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NON-JUDICIAL PUNISHMENT UNDER THE UNIFORM CODE OF MILITARY JUSTICE

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INTRODUCTION

IN OUR Armed Forces, military justice is administered through the disciplinary powers of commanders and courts-martial in accordance with The Uniform Code of Military Justice, effective date May 31, 1951,[1] enacted by the Congress pursuant to its constitutional authority to make rules for the government and regulation of the Armed Forces and under the executive power of the President as Commander-in-Chief of the Armed Forces.[2] Article 15 of the Code represents the present version of Article of War 104, found in the Articles of War of 1920[3] and amended in the 1948 Articles,[4] and long familiar as the commander's authority for company punishment in the Army and Air Force. "Captain's Mast" in the Navy and Coast Guard and "Office Hours" in the Marine Corps. In the Appendix Article 15, UCMJ, is set forth verbatim.

THE NATURE OF NON-JUDICIAL PUNISHMENT

IT IS common practice for both lawyers and laymen to consider the armed services as administrative agencies of the government and their entire program of military justice as "administrative" rather than "judicial" or "common law." There are some historical reasons for this general lack of precision in thinking about military law. In the first century of our national history, our standing army consisted of isolated detachments of frontier troops, numerically insignificant in their political vacuum. It took the Civil War with its draft and enormous citizen armies to make the soldier an important voting element,[5] with his franchise rights thereafter assured by constitutional

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1 Uniform Code of Military Justice, 64 Stat. 108 (1950); 10 U. S. C. §§ 801-940 (1956) (hereinafter cited as U.C.M.J.).

2 U. S. CONST. art. II, § 2, cl. 1.

3 Act of June 4, 1920, 41 Stat. 787, 10 U. S. C. §§ 1471-3 (1952); as amended by acts of August 20, 1937, 50 Stat. 724, 10 U. S. C. § 1522, 1542 (1952); amending Arts. of War 50½ and 70; Act of August 1, 1942, 56 Stat. 732, 43 U. S. C. § 433 (1952) amending Art. of War 50½; Act of December 14, 1942, 56 Stat. 1050, 10 U. S. C. § 511 (1952) amending Art. of War 114; and Act of December 15, 1942, 56 Stat. 1051, 10 U. S. C. amending Art. of War 52.

4 Act of June 24, 1948, 62 Stat. 627; 50 U. S. C. § 470 (1952).

5 Act of February 25, 1865, 13 Stat. 437.

amendment.[6] Following World War I, however, a few enlightened educators and statesmen succeeded in establishing a new concept of the military community, recognizing its ultimate need for discipline, but identifying its members as individuals entitled to the protection of the Constitution and the "common law" so far as the latter is the governing law[7] in the "judicial process" of the court-martial.[8]

MILITARY "COMMON LAW"

"JUDICIAL" protections of the individual in the military law derive from the Constitutional principle of separation of powers,[9] amendments to the Constitution like the Fifth[10] and statutory enactments of Congress. They also include such provisions of the Code as Art. 25 (Trial by Peers), Art. 38 (Defense Counsel), Art. 31 (Self-Incrimination), Arts. 54, 60, 61 and 65 (Records), Art. 32 (Investigation) and

[6] U. S. CONST. amend. XIV.

"An act to protect all persons in the United States in their civil rights and furnish the means of their vindication" was the forerunner of the Fourteenth Amendment, having been enacted two years prior to its adoption. It was passed April 9, 1866, over the President's veto and was known as the Civil Rights Act.

[7] There is no common law of the United States, as a distinct sovereignty, and there are no common law offenses against the United States, but the common law is resorted to by federal courts for definition of common law crimes not defined by statute, and it is generally in force to some extent, such as rules of evidence in criminal cases and of practice as well as principle in the absence of statutes to the contrary. There are too many court opinions and law articles on this subject to be cited. Any law digest or set of annotated decisions on the common law will contain numerous instances or items in point. But see Reid v. Covert, 354 U. S. 1, 37, 77 S. C. 1222, 1241, 1 L. Ed. 2d 1148, 1175 (1955) where Mr. Justice Black, speaking for the majority said, "As yet it has not been clearly settled to what extent the Bill of Rights and other protective parts of the Constitution apply to military trials."

[8] See MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, c. XXVII, par. 137, p. 238, hereinafter cited as M.C.M. (1951).

[9] It is frequently reflected in the Articles of the Uniform Code of Military Justice. The commander who convenes a court-martial may not be the accuser or the prosecutor (M.C.M. 1951, c. III, par. 5, p. 7). No person who has acted as investigating officer, law officer, or court member in any case shall act subsequently as trial counsel, assistant trial counsel or, unless expressly requested by the accused, as defense counsel or assistant defense counsel in the same case (M.C.M. 1951, c. III, par. 6, p. 9). No member of a court-martial may be an accuser or a witness for the prosecution (M.C.M. 1951, par. 63, p. 94 and Art. 25) or sit in a rehearing if he was a member of the court which first heard the case (Art. 63). No enlisted person may sit as a member of a court-martial for the trial of another enlisted person who is assigned to the same unit (M.C.M. 1951, par. 62f and Art. 25c). It may be accepted as a basic principle of our legal system that even in the military community, the idea of one person issuing an order or making a regulation in the nature of law, then arbitrarily determining the standards of compliance and, at will, punishing those under him or her for violation thereof is repugnant to Congress and to the public.

[10] Only presentment or indictment of a Grand Jury is excepted in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger.

Arts. 63 through 74 (Review). These "judicial" safeguards are enactments of Congress and have achieved a high measure of protection for the individual in the court-martial system. It is using very loose language, indeed, to call them "common law" protections, yet the "common law" does favor the individual in evidentiary and procedural matters and both Generals Leiber and Sherman advocated the development of a "common law" for the armed forces. So, perhaps it is not too far fetched to say that this accumulation of evidentiary and procedural rules, favoring the person rather than the group, is the "common law" of the military "judicial" process.

Administrative Discipline

Non-judicial punishment, on the other hand, is a necessary attribute of command. Its benefit is for society and its purpose is to direct the attention of the individual to the need for group discipline. There is little of the "common law" of the military "judicial" process in Article 15 of the Uniform Code.[11] Personal rights are submerged before the social interests of an organization or community. To the extent, therefore, that a commander has the right to punish a subordinate for minor offenses without recourse to the court-martial system and for the sake of convenience or to distinguish it from the "judicial process" in the growing community, this action has been called non-judicial punishment.

Part Three of the Code, consisting of Article 15, pertains to non-judicial punishment. It is designed to cover the substantive and procedural law governing the infliction of limited disciplinary penalties for minor offenses without judicial action. It was intended to be uniformly applicable in all of its parts to the Army, the Navy, the Air Force and the Coast Guard in times of war and peace.

Design for Uniformity

Among the provisions designed to secure uniformity in the administration of non-judicial punishment were: (1) An effort to make the offenses punishable under the Code as nearly identical as possible for all of the armed forces, and (2) An attempt to establish the same administrative system with the same jurisdictional limitations. This quest for uniformity in the field of non-judicial punishment was not a simple matter. It was assumed by the Congressional sub-committee

[11] The procedure savors of the High Commission of the English Tudor Era, although the practice is not unique with the British.

which held hearings on the Bill and anticipated in Paragraph (b) of Article 15 that the uniformity sought in the Uniform Code would be less evident in Article 15 than elsewhere. The provisions of Paragraph (b) of Article 15 authorize the Secretaries of the three services: (1) To modify the kind and amount of punishment authorized; (2) To determine which categories of commanding officers may act in specified classes of cases; and (3) To regulate the right of an accused to demand trial by court-martial.

Appreciation of service differences in disciplinary matters, their philosophy and historical background, is desirable to assure an intelligent application of the Code. A knowledge of the origin and scope of "mast punishment" in the Navy and Coast Guard and "company punishment" in the Army and Air Force is a prerequisite to the wise administration of these necessary rights. Otherwise, the divergent concepts are bound to make themselves felt in restrictive and overlapping regulations and in departmental rather than inter-service interpretation and implementations of Article 15. Amphibious and other joint operations could possibly develop the concept of concurrent jurisdiction for Army, Air Force and Marine units in convoy,[12] as well as in battle. The operation of Army transports and the movement of military organizations, not a part of a ship's complement, by water was anticipated by the Armed Services Committee in Hearings.[13] Along this line of reasoning the committee revised the initial bill to establish a consistent disciplinary program for all services on board ship as well as on shore.

THE RIGHT TO ELECT COURT-MARTIAL

THE Code, by authorizing the Secretary of a Department to limit by regulation the non-judicial punishment of "an accused who demands trial by court-martial," permits to continue the difference which has

[12] The act of August 29, 1916, 39 Stat. 586, 34 U. S. C. §§ 717, 743, 1200 (1952) established disciplinary power on a legal basis for commanding officers of marine detachments in convoy or not part of the authorized complement of a vessel, and the commander of such vessel, so that each could punish those offenders under their concurrent jurisdiction. This concept is inherent in the U.C.M.J. See further to the same effect the Order in Council under Section 88 of the Naval Discipline Act, 1866 (29 & 30 Victoria, c. 109) approving Regulations for the discipline of H. M.'s Land Forces embarked as passengers on any of H. M.'s ships and attached Schedule of Summary Punishments. The punishments like "stoppage of smoking" are in themselves interesting.

[13] H. R. REP. No. 491, 81st Cong., 1st Sess. 14 (1949) and House Committee on Armed Services, Hearings on H. R. 4080, H. R. Doc. No. 44, 81st Cong., 1st Sess. 1331 (1949).

long existed between Army and Navy on this point. The Army and Air Force have always recognized the right to demand court-martial instead of company punishment; the Navy has never recognized a right to demand court-martial instead of mast punishment. The differences are partly historical, partly based on the differences between punishments ashore and punishments afloat. Uniformity could be achieved by denying the right in critical or isolated areas as well as on board ship, and by granting it in other cases.

MAST PUNISHMENT

"MAST punishment" can be traced back as the necessary punitive right of a commanding officer clear to the Phoenecians. It is the surviving remnant of an autocratic power, once that of life and death on the high seas. It has always been considered essential to discipline in the congested world afloat. Each effort to limit its application has been opposed as endangering security and order aboard ship. Liberal construction of sea laws, concerning both passengers and crew, gave the captain considerable latitude even through the First World War.[14]

The origin of "Captain's Mast" is obscured in antiquity. Early accounts of disciplinary practices on board ship give the impression that the Master of a ship had almost absolute power of life and death in dealing with the real or fancied derelictions of his officers and crew. The earliest records of the British Navy, at the time when it was quasi-merchant in character, indicate that the captain of a ship had very great powers; this impression is heightened by many novels written about seafaring in the days of sail with their vivid portrayals of abuses of power by over-zealous commanders.[15] Flogging, branding, maiming, and keel-hauling appear to have been indiscriminately imposed by captains without benefit of regular judicial procedures.

The development of military and naval law in the United States Army and Navy and their antecedents, the British Army and Navy, from which most of our customs, traditions, and legal procedures have evolved, has consisted in great part of measures which circumscribe the traditionally unlimited power of the commanding officer.

[14] For an interesting episode in naval justice see 1 AMERICAN STATE TRIALS 531 which contains a transcript of the record of trial by general court-martial (1843) of Commander Alexander Slidell MacKenzie for murder. He had hanged from the yardarm of his ship, the U.S.S. Somers, for mutiny the son of the Secretary of War with two companions.

[15] MELVILLE, WHITE JACKET (Boston, 1892); DANA, TWO YEARS BEFORE THE MAST (Boston, 1932); NORDOFF AND HALL, MUTINY ON THE BOUNTY (N. Y. & New Orleans, 1897).

"Mast punishment" was a part of the Articles for the Government of the Navy for over 120 years before the deck court was constituted.[16] The summary court[17] was not established until 1855 so for half of the life of the United States Navy there was only mast punishment and a general court-martial. To demand a general court-martial that could order "not more than 100 lashes in non-capital cases," in lieu of the maximum of 12 lashes allowed the commander, was not to be considered.[18]

RECORD OF PUNISHMENT

UNDER "mast punishment" the findings were final and binding upon the accused. The arbitrary right exercised left the defendant with no recourse on the merits. He had been found guilty, or to be more practical, he had been unable to prove himself not guilty. Because of the finality of this autocratic decision, the Navy and Coast Guard felt justified in making such conclusion a permanent part of the accused's personnel record.

COMPANY PUNISHMENT

COMPANY punishment, on the other hand, came into being during the era of World War I. It entered our legal system at a time when summary, special and general courts-martial were firmly established and public sentiment was strong for judicial protection of the individual. Prior to the Revision of the Articles of War in 1916, we had

[16] The "deck court" was established in 1909 together with the abolition of irons by Act of February 16, 1909, c. 131, §§ 2 and 8, 35 Stat. 621, 34 U. S. C. §§ 717, 743, 1200 (1952).

[17] Not to be confused with the Army Summary Court of one officer or the summary procedure under British practice. See Air Force Act, Sections 46 and 47, MANUAL OF AIR FORCE LAW (RAF) 1948, at 263. The Army Summary and Navy deck courts were comparable (each requiring one officer). The Navy Summary Court and the Army Special Court were similar (both requiring a minimum of three officers). Army nomenclature was adopted in the U.C.M.J.

[18] Rules for the Regulation of the Navy of the United Colonies as passed by the Continental Congress, Act of November 28, 1775, 3 JOURNALS OF THE CONTINENTAL CONGRESS, pp. 378-387, par. 4 of which provides: "No commander shall inflict any punishment upon a seaman beyond twelve lashes upon his bare back with a cat o' nine tails; if the fault shall deserve a greater punishment, he (the C. O.) is to apply to the commander in chief of the Navy in order to the trying of him by a court-martial." When the Articles were adjusted to the Constitution by the act for the Government of the Navy, March 2, 1799, Statute III, Article 4 was substantially the same as the foregoing with the additions that "No other cat shall be made use of on board of any ship of war or other vessel belonging to the United States." Both the Colonial and the Congressional Acts limited the punishment which a court-martial could order for non-capital offenses to 100 lashes and prohibited wire cats or knots at the ends of the lashes.

no such feature as a system of disciplinary punishments—or punishments imposable at the will of military commanders without the intervention of courts-martial—"our law recognizes no military punishments for the Army, whether administered physically or by deprivation of pay, or otherwise, other than such as may be duly imposed by sentence upon trial and conviction."[19]

"The practical result is that the only discipline in the nature of punishment that, under existing law, can in general safely or legally be administered to soldiers in the absence of trial and sentence is a deprivation of privileges in the discretion of the commander to grant or withhold, (such as leaves of absence or passes) or an exclusion from promotion to the grade of noncommissioned officer, together with such discrimination against them as to selection for the more agreeable duties as may be just and proper. To vest commanders a specific power of disciplinary punishment, express legislation would be requisite."[20]

Company punishment was no autocratic anachronism. It was a new "legal" process created by statute and devised to strengthen discipline in a growing, permanent and politically significant Army. It reflected the need for proper command control and discipline learned from the citizen armies of the Civil and Spanish-American Wars.[21] It legitimatized the regulatory basis on which the Army had attempted to insure compliance with orders prior to the Articles of War of 1916[22] and created three recognizable categories of corrective action:

[19] WINTHROP, MILITARY LAW AND PRECEDENTS (2d ed. 1920).

[20] *Id.* at 446.

[21] See the quotations from *Hearings before the Military Affairs Committee* at 34 on the Revisions of the Articles of War, 1912-1920, of the Judge Advocate General Leiber in 1879 and the comments on it by General W. T. Sherman. Therein were set forth the ultimate speculative ideals of administrative justice:

1. No appeals.
2. No delays in the execution of punishment.
3. No requirement for unanimous verdicts.
4. Liberal rules concerning depositions and a reduction of the right of the accused to see witnesses.
5. Elimination of pre-determined limitations to sentences.

Fortunately for the individual, the influence of Col. (Prof.) Edmund Morgan, Jr., formerly of the Harvard Law School, and other leaders of similar philosophy has been successful in providing judicial safeguards that go beyond the common law or the amendments to the Constitution.

[22] See the remarks of the Judge Advocate General Crowder in *Hearings on the 104th Article of War,* before the Committee on Military Affairs, pp. 112-113, 1912-1920. Under the previous Articles of War there were specific "administrative" punishments such as asking pardon for using reproachful or "provoking speeches or gestures to another" (Article of War 25) and forfeitures for irreverence in church and profanity, Articles 52 and 53 respectively, of the Articles of War of 1874 in effect in 1916—but consistently ignored.

1. Punishment imposed by a court-martial in which the voluminous and cumbersome rules of evidence and procedure protecting the accused are the dominant influence.

2. Non-judicial punishment imposed by a commander in which the group interest in speedy, unencumbered discipline dominates.

3. Curtailment of privileges and the withholding of rights on a non-penal basis through authority vested in the commanding officer.

These categories have both a practical as well as a legal significance. It is a matter of policy never to convene a court-martial if non-judicial punishment will suffice and to avoid any punitive action at all if a remedial deprivation of privilege will correct a situation.[23] Their utilitarian aspects, of course, should never really be weighed too heavily with the merits. The paper work of a summary court is, however, cumbersome and time-consuming. Company punishment involved at most a simple form or two and could be disposed of expeditiously. For the non-penal action, there was no extra work at all, merely a failure to take action or a continuance of routine activity.

"Company punishment" was penal in its nature and, therefore, a statute to be narrowly construed in its application to an accused. The military "judicial" process was deliberate and careful, but it was also relatively slow and time-consuming,[24] and it was too far away from the offense to assure discipline. The acceptance of "company punishment" came at a time when that public recognition of the need for prompt effective disciplinary action was becoming more vocal and insistent.[25] Nevertheless, it was resisted in Congress and in the literature of the times by those whose interest in penal processes affording greater protection for the individual was paramount whether for personal or philosophic reasons.[26]

[23] See M.C.M. 1951, c. XXVI, sec. 129, p. 230.

[24] During World War I a total of over 400,000 Army courts-martial were convened, of which 30,906 general courts-martial were processed. Translated into man hours this means the equivalent of over 600 officers, aside from Judge Advocate or enlisted personnel, or enough to staff nearly two World War I infantry divisions was tied up throughout the 16 months of the war by the judicial process.

[25] Representative Evands, Military Affairs Committee, May 27, 1912, made this remark while considering the 104th Article of War: "I do not believe that we can consider for a moment the rights of soldiers on a civil basis. We have got to have order and the discipline has got to be rigid and the administration of punishment quick in order to be effective." *Hearings, supra* note 22 at 116.

[26] Lest this force be underestimated, consider how, in the present Code, forfeitures for officers were reduced from 6 months in the Original Bill, H. R. 2498, to 1 month in Article 15, while forfeitures for enlisted men were eliminated entirely and confinement on bread and water was reduced by Congress to 3 days from the 5 days proposed. *Hearings, supra* note 22 at 93.

It was this combination of factors which undoubtedly led General Crowder to favor his interpretation of the initial phrase establishing company punishment. "For minor offenses *not denied by the accused*," he construed to mean "unless the accused admits the offense," you cannot do anything. "He can avoid the operation of this article if he desires. In the first place, it has no application to him unless he says, 'I am guilty,' and then it has no application to him if he demands trial by court-martial."[27]

This construction of the phrase which admitted no compromise between an accuser and an accused[28] brought no relief to the overloaded courts-martial system and in 1920 it was changed to its present text.[29] The removal of the requirement for an admission of guilt imposed by General Crowder apparently gave some vitality to company punishment. It also changed its nature from that of merely imposing punishment upon a confessed offender, to a situation in which four steps were recognized.

1. The commanding officer investigated an action or situation which seemed to indicate the need for corrective measures in the interest of discipline.

2. The accused was afforded an opportunity to prove himself innocent. There was no privilege to his communications, however. Rather, it was recommended procedure to read the 24th Article of War prior to interrogation.[30]

3. The accused:

(a) agreed to accept punishment in lieu of judicial action. This procedure was something between a compromise to close an incident, and plea of "nolo contendere" in which the accused neither pleaded guilty nor not guilty. He simply did not contest the charges and agreed to accept punishment imposed by the commanding officer,[31] or

[27] *Ibid.*

[28] "Not denied" may seem pretty close to "admitted" if the accused is asked—but consider the Fifth Amendment to the U. S. Constitution and the 31st Article of the U.C.M.J. which make it a safe and sane practice not to incriminate onself. Under the first phrase, if the accused said nothing or denied his guilt, there was nothing further the commander could do. After the change, the burden was on the accused to deny the charges and to substantiate his denial, if he wished to avoid punishment, without recourse to a court-martial.

[29] "Not denied by the accused" was deleted from the text. It was at this point that a time limitation of one week was placed on company punishment. See also as to the workload of the courts. See note 24, *supra.*

[30] Article 31 of the U.C.M.J. See also M.C.M. 1951, c. XXVI, sec. 133, p. 232.

[31] Non-judicial punishment is akin to "administratif droit." Possibly not, in theory at least, to the extent of invoking a presumption of guilt until the accused can prove himself innocent, but usually and logically in practice. The right to demand a court-

(b) refused to accept company punishment and elected to stand trial before a summary court-martial. This step has occurred so seldom in practice as to exist largely in theory.

4. The accused, having elected to accept company punishment instead of a court-martial, without knowing what his punishment would be, except for its statutory limitations, was still able to appeal from such punishment if he felt there had been an abuse of authority in exceeding the limits imposed by law, that the punishment was cruel or unusual, or that it was unreasonable in relation to the offense.[32]

As the Rev. Robert J. White, J.C.D., has so ably pointed out in his article which appeared in Vol. XXVIII, No. 1, of St. John's Law Review, Dec. 1953, at page 24, there has been a reduction of non-judicial powers under Article 15 in the Navy and Marine Corps. Formerly commanding officers possessed adequate powers to put youthful offenders summarily back on the right track in an atmosphere of paternal correction. This avoided the stigma of a court-martial as a "previous conviction." Such reduced powers have caused a serious impairment of discipline. Of 253 Summary Courts-Martial examined by The Board for the Study of Disciplinary Practices and Procedures of the United States Navy in 1953, it was found that 63% of those cases could have been disposed of at "Mast" thereby saving a great deal of time and "paper-work" and still mete out justice.

The summary court for the Army developed from the Regimental (Organizations) or Garrison (Installations) Courts and Field Grade

martial where a judicial presumption of innocence exists, in an evidentiary sense, tempers the commander's power at least in the Army and Air Force.

[32] To a similar end see Art. 55 of the U.C.M.J. On the other hand, a complaint under Art. 138 of the U.C.M.J. will not be entertained in relation to punishment administered pursuant to Art. 15. An opinion of The Judge Advocate General of the Army (3 DIGEST OF OPINIONS, *The Judge Advocates General of the Armed Forces,* Review § 51.15 (1953)) holds that Art. 138 does not authorize The Judge Advocate General or the Inspector General to reexamine a court-martial conviction which has become final on completion of appellate process. Although this opinion refers specifically only to courts-martial, the rationale is equally applicable to non-judicial punishments administered pursuant to Art. 15, U.C.M.J. The review procedures of the U.C.M.J. available to an enlisted man against whom non-judicial punishment was meted out under Art. 15 are adequate and final, and Art. 138 was not intended to expand such procedures. To do otherwise would result in permitting perpetual appeal under the guise that every commander denying appeal, could become the object of action under Art. 138. The application of Art. 138 is limited to other fields than that of discipline, such as deprivation of property, abuse of command discretion, or otherwise dealing with the subject unjustly. The proper remedy would be by application to the Board for Correction of Military Records. The jurisdiction of such board is provided by a statute separate and distinct from the U.C.M.J. Legislative Reorganization Act, § 207, Aug. 2, 1946, as amended. 60 Stat. 837, 5 U. S. C. §§ 191(a), 275; 65 Stat. 655, 5 U. S. C. 191a, 275, 456a.

Officers (Field Organizations) Courts, in which the court officer was invariably the superior of the company commander.[33] This insured that the officer, sitting as demanded in place of company punishment, was neither biased nor pressured in his judgment. This procedure made considerable sense in providing statutory protection of an individual's right to due process.

WHO MAY IMPOSE NON-JUDICIAL PUNISHMENT

THE problem of who is a commanding officer[34] and who may impose non-judicial punishment is not always easy of solution. Under paragraph (c) of Article 15, where circumstances warrant it, such as small detachments, isolated over considerable periods, and/or at remote outposts, the Coast Guard permits a few of its petty officers to enforce discipline under a restrictive set of circumstances. The other services,

[33] The Regimental or Garrison Courts were established by Article 66 of the April 10, 1806, Articles of War. They were forerunners of the three man special court-martial. Section 7 of the Articles of July 17, 1862, c. 201 provided: "Hereafter, all offenders in the Army charged with offenses now punishable by a regimental or garrison court-martial shall be brought before a field officer of his regiment, who shall be detailed for that purpose, and who shall hear and determine the offense, and order the punishment that shall be inflicted; and shall also make a record of his proceedings, and submit the same to the brigade commander who, upon the approval of the proceedings of such field officer, shall order the same to be executed. Provided, that the punishment in such cases be limited to that authorized to be inflicted by a regimental or garrison court-martial. And provided further, that, in the event of there being no brigade commander, the proceedings as aforesaid shall be submitted for approval to the commanding officer of the post." The regimental commander makes the detail, when there is more than one field officer with the regiment on duty with it. If there be but one field officer with the regiment the detail must be made by his next superior officer; and if there be no field officers present with the regiment recourse must be had to regimental or garrison courts. The above law (par. 647) applies only to regimental organizations. SCOTT, ANALYTICAL DIGEST OF THE MILITARY LAWS OF THE UNITED STATES 288 (1873).

[34] The power to administer non-judicial punishment is vested solely in the commanding officer and may not be delegated even to an executive officer. An officer to whom an enlisted person is assigned for duty may not impose punishment by ordering him to perform extra duties (United States v. Robertson, 17 C.M.R. 684 (1954)). A commander of a provisional unit which is manned and organized with attached personnel for a specific mission and a limited period of time may have authority to impose punishment upon personnel attached to the unit. It is not the character of the unit which determines whether its commander has the power to impose, but whether the unit so composed and its commander has the usual responsibilities and attributes of command. 6 DIG. OPS., *Non-Judicial Punishment* § 3.1 (1956). The imposition of non-judicial punishment takes effect on the date the appropriate commander signs the indorsement notifying the accused of his action. Acccordingly, where an officer was under the jurisdiction of the commander imposing non-judicial punishment on the date the indorsement was signed the punishment was legally effective notwithstanding the fact the officer had been transferred and was not under the commander's jurisdiction at the time he received notification of the punishment. 6 DIG. OPS., *supra,* § 4.6.

however, possess such a ratio of officers and warrant officers to soldiers, sailors and airmen that there is no need for such action by them.[35] The commander of a tenant organization and his superiors in the chain of command never lose jurisdiction to impose non-judicial punishment on a member of the command. Where a support agreement is negotiated and grants court-martial jurisdiction to the accommodating commander, the court-martial jurisdiction and jurisdiction under Article 15 may best be described legally as concurrent. It would be incongruous if the commander of the accommodating command could not impose punishment under Article 15 in lieu of court-martial. To deny him that right would be to deny him the right to exercise his judicial discretion in the case—and this would be contrary to both the letter and the spirit of the Code. While the commander of the tenant unit who has authority to convene courts-martial or to impose non-judicial punishment does not, as a matter of law, divest himself of that authority over the members of his command by entering into a support agreement with another commander (or for that matter by publishing orders attaching certain units to another organization for the administration of military justice) the very fact that such an agreement has been negotiated contemplates that the commander of the accommodating command will exercise court-martial jurisdiction and Article 15 jurisdiction in the majority of instances.[36]

Although communications with respect to the punishment may be signed as provided for official communications in general (M.C.M. (1951) Note to App. 3, page 460) and a letter of reprimand or confirmation of an admonition signed by an executive officer may be valid if reflecting orders of the commanding officer[37] it is poor policy to handle non-judicial punishment on any other basis than a personal one with the accused. With reference to enlisted men, the power to administer non-judicial punishment is not restricted to the accused's immediate commander. Superior commanders can impose non-judicial punishment upon any member of their command, but it is customary to refer such disciplinary action to the immediate commander.[38] A temporary

[35] Any "commanding officer" in the Navy may impose non-judicial punishment but an "officer-in-charge" may impose only the punishment authorized for non-commissioned officers and other enlisted personnel. 1955 N.S. M.C.M. § 0101a(1) and M.C.M. 1951, para. 128a, last subparagraph.

[36] 7 DIG. OPS. No. 1, *Non-Judicial Punishment* § 5.1 (1957).

[37] DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY 1912-1940, p. 368 (1926).

[38] M.C.M., 1951, par. 129, p. 230.

commanding officer may exercise the power as well as the permanently assigned commander[39] and his authorized commanding officer, on return from leave, may punish a junior officer for an offense committed by the junior officer during the commander's absence, even though the junior was in command.[40]

CURTAILMENT OF AUTHORITY

ONLY the Secretary of a Department can restrict the power of a commanding officer to impose non-judicial punishment.[41] When a separate unit having a commanding officer is attached to a Navy vessel for duty, the commanding officer of the unit is enjoined not to exercise his power to impose non-judicial punishment or convene courts-martial as a matter of policy.[42] This policy, however, does not take away the authority of the commanding officer of the unit while aboard ship, but merely emphasizes the paramount authority of the commanding officer of the ship while the unit is aboard.[43]

Another aspect of the problem exists ashore where organizational status is subordinated to the installation[44] or geographical unit; i.e., base, post, theatre or area command. Subordinate units of a base invariably surrender whatever rights they possess to appoint a court-martial to the installation commander and integrated squadrons or battalions do the same to their higher echelons. To the extent indicated by the Departmental Secretaries and to the degree authority is restricted by installations or higher echelons, the rights of lower echelons to administer non-judicial punishment is curtailed although concurrent authority always exists in theory if not in practice. When a certain type of offense becomes too common and the threat to discipline becomes too general, or where the impact of a category of offenses on major organizations is deleterious, higher commands will undoubtedly take over jurisdiction in the interest of uniform justice and the speedy correction of such conditions.

The only limitation that conceivably exists to this power of curtailment is a requirement that authority to restrict the administration of

39 1 *Bull. of the Judge Advocate General of the Army* 24 (1942).
40 DIG. OF OPS. note, 37, *supra* at 368.
41 1 DIG. OPS., *Non-Judicial Punishment* § 3.1 (1951).
42 1955 N.S. M.C.M., §§ 0101a(2), 0102d(2).
43 3 DIG. OPS., *Courts-Martial,* § 4.1 (1953).
44 Activities too, enjoy a very limited amount of concurrent jurisdiction. Chiefs of the various arms and services may administer non-judicial punishment with respect to military personnel on duty in their respective offices. 1 DIG. OPS., note 41, *supra* at § 4.7.

non-judicial punishment (the Code itself takes care of courts-martial) by offenses or by commanding officers is that it be non-discriminating against individuals or organizations and that it be reasonable, i.e., within the limitations imposed by law. The Inspector General, acting for the commander of a higher echelon, will doubtless assure on-the-spot impartiality and fairness. Congress itself has shown that in the long run it will not permit the services to disregard or challenge its legislation.

There is a legal right or obligation imposed on the commanding officer of a detached squadron or company, or even the officer in charge of a detachment thereof, to enforce discipline both through non-judicial punishment and as summary court officer, particularly in those instances where the commander is the sole officer present. In this latter instance there might seem to exist an impasse because of the fact that a single officer is on duty with the detachment and there is no officer present to whom to appeal. As a practical matter, such officer would request that a superior echelon of command appoint a summary court and the next inspector or staff officer visiting the detached unit would usually have that additional duty. This slows justice, however, increases the administrative workload and constitutes another argument for all services to extend to officers-in-charge the right to order non-judicial punishment without recourse in critical and/or isolated areas at least.

UNIFORMITY

THIS restriction of the authority of the lower echelon commanders to impose non-judicial punishment while a part of an installation or a higher echelon suggests that, ashore at least, it is possible for the naval units to subordinate their "mast" punishment power to that of the commanding officer of an installation or higher command or at least have the power to appoint summary courts exercised by the commanding officer of naval installations, thereby removing both the historical and judicial objections to the right of naval personnel ashore to demand a court-martial in lieu of non-judicial punishment. Committee hearings suggest that it was this uniformity aboard and ashore that Congress had in mind in spite of the provisions of paragraph 15(b).

THE RIGHT TO APPEAL

THE right to appeal from a non-judicial sentence of punishment has led to some confusion. The appeal permitted by paragraph (d) of Article 15 of the Code is in no way connected with the right to demand

a court-martial. The latter in the case of the Army and Air Force must be waived before a sentence of punishment can be imposed[45] or an appeal initiated.

Review of Guilt or Innocence

An appeal is not made upon the merits of the case. It does not raise the question of guilt or innocence even though a total remission of sentence might seem the equivalent of a directed finding of "not guilty." The appeal permitted is from the sentence and not from the fact that the person accused has been found liable to a sentence.

Review of Punishment

The right of appeal is not from being punished, but from the nature of the punishment inflicted. The appeal must be effected through a communication in writing through proper channels (i.e., the commanding officer who ordered the punishment or his successor) to the next higher authority. Although the punishment meted out is the end product of the system, and the appeal from "unjust punishment or punishment disproportionate to the offense" provided for in the Code usually goes only to this phase of the proceedings, in the situation where there is an infirmity in the action, unknown to the accused, the commander empowered to act may do so on anyone's "application" including his own.

It is an appeal from an abuse of authority by a commanding officer. This abuse may be based on a lack of jurisdiction or it may be based on excessive or unreasonable punishment in cases where original jurisdiction does exist. Jurisdiction may be raised at any time in the proceedings as a plea in bar. It is calculated to stop proceedings at whatever point the contention is upheld.

Assuming in a record of non-judicial punishment forwarded to the proper authority that a patent error marks the punishment imposed as unjust, or as a nullity in law, any superior officer would have the responsibility and authority to correct such a punishment. This power exists regardless of whether or not an appeal or application for correction has been made. It exists by virtue of his position as a superior

[45] One who fails to demand trial by a court-martial when informed that it is proposed to give him non-judicial punishment unless trial is demanded, is precluded from denying his guilt upon appeal from the punishment adjudged. The appeal is limited to cases where the punishment is deemed unjust or disproportionate to the offense, and the appeal may be entertained on that ground only. 3 *Bull. of the Judge Advocate General of the Army* 424 (1944).

commander under Article 15(d) and not as an adjunct of the exercise of general court-martial authority.[46]

So far as appeal from the punishment itself is concerned, this step under the process of administering non-judicial punishment has three aspects:

1. The prohibition against cruel and unusual punishments is contained in the United States Constitution as well as the Uniform Code of Military Justice. This provision, which is embodied in the Eighth Amendment to the United States Constitution, establishes a basis upon which an accused may challenge the punishment meted out to him by the commander where such punishment is not specifically authorized under the Code.

2. Only one type of punishment may be imposed for each offense under Article 15 in addition to admonition or reprimand. "Grounding" for a person assigned to flying duty is not an authorized punishment. It might necessarily follow, however, from awarding the authorized punishment of restriction. If so, this would be perfectly proper.[47] Limitations of Article 15 itself may not be exceeded by non-judicial action and where any combination of the punishment authorized exceeds the time limits permitted, or the reduction in grade provision is exceeded, or the fiscal amounts in the case of officers, the accused has a basis on which to appeal from his punishment.[48] These first two restrictions pertain to unjust punishment and they are matters of law.

3. Unreasonable punishment is a matter of fact or judgment. It is punishment disproportionate to the offense. It must be based on the pertinent circumstances in the case, including mitigating and aggravating factors. Normally such an appeal indicts the judgment of the officer imposing the punishment, and since the burden is on the appellant to prove the sentencing officer unreasonable and the latter is entitled to favorable interpretation of his judgment, the facts must be very strong for the defendant to have his appeal sustained.

Under the Code all military personnel have a right to appeal from the punishment they receive. Any appeal from punishment will contain, as part of the record of appeal, the nature of the offense, in support of the claim of excessive punishment. To this degree the

[46] M.C.M. 1951, par. 135.

[47] 1 DIG. OPS., note 41, *supra* at § 11.1.

[48] See United States v. Deal, 14 C.M.R. 700 (1954) wherein a commander improperly punished an accused under Art. 15 with both extra duties and restrictions.

appeal invokes a reconsideration of the facts on their merits. The right of appeal is extremely important under the Code where the "officer who imposes the punishment, his successor in command, and superior authority shall have power to . . . restore all rights, privileges and property affected." It means that while, in legal theory, there is only an appeal against the punishment, there may be achieved a measure of appeal based on the nature and extent of the administrative record used which may take the appeal to the substance of the offense itself.

Remission and Suspension

The effect of an appeal introduces further a slight conflict existing between naval theory under the Articles for the Government of the Navy and the concept of the Army and the Air Force under the Articles of War. In the former instance the accused had only the right not to be given cruel and unusual punishment and there were no limitations under the existing Articles for the withholding of privileges or extra duties for an enlisted man. The appeal from such punishment could have no effect at all unless the commanding officer was ingenious enough to devise a "cruel and unusual punishment" falling within that relatively simple category. In the case of confinement, or confinement on bread and water or diminished rations, or solitary confinement, the Articles for the Government of the Navy had a time limit so that an appeal could result in the elimination of any excess time imposed.

In the Army and Air Force an appeal has always been allowed from the punishment imposed as unjust, excessive or disproportionate (in the case of officers). This appeal must show the nature of the offense in an appeal from unjust punishment. Facts must be set forth to establish the other bases for appeal. It is not surprising, therefore, that under authority to remit or suspend any unexecuted portion of the sentence, the officer who ordered punishment is inclined to correct any legal deficiencies called to his attention without recourse to higher headquarters.

The Code follows the Articles of War in respect to the right of appeal from punishment imposed and also includes "the person punished may in the meantime be required to undergo the punishment adjudged." This reduces the practical utility of an appeal since it must be processed through the commanding officer who imposed the sentence or his successor. The brevity of the periods of punishment also

suggests there will not be frequent recourse to appeal and that it will rarely be processed beyond the sentencing officer. The reduction of an enlisted member pursuant to Article 15 cannot be suspended considering that it is executed upon notice to the member and suspension can relate only to an unexecuted portion of a sentence. In the sense that the punishment must be imposed before it can be suspended, suspension cannot be simultaneous with imposition.

APPEALS TO CLEAR RECORDS

ONE exception to this may be an increasing effort, particularly during peacetime, of an officer to keep his record clear. In one respect, the Code goes even further than the Articles of War. The officer who imposes the punishment, his successor in command, and superior authority have the power "to suspend, set aside, or remit any part of the punishment and restore all rights, privileges, and property affected."

Under the 1948 Articles of War this authority only went to the extent of the unexecuted portion of the sentence,[49] and in the case of the Articles for the Government of the Navy, it went only to jurisdiction, cruel and unusual punishment, or excessive punishment in the cases of confinement. If the present practice in some of the services continues, of processing non-judicial punishment into an officer's permanent record, where it can seriously impair his future career,[50] the

[49] There is no provision of law permitting any authority to rescind, vacate or disturb a legal order imposing a forfeiture after execution. 5 *Bull. of the Judge Advocate General of the Army* 341 (1946). A forfeiture of pay lawfully imposed upon an officer could not be "revoked" after it was collected. 4 *Bull. of the Judge Advocate General of the Army 237* (1945). Only board action to revise whatever record existed was available to the punished officer.

[50] "One of the arguments that has always been used in trying to defend this disparity of treatment between officers and enlisted men is that a reprimand would go into the officer's record. Competent military men have said that a reprimand seriously impairs an officer's future service. I think it would be more so today where we have a selection system in the Army and Air Force, the same as the Navy has had, in preference to the old seniority rule for promotion. I am sure those reprimands are going to be in the officer's record and any selection board which passes on an officer is going to see them." *Hearings Before Subcommittee No. 1 of the Committee on Armed Services,* 81st Cong., 1st Sess. 928 (1949). In the hearings before Congress on the 1948 Revised Articles of War, General Hoover stated that punishment under the 104th Article of War would be noted in his record, adding further that it might incidentally become a serious thing for an officer. "If he is in jeopardy of reclassification or if he is subsequently tried by court-martial, the fact that he has been punished under the 104th Article of War definitely militates against him." The General seems a bit obscure on the legal status or use of a record of company punishment, but it undeniably shows that Congress intended that there should be a record somewhere of 104th punishments.

accused will be inclined to demand a court-martial, to exercise an appeal and to seek subsequent board action in an effort to keep his record clear.

Procedure on Appeal

The procedure on appeal in the administrative process is similar to the imposition of punishment by the non-judicial process itself. The officer by whom the appeal is heard, even though it be the officer handing out the punishment, has authority equivalent to that of the President of a special court-martial or of the law officer of a general court-martial to order an accused to change his plea to "not guilty" and then "acquit" him. Such action, however, would be in the nature of a censure of the officer ordering the punishment. He is in an excellent position procedurally to anticipate and avoid such a possibility. It is improbable, therefore, that there will be many instances in which there will be a total remission of all forfeitures and a restoration of all rights and privileges, which is to say a complete wiping out of both the record and the impact of the non-judicial punishment.

Double Jeopardy

There is another difference of interpretation between the Articles of War and the Articles for the Government of the Navy in respect to the admissibility of evidence before a subsequent court-martial of previous company or mast punishment in a trial for the same offense. In the latter case, the Navy, although they maintained a much more systematic and perpetual record system of mast punishment than did either of the other services, ruled that mast punishment was no conviction, that it was irrelevant and inadmissible in a subsequent court-martial proceeding and, therefore, such record could never be a bar to any subsequent judicial action.[51]

The Articles of War and the Uniform Code of Military Justice on the other hand have taken the position that company punishment

[51] There is an historical rationale of the Navy position, since its rulings were established before the finer points of administrative law had been recognized in this country. Mast punishment was an autocratic prerogative in its inception, with non suspicion of any right for the accused. It was not until 1862 that twenty-five Articles for the Government of the Navy were revised and provision was made for an entry in the ship's log. There has been a progressive limitation imposed on the use of non-judicial punishment by the Navy, the Code being merely the last step in that direction. Now that the three services have been relatively unified in their use of the administrative process, it is probable that the size and complexity of the growing military organizations and the pressure of world events will increase the demand for the enlargement of this technique for the protection of group interest.

can never be a bar to judicial trial for a serious offense, but that so far as the identical act is concerned, previous non-judicial punishment may be introduced in evidence after a finding of guilty by a court-martial in mitigation or reduction of the sentence imposed by the court. The use of the term "serious offense" in this respect may develop a rule that administrative punishment is a bar to a subsequent summary court-martial on the basis of double jeopardy since paragraph (e) of Article 15 provides that it will not be a bar only in those cases where a serious crime or offense grows out of the same act or omission which is not properly punished by non-judicial action. The implication of the wording is that previous non-judicial punishment will be a bar if the offense is not serious and the act or omission is properly dealt with under Article 15.[52]

PUNISHMENTS

NON-JUDICIAL punishments reflect the gravity of the offenses they are intended to discourage. Whether an offense is "minor" or "serious" depends upon its nature, the time and place of its commission and the person committing it.[53] There have been developed two categories of offenses for which non-judicial punishment is used: (1) Those which are "minor" and for which there may be no subsequent trial by court-martial, and (2) Those which are "serious" and for which double jeopardy is no plea in bar to subsequent trial.

UNDER THE UNIFORM CODE OF MILITARY JUSTICE

THE schedule of permissible punishments under the Uniform Code of Military Justice reflects a systematic overhauling of earlier laws. There is nothing novel in the new kinds of penalties which may be inflicted. Rather the items remaining reflect world-wide experience and a determination of: (1) Where and when is non-judicial punishment most apt to be needed to maintain discipline; and (2) What kind of punishment is most likely to accomplish the desired result.

There are three categories of non-judicial punishment in the Code:

1. Those which apply equally to officers and warrant officers as well as to other military personnel. These include:

[52] Punishment under Art. 15 for larceny does not bar a court-martial for the same offense since larceny is not a minor offense. United States v. Moore, 5 U.S.C.M.A. 687, 18 C.M.R. 311 (1955). But see opinion of the Judge Advocate General of the Navy to the effect that a commanding officer's imposition of non-judicial punishment for the theft of government gasoline of a value of $6.65 was legal. 7 DIG. OPS., note 36, *supra*.

[53] M.C.M., 1951, c. XXVI, par. 128b, p. 5.1, 229.

a. admonitions and reprimands of other than a corrective nature,
b. withholding of privileges, and
c. restrictions to limits, both for a period not to exceed two weeks;

2. Those which apply only to officers and warrant officers. These include a forfeiture of not to exceed one-half of one month's pay;

3. Those which apply only to other military personnel. These include:

a. extra duties, not to exceed two hours a day for a period not in excess of two weeks;
b. reduction to the next inferior grade if the grade from which demoted was established by the command or an equivalent or lower command; or
c. if imposed upon a person attached or embarked in a vessel, confinement for a period not to exceed seven consecutive days; or
d. if imposed upon a person attached or embarked in a vessel, confinement on bread and water or diminished rations for a period not to exceed three consecutive days.

The Code achieves an interesting compromise between mast punishments which were developed primarily "on board ship" and company punishment which existed only on land. This reflects: (1) A desire for uniformity; and (2) A recognition of the increasing importance of joint operations and unified commands.

Solitary confinement which existed under the Articles for the Government of the Navy is gone; so is hard labor without confinement which was allowed by the Articles of War. This latter deletion reflected in some degree the "loss of face" that accompanied such punishment of an occidental in the Orient and in Africa.[54] Gone also are "arrest" and "suspension from duty" which were permissible as punishments under the Articles and Proposed Articles for the Government of the Navy. The view was accepted that these measures were remedial rather than penal and they were deleted from the Code.

Reprimand and Admonition

The Navy had not considered either reprimand or admonition of sailors matters of penal action. A reprimand of an officer or warrant officer, however, was a matter of permanent record in itself, while a record of the fact that an admonition had been given also rested eternally in the officer's personnel file.

The Army and Air Force allowed both reprimand and admonition

[54] "No such punishment which tends to degrade the grade of the person on whom the punishment is imposed may be imposed upon noncommissioned officers or petty officers." M.C.M., 1951, c. XXVI, par. 131b(1), p. 231.

for all personnel under the 104th Article of War, but the act that the latter was given was seldom made a matter of record and it seems to have been generally necessary for a reprimand to have included within it either the clause "and shall be made a matter of permanent record" and/or the clause "to be included in such officer's or enlisted man's personnel file" to assure a continuing impact on their careers.

WITHHOLDING OF PRIVILEGES

THE Navy had not considered that withholding of privileges from an officer a matter of penal action, but it had permitted an unlimited withholding of privileges for its enlisted personnel. The Proposed Articles for the Government of the Navy would have set a one month limit to the period for which a seaman's privileges might be taken away from him as punishment.[55]

The Army and Air Force from the 1920 version of company punishment had limited this type of penalty to one week for both officers and enlisted men. Prior to 1920, however, the withholding of privileges was a matter of discretion vested in a commanding officer and so long as it was not abused or over-emphasized as a penal matter, its limits were only those of reason.

RESTRICTION TO LIMITS

RESTRICTION to limits has traditionally meant little to the Navy since off-shore everyone on board ship is restricted in a very realistic sense. Shore leave was a privilege which might be withheld or circumvented by extra duty, both without limit although use of these techniques had led to a one month limitation under the Proposed Articles for the Government of the Navy.

Just as confinement was the only restriction that meant anything on board ship, so restriction to quarters or areas was an on-shore penalty in its inception and application. The restriction may be an

[55] The Navy prepared a bill containing many amendments to the Articles for the Government of the Navy, which was introduced into the 80th Congress as H.R. 3687 and as S. 1338 (star print) and which was a redraft of the Articles for the Government of the Navy submitted to Congress by the Navy Department in 1947. These amendments came to be known as the Proposed Articles for the Government of the Navy and were considered by the Congressional subcommittee in its hearings on the Uniform Code of Military Justice. It was ostensibly a bill to reform naval justice, which went further and deeper into modern reform and provided for depriving the officer who ordered a court-martial of his power to review and act judicially upon its proceedings. No hearings were ever held on this bill and it died in committee with the adjournment of the Congress.

exclusion from a certain area or areas or it may be a limitation to certain places. The former is apt to be a withholding of privileges more than a restriction, but the penal effect is the same.

Forfeiture of Pay

The Navy had not allowed a forfeiture of pay as a non-judicial punishment in its 1862 Articles, but proposed to do so in its tentative schedule for both officers and seamen to the extent of half of one month's pay for a single month. One must go back to the early naval codes to find forfeitures allowed. During the Revolutionary era both officers and seamen were liable to fines by a commanding officer for bad language in church or for excessive tippling.

The Army and Air Force did not allow other personnel to be fined, as non-judicial punishment, but permitted an officer or warrant officer to forfeit up to half of his month's pay for a consecutive period of three months. The Code adopted the Navy term of forfeiture for officer category of the Army, if the penalty was imposed by an officer exercising general court-martial jurisdiction. The Army, like the Navy, allowed forfeitures for disrespect in church and too much imbibing.

The Department of Defense, as part of its 1958 legislative program, forwarded to Congress a recommended amendment to Article 15 along with the annual reports of the Court of Military Appeals and the Judge Advocates General of the Services. One of the proposals contained in the bill would provide more authority for commanders to give non-judicial punishment. This would include a fine of one-half of one month's pay or confinement for seven days for enlisted men—provided the punishment was imposed by a major or lieutenant commander or higher. For officers, it would allow a fine of one-half of a month's pay for *two* months instead of the present limitation of one-half of *one* month's pay.[56]

Extra Duties

The Navy placed no limit on the length of time which an enlisted man could be given extra duties, although the Proposed Articles would have limited this punishment to one month. There was nothing in any

[56] See Articles 52 and 53 of the Articles of War (1874). See note 18, *supra* for the Naval references. In the Annual Reports of the United States Court of Military Appeals and the Judge Advocates General of the Armed Forces and the General Counsel of the Treasury on the U.C.M.J., for the years 1956 and 1957, it is significant that although there were many disagreements as to what changes should be made in the U.C.M.J., all agreed that the power of the commanding officer should be increased.

of the previous Articles (Navy or Army) which, specifically, permitted the punishment of an officer or warrant officer by extra duty.

The 1948 Articles of War, permitted a week's extra duty for other military personnel, but was silent on and presumably not in favor of such an action against officers or warrant officers. The Code omits it from the permissible punishments for officers and limits the extra duty to two hours per day for two weeks for other military personnel. It has been against policy to have the extra duty of the same nature as routine duty assignments and it normally consists of fatigue details about the squadron or company areas.

REDUCTION IN GRADE

THE Navy permitted reduction in grade under both its Articles for the Government of the Navy and its Proposed Articles. The 1948 Articles of War did not, although it was a fairly common practice in both the Army and the Army Air Forces to do so on a basis that looked more than a little penal. The Code goes far to limit both the previous abuse and the confusion incident to silence on the matter by authorizing reduction to the next inferior grade only if the grade from which demoted was established by the command or an equivalent or lower command (see also M.C.M. (1951) par. 131b, p. 231-2).

CONFINEMENT

CONFINEMENT is the only restrictive punishment that serves a penal function on board ship. The Navy has experienced a long series of reductions in its right to confine people at sea. The Articles for the Government of the Navy and the Proposed Articles limited this right of the commanding officer: (1) To impose 10 days confinement with (2) a 5 day limitation on confinement with diminished rations or on bread and water. The Code does not stop this downward trend with its 7 day's limitation in the first category and 3 day's in the latter.

If Congressional intent carries its proper weight, the commanding officers of Army and Air Force units while on board will also have this authority, which previously they had lacked. Nothing has been done yet, to establish, and it will probably take Congressional action to effect, concurrent jurisdiction between the services, but as United States operations continue to become more global and joint or amphibious movements increase, the same logic that effected concurrent jurisdiction between commanders of marine detachments not a part

of a ship's company and the ship's commanding officer would seem to hold.

DISCRIMINATION

THOSE committees and persons who worked on the schedule of non-judicial punishments have shown an unusual appreciation of the utilities and significance of each type of penal action. The analysis of those suitable for officers and warrant officers and those most suitable for other military personnel is astute and reassuring. The Code leaves little to criticize in this respect in this first effort at uniformity.

It is inevitable that cases of apparent unfairness will arise when a soldier or airman can ostensibly escape punishment by demanding a court-martial while aboard ship, while a joint participant is punished because he happens to be a seaman. This difficulty may be even more apparent on shore in joint maneuvers. It will probably take Congressional action to eliminate this form of discrimination from the applications of the Code.

CONCLUSIONS

THE Code has made significant progress in the development of a uniform "judicial" system. The court-martial rules and procedures, particularly with the United States Court of Military Appeals, have afforded military personnel at least as much protection as they would enjoy in civilian life, although there is bound to be an occasional miscarriage of justice.

There is less apt to be uniformity among the Armed Services in the development of non-judicial punishment. Legislative progress is slow[57] and the services are used to their own systems.

Although action under Article 15 has been processed to a con-

[57] The history of our Articles of War shows a most conservative trend. The British Code of 1765 was a literal translation of the Roman Articles which were also contained in the Military Code of Gustavus Adolphus. According to 3 LIFE AND WORKS OF JOHN ADAMS, 68-82, *History of the Adoption of the British Articles in 1774 by the Continental Congress,* the autobiographer was somewhat surprised to find a willing acceptance by the Continental Congress practically without a change from the British Code of 1765. In 1806 this Code adopted by the Continental Congress was adjusted to the Constitution of the United States without fundamental change. It is to be noted that the non-applicability of such amendments as the Eighth amendment to the Constitution, to the military establishment, made very little adjusment necessary. When the first major revision of the Articles of War began in 1912 (effective 1916), there had been 106 years of continuous usage of the 101 Articles of War contained in the Code of 1806. In the 1912 revision, 87 of the Articles of War remained entirely unchanged and a considerable number of the remaining 14 Articles of War survived without substantial change.

clusion, its finality may be questioned in more ways than one. A naval enlisted man by the name of Donnelly sued the United States in the Court of Claims.[58] He had qualified for advancement in grade, but was demoted as a result of allegedly unlawful proceedings against him under Article 15. He obtained correction of his records from the Board for Correction of Naval Records, to show that he had not been reduced in grade. The court decided that he was entitled to recovery of pay in accordance with the records as corrected.

In a case decided in the United States Court of Military Appeals[59] the dissenting Chief Judge stated: "At a rehearing, [of the case in chief] I would allow the accused to raise the question of former punishment. In my opinion, there is a substantial issue as to whether Article 15(e), Uniform Code of Military Justice, 50 USC § 571, applies in this case." In that case, as a result of accused's testimony during a preliminary investigation into his alleged wrongdoings, he was charged informally with irregular dealings with property and the giving of false and evasive answers to an inspector general. He was offered an opportunity to accept punishment under Article 15, since he was an Army officer, and when he did not demand a court-martial, he was given a reprimand and fined $200.00. He appealed the sentence to higher headquarters, and the commanding general of that headquarters struck from the record all reference to false statements, but he refused to set aside the punishment. Accused demanded a court of inquiry, and when this request was refused, he petitioned for reconsideration. The subsequent court-martial was ordered only as the result of accused's persistent demand that some further forum hear his complaints and pass upon the merits. As a result of conviction by a general court-martial, he was dismissed from the service. The majority of the judges of the court refused to regard the former punishment of accused under Article 15 as a bar to his trial by court-martial.

In spite of the many changes wrought by the Uniform Code of Military Justice and the ill-advised endeavors of some persons unfamiliar with the necessities of military organization and discipline to abrogate entirely the commanding officer's authority to impose punishment, non-judicial punishment remains the commanding officer's most important tool for enforcement of discipline and enhancement of morale in all of the Armed Services. It must always be borne in mind, however, that true authority may be authoritative but not arbitrary.

[58] Donnelly v. U.S., 134 F. Supp. 635 (Ct. Cl. 1956).
[59] United States v. Doctor, 7 U.S.C.M.A. 126, 21 C.M.R. 252 (1956).

APPENDIX

Uniform Code of Military Justice, 64 Stat. 112 (1950), 10 U.S.C. § 815 (1956).

Art. 15. Commanding officer's non-judicial punishment

(a) Under such regulations as the President may prescribe, any commanding officer may, in addition to or in lieu of admonition or reprimand, impose one of the following disciplinary punishments for minor offenses without the intervention of a court-martial—

(1) upon officers of his command—

(A) withholding of privileges for not more than two consecutive weeks;

(B) restriction to certain specified limits, with or without suspension from duty, for not more than two consecutive weeks; or

(C) if imposed by an officer exercising general court-martial jurisdiction, forfeiture of not more than one-half of one month's pay; and

(2) upon other military personnel of his command—

(A) withholding of privileges for not more than two consecutive weeks;

(B) restriction to certain specified limits, with or without suspension from duty, for not more than two consecutive weeks;

(C) extra duties for not more than two consecutive weeks, and not more than two hours per day, holidays included;

(D) reduction to next inferior grade, if the grade from which demoted was established by the command or an equivalent or lower command;

(E) if imposed upon a person attached to or embarked in a vessel, confinement for not more than seven consecutive days; or

(F) if imposed upon a person attached to or embarked in a vessel, confinement on bread and water or diminished rations for not more than three consecutive days.

(b) The Secretary concerned may, by regulation, place limitations on the powers granted by this article with respect to the kind and amount of punishment authorized, the categories of commanding officers authorized to exercise those powers, and the applicability of this article to an accused who demands trial by court-martial.

(c) An officer in charge may, for minor offenses, impose on enlisted members assigned to the unit of which he is in charge, such of the punishments authorized to be imposed by commanding officers as the Secretary concerned may by regulation specifically prescribe, as provided in subsections (a) and (b).

(d) A person punished under this article who considers his punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority. The appeal shall be promptly forwarded and decided, but the person punished may in the meantime be required to undergo the punishment adjudged. The officer who imposes the punishment, his successor in command, and superior authority may suspend, set aside, or remit any part or amount of the punishment and restore all rights, privileges, and property affected.

(e) The imposition and enforcement of disciplinary punishment under this article for any act or omission is not a bar to trial by court-martial for a serious crime or offense growing out of the same act or omission, and not properly punishable under this article; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.