Making Little Rocks Out of Big Rocks: Implementing Sentences to Hard Labor Without Confinement

Breakin' rocks in the hot sun; I fought the law and the law won.[1]

Major Joseph B. Berger III[2]

Unfortunately, there is a widely-held misconception in the Army that hard labor, a form of punishment under the Uniform Code of Military Justice (UCMJ),[3] is "dead."[4] By definition, labor is a physical or mental exertion.[5] A sentence to hard labor without confinement "must amount to punishment; otherwise it is not only irregular but of no effect."[6] Commanders who require convicted Soldiers to perform only routine extra duty tasks when executing a sentence of hard labor without confinement execute a sentence that is of no effect. Commanders and judge advocates (JAs) may make this mistake if they believe they cannot require Soldiers sentenced to hard labor without confinement to do anything that even approximates historical notions of *making little rocks out of big rocks*.[7] Commanders, however, are not as restricted as they or their JAs may believe.[8] Although arduous physical labor remains legally permissible, lack of consistency in its application threatens its viability.

---

[1] THE BOBBY FULLER FOUR, *I Fought the Law,* on I FOUGHT THE LAW (Del-Fi Records 1966). The Bobby Fuller Four formed in El Paso, Texas, home to Fort Bliss, in the early 1960s where they performed for a number of years before moving to California. Tom Simon Home Page, *The Bobby Fuller Four*, *at* http://www.tsimon.com/fuller.htm (last visited Sept. 20, 2003).

[2] Currently assigned as the Regimental Judge Advocate, 160th Special Operations Aviation Regiment (Airborne), U.S. Army Special Operations Command, Fort Campbell, Kentucky. This article was written while assigned as the Chief, Military Justice, U.S. Army Air Defense Artillery Center and Fort Bliss, Fort Bliss, Texas.

[3] UCMJ art. 15 (2002) (permitting commanders to impose extra duty as punishment for up to forty-five days, depending on the rank of the officer imposing the punishment). *See also* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE tbl. 3-1 (6 Sept. 2002) [hereinafter AR 27-10]. Extra duty is generally defined by customs of the service. MANUAL FOR COURTS MARTIAL, UNITED STATES, pt. V, ¶ 5c(6) (2002) [hereinafter MCM]. Extra duty routinely includes such tasks as grass mowing, general cleaning (*i.e.*, headquarters buildings where there is a lack of junior enlisted Soldiers assigned or working), conducting police calls around unit areas, or general area beautification or maintenance of roads or housing areas sponsored by the assigned unit. The *MCM* provides some general guidance on what constitutes extra duty, defining "extra duties" as the following:

> [T]he performance of duties in addition to those normally assigned to the person undergoing the punishment. Extra duties may include fatigue duties. Military duties of any kind may be assigned as extra duty. However, no extra duty may be imposed which constitutes a known safety or health hazard to the member or which constitutes cruel or unusual punishment or which is not sanctioned by customs of the service concerned. Extra duties assigned as punishment of noncommissioned officers, petty officers, or any other enlisted persons of equivalent grades or positions designated by the Secretary concerned, should not be of a kind which demeans their grade or position.

Id. *Army Regulation 27-10* provides examples of prohibited extra duties, but does *not* provide examples of what is permissible. It prohibits using the offender as a personal servant, assigning him duty intended as an honor, requiring him to perform any duty in a ridiculous or unnecessarily degrading manner (*e.g.*, cleaning a barracks floor with a toothbrush), requiring him to perform any duty that constitutes a safety or health hazard to the offender or that would demean the Soldier's position as a noncommissioned officer or specialist. AR 27-10, *supra*, para. 3-19.

[4] Some commanders and senior noncommissioned officers (NCOs) feel that hard labor is missing the arduous element that distinguishes it from the non-physically taxing extra duty (*i.e.*, unit police call) routinely adjudged under non-judicial punishment. Interview with Command Sergeant Major (CSM) Clifford T. West, CSM, U.S. Army Sergeants Major Academy, Fort Bliss, Texas (Dec. 23, 2002) [hereinafter West Interview].

[5] WEBSTER'S II NEW COLLEGE DICTIONARY 613 (1995) [hereinafter WEBSTER'S]. *Webster's* further defines "hard labor" as "compulsory physical labor assigned to criminals as part of a prison term." *Id*. at 505. *See also* BLACK'S LAW DICTIONARY 717 (6th ed. 1990). Current military dictionaries do not define hard labor. *See generally* JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS (14 Aug. 2002); U.S. DEP'T OF ARMY, REG. 310-25, DICTIONARY OF UNITED STATES ARMY TERMS (21 May 1986); U.S. DEP'T OF NAVY, MARINE CORPS REFERENCE PUB. 5-12C, MARINE CORPS SUPPLEMENT TO THE DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS (29 July 1998).

[6] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 400 (1st ed. 1886).

[7] The misperceptions conveyed in comments by commanders to the author following cases where hard labor without confinement was adjudged are reinforced by experiences such as a panel returning from deliberations to request the military judge define "hard labor without confinement" and its limitations.

[8] This disturbing misperception among trial counsel is reflected by the virtually identical reaction of multiple trial counsel and chiefs of justice from separate general courts-martial (GCM) convening authority jurisdictions, each of whom was specific and adamant in that they would "never" put any guidance "in writing," including e-mail, to commanders on how to execute a sentence to hard labor without confinement. This comment is based on the author's recent professional experiences and correspondence with various trial counsel and chiefs of justice.

This article provides guidance on how to impose sentences to hard labor without confinement based on the applicable law, and contains recent lessons learned drawn largely from one special court-martial convening authority's jurisdiction.[9] Additionally, this article examines the lack of concrete guidance for executing sentences to hard labor without confinement and proposes changes to the *Manual for Courts-Martial* (MCM),[10] *Army Regulation* (AR) *27-10*,[11] and the Military Judges' Benchbook.[12] The article then provides JAs and the commanders they support an analytical framework for executing sentences to hard labor without confinement.

History of Hard Labor

Historically, the public "believes, in theory at least, that prisoners should work—and work hard."[13] The question has long been whether to make prisoners work for rehabilitative purposes, economic production, or punishment.[14] Hard labor as a component of criminal punishment finds its roots in 16th century England.[15] In 1557, London's municipal government "opened an old royal palace as a house of correction."[16] The hope was that by providing convicts "useful labor," they would be rehabilitated into "productive workers rather than idlers."[17]

By the mid to late 1800s, however, prisoners were generally not employed in useful labor. A number of "nonproductive labor devices were employed in some institutions to carry out the sentence to hard labor. These devices included carrying cannon ball to and fro, the treadwheel,[18] and the crank."[19] Obviously, these served no productive end, but filled the need for "hard and servile labor."[20] Ultimately, England's Prisons Act of 1898 abolished the treadwheel and the crank from the prisons.[21]

Early American military writings reinforce the legitimacy of hard labor as a form of punishment, but provide little insight into the specifics of form or duration. In 1886, influenced largely by the Armies' experiences in the Civil War, Colonel (COL) William Winthrop wrote "confinement at *hard labor* is executed . . . by employing the prisoners in road-making, bridging, erecting or repairing fortifications or quarters, gardening, woodcutting, and policing, &c."[22] Colonel

---

[9] The jurisdiction in reference is the 11th Air Defense Artillery (ADA) Brigade, 32d Army Air and Missile Defense Command, Fort Bliss, Texas. *See* FORT BLISS REG. 27-10, MILITARY JUSTICE para. 3-2a(2) (13 Feb. 2003) [hereinafter FB 27-10] (establishing the Commander, 11th ADA Brigade as a special court-martial convening authority).

[10] *See supra* note 3.

[11] *Id.*

[12] U.S. DEP'T OF THE ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK 62.1 (1 Apr. 2001) (C2, 1 July 2003) [hereinafter BENCHBOOK].

[13] HARRY ELMER BARNES & NEGLEY K. TETTERS, NEW HORIZONS IN CRIMINOLOGY 717 (2d ed. 1951).

[14] *Id.*

[15] David McCord, *Imagining a Retributivist Alternative to Capital Punishment*, 50 FLA. L. REV. 1, 83 (1998).

[16] *Id.* at 84 (quoting ADAM J. HIRSCH, THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA (1992)).

[17] *Id.*

[18] The treadwheel,

> as invented by the engineer, Sir William Cubbit, consisted of twenty-four steps, fixed lengthwise, like the floats of a paddlewheel, to a wooden cylinder sixteen feet in circumference, the steps being eight inches apart. The wheel made two revolutions per minute and there was a mechanical contrivance by which, at the end of each thirtieth revolution, a bell rang; the twelve men at the wheel then stepped off and were replaced by twelve more . . . . Sometimes these treadwheels did accomplish something such as grinding corn or pumping water; more often they did nothing.

BARNES & TETTERS, *supra* note 13, at 719.

[19] Invented in 1846, the crank

> consisted of a crank attached to a narrow iron drum placed on the legs. In the interior of the drum, a series of revolving cups scooped up a thick layer of sand at the bottom, carried it to the top and emptied it, to be again caught up by the revolving cups. On this machine a dial plate was fixed, which registered the number of revolutions made.

JOHN LEWIS GILLIN, CRIMINOLOGY AND PENOLOGY 401 (3d ed. 1945).

[20] FRANK TANNENBAUM, CRIME AND THE COMMUNITY 364 (1938).

[21] *Id.*

[22] WINTHROP, *supra* note 6, at 425.

Winthrop went on to describe "hard labor" as "a distinct punishment," which "in some instances, [has] been adjudged alone—*i.e.*, unaccompanied, in the sentence, by confinement."[23] Colonel Winthrop described tasks which are productive forms of labor but offered no opinion as to whether or not the punishment must, or even should, be productive labor.[24] Furthermore, COL Winthrop did not address whether hard labor completed is to time or to task. He described tasks, such as "road-making," which are ongoing tasks whose completion would likely take longer than the entire duration of all but the most severe sentence of any individual Soldier.

During the Civil War, "sentences simply of 'hard labor,' or of 'hard labor at the public works,' or of certain particular labor or labor on particular works—such as fortifications, bridges, roads, &c. (sic), or in breaking stone—unconnected in the sentence with confinement, were not unfrequently [sic] imposed."[25] Reported sentences from the Civil War include one prisoner sentenced to "serve at hard labor for a certain term 'with an iron collar around his neck weighing eight pounds,'" and another sentenced to hard labor "chained to a wheelbarrow."[26] Again, there is no historical requirement that this labor be productive labor and the Civil War demonstrates the historical acceptability of unproductive, and thus purely punitive labor, by making a distinction between 'hard labor' and 'hard labor at the public works.'

In an effort to draw a distinction between permissible and prohibited punishments, COL Winthrop defined cruel and unusual punishments prohibited by the Eighth Amendment as "such punishments as are corporal in their nature, namely such as impose restraint or suffering upon the body."[27] He went on to define "cruel" as punishment which is "harsh and severe, and even in a degree unmerited, without being cruel; and perhaps a satisfactory explanation of the term as can readily be given would be a punishment which inflicted an amount of bodily (or mental) suffering or injury out of all reasonable proportion to the full demands of justice."[28] When addressing what was "cruel and unusual" and thus prohibited, COL Winthrop wrote, "the law doubtless had in view the punishments involving needless agony."[29]

The two reported Civil War punishments of the iron collar and the wheelbarrow would be legally impermissible today. What was legally permissible, however, was arduous, physical labor that, although it may have caused some physical suffering or pain, was commensurate with the full demands of justice. While he was careful to define constitutionally prohibited punishments, COL Winthrop emphasized that a "sentence to hard labor [at confinement] is not legally executed by putting the prisoners at *light* work."[30] The need to have a consistent program for executing sentences of hard labor has not changed in 130 years; consistency is the critical component of any successful contemporary plan for executing sentences to hard labor without confinement.

The Civil War era provides additional usable guidance for today's military on the permissible duration of hard labor tasks. Specifically, the "provision of the Act of June 25, 1868, known as the 'eight hour law,' [did] not apply to prisoners employed at hard labor under sentence of court-martial."[31] During this time, sentences to confinement at hard labor were executed at the U.S. Disciplinary Barracks, Fort Leavenworth, by "means of the 'labor and trades' prescribed for the prisoners by Sec. 1351, Rev. Sts., and the manufacturing of supplies for the army."[32] While confinees were clearly used as a workforce, their hours were specifically exempted from labor regulation. This nonexistent restraint on the duration of hard

---

[23] *Id*. at 421. As with all individual Soldier tasks, some degree of noncommissioned officer supervision is required. That supervision, however direct, does not amount to confinement. *See generally* U.S. DEP'T OF ARMY, FIELD MANUAL 22-100, ARMY LEADERSHIP (31 Aug. 1999). *See also* West Interview, *supra* note 4.

[24] WEBSTER'S, *supra* note 5, at 939 (defining "productive" as "constructive; of or involved in the creation of goods and services to produce wealth or value").

[25] WINTHROP, *supra* note 6, at 421 (citing Department of the Missouri, Gen. Order No. 11 (1862)).

[26] *Id*. (citing Gen. Order (unnumbered) (31 Oct. 1820)).

[27] *Id*. at 398.

[28] *Id.*

[29] *Id*. at 399. Nowhere is productivity a requisite component nor does the nonproductive nature of the work required make the work *per se* "cruel and unusual punishment" or otherwise prohibited. *See* Gregg v. Georgia, 428 U.S. 153, 173-74 (1976) (outlining two aspects of "excessiveness" for Eighth Amendment constitutional analysis purposes); *see also* State v. Lobato, 603 So.2d 739, 751 (1992) (defining a sentence as excessive only if, when considered in light of the harm done to society, it "shocks the sense of justice"). *But see* Weems v. United States, 217 U.S. 349, 378 (1910) (defining cruel and unusual punishment as a progressive concept which acquires meaning as the public becomes enlightened). *See also* McLamore v. South Carolina, 409 U.S. 934, 935-36 (1972) (citing Weems' progressive definition of cruel and unusual punishment); *Gregg*, 428 U.S. at 171 (noting the Eighth "Amendment has been interpreted in a flexible and dynamic manner").

[30] WINTHROP, *supra* note 6, at 425.

[31] *Id.* (citing Gen. Order No. 71, Dep't of the South (1869)).

[32] *Id.*

labor remains a critical distinction between hard labor and extra duty and, like its historical counterpart of hard labor at confinement, is essential to making hard labor without confinement an effective contemporary punishment.[33]

The final critical historical point goes directly to the nature of punishment, which the spectrum of historical documents unfortunately fails, individually or collectively, to specifically define. Discussing punishments generally, and using confinement to bread and water as the specific example, COL Winthrop explains that although such punishments are "infrequently imposed," they are "not 'unusual' since they are still sanctioned by usage and not prohibited by law."[34] President Lincoln's Attorney General, Edward Bates commented that punishments "contrary to the usage of the service would….be forbidden by law."[35] Attorney General Bates went on to note that customs of the service have "sanctioned… imprisonment with or without hard labor."[36] It is therefore critical that the current customs of the service[37] continue to sanction hard labor. Failure to do so could lead to a future loss of the effectiveness of this unique tool in a commander's disciplinary toolbox.

Hierarchy of Punishments

The general nature of what the *MCM* allows and the specific parameters of each service's implementing regulations are critical to defining the specifics of each type of judicial and nonjudicial punishment, including hard labor without confinement. For example, while the UCMJ still allows commanders to impose confinement on bread and water or diminished rations for up to three consecutive days,[38] implementing service regulations greatly restrict upon whom and when the command can impose that punishment.[39] The relevant customs of the respective service shape this interplay. These customs define, at least partially, the limits of each level of available punishment.

Rule for Courts-Martial (RCM) 1003(b) establishes the hierarchy of court-martial punishments.[40] Although RCM 1003(b) fails to state that the punishments are listed in order of increasing severity, this fact is intuitively obvious; the first punishment listed, RCM 1003(b)(1), is a reprimand and the last, RCM 1003(b)(9), is death.[41] The *MCM* also contains the hierarchy of nonjudicial punishment.[42] The *MCM* empowers the concerned Service Secretary to limit the power granted by Article 15 "with respect to the kind and amount of the punishment authorized."[43] The least severe forms of punishment are

---

[33] *See generally* Interview with Private (E1) James T. Bruce, Headquarters and Headquarters Battery, 3-2 Air Defense Artillery (ADA) Battalion, 35th ADA Brigade, Fort Bliss, Tex. (Oct. 18, 2002) [hereinafter Bruce Interview]. Then-Staff Sergeant (SSG) James T. Bruce was convicted at a general court-martial (GCM) of taking indecent liberties with another. The military judge sentenced him to reduction to the grade of Private (E1), sixty day's restriction, and sixty day's hard labor without confinement. As a result of the bar to reenlistment stemming from his court-martial charges, PVT Bruce was discharged upon the expiration of his term of service (ETS) prior to completing his sentence to hard labor without confinement. Private Bruce specifically commented that "extra duty personnel have a set task—when they finish, they're done. I have a set time; it doesn't matter how fast or slow I go, I just have to keep working. The time is the worst thing about [hard labor]." *Id*.

[34] WINTHROP, *supra* note 6, at 398. The UCMJ still allows commanders to impose confinement on bread and water or diminished rations for up to three consecutive days. *See infra* note 38.

[35] *Id*. at 399.

[36] *Id*.

[37] Customs of the service are "sometimes called common law of the Army" and signify "generally a right or law not written, but established by long usage." JASON A. MOSS, OFFICER'S MANUAL 227 (1917). A custom's validity is established by a number of factors, including: (1) habitual or long-established practice; (2) continuance without interruption; (3) continuance without dispute; (4) reasonableness; (5) certainty; (6) compulsoriness; (7) inherent consistency between customs. *Id*.

[38] UCMJ art. 15(b)(2)(A) (2002); *see also* U.S. DEP'T OF NAVY, JAG INSTR. 5800.7C, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN) (3 Oct. 1990) [hereinafter JAGMAN] (allowing confinement on bread and water or diminished rations); U.S. DEP'T OF NAVY, SEC. OF THE NAVY, INSTR. 1640.9B, U.S. DEP'T OF NAVY CORRECTIONS MANUAL (2 Dec. 1996) [hereinafter SECNAVINST 1640.9B] (providing implementation instructions on executing sentences to bread and water/diminished rations). The option of punishment of confinement on bread and water or diminished rations imposable by court-martial was deleted in 1995. MCM, *supra* note 3, app. 21 (analysis of RCM 1003).

[39] *See, e.g.*, SECNAVINST 1640.9B, *supra* note 38 (limiting imposition of diminished rations upon only enlisted persons in the grade of E3 or below who are attached to or embarked in a vessel).

[40] *See* MCM, *supra* note 3, R.C.M. 1301(d)(1) (placing further limits on those punishments under RCM 1003(b) which can be adjudged by a summary court-martial).

[41] *See* BENCHBOOK, *supra* note 12, instr. 2-5-24 (requiring the military judge, in pertinent part, to instruct the panel members to vote on "each proposed sentence, in its entirety, beginning with the lightest"). Based on that instruction, the court provides the members a worksheet that lists, in order from least to most severe, the possible punishments. MCM, *supra* note 3, app. 11, Forms of Sentences (sample worksheet; providing another tool for evaluating the relative severity of the various forms of punishment).

[42] MCM, *supra* note 3, pt. V, ¶ 5b. *See also* AR 27-10, *supra* note 3, para. 3-19b.

[43] MCM, *supra* note 3, pt. V, ¶ 5a.

those that do not involve a deprivation of liberty. They include reprimands, forfeitures, fines, and reductions in pay grade.[44] Those punishments involving physical labor, a discharge, confinement, or death are more increasingly severe.[45]

Within the hierarchy of punishment, certain punishments overlap and are available under both courts-martial and nonjudicial punishment.[46] For example, an enlisted Soldier may be reduced at a court-martial and as punishment under Article 15. Yet, while a court-martial can reduce the enlisted Soldier to the lowest enlisted grade regardless of current rank, the imposing commander's authority under Article 15 may be far more limited.[47] Depending on the commander's rank and the rank of the Soldier being punished, the commander may be empowered to only reduce the Soldier one grade.[48]

Unlike fiscal punishments, physical punishments[49] at court-martial have little overlap with nonjudicial punishment. The maximum allowable punishments under Article 15 are less onerous than those allowable at court-martial.[50] Physical punishments appear to be no exception. Hard labor without confinement is an allowable punishment at a court-martial, but not under Article 15.[51] Extra duty is specifically allowed under Article 15, but not as punishment at court-martial.[52]

Within those punishments, however, overlap occurs with fatigue duty. Correctional custody, a permissible punishment under Article 15, may include "extra duties, fatigue duties, or hard labor as an incident of correctional custody."[53] Extra duties, a separate and distinct punishment under Article 15, "may include fatigue duties."[54] Unfortunately, like hard labor, neither the *MCM* nor *AR 27-10* provide any guidance as to what constitutes "fatigue duty." Webster defines "fatigue" as "physical or mental weariness due to exertion; exhausting effort or activity; manual or menial labor, as barracks cleaning, assigned to enlisted military personnel."[55] Historically, fatigue duty included:

> [A]ll the irregular work that the Soldier is called upon to perform from time to time. In the fields, working upon roads, building field works, rifle pits, &c. (*sic*), making or removing obstructions, duty or forage parties, and, in fact, all the duties where men are required, without arms, for short periods. In the barracks or quarters, there are many duties that call for details for fatigue, such as loading or unloading of stores, the removal of stores from one place to another, digging of graves for deceased Soldiers or officers, labor on the grounds, works, or buildings of the post, &c (*sic*).[56]

This definition of "fatigue duty" includes tasks that might otherwise be considered "hard labor." Therefore, absent a sentence to correctional custody, fatigue duties imposed under Article 15 can amount to hard labor without confinement.

Hard Labor and the Law

"The problem . . . is that that 'hard labor' as envisioned . . . by the early military writers, is no longer being performed . . . . ."[57] Since the establishment of the UCMJ, at least one court has recognized that when executed, the "labor required of present-day prisoners [sentenced to hard labor] is often no more strenuous than the cutting of grass or leaf raking."[58]

---

[44] *Id.* R.C.M. 1003(b)(1)-(4).

[45] Appendix A of this article illustrates the spectrum of available punishments under the UCMJ.

[46] *See* app. B, fig. 1 (containing a Venn diagram of this concept).

[47] *See* AR 27-10, *supra* note 3, para. 3-19b(6) (providing specific guidance).

[48] For example a company/battery commander (in the grade of O-3) can only reduce an E-4 (specialist) one grade, to E-3 (private first class). *Id.* tbl. 3-1.

[49] Physical punishments are defined here as those punishments that involve physical labor.

[50] *See* app. B, fig. 2 (providing a Venn diagram of this concept).

[51] MCM, *supra* note 3, R.C.M. 1003(b)(6). Hard labor is permissible under Article 15, UCMJ, but only as an incident of correctional custody. *Id.* pt. V, ¶ 5c(4).

[52] *Id*. pt. V, ¶ 5b(2)(A)(v) and (2)(B)(v). Extra duty is also allowed incident to a sentence to correctional custody. *Id.* ¶ 5b(2)(B)(ii).

[53] *Id.* pt. V, ¶ 5c(4).

[54] *Id.* ¶ 5c(6).

[55] WEBSTER'S, *supra* note 5, at 467.

[56] U.S. WAR DEPARTMENT, REVISED U.S. ARMY REGULATIONS OF 1861 (C1, 25 June 1863).

[57] United States v. Palmiter, 20 M.J. 90, 94 (1985).

Evolving customs of the service, which are potentially disparate, conflicting, and inconsistent,[59] threaten to eviscerate both the unique deterrent and punitive value of traditional hard labor.[60] Judge advocates must assist commanders in understanding the legality of aggressively pursuing appropriately arduous and punitive "hard labor" in order to maintain a custom of the service that accurately defines the punitive nature of hard labor.

Hard labor, with or without confinement,[61] was established as a permissible punishment in the U.S. Army nearly 200 years ago.[62] Hard labor, with or without confinement, is a constitutionally permissible punishment.[63] Hard labor has since appeared as a lawful form of punishment in every version of the *MCM* from 1917 to the present edition.[64] Hard labor has also been included as a lawful punishment in the UCMJ since its enactment in 1950.[65] Despite its lengthy legal history, there was surprisingly little initial and virtually no subsequent guidance as to what actually constitutes permissible hard labor.

The 1951 *MCM* contains the most detailed definition of hard labor available. While it gives no description of what specific tasks might satisfy sentences of confinement at hard labor, it does state that hard labor without confinement:

> may be adjudged only in the cases of enlisted persons. Hard labor without confinement, adjudged as punishment by courts-martial, shall be performed in addition to other duties which fall on the enlisted person; and no enlisted person shall be excused or relieved from any military duty for the purpose of performing such hard labor. A sentence imposing hard labor without confinement shall be considered satisfied when the enlisted person shall have performed hard labor during available time in addition to performing his military duties. Normally, the immediate commanding officer of the accused will designate the amount and character of the labor to be performed. The daily performance of the designated hard labor before or after routine duties are completed satisfies the sentence whether the particular daily assignment requires one, two, or more hours. Upon completion of the daily assignment, the accused should be permitted to take leave or liberty to which he is properly entitled.[66]

This description also appears virtually unchanged in the 1969 *MCM*.[67] The paragraph is inexplicably omitted, however, from post-1969 editions of the *MCM*.[68]

---

[58] United States v. Bruce, 17 M.J. 1083, 1085 (A.F.C.M.R. 1984).

[59] The concern is both intra and interservice disparities and inconsistencies.

[60] "Traditional hard labor," is defined as that which involves physical or mental exertion demanding great effort or endurance. *See infra* pp. 2-4 (History of Hard Labor).

[61] Confinement at hard labor as an enumerated punishment was deleted from the *MCM* in 1984 in an effort to promote uniformity in the wording of adjudged sentences. The authority executing the sentence still held the power to require hard labor; the words "hard labor" were not required in the sentence to confinement. MCM, *supra* note 3, R.C.M. 1003(b)(8) (1984).

[62] *See* An Act for Establishing Rules and Articles for the Government of the Armies of the United States, Ch. 20, 2 Stat. 359, art. 66-67 (1806).

[63] United States v. Weems, 217 U.S. 349 (1909); *see also* Kerr v. Puckett, 138 F.3d 321 (7th Cir. 1998).

[64] *See* UCMJ art. 58(b) (2002).

[65] *See id.* arts. 18, 20 (1951) (current version at arts. 19 and 20 (2002)); MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶¶ 26c(1), (2) and 126j, k (1951) [hereinafter 1951 MCM]. The original drafters of the UCMJ specifically commented, "The accused is not to be excused from his assigned duties so that he may perform hard labor, the very purpose of the sentence being to exact work of a laborious nature from him during such time as may be available after he has completed his other tasks." HISTORY, PREPARATION AND PROCESSING, MANUAL FOR COURTS-MARTIAL, UNITED STATES 186 (Colonel Charles E. Decker ed., 1951). The drafters provide no description, however, of what specific types of activities constitute hard labor.

[66] 1951 MCM, *supra* note 65, ¶ 126k.

[67] Paragraph 126k of the 1969 *MCM* states:

> Hard labor without confinement will not be adjudged in excess of three months. A summary court-martial will not adjudge hard labor without confinement in excess of 45 days. It may be adjudged only in the cases of enlisted members. Hard labor without confinement, adjudged as punishment by courts-martial, shall be performed in addition to other duties which fall to the enlisted person; and no enlisted member shall be excused or relieved from any military duty for the purpose of performing it. A sentence imposing hard labor without confinement shall be considered satisfied when the enlisted member shall have performed hard labor during available time in addition to performing his military duties. Normally, the immediate commanding officer of the accused will designate the amount and character of the labor to be performed. The daily performance of the designated hard labor before or after routine duties are completed satisfies the sentence whether the particular daily assignment requires one, two, or more hours. Upon completion of the daily assignment, the accused should be permitted to take leave or liberty to which he is properly entitled.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 126k (1969) (rev.).

[68] It appears that the drafters removed the discussion when the *RCM* were added in 1984. The provision, however, can arguably be considered incorporated into the current *MCM*. The availability of hard labor without confinement was not removed as a possible punishment, nor was it limited or changed in any way in the more recent versions of the *MCM*. *See generally* MCM, *supra* note 3, R.C.M. 1003(b)(6) (containing a far less detailed discussion of hard labor).

This earlier guidance establishes the following: (1) The accused is *not* to be excused or relieved from *any* military duty to serve his sentence; (2) hard labor shall be performed *in addition to* other duties; (3) hard labor will be performed *before or after* routine duties; (4) there is no daily time limit on the amount of hard labor to be performed. This early guidance provides a baseline for analysis.

The current Discussion to RCM 1003(b)(6) lacks the more complete guidance of the earlier descriptions. It states the following:

> Hard labor without confinement is performed in addition to other regular duties and does not excuse or relieve a person from performing regular duties. Ordinarily, the immediate commander of the accused will designate the amount and character of the labor to be performed. Upon completion of the daily assignment, the accused shall be permitted to take leave or liberty to which entitled.[69]

The discussion empowers the accused's immediate commander to determine the "character of the labor to be performed."[70] The discussion also implies the accused must perform hard labor on a daily basis.[71] The discussion, however, lacks guidance as to the intensity, time (duration), and type of punishment the commander should or even may impose.[72]

As noted earlier, a sentence "must amount to punishment; otherwise it is not only irregular but of no effect."[73] Like the *MCM*, the legislative history lacks specific guidance on implementation. In the only recorded congressional discussion of hard labor, three congressmen and COL Dinsmore, the Army representative on the committee, said:

> *Mr. Gavin*: "Hard labor without confinement in excess of 45 days," what do you mean by hard labor?
> *Mr. Larkin*: Hard labor I think generally is construed to mean work while in confinement.
> *Mr. Gavin*: Well, what kinds of work?
> *Mr. Larkin*: What kind of work is performed usually, Colonel, do you know?
> *Colonel Dinsmore*: Trimming lawns, picking up garbage, digging ditches maybe—
> *Mr. Rivers*: Captain of the head.
> *Colonel Dinsmore*: Improving the roads around posts, general police work—just the ordinary run of housekeeping, Mr. Gavin.
> *Mr. Gavin*: What about this rock-pile business with a certain cadence; that is, a certain number of blows per minute, and so forth?
> *Colonel Dinsmore*: Never heard of it, sir. I know as a matter of general information that that has been used by the civil authorities sometimes. I do not say that we have not done it. I know of no case where we have.[74]

This brief exchange arguably left the members of Congress with the misconception that hard labor, with the possible exception of the reference to ditch digging, is little more than what is today considered extra duty.[75] The "ordinary run of housekeeping" tasks COL Dinsmore described in 1949 are a far cry from arduous, physical labor. Ditch digging is hard labor. At a minimum, COL Dinsmore's testimony shows that hard labor—ditch digging and possibly rock breaking—was still the custom of the service in the Army as late as the early 1950s.[76]

Over time, the non-physically taxing nature of the specific tasks commanders ordered as "hard labor" has diminished the punishment's intended punitive impact. This has not gone unnoticed. In 1971, a committee appointed by then Chief of Staff of the Army General William C. Westmoreland to study the effectiveness of the administration of military justice noted, "The

---

[69] *Id.* R.C.M. 1003(b)(6) discussion. The commander, as the leave and pass approval authority, determines, in an administrative capacity, to what leave or liberty a Soldier is entitled. *See generally* U.S. DEP'T OF ARMY, REG. 600-8-10, LEAVES AND PASSES (31 July 2003) [hereinafter AR 600-8-10]

[70] MCM, *supra* note 3, R.C.M. 1003(b)(6) discussion. Hard labor without confinement becomes an accused's place of duty for at least some portion of the duty day. It is the immediate commander who decides what that duty of hard labor without confinement entails.

[71] *See id*.

[72] *Id. See also* U.S. DEP'T OF DEFENSE, DIR. 1325.4, CONFINEMENT OF MILITARY PRISONERS AND ADMINISTRATION OF MILITARY CORRECTIONAL PROGRAMS AND FACILITIES (17 Aug. 2001) (containing no discussion of hard labor); AR 27-10, *supra* note 3 (lacking guidance on hard labor).

[73] WINTHROP, *supra* note 6, at 400.

[74] H.R. REP. NO. 491, 81st Cong., 1st Sess. 1 (1949), *reprinted in* 1 INDEX AND LEGISLATIVE HISTORY TO THE UNIFORM CODE OF MILITARY JUSTICE, 1950, at 440 (1985).

[75] There is nothing in the congressional record to support or refute the notion that rock-breaking was so customary a punishment that its existence could be assumed.

[76] *See generally* H.R. REP. NO. 491.

'hard labor' portion of the sentence to confinement at hard labor is meaningless as far as stockade prisoners are concerned. The performance of meaningful hard labor in post stockades would have the distinctively desirable effect of making the prisoner remember his time spent in the stockade and instilling in him a strong desire never to return."[77] The committee recommended that "consideration be given to requiring meaningful hard labor in Army stockades for those persons sentenced to confinement at hard labor."[78] Unfortunately, the committee failed to both describe the specific nature of the problem and include any written recommendations in their report.

The failure of both the *MCM* and *AR 27-10* to delineate specific tasks permissible under a sentence to hard labor without confinement potentially makes determination of a sentence unnecessarily difficult for both members and military judges. Colonel Winthrop noted that "[h]ard labor, being a severe penalty, must be expressed in terms in the sentence, or it cannot be administered."[79] While this counters the current guidance that the immediate commander determines the nature of the punishment, it reinforces the punishment's uniqueness and the need for clear guidance for its lawful and effective implementation.[80]

> The military judge gives panel members the following guidance about hard labor:
> This court may sentence the accused to hard labor without confinement for a maximum period not exceeding three months. Such hard labor would be performed in addition to other military duties which would normally be assigned. In the usual course of business, the immediate commanding officer assigns the amount and character of the hard labor to be performed.[81]

Beyond the critical language describing hard labor as "in addition to other military duties which would normally be assigned," the instruction lacks specific guidance for the accused's immediate commander to follow.[82]

Correctional Custody Units/Facilities (CCU/CCF) provide illustrative guidance for crafting a workable definition for the *MCM* and *AR 27-10*. A workable definition is the foundation for a clear sentencing instruction. One of the most severe forms of nonjudicial punishment, the CCU/CCF serves to punish minor offenses without stigmatizing the offender with a court-martial conviction.[83] The U.S. Marine Corps' (USMC) Camp Lejeune CCU's mission is to "correct the attitudes and motivate awardees through hard work, intensive training, and positive leadership, thereby enabling them to return to their units and perform duties in an honorable and dependable manner."[84] While the Department of the Army (DA) authorizes confinement at a CCU/CCF in *AR 27-10*,[85] due to a lack of operational CCU/CCF's, some installations have withheld the authority to impose correctional custody as nonjudicial punishment.[86]

The CCUs put "awardees"[87] to work at hard labor.[88] U.S. Marine Corps policy states that awardees will, as a minimum, "be gainfully employed at least seven hours per day, five days per week, to include Sundays and holidays." [89] For example, at the USMC's Camp Lejune CCU, awardees perform forty hours of hard labor a week.[90] Hard labor at the Camp Lejune

---

[77] MAJOR GENERAL S. H. MATHESON, CHAIRMAN, REPORT TO GENERAL WILLIAM C. WESTMORELAND, CHIEF OF STAFF, U.S. ARMY, BY THE COMMITTEE FOR EVALUATION OF THE EFFECTIVENESS OF THE ADMINISTRATION OF MILITARY JUSTICE 53-54 (1971).

[78] *Id.* at 59.

[79] WINTHROP, *supra* note 6.

[80] MCM, *supra* note 3, R.C.M. 1003(b)(7) (2002) (stating, in pertinent part, "The court-martial shall not specify the hard labor to be performed").

[81] BENCHBOOK, *supra* note 12, at 62.1.

[82] The Discussion to RCM 1003(b)(7), contains no guidance provided for Soldiers sentenced to confinement at hard labor. MCM, *supra* note 3, R.C.M. 1003(b)(7).

[83] Command briefing, Correctional Custody Unit, Stone Bay Rifle Range, Camp Lejune, NC, slide 5 (2002) [hereinafter CCU Briefing].

[84] *Id*. at slide 4.

[85] AR 27-10, *supra* note 3, para. 3-19b(1).

[86] *See, e.g.*, FB 27-10, *supra* note 9, para. 2-3 (prohibiting correctional custody as a punishment). *But see* FORT CAMPBELL REG. 190-6, FORT CAMPBELL CORRECTIONAL CUSTODY FACILITY (4 Sept. 2001). The Fort Campbell CCF was reestablished by then-Installation and Division CSM Clifford West for the purpose of rehabilitating select Soldiers. *See* West Interview, *supra* note 4.

[87] Confinees at the CCUs are referred to as "awardees." Telephone Interview with Marine Corps Chief Warrant Officer Two (CW2) Martin Herman, Officer-in-Charge, Camp Lejune Correctional Custody Unit, Camp Lejune, North Carolina (Dec. 17, 2002) [hereinafter Herman Interview].

[88] U.S. MARINE CORPS, ORDER P1640.4C, CORRECTIONAL CUSTODY MANUAL 1-3 (9 Mar. 1999) [hereinafter MCO P1640.4C].

[89] *Id*. at 5-6.

[90] CCU Briefing, *supra* note 83, at slide 13.

CCU includes work at the "rock pile."[91] At the "rock pile," awardees literally break big rocks into little rocks.[92] The USMC then uses those rocks for area beautification, such as building and replacing walkways.[93] The CCU leadership takes a proactive approach towards potential overuse of the rock pile. They limit awardee labor on the rock pile to one day per week as a matter of policy.[94] In addition to the rock pile, CCU awardees are routinely required to perform other obviously physical tasks, including filling sandbags, maintaining the installation's large number of nature trails, and conducting general area beautification.[95]

While the CCU leadership avoids mass punishment, the awardees are required to perform a "hell of a lot of" physical training (PT).[96] This is considered part of the week's worth of hard labor, which would seem to blur the line between punishment and training.[97] The stated goal is to have every awardee meet his respective services' physical fitness test requirements. Thus, the underlying purpose is rehabilitative, not punitive.[98] As part of the PT program, awardees routinely participate in "log drills."[99] Log drill exercises use fourteen to eighteen foot long telephone poles that are six to eight inches in diameter and weigh between 300 - 400 pounds, with approximately fifty pounds of weight per awardee.[100] There are only six authorized log drill exercises, including the two-arm push-up, the straddle jump, and the forward bender.[101] While the Navy's Safety Center warns that log drills are inherently dangerous and that failure to adhere to the proper procedures can result in serious injury or death, they remain a part of the CCU awardees' rigorous PT program. Although the CCU example provides a useful illustration of potentially permissible forms of hard labor, the *MCM* explicitly prohibits the court from specifying the hard labor to be performed.[102] This makes it incumbent upon JAs to convey these standards to supported commanders.

Military courts have rarely addressed what constitutes permissible hard labor.[103] The Court of Military Appeals (COMA)[104] first discussed the 1949 congressional language[105] in *United States v. Bayhand*.[106] In determining the legality of certain orders, the court briefly discussed the punishment the accused refused to perform, the misconduct that gave rise to the charged offenses. The court described the labor the accused was ordered to perform as including working "with picks and shovels; . . . chang[ing] the course of an old ditch; the nature of the work requir[ing him] to stand in mud and water which reached half way up on [his] boots."[107] The second work detail the court described involved "a regular work detail in the rock quarry . . . [where] the work was such that it reasonably could be considered as hard labor. The noncommissioned

---

[91] *Id*. at slide 17.

[92] Herman Interview, *supra* note 87.

[93] *Id*.

[94] This policy arises from the fact that hard labor is not a specifically authorized nonjudicial punishment, but is instead incident to confinement at a CCU. Additionally, the CCU's mission is rehabilitative, not punitive. *See supra* note 83. *See also* UCMJ art. 15 (2002), MCO P1640.4C, *supra* note 88.

[95] Herman Interview, *supra* note 87. Much of the area beautification is identical to traditional Army concepts of extra duty. *See supra* note 3.

[96] Herman Interview, *supra* note 87.

[97] *Id.*

[98] *Id*. The CCU at Camp Lejune, at the time of the interview, had awardees from the Navy, Air Force, and Marine Corps.

[99] Naval Safety Center, High Risk Training Division, *Log Drills*, *available at* http://www.safetycenter.navy.mil/ashore/highrisktraining/downloads/logdrills.doc (last visited Dec. 15, 2004).

[100] *Id*.

[101] U.S. DEP'T OF THE NAVY, U.S. MARINE CORPS, FLEET MARINE FORCE REFERENCE PUB. 0-1B, MCRP 3-02A, MARINE PHYSICAL READINESS TRAINING FOR COMBAT 3-30 (20 Jan. 1998).

[102] Rules for Court-Martial 1003(b)(7) states, in pertinent part, that "[t]he court-martial shall not specify the hard labor to be performed." MCM, *supra* note 3, R.C.M. 1003(b)(7). This provision directly contravenes Colonel Winthrop's early admonition that the terms of hard labor must be expressed in the sentence itself for it to be properly administered. *See* WINTHROP, *supra* note 6, at 421.

[103] In response to a request for clarification from a panel, one military judge defined hard labor as "fatigue drills" to include "filling, emptying, and refilling sandbags." E-mail from CPT Brian Battles, Chief of Justice, Office of the Staff Judge Advocate, Fort Jackson, S.C., to the author (12 Dec. 2002) (on file with author).

[104] In 1994, the COMA was renamed the Court of Appeals for the Armed Forces (CAAF).

[105] *See supra* note 79.

[106] United States v. Bayhand, 21 C.M.R. 84, 89 (C.M.A. 1956).

[107] *Id*. at 87.

officer in charge ordered the accused to carry heavy rocks to a rockpile and assist in the loading of a wheelbarrow."[108] The court did not discuss the appropriateness or inappropriateness of this punishment in the opinion. The court found the orders illegal because Bayhand was in pretrial confinement, not yet having been sentenced, and, "[t]o permit military authorities to commingle sentenced and unsentenced prisoners, and deal with them equally, would indeed require an unsentenced prisoner to serve a sentence before conviction."[109] The court did not comment on the lawfulness of the underlying tasks the sentenced Soldiers were being required to perform.

In *United States v. Palmiter*, the court again incidentally addressed the issue of hard labor while analyzing whether a violation of Article 13, UCMJ, had occurred.[110] The court commented that "[t]he problem . . . is that the 'hard labor' as envisioned by Congress in 1949 and by the early military writers, is no longer being performed . . . ."[111] The court went on to quote the congressional committee's specific discussion of "rock breaking," but does not elaborate further as to the permissible scope of the sentence itself.[112]

Guidance for Implementation – Developing a FITT Plan?

The physical nature of hard labor without confinement allows commanders to employ the same principles used to establish a balanced PT program when they determine the nature and scope of tasks to be performed as part of a sentence to hard labor.[113] The commander must consider four elements, called the "FITT factors," when developing a PT program: frequency, intensity, time, and type (FITT).[114] These factors are readily applicable to developing a plan for executing a sentence to hard labor without confinement. Instead of frequency of exercise, frequency is how often (*e.g.*, daily, weekly) the convicted Soldier performs hard labor. Intensity is used to measure whether that Soldier is truly working or simply loafing. The third factor, duration, is the number of hours of each day's labor. Finally, the type of exercise performed becomes the type of physical task assigned (*i.e.*, filling sandbags, moving rocks, digging foxholes).[115] As with any training event, a risk assessment must precede execution of the punishment.[116]

Executing a FITT Plan

Hard labor must be a daily requirement for the duration of the sentence. For example, a convicted Soldier sentenced to ninety days of hard labor without confinement, who begins execution of that portion of his sentence on 15 July, should perform hard labor every day until the end of the day on 13 September of that same year. Commanders should grant breaks in confinement sparingly.[117]

Determining the appropriate intensity of the punishment is the most difficult component. Early physical mechanisms provided an objective metric for assessing how "hard" someone was working.[118] Objective measurements for the given task, clearly articulated in advance, are the simplest metric.[119] Such metrics include having the accused fill a specific number of

---

[108] *Id.* at 765.

[109] *Id.* at 771.

[110] United States v. Palmiter, 20 M.J. 90 (1985).

[111] *Id*. at 94. The *Palmiter* court commented on the historical notions of hard labor incident to a discussion of whether or not commingling pretrial and sentenced confinees for a labor pool amounted to a violation of Article 13, UCMJ. *Id.* at 93-95.

[112] *Id*. at 94 (citations omitted).

[113] U.S. DEP'T OF ARMY, FIELD MANUAL 21-20, PHYSICAL FITNESS TRAINING paras. 1-4 through 1-7 (1 Oct. 1998).

[114] *Id.*

[115] These tasks should never be of the same type of labor done by Soldiers during the duty day. E-mail from COL (Ret.) Peter Brownback, former military judge, to author (19 Jan. 2003) (on file with author) [hereinafter Brownback E-mail]. Colonel Brownback served as a military judge for a number of years. *See also* AR 27-10, *supra* note 3 (defining certain restrictions on nonjudicially imposed extra duty).

[116] *See generally* U.S. ARMY SAFETY CENTER, LEADER'S GUIDE TO FORCE PROTECTION THROUGH RISK MANAGEMENT (1 Oct. 1995).

[117] U.S. DEP'T OF ARMY, REG. 633-30, MILITARY SENTENCES TO CONFINEMENT paras. 2b and 5b (28 Feb. 1989) defines "inoperative time" and identifies when events interrupt the execution of a sentence to hard labor without confinement. Despite the regulation's applicability to sentences to confinement, which, by definition, do not include hard labor without confinement, the regulation provides specific guidance on hard labor without confinement on the issue of inoperative time.

[118] *See supra* note 21.

[119] The challenge for the commander is to make the metric relative to the individual Soldier's physical and mental capabilities and stamina, while ensuring it remains sufficiently arduous.

sandbags within a given time period (*e.g.*, twenty sandbags per hour) or producing a certain poundage or volume of crushed rock for area beautification (*i.e.*, four wheelbarrows full per day). While the type of punishment will dictate the metric used to gauge intensity, a proper risk assessment will ensure a balance between the arduous nature of the punishment, its punitive effect, its productive value, and mitigation of the probability of injury.

Time is measured by the duration (*e.g.*, hours) the Soldier is required to work each day. The eight-hour workday rule does not apply.[120] The absence of a *per se* limitation on the length of the workday strengthens the argument that it is within the commander's discretionary authority to make a convicted Soldier's primary place of duty execution his sentence. Thus, as a practical matter, the length of each day's punishment may vary from convicted Soldier to convicted Soldier; the length of a given convicted Soldier's duty day will depend on whether the command intends to initiate administrative separation proceedings.[121] It logically follows that those Soldiers being retained on active duty continue their "normal" duties and perform hard labor in addition to those military occupational specialty (MOS)-specific duties. Conversely, those Soldiers being separated need not maintain MOS proficiency and can focus on the performance of hard labor to the exclusion of what would, absent the conviction and sentence, be their "normal" duties.

First, Soldiers serving a sentence of hard labor without confinement do so only as a result of a court-martial conviction, and these sentences were historically accompanied by a reduction in grade.[122] Anecdotal evidence indicates this is still true. By virtue of the conviction and the reduction, if any, the convicted Soldier's "normally assigned duties" necessarily change.[123] Other possible reasons for a change in duties include that the Soldier may have lost his security clearance and with it his MOS qualifications.[124] The change in duties for a Soldier in a leadership position prior to his conviction will be even greater. Loss of confidence in a Soldier's leadership abilities due to misconduct all but guarantees removal of that convicted Soldier from the leadership position and an accompanying change in that Soldier's normally assigned duties.[125]

Second, it is more likely than not that a Soldier convicted at court-martial and sentenced to hard labor without confinement will not be retained on active duty after punishment is complete.[126] The command's desire to administratively separate or, in the rare case, retain the Soldier should also help define the length of each day's execution of the punishment. The duties normally assigned to a Soldier reduced in rank or being administratively separated from the Army, or both, should not be the same as for a Soldier being rehabilitated and retained.[127]

In any unit, a Soldier's immediate commander defines that Soldier's duties. This fundamental precept of military organizations does not change for Soldiers convicted at a court-martial; a convicted Soldier's immediate commander defines that convicted Soldier's duties. The convicted Soldier's duties will almost always change from what they were pre-conviction. In some cases, a conviction mandates a much narrower scope of unit duties, however, it is still the commander who defines those duties. If the Soldier is being administratively separated from the Army, the commander must be

---

[120] *See supra* note 35.

[121] At least one senior current military judge disagrees with this premise, asserting that neither factor should impact the length of each day's punishment. This is based on the belief that, as a legal matter, commanders are not empowered to make execution of the sentence to hard labor without confinement the convicted Soldier's primary place of duty. E-mail from COL Ted Dixon, Chief Circuit Judge, Fourth Judicial Circuit (May 3, 2004) (on file with author) [hereinafter COL Dixon E-mail]. Explicitly delineating the ability to make sentence execution the Soldier's primary place of duty would mitigate this concern.

[122] The court-martial sentence of an enlisted Soldier in a pay grade above E1 to hard labor without confinement automatically reduces that Soldier to the grade of E1. UCMJ art. 58a (2002). *But see* AR 27-10, *supra* note 3, para. 5-28e, prohibiting such automatic reductions in the Army and limiting them to cases in which a punitive discharge or greater than six months confinement were adjudged.

[123] For example, a SSG (E6), reduced to Private (E1), and sentenced to ninety days of hard labor is not going to be performing the normally assigned duties of an E6, which would likely include squad or section leader or tank commander. While the execution of the hard labor cannot begin until the convening authority takes action, the reduction in grade takes effect fourteen days after the sentence is adjudged. UCMJ art. 57. The Discussion to RCM 1113(a) lists the exceptions of those sentences which may be carried out prior to their being ordered executed by the convening authority; hard labor without confinement is not an enumerated exception. MCM, *supra* note 3, R.C.M. 1113(a) discussion.

[124] *See generally* U.S. DEP'T OF ARMY, REG. 380-67, PERSONNEL SECURITY PROGRAM (9 Sept. 1988). *See also* U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (15 July 2004). For example, Soldiers in the ADA military occupational specialties (14-series) require a security clearance, as do Signal Corps Soldiers (31-series), and Military Intelligence Soldiers (96, 97, and 98-series).

[125] *See generally* U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 2-17 (13 May 2002). In all likelihood, this change of duty positions will have occurred prior to the court-martial. The conviction makes restoration to the prior leadership position highly unlikely.

[126] Of the thirty-five summary courts-martial referenced in note 14, *supra,* thirty-four of the thirty-five Soldiers were administratively separated from the Army. The majority of these offenses were Article 112a, UCMJ offenses, and all most all of them were personal use of controlled substances.

[127] West Interview, *supra* note 4.

empowered to make that Soldier's primary duty the execution of his sentence to hard labor.[128] The specific prohibition against this was deleted nearly twenty years ago.[129] Furthermore, the limited discussion in the *MCM* of this topic focuses on not allowing a Soldier to use performance of hard labor to "get out" of other regular duties—that is to say, *if* there are other duties, they must be performed *in addition to* the hard labor.[130] The Discussion states, in pertinent part, that performance of the sentence to hard labor without confinement "does not excuse or relieve a person from performing regular duties."[131] Most importantly, however, is the next sentence: "Ordinarily, the immediate commander of the accused will designate the amount and character of the labor to be performed."[132] This is especially true in cases where the Soldier's conviction prevents him from accomplishing his MOS-specific duties.

The convicted Soldier is still a Soldier, and he can be required to participate in unit PT and other unit-wide formations and events (*e.g.*, changes of command, etc.). Those exceptions notwithstanding, the command can order him to begin his hard labor immediately following PT, personal hygiene and breakfast.[133] In the rare instance where the Soldier is retained, it is possible that the time of execution (although not the frequency, intensity or type of task) may practically differ, as the commander may likely have determined that the Soldier should first complete a normal duty day, in a position commensurate with the Soldier's rank and MOS, before performing his hard labor. While the hours of a Soldier being retained and executing hard labor without confinement may therefore be more similar to those of a Soldier performing extra duty (*e.g.*, both conducted at the end of the "normal" duty day, 1700), the type of tasks the Soldier is required to complete (*e.g.*, lawn mowing versus trench digging) should remain distinct.

Commanders and their JAs have difficulty determining the specific type of hard labor to be performed. Legally permissible hard labor should include rock breaking for purposes of area beautification.[134] It also includes strictly punitive tasks such as repetitively filling and emptying sandbags.[135] A commander can require a Soldier sentenced to hard labor without confinement to move large piles of dirt or heavy rocks for no purpose other than to keep the Soldier working.[136] Similarly, the commander can have the Soldier dig fighting positions, whether done for the sole punitive purpose of having the Soldier fill them back in or for more permanent use in an installation's dedicated training area.[137] The commander can also increase the arduous nature of the punishment by limiting the resources available to the Soldier, for example, requiring him to dig fence post holes with his issued entrenching tool rather than with a post-hole digger. Regardless of the task selected, hard labor should *never* default to those routine extra duty tasks Soldiers perform as a result of nonjudicial punishment.

The FITT provides the commander and his advising JA a useful framework for developing and assessing a plan to execute a sentence to hard labor without confinement. The frequency is driven strictly by the calendar. Start on day one and finish once the adjudged number of days has been served, sparingly making adjustments for Soldier-driven interruptions. The commander's and supervising noncommissioned officer's subjective observation must be balanced against their objective assessment of the actual execution and the Soldier's measurable level of productivity in order determine the intensity of the hard labor. The punishment's time will be determined by the command's end state of rehabilitation and retention or separation. Finally, the command's needs (*e.g.*, gravel for a new sidewalk) and intent (whether the labor will be strictly punitive, productive, or a combination of both) will influence the commander's determination of the type of punishment imposed.[138]

---

[128] At least one current senior military judge does not believe a commander is currently legally authorized to determine that a Soldier will perform no military duties for ninety days and that a Soldier's duty day will consist solely or principally of performing hard labor without confinement. COL Dixon E-mail, *supra* note 121.

[129] *See supra* note 74 and accompanying text.

[130] *See supra* note 75 and accompanying text.

[131] MCM, *supra* note 3, R.C.M. 1003(b)(6) (Discussion).

[132] *Id*.

[133] A meal-ready-to-eat (MRE) and an adequate supply of water meets the requirements for each of the Soldier's daily meals. A MRE meets the nutritional standards established by the U.S. Army Surgeon General. U.S. DEP'T OF ARMY, REG. 40-25, NUTRITION STANDARDS AND EDUCATION para. 2.2 (15 June 2001).

[134] One option is to have those Soldiers serving sentences to hard labor without confinement break the rocks to line the sidewalks and have the extra duty personnel paint them. Brownback E-mail, *supra* note 115.

[135] *But see* West Interview, *supra* note 4. Command Sergeant Major West argued that requiring Soldiers to do a physical task simply to have them (or anyone else) undo it later is degrading itself, and serves no other purpose other than perpetuating the accused's agony.

[136] *But see id.*

[137] *But see* Brownback E-mail, *supra* note 115 (arguing that having Soldiers dig foxholes as part of or for a specific unit training event is something Soldiers are supposed to do; having Soldiers dig foxholes on ranges used by the entire installation is "a much better use" of a convicted Soldier's labor).

[138] Appendix C contains one special court-martial convening authority's guidance for execution of sentences to hard labor without confinement.

Practical Definitions

The current language in the *MCM*, *AR 27-10*, and the *Military Judges' Benchbook* fails to clearly define hard labor. The Discussion to RCM 1003(b)(6) currently reads:

> Hard labor without confinement is performed in addition to other regular duties and does not excuse or relieve a person from performing regular duties. Ordinarily, the immediate commander of the accused will designate the amount and character of the labor to be performed. Upon completion of the daily assignment, the accused should be permitted to take leave or liberty to which entitled.
>
> *See* R.C.M. 1301(d) concerning limitations on hard labor without confinement in summary courts-martial.[139]

The Discussion fails, at a minimum, to address: (1) whether or not the punishment must include productive labor; (2) whether its completion is time or task dependent; and, (3) whether it can become a Soldier's "place of duty." It should be changed to read:

> Hard labor without confinement need not be performed in addition to other regular duties; it may be designated by the imposing commander as the Soldier's primary place of duty. The imposing commander will designate the amount and character of the labor. The labor to be performed need not be productive labor and the commander will determine whether its daily completion is time or task dependent. Upon completion of the daily assignment, the accused should be permitted to take liberty to which entitled. No hard labor may be imposed that constitutes cruel or unusual punishment, a punishment not sanctioned by the customs of the Service, is a duty normally intended as an honor, or constitutes a safety or health hazard to the accused. *See* R.C.M. 1301(d) concerning limitations on hard labor without confinement in summary courts-martial.

In attempting to clarify the language of potentially overlapping punishments, the definitions of extra duty and fatigue duty must also be amended. The *MCM* defines "extra duties" as those that:

> [I]nvolve the performance of duties in addition to those normally assigned to the person undergoing punishment. Extra duties may include fatigue duties. Military duties of any kind may be assigned as extra duty. However, no extra duty may be imposed which constitutes a known safety or health hazard to the member or which constitutes cruel or unusual punishment or which is not sanctioned by the customs of the service concerned. Extra duties assigned as punishment of noncommissioned officers, petty officers, or any other enlisted persons of equivalent grades or positions designated by the Secretary concerned, should not be of a kind which demeans their grade or position.

Although the *MCM* fails to define either hard labor or fatigue duties, *AR* 27-10 does closely follow the language of the *MCM* in defining extra duty:

> (5) *Extra duties.* Extra duties may be required to be performed at anytime and, within the duration of the punishment, for any length of time. No extra duty may be imposed that—
> *(a)* Constitutes cruel or unusual punishment or a punishment not sanctioned by the customs of the Service; for example, using the offender as a personal servant.
> *(b)* Is a duty normally intended as an honor, such as assignment to a guard of honor.
> *(c)* Is required to be performed in a ridiculous or unnecessarily degrading manner; for example, an order to clean a barracks floor with a toothbrush.
> *(d)* Constitutes a safety or health hazard to the offender, or
> *(e)* Would demean the Soldier's position as a NCO or specialist (AR 600–20).[140]

While no change is necessary to the *MCM*, the *AR 27-10* definition of extra duty should include the statement, "Fatigue duties may be imposed as extra duties."

An amended, *AR 27-10* should also include a definition for fatigue duty. The definition for fatigue duties should be included immediately after the definition for extra duties in paragraph 3-19 and be defined as:

---

[139] MCM, *supra* note 3, R.C.M. 1003(b)(6).

[140] AR 27-10, *supra* note 3, para. 3-19b(5).

(6) *Fatigue Duties*. Fatigue Duties may be required to be performed at anytime and, within the duration of the punishment, for any length of time. All prohibitions in paragraph (5)(a)-(d), above, apply. Punishments—
(*a*) May require hard, physical labor; for example, manual ditch digging or preparation of fighting positions,
(*b*) Are not required to involve productive work.
(*c*) May not include routine physical fitness training events, and
(*d*) May be executed in conjunction with Soldiers executing sentences to hard labor without confinement as a result of a court-martial.

Once the *MCM* and *AR 27-10* are amended, the *Military Judges' Benchbook* instruction should be amended to reflect the ability to require execution of a sentence to hard labor without confinement as the accused's primary duty. Currently, the *Military Judges' Benchbook* states:

> This court may sentence the accused to hard labor without confinement for a maximum period not exceeding three months. Such hard labor would be performed in addition to or to the exclusion of other military duties which would normally be assigned. In the usual course of business, the immediate commanding officer assigns the amount and character of the hard labor to be performed.[141]

Changes to the *Military Judges' Benchbook* necessitate the following changes to the worksheet in the *MCM*:[142]

> To perform hard labor without confinement for _____ (days) (months) [circle one] (in addition to)(to the exclusion of) [circle one]all regularly assigned military duties.

A change to the *MCM* will ensure the immediate commander and supporting JA can appropriately distinguish between hard labor, extra duty, and fatigue duty. The recommended changes will assist the commander and advising JA in the proper execution of extra duties.

Collateral Attacks on the Nature of the Hard Labor

A Soldier required to perform hard labor without confinement has a limited arsenal with which he can attack the nature of the hard labor he is required to perform.[143] Judicial options are virtually nonexistent, and administrative options are unlikely to bring any relief.[144]

Hard labor without confinement cannot begin until the convening authority takes action.[145] Consequently, requesting a post-trial Article 39(a) session to raise an allegation of unlawful punishment before a military trial judge is impossible.[146] Therefore, the accused cannot challenge, in his post-trial clemency submissions, the nature of punishment he has not yet begun.[147] Once the convening authority takes action, the military trial judge's jurisdiction is lost. Unless and until a superior authority directs a post-trial hearing, the accused cannot return to the court originally exercising jurisdiction.[148]

---

[141] BENCHBOOK, *supra* note 12, at ch. 2, § V, para. 2-5-22.

[142] MCM, *supra* note 3, app. 11.

[143] For example, a monetary damage claim in federal district court for cruel and unusual punishment is barred by the *Feres* doctrine. United States v. Kinsh, 54 M.J. 641, 646 (Army Ct. Crim. App. 2000) (citing Feres v. United States, 340 U.S. 135 (1950)).

[144] Note that a proposed change being considered by Office of the Judge Advocate General, Criminal Law Division, is to provide judicial oversight of charges from preferral (versus referral) through receipt by the Army Court of Criminal Appeals, rather than at authentication. Such a change may provide greater oversight of the implementation of these sentences.

[145] MCM, *supra* note 3, R.C.M. 1113(a). Another proposed change being considered by Office of The Judge Advocate General Criminal Law Division, is that all sentences involving a deprivation of liberty take effect immediately, as sentences to confinement currently do. This change would keep the case under the military trial judge's jurisdiction, providing additional oversight of the implementation of these sentences. *See infra* note 146. Any discussion as to the inherent benefits of such timely imposition, however, is beyond the scope of this article.

[146] The military judge loses the authority to convene a post-trial session once the record is authenticated. Rule for Court-Martial 1102(d) states, in pertinent part, that the convening authority "may direct a post-trial session any time before the convening authority takes initial action on the case" pursuant to RCM 1107. MCM, *supra* note 3, R.C.M. 1102(d).

[147] Rule for Court-Martial 1105 allows the accused to submit "any matters" that "may reasonably tend to affect the convening authority's decision whether to disapprove any findings of guilty or to approve the sentence. Since this happens prior to action, and the hard labor is not executed until after action, this routine "second bite at the apple" is closed as a means of raising the issue of the nature of the hard labor. *Id.* R.C.M. 1105.

[148] *Id.* R.C.M. 1102. *See also id.* R.C.M. 1201(b)(4); R.C.M. 1203(c)(2); United States v. Dubay, 37 C.M.R. 411 (C.M.A. 1967).

Cases in which hard labor without confinement is adjudged are not normally subject to review by the Court of Criminal Appeals (CCA).[149] Although GCM cases are reviewed by the Office of the Judge Advocate General,[150] and can be forwarded to the Army Court of Criminal Appeals (ACCA),[151] the ability to set aside the sentence is largely nullified by the fact that the sentence will likely have already been executed.[152] Relief at that point in time would be meaningless. The appellate courts, if they have jurisdiction, may require exhaustion of all administrative remedies prior to consideration of any appeal on the issue.[153]

The nature of the hard labor is an administrative decision.[154] Since the immediate commander, in a nonjudicial capacity, determines such punishment, Article 138 may be the most appropriate forum for requesting redress and the most effective method for gaining timely relief.[155] Article 138, UCMJ, Complaints of Wrongs, provides:

> Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.[156]

Thus, Article 138, UCMJ, potentially returns to the convening authority jurisdiction lost when he took initial action. Article 138 specifically excludes certain actions from potential resolution under its procedures.[157] Although "matters relating to courts-martial" are listed as the first specific example of those matters inappropriate for resolution under Article 138, that arguably applies only to those matters where review is "specifically provided by the UCMJ" or by "a court authorized by the UCMJ" or a "military judge or military magistrate."[158] None of those appellate options exist for an accused to challenge the nature of his hard labor without confinement.

The likelihood of success through such a request for redress is low if the commander implemented his plan with the advice of his servicing JA. The staff judge advocate (SJA) who advises the convening authority on the Article 138 complaint will likely be the same supervising SJA whose trial counsel originally advised the commander on the nature of the punishment now in question. Nonetheless, it remains an immediately available tool.

A second immediately available form of potential relief would be a complaint to the inspector general (IG).[159] Again, however, this procedure faces the same hurdle as the Article 138 complaint—the SJA who advises the IG will be the same supervising SJA whose counsel advised the commander on the nature of the punishment to be implemented.

---

[149] MCM, *supra* note 3, R.C.M. 1201(a). Hard labor without confinement is rarely accompanied by the punitive discharge or confinement that would trigger the requirement for referral to the Army Court of Criminal Appeals.

[150] *Id.* R.C.M. 1201(b)(1).

[151] *Id.* R.C.M. 1203(b).

[152] Given the ninety-day maximum on hard labor without confinement and the time it takes TJAG to review a record of trial, a case in which hard labor without confinement is adjudged is unlikely to ever be reviewed, thus making the claim moot.

[153] *See* United States v. Coffey, 38 M.J. 290, 291 (C.M.A. 1993) (holding that, where a case was not ripe for review under Article 67(a), UCMJ, but was in fact reviewable; although Article 55, UCMJ, prohibits cruel and unusual punishment, absent unusual or egregious circumstances, the petitioner must seek administrative relief prior to invoking judicial intervention).

[154] The commander's discretion to determine the nature of the hard labor meets the requirements under AR 27-10, para. 20-4e, requiring "a discretionary act" by the commanding officer that is, *inter alia*, "in violation of law or regulation" or "arbitrary, capricious, or an abuse of discretion." Thus, an accused might be able to raise an Eighth Amendment claim under Article 138, UCMJ.

[155] *See* MCM, *supra* note 3, R.C.M. 1003(b)(6) (defining the commander as the authority for determining the nature of the hard labor).

[156] UCMJ art. 138 (2002). Although *AR 27-10* specifically includes "[m]atters relating to courts-martial" as those actions for which Article 138 is inappropriate, that example assumes that review "is provided specifically by the UCMJ" or is "otherwise reviewable by a court authorized by the UCMJ or by a military judge or military magistrate." AR 27-10, *supra* note 3, para. 20-5.

[157] AR 27-10, *supra* note 3, para. 20-5.

[158] *Id.* para. 20-5a(1).

[159] *See* generally U.S. DEP'T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES (29 Mar. 2002).

Complaints under Article 138 and to the IG have logistical roadblocks that must be overcome by the Soldier. The Soldier must either draft his request for redress while exhausted, late at night, following the conclusion of the day's labor, or have a commander who is willing to allow him to cease execution of his sentence in order to challenge that very punishment. Making a complaint to the IG or to the Soldier's congressman carries with it similar burdens. The IG, generally being physically located on the installation, can respond quickly; a congressional complaint, although required to be completed in a timely manner, is not nearly as expeditious. The accused runs the risk that his complaint will be mooted by the completion of the sentence. There is no requirement that the imposing commander suspend execution of the sentence while awaiting IG resolution.

Extraordinary writs cannot be used to appeal the nature of the hard labor imposed. The All Writs Act[160] is to be used only in exceptional cases where there is a clear abuse of discretion or usurpation of judicial authority.[161] Extraordinary writs are "to confine inferior courts" to the lawful exercise of their prescribed jurisdiction or to compel them to exercise their authority when it is their duty to do so.[162] The Court of Appeals for the Armed Forces (CAAF) is confined to "the review of specified sentences imposed by courts-martial."[163] The nature of the hard labor is a commander's decision, not a judicial one. It is an executive action within the commander's purview and not a finding or sentence over which the court can exercise jurisdiction.

Other avenues of judicial review are equally limited. Application for relief under Article 69, UCMJ, is limited to those cases in which the case has been finally reviewed by The Judge Advocate General, but not the Army Court of Criminal Appeals.[164] Furthermore, such relief is limited to findings in special or summary courts-martial only.[165] Even if the Soldier can clear all of those hurdles, the timeliness of any relief would likely be mooted, as a 90-day sentence cap almost guarantees that the punishment will have since been completed.[166]

Lessons Learned

Interviews with Soldiers sentenced to hard labor without confinement reveal what commanders both fear and hate about these sentences— that "it's no more a deterrent than extra duty is" because Soldiers are "doing the same thing extra duty personnel are doing."[167] Time is a serious component of the hardness of hard labor. One Soldier commented, "extra duty personnel have a set task—when they finish, they're done. I have a set time; it doesn't matter how fast or slow I go, I just have to keep working. The time is the worst thing about [hard labor]."[168] While the comment reinforces the punitive nature of the time component of the FITT, it also highlights the need for the command to closely monitor the intensity component. The commander must carefully select the NCO who supervises a Soldier executing a sentence to hard labor without confinement.[169] Supervision by an NCO who was previously junior to the now-reduced convicted Soldier will likely result in

---

[160] The All Writs Act, states:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in the aid of their respective jurisdictions and agreeable to the usages and principles of law.
> (b) An alternative writ or rule nisi may issued by a justice or judge of a court which has jurisdiction.

28 U.S.C. § 1651(a) (2000).

[161] La Buy v. Howes Leather Co., 352 U.S. 249, 257 (1957). The nature of the punishment is reserved exclusively to the commander, is an administrative decision, and thus, by definition, cannot be a usurpation of judicial authority.

[162] Platt v. Minnesota Mining & Mfg. Co., 376 U.S. 240, 245 (1964).

[163] Clinton v. Goldsmith, 526 U.S. 529 (1999) (holding that since the court-martial cannot define the specifics of the hard labor to be executed, the nature of that punishment is beyond the jurisdiction of the court where the court-martial was final and the accused was able to seek relief through administrative channels). *See also* United States v. Bevilacqua, 39 C.M.R. 10, 11 (C.M.A. 1968) (holding the court's power to review is expressly conditioned by the provisions of Article 67). *But see* United States v. Kinsch, 54 M.J. 641, 645 (Army Ct. Crim. App. 2000) (holding that although cruel and unusual punishments are not part of the adjudged/approved sentence, they are not collateral matters outside of the court's jurisdiction as defined by Article 66(c), UCMJ, where the case is before the court on direct appeal and not by extraordinary writ); United States v. Towns, 52 M.J. 830, 833 (A.F. Ct. Crim. App. 2000) (holding that Article 66(c), UCMJ, bestows jurisdiction on the service courts to consider constitutional claims of cruel and unusual post-trial treatment in cases properly referred to them, but only in so much as those claims are considered as part of the court's determination of sentence appropriateness).

[164] AR 27-10, *supra* note 3, para. 14-1a.

[165] *Id*.

[166] It would seem logical that a Soldier, if challenging the nature of the hard labor he was being required to then execute, would seek immediate rather than eventual, post-execution relief.

[167] Bruce Interview, *supra* note 33.

[168] *Id*.

either vengeful extremism or an abundance of "slack" as the punishment is executed.[170] Either situation is unacceptable. Careful selection of the supervising NCO is critical to effective execution of the sentence.

Confinement at the Army's Regional Confinement Facilities (RCF) has been met with mixed reviews. Fort Bliss commanders routinely found, and complained loudly to their trial counsel, that most Soldiers returning from the RCFs bragged about the "vacation" they had "sleeping and shooting hoops."[171] As a result, commanders lost faith in both the punitive and deterrent value of sentences to confinement at the RCFs. When the perceived limited deterrent value was coupled with a cost-benefit analysis of the funds and personnel associated with confining a Soldier, commanders became increasingly motivated to mitigate sentences to confinement.[172] The convening authority for a summary court-martial can mitigate a sentence of thirty days confinement to thirty days of hard labor without confinement.[173] By mitigating sentences, commanders were able to minimize costs as well as impact on unit training and readiness while ensuring that the punishment was truly punitive. Given the commander's control over execution of sentences to hard labor without confinement, commanders felt that the end state of punishment prior to separation, or punishment with a view towards rehabilitation, was actually accomplished when they controlled the nature of the punishment.[174] Mitigation gave commanders a tool to avoid courts-martial awarding Soldiers "RCF vacations."

Making Little Rocks Out of This Big Rock

History, as outlined at the beginning of this article, supports the requiring of arduous physical labor as an element of executing a sentence to hard labor without confinement.[175] There is no requirement that such labor be productive labor; it can be labor for punishment's sake. Once imposed, a court-martial sentence to hard labor without confinement should be strictly enforced. Relaxed enforcement of these punishments is indicative of and, arguably produces, lax unit discipline, thus vitiating its effect throughout the military justice system.[176] The *MCM* explicitly reserves to commanders the authority to determine the nature of the punishment. In order to equip commanders with legally sufficient programs capable of withstanding administrative attack, JAs can use the same the FITT principles that guide the development of unit physical fitness programs. The FITT factors provide commanders and JAs the structure for determining and assessing the specifics of legally sufficient punishment. Where commanders have well-planned, resourced, and consistent programs for implementing sentences of hard labor without confinement, Soldiers *can* be made to work—and work long and hard. In the end, breaking rocks in the hot sun can be done and the law can win.

---

[169] West Interview, *supra* note 4. Command Sergeant Major West was adamant that skilled individuals needed to supervise hard labor without confinement. Any NCO pulled away from his routine duties to supervise an accused is hurting both the unit and the Soldiers that NCO normally supervises. Command Sergeant Major West is very skeptical of NCOs who volunteer for this duty. His experience shows these tend to be individuals who take perverse pleasure from another's agony, and this greatly increases the risk of turning punishment into abuse. Command Sergeant Major West believes that is why correctional confinement units/facilities (CCU/CCFs) went away across the Army.

[170] *Id*.

[171] Interview with Captain Darwin Strickland, 11th Brigade Trial Counsel, Office of the Staff Judge Advocate, Fort Bliss, Texas (Apr. 10, 2002) [hereinafter Strickland Interview].

[172] Fort Bliss is a remote installation. The Department of the Army routinely assigns Soldiers from Fort Bliss sentenced to confinement to destinations as distant as Charleston, S.C., Quantico, Va., Fort Sill, Okla., or Fort Lewis, Wash. None of these RCFs are within driving distance and all require the expenditure of a significant amount of a unit's Operation and Maintenance funds to execute a sentence to confinement. The average cost of execution was close to $3000 per confinee (notes on file with author).

[173] Rule for Court-Martial 1107(d)(1) does not necessarily support the proposition that a summary court-martial convening authority can mitigate a sentence of thirty days confinement to thirty days of hard labor without confinement. *See* AR 27-10, *supra* note 3, para. 3-26a(1). A mitigation of a sentence involving a deprivation of liberty (*e.g.*, confinement) to a sentence involving an equal number of days (quantity) but no deprivation of liberty (quality) is permissible. *See also* MCM, *supra* note 3, R.C.M. 1003(b) (listing punishments in apparent, although not explicit, order of severity, from least to most severe).

[174] *See* Strickland Interview, *supra* note 171.

[175] *See supra* notes 13-37 and accompanying text.

[176] F. GRANVILLE MUNSON &WALTER H.E. JAEGER, UNITED STATES ARMY OFFICERS' HANDBOOK OF MILITARY LAW AND COURT-MARTIAL PROCEDURE (ARMY OFFICERS' BLUE BOOK) 10 (1942).

Appendix A

	COURTS-MARTIAL	NONJUDICIAL PUNISHMENT	ADMINISTRATIVE ACTIONS
LIBERTY	Death Confinement[177] Restriction	Restriction House arrest[178] Correctional Custody	Revocation of pass privileges[179]
DISCHARGE	Dismissal[180] Dishonorable Discharge Bad Conduct Discharge	None	Other than Honorable General Honorable Unqualified
PHYSICAL	Hard labor without confinement (includes fatigue duty)	Extra duty (includes fatigue duty)	None
FINANCIAL	Total forfeitures Fine Reduction to E1[181]	Limited Forfeitures Reduction[182]	Recoupment[183] Administrative fee[184] Administrative reduction[185]
OTHER	Reprimand/Admonition	Reprimand/Admonition	Reprimand/Admonition

Figure 1

[177] Ranging from one day to life without parole. *See generally* MCM, *supra* note 3, R.C.M. 1003(b)(7).

[178] Only in cases of commissioned and warrant officers when imposed by a general officer or the general court-martial convening authority. AR 27-10, *supra* note 3, tbl. 3-1.

[179] The commander, as the leave and pass approval authority, determines, in an administrative capacity, to what leave or liberty a Soldier is entitled. AR 600-8-10, *supra* note 69, para. 2-1d**.** *But see* Major Mark Johnson, *TCAP Tip of the Day: Pretrial Restraint and Recent Cases* (undated) (arguing that any restriction normally associated with merely "pulling pass privileges" may fall into the category of more than mere "conditions on liberty," and may constitute restriction in lieu of arrest) (on file with author).

[180] Only in the cases of commissioned officers, commissioned warrant officers, cadets, and midshipmen and only at a GCM. MCM, *supra* note 3, R.C.M. 1003(b)(8)(A).

[181] Often referred to as "the fine that keeps on giving" (or taking, as the case may be).

[182] Reductions are limited by two factors—the rank of the officer imposing punishment and the rank of the Soldier being punished. *See generally* AR 27-10, *supra* note 3, para. 3-19b(6).

[183] *See* U.S. DEP'T. OF ARMY, REG. 37-104-4, MILITARY PAY AND ALLOWANCES POLICIES AND PROCEDURES-ACTIVE COMPONENT para. 31-2 (30 Sept. 1994). *See generally* U.S. DEP'T. OF ARMY, REG. 350-100, OFFICER ACTIVE DUTY SERVICE OBLIGATIONS (18 Apr 1994); U.S. DEP'T. OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (29 June 2002).

[184] For example, in cases of shoplifting, the Army and Air Force Exchange Service charges a $200 administrative fee.

[185] *See generally* U.S. DEP'T. OF ARMY, REG. 600-8-19, ENLISTED PROMOTIONS AND REDUCTIONS (20 Jan. 2004).

Appendix B

Venn Diagram Illustrating Interplay Between Levels of Punishment

Financial Punishment

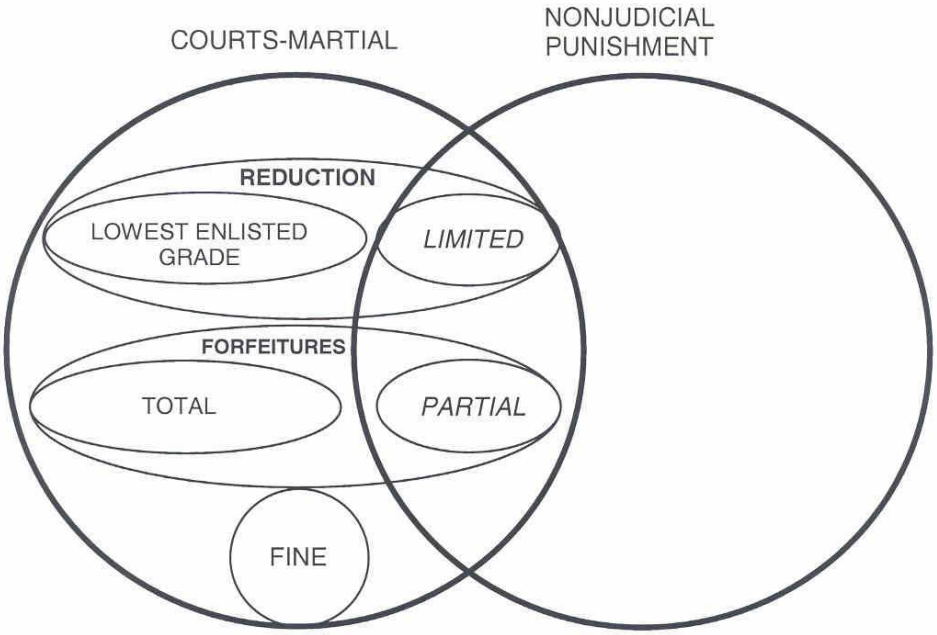

Figure 2

In Figure 2, all financial forms of punishment available to a commander administering nonjudicial punishment are available to the military judge or panel at a general court-martial.

Physical Punishment

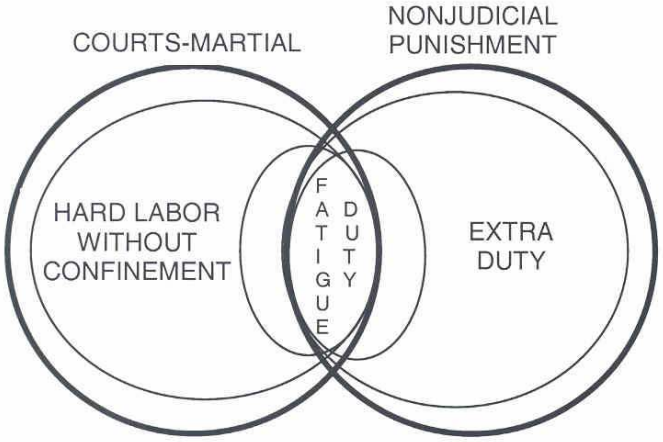

Figure 3

In Figure 3, both courts-martial and NJP are represented by a distinct circle showing both mutually exclusive punishments (hard labor without confinement and extra duty, respectively) and the overlapping subset of available punishment (fatigue duty).

Appendix C

Sample Major Subordinate Command Guidance

MEMORANDUM FOR DISTRIBUTION

SUBJECT: Executing Sentences to Hard Labor Without Confinement

1. The Uniform Code of Military Justice allows for hard labor without confinement to be adjudicated as a form of punishment at courts-martial but it does not define this punishment.

2. All Soldiers who fall under the Special Court-Martial Convening Authority of XX Brigade who have been convicted by a court martial and sentenced to serve hard labor as their punishment (or part of their punishment), and who are being processed for administrative separation, will do the following:

- Physical, manual labor in support of operations that will be executed 7 days a week, until their punishment is completed. Examples include: filling sand bags; digging ditches, building field fortifications, conducting range road repairs, constructing unit training sites, etc.
- The standard for intensity (number of sandbags filled, depth and length of fortifications, etc.) will be determined by the immediate commander and reassessed at least every 48 hours.
- Hours of execution are as follows:
    - Weekdays, except Thursdays – 0900 hours to 2100 hours*
    - Thursdays and Saturdays – 0700 hours to 2100 hours*
    - Sundays – 1300 hours to 2100 hours*

  *End time is a NET time. If the day's mission/task has not been completed to standard, the detail's schedule may extend beyond 2100 hours but Soldiers will get a minimum of six hours of rest before the next day of hard labor begins.
- With the exception of those Soldiers identified in paragraph 9, below, Soldiers serving hard labor will not participate in normal unit training or activities other than PT.
- Soldiers will be allowed 30 minutes for the noon meal and one hour for the evening meal. The MRE is a suitable noontime / evening meal to avoid loss of time due to troop transportation if the work site is more than 15 minutes (driving or walking) from the nearest dining facility (DFAC).
- The uniform for Soldiers serving hard labor is: LCV with canteens and first aid bandage; BDUs; black leather gloves; reflective vest, D-handle shovel, mattock, and soft cap. Soldiers serving hard labor will report daily in the basic uniform and with their ruck-sack containing the following items: entrenching tool, field jacket, wet weather gear, overshoes, sun-wind-dust goggles, extra socks, and balaclava. The NCOIC may adjust the uniform, as necessary.
- Where feasible, Soldiers serving hard labor will be marched to the hard labor site, carrying the implements required to execute the mission and their rucksacks.
- Hard labor details will be supervised by a noncommissioned officer (NCO) and will be that NCO's place of duty.

3. The Brigade Command Sergeant Major (CSM) has overall responsibility for planning and executing hard labor details. Subordinate units will submit recommendations for details to the CSM for consideration and scheduling. The CSM will designate units to provide an NCO(s) to supervise the hard labor detail on a rotational basis. The CSM will direct the Brigade S-3 to task subordinate units to provide equipment (*i.e.*, vehicle support) that may be necessary for task execution or direct the Brigade S-4 to procure equipment and supplies required for task execution.

4. The NCO(s) supervising the hard labor detail will:

- Hold the hard labor detail's initial daily formation in front of the Brigade Headquarters IAW the times specified in paragraph 2.
- Render a morning accountability report and an end of day status report to the Brigade CSM or SDO.
- Conduct a risk assessment of all details to ensure the health of detailed Soldiers is safeguarded. Consideration must be given to ensure: sufficient water is available and Soldiers remain hydrated; uniforms are adjusted as workload and the temperature/weather varies; a medical support plan is developed so the detail can obtain emergency care if necessary; and appropriate safety gear (*i.e.*, Kevlar) is used when tasks merit it.

5. The unit detailed to provide the supervising NCO(s) will also provide vehicle, mess and medical support, as required, to execute missions tasked to the detail.

6. The brigade paralegal NCOIC will provide unit commanders and the Brigade CSM the names of Soldiers who have been sentenced to serve hard labor and the dates hard labor should begin and end. The Brigade CSM will notify the Soldier's 1SG when hard labor is scheduled to begin. *Only I may excuse a Soldier from a day of hard labor once punishment begins*. Except upon my determination that there is good cause for excusal, excusal from a hard labor detail for a day will result in the Soldier not receiving credit as having served hard labor on that day. The Soldier will execute the number of days of hard labor specified by the court, even if those days are not consecutive.

7. Soldiers executing hard labor will not be subjected to ridicule, humiliation, hazing, or other forms of degrading treatment.

8. Hard labor is not the same as extra duty allowed as punishment under the various levels of non-judicial punishment (Article 15s).

9. Commanders will make a determination, prior to execution of the sentence to hard labor without confinement, as to whether or not the Soldier will be retained. For those Soldiers who will be retained on active duty once their sentence is complete, their hours will be adjusted by their immediate commander, on a case-by-case basis, to allow for completion of normal unit duties prior to daily completion of hard labor.