

INVESTIGATIVE PROCEDURES IN THE MILITARY: A SEARCH FOR ABSOLUTES

God send me never to live under the Law of Conveniency or Discretion. Should the Soldier and Justice Sit on one Bench, the Trumpet will not let the Cryer speak in Westminster Hall.¹

Perhaps the greatest dilemma facing any democracy is that of balancing the demands of personal freedom with those made in the name of social, economic or military necessity. This dilemma is especially evident in the efforts of civilian courts to regulate police procedures used in the arrest and interrogation of suspected lawbreakers. Reacting against supposed police abuse of individual rights, these courts are rapidly moving toward absolute standards of investigative conduct which, if violated, will result in automatic reversal of an accused's conviction.

The demands of necessity are even more sharply evident in the armed forces; in an environment where the overriding goal is to maintain superior force of arms, military law has sometimes seemed "harsh law which is frequently cast in very sweeping and vague terms [emphasizing] the iron hand of discipline more than it does the even scales of justice."² An appreciation of this dilemma, together with changes in the nature of our military establishment, have resulted in a movement by the military courts, strikingly parallel to that of their civilian counterparts, toward similar absolute standards of police conduct. This Comment will explore various aspects of the evolution in general, with emphasis on developing standards regarding search and seizure, self-incrimination, and the accused's right to counsel.

I

CONSTITUTIONAL IMPLICATIONS

There is much disagreement as to whether the eighteenth century authors of the Bill of Rights intended it to apply to those in the armed forces. Literalists point to the specific exclusion of the military forces from certain grand jury guarantees in the fifth amendment and say that this implies an intent to include servicemen under all other provisions of the Bill. Traditionalists, however, have maintained that article I, section 8 gave Congress the exclusive authority to govern the military, and that it alone is given the power to strike "a precise balance between the rights of men in the service and the overriding demands of discipline and duty."³ In the words of *ex parte Milligan*, "the power of Congress

¹ LORD COKE, 3 RUSHWORTH, HISTORICAL COLLECTIONS, app. 81 (1721-22).

² Reid v. Covert, 354 U.S. 1, 38 (1956).

³ United States v. Jacoby, 11 U.S.C.M.A. 428, 441, 29 C.M.R. 244, 257 (1960) (dissenting opinion). On the historical arguments, see generally, Henderson, *Courts-Martial*

in the government of the land and naval forces . . . is not at all affected by the fifth or any other amendment."⁴

Of course the intent of the gentlemen in 1789 is largely irrelevant to postwar courts, since our present-day armed colossus is far from the handful of ill-equipped militiamen that passed under the name of "military" in post-revolutionary America.⁵ "World War II pitched military men into a central position of control over our lives,"⁶ and the deficiencies of military justice, criticized sporadically after every conflict in our history, could no longer be ignored. The war years had seen 1,700,000 courts martial—one-third of all the criminal prosecutions in the United States during this period.⁷ Complaints were rife: there were too many courts martial, too many convictions; and there were excessive sentences, too often the result of official intervention on appeal. All added up to a crucial lack of "confidence in the fundamental fairness of the courts martial in our most critical period—not war, not peace—but in a period in which the national defense will need large numbers of young men in the military forces for an indefinite period."⁸

Congress's reaction to this was the Uniform Code of Military Justice, passed in 1950;⁹ concurrently the Supreme Court began to extend to the armed forces the same constitutional guarantees enjoyed by civilian Americans, so that the *Milligan* dictum is not now, if it ever was, the law.¹⁰

and the Constitution: the Original Understanding, 71 HARV. L. REV. 293 (1957). Taking issue with Henderson in a two part article is Weiner, *Courts-Martial and the Bill of Rights: the Original Practice* (pts. 1, 2), 72 HARV. L. REV. 1, 266 (1957). Though Weiner denies the intent of the founders to include the military under the Bill of Rights, he maintains that "it does not follow that they would have been led to a similar conclusion had they been dealing with the greatly enlarged armed forces and widened military jurisdiction that are with us today." *Id.* at 302.

⁴ 71 U.S. (4 Wall.) 2, 138 (1866) (dictum).

⁵ See Weiner, *Courts-Martial and the Bill of Rights: the Original Practice*, 72 HARV. L. REV. 1, 8-11 (1957). At the peak of World War II, 12,300,000 men were under arms and one third of all United States criminal cases were being tried by the military. At war's end, forty-five thousand men remained in military prisons. 35 ST. JOHN'S L. REV. 197, 200 (1961). See also Morgan, *Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1952). The various Acts of War passed between 1786 and 1806 gave military courts jurisdiction over those crimes peculiar to the armed forces, i.e., desertion, mutiny, absence without official leave, etc. The Articles of 1776 directed that soldiers be given to civilian courts for trial of civil offenses. Not until 1951 did the Uniform Code of Military Justice remove all limits on the military's jurisdiction. Weiner, *supra* at 10-12.

⁶ Douglas, *AMERICA CHALLENGED*, 20 (1960).

⁷ White, *The Uniform Code of Military Justice—Its Promise and Performance*, 35 ST. JOHN'S L. REV. 197, 200 (1961).

⁸ *Id.* at 202.

⁹ Uniform Code of Military Justice, ch. 169, 64 Stat. 108-149 (1950) (now 10 U.S.C. §§ 801-940 (1964)) (all sections of the Act were effective by May 31, 1951) [hereinafter referred to as UCMJ].

¹⁰ *United States v. Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960). See Bishop,

Many did not realize that the Supreme Court was in fact extending constitutional guarantees to the military since the Court often did so behind a facade of perfectly orthodox language. Traditionally there could be no collateral attack on court-martial decisions except for review, on habeas corpus, of the court's jurisdiction;¹¹ thus the issue of the applicability of the Bill of Rights to the armed forces has seldom if ever been directly reviewed by the Court.¹² Rather, the issue entered indirectly as a result of the expansion of habeas corpus review to include, first, constitutional issues decided by state courts,¹³ and, finally, issues of "fundamental fairness" decided by military courts.¹⁴

Technically this review was still on jurisdictional grounds, since it was said that a denial of basic constitutional rights by a court vested with unquestionable jurisdiction at the institution of the proceedings will result in the loss of that jurisdiction.¹⁵ In this way many cases which actually undermined *Milligan* were ostensibly resolved on jurisdictional bases alone.¹⁶ Furthermore, by saying a military court could lose its jurisdiction if it failed to apply military standards "in a fundamentally fair way," the federal courts had opened the door to an analysis of what was meant by "fundamental fairness." Inevitably, in attempting this analysis, the courts have had to apply civilian, constitutionally based standards, while all the while genuflecting before the inviolable icon of the "Congressionally-struck balance."¹⁷

Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions, 61 COLUM. L. REV. 40, 56 (1961).

¹¹ *United States ex rel. Creary v. Weeks*, 259 U.S. 336, 344 (1922). "To those in the military . . . the military law is due process." See generally Comment, 64 COLUM. L. REV. 127 (1964).

¹² Thus even *Creary* can be interpreted not as a denial of the applicability of constitutional standards to the armed forces, but rather as a simple refusal to question the application of those rights by a competent military tribunal. Similarly in *In re Yamashita*, 327 U.S. 1, 8 (1945), the Court refused to pass on the constitutional question, saying, "We consider here only the lawful power of the commission to try the petitioner for the offense charged."

¹³ See *Johnson v. Zerbst*, 304 U.S. 458, 465-66 (1938); *Leyla v. Denno*, 347 U.S. 556, 562 (1954).

¹⁴ See *Burns v. Wilson*, 346 U.S. 137, 142-44 (1953).

¹⁵ MAYERS, *THE AMERICAN LEGAL SYSTEM*, 531 (1964): "The federal courts, with the approval of the Supreme Court, [are] in a seeming attempt to preserve the verbal facade of the habeas corpus proceeding unimpaired while altering its inner structure . . ." For a critique of the Court's "residual fondness for jurisdictional analysis," see Comment, 61 HARV. L. REV. 657, 661 (1948).

¹⁶ Thus the Court in *Hiatt v. Brown*, 339 U.S. 103, 111 (1950), stating "the single inquiry, the test, is jurisdiction," ostensibly did not even treat of *Milligan*.

¹⁷ As early as 1944, a federal court, though basing its decision on jurisdictional grounds, went out of its way to deny the supposed independence of military courts from all constitutional restraints: "[T]his basic guarantee of fairness afforded by the due process clause of the fifth amendment applies [in military courts] as well as in a federal civilian court. . .

The ambiguity latent in such an approach became evident in the four separate opinions of the Supreme Court in *Burns v. Wilson*¹⁸ and the commentaries which have succeeded it. Justice Minton took a strict jurisdictional approach and refused to review the constitutional issue: "We have but one function, namely, to see that the military court has jurisdiction, not whether it has committed error in the exercise of that jurisdiction."¹⁹ Chief Justice Vinson straddles the fence. On one hand, he makes such un-*Milligan* statements as, "The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his Constitutional rights."²⁰ On the other hand, Vinson also voices his view that the military law is sui generis and that Congress alone can strike a balance between constitutional requirements and the demands of discipline and duty.²¹ Some interpret Vinson as affirming the traditional view that "to those in the military or naval service of the United States the military law is due process."²² Others see in the opinion a willingness to apply civilian due process standards only if Congress had failed to strike a specific balance between individual rights and military necessity.²³ Finally, many see in the Justice's references to issues of fundamental fairness a definitive shift away from jurisdictional grounds of decision toward the logical extreme espoused in the dissent of Justices Black and Douglas,²⁴ i.e., that ultimately the soldier will receive the same constitutional protection as does the civilian defendant.²⁵

The dissenters are ruthlessly consistent and slash through a truly Gordian tangle of traditional doctrine. They see the problem as strictly a constitutional one and argue that once one grants that some constitu-

This is not to say that the military are entitled to the procedures guaranteed . . . to defendants in the civil courts. As to them due process of law means the application of the procedure of the military law. . . . But . . . [the procedure must] be applied to them in a fundamentally fair way." *United States v. Hiatt*, 141 F.2d 664, 666 (3d Cir. 1944).

¹⁸ 346 U.S. 137 (1953).

¹⁹ *Id.* at 147 (concurring opinion).

²⁰ *Id.* at 142.

²¹ *Id.* at 139-140.

²² *AYCOCK & WURFEL, MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE* 371 (1955). "Certainly . . . it is impossible to interpret the *Burns* dictum as authority for a civilian attack, by a writ of habeas corpus, on the fairness of the military procedures themselves. 65 *YALE L.J.* 413, 422 n.48 (1956). Civilian courts should not use the writ . . . as a means whereby to bring this aspect of military law into conformity with their own concepts of civilian justice." *Id.* at 421.

²³ See Comment, 64 *COLUM. L. REV.* 127, 133 (1964).

²⁴ See, e.g., *De Coster v. Madigan*, 223 F.2d 906 (7th Cir. 1955). Also noteworthy is *Wade v. Hunter*, 336 U.S. 684 (1948), where, in evaluating a military opinion, the court applied civilian standards of double jeopardy under the fifth amendment.

²⁵ See Weiner, *Courts-Martial and the Bill of Rights: the Original Practice*, 72 *HARV. L. REV.* 266, 303 (1957).

tional guarantees apply to the military, one must declare all of them applicable unless specifically declared otherwise by the Constitution. Furthermore, the Supreme Court should not continue to dodge the issue by means of jurisdictional language, for this can lead not only to unquestioning acquiescence in clearly erroneous military court decisions; it can also lead to the spectre of inconsistent constitutional interpretations by military and civilian tribunals:

The basic, undisputed facts . . . leave the clear impression that one of the petitioners was held incommunicado and repeatedly examined over a five day period until he confessed. . . .

Since the requirement for indictment before trial is the only provision of the Fifth Amendment made inapplicable to military trials, it seems to me clear that other relevant requirements of the Fifth Amendment (including the ban on forced confessions) are applicable to them. And if the ban on coerced confessions is applicable, how can it mean one thing in civil trials and another in military trials?

If a prisoner is coerced by torture or other methods to give the evidence against him . . . then the "trial" before the military tribunal becomes an empty ritual. . . .

The opinion of the court is not necessarily opposed to this view. But the Court gives binding effect to the ruling of the military tribunal on the Constitutional question, provided that it has given fair consideration to it. . . . [T]he rules of due process [applied by military courts] are constitutional rules which we, not they, formulate.²⁶

Burns v. Wilson contains no majority opinion, and its value as precedent is further weakened by the ambiguities of the Chief Justice's opinion, which spoke for the largest group on the Court.²⁷ The confusion which has followed *Burns* has been alluded to by Chief Justice Warren²⁸ and admitted by Justice Black in *Reid v. Covert*: "As yet it has not been clearly settled to what extent the Bill of Rights and other protective parts of the Constitution apply to military trials."²⁹ The value of *Burns* is chiefly as a definitive shift of emphasis from a jurisdictional to a constitutional analysis—a doctrinal opening through which the military courts themselves have entered and in less than a decade come to the

²⁶ 346 U.S. at 150-54 (dissenting opinion).

²⁷ Justice Frankfurter evidently saw these problems, for he strongly urged the Court to rehear *Burns*: "I cannot agree that the scope of inquiry is the same as that open to us on review of State convictions; the content of due process in civil trials does not control what is due process in military trials. Nor is the duty of the civil courts upon habeas corpus met simply when it is found that the military sentence has been reviewed by the military hierarchy, although in a debatable situation we should no doubt attach more weight to conclusions on controversial facts by military appellate courts than those reached by [a state's highest court]." *Burns v. Wilson*, 346 U.S. 137, 149 (1953) (concurring opinion).

²⁸ Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 188 (1962).

²⁹ 354 U.S. 1, 37 (1956).

same conclusion to which Black and Douglas came in their *Burns* dissent: As the Court of Military Appeals said in 1960: "[T]he protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces."³⁰

The above statement, later quoted with approval by Chief Justice Warren,³¹ shows how the Court of Military Appeals, since its establishment in 1951 by the Uniform Code of Military Justice, has itself taken over many of the functions of a "civilian Supreme Court of the Military."³² Its willingness to apply constitutional standards to the military has let the Supreme Court off the hook and "since 1951 the number of habeas corpus petitions alleging a lack of fairness in courts-martial has been quite insubstantial."³³ Thus the *Milligan* dictum has not been negated by the Supreme Court which promulgated it so much as it has been eaten away by decisions handed down by the very court it purported to have insulated from all constitutional strictures. The Court of Military Appeals has imported constitutional standards into military justice by means of the rather fuzzy concept of "military due process," the embryonic form of which is to be found in *United States v. Clay*.³⁴ The court begins in *Clay* by saying that military due process is the observance of certain "creative and indwelling principles";³⁵ but in defining the latter the court is torn between tradition, which insists that congressional enactment be the sole source of such principles, and the newer concept that would ground these rights in the Constitution itself: "We do not bottom those rights . . . on the Constitution. We base them on the laws as enacted by Congress . . . [yet we may] give the same legal effect to these rights granted by Congress to military personnel as do civilian courts to [con-

³⁰ *United States v. Jacoby*, 11 U.S.C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960).

³¹ Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181, 189 (1962).

³² Previous to 1948, the same commanding officer decided which cases would be tried by which courts, which officers would sit on those courts, who would represent the accused and who the government. He also chose which cases could go up on review. Thus the commander, on whose good graces the careers of the officer-participants often depended, could control any court under his authority. Among other Uniform Code reforms aimed at such abuses was the Court of Military Appeals, formed to provide for civilian review of military court actions. Judges of the court are appointed from civilian life by the President, with the advice and consent of the Senate, to serve for a period of fifteen years. 10 U.S.C. § 867 (1964). The most serious cases, involving the death penalty or a high ranking officer, must be reviewed; also mandatory is review of any case certified to the court by the Judge Advocate General of any service. Finally, the Court has discretion to pass on any case involving a sentence of confinement for over a year or extending to a bad conduct discharge. See Walker and Niebank, *The Court of Military Appeals—Its History, Organization, and Operation*, 6 VAND. L. REV. 228 (1953).

³³ Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181, 188 (1962).

³⁴ 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951).

³⁵ *United States v. Lee*, 1 U.S.C.M.A. 212, 218, 2 C.M.R. 118, 124 (1952).

stitutionally created rights]. . . . [W]e need not concern ourselves with the constitutional concepts, but if the denial . . . to a defendant is of sufficient importance to justify [*sic*] a civilian court in holding that it denied him due process, [then such] . . . constitutes a violation of military due process."³⁶

Hence the dilemma: Is military due process no more than simple compliance with the Uniform Code of Military Justice and traditional military usage? If so, it is a poor euphemism for the *Milligan* dictum.³⁷ Or is military due process basically constitutional due process of law plus the specific guarantees extended by Congress in the Uniform Code of Military Justice?³⁸ If so, the Court of Military Appeals had broken with volumes of precedent.

The latter course was chosen in *United States v. Lee*,³⁹ a case which, in pointing toward the answer to the dilemma, at the same time enabled the Court of Military Appeals to parallel civilian courts in their development of absolute standards of police conduct in the areas of self incrimination, search and seizure, and the right to counsel.

Traditionally the military courts, like their civilian counterparts, would not reverse a court martial decision, even if the accused's rights had been violated, unless the error below was materially prejudicial to him.⁴⁰ In *Lee*, the court reconsidered this "harmless error" doctrine:

³⁶ *United States v. Clay*, 1 U.S.C.M.A. 74, 77-79, 1 C.M.R. 74, 77-79 (1951).

³⁷ See AYCOCK & WURFEL, *MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE* 206-07 (1955). "Military due process . . . is an unhelpful catchphrase . . . of nebulous meaning [If the words] are simply another way of saying 'no prejudicial error' they are tautological and should be excised." *Id.* at 207.

³⁸ Chief Judge Quinn of the Court of Military Appeals advances this point of view in Quinn, *The Uniform Code of Military Justice and Military Due Process*, 35 ST. JOHN'S L. REV. 225 (1961). The Court of Military Appeals was long bitterly split on this point. Thus Judge Latimer wrote in true *Milligan* style in *United States v. Sutton*, 3 U.S.C.M.A. 220, 223, 11 C.M.R. 220, 223 (1953): "Surely we are seeking to place military justice on the same plane as civilian justice but we are powerless to do that in those instances where Congress has set out legally, clearly, and specifically a different level." Latimer took the same tack in *United States v. Voorhees*, 4 U.S.C.M.A. 509, 531, 16 C.M.R. 83, 105 (1954) (concurring opinion), when the majority applied first amendment standards of free speech to a censorship case: "[M]ilitary units have one major purpose justifying their existence: to prepare for war and to wage it successfully." *United States v. Deian*, 5 U.S.C.M.A. 44, 17 C.M.R. 44 (1954), involved a three way split: Latimer and Quinn taking the two extremes and Brosman equivocating: "There is a good deal to be said on the question of whether military personnel may have 'any constitutional rights other than those which may have been duplicated by specific grants from Congress' Nor do I believe that this court met the matter squarely in *Voorhees*." *Id.* at 56, 17 C.M.R. at 56 (concurring opinion). Later cases have removed all doubts, and in *United States v. Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960), the court implied that it not only could apply constitutional standards to doubtful cases, but that it could itself declare parts of the Uniform Code unconstitutional.

³⁹ 1 U.S.C.M.A. 212, 2 C.M.R. 118 (1952).

⁴⁰ See UCMJ art. 59(a), 10 U.S.C. § 859(a) (1964).

"Two possible limitations on the manifest and proper policy of Article 59(a) (that is, the harmless error doctrine) and similar legislation have been proposed elsewhere, and we mention them with approval. First, where the error involves a recognizable departure from a constitutional precept, and, second, where it constitutes a departure from an express command of the legislature."⁴¹ Thus constitutional and congressional enactments are the indicia of the "creative and indwelling principles" of military due process, the violation of which may lead to automatic reversal of the accused's conviction.

After *Lee*, the task of the Court of Military Appeals was twofold: first, to define the extent to which the Constitution applied to the military, and second, to determine the specific applications to the military of the statutory and constitutional directives it now considered binding. Though the Constitution be relevant to the military, the implementation of its precepts will inevitably differ in the armed forces, and it is these applications to key areas of police and investigative procedure that are considered below.

II

COERCED PRODUCTION OF TESTIMONIAL EVIDENCE: THE RIGHT TO REMAIN SILENT

Typical of the post-1951 dispensation is article 31 of the Uniform Code, which requires that all interrogations be preceded by a warning to the suspect of his right not to incriminate himself. This article is a statutory prototype of the absolute standards of police procedures both the military and the civilian courts are developing. The right to be warned of one's fifth amendment protections has been called "so overwhelmingly important in the scheme of military justice as to elevate it to the level of a creative and indwelling principle,"⁴² the violation of which is reversible error per se.⁴³

In enacting article 31, Congress went much further than the fifth amendment as then interpreted.⁴⁴ The warning must be given before the most minor types of questioning,⁴⁵ any admissions gotten without the warning are inadmissible though there be not a scintilla of evidence to indicate that they were not in fact voluntary.⁴⁶ The slightest allusion

⁴¹ 1 U.S.C.M.A. at 216, 2 C.M.R. at 122 (1952).

⁴² *United States v. Wilson*, 2 U.S.C.M.A. 248, 255, 8 C.M.R. 48, 55 (1952).

⁴³ *United States v. Williams*, 8 U.S.C.M.A. 443, 24 C.M.R. 253 (1957).

⁴⁴ *United States v. Kemp*, 13 U.S.C.M.A. 89, 32 C.M.R. 89 (1963). See also the latest civilian decisions, e.g., *Griffin v. California*, 33 U.S.L. WEEK 4382 (1965), *People v. Dorado* 62 A.C. 350, 398 P.2d 361, 42 Cal. Rptr. 169 (1965).

⁴⁵ See *United States v. Kemp*, 13 U.S.C.M.A. 89, 32 C.M.R. 89 (1963).

⁴⁶ *United States v. Taylor*, 5 U.S.C.M.A. 178, 17 C.M.R. 178 (1954); *accord*, *United*

at the trial to accused's having availed himself of the right not to incriminate himself will be grounds for reversal.⁴⁷

With the exception of the prohibition of any mention at trial of accused's having "taken the fifth,"⁴⁸ civilian courts have not yet so clearly defined any of these standards. The stricter attitude of the Court of Military Appeals is perhaps due to the subtly coercive effect that a bit of gold braid can have on a military accused: "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."⁴⁹ The exceptions to article 31 tend to prove this rule: the warning need not be shown to have been given to gain admission of statements made in a conversation between friends, or of statements made to an informer whose official capacity is unknown to accused.⁵⁰ Finally, a civilian investigator, who questions a suspect about crimes ultimately tried by court-martial, need not give the warning unless it be shown that the armed forces have asked him to interrogate in order to avoid the effects of article 31.⁵¹

There are still a few unresolved questions regarding who is required to give the warning under what circumstances; one extreme says that anyone subject to the Uniform Code must warn any person he questions; others' views would force the duty only on official investigators who reasonably suspect the person interrogated to have committed a crime.⁵² A possible middle ground would require a warning by any questioner subject to the Code who reasonably believes an offense to have been committed by the suspect.⁵³

Despite such gray areas, the general philosophy behind present military standards regarding self-incrimination is clear. Fear of false confessions plays a relatively minor role in this philosophy; more important is a rather vague natural law or due process belief that it is violative of

States v. Howard, 5 U.S.C.M.A. 186, 17 C.M.R. 186 (1954). See Everett, *Criminal Investigation Under Military Law*, 46 J. CRIM. L. C. & P.S. 707 (1956).

⁴⁷ See United States v. Kemp, 13 U.S.C.M.A. 89, 32 C.M.R. 89 (1963).

⁴⁸ Griffin v. California, 33 U.S.L. WEEK 4382 (1965).

⁴⁹ United States v. Gibson, 3 U.S.C.M.A. 746, 752, 14 C.M.R. 164, 170 (1954).

⁵⁰ See United States v. Gibson, 3 U.S.C.M.A. 746, 14 C.M.R. 164 (1954). *But cf.* Massiah v. United States, 377 U.S. 201 (1964).

⁵¹ United States v. Holder, 10 U.S.C.M.A. 448, 28 C.M.R. 14 (1959).

⁵² See United States v. Wilson, 2 U.S.C.M.A. 248, 257, 8 C.M.R. 48, 57 (1953) (dissenting opinion).

⁵³ See United States v. Souder, 11 U.S.C.M.A. 59, 28 C.M.R. 283 (1959). For analogous problems in the civil courts, compare *On Lee v. United States*, 343 U.S. 747 (1952), with *Massiah v. United States*, 377 U.S. 201 (1964). Note the similar civilian court attempts to distinguish between investigative and accusatory questioning. See, e.g., *Escobedo v. Illinois*, 378 U.S. 478 (1964).

one's personal integrity to be forced to make public confession,⁵⁴ and that so fundamental is this principle that it has been enshrined as an absolute to be upheld though an occasional criminal go free.

III

COERCED PRODUCTION OF PHYSICAL EVIDENCE

The rights of an accused subjected to police investigative procedures can be neatly categorized only in the legal theorist's mind; like all such categories which we apply to the continuum of reality, the principles of search and seizure, of the right to counsel, and against self-incrimination often blend together when applied to the specifics of a given situation. Involving several types of these questions is the peculiarly military problem regarding the right of a superior to compel an accused to produce evidentiary matter, including blood, urine, and handwriting samples. Clearly the power of the commander must be limited, but how? In few areas are standards more elusive; the courts sometimes refer to search and seizure, sometimes to self-incrimination,⁵⁵ and at other times to that most nebulous of principles, "due process of law."

Nevertheless it is clear that no order by a commanding officer can effect what neither court nor police could do under the fifth amendment.⁵⁶ Thus if the evidence desired by investigators can only be obtained by an "affirmative conscious act" of the accused,⁵⁷ the privilege against self-incrimination clearly applies and failure to give the article 31 warning will result in automatic reversal.⁵⁸ Hence, while fingerprinting or physical examination of a suspect require only his passive acquiescence,⁵⁹ asking him to produce for examination his books or papers or to identify his clothes is the equivalent of asking him to be his own accuser, and what had been a reasonable search is now a question of self-incrimination.⁶⁰

But there still remains the inevitable hard case: What can be done

⁵⁴ See U.S. DEPT OF DEFENSE, *MANUAL FOR COURTS-MARTIAL* ¶ 150(b) (1951); *Brown v. Mississippi*, 297 U.S. 278 (1935).

⁵⁵ See, e.g., *United States v. Wilson*, 2 U.S.C.M.A. 248, 8 C.M.R. 48 (1953).

⁵⁶ See *United States v. Williamson*, 4 U.S.C.M.A. 320, 331, 15 C.M.R. 320, 331 (1954) (dissenting opinion).

⁵⁷ *United States v. Rosato*, 3 U.S.C.M.A. 143, 11 C.M.R. 143 (1953) (handwriting sample). Upholding certain types of physical examinations is *Holt v. United States*, 218 U.S. 245 (1910).

⁵⁸ See *United States v. Wilson*, 2 U.S.C.M.A. 248, 255, 8 C.M.R. 48, 55 (1952).

⁵⁹ See *United States v. Rosato*, 3 U.S.C.M.A. 143, 11 C.M.R. 143 (1953).

⁶⁰ See *Boyd v. United States*, 116 U.S. 616, 633 (1886). "And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself . . ." *Ibid.*

to extract evidence from a "passive suspect"? May his stomach be pumped? May he be catheterized if he is physically unable to produce a urine specimen? One possible reason to disown such tactics is that, smacking of physical torture, they may well cause a person to confess rather than submit to them.⁶¹

But more often military courts, following the civilian lead, have resorted to possibly more perceptive, but necessarily more vague, concepts of "personal immunities which . . . are 'so rooted in the tradition and conscience of our people as to be ranked as fundamental . . . ;' "⁶² there are some tactics which "do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically."⁶³ There is "conduct which shocks the conscience . . . , methods too close to the rack and screw to permit of constitutional differentiation."⁶⁴ In such cases the credibility of the illegally obtained evidence is totally irrelevant; it is inadmissible.⁶⁵

But is such a test workable in a society as ideologically atomized as ours? Captain Bligh and Casper Milquetoast would have rather different sorts of consciences, and one can certainly understand Justice Black's protest that "the accordion-like qualities of this philosophy must inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights."⁶⁶

To admit that the above "shock the conscience" test applied to the military was only the beginning for the Court of Military Appeals. Due to the military's difficulties with narcotics, the efforts to clarify the issue often involved cases of forced catheterization. Not surprisingly, there were as many opinions as to what shocked the conscience as there were judges on the court. One judge's conscience would be shocked only in cases of actual physical brutality or failure to use proper medical safeguards, and absent these, he would allow forced catheterization of any suspect.⁶⁷ Another claims the technique is shocking primarily because of its psychological impact on the accused. Since an unconscious suspect would presumably be immune both from "castration fears" and from impulses to confess rather than submit, the police could resort to catheterization of such a suspect.⁶⁸ Finally Chief Judge Quinn, ignoring

⁶¹ See *United States v. Williamson*, 4 U.S.C.M.A. 320, 15 C.M.R. 320 (1954) (Brosman, J., concurring).

⁶² *Rochin v. California*, 342 U.S. 165, 169 (1951).

⁶³ *Id.* at 172.

⁶⁴ *Ibid.*

⁶⁵ *Rochin v. California*, 342 U.S. 165 (1951).

⁶⁶ *Id.* at 177 (concurring opinion).

⁶⁷ *United States v. Jones*, 5 U.S.C.M.A. 537, 539, 18 C.M.R. 161, 163 (1955) (dissent).

⁶⁸ *United States v. Williamson*, 4 U.S.C.M.A. 320, 329, 15 C.M.R. 320, 329 (1954) (concurring opinion).

Frankfurter's denial that due process could be fixed as if it were natural law⁶⁹ unabashedly finds his absolute in the idea that the "sanctity of the human body, made in the image and likeness of God—the temple of his immortal soul—[must] be and forever remain sacred and inviolate."⁷⁰ While the Thomistic phraseology may sound rather medieval, perhaps such phrases as "due process," "inalienable rights," and "equal protection" can only be meaningful from some such "higher law" point of view.

IV

SEARCH AND SEIZURE

A. Doctrinal Development

Military court decisions regarding illegal searches and seizures demonstrate the evolution of an attitude. Little more than a decade ago, protections for the serviceman against unreasonable searches and seizures were seen as something that the Congress having given, the Congress could as easily take away. What rules there were were generously provided with loopholes; the exclusionary principle was considered to be purely evidentiary; civilian standards of probable cause were considered irrelevant to the military.

Today, the fourth amendment is seen to be as relevant to military as to civilian courts, and civilian decisions are seen as normative for the armed forces. Probable cause is as requisite in one jurisdiction as it is in the other. Both civilian and military courts are coming to see the exclusionary principle to have constitutional overtones; violation of the principle may soon require reversal for reasons of public policy rather than for reasons of specific prejudice to the accused.⁷¹

The Uniform Code says nothing about guarantees against unreasonable searches and seizures. The Manual for Courts Martial, promulgated by the President pursuant to the Code, does purport to extend such guarantees: "Evidence is inadmissible against the accused if it was obtained as the result of an unlawful search of his property conducted or instigated by persons acting under authority of the United States."⁷² The Manual then defines lawful searches to include those authorized by warrant, those incident to an arrest or conducted to avoid the destruction of "criminal goods," and those consented to by the owner of the property involved.⁷³

⁶⁹ *Rochin v. California*, 342 U.S. 165, 171 (1951).

⁷⁰ *United States v. Williamson*, 4 U.S.C.M.A. 320, 335, 15 C.M.R. 320, 335 (1954) (concurring opinion).

⁷¹ See generally Webb, *Military Searches and Seizures—The Development of a Constitutional Right*, 26 MILITARY L. REV. 1 (1964).

⁷² U.S. DEPT OF DEFENSE, MANUAL FOR COURTS-MARTIAL ¶ 152 (1951).

⁷³ *Ibid.*

This would appear to parallel civilian standards. However, the view of the Court of Military Appeals in its early years was that the origin of these rights was not in the Constitution, but in Congress and the Executive. While the latter had imported basic constitutional principles to the military, they had imposed no obligation to follow civilian court analyses either of the necessity of probable cause for a lawful search⁷⁴ or of the possible constitutional imperatives embodied in the exclusionary rule.⁷⁵ The meaningfulness of the Manual's guarantees seemed to be further compromised by the last section of paragraph 152, which authorized commanding officers to approve searches of any property within their jurisdiction, as well as allowing searches "made in accordance with military custom."

To make meaningful the Manual's guarantees, then, it was simultaneously necessary to overcome certain doctrinal hurdles. Today, not only is the fourth amendment seen as applicable to citizen and citizen soldier alike,⁷⁶ but "in applying the protection of the Amendment to specific situations involving persons subject to military law, military courts have been guided by the decisions of the Federal civilian courts."⁷⁷

By necessity, therefore, civilian requirements of probable cause are now seen not only as mere guidelines for the Court of Military Appeals, as they had been previously regarded by the court,⁷⁸ but they are seen as constitutionally impelled: "To hold otherwise would require us to deny to military personnel the full protection of the United States Constitution itself. This neither we, nor the Congress, nor the Executive, nor any individual can do."⁷⁹ The paragraph 152 "military custom clause" can no longer, the court said in 1958, be invoked to justify searches conducted without probable cause.⁸⁰ Dissenters protested that this decision in effect declared a part of the Manual unconstitutional.⁸¹ They are probably right.

⁷⁴ See *United States v. Doyle*, 1 U.S.C.M.A. 545, 548, 4 C.M.R. 137, 140 (1952). "It is unnecessary to spell out the obvious policy considerations which require a differentiation between the power of a commanding officer over military property and the power of a police officer to invade a citizen's privacy." *Ibid.*

⁷⁵ See *United States v. Dupree* 1 U.S.C.M.A. 665, 5 C.M.R. 93 (1952).

⁷⁶ See U.S. DEP'T OF DEFENSE, *MANUAL FOR COURTS-MARTIAL*, ¶ 152 (1951).

⁷⁷ *United States v. Ross*, 13 U.S.C.M.A. 432, 435, 32 C.M.R. 432, 435 (1963).

⁷⁸ *United States v. Dupree*, 1 U.S.C.M.A. 665, 5 C.M.R. 93 (1952).

⁷⁹ *United States v. Gebhart*, 10 U.S.C.M.A. 606, 610, 28 C.M.R. 172, 176 (1959).

⁸⁰ *United States v. Brown*, 10 U.S.C.M.A. 482, 28 C.M.R. 48 (1959). "In the past ten years, the Court of Military Appeals has not sustained a single search . . . on the basis of custom." *Webb Military Searches and Seizures—The Development of a Constitutional Right*, 26 *MILITARY L. REV.* 1, 49 (1964).

⁸¹ See *United States v. Brown*, 10 U.S.C.M.A. 482, 489, 28 C.M.R. 48, 55 (1958) (dissenting opinion).

B. The "Consent Search"

The constitutional foundation of the serviceman's right to be protected from unreasonable searches is nowhere more directly pertinent than in the area of searches authorized by the suspect's commanding officer. The court from the beginning has been extremely wary about approving of searches justified only by the supposed "consent" of the suspect. Recognizing the tendency of the enlisted man to yield to the least color of authority, the court has required that consent be shown by clear and positive testimony. Mere acquiescence with an officer's announced search is not consent, and if the accused was in custody when he "consented" to the search, the burden on the government to show voluntariness is even greater.⁸²

It has been argued that consent requires that the suspect be first told of his right to refuse to submit to an unreasonable search. This extension of article 31 may be justified on two interrelated grounds: (1) consent is essentially a waiver of a constitutional right; no such waiver should be accepted unless it is clear the accused knew of its full import;⁸³ and, (2) since the products of a search could well be used in evidence against the suspect, his consent to the search is essentially self-incriminatory; therefore the article 31 warning must be applicable.⁸⁴

The Court of Military Appeals has accepted these arguments to a limited extent. Insofar as the suspect is asked to participate in the search by some affirmative act, *e.g.*, he is asked to procure his books, papers, etc. for inspection, the warning must be given.⁸⁵ While other consent searches require no warning,⁸⁶ the courts have said that "it would certainly lessen . . . dispute . . . [if] agents made crystal clear . . . that they have no official authorization and that they cannot search in the absence thereof, unless they have free and knowing consent to enter into and search the premises."⁸⁷ Thus in determining the voluntariness of the consent, while the warning is generally not a prerequisite, it is nevertheless relevant. One judge has indicated that he would require the warning in all cases.⁸⁸

⁸² See, *e.g.*, *United States v. Justice*, 13 U.S.C.M.A. 31, 32 C.M.R. 31 (1962).

⁸³ See, *e.g.*, *United States v. Whitacre*, 12 U.S.C.M.A. 345, 30 C.M.R. 345 (1961).

⁸⁴ See, *e.g.*, *United States v. Insani*, 10 U.S.C.M.A. 519, 28 C.M.R. 85 (1959).

⁸⁵ *E.g.*, *United States v. Nowling*, 9 U.S.C.M.A. 100, 25 C.M.R. 362 (1958); see *Boyd v. United States*, 116 U.S. 616 (1886); notes 56-60 *supra* and accompanying text.

⁸⁶ See, *e.g.*, *United States v. Whitacre*, 12 U.S.C.M.A. 345, 30 C.M.R. 345 (1961).

⁸⁷ *United States v. Justice*, 13 U.S.C.M.A. 31, 34, 32 C.M.R. 31, 34 (1963).

⁸⁸ *United States v. Insani*, 10 U.S.C.M.A. 519, 522, 28 C.M.R. 85, 88 (1959) (dissenting opinion).

C. *The Commander's Power to Order Searches*

The Court of Military Appeals' newly adopted constitutional approach to search and seizure questions has circumscribed the commanding officer's seemingly blanket authority to conduct searches of any property in his jurisdiction. Whereas military custom presumably had allowed him to search anyone or anything under his command with neither a search warrant nor probable cause,⁸⁹ it is clear today that "although the military permits certain deviations from civilian practice in the procedures for initiating a search, [for example, no warrant is ever required] the substantive rights of the individual and the necessity that probable cause exist remain the same."⁹⁰ The Court of Military Appeals has analogized the nonwarrant search of the commander to the warranted search by the civilian policeman; the same criteria of probable cause are required for both, and the commander must act in the same capacity as does a civilian magistrate in judging the necessity for a search.⁹¹ Gone are the halcyon days when he could search on mere suspicion,⁹² or delegate his powers to whomever he pleased,⁹³ or order a shakedown search without probable cause.⁹⁴

D. *Illegal Searches or Seizures and the Exclusionary Rule*

Not only are the rules of the game tighter, but the penalties for dirty play are getting more severe. The Court of Military Appeals originally saw the exclusionary sanction as neither universally applicable nor commanded by the Constitution.⁹⁵ It was a purely evidentiary rule, and thus could not be said to fall within the constitutionally or legislatively impelled exceptions to the harmless error doctrine,⁹⁶ which was interpreted in its strictest sense: "Our inquiry is limited to whether there is evidence in the record of trial sufficient to support the findings made by

⁸⁹ See *United States v. Doyle*, 1 U.S.C.M.A. 545, 4 C.M.R. 137 (1952).

⁹⁰ *United States v. Brown*, 10 U.S.C.M.A. 482, 488, 28 C.M.R. 48, 53 (1958).

⁹¹ See *United States v. Ness*, 13 U.S.C.M.A. 18, 32 C.M.R. 18 (1962).

⁹² See, e.g., *United States v. Brown*, 10 U.S.C.M.A. 482, 28 C.M.R. 48 (1958).

⁹³ See, e.g., *United States v. Ness*, 13 U.S.C.M.A. 18, 32 C.M.R. 18 (1962).

⁹⁴ But in the shakedown search situation, it appears that probable cause will come from a reasonable belief that a person in the commanding officer's unit has committed a crime. The rationale for this is rooted in the "freedom of access of all occupants of . . . [a barracks] to all parts thereof." *United States v. Gebhart*, 10 U.S.C.M.A. 606, 610, 28 C.M.R. 172, 176 (1959).

⁹⁵ See, e.g., *United States v. Dupree*, 1 U.S.C.M.A. 665, 5 C.M.R. 93 (1952).

⁹⁶ *United States v. Lee*, 1 U.S.C.M.A. 212, 2 C.M.R. 118 (1952). Civilian jurisdictions have also recognized that there may be constitutional or legislative grounds for reversal regardless of the harmless error rule. See, e.g., *Kotteakos v. United States*, 328 U.S. 750 (1946).

the convening authority."⁹⁷ The conviction is thus upheld even though the improperly admitted evidence may well have influenced the lower court's decision; all that need be found is that all other evidence could have reasonably supported the earlier decision.⁹⁸

However, this attitude arose before the Supreme Court's decision in *Mapp v. Ohio*,⁹⁹ which made it clear that the exclusionary rule was motivated if not impelled by the Constitution.¹⁰⁰ Today's Court of Military Appeals is strengthening the rule to better accord with its constitutional basis;¹⁰¹ in doing so, it may either make admission of evidence gotten from an illegal search reversible error per se, or it may change the harmless error rule so as to effect reversal if it be shown that the improperly admitted evidence had "substantial influence" on the lower court's decision.¹⁰²

Recent Court of Military Appeals cases reflect an uncertainty as to which course to take. The issue was first advanced by the dissenting opinion in *United States v. Justice*,¹⁰³ where both alternatives to the traditional harmless error rule were mentioned; the dissenter concluded that he would reverse since there was a "fair risk that the court-martial accorded . . . [the evidence] weight in its deliberations."¹⁰⁴ Going even further, the dissent in *United States v. Simpson*,¹⁰⁵ recommended that improper admission of any evidence gotten by illegal search or seizure should result in automatic reversal on public policy grounds rather than on the basis of possible prejudice to the accused. This rule would, of course, place the exclusionary principle as regards illegal searches and seizures on the same absolute plane as the command of article 31.

⁹⁷ *United States v. Justice*, 13 U.S.C.M.A. 31, 34, 32 C.M.R. 31, 34 (1963).

⁹⁸ See *ibid.*

⁹⁹ 367 U.S. 643 (1961); see *United States v. Higgins*, 6 U.S.C.M.A. 308, 20 C.M.R. 24 (1955). See also *Fahy v. Connecticut*, 375 U.S. 85, 92 (1964) (dissenting opinion).

¹⁰⁰ That is, in light of "the obvious futility of relegating the fourth amendment to other protections." 367 U.S. at 652-53.

¹⁰¹ See Webb, *Military Searches and Seizures—The Development of a Constitutional Right*, 26 MILITARY L. REV. 1, 49 (1964).

¹⁰² "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather . . . whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Kotteakos v. United States*, 328 U.S. 750, 765 (1946). Other evidence of a stricter approach is the court's refusal to admit evidence gotten by an illegal search by a private individual, though ¶ 52 of the Manual for Courts-Martial requires exclusion only if the evidence was gotten by "persons acting under the authority of the United States." See *United States v. Sieber*, 12 U.S.C.M.A. 520, 31 C.M.R. 106 (1961.)

¹⁰³ 13 U.S.C.M.A. 31, 42, 32 C.M.R. 31, 42 (1963) (dissenting opinion).

¹⁰⁴ *Id.* at 48, 32 C.M.R. at 48.

¹⁰⁵ 15 U.S.C.M.A. 18, 34 C.M.R. 464 (1964).

V

RIGHT TO COUNSEL

The right to counsel, appointed or retained, during pretrial investigations by police is just as murky defined in the military as it is in civilian jurisdictions. Originally the Uniform Code of Military Justice gave the soldier more rights in this area than the civilian was supposed to have had, *i.e.*, "a mantle of valuable protection extending to areas but recently the subject of discussion by the Supreme Court."¹⁰⁶ Hence the Uniform Code of Military Justice gives the accused the right to appointed counsel not only during trial, but also during the formal pretrial investigation (after charges have been filed), and during automatic appeal.¹⁰⁷ But the Code says nothing of the right to consult privately retained counsel, and while the majority of the Court of Military Appeals says that the sixth amendment right to counsel does apply to the military accused,¹⁰⁸ the scope of this right is quite indeterminate as regards the right to counsel during pretrial investigative proceedings. Furthermore, though the Supreme Court has protested that it still holds by its opinion in *Crooker v. California*¹⁰⁹ that failure to allow accused to retain a lawyer during police interrogation will not result in a reversal unless it is shown that the suspect was denied "fundamental fairness as shown by the totality of circumstances,"¹¹⁰ there is little doubt where the Court's predilections lie today, and that there is ample constitutional basis to hold that any person confronted by police has a right to consult counsel.¹¹¹

The Court of Military Appeals has not been unaffected by the doctrinal ferment represented by recent Supreme Court decisions. Some of the issues before it involve applications of the sixth amendment to peculiarly military questions, such as whether a defendant has a right to an attorney as appointed counsel during special courts martial.¹¹² Other questions before the Court of Military Appeals are those similarly troubling the Supreme Court, such as the right to the presence of retained counsel during any and all police questioning, and the obligation of the police to inform a suspect of his right to counsel.

¹⁰⁶ *United States v. Culp*, 14 U.S.C.M.A. 199, 203, 33 C.M.R. 411, 415 (1963).

¹⁰⁷ UCMJ art. 32, 10 U.S.C. 832 (1964).

¹⁰⁸ See *United States v. Culp*, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963). Note that Judge Kilday disagrees. Although he grants that the sixth amendment does apply to the military, he denies that it confers the right to counsel since the common law in 1791 did not recognize this as a right of military defendants. *Id.* at 204, 33 C.M.R. at 416.

¹⁰⁹ 357 U.S. 433 (1959).

¹¹⁰ *Escobedo v. Illinois*, 378 U.S. 478 (1964).

¹¹¹ *E.g., id.* at 495 (dissenting opinion).

¹¹² See generally *United States v. Culp*, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963).

In *United States v. Gunnels*,¹¹³ the court treated both of these problems. After his arrest, the accused had requested advice of the staff judge advocate's office; his request was refused. When counsel was appointed, he was not allowed to be present at the accused's interrogation. The court reversed the conviction, though no evidence showed that the accused actually lacked knowledge of his rights or that his answers were coerced. The judges condemned "the practice, which appears to be common in the military, of telling a suspect that he cannot consult with counsel in connection with an interrogation by enforcement agents."¹¹⁴ The supposed basis of the reversal was that accused was misadvised when he requested information. Yet the court added a dictum implying that the accused's rights extended to having his lawyer present during all police questioning: "Had he given the accused such advice the accused would have known that he had a right to have his counsel present during his interrogation."¹¹⁵

Subsequent decisions seem to be attempts to distinguish *Gunnels* out of existence. The *Gunnels* dictum concerning the right to counsel's presence during questioning was the shakiest of limbs out on which the court has gone; it was also the first from which the court tried to back off. In *United States v. Melville*,¹¹⁶ the Court refused to find prejudice to the accused from the exclusion of his attorney from the police interrogation. Having in this way seemingly renounced *Gunnels*, the judges added, "We do not . . . wish to be understood in any manner as placing our approval on the practice of excluding the presence of individually retained counsel from an interrogation prior to the preferral of charges."¹¹⁷ This gratuitous comment has left the whole question in the air.

While article 31 of the Uniform Code does guarantee that a suspect be told of his right to stay silent, there is no parallel right to be told that he may retain counsel. *Gunnels* seems to have made this right absolute only if accused himself asked for advice from his interrogators; since *Gunnels*, the court has put even this principle into doubt. While it is clear that the Court of Military Appeals will find prejudice to a defendant if there is both a request for advice and either actual misadvice or efforts to thwart accused's efforts to see counsel,¹¹⁸ the court

¹¹³ 8 U.S.C.M.A. 130, 23 C.M.R. 354 (1957).

¹¹⁴ *Id.* at 134, 23 C.M.R. at 358.

¹¹⁵ *Id.* at 135, 23 C.M.R. at 359.

¹¹⁶ 8 U.S.C.M.A. 597, 25 C.M.R. 101 (1958).

¹¹⁷ *Id.* at 600, 25 C.M.R. at 104. For a critique of the *Gunnels-Melville* discrepancy, see 10 SYRACUSE L. REV. 169 (1958). The Supreme Court treats the issue in *In re Groban*, 352 U.S. 330 (1957).

¹¹⁸ See, e.g., *United States v. Gethard*, 33 C.M.R. 712 (1963); *United States v. Rose*, 8 U.S.C.M.A. 441, 24 C.M.R. 251 (1957).

may not find the same prejudice if the request for advice is simply met with silence and the interrogation resumed a few hours later.¹¹⁰ The court seems not to recognize that ignoring a person's question as to his right to get a lawyer is often reasonably construed by the suspect as a denial that he has that right.¹²⁰ Thus in *United States v. Cadman*,¹²¹ the defendant had asked for advice, and rather than advising him, the investigator had simply ended the interview. A day later questioning was resumed and the suspect confessed. The Court of Military Appeals upheld the admissibility of the confession, because there had had been no actual misadvice though the accused had testified that "[from the investigator's] attitude and by not answering my questions . . . I thought that I couldn't have any legal advice . . .".¹²²

This attitude of the Court of Military Appeals has, in the words of one dissenter, caused the principles of *Gunnels* and its companion cases to "become so limited there is little chance that an accused person will derive any benefit from his right to counsel . . . [There is] too much emphasis on resistance to superior military authority and too little on the naturally submissive attitude of a soldier in the hands of the military police."¹²³ There is nothing to encourage an interrogator to give a suspect any advice, and nothing to discourage him from closing his ears to all requests for it, since it appears that "tenacious questioning by an agent who simply ignores the accused's request is sufficient to excuse the deprivation involved."¹²⁴

But even the Court of Military Appeals reads the advance sheets, and there is evidence that it is again shifting its course in the direction taken by the civilian courts in such cases as *Spano v. New York*,¹²⁵ *Massiah v. United States*,¹²⁶ and *Escobedo v. Illinois*.¹²⁷ In *United States v. Powell*,¹²⁸ the suspect asked advice from a non-lawyer officer who answered by saying, "I'm the legal counsel." There was no proof of misadvice, yet the confession made during the interrogation was rejected on the grounds

¹¹⁰ See, e.g., *United States v. Rose*, 8 U.S.C.M.A. 441, 24 C.M.R. 251 (1957), and *United States v. Wheaton*, 9 U.S.C.M.A. 257, 26 C.M.R. 37 (1957).

¹²⁰ See *United States v. Kantner*, 11 U.S.C.M.A. 201, 29 C.M.R. 17 (1960). In this case the interrogation was not even stopped. The request for counsel was ignored and the questioning continued, the investigator remarking, "This boy has been over the coals before. He knows what it is all about." *Id.* at 204, 206, 29 C.M.R. at 20, 22 (dissenting opinion).

¹²¹ 10 U.S.C.M.A. 222, 27 C.M.R. 296 (1953).

¹²² *United States v. Cadman*, 10 U.S.C.M.A. 222, 224, 27 C.M.R. 296, 298 (1953).

¹²³ *United States v. Kantner*, 11 U.S.C.M.A. 201, 205-07, 29 C.M.R. 17, 21-23 (1960) (dissenting opinion).

¹²⁴ *Id.* at 207, 29 C.M.R. at 23.

¹²⁵ 360 U.S. 315 (1959).

¹²⁶ 377 U.S. 201 (1964).

¹²⁷ 378 U.S. 478 (1964).

¹²⁸ 13 U.S.C.M.A. 364, 32 C.M.R. 364 (1962).

not that the defendant had been misadvised, but that he had been "misled."¹²⁹ The Court also ruled a second confession inadmissible, as "the cat could not here be rebagged . . . [there is no showing of] severance from the presumptive influence of the earlier confession."¹³⁰ Another step in the journey back to *Gunnels* was taken in an instance where the accused who asked for advice was sent to a non-lawyer "battalion legal officer." Again there was no proof of misadvice. The Court, in an almost verbatim repetition of *Gunnels*, reversed the conviction: "Due to acts of omission by others, accused was never effectively advised of his rights [including the right] to consult an attorney and have counsel present with him during questioning."¹³¹

It thus appears that the Court of Military Appeals is abreast of, and perhaps slightly ahead of its civilian counterparts. If an accused requests advice, he must be afforded a chance to see an attorney. Although no case has recently come up on this precise point, it also appears that retained counsel cannot be excluded from an interrogation of his client.¹³² The ultimate step, that of expanding article 31 to require that advice both as to the right to remain silent and to retain counsel be given to all arrestees whether or not they request such advice, has yet to be taken. But the direction the court has taken seems clear.

VI

PROLONGED CONFINEMENT

It has often been repeated that the *McNabb-Mallory* rule,¹³³ excluding confessions obtained during illegally prolonged confinement, does not apply to the military, and that neither prolonged confinement nor repeated interrogation has alone been declared to be coercive as a matter of law.¹³⁴ One questions whether the issue has been quite so clearly resolved. Exclusionary rules in general are meant to enforce court prohibitions of certain police tactics. Thus both military and civilian courts exclude the fruits of an illegal search or seizure;¹³⁵ military courts similarly exclude all evidence obtained during an interrogation carried on in violation of article 31,¹³⁶ or from an interrogation in which accused was misad-

¹²⁹ *Id.* at 368, 32 C.M.R. at 368.

¹³⁰ *Ibid.*

¹³¹ *United States v. Brown*, 13 U.S.C.M.A. 14, 17-18, 32 C.M.R. 14, 17-18 (1953).

¹³² See *ibid.*

¹³³ *Mallory v. United States*, 354 U.S. 449 (1957); *McNabb v. United States*, 318 U.S. 332 (1943).

¹³⁴ See Everett, *Criminal Investigation Under Military Law*, 46 J. CRIM. L., C. & P.S. 707, 716 (1956).

¹³⁵ See notes 73-76 *supra* and accompanying text.

¹³⁶ See notes 44-49 *supra* and accompanying text.

vised as to his right to counsel.¹³⁷ Hence military courts are if anything more receptive to the exclusionary sanction than are their civilian equivalents. Why, then, shy away from excluding the fruits of an illegally prolonged detention?

It is sometimes pointed out in answer that the *McNabb-Mallory* rule was based not on the fifth amendment but on the Supreme Court's power to supervise and establish rules of procedure for the federal courts, and that since there is no equivalent of this power granted to the Court of Military Appeals in the Uniform Code, that court has no parallel obligation or authority to publish a *Mallory* style exclusionary rule.¹³⁸ But such a rule is more than a weapon against confinement without prompt arraignment; it also tends to insure that an accused be informed of his rights to remain silent and retain counsel.¹³⁹ These constitutional implications of the exclusionary sanction have become clearer with the passage of time and the other exclusionary rules enforced in the military show that the Court of Military Appeals is not unaware of these constitutional elements of *McNabb-Mallory*.¹⁴⁰

Furthermore, there are rules in the Uniform Code regarding prolonged confinement. Article 33 requires that within eight days of arrest charges must be furnished to the accused and forwarded to the officer with general court martial jurisdiction. In *United States v. Bayer*¹⁴¹ this provision was flagrantly violated in a case which incidentally shows the dangers of omitting sanctions against prolonged confinement per se. *Bayer* involved the reversal by the court of appeals for the second circuit of an army officer's conviction in the federal district court; the alleged offense was conspiracy to deny the United States the services of one of its military officers.¹⁴² The court of appeals tested the defendant's initial arrest and confinement by military authorities according to its view of military law. Defendant was arrested on August 9, 1944, on suspicion of accepting

¹³⁷ See notes 112-14 *supra* and accompanying text.

¹³⁸ See *United States v. Moore*, 4 U.S.C.M.A. 482, 16 C.M.R. 56 (1954) (dictum). For the source of the Supreme Court's rulemaking power, see 18 U.S.C. 3771 (1964).

¹³⁹ "Rules 5b and c reveal the function of the requirement of prompt arraignment: . . . 'the commissioner shall inform the defendant of the complaint against him, of his right to retain counsel . . . , [and that] he is not required to make a statement'" *Mallory v. United States*, 354 U.S. 449, 453-54. See also *Upshaw v. United States*, 335 U.S. 410 (1948).

¹⁴⁰ See, e.g., *United States v. Dykes*, 5 U.S.C.M.A. 735, 19 C.M.R. 31 (1954). The court here points to the two reasons for excluding extrajudicial confessions, *i.e.*, they may be unreliable and they may have been obtained in violation of the privilege of remaining silent. The court gives *McNabb* as an example of the efforts of the federal courts to implement guarantees against both abuses, and points to article 31 as a parallel example of the military's concern for both ends.

¹⁴¹ 156 F.2d 964 (2d Cir. 1946).

¹⁴² See 18 U.S.C. § 88 (1964). The defendant previously had been court-martialed for conduct unbecoming an officer. See 156 F.2d at 970.

bribes; these charges were neither served on him nor referred for trial until May 10 of the following year. From the date of his arrest until September 16, 1944, the accused was confined in a guarded ward for the insane. There was no evidence of mental imbalance, yet the suspect had to wear the hospital uniform, was forced to eat with a spoon only, and was allowed no communication with the outside world for ten days, though he had said he wanted to see an attorney. It was unclear whether he ever saw a lawyer before he confessed after four weeks of this treatment. His conviction in the federal district court was reversed by the court of appeals.

The court cited *McNabb* and the predecessor of article 33 of the Code,¹⁴³ and concluded that the latter "does not seem significantly different in purpose from the various statutes cited in the *McNabb* case. Hence it ought not to be so construed as to make the *McNabb* principle applicable only where detention is by civil authorities and not where it is by military authorities."¹⁴⁴

Bayer was a civilian court decision, and it is true that the Court of Military Appeals specifically has denied the relevance of the principle to the military.¹⁴⁵ But each such disclaimer has been by way of dictum only. In a typical case, often cited as a clear rejection of the *Mallory* idea, defendant was arrested for cause and immediately warned of his right to remain silent; he made his first inculpatory statements within a day of his arrest, and charges were preferred after four days. When the appellant invoked *McNabb-Mallory*, the Court found them not in point, saying, "It is manifest from the record in the case at bar that the military authorities concerned complied fully with these provisions. . . . [The rule is inapplicable] *in this setting*."¹⁴⁶

McNabb-Mallory must therefore be viewed in the entire context of standards established by the Court of Military Appeals regarding the aspects of police procedure outlined above. By means of other applications of the general exclusionary principle, the court has largely attained the ends for which *Mallory* was designed. It would not be surprising to see the Court of Military Appeals further extend the exclusionary sanction were a case directly involving illegally prolonged confinement put before it.

CONCLUSION

For most of American history the Bill of Rights had little direct effect on military court decisions. This was not so much because these rights were thought inapplicable to servicemen as it was because the jurisdic-

¹⁴³ Articles of War, art. 70, 41 Stat. 802 (1920).

¹⁴⁴ 156 F.2d at 969.

¹⁴⁵ *United States v. Moore*, 4 U.S.C.M.A. 482, 16 C.M.R. 56 (1954).

¹⁴⁶ *Id.* at 485, 16 C.M.R. at 59 (Emphasis added.)

tion of military tribunals, both as to numbers of men and kinds of offenses, was so restricted that the courts were willing to defer almost completely to the definition by Congress of servicemen's rights and to their enforcement by the military tribunals. The Supreme Court questioned a military court decision only when the court had exceeded its jurisdiction.

During peacetime this entente worked tolerably well, but times of war—or cold war—have always been accompanied by accusations that “military justice” was a contradiction in terms. The permanence and pervading influence of the armed establishment today makes unquestioning deference to military procedures even less tenable. Thus the federal courts began to say that a military court with unquestioned jurisdiction both as to subject and person could lose that jurisdiction by a denial to the accused of “fundamental fairness.” This reassured traditionalists as to the integrity of the jurisdictional facade, while behind the facade the libertarians were defining “fundamental fairness” so as to apply to the military the same constitutional absolutes which civilian courts were applying in their own bailiwicks.

Absolute standards of conduct are by definition arbitrary. Yet a court might see their real utility in the area of individual liberties. Automatic reversal of a conviction because of the violation of an essential right of an accused is not only a sanction against governmental wrongdoing. It also tends to reinforce the peculiarly Western idea that there are some things which even the highest courts cannot approve without undermining the integrity of the judicial process. A court might also see that in the military, particularly, vague concepts of fairness are too easily eroded in times of conflict when men are more concerned with survival than with the niceties of constitutional law.

The rule that all suspects be warned of their right not to answer questions was most easy to define; not only was the privilege against self-incrimination in the Constitution, but Congress had clearly defined the rule in the Uniform Code of Military Justice. Forced production of physical evidence—things like blood tests, stomach pumping, and catheterization—have not been as easy to handle. Realizing that the tenets of the national conscience furnish no adequate criterion, civilian and military courts tend to speak in terms of rules of conduct implicit in the nature of man and made evident by various provisions of the Constitution.

In dealing with search and seizure, the military courts have had to reckon not only with the natural diffidence of a soldier faced with an officer demanding to search his effects, but also with the explicit executive endorsement of a search sanctioned by “military custom.” Hence we find the Court of Military Appeals to be especially suspicious of any search justified only by the consent of the person searched or by the

"custom of the service." The latter alone now appears to be no justification of a search.

The general philosophy that a prerequisite to the enjoyment of any constitutional right is a knowledge of that right, seems to earmark most recent decisions of the courts in this area. These decisions not only define the right to counsel's presence during an interrogation and one's right not to submit to an unlawful search, but they seem to point to the day when an accused upon arrest will be informed of all those rights. Civilian and military courts seem to realize that it is too easy to lead a person to believe he has no rights at all simply by keeping him in confinement and saying nothing to him concerning his rights.

The role of any court in protecting individual liberty is minimal in any context. The ambit of the judge in the military is especially confined. Most disciplinary measures which do not involve severe penalties are summary and in fact subject to little more than the discretion of the commanding officer. But within its limited jurisdiction,¹⁴⁷ the Court of Military Appeals is clearly ready to remind the armed forces that one can easily become so involved in the struggle that one forgets what the struggle is all about.

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¹⁴⁷ For an outline of the jurisdiction of the Court of Military Appeals, see note 32 *supra*.