The Wayward Serviceman: His Constitutional Rights and Military Jurisdiction

James W. Hodges

Follow this and additional works at: https://digital.sandiego.edu/sdlr

Part of the Law Commons

Recommended Citation
Available at: https://digital.sandiego.edu/sdlr/vol7/iss2/2

This Article is brought to you for free and open access by the Law School Journals at Digital USD. It has been accepted for inclusion in San Diego Law Review by an authorized editor of Digital USD. For more information, please contact digital@sandiego.edu.
THE WAYWARD SERVICEMAN:
HIS CONSTITUTIONAL RIGHTS AND
MILITARY JURISDICTION

James W. Hodges*

I. INTRODUCTION

Under the guise of protecting the benefits of indictment by
grand jury and trial by petit jury for servicemen, on June 2, 1969,
the United States Supreme Court set aside a rule of constitutional
law which had endured since the adoption of the Constitution by
the colonies. In a decision certain to have extensive consequences,
the Court in O'Callahan v. Parker1 held that the "status" of an
individual as a member of the armed forces does not, standing
alone, confer jurisdiction upon the military to prosecute that
individual for crimes committed while he is a member of the
armed forces. The principle which had clearly emerged after years
of challenge at its periphery suddenly tumbled.2

---

* Lieutenant, United States Naval Reserve, Judge Advocate General's Corps;
Member, State Bar of California, J.D., University of San Diego School of Law, 1967.

1. 395 U.S. 258 (1969). O'Callahan, an Army sergeant stationed in the then Territory
of Hawaii, was on evening leave in Honolulu on July 20, 1956. Dressed in civilian clothes,
he drank a few beers at a hotel bar, broke into the room of a young girl at the hotel,
assaulted and attempted to rape her. He was apprehended by a hotel security officer while
fleeing the victim's room and delivered to military authorities via the Honolulu police.
Convicted of attempted rape, house-breaking, and assault with attempt to rape by an
Army General Court-Martial, O'Callahan's sentence as finally approved on appeal by the
Court of Military Appeals consisted of imprisonment at hard labor for ten years, forfeiture
of all pay and allowances for a like period, and a dishonorable discharge. Habeas corpus
proceedings were denied in the District Court and the Third Circuit Court of Appeals
affirmed. The Supreme Court granted certiorari to decide whether the armed forces had
jurisdiction to prosecute O'Callahan for crimes committed off-post while on leave and
alleged to have no military significance, thus depriving him of his constitutional rights to
indictment by a grand jury and trial by a petit jury in a civilian court. 395 U.S. at 260.

(1960) (holding that military lacked jurisdiction to prosecute civilian employees of overseas
military forces for capital crimes); Kinsella v. United States ex rel. Singleton, 361 U.S.
234 (1960) (holding that military lacked jurisdiction to prosecute civilian dependents of
overseas military personnel for non-capital crimes); Reid v. Covert, 354 U.S. 1 (1957)
(holding that military lacked jurisdiction to prosecute civilian dependents of overseas
military personnel for capital crimes). "The test for jurisdiction, it follows, is one of status,
namely, whether the accused in the court-martial proceeding is a person who can be
regarded as falling within the term 'land and naval forces.'" Kinsella v. United States ex
rel. Singleton 361 U.S. at 240-41.
The Court recognized that the Constitution provides Congress with the power to “make Rules for the Government and Regulation of the land and naval Forces.” Further, the fifth amendment exempts “cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger” from the requirement of presentment or indictment by grand jury and the right to trial by jury. The Court’s attention focused immediately upon dicta in *Toth v. Quarles,* questioning the competency of military courts; it proceeded through a bitter attack against the creation, composition, purposes and ability of military courts regarding their capacity to deal with a defendant’s rights.

---

5. 395 U.S. at 261; *Ex parte Quirin,* 317 U.S. 1 (1942).
6. 350 U.S. 11, 17 (1955); 395 U.S. at 262-63. We find nothing in the history of constitutional treatment of military tribunals which entitled them to rank along with Article III courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty or property. Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to any army’s primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served. And conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts. For instance, the Constitution does not provide life tenure for those performing judicial functions in military trials. They are appointed by military commanders and may be removed at will. Nor does the Constitution protect their salaries as it does judicial salaries. Strides have been made toward making courts-martial less subject to the will of the executive department which appoints, supervises and ultimately controls them. But from the very nature of things, courts have more independence in passing on the life and liberty of people than do military tribunals.

7. Single out in particular and condemned by the Court were the following areas: The requirement that courts-martial be composed of military personnel normally acting by two-thirds vote; the practice of having a military law officer, whose objectivity and independence the Court questioned; differences in rules of evidence and procedure in military trials; the possibility of influence by the officer convening the court; the position of military courts as part of the overall mechanism preserving military discipline; an alleged less favorable attitude toward defendants in the interests of national defense; an alleged ineptness on the part of the military courts to deal with the “nice subtleties” of constitutional law; and, an allegation of “vagueness” of criminal provisions marking the military trials by “the age-old manifest destiny of retributive justice.” 395 U.S. at 263-66. It is interesting to note the Court’s complete lack of citations to military cases dealing with constitutional rights, and the citing by the majority opinion of only two military cases, the latest of which was decided in 1964. Unfortunately, the dissent also cited only two military cases, both fifteen years old, and neither of which touched upon constitutional rights.
Interspersed with a lengthy review of early American and British military law, the Court concluded that "status" as a member of the armed forces on active duty at the time of the offense and at the time of trial is no longer determinative of court-martial jurisdiction in the absence of factors disclosing the crime to be "service-connected." Admittedly, the decision mirrored the Court's desire to prevent the fifth amendment's exemption regarding "cases arising in the land and naval forces" from depriving a member of the armed forces of the "benefits of an indictment by a grand jury and a trial by a jury of his peers." The opinion expressed a lingering doubt concerning the competency of military courts to effectively protect a serviceman-defendant's constitutional rights. Analyzing the factors existing in the instant case, the Court determined that the crime was not "service-connected" and accordingly reversed the military conviction. The following discussion is an attempt to rebut what the author considers unjustified criticism of the military justice system.

II. CONSTITUTIONAL RIGHTS AS SEEN THROUGH THE EYES OF THE MILITARY

A. Advise of Counsel

A most viable issue presented to the American judicial system recently is the sixth amendment protection concerning advice as to the right to counsel. *Miranda v. Arizona* is renowned for its holdings regarding the adequacy of warnings given, the definition

---

8. 395 U.S. at 267.
9. Id. at 272-73.
10. Factors considered important in determining the degree of "service-connection" in O'Callahan's case were: (1) no connection between O'Callahan's military duties and the crimes in question; (2) the crimes were not committed on a military post or enclave; (3) the victim was not performing any duties related to the military; (4) the situs of the crimes were not an armed camp under military control; (5) the offenses were peacetime offenses and not connected with the war power; (6) civil courts were open; (7) the crimes were committed within American territorial limits, rather than in an occupied zone of a foreign country; and (8) the offenses did not involve any question of the flouting of military authority, the security of a military post, or the integrity of military property. 395 U.S. at 273-74.
12. "[T]he person must be warned . . . that he has a right to the presence of an attorney, either retained or appointed." Id. at 444. The individual "must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during the interrogation . . . ." Id. at 471.
of custodial interrogation, 13 and the definition of waiver. 14

The military counterpart to Miranda is United States v. Tempia. 15 The Tempia court found a custodial interrogation present, 16 an invalid warning given relative to the right to counsel, and lack of a knowing and intelligent waiver by the accused. 17 Although the Tempia decision was not announced until April of 1967, the Court of Military Appeals applied the Miranda rulings retroactively to military cases from the effective date of the Miranda decision. 18 Tempia's trial had begun one day following the effective date of Miranda.

The military has dealt with challenges directed at the wording of the warning of the right to counsel since Tempia; the Supreme Court has not yet had the occasion to grapple with this problem. 19

---

13. The test is not whether the accused has technically been taken into custody but, absent that, whether he has been “otherwise deprived of his freedom of action in any significant way.” Id. at 444.

14. “The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.” Id.


16. In the military, unlike civil life, a suspect may be required to report and submit to questioning quite without regard to warrants or other legal process. It ignores the realities of that situation to say that one ordered to appear for interrogation has not been significantly deprived of his freedom of action.

16 U.S.C.M.A. at 636, 37 C.M.R. at 256. See Section II(B), infra, dealing with self-incrimination, for a discussion of “custodial interrogation.”

17. The Court of Military Appeals found that the accused confessed because he was frustrated in his attempts to obtain legal advice, saying, in referring to his conversations with a military lawyer who professed his unavailability to advise Tempia: “They didn't do me no good.” No other lawyers were available to speak to the accused. 17 U.S.C.M.A. at 638, 37 C.M.R. at 258.


19. See Frazier v. Cupp, 285 U.S. 731 (1969). Frazier involved a pre-Miranda factual situation which would have been summarily reversed had the Miranda rulings been applicable. The defendant had remarked during the interrogation: “I think I had better get a lawyer before I talk any more. I am going to get into trouble more than I am in now.” The interrogator, considering the statement as merely a passing remark, replied:
Without exception, the Court of Military Appeals has reversed convictions obtained through the use of confessions where the accused was not adequately advised of his right to counsel. This situation has most often arisen in the areas of appointed military counsel free of charge and advice regarding the right to have counsel present during the interrogation. When one of the essential elements of a warning is missing, it is apparent; when the wording of the warning is challenged, the problem is more complex. Use of the word "counsel," as opposed to "lawyer" or "attorney" has been upheld on the theory that specific words are not necessary so long as the meaning is properly conveyed. While "counsel" has been held acceptable, the same does not hold true.

"You can't be in any more trouble than you are in now," and questioning continued. *Id.* at 738. *Miranda* would have required reversal since "[i]f . . . [a suspect] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." 384 U.S. at 444-45. The Supreme Court found Frazier's request ambiguous within the rule of *Escobedo v. Illinois*, 378 U.S. 478 (1964), and admitted the confession using the "totality of the circumstances" rule of *Clewis v. Texas*, 386 U.S. 707 (1967). See Section II (B), infra, dealing with self-incrimination.


for the phrase "qualified attorney" when otherwise undefined.\textsuperscript{22}

The best explanation to date appears to be \textit{United States v. Mewborn},\textsuperscript{23} holding that "[a]n advice which does not contain the substance of the formula is inadequate. . . . Specific words or phrases, however, need not be used. In other words, it is not the format, but the substance of the advice that matters."\textsuperscript{24} \textit{Mewborn} accepted the "awkward" language of an interrogator who warned the accused, not at the outset of the interview, but before it waxed significant, that the accused could have "the service of an attorney," that he "could go downtown and hire" a lawyer or "military counsel" would be provided for him, and that he could have an attorney "then and there."\textsuperscript{25} The holding dispels any doubts concerning whether substance shall rule over form in determining the validity of warnings in the military. Thus, it recognizes the practicalities involved in law enforcement, providing an acceptable and reasonable standard.

As a means of insuring the protection of the rights interpreted in \textit{Miranda}, the Supreme Court held that once an individual asks for an attorney, all questioning must cease until the person being interrogated obtains an attorney.\textsuperscript{26} The military first applied this constitutional proviso in \textit{United States v. Solomon},\textsuperscript{27} holding that continued questioning by an agent after the accused has made a request for counsel, and while another agent sought to obtain counsel for him, rendered the statement inadmissible.

A further \textit{Miranda} requirement, that "[n]o amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead"\textsuperscript{28} was adopted in

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 233 and 435.
\item \textit{Id.}
\item If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.
\item 17 U.S.C.M.A. 262, 38 C.M.R. 60 (1967).
\item 384 U.S. at 471-72.
\end{enumerate}
\end{footnotesize}
United States v. Stanley. The Court of Military Appeals found evidence that the accused should have known of his right to free appointed military counsel from information supposedly obtained through orientation lectures, but held that such evidence would not suffice to replace a showing on the record that the accused had been adequately advised of his rights at the time of the interrogation. Exculpatory statements, as well as incriminating ones, have been held to be within the rule requiring a showing of proper warnings prior to admitting the statements into evidence. The protection afforded by the Miranda-Tempia rulings extends also to impeachment of the accused by his prior statements. However, a curious exception exists in military courts when the impeachment is used not during the case in chief, but to impeach the accused’s testimony in extenuation and mitigation following the determination of guilt, as found in United States v. Caiola. Although the Caiola court found a “custodial interrogation” to exist and no warnings given, the statement was allowed on the theory that the second stage of a military trail, in which matters relevant to sentencing are presented, did not have a civilian counterpart. The accused, while a prisoner awaiting trial, was asked on a stockade questionnaire if he wanted to return to duty. His negative answer to the question was later used to impeach his statements made in extenuation and mitigation at the trial. Concurring opinions to the decision leave considerable doubt that the decision will remain in effect, at least upon its own reasoning.

A reasonable exception to the Miranda-Tempia requirements has been carved out in the military. When the defense presents testimony relative to the accused’s mental condition, a government expert witness is allowed to testify in rebuttal regarding his


The question of waiver has also been litigated in the Court of Military Appeals since the \textit{Miranda} and \textit{Tempia} decisions. The result has been a careful adherence to the standards of the Supreme Court as described in \textit{Miranda}, requiring a voluntary, knowing and intelligent waiver of the rights to counsel.\footnote{United States v. Stanley, 17 U.S.C.M.A. 384, 38 C.M.R. 182 (1968). The \textit{Stanley} record of trial was silent regarding whether the accused knowingly and intelligently waived his rights to counsel. The sole evidence was: "Q. Did you inform him that he might have a lawyer present either civilian-or military? A. Yes, Sir." In addition, the accused said "[h]e further advised me that I may have legal counsel who may be present during the questioning." 17 U.S.C.M.A. at 385, 38 C.M.R. at 183.} Understandably, a waiver was found when the accused did not object at trial to the admission of a statement obtained after a defective warning, and then cross-examined the interrogator concerning the content of the statement.\footnote{United States v. Gustafson, 17 U.S.C.M.A. 150, 37 C.M.R. 414 (1967).}

To date, the military has not had occasion to deal with the issue of counsel at "line-ups." \footnote{See United States v. Wilson, 18 U.S.C.M.A. 400, 40 C.M.R. 112 (1969). See United States v. Schell, 18 U.S.C.M.A. 410, 40 C.M.R. 122 (1969); United States v. Babbidge, 18 U.S.C.M.A. 327, 40 C.M.R. 39 (1969).} If the recent decisions of the Court of Military Appeals are any indication at all, the military
presumably will follow the Supreme Court in determining line-ups to be “critical stages” of prosecution at which the accused is entitled to the aid of counsel. The military has also moved into the area of searches, proclaiming that no warnings regarding counsel or self-incrimination are necessary when seeking the consent of a suspect for a search. Handwriting exemplars have been held exempt by the Supreme Court from the requirement of warnings on the theory that they do not constitute a “critical stage” of the criminal proceedings, but rather are “identifying physical characteristics” as distinguished from the contents of a writing. In contrast, the military affords the suspect all warnings regarding self-incrimination when dealing with handwriting exemplars, but has held that the warnings regarding right to counsel are not applicable.

B. Advice as to Self-Incrimination

Miranda requires that, in addition to warnings concerning counsel, at the outset of any custodial interrogation the suspect be advised “that he has a right to remain silent, that any statement he does make may be used as evidence against him,” and that “[i]f the individual indicates in any manner, at any time

39. United States v. Wade, 388 U.S. 218 (1967). See Stovall v. Denno, 388 U.S. 293 (1967), and Gilbert v. California, 388 U.S. 263 (1967). See also Foster v. California, 394 U.S. 440 (1969), where the defendant was first placed in a line-up with considerably shorter men, and, after no positive identification was made, a one-to-one confrontation with the robbery victim was arranged. After only a tentative identification at the confrontation, a subsequent line-up was conducted in which the defendant was the only person who had also been in the first line-up. Holding Wade and Gilbert inapplicable since Foster had occurred before the former decisions, the Supreme Court nevertheless reversed the conviction based on the rationale of Stovall, holding that “judged by the ‘totality of circumstances,’ the conduct of identification procedures may be ‘so unnecessarily suggestive and conducive to irreparable mistaken identification’ as to be a denial of due process of law.” 394 U.S. at 442.


42. United States v. Lewis, 18 U.S.C.M.A. 355, 40 C.M.R. 67 (1969). Lewis upheld a conviction based in part upon the taking of a handwriting exemplar by an agent who warned the accused properly except that the accused was told: “If you want an attorney now, I have no provision to furnish you one. You are only entitled to a court appointed attorney at the time the matter should go to the court.” Id. at 357. See Section II (B), infra, dealing with self-incrimination for further discussion of handwriting exemplars.

43. 384 U.S. at 444.
prior to or during questioning, that he wishes to remain silent, the interrogation must cease.\textsuperscript{41} Tempia bound the military to the \textit{Miranda} formulae as constitutional criteria.\textsuperscript{45} However, long before \textit{Miranda} was decided, the military had been bound by the requirements of the renown "Article 31,"\textsuperscript{46} which is broader than \textit{Miranda} in that warnings are required to be given in more depth, limitations are placed upon the type of questions to be asked, and the conditions under which statements may be rendered inadmissible are clearly defined.\textsuperscript{47} The military has again adhered to \textit{Miranda} by requiring interrogators to comply with the wishes of the accused's desire to terminate questioning.\textsuperscript{48} Furthermore, the government is required to show beyond a reasonable doubt that the accused did not in any manner indicate that he did not wish to be interrogated.\textsuperscript{49}

In \textit{United States v. Schloemann},\textsuperscript{50} the court allowed the use

\begin{itemize}
\item \textsuperscript{44} Id. at 473-74.
\item \textsuperscript{45} 16 U.S.C.M.A. at 635, 37 C.M.R. at 255.
\item \textsuperscript{46} 10 U.S.C. § 831 (1956). Compulsory Self-incrimination prohibited:
\begin{itemize}
\item \textsuperscript{(a)} No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.
\item \textsuperscript{(b)} No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offenses of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.
\item \textsuperscript{(c)} No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.
\item \textsuperscript{(d)} No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.
\end{itemize}
\item \textsuperscript{47} See \textit{United States v. Green and Hamilton}, 15 U.S.C.M.A. 300, 35 C.M.R. 272 (1965) (must find that means used by investigator did not vitiate the effect of the § 831, Article 31 warning given).
\item \textsuperscript{48} \textit{United States v. Bollons}, 17 U.S.C.M.A. 253, 38 C.M.R. 51 (1967). Bollons was advised of his rights and answered several statements by saying he didn't want to make any statements that could be used against him or incriminate him, but he apparently answered some questions when the interrogators continued to ask questions, resulting in a fatal defect in the conviction.
\item \textsuperscript{50} 16 U.S.C.M.A. 414, 37 C.M.R. 34 (1966).
\end{itemize}
of the accused’s prior statement to civilian authorities who had not warned him in accordance with the requirements of Article 31, not required in civilian courts, on the theory that the civilian interrogator was not acting in furtherance of a military investigation at the time. And, in United States v. Reynolds,51 the court struck down a statement made to a military investigator who asked the accused what he had done while on an unauthorized absence when the response was incriminating. The basis was that the investigator had not advised the accused of what crime he was suspected as required by Article 31. United States v. D'Arco52 admitted the statement of a serviceman made to the FBI, although no Article 31 warnings were given, on the theory that the FBI acted on its own initiative following receipt of information from a military member who elected to contact the FBI rather than military authorities. United States v. Elliott53 found error in admitting into evidence a statement made by the accused following a defective Article 31 warning. The interrogator advised the suspect that he could refuse to answer only if he was guilty of something, that the accused should say nothing if involved, but, if the accused was only a witness, he was required to testify upon being asked or suffer a court-martial.

The determination of what constitutes a “custodial interrogation” has been the subject of much litigation.54 both in civilian and military courts. As a starting point,55 the Supreme Court held that a custodial interrogation had occurred when the defendant, while incarcerated in a state prison, was questioned by Internal Revenue agents regarding the filing of his tax returns.56 The same finding was made when a defendant was questioned by police in his own bedroom at 4 a.m. regarding his being at the scene of a homocide and his ownership of a pistol later determined to have been the weapon which fired the fatal shot.57

The Court of Military Appeals has run the gamut of

55. “By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” 384 U.S. at 444.
The first application correctly anticipated the Supreme Court's ruling in *Mathis* by finding a custodial interrogation present when the accused was interrogated while imprisoned.⁵⁸

A second application resulted in a finding of no custodial interrogation when an air policeman, performing evening duties in the base equipment office, and required to check all persons in the area, saw the accused receive a tool box from someone inside the office. The policeman asked the accused if he worked there and for his identification, receiving in reply a request for a "break" and an offer of fifty dollars if the policeman would let the accused go.⁵⁹ The military version of a "bedside interrogation" resulted in a strict application of *Orozco v. Texas*⁶⁰ and a finding of a custodial interrogation when only two officers were present in the accused’s home.⁶¹ In the military view, a custodial interrogation necessarily results after the accused has been arrested on suspicion of his involvement in an activity for which he is later prosecuted.⁶² But, absent an arrest, the turning point is whether the interrogator suspects the accused of criminal activity when the interrogator speaks to him. In *United States v. McCrary*, the escort taking the accused to be checked off base following his larceny conviction was held to have implied knowledge of the accused’s conviction and thus should have warned the accused before asking if there was anything in his car the accused did not wish found.

In *United States v. Corson*, the Court of Military Appeals held that warnings should have been given when the accused's superior suspected him of possessing marijuana cigarettes and demanded them by saying, "I think that you know what I want, give it to me."⁶³

---

⁶⁵. Even prior to *Miranda* and *Tempia*, the military had dealt with the same question. *United States v. Ward*, 14 U.S.C.M.A. 3, 33 C.M.R. 215 (1963), found no need for an Article 31 warning by a clerk who asked the accused for a document to complete his pay...
The Court of Military Appeals had occasion to deal with *Miranda*'s proclamation that "'[t]here is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime . . . ." in *United States v. Vogel*. The accused, questioned with the rest of his squad without either warnings or enlightening responses, went to the chapel and decided to confess; subsequently he went to his superior who took him to headquarters for the purpose of making a statement. The court found that Vogel's motivation was to "get it off his chest," and it was for that reason that he confessed. Confessions made to undercover agents pretending to be criminal suspects have yet to be acted upon by the Supreme Court; however, the military upheld such a confession in *United States v. Hinkson*. No custodial interrogation was found to exist when a military informant agreed to act as a law-breaker to gain Hinkson's confidence. The informant told the accused of his own purported involvement and then waited for the accused to volunteer inculpatory statements. Both *Vogel* and *Hinkson* had vigorous dissenting opinions.

A distinct area, separate from the question of warnings, is the *Miranda* requirement that any incriminating statement be found voluntary before it may be used against the defendant. The Supreme Court has declared that a confession may be found involuntary even if warnings were properly given, as witnessed by *Sims v. Georgia*. The Court has not hesitated to strike down convictions based upon statements obtained under compromising circumstances, on the theory that the "totality of the circumstances" was such as to make the confession involuntary. Based upon *Davis v. North Carolina*, where the Court held that lack of warnings coupled with holding the accused

---

66. 384 U.S. at 478.
69. 384 U.S. at 478.
70. 389 U.S. 404 (1967) (defendant subjected to physical violence prior to his confession, kept by police for eight hours and not fed or allowed to see anyone; subsequent warnings prior to his confession did not detract from the involuntary nature of the confession).
incommunicado for sixteen days until he confessed produced an involuntary confession, a series of decisions held statements involuntary under the "totality of the circumstances" doctrine.22

The military has consistently held that the voluntariness of a confession is a question of fact which must be shown by the government beyond a reasonable doubt.73 United States v. Howard74 held the accused's statement voluntary when two investigators questioned him alternately, one interrogator asking questions relentlessly and the other in a friendly manner. Against the accused's claim that he had desired to remain silent after talking with both agents for some time, the court found that he merely had decided not to talk to one interrogator, finding no psychological pressure had been used to induce him to waive his right to remain silent. And, in United States v. Barksdale,75 the court found that the accused answered some questions "no" to indicate his answer and others with the same word to indicate that he did not wish to answer. The accused admitted he had the understanding that he could leave at any time, resulting in a finding that he was willing to be questioned. On the other hand, United States v. O'Such,76 decided before Tempia, held involuntary a confession made after the accused had been questioned all night, put into solitary confinement without light, 

72. Darwin v. Connecticut, 391 U.S. 346 (1968) (held two days; questioned whole time during days and evenings; attorney had tried numerous times to contact; tried to hypnotize the accused; two previous invalid confessions); Greenwald v. Wisconsin, 390 U.S. 519 (1968) (accused had refused to put oral statements in writing, claiming it was against his constitutional rights and claiming he was entitled to a lawyer); Brooks v. Florida, 389 U.S. 413 (1967) (confined naked in tiny cell without toilet; subsisted for two weeks on twelve ounces of thin soup and eight ounces of water daily; complete domination by jailors; confession extracted within minutes after brought from cell); Beecher v. Alabama, 389 U.S. 35 (1967) (defendant, already wounded by police, ordered at gunpoint to speak his guilt or be killed; second confession while in hospital, drugged, in pain and at mercy of prison hospital authorities); Clewis v. Texas, 386 U.S. 707 (1967) (prolonged questioning of unintelligent suspect). See also Harrison v. United States, 392 U.S. 219 (1968) (requiring government to show defendant's inculpatory statements at first trial to have not been induced by government's use of wrongfully obtained confession before admissible at second trial).


checked with a flashlight every five minutes, not allowed to lie
down during daytime, given only a plank and pallet upon which
to lie at night, and interrogated the next day and night.\textsuperscript{77}

Numerous military decisions have dealt with the issue of the
voluntariness of a second statement preceded by proper warnings
following a statement with improper warnings. \textit{United States v.
Plaut},\textsuperscript{78} the most recent of many cases on this point, found no
relationship between two statements made by the accused. The
first statement was made without warnings to a guard who
apprehended the accused and others following the shooting of
another, and the second statement to another guard who
apprehended the accused later without suspecting more than the
unlawful discharge of a firearm. When first interrogated, the
accused had claimed an accidental shooting while the victim tried
to take the gun from him. When apprehended the second time, he
requested that a call be made to his company commander. While
the guard made the call, he volunteered an apology for the
shooting of the victim to the guard. The guard at the time was
unaware of the victim’s involvement and had not prompted or
questioned the accused. The test of \textit{United States v. Wimberley}\textsuperscript{79}
would still seem apropos when dealing with a series of statements,
only the last of which was preceded by proper warnings:

Where there are successive statements, it is not a
precondition to the admission of a properly obtained
statement, that the accused be informed that a previous
statement cannot be used against him. . . . But the fact that

\textsuperscript{77} The test of the voluntariness of a confession is whether accused, at the time it
was made, possessed the mental freedom to speak or remain silent. . . .
The matter in issue is not the tendency of measures taken by the Government
to cause a false statement to be obtained, but whether they are consistent with
(1963)} (holding a promise of immunity vitiated the warnings given to the accused); \textit{United
interrogators and the accused not to question the accused’s pregnant wife vitiated
the warnings given to the accused); \textit{United States v. Shanks, 12 U.S.C.M.A. 586, 31 C.M.R.
172 (1961)} (remanding for a rehearing to determine voluntariness of accused’s confession
to an agent, with proper warnings preceding the interview, following a beating of the
accused by fellow servicemen earlier after he had made statements to the victim of the
larceny).
\textsuperscript{79} 16 U.S.C.M.A. 3, 36 C.M.R. 159 (1966) (overruled by \textit{Tempia} on the issue of
adequacy of warnings).
an inadmissible statement was previously obtained is a factor to be considered in determining the voluntariness of the later statement. . . . Whether the taint of the first statement influenced the making of the second depends on the surrounding circumstances. 80

United States v. Lake 81 has anticipated the Supreme Court in dealing with admissions. While conceding that a confession must have a showing of voluntariness to be admitted into evidence, Lake held that an admission does not require the same showing, absent evidence of involuntariness. The holding would appear to provide a fair and reasonable approach to the question, in light of the recent Supreme Court cases dealing with the issue of voluntariness.

An interesting variation on the issue of voluntariness occurred in United States v. Goldman. 82 During a recess of an Article 32 Investigation, convened to determine the need for a court-martial, the accused incriminated himself in the presence of the investigating officer, who used the statement against the accused at the later court-martial. The accused’s lawyer was at the time placing a telephone call. Goldman wandered next to the investigating officer, who was observing activities outside the room through a window, and initiated a conversation. He commented on the reason that he had left on an unauthorized absence. Refusing to apply the rule that no conversations may take place with an accused after defense counsel has been appointed, 83 the Court of Military Appeals instead relied upon United States v. Schlomann 84 in holding admissible certain confessions which occur in the absence of defense counsel.

80. Id. at 9 and 165. See United States v. Workman, 15 U.S.C.M.A. 228, 35 C.M.R. 200 (1965) (held spontaneous accused's statement requesting leave from commanding officer to get a loan to pay back what he had taken when the statement was made several days after he had been questioned without proper warnings concerning missing documents and had admitted his involvement); United States v. Caliendo and Wolf, 13 U.S.M.C.A. 405, 32 C.M.R. 405 (1962) (requiring that a strong showing exist that the taint of a prior illegal statement be removed before a subsequent one is admissible); United States v. Powell, 13 U.S.C.M.A. 364, 32 C.M.R. 364 (1962) (holding inadmissible subsequent statement made when accused aware that authorities know of his involvement and his prior inadmissible statement and the agent taking it were present at the subsequent interrogation).


The military has also refused to allow a victim to be impeached at trial for his failure to testify during earlier proceedings at which he was the potential defendant. Although no post-Tempia cases have occurred on the subject, there is no reason to believe that the military will deviate from its refusal to allow the prosecution to comment upon the failure of the accused to testify in his own behalf or upon his reliance upon any of his constitutional rights.

While the Supreme Court has held that the taking of handwriting exemplars is not within the area of self-incrimination, but instead enjoys the status of an "identifying physical characteristic" outside the protection of the fifth amendment, the military has taken a unique position which affords the accused considerably more protection. As a result of United States v. Minnifield, military investigators are required to advise the


Of the cases cited, only Andrews was found to be non-prejudicial error, and then only because so much other evidence of the accused's guilt of negligent homicide existed. It will be interesting to examine the treatment given by the military to any further cases on this point, in light of the Supreme Court's limitations on the "harmless error" rule contained in Bruton v. United States, 391 U.S. 123 (1968), modifying Chapman v. California, 386 U.S. 18 (1967), which required a finding of harmlessness beyond a reasonable doubt. See Mause, Harmless Constitutional Error: The Implications of Chapman v. California, 33 MINN. L. REV. 519 (1968). See also Frazier v. Cupp, 394 U.S. 731 (1969), a post-Bruton decision holding that proper instructions cured the prosecutor's opening statement referring to a co-defendant's confession when the co-defendant later refused to testify, and Harrington v. California, 395 U.S. 250 (1969), allowing the use of a co-defendant's confession with limiting instructions.

accused in accordance with Article 31 before asking for a handwriting exemplar. The military considers such samples as the equivalent of a "statement" for the purposes of Article 31. A reasonable extension of the rule requires civilian investigators to advise military defendants in accordance with Article 31 only when they act on behalf of the military.

C. Protection Against Unreasonable Searches and Seizures

The fourth amendment's prohibition against unreasonable searches and seizures has been the topic for a considerable number of recent decisions by the Supreme Court. The decisions have encompassed, among other areas, the issues of probable cause, standing to object, "stop and frisk" searches, searches incident to arrest, consent searches and questions regarding whether a search actually occurred.

Spinelli v. United States provided perhaps the most controversial decision in the area of probable cause for some time. Probable cause was found lacking in an FBI agent's allegation that a confidential reliable informer had supplied information that a wagering suspect was conducting gambling operations by means of two telephones, whose numbers the informer specified. The corroboration supplied consisted merely of evidence that the suspect went in and out of the apartment where the telephone numbers were listed. The Court found that Spinelli did not sufficiently establish compliance with the twofold test to determine the presence of probable cause supplied by Aguilar v.


Military investigators, acting independently in what can be described as an exclusive military investigation, must provide the threshold advice required by Article 31 before asking the accused for a sample of his handwriting, but civilian investigators, acting entirely independent of military authority, need not, as persons not subject to the Code, preliminarily advise an accused of his rights under Article 31. Civilian investigators must warn in accordance with Article 31 when (1) "the scope and character of the co-operative efforts demonstrate 'that the two investigations merged into an indivisible entity,'" . . . and (2) "when the civilian investigator acts 'in furtherance of any military investigation, or in any sense as an instrument of the military'. . . .'"

Texas. Aguilar required that (1) the application for a warrant to search set forth necessary "underlying circumstances" to enable the magistrate to independently judge the validity of the informant’s conclusion; and (2) the affiant-officers attempt to support their claim that the informant was "credible" or his information "reliable." Sibron v. New York and Peters v. New York, companion cases to Spinelli, provided an interesting comparison of probable cause. Sibron refused to accept a warrantless search as a self-protective search for weapons by the arresting officer on the grounds that no probable cause existed for the arrest. The suspect’s mere acts of speaking with a number of known narcotics addicts over an eight-hour period of observation were considered inadequate to support an arrest for any crime whatsoever. However, Peters found evidence that the arresting officer heard noises outside the door of the apartment he had rented for twelve years, opened it and saw two unknown men tiptoeing down the hall, both of whom ran when they saw the officer. This evidence was more than sufficient to establish probable cause to arrest the accused and validate the subsequent cursory search resulting in the discovery of burglary tools. It would appear that the Supreme Court is demanding rigid adherence to the Aguilar test, particularly in regard to the "underlying circumstances" requirement.

The Court of Military Appeals has recently decided a great many cases on the issue of probable cause. The most recent decision, United States v. Goldman, found probable cause

94. See McCray v. Illinois, 396 U.S. 300 (1967) (found probable cause when informant reported defendant selling narcotics, possessed narcotics, and could be found at a particular intersection; police arrived and observed him engaging in suspicious acts); United States v. Ventresca, 380 U.S. 102 (1967) (found probable cause when agents observed repeated deliveries of loads of sugar in sixty pound bags, smelled the odor of fermenting mash, and heard sounds similar to a motor or pump coming from defendant's house); Beck v. Ohio, 379 U.S. 89 (1964) (establishing exclusionary rule); Draper v. United States, 358 U.S. 307 (1959) (found probable cause when informer described exact clothing defendant would wear when arriving; agents corroborated clothing worn upon arrival). See also Davis v. Mississippi, 394 U.S. 721 (1969) (no probable cause for police, over ten day period, to question, fingerprint and then release at least twenty-four Negro youths in rape investigation; decided upon an unfortunate set of circumstances resulting in unnecessary intrusions into defendant's personal security).
present for a search when an unauthorized absentee, who was picked up by investigators, related that he had met the accused through other associates and that the accused had told him of his activities in passing counterfeit money. The informant referred to another person, who was taken into custody. The second person portrayed himself as one engaged in counterfeiting and a criminal associate of the accused. He reported that the counterfeit money could be found in the building where he and the accused rented rooms. United States v. Price\textsuperscript{66} found no probable cause to believe currency was concealed at the location to be searched when neither the inspector’s testimony nor the authorizing papers delineated the facts upon which the belief was based. United States v. Soto\textsuperscript{97} also declined to find probable cause when the searching officer had been informed that a wallet with a sum of money in it had been taken from under the owner’s pillow, and that the accused had been seen during the approximate time of the loss in another row of tents some twenty feet from the victim’s tent bending over a bunk as though he were feeling under it. United States v. Thomas\textsuperscript{96} not only found no probable cause, but not even suspicion, when the accused’s superior took from him a bottle, later found to contain heroin, for the sole reason that he found the accused asleep with the bottle in his hand. Other decisions of the Court of Military Appeals clearly indicate a deeply entrenched understanding of the distinctions between suspicion and probable cause.\textsuperscript{99} The military has also indicated its

\begin{itemize}
\item\textsuperscript{66} 17 U.S.C.M.A. 566, 38 C.M.R. 364 (1968).
\item\textsuperscript{97} 16 U.S.C.M.A. 583, 37 C.M.R. 203 (1967).
\item\textsuperscript{99} See United States v. Carter, 16 U.S.C.M.A. 277, 36 C.M.R. 433 (1966) (found probable cause in request mentioning the dwelling to be searched and accompanying affidavits specifying clearly the property in question); United States v. Penman, 16 U.S.C.M.A. 67, 36 C.M.R. 223 (1966) (no probable cause in search of accused when only evidence showed state narcotics agents raided location, shortly after accused left, and found narcotics; persons arrested at location indicated accused used or possessed marijuana; no indication of reliability of the unknown sources of information); United States v. Martinez, 16 U.S.C.M.A. 40, 36 C.M.R. 196 (1966) (found probable cause when victim awoke to discover accused going through his clothes; three other such cases with the same modus operandi had taken place in the same area within a period of less than a month); United States v. Dollison, 15 U.S.C.M.A. 595, 36 C.M.R. 93 (1966), (no probable cause when sole information was that items other than those for which accused was already charged discovered missing from the office where he had worked); United States v. Hartsook, 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965) (no probable cause in request to search when failed to mention specific things to be seized, but description only of the methods it was suspected that the accused used in altering bingo cards); United States v. Davenport, 14 U.S.C.M.A. 152, 33 C.M.R. 364 (1963) (no probable cause in request describing property
\end{itemize}
understanding that the facts upon which the search is authorized must be closely related to the time of the issuance of the search authorization.100

Standing to raise the objection to an unreasonable search or seizure has historically stemmed from the presence of a "property right" of the objecting party in the property seized or his legitimate presence on the premises searched.101 Spinelli v. United States102 extended this reasoning to include the situation where the defendant was arrested outside his apartment by agents who waited for him to leave, arrested him, obtained the key to his apartment and searched the apartment. However, Mancusi v. DeForte103 found standing to object by a union official when union documents had been seized from his office, which was shared with others, on the theory that the defendant had a reasonable expectation of freedom from government intrusion of his office.104 But the presence of a property right of the defendant in the property searched does not allow him to successfully object to the fruits of a search of property jointly possessed with another when the other party consents to a search of the jointly possessed property.105

to be seized, but without source of information or any corroboration; found to be illegal "shakedown" search upon an unreliable tip); United States v. Battista, 14 U.S.C.M.A. 70, 33 C.M.R. 282 (1963) (no probable cause for search based on allegation of two sailors that accused suggested and/or forced homosexual conduct while they were under influence of drugs in dental office); United States v. Ness, 13 U.S.C.M.A. 18, 32 C.M.R. 18 (1962) (found probable cause in description by informant of accused and two others and their discussion concerning the sale of government property, including time and place of sale and license number of accused's car; corroboration included following of car by agents and observation of described black market operators following pre-described route at times and places that informant had provided).

100. Stoner v. California, 376 U.S. 483 (1964); Preston v. United States, 376 U.S. 364 (1964); United States v. Britt, 17 U.S.C.M.A. 617, 38 C.M.R. 415 (1968) (insufficient relation of facts to authorization when the accused was observed smoking marijuana five months before the search of his locker); United States v. Lange, 15 U.S.C.M.A. 486, 35 C.M.R. 458 (1965) (search conducted seventeen days after authorization for inspection and immediately following report of theft; searching officer conceded he intended to look for stolen property).


104. Extension of protection against unreasonable searches and seizures to commercial premises such as offices is not a novel concept. See See v. City of Seattle, 387 U.S. 541 (1967); Osborn v. United States, 385 U.S. 323 (1966); Lopez v. United States, 373 U.S. 427 (1963); Go-Bart Importing Co. v. United States, 282 U.S. 244 (1931); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

The dual concepts embraced in *Jones v. United States* have not only been adopted by the military, but have been extended to forbid the accused standing to suppress the fruits of a search of his roommate's locker, resulting in the discovery of the accused's marijuana, where clear evidence displayed that the accused had neither express nor implied permission to store the marijuana in his roommate's locker. Recognition of the "jointly possessed" issue has also been afforded by the military in *United States v. Mathis*, where officers entered the accused's house at the invitation of another resident. The Court of Military Appeals held that the other resident could consent to a search of the house insofar as any jointly possessed portions were concerned, but could not consent to a search of the personal belongings of the accused, such as his bedroom dresser.

The area of warrantless searches incident to arrest has been the subject of considerable consternation to the Supreme Court, both separate from and in connection with "stop and frisk" situations. Most dramatic among the recent decisions was *Chimel v. California*, condemning a warrantless search of the defendant's entire house, incident to a proper arrest in the house for burglary. The search extended beyond the defendant's person and the area from which he might have obtained either a weapon or something that could have been used as evidence against him. *Chimel* followed the reasoning of *Terry v. Ohio*, decided the previous term, to the effect that "the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure . . ." and that "[t]he scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry*, which upheld the "stop and frisk" search by an officer who observed conduct by the defendant and another consistent with the theory that they were "casing" a building in anticipation of a robbery, allowed the officer to make a preliminary search of the suspects for weapons by "patting down" their outer garments.

106. See note 101 supra.
111. Id. at 20.
112. Id. at 19.
113. But see *Sibron v. New York*, 392 U.S. 40 (1968), holding invalid a search where the policeman reached into the suspect's pocket to find narcotics, not motivated by
Warden v. Hayden\textsuperscript{114} had been the forerunner of the two decisions. It sustained the right of police in hot pursuit of a robber to conduct a warrantless search of the house into which he fled and later use as evidence against him clothes found in the washing machine in the basement, identified as the clothes he wore during the robbery, and a pistol and shotgun found in the bathroom adjoining the bedroom where the defendant was arrested. The Supreme Court discarded the distinction between "mere evidence," which could not be seized by warrant or otherwise, and those objects which may validly be seized, including instrumentalities and means by which the crime is committed, the fruits, weapons by which escape might be effected and property the possession of which is a crime. Chimel expressly overruled United States v. Rabinowitz,\textsuperscript{115} holding that the validity of a warrantless search is based upon the reasonableness of the search, rather than whether it was reasonable to procure a warrant.\textsuperscript{116}

Military cases in the vein of Chimel, Terry and Hayden have not presented themselves to the Court of Military Appeals recently. However, the military has anticipated the Supreme Court in holding that, although probable cause for a search was present, unauthorized search of private property will not be upheld absent circumstances showing that it was incident to an arrest or that authorities were confronted with the grave possibilities of the protection. See LaFave, "Street Encounters" and the Constitution: Terry, Sibron, Peters and Beyond, 67 Mich. L. Rev. 40 (1968); Comment, 53 Minn. L. Rev. 652 (1969); Comment, 44 Notre Dame Law. 485 (1969); Note, 78 Yale L.J. 433 (1969).

\textsuperscript{114} 387 U.S. 294 (1967).
\textsuperscript{115} 339 U.S. 56 (1950).
\textsuperscript{116} For a history of the development of the rule, see also Ker v. California, 274 U.S. 23 (1963) (applying Rabinowitz); Elkins v. United States, 364 U.S. 206 (1960) (regarding "reasonableness"); Abel v. United States, 362 U.S. 217 (1960) (applying Rabinowitz); Trupiano v. United States, 334 U.S. 699 (1948) (unexplained failure of agents to procure warrant invalidated search when great deal of time available); Harris v. United States, 331 U.S. 145 (1947) (sustaining search for papers incident to arrest); United States v. Lefkowitz, 285 U.S. 452 (1932) (requiring a warrant if practicable; Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931) (requiring a warrant if practicable); Marron v. United States, 275 U.S. 192 (1927) (upholding warrantless search for means of committing crime); Agnello v. United States, 269 U.S. 20, 30 (1925) (allowing warrantless search incident to arrest of "the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody"); Carroll v. United States, 267 U.S. 132 (1925) (allowing search of place within suspect’s control when arrested); Weeks v. United States, 232 U.S. 383 (1914) (approving warrantless search incident to arrest).
destruction or removal of the objects of the search. Decker disallowed the fruits of a search, conducted without authorization after the accused's arrest, on the basis that the "place and time of an arrest must be intimately connected with the place and time of the search to justify the latter as an incident of the former." Probable cause for a search incident to an arrest was found when the accused in United States v. Herberg was reported operating a vehicle unsafely, in connection with another similar complaint describing the accused's vehicle. But the search of the vehicle was made after the accused had been apprehended and taken to headquarters, rendering the subsequently discovered gun to be inadmissible in evidence against the accused.

"Consent searches" have been clearly defined and strictly construed by the Supreme Court, especially when dealing with circumstances which might vitiate the consent originally given. Bumper v. North Carolina declared illegal a search by agents who falsely told the occupant of the house that they had a search warrant. Although the occupant then acquiesced to their search, her acquiescence did not constitute consent.

The military adopted the same theory in United States v. Westmore. Westmore refused to allow acquiescence and ratification as a substitute for consent in a search where the accused was in custody and was asked by an investigator to point out his barracks and locker. The investigator told the accused that he wished to search the locker, and the accused then pointed out the locker. United States v. Johnson used the same reasoning in upholding a search of the accused's locker on the theory of "consent." The accused testified that he had understood the

120. United States v. Simpson, 15 U.S.C.M.A. 18, 34 C.M.R. 464 (1964), upheld, as incident to a proper arrest, a search of the accused. The search disclosed worthless checks which constituted the instrumentalities of the crime. United States v. Ross, 13 U.S.C.M.A. 432, 32 C.M.R. 432 (1963), upheld as incident to an arrest a search of the accused's bedroom, kitchen and dining room for fruits of the crime. The agents, posing as buyers of Navy examinations the accused was suspected of selling, had been sold one copy by the accused.
121. See Mintz, Search of Premises by Consent, 73 Dick. L. Rev. 44 (1968).
request to search to be "imploratory" rather than "mandatory," and had twice previously ignored the request.\textsuperscript{125}

In both civilian and military situations, the question of whether the acts of law enforcement officials constitute a search has caused concern on several occasions. \textit{Harris v. United States}\textsuperscript{126} determined that no search had been made when a robbery victim's auto registration card was found by an officer while removing valuables from the defendant's impounded vehicle, when the card was plainly visible to the officer.\textsuperscript{127} The seizure was upheld upon the theory that the acts by the officer were protective measures for the safety of the vehicle.\textsuperscript{128}

\textit{United States v. McCrary},\textsuperscript{129} however, found a search when the accused's military escort, upon orders from his superior, opened the accused's car for the purpose of retrieving an item which the accused had indicated was there and did not belong to him. The escort saw other government owned items in the car. He collected and turned in everything which appeared to belong to the government. Since the search was without authorization and probable cause, the Court of Military Appeals found it illegal. But, when Air Force regulations required an inventory of an accused's belongings when he was confined, no search was found.\textsuperscript{130} Military authorities inventoried the accused's belongings, and found stolen checks and packages. The accused had been confined on suspicion of breaking into a post office and ransacking a mailbag.

Understandably, the military has not had occasion to become involved in the area of "electronic eavesdropping" to any great extent. \textit{United States v. Wright}\textsuperscript{131} provided an indication of how the military would react to this intricate area of the law. The Court of Military Appeals upheld the secret use of a recording device by one party to a telephone conversation, unknown to the other party, as a permissible means of recording accurately the

\textsuperscript{126} 390 U.S. 234 (1968).
\textsuperscript{131} 17 U.S.C.M.A. 183, 37 C.M.R. 447 (1967).
content of the conversation. In Wright, the accused had been suspected of placing obscene telephone calls. He consented, after proper warnings as to self-incrimination and counsel, to speak with one victim for the purpose of voice identification. The court upheld the right of the investigating officer to explain to the victim that a "suspect" would be speaking to her and to require the suspect to change voice inflection. It also upheld the right of the government to record the conversation unbeknown to the accused. In light of the advice given to the accused and the circumstances of the "eavesdropping," the case would hardly fall within the ambit of protection afforded by Katz v. United States, which held that a search or seizure of speech does not require a trespass or actual penetration of a particular enclosure.

D. Right to a Speedy Trial

One of the relatively few areas in which the Supreme Court has not been extremely active during recent years is that of speedy trial. Surprisingly few factual situations have confronted the Court upon this point, especially in light of the Court's earlier proclamations:

The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice. . . . and [w]hether delay in completing a prosecution . . . amounts to an unconstitutional deprivation of rights depends upon the circumstances. . . . The delay must not be purposeful or oppressive. . . .

Unusual factual situations have been presented to the Court in recent years. In Smith v. Hooey, it was determined that the sixth amendment's provision affording an accused a right to a speedy trial was applicable to a federal prisoner who had requested trial on a state charge. The state failed to act for six years. The Court reasoned that defense difficulties created by such a long delay are apt to be markedly increased when the accused is confined in another jurisdiction. The state must honor a

132. 389 U.S. 347 (1967). Katz was decided approximately four months after Wright.
demand for a speedy trial by attempting to obtain the accused's release or suffer the consequences of being barred from prosecuting him. *Klopf er v. North Carolina* found a violation of the right to speedy trial when the government entered "nolle prosequi with leave," thus allowing the defendant his liberty. But, it did not relieve him of the limitations placed upon him by prosecution. The government's action would have had the effect of vesting discretion in the solicitor to hold the defendant subject to trial, over his objection, throughout an unlimited period of time during which the solicitor could restore the case to the calendar. However, during this time there was no means by which the defendant could obtain dismissal or have the case restored to the calendar for trial. Although the defendant would be under no restraint of any kind and the statute of limitations upon the charges would be tolled, he could still be tried. *United States v. Ewell* found no infringement upon the defendants' rights to a speedy trial when they were promptly indicted and convicted after their original arrests and were immediately arrested and reindicted in due course after their motions to vacate sentence had been granted. The decision was made notwithstanding a 19 month delay between the original arrest and the hearings upon the subsequent indictments.

The military's adaptation of the sixth amendment's guarantee of a speedy trial is premised upon two statutory prerequisites. Before a speedy trial motion will lie, the accused must show that he has either been charged formally with the crime in question or placed in some form of restraint. Any delay in preferring charges, absent restraint, is pertinent only in determining time limitations as required by the particular statute of limitations upon the offense. The military has been faced with numerous allegations of denial of the right to speedy trial. These cases strictly interpret the guarantee in favor of the accused. The military, perhaps in keeping with its reputation for accomplishing objectives with a minimum loss of time, interprets the guarantee in terms of months rather than in years.

The breakthrough in the military accused's favor appears to

---

have taken place in *United States v. Parrish*. The accused was charged with attempted robbery and attempted murder, alleged to have occurred on August 23, 1966. He was brought to trial on January 4, 1967.

Parrish was confined the day of the offenses. His statement was taken two days later. The interviews of witnesses were completed by the investigators in mid-September. The investigatory report was dated October 3. Charges were read to the accused on October 12 and additional charges were read 13 days later. The Article 32 pre-trial investigation, the military substitute for a grand jury proceeding, was held November 2 and its report completed 16 days later. Charges were referred December 8 and the accused served December 12, with trial immediately following the Christmas holidays. The four and one-half month delay was held to have denied the accused his right to a speedy trial.

Parrish provided the impetus for a new era regarding the right to a speedy trial in military law, as evidenced by *United States v. Smith*. Smith, charged with marijuana offenses alleged to have occurred on November 30, 1966, was eventually tried on April 18, 1967. He had been restricted to the base during the interim. Holding that the restriction of the accused amounted to “restraint-in-fact,” the Court of Military Appeals determined that the government had not acted with “reasonable dispatch” in proceeding to trial with the accused. *United States v. Weisenmuller* continued the trend. The accused, charged with marijuana offenses alleged to have occurred prior to March 8, 1967, was kept in “strict punitive type restriction” from that date until August 11. His trial was held on September 7, 1967. The Court of Military Appeals held he was denied his right to a speedy trial. The crux of the decision lay in an unexplained 72 day delay between the date he was originally picked up and the date charges were brought against him.

---

The military has not hesitated to allow the reviewing courts to inquire into the reasons for delays in bringing an accused to trial. *United States v. White* found error in the refusal of the reviewing court to allow appellate defense counsel's request to inquire into the reasons for an unexplained delay of five months in bringing the accused to trial. The record showed that the accused had been restricted to his barracks for five months without explanation other than that he had submitted to a psychiatric examination during that period of time. *United States v. Smith* upheld an inquiry by the judge of the accused as to whether the defense had been prejudiced in any way by the delay in bringing the case to trial. Holding that the defense was not required to submit any proof, the Court of Military Appeals found that the burden to show that the delay was reasonable was properly placed upon the prosecution. Furthermore, the military has condemned any pre-trial agreements which purport to waive the accused's rights to speedy trial or due process in exchange for a guaranteed ceiling for the sentence.

**E. Right to a Fair Trial**

Military courts are not composed of jurors in the sense that civilian juries are so constituted, but rather are composed of members of the armed forces, usually officers. The military has taken many steps to insure the impartiality of the members of the arrest and trial, although a simple case of false claims by the accused with a full confession 2 days after his arrest); United States v. Tibbs, 15 U.S.C.M.A. 350, 353, 35 C.M.R. 322, 325 (1965) (holding a 55 day delay between charges for attempted larceny and housebreaking and trial as non-prejudicial; "It suffices to note that the touchstone for measurement of compliance with the provisions of the Uniform Code is not constant motion, but reasonable diligence in bringing the charges to trial."); United States v. Brown, 13 U.S.C.M.A. 11, 32 C.M.R. 11 (1962) (no unreasonable delay in trying the accused in January for offenses to which he confessed the previous July where most of the time was spent correcting deficiencies in the investigation to protect the rights of the accused; difficulties in proceeding to trial; some delays attributable to the defense). See also Torvestad, *Speedy Trial in Military Law*, 8 U.S.A.F. JAG L. Rev. 33 (No. 3, 1966) (review of law prior to Parrish).

146. Compare United States v. Lamphere, 16 U.S.C.M.A. 580, 37 C.M.R. 200 (1967), where the Court of Military Appeals refused to disturb an appellate dismissal of all charges after the reviewing court independently screened, weighed, and evaluated the facts and the record displayed a substantial basis for the action in the accused's favor.
court and the judge, the absence of command influence upon the court and judge, and the adequacy of counsel. In addition, the armed forces have equalled, and at times surpassed, the civilian requirements when dealing with the right to confrontation of witnesses, the examination of the providence of guilty pleas, the adequacy of measures to insure the ultimate fairness of trials and the preservation of due process in prosecuting and punishing offenders, and protection against double jeopardy.

The Supreme Court has been adamant in its requirement that jurors be impartial, especially when dealing with situations wherein the death sentence is a possibility. *Witherspoon v. Illinois* refused to allow a defendant to be put to death by a jury chosen through the exclusion for cause of veniremen who voiced general objections to the death penalty or expressed conscientious or religious objections to the infliction of the death penalty. While the military has not yet acted upon a decision in the *Witherspoon* context, dealing with the death penalty, it has dealt with the issue of voir dire of court members. *United States v. Sutton* acting upon the theory that the accused is guaranteed the right to fair-minded and impartial arbiters of the evidence, allowed questioning of the military panel regarding their willingness to convict although entertaining a reasonable doubt as to the accused's guilt. *United States v. Fort* agreed that voir dire questioning of the panel should extend to inquiry into fixed preconceptions or inelastic attitudes on the part of the court members. Such attitudes might support a challenge for cause, even if the attitude existed only in regard to sentencing.

The military has long followed the practice of constituting courts-martial solely of officers unless the accused expressly requests the presence of enlisted members. Should the accused so request, the convening authority is obligated to appoint enough

---

149. See Boulden v. Holman, 394 U.S. 478 (1969) (in which the Supreme Court remanded where an Alabama statute provided that fixed opinion against capital punishment is good cause for challenge by the state and it appeared that no less than fifteen jurors were excluded by the prosecution under the terms of the statute); Comment, 21 Baylor L. Rev. 73 (1969); Note, 53 Minn. L. Rev. 838 (1969).
enlisted members to a Special or General Court-Martial so that
the final membership is at least one-third enlisted, but is not
limited in the maximum number of enlisted members he may
appoint.\textsuperscript{153} \textit{United States v. Crawford}\textsuperscript{154} upheld the use of a
selection process for court members where there was no systematic
exclusion of lower enlisted men, but a selection of those who
would best be qualified to judge and sentence an accused. The
process resulted in the use of senior non-commissioned officers.

Of prime importance in recent years has been the Court of
Military Appeals’ fight to eliminate command influence upon the
members of military courts.\textsuperscript{155} \textit{United States v. McLaughlin}\textsuperscript{156}
found command influence when the convening authority set up a
Special Court-Martial consisting of a president and twelve other
members. Then, by memo, the convening authority set up a
schedule of court sessions with only three members to be present
at each session, all the others being excused. On the theory that
appointed members of the court may be excused only through

\textsuperscript{153} 10 U.S.C. \S 825 (c) (1968) amending 10 U.S.C. \S 825 (1964). A Special
Court-Martial consists of a minimum of three members on the court, a Military Judge if
the authorized sentence is to include a Bad Conduct Discharge, or trial before the Military
Judge alone if the accused so requests. When the Military Judge presides in the presence
of court members, he does not vote upon either the findings or the sentence, but acts solely
in the capacity of his civilian counterpart. The maximum punitive jurisdiction of a Special
Court-Martial is six months confinement at hard labor, six months forfeiture of two-thirds
base pay per month, reduction to the lowest enlisted pay grade, and a Bad Conduct
Discharge, the latter authorized only when the Military Judge presides and the accused is
represented by lawyer counsel. A General Court-Martial consists of a minimum of five
members on the court, always requires a Military Judge, and may consist of the Military
Judge alone if the accused so requests. Its punitive jurisdiction is limited only by the
maximum punishment for the crime or crimes for which the accused stands convicted, but
may, depending upon the crime in question, authorize death, life imprisonment and total
forfeitures of pay, as well as a Dishonorable Discharge. 10 U.S.C. \S\S 816-19 (1968),
amending 10 U.S.C. \S\S 816-19 (1964). Lawyer counsel on both sides are mandatory in
General Courts-Martial and lawyer counsel in Special Courts-Martial is almost always
available for the accused, usually without the need for his request, the only exception being
due to “physical conditions or military exigencies.” The definite trend is to discontinue
the use of non-lawyer counsel for the accused in Special Courts-Martial, although the
prosecutor may be a non-lawyer. In no event may the prosecutor possess greater
qualifications than the defense counsel. 10 U.S.C. \S 827 (1968), amending 10 U.S.C. \S
upheld the right of the military to use such non-lawyer counsel, but frowned upon the
continuance of such a practice.

\textsuperscript{155} See Note, 18 Cath. U.L. Rev. 429 (1969); Johnson, \textit{Unlawful Command
legitimate excuse, the Court of Military Appeals held that a pre-
arranged absence deprived the president of his right to attend,
preside at and control all sessions but the first.157 United States v. Cole158 found command influence present in the posting of 
bulletins by the convening authority indicating that the accused 
was to be tried for larceny and indicated that the convening 
authority desired to punish the accused. Post-trial statements of 
two members who had read the notices, declaring that they were 
not influenced, were not sufficient to dispel all doubt. On the other 
hand, United States v. Albert159 did not find command influence 
in lectures by the Staff Judge Advocate to post officers, some of 
whom were later members of the accused's court, which called for 
careful consideration of the factors that affect a particular 
accused. His lecture was not a direction to include certain types 
of punishment at all times and under all circumstances, but 
reminded listeners that the determination of a sentence was for the 
court alone. He discussed administration, morale, and disciplinary 
problems resulting from certain types of punishments without 
expressing any command desires.160

Attempts have been made to further insure the independence 
of military judges, all of whom are lawyers and usually of 
relatively high rank in the armed forces, by not allowing the 
various convening authorities to evaluate their performance, but 
instead placing them in a separate staff corps, answerable only to 
the Judge Advocate General of the particular armed force.161

The Court of Military Appeals has readily reversed cases 
where the convening authority attempted to interfere with the 
performance of counsel162 or when improper practices of counsel

---

160. See also United States v. Dubay, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967) 
(setting up a procedure to deal with command influence); United States v. Johnson, 14 
U.S.C.M.A. 548, 34 C.M.R. 328 (1964) (allowing pre-trial orientation of prospective 
members but not lectures or pamphlets discussing matters not of concern to members).
23 JAG J. 155 (1969); Goldschlager, The Military Judge, A New Judicial Capacity, 11 
JAG L.R. 175 (1959).
the judge to consult with the accused in an out-of-court hearing regarding whether he 
wishes to excuse two assistant defense counsels, neither of whom had assisted in the 
preparation of trial, but refusing to allow the convening authority to authorize the absence 
of assistant defense counsel or allocate functions among them).
or inadequate representation by defense counsel occurred. *United States v. Wood*¹⁶³ condemned defense counsel's failure to object to the prosecutor's erroneous argument, but did not find reversible error. *United States v. Cook*¹⁶⁴ found reversible error in defense counsel's argument on the sentence which was tantamount to a concession that a punitive discharge was appropriate, after the accused had expressed regret for his offenses.¹⁶⁵ *United States v. Colarusso*¹⁶⁶ reversed when accused's non-lawyer defense counsel allowed the accused to take the stand and judicially admit possession of a firearm present in the court which had previously been excluded from evidence as being the product of an unlawful search.¹⁶⁷ The same condemnation has resulted when the defense

---

did not adequately explain the absence of appointed members of
the defense.\textsuperscript{168}

It is basic to the American system of justice that the
defendant be confronted with the witnesses against him and be
afforded ample opportunity to cross-examine them. Although
\textit{Harrington v. California}\textsuperscript{169} allowed the government to present co-
defendants' confessions without having them present on the theory
that there was overwhelming evidence of the defendant's guilt, and
proper limiting instructions relegated the error to the status of
"harmless,"\textsuperscript{170} \textit{Barber v. Page}\textsuperscript{171} was not nearly as permissive.
\textit{Barber} held that the defendant was denied his right to confront
witnesses against him when the government made no effort to
obtain the presence of a co-defendant who was in federal custody
in another state. The co-defendant's testimony at a preliminary
hearing was used at the defendant's trial to incriminate him.\textsuperscript{172}
Denial of the right to confrontation was also found in \textit{Smith v. Illinois},\textsuperscript{173}
when the court sustained the prosecution's objection to
the defense's cross-examination of the government's principle
witness, an informer, regarding his true name and address.\textsuperscript{174}
Similarly, in \textit{Parker v. Gladden},\textsuperscript{175} the Court found a denial of this
right where the bailiff had made statements to jurors that the
defendant was a "wicked fellow," that he was guilty, and that if
there was anything wrong in finding the defendant guilty, the
Supreme Court would correct it.\textsuperscript{176}

The military has embraced equivalent standards in
interpreting the right to confrontation, as exemplified in \textit{United
States v. Shaffer}.\textsuperscript{177} In \textit{Shaffer}, the government was allowed to
introduce testimony taken at a preliminary hearing, when the
witness later refused to testify at the trial. The crux of the decision

\begin{itemize}
\item \textsuperscript{169} 395 U.S. 250 (1969).
\item \textsuperscript{170} Contra \textit{Bruton v. United States}, 291 U.S. 123 (1968) (error to admit co-
defendant's confession even with limiting instructions).
\item \textsuperscript{171} 390 U.S. 719 (1968).
\item \textsuperscript{172} Compare \textit{Douglas v. Alabama}, 380 U.S. 415 (1965); \textit{Pointer v. Texas}, 380 U.S.
400 (1965).
\item \textsuperscript{173} 390 U.S. 129 (1967).
\item \textsuperscript{174} \textit{See Brookhard v. Janis}, 384 U.S. 1 (1965); \textit{Alford v. United States}, 282 U.S.
687 (1931).
\item \textsuperscript{175} 385 U.S. 363 (1966).
\item \textsuperscript{176} \textit{Compare Turner v. Louisiana}, 379 U.S. 466 (1965).
\item \textsuperscript{177} 18 U.S.C.M.A. 362, 40 C.M.R. 74 (1969).
\end{itemize}
was complete opportunity to cross-examine the witness at the previous hearing. Where the opportunity to cross-examine a witness is made available at a pre-trial hearing, the testimony of the witness at such hearing, if it is a "full-fledged hearing," will be admissible at the trial, assuming that the witness is unavailable in fact. United States v. Jacoby determined that the accused has a constitutional right to be present during the taking of depositions under the confrontation clause. Since the Federal Rules of Criminal Procedure are applicable to the armed forces, a defendant in a military trial is entitled to subpoena witnesses.

The providence of guilty pleas, an area which has recently attracted the attention of the Supreme Court, was subjected to vigorous standards in McCarthy v. United States. McCarthy decided that the district judge, who accepted the defendant's guilty plea without personally addressing the defendant to determine that the plea was voluntary and with an understanding of the nature of the charge, failed to adhere to proper procedures under Rule 11 of the Federal Rules of Criminal Procedure, which deals with the acceptance of guilty pleas.

Such inquiries were standard in the military and have since been extended in their scope by several recent decisions. United States v. Lewis found that there had been a proper initial inquiry into the providence of the accused's guilty plea. But, when the defense counsel declared in a post-finding statement that a

179. United States v. Obligacion, 17 U.S.C.M.A. 36, 37 C.M.R. 300 (1967) (inadmissible when witness shown to be over 100 miles away, as required by statute, but not available in fact); United States v. Burrow, 16 U.S.C.M.A. 94, 36 C.M.R. 250 (1966) (testimony of two French nationals who testified at Article 32 Pre-trial Investigation admissible when they refused to appear for trial voluntarily and were not amenable to process).
defense was available but was not asserted due to inability to obtain proof, a further inquiry should have been made. *United States v. Pinkston*\(^{185}\) found an inadequate inquiry into the voluntariness of the accused's guilty plea when the accused, in a statement in extenuation and mitigation, indicated that he had participated in the offenses because of threats against his life and against those of his son and fiancee.\(^{186}\) The military has understandably condemned inquiry into the providence of guilty pleas during a mass arraignment,\(^{187}\) agreements to plead guilty in exchange for a pre-trial agreement limiting the amount of punishment, but specifically waiving any issue of speedy trial or due process,\(^{188}\) and placing the accused under oath for the inquiry and advising him that his answers, if proven false, might result in a charge of perjury against him.\(^{189}\)

Fundamental violations of an accused's right to due process have been found on several occasions in dealing with the handling of the accused either before or during his trial, as well as when dealing with the trial itself. *United States v. Nelson*\(^{190}\) determined that the accused had been punished without due process. Before trial, the accused was placed in the brig in a combat zone to await trial, performed hard labor with convicted criminals, and kept the same schedule hours, and work assignments as sentenced personnel. The only distinction between the accused and the sentenced prisoners consisted of the arm-bands worn.

Some of the recent cases reveal abuses during trial in both civilian and military courtrooms. *Miller v. Pate*\(^{191}\) condemned a


\(^{186}\) See also United States v. Care, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969) (requiring that elements of offense be explained to accused and his actions and intentions ascertained); United States v. Johnson, 18 U.S.C.M.R. 436, 40 C.M.R. 148 (1969) (requiring Military judge to inquire into the facts supporting each element when questioning the accused regarding providency of his guilty plea); United States v. Leggs, 18 U.S.C.M.A. 245, 39 C.M.R. 245 (1969) (error to grant two continuances to obtain medical reports bearing on accused's mental capacity and then, at third meeting of court, accept a guilty plea without more than a *pro forma* inquiry into its providency); United States v. Boberg, 17 U.S.C.M.A. 401, 38 C.M.R. 199 (1968) (upholding adequacy of inquiry into guilty plea to unpredicated murder without accused's categorical admission of his guilt).


\(^{191}\) 386 U.S. 1 (1967).
deliberate misrepresentation by the prosecution through the use of paint-stained girl's pants, and reference to them as "bloody shorts," in a prosecution for the murder of an eight-year old girl during a sex attack. Sheppard v. Maxwell[192] and Estes v. Texas[193] both condemned inherent prejudice against the defendant as a result of failure of the court to control prejudicial publicity and disruptive influences in the courtroom. A military counterpart was United States v. West,[194] where the accused was found to have been denied his right to a fair trial. He was confined in a small dark cell of solid concrete and steel, denied all furniture, reading material and hot meals during pre-trial confinement without any justification for such strenuous restriction. He was then transported to and from the court in a box on the rear of a truck, and was continually surrounded by guards, despite the ruling of the law officer to modify security to make it less conspicuous. In addition, he was required to dress and undress in the presence of the court members, to appear in court in a prison uniform or fatigue clothing and denied the opportunity to shave.[195]

Double jeopardy has been analyzed by the Supreme Court on several occasions, most recently in North Carolina v. Pearce.[196] The Court held that, upon re-conviction, any sentence imposed which is more severe in length than the initial sentence must carry with it affirmative reasons by the judge allowing it. Benton v. Maryland[197] determined that the state court had violated the accused's right to protection against double jeopardy by re-trying him for larceny. He had been acquitted of larceny, but convicted of burglary at an earlier trial, which was subsequently set aside on appeal. Termination of proceedings and discharge of the jury before evidence is presented, on the grounds that the government is not prepared to go forward with its case, does not cause jeopardy to attach.[198] But, once the government has presented evidence, a termination of the proceedings will cause jeopardy to

---

195. See also United States v. Lewis, 16 U.S.C.M.A. 145, 36 C.M.R. 301 (1966), holding that the accused was denied the right to a fair trial as a result of bitter antagonism between counsel during the trial resulting in the disclosure of matters prejudicial to the accused.
attach\textsuperscript{199} unless “very extraordinary and striking circumstances” are present.\textsuperscript{200} Also, the proper declaration of a mistrial will not result in the attaching of jeopardy.\textsuperscript{201} The military case, \textit{United States v. Waldron},\textsuperscript{202} found a proper declaration of mistrial when five of the six members of the accused's court had, at a prior trial of another accused, formed an opinion as to the credibility of an important witness to be called in the accused's case. Dictum in \textit{Waldron} would indicate that the military would decide any other cases in the area of double jeopardy in accordance with the reasoning of the Supreme Court as discussed in the above cases.

\textbf{F. Right to indictment by Grand Jury and Trial by Petit Jury}

The fifth amendment's protection of the right to presentment or indictment by grand jury and trial by petit jury has been the subject of considerable discussion throughout the history of the Supreme Court, particularly in regard to its application to the military. However, the Court has consistently, until the advent of \textit{O'Callahan}, considered that the rights were not applicable to those whose “status” was that of a member of the armed forces.\textsuperscript{203}

The right to a grand jury presentment or indictment is generally available in civilian jurisdictions.\textsuperscript{204} The Supreme Court has recently focused its attention upon the right to trial by jury. In \textit{Duncan v. Louisiana},\textsuperscript{205} the Court expounded the principle that the right to trial by jury was available when the accused, prosecuted for the misdemeanor offense of simple battery, would have been entitled to a jury trial in a federal court under the sixth amendment. He was sentenced to 60 days imprisonment and a $150 fine, when the maximum possible sentence was 2 years

\begin{itemize}
\item \textsuperscript{199} Fung Foo v. United States, 369 U.S. 141 (1962).
\item \textsuperscript{200} Downum v. United States, 372 U.S. 735 (1963) (no extraordinary circumstances present in government serving witnesses with summons but failing to make other arrangements to insure their presence).
\item \textsuperscript{201} Gori v. United States, 367, U.S. 364 (1961).
\item \textsuperscript{203} Kinsella v. United States \textit{ex rel.} Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957); United States \textit{ex rel.} Toth v. Quarles, 350 U.S. 11 (1955); Burns v. Wilson, 346 U.S. 137 (1953); \textit{Ex parte} Quirin, 317 U.S. 1 (1942); Dynes v. Hoover, 61 U.S. 65 (1857).
\item \textsuperscript{204} \textit{See generally}, for example, Fed. R. Crim. Pro. 6, as amended 1966.
\end{itemize}
imprisonment. Holding that trial by jury is a constitutional right which, if tried in a federal court, would come within the sixth amendment’s guarantee as being essential to ordered liberty, the Court found that Louisiana had unlawfully dispensed with the right in a “serious” criminal case.206

The same reasoning has not held true when the Court has been confronted with claims that the military should also afford to its accuseds the right to presentment or indictment by grand jury and trial by petit jury. Over 100 years ago, the Court in Dynes v. Hoover207 reflected on the applicability of the Constitutional proviso authorizing Congress to prescribe regulations for the trial of military personnel,208 declaring

that the power to do so is given without any connection with it and the 3d article of the constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other.209

Ex parte Milligan,210 decided but nine years later, reiterated the declaration of Dynes, reasoning that

[t]he sixth amendment affirms that ‘in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury,’ language broad enough to embrace all persons and cases; but the fifth, recognizing the necessity of an indictment, or presentment, before any one can be held to answer for high crimes, ‘excepts cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger;’ and the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth.211

206. See Destefano v. Woods, 392 U.S. 631 (1968) (holding Duncan inapplicable to trials not already begun before the date of the decision); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968) (holding not “serious” enough to warrant a jury trial a contempt prosecution with a maximum imposable punishment of ten days and a relatively light fine); Bloom v. Illinois, 391 U.S. 194 (1968) (extending Duncan to a contempt case with a two year possible sentence).
207. 61 U.S. 65 (1857).
209. 61 U.S. at 79.
210. 71 U.S. 2 (1866).
211. Id. at 123; See also Johnson v. Sayre, 158 U.S. 109 (1895) (construing “when in actual service in time of war or public danger” to modify only “militia”); but see, State ex rel. Lanng v. Long, 136 La. 1, 66 So. 377 (1914) (allowing court-martial jurisdiction
Ex parte Quirin\textsuperscript{212} confirmed the doctrine that military courts are not courts in the sense of the Judiciary Article of the Constitution, thus making presentment by grand jury and trial by a jury of the vicinage where the crime was committed inapplicable.\textsuperscript{213} To servicemen, the Court has reasoned, trial by court-martial constitutes due process of law, regardless of the fact that he has no right to indictment by grand jury or trial by petit jury.\textsuperscript{214} The same line of reasoning has continued to prevail in the most recent of the Supreme Court's cases, excluding O'Callahan, without deviation.\textsuperscript{215} It is interesting to note that Justice Douglas, who wrote the opinion for the majority in O'Callahan, based his reasoning in that decision upon the theory that to allow the military to have jurisdiction over servicemen in non-service oriented crimes would be a denial of the accused's right to indictment by grand jury and trial by petit jury. However, his dissenting opinion in Burns v. Wilson,\textsuperscript{216} would indicate that he once conceded the inapplicability of such rights to military accuseds. In addition, Justices Douglas and Black would seem to have reversed their apparent concession that "status" is sufficient

\textsuperscript{212} See Kahn v. Anderson, 255 U.S. 1 (1921); In re Vidal, 179 U.S. 126 (1900); Ex parte Vallandigham, 1 Wall. 243 (1863).
\textsuperscript{213} See United States ex rel. Franch v. Weeks, 259 U.S. 326 (1922); Reaves v. Ainsworth, 219 U.S. 296, (1911).
\textsuperscript{214} See United States ex rel. Toth v. Quarles, 350 U.S. 11, 14, n. 5, (1955) (refusing to allow jurisdiction over discharged serviceman; majority opinion by Justice Black to the effect that "there need be no indictment for such military offenses as Congress can authorize military tribunals to try under its Article I power to make rules to govern the armed forces."); Burns v. Wilson, 346 U.S. 137, 152 (1953); Dissenting opinion by Justices Douglas and Black provided:

Of course the military tribunals are not governed by the procedure for trials prescribed in the Fifth and Sixth Amendments. This is the meaning of Ex parte Quirin, \ldots holding that indictment by grand jury and trial by jury are not constitutional requirements for trials before military commissions.

Welchel v. McDonald, 340 U.S. 122, 127 (1950) ("The right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-martial or military commissions."). But see, Kinsella v. United States ex rel. Singleton, 361 U.S. 234 (1960) (refusing to allow military jurisdiction over wife of overseas soldier in a non-capital case on the theory that she was denied her right to indictment by grand jury and trial by petit jury); Reid v. Covert, 354 U.S. 1 (1957) (refusing to allow military jurisdiction over wife of overseas soldier in a capital case on the theory that she was denied her right to indictment by grand jury and trial by petit jury).

\textsuperscript{215} See note 215, supra.
to allow the military jurisdiction over a serviceman, based upon a comparison of their opinions in *Burns, Toth*\(^{217}\) and *O'Callahan*.

The military has long considered itself divorced from the requirement that military accused be granted the rights of indictment by grand jury and trial by petit jury.\(^{218}\) While a court composed of officers, with enlisted members at the accused's request, may not accord with the civilian counterpart of a jury of one's peers, it must be kept in mind that the military operates its system of justice with dual goals—unlike its civilian counterpart. In addition to meting out justice, the armed forces must provide a system by which the safety of the country is insured through the provision of an ever-available and well-disciplined military force. The Constitution has, in accordance with this goal, specifically exempted military tribunals from the requirement that they be composed of petit juries of one's peers.\(^{219}\)

While little mention has been made of the fact, an analysis of the provisions available under federal law and under military law would indicate that the military's counterpart to an indictment by grand jury far exceeds in fairness to the accused its civilian counterpart. In practical effect, the federal rules often provide nothing but a "rubber stamp" process for grand juries. Neither the accused nor his attorney have a right to be present at grand jury proceedings, much less to contest the evidence. No evidence is given on the defendant's behalf, and the proceedings are relatively secret until the outcome is announced.\(^{220}\)

On the other hand, an Article 32 pre-trial investigation, which is required to be convened before any charges may be referred to a General Court-Martial, affords a full inquiry into the truth of the matter.\(^{221}\) The accused is required to be present and

---

\(^{217}\) *Id.*


\(^{219}\) *See Ex parte Milligan*, 4 Wall. 2 (1866).


**The Grand Jury**

\((d)\) *Who May be Present.* Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

allowed to have either military counsel provided free of charge or retained civilian counsel. He is afforded full opportunity to cross-examine all witnesses against him if they are available and to call witnesses either in defense of the charges or in extenuation or mitigation of the charges. He is also given the opportunity to make a statement either under oath or unsworn, without cross-examination, or to remain silent, according to his desires. Furthermore, the recommendations made by the investigating officer may result in referral to a Special Court-Martial, other inferior proceedings, or dismissal of the charges.

The Court of Military Appeals has been most careful in requiring that any testimony taken at a pre-trial hearing be taken under circumstances displaying that the proceeding was a "full-fledged hearing" before the testimony is admissible at a later trial upon the unavailability of the witness. If the testimony of a witness at such a proceeding is not complete, but consists of only what the transcriber considered material, it is inadmissible at a later trial. But failure to cross-examine a witness, if the opportunity is provided, will not detract from the admissibility of the testimony at a later trial. However, the government will not be allowed to introduce the prior testimony of a witness without showing that the witness is unavailable in fact.

III. JURISDICTION AND THE "STATUS" QUESTION

The military courts have been the vanguard of the serviceman's precious individual rights, as seen in the previous section. Attention will now be focused on some practical implications of the Supreme Court's decision to shed "status" as the jurisdictional determinative.

222. Id.
224. United States v. Ledbetter, 18 U.S.C.M.A. 67, 39 C.M.R. 67 (1968) (inadmissible where Scottish women who testified at investigation later refused to testify at trial and accused was represented by counsel and afforded all rights at investigation, but not a "full-fledged" Article 32 Investigation); United States v. Worden, 17 U.S.C.M.A. 486, 38 C.M.R. 284 (1968) (denial of right to interview witnesses before they testified in Article 32 Investigation resulted in denial of effective assistance of counsel).
A. Historical Background

Justices Harlan, Stewart and White, dissenting in *O'Callahan*, recognized that court-martial jurisdiction had, throughout the history of the armed forces, always been founded upon the status of the accused as "a person who can be regarded as ‘a person who can be regarded as falling within the term 'land and naval Forces,'‘ rather than upon the nature of the offense."228 Rejecting the majority's discussion of the interests at stake between the individual and the government, the dissenting justices would allow Congress the power to determine the jurisdictional limitations of military courts.

*Dynes v. Hoover*229 provided the first clear interpretation of the constitutional requirements under the Judicial Article as applied to the military, holding that military defendants, due to their status as members of the armed forces, were subject to the legislative enactments of the Congress in regard to trials in military courts.230 The idea that military jurisdiction over an accused was based upon his status as a member of the armed forces continued unchallenged for decades,231 *O'Callahan* representing the first break in the long line of cases upholding military jurisdiction over a serviceman without reference to the

---

228. 395 U.S. at 275.
229. 61 U.S. 65 (1857).
230. See generally Johnson v. Sayre, 158 U.S. 109 (1895) (dealing with militiamen); Martin v. Mott, 12 Wheat. 19 (1827) (dealing with militiamen); Wise v. Withers, 3 Cranch. 331 (1806) (dealing with militiamen).
231. See generally United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955); Burns v. Wilson, 346 U.S. 137 (1953); Caldwell v. Parker, 252 U.S. 376 (1920); Reaves v. Ainsworth, 219 U.S. 296 (1911); Franklin v. United States, 216 U.S. 559 (1910); Grafton v. United States, 206 U.S. 333 (1907); Ex parte Mason, 105 U.S. 696 (1881); Coleman v. Tennessee, 97 U.S. 509 (1879); Ex parte Milligan, 4 Wall. 2, 123 (1886) held:

Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts. All other persons, citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury.

The military has kept pace with the “status” decisions on various fronts. See United States v. Ginyard, 16 U.S.C.M.A. 512, 37 C.M.R. 132 (1967) (discharge operated as a bar to subsequent trial for offenses occurring during the enlistment prior to discharge); United States v. Hall, 17 U.S.M.C.A. 88, 37 C.M.R. 352 (1967) (no jurisdiction without some semblance of conformity with an induction ceremony, absent subsequent conduct and tacit submission to military authority); United States v. Schuring, 16 U.S.C.M.A. 324, 36 C.M.R. 480 (1966) (finding reservist on duty subject to court-martial jurisdiction as subject to military law at time of offense and time of trial).
nature of the offense. While many may mourn the passing of the status consideration in determining jurisdiction, its passing appears to be final. The Court of Military Appeals, dealing with the question of jurisdiction for the first time since the O'Callahan decision was rendered, followed the standards set forth by the Supreme Court in finding no jurisdiction present to authorize trial in a military court in United States v. Borys. Borys, an Army captain convicted in 1965 of two counts of rape, two of burglary, three of robbery, two of attempted rape, five of sodomy, and one each of attempted sodomy, housebreaking and larceny, was given the benefit of a retroactive application of the O'Callahan decision by the Court of Military Appeals. Over a blistering dissent by Chief Judge Quinn, the Court of Military Appeals found that Borys' crimes were not "service-connected." More recent cases indicate few offenses committed "off-base" will be considered "service-connected."

Presumably, the Supreme Court will continue to adhere to its previous rulings that civilian review of military convictions is limited to questioning the military's jurisdiction and whether the military has exceeded its constitutional powers, without reviewing the evidence presented. The most recent application of the

232. 18 U.S.C.M.A. 545, 40 C.M.R. 257 (1969). Bory's offenses occurred during leave time; his victims were civilian women, and the crimes were civilian in nature, the court found. Decided at the same time, again on a retroactive basis, was United States v. Prather, 18 U.S.C.M.A. 560, 40 C.M.R. 272 (1969). Prather, an Army Private, had been convicted of the wrongful appropriation of an auto, robbing a gas station, and resisting arrest. See United States v. Beeker, 18 U.S.C.M.A. 563, 40 C.M.R. 275 (1969), holding that the military could prosecute the accused for marijuana offenses which were not cognizable in a civilian court, finding a service connection in the possible effects of usage of marijuana by servicemen, but not those for which the civilian courts were available for prosecution. The retroactive application of O'Callahan by the Court of Military Appeals in each case undoubtedly will result in considerable confusion in determining the future of those convicted prior to O'Callahan.


doctrine that civilian review is so limited was in *United States v. Augenblick*,235 where the Court held that the Court of Claims was not empowered to review a court-martial conviction in which the claimed errors were not of constitutional magnitude.

### B. Practical Considerations Involved in Determining Jurisdiction

Military jurisdiction should be based upon the status of the accused as a member of the armed forces, rather than upon a determination of whether the offense alleged to have been committed is service-connected. A great many factors, in conjunction with the expanded rights accorded in military trials, operate as benefits to an accused, in contradiction to Justice Douglas' affirmation that "the military trial is marked by the age-old manifest destiny of retributive justice."236

Not the least significant factor is the relationship which exists between military installations and the adjacent communities. As would be expected, military installations are often faced with innumerable problems with their personnel who venture into the nearby communities. What happens when the nearby communities are hostile toward the presence of the military? Quite obviously, the serviceman suffers. Not only is he unwanted in the community, but he is often the victim of unfriendly local courts. Further, the court calendar may be so crowded that his eventual trial is so distant in time from the date of the offense that his standing in the military is jeopardized, either through his absence awaiting trial or his being retained by the military for the civilian trial. In addition, the cost to the community to prosecute this often non-resident offender is many times heavy, particularly where the neighboring community is rather small. This factor does not tend to ingratiate the serviceman with local citizens. Granted,

---

236. 395 U.S. at 266.
these situations do not always occur, but, would not the community and the serviceman be better off if the community is allowed to waive jurisdiction over the serviceman to the military, thus alleviating a burden on both the community and the military installation?

Another consideration is the relationship between the service and the individual serviceman-offender. Did not the military order the serviceman to the scene of the crime? How often is the serviceman-offender a local citizen? He usually owes his presence in the geographical area to the military, a factor which may not particularly enamor him of the military, but which nevertheless is a contributing factor in his ability to have committed the crime in that area. If he is to be bound over by civilian authorities for trial, his presence must somehow be insured. Assuming that he is confined by civilian authorities, he becomes utterly useless to the armed forces. Should he be confined by military authorities, he will at least be able to continue to serve his obligation to the military. And, if the military has him confined, why not allow the military to prosecute him? If he is not confined, but released upon bond or upon his own recognizance, he must then be detained for the trial. This burden falls upon the armed forces. Orders must be changed and workloads re-arranged to accommodate the civilians until the date of trial arrives. Until he is convicted, the armed services may incur financial obligations to the serviceman-offender, assuming he was not in an unauthorized absence status when apprehended for the crime. This conclusion is particularly evident where the serviceman is acquitted by the civilian court, thus possibly entitling him to back pay from the military for time during which he was of no service to the armed forces. Furthermore, if the military is allowed to retain jurisdiction of the serviceman, it will then know within a reasonable degree of certainty when and if the accused will again be available to continue serving his obligation, a factor which is often extremely uncertain when dealing with civilian courts. Thus, the military can plan in advance where the accused will be sent upon completion of his disciplinary status. An interesting point is this: What happens when the serviceman's so-called "non-service-connected" offense is committed while he is on a period of unauthorized absence from the military? Is he not then committing an offense against the military at the same time that he commits his
"civilian" crime? Should not he be punished at one trial for all the known offenses, rather than at separate trials; and, should not this one trial take place in a military court?

Another advantage to the accused in having his case heard before a military court is the possibility that the convening authority may agree to enter into a "pre-trial agreement" to limit the amount of punishment to be imposed in return for the accused's guilty plea to the offense charged. Such an agreement, which must be initiated by the accused, has the effect of not only reducing the amount of time and money spent by the government in a prosecution, but insures the accused that his punishment will have an agreed-upon maximum limitation. The accused may then present to the court, which is unaware of the existence of the agreement or its terms, evidence in extenuation and mitigation in an effort to secure a sentence even less stringent that the agreed-upon maximum. The process is similar to plea bargaining in civilian courts. Such an agreement has no effect upon the review process; thus, the accused may have his sentence reduced even further upon appeal, if the appellate court feels that error in the record justified such reduction or if the sentence is still unduly harsh.

Of prime importance to the accused is the availability of defense counsel free of cost in the military. While some civilian jurisdictions may supply defense counsel free of charge, the accused may at times be required to display his complete financial inability in order to obtain the free services of a public defender. Suppose the jurisdiction does not have salaried public defenders, but chooses court appointed counsel from the local bar association, perhaps upon a rotation basis. The possible consequence is that the accused may be defended by one without the time or inclination to devote himself fully to representing the accused. In addition, civilian jurisdictions may not be able to provide counsel as rapidly as can the military, since military lawyers are present for the stated purpose of serving military accuseds. While few would argue that the accused should be able to "forum shop" in order to find a jurisdiction which will provide him the best possible representation, the counsel provided by the military free of charge serves as a reasonable and workable

alternative to the dilemma. The accused in a military General Court-Martial is guaranteed an attorney provided by the military free of charge; in a Special Court-Martial, he is guaranteed an attorney, again free of charge, unless such cannot be obtained due to "physical conditions or military exigencies." It is difficult to imagine a situation existing within the boundaries of the United States in which such conditions would exist to prevent the accused from being represented by a military lawyer.

Not only is the accused faced with the risk that the jurisdiction will not provide him counsel free of charge, he also must face the risk that, without counsel, he may not be able to appeal his conviction in a civil court. Even if he is able to obtain an appeal, the result may be forthcoming only after a considerable outlay of funds on his part. The area of free transcripts of the trial for appellate purposes has been the subject of considerable concern in the Supreme Court recently. Gardner v. California declared that an indigent petitioner who applied for habeas corpus, and whose petition had been denied in the lower court, was automatically entitled to a free transcript of that proceeding to aid him in preparing and presenting a new petition to the state supreme court. Long v. District Court of Iowa, In and For Lee County condemned the refusal of the lower court to provide the defendant a free transcript of habeas corpus proceedings held in his case when the transcript was available and could easily have been furnished to him. The Court has consistently held that the interposing of any financial conditions between an indigent prisoner and his exercise of his right to sue for his liberty is a denial of equal protection. And, although the Supreme Court has acted in the area of free counsel for appellate purposes, the providing thereof is far from being a requirement.

242. See Entsminger v. Iowa, 386 U.S. 748 (1967) (inadequate representation on review when counsel failed to file record of trial for appellate purposes); Anders v. California, 386 U.S. 738 (1967) (inadequate representation when appointed defense counsel prepared no brief, but informed the court by letter that he found no merit in appealing); Swenson v. Bosler, 386 U.S. 258 (1967) (inadequate representation when defense counsel prepared a motion for a new trial and notice of appeal and then withdrew them, thus leaving the appellate court without sufficient matters to consider on defendant's behalf);
Unlike civilian proceedings, the military provides for an automatic appeal, free of charge, in any case where the sentence imposed, as approved by the convening authority and supervisory authority, includes a punitive discharge from the armed forces, confinement for one year or more, any greater punishment, or when an issue of law is presented and an appeal is granted. This initial appeal is to a Court of Military Review, established by the Judge Advocate General of the particular service, and composed of not less than three attorneys.\textsuperscript{243} A further appeal to the Court of Military Appeals may be granted the accused with good cause, again free of charge. The Court of Military Appeals is composed of three judges appointed from civilian life by the President with the advice and consent of the Senate for 15-year terms.\textsuperscript{244} Upon each appeal, the accused is entitled, upon his request, to appellate defense counsel free of charge provided by the military. The accused, as in the military trial, is entitled to retain civilian defense counsel to represent him on appeal.\textsuperscript{245}

Examination of the foregoing factors would indicate that it may behoove the accused to appear before a military court-martial rather than a civilian court in the jurisdiction wherein the crime is alleged to have been committed. Certainly, the accused would be accorded a greater degree of certainty regarding his status before the law should he appear in a military court, as opposed to his status before one of the different judicial systems present in the myriad of jurisdictions within the United States.

Little argument can be presented, nor can any justification be offered, in support of the isolated instances in which the military has deviated from fundamental fairness. Such instances will occur in any system of justice, it would seem, the military being no exception. Perfection, that ever-evasive goal of every judicial system, will probably always exist as a goal and nothing more, whether the system be that of the military or a civilian jurisdiction. The military judicial system, unlike its civilian counterpart, is faced with a dual objective in its pursuit of


perfection. Not only must it attempt to provide justice for military accuseds, but it must do so within the confines of the ultimate goal of the armed forces, that of the preservation and protection of the country for whose benefit it was created. The need for more stringent discipline in military life than in civilian life is quite evident. For that reason, the military includes among its list of punishable offenses a considerable number of offenses unknown at common law. Rather than being subjected to criticism for its shortcomings, it would appear that the military judicial system deserves praise for its never-ending battle to provide justice to those service members within its jurisdictional cognizance.

IV. CONCLUSION

The foregoing discussion concerning the expansion of constitutional rights in military trials would indicate that the military is doing its utmost to keep pace with its civilian counterparts. Not only has the military applied the recent constitutional interpretations of the Supreme Court in a blanket fashion, but it has also anticipated the Court in various areas, resulting in an even broader expansion of rights in favor of the military accused. In a word, Justice Douglas' indictment of the military system of justice was unjustifiable.

Recent interpretations concerning advice as to counsel, provided through *Miranda* and ensuing cases, have been applied to military courts in every facet. The result has been the imposition of strict standards upon government interrogators regarding the nature of the warnings given, the rights of a suspect to terminate questioning or request an attorney, and the application of the right to counsel during "critical stages" of prosecution. The military system appears far ahead of civilian jurisdictions in the area of advice concerning self-incrimination, since it requires considerably more detailed warnings, delineates the circumstances under which an accused's statements may be held inadmissible, and provides advice during requests for handwriting exemplars, an area in which the Supreme Court has

---


found warnings unnecessary. Clearly, the military has adhered to
civilian standards in determining the presence of custodial
interrogations, the voluntary nature of a suspect's statement and
impeachment through the use of illegally obtained statements.

In the conduct of searches and seizures, the military has
again required compliance with the standards determined by the
Supreme Court regarding probable cause, standing to object,
"stop and frisk" regarding the actual occurrence arrest, consent
searches, and questions regarding the actual occurrence of a
search. An area in which the military has surpassed civilian
standards by a considerable margin is that of speedy trial.

Although military courts are constituted differently than
civilian courts, the military has kept pace with civilian decisions
regarding impartiality of members and judge, absence of influence
upon the court and judge, confrontation of witnesses, examination
into the providence of guilty pleas, adequacy of measures to insure
the ultimate fairness of trials and preservation of due process, and
the protection against double jeopardy. The military would seem
to have surpassed civilian jurisdictions as a whole in the area of
insuring the accused adequate representation by counsel. Although
the military does not, by constitutional fiat, provide indictment by
grand jury and trial by petit jury to an accused, the substitute
offered would appear to provide a more modern alternative.
Article 32 pre-trial investigation provides benefits to an accused
which will seldom be found in civilian indictment proceedings.
And, with the option of appearing before a court-martial board
or a military judge, a workable alternative to the civilian
counterpart has been provided.

Taking into consideration the expanded rights now available
to military accuseds, in conjunction with the practical
considerations which as a whole provide additional benefits to the
accused, one would question why the Supreme Court has decided
that military jurisdiction shall henceforth be limited to service-
connected crimes. Certainly the military will, for some time, be
plagued by numerous challenges regarding its jurisdiction which
will require *ad hoc* interpretations of the term "service-
connected." As Justice Harlan stated in his dissent to
*O'Callahan*, the law has been thrown into a "demoralizing state
of uncertainty. 248 It is unfortunate that the Supreme Court has scuttled the time-tested old rule, replacing it with a new one of dubious merit.

248. Id. at 275.