



The DoD Times (Redacted)



Circumventing Due Process – Administrative Punishment		
Punishment / Impact	Service Member at Risk?	
	Court Martial / Nonjudicial Punishment	Administrative Punishment
Loss of VA benefits	YES	YES
Loss of employment opportunities	YES	YES
Loss of GI bill	YES	YES
Loss of security clearance	YES	YES
Limited access to VA healthcare	YES	YES
Forfeiture of death benefits	YES	YES

The Ramifications of Both Systems can be Severe

Service Members: “My Right to a Court-Martial Can’t Be Denied!” – Their Military Commander: “Hold My Beer...”

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We often hear from the currently serving and former uniformed service members that the best way to bypass the chicanery of the DoD and Coast Guard’s opaque and unjust administrative punishment (punitive and non-punitive) system is to refuse the punishment and invoke their right to a trial by court-martial. Baldly stated, these people are incorrect. These (unfortunately) naive souls refer to a very real right available to service members to refuse nonjudicial punishment (not the same as administrative punishment) and *demand* (emphasis added—more on that later) a trial by court-martial in its stead.

Before continuing, I must offer several points of clarification. In the DoD and the Coast Guard, there are three ways to punish service members for alleged misconduct.

- 1) [Administrative Punishment](#): All authorities reside with a commander and/or responsible administrative officials. He/she is the judge and jury ([trier of fact](#)), prosecutor (determines [scope of investigation / charges](#)), the police (investigator) through a command-appointed investigating officer that they select or through evidence [gathered on their behalf](#) by service-specific criminal investigative services, and the senior reviewing official on the performance evaluation of the Judge Advocates General who determine [legal sufficiency](#). There are no [Rules of Evidence](#), meaning the accused has no legal right to review and/or cross-exam the evidence used against them and the deciding authority is not compelled to consider the evidence the accused presents. Further, it is not an [Adversarial System](#), meaning that the legal counsel of the accused, if retained, has little to zero leverage in the proceedings. Through administrative punishment, commanders



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can—most egregiously—[involuntarily administratively separate](#) a service member with up to an [Other Than Honorable](#) discharge, ultimately decided upon by a Board of Inquiry (BOI) for officers or an Administrative Separation Board (AdSep Board) for enlisted. Thus, administrative punishment involves [long-term loss of property](#).

- 2) [Nonjudicial Punishment](#): All authorities reside with a commander and all information outlined in section 1) remains the same. Two key differences between administrative punishment and nonjudicial punishment (NJP) are that the punishments available to commanders during NJP include [immediate loss of liberty and property](#), including restriction and/or confinement (loss of liberty) and/or forfeiture of pay (loss of property), and there exists a right to demand a trial by court-martial ([see bottom of page V-3](#)). Key language—to this newsletter—in the Manual for Courts-Martial (MCM) includes, “It is within the discretion of the commander whether to forward or refer charges for trial by court-martial...”
- 3) [Court-Martial](#): All authorities reside with a judge and/or a jury, and—for the first time—[Rules of Evidence](#) and an [Adversarial System](#) exist. This means that the accused has a legal right to review and cross-examine evidence, and that legal counsel has legally mandated leverage in the proceedings; [Procedural Law](#) applies. However, the punishments available during a court-martial are the most extreme, up to an including conviction of federal crimes and confinement in a federal penitentiary.

Looking for more information? Here you go:

Feature	Administrative Punishment	NJP (Article 15, Captains Mast, Office Hours)	Court-Martial
Legal Basis	Military regulations	UCMJ	UCMJ, various Articles
Purpose	Discipline for misconduct /poor performance	Punishment for minor offenses	Punishment for serious criminal offenses
Authority	Various administrative officials	Commanding Officer	Military judge and panel (jury)
Punishments	Reprimands, counseling, adverse evals, separation	Rank reduction, extra duties, restriction, pay forfeiture	Confinement, dishonorable discharge, forfeiture of all pay, rank reduction, hard labor
Right to Refuse?	No	Yes (except when at sea)	No
Right to Attorney?	No	No (but can consult one)	Yes, full legal representation
Burden of Proof	N/A (not a judicial process)	Preponderance of evidence	Beyond a reasonable doubt
Right to Cross-Examine?	No	Limited (no formal trial)	Yes, full trial rights
Appeals?	Sometimes, but often discretionary	Yes, limited	Yes, through military appellate courts

Let’s revisit the key language from the Manual for Courts-Martial:

“It is within the discretion of the commander whether to forward or refer charges for trial by court-martial...”

Yes, a service member may demand a court-martial, but a commander can deny that demand. This leads to the real “Hold my beer” moment:



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Since NJP cannot proceed if a service member demands a court-martial ([see bottom of page V-3](#)), the commander is left with two options:

1. Drop the matter entirely, or
2. Pursue administrative punishment instead.

Which option do you think is more commonly chosen? Spoiler: It's option #2.

So now, the service member who stood up for his/her rights (see [6th Amendment of the U.S. Constitution](#)), demanded due process ([Procedural Law](#)), and refused NJP is funneled back into administrative punishment—where they have the least rights but still face career-ending consequences.

Insane.

We know [courts-martial](#) are not a perfect system, but they are not the [Star Chamber](#) that is the administrative system.

How does this all happen? Let's discuss.

The Mechanism: When allegations are levied against a servicemember (often anonymously), commanders convene a Preliminary Inquiry (PI) or Command Investigation (CI). These are usually led by a commissioned officer under the advice of a Judge Advocate General (JAG). Commissioned officers are [not trained in conducting unbiased inquiries or investigations](#) yet are tasked with this massive responsibility as a collateral duty. As a result, many investigations lead to punitive recommendations based on conjecture, rumors, and unfounded allegations—regurgitated in an echo chamber and presented as “Findings of Fact.”

In a genuine desire to reinforce good order and discipline, many commanders often feel obliged to convene nonjudicial Punishment. However, Undue Command Influence (UCI) is inherently baked into this decision, as every commander knows that his or her superior officer is closely watching.

Since most cases do not involve actual crimes, the DoD knows a court-martial is untenable, so administrative punishment becomes the preferred weapon.

The Problems:

- The grounds for NJP and administrative punishment are broad in nature and susceptible to abuse, all in the name of good order and discipline.
- Commanders are advised, likely by their JAG, not to meet with the accused to gain additional perspective. Oftentimes, the accused is not provided with specific allegations until they are already facing NJP and/or until they receive administrative punishment. As a result, bias is usually deeply ingrained by the time NJP is decided upon.
- The accused is sidelined on "administrative hold" while awaiting the completion of the investigation. They are prohibited from promoting, transferring, or even separating from active-duty service. In other words, they are treated as “guilty until proven innocent.”
- The accused is provided with military counsel, who may or may not have experience in litigation. While they are allowed to retain civilian counsel, they cannot seek public assistance to fund such expenses. This automatically places the service member at a gross disadvantage in their defense.



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- Every servicemember knows they have the right to refuse NJP, but they are culturally indoctrinated to “do the honorable thing” and accept it. They are almost always advised to [trust the process](#).
- A commander only needs a “preponderance of evidence” (50.1%) to believe an offense was committed to find the accused guilty. This is a significantly lower standard compared to a court-martial, where “proof beyond a reasonable doubt” is required. While NJP derives its authority from the rule of law, its standards and burden of proof are far less stringent. As a result, evidence that would never be admissible in a court of law is often considered.
- If NJP is convened and the accused is found guilty, the next step is an administrative [Board of Inquiry](#) (BOI) for officers or an [Administrative Separation Board](#) (AdSep Board) for enlisted to determine if the service member is fit to continue active-duty service.
- If NJP is refused, as is the service member’s right, the BOI / AdSep Board is almost universally convened anyway. In other words, unless a commander dismisses NJP altogether, the Administrative Board will convene either way.
- While the Administrative Board is presented as “non-punitive” and administrative in nature, it has the authority to mandate separation from active-duty service with an [Other Than Honorable](#) discharge and even recommend a pay-grade reduction in retirement (e.g., demotion).
- With even lower evidentiary standards on these boards, service members face lifelong consequences that are often grossly disproportionate to the perceived offense.

Looking for more information? Here you go:

Feature	Board of Inquiry (BOI)	Administrative Separation Board (AdSep Board)
Applies to	Officers	Enlisted personnel
Purpose	Determines if an officer should be retained or separated from service	Determines if an enlisted member should be retained or separated from service
Burden of Proof	Preponderance of Evidence (More likely than not)	Preponderance of Evidence (More likely than not)
Legal Representation	Officers are entitled to legal representation	Enlisted personnel are entitled to legal representation
Possible Outcomes	Retention, Honorable Discharge, General (Under Honorable Conditions) Discharge, Other Than Honorable (OTH) Discharge	Retention, Honorable Discharge, General (Under Honorable Conditions) Discharge, Other Than Honorable (OTH) Discharge
Composition of Board	Senior officers (typically O-5/O-6)	Senior enlisted personnel and officers
Consequence of Negative Finding	Possible loss of retirement, loss of career, reputational damage	Loss of military career, potential impact on veteran benefits (GI Bill, VA benefits, etc.)

The Consequences: This is an emotionally crippling and cruel process to subject honorable service members to, especially for our junior Sailors, Soldiers, and Airmen, who neither have the means to hire adequate defense counsel nor the experience and knowledge to stand up to an abuse of authority.

Allegations made by individuals who weaponize this process for selfish or vindictive reasons can ruin lives. When service members lose trust in their leadership to adjudicate fairly and objectively—but are denied the right to



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demand a court-martial, where higher evidentiary standards apply—they ultimately lose every time. Beyond the injustice this system perpetuates, we know that [suicidal ideations increase among those who face such a leviathan](#).

Despite this knowledge, most senior leaders refuse to criticize the process. On the contrary, they often vehemently defend it.

Presumably, to criticize it would be to criticize the institution itself, which they represent.

While the Uniform Code of Military Justice (UCMJ) and its associated administrative processes were designed with good intentions, they have grown bureaucratic tentacles that make them ripe for abuse. Even well-intentioned senior

officers, who recognize the faults of the system, stand idly by and watch the injustice unfold while continually advising subordinates to “trust the process,” per legal advice from their Senior Judge Advocates.

As officers, we swear an oath to the Constitution of the United States. When we witness injustice, it is our moral obligation to expose it and demand reform. Those entrusted to our care deserve nothing less.

Legislative and Policy Implications: The current system of military administrative punishment and separation creates significant risks of injustice, career destruction, and the erosion of trust in leadership. Without proper safeguards, service members can be deprived of due process, face life-altering consequences based on weak or unverified evidence and be forced into separation proceedings without the protections afforded in a court-martial. Congress and oversight bodies must act to address these deficiencies and restore fairness, transparency, and accountability within the military justice system.

Potential Legislative Reforms

- 1) Strengthening Due Process Protections in Administrative Proceedings
 - a. Require the application of fundamental due process rights in administrative punishment and separation proceedings, including:
 - i. The right to review and challenge evidence that is used against the accused.
 - ii. The right to cross-examine witnesses, ensuring that decisions are not based solely on hearsay or unverified accusations.
 - iii. The right to legal representation with actual leverage in the process, not merely a passive advisory role.
 - b. Implement Rules of Evidence like those in courts-martial for cases where career-ending consequences are at stake.
 - c. Restrict Administrative Boards from wielding punitive authorities.
 - d. Mandate that service members are “innocent until proven guilty.” As such, cancel the current practice of placing them on administrative hold. Previously earned promotions should be honored with a presumption of innocence, until and unless someone is determined to be guilty of an offense that might warrant demotion.
- 2) Closing the Loophole That Allows Shifting from NJP/Court-Martial to Administrative Punishment
 - a. Mandate that once NJP or court-martial proceedings are initiated, commanders cannot revert to administrative punishment.



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- i. This prevents the current tactic where commanders deny a service member's demand for a court-martial and instead force them into administrative separation, where fewer legal protections exist.
 - b. Establish an independent review board to assess whether an alleged offense warrants NJP, administrative separation, or court-martial before a commander initiates administrative proceedings.
 - c. Require documented justification when a commander opts for administrative separation after an NJP refusal, ensuring accountability and preventing punitive backdoor separations.
- 3) Requiring More Oversight in Separation Proceedings
- a. Increase congressional oversight of separation boards to ensure greater transparency and consistency in decision-making.
 - b. Require third-party legal review panels (outside the chain of command) to evaluate cases where an Other Than Honorable (OTH) discharge is recommended.
 - c. Implement an automatic appeal process for service members separated under questionable circumstances, preventing unjust career-ending decisions from going unchallenged.
 - d. Mandate reporting requirements on the use of administrative separations following NJP refusals to identify and prevent patterns of abuse.

We must encourage leaders to lead again. They must stop outsourcing decision-making to “the process” or deferring to legal advice, which seeks to reduce legal risk to zero yet inevitably escalates what should be a common-sense decision into a miscarriage of justice. There is a good reason why JAGs are not given command of operational or training units. Current practices have subverted the spirit of command.

Congress and military oversight bodies have a moral and legal obligation to address the systemic flaws in military administrative punishment and separation processes. By implementing stronger due process protections, closing legal loopholes, and requiring greater oversight, we can restore fairness, accountability, and trust in the military justice system. Service members who dedicate their lives to defending our Constitution deserve nothing less than the same protection it guarantees.

Send this newsletter to your elected officials if you believe they need to correct the issues discussed.

- Find your Representative here: <https://www.house.gov/representatives/find-your-representative>
- Find your Senator here: <https://www.senate.gov/senators/senators-contact.htm>

Feel free to reach out privately at francescagraham@walkthetalkfoundation.org or in the comments.

PETITIONS: [SIGN THIS PETITION](#) demanding that our leaders in Congress change the DoD’s unjust administrative investigatory system.

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