Thank You, Servicemember! But Your Process Is in Another Forum: The Misuse of Civilian Jurisprudence to Inform UCMJ Rights

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Congress codified many of the disciplinary procedural rights for servicemembers in the Uniform Code of Military Justice ("UCMJ"). Several of these explicit, statutory protections were later developed as judicial doctrines for civilians, such as Miranda*'s right against self-incrimination and* Kastigar*'s right to testimonial immunity. In response the military's highest court, the U.S. Court of Appeals for the Armed Forces, adopted the U.S. Supreme Court's jurisprudence to inform a servicemember's statutory rights under the UCMJ. But in doing so, military justice did not recognize that civilian rights are typically only invoked in trials while military discipline is affected through a gamut of proceedings separate and distinct from a court-martial. This Note reviews the incorporation of* Miranda *and* Kastigar *to reveal how appropriating civilian common law, which was intended for the courtroom, may inadvertently decrease a servicemember's procedural protection in other fora.*

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INTRODUCTION

Drawdowns in military force, like the one in which the United States is currently engaged,[1] have historically meant that "those Soldiers with discipline problems will disappear from the ranks."[2] When the uniformed services must reduce their workforce at a higher rate than established departure mechanisms—such as retirement and dismissal-provide—the first step is often to identify and discharge those individuals who have already run afoul of the military justice system.[3]

1. Elisabeth Bumiller & Thom Shanker, *Panetta to Offer Budget Strategy Cutting Military*, N.Y. TIMES, Jan. 3, 2012, at A1.

2. David San Miguel, *Army Drawdown Forces Tightening of Retention Standards*, U.S. ARMY (Apr. 4, 2012), http://www.army.mil/article/77210/Army_drawdown_forces_tightening_of_retention_standards; *see* Major David S. Franke, U.S. Army, *Administrative Separation from the Military: A Due Process Analysis*, 1990 ARMY LAW. 11, 11 ("Since you can't keep every single individual, it will be those who have the best qualities, those who have the best records who stay on." (quoting Brigadier General Sheridan G. Cadoria, U.S. Army, STARS & STRIPES, Mar. 21, 1990, at 1 col. 1)).

3. When reviewing the records of personnel in overmanned specialties, enlisted retention boards consider "nonjudicial or more severe punishment." Erik Slavin, *Navy Unlikely to Convene Another Enlisted Retention Board*, STARS & STRIPES, Jan. 17, 2012, http://www.stripes.com/news/navy/navy-unlikely-to-convene-another-enlisted-retention-board-1.166121.

Military justice extends beyond the familiar drama of a court-martial to encompass less formal proceedings, like nonjudicial punishment[4] and administrative separations.[5] Both of the latter represent the military's ability to maintain a disciplined force without subjecting all servicemembers to potential federal convictions via courts-martial. But although thousands of servicemembers are administratively separated for misconduct every year,[6] these numbers are still insufficient to meet the requisite reduction in force size.[7] Thus those servicemembers who faced nonjudicial punishment or administrative separation, but who were retained, may be involuntarily separated from their careers years or even decades after their disciplinary proceedings.

Although military justice is governed by congressional statute and judicial common law, this Note argues military courts have been too quick to renounce legislative guidance in favor of adopting civilian decisional law.[8] Such indiscriminate incorporation ignores fundamental differences between military and civilian law as well as the congressional intent behind military justice's statutory foundation, the Uniform Code of Military Justice ("UCMJ").[9] This Note focuses on one particular aspect of the UCMJ, the Article 31[10] freedom from self-incrimination, to demonstrate how wholesale adoption of civilian courts' jurisprudence may significantly deprive military personnel of the intentionally broad protections that Congress established. Incorporating Article III judicial constructs ignores some of the core aspects of Congress' intent behind the Article I system. "Specifically, article 31(a) extended the traditional

4. "Nonjudicial punishment provides commanders with an essential and prompt means of maintaining good order and discipline and also promotes positive behavior changes in servicemembers without the stigma of a court-martial conviction." MANUAL FOR COURTS-MARTIAL UNITED STATES V-1 (2008 ed.).

5. "Navy policy is to promote readiness by maintaining high standards of conduct and performance." NAVAL MILITARY PERSONNEL MANUAL, NAVPERS 15560D, 1910-010: ADMINISTRATION SEPARATION (ADSEP) POLICY AND GENERAL INFORMATION (Sept. 20, 2011). Administrative Separations do so by discharging servicemembers prior to the end of their contracts.

6. *See, e.g.*, Franke, *supra* note 2, at 11 n.2 (noting that the Army itself discharged just shy of 9000 soldiers in 1989 for misconduct).

7. In the face of insufficient personnel turnover through normal procedures, the Navy chose to involuntarily separate 3000 sailors to help balance the budget. Matthew M. Burke, *Navy Separation Process Leaves Sailors in the Dark*, STARS & STRIPES, Feb. 7, 2012, http://www.stripes.com/navy-separation-process-leaves-sailors-in-the-dark-1.167923.

8. This may be in part because "the Supreme Court has repeatedly cut back on military jurisdiction on the grounds that the court-martial provides an inferior forum for the protection of constitutional rights." Edward F. Sherman, *Military Justice Without Military Control*, 82 YALE L.J. 1398, 1399–400 (1973).

9. *See* Douglass Calidas, *Sensitive Military "Intelligence": Reconsidering Fifth Amendment Waivers*, 19 GEO. MASON U. C.R. L.J. 133, 145 (2008) (noting that the UCMJ is the "statutory basis" for military law). In its current form, the UCMJ begins at 10 U.S.C. § 801.

10. Throughout this Note, UCMJ articles are followed by a number, while articles of the U.S. Constitution are followed by a roman numeral.

application of the right against self-incrimination from criminal trials to all persons under all circumstances."[11]

This Note argues that Article 31's "universal" application should extend to informal disciplinary and administrative proceedings that can result in many of the same punitive consequences as a court-martial: loss of employment, revocation of veterans' benefits, diminished future employment opportunities, forfeiture of retirement pay, and lingering stigma.[12] The due process requirements of nonjudicial punishment and administrative separations, although always relevant, come into particular focus as the uniformed branches face pressure to reduce their personnel by the thousands. Servicemembers who were unfairly incriminated by their compelled testimony earlier in their careers may be subjected to such statements again during the current drawdown.

This Note examines the extent to which other sources of law, including Supreme Court jurisprudence, should inform or limit the explicit protections granted by the UCMJ in non-courtroom settings. Part I reviews the various forms of military justice and presents a hypothetical situation to bring the nuances into sharper relief. Part II explores the military right against self-incrimination and contrasts that protection against the civilian equivalent. Part III similarly describes the parallel development of testimonial immunity in both military and civilian law. Part IV discusses a servicemember's property interests and whether military justice adequately protects those interests. This Note concludes that judiciary developments would likely allow "immunized" testimony to be used against a servicemember in nonjudicial proceedings and administrative separations. This result runs afoul of the intent behind the UCMJ and extends civilian jurisprudence from the realm of the courtroom into the realm of military discipline.

I. Military Justice Is a Spectrum

American military justice is often characterized by its differences from other federal and state judicial systems.[13] The rationales for a distinct military justice system tend to focus on the armed forces as a separate segment of the population, a subculture with its own norms and goals predicated on different values and expectations.[14] "In every respect

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11. Captain Manuel E.F. Supervielle, U.S. Army, *Article 31(b): Who Should Be Required to Give Warnings?*, 123 Mil. L. Rev. 151, 186 (1989) (internal quotation marks omitted).

12. *See infra* notes 112–118 and accompanying text.

13. Burns v. Wilson, 346 U.S. 137, 140 (1953) ("Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.").

14. Parker v. Levy, 417 U.S. 733, 744 (1974) ("Just as military society has been a society apart from civilian society, so '[m]ilitary law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.'" (alterations in original) (quoting *Burns*, 346 U.S. at 140)).

the military is, as [the Supreme Court] has recognized, a specialized society."[15]

The protections servicemembers enjoy vary by the source of law and forum. Congress codified many protections for both investigations and disciplinary procedures in the UCMJ. However, the U.S. Court of Appeals for the Armed Forces ("CAAF"), the American military's highest court, expounded upon these protections by developing its own jurisprudence and incorporating Supreme Court precedent. Yet the majority of the procedural rights only apply to courts-martial or procedures leading to a court-martial. The extent to which the Bill of Rights applies—and to what proceedings—also varies.[16] The Fifth Amendment explicitly states that servicemembers are not entitled to an indictment by Grand Jury for "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger."[17] Some scholars interpret this caveat as qualifying the entire Bill of Rights for military personnel.[18] As historian Jonathan Lurie noted, "one is struck by the consistency with which the Court pays lip service to its position that the Bill of Rights applies to the armed services, even as, with equal consistency, it rejects applicability in each instance."[19] At the same time, courts continue to debate the formal status of some tiers of court-martial, further obscuring when and what protections may apply.[20]

In perhaps its most recognizable analog to civilian law, military justice can be administered via courts-martial, of which there are three types: general, special, and summary. The most severe is the general courts-martial, which—unless otherwise agreed to by the defense—consists of a military judge and at least five "members."[21] Members function as fact finders, equivalent to jurors. Yet unlike their civilian counterparts, members are not selected from an array of the defendant's

15. United States v. Johnson, 481 U.S. 681, 690–91 (1987) (internal quotation marks omitted).

16. Jonathan Lurie, *Military Justice Fifty Years After Nuremberg: Some Reflections on Appearance v. Reality*, 149 MIL. L. REV. 189, 191 (1995).

17. U.S. CONST. amend V.

18. Eugene R. Fidell, Elizabeth L. Hillman & Dwight H. Sullivan, MILITARY JUSTICE CASES AND MATERIALS 861 (2007) ("Yet a non-capital general court-martial can have as few as five members, and the vote of four of those five would be sufficient to convict the accused. The courts have thus far been hostile to legal challenges attempting to apply the civilian case law governing jury size and voting requirements to the military justice system."); *see* Reid v. Covert, 354 U.S. 1, 42–43 (1957) (Frankfurter, J., concurring) ("Within the scope of appropriate construction, the phrase 'except in cases arising in the land or naval Forces' has been assumed also to modify the guaranties of speedy and public trial by jury."); United States v. Smith 27 M.J. 242, 248 (C.A.A.F. 1988) ("[T]he right to trial by jury has no application to the appointment of members of courts-martial." (citations omitted)). *But see* United States v. Roland, 50 M.J. 66, 68 (C.A.A.F. 1999) (stating that, while the military defendant does not enjoy a Sixth Amendment right to a trial by "impartial jury," he or she does have a right to "members who are fair and impartial" (citations omitted)).

19. Lurie, *supra* note 16, at 193.

20. *See infra* notes 31–32.

21. 10 U.S.C. § 816 (2012).

peers, but are instead chosen from those who "are best qualified to render judgment by reason of age, education, training, experience, length of service, and judicial temperament."[22] In part, this is because a "court-martial panel has a much broader function than a civilian jury. . . . A court-martial panel is empowered not only to impose the typical criminal law punishments of confinement and fines, but also to adjudge a sentence that affects an individual's military status."[23] A general court-martial has jurisdiction over any offense within the UCMJ as well as the laws of war; it is also the only court-martial that may confer a dishonorable discharge or capital punishment.[24]

In contrast, the special court-martial exercises jurisdiction over noncapital offenses of the UCMJ[25] and, unless otherwise agreed, consists of a judge and three members.[26] Special courts-martial also have significant limitations on the extent of punishments they may award.[27] The least formal court-martial is the summary court-martial, which is reviewed by a single commissioned officer instead of a judge.[28] A summary court-martial does not have personal jurisdiction over an officer or officer in training, does not possess subject matter jurisdiction over capital offenses, and is severely limited in the punishments it may award.[29] In essence, the "summary court-martial occupies a position between informal nonjudicial disposition under [UCMJ] Art. 15 and the courtroom-type procedure of the general and special courts-martial."[30] Although listed as a court-martial under the UCMJ, the Supreme Court has ruled that summary courts-martial do not rise to the level of "a 'criminal prosecution' within the meaning of [the Sixth] Amendment."[31] By the very wording of the Bill of Rights, significant protections are generally excepted for servicemembers at all courts-martial.[32]

Conversely, Article 15 empowers military commanders to quickly discipline their subordinates without the need to convene a court-martial.[33] This "nonjudicial punishment" does not result in a federal conviction as a court-martial does, but commanding officers are still

22. *Id.* § 825.

23. Loving v. Hart, 47 M.J. 438, 455 (C.A.A.F. 1998).

24. 10 U.S.C. § 817.

25. *Id.* § 819.

26. *Id.* § 816.

27. *Id.* § 819. Among other limitations, a special court-martial may not award death, dishonorable discharge, dismissal, or confinement for more than one year. *Id.*

28. *Id.* § 816.

29. *Id.* § 820.

30. Middendorf v. Henry, 425 U.S. 25, 32 (1976).

31. *Id*. at 51.

32. Reid v. Covert, 354 U.S. 1, 42–43 (1957) (Frankfurter J., concurring) ("Within the scope of appropriate construction, the phrase 'except in cases arising in the land or naval Forces' has been assumed also to modify the guaranties of speedy and public trial by jury.").

33. 10 U.S.C. § 815.

authorized to restrict subordinates to their quarters, order a forfeiture of pay, and if the subordinate is not an officer, assign extra duties and potentially reduce the servicemember to a lower paygrade.[34] In addition, specific offenses within the UCMJ[35] may require initiation of an administrative separation,[36] where a servicemember is evaluated for discharge from military service prior to the end of their contract. In some circumstances, the nonjudicial punishment itself may precipitate an administrative separation by demonstrating a "pattern of misconduct."[37]

Courts have routinely held that these administrative procedures satisfy the due process requirement that attaches to a public employee's property interest in her employment.[38] While each service possesses its own instructions and mechanisms for administrative separations, they are similar in many respects.[39] This Note focuses on the Navy's procedures in order to explore Article 15's nuance of personnel "attached to or embarked in a vessel," which enables a servicemember to reject nonjudicial punishment by demanding a court-martial instead.[40] By focusing on an instance where the servicemember may potentially shift a disciplinary hearing from a less formal proceeding to a more formal one, the legal discussion is better able to analyze how well military justice fulfills Congress' intent to create a uniform code.

In an administrative separation for either enlisted personnel or officers, a panel of three lay judges (all officers senior to the defendant, or if the defendant is enlisted and so chooses, two officers and one senior enlisted) hear arguments and review evidence before making three findings:[41] (1) whether or not the servicemember committed misconduct;

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34. *Id.*

35. *Id.* § 912a.

36. NAVAL MILITARY PERSONNEL MANUAL, NAVPERS 15560D, 1910-146: SEPARATION BY REASON OF MISCONDUCT—DRUG ABUSE (Sept. 7, 2010).

37. NAVAL MILITARY PERSONNEL MANUAL, NAVPERS 15560D, 1910-140: SEPARATION BY REASON OF MISCONDUCT—PATTERN OF MISCONDUCT (July 21, 2012). Alternatively, documentation of a nonjudicial punishment may lead to adverse remarks in an evaluation and contribute to a finding of Unsatisfactory Performance. *See* NAVAL MILITARY PERSONNEL MANUAL, NAVPERS 15560D, 1910-156: SEPARATION BY REASON OF UNSATISFACTORY PERFORMANCE (July 5, 2012).

38. Franke, *supra* note 2, at 19–20 (explaining how defense directives fulfill the constitutional due process requirement). The civilian equivalent to administrative separation boards are often justified as possessing proficiency and permanency that a jury would not, yet military discharge boards are not selected for their expertise and are rarely permanent. Captain Jack Finney Lane, Jr., U.S. Army, *Evidence and the Administrative Discharge Board*, 55 MIL. L. REV. 95, 101 (1972).

39. Douglass L. Custis, *Due Process and Military Discharges*, 57 A.B.A. J. 875, 875 (1971). Variation between the services exists, however, as to what burden of proof the government must meet. *See* Captain Shane Reeves, U.S. Army, *The Burden of Proof in Nonjudicial Punishment: Why Beyond a Reasonable Doubt Makes Sense*, 2005 ARMY LAW. 28, 29 n.7 (2005) (noting that the Army uses beyond a reasonable doubt, while the Navy, Marine Corps, and Coast Guard determine guilt by a preponderance of the evidence, and the Air Force does not specify a standard but encourages beyond a reasonable doubt).

40. 10 U.S.C. § 815.

41. *See* DEP'T OF DEF., NO. 1332.14, DIRECTIVE: ENLISTED ADMINISTRATIVE SEPARATIONS (1993); SEC'Y OF THE NAVY INSTRUCTION 1920.6C (Dep't of the Navy, Dec. 15, 2005) (officer procedures);

(2) whether such misconduct warrants separation from the Navy; and (3) if the panel recommends separation, what type of discharge is appropriate. The standard of proof is a preponderance of the evidence.[42]

There are typically three discharges, or characterizations of service, available at administrative separation hearings: Honorable, which entitles the servicemember to all of her veterans' benefits; General Under Honorable Conditions, which typically results in a forfeiture of the GI Bill but retains most Veterans' Affairs health benefits; and Other Than Honorable, which bars the servicemember from receiving many veterans' benefits.[43] Separation prior to retirement, no matter how close a servicemember may be to reaching the current twenty-year minimum of service, precludes receiving a military pension. "When one considers that the administrative proceeding is not a judicial proceeding and that the judicial rules of evidence have no application," due process becomes a compromise between the rights of the servicemember and the interest of the government.[44] Neither nonjudicial punishment[45] nor administrative separations[46] adhere to the military rules of evidence.

Each military branch is more than an employer; a uniformed service provides housing, medical services, transportation, food, and recreational outlets. Military justice governs the range of these interactions, as "the rights of men [and women] in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty."[47] But discipline is largely, and daily, effected through a gamut of proceedings, from informal reprimands to formal trials via courts-martial.[48] The purpose, and thus the consequences, of military justice can

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NAVAL MILITARY PERSONNEL MANUAL, NAVPERS 15560D, 1910: ENLISTED ADMINISTRATIVE SEPARATIONS (Apr. 13, 2005) (enlisted procedures); *see also* Captain Richard J. Bednar, U.S. Army, *Discharge and Dismissal as Punishment in the Armed Forces*, 16 MIL. L. REV. 1, 14–15 (1962); Franke, *supra* note 2, at 19; Captain Frederic N. Smalkin, U.S. Army, *Administrative Separations: The Old Order Changeth*, 1974 ARMY L. 6, 6–7 (1974).

42. Reeves, *supra* note 39.

43. 38 C.F.R. § 3.12 (2013); *see* Bednar, *supra* note 41; Smalkin, *supra* note 41, at 7–9 (discussing the types of separation and distinguishing Honorable and General Under Honorable Conditions as non-stigmatizing, but Other Than Honorable as stigmatizing).

44. Major Andrew M. Egeland, Jr., U.S. Air Force, *Developments in Airmen Administrative Separations*, 19 A.F. L. Rev 166, 183–84 (1977).

45. "The Military Rules of Evidence . . . do not apply at nonjudicial punishment proceedings." MANUAL FOR COURTS-MARTIAL UNITED STATES, *supra* note 4, at V-4.

46. NAVAL MILITARY PERSONNEL MANUAL, NAVPERS 15560D, 1910-510: PRESENTATION OF EVIDENCE (July 21, 2008) ("The rules of evidence for court-martial and other judicial proceedings do not apply in an administrative board hearing."). *But see* NAVAL MILITARY PERSONNEL MANUAL, NAVPERS 15560D, 1910-512: RIGHTS OF THE RESPONDENT (July 21, 2008) (listing rights of the respondent "[i]n addition to the respondent's right to testify on his or her own behalf, subject to the right against self-incrimination under [Article 31(b)]").

47. Burns v. Wilson, 346 U.S. 137, 140 (1953).

48. United States v. Wiesen, 56 M.J. 172, 176 (C.A.A.F. 2001) ("'The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security

be obscured by the military's attempts to incorporate civilian/Article III jurisprudence wholesale. This in turn creates a schism between formal courts-martial and more informal forms of maintaining discipline. In doing so, procedures that may have the same result for a servicemember—such as loss in pay, liberty, employment, and reputation—are granted different procedural protections simply because some are analogous to a courtroom (the court-martial) and some are not (nonjudicial punishment and administrative separation). The issue is compounded as empirical data indicate that units stationed in combat zones tend to eschew courts-martial for nonjudicial punishment and use administrative hearings in order to achieve the same outcome.[49]

Military justice involves a spectrum of disciplinary proceedings. Even the term "court-martial" refers to a range of proceedings spanning formal capital trials to hearings that are not overseen by a judge or even a Judge Advocate General.[50] Neither nonjudicial punishments nor administrative separations are constrained by formal rules of evidence. But where a congressional statute explicitly protects servicemembers, the various branches should not use differences in forum to pursue a result that would otherwise be unavailable. In particular, the military should not be empowered to compel self-incriminating testimony in a court-martial only to use those same statements to end the declarant's career. A hypothetical story helps to articulate the consequences of the growing rift between formal and informal military proceedings.

An enlisted sailor has been ordered to testify about a romantic relationship she had with a male officer at a general court-martial convened against the officer. Due to the difference in paygrades, their relationship is considered "fraternization" and violative of Article 134.[51] Because both members willingly participated in the romance, she is also culpable under Article 134, and her testimony would be self-incriminating. Accordingly, she may choose to invoke either her Fifth Amendment or Article 31 rights against self-incrimination.[52] To

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of the United States.' What is reasonable and fair from the public's perception, as well as this Court's judgment as to what is reasonable and fair, would be different in the case of national security exigency or operational necessity." (quoting MANUAL FOR COURTS-MARTIAL UNITED STATES, *supra* note 4, at I-1)).

49. Major Franklin D. Rosenblatt, U.S. Army, *Non-Deployable: The Court-Martial System in Combat from 2001 to 2009*, 2010 ARMY L. 12, 21.

50. JAG is the general term for a military lawyer. In the Navy they provide legal assistance to service members, litigate courts-martial and other hearings, and support commands through operational law. JAGs do not necessarily specialize in any one field, and the same lawyer will participate in all three fields over the course of her career. *Our Mission*, U.S. NAVY JAG CORPS, http://www.jag.navy.mil/careers_/careers/inbrief_ourmission.html (last visited Feb. 25, 2013); *see* Elizabeth Hillman, *Mission Creep in Military Lawyering*, 43 CASE W. RES. J. INT'L L. 565 (2011).

51. 10 U.S.C. § 934 (2012). The "general article" allows for the trial and punishment of "all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital." *Id.*

52. *See infra* notes 62–78 and accompanying text.

overcome these rights, the general court-martial convening authority may grant the sailor testimonial immunity, which bars the government from using her immunized testimony as evidence in a later *court-martial* against her. But limiting immunity to courts-martial leaves the sailor vulnerable to her compelled statements in nonjudicial punishment.[53] Under such circumstances she may still be reduced in rank, restricted to the ship, assigned to extra duties, and forced to forfeit wages.

Moreover, nonjudicial punishments can be sufficient cause for administrative separation.[54] If the administrative board determines the sailor should be separated, she could be conferred an Other Than Honorable discharge[55] and forfeit many veterans' and retirement benefits she may be on the cusp of receiving.[56] Thus despite being "immunized," the sailor could still lose rank, pay, liberty, and property interests, while gaining a stigma that often prevents future federal employment. Complicating the matter, if the sailor was not attached to a vessel, under Article 15 she could refuse the initial nonjudicial punishment and demand a court-martial,[57] where the testimonial immunity could be reinstated and thereby preclude the above chain of events.[58]

Just how often such scenarios occur is difficult to measure. Servicemembers have an interest in keeping disciplinary hearings confidential, even those that led to exoneration, while a commander's discretion in how to investigate and pursue a disciplinary infraction, "though not absolute, is extremely broad."[59] Yet there is some empirical evidence demonstrating that units engaged in operational commitments, such as combat or deployment, significantly favor more informal disciplinary proceedings over courts-martial.[60] By choosing less formal forms of military justice, these commands not only reduce the resource strain a court-martial would impose, but also afford the servicemember fewer procedural safeguards.

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53. *See infra* notes 88–96.

54. NAVAL MILITARY PERSONNEL MANUAL, NAVPERS 15560D, 1910-100: REASONS FOR SEPARATION (Sept. 20, 2011).

55. *See infra* note 43.

56. 38 C.F.R. § 3.12 (2012).

57. MANUAL FOR COURTS-MARTIAL UNITED STATES, *supra* note 4, at V-2.

58. Additionally, while the Fifth Amendment and Article 31 overlap in subject, they are not equivalent rights, and any grant of immunity should take such differences into account. *See infra* notes 62–71 and accompanying text.

59. Reeves, *supra* note 39, at 28.

60. Rosenblatt, *supra* note 49, at 13–16.

II. The (Partial) Overlap of Article 31 and *Miranda*

A. Development of the Law

Congress first passed the current governing document for military justice, the UCMJ, in 1950,[61] and the UCMJ became effective in 1951.[62] Thus, Article 31 and its protection against self-incrimination predated the Supreme Court's landmark *Miranda v. Arizona* decision by fifteen years.[63] Article 31(a) states that no "person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him."[64] Article 31(b) mandates that

> [n]o person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.[65]

Justifications for Article 31 include defending the judicial process by admitting only trustworthy confessions and shielding suspects from coercion out of procedural fairness under the Fourteenth Amendment.[66]

Despite Congress's effort to simplify and codify a uniform standard across all of the armed forces, there has been significant litigation in military courts over the interpretation of Article 31's "plain meaning."[67] Several military courts discussed Article 31's function as protecting servicemembers from the inherently compulsive atmosphere of the military, especially when servicemembers face criminal interrogations.[68] "The Article 31(b) warning requirement provides members of the armed forces with statutory assurance that the standard military requirement for a full and complete response to a superior's inquiry does not apply in a situation when the privilege against self-incrimination may be invoked."[69] To that end, Article 31 offers broader protection than *Miranda*, as the former applies to *any* interrogation, regardless of whether the suspect is

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61. 10 U.S.C. § 831 Historical and Revision Notes (2012).

62. Supervielle, *supra* note 11, at 163.

63. 384 U.S. 436 (1966); *see* Calidas, *supra* note 9, at 145 n.85.

64. 10 U.S.C. § 831.

65. *Id.* Subsection (c) protects against irrelevant and degrading questions, while subsection (d) lists the potentially confusing sources of compulsion: coercion, unlawful influence, and unlawful inducement.

66. Supervielle, *supra* note 11, at 162–63.

67. Captain John R. Morris, U.S. Army, *Right Warnings in the Military: An Article 31(b) Update*, 115 Mil. L. Rev. 261, 263–64 (1987).

68. United States v. Swift, 53 M.J. 439, 445 (C.A.A.F. 2000) ("In such an environment, a question from a superior or an investigator is likely to trigger a direct response without any consideration of the privilege against self-incrimination."); *see* State v. Davis, 582 S.E.2d 289, 293 (N.C. App. 2003) ("Concerns about inherent compulsion are ultimately at the heart of *Miranda*. In the military, interrogation by a superior officer raises a substantial risk of inherent compulsion."); Supervielle, *supra* note 11, at 178.

69. *Swift*, 53 M.J. at 445.

in custody or not.[70] This is intentional, as the "legislative history of the UCMJ reveals that rights warnings in the military extended beyond the minimum requirements of the Constitution."[71]

Article 31's scope also extends beyond criminal investigations and into the "disciplinary" realm of military life.[72] Yet given the right against self-incrimination's wide ambit under Article 31(a) and (b), the only delineated cure for improperly compelled confessions is limited to Article 31(d): excluding the confessions from courts-martial.[73] Congressional commentary, however, did not focus on the distinction between fora, but instead elaborated against whom the evidence might be used.[74]

Despite the difference in scope between Article 31 and *Miranda*—as well as the legislative basis of Article 31 versus *Miranda* as a judicial construct—CAAF ruled that the *Miranda* "formulae there laid down by the Court are constitutional in nature" and therefore apply to servicemembers as well.[75] Since then, and throughout their case law, CAAF and the respective military service appellate courts have examined Article 31 protections along with *Miranda*[76] to develop the military standard for when a servicemember waives her distinct Article 31 right.[77] Because the UCMJ text does not espouse a right to counsel during custodial questioning, CAAF's decision to incorporate *Miranda* also requires military interrogators to apply more analysis than originally envisioned by Article 31. Interrogating officials must inform a

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70. *Id.* ("The broad application of the warning requirement under Article 31 to all suspects, not just those who are in custody, and the statutory restriction on admissibility of unwarned statements reflect a decision by the post-World War II Congress.").

71. *See* Supervielle, *supra* note 11, at 183. *But see* Captain Frederic I. Lederer, U.S. Army, *Rights Warnings in the Armed Services*, 72 MIL. L. REV. 1, 7 (1976) ("Although Professor Morgan's notes at Harvard Law School indicate that the actual language of Article 31 was scrutinized rather closely, there is little evidence that all of Article 31(a) and 31(b) was picked with specific ends in mind." (footnotes omitted)).

72. *Swift*, 53 M.J. at 448.

73. 10 U.S.C. § 831(d) (2012).

74. TEXT, REFERENCES, AND COMMENTARY BASED ON THE REPORT OF THE COMMITTEE ON A UNIFORM CODE OF MILITARY JUSTICE TO THE SECRETARY OF DEFENSE 47 (1949) ("Subdivision (d) makes statements or evidence obtained in violation of the first three subdivisions inadmissible only against the person from whom they were obtained. This conforms with the theory that the privilege against self-incrimination and self-degradation is a personal one.").

75. United States v. Tempia, 37 C.M.R. 249, 255 (C.M.A. 1967).

76. Miranda v. Arizona, 384 U.S. 436, 475 (1966) ("If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.").

77. *See, e.g.*, United States v. Serianne, 69 M.J. 8 (C.A.A.F. 2010); United States v. Mapes 59 M.J. 60 (C.A.A.F. 2003); *Swift*, 53 M.J. 439; United States v. Oxfort, 44 M.J. 337 (C.A.A.F 1996); United States v. Medley, 33 M.J. 75 (C.M.A. 1991), *cert. denied*, 503 U.S. 936 (1992); United States v. Sievers, 29 M.J. 72 (C.M.A. 1989); United States v. Heyward, 22 M.J. 35 (C.M.A. 1986); United States v. Villines, 13 M.J. 46 (C.M.A. 1982); *Tempia*, 37 C.M.R. 249; United States v. Bland, 39 M.J. 921 (N-M. Ct. Crim. App. 1994).

servicemember of her Article 31 rights during any criminal questioning, and of *Miranda*'s additional right to counsel if the suspect is in a custodial interrogation.[78]

Article 31 is the sort of legislative action the Supreme Court "encourage[d] Congress and the States to continue" in their "laudable search for" an effective means of balancing the individual's right against efficient criminal enforcement.[79] However, military courts independently appropriated the substantive and procedural requirements of *Miranda* for servicemembers. This approach causes concern because military courts are not a function of the Constitution's judiciary power in Article III, but rather stem from Article I and Congress's power to "make Rules for the Government and Regulation of the land and naval Forces."[80]

Indeed, the Supreme Court has often balked at reviewing military jurisprudence because "the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment [between discipline and servicemembers' rights]. The Framers expressly entrusted that task to Congress."[81] CAAF should be equally hesitant to apply civilian jurisprudence to already legislated issues, and it has itself recognized that none of Article 31's "terms indicate that Congress intended to permit forced self-incrimination in board proceedings any more than in courts-martial."[82] Given the great lengths the judiciary goes to interpret and enact congressional intent,[83] Article I courts should be at least as deferential when interpreting the UCMJ.

B. Applying a Servicemember's Protection Against Self-Incrimination to the Hypothetical Sailor

Under both the Fifth Amendment and Article 31, the hypothetical sailor would almost certainly have a right against making self-incriminating remarks at court-martial. This bright line has been clouded by recent military cases analyzing "chain reaction[s]," where the requirement to report a violation is not precluded merely because it "might come back to bite" the defendant in the investigatory or adjudicatory processes.[84]

78. Lederer, *supra* note 67, at 10.

79. *Miranda*, 384 U.S. at 467.

80. U.S. Const. art. I, § 8; *see* Anna C. Henning, Cong. Research Serv., No. 7-5700, Supreme Court Appellate Jurisdiction over Military Court Cases (2009).

81. Burns v. Wilson, 346 U.S. 137, 140 (1953) (footnote omitted).

82. United States v. Ruiz, 48 C.M.R. 797, 799 (C.M.A. 1974).

83. *See* United States v. Hayes, 555 U.S. 415, 421–22 (2009). *See generally* Yule Kim, Cong. Research Serv., No. 97-589, Statutory Interpretation: General Principles and Recent Trends (2008).

84. United States v. Bland, 39 M.J. 921, 924 (N-M. Ct. Crim. App. 1994) (quoting United States v. Medley, 33 M.J. 75 (C.M.A. 1991), *cert. denied*, 503 U.S. 936 (1992)); *see* United States. v. Serianne, 69 M.J. 8, 11 (C.A.A.F. 2010); *Medley*, 33 M.J. 75; *see also* Rogers v. United States, 340 U.S. 367, 374 (1951) ("Requiring full disclosure of details after a witness freely testifies as to a criminating fact does not rest upon a further 'waiver' of the privilege against self-incrimination.").

However, it is nearly impossible for the hypothetical sailor to meaningfully report or testify about what she knows of fraternization between an officer and an enlisted sailor without implicating herself. Discussing an unduly familiar relationship is also the sort of inculpatory remark envisioned by Article 31, which did away with the convoluted distinction between an "admission" and "confession."[85]

While a servicemember is often obligated to report any violation of the UCMJ,[86] personally participating in the violation has historically precluded the requirement to report the same offense "based on the members' right against self-incrimination embodied in the Fifth Amendment to the Constitution and Article 31."[87] Article 31's protections extend to disciplinary as well as criminal investigations.[88] Accordingly, invoking her Article 31 rights would shield the sailor from implicating herself at court-martial and at any investigation that may lead to a nonjudicial punishment or administrative separation. Courts, however, have tools to compel a witness's testimony, even if the statements are self-incriminating.

III. Testimonial Immunity in *Kastigar* and the UCMJ

A. Development of the Law

Like Article 31's protection against self-incrimination, the UCMJ's codification of testimonial immunity preceded its civilian counterpart by more than a decade.[89] In *Kastigar v. United States*, the Supreme Court held that courts may compel testimony normally protected by the Fifth Amendment so long as the granted immunity is coextensive with the supplanted privilege.[90] And similar to the aftermath of *Miranda* in non-military courts, subsequent military courts incorporated the judiciary's *Kastigar* construction when reviewing the separate, congressional grant of testimonial immunity[91] provided by the UCMJ.[92] A suspect may raise

85. Supervielle, *supra* note 11, at 178.

86. In addition to likely violating a standing order of the command, failure to report a UCMJ violation could at least be punished under Article 134 of the UCMJ, which criminalizes "all disorders and neglects to the prejudice of good order and discipline in the armed forces." 10 U.S.C. § 934 (1956).

87. *Bland*, 39 M.J. at 923; *see* United States v. Thompson, 22 M.J. 40 (C.M.A. 1986); United States v. Heyward, 22 M.J. 35 (C.M.A. 1986), *cert. denied*, 479 U.S. 1011 (1986). *But see* United States v. Sievers, 29 M.J. 72, 73 (C.M.A. 1989).

88. *See supra* notes 69–72.

89. United States v. Kirsch, 35 C.M.R. 56, 68 (C.M.A. 1964).

90. 406 U.S. 441, 462 (1972).

91. United States v. Mapes, 59 M.J. 60, 64 (C.A.A.F. 2003) ("Appellant asserted that the Government used evidence derived from Appellant's immunized statement to prosecute him in violation of the mandate in *Kastigar* and a long line of cases of this Court that apply *Kastigar*." (citations omitted)); United States v. Villines, 13 M.J. 46, 54 (C.M.A. 1982). However, not all of the cautions set forth in *Kastigar* were followed. *See* United States v. Morrissette, 70 M.J. 431, 438–39 (C.A.A.F. 2012); United States v. Bradley, 68 M.J. 279, 281 (C.A.A.F. 2010).

her Fifth Amendment's protection against self-incrimination in "any other proceeding, civil or criminal, formal or informal, where the answers might incriminate [her] in future criminal proceedings,"[93] but the constitutional right itself is violated "only if one has been compelled to be a witness against [herself] in a criminal case."[94]

Consequently, under *Kastigar*, grants of immunity likewise need only extend so far: "The power to compel testimony is limited by the Fifth Amendment, and . . . any grant of immunity must be co-extensive with the privilege."[95] Because the Fifth Amendment and *Miranda* rights are not wholly equivalent to Article 31 rights, the grant of testimonial immunity within the military should not be completely coterminous either. An equivalent grant of testimonial immunity in the armed forces would match Article 31's right against self-incrimination at all times for all people and not be limited to only courts-martials.

By reducing the military's grant of testimonial immunity to civilian *Kastigar* standards, testimony that is both created by congressional statute and protected by broader protections than *Miranda* grants could be used in disciplinary hearings. The use of such statements at nonjudicial punishment may result in a direct loss of pay and retirement benefits, a damaging stigma and exclusion from future employment, as well as a personal record that will not survive review during the current drawdown in forces. These uses of compelled testimony are inconsistent with the broad mandate that a grant of immunity be "coextensive with the privilege."[96]

B. Applying Compelled Testimony to the Hypothetical Sailor

Because the hypothetical sailor has a right against self-incrimination under both the Fifth Amendment and Article 31, she may be compelled to testify only with a grant of immunity coextensive with those privileges. The Supreme Court has held the Fifth Amendment is only violated in criminal trials.[97] CAAF's adoption of *Kastigar* means that a witness immunized from the use of her compelled testimony only in future courts-martial may be consistent with the Supreme Court's ruling, but not the intent of the

92. One particular difference, however, is that testimonial immunity in the military is not granted by the judge, but by the general court-martial convening authority. Manual for Courts-Martial United States, *supra* note 4, at II-6.

93. Lefkowitz v. Turley, 414 U.S. 70, 77 (1973); *see* Minnesota v. Murphy, 465 U.S. 420, 425 (1984).

94. Chavez v. Martinez, 538 U.S. 760, 770 (2003).

95. Pillsbury Co. v. Conboy, 459 U.S. 248, 254 (1983). Justice Marshall's concurrence implies the immunity extends not only to bar use of compelled testimony at later trials. *Id.* at 264 (Marshall, T., concurring) ("I join the Court's decision that a witness who has given immunized testimony may invoke the Fifth Amendment privilege at a later proceeding in response to questions based on his immunized testimony.").

96. *Id.* at 254 (majority opinion).

97. *Chavez*, 538 U.S. at 770.

UCMJ itself. Thus under Article III jurisprudence and the language of the UCMJ,[98] compelled testimony could be admitted in future proceedings such as nonjudicial punishment and administrative separations.

Yet if the sailor was not attached to a vessel she could potentially demand court-martial in lieu of nonjudicial punishment,[99] at which point the testimonial immunity under Article 31 seems to apply again. However, the Supreme Court has held that summary courts-martial do not qualify as "criminal proceedings" within the meaning of the Sixth Amendment,[100] and the least formal court-martial could be similarly beyond the ambit of the Fifth Amendment. If so, testimonial immunity may not shield the sailor from her compelled testimony—even if she demanded a court-martial—because *Miranda* and the Fifth Amendment do not apply in that forum.

But a servicemember's right against self-incrimination is neither simply nor completely enshrined in the Fifth Amendment. As the legislative history behind the UCMJ and Article 31 demonstrate, Congress intended to provide more than the constitutional minimum protection for servicemembers. Under Article 31(a), "the constitutionally based protection against self-incrimination expanded beyond the traditional forums."[101] Given the potential for nonjudicial punishment and administrative separation to result in many of the same deprivations as a criminal conviction, immunities granted to compel evidence against a servicemember's Article 31 rights should apply throughout the military justice system—from courts-martial to nonjudicial punishment.

Lieutenant Brent Filbert advocated for a similar standard for these "quasi-criminal" sanctions following the 1992 cheating scandal at the Naval Academy.[102] Over 120 midshipmen were implicated for cheating on an engineering exam; two dozen of the students were eventually expelled.[103] At least one of the expelled students "was embittered because he and other midshipmen who admitted to investigators that they cheated were recommended for expulsion, while others who lied about their involvement were exonerated."[104] Just as Filbert argued that improperly compelled testimony should be excluded from administrative hearings, so too should testimonial immunity extend to administrative

98. *See* Rosenblatt, *supra* note 49, at 13–16.

99. *See supra* note 40 and accompanying text.

100. Middendorf v. Henry, 425 U.S. 25, 51 (1976).

101. Supervielle, *supra* note 11, at 184 n.141.

102. Lieutenant Brent G. Filbert, U.S. Navy, *Failing the Article 31 UCMJ Test; The Role of the Navy Inspector General in the Investigation of the Naval Academy Cheating Scandal*, 42 NAVAL L. REV. 1, 19 (1995).

103. Paul Valentine, *Two Dozen Expelled in Naval Academy Cheating Scandal*, THE TECH, Apr. 29, 1994, at 2.

104. *Id.*

hearings.[105] "The self-incrimination right and the exclusionary remedy are not separable simply because the government seeks to use the . . . evidence at a disciplinary forum less serious than court-martial."[106] Similarly, the right against self-incrimination and protection against compelled testimony should not be severed because the government seeks to use the evidence outside of a court-martial in a proceeding that has many of the same legal consequences.

IV. Servicemembers' Public Employee Rights Are at Issue Throughout Military Justice

The military's capacity to affect a servicemember's constitutionally protected interests does not begin and end at court-martial; both nonjudicial punishment and administrative separation can deprive a servicemember of liberty and property. Since *Board of Regents of State Colleges v. Roth* was decided in 1972, the Fourteenth Amendment has protected entitlements "that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[107] This begins a two-part analysis: (1) What entitlements rise to the level of a protected property interest, and (2) what process is sufficient to deprive an individual of those interests?[108] Both civilian and military courts have examined what constitutes a servicemember's property interests, but they have not necessarily arrived at the same conclusions.[109]

A. The Full Extent of a Servicemember's Protected Interests Have Not Been Litigated; Thus Article III Jurisprudence Is an Incomplete Standard to Adopt

Property interests may be created and defined by statute,[110] but for a citizen to have a property interest he "must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement

105. Filbert, *supra* note 102, at 28.

106. *Id.*

107. 408 U.S. 564, 577 (1972).

108. Morrisey v. Brewer, 408 U.S. 471, 481 (1972) ("Once it is determined that due process applies, the question remains what process is due.").

109. For instance, in *Seaver v. Commandant, U.S. Disciplinary Barracks, Ft. Leavenworth, Kan.*, the court held that "a substantial question exists whether [the petitioner] has a legally sufficient property interest" in his retirement. 998 F. Supp. 1215, 1220 (D. Kan. 1998). Military courts, however, note that the loss of retirement benefits is often "the single most important sentencing matter to that accused and the sentencing authority," United States v. Griffin, 25 M.J. 423, 424 (C.M.A. 1988), and as such the opportunity to provide a meaningful argument on the results of a sentence on retirement benefits, as well as tailored sentencing instructions on the same matter, are required. *See* United States v. Luster, 55 M.J. 67, 72 (C.A.A.F. 2001); United States v. Greaves, 46 M.J. 133, 139 (C.A.A.F. 1997).

110. *Roth*, 408 U.S. at 577.

to it."[111] Veterans' benefits, as passed by Congress under Title 38 of the U.S. Code, include a variety of programs, such as educational assistance,[112] housing and small business loans,[113] and health care,[114] some of which do not require a servicemember to retire to collect. Civilian courts have examined the relationship between servicemembers and due process largely under these entitlements.[115] Meanwhile, CAAF explored *Roth*'s application to servicemembers' property interests in *United States v. Bulger*.[116] *Bulger* and its progeny focused on the effect of a court-martial sentence on retirement pay and veterans' benefits.[117] Together, these cases and other congressional statutes[118] demonstrate that servicemembers are public employees and entitled to the same constitutional protections as their civilian peers.

In some circumstances, however, servicemembers have stronger property interests than their civilian public employee counterparts. Under *Roth* and the Fourteenth Amendment, citizens often have additional property interests, such as future employment[119] and personal reputation.[120]

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111. *Id.*

112. 38 U.S.C. §§ 3011, 3102, 3221, 3311, 3461, 3511 (2012).

113. *Id.* § 3742.

114. *Id.* § 1711.

115. Edwards v. Shinseki, 582 F.3d 1351, 1355 (D.C. Cir. 2009) ("Although the Supreme Court has declined to address whether due process applies to Veterans' Affairs determinations of an applicant's eligibility for disability benefits we have recently held that the Due Process Clause applies to such proceedings." (citations omitted)). *But see* Seaver v. Commandant, U.S. Disciplinary Barracks, Ft. Leavenworth, Kan., 998 F. Supp. 1215, 1220 (D. Kan. 1998) ("Petitioner was allowed to present such evidence at his court-martial proceedings. To the extent that a dismissal affects retirement benefits including pay, these procedures have been held to satisfy the meaningful-opportunity-to-be-heard concerns of the Due Process Clause.").

116. United States v. Bulger, 41 M.J. 194, 199 (C.M.A. 1994) (Sullivan, C.J., concurring).

117. United States v. Luster, 55 M.J. 67, 71 (C.A.A.F. 2001) ("The clear import of this and related decisions concerning expected retirement pay is that it is a critical matter of which the members should be informed in certain cases before they decide to impose a punitive discharge."); United States v. Greaves, 46 M.J. 133, 139 (C.A.A.F. 1997) ("[I]t is only in a theoretical sense that the effect a punitive discharge has on retirement benefits can be labeled collateral." (quoting United States v. Griffin, 25 M.J. 423, 424 (C.M.A. 1988)); United States v. Sumrall, 45 M.J. 207, 209 (C.A.A.F. 1996) ("In light of the above, the specified issue before us is whether appellant's court-martial denied him his retirement pay and other retirement benefits without due process of law.").

118. The Federal Tort Claims Act specifically envisions servicemembers as government employees by defining "acting within the scope of his office or employment" to mean "acting in the line of duty" for military personnel. 28 U.S.C. § 2671 (2012).

119. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972) ("Only last year, the Court held that this principle 'proscribing summary dismissal from public employment without hearing or inquiry required by due process' applied." (quoting Connell v. Higginbotham, 403 U.S. 207, 208 (1971))).

120. *Id.* at 573 ("For where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." (internal quotation marks omitted)). *But see* Siegert v. Gilley, 500 U.S. 226, 233 (1991) ("Defamation, by itself, is a tort actionable under the laws of most States, but not a constitutional deprivation."); Paul v. Davis, 424 U.S. 693, 701 (1976) ("[T]his line of cases does not establish the proposition that reputation alone, apart from more tangible interests such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." (citations omitted)); Whiting v. Univ. of S.

Similarly, hiring preference for former servicemembers within other federal agencies is guaranteed by law under Title 38 of the U.S. Code.[121]

The consensus among witnesses at a congressional hearing was that an "undesirable discharge" attached a social and economic stigma.[122] In 1977, the Department of Defense changed the name from "undesirable discharge" to "Discharge under Other Than Honorable Conditions."[123] Because most personnel leave the military with Honorable characterizations, even the intermediate General characterization[124] can stigmatize a servicemember,[125] yet administrative separations may recommend the even less favorable discharge: Other Than Honorable. Given that nonjudicial and administrative procedures may inflict the same damage to property interests as criminal proceedings,[126] the minimum due process for non-criminal hearings may not sufficiently protect a servicemember's interests, especially if other formal evidentiary procedures are not present.[127]

B. A Servicemember's Property Rights Are Implicated Throughout the Spectrum of Military Justice

Due process mandates that certain substantive rights—life, liberty, and property—cannot be deprived absent constitutionally adequate procedures.[128] The exact requirements are, in part, determined by the degree of deprivation itself.[129] For termination of a public employee, the minimum is "some opportunity for the employee to present his side of

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Miss., 451 F.3d 339, 347 (5th Cir. 2006) ("To determine if a public employee has been deprived of a protected liberty interest, th[e] court must find that he was either: terminated for a reason which was (i) false, (ii) publicized, and (iii) stigmatizing . . . or denied other employment opportunities as a result.").

121. 38 U.S.C. § 4212 (2012).

122. Lane, *supra* note 38, at 98.

123. Egeland, *supra* note 44, at 191.

124. *See supra* note 43 and accompanying text.

125. Lane, *supra* note 38, at 55.

126. Although dicta in other cases indicates enlisted pay grades could potentially not be a property interest. "Our cases recognize that a benefit is not a protected entitlement if government officials may grant or deny it in their discretion." Town of Castle Rock v. Gonzales, 545 U.S. 748, 756 (2005). Because commanding officers may individually promote junior enlisted personnel to a higher rank under the Command Advancement Program at their discretion, these promotions may not constitute a protected property interest.

127. Custis, *supra* note 39, at 875–86.

128. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985).

129. Gilbert v. Homar, 520 U.S. 924, 932 (1997) ("In determining what process is due, account must be taken of 'the *length*' and '*finality* of the deprivation.'" (citations omitted)); Fed. Deposit Ins. Corp. v. Mallen, 486 U.S. 230, 242 (1988) ("In determining how long a delay is justified in affording a post-suspension hearing and decision, it is appropriate to examine the importance of the private interest and the harm to this interest occasioned by the delay; the justification for the delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken.").

the case"[130] and a preliminary hearing to balance the "private interest in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination."[131] Administrative separations, when properly conducted, provide the servicemember an opportunity to present a defense and the requisite preliminary hearing.[132] CAAF invoked *Roth* to hold that a court-martial fulfills a servicemember's due process requirements when the trial denies him his retirement pay and benefits as a consequence of being separated, even if these deprivations were not explicitly part of the sentence.[133]

While administrative separation and nonjudicial punishment results are appealable, the decisions are not reviewed by a court of law despite their capacity to deny liberty and property interests.[134] This process exists notwithstanding some scholars' belief that no one "reasonably advocates that judges should run the Army, but judges should recognize and decide cases involving those few protectable and necessary interests the solder has: his pay, his employment, and his retirement."[135] Where property and liberty interests can be impinged upon without the benefit of rules of evidence or appeal to a court of law, there should be greater procedural protection, not less. Accordingly, testimonial immunity should extend from courts-martial to disciplinary hearings, such as nonjudicial punishment and administrative separations.

C. Applying Property Interest Analysis to the Hypothetical Sailor

Determinations of guilt in nonjudicial punishments are recorded in a servicemember's personal evaluation. Such records are often reviewed by promotion boards and when deciding a servicemember's next assignment. In some jurisdictions, the negative record could impinge upon a servicemember's property interests simply by being published and thereby imposing a stigma.[136] In those jurisdictions, such intrusions are entitled to a

130. *Loudermill*, 470 U.S. at 543.

131. *Id.* at 542–43; *see* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

132. Franke, *supra* note 2, at 19–20.

133. United States v. Sumrall, 45 M.J. 207, 209 (C.A.A.F. 1996).

134. Perhaps because a "federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." Bishop v. Wood, 425 U.S. 341, 349 (1976). Results of nonjudicial punishments may be appealed to the commanding officer's superior. Manual for Courts-Martial United States, *supra* note 4, at V-8. The findings of an administrative separation board are not final themselves but must be approved. Military Personnel Manual, NAVPERS 15560D, 1910-600: Forwarding Cases to the Separation Authority (Sept. 2, 2009).

135. Captain Arthur Haessig, U.S. Army, *The Soldier's Right to Administrative Due Process: The Right to Be Heard*, 63 Mil. L. Rev. 1, 40 (1974).

136. In applying a Washington law, the court found "a personnel document is a public record, subject to disclosure, if it relates to the conduct of government and to the performance of governmental functions." Cox v. Roskelley, 359 F.3d 1105, 1112 (9th Cir. 2004).

name-clearing hearing.[137] Similarly, because administrative separations can result in a discharge from military service and the potential loss of both veterans' benefits and retirement pay, servicemembers are entitled to a preliminary hearing and an opportunity to present a defense. Nonjudicial punishment and administrative separations, in isolation, fulfill these requirements.

In the previously discussed hypothetical, the convening authority compels the sailor to testify at a court-martial about her unduly familiar relationship with an officer. Her testimony, while inadmissible at a court-martial against her, could potentially be used as evidence in both nonjudicial punishment and administrative separation hearings. As a result, the government is able to compel a witness to testify against herself and, by eschewing a formal court-martial, impose many of the same deleterious effects. By directly applying Article III developments in constitutional law but ignoring the congressional intent of the UCMJ itself, military justice enables the government to compel a witness to testify in a court-martial and still face the possibility of losing her protected property interests in her public employment, veterans' benefits, potential retirement pay, and reputation.

Whereas the Supreme Court has said the "option to lose their means of livelihood or pay the penalty of self-incrimination" is tantamount to coercion,[138] here the accused is made to self-incriminate *and* potentially lose her livelihood. This is a potential consequence of military courts viewing testimonial immunity and *Roth* due process as distinct spheres with no overlap. However, the hypothetical demonstrates that both legal concepts pervade military justice. It is the cumulative effect of military justice procedures, and not just individual hearings, that the military should consider when interpreting the UCMJ and adapting civilian common law.

CONCLUSION

In the absence of any other instruction, military justice's adoption of Supreme Court jurisprudence would not only be natural but perhaps required. Indeed, where military rules of evidence are similar to those generally recognized by civilian courts, adoption of readily available precedent has reduced interpretive difficulties.[139] But examining administrative separations and nonjudicial punishment as purely disciplinary hearings and therefore unconnected to a servicemember's rights at court-martial ignores the panoply of forms military justice adopts.

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137. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 573 (1972); *Cox*, 359 F.3d at 1110.

138. Garrity v. New Jersey, 385 U.S. 493, 497 (1967).

139. First Lieutenant Robert D. Duke, U.S. Army, *Aspects of the Military Law of Confessions*, 8 VAND. L. REV. 19, 19 (1954).

Because discipline is effected through a variety of mechanisms that possess similar potential to deprive property and liberty rights, congressionally legislated protections should extend throughout the military justice machine. And where congressional intent is clear and not unconstitutional, military justice should enforce the standards set forth by the legislature, made in accordance with Congress' constitutional grant "To make Rules for the Government and Regulation of the land and naval Forces."[140]

While in theory administrative separation and nonjudicial punishment meet the thresholds of due process, CAAF's current incorporation of *Miranda* and *Kastigar* could permit the use of compelled testimony in these less formal fora of military justice. For the servicemember, this potentially results in a loss in paygrade, wages, employment, reputation, and benefits that normally accompanies a conviction by court-martial. Although the current policy's cost to the servicemember is significant, expanding testimonial immunity to encompass nonjudicial punishment and administrative separation is unlikely to burden the government. This is because testimonial immunity can only be granted by a general court-martial convening authority. Both the Article 32 investigation[141] and pre-trial discovery necessary for a general court-martial will likely produce other and significant inculpatory evidence against the declarant. Moreover, in most military jurisdictions culpability at a disciplinary hearing is determined by a preponderance of the evidence and the formal military rules of evidence do not apply. The proposed change only precludes the government from using compelled testimony against the declarant at her own disciplinary hearing; it does not heighten the evidentiary standard or preclude the other inculpatory evidence discovered through pretrial discovery.

Given the deleterious consequences exposure to nonjudicial punishments and administrative separations has for a servicemember, especially in the ongoing drawdown, procedural protections should clarify and strengthen servicemembers' UCMJ as well as Fifth and Fourteenth Amendment rights. The Supreme Court has expressly allowed for such accommodations, as "[w]e have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history."[142] In practice, extending testimonial immunity throughout the military justice system would likely have little impact on existing nonjudicial punishment and administrative separation procedures. Failing to do so, however, violates fundamental notions of fairness and blurs the constitutional separation of powers.

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140. U.S. CONST. art. I, § 8.

141. "No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made." 10 U.S.C. § 832 (1996).

142. Parker v. Levy, 417 U.S. 733, 743 (1974).