



32 of 100 DOCUMENTS

Army Lawyer

July, 1988

*1988 Army Law. 26*

**LENGTH:** 11101 words

**ARTICLE:** Sentencing Reform: Toward a More Uniform, Less Uninformed System of Court-Martial Sentencing

**NAME:** Major Russell W.G. Grove (USMC) \*, Director of Law Center, Marine Corps Air Station, Yuma, Arizona

**BIO:**

\* This article was originally written for the publication elective during 36th Graduate Course.

**LEXISNEXIS SUMMARY:**

... Other than the maximum permissible punishments prescribed in Part IV of the MCM and the Article 19 special court-martial sentence limits, a court-martial has little legal guidance in making sentencing decisions. ... Counsel for both sides would be permitted, or perhaps required, to submit names, addresses, and synopsis of testimony of sentencing witnesses to the presentence officer for inclusion in the presentence report. ... The base offense level for the sum of four Kgs is level twelve. ... At Criminal History Category II on the Sentencing Table, the sentence range for confinement would thus be eight to thirty months, a substantially narrower range than the zero to fifteen years for a similar offense under the MCM. ...

**TEXT:**

[\*26] **Introduction**

*Ordinance of Richard I, A.D. 1190*

Richard, by the grace of God, King of England, Duke of Normandy and Aquitaine, and Earl of Anjou, to all his subjects about to proceed by sea to Jerusalem, greeting. Know ye, that we, with the common consent of fit and proper men, have made the ordannances underwritten. Whoever shall slay a man on ship-board, he shall be bound to the dead man and thrown into the sea. If he shall slay him on land he shall be bound to the dead man and buried in the earth. If anyone shall be convicted, by means of lawful witnesses, of having drawn out a knife with which to strike another, or shall strike another so as to draw blood, he shall lose his hand. If, also, he shall give a blow with his hand, without shedding blood, he shall be plunged in the sea three times. If any man shall utter disgraceful language or abuse, or shall curse his companion, he shall pay him an ounce of silver for every time he has so abused him. A robber who shall be convicted of theft shall [\*27] have his head cropped after the manner of a champion, and boiling pitch shall be poured thereon, and then the feathers of a cushion shall be shaken out upon him, so that he may be known, and at the first land at which the ship shall touch, he shall be set on shore. Witness myself, at Chinon. n1

Richard's code of military justice provided for certainty of punishment, if not proportionality. By contrast, punitive articles of the Uniform Code of Military Justice n2 provide that the person who violates an article ". . . shall be punished as a court martial may direct." n3 Other than the maximum permissible punishments prescribed in Part IV of the Manual for Courts-Martial (MCM), n4 courts-martial have few legal standards to use in determining what punish-

ment to impose for an offense or combination of offenses. n5 Court-martial panels, often lacking in judicial experience, expertise, normative guidance, and basic information about the accused n6 and his offense, must guess at a sentence based on their collective intuition. n7 When the accused elects sentencing by military judge, the sentence is generally better informed, but is still arbitrary. n8

I do not suggest that every barracks thief should get the same sentence. There is no one "correct" sentence for a given offense, although there might be only one correct decision under the law on a motion, or even a verdict, given certain facts. In court-martial sentencing, however, discretion and individualized punishment are perhaps too highly exalted over uniformity, certainty, and predictability. Almost everyone with substantial court-martial experience will agree that in spite of the best efforts and intentions of the participants, some court-martial sentences are clearly disproportionate, irrational, unjust, and inexplicable. Although most court-martial sentences are reasonable, any judge advocate or convening authority with a few years of experience has a repertoire of favorite "laughers" to share at happy hour. Most often these are sentences awarded by members. n9

That most court-martial sentences are appropriately decided is primarily attributable to the conscientiousness and good judgment of military judges and members, in spite of and not because of the sentencing procedures of the MCM. This article will consider alternative sentencing measures that would make the court-martial sentencing process less discretionary and more thorough and informed. Among these measures are a proposal to abandon sentencing by members and adopt a system of military judge sentencing with advice of members, a proposal to use presentencing reports in lieu of the current presentencing process, and a proposal to adopt a uniform set of sentencing guidelines.

### **Purposes and Objectives of Court-Martial Sentencing**

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." n10

The four classical sentencing philosophies of retribution, general deterrence, specific deterrence, and rehabilitation are as applicable in the military as they are in civilian jurisdictions. n11 Sentencing should, of course, be individualized to the accused, n12 yet be proportionate to the offense and contribute to crime reduction. n13 Ideally, similar offenders who commit similar offenses should be sentenced in similar fashion. n14

Good order and discipline require that sentences be consistent, just and swift. n15 Proceedings that minimally interfere with regular duties of trial participants are the most efficient and effective. n16

#### **[\*28] Flaws in Military Sentencing**

##### *Lack of quantity, quality, and uniformity of sentencing data.*

The military presentence hearing is adversarial, highly discretionary, and further limited by evidentiary rules. n17 RCM 1001(b)(1) provides that in the presentence hearing the trial counsel shall inform the court of the pay and service of the accused and the duration and nature of any pretrial restraint. n18 These few lines from the top of the charge sheet, along with the charges and specifications of which the accused stands convicted, constitute the only required sentencing evidence. n19 Trial counsel may present personnel records, evidence of prior convictions, evidence in aggravation, and evidence of rehabilitation potential. n20 The defense then may present matters in extenuation and mitigation, including a statement by the accused. n21 Rebuttal and surrebuttal may follow.

While RCM 1001 allows for presentation of a substantial amount of sentencing information, counsel can elect not to present evidence. They might do so because the accused desires a punitive discharge; n22 for tactical reasons; because of a pretrial agreement with a very low sentence limitation; or out of inexperience, indolence, or lack of preparation. If the accused elects to make a statement, it is often unsworn and may consist only of a brief expression of remorse or a cursory personal history.

##### *Lack of experience and expertise.*

One of the primary criticisms of court-martial sentencing is that members, and some judges, lack the experience and knowledge necessary to be proficient in determining an appropriate sentence. This criticism has been aimed primarily at member sentencing. n23 Military judges are likely to be aware of trends in sentencing and concerned about sentence disparities. They are trained in the law and the philosophy of sentencing. With experience, they develop expertise that promotes uniformity. n24 Even a first-tour military judge will bring substantial court-martial experience to the bench.

Sentencing involves normative, correctional, and other judgments requiring more than merely legal expertise. Civilian judges, therefore, frequently rely upon the presentence report and expert advice of a court adjunct, usually a probation officer with special training and experience in criminal justice. n25 Military courts operate without a comparable sentencing expert.

*Lack of guidelines.*

Other than the maximum permissible punishments prescribed in Part IV of the MCM n26 and the Article 19 special court-martial sentence limits, n27 a court-martial has little legal guidance in making sentencing decisions. RCM 1003 lists authorized types of punishments without defining them or suggesting occasions for their use. n28 RCM 1003 also has "accelerator" or "habitual offender" rules n29 that may increase the maximum permissible punishment based on an accumulation of offenses or previous convictions. RCM 1001 enumerates the types of evidence the court may consider, but provides no guidance as to the relative weight or significance such evidence should carry.

Sentencing courts are charged to set aside predisposition n30 and to consider the entire range of punishment, from no punishment at all to the maximum authorized. n31 Consideration of specific aggravating factors is mandated only in capital cases. n32 In cases with members, the judge must instruct on certain sentencing factors, n33 such as the effect of [\*29] a guilty plea n34 and pretrial confinement. n35 The judge may give tailored instructions on other extenuating, mitigating, or aggravating factors, n36 but many do not. Those who do risk error. n37

Practically every other determination a court-martial makes--motions, challenges, objections, and even verdict--is guided by much more comprehensive legal standards than those employed in sentencing.

**Harm Caused**

Court-martial proceedings that appear desultory and arbitrary, diminish the respect that the military, civilian, and political communities have for military justice and the military leadership. This is especially so when an aberrationally disproportionate sentence gets widespread attention. In the military community this typically occurs when a convicted barracks thief or drug seller is neither confined nor discharged. Civilians, on the other hand, are more often shocked by cases like that of Air Force Second Lieutenant Joann Newak, whose sentence for drug offenses and homosexual sodomy included seven years of confinement. n38

Certainly the greatest harm is that caused within the military community. Loss of faith in the justice system undermines overall respect for authority and the law. Inordinately oppressive punishments impair morale. Fortunately, convening and reviewing authorities can reduce clearly excessive sentences. Overly lenient sentences, on the other hand, subvert discipline and cannot be cured. n39 This situation can breed such evils as unlawful command influence and vigilante justice. n40 The legendary Third Armored Division cases n41 and the more recent case of *United States v. Levite* n42 illustrate the witness tampering and other improper conduct that often results from lack of command confidence in the court-martial sentencing process.

**Possible Solutions**

*Military judge sentencing with advice of members.*

Sentencing by members and by juries in civilian cases has long been criticized. n43 Sentencing is a judicial function under American Bar Association (ABA) Standards. n44 In 1968 and again in 1979, the ABA strongly recommended abolition of jury sentencing in all but capital cases. n45 One fear is that the lay panel is prone to resolve doubt as to guilt by compromising on a light sentence. n46 Another concern is that members/juries often fail to consider factors other than moral approbation--recidivist tendency, available programs and facilities, n47 and the practical effects of particular kinds of punishment. Jurors or members are more likely than judges to be concerned about what others might think of their sentence, n48 and therefore tend to be less independent in their judgment. The danger of unlawful command influence is obviously greater in member cases. Seasoned judges are better able than members to appropriately consider volatile information, n49 and so can safely be exposed to a more complete evidentiary picture. Judges tend to be less swayed than members by sentimentality, the oratory and personality of counsel, n50 and evidence of the accused's work performance.

[\*30] Most civilian jurisdictions have abandoned jury sentencing in noncapital cases. n51 It does not necessarily follow, however, that the military jurisdiction should follow that trend. Court-martial panels are unique "blue ribbon" assemblies, in theory, specially selected for their experience, good judgment, and judicial temperament. n52 The standing panel appears to be a thing of the past, but even the most inexperienced panel consists of mature, specially

screened people with professional status and experience and at least some basic training in military law and customs. n53

Member participation in sentencing does have advantages. It helps define the military community norms for given offenses, n54 and provides feedback to the judges in that regard. Court-martial participation by members increases their understanding and respect for, our system of justice. The member sentencing option is considered to be an important right of the accused. n55 These reasons are among those adopted by the Military Justice Act of 1983 Advisory Commission in recommending rejection of a proposal to abolish member sentencing in noncapital cases. n56

There are advantages to both judge and member sentencing. The UCMJ should be amended to provide for sentence imposition by the judge, with the advice of the panel if the accused so elects. This generally is the paradigm in states that retain jury involvement in sentencing. n57

Such a system would preserve the advantages of member participation, yet allow the judge to act as a check against patently disproportionate or arbitrary sentences. The judge's discretion would in turn be checked by the suasion of the members' recommendation. An additional advantage would be the judge's ability to rectify technical errors n58 in the members' sentence on the spot, rather than require the members to redeliberate or refer the matter to the convening authority for correction. n59

Present deliberation procedures could be continued, but the members' sentence under this system would be in the form of a recommendation. Individual dissenting members would be allowed to make their own separate recommendations in addition to the one concurred in by the panel, n60 so the judge will have the benefit of that additional feedback in making his decision.

To ensure that member participation is truly meaningful, the judge in this model should be compelled under the UCMJ or the MCM to accord deference to the members' judgment, and to adopt the panel's proposed sentence unless it is contrary to law, clearly disproportionate, or clearly inimical to good order and discipline. These would be the only bases for a variation from the proposed sentence. Clearly, a judge should have authority to correct a sentence that would be contrary to law. The latter two grounds provide authority for a military judge to correct a proposed sentence that, while legal, is manifestly inappropriate to the accused and the crime. A sentence would be "disproportionate" or "inimical to good order and discipline" only where it varied substantively from the range of sentences normally imposed for similar offenses. A substantial variation would include variation in award of punitive discharge, forfeitures instead of fine, form of restraint, months of confinement, months of forfeiture, and reduction in grade. It would not include variation of a few days restraint or a few dollars of forfeiture. Perfect uniformity is neither a desirable nor an attainable objective, but providing the military judge the option of overriding a clear abuse of discretion by the panel would reduce the incidence of "the ridiculously low sentences and the ridiculously high sentences." n61

Judges should not be encouraged to override panel recommendations at a whim, but they should have the option of overriding the panel in the face of a manifestly bad sentence. In the event the judge imposes a sentence that varies from the panel's recommendation, the judge should be required to enter specific findings establishing a rationale for the variations. The convening authority and courts of military review would be still authorized to disapprove excessive sentences or parts thereof. n62 Chief judges and circuit military judges would continue to monitor sentences and make appropriate inquiries if certain judges fail to follow the law, regularly override the members, or abuse their discretion.

[\*31] Some court members may resent the adoption of the proposed system. Senior ranking officers might feel slighted and believe that they are being second guessed by a military judge. In reality however, panel sentences are already subject to downward adjustment by the convening authority and respective court of military review. Furthermore, hurt feelings are neither as grave nor as permanent as the inappropriate sentences that may result under the present system. Finally, this potential problem can be alleviated by providing for detailed and diplomatic instructions to the panel regarding its sentencing role, and by detailing members with requisite judicial temperament. n63 When the judge's sentence does vary from the panel recommendation, explanation by way of careful, objectively formulated essential findings would also help to minimize hard feelings. n64

#### *Use of presentence officer recommendations.*

In military practice, counsel must marshal the evidence and make recommendations with respect to the sentence. n65 Presentence proceedings are only slightly less adversarial and formal than proceedings prior to findings. n66 In such an adversarial process, a just outcome is dependent upon relatively equal effort, knowledge, and ability of counsel for both sides.

A well-trying sentencing case can be very time-consuming and expensive. It might include aggravation testimony of victims and law enforcement agents; testimony of the accused's parents, teachers, commanders, and work supervisors; a stack of military personnel records; testimony of psychologists, counselors, medical personnel, and other professional experts; and laborious argument by counsel, summarizing evidence and expounding on sentencing philosophy. For various reasons, however, counsel often elect to present a very brief, "bare-bones" case, giving the court very little with which to work. n67 The court may request additional evidence, but rarely does, supposing--perhaps erroneously--that counsel have good reasons for not presenting more.

The typical civilian criminal court achieves more thorough, expert, consistent, and economical sentencing by the use of presentence reports and recommendations of probation officers or presentence officers. n68 This officer will ideally have training and experience in law enforcement, criminology, corrections, sociology, psychology, and other related disciplines. n69 The report and recommendation are the result of an investigation of the offense and of the background and character of the defendant.

Exact imitation of the civilian model is neither feasible n70 nor desirable. The cost and time consumption involved are salient drawbacks. It is feasible, however, to use military personnel as presentence officers in appropriate cases, and to construct a presentence report format tailored to military sentence considerations, while maintaining or increasing speed and economy of trials. Military corrections specialists would be ideally suited to this purpose. n71 Judge advocates, senior noncommissioned officers with military justice experience, or other experienced military personnel could be specially trained and used in this role. The advantage of using the correctional specialist is that the specialist's expertise would obviate the need for extensive and costly training. n72

A presentence officer with such training and experience would have a more informed perspective of military offenders, their crimes, and of the range of sentence normally imposed for particular offenses. The officer would have a better understanding of the factors that are pertinent in selecting punishments, predicting rehabilitation, and correcting behavior, and would have a greater knowledge of the practical consequences of the various kinds of available punishment.

[\*32] To ensure independence of judgment and avoid the appearance of impropriety, such presentence officers should be organized independently of the existing military law enforcement structure and performance evaluation scheme. The best alternative may be to use the existing trial judiciary structure and the senior circuit judge as the rater. Presentence officers could be collocated with military judges, with common administrative and logistical support and common jurisdictional responsibility.

A presentence report similar to those used in U.S. District Court, n73 with data and recommendations scaled down and adapted to military practice, would be much more comprehensive and valuable than what military courts now use.

Such a report should include detailed information about the offense or offenses for which sentence is to be imposed. This would include a prosecution version; defense version; n74 statement of financial, physical, and psychological impact on any victim; n75 codefendant information, including relative culpability; and statement summaries of witnesses and complainants. n76

The report should feature personal and family data. The accused's early life influences, home and neighborhood environment, and family cohesiveness should be included. n77 The accused's criminal and disciplinary history is a very significant component, and available information relating to juvenile delinquency, truancy, and running away from home should also be noted. Accomplishments, special talents and interests, and significance of religion in the accused's life are also pertinent. n78 The report might include family history regarding criminality, emotional disorders, employment, health, citizenship, religion, and attitudes of parents and siblings toward the accused and toward his offense. n79

Marital information should definitely be included. A spouse or cohabitation partner is normally a dominant influence on the accused, as well as a valuable source of information. n80 Under present court-martial sentencing procedures, information regarding the spouse or companion and the quality of the relationship is usually minimal. If a spouse or fiancée has an impressive personality, defense counsel might ask him or her to appear at the presentence hearing. A competent defense counsel, however, will try to ensure that the court never sees or learns about a spouse or cohabitation partner that is a negative influence. Marital data should include information on problems in the relationship, separations, divorces, and children. n81

Education, special training, and employment history should be addressed. n82 Character and performance evaluations by former employers and military supervisors are always helpful in assessing rehabilitation potential, responsibility, attitude toward work, ambitions, interests, occupational skills, n83 responsiveness to orders, respect for superiors, and leadership potential. Summarizing these evaluations in a presentence report would be more efficient and concise than having the witnesses testify personally.

The accused's health, including physical illnesses and history of drug or alcohol abuse, should be included. n84 Intelligence test scores and other available psychological information should be included, as well as any psychiatric history and evaluations. n85

The accused's financial conditions can be especially important, particularly in assessing forfeitures or a fine. This information should be part of the report. In current court-martial practice, counsel sometimes fail to present significant financial condition evidence. n86

Whether these items of information are presented in courts-martial depends on such variables as time, effort and expertise of counsel, adherence to evidentiary rules, and counsel's tactical considerations. Submission of a standard presentence officer's report, in addition to the military judge's instructions, would be the most efficient means of assuring that the court is fully briefed before making its sentence decision.

Trial counsel could conceivably be tasked with preparing and presenting such reports. The prosecutor, however, is not neutral, and will lack the objectivity, motivation, expertise, and time needed to prepare the report.

The advantages of using presentence officers and reports are as follows:

a. Sentencing data would be gathered and presented in a more uniform, thorough, concise, and objective manner. The sentence officer's primary duty would be to methodically assemble and interpret sentence information. Unlike counsel, he would be objective, desiring neither a light sentence nor a heavy sentence, but an appropriate and informed sentence, reached methodically and dispassionately. Unlike the military judge and members, the presentence officer would be free to gather evidence independently. Of [\*33] all the court personnel, the presentence officer would have the best idea of what information is required, and how to gather and use it most efficiently.

b. The presentence officer's sentence recommendations would give the court valuable guidance in arriving at a sentence. n87 The presentence officer, an officer of the court, would be an expert witness called by the court to render an expert opinion. n88 Accordingly, counsel should have reasonable opportunity for examination and rebuttal, although they should not be permitted to call their own experts to testify. n89 Ideally, the presentence officer would work closely with counsel for both sides in preparing the report, so that disputed matters would be resolved or clarified beforehand. Matters still in dispute after such consultation would be submitted to the court for resolution.

c. The system would eventually save time and expense. Uniform, thorough sentencing procedures reduce the need for protracted presentence hearings involving the testimony of parents, teachers, victims, counselors, commanders, work supervisors, and others. The same evidence would be summarized in the presentence report, appropriately emphasized and developed by the presentence officer. Counsel for both sides would be permitted, or perhaps required, to submit names, addresses, and synopsis of testimony of sentencing witnesses to the presentence officer for inclusion in the presentence report. n90 The court would then receive, in essence, stipulations of expected testimony, obviating the need for live witnesses. n91

Obviously, the role of counsel's advocacy would be reduced under such procedures. This would be a positive change. Adversarial procedures, which are useful for litigation of the narrower issues involved in motions and findings, are not as appropriate once guilt has been determined.

The main disadvantage of the presentence report is that it takes substantial time to prepare it. In contested cases with a substantial possibility of acquittal, it is not economical to begin preparing the report prior to the verdict. n92 Even under current procedures, contested cases with high maximum permissible punishments are often recessed for a week or more after guilty findings to allow counsel to prepare the presentence case. The majority of courts-martial involve guilty pleas; in these cases, processing time should not be significantly affected. Once informed that a guilty plea is to be entered, a presentence officer could begin to prepare for the presentence hearing, and should be able to complete most reports prior to trial. n93

In contested cases, the presentence officer could do some basic preparation prior to findings, such as obtaining names of potential sentence witnesses, and reviewing the accused's military records. If presentence officers were to as-

sume more of the burden of presentence preparation, counsel would be free to concentrate on motions and the merits, and might be ready to go to trial sooner in many cases.

The military judge would be able to control excessive delays in presentence report preparation. The judge could hasten a dilatory presentence officer by setting deadlines. n94 In cases that must be concluded rapidly, provision could be made for the military judge to dispense with the report, receive an incomplete report with a "best guess," or order an abbreviated report. n95 A normal case should not be prolonged more than a day or two, and delay for this purpose would be a small price to pay when balanced against the risk of a "hipshot" sentence by an uninformed court.

Because of the time and effort required, it would not be worthwhile to have a presentence report in all cases. n96 Use could be limited, for example, to general courts-martial, or as directed by the military judge or convening authority, or as requested by counsel. It should be employed in most general courts-martial. The requirement could be suspended or relaxed for special operational requirements and military exigencies. Even in cases in which the presentence report is not used, the influence of its general use would aid the court in formulating its presentence inquiry and sentence.

With the input of a military sentence officer, military sentencing would become a methodical, informed study, rather than a perfunctory "hit or miss" endeavor. Confidence in our justice system would be enhanced.

#### *Establishment of sentence guidelines.*

Court-martial sentencing normally involves selecting a punishment somewhere between the legal maximum and no punishment at all. For example, the maximum permissible punishment for wrongful distribution of a Schedule I, II, or III controlled substance n97 by an enlisted member is dishonorable discharge, forfeiture of all pay and allowances, [\*34] confinement for fifteen years, n98 and reduction to the lowest grade. n99 A first offender who, without partaking, merely passes a marijuana joint to someone while home on leave is amenable to the same maximum punishment as a distributor who delivers a thousand hits of LSD and a canteen of PCP to a customer preparing to deploy to a combat zone. A sentencing authority might properly impose an article 15-type n100 punishment on the first offender, while sentencing the latter offender to the maximum permissible punishment. Unfortunately, in practice, the sentences are not always so rationally related to the offense.

Congressional or Presidential establishment of a mandatory minimum sentence, n101 such as a bad conduct discharge and one year of confinement for wrongful distribution of Schedule I, II, and III controlled substances, would not solve the problem. It would only slightly reduce the potential for sentence disparity in the latter case, and would result in a clear injustice in the former case. Setting a presumptive sentence, n102 such as a bad conduct discharge and two years confinement, would be much better. It would guide the court to a point on the normative scale, yet allow the court the discretion to choose a higher or lower punishment when warranted by the particular circumstances of the case. n103

An even better method is to employ sentencing guidelines similar to those authored by the U.S. Sentencing Commission. n104 The commission's work was in response to a Congressional mandate to establish guidelines to increase certainty and reduce disparity in federal court sentencing. n105 Seeking to strike a balance between complexity and discretion, the Commission settled on an empirical approach. n106 After analyzing data from 10,000 cases, the Commission compiled relevant sentencing distinctions used by legislature, judges, and probation and parole authorities. n107 It adopted a "real offense" approach, based on identifiable characteristics and social harm, rather than the more generic "charged offense" approach. n108

The Commission's scheme could be characterized as one of variable presumptive sentencing. At the core of the guidelines is the sentencing table, n109 reproduced as an Appendix. The vertical axis of the table consists of forty-three overlapping offense levels, quantified in months of confinement. A higher offense level carries a correspondingly higher confinement range. Offense levels for particular crimes have been set by determining the average sentence currently served for the offense, taking into account statutory penalties, parole guidelines, and other relevant factors. n110 The horizontal axis has six criminal history categories. Criminal history points are compiled based on numbers and lengths of previous sentences, whether the offense was committed less than two years after release from an earlier term of imprisonment, and whether the offense was committed while in probation, parole, work release, imprisonment, or escape status. n111

The first step in applying the guidelines is to determine the base offense level, including any applicable specific offense characteristics. Adjustment is then made for special victim characteristics, extent of the defendant's role in the offense, and multiple counts. Further adjustment is then made for defendant's acceptance of responsibility, such as surrendering before arrest, voluntarily making restitution, and pleading guilty. Criminal history points are then tallied, fol-

lowed by reference to the sentencing table and the guidelines for particular punishments set forth in chapter five of the sentencing guidelines. Finally, consideration is given to specific offender characteristics and other factors that may justify departure from the guidelines, n112 such as substantial assistance to authorities. n113

For example, assume that the defendant is a school teacher who has been convicted of two counts of trafficking marijuana to school students. He has one prior conviction for drug use resulting in probation, and has served a few days in jail for drunk driving. Both sales involved about two kilograms (Kgs) of marijuana.

[\*35] The base offense level for trafficking of two Kgs of marijuana, not involving death, serious injury, or possession of a weapon, is level ten. n114 Because there are two counts, the level is increased, based on the total amount of drug in heroin equivalents. n115 The base offense level for the sum of four Kgs is level twelve. n116 Distribution to a person under age twenty one or within 1,000 feet of a school increases the offense level by two to level fourteen. n117 Because the offenses involved abuse of a position and trust, the offense level is raised to level sixteen. n118 Assume that the defendant demonstrated a recognition and acceptance of personal responsibility by confessing, resigning his position, freely relinquishing evidence, and pleading guilty. The offense level is reduced by two to level fourteen. n119 Defendant's two previous brushes with the law each give him one criminal point, placing him in criminal history category II. Refer to the sentencing table, and the imprisonment range is eighteen to twenty-four months. The range for fines at level fourteen is \$ 4,000 to \$ 40,000. n120

Suppose now that the prosecution has stipulated that, since his arrest, defendant has given substantial assistance to authorities by doing high risk undercover work, which has led to the arrest of major drug dealers. This is an extraordinary mitigating factor that allows the court to depart from the guidelines and impose a sentence below the required minimum. n121 The sentencing judge must, however, specify on the record the reasons for departing from the guidelines. n122

Military sentencing could follow a similar set of guidelines, formulated according to uniquely military considerations. In the foregoing scenario, for example, the sentence level was increased because a teacher abused his position by selling drugs to minor students. Along similar lines, military sentencing guidelines could provide for increased ranges of presumptive punishment for abuse of status, such as when a noncommissioned or petty officer distributes drugs on or near a military installation, or distributes them to junior military personnel or dependent children. These increases would be in addition to the aggravating circumstances already in the MCM. n123 Establishment of such guidelines in the MCM would not only bring about greater sentence uniformity, it would be an opportunity to reinforce and clarify substantive military norms.

Service-wide sentencing statistics and surveys of military judges, staff judge advocates, and others with substantial military justice roles would provide ample data on which to base offense levels and guideline criteria. We will have the advantage of being able to monitor the usage and evolution of the Sentencing Commission Guidelines in the U.S. district courts. With appropriate committee work, field comments, and advance field instruction, sentencing guidelines could be adapted and implemented as smoothly as the Federal Rules of Evidence were in 1980.

How would guidelines such as this work in members cases? It would be impractical for the military judge to instruct the members on a step-by-step application of guidelines in every case. Guidelines could, however, be used in members cases to narrow the sentence range. The military judge could determine minimum and maximum permissible punishments based on all possible mitigating and aggravating adjustments to the base offense level. In the previously discussed hypothetical scenario involving the drug dealing school teacher, the offense level range using this method would be ten to sixteen. n124 At Criminal History Category II on the Sentencing Table, n125 the sentence range for confinement would thus be eight to thirty months, a substantially narrower range than the zero to fifteen years for a similar offense under the MCM. n126

Additionally, it might be feasible to inform the panel of the base offense sentence range, and allow them to apply different maximums or minimums based on specific aggravating or mitigating factors that they may find. n127

## **Conclusion**

Our current sentencing system is enigmatic; it is one of the few features of the military justice system that is inferior to that of other jurisdictions. It is only because of the conscientiousness and good judgment of most judges and members that the majority of court martial sentences are reasonably fair and proportionate, and serve the ends of good order and discipline. It is arguable that, because most sentences are reasonable, the system is not "broke," and does not need to be fixed; I disagree. A sentencing system with so much discretion, so little method, and such regularly manifested potential for whimsical sentences is not good enough. More detailed guidelines are needed. Courts need to be

more completely and consistently informed about the [\*36] accused, the offenses, and sentencing philosophy. Available expertise ought to be used to better advantage.

Skeptics might consider proposals like the three contained in this article as civilianization solely for the sake of civilianizing. Adoption of any one or a combination of the above proposals would actually serve unique military needs by promoting efficiency, good order and discipline, and respect for our system. They should not be rejected merely because civilians did them first. A more exacting sentencing process will not ensure a just sentence in every case. It will, however, minimize the likelihood of disproportionate sentences, and lend greater credence to our system of justice.

[\*37] **Appendix**

**SENTENCING TABLE**

Offense Level	<i>Criminal History Category</i>					
	I 0 or 1	II 2 or 3	III 4, 5, 6	IV 7, 8, 9	V 10, 11, 12	VI 13 or more
1	0- 1	0- 2	0- 3	0- 4	0- 5	0- 6
2	0- 2	0- 3	0- 4	0- 5	0- 6	1- 7
3	0- 3	0- 4	0- 5	0- 6	2- 8	3- 9
4	0- 4	0- 5	0- 6	2- 8	4- 10	6- 12
5	0- 5	0- 6	1- 7	4- 10	6- 12	9- 15
6	0- 6	1- 7	2- 8	6- 12	9- 15	12- 18
7	1- 7	2- 8	4- 10	8- 14	12- 18	15- 21
8	2- 8	4- 10	6- 12	10- 16	15- 21	18- 24
9	4- 10	6- 12	8- 14	12- 18	18- 24	21- 27
10	6- 12	8- 14	10- 16	15- 21	21- 27	24- 30
11	8- 14	10- 16	12- 18	18- 24	24- 30	27- 33
12	10- 16	12- 18	15- 21	21- 27	27- 33	30- 37
13	12- 18	15- 21	18- 24	24- 30	30- 37	33- 41
14	15- 21	18- 24	21- 27	27- 33	33- 41	37- 46
15	18- 24	21- 27	24- 30	30- 37	37- 46	41- 51
16	21- 27	24- 30	27- 33	33- 41	41- 51	46- 57
17	24- 30	27- 33	30- 37	37- 46	46- 57	51- 63
18	27- 33	30- 37	33- 41	41- 51	51- 63	57- 71
19	30- 37	33- 41	37- 46	46- 57	57- 71	63- 78
20	33- 41	37- 46	41- 51	51- 63	63- 78	70- 87
21	37- 46	41- 51	46- 57	57- 71	70- 87	77- 96
22	41- 51	46- 57	51- 63	63- 78	77- 96	84-105
23	46- 57	51- 63	57- 71	70- 87	84-105	92-115
24	51- 63	57- 71	63- 78	77- 96	92-115	100-125
25	57- 71	63- 78	70- 87	84-105	100-125	110-137
26	63- 78	70- 87	78- 97	92-115	110-137	120-150
27	70- 87	78- 97	87-108	100-125	120-150	130-162
28	78- 97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235

Offense Level	I 0 or 1	II 2 or 3	III 4, 5, 6	IV 7, 8, 9	V 10, 11, 12	VI 13 or more
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

### Legal Topics:

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

Criminal Law & Procedure Sentencing Guidelines General Overview Criminal Law & Procedure Sentencing Presentence Reports Criminal Law & Procedure Sentencing Proportionality

### FOOTNOTES:

n1 2 F. Grose, *Military Antiquities Respecting a History of the English Army* 62 (1812) (quoting the Ordinance of Richard I, A.D. 1190, decreed to prevent disorders between soldiers and sailors during the Crusades).

n2 Uniform Code of Military Justice arts. 81-134, *10 U.S.C. §§ 881-934* (1982) [hereinafter UCMJ.]

n3 Exceptions are UCMJ arts. 90, 94, 99, 100, 101, 102, 104, 106a, and 120 (death or such other punishment as a court martial may direct); UCMJ art. 106 (death); UCMJ art. 118(1) and 118(4) (death or imprisonment for life); and UCMJ art. 134 (punished at the discretion of the court).

n4 Manual for Courts-Martial, United States, 1984, Part IV [hereinafter MCM, 1984, Part IV].

n5 *See infra* text accompanying notes 10 and 26-37.

n6 For example, financial, family, and psychological data are often ignored in favor of cumulative evidence of work performance.

n7 *See infra* text accompanying notes 18-37.

n8 *Id.*

n9 *See generally* 1 Military Justice Act of 1983 Advisory Commission Report 90, 135, 348 [hereinafter Adv. Comm'n. Rept.] (Testimony of Major General (MG) Kenneth J. Hodson, USA, ret.; Colonel (Col) Donald B. Strickland, USAF; and Brigadier General (BG) Raymond W. Edwards, USMC, ret.).

n10 *See also* Manual for Courts Martial, United States, 1984, Rule for Courts-Martial 1002 [hereinafter R.C.M.] (Sentence to be between maximum and minimum); R.C.M. 1005e (required instructions).

n11 *See* Dep't of Army Pam. 27-9, Military Judges' Benchbook, para. 2-54 (1 May 1982) (protection of society, punishment, rehabilitation, preservation of good order and discipline, deterrence of the wrongdoer, and general deterrence); *see also* U.S. Sentencing Commission Annual Report 1 (1986) (just punishment, deterrence, incapacitation, and rehabilitation).

n12 *United States v. Morrison*, 41 C.M.R. 484 (A.C.M.R. 1969); *United States v. Lania*, 9 M.J. 100 (C.M.A. 1980).

n13 U.S. Sentencing Commission Annual Report 1 (1986).

n14 *Id.*

n15 *See* Westmoreland, *Military Justice--A Commander's Viewpoint*, 10 Am. Cr. L. Rev. 5, 6-7 (1971).

n16 *Id.*

n17 For example, Mil. R. Evid. 404b, which precludes some specific instances of conduct. *See also* R.C.M. 1001(b)(5) (testimony about accused's performance and rehabilitation potential limited to opinion; specific instances disallowed on direct examination). Hearsay and authenticity rules also apply, unless rules are relaxed at the insistence of the defense. *See* R.C.M. 1001(c)(3); *see also* *United States v. Booker*, 5 M.J. 238 (C.M.A. 1977) (limiting admissibility of evidence of prior nonjudicial punishment).

n18 R.C.M. 1001(b)(1).

n19 In guilty plea cases, the court may not ordinarily consider the plea inquiry as evidence. Mil. R. Evid. 410; *United States v. Richardson*, 6 M.J. 654 (N.M.C.M.R. 1978), *petition denied*, 6 M.J. 280 (1979); *United States v. Brooks*, 43 C.M.R. 817 (A.F.C.M.R. 1971). *But see* *United States v. Holt*, 22 M.J. 553 (A.C.M.R. 1986), *petition granted*, 23 M.J. 358 (C.M.A. 1987) (military judge consideration of plea inquiry not *per se* impermissible).

n20 *See generally* R.C.M. 1001(b)(2)-(5).

n21 R.C.M. 1001(c). Defense counsel who does not present evidence in extenuation and mitigation risks charges of ineffective assistance. *See, e.g.,* *United States v. King*, 13 M.J. 863, 866 (N.M.C.M.R. 1982), *petition denied*, 14 M.J. 205 (1982); *United States v. Gagnon*, 15 M.J. 1037, 1041 (N.M.C.M.R. 1983).

n22 Occasionally an accused who might not otherwise receive a punitive discharge will specifically request the court to impose a bad conduct discharge as part of the sentence. This trend was more prevalent in the 1970's. The typical "striker," as they are sometimes called, wants out of his service obligation for one reason or another, and may have already unsuccessfully sought administrative discharge. The charges in these cases are usually absence offenses or offenses against authority, the goal of the accused being to secure a discharge with minimal confinement and financial penalty.

n23 *See* Adv. Comm'n Rept., *supra* note 9, at 89-90 (Testimony of MG Kenneth J. Hodson, U.S.A., ret., former Judge Advocate General of the Army):

I dealt with many convening authorities, and none have ever complained of the findings of a court, but many have been upset by the sentence . . . Incidentally, I have never had a convening authority complain about a sentence imposed by a judge . . . Sentences adjudged by court members are adjudged pretty much in ignorance, and they tend to vary widely for the same or similar offenses. They amount almost to sentencing by lottery.

n24 *Id.* at 5.

n25 *See* ABA Standards Relating to Sentencing Alternatives and Procedures 18-5.1 Commentary (1979); *see also* Model Sentencing and Corrections Act § 3-203 Comment (U.S. Dept. of Justice 1978) [hereinafter Model Act].

n26 *See supra* note 4.

n27 UCMJ art. 19.

n28 R.C.M. 1003(b)(3) discussion provides that a fine should normally not be adjudged unless the accused was unjustly enriched by his offense.

n29 R.C.M. 1003(d).

n30 *See United States v. Karnes, 1 M.J. 92 (C.M.A. 1975); United States v. Cosgrove, 1 M.J. 199 (C.M.A. 1975).*

n31 R.C.M. 1002; R.C.M. 1005.

n32 R.C.M. 1004.

n33 R.C.M. 1005.

n34 R.C.M. 1001(f); *see also United States v. McKleskey, 15 M.J. 565 (A.F.C.M.R. 1982).*

n35 *United States v. Davidson, 14 M.J. 81 (C.M.A. 1982).*

n36 R.C.M. 1005(4).

n37 *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 did not specifically mention other mitigating evidence, i.e., combat record); *see also United States v. Watkins, 17 M.J. 783 (A.F.C.M.R. 1983); United States v. Gore, 14 M.J. 975 (A.C.M.R. 1982)* (mendacity instructions).

n38 *See* McCarthy, *Justice for a Lieutenant*, Wash. Post, Jan. 9, 1983, at M.4; *see also United States v. Newak, 15 M.J. 541 (A.F.C.M.R.), rev'd, 24 M.J. 238 (C.M.A. 1987).* The drug offenses consisted of wrongfully using, possessing, and transferring marijuana and attempting to wrongfully possess and transfer pills she believed to be amphetamines. The convening authority reduced Lt. Newak's confinement to six years.

n39 The convening authority cannot increase the punishment. R.C.M. 1107(d).

n40 An example is the traditional "blanket party" in which indignant members of a unit administer a gang beating to one of their numbers who is accused of barracks theft or other reprehensible conduct on the supposition that the military justice system will not impose sufficiently severe punishment.

n41 See generally *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986), cert. denied, 107 S. Ct. 1289 (1987); *United States v. Treakle*, 18 M.J. 646 (A.C.M.R. 1984), petition granted, 20 M.J. 131 (1985).

n42 *United States v. Levite*, 25 M.J. 334 (C.M.A. 1987).

n43 See *supra* note 23; see also Jouras, *On Modernizing Missouri's Criminal Punishment Procedure*, 20 U. Kan. City L. Rev. 299, 302 (1952) (survey found that Missouri judges, parole board officials, and prosecutors considered judges less affected than juries by emotions and prejudices, that the judges' sentences were more uniform and commensurate to the offense and offender, that juries tended to compromise findings with sentence considerations, and that sentimentality and the "oratory and personality of an impressive counsel" play disproportionate roles in jury sentences); Adv. Comm'n Rept., *supra* note 9, at 347 (testimony of former Assistance Judge Advocate General of the Navy for Criminal Law, BG. Raymond W. Edwards, USMC, ret.):

The time has come to give the sentencing to the military judge. This will give us more consistent and enlightened sentencing tailored to the accused and to the offense, taking into consideration the interests of society . . . This consistency in sentencing will assist the military justice system in maintaining the respect of military society.

n44 ABA Standards Relating to Sentencing Alternatives and Procedures 18-1.1 (1979) [hereinafter ABA Standards].

n45 Adv. Comm'n Rept., *supra* note 9, at 31.

n46 *Id.* at 31.

n47 *Id.*

n48 *Id.* at 6.

n49 *Id.* at 5.

n50 See Jouras, *supra* note 42, at 302. Other advantages to judge sentencing cited in the Advisory Commission report are (1) less potential for error; (2) shorter case processing times; (3) avoidance of forum shopping; and (4) members sentencing option tends to encourage military judges to adjudge lenient sentences to ensure that accused soldiers choose military judge alone trials.

n51 Adv. Comm'n Rept., *supra* note 9, at 5. Six states retain jury participation in noncapital sentencing. Sixteen states and the District of Columbia have it in capital cases only. In almost all of those, jury sentencing is limited to those cases in which guilt is determined by the jury and the judge retains the power to set aside the jury sentence. Gilbreath, *The Constitutionality of Harsher Sentences on Retrial in Virginia*, 62 Va. L. Rev. 1337,

1339 (1976). The Gilbreath article was written before Tennessee abolished jury sentencing in 1982. See National Institute of Justice, Sentencing Reform in the United States; History, Content, and Effect 243 (1985) [hereinafter N.I.J.].

n52 UCMJ art. 125. In reality, members are often picked according to their availability and dispensability.

n53 Unless an enlisted accused requests that the panel include enlisted members, the panel will ordinarily consist entirely of commissioned officers, almost all of whom are college graduates. Many warrant officers and senior enlisted members also have some college level education.

n54 Adv. Comm'n Rep., *supra* note 9, at 5.

n55 *Id.*

n56 *Id.* The Commission also cited the likelihood of increased sentences to confinement and a concomitant increase in corrections costs if member sentencing was abolished. Even so, that is probably a poor reason to continue sentencing by members. If more sentences including confinement are appropriate, then more should be given. The Commission also found "no persuasive evidence that judge sentencing produces more consistent sentences than court member sentencing for similarly situated accuseds." This question suggests that the Commission did not find the implication of the testimony of a former Army TJAG (MG Hodson), a former Navy ATJAG (BG Edwards), and an Air Force Chief Justice (COL Strickland) to be persuasive. See *supra*, notes 9, 23, and 42.

n57 Gilbreath, *supra* note 43, at 1339.

n58 Examples of such technical errors include exceeding jurisdictional forfeiture limits, failing to round forfeitures to whole dollars, awarding restriction without specifying restriction limits, awarding administrative discharges, and awarding nonjudicial punishment, such as correctional custody or extra duties.

n59 See R.C.M. 1009(c)(2)(B).

n60 Member sentences now require concurrence of two-thirds of the members, except for sentences including confinement for life or more than ten years (three-fourths concurrence) or death (unanimous concurrence). R.C.M. 1006(d)(4).

n61 See Adv. Comm'n Rept. *supra* note 9, at 135 (Quote from testimony of Col. Donald B. Strickland, USAF, then Chief Judge, USAF Trial Judiciary).

n62 UCMJ arts. 60(c), 66(c).

n63 As presently required by UCMJ art. 25(d)(2).

n64 The military judge should have the option of dismissing the panel and deliberating before announcing sentence and, if required, essential findings.

n65 See generally R.C.M. 1001.

n66 The Military Rules of Evidence generally apply to sentencing proceedings. Testimony of witnesses is under oath and subject to cross examination and objection. Rebuttal and surrebuttal cases may be presented, and counsel for both sides have the opportunity to make argument to the court. *But see* R.C.M. 1001(c)(2) (accused may make an unsworn statement) and R.C.M. 1001(c)(3) (military judge may relax rules of evidence in extenuation and mitigation).

n67 Sometimes counsel simply miss the mark, spending much time and effort but presenting little significant material. Inexperienced counsel especially tend to be less effective in their presentence advocacy than in litigating motions and findings, in part because presentencing is neither taught in law schools nor emphasized in military legal training.

n68 *See* Model Act, *supra* note 25, § 3-201; *see also* Fed. R. Crim. P. 32; Administrative Office of the U.S. Courts, Probation Division, The Presentence Investigation Report (1984) [hereinafter Presentence Inv. Rept.].

n69 C. Dressler, *Practice and Theory of Probation and Parole*, 219-37 (1979).

n70 R.C.M. 1001 analysis at A21.

n71 Marine Corps: MOS 5804, corrections office; MOS 5831, enlisted corrections specialist; MOS 5832, enlisted correctional counselor. Marine Corps Order P1200.7f, Military Occupational Specialties Manual (8 July 1986). Army: AOC 31C, corrections officer. Army Reg. 611-101, Commissioned Officer Classification System para. 3-8e (30 Oct. 1985). MOS 95c, corrections noncommissioned officer. Army Reg. 611-201, Enlisted Career Management Fields and Military Occupational Specialties, para. 2-389 (31 Oct. 1987). Navy: Designator 6110, deck limited duty officer. Bureau of Naval Personnel Manual 15839, Navy Officer Manpower and Personnel Classification (14 Mar. 1986). NEC 9548, enlisted correctional specialist; NEC 9816, enlisted correctional counselor. Bureau of Naval Personnel Manual 18068e, Navy Enlisted Manpower and Personnel Classification and Occupational Standards (Oct. 1987). Air Force: AFSC 8124, Security Police Officer, Air Force Reg. 36-1, Officer Classification Manual (1 Jan. 1984). AFSC 812 XO, enlisted security policeman, Air Force Reg. 39-1, Airman Classification Manual (1 Jan. 1982).

n72 Army, Navy, and Marine Corps corrections officers, correctional specialists, and correctional counselors receive approximately five weeks of training at the Fort McClellan, Alabama, Corrections Officer and Correctional Specialist Schools. Enlisted military police in grades E-4 and above are eligible for the Correctional Specialist Course; E-5s and above are eligible for the Correctional Counselor Course. In addition to subcourses relating to prison administration and security, the curriculum includes penology, custody classification, counseling, correctional report writing, sentence computation, educational programs, work programs, pre-release programs, internship, situation management, and interpersonal relations. Part of the training is in conjunction with Federal Bureau of Prisons training at Taladega Federal Prison. Graduates of these courses are qualified to write federal presentence reports. Telephone interview with Sr. Chief Douglas R. Malston, USN, Operations Officer, Naval Brig, Pensacola, Florida, formerly a corrections instructor at Ft. McClellan (29 Feb. 1988).

n73 Presentence Inv. Rept., *supra* note 68, at 54-60. For further discussion of recommended presentence report content and format, see ABA Standards 18-5.1 and commentary, *supra* note 44.

n74 Subject to waiver of rights under U.S. CONST. amend. V and UCMJ art. 31.

n75 Presentence Inv. Rept., *supra* note 68, at 3.

n76 *Id.* at 6.

n77 *Id.* at 12.

n78 *Id.*

n79 *Id.* at 13.

n80 *Id.*

n81 *Id.*

n82 *Id.* at 14.

n83 *Id.*

n84 *Id.* at 15.

n85 *Id.*

n86 E.g., where the offense is motivated by poverty or indebtedness, or where an apparently prosperous individual steals or sells drugs for profit.

n87 The presentence officer could recommend a specific sentence, as counsel may do under R.C.M. 1001(g), a sentence range, or perhaps limit the recommendation to the issues of discharge and confinement.

n88 Mil. R. Evid. 702; *see also* Mil. R. Evid. 706.

n89 Allowing counsel to call their own comparable experts would be unnecessarily expensive and time consuming. It would not be essential to a fair hearing because the presentence officer would be a neutral arm of the court, as is the civilian probation officer. Affording counsel the opportunity to question the presentence officer's opinions and conclusions, and to present factual matters in rebuttal would ensure a fair process.

n90 Subject to verification by the presentence officer, and admissibility under rules of relevance and privilege.

n91 Allowing testimony of witnesses in addition to the presentence report summaries would be at the discretion of the military judge. This should be granted, for example, when credibility of the witness is critical and the court's decision would be substantially aided by personal observation of the testimony.

n92 Furthermore, because of fifth amendment and article 31 rights, defense counsel may forbid interview of the accused concerning certain matters. The accused is certainly one of the most important sources of sentencing information. If the presentence officer is unable to interview the accused about the offense, the ultimate recommendation should perhaps be deferred until after the accused has exercised or waived his presentence allocution rights.

n93 In U.S. district courts, the presentence investigation can be ordered prior to conviction or plea. Fed. R. Crim. P. 32(c).

n94 Provision for presentence officer performance evaluations by military judges would further this purpose.

n95 *See* Fed. R. Crim. P. 32 (presentence investigation in all cases except by order of judge or waiver of defendant); *see also* Model Act, *supra* note 25, § 3-203 comment (use in misdemeanor cases discretionary) and § 3-204 (short form report); ABA Standards 18-5.1, *supra* note 44, (presentence investigation in every case where incarceration for one year or more possible, defendant less than 21 years old, or defendant waives and court has sufficient information).

n96 *Supra* note 95. When a presentence report is not feasible, sentencing procedures currently in use would be a reasonable alternative.

n97 Violation of UCMJ art. 112a.

n98 MCM, 1984, Part IV, para. 37e(2)(a).

n99 R.C.M. 1003(b)(5).

n100 Nonjudicial punishment under UCMJ art. 15.

n101 *See generally* Twentieth Century Fund Task Force on Criminal Sentencing, Fair and Certain Punishment 17 (1976) (rejecting flat time and mandatory minimum sentences in general).

n102 *Id.* at 19.

n103 The Task Force Study, *supra* note 78, contemplated a presumptive sentence system in which specific aggravating or mitigating factors would have to be established in order to vary from the presumptive sentence.

n104 U.S. Sentencing Commission Guidelines and Policy Statements 52 *Fed. Reg.* 18046 (1987) [hereinafter Sentencing Guidelines]. Another example of sentencing guidelines is the Model Act, *supra* note 25, § 3-110. *See also* ABA Standards 18-3.1 Commentary, *supra* note 44. For a discussion of state sentencing guidelines *see generally* N.I.J. *supra* note 50. The U.S. Sentencing Commission Guidelines, which became effective 1 November 1987, have been the subject of conflicting opinions as to whether they violate the separation of powers doctrine. *Compare* United States v. Arnold, No. 87-1279-B (S.D. Cal. filed Feb. 18, 1988), 42 *Cr. L.* 2377 with United States v. Ruiz-Villanueva (S.D. Cal. filed Feb. 29, 1988) 42 *Cr. L.* 2377.

n105 Comprehensive Crime Control Act of 1984, 28 *U.S.C.* § 994a (1984).

n106 Sentencing Guidelines, *supra* note 104, § 1.4, 52 *Fed. Reg.* 18049.

n107 *Id.* § 1.4, 52 *Fed. Reg.* 18049.

n108 *Id.* § 1.5, 52 *Fed. Reg.* 18049.

n109 *Id.* ch. 5, part A, 52 *Fed. Reg.* 18095-96.

n110 *Id.* §§ 1.10-1.11, 52 *Fed. Reg.* 18052.

n111 *Id.* § 4 A1.1, 52 Fed. Reg. 18092.

n112 *Id.* § 1 B1.1, 52 Fed. Reg. 18053.

n113 *Id.* § 5 K.1.1, 52 Fed. Reg. 18102. Other factors authorizing departure from the guidelines include: resulting death or serious injury, extreme psychological injury, abduction, property damage or loss, use of weapons, disruption of government function, extreme conduct, additional criminal purpose, victim's conduct, commission to avoid perceived greater harm, coercion and duress not amounting to a defense, diminished capacity, and endangerment of national security, public health, or safety. *Id.* §§ 5 K2.1-5 K2.14, 52 Fed. Reg. 18104-18105. Race, sex, national origin, creed, religion, and socio-economic status are specifically excluded as sentencing factors. *Id.* § 5 H1.10, 52 Fed. Reg. 18103.

n114 *Id.* § 2 D1.1, 52 Fed. Reg. 18064.

n115 *Id.* § 3 D1.2(d), 52 Fed. Reg. 18089.

n116 *Id.* § 2 D1.1, 52 Fed. Reg. 18064.

n117 *Id.* § 2 D1.3, 52 Fed. Reg. 18066.

n118 *Id.* § 3 B1.3, 52 Fed. Reg. 18088.

n119 *Id.* § 4 A1.1, 52 Fed. Reg. 18092.

n120 *Id.* § 5 E4.2, 52 Fed. Reg. 18099.

n121 *Id.* § 5 K1.1, 52 Fed. Reg. 18103.

n122 18 U.S.C. § 3553(c) (1982).

n123 MCM, 1984, Part IV, para. 37e(2) (While on duty as sentinel or lookout, on board vessel or aircraft, in missile launch facility, while receiving special pay, in time of war).

n124 Base offense level for trafficking four Kg of marijuana: twelve less two levels for acceptance of personal responsibility; plus two levels for selling to underage person or near school; plus two levels for abuse of position or trust.

n125 *See* appendix.

n126 *See supra* note 95. The base offense level for drug trafficking would probably be set at a higher range in a military sentence matrix.

n127 For example, in the foregoing hypothetical, an instruction that, if the members find that the accused has demonstrated recognition and acceptance of responsibility, the minimum permissible sentence to confinement is eight months rather than twelve months.

