

Sentencing Disparity in Desertion and Absent Without Leave Trials: Advocating a Return of “Uniform” to the Uniform Code of Military Justice.

I. Introduction

On November 11, 1944¹, the U.S. Army convicted Private Edward “Eddie” Slovik of desertion in time of war.² The Army had listed Private Slovik as a deserter for only one day when he turned himself into the Military Police.³ In a trial lasting one hour and forty minutes, the Army convicted and sentenced to him to death.⁴

In contrast, on November 3, 2004, almost sixty years to the day after Private Slovik’s trial, Sergeant Charles Jenkins pleaded guilty to charges of desertion⁵ and aiding the enemy.⁶ The charge of aiding the enemy carries a maximum punishment of death or confinement for life, the same as desertion.⁷ The Army had listed Sergeant Jenkins as a deserter for over thirty-nine years before he finally turned himself into military custody.⁸ During his court-martial, the U.S. Army sentenced

¹ THE EXECUTION OF PRIVATE SLOVIK (MCA Universal Home Video 1991). *See also* WILLIAM BRADFORD HUIE, THE EXECUTION OF PRIVATE SLOVIK (1974).

² History Channel: WWII, http://www.historychannel.com/thcsearch/thc_resourcedetail.do?encyc_id=226140 (last visited Oct. 29, 2005). The United States was an active participant in World War II from December 7, 1941 – August 15, 1945. Officially, war was not declared until December 8, 1941 and formal peace with Japan was not signed until September 2, 1945.

³ *See* PRIVATE SLOVIK, *supra* note 1.

⁴ *Id.* Private Slovik was one of forty-nine soldiers sentenced to death in WWII, but his was the only death sentence carried out. He holds the distinction of being the only soldier since the Civil War executed for desertion.

⁵ 10 U.S.C. §885 (2000). This code section details the elements required for a service member to be charged with desertion. Although Private Slovik was convicted of desertion, 10 U.S.C. §885 was not enacted until May 5, 1950.

⁶ 10 U.S.C. §904 (2000). This code section describes what elements must be present to be charged with aiding the enemy.

⁷ MANUAL OF COURTS-MARTIAL, app. 12, article 104 (2002 ed.) [hereinafter MANUAL 2002] (displaying a chart detailing the maximum punishment available for each article).

⁸ Seattle Times Staff and News Services, *Around the Globe*, THE SEATTLE TIMES, July 20, 2004, at A6.

him to thirty days in prison.⁹ The Army released Jenkins six days early for good behavior¹⁰ after he served only twenty five days in the brig.¹¹

Normally, a simple mathematical equation¹² assists in showing the sentencing disparity. In this case, the calculation is not possible and not needed. Slovik deserted for one day and was executed; Jenkins deserted for thirty-nine years and served twenty-five days in prison: anyone can see the vast disparity in punishment there.

While this is the most drastic example available, sentencing disparity exists regularly.¹³ The disparity exists because the sentencing authority has a high degree of latitude when fashioning the sentence.¹⁴ One would think that with such a degree of latitude given there would be a corresponding amount of guidance provided, but this is not the case.¹⁵ In an organization that stresses uniformity from the first day of basic training to the last day of discharge, it is baffling that the military would choose to dismiss uniformity in an area it is most needed.

In the beginning, uniform sentences were a factor the sentencing authority was to consider when fashioning a sentence.¹⁶ The 1969 version of the *Manual for Courts-Martial* (Manual)¹⁷

⁹ Corky Siemaszko, *Deserter Tells Horrific Tales of Life in N. Korea*, DAILY NEWS (NEW YORK), November 7, 2004, at News 46. The military judge hearing Jenkins' case stated that Jenkins had suffered enough living in North Korea thereby justifying the short sentence given.

¹⁰ *Army Deserter to be Released*, THE DALLAS MORNING NEWS, November 26, 2005 at A24.

¹¹ Tribune News Services, *Army Deserter Freed After 25 days in Brig*, CHICAGO TRIBUNE, November 27, 2004, at C10.

¹² The mean, average, and deviation of sentences would normally be used to determine if there was a disparity.

¹³ Major Steven M. Immel, *Development, Adoption, and Implementation of Military Sentencing Guidelines*, 165 MIL. L. REV. 159, 186-90 (2000).

¹⁴ See MANUAL 2002, *supra* note 7; Rules for Courts-Martial (R.C.M.) 1002 at II-125. The sentencing authority, either a military judge or fellow service members, is given the latitude to fashion any sentence from no punishment to the maximum authorized by the MANUAL for that article.

¹⁵ Department of the Army, PAMPHLET 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK 60-61 (September 15, 2002) [hereinafter BENCHBOOK].

¹⁶ MANUAL OF COURTS-MARTIAL ¶ 76(a)(4) (1951 ed.) [hereinafter MANUAL 1951].

¹⁷ MANUAL OF COURTS-MARTIAL ¶ 76 (1969 ed.) [hereinafter MANUAL 1969].

removed sentence uniformity as a factor to consider because sentence uniformity proved difficult to administer.¹⁸

Since 1969, the young men and women of our Armed Forces have been treated unfairly and subjected to the passions of the sentencing authority. As a result, service members who commit similar crimes can receive vastly different sentences. Our nation's best and brightest should be guaranteed that justice is dispensed fairly and uniformly for like crimes.

This article advocates a return of uniform sentences. Section II discusses the history and background of uniform sentences, providing the historical use of uniform sentences in the *Uniform Code of Military Justice* (UCMJ) and the Manual, including background on why uniform sentences were removed from the Manual. Section III discusses why the military administers punishment and the current military sentencing guidelines. Section IV examines desertion¹⁹ and absent without leave²⁰ (AWOL) cases to show that a sentencing disparity exists. The section will also analyze desertion cases on the high and low ends of the sentencing spectrum to determine whether there are just reasons why a disparity exists. Section V proposes the plan for returning the military to uniform sentences. This article concludes in section VI that the military should adopt the presented plan to combat the problem of sentencing disparity.

¹⁸ See *infra* Section II(B).

¹⁹ 10 U.S.C. §885 (2000).

²⁰ 10 U.S.C. §886 (2000). This code section details the elements required for a service member to be charged with being absent without leave.

II. History and Background of Uniform Sentences

A. History of Military Sentencing Practices

The precursor to the modern day *Manual for Courts-Martial* was the Articles of War of 1775 (Code of 1775 or Code).²¹ The military courts using the Code of 1775 had a great deal of latitude when fashioning sentences. While types of punishments were provided²² in the Code of 1775, the severity of the punishment was not detailed for the courts with any specificity.²³ The punishment was only detailed “as a general (or regimental) court-martial might order . . . according to the nature of the offense [or] in the court’s discretion.”²⁴ The American Articles of War of 1776 continued to allow the court’s discretion, stating that the character of the offense should be considered when determining a punishment.²⁵ Although the Code was revised several times, the way punishment was adjudged remained basically unchanged until 1890.²⁶

In an 1890 amendment the phrase that punishment should be “left to the discretion of the court-martial”²⁷ was eliminated from the Code of 1874.²⁸ The phrase was replaced with guidance that the court’s punishment may not, in time of peace, exceed a limit that the President prescribes.²⁹

An Executive Order issued on February 26, 1891, included a table prescribing the maximum

²¹ Colonel Robert O. Rollman, *Of Crimes, Courts-Martial and Punishment – A Short History of Military Justice*, 11 A.F. L. REV. 212, 215 (1969) (discussing the early American Code of 1775).

²² Types of punishments adjudged during the time were imprisonment, degrading, whipping, fines, carrying weights, shaving the head, standing on a barrel and being tied up by the thumbs. *Id.* at 215-16.

²³ *Id.* at 215

²⁴ Compare *id.* (the statement “in the court’s discretion”) with MANUAL 2002, *supra* note 14 (“a court-martial may adjudge any punishment authorized in this Manual, including the maximum or any lesser punishment”). With the exception of adding a maximum punishment the court has little more restraint than it did in 1775.

²⁵ See Rollman, *supra* note 21.

²⁶ *Id.* at 218

²⁷ *Id.*

²⁸ *Id.* at 217.

²⁹ *Id.*

punishments allowed for violating each article.³⁰ Military sentencing remained fairly consistent from the Code of 1775 until the enactment of the *Uniform Code of Military Justice* in 1950.³¹

In the 1949 version of the *Manual for Courts-Martial*,³² the sentencing authority was instructed to include uniformity of sentences as a factor³³ for consideration³⁴ when fashioning a sentence. As a result of World War II, the military was criticized for conducting too many courts-martial and was criticized because many of the punishments were unjust.³⁵ This prompted the Military Justice Act of 1950³⁶ which resulted in the UCMJ and the modern *Manual for Courts-Martial* of 1951.³⁷ The last major change to the *Manual for Courts-Martial* took place in 1969 when sentencing uniformity was removed as a sentencing goal.³⁸ While the military has dramatically changed since its inception in 1775, the removal of sentencing uniformity in 1969 makes the modern *Manual for Courts-Martial* little better than its predecessor, the Articles of War of 1775.

B. Why Uniform Sentencing was Removed

The elimination of uniform sentences began in the case of *United States v. Mamaluy*.³⁹ The court in *Mamaluy* concluded that the use of sentencing uniformity by the sentencing authority was

³⁰ *Id.*

³¹ See Immel, *supra* note 13, at 165.

³² MANUAL OF COURTS-MARTIAL (1949 ed.) [hereinafter MANUAL 1949].

³³ Other factors the sentencing authority was to consider was the accused's character, previous convictions, and extenuating or aggravating circumstances. MANUAL 1949, *supra* note 32, at ¶ 80(a).

³⁴ *Id.*

³⁵ See Immel, *supra* note 13, at 165. Eighty-five percent of the sentences adjudged during the World War II were reduced or remitted. *Id.*

³⁶ *Id.*

³⁷ See MANUAL 1951, *supra* note 16.

³⁸ Compare MANUAL 1969, *supra* note 17, ¶ 76, with MANUAL 1951, *supra* note 16, ¶ 76(a)(4).

³⁹ *United States v. Mamaluy*, 27 C.M.R. 176 (1959).

improper.⁴⁰ The *Mamaluy* court further stated “that accused persons are not robots to be sentenced by fixed formulae but rather, they are offenders who should be given individualized consideration on punishment.”⁴¹ As a rule of law, the court stated, sentences in other similar cases could not be given to the sentencing authority for comparative purposes.⁴² As a result of the rule of law and the inability of the sentencing authority to remember similar cases, coupled with the fact that “[m]ilitary courts have little continuity,” the court concluded the sentencing authority did not possess the required information to adequately adjudge a uniform sentence.⁴³ Consequently, the court argued paragraph 76, which states that uniform sentences as a sentencing goal of the *Manual of Courts-Martial* should be discarded and replaced with instructions of more value.⁴⁴

Today, while sentencing uniformity is no longer considered by the sentencing authority, the Court of Criminal Appeals has been given the task of maintaining “relative” sentencing uniformity.⁴⁵ The United States Court of Appeals for the Armed Forces has defined sentencing uniformity very narrowly and only as sentences arising from cases involving co-actors involved in the same criminal act.⁴⁶ The result of *Mamaluy* and the United States Court of Appeals for the Armed Forces’ narrow interpretation of sentencing uniformity is that there is virtually no uniformity in sentences adjudged by the sentencing authority.

⁴⁰ *Id.* at 180.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 181.

⁴⁵ See *Immel*, *supra* note 13, at 172.

⁴⁶ *United States v. Lacy*, 50 M.J. 286, 288 (1999).

III. Why Punish and Military Sentencing Practices

A. Why the Military Punishes

The reasons the military punishes an offender are basically the same reasons offenders have been punished throughout history.⁴⁷ The five reasons include 1) rehabilitation, 2) punishment, 3) protecting society from the offender, 4) deterrence, and 5) maintaining military order and discipline.⁴⁸ For any military to properly function, it must possess the tools to compel soldiers to perform tasks they would rather not perform.⁴⁹ This differs from civilian law which is essentially created to deter people from performing certain acts. Why the military punishes is consistent with the purpose of military law: which is to promote justice, maintain good order and discipline, and to promote efficiency and effectiveness within the military.⁵⁰

B. Current Military Sentencing Practices

Current military sentencing practices consist of the court informing the sentencing authority of the maximum punishment available and then allowing the sentencing authority to fashion the sentence with little further guidance⁵¹ which often times leads to a sentencing disparity.

When the sentencing authority fashions a sentence, it is given a great deal of discretion as to its severity. This distinction is in stark contrast to the relatively little guidance afforded them by the

⁴⁷ Ekow N. Yankah, *Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment*, 25 CARDOZO L. REV. 1019, 1054 (2004).

⁴⁸ BENCHBOOK, *supra* note 15, at 61. “You should bear in mind that our society recognizes five principal reasons for the sentence of those who violate the law. They 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/her crime(s) and his/her sentence from committing the same or similar offenses.” *Id.*

⁴⁹ See, Gary L. Wells, *Cover Story: Eyewitness Identification Evidence: Science and Reform*, 29 CHAMPION 12, 13 (2005) (describing the theory of fight-or-flight). It is in human nature to seek protection when in danger, also known as fight-or-flight, yet it is the military’s nature to seek that danger for that is where the enemy is located. While some are motivated by simple bravado to seek that danger other must be compelled into action by knowing the consequence of failing to act.

⁵⁰ See MANUAL 2002, *supra* note 7, at I-1.

⁵¹ See BENCHBOOK, *supra* note 15.

military court.⁵² The instructions given the sentencing authority are limited to the types of punishment available and the maximum punishment the accused may receive.⁵³ Except when a mandatory minimum sentence is required,⁵⁴ the sentencing authority may prescribe any punishment, from no punishment at all, up to and including the maximum punishment allowed with no intervention from the court.⁵⁵ Beyond the court informing the sentencing authority of the maximum sentence allowed, the sentencing authority is free to give what weight it wants to the five reasons for punishment,⁵⁶ and to take any mitigating, extenuating, and aggravating factors into account. Other than the above stated directions, the sentencing authority has no further guidance from the court in fashioning the sentence. The result of this practice leads to sentences of dramatically different lengths, while the facts remain consistent, thus creating a sentencing disparity.

IV. Analysis of Articles 85 and 86 cases⁵⁷

Disparity in sentences adjudged can be proven statistically by showing the vast standard deviation present. Then by comparing cases on the high and low end of the sentencing spectrum, thereby showing they share similar mitigating factors and the that high end case contains no aggravating factors it will be shown that no justification exists for the sentencing disparity

A. Statistical Breakdown

Using statistics to breakdown the sentences adjudged it becomes clear that a sentencing disparity exists. By focusing on a specific article, such as desertion or AWOL, and showing that a

⁵² *Id.*

⁵³ MANUAL 2002, *supra* note 7; R.C.M. 1005(e)(2) at II-133.

⁵⁴ See MANUAL 2002, *supra* note 7, at app. 12. The offenses that carry mandatory minimum sentences are spying, premeditated murder or death that occurs during the commission or attempted commission of burglary, sodomy, rape, robbery, or aggravated arson. Spying carries a minimum mandatory sentence of death, while the others are mandatory minimum life with parole.

⁵⁵ See MANUAL 2002, *supra* note 14.

⁵⁶ See *supra* Section III(A).

⁵⁷ Article 85 is desertion and, article 86 is absent without leave (AWOL).

high standard deviation exists, a sentencing disparity is consequently proven.⁵⁸ A sentencing disparity can be shown by reviewing the standard deviation results.⁵⁹ The standard deviation is the average of the difference from the mean.⁶⁰ Thus, the further the standard deviation number result is from zero, the greater the disparity that exists.⁶¹

First, article 85, desertion, cases are analyzed.⁶² The maximum punishment that can be adjudged by the sentencing authority is life, if during a time of war, five years if done with the intent to avoid hazardous duty or shirk important service, three years if desertion is terminated by apprehension, or two years if terminated by other means.⁶³ In the cases analyzed, the sentencing range was between three month and sixty months.⁶⁴ The average sentence imposed was 26.35 months and the cases had a standard deviation of 17.4 months.⁶⁵

Next, article 86, AWOL, has a maximum punishment of one month if not absent for more than three days, six months if absent more than three days, but not more than thirty days, one year if gone for more than thirty days and one year and six months if gone for more than thirty days with absent status terminated by apprehension.⁶⁶ The cases analyzed had a sentencing range between 39

⁵⁸ This article will analyze cases without regard to which branch the service member belonged. This is because the UCMJ is applied to all branches of the military and no where does it state that one branch should impose stiffer sentences than another.

⁵⁹ Interview with John P. Holcomb, Jr, Ph.D., Associate Professor, Department of Mathematics, in Cleveland, Oh. (Nov. 10, 2005).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Data on file with the author.

⁶³ See MANUAL 2002, *supra* note 7, at app. 12, article 85.

⁶⁴ Data on file with the author.

⁶⁵ *Id.*

⁶⁶ See MANUAL 2002, *supra* note 7, at app. 12, article 86.

days and 450 days⁶⁷ with an average sentence of 146.7 days.⁶⁸ The standard deviation for this article is 107.1 days.⁶⁹

By focusing the disparity analysis on specific articles and not on articles as a whole, the standard deviation calculation is not just a general indicator that a disparity exists; but in fact supports the conclusion that a disparity does exist.⁷⁰ This is because if articles as a whole were used, the differences among sentences of the various articles would not be taken into account.⁷¹

B. Analysis of Cases on High and Low End of the Spectrum

The following two cases, one on each end of the spectrum from Article 85, desertion, are analyzed to illustrate that no mitigating or aggravating factors existed to justify the disparity in the sentences. In analyzing the Article 85, desertion, cases, the focus was whether mitigating factors were present in the low end case and conversely aggravating factors present in the high end case that would justify them being so far removed from the average sentence of 26.35 months. After review of the desertion cases, mitigating factors did exist in the case on the low end, but mitigating factors that are just as compelling existed in the case on the high end of the spectrum. Thus, there does not appear a logical reason why a sentencing disparity exists.

The low end case,⁷² where the sentence adjudged was three months, involved a sailor who jumped overboard shortly after his ship set sail.⁷³ His reason for jumping was that his wife, of three

⁶⁷ Author used days in article 86 cases because many of the sentences are adjudged in days and not in complete months. Additionally by using days when the sentences are shorter it allows the reader to better visualize the disparity through the use of standard deviation.

⁶⁸ Data on file with the author.

⁶⁹ *Id.*

⁷⁰ *See* Immel, *supra* note 13, at 189.

⁷¹ *Id.*

⁷² *United States v. Buren C. Wimp*, 4 C.M.R. 509 (1952).

months, learned the day prior to his departure that she was pregnant, but was in grave danger of losing the baby.⁷⁴ Her doctor had confined her to bed because she was hemorrhaging and feared a miscarriage; this was to be their first child.⁷⁵ The sailor was gone for only one day before he turned himself into Coast Guard authorities.⁷⁶ Next the high end case is discussed.

In the high end case,⁷⁷ where the sentence adjudged was five years, the soldier in question left his unit to return home and assist his family, who had fallen upon grim times. Prior to his departure, he had served in combat for eleven months in Korea, participated in two offensives, and received two bronze stars; after which he had rotated back to the states and was preparing to deploy to Europe.⁷⁸ His father who owned a 138 acre farm and had been ill for fifteen months, recently had surgery for cancer; in addition his mother was physically unable to perform the necessary work.⁷⁹ As a result, the soldier's assistance was needed on the farm or the family would lose it, and they would be unable to pay the father's medical bills.⁸⁰ The soldier stated that he had no intention of shirking his deployment to Europe and had every intention of returning. He had also attempted to obtain a hardship discharge, but it was not approved.⁸¹ In this instance the soldier was gone for a little less than six months before he turned himself into the Army.⁸²

⁷³ On appeal, the court concluded that the trial court erred in finding that the accused had the intent or frame of mind necessary to constitute the charge of desertion. To court instead found the accused guilty of the lesser charge of absence without leave. *Id.* at 511-12.

⁷⁴ *Id.* at 510.

⁷⁵ *Id.*

⁷⁶ *Id.* at 511.

⁷⁷ *United States v. Private Calvin Guthrie*, 12 C.M.R. 299 (1953).

⁷⁸ *Id.* at 300-01.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

Finally the analysis, as previously stated, will focus on whether reasons exist to justify the vast disparity in the sentence adjudged. In the low end case there were several mitigating factors present: he was gone only one day, he had spoken to his commander about the situation, and his pregnant wife was ill. Thus, it was reasonable for the sentencing authority to justify a light sentence. Similarly though, in the high end case there were mitigating factors present: the soldier's father was very ill, the family was in risk of losing their farm, he was a Korean War veteran with two bronze stars, he intended to return after he had assisted his family, and he had attempted to obtain a hardship discharge. In both cases they intended on returning and had serious family problems that arguably, if not resolved, could have negatively impacted their performance.

In summation, while the soldier in the high end case was away longer, there are no other aggravating factors to justify such a severe sentence; but there were several mitigating factors that would have warranted a reduction in the sentence adjudged. Thus, because the cases are similar, the mitigating factors are comparable, and there were no aggravating factors present to warrant the high end sentence: there is no justification for the sentencing disparity.

V. Replacing the Current Punishment with Uniform Sentencing Guidelines

Uniform sentences in desertion and AWOL cases can improve military discipline; creating a just system whereby all service members will be treated uniformly and not subject to the passions of the sentencing authority.⁸³ This section will present new sentencing guidelines for desertion and AWOL and explain why they create a more uniform system.

First, article 85, desertion, guidelines will be presented. The current *Manual for Courts-Martial* only details the maximum punishment the sentencing authority may give the accused.⁸⁴ Currently, it allows for death or life in prison for desertion in time of war, five years for the intent to

⁸³ See BENCHBOOK, *supra* note 15.

⁸⁴ See MANUAL 2002, *supra* note 7, at app. 12.

avoid hazardous duty or shirk important service, three years when the accused intended never to return to military control with desertion terminated by apprehension, and finally two years when desertion is terminated by means other than apprehension.⁸⁵

First, the proposed guidelines differ from the current in that they remove death and life imprisonment as sentences. Second, the guidelines separate desertion into two categories: the first is desertion with the intent to remain away permanently⁸⁶ and the second is where the goal is to avoid hazardous duty (AHD) or shirk important service (SIS).⁸⁷

In regular desertion cases where the service member deserts and intends to remain away permanently, a simple formula was created to determine a sentence. The length of time the service member is away from military control is matched with the corresponding heading in the proposed sentencing matrix, as seen in appendix A, to determine the range of the proposed sentence. Next, if desertion is terminated by apprehension, this fact will be seen as an aggravating factor and a mandatory additional six months would be imposed on the sentence adjudged. For example, a soldier deserts for fifteen months and is apprehended, the sentence will range from fourteen to sixteen months, this allows some discretion on the part of the sentencing authority, plus six months because of the aggravating factor. Therefore, the sentence adjudged will be between twenty and twenty-two months.

Because most desertions in AHD and SIS cases occur when units are deploying to hostile territory or to avoid combat missions,⁸⁸ the accused is not normally away from military control for an extended period. As a result of this, the formula is adjusted to compensate so as not to allow these service members a lighter sentence. In determining a sentence, the length of time away is

⁸⁵ *Id.*

⁸⁶ Major Wayne Anderson, *Unauthorized Absences*, 1989 ARMY LAW. 3, 12 (1989).

⁸⁷ This category will include cases that arise during the time of war. *Id.* at 11-12.

⁸⁸ *Id.*

again taken from the matrix. Those months are then added to the number of months the unit will be deployed.⁸⁹ Finally, twelve months are added to the sentence as a deterrent factor and if desertion was terminated by apprehension, an additional six months will be applied to the overall sentence. For example, a soldier deserts when his unit is deploying for twelve months and is gone for one month. His sentence will be as follows: two to four months for the time away, plus twelve months for the time his unit was deployed, with an additional twelve months as the deterrent factor. As the soldier was not apprehended, the total sentence would be between twenty-six and twenty-eight months.

Next article 86, AWOL guidelines will be presented. The current guidelines call for one month if the accused is gone not more than three days, six month if the accused is gone more than three days but not more than thirty, one year if gone for more than 30 days, and one year six months if gone for more than thirty days and terminated by apprehension.⁹⁰ Under the current guidelines, there is no incentive for a service member to return to military control if gone for more than thirty days and additionally someone gone for thirty-one days could receive a stiffer sentence than someone gone for 250 days.

Under the proposed changes, as shown in Appendix B, the time away is graduated to give service members who go AWOL an incentive to return, as well as providing uniformity to sentences. With the proposed changes, two service members that are gone for 180 days will both receive between six and seven month sentences. No longer will a service member gone for four years receive a similar sentence of a service member gone one month.⁹¹

⁸⁹ This is done so a service member does not possibly receive a lighter sentence than the unit was in hostile territory. If they could possibly receive a lighter sentence it might seem like a better choice for some to desert.

⁹⁰ See MANUAL 2002, *supra* note 7, at app. 12, article 86.

⁹¹ Compare United States v. Andre A Williams, 21 M.J. 360 (1986) (adjudging an original sentence of two months confinement when the service member had been AWOL for three years), with United States v. Private Milton B. Coglin, 10 M.J. 670, 671 (1981) (adjudging an original sentence of four months confinement when the service member had been AWOL for 19 weeks).

The benefit of the proposed guidelines is that sentencing uniformity will be achieved and still uphold the long standing rule that other case's sentences not be given to the sentencing authority.⁹² Under the proposed guideline, the length of time the service members remain away and whether they are apprehended are the determining factors surrounding the amount of time the sentencing authority adjudges. With the proposed guidelines, service members will know the penalties they face before they go AWOL or desert and are not misguided by the few cases where the penalty was very light. Finally, at long last, the punishment will fit the crime.

VI. Conclusion

In conclusion, returning sentencing uniformity to the *Uniform Code of Military Justice* will punish the accused based on the severity of the crimes they commit not based on the passions of the sentencing authority. As desertion and to a lesser extent AWOL is a crime the service member actively chooses to commit,⁹³ knowing the severity of the sentence may in itself prevent it from happening. The guidelines created will also provide service members an incentive once the crime is committed to return to military control, preventing apprehension and thus a longer sentence. The military prides itself on uniformity and treating everyone equally, just because a crime is committed does not mean they should suddenly be an individual once more.

⁹² United States v. Mamaluy, 27 C.M.R. 176, 180 (1959).

⁹³ See Anderson, *supra* note 86 (explaining the elements required for article 85, desertion, and article 86, absent without leave).

APPENDIX A

Proposed Sentence Matrix

Time Away from Military Control	Proposed Sentence
0 months - 6 months	2 - 4 months in prison
6 months - 12 months	8 - 10 months in prison
12 months - 18 months	14 - 16 months in prison
18 months - 24 months	20 - 22 months in prison
< 24 months	26 months in prison

Aggravating Factors (Apprehension)
Add 6 months

Normal Desertion Cases
(Length of time from Matrix + Aggravating Factors)

Example: Gone 8 months and apprehended: 8-10 months PLUS 6 months = 14-16 months sentence

AHD/SIS Cases

((Length of time from Matrix) + ((Amount of time unit will be deployed (12 mth assumption)) + ((12 months (Deterent Factor)) + (Aggravating Factors))

Example: Gone 3 days, unit deployed 12 months, no apprehension: 2-4 months PLUS 12 months PLUS 12 months = 26-28 month sentence

APPENDIX B

Proposed Sentence Matrix

Time Away From Military Control	Proposed Sentence
Less than 30 days	1 Month
31 days - 90 days	2 - 3 Months
91 days - 150 days	4 - 5 Months
151 days - 210 days	6 - 7 Months
211 days - 290 days	8 - 9 Months
291 days - 365 days	10 - 11 Months
More than 365 days	1.5 Years

Aggravating Factors (Apprehension)

Add 3 months

Example: Gone 180 days and apprehended: 6-7 months PLUS 3 months = 9-10 months sentence