THE FAST-CHANGING LAW OF MILITARY EVIDENCE

BY ROBINSON O. EVERETT

Many fields of law can today be described as fluid and fast-changing. Military law, however, would seem to hold a paramount title to such a description. For instance, before one's eyes military jurisdiction can appear and then disappear in the same case as fundamental principles are judicially altered. Insofar as matters of evidence are concerned, this fluidity is especially discernible—as will be obvious from an examination of some opinions rendered by the Court of Military Appeals during the past decade.

I. DEPOSITIONS

Courts-martial, unlike civilian courts in criminal cases, have long been accustomed to receiving as evidence depositions offered by either the prosecution or the defense; and Article 49 of the Uniform Code of Military Justice specifically authorized this practice. In United States v. Sutton, the Court of Military Appeals ruled in a split decision that even a deposition taken solely on written interrogatories could be used by the prosecution despite defense objections. The majority based this result on certain "necessities of the service"—such as the transient nature of military personnel and the importance of avoiding interference with combat operations that might result from bringing witnesses into court.

Chief Judge Quinn, dissenting, insisted that service personnel "are entitled to the rights and privileges secured to all under the Constitution of the United States, unless excluded directly or by
MILITARY LAW REVIEW

necessary implication, by the provisions of the Constitution itself," that among these is the right of confrontation in accord with the Sixth Amendment, and that the use of written interrogatories over an accused's objection deprived him of this right. As was noted previously, it was not made clear in his Sutton dissent whether Chief Judge Quinn would consider the presence of the accused himself at the taking of a deposition to be a prerequisite for effective cross-examination.  

After the death of Judge Brosman and his replacement by Judge Ferguson, another attack was launched against prosecution use of depositions taken on written interrogatories, but in United States v. Parrish, the previous rule was adhered to. However, some of the subsequent opinions of the Court of Military Appeals led to the observation a year ago that, "In the long run there may occur a substantial diminution, or even the virtual abolition of the written deposition in courts-martial—the very result so fervently advocated by Chief Judge Quinn in the Sutton case."  

This "virtual abolition" of the deposition taken on written interrogatories came more swiftly—and more directly—than had been anticipated. In United States v. Jacoby, the Government had notified defense counsel of its intent to take certain depositions upon written interrogatories. Defense counsel objected and urged that, in order to preserve the accused's right to confrontation, the witnesses should either be produced at the trial or their oral depositions should be taken. This defense pretrial request having been denied, objections were unsuccessfully interposed at the trial; and, on appeal, it was contended that the previous interpretation of Article 49 by the Court of Military Appeals had produced a conflict with the Sixth Amendment. Judge Ferguson, writing for the majority, accepted the position of the Sutton dissent that servicemen are entitled to the protections of the Bill of Rights, except those which are expressly or by necessary implication inapplicable. In order to conform to the requirements of the Sixth Amendment, he re-interpreted Article 49 of the Code as demanding that the accused be present for the taking of any deposition from a prosecution witness and that he have the opportunity,

---

5 Id. at 228, 11 CMR at 228.
7 7 USCMA 337, 22 CMR 127 (1956).
8 Everett, supra note 6, at 135. See also United States v. Daniels, 11 USCMA 52, 28 CMR 276 (1959).
9 11 USCMA 429, 29 CMR 244 (1960).
through counsel, to cross-examine the witness. However, the
majority did conclude that, by reason of "the exigencies of the
military service" and in light of the history of military deposi-
tions, the Sixth Amendment should be construed as allowing
courts-martial to receive in evidence oral depositions which had
been taken with the accused present.\(^\text{10}\)

In criminal trials in federal civilian courts, there is no statutory
authority for the prosecution to offer either written or oral de-
positions in evidence against the accused.\(^\text{11}\) Thus, in any event,
the use of depositions by the Government before a court-martial
will differ from the civilian practice—this difference being justi-
fied in Judge Ferguson's opinion by reason of the "exigencies"
involved. Some would argue, as did the majority in *Sutton*, that
these same "exigencies" justify a further departure from the
usual federal practice contemplated under the Sixth Amendment.
Such further divergence from the civilian norm could consist in
allowing the use of depositions on written interrogatories or else
in requiring only that defense counsel be present and not that the
accused be there. Perhaps, though, it is just as well to preclude
the taking of a written deposition by the Government in all cases
where the accused objects,\(^\text{12}\) instead of having a case-to-case
attrition of the written interrogatory as had been expected by
this writer a year ago.

Under the new rule there will be considerable difficulties for the
prosecution. Sometimes it will be difficult and expensive to ar-
range for accused and his counsel to go to some distant spot to
take the deposition of an absent witness, and especially will this
be so if the accused is in pretrial confinement.\(^\text{13}\) Occasionally it

\(^\text{10}\) The Court discussed especially Mattox v. United States, 156 U.S. 237
(1895), and Motes v. United States, 178 U.S. 468 (1900). The former case
held admissible testimony which witnesses, later deceased, had given at a
previous trial. The latter refused to admit evidence given at a preliminary
hearing before a United States Commissioner by a witness who had later
disappeared. Compare United States v. Eggers, 2 USCMA 191, 11 CMR 191
(1953). See also Everett, Military Justice in the Armed Forces of the United
States 205–6 (1956).

\(^\text{11}\) See dissenting opinion of Judge Latimer in United States v. Jacoby,
*supra* note 9.

\(^\text{12}\) In capital cases an accused must consent—not merely fail to object—to
introduction of a deposition by the Government. See United States v. Young,
2 USCMA 470, 9 CMR 100 (1953). Apparently an accused must object in
order to obtain the benefit of the *Jacoby* rule. United States v. Howell, 11
USCMA 712, 29 CMR 528 (1960).

\(^\text{13}\) Fortunately the Armed Services have made many efforts to reduce the
use of pretrial confinement of an accused, and so this is not so likely to be a
problem as might have been the case at one time. There is, however, no pro-
vision in military law for releasing an accused on bail from pretrial confine-
ment.
MILITARY LAW REVIEW

may be difficult to arrange for the presence of an experienced reporter or stenographer to transcribe the oral deposition; on the other hand, under the previous practice the answers to written interrogatories could be easily written or typed in on the form provided. Frequently it will be easier and cheaper to transport the witness to the scene of trial, rather than transport the accused and other necessary individuals to the witness's residence, although obviously this choice is not available with respect to a recalcitrant foreign witness. Some objectives can still be accomplished by the prosecution through the use of depositions. For instance, it often will be desirable to take the depositions of personnel who are in ill health, scheduled for transfer, or awaiting discharge from the armed services.\textsuperscript{14}

In a previous article, this writer discussed the extent to which the defense could compel the prosecution to subpoena a defense witness to give personal testimony before a court-martial, instead of accepting the presentation of his testimony by a deposition.\textsuperscript{15} If, however, a defense deposition is to be taken, must the accused be allowed to be present at the time to suggest questions to his counsel? The Court of Military Appeals in Jacoby interprets Article 49 of the Code as requiring that an accused be present for the taking of a deposition, and, although the opinion is concerned with depositions taken at the request of the prosecution, it should be noted that, with one exception not here material,\textsuperscript{16} this Article of the Code does not differentiate between depositions of prosecution and defense witnesses. On this basis, it might be reasoned that, even if the defense has initiated the request for a deposition, the accused is entitled to be present to ask questions. However, the rationale of the Jacoby opinion is that the previous construction of Article 49 presents a conflict with the Sixth Amendment. Since that Amendment requires that an accused "be confronted with witnesses against him," it might be argued that it has no relevance to evidence which the accused is trying to obtain for his cause. Under this view, Article 49 could be interpreted as requiring oral depositions with the accused present only when the prosecution has requested the deposition. The question

\textsuperscript{14} The use of depositions are especially important in cases where the contemplated discharge and consequent loss of jurisdiction will occur prior to trial.

\textsuperscript{15} Everett, supra note 6, at 136–141.

\textsuperscript{16} Under Article 49(f) of the Uniform Code a deposition can be used by the defense in a capital case, but it cannot be used by the prosecution in such a case without express consent of the accused.
then would center on whether, in the particular case, the means provided the accused for obtaining and presenting his evidence were sufficient to comply with his right "to have compulsory process for obtaining witnesses in his favor." Unless some limitation is placed on the extent to which the accused can be present for obtaining depositions, there is a danger that the Government will be harassed by defense counsel demanding confrontation of even the most routine witness who may happen to be on another continent.  

II. DOCUMENTARY EVIDENCE

A. OFFICIAL RECORDS

Just as the taking of prosecution depositions has been one distinguishing feature of trials before courts-martial, the heavy reliance on official records has been another. For instance, traditionally absence without leave, the most prevalent military offense, has been proved almost exclusively by the use of official records, usually the morning reports of the unit from which the accused was absent. The importance of official records in trials by court-martial is probably itself a reflection of the fact that in military life many types of activity are subject to official regulation and especially that extensive record-keeping is usually required by the armed services.

In one of its earliest cases the Court of Military Appeals recognized that official records are admissible as an exception to the hearsay rule if the officer who keeps the records, or under whose supervision they are kept, "has an official duty to perform and he is required to know or to ascertain through customary and trustworthy channels of information the truth of the facts or

17 See United States v. Thornton, 8 USCMA 446, 24 CMR 256 (1957), and United States v. Harvey, 8 USCMA 538, 25 CMR 42 (1957). See also Everett, supra note 6, at 136–141.
18 The action taken by the defense in United States v. DeAngelo, 3 USCMA 298, 12 CMR 54 (1953), would seem to sustain the inference that some defense counsel are willing to utilize any possible opportunities for harassing the Government.
19 See, e.g., United States v. Masusock, 1 USCMA 32, 1 CMR 32 (1951). In the Navy the entries in an accused's service record are used to show his unauthorized absence. The morning reports may also be used to show apprehension, escape from confinement, and circumstances of return to military. See, e.g., United States v. Simone, 6 USCMA 146, 19 CMR 272 (1955); United States v. Wilson, 4 USCMA 9, 15 CMR 3 (1954).
events recorded. Accordingly, it often becomes necessary to examine in detail the terms of some applicable military directive to determine whether the recording of certain information is part of the official duty of the person who prepared the record. For instance, in several cases it was necessary for the court to determine whether “apprehension” of an absentee was among the “circumstances of return” which the governing regulation required to be recorded. More recently, the Court commented that Naval directives requiring the notation in a sailor’s service record of the “circumstances of return” from an unauthorized absence did not create a duty to record everything that happened to the accused during his absence and that, therefore, a service record entry about a conviction for vagrancy during the unauthorized absence was inadmissible under the hearsay rule. Under the official record exception to the hearsay doctrine, the armed services have considerable opportunity to alter the scope of the evidence admissible in a court-martial; by changes in the directives for record-keeping, they can enlarge or contract the official duty to record certain information, and this duty will govern admissibility. Of course, there are several limitations on this power to enlarge the area of admissibility. For instance, the Government cannot make a case against an accused by simply requiring in a directive that all misconduct be recorded in some official record; under the Manual for Courts-Martial, official records are not admissible if “made principally with a view to prosecution, or other disciplinary or legal action.” Moreover, even if an entry in an official record surmounts the hearsay obstacle, it can still be challenged for materiality, competency, and relevancy. Accordingly, it was prejudicial error to receive in evidence that portion of a morning report entry which indicated that, during his unauthorized absence, the accused had been arrested for

20 United States v. Massock, 1 USCMA 32, 35, 1 CMR 32, 35 (1961). See also par. 1445, MCM, 1961. A record made long after the event can still be admissible if the official duty includes making delayed entries. See United States v. Takaful, 8 USCMA 623, 25 CMR 127 (1958); United States v. Wilson, 4 USCMA 3, 15 CMR 3 (1954). In the Wilson case an entry made many months after the event was deemed sufficient to show that the accused had become absent without leave on that date.


24 Par. 144d, MCM, 1951, at p. 268; United States v. Takaful, supra note 20.

burglary and convicted of petty theft, misconduct which had no relevancy to the charges before the court-martial.26

On the basis of a detailed investigation of the relevant directives, defense counsel may be able to show that the official record was not prepared in accord with any official duty. Moreover, the type of information used in preparing the report may be questionable for some reason, and may bring into play some other rule of law. For instance, if all the information used as a basis for the questioned entry comes from the accused himself, it may be possible to raise objections—either because of a failure to warn the accused of his rights under Article 31(b) or because of the corpus delicti rule.27 In some instances information contained in the official record would be inadmissible, even if a witness were available to testify personally to the same facts, perhaps because of its remote and prejudicial nature 28 or because it constitutes opinion testimony.

The defense counsel may wish to request a hearing outside the presence of the court-martial members in order to present evidence bearing on the admissibility of an official record.29 However, the Court of Military Appeals has emphasized that the matter of admissibility is entirely different from that of credibility; 30 and so, if the official record is admitted in evidence, counsel may wish to lessen its weight by presenting to the court-martial evidence about the circumstances of its preparation.

There is greater likelihood in military than in civilian life that an official record will be made of some event which may later be pertinent in adjudicating an accused's guilt or innocence; thus, the availability of official records is greater in the armed services than in the civilian context. Moreover, the “exigencies” of the armed forces, exigencies which have already been discussed in connection with depositions, often make it necessary for the Government to rely on documentary evidence rather than produce a witness to testify personally. The Court of Military Appeals appears to have been consistently aware of these exigencies, and it has admitted official records quite freely. The limitations imposed on official records have been very reasonable, and so the

26 United States v. Schaalbe, supra note 25.
29 Cf. United States v. Roland, 9 USCMA 401, 26 CMR 181 (1958); paras. 122c, 144d, MCM, 1951.
MILITARY LAW REVIEW

official records exception has provided the armed forces with an easy route to prima facie proof of some prevalent military offenses.

B. BUSINESS ENTRIES

Since so much of the record-keeping in the armed forces is done pursuant to specific directives and on official government forms, rather than merely in “the regular course” of business, it is often unnecessary to resort to the business entries exception to the hearsay rule. However, where the record-keeping is not done pursuant to any specific regulation, this exception may be useful. Of course, many limitations on admissibility are common to business entries and to official documents; thus, a business entry cannot be used in evidence if it constitutes an “opinion,” if it has been prepared for purposes of a criminal prosecution, or if it is irrelevant, immaterial, or otherwise incompetent.

The liberality of the Court of Military Appeals towards business entries is vividly displayed in United States v. Villasenor, where the Government offered in evidence an envelope on which the accused had marked the amount of money that he had placed inside. This money had been collected by him for an Air Force activity to which he was assigned and had then been put in a safe, but when the safe was opened on the following day, the accused was absent, and the envelope contained substantially less money than had been indicated by his notation thereon. According to the Court, the writing on the envelope qualified as a memorandum of an act done by the accused, and, having been “made in the regular course of his ‘business’ to collect the funds of the Air Force activity, the memorandum was admissible as a business entry. Moreover, even though prepared by the accused, this entry constituted part of the corroboration required for admission of the accused’s confession to larceny of the money.

In United States v. Grosso a witness testified that he had searched the records of the Navy Exchange and had found no

---

32 6 USCMA 3, 19 CMR 189 (1955).
33 The Court also rejected contentions that the memorandum was too fragmentary to be admissible as a business entry. Consider also the dictum in United States v. Sailey, 7 USCMA 603, 605, 23 CMR 67, 69 (1957), indicating that some hospital data might be admissible under the business entry exception to the hearsay rule.
34 9 USCMA 576, 26 CMR 359 (1968). This case concerns the manner of proving that certain entries do not exist in designated business records. The
record that defendant had purchased certain items he was charged with stealing. The Court of Military Appeals found reception of this evidence to be proper as an exception to the hearsay rule and held that it did not violate the best evidence rule. One passage in the opinion might be taken to indicate that a business entry was not admissible if the maker thereof had lacked personal knowledge of the transaction involved.35 However, it seems doubtful that the Court intended to repudiate the contrary implication of the Manual for Courts-Martial on this point.36

C. FINGERPRINT CERTIFICATES

The Manual for Courts-Martial authorizes the introduction in evidence of a certificate of fingerprint comparison, which states that a duly qualified fingerprint expert has examined the fingerprints attached to the certificate—usually those of the accused—and has found that they are those of a named person whose fingerprints are on file in Washington.37 In this way the accused’s identity can be established, which may be important in determining whether he is subject to military jurisdiction or whether he has committed some such offense as fraudulent enlistment. The author is not aware of any civilian jurisdiction where, in a criminal case, a court would consider a similar certificate over defense objection. Clearly a court that received this certificate in evidence has admitted an expert’s opinion in evidence without opportunity for confrontation of the witness or for questioning as to his qualifications. Because of the repeated emphasis by the Court of Military Appeals on assimilating military justice to civilian practice as much as possible, it might have been antici-

---

35 "Two related rules of evidence are actually involved in the accused’s claim of error. One concerns entries made in the regular course of business as an exception to the hearsay rule which excludes evidence not based on the witness’s personal knowledge or observation. The other is that the best evidence of the contents of a writing is the writing itself. Neither rule applies, however, when the facts sought to be proved are independent of the writing and are based upon the witness’s own knowledge and conduct." 9 USCMA at 580–91, 26 CMR at 569–61. (Emphasis supplied.)

36 Par. 143a of the Manual states: “All other circumstances of making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.”

37 Par. 143a (2), MCM, 1951, at p. 259.
MILITARY LAW REVIEW

pected that the use of these certificates would have been severely questioned. However, when this was first considered by the Court, all three Judges agreed that the Manual authorization for their use was valid.38

The Court’s position on this appears to be supportable. Although comparison of fingerprints will involve some expertise, the likelihood of divergence of opinion among qualified experts as to whether two sets of prints are the same would appear to be very small, and the comparison would seem to be a routine observation.39 Probably the amount of “opinion” involved would be considerably less than, for example, that involved in some of the information from hospital records which might be admissible under the business entries exception to hearsay. Since even the Jacoby case 40 makes a bow to military “exigencies,” authorization of the fingerprint certificate appears a reasonable means to avoid the delay and expense involved in producing experts to testify on relatively incontrovertible and indisputable matters.

III. JUDICIAL NOTICE AND PRESUMPTIONS

No evidence need be produced as to matters judicially noticed by a court-martial; 41 therefore, the burden of producing evidence may be greatly affected by the scope of judicial notice. From the very outset, the Court of Military Appeals has allowed a wide

39 At least this would seem true assuming that, as is generally true when fingerprint comparisons are used before courts-martial, the examiner has two complete, clear sets of fingerprints for comparison, and is not called on to give his opinion whether a fragmentary print corresponds to a set of fingerprints on file in Washington. An accused might wish to take a deposition from the fingerprint examiner in order to attack the weight of the certificate, and presumably he would be entitled to do so—as well as to call another expert.
40 See text accompanying note 9 supra.
41 In his concurring opinion in United States v. Lovett, 7 USCMA 704, 23 CMR 168 (1957), Judge Latimer speaks of the rule of judicial notice in these words: “The point of importance is that the rule is founded on the principle that the matter noticed is taken as true without the offering of evidence by the party who should do so because the agency considering the question assumes that the matter is so notorious it will not be disputed. In the light of that concept, my point is this: When evidence which may be qualified, explained, or denied is judicially noted, it should not be accepted as true until the party against whom it is to be used has been afforded an opportunity to come forward with his denial, extension, or qualification. It is entirely possible that unless both parties are offered their day in court, the conclusion reached in reliance on judicially noticed testimony might be erroneous. That result is a distant possibility in this case.” 7 USCMA at 711, 23 CMR at 176. For other comments on judicial notice see Morgan, Judicial Notice, 57 Harv. L. Rev. 269 (1944); 2 Wigmore, Evidence, §§ 2635 et seq. (3d ed. 1940).
scope for such notice. For instance, in United States v. McCrary, Judge Brosman concurred in upholding a conviction of desertion because of facts which he considered subject to judicial notice, such as the fact that accused’s absence commenced at a staging area for overseas shipment to Korea during the Korean War. Other matters that have been judicially noticed include these: that the purpose of a “pipeline” company from which accused absented himself was to process replacements for duty in Korea; that medical men are always attached to units such as machine gun platoons when those units are going into combat; that the Army maintained a rotation program for its troops in Korea and that the average tour of duty there varied at different periods during hostilities and with the type and location of the service rendered; and that “cold war” conditions presently exist between the United States and Russia.

On several occasions Chief Judge Quinn indicated his unwillingness for the court-martial to take judicial notice of certain facts, which Judges Latimer and Brosman thought could be noticed. One suspects that Judge Ferguson sides more with the Chief Judge. Where, however, a defense counsel is urging that judicial notice should be taken of certain defects in the court-martial’s proceeding which are not directly apparent from the record of trial, the Court, as now constituted, appears quite willing to apply judicial notice.

Insofar as judicial notice is used to broaden appellate review of claims that an accused’s rights have been violated, one can easily perceive that the results accord with the Court’s general policy to strike at injustice in courts-martial irrespective of

42 1 USCMA 1, 1 CMR 1 (1951).
43 United States v. Uchihara, 1 USCMA 123, 2 CMR 29 (1952). According to Judge Brosman’s opinion, concurred in by Judge Latimer, it is not necessary that the fact judicially noticed be “generally notorious; it is enough if it is notorious in the military service.” 1 USCMA at 127, 2 CMR at 33.
44 United States v. Cook, 2 USCMA 223, 5 CMR 23 (1953).
48 Compare United States v. Smith, 5 USCMA 314, 338, 17 CMR 314, 338 (1954), with United States v. Schick, 7 USCMA 419, 22 CMR 209 (1956), and United States v. Gray, 9 USCMA 208, 25 CMR 470 (1958). However, these cases, which concerned judicial notice of official publications, present special problems of command control.
procedural niceties. Since many accused are represented by appointed counsel, it is probably appropriate, and in accord with congressional intent, for the Court to be somewhat paternalistic in this regard. The wide expansion of judicial notice at the trial level accords with the “exigencies” of the military services, which make it especially undesirable to view trial by court-martial as merely a game, and which call for eliminating the expense and waste of time involved in proving obvious matters that cannot be disputed.  

To the extent that a material fact may be presumed, the need for evidence thereof is reduced or eliminated. The word “presumption” is often used by judges and lawyers in three different senses: (1) a conclusive presumption, which is really a rule of substantive law; (2) a rebuttable presumption, a fact which the trier of fact must find unless evidence to the contrary is produced; and (3) an inference, which the jury is free to draw or not draw. Professor Thayer and many other scholars have urged that “presumption” should be used only in the second sense, but the Manual for Courts-Martial uses the term primarily to refer to a permissible inference. A number of cases considered by the Court of Military Appeals have involved contentions that, by using the word “presumption” in an instruction to the court-martial, the law officer had misled court members into an erroneous belief that they were under a duty to reach certain conclusions, unless the accused presented evidence to the contrary. Among the permissible inferences which may be especially important, and which the Court of Military Appeals has allowed, are these: larceny inferred from unexplained exclusive possession

---

<sup>60</sup> United States v. Ferguson, 5 USCMA 68, 17 CMR 68 (1954), is a good example. For examples of the Court’s relatively liberal view concerning waiver see Tedrow, Digest—Annotated and Digested Opinions, U.S. Court of Military Appeals 184–85 (1959).

<sup>61</sup> It is not unusual for the trial counsel representing the Government to be young, inexperienced, and overworked; and so he may by oversight fail to prove an obvious fact. Occasionally judicial notice can salvage the situation.

<sup>62</sup> See United States v. Biesak, 3 USCMA 714, 719, 14 CMR 132, 137 (1954).

<sup>63</sup> See 3 USCMA at 720, 14 CMR at 138.

<sup>64</sup> Par. 133b, MCM, 1951. However, the Manual makes it clear that the “presumption of sanity” is a rebuttable presumption.

of recently stolen property;\textsuperscript{56} embezzlement inferred from failure of custodian to account for or deliver entrusted property;\textsuperscript{57} that one intends the natural and probable consequences of an act intentionally committed by him;\textsuperscript{58} that anyone is sane;\textsuperscript{59} and that official duties are regularly performed.\textsuperscript{60}

Paragraph 164a of the Manual for Courts-Martial provides that, if an unauthorized absence "is much prolonged and there is no satisfactory explanation of it, the court will be justified in inferring from that alone an intent to remain absent permanently." In some of its early cases the Court seemed to subscribe to this principle.\textsuperscript{61} Later, however, in \textit{United States v. Cothern} \textsuperscript{62} it held that this Manual provision was invalid by reason of conflict with the Uniform Code, since, as viewed by the Court and when incorporated in a law officer's instructions, it tended to equate any prolonged absence to an absence with intent to remain away permanently. An instruction, that a prolonged period of absence may be a circumstance, among others, from which intent to remain away permanently may be inferred, is permissible.\textsuperscript{63}

In \textit{Cothern}, which involved a seventeen day unauthorized absence, there was no basis for the law officer's instructing the court members that "much prolonged absence" without explanation could justify an inference of desertion, and the reversal of the conviction there may have been justifiable. However, the majority's general repudiation of the apparently well entrenched inference from lengthy, unexplained absence does not seem necessary. Instances can certainly be imagined where the length of the absence would justify any reasonable man in finding beyond all reasonable doubt that the accused had intended to remain away permanently.

\textsuperscript{56} United States v. Ball, \textit{supra} note 55; United States v. Hairston, 9 USCMA 554, 26 CMR 324 (1958); \textit{but cf.} United States v. Boultinghouse, 11 USCMA 721, 29 CMR 537 (1960) (dealing with inability to explain because of amnesia).

\textsuperscript{57} United States v. Crowell, \textit{supra} note 55.

\textsuperscript{58} United States v. Miller and United States v. Jones, \textit{supra} note 55.

\textsuperscript{59} This is initially a rebuttable presumption; but after rebutting evidence has been produced, there remains an inference of sanity. United States v. Besak, \textit{supra} note 52; United States v. Johnson, 3 USCMA 235, 14 CMR 143 (1954).

\textsuperscript{60} United States v. Bennett, 4 USCMA 309, 15 CMR 309 (1954).

\textsuperscript{61} See the concurring opinion of Judge Latimer in United States v. Cothern, 8 USCMA 158, 23 CMR 382 (1957).

\textsuperscript{62} 8 USCMA 158, 23 CMR 382 (1957). See also United States v. Soccio, 8 USCMA 477, 24 CMR 297 (1957), which also involved some other interesting problems.

\textsuperscript{63} United States v. Farris, 9 USCMA 499, 26 CMR 279 (1958).
MILITARY LAW REVIEW

Fortunately there are some helpful by-products of the Court’s position in Cothern. For one thing there will be no need for case-by-case determination of the length of time before an absence becomes “much prolonged.” Moreover, trial counsel will now have added incentive to search for available evidence in connection with desertion charges where a lengthy absence is involved.\textsuperscript{64}

One of the most important “presumptions” is that of the regularity of performance of official duties; indeed, this “presumption” is a foundation for admitting official records in evidence as an exception to the hearsay rule.\textsuperscript{66} According to the Manual for Courts-Martial, there is only a “justifiable inference” that official duties are properly performed.\textsuperscript{66} Yet, as early as United States v. Masusock, Judge Latimer, discussing the “legal presumption of regularity in the conduct of governmental affairs,” wrote for a unanimous Court:

In the absence of a showing to the contrary, this court must presume that the Army and its officials carry out their administrative affairs in accordance with regulations and that morning reports reach the level of other official documents.\textsuperscript{67}

In United States v. Taylor,\textsuperscript{68} a similar remark is made about “a rebuttable presumption” of regularity, and Masusock is cited approvingly. Then, in United States v. Bennett,\textsuperscript{69} both of these cases, along with the Manual, are cited for the proposition that, “In light of the presumption of regularity, we believe the court-martial could reasonably have inferred that on November 12, 1952, an effort was made to distribute to the accused a copy of special orders . . . .” As matters stand, it is unclear whether the “presumption” of regularity is only a permissible inference. Moreover, if the presumption of regularity is more than an inference, does it vanish completely when rebutting evidence is

\textsuperscript{64} In this connection consider the criticism by the Court of trial counsel’s preparation in United States v. Wilson, 4 USCMA 3, 15 CMR 3 (1954). Cf. United States v. Kitchen, 5 USCMA 541, 18 CMR 165 (1955). The trial counsel is also given added incentive to prepare his case by the Court’s rejection of a proposed presumption that an accused’s unauthorized absence—once shown to have begun—will be presumed to have continued through the date alleged for the termination of the absence. United States v. Lovell, 7 USCMA 445, 22 CMR 235 (1956). This decision could hardly be considered an undue burden since, as a practical matter, it will require only that trial counsel introduce in evidence two morning report extracts, instead of only one.

\textsuperscript{66} Cf. United States v. Masusock, 1 USCMA 32, 1 CMR 32 (1951).

\textsuperscript{67} Par. 138a, MCM, 1951.

\textsuperscript{68} 1 USCMA 32, 35, 1 CMR 32, 35 (1951). (Emphasis supplied.)

\textsuperscript{69} 4 USCMA 309, 315, 15 CMR 309, 313 (1954). (Emphasis supplied.)
offered, or in that event does it still retain some weight as the basis for an inference? 70

The presumptions which the Court of Military Appeals have upheld have been a major convenience to the Government in the proof of its cases before courts-martial. However, this is no ground for criticism since there is ample authority that the relative convenience to the parties, along with other factors, can be considered in creating presumptions or allocating the burden of producing evidence. 71 Indeed, under our adversary system, and with an accused protected by the privilege against self-incrimination, the failure to give suitable latitude for a court under certain circumstances to draw adverse inferences from an accused’s failure to produce evidence might place an overwhelming burden on the prosecution. For the most part, the results reached by the Court of Military Appeals in connection with presumptions have represented a satisfactory balancing of the Government’s interests and those of the accused.

IV. EVIDENCE OBTAINED FROM AN ACCUSED PERSON

A. ARTICLE 31

The privilege against self-incrimination, granted in the Fifth Amendment to the United States Constitution and in similar provisions of most state constitutions, is not so universally acclaimed as some Americans may believe. In many foreign countries this privilege is not recognized at all, and some of our own jurists have conceded that fair trials can be accorded without assuring the accused a right to remain silent. 72 Even in this country a few dissenters have recently suggested that the privilege against self-incrimination might merit overhauling. 73

70 In United States v. Bisak, supra note 52, it was held that, although the presumption of sanity is a rebuttable presumption and not merely a justifiable inference, after rebutting evidence is introduced it still has weight as a justifiable inference and the court members may be instructed by the law officer that they are free to consider this inference of sanity.


73 Mayers, Shall We Amend the Fifth Amendment? (1959).
MILITARY LAW REVIEW

However, Congress, in enacting the Uniform Code of Military Justice, and the Court of Military Appeals, in applying and interpreting it, have for the most part appeared determined to expand, rather than contract, the privilege against self-incrimination. Article 31 of the Code,74 in addition to prohibiting self-incrimination, dictates that:

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

Any "statement" obtained in violation of the warning requirement or by coercion is inadmissible in evidence.76 The purpose of this warning requirement is to counteract any coercion to confess that might be implicit in military life.76

As the Court of Military Appeals has noted, Article 31 has a broader scope than does the Fifth Amendment,77 and it embraces more than a right to decline to make any incriminating statement.78 Of course, where there is a duty to speak or furnish evidence, Article 31 is not applicable.79

B. WHO MUST WARN A SUSPECT UNDER ARTICLE 31?

Article 31(b), as quoted above, appears to require a warning only when a suspect is interrogated by a "person subject to" the Uniform Code.80 However, the Court of Military Appeals interpreted the provisions of the Manual for Courts-Martial to cover persons not subject to the Code who were interrogating or requesting a statement in furtherance of any official military investigation.81 Moreover, if anyone subject to the Code utilizes the services of another person not subject thereto "as an instru-

---

75 UCMJ, art. 31 (d), 10 U.S.C. § 831(d) (1968).
78 United States v. Henney, 9 USCMA 6, 25 CMR 268 (1958); United States v. Williams, 2 USCMA 430, 9 CMR 60 (1953).
80 This category of persons has been recently narrowed by the Supreme Court, as is discussed extensively in Everett, Military Jurisdiction Over Civilians, 1960 Duke L. J. 366.
ment for eliciting disclosures without warning,” the Court has indicated that Article 31 would nonetheless be applicable.\textsuperscript{82}

What is an official military investigation wherein any interrogator must give the Article 31(b) warning? In an airman’s trial by court-martial for robbery, a Texas civilian policeman who had arrested the accused on the complaint of his victim testified about statements made to him by the accused. The Court of Military Appeals ruled that this policeman had not been acting for the military; and therefore he was under no duty to give any warning.\textsuperscript{83} In \textit{United States v. Holder} \textsuperscript{84} the accused’s statement had been made to an FBI agent, who had apprehended him as a deserter. Noting that a number of civil officials have authority to apprehend deserters,\textsuperscript{85} the Court, over Judge Ferguson’s dissent, ruled that the accused’s statements were admissible in evidence despite the absence of an Article 31 warning “unless prior to the arrest, the Army interjected itself into the apprehension or in some way assumed direction and control of this agent outside the normal passing of information to the Bureau.”\textsuperscript{86} Since the basic purpose of Article 31 was to counteract any subtle pressures to confess that might be inherent in the military life, and since the FBI agent was not aided by such pressures, the \textit{Holder} case did not present the evil that led to the passage of Article 31. Accordingly, the Court was justified in adopting an interpretation of the Code and Manual that would not necessitate the giving of an Article 31 warning under these circumstances.

In \textit{United States v. Gibson},\textsuperscript{87} the Court passed on the admissibility of an incriminating statement made by the accused to an undercover agent who had been cooperating with military investigators but was the accused’s fellow prisoner. For obvious reasons the obtaining of the accused’s verbal confession had not been preceded by any warning of his right to silence, but it is equally obvious that there was no subtle or implicit coercion to confess, as there might be in the case of a serviceman being interrogated by his superior officer or by a military investigator.

\textsuperscript{82} Id. at 696, 16 CMR at 270.
\textsuperscript{83} United States v. Dial, 9 USCMA 700, 26 CMR 480 (1958). Texas is the only American civilian jurisdiction which requires that an accused be warned before he is interrogated. The Court of Military Appeals considered that chaos would result if it attempted to take the varying state rules of evidence into account in ruling on admissibility in courts-martial.
\textsuperscript{84} 10 USCMA 449, 28 CMR 14 (1959).
\textsuperscript{85} See UCMJ, art. 8, 10 U.S.C. § 808 (1952).
\textsuperscript{86} 10 USCMA at 451, 28 CMR at 17.
\textsuperscript{87} 3 USCMA 746, 14 CMR 164 (1954). The opinions in this case provide some excellent background for interpreting Article 31.
Indeed, a more voluntary statement by an accused could hardly be conceived than the one that had been made to this undercover operative. Chief Judge Quinn and Judge Brosman took the position that, in light of the intent of Article 31(b), no statutory warning was required here; Judge Latimer criticized their interpretation as “judicial legislation.” Whether this criticism is correct, it is apparent that Judge Latimer’s interpretation would have handcuffed the use of undercover agents and informers, one of the most effective means of detection.

A much more recent case is United States v. Souder, which concerned an accused who had attempted to sell a stolen accordion in a local music store. By chance, the store was being operated by a naval officer in civilian attire, whose military status apparently was not known to the accused and who asked several questions designed to elicit incriminating admissions. Judge Ferguson, writing the opinion of the Court but without any citation of the Gibson case, concluded that Article 31(b) did apply and that a warning was required. Chief Judge Quinn concurred, although he cited Gibson for the proposition that, “There are some situations to which Article 31 does not apply, even though the participants are persons subject to the Uniform Code.” Judge Latimer also accepted the applicability of the warning requirement.

Apparently the Court did not intend to overrule the Gibson case, but it is hard to reconcile the results in the two cases. Moreover, there seems little basis for including Souder within the protection of Article 31(b) since there was no pressure of any sort for him to confess, no influence of military rank; instead he apparently thought that he was dealing with a civilian businessman. Is not the purpose of Article 31 best served by considering how the situation appeared to the accused at the time of his statement?

---

89 Id. at 61, 28 CMR at 285. The Chief Judge also cited United States v. Dandaneau, 5 USCMA 462, 18 CMR 86 (1955), for this same proposition. There the accused’s statements to his squadron commander were deemed not subject to the warning requirement of Article 31(b); yet the chance of subtle pressures to confess appears to have been much greater than was the case in Souder.
90 He distinguished cases like United States v. Johnson, 5 USCMA 795, 19 CMR 91 (1955), which held that the requirements of Article 31 did not apply where an interrogator—there the victim of the crime—was acting in a personal, rather than an “official,” role. A similar doctrine is applied in search and seizure cases where the search is performed by one who is acting as a private individual and not in an official capacity. See, e.g., United States v. Volante, 4 USCMA 689, 16 CMR 263 (1954), where it was quite unclear in what capacity the person making the search had acted.

106 AGO 45203
C. WHO IS ENTITLED TO A WARNING?

In United States v. Wilson, a military police sergeant went to an area where a shooting had reportedly occurred, and, approaching a group of soldiers standing around there, asked who had done the shooting. Two men responded that they had "shot at the man." When these admissions were offered at their trial for premeditated murder, they objected to the admissibility of their statements under Article 31 because they were not preceded by a warning of the right to remain silent. Judge Brosman and Chief Judge Quinn concluded that, although these men had not been "accused" and under previous law would not have had any right to a warning, they should be considered "suspects" under Article 31 (b) of the Uniform Code.

In United States v. Haskins, the Court of Military Appeals considered the case of an airman convicted of twenty specifications of larceny, who had been in charge of the Air Force Aid Society office at his base in Georgia, but had been removed from this post and placed in confinement because of suspicions that he had misappropriated certain funds from the base theater, where he worked in off-duty hours. A lieutenant, who was in charge of the Air Force Aid Society Fund, had the accused brought from the stockade for an interview about certain missing ledger cards. The interview was not prefaced by an Article 31 warning, and, in the course thereof, the accused at the officer’s request produced the missing cards. The majority opinion concedes that under the circumstances "some doubt" might arise as to whether accused had misappropriated funds from the Air Society Fund, but adds:

But that is not the sort of suspicion which Congress had in mind when it enacted Article 31, for it provides that the interrogator must inform one suspected of an offense of the nature of the accusation. The suspicion must have crystallized to such an extent that a general accusation of some recognizable crime can be framed. Here it had not, and, therefore, it was impossible to apprise the accused of the nature of the charge.

On this point Judge Ferguson’s dissent seems to have the better of the argument, for most persons, upon learning that an accused had been confined on suspicion of stealing certain funds to which he had access and that certain vital documents concerning a different fund over which he had custody were inexplicably miss-

91 2 USCMA 248, 8 CMR 48 (1963).
92 11 USCMA 365, 29 CMR 181 (1960).
93 Id. at 369, 29 CMR at 185.
MILITARY LAW REVIEW

ing, would strongly have suspected that he had embezzled some of the funds with which he was entrusted. At the least, the emphasis here seems different from that of the Wilson case, and the Court may be moving closer to the English practice, under which a policeman is required to "caution" a suspect only after his suspicions have definitely crystallized and he is ready to prefer charges against the suspect.94

In Haskins the majority is on safer ground when it states that the accused was under a duty to produce the missing ledger cards belonging to the Government of which he was custodian. Thus he was not entitled to a warning that he could permissibly decline to do what, in fact, he could have been lawfully ordered to do.95 Judge Ferguson argued that any duty to produce the records had been terminated when the accused was relieved of his duties as custodian; he reasoned that the duty to account for documents ends when possession ends, and that possession of the ledger cards ended when the accused's responsibility was terminated. In this regard, perhaps it could be contended that possession of the ledger cards was still in Haskins, as he was the only one who knew where they were hidden.96

In United States v. Vail97 the accused had been apprehended in the course of committing larceny of certain government property. At the time the provost marshal, who was participating in the apprehension, asked the accused to show him where he had put certain stolen property. When the evidence obtained by means of the accused's answer was offered in evidence, his counsel objected on the grounds that it had been obtained without any warning in violation of Article 31(b). Where the statement

94 With reference to the English practice, see Judge Brosman's concurring opinion in United States v. Gibson, 3 USCMA 745, 754, 14 CMR 164, 172 (1954). The present writer discussed the English practice with some ranking English police officials and concluded that it bears considerable resemblance to the requirement under former Article of War 24 that an "accused" be warned, in that suspicions must have crystallized to a considerable extent. Cf. United States v. Wilson, 2 USCMA 248, 8 CMR 48 (1953), for a discussion of the expansion of the warning requirement effected by Article 31. The English police officials to whom this writer explained the warning requirement under Article 31 appeared somewhat surprised by its broad scope.

95 The Court relied especially on Wilson v. United States, 221 U.S. 351 (1911), and Davis v. United States, 322 U.S. 682 (1945), both of which involved custodians of documents.

96 Here one must consider a variety of doctrines about constructive possession, abandonment, and the like. One might ask what is the basis of an inference of embezzlement from a failure to account if, as Judge Ferguson argues, there is no duty to account once the accused has been relieved of his duties as custodian.

LAW OF MILITARY EVIDENCE

follows so closely upon the offense and apprehension, the Court, with Judge Ferguson dissenting, reasoned that there is no requirement to warn the accused under Article 31(b). Chief Judge Quinn correctly points out that, under such circumstances, an accused will be aware of what offense he is suspected, as well as that whatever he says may be used as evidence against him. However, the Chief Judge does not discuss whether the accused will know that he has a right to remain silent. And, so far as can be inferred from the wording of Article 31, an accused's right to remain silent is just as applicable when he is caught in the perpetration of the crime and questioned immediately as at any other time. Perhaps the reference in Article 31(b) to interrogation or requesting a statement was designed to suggest a formal sort of interrogation, but any such interpretation can hardly be reconciled with the Wilson case.

D. WHAT IS A STATEMENT?

The Court of Military Appeals quickly recognized that, under some circumstances, an accused's actions can speak louder, and be more incriminating, than his words. Accordingly, the Court applied the Uniform Code's warning requirement to various types of non-verbal admissions and included these admissions within the term "statement," as it appears in Article 31(b). For instance, in United States v. Taylor, it was held that a suspect should not, without receipt of warning, have been asked to point out his clothing to investigators who were inquiring into his possible possession of marijuana. In United States v. Nowling, it was ruled a violation of Article 31(b) for an air policeman to require an airman to produce his pass when he strongly suspected that the airman's own pass had been "pulled," and that any pass in the airman's possession was unauthorized. In that case, however, the Court did emphasize that it did not hold "that every routine or administrative check by an air policeman of a service- man's pass or identification card must first be preceded by an Article 31 warning." 100

As the Manual for Courts-Martial recognizes, silence in the face of an accusation may sometimes be construed as an admission of

100 Id. at 103, 25 CMR at 365.
MILITARY LAW REVIEW

guilt. However, if military investigators could use in evidence the silence of an accused who, in the exercise of his right under Article 31(b), has chosen not to give a statement, his rights under Article 31(b) could be undercut. Accordingly, the Government is not allowed to present evidence that an accused, pursuant to Article 31, had refused to answer questions. Quite frequently evidence—for example, evidence of prior misconduct—can be brought out by cross-examination of an accused when it could not have been independently offered by the prosecution. If an accused takes the stand, can he be cross-examined about his failure to make a statement before trial as a means of showing that his trial testimony is a recent fabrication? There is considerable authority to the affirmative, but the Supreme Court's decision in *Gremewald v. United States* probably sounds the death-knell for such cross-examination in either federal civilian courts or in courts-martial.

When a suspect is asked to consent to a search and seizure, does the warning requirement of Article 31(b) have any applicability? In *United States v. Insant*, the Court recognized that, "Consent to a search is by itself in no way incriminating. It relates only to the preliminary question of the lawfulness of the search." It would be a distortion of Article 31(b) to apply it to a request for consent to search since such consent could hardly be deemed a "statement regarding" the offense. However relevant it may be to admissibility of evidence, the granting of consent to search cannot in any way be used by the court members, the triers of fact, to aid in inferring guilt. Indeed, the granting of a consent to search, if it could be deemed to have any relevance to guilt or innocence, would seem to imply a confidence of the suspect in his innocence and so would be the opposite of incriminatory. Although Article 31(b) gives a protection that extends beyond

---

101 Par. 140a, MCM, 1951, at p. 251. See also United States v. Armstrong, 4 USCMA 248, 15 CMR 248 (1954).
102 United States v. Kowert, 7 USCMA 678, 23 CMR 142 (1957).
103 See United States v. Sims, 5 USCMA 115, 17 CMR 115 (1954), and cases cited therein. See also Everett, Military Justice in the Armed Forces of the United States 86 (1956).
105 The Court of Military Appeals does not invariably consider itself bound by the Supreme Court's opinions on evidence. See, e.g., United States v. Mims, 3 USCMA 316, 24 CMR 126 (1957). It seems clear, however, that, as there is no specific authority in the Manual or elsewhere for allowing such cross-examination of an accused, Chief Judge Quinn and Judge Ferguson would adopt the Supreme Court's view.
106 10 USCMA 519, 28 CMR 85 (1959).
107 Id. at 521, 28 CMR at 87.
the scope of the privilege against self-incrimination, its purpose does not require an interpretation that requests for consent to search must be preceded by a warning to an accused of his right to remain silent.

E. HANDWRITING AND VOICE EXEMPLARS

The Manual for Courts-Martial states that a suspect may be required "to make a sample of his handwriting" or "to utter words for the purpose of voice identification." This provision is based upon the doctrine of "testimonial compulsion" enunciated by the Supreme Court in Holt v. United States. However, the Court of Military Appeals reasoned that to order an accused to perform "an affirmative conscious act," such as writing an exemplar for handwriting identification or reciting some words for voice identification, infringes on the prohibition against compulsory self-incrimination in Article 31(a) of the Uniform Code.

Having ruled that handwriting and voice samples are subject to the privilege against self-incrimination, the Court of Military Appeals was called upon to consider whether such samples could be deemed "statements" within the meaning of Article 31(b). At first the Court refused to apply the warning requirement to these samples. After Judge Ferguson joined the Court, the previous decisions on this point were overruled and a warning requirement was imposed; it was maintained that "a liberal and enlightened, rather than a narrow and grudging, application of Article 31 . . . is best calculated to insure to the military the preservation of our traditional concepts of justice and fair play." On balance, it is believed that the Court of Military

109 Par. 1605, MCM, 1951, at p. 284.
110 213 U.S. 245 (1910).
111 United States v. Greer, 3 USCMA 576, 13 CMR 132 (1953); United States v. Eggars, 3 USCMA 191, 11 CMR 191 (1953) (with extensive citations of authority); United States v. Rosato, 3 USCMA 143, 147, 11 CMR 143, 147 (1953).
112 United States v. McGriff, 6 USCMA 143, 19 CMR 269 (1955); United States v. Ball, 6 USCMA 100, 19 CMR 226 (1955).
113 United States v. Minnifield, 9 USCMA 373, 26 CMR 163 (1958).
114 Id. at 379, 26 CMR at 159. Analyzing these decisions, the author has previously commented: "Certainly the handwriting or voice evidence that the investigator is seeking does not depend for its reliability on anything within the conscious control of the accused. . . . Yet it is clear that the conscious mind does play some role in producing either a verbal or written utterance, and that some characteristics of either writing or speech can be altered—even if not enough to deceive the qualified expert. Therefore, consciously or un-
Appeals was right in its conclusion that handwriting and voice samples are within the scope of Article 31(a), which prohibits compulsory self-incrimination. However, handwriting and voice samples do not involve some of the dangers and abuses present where an accused is compelled to testify; therefore, Congress could reasonably have concluded that the protection of an Article 31(b) warning was not required in such instances. Since this requirement of warning is purely statutory and since the word “statement” does not readily suggest a handwriting or voice exemplar, the original interpretation of the Court of Military Appeals, whereunder no warning to the suspect was necessary, is, at least, supportable, and perhaps, in deference to stare decisis, that interpretation should not have been overruled.

F. BODY FLUIDS

The extraction of certain body fluids from a suspect can be a very useful adjunct to an investigation. For instance, blood tests are useful in detecting intoxication and have been authorized for that purpose by statutes in many jurisdictions, and examinations of urine specimens can indicate whether narcotics have been used. When these methods of scientific investigation are used without the consent of the suspect, the admissibility of the results may be attacked along three different lines: (a) compulsory self-incrimination in violation of Article 31; (b) unreasonable search and seizure; and (c) deprivation of “due process.” For the most part the decisions of the Court of Military Appeals have centered on “due process” and self-incrimination.

The “due process” objection depends particularly on the Supreme Court’s decision in Rochin v. California, where the stomach-pumping of a narcotics suspect, who, when apprehended, had swallowed the drug, was deemed to be “conduct that shocks the conscience” and thus a violation of “due process.” The Court

consciously, the suspect may be impelled to seek to disguise his writing or speech when an identification is attempted thereby. It is possible that any such disguise may itself be treated by the finder of fact as an admission of guilt—in which case, the suspect has testified against himself. More important, the placing of the suspect in the position where he must choose between seeking to deceive the investigator and increasing the chance that he will be convicted is probably one of the very things against which the privilege against self-incrimination is directed.” Everett, New Procedures of Scientific Investigation and the Protection of the Accused’s Rights, 1959 Duke L. J. 32 at 54–55. Some of the opposing considerations are also presented.

116 Ibid.
117 Ibid.

118 Everett, supra note 114 at 36–44.
emphasized that the trustworthiness of the evidence obtained from Rochin's stomach did not vitiate the “due process” objection, just as an involuntary confession remains inadmissible even if independently corroborated.

Later, in Breithaupt v. Abram, the Supreme Court determined that bloodtesting is a far cry from stomach pumping. Breithaupt had been involved in an automobile accident in New Mexico, after which, while he lay unconscious in a hospital emergency room, a sample of about twenty cubic centimeters of blood was withdrawn by an attending physician by use of a hypodermic needle. On the basis of subsequent laboratory analysis of this sample, an expert witness testified that Breithaupt was intoxicated at the time of the collision, and this in turn led to his conviction for manslaughter. Justice Clark, writing for the majority, emphasized that, with the blood test procedure so routine in our everyday life, there is nothing “brutal” or “offensive” in the taking of a sample of blood when done under the protective eye of a physician. Of course, the Supreme Court was concerned here only with a “due process” attack under the Fourteenth Amendment and not with a determination whether similar conduct by federal investigators concerned with a federal crime would have violated the Fifth Amendment privilege against self-incrimination.

The Court of Military Appeals first encountered the problem of body fluids in United States v. Williamson. The accused soldier, after drinking heavily, had received a hypodermic injection in a Japanese house and, almost immediately thereafter had lapsed into a coma. Taken in an ambulance to a hospital, he was examined by an Army medical officer, and, while he was still unconscious, a specimen of urine was extracted from his bladder by means of a catheter. The results of the analysis, testified to before the court-martial, help demonstrate Williamson's guilt of a narcotics offense.

Judge Latimer reasoned that the privilege against self-incrimination was inapplicable to the extraction of body fluids and that the facts revealed no deprivation of due process. Judge Brosman, concurring with Judge Latimer, stated his view that compulsory catheterization of a conscious accused over his protest would

120 4 USCMA 320, 15 CMR 320 (1954); see also United States v. Jones, 5 USCMA 537, 18 CMR 161 (1955).
MILITARY LAW REVIEW

transgress due process, but that the catheterization of Williamson, who at the time had already been rendered unconscious by the narcotic and who was in the hands of a qualified physician, did not infringe the accused's rights. Insofar as Judge Brosman was concerned, no privilege against self-incrimination applied to body fluids, nor was the furnishing of a urine specimen to be considered a "statement" under Article 31 (b).

Chief Judge Quinn wrote a forceful dissent wherein he invoked not only the Uniform Code of Military Justice, but also "the safeguards of the Bill of Rights" and "the protections of both natural and divine law." He noted that in the handwriting cases the Court had gone beyond the doctrine of testimonial compulsion, and to him the use of a catheter seemed analogous to the stomach-pumping in the Rochin case. Of course, as Chief Judge Quinn noted in another case decided at the same time, the accused could not object to a court-martial's consideration of a urinalysis if the urine specimen had been "obtained with his consent" and if "there was no interrogation of any kind."\(^\text{121}\)

The Court of Military Appeals, as initially constituted, also ruled that the warning requirements of Article 31 (b) were inapplicable to requests that an accused furnish a urine specimen.\(^\text{122}\) According to Judges Latimer and Brosman, that provision was "limited by its terms to testimonial utterances of an accused, either oral or written." The Chief Judge, on the other hand, seems to have considered that "statement" would include urine specimens, just as it would include handwriting samples.\(^\text{123}\) In United States v. Barnaby,\(^\text{124}\) Judges Latimer and Brosman were apparently agreed that a suspect could, in some form, be ordered to provide a urine specimen for investigators. Chief Judge Quinn considered that the use of an order to require the accused to furnish evidence, even evidence in the form of a body fluid for analysis and irrespective of the form of the order, would invade

\(^{121}\) United States v. Booker, 4 USCMA 335, 338, 15 CMR 335, 338 (1954) (concurring in result).
\(^{122}\) United States v. Booker, supra note 121.
\(^{123}\) Chief Judge Quinn only concurred in result in United States v. Booker, supra. Later in United States v. Ball, 6 USCMA 109, 19 CMR 226 (1956), he explained that, in dealing with handwriting samples, he considered that, when read as a whole, Article 31 required a broad interpretation of "interrogate" and "statement" as they are used in connection with the warning requirement.
\(^{124}\) 5 USCMA 63, 17 CMR 63 (1954). To avoid a defense of physical inability in any prosecution for failure to obey, an order designed to have the accused furnish a urine specimen should be in the form of an order that he not urinate except in a designated receptacle. See Everett, Military Justice in the Armed Forces of the United States 83 (1956).
the area protected by the privilege against compulsory self-incrimination.

With the arrival of Judge Ferguson on the Court, the approach to the problem of body fluids changed. The first case of this type in which he participated was United States v. Jordan, where, relying on previous statements of the Court, a squadron commander had ordered the accused that "the next time he urinated he was to give the OSI a specimen of his urine." According to Chief Judge Quinn, reversing the conviction, "to compel a person against his will to produce his urine for the purpose of using it, or an analysis of it, as evidence against him in a court-martial proceeding, violates Article 31 of the Uniform Code." Judge Ferguson, refraining from overruling the Barnaby decision, centered his attention on whether the order was a lawful command under Article 90 of the Uniform Code. According to him, it was not, since it violated Article 31(a)’s prohibition of compulsory self-incrimination—which Judge Ferguson would not limit to testimonial utterances. Judge Latimer, of course, dissented.

In United States v. Musguire, the accused, who apparently was suspected of drunkenness, had been ordered "to remove his shirt and submit to a blood alcohol test," and, upon his refusal to comply, he was tried for willful disobedience. Chief Judge Quinn, writing for himself and Judge Ferguson, concluded that this order was not a lawful one because:

Article 31 of the Code provides that no person subject to the Code is required to make a statement regarding an offense of which he is accused or suspected, and cannot be compelled to do so. The word "statement" includes both verbal utterances and actions. United States v. Holmes, 8 USCMA 151, 19 CMR 277. Article 31 is wider in scope than the Fifth Amendment. As we pointed out recently in United States v. Aronson, 8 USCMA 625, 25 CMR 29, Article 31 is 'intended to protect persons accused or suspected of crime who might otherwise be at a disadvantage because of the military rule of obedience to proper authority."

In connection with this conclusion, it should be pointed out that the Holmes case, which is cited by the Chief Judge, does hold that conduct can be included within the word "statement," but it in-

---

125 7 USCMA 452, 22 CMR 242 (1957).
126 See Everett, supra note 124.
127 7 USCMA at 454, 22 CMR at 244.
129 See also his dissent in United States v. McCann, 8 USCMA 675, 25 CMR 179 (1958).
131 Id. at 68, 25 CMR at 330.
MILITARY LAW REVIEW

volves a different kind of conduct. Holmes, without being warned of his right to remain silent, had identified certain clothing as his own, and, because this clothing smelled of gasoline, he was linked to an attempted larceny of Government gasoline. The accused's action in pointing out his clothing was the "equivalent" of language and, when taken with other evidence, was itself incriminatory. On the other hand, submission to a blood test is in no way incriminatory, and it is impossible to conceive how a willingness to submit to such a test would be relevant to a court-martial's determination of guilt or innocence. In this respect it is like consent to a search and seizure, which necessarily has no tendency to show guilt. In short, the only case cited in Musquiere to support the reinterpretation of the term "statement" in Article 81 does not appear applicable to the situation there before the Court.

In United States v. Forslund results of a urinalysis were ruled inadmissible because they were the product of compulsion, in the form of an order to the accused to provide urine specimens. In a later case the urine specimens were also held to have been furnished involuntarily since, although the accused had apparently furnished the specimens voluntarily, the evidence showed that he was in no condition to make a rational choice.

The most recent case involving body fluids is United States v. Hill, where the Court of Military Appeals apparently considered that an order to provide a sample of blood for clinical purposes is valid, although admissibility of the blood test results was also predicated on a conclusion that the accused had consented to the blood test. This case purports to be applying the view of a previous case that, in light of its purposes, Article 81(b) does not apply to a medical officer obtaining information regularly required in the performance of his duties in treating patients.

Perhaps this medical purpose doctrine will give military investigators some desired leeway. For instance, where an accused is unconscious, as was the case in United States v. Williamson and in Breithaupt v. Abrams, it is quite probable that a qualified

132 See United States v. Insani, 10 USCMA 519, 23 CMR 85 (1959), which has been discussed supra.
133 10 USCMA 8, 27 CMR 82 (1965).
135 12 USCMA 9, 30 CMR 9 (1960).
136 United States v. Baker, 11 USCMA 313, 29 CMR 129 (1960). There Judge Ferguson's dissent suggests convincingly that Baker was not being examined in the regular course of treatment. Incidentally, military law does not recognize the patient-physician privilege.
137 4 USCMA 320, 15 CMR 320 (1954).
physician called in to “treat” the accused would need to know the cause of the unconsciousness, and in performing the usual scientific investigations to discover the cause, he may obtain incriminating evidence.

So far as Article 31(b) and its warning requirements are concerned, Chief Judge Quinn and Judge Ferguson would apparently include body fluids within the term “statement” and thus require some form of warning to the accused before he is asked to provide a blood or urine specimen. The arguments for and against this result are parallel to those discussed in connection with the Court’s current position that handwriting and voice samples fall within Article 31(b). 139 Since handwriting samples require the affirmative action of the accused and are products of his will, they are more susceptible to being viewed as “statements” than are an accused’s blood and urine, but, if one shares the Court’s premise that blood and urine specimens involve self-incrimination, then he may conclude that the purposes of Article 31 require a very broad interpretation of its warning requirements.

In Musquiere the Court of Military Appeals emphasized that it was considering solely the lawfulness of the order given to the accused and was not deciding whether evidence of a blood test obtained without the accused’s consent is admissible. 140 Thus, a determination of whether body fluids are subject to the privilege against self-incrimination was deemed unnecessary. However, the Forshall case would seem to imply that the results of either urine or blood tests are inadmissible under Article 31 if the accused has not freely consented to provide the specimens that were tested.

Why should such protection be granted to an accused? Apparently the Fifth Amendment does not require it. A half century ago in Holt v. United States, Justice Holmes wrote for a unanimous Supreme Court:

But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. 141

The processes by which body tissue, blood, and urine are formed are involuntary and do not concern the will; in no way can they be construed as “communications.” Blood and urine specimens

140 9 USCMA at 58, 25 CMR at 330.
141 218 U.S. 245, 253-58 (1910). (Emphasis supplied.)
MILITARY LAW REVIEW

can be obtained without the moral discomfort to which a suspect is subjected when called upon to make the choice between falsifying to protect himself and telling the truth; instead he has no choice because there is no chance for disguise or concealment. Of course, since concealment is impossible, a suspect cannot incriminate himself by seeking unsuccessfully to conceal evidence. Insofar as extraction of the body fluid involves pain for an accused, as with stomach-pumping or catheterization, problems of "due process" may be involved, but not self-incrimination. Even if Article 31 of the Uniform Code was intended to go further than the Fifth Amendment, that Article seems primarily concerned with self-incrimination, and there seems little reason to apply it to urine or blood specimens if they fall outside the Fifth Amendment concept of self-incrimination.

What does this analysis indicate with respect to the lawfulness of orders to submit to blood tests or provide urine specimens? In this connection one might consider a situation where, although the investigators do not wish to obtain body fluids, an accused's person is involved. An example might be the obtaining of the accused's fingerprints for comparison, or, as in *Holt v. United States*, having an accused try on certain garments to see if they fit. If the accused is a serviceman and refuses to be fingerprinted, or declines to try on the garment, what remedy is available to the investigator? Can an order be given the accused that he submit to fingerprinting or permit the garment to be tried on him? If such an order is given, is it an order requiring the accused to furnish evidence, and, therefore, unlawful under the rationale that the Court of Military Appeals has used for urine and blood specimens? If such an order is not to be used, shall the investigators proceed by force to hold the accused in place while he is fingerprinted or fitted with the garment? In that event, problems of "due process" might be created. More important, it seems undesirable to require that the investigators use physical, instead of moral, force as a means of performing their investigation.

It appears far better to hold from the outset that lawful orders can be given for a suspect to submit to certain scientific tests such

---

142 In this respect the situation is different from that of the handwriting samples where there is some possibility of disguising the writing—and this effort to disguise may itself be incriminating.
143 This was stated in *United States v. Musguire*, 9 USCMA 67 at 68, 25 CMR 329 at 330.
144 *Everett*, supra note 139 at 45–53.
145 218 U.S. 245 (1910).
as blood tests. On one side of the dividing line, and therefore lawful, would be those orders whose subject matter does not provide the suspect with a possible choice between attempts at disguise, on the one hand, and incrimination, on the other hand—orders whose manner of performance would, like the granting of a consent to search, be insusceptible of rational use as evidence of guilt. On the other side of the line would be those orders that require an act which might involve a choice between disguise and incrimination, and whose manner of performance might itself tend to support an inference of guilt. The position originally taken by a majority on the Court of Military Appeals seems a sound one; the Court’s present position, based on a novel concept of self-incrimination, gives too little heed to the interest of the public in the detection of offenders.

G. TRUTH DRUGS AND LIE DETECTORS

In the popular press, among the more publicized instrumentalties in the detection of criminals are the so-called “truth serum” drugs such as scopolamine, sodium amytal, and sodium pentothal, and the “lie detector,” or polygraph, which attempts to discover deception by means of graphs which record physical response associated with answering questions about a crime. In courts-martial the Government cannot compel a suspect to submit to these methods of detection, and the evidence obtained by such tests is inadmissible. On the other hand, the prior use of these techniques with an accused’s consent does not render inadmissible his subsequent voluntary confession, and a reference to possible use of these measures can occasionally be useful in obtaining an admissible, voluntary confession.

The most interesting cases before the Court of Military Appeals have concerned the efforts of accused persons to use in evidence the favorable results of such tests. Despite the accused’s requests, apparently neither truth serum nor lie detector results will be received in evidence by a court-martial. However, either may permissibly be considered by a convening authority in his review of the case, and, of course, a defense counsel will want to make

---

146 Everett, supra note 139 at 56–71.
148 Everett, supra note 139 at 63.
151 United States v. Massey, supra note 150.
MILITARY LAW REVIEW

sure that favorable results are brought to the convening authority's attention.

H. WHO RULES ON THE ADMISSIBILITY OF ACCUSED'S STATEMENT?

Article 51(b)\textsuperscript{162} of the Uniform Code provides that the ruling of the law officer is "final" as to any "interlocutory question" except a motion for a finding of not guilty or sanity. In United States v. Dykes,\textsuperscript{163} Judge Brosman, writing the opinion of the Court in which Chief Judge Quinn concurred, reasoned that under this provision of the Code the ruling of the law officer admitting an accused's confession in evidence was "final" and could not be reversed by the members of the court-martial. Under this view the Code prevailed over a provision of the Manual for Courts-Martial which seemed somewhat in conflict therewith.\textsuperscript{164} Under the rule of the Dykes case—a rule for which Judge Brosman marshaled impressive precedent—the members of the court-martial would be instructed that the law officer's ruling would be final as to whether the accused's statement could be considered as evidence, but any evidence of involuntariness or failure to give the warning required by Article 31(b) could be considered by them in determining what weight to give the statement.\textsuperscript{165}

After Judge Ferguson joined the Court, this allocation of functions was swiftly repudiated in United States v. Jones.\textsuperscript{166} In his view courts-martial should instead follow what he deemed "the prevailing Federal rule" whereunder a jury, the trier of fact, is not free to consider a confession if that confession is deemed involuntary. It is not clear that this is the "prevailing" Federal rule.\textsuperscript{167} Certainly the principle advocated by Judge Ferguson in Jones, an opinion concurred in outright by Chief Judge Quinn, who had also concurred outright with Judge Brosman in Dykes, had gained no new vogue in the Federal courts between the dates of these two cases. And why should the Federal rule, whatever it might be, make any difference, since the Dykes result rested on the wishes of Congress as expressed in Article 51(b) of the Uniform Code?

\textsuperscript{162} 10 U.S.C. § 851(b) (1958).
\textsuperscript{163} 5 USCMA 735, 19 CMR 31 (1955).
\textsuperscript{164} Par. 140a, MCM, 1961, at p. 250–51.
\textsuperscript{165} Accord, United States v. Higgins, 6 USCMA 308, 20 CMR 24 (1955).
\textsuperscript{166} 7 USCMA 623, 23 CMR 87 (1957).
\textsuperscript{167} Schaffer v. United States, 221 F.2d 17 n. 3 (5th Cir. 1955); Horne v. United States, 246 F.2d 83 (5th Cir. 1957); Annot., 170 A.L.R. 667 at 669 (1947).
LAW OF MILITARY EVIDENCE

As was mentioned in the Dykes opinion, the result reached there was the one advocated by Professor Wigmore and Professor Morgan, the latter probably the chief draftsman of the Uniform Code. Moreover, the overruling of Dykes, in disregard of stare decisis, produced a number of reversals in cases where the law officer had instructed the court-martial in reliance on the earlier case.\textsuperscript{188}

One would think, then, that some very important purpose must have been served by the reallocation of functions espoused in Jones. The contrary, however, appears to be the case. For one thing, Dykes, by placing ultimate responsibility on the law officer, tended to build up his stature, a by-product very much in accord with some of the Court's other decisions.\textsuperscript{189} Secondly, the allocation of functions in Dykes lent itself to simplicity and to instructions which the court members can readily understand; the present rule places on the members, who are laymen, the difficult task of applying the concept of admissibility and thereby paves the way for committing instructional error when the law officer seeks to explain to them their task.\textsuperscript{190} Thirdly, the rule adopted probably lessens an accused's protection. When the law officer realizes that the ultimate responsibility of determining whether a confession is to be considered by the members belongs solely to him, he may well lean over backward to protect the accused's rights. On the other hand, if the court members are empowered to pass again on the same matter, he may well decide to give his decision less careful consideration and to resolve all questions in favor of the Government, on the assumption that the court members can correct any injustice to the accused. All in all, the Court's reversal of position as to determining voluntariness and compliance with Article 31 does not seem to be a happy move.

I. RIGHT TO COUNSEL

In United States v. Moore\textsuperscript{191} the accused attacked the admissibility of his confession on the ground that he had been confined

\textsuperscript{188} See, e.g., United States v. Schwed, 8 USCMA 305, 24 CMR 115 (1957); United States v. Morris, 9 USCMA 37, 25 CMR 299 (1958).


\textsuperscript{190} See United States v. Rice, 11 USCMA 524, 29 CMR 340 (1960), which holds that each court member must make his individual determination of voluntariness and accept or reject the accused's statement accordingly.

\textsuperscript{191} 4 USCMA 482, 16 CMR 56 (1954). See also United States v. Manuel, 3 USCMA 739, 14 CMR 157 (1954).
MILITARY LAW REVIEW

prior to making the statement and had not been granted the aid of counsel. After first rejecting an effort to invoke the "McNabb rule," which it held inapplicable to the military, the Court of Military Appeals noted:

As a second basis for assault on the voluntariness of these confessions, defense counsel argue that the accused was not furnished with counsel during the interrogations. While it is worthy of note that he is not known to have made any request therefor, the complete answer to this contention is that no right exists to be provided with appointed military counsel prior to the filing of charges.162

However, the Court soon made it clear in United States v. Gunnels,163 that, although there was no requirement that counsel be furnished to an accused, he could not be precluded from consulting with counsel. There it was held prejudicial error for the Staff Judge Advocate to inform the accused Air Force officer that he could not consult with counsel in connection with an interrogation by enforcement agents. In fact, while a military accused "has no right to appointed military counsel, he does have a right to obtain legal advice and a right to have his counsel present with him during an interrogation by a law enforcement agent."164 Several later cases have involved defense contentions that an accused’s pretrial statement was inadmissible because during his interrogation he had been denied, or misadvised concerning, his right to counsel.165

J. CORPUS DELICTI

Like Federal civilian courts, courts-martial are committed to the corpus delicti requirement in ruling on the admissibility of confessions. This requirement, as stated in the Manual for Courts-Martial, is more rigorous than that applied by the Federal courts generally, and the corroborating evidence must go to “each element of the crime alleged, save only the identity of the perpetrator.” 166

162 Id. at 486, 16 CMR at 60. The “McNabb rule,” which the Court rejected, arose out of the Supreme Court’s holding in McNabb v. United States, 318 U.S. 332 (1943), that a confession is inadmissible when obtained while a defendant is illegally detained without the prompt hearing now required by Federal Rule of Criminal Procedure 5.
163 8 USCMA 130, 22 CMR 364 (1957).
164 Id. at 136, 22 CMR at 369.
166 Compare par. 140a, MCM, 1951, at pp. 251–52, with Opper v. United States, 348 U.S. 84 (1954). See also United States v. Fioco, 10 USCMA 198, 27 CMR 272 (1959); United States v. Mims, 8 USCMA 316, 24 CMR 126 (1957); United States v. Villasenor, 6 USCMA 3, 19 CMR 129 (1955).
LAW OF MILITARY EVIDENCE

In accord with his purpose of assimilating military justice as much as possible to that applied in Federal civilian courts, Chief Judge Quinn has insisted that the civilian rule of corpus delicti should govern in courts-martial as well. According to him, "The Manual is not binding on us when it conflicts with the law." Interestingly enough, Judge Ferguson considered that the more rigorous Manual rule should be applied to courts-martial because it was a "better rule for the military than that laid down" by the Supreme Court. He makes it clear that he does not consider the Manual provision in any way to be binding on the Court of Military Appeals. Judge Ferguson's unwillingness to follow the Federal rule, as authoritatively established by the Supreme Court, hardly accords with his subordination of the Uniform Code in United States v. Jones to what he concluded was the "prevailing Federal rule."

In some instances where problems of corpus delicti are involved, the Court has been willing to follow Supreme Court precedents. For instance, in United States v. Stribling, the Government had established through an audit that §2400 was missing from a fund of which the accused was custodian. His confession was the sole evidence that this money had been taken in two installments—one of $200 and the other of $2200. Following the doctrine of several recent Supreme Court decisions involving analogous problems of severability, the Court concluded that the confession was, in itself, sufficient to authorize punishment for two larcenies, rather than for only one.

K. FALSE OFFICIAL STATEMENTS

In some instances a statement given by a suspect to military investigators has been made a basis of prosecution for a false official statement. The Court of Military Appeals placed a considerable damper on such prosecutions by holding that a suspect is not under a duty to make statements during the course of a routine criminal investigation not involving some responsibility

---

167 6 USCMA at 13, 19 CMR at 139 (concurring in result).
169 Ibid.
170 United States v. Jones, 7 USCMA 623, 23 CMR 87 (1957), discussed supra.
171 5 USCMA 531, 13 CMR 155 (1955).
AGO 4520B 123
MILITARY LAW REVIEW

with which he has been entrusted.\textsuperscript{173} Where, however, the information furnished by the accused does pertain to a responsibility to which he is subject—such as a duty to account for funds with which he has been entrusted—he can be prosecuted under Article 107\textsuperscript{174} for making false official statements.\textsuperscript{176}

These interpretations have some relevance to other problems. For example, the concept that an accused has no “official” duty to provide evidence for military investigators forms a foundation for holding that: (a) he cannot be given a lawful command to provide such evidence in the form of body fluids,\textsuperscript{176} and (b) he cannot be prosecuted for furnishing false evidence. Similarly, where there is an official duty involved, such as a duty to account for funds or documents, the accused cannot claim his privilege against self-incrimination when ordered to furnish evidence\textsuperscript{177} and can be prosecuted under Article 107 if he makes a false statement in connection therewith.

So far as the military investigator is concerned, the importance of the concept of “officiality” was significantly reduced in United States v. Claypool.\textsuperscript{178} There it was held that a false statement by a suspect under oath to an investigator constitutes false swearing, conviction of which authorizes up to three years confinement and a dishonorable discharge.\textsuperscript{179} Since there is a broad authority to administer oaths,\textsuperscript{180} the investigator will have every incentive to request that witnesses swear to their statements.\textsuperscript{181}

\textsuperscript{173} United States v. Thomas, 10 USCMA 54, 27 CMR 128 (1958); United States v. Grib, 9 USCMA 392, 26 CMR 172 (1958). See also United States v. Aronson, 8 USCMA 525, 25 CMR 29 (1957).
\textsuperscript{176} See United States v. Musgrove, 9 USCMA 67, 25 CMR 320 (1958); United States v. Fordslund, 10 USCMA 3, 27 CMR 82 (1958), both discussed supra.
\textsuperscript{177} United States v. Hackin, 11 USCMA 365, 29 CMR 181 (1960).
\textsuperscript{178} 10 USCMA 203, 27 CMR 376 (1959).
\textsuperscript{179} See Table of Maximum Punishments, par. 127\textsuperscript{a}, Sec. A, MCM, 1961, at p. 226. In connection with punishment of certain types of falsity, see also United States v. Middleton, 12 USCMA 54, 30 CMR 54 (1960).
\textsuperscript{180} See UCMJ, art. 136, 10 U.S.C. § 936 (1958). In the Claypool case, supra note 178, Judge Ferguson disagreed with the majority as to whether the investigator was authorized under Article 136(b) to administer the oath to the accused. Would he question the authority of a person in one of the categories listed in Article 136(a) to administer the oath to an accused who was making a statement in connection with a routine criminal investigation?
\textsuperscript{181} In recent years military law has placed special emphasis on sworn statements. See United States v. Samuels, 10 USCMA 206, 27 CMR 280 (1969). Whether sworn or unsworn, a false statement by the accused may be evidence of his consciousness of guilt. United States v. Hurt, 9 USCMA 736, 27 CMR 3 (1958).
V. SEARCH AND SEIZURE

Since the most significant problems of military search and seizure have been reviewed elsewhere, the treatment here can be rather brief. With respect to the items subject to seizure, the Court of Military Appeals has followed the federal rule that only fruits and instruments of crime can be seized, but the Court has taken a broad view of what constitutes "instruments." If a search has been performed, the accused must object at the trial to introduction of its results in evidence, or else he will have waived his rights. Moreover, he cannot complain of a search to which he consented, although mere acquiescence will not be treated as consent. An investigator is not required to give an Article 31(b) warning prior to requesting consent to a search.

Certain military officials have authority to order searches of persons and property under their command, and this authority can be delegated. However, in any event the authority to search must be exercised on the basis of probable cause. Requiring probable cause for such a search when directed by a commanding officer with respect to persons or property under his control may mark something of an innovation by the Court of Military Appeals. Apparently the Court would dispense with the requirement of probable cause where the search is in the form of a routine "shakedown inspection," performed for general admini-
strative purposes rather than to aid investigation of a specific crime.\textsuperscript{190} There is some parallel for this in the Supreme Court's willingness to uphold certain searches without a warrant when not made for investigative purposes\textsuperscript{191} and in the ruling by the Court of Military Appeals that the Article 31(b) warning requirement does not apply to routine inspection of passes.\textsuperscript{192}

If there is probable cause for an arrest of the accused, then he can be searched by the person making the arrest.\textsuperscript{193} Moreover, so long as probable cause exists, a search and seizure may be justified on the ground that it was necessary to avoid destruction of the evidence, although, of course, there may be disagreement about the necessity\textsuperscript{194} in particular cases.

An especially interesting case is United States v. DeLeo,\textsuperscript{195} which involved the legality of the search of the accused's apartment in Bordeaux, France. This search, authorized by judicial process from a French court, was undertaken by French police, but, since the suspect was a soldier, they had requested a military investigator to accompany them and during the search the American discovered some very incriminating evidence. Judge Brosman's opinion, concurred in by Chief Judge Quinn, reasoned that, in light of special problems and needs applicable overseas, the search should be treated as if it had been performed by the French alone and the evidence then had been turned over to the military investigators. On this basis, the majority was able to apply "a well-recognized rule of Federal law that the Government may use evidence obtained through an illegal search effected by American state or by foreign police—unless Federal agents participated to some recognizable extent therein."\textsuperscript{196} Although the federal decisions cited by Judge Brosman would fully have supported his position at the time, a recent Supreme Court decision overturns the "silver platter" doctrine and holds that a federal district court cannot consider evidence which was obtained by a

\textsuperscript{190} United States v. Brown, 10 USCMA 482, 489, 28 CMR 48, 55 (1959); United States v. Gebhart, 10 USCMA 606 n. 2, 28 CMR 172 n. 2 (1959).
\textsuperscript{193} United States v. Brown, 10 USCMA 482, 28 CMR 48 (1959); United States v. Florence, 1 USCMA 620, 5 CMR 48 (1959); see also United States v. Nowling, supra note 192.
\textsuperscript{194} United States v. Swanson, 3 USCMA 671, 14 CMR 89 (1954); United States v. Brown, supra note 193; United States v. Davis, 4 USCMA 677, 16 CMR 151 (1954).
\textsuperscript{195} 5 USCMA 148, 17 CMR 148 (1954).
\textsuperscript{196} Id. at 155, 17 CMR at 156.
search on the part of state officers which, if conducted by federal officers, would have violated the Fourth Amendment.\textsuperscript{197}

Undoubtedly the Court of Military Appeals, which so often attempts to approximate federal rules of evidence, will conclude that a court-martial cannot admit any evidence which state officers obtained by unreasonable search and seizure. However, it is still quite possible, consistent with the reasoning of the Supreme Court, to analogize the situation present when evidence is received from foreign police to that which exists when evidence is received from an absolute stranger to law enforcement.\textsuperscript{198} The Supreme Court decided that evidence turned over to federal officials on a "silver platter" by state officials who had unreasonably searched should not be received because those officials had violated the Fourteenth Amendment of the \textit{Federal Constitution}.\textsuperscript{199}

In recent decisions the Supreme Court has evolved new concepts of extraterritoriality in its interpretation and application of the Constitution—concepts which this writer has criticised in detail in another article.\textsuperscript{200} Nonetheless, it is hard to conceive how searches by foreign police could possibly violate the Fourteenth Amendment—which has always been thought to require "state action"—and presumably that of an American state. Thus, upon proper analysis, the "silver platter" doctrine, approved in \textit{United States v. DeLeo}, should remain applicable to the facts of that case, involving a search by foreign police. However, in the law of evidence the Court of Military Appeals has sometimes been reluctant to draw fine distinctions, even when those distinctions were well-justified by previous precedent.

\textbf{VI. THE "POISONOUS TREE" DOCTRINE}

In a case concerning an illegal wire tap, the Supreme Court ruled that information obtained through wire tap leads was the "fruit of the poisonous tree" and so could not be used as evidence.\textsuperscript{201} Earlier the Court had held that knowledge obtained from an illegal search and seizure could not be made the basis for later efforts to seek evidence through court process.\textsuperscript{202} In this context the Manual for Courts-Martial has adopted the "fruit of

\begin{itemize}
  \item \textsuperscript{197} Elkis v. United States, 354 U.S. 206 (1960); Rios v. United States, 364 U.S. 253 (1960).
  \item \textsuperscript{198} United States v. Volante, 4 USCMA 689, 16 CMR 263 (1954).
  \item \textsuperscript{199} Elkis v. United States, supra note 197.
  \item \textsuperscript{200} Everett, \textit{Military Jurisdiction Over Civilians}, 1960 Duke L. J. 366–415.
  \item \textsuperscript{201} Nardone v. United States, 308 U.S. 338, 341 (1939).
  \item \textsuperscript{202} Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). See also Counselman v. Hitchcock, 142 U.S. 547 (1892).
\end{itemize}
the poisonous tree” doctrine by specifying that all evidence obtained through information supplied by wire tapping or illegal searches and seizures is inadmissible.203

Judge Latimer early espoused the view that an accused's confession, offered by the Government in evidence, could be deemed the “fruit of the poisonous tree” if it grew out of information obtained by illegal search or wire tap, information with which the accused had been confronted.204 Apparently a majority of the Court has been willing to apply this doctrine to confessions under some circumstances.205 But, in some instances the Court seemed somewhat reluctant in using the “poisonous tree” doctrine.206

The Manual for Courts-Martial provides that, “Although a confession or admission may be inadmissible because it was not voluntarily made, nevertheless the circumstance that it furnished information which led to the discovery of pertinent facts will not be a reason for excluding evidence of such pertinent facts.”207 In an early case the Court of Military Appeals, in an opinion by Chief Judge Quinl, appeared to accept this provision of the Manual.208 However, several years ago the author suggested that this rule might not withstand application of the “poisonous tree” doctrine,209 and later events soon verified this doubt.

In United States v. Haynes210 it appeared that the accused had made certain statements by reason of a promise of confidentiality and that this statement had led, in turn, to other evidence, which was offered at accused’s trial. Judge Ferguson, writing the opinion of the Court, applied the “poisonous tree” doctrine and held this other evidence to be inadmissible.211 Chief Judge Quinl concurred only in the result, and without opinion; therefore, it is not certain

203 Par. 158, MCM, 1951. For a general discussion of this doctrine, see Everett, Military Justice in the Armed Forces of the United States 112–14 (1956).
205 Ibid.
206 See, e.g., United States v. Dandaneau, supra note 204; United States v. Monge, 1 USCMA 95, 2 CMR 1 (1952).
207 Par. 140a, MCM, 1951, at p. 251.
208 United States v. Fair, 2 USCMA 521, 529, 10 CMR 19, 27 (1953).
209 Everett, Military Justice in the Armed Forces of the United States 113 (1956).
210 9 USCMA 792, 27 CMR 60 (1958).
211 Judge Ferguson characterized the approval in United States v. Fair, supra note 208, of the Manual provision that evidence learned of through an inadmissible confession is itself nonetheless admissible as dictum.
LAW OF MILITARY EVIDENCE

whether he would apply the Manual rule. Ironically, Judge Lati-
mer, who initially had been the Court's most vigorous proponent
of the "poison tree" doctrine, wrote a vigorous dissent, rejecting
the application of that doctrine to information obtained by means
of an inadmissible confession.

It would seem that, the Manual to the contrary notwithstanding,
the "poisonous tree" doctrine should sometimes be applied
to evidence obtained by means of inadmissible confessions. Ex-
clusion of wire tap evidence rests only on the Federal Communi-
cations Act.\textsuperscript{212} Exclusion of evidence resulting from an illegal
search and seizure is not required as an element of "due pro-
cess."\textsuperscript{213} Yet for the "fruit" garnered by these illegal investiga-
tive tactics, the law decrees inadmissibility. The use in evidence of
a coerced confession is clearly a violation of "due process." But
the transgression of a more fundamental norm than that is in-
volved in wire tapping or illegal search.\textsuperscript{214} The exclusion from
evidence of any "fruit" of such a confession would seem demanded
as an \textit{a fortiori} case, and the contrary provision of the Manual
would seem invalid, as the Court of Military Appeals apparently
held in \textit{Haynes}\textsuperscript{215} Perhaps one of the chief difficulties in
accepting the result there is the expectation that, taken together
with the Court's very broad interpretation of Article 31, applica-
tion of the "poisonous tree" doctrine to information obtained from
an inadmissible statement by the accused would grant a criminal
an unwarranted windfall of immunity and would involve exten-
sive, time-consuming inquiries about the paths by which the Gov-
ernment found its evidence.

VII. CONCLUSION

During the past decade the Court of Military Appeals has made

\textsuperscript{212} \textit{Compare} Olmstead \textit{v. United States}, 277 U.S. 438 (1928), \textit{with} Nardone


401 (1945); \textit{Lisenba v. California}, 314 U.S. 219 (1941); \textit{Brown v. Mississippi},
297 U.S. 278 (1936).

\textsuperscript{215} Of course, in that case the incriminatory statements made by the accused
had not been coerced, but instead were allegedly the products of promises to
the accused that his statements would be kept in confidence. Thus, the abuse
at which the Court was striking in this particular instance would seem of a
lesser magnitude than that presented by use of the "third degree" to obtain
a confession. However, the Manual for Courts-Martial provision, which the
Court invalidated, would apparently authorize admission of evidence to which
an accused's confession furnished the "lead," irrespective of the tactics by
which the confession was secured. For an instance in which the privilege
against self-incrimination was deemed by the Supreme Court to apply not
only to one's statements but also to the "fruit" of such statements, see Counsel-
MILITARY LAW REVIEW

numerous changes in the rules of military evidence to be applied in courts-martial. Some of these changes were influenced by a desire to accord to the serviceman the same rights enjoyed by his civilian counterpart. With this objective in mind, the Court gave close attention to the rules of evidence applied in federal courts. The scope of this attention was always being enlarged by an ever-increasing willingness, in a reaction against command control, to disregard the provisions of the Manual for Courts-Martial, which at the beginning of the decade was almost the "Bible" of the military lawyer.

Unfortunately not every change has been for the better. And perhaps the deference paid to the federal rules of evidence has sometimes caused the Court to pass up opportunities to pioneer. Moreover, the failure to adhere to the doctrine of stare decisis has led to an undue number of reversed convictions and to an ensuing disappointment on the part of many military lawyers. This disappointment has been heightened by the belief that in several instances the changes accomplished by the Court have placed an undue burden on the Government and given an unexpected windfall to the guilty.