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Garrity Immunity and the U.S. Armed Forces

Bretton H. Laudeman* & Gabriel J. Chint

The U.S. military is one of the nation's largest and most important public employers. Given the unique nature of military service, the service branches have a strong interest in ensuring the integrity of their ranks. Yet the military lacks a critical force-management tool used by every other public employer to investigate workplace misconduct: the ability to demand answers to potentially incriminating questions under Garrity v. New Jersey, 385 U.S. 493 (1967). The Garrity solution, known as "Garrity immunity," strikes a critical balance between the government's interests in workplace oversight and accountability with the employee's Fifth Amendment right against self-incrimination by immunizing the employee's statements from being used in any future criminal prosecution. Given that service member misconduct and on-the-job mishaps can have grave consequences in the military, Garrity has the potential to serve as a critical tool for the military commander.

This Article contends that despite the military's separate and unique justice system and the increased protections against self-incrimination afforded to service members, as a matter of law, nothing prohibits the application of Garrity immunity to the military. Thus, this Article argues that, in certain circumstances and with appropriate safeguards, allowing military commanders to compel service members to answer questions that are directly related to their official duties under threat of administrative separation could promote the commander's goal of achieving justice, good order and discipline, and the mission-readiness of his or her unit.

* Member, California Bar; J.D. For their helpful comments, we thank Professor Frederic I. Lederer, Professor Francis A. Gilligan, Dillon Fishman, and Taylor Kensy.

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INTRODUCTION

The U.S. military is one of the largest and arguably most important public employers in the country. Military personnel, from pilots to engineers, have grave responsibilities and hold the lives of millions in their hands. In 2020, a junior enlisted sailor allegedly started a fire that resulted in the decommissioning of the multibillion-dollar aircraft carrier *USS Bonhomme Richard*.¹

1. Gidget Fuentes, *Search Warrant Gives New Details into Navy’s Case Against Bonhomme Richard Sailor Charged with Arson*, USNI NEWS (Aug. 4, 2021, 6:50 PM), <https://news.usni.org/2021/08/04/search-warrant-gives-new-details-into-navys-case-against-bonhomme-richard-sailor-charged-with-arson>. The sailor was subsequently acquitted of arson. Gidget Fuentes, *Former Bonhomme Richard Sailor Ryan Sawyer Mays Acquitted of Arson*, USNI NEWS (Sept. 30, 2022, 12:26 PM), <https://news.usni.org/2022/09/30/breaking-former-bonhomme-richard-sailor-ryan-sawyer-mays-acquitted-of-arson>. But other alleged mishaps and instances of service member error demonstrate that imperfect duty performance can have grave consequences. See, e.g., Elly Farelly, *A Tragic Accident Onboard the USS Oriskany Cost Many Lives – Without an Enemy Ship in Sight*, WAR HIST. ONLINE (Dec. 1, 2016), https://www.warhistoryonline.com/military-vehicle-news/how-one-sailor-with-a-burning-flare-nearly-cost-the-usa-an-aircraft_carrier-x.html (43 killed by mishandled ordinance); Sam LaGrone, *Officer Accused of Negligence in Fitzgerald Collision Will Face Special Court-Martial Next Week as Part of Likely Plea Deal*, USNI NEWS (May 1, 2018, 5:41 PM), <https://news.usni.org/2018/05/01/officer-accused-negligence-fitzgerald-collision-will-stand-special-court-martial-next-week-part-likely-plea-deal> (fatal collision of U.S. Navy destroyer *USS Fitzgerald* with a foreign cargo ship allegedly caused by crew error); Sam LaGrone, *Former USS Fitzgerald CO Benson to Retire as Commander Next Month*, USNI NEWS (Nov. 20, 2019), <https://news.usni.org/2019/11/20/former-uss-fitzgerald-co-benson-to-retire-as-commander-next-month>.

This demonstrates that even the youngest and most junior members of the military perform jobs that can save lives and defeat enemies if done correctly, or cost lives if performed poorly. Yet the U.S. armed forces do not have a management tool used by virtually every other public and private employer: the ability to insist on answers to potentially incriminating questions about job performance under the threat of termination.

The problem arises from the Fifth Amendment to the U.S. Constitution, which prohibits compelling a person to be a witness against himself or herself.² Sometimes, an employer is concerned about conduct which might be both a criminal offense and warrant discipline or termination. Because the prohibition applies only to government action, “private employers may question an employee under threat of discharge without Fifth Amendment consequence[.]”³

On the other hand, federal and state civilian employees can be subject to an investigation about job performance and directed to “[a]nswer self-incriminating questions or be fired.”⁴ The law is straightforward. In *Garrity v. New Jersey*, the U.S. Supreme Court held that public employees could not be forced to waive their Fifth Amendment privilege against self-incrimination under threat of being fired.⁵ Accordingly, public employees cannot be forced to subject themselves to criminal liability or lose their jobs. However, in *Gardner v. Broderick*, the Court explained that investigators could legally compel public employees to answer incriminating questions, so long as the information gathered would be used exclusively for noncriminal, employment purposes.⁶ Thus, a public

2. U.S. CONST. amend. V.

3. *United States v. Allen*, 864 F.3d 63, 84 (2d Cir. 2017) (emphasis omitted).

4. This is the title of Peter Westen’s article about compelled testimony and public employment, Peter Westen, *Answer Self-Incriminating Questions or Be Fired*, 37 AM. J. CRIM. L. 97 (2010).

5. 385 U.S. 493, 500 (1967).

6. *Gardner v. Broderick*, 392 U.S. 273, 276–79 (1968) (“If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, the privilege against self-incrimination would not have been a bar to his dismissal.” (citations omitted)); see, e.g., 1 L.A. POLICE DEP’T, DEPARTMENT MANUAL § 210.47 (2022) (“When police officers acquire knowledge of facts which will tend to incriminate any person, it is their duty to disclose such facts to their superiors and to testify freely concerning such facts when called on to do

employee compelled to answer questions receives “use immunity,” also known as “*Garrity* immunity,”⁷ requiring exclusion of compelled statements in any subsequent criminal trial, as well as exclusion of evidence derived directly or indirectly from those statements.⁸ Because *Garrity* immunity eliminates the possibility of incrimination, it is equivalent to the protections provided by the Fifth Amendment.⁹ In sum, “even though a police officer or other public servant may be compelled either to provide self-incriminating information or be dismissed from his job, any information extracted under this threat cannot be used later in a criminal prosecution of the person who furnished it.”¹⁰

The *Garrity* solution applies to the nearly twenty-four million people who are local, state, or federal government employees—more than fifteen percent of the U.S. workforce.¹¹ These public employees work in every occupation imaginable—police officers, firefighters, sanitation workers, schoolteachers, university professors, medical professionals, and public officials—and all may be compelled to answer incriminating questions under *Garrity*. Police departments regularly use *Garrity* immunity to investigate allegations of misconduct or poor job performance.¹² In the last ten years, at least 85,000 police officers have been subject to internal investigation based on allegations of misconduct ranging from excessive use of force to drug and alcohol abuse.¹³ The Supreme

so. It is a violation of duty for police officers to refuse to disclose pertinent facts within their knowledge, and such neglect of duty can result in disciplinary action up to and including termination.”).

7. See, e.g., *Sher v. U.S. Dep’t. of Veterans Affs.*, 488 F.3d 489, 502–03 (1st Cir. 2007).

8. See *Uniformed Sanitation Men Ass’n v. Comm’r of Sanitation of N.Y.C.*, 426 F. 2d 619, 629 (2d Cir. 1970); see also *Kastigar v. United States*, 406 U.S. 441, 452–53 (1972).

9. *Kastigar*, 406 U.S. at 459 (“[A]n appropriately broad immunity grant is compatible with the Constitution.”); see *Lefkowitz v. Turley*, 414 U.S. 70, 84–85 (1973).

10. *United States v. Murphy*, 18 M.J. 220, 240 (C.M.A. 1984) (Everett, C.J., concurring in the result) (citing *Garrity v. New Jersey*, 385 U.S. 493 (1967)).

11. Fiona Hill, *Public Service and the Federal Government*, BROOKINGS (May 27, 2020), <https://www.brookings.edu/policy2020/votervital/public-service-and-the-federal-government>.

12. See 2 ISIDORE SILVER, *PUBLIC EMPLOYEE DISCHARGE AND DISCIPLINE* 981–1008 (3d ed. 2001); Steven D. Clymer, *Compelled Statements from Police Officers and Garrity immunity*, 76 N.Y.U. L. REV. 1309, 1314 (2001).

13. See John Kelly & Mark Nichols, *We Found 85,000 Cops Who’ve Been Investigated for Misconduct. Now You Can Read Their Records.*, USA TODAY (Apr. 24, 2019, 7:15 PM), <https://www.usatoday.com/in-depth/news/investigations/2019/04/24/usa-today-revealing-misconduct-records-police-cops/3223984002>.

Court has recognized that investigation of public employees is necessary “to assure the effective functioning of government[.]”¹⁴

Yet the more than two million military service members are not subject to *Garrity*. Although formal immunity provisions exist under the military justice system,¹⁵ no *Garrity*-type immunity exists.¹⁶ By regulation, the Air Force, Army, Marine Corps, Navy, and Coast Guard prohibit *Garrity*-type questioning during any administrative investigation by a commanding officer or military investigator where criminal conduct may be implicated.¹⁷ Further, because each branch provides rights advisements (similar to *Miranda* warnings) under Article 31 of the Uniform Code of Military Justice (UCMJ) to respondent service members during administrative investigations, a respondent may not be compelled

14. *Turley*, 414 U.S. at 81 (quoting *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 93 (1964)).

15. See 32 C.F.R. § 719.112 (2022); U.S. DEP’T OF DEFENSE, MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 704 (2019) [hereinafter MCM]; *United States v. Mapes*, 59 M.J. 60, 66–67 (C.A.A.F. 2003).

16. See Thomas R. Burks, *Summarily Dismissed: The Use of Immunized Evidence at Administrative Discharge Boards*, 43 THE REPORTER 39, 39 n.2 (2016).

17. This is because a superior officer, unlike the equivalent civilian supervisor or manager, is bound by the military equivalent of *Miranda*-like rights advisements and other legal limitations unique to the military justice system. See Uniform Code of Military Justice (UCMJ) art. 31(a), 10 U.S.C. § 831(a) (2018) (“No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.”); UCMJ art. 31(b), § 831(b) (“No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.”); DEP’T OF THE ARMY, ARMY REGULATION 15–6, PROCEDURES FOR ADMINISTRATIVE INVESTIGATIONS AND BOARDS OF OFFICERS para. 3-7(b)(7)(a) (2016) [hereinafter AR 15–6] (“No military witnesses or military respondents will be compelled to incriminate themselves, to answer any question the answer to which could incriminate them, or to make a statement or produce evidence that is not material to the issues being investigated or that might tend to degrade them. An answer tends to incriminate a person if it would make it appear that the person is guilty of a crime.” (citation omitted)); U.S. DEP’T OF HOMELAND SECURITY & U.S. COAST GUARD, ADMINISTRATIVE INVESTIGATIONS MANUAL, COMDTINST M5830.1A, at 10-1, 10-5 (2007) (discussing the applicability of Article 31 during administrative investigations); U.S. DEP’T OF THE AIR FORCE, JAG GUIDE TO IG INVESTIGATIONS 19-21 (2010) (discussing how civilian Department of Defense employees may be compelled to testify under the *Garrity* Rule, but that any service member subject to investigation may invoke Article 31 and may only be compelled to testify pursuant to a formal grant of immunity); NAVAL JUSTICE SCHOOL, JAGMAN INVESTIGATIONS HANDBOOK, at III-5 (2012), (noting the applicability of Article 31 and requiring that investigators “[a]dvice any military witness who may be suspected of an offense, misconduct, or improper performance of duty, of his/her rights under Article 31(b) UCMJ”).

to provide incriminating statements under threat of discharge, *i.e.*, being separated or fired from the military.¹⁸ For example, Air Force regulations provide that, during an enlisted service member's discharge proceeding, "[a] [r]espondent cannot be compelled to testify against himself or herself, nor may that silence be used against him or her."¹⁹

One caveat is that, with the exception of the Army and Coast Guard, the branches do not uniformly prohibit the introduction of improperly compelled testimony for purposes of an administrative discharge.²⁰ This is because the Military Rules of Evidence do not apply to discharge boards and the UCMJ Article 31(d) exclusionary rule only applies to courts-martial (the military's equivalent of a criminal trial).²¹ However, this is largely irrelevant since military

18. See U.S. DEP'T OF THE AIR FORCE, MANUAL 51-507, ENLISTED DISCHARGE BOARDS AND BOARDS OF OFFICERS (2023) [hereinafter AFM 51-507]; AR 15-6, *supra* note 17, § 3-7(a); U.S. DEP'T OF THE NAVY, MILPERSMAN 1910-512, RIGHTS OF THE RESPONDENT (2021), (noting the applicability of Article 31 and 31(a)'s protection against self-incrimination); U.S. DEP'T OF HOMELAND SECURITY & U.S. COAST GUARD, PSCINST M1910.1, ENLISTED PERSONNEL ADMINISTRATIVE BOARDS MANUAL ch. 6.D.5. (2014); U.S. Marine Corps, *Administrative Separation Information*, MARINES, (last visited Sept. 9, 2023) <https://www.29palms.marines.mil/Staff-Offices/Special-Staff/Legal-Services-Support-Team/Defense-Services/Administrative-Separation> (noting that Article 31 applies to administrative separations and that "compulsory self-incrimination is prohibited").

19. AFM 51-507, *supra* note 18, at ch. 5.5.2.

20. Only the Army and Coast Guard expressly prohibit the introduction of such evidence at a respondent's discharge board, while the other branches' regulations for administrative discharges are silent on this matter. Army Regulation 15-6 provides,

A confession or admission obtained by unlawful coercion or inducement will not be accepted as evidence. IOs or boards should consult with their legal advisor, who will determine whether a confession or admission was obtained through unlawful coercion or inducement. The fact that a respondent was not advised of his or her rights under Article 31, UCMJ, or the Fifth Amendment, does not, by itself, prevent acceptance of a confession or admission as evidence.

AR 15-6, *supra* note 17, para. 3-7(b)(8). Similarly, the Coast Guard regulations provide that "[b]oard members may take into account (consider) the fact that evidence was improperly or illegally obtained when making their recommendations." U.S. DEP'T OF HOMELAND SEC. & U.S. COAST GUARD, PSCINST M1910.1, *supra* note 18, app. 6-1 at 2. The Coast Guard's rationale for such a rule is that "because most of the Military Rules of Evidence (MRE) do not apply to administrative proceedings, an administrative board can consider evidence that judicial proceedings, like courts-martial, cannot consider. For example, some evidence used at an administrative hearing may have been obtained in violation of the respondent's Article 31, UCMJ, or 5th Amendment rights. Rule 4 prevents administrative boards from 'punishing' the respondent or the Coast Guard for those mistakes by excluding that relevant evidence from consideration." *Id.* at 3.

21. UCMJ art. 31(d), 10 U.S.C. § 831(d) (2018) ("No statement obtained from any

commanders and investigators are not lawfully permitted to use *Garrity* immunity and therefore cannot utilize immunized compelled testimony as an affirmative force management tool. Accordingly, the military not only lacks any equivalent to *Garrity*, but it goes beyond what the Constitution requires by prohibiting the admission of compelled testimony in administrative settings.²² This is particularly relevant because the U.S. military and its commanders frequently turn to nonjudicial and nonpunitive, administrative procedures to deal with the important problem of service member misconduct instead of trial by court-martial.²³

Military service is the zenith of public service²⁴ and “[t]he relationship between a member of the armed forces and the Government is at least comparable to that of the police officer and the Government.”²⁵ Military courts have held that immunized statements were improperly used, dismissing criminal charges entirely, in cases where members shot other military members,²⁶ repeatedly sexually abused their own children,²⁷ distributed heroin on base resulting in death of other military members,²⁸ and made unauthorized contact with and transferred information to Soviet intelligence officials.²⁹ While the law protects these members from criminal prosecution, there is no reason that their statements

person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.”).

22. See UCMJ art. 31(a), 10 U.S.C. § 831(a) (2018) (“No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.”); MIL. R. EVID. § 304–05 (2019); *supra* notes 17–19; see also 1 COURT-MARTIAL PROCEDURE § 8-26.20 (2018) (providing that accused service members have “the right to remain silent regarding the charge against him or her” during Article 15 proceedings); Francis A. Gilligan, *The Bill of Rights and Service Members*, THE ARMY LAW. 3 (1987) (service members’ rights are broader than constitutionally required).

23. See Anthony J. Ghiotto, *Back to the Future with the Uniform Code of Military Justice: The Need to Recalibrate the Relationship Between the Military Justice System, Due Process, and Good Order and Discipline*, 90 N.D. L. REV. 485 (2014); see, e.g., Dave Philipps, “This Is Unacceptable.” *Military Reports a Surge of Sexual Assaults in the Ranks*, N.Y. TIMES (May 2, 2019), <https://www.nytimes.com/2019/05/02/us/military-sexual-assault.html> (discussing the recent surge in incidents of sexual misconduct).

24. For example, “[t]he Federal Government and virtually all of the States grant some sort of hiring preference to veterans.” *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 261 (1979).

25. *United States v. Ruiz*, 48 C.M.R. 797, 800 (C.M.A. 1974) (Quinn, J., dissenting).

26. *United States v. Rivera*, 1 M.J. 107, 111 (C.M.A. 1975).

27. *United States v. Kimble*, 33 M.J. 284, 284 (C.M.A. 1991).

28. *United States v. Mapes*, 59 M.J. 60, 72 (C.A.A.F. 2003).

29. *Cooke v. Orser*, 12 M.J. 335, 345–46 (C.M.A. 1982).

should not be used in determining whether they are entitled to remain members of the military. This Article proposes that the armed forces, like other public employers, should be able to monitor job performance by asking questions about potentially criminal conduct, so long as the military member has a guarantee that the information cannot be used in a criminal prosecution.

Part I covers the relevant Fifth Amendment precedent behind *Garrity* immunity as applied to public employees and introduces the military justice system's unique Fifth Amendment counterpart, UCMJ Article 31. Part II analyzes the development of the military branches' policies regarding compelled testimony and explores the compatibility of *Garrity* immunity with U.S. military law and precedent, finding that the use of compelled immunized testimony in military administrative proceedings is likely not prohibited as a matter of law.³⁰ Part III examines how *Garrity* immunity could be adopted in the U.S. military as a means of balancing the rights of service members and the interests of the military, proposing several ways commanders could employ *Garrity* to address misconduct within their unit at the investigation stage.³¹

I. THE FIFTH AMENDMENT AND PUBLIC EMPLOYEES

A. *The Right Against Self-Incrimination and Garrity Immunity*

The Fifth Amendment of the U.S. Constitution provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”³² Before 1964, state law enforcement officers did not benefit from the privilege against self-incrimination, and the use of a law enforcement officer's compelled incriminating statements in a state criminal trial did not implicate the Fifth Amendment.³³ In 1964, in *Malloy v. Hogan*,³⁴ the Supreme Court made the privilege against self-incrimination applicable to

30. See *infra* Part II.

31. See *infra* Part III.

32. U.S. CONST. amend. V.

33. Byron L. Warnken, *The Law Enforcement Officers' Privilege Against Compelled Self-Incrimination*, 16 U. BALT. L. REV. 452, 462–66 (1987) (“When law enforcement officers early in this century began to litigate to secure the guarantees of the fifth amendment, courts took the position that the privilege of being a public servant is dependent on a willingness to forego constitutional rights and privileges.”).

34. *Malloy v. Hogan*, 378 U.S. 1 (1964).

the states, setting the stage for a series of Fifth Amendment public employee decisions, beginning with *Garrity v. New Jersey*³⁵ in 1967.³⁶

In *Garrity*, police officers were questioned by the New York Attorney General's Office regarding an alleged conspiracy to fix traffic tickets.³⁷ The State told the officers that, although they had a right to remain silent, they would be fired if they invoked that right, and if they waived the right, their answers would be used against them in subsequent criminal prosecution.³⁸ The officers answered the investigators' questions and they were later convicted on conspiracy charges based in part on their incriminating statements.³⁹ The Supreme Court overturned the officers' convictions, ruling 5-4 that police officers "are not relegated to a watered-down version of constitutional rights."⁴⁰ The Court held that statements obtained under threat of removal from public office are unconstitutionally "coerced,"⁴¹ and therefore, the State could not compel the officers to waive their Fifth Amendment privilege to answer incriminating questions, and then use that compelled testimony to both terminate and criminally prosecute the officers.⁴²

Three years later, the Supreme Court elaborated on *Garrity* in *Gardner v. Broderick*.⁴³ In *Gardner*, a police officer testifying before a grand jury about police corruption and bribery was threatened with being fired if he did not waive both the right to remain silent and immunity from criminal prosecution.⁴⁴ Unlike in *Garrity*, the officer in *Gardner* remained silent and was administratively terminated for his refusal to waive his Fifth Amendment privilege.⁴⁵ The Court in *Gardner* found that "the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it

35. *Garrity v. New Jersey*, 385 U.S. 493 (1967).

36. Warnken, *supra* note 33, at 466-67.

37. *Garrity*, 385 U.S. at 494; Warnken, *supra* note 33, at 468.

38. *Garrity*, 385 U.S. at 494.

39. *Id.* at 495.

40. *Id.* at 500.

41. *Id.*

42. *Id.* at 499-500.

43. *Gardner v. Broderick*, 392 U.S. 273 (1968).

44. *Id.* at 274-75.

45. *Id.*

confers on penalty of the loss of employment.”⁴⁶ Justice Fortas, writing for the Court, albeit in dicta, explained the principles of *Garrity* immunity for the first time:

If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, the privilege against self-incrimination would not have been a bar to his dismissal.⁴⁷

The *Gardner* Court articulated its reasoning for applying *Garrity* immunity to public employees and not private employees in stating:

[A police officer] is directly, immediately, and entirely responsible to the city or State which is his employer. He owes his entire loyalty to it. He has no other ‘client’ or principal. He is a trustee of the public interest, bearing the burden of great and total responsibility to his public employer.⁴⁸

In two subsequent cases, the Court expanded on the *Gardner* dicta. In *Lefkowitz v. Turley*, decided in 1973, architects were disqualified from state contracts based on their refusal to testify before a grand jury.⁴⁹ Applying *Garrity* and *Gardner*, the Court found that “[a] waiver secured under threat of substantial economic sanction cannot be termed voluntary.”⁵⁰ However, the Court restated the *Garrity* rule: “[G]iven adequate immunity, the State may plainly insist that employees either answer questions under oath about the performance of their job or suffer the loss of employment.”⁵¹ The Court explained that “[i]mmunity is required if there is to be ‘rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify.’”⁵² This “rational accommodation” is achieved because a grant of immunity affords protections

46. *Id.* at 279.

47. *Id.* at 278 (citation omitted).

48. *Id.* at 277-78.

49. *Lefkowitz v. Turley*, 414 U.S. 70, 75-76 (1973).

50. *Id.* at 82-83.

51. *Id.* at 84.

52. *Id.* at 81 (citing *Kastigar v. United States*, 406 U.S. 441, 446 (1972)).

commensurate with the Fifth Amendment privilege against self-incrimination, and therefore suffices to supplant the privilege.⁵³

Four years later, in *Lefkowitz v. Cunningham*, the Court applied *Garrity* and its progeny to strike down a New York law allowing for the removal of officers of political parties based on refusal to testify.⁵⁴ Despite the government's compelling interests in maintaining an honest political process,⁵⁵ the Court found that "direct economic sanctions and imprisonment are not the only penalties capable of forcing the self-incrimination which the [Fifth] Amendment forbids."⁵⁶

Garrity immunity is consistent with the line of Supreme Court cases holding that a grant of immunity provides an individual with protection equivalent to the Fifth Amendment privilege, and therefore justifies compelling testimony because it is not incriminating.⁵⁷ In *Kastigar v. United States*, the Court noted that federal immunity statutes provide "a rational accommodation between the imperatives of the privilege [against self-incrimination] and the legitimate demands of government to compel citizens to testify[,] which are "essential to the effective enforcement of various criminal statutes."⁵⁸ The Court held that use immunity "leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege[.]" and that "[t]he immunity therefore is coextensive with the privilege and suffices to supplant it."⁵⁹ The Court's rationale was based on a two-fold "quid-pro-quo" that helps preserve the integrity of the constitutional privilege against self-incrimination: (1) the testimony is prohibited from use in future criminal prosecution, and (2) to prosecute the underlying offense, the prosecution will need to prove "the heavy burden . . . that all of the evidence it proposes to use was derived from legitimate independent sources."⁶⁰

53. See *Kastigar*, 406 U.S. at 446, 453.

54. *Lefkowitz v. Cunningham*, 431 U.S. 801, 807-08 (1977).

55. *Id.* at 808.

56. *Id.* at 806.

57. See, e.g., *Brown v. Walker*, 161 U.S. 591 (1896).

58. *Kastigar v. United States*, 406 U.S. 441, 446-47 (1972).

59. *Id.* at 462.

60. *Id.* at 461-62.

The theory of *Garrity* and *Kastigar*, and immunity more generally, seems to be that immunity “makes the evidence no longer incriminating[.]”⁶¹ not that it is a predetermined sanction or price for governmental violation of the law or a person’s individual rights. Immunity functions like an exclusionary rule because it prevents the admission of evidence. But the purpose is not to deter or punish governmental misbehavior. Instead, the Court’s policy discussions make clear that the information generated through immunity, including *Garrity* immunity, is both socially desirable and infringes no legitimate rights of the individual. This is consistent with the view of several Justices that “it is not until [the information’s] use in a criminal case that a violation of the Self-Incrimination Clause occurs.”⁶²

Most courts hold that *Garrity* immunity “arises by operation of law; no authority or statute needs to grant it[.]”⁶³ and is self-executing⁶⁴ in that it need neither be offered nor claimed to be effective.⁶⁵ For example, the First Circuit case *Sher v. United States*

61. *Bland v. Hardy*, 672 F.3d 445, 448 (7th Cir. 2012).

62. *Chavez v. Martinez*, 538 U.S. 760, 767 (2003) (citing *United States v. Verdugo-Quirquez*, 494 U.S. 259, 264 (1990)).

63. *State v. Burris*, 187 A.3d 830, 834 (N.H. 2018) (quoting *United States v. Veal*, 153 F.3d 1233, 1239 n.4 (11th Cir. 1998)).

64. There is a split on whether employees may be fired for declining to answer questions, having received *Garrity* immunity by operation of law, without being explicitly advised that they enjoy immunity and therefore that their statements cannot be used against them. *Wilson v. State*, 478 P.3d 1217, 1222–23 (Alaska 2021).

65. *See, e.g., Sher v. U.S. Dep’t of Veterans Affs.*, 488 F.3d 489, 501–02, 502 n.12 (1st Cir. 2007); *Stover v. United States*, 40 F.3d 1096, 1102–03 (10th Cir. 1994); *Uniformed Sanitation Men Ass’n v. Comm’r of Sanitation of N.Y.C.*, 426 F.2d 619, 624–26 (2d Cir. 1970); *Gulden v. McCorkle*, 680 F.2d 1070, 1075 (5th Cir. 1982) (“It is the very fact that the testimony was compelled which prevents its use in subsequent proceedings, not any affirmative tender of immunity.”); *Wiley v. Mayor of Baltimore*, 48 F.3d 773, 777 n.7 (4th Cir. 1995) (“The *Garrity* immunity is self-executing.”); *United States v. Veal*, 153 F.3d 1233, 1239 n.4 (11th Cir. 1998) (“The Fifth Amendment protection afforded by *Garrity* to an accused who reasonably believes that he may lose his job if he does not answer investigation questions is Supreme Court-created and self-executing; it arises by operation of law; no authority or statute needs to grant it.”), *overruled on other grounds by Fowler v. United States*, 563 U.S. 668 (2011); *Confederation of Police v. Conlisk*, 489 F.2d 891, 895 n.4 (7th Cir. 1973) (explaining that *Garrity* itself proscribed the use of compelled statements in any criminal proceedings as a matter of Fifth Amendment law); *Evangelou v. District of Columbia*, 901 F. Supp. 2d 159, 165 (D.D.C. 2012); *see also Clymer, supra* note 12, at 1332 (“[C]ourts more recently have found statements to be ‘compelled’ if a suspect officer believes that refusal to answer questions will cause him to lose his job and if there is an objective basis for that belief rooted in official action.” (footnote omitted)). *But see Warnken, supra* note 33, at 483–88 (discussing three

Department of Veterans Affairs involved compelled statements from the Chief Pharmacist of a VA hospital. The court explained, “When an employee is confronted with the threat of an adverse employment action for refusal to answer questions . . . no specific grant of immunity is necessary: ‘It is the very fact that the testimony was compelled which prevents its use in subsequent proceedings, not any affirmative tender of immunity.’”⁶⁶ This approach is consistent with *Murphy v. Waterfront Commission*, which held that being compelled to testify under a state grant of immunity automatically resulted in the statements being unusable in a federal prosecution.⁶⁷

It would appear that *Garrity* immunity applies neatly to the military context. Military law recognizes immunity, which is available in courts-martial.⁶⁸ Military courts also accept the theory that immunity renders immunized statements admissible because, though compelled, such statements are no longer incriminating. For example, in *United States v. Mapes*,⁶⁹ the military’s highest court, the U.S. Court of Appeals for the Armed Forces (CAAF), squarely adopted the Supreme Court’s reasoning and holding in *Kastigar*.⁷⁰ Mapes, an Army specialist, had provided immunized statements implicating himself and an accomplice in a homicide.⁷¹ After the accomplice was convicted, the accomplice was granted immunity and compelled to testify against Mapes.⁷² CAAF set aside Mapes’s conviction, finding “that the ‘immunized statements caused or played a substantial role in referral of the remaining offenses against [Mapes] to a general court-martial.’”⁷³ However, CAAF also found that “[a] servicemember’s right against self-incrimination . . . is neither absolute nor inviolate[.]” and that “an immunized servicemember may be ordered to give a statement or to testify [at

separate theories of when *Garrity* immunity attaches and arguing that the self-executing theory is the weakest).

66. *Sher*, 488 F.3d at 501–02 (quoting *Gulden*, 680 F.2d. at 1075).

67. *Murphy v. Waterfront Comm’n of N.Y.C. Harbor*, 378 U.S. 52, 79 (1964) (“[T]he Federal Government must be prohibited from making any such use of compelled testimony and its fruits.”), *abrogated on other grounds by* *United States v. Balsys*, 524 U.S. 666 (1998).

68. MCM, *supra* note 15, R.C.M. 704 (providing for transactional and testimonial immunity).

69. *United States v. Mapes*, 59 M.J. 60 (C.A.A.F. 2003).

70. *See id.*; MCM, *supra* note 15, R.C.M. 704(a), (c).

71. *Mapes*, 59 M.J. at 62–63.

72. *Id.*

73. *Id.* at 72 (quoting *United States v. Youngman*, 48 M.J. 123, 128 (C.A.A.F. 1998)).

a court-martial]” because the immunity is coexistent with the privilege, and therefore “the grant of immunity removes the right to refuse to cooperate on self-incrimination grounds.”⁷⁴ Other military cases also accept and apply *Kastigar*.⁷⁵

Military courts have also recognized immunity from other sources, such as when an officer with apparent but not actual authority promises that a service member will not be charged with a crime, and thereby induces a statement.⁷⁶ However, these cases represent an equitable remedy for mistake or misconduct, not recognition of a legitimate investigative tool.

But in *United States v. Castillo*,⁷⁷ CAAF upheld a service regulation requiring reporting of civilian arrests, despite the “reasonable argument . . . [that such reporting] is testimonial and incriminating,” because the regulation prohibited using the information to impose discipline.⁷⁸ The court noted that the reporting requirement served “a regulatory or administrative purpose. On its face, the service instruction states that ‘[d]isclosure is required to monitor and maintain the personnel readiness, welfare, safety, and deployability of the force.’”⁷⁹ The court reasoned that disclosure was not incriminating because the regulation “functions to immunize the compelled disclosure against prosecution[,]” and concluded that “the functional immunity provided by the instruction allows the government to compel the disclosure.”⁸⁰ Although *Garrity* involves questions about any aspect of professional competence and the disclosure in *Castillo* was much more particular, the principle is the

74. *Id.* at 66.

75. *See, e.g.*, *United States v. Jones*, 52 M.J. 60, 65 (C.A.A.F. 1999) (“[O]nly testimonial immunity is necessary to overcome the privileges under the Fifth Amendment and Article 31.” (citing *Kastigar v. United States*, 406 U.S. 441 (1972))); *United States v. Gardner*, 22 M.J. 28, 30 (C.M.A. 1986) (“A grant of testimonial immunity represents ‘a rational accommodation between the imperatives of the [Fifth Amendment] privilege [against self-incrimination] and the legitimate demands of government to compel citizens to testify.’” (quoting *Kastigar*, 406 U.S. at 446)).

76. *United States v. McKeel*, 63 M.J. 81, 83 (C.A.A.F. 2006) (citing *Jones*, 52 M.J. at 65); *United States v. Olivero*, 39 M.J. 246, 249 (C.M.A. 1994). While de facto immunity is provided for under the exclusionary rule at trial, it is not a “valid” grant of immunity and should not be confused as such. *Id.*

77. *United States v. Castillo*, 74 M.J. 160 (C.A.A.F. 2015).

78. *Id.* at 166.

79. *Id.* at 167 (quoting *United States v. Oxford*, 44 M.J. 337, 341 (C.A.A.F. 1996)).

80. *Id.* at 166–67.

same: military members may be questioned for regulatory or administrative purposes, even if the answers might reveal criminal conduct, so long as the statements are immunized, and therefore present no risk of incrimination.

*B. The Military's Increased Privilege Against Self-incrimination:
UCMJ Article 31*

There is another source of protection against self-incrimination in the military. Prior to the implementation of the UCMJ in 1951, service members did not enjoy the same due process rights as civilians.⁸¹ Since the UCMJ's enactment, their rights have improved.⁸² Service members are now entitled to virtually the same procedural protections provided in state or federal court.⁸³ In fact, reforms have been so progressive that in some respects, military service members enjoy more constitutional protections than civilians.⁸⁴

The military justice system was more progressive than the federal courts in at least one notable way: its early protection against compelled self-incrimination.⁸⁵ Due to the coercive

81. See Ghiotto, *supra* note 23, at 496–501.

82. See DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* § 1-1(D) (10th ed. 2018); Ghiotto, *supra* note 23.

83. This is largely because Article 36(a) requires military courts to follow the procedures of federal court. See UCMJ art. 36, 10 U.S.C. § 836 (2018); David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1, 11 (2013).

84. See Francis A. Gilligan, *The Bill of Rights and Service Members*, THE ARMY LAW. 3 (1987) (showing that servicemembers' rights are broader than constitutionally required); *United States v. Graf*, 35 M.J. 450, 460 (C.M.A. 1992) (“[T]here has been substantial scholarly debate on applicability of the Bill of Rights to the American servicemember.”). See generally Fredric I. Lederer & Frederic L. Borch, *Does the Fourth Amendment Apply to the Armed Forces?*, 3 WM. & MARY BILL RTS. J. 219 (1994), reprinted in 144 MIL. L. REV. 110 (1994). However, as a practical matter, this question has been mooted in so far as CAAF has held the Bill of Rights to apply to servicemembers. See *United States v. Easton*, 71 M.J. 168, 174–75 (C.A.A.F. 2012) (“Constitutional rights identified by the Supreme Court generally apply to members of the military unless by text or scope they are plainly inapplicable.” (quoting *United States v. Marcum*, 60 M.J. 198, 206 (C.A.A.F. 2004))); see also *United States v. Jacoby*, 11 C.M.A. 428, 430–31 (C.M.A. 1960) (“[I]t is apparent that the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces.”).

85. Predating *Miranda* by almost twenty years, the Articles of War were amended in 1948 under the Elston Act to include an unprecedented protection for servicemembers against compelled self-incrimination, motivated by the military's coercive rank structure and the potential for officers “to compel subordinates to incriminate themselves.” Fredric I. Lederer, *Rights Warnings in the Armed Services*, 72 MIL. L. REV. 1, 4–6 (1976).

command structure and power of superior rank, the privilege against self-incrimination applies more broadly in the military.⁸⁶ In addition to the Fifth Amendment privilege against self-incrimination, service members are protected by UCMJ Article 31(a), which prohibits using compulsion to obtain incriminating information.⁸⁷ Additionally, Article 31(b) requires that suspects receive rights advisements prior to questioning, similar to *Miranda* warnings⁸⁸:

No person subject to [the UCMJ] may interrogate, or request any statement from . . . a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.⁸⁹

The Article 31(b) warning is required when “(1) a person subject to the UCMJ, (2) interrogates or requests any statement, (3) from an accused or person suspected of an offense, and (4) the statements regard the offense of which the person questioned is accused or suspected.”⁹⁰

86. *United States v. Duga*, 10 M.J. 206, 209 (C.M.A. 1981) (“Because of the effect of superior rank or official position upon one subject to military law, the mere asking of a question under certain circumstances is the equivalent of a command.”); see *Burks*, *supra* note 16, at 41.

87. See *United States v. Rosato*, 11 C.M.R. 143, 145 (C.M.A. 1953). Compare U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime . . . nor shall be compelled in any criminal case to be a witness against himself.”), with UCMJ art. 31(a), 10 U.S.C. § 831(a) (2018) (“No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.”).

88. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (holding that when an officer arrests or takes individuals into custody, the officer must warn them prior to questioning that they have a right to remain silent and the right to counsel). *Miranda* warnings are only required when a person is (1) in custody and (2) subject to interrogation—“custodial interrogation.” *Id.* A person is in custody when physically deprived of freedom of action in any significant way, such that “a reasonable and innocent person” would not feel free to leave after brief questioning. *United States v. Wauneka*, 770 F.2d 1434, 1438 (9th Cir. 1985) (quoting *United States v. Booth*, 669 F.2d 1231, 1235 (9th Cir. 1981)). An interrogation occurs when an officer expressly questions a person or when an officer says anything the officer should know is “reasonably likely to elicit an incriminating response.” *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

89. UCMJ art. 31(b), 10 U.S.C. § 831 (2018).

90. *United States v. Jones*, 73 M.J. 357, 361 (C.A.A.F. 2014) (footnote omitted).

The circumstances that might trigger an Article 31(b) warning are noticeably less stringent than the threshold requirement of a custodial interrogation for *Miranda* warnings.⁹¹ *Miranda* applies only when a person is in custody; Article 31 contains no such requirement. In addition, Article 31(b) applies to a much broader range of conduct because of the existence of purely military offenses and the ever-present concern of coercion resulting from disparity in rank. For instance, a service member arriving late to work—Absent Without Leave (AWOL) under Article 86—would be entitled to an Article 31(b) warning prior to being questioned.⁹² A civilian public employee would rarely if ever be entitled to a *Miranda* warning for arriving late or failing to show up to work. Obviously, this is in part because a civilian's supervisor is not a police officer, whereas in the military, a service member's supervisor—a superior officer—will be bound by Article 31.

However, Article 31 itself suggests that it applies only to criminal prosecutions, and therefore is consistent with *Garrity* immunity. Article 31(d) provides “No statement obtained from any person in violation of this Article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.”⁹³ It does not, on its face, exclude such statements from other proceedings. Consistent with this interpretation, none of the services' regulations, except those of the Army and Coast Guard, exclude statements obtained in violation of Article 31 from being admitted as evidence at administrative discharge boards.⁹⁴

91. Burks, *supra* note 16, at 41; *see also* United States v. Lewis, 12 M.J. 205, 207 (C.M.A. 1982) (“These provisions accord an accused even broader protection than the Fifth Amendment of the United States Constitution, and may apply in situations far more subtle than the custodial interrogation situation defined by the Supreme Court in *Miranda v. Arizona*.” (citations omitted)).

92. *See* UCMJ art. 86, 10 U.S.C. § 886 (2018); Burks, *supra* note 16, at 41; Lewis, 12 M.J. at 207 & 207 n.3 (“However, in carrying out his military duties the superior must be allowed an interplay of communication with subordinates not prefaced in every instance by a warning of rights.” (citations omitted)).

93. *See* UCMJ art. 31(d), 10 U.S.C. § 831(d) (2018).

94. *See supra* note 20. While the services have a more expedient “notice discharge” procedure available that foregoes a formal administrative discharge board, obviating the relevance of using compelled testimony at such a proceeding, *Garrity* would still be applicable to the extent that it would allow commanders to quickly obtain answers to questions that they might otherwise not be legally allowed to ask. *See, e.g.,* NAVY PERS.

II. MILITARY PROHIBITION OF GARRITY IMMUNITY

If immunity is part of military law, and if employee management is important in the military, why does *Garrity* immunity not exist?⁹⁵ The answer lies in service regulations based on erroneous military court decisions.

A. *The Background*

The notion that compelled statements may not be used in administrative proceedings originated in *United States v. Ruiz*, a 1974 decision of the U.S. Court of Military Appeals (COMA)⁹⁶ arising out of a Vietnam-era anti-drug program.⁹⁷ Army Private Ruiz was convicted of disobedience of an order after he refused to submit to urinalysis for drug testing, which his commander

COMMAND, MIL. PERS. MANUAL 1910-402, Administrative Board and Notification Procedures (2019); DEP'T OF THE NAVY, U.S. MARINE CORPS, TALENT MANAGEMENT 2030 at 6-7 (2021) (discussing how the Marine Corps discharges approximately seventy-five percent of its first-term enlisted Marines every year, but also noting that "it is time that the Marine Corps take decisive steps to mature the force" and retain marines beyond their first term of enlistment); DEP'T OF THE AIR FORCE, INSTRUCTION 36-3211: MILITARY SEPARATIONS § 8.2.2 (2022) (describing classes of servicemembers recommended for discharge that are entitled to a discharge hearing, including non-commissioned officers and those with six or more years of service). In a situation where compelled and potentially incriminating testimony would be necessary, an officer could obtain answers to critically important questions under threat of separation. It is less relevant whether those answers could be subsequently admitted at an administrative hearing. Of course, the caveat would be that criminal prosecution based on the servicemember's criminal conduct would be foreclosed.

95. Although *Garrity* does not apply to service members, it applies to civilians employed by the Department of Defense because they are non-military government employees not subject to the UCMJ. See OFF. OF THE DEPUTY INSPECTOR GEN. FOR ADMIN. INVESTIGATIONS, DEP'T OF DEF., ADMINISTRATIVE INVESTIGATIONS MANUAL 45-46 (2020) (discussing the applicability of *Garrity* to Department of Defense employees, but that military service members are entitled to Article 31(b) warnings (citing *Garrity v. New Jersey*, 385 U.S. 493 (1967))); see also OFF. OF THE INSPECTOR GEN., SEC'Y OF THE AIR FORCE, JAG GUIDE TO IG INVESTIGATIONS 19-20 (2010) [*hereinafter* AF GUIDE TO INVESTIGATIONS] (noting the applicability of *Garrity* and that Article 31 does not apply to civilian employees in the Air Force, and that members of the military may only be compelled to testify after a formal grant of immunity from the Staff Judge Advocate). Federal employees are also subject to a similar management tool known as *Kalkines* warnings, originating from the Court of Claims' decision in *Kalkines v. United States*, 473 F.2d 1391 (Ct. Cl. 1973). *Kalkines* warnings compel federal employees to answer questions under pain for disciplinary action, including termination, as long as the employees are explicitly told that they will receive immunity from criminal prosecution. See Eric R. Hammerschmidt, *Avoiding the Pitfalls of Investigating Federal Civilian Employees Pursuant to Army Regulation 15-6*, 2021 ARMY LAW. 53, 57-58.

96. COMA is CAAF's predecessor, the highest military court at the time.

97. *United States v. Ruiz*, 48 C.M.R. 797 (1974).

intended to use for possible administrative separation, but not for criminal prosecution. In a 2-1 decision, the court found that “[Article 31] of the Uniform Code has a broader sweep than the Fifth Amendment to the United States Constitution[,]” and therefore applies to production of evidence as well as statements and testimony.⁹⁸ The court further found that “[t]he constitutional prohibition against self-incrimination applies to administrative as well as criminal proceedings.”⁹⁹ Accordingly, the accused could not be convicted for disobedience of what the majority regarded as an illegal order: “we do not believe [the military’s interests] can outweigh the accused’s right to refuse obedience to an order, compliance with which would require him to furnish evidence that might tend to incriminate him.”¹⁰⁰

Ruiz did not rule out application of the *Garrity* line, finding an “obvious” parallel with *Gardner v. Broderick*¹⁰¹ and the cases before it. However, COMA found “the procedures utilized here exceeded the scope of those suggested in [*Gardner*] and constituted an invasion of the accused’s right to refrain from incriminating himself.”¹⁰² In a footnote, COMA noted:

In this case, the accused actually received a punitive discharge, confinement at hard labor for 4 months and a forfeiture of \$100 per month for 4 months, based in part on disobedience of the order. This is hardly the same as the simple dismissal from the police force involved in *Gardner*.¹⁰³

Judge Quinn dissented on the ground that caselaw allowed the order to generate evidence for non-criminal purposes, and Private *Ruiz* could have objected later “if the test results were sought to be used against him for other than health and fitness reasons.”¹⁰⁴

Six years later, in *Giles v. Secretary of Army*, the D.C. Circuit found it “unnecessary to pass upon the validity of the decision in *Ruiz*[.]” but upheld the certification of a class action of members discharged based on urinalysis.¹⁰⁵ “After *Ruiz*, the services adopted

98. *Id.* at 182.

99. *Id.* at 798-99; *see also* *Giles v. Sec’y of Army*, 627 F.2d 554 (D.C. Cir. 1980).

100. *Ruiz*, 48 C.M.R. at 798.

101. *Gardner v. Broderick*, 392 U.S. 273 (1968).

102. *Ruiz*, 48 C.M.R. at 799.

103. *Id.* at 799 n.3 (citation omitted).

104. *Id.* at 800.

105. *Giles v. Sec’y of Army*, 627 F.2d 554, 557 (D.C. Cir. 1980).

regulations providing that administrative discharges based solely on compelled drug urinalysis samples would be classified 'honorable.'"¹⁰⁶ Also, since *Ruiz*, the service regulations of each U.S. military branch require Article 31(b) warnings during administrative investigations and discharge proceedings, although three of the five branches are silent on whether improperly compelled testimony acquired prior to an administrative discharge board is subsequently admissible at a service member's discharge board.¹⁰⁷ For example, Army Regulation (AR) 15-6 provides that "[n]o military witnesses or military respondents will be compelled to incriminate themselves . . . or to make a statement or produce evidence . . . that might tend to degrade them."¹⁰⁸ AR 27-10 requires that commanders notify soldiers of their right to remain silent before initiating a nonjudicial punishment inquiry, and AR 635-200 applies the Article 31 privilege to administrative discharge boards of enlisted army soldiers.¹⁰⁹

At the time it was decided, *Ruiz* was defensible. Prior COMA decisions had held that the privilege is applicable to urinalysis and other tangible items. And a line of authority held that in the context of the privilege against self-incrimination, a person is entitled to disobey a court order and take one's chances on appeal.¹¹⁰

106. *Walters v. Sec'y of Def.*, 725 F.2d 107, 109 (D.C. Cir. 1983) (citing 32 C.F.R. § 41.7(f) (1982)).

107. See UCMJ art. 31(a), 10 U.S.C. § 831(a) (2018) ("No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him."); *Giles*, 627 F.2d at 557 (upholding the district court's decision to exclude compelled urinalysis test results from being used at an administrative discharge under Article 31's prohibition on compelled testimony); *Ruiz*, 48 C.M.R. at 799 ("The constitutional prohibition against self-incrimination applies to administrative as well as criminal proceedings."); *supra* note 20.

108. AR 15-6, *supra* note 18 (citation omitted); see also NAVAL JUST. SCH., JAGMAN INVESTIGATIONS HANDBOOK (Mar. 2016) (requiring investigators to "[a]dvise any military witness who may be suspected of an offense, misconduct, or improper performance of duty, of his/her rights under Article 31, UCMJ").

109. THE JUDGE ADVOC. GEN.'S LEGAL CTR. & SCH., COMMANDER'S LEGAL HANDBOOK 65, 65-66 (2019); see also AFM 51-507, *supra* note 19, at para. 5.5.2 ("The Respondent cannot be compelled to testify against himself or herself, nor may that silence be used against him or her. Involuntary confessions or admissions by a Respondent are not admissible.").

110. The Court explained:

As the Court stated in *Maness v. Meyers*, 419 U.S. 449 (1975), compelling a witness to testify in "reliance upon a later objection or motion to suppress would 'let the cat out' with no assurance whatever of putting it back." *Id.* at 463. We believe Conboy acted properly in maintaining his silence in the face of the District Court's compulsion order and by testing the validity of his privilege on appeal.

Pillsbury Co. v. Conboy, 459 U.S. 248, 262 (1983).

However, *Ruiz* is no longer good law as to the scope of Article 31. In *United States v. Armstrong*,¹¹¹ COMA found that “the clearly manifested intent of Congress in enacting Article 31(a) was merely to afford to servicepersons a privilege against self-incrimination which paralleled the constitutional privilege.”¹¹² The court cited an earlier COMA ruling that stated, “Undoubtedly, it was the intent of Congress in this division of . . . Article [31] to secure to persons subject to the Code the same rights secured to those of the civilian community under the Fifth Amendment . . . no more and no less.”¹¹³ It is true that the warning requirement of Article 31(b) goes beyond *Miranda*, requiring warnings even when there is no custody.¹¹⁴ But with that exception, in terms of what protections arise from the privilege against self-incrimination, there is no longer a divergence between general federal constitutional law and military law.

Supreme Court decisions since *Ruiz* made clear that the privilege applied only to testimonial evidence. Accordingly, *Armstrong* explicitly rejected one part of *Ruiz*'s holding, concluding that Article 31 “has no relevancy to blood specimens or other body fluids since, under the currently dominant ‘testimonial compulsion’ approach to interpretation of the Fifth Amendment, such evidence is not subject to self-incrimination safeguards as it lacks the qualities of a communication by the suspect.”¹¹⁵ This part

111. *United States v. Armstrong*, 9 M.J. 374 (C.M.A. 1980).

112. *Id.* at 383 (citing military case law and extensive legislative history and congressional committee hearings).

113. *Id.* at 380 (citing *United States v. Eggers*, 3 C.M.A. 191, 195 (1953)); *see also* *United States v. Alameda*, 57 M.J. 190, 198 (C.A.A.F. 2002) (“The privilege against self-incrimination recognized in Article 31(a) . . . is virtually identical to the privilege under the Fifth Amendment. Thus, our Fifth Amendment analysis also applies to Article 31(a).”).

114. Thus, COMA explained:

[T]his Court clearly is on record that, while Article 31(a) and the Fifth Amendment coincide in scope and while Article 31(b) was enacted to serve the purpose of avoiding coerced statements in violation of both provisions, unique factors in the military environment—unknown in the civilian setting—lead us to interpret Article 31(b) as being broader in the scope of its protection than is the mandate of *Miranda*.

United States v. Ravenel, 26 M.J. 344, 349 (C.M.A. 1988); *see also* *United States v. Evans*, 75 M.J. 302, 303 (C.A.A.F. 2016) (“The protections afforded to servicemembers under Article 31(b), UCMJ, are in many respects broader than the rights afforded to those servicemembers under the Fifth Amendment of the Constitution.”).

115. *Armstrong*, 9 M.J. 374 at 380; *see* *Walters v. Sec’y of Def.*, 725 F.2d 107, 109 (D.C. Cir.

of *Armstrong* was codified in Military Rule of Evidence 301(a), which provides, “The privileges against self-incrimination are applicable only to evidence of a testimonial or communicative nature.”¹¹⁶

The second relevant holding in *Ruiz*, rejecting the idea “that Congress intended to permit forced self-incrimination in [discharge] proceedings any more than in courts-martial[.]”¹¹⁷ rested primarily on a citation to *Spevack v. Klein*,¹¹⁸ a case decided the same day as *Garrity*, which applied the privilege to attorney disciplinary proceedings. This remains good law, but with a twist. The privilege “‘can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory,’ in which the witness reasonably believes that the information sought, or discoverable as a result of his testimony, could be used in a subsequent state or federal criminal proceeding.”¹¹⁹ But “the privilege is available to a witness in a civil proceeding” only because it could “later subject the witness to criminal prosecution[.]”¹²⁰ It is not available when the testimony will be used exclusively in a civil matter: “Unless the government seeks testimony that will subject its giver to criminal liability, the constitutional right to remain silent absent immunity does not arise.”¹²¹ Thus, “[a]nswers may be compelled regardless of the privilege if . . . there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying.”¹²² A subsequent COMA decision may have recognized this distinction. In holding that an officer could not be prosecuted for espionage after making statements based on an invalid promise of immunity, COMA noted that it “has no jurisdiction over the administrative discharge system

1983) (“As a matter of Article 31 law, then, the introduction of compulsory urinalysis evidence into administrative discharge proceedings is now lawful.”) (discussing *Armstrong* and *Murray v. Haldeman*, 16 M.J. 74, 81 (C.M.A.1983)).

116. U.S. DEP’T OF DEFENSE, MANUAL FOR COURTS-MARTIAL, UNITED STATES, M.R.E. 301(a) (2015).

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

118. *Spevack v. Klein*, 385 U.S. 511 (1967).

119. *United States v. Balsys*, 524 U.S. 666, 672 (1998) (quoting *Kastigar v. United States*, 406 U.S. 441, 444–45 (1972)).

120. *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977).

121. *Garner v. United States*, 424 U.S. 648, 655 (1976).

122. *Gardner v. Broderick*, 392 U.S. 273, 276 (1968) (first citing *Counselman v. Hitchcock*, 142 U.S. 547, 585–86 (1892); and then citing *Murphy v. Waterfront Commission*, 378 U.S. 52, 79 (1964)).

of the armed services[,]” a statement consistent with the idea that once the threat of criminal prosecution was eliminated, compelled statements were admissible in administrative proceedings.¹²³

B. Is the Administrative Discharge Actually a Criminal Proceeding?

If the administrative discharge is criminal in nature, then a service member’s incriminating statements would obviously be inadmissible at such a proceeding, and *Garrity* immunity would have no place. Though it is argued that a less-than-honorable administrative discharge is punitive in nature, courts have declined to hold that the administrative discharge is tantamount to criminal punishment. To be sure, a less-than-honorable discharge can have lasting negative impacts on a service member’s life, but that does not transform the proceeding into a criminal one.

To evaluate the argument that an administrative discharge is tantamount to criminal punishment, it is helpful to understand some of the workings of the system. Enlistment usually entails an eight-year commitment contract split between active and reserve service.¹²⁴ However, service members may be separated (*i.e.*, discharged) before their contracts have ended.¹²⁵ Members may be discharged upon expiration of their term of service as a matter of course, apply for discharge for their own reasons (such as based on a claim of conscientious objection), or be subjected to punitive or administrative discharge proceedings. A punitive discharge, which may be characterized as either a bad conduct discharge (BCD) or a “dishonorable discharge,” can only be imposed by a court-martial.¹²⁶ Thus, punitive discharges are clearly a criminal punishment. On the other hand, administrative discharges, which are the focus of this Article, are initiated by a superior based on misconduct or unsuitability.¹²⁷ Administrative discharges are

123. *Cooke v. Orser*, 12 M.J. 335, 346 n.39 (C.M.A. 1982).

124. Since this Article focuses on a commander’s ability to compel his or her soldiers to answer questions, enlisted personnel will naturally be its focus. This Article will generally not discuss military officers or their distinct processes for discipline and separation. However, the basic arguments of this Article apply to all military members.

125. See James S. Richardson Sr., *Curing “Bad Paper”: A Primer on Review of Discharges from the Military*, 57 FED. LAW. 47, 48 (2010).

126. See *id.*; *Forms of Military Discharge*, VETERANS AUTHORITY, <https://va.org/forms-of-military-discharge> (last visited Oct. 6, 2023).

127. Latisha Irwin, *Justice in Enlisted Administrative Separations*, 225 MIL. L. REV. 35, 51-

characterized as either: (1) Honorable, (2) General (under honorable conditions), or (3) Other Than Honorable (OTH).¹²⁸ The characterization of a discharge is based on the quality of the service member's service and the reason for discharge,¹²⁹ and each classification has distinct implications and effects on veteran benefits.¹³⁰

Because "military service is a unique calling," and "[t]he acquisition of military status . . . involves an individual's commitment to the United States," it is the policy of the Department of Defense (DoD) that when a service member can no longer "[m]aintain [the] standards of performance, conduct, and discipline" required, he or she should be separated—terminated from military service.¹³¹ Generally, a company-level commander initiates the proceedings by notifying the service member and advising them of their rights.¹³² A member may appear in person (with or without appointment of counsel) at the board and argue, waive a hearing, submit evidence, and request the appearance of witnesses and question any witnesses.¹³³ The rules of evidence are inapplicable, and a board cannot compel witnesses to appear.¹³⁴ If the board recommends discharge, it then determines a characterization of discharge.¹³⁵

Although the administrative discharge is labeled as "administrative," nominally civil or administrative proceedings

52 (2017); DEP'T OF THE ARMY, ARMY REGUL. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS 26 (2021).

128. See Richardson, *supra* note 125, at 48; 32 C.F.R. § 724.109 (2023). The OTH discharge was formerly called an "undesirable" discharge. Wood v. Sec'y of Def., 496 F. Supp. 192, 193 n.1 (D.D.C. 1980). A fourth type of discharge—Entry-level Separation (ELS)—has no characterization and is used to separate service members with less than 180 days of service. See 32 C.F.R. § 724.109 (2023); *Forms of Military Discharge*, *supra* note 126.

129. DEP'T OF DEF., INSTRUCTION 1332.14: ENLISTED ADMINISTRATIVE SEPARATIONS 29-30 (Jan. 27, 2014) [hereinafter DOD INSTRUCTION 1332.14].

130. See UMAR MOULTA-ALI & SIDATH VIRANGA PANANGALA, CONG. RSCH. SERV., R 43928, VETERANS' BENEFITS: THE IMPACT OF MILITARY DISCHARGES ON BASIC ELIGIBILITY (2015); Bradley K. Jones, *The Gravity of Administrative Discharges: A Legal and Empirical Evaluation*, 59 MIL. L. REV. 1 (1973); Jim Salter, *Some Military Discharges Mean No Benefits After Service Ends*, US NEWS, (Dec. 24, 2015, 11:58 AM), <https://www.usnews.com/news/us/articles/2015-12-24/some-military-discharges-mean-no-benefits-after-service-ends>.

131. DOD INSTRUCTION 1332.14, *supra* note 129, at 2.

132. Irwin, *supra* note 127.

133. *Id.* at 53.

134. *Id.*

135. DOD INSTRUCTION 1332.14, *supra* note 129, at 43; Irwin, *supra* note 127, at 53-54.

can be deemed criminal or quasi-criminal for purposes of constitutional protection.¹³⁶ In *United States v. Ward*, the Supreme Court promulgated a two-part test to determine whether a statutorily defined penalty is civil or criminal.¹³⁷ *Ward* concerned whether the assessment of a “civil penalty” pursuant to the mandatory reporting requirement under the Federal Water Pollution Control Act (FWPCA) constituted a “criminal case” within the meaning of the Fifth Amendment’s privilege against compulsory self-incrimination.¹³⁸ Under the FWPCA, parties properly reporting the spill of hazardous waste into federal waters were immunized from criminal prosecution, but not the imposition of a civil fine.¹³⁹ Based on the grant of immunity and the civil/regulatory nature of the provision, the Court held that the privilege against self-incrimination did not apply.¹⁴⁰ Lower courts have applied the *Ward* framework in many contexts, such as forfeiture proceedings, sex-offender registration,¹⁴¹ occupational and professional debarment,¹⁴² and the imposition of civil penalties.¹⁴³

The first part of the *Ward* test asks whether Congress intended the penalizing mechanism to expressly or implicitly possess a particular label—civil, criminal, or administrative.¹⁴⁴ The second prong is triggered when Congress’s intent for a noncriminal penalty is called into question, whereby the Court will determine whether “the statutory scheme [is] so punitive either in purpose or effect as to negate that intention [of a noncriminal label].”¹⁴⁵ For the second part of the analysis, “only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground.”¹⁴⁶

136. See, e.g., *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965) (applying exclusionary rule) (“[A] forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law.”).

137. *United States v. Ward*, 448 U.S. 242, 248–49 (1980).

138. *Id.* at 244.

139. *Id.*

140. *Id.* at 254–55.

141. *Smith v. Doe*, 538 U.S. 84, 105–06 (2003).

142. *Hudson v. United States*, 522 U.S. 93, 105 (1997).

143. *United States v. Ward*, 448 U.S. 242, 248 (1980).

144. *Id.*

145. *Id.* at 248–49.

146. *Id.* at 249 (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (internal quotations omitted)).

To guide its analysis under the second part of the test, the *Ward* Court employed a non-exhaustive and non-dispositive list of seven considerations that the Court previously outlined in *Kennedy v. Mendoza-Martinez*.¹⁴⁷ The seven considerations are whether the sanction (1) “involves an affirmative disability or restraint[;]” (2) “has historically been regarded as a punishment[;]” (3) requires a finding of scienter; (4) “will promote the traditional aims of punishment—retribution and deterrence[;]” (5) applies to behavior that is already a crime; (6) could be assignable to an alternative purpose for which it is rationally connected; and (7) “appears excessive in relation to the alternative purpose assigned”¹⁴⁸

An honorable discharge cannot be regarded as stigmatizing, as it is the highest possible classification.¹⁴⁹ Anything less than “honorable” is stigmatizing.¹⁵⁰ A general or OTH discharge is arguably analogous to being terminated from a civilian public or private job with a mediocre or negative job performance evaluation or based on misconduct.¹⁵¹ Such a discharge may have negative consequences in civilian life.¹⁵² Some studies have shown that service members discharged under the OTH characterization are at a great risk of homelessness, suicide, and involvement in the

147. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963) (listing non-exhaustive and non-dispositive considerations used by the Court to guide the analysis).

148. *Id.*

149. See MOULTA-ALI & PANANGALA, *supra* note 130 (noting that an honorable discharge, which is the norm for discharged service members, affords a veteran the full range of available veterans’ benefits).

150. See Andrew S. Effron, Comment, *Punishment of Enlisted Personnel Outside the UCMJ: A Statutory and Equal Protection Analysis of Military Discharge Certificates*, 9 HARV. C.R.-C.L.L. REV. 227, 228–29 (1974); Jack Finney Lane, Jr., *Evidence and the Administrative Discharge Board*, 55 MIL. L. REV. 95, 98–99 (1972) (“Judicial opinions in a number of cases involving undesirable discharges have generally conceded that since most soldiers are discharged from the service with an honorable discharge, anything less stigmatizes the ex-serviceman.”); see *Sofranoff v. United States*, 165 Ct. Cl. 470, 478 (1964) (“Since the vast majority of discharges from the armed forces are honorable, the issuance of any other type of discharge stigmatizes the ex-serviceman. It robs him of his good name. It injures his economic and social potential as a member of the general community.”) (first citing *Bland v. Connally*, 293 F.2d 852, 858 (D.C. Cir. 1961); and then citing Note, *Discharging the Inactive Reservist for Political Activities Affecting his Security Status*, 69 YALE L.J. 474, 492 (1960)); see also Donald W. Hansen, *Discharge for the Good of the Service: An Historical, Administrative and Judicial Potpourri*, 74 MIL. L. REV. 99, 163 (1976).

151. Thomas R. Folk, *Use of Compelled Testimony in Military Administrative Proceedings*, ARMY LAW. 1, 9–10 (1983).

152. See Effron, *supra* note 150, at 230–34.

criminal justice system.¹⁵³ Furthermore, because most individuals discharged under non-honorable certificates are young,¹⁵⁴ the general and OTH characterizations can carry lifelong stigma.¹⁵⁵ Distinguishing a less-than-honorable discharge from a poor civilian job review, “[i]t is obvious that [the civilian] industry in general does not feel it has the right to brand even an unsatisfactory wage earner for the rest of his life and make it difficult for him ever to get another decent job.”¹⁵⁶ Thus, the DoD can pass lasting judgement on a significant portion of the population, a power possessed by no other employer.¹⁵⁷

Various economic penalties are also implicated by less-than-honorable discharges. One significant penalty is the deprivation of veteran benefits.¹⁵⁸ An honorable discharge entitles a veteran to many benefits, including funding for higher education, home loans, health care, and possible disability or retirement pay.¹⁵⁹ A general discharge, which is “[u]nder [h]onorable [c]onditions[.]” entitles a veteran to “most, if not all, benefits under federal law[.]”¹⁶⁰ However, states often require an honorable discharge for various benefits they provide.¹⁶¹ Of the administrative discharges, an OTH discharge has the most restraining and punitive effect on veteran benefits.¹⁶² No benefits are automatically conferred, and the few benefits available, if not automatically denied, are only conferred after a case-by-case evaluation of an individual and their record.¹⁶³

153. See Stephanie Brooks Holliday & Eric R. Pedersen, *The Association Between Discharge Status, Mental Health, and Substance Misuse Among Young Adult Veterans*, 256 PSYCHIATRY RSCH. 428, 429 (2017).

154. Effron, *supra* note 150, at 233 (citing *Hearings on H.R. 523 Before Subcomm. No. 3 of the H. Comm. On Armed Services*, 92d Cong. 5888 (1971)).

155. *Id.*

156. *Id.* at 231 (quoting H.R. REP. NO. 1510-79, at 9-10 (1946)).

157. *Id.* at 231-33.

158. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963) (considering whether the scheme imposes an “affirmative penalty”); see Hansen, *supra* note 150, at 167-71.

159. See *United States v. Ward*, 448 U.S. 242, 249 (1980); *Kennedy*, 372 U.S. at 168-69; see also *Applying for Benefits and Your Character of Discharge*, VA.GOV (Feb. 11, 2022), https://www.benefits.va.gov/benefits/character_of_discharge.asp.

160. *Schustack v. Herren*, 234 F.2d 134, 135 n.2 (2d Cir. 1956).

161. See, e.g., *id.* (noting that the state of New York, for example, requires an honorable discharge for receipt of most veterans’ benefits).

162. See MOULTA-ALI & PANANGALA, *supra* note 130.

163. See *id.*

For these reasons, many have suggested that at least an OTH discharge is punitive.¹⁶⁴ The argument, though, faces a steep uphill climb given the many cases in which the Supreme Court has upheld terminations of public employment, government licenses, and benefits, even for stigmatizing reasons, without criminal protections.¹⁶⁵ In *Hudson v. United States*, for example, the Supreme Court found noncriminal both debarment from practicing in the banking industry and the process which led to it.¹⁶⁶ Similarly, a stigmatizing form of discharge is tantamount to termination for misconduct, impeachment, a civil complaint or judgment of wrongdoing, and other governmental actions which have never been deemed criminal. Of course, the substantial interests associated with military service warrant robust due process protection,¹⁶⁷ but whether administrative discharge constitutes criminal punishment is a separate question.

Courts, apparently without exception, hold that discharge boards are non-criminal tribunals and do not impose criminal punishment.¹⁶⁸ Accordingly, they reject claims that administrative

164. See *United States v. Phipps*, 12 C.M.A. 14, 16 (1960) (Quinn, C.J., concurring) (“At least one kind of administrative discharge appears to be linked in practice to the military criminal law. On several occasions, Congress has considered the punitive effects of the undesirable [now OTH] discharge, which is classified as an administrative discharge. I fully appreciate that insofar as it impairs economic and educational opportunity and community position, the practical consequences of that type of discharge may be virtually as bad as those of a bad-conduct discharge.”); *United States v. Calkins*, 20 C.M.R. 543, 548 n.4 (N. Bd. Rev. 1956) (“The undesirable discharge is a sort of punishment of the recipient for wrongdoing and not only for past wrongdoing but to deter others from wrongdoing which reflects adversely upon the service. Such discharges are not only to punish the accused but are actually for the public good—the good of the service.”); Brent G. Filbert, *Failing the Article 31 UCMJ Test; the Role of the Navy Inspector General in the Investigation of the Naval Academy Cheating Scandal*, 42 NAVAL L. REV. 1, 19–20 (1995) (arguing for a quasi-criminal label for military administrative discharge proceedings).

165. See, e.g., *Hudson v. United States*, 522 U.S. 93, 104 (1997); *Flemming v. Nestor*, 363 U.S. 603, 603 (1960); *Hawker v. New York*, 170 U.S. 189 (1898); *In re Daley*, 549 F.2d 469 (7th Cir. 1977).

166. *Hudson*, 523 U.S. at 105.

167. *United States v. Gansemer*, 38 M.J. 340, 341 (C.M.A. 1993) (“With regard to administrative-discharge procedures, a servicemember is afforded many due process protections, mostly spelled out in service regulations but having their foundation in the Constitutional principle that no person may be deprived of property without due process of law.”).

168. *United States v. Stokes*, 12 M.J. 229, 235 n.6 (C.M.A. 1982) (“[M]any administrative proceedings—such as those involving military administrative discharges, deportation, or a loss of a driver’s license—bear similar protective trappings, yet are not ‘criminal’ in nature.”); *United States v. Pinkney*, 48 C.M.R. 219, 221 (C.M.A. 1974) (distinguishing “administrative

discharges implicate criminal justice entitlements such as the exclusionary rule under the Fourth Amendment;¹⁶⁹ protection against double jeopardy;¹⁷⁰ *Brady* disclosures;¹⁷¹ proof beyond a reasonable doubt;¹⁷² Sixth Amendment rights to compulsory

discharge rather than criminal trial"); Richard J. Bednar, *Discharge and Dismissal as Punishment in the Armed Forces*, 16 MIL. L. REV. 1, 1 (1962) ("While it cannot be denied that there are penal aspects attached to certain administrative discharges, they are obviously beyond the scope here because they result from action of a non-criminal forum.").

169. *Garrett v. Lehman*, 751 F.2d 997, 1003 (9th Cir. 1985) ("The Board recommended that Garrett be separated from the service with an 'other than honorable' discharge because of his unfitness for future duty as shown by his commission of a crime – not as a punishment for his past behavior.").

170. *Ruffin v. United States*, 509 F. App'x 978, 980 (Fed. Cir. 2013) ("The administrative separation [is] not a criminal proceeding . . ."); *United States v. Rice*, 109 F.3d 151, 153–55 (3d Cir. 1997) (finding that the administrative discharge is a "remedial and civil, not criminal or punitive, sanction"); *United States v. Smith*, 912 F.2d 322, 324 (9th Cir. 1990) (per curiam) ("Although the military charges were criminal in nature, a Chapter 10 discharge is administrative and non-punitive."); *Denton v. Sec'y of Air Force*, 483 F.2d 21, 29 (9th Cir. 1973) ("The Board of Inquiry proceedings, however, were administrative in nature, conducted to determine the fitness of an officer for retention in the Air Force."); *Witten v. United States*, No. 13-CR-10022, 2019 WL 4453624, at *28 (S.D. Fla. Mar. 7, 2019) ("[T]he discharge is an administrative rather than a criminal penalty."), *report and recommendation adopted*, No. 13-CR-10022-JEM, 2019 WL 4453360 (S.D. Fla. May 8, 2019); *Walker v. United States*, No. CIV. A. 93-2728, 1998 WL 637360, at *10 n.29 (E.D. La. Sept. 16, 1998) ("Neither Walker's 1982 nor 1993 administrative discharges were criminal proceedings."), *aff'd per curiam*, 184 F.3d 816 (5th Cir. 1999); *Bartlett v. United States*, 475 F. Supp. 73, 75 (M.D. Fla. 1979) ("An undesirable discharge is in the nature of an administrative action rather than a criminal punishment . . ."); *see also United States v. Blocker*, 33 M.J. 349, 350–51 (C.M.A. 1991) (rejecting claim that consequences of "an administrative discharge board" gave rise to double jeopardy).

171. *Williams v. Wynne*, 533 F.3d 360, 369, 372 (5th Cir. 2008) (finding that the AFBCMR "reasonably concluded that the discovery requirements of *Brady*" and the Sixth Amendment right to counsel "did not apply to the appellant's non-criminal, administrative discharge hearing"); *Weaver v. United States*, 46 Fed. Cl. 69, 78 (2000) ("[A]dministrative discharge hearings are not criminal procedures and, therefore, do not give rise to the *Brady* rule requirements of disclosure.").

172. *Doe v. United States*, 132 F.3d 1430, 1437 (Fed. Cir. 1997) ("[A]n administrative discharge proceeding is not held to the same high standard of proof as a criminal hearing . . ."); *Schowengerdt v. United States*, 944 F.2d 483, 490 n.9 (9th Cir. 1991) ("An administrative military discharge is *not criminal or quasi-criminal in nature*, but is governed by traditional administrative law doctrine, tempered by reference to the unique circumstances of the military." (emphasis added)).

process, confrontation, or counsel;¹⁷³ and the privilege against self-incrimination itself.¹⁷⁴

The Supreme Court's very establishment and maintenance of *Garrity* immunity points to the conclusion that the use of compelled testimony about criminal behavior to fire public employees for misconduct does not amount to criminal punishment.¹⁷⁵ If sex offender registration is noncriminal,¹⁷⁶ then so is being fired.

III. RETHINKING *GARRITY* AND THE MILITARY

There is no impediment, other than service regulations, to using *Garrity* immunity in the armed forces. That is, neither the Constitution nor any statute prohibit demanding answers to questions, so long as the answers are inadmissible in any criminal prosecution. On the other hand, the service regulations represent a

173. *Schultz v. Wellman*, 717 F.2d 301, 307 (6th Cir. 1983) (“[T]here exists no 6th amendment right to confront witnesses or compulsory process which applies to administrative discharge proceedings. Such proceedings are not criminal in nature.”) (footnote omitted); *Crowe v. Clifford*, 455 F.2d 945, 947 (6th Cir. 1972) (“[P]rinciples which govern criminal trials are not applicable to administrative discharge hearings of the nature of the present case. For the same reason appellant’s reliance on the double jeopardy clause is inappropriate.” (citation omitted) (citing *Brown v. Gamage*, 377 F.2d 154 (D.C. Cir. 1967)); *Smith v. Harvey*, 541 F. Supp. 2d 8, 18 (D.D.C. 2008) (“Because a reserve officer’s involuntary separation proceeding does not constitute a criminal prosecution under Article 36, the Sixth Amendment is inapplicable.”); *Williams v. Roche*, 468 F. Supp. 2d 836, 844 (E.D. La. 2007) (“[T]he Court cannot find, and the plaintiff fails to cite, any authority for the proposition that military members facing an administrative discharge board are guaranteed the right to effective assistance of counsel under the Sixth Amendment.”), *aff’d sub nom. Williams v. Wynne*, 533 F.3d 360 (5th Cir. 2008); *Perez v. United States*, 850 F. Supp. 1354, 1364 (N.D. Ill. 1994), (“Sixth Amendment rights do not apply in the administrative discharge context.”); *Pickell v. Reed*, 326 F. Supp. 1086, 1090 (N.D. Cal.) (While undesirable discharge is consequential, “[t]his does not mean, however, that an undesirable discharge is punishment in the criminal sense requiring a full judicial trial.”), *aff’d per curiam*, 446 F.2d 898 (9th Cir. 1971).

174. *Spehr v. United States*, 49 F. App’x 303, 305–06 (Fed. Cir. 2002) (rejecting Spehr’s claim that “his 5th Amendment and Article 31 rights against self-incrimination were denied to him as a result of the use of the Keesler staff psychiatrist’s diagnosis at Spehr’s administrative discharge board”), *aff’g* 51 Fed. Cl. 69, 87 (2001) (“[Plaintiff] knew quite well that the psychiatric evaluation aimed solely at determining his fitness for continued Coast Guard service, and not for any criminal or court martial proceeding. Accordingly, *Spehr was not entitled to any 5th Amendment or Article 31 warning about self-incrimination.*” (emphasis added)); *Kindred v. United States*, 41 Fed. Cl. 106, 112–13 (1998) (finding that the “administrative discharge hearing is not a criminal proceeding”, and therefore “the Article 31(d) remedy [did] not apply”); *Philips v. Perry*, 883 F. Supp. 539, 547 (W.D. Wash. 1995) (finding that Article 31(b) warnings does not apply because “an administrative discharge proceeding is not criminal in nature”).

175. See *supra* Section I.A.

176. See *Smith v. Doe*, 538 U.S. 84, 100–01 (2003).

choice to forego questioning of members as a tool in force management and non-criminal discipline. This Part explores that decision as a matter of policy and concludes that there is no sound reason not to use *Garrity* immunity in the military.

A. Military Justice: Good Order and Discipline

The military justice system is historically and constitutionally separate from civilian law. Whereas the civilian judicial system stems from Article III of the U.S. Constitution, the military justice system is derived from Article I, Section 8, Clause 14, which grants Congress broad power “[t]o make Rules for the Government and Regulation of the land and naval Forces.”¹⁷⁷ The primary goal of the military justice system is to enforce good order and discipline within the ranks; justice is a secondary goal. As stated by the U.S. Court of Appeals for the D.C. Circuit,

Obedience, discipline, and centralized leadership and control, including the ability to mobilize forces rapidly, are all essential if the military is to perform effectively. The system of military justice must respond to these needs for all branches of service, at home and abroad, in time of peace, and . . . war. It must be practical, efficient, and flexible The need for national defense mandates an armed force whose discipline and readiness is not unnecessarily undermined by the often deliberately cumbersome concepts of civilian jurisprudence.¹⁷⁸

The most significant military justice reform came from Congress in 1950 with the enactment of the Uniform Code of Military Justice (UCMJ),¹⁷⁹ which provides a comprehensive statutory framework of military law that applies to service members of all branches.¹⁸⁰ The UCMJ balanced the military commander’s need to instill good order and discipline among his or her unit with protection for the rights of service members.¹⁸¹ The UCMJ was a “skeleton whose framework [would] be filled in by a

177. U.S. CONST. art. I, § 8, cl. 14; see SCHLUETER, *supra* note 86, § 1-1(A).

178. *Curry v. Sec’y of Army*, 595 F.2d 873, 877, 880 (D.C. Cir. 1979) (footnote omitted).

179. 10 U.S.C. §§ 801-946 (2018); Ghiotto, *supra* note 23, at 500.

180. SCHLUETER, *supra* note 82, § 1-7.

181. Schlueter, *supra* note 83, at 4.

law manual,”¹⁸² and thus, Article 36 of the UCMJ authorized the President to enact more detailed rules governing courts-martial,¹⁸³ which has been used to promulgate the *Manual for Courts-Martial*.¹⁸⁴ The President has delegated to the DoD—and the individual branches—authority to promulgate other rules, procedures, and policies regarding discipline.¹⁸⁵ The power to discharge enlisted service members is left largely to the discretion of the Secretaries of each military service branch.¹⁸⁶

The military commander’s role is paramount in the military justice system, which is predicated on the commander’s ability to instill good order and discipline within his or her unit.¹⁸⁷ Good order and discipline are the backbone of the military command structure, and thus the military justice system should be “as flexible and as consistent with the commander’s operational intent as possible.”¹⁸⁸ Consequently, commanders are involved at every step of military justice proceedings and they possess broad discretion in deciding how to handle cases of misconduct, minor and grave.¹⁸⁹

182. WILLIAM THOMAS GENEROUS, *SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE* 54 (1973) (quoting the editor of the Navy’s legal journal).

183. 10 U.S.C. § 836 (2018); GENEROUS, *supra* note 182, at 55.

184. MCM, *supra* note 15; see SCHLUETER, *supra* note 82, § 1-1(C).

185. See SCHLUETER, *supra* note 82, §§ 1-1(C) n.37, 1-3(D); MCM, *supra* note 15, pt. IV, para. 2 (authorizing the armed forces service secretaries to limit nonjudicial punishment).

186. 10 U.S.C. § 1169 (2018); DOD INSTRUCTION 1332.14, *supra* note 129.

187. See *Brown v. Glines*, 444 U.S. 348, 358 (1980) (“Because the right to command and the duty to obey ordinarily must go unquestioned, this Court long ago recognized that the military must possess substantial discretion over its internal discipline.”); *Sec’y of Navy v. Huff*, 444 U.S. 453, 458 (1980) (“[W]e must not limit a commander’s authority more than the legislative purpose requires.”); *United States v. Thomas*, 22 M.J. 388, 400 (M.C.A. 1986) (“One of the most sacred duties of a commander is to administer fairly the military justice system for those under his command.”); Ghiotto, *supra* note 23, at 505; cf. *Parker v. Levy*, 417 U.S. 733 (1974) (noting a well settled precedent for necessity of support for superior-subordinate relationship in the military society).

188. W.G. “Scotch” Perdue, *Weighing the Scales of Discipline: A Perspective on the Naval Commanding Officer’s Prosecutorial Discretion*, 46 NAVAL L. REV. 69, 78 (1999).

189. See SCHLUETER, *supra* note 82, § 3-3(B); see also James V. Roan & Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F. L. REV. 185, 191–92 (2002) (“In deciding which disciplinary tool to employ, a commander considers more than just the nature of the misconduct; he also evaluates the suspect’s record and weighs it against the impact of the misconduct to good order and discipline. The commander is trusted to use his best judgment so that the ‘punishment fits the crime.’”). We recognize that in light of the 2022 National Defense Authorization Act (NDAA), the commander’s role in the administration of military justice is changing. See National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1692–98 (2021) [hereinafter NDAA] (to be

While the military and civilian justice systems have concurrent jurisdiction over offenses committed by service members in the community, other offenses exist only under the UCMJ with no civilian counterpart—so-called “purely military offenses” such as “absence offenses,” “disrespect offenses,” and “disobedience offenses.”¹⁹⁰

B. The Commander’s Tools to Address Service Member Misconduct

In addressing misconduct, a commander may use one of three main categories of disciplinary redress: courts-martial, which are criminal in nature; nonjudicial punishment (NJP), which might be described as quasi-criminal;¹⁹¹ and nonpunitive measures, which

codified at 10 U.S.C. § 824, et seq.). One major change is the creation of the independent Office of the Special Trial Counsel (STC) for each service branch (except the Coast Guard) that will have considerable or exclusive discretion over the prosecution of certain “covered offenses” under the UCMJ. Dan Maurer, *What the FY 2022 NDAA Does, and Does Not Do, to Military Justice*, LAWFARE (Dec. 30, 2021), <https://www.lawfareblog.com/what-fy-2022-ndaa-does-and-does-not-do-military-justice>. These reforms primarily address sex and related domestic violence offenses. *See id.* Serious felonies, such as rape, murder, and kidnapping are also included. *See NDAA*, 135 Stat. 1695 (designating eleven offenses under the UCMJ as “covered offenses”). Thus, the class of offenses covered under these reforms is fairly narrow. While this change is historic and dramatically changes the commander’s prosecutorial role, it does not alter his or her authority when it comes to numerous other offenses. *See id.* Namely, the commander will retain authority over various forms of misconduct and derelict performance within his or her unit, including the sort of incidents we are concerned with here—misconduct that relates to the unit’s operational success and safety. Thus, while the commander may no longer be the “king” of military justice, at least as to the sphere of relevant offenses we imagine, the commander’s authority is largely unchanged. Maurer, *supra* (“It is misleading to suggest that commanders at all echelons have lost the better part of their prosecutorial power designed to foster good order and discipline and thus increase the job performance reliability of those in the Armed Forces.”).

190. *See Parker*, 417 U.S. at 749-51; SCHLUETER, *supra* note 82, § 2. This Article focuses on these unique military offenses as they provide the most interesting and challenging application of Garrity immunity. For example, and as discussed *infra*, failure to show up to assigned work or duty is punishable as a criminal offense under the UCMJ. *See id.* § 2-2(C). Additionally, disobeying or disrespecting one’s superior is a crime under the military justice system, but deliberately disobeying one’s supervisor would not result in criminal liability in the civilian sector. *See id.* §§ 2-3, 2-4.

191. Though nonjudicial punishment is defined as an administrative process, there are a number of procedural similarities between an Article 15 proceeding and a court-martial. . . . The resemblance between nonjudicial punishment proceedings and a court-martial likely creates a perception by the accused servicemember that he is involved in a criminal action. Due to the perceived criminal nature of nonjudicial punishment proceedings, an accused servicemember has a justifiable expectation that the burden of proof in an Article

are noncriminal disciplinary measures. Apart from the possibility of a separate administrative discharge proceeding, nonpunitive and nonjudicial punishment will not result in the service member's separation.¹⁹²

The highest form of discipline available is the commander's authority to initiate court-martial proceedings, which is a military judicial forum akin to criminal prosecution and trial under civilian law.¹⁹³ Although the court-martial is not a part of the federal court system, its findings are usually binding on other courts.¹⁹⁴

The middle ground of discipline in the military between the court-martial and nonpunitive measures is nonjudicial punishment, addressed in UCMJ Article 15.¹⁹⁵ Like a court-martial, Article 15 NJP is based on an alleged violation of a UCMJ punitive article—it is an accusation of criminal conduct cognizable by a court-martial. However, unlike a court-martial, NJP is non-adversarial, does not involve a trial, and cannot result in a federal conviction.¹⁹⁶ Moreover, the Military Rules of Evidence, "other than with respect to privileges, do not apply."¹⁹⁷ Further, NJP is not subject to judicial appeal or review.¹⁹⁸ A commander's authority to use NJP is not limitless—usually, a service member may reject NJP and demand a trial by court-martial.¹⁹⁹ Possible punishments under

15 proceeding would mirror the burden of proof used in a court-martial. Shane Reeves, *The Burden of Proof in Nonjudicial Punishment: Why Beyond a Reasonable Doubt Makes Sense*, 2005 ARMY LAW. 28, 36 n.74 (internal citation omitted).

192. SCHLUETER, *supra* note 82, § 1-8(B)-(C).

193. There are three types of courts-martial: Summary, Special, and General. For further discussion of the differences between each type of court-martial, see Roan & Buxton, *supra* note 189, at 199-202. Whereas Special and General courts-martial are akin to a criminal trial and result in the equivalent of a criminal conviction, a Summary court-martial is "designed to dispose of minor offenses in a simplified proceeding," and does not result in a criminal conviction. See SCHLUETER, *supra* note 82, § 1-8(D)(2) & nn.15 & 19. Thus, for the purposes of this Article, only the Special and General courts-martial are treated as analogous to criminal prosecution and punishment. A Summary court-martial may be considered a separate form of quasi-criminal punishment, such as NJP. Another relevant change under the 2022 NDAA is that the commander's authority to initiate court-martial proceedings for certain "covered offenses" is transferred to the STC.

194. SCHLUETER, *supra* note 82, § 1-7 (explaining that a court-martial constitutes federal jeopardy for double jeopardy purposes); see also *Grafton v. United States*, 206 U.S. 333, 355 (1907).

195. 10 U.S.C. § 815 (2018); SCHLUETER, *supra* note 82, §§ 1-8(C), 3.

196. SCHLUETER, *supra* note 82, § 3-1.

197. MCM, *supra* note 15, pt. V(4)(c)(3).

198. SCHLUETER, *supra* note 82, § 3-1; Roan & Buxton, *supra* note 189, at 193.

199. See 10 U.S.C. § 815(a) (2018); SCHLUETER, *supra* note 82, § 3-4.

NJP “include reduction in rank for enlisted members, forfeiture of pay, restriction to base, [and] extra duties.”²⁰⁰ The purpose of NJP is more than mere punishment; NJP is “primarily corrective or rehabilitative.”²⁰¹ Courts do not treat Article 15 discipline as criminal for purposes of, for example, double jeopardy.²⁰²

The third and least serious form of discipline available to a commander are nonpunitive and administrative measures. Nonpunitive disciplinary measures include written or oral reprimand, fine or reduction in rank, and the initiation of administrative discharge proceedings.²⁰³ Inherently, these proceedings are nonjudicial and noncriminal. There is strong evidence showing that commanders are increasingly using administrative discharges to deal with misconduct in lieu of initiating court-martial proceedings.²⁰⁴ The use of more informal disciplinary measures is consistent with the military justice system’s preference for “swift punishment to ensure discipline.”²⁰⁵ Nonpunitive measures, namely the administrative discharge, allow the commander to avoid potentially burdensome proceedings under formal court-martial proceedings.²⁰⁶ Accordingly, the administrative discharge is the military’s force-management tool and one of the most important tools at the commander’s disposal to deal with misconduct.²⁰⁷ Most relevant to this Article, possible grounds for administrative discharge include unsatisfactory

200. Roan & Buxton, *supra* note 189, at 194.

201. SCHLUETER, *supra* note 82, § 3-2.

202. *United States v. Stoltz*, 720 F.3d 1127, 1128 (9th Cir. 2013); *United States v. Gammons*, 51 M.J. 169, 174 (C.A.A.F. 1999).

203. SCHLUETER, *supra* note 82, § 1-8(B); *see, e.g.*, DEP’T OF THE ARMY, *supra* note 127 (demonstrating how the army, like the other service branches, allows administrative discharges for misconduct or unsuitability). Nonpunitive measures are discussed in MCM, *supra* note 15, pt. II, R.C.M. 306(c); *see also supra* Section I.C.

204. Ghiotto, *supra* note 23, at 518.

205. Perdue, *supra* note 188, at 83.

206. Ghiotto, *supra* note 23, at 518.

207. *See* DOD INSTRUCTION 1332.14, *supra* note 129, at 2; *see, e.g.*, DEP’T OF THE ARMY, *supra* note 127, § 1-1 (“This regulation prescribes policies and standards to ensure the readiness and competency of the force while providing for the orderly administrative separation of Soldiers for a variety of reasons.”); *id.* § 1-16(a) (“The separation policies in this regulation promote the readiness of the U.S. Army by providing an orderly means to . . . [m]aintain standards of performance and conduct through characterization of service in a system that emphasizes the importance of honorable service.”).

performance, failure to rehabilitate after drug or alcohol abuse, and misconduct, including a pattern of minor disciplinary infractions.²⁰⁸

In considering the tools available to commanders it must be remembered that there are carrots as well as sticks. Good performance can be rewarded with promotions, military decorations and awards, and favorable evaluations, which are helpful in obtaining career-advancing assignments and training. It must also be remembered that the employer in this case provides housing, medical care, and sometimes education to members and their families, in addition to employment. And unlike almost any other public or private employee, the military member is not free to quit and seek employment or residence elsewhere if dissatisfied with their treatment. The comprehensive involvement and power the government has over the individual member is a reminder of the member's potential vulnerability, and simultaneously of the importance of the member's work to the government and to the United States.

The adoption of *Garrity* in the military would be consistent with the unique purpose of the military justice system and serve as another "tool of the commander."²⁰⁹ That is, inherent in the commander's discretion to discipline his or her unit is the ability to determine if, when, and how *Garrity* immunity could best serve the various interests at stake to ensure good order and discipline. The discretion to use *Garrity* may be tempered by the same factors a commander considers in selecting the appropriate recourse for any given instance of misconduct or poor performance within his or her unit.²¹⁰ Because the military commander is both manager and prosecutor, in this context perhaps more than any other, the commander is in the best position to make the judgment about whether to grant *Garrity* immunity and then seek discharge or pursue NJP, or instead pursue criminal prosecution.

208. DOD INSTRUCTION 1332.14, *supra* note 129, at 9-25. For the purposes of this Article, it should simply be noted that an enlisted service member may be separated via an administrative discharge for both misconduct and unsatisfactory performance.

209. See *Perdue*, *supra* note 188, at 78.

210. See *id.* at 78, 84-85. The recent changes under the 2022 NDAA warrant another caveat here. Again, although the trend is decreasing the commander's prosecutorial discretion, he still retains authority over a range of possible misconduct or poor performance that affects the operational success of the unit and may also incidentally be cognizable as an offense under the UCMJ. See *Maurer*, *supra* note 189.

Where an employee's position calls for greater responsibility, authority, and power, increased measures for accountability and recourse of misconduct are necessary.²¹¹ This is especially true in the military where military service is a privilege, not a right, and therefore service members must abide by a "more rigorous code of ethics and code of honor than is imposed on the ordinary American citizen."²¹² Analogous to police disciplinary and administrative measures, military administrative discharges "are used to strengthen the concept that military service is a unique calling" and that military status involves "an individual's commitment to the United States, their Military Service, fellow citizens, and fellow [s]ervice members."²¹³ For example, in *Parker v. Levy*,²¹⁴ the Supreme Court found that what is protected speech in civilian life may be constitutionally unprotected in the military.²¹⁵ The Court reasoned that "the different character of the military community and of the military mission[,] . . . [t]he fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."²¹⁶

To reinforce the unique status of military service, The administrative discharge serves two substantial military interests. First and foremost, "[t]he administrative discharge is one of the indispensable tools of quality control in personnel management."²¹⁷ In 1976, the Air Force achieved monumental improvement in terms of "the quality, performance and behavior of its people[,]" largely attributable to improved procedures for administrative discharge of those members who could not meet the standards of the service.²¹⁸ By promptly identifying and eliminating service

211. See, e.g., *UC Davis Police Accountability Board (PAB)*, U.C. DAVIS, <https://pab.ucdavis.edu> (last visited Oct. 6, 2023). The PAB is an independent board composed of students, staff, and faculty from the UC Davis and UC Davis Health community developed to promote "accountability, trust, and communication between the campus community and the UC Davis Police Department."

212. Perdue, *supra* note 188, at 73.

213. See DOD INSTRUCTION 1332.14, *supra* note 129, para. 3.b.

214. *Parker v. Levy*, 417 U.S. 733 (1974).

215. *Id.*

216. *Id.* at 758.

217. Ramutis R. Semeta, *Administrative Discharge of Officers and Airmen*, 17 A.F. L. REV. 79, 79 (1975).

218. Andrew M. Egeland, Jr., *Developments in Airman Administrative Separations*, 19 A.F.L. REV. 166, 166, 198 (1977).

members who are “unfit, undesirable, and substandard . . . during the early stages of their careers[,]” the military can “prevent substantial investment in a losing proposition.”²¹⁹ The future success of the military is determined by the effectiveness of its quality control measures such as disciplinary and discharge proceedings. The U.S. military is “far too vital to be entrusted to persons of substandard conduct and integrity.”²²⁰ Thus, the military’s ability to involuntarily discharge service members is “a way of maintaining readiness and competency”²²¹ and allows the military to expediently expel “troublemakers’ whose presence threatens military discipline” and those who fail to measure up to the required standards of performance.²²²

Although the military does not follow *Garrity*, it already conducts investigations where the right against self-incrimination is mitigated by governmental interests. For example, the military is able to obtain statements without regard for Article 31 during aircraft safety mishap investigations involving injury, death, or damage to government property.²²³ The statements are not admissible at any judicial, disciplinary, or administrative proceedings, and therefore the military must exercise discretion to determine whether the benefits of truthful testimony outweigh the ability to take adverse action.²²⁴ In essence, we propose that this type of existing procedure be expanded to other aspects of military duty.

Surely the military has as strong an interest as any employer in weeding out those who pose a threat to the order, stability, and

219. Semeta, *supra* note 217, at 79.

220. *Id.*

221. Irwin, *supra* note 127, at 51.

222. Christopher H. Lunding, *Judicial Review of Military Administrative Discharges*, 83 *YALE L.J.*, 33, 52 (1973).

223. OFF. OF THE CHIEF OF NAVAL OPERATIONS, DEP’T OF THE NAVY, NAVY & MARINE CORPS MISHAP AND SAFETY INVESTIGATION, REPORTING, AND RECORD KEEPING MANUAL at 7-1 to 7-2 (2005) (“The concept of privilege . . . [o]vercomes any reluctance of an individual to reveal complete and candid information to an investigator about the events surrounding a mishap They may also elect to withhold information by exercising their constitutional right to avoid self-incrimination.”); see Filbert, *supra* note 164, at 29.

224. OFF. OF THE CHIEF OF NAVAL OPERATIONS, DEP’T OF THE NAVY, NAVAL AVIATION SAFETY PROGRAM at 6-11 to 6-13 (2009) (stating that information provided in relation to a mishap is privileged and not admissible as evidence in any punitive, disciplinary, or administrative proceedings against the subject); see Filbert, *supra* note 164, at 29.

discipline of the unit, mission, and national security.²²⁵ It goes without saying that service members often deal with top-secret information, dangerous weaponry, and expensive equipment, and only the most trustworthy, competent, and morally sound should hold such a role. Especially when a service member is particularly disruptive and seriously endangers good order, discipline, and mission readiness, rapid discharge may be necessary.²²⁶ Accordingly, it is critical that the military be able to identify and discharge those who are unfit to serve.

Secondarily, in characterizing a service member's quality of service upon discharge, the military can encourage proper—"honorable"—behavior and service, and deter misconduct and poor performance. A policy that would allow military commanders and discharge boards to compel service members to answer questions "specifically, directly, and narrowly relating to the performance of [their] official duties"²²⁷ could promote "good order and discipline" and the efficiency of the military establishment in the same way it has served public employers and police departments.²²⁸ The service member's interest in and right to procedural due process in adverse administrative discharges is balanced by the immunization of compelled testimony from being used in future criminal prosecution.²²⁹ This safeguard could be bolstered, and any due process concerns negated, by a guarantee that a service member receive an honorable discharge if compelled testimony is used under a *Garrity*-like rule.

225. See Egeland, *supra* note 218, at 166 (citing Wilson, "New Breed" Making 1976 Best Year in Air Force History, WASH. POST, Aug. 11, 1976, at A2).

226. Semeta, *supra* note 217, at 80. For further discussion of the tension between discipline and justice in the military legal system, see FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 1-30.00 (5th ed. 2020) ("The evolution of military criminal law demonstrates an often changing balance between the goals of discipline and justice on the one hand and rapidity and due process on the other."). Where rapid discharge is desirable after obtaining the desired immunized testimony, the service may forego a discharge board and separate the service member through notice procedure. See *supra* note 94.

227. Gardner v. Broderick, 392 U.S. 273, 277-78 (1968).

228. See MCM, *supra* note 15, pt. I.

229. Cf. Kastigar v. United States, 406 U.S. 441, 461-62 (1972) (holding that a grant of immunity satisfies the Fifth Amendment, thereby eliminating constitutional concerns); United States v. Mapes, 59 M.J. 60 (C.A.A.F. 2003) (applying the reasoning and holding of *Kastigar* to the military); Golding v. United States, 48 Fed. Cl. 697, 726 (2001) (holding that if discharged under a stigmatizing, less than honorable characterization, a military service member must be afforded due process).

*C. Garrity as a Tool for the Commander to Instill
Good Order and Discipline*

Good order and discipline require that individuals forego their own interests to foster unit cohesion.²³⁰ While the “justice” component of military law is concerned with deterring and punishing criminal misconduct, the good order and discipline component has a deeper meaning.²³¹ A commander is less concerned with instilling the “fear of punishment” among his or her troops; rather, the focus is instilling the “moral obligation” for them to think of their fellow service members and the unit as a whole before themselves.²³² Forcing the unit into submission, threatening NJP, or recklessly using nonpunitive measures such as discharge would neither gain the trust nor the cooperation of the unit. Thus, a commander’s goal of instilling good order and discipline is not as much about imposing affirmative punishment, but rather about being proactive and preventing misconduct. Said differently, good order and discipline constitute a positive state of affairs within a commander’s unit, not merely an affirmative act of disciplining service members. The DoD’s policy regarding the administrative discharge aligns with the commander’s aforementioned interests: “Reasonable efforts should be made by the chain of command to identify . . . and improve [a service member’s] chances for retention through counseling, retraining, and rehabilitation.”²³³ Allowing a commander the choice to forego the opportunity to punish a service member in favor of getting immediate and immunized compelled answers about conduct within a unit can serve the commander’s interest in achieving good order and discipline.

If a commander’s focus is not on aggressively punishing or ousting unsatisfactory service members but on sorting out issues among the unit, *Garrity* could be a critical tool for the military

230. Ghiotto, *supra* note 23, at 522; Perdue, *supra* note 188, at 76.

231. See Schlueter, *supra* note 83, at 55–56; cf. *Garrett v. Lehman*, 751 F.2d 997, 1002 (9th Cir. 1985) (“The function of such proceedings is to determine eligibility for further military service; not to punish for past wrongs. This purpose is explicitly set forth in the governing *Manual* provision” (citation omitted)). Does “good order and discipline” mean the act of disciplining individuals, or is it a description of the overall state of affairs within a unit? Does the commander discipline his or her troops, or are the troops well disciplined?

232. Ghiotto, *supra* note 23, at 521–22; see Perdue, *supra* note 188, at 72–76.

233. DOD INSTRUCTION 1332.14, *supra* note 129, para. 3.d.(1).

commander. A commander could use *Garrity* to immediately address or prevent undesirable behavior. In exchange, the commander would forego initiating court-martial charges or initiating NJP. Whether *Garrity* is used with regard to a suspect or a witness service member, a commander could get more information about whatever behavior or incident occurred to determine how widespread the issue might be. A commander could use the compelled statements to determine if the behavior is limited to one service member, other members in the unit, or spread throughout multiple units.

Allowing a commander to compel service members to answer potentially or actually incriminating questions is unlikely to be a good idea in all circumstances. Whether and in what manner a commander should be able to use immunized compelled testimony must consider a balance of the totality of the circumstances and the various interests at play.²³⁴ If a commander is sure a service member committed a criminal act, or if serious criminal conduct is implicated, such as after law enforcement presents the commander with the results of an investigation, the commander should use normal judicial processes because such offenses fall more in the purview of military justice than instilling good order and discipline within the unit. However, situations where immediacy and efficiency are paramount, such as during an emergency or combat operations, would likely benefit from a commander's ability to use compelled immunized testimony. In applying such a rule, it is important that the rights of the service member be carefully considered and protected. In the following paragraphs, we examine various potential applications that consider such a balance.

If a commander compelled a service member to provide incriminating statements, the question of whether the commander could or should be able to then use those statements to pursue Article 15 NJP and other nonpunitive measures is implicated.²³⁵ While NJP has been held to be noncriminal, it is likely so only because it is used in the special context of the military. The government would not be able to incarcerate or fine an individual based on an allegation of criminal conduct without following the

234. These interests would include the commander's interest, the interest of the unit, the interests of the military, and that of the military justice system.

235. See SCHLUETER, *supra* note 82, § 1-8.

constitutional rules applicable to criminal cases. If special procedures are authorized to punish members which could not be used to punish civilians, it is not unfair to grant specially favorable privileges as well.²³⁶ Thus, even if immunized compelled testimony *could* be used to pursue NJP, it likely *should not* be allowed based on fundamental notions of justice, fairness, and due process.²³⁷ If the DoD or the services consider *Garrity* immunity to be a useful tool, they will have to decide how to implement it, because regulations will have to be redrafted. One possible way to balance the interests of the government and the individual would be to limit the types of discharges that could be imposed based on compelled immunized testimony.

For example, an honorable discharge might be mandated if a board supports separation after a hearing in which compelled immunized testimony of the member was admitted. With an honorable discharge, there would be no loss of earned veteran benefits or other social stigmatization. The same could probably be said for the general discharge. In cases where discharge of a particular service member is a high priority, but the military has weak evidence or the only available evidence is immunized, the military could proceed with immunized testimony and forego the OTH characterization. This would be consistent with *Garrity* and its progeny because it puts service members in the same position as public employees who are terminated based on the content of their responses, without the additional prejudice of a stigmatizing label or the loss of benefits.

Garrity could also prove useful to commanders in non-discharge scenarios without jeopardizing the rights of service members. Under current military immunity policy, a commander or investigator cannot grant a service member immunity.²³⁸ Unauthorized attempts to grant immunity by commanders,

236. First, the President—as opposed to the services—has made the determination that the privilege against self-incrimination will be available in Article 15 proceedings. MCM, *supra* note 15, pt. V, para. 4.c(3). In addition, since Article 15 proceedings involve criminal violations which could be tried by court-martial and can result in quasi-criminal punishments, this seems fair. Second, when the evidentiary rule really makes a difference, members have the ability to create full applicability of the Military Rules of Evidence by demanding a court-martial and refusing NJP.

237. See Filbert, *supra* note 164, at 31–34.

238. See MCM, *supra* note 115, pt. II, R.C.M. 704(c)(2) (stating that only a general court-martial authority and the U.S. Attorney General can grant use or transactional immunity).

investigators, or prosecutors may result in *de facto* immunity for the accused, disrupting and complicating criminal prosecutions.²³⁹ Since commanders already possess prosecutorial discretion and are central actors in the administration of military justice, it would make sense to allow them to decide whether compelling immediate truthful answers outweighs the prospect of future criminal prosecution.²⁴⁰ If a *Garrity*-like rule were adopted, it could fill in the gaps of *de facto* grants of immunity because a commander could purposefully, instead of inadvertently, grant immunity.²⁴¹ For example, a commander might compel potentially incriminating testimony in situations involving minor misconduct where the immediate or urgent collection of information is paramount.²⁴² A commander could thereby get information from a subordinate and use it for ordinary management or corrective purposes, without using it in the context of a court-martial, Article 15 NJP, or discharge board.

A *Garrity*-like policy could be made enforceable, in part, under UCMJ Articles 131 or 134.²⁴³ Conduct cognizable under Article 131 that could apply to a service member's refusal to testify after a *Garrity*-like grant of immunity include Article 131(d), Wrongful Refusal to Testify²⁴⁴ and Article 131(g), Wrongful Interference with Adverse Administrative Proceeding.²⁴⁵ Article 134 makes certain conduct not enumerated in the UCMJ punishable, such as "disorders and neglects to the prejudice of good order and discipline."²⁴⁶ If Article 131(d) is modified to require a service member to answer questions or testify when presented with immunity commensurate with the Fifth Amendment and Article 31 privileges, an affirmative legal duty to answer could be imposed.²⁴⁷

239. See SCHLUETER, *supra* note 82, § 5-4(C) n.111.

240. See *id.* § 5-2; *cf.* Filbert, *supra* note 164, at 29 n.139 (citing Chief of Naval Operations Instruction 5102.1C para. 204 (Mar. 3, 1989) (discussing how service members do not have the right to remain silent during aircraft and safety mishap investigations, which allows the responsible command to more easily obtain the truth)).

241. See SCHLUETER, *supra* note 82, § 5-4(C) n.111.

242. *Cf.* Filbert, *supra* note 168, at 28-29.

243. UCMJ art. 131, 10 U.S.C. § 931 (2018); UCMJ art. 134, 10 U.S.C. § 934 (2018).

244. UCMJ art. 131(d), 10 U.S.C. § 931(d) (2018); MCM, *supra* note 15, p. IV-130.

245. UCMJ art. 131(g), 10 U.S.C. § 931(g) (2018); MCM, *supra* note 15, at IV-132.

246. UCMJ art. 134, 10 U.S.C. § 934 (2018).

247. *Cf.* Kastigar v. United States, 406 U.S. 441, 461-62 (1972) (holding that, pursuant to

A reading of Article 134 could also support this if the failure to obey an affirmative duty to testify under grant of immunity is construed as prejudicial to good order and discipline.²⁴⁸ The legal duty to testify or answer questions would also be supported by *Kastigar* and *Mapes*, which provide that immunity from future criminal prosecution imposes such a duty.²⁴⁹ Immunized members could also be ordered to testify pursuant to Article 92.²⁵⁰

In sum, there is no reason that military members should be retained if their performance is unsatisfactory, and no reason that they should not be required to discuss their performance like all other employees. Because of the importance and heightened performance obligation of their duties, they are subject to more control, not less, over their work than other employees. Yet despite these high standards, the law should still recognize the substantial ramifications of a less-than-honorable discharge. Considering the total nature of military service, where the employer provides not only employment, but also food, shelter, and other important benefits, it is reasonable to consider the special impact of a discharge characterization that is less than honorable. It is also reasonable to consider the sacrifices made by military members, generally in expectation of the community respect, dignity, and tangible benefits that come with being an honorably discharged veteran. The loss of that is significant, even if it does not rise to the level of criminal punishment.

a grant of immunity, a person becomes compelled as a matter of law to have the duty to testify). We recognize that our proposed rule may have a range of yet-contemplated implications with respect to various military regulations or laws, including a commander's duty under Article 31 to provide rights advisements. For example, our proposed rule would allow a commander to forego Article 31 warnings, but failure to do so could result in liability under Article 92, 10 U.S.C. § 892 (violation of or failure to obey any lawful regulation). The rule proposed here is obviously novel, and we understand that it could have consequences that are beyond the scope of this Article. To avoid incurring an Article 92 violation and cure the Article 31 problem, a comprehensive set of amendments might very well be necessary to ensure regulatory cohesion.

248. See SCHLUETER, *supra* note 82, § 2-6(B) ("Potentially, any improper act or omission could be punished under this [Article].").

249. See *Kastigar*, 406 U.S. at 461-62; *United States v. Mapes*, 59 M.J. 60 (C.A.A.F. 2003).

250. *United States v. Quarles*, 50 C.M.R. 514, 518 (N.C.M.R. 1975) (affirming conviction under Articles 92 and 134 for refusal to testify after grant of immunity), *aff'd*, 1 M.J. 231 (C.M.A. 1975).

CONCLUSION

The DoD's policy rationale for the administrative discharge rests on a chain of command's duty to seek rehabilitative measures before separating a service member.²⁵¹ If, after considering a service member's entire record of service, a service member is deemed no longer fit for duty, the service branches are permitted to separate and return the individual to civilian life.²⁵² This mechanism for separation is similar to local, state, and federal governments' use of internal investigations to address cases of workplace misconduct or criminal wrongdoing.²⁵³ Yet these public employers have one critical force-management tool that the military does not: the ability to compel employees to answer potentially incriminating questions under *Garrity v. New Jersey*. For example, in police department investigations of misconduct, the ability to compel suspect officers and witnesses to testify under *Garrity* is a critical tool that serves the government's interest in holding officers accountable and exercising oversight.²⁵⁴ Police officers, like military service members, hold a unique place in society as public servants with heightened responsibility and power over their respective communities.²⁵⁵

Compelled immunized testimony under *Garrity* represents a critical balance between the government's need to hold its employees accountable and the employee's constitutional privilege against self-incrimination.²⁵⁶ Due to the exceptionally coercive command structure of the military and the reduced due process available during administrative discharge boards, a direct adoption of *Garrity* immunity is unadvisable in the military without significant safeguards, such as mandating imposition of an honorable or general discharge characterization.²⁵⁷ However, allowing military commanders to compel service members to answer questions that are directly and narrowly tailored to their official duties could promote the commander's and military

251. See DOD INSTRUCTION 1332.14, *supra* note 129, para. 3.

252. See *id.*

253. See *supra* Section I.A.

254. See *id.*

255. See *supra* Section III.A.

256. See *id.*

257. See *supra* Part III.

establishment's goals of achieving justice, good order, and discipline.²⁵⁸ In exchange for valuable compelled statements, the commander would relinquish the opportunity to punish a service member if they believe it to be appropriate under the circumstances. Any such policy should preclude the use of the testimony in all forms of disciplinary action or punishment, such as court-martial prosecution, NJP, and nonpunitive measures, including the administrative discharge, unless an honorable or general discharge are mandated.²⁵⁹ Such a policy would empower the military commander to instill good order and discipline within his or her unit, while also balancing the rights and interests of service members.

258. *See supra* Section III.C.

259. *See id.*