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ASPECTS OF THE MILITARY LAW OF CONFESSIONS

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The Uniform Code of Military Justice,[1] which became effective in May, 1951, was enacted largely in response to the criticisms leveled at the administration of military justice during World War II.[2] The Code reflected the prevailing feeling that military justice should be brought more nearly into line with the criminal procedures followed in civilian courts. To further this objective, Congress required that in general court-martial cases legally qualified counsel be appointed to represent both the Government and the accused.[3] The position of "law officer" was created[4] and invested with much of the authority exercised by a federal district judge in criminal cases.[5] A third significant innovation was the establishment of the Court of Military Appeals, to consist of three judges appointed from civilian life.[6] The court acts as the top appellate tribunal and has jurisdiction to hear appeals from the decisions of service boards of review in the more serious cases, usually involving sentences to a dishonorable or bad conduct discharge.

The numerous changes incorporated in the Uniform Code have spawned perplexing legal and administrative problems. To a large extent, however, the rules of criminal evidence applicable in trials by court-martial are similar to those generally recognized by civilian courts, and where a wealth of civilian precedent is available, interpretive difficulties have been correspondingly reduced. On the other hand, where the provisions of the Code are peculiar to military law, a host of knotty problems has arisen to plague the Court of Military Appeals. It is the purpose of this article to explore certain aspects of the law of confessions under the Uniform Code, with a view toward pointing out the special considerations involved and some of the difficult questions which have been presented to the Court of Military Appeals.

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1. 64 STAT. 107 (1950), 50 U.S.C.A. §§ 551 *et seq.* (1951). Hereinafter cited as UCMJ.

2. See generally, McNiece and Thornton, *Military Law from Pearl Harbor to Korea*, 22 FORD. L. REV. 155, 157-60 (1953).

3. UCMJ art. 27(b), 50 U.S.C.A. § 591(b) (1951).

4. UCMJ art. 26, 50 U.S.C.A. § 590 (1951).

5. *E.g.*, UCMJ art. 51(b) and (c), 50 U.S.C.A. § 626(b) and (c); MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, ¶ 39. Hereinafter cited as MCM 1951.

6. UCMJ art. 67, 50 U.S.C.A. § 654 (1951).

THE STATUTORY BASIS

The statutory basis for the military law of confessions and admissions is contained in Article 31 of the Uniform Code. Briefly, Subsection (a) of this Article is a codified version of the privilege against self-incrimination. Subsection (b) requires that persons subject to the Code warn suspects of their rights prior to conducting an interrogation, and Subsection (d) announces an exclusionary rule of evidence with respect to involuntary confessions and violations of Article 31. Subsection (c), setting forth a privilege against self-degradation, is of little practical importance and will not subsequently be discussed.

In addition to these specific provisions, Article 36(a) of the Code authorizes the President to prescribe "the procedure, including modes of proof," in cases before courts-martial. This general grant of authority is restricted by the admonition that he shall, "so far as he deems practicable," apply the rules of evidence generally recognized in criminal cases before the federal district courts, so long as they are not contrary to or inconsistent with the Code. In accordance with Article 36(a), the President has, in the *Manual for Courts-Martial 1951,* promulgated the rules of evidence which govern trials by court-martial.[7] Paragraph 140*a* of the *Manual* sets forth various procedural and evidentiary rules implementing the provisions of Article 31 of the Code; to the extent that they do not conflict with the Code, these rules have the force and effect of statutes.[8]

THE SCOPE OF THE MILITARY PRIVILEGE AGAINST SELF-INCRIMINATION

In civilian law, the privilege against self-incrimination comprehends, in principle at least, an area quite different from extra-judicial confessions.[9] However, Article 31(a) of the Code broadens the privi-

7. See MCM 1951, ¶¶ 137-54. Some of the rules of evidence are contained in other parts of the *Manual,* as for example, in the discussions of particular offenses under the Code. See, *e.g.,* MCM 1951, ¶ 200*a,* setting forth the rules governing proof of value in larceny cases. Lieutenant Colonel Gilbert G. Ackroyd, with the advice of Professor Edmund M. Morgan, was primarily responsible for drafting the rules of evidence in the 1951 *Manual.* The Chief of Division was Colonel Charles L. Decker, now Commandant of the Army Judge Advocate General's School in Charlottesville, Virginia.

8. This conclusion, which seems clearly contemplated by Article 36(a), has been confirmed by the Court of Military Appeals in several cases. *E.g.,* United States v. Lopez-Malave, 4 USCMA 341, 15 CMR 341 (1954); United States v. Gann, 3 USCMA 12, 11 CMR 12 (1953); United States v. Lucas, 1 USCMA 19, 1 CMR 19 (1951). Furthermore, it would seem that the determination of practicability is exclusively an executive function which cannot be reviewed by the court. At first, the House Subcommittee on Armed Services proposed to require that the rules of evidence be the same as those in the federal courts, but the proposal was dropped when it was shown that the federal rules frequently would not satisfy the special requirements of military justice. See *Hearings before a Subcommittee of the Committee on Armed Services on H.R. 2498,* 81st Cong., 1st Sess. 1014-19, 1061-64 (1949). Hereinafter cited as *House Hearings.*

9. See 8 WIGMORE, EVIDENCE § 2266 (3d ed. 1940).

lege to cover some extra-judicial statements which would, in many civilian jurisdictions, be viewed in the light of the rules pertaining to confessions. It is therefore desirable to indicate roughly the scope of the military privilege as it relates to the law of confessions under Article 31.

For thirty years prior to the enactment of the Uniform Code, the privilege was, for the Army, guaranteed by Article of War 24.[10] It protected "witnesses" before several types of military judicial or investigatory agencies, including courts-martial, boards, and "any officer conducting an investigation." However, the precise meaning of the latter phrase was not very clear. Both the 1928 and the 1949 Army *Manual for Courts-Martial* interpreted it to refer to the formal pretrial investigation required by the Articles of War before the charges against the accused could be referred for trial by a general court-martial.[11] Also, the Judge Advocate General of the Army ruled that the privilege applied to investigations conducted by representatives of the Inspector General,[12] and in 1949 the Army Judicial Council, then the appellate agency of last resort, indicated that the privilege might apply to certain other official pretrial investigations.[13]

Article 31(a) of the Code removes whatever doubt may previously have existed on this score. It provides that "No person subject to this code shall compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him." This language is sweeping in tenor, and the legislative history makes it clear that Article 31(a) was intended to prohibit compulsion in all types of official investigations or proceedings, judicial or extra-judicial.[14] Thus the Code's privilege against self-incrimination would be violated if a military superior investigating an offense obtained a confession from one of his subordinates by ordering the latter to answer all questions regarding that offense.[15] It would also be violated if a military policeman used threats or physical violence to obtain a confession. The first of these examples has no exact parallel

10. 41 STAT. 792 (1920), as amended, 62 STAT. 631 (1948).

11. See MANUAL FOR COURTS-MARTIAL, U.S. Army, 1928, ¶ 35*a*; MANUAL FOR COURTS-MARTIAL, U. S. Army, 1949, ¶ 35*a*. Hereinafter cited respectively as MCM 1928, and MCM 1949.

12. See DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, 1912-1940, § 381.

13. *See* CM 337189, Harris (JC), 7 BR-JC 393, 414-19 (1949).

14. Both the Senate and the House Committees on Armed Services stated that Article 31(a) was intended to extend the privilege "to all persons under all circumstances." See SEN. REP. No. 486, 81st Cong., 1st Sess. 16 (1949) (hereinafter cited as SEN. REP.); H.R. REP. No. 491, 81st Cong., 1st Sess. 19 (1949) (hereinafter cited as H.R. REP.). It may be noted that Professor Edmund M. Morgan, who played a leading part in drafting the Uniform Code, has expressed the view that the privilege should be extended by civilian courts to police interrogations. See Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 27-30 (1949).

15. United States v. Rosato, 3 USCMA 143, 11 CMR 143 (1953); United States v. Welch, 1 USCMA 402, 3 CMR 136 (1952).

in the civilian world; the conduct in the second example, however, would normally be viewed as giving rise to an involuntary confession rather than to a violation of the privilege against self-incrimination.[16]

THE EXCLUSIONARY RULE IN ARTICLE 31 (d)

Although the privilege against self-incrimination contained in Article 31 (a) is not limited to statements made during judicial or quasi-judicial proceedings, it does not purport to cover the whole field of conduct which will render a confession involuntary. Furthermore, it does not in terms require the exclusion from evidence of statements obtained in violation of the privilege. To cover those omissions, Article 31 (d) provides:

> "No statement obtained from any person in violation of this article [31], or through the use of coercion, unlawful influence, or unlawful inducement shall be received in evidence against him in a trial by court-martial."

It will be observed that Article 31 (d) is focused directly on the court-martial proceedings. It is thus distinguished from the first three Subsections of Article 31 which are phrased in the form of a command addressed to persons subject to the Code. The "command" phraseology was evidently adopted for two reasons.[17] First, it was considered advisable to legislate within the jurisdictional framework of the Code. A provision not limited to persons subject to the Code might well have raised delicate constitutional questions. Second, the "command" Subsections are directly related to Article 98 of the Code which makes it an offense to knowingly and intentionally fail "to enforce or comply with any provision of this code regulating the proceedings before . . . trial of an accused." Accordingly, a violation of those Subsections may subject the offender to the penal sanctions in Article 98.

It is interesting to note that, as first introduced in Congress and subsequently passed by the House, Article 31 (d) excluded only statements obtained in violation of Article 31 or by any "unlawful inducement."[18] The meaning of "unlawful inducement" was not clarified during the House or Senate hearings, although it was presumably used in a broad sense to refer to any type of coercion or promise of leniency which would render a confession involuntary under the

16. See Morgan, *supra* note 14, at 27-30; Note, *The Privilege Against Self-Incrimination: Does It Exist in the Police Station?*, 5 STAN. L. REV. 459 (1953).
17. See *House Hearings, supra* note 8, at 991-92; H.R. REP., *supra* note 14, at 19.
18. See *House Hearings, supra* note 8, at 983; *Hearings before a Subcommittee on Armed Services on S. 857 and H.R. 4080*, 81st Cong., 1st Sess. 10 (1949) (hereinafter cited as *Senate Hearings*); 95 CONG. REC. 5733, 5744 (1949).

common-law rules of evidence.[19] During the Senate hearings, however, the Judge Advocate General of the Army recommended that Article 31(d) be amended to include "coercion" as well.[20] He argued that since certain types of inducements might not be unlawful under the laws of the state or foreign country where the confession was obtained, the original version of Article 31(d) might not operate to exclude statements obtained under such circumstances. The Senate Committee on Armed Services ultimately amended Article 31(d) to include "coercion" but contented itself with the somewhat cryptic observation that its amendment specifically incorporated the common-law rule of evidence.[21]

The 1951 *Manual* sets forth various rules which interpret the terms used in Article 31(d). The *Manual* does not purport to establish inflexible criteria for determining voluntariness, although it notes that the mere fact that the statement was made to an investigator during the investigation of an offense, or while the accused was in custody, does not make the confession involuntary.[22] In cases involving a claim of coercion or unlawful inducement, the Court of Military Appeals has examined all the circumstances in relation to the crucial question of the accused's mental freedom to confess or deny.[23] Its holdings are in line with the rules generally recognized in American civilian jurisdictions.

THE WARNING REQUIREMENT IN ARTICLE 31(b)

Thus far, it has been indicated that the military law of confessions is similar to the rules applied in most civilian courts. Article 31(b), however, marks a radical departure from those rules and has created a number of perplexing legal problems. It provides as follows:

> "No person subject to this code shall interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising

19. This was Wigmore's usage in his treatise. See 3 WIGMORE, EVIDENCE § 824 (3d ed. 1940).

20. See *Senate Hearings, supra* note 18, at 268.

21. See SEN. REP., *supra* note 14, at 16. It seems likely that the recommendation of The Judge Advocate General was particularly directed toward the French inquisitorial system of interrogation by the *juge d'instruction.* In this connection, see Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree,* 30 MICH. L. REV. 1224, 1244-47 (1932); Keedy, *The Preliminary Investigation of Crime in France,* 88 U. of PA. L. REV. 692, 705-12 (1940); Tyndale, *The Organization and Administration of Justice in France,* 13 CAN. B. REV. 655, 662-64 (1935).

22. MCM 1951, ¶ 140*a*; United States v. Vigneault, 3 USCMA 247, 12 CMR 3 (1953); United States v. Colbert, 2 USCMA 3, 6 CMR 3 (1952).

23. See, *e.g.,* United States v. Jackson, 3 USCMA 646, 14 CMR 64 (1954); United States v. Colbert, *supra* note 22. In line with this approach, the court has held that a prior involuntary confession does not necessarily invalidate a subsequent voluntary confession. United States v. Monge, 1 USCMA 95, 2 CMR 1 (1952); United States v. Sapp, 1 USCMA 100, 2 CMR 6 (1952). This accords with the federal rule. *E.g.,* United States v. Bayer, 331 U.S. 532 (1947).

> him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial."

Under the exclusionary rule in Article 31(d), a statement obtained in violation of this warning requirement cannot be received in evidence against the accused in a trial by court-martial.

The warning requirement is not new in military law. On the contrary, the armed services have long emphasized the desirability of warning a suspect of his rights prior to conducting an interrogation. The 1928 Army *Manual for Courts-Martial* provided that in the ordinary case the court-martial should make further inquiry into the circumstances of a confession made to a military superior.[24] Moreover, Army boards of review put teeth into this provision by holding that such a confession was not admissible in evidence if the accused had not previously been advised of his right against self-incrimination.[25] In the Navy the rule was somewhat less strict. Although a warning was not a prerequisite to admissibility,[26] comparatively minor inducements offered by a military superior were held to invalidate a confession.[27]

In 1948, the so-called Elston Act[28] revised the Articles of War which, with a few isolated amendments, had been continuously in effect since 1920. Among other things, Article of War 24 was enlarged by adding a warning requirement similar to that in Article 31(b) of the Code.[29] The amendment to Article of War 24 did more than merely incorporate in statutory form the rules adopted by Army

24. MCM 1928, ¶ 114*a*. The 1928 Army *Manual* was a condensed version of, and did not purport to supersede entirely, the 1921 *Manual* which expressly stated that it was the duty of an officer conducting an investigation to warn the person being interrogated of his right against self-incrimination and that statements obtained without such a warning "should" be excluded from evidence. MANUAL FOR COURTS-MARTIAL, U.S. ARMY, 1921, ¶¶ 22*j*, 225*b*. See also WINTHROP, MILITARY LAW AND PRECEDENTS 329 (2d ed. 1920 Reprint).

25. There are many cases so holding. *E.g.*, CM 331841, Martinez, 80 BR 171, 179-80 (1948); CM 324725, Blakeley, 73 BR 307, 319-20 (1947); CM 318851, Stacy, 68 BR 53, 56-58 (1947).

26. See NAVAL COURTS AND BOARDS, 1937, § 181. This publication was the Navy counterpart of the Army *Manual for Courts-Martial* and implemented the Articles for the Government of the Navy.

27. *E.g.*, COURT-MARTIAL ORDER No. 2—1944, p. 266 (superior's advice to tell the truth renders confession involuntary); COURT-MARTIAL ORDER No. 2—1943, p. 66 (superior's advice that accused's statement "would be taken into consideration by his senior officers" renders confession involuntary). *Cf.* INBAU AND REID, LIE DETECTION AND CRIMINAL INTERROGATION 216-19 (3d ed. 1953).

28. 62 STAT. 627 (1948).

29. The amendment to Article of War 24 was offered on the floor of the House by Representative Burleson of Texas who erroneously stated that a warning was required in most states. See 94 CONG. REC. 184-85 (1948); *cf.* notes 32 and 33, *infra*. Another member of the House objected on the ground that the Army already required a warning, but after a very brief debate the amendment was agreed to.

boards of review. As construed in the 1949 Army *Manual,* it had the important effect of shifting the crucial factor from superior military rank to the element of "officiality" in pretrial investigations.[30] Thus a sergeant assigned to interrogate a captain suspected of an offense was required to give the statutory warning, and lacking such a warning, the captain's confession obtained during the interrogation could not be received in evidence. Under the former Army rule a confession obtained under such circumstances would normally have been considered entirely voluntary and therefore admissible before a court-martial.[31]

Functions of the warning requirement. Texas is the only American jurisdiction which has a statutory warning requirement similar to Article 31(b). However, the Texas statute contains certain exceptions to its warning requirement, as where the authorities discover a weapon used in the commission of the crime as a result of information obtained from the accused's confession.[32] In the absence of statute, American courts have uniformly held that a failure to warn the suspect of his rights during a police interrogation will not, standing alone, require the exclusion of his confession.[33] Although not always articulated in the opinions, these holdings find theoretical support in the concept of trustworthiness advanced by Mr. Wigmore as the true basis for excluding involuntary confessions as incompetent.[34] While a failure to warn might conceivably induce a confession from a guilty man who is laboring under a vast misconception of his duty to cooperate fully in police interrogations, it will be rare indeed that an innocent person will confess to a crime *solely* because he was not advised of his right against self-incrimination.[35] Unlike physical

30. See MCM 1949, ¶ 127*a*; United States v. Gibson, 3 USCMA 746, 752, 14 CMR 164, 170 (1954).

31. CM 333420, Hummel, 81 BR 349, 358 (1948); CM 320445, Gaillard, 69 BR 345, 373-76 (1947); CM 282913, Atkinson, 55 BR 21, 27 (1945).

32. TEX. CODE CRIM. PROC. ANN. art. 727 (Vernon, 1941). The peculiarities of the Texas statute are discussed in McCormick, *Some Problems and Developments in the Admissibility of Confessions,* 24 TEXAS L. REV. 239, 252-54 (1946).

33. State cases are collected in INBAU AND REID, *op. cit. supra* note 27, 224 n. 217. The Supreme Court has stated that the failure on the part of the police to advise the suspect of his rights bears upon voluntariness. *See* Watts v. Indiana, 338 U.S. 49, 53 (1949); Haley v. Ohio, 332 U.S. 596, 600-1 (1947). However, the courts of appeal have expressly held that a failure to warn will not bar the admission of confessions in the federal courts. *E.g.,* United States v. Heitner, 149 F.2d 105, 107 (2d Cir.), *cert. denied sub nom.* Cryne v. United States, 326 U.S. 727 (1945); Gerard v. United States, 61 F.2d 872, 874 (7th Cir. 1932).

34. See 3 WIGMORE, *op. cit. supra* note 9, § 822. This theory has been questioned by a leading authority in the field of evidence, who argued that the confession rule is primarily designed to protect the individual's privilege against self-incrimination. See McCormick, *supra* note 32, at 239-45; McCormick, *The Scope of Privilege in the Law of Evidence,* 16 TEXAS L. REV. 447, 451-57 (1938).

35. *Cf.* Note, *Voluntary False Confessions: A Neglected Area in Criminal Administration,* 28 IND. L.J. 374, 383 (1953).

abuse, which gives rise to the unpleasant alternatives of confessing guilt or absorbing more punishment, the relatively neutral circumstance of a failure to warn does not create any real inducement to confess falsely. Moreover, it may be noted that in the military there is an affirmative factor tending to guarantee trustworthiness. Under Article 107 of the Code it is a serious offense to make a false official statement, and a false denial of guilt during an official investigation is punishable regardless of whether the accused had been warned of his rights in accordance with Article 31(b).[36] Of course, this does not suggest that untrustworthy confessions cannot be obtained from a military suspect by means other than physical coercion, unlawful inducements, and the like. Fear of the authority exercised by a military superior may, in the unusual case, cause a frightened and inexperienced enlisted man to agree to virtually any incriminating statement. But as a general proposition, the warning requirement cannot be satisfactorily rationalized in terms of the concept of trustworthiness. Its thrust is in quite different directions.

The most common justification for Article 31(b) is found in the inherent characteristics of the military service. Prompt and unflinching obedience to the orders of a superior is the cornerstone of military discipline. And as frequently as not, statements phrased in the form of a request are interpreted as orders.[37] Accordingly, in the typical situation involving the interrogation of an enlisted man by his commanding officer, there is a considerable degree of coercive influence exerted by superior military rank alone. In such a case, ordinary considerations of self-protection may vanish in the face of what the enlisted man may well believe to be his duty to answer all questions, or suffer the serious consequences flowing from disobedience of orders given by his superior officer.[38] Moreover, there is no blinking the plain fact that interrogations conducted by law enforcement officers are, by the very nature of things, characterized by a certain degree of pressure. The suspect suddenly finds himself apprehended, placed in confinement, and questioned by persons intent upon ascertaining his connection with the offense. Under such conditions the warning requirement operates to serve notice upon the suspect that his interro-

36. MCM 1951, ¶ 140*a*; CM 365800, Hudson, 12 CMR 276 (1953).

37. It is to be noted that a failure to obey a "request" may, under certain circumstances, constitute an offense punishable under the Code as a failure to obey a lawful order. United States v. Glaze, 3 USCMA 168, 11 CMR 168 (1953).

38. A comparison of the maximum punishments is revealing. In wartime, the willful disobedience of the lawful order of a superior officer carries a maximum punishment of death, UCMJ art. 90, 50 U.S.C.A. § 684 (1951), although it is presently limited to a maximum of five years' confinement at hard labor, except in the Far East Command. MCM 1951, ¶ 127*c*, as modified by Exec. Order No. 10247, 16 FED. REG. 5035 (May, 1951). A wrongful refusal to testify before a court-martial carries a maximum punishment of five years' confinement at hard labor. MCM 1951, ¶ 127*c*.

gators are cognizant of his right to remain silent—that *they* know that they cannot lawfully compel him to speak. Thus Article 31(b), by forcing the interrogators to adopt a somewhat more impartial attitude, not only mitigates the coercion peculiarly associated with the military, but also tends to assure that the accused's confession will be the product of complete mental freedom.

Often overlooked, however, is another important justification for the warning requirement. The Federal Rules of Criminal Procedure, as well as most state criminal codes, require prompt arraignment of a person placed under arrest. Rule 5(a) of the Federal Rules provides that such a person must be taken before a United States commissioner "without unnecessary delay," and Rule 5(b) requires the commissioner to inform the individual of his right to counsel and of his right to remain silent. This type of preliminary proceeding is unknown in military law where the primary emphasis is upon speed in bringing charges to trial or dismissing them. Although the Code contains certain monitory provisions which tend to accelerate the period between apprehension and trial,[39] the 1951 *Manual* expressly provides that a delay in preferring charges does not operate to release an accused from confinement.[40] The Code itself appears to contemplate that a period of eight days may properly elapse between the accused's confinement and the forwarding of the formal charges to the authority exercising general court-martial jurisdiction.[41] Furthermore, the accused does not have any right to counsel until charges have been formally preferred against him.[42] As a practical matter, of course, this right may be most important to an accused at the time of the first police interrogation, for even the best trial attorney may be able to do little for the soldier who has made a full confession.[43]

Under this statutory framework, there is a hiatus between the accused's apprehension and the forwarding of formal charges, during

39. Article 10 of the Code provides in part: "When any person subject to this code is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him." A similar provision is found in Article 30(b). Also, Article 33 provides: ". . . the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges . . . to the officer exercising general court-martial jurisdiction."

40. Paragraph 22 provides: "Although charges should be preferred promptly . . ., the accused is not automatically released from restraint because of any delay in preferring the charges. He must remain in arrest or confinement until released by proper authority."

41. See UCMJ art. 33, *supra* note 39.

42. United States v. Moore, 4 USCMA 482, 16 CMR 56 (1954); CM 359571, Shaull, 10 CMR 241, *pet. for rev. denied*, 11 CMR 248 (1953); ACM 4903, Nicholson, 4 CMR 519 (1952).

43. The late Mr. Justice Jackson ably stated the conflicting policy considerations in his separate opinion in Watts v. Indiana, 338 U.S. 49, 57 (1949), where he forthrightly observed that granting the right to counsel immediately upon being taken into custody would seriously cripple the effectiveness of current methods of criminal investigation.

which he is at the mercy of the military law enforcement authorities. It does not appear that these authorities have abused the right to conduct interrogations while the accused is confined in a stockade or similar prison facility.[44] Nevertheless, the warning requirement is a substantial deterrent to untrammeled police interrogation methods. Article 31(b) must therefore serve in lieu of the right to counsel and of arraignment proceedings of the type contemplated by the Federal Rules. Strict compliance with its mandate would seem essential if the military is to achieve some reasonable balance between the need for prompt crime detection and the rights of the individual.

Administrative and judicial interpretation of Article 31(b). The broad, inclusive language of Article 31(b) was presumably chosen in order to avoid serious loopholes which might subsequently require corrective legislation. Literally interpreted, however, it would cover some situations which are not within its apparent functions. And since the exclusionary rule in Article 31(d) is tied directly to the scope of Article 31(b), there are apparently no circumstances which would, in a particular case, excuse a failure to warn and thus permit an otherwise voluntary confession to be received in evidence. On the other hand, it is only persons subject to the Code who must give the prescribed warning. Civilian investigators employed by the military departments are not covered by Article 31(b).

Limitation to official investigations:

Article of War 24 required a warning to be given to an "accused or person being investigated."[45] In the 1949 *Manual,* this phrase was construed as limiting the warning requirement to official investigations. Although Article 31(b) of the Code refers only to persons "accused or suspected of an offense," the use of terms such as "interrogate," "request a statement," and "nature of the accusation" suggest strongly that Article 31(b), like its immediate predecessor, extends

44. Well-trained criminal investigators do not need to rely upon coercion to obtain confessions, and the problem in the military becomes acute primarily under conditions of all-out war when numerous investigators must be hurriedly recruited. Since the enactment of the Code, only a few instances of prolonged interrogation appear in the reports. See United States v. Fair, 2 USCMA 521, 10 CMR 19 (1953)' (repeated questioning for more than seven days while accused was in segregation cell, but accused was advised of his rights at least five times); ACM 5753, McElroy, 8 CMR 615, *pet. for rev. denied,* 9 CMR 139 (1953) (repeated and prolonged questioning for several days while accused was held in "solitary," but accused was frequently advised of his rights).

45. The warning requirement in Article of War 24 was not artfully drafted. It provided in pertinent part: "It shall be the duty of any person in obtaining any statement from an *accused* to advise him [of his right to remain silent] regarding the offense of which he is accused *or being investigated.* . . ." (Emphasis added.) In the Army, a person is technically not an "accused" until formal charges against him have been prepared. However, the words "or being investigated" made it apparent that the warning was necessary at some point prior to the formal accusation and this was the view taken by the Army. MCM 1949, ¶ 127*a*; CM 335000, Cellner (BR), 2 BR-JC 1 (1949).

only to official investigations. In any event, the 1951 *Manual for Courts-Martial* adopts this interpretation.

A close reading of paragraph 140*a* of the 1951 *Manual* reveals that it rationalizes Article 31(b) in terms of the factor of "implied coercion" which may characterize an official investigation. In the *Manual,* the word "voluntary" is used as a term of art. Thus, the *Manual* provides that "To be admissible, a confession or admission . . . must be voluntary," and that "A confession which was obtained through the use of coercion, unlawful influence, or unlawful inducement is not voluntary." It then sets forth "some instances of coercion, unlawful influence, and unlawful inducement," among which are the following:

> "Infliction of bodily harm . . . .
> "Threats of bodily harm . . . .
> ". . . .
> "During an official investigation (formal or informal) in which the accused is a person accused or suspected of the offense, obtaining the statement by interrogation or request without giving a preliminary warning of the right against self-incrimination—except when the accused was aware of that right and the statement was not obtained in violation of Article 31*b*.
> "Obtaining the statement in violation of Article 31."

In effect, the *Manual* takes the position that, once the element of officiality is established, there is a conclusive presumption of coercion and hence, involuntariness, if the accused's statement was not preceded by an Article 31(b) warning. Elsewhere in the *Manual,* the term "involuntary" is used without any attempt to distinguish between the several types of conduct which may constitute coercion. Accordingly, in terms of their evidentiary consequences, a failure to warn and a brutal beating are treated identically.

At first, the Court of Military Appeals appeared unwilling to accept the *Manual's* thesis that Article 31(b) applies only to official investigations. In *United States v. Wilson and Harvey,*[46] the accused, two privates, were convicted of the premeditated murder of a Korean national. Immediately after the fatal shooting, one Sergeant Wang, a military policeman, had been summoned to the scene. There, another MP told Sergeant Wang that some Koreans had identified the accused as the offenders from a number of soldiers who were gathered about. Looking directly at the two accused, Sergeant Wang asked who had done the shooting and the accused replied that they had "shot at" the Korean. Although Sergeant Wang did not preface his question with the required warning, the replies of the accused were admitted in evidence at their court-martial.

These facts would seem to make it clear that Sergeant Wang was

46. 2 USCMA 248, 8 CMR 48 (1953).

conducting an informal official investigation, with the result that the incriminating statements made by the accused would not have been admissible under the *Manual's* interpretation of Article 31(b). The majority of the court reached the same result, but solely upon a literal reading of Article 31(b). After stating that no question was raised as to the "voluntary" nature of the statements,[47] the court reasoned as follows:

> "[The provisions of Article 31 (b) and (d)] are as plain and unequivocal as legislation can be. According to the Uniform Code . . ., Sergeant Wang was a 'person subject to this code,' and appellants, at the time the question was directed to them, were persons 'suspected of an offense.' Consequently, the statements should have been excluded in accordance with Article 31(d) and their admission was clearly erroneous."[48]

Apparently the court considered that the element of officiality was relevant only in determining whether a rehearing was automatically required.[49]

The purely mechanical view adopted in *Wilson and Harvey* returned to haunt the court in *United States v. Gibson*,[50] which involved the use of an informer by the Army Criminal Investigation Division. The accused, Gibson, had been apprehended and confined in a post stockade on suspicion of having committed several offenses of housebreaking and larceny. The CID instructed a provost sergeant to put a "good reliable rat" in close proximity to the accused. Another private in the stockade was selected and in due course the accused confided to him that he, the accused, had committed the offenses. At the accused's trial, the informer's testimony was admitted in evidence.

In this case it was fairly clear that the informer had "interrogated" the accused, and it was undisputed that the informer was a person subject to the Code and that the interrogation had not been preceded by an Article 31(b) warning. Accordingly, all the conditions announced by the majority in *Wilson and Harvey* were present. However, after reviewing the history of the warning requirement in military law, the same majority concluded that the accused's confession was outside the scope of Article 31(b), relying upon the absence of any officiality with its attendant implied coercion.

At this point, mention should be made of the interpretation of

47. 2 USCMA at 254, 8 CMR at 54. A similar observation appears in United States v. Williams, 2 USCMA 430, 433, 9 CMR 60, 63 (1953), where the court stated that in confession cases two inquiries were necessary: first, whether the confession was voluntary, and second, whether the accused had been warned of his rights. The effect of this rationale was to divorce the warning requirement from its apparent functional basis.

48. 2 USCMA at 255, 8 CMR at 55.

49. See p. 47, *infra*.

50. 3 USCMA 746, 14 CMR 164 (1954).

Article 31(b) advanced by Judge Latimer in his separate opinions in the *Wilson and Harvey* and *Gibson* cases.[51] This interpretation assumes particular significance since the military departments have used it as a guide in recommending an amendment to Article 31(b)[52] on the ground that "the wide coverage of the present article has resulted in unnecessary difficulties in the path of effective crime detection and punishment."[53]

In *Wilson and Harvey,* Judge Latimer argued that an Article 31(b) warning should be required only if three specified factors are present. These are: (1) that the interrogator occupies an official position in connection with law enforcement or crime detection; (2) that the interrogation is in furtherance of an official investigation; and (3) that the facts have been developed to a point where the interrogator has reasonable grounds to suspect that the person interrogated has committed an offense.[54] It will be noted that the second factor is in line with the theory of implied coercion adopted by the 1951 *Manual* and ultimately by the majority of the court in *Gibson.* However, by importing objective criteria into Article 31(b), the other two factors appear not only to lose sight of one of its fundamental purposes—the protection of the military suspect from implied coercion—but also to inhibit legitimate investigative techniques.

The first factor would require that the interrogator occupy an "official position." As construed by Judge Latimer in the *Gibson* case, the *fact* of an official position would alone determine the need for a warning. Hence it would be immaterial that the suspect did not know of the interrogator's status and indeed thought him to be a friend. The official position factor would thus have the effect of preventing full use of information obtained from the suspect during undercover investigations by military personnel. It is, moreover, at war with the theory of implied coercion, for if the suspect is wholly unaware of the interrogator's official position, such coercion is obviously lacking. Where, as in *Gibson,* the interrogator is a mere informer whose services have been solicited by military law enforcement authorities, Judge Latimer would apparently have the applicability of Article 31(b) depend upon whether the informer was their "agent." This agency relationship would be in part determined by

51. *See* United States v. Wilson and Harvey, 2 USCMA 248, 257, 8 CMR 48, 57 (1953) (dissenting opinion); United States v. Gibson, 3 USCMA 746, 757, 14 CMR 164, 175 (1954) (concurring opinion).

52. See 2 ANN. REP. OF THE COURT OF MILITARY APPEALS, THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES, AND THE GENERAL COUNSEL OF THE DEPARTMENT OF THE TREASURY 33 (1953). Legislation implementing this and other recommendations had been drafted but had not been cleared through the Bureau of the Budget when the Eighty-Third Congress adjourned in August, 1954.

53. See ARMY, NAVY, AIR FORCE JOURNAL, June 12, 1954, p. 1253, col. 3

54. 2 USCMA at 261, 8 CMR at 61.

the extent of the informer's cooperation with the authorities and his knowledge of the details concerning the offense which he was asked to investigate. Such indicia would seem to put a premium upon a haphazard, hit-or-miss investigative procedure, and their relevance to the implied coercion which may be exerted by the informer is not apparent. Of course, it may, as a matter of policy, be desirable to prohibit the use of undercover agents and informers.[55] But putting that consideration aside, it seems clear that this proposed limitation of Article 31(b) is not well calculated to achieve the stated purpose of removing obstacles to crime detection and punishment.

Apparently the further limitation to officials engaged in "law enforcement or crime detection" will not be followed in the proposed amendment to Article 31(b). Many official investigations are conducted by military personnel who have no official position in connection with law enforcement or crime detection activities. These investigations are carried on for purposes largely unrelated to future court-martial action, although the evidence discovered may show the commission of an offense under the Code. In the Army, for example, "line-of-duty" investigations must be conducted to determine whether a soldier's injuries were in line of duty and not due to his own misconduct. The results affect his pay and length of service, yet the facts disclosed may indicate malingering.[56] Similarly, investigations of automobile accidents involving Army personnel are conducted to determine the extent of the Government's liability in the event that a claim is thereafter made against it. The facts may also show that the soldier responsible for the accident was driving recklessly or while drunk. In such investigations the elimination of the Article 31(b) warning would amount to setting a trap for the unwary soldier who may quite reasonably believe that his statements will be used for a purpose other than as evidence in a trial by court-martial.[57]

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55. In the federal courts, evidence obtained by undercover agents or informers is generally admissible unless their conduct amounts to entrapment. Sorrells v. United States, 287 U.S. 435 (1932). See Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091 (1951). In one military case, a lieutenant who had been working closely with the Air Force Office of Special Investigations testified at length concerning the statements made by a sergeant charged with attempting to sell military secrets to the enemy. The sergeant had thought the lieutenant to be a fellow conspirator. Fortunately, this case arose after *Gibson* and the Air Force board of review was able to affirm the findings of guilty on the basis of the rationale of implied coercion adopted by the majority of the court. ACM 8212, Cascio, —CMR— (1954).

56. For an instance where this occurred, see United States v. Pedersen, 2 USCMA 263, 8 CMR 63 (1953).

57. In CM 230377, Wilson, 17 BR 361, 366 (1943), involving misleading advice given a suspected enlisted man by his superior officer, the Army board of review made the following pertinent observation: "[I]t is not only the purpose of military justice to safeguard the soldier and the court from the consequences of a false confession, but . . . it is also its purpose to protect the

There remains for consideration the third limiting factor developed in *Wilson and Harvey:* that the interrogator have "reasonable grounds" to suspect the person interrogated. It will be recalled that at the time Sergeant Wang asked the accused who had done the shooting, he knew only that a Korean had been killed, that he had been summoned to the scene, and that hearsay had identified the accused as the perpetrators. According to Judge Latimer, this meant that "no one, except possibly the eyewitnesses, knew whether a crime had been committed" and therefore that the accused were not then suspected of an offense. But this view of the facts seems somewhat precious, for the very occurrence of a homicide would, under the circumstances of that case, probably have aroused stern suspicions in the mind of a military policeman stationed in Korea. Moreover, the replies made by the accused, to the effect that they had "shot at" the Korean, would not necessarily indicate the commission of a crime since the shooting might have been justifiable or excusable. Their replies did no more than confirm the hearsay evidence previously communicated to Sergeant Wang, who presumably could have continued to interrogate the accused consistently with Article 31(b). Thus the theory advocated by Judge Latimer would encourage unrestricted interrogation of a suspect in lieu of making an attempt to determine from other witnesses whether a crime had been committed. Carried to its logical conclusion, this theory would require a warning only after the accused's replies had eliminated any possibility of innocence.[58]

The reasonable grounds requirement also seems objectionable on the ground that it would remove the need for an Article 31(b) warning where the interrogator, knowing that an offense has been committed, has no substantial evidence tending to identify the person interrogated as the offender.[59] Let us assume that a wallet has

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soldier from the consequences of his own ignorance, and to assure him that trust and confidence reposed in the statements or promises of superior officers is well placed."

58. Judge Latimer did not elaborate on this matter, although he did observe that until "the elements of the crime start to take form, it would be unlikely for one asking preliminary questions to know the nature of the accusations." United States v. Wilson and Harvey, 2 USCMA 248, 261, 8 CMR 48, 61 (1953). However, this would hardly seem an insuperable objection, for the court has since held that a failure to inform the suspect of the nature of the accusation will invalidate a confession "in only the rare and unusual case." United States v. O'Brien, 3 USCMA 105, 11 CMR 105 (1953). Moreover, it is important to note that a failure to warn the suspect during the "preliminary" inquiry does not foreclose the use of subsequent statements obtained after complying with Article 31(b). See note 23, *supra.*

59. During the House hearings it was agreed that Article 31(b) would extend to this situation. See *House Hearings, supra* note 8, at 990-91. Moreover, it was expressly stated that the inclusion of the term "suspected" would have the effect of broadening the protection afforded by Article of War 24. See SEN. REP., *supra* note 14, at 16; H.R. REP., *supra* note 14, at 19. *Cf.* note 45 *supra.*

been stolen from Corporal Brown's footlocker located in an Army barracks. Brown's company commander, Captain Jones, calls in five privates with cots near that of the victim. As each private enters his office, Captain Jones says to him, "I want you to tell me the truth. Did you steal Brown's wallet?" Private Smith, thinking that he must "talk," confesses to the offense. The emasculation of the right to remain silent is apparent in this sort of interrogation. Yet the proposed reasonable grounds limitation would authorize unrestricted interrogation under these circumstances, so long as it did not involve actual coercion, unlawful influence, or unlawful inducement.

This hypothetical case points up one curious aspect of the proposed limitation of Article 31(b). The ordinary meaning of the word "suspect"[60] seems basically incompatible with the reasonable grounds requirement. A suspicion may be, and often is, grounded on little more than a hunch which will fall far short of constituting reasonable grounds. Captain Jones would not have interrogated the privates as he did, if he had not "suspected" them. But their proximity to the victim's footlocker would clearly not be reasonable grounds for believing that one or more of them had taken the wallet. Thus the apparent effect of the reasonable grounds requirement is to relegate an Article 31(b) warning to some later stage of the investigation where the authorities have discovered incriminating facts which would almost be sufficient to support a prima facie case against the suspect.

The limitations found in the recommended amendment to Article 31(b) reflect an effort to mitigate the impact of a rule which often operates in favor of the guilty. Unfortunately, the nature of those limitations would seemingly result in arbitrary distinctions having little or no relationship to the functions of Article 31(b). Implied coercion is a fact of military life, and it is submitted that, wherever such coercion may go, Article 31(b) should follow.

May a failure to warn be excused?:

The warning requirement was presumably incorporated in the Code with an eye toward the interrogation of an enlisted man by a military superior or his representative. All cases do not, however, fit neatly into this pattern. In fact, the warning may at times be merely perfunctory. To take an admittedly exaggerated example, let us suppose that a major in the Judge Advocate General's Corps is suspected of having committed an offense under the Code. A CID sergeant is assigned to interrogate the major concerning this offense; however, perhaps overawed by superior rank, the sergeant uninten-

60. For example, WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1952) defines the verb "suspect" as, "To imagine (one) to be guilty . . . on slight evidence, or without proof. . . ."

tionally fails to warn the major. During the course of the routine interrogation, the major admits various incriminating facts. Here, the sergeant's ability to exert coercive influences will ordinarily be negligible, and it may be assumed that the major, a military lawyer, is thoroughly conversant with the provisions of Article 31(b). Accordingly, it seems obvious that a warning by the sergeant would have added little, if anything, to the voluntariness of the major's admissions. Hence the theory of implied coercion does not supply a satisfactory functional explanation for the warning requirement.

The 1948 amendment to Article of War 24 did not provide that a statement obtained in violation of its warning requirement must be excluded from evidence. This omission permitted some latitude for administrative interpretation, and the 1949 *Manual* provided that the accused's confession could be admitted in evidence despite a failure to warn, if it was shown that he had been aware of his rights at the time.[61] However, the flat exclusionary rule in Article 31(d) of the Code is not susceptible of such an administrative gloss. Accordingly, the 1951 *Manual* takes the position that facts tending to show an absence of implied coercion are immaterial, and in our hypothetical case the major's admission must be excluded at his subsequent trial by court-martial.[62]

Service boards of review have followed the *Manual's* view that the accused's prior knowledge of his rights will not excuse a failure to warn.[63] The Court of Military Appeals has not yet been confronted with a case where the circumstances surrounding the accused's confession showed beyond question that the failure to give the required warning did not affect its voluntariness. However, in the *Gibson* case, involving the Government's use of an informer, the court's opinion emphasized the coercive influence of superior rank or official position upon persons being interrogated. The court then observed that:

> "[I]t is our duty to see to it that such rights are not extended beyond the reasonable intendment of the Code at the expense of substantial justice and on grounds that are fanciful or unsubstantial."[64]

61. MCM 1949, ¶ 127*a*.

62. MCM 1951, ¶ 140*a*. This is made perfectly clear in LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, which was prepared by the draftsmen of the 1951 *Manual* primarily in order to explain its many new provisions to military lawyers. The LEGAL AND LEGISLATIVE BASIS states flatly that it is not material that the person interrogated "may have been well aware of his right not to incriminate himself (an accused lawyer, or [sic] example)." *Id.* at 216. See also Sellingsloh and Hodson, *Civilian Counsel in General Court-Martial Cases Under the Uniform Code of Military Justice*, [1952] WASH. U.L.Q. 356, 370. Colonel Hodson was among those who played a leading part in the drafting of the 1951 *Manual*.

63. ACM 7072, Hawk, 12 CMR 741 (1953); CM 364267, Orange, 11 CMR 411 (1953).

64. United States v. Gibson, 3 USCMA 746, 752, 14 CMR 164, 170 (1954).

Although this assertion suggests that the court may be willing to adopt "implied coercion" as the controlling criterion in every case, it would seem that *Gibson* reflects in part a belated move to cure the unnecessarily broad holding in *Wilson and Harvey*. Moreover, the court was able to point to ample precedent in support of its limitation of Article 31(b) to official investigations. In view of the rule announced in the 1951 *Manual*, it seems doubtful whether the court will, in the name of implied coercion, make further inroads upon the scope of Article 31(b).

It may be noted that an interesting and persuasive analogy can be drawn between the exclusionary rule in Article 31(d) and the federal *McNabb* rule.[65] Under the *McNabb* rule a confession obtained in violation of the prompt arraignment requirements of Rule 5 of the Federal Rules of Criminal Procedure[66] cannot be admitted in evidence in the federal district court. *McNabb* represents a judicial attempt to control police investigative techniques and, by denying to the Government the fruits of such a confession, tends to effectuate the rights guaranteed by Rule 5. Although the *McNabb* rule has not been applied in an entirely mechanical manner,[67] it clearly does not depend upon the particular accused's resistance to the psychological pressures exerted by "secret interrogation" or "unlawful detention."[68]

The Code does not provide for proceedings comparable to those required by Rule 5, and the *McNabb* rule itself has been held inapplicable to military law.[69] But as indicated earlier, the protective functions of Article 31(b) and Rule 5 are substantially the same. Accordingly, it is arguable that Article 31(d) announces a military *McNabb* rule which is designed to provide a further assurance that military personnel will comply with the warning requirement of Article 31(b). This analogy would seem to accord with the spirit of Article 36(a) of the Code which makes it transparently clear that, to the extent practicable, the rules of evidence applied in the federal courts are to govern courts-martial.

65. See Upshaw v. United States, 335 U.S. 410 (1948); McNabb v. United States, 318 U.S. 332 (1943).

66. See p. 27, *supra*.

67. Where the delay in arraigning the suspect was not "unreasonable," the courts of appeal have held the *McNabb* rule inapplicable. *E.g.*, Allen v. United States, 202 F.2d 329 (D.C. Cir.), *cert. denied*, 344 U.S. 869 (1952); Mora v. United States, 190 F.2d 749 (5th Cir. 1951). However, the reasonableness of the delay depends upon the availability of the United States Commissioner and similar factors which are extraneous to the quantum of psychological coercion which may have been exerted upon the suspect.

68. Upshaw v. United States, 335 U.S. 410, 413 (1948). See also Wicker, *Some Developments in the Law Concerning Confessions*, 5 VAND. L. REV. 507, 512-15 (1952).

69. United States v. Moore, 4 USCMA 482, 16 CMR 56 (1954). The same result was reached under the Articles of War. CM 328248, Richardson, 77 BR 1, 22-23 (1948). See also Burns v. Wilson, 346 U.S. 137, 145 n. 12 (1953); Richardson v. Zuppann, 81 F. Supp. 809 (M.D. Pa. 1949), *aff'd per curiam*, 174 F.2d 829 (3d Cir. 1949).

Persons not subject to the Code:

The warning required by Article 31(b) need be given only by persons subject to the Code. This gap in the otherwise inclusive coverage of Article 31(b) presented a serious problem to the draftsmen of the 1951 *Manual,* for there are a number of civilian investigators employed within the military establishment.[70] Although not subject to the Code, these civilians are representatives of the military commander, with the result that there may be a substantial element of implied coercion in their interrogations. In addition, state and local police officials, as well as agents of the Federal Bureau of Investigation, may have occasion to deal with military personnel who are accused or suspected of an offense.[71]

We have seen that the *Manual* excludes a statement obtained from the accused during "an official investigation" if the accused was not aware of his right against self-incrimination or if the statement was obtained in violation of Article 31(b).[72] Although somewhat awkwardly phrased, this provision was clearly designed to extend the exclusionary rule to *any* official investigation conducted by a person not subject to the Code.[73] There is considerable justification for this

70. The Navy employs civilian investigators at its shore installations. See Ward *UCMJ—Does It Work?,* 6 VAND. L. REV. 186, 196-97 (1953).

71. In addition to handling offenses committed by servicemen off military reservations, civilian police officials are specifically authorized to apprehend deserters from the armed forces. UCMJ art. 8, 50 U.S.C.A. § 562 (1951).

72. See p. 29, *supra.* It will be noted that the right against *self-incrimination* is not so broad as the right *to remain silent* conferred by Article 31(b). *Cf.* United States v. Williams, 2 USCMA 430, 9 CMR 60 (1953). However, it is doubtful whether the draftsmen of the *Manual* intended to make such a distinction in the case of civilian police interrogations. In this connection, see Department of the Army Pamphlet No. 27-9, *The Law Officer,* app. XVII (August, 1954), where a recommended instruction to be given by the law officer treats the "right against self-incrimination" as a shorthand expression for the advice required by Article 31(b). See also note 73, *infra.*

73. The draftsmen of the *Manual* had this to say about their rule: "Since it would appear to be both logically and morally indefensible, from the standpoint of making rules for determining the admissibility of confessions and admissions, to require that the accused or suspect be advised of the right against self-incrimination when he is interrogated or requested to make a statement by persons who are subject to the code, but to dispense entirely, and in every case, with such a requirement when he is interrogated or requested to make a statement by persons (who may be military investigators) who are not subject to the code, the text of the Manual has been so phrased that civilian military investigators not subject to the code, and other investigators not subject to the code who are acting in an official capacity, must give a warning in those cases of interrogation or request in which the accused or suspect is not aware of the right against self-incrimination." LEGAL AND LEGISLATIVE BASIS, *supra* note 62, at 216. An Air Force board of review reviewed the background of the *Manual's* rule at some length and rather reluctantly concluded that a confession obtained from the accused by American civilian police in violation of that rule could not be admitted in evidence. ACM S-5198, Wiser, 9 CMR 748 (1953). An Army board of review had previously reached a contrary result without referring to the *Manual's* rule. CM 353954, Franklin, 8 CMR 513 (1952), *pet. for rev. and pet. for recon. denied,* 8 CMR 179 (1952). But see Department of the Army Pamphlet, *supra* note 72, app. XVII. A Navy board of review has held that if civilian investigators employed by the Navy do not comply fully with Article 31(b), the accused's

refusal to accept incriminating evidence obtained by civilian investigators in violation of what was conceived to be the proper procedure for interrogating a military suspect. A typical civilian police interrogation necessarily involves the application of substantial psychological pressure to make the suspect reveal all he knows. In this respect it is doubtful whether civilian police interrogations are inherently less coercive than their military counterparts. Furthermore, it is not amiss to observe that professional criminals do not find their way into the armed forces. The serviceman who is "in trouble" for the first time may be unusually vulnerable to demands for a statement, and the *Manual* appears to recognize that the military suspect's right to remain silent means little unless he is aware of it. What the Supreme Court has indicated to be one of the factors bearing upon voluntariness[74] was thus converted into a strict prerequisite to admissibility.

The Court of Military Appeals has recently narrowed the apparent scope of the *Manual's* exclusionary rule. In *United States v. Grisham*,[75] the accused, an American civilian employed by the Department of the Army in France,[76] was convicted by general court-martial of the unpremeditated murder of his wife. Following this homicide, the accused summoned the American military police to the scene. They in turn notified the French police and, after making a preliminary investigation, surrendered the accused to the French who exercised concurrent but primary jurisdiction over this offense. The accused remained in French custody for approximately two weeks but was ultimately returned to the American military authorities upon their specific request. It was evidently understood that the accused's return would not constitute a precedent in subsequent criminal cases involving Americans. During the two-week period the accused made two statements to a French police commissioner and two statements to a French *juge d'instruction*. Apparently the French interrogators had not advised the accused of his right against self-incrimination.[77] Accordingly, the accused contended that the

incriminating statements must be excluded from evidence. NCM 181, Noel, 8 CMR 572 (1953).

74. See note 33 *supra*.

75. 4 USCMA 694, 16 CMR 268 (1954).

76. Persons serving with or accompanying the armed forces outside the continental United States (and certain of its territories) are subject to the Code and hence liable to trial by court-martial. UCMJ art. 2(11), 50 U.S.C.A. § 552(11) (1951).

77. The court so stated but the Army board of review indicated that the record did not actually show the circumstances of one of the interrogations. See CM 365320, Grisham, 13 CMR 486, 499 (1953). Before the French took custody of the accused, the American military police had warned him in accordance with Article 31(b) but there was no indication that the French considered themselves bound by that Article. The court also observed that the record did not reflect "any sort of coercion" and that the accused's four statements were "voluntary in the traditional sense." Apparently the parties

four statements should have been excluded from evidence under the rule prescribed by the *Manual*. However, the court held that rule to be applicable only where the civilian investigators were acting "in furtherance of any military investigation or in any sense as an instrument of the military." The court then reviewed the circumstances surrounding the accused's four statements and concluded that the statements were admissible under its view of the *Manual's* rule. Although the opinion is not very clear, the court seemed to be impressed by the fact that, at the time of obtaining the statements from the accused, the probabilities were that he would be prosecuted by the French rather than be surrendered to the American military authorities.

The *Grisham* case does not indicate how the court's "instrumentality" test may be applied where American state or local police officials conduct the accused's interrogation. The mere fact that the civilian police were aware of the accused's military status does not seem to be decisive of the need for a warning. However, American civilian police frequently have informal working agreements with the military authorities to deliver servicemen to the latter for prosecution. In such cases the civilian police may assume that any evidence obtained during their interrogation will be turned over to the military for possible use in a trial by court-martial. Presumably the "instrumentality" test is sufficiently flexible to exclude a confession obtained under such circumstances, even though the military authorities may not have known of or acquiesced in the interrogation of the particular accused.

Procedural Aspects of Military Confessions

Article 31 announces only the substantive principles governing confessions and admissions. The task of prescribing the procedures to be observed in determining their admissibility was left to the draftsmen of the 1951 *Manual*. In this connection, it will be recalled that Article 36(a) of the Code requires conformity, so far as practicable, with the procedures followed in the federal district courts.

Briefly, paragraph 140*a* of the *Manual* requires the prosecution to make an affirmative showing that the confession was voluntary, unless the accused expressly consents to the omission of such a showing. With respect to admissions, however, an affirmative showing is necessary only if there is an "indication" of involuntariness.[78] In a general

to the court-martial did not initiate a full inquiry into the interrogations conducted by the French *juge d'instruction*. *Cf.* note 21 *supra*.

78. This procedure was prescribed with a view toward the practicalities of trial. See Legal and Legislative Basis, *supra* note 62, at 216. It is frequently difficult to determine whether a particular statement amounts to an admission, and in any event it would not be desirable to halt the trial for a collateral inquiry into voluntariness each time a witness testifies to some minor admission made by the accused. The *Manual's* rule does no more than shift the burden to the defense to lodge an appropriate objection.

court-martial, the accused is entitled to a preliminary hearing before the law officer and outside the presence of the members of the court.[79] The law officer rules on the voluntariness of the confession, but if he rules that the confession is admissible, the issue of voluntariness must later be submitted to the members of the court who, during their deliberations on the findings, are free to come to their own conclusions and accept or reject the confession accordingly. In addition, the court members may weigh the credibility of the confession evidence.

The *Manual's* resubmission requirement raises some interesting considerations. Paragraph 140*a* provides that the law officer's ruling admitting the confession in evidence "is not conclusive of [its] voluntary nature. . . that is, the ruling is final only on the question of admissibility." Although similar statements are often found in judicial opinions, it should be observed that the *Manual's* provision is to a large extent self-contradictory. By permitting the court members to consider voluntariness *de novo,* the law officer's ruling is not final on what is almost invariably the only issue relating to the competency (admissibility) of the confession evidence. The logical impasse resulting from the resubmission requirement has been severely criticized by Mr. Wigmore who contended that the correct allocation of judge-jury functions demands that the voluntariness of the confession, as distinguished from its credibility, be determined finally by the trial judge.[80] Under this view the jury would not be bound to reject the confession even though they found that it had been obtained involuntarily. However, a substantial number of state courts continue to require resubmission.[81] In the federal system, the Supreme Court has never elaborated on the procedure to be followed by the district courts, although its decisions do not appear to forbid resubmission of the issue of voluntariness.[82] Lacking any definitive expression of opinion by that Court, the federal courts of appeal have adopted divergent views, some requiring resubmission and others requiring final determination by the district judge.[83]

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79. Although not specifically stated in the *Manual,* the Court of Military Appeals has so held in United States v. Cooper, 2 USCMA 333, 8 CMR 133 (1953).

80. See 3 WIGMORE, *op. cit. supra* note 9, § 861; 9 *Id.* § 2550.

81. See Notes, 85 A.L.R. 870, 881 *et seq.* (1933), 170 A.L.R. 567, 580 *et seq.* (1947).

82. *See* United States v. Carignan, 342 U.S. 36, 39 (1951) ("The evidence on the new trial will determine the necessity for or character of instructions to the jury on the weight to be accorded the confession, if it is admitted in evidence."); Wilson v. United States, 162 U.S. 613, 624 (1896) (". . . the question may be left to the jury with the direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant."). *Cf.* Ziang Sung Wan v. United States, 266 U.S. 1, 16-17 (1924); Anderson v. United States, 318 U.S. 350, 351 n. 1 (1943); Upshaw v. United States, 335 U.S. 410, 429 (1948) (dissenting opinion).

83. Resubmission required or permitted: United States v. Leviton, 193 F.2d

The Court of Military Appeals has acquiesced in the resubmission requirement of the *Manual*, although it has held that the law officer need not instruct the court members on their right to redetermine voluntariness where that issue has not been raised by the evidence.[84] Also, Judge Latimer has expressed hostility to this requirement in cases involving only a disputed violation of Article 31(b).[85] The *Manual* provides merely that the court members may reach their own conclusions as to the "voluntary" nature of the confession. But as previously noted, the term "voluntary" is used in the *Manual* as a word of art; thus a confession is not voluntary if it was obtained in violation of Article 31(b). Since the *Manual*, consistent with the language of Article 31, elsewhere regards a violation of Article 31(b) as being equally as serious, for purposes of its exclusionary rules, as a violation of any other prohibition in Article 31, there is no reason to suppose that different treatment was intended on the procedural level.[86] Apparently Judge Latimer has now altered his position, for in a subsequent case he seemed to indicate that the question of whether the accused *understood* the Article 31(b) warning should be resubmitted.[87]

Another important procedural question, not discussed in the *Manual* or yet decided by the court, involves the standard of proof which governs the deliberations of the court-martial on the issue of voluntariness. Prompted in part by the Supreme Court's decision in *Stein v. New York*,[88] the Army has recommended that its law officers instruct the court members that voluntariness must be shown *beyond a reasonable doubt*.[89] Shortly thereafter, however, an Army board

848, 852 (2d Cir. 1951), *cert. denied*, 343 U.S. 946 (1952); Patterson v. United States, 183 F.2d 687 (5th Cir. 1950); McAffee v. United States, 111 F.2d 199, 201 (D.C. Cir.), *cert. denied*, 310 U.S. 643 (1940). Resubmission unnecessary or incorrect: Pon Wing Quong v. United States, 111 F.2d 751, 757 (9th Cir. 1940); Murphy v. United States, 285 Fed. 801 (7th Cir.), *cert. denied*, 261 U.S. 617 (1923); Harrold v. Territory of Oklahoma, 169 Fed. 47, 53-54 (8th Cir. 1909). *But cf.* Litton v. United States, 177 F.2d 416, 421-22 (8th Cir. 1949). Some of the cases fail to distinguish clearly between voluntariness and credibility. *E.g.*, Lewis v. United States, 74 F.2d 173, 176 (9th Cir. 1934).

84. United States v. Smith, 3 USCMA 680, 684, 14 CMR 98, 102 (1954); United States v. Davis, 2 USCMA 505, 512-13, 10 CMR 3, 10-11 (1953). There is federal authority in support of this view. Iva Ikuko Toguri D'Acquino v. United States, 192 F.2d 338, 356 (9th Cir. 1951); Williams v. United States, 189 F.2d 693 (D.C. Cir. 1951). See also note 82 *supra*.

85. *See* United States v. Gibson, 3 USCMA 746, 764-67, 14 CMR 164, 182-85 (1954) (concurring opinion). His views on this question may have been influenced by his service on the Supreme Court of Utah, which in 1943 adopted the procedure advocated by Wigmore. State v. Crank, 105 Utah 332, 142 P.2d 178 (1943). See also State v. Mares, 113 Utah 225, 192 P.2d 861 (1948).

86. See pp. 29-30, *supra*. The Army has adopted the view that a disputed Article 31(b) violation must be resubmitted to the court. See Department of the Army Pamphlet, *supra* note 72, app. XVII.

87. *See* United States v. Hernandez, 4 USCMA 465, 469, 16 CMR 39, 43 (1954) (concurring opinion).

88. 346 U.S. 156 (1953).

89. See 1953 JAG CHRONICLE 237. The recommendation has since been incorporated in Department of the Army Pamphlet, *supra* note 72, app. XVII.

of review disagreed with this recommendation and held that the instruction need not include any reference to a standard of proof.[90] A review of the federal cases discloses that explicit holdings on this point are almost nonexistent. In practice, the issue is generally submitted to the jury with the simple admonition to disregard the confession if they find that it was involuntary.[91] In a few instances, the reasonable doubt test has been incorporated in the instructions given by the district judge.[92]

The Army's recommended instruction seems desirable on policy grounds. Appraised realistically, a confession which is accepted as voluntary by the court members will effectively seal the accused's fate in a case where it constitutes the only evidence of complicity in a crime which has clearly been committed. Indeed, if the court members find that the confession was made voluntarily, their oath virtually obligates them to return a finding of guilty. Accordingly, any lesser standard would, as a practical matter, be inconsistent with the reasonable doubt yardstick for determining the ultimate issue of guilt or innocence. If the law officer fails to prescribe any standard, it is quite possible that some members of the court will conclude not only that a looser standard than reasonable doubt is to be used, but also that the burden is on the accused, as the complaining party, to establish involuntariness.[93] The accused's substantial rights may thus be eroded by vague and unhelpful instructions.

SCOPE OF REVIEW EXERCISED BY THE COURT OF MILITARY APPEALS

By statute, the reviewing authority of the Court of Military Appeals is limited to questions of law.[94] However, in confession cases involving a claim that basic constitutional rights have been infringed, the Supreme Court has, after some travail, finally held that it will reserve the right to draw its own inferences from the undisputed facts relating to the voluntariness of the confession, although it will not go further

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The Supreme Court's opinion in the *Stein* case did not, however, intimate that the resubmission procedure used in New York would have fallen short of due process requirements if the issue of voluntariness had heen submitted under some lesser standard than reasonable doubt. The Army's recommendation was principally based on policy considerations plus an abundance of caution.

90. CM 363294, Moses (Reh), 14 CMR 278, *pet. for rev. denied*, 15 CMR— (1954).

91. See notes 82 and 83 *supra;* Meltzer, *Involuntary Confessions: The Allocation of Responsibility between Judge and Jury*, 21 U. OF CHI. L. REV. 317, 324-25 (1954).

92. See Mora v. United States, 190 F.2d 749, 752 (5th Cir. 1951); Patterson v. United States, 183 F.2d 687 (5th Cir. 1950).

93. The Court of Military Appeals has noted the possible confusion which may result where the law officer fails to instruct the court that it must acquit unless convinced that the accused was sane *beyond a reasonable doubt.* United States v. Burns, 2 USCMA 400, 402, 9 CMR 30, 32 (1953).

94. UCMJ art. 67(d), 50 U.S.C.A. § 654 (1951).

and weigh evidence or otherwise resolve disputed factual issues.[95] Under the Supreme Court's former, more passive approach, it would not disturb the finding of voluntariness by the triers of fact if they could reasonably have drawn different inferences from the undisputed testimony.[96] It is noteworthy that the Court's jurisdiction to draw its own inferences has been asserted in cases arising in the state courts. There has been some slight suggestion that, in view of its broad supervisory powers over the federal courts, the Court may exercise an even more extensive scope of review over confessions admitted in federal criminal cases.[97]

The Court of Military Appeals occupies a position in the military judicial system which is in many respects similar to that of the Supreme Court *vis-à-vis* the lower federal courts. It seems that, in providing for a civilian court, Congress intended that a leavening influence would be brought to bear upon the administration of military justice,[98] and the court itself has apparently recognized its general supervisory powers.[99] Accordingly, one would suppose that it would not abdicate any reviewing authority which it might properly assert in cases dealing with alleged violations of the important rights secured by Article 31. Yet surprisingly enough, the court seems to have unnecessarily narrowed its powers to review the voluntariness of confessions.

The court's position was clearly stated in *United States v. Webb*,[100] which involved a factual dispute concerning an unlawful inducement allegedly offered by an Army CID investigator. After rejecting the accused's contentions in this connection, the court stated:

> "To fulfill our appellate responsibility, it is certainly incumbent on us to review the circumstances surrounding the making of the allegedly involuntary statement. However, where there is conflict in the evidence as to whether imputed improper acts actually occurred, *or where conceded facts reasonably permit varying inferences,* the . . . law officer—that is, the 'judge' of the court-martial—is not only better equipped for the purpose, but labors under a legal duty to weigh the evidence and to determine whether the confession is, in fact, admissible. Indeed, we must accept his resolution of the question of admissibility when it is supported by substantial evidence, *regardless of whether we as individual lawyers might resolve the contro-*

95. *E.g.*, Leyra v. Denno, 347 U.S. 556 (1954); Stroble v. California, 343 U.S. 181, 190 (1952); Haley v. Ohio, 332 U.S. 596, 597-98 (1948).

96. *E.g.*, Lyons v. Oklahoma, 322 U.S. 596, 602-3 (1944).

97. *See* Stein v. New York, 346 U.S. 156, 187-88, 190 n. 35 (1953); Leyra v. Denno, 347 U.S. 556, 589 (dissenting opinion).

98. See *Senate Hearings, supra* note 18, at 48-49.

99. *See* United States v. Woods and Duffer, 2 USCMA 203, 206, 8 CMR 3, 6 (1953) (concurring opinion). The concept of "general prejudice," requiring automatic reversal of a conviction where there has been a failure to conform to certain procedural innovations of the Code, seems based in large part upon the Court's supervisory powers. See pp. 47-48, *infra.*

100. 1 USCMA 219, 2 CMR 125 (1952).

verted question otherwise or draw other inferences from the facts."[101] (Emphasis added).

The court did not mention the decisions of the Supreme Court which announce a contrary rule with respect to the power to draw inferences from undisputed facts.

The more recent *Hernandez* case[102] represents a logical extension of the views expressed in *Webb*. In order to understand the holding in *Hernandez,* it is necessary to advert briefly to the provisions of the Code which define the powers of service boards of review. Article 66(c) provides that a board of review "shall affirm only such findings of guilty . . . as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." This Article goes on to authorize boards of review to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." Thus the powers granted by the Code far exceed those normally exercised by appellate agencies; in effect, a board of review may retry the entire case on the merits.

The *Hernandez* case involved an Army private of Puerto Rican extraction who was convicted of raping a German girl. The issue presented to the Court of Military Appeals was whether the accused's confession had been obtained in violation of Article 31(b) and therefore improperly admitted in evidence. The initial interrogation of the accused was in the presence of the accused's company commander who testified that the interrogator, a CID sergeant, gave no warning at that time. The accused seemed "surprised and shocked" and stated that he thought the girl was making a false accusation. He did not make any other statement during that interrogation. Three days later, the CID sergeant conducted a second interrogation at which only the accused and he were present. At this interrogation, the accused made the confession which was received in evidence at his trial. The CID sergeant testified that, before interrogating the accused, he had "read and explained" Article 31 to him; the accused, however, testified that he had not been warned. The sergeant admitted that he had used "his own words" in writing out the accused's oral confession, and the accused testified that he did not understand many of the words contained in the written confession, as for example, "sexual intercourse." Impartial defense witnesses testified that the accused was eager "to do what you ask of him and please his su-

101. *Id.* at 222, 2 CMR at 128. For similar statements, see United States v. Sapp, 1 USCMA 100, 102, 2 CMR 6, 8 (1952), and United States v. Monge, 1 USCMA 95, 98, 2 CMR 1, 4 (1952). The *Monge* case is criticized in 5 VAND. L. REV. 640 (1952), and defended in McNiece and Thornton, *supra* note 2, at 168-69.

102. United States v. Hernandez, 4 USCMA 465, 16 CMR 39 (1954).

periors" and that the accused's reading and conversational level was that of a nine- or ten-year-old child.

It will be noted that this evidence raised a disputed issue of fact as to whether the accused had been warned at all. But a second issue was whether the accused had *understood* the warning. As to this, the facts were undisputed; it was merely a matter of drawing the inferences from these facts. An Army board of review held, in the exercise of its fact-finding powers, that the accused did not understand his rights under Article 31 and, accordingly, that his confession should not have been admitted in evidence.[103] Under the circumstances the board's conclusion seems justified and the Court of Military Appeals affirmed. However, the court apparently thought that it was powerless to do otherwise, for it stated, "Since there is substantial evidence to support this finding by the board of review, it is binding upon this Court."[104]

The court's rejection of the more liberal federal rule can have important consequences in cases involving a substantial period of confinement accompanied by protracted periods of interrogation, denial of visitors, and the like. Although such intangible factors will normally permit different inferences as to voluntariness, the court's self-imposed restriction upon its reviewing authority does not readily lend itself to the close supervision of police practices in the military.

Involuntary Confessions and the Harmless Error Rule

Article 59(a) of the Code sets forth the "harmless error" rule to be applied in trials by court-martial. Under Article 59(a), a conviction may not be reversed unless the error materially prejudiced the substantial rights of the accused. Although Article 59(a) appears to announce a rule of general application, it is also apparent that the constitutional overtones of Article 31 make adherence to its provisions particularly important. The question thus arises: What corrective action by appellate reviewing authorities is necessary where a confession obtained in violation of Article 31 has been admitted in evidence before the court-martial? To put this question in the proper perspective, it will be helpful to consider briefly the federal rule and the military precedents developed under the Articles of War.

The federal rule. Until the recent *Stein* case,[105] decisions of the Supreme Court appeared to stand for the proposition that it would automatically reverse a conviction where a confession obtained from the accused by coercion had been admitted in evidence against him.[106]

103. CM 365300, Hernandez, 13 CMR 339 (1953).
104. 4 USCMA at 468, 16 CMR at 42.
105. Stein v. New York, 346 U.S. 156 (1953). For a thorough analysis of the *Stein* case, see Meltzer, *supra* note 91, at 339 *et seq.*
106. *E.g.*, Stroble v. California, 343 U.S. 181, 190 (1952); Haley v. Ohio, 332 U.S. 596, 597-98 (1948); Malinski v. New York, 324 U.S. 401, 404 (1945).

Those decisions indicated clearly that the harmless error rule[107] was not applicable. Although not necessary to its decision in *Stein*, the Court nevertheless attempted to distinguish the earlier automatic reversal cases and thus cast some doubt on their current validity. The *Stein* case may reflect a new trend in the Court's attitude toward involuntary confessions, but it seems doubtful whether the Court is now prepared to overturn the rule of automatic reversal by permitting a conviction to stand if the record contains compelling evidence, apart from the tainted confession, to support the conviction.[108]

The military rule under the Articles of War. In the Army, the relationship of the harmless error rule to involuntary confessions was well settled at the time the Uniform Code was enacted. In cases involving the reception in evidence of a confession which was the product of actual duress, the accused's conviction was reversed regardless of the other evidence of guilt.[109] These holdings were based on the automatic reversal rule announced in decisions of the Supreme Court. However, a contrary result was reached where there was merely a failure to advise the accused of his rights, as required by the 1928 *Manual* or, later, by the amendment to Article of War 24. In those cases, boards of review analyzed the evidence of guilt *aliunde* the improperly admitted confession and reversed only if such evidence was not "compelling."[110]

Article of War 24 expressly excluded from evidence those confessions which were obtained by coercion or unlawful influence. It was silent as to the disposition of confessions obtained in violation of its warning requirement. Thus it might be argued that, for purposes of measuring the gravity of the error, a distinction should be drawn between a failure to warn and actual coercion or unlawful influence. Article 31(d) of the Code, however, does not provide any apparent basis for such a distinction. Coerced confessions, failures to warn, and violations of the privilege against self-incrimination are all lumped together. Purely as a matter of statutory construction, it is difficult to contend that one type of violation of Article 31 should be

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107. See pp. 52-53, *infra*.

108. A federal district court has rejected the argument that *Stein* overruled the "automatic reversal" cases. Giron v. Cramer, 116 F. Supp. 92 (E.D. Wash. 1953). See also Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411, 425 (1954).

109. *E.g.*, CM 337333, Burton (BR), 4 BR-JC 43, 53 (1949); CM 329162, Sliger, 77 BR 361, 364-67 (1948); CM 328548, Yavonikis, 77 BR 131, 140-42 (1948). A like result was reached in cases involving a violation of the privilege against self-incrimination at the court-martial. *E.g.*, CM 346594, Mardiss, 1 CMR 283 (1951); CM 344026, Swinehart (BR), 10 BR-JC 11, 13 (1950); CM 343838, Smith (BR), 9 BR-JC 347 (1950); CM 326450, Baez, 75 BR 231 (1947). It is to be noted that Article of War 37 contained a harmless error rule similar to that in Article 59(a) of the Code.

110. *E.g.*, CM 342409, Woodall (BR), 8 BR-JC 69, 79 (1950); CM 336405, Jonson (BR), 3 BR-JC 69, 75 (1949).

treated differently from another. But on a more pragmatic level, there are several countervailing considerations in the case of a violation of Article 31(b). First, a failure to warn does not ordinarily affect the trustworthiness of the confession. Second, the interrogator's failure to warn will frequently be the result of inadvertence or ignorance rather than a deliberate flouting of the accused's rights in order to extract a confession at all costs. Finally, a mere failure to warn is a far cry from police brutality and similar conduct considered repugnant to civilized society.

Decisions of the Court of Military Appeals. Since the enactment of the Uniform Code, there have been very few cases involving confessions obtained by physical coercion, unlawful influence, or unlawful inducement. In fact, a case where such means have been used is yet to reach the Court of Military Appeals; instead, it has been required to reverse a conviction only because of a failure to warn or a violation of the privilege against self-incrimination.

As previously indicated, more than one consideration may be weighed in determining appellate disposition of an Article 31(b) violation. However, in the *Wilson and Harvey* case, the court needed only two sentences to adopt its version of the automatic reversal rule:

> "Where—as here—an element of officiality attended the questioning which produced the admissions, there is more than a violation of the naked rule of Article 31(b) . . .; there is an abridgement of the policy underlying the Article which must—we think—be regarded as 'so overwhelmingly important in the scheme of military justice as to elevate it to the level of a "creative and indwelling principle". . . .' To put the matter otherwise, we must and do regard a departure from the clear mandate of the Article as generally and inherently prejudicial."[111]

Oddly enough, after declaring in these bold and unequivocal terms that violations of Article 31(b) required invocation of the "general prejudice" doctrine, the court took considerable pains to show that the erroneuos admission of the incriminating statements amounted to "specific prejudice," *i.e.*, that the error was not harmless within Article 59(a) of the Code.[112] This dualistic approach also appears in a subsequent Article 31(b) case decided by the court.[113]

The "general prejudice" holding in *Wilson and Harvey* came as a distinct shock to the military, overturning, as it did, established precedent under the Articles of War. Most service boards of review assumed that the court meant what it said and therefore embarked upon a course of reversing any conviction where an incriminating

111. United States v. Wilson and Harvey, 2 USCMA 248, 255, 8 CMR 48, 55 (1953). For a discussion of the concept of "general prejudice," see Wurfel, *"Military Due Process": What Is It?*, 6 VAND. L. REV. 251, 281-85 (1953).
112. 2 USCMA at 255-56, 8 CMR at 55-56.
113. See United States v. Williams, 2 USCMA 430, 9 CMR 60 (1953).

statement apparently obtained in violation of Article 31(b) had been admitted in evidence.[114] Other boards of review found ways of distinguishing *Wilson and Harvey*.[115]

The court evidently recognized the imperative need for clarifying the scope of its "general prejudice" doctrine, and recent cases have attempted to confine that doctrine within practicable bounds. The court's attempts have been rationalized in two ways: first, that the evidence does not adequately show a violation of Article 31(b), and second, that by failing to object at the court-martial the accused waives his right to urge the alleged Article 31(b) violation on appeal.

The *Seymour*[116] and *Josey*[117] cases illustrate the first approach. In *Seymour,* an admission obtained from the accused during an official investigation had been received in evidence. However, the accused had not objected and the evidence did not show whether he had previously been warned of his rights. The *Manual* provides that the mere fact that an admission, as distinguished from a confession, was obtained during the course of an official investigation does not amount to an "indication" of involuntariness.[118] Thus the prosecution need not make an affirmative showing of voluntariness, in the absence of an objection by the accused. The court upheld the *Manual's* procedural rule and, there being nothing in the record to show whether Article 31(b) had in fact been violated, found the general prejudice doctrine to be inapplicable. The subsequent *Josey* case enlarged on this reasoning. There, the accused's incriminating statements had been made under circumstances indicating that they had been prompted by an illegal inducement offered by a CID investigator. Accordingly, the *Manual's* rule required an affirmative showing of voluntariness. The prosecution had failed to make this showing, but the accused had not objected to the admission of these statements. The court held that the evidence of record showed no more than an "indication" of involuntariness and that a mere violation of the procedural requirements of the *Manual* was not a sufficient predicate for the general prejudice doctrine. This being so, the overwhelming evidence of guilt apart from the incriminating statements required affirmance of the accused's conviction.

The second limitation of *Wilson and Harvey* is based on the principle of waiver resulting from a failure to object to the admission in evidence of the incriminating statement. This principle would not,

114. *E.g.,* CM 367761, Cox, 13 CMR 414 (1953); CM 365619, Dickerson, 12 CMR 512 (1953); CM 360348, Arista, 9 CMR 359 (1953); ACM 6745, Calandrino, 12 CMR 689 (1953).
115. ACM 6499, Danilson, 11 CMR 692, *pet. for rev. denied,* 12 CMR 204 (1953); ACM S-6031, Ketchum, 10 CMR 930 (1953).
116. United States v. Seymour, 3 USCMA 401, 12 CMR 157 (1953).
117. United States v. Josey, 3 USCMA 767, 14 CMR 185 (1954).
118. MCM 1951, ¶ 140*a*. See pp. 39-40, *supra.*

of course, seem startling to the civilian lawyer. However, the 1951 *Manual* provides that: "[A] mere failure to object does not amount to a waiver except as otherwise stated or indicated in this manual."[119] A similar statement appeared in the 1928 *Manual.*[120] In prosecutions under the Articles of War, the accused was frequently represented by lay counsel whose ignorance or inexperience might jeopardize the accused's substantial rights. The waiver rule in the 1928 *Manual* was thus intended to assure that boards of review would not be precluded from considering errors committed at the court-martial. It did not purport to *require* the appellate reviewing authorities to consider such errors. Under the Uniform Code, with its requirement of legally qualified counsel, the 1951 *Manual's* continuation of the former waiver rule represents, to some extent, an anachronism in general court-martial cases. The Court of Military Appeals at first indicated that it would consider any error committed at the court-martial unless the accused or his counsel had taken some affirmative action which amounted to a waiver. Experience showed that this rule did not lend itself to the orderly administration of military justice, and the court has relied increasingly upon the stricter waiver rule commonly applied before civilian appellate courts. In Article 31(b) cases, the court now seems committed to the general rule that the accused will not be permitted to raise the alleged Article 31(b) violation before it unless an appropriate objection was interposed at the court-martial.[121] However, the court has stated that it will notice the violation where necessary to do "substantial justice" or to prevent a "miscarriage of justice."[122]

The future of "general prejudice." The Court of Military Appeals has not yet indicated that it is prepared to overrule its general prejudice doctrine in Article 31(b) cases. On the contrary, the various

119. MCM 1951, ¶ 154*d*.
120. MCM 1928, ¶ 126*c*.
121. United States v. Henry, 4 USCMA 158, 15 CMR 158 (1954); United States v. Fisher, 4 USCMA 152, 15 CMR 152 (1954). Chief Judge Quinn has been the chief proponent of this view, with the somewhat grudging concurrence of Judge Latimer who has never acquiesced in the general prejudice doctrine. Judge Brosman at first vigorously dissented from the application of any waiver theory based on a mere failure to object, but he has since joined the majority of the court. See his self-styled "swan song" in United States v. Clark, 4 USCMA 650, 653, 16 CMR 224, 227 (1954) (concurring opinion).
122. United States v. Fisher, 4 USCMA 152, 156, 15 CMR 152, 156 (1954). Whether "substantial justice" can be done where the erroneous admission of incriminating statements has specifically prejudiced the accused remains to be seen. In this connection it may be noted that in *Wilson and Harvey* the defense did not object to the admission of the incriminating replies made by the accused. There, one of the witnesses identified Wilson at the court-martial but could not identify Harvey. The prosecution did not introduce any other competent evidence connecting either accused with the crime. As to the accused Harvey, reversal was clearly demanded because of the insufficiency of the evidence. As to the accused Wilson, however, it is arguable that "substantial justice" might not require reversal although the error in admitting his reply would not seem to be harmless. The court directed a rehearing as to both accused without elaborating on this question.

limitations on the apparent scope of the doctrine have been based upon the assumption that it retains its vitality where the accused has laid a proper foundation. Since the court has never expressly overruled any of its cases,[123] it is perhaps doubtful whether such drastic action will be taken in this important area. However, the recent holding in *United States v. Morris*,[124] involving the related field of self-incrimination under Article 31(a) of the Code, is suggestive of still another limitation which may be grafted on the general prejudice doctrine. Prior to the *Morris* decision, it had seemed reasonably clear that the court would automatically reverse where the accused's privilege against self-incrimination had been violated.[125] Perhaps because of the constitutional derivation of Article 31(a), the court did not find it necessary to resort to the general prejudice doctrine in these cases. Instead, it contented itself with statements such as, "Material prejudice results as a matter of law" from a violation of the accused's privilege.[126] Putting conceptual distinctions aside, however, the court's disposition of both Article 31(a) and Article 31(b) violations was substantially the same.

The facts in the *Morris* case were somewhat unusual. A general court-martial had found the accused guilty of several offenses, including the larceny of a wristwatch which he had subsequently pawned. His confession of the larceny was offered in evidence by the prosecution, and the accused took the stand for the limited purpose of testifying as to its voluntariness. He testified that FBI agents had "talked [him] into making the statement," but on cross-examination he admitted that he had been warned of his rights and that threats of force had not been used. The law officer thereafter received in evidence the confession, on which the accused had signed his name eight times. A pawn ticket purportedly bearing the accused's signature was also admitted in evidence. Upon the request of the prosecution, the law officer in open court required the accused to write his signature five times on a blank sheet of paper. At the time, this action was expressly authorized by the 1951 *Manual*.[127] Subsequently, however, the Court of Military Appeals held that handwriting specimens were

123. This is not to intimate that the court has not been required to modify some of its prior decisions. At times, drastic modifications appear to have been accomplished by the expedient of overlooking inconsistent holdings. *Compare, e.g.*, United States v. Wycliff, 3 USCMA 38, 11 CMR 38 (1953), *and* United States v. Clark, 2 USCMA 437, 9 CMR 67 (1953), *with* United States v. Tubbs, 1 USCMA 588, 5 CMR 16 (1952).

124. 4 USCMA 209, 15 CMR 209 (1954).

125. *E.g.*, United States v. Greer, 3 USCMA 576, 13 CMR 132 (1953). The generally accepted interpretation of the *Greer* holding appears in CM 366858, Rice (Recon), 14 CMR 379 (1954).

126. *E.g.*, United States v. Greer, 3 USCMA 576, 579, 13 CMR 132, 135 (1953).

127. MCM 1951, ¶ 150b.

protected by Article 31(a) and that the *Manual's* provision in this connection was void.[128]

An Army board of review reversed the accused's conviction of larceny on the basis of the general prejudice doctrine, but it affirmed the other findings of guilty and the sentence.[129] The Court of Military Appeals, however, held that the accused's conviction of larceny should have been affirmed, apparently relying on two separate grounds. First, the accused's ill-fated attempt to show that his confession had been obtained by unlawful means was turned against him. The court stated that, as a result of this attempt, "it is distinctly arguable that [the accused] is in no position to take advantage of the violation of [the privilege against self-incrimination] found here."[130] Although not articulated in the opinion, the court may have thought that the accused judicially admitted the genuineness of the signatures appearing in his confession. Otherwise, it is hard to perceive the logical relationship between the accused's testimony for a limited purpose and the subsequent violation of his privilege.

The second, and probably the most important, ground[131] for the court's decision was the cumulative nature of the handwriting evidence obtained in violation of the accused's privilege. The court reasoned that, since the confession contained eight specimens of the accused's signature, the five handwriting exemplars required by the law officer constituted "not merely cumulative evidence, but repetitious evidence as well."[132] The court observed that it might reverse where the record reflected a deliberate invasion of the accused's privilege, but this was not the case here and the court could not "discern the presence of any sort of purpose which would be served by a retrial."[133]

Although the opinion in *Morris* was strictly confined to the factual context of that case, the cumulative evidence test could serve a salutary function in some Article 31(b) cases. Frequently, the accused's admission of one isolated fact tending to incriminate him will be confirmed by a mass of other undisputed testimony. Under such circumstances the cumulative evidence test might prevent a reversal

128. United States v. Eggers, 3 USCMA 191, 11 CMR 191 (1953); United States v. Rosato, *supra* note 15.
129. CM 365623, Morris, 12 CMR 510 (1953).
130. 4 USCMA at 213, 15 CMR at 213.
131. Although the court described its first ground merely as "distinctly arguable," the next sentence stated that it was not necessary to base the decision "entirely" upon that ground.
132. 4 USCMA at 213, 15 CMR at 213.
133. *Ibid.* As a matter of fact, it seems obvious that there would not have been any retrial of this case since the board of review had affirmed the accused's sentence on the basis of findings of guilty not contested before the Court of Military Appeals. The Army apparently took the opportunity to obtain an advisory decision by the court on facts favorable to the Government.

of the conviction simply because the accused's incriminating admission was obtained in violation of Article 31(b) and therefore erroneously received in evidence. A full confession, on the other hand, is normally a most important factor in the case. Nevertheless, it might be described as cumulative in certain instances, as where the accused had made several other confessions which were properly admitted in evidence or where the accused had judicially confessed before the court-martial in the hope of obtaining a lenient sentence.[134] There does not seem to be any substantial reason to distinguish between violations of Article 31(a) and Article 31(b) in this respect. We have seen that Article 31(a) is not limited to judicial proceedings but may be violated by compelling the accused to incriminate himself during any official interrogation. As a result, the same incriminating statement might be obtained under circumstances showing that both provisions of Article 31 had been violated.[135] But evidence obtained by failing to warn the accused of his rights is certainly no more tainted than evidence obtained through compelled self-incrimination. If anything, the fact that a basic constitutional principle is embodied in Article 31(a) would seem to render its infringement somewhat more serious than a failure to warn.

One other matter deserves brief mention. The cumulative evidence test adopted in *Morris* appears to represent an uneasy compromise between the general prejudice doctrine and the harmless error rule in Article 59(a) of the Code. In this connection, the court stated:

> "Application of the so-called compelling evidence rule involves, in a real sense, an evaluation of testimony and other evidence. However, no evaluation whatever is required to support the conclusion that the Government's case with eight signatures would be no less compelling than its case with thirteen. Indeed, within any practical context, it would in both instances be identical."[136]

The "compelling evidence" rule, referred to by the court, is merely another expression for the military harmless error rule. As stated in the 1951 *Manual,* that rule differs substantially from the interpretation of the federal harmless error rule[137] in *Kotteakos v. United*

134. Judicial confessions are not unusual in court-martial practice, and the 1951 *Manual* contemplates that matter in extenuation and mitigation of the sentence may be introduced prior to findings of guilt or innocence. See MCM 1951, ¶ 137. The court has already indicated that a judicial confession will preclude the accused from raising an alleged Article 31(a) violation before it. United States v. Hatchett, 2 USCMA 482, 9 CMR 112 (1953). *But cf.* CM 369937, Trojanowski, 15 CMR — (1954).

135. See United States v. Rosato, *supra* note 15, and United States v. Welch, *supra* note 15.

136. 4 USCMA at 213, 15 CMR at 213.

137. See FED. R. CRIM. P. 52(a).

States.[138] In the *Kotteakos* case, the Supreme Court held that the significant consideration is whether the error actually had any substantial influence upon the verdict of guilty returned by the jury, not whether the evidence unaffected by the error clearly establishes guilt. However, the *Manual* provides that the test of prejudicial error is whether "the competent evidence of record is of such quantity and quality that a court of reasonable and conscientious men would have made the same finding had the error not been committed."[139] In line with this test, service boards of review generally proceed upon the assumption that, if the other evidence of record "compels" a conclusion of guilt, affirmance of the accused's conviction is dictated.[140] The military harmless error rule seems to recognize implicitly that the findings of guilty returned by the court-martial do not carry the same weight as a jury's verdict, since boards of review have unusually broad powers to redetermine the facts.[141] Nevertheless, it should be noted that in Article 31(b) cases this rule tends to ignore the fact that the court members may well have been influenced by the otherwise voluntary confession made by the accused, regardless of the other compelling evidence of guilt. Moreover, by focusing its attention upon the evidence in the record of trial, the rule does not contemplate a practical appraisal of the harm actually done the accused at the court-martial. The *Morris* case itself illustrates this point. There, the accused's confession containing the eight signatures was clearly not admitted for the purpose of establishing his handwriting; otherwise, there would have been little reason for the prosecution to request additional exemplars. It does not appear that the law officer instructed the court members that they might compare the eight signatures in the confession with the signature on the pawn ticket. Accordingly, it seems quite probable that the comparison was actually made by using the five exemplars obtained from the accused in the very presence of the court members for the sole purpose of proving his handwriting.

138. 328 U.S. 750 (1946). Although *Kotteakos* was decided under the predecessor of Rule 52(a) of the Federal Rules of Criminal Procedure, that Rule was intended to be a restatement of existing law.

139. MCM 1951, ¶ 87c.

140. *E.g.*, ACM 6499, Danilson, 11 CMR 692, 712, *pet. for rev. denied*, 12 CMR 204 (1953); CM 331849, Estrada, 80 BR 183, 196 (1948). In several cases which did not involve violations of Article 31, the Court of Military Appeals seemed to follow the federal harmless error rule but did not discuss the differing military rule. *See, e.g.*, United States v. Barcomb, 2 USCMA 92, 6 CMR 92 (1952); United States v. Kellum, 1 USCMA 482, 486, 4 CMR 74, 78 (1952). *But cf.* United States v. Fleming, 3 USCMA 461, 465, 13 CMR 17, 21 (1953); United States v. Doyle, 1 USCMA 545, 550, 4 CMR 137, 142 (1952).

141. See pp. 43-44, *supra.*

CONCLUSION

This brief survey should make it apparent that the military law of confessions is still in an evolutionary stage of its development. In little more than three years, the Court of Military Appeals has been confronted with many problems requiring delicate adjustment of the legitimate demands of military law enforcement authorities and the important rights secured by Article 31 of the Code. Although some of its decisions seem open to criticism, the court has made a diligent and conscientious effort to achieve a fair balance between these conflicting considerations.