

# The Burden of Proof in Nonjudicial Punishment: Why Beyond a Reasonable Doubt Makes Sense

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## Roadmap

The *Manual for Courts-Martial* (MCM) fails to specify the required burden of proof for a commanding officer to determine guilt when administering nonjudicial punishment. As a result of the MCM's silence, the military services have been able to apply different burdens of proof when administering nonjudicial punishment. The lack of a uniform burden of proof throughout the military creates a perception of arbitrary justice, is contrary to the intent of the Uniform Code of Military Justice (UCMJ), and presents difficult issues for joint operation commanders.

The adoption of a uniform burden of proof would eliminate these problems. A comparison of possible burdens of proof demonstrates that beyond a reasonable doubt offers the greatest individual protections to accused servicemembers while maintaining the efficiency required by the nonjudicial punishment system. Therefore, the services should universally implement beyond a reasonable doubt as the burden of proof when administering nonjudicial punishment.

To support this contention, the article is divided into five sections. Section I briefly introduces the nonjudicial punishment system and discusses the problem of services using different burdens of proof. Section II defines burden of proof and describes the possible burdens of proof available to military commanders. This discussion analyzes when a burden of proof is typically implemented and what situations require a finding of guilt beyond a reasonable doubt. Section III describes the severity, scope, and long-term consequences of the possible punishments available to commanding officers in Article 15 proceedings and explains why beyond a reasonable doubt is the most equitable burden of proof in nonjudicial punishment proceedings. Section IV compares civilian administrative hearings and Article 15 proceedings. This comparison illustrates that nonjudicial punishment lacks many of the procedural protections found in civilian administrative adjudications. Adopting beyond a reasonable doubt as the universal standard when adjudicating nonjudicial punishment is necessary in order to counterbalance the loss of these procedural protections. Section V concludes that all military commanders should apply the burden of proof of beyond a reasonable doubt when adjudicating nonjudicial punishment.

## I. Introduction

Article 15 of the UCMJ enables U.S. military commanders to address minor offenses<sup>1</sup> that do not warrant a trial by court-martial, but present discipline or authority problems within their units.<sup>2</sup> Article 15 proceedings are unlike courts-martial and are a nonjudicial form of punishment.<sup>3</sup> Commander's discretion, though not absolute, is extremely broad.<sup>4</sup> Commanders determine when to pursue nonjudicial punishment and also what punishment to impose if he finds the individual guilty of the alleged infraction.<sup>5</sup> Before making a determination of guilt, the commanding officer must be

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<sup>1</sup> What constitutes a "minor offense" is a much debated topic. The UCMJ does not define "minor offense" and simply states that "[A]ny commanding officer may . . . impose one of the following disciplinary punishments for minor offenses without the intervention of a court-martial." UCMJ art. 15(b) (2005). The MCM states:

Whether an offense is minor depends on several factors: 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. Ordinarily, a minor offense is an offense which the maximum sentence imposable would not include a dishonorable discharge or confinement for longer than 1 year if tried by general court-martial. The decision whether an offense is "minor" is a matter of discretion for the commander imposing nonjudicial punishment.

MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. V, ¶ 1e (2005) [hereinafter MCM]. The Supreme Court has stated that "those infractions falling below the threshold of criminal activity in the civilian world" may be dealt with by nonjudicial punishment in the military. *Parker v. Levy*, 417 U.S. 733, 750 (1974). For a discussion concerning the parameters and definition of "minor offense" see FREDRIC I. LEDERER, *MILITARY LAW: CASES AND MATERIALS* § 8-22.00 (1999).

<sup>2</sup> UCMJ art. 15(b).

<sup>3</sup> Nonjudicial punishment is known by different names among the separate branches of the military. The Navy and Marine Corps refer to nonjudicial punishment as "Captain's Mast" or "Office Hours." The Army refers to nonjudicial punishment as an "Article 15" and the Air Force calls it "NJP." The Coast Guard refers to nonjudicial punishment as "NJP," "Captain's Mast," or "Article 15" punishment.

<sup>4</sup> The primary limit on a commanding officer's discretion is the right of the accused military personnel to refuse nonjudicial punishment and demand trial by court-martial. UCMJ art. 15(a). The one exception to this rule is for personnel "attached to or embarked in a vessel." *Id.* In addition, personnel given punishment they feel is unjust may appeal to the commanding officer's next superior in the chain of command. MCM, *supra* note 1, pt. V, ¶ 7a.

<sup>5</sup> MCM, *supra* note 1, pt. V, ¶ 1d(2).

convinced by the facts and circumstances surrounding the infractions that nonjudicial punishment is appropriate.<sup>6</sup> The *MCM*, however, fails to specify the required burden of proof for determining guilt in nonjudicial punishment proceedings. As a result, the services currently use different burdens of proof for ascertaining guilt in nonjudicial punishment proceedings.<sup>7</sup>

The use of different burdens of proof throughout the military is contrary to the intent of the drafters of the UCMJ and specifically Article 15. Prior to the creation of the UCMJ, the military services dealt with misconduct individually. Criticism of these separate military justice systems caused the Secretary of Defense in 1948 to “appoint[] a special committee to draft a Uniform Code of Military Justice, uniform in substance and uniform in interpretation and construction, to be equally applicable to all of the armed forces.”<sup>8</sup> Article 15 of the UCMJ “combine[d] the present practices of mast punishment in the Navy and Coast Guard and the disciplinary punishment imposed by commanding officers in the Army and Air Force.”<sup>9</sup> The intent behind the enactment of Article 15 was to eliminate the differences in the separate forms of nonjudicial punishment. The continued use of different burdens of proof among the individual branches of the military violates the drafters’ intent for conformity in all service branches.<sup>10</sup>

The lack of a uniform burden of proof also raises credibility questions about the equity of the nonjudicial punishment system. Commanders are entrusted with the power to act as both prosecutor and judge in nonjudicial matters.<sup>11</sup> Commanders must determine if a servicemember’s actions should result in nonjudicial punishment. A commander’s determination will differ based on the burden of proof adopted by the commander’s specific service. Because of the different burdens of proof, outcomes and punishments may vary for the same misconduct by virtue of the offender’s branch of service.

The problems that arise by the separate services adopting different burdens of proof are most clearly demonstrated in joint operations. Joint operations place nonjudicial punishment authority over military personnel from different services under a single commander.<sup>12</sup> The joint operation commander has authority to impose nonjudicial punishment on any servicemember, but must apply the parent service’s procedures.<sup>13</sup> Thus, if the joint operation commander administers nonjudicial punishment to military personnel from different services who commit the same act of misconduct, he determines guilt or innocence based upon different burdens of proof.<sup>14</sup> This disparity creates a likelihood of servicemembers under the same command who commit the same misconduct receiving different punishments. The possible variance in outcomes creates credibility issues for the joint operations commander, promulgates a perception of partiality, and raises legitimate concerns for military personnel serving in a joint operation.

Based upon the intent behind the drafting of Article 15 and the credibility problems created by the separate services’ use of different burdens of proof, there is a need for a uniform burden of proof throughout the military. Only a uniform burden of proof would eliminate the perception of arbitrary justice and create certainty in the nonjudicial punishment system. With the

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<sup>6</sup> *Id.*

<sup>7</sup> Commanders in the U.S. Army must find guilt beyond a reasonable doubt. U.S. DEP’T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE para. 3-16(d)(4) (27 Apr. 2005) [hereinafter AR 27-10]. Navy, Marine, and Coast Guard commanders must find guilt by no less than a preponderance of the evidence. U.S. DEP’T OF NAVY, NAVY JAG MANUAL para. 0110(b) (1990) [hereinafter NAVY JAG MANUAL]; U.S. COAST GUARD, COMMANDANT INSTR. M5810.1, MILITARY JUSTICE MANUAL para. 1.D.1.f (17 Aug. 2000) [hereinafter MJM]. In the Air Force, no specific standard of proof applies to NJP proceedings; however, because beyond a reasonable doubt is used in courts-martial, which an accused may elect, commanders are urged to consider this standard before initiating NJP proceedings. U.S. DEP’T OF AIR FORCE, INSTR. 51-202, NONJUDICIAL PUNISHMENT para. 3.4 (3 Nov. 2003)[hereinafter AFI 51-202].

<sup>8</sup> ESTES KEFAUVER, ESTABLISHING A UNIFORM CODE OF MILITARY JUSTICE, S. REP. NO. 81-486, at 4 (1949), *reprinted in* INDEX AND LEGISLATIVE HISTORY OF THE UNIFORM CODE OF MILITARY JUSTICE, 1950, at 4 (1985).

<sup>9</sup> *Id.* at 5.

<sup>10</sup> For a discussion concerning whether the unique discipline scenarios faced by the separate military branches justifies different burdens of proof in nonjudicial punishment, *see infra* text accompanying notes 91-96.

<sup>11</sup> *Coppella v. United States*, 624 F.2d 976 (Ct. Cl. 1980) (supporting the use of commander’s discretion to determine when a particular offense was punishable by Article 15).

<sup>12</sup> A joint operation, or joint force, is “composed of significant elements, assigned or attached, of two or more Military Departments operating under a single commander authorized to exercise operational control over the force to accomplish an assigned mission.” AFI 51-202, *supra* note 7, para. 2.4.

<sup>13</sup> In the Army, a “commander is not prohibited from imposing nonjudicial punishment on a military member of his command solely because the member is a member of another armed service.” AR 27-10, *supra* note 7, para. 3-8c. But punishment may only be imposed on the servicemember, “under the circumstances, and according to the procedures, prescribed by the member’s parent service.” *Id.* The Air Force recognizes the possible need for joint operation commanders to use nonjudicial punishment, but requires the commander to follow the procedures detailed in their instruction. AFI 51-202, *supra* note 7, para. 2.4.2.

<sup>14</sup> *Id.* The commander conducting the nonjudicial punishment must use the parent service’s procedures and presumably the parent service’s burden of proof. *See generally id.*

need for a uniform burden of proof evident, what burden of proof should be adopted as the standard for all military commanding officers when administering nonjudicial punishment?

To answer this question, burden of proof must be defined, and more specifically, the burdens of proof available to commanding officers in Article 15 proceedings must be described. The appropriate burden of proof to apply in Article 15 proceedings depends on the servicemember's threatened individual interest. As the individual interest in the outcome of the proceeding increases, the need for a greater burden of proof to protect those interests also increases.<sup>15</sup> The proper burden of proof to apply in Article 15 proceedings is further dependent on the procedural safeguards implemented in Article 15 proceedings.<sup>16</sup> A comparison between civilian administrative hearings and Article 15 proceedings<sup>17</sup> demonstrates that a demanding burden of proof is needed to compensate for the loss of traditional administrative procedural protections.<sup>18</sup> The combination of the servicemember's threatened personal interests and the limited procedural protections offered in Article 15 proceedings indicate that of the available burdens of proof, the most equitable burden is a finding of guilt beyond a reasonable doubt.

## II. Possible Burdens of Proof

A burden of proof "represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."<sup>19</sup> The burden of proof influences the relative frequency of erroneous outcomes; thus the application of a particular burden of proof to a case is an indicator of the level of protection society places on a particular individual interest.<sup>20</sup> The greater the individual's threatened interests, the greater the confidence the deciding authority needs to have in his decision—the greater the burden of proof.<sup>21</sup>

There are three burdens of proof generally recognized as available to a deciding authority when determining guilt: preponderance of the evidence, clear and convincing evidence, and beyond a reasonable doubt. An analysis of these three burdens of proof illustrates that the implementation of the proper standard is dependent on the magnitude of possible deprivations of individual liberties and the interest society has in protecting against these deprivations.<sup>22</sup> If an individual has minimal interest in the outcome of the proceeding, the authority making the decision should use a less demanding burden of proof. Conversely, if the individual's interest in the outcome is high, a more demanding burden of proof is required.

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<sup>15</sup> See *infra* text accompanying notes 21-22.

<sup>16</sup> Another method to protect against erroneous outcomes is by increasing the procedural safeguards in administrative hearings. See *infra* text accompanying notes 68-77.

<sup>17</sup> For a comparison between civilian administrative hearings and Article 15 proceedings see *infra* Section IV.

<sup>18</sup> There has been some debate whether nonjudicial punishment is an "administrative" action in the same context as civilian administrative adjudications. The Supreme Court has stated that "[a]rticle 15 punishment, conducted personally by the accused's commanding officer, is an administrative method of dealing with the most minor offenses." *Middendorf v. Henry*, 425 U.S. 25, 31-2 (1976). The Court went on to state that there are four methods of dealing with offenses committed by members of the military: general, special, and summary courts-martial, and "disciplinary punishment administered by the commanding officer pursuant to Article 15, UCMJ, 10 U.S.C. section 815." *Id.* at 31. General and special courts-martial resemble civilian judicial proceedings, summary courts-martial fall between the courtroom-type procedure of general and special courts-martial and the informality of nonjudicial punishment. Thus, nonjudicial punishment was considered informal adjudication similar to civilian administrative adjudications. See *id.*; see also *Parker v. Levy*, 417 U.S. 733, 750-51 (1974).

In short, the UCMJ regulates a far broader range of the conduct of military personnel than a typical state criminal code regulates of the conduct of civilians; but at the same time the enforcement of the UCMJ in the area of minor offenses is often by sanctions that are more akin to administrative or civil sanctions than to civilian criminal sanctions.

<sup>19</sup> *In re Winship*, 397 U.S. 358, 370 (1970). The burden chosen will "communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusions." *Id.*

<sup>20</sup> *Id.* Burdens of proof are usually associated with the form of the proceeding, for example beyond a reasonable doubt with criminal proceedings and a preponderance of the evidence with a civil proceeding. It is important to note that the form of the proceeding is irrelevant; it is the individual interest threatened that determines when the proper burden of proof is implemented. The individual interest at risk in a proceeding is recognizable by the possible punishments available to the deciding authority and the procedural safeguards that are emplaced in the proceeding.

<sup>21</sup> *Ortiz v. Principi*, 274 F.3d 1361 (Fed. Cir. 2001).

<sup>22</sup> In situations involving individual rights "[the] standard of proof [at a minimum] reflects the value society places on individual liberty." *Tippett v. Maryland*, 436 F.2d 1153, 1166 (4th Cir. 1971).

### *Preponderance of the Evidence*

The “burden of proving something 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 before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact’s existence.”<sup>23</sup> Preponderance of the evidence is the least demanding burden of proof and is typically used in civil cases involving monetary disputes between private parties.<sup>24</sup> A lower burden of proof is required when the accused’s interest is money, which may be important to the individual, but does not involve an individual liberty interest and has minimal societal implications. Thus, when no substantial individual rights are at risk, the societal implications of these proceedings are minimal.<sup>25</sup> Once a more recognizably important individual interest or right is threatened, however, the plaintiff’s burden of proof is increased.<sup>26</sup>

### *Clear and Convincing Evidence*

Clear and convincing evidence is considered the intermediate standard of proof and is typically used in situations in which the accused’s interests are greater than the loss of money. An example would be a civil case involving allegations of fraud in which an individual may not only lose money, but also sustain damage to his reputation.<sup>27</sup> Clear and convincing evidence requires the government to “prove [its] case to a higher probability than is required by the preponderance-of-the-evidence standard,”<sup>28</sup> which means that “the thing to be proved is highly probable or reasonably certain”<sup>29</sup> to the extent that guilt is clear, convincing, and unequivocal.<sup>30</sup>

### *Beyond a Reasonable Doubt*

When confinement or imprisonment is possible as the result of a criminal trial, the accused is protected “against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”<sup>31</sup> The state cannot impose its most severe form of punishment, notably confinement, if reasonable doubt remains as to the guilt of the accused.<sup>32</sup> The accused maintains the presumption of innocence until his guilt is established beyond a reasonable doubt; if this burden is not met, he must be declared not guilty.<sup>33</sup> Due to the U.S. judicial system’s emphasis on the protection of individual rights, this most demanding burden of proof is required when an accused could possibly be deprived of personal liberty.

An Article 15 proceeding threatens an accused servicemember’s specific individual interests. The appropriate burden of proof to apply should be dependent upon the servicemember’s threatened interests. The forms of punishment that may be imposed and the long-term consequences that attach upon a finding of guilt determine a servicemember’s individual interests in an Article 15 proceeding. Thus, a description of the forms of punishment and a discussion of the long-term consequences is required to determine the appropriate burden of proof in an Article 15 proceeding.

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<sup>23</sup> *Principi*, 274 F.3d at 1361 (quoting *Winship*, 397 U.S. at 371-72). When a decision is based upon a preponderance of the evidence, both parties “share the risk of error in roughly equal fashion,” with the complaining party carrying the burden of persuasion. *Addington v. Texas*, 441 U.S. 418, 423 (1979). If the evidence is inconclusive, the complaining party loses.

<sup>24</sup> See *Addington*, 441 U.S. at 423.

<sup>25</sup> *Principi*, 274 F.3d at 1361 (quoting *Winship*, 397 U.S. at 371-72).

<sup>26</sup> *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389-90 (1983).

<sup>27</sup> *Addington*, 441 U.S. at 424. Clear and convincing evidence is used when an individual is accused of “quasi-criminal wrongdoing.” *Id.*

<sup>28</sup> *California ex rel. Cooper v. Mitchell Bros. Santa Ana Theater*, 454 U.S. 90, 93 n.6 (1981).

<sup>29</sup> BLACK’S LAW DICTIONARY 577 (7th ed. 1999).

<sup>30</sup> *Addington*, 441 U.S. at 424.

<sup>31</sup> *In re Winship*, 397 U.S. 358, 364 (1970).

<sup>32</sup> *United States v. Pine*, 609 F.2d 106, 107 (1979).

<sup>33</sup> *Id.* at 108.

### III. Forms of Punishment

There are five forms of punishment available to commanding officers when an accused is found guilty in nonjudicial punishment.<sup>34</sup> The punishments available to a commander include the following: forfeiture of pay, restriction on movement, extra duty, reduction of grade, reprimand, and admonition.<sup>35</sup> The punishments range from causing a servicemember inconvenience to directly threatening highly protected individual rights. A brief description of the forms of punishment illustrates the wide range of options a commander has when implementing nonjudicial punishment.

#### *Forfeiture of Pay*

A commander may influence the property interest of charged personnel by forcing a forfeiture of a portion of basic pay for up to two months.<sup>36</sup> When this punishment is imposed, the servicemember loses all entitlement to the forfeited amount of basic pay.<sup>37</sup> Forfeiture of pay must be expressed in dollar amounts for the affected time period, and if the forfeiture lasts longer than one month, the commander must notate the monetary amount and number of months the servicemember's pay is forfeited.<sup>38</sup>

#### *Restriction on Movement*

Commanders may limit freedom of movement in one of four ways: restriction, arrest in quarters, correctional custody, and confinement on bread and water or diminished rations.<sup>39</sup> Both restriction and arrest in quarters involve moral restraint<sup>40</sup> and are a less severe deprivation than correctional custody, confinement on bread and water, or diminished rations, which all involve physical restraint.<sup>41</sup>

Restriction and arrest in quarters are a less severe manner of depriving the charged individual of liberty.<sup>42</sup> Restriction allows the commander to require the charged individual to report to a designated place at a specified time.<sup>43</sup> The severity of restriction depends on the length of the punishment and the geographical limits of restriction that are specified when imposed.<sup>44</sup> Arrest in quarters, which applies only to officers, requires the charged personnel to remain within their quarters during the period of punishment unless the deciding authority extends the boundaries.<sup>45</sup> "Quarters" is broadly defined, thus giving the commander latitude to restrict the officer to more than a traditional living area.<sup>46</sup>

Correctional custody and confinement on bread and water include physical restraint and clearly deprive the charged individual of freedom of movement or physical needs. An individual under correctional custody is physically restrained during duty or nonduty hours and may be under a number of incidental punishments including extra duty, fatigue duty, or

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<sup>34</sup> There are two limits on the commanding officer's ability to impose punishment: (1) The rank or grade of the servicemember, and (2) Express limits found in Article 15(b). UCMJ art. 15(b) (2005). A commanding officer may also find a servicemember guilty, but decide to adjudge no punishment or suspend all punishment. AR 27-10, *supra* note 7, para. 3-25.

<sup>35</sup> MCM, *supra* note 1, pt. V, ¶ 5.

<sup>36</sup> *Id.* ¶ 5b.

<sup>37</sup> *Id.* ¶ 5c(8). Basic pay is "fixed by statute for the grade and length of service of the person concerned and does not include special pay for a special qualification, incentive pay for the performance of hazardous duties, proficiency pay, subsistence and quarters allowances, and similar types of compensation." *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* ¶ 5c(2)(3)(4)(5).

<sup>40</sup> *Id.* ¶ 5c(2)(3).

<sup>41</sup> *Id.* ¶ 5c(4)(5). Confinement on bread and water or diminished rations has been eliminated as a possible punishment imposable by court-martial, but has been retained in Article 15 proceedings. *Id.* R.C.M. 1003(d)(9) (amended 1995).

<sup>42</sup> *Id.* ¶ 5c(2).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* ¶ 5c(3).

<sup>46</sup> *Id.* Quarters is construed broadly to include a military residence, "whether a tent, stateroom, or other quarters assigned or a private residence when government quarters have not been provided." *Id.*

hard labor.<sup>47</sup> Confinement on bread and water or diminished rations restricts the charged individual to an area where he may only communicate with authorized personnel.<sup>48</sup> The commander specifies the ration given to the charged individual, but he does not have the discretion to restrict the ration to solely bread and water.<sup>49</sup> The punishment of confinement on bread and water cannot be implemented unless specifically imposed.<sup>50</sup> Confinement on bread and water is further restricted to those individuals that, in a medical officer's opinion, will not suffer serious injury due to the punishment.<sup>51</sup>

#### *Extra Duty*

A charged individual punished with extra duty is simply performing duties in addition to those normally assigned.<sup>52</sup> Extra duty may include any military duty with some limitations on the commander's discretion. Assigned duties may not include the following: duties associated with a known safety or health hazard, duties amounting to cruel or unusual punishment, duties unsanctioned by customs of the concerned service, or duties that "demean the grade or position of the punished personnel."<sup>53</sup>

#### *Reduction in Grade*

Reduction in grade is recognized as one of the most severe forms of nonjudicial punishment.<sup>54</sup> The *MCM* does not express why reduction in grade is considered one of the most severe forms of nonjudicial punishment. It is possible the combination of short-term consequences, such as deprivation of pay and prestige, and long-term consequences, such as reduced future promotion possibilities, is a reason why extra caution is required of the commander prior to imposing this punishment. Though all nonjudicial punishment requires discretion, extra care is required prior to imposing reduction in grade.<sup>55</sup> Due to possible abuse, commanding officers may only reduce the grade of those who he has the authority to promote.

#### *Reprimand and Admonition*

Reprimand and admonition are two ways for a commanding officer to censure a servicemember's conduct.<sup>56</sup> When used as nonjudicial punishment, reprimands and admonitions are punitive and are considered more severe than administrative reprimands or counseling.<sup>57</sup> Reprimands or admonitions are required to be in writing if given to a commissioned officer or warrant officer; otherwise "they may be administered either orally or in writing."<sup>58</sup>

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<sup>47</sup> *Id.* ¶ 5c(4).

<sup>48</sup> *Id.* ¶ 5c(5).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* ¶ 5c(6).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* ¶ 5c(7).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* ¶ 5c(1). A reprimand is more severe than an admonition. *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* "Written admonitions and reprimands imposed as a punitive measure under UCMJ, Art. 15, will be in memorandum format, per AR 25-50, and will be listed as an attachment" to the DA Form 2627. AR 27-10 *supra* note 7, para. 3-19(d). If the Article 15 is filed in the servicemember's Official Military Personnel Record, the written admonition or reprimand accompanies the Article 15 as an attachment. *See id.* Similar to the negative impact that a permanently filed Article 15 has on a servicemember's career, a permanently filed admonition or reprimand could potentially have a comparable negative impact on a servicemember's career. *See infra* notes 61-62.

The long-term consequences of nonjudicial punishment cannot be ignored when assigning the appropriate burden of proof for determining guilt in Article 15 proceedings. The specific forms of punishment available to a commanding officer are merely the short-term consequences of nonjudicial punishment. The effects of nonjudicial punishment on a servicemember are felt long after the specific punishment imposed is complete. Nonjudicial punishment dramatically affects the servicemember's long-term career possibilities, his social standing within the military hierarchy, and his competitiveness for promotion. The specific punishments that may be imposed by an Article 15 combined with the long-term stigma attached to nonjudicial punishment require a commander to have absolute confidence that his decision is justly imposed.

The specific punishments available to a commanding officer range from minor intrusions to short durations of correctional custody or restricted movement. If a servicemember returned to his previous social and career status upon completion of a specific punishment, the use of beyond a reasonable doubt as the applicable burden of proof would seem extreme in most situations. Because, however, a servicemember continues to carry the stigma of being the recipient of nonjudicial punishment, a more restrictive burden of proof appears warranted.<sup>59</sup> Simply receiving nonjudicial punishment can harm the servicemember's career by affecting future promotion possibilities, the likelihood of retention, and his social standing within the military hierarchy.<sup>60</sup>

After a servicemember received punishment, the record of the proceeding will be filed in either their local units' records or permanently in their official military record. A permanent filing of nonjudicial punishment in a servicemember's military record effectively eliminates opportunities for advancement and retention.<sup>61</sup> A servicemember may petition the review board to remove the permanent filing from their record.<sup>62</sup> A review board, however, is slow, burdensome, and does not remove the stigma associated with receiving nonjudicial punishment.<sup>63</sup> Furthermore, a favorable outcome—removal—is not guaranteed. Many findings of guilt are not permanently recorded and are instead filed in the servicemember's local personal file.<sup>64</sup> Though the severity of the long-term consequences associated with nonjudicial punishment may be reduced by a local filing, the stigma of receiving nonjudicial punishment still attaches to the servicemember regardless of the filing determination. Upon receipt of nonjudicial punishment, whether permanently or locally filed, the servicemember is adversely impacted without an adequate remedy to address the long-term consequences.

The most practical manner to protect the servicemember from the harsh consequences of an Article 15 while maintaining a fair result is to require commanding officers to make a determination of guilt beyond a reasonable doubt in nonjudicial punishment proceedings.

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<sup>59</sup> See *United States v. Pine*, 609 F.2d 106, 107 (1979) (citing *In re Winship*, 397 U.S. 358, 364 (1970)) (recognizing that beyond a reasonable doubt is the proper standard in criminal cases because a criminal conviction may result in the loss of personal liberty and will result in the stigmatization of the accused).

<sup>60</sup> See *United States v. Kelley*, 3 M.J. 535 (A.C.M.R. 1977). Captain Kelley received an Article 15 as an enlisted man. *Id.* at 535. He attempted to wrongfully remove the record of the Article 15 from his Official Military Personnel Records Jacket because he feared the impact it might have on his retention. *Id.* at 536. The damage to a punished individual's career is arguably dependent on his rank as well as the punishment imposed. Regardless of the scope of the damage caused, it seems clear that nonjudicial punishment carries with it a stigma that often damages the career of the charged individual. See generally *LEDERER supra* note 1, § 8-29.20 (stating "it is abundantly clear that nonjudicial punishment can have a prejudicial effect on the subsequent military career of the accused.").

<sup>61</sup> See AR 27-10, *supra* note 7, para. 3-6(a). When making a filing determination, the Army requires its commanders to balance the future career of the servicemember against the interests of the Army. *Id.* "A commander's decision whether to file a record of nonjudicial punishment on the performance section of a Soldier's Official Military Personnel File is as important as the decision relating to the imposition of nonjudicial punishment itself." *Id.* See also *MJM, supra* note 7, para. 1.A.6.b(10) (explaining that when implementing punishment during NJP a commander must take into consideration the potential adverse administrative consequences); AFI 51-202, *supra* note 7, para. 6.4.1 (discussing that a commander has the discretion to determine whether the NJP record is permanently filed presumably based upon his opinion concerning the service member's future value to the Air Force).

<sup>62</sup> The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. Except as provided in paragraph (2), such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department. The Secretary of Homeland Security may in the same manner correct any military record of the Coast Guard. 10 U.S.C.S. § 1552(a) (LEXIS 2005).

<sup>63</sup> For example, a Soldier may apply for relief to the Army Board for Correction of Military Records (ABCMR). U.S. DEP'T OF ARMY, REG. 15-185, ARMY BOARD FOR CORRECTION OF MILITARY RECORDS para. 2-3(b) (29 Feb. 2000) [hereinafter AR 15-185]. Before applying for relief from the ABCMR the Soldier must first exhaust all other administrative remedies. *Id.* para. 2-5. The Soldier has the burden of persuading the board that an injustice or material error exists, *id.* para. 2-9, and he must pay for his own attorney if he wants representation. *Id.* para. 2-7. In most situations the ABCMR decision is only a recommendation and the Secretary of the Army is the final decision authority. *Id.* paras. 2-13 to -14.

<sup>64</sup> The Army maintains a non-permanently filed record of nonjudicial punishment for two years at the unit level. AR 27-10, *supra* note 7, para. 3-37(b)(1). In the Air Force, a commander determines whether the NJP is permanently filed. AFI 51-202, *supra* note 7, para. 6.4.1.

Comparing civilian administrative proceedings and Article 15 proceedings further justifies beyond a reasonable doubt as the proper burden of proof when a commander imposes nonjudicial punishment. A comparison between these proceedings illustrates that a servicemember facing nonjudicial punishment has fewer procedural safeguards protecting their interests than a civilian facing a comparable administrative punishment. To balance the loss of these traditional safeguards without affecting the military necessity of Article 15 efficiency requires commanding officers find servicemembers guilty beyond a reasonable doubt.

#### IV. Lack of Procedural Safeguards

The *MCM* specifies the general procedural aspects for Article 15 proceedings.<sup>65</sup> Similar to a civilian administrative hearing, the procedures required during nonjudicial punishment proceedings are intended to afford the accused due process protections.<sup>66</sup> Clearly, both civilian administrative hearings and nonjudicial punishment proceedings are concerned with protecting the accused individual's rights. A comparison between the minimum procedures required for a civilian administrative hearing and the minimum procedures required for a nonjudicial punishment hearing, however, indicate that greater protection is afforded an accused in a civilian hearing.

##### *Civilian Administrative Hearing Procedures*

Civilian administrative hearings vary and do not rely upon a single uniform set of procedures. In a civilian administrative hearing, due process protection is applicable only if a state actor is involved<sup>67</sup> and only if a potential deprivation of liberty or property may result.<sup>68</sup> If both of these criteria are present, the proper procedures for the hearing are determined by balancing individual interests against governmental interests.<sup>69</sup> Civilian procedures require flexibility since the individual's interest may vary from a small monetary loss<sup>70</sup> to confinement. The government's interest is much easier to define and is typically the administrative and fiscal costs of implementing further procedural protections. Balancing these interests achieves the proper level of procedures in a civilian administrative hearing. Thus, if the property or liberty interest of the individual is great, more procedural safeguards are required to protect against the risk of erroneous deprivation.<sup>71</sup> If the burden on the government of adding procedural protections outweighs the individual's possible loss of liberty, then the cost of the additional procedures outweighs the benefit gained by their implementation.<sup>72</sup>

Despite this flexible approach, civilian administrative hearings generally require specific procedures. These procedures include the following: impartial and competent tribunal, notice, opportunity to present proof, cross-examination of witnesses, a decision based on the record, and reviewability of decisions.<sup>73</sup> These procedures are still not concretely defined in all civilian administrative hearings and are dependent on the individual interest threatened. Thus, as the individual interest increases, and the consequences of an erroneous deprivation become more severe, the formality of the procedural safeguards increases.

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<sup>65</sup> *MCM*, *supra* note 1, pt. V, ¶ 4.

<sup>66</sup> *Id.* Appendix 24, at A24-1, pt. IV, ¶ 1.

<sup>67</sup> *See* *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 829 (1982) (stating that the offending party must be a state actor).

<sup>68</sup> *See* *Goldberg v. Kelly*, 397 U.S. 254 (1970) (arguing that the government cannot take away an entitlement without due process); *Board of Regents v. Roth*, 408 U.S. 564 (1972) (arguing that the government cannot change a person's legal status without due process).

<sup>69</sup> *See* *Matthews v. Eldridge*, 424 U.S. 319 (1976) (stating that three factors must be weighed to determine the procedures necessary in a hearing: private interest, government interest, and risk of erroneous deprivation).

<sup>70</sup> A speeding ticket is one example of a small monetary loss.

<sup>71</sup> *Matthews*, 424 U.S. at 335.

<sup>72</sup> *Id.*

<sup>73</sup> *See* Roger Cramton, *A Comment on Trial-Type hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585, 588 (1972). This list of procedural protections is debatable and different opinions exist as to what procedures are required in all administrative hearings. *See* Henry Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975) (listing possible procedural elements to include: unbiased tribunal, notice of proposed action and the grounds asserted for it, opportunity to challenge, right to call witnesses, right to know adverse evidence, right to have decision based only on evidence presented, right to be represented, record, statement of reasons for final action, hearing open to public, opportunity for review within the agency).

## Article 15 Hearing Procedures

In contrast to civilian administrative hearings, which provide different procedures based on the individual interest threatened, Article 15 proceedings approach all offenses with the same level of procedural safeguards. Article 15 proceedings are considered an administrative method for military commanders to deal with minor offenses in an informal and efficient manner.<sup>74</sup> Consequently, Article 15 proceedings have few required procedures.<sup>75</sup> Prior to actually pursuing nonjudicial punishment, a preliminary inquiry is performed to determine if nonjudicial punishment is appropriate.<sup>76</sup> Once nonjudicial punishment is deemed necessary, the same procedures are applied regardless of the individual interest threatened.

Once a commander decides to use nonjudicial punishment, he must provide notice to the accused servicemember.<sup>77</sup> Notice to the servicemember must include the following:

- (1) a statement that the nonjudicial punishment authority is considering the imposition of nonjudicial punishment;
- (2) a statement describing the alleged offenses—including the article of the code—which the member is alleged to have committed;
- (3) a brief summary of the information upon which the allegations are based or a statement that the member may, upon request, examine available statements and evidence;
- (4) a statement of the rights that will be accorded to the servicemember . . . .
- (5) unless the right to demand trial is not applicable . . . a statement that the member may demand trial by court-martial in lieu of nonjudicial punishment, a statement of the maximum punishment which the nonjudicial punishment authority may impose by nonjudicial punishment; a statement that, if trial by court-martial is demanded, charges could be referred for trial by summary, special, or general court-martial; that the member may not be tried by summary court-martial over the member's objection; and that at a special or general court-martial the member has the right to be represented by counsel.<sup>78</sup>

Once the accused servicemember receives notice, he must elect either a trial by court martial or nonjudicial punishment. If the servicemember elects to waive his right to trial by court-martial, the servicemember will have a number of rights at the nonjudicial punishment hearing. The accused servicemember may personally appear before the commander, unless there are extraordinary circumstances.<sup>79</sup> The servicemember may have a spokesperson, but the spokesperson is not an advocate and may not question witnesses unless the commanding officer allows questioning as a matter of discretion.<sup>80</sup> The commanding officer is to inform the servicemember, either orally or in writing, of the information gathered concerning the allegations.<sup>81</sup> The servicemember is allowed to review evidence that the commanding officer has examined and intends to use in determining guilt and in electing the punishment that should be imposed.<sup>82</sup> The servicemember may present a defense or

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<sup>74</sup> *Middendorf v. Henry*, 425 U.S. 25, 32 (1976). Though nonjudicial punishment is defined as an administrative process, there are a number of procedural similarities between an Article 15 proceeding and a court-martial. The common procedural similarities include: formal accusation of criminal misconduct, mandatory consultation with a defense attorney, ability to examine evidence, opportunity to present witnesses, opportunity to question adverse witnesses, and the ability to offer mitigating or extenuating evidence. See *infra* text accompanying notes 77-88. The resemblance between nonjudicial punishment proceedings and a court-martial likely creates a perception by the accused servicemember that he is involved in a criminal action. Due to the perceived criminal nature of nonjudicial punishment proceedings, an accused servicemember has a justifiable expectation that the burden of proof in an Article 15 proceeding would mirror the burden of proof used in a court-martial.

<sup>75</sup> *Middendorf*, 425 U.S. at 32 (stating “[i]ts [nonjudicial punishment] purpose ‘is to exercise justice promptly for relatively minor offenses under a simple form of procedure.’”) (quoting MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 79a (1969) [hereinafter 1969 MCM]).

<sup>76</sup> MCM, *supra* note 1, pt. V, ¶ 4a; see LEDERER, *supra* note 1, § 8-25.20 (discussing with more detail how the preliminary screening works).

<sup>77</sup> MCM, *supra* note 1, pt. V, ¶ 4a.

<sup>78</sup> *Id.* ¶ 4a.

<sup>79</sup> *Id.* ¶ 4c(1). If there is a reason why the nonjudicial punishment authority cannot be present than the accused is “entitled to appear before a person designated by the nonjudicial punishment authority who shall prepare a written summary of any proceedings before that person and forward it and any written matter submitted by the servicemember to the nonjudicial punishment authority.” *Id.* In addition, “subject to the approval of the nonjudicial punishment authority, the servicemember may request not to appear personally.” *Id.* ¶ 4c(2). If the request is granted, the accused “may submit written matters for consideration by the nonjudicial punishment authority before such authority’s decision.” *Id.*

<sup>80</sup> *Id.* ¶ 4c(1)(B). This does not apply if the punishment to be “imposed will not exceed extra duty for 14 days, restriction for 14 days, and an oral reprimand.” *Id.* Since this is not a criminal proceeding, the 6th Amendment right to counsel does not apply. See generally *Middendorf v. Henry*, 425 U.S. 25, 25 (1976).

<sup>81</sup> MCM, *supra* note 1, pt. V, ¶ 4c(1)(C).

<sup>82</sup> *Id.* ¶ 4c(1)(D).

explain mitigating circumstances either orally or in writing.<sup>83</sup> The servicemember may present witnesses, including adverse witnesses, but with limitations.<sup>84</sup> Finally, the servicemember may open the proceedings to the public with limitations.<sup>85</sup>

After considering all relevant matters, the commanding officer will make his decision. If the commanding officer decides that the accused servicemember did not commit the alleged offense, the proceedings are terminated.<sup>86</sup> If the commanding officer decides that the servicemember committed the alleged offenses, the commanding officer will “(i) so inform the servicemember; (ii) inform the servicemember of the punishment imposed; and (iii) inform the servicemember of the right to appeal.”<sup>87</sup>

### *Comparison*

Article 15 proceedings, and specifically the hearing, contain many of the procedures required in a civilian administrative hearing, but lack the ability to add crucial procedural safeguards.<sup>88</sup> Civilian administrative hearings use a malleable balancing test to protect against erroneous deprivation of liberty when the accused has a significant interest. In nonjudicial punishment proceedings, however, the procedure is concretely defined regardless of possible punishment. Civilian administrative hearings add more formality or more protective procedures to the proceeding as the individual interest at stake increases. In comparison, Article 15 procedures do not change because of the possible punishments<sup>89</sup> — the same procedures are used regardless of the individual interest threatened. Failure to consider the extent of the possible punishments creates a situation in which accused servicemembers with substantially different interests are dealt with under the same procedures.<sup>90</sup>

Though greater procedural protection seems reasonable when greater individual interests are threatened, more procedures or added formality also make the hearing less efficient and more time consuming. Military necessity requires nonjudicial punishment to remain efficient when dealing with discipline problems. Additional procedures may cause the system to become inefficient and essentially create the same time commitment problems found in a court-martial.

It is possible to reconcile the competing interests of adequately protecting individual interests with procedural efficiency by requiring commanding officers to find guilt beyond a reasonable doubt in nonjudicial punishment proceedings. Most of the procedural protections that are omitted in nonjudicial punishment proceedings are intended to decrease the possibility of erroneous deprivation of liberty and to increase the confidence in the decision. A determination of guilt beyond a reasonable doubt, without additional procedures, would minimize the possibility of the erroneous deprivation of individual rights. Thus, the accused servicemember would gain a heightened form of protection from deprivation, and the government would retain the efficient system it requires. Accepting beyond a reasonable doubt as the burden of proof in nonjudicial punishment is a non-intrusive manner of balancing the military necessity for an efficient system with the goal of protecting the servicemember’s individual rights.

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<sup>83</sup> *Id.* ¶ 4c(1)(E).

<sup>84</sup> *Id.* ¶ 4c(1)(F). The witness statements must be relevant and reasonably available. *Id.* For a detailed description of what is reasonably available see *id.*

<sup>85</sup> *Id.* ¶ 4c(1)(G). For a discussion of the limitations on having the nonjudicial hearing open to the public see *id.*

<sup>86</sup> *Id.* ¶ 4c(4)(A).

<sup>87</sup> *Id.* ¶ 4c(4)(B).

<sup>88</sup> This article does not dispute the constitutionality of different approaches to dealing with administrative problems between civilian and military law. Procedural differences between civilian administrative hearings and Article 15 proceedings are valid due to the inherent differences that are judicially recognized between civilian and military law. The Supreme Court is traditionally deferential to the military concerning discipline and recognizes that “the military is, by necessity, a specialized society separate from civilian society. . . . [and] also recognize[] that the military has, again by necessity, developed laws and traditions of its own during its long history.” *Parker v. Levy*, 417 U.S. 733, 743 (1974). “Members of the military community enjoy many of the same rights and bear many of the same burdens as do members of the civilian community, within the military community there is simply not the same autonomy as there is in the larger civilian community.” *Id.* at 751. A comparison between civilian administrative hearings and Article 15 proceedings remains valuable to demonstrate that some of the added protections found in civilian hearings are possible by using the “beyond a reasonable doubt” burden of proof without the inefficiency of added procedures.

<sup>89</sup> For punishments ranging from the inconvenience of extra-duty to the severe deprivation of liberty through confinement see *supra* Section III.

<sup>90</sup> There are a number of other possible procedural shortcomings to nonjudicial punishment. For example, it is arguable that a commander residing over the nonjudicial punishment proceeding or the residing authority in appeals can act as an impartial tribunal in every situation.

## V. Conclusion

It is arguable that requiring a finding of guilt beyond a reasonable doubt as the burden of proof in all nonjudicial punishment scenarios is impractical since the separate services have varying degrees of interest in different burdens of proof. For example, naval operations on a ship present unique disciplinary matters that are not faced in any other aspect of the military. Does this justify a less demanding burden of proof for those commanders imposing nonjudicial punishment on a ship? When attempting to create the UCMJ a similar question was raised concerning the need for different forms of punishment between the services.<sup>91</sup> Historically, the diversity in practice between the Army and the Navy was attributed to the following two factors:

- (1) men on shipboard are necessarily in a different situation with reference to freedom of motion and availability of replacement than men in camp, and
- (2) the punishment is imposed at mast by the captain, and a summary court consists of an inferior officer, while in the Army such an incongruity in rank between a commanding officer and a summary court would be virtually unknown.<sup>92</sup>

These factors justified allowing the separate services to impose different punishments in Article 15 proceedings, but once again presented an appearance of arbitrariness in the administration of nonjudicial punishment.<sup>93</sup> To reduce this appearance, a uniform set of punishments was created and the Secretaries of the individual services were given the power to “determine which ones of these different and various punishments that are set forth are necessary for their own disciplinary problems.”<sup>94</sup> Creating a single list of punishments and then allowing each service to further restrict use of these punishments was the solution to the recognized problem that no set of punishments would fit all the services perfectly.<sup>95</sup> But the intent behind making a single list of punishments and allowing the individual services to limit their own powers in comparison to each service having a separate list of punishments was to maintain a sense of uniformity. By having the powers and punishments “emanate from one source, such action w[ould] [e]nsure uniformity of punishment for the same type of offense and a uniform exercise of powers throughout the armed services.”<sup>96</sup>

This very small exception to the general rule of uniformity adopted by the drafters of the UCMJ does not apply to the burden of proof. This exception was created solely to address the recognized need for different forms of possible punishments due to the special environments each service faced. The exception, however, was meant to remain very narrow to maintain a sense of uniformity concerning nonjudicial punishment. Though the disciplinary problems may be different due to service specific mission requirements, a commanding officer’s ability to determine guilt beyond a reasonable doubt is not affected. The threat to a servicemember’s individual interests combined with the lack of procedural safeguards in Article 15 proceedings remains the same regardless of the accused servicemember’s branch and environment in which they serve.

The use of different burdens of proof by the separate military branches raises serious concerns about Article 15 proceedings. These concerns are most evident in joint operations where servicemembers under the same command who commit the same misconduct may receive different dispositions. A fair yet efficient solution is for a uniform requirement that all commanding officers find guilt beyond a reasonable doubt. Regardless of the form of the proceeding, whether criminal, civil, or administrative, the greater the individual’s interest, the greater the confidence the deciding authority needs to have in his decision. Neither preponderance of the evidence nor clear and convincing evidence, adequately protects an

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<sup>91</sup> See *Bill to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcommittee of the Committee on Armed Services*, 81st Cong. 1st Sess. (1949), reprinted in *INDEX AND LEGISLATIVE HISTORY OF THE UNIFORM CODE OF MILITARY JUSTICE*, 1950, at 931-32 (1985).

<sup>92</sup> *Bill to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcommittee of the Committee on Armed Services*, 81st Cong. 1st Sess. (1949) (statement of Professor Edmund M. Morgan Jr. Harvard University Law School), reprinted in *INDEX AND LEGISLATIVE HISTORY OF THE UNIFORM CODE OF MILITARY JUSTICE*, 1950, at 601 (1985).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 932.

<sup>95</sup> *Id.*

<sup>96</sup> *Bill to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearings on S. 857 and H.R. 4080 Before a Subcommittee of the Committee on Armed Services*, 81st Cong. 1st Sess. (1949) (statement of John J. Finn, Judge Advocate, Department of the District of Columbia, the American Legion), reprinted in *INDEX AND LEGISLATIVE HISTORY OF THE UNIFORM CODE OF MILITARY JUSTICE*, 1950, at 197 (1985).

accused servicemember's individual interests. Both of these standards also fall short when attempting to find an effective and efficient counter balance to the lack of procedural protections offered to an accused servicemember. Beyond a reasonable doubt is the only standard that adequately protects an accused servicemember's inherent individual rights and maintains the speed and efficiency required for nonjudicial punishment.