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Rights Warnings in the Armed Services

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I. INTRODUCTION

The right against self-incrimination has been considered a fundamental principle of American law since at least the ratification of the fifth amendment to the Constitution in 1791. Despite this, it took some 175 years before this right was meaningfully implemented by requiring that persons suspected of crime be warned of their right to remain silent before a custodial police interrogation could take place. While the warning requirement burst upon the civilian population in 1966 with the Supreme Court's decision in the case of *Miranda v. Arizona*, a similar and in one sense broader warning requirement had been in effect in the Army since 1948 and in the armed services generally since 1951. Indeed, the military requirement was noted with approval in the Supreme Court's opinion in *Miranda*. As we near the 10th anniversary of

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*Miranda v. Arizona, 384 U.S. 436 (1966). Miranda also required that an individual in custody be told that he is entitled to the presence of an attorney, and that an attorney will be appointed if he cannot afford one; and that any statement he makes may be used against him in a court of law.

†Id.

‡ Act of June 24, 1948, ch. 625, § 214, 41 Stat. 792.


* 384 U.S. at 489.
Miranda and perhaps its impending destruction by the Supreme Court, it seems particularly appropriate to review the nature of the statutorily based warning requirements now in use in the military.

Properly used, the term "right against self-incrimination," refers specifically to the right of an individual to refuse to make an incriminating statement. Strictly speaking, the right does not involve the voluntariness of a statement made when the right is not invoked—an issue that is determined by the law of confessions. Despite this differentiation, the two distinct legal doctrines have tended to merge in the United States if only because the Miranda warning requirement both implements the basic right by informing a suspect of its existence and at least in theory tends to make a statement voluntary by interrupting the possibly coercive nature of a custodial interrogation. Accordingly, a proper understanding of the warning requirements in the military requires a brief historical review of both the right against self-incrimination and the voluntariness doctrine in the armed services.

II. HISTORY OF THE MILITARY RIGHT AGAINST SELF-INCRIMINATION

Although it is difficult to find the specific origins of the military right against self-incrimination in the United States, it is clear that aspects of the right existed by 1862 at the latest. Until 1878 the military accused was considered an incompetent witness and unfit to take the witness stand in his own behalf thus rendering the issue academic insofar as formal judicial interrogation of the accused was concerned. When Congress removed the disability by statute, however, it took care to make it clear that the accused did not have to take the stand and that comment as to his failure to do so

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2 The right against self-incrimination was adopted by the British Army prior to 1806. A. TYTLER, AN ESSAY ON MILITARY LAW AND THE PRACTICE OF COURTS MARTIAL 283 (2d ed. 1806). For the American practice, see Wiener, COURTS-MARTIAL AND THE BILL OF RIGHTS: THE ORIGINAL PRACTICE II, 72 HARV. L. REV. 266, 277-78, nn.392-396 (1958) [hereinafter cited as Wiener].

3 For an exposition of this right see S. BENET, A TREATISE ON MILITARY LAW AND THE PRACTICE OF COURTS-MARTIAL 310-13 (4th ed. 1864). The voluntariness doctrine, the heart of the law of confessions, was evidently accepted by at least some American military units near the turn of the nineteenth century. See MALTBY, A TREATISE ON COURTS MARTIAL AND MILITARY LAW 43 (1813). This should not be surprising in view of the general dependence of American military law on British practice. Wiener states that the right against self-incrimination was recognized in at least one case in 1795, as well as in Article 6 of the 1786 Articles of War. Wiener, supra note 8, at 277.

4 This rule was changed by statute. Act of March 16, 1875, ch. 37, 20 Stat. 30. See generally W. WINTHROP, MILITARY LAW AND PRECEDENTS 335-36 (2d ed. 1920 reprint) [hereinafter cited as WINTHROP].
so could not be made. The application of the right to witnesses at courts-martial remains unclear until 1916 although there is reason to believe that the fifth amendment right was considered binding. Statutory enactment of the right against self-incrimination appears to stem directly from the Army's attempt to enforce its right to compel attendance of civilian witnesses at trials by court-martial by certifying the witness' refusal to appear or testify to a federal district court for trial of the issue. When Congress enacted the certification provision in 1901, it included the proviso "that no witness shall be compelled to incriminate himself or to answer any question which may tend to incriminate or degrade him." When in 1912 Major General Enoch Crowder, then Judge Advocate General of the Army, presented the first major revision in the Articles of War in over one hundred years, his code lacked any reference to a general right against self-incrimination. However, by 1914 the congressional hearings on the proposed revision contained a new proposed Article of War 25 which declared:

No witness before a military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, shall be compelled to incriminate himself or to answer any questions which my tend to incriminate or degrade him.

In his testimony before the Senate Committee on Military Affairs, General Crowder explained that because the self-incrimination exemption had originally been attached to the certification act,

... the construction was advanced that this language would not apply to any other witnesses than those named in the act itself. It thus did not protect any and all witness [sic] against self-incrimination but only those described in the act in which the proviso appears. So I struck out that proviso and have put it in the next article, where it will be of general application. Congress accepted General Crowder's self-incrimination provision

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11 According to the statute, the accused "shall, at his own request, but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him." Act of March 16, 1878, ch. 37, 20 Stat. 30.
12 Winthrop apparently felt that the Supreme Court's fifth amendment decisions were binding on courts-martial after the statute was adopted. WINTHROP, supra note 10, at 336 n.58. See also Wiener, supra note 8, at 277-78 nn.395, 396 which indicate that warnings were given in an 1808 trial and recognized in part by 1795.
13 Act of March 2, 1901, ch. 809, § 1, 31 Stat. 951. See also Hearings on S. 3191 Before the Subcomm. on Military Affairs of the Senate Comm. on Military Affairs, 64th Cong., 1st Sess. (1916) as printed in S. REP. No. 130, 64th Cong., 1st Sess. 53 (1916) [hereinafter cited as S. REP. No. 130].
14 See generally Hearings on H.R. 23628 Before the House Comm. on Military Affairs, 62d Cong., 2d Sess. 35 (1912).
15 S. REP. No. 229, 63d Cong., 2d Sess. 4, at art. 25 (1914).
16 S. REP. No. 130, supra note 13, at 53.
and, renumbered, it became Article of War 24 when the revised Articles of War were enacted in 1916. A minor revision was made in 1920 when the right against self-incrimination was expanded to include witnesses before officers conducting investigations. No other statutory change took place, however, until the Elston Act of 1948. It should be noted that before the Elston Act revision, Article of War 24 dealt only with judicial or quasi-judicial interrogations. The statute was silent as to pretrial police interrogations or their equivalent. The accused seems to have had the right to remain silent and to refuse to cooperate in such an investigation. However, no formal warning of that fact was apparently required although evidence exists that some form of warning was occasionally given by military investigators. The primary check on pretrial interrogation was inserted into the statute only in 1948; until then military due process and the common law requirement that confessions be voluntary and not the product of improper coercion or inducement was the suspect's only protection against abusive questioning.

World War II was fought under the Articles of War of 1916 as revised in 1920. Soon after the close of the war it became evident that substantial dissatisfaction existed with the Articles of War and indeed with military justice in general. Complaints of drumhead justice were frequent and a number of congressional committees as well as the American Bar Association and other legal groups began investigations of military justice during the war.

As a consequence of this dissatisfaction Congress enacted a number of significant changes to the Articles of War, one of which involved the right against self-incrimination. The various investigations into military justice during the Second World War had emphasized displeasure with results caused by differentials in rank. Particularly important in some cases was the potential for commissioned or noncommissioned officers to compel subordinates to incriminate themselves. In an effort to provide more

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19 Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services, 81st Cong., 1st Sess. 990-91 (1949) [hereinafter cited as 1949 Hearings]. Mr. Smart, a House Armed Services Committee Staff member, related his experience of being warned of his rights under Article of War 24. It is unclear whether this warning occurred before the Elston Act; however, it seems most likely that it took place during the Second World War.
20 See T. GENEROUS, SWORDS AND SCALES 14-24 (1973) [hereinafter cited as GENEROUS].
22 See generally REPORT OF THE WAR DEPARTMENT ADVISORY COMMITTEE ON MILITARY JUSTICE (1946) [hereinafter cited as VANDERBILT REPORT]. It is interesting to note
fairness in interrogations, Congress amended Article of War 24 by adding an entirely new second paragraph. In many respects the amendment was unique in American law. It indicated:

The use of coercion or unlawful influence in any manner whatsoever by any person to obtain any statement, admission or confession from any accused person or witness, shall be deemed to be conduct to the prejudice of good order and military discipline, and no such statement, admission or confession shall be received in evidence by any court-martial. It shall be the duty of any person in obtaining any statement from an accused to advise him that he does not have to make any statement at all regarding the offense of which he is accused or being investigated, that any statement by the accused may be used as evidence against him in a trial by court-martial.

It is difficult to overestimate the significance of this amendment. It departed from previous law in three significant ways. First, it adopted by statute the common law exclusionary rule already found in the law of confessions. Second, it adopted a warning requirement for the first time in federal statute, and third, it made the use of coercion or unlawful influence to obtain a statement, admission or confession a criminal offense punishable by court-martial. The expansion of Article of War 24 also made that Article explicitly applicable for the first time to an accused person as well as a witness. Congress did not, however, clearly indicate whether the failure to warn an accused or witness of his rights pursuant to Arti-

that attached to the Vanderbilt Report in the papers of Professor Edmund Morgan, the chairman of the UCMJ Committee which proposed the new Uniform Code of Military Justice, is a press release which stated: “Amendment of the Articles of War will be proposed expressly to forbid coercion in any form in the procurement of admissions and confessions of accused persons and to provide punishments for such coercion or attempts at coercion.” War Department Public Relations Division, Press Section at 6, Feb. 20, 1947, on file with the Edmund Morris Morgan Papers, Manuscript Division, Harvard Law School Library [hereinafter cited as Morgan Papers].

The punitive portions of the Elston Act’s revision of Article of War 24 were intended to prevent, at the very least, outright physical coercion of confessions. The “third degree” was considered a problem. See Hearings on H.R. 2575 Before a Subcomm. of the House Comm. on Armed Services, 80th Cong., 1st Sess. 2043 (1947). In United States v. Gibson, 3 U.S.C.M.A. 746, 14 C.M.R. 164, 170 (1954) the Court of Military Appeals recognized that the effect of superior rank or official position could make the mere asking of a question the equivalent of a command which might be regarded as depriving an individual of his freedom to remain silent.

Act of June 24, 1948, ch. 625, § 214, art. 24, 41 Stat. 792. The warning requirement was added by amendment. Representative Burleson stated:

... I feel that when anyone authorized to take statements from an accused interrogates him for that purpose that he should tell the accused that any statement he makes may be used against him on the trial of the offense with which he is charged.

94 CONG. REC. 184 (1948). Mr. Burleson was apparently motivated, at least in part, by the mistaken belief that warnings were required in “most State jurisdictions.” Id. However, there is no doubt that he was attempting to achieve greater fairness in interrogations. From the text of his remarks in the Congressional Record, one can fairly presume that he was concerned with the problems peculiar to military rank.

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cle of War 24 would be punishable by court-martial in the same fashion that coercion or unlawful influence would be. Whether or not failure to warn constituted coercion or unlawful influence was also left open by the statute.

The Elston Act was the immediate result of the post-war attempt to reform Army justice. Its existence, as such, was shortlived, because the decision to unify the services under the Department of Defense carried with it the task of preparing a uniform code of military law. At the time that Professor Morgan of Harvard was appointed to devise such a code for the armed services, defendants and witnesses in Army courts-martial could invoke the statutory right against self-incrimination which had been enacted into law by the Elston Committee's efforts. The Articles for the Government of the United States Navy, however, had no provision equivalent to Article of War 24. According to the Comparative Studies Notebook, a document prepared to aid the codification effort, the only Naval provision dealing with the right against self-incrimination was found not in statute but rather in the Naval Courts and Boards of 1937, the equivalent of the Army's Manual for Courts-Martial. Section 235 of the 1937 Naval Courts and Boards contained the following provision:

The Constitution provides that no person shall be compelled to give any evidence against himself. The prohibition of the fifth amendment against compelling a man to give evidence against himself is a prohibition of the use of physical or moral compulsion to extort communications from him and not an exclusion of his body as evidence when it is material.

The committee which prepared the Comparative Studies Notebook rejected the proposed Navy bill that failed to refer specifically to a right against self-incrimination, preferring to adopt the Army rule that preserved the right against self-incrimination in statutory form. Significantly, the committee stated:

The practice of including in state codes relevant Constitutional provisions in the form of statutes might well be followed in a code for the Government of the Armed Forces. In operations overseas, in time of war, paucity of reference material on courts-martial usually prevails. The code should speak out clearly in every respect, including within its provisions basic constitutional guarantees and limitations. Many who are called up to administer such law are unlearned in the law. Unless constitutional provisions are reflected within the code the natural tendency is not to venture beyond the exact language of the code. Reversals by courts and criticisms from the war may be avoided by resort to such a device.

21 See generally GENEROUS, supra note 20, at 34-53.
22 Id. at 37-38.
23 Id.
25 Id.
26 Id.
Ultimately both the Code Committee and the Congress accepted the recommendations of the Comparative Studies Committee. The final result was Article 31 of the Uniform Code of Military Justice, which has remained unaltered from its enactment to date.

Although Professor Morgan's notes at Harvard Law School indicate that the actual language of Article 31 was scrutinized rather closely, there is little evidence that all of the language of Article 31(a) and 31(b) was picked with specific ends in mind. Thus, although the Court of Military Appeals has decided that the coverage of the military right against self-incrimination is a good deal broader than that of the fifth amendment right, relying in part on the differences in language between the two phrasings, there is little indication that Article 31 was intended to differ in its

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29 See note 5 supra.
30 Article 31 reads:

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

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

(c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this Article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

31 The kind assistance of Mrs. Chadbourne of the Harvard Law School Library during my examination of Professor Morgan's papers is gratefully acknowledged.
32 Professor Morgan's papers indicate a number of handwritten changes in a text of what ultimately became Article 31. As typed, with the handwritten changes shown in brackets, the text reads (deletions are underlined):

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

A subparagraph (e) was written in under the text as follows: "I would require defense counsel to inform accused of this privilege." The text shown above was designated Proposed Article 43, revised draft, December 6, 1948, on file in Volume II of the Morgan Papers, supra note 22. Of the three changes shown above, only one appears truly critical—the addition of suspects to those entitled to rights warnings.
33 See, e.g., United States v. Musguire, 9 U.S.C.M.A. 67, 25 C.M.R. 329 (1958) in which then Chief Judge Quinn stated:
coverage from the fifth amendment. Indeed with the exception of the Article 31(b) warning requirement, such evidence as may exist seems to suggest the opposite conclusion. It is an interesting fact that in the approximately ten pages of legislative hearings devoted to consideration of Article 31,\textsuperscript{34} six pages discuss Article 31(c)\textsuperscript{35}—an aspect of the Code presently a dead letter.\textsuperscript{36} Virtually no discussion was devoted to the substantive coverage of the basic right of self-incrimination found in Article 31(a) and only a few paragraphs on the scope of the rights warning requirements found in Article 31(b).\textsuperscript{37} Article 31, as ultimately enacted by Congress did not include language equivalent to that found in the Elston Act’s revision of Article of War 24 making the coercion of a confession a crime under the Code. Both Professor Morgan’s materials and the congressional hearings make it abundantly clear that this language was eliminated from Article 31 on the grounds that it was unnecessary and superfluous in view of the creation of a new article of the Uniform Code of Military Justice, Article 98.\textsuperscript{38} Indeed on March}

\textsuperscript{14} See 1949 Hearings, supra note 19, at 983-93. These hearings took place in March 1949.

\textsuperscript{15} See note 30 supra.

\textsuperscript{16} Article 31(c) appears useless, for if a matter is not material it is irrelevant and inadmissible. It may be that the increased legalization of military justice has mooted this issue. See, e.g., 1949 Hearings, supra note 19, at 985.

\textsuperscript{17} See id. at 990-92.

\textsuperscript{18} On March 24, 1949, Mr. Felix Larkin, Assistant General Counsel of the Office of the Secretary of Defense, testified:

\textsuperscript{1949 Hearings, supra note 19, at 988.}

The revised draft of then proposed Article 43 in Professor Morgan’s notes contains a typewritten passage:

\textsuperscript{It is felt that [Article 31] makes it even clearer that any person who compels self-incrimination will be subject to punishment under the proposed punitive article [now Article 98] which makes violation of procedural articles an offense under the code.}

Morgan Papers, supra note 22, notes for Dec. 6, 1948, at 8.

The final Article 31 Commentary indicated that Article 31(b) broadened Article of War 24 to those who were suspected as well as accused and that intentional violation of any of provision Article 31 constituted an offense under Article 98. Morgan Papers, supra note 22, Volume II, UCMJ, Text, References and Commentary Based
23, 1949 during the hearings on the Uniform Code of Military Justice before the House Subcommittee considering Article 31, Mr. Robert W. Smart, a staff member, testified that "the international [sic] violation of any of the provisons of this article constitutes an offense punishable under Article 98." This would appear to correct the vagueness left in Article of War 24 as to whether or not failure to give the warnings might in itself be a criminal offense. However, the failure to include within Article 31 express language making failure to comply with its provisions an offense must be presumed to be at least one of the explanations for the complete and utter failure of the Article 98 sanction. No recorded case exists in which a member of the military has been prosecuted under Article 98 or any other article for coercion of a confession, let alone failure to give the rights warnings.

III. ARTICLE 31

A. A BRIEF OVERVIEW OF ARTICLE 31 AND MIRANDA v. ARIZONA

Before proceeding to further analysis of the law relating to rights warnings in the military, it is important to recognize the interaction between Articles 31(a), 31(b) and the rights accorded by Miranda v. Arizona. Although the statutory military right against self-incrimination is found in Article 31(a), which speaks in terms of incrimination, Article 31(b) appears to have a much broader coverage. Whereas the question in 31(a) is the meaning of "incrimination," the question in 31(b) appears to be the definition of the word "statement," for under Article 31(b), warnings, including the right to remain silent, must be given before a "statement" may be requested of a suspect. Indeed, the Court of Military Appeals has indicated that the Article 31(b) language goes so far as to outlaw a request without warnings for bodily fluid samples or voice or

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on the Report of the Committee on a Uniform Code of Military Justice to the Secretary of Defense, at 47.

1949 Hearings, supra note 19, at ms.

Legend has it that a lieutenant colonel was once convicted of violating Article 98 for having negligently or intentionally thrown away some case files. If true, the case is unreported, presumably because the punishment was not sufficiently severe to result in appellate judicial review. Commanders have preferred administrative measures rather than criminal prosecutions to deal with the derelictions that Article 98 was intended to cover. Article 98 remains, however, a theoretically potent weapon to control violations of constitutional rights.


handwriting\textsuperscript{43} exemplars. Thus, Article 31(b) is in fact a substantive right against self-incrimination in and of itself because it has been interpreted to apply to nonverbal acts.

Even the most cursory view of Article 31 will immediately reveal the lack of any right to counsel.\textsuperscript{43a} The legislative history reveals no reference whatsoever to a right to counsel within the military right against self-incrimination. The right to counsel does, however, apply to military members just as it does to civilians. Subsequent to \textit{Miranda}, the Court of Military Appeals held in the case of \textit{United States v. Tempia}\textsuperscript{44} that \textit{Miranda} applied to all custodial interrogations within the military. Accordingly, while Article 31(b) warnings must be given to any person who is a suspect or an accused, \textit{Miranda} rights to counsel, as set forth in paragraph 140a(2) of the Manual for Courts-Martial, must be complied with only if the military member is the subject of a custodial interrogation. In military practice then, one must first determine whether or not an individual questioned was a suspect or an accused and if so must then determine whether or not the individual was in custody. With these considerations in mind it is now possible to turn to an analysis of rights warnings in the military.

The very nature of the phrasing of Article 31(b) supplies a framework for analysis. As suggested by Professor Maguire,\textsuperscript{45} Article 31(b)'s language can easily be placed against the questions it poses:

\begin{itemize}
  \item Who must warn? No person subject to this [code] may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is
  \item When is warning required? [code]
  \item Who must be warned? [code]
  \item What warning is required? [code]
\end{itemize}


\textsuperscript{43a} Despite this, the Court of Military Appeals has recently found that either Article 27 or Article 31 of the Uniform Code of Military Justice requires that military police notify an accused's defense counsel prior to interrogation. \textit{United States v. McOmber}, 24 U.S.C.M.A. 207, 51 C.M.R. 452 (1976). This highly confusing opinion creates the possibility that the Court may have found a right to counsel in Article 31.

\textsuperscript{44} 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

\textsuperscript{45} Maguire, \textit{The Warning Requirement of Article 31(b): Who Must Do What To Whom and When?}, 2 Mitt. L. Rev. 1 (1958) [hereinafter cited as Maguire].
accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial. 46

While the plain meaning of the statute would appear to answer these questions, 25 years of litigation and judicial interpretation have made it clear that virtually nothing involving Article 31 has a "plain meaning." For ease of analysis the major questions are best considered in the following sequence: what warnings are required; who must give warnings; who must be warned; and when must warnings be given.

B. THE CONTENT OF THE WARNINGS

As indicated above, the specific content of the Article 31(b) warning is comparatively simple. However, judicial decisions have refined the meaning of the terms used in the clause. While the Code requires that the individual be informed of the nature of the accusation against him, a requirement not found in Miranda, the Code does not indicate the degree of specificity required to satisfy this provision. It now appears settled that as long as the individual being questioned is informed of the general nature of the offense, rather than the specific article of the Code violated or the specific degree of the offense, the interrogator has complied with the 31(b) requirement. 47 Unlike other aspects of Article 31(b), the Court of Military Appeals has held that it may be unnecessary for military police or other persons in authority to inform an accused of the nature of the offense when evidence exists that he is fully aware of the offense and where other important considerations justify the police failure to advise the accused of the specific offense. Thus in United States v. Nitschke 48 the accused was involved in an automobile accident in Germany that killed a pedestrian. The accused had been drinking and was asked by criminal investigators to give a blood sample. The CID agent involved did not notify the accused that he was suspected of a homicide because a local doctor had advised against it in light of the accused's mental state after the accident. Throughout the interview, the accused kept repeating, however, that he must have killed someone. On appeal, the Court of Military Appeals found that the agent had simply omitted confirming the fatality and that in view of all the circumstances the ac-

46 Id. at 4.
47 See, e.g., Maguire, supra note 45, at 28-30.
cused knew of the nature of the offense. While this case should not be interpreted liberally, it appears to remain good authority.

Where an accused is suspected of more than one offense, military police must warn of all offenses or risk total suppression of any statement that the accused may make. When knowledge of a specific offense exists, it is insufficient for the Government to inform a suspect that the agents involved are interested in the activities of the accused over a general period of time. For example, in United States v. Reynolds the Court of Military Appeals held that where agents of the Air Force's Office of Special Investigations (OSI) informed the accused that they were interested in his activities over a given period of time when he was in fact suspected of both absence without leave and larceny of an officer's vehicle, the Government was held not to have complied with the requirements of Article 31(b) and the suspect's statement was held inadmissible.

While it would appear reasonably simple to adhere to the requirement of Article 31(b) and inform a suspect of his right to remain silent, the case law reflects numerous attempts by military police to avoid complete compliance. Two 1953 cases reversed convictions in which military police had informed the accused that while Article 31 meant that they did not have to incriminate themselves it did not mean that they had a right to remain silent. Perhaps these cases can be explained simply by pointing to their date and the unfamiliarity with the new Article 31, but it is unfortunately true that similar cases have appeared in more recent years. In 1972 for instance, investigators told an accused who was suspected of larceny and murder that if he was not involved and withheld knowledge of the offense, he would be an accessory after the fact and could receive 300 years in jail. The Court of Military Appeals reversed the conviction for failure to comply with Article 31(b). All in all, however, this portion of the Article 31(b) warnings appears to be subject to general compliance by military interrogators.

Relatively few cases involve the third portion of Article 31(b)—that portion which advises the accused or suspect of the fact that anything he says may be used against him in a trial by court-martial. If the suspect being questioned is in custody he must be

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warned not only of his Article 31(b) rights but also of those rights conferred by *Miranda*.\(^{55}\) These rights include the right to remain silent, a warning that anything said may be used against the accused at trial, and the right to have an attorney present at the interrogation with the additional right that if the individual cannot afford an attorney one will be appointed for him. The exact nature of the right to counsel in the military merits detailed discussion and will be so treated later in this article.

**C. WHO MUST WARN?**

Who must give Article 31(b) warnings is perhaps the single most complex question raised by Article 31. In civilian jurisdictions *Miranda* warnings must be given by persons with official status investigating possible criminal conduct. As a practical matter this generally means police officers. To further simplify the situation, *Miranda* warnings are required only during custodial interrogations. On the other hand, Article 31(b) read literally, requires warnings during *any* criminal interrogation of a suspect by a person subject to the Uniform Code of Military Justice. If Article 31(b) were to be interpreted literally, warnings would be required every time an accused or suspect is questioned. Although this possibility does not necessarily appear unreasonable, it raises a number of significant problems.

Many of these difficulties stem directly from the peculiar nature of the military itself. All military personnel have rank and status and virtually every military member is potentially senior to at least one other and thus holds actual or potential disciplinary authority. Even those individuals performing nonpolice duties frequently hold disciplinary or quasi-police powers. Thus an Army doctor who questions a patient may do so for medical purposes just as a civilian doctor might. However, unlike his civilian colleague, the Army doctor is a military officer with the same authority and powers that a military police officer holds.\(^{56}\) Must Article 31 warnings by given by a military doctor who in the course of performing a medical examination questions a patient known to be a criminal suspect? To date the courts have absolved the medical corps and others from such responsibilities as long as their questions are purely professional or "personal" in nature. This has been the result of


\(^{56}\) While members of the Medical Corps are restricted in their command authority and spared certain responsibilities because of the need for medical specialists, they retain the full powers to question and apprehend that any other officer may have.
what has been called the "official capacity test" applied by the Court of Military Appeals.\textsuperscript{57}

Under the test, the court has insisted that trial courts determine the role or status of an interrogator at the instant of interrogation. Thus who must give warnings frequently becomes a question of fact. Was the JAGC officer who questioned the suspect acting as an attorney or as an officer holding police powers? As can be imagined, the official capacity test has been extremely difficult to implement and has given rise to a great deal of appellate litigation.

The simplistic alternative to the official capacity test would be to hold that Article 31(b)'s literal interpretation is binding. This eminently workable solution has recently been proposed yet again by Senior Judge Ferguson of the Court of Military Appeals in the case of \textit{United States v. Seay},\textsuperscript{58} decided on November 7, 1975. Concurring in the result, Judge Ferguson stated:

\begin{quote}
I would apply the literal language of Article 31. No plainer nor clearer language may be imagined than "[n]o person subject this chapter...". . . .

This Court’s mandate is to apply and, when necessary, to interpret the law, not to ignore statutory language which lends itself to but one meaning. Furthermore, the reason for this broad literal proscription imposed by Congress is illustrated by the case at bar. In the military, unlike civilian society, the exact relationship at any given moment between the ordinary soldier and other service personnel in authority (i.e., commissioned and noncommissioned officers) often is unclear. In the civilian experience, it is unlikely that anyone to whom \textit{Miranda} might apply would question someone else other than in the former’s official capacity—that is, as a law enforcement officer. . . . Thus, to simplify matters, and in recognition of the superior/subordinate atmosphere inherent in the military not present in the civilian structure, the [Article 31] requirement is broader [than \textit{Miranda}'s].

. . . [W]e have seen in repeated instances the difficulty the military seems to have in applying a more narrow proscription such as the "official capacity" standard. . . . [T]his case has served to illustrate the wisdom of the Congress in removing from consideration such irrelevant factors as whether the questioner did or did not ask questions in an official capacity. Thus when any person subject to the Uniform Code of Military Justice questions a person suspected or accused of a violation of the Code without first advising him of his pertinent rights, he has thereby violated Article 31 and any further inquiry is immaterial to the legal conclusion of inadmissibility of the result of such interrogation.\textsuperscript{59}

While a fuller understanding of Judge Ferguson’s position and its consequences must await an exposition of the numerous cases within this area, adoption of the Judge’s position would bar the use

\begin{footnotes}
59 Id. at 12-13, 51 C.M.R. at 62-63 (citations omitted).
\end{footnotes}
of any unwarned statements taken from a suspect or accused in a criminal prosecution. The difficulties inherent in this proposition may not be readily recognized. On one hand, such a rule would further complicate the already difficult problem of psychiatric evaluations of accused persons and raise new questions about the use of undercover agents; and on the other hand, because of the exclusionary rule and a recent decision of the Court of Military Appeals in the immunity area, it would likely compel the prosecution to prove that unwarned statements were not used in any fashion in preparation for the ultimate prosecution in substantially more cases than at present. The practical burden that this development might place on the prosecution might well be insurmountable depending upon the number of unwarned statements that actually occur. Since there are only a limited number of areas in which the courts have applied the official capacity test, this concern may well be a needless one, however.

1. "Private Citizens"

A question of theoretical importance that has rarely arisen in actual practice is the responsibility of an individual to give rights warnings when he does not in fact hold any form of disciplinary authority. In the usual case, one private informally questions another suspected of barracks theft. In the civilian world a private citizen certainly has no responsibility to give warnings to another citizen. What, however, of Article 31(b)'s intonation that "no person" may interrogate another without giving warnings? In the only two cases on point, the military courts have applied the official capacity test: where a military member is acting in a purely personal capacity and lacks disciplinary authority, warnings are not required. Thus in United States v. Bartee, two Marines returned

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60 See Section III.C.3. infra.
61 There is a serious academic argument about whether Article 31(b) requires even undercover operatives to give warnings while in their undercover roles. See text accompanying notes 106-126 infra.
63 The court's holding in Rivera is certainly noncontroversial. It requires the prosecution to prove, rather than just represent, that no use has been made of immunized testimony when prosecuting an accused who testified at a prior trial pursuant to a grant of use or testimonial immunity. However, the opinion contains dicta to the effect that such prosecutions of immunized individuals are to be extremely discouraged. Id. at 433, 50 C.M.R. at 392. Rivera would suggest that the existence of an unwarned statement might be taken by the Court of Military Appeals to have unlawfully narrowed the case or supplied a witness or other evidence. This use of the exclusionary rule is somewhat extreme compared to the general civilian rule.
to their squad bay to discover that a tape player and five tapes were missing. The next morning one of the Marines heard one of the stolen tapes being played elsewhere in the squad bay. The Marine called a corporal, walked over to the locker the sound was coming from and told the corporal that his tape was playing within the wall locker. The accused was standing by the locker at the time and the victim informed him that he had his tape in the locker. The accused replied by taking the tape player and tapes from the wall locker and throwing them on a bed. The Navy Court of Military Review, quoting the earlier case of United States v. Woods\textsuperscript{65} for the principle that where failure to warn is at issue "the ultimate inquiry is whether the individual, in line of duty, is acting on behalf of the service or is motivated solely by personal considerations when he seeks to question one whom he suspects of an offense,"\textsuperscript{66} found that the Marine victim's initial statement to Bartee was motivated solely by personal considerations and would not have required Article 31(b) warnings. However, the court accepted as binding the testimony of the corporal who added to the victim's statement by saying that he had asked Bartee where the rest of the tapes were and that it was his question that led to Bartee's surrender of the tapes. The court found that the corporal's official position required him to give Article 31 warnings prior to his remark to Bartee and thus reversed Bartee's conviction of that particular specification as having resulted from a violation of Article 31.

In the unique\textsuperscript{67} case of United States v. Trojanowski,\textsuperscript{68} the accused admitted a barracks theft after having been beaten by the victim. On appeal, the Court of Military Appeals held that although the beating of the accused had violated Article 31(a), the theft victim had been acting in a personal capacity and had not been required to give rights warnings prior to questioning the accused.\textsuperscript{69}

There appears to be one major caveat to the official-personal capacity test. In 1959 the Court of Military Appeals indicated in

\textsuperscript{67} Believed to be the only case to include a violation of both Article 31(a) and Article 31(b) in the personal questioning area.
\textsuperscript{69} Surprisingly, the court affirmed Trojanowski's conviction, reasoning that his admissions had been nonprejudicial. Inasmuch as the usual rule is the "automatic reversal" rule which refuses to test erroneous admission of confession evidence for prejudice, see, e.g., United States v. Wagner, 18 U.S.C.M.A. 216, 39 C.M.R. 216 (1969), this aspect of the case must be considered an aberration based perhaps on the court's conclusion that a defendant who is so clearly guilty should not go free, traditionally known as the "bad man" rule.
United States v. Souder\textsuperscript{70} that despite an interrogator's lack of official capacity, warnings would be required if the questioner's intention was to perfect a case against the accused. This case was thought to have potentially awesome consequences,\textsuperscript{71} but the Souder dictum has apparently died stillborn.\textsuperscript{72}

2. The Interrogating Guard

The official capacity test was applied consistently by the Court of Military Appeals until November of 1975.\textsuperscript{73} While the test was easy to apply in theory, it was particularly difficult to apply in practice calling as it did for a factual determination of an interrogator's intent.\textsuperscript{74} Indeed, the application of the test has proved particularly difficult in at least one important area—that of the interrogating guard. When military police themselves become criminal suspects and are placed in confinement, they are usually guarded by members of the military police who are former associates and often friends. A number of cases in the Court-Martial Reports deal with admissions made by such an individual to his guard.\textsuperscript{75} In such cases the military appellate courts have applied the official capacity test by determining the motivation of the guard at the time that he questioned the suspect. The trial court would thus be forced to determine whether the guard was acting as a personal friend and expressing merely a polite personal interest or was, on the other hand, acting as a policeman interrogating a suspect. As can be anticipated, this determination has been exceedingly difficult for the trial courts. Considering the appellate results, one might also observe that the test has worked almost entirely to the benefit of the Government.\textsuperscript{76} It was this peculiar result of admitting into

\textsuperscript{72}Souder does not appear to have been cited as binding precedent in any case.
\textsuperscript{74}See, e.g., United States v. Dandaneau, 5 U.S.C.M.A. 462, 18 C.M.R. 86 (1958) in which the court sustained the admissibility of incriminating admissions made by Sergeant Dandaneau to a captain who had engaged him in a casual "personal" conversation regarding his reasons for missing movement. The "personal" conversation was followed one hour later by an official inquiry by the captain prefaced by Article 31(b) warnings but consisting primarily of the same questions the accused had answered an hour before. The court's determination of the nature of the first conversation was, of course, a factual one. If correct when decided, Dandaneau is suspect today.
\textsuperscript{76}While the Court in the Beck case remanded to allow a possible rehearing as to the status of Beck's guard during the interrogation, 15 U.S.C.M.A. at 339, 35 C.M.R. at
evidence the results of such custodial questioning by individuals who by happenstance were personal acquaintances of the suspect that led to the case of United States v. Dohle.77

In Dohle, the accused was suspected of the theft of four M-16 rifles and 14 locks. Chief Judge Fletcher rejected the official capacity test, and, attempting to overrule prior decisions, announced a new test that might be called the position of authority test. He stated:

Where the questioner is in a position of authority, we do not believe that an inquiry into his motives ensures that the protections granted an accused or suspect by Article 31 are observed. While the phrase “interrogate, or request any statement from” in Article 31 may imply some degree of officiality in the questioning before Article 31 becomes operative, ... the phrase does not also imply that non-personal motives are necessary before the Article becomes applicable. Indeed, in the military setting in which we operate, which depends for its very existence upon superior-subordinate relationships, we must recognize that the position of the questioner, regardless of his motives, may be the moving factor in an accused's or suspect's decision to speak. It is the accused's or suspect's state of mind, then, not the questioner's, that is important.78

The effect of the Dohle case is unclear. While Judge Fletcher spoke in the plural and announced a new test on behalf of the court, it is clear that his new test was not joined in by his two judicial brethren. Judge Ferguson concurred on the basis that he believed, as in the Seay case, that Article 31 should be taken literally. Indeed, Judge Ferguson stated specifically in Dohle that he refused to join in the new test “the Chief Judge purports to enunciate in his opinion.”79 Judge Cook concurred in the result on the basis of a prior decision.80 Until Judge Ferguson’s second retirement from the bench81 the impact of the Dohle case was, as a pragmatic matter, easily ascertainable. A specific rule requiring anyone in a position of authority to preface his questions with Article 31(b) warnings had been announced and would certainly affect at least the guard cases.

311, Carlisle and other cases have simply found the guard to have been acting in a personal capacity despite what seems to have been official intent insofar as the reported facts are revealed by the appellate cases.

78 Id. at 36-37, 51 C.M.R. at 86-87.
79 Id. at 37, 51 C.M.R. at 87.
81 Judge Homer Ferguson became a Senior Judge on May 2, 1971. On February 17, 1974, at the request of then Chief Judge Duncan, Judge Ferguson returned to full active service presumably because of Judge Darden’s resignation on December 29, 1973. Judge Ferguson continued to sit as a result of Chief Judge Duncan’s resignation on July 11, 1974 and then Judge Quinn’s retirement on April 25, 1975. See 49 C.M.R. at vii. It has only been with the 1975 appointment of Judge Perry to the Court that Judge Ferguson has been able to retire from active status. As of January 1976, the Court’s members were: Chief Judge Fletcher (confirmed April 4, 1976); Judge
With Judge Ferguson's retirement, however, this aspect of *Dohle* is clearly in question and it is unclear whether *Dohle* possesses any precedential value beyond its peculiar facts. Judge Fletcher's language in the case does not appear to do away with the official capacity test. Rather it seems to add an additional level: if an interrogator is not in an active position of authority the court must then turn to the official capacity test. For example, prior to *Dohle*, the official capacity test was used to hold that individuals serving as Charge of Quarters and as Marine fire watches were required to give Article 31(b) warnings if they intended to question individual suspects about criminal wrongdoing. It seems unlikely that the position of authority test would in any way make a difference in these cases. Although a Charge of Quarters may indeed be said to have authority because he in one sense acts in the place of a company or squadron commander, a Marine fire watch whose sole duty in effect is to be alert for fires or other disturbances would seem to lack any authority in the usual sense. On the other hand, it is certainly true that he is acting in an official capacity. Accordingly, it would seem likely that the official capacity test would be applied.

It seems reasonable, therefore, to believe that the official capacity-personal capacity dichotomy is still alive and well with only a new twist added. However, it is possible that *Dohle* will be expanded greatly in future months and years. Should this be the case, it is likely that a number of different decisions will be called into question, particularly those dealing with undercover operatives. These cases will be discussed in a later section of this article.

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Cook (confirmed August 21, 1974); Judge Perry. It should be clear that the makeup of the Court of Military Appeals has changed drastically in a few short years. Accordingly, many legal precedents are now open to question. The next two years should indicate the new court's view of both military law generally and stare decisis particularly.

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No one can anticipate the decision of Judge Ferguson's replacement on this issue. However, Judge Perry's record as a civil libertarian does suggest that his decision in such a case might well be similar to Chief Judge Fletcher's opinion in *Dohle*.

It has been suggested that *Dohle* can be viewed as attempting to promulgate a new test that subsumes the "official capacity test." This may be an easier formulation to work with. On the other hand, *Dohle* could be viewed as simply holding that those in authority act in an official capacity.

*United States v. Woods*, 22 U.S.C.M.A. 369, 47 C.M.R. 124 (1973). A CQ is an individual who has limited responsibility for a company during off-duty hours. His primary responsibilities are administrative, including the notification of superior officers in the event of a situation requiring a decision. CQ's are usually middle grade NCO's.

*United States v. Brazzil*, NCM 740066 (NCMR 26 Apr. 1974) (unpublished opinion). A Marine fire watch appears to be a low-ranking enlisted man whose primary duty is to be alert for fire or other disturbance during evening off-duty hours.
3. The Medical Profession

The most significant problem in the area of who must give warnings involves the medical profession, and significantly different considerations are raised by the differing roles of psychiatrists and nonpsychiatrists. The problem is relatively simple when dealing with nonpsychiatrist members of the medical profession. Depending upon the Dohle case, the question is the "traditional" one of the intent of the doctor who questions the suspect. If his intent is a medical one and he is questioning for diagnostic purposes, the cases indicate that there is no requirement that the doctor must give rights warnings. For example, in United States v. Fisher, when the accused was brought into an emergency room with respiratory depression, it was proper for the doctor to question him without warnings as to the cause of the depression. The accused's admissions as to the use of cocaine were held admissible at his subsequent trial. However, as all members of the Medical Corps are officers with the same responsibilities and powers held by any other military officer, if Dohle is to have any meaning beyond its narrow facts, then perhaps "in authority" means that a questioner, including a doctor, who outranks the individual being interrogated must give warnings when that individual is a criminal suspect regardless of any other motivation he might have for asking the question.

If so, such a formulation would present difficulties when dealing with the medical profession. While the military doctor does have law enforcement powers, his primary duty is to maintain health and to heal the sick. Requiring rights warnings of military doctors when their sole intent is to perform their medical duty would clearly chill the replies given by some patients and could make health care for suspects difficult if not impossible. One could well urge that for public policy reasons members of the medical profession should be exempted from the responsibility of giving warnings when they act in a medical capacity.

The major problem in this area deals, however, not with members

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86 Since members of the Medical Corps are commissioned officers, the Court of Military Appeals could easily find that they are in a "position of authority" when questioning a known suspect regardless of their intent in questioning.


88 See also United States v. Baker, 11 U.S.C.M.A. 313, 29 C.M.R. 129 (1960) in which the court sustained the admissibility of incriminating remarks made by Baker to a Navy doctor who questioned him regarding "tracks" on his arm when the doctor apparently suspected him of illegal narcotics use. The court justified its decision by relying on the fact that the admissions were made at a second meeting after Baker had requested help for an insomnia problem.

89 Of course, individuals other than those in the medical profession may also be confronted with this problem. For a unique case involving testimony by a military
of the medical profession generally but with psychiatrists in particular. The tension between the right against self-incrimination and the presentation of psychiatric evidence by the defense at trial is substantial, particularly in the military which lacks a doctor-patient privilege. \(^9\) Having been given notice of a psychiatric defense, the prosecution will usually desire to have the accused submit to an examination by a government psychiatrist. \(^9\) To allow the accused to refuse to cooperate would seem to create an unsupported and unfair burden for the prosecution while forcing cooperation would seem to nullify the right against self-incrimination. In the civilian courts, this problem has yet to be adequately dealt with \(^9\) although statutory privilege \(^9\) occasionally resolves the matter when dealing with a question of competency to stand trial rather than competency at the time of the offense. A limited waiver of the right against self-incrimination has been found in a number of the civilian jurisdictions \(^9\) and a substantial amount of critical comment has been engendered. \(^9\)

In the military this situation has given rise to what is known as the Babbidge Rule. In Babbidge, \(^9\) the Court of Military Appeals held that when the accused raises a defense of insanity, he can be compelled to undergo a limited government psychiatric evaluation. The court found that a defense of insanity constituted an implied lawyer of information gained from an interview of a co-accused (not his client), see United States v. Marshall, 45 C.M.R. 802 (NCMR 1972).

\(^9\) MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev. ed.), para. 151c(2) [hereinafter cited as MCM, 1969].

\(^9\) While the usual procedure in a civilian jurisdiction would be for the accused to be examined by his own expert who would usually be an entirely different individual than the expert used by the prosecution, the military practice is frequently different. The normal military situation in which the accused lacks funds to hire a civilian psychiatrist would be for the accused to be examined by a military psychiatrist in the first place. Examination by another psychiatrist will often not be possible for the Government. Thus self-incrimination problems plague the defense from the very start as the military psychiatrist is by no means a "defense" psychiatrist. Of course proper procedure will likely require an accused who is raising a defense of insanity to submit to a military sanity board. See generally MCM, 1969, para. 121.


waiver of the accused’s rights against self-incrimination. Babbidge represents a compromise between the government’s need for proof and the accused’s rights against self-incrimination. Although the accused can be compelled to submit to a government psychiatric evaluation on pain of having any defense expert testimony suppressed at trial, the government psychiatrist in theory may testify at trial only to his ultimate conclusions as to the accused’s sanity, either at trial or at the time of the offense. He may not testify to any specific details given during the psychiatric interviews.

The numerous problems of administration and trial procedure instigated by Babbidge arise only when a psychiatrist

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98 Babbidge suggested that an accused who refused to submit to a government evaluation could be estopped from presenting a defense. If such is the case, this sanction is similar to that imposed on the person who refuses to testify upon cross-examination. There the result of such a refusal may result in the striking of direct testimony. United States v. Colon-Atienza, 22 U.S.C.M.A. 399, 47 C.M.R. 336 (1973). However, Babbidge did not make it clear whether it was the entire defense of insanity that could be estopped (or struck) or if it was only the expert psychiatric testimony that was involved.


100 Primary among the difficult questions spawned by Babbidge are the procedural details that surround the so-called “trigger problem.” These questions include whether the Government may compel an accused to submit to a psychiatric examination if the defense chooses to raise the defense of insanity through lay rather than expert psychiatric testimony, see MCM, 1969, para. 122c, which unlike some civilian jurisdictions does not require expert evidence to either raise or rebut a defense of insanity; at what point in the pretrial or trial proceedings the Government may require such an examination; and whether the failure of an accused to submit to such an examination would be grounds for precluding the use of such a defense. The 1975 revision of the Manual for Courts-Martial attempted to solve some of these problems. After the defense has presented expert psychiatric testimony at trial, the Government may compel the defendant to submit to a government psychiatric examination. The sanction for defense refusal to cooperate is the suppression or striking of the defense expert testimony. MCM, 1969, paras. 140a, 122b, 150b, as amended, 49 Fed. Reg. 4247 (1975).

United States v. Johnson, 22 U.S.C.M.A. 424, 42 C.M.R. 402 (1973), exhibits one possible solution to correct some of the noted difficulties. There the trial court issued an order prohibiting any disclosure of the results of a psychiatric interview of the accused outside medical channels and the defense. The judge made it clear that he would personally review the findings and that no material would be disclosed to the prosecution pending his final determination, see id. at 426, 47 C.M.R. at 404. The Court of Military Appeals sustained this use of the court order although Judge Duncan in his concurrence voiced his strong doubts as to the legality of the protective order and the judge’s power to issue it. Id. at 428-30, 47 C.M.R. at 406-08.

101 Even the use of a court order, see note 100 supra, does not address the essential difficulty. At trial the defense would usually present its evidence on the issue of sanity by calling its expert witness. If the defense counsel attempts to ask its expert witness for anything more than his ultimate conclusion on the defendant’s sanity, he risks “opening the door” to more probing questions by the trial counsel on cross-
fails to give Article 31(b) warnings. If the psychiatrist chooses to comply with that Article, he has negated Babbidge's premise because the Article 31(b) warning specifically informs the suspect or accused that he has the right to remain silent. Should a suspect so warned knowingly waive his rights, then there is no Babbidge issue. The armed services have combined to issue what is known as a technical manual[103] that specifically deals with psychiatric issues in the criminal law area. Interestingly enough, a specific section of that pamphlet addresses the topic of performing pretrial psychiatric evaluations of a criminal accused[104] and specifically requires a government psychiatrist to give Article 31(b) warnings.[105] Query the effect of compliance with this particular paragraph? If a suspect is so warned by a psychiatrist and says that he wishes to exercise his right to remain silent, may a psychiatrist tell him that the warnings were purely ritualistic and that he in fact has no rights? Could the defense counsel in a case successfully argue that regardless of Babbidge, the joint effort of the armed services of including this language in its technical manual specifically modifies the Babbidge case by creating a broader right for the accused? It should be evident that the entire issue of the sanity of the accused and the right against self-incrimination is an exceedingly difficult one not susceptible of easy solution. Further clarification must await the future litigation which is all too probable.

4. Undercover Agents

The other major problem in this area of Article 31(b) concerns undercover agents and their responsibility, if any, to give Article 31(b) warnings. While the mere suggestion that undercover agents might be covered by Article 31(b) may appear somewhat amusing, the language of Article 31(b) taken literally would require military personnel acting in an undercover capacity to give Article 31(b) examination (or indeed on direct examination of an expert witness selected by the prosecution) which while revealing the basis of the ultimate conclusion also contain the definite possibility of revealing incriminating statements given by the accused during the conduct of the interview.

102 There remains the argument that the suspect is so mentally ill that he could not give an intelligent knowing waiver.

103 U.S. DEPT OF ARMY, TECHNICAL MANUAL NO. 8-240, PSYCHIATRY IN MILITARY LAW (1968) [hereinafter cited as TM 8-240]. This manual was published as a joint services manual under the auspices of the Departments of the Air Force and Navy, as well as the Department of the Army.

104 Id. at ch. 4.

105 Id., para. 4-4f. Note that while the accused is to be told he can consult with counsel, paragraph 4-4g states that "[n]ormally, there will be no third party witnesses to the examination. Good rapport is best established when the psychiatric examination is conducted with only the medical officer and the patient present."
warnings prior to asking questions of suspects. Indeed, Judge Ferguson’s position in Seay\(^{106}\) would seem to support this. Unless a literal meaning is ascribed to Article 31(b),\(^{107}\) however, this interpretation appears hardly justifiable.\(^{108}\) The Miranda decision was based in large part on the theory that the very presence in a police station or involvement in a custodial interrogation could not help but involve some form of psychological coercion. Article 31(b), enacted for many of the same general reasons that underlie Miranda,\(^{109}\) stems in part from a congressional desire for fairness in interrogations. An undercover police setting, however, appears to lack any of the traditional forms of police coercion.

The cases in this area accordingly support use of undercover interrogation.\(^{110}\) Unfortunately, the cases may support it to an unjustifiable extent thereby raising questions of fairness and infringement of a suspect’s right to counsel. United States v. French\(^{111}\) is typical of one type of case involving undercover agents. Captain French, an Air Force officer, sent a message to the Soviet Embassy in Washington that he was willing to sell certain classified weapons information to the Soviet Union in return for cash to settle some gambling debts. The message was retrieved by the FBI and some time later an FBI agent, accompanied by an Air Force Office of Special Investigation agent knocked on Captain French’s door in New York. Upon entry they identified themselves as Russian agents and engaged in a short conversation with Captain French. As soon as they had secured sufficient incriminatory information to make it clear that Captain French was indeed offer-

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\(^{107}\) Interestingly enough, there are unconfirmed reports that a military judge sitting at a general court-martial in Norfolk, Virginia, in the summer of 1975 accepted this theory. Finding that an undercover Naval Investigative Service agent should have given Article 31(b) warnings while attempting to make an undercover purchase of narcotics, he suppressed the resulting evidence.

\(^{108}\) Chief Judge Quinn stated in United States v. Gibson:

> Judicial discretion indicates a necessity for denying its application to a situation not considered by its framers, and wholly unrelated to the reasons for its creation . . . Careful consideration of the history of the requirement of warning, compels a conclusion that its purpose is to avoid impairment of the constitutional guarantee against compulsory self-incrimination.


ing to sell classified data, they apprehended him and informed him of his rights under Article 31(b). At trial and on appeal his defense counsel’s suggestion that the agents should have read Article 31(b) as soon as the door was opened was summarily dismissed.

In *United States v. Gibson* the Court of Military Appeals dealt with another type of undercover agent case. There the court held admissible certain admissions gathered from the accused, then in pretrial confinement, by a fellow prisoner—termed “a good reliable rat”—who had agreed to act as a CID informant. The acknowledged intent in *Gibson* was to obtain information from an individual who would not otherwise have talked. The court found that Article 31(b) was not literal in meaning, that the “rat’s” conduct was not official action, and that deceit was lawful when not calculated to result in untrue statements. In a similar vein, the Court of Military Appeals allowed the introduction into evidence of admissions made in *United States v. Hinkson*. In *Hinkson*, the accused was placed outside a Naval Investigation Service agent’s office. A fellow Marine who had been acting as an informant was placed in a seat next to him and initiated a conversation. Hinkson made incriminating remarks. The court based its finding that the admissions were properly placed before the court on the ground that the accused must bear the risk of any discussion that he may choose to have with others. It must be conceded that in both the *Gibson* and *Hinkson* cases the possibility of the type of coercion that motivated both *Miranda* and Article 31(b) was absent. However, Article 31(b) arguably establishes what might be called a rule of fairness, one that specifically prevents official interrogations of suspects without supplying warnings. While review of the congressional hearings leading to Article 31’s enactment is not of particular value, it does indicate that it was more than mere coercion that troubled Congress.

112 25 C.M.R. at 865. During sentencing French testified that he had sold the plans to settle gambling debts but that he was not morally guilty because he intended to capture the Russian agents via a suicide plan. The trial and appellate courts rejected his explanation. 25 C.M.R. at 868. It could well be that his extenuation and mitigation assisted the courts in rejecting his Article 31 claims.


118 The decision of the Court of Military Appeals in *Souder v. United States*, 11 U.S.C.M.A. 59, 28 C.M.R. 283 (1959), seems primarily to stem from a feeling that fairness should predominate in military justice.
If there is some substance to the concept of fairness which motivated the court’s decision in Souder, it may well be that the concept is in harmony with a deeper congressional concern. Although the coercion of rank that may have concerned Congress is absent in cases such as Gibson and Hinkson, cases of that type raise questions of fairness. It seems at least arguable that Congress was attempting to partially redress the imbalance of skill and resources between the individual and the military establishment when it enacted Article 31(b). If this premise is accepted, it can be suggested that there is a point in the process of bringing a man to trial beyond which the Government cannot interrogate a suspect, directly or indirectly, without notice.

The Supreme Court dealt with this very issue in 1964 when it decided the case of Massiah v. United States. In Massiah, the accused was a merchant seaman who had been arrested for violation of federal narcotics laws. Indicted, Massiah was released on bail. He had already retained an attorney who had assisted him in his arraignment and his plea of not guilty. Subsequent to the indictment and unknown to Massiah, a co-accused turned government informant and cooperated with the Government in placing a radio transmitter under his car. Subsequently, the co-accused and Massiah held a lengthy conversation while sitting in co-accused’s automobile. The entire conversation was monitored by government agents, conduct which the Supreme Court found to be unacceptable. Quoting with approval from a New York case, the Court stated, “Any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal cases and the fundamental rights of persons charged with crime.” The Supreme Court went on to find that the bugging of Massiah was a violation of the sixth amendment right to counsel in that he had been interrogated after indictment and in the absence of his already retained attorney.

While Massiah concerned an individual who already had an attorney—unlike Gibson and Hinkson—it appears to stand for basic proposition that an individual who has been indicted may not be interrogated by police or police agents without being informed of his right to counsel. The reasoning of the Court in Massiah would support the argument that in the military Article

122 Perhaps limited to an individual with counsel.
31(b) warnings should be required even of alleged undercover operatives at some particular point in the criminal justice process. A number of specific points could be identified where this could be done: identification as a suspect; apprehension, restriction, or pretrial confinement; the date that charges are formally preferred; the date of formal referral; or the date of the trial itself. While the term "indictment" has no formal equivalent in military terminology, it is generally accepted to be the rough equivalent of referral. However, it seems more appropriate in this area to consider indictment the equivalent of the point at which the accused is either formally charged or his liberty is infringed upon. At both those steps the accused is clearly placed well within the criminal process and the system is on notice that he is accused of the specific offense.

There is even some support in contemporary military law for this particular view. The Court of Military Appeals condemned an indirect interrogation in the case of United States v. Borodzik, decided in 1971. In Borodzik, the accused was suspected of theft of aviation watches. After two Naval agents visited the accused in his civilian apartment and informed him of his rights, he exercised his right to remain silent and requested an attorney. As he packed to accompany the agents, they advised his wife that things would go better for him if the watches were turned over to them. The wife spoke to the accused out of the presence of the agents and her husband then turned over eight aviation watches. The court held that this was nothing more than an indirect interrogation of Borodzik by the Naval agents and that the questioning was improper without specific warnings. The opinion also implies that the agents violated the defendant's already exercised rights to remain silent and to have an attorney present. While in one sense Borodzik could be held to have overruled Gibson and Hinkson sub silentio, such a conclusion seems difficult to support. Indeed, in the Dohle decision, Chief Judge Fletcher specifically referred to the Gibson case, indicating that Dohle did not go so far (in his opinion) as to affect the

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123 Jimmy Hoffa was held not to have a right to be arrested as soon as a prima facie case was available. However, Hoffa is highly distinguishable from this argument; Hoffa was not involved in the criminal law process until his arrest (other than being identified as an accused or prospective defendant). Hoffa v. United States, 385 U.S. 293 (1966).

124 Indictment is of course the formal decision that sends a case to trial. Referral in the military criminal process has the identical result. While the Article 32 investigation, see UCMJ, art. 32, 10 U.S.C. § 832 (1970), fulfills much the same investigatory function as the grand jury, only the general court-martial convening authority has the power that a grand jury has to send a case to trial.


126 Id. at 97, 44 C.M.R. at 151.
undercover agent problem. Souder, Borodzik, and Massiah together, however, would appear to make a strong argument that at some step in the military criminal process prior to trial, the accused can no longer be questioned by an undercover agent without rights warnings being given. While this conclusion is far from radical, it appears to lack specific supporting precedent at this time.

5. Civilian Police

The question arose in the early 1950's as to the responsibility of civilian police to advise military suspects of their rights pursuant to Article 31. The question had in fact arisen during the legislative hearings concerning the then proposed Uniform Code of Military Justice. On Tuesday, March 24, 1949, during the hearings before the House of Representatives Committee on Armed Services, Subcommittee Number 1, the following interchange took place:

Mr. Smart (Professional Staff Member): [T]his particular article refers only to persons subject to this code, so that if a military person is apprehended by authorities other than military authorities they may likewise extract a statement from the accused or suspect which is in violation of the provisions of this article.

Now I think the record should clearly show that any statements obtained under those circumstances would likewise be inadmissible.

Mr. Larkin. I think there ought to be a distinction pointed out there, Mr. Chairman. In many State jurisdictions the local authorities have no obligation to inform a person suspected of an offense that any answers they [sic] make may be used against them.

I don't think if a confession is obtained by the civilian authorities that it should be inadmissible because the civilian authorities neglected to inform the man in advance of his rights.

But you would face this situation if you required the civilians—whom you can't require by this code—to inform a suspect in advance as provided in subsection (b): A man may voluntarily walk into the local civilian authorities or a police station and make a confession and they won't know what it is all about and not having any obligation to inform him or not seeing any reason to, why you would then not be able under the construction presented here to use such a statement or such a confession against the man.128

The final rule in this area as expressed by the Court of Military Appeals can be summarized as follows: Unless the scope and character of cooperative efforts between civilian and military personnel demonstrate that the two investigations have merged into an indivisible entity or the civilian investigator acts in furtherance of a military investigation or in any sense as an instrument of the

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128 Hearings, supra note 19, at 991-92.
military, civilian police will not have to give Article 31(b) warnings although they remain bound by the *Miranda* rules. Thus civilian police working on a civilian offense involving a military service member will almost never have to give Article 31(b) warnings. Only in those cases in which military and civilian police are working in close cooperation with each other and arguably only in cases in which the civilians are totally subordinated to military control, will Article 31(b) apply to civilian law officers.

Representative of this view are *United States v. Holder* and *United States v. Temperly* in which the Court of Military Appeals in both 1959 and 1973 held that FBI agents engaged in the arrest of military deserters were sufficiently independent from military control (despite the purely military justification for the arrests) to be immune from the requirement of giving Article 31(b) warnings. The law is similar for cases involving foreign police when acting independently of military authorities they are not required to give Article 31 warnings. This general doctrine is based in significant part on the rationale expressed in the 1949 congressional hearings. If it is sufficiently difficult to have American civilian police comply with the requirements of the *Miranda* decision, how much more difficult would it be for civilian police to attempt to comply with military rules?

**D. WHO MUST RECEIVE ARTICLE 31(b) WARNINGS**

Although not specifically stated in Article 31(b), the warning requirements would appear to apply only to members of the armed forces or perhaps those subject to military law. There would seem

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133 In 1975, the Court of Military Appeals decided the *Schnell* case, indicating its willingness to require foreign police working with Americans to comply with American fourth amendment standards. However, the court's track record in cases involving the application of Article 31 to civilian police suggests the existence of an informal presumption that makes it unnecessary for civilian police to give Article 31 warnings. This situation may change with the "new" court

to be little justification to extend Article 31(b) rights to civilians not subject to the potential authority of the military criminal law system. Certainly what little justification may exist—primarily the argument that fairness and voluntariness require warnings—would seem to be mooted so long as Miranda retains some vitality. Clearly a custodial interrogation of a civilian by a military policeman, somewhat rare in any event because of the Posse Comitatus Act, would require Miranda warnings. What standard must be used, however, by the military policeman who apprehends an individual in civilian clothes who may or may not be a civilian? Research indicates only one military case that has even remotely considered the issue.

In United States v. Zeigler, a Marine warrant officer interrogated a suspect in civilian clothes whom he, erroneously, believed to be a civilian "hippie" because of his clothes and disheveled appearance. Although the Court of Military Appeals found that the warrant officer's inquiry into the suspect's identity "was not, in our opinion, the kind of interrogation into the commission of a criminal offense which requires threshold advice as to the right against self-incrimination and the right to counsel," both the majority and dissenting opinions seemed to recognize the inapplicability of Article 31(b) to apparent civilians. An issue the case did not address, however, is the standard to be used in reviewing the interrogator's decision. Shall it be an objective one or simply a good faith subjective belief by the military questioner? The question remains unresolved.

While there has been little or no appellate litigation over the term "accused" as used in Article 31(b), there has been a significant amount of controversy over the word "suspect." The issue, of

1 While there are numerous civilian employees in the Department of Defense whose livelihood could be affected by any incriminating remarks and who could also be subject to a form of rank inspired psychological coercion, the coercion present in the uniformed forces comes from the possibility of direct punishment. Only those persons directly liable to court-martial should be covered by Article 31(b).


3 20 U.S.C.M.A. 523, 43 C.M.R. 363 (1971). See also United States v. Camacho, 508 F.2d 594 (9th Cir. 1974) (identification required of possible civilian without Article 31(b) warnings although he claimed military status; Article 31 not discussed).


5 Judge Ferguson dissented, apparently believing that the warrant officer believed Zeigler to be a Marine rather than a civilian.

6 See generally Maguire, supra note 45, at 15-18.
course, relates not to the academic definition of the word, but rather to the factual determination that must be made in each case to determine whether a sufficient quantum of evidence existed at the time of the interrogation for the individual questioned to have been a suspect. It is clear that an individual may be questioned by a policeman without being a suspect in either Article 31 or *Miranda* terms. Even where a law enforcement officer is concerned about possible criminal conduct, his "hunch" that a crime has been committed need not rise to the level of suspicion necessary to trigger Article 31(b).

In the illustrative case of *United States v. Ballard*, an air policeman on night patrol saw tool boxes being placed in a private car at the Base Equipment Management Office. The air policeman investigated and asked Ballard his identity and place of duty. Ballard replied with a bribe attempt. The Court of Military Appeals held that the air policeman was simply performing his duty to inquire of anything out of the ordinary and did not at the time suspect Ballard in the Article 31(b) sense. Similarly, in *United States v. Henry*, the accused shot into a hooch in Vietnam killing a soldier. Hearing the shot, an officer rushed to the scene and inquired of the small crowd in front of the hooch who had shot whom. The accused confessed from the crowd. The Court of Military Appeals held that Article 31(b) warnings were not required of the officer prior to asking the crowd what had occurred. What is unclear, of course, is what level of suspicion is necessary before Article 31(b) warnings are required and specifically, perhaps, how close the finger of suspicion must point to a specific individual before he or she becomes an Article 31(b) suspect.

The question of imputed knowledge has arisen occasionally. Where one government agency is aware that the individual to be questioned is a criminal suspect but the questioner—the actual interrogator—is unaware of that fact, no Article 31(b) warnings are required. The difficulty with this imputed knowledge result is that it seems to penalize good police work and good intra-government communications and reward inefficiency. If one government agent fails to inform another of the status of a case, then Article 31(b) warnings are not required. Surely this conclusion


is questionable. One can easily postulate a set of facts which would present the defense with an excellent argument to estop the Government from relying upon its own gross negligence to escape the failure to give rights warnings.

E. WHEN MUST WARNINGS BE GIVEN?

The traditional phrasing is that Article 31(b) warnings must be given whenever questioning or conversation designed to elicit a response takes place. This formulation is, however, too simplistic although it more than adequately makes it clear that Article 31(b) warnings need not be given in cases of spontaneous remarks by a suspect. The military has followed the general civilian rule that an individual who volunteers an incriminating admission need not be stopped and given rights warnings. Whether an individual suspect who begins in spontaneous fashion may be encouraged to finish his statement without being warned of his rights is unclear. To the extent that authority may exist, it appears likely that a witness to such a spontaneous admission is allowed to add follow-up questions to complete a statement.

The difficulty with the "elicit a response" formulation is that it does not adequately deal with the problem of preliminary or administrative questions and "caught in the act" questioning. The majority civilian rule in the Miranda area has been that questions asked of the accused not intended to elicit incriminating admissions but rather intended to elicit purely administrative information—in short, preliminary questions—need not be prefaced with Miranda rights warnings. The ultimate position of the military courts on the same issue is as yet unknown.

The authors of Article 31 intentionally changed the language from the phraseology found in Article of War 24 so as to eliminate Article 24's absolute ban on any solicitation of any information

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147 Id.
148 See, e.g., United States v. LaVallee, 521 F.2d 1109 (2d Cir. 1975); Owens v. United States, ___ F.2d ___ (D.C. Cir. 1975). Numerous cases supporting this proposition are cited in United States v. LaVallee, supra at 1109, n.1. Miranda could be interpreted as applying only to station house interrogations. Cf. Schneckloth v. Bustamonte, 412 U.S. 218, 247 (1973).
149 There is authority to believe that Article 31(b) may have been extended to any questioning. See United States v. Hundley, 21 U.S.C.M.A. 320, 45 C.M.R. 94 (1972), citing United States v. Williams, 2 U.S.C.M.A. 430, 9 C.M.R. 60 (1953); cf. United States v. Pruitt, 48 C.M.R. 495 (AFCMR 1974). See also Maguire, supra note 45, at 31.
150 The cases in the area have not truly come to grips with the question. See United States v. Vail, 11 U.S.C.M.A. 134, 28 C.M.R. 358 (1960), now almost a legal oddity with its "caught in the act" exception.
and to replace it with a ban on solicitation of incriminating information.\footnote{The revised draft of the UCMJ states that Article of War 24 made all improperly obtained statements inadmissible against anyone. "This is changed," the draft continues, "Article of War 24 forbids the use of coercion to obtain any statement whether or not self incriminating. Proposed article 43 [Article 31] forbids compulsion to obtain self-incriminating statements." 2 Morgan Papers, supra note 22, revised draft of December 6, 1948, at page 3.} Despite this history, it seems likely that Article 31(b)'s intent may have been to prohibit any official, unwarned questioning of a suspect whatsoever.\footnote{See note 149 supra.} This suggestion cannot be taken literally. A company commander who wishes to inquire of an individual suspected of or being investigated for an offense as to whether or not he has finished an assigned military task certainly will not have his question banned by Article 31(b). However, any question posed to a suspect as part of an intended interrogation into an alleged criminal offense may well be banned.

A related issue is the difficulty of "caught in the act" questioning. This difficulty can arise when an individual surprises a suspect in the midst of apparent criminal activity. In the civilian jurisdictions the issue is a good deal simpler, for \textit{Miranda} applies only to custodial interrogations. Most questions asked by a police officer of a suspect prior to an arrest will not be covered by \textit{Miranda} or by any other form of rights warnings. In the military, on the other hand, so long as the military policeman is convinced that the individual is a suspect, Article 31(b)'s literal language would require warnings. The principal military case dealing with this issue is \textit{United States v. Vail}.\footnote{11 U.S.C.M.A. 134, 28 C.M.R. 358 (1960).} Vail and two others were suspected of an attempt to steal arms from an Air Force warehouse in Morocco. At the time of their apprehension the Provost Marshal asked one of Vail's co-accuseds to show him the location of the weapons which had been removed from the warehouse. The weapons were produced in response to the demand. The Court of Military Appeals chose not to decide the issue of standing and decided that the production of the weapons constituted a verbal act, an equivalent of an oral response. The court stated: "The real question is whether an accused apprehended in the very commission of a larceny must be advised of his rights under Article 31 as a condition to the admission of testimony of his reply to a demand to produce stolen weapons."\footnote{Id. at 135, 28 C.M.R. at 359.} The late Judge Quinn answered his own question in the following fashion:
Common sense tells us the arresting officer cannot be expected to stop everything in order to inform the accused of his rights under Article 31. On the contrary, in such a situation he is naturally and logically expected to ask the criminal to turn over the property he has just stolen... In our opinion, Article 31 is inapplicable to the situation presented in this case.155

Judge Ferguson, on the other hand, in a well written and seemingly correct dissent, argued that Vail was contrary to both earlier decisions and congressional intent. Judge Latimer, concurring in the court's holding, believed that Article 31 was not applicable at all.

Although there is substantial civilian authority in the Miranda area to suggest that Vail is a correctly decided case, the actual validity of Vail as a military precedent is highly uncertain. Research indicates that Vail has been followed only once, and that in a general court-martial case affirmed in an unpublished opinion156 by the Army Court of Military Review that found any Article 31 violation to be de minimis.157 In view of the legislative history of Article 31 and its peculiar phrasing, it can be suggested that Article 31(b) should apply specifically to the case of an individual caught in the act. In such a case the interrogator simply must stop the individual, apprehend him should he choose, and inform him of his rights. This should not be as difficult or as an absurd a suggestion as it might appear, for if the interrogator is not convinced that the individual is responsible for criminal wrongdoing, the individual is most likely not a "suspect" in the Article 31(b) sense and accordingly Article 31 warnings would not be required.

A never-ending Article 31(b) problem is determining if warnings must be repeated when warnings have already been given to a suspect at a prior interrogation. The general rule is that if the warnings were given properly at the first interrogation session and that the time elapsed between the first and subsequent sessions is sufficiently short as to constitute one entire continuous interrogation, separate warnings need not be given.158 On the other hand, if the

155 Id. at 136, 28 C.M.R. at 360.
157 Id. The court found that any prejudice was minimal in view of a full confession made later after proper warnings. The decision of the Court of Military Review is at odds with the automatic reversal rule usually applied in the Article 31 area.
158 See, e.g., United States v. Schultz, 19 U.S.C.M.A. 311, 41 C.M.R. 311 (1970) (interrogations separated by seven hours found to be one continuous session); United States v. White, 17 U.S.C.M.A. 211, 38 C.M.R. 9 (1967) (interrogations separated by one day found to be continuous); United States v. Boster, 38 C.M.R. 681 (ABR 1968) (interrogations separated by 10 days found to be separate sessions).
time interval is long enough to create separate and distinct interrogation sessions, then each individual session must be prefaced by Article 31(b) warnings.\textsuperscript{159} No firm guidance can be given as to what minimum time interval between sessions will result in a determination that the sessions constituted a continuing interrogation. The Court of Military Appeals and its subordinate courts have decided each case on an individual basis.\textsuperscript{160}

Occasionally an individual taking part in an investigation as a witness becomes a suspect.\textsuperscript{161} In such a case, it is the responsibility of the individual questioning the witness to inform him of his rights before proceeding further.\textsuperscript{162} This rule does not, however, apply to witnesses at trial\textsuperscript{163} although there is strong support\textsuperscript{164} for the proposition that the trial judge should himself interrupt the witness and advise him of his rights.\textsuperscript{165}

**IV. THE VERBAL ACTS DOCTRINE**

One of the most perplexing questions surrounding Article 31(b) concerns what has been called the verbal acts doctrine. The express phrasing of Article 31(b) is that "no person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him...." The verbal acts doctrine originates in the definition of the word "statement." There is no doubt that a testimonial verbal utterance is included within the definition of "statement." However, the Court of Military Appeals has indicated time and time again that the word "statement" in Article 31(b) must be interpreted in a more expansive manner.\textsuperscript{166} It is because of the court's unusually wide defi-


\textsuperscript{160} See note 158 supra.


\textsuperscript{162} Id.


\textsuperscript{165} Note that such a warning may have the effect of deterring a witness from testifying. A fascinating ethical question is raised if either the defense or trial counsel (prosecutor) asks the judge to warn a witness of his rights (especially when the request is made in open court). Is such an inquiry ethical if it is made with an "improper intent"? Attempts to protect a witness can backfire. See United States v. Jorn, 400 U.S. 470 (1971), in which the Court held that a mistrial declared to allow proper warning of witnesses' rights against self-incrimination was without manifest necessity and resulted in attachment of jeopardy to the defendant's first mistried case.

\textsuperscript{166} The Court of Military Appeals has stated: "It seems to us that to say a handwriting specimen does not constitute a 'statement' within the meaning of Article 31 is to give that Article the most restricted interpretation possible." United States v. Minnifield, 9 U.S.C.M.A. 373, 378, 26 C.M.R. 153, 158 (1958).
tion of the word "statement" that the right against self-incrimination in the military is to a large extent so very much greater than in civilian jurisdictions covered only by the constitutional right.

Clearly both the fifth amendment and Article 31 cover some types of physical acts that must be considered equivalent to speech. Surely no one would argue that an individual suspect would not be covered by the requirements of Miranda if his interrogator told him not to speak but to respond by nodding his head. For ease of analysis, it is best to consider verbal acts in two general classifications—acts not involving bodily fluids and acts involving bodily fluids.

Verbal acts may be loosely defined as physical acts which produce results similar to testimonial utterances—in short, verbal acts are considered speech analogs. The acts usually discussed in the cases involve identification cards, surrender of a wallet or of stolen goods, or possession of contraband. In the case of United States v. Corson, for example, a Navy Chief Petty Officer suspecting Corson of possession of marihuana cigarettes told the accused, "You know what I want, give them to me..."; the accused replied by turning the contraband over to him. The Court of Military Appeals held that the Chief Petty Officer's command was the equivalent of a request for a verbal admission of possession and that, accordingly, Article 31(b) warnings were necessary.

There are numerous military cases which have involved the verbal acts doctrine and any effort to attempt to bring them all into line with any particular theory of the doctrine is doomed to failure. Unfortunately, it appears that the various military appellate courts are not, as it is occasionally said, "reading off the same sheet of music." A theory can, however, be postulated for the nonbodily fluid cases—a theory that appears to explain most of the cases. The key to the synthesis is the concept that the surrender of an item under circumstances indicating prior knowledge of its possession, thereby fulfilling a key element of proof where possession is an element of the offense, is the equivalent to a spoken admission.172

172 It should also be enough if the information obtained is important to the case. In Professor Maguire's formulation, unimportant information would not constitute a "statement" in the Article 31(b) sense. Maguire, supra note 45, at 21.

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Thus, where a soldier is suspected of possession of heroin and is ordered to take everything out of his pocket, Article 31(b) warnings will not be required because farfetched as it may appear in practice, the accused is entitled to react with surprise and denial should he pull from his pocket the traditional glassene bag of white powder. On the other hand, where, as in the *Corson* case, the suspect is ordered to "take it out of your pocket, you know what I want," the specific surrender of the item in question in response to the demand indicates knowledge by the suspect of exactly what is demanded. Thus, Article 31(b) warnings would be required because the discretionary surrender of the object would be the equivalent of a verbal admission of knowing possession.

Article 31, like the fifth amendment, interacts of course with the fourth amendment prohibition against unreasonable search and seizure. In most cases a demand for an object will involve fourth amendment as well as Article 31 issues. The oft-used "give me what I want" demand raises both such issues. A search illegal under the fourth amendment remains illegal even if the particular demand would not run afoul of the verbal acts doctrine. It is also quite possible for a demand to be illegal in terms of both Article 31 and the fourth amendment. The cases involving these issues run together, and many cases which would develop a clearer theory of the verbal acts doctrine if decided on Article 31 grounds are in fact decided on the grounds of illegal search and seizure. The key element within the area of verbal acts is discretion by the individual being interrogated. These specific possibilities result:

1. Where a lawful search is being conducted and the suspect lacks any discretion, Article 31 does not apply.
2. Where a search is unlawful and the accused is required to perform a nondiscretionary act, the evidence will be inadmissible on fourth amendment grounds and possibly on Article 31 grounds as well.
3. Where a lawful or unlawful search occurs and the suspect is required to perform a discretionary act that is incriminating, the evidence will be excluded because of Article 31.\(^{172}\)

Under this analysis a lawful search overcomes the argument that the mere act of surrender of contraband, for example, is incriminating. While such a surrender may well be incriminating in

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\(^{172}\)The Court of Military Appeals appears to have accepted this reasoning. See *United States v. Kinane*, 24 U.S.C.M.A. 120, 122 n.1, 51 C.M.R. 310, 312 n.1 (1976).
the literal sense of the word, the fourth amendment right to search would predominate over any arguable application of Article 31 to searches generally. Where, however, the individual's mind—and consequently an act of discretion—is involved, the situation changes and Article 31 and the right against self-incrimination become dominant. Note, for example, the case of United States v. Pyatt.\textsuperscript{173} Suspecting Pyatt of theft, the unit executive officer ordered him to remove his wallet and count out his money. The Court of Military Appeals held that the officer's order to count the money, although it resulted in a physical act, violated Article 31. In this particular case, probable cause for what was clearly a search was lacking and it can be suggested that the order resulted in both an illegal search under the fourth amendment and an Article 31 violation.

There are few verbal act cases of the "pure" possession type. Both Corson and Pyatt are decisions of the Court of Military Appeals and fit within the theoretical model suggested above. Other cases of the same type are decisions of the subordinate military appellate courts and, generally speaking, do not fit within the model. The case of United States v. Davis\textsuperscript{174} is illustrative. Davis was a sailor on liberty in Ismir, Turkey, who was suspected of possession of contraband. Like virtually all other members of the crew, he was stopped for inspection before being allowed to board his ship. The ship's captain, concerned that his crew might easily obtain drugs, had ordered what amounted to a border search of all returning personnel. Davis was asked by the Master at Arms, "What do you have? Come on, what have you got?" Davis replied, "Please let me throw it overboard." The trial court suppressed Davis' oral reply as a violation of Article 31(b), however, it did allow testimony that Davis had surrendered a bag of marihuana. According to the theory that has been suggested above, the evidence of Davis' knowing surrender of the bag in response to a demand for it should have been suppressed as well. There is no evidence that the Navy Court of Military Review which decided the unpublished case ever considered the element of possession as a critical feature. Rather, the court reasoned that Davis, like all other sailors coming aboard, would have been searched by order of the captain and that the detection of the marihuana would have been inevitable. The court therefore presumably felt that to distinguish between a simple

\textsuperscript{173} 22 U.S.C.M.A. 84, 46 C.M.R. 84 (1972).
\textsuperscript{175} NCM 741757 (NCMR 30 Jan. 1975) (unpublished opinion).
search and the fact that Davis had personally surrendered the marihuana was unnecessary. In Davis it is unlikely that a different result would have followed even had the evidence shown that Davis was found with marihuana.

The reason for the failure of the courts of review to follow what seem to be the holdings of Corson and Pyatt is unclear. However, both Davis and Mann are cases in which the ultimate result appears to have been unavoidable. Perhaps the courts have been applying some unarticulated harmless error rule. Whatever the reason, there is little doubt that the theoretical structure expressed above fails to comply with all of the relevant holdings. Only future cases will demonstrate the ultimate viability of the theory.

Another line of cases involves suspects who are ordered to point out their locker or certain belongings. In the usual case, a criminal investigator demands that the accused point out the clothes he wore the night before or point out his locker. The courts have consistently taken the position that the act of pointing is the equivalent of a verbal act. The Army176 and the Air Force177 Courts of Military Review have, however, held that where the act of pointing is merely what they have termed “preliminary assistance,” Article 31(b) warnings are not required. What the cases really appear to be saying is that when the question of knowing possession is neither an element of the case nor of any particular significance, any Article 31 issue is de minimis. In short, no one cares whether or not the accused knew the locker involved, for example, was his. These cases are to be distinguished from those in which the element of knowing possession is critical; for example, the case in which the suspect is asked to point out the clothes he wore the night of the alleged robbery. Here identification of a jacket similar to that worn by the robber is clearly a critical element of the case. In such an instance the suspect is not merely being asked to give preliminary assistance and Article 31(b) warnings must be given. Although verbal acts are involved in all of these cases, it appears more relevant to simply ask whether or not the specific “admission” being litigated is truly material to the case. The precedents do appear to suggest that Article 31(b) bars any statement taken in violation of the Article178 and this doctrine of preliminary assistance appears

176 United States v. Dickinson, 38 C.M.R. 463 (ABR 1968). See also United States v. Taylor, 5 U.S.C.M.A. 178, 17 C.M.R. 178 (1954) in which a military policeman’s request that Taylor point out his clothing was held improper in the absence of Article 31 warnings, because more than preliminary assistance was involved.


178 See notes 147-149 supra.
to be contrary to this rule. At best, one can suggest that this line of cases creates a judicial exception akin to "inevitable discovery" in order to avoid "unnecessary" suppression of evidence.

The key question in the verbal acts area is, of course, the definition of "statement." As discussed, there is a line of cases involving the physical act of surrendering an object. Much more difficult than the mere surrender of a physical object is the question of requesting an individual's identification. In 1958 the Court of Military Appeals in United States v. Nowling\footnote{179 U.S.C.M.A. 100, 25 C.M.R. 362 (1958).} held that an air policeman who suspected an individual of being off base without a pass should have informed the individual suspect of his rights under Article 31(b) prior to requesting the individual's pass. The pass which the defendant surrendered had another man's name on it and was used to prove possession of an unauthorized pass. The court held that the pass was the equivalent of a verbal statement and covered by Article 31(b) because Nowling was a suspect. The reaction to the Nowling case was vehement; indeed, it may have been one of the primary reasons that the Powell Committee,\footnote{180 See generally GENEROUS, supra note 20, at 133-45 (1973).} an Army committee which analyzed the Uniform Code and recommended\footnote{181 The Committee's recommendations died stillborn, largely because of the refusal of the Air Force and Navy to cooperate. Id.} major Code changes in 1960, was appointed.\footnote{182 The Committee's Article 31 recommendations can be found in COMMITTEE ON THE UNIFORM CODE OF MILITARY JUSTICE GOOD ORDER AND DISCIPLINE IN THE ARMY, REPORT TO HONORABLE WILBER M. BRUCKER, SECRETARY OF THE ARMY 87-89, 101-103 (1960). In the area of verbal acts, the Committee recommended the addition of a section (e) to Article 31 which would have read:

This Article extends only to oral and written statements and does not extend to —

(1) physical acts which do not require the active and conscious use of the mental faculties of an accused, or

(2) documents, tokens or papers furnished a person for identification or status determination purposes and the acts necessary to display them upon demand.

\textit{Id.} at 102-03. The Committee also recommended that the failure to give Article 31(b) warnings should not result in the exclusion of the "statement" from evidence.}

While Nowling can be distinguished on the grounds that physical surrender of the written pass was no different from surrender of marihuana or heroin, the basic question of identification remains. Few procedures are as common to military life as the requirement to identify oneself. Yet the identification requirement in the case of a criminal suspect is a difficult question not yet resolved. Whether the request is for a verbal statement or for an identification card, the usual military police request clearly is a request for a statement within the usual meaning of Article 31(b). However, the effect of Article 31(b) is completely unclear. There is some sup-
port for the conclusion that, as in the preliminary assistance cases, because an individual's identity is not generally an element of the offense, identification is not within the ambit of Article 31(b). Despite this, the issue has not as yet been fully resolved by the military courts.

The civilian courts are split with the majority rule being that *Miranda* does not cover "noninvestigative questioning" including a suspect's identity. The Ninth Circuit considered a similar question in *United States v. Camacho*. Camacho, an ex-soldier, had retained his identification card and was using it to illegally obtain services at a Naval station which was not open to the general public. The authorities, suspecting that Camacho was an ex-serviceman in illegal possession of an identification card, approached Camacho and asked him to identify himself. He replied by showing the identification card. The court of appeals held the Navy was acting properly in checking the individual's identity if only to ensure the base's security. The Ninth Circuit did not, however, discuss Article 31 at all. What, then is the answer to the identification quandry? As in the preliminary assistance cases, it is suggested that Article 31(b) warnings must be given before requesting identity when the individual's identity is involved in the offense. Thus in a desertion case where the suspect may be using an alias, the military police should warn a suspect before asking him his name. If, however, the suspect's identity is neither an element of the offense nor reasonably believed to be significant, the issue should be considered mere preliminary assistance not requiring Article 31(b) warnings.

The other major area in the verbal acts doctrine consists of the bodily fluid cases. As indicated earlier in this article, the Court of Military Appeals has consistently held that Article 31(b)'s right against self-incrimination is more extensive than the fifth amendment constitutional right. The primary means by which the Court of Military Appeals has extended Article 31 coverage is through its

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183 See, e.g., *United States v. Taylor*, 5 U.S.C.M.A. 178, 17 C.M.R. 178, 181 (1954) (dictum); *United States v. Jackson*, 1 C.M.R. 764, 767 (AFBR 1951) and cases cited therein. According to *Jackson*, "... it is well established that an admission by an accused of his identity ... is not 'an admission against interest' and consequently evidence of such an admission may be received by a court 'without proof of its voluntary nature'." Query the validity of this conclusion. See also *United States v. Zeigler*, 20 U.S.C.M.A. 523, 525-26, 43 C.M.R. 363, 365-66 (1971).

184 See note 148 supra. See also *United States v. Menichino*, 497 F.2d 935, 939-42 (5th Cir. 1974); *United States v. LaMonica*, 472 F.2d 580 (9th Cir. 1972); *Proctor v. United States*, 404 F.2d 819 (D.C. Cir. 1968); ALI MODEL CODE OF PREARRAIGNMENT PROCEDURE § 140.8(5) (1975).

186 See, e.g., note 166 supra.
interpretation of the term "statement." The court has held, for instance, that both handwriting and voice exemplars are the equivalents of verbal admissions and are therefore covered by Article 31(b). More difficult to rationalize, however, has been the bodily fluid problem. The issue arose soon after the enactment of the Uniform Code as to whether blood or urine samples could be obtained from a service member without giving Article 31(b) warnings. Prior to 1974, most military lawyers were under the impression that Article 31(b) warnings where, in fact, required prior to taking such samples for *criminal* investigatory purposes. However, the reason for the requirement of the warnings was totally unclear. While a number of cases had been decided that held Article 31(b) warnings to be required, the cases predated the decision of the United States Supreme Court in *Schmerber v. California* and it was generally believed that the Court of Military Appeals had simply adopted a constitutional interpretation of the fifth amendment contrary to that ultimately adopted by the Supreme Court. It was, therefore, to the great amazement of many in the military legal community that the Court of Military Appeals extended the scope of Article 31(b) in the case of *United States v. Ruiz* in 1974. Private Ruiz had been enrolled in a drug abuse program in Vietnam which specifically forbade use of the results of urinalysis tests for criminal prosecution purposes. Indeed, the pertinent regulation also forbade use of any results to discharge an individual with a less than general discharge. Ruiz was ordered to submit to a urinalysis test to determine the success of his participation in the program. He refused and was given a second order to submit. He subsequently was court-martialed for disobedience of a lawful order. On appeal, the Court of Military Appeals held that Ruiz was properly within his rights to refuse the order because it was in viola-

187 Id.
190 As already discussed, if bodily fluids are statements in the Article 31(b) sense, the suspect has an automatic right to refuse to cooperate. Further, Article 31 would likely bar involuntary sample acquisition despite United States v. Williamson, 4 U.S.C.M.A. 320, 15 C.M.R. 320 (1954).
194 Id.
tion of Article 31 and consequently illegal. The rationale of the Court in Ruiz is puzzling. As Ruiz could neither have been court-martialed had the sample proven positive, nor been discharged with a less than general discharge,\(^\text{196}\) it is difficult to discover any "incrimination" which would justify the assertion of Article 31.\(^\text{197}\) The likely basis of the court's holding is that it found that a general discharge from the United States Army smacked of incrimination because it may have much the same practical effect as a bad conduct discharge.\(^\text{198}\) Indeed, the court did cite a number of Supreme Court opinions\(^\text{198}\) involving discharge of public employees for refusal to testify. However, it is difficult to extend those cases to the Ruiz situation where there was no possibility of prosecution.

Prior to Ruiz, there had been some indication that Article 31 rather than the fifth amendment would itself be used to bar urine or blood tests for criminal prosecution purposes.\(^\text{200}\) The reasoning of the Court of Military Appeals in those cases appeared to be that whenever the individual was forced to create evidence that did not exist beforehand, or to make use of his mind to create the equivalent of a verbal intelligent utterance, Article 31(b) would be invoked. This was generally summed up by what was known as the passive-active test. If the evidence could be obtained from a passive suspect who did not affirmatively cooperate in any fashion, Article 31(b)

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\(^{196}\) A general discharge is one level "lower" than an honorable discharge. A recipient of a general discharge is entitled to the same veterans' benefits as the recipient of an honorable discharge. However, the public, particularly employers, may believe a general discharge to be a stigma. See generally Jones, The Gravity of Administrative Discharges: A Legal and Empirical Evaluation, 59 MIL. L. REV. 1 (1973) [hereinafter cited as Jones].

\(^{197}\) Major Dennis Coupe of The Judge Advocate General's School has suggested an interesting alternative theory. He suggests that underlying Ruiz is the court's decision to extend Article 31 to bodily fluids obtained for prosecutorial purposes. Assuming this, Ruiz could have refused to supply the urine sample but for the regulation which granted him immunity. The court could have decided that in view of this and in the absence of formal notice of immunity from criminal prosecution, Ruiz was in effect claiming a good faith belief in the right against self-incrimination. Thus, the court may have been requiring the Government to inform Ruiz of his immunity (to moot a possible affirmative defense in advance). While this interpretation is possible, the court's efforts to backstop its decision with fifth amendment decisions of the Supreme Court makes this theory unlikely. Using either of these theories still leaves one with the conclusion that the court believes bodily fluids to be "statements."

\(^{198}\) Jones, supra note 196. The Jones study confirms that a recipient of a general discharge may be prejudiced in obtaining future employment, although to a lesser extent than one who has received a bad-conduct discharge. See also Lance, A Punitive Discharge—An Effective Punishment?, THE ARMY LAWYER, July 1976, at 25.


\(^{200}\) See note 191 supra.
would not be involved.\textsuperscript{201} On the other hand, if the individual's cooperation was required to secure the evidence, the result was the equivalent of a verbal statement and Article 31(b) warnings were to be given. It is difficult to harmonize even this theory with the process of obtaining a blood or urine sample. The bodily fluids are, of course, already in existence. The subject's cooperation is physical only and his mind and its contents are totally irrelevant to the desired sample. Thus, the very justification that gave rise to the right against self-incrimination in England would appear to allow, as the Supreme Court itself determined in \textit{Schmerber}, taking blood or urine samples.

What then motivated the Court of Military Appeals to decide \textit{Ruiz} as it did? The court appears to have found that discharge from the armed services with a less than honorable discharge is the equivalent of incrimination. More importantly, it also seems to have determined finally that supplying a bodily fluid sample is a verbal act. Although to rule otherwise would have been to partially overrule a number of prior cases, it seems likely that the Court of Military Appeals could easily have determined that blood or urine samples fell under the due process clause of the fifth amendment, the fourth amendment, and paragraph 152 of the Manual for Courts-Martial, rather than Article 31. In light of the fact that no cases of major import had been decided since the \textit{Schmerber} case, this would not have damaged the court's adherence to the doctrine of stare decisis. It must be concluded then that \textit{Ruiz} was decided as it was basically as a determination of public policy.

Due process and search and seizure both involve balancing tests of one type or the other. Article 31 and the right against self-incrimination, however, are generally absolute matters;\textsuperscript{202} either a topic is covered within the ambit of the right and is therefore protected or it is not. By placing bodily fluid sampling under the right against self-incrimination, the court neatly guaranteed that military personnel would not be compelled to submit to blood or urine tests that could have any form of adverse consequence other than the possibility of being honorably discharged from the service. The judges may have presumed that once they had eliminated the major reason for requiring random urine analysis or blood testing, the service member would be spared the necessity of submitting to unnecessary and vexatious exams. It is questionable whether or


\textsuperscript{202} The only exceptions to this may be in the preliminary assistance areas in which a de minimis rule seems to be at work.
not this conclusion, in fact, follows.\textsuperscript{203} While the legislative history is unclear, it seems highly unlikely that Congress truly intended the right against self-incrimination in the military to be interpreted in such an expansive manner. Despite the probability of this conclusion, the Court of Military Appeals has consistently interpreted Article 31(b) in such a broad manner. One of the questions that faces the new court will be not only the continued vitality of the \textit{Ruiz} case but, indeed, the continued widening definition of the word "statement." \textit{Ruiz} could, for example, logically be extended to hold that an honorable discharge from the armed services under other than voluntary circumstances is akin to a general discharge and thus incrimination. Such a holding could significantly impair military administration and morale. This particular means of protecting a service member appears to be legally questionable, and the long term position of the Court of Military Appeals on the issue is an open question.

\section*{V. MIRANDA-TEMPIA WARNINGS}

While Article 31 supplies the unique element in military rights warnings, any survey of the law of warnings in the armed services would be incomplete if it did not at least touch upon the military's implementation of the \textit{Miranda} decision.\textsuperscript{204} As Article 31 is broader in scope than \textit{Miranda} in all areas save that of the right to counsel,\textsuperscript{205} it is the right to counsel portion of \textit{Miranda} which is critical to military practice.

\subsection*{A. WHAT WARNINGS ARE REQUIRED?}

The \textit{Miranda} warnings may be phrased:

\begin{itemize}
  \item You have the right to remain silent;
  \item Any statement that you do make may be used as evidence against you at trial;
\end{itemize}

\textsuperscript{203} See, e.g., United States v. McFarland, 49 C.M.R. 834 (ACMR 1975) in which Judge Alley affirmed the conviction of McFarland for refusing to give a urine sample. Judge Alley distinguished \textit{Ruiz} on the grounds that McFarland was suspected (and enrolled in a drug control program) only of marihuana usage which could not be detected by urinalysis. The judge found that the (in one sense) useless urinalysis had a proper military purpose in that it tended to deter improper drug use.

\textsuperscript{204} See generally Hansen, \textit{Miranda and the Military Development of a Constitutional Right}, 42 Mil. L. REV. 55 (1968) [hereinafter cited as Hansen].

You have a right to consult with a lawyer and to have a lawyer present during this interrogation and if you cannot afford an attorney, one will be appointed for you free of charge.\footnote{Miranda v. Arizona, 384 U.S. 436, 444.}

There are other warnings given by police which have their origins in \textit{Miranda} but which are not expressly required. Notable among these is the right to stop making a statement at any time.\footnote{Id. at 444-45 (semble).} Prior to 1974, the right to counsel warnings of \textit{Miranda} had been incorporated into military practice in a peculiarly military fashion. Incorporated not only by the decision of the United States Court of Military Appeals in \textit{United States v. Tempia},\footnote{16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).} but also by paragraph 140a(2) of the Manual for Courts-Martial,\footnote{The Manual states:

An accused or suspect in custody has a right to have at the interrogation civilian counsel provided by him (or, when entitled thereto, civilian counsel provided for him) or, if the interrogation is a United States military interrogation, military counsel assigned to his case for the purpose. MCM, 1969, para. 140a(2).} the right to counsel statement that military interrogators felt obliged to recite, and indeed which is normally read to individuals today is:

You have a right to talk to a lawyer before and after questioning or have a lawyer present with you during questioning. This lawyer can be a civilian lawyer of your own choice at your own expense or a military lawyer detailed for you at no expense to you. Also, you may ask for a military lawyer of your choice by name and he will be detailed for you if his superiors determine he is reasonably available.\footnote{U.S. Dep’t of Army, GTA 16-9-2 (July 1972) (rights warning card).}

No specific authority exists anywhere for the part of the warning that suggests that an individual may request specific military counsel by name and that that individual will be supplied free of charge if reasonably available. This aspect of the warning appears to come from the standard rights to counsel given an individual pending trial by court-martial\footnote{See UCMJ, art. 38(b), 10 U.S.C. § 838(b) (1970).} and even then that right is subject to certain specific limitations.\footnote{See United States v. Jordan, 22 U.S.C.M.A. 164, 46 C.M.R. 164 (1973); United States v. Johnson, 47 C.M.R. 885 (CGCMR 1973).} However, until 1974 there was no doubt that the Manual for Courts-Martial had adopted the \textit{Tempia
decision in such a fashion as to supply all military personnel with an absolute right to free military counsel regardless of their economic situation. The Court of Military Appeals held that this assumption was erroneous in the case of United States v. Clark.\textsuperscript{213} In Clark, the military interrogator had given a Miranda warning which failed to meet the requirements of paragraph 140a(2).\textsuperscript{214} The Court of Military Appeals, interpreting that paragraph of the Manual for Courts-Martial, nullified its clear and plain meaning and held that the writers of the Manual had intended to incorporate only the decision in Miranda and not to extend the Miranda rights to counsel in any way.\textsuperscript{215} The Clark case appears erroneous\textsuperscript{216} and suspect. The court in Clark also failed to consider the difficulty of applying a pure Miranda standard to military practice. Except for the expanded legal assistance program, rights to legal assistance in the military cut across all ranks and all economic classifications. If the pure Miranda warning were to be given in the military, someone would be compelled to determine whether or not the individual claiming indigency was in fact too poor to retain a civilian attorney. Notoriously difficult within civilian practice, this would be a good deal more difficult in the military unless arbitrary pay grades were to be used.\textsuperscript{217} Despite this, the Clark case remains a valuable precedent for the prosecutor whose witness indicates that he failed to comply fully with the military rights warnings. Due to doubt of Clark's inherent validity, few prosecutors suggest that routine counsel warnings should be truncated and replaced with a pure Miranda warning.

There is some argument that the military has in effect created a new right to counsel. The standard rights warnings given in military practice\textsuperscript{218} appear in one sense to be broader than any requirement in either the Code or Manual, and broader than the re-

\textsuperscript{214} See note 209 supra.
\textsuperscript{216} See Judge Duncan's dissent in United States v. Clark, 22 U.S.C.M.A. at 571-75, 48 C.M.R. at 78-82. Military reference sources ambiguously state that paragraph 140a(2) sets forth "rules [which] are a result of the decision in Miranda. . . ." which is substantially different from saying that they are identical to the Miranda rules. U.S. DEPT OF ARMY. PAMPHLET NO. 27-2, ANALYSIS OF CONTENTS MANUAL FOR COURTS-MARTIAL, UNITED STATES 1969, REVISED EDITION 27-28 (1970).
\textsuperscript{217} Procedural details to enforce this system can be imagined. The suspect could be required to file a Pauper's Oath, which could be difficult to impeach in light of the intent behind the Privacy Act, Act of Dec. 31, 1974, Pub. L. 93-579, 88 Stat. 1896. And even if a suspect perjured himself in his Pauper's Oath, a court-martial for having given a false official statement would appear to be an unnecessary source of useless litigation that is best ignored.
\textsuperscript{218} See text accompanying note 210 supra.
quirements of *Miranda* in their failure to consider an individual’s financial resources. May the defense successfully argue that the governmental adoption of rights warning cards and certificates—forms that are required to be read whenever possible—have expanded the right to counsel as expressed in the Manual for Courts-Martial and created a new right? Clarification of this issue awaits a case with the required factual circumstances.

**B. WHO MUST WARN?**

As indicated earlier police officials or individuals performing police duties in civilian jurisdictions are required to give *Miranda* warnings. In the military, the same individuals who must give Article 31(b) warnings must give *Miranda* warnings if *Miranda* is applicable to the situation, in other words, if a custodial interrogation is taking place. There seems no reason to believe that any difference exists between civilian and military practice as to who must give *Miranda* warnings.

**C. WHO MUST BE GIVEN *MIRANDA* WARNINGS?**

Both *Miranda* and its military analog, *United States v. Tempia*, require that *Miranda* warnings be given to suspects undergoing custodial interrogation. The difficulty in practice is determining if a suspect is in fact in custody when he is being questioned. A number of different tests have been adopted by various jurisdictions. These include focus, subjective intent of the police officer, the subjective belief of the person being questioned, and the objective test. Under the focus test, which has its origins in *Escobedo v. Illinois* the question to be asked is whether the police have so narrowed the investigation process so as to “focus” on a particular suspect. In the now famous footnote 4 of the *Miranda* opinion the Supreme Court attempted to indicate that the *Miranda* requirement that rights be given during custodial interrogations was what it had meant earlier by the term “focus” in the *Escobedo* case. This seems unlikely although possible.

It is conceivable that focus remains a viable rule in cases where

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219 See Section III.C. supra.
220 See MCM, 1969, para. 140a(2).
223 384 U.S. at 444 n.4.
224 Clearly, Escobedo was in a custodial situation when interrogated. See Mr. Justice Goldberg’s opinion for the Court.
custodial interrogation is lacking but focus exists.\textsuperscript{225} It is beyond the scope of this article to discuss with any depth the various tests that have in fact been enunciated by civilian courts to determine the existence of custody. Within military practice, however, the Court of Military Appeals has apparently adopted a modified objective belief test. Under this test, set forth in dictum in United States v. Temperly,\textsuperscript{226} the primary issue is: was the suspect objectively in a custodial situation? The court's language would seem to indicate that this objective test is modified to some extent by the individual's own subjective experience.\textsuperscript{227} It is theoretically possible to have a case in which a suspect was objectively in custody but did not himself think so. In such a case the individual being questioned would not be subject to any form of psychological coercion for he would not believe himself deprived of his liberty.\textsuperscript{228} While this test, if it is indeed the military test, appears preferable to either the subjective intent of the accused or the subjective intent of the police officer, both of which are particularly susceptible to the bias of the individual witness, the military test is not fully in accord with the American Law Institute Model Code of Prearraignment Procedure, which would have the rights attach before any questioning of a suspect takes place at a police station.\textsuperscript{229} However, the military rule seems eminently satisfactory.

\textbf{D. EFFECTS OF THE WARNING REQUIREMENTS}

The exclusionary rule is a basic part of military jurisprudence having its origins both in the Miranda decision and in Article 31(d)

\begin{footnotesize}
\textsuperscript{225} But see United States v. Gardner, 516 F.2d 334, 339-40 (7th Cir. 1975).
\textsuperscript{227} After seeming to reject the opportunity of deciding the issue on the basis of the objective intent of the interrogating officers because it would "go beyond one of the reasons for the Miranda-Tempia requirements [which was to counter] the potential for coercion inherent in custodial situations" the court distinguished an earlier case, United States v. Phifer, 18 U.S.C.M.A. 508, 40 C.M.R. 220 (1969), because "[u]nder either an objective or subjective test, a person [like Phifer] is subjected to a more significant deprivation of freedom than a person [like Temperly]." United States v. Temperly, 22 U.S.C.M.A. at 386, 47 C.M.R. at 238. The court concluded that:

The purpose of Miranda-Tempia was to protect persons against abusive interrogations. Where the accused is still free from police control, we see no interest that would be served by extending to him a right designed only to protect him against abuse of that control.

\textit{Id.} The court never clearly defined whether the determination of "freedom from police control" should be determined objectively, or in the subjective view of the individual interrogated. \textit{See also} United States v. Dohle, 24 U.S.C.M.A. 34, 36-37, 51 C.M.R. 84, 86-87 (1975).

\textsuperscript{228} A rule of fairness might apply in part to prevent improper police conduct—one of the traditional underpinnings of the exclusionary rule.

\textsuperscript{229} \textit{ALI Model Code of Pre-Arraignment Procedure} § 110.1(2) (1975).
\end{footnotesize}
of the Uniform Code of Military Justice. Failure to comply with the Article 31(b) warning requirements automatically triggers the exclusionary rule found in Article 31(d) which forbids admission into evidence at any criminal proceeding of any statements taken in violation of the Article. Under military law, knowledge of one’s rights is insufficient to cure a defect in the warnings. This conclusion would appear to parallel the reasoning that the Supreme Court followed in announcing the *Miranda* decision—if the atmosphere of a custodial interrogation may be considered as presumptively coercive, even an individual fully aware of his rights needs to be reminded of them. Of course, Article 31(d)’s prohibition concerns only the warning requirements found in Article 31(b) and not the *Miranda* requirements. However, *Miranda*’s own exclusionary rule and the Manual for Courts-Martial combine to extend the military exclusionary rule into the right to counsel area.

There are significant differences, however, between the military and civilian exclusionary rules. The military, like civilian jurisdictions throughout the nation, has both the primary exclusionary rule and the fruit of the poisonous tree or derivative evidence rule as well. However, the military rule is absolute while the developing civilian law takes cognizance of a number of major exceptions. Note, for example, that under the Supreme Court’s recent decisions statements obtained in violation of *Miranda v. Arizona* may be used for purposes of impeaching an accused who testifies at trial. The Court of Military Appeals has rejected this position, basing its conclusion on Article 31, and has indicated that statements taken in violation of Article 31 are inadmissible for any purpose whatsoever. This does allow an accused who has given a complete though improperly warned confession prior to trial to take the stand and perjure himself without any possibility of impeachment or perjury prosecution. Again, the court’s reasoning is presumably that Congress created a statutory right greater in

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scope than the constitutionally demanded minimum rights. The court has certainly indulged in this form of reasoning in a number of areas.

The Supreme Court has, for example, recognized the possibility of applying the harmless error rule to improperly admitted confessions at trial, but the Court of Military Appeals has strongly indicated that it will not apply the harmless error rule to cases involving an Article 31 violation. The court has stated that where evidence complained of is in violation of the statutory provision "The test to be applied and the remedy tendered may be more beneficial to the accused than otherwise under standards enunciated by the United States Supreme Court." Recently, the Supreme Court acknowledged that where an accused refused police efforts at interrogation, the law enforcement officers could properly question the accused at a later time about an entirely new offense not considered at the time of the first interrogation.

The position of the Court of Military Appeals is unclear in this area. It seems likely that the court would recognize the police or command right to ask an individual to reconsider his prior decision. Such an attempt would be more likely to succeed where the second attempt involves an offense completely unrelated to the first. However, it does seem likely that the court would hold any resulting evidence inadmissible if any form of coercion or strong persuasion were used to obtain consent at the second or subsequent interrogation. How many attempts to convince a suspect to change his mind and make a statement will be allowed is unclear and the Court of Military Appeals has indicated it will decide the issue on a case by case basis.

The problem of subsequent interrogations has plagued both the civilian and the military courts alike. The general rule is, of course, that no suspect or accused may be compelled to make a statement against his will and that he must make a knowing, intelligent waiver of his rights before a statement will be admissible at trial. Frequently military investigators determine that they have improperly complied with the warning requirements of Article 31 or Miranda. They usually then endeavor to reinterrogate the accused,

236 Id.
239 See United States v. Collier, 24 U.S.C.M.A. 183, 51 C.M.R. 429 (1975) in which Judge Cook (Judges Fletcher and Ferguson concurring in the result) attempted to adopt an expanded view of Mosley.
hoping to correct the error at the first interrogation. While the Court of Military Appeals has indicated that it will look at each case to determine whether or not the statement given at the second or subsequent interrogation was in fact voluntary and will look to factors such as elapsed time, the presence or absence of new rights warnings, and the specific physical circumstances surrounding the second or later interrogation, the court has also stated quite clearly that

... only the strongest combination of these factors would be sufficient to overcome the presumptive taint which attaches once the Government improperly has secured incriminating statements or other evidence... In addition to rewarning the accused, the preferable course in seeking an additional statement would include advice that prior illegal admissions or other improperly obtained evidence which incriminated the accused cannot be used against him.\textsuperscript{242}

Thus, within military practice at least, not only must the warnings be properly complied with, but a failure to comply with Article 31 and \textit{Miranda-Tempia} creates a prosecution burden that is virtually impossible to overcome.

\textbf{VI. THE FUTURE OF THE WARNING REQUIREMENTS}

The Supreme Court seems to have embarked on a course of consistently undercutting its decision in \textit{Miranda}. Certainly recent cases\textsuperscript{243} indicate quite strongly that \textit{Miranda}'s significance is increasingly on the wane. While it seems probable that the Court will never explicitly overrule \textit{Miranda}, it seems likely that it will no longer require that a failure to comply with the \textit{Miranda} warning requirements will in itself result in the exclusion of any resulting evidence. If this is correct, the \textit{Miranda} decision will continue to retain some vitality; police will still be required in one sense to give \textit{Miranda} warnings. However, in the event that the police fail to comply fully with \textit{Miranda}, that failure will constitute simply one factor amongst many in the determination of the voluntariness of any resulting statement. In short, the Supreme Court is likely to return to the pre-\textit{Miranda} days when voluntariness in the common law meaning of the term was the key issue for a trial judge to determine prior to admitting confessions and admissions into evidence.\textsuperscript{244}


\textsuperscript{244} See generally Hansen, \textit{supra} note 204.
Such a decision would not necessarily change military law. That Congress enacted the forerunner of Article 31 in 1948 is a fact not easily ignored. It is improbable that the United States Congress would at this late date attempt to nullify a statutory right of the service member although there would be no constitutional inhibition against doing so. Nullification of Article 31 would simply leave the service member with his fifth amendment protections. Although it was unclear that the constitutional right against self-incrimination applied to the serviceman even in 1951, decisions of the United States Court of Military Appeals make it apparent that the court's view is that this right, among others, does apply today. Thus, elimination of Article 31 would result in a distinct change in the rights of a service member but not necessarily an unacceptable one.

It is impossible to appraise the effects that Article 31(b) rules may have on criminal investigations generally. There is a definite, although difficult to document, conviction among military lawyers that the rights warnings in fact have no significant effect whatsoever on criminal investigations and that criminal suspects frequently make statements regardless of the warnings. If this be the case, it should not be particularly surprising. If, as *Miranda* suggests, custodial situations are inherently coercive and engender in a suspect an intense desire to cooperate with interrogators to make things go easier for him, it can be suggested that regardless of any rights warnings, the suspect continues to believe that things will be worse for him if he does not cooperate. While one could suggest that this feeling should be encouraged in order to increase the number of admissions which could lead to independent evidence of an offense, it may well be that this is additional evidence to support the proposition that confessions and admissions should be banned from criminal trials except under the most unusual circumstances.

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246 At a minimum the following changes would result:

- Only suspects in custody would be warned;
- Suspects would not be warned of the specific offense violated;
- The scope of the right against self-incrimination would narrow sharply and would no longer include blood and urine, voice, or handwriting exemplars.

247 A number of civilian studies evaluating *Miranda* suggest that the negative effects of the decision have been minimal. See Note, Interrogations in New Haven: The Impact of Miranda, 76 YALE L.J. 1521 (1967); Note, A Postscript to the Miranda Project: Interrogation of Draft Protestors, 77 YALE L.J. 300 (1967).

248 The fear of unreliable confessions could be met by allowing use only of derivative evidence with independent validity.
Any overview of the rights warnings situation in military law would have to indicate that the system apparently works. Certainly no hard evidence appears to exist to suggest that the Article 31(b) requirements as augmented by *Miranda* cause any particular difficulties to military criminal investigators. Although confessions and admissions are ruled inadmissible because of erroneous rights warnings and "unnecessary" acquittals may result. However, the general use of standard warning cards and waiver certificates during military interrogations would support the perceived view that most military confessions are voluntary and admissible.

While the current Supreme Court's apparent desire to undercut *Miranda* seems at odds with the *Miranda* Court's assessment of human nature, the congressional decision to require rights warnings because of the inherent coercion involved in a military interrogation appears valid. The Article 31(b) warnings are, in terms of content, fair and include notice of the offense, a requirement not found in *Miranda*; notice that the individual has the right to be silent; and notice that if he chooses to speak there may well be adverse consequences. The problems that exist with the utilization of the rights warnings within military practice do not appear to go to the essential issue of whether or not there ought to be such warnings, but rather address specific problems that could be resolved. All in all, the Article 31(b) warnings appear to be a workable solution to ensure the reliability of military confessions and admissions and to implement one of the fundamental rules of Anglo-American jurisprudence. It would be particularly ironic if in America's bicentennial year, the military, which ensured its members greater procedural protections than the civilian community at large in 1948 and 1951, is left at the forefront of American civil rights as the Supreme Court effectively nullifies, after one decade, the general expansion of these rights to all citizens.

249 Virtually all of these problems could be resolved by educating police and public alike to the reasons for *Miranda* and Article 31, and their employment. Simplification of the warnings would also be useful.