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NONJUDICIAL PUNISHMENT: THE DEVELOPMENT OF RESTRAINT  
IN MAINTAINING DISCIPLINE

BY

LIEUTENANT COLONEL GERALD L. MILLER, USMC

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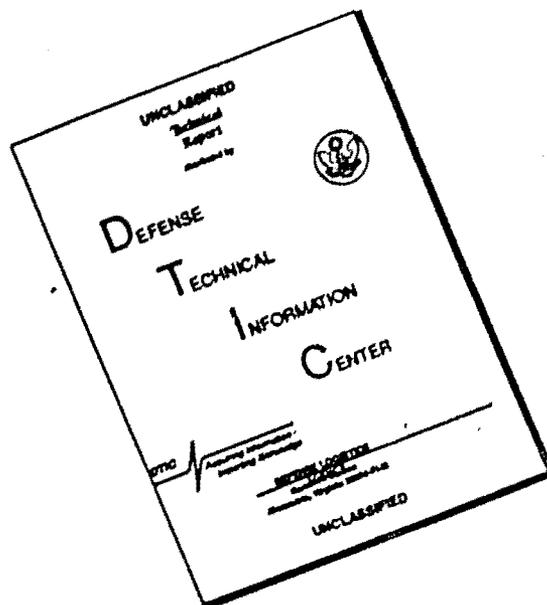


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force commanding officers. Congress increased military commanders' nonjudicial punishment authority in 1962, but not to the levels of the past. Various proposals have been made to increase the quantity of nonjudicial punishment authority. The United States Congress should enact legislation which: eliminates the summary courts-martial; and changes nonjudicial punishment by permitting confinement in lieu of correctional custody, by eliminating extra duties and detention of pay, and by abolishing the right of a service member to refuse nonjudicial punishment. These changes are necessary to assist in maintaining discipline; and to permit the effective and efficient use of nonjudicial punishment in war.

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USAWC MILITARY STUDIES PROGRAM PAPER

NONJUDICIAL PUNISHMENT:  
THE DEVELOPMENT OF RESTRAINT  
IN MAINTAINING DISCIPLINE

AN INDIVIDUAL STUDY PROJECT

by

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16 April 1984

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ABSTRACT

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TITLE: Nonjudicial Punishment: The Development of Restraint in Maintaining Discipline

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Nonjudicial punishment in the United States armed forces has changed dramatically since the American Revolution. Until 1950, the army and navy had different disciplinary codes. Earlier navy punishment imposed without courts-martial was more severe than army punishment. The enactment of the Uniform Code of Military Justice in 1950 resulted in decreased nonjudicial punishment for naval commanders and increased punishment authority for army and air force commanding officers. Congress increased military commanders' nonjudicial punishment authority in 1962, but not to the levels of the past. Various proposals have been made to increase the quantity of nonjudicial punishment authority. The United States Congress should enact legislation which: eliminates the summary courts-martial; and changes nonjudicial punishment by permitting confinement in lieu of correctional custody, by eliminating extra duties and detention of pay, and by abolishing the right of a service member to refuse nonjudicial punishment. These changes are necessary to assist in maintaining discipline; and to permit the effective and efficient use of nonjudicial punishment in war.

TABLE OF CONTENTS

	Page
ABSTRACT . . . . .	11
INTRODUCTION . . . . .	1
Purpose of This Study . . . . .	1
Background . . . . .	2
THE EVOLUTION OF MILITARY DISCIPLINARY AUTHORITY IN THE UNITED STATES . . . . .	2
United States Army . . . . .	2
The First Articles of War . . . . .	2
Nineteenth Century . . . . .	5
Article of War 104 . . . . .	7
United States Air Force . . . . .	9
United States Navy . . . . .	9
Rules for Regulation of the Navy of the United Colonies . . . . .	9
Acts for the Government of the Navy of the United States . . . . .	10
"Rocks and Shoals" . . . . .	12
United States Coast Guard . . . . .	14
DRAFTING THE UNIFORM CODE OF MILITARY JUSTICE . . . . .	15
The Morgan Committee . . . . .	15
Congress and the New Code . . . . .	18
Article 15 . . . . .	19
THE UNIFORM CODE OF MILITARY JUSTICE IN PRACTICE . . . . .	20
The New Manual for Courts-Martial . . . . .	20
Criticism of the New Code . . . . .	21
Code Committee Annual Reports . . . . .	24
Powell Report . . . . .	26
Article 15 Amended . . . . .	27
Nonjudicial Punishment after 1962 . . . . .	31
Army Task Force on the Administration of Military Justice . . . . .	32
Laird Report . . . . .	32
1980 General Accounting Office Report . . . . .	34
CONCLUSIONS AND RECOMMENDATIONS . . . . .	36
Conclusions . . . . .	36
Current Proposals for Change . . . . .	37
Military Justice System During Time of War . . . . .	38
Recommendations . . . . .	39
FOOTNOTES . . . . .	42
BIBLIOGRAPHY . . . . .	48



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## INTRODUCTION

Just as the weapons of war and the manner of training military personnel have changed over the years, so has the commanding officer's means of maintaining discipline. At present, a United States military commander has available limited forms of punishment which can be imposed without resort to judicial proceedings. Nonjudicial punishment (NJP) has changed considerably in the more than two hundred year history of the United States fighting forces. Punishments have also varied between the army and the navy. Many critics of the present nonjudicial punishment authority suggest an increase in the punishment available for commanding officers. Any increase in the quality or quantity of existing nonjudicial punishment authority would permit commanders to impose more timely and perhaps effective punishment without resort to judicial proceedings and accompanying administrative delays.

### PURPOSE OF THIS STUDY

The purpose of this study is to describe the development and changes in the nonjudicial disciplinary authority of United States military commanders from the Revolutionary War to present. The nature of this study, however, does not permit full treatment of certain important issues such as the constitutionality of nonjudicial punishment, due process of law implications, and other legal concerns connected with any changes in the nature of this punishment. Such issues, though, do not impose insurmountable obstacles to change. Emphasis is instead placed on the history of commanders' disciplinary authority, particularly after World War II. Proposed and recommended changes to disciplinary authority under the Uniform Code of Military Justice are also set forth.

## BACKGROUND

United States military law, like its civilian counterparts, was drawn from that of Great Britain. In early England, military law was used only during times of war. Troops were raised, weapons were made, and ordinances for the government of the military were written by the Crown. When wars ended so did the need for this military law. In 1689, however, the first mutiny act established a continuing series of military laws. These early disciplinary laws were excessively severe--the punishment for almost every crime was death or the loss of a limb.<sup>1</sup>

### THE EVOLUTION OF MILITARY DISCIPLINARY AUTHORITY IN THE UNITED STATES

#### UNITED STATES ARMY

##### The First Articles of War

On 30 June 1775, the second Continental Congress adopted the first Code of Articles of War. This code had been drafted by a committee consisting of George Washington, Philip Schuyler, Silas Deane, Thomas Cushing, and Joseph Hewes. The 69 articles comprising the original code were similar to the then existing British Articles of War. The American articles were, in fact, copied with minor modifications, from the intermediate Massachusetts Articles of War, adopted on 5 April 1775.<sup>2</sup> These articles were largely copied from the British Articles of War of 1774.<sup>3</sup> Three of the articles of the American Articles of War of 1775 authorized punishment without trial. They are set forth verbatim:<sup>4</sup>

ARTICLE II. It is earnestly recommended to all officers and soldiers, diligently to attend divine service; and all officers and soldiers who shall behave indecently or irreverently at any place of divine worship, shall, if commissioned officers, be

brought before a court-martial, there to be publicly and severely reprimanded by the president; if non-commissioned officers or soldiers, every person so offending, shall, for his first offence, forfeit one sixth of a dollar, to be deducted out of his next pay; for the second offence, he shall not only forfeit a like sum, but be confined for twenty-four hours, and for every like offence, shall suffer and pay in like manner; which money so forfeited, shall be applied to the use of sick soldiers of the troop or company to which the offender belongs.

ARTICLE III. Whatsoever non-commissioned officer or soldier shall use any profane oath or exeration, shall incur the penalties expressed in the foregoing article; and if a commissioned officer be thus guilty of profane cursing or swearing, he shall forfeit and pay for each and every offence, the sum of four shillings, lawful money.

ARTICLE XVIII. Every non-commissioned officer and soldier shall retire to his quarters or tent, at the beating of retreat; in default of which he shall be punished according to the nature of his offence, by order of the commanding officer.

The above three articles from the American Articles of War of 1775 provided very limited summary punishment, and were apparently insufficient to deal with the many transgressions which might be expected of Army personnel. General George Washington even wrote to Congress on a number of occasions to request that more severe punishments be permitted.<sup>5</sup> Seemingly in response to this request the second Continental Congress amended the American Articles of War of 1775 by adding 16 more articles to the original 69. Six of these new articles provided for increased summary punishments, albeit for specific punishments:<sup>6</sup>

7. Whatsoever commissioned officer shall be found drunk on his guard, party, or other duty under arms, shall be cashiered and drummed out of the army with infamy, any non-commissioned officer or soldier, so offending, shall be sentenced to be whipt, not less than twenty, nor more than thirty-nine lashes, according to the nature of the offence.

8. Whatsoever officer or soldier, placed as a sentinel, shall be found sleeping upon his post, or shall leave it before he shall be regularly relieved, if a commissioned officer, shall be cashiered, and drummed out of the army with infamy; if a non-commissioned officer or soldier, shall be sentenced to be whipt.

not less than twenty, nor more than thirty-nine lashes, according to the nature of the offence.

9. No officer or soldier shall lie out of his quarters or camp, without leave from the commanding officer of the regiment, upon penalty, if any officer, of being mulcted one month's pay for the first offence, and cashiered for the second; if a non-commissioned officer or soldier, of being confined seven days on bread and water for the first offence; and the same punishment and a forfeiture of a week's pay for the second.

10. Whatsoever officer or soldier shall misbehave himself before the enemy or shamefully abandon any post committed to his charge, or shall speak words inducing others to do the like shall suffer death.

12. If any officer or soldier shall leave his post or colours, in time of an engagement, to go in search of plunder, he shall, if a commissioned officer, be cashiered, and drummed out of the army with infamy, and forfeit all share of plunder; if a non-commissioned officer or soldier, be whipped not less than twenty, nor more than thirty-nine lashes, according to the nature of the offence, and forfeit all share of the plunder taken from the enemy.

13. Every officer commanding a regiment, troop, or company, shall, upon notice given to him by the commissary of the musters, or from one of his deputies, assemble the regiment, troop, or company under his command, in the next convenient place for their being mustered, on penalty of his being cashiered, and mulcted of his pay.

In the following year, on September 20th, the Continental Congress enacted a new Code of American Articles of War. The original three articles (2, 3, and 18) were also written into this new code; and one other summary punishment article was added:<sup>7</sup>

SECTION VII. ARTICLE 1. No officer or soldier shall use any reproachful or provoking speeches or gestures to another, upon pain, if an officer, of being put in arrest; if a soldier, imprisoned, and of asking pardon of the party offended, in the presence of his commanding officer.

The 16 Additional Articles of 7 November 1775, were also carried over into the new American Articles of War of 1776. Gone, however, were the provisions for summary punishment by whippi<sup>g</sup>, forfeiture of pay, drumming out of the army

("with infamy"), and confinement on bread and water. Except where death was the designated punishment (as for misbehavior before the enemy, forcing a safeguard, or abandoning one's post), punishment was to be "according to the nature of the offence" and at the discretion of the commanding officer.<sup>8</sup> Where summary punishment authority for any remaining offenses was not provided for in the Articles of War, the United States Army provided such authority in its general orders.<sup>9</sup> Statutory authority for across the board summary punishment for minor offenses was not provided until 1916.

#### Nineteenth Century

The Articles of War of 1776 survived, with some amendments, until after the adoption of the United States Constitution. The next new military code was enacted on 10 April 1806. The American Articles of War of 1806, consisting of 101 articles, remained in effect, with some amendments, until approval of the Code of 1874.<sup>10</sup> The American Articles of War of 1874, enacted on 22 June 1874, provided the statutory Army law until superceded by yet another new code on 1 March 1917.<sup>11</sup>

Prior to 1917, where Congressional authority did not exist for commanding officer's disciplinary punishment, the United States Army relied upon such authority as was provided in its general orders. For example, in 1835, regimental commanding officers were permitted by Army Regulations to reduce non-commissioned officers in grade. It appears that at some time thereafter even captains were authorized to reduce their first sergeants.<sup>12</sup>

Colonel William W. Winthrop, United States Army, in his 1886 treatise, Military Law and Precedents, stated that, in his view, the only legal punishment which could be executed by a commanding officer was that approved as a

sentence by a military court-martial.<sup>13</sup> He wrote that punishments imposed as discipline, irrespective of arrest and trial, had repeatedly been denounced in the Army General Orders and in the opinions of the Judge Advocate General. Officers who had inflicted such illegal punishment were themselves reportedly brought to trial and punished. Colonel Winthrop further provided that, in instances where soldiers had been subjected to illegal corporal punishments, subsequent court-martial sentences were disapproved, mitigated, or remitted. He also wrote:<sup>14</sup>

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 some discrimination against them as to selection for the more agreeable duties as may be just and proper. To vest in commanders a specific power of disciplinary punishment, express legislation would be a requisite.

As if to compensate for this lack of disciplinary authority for minor offenses, Congress responded in 1862 with legislation authorizing the field officer's court. This court-martial consisted of a single field grade officer with authority to try and punish enlisted men for non-capital offenses. Its punishment was limited to that of the then existing garrison or regimental court-martial. The field officer's court could adjudge a fine of up to one month's pay and imprisonment or hard labor for one month.<sup>15</sup> In 1890, Congress provided for the summary court-martial to be conducted by the line officer second in rank, and for offenses similar to those disposed of at the field officer's court.<sup>16</sup> The accused had to be brought before this summary court-martial, however, within 24 hours of his arrest.

But the field officer's court and the new summary court-martial (as with the regimental and general courts-martial) did not provide for direct imposition of punishment by a commanding officer. In 1895, by resorting to a War Department directive, the United States Army Regulations, at paragraph 930, authorized commanding officers to punish minor offenses without trial.<sup>17</sup> And in 1898, those soldiers who were facing this commanding officer's summary punishment were authorized to refuse and demand trial by court-martial.<sup>18</sup> The Army's 1898 policy on a commanding officer's use of summary discipline was set forth as follows:<sup>19</sup>

Commanding officers are not required to bring every dereliction of duty before a court for trial, but will endeavor to prevent their recurrence by admonitions, withholding of privileges, and taking such steps as may be necessary to enforce their orders. It is believed that the proper use of this power will make it unnecessary to bring before the summary court many of the trifling delinquencies which are now made the subject of trial; indeed, that such trifling delinquencies will in great measure be prevented. Department commanders will see that their subordinate commanding officers fulfill their duties in this regard.

#### Article of War 104

In 1916, the United States Congress enacted new Articles of War for the Army. For the first time all commanding officers of the United States Army were authorized to impose disciplinary punishment for all minor offenses committed by persons within their commands. "It reflected the need for proper command control and discipline learned from the citizen armies of the Civil and Spanish-American Wars."<sup>20</sup> The enabling legislation was Article 104 of the 1916 Articles of War:<sup>21</sup>

ART. 104. DISCIPLINARY POWERS OF COMMANDING OFFICERS.--  
Under such regulations as the President may prescribe, and which he may from time to time revoke, alter, or add to, the

commanding officer of any detachment, company, or higher command may, for minor offenses not denied by the accused, impose disciplinary punishments upon persons of his command without the intervention of a court-martial, unless the accused demands trial by court-martial.

The disciplinary punishments authorized by this article may include admonition, reprimand, withholding of privileges, extra fatigue, and restriction to certain specified limits, but shall not include forfeiture of pay or confinement under guard. A person punished under authority of this article, who deems his punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority, but may in the meantime be required to undergo the punishment adjudged. The commanding officer who imposes the punishment, his successor in command, and superior authority shall have power to mitigate or remit any unexecuted portion of the punishment. The imposition and enforcement of disciplinary punishment under authority of this article for any act or omission shall not be a bar to trial by court-martial for a crime or offense growing out of the same act or omission; 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.

It is of interest to note that the punishment imposed under Article 104 was to be for minor offenses not denied by the accused; and that the accused could demand trial in lieu of this summary punishment. Authorized punishments included admonition, reprimand, withholding of privileges, extra fatigue, and restriction to specified limits. Forfeiture of pay and confinement were not permitted as punishment. Although no limit on the duration of the available punishments was set forth in Article of War 104, the legislative history of the article indicates that the duration of punishments imposed would be discretionary with post commanders.<sup>22</sup>

After World War I, Congress again changed the Articles of War, to include Article 104.<sup>23</sup> These changes, as set forth in the Articles of War of 1920, became effective on 4 February 1921. Article of War 104 changes included

deleting the words requiring the accused to "admit," or at least not deny, an offense, before punishment under this article could be imposed. Statutory limitations on the duration of authorized punishments were also set forth. The maximum duration for withholding of privileges, restriction, extra fatigue, and hard labor without confinement was one week. Forfeiture of pay and confinement under guard were still prohibited. This new Article 104 also provided that, during the time of war or grave public emergency, a commanding officer who was at least a brigadier general in grade, could impose a single one-half month's pay forfeiture on officers of his command who were below the grade of major.<sup>24</sup>

Article of War 104 was changed again in 1948 to permit the combining of authorized punishments and officer disciplinary punishment of one-half of one month's pay per month for three months, to apply to any officer, colonel and below in grade.<sup>25</sup> The Articles of War remained in effect until the enactment of the Uniform Code of Military Justice in 1950.

#### UNITED STATES AIR FORCE

By virtue of the National Security Act of 1947, the United States Air Force became a separate military service in that same year. In 1948 Congress made the Army's Articles of War applicable to the Air Force.<sup>26</sup>

#### UNITED STATES NAVY

##### Rules for Regulation of the Navy of the United Colonies

The second Continental Congress, on 13 October 1775, authorized its Naval Committee to arm two or more merchant vessels. This was the beginning of the

United States Navy. And, on 10 November 1775, that same Continental Congress authorized the raising of two battalions of Marines. So began the United States Marine Corps, the other service within the Department of Navy. To govern the fledgling navy of the Revolutionary War, Congress, in December 1775, enacted the "Rules for the Regulation of the Navy of the United Colonies."<sup>27</sup> These rules were largely the work of John Adams and were based almost entirely on existing British naval law. Unlike the Articles of War for the Army, the rules and regulations for the Navy provided that the laws and unwritten customs of the sea would predominate. In effect the customary law of the British navy was followed by the new navy of the United Colonies. British naval customs and law at this time provided substantial summary punishment authority for ship's captains. Such punishments included keelhauling, flogging, dragging astern of a ship, and other forms of torture, often resulting in death.<sup>28</sup>

#### Acts for the Government of the Navy of the United States

On 2 March 1799, the Fifth United States Congress enacted "An Act for the Government of the Navy of the United States." Portions of this act applicable to commanders' summary discipline authority are as follows:<sup>29</sup>

Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following rules and regulations be adopted and put in force, for the government of the navy of the United States.

Article 1. The commanders of all ships and vessels belonging to the United States are strictly required to show in themselves a good example of honour and virtue to their officers and men, and to be every vigilant in inspecting the behaviour of all such as are under them, and to discountenance and suppress all such as are absolute, immoral, and disorderly practices, and all such as are contrary to the rules of discipline and obedience, and to correct those

who are guilty of the same, according to the usage of the sea service.

\* \* \*

3. Any person who shall be guilty of profane swearing, or of drunkenness, if a seaman or marine, shall be put in irons until sober, and then flogged if the captain shall think proper--but if an officer, he shall forfeit two days pay, or incur such punishment as a court martial shall impose, and as the nature and degree of offence shall deserve.

4. No commander, for any one offence, shall inflict any punishment upon a seaman or marine beyond twelve lashes upon his bare back with a cat of nine tails, and no other cat shall be made use of on board any ship of war, or other vessel belonging to the United States--if the fault shall deserve a greater punishment, he shall apply to the Secretary of the Navy, the commander in chief of the navy, or the commander of a squadron, in order to the trying of him by a court martial; and in the mean time he may put him under confinement.

\* \* \*

6. The officer who commands by accident in the captain or commander's absence (unless he be absent for a time on leave) shall not order any correction, but confinement, and upon the captain's return on board, he shall then give an account of his reasons for so doing.

One year later, the Sixth United States Congress repealed the 1799 Act for the Government of the Navy, and substituted therefor "An Act for the better government of the Navy of the United States."<sup>30</sup> Two of the original Act's articles were modified as follows:

Article III. Any officer, or other person in the navy, who shall be guilty of oppression, cruelty, fraud, profane swearing, drunkenness, or any other scandalous conduct, tending to the destruction of good morals, shall if an officer, be cashiered, or suffer such other punishment as a court martial shall adjudge; if a private, shall be put in irons, or flogged, at the discretion of the captain, not exceeding twelve lashes, but if the offence requires severer punishment, he shall be tried by a court martial, and suffer such punishment as said court shall inflict.

\* \* \*

Article XXX. [This revised article, a modification of part of Article 4 of the 1799 Act, provided that a commanding officer could not strike or punish an officer (commissioned or warrant) other than by suspension or confinement--nor could he inflict on any private a punishment beyond 12 lashes with a cat-of-nine-tails; nor could he permit any wired, or other than a plain cat-of-nine-tails, to be used on his ship.]

### "Rocks and Shoals"

By 1862, Congress had changed naval law at least six times since it enacted the first rules for the United States Navy in 1775.<sup>31</sup> The Civil War resulted in a rapid expansion in naval forces. Because of this and the need for more definition in naval law, then part statutory and part custom, new legislation was enacted. On 17 July 1862, Congress approved "An Act for the better Government of the Navy of the United States," also known as "Rocks and Shoals." Articles affecting the captain's authority to impose summary punishment became more specific:<sup>32</sup>

Article 1. The commanders of all fleets, squadrons, naval stations, and vessels belonging to the navy, are strictly enjoined and required to show in themselves a good example of virtue, honor, patriotism, and subordination; to be vigilant in inspecting the conduct of all who may be placed under their command; to guard against and suppress all dissolute and immoral practices, and to correct all who may be guilty of them, according to the laws and regulations of the navy, upon pain of such punishment as a general court-martial may think proper to inflict.

\* \* \*

Article 8. [This article did away with flogging as a punishment in the Navy.]

\* \* \*

Article 10. No commander of a vessel of the navy shall inflict any other punishment upon a commissioned or warrant officer than private reprimand, suspension from duty, arrest or confinement, neither of which shall continue longer than ten days, except a further period be necessary to bring the

offender to a court-martial; nor shall he inflict, or cause or permit to be inflicted upon any petty officer or person of inferior rating, or marine, any punishment for a single offence or at any one time other than one of the following punishments, viz:

First. Reduction of any rating established by himself.

Second. Confinement with or without irons, single or double, such confinement not to exceed ten days, unless necessary in the case of a prisoner to be tried by court-martial.

Third. Solitary confinement on bread and water not exceeding five days.

Fourth. Solitary confinement not exceeding seven days.

Fifth. Deprivation of liberty on shore.

Sixth. Extra duties.

No other punishment shall be permitted on board of vessels belonging to the navy, except by sentence of a general or summary court-martial. Summary courts-martial may disrate any rated person for incompetency. All punishments inflicted by the commander, or by his order, except reprimands, shall be fully entered upon the ship's log.

Article 10 of the 1862 "Act for the better Government of the Navy of the United States" was renumbered as Article 24 when reenacted in 1909.<sup>33</sup> In 1916, Congress added Article 25 to the "Articles for the Government of the Navy." This new Article 25 permitted all officers of the United States Navy or United States Marine Corps, who were by billet authorized to order general or summary courts-martial, the same authority to inflict minor punishments as existed for commanders of naval vessels.<sup>34</sup> The addition of Article 25 for the Navy and the Marine Corps in 1916, was contemporaneous with the enacting of Article of War 104, which permitted summary disciplinary authority down to the level of Army company commanders. Navy and Marine Corps personnel, however, could not demand court-martial in lieu of this summary disciplinary authority, and

enjoyed no right of appeal. By virtue of Article of War 2, though, "officers and soldiers" of the United States Marine Corps who were detached by order of the President for service with the United States Army, were subject to the Army's Articles of War.<sup>35</sup> It appears then that those Marine Corps personnel serving with the Allied Expeditionary Force in Europe in World War I were subject to the less severe Article of War 104 disciplinary power for commanding officers. Also, in World War II, a similar practice should have occurred for any Marines when assigned individually or by unit by the President for duty with armies of the United States.

The Articles for the Government of the Navy were revised several times after 1916, but remained in effect until the Uniform Code of Military Justice took effect in 1951.<sup>36</sup>

#### UNITED STATES COAST GUARD

The Revenue Marine (the Revenue Cutter Service) was established by act of Congress on 4 August 1790, and became the precursor to the United States Coast Guard.<sup>37</sup> The Coast Guard, as it is known today, was created on 28 January 1915, by an act of Congress which combined the Revenue Cutter Service with the Life-Saving Service. This same act made the Coast Guard a part of the United States military forces, to operate under the Treasury Department in peacetime and to be transferred to the Department of the Navy either in time of war or when directed by the President. On 1 April 1967, the Coast Guard became a part of the Department of Transportation. Coast Guard courts-martial were first permitted in an act of 26 May 1906. Its limited jurisdiction was expanded in 1920.<sup>38</sup> Congress enacted the Disciplinary Laws of the Coast Guard on 4 August 1949. These laws, which were patterned after the naval system of

military justice, lasted until 1951 when the Coast Guard was also subjected to the Uniform Code of Military Justice.

#### DRAFTING THE UNIFORM CODE OF MILITARY JUSTICE

##### THE MORGAN COMMITTEE

In July 1948, Secretary of Defense James V. Forrestal appointed a special committee to draft a uniform code of military justice, applicable to all of the armed forces, including the United States Coast Guard. Professor Edmund M. Morgan, Jr., of Harvard Law School, was designated the committee chairman. Other members of the committee were Assistant Secretary of the Army Gordon Gray, Assistant Secretary of the Air Force Eugene M. Zuckert, Undersecretary of the Navy W. John Kenney, and Assistant General Counsel of the Department of Defense, Felix E. Larkin. The work of this primary committee was supplemented by a working group of 15, including field grade representatives from all three services, and five civilian attorneys with military service experience. The working group was chaired by Mr. Larkin. A third panel, called the "Research Group," was actually Larkin's own personal office staff.<sup>39</sup>

By 7 January 1949, the Morgan committee was able to submit to the Secretary of Defense, a proposal for a new code.<sup>40</sup> Some differences, however, between committee members existed. As to nonjudicial punishment, Felix Larkin's staff described four differences between the Army's Article of War 104 and Article 24 of the Articles for the Government of the Navy. Navy personnel could not refuse nonjudicial punishment. Army personnel could demand trial by summary court-martial instead of accepting a commander's punishment. Navy personnel could not appeal the imposition of nonjudicial punishment to their commanders'

next superior officers. Army personnel could appeal. Navy commanding officers who originally imposed punishment could not at a later date remit, mitigate, or suspend it. Army commanders, however, could take such action. Navy courts-martial could not consider previously imposed nonjudicial punishment for the same offense as a matter in mitigation during the sentencing phase of a trial. Army courts-martial were authorized to consider the previously imposed non-judicial punishment.<sup>41</sup>

Mr. William T. Generous, Jr., in his 1973 book, Swords and Scales: The Development of the Uniform Code of Military Justice, correctly points out that the above described<sup>42</sup>

. . . differences are explained by the fundamental approaches taken by the two services. In the Navy, the NJP officer was almost always the commander of a ship. The Navy reposed special faith in its ships' captains and gave them the power to discipline their crews in order to carry out assigned missions. By the time he was appointed to command, an officer had usually accumulated great experience and had been observed and rated by so many senior officers that his character and judicial temperament were thoroughly known. In the Army, on the other hand, NJP was exercised by company commanders. These officers were very junior to the usual Navy ship's captain and had correspondingly less experience. The Navy commander was also authorized to convene both deck and summary courts-martial, while the Army company commander had no convening authority whatever, and was required to refer cases to his superiors for courts-martial.

Given these differences, the right of election by a sailor from NJP would have been absurd. The commanding officer in such a case would have to convene a court consisting of one of his subordinate officers, who would then have to pass on the legitimacy of his captain's judgement. In the Army, the right of election meant that a soldier who disputed the justice of an AW 104 finding handed down by his inexperienced company commander could have the case studied by a senior officer and perhaps heard by a court-martial composed of officers from other units. The other three differences in NJP procedures are explained by the reverence fit for a minor god traditionally bestowed upon Navy commanders. It would be demeaning for a captain if his decisions were reviewed or mitigated, whether by his superior or by himself.

Even though Mr. Generous fails to say that Marine Corps company commanders, with experience and responsibilities similar to Army company commanders, enjoyed the same disciplinary authority as Navy ships' captains; and that Army battalion or regimental commanders would enjoy the same "minor god" reverence as ships' captains, his comments are worth noting. And, to these Navy concerns about summary punishment must be added the difficulty and delay in assembling a deck (or even summary) court aboard ship, particularly on smaller vessels. Too, the Navy's captain's mast was a fairly formal affair. Witnesses were called, evidence was heard, and the accused could present his own evidence in his behalf. The Army practice was to permit the commanding officer to consult evidence out of the presence of the accused.<sup>43</sup>

The Navy also asserted that the unique quality of shipboard life set forth a requirement for summary disciplinary authority to confine an accused. Restriction or loss of privileges were not deemed to be much of a punishment for ship bound sailors. Accordingly, the Navy argued for forfeitures of pay as a nonjudicial punishment.<sup>44</sup>

Professor Morgan, in 1953, commented on the results of his 1949 Code Committee:<sup>45</sup>

The Committee endeavored to follow the directive of Secretary Forrestal to frame a Code that would be uniform in terms and in operation and that would provide full protection of the rights of persons subject to the Code without undue interference with appropriate military discipline and the exercise of appropriate military functions. This meant complete repudiation of a system of military justice conceived of as only an instrumentality of command; on the hand, it negated a system designed to be administered as the criminal law is administered in a civil criminal court. The Code contains all the criminal law and procedures governing the Army, Navy, Air Force and Coast Guard both in time of peace and in time of war.

## CONGRESS AND THE NEW CODE

On 8 February 1949, the Defense Department proposed Uniform Code of Military Justice was introduced into the House of Representatives by Carl Vinson of Georgia; and into the Senate by Millard Tydings of Maryland.<sup>46</sup> Subcommittees of the Senate and House Armed Services Committees held extensive hearings on the Senate and House Bills "to unify, consolidate, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard."<sup>47</sup> Testifying before the committees were representatives of the Morgan committee, veterans' associations, bar associations, reserve officer associations, the judge advocates general of the armed services, and others. The initial proposal for the new Article 15 (nonjudicial punishment article) would have permitted the imposition of up to seven days confinement or up to five days confinement on bread and water or diminished rations. The House of Representatives' version would have permitted these punishments to be imposed upon personnel attached to or embarked in a vessel. The Conference Committee concurred "that the nature of naval operations at sea makes these punishments desirable in such circumstances,"<sup>48</sup> but reduced the period of shipboard confinement on bread and water from five to three days.

Under the Articles for the Government of the Navy, accused facing captain's mast could not elect trial by court-martial. This practice relied on the theory that a commanding officer's punishment related entirely to discipline and not to crime. Also, in the Navy, the officer who imposed disciplinary punishment convened courts-martial. The Navy position in this regard was that the subordinate court-martial officer would pass judgment on the senior's decision

to impose punishment at mast. This was not a desirable situation in a military organization which recognized the near-absolute authority of a ship's captain. The compromise reached for the Uniform Code of Military Justice was to permit the Secretary of the Navy and the Secretary of Treasury (for the Coast Guard) to resolve this issue by regulation. In the Army and the Air Force, the summary court-martial convening authority was viewed as usually being senior to the nonjudicial punishment imposing officer.<sup>49</sup> And, in the 1950 Code the right to appeal from nonjudicial punishment was new to the Navy and Coast Guard.

#### ARTICLE 15

The Uniform Code of Military Justice was enacted on 5 May 1950, for the purpose of ". . . unifying, consolidating, revising, and codifying the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard<sup>50</sup>" Part III set forth Article 15, "Non-Judicial Punishment," of the new Uniform Code. Under its authority<sup>51</sup> a commanding officer could withhold privileges, or restrict to certain specified limits (for two weeks each) commissioned or warrant officers of his or her command. Additionally, if the imposing officer exercised general court-martial jurisdiction as to officer accused, he or she could also impose forfeiture of one-half of one month's pay. For enlisted personnel of a command, a commanding officer could:

1. Withhold privileges for two weeks; or
2. Restrict to certain specified limits for two weeks; or
3. Impose extra duties for two hours a day for two weeks; or
4. Reduce one grade if promotional authority to the grade reduced from existed within the command; or

5. Confine for seven days, if the accused was attached to or embarked in a vessel; or

6. Confine on bread and water for three days, if the accused was attached to or embarked in a vessel.

This new Article 15, Uniform Code of Military Justice, also provided for Department Secretaries<sup>52</sup> to:

1. Place restrictions on categories of commanding officers or on officers in charge, as to their nonjudicial punishment authority.

2. Limit the right of accused to demand trial by court-martial in lieu of nonjudicial punishment.

And finally, accused, in all services could now appeal nonjudicial punishment deemed to be "unjust" or "disproportionate to the offense." Authority also was created for the imposing officer, a successor in command, or a superior authority, to suspend, set aside, or remit all or part of any punishment imposed. The Article of War 104 proviso permitting trial by court-martial for a Article 15 added the word "serious"7 crime or offense growing out of the same act or omission for which nonjudicial punishment may have been imposed, was retained in Article 15.<sup>53</sup> The provisions of the 1950 Article 15 remained in effect, without change, until 1962.

#### THE UNIFORM CODE OF MILITARY JUSTICE IN PRACTICE

##### THE NEW MANUAL FOR COURTS-MARTIAL

Just as the Uniform Code of Military Justice was, to a degree, a rewriting of the Army 1948 Articles of War, so the Manual for Courts-Martial, United States, 1951, resembled the Manual for Courts-Martial, United States Army,

1916. The new Manual for Courts-Martial, United States, 1951, was an executive order issued by President Truman, on 8 February 1951.<sup>54</sup> The new Manual did, however, include the relevant sections from the Army and Air Force Manuals of 1949, the Naval Courts and Boards, and the Coast Guard Manual for Courts-Martial.<sup>55</sup> A question did arise, however, as to who would issue the new Manual for Courts-Martial, United States, 1951. The Secretary of the Navy had prescribed the Navy's Naval Courts and Boards, although with Presidential approval. Because the President of the United States had promulgated the Army's Manuals since 1916, he (and not, for example, the Secretary of Defense) issued the new all services Manual for Courts-Martial, United States, 1951. Additionally, Article 36 of the Uniform Code of Military Justice authorized the President to prescribe the rules of procedure in cases before courts-martial. Rules of procedure and practice for nonjudicial punishment (differing among the services) were also set forth in the new Manual.<sup>56</sup>

#### CRITICISM OF THE NEW CODE

The Uniform Code of Military Justice went into effect on 31 May 1951. Within a year some criticism of the new Code began developing in the military itself. One of the leaders of criticism of nonjudicial punishment was the Navy Judge Advocate General, Rear Admiral Ira H. Nunn, a decorated (Navy Cross) World War II destroyer commander.<sup>57</sup> His disapproval of the Code was based on the loss of disciplinary punishment authority under Article 15. In Admiral Nunn's view, commanding officers would now resort to courts-martial to find proper punishments previously available, in the United States Navy, at "captain's mast."<sup>58</sup>

Senior Navy officers, too, were critical of Article 15 of the new Code. Cuts imposed on the mast power of Navy commanders were viewed as drastic, with resulting injury to Navy discipline and morale.<sup>59</sup> The Commander in Chief, United States Pacific Fleet, after polling his subordinate commanders in the Far East in 1952, noted an increase in summary courts-martial following enactment of the Uniform Code of Military Justice. This resulted, he felt, in more work and administration without any appreciable disciplinary benefits.<sup>60</sup> In his 1 October 1952, "Report of Survey of the Impact of the Law (UCMJ) and its Implementing Regulations Upon Ships Operating Under War Conditions," the Commander in Chief, Pacific Fleet, recommended changing Article 15's punishment powers as follows:<sup>61</sup>

1. Amend Article 15, UCMJ to provide, in addition to those presently authorized, nonjudicial punishments upon enlisted personnel:
  - a. Forfeiture of one-half of one month's pay if imposed by an officer exercising special court-martial jurisdiction.
  - b. Ten days confinement in lieu of the present seven days.
  - c. Five days confinement on bread and water or diminished rations in lieu of the present three days.
  - d. Confinement of shore based personnel, especially foreign shore based personnel.
  - e. Extra duties for a period not to exceed four consecutive weeks.
  - f. Restriction of 30 days for personnel who are outside the continental limits of the United States, its territories and possessions.
2. Authorize the commanding officer of a ship a reasonable latitude in setting the effective date for executing non-judicial punishment.

In 1953, the Navy conducted a disciplinary inquiry by a committee headed by Rear Admiral Robert J. White, a priest-lawyer and former Dean of the Catholic University Law School. Among other conclusions as to the impact of the new Uniform Code of Military Justice, Father White's committee was of the opinion that the best solution to many of the Navy's military justice problems was to increase a commander's nonjudicial punishment authority.<sup>62</sup>

In a 1953 law review article, Father White reiterated his belief that the reduced nonjudicial punishment authority had caused a serious impairment of naval discipline. With support from a 1953 cross-section of summary courts-martial and Board of Review cases, he was of the view that many offenders who were court-martialed should have instead received nonjudicial punishment. For example, of 253 summary court-martial cases reviewed by Father White, 160 had punishments available at captain's mast prior to the 1950 Code. Additionally, some individuals eventually received bad conduct discharges (at special courts-martial) because of the aggravation permitted by a previous summary court-martial conviction, which summary court-martial might well have been disposed of at nonjudicial punishment.<sup>63</sup>

Other critics, however, saw the new Code as too stringent. In their article, "Codified Military Injustice,"<sup>64</sup> authors Professor Arthur J. Keeffe and Morton Moskin, complained about Article 15 permitting a commanding officer aboard ship to impose confinement on bread and water for three days. They viewed this form of nonjudicial punishment to be "cruel and unusual," prohibited from adjudication at courts-martial by Article 55, Uniform Code of Military Justice. They equated this type of summary punishment with flogging, marking, branding, and tattooing. Keeffe and Moskin also complained that a

person who received nonjudicial punishment would have to be "intrepid" or "insane" to appeal any imposed nonjudicial punishment over the head of the very commanding officer who provided ". . . fitness reports, assignments, and furloughs."<sup>65</sup>

Still others had a more sanguine view of the new Code's nonjudicial punishment authority. As an example, United States Marine Corps Brigadier General James Snedeker, wrote in 1953:<sup>66</sup>

It is the function of non-judicial punishment to render speedy justice whenever punishment is deemed necessary, unless it is clear that non-judicial punishment would not meet the ends of justice and discipline. Resort is had to punishment when nonpunitive measures have failed or are inappropriate. Non-judicial punishment is designed to take care of minor offenses, which are usually susceptible of a summary determination on facts not seriously open to contest. The system of non-judicial punishment serves to prevent disruption of the military mission, by allowing disciplinary matters of less serious import to be determined in a manner requiring less time and diversions from more important duties of the personnel involved. Non-judicial punishment supplies the machinery for complying with a stated policy of avoiding resort to courts-martial whenever possible. This has the salutary effect not only of preserving the accused's service record from unnecessary stigmatization and thus guarding his future, but also of conserving the time of the personnel who would be eligible to serve as members of courts-martial.

#### CODE COMMITTEE ANNUAL REPORTS

Other suggestions for changes to the Uniform Code of Military Justice, to include Article 15, began in the early 1950s. One avenue for such recommendations was provided by Article 67(g) of the Code. This article called for an annual meeting of the Court of Military Appeals and the Judge Advocates General to review the operation of the Code and to provide a report to the Committees on Armed Services of the Senate and the House of Representatives,

and to the Secretary of Defense and the Secretaries of the military departments, and of the Department of Transportation. This annual report by the "Code Committee" was to cover court-martial statistics, recommendations as to proposed changes to the Uniform Code, ". . . and any other matters considered appropriate."<sup>67</sup>

In the second annual report as required by Article 67(g), and covering the period 1 June 1952 to 31 December 1953, the Judge Advocate General of the Navy recommended that Article 15 be amended so as to permit:<sup>68</sup>

1. Imposition of seven days' confinement (not just aboard ship) and forfeiture of one-half of one month's pay for enlisted personnel.
2. General courts-martial authority to impose forfeiture of one-half of an officer's pay for three months.
3. Reduction authority not tied to promotion authority.

The Navy Judge Advocate General was further of the opinion that under the new Uniform Code of Military Justice, discipline and morale in the Navy had suffered because of the restrictions on nonjudicial punishment. He stated further that,<sup>69</sup> "a/n increase in the non-judicial powers of commanding officers will enable them to deal effectively with youthful offenders and thereby deter many of them from becoming repeated offenders."

The recommendations for increased nonjudicial punishment authority next became a joint recommendation of the Court of Military Appeals, all of the Judge Advocates General and the General Counsel of the Department of the Treasury. Increases in punishment were urged so as to permit confinement for seven days (imposed by officers in the grade of O-4 and above) and increased forfeiture of pay. These recommendations were repeated in the 1956, 1957, 1958, and 1959 annual reports.<sup>70</sup>

In the 1959 and 1960 annual reports, the Court of Military Appeals recommended that the summary court-martial be eliminated and its disciplinary powers transferred to the same officer who possessed summary court-martial convening authority to be exercised under Article 15, Uniform Code of Military Justice. The three judges of the Court commented that,<sup>71</sup> "Such a change will eliminate time-consuming procedures rarely understood by those who are charged with their administration, while it will assure effective disciplinary sanctions for infractions of the rules. It 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."

#### POWELL REPORT

The Navy and the Court of Military Appeals were not alone in recommending changes to Article 15 of the Code. In October 1959, the Secretary of the Army, Wilber M. Brucker, appointed a committee of general officers to study the effect of the Uniform Code of Military Justice on discipline in the United States Army. This committee was entitled the "Committee on the Uniform Code of Military Justice, Good Order and Discipline," and was chaired by Lieutenant General Herbert B. Powell.<sup>72</sup> In its 1960 Report to the Secretary of the Army by the Ad Hoc Committee on the UCMJ, Good Order and Discipline in the Army ("Powell Report") this committee stated that it had canvassed all Army general court-martial authorities, and a cross-section of battle group, battalion, battery, and company commanders. Over 2,000 enlisted personnel were also questioned.

The "Powell committee" concluded that United States Army commanders did not have enough nonjudicial punishment authority. It recommended an expanded

Article 15 to permit punishment equivalent to sentences available at summary courts-martial. By so enlarging a commander's authority under Article 15, the committee reasoned, summary and special courts-martial could be abolished. The committee further concluded that such changes would also benefit the accused charged with a minor offense in that summary punishment could be effected without the stigma of a court-martial conviction.<sup>73</sup>

#### ARTICLE 15 AMENDED

During the first ten years of the Uniform Code of Military Justice, the article covering nonjudicial punishment came under attack from various quarters. Most critics agreed that some changes were necessary to increase the commander's authority under Article 15. In addition to the suggested changes discussed above, other examples of inherent limitations cited include: restriction and extra duties alone were not effective punishments against personnel already in the field, aboard ship, or performing routine additional duties. Reduction in grade alone (combining of nonjudicial punishments was not permitted) was considered too harsh a punishment in instances where forfeiture of pay might be more appropriate.<sup>74</sup>

After a number of false starts and dead end efforts, Congress, in 1962, acknowledged the Department of Defense position that military commanders had inadequate Uniform Code of Military Justice powers to deal with minor behavioral infractions without resorting to courts-martial. And, where courts-martial were resorted to, an accused was stigmatized with a criminal conviction which would follow him or her into civilian life. The changes to Article 15 enacted in 1962 were viewed as permitting a reduction in courts-martial for minor offenses.<sup>75</sup>

Public Law 87-648 of 7 September 1962, amended Article 15, Uniform Code of Military Justice, by changing the quantity and quality of nonjudicial punishment available to military commanders.<sup>76</sup> Article 15, as so amended, permitted the imposition of admonition or reprimand as nonjudicial punishment, in addition to one or more of the following punishments (upon officers):<sup>77</sup>

1. Restriction: Increased from two weeks to 60 days (limited to 30 days if the imposing officer was other than a general or flag officer in command or a general court-martial authority).

2. Arrest in quarters: Thirty days (which could only be imposed by a general or flag officer in command or a general court-martial authority). Previously, Article 15 permitted only the withholding of privileges for two weeks.

3. Forfeiture: One-half of one month's pay for two months (if imposed by a general or flag officer in command or a general court-martial authority). This was an increase from one-half pay for one month only.

4. Detention of pay: One-half of one month's pay for three months (if imposed by a general or flag officer in command or a general court-martial authority). No previous detention of pay punishment existed.

For enlisted personnel, nonjudicial punishment of admonition or reprimand, and one or more of the following were authorized by the 1962 amendment to Article 15:<sup>78</sup>

1. Confinement on bread and water or diminished rations for three days, if imposed upon a person attached to or embarked in a vessel. This is the same punishment permitted by the original Article 15.

2. Confinement: Changed from seven days authorized aboard ship to correctional custody for 30 days (limited to seven days if imposed by an

officer below the grade of O-4). Correctional custody was adopted from the Canadian Army, and initially sought to permit an accused to work in his or her unit with off-duty custody aimed at rehabilitation.<sup>79</sup>

3. Forfeiture: One-half of one month's pay for two months (limited to seven days' pay if imposed by an officer below the grade of O-4). No previous forfeiture of pay punishment existed for enlisted personnel under Article 15.

4. Reduction in grade: Two levels of reduction in grade were authorized. For officers below the grade of O-4, a single pay grade reduction was permitted. For officers in the grade of O-4 or above, enlisted personnel could be reduced to the lowest or any intermediate grade. The officer imposing a reduction must be able to promote personnel to the pay grade from which demotion would occur. Enlisted personnel in the pay grade of E-4 or above could not be reduced more than two pay grades. Under the first Article 15, commanding officers could reduce a single pay grade, provided he or she had promotional authority to the grade from which an accused was reduced.

5. Extra duties: Increased from two weeks (at two hours a day) to 45 days (limited to 14 days if imposed by an officer below the grade of O-4).

6. Restriction: Increased from two weeks to 60 days (limited to 14 days if imposed by an officer below the grade of O-4).

7. Detention of pay: One-half of one month's pay for three months (limited to 14 days' pay if imposed by an officer below the grade of O-4). No previous detention of pay punishment existed.

In addition to increasing the quantity of nonjudicial punishment (except for the loss of seven days of confinement aboard ship) certain "qualitative" changes were introduced to Article 15 in 1962:

1. Detention of pay was added as a new punishment.

2. Correctional custody was added as a new form of restraint and was defined as "physical restraint during duty or nonduty hours, and could include extra duties, fatigue duties or hard labor."<sup>80</sup> Congress reportedly viewed the purpose of correctional custody to be to permit close supervision over an accused so that the cause of his or her behavior might be corrected, without "stigmatizing" with confinement. This concept appears to have grown out of the United States military development of corrective counseling and rehabilitative efforts at confinement facilities (brigs in the United States Navy). Congress anticipated that an enlisted service member serving correctional custody would work normal days and be in a confinement status at night and on weekends. Further, no mixing of pretrial detainees or convicted prisoners was to occur.<sup>81</sup>

3. Combination of nonjudicial punishments was not authorized by the 1950 Code. After 1962, Article 15 permitted combination of punishments, but required apportionment of punishments involving deprivation of liberty, or forfeiture and detention of pay.

4. The right to demand trial by court-martial in lieu of nonjudicial punishment was not previously provided for. Such a right, however, did exist by Secretarial approval for Army and Air Force personnel only. This right was now extended by statute to Navy, Marine Corps, and Coast Guard personnel not attached to or embarked in vessels. Congressional reasoning appears to have been that since military commanders were given considerably more punishment authority, seen as akin to summary court-martial punishment authority, a greater restriction should be placed upon the inability to refuse nonjudicial punishment. The traditional Navy concerns for personnel aboard ship challenging the captain by refusing punishment and for junior officers then conducting

courts-martial, helped retain the limitation on demanding trial by these personnel aboard ships.<sup>82</sup>

5. The right to appeal nonjudicial punishment considered to be unjust or disproportionate to the offense continued. Reflecting concern for the greater punishments permitted (and introducing greater lawyer involvement into the working of the Uniform Code of Military Justice), a judge advocate (or equivalent) was now required to provide advice when the punishment imposed was greater than that imposable by an officer in the grade of O-3 or below. This advice was to be provided to the officer deciding any appeal.

#### NONJUDICIAL PUNISHMENT AFTER 1962

The 1962 amendment to Article 15, Uniform Code of Military Justice, went into effect on 1 February 1963, and has remained essentially unchanged since then. This lack of change should not suggest that all commanders or all military services or others have been satisfied with the current nonjudicial punishment authority. Initially (and perhaps yet today), commanding officers are not inclined to use correctional custody as it was envisioned by Congress in 1962.<sup>83</sup> Commanders, who are concerned for the most part with the operational demands of their units, ships, or systems, can understand what confinement is; but correctional custody, where an individual is in custody only some of the time, where "rehabilitation" is the goal, and where resources (precious personnel and funds) are necessary to set up a correctional custody facility, is another matter. As such, correctional custody is less likely to be used than confinement (if available as a punishment). Detention of pay is another punishment which received low initial acceptance and use by commanders.<sup>84</sup>

### Army Task Force on the Administration of Military Justice

On 16 March 1971, General William C. Westmoreland, Chief of Staff of the United States Army (and former member of the 1960 Powell committee), established the Committee for Evaluation of the Effectiveness of the Administration of Military Justice, chaired by Major General S. H. Matheson, United States Army. This committee was directed to assess the role of the administration of the military justice system as it pertained to the maintenance of morale and discipline at the small unit level, to identify any small unit problem areas, and to provide recommendations, if any. The committee concentrated upon the administration of military justice at the Army small unit level only. At that level, that of the company commander, the committee found concern about the large amount of nonjudicial punishment paperwork and a need for an increase in authorized punishment. The committee, however, felt that Army commanders did have adequate punishment authority under Article 15, Uniform Code of Military Justice. It recommended that the Department of the Army provide resources for greater use of correctional custody as a punishment; and that the administration of nonjudicial punishment be simplified to make it an "uncomplicated" means of punishment for minor offenses.<sup>85</sup>

### Laird Report

Secretary of Defense Melvin R. Laird, on 5 April 1972, commissioned the Task Force on the Administration of Military Justice, to determine the nature and extent of any racial discrimination of United States military justice and to recommend ways to strengthen the military justice system. The task force took eight months to complete its work, the results of which emphasized the

need for measures to be taken to reduce lingering intentional and systemic discrimination in the military justice system.<sup>86</sup>

As to nonjudicial punishment, this task force recommended that the United States armed services take steps to standardize nonjudicial punishment procedures among the various services, that "legally-qualified military counsel" be made available to provide advice to accused facing nonjudicial punishment (except where limited by military exigencies), that an open hearing for nonjudicial punishment proceedings be provided in all the services, and that forfeiture and reduction in grade not be imposed as simultaneous punishments.<sup>87</sup> In its findings the Task Force on the Administration of Military Justice also noted that correctional custody was not widely used by all of the services. Increased funding was deemed necessary to correct this deficiency.<sup>88</sup>

One final recommendation of note from this 1972 task force pertained to the summary court-martial. In its report to Secretary Laird, the task force recommended that the armed forces decrease the use of summary courts-martial with a view toward its eventual abolishment.<sup>89</sup> It was of the opinion that virtually every case then being tried by summary court-martial could be appropriately disposed of at nonjudicial punishment or at trial by special court-martial. A minority opinion in the task force report pointed out that in Fiscal Year 1972, there were over 23,000 military summary courts-martial, representing 43.8 percent of all service courts-martial for that year. This same minority group viewed the summary court-martial as a relatively uncomplicated forum which provided substantial justice for the trial of minor offenses involving simple issues.<sup>90</sup>

As a result of the recommendations of this task force, Secretary of Defense Melvin Laird directed that service personnel facing nonjudicial punishment under

Article 15, Uniform Code of Military Justice, would be allowed an opportunity to consult with legal counsel.<sup>91</sup> All service acceptance of this principle was not completely effected until 1977, when the United States Court of Military Appeals held that a record of nonjudicial punishment under Article 15 (and record of a summary court-martial conviction) cannot be used in determining punishment in subsequent courts-martial unless the accused was provided the opportunity to confer with independent counsel before deciding to accept the nonjudicial punishment (or trial by summary court-martial).<sup>92</sup> This opportunity to consult with independent counsel (for nonjudicial punishment) did not apply to personnel attached to or embarked on vessels, as no right to refuse this punishment existed there anyway.

#### 1980 General Accounting Office Report

In its 1980 report to the Secretary of Defense on the administration of military justice, the United States General Accounting Office found, in its opinion, problems with the use, implementation, and supervision of nonjudicial punishment in the United States military.<sup>93</sup> This report premised that Article 15, Uniform Code of Military Justice, was intended to give military commanders a swift, efficient, and simplified tool to deter misconduct, maintain discipline, and encourage service personnel to improve their performance. After examining 1,117 nonjudicial punishment cases (representing 0.17 percent of the total nonjudicial punishments imposed by all of the United States armed services for the two years, 1977 and 1978, of the study), the General Accounting Office concluded that there was too great a disparity between commanders in administering nonjudicial punishment; that there was "infrequent" use by accused facing nonjudicial punishment of the opportunity to consult with counsel, of the right

to appeal and of the right to refuse nonjudicial punishment; and that the recording of nonjudicial punishments resulted in their adverse use for a wide range of personnel decisions--many of little or no relationship to the misconduct nonjudicially punished.<sup>94</sup>

The Department of Defense response to the draft of the General Accounting Office's report was by Mr. Richard Danzig, Principal Assistant Secretary of Defense for Manpower, Reserve Affairs and Logistics. In that response, on 19 June 1980, Danzig stated that he agreed with the underlying theme of the General Accounting Office study, on the need for a fair and efficient system of administering nonjudicial punishment. He pointed out, however, that any attempt to provide too much guidance and supervisory control as to the amounts of nonjudicial punishment to be imposed would supplant a commander's discretion and thereby eliminate "consideration of personal factors which cannot be discretely defined and which are essential to good disciplinary decisions and effective leadership."<sup>95</sup> Mr. Danzig commented further that there was no "credible statistical basis" from which to conclude that service personnel infrequently used legal counsel when facing nonjudicial punishment. Favorable Army Defense Service statistics were provided to support this response. The Assistant Secretary of Defense also disagreed with the General Accounting Office recommendations as to maintaining nonjudicial punishment records in permanent personnel files, and responded that such records were either required by law, or were essential for responsible personnel management, or were required to respond to later complaints, legal actions, and similar queries initiated by individual accused.

## CONCLUSIONS AND RECOMMENDATIONS

### CONCLUSIONS

Commanding officers' summary disciplinary authority has been curtailed since the time in United States military history when flogging, substantial confinement, and other severe punishments were permitted. The trend in military justice since World War II has been toward greater involvement of military lawyers and more complicated and time consuming administration. The imposition of nonjudicial punishment has not escaped this same degree of entanglement. Despite recommendations for increased simplicity, nonjudicial punishment proceedings, protections and effects have become more convoluted than ever. Nonjudicial punishment hearings, although administrative and nonadversary in nature, can even resemble a time-consuming semi-judicial hearing. Add to this the necessary advice of rights forms, written summary of the proceeding (when used), copies of documentary evidence, and recording and reporting documents. In all, a lawyer or very well-trained legal technician is necessary to ensure that nonjudicial punishment is properly executed. And, after punishment is imposed, additional entries in service records and reports will be necessary to properly record the nonjudicial punishment results. If there is an appeal, further clerical assistance and writing will be necessary to properly record the appeal and any endorsement thereon. Still more paperwork may be necessary to yet effect any reduction in grade imposed, order forfeiture or detention of pay, write restriction or extra duty orders, carry out correctional custody, and write any imposed admonition or reprimand. These difficult and technical requirements for nonjudicial punishment compete with other consuming clerical

demands placed on the administrative offices of military commands. These requirements have become a heavy burden, even in peacetime, and show no signs of relenting.

#### CURRENT PROPOSALS FOR CHANGE

In recent years a number of proposals for changing the nature of non-judicial punishment have been suggested by senior commanders of the various services. None of these suggestions, however, touch upon the administrative burden placed upon commands. Instead they suggest changes in the rights or punishments available under Article 15, Uniform Code of Military Justice. Those suggested changes known to the author are summarized as follows:

1. Abolition of the service member's right to refuse nonjudicial punishment.
2. Abolition of field grade (O-4 and above in grade) and company grade (O-3 and below in grade) distinctions as to the quantity of punishment which may be imposed.
3. Removal of reduction authority connected to promotion authority to the grade from which an accused would be reduced.
4. Providing for confinement of up to 30 (or more) days.
5. An increase in reduction authority of up to two enlisted pay grades in pay grades above E-4.
6. General or flag officer reduction authority for enlisted personnel in pay grades E-6 or E-7 through E-9, with no promotional authority limitations.
7. Two levels of nonjudicial punishment, by which enlisted personnel in pay grade E-4 and below could not refuse imposition of punishment. At the

second level an accused could also not refuse nonjudicial punishment. Instead, an accused could request that the next commander in the chain of command impose nonjudicial punishment, if any. Among proposed variations of this proposal, one would eliminate the right to refuse nonjudicial punishment for multiple offenders, in time of war or declared national emergency in a hostile fire pay zone.

8. Elimination of the summary court-martial, particularly with an increase in the punishment available under Article 15.

#### MILITARY JUSTICE SYSTEM DURING TIME OF WAR

Although there are many arguments and positions in this regard, any changes in nonjudicial punishment and the rights and procedures connected with this punishment should reflect the continuing need for discipline in the armed services, and the need to have a system of military justice which will in fact work in time of war or national emergency. As to the former, General William C. Westmoreland, said of discipline and military justice:<sup>96</sup>

First and foremost, the military justice system should deter conduct which is prejudicial to good order and discipline. Discipline is an attitude of respect for authority which is developed by leadership precept and training. It is a state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task to be performed. Discipline conditions the soldier to perform his military duty even if it requires him to act in a way which is highly inconsistent with his basic instinct for self-preservation. Discipline markedly differentiates the soldier from his counterpart in civilian society. Unlike the order that is sought in civilian society, military discipline is absolutely essential in the Armed Forces.

Many civilians believe that military discipline is synonymous with punishment. Discipline, however, is a function of command; and as stated by General Westmoreland, is an attitude of respect for authority which results in prompt

and willing responsiveness to orders and an unhesitating compliance with regulations. The ultimate objective of discipline is efficient performance in battle, and could spell the difference between life or death, victory or defeat. Nonjudicial punishment is one of the tools a commanding officer must have to develop and maintain this discipline. As such, nonjudicial punishment must be employable in combat and in garrison. It is doubtful that the present system of nonjudicial punishment, as well as most of the military justice system, will work effectively in combat. Of the Uniform Code of Military Justice, General Westmoreland and Major General Prugh (Judge Advocate General, United States Army, 1971-1975) said in 1980:<sup>97</sup>

The primary difficulty with the Code as it has evolved since 1950 is its failure to address the special nature of what a military justice system should accomplish. Although it is not intended here to denigrate from the achievements of the Code, or the Court of Military Appeals' and the services' efforts to make the Code work, it is our conviction that the revised military justice system will not perform its intended tasks in periods of military exigency, stress, emergency, combat, or other special conditions unique to military service. The most perfect truth-finding, fairest, and compassionate infusion of civilian processes into the peacetime justice is of marginal relevance to a war situation.

#### RECOMMENDATIONS

Whether the present system of military justice is viewed as too "civilianized," too bureaucratic, or too slow, it will have serious difficulty in a fast-moving, intense combat situation. For example, if the United States mobilized for war or national emergency, the turbulence connected with activating reservists, any conscription action, and the moving of personnel and units, among other things, will increase the incidence of misconduct. In areas of combat, the military services will likely not have sufficient officers to dedicate

proper time as summary courts-martial and as members of special and general courts-martial (as these courts are currently conducted). Most future combat situations will also not be akin to the Vietnam garrison war. Many units will be more mobile and heavily involved in combat. Personnel, time, and administrative capacity will not be available to manage the military justice system as it now exists. And, a completely separate military justice system cannot also be written for use in combat zones only. Just as most units will fight as they have trained, a new military justice system, with new rights, procedures and administration, could hardly be expected to find its first use in war. An effective military justice system must be capable of peacetime use exactly (or nearly so) as it will be used in a pressing combat environment. Any changes in military justice during the time of war must be limited to changes in the amounts of punishments, for example, or to the curtailment of procedures or requirements. And too, these changes must be simple and easy to implement.

To this end, some basic changes should be made in the Uniform Code of Military Justice as it presently exists. Two possible changes are to be considered by the nine-member study commission created by the Military Justice Act of 1983.<sup>98</sup> This commission, to be appointed by the Secretary of Defense, will study, among other items, whether sentencing should be by the military judge alone in all noncapital courts-martial, and whether the jurisdiction of special courts-martial should be increased to authorize confinement for up to one year. Additionally, this study commission or the Code Committee, existing by virtue of Article 67(g) of the Uniform Code of Military Justice, should consider the following changes, in the interest of improved discipline, administration of military justice, and combat readiness of the American armed forces:

1. Substitution of confinement as nonjudicial punishment, in lieu of the seldom used and more costly correctional custody.

2. Elimination of the burdensome and rarely used detention of pay and extra duties as nonjudicial punishments.

3. Abolition of the service member's right to refuse nonjudicial punishment (at least during time of declared war, in a hostile fire pay zone, or in a national emergency as declared by the President).

4. Elimination of the summary court-martial. If the above changes to nonjudicial punishment were enacted, punishment authority of commanding officers would be close to that of the summary court-martial. Its purpose would then be outlived; and cases requiring trial or serious misconduct could be referred to a special or general court-martial.

FOOTNOTES

- <sup>1</sup>US Army, The Military Laws of the United States, 1915, pp. 577-579.
- <sup>2</sup>William W. Winthrop, COL, Military Law and Precedents, Vol. 1, p. 11.
- <sup>3</sup>US Army, The Military Laws of the United States, 1915, pp. 577-579.
- <sup>4</sup>Winthrop, Vol. 2, pp. 1478-1481.
- <sup>5</sup>Harold L. Miller, CPT, "A Long Look at Article 15," Military Law Review, April 1965, p. 39.
- <sup>6</sup>Winthrop, Vol. 2, pp. 1487-1488.
- <sup>7</sup>Ibid., pp. 1489-1503.
- <sup>8</sup>Ibid., p. 1495.
- <sup>9</sup>Harold L. Miller, p. 39.
- <sup>10</sup>Winthrop, Vol. 1, pp. 13-15.
- <sup>11</sup>Edward M. Byrne, Military Law, p. 8.
- <sup>12</sup>Harold L. Miller, p. 41.
- <sup>13</sup>Winthrop, Vol. 1, pp. 678-683.
- <sup>14</sup>Ibid., pp. 680-681.
- <sup>15</sup>Harold L. Miller, p. 42.
- <sup>16</sup>Ibid., p. 43.
- <sup>17</sup>Ibid., p. 44.
- <sup>18</sup>George B. Davis, A Treatise on the Military Law of the United States, p. 80.
- <sup>19</sup>US Army, A Manual for Courts-Martial, United States Army, 1898, pp. 68-69.
- <sup>20</sup>F. W. Schweikhardt, Col, USAF, "Non-Judicial Punishment Under the Uniform Code of Military Justice," New York Law Forum, 1959, p. 50.
- <sup>21</sup>US Statute, "Articles of War," ch. 418, sec. 1342, art. 104, 39 Stat. 650 (1916).

<sup>22</sup>US Congress, House, Hearings on H.R. 23628 Before the House Committee on Military Affairs, 62d Cong., 2d Sess., p. 88 (1912), cited by Harold L. Miller, p. 45.

<sup>23</sup>US Statute, "Act of June 4, 1920," ch. 227, sec. 1, art. 104, 41 Stat. 808 (1920).

<sup>24</sup>Ibid.

<sup>25</sup>US Statute, "Act of June 24, 1948," ch. 625, tit. II, art. 104, 62 Stat. 641 (1948).

<sup>26</sup>Byrne, p. 8.

<sup>27</sup>Ibid., p. 4.

<sup>28</sup>Ibid., p. 3.

<sup>29</sup>US Statute, "An Act for the Government of the Navy of the United States," ch. 24, sec. 1, 1 Stat. 709 (1799).

<sup>30</sup>US Statute, "An Act for the better government of the Navy of the United States," ch. 33, sec. 1, 2 Stat. 45 (1800).

<sup>31</sup>Byrne, p. 3.

<sup>32</sup>US Statute, "An Act for the better Government of the Navy of the United States," ch. 204, 12 Stat. 600 (1862).

<sup>33</sup>US Statute, "An Act to promote the administration of justice in the Navy," ch. 131, sec. 1, 8, 35 Stat. 621 (1909).

<sup>34</sup>US Statute, "Administration of Justice," ch. 417, art. 25, 39 Stat. 586 (1916).

<sup>35</sup>US Statute, "Articles of War," ch. 418, sec. 1342, art. 2, 39 Stat. 651 (1916). (A similar proviso was initially set forth in "An Act for the establishing and organizing a Marine Corps," 11 July 1798, ch. 72, sec. 4, 1 Stat. 595:

That the officers, non-commissioned officers, privates and musicians aforesaid, shall take the same oath, and shall be governed by the same rules and articles of war, as are prescribed for the military establishment of the United States, and by the rules for the regulation of the navy, heretofore, or which shall be established by law, according to the nature of the service in which they shall be employed, and shall be entitled to the same allowance, in case of wounds or disabilities, according to their respective ranks, as are granted by the act to ascertain and fix the military establishment of the United States.)

This 1798 statute was thereafter amended by "An Act for the better organization of the United States' 'Marine Corps'," 30 June 1834, ch. 132, sec. 2, 4 Stat. 713, which provided:

That the said corps shall, at all times, be subject to, and under the laws and regulations which are, or may hereafter be, established for the better government of the navy, except when detached for service with the army by order of the President of the United States.

The 1834 statute remained essentially the same until enactment of the Uniform Code of Military Justice in 1950.

The Medical Corps of the Navy was similarly affected when serving with United States Marines who were detached for service with the United States Army. R.S., sec. 1621, p. 274, 29 August 1916, ch. 417, 39 Stat. 573.

<sup>36</sup>Byrne, p. 5.

<sup>37</sup>Ibid., p. 8.

<sup>38</sup>Ibid., p. 9.

<sup>39</sup>William T. Generous, Jr., Swords and Scales: The Development of the Uniform Code of Military Justice, pp. 35-37.

<sup>40</sup>Ibid., p. 42.

<sup>41</sup>Ibid., p. 123.

<sup>42</sup>Ibid.

<sup>43</sup>Harold L. Miller, pp. 99-100.

<sup>44</sup>Generous, p. 124.

<sup>45</sup>Edmund M. Morgan, "The Background of the Uniform Code of Military Justice," Vanderbilt Law Review, 1953, p. 174.

<sup>46</sup>Generous, p. 42.

<sup>47</sup>US Congress, Senate, Committee on Armed Services, Uniform Code of Military Justice, printed in United States Code Congressional Service, 1950, Vol. 2, pp. 2222-2269.

<sup>48</sup>Ibid., p. 2234.

<sup>49</sup>Ibid.

<sup>50</sup> US Statute, "An Act to unify, consolidate, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the disciplinary law of the Coast Guard, and to enact and establish a Uniform Code of Military Justice," ch. 169, 64 Stat. 107 (1950).

<sup>51</sup> Ibid., article 15.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> Generous, p. 57.

<sup>55</sup> Ibid., pp. 54-57.

<sup>56</sup> US Executive Order, Manual for Courts-Martial, United States, 1951.

<sup>57</sup> Generous, p. 21.

<sup>58</sup> Ibid., pp. 70-71.

<sup>59</sup> Chester Ward, "UCMJ--Does It Work?" Vanderbilt Law Review, 1953, p. 221.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid., p. 223.

<sup>62</sup> Generous, p. 91.

<sup>63</sup> Rev. Robert J. White, "Has the Uniform Code of Military Justice Improved the Courts-Martial System?" St. John's Law Review, December 1953, pp. 24-25.

<sup>64</sup> Arthur J. Keefe and Morton Moskin, "Codified Military Injustice," Cornell Law Quarterly, 1950, pp. 151-170.

<sup>65</sup> Ibid., pp. 156-157.

<sup>66</sup> James Snedeker, BrigGen, USMC (Ret.), Military Justice Under the Uniform Code, p. 64.

<sup>67</sup> Uniform Code of Military Justice article 67(g).

<sup>68</sup> US Department of Defense, Annual Report of the United States Court of Military Appeals and The Judge Advocates General of the Armed Forces and the General Counsel of the Department of Treasury Pursuant to the Uniform Code of Military Justice, For the Period 1 June 1952, to 31 December 1953, p. 45 (hereafter referred to as Annual Report).

<sup>69</sup> Ibid.

<sup>70</sup> Annual Report, For the Period 1 January 1956, to 31 December 1956, p. 8. Annual Report, For the Period 1 January 1957, to 31 December 1957, pp. 8 and 10. Annual Report, For the Period 1 January 1958, to 31 December 1958, pp. 8 and 12. Annual Report, For the Period 1 January 1959, to 31 December 1959, p. 8.

<sup>71</sup> Annual Report, For the Period 1 January 1959, to 31 December 1959, p. 34. Annual Report, For the Period 1 January 1960, to 31 December 1960, p. 10.

<sup>72</sup> Generous, p. 139.

<sup>73</sup> Annual Report, For the Period 1 January 1960, to 31 December 1960, p. 4.

<sup>74</sup> Hubert G. Miller, LTC, "The New Look in Article 15," Army Information Digest, January 1963, p. 3.

<sup>75</sup> US Congress, Senate, Committee on Armed Services, Armed Forces-- Nonjudicial Punishment, printed in United States Code Congressional and Administrative News, 1962, Vol. 2, pp. 2379-2390.

<sup>76</sup> US Statute, "An Act to amend section 815 (article 15) of title 10, United States Code, relating to nonjudicial punishment, and for other purposes," Public Law 87-648, 76 Stat. 447 (codified at 10 U.S.C., sec. 815 (1962)).

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

<sup>79</sup> Harold L. Miller, pp. 70-72.

<sup>80</sup> US Congress, Senate, Committee on Armed Services, Armed Forces-- Nonjudicial Punishment, printed in United States Code Congressional and Administrative News, 1962, Vol. 2, pp. 2379-2390.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid., pp. 2379-2380.

<sup>83</sup> Generous, pp. 152-153.

<sup>84</sup> Ibid., p. 153.

<sup>85</sup> US Army, Report to General William C. Westmoreland, Chief of Staff, US Army, by The Committee for Evaluation of the Effectiveness of the Administration of Military Justice, 1 June 1971.

<sup>86</sup> US Department of Defense, Report of the Task Force on the Administration of Military Justice in the Armed Forces, Vol. 1, 30 November 1972, p. 2.

<sup>87</sup>Ibid., pp. 120-121.

<sup>88</sup>Ibid., Vol. 2, p. 41.

<sup>89</sup>Ibid., Vol. 1, p. 122.

<sup>90</sup>Ibid., Vol. 2, pp. 46-47.

<sup>91</sup>US Secretary of Defense, Memorandum for the Secretaries of the Military Departments, Subject: Report of the Task Force on the Administration of Military Justice in the Armed Forces, 11 January 1973.

<sup>92</sup>United States v. Booker, 5 M.J. 238 (CMA, 1977) and, on reconsideration, 5 M.J. 246 (CMA, 1978).

<sup>93</sup>US General Accounting Office, Report to the Secretary of Defense: Better Administration of the Military's Article 15 Punishments for Minor Offenses is Needed, 2 September 1980.

<sup>94</sup>Ibid., pp. 26 and 40.

<sup>95</sup>Ibid., p. 65.

<sup>96</sup>William C. Westmoreland, GEN, "Military Justice--A Commander's Viewpoint," The American Criminal Law Review, July 1971, p. 5.

<sup>97</sup>William C. Westmoreland, GEN (Ret.) and George S. Prugh, MG (Ret.), "Judges in Command: The Judicialized Uniform Code of Military Justice in Combat," Harvard Journal of Law and Public Policy, 1980, p. 40.

<sup>98</sup>US Statute, "Military Justice Act of 1983," Public Law No. 98-209, 97 Stat. 1393 (1983) (amending the Uniform Code of Military Justice articles 1-140, 10 U.S.C., sec. 801-940 (1976)).

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