



7-2017

# The More? Uniform Code of Military Justice (and a Practical Way to Make it Better)

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## Recommended Citation

92 Notre Dame L. Rev. 2179 (2017)

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## NOTES

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# THE MORE? UNIFORM CODE OF MILITARY JUSTICE (AND A PRACTICAL WAY TO MAKE IT BETTER)

*Sean Patrick Flynn\**

### INTRODUCTION

Army Regulation dictates that “[s]ideburns are hair grown in front of the ear and below the point where the top portion of the ear attaches to the head. Sideburns will not extend below the bottom of the opening of the ear,”<sup>1</sup> and “[f]emales will not exceed a nail length of 1/4 inch as measured from the tip of the finger.”<sup>2</sup> United States Navy Uniform Regulation states that on the right shoulder of a flight suit the “[w]eapons school patch (if authorized) shall be worn centered on the shoulder arch, approximately 1 inch below the seam.”<sup>3</sup>

Uniformity matters to the professional appearance of those that serve in the Armed Forces. In some situations, uniformity may save lives. However, the importance placed on uniformity has not translated to uniform punishments for those who violate the Uniform Code of Military Justice (UCMJ).<sup>4</sup> In an effort to resolve this, Congress, at the request of the Department of Defense, passed the Military Justice Act of 2016 (“the Act”).<sup>5</sup> Among other

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\* Candidate for Juris Doctor, Notre Dame Law School, 2018; Bachelor of Science, United States Military Academy at West Point, 2012. I would like to thank Colonel Charles L. Pritchard, Jr., for helpful suggestions at the beginning of the writing process, the *Notre Dame Law Review* for providing tremendous editing and lifelong friendships, Professor Jay Tidmarsh, my advisor, whose guidance has extended far beyond this Note, Captain Patrick Kelly, my life editor, without whom I would be lost, and my family, for all their support. Finally, thank you, Ann-Marie—my amazing wife—home is wherever I’m with you, I love you. All errors are my own.

1 U.S. Dep’t of the Army, Reg. 670-1, Wear and Appearance of Army Uniforms and Insignia ¶ 3-2a(2)(a) (2015).

2 *Id.* ¶ 3-2b(4)(c).

3 U.S. Dep’t of the Navy, Uniform Regulations. art. 6803 ¶ 3a(4)(f).

4 See *infra* Part I.

5 National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328 (to be codified in scattered sections of 10 U.S.C.).

things, the Act purports to bring military sentencing more in line with the federal sentencing system, which was created in part due to disparate sentences.<sup>6</sup> With the goal of increased uniformity, the federal system and federal sentencing guidelines increased the length of sentences defendants received across the board.<sup>7</sup> Guidelines in the military will likely have a similar effect on military sentences.

Part I of this Note examines the current military court-martial sentencing system and analyzes some of the impetus for a change. It also assesses the changes, in regards to sentencing, that the Act would bring about. Part II examines the negative effects of the federal sentencing system. Part III offers suggestions for the successful transition of the military sentencing system, in light of the responses to the federal sentencing system. This Note concludes that because sentencing guidelines are detrimental to the defendant, the military sentencing process should offer a guaranteed, but waivable, two days of preparation to the defendant post-conviction and presentencing.

## I. THE CASE FOR A CHANGE IN MILITARY SENTENCING

Prior to the UCMJ, a “commander historically had virtually unchecked control over military justice.”<sup>8</sup> After World War II, though, protests against an unfair and unduly harsh system led Congress to adopt the UCMJ in 1951.<sup>9</sup> The UCMJ, and the individual services, went through many changes after its adoption in an effort to improve military justice.<sup>10</sup> The changes were successful enough to prompt praise from Justice Ginsburg, who described the new military justice system as “notably more sensitive to due process concerns than the one prevailing through most of our country’s history.”<sup>11</sup>

### A. *The Current System*

Chapter 47 of Title 10 in the United States Code encompasses the UCMJ.<sup>12</sup> Articles 55 through 58 of the UCMJ govern the military sentencing process.<sup>13</sup> Article 53 is also relevant, declaring, “[a] court-martial shall

6 See *infra* Part II.

7 See *infra* notes 126–31 and accompanying text.

8 Note, *Prosecutorial Power and the Legitimacy of the Military Justice System*, 123 HARV. L. REV. 937, 940 (2010).

9 *Id.* The UCMJ “was meant to strike a balance between the individual rights of servicemembers and fairness, on the one hand, and the interest in maintaining discipline and command authority, on the other.” *Id.*

10 *Id.* at 940–41. Those improvements included appellate courts within each branch of the military, the creation of military judges and a requirement that one be present at every court-martial, and independent chains of command for defense counsel. *Id.*

11 *Weiss v. United States*, 510 U.S. 163, 194 (1994) (Ginsburg, J., concurring).

12 10 U.S.C. §§ 801–946 (2012).

13 See UCMJ art. 55–58, 10 U.S.C. §§ 855–58. Besides the sentencing of convicted servicemembers, the rest of a court-martial essentially follows the structure of a federal criminal trial. Colin A. Kisor, *The Need for Sentencing Reform in Military Courts-Martial*, 58 NAVAL L. REV. 39, 41 (2009).

announce its findings and sentence to the parties as soon as determined.”<sup>14</sup> Either a panel (jury) or a military judge decides the outcome of the case.<sup>15</sup> If guilt is found, the deciding entity determines the sentence.<sup>16</sup>

After the trial and “findings of guilty have been announced, the prosecution and defense may present [the] matter . . . to aid the court-martial in determining an appropriate sentence.”<sup>17</sup> A panel, composed of officers (and at least one-third enlisted members, if the accused is enlisted and so requests)<sup>18</sup> who outrank the accused, receives “appropriate instructions on sentenc[ing]” from the military judge.<sup>19</sup> The required instructions must include a statement of (1) any mandatory maximum or minimum, (2) the effect of a punitive discharge and confinement or a confinement greater than six months on the accused’s pay, (3) the procedures for deliberation, (4) the members’ sole responsibility for choosing an appropriate sentence, and (5) “[a] statement that the members should consider all matters in extenuation, mitigation, and aggravation, whether introduced before or after findings, and matters introduced under R.C.M. 1001(b)(1), (2), (3) and (5).”<sup>20</sup> The military judge also informs the members of the panel of the five reasons principally considered by society in sentencing: “rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of [the] crime [ ] and . . . sentence.”<sup>21</sup>

Currently there are only a handful of articles of the UCMJ whose violation carry any sort of mandatory minimum. Premeditated and felony murder carry a minimum sentence of imprisonment for life,<sup>22</sup> and spying in a time of war carries a minimum sentence of death.<sup>23</sup> Any rape, sexual assault, forcible sodomy (violations of Article 120(a) and (b)<sup>24</sup> and Article 125),<sup>25</sup> or attempt to commit any of the above, carry a mandatory minimum of dismissal or dis-

14 UCMJ art. 53, 10 U.S.C. § 853.

15 Kisor, *supra* note 13, at 41 n.13 (“The accused at a court-martial elects a members trial or a bench trial. The Government cannot impose a particular forum.”).

16 See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1006–07 (2012) [hereinafter MCM].

17 *Id.* R.C.M. 1001(a)(1).

18 UCMJ art. 25, 10 U.S.C. § 825.

19 MCM, *supra* note 16, R.C.M. 1005(a).

20 *Id.* R.C.M. 1005(e). The relevant considerations under R.C.M. 1001 are service data of the accused (including pay and time and jobs in service), any other records of the accused’s service (to include evaluation reports, marital status and number of dependents, and other disciplinary actions), evidence of other prior convictions, and evidence of rehabilitative potential (but only in the form of opinions). See *id.* R.C.M. 1001.

21 U.S. DEP’T. OF THE ARMY, PAMPHLET 27-9, LEGAL SERVICES: MILITARY JUDGES’ BENCHBOOK ¶ 2-6-9 (2014).

22 UCMJ art. 118, 10 U.S.C. § 918.

23 UCMJ art. 106, 10 U.S.C. § 906.

24 UCMJ art. 120(a)–(b), 10 U.S.C. § 920.

25 UCMJ art. 125, 10 U.S.C. § 925.

honorable discharge.<sup>26</sup> All other punitive articles of the UCMJ state that the convicted “shall be punished as a court-martial may direct” or other similar language.<sup>27</sup>

Upon conclusion of the court-martial “[t]he findings and sentence of a court-martial shall be reported promptly to the convening authority after the announcement of the sentence.”<sup>28</sup> Although the ability has been restricted,<sup>29</sup> the convening authority may still grant clemency in certain situations.<sup>30</sup> A servicemember sentenced to more than one year confinement or a punitive discharge (dishonorable or bad conduct) receives a mandatory review from the appropriate court of criminal appeals.<sup>31</sup> Following review at the Service Court of Appeals, the Court of Appeals for the Armed Forces (CAAF) reviews cases (1) with a death sentence, (2) ordered to the CAAF by the Judge Advocate General of the relevant service, and (3) cases that it grants review for good cause shown upon petition of the accused.<sup>32</sup> Finally, a case may be appealed to the United States Supreme Court.<sup>33</sup>

### B. *Complaints with the Current System*

Critics of the current sentencing system in the military argue that, for a panel sentencing, the jury is unfamiliar with norms for similar crimes.<sup>34</sup> This problem may have been exacerbated by the Supreme Court’s extension of courts-martial jurisdiction to servicemembers even if the crime has no mili-

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26 10 U.S.C.S. § 856(b)(1) (LEXIS through Pub. L. No. 114-327). “The most serious type of punitive discharge is a dishonorable discharge for enlisted members or a dismissal for officer members.” Elizabeth Cameron Hernandez, *Is “Mandatory Justice” Right for the Military?*, 27 FED. SENT’G REP. 131, 133 (2015).

27 UCMJ art. 81–134, 10 U.S.C. §§ 881–934.

28 UCMJ art. 60, 10 U.S.C. § 860.

29 See James E. Baker, *Is Military Justice Sentencing on the March? Should It Be? And If So, Where Should It Head? Court-Martial Sentencing Process, Practice, and Issues*, 27 FED. SENT’G REP. 72, 79 (2014). When he wrote the cited article, James E. Baker was the Chief Judge for the United States Court of Appeals for the Armed Forces. See *id.* at 72.

30 10 U.S.C.S. § 860(c)(2)(B) (LEXIS) (“Except as provided in paragraph (4), the convening authority . . . may approve, disapprove, commute, or suspend the sentence of the court-martial in whole or in part.”). The cases where the convening authority may not grant any type of clemency are those in which the court-martial sentenced the defendant to more than six months confinement or a dismissal, dishonorable discharge, or bad conduct discharge. *Id.* § 860(c)(4)(A). An exception here is if the defendant provided “substantial assistance” in the investigation or prosecution of another, or a qualifying pretrial agreement was entered. *Id.* § 860(c)(4)(B)–(C).

31 UCMJ art. 66(b)(1), 10 U.S.C. § 866. The branches of the military have separate courts of criminal appeals. The Army, Air Force, and Coast Guard have their own, and the Navy and Marine Corps (as a part of the Navy) both appeal to the Navy-Marine Corps Court of Criminal Appeals. See Kisor, *supra* note 13, at 42.

32 UCMJ art. 67, 10 U.S.C. § 867.

33 Kisor, *supra* note 13, at 42.

34 *Id.* at 44 (“[M]embers often lack sufficient experience with the criminal justice system to determine reasonable lengths of prison terms in the absence of guidance . . .”).

tary connection.<sup>35</sup> While panel members may be well suited to understand the gravity and appropriate sentencing for military-related offenses, for other cases they may “have no frame of reference.”<sup>36</sup> Members are not permitted to receive information about sentences for other comparative cases, unless it is introduced by the defense, at which point the prosecution may respond.<sup>37</sup> In some cases, jurors will readily admit they are unprepared and ill equipped to deliver an appropriate sentence to a convicted servicemember<sup>38</sup> because they are cognizant “that the accused’s sentence should not be considerably different from other accused who are similarly situated.”<sup>39</sup>

Also relevant in a military context is that the jury members, for the most part, are subordinates of the authority who convened the general court-martial. Therefore, the UCMJ specifically prohibits unlawful command influence, because of the concern that it may cause a miscarriage of justice.<sup>40</sup> It states:

No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.<sup>41</sup>

The arguments for and against jury sentencing in the military are similar to those in civilian criminal justice.<sup>42</sup> One argument in favor of jury sentencing is that “jury members are better able to express the community’s outrage at an offender’s violation of its norms.”<sup>43</sup> Another is that juries will not feel political pressure to sentence in a certain way.<sup>44</sup> But in the military context, “[t]his argument carries little to no weight . . . because military judges are not elected and they report through a separate chain of command from the con-

35 See *Solario v. United States*, 483 U.S. 435, 450–51 (1987).

36 Steven J. Ehlenbeck, *Court-Martial Sentencing with Members: A Shot in the Dark?*, 35 REP. 33, 34 (2008).

37 Megan N. Schmid, *This Court-Martial Hereby (Arbitrarily) Sentences You: Problems with Court Member Sentencing in the Military and Proposed Solutions*, 67 A.F. L. REV. 245, 252 (2011).

38 See James A. Young III, *Revising the Court Member Selection Process*, 163 MIL. L. REV. 91, 111 n.112 (2000) (presenting anecdotal evidence that “several officers who sat on courts-martial complained that military judges did not provide them realistic guidance on how to determine an appropriate sentence”).

39 *Id.* at 114.

40 See UCMJ art. 37(a), 10 U.S.C. § 837 (2012).

41 *Id.*

42 See generally Brian M. Thompson, *Judge-Only Sentencing: Judicial Power Grab?*, 36 REPORTER 12 (2009).

43 Schmid, *supra* note 37, at 255.

44 *Id.*

vening authority.”<sup>45</sup> In fact, given the facts of command and evaluations, the military juries may actually feel more pressure to impose a harsh sentence than a military judge.

Moreover, the current sentencing system can lead to unacceptable disparities in sentences for crimes with similar facts. For example, in November of 1994, Private First Class (PFC) Looney was with some friends before going out to the bars.<sup>46</sup> PFC Looney “displayed a knife to his companions and indicated that he was ‘ready’ if any trouble broke out and that he had the group ‘covered.’”<sup>47</sup> After drinking throughout the evening, although not getting drunk, PFC Looney and one of his good friends (the victim) got into a physical altercation. Punches were being thrown and landed, and eventually another soldier stepped in between.<sup>48</sup> While the soldier was restraining PFC Looney the victim punched PFC Looney in the face. The soldier then turned to restrain the victim and PFC Looney “landed what appeared to be a direct blow to [the victim’s] upper body.”<sup>49</sup> PFC Looney immediately left the establishment and, while his friends followed, the victim collapsed, and later died due to a “lateral, penetrating stab wound to the heart, entering from the left side of the chest.”<sup>50</sup> PFC Looney was convicted of unpremeditated murder and sentenced to 120 months confinement.<sup>51</sup>

In a separate incident, PFC Saulsberry and his roommates were watching television in his barracks room.<sup>52</sup> Evidence showed that PFC Saulsberry did not really “fit in” with his unit, and the other soldiers “constantly teased and criticized him.”<sup>53</sup> Another soldier in the unit (the victim) entered the room, took a drink from the fridge, and began changing the channels on the television. An argument between PFC Saulsberry and the victim turned into a shoving match.<sup>54</sup> PFC Saulsberry turned to retreat and the victim “attacked him from behind, threw him on the bed, and put his hands around his throat.”<sup>55</sup> The other soldiers broke it up, and while the victim was speaking to one of them, PFC Saulsberry “retreated to the corner of the room and sat on his bed, muttering and playing with a boot knife.”<sup>56</sup> Shortly thereafter, the victim again approached PFC Saulsberry and began taunting and cursing at him.<sup>57</sup> PFC Saulsberry “stood up and jabbed the knife” at the victim, who “died as a result of a single stab wound that penetrated between two ribs and

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45 *Id.*

46 *United States v. Looney*, 48 M.J. 681, 683 (A. Ct. Crim. App. 1998).

47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.* at 682. PFC Looney was tried before a military judge. *Id.*

52 *United States v. Saulsberry*, 47 M.J. 493, 494 (C.A.A.F. 1998).

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*

pierced his heart.”<sup>58</sup> PFC Saulsberry was convicted of unpremeditated murder and sentenced to 360 months confinement.<sup>59</sup> PFC Saulsberry was sentenced to 240 more months confinement for a crime similar to the one PFC Looney committed.

Sentencing disparity exists in other crimes too. Seaman Kirkman was convicted for rape, where the victim was drunk and regained consciousness while he was raping her. Seaman Kirkman was sentenced to eighty-nine days confinement and given a bad-conduct discharge.<sup>60</sup> Hospitalman Apprentice Ibarra, one pay grade below Seaman Kirkman, raped a drunk victim who woke up during the rape, and he was sentenced to forty-eight months confinement and received a dishonorable discharge.<sup>61</sup>

The sentencing disparity at the trial level is not just anecdotal. General courts-martial for violations of Article 118 (murder)<sup>62</sup> have produced a standard deviation in sentencing of 172 months (for convictions not including life as a minimum sentence).<sup>63</sup> In general courts-martial for Article 120 violations (rape),<sup>64</sup> the standard deviation among all four branches for sentencing is 155 months confinement, and 196 months confinement if all sentences of twenty-four months or less are not factored in.<sup>65</sup> Finally, violations of Article 112(a)(3) (wrongful distribution of a controlled substance)<sup>66</sup> resulted in a standard deviation in sentencing of thirty-one months.<sup>67</sup>

The lack of uniform military sentencing presented is perhaps unsurprising given that the Court of Military Appeals (the precursor to the Court of Appeals for the Armed Forces) determined in *United States v. Mamaluy* that uniformity in sentencing throughout the Armed Forces is not something with which a court-martial should concern itself.<sup>68</sup> This took greater effect when

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58 *Id.*

59 *Id.* at 493. PFC Saulsberry was convicted and sentenced before a panel consisting of officers and enlisted personnel. PFC Saulsberry’s murder conviction was later reduced to voluntary manslaughter, and a mandated rehearing resulted in seventy-eight months confinement, which was approved by the convening authority. *Id.* at 493–94.

60 *United States v. Kirkman*, No. NCMC 98 01264, 2000 WL 349760, at \*1 (N-M. Ct. Crim. App. Mar. 30, 2000). Seaman Kirkman was convicted and sentenced by a panel of officers and enlisted members.

61 *United States v. Ibarra*, 53 M.J. 616, 617 (N-M. Ct. Crim. App. 2000). Hospitalman Apprentice Ibarra was also convicted and sentenced by a panel of officers and enlisted members. His conviction was later overturned by the Navy-Marine Corps Court of Criminal Appeals because of plain error on the part of the military judge in allowing testimony concerning the invocation of a right to counsel and against unreasonable search and seizure. The testimony concerned the search for a drug used to possibly incapacitate the defendant. *Id.* at 618.

62 UCMJ art. 118, 10 U.S.C. § 918 (2012).

63 Steven M. Immel, *Development, Adoption, and Implementation of Military Sentencing Guidelines*, 165 MIL. L. REV. 159, 192 (2000).

64 UCMJ art. 120, 10 U.S.C. § 920.

65 Immel, *supra* note 63, at 191.

66 UCMJ art. 112(a)(3), 10 U.S.C. § 912.

67 Immel, *supra* note 63, at 192.

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

“sentence uniformity was deleted as a sentencing goal in the 1969 *Manual for Courts-Martial*.”<sup>69</sup> It was believed that the appellate courts would ensure sentence uniformity by monitoring and fixing inappropriate sentences.<sup>70</sup> However, given the strict standards for appellate review, most sentences are left intact.<sup>71</sup> Therefore, sentencing disparity at the trial level will likely be carried out.<sup>72</sup>

### C. *The Proposed Solution to Military Sentencing*

In response to a request from senior military officials, in October 2013 then-Secretary of Defense Chuck Hagel directed a review of the UCMJ and the Manual for Courts-Martial.<sup>73</sup> The task was assigned to the General Counsel of the Department of Defense, who in turn established the Military Justice Review Group (MJRG).<sup>74</sup> In December 2015, the Defense Department “forwarded to Congress a legislative proposal outlining a number of reforms [to] [t]he UCMJ[,] . . . the statutory framework of the military justice system.”<sup>75</sup> It consisted of “37 statutory additions and substantive amendments to 68 current provisions of the UCMJ.”<sup>76</sup> The proposals were intended to: (1) strengthen the structure of the military justice system, (2) enhance fairness and efficiency in pretrial and trial procedures, (3) modernize military sentencing, (4) streamline the post-trial process, (5) reform military appellate practice, and (6) update the punitive articles.<sup>77</sup>

In order to modernize military sentencing, the MJRG proposed

[r]eplacing the current sentencing standard (which relies on maximum punishments with minimal criteria in adjudging a sentence below the maximum) with a system of judicial discretion guided by parameters and criteria[,] . . . [e]nsuring that each offense receives separate consideration for purposes of sentencing to confinement[,] . . . [i]mproving military plea agreements by allowing negotiated ranges of punishments and adjudged sentences within the range[,] . . . [c]ontinuing to permit appeals of sentences by servicemembers, and establishing government appeals of sentences in circumstances similar to federal civilian practice[,] . . . [and]

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69 Immel, *supra* note 63, at 172.

70 *See id.* at 193 n.309.

71 *Id.* (“The appellate courts review a sentence on uniformity grounds only if the cases are closely related and highly similar. The standard of review is abuse of discretion or preventing an obvious miscarriage of justice. The end result is that the appellate courts review very few cases on sentence uniformity issues. Since the appellate courts review very few cases on sentence uniformity grounds, and when they do review a case the standard of review is very high, the vast majority of sentences are left intact.”).

72 *See id.*

73 Press Release, U.S. Dep’t of Def., Defense Department Proposes UCMJ Changes (Dec. 28, 2015), <http://www.defense.gov/News/Article/Article/638108/defense-department-proposes-ucmj-changes>.

74 MIL. JUST. REV. GROUP, <http://ogc.osd.mil/mjrg.html> (last visited May 18, 2017).

75 Press Release, *supra* note 73.

76 *Id.*

77 *Id.*

[p]roviding for the effective implementation of [sentencing] reforms by establishing sentencing by military judges in all non-capital trials.<sup>78</sup>

The amendments take place over two phases. Phase One creates and implements the Military Sentencing Parameters and Criteria Board (“the Board”).<sup>79</sup> During Phase One the Board will “begin the process of gathering sentencing data for the development of sentencing parameters and criteria.”<sup>80</sup> The Board, in coming up with its parameters and criteria, is expected to “draw upon best practices at the federal and state level.”<sup>81</sup> The Board will be responsible for developing interim guidance, established by the President, which will be used until Phase Two, which begins four years after enactment.<sup>82</sup> Also in Phase One, “judicial sentencing in all non-capital . . . courts-martial would take effect.”<sup>83</sup> More similar to civilian courts, all information will be provided to the judge to reach an appropriate sentence, and the system will do away with unitary sentencing.<sup>84</sup> The “sentencing parameter for an offense would set a boundary on the judge’s discretion, subject to a departure for case specific reasons set forth by the judge in the record.”<sup>85</sup>

In Phase Two, the “parameters and criteria approved by the President” apply to sentencing.<sup>86</sup> A key component of this phase is the authorization of the Government to appeal sentences. The MJRG asserted that this would reduce the impetus for “rigid mandatory minimum sentences.”<sup>87</sup> Further, military judges will retain the ability to adjudge a sentence outside the parameters, as long as they provide reasons for the departure on the record.<sup>88</sup>

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78 Press Release, Military Justice Review Grp., Summary of Major Legislative Proposals (Dec. 28, 2015), <http://www.dod.gov/dodgc/images/summary.pdf>.

79 MILITARY JUSTICE REVIEW GRP., MILITARY JUSTICE ACT OF 2016: SECTION-BY-SECTION ANALYSIS 18–19 (2015), [http://www.dod.gov/dodgc/images/military\\_justice\\_sectional.pdf](http://www.dod.gov/dodgc/images/military_justice_sectional.pdf). The Board “would be composed of the chief trial judge of each service . . . and the Secretary of Defense would select a chair and vice-chair.” *Id.* at 20–21.

80 *Id.* at 18.

81 *Id.* at 19. The MJRG also notes that parameters would “replace the current practice of adjudging sentences with little or no guidance.” *Id.*

82 *Id.* at 18–19.

83 *Id.* at 18.

84 *See id.* Unitary sentencing is where a single sentence is “adjudged for all offenses for which there has been a finding of guilty without any explanation as to how the sentence was reached or which portions of the sentence are attributable to which offense.” *Id.*

85 *Id.* at 19. It is important to note that “[s]entencing parameters would not be required for those offenses for which it would be impracticable to set a parameter, such as unique military offenses that vary greatly in seriousness depending on the context.” *Id.*

86 *Id.*

87 *Id.* It appears that the MJRG is attempting to remove the mandatory minimums that currently apply in only a very small subset of cases. *See supra* notes 21–26 and accompanying text.

88 *Id.*

Although the Board is given the responsibility of establishing sentencing criteria,<sup>89</sup> the Military Justice Act includes some baseline considerations that a judge must consider when imposing a sentence:

[A] court-martial shall impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces, taking into consideration—

(A) the nature and circumstances of the offense and the history and characteristics of the accused;

(B) the impact of the offense on—(i) the financial, social, psychological, or medical well-being of any victim of the offense; and (ii) the mission, discipline, or efficiency of the command of the accused and any victim of the offense;

(C) the need for the sentence—(i) to reflect the seriousness of the offense; (ii) to promote respect for the law; (iii) to provide just punishment for the offense; (iv) to promote adequate deterrence of misconduct; (v) to protect others from further crimes by the accused; (vi) to rehabilitate the accused; and (vii) to provide, in appropriate cases, the opportunity for retraining and return to duty to meet the needs of the service; and

(D) the sentences available under this chapter.<sup>90</sup>

The Military Justice Act of 2016 brings court-martial sentencing more in line with civilian trials. Court-martial sentencing still retains its military character, most clearly with the continued focus on good order and discipline. However, the Act also takes away some autonomy from the military structure. Imposing guidelines will canalize the ability of judges to punish as they see fit. The defendant's unit, represented by the panel members, also loses its role in sentencing. Reaction to the recommended changes has been mixed.<sup>91</sup> Nonetheless, both the Senate and House absorbed the recommended changes from the MJRG and inserted them verbatim into the

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89 *Id.* (defining the sentencing criteria as “factors that a judge must consider when sentencing a case, but that do not propose a specific punishment”).

90 National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2919 (to be codified in scattered sections of 10 U.S.C.) (internal quotation marks omitted). The factors to be considered are much more extensive than previously provided, especially when considering that the previous instructions were to a jury full of officers and possibly enlisted personnel who did not necessarily have an extensive familiarity with the law and its purposes, whereas here the guidance is going solely to a military judge, trained in the practice of adjudicating. *See supra* notes 18–20 and accompanying text.

91 Compare Colby Vokey, *The Gutting of Military Justice (Again)*, COLBYVOKEY.COM (Oct. 19, 2016), <http://colbyvokey.com/the-gutting-of-military-justice-again/> (“The Military Justice Act of 2016 may just be the death knell of military justice and the rights of military servicemembers.”), with Clara Spera, *Amending the Uniform Code of Military Justice to Mirror Civilian Courts*, LAWFARE (Jan. 12, 2016 2:02 PM), <https://www.lawfareblog.com/amending-uniform-code-military-justice-mirror-civilian-courts> (“[S]hifting the military justice system closer to the civilian criminal justice model may help the military overcome the perception that in military tribunals the deck is stacked against victims of sexual assault.”).

National Defense Authorization Act for 2017,<sup>92</sup> which became law on December 23, 2016.<sup>93</sup>

## II. THE FEDERAL SENTENCING SYSTEM

Despite good intentions, the implementation of the Federal Sentencing Guidelines has been to the detriment of defendants. Before the Guidelines, “[j]udges were free to sentence defendants to any term authorized by the penal code,” and sometimes “offenders convicted of equivalent offenses . . . served disparate sentences.”<sup>94</sup> Because of this, “some critics began to condemn the horror stories about identical offenders before different judges” receiving disparate sentences.<sup>95</sup> Frustration with the sentencing system and concerns about crime led Congress to take action.<sup>96</sup> The Federal Sentencing Guidelines began with the Sentencing Reform Act of 1984<sup>97</sup> (“the Act”), which created the United States Sentencing Commission (“the Commission”).<sup>98</sup>

The Commission originally consisted of seven voting members and a nonvoting member,<sup>99</sup> and had the express tasks of “establish[ing] sentencing policies and practices for the Federal criminal justice system” and

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92 Compare MILITARY JUSTICE REVIEW GRP., *supra* note 79, with National Defense Authorization Act for Fiscal Year 2017, H.R. 4909, 114th Cong. (2016), and National Defense Authorization Act for Fiscal Year 2017, S. 2943, 114th Cong. (2016).

93 National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2025 (to be codified in scattered sections of 10 U.S.C.). There was never really any concern about the act passing once it was inserted into the NDAA. See Jessica C. Abrahams & Kevin J. Lombardo, *November Elections Loom over Congress’ Continued Progress on National Defense Authorization Act*, LEXOLOGY (Oct. 11, 2016), <http://www.lexology.com/library/detail.aspx?g=999378-599a-4f12-a631-c52c355fde8b> (“Although differences remain unresolved in conference and between Congress and the Administration, the NDAA has been signed into law every year for more than 50 straight years, and while continued negotiations and horse-trading must take place after the November elections, ultimately the NDAA will become law before year’s end.” (emphasis added)).

94 J.C. Oleson, *Blowing Out All the Candles: A Few Thoughts on the Twenty-Fifth Birthday of the Sentencing Reform Act of 1984*, 45 U. RICH. L. REV. 693, 700 (2011) (citing *Williams v. New York*, 337 U.S. 241, 247 (1949), *superseded by statute*, Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1988, 1989 (codified in scattered sections of 18 U.S.C. and 28 U.S.C.)).

95 *Id.* Senator “Kennedy came to view sentencing in the federal courts as ‘a disgrace,’ ‘a national scandal,’ a ‘glaring flaw,’ in ‘utter disarray,’ ‘hopelessly inconsistent,’ ‘arbitrary,’ and ‘desperately’ in need of reform.” KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 38 (1998).

96 See STITH & CABRANES, *supra* note 95, at 38–48.

97 Pub. L. No. 98-473, 98 Stat. 1987. The Act was passed with “broad, bipartisan support” and an “enthusiastic” President Reagan. STITH & CABRANES, *supra* note 95, at 48.

98 Pub. L. No. 98-473, 98 Stat. 1987, 2017. “There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission . . . .” *Id.*

99 *Id.* The President is responsible for appointing voting members of the Commission, with approval from the Senate. A minimum of three members of the Commission had to be active federal judges, and no more than four members could be from the same political party. *Id.* The members were removable only for good cause. *Id.* at 2018. The minimum

“develop[ing] means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing.”<sup>100</sup> The Act assisted the Commission by detailing organically the things judges should consider for imposing a sentence.<sup>101</sup> They included:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;
- (5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) and that is in effect on the date the defendant is sentenced; and
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.<sup>102</sup>

In short, the Act “did not give the Commission a clean slate upon which to draft its Guidelines.”<sup>103</sup> Congress intended the Commission to focus on the generally recognized purposes of punishment.<sup>104</sup> However, Congress did not specify what purpose would predominate.<sup>105</sup>

The lack of a clear sentencing philosophy was felt early by the Commission<sup>106</sup> and “[f]or the first eighteen months of its existence, [it] debated and

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of three federal judges was changed to a maximum with the Feeney Amendment to the PROTECT Act. Oleson, *supra* note 94, at 732.

100 Pub. L. No. 98-473, 98 Stat. 2017, 2018.

101 *See id.* at 1989.

102 *Id.* at 1989–90.

103 STITH & CABRANES, *supra* note 95, at 52.

104 *Id.* The four purposes of punishment are generally recognized as retribution, deterrence, incapacitation, and rehabilitation. Oleson, *supra* note 94, at 696.

105 *See* STITH & CABRANES, *supra* note 95, at 52 (“Congress in the Sentencing Reform Act had failed to adopt any particular philosophy of punishment.”); Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 29 (2003) (“[T]he SRA does not specify priorities among these purposes or explain how the well-known tensions among them should be resolved.”).

106 However, the Commission did take the interest in sentencing uniformity to heart, claiming more than a decade after its creation that “[e]liminating unwarranted sentencing disparity was the primary goal of the Sentencing Reform Act.” PAUL J. HOFER ET AL., U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW

drafted competing versions of the Guidelines, each built on fundamentally different philosophies.”<sup>107</sup> A clear philosophy was never attained, and some of the Commission’s members even resigned because of it.<sup>108</sup> The Commission ultimately adopted an approach that sampled ten thousand cases and “determined the average sentences for various types of crime and the aggravating and mitigating factors that were significantly correlated with increases or decreases in the sentences, along with each factor’s magnitude.”<sup>109</sup>

While the Commission never chose a formal philosophy for sentencing, it did appear to be “significantly influenced” by a stricter, quantitative calculus.<sup>110</sup> In fact, the Guidelines go further than the Act calls for in ensuring that additional harms are met with additional punishment.<sup>111</sup> Still, even in the years since its creation the Commission has not resolved nor even addressed its sentencing philosophy.<sup>112</sup>

Before understanding any critique of the Guidelines, it is important to have a basic understanding of how they work. Fortunately, the Commission provides a handy overview of the Federal Sentencing Guidelines.<sup>113</sup> The overview explains the Guidelines’s creation of a formulaic sentencing chart, which “take[s] into account both the seriousness of the offense and the offender’s criminal history.”<sup>114</sup> There are *forty-three* levels of offense seriousness (one being the least serious), and each type of crime has a base offense level.<sup>115</sup> The sentencing judge begins by determining the base offense level for the crime committed (for multiple counts the judge begins with the most serious offense), and then looks to see if there are any specific offense characteristics to consider. If so, they get added to the base offense level. For example, robbery has a base offense level of twenty; if a firearm was brandished during the robbery there must be a five-level increase, and if a firearm was discharged there must be a seven-level increase.<sup>116</sup> There are also adjust-

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WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 79 (2004), [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15\\_year\\_study\\_full.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf).

107 Hofer & Allenbaugh, *supra* note 105, at 31.

108 *Id.*

109 *Id.* at 33 (citing U.S. SENTENCING COMM’N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 16 (1987), [http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1987/manual-pdf/1987\\_Supplementary\\_Report\\_Initial\\_Sentencing\\_Guidelines.pdf](http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1987/manual-pdf/1987_Supplementary_Report_Initial_Sentencing_Guidelines.pdf)); *see id.* at 17–19.

110 STITH & CABRANES, *supra* note 95, at 55. This approach more mirrors the philosophy of Commissioner Robinson, a law professor at Rutgers, who believed that the purpose of sentencing was to achieve retribution, and that this is best accomplished with a “sentencing calculus,” a detailed and complex sentencing system. *See id.* at 50–53.

111 *Id.* at 55; *see also* 28 U.S.C. § 994(a)(1) (2012).

112 STITH & CABRANES, *supra* note 95, at 56.

113 *See* U.S. SENTENCING COMM’N, AN OVERVIEW OF THE FEDERAL SENTENCING GUIDELINES, [http://www.ussc.gov/sites/default/files/pdf/about/overview/Overview\\_Federal\\_Sentencing\\_Guidelines.pdf](http://www.ussc.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf).

114 *Id.* at 1.

115 *Id.*

116 *Id.*

ments that may apply to any crime and can be mitigating, such as being a minimal participant (a four-level decrease), or aggravating, such as knowing the victim is unusually vulnerable (a two-level increase).<sup>117</sup> Finally, acceptance of responsibility may result in up to a two-level decrease.<sup>118</sup> The final number arrived at through this system determines the placement along the y-axis. The judge then determines the criminal history category (situated along the x-axis), which is six categories with I being the least serious and first-time offenders, and VI being the most serious. The point at which the offense level and criminal history categories intersect determines the sentencing guideline in months.<sup>119</sup>

The response to the Guidelines has been mixed, at best. Many scholars argue that the system needs to be improved,<sup>120</sup> and others that it needs to be abolished.<sup>121</sup> The common complaints are that the Guidelines are too severe, complex, and rigid.<sup>122</sup>

While a primary motivation for the Sentencing Guidelines was curbing sentence disparity, Congress made clear the direction in which it believed the disparity should be resolved.<sup>123</sup> Congress directed the Commission to “specify a sentence to a term of imprisonment at or near the maximum term authorized” for certain types of crimes.<sup>124</sup> Congress further stipulated that “[t]he Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense.”<sup>125</sup>

117 *Id.* at 2.

118 *Id.*

119 *Id.* at 2–3.

120 See Frank O. Bowman, III, *Nothing Is Not Enough: Fix the Absurd Post-Booker Federal Sentencing System*, 24 FED. SENT’G REP. 356, 366 (2012) (“The Sentencing Commission’s rule-making process should be made more akin to that required of other independent agencies by the Administrative Procedure Act and other governmental openness statutes, and a mechanism for direct judicial review of the Commission’s rules should be devised.”); Oleson, *supra* note 94, at 763 (“Instead of basing federal sentences on political intuitions, the Commission could provide sentencing judges with meaningful data about which available sentences are most effective in reducing recidivism.”). *But see* Paul G. Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017, 1020 (2004) (“While the Guidelines may be tough, they merely impose the kind of punishment that society expects for serious federal offenses.”).

121 See Mark Osler, *Death to These Guidelines, and a Clean Sheet of Paper*, 21 FED. SENT’G REP. 7, 7 (2008) (“The Guidelines produced from these policy goals are a baffling set of complexities that do nothing well other than increase incarceration and guarantee the full employment of sentencing experts. It is time to start over.”); Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing* 23 (Cato Inst. Policy Analysis, Paper No. 458, 2002) (“American conceptions of justice demand that the Guidelines be scrapped and the commission disbanded.”).

122 Oleson, *supra* note 94, at 707.

123 See 28 U.S.C. § 994 (2012).

124 *Id.* § 994(h). *But see* 18 U.S.C. § 3553(a) (2012) (“The court shall impose a sentence sufficient, but not greater than necessary . . .”).

125 28 U.S.C. § 994(m).

The impact on increased sentence length due to the Guidelines is real and observable. Since the adoption of the Guidelines, federal sentences have increased drastically,<sup>126</sup> and federal sentences are significantly harsher than state sentences on average.<sup>127</sup> The severity of the sentences has led to an outcry among judges,<sup>128</sup> politicians,<sup>129</sup> families,<sup>130</sup> and academics.<sup>131</sup>

The complexity of the Guidelines is another issue. Given how the overview that the Commission provides breaks down the sentencing process, it is reasonable to believe that the system is a relatively straightforward math problem.<sup>132</sup> Determine the defendant's x- and y-axes, and you have your sentence range. However, the impression of mathematical certainty is one thing critics attack:

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126 See STITH & CABRANES, *supra* note 95, at 63 tbl.1 (demonstrating that the seven years after the Guidelines have seen markedly longer sentences than did the nine years prior). All crimes have an average sentence length of twenty-two more months. While robbery has a thirty-nine-month-shorter sentence length, its time served is still thirty-nine months more than before the Guidelines. *Id.*

127 See Oleson, *supra* note 94, at 707–08 (“[T]here’s little doubt that sentences associated with crimes charged under federal jurisdiction are *dramatically* longer than equivalent crimes charged in state courts.”); see also MATTHEW DUROSE, BUREAU OF JUSTICE STATISTICS, STATE COURT SENTENCING OF CONVICTED FELONS, 2004—STATISTICAL TABLES tbl.1.10 (2007), <https://www.bjs.gov/content/pub/html/scscf04/tables/scs04110tab.cfm> (demonstrating that most federal crimes result in significantly higher sentences than state crimes). However, one large exception to the rule is murder, which has an average sentence in state courts of 232 months, compared to 111 months in federal courts. Yet, violent crime as a whole carries twenty-eight months more in federal court. Drug and weapons offenses are particularly more severe, with an average of fifty-three and fifty-two more months, respectively. *Id.*

128 See, e.g., Anthony M. Kennedy, Assoc. Justice, Supreme Court of the U.S., Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), [http://www.supremecourt.us.gov/publicinfo/speeches/sp\\_08-09-03.html](http://www.supremecourt.us.gov/publicinfo/speeches/sp_08-09-03.html) (“Our resources are misspent, our punishments too severe, our sentences too long.”); see also Elaine Cassel, *Federal Judge Quits, Assails Unjust Sentencing Guidelines*, COUNTERPUNCH (June 24, 2003), <http://www.counterpunch.org/2003/06/24/federal-judge-quits-assails-unjust-sentencing-guidelines/>.

129 See Ann E. Marimow, *All Agree His Sentence Was Too Harsh, But He May Still Stay Locked Up Forever*, WASH. POST (Mar. 22, 2016), [https://www.washingtonpost.com/local/public-safety/all-agree-his-sentence-was-too-harsh-but-he-may-still-stay-locked-up-forever/2016/03/22/0d34aea2-ed3e-11e5-bc08-3e03a5b41910\\_story.html](https://www.washingtonpost.com/local/public-safety/all-agree-his-sentence-was-too-harsh-but-he-may-still-stay-locked-up-forever/2016/03/22/0d34aea2-ed3e-11e5-bc08-3e03a5b41910_story.html) (“President Obama and lawmakers on Capitol Hill[] are working to roll back decades of prison sentences, set down during the nation’s war on drugs, that they see as excessively harsh.”).

130 See *My Story: Simeon F.*, FAMM, <http://famm.org/my-story-simeon-f/> (last visited May 18, 2017) (“[A] misguided sentence . . . has cost society more than it stands to impact [my incarcerated son, Paul]. Paul does not need to be imprisoned for another decade. He needs to be released and reunited with his family.”).

131 See, e.g., Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1328 (2005) (“At or near the root of virtually every serious criticism of the guidelines is the concern that they are too harsh, that federal law requires imposition of prison sentences too often and for terms that are too long.”); John S. Martin, Jr., *Cruel and Usual: Sentencing in the Federal Courts*, 26 PACE L. REV. 489, 490 (2006) (“[O]verly severe sentences are being applied to low level violators.”).

132 See *supra* notes 113–19 and accompanying text.

Voila! A human being has been transformed from a multidimensional being into a string of letters and numbers . . . for internment in a federal penitentiary. The defendant is now a two-dimensional character . . . . [F]ederal judges cannot consider . . . age, education, vocational skills, mental and emotional condition, physical condition, drug or alcohol dependence, lack of guidance as a youth, employment history, family ties and responsibilities, community ties, military and public service, and charitable works.<sup>133</sup>

Furthermore, the mathematical formula in practice can turn out to be not so simple. The system “sometimes result[s] in sentences that are off by years.”<sup>134</sup> The system has been empirically demonstrated as susceptible to error. A study on the reliability of the Guidelines showed that “[o]fficers applying the relevant conduct rules produce[ ] widely divergent outcomes, ranging from 57 to 136 months for the first defendant, 37 to 136 months for the second defendant, and 24 to 136 months for the third defendant.”<sup>135</sup>

Finally, the system is faulted for being too rigid. In 2003, Congress attempted to make the Guidelines even more rigid by passing the Feeney Amendment to the PROTECT Act.<sup>136</sup> The Feeney Amendment “was a slap in the face of federal judges” and took incredible strides to limit downward departures from the Guidelines.<sup>137</sup> However, in *United States v. Booker* the Supreme Court “severed and excised” the provision of the federal sentencing statute that made the Guidelines mandatory.<sup>138</sup> But the Guidelines were allowed to stand and still had to be consulted by sentencing judges.<sup>139</sup> Nonetheless, the decision to make the Guidelines explicitly advisory did not result in defendants receiving less harsh sentences from judges. It is maintained that “[s]o long as the rules prescribe unduly lengthy sentences, post-*Booker*

133 Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 J. CRIM. L. & CRIMINOLOGY 25, 38–39 (2005) (“Under the Guidelines, judges thus confront defendants as numbers rather than as human beings.”).

134 Luna, *supra* note 121, at 12.

135 Oleson, *supra* note 94, at 714 n.129 (citing Pamela B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of the Relevant Conduct Guideline § 1B1.3*, 10 FED. SENT’G REP. 16, 18–19 (1997)).

136 See Pub. L. No 108-21, § 401, 117 Stat. 650, 667 (2003) (codified at 18 U.S.C. § 3553(b) (2012)).

137 Oleson, *supra* note 94, at 731 (“It prohibited judges from departing downward in almost all cases involving child pornography, sexual abuse, or sex trafficking; prohibited the Commission from establishing any new grounds for downward departures for two years; and directed the Commission to reduce the number of available downward departures.” (footnotes omitted)). The Feeney Amendment was, in part, due to federal judges departing from the guidelines, and Congress’s displeasure with them. See David Beck, *Is Our Judiciary Under Serious Attack? Separation of Powers*, 67 TEX. B.J. 974, 976–77 (2004); see also *infra* note 141 and accompanying text.

138 See *United States v. Booker*, 543 U.S. 220, 245 (2005).

139 *Id.* “[T]he federal sentencing statute as amended makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns . . . .” *Id.* at 245–46 (citations omitted).

experience suggests that most defendants for whom those sentences are prescribed will get them, or at best sentences only slightly lower.”<sup>140</sup>

Further, although the Guidelines are now explicitly only advisory, reversal or binding rules are not the only tools that could be employed against recalcitrant judges. Prior to the *Booker* decision, Congress threatened to subpoena records related to a federal judge’s sentencing decisions.<sup>141</sup> Although infrequently exercised, this power nonetheless may motivate some judges to stay inside the Guidelines just to avoid having their decisions called into question.

Intentionally or not, just or not, Guidelines are detrimental to defendants during sentencing. The next Part of this Note will compare the changes in the Military Justice Act of 2016 to the current federal system and suggest how the Act can best be implemented.

### III. HOW TO BEST MOVE FORWARD WITH MILITARY SENTENCING

All things being equal, the implementation of the Guidelines will likely be to the detriment of military defendants. However, a deliberate approach by the Board and a two-day delay prior to sentencing can lead to more effective sentences. In creating the Commission, Congress both burdened it with countless objectives and provided no primary direction.<sup>142</sup> It is generally accepted that the Commission has never tackled this problem, and the lack of a clear sentencing philosophy plagues its Guidelines.<sup>143</sup> The Board does not face as daunting a charter, in that its creating language is more open.<sup>144</sup> Establishing two advisory groups<sup>145</sup> is really its only explicit guidance in the creation of its parameters.

However, this lack of conflicting guidance is not a golden ticket to a successful mission. The Board, full of different lawyers with different backgrounds and ideas, will still face the issue of developing a sentencing philosophy for the entire Department of Defense.<sup>146</sup> Furthermore, the Board will have to juggle this with the additional military justice goal of maintaining good order and discipline. Congress, through the MJRG, may have given a

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140 Bowman, *supra* note 120, at 360.

141 See Tresa Baldas, *Congress Comes After a Federal Judge: Sentencing at Issue in Subpoena Uproar*, NAT’L L.J., (Mar. 24, 2003), <http://www.nationallawjournal.com/id=900005534745/Congress-Comes-After-a-Federal-Judge?slreturn=20161017231037> (“[U.S. District Court Judge James] Rosenbaum . . . is accused of imposing unlawfully light sentences.”). It was argued that Congress did this in “an effort to chill and intimidate judges by subjecting their decisions to this kind of data and collection and review.” *Id.*

142 See *supra* notes 106–12 and accompanying text.

143 See *supra* notes 106–12 and accompanying text.

144 See MILITARY JUSTICE REVIEW GRP., *supra* note 79, at 21.

145 *Id.* The first advisory group will consist of “senior officer and enlisted members who provide guidance on the effectiveness of military justice on discipline.” *Id.* The second group will consist of military justice practitioners. *Id.*

146 While the Act does not specify that the MJRG must create this philosophy, a clear philosophy is vital moving forward and will show itself in the sentencing parameters the MJRG produces.

hint to the Board that its focus should first be on good order and discipline. The language of the Act, in regards to sentencing, claims the punishment shall “promote justice and . . . maintain good order and discipline” taking into consideration the other sentencing philosophies.<sup>147</sup> Good order and discipline is to be maintained through the effective use of other philosophies, not the other way around.<sup>148</sup> In contrast to the principles under which the civilian panel operated, these directions may allow for more directed parameters. But the Board may still have to wrestle with what theory of punishment best promotes good order and discipline and how best to go about emphasizing that theory.

Regardless of how the Board determines to move forward, in developing parameters it is directed to “draw upon best practices at the federal and state level.”<sup>149</sup> This entails developing parameters that respond to the severity, complexity, and rigidity that plague the federal system. And while *Booker* made clear that any attempt at binding federal guidelines was unconstitutional, even suggestive guidelines may still in effect be unduly restrictive.<sup>150</sup> This could go even further in the military context where the parameters will “set a boundary on the judge’s discretion, subject to a departure for case specific reasons set forth by the judge in the record.”<sup>151</sup> While a military judge is protected by the UCMJ from undue command influence, it is unlikely a military judge, or any judge, will be unaware of outside pressures. To be effective, and to keep judges effective, the Board needs to ensure that it assuages judges’ concerns about any type of retribution for a decision, and that it educates military judges on the best practices for departing from a guideline.

While the Military Justice Act makes clear that it intends to bring the court-martial process more in line with the federal sentencing system, it does not suggest that the procedural and adversarial aspects of sentencing will change. Currently, in the federal system, upon a plea or a finding of guilty, a probation officer conducts a presentence investigation and submits a report to the court.<sup>152</sup> The report must be submitted to the defendant, the defendant’s attorney, and the Government’s attorney at least thirty-five days before

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147 National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2025 (to be codified in scattered sections of 10 U.S.C.).

148 This focus for the military is not new and has been respected by the courts. See *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion) (“Military law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. . . . [T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment.” (footnote omitted)).

149 MILITARY JUSTICE REVIEW GRP., *supra* note 79, at 19.

150 See *supra* note 122 and accompanying text.

151 MILITARY JUSTICE REVIEW GRP., *supra* note 79, at 19.

152 See U.S. SENTENCING COMM’N, GUIDELINES MANUAL § 6A1.1 cmt. (2015) (“A thorough presentence investigation ordinarily is essential in determining the facts relevant to sentencing.”). This general requirement cannot be waived by the defendant. *Id.*

sentencing.<sup>153</sup> Both parties have fourteen days to respond, and the probation officer must submit the final presentence report to the parties at least seven days before sentencing.<sup>154</sup> This process is relatively removed from the adversarial nature of a trial, and more in line with the calculating nature of sentencing.

The military system, however, still maintains an adversarial nature. Furthermore, the sentence is expected to be completed as quickly after the trial as possible.<sup>155</sup> Occasionally, if a verdict is delivered later in the day, a military judge may push the sentence on to the next duty day, or it can be pushed back a few hours, but this is not required.<sup>156</sup> The expectation of the lawyers is that their arguments are prepared and their witnesses ready to be called if the sentencing phase immediately follows trial.<sup>157</sup> Because there is no presentencing report agreed to by the parties, the prosecution must prove any aggravating circumstances.<sup>158</sup> The defense is also given “considerable latitude” in presenting witnesses and mitigating evidence.<sup>159</sup>

As demonstrated by the Federal Sentencing Guidelines, increases in severity are the norm for sentences under guidelines. In the new system, the trial counsel has a sentence floor, which increases the Government’s power in plea bargaining too. The defendant does have a ceiling, but could already rely on the Courts of Criminal Appeals in extreme situations prior to the Military Justice Act.<sup>160</sup> While a two-day delay would have been beneficial even prior to the changes in the Act, with sentencing guidelines to the detriment of the defendant, it is even more important to ensure the sentencing phase of the court-martial is as thorough as possible.

A reasonable opportunity exists for the prosecution and defense to make sound sentencing arguments. The deck is stacked against no one, and both are given reasonable latitude. However, that reasonable opportunity for soundness does not necessarily translate into the best process for a just sentence. The defendant may be left reeling that he or she was just convicted of a crime, possibly a serious one, even as a mitigation case needs to be presented. The defense attorney presumably will have done everything within reason to obtain a not-guilty verdict for the defendant whose case was just argued, and then must immediately be prepared to demonstrate why that guilty client should be given a lenient sentence. To make any sort of coherent argument, and certainly to have witnesses prepared, the defense attorney must plan on this contingency before beginning the trial. The defense attor-

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153 *Id.* § 6A1.2(a). This requirement can be waived by the defendant. *Id.*

154 *Id.* § 6A1.2(b)–(c).

155 *See* MCM, *supra* note 16, R.C.M. 1001(a)(2) (“A sentence shall be adjudged in all cases without unreasonable delay.”).

156 Robert F. Holland, *Unique Procedural Aspects of Court-Martial Sentencing by Jury*, 27 FED. SENT’G REP. 91, 93 (2014).

157 *Id.*

158 *Id.*

159 *Id.*

160 *See* Kisor, *supra* note 13, at 51 (“[M]ilitary service courts of criminal appeals have the discretion to reduce an inappropriately severe sentence.”).

ney would make a better, more reasoned argument for mitigation if that was the only argument to prepare. Instead, sometimes the following arguments are what the court-martial and defendant get: “The accused needs to be with his family. Years in prison will only mean that he may never see them again. They need him. Any double digit number is going to be too much.”<sup>161</sup> The preceding sentencing arguments might have been better and more reasoned if the defense attorney had two days after the trial to focus on the sentencing argument. It is not unreasonable to expect, along the same lines, that the defense attorney may serve as better counsel during the trial if the only focus was on a not-guilty verdict.

Furthermore, the trial counsel is affected in much the same way. While the trial counsel will not need to turn around from a loss, the preparation will still be divided up between two tasks instead of focused on one. In the case of a not-guilty verdict, the trial counsel’s time spent preparing for sentencing may have been spent better in preparation for the trial phase. Finally, it is not unreasonable to expect that the trial counsel’s personal feelings of frustration towards the defendant will carry over into sentencing. In the current environment, trial counsel may resort to arguments like the following: “The accused needs to go to jail for at least twenty-eight years. He is twenty-two years old right now. He will be fifty when he gets out. . . . Your Honor, you should add up the minor victims’ ages and make the accused serve confinement for that long.”<sup>162</sup> These haphazard arguments may be improved if the trial counsel has time to prepare and does not face multiple contingencies within fixed time constraints.

Finally, a delay of two days between conviction and sentencing may have a strong impact on the defendant. In civilian courts, an “[e]xpression[ ] of remorse can reduce prison sentences by more than a third.”<sup>163</sup> Imagine the mindset of a defendant who just spent an entire trial proclaiming his innocence but is nonetheless convicted of the crime. Then consider that in order to receive a smaller sentence, that defendant is expected to make a heartfelt apology shortly after, even within a few hours. Two days would give the defendant the opportunity to come to grips with the guilt just assigned by the community, and coming to grips with that guilt may lead to a more heartfelt apology. This may benefit the rehabilitation of the defendant, and “victims themselves say that emotional harm is healed, as opposed to compensated for, only by an act of emotional repair.”<sup>164</sup> It is no secret that apologies from the guilty “often are stilted, forced, or just not enough.”<sup>165</sup> But the possibility of an improved apology is worth the negligible risks.

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161 Charles L. Pritchard, Jr., “*Punished as a Court-Martial May Direct*”: *Making Meaningful Sentence Requests*, *ARMY LAW.*, Dec. 2015, at 33 (internal quotation marks omitted).

162 *Id.* (internal quotation marks omitted).

163 STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 74 (2012).

164 Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 *UTAH L. REV.* 15, 22.

165 BIBAS, *supra* note 163, at 74.

A mandatory delay between a conviction and sentencing is not without precedent. In the late 1950s the appellate division of New York's supreme court held in several cases that a trial court must follow a statute requiring a two-day delay between a guilty verdict (including a plea) and sentencing, and failure of a trial court to do so would invalidate a sentencing.<sup>166</sup> A defendant in Oregon has a statutory right of two calendar days following a guilty plea or verdict before sentencing.<sup>167</sup> In *State v. Dawson* the Oregon Court of Appeals held that a violation of the statute is cause for a remand and resentencing.<sup>168</sup> During a turn-of-the-century murder case in Kentucky, the highest court determined that a violation of the criminal code that mandated a two-day delay between a verdict and judgment warranted a reversal.<sup>169</sup> It reasoned that the code "contain[ed] a most solemn and vital right of the accused. Its meaning is upon the surface. It requires no reflection to understand it. It was enacted for the express purpose of giving the accused time in which to show cause against the sentence about to be passed upon him."<sup>170</sup>

One clear implication of this suggested delay is a slowdown of justice. However, as noted above, in the federal system there are at least thirty-five days between a conviction or guilty plea and sentencing (plus however long it takes the probation officer to submit the report).<sup>171</sup> A delay of a few days pales in comparison to that month. Furthermore, just as a defendant can waive this time requirement in the federal system (although there will still likely be a brief delay as the probation officer writes the report), this option could also be given to defendants in a court-martial. Either before or after the trial the judge can ask the defendant if he would like to waive his right to a brief delay before sentencing.

But the importance of speedy justice has an impact on the functionality of the military as well.<sup>172</sup> The military functions as smaller units that are part of larger units, and "everyone knows or at least has a perception about when and whether 'justice has been done.'"<sup>173</sup> However, the delays that have

166 See, e.g., *People ex rel. La Shombe v. Jackson*, 184 N.Y.S.2d 949, 949 (App. Div. 1959) ("A failure to allow two days between conviction and sentence, if properly pleaded . . . would invalidate the sentence."); *People ex rel. Ingber v. Jackson*, 172 N.Y.S.2d 358, 358 (App. Div. 1958) (same concept).

167 See OR. REV. STAT. § 137.020 (2015). The court may sentence sooner if it does not intend to be in session, but it should be "as remote a time as can reasonably be allowed," and no sooner than six hours unless waived by the defendant. *Id.*

168 284 P.3d 1272, 1276 (Or. Ct. App. 2012) ("[O]ur focus is on the court's disregard of an important statutory right . . . whose purpose, in part, is to ensure the deliberate and carefully considered pronouncement of judgment in criminal cases.").

169 *Powers v. Commonwealth*, 83 S.W. 146 (Ky. 1904).

170 *Id.* at 148; see also *People v. Felix*, 45 Cal. 163, 164 (1872) ("The purpose of the statute seems to be to guard the rights of the prisoner from a hasty or too precipitous entry of judgment against him.").

171 See *supra* notes 152–54 and accompanying text.

172 See *Baker*, *supra* note 29, at 81 ("[T]he timely administration of justice, has long been viewed as a strength of the military justice system.").

173 *Id.*

caused concerns in the military process come not from the sentencing phase of a court-martial but from the post-sentencing process.<sup>174</sup> Given the extraordinary length of sentencing delays that can occur after courts-martial conclude, it is unreasonable to argue that a few days in between conviction and sentencing will unduly prejudice good order and discipline. Furthermore, depending on the circumstances, there may be other options available to remove the defendant from the unit.<sup>175</sup>

A final argument against the delay between a conviction and sentencing is that it may lead to disruptions of an efficient military justice system. This argument falls short because the federal system has demonstrated an ability to operate without an immediate rush from conviction to sentencing. Furthermore, the military justice system operates with a “relatively light caseload—extremely light compared with civilian criminal justice systems.”<sup>176</sup> Finding the time for two segmented phases of a court-martial may initially prove more complicated, but will likely just become part of the process with which the military justice system functions. Finally, this recommendation has the ability to actually increase efficiency in the military justice system by minimizing wasted work. In the case of a not-guilty verdict, neither the defense attorney nor trial counsel will have spent government time and resources preparing for sentencing.

#### CONCLUSION

The foregoing recommendations to improve implementation of the Military Justice Act need not happen overnight. Effectively implementing just the changes the Act recommends may be trouble enough initially. A two-day delay between a conviction and sentencing does not have to come from an act of Congress or an order from the President. Individual services, and even

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174 See *id.* “[M]ilitary case law makes clear . . . that there have been problems with appellate delay in the military . . . [T]he convening authority in approving findings and sentence as well as in reviewing for clemency often adds weeks, months, and sometimes even years to the court-martial process.” *Id.*; see, e.g., *United States v. Harvey*, 64 M.J. 13, 23 (C.A.A.F. 2006) (“Simply stated, the 2,031 days for a first-level appellate review by a service court of criminal appeals is facially unreasonable as it clearly is excessive and inordinate.”); *United States v. Moreno*, 63 M.J. 129, 136–37 (C.A.A.F. 2006) (holding that 1688 days between the conclusion of the court-martial and the decision of the Court of Criminal Appeals was facially unreasonable and that 490 days between the court-martial and approval by the convening authority was excessive).

175 The most severe avenue available is pretrial confinement. Probable cause must exist for pretrial confinement, which consists of a reasonable belief that: “(1) An offense triable by court-martial has been committed; (2) The person confined committed it; and (3) Confinement is required by the circumstances.” MCM, *supra* note 16, R.C.M. 305. The required circumstances are that it is foreseeable that the defendant will not appear at trial or will engage in “serious criminal misconduct,” and restraint of a less severe nature is inadequate. *Id.* Also available is pretrial restraint, a less severe restriction on a person’s liberty. It may consist of conditions on liberty, restriction in lieu of arrest, arrest, or confinement. *Id.* R.C.M. 304.

176 Ehlenbeck, *supra* note 36, at 33.

individual judges, can create opportunities to observe the recommended delay and determine if it improves the military justice system. At little or no cost to the machine, the proposed delay may bring out the best in all involved in the military sentencing process.

A delay between conviction and sentencing will not create a perfect sentence for a guilty defendant, nor a perfect system for military sentencing. But, it may be able to make military justice better.

