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THE MILITARY RULES OF EVIDENCE: ORIGINS AND JUDICIAL IMPLEMENTATION

by Fredric I. Lederer*

*No man should see how laws or sausages are made.***

Otto von Bismarck

I. INTRODUCTION

The tenth anniversary of the Military Rules of Evidence is an appropriate time to pause and reflect upon the rules, their implementation, and their future. In addition, enough time has passed to permit a more detailed discussion of the drafting of the rules than has heretofore taken place.¹

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**Nat'l L.J., December 24, 1984, at 2 (quoting Bismarck). There are other English versions of this famous cynical observation, including "There are two things that one should never watch in the making, one is sausage, the other is legislation." Heritage Foundation Reports, The Heritage Lectures; No. 144, November 20, 1987 (in this version, the author added his own observation, "I think that the quote does disservice to sausage makers, who at least produce something that people want").

¹The editor of the Military Law Review asked me to prepare this commemorative article in light of my role as co-author of the Military Rules of Evidence. Because I often was not privy to the thoughts and actions of my co-authors and their relationships with the institutions they represented, aspects of this article necessarily present my own perspective on the rules and best detail the Army's position on various issues. Further, because most of the records reflecting the details of the writing of the rules are no longer reasonably available, much of what follows necessarily stems from memory. Memory is, however, notoriously fragile and imperfect. Should my recollections prove inaccurate, I hope that those with more correct information will set them right.

Because of the diffuse nature of law reform and what is often the extraordinary delay between an idea for change and its adoption, determining with precision who should be credited with originating any significant legal reform is often difficult. That, however, is not the case with the Military Rules of Evidence. The "father" of both the rules and our contemporary military criminal law reform process is Wayne Alley, who was a Colonel and the Chief of the Criminal Law Division of the Office of The Judge Advocate General of the Army.² The Military Rules of Evidence owe their existence to many different people,³ but the originator of the Military Rules of Evidence project was clearly Colonel Alley. An extraordinarily competent attorney, Colonel Alley not only began and initially supervised the project, but also articulated the basic guidance to the drafters without which drafting would still be going on.

The Federal Rules of Evidence were effective in 1975, and that same year Colonel Alley formally proposed that the military revise the Manual for Courts-Martial to adopt, to the extent practicable, the new civilian rules.⁴

II. THE MANUAL FOR COURTS-MARTIAL

The necessity for the codification cannot be appreciated fully without an understanding of the place of the Manual for Courts-Martial in military law. Promulgated by the President under the authority prescribed by Congress in article 36 of the Uniform Code of Military Justice,⁵ the Manual has the force of law and is subordinate only to the Constitution, treaties, and federal statutes.

As discussed in *Trial by Court-Martial*:⁶

The Manual for Courts-Martial had its origins in private treatises such as Winthrop's 1886 *Military Law and Precedents* dealing

²After promotion and service as Judge Advocate of United States Army Europe, then General Alley retired to assume the post of Dean of the University of Oklahoma School of Law, a position he left a few years later to become a United States District Judge.

³Other individuals who have been credited with responsibility for the Military Rules of Evidence include Deanne Siemer, who was the Department of Defense General Counsel at the time of the drafting, and then Chief Judge Albert Fletcher of the Court of Military Appeals.

⁴Telephone interview of Judge Wayne Alley (May 23, 1990) [hereinafter Interview].

⁵10 U.S.C. § 836 (1988).

⁶F. Gilligan & F. Lederer, *Trial By Court-Martial, Criminal Procedure in the Armed Forces* § 1-54.00 (pending 1991 publication) (unomitted footnotes renumbered).

with military law in the Army context.¹⁷¹ In 1889, one such work, "Instructions for Courts Martial and Judge Advocates," written by Captain Arthur Murray, was officially promulgated at Fort Leavenworth, Kansas, and was expanded and published in 1895 as a "Manual for Courts-Martial."¹⁸¹

Murray's work served as the prototype of every *Manual* issued during the next 15 years (1901, 1905, 1907, 1908, 1909, 1910). All were pocket-sized books with small type, similar in size and style to the many other manuals. . . . The *Manual* was published in a somewhat enlarged version in 1917, but was not basically changed until Colonel Wigmore revised it in 1921 to reflect the substantial changes in the Articles of War that were enacted in the previous year. . . .¹⁹¹ A condensed edition of the *Manual* was issued in 1928 which, with minor changes, remained in force until 1949.¹¹⁰¹

As a result of the 1948 amendments to the Articles of War, a 1949 Manual for Courts-Martial was promulgated. Soon after, the enactment of the Uniform Code of Military Justice required the publication of the substantially revised 1951 Manual for Courts-Martial, which for the first time covered all of the armed forces. In turn, the Military Justice Act of 1968 gave rise to the 1969 Manual for Courts-Martial. . . .

Until the 1980 amendment to the 1969 Manual for Courts-Martial, the Manuals were basically "how to guides" coupled with basic hornbook type discussion and compilations of necessary legal information. That format, consistent with all of the prior Manuals, proved highly troublesome. Inasmuch as the President had statutory authority under article 36 to prescribe rules and procedures for courts-martial, the Manual had the force of law. It was impossible to determine, however, what portions of the Manual were intended to have that force. Much of the 1969 Manual, for example, appeared to include

¹⁷¹The Navy's equivalent of the Manual for Courts-Martial was Naval Courts and Boards, an official publication, that was amended in 1923 and 1937. Crump, *Part II: A History of the Structure of Military Justice in the United States, 1921-1966*, 17 A.F. L. Rev. 55 (1975). It appears, however, that the current Manual is descended directly from the Army's publication.

¹⁸¹The Army Lawyer: A History of The Judge Advocate General's Corps, 1775-1975, 94-95 (1975) (remainder of note omitted).

¹⁹¹*Id.* at 95-96.

¹¹⁰¹*Id.* at 138.

numerous past decisions of the Court of Military Appeals. It was often impossible to tell whether the Manual meant to adopt those decisions as positive law or was merely setting them forth for the edification of the reader. This was especially true in the portion of the Manual setting forth evidentiary matters. The publication of the Military Rules of Evidence in rules format began the format revision designed to emphasize what is binding and what is explanatory.

The codification of the Military Rules of Evidence thus began against a backdrop of an amorphous partial evidentiary codification that was set forth in the Manual often in hornbook fashion. Codification therefore required determination of the origins of specific military evidentiary rules and their desired utility vis-a-vis the civilian law of evidence.

III. THE ORIGINS OF CODIFICATION

The Army proposed and strongly advocated evidentiary codification.¹¹ Codification was by no means unanimously supported by the armed services, however. The Navy, for example, opposed it.¹² In 1975, in what could be said to be a harbinger of things to come, a member of the Office of the Judge Advocate General of the Navy reported on a Federal Bar Association seminar about the "new" Federal Rules of Evidence and recommended that "relatively low priority . . . be given to their quick implementation in the military."¹³ Among other matters, he reasoned that the Manual for Courts-Martial already had "a well thought out set of rules located in one convenient place," that the new evidentiary rules would generate "a substantial amount of litigation," that the civilian rules would have to be scrutinized and adapted "to any peculiarities of the military system," and that a "great deal of effort and expense . . . might be required in instructing each judge advocate in the field."¹⁴

¹¹Judge Alley reports that General Persons, The Judge Advocate General of the Army while Colonel Alley was chief of the Criminal Law Division, was a strong supporter of the project and essential to its success. Interview, *supra* note 4.

¹²See *supra* note 4. Lack of initial Navy support did not mean lack of Naval assistance later in the project. The Navy member on the Working Group, Commander Jim Pinnell, was an extraordinarily hardworking and dedicated colleague.

¹³Memorandum, William M. Trott to Code 20, JAG:204.1:WMT:1kb (17 Mar. 1975).

¹⁴Naval recalcitrance once again surfaced in 1979. On 16 May 1979, I forwarded the following memorandum to The Assistant Judge Advocate General of the Army:

1. Earlier today, LCMR Pinnell, USN, distributed copies of a memorandum/agenda concerning the 30 May meeting of the Joint Service Committee on Military Justice. Originally, the meeting was to be used to begin to review the Working Group's product. The memo, however, five pages in length, propounds a series of questions which in effect call the entire revision effort of

Codification took place under the auspices of the Joint Service Committee on Military Justice. The process by which codification occurred notwithstanding opposition¹⁵ and bureaucratic inertia best was summed up in 1986 by then DOD General Counsel H. Lawrence Garrett, III:¹⁶

The Joint Service Committee was originally established as a result of the problems encountered by the group that drafted the 1969 version of the Manual for Courts-Martial. The drafting group reported that their task has been "monumental" due to the failure during the fifties and sixties to consider adequately many of the developments in law that occurred after issuance of the 1951 Manual (which implemented the new Uniform Code of Military Justice). An ad hoc group was formed, and a formal charter was signed by the services Judge Advocates General in 1972 assigning to the Committee responsibility for considering amendments to the UCMJ and the Manual. The chairmanship rotated among the services on a biennial basis, with the group operating primarily on the basis of consensus.

In 1975, the chairmanship rotated to the Chief of the Army's Criminal Law Division, then-Colonel Wayne Alley. . . .

The original motivation for establishment of the Joint Service Committee—the need to keep the Manual current with devel-

the past year into question. The memo was authored by CMDR Ed Byrne, Chief of Criminal Law of the Navy, and represents his personal views rather than those of the Navy TJAG. He is the Chairman of the Joint Service Committee.

2. Chief Judge Fletcher, acquainted with the memo by Bob Mueller of the Working Group, joined our meeting to voice his strong concern over what he viewed as a possible attempt to "scuttle" the evidence project. . . .

3. . . . At present, this is hopefully a minor matter that may be resolved without great effort. However, it does provide the possibility of a major confrontation with DOD General Counsel and the Court of Military Appeals on one side and the Navy (and possibly the Air Force as well) on the other. . . .

Memorandum, Major Fredric Lederer to Major General Lawrence Williams, subject: Revision of the Rules of Evidence (16 May 1979).

¹⁵One can only speculate as to why most lawmakers choose to proceed with or refrain from law reform. Absent a pressing visible need for change, usually the reformers' claim of future improvement in the law is countered by claims of contemporary legal adequacy and needless expense. In actual fact, one can argue that most people are inherently comfortable with the status quo and reluctant to change, particularly if they have invested great personal effort in the thing to be changed. This is often summed up by the old adage, "If it ain't broke, don't fix it." Unfortunately, the adage discourages improving a product or process assumed to be adequate; we would probably still be living in caves if we took it seriously.

¹⁶Garrett, *Reflections on Contemporary Sources of Military Law*, The Army Lawyer, Feb. 1987, at 38, 39-40.

opments in the law—was a matter of particular concern to Colonel Alley. In January, 1975, President Ford signed legislation establishing the Federal Rules of Evidence, which contained reforms greatly simplifying trial of criminal and civil cases. Other changes in federal criminal law, particularly as a result of Supreme Court decisions, also created the potential for parallel changes in the Manual and the Code. In view of article 36, UCMJ, which generally requires us to follow federal criminal rules of evidence and procedure to the extent practicable and not inconsistent with the Code, Alley believed a vigorous and systematic review effort was necessary to comply with the Code.

Despite these opportunities, Colonel Alley found his chairmanship to be a source of frustration rather than reward. In the absence of a crisis, the requirement for consensus proved to be a powerful disincentive to developing the level of effort on a joint service basis necessary to produce reform proposals.

By late 1977, little had been accomplished. At that time, however, one of my predecessors, Deanne Siemer, developed an interest in military justice and asked a member of our staff to meet with the services to assess the legislative process. Colonel Alley readily seized on this chance to break the logjam. He recommended that an effort be initiated to adopt the Federal Rules of Evidence, with appropriate modifications, into the Manual for Courts-Martial. Alley suggested that the project would serve three separate goals:

first, it would meet the Article 36 requirement that we generally apply federal rules; second, it was a discrete project that could be accomplished with one year's concerted effort, establishing a pattern of work that the Joint Service Committee could carry into the future; and third, the efficiencies in trial practice generated by the new rules would demonstrate to the services the benefits of serious attention to law reform on a sustained basis.

Colonel Alley's initiative was adopted by the General Counsel who established the Evidence Project as a DOD requirement and placed a member of our staff on the working group.¹⁷

Drafting began in early 1978. Ms. Siemer forwarded the final draft

¹⁷*Id.*

to the Office of Management and Budget on September 12, 1979.¹⁸ Colonel Alley had been optimistic; codification took somewhat longer than the year he had predicted. Despite the complexity of the process and service disagreement,¹⁹ the project was a success, and on March 12, 1980, the President issued an executive order amending the Manual for Courts-Martial and promulgating the Military Rules of Evidence, effective 1 September 1980.²⁰

IV. THE FORMAL CODIFICATION STRUCTURE

The Joint Service Committee on Military Justice Working Group drafted the Military Rules of Evidence. The Working Group "was composed of two representatives from the staff of the Court of Military Appeals, and one representative from the Army, Navy, Air Force, Coast Guard, and Office of the General Counsel of the Department of Defense, respectively. The Marine Corps did not participate at the drafting level."²¹ The Working Group was responsible to the Joint Service Committee on Military Justice, which then was composed of the chief of the criminal law branch of each of the Armed Forces, including the Marine Corps, and one representative each from the Office of the DOD General Counsel and the Court of Military Appeals.²² Although the Joint Service Committee was the supervisory agency and reviewed the rules, its role in the codification proved to be relatively minor;²³ most disputes were resolved within the Working Group or outside the formal codification structure.

Article 67(g) of the Uniform Code of Military Justice²⁴ creates the "Code Committee," a body composed of The Judge Advocate General of each of the Armed Forces, the Director of the Marine Judge Ad-

¹⁸DOD E.O. Doc. 241 (September 12, 1979).

¹⁹See, e.g., *infra* note 43 and accompanying text.

²⁰Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (1980).

²¹Lederer, *The Military Rules of Evidence: An Overview*, 12 *The Advocate* 113, 114 (1980). The Working Group members who drafted the rules were Commander Jim Pinnell (Navy), Major Fredric Lederer (Army), Major James Potuk (Air Force), Lieutenant Commander Tom Snook (Coast Guard), Mr. Robert Mueller (Court of Military Appeals), Ms. Carol Scott (Court of Military Appeals), and Mr. Andrew Effron (DOD General Counsel).

²²The Joint Service Committee representatives of these institutions also served on the Working Group.

²³This is not to minimize the importance of the Joint Service Committee. It spent a significant amount of time reviewing the rules and made a number of important decisions in the process.

²⁴Uniform Code of Military Justice, art. 67(g), 10 U.S.C. § 867(g) (1988) [hereinafter UCMJ].

vocate Division, and the judges of the Court of Military Appeals.²⁵ The Code Committee met once to resolve several minor interservice conflicts.²⁶

The final draft of the Military Rules of Evidence "was forwarded through the General Counsel of the Department of Defense to the Office of Management and Budget, which circulated the rules to the Department of Justice and other agencies, and finally forwarded them to the President via the White House Counsel's office."²⁷

This sterile description of the "chain of command" fails to impart an accurate picture of how the rules actually were drafted and approved—a picture that only can be viewed via a detailed rendition of the actual codification process.

V. CODIFICATION BEGINS

The Working Group began its activities in early 1978. Because I did not join it until approximately August 1978,²⁸ I lack first hand knowledge of its early activities. Clearly, the Working Group had begun the drafting process. I believe, however, that it had not gone into "high speed operation" primarily because higher authority initially had failed to supply it with adequate guidance.

The most important question faced by the Working Group was the definition of its mission. Although the Working Group's charter was to draft new evidentiary rules using the Federal Rules of Evidence as its basis, the scope of its task was unclear. Were the Federal Rules of Evidence to be adopted verbatim, modified slightly, or used simply as a point of departure? Given the option, each member of the Working Group, for example, preferred to modify substantially, if not to redraft entirely, at least one of the Federal Rules of Evidence.²⁹ Draft-

²⁵To the best of my knowledge, the Coast Guard General Counsel participated on behalf of the Coast Guard.

²⁶One such conflict concerned whether to retain Rules 407, 408, 409, and 411 because of their civil application.

²⁷Lederer, *supra* note 21, at 113, 114.

²⁸Replacing then Major John Bozeman.

²⁹It was apparent to the Working Group that a number of the Federal Rules of Evidence badly needed clarification. Although Fed. R. Evid. 607 permits impeachment of a party's own witness, for example, Fed. R. Evid. 608(b) permits impeachment by "prior bad acts" only on cross-examination, "slippage" that is questionable. More important was Fed. R. Evid. 609(a)(2)'s limitation on impeachment by prior conviction to convictions involving "dishonesty or false statement." It was clear that "dishonesty" was dangerously misleading. See, e.g., Memorandum, Fred Lederer to the Evidence Committee, subject: Commentary to the Military Rules of Evidence 6 (7 Feb. 1979).

ing appeared to be an interminable process when Colonel Alley gave the Working Group the "marching orders" that made the project possible. He instructed the Working Group that it was to adopt each Federal Rule of Evidence verbatim, making only the necessary wording changes needed to apply it to military procedure, unless a substantial articulated military necessity for its revision existed, or, put differently, unless the civilian rule would be unworkable within the armed forces without change.

Colonel Alley's instructions not only made pragmatic sense, they incorporated a fundamental philosophical position: military evidentiary law should be as similar to civilian law as possible. Military evidentiary law as found in the Manual for Courts-Martial had begun as nearly identical with prevailing civilian federal law,³⁰ in part due to the efforts of Professor Wigmore, author of the 1921 revision. Nevertheless, the process of incorporation of case rulings without periodic systemic revision had created a wide gap between civilian and military practice in some areas, a gap that the advent of the Federal Rules of Evidence broadened considerably. Colonel Alley intended not just that the codification reflect the Federal Rules of Evidence, but that all *future* military evidentiary law echo it as well, unless a valid military reason existed for departing from it.³¹

Although generally dispositive,³² Colonel Alley's instructions left open several major policy questions. One was raised in the debate over adoption of Rule 201, Judicial Notice of Adjudicative Facts. Commander Pinnell argued most strongly that the distinction between

³⁰*Cf.* Fed. R. Evid.

The [first] Manual contained no formal discussion of evidence and only a few brief notes on credibility, competency and proof of intent. The author advised that the court should follow as far as possible the evidentiary rules of the criminal courts of the United States—but that since members were not versed in legal science they should not be overly concerned with technicalities.

The Army Lawyer: A History of The Judge Advocate General's Corps, 1775-1975, 95 (1975).

³¹This was ensured by Mil. R. Evid. 1102, which provides for the automatic adoption of amendments to the Federal Rules of Evidence unless the President instructs otherwise.

³²What was "unworkable" or not "practicable" in article 36 terms was a frequent subject of debate. Arguing that they were unnecessary and thus not mandated, the court representative, for example, objected to modifying Rules 803 and 804 to preserve previously articulated hearsay exceptions (and to expand them to laboratory reports and chain of custody receipts) as well as to alter Rule 902 to include military attestation certificates. Similarly, the Air Force objected to revising Rule 1102 to provide the President six months before an amendment to the Federal Rules of Evidence automatically applied to the Armed Forces. Occasionally, alternative "tests" were argued. The Air Force opposed Rule 507, Political Vote, on the grounds that it was unnecessary and ridiculous. Post Joint Service Committee summary submitted to Colonel Wayne Hansen (July 1979).

adjudicative and legislative facts in the Federal Rules of Evidence was so unintelligible and confusing as to make it unworkable in the military context. Although persuasive in the context of Rule 201, redrafting it would have set a precedent that would have permitted substantial alterations in otherwise acceptable rules.³³ Ultimately,³⁴ the Working Group decided that although Federal Rule 201 was either poorly written or unduly sophisticated, it was workable.³⁵ We therefore adopted it,³⁶ mooted the general philosophical debate.

A less significant question concerned rules primarily of application to civil cases. The Navy initially opposed retention of Rules 407 (Subsequent Remedial Measures), 408 (Compromise and Offer to Compromise), 409 (Payment of Medical and Similar Expenses) and 411 (Liability Insurance) on the grounds of irrelevancy. Although clearly the original intent of most if not all of these rules applied solely to civil cases,³⁷ they were not necessarily inapplicable to

³³My internal report on the matter read:

[Federal] Rule 201(a) allows judicial notice of adjudicative facts only [,] attempting to distinguish between adjudicative and legislative facts. The distinction is a difficult one, even for the author of the concept. Accordingly, the Navy representative moved to eliminate the word, "adjudicative" leaving only the word "facts." This precipitated a major argument as [to] the Group's purpose with the Air Force and COMA members stating that their intent was to adopt the Rules without modification except as required by military operations. The Navy member argued that it was ridiculous to adopt a rule that is poorly drafted and which can be improved (in this case, most of the States have refused to adopt the specific rule). CPT Effron of DOD took an intermediate position agreeing that if a Rule would cause so much confusion as to render it virtually useless, it should be modified. Discussion of this specific Rule was deferred pending further study as to its accepted interpretation in the civilian courts. The general philosophical debate has, however, importance beyond the specific rule and represents a continuing clash between the representatives. While I would agree with the Navy's position personally, it seems clear that too much work has been done to reasonably push that position. Consequently, my position at present is that we must adopt the specific Federal Rule unless it is either contra to military law (to be interpreted rather widely) or is so poorly drafted as to make its adoption almost an exercise in futility. . . .

Memorandum, Fed. R. Evid. Working Group Meeting, from MAJ Fredric Lederer to COL Doug Clause, para. 1.e. (1 Sept. 1978).

³⁴This occurred following a meeting of members of the Working Group with Professor Steve Saltzburg, University of Virginia School of Law, and a personal meeting with Professor Edward Imwinkelried, then of the University of San Diego Law School. Memorandum, Fred Lederer to the Evidence Committee, subject: Commentary to the Military Rules of Evidence (7 Feb. 1979).

³⁵*Cf. id.* at 2.

³⁶The Working Group did, however, draft a unique Rule 201A, Judicial Notice of Law, to clarify matters ordinarily dealt with in the civilian courts by Fed. R. Crim. P. 26.1. Mil. R. Evid. 201A analysis at A22-4.

³⁷*See, e.g.,* Fed. R. Evid. 409: "Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by any injury is not admissible to prove liability for the injury."

criminal cases, particularly considering military offenses based on negligence. In final voting at the Joint Service Committee, on May 30, 1979, the Air Force opposed Rule 408; and the Navy, Air Force, and Marine Corps opposed Rules 409 and 411. The Joint Service Committee adopted Rule 408 and sent Rules 409 and 411 to the Code Committee, which adopted them.

Two major policy questions remained: 1) whether to codify privilege rules; and 2) whether to codify the law of search and seizure, interrogation, and eyewitness identification.

Although the draft Federal Rules of Evidence had included privilege rules, they proved highly controversial, and Congress elected to proceed without them.³⁸ The Manual for Courts-Martial, however, had a comprehensive body of these rules. The Working Group readily decided that because many military personnel were stationed in places where they did not have easy access to legal advice, accessibility and certainty required the adoption of specific privilege rules.³⁹

The "constitutional" issues proved more complex. Although determining what constituted academic comment and what was positive law in the area was particularly difficult, the Manual's evidentiary chapter extended to search and seizure, interrogation, and eyewitness identification as well as to more traditional evidentiary topics. Not only did the Federal Rules of Evidence fail to address these matters, no other codification had either.⁴⁰ To the extent that these matters were of importance, they could have been placed in the planned procedural revision of the Manual.⁴¹ Although that would not have been unreasonable, it was undesirable if only because the "constitutional"⁴² portion of the Manual governed matters of enormous importance that occurred daily throughout the armed forces and that customarily were dealt with by nonlawyers. After debate, the Working Group elected to codify the area, albeit in a very careful fashion that codified some issues⁴³ while leaving others to case law development. The drafters' intent was clear and plain: the new rules were to function as positive law rather than as a useless

³⁸This left only Fed. R. Evid. 501 recognizing and establishing a federal common law of privileges.

³⁹See *infra* text accompanying notes 80-82 (discussion of the privilege rules).

⁴⁰To date, no other jurisdiction has codified these topics.

⁴¹That revision ultimately produced the Rules for Courts-Martial.

⁴²This is, of course, somewhat of a misnomer as interrogation is governed as well by UCMJ art. 31.

⁴³The issues that were codified were those that dealt with matters such as searches and inspections, normally handled by nonlawyers.

summary of what the drafters thought the current law to be.⁴⁴ The decision to codify remained controversial, however, and, at the last possible moment, the Air Force attempted to "missile" the search and seizure codification.⁴⁵

⁴⁴The contrary position, *see, e.g.*, *United States v. Postle*, 20 M.J. 632 (N.M.C.M.R. 1985), is difficult to understand. The President has power to create rules of both evidence and procedure under article 36, augmented by his constitutional authority as Commander in Chief. Clearly, the President may limit the government's action in these areas (as distinguished from expanding it beyond the limits imposed by the Constitution or statute):

Normal rules of statutory construction provide that the highest source authority will be paramount *unless* a lower source creates rules that are constitutional and provide greater rights for the individual. As applied to the Military Rules of Evidence, if a section III search rule is more restrictive of government conduct than Supreme Court constitutional interpretation, then the military should be bound by the more restrictive, constitutional, subordinate rule. It follows then that military trial and appellate courts should not be free to ignore the Military Rules of Evidence and adopt reasonableness as the standard for assessing fourth amendment conduct.

Gilligan & Smith, *Supreme Court—1989 Term, Part II*, *The Army Lawyer*, May 1990, at 85, 89 (calling into question the value of codifying "constitutional rules").

The careful crafting of the rules makes it apparent, even if one ignored all other evidence of intent, that some rules were to be absolutely binding while others were to use case precedent. *See, e.g.*, Mil. R. Evid. 314 (k). To argue that the constitutional codification was simply declarative of then existing law is to ignore the intent and structure of the rules and to defy common sense. The Working Group assumed that desirable Supreme Court case law changes would be adopted through amendment of the rules, a process that has in fact worked handily. *See generally infra* text accompanying notes 118-144.

⁴⁵On 30 July 1979, Brigadier General Taylor, Acting The Judge Advocate General of the Air Force, wrote to Major General Harvey, The Judge Advocate General of the Army, expressing his concern over the codification of search and seizure noting that the rules would impact "on the present and future state of discipline, readiness and command authority." General Harvey responded briefly, endorsing the rules. Subsequently, the Department of the Air Force nonconcurred with that part of the rules. Memorandum, Colonel Carl R. Abrams, Office of Legislative Liaison, for Director, Legislative Reference Service, DOD General Counsel (30 Aug. 1979). In relevant part, page two of this memo stated:

The Department of the Air Force nonconcurs with rules 311-317, which establishes rules governing search and seizure in trials by courts-martial, for the following reasons:

(1) In many cases, the rules purport to overrule United States Court of Military Appeals decisions which are based on constitutional principles. Adoption of these rules may create disorder, in that the court, since the decisions were based on constitutional principles, will no doubt invalidate those provisions of the Manual.

(2) The rules establish concrete rules of law governing searches and seizures. In the military environment, search and seizure is a very fluid area of the law. It may well be that we should, as the Federal Courts have done, leave interpretation to the courts. In addition, because this area of the law is so fluid, we may be bound by rules in the Manual which are more restrictive than those advanced by the Supreme Court.

We recognize, however, that at least four of the rules (311, 312, 315 and 317) which provide procedural guidance to the field could be useful and extremely beneficial to both judge advocates and nonlawyers. We could support the retention of those rules. Further we also could support many of the other rules, but

The actual initial codification process was simple. Individual members of the Working Group took responsibility for specific areas or rules, prepared drafts, and circulated them. The Working Group would then meet and debate policy and text. Particularly in the latter part of the phase, meetings were held at the Court of Military Appeals, away from the usual demands of the telephone.

By intent, each member of the Working Group represented an armed force or other institution and was the primary liaison with that institution.⁴⁶ What differed radically was the nature of the relationship between the Working Group representative and the institution represented. Commander Pinnell, responsible to Captain Ed Byrne, briefed Navy JAG flag officers periodically and circulated rules drafts throughout the Navy JAG Corps. The Army functioned quite differently. Although General Persons, The Judge Advocate General of the Army when Colonel Alley created the codification project, showed a great deal of interest in it, subsequent general officer supervision within the Army was virtually absent.⁴⁷ Circulation of the proposed rules within the Army similarly was limited; The Judge Advocate General's School,⁴⁸ members of the judiciary, and government

only after careful evaluation and redraft.

Interestingly, aspects of this futile effort are contradictory. Only one rule arguably extended the power of the government—Rule 313(b), Inspections. All the others were within the clear parameters of case law. Yet, the memo confidently predicted action by the Court of Military Appeals to “overrule” the rules while, at the same time, it expressed concern that the Air Force might be bound by rules more restrictive than necessary. At the same time that the Air Force objected to the search and seizure rules, it failed to mount a broadside attack on the confession and interrogation rules, 301-306.

The Court of Military Appeals has invalidated only one of the constitutional rules: the part of Mil. R. Evid. 315(d)(2) that permitted a commander to delegate the power to authorize searches, *United States v. Kalscheur*, 11 M.J. 373 (C.M.A. 1981), and its unprecedented holding nullified a rule that did nothing more than to restate prior law. It has, however, periodically ignored them. See *Gilligan & Smith, Supreme Court—1989 Term, Part II*, *The Army Lawyer*, May 1990, at 85 n.45.

After the decision was made to promulgate the rules, the Army, Navy, Marine Corps, and Coast Guard participated in a worldwide training program conducted by then Commander Jim Pinnell and Major Fred Lederer. With the exception of one installation in Colorado Springs, however, the Air Force chose not to participate. Although no connection between the above memo and the Air Force boycott ever was made, one must wonder whether a connection actually did exist.

⁴⁶One exception to this general rule was that the Navy representative, Commander Pinnell, represented the Marine Corps as well as the Navy.

⁴⁷During the drafting phase, I reported regularly to Colonel James Clause, Chief, Criminal Law Division, Office of The Judge Advocate General of the Army, for whom I worked. Generally speaking, Colonel Clause either concurred in my positions or permitted me substantial discretion. Soon after the rules were in near final form, Colonel Clause was reassigned to the Army Court of Military Review and replaced by then Colonel, now Brigadier General, Wayne Hansen.

⁴⁸The Judge Advocate General's School Criminal Law Division supplied seven pages of thoughtful and detailed comments, a number of which led to alterations of the rules.

and defense appellate counsel received drafts and were asked to comment. The various members of the Working Group held differing degrees of independence.⁴⁹ To the best of my knowledge, however, these differences had virtually no effect on debate within the Committee.⁵⁰

Because the Working Group members were institutional representatives, the Working Group's decisions tended to be final, and few matters required formal consideration at higher levels. The Joint Service Committee did meet to resolve several interservice disputes,⁵¹ and the Code Committee met once to discuss the rules.⁵²

After a final official coordination from the Department of Defense General Counsel's office,⁵³ the Working Group forwarded the rules to the Department of Justice, the Department of Transportation, and

⁴⁹Among the armed forces representatives, I held the largest degree of individual discretion. Colonel Clause directed me to draft a hearsay exception for laboratory reports, Mil. R. Evid. 803(6) & (8), and not to attempt to modify Mil. R. Evid. 615. Otherwise I was permitted nearly unlimited independence.

⁵⁰Despite occasional efforts of the Navy representative to bring to bear the alleged unified position of senior Navy leadership. Of course, the Working Group was deeply concerned about the political feasibility of its changes. In this regard, although he was not technically chair of the committee, Andrew Effron held what usually was viewed as final authority because the DOD General Counsel determined the nature of the final draft that would leave the Pentagon. A great deal is owed to Mr. Effron for his extraordinary efforts to ensure completion of the rules in a form of which all could be proud.

⁵¹One of my "favorite" memories of the Joint Service Committee concerned the draft of Rule 321, Eyewitness Identification. In light of the potentially substantial changes made in the Rule, I had recommended that the Analysis contain a suggestion that prior to an attempted government identification of the accused, defense counsel could ask the trial judge for permission to seat the accused in the gallery. A member of the Committee—not the Army representative I hasten to add—exclaimed in shock, "You know we can't do that, we'd never get any identifications."

⁵²The most important decision made by the Code Committee concerned the application of former testimony to courts-martial, article 32 investigations, and similar proceedings. Unfortunately, its resolution of this issue created more trouble than it solved. See *infra* text accompanying notes 74-79.

⁵³The coordination process proved to be quite instructive. It occurred, with a "short fuse," after a number of members of the Working Group had been given leave with the express knowledge of, and presumed implicit consent of, the DOD General Counsel's Office. It was apparent that the DOD General Counsel did not wish the services to challenge the circulated draft, particularly changes that had been made in her office. The services responded to the DOD draft with numerous proposed corrections. These ranged from a request to restore proposed Rule 412A, Fresh Complaint, through objection to changing the judge's duty to advise an apparently uninformed witness of his or her self-incrimination rights from "should advise" to "may advise," to a protest at the omission of "anus or vagina" and the substitution thereof of "other body cavities" in Rule 312(c), Intrusion into Body Cavities. Memorandum, MG Clausen, Acting Army TJAG, for General Counsel, DOD, 23 July 1979, subject: DOD Draft of the Military Rules of Evidence (14 Aug. 1979).

the Office of Management and Budget for coordination. After minor changes in response to comments by the Department of Justice, the Working Group sent the rules to the White House for the President's signature.

After the Working Group finished preparing the rules, the Drafters' Analysis was written. For each new rule, the Analysis was to contain its origin, the changes it made in military law, and, as appropriate, practice commentary. I wrote the Analysis, and the Working Group and the Joint Service Committee on Military Justice reviewed and edited it. Concurrent with the concluding portion of the rules project, Commander Pinnell and I traveled around the world presenting on-site instruction for Army, Navy, Coast Guard, and Marine personnel.⁵⁴

VI. SELECTED RULES

Although space does not permit a detailed review of each of the rules, discussion of the origin of some of the rules is illustrative of the rule-making process and perhaps of independent interest.

A. PRESUMPTIONS

Article III of the Federal Rules of Evidence codifies in Rule 301 the Thayer "burst the bubble" form of presumption⁵⁵ for presumptions not otherwise defined by statute or case law. Although the Manual dealt with presumptions to some degree, presumptions were not codified as part of the rules. Instead, Section III was used for the codification of the law of search and seizure, interrogation, and eyewitness identification. To the best of my memory, presumptions were not codified, not because of their inherent difficulty and complexity,⁵⁶ but rather because members of the Working Group failed to understand fully their importance. Instead, the Working Group quickly accepted the decision of the framers of the Federal Rules of Evidence not to codify presumptions in criminal cases and refused to adopt Federal Rule 301 because of its application to civil cases.⁵⁷

⁵⁴The Air Force did not participate. See *supra* note 45.

⁵⁵This shifts only the burden of production (also called the burden of going forward). Once an adequate amount of evidence is introduced to counter the presumed fact, the "bubble bursts" and the presumption vanishes. It is named after Professor Thayer.

⁵⁶In lieu of Fed. R. Evid. 301, states have often adopted, for example, the Morgan true rebuttable presumption, which shifts the burden of proof as well as the burden of production. Still more difficult in light of the Bill of Rights are presumptions in criminal cases. Compare Fed. R. Evid., art. III, with Uniform Rules of Evidence, art. III.

⁵⁷I believe that the primary proponent of noncodification was Mr. Effron, who may well have understood entirely the law and issues involved—something I surely did not.

In retrospect, the omission of presumptions from the Military Rules of Evidence seems inconsequential and fully in keeping with the goal of ensuring that military evidentiary law remains as similar to civilian evidentiary law as possible. At the same time, adoption of a presumption rule applicable to criminal cases might have been of value to judges and counsel.

B. PLEAS, PLEA BARGAINING, AND OATHS DURING PROVIDENCY

The Working Group had no problem adopting Federal Rule of Evidence 410, which protected the plea bargaining process. The drafters were concerned with the unique nature of the military procedure that permits an attempt to resign "for the good of the service" and expanded the rule to protect against statements submitted as part of such an attempt.⁵⁸

There was debate as to whether an accused pleading guilty should be examined under oath during the providency inquiry. Commander Pinnell argued strenuously that the oath requirement was necessary to protect the integrity of the plea and to avoid pretrial agreements by innocent accused. I maintained that an innocent accused willing to plead guilty to obtain a plea bargain was not likely to be deterred from doing so by the oath, which simply would add to the coercive nature of the criminal justice system. In its original form, Rule 410 was promulgated without a requirement that the providency inquiry be conducted under oath. That requirement, however, was added as part of the Rules for Courts-Martial.⁵⁹

C. THE RAPE SHIELD RULE; FRESH COMPLAINT

Federal Rule of Evidence 412 presented special problems. Under military law as it then existed, evidence of lack of chastity of a rape victim or of sexual relations outside marriage was admissible for impeachment and to establish consent. It was apparent that the usual form of this evidence was irrelevant, psychologically damaging to

⁵⁸The drafters were concerned with formal procedures that required a confessional request for an administrative discharge. We did not discuss, nor did we intend to reach, the type of conduct that the Court of Military Appeals subsequently has protected via Rule 410. *See, e.g.*, *United States v. Brabant*, 29 M.J. 259, 263-64 (C.M.A. 1989); *United States v. Barunas*, 23 M.J. 71 (C.M.A. 1986).

⁵⁹R.C.M. 910 (e). Commander Pinnell had declared his intent to adopt the oath requirement at the first opportunity. The change illustrates the importance of the individuals assigned to drafting duty.

many complainants, and often was given unwarranted value by fact-finders. The question was, however, what to do about the situation.

Given its attempt to limit sharply evidence relating to a victim's past sexual history, Federal Rule of Evidence 412 seemed an unduly complex rule with significant constitutional difficulties. The rule itself is an unusual one. Outside of the District of Columbia, limited federal criminal jurisdiction provides that most rape cases are tried in state courts. Viewed objectively and without concern for individual bias or political implications,⁶⁰ Rule 412 was unnecessary. Basic principles of logical relevance coupled with Federal Rule of Evidence 403 should have been sufficient, and a proposal was made not to adopt Rule 412 in favor of a more general statement of the application of the principle of relevancy. Ms. Siemer, DOD General Counsel, rejected that position, and the Working Group adopted Rule 412.

Having decided (or directed) to adopt the federal rape shield rule, the Working Group was left with several important details. The Group quickly deleted the civilian rule's requirement that the proponent of evidence covered by the rule give fifteen days notice of proffer because it might unnecessarily delay trials. More important, the Working Group considered Rule 412 to be both too limited and too expansive. It was too limited because of its focus only on rape, and accordingly, the Group expanded Military Rule of Evidence 412 to include other offenses such as sodomy.⁶¹

It was, however, also too expansive in its provision that evidence of past reputation or opinion of the character of a victim be per se inadmissible. One can create hypotheticals in which such evidence, offered by the defense, would be constitutionally necessary for a fair trial. Under normal circumstances, the constitutional guarantees would supersede an evidentiary rule, and the evidence would be admitted. Rule 412 is a highly unusual rule, however, and a different

⁶⁰Of course, Rule 412 was an important symbol for these very reasons, and it was evident that, given past military law, it was essential that some form of clear break with the past be demonstrated.

⁶¹At Colonel Alley's request, the Army proposed an additional section that would have admitted "past sexual behavior as a prostitute" if there were other evidence of consent, evidence that the alleged sexual act was performed by the victim for payment, and evidence that "the complaint of the nonconsensual sexual offense was made by the victim as a result of subsequent dispute concerning payment for the sexual act." Colonel Alley had found that the Army in Europe had a number of cases in which prostitutes had alleged rape following disagreement on the proper remuneration. The additional section would have clarified Rule 412's application to this situation. The other services, however, unanimously rejected it. Post Joint Service Committee summary submitted to Colonel Wayne Hansen (July 1979).

result can apply. The rule provides that if its procedural requirements are met, otherwise barred evidence, other than opinion or reputation evidence, may be admitted when constitutionally required.⁶² The plain meaning of the rule is that reputation or opinion evidence is never admissible. Accordingly, the defense is estopped from using it, and if a fair trial demands its use, the only remedy is to abate the trial or to dismiss the charges. This somewhat abnormal situation makes perfect sense considering the legislative history of Federal Rule of Evidence 412, which includes concern that complainants not be psychologically injured by improper cross-examination. Although the Working Group believed that concern to be substantial, it felt that dismissal of charges would not be in the best interests of society or the complainant, and the Group preferred to remove the absolute language from Rule 412(a). The Working Group's sole female member strongly objected, and the Navy concurred in her objection. As a result, we decided to place our intent in the Analysis rather than the rule.⁶³

A collateral consequence of the adoption of the Federal Rules of Evidence was the elimination of the specific Manual declaration of admissibility of evidence of fresh complaint. Considering the number of sex offenses that occur in the armed forces, members of the Working Group preferred to codify "fresh complaint"—which in the military had been broad enough to include the identity of the offender⁶⁴—and to preserve it in the military rules. The military members of the Joint Service Committee⁶⁵ unanimously approved the policy decision, and we drafted proposed Rule 412A, Fresh Complaint Concerning a Sexual Offense. Ms. Siemer overruled the attempt to retain fresh complaint evidence.⁶⁶ Accordingly, the present rules per-

⁶²*See, e.g.*, *United States v. Perry*, 14 M.J. 856 (A.C.M.R. 1982).

⁶³Accordingly, we attempted for political reasons to preserve our intent via the "legislative history" rather than modifying the rule itself.

⁶⁴MCM, 1969 (Rev. ed.), para. 142c.

⁶⁵Voting Sheet, Joint Service Committee on Military Justice (30 May 1979) (policy decision). The Court Representative objected to inclusion of the proposed Rule 412A on the grounds that it was not within the Federal Rules of Evidence and that fresh complaint evidence was not probative. Post Joint Service Committee summary submitted to Colonel Wayne Hansen (July 1979).

⁶⁶During final coordination, the Army responded officially: "The Rules omit any explicit reference to fresh complaint. Specific recognition of this exception to the hearsay rule should be included in the Rules. The omission of a specific fresh complaint is of significant concern to the Department of the Army." Memorandum for General Counsel Department of Defense (Attn: Director, Legislative Reference Service) Proposed Executive Order "Prescribing Amendments to the Manual for Courts-Martial, United States, 1969 (Revised Edition)" (5 Aug. 1979). In a memorandum directly to the DOD General Counsel, General Clausen wrote:

Recommend Rule 412A (Fresh Complaint) be restored. The omission of the topic from the Federal Rules reflects only the minimal number of cases involving sexual assaults in the Article III courts and is apparently an oversight. Its omis-

mit fresh complaint evidence on the merits only when admissible under Rule 801(d)(1)(B) as a prior consistent statement when the complainant is alleged to have fabricated his or her testimony or when admissible as an "excited utterance"⁶⁷ or other hearsay exception.⁶⁸

D. BIAS IMPEACHMENT

The Federal Rules of Evidence failed to codify bias impeachment. In one sense, this was eminently reasonable given the impeachment structure of those rules. Because the basic impeachment rule is one of logical relevance under Rules 401 and 402, the drafters codified only those areas that departed from the concept—most notably those rules that limited admissibility. It seemed clear to me that although the federal approach might be analytically sound, it might prove highly troublesome in military practice. The Manual for Courts-Martial not only had a bias impeachment rule, but also expressly permitted the use of extrinsic evidence. Absent a similar provision in the Military Rules of Evidence, litigation over this essential form of impeachment was probable. Accordingly, bias was codified as Rule 608(c), a national model.⁶⁹

sion from the Military Rules will result in the exclusion of evidence of fresh complaint in all but those few cases which would come within the very limited relevant exceptions to the hearsay rule. Evidence of fresh complaint, or lack thereof, is probative and valuable. Considering the unfortunately large number of sexual assault cases common to the armed forces, the rule is clearly needed. Evidence of fresh complaint does not involve any of the detrimental factors that led to Federal Rule of Evidence 412, and there appears to be no social or political justification for its omission.

Memorandum, MG Clausen, Army Acting TJAG, for General Counsel, DOD, 23 July 1979, subject: DOD Draft of the Military Rules of Evidence (14 Aug. 1979). The Air Force agreed with this position, stating:

Although there is no comparable rule in the Federal Rules of Evidence, the Air Force strongly recommends the inclusion of 412A in the military rules. Apparently, it was not included in the Federal Rules due to oversight or a general belief that the infrequent trial of sexual offenses in Federal Courts negated its necessity. Most states have adopted some concept of the "fresh complaint" doctrine, and the Code Committee approved the insertion of this rule in the military rules.

Memorandum for General Counsel Department of Defense (ATTN: Director, Legislative Reference Service) D/D E.O. Doc. 241, Proposed Executive Order "Prescribing Amendments to the Manual for Courts-Martial, United States, 1969 (Revised Edition)" (AFLI 4664) (30 Aug. 1979).

⁶⁷See, e.g., *United States v. Smith*, 14 M.J. 845 (A.C.M.R. 1982).

⁶⁸Somewhat ironically, despite my enthusiasm for a fresh complaint rule during drafting, I have concluded that fresh complaint is neither justified nor necessary. It is hard to defend the doctrine when declaring as irrelevant a "fresh complaint" of a nonsexual offense, such as robbery.

⁶⁹Interestingly, despite general acceptance in the federal district courts, the question of whether bias was permitted under the Federal Rules of Evidence had to be resolved by the Supreme Court in 1984. *United States v. Abel*, 469 U.S. 45 (1984).

E. THE HEARSAY RULE— LABORATORY REPORTS

Drug prosecutions were (and are) a major component of military criminal legal practice. At the time the Military Rules of Evidence were written, a fair degree of litigation time had been devoted to the admissibility of forensic laboratory reports in courts-martial. Given the confrontation clause, there was strong reason to doubt that these records had the type of reliability that justified their admission. As a practical matter, however, the abolition of these reports was considered unacceptable by the services, and express exceptions for laboratory reports and chains of custody were incorporated into Rules 803(6) and (8) along with a list of otherwise acceptable documents then listed as hearsay exceptions in the Manual.⁷⁰

F. THE HEARSAY RULE— ARTICLE 32 TESTIMONY

Although the Military Rules of Evidence contain several drafting errors,⁷¹ the provision for use of prior article 32 testimony is one of the worst.⁷² Under the 1969 Manual, article 32 investigation testimony could be offered at trial by court-martial if the declarant was unavailable and the prior testimony had been under oath, subject to cross-examination, and recorded on a verbatim record. Federal Rule of Evidence 804(b)(1), however, provides that a hearsay exception exists for testimony of an unavailable declarant when it is:

Testimony given as a witness at another hearing of the same or a different proceeding or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

⁷⁰I drafted the laboratory exceptions at the direction of Colonel Clause. *See supra* note 47. I added the exception for chain of custody documents for reasons of consistency and because I believed that they were in fact proper business records. A little noticed aspect of chain of custody forms is, however, that they usually do not provide space for reports of the condition of the material being transferred and thus are not relevant on the issue of condition or contamination. The court representative opposed the changes on the grounds that they were not in the Federal Rules of Evidence and inadequate military necessity existed for them. Post Joint Service Committee summary submitted to Colonel Wayne Hansen (July 1979).

⁷¹*See, e.g.*, Mil. R. Evid. 311(g)(2). In adopting *Franks v. Delaware*, 422 U.S. 928 (1978), the rule refers to "the allegation of falsity or reckless disregard for the truth." The rule should have used "perjury" or "intentional misstatement" instead of "falsity."

⁷²I drafted it.

The focus of the federal rule is on the motivation of the declarant at the earlier proceeding. The 1969 Manual provision did not include motive. When drafted, Military Rule of Evidence 804(b)(2) attempted to adopt the federal rule while retaining the original Manual rule for military proceedings, including article 32 investigations.

Testimony given as a witness at another hearing of the same or different proceeding or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. A record of testimony given before courts-martial, courts of inquiry, military commissions, other military tribunals, and before proceedings pursuant to or equivalent to those required by Article 32 is admissible under this subdivision if such a record is a verbatim record. . . .

The text of the rule technically was sufficient because the second sentence set forth a special and distinct rule for military proceedings. Notwithstanding this, some could argue that it is unclear from the text whether the second sentence, dealing with unique military proceedings, stands alone or is governed by the similar motive rule in the first sentence.

The exception was one of the few rules to be discussed at length by the Joint Service Committee on Military Justice. The Marine representative questioned the way the military provision had been grafted onto the basic civilian rule. Distracted by other business, I failed to recognize fully the implications of the text, and I convinced the Committee to rely on the Analysis.⁷³ This was done badly by any

⁷³I subsequently reported:

The Marine Corps has objected to one aspect of Rule 804 Subdivision (b)(1) [Former Testimony] was modified in committee to make testimony given at courts-martial, Article 32 proceedings, or their equivalents admissible when a verbatim record is made of the proceedings. This language was a result of the requirement in the Federal Rule that the party against whom the testimony is being offered have had a "similar motive" at the first proceeding to develop testimony by direct, cross, or redirect examination. The Committee is unanimous (with the probable exception of the Court Representative) that Article 32 testimony et al. should be admissible as former testimony pursuant to the modification. The difficulty lies in the draftsmanship. It is presumed that the Marine Corps would support specific language in the Rule making it clear that the "similar motive" language is not relevant, but the Court would probably object. The Navy is willing to resolve the issue via the Analysis but the Marines may object. Either solution should be acceptable to us. The problem is complicated by the USCMA recognition that Article 32's were intended to be discovery devices by Congress. Hence, there is a valid argument that specific language in the Rule would be inappropriate. Present law, however, allows use of Article 32 testimony as former testimony when a verbatim record has been made.

Post Joint Service Committee summary submitted to Colonel Wayne Hansen (July 1979).

standard. It became fatal, however, when the issue was sent to the Code Committee for resolution, and the Code Committee determined that, without amending the rule, it wished *both* sentences to be read together, thus requiring proof of similar motive *and* a verbatim record for article 32 and similar hearings.⁷⁴ The Analysis reflects the Code Committee's intent in that regard: "The Rule is explicitly intended to prohibit use of testimony at an Article 32 hearing unless the requisite similar motive was present during the hearing."⁷⁵ The final irony occurred when the Court of Military Appeals decided the question of how to interpret the rule, the judges having participated in the decision that merged the two provisions into one. Having previously decided that discovery was not "a *prime* object of the pretrial investigation,"⁷⁶ in *United States v. Conner*⁷⁷ Judges Everett and Cox dispensed with the Analysis and held:

[A]s we interpret the requirement of 'similar motive,' if the defense counsel has been allowed to cross-examine the government witness without restriction on the scope of cross-examination, then the provisions of Mil. R. Evid. 804(b)(1) and of the Sixth Amendment are satisfied even if that opportunity is not used, and the testimony can later be admitted at trial.⁷⁸

As a consequence, the court accepted the similar motive test and then gutted it by rendering it meaningless.⁷⁹ All this could have been avoided by a minor redraft of the rule.

G. PRIVILEGES

Given the Working Group's mandate to adopt the Federal Rules of Evidence to the extent practicable, the drafters were limited in their creativity. Because the Federal Rules of Evidence lack specific privilege rules, however, the normal limitation did not apply to codification of privileges. The military privilege rules were taken in part from the 1969 Manual for Courts-Martial and the proposed but unenacted Federal Rules of Evidence dealing with privileges, and were written partially from scratch.

⁷⁴From an academic standpoint, the Code Committee's decision was eminently reasonable, and, I now think, correct. The failure to modify Rule 804(b)(1) to expressly state the Code Committee's intent, however, was a major error that led first to unnecessary confusion and litigation and then to its nullification.

⁷⁵Mil. R. Evid. 804 analysis at A22-51.

⁷⁶*United States v. Arruza*, 26 M.J. 234 (C.M.A. 1988) (citing *United States v. Eggers*, 11 C.M.R. 191, 194 (1953)) (emphasis added).

⁷⁷27 M.J. 378, 387-90 (C.M.A. 1989).

⁷⁸*Id.* at 389.

⁷⁹Concurring in the result, Judge Sullivan wrote of "the majority opinion's evisceration of Mil. R. Evid. 804(b)(1)." *Id.* at 392.

Andy Effron drafted the privilege rules. Although all the privilege rules were done well, his genius shines through in Military Rule of Evidence 501. A hybrid masterpiece,⁸⁰ the rule provides both for codified individual privileges and for those privileges "generally recognized in the trial of criminal cases in the United States district courts." As a result, military law has a body of specific privileges and may adopt other new privileges that are accepted by the federal district courts. Codification of privileges is inherently difficult given the major policy questions and the fear of preventing growth in the law to adjust to new situations. Military Rule of Evidence 501 is an ideal compromise between total, rigid, codification and abandonment of the effort in favor of a case law approach.

Space prohibits a detailed review of the privilege rules, but it may suffice to note that the codification is one of the most complete⁸¹ and useful in the nation.⁸²

H. THE CONSTITUTIONAL CODIFICATION IN GENERAL

The Section III rules are unique in the United States and are a compromise between the military's need for fixed rules with stability and certainty and the lawyer's desire for case-by-case adjudication and change. They are binding because they either accurately codify existing constitutional case law or are more favorable to the accused than case law prescribes. Except insofar as individual provisions intentionally leave matters "free to float" with case law, they were intended to be absolutely binding on all personnel and were to be altered solely by amendment.⁸³

When drafting the search and seizure and interrogation rules,⁸⁴ I attempted to use the following guidelines:

⁸⁰Which the ABA Section on Criminal Justice Committee on Rules of Evidence and Criminal Procedure has adopted as a preferred alternative to the present Federal rule.

⁸¹And arguably one of the best.

⁸²*See, e.g.*, Mil. R. Evid. 505, Classified Information. One of the most unusual provisions found in the rules is Mil. R. 511(b), which I believe I drafted initially. That rule provides in part that the transmission of otherwise privileged information by telephone remains privileged even if overheard in a predictable fashion. Intended to recognize modern life, particularly in the armed forces with communications monitoring, the rule is a unique recognition of social changes due to technology.

⁸³*But see infra* note 118 and accompanying text (discussing judicial abrogation and indifference).

⁸⁴Mr. Effron drafted the eyewitness identification rules and collaborated on Mil. R. Evid. 313(b), Inspections.

1. Procedural rules should be binding and should be spelled out in detail.⁸⁵
2. Areas of the law that are of importance only to lawyers ordinarily should be left to case law development.⁸⁶
3. Areas of law that are of importance to nonlawyers should be codified in a binding fashion and should be spelled out in detail.⁸⁷ Change should be through amendment of the rules.
4. If the answer to a legal question is unclear and we are unable to resolve it by policy decision, no answer should be codified;⁸⁸ applicable Supreme Court language should be used, however unclear,⁸⁹ or, as complete an answer as is accurate should be given, with the remainder of the question left to case law.⁹⁰
5. When desirable, room should be left for unanticipated major changes in the law.⁹¹

Although one could disagree with any given provision, one would have thought that taken as a whole the structure would have addressed adequately all legitimate concerns about "over codification," limiting the development of the law, or supplying "inadequate guidance to the field." That it did not⁹² for many critics may be more of a comment on the common law orientation of American lawyers, or on the hubris of judges, than an indication of inadequacy.

I. INTERROGATIONS—NOTICE TO COUNSEL

Within the Working Group one of the more controversial provisions was the notice to counsel rule—Military Rule of Evidence

⁸⁵See, e.g., Mil. R. Evid. 301, 311.

⁸⁶See, e.g., Mil. R. Evid. 311(a)(2) ("the accused would otherwise have grounds to object to the search or seizure under the Constitution"); Mil. R. Evid. 311(c)(1) (a search or seizure is unlawful if "in violation of the Constitution of the United States as applied to members of the armed forces").

⁸⁷See, e.g., Mil. R. Evid. 314.

⁸⁸See, e.g., Mil. R. Evid. 305(c).

⁸⁹See, e.g., Mil. R. Evid. 301(d) ("except when there is a real danger of further self-incrimination"); Mil. R. Evid. 314(f)(1) ("criminal activity may be afoot").

⁹⁰See, e.g., Mil. R. Evid. 305(f) ("if a person chooses to exercise the privilege against self-incrimination or the right to counsel under this rule, questioning must cease immediately"). At the time this was written, the impact of asserting the right to counsel was unclear. *Edwards v. Arizona*, 451 U.S. 477 (1981), and *Arizona v. Roberson*, 486 U.S. 675 (1988), came later. The rule specified what was known—that interrogation had to stop, but left open and to case law the question of resumption.

⁹¹See, e.g., Mil. R. Evid. 314(k) (other searches).

⁹²See *infra* text accompanying notes 118-44.

305(e)⁹³—which implemented the decision of the Court of Military Appeals in *United States v. McOmber*⁹⁴ in an effort to ensure that interrogators did not nullify a represented suspect's right to counsel. The Navy representative strongly opposed the rule and forecast dire consequences if it were adopted,⁹⁵ while the Air Force attempted to limit its reach.⁹⁶ The rule was adopted and, contrary to the expressed fears, apparently has proven neither unworkable nor controversial.⁹⁷

J. SEARCH AND SEIZURE—BODILY VIEWS AND INSPECTIONS ⁹⁸

When originally drafted, Military Rule of Evidence 312 dealt primarily with strip and intrusive body searches. As such, it was to the best of my knowledge the first binding rule of its type in the nation and, insofar as that aspect is concerned, it has held up quite well. Neither Rule 312 nor Rule 313(b), Inspections, however, dealt adequately with urinalysis—primarily because they were not intended to do so.

When the rule was drafted, the services' general policy was to locate drug abusers and either treat them or discharge them using a medical justification. Military Rule of Evidence 312(f), Intrusions for Medical Diagnosis, was an "open sesame" designed to permit urinalysis or other procedures for valid medical reasons.⁹⁹ When first the Navy and then the other services abandoned in whole or in part the medical justification for urinalysis,¹⁰⁰ the Rule 312(f) "escape clause" lost its utility.

⁹³"When a person subject to the Code who is required to give warnings under subdivision (c) intends to question an accused or person suspected of an offense and knows or reasonably should know that counsel either has been appointed for or retained by the accused or suspect with respect to that offense, the counsel must be notified of the intended interrogation and given a reasonable time in which to attend before the interrogation may proceed."

⁹⁴1 M.J. 380 (C.M.A. 1976).

⁹⁵As well as promising repeal at the earliest possible moment.

⁹⁶The Air Force wished to eliminate that part of the notice requirement that applied when the interrogator "reasonably should know" that counsel had been obtained. Memorandum for General Counsel Department of Defense (Attn: Director, Legislative Reference Service) D/D E.O. Doc. 241, Proposed Executive Order "Prescribing Amendments to the Manual for Courts-Martial, United States, 1969 (Revised Edition)" (AFLI 4664) 2 (30 Aug. 1979).

⁹⁷At the same time, the rule has bolstered the protection afforded military personnel from the type of implicit coercion potentially found in the military environment.

⁹⁸Now amended to read "Body views and intrusions." See *infra* text accompanying notes 122-25.

⁹⁹See Mil. R. Evid. 312(f) analysis of A22-19.

¹⁰⁰See, e.g., *Murray v. Haldeman*, 16 M.J. 74, 77 (C.M.A. 1983) (citing "The Carlucci Memorandum," a December 28, 1981, DOD memorandum issued by Deputy Secretary of Defense Carlucci allowing "evidence obtained by compulsory urinalysis to be used for disciplinary action").

Inherent in this discussion is the assumption that Military Rule of Evidence 312 was intended to apply to urinalysis and forcible extraction of bodily fluids. When the rule was revised concurrently with the promulgation of the Rules for Courts-Martial, however, Military Rule of Evidence 312(d)'s title was changed from "Seizure of Bodily Fluids" to "Extraction of Body Fluids." The change in title was needed because the subsection "does not apply to compulsory production of body fluids (e.g., being ordered to void urine), but rather to physical extraction of body fluids (e.g., catheterization or withdrawal of blood),"¹⁰¹ an analysis concurred in by the Court of Military Appeals.¹⁰² This was erroneous; the rule always was intended to apply to urinalysis outside the scope of the medical exception in Rule 312(f). That is why the section was entitled "seizure." That the rule was not drafted well for this purpose, however, is apparent.¹⁰³

K. SEARCH AND SEIZURE—INSPECTIONS

Arguably, the most important aspect of the "constitutional" codification was Rule 313(b), Inspections. It is the only rule expressly issued by the President using his authority as Commander in Chief.¹⁰⁴ Unlike the other rules, it is the only rule intended to regulate directly day-to-day nonlaw enforcement activities of the armed forces.

To be understood, Rule 313(b) must be placed in context. When the drafting project began, it did so against the backdrop of a major worldwide drug abuse problem and an activist Court of Military Appeals without a unified theory of inspections,¹⁰⁵ a court that was hostile to prosecutions based on inspections for drugs. Judge Perry in particular viewed drug possession and sale as "evidence of crime"¹⁰⁶ and could not accept an inspection for drugs as a proper administrative inspection.¹⁰⁷ His view seemed mistaken as drug use rendered successful military operations impossible; drugs—like unlawful weapons—seemed a fundamental aspect of the health, welfare, and operational readiness of the armed forces. The court's

¹⁰¹Mil. R. Evid. 312 analysis at A22-19.

¹⁰²*Murray*, 16 M.J. at 77.

¹⁰³As a consequence Mil. R. Evid. 313(b) was subsequently amended to state that, "[a]n order to produce body fluids, such as urine, is permissible in accordance with this Rule." Although this resolves the urinalysis "inspection" issue, it leaves open an order to produce urine incident to a probable cause seizure.

¹⁰⁴Mil. R. Evid. 313(b) analysis at A22-20.

¹⁰⁵*See, e.g.*, *United States v. Thomas*, 1 M.J. 397 (C.M.A. 1976).

¹⁰⁶*United States v. Roberts*, 2 M.J. 31, 36 (C.M.A. 1976).

¹⁰⁷The court changed its perspective in *United States v. Middleton*, 10 M.J. 123 (C.M.A. 1981).

holdings, therefore, seriously threatened readiness. At the same time, we had the perception that some commanders were perjuring themselves during suppression motions by testifying that they were conducting traditional "health and welfare" inspections when they were really looking for drugs. Such conduct was clearly horrendous and unacceptable.

Accordingly, Rule 313(b) was drafted to realign the concept of "health and welfare inspections,"¹⁰⁸ and it stated explicitly that "[a]n inspection also includes an examination to locate and confiscate unlawful weapons and other contraband when such property would affect adversely the security, military fitness, or good order and discipline of the command." The rule assumed, for example, that there was some form of reasonable expectation of privacy in one's belongings in a barracks,¹⁰⁹ but that the military's interest in readiness, as well as the individual's interest in a secure and safe environment, justified inspection for drugs when that inspection was not intended as a subterfuge for a search of an individual. When viewed against the backdrop of the drug problem, Rule 313(b) had enormous consequence and potentially permitted near carte blanche authority to inspect in some badly troubled commands. That result seemed fully appropriate when the usually minimal expectation of privacy was viewed against the administrative need.

Rule 313(b) subsequently was amended. Among other changes, using the decision of the Court of Military Appeals in *United States v. Middleton*,¹¹⁰ the drafters deleted the requirement for "a case-by-case showing of the adverse effects of weapons or contraband (including controlled substances) in the particular unit, organization, installation, aircraft, or vehicle examined."¹¹¹ The rule thus assumes that drugs (included within the definition of contraband) are sufficiently adverse to military readiness and the like to permit administrative inspections. It shifts the primary focus to prohibiting subterfuge searches intended for prosecutorial purposes. The drafters of the amendments acted in an appellate legal environment far more favorable to inspections for drugs than we did.

Contemporary civilian case law¹¹² suggests that even the present

¹⁰⁸See generally Mil. R. Evid. 313(b) analysis at A22-20-A22-24.

¹⁰⁹The rule, however, also applied to all other locations including on post quarters.

¹¹⁰10 M.J. 123 (C.M.A. 1981) (*Middleton* was not based, however, on Rule 313(b)).

¹¹¹See Mil. R. Evid. 313(b) analysis at A22-23.

¹¹²See, e.g., *Michigan Dep't of State Police v. Sitz*, 15 U.S.L.W. 4781 (U.S. June 14, 1990); *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384 (1989); *Skinner v. Railway Labor Exec. Ass'n*, 109 S. Ct. 1402 (1989). Cf. *Griffin v. Wisconsin*, 483 U.S. 868 (1987); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

Rule 313(b) may be more conservative than needed. The rule retains the distinction between an administrative inspection and an examination intended to locate evidence for prosecutorial purposes. Major Pat Lisowski¹¹³ has suggested that many commanders would testify, if they could, that they see little distinction for readiness purposes between inspecting for drugs to rid the unit of them¹¹⁴ and looking for offenders to prosecute to deter others. In civilian life, the war against drugs poses agonizing choices between personal privacy and liberty on the one hand, and our strong desire to eliminate drug trafficking and use on the other. Presumably, however, the fourth amendment provides some basic reservoir of privacy for civilians that cannot be altered despite public desire. It is by no means clear that the fourth amendment need function similarly in the armed forces.

When Rule 313(b) initially was drafted, it was apparent that there was a reasonable legal argument that inspections were simply not "searches" within the scope of the fourth amendment. The Analysis states in part: "Consequently, although the fourth amendment is applicable to members of the Armed Forces, inspections may not be 'searches' within the meaning of the fourth amendment by reason of history, necessity, and constitutional interpretation."¹¹⁵ Although I find it troubling, at least in its attempted application to civilian life, I believe that the doctrine of original intent readily could be used to remove all military inspections—*whatever their intent*—from fourth amendment regulation.¹¹⁶ This would permit inspections with prosecutorial purposes, although arguably it would prohibit a subterfuge inspection intended solely to obtain evidence against a single individual.

Although it may be that reappraisal of the application of the fourth amendment to military inspections¹¹⁷ would yield significantly greater command freedom—freedom sustainable by the United States Supreme Court—it is not clear that increasing command flexibility in this manner is desirable as a policy matter. Implementation of such

¹¹³The outgoing search and seizure expert from the Criminal Law Division of The Judge Advocate General's School.

¹¹⁴Or to forestall their appearance.

¹¹⁵Mil. R. Evid. 313(b) analysis at A22-20.

¹¹⁶The same result might follow from an assumption that there is a *de minimis* expectation of privacy throughout the armed forces. I think, however, that various reasonable expectations do in fact exist and would hesitate to rewrite Rule 313(b) on that basis.

¹¹⁷Because of the structure of the Military Rules of Evidence, Rule 313(b) would have to first be amended before such a change could be effective. Of course, the Court of Military Appeals first could endorse such an approach in dictum.

a change might send a signal to personnel at all levels that might significantly impair morale and thus might entail an unreasonable socio-political cost.

VII. THE RULES IN ACTION— JUDICIAL RESISTANCE

In a common law system based on precedent, a new statute presents a new starting point. Unless the constitutionality of the statute is called into question, the statute is valid and must be applied. As cases are presented to the courts, the courts interpret the statute and, through case law precedent, often alter the statute's meaning in the process. Certainly, the court may interpret the text in a fashion inconsistent with its historical intent.¹¹⁸ Should the legislative authorities disagree with the judicial interpretation, they are free to revise the statute and reinitiate the process of interpretation. This description of the common law process is known to and is accepted by all Anglo-American lawyers and often is taken for granted by them. It is thus the same process that we expected to

¹¹⁸The Court of Military Appeals has done this, for example, in the area of character evidence. Like its federal counterpart, Military Rule of Evidence 404(a)(1) permits the accused to offer on the merits "evidence of a pertinent trait of the character of the accused." The analysis to the rule states, "It is the intention of the Committee, however, to allow the defense to introduce evidence of good military character when that specific trait is pertinent. Evidence of good military character would be admissible, for example, in a prosecution for disobedience of orders." Mil. R. Evid. 404 analysis at A22-32. Interpreting the rule, however, the court has gone well beyond the limited use intended by the drafters. *See, e.g.*, *United States v. Wilson*, 28 M.J. 48, 49 n.1 (C.M.A. 1989). *See generally* Smith, *Military Rule of Evidence 404(a)(1): An Unsuccessful Attempt to Limit the Introduction of Character Evidence on the Merits*, 33 Fed. B. News & J. 429 (1986) ("An analysis of these cases leads to a conclusion that the drafters' intent behind Mil. R. Evid. 404(a)(1) to limit the nature of admissible character evidence has been all but ignored—and that the interests of justice have been better served as a result") *Id.* at 430.

Clearly the text of a rule is the primary source of law. In one of my first cases as a military judge after drafting the rules, I was faced with an eyewitness identification suppression motion brought under Rule 321. After argument by counsel, I felt constrained to apply the rule as explicitly written even though its analysis suggested a different outcome. Although I think it proper to consult legislative history to interpret a statute or rule, if the "plain meaning" is susceptible of only one interpretation, I believe that interpretation to be binding.

apply once the Military Rules of Evidence were promulgated.¹¹⁹ We did not expect the degree of judicial resistance that took place.¹²⁰

Although most courts in the armed forces, at all levels, have applied the rules routinely and have dealt with them as one would expect, that has not always been the case. The actions of the Court of Military Appeals have been particularly disturbing given its role as the "Supreme Court of the Armed Forces." The court has shown a surprising and alarming willingness to ignore and twist the rules,¹²¹ especially the "constitutional" rules.

Although trivial, one of the earliest harbingers of the court's attitude may be *United States v. Armstrong*.¹²² A pre-rules case, *Armstrong* examined the application of the article 31 right against self-incrimination to a blood test of a suspected drunk driver convicted of involuntary manslaughter. In discussing article 31(b), Chief Judge Everett referred to "body fluids"¹²³ and then, via a lengthy explanatory footnote,¹²⁴ stated: "Although Mil. R. Evid. 312(d) uses the term 'bodily fluids,' we choose to employ the words 'body fluids,'" Although strictly speaking, the court did not use its own terminology in lieu of the rule's,¹²⁵ it signaled its willingness to substitute its own preferences for those promulgated by the President.

¹¹⁹It may be that *United States v. Alleyne*, 13 M.J. 331 (C.M.A. 1982), is an illustrative case. Faced with the refusal of a soldier to permit an exit examination of personal property when he was leaving a United States installation in Korea, the property was seized and searched yielding evidence of theft. After deciding that civilian case law permitted exit customs searches, the court briefly referred to Mil. R. Evid. 314(c) and, noting that the rule,

seems to limit overseas gate searches to occasions of entry. Since such a distinction would be at odds with the rationale for border searches and with the precedents on the subject—and since the Rule does not purport specifically to preclude the exit search—we are unwilling in this instance to find a negative implication in the authority granted by the Rule to make entry searches.

13 M.J. at 335. One could argue that if the search were not authorized by Rule 314 in some particular, including the 314(k) new type of search "escape clause," it would be unlawful. One could read the court's opinion, however, as interpreting Rule 314(c) implicitly to permit exit searches through poor drafting. Although I know this to be erroneous given my knowledge of the original intent of the provision (which considered the interests in protecting against improper entry of property to be different from those associated with exits), it is the type of thing one might expect an American court to do within the scope of the "game" of statutory interpretation.

¹²⁰Concededly, the rules are not statutes themselves but they were promulgated by the President under both statutory authority, UCMJ art. 36, and his inherent authority as Commander in Chief; thus, they have the force of law.

¹²¹At least "twisting" rules is sometimes part of the "interpretation game." Ignoring rules is an entirely different matter.

¹²²9 M.J. 374 (1980).

¹²³*Id.* at 378.

¹²⁴*Id.* n.5.

¹²⁵Rule 312 subsequently was amended to use "body" fluids, and the court's first review of the rule properly addressed the new, and preferred, terminology.

Far more worrisome was the court's statement in *Murray v. Haldeman*.¹²⁶ "However, it is not necessary—or even profitable—to try to fit compulsory urinalysis within the specific terms of that rule. We have made clear that a search may be reasonable even though it does not fit neatly into a category specifically authorized by a Military Rule of Evidence."¹²⁷ This was error. Military Rule of Evidence 314(k) recognizes new *types* of searches approved via case law; it is quite clearly not a "near miss" rule. As the court is bound by the rules, either a search is authorized by them or it is unlawful—unless it is a new type under Rule 314(k).

Having set the stage, the court then proceeded to an unprecedented form of judicial sleight of hand in *United States v. Tipton*.¹²⁸ *Tipton* involved the reliability of an informant who supplied information that ultimately resulted in the apprehension of the accused. The unanimous court discussed and applied the Supreme Court's *Illinois v. Gates*¹²⁹ decision, which abrogated the *Aguilar/Spinelli* two-prong¹³⁰ test for probable cause to search. The court did this notwithstanding the fact that *Aguilar/Spinelli* was written into Military Rules of Evidence 315(f)(2) and 316(d).¹³¹ Amazingly, the *Tipton* opinion fails even to cite the Military Rules of Evidence. The court had no problem, however, discussing Rule 313(c), Inventory, in *United States v. Dulus*,¹³² a case decided less than one month after *Tipton*. In *Dulus* the court used, and perhaps "stretched," the rule to justify an "inventory" search of an airman's automobile after his apprehension and confinement.

The Court of Military Appeals was not the only offender during this period. In 1982, the Air Force Court of Military Review, discussing Rule 614(b)'s requirement that questions of a witness by court members be submitted in writing, referred to "the procedure *suggested*" by the rule and disparaged it.¹³³

¹²⁶16 M.J. 74 (C.M.A. 1983).

¹²⁷*Id.* at 82. The opinion continues:

Compulsory urinalysis under the circumstances of the present case is justified by the same considerations that permit health and welfare inspections. Therefore, we conclude that the draftsmen of the Rules did not intend to invalidate that procedure *sub silentio* by their failure to authorize it specifically. Indeed, Mil. R. Evid. 314(k) makes this very point . . . *Id.*

¹²⁸16 M.J. 283 (C.M.A. 1983).

¹²⁹462 U.S. 213 (1983).

¹³⁰The two prongs of this test are 1) reliability and 2) basis in fact.

¹³¹*Compare Tipton with United States v. Bollerud*, 16 M.J. 761 (A.C.M.R. 1983) (holding that the Military Rules preempted application of *Gates*).

¹³²16 M.J. 324 (C.M.A. 1983).

¹³³*United States v. Miller*, 14 M.J. 924, 926 (A.F.C.M.R. 1982) (emphasis added).

In 1984, Chief Judge Everett invited me to address the annual Homer Ferguson Conference on the topic of the Military Rules of Evidence. I spoke¹³⁴ on rules compliance and quite bluntly asserted that *Tipton* in particular compelled the conclusion that the Court of Military Appeals was either incompetent or lawless. In fact, incompetence was impossible, at least in the sense of ignorance of the rule's existence. After all, one of the drafters of the rules, Mr. Robert Mueller, a highly competent and responsible lawyer, had represented the court during drafting and was still at the court. What the court actually had done was to disregard the rules and thereby set itself above the President's statutory authority—and it had done so without the minimum judicial candor expected from a court when it feels it is right and proper to deviate from an apparently applicable statute or regulation.

Following *Tipton*, the Navy-Marine Corps Court of Military Review directly addressed the binding nature of the rules. In *United States v. Postle*¹³⁵ the court, in dicta, discussed the potential application to the military of the "good faith exception" enunciated in *United States v. Leon*.¹³⁶ Having first conceded that the text of the Military Rules of Evidence excluded that exception and that "to conclude otherwise is to open a court to attack on the ground that its interpretation of the law is nothing more than judicial legislation—an exercise of power which we believe to be the antithesis of that granted courts created under Article I of the United States Constitution . . . [,]"¹³⁷ the court handily found that the "Constitution is a fluid and dynamic law" and that the

drafters, well aware of this flexibility in the Constitution—and the unpredictable vagaries of its interpretation—must have intended that rules of evidence enacted to incorporate the then extant constitutional principles on the subjects addressed be interpreted with equal flexibility. These "constitutional rules" . . . were intended to keep pace with, and apply to the military, the burgeoning body of interpretative constitutional law . . . not to cast in legal evidentiary concrete the Constitution as it was known in 1980.¹³⁸

¹³⁴With his prior knowledge and consent.

¹³⁵20 M.J. 632 (N.M.C.R. 1985).

¹³⁶468 U.S. 897 (1984).

¹³⁷*Postle*, 20 M.J. at 643.

¹³⁸*Id.*

That this attractive and facile statement clearly is wrong is immediately evident from a review of the text of the rules,¹³⁹ the Analysis, and the post-promulgation history of the rules.

The rules were written in large measure to supply *certainty* and *predictability* to this critical area of military law. Given the worldwide dispersion of the armed forces, the comparative lack of legal advice, and the need for consistent procedures throughout the armed forces, the drafters—and the President—intentionally set much of the Military Rules of Evidence in “concrete.”¹⁴⁰ The assumption was that as *desirable* or binding changes occurred in the constitutional case law enunciated by the Supreme Court, the Military Rules would be amended.¹⁴¹ This already had happened when the Navy-Marine Corps Court of Military Review decided *Postle*; actually, the court referred to the amendment of the rules to adopt the *Gates* abolition of *Aguilar/Spinelli*,¹⁴² so it obviously was well aware of it. Although codification of constitutional law may well be desirable in civilian life as well, it is particularly easy to apply in the military, given the daily awareness of, and reliance of the armed forces on, periodically changed service regulations and directives.

The services are not in agreement on the binding effect of the rules. The Air Force Court of Military Review, for example, finally has held that it is bound by the rules.¹⁴³ Although infrequent, the Court of Military Appeals, however, still is playing fast and loose with the rules,¹⁴⁴ thus abdicating not only its own judicial responsibilities, but also its role as supervisor and “role model” for the subordinate military courts.

¹³⁹While concededly the “plain meaning” school of statutory analysis has its difficulties, the extraordinarily careful drafting of the rules, insofar as what was “fixed” and absolute and what was clearly and expressly designed to change with case law makes the *Postle* declaration extraordinarily difficult to accept. When other factors are added—the “legislative” history and the subsequent revision history of the rules—it becomes incredible.

¹⁴⁰I note drolly that in the worldwide lectures that Commander Pinnell and I presented in 1980 and, I believe, in my 1984 Homer Ferguson Lecture, I routinely commented that we often had “set the rules in concrete” to ensure certainty and predictability.

¹⁴¹Pursuant to DOD Directive 5500.17 (January 1985), the Joint Service Committee on Military Justice is required to perform an annual review of the Manual for Courts-Martial and to forward to the DOD General Counsel's Office proposals for revision. See generally Garrett, *Reflections on Contemporary Sources of Military Law*, The Army Lawyer, Feb. 1987, at 38, 40. This process has worked well, and the Manual has been amended a number of times as a result. Gilligan & Smith, *supra* note 44, at 85 n.49.

¹⁴²20 M.J. at 642.

¹⁴³United States v. Johnson, 21 M.J. 553, 556-57 (A.F.C.M.R. 1985) (en banc).

¹⁴⁴See United States v. Conner, 27 M.J. 378 (C.M.A. 1989) (discussed *supra* note 66).

If one accepts the statement that the Military Rules of Evidence are binding and that some courts, including the Court of Military Appeals, are choosing not to follow them, one must ask why judicial resistance exists.

I would posit that the core of judicial resistance to the rules is nothing more—or less—than the traditional reluctance of Anglo-American judges to be bound by statute. Both our legal system and our law schools are case oriented.¹⁴⁵ The emphasis in law school is on understanding precedent and applying it. In the process we all too often convey the message that the only limit that exists to case—and statutory—interpretation is the creativity of the student. Students then become lawyers wedded to the adversary system who consequently, as zealous advocates, must argue the interpretation most favorable to the client, subject only to the slight limitations of professional ethics. When counsel *ascends* to the bench, the entire system emphasizes the judge's individual independence and power, albeit one usually subject to appellate review. It would hardly be surprising then that many judges would find themselves disinclined to take seriously evidentiary rules, particularly unique evidentiary rules that limit what was nearly unfettered individual creativity, especially if the rules prohibited a result that the court would like to reach.

The price of judicial noncompliance with the Military Rules of Evidence is plain: the appellate courts that are engaging in this not so genteel resistance deprive the military criminal legal system of its predictability and stability. Of perhaps greater significance, they call into question their own legitimacy under the law.

VIII. THE RULES: APPRAISAL AND FUTURE

The Military Rules of Evidence are now a fixture of military legal practice. Law students who become military lawyers find the evidentiary rules applicable to courts-martial substantially identical with the majority rules in force in the United States. Civilian attorneys who appear before courts-martial are not hindered by unique, out-moded, rules easily subject to individual judicial interpretation. Perhaps even more important, the creation of the rules gave birth to what appears to be a continuing, active, and successful military law reform effort. The Military Rules of Evidence have not been placed in the Manual for Courts-Martial and abandoned to the ravages of time; rather, they have been revised periodically as thought ap-

¹⁴⁵Which to some degree is surprising when one considers the ever increasing impact not only of statutes but, most especially, of administrative rules.

propriate to adopt changes in the law.¹⁴⁶ Even as this article is being written, the process is under way to adopt the recent change to Federal Rule of Evidence 609(a).

The periodic spasm of judicial indifference and resistance to the rules is troublesome, particularly inasmuch as it sends signals to the trial bench. Should it continue, it may undermine the rules in toto. At present, however, it might be viewed as occasional obstructions on the expressway; that is, the careful driver must take note of the hazards and accommodate them, but the speedy progress forward usually is not affected significantly.

The Military Rules of Evidence not only routinely govern trials by courts-martial worldwide, but also guide law enforcement personnel and commanders in their daily need to protect the rights of military personnel while they enforce the law. The apparatus that gave rise to the rules continues to function. It has given birth to the Rules for Courts-Martial and has assisted in the revision of the Uniform Code of Military Justice. In the future, the military will amend the rules as society and law change. The structure behind them should ensure a vibrant military legal system at the forefront of criminal justice in the United States. Colonel Alley wrought well!

¹⁴⁶Gilligan & Smith, *supra* note 44, at 85 n.49; *see also supra* note 141