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The Effect of Recent Supreme Court Decisions on Military Law

Myron L. Birnbaum
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I. INTRODUCTION

LANDMARK cases of the United States Supreme Court in the field of criminal law during the past several years have had far-reaching effects upon prosecutions in state and federal courts. The impact of these decisions upon practice in the civilian courts has been thoroughly recognized and the subject for much analysis and discussion. There remains, however, another very active jurisdiction which falls outside the scope usually thought of as affected by these decisions, but which has been similarly influenced.

This jurisdiction, of course, is the military services' court-martial operation. Exercising jurisdiction over some three million persons, mostly young men, the services during calendar year 1966 (the last period for which final reports have been rendered) tried 69,174 cases. Of these, the great majority were either summary courts-martial or those special and general courts-martial in which the sentence did not include a punitive discharge. However, there were almost 4,000 cases requiring review by a board of review, in most cases, because the sentence included a punitive discharge or confinement at hard labor for a year or more.

With so large a military community, mostly short-tenure rather than "career" and drawn from all parts of the general population, and with such an active docket of both "military" and "non-military" cases, courts-martial are of wide interest. Scarcely a household in the country does not have a close connection with someone in the services; any conviction,
whether or not deserved, may trigger interest not only in the immediate family but throughout ever-widening segments of the community. In this setting, the effect of the Supreme Court's decisions on military practice is of more than parochial interest.

This effect is less direct than that which operates in the civilian sphere. Although courts-martial act under the authority of the United States, each Supreme Court decision of general application which does not directly address itself to courts-martial must be examined carefully to determine its effect on military trials. The answer to this is determined primarily outside the federal court system. Courts-martial derive their jurisdiction not from Article II of the Constitution, which provides for the Federal Judiciary, but from the power of Congress to "make Rules for the Government and Regulation of the land and naval Forces." Accordingly, the ordinary federal appellate courts have sharply limited their cognizance of court-martial matters and, when they have acted, have done so principally in habeas corpus actions. In *Grafton v. United States,* the Supreme Court limited the "civil tribunals" to the question of "whether the military court had jurisdiction of the person and subject matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced." This limited scope was somewhat extended in *Burns v. Wilson* to encompass determination of whether the accused has received due process, and so rests the state of the jurisdiction of the federal courts in this area at present.

In consequence, the application to courts-martial of new developments in criminal law, whether dependent upon the Constitution or otherwise, is generally decided within the military appellate system. As will be seen, the definitive decision rests with the Court of Military Appeals. Some of the recent pronouncements of the Supreme Court which may affect military law have already been touched upon by this highest military court. Others await the presentation of cases which will so frame the issue as to call for a ruling. Some of the recent Supreme Court decisions, such as those dealing with civil rights and contempt are not likely to find counterparts in

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8. 346 U.S. 137, 142 (1953).
court-martial practice. This article, after a brief examination of the military justice system itself and some recent procedural developments, will deal with those doctrinal developments which have particular impact on military trials—the right to counsel at pretrial interrogations, blood-alcohol tests, handwriting exemplars and voice identification, and the search for "evidence."

II. THE COURT-MARTIAL SYSTEM

At present, the military justice system is governed by the Uniform Code of Military Justice, a revision of the pre-existing separate Army and Navy enactments, which was adopted in 1950 and became effective on May 31, 1951. It was later codified as sections 801 through 940 of Title 10 of the United States Code, and has been amended in a few details which have not altered the overall scheme.

There are three classes of courts-martial—summary, special and general. All are appointed by a commander who is not the accuser. The appointing authority is generally a commander, one or several echelons higher than the unit to which the accused is assigned. In every case the findings and sentence are effective only as approved by the appointing authority or a prescribed substitute reviewing authority, and may be disapproved or reduced. Reduction in both findings and sentence is common at this level and at higher levels of review.

Summary courts-martial consist of a single officer, without provision for defense counsel or prosecutor. During recent years, however, the services have increasingly permitted or provided counsel on request. The punitive power of the court is generally limited to one month's confinement, forfeiture of two-thirds of a month's pay and limited reductions in grade. It may not try commissioned or warrant officers. The record is limited to docket-type entries, except that the services and their subordinate headquarters have increasingly required a summary of the proceedings and of the evidence. It is finally reviewed by the staff judge advocate of the officer exercising general court-martial jurisdiction, except where departmental regulations place the review at a higher level.

12. The Army had convened courts-martial under successive revisions of the Articles of War, the Navy under the Articles for the Government of the Navy. The Air Force, separated from the Army in 1947, operated under the Articles of War until the adoption of the UCMJ. The Coast Guard now is included under the UCMJ but, because of the small number of cases which it generates, will not be dealt with separately in this article.


Special courts-martial consist of three or more members. These are commissioned or warrant officers, except that if an enlisted accused requests that enlisted persons be included, at least one-third of the members must be enlisted persons. Trial counsel (i.e., a prosecutor) and defense counsel are required. These need not be lawyers, but if the trial counsel is a lawyer who is certified as qualified to act as counsel in a general court-martial, the defense counsel must be similarly qualified. Sentences are limited by the provisions of the Table of Maximum Punishments prescribed by the President in the Manual for Courts-Martial, but in no case may they exceed a bad conduct discharge, confinement at hard labor for six months, forfeiture of two-thirds pay for six months and reduction in grade. A complete record is kept—in summarized form if the sentence does not include a bad conduct discharge, but verbatim if such a discharge is included. If no bad conduct discharge is included, the final review is generally at the general court-martial level. Cases in which a bad conduct discharge is approved by the appointing authority are reviewed by a board of review under Article 66, the same as a general court-martial.

General courts-martial consist of five or more members, with enlisted membership only at accused’s request, as discussed above. A law officer serves in a capacity closely corresponding to a civilian judge, except that he does not rule on challenges, does not finally rule on motions for findings of not guilty, does not determine sentence, and lacks certain collateral responsibilities and powers of his civilian counterpart. He must be a lawyer, specifically certified by his respective Judge Advocate General as

17. UCMJ, art. 25(c)(1), 10 U.S.C. § 825(c)(1) (1964). Experience quickly proved that enlisted members of courts-martial are generally less forgiving and less lenient as court members than are officers. As a result, requests for enlisted persons as members are generally limited to those cases in which accused and counsel believe that particular aspects of defense or mitigation will be peculiarly understandable by them.
19. UCMJ, art. 27(c), 10 U.S.C. § 827(c) (1964). In the Air Force, trial and defense counsel of virtually all special courts-martial are lawyers. In the Navy, lawyers act in fewer than fifty per cent of the cases; in the Army and the Marine Corps, fewer than ten per cent.
20. Manual, § 127c; this is expressly provided for in UCMJ, art. 56, 10 U.S.C. § 856 (1964).
22. Since the Army does not permit court reporters to be used in special courts-martial, no Army court at this level may impose a bad conduct discharge. The other services do employ reporters in special courts-martial and do impose bad conduct discharges at this level.
qualified to perform this function.\textsuperscript{25} Trial and defense counsel must be lawyers, certified as qualified for that duty.\textsuperscript{26} The court may impose any punishment or combination permitted by the Uniform Code and by the limitations provided by the President. A verbatim record is maintained.\textsuperscript{27} All general court-martial records are forwarded to the respective Judge Advocate General. Those in which the approved sentence "affects a general or flag officer or extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more"\textsuperscript{28} are reviewed by a board of review under Article 66.\textsuperscript{29} Other general court-martial cases are examined in the office of the Judge Advocate General and, if error is found, are referred to a board of review.

The boards of review in each service constitute an intermediate appellate tribunal and have broad responsibilities and powers, including the review of matters of fact as well as law, and the affirmance of no more of the approved sentence than they find appropriate. They must, in consequence, deal with all of the issues in each case before it reaches the Court of Military Appeals.\textsuperscript{30} The United States and the accused are represented before the boards by judge advocates in the office of the respective Judge Advocate General and the accused may introduce individual counsel as well.\textsuperscript{31} Selected decisions of the boards of review are published in the Court-Martial Reports, establishing a body of case law for use as precedent in the services, under the doctrine of \textit{stare decisis}.

The key tribunal in fashioning military law is, however, the Court of Military Appeals. Cases move from the boards of review to this court (1) mandatorily, when a general or flag officer or an affirmed death sentence is involved; (2) on petition of the accused, granted by the court; or (3) on certification by The Judge Advocate General concerned.\textsuperscript{32} The certification device may be employed to question a decision of the board of review favoring either the Government or the accused. Of the 19,749 cases considered by the court through June 1966, over 98 per cent came

\begin{itemize}
\item \textsuperscript{25} UCMJ, art. 26, 10 U.S.C. § 826 (1964). In the Army and Navy, officers are appointed to this work as a full-time duty.
\item \textsuperscript{26} UCMJ, art. 27(b), 10 U.S.C. § 827(b) (1964).
\item \textsuperscript{27} Manual, § 82b; UCMJ, art. 39, 10 U.S.C. § 839 (1964).
\item \textsuperscript{28} UCMJ, art. 66(b), 10 U.S.C. § 866(b) (1964).
\item \textsuperscript{29} UCMJ, art. 66, 10 U.S.C. § 866 (1964).
\item \textsuperscript{30} UCMJ, art. 67(b), 10 U.S.C. § 867(b) (1964).
\item \textsuperscript{31} UCMJ, art. 70, 10 U.S.C. § 870 (1964).
\item \textsuperscript{32} UCMJ, art. 67(b), 10 U.S.C. § 867(b) (1964).
\end{itemize}
forward on petition. The court has been quick to shoulder its responsibilities as the highest military court and to rule on the fundamental questions which have been considered by the boards of review. Much as the Supreme Court in time passes upon the varying positions which the several circuit courts take on important matters, the Court of Military Appeals ultimately rules on all basic matters and it is to this court that we must look for the final answer on military law.

The foregoing outline of the military justice system has omitted many details, notably the requirement for pretrial investigation and staff judge advocate's advice before trial of general court-martial cases and for a staff judge advocate's review before final approval at the appointing level of general court-martial sentence and of special court-martial sentences which included a bad conduct discharge. However, this brief summary should set the stage for considerations of the new developments in the military justice field.

III. *Miranda* and the Right to Counsel

The most noteworthy area for consideration is that centering about *Miranda v. Arizona*. Since 1951, under the Uniform Code of Military Justice, appointment of defense counsel to special and general courts-martial has been an indispensable element of jurisdiction. However, under military practice, counsel was generally appointed only when the charges were referred to trial, so that the question of entitlement to counsel (as a matter of right) at earlier stages of the case remained in question.

The key case on this question during the 1950's was *United States v. Gunnels*. There, the accused officer had been suspected of a complicated course of misconduct and had been interviewed by agents of the Office of Special Investigations [hereinafter referred to as OSI]. He told one of the agents that he desired to make no statement until "he had an opportunity to consult with counsel." The accused went to the office of the base staff

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34. UCMJ, art. 34, 10 U.S.C. § 834 (1964).
35. UCMJ, arts. 61, 65(b), 10 U.S.C. §§ 861, 865(b) (1964).
37. UCMJ, art. 27(a), 10 U.S.C. § 827(a) (1964); see United States v. Hutchison, 1 U.S.C.M.A. 291, 3 C.M.R. 25 (1952). The Articles of War applicable to the Army and the Air Force had had a similar requirement since 1920. Earlier, the accused was entitled to counsel upon request. For the still earlier practice in this regard in Army courts-martial, see W. Winthrop, Military Law and Precedent 166-67 (2d ed. rev. 1920). In the Naval service the accused before 1951 was entitled to counsel upon request only. See Naval Courts and Boards § 357 (1937). The entitlement was provided for administratively, rather than by statute.
38a. Id. at 132, 23 C.M.R. at 356.
judge advocate for assistance. That officer, however, had advised his subordinates that charges against Gunnels were being drafted, that he had not decided what personnel assignments he would make in the case and that for the time being no one was to give legal advice to, or consult with the accused. As a result, when the accused approached an assistant staff judge advocate who had represented him in an earlier phase of the affair, he declined to give any advice. Returning to the OSI office, the accused refused to answer some questions but did answer others. Certain answers, constituting a denial of receipt of money from an airman to assist in getting an honorable discharge for him, were charged as a false official statement. In reversing the conviction for this offense, although sustaining as to others not affected, the Court of Military Appeals condemned the practice of telling military accused that he cannot consult with counsel in connection with an interrogation by enforcement agents, as well as the staff judge advocate’s order to his assistants not to advise the accused if he sought their counsel. Two key observations of the court set the rule for military practice during the decade which followed and afforded a forecast of changes to come:

A suspect has no right to the appointment of military counsel, but he most assuredly has a right to consult with a lawyer of his own choice or with the Staff Judge Advocate. It seems to us to be a relatively simple matter to advise an uninformed and unknowing accused that, while he has no right to appointed military counsel, he does have a right to obtain legal advice and a right to have counsel present with him during an interrogation by a law enforcement agent.

The modification in Gunnels of the previous military understanding of the right to counsel formed the basis for the activities of military enforcement agents during the years that followed, and few cases were reversed for violation. In United States v. Wheaton, an air police sergeant who first questioned the accused told him that he was not entitled to have counsel. The accused did not make a statement then but did so later when questioned by the OSI. When this statement was offered in evidence, the accused testified that he had not asked the OSI for counsel because of earlier misadvice by the sergeant. The statement was admitted over objection. The accused’s conviction was reversed by the Air Force board of review, and The Judge Advocate General certified this decision to the Court of Military Appeals. That court sustained the board, relying on Gunnels.

39. Id. at 134, 23 C.M.R. at 358.
40. Id. at 135, 23 C.M.R. at 359 (emphasis added).
42. Id. at 259, 26 C.M.R. at 39.
In 1966, after the Supreme Court's decision in Escobedo v. Illinois, the Court of Military Appeals considered the case of United States v. Wimberley, in which an incriminating statement made to an Army CID agent had been admitted in evidence. The accused admitted that he had been given the advice required by Article 31 of the Code. The conviction was attacked under Escobedo on the ground that he had been denied his right to counsel, although there was no showing that he had asked questions regarding counsel or that he had been given any advice regarding his right to counsel, erroneous or not. The court observed that the Escobedo decision had received varying interpretation by different state and federal courts and adhered to its previous view that an accused in an interrogation "is not denied the assistance of counsel, unless he requests and is refused the right to consult counsel during the interrogation, or is misinformed as to his right to counsel."

The Miranda decision was handed down by the Supreme Court some four months later. Within days the military departments advised their law enforcement personnel of the decision and issued instructions calculated to require compliance with the Miranda rules where applicable. In the Air Force, this required full compliance with Miranda in every case where advice under Article 31(b) was required. There was, however, some disagreement among the services as to whether this broad an edict was necessary since this would require the full advice in many circumstances in which the accused was not in custody, whereas Miranda had limited its requirements to custodial interrogation.

The months that followed were marked by interest in the military legal community over the position which the Court of Military Appeals would take upon the applicability of Miranda, in view of the express language of Wimberley. In several cases the court touched upon Miranda without

45. UCMJ, art. 31(b), 10 U.S.C § 831(b) (1964), requires that persons accused or suspected shall be advised before interrogation "of the nature of the accusation and . . . 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."
49. UCMJ, art. 31(b), 10 U.S.C. § 831(b) (1964).
50. 384 U.S. at 478.
enunciating its view of the effect of that decision on military law.\textsuperscript{51} In United States v. Decker,\textsuperscript{52} decided on November 18, 1966, the Chief Judge assumed without deciding that Miranda applied in the military, but held the rules of that decision to be inapplicable to the instant case, because it had been tried before June 13, 1966.\textsuperscript{53} At the time of the Decker decision, an Air Force board of review had just sustained the conviction of Airman Third Class Michael L. Tempia,\textsuperscript{54} and The Judge Advocate General certified the case to the court in the interest of presenting a clear case, tried after June 13, 1966, on which the court could base a statement of the post-Miranda military rule.

The Tempia trial had taken place on June 14, 1966, the day after the Supreme Court handed down Miranda. Two young judge advocates represented the government and the accused. Working from the account of the decision which had been published in the \textit{New York Times}, they litigated the question of the accused’s entitlement to the \textit{Miranda} advice with remarkable skill.

Airman Tempia had been treated quite as Gunnels prescribed. Before interrogation he had been given the advice required by Article 31(b)\textsuperscript{55} and, in addition, had been told that he could consult counsel. He was permitted to leave to obtain counsel. Recalled to the OSI office two days later, he had not yet consulted an attorney. Arrangements were made for him to see the Staff Judge Advocate. That officer did not enter into an attorney-client relationship with him or make an assistant available for such purpose, but gave him detailed instructions as to his rights. He explained in detail each facet of Article 31 and (according to his trial testimony) told the accused that he “didn’t have to claim it would incriminate him at all; all he had to do the minute they told him they suspected him of an offense was to say he wished to remain silent and that’s all.”\textsuperscript{56a} When returned once again to the OSI office, the accused was again advised of his rights under Article 31(b). However, no one ever told him that counsel would be provided for him or that he was entitled to have counsel present at the interrogation. Within an hour of his return to the OSI office he began to dictate his incriminating statement, and had signed it within four hours of the time the Staff Judge Advocate had explained his rights.


\textsuperscript{53} The court based its decision on Johnson v. New Jersey, 384 U.S. 719 (1966), in which the Supreme Court held Miranda inapplicable to trials commenced before June 13, 1966.

\textsuperscript{54} ACM 19638, Tempia, 37 C.M.R. —— (Nov. 1, 1966).

\textsuperscript{55} UCMJ, art. 31(b), 10 U.S.C. § 831(b) (1964).

\textsuperscript{55a} ACM 19638, Tempia, 37 C.M.R. at —— (Manuscript opinion at 4).
At trial, the defense took the position that the accused's confession was not admissible under *Miranda*; the prosecution rested on *Wimberley*, thoroughly exploring the apparent disagreement between the Court of Military Appeals and the later Supreme Court delineation of the right to counsel. The law officer admitted the document into evidence and the accused was convicted. The board of review affirmed the conviction, observing that there was no claim of a violation of *Escobedo* or *Gunnels* and that the only possible claim of prejudice must be based upon *Miranda*. Recognizing that the advice the accused had received exceeded what *Wimberley* required, the board proceeded to consider the sufficiency of his treatment tested under *Miranda*. Looking to the Supreme Court's observation, preliminary to the express rules in *Miranda* that "unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required," the board concluded that the repeated advice under Article 31(b), the repeated opportunities to seek legal counsel, and the consultation with the Staff Judge Advocate had served to provide the accused with the necessary understanding of his rights.

Before the Court of Military Appeals on certification, the case was argued for the Government on the grounds that (1) the *Miranda* rules did not apply to courts-martial; (2) the OSI questioning had not been a "custodial interrogation"; (3) the advice actually given had, in any event, met the *Miranda* requirements; and (4) the accused had knowingly and intelligently waived his rights. In addition, The Judge Advocate General of the Navy, appearing as *amicus curiae*, argued that constitutional limitations do not affect courts-martial.

The Court of Military Appeals reversed. Judge Ferguson's principal opinion begins with the observation that, as to cases tried on and after June 13, 1966, the doctrine of *Wimberley* had "largely been set at naught." Reviewing civilian and military precedents dealing with the relationship of the civilian courts and of constitutional guarantees to court-martial practice, the decision quickly rejects both the Navy argument and the Government's contention that the Supreme Court does not exercise supervisory authority over courts-martial. Instead, it holds that *Miranda* applies completely in military courts.

The decision next turns to the question of custody, for the accused was not under arrest or apprehension in the civilian sense of these terms when he made his confession. Judge Ferguson observes that the question is not

56. 384 U.S. at 444.
58. Id. at 631, 37 C.M.R. at 251.
59. Id. at 635, 37 C.M.R. at 255.
whether the accused is "technically" in custody, but whether he has "otherwise been deprived of his freedom of action in any significant way." Noting that the accused had been summoned for the interrogation and might have been punishable under the Code for a failure to repair (i.e., report for duty) if he did not comply, the decision observes:

In the military, . . . a suspect may be required to report and submit to questioning quite without regard to warrants or other legal process. It ignores the realities of that situation to say that one ordered to appear for interrogation has not been significantly deprived of his freedom of action.

It holds that there was in fact "custodial interrogation." Proceeding to the remaining Government arguments, the decision holds that the Staff Judge Advocate's statement to the accused that counsel would not be appointed for him violated the Miranda requirement for advice to the opposite effect and, finally, that the evidence did not support the contention that the accused had knowingly and intelligently waived his right to counsel.

Before a few additional comments on the principal opinion, it should be noted that Judge Kilday concurred in a separate opinion, setting forth additional support for the view that the decision of the Supreme Court is controlling on military law in this area. Chief Judge Quinn dissented. His opinion at the outset suggests that "[a] good case can be made to show that Miranda v. Arizona . . . was not intended by the Supreme Court to apply to the military legal system." He points out the high regard which the principal opinion in Miranda expressed for the military safeguards under Article 31 and concludes that "this esteem for the military practice" demonstrates the Supreme Court's satisfaction with the military procedures. However, he passes this point to conclude that the military practice, both generally and in the particular case, met the requirements of Miranda.

In the principal opinion, Judge Ferguson deals seriatim with the points made by the Chief Judge in his dissent. He sums up his conclusion that the Chief Judge errs in concluding that previous military procedures were the equal of those required by Miranda with the following:

60. Id. at 636, 37 C.M.R. at 256, quoting from Miranda v. Arizona, 384 U.S. 436, 444 (1966).
62. Id. at 637, 37 C.M.R. at 257.
63. Id. at 640, 37 C.M.R. at 260.
64. Id. at 643, 37 C.M.R. at 263.
65. 384 U.S. at 489.
67. Id. at 644, 37 C.M.R. at 264.
Now, the accused must have a lawyer; before, he need not have been given one; now, he must be warned of his right to counsel; before, he need not be so warned; and now, finally, he will receive effective legal advice not only as to what he can do, but also as to what he should do.68

This apparently unexceptional language conceals a possible source of future difficulties which remains unresolved at this writing. Under the Code, the accused is entitled to counsel before special and general courts-martial. Counsel before a general court-martial must always be a lawyer,69 but a lawyer must be appointed for the accused in a special court-martial only if a lawyer is appointed to prosecute.70 The legality of this limited right to representation by a member of the bar before a special court-martial has been repeatedly confirmed.71 In the Air Force, distribution of judge advocates (i.e., attorneys) is such that only the rarest of special court-martial cases is defended by a non-lawyer, but in the Navy a large proportion of these cases are so defended, and in the Army and in the Marine Corps defense by a lawyer is the exception.72 The large number of cases defended by non-lawyers is not so much a result of reluctance to make lawyers available as it is a reflection of the limited number of attorneys available, particularly in the Marine Corps, and of the necessity to try special courts-martial on shipboard and at other places where the small complement of personnel cannot reasonably include a legal staff.

To return to the last quotation from Judge Ferguson's opinion, does the use of the term “lawyer” indicate that an accused, whose case will eventually be tried by a special court-martial, before which his counsel will not necessarily be a lawyer, will be entitled to legally qualified counsel at any pretrial interrogation as a prerequisite to use of his statement at trial? And—if so—what of the attorney-client relationship thus established? Will the Government, having once made a lawyer available to the accused for purposes of the interrogation, then be permitted to withdraw that assistance and make only a non-lawyer available as defense counsel at the trial itself? It may be argued that the Miranda requirements may be met by giving an accused, prior to the interrogation, counsel of the type qualified

68. Id. at 640, 37 C.M.R. at 260.
70. UCMJ, art. 27(c), 10 U.S.C. § 827(c) (1964); cf. UCMJ, art. 38(b), 10 U.S.C. § 838(b) (1964).
to defend him before the court-martial by which he is ultimately tried. Thus, an accused could be counseled at the interrogation by a non-lawyer so long as he was subsequently tried at a special court-martial with a non-lawyer prosecuting. However, there is no foundation for this suggestion anywhere in the cases, and the problem thus presented, primarily of concern to the Army, Navy and Marine Corps, remains unresolved. In the present state of the cases, it would appear that the accused is entitled to a lawyer, at any interrogation but not, in some cases, at the subsequent trial.

Promulgation of the long-awaited *Tempia* decision did clear up a major area of uncertainty in the Armed Services, and judge advocates in the field were promptly notified that the military requirement for full compliance with *Miranda* had been confirmed. Several subsidiary questions remain, which must await presentation of the right cases for their resolution. Airman Tempia was ordered to report for interrogation and was given no option as to whether he would remain. Based on this, the court found custodial interrogation. What of an accused who is explicitly told that he may leave whenever he likes—will he be entitled to so much of the *Miranda* advice as exceeds the requirements of Article 31(b)? What showing of indigency, if any, will a service member be required to make in order to be entitled to appointment of counsel at Government expense? In *Tempia* the thrust of the court's decision was that the accused was entitled to appointed counsel at the time of the interrogation, not merely at the time of reference to trial. The question of financial ability to retain civilian counsel was not mentioned at all. If there is a requirement to show indigency, how will this apply in areas, particularly overseas, where lawyers qualified in United States law are scarce or wholly unavailable? It appears unlikely that the Court of Military Appeals will make the right of a serviceman to appointed counsel, at the time of pretrial interrogation, conditional upon his showing of insufficient funds to retain a private attorney.

The unsettled questions in this area leave uncertainty as to the steps which military agencies in the field must take in order to insure that the results of interrogations will be admissible in courts-martial. Understandably, both investigative agencies and legal personnel tend toward a conservative view in order to avoid the risk that statements of suspects will ultimately be held inadmissible. As a result, we cannot anticipate early presentation of cases which will yield all of the answers.

Of interest is the question of the effect which application of the *Miranda* rules has had upon the outcome of interrogations. Of course, a substantial

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73. This would also be so at a summary court-martial, where there is no statutory right to counsel, although defense counsel are frequently permitted to act for the accused at his request.
number of cases which were in process when the rules were enunciated have been affected. Some convictions have been reversed since Tempia and doubtless some cases failed of prosecution because the accused's confession was essential to the prosecution's case and, though otherwise voluntary, did not meet the Miranda requirements. However, it does not appear that compliance with these requirements by the investigative agencies, once instituted, has resulted in any notable lessening of the percentage of statements obtained in the course of interrogation. No coordinated study has been made in this area, but personal contact with investigative personnel confirms that quite as many suspects are prepared to make a statement under the expanded warning as did under the brief requirement of Article 31.

IV. Schmerber and Related Problems

A. Admissibility of Blood Tests

Another 1966 decision of the Supreme Court has been of great interest to practitioners of military law. In Schmerber v. California, the Court held that it was not violative of the Constitution—particularly the fourth, fifth, sixth, or fourteenth amendments—for the prosecution in a drunk-driving case to use the results of a blood-alcohol test, where the blood was taken by a physician at the direction of a police officer and over the protestations of the suspect. This touches a field in which military law has not been fully resolved and raises the question of whether the Court of Military Appeals will be guided by the thinking of the Supreme Court. Intoxication frequently plays a part in military prosecutions, and easy availability of persuasive evidence of intoxication or sobriety can be of great practical value.

The military law on the question of admissibility of blood-alcohol samples has been closely intertwined with the question of urine samples, as the Court of Military Appeals has treated the two as involving the same principles of law. In early decisions by the court it was held that evidence of chemical tests of urine samples (1) taken by catheterization of the accused while he was unconscious, (2) taken by catheterization of a conscious accused with his consent but without Article 31(b) warning, and (3) given by the accused pursuant to an order from a superior officer but without warning were admissible. The following year, however, the

75. Id. at 772.
court held that a sample taken by catheterization over the accused's protest was inadmissible.\textsuperscript{79} In \textit{United States v. Jordan},\textsuperscript{80} the court held that an order to give a urine sample was not lawful, so that the accused could not be convicted of disobedience for not complying. In its decision the court relied upon \textit{Rochin v. California},\textsuperscript{81} in which the Supreme Court had held inadmissible the evidence of stomach contents obtained by a brutal episode of stomach pumping on the grounds that it was violative of the fourteenth amendment as offending "a sense of justice."\textsuperscript{82} The Court of Military Appeals referred to the dictum in the District of Columbia case of \textit{United States v. Nesmith},\textsuperscript{83} in which Judge Holtzoff, although holding that in that case the \textit{Rochin} decision was not controlling, said it would have required reversal had the defendant been \emph{compelled} to supply the urine specimen or \emph{if an instrument had been used to obtain it by force.}

The first case dealing with a blood-alcohol test was \textit{United States v. McCann},\textsuperscript{84} decided in 1958. The majority of the court reversed on other grounds, but Judge Latimer, dissenting, expressed the opinion that evidence of a blood sample, taken in a proper manner pursuant to an order, was admissible.\textsuperscript{85} A short time later, in \textit{United States v. Musguire},\textsuperscript{80} the majority (Latimer dissenting) held that an order to give blood sample was illegal and that the accused could not be convicted of violation, on the grounds that the sample was a "statement" under Article 31 (which the accused could not be required to give) and, in addition, that giving the sample was not a military duty.\textsuperscript{87} Still later in the same year, the court held that a urine sample produced by an accused pursuant to an order was not admissible, thus making it clear that the earlier \textit{Barnaby} decision was overruled.\textsuperscript{88}

Several years then passed without any decisions on blood or urine samples. In 1961, Chief Judge Quinn ruled that a blood sample obtained for clinical, as distinguished from investigative, purposes was admissible. He declined to decide whether a blood sample obtained pursuant to an order was admissible, citing \textit{Forslund}, and held that in the case at issue the

\textsuperscript{81} 342 U.S. 165 (1952).
\textsuperscript{82} Id. at 173.
\textsuperscript{83} 121 F. Supp. 758 (D.D.C. 1954).
\textsuperscript{85} Id. at 680, 25 C.M.R. at 184.
\textsuperscript{87} Id. at 69, 25 C.M.R. at 331.
results of the blood test were admissible because the accused had consented to the taking of the sample.89

Finally, in 1965, in United States v. Miller,90 Chief Judge Quinn wrote for a unanimous court. The accused had been convicted of negligent homicide resulting from an auto accident. Evidence of the alcoholic content of a sample of blood taken from him while he was unconscious was admitted. Judge Quinn observed that later decisions had "narrowed Williamson"—the case first cited above—and that it was unnecessary to consider the "continued validity" of Breithaupt v. Abram,91 the Supreme Court decision which had held that admission of evidence of a blood sample taken from an unconscious individual did not deprive him of his constitutional rights. He concluded that in the case at bar the blood had been taken "solely for medical diagnosis."92 As the court had already determined that the result of a medical examination made by a doctor for the purpose of treatment is admissible without conflict with Article 31,93 he concluded that the admission in evidence of the blood-alcohol findings was a proper exercise of the law officer's discretion.94

This development from case to case all occurred before the Supreme Court's decision in Schmerber. There it was held that use in evidence of a blood sample taken over the defendant's objection did not violate his Constitutional rights.95 It may be anticipated that the Court of Military Appeals will find no constitutional error where the Supreme Court has found none, but this does not dispose of the question of whether evidence of involuntary blood-alcohol samples will be admissible.

When the Court of Military Appeals held in Musguire that an order to give a blood sample for purposes of criminal investigation was unlawful, it was speaking in advance of the later Supreme Court decisions broadening the application of the fourth and fifth amendments.96 Without relying on constitutional concepts for the decision, Judge Quinn observed: "Article 31 is wider in scope than the Fifth Amendment."97 Accordingly, he held that the "statement"—which the accused cannot be compelled to

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95. 384 U.S. at 772.
give under Article 31(a)—includes “both verbal utterances and actions.”98

The order to take the action of giving the blood sample was thus within the proscription of the Article.

The court’s view of the breadth of the scope of Article 31 has apparently not changed with the Supreme Court’s extension of the applicability of the fourth and fifth amendments, for within recent months, in another connection discussed below, Judge Quinn has again quoted the language from Musguire noted above.99 It thus remains open to question whether the Court of Military Appeals will follow the lead of Schmerber, so as to allow the results of involuntary (and “unwarned”) blood-alcohol samples to be received in evidence. The position which the court has taken leaves ample space for a decision that the forcible taking of blood for investigative purposes, although it does not violate any of the portions of the Constitution which might appear to be applicable, is yet violative of Article 31. This, of course, would lead to the conclusion that “incriminate himself,” in the Article, is more encompassing than the term “be a witness against himself” in the fifth amendment.

At this writing, no case which will test this concept is before the court nor, to the knowledge of the writer, is any on its way. However, the potential value of blood-alcohol tests in investigation and proof of court-martial offenses makes it virtually certain that efforts to use such evidence will eventually reach the court. Activities of military investigators are likely to raise the question of whether the court will apply Article 31 to blood-alcohol tests. Further, since foreign authorities which investigate many offenses involving servicemen are generally at liberty under their own law to take blood samples, the introduction in courts-martial of the evidence of samples taken by them may well resolve the question of whether the court will consider Rochin to be applicable to blood samples, entirely aside from the warning requirements of Article 31(b).100

B. Handwriting Exemplars and Voice Identification

Closely related to the question of blood-alcohol evidence is that of handwriting exemplars and voice identification. In Schmerber, the principal opinion, referring to the privilege under the fifth amendment, observes that:

both federal and state courts have usually held that it offers no protection against

98. Id.
100. For a more extended discussion of the blood-alcohol question in military law, with particular attention to blood samples taken by foreign agencies see Willmore, The Implications of Schmerber v. California, 9 A.F. JAG L. Rev. 26 (1967).
compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it.101

Citing this language, the Supreme Court in Gilbert v. California102 held that handwriting exemplars given by the accused to an FBI agent during an interrogation without the benefit of counsel, admitted into evidence, did not violate the fifth amendment.103

The Court of Military Appeals, several years earlier, had considered the status of handwriting exemplars under the Uniform Code of Military Justice. The late Judge Brosman, in United States v. Ball,104 with Judge Latimer concurring, had held that such exemplars do not fall under Article 31, so that the particular warning required by Article 31(b) was not required as a prerequisite for taking them.105 Chief Judge Quinn, although he concurred in the result, disagreed with this position.106 Some three years later, Judge Ferguson, who had replaced Judge Brosman upon the latter's death, wrote the principal opinion in United States v. Minnifield,107 with Chief Judge Quinn concurring and Judge Latimer dissenting, and overruled Ball. He quoted the language from Musguire, to the effect that Article 31 is broader in scope than the fifth amendment, and held that the warning required by Article 31(b) must be given if the resultant exemplar is to be used in evidence.108

A few weeks after promulgation of the Supreme Court's decision in Gilbert, the Court of Military Appeals handed down its decision in United States v. White.109 The court noted the Gilbert decision and addressed itself to the question of whether Minnifield should be overruled. Referring to the Musguire language, the Chief Judge held that Minnifield was the court's interpretation of the "rights Congress accorded an accused" rather than of a constitutional right.110 So concluding, he adhered to Minnifield and reaffirmed "the rule that an accused must be apprised of his rights under Article 31, before he can be asked for samples of his handwriting."111

101. 384 U.S. at 764 (emphasis added) (footnote omitted).
103. Id. at 266.
105. Id. at 105, 19 C.M.R. at 231.
106. Id.
108. Id. at 378-79, 26 C.M.R. at 158-59.
110. Id. at 216, 38 C.M.R. at 14.
111. Id. at 216-17, 38 C.M.R. at 14-15.
He then sustained the conviction, holding that the record established that Article 31(b) advice had been given.\footnote{112}

There can be little doubt that the court will take the same approach with respect to voice identification. In the early case of \textit{United States v. Greer},\footnote{113} the Chief Judge, writing for a unanimous court held that requiring a person to speak for voice identification violated the Constitution as well as Article 31 of the Code, likening it to handwriting.\footnote{114} In the later \textit{Ball} opinion, where handwriting exemplars were held not to fall under Article 31, Judge Brosman expressed the view that the same applied also to speaking for voice identification.\footnote{115} However, as has been seen, \textit{Ball} was overruled as to the handwriting aspect by \textit{Minnifield} and must be considered to have lost its validity as to voice identification as well.

Thus, there is little likelihood that the Court of Military Appeals will hold that either handwriting exemplars or voice identification can be taken and used in evidence without full compliance with Article 31, quite as would be required for a confession. However, it may be anticipated that the additional requirements of \textit{Miranda} will not be applied since those requirements are \textit{not} statutory and have been held by the Supreme Court not to apply to handwriting and voice identification.

V. \textit{Warden v. Hayden and the Fall of the \textquotedblleft Mere Evidence\textquotedblright\ Rule}

A recent decision of the Supreme Court has also resulted in a modification of military law in the area of the fourth amendment. In \textit{Gouled v. United States},\footnote{116} the Court had held that a search warrant might not be used \textquotedblleft solely for the purpose of making search to secure evidence.\textquotedblright\footnote{117} In subsequent cases, the rule had been developed to distinguish instrumentalities, fruits of crime and contraband, all properly the objects of search and seizure, from \textquotedblleft mere evidence,\textquotedblright which was not.\footnote{118}

The question of searches and seizures is not directly touched upon by the Uniform Code of Military Justice and the discussion of the topic in the Manual for Courts-Martial, 1951 (in which the President, pursuant to the authority of Article 36, provides rules of evidence among other items) does not deal with what classes of property are proper subjects

\footnote{112} Id. at 218, 38 C.M.R. at 16.
\footnote{114} Id. at 578, 13 C.M.R. at 134.
\footnote{116} 255 U.S. 298 (1921).
\footnote{117} Id. at 309.
\footnote{118} See United States v. Rabinowitz, 339 U.S. 56, 64 n.6 (1950); Harris v. United States, 331 U.S. 145, 154 (1947); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); Marron v. United States, 275 U.S. 192 (1927).
for those processes. In an early case, the Court of Military Appeals recognized the existence of the Gouled principle but found it unnecessary to discuss its application either to court-martial practice generally or to the particular case, since it found that the property seized was used by the accused as an instrumentality of his criminal activity. Later, however, in United States v. Vierra, the majority of the court set aside a conviction where essential evidence had been furnished through notations on a business card seized from the accused's possession. Holding this "mere evidence," the court held that it had been improperly seized and was therefore inadmissible.

Perhaps the first sign of the Supreme Court's departure from the Gouled distinction may be found in Schmerber, where the Court dealt with the taking of the blood sample as an "attempt to secure evidence." That this language was no slip of the pen was confirmed in Warden v. Hayden, decided in May of this year. Hayden had been apprehended by Baltimore police in hot pursuit after the robbery of a cab driver. He was found in bed in his own house, almost nude, after his wife had permitted the police to enter without a warrant. Outer clothing of the type the robber had been said to have worn was found in a washing machine, and ultimately was admitted in evidence at his trial. The Court of Appeals for the Fourth Circuit reversed the conviction on the ground that the clothing had evidential value only and was therefore not subject to seizure. Passing by the possible argument that the clothing was an instrumentality of the crime under the peculiar facts of the case, the Supreme Court wholly disavowed the "mere evidence" rule.

While Hayden was before the Fourth Circuit, a parallel conviction reached an Air Force board of review. A WAF had been found brutally beaten in an office building on an Air Force base a short while after the close of business. Investigation was commenced while she was still unconscious at the base hospital, and it was ascertained that the accused, Airman Whisenhant, would normally have been the last person to leave the building. Interrogated after Article 31(b) advice—the offense and the trial antedated Miranda—the accused admitted seeing the girl, but said that she had remained in the building when he left. Later the same evening, jurisdiction of the investigation was transferred from Air

121. 384 U.S. at 771.
123. 387 U.S. 294 (1967).
125. See 363 F.2d at 655, 657 (dissenting opinion).
126. 387 U.S. at 310.
Force authorities to the FBI, and an FBI agent made a search of the accused's barracks room, with the latter's consent, and seized a pair of shoes and a uniform blouse and trousers, both of which were damp and bore dark stains. All of these items of clothing were admitted at the accused's trial for assault with intent to murder. Bits of glass which had the same optical qualities and physical properties as a broken Coca Cola bottle, found at the scene of the crime and apparently one of the weapons used in the beating, were proved to have been imbedded in the shoes. The shoes, trousers and blouse all bore traces of human blood. Recognizing, but declining to follow the circuit court decision in the Hayden case, the board of review held that the clothing had been properly seized and affirmed the conviction.

The Court of Military Appeals granted the accused's petition for review. While the case was before the court, Hayden was decided by the Supreme Court. Observing that Vierra had been based upon the Supreme Court's limitations on searches and seizures in Goided and thereafter, the court followed the Supreme Court's lead in dropping the "mere evidence" rule and sustained the board of review.127

It has been observed that the liberalization of the limitations on searches and seizures in Hayden compensates in some measure for the greater strictures on criminal investigators imposed by Miranda. The same, of course, applies in the military with respect to Whisenhant and Tempia. Indeed, since earlier military practice had been far closer to the Miranda requirements than had been true in most civilian jurisdictions and a lesser setback in investigative procedures was suffered by the military investigator, it would appear that the compensatory advantage to him would be relatively greater than that to the civilian policeman.

VI. CONCLUSION

From the foregoing examples it may be seen that military law has been responsive to the recent decisions of the Supreme Court in criminal law, but that the Court of Military Appeals continues to exercise its independent judgment and control over courts-martial. From this, the serviceman at times derives advantages not enjoyed by the civilian offender, because of the broader protection provided by Article 31 than by the fifth amendment and the more restrictive rule upon the prosecution in corroborating confessions, which in the military requires separate proof of the probability that the offense was committed by someone.128

The court has been keenly aware of its responsibility for the guidance of the military justice system and continually solicitous lest the military offender suffer in comparison with his civilian counterpart.\(^{129}\) It may safely be predicted that, as constitutional concepts of criminal law develop, military law will keep pace and that the Court of Military Appeals will insure that—within the framework of a different procedural system, operating under conditions vastly different from the civilian community—the military serviceman will be guaranteed the same standards of justice, fairness and due process provided to civilians in the federal and state courts.