DRUG ABUSE, COURTS-MARTIAL, AND RANDOM URINALYSIS—AN UNWORKABLE COMBINATION

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Despite strong attempts to curb the illegal use of drugs in the armed forces, the problem of drug abuse persists. Over the last few years, military courts have prosecuted drug abusers with especial vigor. Often the only evidence for the government consists of scientific analysis of a urine sample obtained from the accused serviceperson.

This Essay concerns prosecution for drug abuse based solely on a random urinalysis, unsupported by any objective symptoms of the accused or admissible evidence from other sources. The inquiry focuses on the difficulty inherent in pitting an uncorroborated scientific test against the word of an accused. The dilemma is compounded by repeatedly revealed flaws in the massive urinalysis screening program and by the stringent requirement that the government prove any criminal charge beyond a reasonable doubt.

Under such circumstances, the criminal justice system should not be used to combat military drug abuse. The problem is that a questionable random urinalysis program is employed in an indiscriminate and unbridled manner in a legal setting which demands a very high level of certainty, and which exacts drastic penalties upon conviction. The courts have apparently accepted the constitutionality of this unsettling procedure. On practical and jurisprudential grounds, however, the fight against drug abuse should be conducted in a manner more respectful of the limits of our criminal justice system and less draconian to suspected drug abusers.

I. NATURE OF THE DRUG ABUSE PROBLEM

The use of illegal drugs is apparently a chronic problem in the armed forces of this nation.[1] Over the past few years, more than 375,000 positive

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1. *See, e.g.*, United States v. McFarland, 49 C.M.R. 834, 836 (A.C.M.R. 1975) (conviction for disobedience of an order to provide a urine sample).

urinalysis results testify to a high level of abuse.[2] One federal appellate court has concluded that this "increased incidence of drug abuse in the Armed Forces poses a substantial threat to the readiness and efficiency of our military forces."[3] In a recent decision,[4] the Navy and Marine Corps Court of Military Review was more emphatic:

> While our position, removed as it is from the operational level of command, insulates us from having to *personally* confront the drug problem in the military, we can, by virtue of our review role in the military justice system, *bear* witness to the manner and extreme in which it undermines good order, discipline, and the welfare of our service. We, in fact, would be blind not to recognize the epidemic proportions to which the drug culture has permeated our military community and the cavalier manner in which it, at times, appears to be accepted as an incident of military life.[5]

Since the defense establishment will tolerate absolutely no unauthorized use of controlled substances,[6] it is difficult to gauge the actual impact of drug use on the readiness and overall health of the armed forces. For example, almost any trace of an illicit drug in a servicemember's body is labelled "abuse," without ascertaining if the individual's performance has been impaired in any fashion. The ready accessibility of drugs near military installations and ports of call, and relaxed civilian attitudes on the matter enhance the attractiveness of drug use. When these aspects are coupled with the frequent tedium and loneliness of military duty and the inexperience of many young servicepeople, some level of illegal drug use may be inevitable.[7]

In the Korean War era, morphine was the drug of choice among servicemembers.[8] During the Vietnam Conflict, there was "commonplace usage of heroin and marijuana."[9] The situation has improved,[10] although both

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2. *Poor Military Drug Tests Said to Hamper Drug War*, L.A. Daily J., Aug. 28, 1984, at 5.

3. Committee for GI Rights v. Callaway, 518 F.2d 466, 476 (D.C. Cir. 1975) (constitutionality of the Army's drug abuse prevention plan upheld), *rev'g*, 370 F. Supp. 934 (D.D.C. 1974).

4. United States v. Wade, 15 M.J. 993 (N.M.C.M.R.) (writ of mandamus issued forcing military trial judge to admit urinalysis results into evidence), *rev'd on other grounds*, 16 M.J. 115 (C.M.A. 1983).

5. 15 M.J. at 1003. (emphasis in the original).

6. *See* the various Department of Defense directives set forth in United States v. Broady, 12 M.J. 963, (A.F.C.M.R. 1982) (Miller, J., concurring). The U.S. Navy position is set forth in no uncertain terms: "There will be 'Zero Tolerance' of drug and alcohol abuse." CHIEF OF NAVAL OPERATIONS INSTRUCTION (OPNAVINST) 5350.4, para. 6.a. (29 November 1982) [hereinafter cited as OPNAVINST 5350.4].

7. United States v. Trottier, 9 M.J. 337, 345-46, 350 (C.M.A. 1980).

8. *See infra* notes 34-39, 43-45, 47-54, 56, 58 & 60 and accompanying text. (Each case cited in these notes involved morphine use).

9. Harris, *'Dubious' Drug Tests May Have Forced Thousands From Service*, L.A. Times, Sept. 9, 1984, at CC4. Note the shift from morphine to marijuana and hallucinogenics revealed in cases cited *infra* notes 68-69, 81-86 & 88.

The problem in Vietnam was horrendous:

> The use of drugs was so widespread that, according to an official estimate made in 1971, nearly one-third of the troops were addicted to opium or heroin, and marijuana smoking had become routine . . . .
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> The growing rancor toward the United States among urban South Vietnamese was mirrored in the sense of futility that seeped through the ranks of the American armed forces, its most serious symptom a growing narcotics addiction, which one official study linked to "idleness, loneliness, anxiety, and frustration." The U.S. command in Saigon estimated that sixty-five thousand GIs were on drugs in 1970. Fred Hickey, a helicopter

the extent of the problem and its gravity are uncertain.[11] For the purposes of this Essay, the author generally assumes that drug abuse in the military is still a serious problem which must be dealt with by direct and special action.

II. Efforts to Curb Military Drug Abuse

The military has adopted several approaches to the drug problem. There are continuing educational and rehabilitative projects,[12] although there appears to be no accurate way to measure their effectiveness.[13] In addition, administrative sanctions may be employed against suspected drug abusers.[14] These devices range from an administrative discharge from military service under less than honorable circumstances,[15] to non-judicial punishments given by the servicemember's commanding officer.[16]

The armed forces have also utilized the traditional criminal law banning the possession and distribution of controlled substances,[17] in an effort to dry

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pilot at the time, later recalled that almost entire American units, including officers, were "doing heroin." "The majority of people were high all the time," he said. "For ten dollars you could get a vial of pure heroin the size of a cigarette butt, and you could get liquid opium, speed, acid, anything you wanted. You could trade a box of Tide for a carton of prepacked, prerolled marijuana cigarettes soaked in opium." The American military authorities introduced measures to halt the epidemic. "They harassed everybody," Hickey went on, "making them take urine tests any time, day or night. They had no regard for human dignity."

S. Karnow, Vietnam: A History 23, 631 (1983).

10. Harris, *supra* note 9, at CC3.

11. Dietrich, *Drug Test Flaws Give Sailors A Second Chance*, San Diego Tribune, Aug. 29, 1984, at B1.

12. For instance, the Navy programs include command evaluation and counseling through a trained Substance Abuse Coordinator. Residential rehabilitation programs are available for those formally identified as drug dependent and who require rehabilitation on a full-time, live-in basis, and "who in the opinion of their commanding officers, evidence potential for continued naval service." OPNAVINST, *supra* note 6, at encl. (6).

13. *See, e.g.*, Purcell, *Drug Use at Lowest in 3 Years*, Navy Times, Oct. 22, 1984, at 14. Evaluations of drug use seem to come from estimates from the Department of Defense, or from very small urinalysis samplings. For example, a July, 1984, urinalysis survey to determine overall Navy drug use only tested 1000 junior enlisted and 100 junior officer personnel at only two bases. *Id.*

14. Administrative sanctions are outlined in OPNAVINST *supra* note 6.

15. *See* Walters v. Secretary of Defense, 533 F. Supp. 1068, 1070 (D.D.C. 1982) (plaintiff unsuccessfully sought to upgrade his discharge from the United States Marine Corps), *rev'd*, 725 F.2d 107 (D.C. Cir. 1983):

> The drug abuse program involved in this proceeding was an enormous undertaking. It began in 1972, and within 14 months, the military had subjected servicemembers to 4,400,000 urinalyses. If the test indicated illegal use of drugs, the abusing servicemember was issued a less than honorable administrative discharge. Approximately 29,000 drug abusers, most of whom were identified through this program, were gleaned from the ranks of all branches of the military for drug abuse between 1970 and 1975 and were given less than honorable discharges.

533 F. Supp. at 1070. This program lasted until the decision in *United States v. Ruiz*, 23 U.S.C.M.A. at 183, 48 C.M.R. at 799. *See infra* notes 72-74 and accompanying text.

16. These "non-judicial" punishments can be quite severe. The Manual for Courts-Martial (1984) [hereinafter cited as M.C.M.] allows a commanding officer to impose various combinations of correctional custody, restriction, extra duties, reduction in pay grade and forfeitures of pay, among other penalties. *See generally* M.C.M. *supra*, part V, para.5. This system of non-judicial punishment is obviously open to abuse and can deny this serviceperson many basic trial rights. *See* Salisbury, *Nonjudicial Punishment Under Article 15 of the Uniform Code of Military Justice: Congressional Precept and Military Practice*, 19 San Diego L. Rev. 839 (1982).

17. M.C.M., *supra* note 15, at article 112a, proscribes the "wrongful use, possession, etc., of controlled substances" as defined in that Article and in Schedules I through V of the Controlled Substances Act of 1970, 21 U.S.C. § 812. Drug offenses were formally punished under Articles 134

up supply and thereby cut into use. Stiff sentences against "drug pushers" are regularly obtained,[18] but once again, the ultimate impact of the vigorous prosecution is unclear.[19] Perhaps the drastic measures are merely infusing an added caution into drug suppliers and driving users toward the abuse of substances not targeted by the present technology.[20] In the direct attack on use, the military establishment has implemented a large-scale random urinalysis program.

A. *The Random Urinalysis Program*

Under the present program, any servicemember may be forced to give a urine specimen as part of a random sampling. An entire military unit may be compelled to provide urine specimens in one coordinated operation. If less than all are to provide specimens, those who do give samples are chosen by random process, as by the last digit of their Social Security numbers, or by their birth month. Assuming compliance with the proper collection and processing procedures, the urinalysis results are admissible in courts-martial.[21]

The random tests are generally justified as "inspections" under Military Rule of Evidence 313.[22] These "inspections" purportedly determine the

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and 92 of the M.C.M. (1969) and the Uniform Code of Military Justice, 10 U.S.C. §§ 801-940. *See generally*, D. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 2-7 (1982).

18. *See, e.g.*, United States v. Zubko, 18 M.J. 378, 379 (C.M.A. 1984) (sentence for marijuana possession and distribution included confinement for 140 days and bad-conduct discharge); United States v. Mercer, 18 M.J. 644 (A.F.C.M.R. 1984) (three months' confinement for use, distribution and introduction of marijuana onto a military base).

19. *See supra* note 13 and accompanying text.

20. Prohibition and the amazing schemes it spawned to supply the public with alcohol come to mind. Interestingly, there is "increased alcohol abuse among the same groups that recorded the greatest drop in drug use." *DoD Plans Substance Abuse Survey*, Navy Times, Nov. 12, 1984, at 4. The change in the substances abused was discovered in the 1983 world-wide written survey conducted by the Department of Defense. *Id.* Drug users may simply be shifting to substances indetectable by the standard urinalysis screening tests. *See supra* note 9 and accompanying text, and *see infra* note 30.

21. *See* the procedures set forth in OPNAVINST *supra* note 6, at encl.(4). *See also* United States v. Lewis, 19 M.J. 869, 870 (A.F.C.M.R. 1985) (military trial judge suppresses urinalysis test results because of procedural and administrative errors in handling the sample).

22. The complete text of MIL. R. EVID. 313 follows:

Rule 313. *Inspections and inventories in the armed forces*

(a) *General rule.* Evidence obtained from inspections and inventories in the armed formes conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

(b) *Inspections.* An "inspection" is an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle. An inspection may include but is not limited to an examination to determine and to ensure that any or all of the following requirements are met: that the command is properly equipped, functioning properly, maintaining proper standards of readiness, sea or airworthiness, sanitation and cleanliness, and that personnel are present, fit, and ready for duty. An inspection also includes an examination to locate and confiscate unlawful weapons and other contraband. An order to produce body fluids, such as urine, is permissible in accordance with this rule. An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this rule. If a purpose of an examination is to locate weapons or contraband, and if: (1) the examination was directed immediately fol-

health, welfare, military fitness, good order, discipline and readiness of the targeted military units.[23] In theory, if the primary purpose of the random sampling is to obtain evidence for use in a court-martial or non-judicial disciplinary proceeding, the sampling is not an "inspection," and the urinalysis results will be excluded.[24] In practice, however, random sweeps are conducted precisely to ferret out drug users who will then be disciplined accordingly.[25] Disobedience of an order to provide a sample for a random sweep is itself a prosecutable offense under the Uniform Code of Military Justice.[26]

No probable cause is needed to conduct a random urinalysis sweep.[27] There need be no reasonable suspicion of drug use in the unit selected for the random sampling.[28] The officers in charge of the program may select a unit for any reason, so long as the sweep is not done as a *sub rosa* search for evidence.[29] It is unclear how the serviceperson who is forced to give a sample which comes up positive can establish that the original order for the random sweep was a mere subterfuge. That defense is, however, theoretically available.

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lowing a report of a specific offense in the unit, organization, installation, vessel, aircraft, or vehicle and was not previously scheduled; (2) specific individuals are selected for examination; or (3) persons examined are subjected to substantially different intrusions during the same examination, the prosecution must prove by clear and convincing evidence that the examination was an inspection within the meaning of this rule. Inspections shall be conducted in a reasonable fashion and shall comply with Mil. R. Evid. 312, if applicable. Inspections may utilize any reasonable natural or technological aid and may be conducted with or without notice to those inspected. Unlawful weapons, contraband, or other evidence of crime located during an inspection may be seized.

(c) *Inventories.* Unlawful weapons, contraband, or other evidence of crime discovered in the process of an inspection, the primary purpose of which is administrative in nature, may be seized. Inventories shall be conducted in a reasonable fashion and shall comply with Mil. R. Evid. 312, if applicable. An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inventory within the meaning of this rule.

However, the Court of Military Appeals prefers to call the random urinalysis valid under MIL. R. EVID. 314(k), the text of which follows:

Rule 314. *Searches not requiring probable cause* (k) *Other searches.* A search of a type not otherwise included in this rule and not requiring probable case under Mil. R. Evid. 315 may be conducted when permissible under the Constitution of the United States as applied to members of the armed forces.

Murray v. Haldeman, 16 M.J. 74, 82 (C.M.A. 1983). *See infra* notes 121-24 and accompanying text.

23. *See* MIL. R. EVID. 313(b); OPNAVINST *supra* note 6, at para. 6.b.

24. OPNAVINST *supra* note 6, at para. 6.b.

25. In United States v. Mitchell, 15 M.J. 654, *aff'd*, 15 M.J. 937 (N.M.C.M.R. 1983), the court discussed the general outcome, scope and procedures of a MIL. R. EVID. 313(b) random urinalysis "inspection." The results are overwhelmingly used to prosecute. *See, e.g.*, United States v. Hillman, 18 M.J. 638 (N.M.C.M.R. 1984); *Thousands of Military Drug Cases Reversed*, San Diego Union, Aug. 28, 1984, at B14; *Suit Challenging Urine Tests Settled Out of Court by Navy*, Navy Times, Oct. 22, 1984, at 14; Cooper, *Navy Drug Screening Lab Gets Director*, San Diego Union, July 1, 1984, at B10; Harris, *supra* note 9, at CC1, 3-4.

26. Depending on the circumtances, violation of an order to provide a urine sample will violate one of three separate articles under the UNIFORM CODE OF MILITARY JUSTICE (U.C.M.J.); art. 90 (disobedience of superior's order); art. 91 (disobedience of orders from a warrant, petty or noncommissioned officer, art. 92 (disobedience of orders from other sources). Prosecution for disobeying an order to provide a urine sample in a criminal case was allowed in United States v. Brints, 15 C.M.R. 818 (A.B.R. 1954). For a good general discussion of orders violations, *see* United States v. McLaughlin, 14 M.J. 908 (N.M.C.M.R. 1982).

27. MIL. R. EVID. 313(b) & 314(k). *See supra* note 22 and accompanying text.

28. MIL. R. EVID. 313(b) & 314(k).

29. *Id.*

The actual current mechanics of sampling and urinalysis are fairly straightforward:

> A service member provides a urine specimen with a witness present. The specimen is labelled by an identifying number and transported with other specimens from the same military unit to a laboratory, along with paper work detailing around-the-clock custody of the specimen en route.
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> A two-level testing process is then used to identify the presence of marijuana, cocaine, phencyclidine (PCP), opiates, amphetamines or barbituates. First, all specimens are screened on a radioimmunoassay test. Those that test positive for marijuana use are then analyzed a second time by gas chromatography, considered the most specific test method. Gas liquid chromatography is used to re-test the specimens that have shown positive signs for other drug groups.[30]

Military labs conduct the bulk of the tests, although some work is contracted to civilian firms.[31] The results are given in terms of billionths of a gram per milliliter of sample, with distinct cut-off levels for the various drugs tested.[32]

This article focuses on the utilization of urinalysis in the battle against military drug abuse. More specifically the primary concern is prosecution of military personnel for controlled substance abuse based solely on a positive random urinalysis test. Under current guidelines, an uncorroborated urinalysis is admissible in court when it is obtained during a bona fide "inspection." The defendant may be convicted and subjected to severe criminal penalties exclusively as a result of a urinalysis test. No additional evidence of any kind is required.[33] The evolution of this approach in the military courts may throw some light on the current criminal justice problems that result from such heavy reliance on an uncorroborated "scientific" test.

B. *Urinalysis and the Military Courts*

Court-martial use of urinalysis came into its own at the close of the Korean War. Abuse of habit-forming drugs such as morphine had reached alarming proportions; in response the military actively prosecuted drug use cases. The apparent concern was to ensure that "military people receive a full measure of protection from the very real horrors of drug addiction."[34]

There was some doubt in the early 1950's as to whether the color reaction tests for opiates were sufficiently accurate to be admissible in court,[35] or to serve as the sole basis for a conviction.[36] As chromatography techniques improved,[37] the Court of Military Appeals decided that "the results of such

30. Harris, *supra* note 9, at CC4. *See also,* OPNAVINST, *supra* note 6, at encl.(4).

31. Roland, *Higher Use of Drug Tests Pushes Army to Use Civilian Lab,* Navy Times, Oct. 22, 1984, at 14.

32. Cooper, *supra* note 25, at B10.

33. *See, e.g.,* United States v. Hillman, 18 M.J. 638 (N.M.C.M.R. 1984).

34. United States v. Greenwood, 6 C.M.A. 209, 213, 19 C.M.R. 335, 339 (1955) (in morphine use prosecution, accused was unable to establish any evidence of an honest mistake concerning consumption of the drug).

35. United States v. Ellibee, 13 C.M.R. 416 (A.B.R. 1953) (morphine).

36. United States v. Derosans, 13 C.M.R. 449 (A.B.R. 1953) (morphine).

37. United States v. Yates, 16 C.M.R. 629 (A.F.B.R. 1954) (morphine use case based solely on urinalysis color reaction and paper absorption chromatography tests).

tests [were] legally sufficient to support a finding of guilty,"[38] especially when the defendant put on no defense.[39]

The real dilemma was whether compelling a serviceperson to provide a sample of urine, the analysis of which would be used against him in disciplinary proceedings, violated his statutory or constitutional rights. Article 31(a) of the then newly enacted Uniform Code of Military Justice seemed to create substantial statutory protections.[40] Moreover, the fifth amendment[41] guaranteed a right against self-incrimination, and a recent United States Supreme Court decision condemned the forceful extraction of evidence from a suspect's body by means of a stomach pump as a violation of due process.[42]

In the early cases, courts admitted urinalysis results when the sample was not compelled because there was no danger of active self-incrimination.[43] The Court of Military Appeals allowed catheterization to obtain a urine specimen when the accused was unconscious[44] or willingly cooperated with the procedure.[45] The court decided that article 31(a) was inapplicable since the accused was not "required to consciously contribute to his conviction."[46] Testimonial compulsion was the key triggering both article 31(a) and the United States Constitution.[47] Under that approach, a sample given under threat of catheterization was held admissible,[48] as was one provided because of a direct order.[49] Finally, in *United States v. Speight*, the Army Board of Review approved the admission of results from a sample procured through a nonconsensual catherization.[50]

The military cases then began to move in a more liberal direction. The Court of Military Appeals overruled *Speight*, suppressing the sample ob-

38. United States v. Griffin, 4 C.M.A. 699, 700, 16 C.M.R. 273, 274 (1954) (morphine). *See also* United States v. Ford, 4 C.M.A. 611, 16 C.M.R. 185 (1954).

39. It is baffling why what the accused does in defense should matter. This may amount to an unconstitutional burden on a criminal defendant, and yet this point was raised without success in several early cases. *See, e.g.*, United States v. Yates, 16 C.M.R. 629 (A.F.B.R. 1954); United States v. Andrews, 5 C.M.A. 66, 17 C.M.R. 66 (1954); United States v. Grier, 6 C.M.A. 218, 19 C.M.R. 344 (1955).

Today, there is no serious challenge to the scientific principles underlying urinalysis testing. *See* materials cited *supra* notes 22, 25 & 31. Even though urinalysis lab reports are largely prepared for litigation they are still admissible, contrary to the early case of United States v. Bates, 22 C.M.R. 413 (A.B.R. 1956) (opium). MIL. R. EVID. 803(6) (business records) and 803(8) (public records) exempt "forensic laboratory reports" from the hearsay rule.

40. Article 31(a) of the U.C.M.J. states:

Art. 31. *Compulsory self-incrimination prohibited*

(a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

41. U.S. CONST. amend. V.

42. Rochin v. California, 342 U.S. 165 (1952).

43. United States v. Milton, 13 C.M.R. 747 (A.F.B.R. 1953) (in morphine case, court concluded that urine specimen by itself is non-conclusive even if positive for drug presence).

44. United States v. Williamson, 4 C.M.A. 320, 15 C.M.R. 320 (1954) (morphine).

45. United States v. Booker, 4 C.M.A. 335, 15 C.M.R. 335 (1954) (morphine).

46. *Id.* at 337, 15 C.M.R. at 337.

47. United States v. Brints, 15 C.M.R. 818, 822 (A.B.R. 1954) (urination is an essentially active process, at least among healthy adults, but is not testimonial).

48. United States v. Dillon, 16 C.M.R. 835 (A.B.R. 1954) (morphine).

49. United States v. Barnaby, 5 C.M.A. 63, 17 C.M.R. 63 (1954) (morphine), *petition denied*, 16 C.M.R. 292 (C.M.A. 1954).

50. 17 C.M.R. 428 (A.B.R. 1954) (morphine), *rev'd*, 5 C.M.A. 688, 18 C.M.R. 292 (1955).

tained by catheterization under protest.[51] In *United States v. Jones*, that court again condemned the forced catheterization of a man intravenously injected with "over a quart" of glucose solution to induce urination.[52] The conduct of the law enforcement agents in these cases was sufficiently shocking to implicate the fifth amendment due process guarantee.[53]

The Court of Military Appeals took several opportunities over the next two years to remind lower courts that urinalysis had its limits. The presence of a drug in the accused's body was not conclusive of criminal guilt. If the defendant was honestly ignorant or mistaken as to how the drug could have entered his system he could escape conviction.[54] There was no presumption that use or consumption was wrongful.[55] A urinalyis could, however, be used to impeach an accused and even to corroborate an admission of use.[56]

From the standpoint of those advocating greater article 31 and fifth amendment protections, the 1957 case of *United States v. Jordan*[57] was the real turning point. Airman Third Class Jordan refused to provide a urine sample despite a direct order from his commanding officer. Jordan was subsequently convicted for willfully disobeying a lawful order. Noting that a military order is far more than a "moral sanction," the Court of Military Appeals held that compelling "a person against his will to produce his urine for the purpose of using it, or an analysis of it, as evidence against him in a court-martial proceeding, violates Article 31 of the Uniform Code."[58] The court held that any such order is *per se* illegal.[59]

The next year, the Court of Military Appeals suppressed test results from a sample obtained by confinement, threat of catheterization and a military order.[60] The court observed that article 31 must be interpreted generously to avoid a gradual dissolution of a defendant's most basic protections.[61] The court refused to allow the fight against drug abuse to

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51. U.S. v. Speight, 5 C.M.A. 668, 18 C.M.R. 292 (1955) (morphine).

52. 5 C.M.A. at 538, 18 C.M.R. at 162 (1955) (morphine).

53. *Id. But see* United States v. Kracko, 24 C.M.R. 533, (A.F.B.R. 1956), in which the defendant was forced for hours to drink liquids and stand against a radiator. He finally agreed to catheterization. Noting lack of force or violence, the court upheld the conviction for use of morphine.

54. United States v. Greenwood, 6 C.M.A. 209, 216, 19 C.M.R. 335, 342 (1955) (morphine); United States v. Grier, 6 C.M.A. 218, 223, 19 C.M.R. 344, 349 (1955) (morphine); United States v. Chinn, 6 C.M.A. 327, 329, 20 C.M.R. 43, 45 (1955) (morphine).

55. United States v. Grier, 6 C.M.A. 218, 223, 19 C.M.R. 344, 349 (1955).

56. United States v. Payne, 6 C.M.A. 225, 229, 19 C.M.R. 351, 355 (1955) (urine sample meeting only part of the morphine screening procedure was sufficient to establish the corpus delecti when substantiated by admissions of guilt and needle marks); United States v. Chinn, 6 C.M.A. 327, 20 C.M.R. 43 (1955).

57. 7 C.M.A. 452, 22 C.M.R. 242 (1957). The facts of *Jordan* are set forth 7 C.M.A. at 453-54, 22 C.M.R. at 243-44.

58. *Id.* at 452, 22 C.M.R. at 242. When article 31 rights are properly observed, the urinalysis is admissible. *See, e.g.*, United States v. Bass, 8 C.M.A. 299, 300, 24 C.M.R. 109, 110 (1957) (morphine); United States v. Fears, 24 C.M.R. 885 (A.F.B.R. 1959) (morphine).

59. 7 C.M.A. at 454, 22 C.M.R. at 244. The concurring opinion noted that the first clause of article 31(a) deals with non-testimonial compulsion and has no civilian counterpart. 7 C.M.A. at 456, 22 C.M.R. at 246 (Ferguson, J., concurring). Following this decision, Congress made no attempt to modify article 31(a).

60. United States v. Forslund, 10 C.M.A. 8, 27 C.M.R. 82 (1958) (morphine).

61. The court's sentiments in the matter were clear:

> If this Court is to succeed in preserving the Uniform Code of Military Justice as a truly living document, it cannot permit a gradual whittling away of an accused's most important safeguard until nothing is left of it but a heap of bare bones. In times of stress, as well as in

overwhelm the rights due an accused, even if some criminals might thereby benefit.[62]

The Court of Military Appeals stood by the *Jordan* analysis for over two decades as the military appellate courts continued to struggle with urinalysis-related issues. In 1960, the court observed it is "beyond cavil that the burden of proof [is] on the prosecution to establish accused's knowing use of the drug," even when a urinalysis test is employed.[63] That same year, in *United States v. McClung*, the Court of Military Appeals suppressed the test results of a urine specimen furnished by a semiconscious defendant who was warned of his Article 31(a) rights but who could not knowingly consent in his semiconscious state.[64]

In the 1965 decision of *United States v. Miller*, the accused motorist's blood-alcohol level was determined while he was unconscious in a military hospital.[65] Since the blood sample was taken solely for a diagnostic and treatment purposes it was held admissible in a negligent driving prosecution.[66] The court found no "nexus" between the medical and law enforcement personnel and determined there was no request by police to take the blood sample for prosecution purposes.[67] The *Miller* rationale was subsequently adapted to urinalysis.[68]

As the military case law on urinalysis admissibility evolved, the Defense Department hierarchy reacted with various programs to identify and rehabilitate drug abusers or, through administrative boards, to discharge them.[69]

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times of calm, it is a liberal and enlightened, rather than a narrow and grudging, application of Article 31 that is best calculated to insure to the military the preservation of our traditional concepts of justice and fair play.

10 C.M.A. at 9, 27 C.M.R. at 83, quoting United States v. Minnifield, 9 C.M.A. 373, 379, 26 C.M.R. 153, 159 (1958).

62. The court placed the fight against drug abuse into perspective:

"It is desirable that criminals should be detected and to that end that all available evidence should be used. It is also desirable that the government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. . . . [F]or my part, I think it a less evil that some criminals should escape than that the government should play an ignoble part."

10 C.M.A. at 10, 27 C.M.R. at 84, *quoting* Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

63. United States v. Wynn, 11 C.M.A. 195, 198-99, 29 C.M.R. 11, 14-15 (1960) (morphine). *See also* United States v. Fears, 11 C.M.A. 584, 595, 29 C.M.R. 400, 411 (1960) (Ferguson, J., dissenting) (morphine).

64. 11 C.M.A. 754, 29 C.M.R. 570 (1960) (morphine).

65. 15 C.M.A. 320, 35 C.M.R. 292 (1965).

66. *Id.*

67. *Id.* at 321-22, 35 C.M.R. at 293-94.

68. *See, e.g.*, United States v. Nand, 17 M.J. 936 (A.F.C.M.R. 1984) (urinalysis done as part of a routine physical reveals marijuana use); *see also* MIL. R. EVID. 312(d), the text of which is given below:

Rule 312, *Body views and intrusion* (d) *Extraction of body fluids.* Nonconsensual extraction of body fluids, including blood and urine, may be made from the body of an individual pursuant to a search warrant or authorization under Mil. R. Evid. 315(g). Nonconsensual extraction of such body fluids may be made without such warrant or authorization, notwithstanding Mil. R. Evid. 315(g), only when there is clear indication that evidence of crime will be found and that there is reason to believe that the delay that would result if a warrant or authorization were sought could result in the destruction of the evidence. Involuntary extraction of body fluids under this rule must be done in a reasonable fashion by a person with appropriate medical qualifications.

69. *See generally*, United States v. Broady, 12 M.J. 963 (A.F.C.M.R. 1982) (LSD).

Even though use of urinalysis results in this context could lead to substantial adverse consequences, such as a discharge under other than honorable conditions,[70] the courts initially upheld military orders to give urine specimens because criminal prosecution was foreclosed.[71]

Finally, in *United States v. Ruiz*, the Court of Military Appeals held that none of the terms of article 31(a) "indicate that Congress intended to permit forced self-incrimination in board proceedings any more than in courts-martial."[72] Despite a direct order, Ruiz had refused to provide urine for a drug rehabilitation follow-up urinalysis.[73] Conceding that drug abuse is indeed a serious problem, the court stated that the solution "lies not in depriving the accused of his rights, however inadvertent that may be, but in assuring either his voluntary cooperation or separating him from the service without penalty."[74] The military courts continued to regard orders compelling suspected drug users to provide incriminating body fluids as illegal[75] until the 1980 Court of Military Appeals decision of *United States v. Armstrong*.[76]

In *Armstrong*, the defendant was a motorist compelled to provide blood samples following a serious accident. He appeared to be under the influence of alcohol; analysis of the blood specimens revealed a high blood-alcohol level. The Court of Military Appeals held the laboratory results admissible, overruling *Jordan* and its progeny.[77] The court concluded that article 31(a) was *not* intended to go beyond the scope of the fifth amendment, which did not protect against non-testimonial compulsion.[78] The court completely ignored the 23-year congressional acquiescence in the liberal *Jordan* interpretation of article 31(a). Moreover, as noted by the *Jordan* court, the first clause of article 31(a) deals with non-testimonial compulsion, while the second clause pertains to testimonial compulsion.[79] When the *Armstrong* court

70. United States v. Frazier, 49 C.M.R. 713 (A.C.M.R. 1975) (possession of heroin).

71. United States v. Ashley, 48 C.M.R. 102, 104 (A.F.C.M.R. 1973) (conviction for refusal to obey order to give urine sample as part of Air Force drug testing program upheld since accused disobeyed only because the order was "offensive to his own conscience, not because he thought it to be illegal").

72. 23 C.M.A. 181, 182, 48 C.M.R. 797, 799 (1974). The lower appellate courts accepted the idea that Article 31(a) offered broad protection. *See, e.g.*, United States v. Peterson, 49 C.M.R. 696 (A.C.M.R. 1974) (accused knew sample would test positive and asserted his Article 31 right to disobey).

73. 23 C.M.A. 181, 48 C.M.R. 797 (1974).

74. *Id.* at 183, 48 C.M.R. at 799. *See also* United States v. McFarland, 49 C.M.R. 834 (A.C.M.R. 1975), in which the accused was convicted for failing to provide a urine sample. He was suspected of marijuana use, but the tests at the time could not detect the THC metabolite in urine. Since there was no danger of self-incrimination concerning marijuana, the court concluded that Article 31(a) was not applicable and held the order lawful. *Id.* at 835.

75. *E.g.*, United States v. Jackson, 1 M.J. 606 (A.C.M.R. 1975) (accused refused to obey order to submit a urine sample on the belief that the results would be positive); United States v. Kineer, 7 M.J. 974 (N.C.M.R. 1979) (defendant refused to urinate in a specimen bottle as part of a revised urinalysis program).

76. 9 M.J. 374 (C.M.A. 1980). The facts of *Armstrong* are set forth 9 M.J. at 375.

77. *Id.* at 377.

78. *Id.* at 380.

79. As noted in *Jordan*, the first clause of Article 31(a) deals with something other than testimonial compulsion which is covered in the second clause. United States v. Jordan, 7 U.S.C.M.A. 542, 546, 22 C.M.R. 242, 246 (1957) (Ferguson, J., concurring in the result). *See supra* note 40 and accompanying text.

concluded that article 31(a) only applied to testimonial evidence, it took any meaning away from the first clause, in contravention of standard canons of statutory construction.[80] The *Armstrong* doctrine was subsequently applied to urinalysis.[81]

United States v. Armstrong freed military courts to consider urinalysis results obtained through random testing programs.[82] Samples given upon direct order and not part of a random selection process were still inadmissible[83] unless they were the result of a proper search authorization or the product of a bona fide medical procedure.[84] Participation of the accused in a drug rehabilitation program was also generally inadmissible other than on the accused's initiative in sentencing or on the merits,[85] except for impeachment purposes.[86]

Armstrong also unleashed a deluge of urinalysis cases reminiscent of the 1950's.[87] The military appellate courts wholeheartedly supported the wide-open anti-drug effort, seemingly to the limits of judicial propriety,[88] and

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80. It should be generally assumed by courts that Congress expresses its intent and purpose through the ordinary meaning of the words it uses. Escondido Mut. Water Co. v. La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians, 104 S. Ct. 2105, 2110 (1984). "One reliable *indicium* of the clarity of Congress's language is consistent judicial interpretation of the provision in question." Rickard v. Auto Publisher, Inc., 735 F.2d 450, 455 (11th Cir. 1984). The *Armstrong* courts denigrated the decades-long interpretation of Article 31(a) in violation of this canon of construction.

81. *See, e.g.*, Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983) (marijuana).

82. *E.g.*, United States v. Willett, 11 M.J. 723 (A.F.C.M.R. 1981) (cocaine).

83. *See, e.g.*, United States v. Broady, 12 M.J. 963 (A.F.C.M.R. 1982) (use of LSD and discussion of applicable regulations); United States v. Ouellette, 16 M.J. 911 (N.M.C.M.R. 1983) (marijuana use; results of a "competence for duty" examination not admissible); OPNAVINST, *supra* note 6.

84. *See, e.g.*, OPNAVINST, *supra* note 6; United States v. Foley, 12 M.J. 826 (N.M.C.M.R. 1981) (use of PCP; results of blood and urine tests admissible since sole reason to take samples was diagnostic); United States v. Nand, 17 M.J. 936 (A.F.C.M.R. 1984) (marijuana use; urinalysis obtained as result of routine physical exam is admissible in court).

85. *See, e.g.*, United States v. Cottle, 11 M.J. 572 (A.F.C.M.R. 1981) (cocaine); United States v. Schmenk, 11 M.J. 803 (A.F.C.M.R. 1981); United States v. Cruzado-Rodriguez, 9 M.J. 908 (A.F.C.M.R. 1980).

86. *See* United States v. Bowling, 16 M.J. 848 (N.M.C.M.R. 1983) (marijuana).

87. *See* United States v. Brown, 6 U.S.C.M.A. 235, 19 C.M.R. 363 (1955) ("Still another drug case confronts the Court here." *Brown* involved morphine use).

88. Observe the spectacle in United States v. Mitchell, 15 M.J. 654 (marijuana use), *aff'd*, 15 M.J. 937 (N.M.C.M.R. 1983), in which the court effectively ordered the trial judge to decide a debatable urinalysis-related evidentiary issue as the appellate court felt best. *See infra* notes 152-53 and accompanying text. *See also*, United States v. Wade, 15 M.J. 993 (N.M.C.M.R.) (cocaine), *rev'd on other grounds*, 16 M.J. 115 (C.M.A. 1983), where the Navy and Marine Corps Courts of Military Review, almost without qualification, enlisted in the war on drugs. *See infra* notes 152-46 and accompanying text.

Instructive is United States v. Brice, 11 MIL. L. RPTR. PUB. L. EDUC. INST. 2529 (N.M.C.M.R. 1982) (use of LSD), where the trial court proceedings were interrupted by a speech of the United States Marine Corps Commandant concerning the strict anti-drug policy of the Corps. Further voir dire was allowed, but the court members, who were forced to attend the speech, were allowed to continue in their role as jury. The N.M.C.M.R. permitted the drug-use convictions to stand, completely ignoring United States v. McCann, 8 U.S.C.M.A. 675, 25 C.M.R. 179 (1958), in which a Ground Approach Facility (G.A.F.) operator was charged with being drunk on duty and with incapacitation for duty. After the trial had begun, the Staff Judge Advocate gave a lecture to some of the court members on misconduct in general and the special reprehensibility of incapacitation by a G.A.F. operator. The Court of Military Appeals noted that this was clearly an improper influence and reversed the conviction. It might be argued in spite of the N.M.C.M.R. *Brice* opinion that the Commandant of the Marine Corps has more influence than a Staff Judge Advocate. The case is

clearly to the limits of military jurisdiction.[89] Even so, questions began to surface about the reliability[90] and propriety of the urinalysis regimen.[91]

The tide, however, may be turning once again. In the 1984 case of *United States v. Hillman*, the defendant's urine sample tested positive following a random unit sweep.[92] The sampling procedures were carelessly followed. The Navy and Marine Corps Court of Military Review held the urinalysis results admissible, but the court was not, "on the record before [it] convinced beyond a reasonable doubt of the guilt of the appellant."[93] The court was concerned with the heavy burden an accused bears when faced with a positive urinalysis:

> We all agree that when the government proceeds on a charge alleging drug usage based solely upon evidence obtained by non-consensual methods a special scrutiny of that evidence and the means of obtaining it must be made. We are balancing two very important principles: the individual rights of a United States citizen in the armed forces; and the important national security needs of this nation to rely on a military force unaffected by drug usage.[94]

The concurring opinion laid greater stress on the need for the government to absolutely toe the line in these types of cases:

> The stakes are too high for the service member charged with drug use when the only government evidence is an analysis report from a laboratory ranged against an accused's naked assertion that he or she is not a user of drugs. If the government cannot comply strictly with its own comprehensive and necessary procedures, then its "evidence" should be forfeited.[95]

The concurrence would have excluded the analysis, which was the only government evidence of drug use, thereby effectively reversing the case.

Taken as a whole, *United States v. Hillman* may represent the first glimmerings of a new judicial realization that the military criminal justice system is not the proper forum to balance such thorny problems of proof and credibility in light of the drastic punishments meted out by a criminal court. The difficulties inherent in the present urinalysis program are explored more fully in the following section, but some comments on prior urinalysis case law are in order here.

Even before the Court of Military Appeals adopted its liberal interpre-

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discussed in Note, *United States v. Brice: Command Policy or Command Influence*, 33 J.A.G.J. 133 (Summer 1984).

The lower court decision was finally overturned by the Court of Military Appeals, largely based on the *McCann* rationale. United States v. Brice, 19 M.J. 170, 172 (C.M.A. 1985). Perhaps the Court of Military Appeals is willing to put more restrictions on the enthusiasm of the lower military appellate tribunals.

89. *See, e.g.*, Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983). *See* notes *infra* 122-26 and accompanying text.

90. *See, e.g.*, United States v. Jensen, 16 M.J. 550 (A.F.C.M.R. 1983) (court, however, did not address the challenge to reliability of urinalysis test).

91. United States v. Nand, 17 M.J. 936 (A.F.C.M.R. 1984).

92. 18 M.J. 638 (N.M.C.M.R. 1984) The facts of *Hillman* are set forth 18 M.J. at 638-40.

93. *Id.* at 640.

94. *Id.*

95. *Id.* (May, J., concurring).

tation of article 31(a) in 1957,[96] urinalysis tests were supported by the accused's symptoms or other objective evidence. For whatever reason, judicial willingness to expansively protect the rights of an individual accused of drug use has ended. Corroboration for a drug use prosecution is no longer required; random urinalysis is sufficient. The military judiciary has thus literally backed itself into a corner. Greater respect for past case law and individual human liberty could have avoided the present dilemma entirely.

III. Problems of Drug Use Prosecution Based Solely on a Random Urinalysis

There are many difficulties inherent in prosecuting a servicemember solely on the basis of a random urinalysis. First, proof in any criminal case must be beyond a reasonable doubt. Considering this stringent standard, almost any evidence on behalf of the accused should prevent conviction, especially when balanced against an uncorroborated test which is beset with problems. Indeed, there is a serious question as to whether a prosecution based on such a test, and nothing else, may properly be brought at all.

Second, if the drug use charge is based exclusively on the presence of miniscule quantities of a controlled substance in the accused's body, the service connection necessary for military jurisdiction is far from apparent. When drug abuse affects performance, then the crime is incapacitation and so should be the charge. Such a charge has an obvious connection to military service. If there is no behavioral effect, then criminal military jurisdiction is unclear. Moreover, criminal punishment in such a case seems less appropriate than administrative action. In fact, criminal sanctions under such circumstances may be unconstitutional.

Third, there are a group of concerns related to the perceived unfairness of the entire random urinalysis scheme. The military establishment seems to have overreacted to a situation which will correct itself as society changes. The resources expended on searching out and punishing users through random urinalysis could more effectively be spent on improving the conditions of military life and on rehabilitation of identified drug users. The penalties for use in the military are highly disproportionate to those in other American jurisdictions and to the actual impact on the armed forces. Furthermore, although the trend may be reversing itself, the military appellate courts have recently displayed a somewhat unjudicial eagerness to assist in the prosecution of drug cases, thus raising questions as to the courts' ability to protect accused servicepersons with impartiality.

Finally, the mass random urinalysis program infringes in varying degrees on the constitutional rights of freedom from self-incrimination, equal protection under the law, freedom from unreasonable searches and seizures, and due process of law.

A. *Proof Beyond a Reasonable Doubt*

Even in a drug use prosecution, the government must prove its case

96. *See supra* note 59 and accompanying text.

beyond a reasonable doubt.[97] This is a constitutional right guaranteed to every accused.[98] Defining the reasonable doubt formula is difficult since there is an inescapable element of subjectivity. In general, reasonable doubt is such a doubt as would cause prudent men to hesitate before acting in matters of importance to themselves.[99] This standard of proof is the most stringent known to the criminal law and "provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.' "[100]

In essence, the standard random urinalysis case comes down to a contest between "science" and the veracity and good character of one human being. Significantly, if the government fails to stringently comply with the procedures involved in collecting, storing, and testing the urine sample, the results of the urinalysis are not admissible in court.[101] The noncompliance injects elements of reasonable doubt as to deliberate tampering or careless misidentification of the specimen. Since the balance of proof is so delicate in random urinalysis cases, conviction should logically almost be impossible. After all, what defendant cannot gainsay the charge and produce at least some indication of non-drug involvement during the period in which the alleged drug consumption occurred?

Indeed, because the accused is forced to resort to extremes in establishing his innocence in this type of case, traditional rules of evidence may have to be substantially disregarded in his favor.[102] Since guilt hinges on his word, normally inadmissible lie detection tests should arguably be introducible to at least give him a fighting chance. Likewise, usually excludable character testimonials take on vital importance as a bolster to the accused's case. In no other realm of criminal prosecution does the law purport to give "science" such a free hand.[103]

An instructive contrast arises between the case of a motorist convicted

97. Jackson v. Virginia, 443 U.S. 307, 313-16, *pet. denied*, 444 U.S. 890 (1979).

98. *See, e.g.*, Estelle v. Williams, 425 U.S. 501, 503 (1976).

99. United States v. Chas. Pfizer Co., Inc., 367 F. Supp. 91, 101 (S.D.N.Y. 1973).

100. *In re* Winship, 398 U.S. 359, 363 (1970), *quoting* Coffin v. U.S., 156 U.S. 432, 453 (1895).

101. United States v. Hillman, 18 M.J. 638 (N.M.C.M.R. 1984); *see supra* notes 92-95; *see also*, United States v. Lewis, 19 M.J. 869 (A.F.C.M.R. 1985).

102. *See, e.g.*, United States v. Kahakauwila, 19 M.J. 60 (C.M.A. 1984), in which the court faced the question whether the accused possessed, sold, or transferred marijuana. At trial, the military judge refused to admit general evidence of the defendant's good military character. Noting that in such a close case the defendant would be prejudiced absent this evidence, the Court of Military Appeals reversed. This situation is repeated in almost every random urinalysis case, where the evidence is the word of the defendant against the test readings.

103. In civil suits there may be an absolute presumption of a lack of paternity based upon certain blood tests. *See, e.g.*, Michael B. v. Super. Court, 86 Cal.App.3d 1006, 1009-10, 150 Cal. Rptr. 586, 588 (5th Dist. 1978). Even paternity blood tets are being challenged successfully on some occasions. *See, e.g.*, Alinda V. v. Alfredo V., 125 Cal. App. 3d 98, 99, 177 Cal.Rptr. 839, 840 (1st Dist. 1981) (98.95% probability of paternity from human leucocyte antigen paternity test not entitled to any substantial evidentiary weight due to foundational problems with the expert witness); Barber v. Davis, 11 FAM. L. REP. (BNA) 1144, 1145 (N.Y. Fam. Ct. Jan. 29, 1985) (despite statute mandating admission of human leukocyte antigen test results in a paternity action, trial court dismisses the action because of mother's total lack of credibility). In *Barber*, the high probability of correct results connected with the test did not decide the matter with finality.

> The bottom line is that the HLA test, in contradistinction to a procedure yielding definitive results, is rather an impersonal analysis that, by its very nature, cannot mesh with the

of driving under the influence of alcohol based on a breathalyzer test and the case of a servicemember convicted of drug use based on a random urinalysis. The motorist exhibited suspicious behavior leading to the initial traffic stop; the servicemember behaved normally. The breathalyzer test may be substantiated by conduct sufficient in itself to constitute probable cause for an arrest; there is nothing to corroborate the positive random urinalysis. Even if the random urinalysis program had an umblemished record, reasonable doubt is already present in any military random urinalysis case.[104]

There have been chronic flaws in the urinalysis program itself. The military "services have admitted that many mistakes have been made in urinalysis tests since the Department of Defense cracked down on drug use."[105] For example in 1982, the Navy's Oakland lab incorrectly reported over 4,300 samples as positive for drug use.[106] Between April, 1982, and November, 1983, the Army and Air Force poorly processed more than 70,000 samples such that the test results could not stand up in court.[107] Navy officials have conceded that "the extensive testing program led to false positive test results for drug use and wrecked many sailors' careers."[108]

The newest testing onslaught was started in 1982 by the Chief of Naval Operations, Admiral Thomas Hayward.[109] After a "reliable" urinalysis was developed for marijuana and hashish, a combined armed forces panel recommended a six-month period in which no charges would be filed while the accuracy of the new system was evaluated. The Navy ignored the recommendation and began its massive testing program and the other military services followed suit.[110] Since 1982, there have been well over 6 million urine tests of military personnel.[111] Admiral Hayward, now retired, has admitted that his decision to expand the urinalysis program led to some bad

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factual underpinnings of each individual case. In litigation where so much is at stake, the possibility of a miscarriage of justice is simply intolerable.

This margin of error is simply too great to allow the results of this test to render a judge or jury obsolete. It obviously cannot reverse or nullify the findings of fact made after consideration of classic evidence received at the trial. *Id.*

But see Jensen v. Lick, 589 F. Supp. 35 (D.N.D. 1984), in which the inmate of a North Dakota state penitentiary brought a civil action alleging his warden had unlawfully instituted a marijuana urinalysis screening program similar in many respects to the military random urinalysis program. The results were stipulated to be 95% accurate. *Id.* at 38. The court concluded that in a prison environment, "such a level of reliability is adequate to support a decision for administrative punishment." *Id.* Similarly, the military urinalysis program may be good enough for administrative sanctions, but more caution should be used with criminal penalties.

104. The traditional drunk driving case has seemingly been modified by the use of random roadblocks. However, even at a random stop, there must be observable indicia of intoxication before further restrictions on the liberty of the driver are allowed. *See, e.g.*, State v. Deskins, 234 Kan. 529, 673 P.2d 1174 (1983) (visual and olfactory examination of stopped motorist coupled with sobriety and coordination tets gave probable cause for arrest).

105. *Suit Challenging Urine Tests Settled Out of Court by Navy*, Navy Times, Oct. 22, 1984, at 14.

106. Dietrich, *supra* note 11, at B1.

107. Roland, *supra* note 31, at 14; *see also, Army to Reverse Actions in Drug Cases*, Army Times, Jan. 23, 1984, at 1; *Ex-Chief Cites 3-5% False Positives at Drug Lab*, Army Times, Mar. 26, 1984, at 3; *In Brief*, L.A. Daily J., Sept. 18, 1984, at 1.

108. *Poor Military Drug Tests Said to Hamper Drug War*, L.A. Daily J., Aug. 28, 1984, at 5.

109. *Thousands of Military Drug Cases Reversed*, San Diego Union, Aug. 28, 1984, at B14.

110. Harris, *supra* note 9, at CC4.

111. *Thousands of Military Drug Cases Reversed, supra* note 109.

tests and wrongful accusations of drug use.[112] His explanation revealed an interesting perspective on the rights of people in military service:

> But if one is not going to take action against a national problem because of a concern that a few will be disadvantaged we will never make any progress at all. All kinds of cautions were being thrown up about class-action suit and we can't do this and we can't do that. I had reached the point of exasperation. We took charge.[113]

The head of the Navy's war on drugs under Admiral Hayward, Rear Admiral Paul Mulloy, added that "[t]he falsely accused are part of the game. Out of 1.4 million tests conducted annually, these numbers [of wrongly accused] are statistically insignificant."[114]

In such an unprecedented general search, a very small percentage of errors will obviously have inordinate ramifications. The defective urinalysis rates are running about 5 to 10 percent.[115] Even assuming a false positive rate of only 1 percent, that would still be 10,000 errors per 1,000,000 samples. Reliance on such a dubious program to prove guilt beyond a reasonable doubt is disturbing. Colonel William W. Manders, former chief of the military urinalysis quality control program at the Armed Forces Institute of Pathology, recently remarked: "When the results come out of the lab, you're guilty until you're proven innocent. That's just contrary to our system of justice. I've seen people convicted with evidence so flimsy you find it hard to believe."[116]

Such a system places a tremendous strain on the constitutional concept of proof beyond a reasonable doubt. There is surely a temptation to bend the high standard of proof in the rush to control drug abuse. As Justice Jackson remarked in the case of a civilian Japanese-American citizen who was interred on the West Coast during the early hysteria of World War II, "if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient."[117] There is a limit on what an American criminal justice system can accomplish when conviction must be beyond a reasonable doubt, and the military random urinalysis program may well surpass that limit.

B. *Military Jurisdiction*

In addition to the strict criminal standard of proof, the United States Constitution places more immediate limits on courts-martial. The military

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112. *Id.*

113. *Id.*

114. Dietrich, *Drug War: Can Navy Justify Errors?*, San Diego Tribune, Sept. 28, 1983, at A1.

115. *Good News for Urinalysis?*, 12 MIL. L. REP. (PUB. L. EDUC. INST.) 1027 (March-April 1984). The random urinalysis situation brings up some of the concerns expressed in California v. Trombetta, 104 S. Ct. 2528 (1984). In *Trombetta*, the defendant in a drunk driving prosecution claimed he was prejudiced because the breath sample was destroyed and unavailable for retest. The Court unanimously ruled against the defendant. The Court did note, however, that if the Intoxilyzer gave erroneous readings, then "a more direct constitutional attack might be made on the sufficiency of the evidence underlying the State's case. After all, if the Intoxilyzer were truly prone to erroneous readings then Intoxilyzer results without more might be insufficient to establish guilt beyond a reasonable doubt." *Id.* at 2534, n.10. The Court regarded this as a *constitutional* issue.

116. Harris, *supra* note 9, at CC3.

117. Korematsu v. United States, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting).

courts have jurisdiction only over cases with a connection to military service.[118] The burden is on the government to establish a service connection, even in urinalysis cases.[119] It is uncertain how this can be accomplished in the case of a random urinalysis when the defendant acts normally in every respect and his performance is unimpaired.[120]

There may be instances, as with long cruises aboard a naval vessel, when the suspected drug use must have taken place on a military installation. There may also be other cases in which there is tangible evidence of drug use while in a place or situation under exclusive military control. In the latter instances, of course, the urinalysis is not uncorroborated for purposes of military jurisdiction. In the vast majority of drug cases, it is entirely possible that the use may have taken place outside the physical confines of a military base or vessel.

The Court of Military Appeals has stated that drug use during a period of extended leave from the military might not be punishable, because the use offense was committed outside of military jurisdiction.[121] In *Murray v. Haldeman*,[122] the court sought to narrow this statement:

> We are convinced that even when a servicemember uses a psychoactive drug in private while he is on extended leave far away from any military installation, that use is service connected, if he later enters a military installation while subject to any physiological or psychological effects of the drug.[123]

Petty Officer Haldeman had been compelled to provide a urine sample when he reported to a navy school following a period of extended leave. The urinalysis revealed a trace of THC metabolite. The court noted the absence of evidence of any physiological or psychological effects from the presence of the metabolite in the defendant's body, and added that the court could not take judicial notice of those effects.[124]

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118. O'Callahan v. Parker, 395 U.S. 258 (1969). *See also*, Hodgson, *Limiting Court-Martial Jurisdiction: A Continuing Process*, 20 A.F.L. REV. 256 (1978).

119. There must be a service connection for the military to have jurisdiction over any criminal case. *See, e.g.*, Relford v. Commandant, 401 U.S. 353 (1971).

120. *See infra* notes 122-31 and accompanying text.

121. United States v. Trottier, 9 M.J. 337, 350, n.28 (C.M.A. 1980).

122. 16 M.J. 74, 80 (C.M.A. 1983). The facts of *Haldeman* are set forth at 75-56.

123. *Id.* at 75-56.

124. *Id.* at 80. Since the accused gave the incriminating sample on a military installation, it would seem that the fact of a positive test result within a military enclave would be insufficient in and of itself to confer jurisdiction. This is, perhaps, the basis for the remand (the case having come up on extraordinary writ). However, the Air Force Court of Military Review, in United States v. Frost, 19 M.J. 509 (A.F.C.M.R. 1984), somehow came to a different conclusion. Frost, as part of a random unit sweep, gave a urine sample on a military base. The sample came up positive for marijuana. *Id.* at 510. Frost was charged with using marijuana over a certain time frame, "at some place in North America." The A.F.C.M.R. not only approved the wide-open geographical allegation, but it also somehow deduced jurisdiction based on *Murray v. Haldeman*. *Id.* at 511. The *full* analysis of the A.F.C.M.R. follows:

> National borders do not limit the operation of the Uniform Code of Military Justice. U.C.M.J., art. 5, 10 U.S.C. 805; *see also United States v. Newvine*, 48 C.M.R. 188 (A.F.C.M.R. 1974). It is well established that almost any drug use by a servicemember is service connected. *O'Callahan v. Parker*, 395 U.S. 258, 89 S. Ct. 1683, 23 L.Ed.2d 291 (1969); *Relford v. Commandant*, 401 U.S. 355, 91 S.Ct. 649, 28 L.Ed.2d 102 (1971); *United States v. Trottier*, 9 M.J. 337 (C.M.A. 1980); *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983). In *Haldeman*, the Court of Military Appeals held that court-martial jurisdiction

Murray v. Haldeman sums up the juridical dilemma. In the typical random urinalysis case, the defendant exhibits no outward symptoms. Until psychological or physiological effects are manifest, a logical reading of *Murray* would seem to preclude jurisdiction. Whether drug use occurred on an extended leave or on a short liberty should not matter. Only when drug-related deleterious effects are shown is there evidence of a service connection sufficient for *criminal* jurisdiction. Administrative proceedings, with their less stringent standards and safeguards and less onerous punishments, may be appropriate even in the absence of such overt symptoms.[125] To unduly extend military criminal jurisdiction in such cases, however, violates principles of constitutionality and fairness.[126]

C. *Fairness and Appropriateness of Random Urinalysis*

There is a cluster of issues that relate to the overall fairness and appropriateness of the current mass urinalysis scheme. First, the military establishment seems to have overrreacted to a situation which may spontaneously ameliorate as the national drug fad wanes. Defense Department "analysts believe illegal drug use has slackened, as it has in the youth population generally."[127] A recent Navy survey showed a decrease in the overall drug use rate among enlisted persons and officers from 13.4 percent in 1982 to below 8 percent in 1984.[128] This is laudable, but there is no evidence that similar results would not have been achieved by vigorous action outside of the criminal justice system. The response of some military spokespersons "that the ends of the program have justified its means,"[129] could only tangentially justify the means, and then only if there were some measurable results directly attributable to the program.

Second, the resort to criminal law is a fundamental misallocation of resources. It is more humane and logical to attack the causes of military drug abuse by improving work conditions, increasing pay and providing more recreational, professional, and educational opportunities for military personnel. Persons dependent on drugs should indeed be identified, but for the purpose of rehabilitation for further honorable service. Those unable or unwilling to serve without drug abuse should be separated from the armed forces as quickly and painlessly as possible. The ready resort to courts-mar-

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exists over servicemembers when they enter a military base "subject to any physiological *or* psychological effects of the drug." (emphasis added). In the present case the test was given on base and the results were positive for marijuana. That is sufficient physiological effect to establish jurisdiction.

Id. It seems that the only way to avoid military jurisdiction is to mail in the sample from some place outside of North America. Obviously, that was not the intent of the *Haldeman* court, and if it were, that would be overstepping the constitutional limits embodied in the service connection requirement.

125. At an administrative hearing, the serviceperson suspected of drug use should at least have the right to an evidentiary hearing with the right to call witnesses, to be represented by counsel, to cross-examine witnesses who testify against him, and to judicial review. Goldberg v. Kelly, 397 U.S. 254 (1970). *But see* Mathews v. Eldridge, 424 U.S. 319 (1976) (balancing test to determine what process is due).

126. *See* cases cited *supra* notes 118 & 119.

127. U.S.N. & W.R., Sept. 17, 1984, at 27.

128. Purcell, *supra* note 13, at 14.

129. Harris, *supra* note 9, at CC4.

tial is a shocking admission that the only way to make drug use less attractive is to employ criminal punishment.

Third, the criminal penalties for drug use are out of line with the laws of other American jurisdictions.[130] Based solely on an uncorroborated urinalysis, a cocaine user could face 5 years of confinement; a marijuana user could spend 2 years behind bars.[131] Actual sentences are apparently now more lenient than the prescribed maximums, but nothing prevents a return to the routinely high prison terms of the past.[132]

In other jurisdictions, some use is not punished at all or is dealt with at the misdemeanor level.[133] The disproportionality of military drug penalties comes close to implicating the "cruel and unusual" provisions of the eighth amendment.[134] Use may be incompatible with military service, but it is questionable whether the present stiff punishments reflect in any way the actual adverse impact of drug abuse on the armed forces.

The military courts have handed down harsh drug sentences for decades.[135] The drug problem has, however, purportedly been on the rise for decades. Perhaps the military is on the wrong track. Studies have traditionally shown that swift and fair punishment has greater deterrent effect than sporadic, harsh punishment.[136] This fact, coupled with the uncertainty and criticism generated by the random urinalysis program, may mean that it is time to refrain from criminal punishments and institute swift and uniform administrative measures.[137]

Fourth, in random urinalysis cases, the largely unbridled discretion of the defendant's commanding officer to bring the case to trial appears unusually arbitrary.[138] With a multitude of cases and identical evidence in each case, the commanding officer must choose to prosecute some cases and forego drug charges in others. The only evidence is the uncorroborated urinalysis. With no outside standards to guide or control the prosecution decision, the commanding officer may be pressed to capriciousness in choosing the servicepersons who will stand trial. If the decision is based on past performance or character of the accused, then has not a criminal justice system been subverted and replaced with a purely disciplinary adjunct?

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130. "We were aware, of course, that some civil jurisdictions no longer prosecute certain drug offenses—especially those involving possession or use of small quantities of marijuana." Murray v. Haldeman, 16 M.J. 74, 79 (C.M.A. 1983). *See also* NATIONAL ACADEMY PRESS, *An Analysis of Marijuana Policy* 6-9, 12-14 (1982).

131. M.C.M. *supra* note 16, at A12-4.

132. *See, e.g.*, United States v. Dillon, 16 C.M.R. 835 (A.B.R. 1954) (confinement at hard labor for three years for using morphine); United States v. Yates, 15 C.M.R. 629 (A.F.B.R. 1954) (same sentence).

133. See *supra* note 130.

134. U.S. CONST. amend. VIII. It may also violate the eighth amendment to punish a user who is a drug addict and who is unable to survive without the addictive drug in his system. Robinson v. California, 370 U.S. 660 (1962). *See* United States v. Ortiz, 742 F.2d 712 (2d Cir. 1984) (eighth amendment disproportionality argument in heroin possession and distribution case warranted lengthy analysis by the appellate court).

135. *See, e.g.*, cases cited *supra* note 132.

136. *See, e.g.*, I WHARTON'S CRIMINAL LAW § 3 (C. Torcia, ed. 14th ed. 1978).

137. These measures should include the safeguards provided for in the Constitution. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970).

138. *See generally* M.C.M. *supra* note 16, at R.C.M. 504; D. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE §§ 4-14 to 4-14(A)(3) (1982).

Fifth, the military appellate courts have recently displayed a very unjudicial zeal to aid the government in urinalysis cases. For instance, the Navy and Marine Corps Court of Military Review (N.M.C.M.R.) has twice ordered military judges to conform in urinalysis cases. In the *United States v. Mitchell*[139] decisions, a Navy special court-martial judge suppressed urinalysis results when the accused had been forced to remain in a library and consume liquids until she could provide a urine sample. The military judge reasoned such evidence was inadmissible under Military Rule of Evidence 312(e),[140] which is a reasonable reading of the rule. The government sought a writ of mandamus to compel the military judge to decide in its favor. The N.M.C.M.R. agreed, sending the case back with the advice that "it would be advisable for the respondent [the military judge] to consider recusing himself from further participation in this case."[141]

In *United States v. Wade*,[142] the same appellate court issued another writ of mandamus. A different military trial judge had suppressed urinalysis results from a random unit sweep. The trial judge viewed the sweep as a nonconsensual extraction and seizure of the defendant's body fluids without a search authorization or the exigency safeguards of Military Rule of Evidence 312(d).[143] As with all random urinalysis searches, there was no probable cause to take the sample. The government maintained that the specimen was lawfully taken as part of an inspection under Military Rule of Evidence 313(b).[144] The appellate court agreed and castigated the trial judge for his "flagrant abuse of discretion."[145]

The Navy and Marine Corps Court of Military Review realized that it was coming dangerously close to a perception of bias by wholeheartedly supporting the anti-drug crusade. The court tried to soften that stance by stating that it would readily strike down any aspect of the drug policy that was against federal statute or the Constitution.[146] However, will not the zealous attitude of the N.M.C.M.R. affect the impartiality of the military trial judges under it? Will those judges who act as triers of fact in random urinalysis cases give the defendant the benefit of every reasonable doubt when faced with such a vigorous appellate court? Will the trial judges hedge their bets in deciding how expansively to interpret statutory and constitutional protec-

139. 15 M.J. 654, *aff'd*, 15 M.J. 937 (N.M.C.M.R. 1983). *See supra* note 88.

140. The text of MIL. R. EVID. 312(e) follows:

Rule 312. *Body views and intrusions*

(e) *Other intrusive searches.* Nonconsensual intrusive searches of the body made to locate or obtain weapons, contraband, or evidence of crime and not within the scope of subdivision (b) or (c) may be made only upon search warrant or search authorization under Mil. R. Evid. 315 and only if such search is conducted in a reasonable fashion by a person with appropriate medical qualifications and does not endanger the health of the person to be searched. Compelling a person to ingest substances for the purposes of locating the property described above or to compel the bodily elimination of such property is a search within the meaning of this section. Notwithstanding this rule, a person who is neither a suspect nor an accused may not be compelled to submit to an intrusive search of the body for the sole purpose of obtaining evidence of crime.

141. 15 M.J. at 941.

142. 15 M.J. 993 (N.M.C.M.R.), *rev'd on other grounds*, 16 M.J. 115 (C.M.A. 1983).

143. For the complete text of MIL. R. EVID. 312(d), *see supra* note 68.

144. For the complete text of MIL. R. EVID. 313(b), *see supra* note 22.

145. 15 M.J. at 1001.

146. 15 M.J. at 1002-03.

tions? The former willingness of the Court of Military Appeals and the other military appellate tribunals to safeguard the defendant's individual rights has been turned on its head, leaving the military defendant unprotected against the "scientific" urinalysis regimen.

This attitude is even more disturbing taking into account the fact that military appellate courts are the only conceivable bulwark protecting the rights of the military defendant in urinalysis cases. The civilian federal appellate courts, laying great stress on the changed and unique status of servicepersons,[147] have upheld past urinalysis programs.[148] Continued civilian deference to the military establishment further aggravates the blithe acceptance of the unsound urinalysis program by the military appellate courts.

D. *Implication of Constitutional Rights*

The mass screening program also directly implicates a series of constitutional protections. Although the military courts have decided that body fluids do not fall within the ambit of the fifth amendment in accord with federal case law, a case can be made for the right against self-incrimination.[149] That is due to the unique situation of a random urinalysis defendant in the overall military system. The servicemember is compelled by law to give a urine sample. Refusal to obey is a punishable offense in itself.[150] This is frank and forced self-incrimination, possible only because unjustifiably excused by the military judiciary.

The urinalysis sweeps also deny the right to be free from unreasonable searches and seizures. The random program has become a general warrantless search for incriminating evidence. There is no probable cause, or even reasonable suspicion, to search or seize the body fluids of any individual servicemember. There are no warrants of any sort and there is no judicial supervision. The goal is evidence of wrongdoing.[151] That is just the sort of governmental license and abuse exemplified in the hated general warrants of our colonial past. Similar outrages led to the American Revolution and the enactment of the fourth amendment itself.[152]

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147. *E.g.*, Wickham v. Hall, 706 F.2d 713 (5th Cir. 1983). "A cardinal tenet of military law is that a serviceman, upon enlisting, has changed his status." *Id.* at 714-15, *quoting In re* Grimley, 137 U.S. 147 (1890). *See generally* Zillman & Imwinkelreid, *Constitutional Rights and Military Necessity: Reflections on the Society Apart*, 51 NOTRE DAME L. REV. 396 (1976).

The exact nature of the changed status of persons in the military has never been precisely defined, but there seems to be a consensus that the rights of privacy and expression are curtailed. *See generally*, Parker v. Levy, 417 U.S. 733 (1974). *See also* Goldman v. Secretary of Defense, 734 F.2d 1531 (D.C. Cir. 1984) (Orthodox Jewish Air Force captain properly forbidden by military regulations from wearing his yarmulke for religious reasons while in military uniform); Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984) (Army's policy of excluding homosexuals from military service did not infringe on the constitutional rights of appellant); Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984) (Navy's policy of mandatory separation for homosexual conduct did not violate constitutional rights to privacy and equal protection).

148. *See, e.g.*, Committee for GI Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975) (Army drug abuse program allowed other than honorable discharges, but no courts-martial).

149. *See supra* notes 57-62 and accompanying text. *But see*, South Dakota v. Neville, 459 U.S. 553 (1983), and cases cited therein.

150. *See, e.g., supra* note 26 and accompanying text.

151. *See supra* note 25.

152. *See*, Stone v. Powell, 428 U.S. 465, 482 (1976); Stanford v. Texas, 379 U.S. 476, 481-86 (1965).

Yet, somehow, the government has circumvented the Bill of Rights and justified the random urinalysis searches under the rubric of military necessity. As noted by the District of Columbia Federal District Court:

> The doctrine of military necessity does not embrace everything the military may consider desirable. One does not automatically forfeit the protections of the Constitution when he enters military service. The constitutional rights of a G.I., including his privacy, may not be infringed except to the extent that the military can demonstrate by concrete proof an urgent necessity to act unconstitutionally in order to preserve a significant aspect of discipline or morale.[153]

The central question is whether the government could avoid search and seizure problems by using an administrative rather than a criminal vehicle to combat drug abuse. Using an administrative approach, there would be no need and no excuse for infringing on constitutional protections that rightfully belong to every member of the Armed Forces.

Finally, the random urinalysis scheme impinges on the right to due process of law. When a sample comes up positive, the accused is saddled with the task of showing his innocence. The only accuser is a scientific test. Conviction means severe criminal penalties. Mere suspicion of drug use can wreck a career. The stigma attached to drug use might not be washed away even by a full acquittal. The law has created a situation in which the defendant simply cannot win, and that is not due process.[154]

Under any traditional legal analysis, the random urinalysis program is

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153. Committee for GI Rights v. Callaway, 370 F. Supp. 934, 940 (D.D.C. 1974), *overruled*, 518 F.2d 466 (D.C. Cir. 1975). *See supra* note 148.

154. The sentiments of a former Navy defense attorney are noteworthy:

> Put yourself in the place of a service member who really is innocent, who actually didn't use drugs, but for whatever reasons—be it improper handling, mislabeling, misidentification, deliberate or careless sample switching or other causes (you simply don't know)—the lab has reported that your urine sample turned up positive. The sole evidence against you is that positive result.
>
> You are now at a court-martial. All you can do it take the stand and deny that you used the particular drug. It's your word vs. an apparently unassailable monolithic system that somehow, you claim, somewhere made a mistake. Do you think the judge or jury will believe you?
>
> Even if you are believed and you are officially found not guilty, you are still not exonerated. There are innumerable administrative methods of continuing your drug-abuser stigma. You will probably not be returned to your professional specialty (submarines, aviation, diving, etc.) and probably not be recommended for advancement or retention. Your colleagues and superiors, most of whom attribute gospel truth to positive results, notwithstanding the recent disclosures about Oakland, will always view you with a suspect eye, thinking you must have got off on some legal technicality.
>
> Many service members are being punished, convicted, confined, discharged and/or stigmatized for the rest of their lives because of the military's compulsory urinalysis program. How many or how few individuals have been erroneously punished, no one will ever know. Those thousands of individuals wrongfully implicated at Oakland are the lucky ones.
>
> Some rational minds would prefer to wage war on drugs in a way that wouldn't necessarily injure innocent people. (For example, using urinalysis to corroborate eyewitness observations of use rather than as the sole evidence.) But it seems that isn't the case in our Navy. If you are one of the "statistically insignificant" falsely accused who are "part of the game," cheer up, you're serving a good cause.

Grinnell, *Navy Drug Testing, Attitude Under Fire*, San Diego Tribune, Oct. 11, 1983, at B6 (letters to the editor). On the Oakland problems, *see supra* note 106 and accompanying text. On the above quotes, *see supra* note 114 and accompanying text.

suspect. Courts-martial have been dragged in to resolve a problem by methods which are inappropriate and essentially unworkable. The military must deal with drug abuse, but not by combining criminal procedures and punishments with random urinalysis. The combination is simply untenable.

IV. APPLICATION OF THE "RULE OF LAW"

Professor Roberto Unger of the Harvard Law School has developed several jurisprudential theories which can be used to help explain the difficulties inherent in combining the random urinalysis program with our criminal justice system. According to Professor Unger, if laws are obeyed only out of the fear of punishment, there will always be the danger of disobedience when the expected gains outweigh the feared punishments.[155] To have truly legitimate laws, the members of the regulated group must come to "accept in belief and embody in concept the values the laws express."[156]

Western societies and the United States armed forces operate under a "rule of law" delineated "by the interrelated notions of neutrality, uniformity and predictability."[157] Such a system assumes that the most significant types of power can be concentrated in government and can still be effectively constrained by the rule of law.[158] Even under the best of conditions, both assumptions are somewhat shaky, since there can never be a truly impartial method of adjudication and implementation. All laws are of necessity subject to a balancing of beliefs and priorities by all-too-human judges.

As judges seek to substantiate the priorities of the law, Professor Unger thinks they are groping toward an unreachable resolution of the problem.[159] Some judges will regard the equities of a particular case while other judges look only to the strict rules of law. The result is confusion and a sense of betrayal, for the people want a "just" result in every case. As Professor Unger has stated:

> The more equity is sacrificed to the logic of rules, the greater the distance between the official law and the lay sentiment of right. As a result, the law loses its intelligibility as well as its legitimacy in the eyes of the layman; he knows it either as a chest of magical tools to be used by the well-placed or as a series of lightning bolts falling randomly on the righteous and the wicked.[160]

The problem occurs where leaders of a society try to solve all its problems with legal rules which can be purely unilateral choices. Legal rules, however, may only be rationalized if they are uniform, predictable, neutral and acceptable as solutions to a well-defined problem.[161] Unless people can attain the sense that laws "represent some sort of natural order instead of a set of arbitrary choices, they cannot hope to escape from the

155. R. UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 28 (1976).
156. *Id.* at 31.
157. *Id.* at 176.
158. *Id.* at 178-80.
159. *Id.* at 181.
160. *Id.* at 205-06.
161. *Id.* at 203, 229.

dilemma of unjustified power."[162] There must be some sort of reconciliation between the popular sense of the proper social order and the capacity and will to remake society along even more humane and progressive lines.[163] While these issues have no formal or scientific answer, we must continue to strive toward some solution to the challenge of producing a society truly reflective of the capacities of humanity.

Professor's Unger's concepts suggest why the random urinalysis program will never be a workable solution to the drug abuse problem when coupled with a criminal justice system trying to operate with a stringent standard of proof. Control of drug abuse is an acceptable goal, but the urinalysis tests combined with military courts are neither neutral, uniform, nor predictable. The tests presume guilt; the results are questionable. Both accusation and conviction are capriciously uncertain.

There is no impartial and fixed way to guarantee that military judges will respect equities and individual rights in any given urinalysis case. The innocent and the guilty are confounded together and no one can untangle the knot to determine who has violated the law. Arbitrariness and disharmony result as people in the military try to understand a system at odds with normal American notions of fair play and substantial justice. Some other approach is in order.

V. CONCLUSION

The solution in this instance is to admit that random urinalysis is incompatible with the rigid structure of American criminal law. We should defer to the more flexible administrative adjudicatory system and discharge or treat suspected drug abusers. If the final choices are still arbitrary, at least the penalties will be lessened and we will not have to twist the stiff mechanisms of criminal justice to resolve a problem that is beyond the system's principled capacity. To do otherwise makes a mockery of our legal system as the government tries to prove beyond a reasonable doubt charges based upon an uncorroborated test that tramples on the beneficial protections of our Constitution and legal heritage.

162. *Id.* at 240.

163. *Id.* at 266. Professor Unger's theories are further explicated in R. UNGER, KNOWLEDGE AND POLITICS (1975).