

Army Commander's Role—The Judge, Jury, & Prosecutor for the Article 15

*Anthony Godwin**

CONTENTS

INTRODUCTION	889
I. THE COMMANDERS' ROLE IN NON-JUDICIAL PUNISHMENTS.....	890
<i>A. DUI Example</i>	890
<i>B. Military Commanders' Role</i>	891
<i>C. Types of Punishments</i>	893
<i>D. Constitutionality of Article 15 Punishments</i>	895
II. PROBLEMS WITH NON-JUDICIAL PUNISHMENTS	896
<i>A. Criminal-like Punishments</i>	896
<i>B. Commander's Impartiality</i>	898
III. PROBLEMS WITH INVESTIGATIONS	900
<i>A. Informal Inquiries and AR 15-6 Investigations</i>	901
<i>B. The Unsustainable Time Constraints on Investigating Officers</i> ...	902
<i>C. The Lack of Required Legal Review of Investigative Findings</i>	902
<i>D. Are Investigating Officers Qualified?</i>	903
IV. PROPOSED SOLUTION.....	906
<i>A. Alternate Means to Convene Non-Judicial Punishments</i>	906
<i>B. Alternate Means to Conduct Investigations</i>	907
<i>C. Eliminate the Thirty-Day Correctional Custody</i>	907
CONCLUSION	908

INTRODUCTION

Service members in the armed forces are bound by a different set of rules when compared to other U.S. citizens. Some of the normal

* J.D. Candidate, Seattle University School of Law. Opinions and conclusions in this law review article are solely those of the author. They do not necessarily reflect the views of the Judge Advocate General, the Department of the Army, or any other government agency.

safeguards and protections that civilians enjoy are much more restrictive for military service members, and this is generally for a good reason. Such restrictions are partly due to the complex demands and needs of the United States military. Congress and the President have entrusted military commanders with special powers that enable them to handle minor violations of law without needing to go through a full judicial proceeding.¹ Non-judicial punishments (NJP), also known as Article 15s, are among the many powers military commanders can utilize to swiftly handle minor violations of the Uniform Code of Military Justice (UCMJ).² This Note will explore the military commander's role in executing such authority and the various ways in which these proceedings can inadvertently undercut soldiers' rights. The first part of the Note will cover the commander's role and authority and outline the various types of punishments a commander can implement within an Article 15 proceeding. The subsequent sections will explain the administrative nature of an Article 15 proceeding and how the punishments seem to overreach as if commanders were addressing criminal-like conduct rather than administrative. The next section will analyze whether commanders are able to truly exercise impartiality throughout the non-judicial process. The last section will provide possible alternative courses of action to remedy the common problems associated with the administration of non-judicial punishments.

I. THE COMMANDERS' ROLE IN NON-JUDICIAL PUNISHMENTS

A. DUI Example

The following case is a common example of how commanders exert their non-judicial authority against their soldiers. In the recent case, *United States v. Trogden*, a service member was arrested and cited on a military installation for driving under the influence of alcohol (DUI).³ After the military police informed the service member's command team, the commander subsequently initiated Article 15 proceedings after receiving the findings from a military police report.⁴ The commander used the information provided in the report as a basis for recommending non-judicial punishment and informed the service member that Article 15 proceedings had been initiated.⁵ The commander recommended the punishment to reduce the service member by one rank, forfeiture of one-half of his monthly pay for two months, restriction to post for forty-five

1. See ARMY REGULATION 27-10, MILITARY JUSTICE 20-6 (2020).

2. See *id.*

3. See *United States v. Trogden*, 476 F. Supp. 2d 564, 565–66 (E.D. Va. 2007).

4. See *id.* at 565.

5. See *id.*

days, and extra duty for forty-five days.⁶ The commander found him guilty of the alleged offense and implemented the aforementioned punishments.⁷ The Federal Government subsequently filed charges against the service member for “knowingly and unlawfully operat[ing] a motor vehicle while under the influence of alcohol.”⁸ He entered a guilty plea a month later and was subject to yet another financial penalty.⁹ Surprisingly, it was the magistrate judge who believed he was being punished twice for the same offense; however, the Court noted the defendant’s due process rights under the Double Jeopardy Clause were not violated because a non-judicial punishment is administrative in nature according to *Trodden*.¹⁰

While the double penalty, on its face, looks like it would be a violation of the double jeopardy clause, the distinguishing feature is that the Article 15 is considered non-judicial, thereby avoiding the reach of the constitutional double jeopardy clause. The risk of a double penalty is an unfair burden service members can face when compared to penalties a civilian might incur from a DUI, especially when taking into consideration the other substantial burdens members in the military face: lengthy deployments, immense sacrifices to personal freedom, countless missed birthdays and anniversaries, and an already small paycheck. While it might not seem fair, the DUI case is one example of the harsh reality service members may undergo. The subsequent section will touch upon the specific rules and regulations regarding military commanders and their authorities.

B. Military Commanders’ Role

The term “Commander” refers to a commissioned officer who exercises primary command authority over a military organization by virtue of that officer’s grade and assignment.¹¹ Given the nature of the military and complexities of war, Congress has vested a substantial amount of responsibility and authority in military commanders.¹² Among these powers and responsibilities is the inherent decision-making authority Congress has given to military commanders. Commanders are the

6. *See id.*

7. *See id.*

8. *See id.*; *see also* 18 U.S.C §§ 7, 13 (2001).

9. 476 F. Supp. 2d at 565.

10. *Id.* at 566, 571.

11. ARMY REGULATION 27-10, MILITARY JUSTICE 3-7(a)(1) (2020).

12. *See generally* RICHARD M. SWAIN & ALBERT C. PIERCE, THE ARMED FORCES OFFICER (2017); ARMY REGULATION 600-20, ARMY COMMAND POLICY (2006). Chapter two outlines a comprehensive policy guide to understanding the various responsibilities of commanding officers, while chapter four outlines the responsibility of commanders to maintain discipline within their units. *See* ARMY REGULATION 600-20, *supra*, at ch. 2.

company's decision makers, and often make legal decisions for their soldiers.¹³ For example, commanding officers in the military, for disciplinary purposes, have the inherent authority to convene a court martial or conduct other non-judicial disciplinary measures.¹⁴ Military commanders are able to exercise their discretion "in deciding whether an offense should be charged and how the offenders should be punished," which is a process unlike the state or federal judicial process where a prosecutor would normally bring charges upon an alleged offender.¹⁵ A common tool at the commander's disposal is the use of an Article 15, or "non-judicial punishment," to address matters dealing with minor violations of the UCMJ without the need to intervene in a court-martial.¹⁶ Congress did not intend for non-judicial punishment for certain types of offenses committed by military members to be criminal in nature;¹⁷ however, Article 15s are routinely applied to minor instances of criminal conduct.¹⁸ Because they are not limited to only criminal matters, military commanders possess a broad scope of prosecutorial power in adjudicating non-judicial punishments. Specifically, commanders can investigate and prosecute both criminal and noncriminal activity.¹⁹

There are several options available to the commander to resolve a disciplinary problem. The commander can choose to take no action, initiate an administrative action against the soldier, exercise a non-judicial punishment action, or initiate a court-martial.²⁰ Additionally, in situations involving trivial or performance-based concerns—for example, an issue regarding a subordinate's substandard performance—the commander may conduct an event-oriented counseling in order to address specific instances of substandard performance and develop a plan for improvement.²¹ The commander may exercise their discretion to administer non-judicial punishments for minor offenses of UCMJ only if the accused has not demanded a trial by court-martial.²² Non-judicial punishments allow the

13. ANGELA HALVORSON, UNDERSTANDING THE MILITARY: THE INSTITUTION, THE CULTURE, AND THE PEOPLE 8 (2010), https://www.samhsa.gov/sites/default/files/military_white_paper_final.pdf [https://perma.cc/3CRW-P36R].

14. 10 U.S.C. § 822 (Art. 22).

15. FED. R. CRIM. P. 3; *Military Justice Overview*, DEP'T DEF. VICTIM & WITNESS ASSISTANCE COUNCIL, <https://vwac.defense.gov/military.aspx> [https://perma.cc/LP95-JD9L].

16. 10 U.S.C. § 815 (Art. 15).

17. *See United States v. Trogden*, 476 F. Supp. 2d 564, 568 (E.D. Va. 2007).

18. *See, e.g., id.* at 565.

19. *See AR 15-6 Investigations*, MYJAG (2021), <http://myjag.com/otw/ar-15-6-investigations> [https://perma.cc/GRB9-4X5F].

20. *See id.*

21. *See* DEP'T ARMY HEADQUARTERS, ATP 6-22.1, THE COUNSELING PROCESS 1-2 (2014), https://www.cpl.army.mil/atp-6-22x1/web/_main.pdf [https://perma.cc/N9Y2-JVSE] [hereinafter ATP 6-22.1].

22. 10 U.S.C. § 815(a) (Art. 15).

commander to impose punishments limited to a fixed set of restrictions and are generally used to quickly and efficiently dispose of disciplinary issues without the need to go through a long and drawn-out trial by court-martial.²³ It is also important to note only commanders or officers in charge are authorized to impose non-judicial punishments, whereas other administrative actions, such as event-oriented counseling, may be conducted by any leader as defined under section 2-1 of ATP 6-22.1.²⁴

C. Types of Punishments

As discussed above, the two most common forms of legal action routinely adjudicated against military offenders who have violated offenses under UCMJ are court-martial proceedings and non-judicial punishments.²⁵ A court-martial is a legal proceeding that looks very similar to a civilian court trial and often involves more serious criminal allegations.²⁶ Non-judicial punishments, on the other hand, are administrative in nature and serve the purpose to enhance discipline in Army units by increasing the authority of commanding officers to impose non-judicial punishments without the need to resort to a trial by courts-martial.²⁷ The key distinguishing feature between the two methods of punishment is that there is no right to due process of law in non-judicial punishments, while the right exists in court-martial proceedings.²⁸

The Armed Forces have historically adopted forms of non-judicial punishments since the Revolutionary War.²⁹ Congress passed the Articles of War (the Articles), which gave the Army authority to punish its members without a judicial process in 1775.³⁰ Congress later amended the Articles in 1916 to permit Army commanders to “restrict the liberty of

23. See *UCMJ Article 15—Almost Everything You Need to Know*, FED. PRAC. GRP. (Feb. 4, 2012), <https://fedpractice.com/2012/02/04/ucmj-article-15-almost-everything-need-know/> [<https://perma.cc/MPG6-B9Y9>].

24. See *id.*; ATP 6-22.1, *supra* note 21, at 2-1.

25. Jim Absher, *What Is a Military Court Martial?*, MILITARY.COM (Jul. 30, 2021) <https://www.military.com/benefits/military-legal-matters/courts-martial-explained.html> [<https://perma.cc/BKB5-SS8B>].

26. See *id.*

27. *Non-Judicial Punishment/Article 15*, JAG DEF., <https://jagdefense.com/practice-areas/non-judicial-punishment/article-15/> [<https://perma.cc/NSQ2-U5UW>]; *United States v. Miller*, 17 M.J. 817, 819 (A.C.M.R. 1984).

28. George F. Indest III, *Military Non-Judicial Punishments or Article 15 Proceedings Are Not Criminal Convictions—Military and Former Military Physicians, Dentists and Nurses Should Know This*, HEALTH L. FIRM (Mar. 4, 2021), <https://www.thehealthlawfirm.com/blog/posts/military-non-judicial-punishments-or-article-15-proceedings-are-not-criminal-convictions-military-and-former-military-physicians-dentists-and-nurses-should-know-this.html> [<https://perma.cc/2268-UBNM>].

29. See William R. Salisbury, *Nonjudicial Punishment Under Article 15 of the Uniform Code of Military Justice: Congressional Precept and Military Practice*, 19 SAN DIEGO L. REV. 839, 839 (1982).

30. See *id.* at 840.

enlisted members for short duration, give them extra duty, withhold privileges, and issue reprimands.”³¹ Later amendments served to expand commanders’ authority further, and in 1962, Congress significantly expanded the authority while simultaneously increasing procedural safeguards for the accused.³²

Today, there are three types of non-judicial punishments within Article 15 of the UCMJ: Summarized Article 15, Company Grade Article 15, and Field Grade Article 15.³³ The soldier’s maximum punishment can include up to fourteen days of extra duty, restriction, or both, admonition or oral reprimand in a Summarized Article 15.³⁴ For a Company Grade Article 15, the maximum punishment allows a reduction of one grade E-4 and below, forfeiture of seven days’ pay, fourteen days’ extra duty and/or restriction, admonition, or oral reprimand.³⁵ A Field Grade Article 15 allows a maximum punishment of reduction in one or more grades for E-4 and below, and one grade for E-5 and E-6, forfeiture of half a month’s pay for two months, extra duty and restriction for forty-five days, or if restriction is given by itself, the restriction can be up to sixty days.³⁶ Additionally, under Article 15, the maximum punishment that can be imposed by an officer in the grade of major, lieutenant commander, or above is correctional custody for not more than thirty consecutive days.³⁷

Commanders have the discretion to choose between the three types of non-judicial punishments available, and the punishments should correspond to the severity of the offense.³⁸ Additionally, Field Grade Article 15s are allowed to be administered only by higher ranking officers, usually at the Field Grade level, to ensure the “maximum authority will be exercised only by officers of maturity and experience.”³⁹ The Manual for Courts-Martial provides that non-judicial proceedings are means to deal with “minor offense[s]” despite the option to escalate a punishment up to a Field Grade Article 15.⁴⁰ The classification of “minor offenses” depends on several factors: the nature and circumstances surrounding the offense;

31. *See id.*

32. *See id.*; U.S. v. Miller, 17 M.J. 817, 819 (A.C.M.R. 1984).

33. Gina M. Onesto-Person, *Nonjudicial Punishment*, ARMY UNIV. PRESS: NCO J. (Jan. 17, 2018), <https://www.armyupress.army.mil/Journals/NCO-Journal/Archives/2018/January/NJP/> [https://perma.cc/UGK4-LGX9].

34. *See id.*

35. *See id.*

36. *See id.*

37. 10 U.S.C. § 815(b)(2)(H)(ii).

38. *Military Justice Overview*, *supra* note 15.

39. *See* Salisbury, *supra* note 29, at 841 (internal citation omitted).

40. *See* MANUAL FOR COURTS-MARTIAL UNITED STATES V-1 (2019), [https://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20\(Final\)%20\(20190108\).pdf?ver=2019-01-11-115724-610](https://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20(Final)%20(20190108).pdf?ver=2019-01-11-115724-610) [https://perma.cc/7E7U-AJDE].

“the offender’s age, rank, duty assignment, record[,] and experience”; and the maximum sentenced allowed for the offense if it were tried by a general court-martial.⁴¹

D. Constitutionality of Article 15 Punishments

Courts have continuously ruled that Article 15 punishments are constitutional and not a violation of the Fifth Amendment’s Double Jeopardy Clause if an offender is later charged and held liable for the same offense under either a trial by court-martial proceeding or other criminal proceeding.⁴² A subsequent trial by court-martial may be allowed for the same misconduct that was the basis for imposing non-judicial punishment.⁴³ A subsequent trial by court-martial process is not a violation of due process absent any bad faith on the government’s part.⁴⁴ Courts generally view non-judicial punishments as administrative in nature and, thus, are reluctant to view non-judicial punishments as anything beyond a mere administrative action.

In *United States v. Trogden*, the court notes Congress did not intend for non-judicial punishments to be “criminal” in nature; instead, they are to be understood as “disciplinary” in nature.⁴⁵ The court held the text of Article 15 and the Manual for Courts-Martial under Part V both describe non-judicial punishments “as a ‘disciplinary measure’ more serious than lesser administrative measures ‘but less serious than trial by court-martial.’”⁴⁶ Due to their “noncriminal nature, NJP proceedings do not follow rules of evidence, guarantee certain rights to the accused, or require a finding of guilt beyond a reasonable doubt.”⁴⁷

In *Middendorf v. Henry*, the court held similarly with respect to a thirty-day correctional custody issue in a summary courts martial.⁴⁸ Specifically, the Sixth Amendment issue was the plaintiff’s request for his right to the assistance of counsel in a summary court martial proceeding.⁴⁹ The court “held that the sixth amendment’s right to counsel did not apply to a summary court-martial because that proceeding is not a ‘criminal prosecution’ under the sixth amendment.”⁵⁰ Moreover, the Sixth

41. *See id.*

42. *United States v. Stoltz*, 720 F.3d 1127, 1128 (9th Cir. 2013).

43. *See id.*

44. *United States v. Dire*, 46 M.J. 804, 807 (C.G. Ct. Crim. App. 1997), *aff’d*, 52 M.J. 418 (C.A.A.F. 1999).

45. *United States v. Trogden*, 476 F. Supp. 2d 564, 568 (E.D. Va. 2007).

46. *Id.* (internal citation omitted).

47. *Id.*

48. *See Middendorf v. Henry*, 425 U.S. 25, 34 (1976).

49. *Cappella v. United States*, 624 F.2d 976, 980 (Ct. Cl. 1980) (describing the holding in *Middendorf*).

50. *Id.* (quoting *Middendorf*, 425 U.S. at 34).

Amendment's right to counsel does not apply to Article 15 proceedings because the proceeding is not a "criminal prosecution" according to the court's reasoning in *Cappella v. United States*.⁵¹ As will be discussed below in Section II.A, however, Article 15 proceedings *are* like criminal prosecutions because the severity of the punishment can often exceed the notion of what it means to be administrative.

II. PROBLEMS WITH NON-JUDICIAL PUNISHMENTS

A. Criminal-like Punishments

It seems surprising that a soldier who faces an administrative action for a minor offense could be subject to correctional custody of up to thirty consecutive days and not be afforded the same constitutional due process rights as a civilian defendant who faces even one day of jail time.⁵² Even taking the thirty consecutive days of correctional custody punishment off the table, the restrictions with imposed limits punishment could conceivably imitate confinement if the soldier is restricted to "on-post" or "on ship" and not allowed to leave the installation or vessel.⁵³ Moreover, factor in the potential to lose up to half a month's paycheck, loss of additional pay due to reduction in rank, loss of freedom to leave the installation, and the forced performance of additional labor, the punishments seem to be disproportionately burdensome for the soldier when compared to the "minor" nature of the offense.⁵⁴ However, as noted in Justice Powell and Justice Blackmun's concurrence in *Middendorf*, "[c]ourt[s] ha[ve] long recognized that the military is, by necessity, a specialized society separate from civilian society."⁵⁵ Thus, given the nature of the military and a long history of court decisions, service members seem to lose some of their inherent due process rights in order for commanders to effectuate discipline in the military.

At what point, however, does a punishment's severity surpass the boundaries of what it means to be "administrative?" More specifically, when does the punishment become so punitive it transforms the civil remedy into a criminal penalty? A recent Ninth Circuit case, *United States v. Reveles*, addresses the question to determine if the non-judicial punishment should be considered a criminal penalty, which would implicate the Double Jeopardy Clause of the Fifth Amendment.⁵⁶ Reveles,

51. *Id.*

52. *See* 10 U.S.C. § 815(b) (Art. 15).

53. *Id.* § 815 (Art. 15).

54. *See id.*

55. *Middendorf v. Henry*, 425 U.S. 25, 49 (1946) (Powell, J., Blackmun, J., concurring) (internal citation omitted).

56. *See United States v. Reveles*, 660 F.3d 1138, 1142 (9th Cir. 2011).

a service member in the Navy, was charged by the Navy under an Article 15 proceeding for drunk driving on Kitsap Naval Base in Bremerton, Washington.⁵⁷ In the Article 15 proceeding, Reveles was sentenced to forfeiture of \$200 of one month's pay, rank reduction, extra duty for forty-five days, and restriction to ship for forty-five days.⁵⁸ Additionally, based on the same conduct, Reveles was later charged in federal court for drunk driving, where he pled guilty and was sentenced to twenty-four hours in detention and a \$375 fine.⁵⁹ The Fifth Amendment's Double Jeopardy Clause states no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."⁶⁰ To address the double jeopardy question, the court analyzed whether the non-judicial punishment statute is so punitive it transforms the civil remedy into a criminal penalty.⁶¹ The court considered the following seven factors that the court established in *Hudson v. United States*:

- (1) [I]nvolves an affirmative disability or restraint; (2) has historically been regarded as punishment; (3) requires a finding of scienter; (4) will promote retribution and deterrence; (5) applies to behavior that is already a crime; (6) can have an alternative purpose; and (7) appears excessive in relation to the alternative purpose."⁶²

After the court analyzed each factor, it held, in the aggregate, the weight of the factors favored a finding against considering non-judicial punishments to be a criminal proceeding in nature.⁶³ The court reasoned that non-judicial punishments are not excessive when weighed against the military's need to maintain strict order and discipline.⁶⁴ Deference should be accorded to the armed forces and its mission.

With respect to the maximum of thirty days of correctional custody punishment, the first two factors seem to be consistent with the notion of confinement and its historical regard as a punishment. For the third factor, the court mentioned while a finding of scienter is often required for certain minor offenses, it is not required for all minor offenses punishable under Article 15.⁶⁵ The court analyzed the fourth factor and determined it was neutral; it held while non-judicial punishment may act as a deterrent, that factor alone is not enough to render a non-judicial punishment as criminal

57. *Id.* at 1139.

58. *Id.*

59. *Id.* at 1140.

60. U.S. CONST. amend. V.

61. *Reveles*, 660 F.3d at 1142–43.

62. *Id.* (internal citation omitted).

63. *See id.* at 1143–45.

64. *Id.* at 1145.

65. *Id.* at 1143–44.

in nature.⁶⁶ For the fifth factor, the court determined it to be neutral because while non-judicial punishments can apply to behavior already criminal or civil, it is also imposed for many other acts or omissions considered non-civilian crimes.⁶⁷ For example, conduct such as disrespecting a senior officer, conduct unbecoming of an officer, or other military offenses without corresponding civilian crimes, are all instances where the offenses are not considered behavior already a crime.⁶⁸ The court held the sixth factor favored a finding that it is not criminal in nature because the Manual for Courts-Martial (MCM) notes, “[n]onjudicial punishment provides commanders with an essential and prompt means of maintaining good order and discipline.”⁶⁹ As a result, there is a clear alternative purpose for non-judicial punishments other than deterrence and retribution. For the seventh and final factor, the court balanced the severity of a non-judicial punishment, compared it with its purpose of maintaining military discipline, and ultimately held non-judicial punishments are not excessive when weighed against the military’s need to maintain strict order and discipline.⁷⁰

The last factor seems to be the crux the court uses to tip the scales in favor of a finding that non-judicial punishments are not criminal in nature.⁷¹ The court seems to overlook the severity of the thirty-day correctional custody punishment, however, and it arbitrarily indicates the severity is justified when weighed against the military’s need to maintain strict order and discipline. The court does not consider where the line should be drawn as to what is or is not excessive when compared to this overarching theme. Had the court considered drawing the line at circumstances where it is necessary to maintain extreme levels of discipline, the court would have at least provided clearer guidance with respect to when a commander could implement the thirty-days correctional custody punishment.

B. Commander’s Impartiality

“Commanders must impose [non-judicial punishments] in an absolutely fair and judicious manner” according to both the Manual for Courts-Martial and AR 27-10.⁷² The requirement implies commanders act

66. *Id.* at 1144.

67. *Id.*

68. *Id.*

69. *Id.* at 1145 (quoting MANUAL FOR COURTS-MARTIAL UNITED STATES, *supra* note 40, at V-1(c)).

70. *See Reveles*, 660 F.3d at 1145.

71. *See id.*

72. ARMY REGULATION 27-10, MILITARY JUSTICE 3-13 (2020); MANUAL FOR COURTS-MARTIAL UNITED STATES, *supra* note 40, at V-1.

like judges in their decision-making process and must ensure fairness when adjudicating non-judicial punishments. The concern with non-judicial punishments, however, is the military commander's ability to remain impartial throughout the Article 15 process. Given the commander has an obligation to maintain good order and discipline in their unit, their judgment is unlike that of a neutral decision-maker, such as a judge or mediator; instead, a commander's judgment is likely motivated by a variety of external factors, which often include other matters apart from the need to maintain good order and discipline.⁷³

It would seem incomprehensible in a criminal, civil, or courts-martial matter, for the judge to bring the charges against a defendant, preside over the case, and rule on the matter. Such a practice would clearly implicate conflicts of interest and impartiality concerns. If a judge were to recommend charges, the judge would likely want to confirm their suspicions and allegations with a finding of guilt through confirmation bias.⁷⁴ Likewise, according to Rule 605 of the Federal Rules of Evidence, a judge who presides over a case cannot also testify as a witness because the roles of testifying and presiding are incompatible.⁷⁵ A judge cannot rule impartially on the weight and admissibility of their own testimony.⁷⁶

In the military's non-judicial process, however, the commander can act as a witness and possesses the sole authority to recommend the charges, determine the facts, and ultimately act as the judge to determine if the service member is guilty of the alleged offense.⁷⁷ As such, it is clear the commander acts in both a prosecutorial and judicial capacity for the service members in their unit. But given this broad authority and discretion, there is ample room for a variety of external factors that may influence or impede the commander's ability to be fair and judicious.⁷⁸

73. *See generally* U.S. GEN. ACCT. OFF., REPORT TO THE SECRETARY OF DEFENSE: BETTER ADMINISTRATION OF THE MILITARY'S ARTICLE 15 PUNISHMENTS FOR MINOR OFFENSES IS NEEDED (1980), <https://www.gao.gov/assets/fpcd-80-19.pdf> [<https://perma.cc/UZ3P-6JU4>] (discussing that commanders need more guidance on implementing Article 15s). For example:

GAO found that wide disparities exist within and among the services with respect to how offenses are dealt with. Without sufficient guidance, the commander's past experiences, personality, moral values, prejudices, and state of mind are the dominant factors in (1) deciding whether an offense was committed and (2) the punishment to be imposed.

Id. at ii.

74. *See Confirmation Bias (Psychology)*, BRITANNICA, <https://www.britannica.com/science/confirmation-bias> [<https://perma.cc/E9LL-FFKP>].

75. DEBORAH JONES MERRITT & RIC SIMMONS, *LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM* 169 (4th ed. 2018).

76. *See id.*

77. *See discussion supra* Section I.B (discussing how a commander can impose non-judicial punishments).

78. *See supra* text accompanying note 54.

Unlawful command influence, governed under Art. 37, 10 U.S.C. § 837, is strictly prohibited but historically has been shown to inadvertently surface in situations where problems in leadership and communication arise.⁷⁹ In situations where the commander may have good intentions, for example, their message may nevertheless result in command influence problems if the subordinate commander misinterprets or misunderstands the senior commander's message.⁸⁰ Moreover, the entire non-judicial process occurs simultaneously while their senior commander evaluates them on their unit's disciplinary status.⁸¹ Additional factors include the countless taskings, missions, and the notion the commander is also evaluated internally by subordinate service members with respect to the command climate and discipline within the unit.⁸² With the reality of various external factors influencing the commander's decision-making process, the commander's ability to truly exercise impartiality in a non-judicial proceeding is not equivalent to that afforded to an experienced judge. While the service member has the option to reject a non-judicial punishment and demand a trial by courts-martial to receive the benefit of having their case heard by a judge, the service member will seldom make this decision due to the increased risk of harsher courts-martial punishments.⁸³

III. PROBLEMS WITH INVESTIGATIONS

While commanders have the discretion to decide whether they want to pursue a non-judicial punishment or court-martial, commanders also have the authority to investigate matters under their command in order to ascertain the facts needed to make a well-informed decision.⁸⁴ This is a very important step for commanders, as it is essential to develop an understanding of the necessary facts surrounding a given situation in order for the commander to properly decide if the offender committed the offense. This section highlights the three types of investigative procedures under Army Regulation 15-6 and further argues that the time constraints

79. See Larry A. Gaydos & Michael Warren, *What Commanders Need to Know About Unlawful Command Control*, 1986 ARMY LAW. 9, 11; *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986).

80. See *id.*

81. See, e.g., Randy James, *Commander's Unit Assessment: Is Your Unit Achieving the Standard?*, U.S. ARMY (Jul. 10, 2020), https://www.army.mil/article/237192/commanders_unit_assessment_is_your_unit_achieving_the_standard [<https://perma.cc/GPX6-G2AS>]; U.S. ARMY, MILITARY EVALUATION (OER & NCOER) RATER AND SENIOR RATER PROFILE MANAGEMENT 13 (<https://www.hrc.army.mil/asset/19010>) [<https://perma.cc/S6PN-8W33>]

82. See, e.g., James, *supra* note 81.

83. See *The Unconstitutional Burden of Article 15*, 82 YALE L.J. 1481, 1481–82 (1973) (discussing the prospect of additional punishments, which usually means that the service member's right to request trial by courts-martial will go unexercised).

84. *AR 15-6 Investigations*, *supra* note 19.

on investigating authorities, the lack of legal review of investigation findings, and the lack of formal training on how to conduct investigations in accordance with soldier's rights are significant issues in the current Army Regulation 15-6 investigation process.

A. Informal Inquiries and AR 15-6 Investigations

While a formal investigation under AR 15-6, or an informal commander's inquiry, can help the commander make an informed decision, there is no formal requirement that a commander conduct an investigation prior to taking adverse administrative action.⁸⁵ Consequently, this leads to a potential problem where commanders may take administrative action against a soldier without knowing all the facts. Because the commander is the one recommending the charges, determining the facts, and deciding whether the soldier is guilty or innocent, it brings into question whether the commander's decision is sufficiently justified without at least having a general sense of the facts.

In instances where investigations are conducted for minor offenses, the immediate commander of the soldier will usually conduct either a preliminary inquiry or an administrative investigation.⁸⁶ There are three types of investigative procedures under Army Regulation 15-6 (AR 15-6): preliminary inquiries, administrative investigations, and boards of officers.⁸⁷ A preliminary inquiry is a procedure used to interview witnesses and can sometimes help determine whether an investigation or a board of officers may be necessary.⁸⁸ It is either conducted by the appointing authority personally or by an inquiry officer (IO) appointed by the appointing authority.⁸⁹ An administrative investigation, on the other hand, is a more formal approach. Commanders will generally weigh a variety of factors to determine if an administrative investigation needs to be conducted.⁹⁰ For both preliminary inquiries and administrative investigations, the commander will usually appoint an investigating officer (also IO), either orally or in writing, to conduct the investigation.⁹¹ The function of the investigating officer is to ensure that they document and preserve evidence found in order to report the findings to the

85. ARMY REGULATION 15-6, PROCEDURES FOR ADMINISTRATIVE INVESTIGATIONS AND BOARDS OF OFFICERS 1-12 (2016).

86. *Military Justice Overview*, *supra* note 15.

87. ARMY REGULATION 15-6, PROCEDURES FOR ADMINISTRATIVE INVESTIGATIONS AND BOARDS OF OFFICERS 1-6 (2016).

88. *See id.*

89. *See id.*

90. *See id.*

91. *Id.* at 2-3.

approving authority or commander.⁹² Once the IO receives their appointment orders, they will begin their investigation and in most circumstances, interview witnesses to gather facts.⁹³

B. The Unsustainable Time Constraints on Investigating Officers

The investigating officer's time is very limited: "the investigating officer has a couple of weeks to find the facts and submit a report to the commander, complete with findings and recommendations as to disposition of the alleged misconduct."⁹⁴ This short time frame to compile a comprehensive report, conduct interviews, and finish an investigation while simultaneously conducting all the other necessary duties as an Army leader seems unsustainable. Army company leaders average approximately 12.5-hour workdays and less than one-third of that time is spent on their unit training and readiness.⁹⁵ An Army officer acting in the role of an investigator likely plays a substantial role in that two-thirds of time spent not conducting unit training or readiness. Roughly 13% of company level leader time is spent on AR 600-20 Army command policy, and 10% of their time is focused on higher command tasks.⁹⁶ Consequently, due to the time constraints and average workload, concerns arise as to whether IOs are able to dedicate the time necessary to conduct a diligent investigation and ascertain the complete facts necessary for the commander to make an informed decision.

C. The Lack of Required Legal Review of Investigative Findings

Once an IO completes their investigation, the final report will usually include a chronology of events conducted by the appointed investigating officer, as well as all the facts, exhibits, findings, and recommendations proscribed by the IO.⁹⁷ While there is typically a legal review of the IO's findings and recommendations at the conclusion of the investigation, AR

92. See *id.* at 1-8.

93. Christopher Bricker, *Requirements: Congratulations, You Have Been Selected as a 15-6 Investigating Officer*, SENTINEL (Dec. 22, 2015), http://www.forthoodssentinel.com/news/requirements-congratulations-you-have-been-selected-as-a-15-6-investigating-officer/article_bfbb6f41-26b8-58d2-b7a5-a3abf78348f9.html [https://perma.cc/WW25-UCSZ].

94. See *Criminal Investigations—Pulling Back the Curtain (Pt. 1)*, DIXON & LASSETER, <https://dixontriallawyer.com/criminal-investigations-military-justice-system/> [https://perma.cc/3P3L-9MAL] [hereinafter *Pulling Back the Curtain*].

95. See Todd South, *Army Company Leader Workload Is Unsustainable. Here Are Some Ways to Fix It*, ARMYTIMES (Dec. 22, 2019), <https://www.armytimes.com/news/your-army/2019/12/22/army-company-leader-workload-is-unsustainable-here-are-some-ways-to-fix-it/> [https://perma.cc/5E8D-L6LK].

96. See *id.*

97. AR 15-6 INVESTIGATING OFFICER'S GUIDE 10, https://usacac.army.mil/sites/default/files/documents/sja/15_6Investigation.pdf [https://perma.cc/W8FT-SGMV].

15-6 does not require that all informal investigations receive legal review unless the case involves serious or complex matters.⁹⁸ Consequently, for most minor offenses, there is no requirement that the IO's findings and recommendations in a 15-6 investigation receive legal review.⁹⁹ The lack of a legal review requirement for 15-6 investigations seems to be consistent with the principle that there is no right to due process of law in a non-judicial proceeding because both are viewed as administrative actions.¹⁰⁰ However, because both are merely administrative procedures, it seems that there are very little checks to ensure that offenders' rights are being adhered to without at least a mandatory legal review of the investigators findings and recommendations.

There is a significant need for a mandatory legal review process. Without such legal review, commanders' findings of liability against soldiers predicated on the IO's investigation may inadvertently violate their other constitutional rights such as the Fifth Amendment's right to remain silent. IOs are required to read a soldier their right to remain silent with a DA Form 3881 prior to questioning, notifying the soldier that they also have rights to speak with a lawyer before, during, and after questioning and to be present with a lawyer during questioning.¹⁰¹ If an IO is unaware of this procedure, they may inadvertently violate the explicit right afforded to soldiers under the Fifth Amendment right to remain silent. A good practice is to always ensure the IO consults with their unit staff judge advocate for legal review and legal brief. An even better practice would be to make it mandatory.

D. Are Investigating Officers Qualified?

The curriculum to becoming an officer in the military does not include any formal training on how to properly conduct investigations, nor do any of the avenues to becoming an officer offer a curriculum or mandate education on the legal rights soldiers have in investigations.¹⁰² As a result of this lack of training through their institutional basic officer training curriculum, without the proper guidance on the Article 31 rights from a judicial expert, it is likely that officers appointed as IOs may incidentally violate a soldier's Article 31 rights without knowing it. Absent a consultation with a legal expert, the officer in charge of an investigation

98. *See id.*

99. *See id.*

100. *See supra* text accompanying note 17.

101. *See DA Form, Record Details for DA FORM 3881*, ARMY PUBL'G DIRECTORATE (Nov. 1, 1989), https://armypubs.army.mil/ProductMaps/PubForm/Details.aspx?PUB_ID=2386 [<https://perma.cc/DER7-TDFT>].

102. *See Education and Training*, TODAY'S MIL., <https://www.todaysmilitary.com/education-training> [<https://perma.cc/X5YM-DVNQ>].

is not going to have the legal knowledge as it pertains to constitutional rights or an understanding of when those rights have been violated.

Furthermore, when a commander does appoint an IO to ascertain the facts, the IO charged for investigating a soldier for minor offenses is often a junior officer with limited experience.¹⁰³ Often, a unit commander will appoint “a subordinate (usually an O-1) to do so.”¹⁰⁴ The IO may receive their appointment orders either orally or in writing to conduct the investigation; however, the IO must be, “in the opinion of the appointing authority . . . best qualified for the duty by reason of their education, training, experience, length of service, demonstrated sound judgment and temperament.”¹⁰⁵ The language in Army Regulation 15-6 specifically emphasizes that the commander must use their “opinion” to choose who they believe to be the most qualified to serve as an IO.¹⁰⁶ Given that the commander has the discretion to decide who to appoint as an IO, it is not uncommon for commanders to appoint junior commissioned officers, such as lieutenants, to be investigating officers.¹⁰⁷

An obvious concern with the appointment of a junior officer is whether the candidate possesses the legal training and experience required to sufficiently investigate matters without violating the rights of service members. The minimum four year education of a bachelor’s degree combined with a few months of their functional branch basic officers course is likely the only military experience a junior officer possesses, neither of which require any basic training on military investigations or basic human legal rights.¹⁰⁸ Furthermore, without the formal requirement to seek judicial guidance in a commander’s preliminary inquiry, a junior officer likely lacks the experiential depth to thoroughly investigate the matter and likely will not have the legal knowledge to adhere to the rules of evidence and rights of individuals throughout the investigative process.¹⁰⁹ As a result, a minimal requirement should be to have a designated legal advisor during the investigation phase in a commander’s preliminary inquiry.

103. See *Criminal Investigations*, *supra* note 94. The webpage mentions that commanders usually appoint a subordinate officer (usually an O-1) to do so. An O-1 is a 1st Lieutenant Officer with approximately one and half years of officer experience.

104. *Id.*

105. ARMY REGULATION 15-6, PROCEDURES FOR ADMINISTRATIVE INVESTIGATIONS AND BOARDS OF OFFICERS 2-3 (2016).

106. *Id.*

107. See *Criminal Investigations*, *supra* note 94.

108. See *How to Become an Army Officer*, MILITARY.COM, <https://www.military.com/join-armed-forces/join-army-officer.html> [<https://perma.cc/UB78-3PG2>].

109. See, e.g., ARMY REGULATION 15-6, PROCEDURES FOR ADMINISTRATIVE INVESTIGATIONS AND BOARDS OF OFFICERS 2-6 (2016).

Importantly, Section 2-1(f) of AR 15-6 provides that that appointing authority shall not appoint an IO where there will be a conflict of interest, bias, or a perceived bias against a potential subject of the investigation.¹¹⁰ However, this section potentially conflicts with the language “in the opinion of the appointing authority” in AR 15-6 because this leaves the door open for a commander to choose an IO from the same unit, by virtue of the commander’s knowledge of their own officers. As a result, this creates concerns about the potential lack of impartiality an IO may have if they investigate a soldier from the same unit or organization of which they are a member. A common criticism of AR 15-6 investigations is that because the investigations are often conducted internally, there is ample room for a lack of impartiality.¹¹¹ A high profile example of this revolved around the Army’s investigation into the friendly fire death of CPL Patrick Tillman, where the 2007 DoD Inspector General report determined multiple levels of command errors in assigning administrative investigative jurisdiction.¹¹² The report concluded that “the first two of three AR 15-6 investigations were ‘tainted by the failure to preserve evidence, a lack of thoroughness, the failure to pursue logical investigative leads, and conclusions that were open to challenge based on the evidence provided.’”¹¹³

Additionally, the suggestion that the senior commander in charge of appointing an IO may choose the best qualified candidate from outside the organization seems like a difficult judgment to make if the appointing authority knows very little about the outside IO candidate. Moreover, if appointing authorities choose from officers outside the unit in the hope to retain impartiality of the IO, the appointing authority may encounter issues finding a candidate that they know can exercise “demonstrated sound judgment and temperament” due to their lack of interaction with the potential IO candidate.¹¹⁴ The availability of a candidate may also be a challenge due to the already busy workload of most military leaders.¹¹⁵ This challenge likely places an undue burden on commanders to find qualified candidates they know with certainty to be impartial investigators.

110. *Id.* at 2-1(f).

111. See Sara M. Tracy-Ruazol, *Administrative Investigations in an Era of Increased Government Scrutiny: An Analysis of Army Regulation 15-6 and Its Perceived Lack of Independence*, 225 MIL. L. REV. 909, 913–15 (2017).

112. See *id.* at 913–14.

113. *Id.* (quoting DoD IG Tillman Report).

114. ARMY REGULATION 15-6, PROCEDURES FOR ADMINISTRATIVE INVESTIGATIONS AND BOARDS OF OFFICERS 2-3 (2016).

115. See South, *supra* note 95.

IV. PROPOSED SOLUTION

A. Alternate Means to Convene Non-Judicial Punishments

Experts have considered new ways to convene disciplinary proceedings in the military. A recent report titled the “shadow report” encompassed a study which reported the findings on a potentially new “alternative military justice system.”¹¹⁶ The report was reserved in its scope to analyze senior commanders (very high-ranking officers) and their ability to decide whether alleged UCMJ violations that constitute “felonies” shall be referred to a courts-martial.¹¹⁷ “The ‘alternative’ model that the Defense Department must address, per Section 540F is simply whether that decision-making authority should lie solely with an independent senior judge advocate outside the chain of command.”¹¹⁸ Although that report focused on senior military commanders referring to courts-martial, the experts could recommend the same proposal for all commanders and whether the execution of a non-judicial punishment should be reserved to an independent judicial officer. Under this approach, the commander would still be the one recommending the soldier to the non-judicial process and choosing the proscribed punishment; however, the independent judge advocate would be the one to determine liability.

By having an independent judge advocate determine liability, you could conceivably eliminate any impartiality concerns because the independent judge advocate would not be intertwined with the internal dealings of the unit. Moreover, the independent judge advocate would likely be much more familiar than the commander with the rules of evidence and servicemembers’ rights, which would likely increase the likelihood of a fair non-judicial punishment proceeding and outcome. This proposed system would break away from the current regimen of commanders serving as witnesses who also preside as the decision-maker in non-judicial proceedings. The independent judge advocate, however, would preside over cases without the ability to testify as a witness because the roles of testifying and presiding are incompatible.¹¹⁹

Since non-judicial punishments occur at a significantly higher frequency than serious felony offenses, there would be a significant demand for resourcing the high number of independent judge advocates.¹²⁰

116. Dan Maurer, *The ‘Shadow Report’ on Commanders’ Prosecutorial Powers Raises More Questions Than Answers*, LAWFARE: MIL. JUST. (May 11, 2020) <https://www.lawfareblog.com/shadow-report-commanders-prosecutorial-powers-raises-more-questions-answers> [https://perma.cc/XA3X-MXG9].

117. *Id.*

118. *Id.*

119. MERRITT & SIMMONS, *supra* note 75, at 169.

120. *See* U.S. GEN. ACCT. OFF., *supra* note 73, at 1.

As such, the military would likely have to allocate additional judicial resources to facilitate the high frequency of non-judicial punishments. The resources, however, could be acquired by expanding the military's judicial branch and allowing more trained independent judge advocates to fill those positions. By having an independent judge advocate review non-judicial proceedings, the military would achieve its goal of executing non-judicial punishments expeditiously and arguably increase its productivity because this would allow commanders to focus on their many other core important duties. Moreover, independent judicial officers are still military members, and their objective viewpoints will further support the overarching theme of maintaining good order and discipline.¹²¹

B. Alternate Means to Conduct Investigations

Similar to the analysis for the alternative means for administering a non-judicial punishment, it would be preferable to have a neutral third party investigate all matters leading to a non-judicial punishment action. By having an independent third party investigate matters in a unit, the military could conceivably eliminate impartiality and unlawful command influence concerns when conducting investigations. My proposed approach would be to have the Criminal Investigations Division (CID), which is already tasked with conducting felony level investigations, conduct the investigation for the commander in non-judicial punishment proceedings. The result would likely yield better and more accurate results in the investigations because independent investigators will presumably have a greater understanding of how to properly conduct an investigation given their ties to the judge advocate branch of the military during their investigations for courts martial proceedings. Additionally, having an independent investigator would free up available time for commissioned and warrant officers because it allows them to continue to focus on their other daily requirements without being bogged down by assignments to serve as investigating officers. The independent CID investigator would have the same time requirement to complete the investigation, but as a result of the investigation being their sole responsibility, CID can complete investigations in a much faster and more efficient manner.

C. Eliminate the Thirty-Day Correctional Custody

To maintain the goal of keeping minor violations consistent with administrative actions, the thirty-day correctional custody option must be taken off the list of punishments for soldiers in the grades of E-3 and below. The thirty-day correctional custody option for service members in

121. MANUAL FOR COURTS-MARTIAL UNITED STATES, *supra* note 40, at V-1(c).

the grades of E-3 and below is the most “criminal-like” punishment in comparison to the other punishments available. Even in *Reveles*, the court held that with respect to the maximum of thirty days of correctional custody punishment, the first two factors of the *Hudson* test seem to be consistent with the notion of confinement and its historical regard as a criminal punishment.¹²² There are still ample administrative-like options to choose from when deciding the appropriate non-judicial punishment for soldiers who have committed minor violations. Instead of correctional custody, the “restriction limits” punishment can be used for similar corrective action purposes and do not go as far as locking the soldier up in a jail cell for committing a minor violation.

CONCLUSION

While Congress has given military commanders the power and authority to administer punishments and investigate soldiers, problems can arise from this unilateral power. Because commanders are the finders of fact when deciding whether to hold a soldier culpable in a non-judicial proceeding, commanders have an interest in confirming their suspicions and are therefore more susceptible to partiality when making decisions of culpability. This confirmation bias also bleeds into commander investigations because commanders also have the unilateral authority to either conduct the investigation themselves or appoint an officer, often within the same unit as the accused, that they so choose. As a proposed solution, commanders should be limited in their power to administer non-judicial punishments and should instead have the authority to refer cases to an independent judge advocate to conduct the non-judicial punishment proceedings. The independent judge advocate, who is much more likely to remain neutral, can review the facts and make the findings gathered by an independent investigating agency, like CID, to decide if the soldier should be held liable. The dual proposal of having an independent investigator investigate matters and an independent decision maker determining liability, will likely lead to more equitable outcomes for soldiers and alleviate unnecessary burdens associated with having officers act as investigators and judges in non-judicial proceedings.

122. 660 F.3d 1138, 1143 (9th Cir. 2011).