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NONJUDICIAL PUNISHMENT UNDER ARTICLE 15 OF THE UNIFORM CODE OF MILITARY JUSTICE: CONGRESSIONAL PRECEPT AND MILITARY PRACTICE*

Article 15 of the Uniform Code of Military Justice is a congressional enactment that gives military commanders authority to punish subordinates without judicial process. Article 15 serves two main statutory purposes: first, it enables commanders to deal swiftly with minor crimes; second, it protects subordinates from the stigma of a court-martial conviction.

The Armed Forces have, however, used nonjudicial punishment in ways not intended by Congress. Punishment does in fact stigmatize and article 15 has been used to circumvent legal safeguards available at courts-martial. Moreover, the Navy's use of article 15 has in some tragic instances led to death and serious injury. Congressional action is needed to curb abuse of the nonjudicial punishment power.

INTRODUCTION

The United States military has had a form of summary nonjudicial punishment since the Revolutionary War. In 1775 the Continental Congress authorized Navy commanding officers to punish sailors at a proceeding known as "captain's mast." Customs and usages of the Service set vague penalty limits. Regulations and laws were later passed that did specify what captains could do at mast. 2

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1. The Marine Corps refers to the nonjudicial punishment hearing as "office hours," and the Army calls it "company punishment."

2. H.R. REP. No. 1612, 87th Cong., 2d Sess. 2 (1962). Historical facts on the development of nonjudicial punishment prior to 1950 are taken from this source.

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The Articles of War, first passed by Congress in 1775, gave the Army much less authority than the Navy to punish its members without judicial process. In 1916 the Articles of War as amended permitted Army commanders to restrict the liberty of enlisted members for short duration, give them extra duty, withhold privileges, and issue reprimands. Periodic changes to the Articles after 1916 extended the punishment to officers and allowed forfeiture of small amounts of pay. The Air Force became subject to the Articles of War in 1947.

In 1950 Congress approved legislation that defined what commanders of all Services could "award" as nonjudicial punishment. Article 15 of the Uniform Code of Military Justice (the Code) specified maximum punishments that were categorized according to the rank of both the offender and the officer imposing punishment. Officers could have privileges withheld for two weeks, be restricted to an area such as a base for two weeks, or be ordered to forfeit one-half of one month's pay for one month. Enlisted personnel could be confined for seven days (three days on bread and water) if attached to or embarked in a vessel. They could also be reduced in rank, be given two hours extra duty each day for two weeks, or be restricted for two weeks. Punishments could not be combined. Navy commanders could impose the harsher penalty of confinement on bread and water because Congress believed that "the nature of naval operations at sea makes these punishments desirable in such circumstances. . . ."

A 1962 amendment to article 15 significantly expanded the authority of commanders in all Services to award nonjudicial punishment, while at the same time increasing procedural safeguards for the accused. The 1962 amendment served two main purposes. The first was to "enable [commanders] to deal with minor disciplinary problems and offenses without resort to trial by court-martial." The second was to prevent the stigma of a court-martial, "which . . . [impairs] the efficiency and morale of the person

3. "Award" is used here in that peculiar military sense of winning a punishment rather than a prize.
5. Id. art. 15(a)(1). This punishment could only be imposed if the officer awarding it was one who exercised general court-martial jurisdiction, normally an admiral or a general.
6. Id. art. 15(a)(2), 64 Stat. 113.
concerned."10

Stiffer penalties encompassed denial of liberty, property, and status.11 These penalties could be combined and apportioned.12 The greater the penalty allowed, however, the higher the rank requirement for the officer assessing the penalty. This was to ensure "that the maximum authority given will be exercised only by officers of maturity and experience."13

Punishments continued to be categorized according to rank. An officer, for example, may now be punished by arrest in quarters for thirty days and forfeiture of one-half of one month's pay for two months. This punishment may only be imposed by a general, admiral or any officer exercising general court-martial jurisdiction.14 Admonitions or written reprimands may be issued to an officer by any commanding officer.15 Enlisted members may be punished by "correctional custody" for thirty days, forfeiture of one-half of one month's pay for two months, and loss of rank.16 Navy enlisted members may still be confined for three days on bread and water if attached to or embarked in a vessel.17

The role of the commander at an article 15 hearing is that of judge, jury, prosecutor, and defense counsel.18 He considers the evidence under exceedingly flexible rules that vary among and within the Services.19 Congress provided two safeguards against

10. S. Rep. No. 1911, supra note 9, at 5 and 2381; see also H.R. Rep. No. 1612, supra note 2, at 3.
12. Id. art. 15(b), 10 U.S.C. § 815(b).
15. Id. art. 15(b), 10 U.S.C. § 815(b).
19. Compare MCM, 1969, para. 133a with MCM, 1969, para. 133b. Air Force commanders imposing nonjudicial punishment need not do so pursuant to a personal hearing for the accused, unless such a hearing is requested. At this hearing, the commander is under no duty to present facts of the case against the accused. The accused may present evidence in his behalf. The Navy commander must, except under unusual circumstances, conduct a personal hearing for the accused and must consider all facts at that hearing bearing on guilt or innocence. Within the Navy some general court-martial authorities require that commanders imposing nonjudicial punishment establish the accused's guilt beyond a reasonable doubt,
abuse of this sweeping power: first, any service member, except those attached to or embarked in a vessel, may elect trial by court-martial in lieu of an article 15 hearing; second, all members have the right to appeal nonjudicial punishment to the superior officer of the commander who imposes punishment. The Code does not provide for judicial review of article 15 proceedings, and neither the Service Courts of Military Review or the Court of Military Appeals will hear appeals under the All Writs Act. Nevertheless, some federal district courts have considered appeals and the Court of Claims will hear cases if punishment affects pay and allowances.

Challenges to the constitutionality of article 15 have been unsuccessful. In Middendorf v. Henry, for example, the Supreme Court held that an accused at either a summary court-martial or while others set no legal standard at all. Compare Commander Naval Surface Force, United States Pacific Fleet, Legal Briefing Memorandum for Prospective Commanding Officers, para. 3a (rev. Jan. 5, 1977) with Commander Naval Surface Force, United States Atlantic Fleet, Instruction 5400.1a, art. 2708a (1978).

21. Id. art. 15(e), 10 U.S.C. § 815(e). Congress was also concerned that a commander might shield a subordinate from court-martial by treating major offenses as minor at an article 15 hearing. To reduce this possibility, article 15(f) provides: "The imposition . . . of punishment under this article for any act or omission is not a bar to trial by court-martial for a serious . . . offense growing out of the same act or omission, and not properly punishable under this article . . . ."

22. Stewart v. Stevens, 5 M.J. 220 (C.M.A. 1978) (order dismissing petition for extraordinary relief); Rogers v. St. George, 6 M.J. 558 (N.C.M.R. 1978). UCMJ, art. 66, 10 U.S.C. § 866 (1970), provides that certain specified court-martial sentences may be appealed to Army, Navy and Air Force Courts of Military Review that are staffed by active-duty military judges. UCMJ, art. 67(b), 10 U.S.C. § 867(b) (1970), specifies that certain decisions of these courts of military review may be further appealed to the civilian Court of Military Appeals.

24. See, e.g., Hagarty v. United States, 449 F.2d 352 (Ct. Cl. 1971); Conn. v. United States, 376 F.2d 876 (Ct. Cl. 1967); see also Gross v. United States, 531 F.2d 482 (Ct. Cl. 1976) (confirming court's jurisdiction to hear appeal from special court-martial, where sentence extends to forfeiture of pay and allowances); Jones v. United States, 499 F.2d 631 (Ct. Cl. 1974) (confirming court's jurisdiction to rule on constitutionality of the summary court-martial).

27. Constitutional challenges such as Middendorf to the summary court-martial have generally subsumed nonjudicial punishment. It is argued that both proceedings deny basic due process. The summary court-martial is the lowest forum in the three-tiered military courts-martial system. It ranks below the special and
an article 15 hearing does not have a right to counsel under the fifth and sixth amendments. The Court reasoned that nonjudicial punishment is given pursuant to an administrative hearing, such as one held on revocation of probation, and is not a criminal proceeding under the sixth amendment: “Article 15 punishment, conducted personally by the accused’s commanding officer, is an administrative method of dealing with the most minor offenses.”28 The Court emphasized, as it has traditionally done,29 the distinctive quality of military society with its need for swift, certain discipline.30 The Court also stressed that counsel was unnecessary, because neither nonjudicial punishment nor conviction by a summary court-martial carries a “stamp of bad character.”31

There are indications, however, that the Armed Forces have not used nonjudicial punishment as intended by Congress, and that punishment does in fact carry a stamp of bad character. This Comment examines how nonjudicial punishment has been misused and makes recommendations to curb this misuse. Through an analysis of legislative history, Executive orders, current military regulations, and judicial decisions, the Comment focuses on the gap between congressional precept and military practice in the use of article 15. Particular attention is given misapplication of article 15 to circumvent jurisdictional demands of courts-martial, the misuse of nonjudicial punishment as proof of bad character, and excesses by the Navy in the administration of correctional custody—a form of nonjudicial punishment. The Comment also examines the assumption that there are unique demands of shipboard duty, which justify denying those sailors attached to or embarked in a vessel the right to refuse an article 15 hearing.

**WHAT IS A MINOR OFFENSE?**

Congress limited the scope of authority under article 15 to only those acts or omissions that were minor violations of the Code. Both the original enactment and the 1962 amendment place this

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28. 425 U.S. at 31-32 (emphasis added).
30. 425 U.S. at 45.
31. Id. at 39.
restriction on the commander.\textsuperscript{32} Although this is a limitation of key importance the Code does not define a minor offense. Nevertheless, it appears from the legislative history of both the original enactment and the 1962 amendment that Congress believed a minor offense to be “misconduct not involving moral turpitude or any greater degree of criminality than is involved in the average offense tried by summary court-martial.”\textsuperscript{33}

This definition was extended to permit some discretion by the commander in determining whether an offense was minor. He could consider, for example, the nature, time, and place of the crime, together with the person committing it.\textsuperscript{34} This subjective standard was strictly limited to only those offenses that could not be objectively categorized as punishable by “death . . . or . . . confinement for one year or more. . . .”\textsuperscript{35}

The House subcommittee that held extensive hearings on the 1962 amendment understood the term “minor” in the proposed

\begin{itemize}
\item \textsuperscript{32} UCMJ, art. 15(a), 64 Stat. 112 (1950); UCMJ, art. 15(b), 10 U.S.C. § 815(b) (1970).
\item \textsuperscript{33} U.S. DEP'T OF THE ARMY, THE ARMY MANUAL FOR COURTS-MARTIAL, para. 118 (1949). The congressional report on the original article 15 adopted this definition to specify what was meant by the term “minor” in the legislation. S. REP. No. 486, supra note 7, at 2235. The definition was carried over from the Army Manual to the new Defense Department Manual for Courts-Martial, which contained the Executive order that implemented the UCMJ in 1951. The 1951 definition stated: Whether an offense may be considered “minor” depends upon its nature, the time and place of its commission, and the person committing it. Generally speaking, the term includes misconduct not involving moral turpitude or any greater degree of criminality than is involved in the average offense tried by summary court-martial. An offense for which the punitive article authorizes the death penalty or for which confinement for one year or more is authorized is not a minor offense. Offenses such as larceny, forgery, maiming, and the like involve moral turpitude and are not to be treated as minor. Escape from confinement, willful disobedience of a non-commissioned officer or petty officer, and protracted absence without leave are offenses which are more serious than the average offense tried by summary courts-martial and should not ordinarily be treated as minor. U.S. DEP'T OF DEFENSE, THE MANUAL FOR COURTS-MARTIAL, para. 128b (1951) (emphasis added).
\end{itemize}
legislation to be as defined in the 1951 Manual for Courts-Martial.\textsuperscript{36} The subcommittee chairman, Mendel Rivers, believed the dividing line between minor and major crimes to be analogous to that separating misdemeanors from felonies.\textsuperscript{37} Congress did not suggest during the hearings and debates that article 15 should be used for felonies. On the contrary, the amendment permits reviewing authorities to set aside nonjudicial punishment improperly awarded for a serious offense and try that offense at a court-martial.\textsuperscript{38}

Congress was also concerned that the Services might, through regulation and Executive order, expand the limits of punishment. This was a concern strongly argued before Congress by the American Legion, an organization that opposed several parts of the original Defense Department proposal to amend article 15.\textsuperscript{39} Congressman Rivers agreed with the Legion position, because he thought it preferable to "live under the law [rather] than under Executive order or regulation."\textsuperscript{40}

\begin{itemize}
\item \textsuperscript{36} On the subject of what constituted a minor offense, the leading military spokesman for the amendment, Major General Kuhfeld, USAF, emphasized that "minor" meant what was stated in the 1951 Manual. This was brought out in the following dialogue between the General and members of the House subcommittee:

\begin{quote}
Mr. Hardy: General, one thing I would like to understand and it may have already been cleared up. This whole article 15 refers to minor offenses.

General Kuhfeld: That is right, sir.

Mr. Hardy: Now how is the term "minor offenses" defined? Is it defined in the act?

General Kuhfeld: It is not defined in the act specifically, but it is defined in the [1951] Manual . . . the definition that has been used and is now in the Manual is that an offense which normally would be considered by a summary court, which is the equivalent of a police court in civilian life, just a police court.

\ldots

General Kuhfeld: Mr. Hardy, here is the definition that we have been following all the time, that is in the Manual . . .

Mr. Rivers: Then you get into the area of a misdemeanor or a felony.

General Kuhfeld: Yes, sir.
\end{quote}

\begin{itemize}
\item \textsuperscript{37} \textit{Id.} A federal felony is an offense punishable by death or imprisonment for more than one year; all other offenses are misdemeanors. 18 U.S.C. § 1 (1970).
\item \textsuperscript{38} UCMJ, art. 15(f), 10 U.S.C. § 815(f) (1970).
\item \textsuperscript{39} Letter from Mr. John Finn to Hon. L. Mendel Rivers (Apr. 5, 1962), reprinted in H.R. REP. No. 1612, supra note 2, at 507.
\item \textsuperscript{40} 1962 House Hearings, supra note 36, at 4900.
\end{itemize}
Owing to this concern, shared by the Senate, article 15 spells out in detail how the President and Service Secretaries may implement the law. No expansion of authority is allowed, only limitations. Nonetheless, the 1963 Executive order that put the amendment into effect did expand the commander's authority by re-defining a minor offense. This re-definition and its adoption in later Service regulations was done without congressional approval, and the felony-misdemeanor distinction relied upon by Congressman Rivers and others has been obliterated.

The 1969 Manual for Courts-Martial, which incorporates the 1963 redefinition, states that the "term [minor] ordinarily does not include misconduct . . . [punishable] by . . . confinement for more than one year." This insertion of the qualifier, ordinarily, removes the absolute bar against nonjudicial punishment for crimes punishable as felonies in effect at the time of the 1962 amendment. A commander may now choose to treat such offenses as minor and within his article 15 jurisdiction. The Armed Forces encourage him to do so by emphasizing that consideration of maximum imposable sentences in determining whether an offense is minor is "not a hard and fast rule. . . ."

It has been argued that despite any express authority to extend article 15 jurisdiction by broadening the meaning of a minor offense, such a broadening works to the advantage of the accused. It is therefore in keeping with the spirit of the legislation. This argument points out that "Congress was . . . concerned lest the President and the military . . . attempt to expand nonjudicial punishment to the detriment of the accused." If courts accept punishment imposed under the broadened definition as a bar to subsequent court-martial, then "the problem is somewhat circular

41. Proposed Amendment to Article 15 of the Uniform Code of Military Justice: Hearings on H.R. 11257 Before Subcomm. of the Senate Armed Services Comm., 87th Cong., 2d Sess. 6, 24 (1962) [hereinafter cited as Hearings on H.R. 11257].
42. "Under such regulations as the President may prescribe, and under such additional regulations as may be prescribed by the Secretary concerned, limitations may be placed on the powers granted by this article. . . ." UCMJ, art. 15(a), 10 U.S.C. § 815(a) (1970) (emphasis added).
44. See, e.g., United States Army Regulation (AR) 27-10, change 12, para. 3-3d (Dec. 12, 1973).
45. MCM, 1969, supra note 18, para. 128b.
46. AR 27-10, change 12, para. 3-3d (Dec. 12, 1973).
47. Captain Miller, A Long Look at Article 15, 28 MIL. L. REV. 37, 65 (1965).
... [because] the broadened concept ... seems to have been contemplated by Congress, and furthers Congress' announced remedial purpose of the new legislation.48

This conclusion raises two important questions. Have the courts in fact accepted the expanded determination of minor as a bar to trial by court-martial for the same offense? Does the expanded article 15 jurisdiction truly benefit the accused in most cases? If the answer to these questions is “no,” then the problem of the Executive exceeding the authority granted by Congress is not at all circular: the benign aspect of article 15 has been seriously eroded.

Military appellate court decisions since 1960 that deal with the issue of what constitutes a minor offense reveal that on balance the accused has fared badly.49 In handing down these decisions, the courts have adopted a subjective approach to determine whether an offense is minor. With one exception,50 the courts have rejected the notion that minor offenses are equivalent to misdemeanors under federal civilian law.

United States v. Fretwell51 is the leading precedent for a subjective standard to judge if an offense is minor and within article 15 jurisdiction.52 Lt. Fretwell was charged with being drunk on duty while his ship was in drydock for repairs. He was first given non-judicial punishment by his commander, but the commander's superior determined that the offense was not minor and convened a general court-martial under article 15(f). The Court of Military Appeals affirmed Lt. Fretwell's conviction and found that the commander had mistakenly decided the offense was minor. The non-judicial punishment was not a bar to later trial. The court made

48. Id.
51. 11 C.M.A. 377 (1960) (2-1 decision; Ferguson, J., dissenting).
52. See cases cited supra note 49.
this finding although the crime was punishable by neither a dishonorable discharge nor by confinement for more than one year. The court considered maximum imposable punishments, but the two-judge majority placed much greater weight on subjective elements: the time and place of the offense, the accused, and the degree of criminality involved. The dissenting judge wrote a strong opinion that supported the felony-misdemeanor distinction for minor crimes.

In the civilian judiciary, the Court of Claims initially adopted a position similar to that of the Fretwell dissent. In Hagarty v. United States the court relied on a largely objective standard to hold that a commander had abused his discretion by treating the offense of fraud as minor. Unlike the situation in Fretwell, this abuse of discretion harmed the accused by denying him rights available at a court-martial.

Petty officer Hagarty had served the Navy as a steward for more than nineteen years without disciplinary problems. He was an E-6 (a senior enlisted grade just below that of chief petty officer), and was eligible to retire in this grade upon completion of twenty years' active duty. Shortly before his retirement he was charged with improperly accounting for $600.00 in receipts and disbursements. He was taken to captain's mast aboard the USS Keller; because he was attached to a ship he could not refuse mast. No firm evidence was presented to support the charge. Nonetheless, "the Captain pounded his fists together and stated that plaintiff's case called for a bust. ..."

The results of this "bust" (a reduction in pay grade to E-5) reached far beyond the few months that Hagarty had left in the Navy. His retirement pay was reduced because he would draw this pay over his lifetime at a lower rate. Depending on how long he lived, this could have amounted to several thousand dollars.

53. 11 C.M.A. at 379-80.
54. In his dissent, Judge Ferguson rejected the majority position that a subjective yardstick should be used to measure the severity of an offense. He criticized this approach as "personal justice with a vengeance [that] effectively substitutes for the judgment of Congress and the President our individual reaction as judges to the facts of each case." 11 C.M.A. at 382. Judge Ferguson would have treated felonies as serious offenses and all others as minor:

It is . . . apparent that the maximum punishment thus authorized falls below the traditional dividing line between misdemeanors and felonies . . . we must hold that drunkenness on duty in time of peace is, as a matter of law, a 'minor offense' . . . . Neither a dishonorable discharge nor confinement in excess of one year is authorized for the delict.

Id. at 383; see also United States v. Harding, 29 C.M.R. 490, 493 (C.M.A. 1960) (2-1 decision; Ferguson, J., dissenting).
55. 449 F.2d 352 (Ct. Cl. 1971).
56. Id. at 354.
57. See id. at 356.
The actual and potential loss of earnings gave Hagarty standing for an appeal to the Court of Claims.\textsuperscript{58}

In finding for Petty Officer Hagarty, the court held that the offenses charged were not minor. More importantly, the court concluded "that the requirement that offenses be minor is jurisdictional, so that nonjudicial punishment imposed under this article for an offense which is not minor is void and invalid. . . ."\textsuperscript{59} The court suggested that special circumstances might qualify a case as minor despite maximum punishments. The court emphasized, however, that "this interpretation necessarily requires that the record in each case must establish proof that the offense charged was a 'minor' offense."\textsuperscript{60}

The Court of Claims found such circumstances in its most recent interpretation of what constitutes a minor offense. In 1980 the court held that purchase and use of heroin by a sailor in Hong Kong was a minor crime, although this crime, if tried by a general court-martial, is punishable by a dishonorable discharge and confinement at hard labor for up to two years.\textsuperscript{61} The court quoted with favor the 1969 Manual definition of a minor offense and stressed that the qualifier, \textit{ordinarily}, gave the commander article 15 jurisdiction over an otherwise serious crime.\textsuperscript{62}

In sum, the Court of Claims now takes a position virtually the same as that of the Court of Military Appeals in \textit{Fretwell} and its progeny. This position is not based on congressional enactment. It relies instead on an Executive broadening of the term "minor" that now appears in the 1969 Manual. This re-definition has worked largely to the detriment of the service member caught up in an article 15 proceeding, and is particularly harmful to the sailor on a ship who cannot demand a court-martial. The practice of both civilian and military courts with respect to article 15 jurisdiction has not, on the whole, favored the accused. Nor has this practice "distinctly [furthered] Congress' announced remedial

\textsuperscript{58} See supra text accompanying note 24.
\textsuperscript{59} 449 F.2d at 359.
\textsuperscript{60} Id.
\textsuperscript{61} Capella v. United States, 624 F.2d 976 (Ct. Cl. 1980).
\textsuperscript{62} Id. at 978. Unlike the \textit{Hagarty} decision, the court in \textit{Capella} upheld the commander's decision and made it clear that the subjective standard controlled: "[W]e think that the commanding officer has broad discretion to determine whether [an] . . . offense is sufficiently serious to warrant court-martial rather than nonjudicial punishment under Article 15." Id. at 978.
ARTICLE 15 AS A MEANS TO CIRCUMVENT JURISDICTIONAL LIMITS PLACED ON COURTS-MARTIAL

Four jurisdictional requirements must be satisfied before a person may be tried by court-martial. The court must be convened by an officer empowered to do so; membership must be correct with regard to numbers and competency; the court must have personal jurisdiction; the court must have jurisdiction over the offense charged, i.e., the offense must be a violation of the Code and "service connected." The requirements for establishing jurisdiction over the person and the offense have become increasingly burdensome for the military.

Article 15 offers a convenient means to reduce the risk that an offense will be dismissed on either of these grounds. It is particularly attractive for the Navy because of the proviso in article 15(a) that persons attached to or embarked in a vessel may not obtain the safeguards of a court-martial. At first glance it may seem that there is a significant loss of punishment power by disposing of a court-martial offense at an article 15 hearing, but the Navy has attached administrative consequences to these hearings that make them much more potent than provided for in the Code. Before discussing specific examples of how the Navy has proceeded in this area, it will be useful to briefly review major cases that have shaped the law of personal and subject matter jurisdiction.

Jurisdiction over the person begins at the time of enlistment and ordinarily ends with the delivery of discharge papers. The traditional rule was that fraudulent enlistment would not void an enlistment contract if it could be shown that the enlistee had accepted benefits of the Service such as pay and allowances. The Court of Military Appeals carved out an important exception to this "constructive enlistment" theory in two decisions: United States v. Catlow and United States v. Russo. These cases held that where a person was coerced to enlist, or enlisted through willful misconduct on the part of the recruiter, the enlistments were void. Any attempt by the military to later prosecute people serving under these contracts would fail for lack of personal jurisdiction.

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63. Miller, supra note 47, at 65.
64. MCM, 1969, supra note 18, para. 8.
65. Id. paras. 9, 11.
68. 50 C.M.R. 650 (C.M.A. 1975).
Recruiter misconduct turned out to be wide-spread and "Catlow-Russo" motions were routinely filed and upheld. Even if these motions were denied, it was costly to bring recruiters great distances to testify about their conduct in the enlistment of an accused. Disposition of an offense at a counselless article 15 hearing greatly reduced the chance that this legal issue would be raised. If the issue was raised, the commander would be under no obligation to bring the recruiter to testify as required at a court-martial.

Article 5 of the Code states that the Code applies in all places. Subject matter jurisdiction had therefore simply been a question of establishing that a person subject to the Code had committed an offense under the Code. It did not matter where the offense was committed or under what circumstances. The Supreme Court changed this by its 1969 decision in *O'Callahan v. Parker,* which required that an offense be "service connected" before it could be tried by court-martial. The Court pointed out that members of the Armed Forces tried by court-martial were denied important constitutional rights to indictment by grand jury and trial by a jury of peers. To guarantee these rights as often as possible, the Court held that offenses cognizable in civilian courts should be tried in these courts, if the nature, time, and place of

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69. The Navy found recruiter misconduct to be so burdensome on subsequent courts-martial of illegally enlisted service members that it lobbied Congress to change the law. The Chief of Naval Operations hailed this change as "closing the Catlow/Russo loophole, with resulting favorable impacts on good order and discipline." T. HAYWARD, CNO REPORT (FY 1981) (a report by the Chief of Naval Operations to Congress prepared by the Navy Internal Relations Activity, Office of the Chief of Information, Washington, D.C.). Recruiter misconduct itself appears to march on. See, e.g., NAVY CONCEDES RECRUITERS HELPED IN TEST CHEATING, San Diego Union, June 6, 1981, at A3, col. 1; see also STERRIT, RECRUITER MISCONDUCT, 30 JAG J. 105 (1978).

70. See, e.g., DEPT OF THE NAVY, MANUAL OF THE JUDGE ADVOCATE GENERAL, § 0101d(2) (1978). Section 0101d(2) states:

The elemental hearing requirements of paragraph 133b, MCM, are expanded to provide that when there are controverted questions of fact concerning the suspected offense, witnesses, if present on the same ship, camp, station, or otherwise available, shall be called to testify if this can be done at no cost to the Government. If an accused aboard ship wished to raise the issue of a coerced enlistment or recruiter misconduct, he would have no right under this provision to compel testimony of a recruiter if such testimony could be had only by bringing the recruiter to the hearing at government expense.


73. Id. at 273-74.
the crime did not show a “service connection.” A later Supreme Court case, _Relford v. Commandant_, more precisely defined “service connection.”

Following _O'Callahan_ and _Relford_, the Court of Military Appeals generally ruled than any crime not petty, which is committed by Armed Forces personnel in the United States outside a military base, is not “service connected” if subject to prosecution in a civilian court. This approach made it particularly difficult for the military to prosecute off-base drug violations punishable under the Code by more than six months’ confinement. Additionally, if these violations were for use and possession only, it was unlikely that civilian prosecutors would bring them to trial. This was especially true in some states with large military populations such as California and Hawaii.

Shortly after _O'Callahan_, the Secretary of the Navy sent a message to all commanders explaining the impact of that decision on the court-martial system. The message was careful to point out that “punishment under Article 15, UCMJ, is not affected by the decision.” Under this authority, Navy commanders have employed article 15 to avoid jurisdictional and other “technical” requirements of courts-martial.

Because the Navy does not publicly report on this practice, it is

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74. Id. at 272.
75. 401 U.S. 355 (1971).
76. See id. at 365.
79. In a recent, major departure from its position that off-base drug activity by military people was generally not “service connected,” the Court of Military Appeals held that “almost every involvement of service personnel with commerce in drugs is ‘service-connected.’” United States v. Trottier, 9 M.J. 337 (C.M.A. 1980).
81. Secretary of the Navy message 052224Z of June 1969 (SECNAVNOTE 5520).
82. A Navy commander, writing in a professional journal, attacked the Court of Military Appeals for its “technical requirements [that have] removed the line officer from the military legal system.” Commander Bonds, _Punishment, Discipline, and the Naval Profession_, NAVAL INST. PROC. Dec. 12, 1978, at 48. Commander Bonds added that “Captain's Mast is the most valuable tool remaining to those responsible to the nation for discipline in the military service.” _Id._ at 49.
difficult to calculate how often mast is used to avoid dismissal of charges as a matter of law at courts-martial. Examples do, however, surface occasionally to confirm the Navy's use of nonjudicial punishment in this fashion.

A Navy man provided such an example when he petitioned the Court of Military Appeals for extraordinary relief from nonjudicial punishment. Petty officer Paul Stewart was taken to mast for six off-base marijuana offenses. His commanding officer had first asked Navy lawyers to prosecute the offenses at a special court-martial. They told him that lack of "service connection" would frustrate attempts for a court-martial conviction. The commanding officer then disposed of the offenses at mast. Stewart requested trial by court-martial but this request was denied because he was attached to a ship.

The Code does not grant judicial review of mast proceedings. Stewart therefore petitioned the Court of Military Appeals under the All Writs Act. During jurisdictional hearings, Chief Judge Fletcher "asked a Navy lawyer if the Services believed that commanders could use article 15 to 'circumvent the law of the land. You believe this was the intent of Congress?'" Despite Chief Judge Fletcher's concern, the court ruled that it lacked jurisdiction to grant relief from nonjudicial punishment.

Recent command action aboard the USS Denver illustrates how article 15 may be used not only to defeat the "service connection" issue, but also a civilian dismissal of charges for insufficient evidence. Six crew members of the Denver were arrested while on liberty in Oakland, California, and charged with robbery. The charges stemmed from an incident that took place off-base, off-duty, and in a United States civilian jurisdiction empowered to try the felony charges. The charges were dismissed against three of

83. The facts of this case are taken from CMA Eyes Role in Article 15 Cases, Navy Times, May 15, 1978, at 26, col. 1.
84. For the Court of Military Appeals' reasoning to consider petitions under the All Writs Act, see McPhail v. United States, 1 M.J. 457 (C.M.A. 1976).
86. Stewart v. Stevens, 5 M.J. 220 (C.M.A. 1978) (order dismissing petition for extraordinary relief). Federal civilian courts, unlike the Court of Military Appeals, have accepted petitions for review of nonjudicial punishment. See, e.g., cases cited supra notes 23-24. At least one district court has held that "service connection" must be proved for a commander to have article 15 jurisdiction. See Bennett v. Tarquin, 466 F. Supp. 257, 258 (D. Hawaii 1979) (granting writ of habeas corpus as to three petitioners).
87. USS Denver message 021630Z of March 1981.
the crew members for insufficient evidence. Nonetheless, one of these crew members was later taken to mast and found guilty by the commanding officer, who wrote: "The dismissal of civil charges notwithstanding, more than sufficient documentary evidence existed to substantiate each charge." The commanding officer in this summary fashion substituted his judgment for that of a civilian officer of the court, who had not found probable cause to try the crew member.

Misuse of nonjudicial punishment is even more onerous because of serious administrative consequences that an awardee may suffer beyond the punishment itself. Another example of Navy practice in this area reveals how serious these consequences may be.

In 1978 seventeen sailors attached to the nuclear submarine, USS Thomas A. Edison, went to mast on charges for use and possession of marijuana. Owing to the nature of submarine duty, i.e., extended patrols, two crews are assigned each submarine. The Navy calls these crews, "blue" and "gold." While one crew is embarked in the submarine for the three-month patrol, the "off-crew" is ashore for training and leave. All persons taken to mast were members of the "blue" or "off-crew." Although these sailors were ashore in Hawaii when the alleged offenses took place, with their submarine several thousand miles away in Guam, the Navy denied their request for court-martial. The Navy proceeded on the narrow legal theory that the sailors had orders to the submarine, and were therefore "attached" to it regardless of its remote location. The sailors were punished based on the testimony of one shipmate. The most severe punishment was sixty days restriction, reduction in rank, and a fine of $300. But all punishments triggered automatic removal under Naval regulations from nuclear submarine duty. This removal cost the sailors their monthly submarine pay of sixty dollars. It also cost them their eligibility for a $15,000 reenlistment bonus.

This is not to suggest that the Navy be lenient with submarine sailors who use marijuana; however, given the harsh administrative penalties that attend punishment for "minor" drug offenses at mast, it appears that an adversary hearing such as a court-martial

88. Id.
89. USS Denver message 131601Z of March 1981.
90. The facts of this case are taken from Bennett v. Tarquin, 466 F. Supp. 257 (D. Hawaii 1979).
91. See id. at 260 for other indicia of "attachment" argued successfully by the government.
92. DEPT OF DEFENSE, MILITARY PAY AND ALLOWANCES ENTITLEMENT MANUAL art. 1130, table 2-1-1 (1978).
should be available before imposing these penalties. The fairness of this requirement is more compelling when it may be satisfied without impairing the readiness of a vessel actually at sea.

The legislative history of the 1962 amendment does not support a conclusion that Congress intended these harsh penalties to blossom from an award of nonjudicial punishment. The debates and hearings on the amendment emphasize time and again the short-term nature of punishment and its remedial, protective goals.

Representative Sikes, for example, stated that the amendment would ensure that “fine young men will escape bearing a mark on their record for the rest of their lives . . . matters of discipline will be better handled with less injury to the individual. . . .”93

Senator Douglas believed that the new article 15 would “strike a nice balance . . . between the need for military discipline and the protection of the rights of enlisted men particularly . . . we attempted to protect enlisted men from the arbitrary use of power by commanding officers.”94

Representative Rivers said that “it would be safe [to summarize] the position of all . . . that . . . the basic objective is to actually benefit the offender so that he will not have to be tried by a summary court. . . .”95

Contrary to this congressional emphasis on the benefits of article 15 for military people, all Services have used non-judicial punishment to inflict serious, long-term administrative and legal penalties. These penalties are next examined as they relate to unsuitability for government service and civilian employment, their use at courts-martial to support sentences that include dishonorable discharges, and their role in creating prison records for service women jailed in federal penitentiaries.

**Nonjudicial Punishment as a Stamp of Bad Character**

A major purpose of the 1962 amendment was to prevent minor disciplinary infractions from plaguing a service member throughout a military career and jeopardizing civilian employment.96 Congressional hearings and reports stress the importance of this

94. Id. at 17560.
95. 1962 House Hearings, supra note 36, at 4944.
purpose. Senator Ervin, chairman of the Senate Armed Services Committee, said: "I am much in favor of the overall objective of the bill. I think it is very unfortunate to have a tremendous number of courts-martial for relatively minor offenses. It makes a bad record against a man." 97

Representative Rivers echoed this concern: "Here is our philosophy: deterrence and salvaging an individual, to deter him from doing what he is doing and to save his career in the future." 98

General Kuhfeld, the leading Defense Department spokesman before the Rivers subcommittee, emphasized the military's apparent desire to see the service member freed from the long-term damage of minor disciplinary action: "[Nonjudicial punishment] will not constitute a previous conviction for any purpose nor time lost nor a permanent blot on the individual's military record which will follow him into civilian life." 99

House subcommittee members closely questioned Defense officials about article 15 record-keeping to ensure that punishment would not be used for other than the immediate, limited purpose of reforming minor breaches of discipline:

Mr. Blandford: Well, General, let me ask you this question on administrative discharges. Supposing a man has three article 15 punishments, and they transfer him to another command. Now you say the records at that point do not follow him.

General Kuhfeld: Under the present rule.

Mr. Blandford: Are those records forwarded to headquarters, US Air Force, or to the Bureau of Naval Personnel, and the JAG or Adjutant General, the Army?

General Kuhfeld: [W]hen he is transferred from the command it goes out, that is all.

Mr. Blandford: When you say "goes out" where does it go to?

General Kuhfeld: Destroyed, no longer kept. 100

Since enactment of the amendment, military practice in the use of nonjudicial punishment records has been at odds with both the spirit of the legislation and the testimony of those officers who urged its passage. Congress did not mean for nonjudicial punishment to have a lasting influence on a person's discharge, military career prospects, civilian employment opportunities, or personal

99. *Id.* at 4956 (emphasis added).
100. *Id.* General Kuhfeld, an Air Force officer, described the record-keeping practices for his Service only. Army and Navy practices were somewhat different, but the emphasis was on the short duration of the records. Records in the Navy were said to be kept only for a person's enlistment. *Id.* at 4964. Army records were described as being kept on file at the unit level for two years after transfer of the awardee. Thereafter they were "retired and sent to the Army's record holding center in St. Louis." *Id.* at 4965 (testimony of Col. Ackroyd).
reputation. Nonetheless, Executive orders and Service regulations now permit all these harmful effects. Article 15 records are used to justify less than honorable discharges, permanently threaten promotion and retirement, deny duty assignments, and increase the severity of courts-martial sentences.

Of course the longer the record is active, the greater the chance it will be used for one of these damaging purposes. Notwithstanding General Kuhfeld's representations to the House subcommittee in 1962, his Service has permitted use of article 15 records throughout an Air Force member's career to administratively separate him from the Air Force. Although the discharge may be "honorable" despite being based on misconduct, the form used to document the separation (DD Form 214) contains coded information that alerts potential employers, especially government employers, to the reason for discharge.

In 1978 the Air Force Court of Military Review upheld an Air Force regulation that authorized use of nonjudicial punishment records to increase the severity of a sentence at a court-martial for an unrelated offense. The regulation provided that these records could be used if punishment had been awarded within six years of the court-martial.

In 1980 the US General Accounting Office (GAO) published a report that, among other things, criticized the practice of permanently maintaining nonjudicial punishment records. The Air Force vigorously opposed the GAO suggestion that these records

101. See, e.g., BUREAU OF NAVAL PERSONNEL MANUAL (BUPERSMAN) para. 3420185 (1978); see also Denton v. Secretary of Air Force, 483 F.2d 21 (9th Cir. 1973); Conn v. United States, 376 F.2d 1967 (Cl. Cl. 1967); Rew v. Ward, 462 F. Supp. 331 (D. N.M. 1975).


104. See MCM, 1969, supra note 18, para. 76d.


106. In Rew v. Ward a federal district court held that such an administrative discharge based in part on nonjudicial punishment jeopardized an Air Force enlisted woman's opportunity to gain employment in either the public or private sector. "a discharge under AFM 39-10 is a bar to reenlistment in all branches of the armed forces. More importantly . . . it could impair civilian employment with the federal government and the private sector." 402 F. Supp. 331, 340 (D. N.M. 1975).


not be maintained. The Air Force now believes that the records “are needed for several important reasons: when forfeiture or re-
duction [in rank] is ordered; as a general management tool; and
for use in subsequent complaints, litigation or records correction
cases.” 109

The current Air Force policy for use of article 15 records is obvi-
ously not as represented by General Kuhfeld before Congress.
The records are not “destroyed, no longer kept” 110 when people
transfer from one Air Force unit to another. Furthermore, the Air
Force now insists that such destruction would frustrate its need
for a “general personnel management tool.” 111 There is no hint of
this need in the hearings on the amendment, nor is there any in-
dication that Congress wished for the records to be used in this
way. On the contrary, it is plain from the hearings that Congress
opposed long-term use. 112

The Army also permits nonjudicial punishment records to
plague a soldier throughout his career. 113 The rule stated by the
Army before Congress in 1962 now has limited application. 114

Only those enlisted persons serving their first three-year term
may have all records of punishment destroyed after two years. 115
Enlisted members with more than three years active duty have
their punishment recorded permanently in an Official Military
Personnel File (OMPF) at the Army Enlisted Records Center,
Fort Benjamin Harrison, Indiana. 116 These records are not, in
short, “retired” as suggested by the Army in congressional
testimony. 117

Records of punishment for Army officers are treated like those

109. Memorandum from Stuart R. Reichart, Department of the Air Force Gen-
eral Counsel, to the Assistant Secretary of Defense (Mappower, Reserve Affairs
and Logistics) (June 27, 1980).
110. See supra note 100 and accompanying text.
111. See supra note 109.
112. The following comments by members of the House subcommittee illus-
trate their belief that nonjudicial punishment records should not be permanently
maintained and used for any purpose:

Mr. Hardy: The thing that we are concerned with here... we are talk-
ing about this not being a blemish on the man's record, then we ought to
put a cut-off period... for which these documents... can be used for
administrative discharge purposes.

Mr. Blandford: Two years is a reasonable period.

Mr. Hardy: For any purpose.

1962 House Hearings, supra note 36, at 4968 (emphasis added).
113. Letter from Col. Donald W. Hansen, Chief, Criminal Law Division, US
with the San Diego Law Review).
114. See supra note 100 (Col. Ackroyd's testimony).
115. AR 27-10, change 20, para. 3-15c(3)(d) (Aug. 15, 1980).
116. Id. para. 3-15c(2)(a).
117. See supra note 100 (Col. Ackroyd's testimony).
of career enlisted soldiers. No matter where officer or enlisted records are kept, the Army is clear that these records "may be used as competent authority may direct and nothing in this [instruction for records] is intended to affect the admissibility of nonjudicial punishment records at courts-martial and administrative proceedings, regardless of where such records are filed."120

The remedial purpose of the amendment is not couched in terms that apply only to first-term enlisted persons. Indeed, prior to enactment of the amendment, the Court of Military Appeals recognized that protection against the impact of punishment on an officer's career was particularly needed. The court concluded "that an officer who has one record of an Article 15... might just as well make his plans to get out of the Service."122

Regardless of this conclusion and the rehabilitative spirit of the amendment for all military people, Army practice remains largely unchanged. The 1977 case of United States v. Kelley123 demonstrates how an officer perceives the threat to career of a single remote punishment.

Captain Kelley began his service as an Air Force enlisted man. He completed a four-year tour and was presented a good conduct ribbon.124 He then enlisted in the Army in 1966, was selected for officer candidate school, and gained a commission in 1967. During his brief time as an Army enlisted man he was punished under article 15. Beyond this single disciplinary action, his career in the Army was marked by achievement: he fought in Vietnam, received the Bronze Star and Army Commendation medals, served

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118. AR 27-10, change 20, para. 3-15c(1) (d). Nonjudicial punishment results for Army officers may, at the commander's discretion, be filed permanently in the performance section of personnel records maintained at Army Headquarters in Alexandria, Virginia.

119. The Military Personnel Records Jacket (MPRJ) accompanies the Army member from unit to unit; the Official Military Personnel File (OMPF) is maintained at a national headquarters. A commander imposing nonjudicial punishment has limited discretion in determining whether punishment is to be recorded in the MPRJ or the OMPF. The Army has determined that some minor offenses are more minor than others, and it is these most minor offenses that may be filed at the local level. AR 27-10, change 20, para. 3-15b (Aug. 15, 1980).

120. Id. para. 3-15g.

121. See, e.g., supra text accompanying notes 96-100.


123. 3 M.J. 535 (A.C.M.R. 1977).

124. Id. at 538, 539. All facts of Captain Kelley's career are taken from these pages.
as a company commander in the elite 82nd Airborne Division, earned a college degree, and attended an Army Advance Course. Even with this fine record, Captain Kelley faced possible separation from the Army as part of a Reduction in Force (RIF) after the Vietnam War.

Captain Kelley went to the Army Military Personnel Center, Alexandria, Virginia, to review his file that would be used to determine if he would be part of the RIF. The file contained his enlisted nonjudicial punishment imposed nine years earlier. Captain Kelley was “very concerned” at finding the document. He argued with the custodian of the file, a Sergeant Dey, that the punishment should not be recorded. Sergeant Dey advised him that “the document was in the file pursuant to Army Regulations. . . . Soon thereafter [Captain Kelley] returned the file and the receptionist observed that the Article 15 was missing. She reported the fact to Sergeant Dey. . . .”

Captain Kelley was tried by a general court-martial for removing the document. He was found guilty and dismissed from the Service.

Women in the Navy form another class uniquely disadvantaged by record-keeping requirements that flow from nonjudicial punishment. The 1962 amendment establishes two ways military people may be confined in areas other than where they live or work. First, they may be placed in “correctional custody” for up to thirty days. This custody is normally served in minimum security areas apart from other prisoners. Second, lower-ranking enlisted persons attached to or embarked in a vessel may be placed in solitary confinement for three days on bread and water.

Enlisted Navy women for years have been without facilities to serve either correctional custody or confinement. The Navy refuses to mix women with men for these purposes, and has instead confined women in federal penitentiaries such as the Metropolitan Correctional Center in San Diego, California. Because of the booking procedures at these penitentiaries, Navy women im-

125. Id. at 536.
127. See, e.g., AR 27-10, change 20, para. 3-8c(2)(c).
130. Id. at B1, col. 1. The Navy believes that confinement of its women sailors in civilian penal institutions is a “sensitive issue,” and monitors the situation closely; however, the practice is justified as being the best method presently available “to ensure equality in corrections and that discipline is afforded all Navy offenders who warrant such punishment.” Commander, Naval Base San Diego message 082258Z of Dec. 1980.

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prisoned for minor offenses receive federal prison records. Prison
officials send the women's identification data, including photo-
graphs and fingerprints, to the Federal Bureau of Investigation's
(FBI) National Identification Center.131

The attorney for an eighteen-year-old Navy woman, who was
confined in the San Diego Metropolitan Correctional Center after
a captain's mast aboard the USS Norton Sound, said that her cli-
ent "now has a criminal record for life." Susan McGreivy, an at-
torney for the American Civil Liberties Union, also criticized
Navy administrative proceedings in general, because "they rely
on purely hearsay evidence to make decisions that do great harm.
What is worse, [the Navy] makes it difficult if not impossible [for
defense attorneys] at administrative hearings to challenge the
truth of some affidavits by refusing to make [affiants] available
for cross-examination."132

Perhaps the strongest example of how nonjudicial punishment
is used as a stamp of bad character for all military people is
through its introduction at court-martial to increase a sentence.
Although Congress intended that nonjudicial punishment be used

131. [USS] Norton Sound Woman Sailor Was a Prisoner in [Metropolitan Cor-
rectional Center], San Diego Union, July 10, 1980, at B9, col. 1. The arrest record
created for women serving nonjudicial punishment for minor offenses at federal
penitentiaries frustrates the congressional purpose behind the 1962 amendment of
protecting the Service member from long-term employment disabilities and social
stigma. Writing of such a record in general, a federal appeals court noted that
there is "an undoubted 'social stigma' involved in an arrest record . . . . An arrest
record often proves to be a substantial barrier to employment." Menard v. Saxbe,
498 F.2d 1017, 1024 (D.C. Cir. 1974). For a description of the FBI's practices in
maintaining and disseminating files such as those created for Navy women in fed-
eral penitentiaries, see generally Utz v. Cullinane, 520 F.2d 467 (D.C. Cir. 1975)
(transmission of local arrest records to FBI).

The Navy has very recently begun opening its own correctional facilities for wo-
men on a limited scale. In September 1980 a women's correctional custody unit
was opened at Miramar Naval Air Station, San Diego, California. The unit had a
capacity for twenty-five women, but was closed down temporarily one year later
for lack of supervisory personnel. Naval Air Station Miramar message 172313Z of
politan Correctional Center, with its booking requirements that result in federal
arrest records, as a "cost effective measure where short periods of confinement are

132. Interview with Susan McGreivy, staff attorney with the Los Angeles office
of the American Civil Liberties Union (Apr. 5, 1982). Ms. McGreivy said that the
Navy refused to produce civilian investigators who helped prepare cases against
her clients, so that she could cross-examine. Ms. McGreivy said that the Navy
claimed lack of jurisdiction over these investigators because of their civilian sta-
tus. Nonetheless, Navy boards relied heavily on reports prepared by the investiga-
tors to discharge sailors.
to remove minor offenses from the court-martial system, the 1969 Manual inserts these offenses back into the system. It does so by permitting their consideration in sentencing at any later court-martial—even one totally unrelated to the nonjudicial punishment—as proof of "the past conduct and performance of the accused." Military prosecutors, judges, and juries routinely rely on former nonjudicial punishment as evidence of bad character. Bad conduct and dishonorable discharges are awarded based in part on this evidence.

The serious administrative and judicial consequences of article 15 punishment have not gone unnoticed by the Court of Military Appeals. In United States v. Booker, then-Chief Judge Fletcher wrote the majority opinion that required legal counsel for all service people before they submitted to an article 15 hearing. Absent counsel or written waiver of counsel, results of the hearing could not be used to increase a sentence at any later court-martial. The court also limited "summary courts-martial to disciplinary actions concerned solely with minor military offenses unknown in civilian society."

The Armed Forces, particularly the Navy, reacted strongly to this ruling. Since Booker the Navy has pushed a court-packing plan to increase the size of the Court of Military Appeals and lower courts of military review, staffed by active-duty officers, have eroded the protections of Booker.

133. MCM, 1969, supra note 18, para. 76d.
137. Id. at 447.
138. T. Hayward, supra note 69, at 24.
139. See, e.g., United States v. Nordstrom, 5 M.J. 528 (N.C.M.R. 1978) (records of nonjudicial punishment awarded to person attached to ship admissible at subsequent court-martial although no opportunity to consult with counsel or refuse punishment). In Nordstrom, the Booker opinion was denounced in strong terms:

I think it can be reasonably said...that the Booker decision is simply a pseudo-rational manipulation...It smacks of a sort of youthful, one-sided idealism aimed at providing every protection conceivable for military wrongdoers...[If we legitimize Booker by passively accepting it, without protest, as representative of communicable and credible legal reasoning, then in my opinion, there can be no further honest thinking in military law.

Id. at 533.
The Court of Military Appeals has retreated from its original position in face of this military dissatisfaction and censure. That part of Booker restricting summary courts to minor military offenses has been expressly overruled.\textsuperscript{140} The court has also refused to apply Booker retroactively,\textsuperscript{141} and has confirmed use of nonjudicial punishment to increase a court-martial sentence even though the record shows neither waiver of counsel nor fact of consultation.\textsuperscript{142} The court has further held that Booker does not apply to people attached to a ship.\textsuperscript{143} Pressure for Justice Fletcher's removal from the court has been unsuccessful, but he is no longer Chief Judge.\textsuperscript{144}

The court's refusal to extend Booker to persons attached to a ship is in keeping with the special treatment traditionally afforded these persons when they find themselves before the bar of military justice. Does the ship-board environment of a modern, peace-time Navy justify denial of legal protections enjoyed by other military people? Today's aircraft carrier may have a crew of more than four thousand that includes lawyers, doctors, chaplains, and even civilian professors embarked to provide college degree opportunities.\textsuperscript{145} The carrier is a far cry from Walt Whitman's solitary, "freighted ship tacking speeds away under her grey sails."\textsuperscript{146} Instead, the carrier is a technological marvel continually in touch with the world through sophisticated satellite communications, and is regularly provisioned by a host of support ships and aircraft. The carrier with good reason is often referred to as a "floating city."\textsuperscript{147}

\textsuperscript{140} United States v. Booker, 5 M.J. 246 (C.M.A. 1978).

\textsuperscript{141} United States v. Syro, 7 M.J. 431 (C.M.A. 1979).

\textsuperscript{142} United States v. Mack, 9 M.J. 300, 322 (C.M.A. 1980).

\textsuperscript{143} Id. at 320.

\textsuperscript{144} Military Court Chief Replaced, San Diego Union, Apr. 27, 1980, at A26, col. 1.

\textsuperscript{145} See, e.g., More than 1,000 Complete College Aboard Ranger, San Diego Dispatch, June 4, 1981, at 18, col. 1.

\textsuperscript{146} Whitman, Aboard at a Ship's Helm, in THE POCKET BOOK OF MODERN VERSE 39 (O. Williams ed. 1958).

\textsuperscript{147} See, e.g., Kitty Hawk Shoves Off with a Strange Cargo, San Diego Union, Jan. 7, 1982, at B1, col. 2. The aircraft carrier Kitty Hawk was used by the Navy to transport the families and household goods of crew members when the ship transferred home ports from San Diego to Bremerton, Washington. The carrier "became a floating city for sailors and their families [during] the five day voyage." Id. at B3, col. 6; see also Phone Credit Cards Tested Aboard Indy, Navy Times, Jan. 18, 1982, at 2, col. 1. Crew members aboard the aircraft carrier Independence have been issued telephone credit cards and phones have been installed throughout the
Assuming that operations at sea are still sufficiently isolated and perilous to warrant denial of legal counsel for sailors faced with an article 15, should such counsel be refused sailors working aboard a ship in drydock? What if these sailors live in a downtown San Diego hotel? Should these hotel-bound sailors be denied the right to refuse nonjudicial punishment? These and associated questions are next explored within the contours of congressional intent as applied to article 15 for military persons attached to or embarked in a vessel.

THE CONTEMPORARY NATURE OF COMMAND AT SEA: DOES IT WARRANT HARSH PUNISHMENT POWER?

Congressional Attitudes and Navy Practice

Navy commanders have historically enjoyed greater summary powers than other military officers. The Continental Congress placed no specific limits on the authority of a ship's captain over his crew. The captain could “imprison and also inflict reasonable corporal punishment upon a seaman, for disobedience to reasonable commands, or for disorderly, riotous or insolent conduct.” The argument for these broad powers assumed that each time a ship left port it was so vulnerable to the forces of nature that a highly-trained, tightly-disciplined crew was needed to bring her safely home. The need for this crew was even more pressing when an armed enemy barred the way.

To ensure that a crew was properly disciplined, the Navy traditionally resorted to harsh, immediate punishment—sometimes with serious or even fatal consequences for the offending sailor.

ship. The sailors “can now call home from most ports without fumbling for change or without reversing the charges.” Id.

148. See, e.g., 270 Sailors to Move into Grant Hotel, San Diego Transcript, Mar. 5, 1981, at 1, col. 3. These sailors were the crew of the USS Vancouver, a Navy ship undergoing extensive renovation by a civilian repair firm in San Diego. They were expected to stay in the Grant Hotel for at least five months and perhaps longer during the renovation. When asked by a reporter if placing sailors in hotels was unusual, a Navy spokeswoman replied: “Well, it’s been done in the Navy before, but we think this is the first time it’s happened in San Diego. We just don’t have room for the crew on base.” Id. The Navy also billets crews of ships in overhaul at the Oakwood Apartments in Coronado, California, a suburb of San Diego.


151. In 1840 three crew members were summarily hanged aboard the USS Somers on suspicion of inciting mutiny. One of the dead men was Philip Spencer, son of the Secretary of War, and there was great public outcry against the executions. The commanding officer of the Somers, Captain MacKenzie, was court-martialed for the hangings and acquitted. The Somers incident became the basis for Herbert Melville’s classic, Billy Budd. J. DiMona, Great Court Martial Cases 43 (1972).
Of course today the Navy is much more than iron men and wooden ships. A large shore establishment supports modern fleets and many Navy personnel seldom set afoot aboard ship for years at a time.

Partly in recognition of this change in the way the Navy operates, Congress has increasingly restricted the disciplinary authority previously enjoyed by all Navy commanders. The original article 15 limited the kinds and amounts of punishment that Navy officers could award without trial. Ships' captains, however, were still permitted the widest range punishment in recognition of "the nature of naval operations at sea." No sailor, either aboard ship or ashore, was given the right to elect court-martial instead of nonjudicial punishment. This right was granted by regulation to members of the Army and Air Force.

The debate over unequal treatment for sailors was intense before passage of the 1962 amendment. The most influential proponent of continuing this treatment in some form was Representative Rivers. He argued that the "law of the sea is different from the law of other things. This is ageless and age-old." Representative Rivers noted that "when the master of the ship leaves port, he has to come home."

Several Congressmen were nonetheless troubled by this dis-

152. UCMJ, art. 15(a), 64 Stat. 112 (1950).
153. S. REP. No. 486, supra note 7, at 2234 (emphasis added). Only those Navy officers in command of persons attached to or embarked in a vessel could impose this punishment. Such commanders could confine persons on bread and water for five consecutive days. UCMJ, art. 15(a)(2)(E), (F), 64 Stat. 113 (1950).
154. S. REP. No. 486, supra note 7, at 2234.
155. The following comments by Senator Ervin are typical of the concern felt by many over unequal treatment for this class of military personnel:
   The subcommittee on Constitutional Rights . . . received a number of complaints from lawyers to the effect that the Navy should be compelled to give the same option which the Army and Air Force give . . . . I brought this question up [of unequal treatment] because, frankly, I had more misgivings expressed about that one thing . . . than any provision of the bill.

Proposed Amendment to Article 15 of the Uniform Code of Military Justice: Hearings on H.R. 11257 Before Subcomm. of the Senate Armed Services Committee, 87th Cong., 2d Sess. 6, 32 (1962).

The American Legion opposed any discriminatory treatment whereby some military people were denied rights enjoyed by others. See Letter from John Finn, Chairman, Special Committee on UCMJ and the U.S. Court of Military Appeals of the American Legion, to Hon. L. Mendel Rivers (Apr. 5, 1962), reprinted in H.R. REP. No. 1612, supra note 2, at 5.
156. 1962 House Hearings, supra note 36, at 4900.
157. Id. at 4905 (emphasis added).
crimination. Representative Bates asked a Navy spokesman, "what is wrong with making the Services the same... You might have somebody, like in the 'Caine Mutiny'... where you have this unusual commanding officer, and when an individual is willing to take a gamble with a court-martial. Why should he be denied it when he is accorded it in the other Services?"158

The Navy spokesman insisted that swift, certain punishment was needed to make article 15 effective: "So, if the ship is at sea—if a submarine is on an extended cruise and the man says 'No, Captain, I want a court-martial!'—it may be weeks and weeks before the ship gets to a place where he can be tried..."159

This dialogue, together with observations made by other members of Congress,160 shows that it was the extraordinary position of the captain who commanded a vessel at sea, or one capable of immediately going to sea, that justified denial of the court-martial choice to his crew. Despite this legislative history, the Navy has expanded the indicia of "attachment"161 and the meaning of "vessel,"162 so that now a sailor attached to a ship absolutely incapable of getting underway for a year or more may not refuse nonjudicial punishment. Nor may crew members assigned shore duties refuse mast during the months when their submarine is thousands of miles away.

The Navy did not discuss these practices during the 1962 hear-

158. Id. at 4913-14. For an account of an "unusual commanding officer," see N. SHEEHAN, THE ARMBRITTER AFFAIR (1971).
159. 1962 House Hearings, supra note 36, at 4914 (testimony of Captain Greenberg, USN) (emphasis added).
160. The following typical observations were made by Congressmen on the unique requirements of command at sea: "Because of testimony by the Navy, the right to demand a trial by court-martial in lieu of nonjudicial punishment was not extended to those aboard ship, in view of the unique responsibilities of the ship's captain and in the interest in maintaining morale and discipline aboard ship." 108 CONG. REC. 17559 (1962) (remarks of Sen. Mansfield).
161. This is deterrent legislation. Now, he [the punished person] can always appeal. Furthermore, he does not have to accept this punishment unless he is in the Navy and a ship is generally out in the ocean and he cannot do anything about it." Id. at 8430 (remarks of Rep. Rivers) (emphasis added).
162. "It is not true in some cases [that a military person can refuse nonjudicial punishment] where a ship is at sea. That never has been so." Id. at 17560 (remarks of Sen. Russell in response to a question by Sen. Douglas) (emphasis added).
163. The Navy has successfully argued, for example, that a person is attached to a vessel if he has orders to that vessel, draws extra pay based on those orders, uses the vessel's fleet post office address to receive mail, and is subject to recall to the vessel. He need not be living on board the ship either at sea or in port. Bennett v. Tarquin, 466 F. Supp. 257 (D. Hawaii 1979); see also Jones v. Frudden, No. 74-2273 (N.D. Cal. Nov. 22, 1976) (sailor assigned to Navy ship undergoing repairs in shipyard denied right to refuse nonjudicial punishment).
164. See, e.g., United States v. Forester, 8 M.J. 560 (N.C.M.R. 1979) (a ship commissioned into the service of the Navy is at all times a "vessel" for article 15 purposes).
ings. Certainly the crew members of the submarine, *USS Thomas A. Edison*, were not on the kind of "extended cruise" described by Navy testimony when they requested and were denied courts-martial. 163 These sailors were ashore in Hawaii, where it would have been a simple matter to refer their cases to trial.

The captain who commands a ship high and dry for lengthy repairs seems far removed from the "master of the ship" who must bring her safely to port. And sailors attached to ships in drydock do not appear sufficiently different from other land-based military people to deny them the right to elect court-martial. In fact, many of these sailors live in the decidedly civilian environment of downtown hotels and suburban garden apartments while their ships are repaired. 164 Still, the Navy continues to deny them the right to refuse mast if they fear the personalized justice of their captain.

No doubt there are responsibilities unique to command at sea that justify increased punishment authority. However, these responsibilities are greatly attenuated when ships sit in drydock, gutted of the machinery that makes them steam, while crews rest in hotels.

When ships are truly at sea, Congress believed they might not have enough officers to convene a court-martial: "In the Army and Air Force, the individual can refuse . . . punishment and demand trial, although this privilege does not exist [in the Navy] because of the problem . . . at sea where there may not be enough officers to convene a court." 165 Today the Navy is able to find enough officers to convene courts when the captain decides that he, rather than the accused, wants a trial. Large ships such as aircraft carriers embark investigators, attorneys, and clerks necessary to hold courts-martial. Court members (jury) are drawn from the more than 100 officers on board. 166

The decision, by a ship's captain to punish a sailor at mast or refer his case to trial is not, of course, necessarily unfair or arbitrary. Congress endorsed the view that a senior officer, such as the captain of an aircraft carrier, would have the "maturity and

163. *See supra* notes 90-92 and accompanying text.
164. *See supra* note 148.
166. *See, e.g.,* Naval Legal Services Office, Norfolk, VA, message 031930Z of Nov. 1981 (confirming assignment of a Navy lawyer aboard the aircraft carrier *Eisenhower* to prosecute special courts-martial while ship is underway).
experience" needed to properly exercise the punishment autho-

rity given him. The controversial punishment of confinement on

bread and water, for example, may only be awarded by the

commander of people attached to or embarked in his vessel.

Correctional custody, while not technically confinement, may

be awarded by a ship's captain for a period of thirty consecutive
days, but may not be combined to run consecutively with the

maximum bread and water penalty. Navy practice on board

ship, however, results in the functional if not legal equivalent of

combination. This practice in at least one tragic instance raises
doubts that Congress should rely on the wisdom of ships' cap-
tains to humanely punish sailors by awarding them correctional

custody and confinement on bread and water. Moreover, action
taken by the Navy following the USS Ranger incident suggests

that abuse of article 15 authority was not limited to a single ship.

The Ranger Affair: Correctional Custody and Confinement on

Bread and Water

The military successfully lobbied for correctional custody as a

punishment that would achieve two goals. First, it would give

commanders a quasi-confinement power to deter illegal conduct;

second, it would provide rehabilitative counselling for the person

in custody. The military represented the program as one

wherein the awardee would work at his usual job during the day,

and spend his off-duty time reflecting on his behavioral problem

in a setting less oppressive than a jail cell. A staff highly

trained in counselling techniques would guide this reflection:

"The Armed Forces have . . . concentrated on developing an
effective correctional treatment and evaluation capability in their

. . . rehabilitation facilities. They have placed a great deal of em-
phasis on special training . . . in correctional custody."

167. See supra text accompanying note 13.

168. For examples of opposition to the bread and water punishment by vet-

eran's associations and lawyers' groups, see letter from John Finn, American Le-


note 2, at 7; Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on

Armed Services, 81st Cong., 1st Sess. 208 (1949) (testimony of Mr. Richard Wels,

chairman of a special committee on military justice of the N.Y. County Lawyers'

Association).


172. See, e.g., infra text accompanying notes 185-87.


174. Id. at 140.

175. S. REP. No. 1911, 87th Cong., 2d Sess. 6, reprinted in 1962 U.S. CODE CONG.

& AD. NEWS 2380, 2384.
Congress, over the misgivings of some members,\textsuperscript{176} authorized correctional custody in the 1962 amendment. The maximum time allowed in custody was thirty days if imposed by an officer in the rank of major, lieutenant commander, or above.\textsuperscript{177} Correctional custody was defined as “the physical restraint . . . during duty or non-duty hours and may include extra duties, fatigue duties, or hard labor.”\textsuperscript{178} The Executive order and Service regulations that implement correctional custody underscore the remedial aspect of this punishment.\textsuperscript{179}

In recent years the Navy has widened its use of correctional custody. As of May 1981, fourteen correctional custody units had been established aboard ships—including all aircraft carriers—and fifteen units were operational ashore.\textsuperscript{180} These units developed a reputation for tough discipline that was praised by the Chief of Naval Operations, Admiral Thomas B. Hayward, during a 1980 interview.\textsuperscript{181} Admiral Hayward said that some units had a “70 percent turn-around rate.” He added that many units he had visited were “run a hell of a lot tougher than brigs.”\textsuperscript{182}

\begin{itemize}
\item \textsuperscript{176} Some Congressmen had a difficult time with the idea that a person could be placed in a jail-like setting, yet not be “confined”:
  \begin{itemize}
  \item Mr. Bennett: What is the difference between correctional custody and confinement? I mean is he going to be in a room with the walls . . . .
  \item General Kuhfeld: We define that—he is not supposed to be . . . treated as a prisoner, but . . . in an entirely different manner.
  \item Mr. Hardy: That, I think, calls for a little further distinction.
  \item . . .
  \item Mr. Blandford [committee counsel]: In corrective custody he will report to a place where he will spend the night. It may be the brig. But it will be in a cell set aside from other prisoners.
  \end{itemize}
\end{itemize}

\textit{1962 House Hearings, supra} note 36, at 4929.

Committee members were also concerned that correctional custody did not seem to be a minor punishment in keeping with the spirit of article 15:

\begin{itemize}
\item Mr. Hardy: If it gets to the point where you have . . . a sentence of 30 consecutive days of correctional custody, I get in a little trouble understanding how minor that might be.
\item General Kuhfeld: (I)t is 30 days corrective custody and not confinement, but corrective custody, to straighten him out and get him to understand what it is all about.
\end{itemize}

\textit{Id.} at 4930.


\textsuperscript{178} \textit{Id.}, art. 15(b), 10 U.S.C. § 815(b).

\textsuperscript{179} See, e.g., MCM, 1969, \textit{supra} note 18, para. 131c; AR 27-10, para. 3-8c (Aug. 15, 1980); Secretary of the Navy Instruction 1640.7B, Mar. 18, 1976.

\textsuperscript{180} \textit{Navy Ships' Punishment Units Closed}. San Diego Union, May 19, 1981, at A1, col. 1.

\textsuperscript{181} \textit{Hayward, Barrow Tell JAG Conference of Need for Tighter Sea Service Discipline}, Navy Times, Nov. 3, 1980, at 2.

\textsuperscript{182} \textit{Id.} col. 3.
Six months after this interview the Secretary of the Navy closed all ship-board correctional custody units. He said he took this action because “[Admiral Hayward] and I believe that some of the current procedures and policies in regard to our . . . correctional custody units are not satisfactory.”183 The closings were triggered by the death in April, 1981, of a sailor serving correctional custody aboard the aircraft carrier Ranger, and the “number and intensity of . . . allegations made by individuals from different locations.”184

Paul A. Trerice, twenty-one, was an enlisted member of Air Antisubmarine Squadron 37 embarked in the Ranger.185 This 6-foot-5-inch, 230-pound sailor had been confined to the ship’s correctional custody unit (CCU) after an article 15 hearing for an unauthorized absence in Hong Kong. During his custody, Airman Trerice disobeyed an order given by a CCU “escort.”186 He again received an article 15 hearing and was ordered to solitary confinement on bread and water.

This confinement is a means used by the Navy to compel those already in custody to accept the rigors of the CCU. Correctional custody, as employed by the Navy aboard ship, may be interrupted for punishment on bread and water. Time served during the bread and water confinement does not count toward satisfaction of the original custody award.187 Multiple confinements on bread and water may therefore be ordered during a single, thirty-day custody period.

In keeping with this process, Airman Trerice was returned to the CCU and directed to do calisthenics for an hour on the flight deck of the Ranger. The Ranger at this point was in port at Subic Bay in the Philippines. Trerice could not complete the exercises and became sick in the tropic heat. He asked to see a doctor. The events that followed are in dispute, but the Navy acknowledges

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184. Id.
185. Except where otherwise noted, this description of the events surrounding the death of Airman Recruit Trerice is taken from the Navy Times, May 11, 1981, at 2, cols. 1-4.
186. Guards in a Correctional Custody unit are called “escorts” and those confined are called “awardees.”
187. See Chief of Naval Operations Instruction 1640.7, § 301, para. 4.b. (1981). In a sworn statement, a Ranger sailor in the CCU described how the threat of punishment on bread and water was used:

   During . . . 2 1/2 hours I underwent extensive physical training, passing out once from exhaustion only to be revived . . . with smelling salts so that I could continue . . . . [The guard] accused me of lying [about leg cramps] and threatened to PT me until I dropped . . . . [He told me] I was going to bread and water.

that Airman Trerice struggled with his escorts, was forcibly restrained, and died before a doctor arrived. The autopsy showed "dislocated fingers, scratches, bruises and scrapes. . . ." The cause of death was stated as "heat stroke, specifically cardio-vascular attack and respiratory failure."

Navy investigations, demanded by Congressmen from Trerice's home State of Michigan, have resulted in numerous charges against officers and men of the Ranger. Senator Levin of Michigan has also asked the Navy for any complaints made by sailors given correctional custody aboard the oiler Ashtabula. A sailor in custody aboard that ship was found dead in a river two days after he had reportedly escaped.

A veteran newspaper writer on military affairs gave the following summary of mistreatment aboard the Ranger:

Men are herded into a room where guards have closed doors and other accesses and have cut off fans that would provide ventilation.

Then the men inside are exercised to the point of exhaustion.

Some of them are slapped in the face, others are punched in the head and stomach, some are choked into unconsciousness.

Some men confined to cells on a daily diet of bread and water are deprived of water but fed the bread.

Hispanics and other minorities confined for punishment are insulted in vulgar and profane references to their racial origins.

These are instances of abuse recorded in and resulting from an official investigation aboard the U.S. Navy ship Ranger.

Based on this investigation, twenty-five enlisted men have been charged with offenses ranging from assault to manslaughter. Charges against the executive officer and the supervising officer of the CCU were referred to trial by general court-martial. The executive officer was acquitted and the charges against the CCU supervising officer were dismissed before trial. The senior
petty officer in charge of the CCU was also acquitted.\textsuperscript{193} The captain of the \textit{Ranger} received a non-punitive letter of reprimand that is not made a part of his permanent record; he remains in command of the ship.\textsuperscript{194} CCUs are once more open and a new regulation has been issued on how they should be managed.\textsuperscript{195}

The \textit{Ranger} affair and its aftermath demonstrates that the Navy has in some tragic instances failed to act as Congress intended in the areas of correctional custody and confinement on bread and water. CCUs are not places where people "go to spend the night"\textsuperscript{196} after a normal work-day. The CCU is a place where harsh methods are used that may well embitter rather than rehabilitate.\textsuperscript{197} New instructions do not guarantee that this will

\textsuperscript{193} Petty Officer Tied to Curb on Criticism, San Diego Union, Sept. 11, 1981, at B1, col. 1; Navy Accused of Avoiding Open Hearings, San Diego Union, Aug. 29, 1981, at B1, col. 1. The doctor aboard the \textit{Ranger} when Airman Trerice died was quoted as saying that he had seen bruises on other awardees before the death: "I was surprised and shocked to see the bruises . . . . [I]t was like red flags." The doctor said that he advised both the executive officer and the supervising officer for the CCU about these bruises. He said that the executive officer warned the CCU enlisted supervisors not to extend the awardees beyond their limits. Ex-Ranger Doctor Tells His 'Shock', L.A. Times, Oct. 2, 1981, pt. II, at 1, col. 1.

The captain of the \textit{Ranger} was quoted as saying in support of the executive officer: "I am just flabbergasted about some of the allegations about the CCU . . . . I absolutely guarantee you that I would not allow any physical abuse nor would [the executive officer]." The captain blamed two sailors punished for drug dealing as responsible for the public outcry about mistreatment aboard the \textit{Ranger}: "[The] Trerice case became a news item when two sailors were . . . to be court-martialed . . . . They became very public on the telephone. They never mentioned their own case. I believe it was to get back at the \textit{Ranger} and to take the heat off themselves." Ranger Skipper Testifies . . . Says 2 Sailors Stirred Abuse Outcry, San Diego Union, Sept. 30, 1981, at B1, cols. 1-4.

These two men claimed that they had received death threats after reporting that they had been beaten by guards aboard the \textit{Ranger}. Senator Levin of Michigan filed a "threat-to-life" request with the Navy and a 24-hour protective guard was provided. Navy Puts Guard on 2 Sailors After Death Threats, San Diego Union, May 1, 1981, at A5, col. 1.\textsuperscript{194}


\textsuperscript{194} Ranger Court-Martial Charges Tell of Brig Brutality, L.A. Times, Aug. 1, 1981, pt. II, at 1, col. 2. The captain received the letter for "inefficient exercise of command supervision." \textit{Id.} A 41 million-dollar civil suit has been filed against the captain by Trerice’s parents in federal district court. Four other crew-members have also filed suit against the Navy for alleged mistreatment while confined in the \textit{Ranger} CCU. \textit{Id.} at col. 6.

\textsuperscript{195} U.S. NAVY MANUAL FOR ADMINISTRATION OF CORRECTIONAL CUSTODY UNITS (1981) (OPNAVINST. 1640.7).

\textsuperscript{196} See supra note 176 (remarks of Mr. Blandford).

\textsuperscript{197} Numerous public remarks by officers and men associated with the \textit{Ranger} affair support this conclusion. The following are typical:

Top Navy commanders demanded a "tough, physical Marine Corps Boot camp environment . . . . [T]hey had a very strong interest in perpetuating it."

change. For example, the new routine for people in custody is still more severe, less flexible than that for so-called "brig rats." Worst of all, the use of confinement on bread and water is still implicitly supported to ensure compliance with CCU discipline.

There is, to be sure, an abundance of restrictions against mistreatment and an admonishment for escorts to report "incidents which could result in embarrassment or focus public attention on the correctional custody unit or the United States Navy."

Many restrictions against mistreatment were on paper before the excesses aboard the Ranger and perhaps other ships became generally known. There is no persuasive reason to believe that a fresh batch of regulations will, in the long run, be any more effective than the last. The best guarantee against abuse fostered by the zeal to establish good order and discipline is for Congress to limit by law what the Navy has failed to restrain through regulation.

CONCLUSIONS AND RECOMMENDATIONS

The Armed Forces do not administer article 15 as Congress intended. Although the 1962 amendment explicitly limited the scope and nature of nonjudicial punishment, sufficient ambiguity

Carrier sailors view the CCUs more like concentration camps than Navy confinement centers. . . . "The system is antiquated . . . I always knew, and so did many of my friends that someday, somewhere, somebody would die there. People who are there deserve to be there, but not to be dehumanized or herded around and punished in the extreme."

Trerice Case: Navy Discipline is in the Dock, San Diego Union, May 24, 1981, at B4, col. 4 (remarks by sailor who had observed CCUs in operation but had never been punished in one).

The objective is to retrain you to be a four-O, squared-away sailor . . . And they expect to accomplish this by humiliating you in front of your shipmates. They treat you like dogs. They push you around and expect you to show some respect. When I got out of the CCU I hated the Navy all that much more.

Id. at B4, col. 4, B5, col. 1 (remarks by ex-awardee punished in the Ranger CCU).

198. Weekdays for both the brig and CCU begin at 4:30 a.m. and end at 9:30 p.m. During the day, however, the brig prisoner has more time to eat, receives a hot meal at noon rather than a box lunch, and has a recreation period of approximately one hour that is denied the awardee. The prisoner also spends one-third less time at physical training. Compare U.S. Navy Manual for the Administration of Navy Brig, enclosure (2), at 1 (1981) (OPNAVINST 1640.6) with U.S. Navy Manual for the Administration of Correctional Custody Units, at C-1 (1981) (OPNAVINST 1640.7).


200. Id. § 506, para. 3.
remains in the statute that permits the Services to frustrate its rehabilitative spirit. Regulatory expansion of the term "minor" gives the commander jurisdiction over too many offenses. This expanded jurisdiction often does not protect the accused, but works against him through denial of safeguards available at a court-martial. The problem is particularly acute for people attached to or embarked in vessels, because they may not elect trial instead of nonjudicial punishment.

Article 15 action as recorded and used may stigmatize the awardee in a manner very similar to that of a court-martial conviction. Article 15 records are used to increase courts-martial sentences and to diminish employment opportunities in both the public and private sectors. These records are often maintained in files where they permanently threaten the security and impair the morale of the person punished.

Women in the Navy and officers in all Services are particularly vulnerable to the harmful effects of nonjudicial punishment. The Navy jails women in federal penitentiaries for minor offenses dealt with in summary fashion. This jailing creates a national arrest record; fingerprints and photographs are sent to the FBI just as if the woman had been booked on a felony complaint. Such a record is widely recognized as an impediment with serious economic, social, and legal consequences. Military officers, caught up in an increasingly competitive profession, may have their careers truncated or ruined altogether by a single article 15 punishment.

People attached to or embarked in vessels suffer particularly harsh measures under article 15. These measures have led to serious injury and death. People aboard ships do not have the same rights as others in the military to demand a court-martial rather than article 15. The arguments in favor of this unequal, potentially dangerous treatment are no longer persuasive for a modern, peace-time Navy.

Congress should act to remove the ambiguities that now burden article 15; such action should place this proceeding squarely within the spirit and purpose of the 1962 amendment. This could be accomplished by further statutory amendment that would:

1. Adopt the federal, felony-misdemeanor distinction as the dividing line for minor and serious crimes;
2. Permit the commander to treat specified serious offenses, such as possession and use of marijuana, as minor with the requirement that he set forth in writing his reasons for this treatment;
3. Prohibit the use of nonjudicial punishment to increase a sen-
tence at a subsequent court-martial, unless the accused claims a record free from disciplinary action;
4. Require destruction of all nonjudicial punishment records after two years;
5. Prohibit use of nonjudicial punishment records for administrative discharges if counsel was not available at the article 15 hearing;
6. Prohibit the jailing of women awardees in federal penitentiaries;
7. Permit military people to choose court-martial in lieu of nonjudicial punishment when attached to or embarked in a vessel under one or more of the following circumstances:
   a. The vessel is in drydock for repairs that require six weeks or more to complete;\textsuperscript{201}
   b. The person charged is a member of a submarine “off” crew physically stationed ashore;
   c. The captain of the vessel has established a courts-martial panel to try offenses at the option of the government;
8. Prohibit operation of correctional custody units aboard ship;
9. Remove confinement on bread and water as a punishment;
10. Establish a civilian inspector general within the legislative branch to monitor administration of nonjudicial punishment.

These measures, if adopted in whole or in part, would do much to bring military practice into line with congressional precept for use of the article 15 power.

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\textsuperscript{201} If a ship is in a yard for repairs that take more than six weeks, all ammunition must be offloaded. \textit{DEP’T OF THE NAVY, AMMUNITION AFLOAT}, para. 2-53B (1979) (NAVSEA OP 4, Vol. 2, fifth rev.). The repairs, routinely accomplished by civilian workers, are so extensive that they cannot be safely made without dismantling the ship’s war-making plant. Of course a ship torn apart in this manner is incapable of performing a military mission. The military necessity argument for denying a sailor the right to court-martial in such circumstances is therefore unpersuasive.