MILITARY SENTENCING PARAMETERS AND CRITERIA OFFENSES: A FIRST STEP TO REDUCING "NOISE" IN COURT-MARTIAL SENTENCING

Captain Stephen C. Reyes, JAGC, USN*

I. THE PROBLEM WITH NOISE

Whenever there is judgment, there is likely noise. Noise is a term used to describe the variability between judgments within a set.[1] For example, if you were to ask a group of friends to guess how many jellybeans are in a glass jar and the answers were 500, 300, 800, 1200, 10, then the variability in those answers is noise. In that circumstance, noise is benign because estimating jellybeans is a trivial matter.[2] But what about in complex, non-trivial matters of judgment, like the appropriate sentence for an accused convicted at a court-martial of aggravated assault? Suppose the answers to that question were: thirty days confinement and a bad conduct discharge from the service; two years confinement and no discharge; reduction to E-1 and a letter of reprimand; and five years confinement and a dishonorable discharge. In those instances, how should one view noise?

Indeed, disparate sentences awarded to similarly situated accused seem unjust and erode the public's trust in the criminal justice system; decreasing disparity creates consistency in sentencing that may "serve to increase deterrence, predictability, and public confidence in criminal sentences."[3] In both the civilian[4] and military systems,[5] the calls for sentencing reform have been based on

---

* Currently the Chief Trial Judge, Navy-Marine Corps Trial Judiciary and Chair of the Military Sentencing Parameters and Criteria Board. This article is adapted from a presentation delivered by the author at the Continuing Legal Education and Training Program of the Court of Appeals for the Armed Forces on 15 May 2024. The positions and opinions expressed in this article are those of the author and do not represent the views of the U.S. Government, the U.S. Department of Defense, the U.S. Navy or the Military Sentencing Parameters and Criteria Board.

[1] *See* Daniel Kahneman, Olivier Sibony & Cass Sunstein, *Bias Is a Big Problem. But So Is 'Noise*,*'* N.Y. TIMES (May 17, 2021), http://bit.ly/45U6iYA.

[2] Notably, in non-complex tasks such as guessing the number of jellybeans in a jar or the weight of a fat ox at the state fair, the average guess from a crowd can be surprisingly accurate. *See* JAMES A. SUROWIECKI, THE WISDOM OF CROWDS xi–xii (Doubleday ed., 2005).

[3] MIL. JUST. REV. GROUP, REPORT OF THE MILITARY JUSTICE REVIEW GROUP PART I: UCMJ RECOMMENDATIONS 511 (2015) [herein after MJRG REPORT].

[4] *See generally* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (Hill & Wang ed., 1973) (seminal work advocating the need for guided sentencing in the federal system).

[5] *See* Colin Kisor, *The Need for Sentencing Reform in Military Courts-Martial*, 58 NAVAL L. REV. 39 (2009); Captain Megan N. Schmid, *This Court-Martial Hereby (Arbitrarily) Sentences You:*

decreasing disparity and the corresponding effort to constrain the sentencer's discretion. In the National Defense Authorization Act of 2022 (NDAA), Congress enacted changes to military sentencing in an effort to decrease "inappropriate disparity" or noise.[6] These changes occurred in two major areas: one, Congress mandated military judge alone sentencing for all non-capital offenses, thus removing the accused's option of being sentenced by members (jurors); and two, Congress placed limits on the military judge's discretion through the establishment of sentencing parameters and criteria.[7]

It is easy to endorse efforts of this kind when one encounters situations wherein one accused is sentenced to thirty days confinement and another accused is sentenced to ten years confinement for the same offense.[8] This seems inherently wrong. However, arguments can be won by the extremes but lost by the particulars.[9] To guard against knee-jerk reactions, it is important to go beyond the proverbial noise, examine the root cause of the variability, and assess what is the best way to remove this noise without removing what is good about the system. This Article attempts to answer these questions. Part II will examine the causes of noise in military sentencing; Part III will outline the initial call for sentencing reform by the Military Justice Review Group; and Part IV will analyze the development of military sentencing parameters and criteria and will compare them to the Federal Guidelines and the District of Columbia Guidelines.

Highlighted below are three aspects of military sentencing and sentencing reform: first, noise has been an attribute of the system that is produced

---

Problems with Court Member Sentencing in the Military and Proposed Solutions, 67 A.F. L. REV. 245 (2011); Major James Lovejoy*, Abolition of Court Member Sentencing in the Military*, 142 MIL. L. REV. 1 (1994); Major Steven M. Immel, *Development, Adoption, and Implementation of Military Sentencing Guidelines*, 165 MIL L. REV. 159 (2000).

[6] National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81 (2021) [hereinafter NDAA]. The NDAA did not specifically state the aim of sentencing parameters and criteria. *But see* MJRG REPORT, *supra* note 3, at 32 (Proposed the creation of sentencing parameters and criteria in order to limit "inappropriate disparity").

[7] NDAA, *supra* note 6.

[8] *See* Kisor, *supra* note 5.

[9] 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 (2014). In his article, Judge Baker summed up this point in the following passage:

> Policymakers should take special care when addressing sentencing in the military context to avoid making decisions based on anecdotal evidence, such as the case where the rapist or child pornographer received no confinement or the first-time drug user received thirty years. This is a subject for which empirical data can especially bring truth to power. But the data must be accurate and complete. Better statistics are needed.

Id. at 80.

by myriad causes, each with its own unique purpose, advantage, and disadvantage. Second, these causes are distinct from the causes of noise in the civilian system. Consequently, civilian sentencing reforms are not readily adaptable to the military. Third, considering the unique attributes of military sentencing, the initial sentencing parameters and criteria established by the President provide a reasonable first step to build upon; nevertheless, more can be done.

II. NOISE BY DESIGN

A. Individualized Sentencing

Military sentencing has been historically noisy.[10] But military sentencing has also been historically discretionary. Except for a few offenses with mandated minimum sentences, the sentencer is given broad discretion to determine an appropriate sentence, ranging from no punishment to the maximum authorized punishment.[11] Additionally, the sentencer's discretion has been largely unguided. For example, the sentencer is informed of the five recognized principles behind military sentencing[12] and instructed to "impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline" taking into consideration factors such as the "nature and circumstances of the offense" and the "history and characteristics of the accused."[13]

Given this wide discretion, it is foreseeable that the system would produce variability. Whenever there is judgment, there is likely noise. In other words, noise has been by design. But why countenance such discretion? The short answer is that "military sentencing is predicated on the principle of individualized

---

[10] *See* Immel, *supra* note 5, at 186–93; Kisor, *supra* note 5, at 54–55 (comparing the sentencing disparity between various accused convicted of rape); Schmid, *supra* note 5; Colonel James A. Young, *Revising the Court Member Selection Process*, 163 MIL L. REV. 91 (2000).

[11] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, RULE FOR COURTS-MARTIAL 1002(a) (2019) [hereinafter 2019 MCM] ("[T]he sentence to be adjudged is a matter within the discretion of the court-martial.").

[12] U.S. DEP'T OF ARMY, PAM. 27-9, MIL. JUDGE'S BENCHBOOK para. 2-6-9 (29 Feb. 2020) [hereinafter BENCHBOOK]. The principles are: 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 his crime and his sentence from committing the same or similar offenses, i.e., specific and general deterrence.

[13] *See* 2019 MCM, *supra* note 11, R.C.M. 1002(f). The full list of factors that the sentencer should consider are: (1) the nature and circumstances of the offense and the history and characteristics of the accused; (2) the impact of the offense on—(A) the financial, social, psychological, or medical well-being of any victim of the offense; and (B) the mission, discipline, or efficiency of the command of the accused and any victim of the offense; (3) the need for the sentence to—(A) reflect the seriousness of the offense; (B) promote respect for the law; (C) provide just punishment for the offense; (D) promote adequate deterrence of misconduct; (E) protect others from further crimes by the accused; (F) rehabilitate the accused; and (G) provide, in appropriate cases, the opportunity for retraining and returning to duty to meet the needs of the service; and (4) the sentences available under these rules.

sentencing."[14] It is grounded on the belief that "offenses can present a wide range of disparities in gravity and culpability, as well as a wide breadth of extenuating and mitigating factors"[15] and that judgment must be given wide latitude to navigate these facts as applied to the accused.[16] Whether a sentence promotes justice and maintains good order and discipline is, in part, a normative question that does not fit conveniently into a set formula or a standard equation. The meaning of life may very well be forty-two,[17] but the answer to what is a sufficient but not greater than necessary sentence requires judgment.

Another rationale is the role that the principle of rehabilitation has played in military sentencing. Unlike the principles of general deterrence and retribution, rehabilitation is based on the accused's character and unique circumstances. In the military, rehabilitation takes on the added dimension of ascertaining whether the accused could return to service.[18] Thus, rehabilitation requires an individualized approach.[19] That is, the sentence must be relevant to the accused's conduct and meaningful to him. An appropriate sentence for one accused may not be an appropriate sentence for another accused, even where both are convicted of the same offense. As noted by the Court of Military Appeals in *United States v. Mamaluy*, "accused persons are not robots to be sentenced by fixed formulae but rather, they are offenders who should be given individualized consideration on punishment."[20]

Moreover, while the goal of individualized sentencing has been widely promoted in the military system, the goal of sentence uniformity at the trial level has been outright rejected. Until the first half of the 20th century, the principle of uniformity was listed as a sentencing goal and the members were instructed on

[14] Baker, *supra* note 9; *see also* United States v. McNutt, 62 M.J. 16, 19–20 (C.A.A.F. 2005) ("Each accused deserves individualized consideration on punishment.").
[15] Baker, *supra* note 9.
[16] *See* KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 82 (1998) ("But it is in the nature of moral and juridical principles that [judgment] must be informed by a particular set of facts before they can be applied. Only a person can perform this task.").
[17] DOUGLAS ADAMS, THE HITCHHIKER'S GUIDE TO THE GALAXY (Del Ray ed., 2007).
[18] 2019 MCM, *supra* note 11, R.C.M. 1002(f)(3)(G). *See* General William C. Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 5, 22 (1971) ("Military justice must provide a method for the rehabilitation of as many offenders as possible[.] Because manpower is our most precious asset in the Army, conservation of human resources is of primary concern.").
[19] *See* Misretta v. United States, 488 U.S. 361, 362–67 (1989) (discussing rehabilitation as the philosophical support behind the pre-guideline indeterminate system and creation of parole).
[20] 27 C.M.R. 176, 180 (C.M.A. 1959).

it.[21] However, the court in *Mamaluy* criticized this practice,[22] and the principle of uniformity was eventually removed from the 1969 MCM.[23]

In addition to this discretionary framework, there are three other unique attributes about military sentencing that contribute to the noise: multiple sentencing principles, multiple sentencing options, and multiple sentencing authorities. Each of these is discussed below.

B. Multiple Sentencing Principles

Military sentencing is based on the following five principles:

> (1) Rehabilitation of the wrongdoer; (2) Punishment of the wrongdoer; (3) Protection of society from the wrongdoer; (4) Preservation of good order and discipline in the military, and (5) Deterrence of the wrongdoer and those who know of his crime and his sentence from committing the same or similar offenses (specific and general deterrence).[24]

These five principles are all worthy aims, and none can be criticized as being unnecessary. But the principles, at times, conflict with one another. For example, general deterrence is based on the idea of instilling fear of punishment in the general population; thus, unlike rehabilitation, which focuses on what sentence should apply to the individual, general deterrence looks to what sentence would influence this population.[25] The Court of Military Appeals recognized this conflict in *United States v. Lania* when it held that general deterrence, although a proper principle of sentencing, cannot be the sole basis for a sentence; the sentencer must still "take into account the circumstances surrounding that case together with the character and propensities of the accused."[26] In essence, despite the conflicting nature, the sentencer must still balance all the principles as applied to the case.

Yet, how to balance these principles is completely discretionary and leaves open the additional question of whether one principle should be prioritized over another. If a sentencer chooses deterrence as the primary purpose for a sentence, a particular factor may be relevant. But if the sentencer instead chooses rehabilitation as its primary purpose, that same factor may be irrelevant. Simply

---

[21] *See* Captain Denise K. Vowell, *To Determine an Appropriate Sentence in the Military Justice System*, 114 MIL. L. REV. 87, 118 (1986).
[22] 27 C.M.R. at 180.
[23] Vowell, *supra* note 21, at 118.
[24] *See* BENCHBOOK, *supra* note 12, at para. 2-6-9.
[25] *See* United States v. Lania, 9 M.J. 100 (C.M.A. 1980).
[26] *Id*. at 104.

put, the sentencing philosophy determines the relevancy and weight of the sentencing evidence. In a system with five distinct and sometimes conflicting sentencing philosophies, what may be relevant and weighty evidence is too numerous to list. Ultimately, how the sentencer decides to strike the balance influences the sentence that is awarded: for "[o]ne path was followed, another closed, because of the conviction in the . . . mind that the one selected led to justice."[27]

C. Multiple Sentencing Options to Make an Appropriate Sentence

Military sentencing offers numerous punishments from which to craft an appropriate sentence, several of which are unique to the military. First, absent a mandatory minimum, the sentencer could choose no punishment. Second, the sentencer may adjudge any of the following punishments, individually or in certain combinations: confinement; hard labor without confinement; a punitive discharge; a reduction in paygrade for enlisted accused; restriction; forfeiture of pay; a fine; or a letter of reprimand.[28] This breadth is a major distinction from the civilian system where the appropriateness and gravamen of the sentence is largely associated with prison time.[29]

Furthermore, the meaning and effect of any combination of punishments are greatly influenced by the individual circumstances. Upon balancing those circumstances, the ultimate combination may not even include confinement. For example, for a service member in the highest enlisted paygrade of E-9 with 30 years of service, a bad conduct discharge and reduction to E-1 may be an appropriate sentence depending on the offense. Nonetheless, each of the above options are meaningful forms of punishment which, standing alone or in multiple combinations, can constitute an appropriate sentence in a given case.

Moreover, these multiple sentencing options present an obstacle in crafting parameters. Namely, it is impossible to disaggregate non-confinement punishments into a term of confinement in a non-prescriptive, non-arbitrary, and meaningful manner. In other words, what confinement term relates to a bad-conduct discharge? This disaggregation problem is unique to the military and is one factor that prevents the wholesale adoption of civilian-type sentencing reforms.

---

[27] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 41 (Yale Univ. Press 3d ed., 1964).
[28] *See* 2019 MCM, *supra* note 11, R.C.M. 1003.
[29] *See* U.S. SENT'G COMM'N, ALTERNATIVE SENTENCING IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (2015) (giving federal judges the option to sentence a defendant to a mixture of prison time, stand-alone probation, mixed confinement and probation, and in-home detention).

D. The Military's Three-Body Problem

Who decides the accused's sentence?

Prior to the changes in the NDAA, there would be two possible answers: a panel of members or a military judge. However, when examining the question under the rubric of noise, this answer is incomplete. Once again, noise is a measurement of judgment or discretion. Thus, we are looking for areas where there are judgments being made about sentencing. To that end, in the military, there are three possible answers: the judgment of the members, the judgment by the military judge, or the agreed upon judgment of the convening authority and the accused by way of a plea agreement.

1. Members for Sentencing

The appellate record is replete with examples of highly disparate sentences by members, which have led some scholars to call for the end of member sentencing.[30] But just as there are multiple combinations of punishments that can be awarded, there are just as many combinations of members that can compose a panel. The members can be of various ranks and occupations. They can hold different professional degrees or have distinct life experiences and sentencing philosophies. Moreover, the members are given wide discretion on how to determine an appropriate sentence, but they receive little guidance on how to exercise this discretion and no guidance toward ensuring uniformity in sentencing.[31]

2. Military Judge Sentencing and Plea Agreements

Indeed, the majority of courts-martial are tried before a military judge alone. For example, the data presented by the services in their Article 146a, Uniform Code of Military Justice (UCMJ), reports from 2021 to 2023 revealed the following percentages of military judge alone cases for all completed general and special courts-martial: Army–60 percent (1029/1073); Navy–79 percent (413/520); Marine Corps–86 percent (497/574); and, Air Force–56 percent (496/874).[32] However, most of these cases are guilty pleas, which are done pursuant to a plea agreement between the government and the accused. The data compiled by the 2021–2023 Army report best illustrates this point.[33] From that

[30] *See* Schmid, *supra* note 5; *see also* Lovejoy, *supra* note 5.
[31] *See Mamaluy*, 27 C.M.R. at 180.
[32] The Service reports pursuant to Article 146, UCMJ, are available at https://bit.ly/3LdgqlO.
[33] *Id*. The Army provided a breakdown of how many guilty pleas were done. However, the other services did not provide similar data.

period, 85 percent of the general and special courts-martial tried by a military judge alone were guilty pleas (879/1029).[34]

Prior to 2019, the military had what has come to be known as a "beat the deal" plea bargaining practice.[35] In this practice, the military judge was not informed of the terms of the plea agreement until after she announced the sentence.[36] Thus, these pre-2019 sentences are—with some caveats—a fair approximation of military judge sentencing in cases involving a plea.[37] Nevertheless, counsel could implicitly signal to the judge the terms of the deal in their sentencing argument. Despite this, plea agreements still influence a military judge's sentence by dictating to what offenses the accused will plead guilty. For example, the agreement may allow the accused to plead guilty to a less severe offense; however, the government may still introduce relevant sentencing evidence about the greater offense.[38] In this scenario, it is likely that the adjudged sentence for the less severe offense would reflect the true seriousness of the accused's conduct and be greater than what would be awarded for a typical violation of that offense.

In 2019, Congress enacted changes that allowed plea agreements to set the specific sentence that the military judge must award.[39] Therefore, this Article references the data from 2021-2023 as this time period more accurately reflects current practice. Under current practice, the military judge is aware of the terms of the deal prior to sentencing. Most significantly, a plea agreement can now require the military judge to award a specific sentence such as a set amount of confinement or other punishment like a bad conduct discharge.[40] Granted, the rules allow for the plea agreement to establish a range of punishment—for example, six to nine months confinement—but the military judge cannot deviate from that range.[41] Hence, under the terms of the plea agreement, the military judge can be left with little or no discretion.

---

[34] *Id*.
[35] *See* MJRG REPORT, *supra* note 3, at 484.
[36] Prior to 2019, the term "pre-trial agreement" was used instead of "plea agreements." *Compare* 2016 MCM, R.C.M. 705, *with* 2019 MCM, *supra* note 11, R.C.M. 705.
[37] For cases prior to 2019, the accused could only be tried and sentenced by one forum of his own selection—members or military judge alone. So, in contested courts-martial that do not involve a plea, in order to get a true sense of military judge sentencing one would have to look to situations wherein the accused elected to be tried and sentenced by a military judge alone.
[38] *See* United States v. Nourse, 55 M.J. 229 (C.A.A.F. 2001).
[39] UCMJ art. 53a (2019); 2019 MCM, supra note 11, R.C.M. 705.
[40] *See* 2019 MCM, *supra* note 11, R.C.M. 705(d); *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, RULE FOR COURTS-MARTIAL 1002(a) (2019) [hereinafter 2024 MCM], R.C.M. 705(d)(1)–(2).
[41] *Id*.

Lastly, with respect to noise, there is generally a tension between increasing uniformity and plea bargaining. This tension increases when the system lacks a focal point, like a guideline or parameter, from which to base the terms of a plea agreement. Simply put, the parties engaged in plea bargaining are not concerned with advancing sentencing uniformity; instead, they are concerned with making a fair deal. What was considered fair in military plea bargaining used to be influenced by local practice, as well as the individual views of the convening authority, the prosecuting attorney, and the accused, creating considerable variability in plea agreement terms. Although this environment produced noise, it ensured relative parity in plea bargaining power since the sentence that would have been awarded absent a plea agreement was relatively unknown. Now, with a focal point imposed by parameters, the question remains whether this parity will be disrupted.

In the military, the three-body framework—members, military judge, and plea agreements—represents the corpus of military sentencing. Contrast this to the federal sentencing system where sentencing has been exclusively the duty of the judge.[42] There, the historical record reflects the sentencing trends and patterns of the judiciary. It was an examination of that record—and the variability therein—that provided the bases for sentencing reform in the federal system as well as the foundation from which to build the Federal Guidelines. Conversely, the three bodies in the military are unique entities with different components, different experiences, and, in some respects, different aims. Hence, one is not an accurate reflection of the other. Yet, the historical record consists of an amalgamation of the sentences awarded by each of them. Said differently, the noise comes from a cacophony of instruments as opposed to the crash and bang from a single drum. This noise presents complications with how to develop sentencing parameters. In the military, there is a three-body problem.

III. THE CALL FOR NOISE REDUCTION IN THE MILITARY: MILITARY JUSTICE REVIEW GROUP

There have been repeated calls for sentencing reform in the military for some time.[43] But the first comprehensive review which resulted in statutory change was done by the Military Justice Review Group (MJRG), led by Judge Andrew Effron of the Court of Appeals for the Armed Forces.[44] In 2005, the MJRG issued a report outlining numerous proposals to modify the UCMJ, to include changes to sentencing.[45] The MJRG made three recommendations that are

[42] STITH & CABRANES, *supra* note 16, at 9.
[43] *See* Kisor, *supra* note 5; *see also* Lovejoy, *supra* note 5.
[44] The MJRG was established by the Department of Defense General Counsel's Office, and Judge Effron was not acting in his judicial capacity as the Chair. *See* MJRG REPORT, *supra* note 3, at 5.
[45] MJRG REPORT, *supra* note 3.

relevant to our discussion about noise: (1) the use of segmented sentencing for confinement and fines instead of unitary sentencing;[46] (2) military judge alone sentencing for all non-capital offenses—thus, removing the issues related to member sentencing;[47] and (3) the phased introduction of sentencing parameters that would provide a boundary to the military judge's discretion by providing upper and lower limits and sentencing criteria that set out factors to guide the military judge in fashioning an appropriate sentence.[48]

These proposed reforms dealt with some of the aforementioned causes of noise: the introduction of segmented sentencing for confinement and fines assuages the problems with disaggregated sentencing; and, limiting sentencing to military judge alone resolves the three-body problem. Although the MJRG recognized the need to modify plea agreements, it did not advocate for additional limitations to the plea agreement terms other than the authority for a military judge to reject a plea agreement as "plainly unreasonable".[49]

A. Sentencing Parameters and Criteria.

Notably, with respect to sentencing parameters and criteria, the MJRG made several crucial points. First, the MJRG recognized that to serve the dual purpose of justice and discipline, these reforms must be designed around the key principle of flexibility.

> A military sentencing scheme must be flexible enough to adjudge any lawful sentence when appropriate. Crimes committed in combat, for example, may severely aggravate an offense if the accused put the unit or mission at risk, or may mitigate an offense committed during or after intense operations. Courts-martial, while often trying crimes similar to those in civilian courts, need to have the flexibility to impose an appropriate sentence stemming from extreme situations (or unique military contexts).[50]

Second, the MJRG asserted that the aim of this reform was "to limit inappropriate disparity within a system that will largely maintain individualized sentencing and judicial discretion in sentencing."[51] This desire to balance these interests was also reflected in the MJRG's recommendation that the parameters consist of no more than twelve offense categories since this limitation ensured

[46] *Id*. at 509.
[47] *Id*. at 475–76.
[48] *Id*. at 505.
[49] *Id*. at 514.
[50] *Id*. at 512.
[51] *Id*. at 31.

that the categories would be sufficiently broad to account for various circumstances that the military judge may face.[52]

Third, the MJRG recognized that given the unique circumstances found in the military, not all offenses should be subjected to the limitations placed by sentencing parameters. Instead, there are unique offenses—that is, criteria offenses—that are unsuitable for parameters.

Fourth, the MJRG recommended against the direct application of the Federal Sentencing Guidelines for several reasons. For our purposes, the most salient reason was that "federal sentencing guidelines were developed for federal crimes."[53]

Lastly, and perhaps most significantly, the MJRG recommended a phased approach to implementing the reforms. The MJRG proposed that the reforms take effect within four years of enactment. Additionally, the MJRG proposed the creation of a Military Sentencing Parameters and Criteria Board consisting of the Chief Trial Judges of each service and ex officio members from other relevant areas in the federal government.[54] The Board would use the interim four-year period to "collect and analyze sentencing data, propose sentencing parameters and criteria, and submit the proposals to the President for approval."[55]Ultimately, the MJRG believed that these two reforms would "retain flexibility in sentences, recognizing the unique offenses and circumstances of military justice; [they] would continue the current emphasis on rehabilitation of an accused; and it would alter current practice by providing guidance to the judge on how to fashion an appropriate sentence."[56]

In the Military Justice Act of 2016, Congress enacted a number of MJRG's proposed reforms, to include segmented sentencing for fines and confinement in military judge sentencing; however, the act did not include sentencing parameters and criteria or military judge alone sentencing for all non-capital offenses.[57] Instead, it was not until the 2022 NDAA that these two reforms were enacted.[58]

---

[52] *Id*. at 512.
[53] *Id*. at 511.
[54] *Id*. at 513. The MJRG also recommended that the Department of Defense should provide the Board with a full-time staff to assist with the study to collect and analyze data. Unfortunately, when the NDAA was enacted, it did not provide for staff to assist the Board.
[55] *Id*.
[56] *Id*.
[57] Pub. L. No. 114–328, div. E, §§ 5001–5542, 130 Stat. 2000, 2894 (2016), codified at 10 U.S.C. §§ 801–946a (2024).
[58] NDAA, *supra* note 6.

IV. SENTENCING PARAMETERS AND CRITERIA

In the 2022 NDAA, Congress adopted most of the MJRG's recommended sentencing reforms. Congress required the use of military judge alone sentencing for all non-capital offenses and created the Military Sentencing Parameters and Criteria Board with the mandate to make recommendations to the President on sentencing parameters and criteria offenses.[59] But most pointedly, missing from the statute was the MJRG's recommendation that the parameters and criteria be introduced through a four-year phased approach.

A. Statutory Directive

Another facet missing from the NDAA was an explicit statutory directive outlining the purpose of the sentencing reforms. However, one can easily discern from the nature of the reforms and the explicit goal outlined by the MJRG that its purpose was to "limit inappropriate disparity" and to promote greater uniformity and predictability in sentencing while largely retaining "individualized sentencing and judicial discretion in sentencing."[60] However, it is worth comparing this implicit purpose with the explicit one outlined in the Sentencing Reform Act, which was the basis for the federal guidelines:

> provide certainty and fairness in meeting the purposes of sentencing, *avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct* while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.[61]

Under this statute, the "unwarranted disparity" is viewed with respect to "defendants with similar records who have been found guilty of similar conduct." In other words, the disparate treatment of similarly situated defendants is what makes the disparity unwarranted. This statement merely recognizes the non-controversial maxim to treat like cases alike and different cases differently.[62] But this leads to the inevitable question: in sentencing, what is a "like" case? In the civilian system, grouping cases may be easier since distinguishing defendants for sentencing is limited. For instance, the Federal Sentencing Statute outlines a number of specific offender characteristics that are generally inappropriate to

---

[59] *Id*.
[60] MJRG REPORT, *supra* note 3, at 31.
[61] 28 U.S.C. § 991(b)(1)(B) (emphasis added).
[62] H.L.A. HART, THE CONCEPT OF LAW 159 (3d ed., Oxford Univ. Press 2012).

consider in sentencing, such as, "the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant."[63]

But in the military, we intentionally differentiate a person in numerous ways that are indeed relevant to sentencing, such as rank, responsibilities, relationships within the chain-of-command, and duties to one another.[64] And the weight, impact, and meaning of the punishment may be tied directly to those differences. For example, in the Navy, the Chiefs Mess is a prized club; thus, a single reduction in rank from a Chief Petty Officer to a Petty Officer First Class can be impactful. In the military, the issue is not distinguishing amongst accused; the issue is how to group different accused into reasonably similar categories for purposes of sentencing parameters.

Furthermore, it is safe to say that the NDAA was attempting to cancel out the noise from member sentencing since it removed member sentencing as an option for all non-capital offenses. But was there a corresponding noisy problem with sentencing by a military judge that needed to be solved through parameters? The Federal Guidelines were enacted after a comprehensive study of sentencing by federal judges with respect to confinement.[65] In other words, there was a noise audit of judicial sentencing that demonstrated significant disparity in sentencing. However, no similar audit has been conducted in the military. Indeed, several studies, such as the one conducted by the Internal Review Team, have found issues with race in some discretionary functions of military justice; but sentencing did not appear to be one of them.[66] Further, this result is more an indication of bias in the system rather than a commentary about noise. It stands to reason that some of the noise could be solved by limiting sentencing to a legally trained cadre of professionals. Albeit the decision to enact parameters and criteria can be simply born from observing over years of practice that judges—federal, state, or military—are not immune from noise.

B. Military Sentencing Parameters and Criteria Board

The NDAA created the Military Sentencing Parameters and Criteria Board with the mandate to develop and recommend sentencing parameters and criteria for the President's consideration. The Board consists of the Chief Trial Judges from each service and one additional judge from the Department of the

---

[63] 28 U.S.C. § 994(e) (2006).
[64] *See, e.g.*, 2019 MCM, *supra* note 11, R.C.M. 1001(b)(1)–(2) (permitting the use of service data from the charge sheet and the introduction of personal data and character of prior service of the accused for sentencing).
[65] U.S. SENT'G GUIDELINES MANUAL § 1A3 (U.S. SENT'G COMM'N 2021) [hereinafter FEDERAL GUIDELINES].
[66] U.S. DEP'T OF DEFENSE, INTERNAL REVIEW TEAM ON RACIAL DISPARITIES IN THE INVESTIGATIVE AND MILITARY JUSTICE SYSTEMS (2022).

Navy as voting members; non-voting ex officio members from the Court of Appeals for the Armed Forces, the Joint Chiefs of Staff, and the Office of General Counsel for the Department of Defense; and an additional non-voting member designated at the discretion of the Secretary of Defense.[67] In fulfilling its responsibilities, the Board was required to consider "the sentencing data collected by the Military Justice Review Panel" and "consult authorities on, and individual and institutional representatives of, various aspects of the military criminal justice system."[68] Most notably, the Board is a standing board with the obligation to review and propose revisions to the sentencing parameters and criteria regularly; any proposed revision must be accompanied by a statement outlining the basis for the revision.[69] Consequently, the parameters and criteria system was meant to be evolutionary.

On July 28, 2023, the President signed Executive Order 14103 (EO) which implemented the Sentencing Parameters and Criteria system proposed by the Board, and additional changes to the Manual for Courts-Martial that were required considering the new sentencing scheme.[70]

C. Sentencing Parameters

1. Typical Violation of an Offense

In setting out sentencing parameters, the NDAA required that the parameters represent a delineated sentencing range for a "typical violation of the offense".[71] In ascertaining a "typical violation" the following factors were to be considered:

> (i) the severity of the offense; (ii) the guideline or offense category that would apply to the offense if the offense were tried in a United States district court; (iii) any military-specific sentencing factors; (iv) the need for the sentencing parameter to be sufficiently broad to allow for individualized consideration of the offense and the accused; and (v) any other relevant sentencing guideline.[72]

---

[67] NDAA, *supra* note 6, § 539E(e)(4).
[68] *Id*. § 539E(e)(4)(F)(iii).
[69] *See id*. § 539E(4)(F)(v).
[70] Exec. Order No. 14,103, 88 Fed. Reg. 50535 (Jul. 28, 2023).
[71] NDAA, *supra* note 6, § 539E(e)(2)(A).
[72] *Id*. § 539E(e)(2)(A)(i)-(v).

Further, the NDAA required that the ranges consist of no fewer than five and no more than 12 offense categories.[73] Lastly, the parameters were to apply to both special and general courts-martial.[74]

Though the NDAA established the above factors to consider, it did not provide specific direction on what method should be taken in designing sentencing parameters: whether the sentencing ranges should be based on an empirical, or descriptive, method—as was used for the Federal Guidelines. Additionally, the NDAA provided no direction on whether the sentencing parameters should reflect more of a real offense or charge offense system. How one answers these two questions largely determines how the system is designed and how it develops.

2. Empirical Method

An empirical method is an attempt to track past sentencing practice through a review of the available record. This method can be labeled as a "descriptive approach" since its aim is to describe the existing state of affairs.[75] Although the Federal Guidelines were not adopted for the military, it is worth noting that the empirical method was used by the U.S. Sentencing Commission (Sentencing Commission) in creating them. The Sentencing Commission conducted a review of over 10,000 cases and the corresponding presentencing reports to come up with pre-guideline confinement averages for each offense.[76] Through this review, the Sentencing Commission also discerned what it thought were several commonly occurring characteristics that influenced how judges had sentenced in the past. The Sentencing Commission then based the sentencing ranges for the offense on these pre-guideline averages, as well as derived from these commonly occurring characteristics several delineated factors, such as offense characteristics, that affect how the sentencing range would be calculated. Simply put, this empirical method provided a ready-made answer to the question of why an offense was given a specific offense level: "this was how federal judges, on average, sentenced these sorts of cases in the past."[77]

Yet the Sentencing Commission did not take an exclusively empirical approach. In cases where the Sentencing Commission believed that past sentences were inadequate, it departed from those average sentences for policy reasons. For

---

[73] *Id*. § 539E(e)(2)(B).
[74] *Id*. § 539E(e)(1).
[75] STITH & CABRANES, *supra* note 16, at 51–60; *see also* Ronald F. Wright, *Rules for Sentencing Revolutions*, 108 YALE L.J. 1355, 1365 (1998).
[76] FEDERAL GUIDELINES, *supra* note 63, § 1A3.
[77] Wright, *supra* note 72, at 1364–65; *see also* Jeffrey S. Parker & Michael K. Block, *The Sentencing Commission, P.M. (Post-Mistretta): Sunshine or Sunset?*, 27 AM. CRIM. L. REV. 289, 289 (1989) (criticizing the guidelines use of a descriptive approach).

example, in white-collar crimes, the data revealed that judges were punishing "economic crimes less severely than other apparently equivalent behavior."[78] Also, the Sentencing Commission lengthened the prison sentence for certain drug offenses to account for the increased mandatory minimum sentences imposed by subsequent drug statutes.[79]

The NDAA includes language that calls for an empirical review of past sentencing practice. Specifically, the NDAA requires that sentencing parameters reflect a "typical violation of the offense" and that "the sentencing data collected by the Military Justice Review Panel" be considered when designing the sentencing parameters.[80] However, in general, there are multiple issues with military sentencing data which make it impractical to conduct a comprehensive empirical review like the one conducted by the Sentencing Commission. In sum, it is not possible to describe the existing state of affairs of the military sentencing system in an accurate manner. The most significant and overriding issue is that it is exceedingly difficult in the military to collect specific, meaningful information from which to base conclusions.[81] Moreover, the military does not have reports like the federal presentencing reports which outline the relevant sentencing information presented to the sentencer. Although one could deduce what sentencing evidence was introduced at the presentencing hearing from reviewing numerous court-martial records of trial. But not only is this an "intricate, labor-intensive task"[82] that requires the support of a fulltime staff,[83] it still would not reveal what the sentencer thought was relevant for the sentence. In essence, sentencing data only reflect the adjudged sentence and not the reasoning for it. "[S]entencing decisions are so complex and there are so many variables, including the philosophy of the sentencing judge, that it is impossible to explain sentences without getting into the head of the sentencing judge." [84] Yet in the military, the sentencer is neither permitted nor required to outline on the record its basis for a sentence.[85]

Further, unlike the federal system where the 10,000 reviewed cases reflected the past practice of a single body (judges), the military's historical record reflects the judgment of three separate bodies: members, judges, and plea agreements. Moreover, unlike the federal system where the punishment awarded

---

[78] FEDERAL GUIDELINES, *supra* note 64, § 1A3.
[79] *Id*.
[80] *See* NDAA, *supra* note 6, §§ 539E(e)(2)(A), (4)(F)(iii).
[81] *See, e.g*., U.S. Gov't Accountability Off., GAO-19-344, *DOD and the Coast Guard Need to Improve Their Capabilities to Assess Racial and Gender Disparities* (2019), http://bit.ly/4bGAZSh.
[82] Mistretta v. United States, 488 U.S. 361, 379 (1989).
[83] *See* MJRG REPORT, *supra* note 3, at 513 (recommending the Board be provided with full-time staff).
[84] ANNUAL REPORT, DISTRICT OF COLUMBIA ADVISORY COMM'N ON SENT'G, 2 (2003) [hereinafter D.C. ADVISORY COMMISSION REPORT].
[85] *See, e.g*., United States v. Winckelmann, 73 M.J. 11, 16 (C.A.A.F. 2013).

is centered around prison time, the inclusion of other meaningful sentencing options in the military—for example, a punitive discharge—undoubtedly influences the overall sentence, which may or may not include confinement. Thus, it is impossible to transform these constituent parts of the sentence into a reliable and non-arbitrary confinement amount.

Notwithstanding these inherent difficulties with military data collection and analysis, the NDAA did not contemplate that the parameters be developed solely using an empirical approach. Indeed, in defining what constitutes a "typical violation", the NDAA included various other factors, such as the severity of the offense and the broad nature of the ranges. With that said, it is worth discussing the differences between a real offense and a charge offense system.

3. Real Offenses versus Charge Offense

A real offense system considers the conduct of the accused and all relevant aggravating, extenuating, and mitigating circumstances, to include the accused's personal and professional history. The difficulty with this system is that the amount of sentencing information that can be relevant is potentially limitless and therefore results in variability in sentencing. To use a loose analogy: "Happy families are all alike; every unhappy family is unhappy in its own way."[86] Conversely, a charged offense system is based on the "conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted."[87] In a pure charge offense system, the sentence or the sentencing range is determined entirely by the offense of conviction; thus, two defendants convicted for the same offense would receive the same punishment regardless of individual circumstances. Consequently, a pure charge offense system promotes uniformity but at the expense of individuality.[88] Many factors that are relevant to sentencing are not included as elements of the offense and a charge offense system would exclude that information from being considered. Another critique with a charge offense system is that it increases the prosecutor's influence on sentencing since the prosecutor has broad discretion to select what charges are brought against a defendant.[89]

It is important to distinguish between a real and charge offense system because ultimately a successful system is one that strikes the appropriate balance between uniformity and proportionality.[90] As noted above, each of those systems

[86] LEO TOLSTOY, ANNA KARENINA 1 (Constance Garnett trans., Project Gutenberg, 1998) (1878).
[87] FEDERAL GUIDELINES, *supra* note 64, § 1A4.
[88] *See* David N. Yellen, *Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403, 413 (1993).
[89] *See* David N. Yellen, *Reforming the Federal Sentencing Guidelines' Misguided Approach to Real-Offense Sentencing*, 58 STAN. L. REV. 267, 270 (2005).
[90] Yellen, *Illusion*, *supra* note 86.

inherently promotes one principle above the other: a real offense system promotes proportionality at the expense of uniformity, and a charge offense system does the reverse. However, the NDAA includes elements of both a real offense and a charge offense system. The NDAA's criterion to look to "military-specific sentencing factors" has one go beyond the elements and definitions of the offense, and the requirement for the ranges to be "sufficiently broad to allow for individualized consideration of the offense and the accused" are attributes of a real offense system.[91] Conversely, the phrase "severity of the offense" has one look at the terms of the offense and to the statutory elements that may increase the seriousness of the offense, such as the accused's *mens rea* (for example, by neglect or by design),[92] the conduct of the accused (for example, unlawful force),[93] or the amount of harm involved (for example, value greater than $1,000).[94] Since the NDAA includes both elements of a charge offense and a real offense system, the overriding question is how to create a system that incorporates both approaches.

The Federal Guidelines attempt to combine real and charge offense elements in what has been called a compromise approach.[95] As noted above, the Sentencing Commission determined the range of offenses based on a review of 10,000 pre-guideline cases as well as the corresponding presentencing reports. The Sentencing Commission also derived a list of common sentencing factors that it thought made a significant difference in sentencing and incorporated those real offense factors into how the ranges are ultimately calculated.[96] Using this approach, the Sentencing Commission created the following sentencing table:[97]

[91] NDAA, *supra* note 6, §§ 539E(e)(2)(A)(i)–(v).
[92] *See, e.g.*, 10 U.S.C. § 887 (2016) (discussing missing movement).
[93] *See, e.g.*, 10 U.S.C. § 920 (2017) (discussing rape).
[94] *See, e.g.*, 10 U.S.C. § 921 (2016) (discussing larceny and wrongful appropriation).
[95] *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988).
[96] *See* FEDERAL GUIDELINES, *supra* note 64, § 1A3.
[97] *Id*. § 5A.

Offense Level	Criminal History Category (Criminal History Points) 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	0–6	0–6	0–6	0–6	0–6	0–6
2	0–6	0–6	0–6	0–6	0–6	1–7
3	0–6	0–6	0–6	0–6	2–8	3–9
4	0–6	0–6	0–6	2–8	4–10	6–12
5	0–6	0–6	1–7	4–10	6–12	9–15
6	0–6	1–7	2–8	6–12	9–15	12–18
7	0–6	2–8	4–10	8–14	12–18	15–21
8	0–6	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
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

The vertical axis of the table lists 43 offense levels which correspond to the severity of the offense. Notably, the confinement ranges are limited by what is commonly referred to as the "25 percent rule", which states that the maximum of the range "shall not exceed the minimum of the range by more than the greater of 25 percent or six months . . . ."[98] Each offense is assigned a base offense level, which can be increased or decreased depending on various offense characteristics and adjustments. For example, an assault that involved physical contact has a base offense level of seven.[99] However, if the victim of the assault sustained bodily injury, then the offense level is increased by two.[100] Further, if the defendant accepts responsibility and pleads guilty by truthfully admitting his conduct, then the offense level is decreased by two.[101] Thus, in this basic scenario, the final offense level will be seven (7 + 2 − 2).

[98] 28 U.S.C. § 994(b)(2) (2006).
[99] FEDERAL GUIDELINES, *supra* note 64, § 2A2.3.
[100] *Id*.
[101] *Id*. § 3E1.1.

The horizontal axis of the table lists the defendant's criminal history in a graduated scale. The higher the criminal history, the greater the potential punishment depending on the offense level. The sentencing range for a case is calculated by matching the base level with the appropriate criminal history level on the table. In our above hypothetical, a defendant with a criminal history score of one can be sentenced within a range of zero to six months of confinement. Further, a judge may depart from this calculated range if there are aggravating or mitigating circumstances beyond what was initially considered by the Sentencing Commission.[102]

Although the Federal Guidelines were not adopted by the NDAA, the NDAA requires that the Board consider the offense category that would apply to the offense under the Federal Guidelines.[103] Nonetheless, the Federal Guidelines are not readily transferable to military offenses because they reflect either the historical averages for sentences by federal judges for federal crimes or intentional policy departures from those averages based on reasons not relevant to the military. Notwithstanding this objection, the question remains whether the military could adopt this structure that uses base levels, offense characteristics, and adjustments. At present, the answer is no. The problems identified with the empirical approach make it difficult to recreate the historical sentencing record in the military. Thus, there is no practical way to discern either a reliable base average or the common sentencing factors that made a significant difference in sentencing. Without these two pillars, a system like the Federal Guidelines cannot be properly constructed.

Moreover, the Federal Guidelines is a complex system that has been fairly criticized for its complexity.[104] And because the offense level can be increased or decreased by specific offense characteristics and adjustments, this creates additional litigation to determine the correct calculation. However, it must be remembered that a military sentencing scheme is meant to be deployed in a military environment. To that end, the system must be workable both in a garrison as well as in a foreign and hostile setting. Accordingly, a complex system that may increase litigation or is overly complex may not be sufficiently flexible enough to be used in the military. A simpler, more deployable system is required. For that, we must survey another jurisdiction.

---

[102] *Id*. § 1A4(b).
[103] NDAA, *supra* note 6, § 539E(e)(2)(A)(ii).
[104] *See* Yellen, *Illusion*, *supra* note 88; *see also* Keven R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN L. REV. 523 (1993); STITH & CABRANES, *supra* note 16.

4. Other Relevant Sentencing Guidelines

In addition to the Federal Guidelines, the Board was required to look at "other relevant sentencing guidelines."[105] This Article will not attempt an exhaustive analysis of other relevant sentencing guidelines but will instead focus on the District of Columbia Voluntary Sentencing Guidelines (D.C. Guidelines) since the D.C. Guidelines provide a good contrast to the Federal Guidelines. Simply put, it is a far simpler system;[106] and in contrast to the Federal Guidelines, the D.C. Guidelines reflect a charge offense system that uses real offense characteristics as a basis for the judge's departure.[107] Further, the D.C. Guidelines group the offenses into nine groups with broad sentencing ranges, as opposed to the 43 offense levels listed in the Federal Guidelines.[108]

The D.C. guidelines were created by the Advisory Commission on Sentencing (D.C. Commission) after an extensive four-year study of sentencing practice in the District of Columbia.[109] The D.C. Commission conducted a review of cases from 1996–2003 to set the baseline ranges.[110] In creating these ranges, the D.C. Commission set out to ensure that "the amount of time-served under a sentence in the new system should approximate the amount of time-served in the old system." [111] The eventual base ranges that were produced were meant to capture the middle 50 percent of historical sentences. As noted below, the ranges are broad, but this is intentional.

> Another aspect of fairness is promoting warranted disparity, that is, treating different offenses and offenders differently. Relatively wide ranges permit the court to take into account factors other than offense severity and criminal history in fashioning an appropriate sentence . . . . Judges need discretion to account for this kind of variation, and the [D.C.] Commission concludes that relatively wide ranges, including the option of probation for low-end crimes, will promote fairness and make it more likely that judges will elect to depart only in a relatively small percentage of truly extraordinary cases.[112]

---

[105] NDAA, *supra* note 6, §§ 539E(e)(2)(A)(i)–(v).
[106] *See* VOLUNTARY SENT'G GUIDELINES MANUAL (DISTRICT OF COLUMBIA SENT'G COMM'N, 2023) [hereinafter D.C. GUIDELINES].
[107] D.C. ADVISORY COMMISSION REPORT, *supra* note 84, at 30 ("Sentences will be based on the offense of conviction, not on the real offense behavior.").
[108] D.C. GUIDELINES, *supra* note 106, at app. 1 (illustrating the master grid).
[109] D.C. ADVISORY COMMISSION REPORT, *supra* note 84, at iii.
[110] *Id*.
[111] *Id*. at 29.
[112] *Id*. at 21.

The overall goal was to cabin the judge's discretion and to move all typical offenses into a "sentencing corral."[113] According to the D.C. Commission, the corralling was meant to indicate that the "goal of reducing unwarranted disparity by drawing in the mavericks is balanced against the goal of maximizing judicial discretion to achieve a just result in a particular typical case."[114]

The D.C. Commission adopted a grid or table approach like the Federal Guidelines that contains vertical and horizontal axes. The D.C. Commission also separated offenses into two grids: a master grid and a drug grid. For our purposes, we will focus on the master grid.[115]

[113] *Id*. at 34.
[114] *Id*. at 34–35.
[115] D.C. GUIDELINES, *supra* note 106, app. 1.

APPENDIX A – MASTER GRID

August 2023 -- Sentencing Ranges Listed in Months

		Criminal History Score				
	Ranking Group Most Common Offenses	0 to ½ A	¾ to 1¾ B	2 to 3¾ C	4 to 5¾ D	6 + E
3 Points*	**Group 1** 1st degree murder w/armed 1st degree murder	360 - 720	360 - 720	360 - 720	360 - 720	360 +
3 Points*	**Group 2** 2nd degree murder w/armed 2nd degree murder 1st degree sex abuse 1st degree sex abuse w/armed	144 - 288	156 - 300	168 - 312	180 - 324	192 +
3 Points*	**Group 3** Voluntary manslaughter w/armed 1st degree child sex abuse Carjacking while armed Assault with intent to kill w/armed Armed burglary I	90 - 180	102 - 192	114 - 204	126 - 216	138 +
3 Points*	**Group 4** Aggravated assault w/armed Voluntary manslaughter	48 - 120	60 - 132	72 - 144	84 - 156	96 +
3 Points*	**Group 5** PFCOV Armed robbery Burglary I Obstruction of justice Assault with intent to kill	36 - 84	48 - 96	60 - 108	72 - 120	84 +
2 Points*	**Group 6** ADW Robbery Aggravated assault 2nd degree child sex abuse Assault with intent to rob	18 - 60	24 - 66	30 - 72	36 - 78	42 +
2 Points*	**Group 7** Burglary II 3rd degree sex abuse UPF-PCOV Negligent homicide Attempt 2nd degree sex abuse	12 - 36	18 - 42	24 - 48	30 - 54	36 +
1 Point*	**Group 8** Carrying a pistol (CPWL) UUV Attempt robbery/burglary UPF-[43] 1st degree theft Assault w/significant bodily injury	6 - 24	10 - 28	14 - 32	18 - 36	22 +
1 Point*	**Group 9** Escape/prison breach BRA Receiving stolen property Forgery/uttering Fraud	1 - 12	3 - 16	5 - 20	7 - 24	9 +

*Criminal History Points for prior convictions in these groups.

White/unshaded boxes – prison or compliant long split only.

Green/Dark shaded boxes – prison, compliant long split, or short split permissible.

Yellow/Light shaded boxes – prison, compliant long split, short split, or probation permissible.

The vertical axis of the master grid is separated into nine groups that represent the severity of the offense. The horizontal axis of the grid denotes the defendant's criminal history score. Like the Federal Guidelines, the judge must find the box where the offense category and criminal history connect to determine the range of punishment for the offense. Unlike the Federal Guidelines, the D.C. Guidelines exclude the use of offense characteristics or other adjustments in favor of a simpler system. The D.C. Commission believed that this system would be easy to operate and be easily understood yet be responsive to individual factors in each case. The D.C. Commission favored simplicity to avoid excessive and time-consuming litigation over the guidelines.[116]

Under the D.C. Guidelines, the judge may depart from the sentencing range if there is a "substantial and compelling" reason to sentence outside of the range.[117] The D.C. Guidelines include a non-exclusive list of mitigating and aggravating factors that may support a departure.[118]

There are several attributes about the D.C. Guidelines that are adaptable for the military. First, the D.C. Guidelines ranges are broad and are reflected in only nine groups, thus meeting the NDAA's requirement of no less than five and no more than 12 categories. Second, the D.C. Guidelines are simple and easy to navigate. They do not rely on an intricate system to determine the sentencing range; therefore, the scheme is more readily deployable. Third, unlike the Federal Guidelines, there are no limits to the type of sentencing evidence that the judge may use as a basis for a sentence or for a departure, in keeping with the military's sentencing rules and philosophies. Nevertheless, these attributes allow for the D.C. Guidelines to be mimicked, but for several reasons discussed below, they cannot be directly adopted for use in the military.

D. Parameters Applied

For offenses occurring after December 27, 2023, the following sentencing parameters table applies to six offense categories:[119]

[116] D.C. ADVISORY COMMISSION REPORT, *supra* note 84, at 26.
[117] *Id*. at 43; *see also* D.C. GUIDELINES, *supra* note 106, at 34.
[118] *See* D.C. GUIDELINES, *supra* note 106, at 33–34.
[119] 2024 MCM, *supra* note 40, app. 12B.

Offense Category	Months
1	0–12
2	1–36
3	30–120
4	120–240
5	240–480
6	Confinement for life with eligibility for parole

The above sentencing table, when combined with the applicable sentencing rules, reflects a hybrid system that includes elements of both a charge offense and real offense system. The offenses are placed into offense categories that correspond to their severity with a range of punishment that is proportional to a typical violation of those offenses. Additionally, the rules on sentencing remain largely unchanged and the military judge retains the same discretion that she had prior to the NDAA to look at both the offense of conviction and the offense and offender characteristics that she deems are legally and logically relevant to her sentencing decision.

There are two obvious differences between the military sentencing parameter table and both the Federal Sentencing Table and the D.C. Master Grid: (1) there is no horizontal axis; and (2) the ranges are broader.

E. Horizontal Axis

For both the Federal Guideline and the D.C. Guidelines, the inclusion of criminal history as a horizontal axis is based on the principle that a "defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment."[120] There is no reason to challenge this logic, but hardly any empirical proof for it. Notably, when deciding to include a horizontal access in its grid, the D.C. Commission did so out of acceptance of the

[120] FEDERAL GUIDELINES, *supra* note 64, § 4A1.1.

principle as opposed to evidence supporting its conclusion.[121] Even though the Sentencing Commission reviewed over 10,000 cases, the same can be said for the Federal Guidelines.[122] The significance of this point is that the horizontal axis is based on a prescriptive approach. In other words, it reflects judgment, not averages.

Putting this aside, there are reasons to exclude a criminal history axis from a military sentencing scheme. Firstly, it is rare to encounter an accused at court-martial with a prior criminal history since the military is an all-volunteer force with imposed entry requirements. Prospective service members with prior civilian convictions are normally deselected. Further, a court-martial conviction can (and typically does) sever personal jurisdiction over a convicted service member either through a punitive discharge or subsequent administrative actions taken to remove the member from the service.

Granted, even though encountering an accused with prior convictions is rare, it does happen. In fact, the presentencing rules for courts-martial account for this scenario.[123] Although possible, there is no pressing need to build a rule for the exception. The parameter ranges are broad enough to give the military judge flexibility to account for these occasions, and the military judge may depart outside of the range for various reasons, to include criminal history. Furthermore, the graduated steps and corresponding increase in punishment associated with the criminal history axis are ultimately policy judgments and, given the various nuances and difficulties with military sentencing mentioned above and the rarity of the occurrence, it does not seem sensible to take a prescriptive approach at this time.

F. Broad Nature

Another marked difference with the parameters is that the ranges are broader than the Federal Guidelines and D.C. Guidelines. Unlike the 25 percent limit imposed by the Federal Guidelines, the NDAA took the opposite approach and required that the ranges be "sufficiently broad to allow for individualized consideration of the offense and the accused."[124] This raises the question: what does sufficiently broad mean? The answer to this question is further complicated by the fact that under the NDAA there can be no less than five and no more than 12 categories. As a result, the ranges could never be as narrow as those found in

[121] D.C. ADVISORY COMMISSION REPORT, *supra* note 84, at 32 ("[S]entencing ranges increase by increments as criminal history of the offender increases. The progressiveness of sentences on the grids from cell to cell was followed in developing these increments, despite the fact that available historical data were not consistent in demonstrating that principle as part of historical practice.").
[122] STITH & CABRANES, *supra* note 16, at 72.
[123] *See* 2024 MCM, *supra* note 40, R.C.M. 1001(a)(3).
[124] NDAA, *supra* note 6, § 539E(e)(2)(A)(iv).

the Federal Guidelines' 43 offense levels. However, the nine groups found in the D.C. Guidelines fall within the NDAA's limitations. So, could the parameter ranges mirror those imposed by the D.C. Guidelines? It is worth remembering that the Federal Guidelines and D.C. Guidelines were products of a comprehensive review of judicial sentencing as it relates to prison time for civilian criminal offenses.

Further, in defining what is sufficiently broad it is best to guard against conclusions that may have unintended consequences, leading down a path that becomes increasingly difficult to navigate, especially since the historical record is inconclusive. The parameter table evinces an effort to strike a balance between proportionality and uniformity that is most appropriate at this juncture. Indeed, what can be deduced from the table is that the balance tilts in favor of proportionality. Given the NDAA's requirement that the ranges be sufficiently broad and the legal requirement that the military judge award a sentence that is sufficient but no greater than necessary, the military sentencing writ large tilts in favor of proportionality.[125] However, the goal of increasing uniformity can be met through the collection of better sentencing data as well as a more comprehensive understanding of judicial sentencing and the relevant common sentencing factors that influence sentences.

The ranges also reflect the fact that the sentencing rules at courts-martial remain largely unchanged[126] and that the military judge must still: balance sometimes conflicting sentencing principles; consider numerous sentencing factors; face accused with various ranks, responsibilities, and life histories; understand the vagaries of the then-existing military environment; and, decide amongst multiple sentencing options in order to craft a sentence "that is sufficient, but no greater than necessary, to promote justice and to maintain good order and discipline in the armed forces."[127] Given this, judicial discretion is a benefit to the system. Not discretion for the sake of discretion, but discretion that is exercised under reasonable guidance and established principles as a means to give the judge the freedom to navigate the individualized and adjudicatory process that still applies at courts-martial.[128] In essence, we should not cower in fear of judging; instead, we should use it to help refine and shape the system.

To that end, the ranges cannot be so narrow that they are unworkable. The more restrictive the ranges, the less space the military judge has to craft an

[125] *See* 2024 MCM, *supra* note 40, R.C.M. 1002.
[126] *See* 10 U.S.C. § 856 (2021); *see also* 2024 MCM, *supra* note 39, R.C.M. 1001.
[127] 2024 MCM, *supra* note 40, R.C.M. 1002(c).
[128] *See*, *e.g.*, United States v. Ballard, 20 M.J. 282, 286 (C.M.A. 1985) ("We are, of course, well aware that the experienced and professional military lawyers who find themselves appointed as trial judges and judges on the courts of military review have a solid feel for the range of punishments typically meted out in courts-martial.").

appropriate sentence. In those circumstances, the military judge is more apt to sentence outside of the range than within it. The range becomes the exception instead of the norm, which is contrary to the aim of increasing uniformity and predictability in sentencing. When crafting its guidelines, the D.C. Commission believed that the broad ranges would have a "corralling" effect that would eventually bring the sentences into a more refined group.[129] However, an overly restrictive range could cause a stampede.

Moreover, whenever the actual sentence (or sentencing range) for an offense is known beforehand, the government's ability to influence sentencing and plea bargaining is increased because the government controls what offenses to bring to trial. Prior to the NDAA, sentencing in the military was not directly coupled to the offense, but to the circumstances surrounding the offense and the accused. The terms of the plea agreement were predominantly set at the local level to reflect local practice and expectations. Under the NDAA, ranges that drastically diverge from the historical practice may have unintended consequences by placing the parties in a significantly worse position than existed prior to the use of parameters. Additionally, an overly restrictive confinement range—not descriptive of existing practice—may exacerbate the government's influence and have an inadvertent, deleterious effect on plea agreements.

The ranges reflect the collective input and judgment from stakeholders and practitioners in the field[130] and a good-faith effort to approximate current practice given limited and imperfect sentencing data. Lastly, and more importantly, sentencing parameters and criteria are meant to evolve as the practice develops.[131] The Military Sentencing Parameters and Criteria Board is a standing board with the requirement to evaluate the changes and to make recommendations on future modifications to the parameters. There was wisdom in the MJRG's proposal to establish parameters through a phased approach. The parameters recognize this wisdom. Foundations are being laid down now; the current parameters are the cornerstone of the new sentencing system.

G. Offense Category

Each designated parameter offense under the UCMJ (as distinct from a criteria offense) is given a corresponding offense category.[132] The offenses are categorized by their seriousness, as determined by: their elements and definitions; the type of harm involved; the corresponding maximum punishments; limited

[129] D.C. ADVISORY COMMISSION REPORT, *supra* note 84, at 34–35.
[130] NDAA, *supra* note 6, § 539E(e)(4)(F)(vii) ("In fulfilling its duties . . . the Board shall consult authorities on, and individual and institutional representatives of, various aspects of the military criminal justice system.").
[131] *Id*. § 539E(e)(4)(v)(I)-(II).
[132] 2024 MCM, *supra* note 40, app. 12C.

historical record; the type of court-martial that the offenses would historically be tried in; collective input from current stakeholders and practitioners in the field; and, how the offenses compare with like offenses in the UCMJ and other criminal jurisdictions. In other words, the offenses were placed in the punishment range that was proportional to its severity. For example, possession of marijuana in violation of Article 112a, UCMJ, is a Category 1 offense. This offense—if prosecuted at a court-martial at all—is normally tried at a special court-martial, which is akin to the misdemeanor level in civilian jurisdictions, and is punished accordingly.

Category 1 Offenses. The sentencing range for Category 1 offenses mirrors the jurisdictional limits of a special court-martial and this category reflects the type of offenses that would normally be tried in this forum because of the nature of the offense (or the maximum authorized punishment is either at or less than the jurisdictional maximum).

Category 2 Offenses. Category 2 offenses are what some civilian jurisdictions label as "wobbler" offenses.[133] These are offenses that are either tried as a felony or a misdemeanor (at a general or special court-martial) depending on the circumstances surrounding the offense. For example, drug distribution in violation of Article 112a, UCMJ, is a Category 2 offense that encompasses conduct ranging from a sailor giving his shipmates ecstasy pills one night during a party to the soldier selling pills on multiple occasions for profit. Both acts fit the statutory definition of drug distribution, but they range in severity of conduct. These offenses could be separated by commonly occurring offense characteristics that go beyond the statutory elements, as done by the Federal Guidelines—for example, the amount of drugs distributed.[134] However, as noted above, without the appropriate data, this precise gradation cannot presently be done in a reliable, non-prescriptive manner with meaningful specificity.

Category 3 Offenses. Category 3 offenses are clear felony-level offenses that cannot be appropriately classified as "wobbler" offenses. The gravity of the offenses is demonstrated by the aforementioned factors, such as the elements and definitions, the resulting harm, a comparison to similar crimes, and the maximum punishments. For example, aggravated arson in violation of Article 126, UCMJ, a Category 3 offense, involves a willful and malicious act of setting fire to a dwelling or structure that was occupied by a person.[135] The mens rea ("willful and malicious") and the potential or actual harm resulting from this crime (harm to a person and harm to a person's "home") adds a particular weight to the offense. Further, a review of the maximum punishment of 25 years for aggravated arson

[133] *See, e.g.*, Davis v. Municipal Court, 46 Cal. 3d 64 (Cal. 1988).
[134] *See* FEDERAL GUIDELINES, *supra* note 64, § 2D1.1.
[135] 10 U.S.C. § 926 (2019).

and a comparison with the offense of simple arson adds support to how aggravated arson should be categorized.

Category 4 and 5 Offenses. Category 4 and 5 offenses represent a continued gradation using the aforementioned factors and are reserved for what is commonly believed to be the most egregious felony offenses or offenses that have been historically labeled as *malum in se*. Category 4 consists of only five offenses: solicitation of espionage; voluntary manslaughter; rape; sexual assault of a child; and production of child pornography. Category 5 consists of only four offenses: spying, espionage, rape of a child, and murder.

Category 6 Offenses. There are only two Category 6 offenses: premeditated murder and felony-murder. Both offenses have a mandatory minimum life sentence, which can be either with or without the eligibility for parole. The parameter for a Category 6 offense is life with the eligibility for parole. Thus, if the military judge departs from the range and sentences the accused to life without the eligibility for parole, she must provide a written factual basis on the record for her departure.

H. Departures

As illustrated in the table above, the offense category establishes an upper and lower limit for confinement. The sentencing ranges were intended to "anchor[] the discretion of a military judge within a specified range, but allow[] the military judge to exercise discretion in deviating from the established parameter."[136] The military judge must sentence an accused within the confinement range of the offense category.[137] However, the military judge may sentence the accused above or below the confinement range if the record warrants such a departure and she outlines her factual basis for the departure in a written statement.[138] Neither the NDAA nor the EO provides a definition on what constitutes a factual basis for a departure from the range. The law only requires that the military judge "find specific facts that warrant a sentence outside the applicable parameter" and place a written statement outlining her factual basis on the record.[139]

This general guidance is contrary to the Federal Guidelines, which state that the judge may depart from the guideline if there exists "an aggravating or mitigating circumstance of a kind, or to a degree, **not adequately taken into consideration** by the Sentencing Commission in formulating the guidelines that

[136] MJRG REPORT, *supra* note 3, at 513.
[137] 10 U.S.C. § 856(c)(2)(A).
[138] 10 U.S.C. § 856(c)(2)(B).
[139] *Id*.; *see also* 2024 MCM, *supra* note 39, R.C.M. 1002.

should result in a sentence different from that described."[140] To assist the judge, the Federal Guidelines lists prohibited factors that a judge may never consider—for example, race, religion, or nationality[141]—as well as encouraged and discouraged factors for departure.[142] According to the Sentencing Commission, each guideline carves out a "heartland" that represents a set of typical cases for that offense.[143] Thus, "when a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether departure is warranted."[144] Under the Federal Guidelines, the most appropriate use of offense and offender characteristics of a kind that a judge would normally see in a presentencing report is not as a basis for departure but as a basis for other finding such as determining a sentence within the range.[145]

The D.C. Guidelines take a similar approach toward departures. The D.C. Guidelines were designed with "broad ranges with the typical conduct for the offense in mind." Therefore, departures are reserved for atypical cases wherein the judge finds a "substantial and compelling" basis to depart.[146] Unlike the Federal Guidelines, the D.C. Guidelines were not required by statute to delineate which factors were "encouraged" or "discouraged". Instead, the D.C. Guidelines include a non-exclusive list of aggravating and mitigating factors that the judge may use as reasons for a departure. If the judge finds an enumerated factor is present in the case, and is substantial and compelling, the judge may depart from the range of punishment and must place the reasons for departure on the record.[147]

Neither the NDAA nor the *Manual for Courts-Martial (MCM)* place requirements and restrictions on the military judge's authority to depart from the sentencing parameter. In that respect, the military's parameter system is distinguishable from civilian systems.[148] Furthermore, as noted above, the NDAA neither limits departures to facts that fall outside of the "heartland" of cases nor enumerates a set of encouraged or discouraged factors.[149] Instead, the NDAA and the MCM have essentially left it to the military judge's discretion to determine

---

[140] 18 U.S.C. § 3553(b)(1) (emphasis added).
[141] *See* FEDERAL GUIDELINES, *supra* note 64, § 5H1.10
[142] *See* Koon v. United States, 518 U.S. 81, 95–96 (1996).
[143] *See* FEDERAL GUIDELINES, *supra* note 64, § 1A4(b); *see also* Koon, 518 U.S. at 98 (1996).
[144] *See* FEDERAL GUIDELINES, *supra* note 64, § 1A.
[145] *See* FEDERAL GUIDELINES, *supra* note 64, § 5.h (introductory comments).
[146] D.C. GUIDELINES, *supra* note 206, at 32.
[147] *Id*.
[148] *Cf*. United States v. Booker, 543 U.S. 220, 234 (2005). In *Booker*, the Supreme Court held that the Federal Guidelines were unconstitutional under the Sixth Amendment's right to a jury trial. The Court based its holding in part on the fact that the judge's discretion to depart from the range was severely limited by the guidelines. Conversely, under the sentencing parameter system, there are no similar limits placed on the military judge's discretion.
[149] *See Koon*, 518 U.S. at 95–96.

what factors warrant a departure. Nonetheless, there are practical reasons to limit the use of departures. First, the NDAA requires that the parameters delineate a range for "a typical violation of the offense."[150] Thus, consistent with the terms of the NDAA, departures should be reserved for atypical cases. Second, the ranges are sufficiently broad enough to allow the military judge to weigh the relevant extenuating, mitigating, and aggravating evidence and fashion an appropriate sentence to confinement that is within the parameters, while considering the other punishments that may accompany such a sentence.

The Military Judge's Benchbook (Benchbook) provides a non-exhaustive and illustrative list of types of aggravating, extenuating, and mitigating factors that a judge may consider when determining if a departure is warranted.[151] The list is non-binding and the Benchbook clearly notes that a military judge "may instead articulate other specific facts that aggravate, extenuate, or mitigate the seriousness of the offense or the accused's culpability."[152] Conversely, the Benchbook notes—consistent with the NDAA's requirement—that the parameters outline the "typical conduct for the offense in mind."[153] As such, the mere existence of a listed factor in a typical case does not automatically trigger a departure from the range. Indeed, relevant sentencing evidence[154] plays a crucial role in the military judge's sentencing decision, but in most cases, that role should normally be played out within the boundaries of the applicable range.

Moreover, a major critique of a sentencing scheme that permits departures based on real offense characteristics is that an accused may be sentenced based on facts not proved at trial or admitted to in the plea inquiry. However, in the military this has been historically the case for both military judge and member sentencing under Rule for Courts-Martial (RCM) 1001. But the difference is that in the military there are measures that ensure reliability and alleviate due process concerns. First, sentencing evidence in support of a departure, as with all sentencing evidence, must comport with the requirements of RCM 1001 and the Military Rules of Evidence. For instance, to be admissible, the evidence must be relevant and its probative value may not be substantially outweighed by the danger of unfair prejudice.[155] Further, RCM 1001 limits aggravating evidence to "aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty"[156] and victim impact evidence "directly relating to or arising from the offense of which

[150] NDAA, *supra* note 6, § 539E(e)(2)(A).
[151] BENCHBOOK, *supra* note 12, app. J.
[152] *Id*.
[153] *Id*.
[154] *See* 2024 MCM, *supra* note 40, R.C.M. 1001.
[155] *Id*. M.R.E. 401; *see also id*. M.R.E. 403.
[156] *See id*. R.C.M. 1001(b)(4).

the accused has been found guilty."[157] However, the definition of extenuating and mitigating evidence is relatively broad.

I. Multiple Offenses

In cases involving more than one offense, the military judge is required to sentence the accused for each offense within the applicable parameter.[158] This is distinct from the Federal Guidelines process of grouping together common offenses into a single offense with one offense level.[159] The military's sentencing parameter system does not incorporate grouping; however, the rules concerning concurrent and consecutive terms of confinement and the legal concept of unreasonable multiplication of charges for sentencing provide equitable solutions similar to that of civilian systems.

1. Concurrent versus Consecutive Sentences

Pursuant to Article 56, UCMJ, if the accused is sentenced to confinement for more than one offense, the military judge must state whether the terms of confinement are to run consecutively or concurrently.[160] Prior to the EO, RCM 1002 included language that dictated when sentences must run consecutively.[161] However, this language has been omitted from the current rule.[162] Despite this, the omitted language from the prior rule provides useful guidance: namely, it required concurrent sentences for specifications involving the same victim and the same transaction, or when the charges or specifications were unreasonably multiplied.[163] In other words, it provided reasons to "group" offenses.

Under the current RCM 1002, except in cases involving plea agreements that mandate a consecutive or concurrent sentence, the decision to impose such terms of confinement is left to the military judge. [164] Furthermore, because a sentencing parameter is based on the specific offense, it is more appropriate to decide the terms of confinement—to include whether a departure is justified—for each offense before the decision to run the confinement concurrently or consecutively is made. For instance, after considering the sentencing case, the military judge may find that no confinement should be awarded for one offense,

---

[157] *See id*. R.C.M. 1001(c)(2)(B).
[158] *See id*. R.C.M. 1002(a)(2)(B) ("When an offense is subject to sentencing parameters, the military judge shall sentence the accused for that offense within the applicable parameter.").
[159] *See* FEDERAL GUIDELINES, *supra* note 64, § 3D1.2.
[160] 10 U.S.C. § 856(c)(4).
[161] *See* 2019 MCM, *supra* note 11, R.C.M. 1002(d)(2)(B.
[162] *See* 2024 MCM, *supra* note 40, R.C.M. 1002(d).
[163] *See* 2019 MCM, *supra* note 11, R.C.M. 1002(d)(2)(B).
[164] 2024 MCM, *supra* note 40, R.C.M. 705(c)(2)(F).

either as a sentence within the range[165] or a departure.[166] Given this, it would be unnecessary to assess whether the terms should run concurrently. Moreover, factors that are relevant in determining concurrent or consecutive terms may not be relevant to a determination regarding range or departure. For instance, whether the offenses involved the same victim or were unreasonably multiplied do not seem to be reasons to depart from the category range for that specific offense, but rather reasons to group the offenses together for sentencing.

2. Unreasonable Multiplication of Charges for Sentencing

The doctrine of unreasonable multiplication of charges (UMC) for sentencing provides an additional method in which offenses can be 'grouped.' UMC is a rule that is intended to countermand the "potential for overreaching in the exercise of prosecutorial discretion" and to prevent an exaggeration of the accused's criminality.[167] To determine if multiple offenses constitute an unreasonable multiplication of charges for sentencing, the military judge must conduct an analysis of the facts using the factors outlined in *United States v. Quiroz*.[168] Under the previous RCM 1002, in a military judge alone sentencing hearing where the military judge finds that UMC for sentencing applies, the remedy is to run the terms of confinement concurrently.[169] This provision was omitted from the current RCM 1002. Nonetheless, concurrent sentencing is still a justified way for the military judge to remedy UMC for sentencing.

3. Plea Agreements and Parameters

The military judge is required to sentence the accused per the terms of a plea agreement, regardless of whether the terms of confinement depart from the parameter range. But if the plea agreement does depart from the range, the military judge may reject the plea agreement if the sentence is plainly unreasonable.[170] Further, as noted earlier, plea agreements can now dictate the exact terms of the sentence that the military judge must award, thus leaving the military judge with no discretion.[171] Add this non-discretionary framework to the fact that under a

---

[165] The range for category 1 offenses is 0 to 12 months. *Id*. app. 12B.
[166] The range for category 2 offenses is 1 to 36 months. *Id*.
[167] United States v. Quiroz, 55 M.J. 334, 337 (C.A.A.F. 2001); *see also* 2024 MCM, *supra* note 40, R.C.M 307(c)(4).
[168] *Quiroz*, 55 M.J. at 338.
[169] *See* 2024 MCM, *supra* note 40, R.C.M. 1002(d)(2)(B)(iii). Further, under R.C.M. 906(b)(12)(B), the UMC remedy of merging the offenses into one offense for sentencing applies to members for sentencing and not military judge alone sentencing. *See also* United States v. Campbell, 71 M.J. 19 (C.A.A.F. 2012).
[170] *See* 2024 MCM, *supra* note 40, R.C.M. 1002(a)(3)(B).
[171] Indeed, a military judge may still reject a plea agreement if the term of confinement departs from the parameter range and the military judge finds that the terms are plainly unreasonable. *See* 10 U.S.C. § 853a.

sentencing guideline or parameter scheme where the sentence or sentencing range is known in advance, the government can greatly influence the sentence by exercising its discretion on what offenses to charge. Thus, under the current law, discretion has moved away from military judges and toward the government, but with no corresponding limits to that discretion. Given this, it is important that the sentencing parameters are not applied in a manner that may lead to plea bargaining inequities.

J. Sentencing Criteria

Under the NDAA, criteria offenses have two requirements: (1) the nature of the offense is indeterminate and unsuitable for categorization, and (2) there is no similar Federal or District of Columbia offense.[172] Although much space has been spent in this Article analyzing sentencing parameters, conceptually, the more interesting reform in the NDAA is sentencing criteria. They are interesting because they represent a class of offenses in which the military judge's discretion is not cabined by a range of punishment. Essentially, for criteria offense, the military judge maintains the wide discretion that she had pre-parameters.

However, in light of the call for greater uniformity and the desire to avoid inappropriate disparity, why is there an exception for cases that will undoubtedly lead to variability in sentencing? In other words, why is noise acceptable here? To answer this, we should first refer back to the MJRG Report. There, the MJRG noted that:

> [s]ome military offenses are so varied in their nature that they escape any reasonable categorization. The effect of disobeying an order ranges from the trivial to the perilous, and this fact is reflected in the range of lawful punishment.[173]

The first sentence echoes the sentiment expressed in the following NDAA language: "the nature of the offense is indeterminate and unsuitable for categorization." Namely, the circumstances of where the act could be committed and how it could be committed, viewed in the context of a dynamic military environment, are so varied that placing limitations on a military judge's discretion would undermine the purpose of sentencing. As noted in the MJRG Report: "Crimes committed in combat, for example, may severely aggravate an offense if the accused put the unit or mission at risk, or may mitigate an offense committed during or after intense operations."

---

[172] NDAA, *supra* note 6.

[173] MJRG REPORT, *supra note* 3, at 512 (noting that Article 90, UCMJ—willful disobeying an order during a time of war—is a criteria offense; however, non-wartime Article 90, UCMJ, offenses and willfully disobeying an officer not in the time of war are parameter offenses).

The second criterion for a criteria offense is that there be no similar offense under Federal or D.C. law. To that end, there are several unique military offenses in the UCMJ that do not have a similar civilian counterpart—for example, mutiny, aiding the enemy, or improper use of a countersign.[174] Nevertheless, some of these unique military offenses can be fairly categorized, thus failing the first criterion. For example, a civilian is not criminally liable for failing to show up to work when required, but in the military, a service member can be charged under Article 86, UCMJ, for an unauthorized absence.[175] However, Article 86, UCMJ, offenses can be categorized by looking at both the charged offense and common practice. Specifically, the severity of the offense is increased by the length of the absence and the circumstances of how it ended: by apprehension or a voluntary return. It is through these distinctions—validated by some historical record—that the offense can be categorized.

Conversely, there are other unique military offenses that do not have these elemental distinctions and cannot be fairly categorized because the circumstances from which they arise are unknown and too varied. Offenses committed during a time of war or offenses that only become relevant when encountering combat situations come to mind.

[174] *See* 2024 MCM, *supra* note 40, app. 12D.
[175] 10 U.S.C. § 886 (1956).

The President approved the following criteria offenses:[176]

UCMJ Article	Title
82	Solicitation to desert (in time of war)
83	Malingering (in time of war or in hostile fire pay zone)
85	Desertion (in time of war)
89	Striking, drawing, or lifting up a weapon or offering any violence to superior commissioned officer in execution of office (in time of war)
90	Willfully disobeying a lawful order of superior commissioned officer (in time of war)
94	Mutiny or sedition
95	Offenses by sentinel or lookout (in time of war or while receiving special pay under 37 U.S.C. 310)
98	Misconduct as prisoner
99	Misbehavior before the enemy
100	Subordinate compelling surrender
101	Improper use of countersign
102	Forcing a safeguard
103b	Aiding the enemy
108a	Captured or abandoned property (looting or pillaging)
110	Improper hazarding of vessel or aircraft (willfully and wrongfully)
133	Conduct unbecoming an officer
134	General article
134	Self-injury without intent to avoid service (in time of war or in a hostile fire pay zone)

As noted above, for criteria offenses, the military judge's discretion is not limited by the offense categories listed for parameter offenses. Instead, the military judge is provided with a set of sentencing criteria for each offense that she must consider when deciding an appropriate sentence.[177] These sentencing criteria used by the military judge are in addition to the factors outlined in R.C.M. 1001 and the relevant evidence that is presented during a presentencing hearing.[178]

[176] *See* 2024 MCM, *supra* note 40, app. 12D.
[177] *Id*.
[178] *See* 2024 MCM, *supra* note 40, R.C.M. 1001.

V. CONCLUSION.

The implementation of sentencing parameters and criteria is but one of the numerous changes that have been made to the military justice system in recent history. Indeed, change can be noisy. But the hope is that each change will further instill trust and confidence in the system. In this endeavor, it is up to military justice practitioners to find the signal from the noise.