



COMMENT

NONJUDICIAL PUNISHMENT IN THE MILITARY: WHY A LOWER BURDEN OF PROOF ACROSS ALL BRANCHES IS UNNECESSARY

Katherine Gorski*

INTRODUCTION

Envision a United States Navy warship docked at a foreign port for three days during the second month of a six month long deployment.¹ The ship is preparing to set sail at dawn on the fourth day. Before the ship departs from the port, the ship's crew is ordered to Quarters for muster, instruction, and inspection.² Once the ship

* George Mason University School of Law, J.D. Candidate, May 2014. I would like to thank my dad, retired Capt. Thomas H. Gorski, U.S. Navy, for giving me the inspiration to write this piece with his numerous tales of Captain's Mast, and for allowing me to interview him. I would also like to thank Capt. Eric C. Price, U.S. Navy, Judge Advocate General Corps, for answering my questions. Finally, I would like to thank my Notes Editor, Jessica O'Connell, and the current Articles team, for providing helpful commentary that made this piece far better than I could have managed on my own.

¹ Telephone Interview with retired Capt. Thomas H. Gorski, U.S. Navy (Oct. 8, 2012) [hereinafter Gorski Interview]. The following hypothetical is drawn from an actual Captain's Mast and like situations conducted in 1990 by retired Capt. Thomas H. Gorski, U.S. Navy.

² *Id.* When the crew is ordered to Quarters, it is a signal to gather in designated areas. Quarters muster is essentially a headcount of all sailors aboard the ship. It is the most important part of this procedure, as it ensures that everyone is aboard and

sets sail, it will not visit port again for over a month and is not scheduled to return to this particular foreign port during its current deployment.

A young enlisted man, in his early twenties, is granted liberty and leaves the ship. He travels through the base, and enters the city to enjoy his free time in port. He does not return to the base until after his liberty expires. While on base, but before returning to the ship, the young man gets into a physical altercation with a civilian. The Shore Patrol, a group of officers acting in a law enforcement capacity in port while sailors are at liberty,³ quells the fight and, after dealing with the sailor's disrespectful and antagonistic attitude, manages to gain control of him and returns the young man to the ship, well after the expiration of his liberty.

Ship policy requires crewmen arriving after expiration of liberty to submit to a urinalysis test. Per the policy, the Master-at-Arms collects a sample and returns the sailor to his division where the sailor's Chief Petty Officer orders him to attend Quarters. After offering some specific and graphic advice to the Chief about what he could do with his idea of attending Quarters, the sailor instead goes to bed. Meanwhile, the sailor's urine analysis comes back positive for cocaine use.

The young sailor is then written up for several violations of the Articles of the Uniform Code of Military Justice ("UCMJ"),⁴ including: absence from unit and place of duty, Quarters; insubordination toward a Navy petty officer; failure to obey a lawful order; wrongful use of a controlled substance; assault and battery of a civilian; and disorderly conduct. The sailor is notified of these violations and his rights regarding nonjudicial punishment. Within days of the ship's departure, the young man attends Captain's Mast ("Mast"), where the Captain determines whether the sailor committed the violations and what will be an appropriate punishment.

that no one has been left behind, either in port or overboard. The crew then also receives instructions for the upcoming mission and undergoes inspection.

³ 32 C.F.R. § 700.922 (2013).

⁴ The UCMJ is codified in 10 U.S.C. §§ 801–946 (2013).

At the beginning of the Mast, the Captain reads a statement to the accused telling him the offenses he is suspected of committing and advising him of the nonjudicial punishment process:

You do not have to make any statement regarding the offense(s) of which you are accused or suspected and any statement made by you may be used as evidence against you. You are advised that a [Mast] is not a trial and that a determination of misconduct on your part is not a conviction by a court. Further, you are advised that the formal rules of evidence used in trials by court-martial do not apply at [Mast]. You have signed a statement acknowledging that you were fully advised of your legal rights pertaining to this hearing. Do you understand this statement and do you understand the rights explained therein? Do you have any questions about them or do you wish to make any requests?⁵

A number of authority figures aboard the ship attend the Mast and offer testimonials to the Captain regarding the young man's behavior and any extenuating circumstances. The Captain considers these testimonials as well as the Shore Patrol's report and the sailor's own defenses regarding his offenses.

In addition to considering such testimony, the Captain takes into consideration a number of administrative matters regarding not only the offenses, but also whether nonjudicial punishment is appropriate. The ship's departure cannot be delayed to allow for the Shore Patrol or the civilian to be present as witnesses, or to gather additional evidence. Additionally, because the sailor has crucial technical training required for the safe operation of the ship, it is not possible to leave him behind for the base commander to conduct a proceeding. Further, in the interest of swift justice and the maintenance of good discipline, as well as for fiscal reasons, the Mast cannot be delayed until the ship reaches the next port. Because of these considerations, the Captain must serve justice on the open seas.

⁵ Gorski Interview, *supra* note 1. A slight variation, substantively the same, can be found in U.S. DEP'T OF NAVY, NAVAL ACAD. INSTR. 5812.1A, NONJUDICIAL PUNISHMENT PROCEDURES (Nov. 16, 2012).

In determining the sailor's punishment, the Captain considers the sailor's individual circumstances, including any family who might be affected by his punishment, in addition to any prior offenses. This particular sailor has no wife or children depending on his income and has a previous record of Mast's for a variety of offenses, including those involved here: fighting, insubordination, and drug use.

In light of these considerations, the Captain decides that the sailor has committed the offenses with which he is charged and imposes punishment accordingly. The sailor is restricted to the ship for a total of forty-five days, meaning he cannot leave the ship, but can go anywhere onboard the ship. Additionally, the sailor is awarded extra duty, also for forty-five days. He is also fined half a month's pay for two months and reduced in rate⁶ from E-2 to E-1,⁷ the lowest rate for an enlisted sailor. A record is made of the nonjudicial punishment in the sailor's military record, but he does not receive a criminal conviction that would stay with him beyond his service in the military and into civilian life.

Instances of conduct such as the incident described above can occur in the course of military affairs, and the need for commanders to impose such penalties to maintain order and

⁶ Gorski Interview, *supra* note 1. Rate or grade for enlisted sailors is similar to rank for officers, and a reduction in rate or grade involves a corresponding salary cut. For enlisted, the terms "rate," "grade," and "pay grade" can be used interchangeably.

⁷ "E" indicates enlisted personnel while "W" indicates a warrant officer and "O" a commissioned officer. The number following the letter is an indication of the grade, with the lowest being 1 and the highest being 9 for enlisted, 5 for warrant officers, and 10 for commissioned officers. These grades or rates are used for standardization across the services, which each have their different rank titles. For instance, an E-1 in the Army is a Private while in the Navy, he would be a Seaman Recruit. Further, O-4 corresponds to the rank of major in the Army, Marine Corps, and the Air Force but the rank of lieutenant commander in the Navy and the Coast Guard. See *The United States Military Rank Insignia*, U.S. DEP'T OF DEF., <http://www.defense.gov/about/insignias> (last visited Aug. 22, 2013); *The United States Military Officer Rank Insignia*, U.S. DEP'T OF DEF., <http://www.defense.gov/about/insignias/officers.aspx> (last visited Aug. 22, 2013); *The United States Military Enlisted Rank Insignia*, U.S. DEP'T OF DEF., <http://www.defense.gov/about/insignias/enlisted.aspx> (last visited Aug. 22, 2013).

discipline has long been recognized.⁸ However, different opinions exist over the methods that should be used in nonjudicial punishment.

Article 15 of the UCMJ allows military commanders to impose nonjudicial punishment on service members under their command.⁹ However, neither the UCMJ nor the *Manual for Courts-Martial* specifies the burden of proof required in such proceedings, leaving it up to the different branches of service to decide which standard to use.¹⁰ Some branches, like the Navy, use a preponderance of the evidence standard, while others, like the Army, use the higher beyond a reasonable doubt standard.¹¹ Some believe that the beyond a reasonable doubt standard should be used across all branches of the military. These critics argue the higher standard offers better protection for service members in a punishment system that allegedly provides insufficient protection for those service members.¹²

This Comment will analyze nonjudicial punishment in the military and the burdens of proof used by the different branches. Part I will address the history of nonjudicial punishment and the institution of the UCMJ and Article 15. Part II will discuss the nature and purpose of nonjudicial punishment and why they negate the necessity for a higher burden of proof. Part III will address the procedural safeguards inherent in nonjudicial punishment procedures, which are designed to promote fairness to the accused. Part IV will argue that, while a higher burden of proof may be feasible in other branches, the unique circumstances aboard a ship make the lower burden of proof more practical for the Navy.

⁸ Capt. Harold L. Miller, U.S. Army, Judge Advocate General Corps, *A Long Look at Article 15*, 28 MIL. L. REV. 37, 38 (1965).

⁹ UCMJ art. 15.

¹⁰ LAWRENCE J. MORRIS, *MILITARY JUSTICE: A GUIDE TO THE ISSUES* 155 (2010).

¹¹ *Id.* at 155-56. For a description of the different burdens of proof see *infra* Part I.C.

¹² See, e.g., Capt. Shane Reeves, U.S. Army, *The Burden of Proof in Nonjudicial Punishment: Why Beyond a Reasonable Doubt Makes Sense*, 2005-NOV ARMY LAW. 28 (2005).

I. BACKGROUND

A. *History of Nonjudicial Punishment Prior to Article 15*

The military has a long history of employing nonjudicial punishment to maintain order and discipline within a command, even prior to the enactment of the UCMJ and Article 15.¹³ As far back as the Revolutionary War, military commanding officers had the authority to discipline those under their command, even though that disciplinary authority was not officially granted in any laws or regulations.¹⁴ According to one author, “[c]ommanders’ arbitrary punishment power antedated any legal authorization for it.”¹⁵ Many forms of punishments involved humiliation. For example, “[f]or swearing or cursing, a seaman was required to wear a wooden collar or other shameful badge of distinction for as long as his commander judged proper; for drunkenness, he was put in irons until he was sober.”¹⁶ Commanders also forfeited officers’ pay to punish them for similar offenses.¹⁷

The Articles of War passed by the Continental Congress in 1775 authorized commanders to punish service members for minor offenses by deducting their pay and confining them for short periods of time.¹⁸ The Army’s summary punishment was not given statutory authority until the 1916 Articles of War were enacted, although it had long been the practice for Army commanders to issue punishment in response to disciplinary offenses.¹⁹ Although the Articles of War provided legislative authority for ship commanders to punish their crew, in the Navy “specific legislation was never considered necessary for a ship’s commander to punish his crew. As late as 1963, even after the UCMJ was enacted, the Navy JAG told his lawyers that laws were not the source of [nonjudicial punishment],

¹³ Miller, *supra* note 8, at 38.

¹⁴ *Id.*

¹⁵ WILLIAM T. GENEROUS, JR., *SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE* 122 (1973).

¹⁶ Miller, *supra* note 8, at 38.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ GENEROUS, *supra* note 15, at 122 (internal quotation marks omitted).

but that the authority was inherent in the disciplinary powers of the [Commanding Officer].²⁰ Whether the authority is derived from tradition or laws, nonjudicial punishment is still widely practiced by commanders in the military today.²¹

B. Enactment of the Uniform Code of Military Justice and Article 15

The UCMJ was amended in 1962 to provide statutory authority for commanders in the military to use nonjudicial punishment to maintain order and discipline within their commands.²² Article 15 of the UCMJ allows for use of nonjudicial punishment for minor offenses rather than requiring the longer and more difficult process of a court-martial.²³ Punishments allowed within Article 15 range in severity from admonition to reduction in grade.²⁴ A commander can issue an admonition or reprimand; impose restriction to specified limits (“Restriction”), arrest in quarters, or correctional custody for a limited number of days; authorize forfeiture or detention of pay; add extra duties; or order a reduction to an inferior grade or rate.²⁵ There are restrictions for the length and severity of these punishments that differ depending on the rank of the commanding officer as well as the rank or rate of the individual being punished.²⁶

C. The Burden of Proof

With its silence on the matter, Article 15 allows each individual military branch to determine which burden of proof standard to use in nonjudicial punishment.²⁷ The Army has traditionally used proof beyond a reasonable doubt, which is the highest available burden of proof and is also used in criminal trials.²⁸

²⁰ *Id.*

²¹ Miller, *supra* note 8, at 46-47.

²² *Id.* at 37.

²³ UCMJ art. 15(b).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ MORRIS, *supra* note 10, at 155.

²⁸ *Id.* at 155-56.

The Navy, on the other hand “has set the standard at preponderance of the evidence, a standard used for many administrative proceedings and for some pretrial motions at courts-martial.”²⁹

Proof by a preponderance of the evidence “requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence.”³⁰ This standard is often used for monetary disputes.³¹ When “important individual interests or rights are at stake,” the slightly higher burden of proof of clear and convincing evidence is used.³² However, the “imposition of even severe civil sanctions that do not implicate such interests has been permitted after proof by a preponderance of the evidence.”³³

Proof by clear and convincing evidence is the intermediate burden of proof standard, used to protect important individual interests in civil cases.³⁴ It is often used when the defendant’s reputation might be at risk, rather than simply a loss of money.³⁵ Proof beyond a reasonable doubt is the highest burden of proof available. It is required for a criminal conviction in recognition of the fact that such a conviction may result in incarceration and social stigma, and that a man should not be condemned for a crime when there is a reasonable doubt about whether he actually committed it.³⁶

II. THE NATURE OF NONJUDICIAL PUNISHMENT NEGATES THE NECESSITY OF A HIGHER BURDEN OF PROOF

Proof beyond a reasonable doubt is not necessary in nonjudicial punishment for several reasons. First, nonjudicial

²⁹ *Id.* at 155.

³⁰ *In re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring) (internal quotation marks omitted).

³¹ *Addington v. Texas*, 441 U.S. 418, 423 (1979).

³² *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983).

³³ *Id.* at 389-90 (citing *United States v. Regan*, 232 U.S. 37, 48-49 (1914), in which the preponderance of the evidence standard was used in a civil suit even though it involved “a penalized or criminal act” that exposed the party to criminal prosecution).

³⁴ *Id.* at 389.

³⁵ *Addington*, 441 U.S. at 424.

³⁶ *In re Winship*, 397 U.S. at 363-64.

punishment is usually only reserved for minor offenses. Second, the punishments imposed by commanders are minimal, and the commander has the authority to mitigate punishment. Finally, the imposition of nonjudicial punishment does not result in a criminal conviction that appears on one's record.

A. *Nonjudicial Punishment is Used for Minor Offenses*

1. *The Manual for Courts-Martial Defines "Minor Offense"*

The UCMJ only allows the use of nonjudicial punishment for minor offenses.³⁷ According to the *Manual for Courts-Martial*, an executive order establishing rules pertaining to the implementation of the UCMJ,³⁸ a number of factors determine whether an offense is considered minor: "the nature of the offense and the circumstances surrounding its commission; the offender's age, rank, duty assignment, record and experience; and the maximum sentence imposable for the offense if tried by general court-martial."³⁹ Minor offenses are usually restricted to those offenses for "which the maximum sentence imposable would not include a dishonorable discharge or confinement for longer than [one] year if tried by general court-martial."⁴⁰ This requirement emphasizes that nonjudicial punishment is intended as a disciplinary measure to maintain order within a command.

2. *The Family Analogy*

The *Manual for Courts-Martial* states that nonjudicial punishment is meant to act as a disciplinary measure when administrative corrective measures are inadequate to promote positive behavioral changes and both parties wish to avoid the "stigma of a court-martial conviction."⁴¹ While commanders are given discretion over what constitutes a minor offense, oftentimes it

³⁷ UCMJ art. 15(b).

³⁸ *Id.* art. 36.

³⁹ MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. V, ¶ 1e (2012) [hereinafter MCM].

⁴⁰ *Id.*

⁴¹ *Id.* ¶ 1b-d.

is defined by such violations of the UCMJ as tardiness, insubordination, disorderly conduct, and failure to obey orders, as seen in the earlier example.⁴²

The use of nonjudicial punishment to correct minor offenses seems far more akin to parents grounding their children for breaking curfew or failing to do their chores than the imposition of a criminal sentence, a notion that parallels the Navy's perception of itself as a family.⁴³ It is true that sometimes this broad discretion allows commanders to punish offenses that might not ordinarily be considered minor, such as the possession or consumption of drugs;⁴⁴ however, nonjudicial punishment also results in far milder penalties than a court-martial would impose,⁴⁵ mitigating the loss of the stricter procedural measures of a court-martial.

B. Nonjudicial Punishment Imposes Lesser Penalties than General Court-Martial

Some of the offenses for which nonjudicial punishment is often used could warrant up to a year of confinement if tried by general court-martial.⁴⁶ Although drug use can warrant a punishment of more than a year of confinement, it still often goes to

⁴² Gorski Interview, *supra* note 1; MCM, *supra* note 39, pt. V, ¶ 1d.

⁴³ GENEROUS, *supra* note 15, at 114. "The Navy thinks of itself as a family; since families do not ordinarily have to send out for lawyers and judges to help resolve their problems, neither should the Navy."

⁴⁴ MORRIS, *supra* note 10, at 150.

⁴⁵ See MCM, *supra* note 39, pt. IV, ¶ 37e. The maximum punishment listed for "wrongful use, possession, manufacture, or introduction of a controlled substance," cocaine in this example, under the Punitive Articles of the *Manual for Courts-Martial* is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years. For less than 30 grams of marijuana or use of marijuana, the maximum punishment listed is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for two years.

⁴⁶ *Id.* pt. V, ¶¶ 1e, 5b. The *Manual for Courts-Martial* defines minor offenses as those for "which the maximum sentence imposable would not include a dishonorable discharge or confinement for longer than one year if tried by general court-martial" while the longest available punishment for nonjudicial punishment would be days, not exceeding two months. For instance, disobeying the order of a non-commissioned or petty officer could result in a bad-conduct discharge, forfeiture of all pay and allowances, and a year of confinement. *Id.* pt. IV, ¶ 15e.

nonjudicial punishment rather than court-martial.⁴⁷ Possible punishments for nonjudicial punishment, however, include Restriction⁴⁸ for up to sixty consecutive days, forfeiture or detention of pay for up to three months, extra duties for up to forty-five consecutive days, or a reduction in pay grade.⁴⁹ As mentioned earlier, the punishments available to commanders differ based on the rank or rate of the individual being punished, as well as the rank of the commanding officer.⁵⁰

1. Availability of Punishments Based on Commanding Officer and Accused

Commanding officers can impose nonjudicial punishment on those within their command as long as that punishment is consistent with the kind of punishment that can be imposed on someone of that rank or rate.⁵¹ Commanding officers of higher ranks can impose a broader range of punishments than lower-ranked commanding officers, again, as long as those punishments are consistent with the rank or rate of the accused.⁵² Reductions in rate are also dependent upon the promotion abilities of the commanding officer, who must have the ability to promote the accused back to the original rate before such reduction can be imposed.⁵³

a. Commissioned Officers and Warrant Officers

Commissioned officers and warrant officers can be restricted to specified limits for no more than thirty consecutive days by any

⁴⁷ See Gorski Interview, *supra* note 1. The example in the beginning included nonjudicial punishment for drug use.

⁴⁸ MORRIS, *supra* note 10, at 159 (stating “[r]estriction is perhaps the most common sanction at [nonjudicial punishment]. The imposing commander sets the terms of the restriction—typically to specific limits on an installation. . . . The toughest restrictions are to place of duty, worship, mess hall, and perhaps gym. Less restrictive terms might include freedom to go anywhere on a military installation. . .”).

⁴⁹ UCMJ art. 15.

⁵⁰ MCM, *supra* note 39, pt. V, ¶ 5b.

⁵¹ *Id.* ¶¶ 2a, 5b.

⁵² *Id.* ¶ 5b.

⁵³ *Id.*

commanding officer and no more than sixty days by a higher ranking commanding officer.⁵⁴ If the officer imposing punishment has general court-martial jurisdiction,⁵⁵ he can also impose arrest in quarters for no more than thirty consecutive days and forfeiture of no more than one-half of one month's pay for two months.⁵⁶

b. Enlisted Sailors

Enlisted sailors can be punished with confinement on bread and water or diminished rations for no more than three consecutive days, correctional custody for no more than seven days, forfeiture of no more than seven days' pay, reduction to the next inferior grade or rate if the officer imposing punishment has the authority to promote to the original rate, extra duties for no more than fourteen days, and Restriction for no more than fourteen days.⁵⁷ If the commanding officer imposing punishment is an O-4, which is a major or lieutenant commander, or higher, the commander has a slightly greater range of punishments at his disposal.⁵⁸ The restrictions for confinement on bread and water or diminished rations and forfeiture of pay remain the same.⁵⁹ Correctional custody can be imposed for no more than thirty consecutive days instead of seven.⁶⁰

As mentioned above, all commanding officers can reduce sailors to the next inferior grade if they have the authority to promote them back to their starting grade, but only an O-4 or higher can reduce sailors to E-1 or any intermediate grade between that and the inferior grade, with the same restriction of promotion ability.⁶¹ However, enlisted sailors above E-4 cannot be reduced more than

⁵⁴ *Id.*

⁵⁵ Officers of general or flag rank as well as an individual, known as a "Principal Assistant," who has been delegated this authority by either an officer exercising general court-martial jurisdiction or officers of general or flag rank, have the same punishment authority. These are generally the highest-ranking commissioned officers. *Id.* ¶¶ 2c, 5b.

⁵⁶ MCM, *supra* note 39, pt. V, ¶ 5b.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

one rate except during certain circumstances.⁶² For these sailors, extra duties can be imposed for no more than forty-five consecutive days and Restriction may be imposed for no more than sixty consecutive days, instead of fourteen.⁶³

2. Common Nonjudicial Punishments

a. *Restriction to Specified Limits*

While the label “restriction to specified limits” and the length of time for which it can be imposed might make Restriction seem like one of the more severe punishments available, the *Manual for Courts-Martial* actually identifies it as “the least severe form of deprivation of liberty.”⁶⁴ In the Navy, Restriction is a common punishment and the specified limits are often designated as the ship, though the commander could also choose to define those limits as, for example, a military base or part of one.⁶⁵ As seen in the example in the introduction to this Comment, the Captain in that case chose to impose Restriction to the ship for forty-five days.⁶⁶ Since the ship was about to leave port,⁶⁷ a substantial portion of those forty-five days would be spent away from port, when the sailor would be limited to the confines of the ship anyway. Such circumstances make the punishment more symbolic than restricting, to demonstrate censure for wrong behavior and dissuade others from committing similar offenses.

The *Manual for Courts-Martial* identifies Restriction as a “moral rather than physical restraint,” sometimes requiring the individual to report to a specified place at a certain time to ensure the punishment is being observed.⁶⁸ This punishment is further mitigated by the restrictions placed on its use with regards to the rate of the individual being punished as well as the rank of the officer

⁶² MCM, *supra* note 39, pt. V, ¶ 5b. During times of war or national emergency, the commander may reduce the enlisted sailor by two grades.

⁶³ *Id.*

⁶⁴ *Id.* ¶ 5c.

⁶⁵ Gorski Interview, *supra* note 1; MORRIS, *supra* note 10, at 159.

⁶⁶ Gorski Interview, *supra* note 1.

⁶⁷ *Id.*

⁶⁸ MCM, *supra* note 39, pt. V, ¶ 5c.

imposing punishment. Any commanding officer can impose this punishment on commissioned or warrant officers for no more than thirty days, and any nonjudicial punishment authority can impose this punishment on enlisted personnel for no more than fourteen days. If the officer imposing punishment has general court-martial jurisdiction, he can impose this punishment on commissioned or warrant officers for no more than sixty days.⁶⁹ If the commanding officer is an O-4, that is, of the rank major or lieutenant commander, or higher, he can impose Restriction on enlisted personnel for no more than sixty days.

*b. Arrest in Quarters, Correctional Custody, and
Confinement on Bread and Water or Diminished
Rations*

Slightly more severe than Restriction are the punishments of arrest in quarters, correctional custody, and confinement on bread and water or diminished rations.⁷⁰ Arrest in quarters may only be imposed on officers, not enlisted crewmen, and only by an officer with general court-martial jurisdiction.⁷¹ Correctional custody can be imposed on enlisted personnel for no more than seven days by anyone exercising nonjudicial punishment authority, and no more than thirty days if the commanding officer is an O-4 or higher.⁷² Confinement on bread and water or diminished rations can only be imposed on enlisted crewmen when attached to or embarked in a vessel for no more than three days, and it requires a signed certificate of a medical officer stating that no serious injury will result from the punishment.⁷³ While these punishments are more severe than Restriction, they may also be coupled with extra duties, allowing the individuals to leave confinement to perform those duties when authorized.⁷⁴ If such authorization is not allowed, however, these sorts of punishments might limit crewmen's ability to carry out their

⁶⁹ *Id.* ¶ 5b.

⁷⁰ *Id.* ¶ 5c.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ MCM, *supra* note 39, pt. V, ¶ 5c.

regular duties, making such punishments undesirable for commanders to use.⁷⁵

c. Reduction in Rate

Reduction in grade is considered “one of the most severe forms of nonjudicial punishment.”⁷⁶ For this reason, the *Manual for Courts-Martial* indicates that “it should be used with discretion,” and only commanders with the ability to grant the rate from which the service member is reduced can impose such punishment.⁷⁷ This punishment is also further limited to use against enlisted personnel rather than officers.⁷⁸ Any nonjudicial punishment authority can reduce a sailor to the next inferior rate as long as he can also promote to the original rate.⁷⁹ If the commanding officer is an O-4 or higher, he can reduce the sailor to E-1, the lowest rate, or any intermediate rate, as long as he can also promote to the original rate.⁸⁰ However, if the sailor is above E-4, the commanding officer can only reduce him by one rate.⁸¹ Even though this might seem like a harsh punishment, it is only temporary, as the individual will be able to earn back his previous rate in time.⁸²

C. Nonjudicial Punishment Includes a Mitigation Process

Though these punishments are, by nature, short and temporary, nonjudicial punishment also includes a process for mitigation of punishment to further lessen the severity of these penalties.⁸³ In a case like the example in the introduction, in which the sailor has a long history of prior poor conduct, the Captain is less likely to mitigate the punishment imposed.⁸⁴ However, if the sailor

⁷⁵ Gorski Interview, *supra* note 1.

⁷⁶ MCM, *supra* note 39, pt. V, ¶ 5c(7).

⁷⁷ *Id.*

⁷⁸ *Id.* ¶ 5b.

⁷⁹ *Id.* ¶ 5.

⁸⁰ *Id.*

⁸¹ *Id.* During times of war or national emergency, however, those above E-4 can be reduced by two grades, if circumstances require.

⁸² Gorski Interview, *supra* note 1.

⁸³ UCMJ art. 15(d).

⁸⁴ Gorski Interview, *supra* note 1.

doesn't have such a history, and has demonstrated an improvement in his behavior after the punishment was imposed, the Captain may choose to mitigate a more severe punishment like reduction in rate to a less severe punishment like forfeiture or detention of pay, or suspend it in its entirety.⁸⁵

This mitigation process is codified in Article 15 of the UCMJ, which states, “[t]he officer who imposes the punishment . . . may, at any time, suspend probationally any part or amount of the unexpected punishment imposed and may suspend probationally a reduction in grade or a forfeiture imposed under subsection (b), whether or not executed.”⁸⁶ Similarly, the *Manual for Courts-Martial* states, “[m]itigation is appropriate when the offender’s later good conduct merits a reduction in the punishment, or when it is determined that the punishment imposed was disproportionate.”⁸⁷ Giving the commander such latitude in the execution of these nonjudicial punishments further diminishes the already relatively minor penalties involved in this process.

D. Nonjudicial Punishment Does Not Result in a Criminal Conviction

While nonjudicial punishment is recorded in the service member’s military record, that punishment does not extend beyond the service member’s time within the military because, unlike a court-martial conviction, nonjudicial punishment “does not result in a criminal record, and its sanctions—loss of pay, status, and liberty—are internal to the military.”⁸⁸ The Supreme Court in *In re Winship* held “that, where a 12-year-old child is charged with an act of stealing which renders him liable to confinement for as long as six years, then, as a matter of due process . . . the case against him must be proved beyond a reasonable doubt.”⁸⁹ The Supreme Court was

⁸⁵ *Id.*; UCMJ art. 15(d).

⁸⁶ UCMJ art. 15(d).

⁸⁷ MCM, *supra* note 39, pt. V, ¶ 6b.

⁸⁸ MORRIS, *supra* note 10, at 156.

⁸⁹ As the *Winship* Court explained:

The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal

quite concerned with the stigma of a criminal conviction and the possibility of a lengthy confinement as a result of that conviction when it held that the higher burden of proof should be used when trying juveniles for criminal acts.

Unlike the process of *In re Winship*, nonjudicial punishment is not an adjudicative process, and thereby bypasses the concerns the Court outlined. First, nonjudicial punishment avoids the stigma of a criminal conviction and instead is a necessary remedy purely insular to the military system. Second, the punishment meted out in nonjudicial punishment, such as Restriction for a period of no more than two months, is far more desirable than subjecting sailors to lengthy confinements. Because using nonjudicial punishment in lieu of a court-martial avoids the “unnecessary stigmatizations”⁹⁰ and the lengthy confinements caused by a criminal conviction, it is more desirable than a court-martial.

III. PROCEDURES USED IN NONJUDICIAL PUNISHMENT TO ENSURE FAIRNESS

Even though nonjudicial punishment is viewed as a disciplinary proceeding rather than a legal proceeding,⁹¹ there are still due process concerns demonstrated by the procedures involved in the hearing process, the restrictions placed on available punishments, the ability to request or demand court-martial, and considerations of double jeopardy.

prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction.

In re Winship, 397 U.S. at 363.

⁹⁰ Miller, *supra* note 8, at 65.

⁹¹ MCM, *supra* note 39, pt. V, ¶ 1b (stating “[n]onjudicial punishment is a disciplinary measure”); MORRIS, *supra* note 10, at 150 (stating “the intent of Article 15 is to correct a soldier—sting her with loss of pay, rank, or liberty, and then put her back to work. . . . [I]t also has the collateral impact of deterring those who might contemplate similar misconduct”); *United States v. Penn*, 4 M.J. 879, 882 (1978) (stating “[n]onjudicial punishment is an administrative method of dealing with minor offenses . . . not a criminal proceeding”).

A. *The Hearing Process*

The accused is notified of his violations and his rights prior to the nonjudicial punishment hearing.⁹² This notification provides the accused with time to decide whether to accept nonjudicial punishment, or, unless the accused is “attached to or embarked in a vessel,” demand trial by court-martial.⁹³ The ability to demand trial by court-martial allows the service member to choose the risk of more severe punishment for the judicial procedures of a court-martial.⁹⁴ This notification also presents the accused with an opportunity to decide on the best defense to present to the commander, or even if nonjudicial punishment is the right course for him. The accused usually has the right to consult defense counsel, who can sometimes appear at a nonjudicial punishment hearing.⁹⁵ Even when attached to a ship, the accused may be able to contact the Regional Legal Services Office (“RLSO”) to seek advice.⁹⁶ In a nonjudicial punishment proceeding, the accused can speak at his own hearing and offer evidence on his behalf, both contesting the charge against him and mitigating any possible punishment.⁹⁷

At a nonjudicial punishment hearing in the Navy, the captain reads a statement again advising the sailor of the charges against him and his rights.⁹⁸ The captain reiterates that nonjudicial punishment does not result in a conviction, but also informs the sailor once again that the traditional rules of evidence do not apply.⁹⁹ The captain acknowledges that the sailor has signed a statement saying he was advised of his rights, and further confirms this by

⁹² MORRIS, *supra* note 10, at 153-54.

⁹³ *Id.* at 154; UCMJ art. 15(a).

⁹⁴ MORRIS, *supra* note 10, at 153-54.

⁹⁵ *Id.* at 154; UCMJ art. 15(a).

⁹⁶ E-mail from Katherine Gorski, author, to Capt. Eric C. Price, U.S. Navy, Judge Advocate General Corps (Jul. 25, 2013 & Jul. 29, 2013) (on file with author) [hereinafter Price E-mail]; Telephone Interview with Capt. Eric C. Price, U.S. Navy, Judge Advocate General Corps (Jul. 31, 2013) [hereinafter Price Interview].

⁹⁷ MORRIS, *supra* note 10, at 156-57.

⁹⁸ Gorski Interview, *supra* note 1.

⁹⁹ *Id.*

asking whether the sailor understands those rights or has any questions.¹⁰⁰

After the commander has imposed nonjudicial punishment, the service member has the right to appeal the decision to a superior authority if he finds the punishment unjust or disproportionate to the offense.¹⁰¹ These formalities and the ability to appeal the nonjudicial punishment provide a check on that procedure, further demonstrating a concern for maintaining due process.

B. *Restrictions on Punishments*

Article 15, as mentioned earlier, provides a finite list of punishments from which commanders can choose from when utilizing nonjudicial punishment.¹⁰² Many of these punishments are restricted by duration and cannot exceed a certain number of consecutive days.¹⁰³ For example, Restriction can be imposed for a maximum of sixty days, depending on the rank of the commander imposing punishment and the rate or rank of the accused.¹⁰⁴ The rank of the commanding officer administering punishment and the rank or rate of the accused place limitations on the type and severity of punishment that can be applied.¹⁰⁵

C. *Ability to Demand Court-Martial*

Article 15 places a restriction on nonjudicial punishment, giving the accused the right to demand trial by court-martial rather than consent to nonjudicial punishment as long as the accused is not attached to or embarked in a vessel.¹⁰⁶ In *United States v. McLemore*, the military court enforced this restriction when it stated, “the

¹⁰⁰ *Id.*

¹⁰¹ UCMJ art. 15(e).

¹⁰² *Id.* art. 15.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* art. 15(a).

accused must exercise or waive his right to trial by court-martial” prior to the imposition of nonjudicial punishment.¹⁰⁷

Some court cases have even discussed whether such a waiver is proper if the accused did not possess enough information to make an informed decision.¹⁰⁸ For example, the Federal Circuit in *Fairchild v. Lehman* held that a waiver must be “knowing, voluntary, and intelligent.”¹⁰⁹ In this case, the accused was misinformed that he could not receive an adverse administrative discharge, and chose to waive his right to a court-martial as a result.¹¹⁰ Consequently, the Federal Circuit ruled that the accused did not execute an intelligent waiver of his right to trial because counsel misinformed him as to the consequences of electing nonjudicial punishment.¹¹¹ In *U.S. v. Espinosa*, the Eastern District of Virginia held that the waivers of those accused were ineffective because counsel offered inadequate advice regarding the consequences of waiving the right to court-martial and accepting nonjudicial punishment in failing to apprise them of potential civilian prosecution due to a drunk driving offense.¹¹²

The only time a service member cannot demand a court-martial is when he is on a vessel.¹¹³ In *United States v. Penn*, where the accused argued that his inability to refuse nonjudicial punishment because of his assignment to a ship was discrimination, the military court held that denying the sailor the ability to demand court-martial while attached to a vessel does not also deny him equal protection.¹¹⁴ The basis for this decision rested on the fact that nonjudicial punishment is administrative, and therefore the relevant

¹⁰⁷ *U.S. v. McLemore*, 10 M.J. 238, 241 (C.M.A. 1981).

¹⁰⁸ *Fairchild v. Lehman*, 814 F.2d 1555, 1558, 1560 (Fed. Cir. 1987); *U.S. v. Espinosa*, 789 F. Supp. 2d 681, 686, 689-90 (E.D. Va. 2011).

¹⁰⁹ *Fairchild*, 814 F.2d at 1558.

¹¹⁰ *Id.* at 1559-60.

¹¹¹ *Id.* at 1558, 1560.

¹¹² See *Espinosa*, 789 F. Supp. 2d at 686, 690. If a service member waives court-martial, he could be subject to civilian prosecution. However, if a service member does not submit to nonjudicial punishment, he will go to court-martial, and will be subject the corresponding stigma and potential lengthy confinement.

¹¹³ UCMJ art. 15(a).

¹¹⁴ *Penn*, 4 M.J. at 882-83.

question was whether there existed “a rational basis for denying . . . service members the option to refuse nonjudicial punishment” when attached to or embarked in a vessel, rather than a question of federal constitutional provisions.¹¹⁵ The military court cited the unique responsibilities of the ship’s captain to discipline those aboard a ship as a justification for not allowing sailors attached to or embarked in a vessel to demand court-martial.¹¹⁶

Additionally, the military court listed the three unattractive alternatives to requiring a sailor to submit to nonjudicial punishment while attached to a vessel, “(1) [l]eaving the accused persons and all witnesses ashore when ships put out to sea; (2) regulating ships’ itineraries around courts-martial; or (3) permitting minor infractions to go unpunished.”¹¹⁷ The military court’s analysis presents the exact concerns present in the hypothetical in the introduction of this article. In the hypothetical, the sailor had crucial technical knowledge.¹¹⁸ Expecting the ship to leave the accused behind would be unreasonable, as it could jeopardize the safe and efficient operation of the ship. Even in the absence of specialized knowledge, his Chief Petty Officer was a witness to the sailor’s disregard of the Chief Petty Officer’s order,¹¹⁹ and it would also be unreasonable to expect the ship to leave behind one of its leaders when that person is needed to perform his duties on the ship.

The second option, “regulating ships’ itineraries around courts-martial,”¹²⁰ is not feasible, particularly when a ship’s mission is time sensitive. Finally, permitting minor infractions to go unpunished would only encourage such future infractions, creating a disciplinary problem aboard the ship. Due to the impracticality of these three alternatives, nonjudicial punishment is often the only method of discipline available to ships’ commanding officers.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 883.

¹¹⁷ *Id.*

¹¹⁸ See Gorski Interview, *supra* note 1.

¹¹⁹ *Id.*

¹²⁰ *Penn*, 4 M.J. at 883.

Even though the sailor aboard a ship may not demand a court-martial, he may still request one.¹²¹ While circumstances may not always permit a court-martial to be convened, commanders often try to accommodate such a request.¹²² Thus, while the court-martial exception for vessels might cause some concern regarding the service member's rights, the ability to still request court-martial and the other limitations on nonjudicial punishment, as well as this concept of "knowing, voluntary, and intelligent"¹²³ waivers minimize this issue.

D. Double Jeopardy Style Protections

The nonjudicial punishment system contains double jeopardy style protections.¹²⁴ Within the nonjudicial punishment system a service member may not receive nonjudicial punishment for the same offense more than once, nor may the punishment be increased, even on appeal.¹²⁵

The *Manual for Courts-Martial* also bars trial by court-martial for minor offenses for which service members have already received nonjudicial punishment.¹²⁶ This protection does not extend to non-minor offenses, as the *Manual for Courts-Martial* states that nonjudicial punishment is not a bar to trial by court-martial for a non-minor offense and the United States Court of Military Appeals has further established that a service member can be tried by court-martial for a serious offense,¹²⁷ even if he has already received nonjudicial punishment.¹²⁸ This is very rare, but might occur when it is later discovered that the offense is more serious than initially thought, or a pattern of conduct is discovered.¹²⁹ However, in the

¹²¹ See Gorski Interview, *supra* note 1.

¹²² *See id.*

¹²³ *Fairchild*, 814 F.2d at 1558.

¹²⁴ MCM, *supra* note 39, pt. V.

¹²⁵ *Id.* ¶ 1f(1).

¹²⁶ *Id.* ¶ 1e.

¹²⁷ *Id.* ¶ 1e ("[N]onjudicial punishment for an offense other than a minor offense . . . is not a bar to trial by court-martial for the same offense.").

¹²⁸ *Id.* ¶ 1e; *U.S. v. Pierce*, 27 M.J. 367, 368-69 (C.M.A. 1989).

¹²⁹ Price E-mail, *supra* note 96; Price Interview, *supra* note 96. For instance, if a service member were to download pornography using a government computer, it

event that a non-minor offense does go to court-martial, the accused may disclose the prior nonjudicial punishment to be used exclusively in sentencing.¹³⁰ That nonjudicial punishment is then taken into account, and would likely result in a reduced sentence.¹³¹ However, it is solely up to the accused “whether the prior punishment will be revealed to the court-martial for consideration on sentencing.”¹³² These procedural limitations lessen the severity of nonjudicial punishment and negate the need for proof beyond a reasonable doubt.

IV. UNIQUE CIRCUMSTANCES ABOARD A SHIP MAKE A LOWER BURDEN MORE PRACTICAL FOR THE NAVY

Circumstances in the Army, as a primarily land-based service, and other branches of the military allow for the higher standard of proof beyond a reasonable doubt, so imposing the lower standard across all the branches may or may not be appropriate.¹³³ However, the unique circumstances aboard a ship make the lower standard of proof by a preponderance of the evidence more of a practical necessity for the Navy, thereby making the higher burden inappropriate.

would likely go to nonjudicial punishment. But, if it were later discovered that the downloaded pornography included child pornography, an offense which usually goes to court-martial, that service member could face court-martial for the same conduct. Another instance where a soldier who has faced nonjudicial punishment would likely face court-martial later would be if a male service member entered a female’s barracks room by accident while intoxicated, but, later, it is discovered that he has done this before and is also suspected of sexually assaulting her. In the case of a drug use offense, it is more likely that it would be discovered that the service member is also selling or distributing drugs, for which he would be court-martialed based on the separate conduct, not the drug use that was the subject of nonjudicial punishment.

¹³⁰ *Pierce*, 27 M.J. at 369 (stating that nonjudicial punishment “may not be used for any purpose at trial.”).

¹³¹ *Id.* at 369-70; *U.S. v. Hamilton*, 36 M.J. 723, 731 (A.C.M.R. 1992).

¹³² *Pierce*, 27 M.J. at 369-70; *Hamilton*, 36 M.J. at 731.

¹³³ This is beyond the scope of this Comment.

A. *Limited Availability of Evidence*

Just as the presence of an attorney is not guaranteed when aboard a ship, the availability of evidence and witnesses is also limited.¹³⁴ Due to the mobile nature of the ship, there is very limited time to gather evidence against the accused, particularly when the ship's mission is time sensitive.¹³⁵ On the other hand, with stationary bases used by other branches of the military, where the offenses have likely taken place on base or within its vicinity, witnesses are more readily available and there is more time to gather evidence.

This limited availability of witnesses and evidence makes it difficult for Navy commanding officers to attain the requisite proof to demonstrate guilt beyond a reasonable doubt. In the example in the introduction, the sailor argued that the civilian witness would have sided with him and claimed there was no assault and battery.¹³⁶ However, it is equally likely that the civilian would have corroborated the Shore Patrol's report stating there was an assault and battery. While the Shore Patrol's report and the other evidence against the sailor was sufficient under a preponderance of the evidence standard, it most likely would not have met the proof beyond a reasonable doubt standard without the civilian's testimony, particularly because the sailor contested what the civilian would say.

Leaving the sailor and crew member witnesses ashore for a hearing while the ship left port would have been a huge burden on the ship and her crew. Requiring the civilian and Shore Patrol witnesses to board the ship for a hearing would have been even more onerous and exceedingly impractical for all parties involved. For these reasons, the lower standard of proof is clearly more practical for such situations.

¹³⁴ Gorski Interview, *supra* note 1.

¹³⁵ *Id.*

¹³⁶ *Id.*

B. Legal Contacts Aboard a Ship

On a military base on land, it is easier to consult with an attorney face-to-face.¹³⁷ Ships, however, present an understandably different story. Carriers will often have an attorney assigned to them, but the same is often not true of smaller ships.¹³⁸ Those aboard a ship would have access by phone or e-mail to an attorney higher up the chain of command, or an attorney with the RLSO, but most ships will not have an attorney physically on board.¹³⁹ Instead, they might have a legal officer, a collateral duty given to a sailor with more legal training than the average officer, but still not an attorney.¹⁴⁰

In criminal trials, the burden of proof may be interpreted by the jury to determine guilt, but the court almost always provides guidance about what that burden means.¹⁴¹ Even with the possibility of that guidance, however, the burdens of proof are difficult to define. There remains debate even among those with formal legal training over what the burdens of proof actually mean.¹⁴² In comparison to the legally-trained, the average jury member will likely have as much, if not more difficulty defining these burdens.¹⁴³ On a ship, the captain is in a similar position, but does not have even the limited guidance offered by the judge to a jury in deciding whether or not the evidence of the sailor's offense meets the particular burden of proof in use.¹⁴⁴ He could, potentially, go up the chain of command or contact the RLSO to speak with an attorney with more

¹³⁷ *Id.*

¹³⁸ Price E-mail, *supra* note 96; Price Interview, *supra* note 96.

¹³⁹ Price E-mail, *supra* note 96; Price Interview, *supra* note 96.

¹⁴⁰ Price E-mail, *supra* note 96; Price Interview, *supra* note 96.

¹⁴¹ *Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (explaining that the Constitution neither requires nor prohibits an explanation by the court regarding the meaning of beyond a reasonable doubt and that if an instruction is given, it must "correctly convey the concept of reasonable doubt to the jury.").

¹⁴² See generally Hisham M. Ramadan, *The Challenge of Explaining "Reasonable Doubt,"* 40 CRIM. L. BULL. 1 (Winter 2004).

¹⁴³ *Id.* at n.4 (noting that different states have provided different definitions of reasonable doubt, comparing California to Virginia and Massachusetts, and explaining survey results indicating a wide array of opinions regarding the percentages necessary for deciding beyond a reasonable doubt).

¹⁴⁴ See Gorski Interview, *supra* note 1.

experience,¹⁴⁵ but that would require either a phone call or an e-mail exchange, lengthening the process of nonjudicial punishment.¹⁴⁶ He could also rely on the legal officer aboard his ship, but again, this individual would not have the same legal training as an attorney or a judge. There are manuals the captain could access that would aid in defining the burden,¹⁴⁷ but a piece of paper might not always be sufficient when dealing with the intricacies of different burdens of proof.

Proof by a preponderance of the evidence “requires the trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence. . . .’”¹⁴⁸ This standard indicates that the majority of the evidence should point to the fact that the sailor committed the offense, which is fairly easy for the layman, untrained in the law, to understand. Proof beyond a reasonable doubt is less clear, raising the questions: what constitutes reasonable doubt and by whose standard? Adding the intermediate clear and convincing standard would cause even more confusion.

Although all commanding officers will receive some training at the Naval Justice School with respect to their rights and responsibilities under the UCMJ and the specialized legal issues a commanding officer is likely to encounter,¹⁴⁹ such brief and broad coverage does not come close to the formal legal training an attorney receives by attending law school for three or four years followed by attendance at the Naval Justice School. When those practicing in the legal field debate over the different burdens of proof, it seems misguided to expect someone with a few weeks of introduction to the law generally to understand something so complicated with such

¹⁴⁵ Price E-mail, *supra* note 96; Price Interview, *supra* note 96.

¹⁴⁶ As I will explain later, quick justice is needed for maintaining order and discipline aboard a ship.

¹⁴⁷ Price E-mail, *supra* note 96; Price Interview, *supra* note 96. Examples of such manuals are the *Manual for Courts-Martial*, the *Military Judge’s Benchbook*, and the *JAG Manual*.

¹⁴⁸ *In re Winship*, 397 U.S. 358, 371 (1970) (citing F. JAMES, CIVIL PROCEDURE 250-51 (1965)).

¹⁴⁹ Price E-mail, *supra* note 96; Price Interview, *supra* note 96. Certain specialized duties, including prospective commanding officers, may require some specialized legal training, usually in the form of a two- or three-week course.

limited guidance. Because there might not always be an attorney aboard a ship to guide the Captain regarding the meaning of those terms, and contacting an attorney would require a phone call or e-mail exchange, proof by a preponderance of the evidence is more practical.

C. *Isolated Community of Sailors*

It has long been recognized that the ship's captain has a unique responsibility "as the master of a frequently isolated community of sailors. . . ." ¹⁵⁰ Because of this unique responsibility, legislation has typically acknowledged "the peculiar vulnerability of this independent society to disorderly practices; and hence the essentiality of affording the captain the authority to swiftly and surely 'discountenance and suppress all dissolute, immoral, and disorderly practices,' and to expeditiously correct those who are guilty of the same." ¹⁵¹ It is for reasons such as this that the vessel exception applies, preventing sailors from refusing nonjudicial punishment when aboard or attached to a vessel.

The same considerations can apply to the burden of proof. Requiring captains to find proof beyond a reasonable doubt would hinder the ability to maintain discipline aboard a ship with this isolated community. Not only might it be difficult for the captain to determine what, exactly, beyond a reasonable doubt entails, but the difficulties of gathering evidence when aboard or attached to a ship would severely hinder the captain's ability to maintain discipline. Many infractions would likely go unpunished, which would only serve to encourage such behavior in the future, because sailors would know they could get away with certain types of misconduct.

V. CONCLUSION

As the *Manual for Courts-Martial* states, "[c]ommanders are responsible for good order and discipline in their commands." ¹⁵² Nonjudicial punishment allows commanders to maintain order and

¹⁵⁰ *Penn*, 4 M.J. at 882.

¹⁵¹ *Id.*

¹⁵² MCM, *supra* note 39, pt. V, ¶ 1d(1).

discipline by punishing minor offenses swiftly without the long, more complicated process of a court-martial, and without burdening the accused with the stigma of a court-martial conviction.

The nature of nonjudicial punishment negates the necessity of the proof beyond a reasonable doubt standard because nonjudicial punishment is used for minor offenses, the punishments imposed are not severe, the commander has the discretion to mitigate punishment, and the imposition of nonjudicial punishment does not result in a criminal conviction. Although nonjudicial punishment is an informal, administrative disciplinary proceeding, there are required procedures governing the hearing process, restrictions placed on available punishments, a requirement that the accused be able to demand court-martial unless attached to or embarked on a vessel, and protections against receiving nonjudicial punishment more than once for the same offense.

Not only is a higher burden of proof unnecessary, but, as compared to other branches of the military, Navy commanders deal with a unique set of circumstances aboard a ship that make a lower burden of proof by a preponderance of the evidence more practical. First, because a ship does not remain in port for an extended period of time while on deployment, the ability to accommodate witnesses or find additional evidence is limited. Second, because there may not be an attorney aboard the ship, the captain is left with limited options from which to seek guidance regarding the higher standard of proof. Due to the nature of nonjudicial punishment, the procedural safeguards, and the difficulties unique to justice at sea, the preponderance of the evidence standard is sufficient and far more practical for the Navy.

