deterrence.

The military has experienced similar trends with respect to the perceived goals of sentencing. Prior to 1949, sentences focused more on retribution, general deterrence, and incapacitation of the offender, as no provision existed in the *Manual for Courts-Martial (Manual)* for evidence to be offered about the offender. Under the 1951 *Manual*, members had access to information about the defendant and sentences began to focus more on rehabilitation. n23 But because of the high quality of the all-volunteer force in the 1980s [*7] and the more recent downsizing of the military, rehabilitation has lost its attractiveness. n24

Although some specific purposes of sentencing -- retribution or rehabilitation -- have fallen in and out of popularity, the wiser practice, and avowed goal of sentencing in today's military, is to adjudge a sentence that considers all five purposes previously enumerated. n25 This is not a simple task. n26 To adjudge a sentence that achieves these goals, the sentencing body must: (1) have access to all relevant information about the accused; (2) understand the principles of penology and the administrative consequences of sentences adjudged; (3) treat accused soldiers fairly and equally; n27 and (4) understand the impact the sentence will have on military discipline. This is far too difficult a task to be left to court members who are untrained and inexperienced in the science of criminal sentencing.

To evaluate the merits of adopting mandatory sentencing by military judges, this article will examine the development and implementation of current sentencing procedures. This article then will evaluate these procedures from the perspective of the people most affected by them -- namely, the accused, the government trial counsel, commanders, court members, military judges, and the general public.

II. Current Sentencing Procedures Under the Uniform Code of Military Justice

A. *Forum Options*

Soldiers facing courts-martial may choose from four different options regarding their plea and the composition of their court-martial. They may elect to: (1) be tried by members on both the merits and sentencing; (2) be tried by a military judge on both the merits and sentencing; (3) plead guilty before a military judge and be sentenced by members; or (4) plead guilty and be sentenced by a military judge. n28 The option soldiers do not have is to be tried by members on the merits but sentenced by a military judge. n29 This often [*8] poses a significant problem for the accused, because the sentencing consequences of his or her choice between members or the military judge may prevent him or her from choosing the most favorable forum with respect to guilt. A common belief exists among many of those who practice military justice that, *as a general rule*, an accused stands a better chance of acquittal with members. n30 However, it is also the general consensus that if convicted by members, an accused often stands a greater risk of being punished severely by the same members during sentencing. n31 In light of this phenomenon, defense counsel are more likely to advise their clients to forfeit their right to trial by members to avoid the heightened risk of a more severe sentence. n32

Although the *Manual* gives the accused the right to request trial by military judge alone, this right is not absolute. n33 The military judge has the discretion to grant or deny the request, which may force the accused to be tried and sentenced by a forum not to his liking. n34 Common reasons for disapproving requests for trial by judge alone are if the military judge has tried a coaccused, or has heard [*9] testimony during an improvident plea. n35 A former Chief Judge of the United States Court of Military Appeals (COMA), Robinson Everett, recognized that this discretion can cause problems for an accused, because the accused often has very cogent reasons for wanting trial by judge alone: "namely, (a) a desire to be tried [and sentenced] by an official who is not under the command of the convening authority who referred the charges for trial; and (b) a wish to have guilt adjudged and sentence imposed by an officer who is legally trained." n36

Although the soldier facing court-martial does not have an absolute right to trial by military judge, he does have more control over the matter than his civilian counterpart facing charges in federal court. Federal Rule of Criminal Procedure 23b requires the consent of both the trial judge and the prosecutor for the accused to be tried by judge alone; Rule for Courts-Martial (R.C.M.) 903 requires only the consent of the military judge, not the trial counsel or convening authority. n37 However, civilian defendants, when making that forum choice, need not concern themselves with the sentencing consequences of that decision, because all sentences are determined by the judge. However, the military accused must accept the consequences of being sentenced by members should he choose to be tried by members on findings. Consequently, soldiers facing court-martial may feel pressured to forfeit their right to a trial by their peers to avoid being sentenced by them. n38

B. *Presentencing Hearing*

Presentencing hearings are governed by R.C.M. 1001 through 1011. The general procedures permit the government to present its case in aggravation through documents and live witnesses, subject to cross-examination. The defense then is Permitted to offer evidence of extenuating and mitigating circumstances, also through documentary evidence and the testimony of live witnesses. The accused may make a sworn statement subject to cross-examination, or an unsworn statement subject only to rebuttal. n39 Rebuttal and surrebuttal may follow at the discretion of the military judge. After counsel [*10] present their respective arguments on sentencing, the members are instructed by the military judge before they close to deliberate.

With respect to the government's case in aggravation, the only evidence that *must* be presented to the sentencing body is the pay and service data of the accused and the duration and nature of any pretrial restraint, all of which is listed on the charge sheet. n40 Whether additional evidence is offered in aggravation is left to the discretion of the trial counsel. Provided that admissibility requirements can be satisfied, the trial counsel may offer personnel records, n41 evidence of prior convictions, n42 evidence in aggravation, n43 and opinion evidence regarding the duty performance and rehabilitation potential of the accused. n44

The accused then may present rebuttal evidence and other matters in extenuation and mitigation n45 -- or choose to remain silent and offer no evidence on sentencing. Because nothing is required from the accused and little of the government during presentencing, it is not unusual for the sentencing body to be lacking in information about the accused when it begins its sentencing deliberations. This lack of information about the accused is perhaps the biggest

flaw in the military's current sentencing procedure, particularly when compared to the comprehensive presentencing reports prepared in federal and some state criminal courts. n46

The lack of detailed sentencing instructions for court members is another aspect of court-martial sentencing subject to criticism. The only instructions the military judge is required to give the members include: (1) guidance on the maximum punishment; (2) guidance on the procedures for deliberation and voting; (3) advice that they are solely responsible for adjudging an appropriate sentence and may not rely on the possibility of any mitigating action by the convening or higher authority; and (4) instructions that they should consider all matters in extenuation and mitigation and aggravation. n47

The *Military Judges' Benchbook (Benchbook)* provides additional [*11] guidance to military judges regarding supplemental instructions judges should give members, such as describing the different punishments, advising the members that "no punishment" is an option, that a guilty plea is a matter in mitigation and may be the first step toward rehabilitation, an explanation of sworn versus unsworn statements, and that the accused will be given credit for any pre-trial confinement served. n48 The military judge is given the discretion to decide whether to instruct the members on the accused's mendacity, n49 and other matters raised by the particular facts of a case, n50 or specifically requested by the trial counsel, defense counsel, or the members. n51 Most military judges conclude their instructions with the following general guidance regarding the overall goals of sentencing:

In accordance with your best judgement based on the evidence that has been presented in this case, your own experiences and general background, you should select a sentence which best serves the ends of good order and discipline in the military, the needs of the accused, and the welfare of society. n52

III. Origins of Current Military Sentencing Procedures

America's federal, state, and military criminal justice systems all developed during a period in history when the public feared the [*12] threat of oppressive, foreign appointed judges presiding over criminal trials. n53 In light of this fear, one of the earliest criminal procedures developed was the protection of the right to trial by a jury of one's peers. n54 Another factor contributing to the popularity of trial by jury was the paucity of trained jurists, which led to the perception that little difference existed between a judge and a lay jury. n55 One might have expected that these circumstances would have led to the adoption of jury sentencing as well, but that did not occur. The federal government and the vast majority of states all adopted the British tradition of mandatory judge sentencing. n56 In similar fashion, the American military looked to the British Army for guidance, and adopted its practice of having the court-martial adjudge the sentence as well as determine guilt. n57

A. *Early History of Military Justice*

Most military legal scholars agree that the origins of American military justice can be traced to The Code of Articles promulgated in 1621 by Swedish General Gustavus Adolphus. n58 General Adolphus was the first commander to appoint a judge advocate to his staff. He also developed a two-tier system of courts-martial very similar to the military's current general and special courts-martial. n59 Sentencing in these early courts-martial was performed by the members, who had absolute discretion unless the punishment was fixed by decree. n60

The American Army's first formal code -- the American Articles of War of 1775 -- closely mirrored the British Code which had evolved from the code of General Adolphus. n61 Like the British and Swedish codes, sentencing was the duty of the members. n62 With the exception [*13] of a few offenses, the members had complete discretion regarding the punishment to be adjudged. n63 Unfortunately, the members usually had access to very little information about the accused on which to exercise their abundant discretion. Because the Articles of War of 1775 did not provide a separate sentencing hearing, the sentence was based solely on the evidence presented on the merits. n64

The Articles of War of 1775 were modified in 1776 by Thomas Jefferson, John Adams, and three others. Notable changes included: increasing the mandatory sentences for several offenses; authorizing death as a punishment for more offenses; precluding execution of sentences until a report was made to Congress, the General, or Commander-in-Chief; and providing for a second court-martial based on vexatious appeals. n65 The Articles were amended again in 1786 to require the Secretary of War's approval for any sentence that included death or dismissal of an officer. All other punishments could be approved by the appointing authority. n66

The American Articles of War of 1806 created the new offenses of disrespect to the President, Vice President, or Congress, and absence without leave as we know it today. Death could be adjudged only by a general court-martial, and required concurrence of two-thirds of the members.

One of the most significant changes made with respect to sentencing was the 1890 amendment to the Articles of War of 1874, [*14] which severely curtailed court members' discretion during sentencing. No longer could punishment "in time of peace, be in excess of a limit which the President may prescribe." n67 A table of maximum punishments was published one year later. n68

During these early years of military justice, members had very little evidence on which to adjudge an appropriate sentence. There was no sentencing hearing, n69 evidence of prior convictions was strictly limited, n70 and evidence in extenuation and mitigation could not be offered unless it was relevant to the merits. n71 Consequently, the sentences adjudged under these procedures emphasized uniformity and retribution as attention focused on the offense, and not the individual offender. n72

Although given practically complete discretion with respect to sentencing from the very beginning, it was not until the 1917 *Manual for Courts-Martial* (1917 *Manual*) that members were given any kind of guidance regarding the ends to which they should apply their discretion. The 1917 *Manual* contained detailed information about the United States Disciplinary Barracks at Fort Leavenworth, Kansas; the new policy permitting suspension of the punitive discharge for purely military offenses and the return to duty of those soldiers successfully rehabilitated; n73 and numerous other considerations that [*15] might affect the type and amount of punishment adjudged. n74 Thus began the long, slow trend toward individualized sentences that focused less on the offense and more on the offender. Although members now were expected to focus more on the individual, the sentencing procedures continued to provide them little access to information about the accused.

The 1921 *Manual for Courts-Martial* (1921 *Manual*) attempted to fill this void by permitting the members to consider the statement of service on the first page of the charge sheet. n75 This contained data on the accused's current enlistment, age, pay rate, allotments, prior service, character of any prior discharges, and dates of any pretrial restraint. The 1928 *Manual for Courts-Martial* (1928 *Manual*), also provided additional guidance to the members on what they might consider, n76 but again failed to provide the members meaningful guidance on what the sentence should hope to achieve. n77

[*16] One other notable characteristic of early military justice practice is that the decisions of courts-martial, with the exception of jurisdictional issues, could not be modified or set aside by The Judge Advocate General. n78 The appointing authority had absolute discretion to act on the findings and sentence. By custom of service he could return an acquittal or lenient sentence to the court-martial for reconsideration with a view toward greater punishment. n79

B. Post-World War I Developments in Military Justice

Following World War I, the military justice system, like the rest of the military, was subject to a significant after-action review. The post-World War I changes to military justice grew out of the historic *Crowder-Ansell* disputes. n80 In 1917, several enlisted soldiers assigned to Fort Bliss, Texas, refused to attend a drill formation. They were court-martialed and sentenced to a dishonorable discharge and confinement ranging from ten to twenty-five years. After the appointing authority ordered the sentence executed, the record of proceedings was forwarded to the Office of The Judge Advocate General for review. n81 The cases were forwarded to Brigadier General (BG) Samuel T. Ansell, Acting The Judge Advocate General n82 for review. Brigadier General Ansell directed that the findings be set aside for legal error. He was of the opinion that his powers of review authorized him to modify or set aside findings and sentence for lack of jurisdiction or for serious prejudicial error. n83 This was a radical departure from views held by former Judge Advocates General.

Major General (MG) Crowder, The Judge Advocate General, opposed BG General Ansell's position. He believed that The Judge Advocate General's review simply was advisory except for jurisdictional [*17] matters. n84 The War Department ultimately adopted MG Crowder's view. n85 In the end, however, the debate shifted to Congress which eventually adopted several of BG Ansell's proposals in the 1920 Articles of War. n86 Congress eventually approved several other proposals of BG Ansell as well. n87

C. Post-World War II Developments in Military Justice

During World War II, over sixteen million men and women served in the armed forces. Approximately two million courts-martial were convened, one for every eight service members. An average of sixty convictions were returned for every day the war was fought. n88 Consequently, many soldiers left the service with a very poor view of military justice. n89 The heavy caseload and unfair treatment received by numerous soldiers during World War II demonstrated the competing interests of military justice during time of war. On the one hand, the military must have the means to enforce discipline [*18] on a large scale during hostile operations. Balanced against this is the competing interest of ensuring the legal rights of the individual soldier are not abused. n90

The post-World War II review resulted in drastic changes to military justice. The 1951 Uniform Code of Military Justice (UCMJ) brought all four services under one code; established the COMA; n91 provided the accused the right to remain silent; n92 prohibited double jeopardy; n93 and guaranteed soldiers the right to counsel. n94

By far the most significant change made to military justice was the creation of the *law officer* -- an attorney who would be responsible for the fair and orderly conduct of the proceedings in accordance with the law. n95 The law officer would sit apart from the members, n96 instruct them on the applicable law, and make interlocutory rulings. n97 During congressional hearings, Professor Edmund Morgan advised Congress that the law officer "will now act solely as a judge and not as a member of the court, which becomes much like a civilian jury" and that "the law officer now becomes more nearly an impartial judge in the manner of civilian courts." n98

The 1951 *Manual* also codified the adversarial presentencing hearing. Under the 1951 *Manual*, the prosecution and defense were permitted to present "appropriate matter to aid the court in determining the kind and amount of punishment to be imposed." n99 As before, members were advised of the service data on the charge sheet and evidence of prior convictions. In guilty pleas, however, the trial counsel now could offer evidence in aggravation of the offense, subject to defense counsel cross-examination and rebuttal. n100 The [*19] 1951 *Manual* also allowed the accused to make an unsworn statement, and enabled the law officer to relax the rules of evidence for the accused's presentation of extenuating and mitigating evidence. n101

The 1951 *Manual* also contained additional guidance on what matters the members could consider during sentencing deliberations. n102 They were cautioned to adjudge the maximum sentence only in the most aggravated cases or instances of prior convictions. Members were encouraged to adjudge uniform sentences for similar offenses with the understanding that the special needs of the local community might justify a more severe punishment. Members were not to rely on higher authority to mitigate a sentence, but they were to keep in mind the effects a light sentence might have on the local community's perception of the military in those cases that also could be tried in civilian courts. n103 Finally, the 1951 *Manual* included a discussion on the two types of punitive discharge and when each would be an appropriate part of a sentence. n104

D. Post-Vietnam War Developments in Military Justice

Criticism of military justice during the Vietnam War prompted Congress to enact the most sweeping changes ever made to military justice. The Military Justice Act of 1968 created the position of military judge, and provided soldiers the option to be tried and sentenced by a military judge sitting without members. n105 Congress created an independent trial judiciary designed to give military judges the same functions and powers their civilian counterparts possessed. n106

Presentencing procedures were changed to permit argument by counsel and admission of the entire "personnel records" of an accused, as opposed to just their "service record." n107 Members no [*20] longer were instructed on the need for uniform sentences, or the effect of light sentences on the reputation of the armed forces. In effect, the goal was to give members even greater discretion in adjudging an appropriate sentence. n108

To assist military judges with their newly created authority and responsibility, the Army published the *Military Judges' Benchbook (Benchbook)*. n109 The Benchbook provides a detailed script for judges and counsel to follow during both the merits and sentencing portions of the court-martial, along with sample instructions for trials with members. n110

Several provisions of the Military Justice Act of 1968 simply codified earlier judicial opinions reached by the COMA between 1951 and 1968. In *United States v. Mamaluy*, n111 the COMA held that the court members were not to consider sentences in similar cases despite the language of paragraph 76a encouraging uniform sentences. n112 Similarly, in *United States v. Rinehart*, n113 the COMA eliminated the long-standing military practice of permitting

the members to consult the *Manual* during deliberations, and emphasized that the sole source of instruction on the law would be the military judge. n114

The COMA further attempted to relax the rules of evidence during sentencing in hopes of expanding the information that counsel could present to the sentencing body. n115 Unfortunately for trial counsel, these rules rarely were relaxed for the government. n116 Evidence [*21] in aggravation remained limited to evidence related to the offense, and not the offender. n117 The reluctance to relax the rules for the government extended into posttrial matters in *United States v. Hill*, n118 where the COMA condemned the government practice of gathering evidence of the accused's background for the convening authority to consider through posttrial interviews of soldiers convicted by a court-martial.

As previously noted, the goal of sentencing after 1917 gradually began to focus on individualized sentences and rehabilitation of the offender as opposed to retribution for the offense and general deterrence. In *United States v. Burfield*, n119 the COMA ordered a new sentencing hearing when the trial judge refused to allow a psychiatrist to testify for the defense that it was unlikely that the accused would repeat his offense. The COMA held that this was precisely the type of evidence that the sentencing body should consider. n120 This emphasis on individualized sentences and rehabilitation reached its zenith in a short-lived opinion from Judge Fletcher in *United States v. Mosely*. n121 In *Mosely*, Judge Fletcher went so far as to find that general deterrence was not a proper matter for consideration during sentencing. Fortunately for the government, *Mosely* rarely was enforced and ultimately was overruled in *United States v. Lania*. n122

The 1981 amendments to the 1969 *Manual for Courts-Martial* (1969 *Manual*), and the emergence of Chief Judge Robinson Everett on the COMA vastly improved the government's position with respect to sentencing. In *United States v. Vickers*, n123 the COMA affirmed the Navy-Marine Court of Military Review's (NMCMR) decision reversing the fifty-year-old practice that prohibited evidence in aggravation when an accused pleaded guilty. The COMA recognized that certain evidence -- such as rape trauma syndrome -- is highly relevant to determining the appropriate sentence. The 1969 *Manual* [*22] was revised to allow the military judge to relax the rules of evidence for the government, albeit only during rebuttal of defense evidence. n124 In *United States v. Mack*, n125 Chief Judge Everett expanded the admissibility of records of nonjudicial punishment. Although he was convinced in *Mack* that members could properly evaluate the weight to be given records of nonjudicial punishment, Chief Judge Everett later concurred in Judge Fletcher's opinion in *United States v. Boles* n126 that not all evidence in an accused's military records was admissible, essentially because members cannot be trusted to properly use this type of information. n127

The intent behind the sentencing changes in the 1984 *Manual for Courts-Martial* (1984 *Manual*) was to remove control of the proceedings from the hands of the defense. n128 The 1984 *Manual* greatly increased the amount of evidence the government could offer on sentencing during its case-in-chief. The government now could offer opinion evidence regarding the accused's rehabilitation potential regardless of whether or not the accused previously had opened the door. n129 However, all was not lost for the defense. Specific acts still were limited to cross-examination. n130 Aggravation evidence relating to the defendant was limited to rebuttal. n131 Only matters related to the offense -- victim impact, and adverse effects on the mission, discipline, or the command -- were admissible. n132 For the first time the members were allowed to consider the defendant's guilty plea. n133 Finally, the burden of posttrial review was switched from the government (staff judge advocate) to the defense. n134

[*23] This brief history demonstrates how sentencing procedures in the military have changed over the years. n135 In its infancy, the purpose of military sentencing was retribution for the offense and the procedures reflected this purpose by limiting the evidence on sentencing to that which was presented on the merits. Current sentencing procedures are concerned with far more than just retribution. They have been modified to provide greater access to information about the offense and the offender to result in a sentence that takes into account all of the additional purposes behind military sentencing. But each increase in permissible sentencing evidence is accompanied by a related increase in risk that the members will not know how to factor this evidence into their sentencing deliberations. Sentencing is no longer the one-dimensional process it used to be. It is a very complicated process that requires training and experience in both the law and the principles of sentencing -- training and experience that members sorely lack, and military judges possess.

IV. Comparison of Federal and State Sentencing Procedures

Although numerous theories exist on the origin of the jury system, one common belief is that it was brought to England in 1066 during the Norman invasion. n136 The first juries were actually the precursor to our modern grand

jury. n137 The trials themselves were conducted not in a court of law, but by ordeal, n138 wager of law, n139 or [*24] battle. n140 Although there was certainly little need for sentencing after trials of this nature, trials eventually moved into the courtroom, and the English common law developed the practice of having the trial judge decide the sentence in criminal trials. n141

In colonial America, drafters of federal and state constitutions were determined to protect the right of an accused to be tried by a jury of his peers. n142 Although the Constitution and Bill of Rights specifically provided for the right to trial by jury, they did not provide a constitutional right to be punished by a jury of one's peers. n143 The sole purpose for providing the right to trial by jury was to protect the accused from unwarranted punishment. n144 But once found guilty by a jury of one's peers, the only constitutional protection regarding the degree of punishment is that it not be "cruel and unusual" n145

The vast majority of states have adopted the practice of mandatory judge sentencing. This was not always the case, as several states preferred jury sentencing. Prior to 1967, jury sentencing, in one form or another, was practiced in thirteen states. n146 This number has declined to only eight states, n147 out of a growing recognition that the [*25] circumstances that may have justified jury sentencing at one time no longer exist. n148

Tremendous diversity exists among these eight states regarding both the amount of discretion afforded the jury, and the circumstances under which the jury will determine the sentence. In Mississippi, for example, the jury may determine punishment for only two crimes -- carnal knowledge and rape. If the defendant pleads guilty to these offenses, the trial judge decides the sentence. n149 In Kentucky, the jury decides the sentence in cases when the jury determines guilt, unless the punishment is fixed by the law. n150

In Arkansas, the jury determines the sentence unless: (1) the defendant pleads guilty; (2) the defendant elects trial by judge alone; (3) the jury fails to agree on punishment; or (4) the prosecution and defense agree that the judge will fix the sentence. n151

The practice in Missouri is for the judge to instruct the jury on the range of permissible punishment, but if the defendant requests in writing that a judge impose a sentence, or if the defendant is a prior, persistent, or dangerous offender, then the judge assesses punishment. The judge also will assess punishment if the jury cannot agree on a sentence. Even in those cases where the jury deliberates on a sentence, the judge ultimately decides the actual sentence, with the limitation that he or she cannot exceed the sentence adjudged by the jury unless their sentence is below the mandatory minimum. n152

In Oklahoma, the defendant must make a specific request to have the jury decide his or her punishment. The Oklahoma code sets limits within which the adjudged sentence must fall. If the jury fails to agree on the sentence, then the judge will determine the sentence for them. n153

In Texas, the judge is charged with determining the sentence unless the offense is one for which the jury can recommend probation, or the defendant requests in writing, before *voir dire*, that the jury decide the sentence. When the jury does decide the sentence, the Texas code provides detailed guidance on the instructions to be given the members regarding parole and good time. n154

[*26] Tennessee, conversely, has the jury decide the maximum and minimum sentence range within which the judge must determine the actual sentence. Except for the offenses of second degree murder, rape, carnal knowledge, assault and battery with intent to commit carnal knowledge, armed robbery, kidnapping for ransom, or any class X felony, the jury "shall affix a determinate sentence." n155

The Commonwealth of Virginia is the lone holdout remaining most true to jury sentencing. n156 Yet even in Virginia, jury sentencing is limited to only those cases tried on the merits before a jury. The right to trial by judge alone requires the consent of the trial judge and the prosecutor. n157 In cases decided by a jury, the Virginia code sets limits within which the jury's sentence must fall. The jury's sentence is subject to the review of the trial judge who has the power to suspend the sentence. n158 Legal scholars have criticized the Virginia procedure for years; n159 to avoid sentencing by juries that have demonstrated a tendency to impose severe sentences, criminal defendants are systematically forced to forfeit their right to a jury trial. n160

V. Consequences of Current Sentencing Procedures

It is necessary to understand the proper purposes and goals of sentencing before one can evaluate the success or failure of current military sentencing procedures. Should the goal of military sentencing be uniform sentences, lenient

sentences, sentences that maintain discipline, or sentences that focus on the offender as opposed to the offense? The only constitutional restriction with respect to criminal punishments is that they not be "cruel and unusual." n161 The *Manual's* only concern is that the sentence be "appropriate." n162

[*27] One view is that the predominant concern in sentencing should be its effect on discipline and the military's ability to accomplish its mission. n163 An alternate view is that the sentence of a court-martial is not an expression of the will of the command, but a judgment of a court of the United States that must, therefore, provide fairness and due process to the accused. n164 The resolution of these competing viewpoints lies somewhere in between. n165

To determine the full ramifications of the military's sentencing procedures, one should consider their impact on all of the affected parties. Thus, the military's sentencing procedures will be reviewed from the perspective of the accused, the government-trial counsel, commanders-court members, military judges, and the general public. n166

A. *The Accused*

A soldier pending court-martial benefits from the current sentencing procedures in several ways. Most importantly, the accused has a choice between sentencing by members and sentencing by judge alone. Depending on the circumstances of the case and the advice of counsel, the accused normally will select the forum most likely to adjudge the most lenient sentence. n167 The soldiers' morale is improved when they know they have a choice should they ever find [*28] themselves before a courts-martial. Giving soldiers this option also creates an appearance of fairness with the general public. n168 The right to be tried and sentenced by members also provides the accused a valuable bargaining chip during pretrial negotiations with the convening authority. n169

The downside for the accused is that the military judge may deny the request for trial by military judge alone. n170 Another significant drawback occurs when the accused perceives that members will sentence more harshly than a judge. To avoid being sentenced by these members, the accused must forfeit his right to be tried by them on the merits. n171 Although the perception exists among those involved in military justice that the odds favor contesting a case before members, n172 it is not uncommon for defense counsel to encourage defendants to request trial before military judge alone, based on the more favorable sentencing prospects presented. n173 Moreover, because two out of every three courts-martial are tried by [*29] military judge alone, n174 arguably the choice of being sentenced by members is not that important to the accused. n175

B. *Government -- Trial Counsel*

Retaining the current sentencing procedure that gives the accused the option to be sentenced by court members -- although perceived as advantageous -- offers no significant benefits to the government.

1. *Administrative Burden.* -- Sentencing by members creates an enormous burden on the government in the form of both the administrative difficulties associated with securing the attendance of members at trial and the corresponding disruption to military training caused by their absence from regular duties. n176 The impetus behind the change to the 1969 *Manual* -- giving the accused the option to be tried by military judge alone -- was to reduce the administrative burdens on the government. Eliminating court members from sentencing may extend these manpower savings even further. n177

2. *Forum Shopping.* -- Giving an accused the option to be tried by judge or members inevitably leads to "forum shopping." Soldiers facing trial undoubtedly will select members in those cases in which they feel they will receive a more lenient sentence. n178 Former Chief Judge Cedarburg, United States Coast Guard Court of Military [*30] Review, offered the following comment during his testimony before the 1983 Advisory Committee: "I know that there are judges who hammer and there are other judges who are lenient; but I also know that the hammers under the present system don't get a chance to sentence because they [the accused] don't go before them. They choose the trial by members." n179

That military judges will become too powerful or too heavy handed with their sentences if we eliminate court members sentencing is unlikely. Military judges are trained jurists who can be entrusted to sentence soldiers fairly. Nevertheless, if military judges begin to demonstrate a pervasive inability to adjudge proper sentences, the more appropriate solution would be consideration of some form of sentencing guidelines, as opposed to the current system of relying on untrained court members to serve as a system of checks and balances against judges who impose harsh sentences.

3. *Disparate Sentences.* -- Member sentencing also lends itself to much more disparate results, on both the high and low ends of the sentencing spectrum. n180 From the government's perspective, this can be either good or bad --

assuming a severe sentence is considered "good" for the government, and a lenient sentence is considered "bad." But not all disparate results are an indication of unfairness to the accused. n181 Several survey responses indicated that sentence disparity may be justified by different commands placing focus on different aspects of a crime. Such disparity also may be justified by a crime having a different effect on different units, depending on the unit's mission -- Training and Doctrine (TRADOC) posts may be more severe on fraternization and sexual offenses than Forces Command (FORSCOM) installations; 82d Airborne Division "ready brigades" are inclined to sentence more severely than garrison units stationed at XVIII Airborne Corps at Fort Bragg, North Carolina.

Excessive results -- be they high or low -- are detrimental to the government because they effect soldiers' perceptions of the overall fairness of the system. If the sentence is unduly harsh, soldiers -- as well as the general public -- will consider it an ineffective system [*31] corrupted by command influence. n182 Alternatively, an unduly lenient sentence -- such as retention of a barracks thief -- can have a devastating effect on unit morale and discipline. Unusually lenient sentences pose the greatest danger to military discipline because no posttrial remedy is available to correct the injustice. n183 If the sentencing body adjudges an unduly harsh sentence, however, the convening authority, or courts of military review can reduce an accused's sentence. n184 Although it is possible for a military judge to announce an irrationally low sentence, statistics indicate that judges, as opposed to members, are far less likely to adjudge aberrant sentences on either the high or low end of the spectrum. n185

4. *Unpredictable Results.* -- Parties in both surveys overwhelmingly agreed that court members are more unpredictable with respect to sentencing. Judges, be they more harsh or lenient, n186 have a much better history of adjudging sentences within a certain range of reason. Some defense counsel do not like this tendency of military judges to be more uniform during sentencing, because they lose the opportunity to gain their client a lenient sentence. n187 From the government's perspective, however, it is more advantageous for the military to have a system that is inclined to sentence more uniformly than one that promotes unpredictable results.

5. *Appellate Error.* -- Member sentencing creates a much greater risk of appellate error. n188 In the Advisory Commission to the Military Justice Act of 1983, critics of judge alone sentencing felt that appellate [*32] error was not a significant concern. It was their impression that few complex legal issues were addressed during sentencing, so only a minimal number of legal errors would be prevented. They also believed that most sentencing errors could be cured through sentence reassessment by a court of military review. n189 One need only look to the index of any recent Military Justice Reporter under "rehabilitation potential" or "uncharged misconduct" to discover the tremendous volume of appellate litigation generated by errors during sentencing. n190 Moreover, having courts of military review and convening authorities provide relief for sentencing errors is a poor excuse for maintaining a sentencing forum option that is far more prone to making such errors. n191

6. *Safeguards Against Command Influence.* -- To preserve the military tradition of member sentencing, and at the same time protect soldiers from being sentenced by panel members who may be unlawfully influenced by the convening authority that selected them as well as by commanders, n192 Congress and the President have had to continually monitor and update procedural safeguards to reduce the possibilities of unlawful command influence.

The intent of Article 25, UCMJ, is to ensure that convening authorities select only the "best qualified" personnel to sit as court members. It also requires that the court members be from a unit different from the accused n193 and senior in grade. n194 The court-martial panel often is referred to as a "blue ribbon panel," n195 hand picked by the convening authority. But the high standards of Article 25 are not always achieved. Sometimes convening authorities intentionally or unintentionally select members on the basis of their expendability from regular duties. n196 Counsel who have tried cases [*33] in busy jurisdictions are well aware of how often members are excused for field training exercises and other important military duties. There are virtually no restrictions on the convening authority's discretion to excuse members n197 -- the convening authority may delegate this authority to the staff judge advocate, legal officer, or principal assistant. n198

The disparity in the amount of time a convening authority spends selecting court members is another area of concern. The amount ranged from thirty minutes to several days. n199 Those who spent little time selecting members often commented that they rely on their subordinates to prepare a list of nominees. *United States v. Hilow* n200 demonstrated the risks associated with this practice. Although the convening authority in Hilow properly applied Article 25 criteria, his actions did not cure the taint of a misguided assistant adjutant who prepared the list of nominees with what he perceived to be people who were "hard-liners" on discipline.

Article 37, UCMJ, is designed to prevent commanders from reprimanding court-martial personnel or otherwise trying to influence [*34] court members or convening authorities with respect to judicial activities. n201 Article

98, UCMJ, n202 is designed to enforce the provisions of Articles 25 and 37. Article 98 provides punitive sanctions for anyone convicted of unlawful command influence. To date, however, there is not one reported case of a conviction under this article. Nevertheless, appellate courts continue to report cases of unlawful command influence. n203 Eliminating members on sentencing will significantly reduce concerns associated with unlawful command influence. n204

7. *Evidentiary Safeguards.* -- One of the military judge's responsibilities is to consider evidence, on motions and objections, that later may be ruled inadmissible. Judges are trusted to disregard such evidence and ultimately render a fair and impartial decision based only on admissible evidence. n205 Because court members are untrained in the law, however, the Military Rules of Evidence severely limit the evidence members may be exposed to. Consequently, the government's ability to offer substantial evidence about the accused or the offense often is frustrated and the resultant sentence is based on little or no information about the accused or the offense. n206

[*35] Moreover, it is the accused and not the government who controls the amount and type of evidence that the government may introduce regarding the accused's background and character. If the accused has a bad record, he or she can keep this from the members by not "opening the door" for the government by introducing any good character evidence. Conversely, if he or she has a good background, the defense can present a great variety of evidence in extenuation and mitigation.

In *United States v. Boles*, n207 the COMA observed that the military's procedural rules for sentencing were not as liberal as those in the federal district courts. The COMA recognized that this variance may be the result of court members adjudging sentences at courts-martial as opposed to judges in the federal system. The susceptibility of court members requires the military judge to assume a proactive role in protecting members from evidence that may "unduly arouse the members' hostility or prejudice against an accused." n208

Moreover, due to the members' inexperience in evaluating evidence, relevant evidence that is otherwise admissible on sentencing must be excluded because its prejudicial impact outweighs its probative value. n209 The task of determining relevant sentencing evidence has become so confusing that appellate court judges have taken to discouraging trial counsel from pushing the limit until "the dust settles a bit and the rules become more clear." n210

C. *Commanders-Court Members*

From the command's viewpoint, member sentencing offers the [*36] following advantages: n211 (1) members provide a highly educated *blue ribbon* panel that knows the needs of the military; (2) members provide valuable community input as to what is needed for discipline; (3) member sentencing provides valuable training for young soldiers; and (4) member sentencing is a highly valued military tradition. Alternatively, member sentencing creates the following problem for commanders: (5) it disrupts unit training and mission requirements while commanders and senior non-commissioned officers are away from their normal duties; (6) members are not properly trained to perform the sentencing function because they cannot properly evaluate rehabilitation and aggravation evidence; do not know the collateral consequences of certain punishments; are [prone to compromise verdicts; and are unduly influenced by emotion; and (7) it causes undue reliance on convening authorities and appellate courts to correct inappropriate sentences.

1. *Court Members Are a Blue Ribbon Panel.* --are a bBlue Ribbon Panel, --

We have a habit . . . of loosely referring to a court-martial panel as the jury. . . . [I]t is not a jury; it was never designed to be a jury. . . . It was designed to be a blue ribbon panel. They were to be picked because of their expertise and their knowledge. They wanted . . . the people who were mature; the people who knew how to make decisions; the people who were aware of the military requirements. . . . [T]hey represent the decision-making level of the Army. . . . [W]e teach them something about military justice; they know the situation in the Army." n212

That member sentencing has survived to this date is attributable to the quality and integrity of the officers and enlisted personnel who serve as members. n213 The problem with member sentencing lies not with the integrity of the members, but with asking them to perform a duty they know little if anything about. n214

[*37] Nonlegal military commanders are distinctly inferior to legal personnel insofar as the technical ability needed for the proper administration of a system of criminal justice is concerned, just as they are inferior (as are lawyers) to physicians in terms of medical knowledge. Lawyers are ill equipped to direct air strikes against enemy targets, lead troops into battle, or engage in any of the myriad other functions. . . . Military commanders, in like fashion, are not trained to perform brain surgery on military patients in military hospitals. And military commanders are not Professionally competent to administer criminal justice. n215

Even if we presume that the convening authority always selects the "best qualified" people to serve as court members, this still would not overcome the members' lack of training and education in the principles of sentencing. n216

2. *Members Provide Valuable Community Input Needed to Determine an Appropriate Sentence.* -- This was the reason most commonly offered in support of maintaining court member sentencing. n217 Several commanders and staff judge advocates indicated that because court members live and work in the community affected by the offense they are better able to determine the type and amount of punishment appropriate for the Particular offense. Others commented that the military judge is too far removed from the military community to understand the ramifications his or her sentence will have on discipline within the unit and the community. n218 Three of [*38] fifteen military judges surveyed agreed that they try to balance the sentences they adjudge against those adjudged by members in similar cases. n219 Those responding to the survey in favor of member sentencing also argue that the judgment of several members with different points of view and experiences is more likely to result in a more fair sentence than that adjudged by a military judge sitting alone. n220

When the charged offenses involved are uniquely military -- such as, absence without authority, disrespect, and failure to obey a lawful order -- or have a direct impact on the military, more of an argument is made on behalf of the community input that court members bring to the sentencing process. Yet whatever advantage court members may have in such cases can be overcome by having sentencing witnesses testify regarding the impact of these offenses on the military community. Moreover, military judges will develop a greater appreciation for this impact over time -- after all, they are members of the community as well. Finally, as the scope of military jurisdiction has expanded to cover more cases only tangentially related to the military solely by virtue of the offender's status as a soldier, n221 the unique perspectives that court members bring to the sentencing process have become less significant.

The original intent of Congress was that courts-martial would be courts of very limited jurisdiction over only military offenses. n222 When this was the practice, member sentencing made good sense. The court members were well suited to determine the appropriate [*39] punishment for the average private disobeying a lawful general order. But now that courts-martial have jurisdiction over practically every offense committed by a soldier, court member sentencing does not appear as sensible. The sentencing body must consider far more than the effect on the military in arriving at an appropriate sentence for a soldier who physically abuses his nephew while on leave in Texas.

Rather than attempt to fashion a system that permits members to punish military offenses and judges to punish the "generic" offenses, more consistent results will be achieved by having the military judge impose punishment for all offenses. Developing one military judge's knowledge concerning the effect crimes have on the military community is much easier than attempting to train new court members in the principles of sentencing for every new case. Military judges are members of the community and they all have extensive criminal law experience. Evidence of the specific impact a particular offense may have on a military community also can be offered by both the government and defense during the sentencing phase of the trial. n223

Whatever advantage members may bring to the system by serving as the "conscience of the community," their influence has declined over the years for several reasons. First, the number of cases in which an accused elects to be tried and sentenced by members has decreased. n224 Second, the perception exists that members are more likely to adjudge disproportionately higher and lower sentences than are military judges. n225 As such, it would appear that member "input" is not that valuable to our system of justice in determining an appropriate sentence. n226 Finally, the ability of members to provide the community's assessment of the punishment necessary for a particular offense is now controlled indirectly by the military judge and the decisions he or she makes regarding the type and amount of evidence the members may consider during deliberations on sentencing.

3. *Member Sentencing Helps Train Future Leaders.* -- This is one of the more common reasons offered in support of member sentencing. n227 Lieutenant General John Galvin, former Commander, VII [*40] Corps, testifying before the Advisory Commission to the Military Justice Act of 1983, stated that "the fundamental fairness which is characteristic of the military justice system is instilled in court members and they carry that concept with them from the courtroom." n228 Colonel William W. Crouch, former Commander, 2d Armored Cavalry Regiment, felt that court-martial duty prepared members for "all kinds of leadership positions." n229

Although development of junior leaders is an admirable goal, *training* them in a forum that must decide whether a soldier should be punitively discharged and an appropriate amount of confinement is grossly unfair to the accused. Unlike most other military training, a court-martial is at best, a "live fire" exercise and, at worst, "actual combat," as far as the counsel, judge, and accused are concerned. The courtroom never was intended to be a training ground for junior officers.

Command influence issues aside, numerous appellate court decisions indicate that convening authorities often are reluctant to select junior members to serve on court-martial panels because they lack the proper age, experience, length of service, and judicial temperament. n230 Article 25, UCMJ, encourages this practice. Ultimately, most convening authorities select as members those officers and senior noncommissioned officers who already have demonstrated their decision-making and leadership abilities. n231 Junior officers are not the only ones who benefit from serving on court-martial panels. As noted by Lieutenant General Galvin, all court members carry with them from the courtroom a greater sense of the magnitude and importance of the military justice system. Yet court members need not participate in the sentencing function to gain this appreciation for the justice system. They will continue to gain the same benefits from their role in determining guilt or innocence.

4. *Military Tradition.* -- The tradition of court member sentencing is tied to the very origins of the military court-martial. n232 Commanders [*41] are understandably reluctant to surrender control over what they perceive to be a unique need of the military community. n233 Commanders feel that it is their responsibility to establish the moral and professional tone of the unit. n234 These feelings alone, however, do not justify continuation of an antiquated sentencing practice solely to preserve an historical tradition for the sake of tradition.

The professed sincerity of the command's commitment to member sentencing is not supported by their actions. The radical change in the 1968 Military Justice Act that gave the accused the option to be tried and sentenced by military judge alone was "vigorously supported" by the armed forces. n235 Convening authorities agree that eliminating members from sentencing would not deprive the command of important powers. n236 Although some senior commanders have expressed a willingness to bear the administrative burdens of court-martial duties as an inherent part of their overall command responsibility, n237 one need only consider the frequency with which requests for excusal occur whenever a member is due to participate in a field training exercise or other important military operation. The proposal currently being evaluated by the working group to the Joint Service Committee on Military Justice, to completely eliminate court members from straight special courts-martial during combat, is indicative of how "sincere" commanders are about the professed importance of court-martial duty compared to their principle military responsibilities. n238

[*42] Furthermore, the military *tradition* of court member sentencing bears little resemblance to its original beginnings. Commencing in 1948, with the introduction of enlisted members on the panel, and continuing in 1968, by giving the accused the option to be tried and sentenced by the military judge alone, the role of court members has changed so drastically that it is hardly worthy of being characterized as a *tradition* any longer. n239 This is especially true when one considers that it is the accused. n240 not the convening authority or commanders -- who controls members' participation in the court-martial. n241 How important can this tradition be if the military continues to willingly surrender it to the whim of the accused? n242

Finally, based on comments from both surveys, commanders and convening authorities apparently believe that being sentenced by one's military peers is the "honorable" thing to do. Thirteen of twenty-five Senior Officers' Legal Orientation (SOLO) course attendees indicated that they would choose to be sentenced by members regardless of the nature of the charges. n243 Major General Sennewald, former Commander, Forces Command, summarized this perception before the Advisory Commission to the Military Justice Act of 1983 with the following comment:

[I]t has to do with the soldier . . . committing an act, [being] found guilty, and [being] sentenced by people who he sees and works with and deals with, being sentenced by the [command] chain, being sentenced by the institution as opposed to a judge alone who is . . . someone he can't identify with as well. . . . It is the relationship, essentially it is a senior group, well senior to him obviously, enlisted if he so desires, who are now being involved in controlling . . . that person's fate as opposed [*43] again to the judge [who] . . . does not have that same relationship. n244

Although such sentiment is popular with commanders and senior noncommissioned officers, it is of minimal concern to the typical junior or midlevel soldier facing punishment under the UCMJ. His concern is that he be sentenced by a fair and properly trained sentencing body.

Court member sentencing creates the following problems for the command as well:

5. *Mission Disruption.* -- Any system of justice adopted by Congress and the President must be able to function both in time of war and in time of peace. n245 From the command's point of view, disruption to the mission is one of the biggest drawbacks to member participation in courts-martial. Disruption is magnified during periods of armed conflict. The problems surrounding defense counsel tactics in Operation Desert Storm. n246 demonstrate how giving soldiers the option to request trial by members can cause tremendous problems in a combat environment.

Though the right to trial by jury does not apply to the military n247 it is nevertheless a nationally respected and expected right that is not likely to be eliminated any time soon, even in the military. n248 Jury sentencing, on the other hand, is not as universally accepted and is not protected under the Constitution. n249 Consequently, no underlying legal or popular basis exists to support a soldier's interest in court member sentencing other than military tradition. Comparing the interests of the command -- to be prepared to fight a war -- against the interests of the accused -- to choose a sentencing [*44] forum that he thinks will result in a more lenient sentence -- clearly weighs in favor of the needs of the military.

6. *Members are Not Properly Trained in the Principles of Sentencing.* --

[E]ven the most experienced trial jurist in the civilian community will describe the sentencing process as the aspect of the criminal trial which taxes his or her judicial abilities to the limit. The military justice system . . . [continues] to permit this function to be exercised . . . by the court-martial members, if the accused desires. . . . [We] simply cannot leave the task to amateurs. Indeed, this is especially true in the military where the deterrent effect of a sentence may have a direct affect on the maintenance of the discipline of a combat unit. n250

No one can question the integrity and motivation of the officers and enlisted personnel selected to serve as court members. Nevertheless, they are simply out of their element when it comes to adjudging appropriate sentences for courts-martial. Of the five purposes of sentencing listed in the *Benchbook*, n251 the only area in which members might possibly have an advantage over a military judge is in assessing the effect the sentence may have on unit discipline. n252 But adjudication of an appropriate sentence requires more than understanding its potential effect on unit discipline.

[T]he determination of an appropriate sentence [turns on more than the degree of moral approbation which the offense commands. In the military context, it also requires more than evaluation of the effect of the offense on discipline within the local command. "An enlightened sentencing decision today calls for a sophisticated and informed judgment which takes into account a vast range of additional factors, from the likelihood that the defendant will commit other crimes to the types of programs and facilities which may induce a change in the pattern activity which led to the offense." n253

[*45] The military judge is at a decided advantage with respect to evaluating these additional factors necessary for determining an appropriate sentence. The military judge is a trained jurist, certified by The Judge Advocate General. n254 Military judges traditionally have extensive experience as both a trial and defense counsel before assuming a seat on the bench. Judges attend an initial three-week Military Judges' Course at The Judge Advocate General's School of the Army (TJAGSA) to develop the skills necessary to be certified, and to serve, as a military judge. Additionally, military judges may attend an annual judicial conference sponsored by the United States Army Trial Judiciary, and the annual Criminal Law New Developments Course at (TJAGSA), to refine these skills. Of course, not all trial judges are equally capable. Some may not be as experienced or as knowledgeable as others, and some will impose an occasional inappropriate sentence. But the answer to this problem does not lie in retaining the power in an even less qualified panel of court members. n255

Conversely, members have little or no formal training in military justice in general, and sentencing in particular. n256 Prospective court members with any kind of law-related training or background, such as military police and inspectors general, often are challenged for cause precisely because of this background. n257 In light of the differences in training and experience, judges are much better qualified to adjudge a sentence that best serves the "needs of the community, the accused, and the army." n258

[*46] Numerous appellate court decisions regarding the admissibility of sentencing evidence have turned on the members' unfamiliarity with the intricacies of sentencing. n259 In *United States v. Hill*, n260 the COMA recognized that the problem with military sentencing is that members, when they are the sentencing body, cannot be trusted to properly evaluate all of the evidence that might otherwise be relevant and admissible on sentencing. Consequently, it is necessary to limit the evidence to which they are exposed. In *United States v. Boles*, n261 the COMA ordered a rehearing on sentence after the military judge erroneously admitted a letter of reprimand during the sentencing phase of the court-martial." n262 The COMA concluded that the appellant was prejudiced because trial counsel's inflammatory argument confused the members regarding their duties during sentencing.

In *United States v. Montgomery*, n263 the COMA affirmed the practice that permitted military judges to consider "any personnel" records of the accused, but limited members to only information from those records "which reflects the past conduct and performance of the accused." n264 The stated intent of this practice was to broaden the information

available to the sentencing body. Apparently, this was only applicable to military judges. *Montgomery* provides one of the clearest demonstrations of the differences between a military judge and lay court members with respect to sentencing. In *Montgomery*, the COMA presumed that the military judge could distinguish between material and immaterial evidence contained in the personnel records and base his sentence on only the former, n265 whereas members had to have this issue decided for them by the military judge.

That the military judge is the presiding officer n266 who rules on [*47] all evidentiary motions n267 and objections n268 is further proof of his or her superior training and skill in the law. To reduce the risk of exposing members to potentially inadmissible evidence, the military judge conducts such motions out of their presence. n269 When ruling on motions and objections, the military judge is not bound by the rules of evidence, save those related to privileged communications. n270

Prior to 1957, members had been permitted to review the *Manual* during deliberations. This process was first criticized by the COMA in *United States v. Boswell*, n271 and later prohibited in *United States v. Rinehart*. n272 In *Rinehart*, the trial counsel directed the members' attention to provisions of the *Manual* regarding the Army policy on discharging thieves. During deliberations the members "discovered" two other provisions in the *Manual* that generated requests for further guidance from the law officer. n273 These queries from the members prompted the COMA to conclude that trial counsel's tactics caused a "virtual race to the manual" during deliberations despite full and adequate instructions from the law officer.

We cannot sanction a practice which permits court members to rummage through a treatise on military law, such as the *Manual*, indiscriminately rejecting and applying a myriad of principles -- judicial and otherwise -- contained therein. The consequences that flow from such a situation are manifold. . . . It is fundamental that the only appropriate source of the law applicable to any case should come from the law officer. . . . [T]he great majority of court members are untrained in the law. A treatise on the [*48] law in the hands of a nonlawyer creates a situation which is fraught with potential harm, especially when one's life and liberty hang in the balance. n274

(a) *Evidence of Aggravation and Rehabilitation Potential.* -- The endless amount of appellate litigation concerning evidence of rehabilitation potential and aggravation provides recent examples of court members' limitations during sentencing. n275 Even when such evidence is otherwise relevant and admissible, the military judge must apply a balancing test to ensure that the probative value of the evidence is not substantially outweighed by the danger that it will cause unfair prejudice, confuse the issues, or mislead the members. n276 If the balance weighs in favor of unfair prejudice, the members will be deprived of relevant evidence that often is important to determining an appropriate sentence. n277 Military judges also have acted as referee between the government and defense regarding inadmissible aggravation evidence that the government wants to include in a stipulation of fact, as part of the pretrial agreement between the accused and the convening authority. n278

(b) *Collateral Consequences.* -- Awareness of the collateral consequences of a court-martial sentence is yet another area where court members lag far behind the military judge. In *United States v. Griffin*, n279 the COMA affirmed the general rule that "courts-martial [are] to concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral [*49] administrative effects of the penalty under consideration." n280 This may deprive the accused of the opportunity to present important evidence to the members. n281 For example, members may be permitted to hear testimony about a rehabilitative program for sex offenders at the United States Disciplinary Barracks, but not be informed of the sentence length necessary for the accused to be incarcerated there. n282

Judges, on the other hand, are cognizant of the administrative consequences of their sentences and are permitted to consider this knowledge in arriving at a proper sentence.

Among the objects of punishment is rehabilitation, and parole is one of the correctional tools utilized to facilitate rehabilitation of prisoners. Thus in seeking to arrive at an appropriate sentence, Judge Wold properly took into account the rules governing parole eligibility. Indeed, military judges can best perform their sentencing duties if they are aware of the directives and policies concerning good-conduct time, parole, eligibility for parole, retraining programs, and the like. n283

Further complicating the problems of collateral consequences is the convening authority's power to consider these factors during his posttrial review. n284 If this information is appropriate for the convening [*50] authority to consider in deciding whether or not to approve a sentence, it also should be considered by the sentencing body, who as-

esses the sentence in the first place. Instructing court members not to consider these important consequences is another reason to eliminate them from the sentencing process.

(c) Members Create Risk of Compromise Verdicts. -- Compromise verdicts can occur under two different circumstances. In the first instance, if the members cannot agree on findings, they might agree to adjudge a lighter sentence in return for a concession on guilt. It also can work in reverse, with the members agreeing to acquit the accused of some charges or to convict him of a lesser offense, with the understanding that they will impose a sentence more severe than might otherwise be imposed for the lesser offense. n285 The significance of compromise verdicts cannot be overemphasized; they strike at the cornerstone of our criminal justice system -- that guilt be proven beyond a reasonable doubt. n286

Although the majority of those surveyed in 1983 believed that compromise verdicts occur only on an "infrequent basis," n287 that they occur at all is reason enough to eliminate a practice that increases the risk of such verdicts.

(d) Members are Unduly Influenced by Emotion. -- All parties involved in military justice share the common belief that the sentences of military judges are more consistent because they are not swayed by the emotional aspects of a case. n288 Judges have "heard it all before," and are not as easily impressed by argument, or influenced by a particularly aggravated offense, as are members seeing or hearing such evidence for the first time. This tendency of human nature to "toughen up" after repeated exposure to certain behavior is confirmed by the comments of two staff judge advocates and one SOLO course attendee that members' sentences tend to [*51] become more severe the longer they sit. n289 Responses from defense counsel indicate that they prefer a fresh panel as opposed to one that is near the end of its term. n290

From the defendant's perspective, the impact emotion may have on an accused's sentence can be positive or negative, depending on the direction in which the flames are fanned. But in the end, justice is much better served when emotion is left at the doorstep to the deliberation room.

7. Undue Reliance on Convening Authority and Courts of Military Review to Correct Erroneous Sentences. --

The convening authority may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased. n291

The respective courts of military review have similar powers of review under Article 66, UCMJ. n292

Reliance on the convening authority's clemency powers to correct errors and mitigate sentences can be traced to the original Articles of War of 1775. n293 During these early years of military justice the convening authority was the only one who had access to evidence about the accused that might be relevant to an appropriate sentence.

Although much of the information that was once exclusively reserved for the convening authority's consideration is now available to the members, the convening authority still may consider ample information that is not disclosed to the members. n294 Appellate courts have relied on these posttrial powers of the convening authority and courts of review as an excuse to continue a sentencing procedure [*52] that exposes itself to unnecessary risks of error. n295 In *United States v. Warren*, n296 the COMA, though noting the increased risk of error that results from permitting members to consider an accused's perjury during trial, felt that it was neutralized by the unique sentence review available in military justice. "The convening authority -- who often will have been provided extensive information about an accused -- and the Court of Military Review, can grant relief by reducing the sentence if it appears that excessive weight was given by the sentencing authority to the accused's mendacity." n297

The fallacy of this practice is readily apparent. The military should not rely on the convening authority or courts of military review to determine whether a particular sentence is appropriate or lawful, when they never have seen nor heard the accused in person and must rely on a written record of trial. n298 Instead, permit the body that is actually deliberating on the sentence to have access to at least as much information as the body that ultimately will review their decision. As Brigadier General Ansell noted many years ago, "[s]urely we need not point out to a lawyer that clemency, even when generously granted, is a poor remedy in the case of a soldier who should not have been convicted [or sentenced] at all." n299

Appellate review of an excessive sentence provides the accused a woefully inadequate remedy. Many soldiers wrongfully or excessively confined will have served their periods of confinement by the time their case is reviewed on

appeal. n300 Moreover, the convening authority and courts of review can do nothing to remedy the inappropriately lenient sentence that may have a greater impact on unit morale and discipline. n301

D. *The Judiciary*

1. *Member Sentences Provide Judges a Basis for Comparison.* -- One of the arguments offered in favor of member sentencing is that [*53] court member sentences serve as a benchmark for military judges during their sentencing deliberations. n302 However, statistics show that member participation in sentencing is sporadic (less than one-third) n303 and it is widely recognized that the sentences members adjudge often are on either the high or low end of the spectrum. Member sentences may well be a factor for military judges to consider in fashioning their sentence, but should be no more so than a sentence reached by a fellow member of the bench.

One would hope that our military judges do not reduce what they have otherwise determined to be an appropriate punishment for an offense simply to encourage future accused soldiers to elect to be sentenced by a military judge as opposed to court members. These concerns are irrelevant to the determination of an appropriate sentence in the case currently before the military judge. Eliminating the accused soldier's option to elect court members for sentencing will save military judges from the temptation to consider the impact of their sentence on future decisions concerning the sentencing forum.

2. *Member Sentencing Requires Jury Instructions.* -- When an accused selects members for sentencing, the military judge is placed on the proverbial "horns of a dilemma." It generally is recognized that the sentencing body needs as much information as possible to adjudge an appropriate sentence. n304 But members are untrained, inexperienced and often are unable to understand and properly consider much of the evidence that is relevant to sentencing. Consequently, the judge is faced with either excluding otherwise relevant evidence, or admitting it and then trying to fashion proper instructions to ensure that the evidence is properly considered by the members. n305 Although the former may result in a "cleaner" record on [*54] appeal, it also may result in an incomplete picture for the sentencing body. The latter option, although painting a more accurate and complete picture for sentencing, also increases the risk of appellate error.

A hotly contested presentencing hearing before members is like walking through a minefield for the military judge. The sentencing phase is filled with appellate landmines waiting to be tripped by the slightest misstep of the military judge. There are few roadsigns to guide judges through this minefield. The only instructions required by the *Manual* are that the members be advised (1) of the maximum punishment, (2) of proper deliberation procedures, (3) that they should consider all evidence in aggravation and extenuation and mitigation, and (4) that they are not to rely on the possibility of mitigating action by the convening or higher authority. n306 Fortunately, military judges can turn to the *Benchbook* for guidance on additional instructions if the need arises -- such as, the effect of a guilty plea, and explanation of sworn versus unsworn statements made by the accused. n307 The judge may elect to summarize the evidence in aggravation and mitigation. n308 He or she also may choose to instruct members on collateral consequences, provided the accused consents. n309 Military judges venturing off the beaten path of sentencing instructions, however, often find themselves challenged on appeal. n310

[*55] Appellate review of jury instructions regarding rehabilitation potential demonstrates the tightrope judges must walk with respect to crafting their sentencing instructions. In *Warren*, n311 the COMA offered the following "guidance" for judges to follow when instructing members on the effect an accused's mendacity may have on rehabilitation potential:

Finally, the members should be alerted that this factor may be considered by them only insofar as they conclude that it, along with all the other circumstances in the case, bears on the likelihood that the accused can be rehabilitated. They may not mete out additional punishment for the false testimony itself. This distinction is a real one and it must be clearly drawn by the military judge in his instructions and morally adhered to by the individual members when voting on the sentence. n312

Despite the COMA's best intentions, *Warren* confused this area of the law even more. The question now is, if an accused lacks rehabilitation potential, does that mean that his or her sentence should be longer or that the accused should be discharged?

The COMA attempted to clarify this issue in *United States v. Aurich* n313 by holding that rehabilitation potential is a mitigating factor and that lack of such potential is not an aggravating factor. n314 Rather than settle the matter, *Aurich* simply created a new issue -- whether evidence of rehabilitation potential could be offered in the government's

case in chief on sentencing, or only in rebuttal. n315 The existing body of law on evidence of rehabilitation potential undoubtedly is in a complete state of confusion.

Before deciding how to instruct court members on discretionary [*56] issues, the judge initially must decide whether instructions need to be given. In *Warren*, the COMA cautioned military judges about giving any instructions sua sponte or over defense objection. n316 Trial judges also should exercise caution regarding other curative instructions that only may serve to highlight or reinforce evidence that members are instructed not to consider. n317

Sentencing with court members requires instructions. Instructions require the military judge to put his or her thought process on the record. The more the judge's thoughts are on the record, the more likely and easily they are challenged on appeal. Because judge alone sentencing leaves no such paper trail, it is much less likely to be challenged on appeal. Even when judge alone sentences are challenged, appellate courts are much more inclined to give the military judge the benefit of the doubt and presume that the judge knew the law and properly applied it. n318

E. Public Perception

A judicial system operates effectively only with public confidence -- and, naturally that trust exists only if there also exists a belief that triers of fact act fairly. n319

On the positive side, the public sees that a soldier facing a court-martial has the choice of being tried and sentenced by court members or a military judge. n320 That soldiers facing courts-martial have this option is important to the general public because of the public's perception -- right or wrong -- that courts-martial are not as fair as the state and federal criminal justice systems and that courts-martial are more likely to punish soldiers more severely than do state or federal judges. n321

[*57] The positive value that the public sees in giving soldiers the choice between court members and a military judge is that soldiers have the means to avoid being convicted and sentenced by aggressive members prone to convict and impose heavy-handed sentences -- not because soldiers need a means to avoid being tried and sentenced by an experienced military judge. The public perception problem lies with court members, not with military judges. Consequently, if court members are eliminated from sentencing, the need for choice no longer would exist in the eyes of the public, because our soldiers will have the same options as a defendant in the state or federal system -- that is, trial by judge or jury with sentencing to be determined by a trained jurist. n322

VI. Consequences of Change to Mandatory Judge Alone Sentencing

A. The Accused

With mandatory judge alone sentencing, accused soldiers no longer would need to concern themselves with the potential sentencing consequences of their decision to be tried on the merits before the military judge or court members. n323 Ironically, this may result in more contested trials before members than we see today, because accused soldiers no longer will face the fear of a severe sentence from members who may find them guilty. n324 Although this may reduce the savings in manpower and administrative costs originally viewed as a potential benefit from mandatory judge alone sentencing, it nevertheless is a change well worth any potential additional cost. The accused's choice of forum will be based on the more important and constitutionally protected issue of guilt or innocence, as opposed to the potential severity of the sentence.

A related benefit to the accused is the realization that sentences will be more consistent. n325 If nothing else, this may relieve some of the accused's pretrial anxiety. Having a better idea of the [*58] range within which the sentence is likely to fall may encourage accuseds to contest charges they might otherwise plead guilty to because they no longer need the safety net of a pretrial agreement to protect them from the much more unpredictable sentences members are prone to adjudge. Knowing that there is relative certainty as to the sentence that might be adjudged also will provide counsel and the accused firmer ground from which to enter pretrial negotiations.

The accused will benefit from being sentenced by a jurist who is trained in law and penology. n326 Even if we were to assume that members know more about the effect of a sentence on discipline in the community, n327 several other factors enter the equation to reach an appropriate sentence. Military judges are far more qualified to assess these factors than lay court members. Moreover, by making this the sole responsibility of judges they will continue to develop these skills at an even faster pace, as they perform the sentencing function more frequently.

One drawback for the accused is the loss of perhaps his biggest bargaining chip in pretrial negotiations. Forty-five of the sixty-eight staff judges advocates agreed that waiver of trial or sentencing by members often had a significant effect on pretrial negotiations. n328 Over half of the defense counsel surveyed indicated they were successful in obtaining a better pretrial agreement for their client by offering to waive sentencing by the members. n329 But accuseds will not necessarily have to come to the bargaining table empty handed. The government's biggest interest in pretrial negotiations is the guilty plea itself. n330 Because accuseds may be more inclined to demand trial on the merits before members -- because they need no longer fear the possibility of a severe sentence from members -- the government may be more inclined to enter into a favorable pretrial agreement.

The most adverse consequence for the accused is the loss of the option to choose the forum for sentencing that is likely to adjudge the more lenient sentence. n331 But the accused does not have a constitutional [*59] right to be sentenced by members. n332 Consequently, the military does not need to continue to protect a sentencing procedure that effectively issues the accused a silver platter on which to have the members serve him a more lenient sentence.

Finally, the military may be overestimating the importance of protecting the accused's forum options. All parties surveyed in 1983, except defense counsel, agreed that eliminating the choice would not deprive the accused of a substantial benefit. n333

B. Government -- Trial Counsel

Mandatory judge alone sentencing benefits the government in numerous ways. The risks of appellate errors n334 and command influences n335 would be reduced significantly. Compromise verdicts would virtually disappear. n336 Sentences would be more uniform and based on a more complete picture of the offender. n337 Finally, the accused would no longer be able to "forum shop" for a more lenient sentence. n338 Without members, the rules of evidence could be fully relaxed for both the government and defense, thereby permitting the trial counsel to offer more relevant evidence about sentencing without having to "pigeon hole" it to fit one of the specific categories listed in Rule for Courts-Martial 1001.

It is uncertain how mandatory judge alone sentencing will effect the administrative burden associated with court members. On the one hand, members' time away from regular duties will be reduced by the [*60] amount of time normally spent on sentencing. This may not be much of a savings, as the members may have to be present for the merits portion of the trial regardless. The biggest savings would be in guilty pleas, where members would no longer be involved at all. However, the ultimate impact may actually be more trials on the merits before members as the accused no longer faces the prospect of a severe sentence if convicted by a panel. But the advantage to the government is that the accused's forum selection will be made without undue concern over sentencing considerations. n339

C. Commanders -- Court Members

The most significant advantage for court members is that they no longer will be asked to do a job they are unqualified to perform. Although convening authorities and commanders overwhelmingly felt that they had sufficient understanding of the principles of sentencing to determine an appropriate sentence, judges and attorneys felt otherwise. n340

Although officer and enlisted court members may not be spared the burden of court-martial duty as much as originally hoped, the additional time spent by members deciding guilt or innocence will be far more meaningful than that currently spent attempting to perform the sentencing function about which they know little.

Furthermore, the time and effort court members put into sentencing often appears needlessly spent. An accused who pleads guilty under current procedures still can demand sentencing by members. If the accused has the benefit of a pretrial agreement with a sentence limitation, the sentence adjudged by the members is immaterial, except from the standpoint of the occasional accused who happens to "beat the deal." n341 But members who sincerely deliberate on what they perceive to be a fair and just sentence, only to later discover that their sentence was reduced by the terms of a pretrial agreement, are likely to feel frustrated and ponder why the system asks them to adjudge a sentence when it has been predetermined [*61] by the convening authority. n342 Conversely, military judges, because they understand the system, are not likely to become as frustrated.

Commanders also stand to benefit from more consistent results, because they are the ones who must deal with the consequences an unduly harsh or lenient sentence may have on morale and discipline within the unit. Commanders will be deprived of the perceived benefit of offering their input on the type and amount of punishment necessary to

maintain discipline in the military. However, the importance of this input was not supported by the 1983 Advisory Commission Survey. All groups agreed that mandatory judge alone sentencing would not deprive the command of important powers. n343 But convening authorities and the Army staff judge advocates did agree that it would "appear" that command authority had diminished. n344 On closer scrutiny, the relative unimportance of command input is not surprising. After all, member participation is controlled by the accused, who selects members only when it is perceived to be in his or her best interests.

Commanders need not worry that their input on discipline no longer will play a role in courts-martial sentencing. Their opinions regarding the "significant adverse impact on the mission, discipline or efficiency of the command directly and immediately resulting from the accused's offense" still can be offered by the trial counsel during the sentencing phase of the trial. n345 Trial counsel also can include the command's opinion in the sentencing argument to the military judge. n346

Finally, the vast majority of day-to-day discipline in the military occurs outside the courtroom, and is taken care of within the unit through training, leadership, counseling, and the administration of nonjudicial punishment under Article 15, UCMJ. n347

[*62] *D. The Judiciary*

Military judges stand to benefit the most from mandatory judge alone sentencing. There no longer will be a need for confusing instructions on the procedures and purposes of sentencing. n348 Fewer instructions will reduce the number of appellate issues. Those issues that are raised rarely will result in prejudicial error, as judges are often presumed to have disregarded inadmissible evidence and to have relied on only evidence properly before the court. n349

Eliminating members will rid the military of the need to maintain artificial evidentiary procedures. Presentencing hearings no longer would be a matter of gamesmanship between counsel arguing whether certain evidence directly relates to the charged offense, or is unfairly prejudicial to the accused. Defense counsel will not have to decide whether to "open the door" to certain evidence, because it always will be open under the simple rule of relevance. With judge alone sentencing, the rules of evidence could be completely relaxed to admit as much evidence as possible about the offense and the offender without the fear that it will be misused or confuse the issues. n350

Access to additional information about the offense and the offender is more important in the military than in civilian jurisdictions because of the variety of punishments permissible under the UCMJ. In addition to fines and confinement -- which can be adjudged in state and federal criminal trials -- a military court-martial must consider the appropriateness of a punitive discharge, restriction, hard labor without confinement, forfeiture of pay, a reduction in grade, or a reprimand. n351

With mandatory judge alone sentencing, every court-martial sentence would be determined by a military judge fully versed in the collateral consequences of his decision. No longer will sentences from members include confinement for twelve months and sixty-eight days in a feeble attempt to account for the administrative consequences of a court-martial sentence. n352

There will be fewer instances of unlawful command influence because judges are better insulated from the influence of command. n353 [*63] The military judge is not rated by the convening authority, or anyone else involved in the military justice system. n354 Even within the Judge Advocate General's Corps, the judiciary is treated as a separate division. n355

One further advantage of mandatory judge alone sentencing is that sentences will be less influenced by emotion and argument of counsel. n356 Judges are jurists, trained to minimize the role emotion may play during sentencing deliberations. Judges have "seen and heard it all before" and are therefore less inclined to be swayed by inflammatory arguments and heinous crimes as are members who are usually seeing and hearing about such events for the first time.

The lone drawback to mandatory judge alone sentencing is the loss of member sentences as a check against which military judges can balance their sentences. n357 This loss is insignificant when one considers how few sentences are currently adjudged by members, and that most judges state that they are not affected by this information. n358

A related concern is that military judges given exclusive control over sentencing will abuse their discretion and adjudge unduly harsh or severe sentences. n359 In the unlikely event this should ever occur, the convening authority and courts of review have the authority to grant clemency or correct what they find to be an excessively severe sentence. n360 The convening authority's clemency power may fill the void caused by the loss of community input from member

sentencing. The convening authority can reduce any sentence he or she feels [*64] is excessive, thereby communicating to the judge the command's perspective on the amount of punishment a particular offense warrants.

E. Public Perception

The code is not military jargon. The code has got to be completely understood by the average man on the streets of the United States of America. And so that's why I say, and you see it in my questionnaire, that given the exigencies of military service, we have to approach the daily run of the mill American system of justice as closely as we can. n361

Mandatory judge alone sentencing undoubtedly will improve the public's perception of the military justice system. The public will observe a system of military justice that continues to more closely resemble the criminal justice system with which the vast majority of our citizens are familiar. n362

The public no longer will perceive the punishment phase of courts-martial practice as controlled by overzealous commanders bent on severe punishment. The public will hear about fewer cases of disparate sentences. A closer look will reveal a sentencing procedure that permits the military judge to take a complete look at the offender's duty performance and civilian background -- tested for reliability by our adversarial sentencing hearing n363 -- prior to deliberating on an appropriate sentence. The public also will see a system in which an accused need not forfeit the right to trial by jury to avoid being sentenced by the court-martial panel. Public approval of military justice is critical to its overall success. Eliminating members from the sentencing process will significantly reduce this particular criticism of military justice.

[*65] VII. Conclusion

Court member sentencing is a long-standing military tradition. It has been a part of military justice since the origins of the American military itself. When the jurisdiction of courts-martial were limited to military offenses and other offenses directly impacting on military discipline and readiness, and the general focus of sentencing was simply retribution for the offense as opposed to an individualized sentence tailored to the particular offender, there was little need for a highly trained sentencing body, and court members were capable of performing the task.

With the expanding jurisdiction of military courts-martial over practically all offenses committed by a soldier, and the increasing popularity of individualized sentences that focus on more than just rehabilitation, the sentencing function has developed into a drastically more complicated process. As the goals of sentencing expand to include discipline, individual and general deterrence, and rehabilitation of the individual offender, additional information about the accused and the crime becomes necessary for the sentencing body to accomplish these goals. As the amount of information about the offense and offender increases, so too does the risk that lay court members, untrained in the laws and principles of sentencing, will be prejudiced unduly by what they hear, or will not know how to properly account for this information during their sentencing deliberations.

In a vain attempt to compensate for court members' deficiencies, Congress, through the UCMJ, the President, through the *Manual*, and military appellate courts, through their published opinions, have continually made piecemeal changes to sentencing procedures to protect military accuseds from being sentenced unfairly by court members who know nothing about the principles of sentencing. A much more effective solution is to eliminate court members altogether and turn over the sentencing process exclusively to military judges who are fully trained to perform this complex task.

Having risen from the status of "court judge advocate" to "law officer" and finally to "military judge," the authority of the military judge has grown to where the judge is now the focal point of the military courts-martial. This heightened status of the military judge is apparent not only in the eyes of the Congress, the President, and the military appellate courts, who helped place them in this position, but also in the eyes of the vast majority of soldiers who prefer to be tried and sentenced by a military judge.

Even if the military was to disregard that all of the tangential issues related to sentencing favor the military judge over court members [*66] -- that is, appellate issues, sentence disparity, instructions, administrative burdens, compromise verdicts, and command influence -- the simple fact remains: court members are not qualified to perform the sentencing function, military judges are. Since 1969, when first given the shared responsibility for courts-martial sentencing, military judges have proven their mettle, and should be the exclusive sentencing body under the UCMJ. n364

General Courts-Martial Tried Before a Military Judge Alone During the Previous Five Years

FY	Cases	Judge Alone	Percentage
1988	1629	1103	67%
1989	1585	1011	63.8%
1990	1451	995	68.6%
1991	1173	782	67.5%
1992	1168	782	66.6%

Information furnished by the Office of the Clerk of Court, U.S. Army Judiciary, 5611 Columbia Pike, Falls Church, Virginia 22041-5013.

APPENDIX B

GUILTY PLEAS

FY	Judge Alone	Members
1988	1455--82%	323--18%
1989	1239--77%	366--23%
1990	1148--80%	283--20%
1991	887--82%	194--18%
1992	1035--82%	208--18%

Information furnished by the Office of the Clerk of Court, U.S. Army Judiciary, 5611 Columbia Pike, Falls Church, Virginia 22041-5013.

Legal Topics:

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

Criminal Law & Procedure
 Guilty Pleas
 General Overview
 Criminal Law & Procedure
 Postconviction Proceedings
 Parole
 Criminal Law & Procedure
 Appeals
 Standards of Review
 Plain Error
 General Overview

FOOTNOTES:

n1 The military's procedures for capital sentencing are beyond the scope of this thesis, other than to observe that the decision whether to sentence an accused to death is a matter far too grave to place on the shoulders of one person, no matter how well trained they may be in the science of sentencing. Consequently, this proposal to adopt mandatory military judge alone sentencing does not address recommended procedures for capital cases.

n2 Charles W. Webster, *Jury Sentencing -- Grab-Bag Justice*, 14 Sw. L.J. 227 (1960).

n3 Russel W.G. Grove, *Sentencing Reform: Toward a More Uniform, Less Uninformed System of Court-Martial Sentencing*, ARMY LAW., July 1988, at 28 n.23 (citing testimony of Major General Kenneth J. Hodson before the Advisory Commission to the Military Justice Act of 1983).

n4 To gain insight into the current attitudes and opinions of those affected by the sentencing process, surveys were provided to prisoners at the United States Disciplinary Barracks at Fort Leavenworth, Kansas, convening authorities, staff judge advocates, military judges, defense counsel, and senior commanders attending the Senior Officer Legal Orientation (SOLO) Course at The Judge Advocate General's School, United States Army, Charlottesville, Virginia. Responses were received from fifty-four defense counsel, sixty-eight prisoners, twenty-five SOLO Course attendees, forty-seven convening authorities, fifteen military judges, and sixty-eight staff judge advocates. Copies of this survey and the responses are on file in the library of The Judge Advocate General's School. This survey does not profess to be a model of scientific accuracy. Nevertheless, it represents the insights of a large portion of those individuals involved in the administration of military justice. References to responses to this survey [hereinafter Thesis Survey], along with a survey conducted by the Advisory Commission to the Military Justice Act of 1983, will be made throughout the remaining text. See *infra* note 10

(discussing the survey conducted by the Advisory Commission to the Military Justice Act of 1983). *See also infra*, note 167 (survey responses from defense counsel).

n5 E.A.L., *Jury Sentencing in Virginia*, 53 VA. L. REV. 991 (1967).

n6 *Giacco v. Pennsylvania*, 382 U.S. 339, 405 (1966) (Stewart, J. concurring).

n7 Indiana, Montana, North Dakota, Georgia, and Alabama have eliminated jury sentencing in noncapital criminal trials.

n8 Terry W. Brown, *The Crowder-Ansell Dispute: The Emergency of General Samuel T. Ansell*, 35 MIL. L. REV. 23 (1967). One of General Ansell's numerous proposals was that the military "court judge advocate" determine and impose an appropriate sentence. *See also* Robert D. Byers, *The Court-Martial as Sentencing Agency: Milestone or Millstone*, 41 MIL. L. REV. 105 (1968); M. Scott Magers, *The Military Sentencing Procedure -- Time for a Change* 72 (1974) (unpublished LL.M. thesis, The Judge Advocate General's School, United States Army).

n9 I Advisory Commission to the Military Justice Act of 1983 Report at 61 [hereinafter Report]. The Advisory Committee recommended maintaining the status quo, but not without much debate and two separate opinions.

n10 Craig Reese, *Jury Sentencing in Texas: Time for a Change?*, 31 S. TEX. L.J. 331 (1990) (sentencing is at once, the most critical and criticized phase of the criminal justice system); *see also United States v. DiFrancesco*, 449 U.S. 117, 149-50 (1980) (Brennan J., dissenting) (sentencing phase as critical as guilt-innocence phase); Advisory Commission to the Military Justice Act of 1983 Survey at 25 (60% of defense counsel believe sentencing considerations more important than findings with respect to selecting forum). The Advisory Commission conducted a comprehensive survey of convening authorities, appellate court judges, staff judge advocates, and trial and defense counsel, in conjunction with their overall study of military justice. References to responses to this survey [hereinafter Survey] will be made throughout this article. The survey and responses to the survey are on file in the library of The Judge Advocate General's School.

n11 *See* U.S. CONST. art. III, § 2, cl. 3 ("The trial of all crimes, except in cases of impeachment, shall be by jury. . ."); *Id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .").

n12 *Id.* amend. VIII.

n13 MANUAL FOR COURTS-MARTIAL, United States, Chapter X, (1984) [hereinafter MCM].

n14 *See supra* text accompanying note 1; *see also infra* text accompanying notes 146-47.

n15 *See United States v. Boles*, 11 M.J. 195, 198 (C.M.A. 1981) ("[the President's] rules of sentencing procedure at courts-martial are still not as broad as those in operation in federal district courts. This may have something to do with the fact that members may sentence at courts-martial while a judge sentences in federal district court.").

n16 *See infra* notes 53-135 and accompanying text (tracing the development of our current sentencing procedures).

n17 See WINTHROP, MILITARY LAW AND PRECEDENTS, 444-46 (2d ed. 1920) (court-martial is a criminal judgment of a court of the United States, not an expression of the will of the command or its officers in disciplinary matters) *cited in* Report, *supra* note 9, at 98. See also William C. Westmoreland, *Military Justice -- A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 21 (1971) (A military trial should not have a dual function as an instrument of discipline and as an instrument of justice. It should be an instrument of justice and in fulfilling this function it will promote discipline).

n18 See Report, *supra* note 9, at 36, (quoting testimony of Major General John Galvin, before the Advisory Commission to the Military Justice Act of 1983, that the "principle purpose of [military justice] is the maintenance of discipline on the battlefield"); Winthrop, *supra* note 17, at 49 (courts-martial "are in fact simply instrumentalities of the executive power, provided by Congress for the President as Commander-in-Chief, to aid him in properly commanding the army and navy and enforcing discipline therein"); Colonel John H. Wigmore, Address Before the Maryland State Bar Association (June 28, 1919), in 24 MD. STATE BAR ASS'N TRANSACTION, 1919, at 188 ("The prime object of military organization is Victory, not Justice. . . . If it can do justice to its men, well and good. But Justice is always secondary, and Victory is always primary) *cited in* Brown, *supra* note 8, at 13.

n19 See Survey, *supra* note 10, at 21. Respondents were asked which sentencing authority had the most knowledge of the ramifications of sentences imposed and were given choices of "officer panels," "officer and enlisted panels," "military judges," and "all equally qualified." Convening authorities narrowly selected officer and enlisted panels (except Air Force convening authorities, who selected judges), with the other two selectors about even. However, all lawyer groups overwhelmingly selected judges.

n20 See Reese, *supra*, note 10, at 331.

n21 DEPT OF ARMY, PAMPHLET 27-9, MILITARY JUDGES' BENCHBOOK, para. 2-59 (1 May 1982) (C1, 15 Feb. 1985) [hereinafter BENCHBOOK].

n22 See Reese, *supra* note 10, at 331.

n23 See Westmoreland, *supra* note 17, at 22. "Military justice must provide a method for the rehabilitation of as many offenders as possible Because manpower is our most precious asset in the Army, conservation of human resources is of primary concern."

n24 See *United States v. Motsinger*, 34 M.J. 253 (C.M.A. 1992) (president of special court-martial wrote letter to convening authority requesting suspension of bad-conduct discharge because it was adjudged out of "recognition of quality force and impending force drawdown requirements"). Today we have such an abundance of good recruits there is no need to keep even the "smallest time" criminal.

n25 See BENCHBOOK, *supra* note 21, para. 2-59.

n26 See *infra* note 250 and accompanying text (discussing how difficult the sentencing function is for even the most trained jurist).

n27 See E.A.L., *supra* note 5, at 969.

n28 See MCM, *supra* note 13, R.C.M. 903, 910.

n29 Nor can soldiers elect to have a military judge for the merits and members for sentencing.

n30 36 of 54 defense counsel surveyed stated that if given the option of members for findings and judge alone for sentencing, they would advise their clients to elect this option, because the client stood a better chance of acquittal with members. A large number of staff judge advocates indicated that they based their advice concerning forum choice on the nature of the offense. For a purely legal defense, most staff judge advocates would recommend a military judge for findings -- *i.e.*, "good law, go military judge; good facts, go jury." In all other cases, the vast majority of staff judge advocates believed that an accused stood a better chance of acquittal with members. Their comments included, "jury easier to mislead on the facts," "inexperienced panel easy to sell defense to," "more chance of jury nullification with members," easier to get acquittal particularly if defense counsel is trying to sell them snake oil," and "members are easier to confuse or get wrapped up over something inconsequential." Thesis Survey, *supra* note 4.

n31 Thirteen of fifty-four defense counsel volunteered this specific comment when asked what kind of advice they generally give their clients on the advantages and disadvantages of being tried and sentenced by judges versus members. Thesis Survey, *supra* note 4. Although defense counsel remarked that their clients were more likely to be punished severely by court members, they also recognized that they often stood a greater chance of receiving a more lenient sentence from members as opposed to a judge who is perceived as being more likely to sentence within a more predictable range. See *infra* notes 186-87 and accompanying text.

n32 Survey, *supra* note 10, at 25. Sixty percent of defense counsel stated that sentencing considerations are much more important than findings in forum selection.

n33 UCMJ art. 16 (1984); MCM, *supra* note 13, R.C.M. 903(b)(2). See *United States v. Singer*, 380 U.S. 24, 36 (1965) ("a defendant's only constitutional right concerning the method of trial is to an impartial trial by jury").

n34 See *United States v. Sherrod*, 26 M.J. 30 (C.M.A. 1980), in which the military judge was challenged for cause because his daughter was friends with the victim of the charged offenses of indecent acts. The judge denied the challenge. Appellant nonetheless "felt so constrained to avoid court-martial with members that he requested trial by the very same judge." The military judge also denied this request out of concern that others might perceive bias on his part, and directed that appellant be tried by members. The accused subsequently was sentenced to the "literal maximum punishment" by the members.

n35 *Id.*

n36 *United States v. Butler*, 14 M.J. 72, 74 (C.M.A. 1982) (Everett, C.J., concurring). Judge Everett also noted that "[i]n view of the Uniform Code's purpose of eliminating 'command influence' and concerning the professionalism in military justice, these reasons have the blessings of Congress." *Id.*

n37 Congress deliberately chose not to involve the convening authority in this decision to avoid the "possibility of undue prejudicial command influence." *Id.* at 78 (citing S. REP. No. 1601, 90th Cong., 2d Sess. (1968), reprinted in 1968 U.S.C.C.A.N. 4501, 4504-05).

n38 See *supra* note 32; see also *infra* text accompanying notes 171-72.

n39 MCM, *supra* note 13, R.C.M. 1001(c)(2).

n40 *Id.* R.C.M. 1001(b)(2).

n41 *Id.*

n42 *Id.* R.C.M. 1001(b)(3).

n43 *Id.* R.C.M. 1001(b)(4).

n44 *Id.* R.C.M. 1001(b)(5).

n45 *Id.* R.C.M. 1001(c). The military judge may relax the rules of evidence for the presentation of defense evidence. *Id.* R.C.M. 11001(c)(3).

n46 This is not to say that the military justice system has not vastly improved the amount of personal information it now permits the judge or members to hear about an accused. *See infra* notes 99-134 and accompanying text tracing the development of military sentencing procedures.

n47 *Id.* R.C.M. 1005(e). *See also* BENCHBOOK, *supra* note 21, para. 2-37.

n48 BENCHBOOK, *supra* note 21, para. 2-37. Even though members are instructed on the duration and nature of pretrial confinement and that the accused will receive credit for any pretrial confinement served, they are not told how to account for this during sentencing deliberations. *See United States v. Balboa*, 33 M.J. 304, (C.M.A. 1991), where the members sentenced the accused to 12 months and 68 days, in an ineffective attempt to compensate for 68 days of pretrial confinement. In his concurring opinion, Chief Judge Everett remarked, "[t]his Court does not need a crystal ball to discern the real likelihood that as a practical result of the members' action appellant has been denied the legally required credit for his pretrial confinement." *Id.* at 307 307-8.

n49 BENCHBOOK, *supra* note 21, para. 2-60.

n50 MCM, *supra* note 13, R.C.M. 1005(e)(4) discussion. The judge does so at his or her own risk. *See infra* notes 188-91 and 304-19 and accompanying text (discussing risks of appellate issues created by a military judge's sentencing instructions to the court members).

n51 MCM, *supra* note 13, R.C.M. 1005(b),(c) (although members may recommend suspension or clemency of any portion of the sentence, the military judge is not required to instruct them on this matter unless one of the members happens to discover it and asks the military judge for guidance). *See* BENCHBOOK, *supra* note 21, paras. 2-54, 2-55.

n52 BENCHBOOK, *supra* note 21, para. 2-39. *See also* Grove, *supra* note 3, at 27: "The closest thing to a statement of sentencing policy in the MCM is in its preamble: "The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and to thereby strengthen the national security of the United States."

n53 Reese, *supra* note 10, at 325.

n54 *Id.* at 325 n.16.

n55 E.A.L., *supra* note 5, at 970.

n56 See *infra* notes 142-160 and accompanying text (discussing the federal and state sentencing procedures).

n57 See Winthrop, *supra* note 17, at 21-24, *cited in* Report, *supra* note 9, at 65.

n58 *Code of Articles of King Gustavus Adolphus of Sweden*, reprinted in Winthrop, *supra* note 17, App. III, at 907-18, *cited in* Robert O. Rollman, *Of Crimes, Courts-Martial and Punishment -- A Short History of Military Justice*, 11 A.F.L. REV. 213 (1969).

n59 Anthony J. DeVico, *Evolution of Military Law*, 21 JAG J. 64 (Dec. 1966-Jan. 1967).

n60 Rollman, *supra* note 58, at 214 (threatening to strike a superior officer, "whether been hit or misse" resulted in loss of the right hand. Other offenses were left to the discretion of the members "according to the importance of the Fact," or "what punishment they [Council of War] thinke convenient.").

n61 *Id.* at 215. George Washington was a member of the five-man committee that drafted these articles. See Walter T. Cox III, *The Army, The Courts and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 5-6 (1987).

n62 There was no one else to perform this task, because courts-martial were composed only of court members at this time.

n63 See Rollman, *supra* note 58, at 215. Punishments generally were prescribed in terms of "as a general or regimental court-martial might order," "according to the nature of the offense," or "in the court's discretion" -- for example, article IV, provided that: "[a]ny officer who shall behave himself with contempt or disrespect towards the general or generals, or commanders in chief of the continental forces, or shall speak false words, tending to his or their hurt or dishonor, shall be punished according to the nature of the offense by the judgment of the general court-martial." Examples of mandatory sentences included a fine of four shillings for cursing or swearing and death for anyone shamefully abandoning their post.

n64 See Winthrop, *supra* note 17, at 390-91. Even worse for the accused was that evidence of good character and an exemplary military record was not admissible on the merits in most instances. If an accused pleaded guilty, a provision existed allowing the members to hear evidence of the circumstances surrounding the offense, unless the specification was so descriptive as to disclose all the circumstances of mitigation or aggravation that accompanied the offense. See Ray, INSTRUCTIONS FOR COURTS-MARTIAL AND JUDGE ADVOCATES, 24 (1890) (citing Winthrop, *supra* note 17, at 376), *cited in* Denise A. Vowell, *To Determine an Appropriate Sentence: Sentencing in the Military Justice System*, 114 MIL. L. REV. 87 n.118 (1986).

n65 Rollman, *supra* note 58, at 216 ("if on a second hearing, the appeal shall appear vexatious and groundless, the person so appealing shall be punished at the discretion of the . . . general court"). Benedict Arnold may have been one of the first soldiers displeased with the results of his court-martial. It is alleged that one of the reasons leading to his decision to become a "turncoat" was his belief that he had been wronged by General Washington and Congress during his court-martial at West Point in 1780. Cox, *supra* note 61, at 6.

n66 Rollman, *supra* note 58, at 217.

n67 *Id.* at 218. See Winthrop, *supra* note 17, App. XIV, at 998.

n68 Rollman, *supra* note 58, at 218.

n69 *See supra* note 64 and accompanying text.

n70 Only courts-martial convictions were permitted, and they had to be "final." They also required formal proof by either the record of trial or authenticated copies of court-martial orders. *See Vowell, supra* note 64, at 26.

n71 *Id.* at 26-27. Fortunately for the accused, relevance was broadly construed and courts permitted accused soldiers to offer character evidence in mitigation on the merits.

At military law, evidence of character, which is always admissible, is comparatively seldom offered strictly or exclusively in defense; but, when introduced, is usually intended partly or principally, as in mitigation of the punishment which may follow on conviction. . . . It need have no reference to the nature of the charge, but may exhibit the reputation or record of the accused in the service, for efficiency, fidelity, subordination, temperance, courage, or any of the traits or habits that go to make the good officer or soldier. It also need not be limited to general character, but may include particular acts of good conduct, bravery, &c (etc.). Winthrop, *supra* note 17, at 351-52.

Nevertheless, recognize that the original intent was that the reviewing authority, and not the court members, consider such matters as good character or an exemplary military record. "Regularly, however, the same is rather ground for mitigation of punishment by the reviewing authority than for a milder judgement on the part of the court." *Id.* at 396. *See infra* notes 291-301 and accompanying text (discussing the dangers of relying on posttrial review to correct inappropriate sentences).

n72 *See Vowell, supra* note 64, at 25.

n73 MANUAL FOR COURTS-MARTIAL, United States, para. 340 (rev. ed. 1917) [hereinafter 1917 MANUAL]. The practice at this time was to permit the court members to take the *Manual* with them into the deliberation room. *See Vowell, supra* note 64, at 29.

n74 *Id.* at 342. The MANUAL provided the following:

In cases where the punishment is discretionary the best interest of service and of society demand thoughtful application of the following principles: That because of the effect of confinement on a soldier's self-respect, confinement is not to be ordered when the interests of the service permit it to be avoided; that a man against whom there is no evidence of previous convictions for the same or similar offenses should be punished less severely than one who has offended repeatedly; the presence or absence of extenuating or aggravating circumstances should be taken into consideration in determining the measure of punishment in any case; that the maximum limits of punishment authorized are to be applied only in cases in which from the nature and circumstances of the offense and the general conduct of the offender, severe punishment appears to be necessary to meet the ends of discipline; and that in adjudging punishment the court should take into consideration the individual characteristics of the accused, with a view to determining the nature of the punishment best suited to produce the desired results in the case in question, as the individual factor in one case may be such that punishment of one kind would serve the ends of discipline, while in another case punishment of a different kind would be required. *See Vowell, supra* note 64, at 29.

n75 MANUAL FOR COURTS-MARTIAL, United States, para. 271 (rev. ed. 1921) [hereinafter 1921 MANUAL]. This change, along with the existing practice of opening the court after findings to advise the members of prior courts-martial convictions, were the genesis of our modern presentencing hearings. *See Vowell, supra* note 64, at 31-32.

n76 Members were advised that they should consider "the character of the accused as given on former discharges, the number and character of previous convictions, the circumstances extenuating or aggravating the offense itself, or any collateral feature thereof. . . ." MANUAL FOR COURTS-MARTIAL, United States, para. 80 (rev. ed. 1928) [hereinafter 1928 MANUAL]. This same paragraph also advised members that a light sentence in cases triable by civilian courts might adversely affect the public's opinion of the Army. See Vowell, *supra* note 64, at 32.

n77 "To the extent that punishment is discretionary, the sentence should provide for a legal, appropriate, and adequate punishment." 1928 MANUAL, *supra* note 76, para. 80. Paragraph 80 of the 1949 *Manual* included an instruction to the members to consider the need to render uniform sentences for similar offenses throughout the Army. Unfortunately, it did not provide a mechanism whereby members could know what sentences were being adjudged for similar offenses.

n78 Brown, *supra* note 8, at 29.

n79 *Id.* at 28. This authority subsequently was repealed. Headquarters, Dep't of Army, Gen. Orders No. 88 (14 July 1919).

n80 See generally Brown, *supra* note 8 (an in-depth analysis of this tumultuous period in the Judge Advocate General's Corps history).

n81 *Id.* at 1. At approximately the same time, several black soldiers in Houston, Texas, were court-martialed for murder, mutiny, and riot. They were convicted and then hanged two days after the completion of the courts-martial. The Office of The Judge Advocate General did not receive copies of the record of proceedings in these cases until four months after the sentences had been executed. *Id.*

n82 Major General Enoch H. Crowder was performing the duty of Provost Marshall at the time. *Id.* at 2.

n83 *Id.* at 4.

n84 *Id.* at 5-6. See also Wiener, *The Seamy Side of the World War I Court-Martial Controversy*, 123 MIL. L. REV. 109 (1969).

n85 A compromise of sorts was achieved through a new general order which established boards of review. These boards were to review all death sentences and those involving dismissal and dishonorable discharges prior to execution. Headquarters, Dep't of Army, Gen. Orders No. 7 (7 Jan. 1918). Wiener, *supra* note 84, at 115.

n86 See Brown, *supra* note 8, at 15-42 (staff judge advocate pretrial advice; appointment of military counsel, or civilian counsel of choice provided by the accused; selection of court-martial members "best qualified by reason of age, training, experience and judicial temperament;" challenges for cause and one peremptory challenge; staff judge advocate posttrial review; prohibition against returning for reconsideration an acquittal or reconsideration of a sentence imposed "with a view to increasing its severity;" established a board of review and prohibited execution of any sentence that included death, dismissal, or dishonorable discharge until the board of review concluded that it was legally sufficient; and requirement for unanimous votes for death, three-fourths majority for sentence in excess of 10 years, and two-thirds majority for any other sentence).

n87 *Id.* at 39-42 (creation of a civilian court of military appeals (art. 67, UCMJ), plenary power of court judge advocate over the conduct of the court-martial (arts. 26 and 51b, UCMJ); and one-third enlisted members at accused's request (art. 25 UCMJ)).

n88 Cox, *supra* note 61, at 11 (citing W. Generous, *SWORDS AND SCALES* 3-13 (1973); Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 *MIL. L. REV.* 39 n.3 (1972)).

n89 Perhaps the classic case of maltreatment under the UCMJ involved Second Lieutenant Sidney Shapiro. He had been appointed to defend a soldier accused of assault with intent to rape. At trial he substituted another soldier at the defense table for the accused. The alleged victim identified the interloper as the attacker, and the court convicted him of the charge. Shapiro then revealed his scheme to the court. The convening authority did not take kindly to Shapiro's tactics and preferred charges against him for "delaying the orderly progress" of a court-martial under the 96th Article of War. The charge was served at 1240 hours, trial commenced at 1400, and Shapiro was convicted and sentenced to be dismissed from the service by 1730 hours that same day. After being dismissed, the Army promptly drafted him back into the Army as a private. Shapiro's client did not fair much better, as he was later retried and convicted of the original charge. *See* Generous, *supra* note 88, at 169-70; LUTHER WEST, *THEY CALL IT JUSTICE* 39-40 (1977); DeVico, *supra* note 59, at 66.

n90 DeVico, *supra* note 59, at 66.

n91 UCMJ art. 67 (1951).

n92 UCMJ art. 31 (1951).

n93 UCMJ art. 44 (1951).

n94 UCMJ arts. 27, 38 (1951).

n95 UCMJ art. 39b (1951).

n96 Previously, the law officer was known as the court judge advocate, who sat with the members and remained present during deliberations and voted like the other members. Frequently, he was not a judge advocate. *See United States v. Griffith*, 27 *M.J.* 42, 45 (C.M.A. 1988).

n97 *Id.*

n98 Hearings on H.R. 2498 Before the Subcomm. of the House Armed Services Comm., 81st Cong., 1st Sess. (1949) (Professor Morgan was Royall Professor of Law Emeritus, Harvard University, Frank C. Rand Professor of Law, Vanderbilt University, and a former Lieutenant Colonel, The Judge Advocate General's Department, where he served as Assistant to the Judge Advocate General, United States Army. Professor Morgan also served as Chairman of the Defense Department Committee on the Drafting of a Uniform Code of Military Justice).

n99 *MANUAL FOR COURTS-MARTIAL*, United States, para. 75a (rev. ed. 1951) [hereinafter 1951 *MANUAL*].

n100 *Id.* para. 75b(3).

n101 *Id.* para. 75c. *See* Vowell, *supra* note 64, at 35-36.

n102 UCMJ art. 76a(4) (1951).

n103 1951 *Manual*, *supra* note 99, para. 76a(5).

n104 *See id.* paras. 76a(6), (7).

n105 The Military Justice Act of 1968, Pub. L. No. 90-632, 82 *Stat.* 1355; UCMJ arts. 4e, 53d (1969). *See generally* Criminal Law Div. Note, *An Ongoing Trend: Expanding the Status and Power of the Military Judge*, ARMY LAW., Oct. 1992, at 25 (Military Justice Act of 1968 reflected wartime criticism that the system lacked individual procedural safeguards and that unlawful command influence had poisoned the fairness of courts-martial. Congress concluded that the military justice system needed a substantial overhaul to convince the public that the system actually protected the rights of accused service members.).

n106 Sam J. Ervin, *The Military Justice Act of 1968*, 45 *MIL. L. REv.* 77 (1969); *United States v. Griffith*, 27 *M.J.* 42, 45-46.

n107 MANUAL FOR COURTS-MARTIAL, United States, para. 75b. (rev. ed. 1968) [hereinafter 1968 MANUAL]. "Service records" was a technical term referring to only a portion of a soldier's personnel records. Under the change, any records properly maintained in accordance with departmental regulations that reflected past military efficiency, conduct, performance, and history of the accused could be offered by counsel.

n108 *See* Vowell, *supra* note 64, at 54.

n109 BENCHBOOK, *supra* note 21.

n110 *See infra* notes 304-19 and accompanying text (discussing jury instructions for sentencing).

n111 27 *C.M.R.* 176, 180 (*C.M.A.* 1959).

n112 The Air Force Board of Review reached a similar result several years earlier in *United States v. Dowling*, 18 *C.M.R.* 670 (*A.F.B.R.* 1954), when it upheld the law officer's decision denying the members' request for information on sentences in comparable cases. The Air Force Board concluded that the provisions of paragraph 76a simply meant that members should consider cases that they previously had adjudged. *See* Vowell, *supra* note 64, at 38 n. 180.

n113 24 *C.M.R.* 212 (*C.M.A.* 1957).

n114 *Id.* at 215-16. In *Rinehart*, the trial counsel encouraged the members to discharge appellant by referring them to paragraph 33h of the 1951 *Manual*, which stated that retention of thieves "injuriously reflects on the good name of the military service and its self-respecting personnel." The court concluded that permitting the members to use the manual would expose them to impermissible command influence. *Id.* at 215. *See also* *United States v. Boswell*, 23 *C.M.R.* 369 (*C.M.R.* 1957).

n115 *See United States v. Blau*, 17 *C.M.R.* 232, 243 (*C.M.R.* 1954); Vowell, *supra* note 64, at 44-47.

n116 *See* Vowell, *supra* note 64, at 58-61.

n117 *See United States v. Billingsley*, 20 C.M.R. 917, 919 (A.F.B.R. 1955).

n118 4 M.J. 33 (C.M.A. 1977). The chief criticism of the posttrial interview (at one time a widespread practice developed to secure as much background information as possible on an accused, to assist the convening authority in determining the propriety of clemency) was that the sentencing body should have had the opportunity to review the information that the interview revealed about the accused. Instead, this information was reserved for the exclusive consideration of the convening authority in the posttrial clemency review. *Id.* at 37 n. 18. *See infra* notes 291-301 and accompanying text (discussing undue reliance on the convening authority and appellate courts to correct inappropriate sentences). In *Hill*, the COMA also urged Congress to adopt some type of presentence report that would be given to the sentencing body. Congress never has adopted this suggestion.

n119 46 C.M.R. 321 (C.M.A. 1973).

n120 *Id.* at 322.

n121 1 M.J. 350 (C.M.A. 1976).

n122 9 M.J. 100 (C.M.A. 1980).

n123 10 M.J. 839 (N.M.C.M.R. 1981), *aff'd* 13 M.J. 403 (C.M.A. 1982).

n124 Vowell, *supra* note 64, at 69 (citing 1969 MANUAL, para. 75d, as amended by Executive Order 12315, 3 C.F.R. 163 (1982)).

n125 9 M.J. 300 (C.M.A. 1980).

n126 11 M.J. 195, 201 (C.M.A. 1981).

n127 *Id.* at 198 n.5. The information suppressed was a letter of reprimand.

n128 Prior to 1984, the accused and his counsel practically controlled the amount and type of evidence about the accused that could be offered during sentencing by their decision whether or not to offer any evidence in extenuation and mitigation. *See supra* note 45 and accompanying text.

n129 MCM, *supra* note 13, R.C.M. 1001(b)(5). In retrospect, this may have been a box better left unopened, considering the amount of appellate litigation generated by rehabilitation potential evidence. The failure of Congress and the President to provide any concrete guidance on how rehabilitation potential should fit into the sentencing equation caused this. *See infra* notes 275-78 and accompanying text (discussing the current state of confusion regarding rehabilitation potential evidence).

n130 *Id.*

n131 *Id.* R.C.M. 1001(d).

n132 *Id.* R.C.M. 1001(b)(4) discussion.

n133 *Id.* R.C.M. 1001(b)(5). But again, Congress provided no specific guidance as to how the accused's guilty plea should affect a sentence.

n134 *See* UCMJ art. 60 (1984); MCM, *supra* note 13, R.C.M. 1106. *See generally* Vowell, *supra* note 64, at 85.

n135 *See* Vowell, *supra* note 64, at 4.

n136 Webster, *supra* note 2, at 222.

n137 King Henry II passed a law in 1166 that decreed no man would be brought to trial unless found guilty by "twelve knights, good and true." *Id.*

n138 "Four kinds of ordeal were in common use in England. The Ordeal by Fire required the accused to carry a piece of hot iron for nine paces. The hand was then wrapped for three days. At the end of the third day the bandage was removed; if the hand had festered, it was determined that the man was guilty because it had previously been requested that God keep an innocent man's hand clean of infection. The Ordeal by Hot Water was similar to ordeal by fire in that the same routine was followed, except that the accused was required to remove a stone from the bottom of a vessel of boiling water. In the Ordeal of the Corsnade, the priest gave to the accused a one-ounce morsel of bread or cheese which had been charged to stick in the man's throat if he were guilty. When the Ordeal was by Cold Water, the accused was bound and lowered into a pool of water which the priest had consecrated and adjured to receive the innocent but to reject the guilty. Therefore, if the man floated he was guilty; if he sank he was innocent." *See* WINDEYER, LEGAL HISTORY 14, 15 (2d rev. ed. 1957).

n139 *Id.* at 15 n.8.

In Compurgation or Wager at Law the accused swore that he was not guilty and he then called several of his neighbors to state on their oath that the accused party's oath was clean, i.e. that he was the sort of person who would not tell a lie under oath. Although somewhat difficult to understand by modern standards, at this time in history a man would hesitate to swear a false oath. His neighbors, if not convinced of his innocence, might fear to support this oath because of their belief that the wrath of God would be made manifest on them and that misfortunes would follow such a false oath. Therein lay the effectiveness of Compurgation.
Id. at 12

n140 *Id.* at 223. Trial by Battle also was a way of determining the decision of God in the quarrels of men. Parties would either fight themselves, or hire a champion to fight for them. *Id.* at 44-46.

n141 HANS & VIDMAR, JUDGING THE JURY 40 (1986).

n142 U.S. CONST. art. III, § 2, cl. 3 (The trial of all crimes, except in cases of impeachment, shall be by jury. . . .); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ."). With respect to state constitutions, *see* HANS & VIDMAR, *supra* note 141, at 31.

n143 *See* Reese, *supra* note 10, at 327 (citing *McMillan v. Pennsylvania*, 477 U.S. 79 (1986)) (no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact); *James v. Twomey*, 466 F.2d 718, 721 (7th Cir. 1972) (no federally guaranteed right to jury determination of sentence); *Payne v. Nash*, 327 F.2d 197, 200 (8th Cir. 1964) (nothing in fourteenth amendment gives right to have jury assess punishment)).

n144 John Poulos, *Liability Rules, Sentencing Factors and the Sixth Amendment Right to a Jury Trial: A Preliminary Inquiry*, 44 U. MIAMI L. REV. 669 (1990) (Sixth Amendment achieves this goal by interposing the common sense judgment of a group of laymen between the accused and his accuser, and by invoking the community participation and shared responsibility that results from that group's determination that the defendant is liable for punishment at the hands of the government).

n145 U.S. CONST. amend. VIII.

n146 See E.A.L., *supra* note 5, at 969 n.2. The 13 states that used or continue to use juries for sentencing are: Virginia, Alabama, Arkansas, Georgia, Indiana, Mississippi, Missouri, Montana, North Dakota, Oklahoma, Tennessee, Texas, and Kentucky.

n147 See Reese, *supra* note 10, at 328-29. The eight states still using juries in some form for sentencing are Mississippi, Arkansas, Missouri, Kentucky, Texas, Oklahoma, Tennessee, and Virginia.

n148 See Report, *supra* note 9, at 79. Some of the early reasons for jury sentencing were "colonial distrust of judges appointed by the crown (and later federalist-dominated courts), the frontier belief that the people should decide for themselves, and the general lack of difference in either training or competence between the judge and the jury throughout much of the nineteenth century." *Id.*

n149 MISS. CODE ANN. § 97-3-67; 97-3-71 (1988).

n150 KY. R. CRIM. PROC. 9.84(1)(1992).

n151 ARK. CODE ANN. § 5-4-103 (Michie 1992).

n152 MO. ANN. STAT. § 557.036 (Vernon 1991).

n153 OKLA. STAT. ANN. tit. 22, § 926, 927 (West 1991).

n154 TEX. CODE CRIM. PROC. ANN. art. 37.07, § 2(b) (West 1990).

n155 TENN. CODE ANN. § 40-20-106 (1982).

n156 VA. CODE ANN. § 19.2-295 (Michie 1992).

n157 See *Roman v. Parrish*, 328 F. Supp. 882 (E.D. Va. 1971).

n158 *Vines v. Murray*, 553 F.2d 342 (4th Cir.), cert. denied 434 U.S. 851 (1977). One could compare this suspension power to the convening authority's clemency power. However, the trial judge is an observer at the trial as opposed to the convening authority who is reviewing the case on paper.

n159 See generally E.A.L., *supra* note 5.

n160 *Id.* See also *Few are Willing to Gamble on Jury*, THE DAILY PROGRESS (Charlottesville, Va.), Nov. 17, 1992, at 1. This article noted that within the Charlottesville, Virginia, area, the vast majority of the people charged with crimes are not willing to gamble on a jury, although juries present a better chance for ac-

quittal. Jury sentences in drug cases were five times more severe than those imposed by judges. Sentences for burglaries and violent felonies were over twice as severe as those from judges. As a result of these manifest differences, 802 of the 831 defendants who pleaded guilty between 1989 and 1991, had their sentence decided by the trial judge, and 155 of the 162 contested trials were tried before a judge without a jury.

n161 U.S. CONST. amend. VIII; UCMJ art. 55 (1984).

n162 MCM, *supra* note 13, R.C.M. 1006(e)(3) "Instructions on sentence shall include . . . a statement informing the members that they are solely responsible for selecting an appropriate sentence. . . ."

n163 *See* Vowell, *supra* note 64, at 6.

n164 *Id.* at 7 n.20 (citing Minority Report of Mr. Sterritt).

n165 *See* BENCHBOOK, *supra* note 21, para. 2-39 ("you should select a sentence which best serves the ends of good order and discipline in the military, the needs of the accused, and the welfare of society").

n166 The opinion of the general public is critical to any assessment of our military justice system. *See* Cox, *supra* note 61, at 2 ("Our system of military justice cannot be viewed solely from the vantage point of the military; it must also be viewed from the perspective of the people and the politicians.").

n167 In 1983, 60% of the defense counsel surveyed stated that decisions to request trial by military judge alone are based primarily on sentencing considerations, 10% indicated that such decisions are based on findings considerations, and 28% indicated that there was no difference. Survey, *supra* note 10, at 25. Specific responses from defense counsel surveyed in 1993, regarding the advice they give clients on forum selection, included the following: "it's better to go with a new panel as opposed to a 'hardened' one"; "if you have a sympathetic victim or any other particularly aggravating factor, stay away from members"; "the military judge is less swayed by emotion and argument of counsel"; "if the accused has a good case in extenuation and mitigation go with members"; "if you have a pretrial agreement (safety net) you may as well take a risk of beating the deal with a panel, because the judge is more likely to adjudge a sentence within a narrower range than will a panel"; "a panel for sentencing without a pretrial agreement is a 'crapshoot'; if it's a military offense -- avoid members"; "the accused may want to waive members in order to get a better pretrial agreement." Thesis Survey, *supra* note 4. *See also* John E. Baker & William L. Wallis, *Predicting Courts-Martial Results: Choosing the Right Forum*, ARMY LAW., Sept. 1985, at 71.

n168 Report, *supra* note 9, at 27. During hearings, the American Civil Liberties Union offered the following comment: "The public's perception that the military justice system is fair and their continued confidence in the system are necessary in order to achieve general public support for the armed forces. Public perception regarding the fairness of the system is enhanced when service members have options such as that of selecting their sentencing authority." *See also* Survey, *supra* note 10, at 21. Trial and defense counsel agree that elimination of the option would appear to deprive an accused of a substantial right. Although most parties agree that giving an accused the option to select the sentencing forum is good, none of the parties surveyed in 1983 approved of giving the accused even greater choices. *Id.* Although an accused having options is perceived positively, a more equitable and efficient means for improving the public's perception of military justice would be to completely remove court members from the sentencing process. *See infra* notes 320-21 and accompanying text.

n169 MCM, *supra* note 13, R.C.M. 705(c)(2)(E). Thirty-four of fifty-four defense counsel stated that they offered to waive members for findings or sentence in hopes of a better pretrial agreement for their client. Six of eighteen prisoners who pleaded guilty responded that they specifically waived members for sentencing to get a better deal. Thesis Survey, *supra* note 4.

n170 MCM, *supra*, note 13, R.C.M. 705(c)(2)(E). See *United States v. Stewart*, 2 M.J. 423, 426 (C.M.A. 1975).

n171 See *United States v. Sherrod*, 26 M.J. 30 (C.M.A. 1988) (appellant nonetheless felt so constrained to avoid court-martial with members that he requested trial by the same judge who had denied appellant's earlier challenge of that judge -- arguing that the judge could not be impartial because the judge's daughter was a good friend of the victim of the alleged indecent acts. The COMA noted that appellant's instincts were on the mark as the members eventually sentenced appellant to the literal maximum punishment allowed by law.). *Id.*

Twelve of seventeen prisoners who pleaded not guilty before a military judge did so to avoid member sentencing. Only four of the seventeen regretted this decision, compared to fourteen of the twenty-nine who regretted their decision to be tried and sentenced by members. Thesis Survey, *supra* note 4.

n172 See *supra* notes 31-32 and accompanying text.

n173 Thirteen of fifty-four defense counsel surveyed volunteered that they often give this type of advice to their clients. Thesis Survey, *supra* note 4.

n174 See *infra* Appendix A (Chart, "General Courts-Martial Tried Before a Military Judge Alone During the Previous Five Years").

n175 The percentage of judge alone cases could be even higher, as many of the soldiers requesting trial by members are doing so because they want members to determine their guilt or innocence, not necessarily because they prefer to be sentenced by them. This is supported by recent statistics on guilty pleas, which demonstrate a steady 80% preference for judge alone sentencing over the last five years. These numbers may be influenced, however, by some jurisdictions' requirement that an accused waive the right to members on sentencing prior to entering into a pretrial agreement with the convening authority. See *supra* notes 168-73 and accompanying text (discussing waiver of sentencing by members during pretrial negotiations). See *infra* Appendix B (chart, "Guilty Pleas").

n176 Report, *supra* note 9, at 28. "Military judge alone sentencing will relieve commanders of the need to expend valuable line officer assets for this purpose, which is particularly critical in wartime."

n177 See Ervin, *supra* note 106, at 92-93. "The armed services, which vigorously supported this provision [option to be tried by military judge alone], anticipate that this new procedure will result in a great reduction in both the time and manpower normally, expended in trials by court-martial." See also *United States v. Butler*, 14 M.J. 72, 73 (C.M.A. 1982) (cost efficiencies should encourage bench trials when appropriate and properly requested by an accused). But See *infra* note 339 and accompanying text.

n178 Report, *supra* note 9, at 28. "Continuing a service member's forum option through the sentencing phase enables an accused to 'forum shop' for the court-martial composition which is likely to award the most lenient sentence."

n179 *Id.* at 48 (citing testimony of Chief Judge Cedarburg, United States Coast Guard Court of Military Review).

n180 Survey, *supra* note 10, at 20. When asked how often court member sentences and military judge sentences were inappropriately harsh or lenient, convening authorities generally rated members and judges evenly, although Air Force convening authorities felt that members gave inappropriate sentences slightly more

often than did judges. All lawyer groups, particularly judges, felt that members gave inappropriate sentences more often than judges, with defense counsel coming closest to calling them equal in this area.

n181 Thesis Survey, *supra* note 4.

n182 *See* Grove, *supra* note 3, at 29. This is especially true when an unusually disproportionate sentence gets widespread attention. Civilians tend to be more offended by excessive sentences like that handed down to Air Force Second Lieutenant Joann Newak, whose sentence for drug offense and homosexual sodomy included seven years confinement. *Id.* (citing McCarthy, *Justice for a Lieutenant*, WASH. POST, Jan. 9, 1983, at M.4; *United States v. Newak*, 15 M.J. 541 (A.F.C.M.R.), *rev'd*, 24 M.J. 238 (C.M.A. 1987).

n183 MCM, *supra* note 13, R.C.M. 1107(d)(1) (convening or higher authority may not increase punishment imposed by a court-martial).

n184 *Id.*; *See also* UCMJ art. 66 (1984).

n185 All groups overwhelmingly agreed that judges sentence more consistently in similar cases. Survey, *supra* note 10, at 22.

n186 Opinions on whether judges were harsh or lenient differed greatly among all parties surveyed -- yet all agreed that judges were not unduly harsh or lenient. *See generally* Thesis Survey, *supra* note 4; Survey, *supra* note 10.

n187 Thesis survey responses from defense counsel confirmed the belief that their clients stood a greater chance of receiving either a more lenient or more harsh sentence with court members. Thesis Survey, *supra* note 4.

n188 From fiscal year 1988 through fiscal year 1992, the United States Army Court of Military Review (ACMR) reassessed sentences in 2.6% (120 of 4,483) of all cases involving members for sentencing because of sentencing errors. Comparatively, the ACMR reassessed sentences in only 1.5% (189 of 12,492) of cases with military judges determining the sentence due to sentencing errors. Statistics provided by the Clerk of Court, United States Army Court of Military Review, 5611 Columbia Pike, Falls Church, Virginia 22041-5013.

n189 Report, *supra* note 9, at 47 (quoting testimony of Brigadier General Moore, United States Marine Corps (Retired)).

n190 *E.g.*, *United States v. Oquendo*, 35 M.J. 24 (C.M.A. 1992) (improper testimony on rehabilitation potential from accused's battalion commander and command sergeant major not harmless because their views would logically be afforded serious consideration by members); *United States v. Stinson*, 34 M.J. 233 (C.M.A. 1992); *United States v. Rice*, 33 M.J. 451 (C.M.A. 1991); *United States v. Ohrt*, 28 M.J. 301 (C.M.A. 1989).

n191 *See infra* notes 291-301 and accompanying text (discussing undue reliance on convening authority and courts of review to correct inappropriate sentences).

n192 *See* UCMJ arts. 25, 37, 98 (1984).

n193 UCMJ art. 25(c) (1984).

n194 UCMJ art. 25(d) (1984).

n195 The term "blue ribbon panel" initially was mentioned during the Senate Hearings on the 1951 *Manual. See Report, supra* note 9, at 67 (citing Hearings on H.R. 5957, Before a Subcomm. of the House Comm. on Armed Services, 81st Cong., 1st Sess. 94 (1949)).

n196 The Advisory Commission's Survey determined the following:

Several questions tested perceptions of the 'quality' of court members, the importance of court member duty, and the value of court duty to the court members. All groups believed that the 'best qualified' personnel were sometimes or usually selected for duty, although the lawyers who actually see them in court (military judges, trial counsel, and defense counsel) had a slightly lower opinion of members' qualifications. Convening authorities and staff judge advocates generally thought that members were 'seldom' or 'sometimes' selected based primarily on their relative expendability. The other groups thought that expendability played a slightly greater role in member selection.

Survey, *supra* note 10, at 21.

n197 UCMJ art. 25(e) (1984). In *United States v. Carter*, 25 M.J. 471, 478 (C.M.A. 1988), Judge Cox noted that this power over the selection process gives the government the "functional equivalent of an unlimited number of peremptory challenges." *Id. at 478*.

n198 *See* UCMJ art. 25(e); *see also* MCM, *supra* note 13, R.C.M. 505(c)(1).

n199 Of the forty-seven convening authorities surveyed, twelve spent less than one hour, ten spent about one hour, eleven spent one to two hours, seven spent longer than two hours, and seven spent longer than one day. One convening authority commented, "I don't have time to choose, so I rely on the people I know that are on the list." Another felt that the two hours he spent was "an inordinate amount of time to be spent on court-member selection." Thesis Survey, *supra* note 4. In a 1977 study, the Comptroller General interviewed thirteen convening authorities from the four services. The study found that all convening authorities used different criteria, such as position, type of experience, grade, and availability to exclude persons from consideration. Some personally select jurors while others selected from nominations by subordinates. Some had not discussed selection criteria with subordinates who nominate jurors. The Comptroller General ultimately recommended that article 25, UCMJ be amended to require random selection of court members. This recommendation was not adopted. *See Military Jury System Needs Safeguards Found in Civilian Federal Courts*, Comp. Gen. Rep. B-186183 at 16-18 (Jun. 6, 1977).

n200 32 M.J. 439 (C.M.A. 1991). *See also* *United States v. McCall*, 26 M.J. 804 (A.C.M.R. 1988) (the ACMR held that "it sounds like somebody has already selected a list of people to take in to the convening authority for him just to kind of rubberstamp.").

n201 UCMJ art. 37 (1984) provides: "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 . . . 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 . . ."

n202 UCMJ art. 98 (1984) provides: "Any person subject to this chapter who . . . knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused, shall be punished as a court-martial may direct."

n203 *E.g., United States v. Redman*, 33 M.J. 679 (A.C.M.R. 1991) (convening authority selects new panel because dissatisfied with court-martial results of current panel); *United States v. Jameson*, 33 M.J. 669

(*N.M.C.M.R. 1991*), *United States v. Jones*, 33 *M.J.* 1040 (*N.M.C.M.R. 1991*). In both *Jameson* and *Jones*, witnesses who provided favorable testimony for homosexual defendants were relieved from leadership positions.

n204 The majority of appellate cases addressing unlawful command influence involve command influence related to sentencing as opposed to the merits. *E.g.*, *United States v. Thomas*, 22 *M.J.* 388 (*C.M.A. 1986*); *United States v. Treakle*, 18 *M.J.* 646 (*A.C.M.R. 1984*) (which involved commanders discouraging soldiers from testifying for defendants during sentencing). *See also Jameson*, 33 *M.J.* at 699 and *Jones*, 33 *M.J.* at 1040. In guilty pleas, command influence always is directed at sentencing.

n205 *United States v. Oakley*, 33 *M.J.* 27 (*C.M.A. 1991*) (exposure to pleas and motions did not require recusal of the military judge); *United States v. Stinson*, 34 *M.J.* 233 (*C.M.A. 1992*) (in absence of evidence to the contrary, COMA assumed military judge properly evaluated evidence in accordance with M.R.E. 403 and 702); *United States v. Oulette*, 34 *M.J.* 798 (*N.M.C.M.R. 1991*) (military judge's assertion of impartiality afforded great weight).

n206 Although R.M.C. 1001(b)(4) permits the government to present evidence in aggravation directly related to the offense, the government is extremely limited in its ability to offer evidence about the accused. *See Magers*, *supra* note 8, at 59.

n207 11 *M.J.* 195, 198 (*C.M.A. 1981*).

n208 *Id.* at 201. The COMA added:

In a similar vein, it must be remembered the sentencing body in the military justice system . . . may be the lay members of a court-martial rather than a military judge. In such a system of criminal justice, the military judge must act in a manner to ensure the integrity of the court members as impartial and properly informed decision makers. Such a reality in the military justice system substantially affects the exercise of discretion by the military judge in the array of information he may permit to go before the members on the question of sentencing and in his decision to *sua sponte* instruct them concerning the permissible use of such evidence. In this light, he should be particularly sensitive to probative dangers which might arise from the admission of uncharged misconduct evidence during the sentence procedure which, though relevant or even admissible, would unduly arouse the members' hostility or prejudice against an accused. *Id.* (citations omitted).

n209 MCM, *supra* note 13, Mil R. EVID. 403. *See United States v. Zengel*, 32 *M.J.* 642 (*C.G.C.M.R. 1991*).

n210 *United States v. Bennett*, 28 *M.J.* 985, 987 (*A.F.C.M.R. 1989*) (Kastl, J. concurring).

n211 These *perceived* advantages to 'the command' are not to be construed with the advantages to the government that are discussed later in this article. *See infra* text accompanying notes 334-39.

n212 RePort, *supra* note 9, at 39 (quoting testimony of Colonel Garner, United States Army, before the Advisory Commission to the Military Justice Act of 1983).

n213 *See Grove supra* note 3, at 27.

n214 Charles W. Schieser & Daniel H. Benson, *A Proposal to Make Courts-Martial Courts: the Removal of Commanders from Military Justice*, 7 *TEX. TECH L. REV.* 559, 565 (1976).

Unlawful command influence exists in significant part because the present structure of American military justice permits it to exist. That structure sets up conditions which virtually insure that unlawful command influence will be present in a variety of ways. . . . To attack this problem inherent in the present system of military justice is not to impugn the integrity of military commanders. Military commanders are no better and no worse, insofar as the present analysis is concerned, than any other citizens of our society; neither are they inferior, morally or ethically, to legal personnel.
Id. at 565.

n215 *Id.* Perhaps the most significant drawback to member sentencing is not that members lack the ability to perform the sentencing function, but rather that they do it so infrequently -- court member panels rarely sit for more than six months--that they are unable to develop any expertise. Seen from this perspective, a more appropriate analogy to the field of medicine would be that just as a patient suffering back pain would rather be treated by a back specialist -- as opposed to a general practitioner seeing his first patient with back pain -- so too would an accused desire to be sentenced by the more trained and experienced military judge.

n216 This same argument applies even more so to the eight states that continue to use randomly selected jury members for sentencing. If any jury would ever be qualified to perform the sentencing function, it would be the military court-martial. The convening authority selects members by virtue of their age, experience, education, length of service, and judicial temperament, as opposed to the random selection of juries performed in the state and federal criminal justice systems.

n217 Twenty-two of forty-seven convening authorities listed this as a reason to preserve member sentencing. Twenty-five of sixty-eight staff judge advocates expressed the same opinion. Thesis Survey, *supra* note 4. Convening authorities and defense counsel surveyed in 1983 felt member sentences more fairly reflected the sense of justice in the community. Survey, *supra* note 10, at 19-20.

n218 Thesis Survey, *supra* note 4.

n219 *Id.* All groups surveyed in 1983, except appellate judges and Marine Corps staff judge advocates, agreed that judges are influenced not to exceed the sentences adjudged by members in similar cases so as not to discourage requests for judge alone trials. Survey, *supra* note 10, at 21. Major General Oaks, United States Air Force, noted, "[The sentencing authority] option in fact makes the judge's decision . . . more fair, because he knows he's being played off. If I know that I'm always going to sentence . . . there is a possibility that I would be less attentive to my responsibilities. . . . It is competition . . . I just know . . . [it is] good for [judges] to realize [they don't] have absolute power all the time." Report, *supra* note 9, at 49 (quoting the testimony of MG Oaks before the Advisory Commission to the Military Justice Act of 1983).

n220 Thesis Survey, *supra* note 4 (responses from SOLO course attendees). Whatever advantage group decision making may offer is offset by the corresponding risk that members may attempt to compromise their verdict or sentence and "split the baby." *See supra* notes 285-87 and accompanying text (discussing compromise verdicts). Moreover, the argument that a group can make a better decision begs the question as all of the group members are untrained in the laws and principles of sentencing. That they are a group cannot overcome their lack of training to perform this very complicated task.

n221 *See Solorio v. United States*, 483 U.S. 435 (1981) (jurisdiction of courts-martial depends solely on accused's status as a member of the armed forces).

n222 *See William C. Westmoreland & George S. Prugh, Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 3 HARV. J.L. & PUS. 41 n.128 (1980); *see also Reid v. Covert*, 354 U.S. 1, 23-30 (1957) (discussing jurisdiction of courts-martials).

n223 MCM, *supra* note 13, R.C.M. 1001(b)(4); 1001(c).

n224 *See supra* notes 174-76 (courts-martial statistics on the number of trials by judge alone versus court members).

n225 *See* Thesis Survey, *supra* note 4; *See also* Survey, *supra* note 10, at 22.

n226 In a surprising response, all groups, including convening authorities, when asked whether depriving members of sentencing authority would deprive the command of important powers, said that it would not. Survey, *supra* note 10, at 22.

n227 Six of forty-seven covering authorities agreed that court-martial duty better prepares junior officers for leadership. Thesis Survey, *supra* note 4.

n228 Report, *supra* note 9, at 37.

n229 *Id.*

n230 *See United States v. Nixon*, 33 M.J. 433 (C.M.A. 1991) (court-martial whose membership contained only master sergeants and sergeants major was not what Congress had in mind); *United States v. James*, 24 M.J. 894, 896 (A.C.M.R. 1987) (lack of lieutenants or warrant officers on panels for past year does not prove systematic exclusion); *United States v. Greene*, 43 C.M.R. 72,78 (C.M.A. 1970) (panel consisting of three colonels and six lieutenant colonels gave appearance of being "handpicked" by government).

n231 *See supra* note 212 and accompanying text (court members "represent the decision making level of the Army").

n232 *See supra* note 62 and accompanying text (discussing origins of military justice).

n233 "Although a military judge might bring a fresh perspective to the sentencing procedure, there is "that responsibility that the commander has that the judge can never assume" . . . "that responsibility is unique for the military . . . [T]hat's why the involvement must be there." Report, *supra* note 9, at 32 (testimony of General Robert W. Sennewald, United States Army, before the Advisory Commission to the Military Justice Act of 1983).

n234 *Id.*

n235 Ervin, *supra* note 106, at 92. The support was primarily because of the savings in both the time and manpower involved in trials by court-martial. *Id.*

n236 Survey, *supra* note 10, at 31. But most convening authorities and Army staff judge advocates believed that such a procedure would create the appearance -- presumably among soldiers -- that command authority had been diminished.

n237 Report, *supra* note 9, at 47-48.

n238 The proposal to eliminate members from straight special courts-martial was raised after Operation Desert Storm. During the operation, some judge advocates reported that defense counsel were using the right to demand trial by members to get their clients more favorable pretrial agreements. The administrative difficulties related to securing the presence of members for a special courts-martial during combat prompted some commands to agree to more favorable sentence limitations, in return for an accused waiving the right to be tried or sentenced by members, than the commands might have agreed to under different circumstances. Telephone Interview with Major Eugene Milhizer, Criminal Law Division, Office of The Judge Advocate General, (Mar. 26, 1993). For an explanation of the Joint Service Committee on Military Justice, see Criminal Law Div. Note, *Amending the Manual for Courts-Martial*, ARMY LAW., Apr. 1992, at 78, 79-80.

n239 See Report, *supra* note 9, at 67-68.

n240 The military judge also is involved in this decision to the extent he or she does not abuse his or her discretion to grant or deny the accused's request. MCM, *supra*, note 13, R.C.M. 903(d)(2).

n241 Survey, *supra* note 10, at 95.

n242 See Report, *supra* note 9, at 112. (minority report of Mr. Sterritt). "There was little, if any, support for a return to mandatory member sentencing from the senior military commanders who testified before the commission." *Id.* Nor does there appear to be any current interest in returning to the practice of mandatory member sentencing. Only one SOLO course attendee suggested this in his comments. Thesis Survey, *supra* note 4.

n243 Thesis Survey, *supra* note 4. One convening authority responded that "we are dealing with a system in which an inherent part of the soldiers' perception of fairness and justice is that his fellow soldiers will judge and sentence him from both a legal and soldierly point of view. To retain soldiers' respect and confidence, this is one of those acceptable and necessary "differences" [from the civilian procedure]." Numerous convening authorities commented that members "represent the institution whose laws have been violated," and have a "direct stake in the sentence adjudged." *Id.*

n244 Report, *supra* note 9, at 33.

n245 See Westmoreland, *supra* note 17, at 20.

A system of justice must therefore be fully integrated into the Armed Services so that it can operate equally well in war as well as in peace. We need a system that is part of the Army to permit the administration of justice within a combat zone, and to permit our constitution and American legal principles to follow our servicemen wherever they are deployed. *Id.*

n246 See *supra* note 238 and accompanying text (discussing defense counsel tactics in Operation Desert Storm).

n247 See *United States v. Kemp*, 46 C.M.R. 152 (C.M.A. 1973) (relying on *Ex Parte Quirin*, 317 U.S. 1 (1942)).

n248 With the possible exception of straight special courts-martial, where the maximum punishment is only six months confinement. See MCM, *supra* note 13, R.C.M. 201(g)(2). This currently is the proposal being evaluated by the Working Group of the Joint Service Committee. See *supra* note 238.

n249 *See supra* note 143 and accompanying text (discussing the absence of a constitutional right to be sentenced by a jury).

n250 Report, *supra* note 9, at 205 (separate Statement of Professor Kenneth F. Ripple).

n251 *See* BENCHBOOK, *supra* note 21, para. 2-59.

n252 *See* Survey, *supra* note 10, at 21 (demonstrating a definite split between convening authorities and attorneys regarding who has a better understanding of sentencing ramifications).

n253 *Id.* at 90 (minority opinion of Mr. Sterritt, citing ABA Standards Relating to Sentencing Alternatives and Procedures § 1.1(b) (September 1968)).

n254 UCMJ art. 26 (1984).

n255 *See* Report, *supra* note 9, at 76 (citing ABA Standards Relating to Sentencing Alternatives and Procedures, § 1.1(c) (Sept. 1968)). Nor can juries possibly be expected to develop this expertise for the one or more courts-martial they might participate in. *Id.* at 75. *See also United States v. Rinehart*, 24 C.M.R. 212 (C.M.A. 1957) (judges' instructions cannot be expected to make up for the years of training and experience that military judges bring to each court-martial).

n256 A select few brigade and battalion commanders have the opportunity to attend the SOLO course at The Judge Advocate General's School, United States Army, Charlottesville, Virginia. This course is designed to orient brigade and battalion level commanders on the legal issues they are likely to confront as commanders. One of the electives offered includes an hour of instruction on sentencing principles and procedures. It touches on punishments, confinement, parole, clemency, and good time. Ironically, it is this type of information that members are specifically instructed not to consider. *See infra* notes 279-84 and accompanying text. Most likely, the intent of the SOLO course is to train commanders in legal issues related to their duties as convening authorities and commanders as opposed to preparation for duty as potential court members.

n257 *See* MCM, *supra* note 13, R.C.M. 912; *United States v. Swagger*, 16 M.J. 759 (A.C.M.R. 1983) (individuals assigned to military police duties should not be court members).

n258 BENCHBOOK, *supra* note 21, para. 2-39.

n259 *See* Vowell, *supra* note 64, at 67 (discussing former Chief Judge Fletcher's opinion that one of the deficiencies of military sentencing was the lack of evidence before the sentencing body, and how the members' inability, during sentencing to properly apply evidence that a military judge would otherwise be presumed to understand and properly apply influenced his view).

n260 4 M.J. 33 (C.M.A. 1977).

n261 11 M.J. 195 (C.M.A. 1981).

n262 The COMA held that the letter of reprimand was inadmissible because it was issued by the commander for the specific purpose of aggravating the court-martial sentence, not as a management tool. *Id.* at 199.

n263 42 C.M.R. 227 (C.M.A. 1970).

n264 UCMJ para. 75d (1969).

n265 42 C.M.R. at 231. *see also United States v. Philippon*, 30 M.J. 1019 (A.F.C.M.R. 1990); *United States v. Williams*, 34 M.J. 1127 (A.F.C.M.R. 1992) *aff'd on reconsideration* 35 M.J. 812 (A.F.C.M.R. 1992) ("future dangerousness" of accused inadmissible, but military judge presumed to limit consideration to proper factors only).

n266 MCM, *supra* note 13, R.C.M. 801(a)(1)-(5).

n267 *Id.*

n268 *Id.* MIL. R. EVID. 104(a) (preliminary questions concerning the admissibility of evidence shall be determined by military judge).

n269 *Id.* MIL. R. EVID. 103(a) which states that "in a court-martial composed of a military judge and members, proceedings shall be conducted to the extent practicable, so as to prevent inadmissible evidence from being suggested to the members by any means, such as making statements or offers of proof or asking questions in the hearing of the members." *See also id.* MIL. R. EVID. 104(e): "Hearings on the admissibility of statements of an accused under MIL. R. EVID. 301-306 shall be in all cases conducted out of the hearing of the members."

n270 *Id.* MIL. R. EVID. 104(a).

n271 23 C.M.R. 369 (C.M.A. 1957).

n272 24 C.M.R. 212 (C.M.A. 1957).

n273 The paragraphs cited by the trial counsel were paragraphs 33h and 75a(5) of the 1951 *Manual*. The passages discovered by the members were paragraphs 76a(3) (previous convictions) and 76a(4) (factors which may be considered are penalties adjudged in other cases for similar offenses). The members asked the law officer for information on sentences in other similar cases and for an explanation of what paragraph 76a(3) meant. The law officer instructed the members to decide this case on its facts alone and to disregard paragraph 76a(3). *Id.* at 214.

n274 *Id.* at 216-17.

N275 *See, e.g., United States v. Horner*, 22 M.J. 294 (C.M.A. 1986), *United States v. Ohrt*, 28 M.J. 301 (C.M.A. 1989), *United States v. Aurich*, 31 M.J. 95 (C.M.A. 1990); *United States v. Claxton*, 32 M.J. 159 (C.M.A. 1991); and *United States v. Goodman*, 33 M.J. 84 (C.M.A. 1991). For cases involving evidence in aggravation see *United States v. Wingart*, 27 M.J. 128 (C.M.A. 1988) (uncharged misconduct is irrelevant unless it relates directly to the accused's offense); *United States v. Hall*, 29 M.J. 786 (A.C.M.R. 1989) (evidence of absence and escape from custody to avoid court-martial are only relevant to defendant's rehabilitation potential; uncharged distribution of crack cocaine was not directly related to charged offense and therefore inadmissible); *United States v. King*, 30 M.J. 334 (C.M.A. 1990) (government cannot offer evidence that accused appeared before the United States Disciplinary Barracks disciplinary board on 19 occasions while confined because it is not directly related to charged offense).

n276 MCM, *supra* note 13, MIL. R. EVID. 403.

n277 See generally *United States v. Zengel*, 32 M.J. 642 (C.G.C.M.R. 1991); *United States v. Martin*, 20 M.J. 227, 230 n.5 (C.M.A. 1985).

n278 See *United States v. DeYoung*, 29 M.J. 78 (C.M.A. 1989) (military judge must make ruling if defense counsel objects to uncharged misconduct in the stipulation of fact); but see *United States v. Vargas*, 29 M.J. 968 (A.C.M.R. 1990) (although evidence inadmissible, accused agreed to permit use in return for a favorable sentence limitation, and no evidence of government overreaching).

n279 25 M.J. 423 (C.M.A. 1988), cert. denied, 487 U.S. 1206 (1988).

n280 In *Griffin*, the COMA nevertheless affirmed the trial court's ruling because the defense counsel consented to the proposed instruction concerning the effect a punitive discharge would have on the accused's retirement benefits. Moreover, the COMA noted that what might be labeled as a "collateral" consequence of a sentence, is often the "single most important" matter to the accused and the sentencing authority. Consequently, such a factor should hardly be considered collateral, but rather directly related to the offense and the accused and therefore should be instructed on by the military judge. *Griffin*, 25 M.J. at 424. Chief Judge Everett, in his concurring opinion, wrote that it is appropriate for members or the judge to consider the collateral consequences of various sentencing alternatives. *Id.* at 425 (Everett, J. concurring).

n281 See *United States v. Rosato*, 32 M.J. 93 (C.M.A. 1991) (military judge erred by denying accused important right to testify about the Air Force Correction and Rehabilitation Squadron).

n282 Vowell, *supra* note 64, at 97.

n283 *United States v. Hannan*, 17 M.J. 115 (C.M.A. 1984) (the accused entered into a pretrial agreement with the convening authority limiting confinement to one year. The judge sentenced the accused to one year and one day so that he would be eligible for parole within six months. Soldiers sentenced to a year or less are not eligible for parole and, consequently, have to serve the full term less any good time. Despite the military judge's intent, appellant's complaint that he should get the benefit of parole was denied by the COMA).

n284 MCM, *supra* note 13, R.C.M. 1107(b)(3)(B)(iii) (before taking action, convening authority may consider "such other matters as he deems appropriate"). See also *Hannan*, 17 M.J. at 124 (staff judge advocate should discuss in his posttrial review how parole eligibility is affected if confinement is reduced pursuant to pretrial agreement).

n285 See Report, *supra* note 9, at 29, 45; E.A.L., *supra* note 5, at 995 (discussing jury nullification in drunk driving cases).

n286 One commentator noted:

It has often been stated that in determining the defendant's guilt the jury should focus only on the evidence before it and should not be swayed by the nature of the punishment which would follow a verdict of guilty. However, when the jury is to determine the sentence in addition to the issue of guilt or innocence, this principle is taxed to the breaking point.
E.A.L., *supra* note 5, at 986-97.

n287 See Report, *supra* note 9, at 45 (contrary to general conclusion reached by the Advisory Commission that compromise verdicts occur "infrequently," were responses from all lawyer groups in the 1983 survey that indicated compromises "sometimes" occur. Survey, *supra* note 10, at 23.

n288 Fifteen of sixty-eight staff judge advocates commented that members are more likely to be swayed by emotion and argument of counsel in their sentencing deliberations. Thesis Survey, *supra* note 4.

n289 *Id.*

n290 *Id.*

n291 MCM, *supra* note 13, R.C.M. 1107(d) (this power even extends to those offenses that carry a mandatory punishment. *Id.* R.C.M. 1107(d)(2).

n292 UCMJ art. 66 (1984) states:

In a case referred to it, the Court of Military Review may . . . affirm only such findings of guilty and the sentence or such part or amount of the sentence as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the evidence.

n293 Rollman, *supra* note 58, at 215.

n294 MCM, *supra* note 13, R.C.M. 1107(b)(3)(B)(iii) (before considering such matters, convening authority must give the accused notice and an opportunity to respond). *Id.*

n295 Two staff judge advocates surveyed listed posttrial review by the convening authority and appellate courts as a safeguard against errant member sentences. Thesis Survey, *supra* note 4.

n296 *13 M.J. 278 (C.M.A. 1982).*

n297 *Id. at 284.*

n298 Byers, *supra* note 8, at 100.

n299 *See Brown, supra* note 8, at 12.

n300 In fiscal year 1990 the total time for appellate review, from the date of trial to date of written opinion from the ACMR, averaged 217 days. In fiscal year 1991 the average posttrial processing time was 182 days. In fiscal year 1992 the average was 201 days. The average processing time from end of trial to action by the convening authority was 52 days in fiscal year 1990, 66 days in fiscal year 1991, and 74 days in fiscal year 1992. Information provided by the Clerk of Court, the United States Army Court of Military Review, 5611 Columbia Pike, Falls Church, Virginia 22041-5013.

n301 *See supra* text accompanying note 183 (discussing effects of unduly lenient sentence on unit morale and discipline).

n302 All groups, except appellate judges and Marine Corps staff judge advocates, agreed that judges may moderate their sentences to encourage soldiers to continue requests for judge alone trials. Survey, *supra* note 10, at 21. Four of forty-seven staff judges advocates surveyed felt that this was true. However, thirteen of fif-

teen trial judges, the parties most affected by this observation, strongly disagreed that this occurred. Thesis Survey, *supra* note 4.

n303 *See supra* notes 174-75 (courts-martial statistics).

n304 *See United States v. Sauer, 15 M.J. 113, 116-17 (C.M.A. 1983)* (salutary principle that a sentencing authority should be provided with as much information as possible).

n305 The Advisory Commission to the Military Justice Act of 1983 noted as follows:

In view of the complicated nature of sentencing, as compared to the determination of a fact, significant time and effort must be expended by the judge in fashioning his instructions, communicating his instructions and ensuring the members proper understanding. Even then, there is no assurance that an inexperienced members [sic] can follow these instructions without error. The possibility of error and reversal on appeal generates additional consumption of judicial and military resources.

Report, *supra* note 9, at 91 (minority report of Mr. Sterritt). *See* BENCHBOOK, *supra* note 21, para. 1-2 (no standardized set of instructions can cover every situation arising in a trial by courts-martial. Special circumstances will invariably be presented requiring instructions not dealt with in *Benchbook*).

n306 MCM, *supra* note 13, R.C.M. 1005(e).

n307 BENCHBOOK, *supra* note 21, para 2-37. *See supra* notes 47-52 and accompanying text (discussing jury instructions). The guidance contained in the *Benchbook* is deficient for two reasons; (1) there is insufficient detail to help judges craft meaningful instructions; (2) it is subject to being overruled since it is only a DA pamphlet. *See* Vowell, *supra* note 64, at 95.

n308 MCM, *supra* note 13, R.C.M. 1005(e)(4) discussion; BENCHBOOK, *supra* note 21, para. 2-37.

n309 *See United States v. Griffin, 25 M.J. 423 (C.M.A. 1988)*.

n310 *See United States v. Warren, 13 M.J. 278 (C.M.A. 1982)*. After discussing the complexity of determining whether an accused lied in court and its impact on the sentence, Judge Kastl commented that "it is one thing to permit a trained judge to consider an accused's false testimony in reaching a sentence . . . but it is quite a different matter to permit a court-martial consisting of members to do this." In its opinion affirming the AFCEM's decision to permit members to perform this difficult task, the COMA joined in Judge Kastl's concern that "the particular pet we welcome today into our judicial household will not easily be housebroken." *Id. at 284*. *See United States v. Below, ACM S26133 (A.F.C.M.R. 28 Oct. 1983)* (sentence set aside where military judge instructed panel to consider accused's awards and decorations but failed to mention combat service); *United States v. Kirkpatrick, 33 M.J. 132 (C.M.A. 1991)* (plain error to instruct members to consider Army policy on drugs). *Compare United States v. Chavez, 28 M.J. 691 (A.F.C.M.R. 1991)* (military judge erred by instructing on defendant's failure to express remorse, but it was not error to instruct on defendant's lack of remorse) *with United States v. Holt, 33 M.J. 400 (C.M.A. 1991)* (consideration of accused's recalcitrance in admitting guilt is appropriate in the proper case).

n311 *Warren, 13 M.J. at 286*.

n312 *Id. at 286*.

n313 *31 M.J. 95 (C.M.A. 1990)*.

n314 *Id.* "In other words, if an offense does not ordinarily warrant a punitive discharge, then it would be inappropriate to award such a discharge to an accused because he lacked 'rehabilitation potential.'" *But see id. at 100.* (Sullivan, C.J. concurring in part, dissenting in part) (military tradition that commander's opinion whether accused could be restored to his former place in unit was common measure of rehabilitation potential in the military). It appears that Chief Judge Sullivan's view has prevailed. In *United States v. Goodman*, 33 M.J. 84 (C.M.A. 1991) the COMA found harmless error in asking "Do you want . . . [the accused] back in your unit?" and "Do you think he [the accused] has a place in the Army?" because it is self-evident that most people have qualms about having someone in the unit or the service who has "torched" the barracks. *Id. at 85.*

n315 *See United States v. Claxton*, 32 M.J. 159 (C.M.A. 1991).

n316 *United States v. Warren*, 13 M.J. 278, 285 n.5.

n317 *See MCM*, *supra* note 13, MIL R. EVID. 105.

n318 *See United States v. Montgomery*, 42 C.M.R. 227, 231 (C.M.A. 1970) (military judge presumed to know and consider only relevant evidence). *Compare United States v. Donnelly*, 13 M.J. 79 (C.M.A. 1982) (hearing on sentence was before military judge; under such circumstances the COMA found no prejudicial error) *with United States v. Boles*, 11 M.J. 195, 199 (C.M.A. 1981) (in view of the severe sentence adjudged in court-martial, the COMA's misgivings as to its impact on the members are justified); *compare United States v. Williams*, 35 M.J. 812 (A.F.C.M.R. 1992) (expert testimony of accused's "future dangerousness," harmless because military judge gave it the diminished weight it deserved) *with United States v. King*, 35 M.J. 337 (C.M.A. 1992) (expert testimony about pedophiles before members constituted plain error).

n319 *United States v. Stringer*, 17 C.M.R. 122 (C.M.A. 1954).

n320 This choice is somewhat illusory because the accused has to forfeit his or her right to a trial by peers to avoid being sentenced by such an untrained sentencing authority. *See supra* notes 28-37 and accompanying text (regarding accused's forum choices).

n321 Over the years, courts-martial have developed the reputation for being hand-picked by the convening authority for the purpose of adjudging severe punishment. Report, *supra* note 9, at 88. *See supra* note 105.

n322 Eliminating members for sentencing will not be an overnight cure for the public's perception of the military justice system. That soldiers would have the same procedural rights as civilian defendants and would no longer face the prospect of being sentenced by "hard-charging" court members would be a positive step.

n323 *See supra* notes 28-37, 170-72 and accompanying text (regarding factors affecting forum selection).

n324 Defense counsel perceive that an accused stands a better chance of acquittal before members. Thesis Survey, *supra* note 4. However, this opinion often was offered with the caveat that the nature of the charge and offense may affect the opinion. Most defense counsel agreed that court members were easier to confuse and more likely to return equitable acquittals.

n325 Survey, *supra* note 10, at 22 (all members (except Navy CMR judges who split evenly) overwhelmingly agreed that sentences from military judges are more consistent in similar cases than those determined by court members).

n326 *See supra* notes 254-74 and accompanying text (discussing the training and qualifications of military judges).

n327 *See supra* notes 217-25 and accompanying text (discussing community input from court members).

n328 Thesis Survey, *supra* note 4.

n329 *Id.* This reflects a significant change from prior defense tactics. In 1983, defense counsel "seldom" offered waivers of trial or sentencing by members as an incentive for a pretrial agreement. Survey, *supra* note 10, at 24.

n330 *See Report, supra* note 9, at 94.

n331 Defense counsel and staff judge advocates noted that several circumstances exist in which the accused may fare better if sentenced by members -- such as manslaughter, unsympathetic victim, an accused with an outstanding military record, offenses that prompt members to think to themselves "there but for the grace of God go I." Thesis Survey, *supra* note 4.

n332 *See supra* note 143 (discussing constitutional aspects of jury sentencing).

n333 Survey, *supra* note 10, at 21. Unfortunately, the committee did not offer a definition of what was meant by "substantial." Additionally, the responses became more mixed when asked if it would "appear" to deprive the accused of a substantial right. A strong indication that this right is not so important is that accuseds are waiving sentencing and trial by members in two of every three cases, and sentencing by members in eight out of every ten guilty pleas. *See supra* notes 174-175 (statistics on the composition of courts-martial).

n334 *See supra* notes 188-91, 348-51 and accompanying text (discussing the risks of appellate error associated with instructions to court members).

n335 The counter-argument to command influence is that the remedy is not to revamp the entire process, but to prosecute those who commit such acts. Report, *supra* note 9, at 45. This argument is defective because unlawful command influence is practically impossible to prove and is usually the result of ignorance as opposed to intentional acts. *See United States v. Hilow, 32 M.J. 439 (C.M.A. 1991).*

n336 *See supra* notes 285-87 and accompanying text (discussing the risks of compromise verdicts associated with court members).

n337 *See supra* notes 180-85, 205-10 and accompanying text (discussing sentence disparity and evidentiary limitations applicable to court members).

n338 *See supra* notes 178-79 and accompanying text (discussing "forum shopping").

n339 One could argue that the current requirement that the accused be sentenced by members to be tried on the merits by members, interferes with his or her Sixth Amendment right to a jury trial.

n340 Survey, *supra* note 10, at 20 (convening authorities felt that judges and members adjudged inappropriately severe or lenient sentences evenly. Judges and counsel felt members do so more often. As for who could

better adjudge an appropriate sentence, only convening authorities favored members. Even defense counsel felt judges could better decide an appropriate sentence).

n341 Several defense counsel commented that sentencing before members is ideal when the accused has a pretrial agreement, because the accused has nothing to lose in return for the chance at an unusually light sentence from the members. Thesis Survey, *supra* note 4.

n342 See Byers, *supra* note 8, at 89. In calendar years 1965 and 1966 the Army tried 3029 general courts-martial. 67.4% were guilty pleas. Of these guilty pleas, 80% were entered pursuant to a pretrial agreement, thus limiting, to some degree, the effect of the members' sentence. Of course, in those instances when the members adjudge a sentence below that set forth in the pretrial agreement, the accused will reap the benefit of the lower sentence.

n343 Survey, *supra* note 8, at 21.

n344 *Id.* at 22.

n345 See MCM, *supra* note 13, R.C.M. 1001(b)(4); Report, *supra* note 9, at 96.

n346 One potential compromise that would continue to provide members a mechanism to contribute their views on the effect the adjudged sentence will have on discipline within the command is to permit the members to attach to their findings of guilt a recommendation to the military judge that in their collective opinion, the crime(s) committed warrant lenient or severe punishment.

n347 Westmoreland, *supra* note 17, at 21. "Some individuals are corrected by encouragement, some by exhortation, and others by criticism. How much and what type of correction is used is part of leadership. By far, most correction is done outside the system of military justice."

n348 See *supra* note 304-18 and accompanying text.

n349 See *supra* text accompanying note 318.

n350 See Vowell, *supra* note 64, at 96.

n351 See MCM, *supra* note 13, R.C.M. 1003(b).

n352 See *United States v. Balboa*, 33 M.J. 304 (C.M.A. 1991).

n353 See UCMJ arts. 26(c), 37 (1984); *United States v. Butler* 14 M.J. 72, 74 (C.M.A. 1982). But see *United States v. Mabe*, 33 M.J. 200 (C.M.A. 1991).

n354 See *Butler*, 14 M.J. at 74 (C.J. Everett, concurring) (one of the two obvious reasons an accused would want to be tried by judge alone is a "desire to be tried by an official who is not under the command of the convening authority who referred the charges for trial").

n355 See UCMJ art. 26 (1984); DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE, ch. 8 (25 Jan. 1990) (United States Army Trial Judiciary -- Military Judge Program).

n356 All parties surveyed unanimously agreed that judges are much less influenced by emotion and arguments of counsel. Thesis Survey, *supra* note 4.

n357 *See supra* notes 217-26 and accompanying text (discussing community input provided by court member sentencing).

n358 Twelve of fifteen military judges stated that the sentences of members do not affect the sentences they adjudge. Thesis Survey, *supra* note 4.

n359 All groups surveyed in 1983, except appellate judges and Marine Corps staff judge advocates, agreed that judges are influenced not to exceed the sentences adjudged by members in similar cases so as not to discourage requests for judge alone trials. Survey, *supra* note 10, at 21.

n360 Convening authorities are limited in that they cannot increase punishment for what they perceive to be an inappropriately lenient sentence. As judges are much more likely to sentence within a reasonable range, chances are rare that there will be a need for corrective action.

n361 Report, *supra* note 9, at 14-15 (quoting testimony of Lieutenant General John Galvin before the Advisory Commission to the Military Justice Act of 1983).

n362 *See supra* notes 146-60 (forty-two of the fifty states have judge alone sentencing).

n363 The adversarial process need not be abandoned to implement this change. Military personnel records of an accused often contain more information than the typical federal presentence report. The military also has the advantage of being able to order witnesses to testify. The military also has the advantage of being able to order witnesses to testify. The military also has the luxury of calling officers and noncommissioned officers, who live and work with the accused, to offer live testimony subject to cross-examination. Finally, "the soldier is in an environment where all weaknesses and excesses have an opportunity to betray themselves. He is carefully observed by his superiors -- more carefully than falls to the lot of any member of the ordinary civil community -- and all his delinquencies and merits are recorded systematically." *See Magers, supra* note 8, at 67.

n364 "Incidentally, I have never had a convening authority complain about a sentence imposed by a judge. . ." Report, *supra* note 9, at 33 (quoting testimony of Major General Kenneth J. Hodson, before the Advisory Commission to the Military Justice Act of 1983).