The Unconstitutional Burden of Article 15

I. The Burden of Article 15 and *Jackson*

The company commander grimaces as his first sergeant tells him that one of his privates failed to report for KP. The commander instructs the company clerk to type up an Article 15[1] charging the private with disobeying a lawful order. With the paper in hand he notifies the soldier that he will be offered non-judicial punishment. The private could refuse and demand a summary court-martial,[2] but there the company commander would serve as both prosecutor and judge *and* have the authority to prescribe a stiffer maximum penalty. Or the private could go still further and demand a special court-martial,[3] which would hold the promise of greater procedural rights but also the threat of significantly harsher punishment. Faced with such choices, the private, with no opportunity to call witnesses or present a legal defense, accepts the Article 15.[4] The commander immediately imposes punishment, which can include loss of rank, forfeiture of pay, or confinement to quarters.[5] The entire process takes less than ten minutes.

This scenario, or something like it, occurs about a thousand times each day.[6] As the most frequently used procedure in military justice, Article 15 serves to dispense swift punishment for minor violations

1. 10 U.S.C. § 815(a) (1970).
2. 10 U.S.C. § 820 (1970).
3. 10 U.S.C. § 819 (1970).
4. For an assessment of the pressures compelling acceptance of non-judicial punishment, see Fuller, *Signin' Them Papers: Summary Punishment in the Military*, 2 YALE REV. L. & SOC. ACT. 41 (1971).
5. 10 U.S.C. § 815(b) (1970) outlines the maximum punishments permitted under Article 15. The severity of the choice for a corporal (E-4) between accepting the Article 15 or demanding a court-martial can be illustrated as follows: In accepting an Article 15, the serviceman's maximum punishment would be reduction of one rank to E-3, forfeiture of seven days pay, and restriction to the company or extra duties for fourteen days. However, a special court-martial finding the accused guilty of violating Article 92, failure to obey a lawful order, could order reduction to the lowest rank, E-1, forfeiture of two-thirds pay for six months, confinement at hard labor for six months, and a bad conduct discharge. The less than honorable discharge is the most serious sanction, as it carries grave consequences in civilian life. *See* Jones, *The Gravity of Administrative Discharges: A Legal and Empirical Evaluation*, 59 MIL. L. REV. 1 (1973).
6. Statistics maintained by the Office of the Judge Advocate General of the Navy indicate the number of Article 15 punishments imposed in the Navy and Marine Corps as 136,476 in 1970, 121,521 in 1971, and 110,772 in 1972. The decrease reflects the overall decline in military strength; the number of punishments per serviceman has in fact increased. Since these two services represented thirty to thirty-four percent of the armed forces during this period, it can be assumed that between 330,000 and 450,000 Article 15's were imposed in all the services annually from 1970-72. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1972, at 259.

of the Uniform Code of Military Justice (UCMJ). Commanders favor it over the more formal court-martial both because it can be administered simply and because it does not result in a permanent blot on the serviceman's record.

However, despite this popularity, the scant procedures of Article 15 seem inadequate. To correct some of these deficiencies, Secretary of Defense Laird recently directed that additional procedural rights be insured in its administration.[7] But even if these directives are fully implemented, Article 15 will still fail to satisfy the constitutional requirements of due process. To benefit fully from even the military version of procedural due process, the accused must reject the Article 15 and risk the stiffer penalties of a special court-martial.[8] Yet the prospect of additional punishment almost always means that such rights go unexercised.

Only five years ago the Supreme Court condemned a strikingly similar inhibition in *United States v. Jackson*,[9] invalidating that portion of the Federal Kidnapping Act which authorized a jury—but not a judge—to impose the death penalty. The Court held that such a provision burdened the exercise of a defendant's Fifth Amendment right to plead not guilty and his Sixth Amendment right to a jury trial. The Court condemned the burden irrespective of the intent of Congress in enacting the dual penalty provision:

> Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights.[10]

Writing for the Court, Justice Stewart argued that,

> [T]he evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right.[11]

The statutory framework of Article 15 seems to violate the *Jackson* principle by creating a similar burden. The serviceman is confronted

7. Memorandum from Secretary of Defense Melvin Laird, Report on the Task Force on the Administration of Military Justice in the Armed Forces, Jan. 11, 1973 [hereinafter cited as Laird Memorandum].
8. 10 U.S.C. § 815(a) (1970).
9. 390 U.S. 570 (1968).
10. *Id.* at 582.
11. *Id.* at 583.

with the choice of waiving his rights to plead not guilty and to be tried before a military jury *or* invoking those rights and facing the possibility of far more severe punishment.[12]

A comparison of the relative rights in an Article 15 procedure and a special court-martial indicates the vast disparity in treatment. In a special court-martial command influence on the military judge and court-martial board is absolutely prohibited;[13] yet an Article 15 involves the epitome of "command influence," as the accused's commander determines guilt and imposes punishment.[14] At a special court-martial the defense has power to subpoena witnesses from anywhere in the United States;[15] in an Article 15 proceeding the accused has no such power.[16] Moreover, in a special court-martial, witnesses testify under oath,[17] the defense can cross-examine,[18] and a transcript is often prepared;[19] none of these rights are available with non-judicial punishment. The accused in a special court-martial is also entitled to a three-member board which serves as a jury,[20] or to trial before a military judge;[21] in an Article 15 proceeding, the accused's fate is determined by the same commander who initiated the action.[22]

After conviction by a court-martial, the accused can appeal the court's findings and his punishment to the Judge Advocate General[23] or the Court of Military Review,[24] and subsequently to the *civilian* Court of Military Appeals;[25] the recipient of an Article 15 can appeal only his punishment, not his guilt, to the next-higher officer

12. The increased penalties allowed in special courts-martial are listed in MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 15b. (rev. ed. 1969) [hereinafter cited as MCM]. Punishments permitted by summary courts-martial are outlined in MCM ¶ 16b.
13. 10 U.S.C. § 837 (1970).
14. 10 U.S.C. § 815(a) (1970); MCM ¶ 128.
15. 10 U.S.C. § 846 (1970).
16. By its terms, 10 U.S.C. § 846 does not apply to Article 15 proceedings. The Laird Memorandum, however, does extend a "right to call witnesses" to an Article 15 proceeding, but it does not mention any subpoena power. Laird Memorandum, *supra* note 7, at ¶ b.
17. MCM, *supra* note 12, at ¶ 114f.
18. *Id.* at ¶ 149b.
19. *Id.* at ¶ 83a. If a bad conduct discharge is adjudged at a special court-martial, a transcript is required.
20. *Id.* at ¶ 4a. For an analysis of the court-martial as a jury, see pp. 1486-87 *infra*.
21. 10 U.S.C. § 816(2)(c) (1970).
22. MCM ¶ 133a requires that:
The commanding officer, upon ascertaining to his satisfaction . . . that an offense punishable under Article 15 has been committed by a member of his command, will . . . so notify the member of the nature of the alleged misconduct . . . and inform him that he intends to impose punishment under Article 15 . . . .
23. 10 U.S.C. § 869 (1970).
24. 10 U.S.C. § 866 (1970).
25. 10 U.S.C. § 867 (1970).

in the chain of command.[26] Furthermore, commanders are often able to use Article 15 to punish acts which are not properly punishable under the UCMJ[27] as their actions are seldom reviewed by JAG attorneys or other legal authorities. Finally, unlike a court-martial verdict,[28] Article 15 punishment does not bar a subsequent court-martial should the commander decide further punishment is merited.[29] Given the absence of so many procedural rights, it is hardly surprising that some courts have questioned the constitutionality of state military codes which did not grant a serviceman the right to refuse the non-judicial punishment and demand trial in another forum.[30]

However, before applying *Jackson* to Article 15, a court must hold:

(1) that accepting an Article 15 constitutes a guilty plea and/or jury waiver analogous to *Jackson*'s Fifth and Sixth Amendment infirmities;

(2) that *Jackson* is not limited to death penalty cases; and

(3) that military necessity does not preclude the application of *Jackson* to the military context.

II. The Guilty Plea in Article 15

Two arguments can be advanced to save Article 15 from the requirements of *Jackson* on the grounds that non-judicial punishment does not constitute a guilty plea:[31] First, since Article 15 is an informal proceeding that does not lead to a formal conviction,[32] it does not elicit a true "guilty plea." Second, since acceptance of an Article 15 is neither an admission of guilt nor a trigger for automatic punish-

26. MCM, *supra* note 12, at ¶ 135.

27. Although this practice is forbidden by MCM ¶ 128b, the likelihood of abuse is much greater than in a court-martial where the charges are under the scrutiny of defense counsel and a military judge.

28. Double jeopardy is forbidden, 10 U.S.C. § 844 (1970), MCM ¶ 68d; United States v. Culver, 22 U.S.C.M.A. 141, 46 C.M.R. 141 (1973).

29. MCM ¶ 128b; United States v. Fretwell, 11 U.S.C.M.A. 377, 29 C.M.R. 193 (1960).

30. *See* note 70 *infra*.

31. MCM ¶ 70(a) reads: "The accused has a legal and moral right to enter a plea of not guilty even if he knows he is guilty."

32. "Since this punishment is non-judicial, it is not considered in any manner as a conviction of a crime, and in this sense has no connection with the military court-martial system." REP. NO. 1612 OF HOUSE ARMED SERVICES COMM. ON H.R. 11257, 87th CONG. 2d SESS., *cited in* United States v. Johnson, 19 U.S.C.M.A. 464, 469, 42 C.M.R. 66, 71 (1970) (Ferguson, J., dissenting).

United States v. Fretwell, 11 U.S.C.M.A. 377, 29 C.M.R. 193 (1960) held that imposing an Article 15 for a serious crime did not preclude a subsequent court-martial for the same offense since the Article 15 was not an adjudication at which jeopardy attached.

ment, it is again not tantamount to a guilty plea. Neither proposition, however, seems persuasive.

In *In re Gault*,[33] the Supreme Court rejected the proposition that mere informality saved a juvenile hearing—an adjudicatory proceeding—from due process constraints. In this sense, the Court of Military Appeals has similarly held Article 15 to be an adjudicatory proceeding. Recently this view was articulated more fully by the Army Court of Military Review in *United States v. Delaney*.[34] In affirming the conviction of an enlisted man who had asked a serviceman to alter an affidavit being used in an Article 15, the court stated:

> Although Article 15 punishment is termed "non-judicial," it is patent that it is punitive in nature, and aids in the discipline of the Army by authorizing the disposition of those minor acts or omissions constituting offenses under the punitive articles of the Uniform Code of Military Justice. As such, it is the first, an integral, and a crucial component of the Code . . . .[35]

The absence of a formal conviction does not lessen the adjudicatory nature of an Article 15. Despite the fact that Congress characterized such an adjudication as a non-conviction, it is undeniable that it results in punishment for criminal actions. Recent decisions by the Court of Military Appeals recognize the effect of an Article 15 record. Although adhering to the proposition that they are not formal convictions, the court has authorized the use of prior Article 15 punishments in the sentencing stage of a subsequent court-martial:

> The effect of using a record of Article 15 punishment in this respect is indistinguishable from the use of evidence of previous convictions.[36]

As Judge Ferguson has noted:

> Court members are going to treat it [Article 15] in fact as an instance in which an accused has committed an offense under the Code, has been "tried" by his commander, and had punishment imposed on him.[37]

Thus given the *Gault* Court's recognition that an informal criminal adjudication must meet due process standards and the military judi-

33. *In re* Gault, 387 U.S. 1 (1967).
34. 44 C.M.R. 367 (ACMR 1971).
35. *Id.* at 368.
36. United States v. Johnson, 19 U.S.C.M.A. 464, 468, 42 C.M.R. 66, 70 (1970).
37. United States v. Taylor, 20 U.S.C.M.A. 93, 95, 42 C.M.R. 285, 287 (1970) (Ferguson, J., dissenting).

ciary's recognition that Article 15 is such an adjudication, the informality of Article 15 cannot distinguish it from the guilty plea in *Jackson*.[38]

The second argument—that accepting an Article 15 does not necessarily lead to conviction and punishment—is simply at war with reality. It is, of course, theoretically possible for a commander to decline to impose punishment, but in practice this possibility is virtually nil. It must be remembered that the commander has already satisfied himself of the serviceman's culpability and of the necessity for some punishment in determining to proceed with the Article 15. Even the Court of Military Appeals recognizes this reality, noting in one case that "when offered a chance to plead guilty under Article 15, [the accused] did so . . . ."[39]

Thus the practical effect of accepting an Article 15 is a waiver of the right to trial—the essence of a guilty plea.[40] Neither the informality of the proceeding nor the absence of a formal conviction excuses it from due process requirements. Therefore the Article 15 burden does encourage the serviceman-accused to "plead guilty."

III. Waiver of the Right to a Jury Trial

Despite the fact that the Supreme Court has not yet extended the Sixth Amendment right of jury trial to servicemen (a conclusion that is certainly open to question),[41] the *Jackson* rationale of unburdening

38. Carnahan, *Comment: Article 15 Punishments*, 13 U.S.A.F. JAG L. REV. 270, 273 (1971). *But see* Miller, *A Long Look at Article 15*, 28 MIL. L. REV. 37, 39 (1965).

39. United States v. Domenech, 18 U.S.C.M.A. 314, 318, 40 C.M.R. 26, 30 (1969).

40. The Supreme Court recognized this principle in North Carolina v. Alford, 400 U.S. 25, 37 (1970): "Thus, while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite." The same result occurs if Article 15 is analogized to a plea of nolo contendere. *See id.* at 35 n.8 *citing* Lott v. United States, 367 U.S. 421 (1961).

41. Traditionally the Supreme Court has denied the existence of a jury right on the grounds that the Sixth Amendment is applicable only to those indicted according to the Fifth Amendment. Since military personnel are excluded from this latter right, the Court has held the jury right to be equally inapplicable. *See* O'Callahan v. Parker, 395 U.S. 258 (1969); Whelchel v. McDonald, 340 U.S. 122 (1950); Kahn v. Anderson, 255 U.S. 1 (1921); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 132 (1866) (Chase, C.J., concurring). Whatever the validity of this rationale, the result seems to square with the original intent of the framers. *See* Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957); Weiner, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 269 (1958). *But see* Remcho, *Military Juries: Constitutional Analysis and the Need for Reform*, 47 INDIANA L. REV. 193 (1972).

The original intent of the framers, however, need not bind the Court. The military as an institution has changed dramatically since 1789, increasing in size from a few thousand professional soldiers to over three million men and women. Moreover, the offenses punishable by courts-martial were much more limited in the eighteenth century. And the Supreme Court itself has demonstrated a willingness to expand the jury right

the exercise of fundamental rights seems applicable to Article 15. The panel sitting in a special court-martial is the statutory equivalent of the civilian jury. Like civilian juries, the members of a special court-martial hear evidence and decide on guilt or innocence.[42] They are not required to possess any legal training; and although not randomly selected, the board members must be impartial.[43] A semblance of a "jury of peers" is maintained by the requirement that only officers sit in judgment of officers[44] and by provisions granting an enlisted man the right to have one-third enlisted personnel on his board.[45]

This functional similarity is further emphasized when the role of a court-martial member is contrasted with that of a military judge. The latter, required in all general courts-martial and present in most special courts-martial, performs the same functions as a civilian judge. Unlike the board members, he is a trained legal expert. He supervises the course of the trial and acts as the final arbiter on matters of law; he does not, however, participate in decisions of fact.[46]

The special court-martial panel, therefore, provides the serviceman with the military approximation of a jury. Recognizing this functional equivalence, the Court of Military Appeals has several times explicitly relied on civilian jury cases in resolving questions concerning military boards.[47] To be sure, the panel is—at least in the absence of a reversal of hoary precedent—only a statutory right; but even statutory rights once granted must be implemented in a constitutional manner. Thus in *Carter v. Jury Commission,* the Supreme Court stated that,

> Once the State chooses to provide grand and petit juries, whether or not constitutionally required to do so, it must hew to federal constitutional criteria . . . .[48]

to encompass situations not originally governed by the Sixth Amendment. *See* Duncan v. Louisiana, 391 U.S. 145 (1968).

Finally, one must consider the status of courts-martial as an element of military common law. Since 1789 military-accused have been offered a court-martial by more than one officer. *See* WINTHROP, MILITARY LAW AND PRECEDENTS 23 (2d ed. GPO Reprint 1920). As such, the right to trial by court-martial, the military analogue to a jury trial, is arguably part of the common law "frozen" by the Sixth Amendment.

42. 10 U.S.C. §§ 851, 852. *See* Brookshire, *Juror Selection Under the Uniform Code of Military Justice: Fact and Fiction,* 58 MIL. L. REV. 71, 72-73 (1972).

43. 10 U.S.C. § 825(d)(2) (1970).

44. 10 U.S.C. §§ 825(a), 825(b) (1970).

45. 10 U.S.C. § 825(c)(1) (1970).

46. 10 U.S.C. § 826 (1970).

47. *See, e.g.,* United States v. Mackie, 16 U.S.C.M.A. 14, 36 C.M.R. 170 (1966); United States v. Crawford, 15 U.S.C.M.A. 31, 35 C.M.R. 3 (1964).

48. Carter v. Jury Commission, 396 U.S. 320, 330 (1970) (invalidating the exclusion of blacks from grand juries).

It therefore seems proper to argue that the right to a military jury —perhaps the most important of the many rights waived in accepting an Article 15—must not be burdened by a fear of harsher punishment.

IV. The Scope of *Jackson*

To apply *Jackson* to the Article 15 context, a court must also hold that the decision applies beyond death penalty cases. Although some courts have limited *Jackson* to capital cases,[49] others have used it to strike down lesser burdens on constitutional rights.[50] Faced with this split over the scope of *Jackson,* a court should consider the Supreme Court's extension of other precedents originally developed in capital cases to non-capital contexts.

Two decisions coincidentally dealing with military jurisdiction demonstrate this treatment. In *Reid v. Covert*[51] and *Kinsella v. Singleton*[52] the Court invalidated court-martial jurisdiction over civilian dependents in capital and non-capital prosecutions respectively. In *Reid* the Court, in reversing the murder convictions of two wives of servicemen stationed overseas, voided the provision of the UCMJ conferring court-martial jurisdiction over military dependents. Justices Frankfurter and Harlan concurred in the result of the four-justice plurality, but explicitly limited their concurrence to capital cases.[53] Three years later in *Kinsella,* the Court rejected this distinction and extended *Reid* to non-capital cases:

> We believe that to deprive civilian dependents the safeguards of a jury trial here, an infamous case by constitutional standards, *would be as invalid under those cases as it would be in cases of a capital nature.*[54]

49. *See, e.g.,* United States v. James, 464 F.2d 1228 (9th Cir. 1972) (declining to apply *Jackson* to juvenile proceedings). The most explicit characterization of *Jackson* as a death penalty case is United States v. Lewis, 300 F. Supp. 1171, 1174-75 (E.D. Pa. 1969):

> In Jackson the unconstitutional burden placed upon the defendant involved a choice between life and possible death, whereas in this case the burden allegedly placed upon the defendant involves a possible term of mandatory imprisonment . . . . Overriding the Court's decision in Jackson then are certain emotional overtones . . . which naturally come into play when the death penalty is involved . . . . Whether the Court would reach the same conclusion where something less than death burdens one set of choices is at least open to question.

50. *See, e.g.,* Nieves v. United States, 280 F. Supp. 994 (S.D.N.Y. 1968) (applying *Jackson* to a choice between five and twenty years imprisonment); Opinion of the Justices, 357 Mass. 827, 829, 257 N.E.2d 94, 95 (1970) (citing *Jackson* in striking down welfare residency laws); People v. C., 27 N.Y.2d 79, 261 N.E.2d 620 (1970) (applying *Jackson* to jury waivers by juveniles).

51. 354 U.S. 1 (1957).

52. 361 U.S. 234 (1960).

53. Justice Black, joined by Chief Justice Warren, Justice Douglas, and Justice Brennan, wrote the plurality opinion which drew no line between capital and non-capital cases.

54. 361 U.S. at 246-47 (emphasis added).

The *Kinsella* Court realized that maintaining the capital distinction would allow the prosecutor to decide the issue of jurisdiction in each case by determining the charge under which to proceed. This rationale applies to *Jackson* as well. If *Jackson* is limited to capital offenses, statutes encouraging the waiver of either the right of jury trial or the right to plead not guilty would be immune whenever the penalty involved only imprisonment. Yet nothing in *Jackson* suggests that the Court intended to so limit its holding. The Court spoke more broadly of "burdens" that "needlessly chill" the exercise of constitutional rights,[55] and it is rather clear that having to risk a far stiffer penalty constitutes such a burden.

V. Military Necessity

Finally in order to apply *Jackson* to Article 15 a court must find that military necessity[56] does not justify the present burden of Article 15. Such a finding is essential because of the judicially-created doctrine that normal constitutional safeguards do not apply where "it is shown that conditions peculiar to military life require a different rule."[57] However, while such conditions would restrict the application of *Jackson,* close scrutiny should be given to any claim of military necessity. Indeed, courts have become increasingly aware that Congress' determination of the appropriate balance between the needs of the military and rights of servicemen is not conclusive.[58] To justify the alleged necessity of the Article 15 burden, the military must prove that it is critical to the morale and discipline of an effective fighting force. Here proponents of Article 15 generally rely on three desirable features of the present scheme: judicial economy, protection of the accused, and rapid punishment of minor violations of military law.

The significant decline in the number of summary courts-martial following the enactment of Article 15 in 1962[59] would seem to support the view that the use of non-judicial punishment fosters judicial economy. However, the degradation of procedural rights inherent in

55. 390 U.S. 570, 582-83 (1968).

56. *See* Burns v. Wilson, 346 U.S. 137 (1953). For a discussion of the effect of military necessity on substantive articles of the UCMJ, see Note, *Taps For the Real Catch-22,* 81 YALE L.J. 1518, 1533-36 (1972).

57. Kauffman v. Secretary of the Air Force, 415 F.2d 991, 997 (D.C. Cir. 1969).

58. *See, e.g.,* Avrech v. Secretary of the Navy (D.C. Cir. No. 71-1841, filed March 20, 1973) (Article 134, unconstitutionally vague). The Third Circuit similarly declared recently in Levy v. Parker that Article 133, prohibiting conduct unbecoming to an officer, was unconstitutionally vague despite government claims of military necessity. N.Y. Times, Apr. 19, 1973, at 1, col. 6.

59. Summary courts-martial declined from 85,166 in 1962 to 28,281 in 1969. Fidell, *The Summary Court-Martial: A Proposal,* 8 HARV. J. LEGIS. 571, 573 (1971).

this "economy" has also led to inequities that may have had an even more deleterious effect on military discipline. Thus, the Laird Memorandum has already directed that an accused offered an Article 15 have access to legal counsel, that he be given some right to call witnesses, and that his punishment be stayed pending appeal.[60] These embellishments, while serving the worthwhile ends of procedural due process, necessarily undermine the argument that Article 15 fosters judicial economy.

Similarly, while perhaps well-intentioned the secrecy considered necessary to protect the accused often fans animosities among servicemen suspecting unequal treatment of those charged with the same offense.[61] The closed sessions also often result in servicemen accepting punishment for actions which would not be held criminal by a formal court-martial.[62] Moreover, the protection of the serviceman is often illusory. Article 15 punishments for drug offenses have resulted in the same serious disadvantages in civilian life as those suffered after conviction by a court-martial,[63] and as noted above, Article 15 "convictions" may now be used in a subsequent court-martial as a factor in sentence determination.[64]

Finally, the desirability of swift retribution for minor military offenses was weighed in 1962 against the serviceman's right to a forum where constitutional claims could be presented. Congress favored the latter by providing the serviceman with the right to demand a special court-martial,[65] and therefore any desire for guard-house punishment is no longer a valid part of "military necessity."

60. Laird Memorandum, *supra* note 7, at ¶¶ a, b, d.

61. *See* N.Y. Times, Dec. 1, 1972, at 1, col. 4, reporting the conclusion of the Task Force on the Administration of Military Justice in the Armed Forces that non-judicial punishment has been used to discriminate against racial minorities; R. RIVKIN, THE RIGHTS OF SERVICEMEN 34 (1972).

62. MCM, *supra* note 12, at ¶ 128b, requires that only offenses punishable under the UCMJ can be subject to Article 15 sanctions. However, the secret proceedings and absence of judicial review enable commanders to circumvent this requirement.

63. Article 15 punishment can be reflected in the code which is part of all discharges. This code is utilized by civilian employers in hiring decisions, so that the stigma of non-judicial punishment can burden the serviceman despite an honorable discharge. N.Y. Post, Mar. 9, 1973, at 5, col. 1. The current code of Separation Program Numbers includes designations for homosexual tendencies, financial irresponsibility, unsanitary habits, alcoholism, drug abuse, character disorders, apathy, and even obesity. These labels are imposed administratively, rather than as the result of a court-martial. N.Y. Post, Apr. 5, 1973, at 5, col. 6. *See also* Fuller, *supra* note 4, at 45.

64. MCM, *supra* note 12, at ¶ 75(d), effective Aug. 1, 1969. United States v. Dillard, 20 U.S.C.M.A. 57, 42 C.M.R. 249 (1970); United States v. Smith, 19 U.S.C.M.A. 491, 42 C.M.R. 93 (1970); United States v. Wheat, 19 U.S.C.M.A. 491, 42 C.M.R. 93 (1970); United States v. Johnson, 19 U.S.C.M.A. 464, 42 C.M.R. (1970). *But see* United States v. Scott, 21 U.S.C.M.A. 154, 44 C.M.R. 208 (1972).

65. Military personnel attached to ships are the only servicemen who cannot demand trial by court-martial as a matter of right. 32 C.F.R. § 719.101(b) (1972). The possible abuses implicit in such a system are shown in N. SHEEHAN, THE ARNHEITER AFFAIR 89-92 (1973).

The federal district court for a critically important military area, Hawaii, recently rejected such defenses of military necessity in invalidating the Navy's practice of counsel-less summary courts-martial —the military tribunal most akin to Article 15. In *Daigle v. Warner*, Chief Judge Pence dismissed the argument of military necessity, holding that

> these special attributes of military justice cannot justify denial of basic constitutional rights when both these rights and the needs of the military can be successfully accommodated.[66]

Perhaps more importantly, Judge Pence also condemned the burdened waiver confronting the accused. The Navy had argued that any defect in the summary court-martial proceeding was cured by the accused's absolute right to elect a special court-martial which contained a right to counsel. Judge Pence rejected this argument, stating:

> Leaving aside the difficulty of equating waiver with the lack of objection, the stickler is that by objecting to the summary court procedure . . . the accused is forced to run the risk of receiving the greater punishments sanctioned by the general and special courts-martial. *One cannot be "punished" for the exercise of his constitutional rights, United States v. Jackson . . . .*[67]

Thus, in evaluating the argument of military necessity the courts should look for any "less drastic means" which would accomplish the legitimate goals of the military without inhibiting individual rights. As the next section will demonstrate such means in fact do exist.

VI. Alternatives to Article 15

A court considering alternatives for adjudicating minor military offenses should focus on the policy considerations underlying the present Article 15. One is allowing the commanding officer to deal with minor offenses in a summary fashion. However, even efficiency cannot outweigh the accused's procedural rights as now protected by the Laird Memorandum. Another is the paternalistic view which sees

66. 348 F. Supp. 1074, 1080 (D. Hawaii 1972).

67. *Id.* (emphasis added). A similar class-action in California resulted in a decree that attorneys for Navy personnel be available at summary courts-martial worldwide, Henry v. Warner, Civ. No. 73-354 DWW (C.D. Calif., filed April 13, 1973). The court held that the special court-martial punishment attending an exercise of constitutional rights "flies in the face of the Supreme Court's articulated position against the doctrine of unconstitutional conditions, *i.e.*, one cannot be 'punished' for the exercise of one's constitutional rights. United States v. Jackson." Mem. Opinion at 14.

Article 15 as protecting minor offenders from the harsh punishments of courts-martial.

A. *Congress could abolish Article 15*

While this approach obviously satisfies *Jackson,* it would destroy the "flexibility" inherent in non-judicial punishment, particularly the protection of the accused from the stigma of a formal conviction. Eliminating Article 15 also raises the spectre of the excessive cost and delay in court-martialing even those who knowingly prefer a more summary process. However, this danger may not be as great as first appears, as a commander would still have authority to remove discretionary privileges, recommend against promotion or other favorable personnel action, and issue reprimands[68]—all of which could serve a disciplinary end in a non-penal manner.

B. *Congress could eliminate the right to a special court-martial*

This approach again eliminates the *Jackson* problem by removing the possibility of an "unconstitutionally encouraged" waiver: The accused would be restricted to the forum originally chosen by the prosecution. However, this regression into the "pre-UCMJ era"[69] would make Article 15 constitutionally suspect. Two cases involving prosecutions of National Guardsmen under state military codes with just such provisions suggest that such a system would not pass constitutional muster as it would prevent the accused from ever reaching a court where his rights could be asserted.[70] Furthermore, the accused's protection from arbitrary use of Article 15 stemming from his right to a special court-martial serves the morale goals of military justice. For effective discipline servicemen must feel that they can resort to a tribunal offering a fair hearing of their case—a situation not always possible in an Article 15.

68. MCM, *supra* note 12, at ¶ 129b.

69. Before 1950 an accused had no right to demand a court-martial if offered non-judicial punishment.

70. In *In re* Palacio, 238 Cal. App. 2d 545, 48 Cal. Rptr. 50 (2d Dist. 1965), a pre-*Jackson* case, the California Court of Appeals construed the provisions of the state's military code to require that an accused have a right to demand a special court-martial with its right to counsel because, "to so construe the statute [without that right] would create grave doubts concerning the constitutionality of that statute." 238 Cal. App. 2d at 550, 48 Cal. Rptr. at 54.

In Miller v. Rockefeller, 327 F. Supp. 542, 553-54 (S.D.N.Y. 1971), a federal district court approved of *In re* Palacio in a similar case brought by a New York National Guardsman. However, the complaint was dismissed for failure to exhaust state remedies.

C. *Congress could provide all procedural rights at the Article 15 level*

If all constitutional rights were provided at the Article 15 level, accepting an Article 15 would *by hypothesis* waive nothing and thus again satisfy the *Jackson* rule. The *Daigle* court adopted this approach to avoid a *Jackson* burden on the right to counsel in summary courts-martial.[71] Again, however, such an approach in the Article 15 context would involve increased administrative costs. Moreover, this approach destroys the beneficial effects of the summary, non-public nature of present Article 15 proceedings in the instances when an accused knowingly desires such an adjudication.

D. *Congress could maintain the special court-martial, but limit its maximum punishment to that of the level initially chosen by the commander*

Under this alternative a serviceman who refused Article 15 punishment would be assured that his punishment from even a special court-martial could be no harsher than that originally authorized by the Article 15.[72] To avoid penalizing the exercise of such rights, any adjudication by a court-martial demanded by the accused would be stripped of the elements of a criminal conviction. As in the current Article 15, no permanent record would be kept. Thus, without any punishment differential, the accused would not be encouraged to waive the rights secured in special courts-martial. Any such waiver would presumably be voluntary, and the *Jackson* rule would be met. Of course, for serious offenses a commander could, as he can now, initiate a prosecution by special or general court-martial and seek its harsher maximum punishments. But if a commander decided that an offense was minor, he would be bound by that determination regardless of which tribunal ultimately heard the case.

Such a system embodies efficiencies absent in the other alternatives. It protects judicial economy by allowing only those servicemen who wish to assert their rights to do so without penalty; others can plead guilty in less-publicized proceedings. Many servicemen undoubtedly will wish to avoid publicity and rightly will believe that they would be less likely to receive the maximum penalty in an Article 15 than in the hybrid Article 15-court-martial.

71. 348 F. Supp. 1074, 1080 (D. Hawaii 1972); *see* Henry v. Warner, Civ. No. 73-354 DWW (C.D. Calif., Apr. 13, 1973), *supra* note 67.

72. A commander's determination that an offense is essentially minor could not be altered by the defendant's assertion of his legitimate constitutional rights.

Thus, each of these four alternatives eliminates the present Article 15 burden. The first two, however, do so only at the risk of substantially frustrating the benefits available to some accused through the option of Article 15. The third provides a suitable alternative by continuing the trend initiated by the Laird Memorandum, but might well be overly cumbersome and burdensome to effective military justice.

The final approach suggested is compatible with both the needs of the military and the rights of the individual in that it allows the military to continue to deal with most minor violations swiftly, but also maintains the individual's right to object, obtain his full constitutional protections, and yet expose himself to no greater risk. Thus the military would achieve effective discipline without loss of morale due to real or perceived injustices.