Comments

Procedural Due Process in the Civilian and Military Justice Systems

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The national socio-legal introspection generated by the Vietnam war and, in particular, the My Lai trials has focused critical attention upon the military justice system and its statutory basis, the *Uniform Code of Military Justice* (UCMJ).[1] Such attention, supplemented by criticism of the military justice system expressed by the United States Supreme Court in *O'Callahan v. Parker*,[2] has bared to public scrutiny problems long in need of clarification, if not corrective action. The public has demanded to know the degree to which the military justice system preserves the constitutional rights of servicemen, and the extent to which military courts-martial are fair and just tribunals.[3]

In its search for such information, however, the public has been presented with few objective criticisms from which to judge. Consequently, the little that is known about the military judicial structure has generated confusion and misunderstanding concerning the impartiality of the system. Misconceptions have resulted, for example, from the relative freedom of a commander to administer light disciplinary punishment under article 15,[4] and the consolidation of the roles of judge, jury and counsel for both sides in one officer in summary courts-martial,[5] where a maximum sentence of 30 days imprisonment may be adjudged.[6] Few people realize that in the two most serious

1. 10 U.S.C. §§ 801-940 (1970).
2. 395 U.S. 258 (1969). In *O'Callahan* the Supreme Court stated that "courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law." *Id.* at 265. *See also* Toth v. Quarles, 350 U.S. 11 (1955).
3. *See, e.g.*, Benson, *Military Justice in the Consumer Perspective*, 13 ARIZ. L. REV. 595 (1971); Palmer, *18-Minute Verdict, Military Justice and Constitutional Rights*, 90 COMMONWEAL, Mar. 28, 1969, at 40-43; Sherman, *Learning from the Green Berets*, 209 THE NATION, Oct. 20, 1969, at 399-403.
4. 10 U.S.C. § 815 (1970).
5. *See generally* DEPARTMENT OF DEFENSE, MANUAL FOR COURTS-MARTIAL ¶ 79 (rev. ed. 1969) [hereinafter cited as MANUAL].
6. 10 U.S.C. § 820 (1970). Individuals tried by a summary court-martial have the right to elect to be tried by special or general courts-martial with their greater

forms of court-martial, special and general,[7] the defendant enjoys procedural protections of a quality sometimes superior to those enjoyed by civilian defendants.

The following discussion will examine objectively and critically some of the more significant procedural differences between the military and civilian judicial systems,[8] and advance some rational suggestions for improving military justice. Hopefully, such an analysis will contribute to a more enlightened public understanding of the military system.

CONSTITUTIONAL RIGHTS AND RELATIONSHIPS

Military and civilian judicial systems cannot be intelligently compared without first acknowledging the different constitutional provisions upon which they are founded and the effects of these differences. The federal courts derive the entirety of their power from article III, section 1 of the United States Constitution, which establishes a Supreme Court and provides Congress with the power to create inferior courts. Military courts, however, are creations of article I,[9] which grants certain express legislative powers to the Congress. Among these are the powers to "provide for the common defense and general welfare,"[10] "raise and support armies,"[11] "make rules for the government and regulation of the land and naval forces,"[12] and "make all laws which shall be necessary and proper for carrying into execution the foregoing powers."[13] In these provisions Congress found the power to promulgate the *Uniform Code of Military Justice* and to establish military courts.[14]

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inherent procedural protections. *Id.* Concomitant with these greater procedural protections, however, is greater potential punishment. See note 7 *infra.*

7. The death penalty may be adjudged only in the general court-martial. 10 U.S.C. § 818 (1970). Maximum punishment in a special court-martial is six months imprisonment. *Id.* § 819. Summary courts-martial may adjudge only one month confinement. *Id.* § 820.

8. The problems related to military wiretapping of both civilians and military personnel, and the area of first amendment rights are topics complete in themselves and cannot be fairly dealt with in a brief discussion such as this. Other important topics not discussed in depth in this analysis include bail procedures and the right to a speedy trial.

9. *See* Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858).

10. U.S. CONST. art. I, § 8, cl. 1.

11. *Id.* cl. 12.

12. *Id.* cl. 14.

13. *Id.* cl. 18.

14. Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858). Since *Dynes,* the Article I authority of Congress to regulate military justice has gone unchallenged. Courts have debated only the question of which classes of individuals are subject to military justice. *See* O'Callahan v. Parker, 395 U.S. 258 (1969) (military jurisdiction limited to "service connected" crimes); McElroy v. Guagliardo, 361 U.S. 281 (1959) (civilian employees of American forces overseas not subject to trial by court-martial); Kinsella v. Singleton, 361 U.S. 234 (1959) (civilian dependents accompanying military personnel on overseas tour not subject to trial by court-martial); Reid v. Covert,

Since they were created under Congress' power to establish and regulate the military rather than the congressional power to create tribunals inferior to the Supreme Court,[15] military courts are not article III courts and, therefore, are not part of the system of federal courts.[16] Consequently, the Supreme Court possesses no powers of direct review over military courts.[17] As Chief Justice Vinson stated in *Burns v. Wilson*: "Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs the federal judicial establishment. This Court has played no role in its development; we have exerted no supervisory power over the courts which enforce it . . . ."[18]

Though military courts are generally unrestricted, their independence is not absolute. Federal courts will entertain a writ of habeas corpus[19] from military courts when the jurisdiction of a military court to adjudicate an issue is in question.[20] The Supreme Court has provided guidelines for application of the writ by adopting the rule of "full and fair consideration" in habeas corpus cases. Under this rule, "when a military court has dealt fully and fairly with an allegation raised in [the] application [for a writ of habeas corpus], it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence."[21] The rule limits habeas corpus determinations to jurisdic-

354 U.S. 1 (1956) (civilian dependents accompanying military personnel on overseas tour not subject to trial by court-martial); Toth v. Quarles, 350 U.S. 11 (1955) (no military jurisdiction over a civilian accused of committing a crime while previously in service); Caldwell v. Parker, 252 U.S. 376 (1920) (no exclusive court-martial jurisdiction over serviceman who killed civilian during time of war in state where no hostilities present and martial law not proclaimed); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866) (no court-martial jurisdiction to try civilian confederate sympathizer and conspirator in state where civilian courts open).

15. U.S. CONST. art. I, § 8, cl. 9; *see id.* art. III, § 1.

16. Burns v. Wilson, 346 U.S. 137 (1953); Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858); Carter v. Woodring, 92 F.2d 544 (D.C. Cir.), *cert. denied*, 302 U.S. 752 (1937); *Ex parte* Potens, 63 F. Supp. 582 (E.D. Wis. 1945); United States *ex rel.* Wessels v. McDonald, 265 F. 754 (E.D.N.Y.), *appeal dismissed*, 256 U.S. 705 (1921).

17. Foweler v. Wilkinson, 353 U.S. 583 (1957); Burns v. Wilson, 346 U.S. 137 (1953); Reaves v. Ainsworth, 219 U.S. 296 (1911); Mullan v. United States, 212 U.S. 516 (1909); *In re* Vidal, 179 U.S. 126 (1900); Swaim v. United States, 165 U.S. 553 (1897); Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858).

18. 346 U.S. 137, 140 (1953). Former Chief Justice Warren has opined that the most obvious reason for maintaining the independence of the military courts is that civilian "courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have. Many problems of the military society are, in a sense, alien to the problems with which the judiciary is trained to deal." Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181, 187 (1962). Warren raises the question, however, whether that rationale is still valid when the entire male civilian population is subject to service in the military. *Id.* at 187-88.

19. 28 U.S.C. §§ 2241 *et seq.* (1970).

20. Burns v. Wilson, 346 U.S. 583 (1953); Hiatt v. Brown, 339 U.S. 103 (1950); Gusik v. Schilder, 340 U.S. 128 (1950); Carter v. McClaughry, 183 U.S. 365 (1902); *In re* Grimley, 137 U.S. 147 (1890); *Ex parte* Vallandingham, 68 U.S. (1 Wall.) 243 (1863); Allen v. Van Cantfort, 316 F. Supp. 222 (S.D. Me. 1970), *aff'd*, 436 F.2d 625 (1st Cir.), *cert. denied*, 402 U.S. 1008 (1971).

21. Burns v. Wilson, 346 U.S. 137, 142 (1953). Though the Supreme Court has

tional questions dealing only with the power of the military court to adjudicate an issue and its fairness in so doing. Decisions of the Supreme Court in such situations rarely challenge the decisions of military courts. This leaves the military courts relatively free to apply their own standards in interpreting the Constitution and adjudicating the rights of servicemen.

Though it will question only the jurisdiction of military tribunals,[22] the Supreme Court has held that military courts must protect the constitutional rights of members of the military.[23] These rights include all of the basic protections afforded to civilians.[24] The military courts, however, have the power to interpret the Constitution independently and may make exceptions to the applicability of these rights where such exceptions are essentially due to the nature of the military.[25] For servicemen, therefore, due process of law is "military due process" as determined by the Court of Military Appeals.[26] It is generally agreed that the only limitation on the adjudicative power of the military courts in this context is that due process in the military must conform to the minimal requirements of constitutional due process.[27]

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not since expounded upon the "full and fair consideration" rule, it is generally considered that the rule provides the proper guidelines for federal inquiries into military decisions. *See* United States *ex rel.* Thompson v. Parker, 399 F.2d 774 (3d Cir.), *cert. denied,* 393 U.S. 1059 (1968); Kennedy v. Commandant, United States Disciplinary Barracks, 377 F.2d 339 (10th Cir. 1967); Easley v. Hunter, 209 F.2d 483 (10th Cir. 1953); Allen v. Van Cantfort, 316 F. Supp. 222 (S.D. Me. 1970), *aff'd,* 436 F.2d 625 (1st Cir.), *cert. denied,* 402 U.S. 1008 (1971); Swisher v. United States, 237 F. Supp. 921 (W.D. Mo. 1965), *aff'd,* 354 F.2d 472 (8th Cir. 1966). A few courts, however, have ignored the rule completely. *See* White v. Humphrey, 212 F.2d 503 (3d Cir.), *cert. denied,* 348 U.S. 900 (1954); Harris v. Ciccone, 290 F. Supp. 729 (W.D. Mo. 1968); Application of Stapley, 246 F. Supp. 316 (D. Utah 1965). For a history of the use of the writ of habeas corpus by military defendants to obtain federal review, see *Developments in the Law—Federal Habeas Corpus,* 83 HARV. L. REV. 1038, 1208-38 (1970).

22. *In re* Grimley, 137 U.S. 147 (1890); *Ex parte* Vallandingham, 68 U.S. (1 Wall.) 243 (1863).

23. Burns v. Wilson, 346 U.S. 137 (1953). *See also In re* Kelly, 401 F.2d 211 (5th Cir. 1968); Kennedy v. Commandant, United Staets Disciplinary Barracks, 377 F.2d 339 (10th Cir. 1967); Allen v. Van Cantfort, 316 F. Supp. 222 (S.D. Me. 1970), *aff'd,* 436 F.2d 625 (1st Cir.), *cert. denied,* 402 U.S. 1008 (1971).

24. Burns v. Wilson, 346 U.S. 137, 142 (1953); see Warren, *supra* note 18, at 188, where the former Chief Justice states: "The various opinions . . . in *Burns* . . . constitute recognition . . . that our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes."

25. *Id.* at 140.

26. "Military due process" is a term which originated in United States v. Clay, 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951). *See also* United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960). Federal courts have held that, as applied to those persons in the military or naval service, military law as determined by Congress and the military courts is coextensive with due process. Burns v. Wilson, 346 U.S. 137 (1953); Bisson v. Howard, 224 F.2d 586 (5th Cir.), *cert. denied,* 350 U.S. 916 (1955); White v. Humphrey, 212 F.2d 503 (3d Cir.), *cert. denied,* 348 U.S. 900 (1954). *See* Application of Stapley, 246 F. Supp. 316 (D. Utah 1965); Unglesby v. Zinny, 250 F. Supp. 714 (N.D. Cal. 1965).

27. McCurdy v. Zuckert, 359 F.2d 491 (5th Cir.), *cert. denied,* 385 U.S. 903 (1966); Montalvo v. Hiatt, 174 F.2d 645 (5th Cir.), *cert. denied,* 338 U.S. 874 (1949); Henry v. Hodges, 171 F.2d 401 (2d Cir. 1948), *cert. denied,* 336 U.S. 968

In order to enforce this requirement, federal courts have occasionally expanded the scope of their jurisdictional inquiry to include due process issues[28] and even issues involving specific constitutional rights in courts-martial,[29] so that these questions could be reviewed in federal habeas corpus proceedings. These expanded inquiries were made after several Supreme Court decisions broadened the definition of jurisdiction applicable to civilian habeas corpus cases, and therefore the concept of collateral review, to include issues of due process in state court decisions.[30] The Supreme Court itself, however, has not

(1949); Benjamin v. Hunter, 169 F.2d 512 (10th Cir. 1948); United States *ex rel.* Innes v. Hiatt, 144 F.2d 664 (3d Cir. 1944); Schita v. King, 133 F.2d 283 (8th Cir. 1943), *cert. denied,* 322 U.S. 761 (1944). In Burns v. Lovett, 202 F.2d 335, 339-40 (D.C. Cir. 1952), *aff'd sub nom.* Burns v. Wilson, 346 U.S. 137 (1953), the court discussed several cases which could have been construed to hold that individuals tried by courts-martial are not protected by the right to constitutional due process. The court decided, however, that these cases represented special situations and could not be regarded as indicative of a general rule that military personnel are not protected by constitutional due process. *See* Johnson v. Eisentrager, 339 U.S. 763 (1950) (enemy aliens tried outside the United States could not claim constitutional rights as citizens or foreigners on United States soil); *Ex parte* Quirin, 317 U.S. 1 (1942) (constitutional rights to jury trial and grand jury indictment not applicable to courts-martial for unique reasons which would not infer further restriction of other constitutional rights in such proceedings); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866) (military court could not try civilian spy when state courts were available).

The Court of Military Appeals has expressed agreement with the requirement that military law must conform to basic due process standards. See note 38 *infra.*

28. "[W]here there has been such a gross violation of Constitutional rights as to deny the substance of a fair trial and, because of some exceptional circumstances, petitioner has not been able to obtain adequate protection of that right in military processes," constitutional due process applies, depriving military authorities of jurisdiction in the case. Burns v. Lovett, 202 F.2d 335, 342 (D.C. Cir. 1952), *aff'd sub nom.* Burns v. Wilson, 346 U.S. 137 (1953). In his dissenting opinion in Burns v. Wilson, 346 U.S. 844 (1953), Justice Frankfurter argued that the problem of jurisdiction, as it applies to military habeas corpus cases, includes questions of constitutional due process. In support of his argument, he cited Fly v. United States, 100 F. Supp. 440 (Ct. Cl. 1951); Sima v. United States, 96 F. Supp. 205 (Ct. Cl. 1951); Shapiro v. United States, 69 F. Supp. 205 (Ct. Cl. 1947).

29. In Application of Stapley, 246 F. Supp. 316 (D. Utah 1965), the court granted a writ of habeas corpus to determine whether the military defendant had been denied his right to counsel under the sixth amendment. Though the court found the sixth amendment inapplicable to military proceedings, the decision was significant for having granted habeas corpus on such an issue. In Kauffman v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir. 1969), the court went even further, holding that civilian courts should be able to review military decisions on precisely the same basis as they review civilian lower court proceedings. *See also* Note, *Military Court-Martial—Scope of Review by Civilian Courts—Violation of Constitutional Rights,* 19 AM. U.L. REV. 84 (1971).

30. The Supreme Court has acted on writs of habeas corpus from state courts in situations where there have been such due process violations as denial of counsel, Johnson v. Zerbst, 304 U.S. 458 (1938); double jeopardy, *Ex parte* Neilsen, 131 U.S. 176 (1889); a coerced plea of guilty, Von Moltke v. Gillies, 332 U.S. 708 (1948); Walker v. Johnston, 312 U.S. 275 (1941); deliberate suppression of evidence, Pyle v. Kansas, 317 U.S. 213 (1942); and prejudice resulting from mob hysteria, Moore v. Dempsey, 261 U.S. 86 (1923). See United States v. Augenblick, 393 U.S. 348, 351 (1968), in which the Court referred to its acceptance of a broader definition of jurisdiction in state habeas corpus cases:

> [I]t is urged that when, in review of state convictions by way of federal habeas corpus, the concept of 'jurisdiction' was broadened to include deprivation by the trial tribunal of the constitutional rights of a defendant, [citations omitted] the scope of collateral review of court-martial convictions was also broadened.

The Court did not decide the issue, however.

yet clarified whether these rulings are sufficient precedent for expanding the definition of jurisdiction in military habeas corpus cases.[31] The Court apparently still stands on its ruling that "in military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases."[32] As a result, it appears that the "full and fair consideration" rule remains the test for applications for writs of habeas corpus from military courts.[33]

Military courts have generally agreed with federal courts that courts-martial are tribunals independent of civilian supervision.[34] It is only with the requirement that military due process must conform to the minimal standards of constitutional due process that military judges have taken issue.[35] The first members of the Court of Military Appeals were divided on the degree to which the Constitution limits the independence of military courts.[36] More recently, the current

31. *See* United States v. Augenblick, 393 U.S. 348 (1968). There exists some authority, however, for the proposition that the Supreme Court has already broadened the definition of jurisdiction in military habeas corpus to permit review where due process rights have been violated. See Wade v. Hunter, 336 U.S. 684 (1949), where the Court ruled that the question of the occurrence of double jeopardy in a military court-martial should be determined in the same manner as it would be determined in a civilian court. *See also* Burns v. Wilson, 346 U.S. 137, 153 (1953) (Douglas, J., dissenting).

32. Burns v. Wilson, 346 U.S. 137, 139 (1953). *But see* note 28 *supra.*

33. See text & note 21 *supra.* For enlightening discussions of the historical development of civilian review of military proceedings, see Sherman, *Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement,* 55 VA. L. REV. 483 (1969); Comment, *Civilian Review of Court-Martial Adjudications,* 69 COLUM. L. REV. 1259 (1969). *See also* Weckstein, *Federal Court Review of Courts-Martial Proceedings: A Delicate Balance of Individual Rights and Military Responsibilities,* 54 MIL. L. REV. 1, 12 (1971) where the author discusses methods of civilian collateral attack upon court-martial adjudications.

34. United States v. Smith, 13 U.S.C.M.A. 105, 32 C.M.R. 105 (1962).

35. There was some question whether military due process was a function of the Constitution or the powers of Congress. Nevertheless, military due process endowed the serviceman with significant rights. Included among these protections are the right to counsel, United States v. Culp, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963); protections against unreasonable search and seizure, United States v. Vierra, 14 U.S.C.M.A. 48, 33 C.M.R. 260 (1963), United States v. Brown, 10 U.S.C.M.A. 482, 28 C.M.R. 48 (1959); right to speedy trial, United States v. Schalck, 14 U.S.C.M.A. 371, 34 C.M.R. 151 (1964); and protections against self-incrimination, United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967); 10 U.S.C. § 831 (1970).

36. Former Judge Latimer believed that article I, section 8, clause 14 of the United States Constitution gave Congress absolute power to enact laws governing the rights of military personnel and that these laws were final and binding. On the basis of this conclusion he argued that the protections of the Bill of Rights are inapplicable to military personnel because their rights are limited to those promulgated either by Congress or the military courts it has created. *See* United States v. Clay, 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951) (Latimer, J.). Judge Brosman demonstrated his belief in the necessary independence of the military courts by finding "necessary implications" which served to render a constitutional right inapplicable to the military. *See* United States v. Sutton, 3 U.S.C.M.A. 220, 11 C.M.R. 220, 227-28 (1953) (Brosman, J., concurring). Chief Judge Quinn consistently opposed Latimer's viewpoint, arguing that constitutional due process limits the independence of the military courts. *See* United States v. Culp, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963) (Quinn, C.J.); United States v. Sutton, 3 U.S.C.M.A. 220, 228, 11 C.M.R. 220, 228 (1953) (Quinn, C.J., dissenting).

members of the court[37] have expressed general agreement that the doctrine adopted by the federal courts is correct and that constitutional due process limitations on the independence of military courts do exist.[38]

A new issue, however, has emerged within this concord: whether the limitations on the independence of military courts are limitations of minimal due process, as the civilian courts believe, or whether the limitations demand adherence to specific Supreme Court interpretatoins of constitutional requirements. In three recent cases,[39] the Court of Military Appeals based its rulings on the ground that Supreme Court decisions, not simply minimal due process standards, are binding on the military courts. In one of these decisions,[40] the court actually changed military law specifically because the military procedures involved did not totally comply with the standards promulgated in *Miranda v. Arizona*.[41] These cases are indicative of the trend of thought of military judges, although such thinking has not yet had full impact on various procedural rights, such as those related to search and seizure.[42]

37. Judge Ferguson replaced Judge Brosman in 1956; Judge Kilday replaced Judge Latimer in 1961, and was, in turn, replaced by Judge Darden in 1968. Chief Judge Quinn has remained on the court from its inception on June 20, 1951, to the present.

38. The change in opinion became evident after Judge Ferguson replaced Judge Brosman on the court. See note 37 *supra*. *See also* United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960), *overruling by implication* United States v. Clay, 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1953). Later, in United States v. Culp, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963), Judge Ferguson and Chief Judge Quinn arrived by different reasoning at the conclusion that a military defendant is entitled to the protection of the sixth amendment right to counsel. Judge Kilday, replacing Judge Latimer, brought the court to unanimity on the basic issue of applicability of the Bill of Rights to military trials. He insisted, however, that only those parts of the Bill of Rights are applicable today which, in light of common law at the time the document was written, were meant to be applicable. The sixth amendment right to counsel could not, he opined, be applicable to courts-martial. Judge Darden seems to agree that servicemen are protected by the Bill of Rights. *See* United States v. Caiola, 18 U.S.C.M.A. 336, 40 C.M.R. 48 (1969). He does not, however, appear anxious to apply the Constitution when military law has set satisfactory precedent. *See, e.g.*, United States v. Prater, 20 U.S.C.M.A. 339, 43 C.M.R. 179 (1971).

39. United States v. Penn, 18 U.S.C.M.A. 194, 39 C.M.R. 194 (1969) (Supreme Court rulings on constitutional questions are binding on military courts, although the latter are free to give the UNIFORM CODE OF MILITARY JUSTICE (UCMJ) their own interpretation in the absence on an applicable Supreme Court decision); United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967) (Supreme Court's *Miranda* ruling made applicable to military courts); United States v. White, 17 U.S.C.M.A. 211, 38 C.M.R. 9 (1967) (military courts are bound to follow the constitutional interpretations of the Supreme Court, although, because Article 31 of the UCMJ, 10 U.S.C. § 831 (1970), providing protections against self-incrimination, is broader than the fifth amendment protection, military procedures are required to meet Article 31, rather than fifth amendment standards); *see also* United States v. Whisenhunt, 17 U.S.C.M.A. 117, 37 C.M.R. 381 (1967) ("mere evidence" rule of Warden v. Hayden, 387 U.S. 294 (1967), adopted by military courts apparently for sole reason that the rule had been promulgated by the Supreme Court).

40. United States v. Tempia, 16 U.S.C.M.A. 629, 327 C.M.R. 249 (1967).

41. 384 U.S. 436 (1966). See text & notes 43-47 *infra*. The *Miranda* cases are discussed in "No Miranda Warnings for Ernest A. Miranda," 11 ARIZ. L. REV. 61, 85 (1969).

42. *See* text & notes 81-101 *infra*.

If military courts continue to follow specific Supreme Court rulings, however, they will be doing so on their own volition, not as a result of any requirement imposed by the Supreme Court.

UNWARNED STATEMENTS

Military justice has led the civilian judicial systems in protecting the individual from abuses of his right against self-incrimination. Fifteen years prior to the Supreme Court's *Miranda* decision, article 31[43] of the UCMJ protected the military accused or suspect from the type of legal ignorance or compulsion which might result in involuntary self-incrimination. Article 31 reads in part:

> (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.
>
> (b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.[44]

This provision, written in 1951, embodies all of the *Miranda* warning requirements except that necessitating that the accused be informed of his right to have an attorney, appointed or self-procured, present at any interrogation.

Because of article 31, the *Miranda* decision did not have a resounding effect on military justice. Nonetheless, when the Court of Military Appeals dealt in *United States v. Tempia*,[45] with a situation in which warnings of right to counsel adequate to satisfy article 31 but not *Miranda* had been given, the *Miranda* warnings were held to be a requirement for military law enforcement. Citing *Burns v. Wilson*,[46] the court ruled that as a decision exercising the Supreme Court's constitutional rather than supervisory powers, *Miranda* applied fully to members of the armed services as American citizens. Thus, article 31 warnings were no longer sufficient; they had to be supplemented by the *Miranda* warning of right to the presence of counsel at interrogation.[47]

43. 10 U.S.C. § 831 (1970) (originally enacted as Act of May 5, 1950, ch. 169, § 1 (Art. 31), 64 Stat. 118).
44. 10 U.S.C. § 831(a)-(b) (1970).
45. 16 U.S.C.M.A. 629, 37 C.M.R. 349 (1967).
46. 346 U.S. 137 (1953).
47. After *Tempia*, the *Manual for Courts Martial*, which has the force of law in

The *Tempia* decision did more than place military procedures for warning of rights on a par with civilian law, for article 31 has a broader application than *Miranda*.[48] *Miranda* requires that the accused or suspect be informed of his rights only during a "custodial interrogation" where he is "deprived of his freedom of action in any significant way."[49] Under article 31, by contrast, the accused or suspect must be informed of his rights any time he is subjected during an official investigation to "interrogation or request, formal or informal"[50] by anyone who is subject to the Code or acting as an instrument of an individual or an armed force subject to the Code.[51] Thus, while the *Tempia* warning of right to counsel is a mere application of *Miranda* to the military and attaches only in custodial situations, the other *Miranda* warnings are required by article 31 to be given much earlier.

United States v. Souder[52] provides a good illustration of the breadth of article 31 protections as compared with the scope of appli-

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courts-martial, 10 U.S.C. § 836 (1970), was amended to read:

> b. In an interrogation at which an accused or suspect is in custody, he will also be advised that he has a right to consult with counsel, provided as indicated in 34c, and to have counsel present at the interrogation. After having been advised of these rights, the accused or suspect ordinarily should not be interrogated in the absence of counsel unless he expressly and voluntarily states (1) that he does not desire counsel and (2) that he is willing to make a statement. See 140a.

MANUAL, *supra* note 5, ¶ 30b. Paragraph 140a(2) states in part:

> A statement is obtained in violation of the warning requirements as to the right to counsel if a person . . . obtained it by official interrogation from an accused or suspect when he was in custody without having, before any questioning, warned him of his right to consult, and to have with him at the interrogation, civilian counsel provided by him (or, when entitled thereto, civilian counsel provided for him) or, if the interrogation is a United States military interrogation, military counsel assigned to his case for the purpose.

Id. ¶ 140a(2) at 27-15.

48. See text & notes 66-80 *infra.*

49. 384 U.S. at 444.

50. MANUAL, *supra* note 5, ¶ 140a(2) at 27-15. This includes situations where superiors request the appearance of a suspect for interrogation and the suspect voluntarily complies. United States v. Bollons, 17 U.S.C.M.A. 253, 38 C.M.R. 51 (1967). The military courts have recognized that such "requests" by superior officers, as well as questions casually asked by them, are in reality often equivalent to commands. United States v. Tharp, 11 U.S.C.M.A. 467, 29 C.M.R. 283 (1960); United States v. Gibson, 3 U.S.C.M.A. 746, 14 C.M.R. 164 (1954). On the other hand, "[o]ne may occupy a position officially superior to that of an accused, without necessarily characterizing all his actions in relation to the accused, as official." United States v. Dandaneau, 5 U.S.C.M.A. 462, 465, 18 C.M.R. 86, 89 (1954); *accord,* United States v. Trojanowski, 5 U.S.C.M.A. 305, 17 C.M.R. 305 (1954); United States v. Armstrong, 4 U.S.C.M.A. 248, 15 C.M.R. 248 (1954). *See generally* Maguire, *Interrogation of Suspects by "Secret" Investigations,* 12 MIL. L. REV. 269 (1961).

51. MANUAL, *supra* note 5, ¶ 140a(2) at 27-15. In United States v. Penn, 18 U.S.C.M.A. 194, 39 C.M.R. 194, 199 (1969) (citation omitted), the court said:

> Our cases identify at least two situations in which Article 31 extends to the civilian investigator. These are: (1) When the scope and character of the cooperative efforts demonstrate 'that the two investigations merged into an indivisible entity,' . . . and (2) when the civilian investigator acts 'in furtherance of any military investigation, or in any sense as an instrument of the military.

52. 11 U.S.C.M.A. 59, 28 C.M.R. 283 (1959); *see* United States v. Taylor, 5 U.S.C.M.A. 178, 17 C.M.R. 178 (1954); Maguire, *supra* note 50.

cation of *Miranda* requirements. In *Souder* a sailor attempted to sell stolen accordians at an off-base music store owned by an active duty officer, Lieutenant Gallagher. Warned by the Office for Naval Investigations to watch for the merchandise and by chance behind the counter when Souder chose his store out of the many in town, the lieutenant asked information of him in conversational tones. The suspect responded with several incriminating statements later used against him in court. The Court of Military Appeals held that the conversation constituted an interrogation under article 31. Moreover, since Lieutenant Gallagher was an active duty officer subject to the Code and because as an officer he was participating in an official investigation, several unwarned incriminatory statements made by the defendant over the music store counter were declared inadmissible under article 31. Had the case arisen under civilian law, it seems doubtful that Lieutenant Gallagher would have been obliged to inform Souder of his rights. Since Souder could have left the music store at any time, it could not be cogently argued that his freedom of movement had been impaired in any significant way, as must be the case before *Miranda* warnings become obligatory.[53]

Impeachment

In recent years the civilian and military judicial systems have completely reversed positions on the issue of admitting unwarned self-incriminatory statements at trial for impeachment purposes. Originally, under the UCMJ and the *Manual for Courts-Martial,* military

53. See text & note 49 *supra.* It has been argued that the breadth of the *Souder* decision's protection of the rights of servicemen has been diluted or obscured by the later decision in United States v. Hinkson, 17 U.S.C.M.A. 126, 37 C.M.R. 390 (1967). *See, e.g.,* Hansen, *Miranda and the Military Development of a Constitutional Right,* 42 MIL. L. REV. 55, 72 (1968). In *Hinkson* the Court of Military Appeals held that where an informer merely conversed with the suspect while they were both alone in the police station awaiting interrogation and the informer did not ask questions of the suspect but merely relied on the suspect's instincts to discuss his own problems, informing the suspect of his rights was not necessary to make his self-incriminatory statements admissible at trial. Judge Ferguson, dissenting, argued that at the time the incriminating statements were made the defendant had been interrogated in a custodial situation under an air of "officiality" because the interrogator was a participant in an official investigation under the Code. The decision, however, was based on two findings: (1) while the suspect's presence in the police station might have placed him in a custodial situation, there was no element of coercion in his conversation with the informer, and where coercion is not a factor, neither *Miranda* nor article 31 warnings are needed or required; (2) particularly when informers are involved, where no element of coercion exists, such reliance on mere conversation to obtain incriminatory remarks does not constitute either an interrogation or a request under article 31. These findings distinguish *Hinkson* as a special case dealing with informers. The court appeared to be interested in maintaining the usefulness of this weapon against crime as long as it imposed no threat of coercion upon the suspect. *Souder,* therefore, still provides the primary precedent for the general class of self-incrimination questions. The individual's right to be warned against making self-incriminatory statements, even in noncustodial situations, stands undiluted.

law recognized a dichotomy between types of statements: "A confession is an acknowledgment of guilt, whereas an admission is a self-incriminatory statement falling short of an acknowledgment of guilt."[54] This distinction was important since a confession could be admitted for impeachment purposes only on positive proof that it had been made voluntarily, but an admission could be used for impeachment purposes if no indication of coercion was shown.[55] Thus the burden was placed on the defense to prove that unwarned admissions were involuntary in order to prevent the use of those statements to impeach the defendant.

In *Miranda* the Supreme Court abolished the distinction between confessions and admissions for impeachment purposes in civilian courts:

> The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissability of any statement made by a defendant. No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination.[56]

On the basis of *Miranda* and paragraph 140a[57] of the *Manual for Courts-Martial*, the Court of Military Appeals held in *United States v. Lincoln*[58] that the *Miranda-Tempia* warning had to be given before any statements of the accused, admissions as well as confessions, could be used at trial, even for impeachment purposes.[59] Later, in *United States v. Caiola*[60] the court appeared to hedge the *Lincoln* rule. Without any showing of voluntariness, the court allowed an unwarned statement made by an accused on a stockade questionnaire to be used to impeach him on a matter he had affirmatively introduced that went

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54. Manual for Courts Martial ¶ 140a, at 248 (1951) (replaced 1969).
55. *Id.* at 249, which states in part:
> The admissability of a confession of the accused must be established by an affirmative showing that it was voluntary, unless the defense expressly consents to the omission of such a showing, but an admission of the accused may be introduced without such preliminary proof if there is no indication that it was involuntary.

For the current version of paragraph 140a, see text & note 62 *infra*.
56. 384 U.S. at 476.
57. Manual for Courts-Martial ¶ 140a, at 248 (1951) (replaced 1969).
58. 17 U.S.C.M.A. 507, 38 C.M.R. 305 (1967).
59. The decision upset precedent established in United States v. Lake, 17 U.S.C.M.A. 3, 37 C.M.R. 267 (1967), where the MANUAL, *supra* note 5, distinction between confessions and admissions had been upheld.
60. 18 U.S.C.M.A. 336, 40 C.M.R. 48 (1969).

beyond the issue of commission of the offense. Though this decision may be construed to establish an exception to the *Lincoln* rule in situations where the statement does not relate to commission of the crime, such a proposition seems doubtful due to the divergent opinions of the court.[61] Furthermore, amended paragraph 140a(2) of the *Manual* evidences approval of the *Lincoln* rule:

> (2) *Voluntariness.* To be admissable against him, a confession or admission of the accused must be voluntary. . . .
>
> . . . .
>
> The admissability of a confession or admission of the accused must be established by an affirmative showing that it was voluntary, unless the defense expressly consents to the omission of such a showing.[62]

Ironically, while the Court of Military Appeals interpreted *Miranda* to mean that unwarned pre-trial admissions and confessions could not be used at trial for impeachment purposes, the Supreme Court has refused to accord *Miranda* the same interpretation. In *Harris v. New York*[63] the Court ruled that statements illegally obtained from the defendant could later be utilized to impeach him. The Court based its decision on *Walder v. United States*,[64] a 1954 case which held that evidence obtained in an illegal search could be used to impeach the defendant. The court reasoned that although the purpose of excluding unwarned though possibly valid and uncoerced incriminating statements is to discipline the police in their investigations and enforcement procedures, "sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief."[65] Although conceding that *Miranda* could be interpreted as prohibiting the use of illegally obtained statements for impeachment purposes, the Court stated that because the discussion of that issue was not necessary to the Court's holding in *Miranda*, it cannot be regarded as controlling. Thus, defendants in civilian trials, unlike their military counterparts, may be impeached by their own unwarned statements.

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61. Judge Ferguson dissented from the entire decision, and Chief Judge Quinn concurred only on grounds that the defense had not objected to the use of defendant's statements. Only Judge Darden seemed disposed to create an exception to the *Lincoln* rule.

62. MANUAL, *supra* note 5, ¶ 140a(2), at 27-14 to -16. To compare the original version of 140a(2), see note 55 *supra*.

63. 401 U.S. 222 (1971).

64. 347 U.S. 62 (1954).

65. 401 U.S. at 225 (1971). The Court asserted that the privilege to take the stand in one's defense should not be construed to mean that the defendant may commit perjury in his own defense. *Id.*

Breadth of Definition of Terms

Article 31 proscribes a wider variety of incriminating actions and declarations that civilian law does under the self-incrimination clause of the fifth amendment. "Statements" prohibited in article 31 apparently include two classifications of situations: those in which the accused is required to perform affirmative, conscious acts,[66] including making verbal utterances,[67] and those in which the accused's body, bodily functions or physical personality is tested or examined.[68] Civilian prohibitions against self-incrimination proscribe only part of the first classification: only statements of a "testimonial or communicative nature"[69] require a forewarning. As examples will demonstrate, under civilian law statements of a "testimonial or communicative nature" generally encompass only incriminating written or verbal statements.

A comparison of situations in which civilian and military law will permit the use of unwarned statements by an accused reveals significant differences between the two legal systems. For instance, blood tests are not considered statements in civilian cases and therefore may go unwarned.[70] Under military law, however, they qualify as statements and prior to the administration of the test an accused must be informed of his article 31 rights.[71] In addition, if he is in custody

66. United States v. Holmes, 6 U.S.C.M.A. 151, 19 C.M.R. 277 (1955); United States v. Rosato, 3 U.S.C.M.A. 143, 11 C.M.R. 143 (1953); United States v. Eggers, 3 U.S.C.M.A. 191, 11 C.M.R. 191 (1953). Even the requirement that the act involve the use of intelligence by the accused appears to have been abolished. In United States v. Williamson, 4 U.S.C.M.A. 320, 15 C.M.R. 320 (1954), the court ruled that acts not requiring the use of mental faculties, such as the taking of blood or urine samples, were not statements under article 31, although it conceded that the taking of handwriting exemplars and other acts requiring the use of intelligence were statements. Today, however, even most acts in the former category are included within the definition of statement. See text & notes 70-78 *infra*.

67. In United States v. Musguire, 9 U.S.C.M.A. 67, 68, 25 C.M.R. 329, 330 (1958), the court said: "[T]he word 'statement' includes both verbal utterances and actions."

68. In United States v. Bell, 6 U.S.C.M.A. 100, 19 C.M.R. 226 (1955), narrow construction of the word statement had led the court to exclude testing of body or personality characteristics, including handwriting exemplars, from its definitional scope. In United States v. Minnifield, 9 U.S.C.M.A. 373, 26 C.M.R. 153 (1958), the court specifically overruled *Bell* and held that article 31 was to be interpreted liberally rather than strictly.

For examples of types of tests that have been placed in the category of statements under article 31, see notes 70-78 *infra*.

69. Schmerber v. California, 384 U.S. 757, 761 (1966); *accord*, United States v. Wade, 388 U.S. 218 (1967). In footnote 7 of *Schmerber*, the Court stated that its decision was not to be construed as an endorsement of Professor Wigmore's view that the privilege against self-incrimination prohibits only "testimonial compulsion," by which the legal process is employed "to extract from the person's own lips an admission of guilt." *See* 8 J. WIGMORE, EVIDENCE § 2263, at 378-79 (McNaughten rev. ed. 1961). Notwithstanding this disavowal, there seems to be little practical difference between Wigmore's view and that adopted by the Court.

70. Schmerber v. California, 384 U.S. 757 (1966).

71. United States v. Musguire, 9 U.S.C.M.A. 67, 25 C.M.R. 329 (1954). Earlier,

he must be given the *Miranda-Tempia* right-to-counsel warning.[72] Handwriting exemplars,[73] voice utterances,[74] urine tests,[75] and other acts requested of the accused[76] also qualify as statements and are protected under article 31. By contrast, both civilian and military law permit compulsory fingerprinting[77] and photography[78] of an accused.

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in United States v. Williamson, 4 U.S.C.M.A. 320, 15 C.M.R. 320 (1954) the court indicated that compulsory blood tests were legal. An accused may legally be ordered to provide blood samples for medical rather than criminal investigative purposes, United States v. Hill, 12 U.S.C.M.A. 9, 30 C.M.R. 9 (1961), and such samples may be used at trial as evidence. United States v. Miller, 15 U.S.C.M.A. 320, 35 C.M.R. 292 (1965).

72. See note 47 *supra.*

73. Authorities may require an accused to submit a handwriting exemplar in civilian courts, since such samples constitute only an identifying physical characteristic. Gilbert v. California, 388 U.S. 263 (1967). Military authorities may only request such an exemplar from an accused, and then only after explaining his rights. United States v. Lewis, 18 U.S.C.M.A. 355, 40 C.M.R. 67 (1969); United States v. White, 17 U.S.C.M.A. 211, 38 C.M.R. 9 (1967) (post-*Gilbert*) (reaffirming the rule of United States v. Rosato, 3 U.S.C.M.A. 143, 11 C.M.R. 143 (1953)).

74. *Compare* United States v. Wade, 388 U.S. 218 (1967), *and* United States v. Fioravanti, 412 F.2d 407 (3d Cir. 1969), *with* United States v. Mewborn, 17 U.S.C.M.A. 431, 38 C.M.R. 229 (1968) (specifically putting aside the *Wade* ruling that an accused may be required to make voice utterances for identification), *and* United States v. Greer, 3 U.S.C.M.A. 576, 13 C.M.R. 132 (1953).

75. *Compare* United States v. Nesmith, 121 F. Supp. 758 (D.D.C. 1954), *with* United States v. Forslund, 10 U.S.C.M.A. 8, 27 C.M.R. 82 (1958), *and* United States v. Jordan, 7 U.S.C.M.A. 452, 22 C.M.R. 242 (1957).

76. *Compare* United States v. Wade, 388 U.S. 218 (1967), *and* United States v. Gilbert, 388 U.S. 263 (1967) (accused could not refuse to participate in a post-indictment line-up, although he did have the right to have counsel present at the line-up), *with* United States v. Schulz, 19 U.S.C.M.A. 311, 41 C.M.R. 311 (1970), *and* United States v. Mewborn, 17 U.S.C.M.A. 431, 38 C.M.R. 229 (1968) (whether a military suspect has the right to refuse participation in a line-up is still in question). A ruling that an individual could not be coerced into participation at a line-up would be significant but not surprising in light of the already extended breadth of the types of "statements" protected under Article 31. See text & notes 70-75 *supra.* It is clear that the issue is far from decided, however. In United States v. Scoles, 32 C.M.R. 614 (Bd. Rev.), *rev'd on other grounds,* 14 U.S.C.M.A. 14, 33 C.M.R. 226 (1963), a Board of Review held that to force an accused to wear a certain type uniform at trial for identification purposes is not violative of the military privilege against self-incrimination. The court, however, cited as its only military precedent and authority the case of United States v. Eggers, 3 U.S.C.M.A. 191, 11 C.M.R. 191 (1953), in which the court had held that the part of paragraph 150b of the 1951 Manual for Courts-Martial, *supra* note 53 which made the taking of handwriting exemplars permissible was in fact not consistent with the spirit of article 31 and was incorrect. Though the rest of the paragraph still stands, MANUAL, *supra* note 5, ¶ 150b, at 27-58, including the provision permitting use of the accused's body for identification purposes, *Eggers* can hardly be used to justify its existence. Moreover, when the Court of Military Appeals heard the *Scoles* case, *supra,* it addressed scathing remarks toward the practice of forcing a defendant to wear certain clothes during the trial for purposes of identification. This, along with the indication in *Schulz* and *Mewborn, supra,* that lineups may not, in fact, be compulsory in the military, seems to be more indicative of military thought than does the Board of Review's decision in *Scoles. But see* United States v. Johnson, 39 C.M.R. 745 (Bd. Rev. 1968), *petition denied,* 39 C.M.R. 293 (U.S.C.M.A. 1969), in which the Court of Military Review followed the civilian rule that hair samples do not constitute statements and may therefore be taken from an accused without warning him of his article 31 rights. *See also* Grimes v. United States, 405 F.2d 477 (5th Cir. 1968).

77. Civilian courts have stated that the taking of fingerprints is not violative of the fifth amendment privilege against self-incrimination. United States v. Wade, 388 U.S. 218 (1967) (dictum); Schmerber v. California, 384 U.S. 757 (1966) (dictum); Grimes v. United States, 405 F.2d 477 (5th Cir. 1968); Woods v. United States, 397 F.2d 156 (9th Cir. 1968); Napolitano v. United States, 340 F.2d 313 (1st Cir.

An offshoot of the current liberal military definition of the word "statements" is that such a definition thrusts the queston of self-incrimination into areas heretofore governed solely by search and seizure standards. In *United States v. Rehm*,[79] for example, upon entering a barracks to rouse the men for formation, a sergeant spotted the accused trying to hide an envelope. At the sergeant's request, Rehm relinquished the envelope, which contained marijuana. The evidence was declared inadmissable at Rehm's subsequent trial on a charge of wrongful possession because, in requesting the envelope, the sergeant had requested that the accused make a "statement" against himself without the required article 31 warning.[80] The *Rehm* decision is indicative of the extreme breadth of meaning of the word "statement" in military courts and demonstrates well how that increased breadth ensures greater protections against violations of individual rights.

SEARCH AND SEIZURE

The Court of Military Appeals has held that military personnel are protected by the fourth amendment from unreasonable searches and seizures.[81] Exercising their independence from Supreme Court supervision, however, the military courts have upheld military search and seizure procedures which are considerably inferior to civilian procedures in preserving the individual's fourth amendment rights.[82]

Civilian procedures include several basic requirements necessary

1965); Kennedy v. United States, 353 F.2d 462 (D.C. Cir. 1965); United States v. Iaculo, 226 F.2d 788 (7th Cir.), *cert. denied*, 350 U.S. 966 (1955); United States v. Kelly, 55 F.2d 67 (2d Cir. 1932). Though the Court of Military Appeals has never specifically held that the taking of fingerprints does not violate the suspect's right against self-incrimination, dicta supportive of that conclusion does exist. *See* United States v. Williamson, 4 U.S.C.M.A. 320, 322, 15 C.M.R. 320, 322 (1954) (dictum).

78. The taking of photographs for identification does not violate the accused's privilege against self-incrimination in federal courts. Shaffer v. United States, 24 App. D.C. 417, *cert. denied*, 196 U.S. 639 (1904); *accord*, United States v. Wade, 388 U.S. 218 (1967) (dictum); Schmerber v. California, 384 U.S. 757 (1966) (dictum). The Court of Appeals for the District of Columbia Circuit has recently held, however, that the right to counsel at lineups proclaimed in *Wade, supra*, also applies to the photographing of in-custody suspects. United States v. Ash, 10 CRIM. L. REP. 1085 (D.C. Cir. March 1, 1972). *Cf.* Simmons v. United States, 390 U.S. 377 (1968). The unwarned taking of photographs was ruled nonviolative of the suspect's privilege against self-incrimination by a Court of Military Review in United States v. Flesher, 37 C.M.R. 669 (Bd. Rev.), *petition denied*, 38 C.M.R. 441 (U.S.C.M.A. 1967). Comments of the Court of Military Appeals appear to confirm such a rule. United States v. Williamson, 4 U.S.C.M.A. 320, 322, 15 C.M.R. 320, 322 (1954) (dictum).

79. 19 U.S.C.M.A. 559, 42 C.M.R. 161 (1970).

80. *See* United States v. Corson, 18 U.S.C.M.A. 34, 39 C.M.R. 34 (1968) (similar ruling).

81. United States v. Vierra, 14 U.S.C.M.A. 48, 33 C.M.R. 260 (1963); United States v. Brown, 10 U.S.C.M.A. 482, 28 C.M.R. 48 (1959).

82. New trends in military law requiring adherence to specific Supreme Court constitutional rulings, as discussed in text & notes 39-42 *supra*, have not yet been applied to search and seizure procedures in any military cases.

to make the warrant and the ensuing search and seizure valid. First, there must exist probable cause for a search.[83] Second, the Supreme Court has ruled that a written search warrant is generally required.[84] A written warrant protects the citizen from unauthorized intrusions into his privacy, since it must particularly describe the items to be seized and the place to be searched.[85] Third, the application for a search warrant must be in the form of a written affidavit[86] made on oath or affirmation of the veracity of its contents.[87] Fourth, rule 41 of the *Federal Rules of Criminal Procedure* allows only a federal or state judge or U.S. Commissioner in the district where the search is to be made to issue a warrant.[88] The requirement that application for a search warrant be made to an independent magistrate is designed to "substitute inferences of a neutral and detached magistrate for the inferences of a committed officer in the heat of ferretting out crime."[89] Finally, civilian law provides machinery for returning illegally seized items to their owner. Under rule 41(e) of the *Federal Rules of Criminal Procedure* an individual aggrieved by an unreasonable search and seizure may move for the return of the property.

On the other hand, military law requires only the first of the basic civilian requirements: probable cause for a search must exist before the search may be authorized.[90] Searches need not be made pursuant to a written warrant that can be shown to the party searched as evidence of the right to search. Instead, a search may be authorized orally by a commanding officer[91] and executed either by him or one

83. U.S. CONST. amend. IV.

84. Vale v. Louisiana, 399 U.S. 30 (1969); Chimel v. California, 395 U.S. 752 (1968); Trupiano v. United States, 344 U.S. 699 (1947); Johnson v. United States, 333 U.S. 10 (1947); Taylor v. United States, 286 U.S. 1 (1931); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931). There are situations where the police may search without a warrant. *See, e.g.*, Warden v. Hayden, 387 U.S. 294 (1967) (searches conducted while in hot pursuit of a criminal); Terry v. Ohio, 392 U.S. 1 (1967) (police officers permitted to stop and frisk in certain situations); Schmerber v. California, 384 U.S. 757 (1966) (searches conducted in emergency situations where the need to search is immediate); United States v. Rabinowitz, 339 U.S. 56 (1950) (searches made incident to a lawful arrest); Carroll v. United States, 267 U.S. 132 (1925) (searches of vehicles). For a comprehensive analysis of warrantless searches, see Note, *Warrantless Searches in Light of Chimel: A Return to the Original Understanding*, 11 ARIZ. L. REV. 457 (1969); *cf.* "Warrantless Automobile Searches," 13 ARIZ. L. REV. 313, 341 (1971).

85. U.S. CONST. amend. IV; United States v. Marron, 275 U.S. 192 (1927).

86. FED. R. CRIM. P. 41(c).

87. U.S. CONST. amend. IV.

88. FED. R. CRIM. P. 41(a).

89. Rosencranz v. United States, 356 F.2d 310, 313 (1st Cir. 1966); *accord*, Marcusi v. DeForte, 392 U.S. 364 (1968); Johnson v. United States, 333 U.S. 10 (1948); United States v. Lefkowitz, 285 U.S. 464 (1931).

90. MANUAL, *supra* note 5, ¶ 152. *See* United States v. Harmon, 12 U.S.C.M.A. 180, 30 C.M.R. 180 (1961); United States v. Gebhart, 10 U.S.C.M.A. 606, 28 C.M.R. 172 (1959); United States v. Brown, 10 U.S.C.M.A. 482, 28 C.M.R. 48 (1959).

91. "In military law . . . there is no provision for the issuance of a warrant to search." United States v. Hartsook, 15 U.S.C.M.A. 291, 35 C.M.R. 263, 266 (1965).

of his subordinates.[92] Moreover, while it has recognized the importance of written applications for warrants,[93] the Court of Military Appeals has upheld the general use of oral applications since the *Manual for Courts-Martial* does not requre that they be written.[94] Similarly, there is no requirement that these oral applications be made on oath or affirmation.[95]

The civilian requirement that a search warrant may be issued only by an independent judicial authority is unparalleled in military law. Military judges have very recently been given the authority to issue written warrants, but military law enforcement authorities are not required to obtain one of these warrants as a prerequisite to a search.[96] Generally, searches need only be "authorized upon probable cause by a commanding officer."[97] Consequently, while subordinates must "apply" to the commanding officer for authority to search, the latter need make no such application. Any commanding officer or officer in charge, even though he may later be the convening authority or the court-martial itself,[98] can search and seize upon his own personal de-

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See MANUAL, *supra* note 5, ¶ 152, at 27-63 to -64; United States v. Battista, 14 U.S.C.M.A. 70, 33 C.M.R. 282 (1963); United States v. Davenport, 14 U.S.C.M.A. 152, 33 C.M.R. 364 (1963); United States v. Ness, 13 U.S.C.M.A. 18, 32 C.M.R. 18 (1963). The Army has adopted regulations permitting its military judges to issue warrants on oath. Army Reg. 27-10, ¶ 14-2, (change 8, Sept. 7, 1971). The Air Force publishes warrant forms which may be utilized at the discretion of the commander authorizing a search. Air Force Form 1176.

92. MANUAL, *supra* note 5, ¶ 152, at 27-64. Air Force regulations state that such delegation of responsibility may occur only "on rare occasions." United States v. Surenian, 41 C.M.R. 963, 966 n.1 (Ct. Rev. 1970), *citing* AIR FORCE MANUAL 111-1, ¶ 1-5.

93. The court noted that written applications simplify the judge's task of determining whether probable cause for the search existed. In order to prove or disprove the validity of warrants issued without written applications, both prosecution and defense are faced with the often impossible task of reconstructing the justification for the warrant, many months removed from the events. Chief Judge Quinn has noted that without written applications all possibility of either attacking or upholding a warrant may be precluded by the death or nonavailability of a witness during the period between the event and the trial. Quinn, *Some Comparisons Between Courts-Martial and Civilian Practice*, 15 U.C.L.A.L. REV. 1240, 1254 (1968). *See also* United States v. Wolfe, 37 C.M.R. 571 (Bd. Rev. 1966), acknowledging the desirability of obtaining written authorization to search.

94. 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965); *accord*, United States v. Martinez, 16 U.S.C.M.A. 40, 36 C.M.R. 196 (1966); United States v. King, 36 C.M.R. 929 (Bd. Rev.), *petition denied*, 36 C.M.R. 541 (U.S.C.M.A. 1966) (applications for search need not be made on oath).

95. But see note 96 *infra*.

96. Army Reg. 27-10, ¶ 14-2, (change 8, Sept. 7, 1971). If the law enforcing authority elects to procure a search warrant from a military judge, however, he must present a written affadavit made on oath. *Id.* ¶ 14-4. *See* note 93 *supra*.

97. MANUAL, *supra* note 5, ¶ 152, at 27-63. In United States v. Gebhart, 10 U.S.C.M.A. 606, 28 C.M.R. 172 (1959), the Court of Military Appeals held that the Constitution does not require that a search warrant be issued by an independent judicial officer.

98. Mere issuance of authorization to search does not exclude an otherwise qualified officer from becoming the convening authority of a court-martial. Even if an officer who authorized a search should be classified as an "accuser" he may still be the convening authority of a summary court-martial or serve as the summary court officer

termination of probable cause. The question of probable cause for a search is reviewable on appeal, and to some extent this protects the individual from illegal searches. By the time the search is determined to have been made without probable cause, however, the defendant will have suffered irreparably. In addition, because application for authority to search need not be made in writing, it may be extremely difficult to prove whether the requisite probable cause in fact existed at the time of the search.

Unlike civilian rules, military procedures fail to provide machinery for the return of illegally seized items. The *Manual* states: "Military courts have no authority to entertain a motion for or to order the return of property obtained as a result of an unlawful search or seizure . . . ."[99] The implications are manifold. The personal belongings of any person subject to military law are always vulnerable and in danger of permanent forfeiture at the hands of an illegal search. While the illegal seizure of personal belongings may be useless to any prosecution, the individual has no recourse by which he can regain possession. Without trial or other fundamental protections of due process or the fourth amendment, the commanding officer may deny the soldier possession of belongings which the officer has himself determined to be illegally obtained or possessed, or merely undesirable.

Search and seizure procedures in the military are clearly based upon the concept that the commanding officer can always be impartial towards his men. Unfortunately, commanders are frequently unable to perform successfully and unemotionally the combined roles of commanding officer seeking to maintain the discipline of his troops, impartial judge determining probable cause, investigating officer, and

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(judge). MANUAL, *supra* note 5, ¶ 5c. An accuser is defined as "any person who signs and swears to charges . . . who directs that charges nominally be signed and sworn to by another . . . [or] who has an interest other than an official interest in the prosecution of the accused," 10 U.S.C. § 801(9) (1970). *Compare* 10 U.S.C. § 824 (1970), which does not disqualify an accuser from convening a summary court-martial, *with* 10 U.S.C. §§ 822(b), 823(b) (1970), which specifically disqualify an accuser from acting as convening authority in either a general or special court-martial.

It is very possible that an officer who merely authorized a search would not be considered as having a sufficiently personal interest in the prosecution to be classified as an accuser and would not then be disqualified from acting as convening authority even in general and special courts-martial. *See* MANUAL, *supra* note 5, ¶ 5a(4) at 3-1 to -2: "Action by a commanding officer which is merely official and in the strict line of duty cannot be regarded as sufficient to disqualify him [as an accuser]." *Cf.* United States v. Taylor, 5 U.S.C.M.A. 523, 18 C.M.R. 147 (1955); United States v. McClenny, 5 U.S.C.M.A. 507, 18 C.M.R. 131 (1955); United States v. Jewson, 1 U.S.C.M.A. 652, 5 C.M.R. 80 (1952). Since a military judge must be appointed in all general and special courts-martial in which the convening authority appoints a judge to preside, 10 U.S.C. § 816(1)-(2) (1970), no commander, regardless of whether he had authorized a search, could sit as judge in those tribunals as he could in a summary court-martial.

99. MANUAL, *supra* note 5, ¶ 152 at 27-64.

possibly accuser bringing charges. Until military laws and procedures acknowledge that commanders are human beings capable of making mistakes and losing their objectivity when they become too closely involved with a situation, servicemen will continue to suffer from the everpresent threat to their privacy and personal belongings. The armed forces have begun to place some of the commander's authority to issue warrants in the hands of independent military judges.[100] Until this trend is brought to its ultimate conclusion and commanders are required to apply to an impartial judge before searching or seizing servicemen's personal belongings, individual rights and military justice will suffer.[101]

RIGHT TO COUNSEL

A fundamental observation must be made prior to any comparison of the individual's right to counsel in the military and civilian judicial systems: the two systems technically do not share a common definition of the word "counsel." Counsel required by the Constitution for representation of individuals in criminal cases means a lawyer admitted to the bar of the civilian court in which he is practicing.[102] In military justice the term includes both lawyers and nonlawyer commissioned officers.[103] While the definitional difference does exist, the use of lay counsel in the military has virtually been eliminated. At present, lawyer counsel must be appointed for a defendant in all general and special courts-martial,[104] except in rare special courts-martial in which lawyer counsel is not available due to "physical conditions and military exigencies."[105] Moreover, no court-martial may be held without lawyer counsel if the potential punishment includes a bad conduct discharge.[106]

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100. *See* text & note 96 *supra.*

101. Of course, provisions would have to be retained empowering the commander to authorize searches in combat situations. Such powers held by the commander in exceptional situations would be closely analogous to the power of civilian law enforcement authorities to search and seize in certain cases upon their own determination of probable cause. See note 84 *supra.*

102. People v. Cox, 12 Ill. 2d 265, 146 N.E.2d 19, 68 A.L.R.2d 1134 (1957); Higgins v. Parker, 354 Mo. 888, 191 S.W.2d 668 (1945); *Ex parte* Lamberth, 242 Ala. 165, 5 So. 2d 622 (1942).

103. 10 U.S.C. § 827(c)(1) (1970).

104. Prior to 1968, article 27(c) permitted the convening authority to appoint at his discretion either lawyer counsel or nonlawyer counsel in special courts-martial. Act of May 5, 1950, ch. 169, § 1 (Art. 27(c)), 64 Stat. 117, *amended,* 10 U.S.C. § 827(c) (1970).

105. 10 U.S.C. § 827(c) (1970). The MANUAL states that such conditions may exist under rare circumstances, such as on an isolated ship on the high seas or in a unit in an inaccessible area, provided compelling reasons exist why trial must be held at that time and at that place. Mere inconvenience does not constitute a physical condition or military exigency and does not excuse a failure to extend to an accused the right to qualified counsel.
MANUAL, *supra* note 5, ¶ 6c, at 3-4 to -5.

106. 10 U.S.C. § 819 (1970).

Consideration of the Supreme Court's declaration of parallel civilian rights in *Gideon v. Wainwright*[107] eliminates any remaining apprehensions about the extensiveness of the right to counsel in the military. In *Gideon* the Court held that defendant in a federal or state court had a constituional right to counsel in a felony trial, but it has never specifically applied the *Gideon* rule to misdemeanor cases.[108] Felony is defined by federal law as a crime punishable by death or more than 1 year in prison.[109] Since special courts-martial are restricted to a maximum sentence of 6 months confinement,[110] they are generally of a less serious nature than civilian felony trials where right to counsel prevails. Nevertheless, the military defendant retains his right to counsel in special courts-martial, while the civilian defendant often does not enjoy a similar right in corresponding civilian cases. This discrepancy has been eliminated statutorily in federal courts by two separate provisions. Rule 44(a) of the *Federal Rules of Criminal Procedure* states broadly that every defendant who cannot provide himself with counsel will be appointed counsel. In addition, federal law requires that counsel be appointed for indigents in federal cases in which the possible sentence exceeds 6 months in prison or a fine of $500.[111]

State courts are unaffected by these federal provisions and need appoint counsel only in felony cases, as required by *Gideon*. In an effort to eliminate this dichotomy between military and federal procedure on the one hand and state procedure on the other, some civilian courts have adhered to the inference drawn from the Supreme Court's opinion in *In re Gault*[112] that the right to counsel exists in all "serious crimes."[113] Under this interpretation of *Gault*, the *Gideon* rule is expanded to encompass serious misdemeanors.[114] Thus, in civilian

107. 372 U.S. 335 (1963).
108. *See* State v. DeJoseph, 3 Conn. Cir. 624, 222 A.2d 752, *appeal denied*, 220 A.2d 771 (Conn.), *cert. denied*, 385 U.S. 982 (1966); Winters v. Beck, 239 Ark. 1151, 397 S.W.2d 364, *cert. denied*, 385 U.S. 907 (1966). The Court again has an opportunity to decide this issue. Argersinger v. Hamlin, 10 CRIM. L. REP. 1087, 4201 (D.C. Cir. argued Feb. 28, 1971).
109. 18 U.S.C. § 1 (1970). The states are not in agreement as to the meaning of felony and have differed in their application of *Gideon*. New Jersey, for example, designates most crimes as misdemeanors and high misdemeanors. Although Delaware law employs the felony classification, it enumerates 35 misdemeanors punishable by more than one year in prison. Adultery is a felony in Arizona, ARIZ. REV. STAT. ANN. § 13-221 (1956), and Florida, FLA. STAT. ANN. § 798.01 (1965), but is a misdemeanor in Kansas. KAN. STAT. ANN. § 21-3507(2) (Supp. 1971). *See* Comment, *Continuing Echoes of Gideon's Trumpet—The Indigent Defendant and the Misdemeanor: A New Crisis involving the Assistance of Counsel in "A Criminal Trial,"* 10 S. TEXAS L.J. 222 (1968).
110. 10 U.S.C. § 819 (1970).
111. 18 U.S.C. § 3006A(a) (1970).
112. 387 U.S. 1 (1967).
113. *Id.* at 42.
114. Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965) (crime punishable by

courts right to counsel may exist in cases of roughly the same seriousness and severity of punishment as in special courts-martial. While this trend is proceeding and may soon culminate in a concrete decision by the Supreme Court,[115] it is not accepted in all jurisdictions.

Military justice also provides every defendant with lawyer counsel in pretrial proceedings. An accused has the right to legally trained counsel during the interrogation stages under the *Miranda-Tempia* rule.[116] In addition, article 32 requires that a formal pretrial investigation occur prior to every general court-martial[117] and that counsel be appointed to assist the defendant throughout the entire proceedings.[118] Since the pretrial investigation under article 32 encompasses all proceedings between interrogation and trial, the military accused is guaranteed counsel during all confrontations with military authorities.

Procedure prior to summary and special courts-martial does not include pretrial investigation and the accompanying right to counsel.[119] Nevertheless, due to the expansive scope of his *Miranda-Tempia* safeguards,[120] the defendant is well protected. Since the definition of a self-incriminating "statement" is broader in the military than in civilian life,[121] and since under the *Miranda-Tempia* rule the suspect cannot be made to make any such "statement" without first being informed of his right to counsel, he enjoys the right to counsel at virtually all confrontations with authorities.

In civilian courts, pretrial proceedings are fragmented. Although legal counsel is provided for military defendants throughout the pretrial proceedings, counsel is required for the civilian accused only at

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maximum 90 days imprisonment and $500 fine was sufficiently "serious" to require right to representation by counsel at trial); Brinson v. County of Dade, 273 F. Supp. 840 (S.D. Fla. 1967) (crime which exposed defendant to maximum one year imprisonment, and two years on second conviction, was a "serious offense" even though the charge was not termed a felony); Burrage v. Superior Court, 105 Ariz. 53, 459 P.2d 313 (1969) (misdemeanor punishable by 5-months imprisonment and/or $300 fine was a "serious misdemeanor" in light of the potential complexity of the defense to the charge involved, unlawful possession of dangerous drugs); *In re* Johnson, 62 Cal. 2d 325, 398 P.2d 420, 42 Cal. Rptr. 228 (1965) (right to counsel in California extends to misdemeanors in municipal or other inferior courts). *See also* Uveges v. Pennsylvania, 335 U.S. 437, 440-41 (1948).

115. *See* Argersinger v. Hamlin, 10 CRIM. L. REP. 1087, 4201 (D.C. Cir. argued Feb. 28, 1971).

Requirements for lawyer-counsel, discussed in text & notes 116-18 *infra*, are absolute and not amenable to exceptions such as those described in 10 U.S.C. § 827 (1970), relating to appointment of counsel for the court-martial itself.

116. See text & note 47 *supra*.

117. 10 U.S.C. § 832(a) (1970).

118. *Id.* § 832(b).

119. *Id.* The pre-trial investigation occurs only before general courts-martial.

120. See note 47 *supra*.

121. See text & notes 66-80 *supra*.

"critical stages," of the pretrial investigation.[122] A critical stage exists where lack of counsel "might derogate the accused's right to a fair trial."[123] Phases of criminal proceedings which have been designated critical stages include custodial interrogations,[124] post-indictment lineups,[125] some forms of arraignment,[126] and trial itself.[127] The taking of handwriting exemplars, blood tests, fingerprints, photographs, or clothing or hair samples are not deemed critical stages.[128] By contrast, all of these latter activities except fingerprinting are viewed as producing "statements" within the article 31 definition.[129] Under the *Miranda-Tempia* extension of article 31, all military suspects have a right to counsel prior to custodial interrogation or requests leading to such "statements."[130] The added breadth of the definition of "statement" in the military therefore broadens the military defendant's right to counsel.

One inherent advantage of military justice is that servicemen are not required to demonstrate indigency in order to be entitled to appointed counsel.[131] The military rule of universal right to appointment of counsel was the only factor which was injected into the *Miranda* rule adopted in *United States v. Tempia.*[132] As a result, in the military an individual is entitled to automatic appointment of legally trained counsel at the interrogation stage. Civilians, however, benefit from appointed counsel under *Miranda* and *Gideon* only when they have demonstrated an economic inability to provide their own counsel.

JURY TRIAL

Although it is not constitutionally required,[133] the UCMJ does

122. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Hamilton v. Alabama, 368 U.S. 52 (1961). *See also* Gideon v. Wainwright, 372 U.S. 355 (1963), which overruled the "special circumstances" test of Betts v. Brady, 316 U.S. 455 (1942).

123. United States v. Wade, 388 U.S. 218, 228 (1967).

124. Miranda v. Arizona, 384 U.S. 436 (1966).

125. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967).

126. Hamilton v. Alabama, 368 U.S. 52 (1961).

127. Gideon v. Wainwright, 372 U.S. 335 (1963).

128. *See generally* United States v. Wade, 388 U.S. 218 (1967); *cf.* "Lineups," 12 ARIZ. L. REV. 89, 122 (1970). In Gilbert v. California, 388 U.S. 263 (1967), the Supreme Court held that the taking of handwriting exemplars did not represent a critical stage. Schmerber v. California, 384 U.S. 757 (1966), established that the taking of blood tests did not constitute a critical stage. *But see* United States v. Ash, 10 CRIM. L. REP. 1085, 2408 (D.C. Cir. March 1, 1972), where the court held that the right to counsel applies to photographic identifications of in-custody suspects. *Cf.* Simmons v. United States, 390 U.S. 377 (1968).

129. See notes 70-78 *supra.*

130. MANUAL, *supra* note 5, ¶ 140a(2), at 27-15.

131. 10 U.S.C. § 827 (1970).

132. 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

133. U.S. CONST. art. III, § 2, cl. 3 directs that "Trial of all Crimes, except in

afford the military defendant the right to trial by the military equivalent of a jury. Until recently, the most glaring difference between military and civilian juries was the number of jurors. Special courts-martial consist of not less than three members ("jurors"), while general courts-martial include not less than five members.[134] The Supreme Court's desanctification of the traditional 12-man civilian jury,[135] however, has diminished the significance of the difference in number of jurors.

Because military justice is not constrained by constitutional provisions requiring jury trial, drafters of the UCMJ were able to search for and utilize various procedures which are in many ways superior to parallel constitutional rules which govern civilian courts. The Supreme Court has stated that, in federal courts, jury verdicts must be unanimous,[136] but this is not constitutionally required, apparently.[137] Article 52 of the UCMJ, on the other hand, provides that a person may be convicted of a noncapital offense by a vote of at least two-thirds of the members present at the time the vote is taken.[138] Conviction of a crime carrying the death penalty requires concurrence of all members present at the time the vote is taken, and no person may be sentenced to incarceration for life or more than 10 years without

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Cases of Impeachment, shall be by Jury . . . ." The object of this clause, however, was to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law and in all cases of a like nature as they might arise in the future [citation omitted], but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right.

Ex parte Quirin, 317 U.S. 1, 39 (1942). Because the right to a military jury trial was not a common law right at the time the Constitution was written, art. III, § 2, cl. 3 could not be construed to encompass courts-martial and thus deprive Congress of its article I power to regulate and govern the armed services. *Ex parte* Quirin, *supra; see* Kahn v. Anderson, 255 U.S. 1 (1920). See generally text and notes 7-16 *supra.* In addition, the Supreme Court has held that the fifth and sixth amendments do not enlarge the right to jury trial provided in article III. Whelchel v. McDonald, 340 U.S. 122 (1950); *Ex parte* Quirin, *supra; see* Kahn v. Anderson, *supra;* Burns v. Lovett, 202 F.2d 335 (D.C. Cir. 1952), *aff'd sub nom.* Burns v. Wilson, 346 U.S. 137 (1953).

134. 10 U.S.C. § 816(1)(A), (2)(A)-(B) (1970). The only circumstance under which a general or special court-martial may consist of fewer than five and three members (in addition to the judge), respectively, is when the defendant requests trial by judge alone. *Id.* § 816(1)(B), 816(2)(C).

135. Williams v. Florida, 399 U.S. 78 (1970). In *Williams* the Supreme Court overturned Thompson v. Utah, 170 U.S. 343 (1898), and later cases following the Thompson rule (Patton v. United States, 281 U.S. 276 (1930); Rasmussen v. United States, 197 U.S. 516 (1905)) and upheld a new state statute establishing 6-man juries in place of the traditional 12-man jury. The Court stated, "the 12-man panel is not a necessary ingredient of 'trial by jury' [in all criminal cases]." 399 U.S. at 86.

136. Andres v. United States, 333 U.S. 740 (1948). As this issue went to press, the Supreme Court ruled that jury verdicts in state courts may be less than unanimous. Apodoca v. Oregon, No. 69-5046, 40 U.S.L.W. 4528 (U.S. May 22, 1972); *see* The Wall Street Journal, May 23, 1972, at 1, col. 3.

137. Apodoca v. Oregon, No. 69-5046, 40 U.S.L.W. 4528 (U.S. May 22, 1972). *Contra, id.* at 4536 (Douglas, Brennan & Marshall, JJ., dissenting).

138. 10 U.S.C. § 852(a)(2) (1970).

the concurrence of three-quarters of the members present.[139]

Although article 52 could be viewed as increasing the probability of conviction by reducing the number of votes needed for a verdict of guilty, such a deduction does not necessarily follow. "Studies of the operative factors contributing to small group deliberation and decision-making suggest that jurors in the minority on the first ballot are likely to be influenced by . . . the majority aligned against them."[140] As a result, even where unanimous verdicts are required, the prosecutor theoretically need convince only a simple majority of the jurors of the defendant's guilt. Psychological pressures generated by interaction among the jurors, as well as the ever-present pressure to reach a verdict, work to induce unanimity.[141]

Once it is recognized that civilian prosecutors may be effectively obligated to convince only a simple majority, the military requirement that trial counsel convince less than the entire jury does not seem so anomalous. Moreover, the advantages of non-unanimity outweigh whatever slight disadvantages there may be. Since the jury need not pursue a unanimous decision, any formal vote taken is final. The phenomenon known as a hung jury does not exist under such a system. Consequently, the accussed is relieved of the burden of being tried under a system in which the "reasonable doubt" standard may

139. *Id.* § 852(b). In order to have a vote, however, there must be a quorum present of at least five members. MANUAL, *supra* note 5, ¶ 41d(1).

140. Williams v. Florida, 399 U.S. 78, 101 n.49 (1970). *See* H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966), in which the authors discuss figures resulting from studies of jury voting patterns. They note that

> where the jury is split 6-6 [on the first ballot] the final verdict falls half the time (it so happens, exactly half the time) in one direction and half in the other. However, in the instances where there is an initial majority either for conviction or for acquittal, the jury in roughly nine out of ten cases decides in the direction of the initial majority. . . .

Id. at 488. Two states permit verdicts by less than unanimous juries in felony trials. *See* LA. CONST. art. 7, § 41; ORE. CONST. art. I, § 11. Several other states allow non-unanimity in some misdemeanor cases. *See* IDAHO CONST. art. I, § 7; MONT. CONST. art. III, § 23; OKLA. CONST. art. II, § 19, TEX. CONST. art. V, § 13. See text & note 139 *supra*. For discussion of and arguments in opposition to non-unanimity requirements, see Comment, *Should Jury Verdicts Be Unanimous in Criminal Cases?*, 47 ORE. L. REV. 417 (1968).

141. The judge, as well as the jurors, contributes to the pressure in many cases. As part of their instructions, judges sometimes give the "Allen charge," Allen v. United States, 164 U.S. 492 (1896), which encourages jurors to have deference for the views of the other jurors and to listen to the views of the majority "with a disposition to be convinced." 164 U.S. at 501. Many courts have expressed strong doubts about the propriety of this type of instruction, and it has been outlawed in some jurisdictions. *See, e.g.*, United States v. Thomas, 449 F.2d 1177 (D.C. Cir. 1971) United States v. Fioravanti, 412 F.2d 407 (3d Cir.), *cert. denied*, Panaccione v. United States, 396 U.S. 837 (1969); United States v. Brown, 411 F.2d 930 (7th Cir. 1969), *cert. denied*, 396 U.S. 1017 (1970); Green v. United States, 309 F.2d 852 (5th Cir. 1962); State v. Thomas, 86 Ariz. 161, 342 P.2d 197 (1959). It has been said that the doubts concerning the "Allen charge" rest upon two grounds: "that it may give the jury the impression that the judge agrees with the majority position on the jury, and that he is in fact suggesting to the minority that it capitulate without being convinced." H. KALVEN & H. ZEISEL, *supra* note 140, at 454.

be used to convict him, but offers him no freedom from custody and future criminal prosecutions unless every juror agrees to his innocence.[142] The defendant does not have to endure the harrowing process of retrial, while the government concomitantly is spared the additional load on its already crowded court dockets, although it may be that the prosecution will move to dismiss in such a case. Elimination of the unanimity requirement also helps to avoid the pressures and possible coercions which may force panel members to compromise their beliefs for the sake of unanimity.[143]

One procedural problem stems from the tiered structure of the court-martial system and its influence on the availability of a military jury trial. The military defendant has a right to a jury trial in only the top two tiers, special and general courts-martial.[144] In the summary court-martial, which is restricted to the imposition of less severe maximum punishments than a general court-martial,[145] no right to jury trial exists. While a defendant before summary court-martial can opt for a special court-martial, election of this alternative simultaneously exposes him to the possibility of more severe punishment. In civilian courts such discouragement of the assertion of one's rights would be unconstitutional. In *United States v. Jackson*[146] the Supreme Court held that the imposition upon the defendant of a choice between asserting his right to jury trial and concomitantly subjecting himself to potentially more severe punishment or not asserting such right, placed an unconstituional chilling effect on his right to have a jury trial. Military procedures clearly violate the spirit of the *Jackson* rule, although no constitutional transgression results since the constitutional right to jury trial has been held inapplicable to the military.[147]

Another significant problem relating to juries in military courts-martial is that the membership appears to be unfavorable to the defendant, since he has little chance of being tried by a jury of his peers. Senator Birch Bayh stated in the *Congressional Record* that "in a re-

142. *See* Comment, *Waiver of Jury Unanimity—Some Doubts About Reasonable Doubt*, 21 U. CHI. L. REV. 438, 442 (1942).

143. Military jurors may, however, be subject to other influences. See text & notes 198-204 *infra.*

144. 10 U.S.C. § 816 (1970).

145. *Id.* § 820 reads in part:

> Summary courts-martial may . . . addjudge any punishment not forbidden by this chapter except death, dismissal, dishonorable or bad conduct discharge, confinement for more than one month, hard labor without confinement for more than 45 days, restriction to specified limits for more than two months, or forfeiture of more than two-thirds of one month's pay

Compare the punishments imposable in special and general courts-martial, note 7 *supra.*

146. 390 U.S. 570 (1968).

147. See note 133 *supra.*

cent year, the Army tried more than 68,000 men. Of those prosecuted, only 63 were officers, less than one-tenth of one per cent."[148] The convening authority of the court-martial is an officer,[149] and the court-martial panel normally consists of officers. Only upon written request by an enlisted defendant will enlisted personnel be appointed to serve on courts-martial, and even then he is guaranteed only that one-third of the court membership will consist of enlisted men.[150] In addition, it is widely accepted that an enlisted defendant's request for enlisted court members most often results in appointment of senior noncommissioned officers—career soldiers—as panel members.[151] These men are often more strict disciplinarians and have even less in common with the young enlisted man than do young officers.[152] The enlisted man finds more reason for discontent when he learns that the UCMJ will not permit enlisted personnel of the defendant's unit to be court members,[153] although officers of his unit may be seated.[154]

It is obvious that even under civilian law and the Constitution no accused is tried by absolute peers. The Supreme Court has held that juries selected by sifting procedures which exclude certain citizens from the jury rolls are legal only when "the grounds of elimination [are] reasonably and closely related to the juror's suitability"[155] for jury duty. As a rule, no citizen may be excluded intentionally or systemmatically on the basis of race, color, creed, occupation,[156] or economic, social or political class.[157] While military procedures are not

148. 117 CONG. REC. S2554 (daily ed. March 8, 1971) (remarks of Senator Birch Bayh).

149. 10 U.S.C. § 822-24 (1970).

150. *Id.* § 825(c)(1).

151. *See, e.g.*, O'Callahan v. Parker, 395 U.S. 258, 264 (1969); United States v. Crawford, 15 U.S.C.M.A. 31, 35 C.M.R. 3 (1964), *leave to file pet. for cert. denied*, 380 U.S. 970 (1965). *See generally* Schiesser, *Trial by Peers: Enlisted Members on Courts-Martial*, 15 CATH. U.L. REV. 171 (1966).

152. Benson, *Military Justice in the Consumer Perspective*, 13 ARIZ. L. REV. 595, 607-08 (1972). *But see* Schiesser, *supra* note 151, at 196-97, where the author states that all-officer courts-martial have a conviction rate twice that of courts-martial conducted by both officers and enlisted members. The source of his statistics, however, is not cited.

153. 10 U.S.C. § 825(c)(1) (1970).

154. *Id.* § 825(a). This statutory provision authorizes any commissioned officer, regardless of the unit to which he is assigned, to serve on a court-martial.

155. Fay v. New York, 332 U.S. 261, 270 (1946). Though requirements vary from state to state, the following criteria for suitability appear typical of the type of restrictions which legally may be used in selecting juries:

> A person must be an American citizen and a resident of the county; not less than 21 nor more than 70 years old; the owner or spouse of an owner of property of the value of $250; in possession of his or her natural faculties and not infirm or decrepit; not convicted of a felony or misdemeanor involving moral turpitude; intelligent; of sound mind and good character; well-informed; able to read and write the English language understandably.

Id. at 266-67 (footnote omitted).

156. *See generally* Fay v. New York, 332 U.S. 261 (1946).

157. Thiel v. Southern Pac. Co., 328 U.S. 217 (1946); Glasser v. United States, 315 U.S. 60 (1942).

subject to such constitutional restraints, the military system nevertheless appears lacking in basic fairness on this point. It is clear that the UCMJ discriminatorily excludes enlisted personnel on the basis of rank,[158] a factor intimately related to the factors of occupation and social and economic class, but not reasonably related to the individual's suitability for jury duty.

Prior to making any final indictments against military justice on these grounds, two additional considerations should be weighed. First, Congress did not establish the court-martial panels out of constitutional necessity. Congress' adoption of a form of jury trial for military trials might, therefore, be hailed as somewhat enlightened. Second, the UCMJ's provisions for court-martial panels seem fairer when viewed in light of the nature and purpose of the military. The military is necessarily an organization in which discipline is placed at a premium.

Despite the disciplinary requirements inherent in the military, however, the existing degree of unfairness and discrimination in the selection of military jury panels is unjustified. That is not to say that military procedures should be made to conform precisely with civilian selection procedures. A system of trial by jury in which subordinates participated in determining the guilt or innocence of their superiors[159] would lend itself to severe and justified criticism. Whether an officer could obtain a fair trial at the hands of enlisted men would be as dubiously fair as the opposite situation which currently exists. Nevertheless, a system in which the panel was chosen at random from all members of equal or superior rank to the accused,[160] and possibly pro-

158. The military accused is subject to the statutory discrimination against participation of the *entire* class of enlisted members on the court-martial although the effect is alleviated slightly since on special request a maximum of one-third of the panel must be enlisted men. See note 150 *supra*. He is affected also by the unwritten policy of the armed forces to further discriminate against *lower* enlisted men as a class. See Benson, *The Military Jury . . . An Unrepresentative Tribunal?*, 7 TRIAL 40, 41-42 (1971), for an expose on how the lower enlisted ranks were successfully discriminated against in one famous case. In addition, discrimination solely on the basis of grade sometimes occurs in the officer ranks. *See* United States v. Green, 20 U.S.C.M.A. 232, 43 C.M.R. 72 (1970). *See generally* Comment, *Stacked Juries: A Problem of Military Injustice*, 11 SANTA CLARA LAW. 362 (1971); *cf.* Benson, *Military Justice in the Consumer Perspective*, 13 ARIZ. L. REV. 595 (1971).

159. Senator Birch Bayh has introduced a proposal, S. 1127, 92d Cong., 1st Sess. (1971), under which military juries would be selected at random from among officers and enlisted men. For an account of an interesting experiment concerning randomly selected military jury panels, see TIME, Nov. 8, 1971, at 47, col. 1, where a random jury in Vietnam rendered a verdict of not guilty.

160. A bill introduced by Senator Mark Hatfield, S. 2177, 92d Cong., 1st Sess. (1971), approximates such a plan. Under that proposal, 10 U.S.C. § 825 would be amended in part to read:

> (d) Not less than one-half of the total membership of a general or special court-martial shall be composed of members of the same rank and grade as the accused if the accused . . . requests in writing that the court member-

viding for a minority of members of inferior rank, would remove many of the apprehensions about biased panels without threatening discipline. Such a combination of present-day military and civilian procedures would eliminate unnecessary discrimination against enlisted men of the lower ranks to feel and act as if they had a role and a stake in military justice.

DISCOVERY AND SERVICE OF PROCESS

Military procedures for discovery and for obtaining the appearance of witnesses at trial are both unique and extensive. Unlike its civilian counterpart, military criminal process is not limited by state or national boundaries; compulsory process may be served anywhere in the world on persons subject to the UCMJ.[161] The responsibility for serving and insuring the appearance of witnesses, however, falls entirely on the prosecution.[162] Accordingly, since the prosecution has sole authority to serve process, the defense must request the subpoena of desired witnesses or documentary evidence.[163] The prosecution is not required, however, to serve process unless it is satisfied that the expected testimony of the witness will be "material and necessary."[164]

The Supreme Court has criticized such a system because it leaves the access of the defense to witnesses and documentary evidence "dependent upon the approval of the prosecution."[165] Controversy ranges wide on the ultimate effect of such a requirement.[166] It could

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ship be so composed.

. . . .

(e)(2) The name of every officer and warrant officer within the command of the convening authority who is eligible to serve as a member of a general or special court-martial shall be included on a court-martial master roll and the name of every enlisted man within such command who is eligible . . . shall be included on a separate court-martial master roll.

(3) . . . The random selection method shall be used for the selection of members of a court-martial for each separate trial.

For an enlightening discussion of the Bayh and Hatfield bills, *see* Rothblatt, *Military Justice: The Need for Change*, 12 WM. & MARY L. REV. 455, 467-69 (1971).

161. 10 U.S.C. § 846 (1970). In federal courts a subpoena may be served any place within the United States or a foreign country as provided in 28 U.S.C. § 1783 (1970). FED. R. CRIM. P. 17(e). State courts cannot require the attendance of a nonresident witness absent from the state (State v. Rasor, 168 S.C. 221, 167 S.E. 396 (1933); *cf.* Wilcox v. Hunt, 38 U.S. (13 Pet.) 378 (1839)), unless the states involved have adopted a reciprocal statute such as the UNIFORM ACT TO SECURE WITNESSES FROM WITHOUT A STATE IN CRIMINAL PROCEEDINGS. *See* New York v. O'Neill, 359 U.S. 1 (1958). State courts do not have the power to subpoena witnesses in foreign countries.

162. MANUAL, *supra* note 5, ¶ 115a, at 23-1, which provides in part:

The trial counsel will take timely and appropriate action to provide for the attendance of those witnesses who have personal knowledge of the facts at ssue in the case for both the prosecution and the defense.

163. *Id.*

164. *Id.*

165. O'Callahan v. Parker, 395 U.S. 258, 264 n.4 (1969).

166. *Compare* Melnick, *The Defendant's Right to Obtain Evidence: An Examina-*

leave the defense open to obstruction by the prosecution. In a situation where defense and prosecution disagree as to the materiality of a potential defense witness, the matter must be taken to the convening authority if prior to trial, or to the presiding military judge if the trial has commenced.[167] In this situation the defense may be forced prematurely to expose the testimony expected of the witness and the reason why his personal appearance is necessary.[168] On the other hand, there is no doubt that a defendant in a court-martial is entitled to the personal appearance of all material witnesses.[169] Not only is the decision of the trial counsel appealable to the convening authority or the military judge,[170] but if the defense requests service at trial, even after appeal to the convening authority prior to trial, denial of the request may serve as grounds for later appeal to a military appellate court for prejudicial error.[171] Therefore, the defense request for service is not a matter for the consideration of the trial counsel alone. Moreover, the latter will not be able effectively to obstruct the defense without giving the defense grounds for appeal.

The defense may actually profit by having the burden of responsibility for insuring the appearance of witnesses placed on the prosecution. The government bears the entire financial burden of transporting and accommodating witnesses,[172] including experts.[173] The defendant is thus guaranteed the availability of his witnesses regardless of his own ability to pay their expenses. In many civilian jurisdictions, by contrast, defendants must themselves bear the expense of providing witnesses.[174] Even in federal courts, process will not cover the expenses of a witness unless the appearance of the witness is shown to be necessary for an "adequate defense" and the defendant has convinced the court of his inability to pay those expenses.[175]

Military procedures for pretrial discovery are unquestionably

tion of the Military Viewpoint, 29 MIL. L. REV. 1 (1965), *with* Moyer, *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant*, 22 ME. L. REV. 105 (1970).

167. MANUAL, *supra* note 5, ¶ 115a, at 23-1.

168. *See* Melnick, *supra* note 166, at 2.

169. MANUAL, *supra* note 5, ¶ 115a, at 23-1; United States v. Sweeny, 14 U.S.C.M.A. 599, 34 C.M.R. 379 (1964); United States v. Hawkins, 6 U.S.C.M.A. 135, 19 C.M.R. 261 (1955). *See also* United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).

170. MANUAL, *supra* note 5, ¶ 115a, at 23-1.

171. *Id.*

172. 10 U.S.C. § 846 (1970).

173. MANUAL, *supra* note 5, ¶ 116.

174. *See* Comment, *Making the Indigent Pay to Obtain Out-of-State Witnesses*, 1 U. SAN FRAN. L. REV. 326 (1967), in which the author discusses how, even in the large number of states that have adopted the UNIFORM ACT TO SECURE WITNESSES FROM WITHOUT A STATE IN CRIMINAL PROCEEDINGS, the indigent defendant is nevertheless required to pay witness' expenses.

175. FED. R. CRIM. P. 17(b).

more advanced than their civilian counterparts.[176] Most important of the military discovery procedures is the article 32 pretrial investigation[177] that is held to determine whether charges should be brought against the accused. The investigating officer must call government witnesses and present documentary evidence against the accused in order to provide a thorough and impartial hearing. The accused is entitled to the assistance of counsel during the entire investigation, may confront and cross-examine all witnesses, and is present to hear all testimony and evidence.[178] By comparison, in civilian jurisdictions where grand juries perform the essential task of the article 32 investigation, much evidence remains undisclosed to the defendant until trial since he is not permitted to be present to hear evidence presented against him.[179] Although the defendant may seek to discover the evidence introduced at the grand jury hearings, he will very likely achieve only limited success. In many jurisdictions grand jury testimony and evidence is either entirely secret or disclosable only upon a showing of need.[180] These restrictions do not of course apply to preliminary hearings, which are used, at least in some areas, more extensively than grand juries. In the federal system a defendant may obtain a transcript of his own grand jury testimony without restriction,[181] but may obtain the testimony of others only on a showing of "particularized need."[182]

In addition to the discovery procedures inherent in the article 32

176. A former Chairman of the Criminal Law Section of the American Bar Association has said that the almost unlimited discovery in the military comes nearest of all judicial systems in the United States to meeting American Bar Association standards as set out in ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL (Tent. Draft, 1969). Nichols, *The Justice of Military Justice*, 12 WM. & MARY L. REV. 482, 495 (1971).

177. 10 U.S.C. § 832 (1970).

178. *Id.*

179. FED. R. CRIM. P. 6(d):

> *Who May Be Present.* Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session . . . .

In situations where prosecution was initiated by complaint, however, the accused has the right in federal courts to a preliminary hearing. FED. R. CRIM. P. 5(b). In that proceeding, the accused has the right to be present, retain counsel, cross-examine witnesses, and hear all evidence produced against him. *Id.* 5(c).

180. *See* Moyer, *supra* note 166, at 111. *See generally* Note, *Discovery By a Criminal Defendant of His Own Grand Jury Testimony*, 68 COLUM. L. REV. 311, 322 n.66, 323 n.68 (1968), for a discussion of the extent to which various states maintain grand jury secrecy. *See also* Buikholder v. State, 491 P.2d 754, 755 (Alaska 1971), where the court argues that the policy of secrecy is not justified after deliberation has ceased and the indictment has been returned.

181. FED. R. CRIM. P. 16(a)(3).

182. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 400 (1959), *interpreting* FED. R. CRIM. P. 6(e); *see* Commonwealth v. DeChristoforo, 277 N.E.2d 100 (Mass. 1971), (suggesting that the "particularized need" test places too difficult a burden on the defense).

investigation, the military defendant enjoys other broad discovery rights, including complete access to the names of prosecution witnesses, to a copy of the investigation report and all matters included therein, and to any other papers accompanying the charges.[183] The defense also has the right to interview each prosecution witness before trial[184] and may move to recess trial proceedings long enough to interview proposed surprise witnesses.[185] Under federal procedures defendant is also entitled to disclosure of real and documentary evidence held by the prosecution. He must, however, show that such evidence is material to his defense prior to its being disclosed.[186] Furthermore, there exists no provision for interviewing prosecution witnesses prior to trial. Here again, federal discovery procedures, deservedly renowned though they are, could be liberalized profitably by removing limitations and restrictions which distinguish them from military procedures.

COMMAND INFLUENCE

Possibly the most serious criticism of military justice focuses on the opportunity afforded a commanding officer, acting as the convening authority of a court-martial, to influence the judicial process to further his own interests.[187] The use of such influence may stem from personal interests of the convening authority or from confusion of his part-time role as an official of the military justice system with his full-time role as a commander interested in the discipline of his troops. Cognizant of this problem, the drafters of the UCMJ attempted to solve it by statutorily proscribing various forms of influence.[188] One long-established statutory provision aimed at preventing command influence in special and general courts-martial prohibits the "accuser" who originally brought charges from serving as the convening authority.[189] In addition, the military courts have attempted to eliminate any benefit gained through employment of illegal command influence by striking down decisions in which the exercise of such influence is at all

183. MANUAL, *supra* note 5, ¶ 44h.
184. *Id.* ¶¶ 42c, 48g.
185. United States v. Strong, 16 U.S.C.M.A. 43, 36 C.M.R. 199 (1966).
186. FED. R. CRIM. P. 16(b).
187. R. SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC (1970); *see* West, *Command Influence*, in CONSCIENCE AND COMMAND: JUSTICE AND DISCIPLINE IN THE MILITARY (J. Finn ed. 1971); *cf.* Benson, *Military Justice in the Consumer Perspective*, 13 ARIZ. L. REV. 595 (1971).
188. *See* 10 U.S.C. § 837(a) (1970), which provides in part:
> No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

189. *Id.* §§ 822(b), 823(b) (1970). Accusers, however, may be the convening authority in summary courts-martial. See note 98 *supra*.

in question.[190] Illegal influence, however, is often too intangible to prove. Thus, in reality the general integrity of the officer corps serves as the only deterrent of the frequent occurrence of command influence in courts-martial.

For purposes of simplification, the exercise of command influence can be divided into two classifications: appointment of hand-picked officers to act as various court officials, and the exercise of influence over these officials. These two forms of influence may occur in any of three relationships. The convening authority may influence the judge, the court members making up the jury, or either of the counsel, all of whom he appoints. The *UCMJ*, particularly as amended by the Military Justice Act of 1968,[191] has safeguarded against some of these forms of influence.

Military judges are now significantly more independent of the convening authority than was the case prior to enactment of the Military Justice Act of 1968.[192] The Judge Advocates General of the respective armed services certify full-time military judges, who preside over general courts-martial. These judges are responsible only to the Judge Advocates General, who assign them and prepare their efficiency reports.[193] When the convening authority requires a judge for a general court-martial, he is assigned one of these independent military judges.[194] Consequently, in general courts-martial the convening authority no longer has direct influence over either the appointment of the judge or the judge himself.

In special courts-martial, however, command influence over judges is still possible. Here the convening authority need not appoint full-time military judges.[195] Instead, he may appoint judge advocates

190. *See, e.g.*, United States v. Clayton, 17 U.S.C.M.A. 248, 38 C.M.R. 46 (1967); United States v. DuBay, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967); United States v. Wright, 17 U.S.C.M.A. 100, 37 C.M.R. 374 (1967); United States v. McCann, 8 U.S.C.M.A. 675, 25 C.M.R. 179 (1958); United States v. Littrice, 3 U.S.C.M.A. 487, 13 C.M.R. 3 (1953).

191. Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335. *See generally*, Ervin, *The Military Justice Act of 1968*, 45 MIL. L. REV. 77 (1969); McCoy, *Due Process for Servicemen—The Military Justice Act of 1968*, 11 WM. & MARY L. REV. 66 (1969); Note, *Reflections and Observations on Military Law—A System Improved by the Military Justice Act of 1968*, 15 N.Y.L. FORUM 708 (1969).

192. Most writers have concluded that the power as well as the independence of the military judge has increased. Through the "All Writs Act," 28 U.S.C. § 1651 (1970), the Court of Military Appeals has been granted virtually the same power to issue extraordinary writs as federal courts. United States v. Metcalf, 16 U.S.C.M.A. 153, 36 C.M.R. 309 (1966); *see* Weckstein, *supra* note 33, at 7. *See generally* Goldschlager, *The Military Judge, A New Judicial Capacity*, 11 A.F. JAG L. REV. 175 (1969). *But see* Benson, *supra* note 152, at 601-03.

193. 10 U.S.C. § 826 (1970).

194. *Id.* § 826(c): "The military judge shall be designated by the Judge Advocate General . . . for detail by the convening authority . . . ."

195. *Id.* § 826(a).

certified as military judges only for special courts-martial.[196] These men are subordinate to the convening authority and he is allowed a wider choice of appointments. It is true that the Military Justice Act of 1968 expanded the prohibitions of article 37 to prevent commanders from considering performance at courts-martial when preparing subordinates' efficiency reports or from reviewing reports of subordinates who have so served.[197] Proving that a commander did not in fact consider a subordinate's ruling in a crucial court-martial is a difficult if not impossible task, however.

The problem of command influence over court members serving as jurors has not been completely remedied. It is within the convening authority's discretion as commanding officer to determine which officers and enlisted men are available for panel duty,[198] and he may select any officer or noncommissioned officer he desires to sit on the court-martial.[199] These officers are usually subordinates of the convening authority and, unless extremely stalwart, could be persuaded by his subtle influences. The article 37 provisions mentioned above,[200] prohibiting a commanding officer from reviewing or from writing an efficiency report while considering an officer's court-martial performance, including, it may be supposed, his participation in the verdict rendered, also apply in cases of command influence over panel members. Commentators have noted, however, that this solution is unenforceable and that better controls on command influence of court members are conceivable.[201]

A potential solution to the problem of command influence over jurors is available in all general courts-martial and those special courts-martial where a military judge has been appointed in addition to the requisite number of panelists. In these situtations the accused may elect to be tried only by the military judge, whose identity is already known to him.[202] In special courts-martial, however, the convening authority has the right to appoint a three-member panel to sit without an independent judge[203] so that the accused may never have the chance

196. *See, e.g.*, Army Reg. 27-10, ¶ 9-2d (change 8, Sept. 7, 1971).
197. 10 U.S.C. § 837 (1970). *See* MANUAL, *supra* note 5, ¶ 38e.
198. United States *ex rel.* McClellan v. Humphrey, 181 F.2d 757 (3d Cir. 1950). In addition, the determination by the convening authority whether a particular officer is available for panel duty is probably not reviewable. Henry v. Hodges, 171 F.2d 401 (2d Cir.), *cert. denied*, 336 U.S. 968 (1948).
199. 10 U.S.C. § 825(d)(2) (1970).
200. 10 U.S.C. § 837 (1970). See text & note 197 *supra.*
201. *See, e.g.*, McCoy, *supra* note 191 at 84-85.
202. 10 U.S.C. § 816(1)(B) & (2)(C) (1970). Defendant's election to waive jury trial and be tried by judge is not subject to veto by the prosecution as is the case in federal courts. *See* FED. R. CRIM. P. 23a.
203. 10 U.S.C. § 816(2)(C) (1970); MANUAL, *supra* note 5, ¶ 4a.

to elect for trial by judge alone. In all situations the defendant is afforded one peremptory challenge to be used against any member except the military judge, and an unlimited number of challenges for cause.[204] Again, however, the usefulness of these weapons is decreased since cause may be extremely difficult to prove.

The ability of the convening authority to influence counsel by appointment has been limited by article 38 of the UCMJ. That provision gives the defendant the right to choose his own appointed military counsel or to retain civilian counsel in lieu of, or supplemental to, that automatically detailed to his defense.[205] In addition, the Code requires that counsel appointed by the convening authority for general courts-martial be a trained and qualified lawyer.[206] Counsel for special courts-martial must be similarly qualified, unless military exigencies render such an appointment unreasonable.[207] In any case, defense counsel's formal qualifications must be at least equal to trial counsel's,[208] so that the defendant cannot be disadvantaged by being assigned an advocate who is markedly inferior to the trial counsel. This limitation on appointment provides only minimal protection, however, because the convening authority may still hand-pick counsel. In addition, the convening authority still serves as superior officer to these counsel and may subject them to unfair and intangible influences.

In all the services, only a small percentage of legally trained staff judge advocates make careers in the military. It is often argued that they are, therefore, less subject to the pressures of superiors who might threaten to delay later promotions. All pressures and influences, however, need not take the form of direct threats to one's career or promotion opportunties. The commander can also influence the more mundane problems of the young officer's life, such as whether he is granted authority to live off the post with his family or whether he is assigned extra duties.

The services have responded to the need to eliminate influence of counsel by an appointment system. In various military districts, for example, the Navy has established "law centers" to which attorneys are assigned.[209] Convening authorities merely request the required number of counsel from the district center, and counsel are assigned to the case on a random selection basis. Convening authorities, there-

204. 10 U.S.C. § 841 (1970).
205. *Id.* § 838(b).
206. *Id.* § 827(b)(1).
207. *Id.* § 827(c)(1).
208. *Id.* § 827(c)(2)-(3).
209. Office of Naval Operations Instruction 5800.6 (June 18, 1969), *cited in* Moyer, *supra* note 166, at 136 n.237.

fore, only nominally appoint counsel, much like they only nominally appoint full-time military judges.[210] The Air Force recently experimented with a new program in which roving counsel handled cases throughout a geographical area. These military attorneys, too, were outside the normal chain of command and were less subject, therefore, to illegal influence.

Another major area of military justice in which command influence may exist is summary courts-martial. Senator Ervin, Chairman of the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, has expressed the view that the summary court-martial has no purpose or place in military justice and that it remains a part of the Code merely out of compromise.[211] Unlike the situation with regard to general and special courts-martial, the convening authority of a summary court-martial may also be the original accusing officer.[212] He may appoint himself judge, and in that role act as jury, trial and defense counsel, and reviewing authority after sentencing. Though the sentences rendered by summary courts are relatively minor,[213] the potential for exercise of influence by the convening authority is virtually unlimited: the defendant is left without the assistance of counsel[214] at a trial controlled by a person who may be not only the defendant's commanding officer, but also the officer who originally filed charges against him. Such a situtation seriously undermines the historical requirement of judicial impartiality.[215] It is often said in response to such criticism that the defendant may avoid the lack of procedural safeguards in the summary court[216] by opting for trial in a special or general court-martial.[217] In those courts, however, impossible pun-

210. See text & notes 193-94 *supra.*
211. *See* Ervin, *supra* note 191, at 95.
212. See note 98 *supra.*
213. See note 145 *supra.*
214. In summary courts-martial, the judge also assumes the role of both trial and defense counsel. *See, e.g.*, MANUAL, *supra* note 5, ¶ 115a, at 23-1: "In this paragraph (115) the term 'trial counsel' includes a summary court-martial unless the context indicates otherwise." *See also id.* ¶ 79 at at 14-1 to -4, where the role of the summary court-martial officer is defined to include many of the tasks required of counsel in general and special courts-martial, such as compelling the attendance of witnesses and taking depositions. The summary court-martial officer, paradoxically, is expected to offer advice and aid to the defendant and to prosecute the case at the same time.
215. "It is indeed axiomatic that the right to a fair trial as guaranteed by the Federal Constitution includes an impartial judge . . . ." Sheppard v. Maxwell, 231 F. Supp. 37, 65 (S.D. Ohio 1964) (citation omitted), *rev'd on other grounds,* 346 F.2d 707 (6th Cir. 1965), *rev'd,* 384 U.S. 333 (1966).
216. 10 U.S.C. § 820 (1970).
217. In a summary court-martial, the defendant does not possess the right to separate counsel, see note 98 *supra,* that he possesses in special and general courts-martial. *See* 10 U.S.C. § 827 (1970). The convening authority or the court officer may be the accuser in summary courts-martial, but not in special or general courts-martial. See note 98 *supra.* There is no opportunity for jury trial in summary courts-martial, 10 U.S.C. § 816(3) (1970), but there is in other courts-martial, 10 U.S.C. § 816(1)-(2) (1970).

ishment is potentially more severe.[218] This factor makes the choice unrealistic in many cases and very likely serves to encourage the accused to remain in the grips of his accuser and accept the potential injustice of the summary court-martial.

Command influence is usually of a most intangible nature. Consequently, it is more dangerous to the judicial structure than other, more tangible problems. The legal loopholes discussed above exacerbate the command influence problem, and leave the military judicial system open for abuse.

CONCLUSION

The military judicial system is by no means perfect. Nontheless, its reputation as a biased system designed solely to maintain discipline within the ranks is largely unfounded. While in many respects, the military system affords the defendant a lesser degree of fairness than the civilian judicial system, in many other ways the military system offers greater fairness. The military accused is afforded few protections in the field of search and seizure, and only partial protections of the jury trial. In contrast, he enjoys broader rights to counsel, rights of discovery and securing of witnesses, and protections against self-incrimination. It is hoped that the prejudices and founded generalities produced by the Vietnam war and its tragedies will not be allowed to conceal these positive aspects of the military system. Instead, the military judicial system should be more closely analyzed, reformed in some areas, and, difficult as it may be for some persons to accept, copied by civilian jurisdictions in others.

218. *Compare* 10 U.S.C. § 820 (1970), *with* 10 U.S.C. §§ 818-19 (1970).