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PARTIAL PROTECTION FROM SELF-INCRIMINATION IN MILITARY JUSTICE

On May 1, 1966, Airman Third Class Michael Tempia was arrested on suspicion of committing a violation of the Uniform Code of Military Justice¹ at Dover Air Force Base. He was brought before an investigator of the Office of Special Investigations and, prior to interrogation, was warned that he had the right to remain silent and that he could consult with legal counsel. Tempia indicated that he desired counsel and the interview was terminated. Two days later Tempia again was called to appear at the OSI office and again was advised of his rights. An interview was set up by the investigator with the Base Staff Judge Advocate and Tempia was sent to that office. During the ensuing discussion that officer, a trained lawyer, informed Tempia that a lawyer-client relationship could not exist between the two since it would disqualify the officer from later acting in his capacity as the Staff Judge Advocate. The lawyer did advise Tempia of his right to remain silent and that the suspect could retain civilian counsel during the investigation, but that a military lawyer would not be made available for the interrogation. Tempia acknowledged his understanding of his right of silence by signing a written form. On his return to the OSI office Tempia stated that "They didn't do me no good." He was again advised of his right of silence but proceeded to make a confession of his role in the offense.

Tempia's general court-martial took place on July 14, 1966, the day after *Miranda v. Arizona*² was decided by the Supreme Court. During the trial, defense counsel sought to exclude the confession on the grounds that it was obtained without the presence of a lawyer as required by the Supreme Court. The motion was overruled and Tempia was found guilty. A board of review sustained the findings but the case was certified to the United States Court of Military Appeals by the Judge Advocate General, United States Air Force, on the issue of the applicability of *Miranda* to the administration of military justice.³

On April 25, 1967, the Court of Military Appeals reversed the conviction, thereby requiring the government to provide military personnel

1. Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (1964 ed.).

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

3. The facts of the case are as stated in the majority opinion of Judge Ferguson.

with trained legal counsel, regardless of ability to retain civilian counsel, during interrogations.⁴

Through its decision the Court of Military Appeals has brought into question the effectiveness of military counsel—a term denoting officers untrained in the law—appearing for the defense before military tribunals. At present, trained legal counsel are required to represent the defendant only before general courts-martial or where the trial counsel is a qualified lawyer.⁵ The resultant problem can be illustrated by the corollary of a statement in the *Miranda* opinion: For the court to protect the right of silence during interrogation and not protect that right at an equally critical stage of the adversary proceedings—the trial—is to offer no protection at all.⁶ This discussion will attempt to point out the contradictions of this example of judicial legislation as it affects the administration of military justice.

EVOLUTION OF THE AMERICAN MILITARY JUSTICE SYSTEM

Before one can appreciate the effect that *Tempia* may have on the administration of military justice, it is useful to understand the term “military counsel” in an historical context. While not extensive, the following outline of the evolution of this concept will illustrate the traditions which the present decision seeks to overcome.⁷

As a result of the European experience, there was great concern in the young American nation over the presence of a standing army and its possible influence over the government.⁸ As an outgrowth of this concern, the military was placed under the regulatory control of Congress⁹ and the legislation which provided for the government of the Army was given only passing attention. The Continental Congress, whose members were largely responsible for the later adoption of the

4. *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

5. Note 21 *infra*.

6. 384 U.S. at 477.

7. See Judge Kilday's majority opinion in *United States v. Culp*, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963); Wiener, *Courts-Martial and the Bill of Rights: The Original Practice*, 72 HARV. L. REV. 1 and 266 (1958); Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957).

8. This position resulted in Alexander Hamilton's strong reply in favor of a national armed force in *The Federalist*. *The Federalist* No.'s. 23-26 (Hamilton).

9. “Congress shall have the Power. . . . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years. . . . To make Rules for the Government and Regulation of the land and naval Forces.” U.S. CONST. art. I, § 8.

Bill of Rights, enacted substantially the same procedures for the administration of military justice as were then in force in the British Army.¹⁰ These procedures failed to recognize that the accused was an interested party before a court-martial, or that he might possess certain rights which required protection.¹¹ It is significant to note that when the accused did receive legislative recognition ten years later, it was to extend to him some protection for his freedom from involuntary self-incrimination.¹² Here, it should be noted that the accused did not receive his protection from an attorney but from the military judge advocate, who retained the primary duty of prosecuting the case for the government.¹³ This legislation seems to have satisfied Congress for the same procedure was reenacted without change as late as 1873.¹⁴

As the system of military jurisprudence evolved, the Judge Advocate became firmly established as the proper instrument for protecting the accused before a court martial. The Supreme Court had occasion to note this situation, and its approval of the system can be inferred from that body's statement that military courts-martial operate independently of the judicial powers of the United States as defined by the Constitution¹⁵ and, further, that "military law is itself due process."¹⁶ Con-

10. "There was extant one system of articles of war, which had carried two empires to the helm of command, the Roman and the British, for the British Articles of War were only a literal translation of the Roman. . . . I was therefore for reporting the British Articles *totidum verbis*. . . . The British Articles were accordingly reported." 3 ADAMS, WORKS OF JOHN ADAMS 93 (1850), quoted in Morgan, *The Background of the Uniform Code of Military Justice*, 28 MIL. L. REV. 17 at 18 (1965).

11. The following section of the early Articles of War points out the singular attention given the prosecution to the exclusion of the interests of the accused. There was no comparable section assigning representation for the accused. "The judge-advocate general, or some person deputed by him, shall prosecute in the name of the United States of America." 5 *Journals of the Continental Congress* § XIV, art. 3 at 801 (1776).

12. "The judge-advocate, or some person deputed by him, or by the general or officer commanding the Army, detachment, or garrison, shall prosecute in the name of the United States, but shall so far consider himself as counsel for the prisoner, after the said prisoner shall have made his plea, as to object to any leading question to any of the witnesses, or any question to the prisoner, the answer to which might tend to criminate himself." Act of April 10, ch. XX, art. 69, 2 Stat. 367 (1806).

13. "Plainly, the foregoing [art. 69 of 1806] reflects the Blackstonian common law notion of the judge as counsel for the prisoner, rather than the sixteenth amendment's guarantee of the assistance of counsel." Wiener, *supra* note 7 at 22.

14. Articles of War, ch. 5, § 1342 art. 90, 18 Stat. 238 (1873).

15. "These provisions [U.S. CONST. art. I, § 8] show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3rd article of the Constitution defining the judicial power of the United States; indeed that the two powers are entirely inde-

temporary writers observed that, although some judge advocates would allow counsel to appeal in the capacity of *amicus curiae* for the accused, the presence of counsel was at all times a privilege rather than a right of the "prisoner."¹⁷

In 1916 legislation was enacted which expressly granted to an accused before a military tribunal the right to be represented by counsel.¹⁸ If the accused desired counsel the court could not deny him that right; if he could not afford counsel the judge advocate retained the responsibility of protecting the accused from over-zealous prosecution. In 1920 a further change in the Articles of War granted the military accused the right to be represented by appointed military counsel if he was unable to retain civilian counsel.¹⁹ Since military officers traditionally were qualified to appear before, or be appointed to, military tribunals by authority of their commission, the term "appointed military counsel" was taken to mean any military officer regardless of his level of legal training.²⁰ It can be seen that the duty of appointed counsel was to act as a foil for excessive pressure from the prosecution rather than to test aggressively the elements of the prosecution's case.

Following World War II, Congress, as part of a drive to unify the armed forces, conducted extensive studies of the status of military justice; the result is the present Uniform Code of Military Justice.²¹ From this congressional reappraisal certain definitive requirements are placed on the armed forces which increase the accused's protection from involuntary self-incrimination during a court-martial. One of the results of the legislation is to establish the unqualified right of the ac-

pendent of each other." *Dynes v. Hoover*, 61 U.S. (20 How.) 65 at 79 (1858); *see also Burns v. Wilson*, 346 U.S. 137 (1953).

16. *Reaves v. Ainsworth*, 219 U.S. 296 at 304 (1911).

17. "Courts-martial are particularly guarded in adhering to the custom which obtains, of resisting every attempt on the part of counsel to address them; a lawyer is not recognized by a Court-Martial, though his presence is tolerated, as a friend of the prisoner, to assist him by advice in preparing questions for witnesses, in taking notes and shaping his defense." *MACOMB, THE PRACTICE OF COURTS-MARTIAL*, § 93 at 47 (1840) quoted in *Wiener, supra* note 7 at 38.

18. Act of June 3, 1916, ch. 418, § 1342, art. 17, 39 Stat. 650.

19. Act of June 4, 1920, ch. 227, § 52, art. 17, 41 Stat. 787.

20. "From the earliest days of our military establishment, all officers of the military have been recognized as qualified to serve as counsel before courts-martial. Ability to discharge duties on courts-martial, consonant with his rank, has always been considered as one of the qualifications of a military officer." *United States v. Culp*, 14 U.S.C.M.A. 199 at 203, 33 C.M.R. 411 at 418 (1963).

21. Uniform Code of Military Justice, hereafter cited as UCMJ, 10 U.S.C. §§ 801-940 (1964) ed.).

cused appearing before a general court-martial to have trained legal counsel appointed for his defense.²² A second element puts the legal qualifications of counsel for the accused before inferior courts-martial in parity with the qualifications of the trial counsel.²³ An examination of the statute indicates that Congress has retained the view that military officers are qualified to appear in the capacity of counsel before military courts so long as the court before which they appear lacks the authority to try certain crimes²⁴ and impose certain punishments.²⁵

In its effort to provide adequate protection for the accused's right to remain free from involuntary self-incrimination, Congress established certain procedural standards which serve to define this basic principle. Compiled in Article 31²⁶ of the Code, these provisions require the government to recognize and respect the accused's right to silence during the proceedings against him.²⁷ Specifically, the Article requires that no

22. UCMJ art. 27 (b), 10 U.S.C. § 827 (b) (1964 ed.) "Trial counsel or defense counsel detailed for a general court-martial—

(1) must be a judge advocate of the Army or Air Force, or a law specialist of the Navy or Coast Guard, who is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; or must be a member of the bar of a Federal court or of the highest court of a State; and

(2) must be certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member."

23. UCMJ art. 27 (c), 10 U.S.C. § 827 (c) (1964 ed.) "In the case of a special court-martial—

(1) if the trial counsel is qualified to act as counsel before a general court-martial, the defense counsel detailed by the convening authority must be a person similarly qualified; and

(2) if the trial counsel is a judge advocate, or a law specialist, or a member of the bar of a Federal court or of the highest court of a State, the defense counsel detailed by the convening authority must be one of the foregoing."

24. UCMJ art. 19, 10 U.S.C. § 819 (1964 ed.) "[S]pecial courts-martial have jurisdiction to try persons subject to this chapter for any noncapital offense made punishable by this chapter and, under such regulations as the President may prescribe, for capital offenses."

25. UCMJ art. 19, 10 U.S.C. § 819 (1964 ed.) "Special courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dishonorable discharge, dismissal, confinement for more than six months, hard labor without confinement for more than three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for more than six months. A bad conduct discharge may not be adjudged unless a complete record of the proceedings and testimony before the court has been made."

26. UCMJ art. 31, 10 U.S.C. § 231 (1964 ed.).

27. For judicial interpretation of the congressional intent and of the proper application of article 31 see *United States v. Welch*, 1 U.S.C.M.A. 402, 3 C.M.R. 136 (1952); *United States v. Josey*, 3 U.S.C.M.A. 767, 14 C.M.R. 185 (1954); *United States v. Johnson*, 5 U.S.C.M.A. 795, 19 C.M.R. 91 (1955); *United States v. Williams*, 8 U.S.C.M.A. 443,

member of the military shall compel another to make self-incriminating statements.²⁸ Before the suspect can be interrogated he must be warned of the crime he is suspected of having committed, of his right to remain silent, and that if he does speak, what he says may be used in a subsequent trial by court-martial.²⁹ If the government succeeds in obtaining a statement in violation of these provisions, that statement is inadmissible in any subsequent trial,³⁰ and the persons who obtained the statement, either through coercion or an unlawful inducement, have themselves violated the Code.³¹ Through the provisions of the Manual for Courts-Martial,³² the procedural effects of the Article are extended to protect the accused through the exclusion of confessions illegally obtained³³ and also by the continued protection of the accused's rights while testifying.³⁴

To insure adherence to the spirit as well as the letter of the Uniform Code of Military Justice, Congress created the United States Court of Military Appeals³⁵ with final reviewing authority vested in that body

24 C.M.R. 253 (1957); *United States v. Souder*, 11 U.S.C.M.A. 59, 28 C.M.R. 283 (1959); *United States v. Kemp*, 13 U.S.C.M.A. 89, 32 C.M.R. 89 (1962).

28. UCMJ art. 31 (a), 10 U.S.C. § 831 (a) (1964 ed.) "No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him."

29. UCMJ art. 31 (b), 10 U.S.C. § 831 (b) (1964 ed.) "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." *See also* *United States v. Kemp*, 13 U.S.C.M.A. 89, 32 C.M.R. 89 (1962).

30. UCMJ art. 31 (d), 10 U.S.C. § 831 (d) (1964 ed.) "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." *See also* *United States v. Williams*, 2 U.S.C.M.A. 430, 9 C.M.R. 60 (1953), *United States v. Johnson*, 5 U.S.C.M.A. 795, 19 C.M.R. 91 (1955).

31. UCMJ art. 98, 10 U.S.C. § 898 (1964 ed.) "Any person subject to this chapter who—

(2) knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused; shall be punished as a court-martial may direct."

32. Exec. Order No. 10214, *Manual for Courts-Martial, United States, 1951* hereafter cited as MCM, 1951.

33. MCM, 1951, para. 140 *a*. "Confessions and admissions"; *cf.* MCM, 1951, para. 149 "Examination of Witnesses", and *United States v. Howard*, 5 U.S.C.M.A. 186, 17 C.M.R. 186 (1954).

34. MCM, 1951, para. 53 *b*. "Explanation of rights of accused."

35. UCMJ art. 67, 10 U.S.C. § 867 (1964 ed.) "Review by the Court of Military Appeals."

over all cases reviewed by the boards of review of the respective services, except sentences of death or sentences which are imposed against a general or a flag officer.³⁶ Acting in its appellate capacity, the court has closely monitored and often corrected the government's application of Article 31 in all stages of the proceedings against an accused. In the sixteen years of its existence, the court has handed down a series of decisions on the issue of the right to counsel during the investigative stages which have assured the accused of his right to remain silent.³⁷ Although the decisions have paralleled the holdings of the Supreme Court in this area, they have been based explicitly on the intent of Congress as that body has seen fit to enact legislation "for the Government and Regulation of the land and naval forces."³⁸

MILITARY COUNSEL REQUIREMENTS PRIOR TO THE *Tempia* DECISION

The position of the Court of Military Appeals prior to *Tempia* can be summarized as follows: (1) It was not necessary for the government to appoint counsel for the accused until charges had been filed against him.³⁹ (2) Although not required to appoint counsel during a preliminary investigation, the government could not deny the accused the right to consult with counsel.⁴⁰ (3) It was not necessary that counsel be present with the accused during the interrogation, nor was it necessary to inform the accused that he had the right to consult counsel during the questioning in order to insure his right to remain silent.⁴¹

The reasoning of the court was made clear in *United States v. Wimberly*.⁴² Recognizing the holding in *Escobedo v. Illinois*,⁴³ the court stated that both *Escobedo* and the proper application of Article 31 were designed, within their respective jurisdictional limits, to extend to the accused the free exercise of his right to remain silent. Speaking for the court, Chief Judge Quinn said:

This Court has always been alert to the accused's need for counsel at all stages of the proceedings against him. We are not persuaded,

36. UCMJ art. 67(b), 71(a) & (b); 10 U.S.C. §§ 867 (b), 871 (a) & (b) (1964 ed.)

37. See *United States v. Clay*, 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951); *United States v. Hernandez*, 4 U.S.C.M.A. 465, 16 C.M.R. 39 (1954); *United States v. Gunnels*, 8 U.S.C.M.A. 130, 23 C.M.R. 354 (1957); *United States v. Culp*, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963); *United States v. Wimberly*, 16 U.S.C.M.A. 3, 36 C.M.R. 159 (1966).

38. U. S. Const. art. I, § 8.

39. 8 U.S.C.M.A. 130, 23 C.M.R. 354 (1957).

40. 8 U.S.C.M.A. 441, 24 C.M.R. 251 (1957).

41. 16 U.S.C.M.A. 3, 36 C.M.R. 159 (1966).

42. *Id.*

43. 378 U.S. 478 (1964).

however, that the right to counsel must be extended to include the investigative process. . . . Nothing in the Uniform Code or in the decisions of this Court, and nothing in our experience with military methods of interrogation, indicates that the only feasible way to give maximum effect to the Constitutional right to the assistance of counsel is that the accused have counsel beside him during police questioning—We adhere, therefore, to our previous decision, and hold that an incriminating statement given by the accused in a police interrogation, which meets the requirements of Article 31, is admissible in evidence, even though the accused is not informed he has the right to consult counsel during the questioning.⁴⁴

It was with this precedential background that *Miranda v. Arizona*⁴⁵ made its entrance on the military scene. With its decision in *Miranda* the Supreme Court brought the right to counsel during interrogation within the ambit of constitutional due process.⁴⁶ As stated by the Court the presence of counsel is specifically required “to assure that the individual’s right to choose between silence and speech remains unfettered throughout the interrogation process.”⁴⁷ No longer does a cursory warning by the police suffice to protect the prosecution from a later charge that the accused has been denied his constitutional rights.⁴⁸ In answer to the obvious question of what would be an acceptable showing of a clearly voluntary waiver of the accused’s right of silence, the Court dictated the so-called “*Miranda* formula.”⁴⁹

44. 16 U.S.C.M.A. at 4, 36 C.M.R. at 160.

45. 384 U.S. 436.

46. “Accordingly, we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation.” 384 U.S. at 471.

47. 384 U.S. at 469.

48. “If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.” 384 U.S. at 475.

49. “Unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has a right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.” 384 U.S. at 479.

It is significant to note that the Court did not suggest the formula as the Alpha and Omega of adequate safeguard procedures; other procedures may be equally effective so long as the prosecution can show that the procedure used serves not only to inform the accused of his right to remain silent but also allows him to make continuing and effective use of this right.⁵⁰

In anticipation of the same critical forecasts which followed the *Escobedo* decision as to the ultimate debilitating effect which *Miranda* would have on law enforcement, Chief Justice Warren stated:

There appears to have been no marked detrimental effect on criminal law enforcement in these jurisdictions [having similar safeguards] as a result of these rules. Conditions of law enforcement in our country are sufficiently similar to permit reference to this experience as assurance that lawlessness will not result from warning an individual of his rights or allowing him to exercise them.⁵¹

Significantly, although it was discounted by the Court of Military Appeals, one of "these jurisdictions" referred to by the Chief Justice was the military establishment of the United States.⁵²

Therefore, at the time *Tempia* came before the Court of Military Appeals the military safeguard procedure differed from that proposed by the Supreme Court only to the extent that the military did not require as a prerequisite to the full exercise of the right to remain silent that a lawyer be present at the examination of the accused.

EFFECTS OF THE TEMPIA DECISION

As a result of the decision in *Tempia*, the accused in an investigation must be warned that he has the right to have counsel with him during the investigation. This "counsel" must be a trained lawyer.⁵³ Failure to

50. "It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted." 384 U.S. at 467.

51. 384 U.S. at 489.

52. "Similarly, in our country the Uniform Code of Military Justice has long provided that no suspect may be interrogated without first being warned of his right not to make a statement and that any statement he makes may be used against him. Denial of the right to consult counsel during interrogation has always been proscribed by military tribunals." 384 U.S. at 489.

53. "Now, the accused must have a lawyer; before he need not have been given one; now, he must be warned of his right to counsel; before, he need not be so

comply with this procedure does not vitiate the government's case, but it prohibits the government from using the accused's statements either in an inculpatory or exculpatory sense, in support of a conviction.⁵⁴

By basing its decision on the constitutional safeguards applicable in a civilian environment, the Court of Military Appeals is placed in the anomalous position of compelling the government to provide trained legal counsel during the interrogation of a suspect where there is the possibility that the lawyer will be replaced by a layman for the trial. While it is true that every accused before a general court-martial will be defended by a lawyer qualified to practice before a federal court or the highest court of a state, not every person accused of an offense will be tried by a general court-martial.⁵⁵

A not so extreme example of this position can be illustrated as follows: An enlisted man suspected of participating in a riot⁵⁶ is taken into custody for questioning. Prior to the actual interrogation he is assigned a lawyer and informed of his right of silence. Since it is possible that the accused will be tried by a general court-martial, an Article 32⁵⁷ investigation is initiated and again a lawyer represents the accused. If, however, upon completion of the investigation, it appears that the evidence will only support a conviction for breach of the peace,⁵⁸ the

warned; and, now, finally, he will receive effective legal advice not only as to what he can do, but also as to what he should do." 16 U.S.C.M.A. at 640, 37 C.M.R. at 260.

54. "Miranda does not specifically require such procedures or their equivalent to be followed. It merely prohibits the receipt in evidence of any statement taken, unless there is compliance with these constitutional standards. If the Government cannot comply with them, it need only abandon its reliance in criminal cases on the accused's statements as evidence." 16 U.S.C.M.A. at 639, 37 C.M.R. at 259.

55. *Hearings on S. Res. 260 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 2nd Sess., at 939 (1962). On the basis of an Air Force study submitted in 1962 covering the years 1956-1960 inferior courts-martial outnumbered general courts-martial roughly 25 to 1.

56. UCMJ art. 116, 10 U.S.C. § 916 (1964 ed.) "Riot or breach of peace. Any person subject to this chapter who causes or participates in any riot or breach of the peace shall be punished as a court-martial may direct."

57. UCMJ art. 32, 10 U.S.C. § 832 (1964 ed.) "Investigation, (a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.

(b) The accused shall be advised of the charges against him and of his right to be represented at the investigation by counsel . . ."

58. MCM, 1951, ch. 28, para. 195 *b*. This paragraph sets forth the elements of the offense of riot and breach of the peace.

convening authority may refer the case to trial by special court-martial. Since this is an inferior court-martial, the government is required to appoint trained legal counsel only if the case is prosecuted by a trained lawyer.⁵⁹ Suddenly the accused, who has been led to rely on the protection offered by a skilled professional who has been working with that man's best interests in mind, finds the lawyer-client relationship dissolved and his defense placed in the hands of a layman. The aggressive assertion by the lawyer of the man's right of silence is replaced by the defensive shielding of the accused from whatever basic unfairness the officer can anticipate or detect. While it is true that the sentence is less than the defendant could have received from a general court-martial, it is doubtful whether the prisoner will appreciate his good fortune while serving his six months confinement.⁶⁰

The decision by the Court of Military Appeals in *Tempia* without a doubt was designed to assure the free exercise of the right of the accused to remain silent at a crucial period in the proceedings against him. But how effective is this protection when it can be taken away during the preparation for trial? If we must assume that military officers without formal legal training cannot assure the free and continued exercise of the right of silence during the interrogation, it necessarily must follow that these officers should not be expected to guard this same right at a later state of an adversary proceeding. The proper implementation of the spirit as well as the letter of *Tempia* requires a uniform application of the decision not only at all stages of the adversary proceeding but also in all adversary proceedings which may result in a judicial determination of guilt or innocence. The right to remain silent is placed in no less jeopardy when a serviceman appears before a special court-martial than when he appears before a general court-martial. If, to ensure the continued protection of the right of silence, it is necessary to require the presence of trained legal counsel throughout the preparation for trial by general court-martial, then it likewise is essential to ensure the presence of the same protective influence for a serviceman facing a special court-martial.

The Court of Military Appeals indicated in the present decision that the services of the military lawyer can be augmented by civilian counsel retained at the expense of the government in the event of the non-availability of trained military counsel.⁶¹ Such an idea has limited ap-

59. UCMJ art. 27, 10 U.S.C. § 827 (1964 ed.).

60. MCM, 1951, ch. 25, sec. A at 223. "Table of Maximum Punishments."

61. 16 U.S.C.M.A at 638, 37 C.M.R. at 258.

plication for it ignores the realities of military life. While many large military bases are located near large population centers in the United States where civilian counsel is available, the nation's present military posture requires large segments of the military establishment to be committed overseas. If military units operating in combat zones, aboard ship or in isolated areas of the nation's defense perimeter do not have trained legal counsel as part of their military organization they will do without trained legal counsel. If it may be assumed that the number of military attorneys is presently adequate for the proper administration of military justice and that as the result of *Tempia* the workload of these attorneys will increase,⁶² it follows that the requirements laid down by the present case, without more, may have a detrimental effect on the military justice system. Either the present number of lawyers will bear the increased workload, which may result in spreading the legal branches of the services too thin, or there will be an increase in the number of acts which warrant punishment but, due to the non-availability of legal counsel, are dismissed. While not all convictions need be based on confessions of the accused, the burden of proof which the government must carry to show the continuous exercise by the accused of his right to silence may be so great as to demand the presence of an attorney during preparation for trial to ensure that the conviction will not be overruled.⁶³

CONCLUSION

In effect, the Court of Military Appeals has established a standard for the proper administration of military justice which it is powerless to implement. Not only is Congress the source of the military justice system⁶⁴ but it also remains the source of the funds on which the system depends for its effective operation. If the court meant to point the way

62. *Supra* note 55.

63. "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." 16 USCMA at 638, 37 CMR at 258 quoting *Miranda* at 475. Also, "The correct principle requires proof by the United States of the proper warning as to the accused's right to remain silent and to a lawyer, as the predicate for the use of any pretrial statement, obtained during custodial interrogation, whether it be inculpatory or exculpatory, or used on the merits or merely to impeach the accused. It is apparent that the Government did not, on this record, show such compliance. Reversible error." *United States v. Lincoln* 17 U.S.C.M.A. 330, 38 C.M.R. 128 (1967).

64. U. S. CONST. art. 1, § 8.

for congressional re-evaluation of the application of constitutional safeguards to the military, then alternative means of protecting the right of an accused to remain silent within the traditional concept of "military counsel" should have been left open. While this would have required evaluation of each conviction as it was appealed, such a system would have had the advantage of encouraging meaningful alternatives to the requirement of a trained lawyer present at each interrogation. If it were apparent that abuse of the individual's right of silence continued, then the present requirements could have been established as part of a uniform and comprehensive plan by the Congress.⁶⁵ While the present decision is reduced by the contemporary circumstances and a disregard for the realities of military life to an example of judicial legislation⁶⁶ with all of the limitations inherent in that term, organized and comprehensive legislation to the same effect would have achieved a smooth transition from one procedure to another while recognizing the authority and ultimate responsibility of Congress for the proper administration of military justice.

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65. That Congress is not unmindful of its responsibilities in this area is attested to by the continuous revisions of the Uniform Code of Military Justice up through 10 U.S.C. (Supp. II, 1965-66). UCMJ art. 67 (g), 10 U.S.C. § 867 (g) (1964 ed.) requires the Court of Military Appeals to submit to the Congress an annual report containing "recommendations relating to uniformity of policies as to sentences, amendments to this chapter, and any other matters considered appropriate."

66. See dissenting opinion of Chief Judge Quinn, 16 U.S.C.M.A. at 644, 37 C.M.R. at 264.