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Self-incrimination in the Military Justice System

Recent decisions of the United States Court of Military Appeals (COMA)[1] in the area of self-incrimination reveal that the court is actively grappling with questions that are frequently raised during the course of a criminal investigation.[2] These questions go to the very heart of the elusive

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[1]The United States Court of Military Appeals (COMA) was authorized by Article 67, 10 U.S.C. §867 (1970), of the Uniform Code of Military Justice, 10 U.S.C. §801 *et seq.* (1970) [hereinafter cited as UCMJ], as an extension of the Executive branch of government under Article I of the Constitution.

[2]In United States v. Dohle, 24 C.M.A. 34, 51 C.M.R. 84 (1975), an accused thief was questioned by a friend about the accused's role in a robbery from a military armory. At the time of the questioning, this friend was the military guard who had been detailed to transfer the accused to confinement. The conversation which followed resulted in incriminating remarks by the accused which were later used against him at trial. On appeal, COMA reversed that part of the conviction upon which these statements had an effect.

In so holding, the court resolved a threshold problem concerning the activation of the UCMJ's Article 31 warnings. *See* 10 U.S.C. §831 (1970). No longer will a case-by-case determination be made as to the subjective motivation of the questioning officer vis-a-vis his capacity as a questioner. Instead, the suspect's perception of his questioner's authority will be the determing factor for the activation of the Article 31 warning. The result of this seems to be that the balance in close cases has swung in favor of the individual. The court will no longer allow these incriminating statements to be saved for use against the accused by means of the questioner's proof of personal good faith.

In United States v. Kinane, 24 C.M.A. 120, 51 C.M.R. 310 (1976), a suspected thief was ordered by a criminal investigator to empty his pockets. The result was the production of incriminating physical evidence which was then used to convict the suspect. Although the bulk of the opinion was concerned with the legality of the search, the court did state, in an alternative holding, that such an order was a violation of Article 31. This is apparently based on section (a) of Article 31 which, if applied literally, would totally prohibit any order which would result in the incrimination of a suspect. *Kinane* apparently signals a period of literal application of this section; however, it should be noted that this evaluation of *Kinane* is actually more the result of a logical process of elimination than of any express statement of the court.

In United States v. McOmber, 24 C.M.A. 207, 51 C.M.R. 452 (1976), a criminal investigator interviewed a suspect over two months after that suspect had requested and received the assistance of counsel. Prior to this subsequent interview, the investigator had not informed the suspect's attorney of his intention to question the accused. During the interview, the suspect waived his previously asserted rights and incriminated himself in the course of the discussion.

In response to this action on the part of the investigator, COMA took a step which it had previously threatened to take. In the future, any officer or law enforcement official who is aware of a suspect's desire at any previous time to avail himself of the right to counsel, may not question the suspect at all without first affording his counsel a reasonable opportunity to be present. Failure to comply with this directive is a violation of Article 31 (d) and causes any information obtained thereby to be excluded.

The most recent of the cases is United States v. Moore, 24 C.M.A. 217, 51 C.M.R. 514 (1976). There COMA gave further definition to one of its previous decisions which had set forth the standard to be used for determining whether or not an error in the application of a constitutional right would be considered "harmless." In *Moore*, the principal issue concerned the wrongful revelation to the members of the court of the fact that PFC Moore had requested the presence of an attorney following his advisement of his Article 31 and fifth amendment rights. In finding the error harmful and in reversing Moore's conviction, COMA stated that

interface between the civilian and military worlds. Although all of these problems have not yet been resolved, the court does seem to be moving to reinforce and even expand the basic right to be free from coerced self-incrimination. The significance of this movement is that it seems to be more than a mere reflection of the civilian court's protective measures. Instead, as the cases discussed herein indicate, recent decisions in this area may more correctly be characterized as attempts by COMA to respond to the special needs and problems of military personnel.

At the outset, it is important to understand that persons are not shorn of their constitutional rights when they enter the military.[3] However, the rights of individuals in the military are balanced against, and frequently subordinated to, the goals of conformity and discipline. When subordination occurs, the sacrifice of rights is often justified on the basis of "military necessity."[4] This problem of subordination exists in all aspects of military activity, but an area in which this balancing has been put to one of its severest tests is in the area of self-incrimination.

In the military, the subordinate status of a serviceman dealing with superiors creates a problem with far-reaching implications. The military chain-of-command, oriented by necessity towards the preservation of discipline, can have the effect of *forcing* a serviceman, obliged to obey all lawful orders, to incriminate himself while complying with a superior's directive.[5] It has been conceded that the pressures inherent in a superior rank or official position can often have the effect of making the mere asking of a question the equivalent of a command when directed to one who occupies a subordinate status.[6] When one realizes that the force of a military order by a superior is one of the strongest inducements known to

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the new standard would be one which will consider an error harmful "unless an examination of the record supports the conclusion that there is no reasonable possibility that the error might have contributed to the conviction." *Id.* at 219, 51 C.M.R. at 516.

[3]This position was affirmed by the United States Supreme Court in Burns v. Wilson, 346 U.S. 137 (1953), where Chief Justice Vinson stated that "[t]he military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his Constitutional rights." *Id.* at 142. Similar statements were made by COMA in United States v. Culp, 14 C.M.A. 199, 33 C.M.R. 411 (1963), and in United States v. Jacoby, 11 C.M.A. 428, 29 C.M.R. 244 (1960). In *Jacoby* the court stated: "[I]t is apparent that the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces." 11 C.M.A. at 430-31, 29 C.M.R. at 246-47. In *Culp*, COMA quoted from Blackstone's *Commentaries:* "[H]e puts not off the citizen when he enters the camp; but it is because he is a citizen, and would wish to continue so, that he makes himself for a while a soldier." 14 C.M.A. at 206, 33 C.M.R. at 418. See also Quinn, *Some Comparisons Between Courts-Martial and Civilian Practice,* 15 U.C.L.A. L. REV. 1240, 1241 (1968) where it is stated: "Persons in the military service are generally entitled to the rights granted all persons by the Constitution, both as defendants in criminal prosecutions and as individuals in a democratic society."

[4]*See, e.g.,* Middendorf v. Henry, 425 U.S. 25 (1976); Parker v. Levy, 417 U.S. 733 (1974); United States v. Priest, 21 C.M.A. 564, 45 C.M.R. 338 (1972).

[5]Sherman, *The Civilianization of Military Law,* 22 ME. L. REV. 3, 70 (1970).

[6]United States v. Gibson, 3 C.M.A. 746, 752, 14 C.M.R. 164, 170 (1954).

military law, the full weight of this implicit yet pervasive coercion becomes more apparent.[7] Had this problem remained unchecked, the serviceman-suspect would have been left in a very difficult situation, virtually deprived of the civilian world's guarantees of due process. This note discusses four cases[8] decided by COMA during its 1975-76 term which exemplify the court's concern for the protection of the rights of service personnel against the pressures which elicit coerced statements of a self-incriminating nature.

ARTICLE 31(b) WARNING: QUESTIONER'S AUTHORITY IS DETERMINATIVE

In recognition of the problem created by the subordination of some constitutional rights in furtherance of military discipline,[9] Congress, in 1950, enacted a protective article for the military, Article 31 of the UCMJ.[10] This statute affords protections more extensive in some respects than those available in the civilian courts.[11]

COMA, in *United States v. Dohle*,[12] recently reevaluated and significantly changed an important threshold for the activation of the Article 31 protections. This new threshold, concerning the identity and status of the

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[7]United States v. Jordan, 7 C.M.A. 452, 455, 22 C.M.R. 242, 245 (1957); Manual for Courts-Martial ¶ 171, United States, 1969 (rev.) [hereinafter cited as MCM]; UCMJ art. 92, 10 U.S.C. § 892 (1970).

[8]*See* cases cited at note 2 *supra*.

[9]*See* Schlesinger v. Councilman, 420 U.S. 738 (1975), where the Court recognizes the problem by stating: "In enacting the [Uniform Code of Military Justice], Congress attempted to balance these military necessities against the equally significant interest of ensuring fairness to servicemen charged with military offenses . . . ." 420 U.S. at 757-58.

[10]Article 31 provides:

> (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.
>
> (b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.
>
> (c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.
>
> (d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

10 U.S.C. § 831 (1970).

One commentator has described Article 31 (a) as being closely analogous to the fifth amendment because of its broad prohibition against self-incrimination; Article 31 (b) as being a codified warning requirement which closely parallels the *Miranda* warning — a standard which it preceeded by sixteen years; Article 31 (c) as a prohibition against the production of irrelevant or degrading material at trial; and Article 31 (d) as a codification of the exclusionary rule. H. MOYER, JUSTICE AND THE MILITARY, p. 317, (1972) [hereinafter cited as MOYER].

[11]MOYER, *supra* note 10, at 337. Note, for example, that the Article 31 warning can be activated long before a custodial interrogation occurs which would activate the *Miranda* warning. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

[12]24 C.M.A. 34, 51 C.M.R. 84 (1975).

person conducting an investigation or interrogation, applies equally to sections (a), (b) and (c) of Article 31.[13]

In *Dohle,* the central issue concerned the proper definition and application of the Article 31 threshold defined by the phase "no person subject to this chapter." As is apparent from a reading of Article 31, the protections afforded are prefaced upon the acting party having the status of a "person subject to this chapter." On its face this status requirement seems to be of little significance; however, its importance increases dramatically in light of the past construction given to these words by COMA.[14]

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[13]*See* note 10 *supra.*

[14]By its terms Article 31 (b) is extremely broad. Indeed, a literal application of the article would have subjected every person in the military to its mandate. Quinn, *Some Comparisons Between Courts-Martial and Civilian Practice,* 15 U.C.L.A. L. REV. 1240, 1245 (1968). This problem did not go long unnoticed. In fact, soon after the Article's passage, it was suggested that unless Article 31 (b) was somehow limited by judicial interpretation, the ordinary processes for investigating crime would be seriously impaired. United States v. Wilson, 2 C.M.A. 248, 261, 8 C.M.R. 48, 61 (1953).

In addressing this problem, COMA chose to deny a literal interpretation of the words "person subject to this chapter." Over the years the case law developed the general rule that the Article would not be applicable to two classes of persons:

(1) those not engaged in gathering evidence for the prosecution of a crime and,

(2) those not proporting to exercise disciplinary authority over the accused at the time of questioning.

See Quinn, *supra,* at 1245-46.

In other words, Article 31 (b) was not applied to a situation in which the questioner and the accused were engaged in private communication. *Id.* at 1246. Questioning which was motivated by other than law enforcement or disciplinary purposes did not require a warning. *See* United States v. Beck, 15 C.M.A. 333, 337, 35 C.M.R. 305, 309 (1965).

In an effort to apply this restrictive interpretation to the Article 31 threshold, COMA resorted to a test of "officiality" to determine when an Article 31 warning was required. *See, e.g.,* United States v. Dandaneau, 5 C.M.A. 462, 464, 18 C.M.R. 86, 88 (1955); United States v. Gibson, 3 C.M.A. 746, 752, 14 C.M.R. 164, 170 (1954). This action by the court stopped short of the recommendations made by the Judge Advocate Generals of the Armed Forces and the General Counsel for the Treasury following the *Wilson* case. They had suggested that Article 31 "be redrafted to make it more practical in application so that it does not impose an insuperable burden upon law enforcement agencies." Maguire, *The Warning Requirement of Article 31 (b): Who Must Do What To Whom and When?,* 2 MIL. L. REV. 1, 6 (1958). However, without redrafting, Article 31 (b) was construed so that had the Article been amended to conform to its judicial interpretation, it would have read as follows:

> No person subject to the code who occupies an official position superior to that of an accused or suspect or who occupies an official position in connection with law enforcement, or the detection or investigation of crimes, and no person, whether or not such person is himself subject to the code, who is acting as the agent of such first mentioned person, shall, while engaged in an official investigation of an alleged or suspected offense, unless at some prior time during such investigation the accused or suspect has been otherwise properly advised and informed, interrogate . . . .

Id. at 14.

When deciding whether to characterize an exchange as "official" or not, COMA held that superior rank would not necessarily be conclusive proof of "officiality". *See* United States v. Dandaneau, 5 C.M.A. 462, 465, 18 C.M.R. 86, 89 (1955). Instead, "officiality" was made a question of fact, so that if the *questioner's* motivation was found to have been of a purely personal nature, the "statement" obtained was held to be admissible despite the absence of a warning. *See* United States v. Beck, 15 C.M.A. 333, 337, 35 C.M.R. 305, 309 (1965). In essence, the "ultimate inquiry in every case is whether the individual, in the line of duty, is acting on behalf of the service or is motivated solely by personal considerations when he seeks to

Prior to the *Dohle* case, the court had measured a challenged interrogation against a subjective standard of "officiality." Using the "officiality" criterion, a person who was admittedly subject to the UCMJ, but who was not acting in an official capacity at the time of the questioning, was not required to give an Article 31 warning.[15] The determination of whether the incriminating statements were "officially" obtained was deemed a question of fact to be decided by the trial court.[16] Unfortunately, a consequence of this after-the-fact judicial review was that the persons in the field, initially responsible for the protection of the accused's rights, had no clear-cut guidelines as to when the warnings were required to be given. Unsatisfactory results from the use of "officiality" as a triggering device for the Article 31 (b) warning have created a climate which makes the continued use of this standard extremely unlikely.[17]

In *United States v. Seay,*[18] the majority opinion, written by Judge Fletcher, retained the previously accepted approach while rejecting the prosecution's claim of non-officiality on the facts.[19] However, the following week, in *Dohle,* Fletcher abandoned the officiality standard and adopted a position which appears to have been greatly influenced by Judge Ferguson's concurring opinion in *Seay.*[20] In *Dohle,* Judge Fletcher reviewed the difficulty of using a subjective test in order to determine the nature of the questioner's motives.[21] After noting the court's general dissatisfaction with

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question one whom he suspects of an offense." 15 C.M.A. at 338, 35 C.M.R. at 310.

This use of "officiality" as a triggering device for the giving of the Article 31 warning had the effect of forcing critical evidentiary decisions to turn upon a court's subjective evaluation of the *questioner's* motivation. *See* United States v. Dohle, 24 C.M.A. 34, 51 C.M.R. 84 (1975). Although this was difficult enough, this determination caused the most difficulty when factual situations such as the one presented in *Dohle* occurred, *i.e.* an interrogation by a superior officer, when both persons involved were also personal acquaintances. *See* MOYER, *supra* note 10, at 321.

[15]*See* United States v. Beck, 15 C.M.A. 333, 337, 35 C.M.R. 305, 309 (1965).

[16]*Id.*

[17]The first signs of a possible break came in United States v. Seay, 24 C.M.A. 7, 51 C.M.R. 57 (1975), in which Judge Ferguson, while concurring in the result, wrote a vigorous opinion arguing in favor of abandoning the case-by-case analysis of "officiality."

[18]24 C.M.A. 7, 51 C.M.R. 57 (1975).

[19]The court held that "a warning was still required since the commander was acting in his official capacity and sought to question the appellant whom he suspected of a criminal offense." 24 C.M.A. at 9, 51 C.M.R. at 59.

[20]Judge Ferguson urged a literal application of the phrase "no person subject to this chapter." His reasoning was based upon the rationale that "[i]n the military, unlike civilian society, the exact relationship at any given moment between the ordinary soldier and other service personnel in authority often is unclear." 24 C.M.A. at 12, 51 C.M.R. at 56. He was also influenced by the presence of the superior/subordinate atmosphere in the military which did not exist in the civilian world. *Id.* These combined, he argued, to require a protection broader than that of the *Miranda* warning. *See* Miranda v. Arizona, 384 U.S. 436 (1966). His recommendation was that "when *any* person subject to the Uniform Code of Military Justice questions a person suspected or accused of a violation of the Code without first advising him of his pertinent rights, he has thereby violated Article 31 . . . ." 24 C.M.A. at 13, 51 C.M.R. at 63.

[21]*See* discussion and authority cited in note 20 *supra.*

this approach, Judge Fletcher signaled the court's reversal by stating that because of the frequent presence of multiple motives, the court no longer believed that an inquiry into the *questioner's* motives adequately protected the accused from an infringement of his Article 31 privileges.[22] Instead, he stated that concern should be more properly focused upon the suspect's state of mind — *i.e.* his perception of the authority exercised over him by the questioner.[23]

With this as the newly accepted premise, the problem then remaining to be solved was the formulation of a new guideline. Rather than attempt to analyze and then characterize each encounter within this complicated structure of multiple role playing, Judge Fletcher formulated a more objective guideline:

> [W]here a person subject to the Code interrogates—questions—or requests a statement from an accused or suspect over whom the questioner has some position of authority of which the accused or suspect is aware, the accused or suspect must be advised in accordance with Article 31.[24]

The new standard was formulated primarily for the purpose of neutralizing the latent effects of the military's discipline oriented social structure. The principal change accomplished by this new test is that there is no longer a need to determine whether the actor was *exercising* some degree of authority over the suspect. Now, the very fact that he *could* so act is enough to require that the warning be given, for "the *position* of the questioner, regardless of his motives, may be the moving factor in an accused's or suspect's decision to speak."[25] It should be noted, however, that the authority's right to use a volunteered statement of an incriminating nature against an accused is left unchanged by the new standard.

Although the new standard unavoidably keeps a subjective question of fact before the court,[26] COMA, by predicating the Article 31(b) warning upon the suspect's awareness of a dominating authority, has dispelled any notion that it is merely an informational procedure. At the same time, the fundamental anti-coercive purpose of the warning requirement has been reaffirmed.[27] Similarly, the imposition of the warning requirement on informers or undercover agents is necessarily foreclosed.

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[22]United States v. Dohle, 24 C.M.A. at 36, 51 C.M.R. at 86.

[23]24 C.M.A. at 37, 51 C.M.R. at 87.

[24]*Id.*

[25]*Id.* at 36-37, 51 C.M.R. at 86-87 (emphasis added).

[26]The court is required to make a determination of "awareness" by the suspect of the investigator's authority.

[27]*See* Quinn, *Some Comparisons Between Courts-Martial and Civilian Practice*, 15 U.C.L.A. L. REV. 1240, 1247 (1968) which states that "a searching review of the history and legislative background of the article convinced the Court of Military Appeals that the article was intended to overcome the pressures inherent in superior rank or official position, which made the mere asking of a question the equivalent of a command."

It would therefore seem advisable for the court to adopt Judge Fletcher's position.[28] It is a well reasoned attempt to deal with a difficult problem, and if adopted, it would signal a new and insightful sensitivity for civil liberties by the civilian judges of the highest court of military law.

ARTICLE 31 (a): SUSPECT MAY NOT BE REQUIRED TO ACT AFFIRMATIVELY

In the case of *United States v. Kinane*,[29] COMA indicated that its concern for individual rights, as exhibited in *Dohle*,[30] had not been a fluke. In fact, it used the *Kinane* case to extend the procedural protections against self-incrimination which are available to servicemen.

The issues raised by *Kinane* enter a gray area where the procedural protections affecting searches overlap into the area of the privilege against compulsory self-incrimination.[31] Over the years, COMA has dealt with this problem on several occasions.[32] However, despite those opportunities, the court has failed to provide guidelines as to what *acts* are covered by the Article 31 warning when there is a legally justified search. The finding of a lawful search has always foreclosed the requirement of an Article 31 warning,[33] even if the requested act might also have constituted a

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[28]The status of this turnabout is treated in this note as if it were merely a tenative decision because this new approach was announced solely by Judge Fletcher, with Judges Ferguson and Cook concurring only in the result. *See* 24 C.M.A. at 37, 51 C.M.R. at 87. The future of this approach is made even more uncertain because of two additional facts: Cook's concurring opinion was founded upon his application of the totality of the circumstances approach which Fletcher has expressly rejected; and secondly, although Cook remains on the court, Ferguson has retired and been replaced by Judge Perry. This is especially significant because Ferguson had withheld his concurrence only because he did not feel the reform had gone far enough. In light of the above, it is evident that this situation is far from settled.

[29]24 C.M.A. 120, 51 C.M.R. 310 (1976).

[30]United States v. Dohle, 24 C.M.A. 34, 51 C.M.R. 84 (1975).

[31]This overlap is primarily the result of the expansive definition given by COMA to the term "statement." Their definition brings the protection of Article 31(b) into play more frequently than the civilian counterpart, the *Miranda* warning. The court has expressly rejected the distinction between oral declarations and physical acts for the purpose of determining what is, or is not, a statement under Article 31(b). United States v. Nowling, 9 C.M.A. 100, 102, 25 C.M.R. 362, 364 (1958). Instead it has adopted a standard which defines a "statement" as the result of a request which calls for an affirmative conscious act on the part of the suspect that involves the conscious exercise of both mind and body. *Id. See also* United States v. Holmes, 6 C.M.A. 151, 19 C.M.R. 277 (1955); United States v. Rosato, 3 C.M.A. 143, 11 C.M.R. 143 (1953). A consequence is that handwriting exemplars, United States v. White, 17 C.M.A. 211, 38 C.M.R. 9 (1967); United States v. Minnifield, 9 C.M.A. 373, 26 C.M.R. 153 (1958), and voice exemplars, United States v. Mewborn, 17 C.M.A. 431, 38 C.M.R. 229 (1968); United States v. Greer, 3 C.M.A. 576, 13 C.M.R. 132 (1953), are both considered statements by COMA but are not protected by *Miranda* in the civilian world. *See, e.g.*, Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967).

[32]COMA has held that a warning is required prior to a demand for the production of physical evidence when no lawful search is justified *e.g.*, United States v. Pyatt, 22 C.M.A. 84, 46 C.M.R. 84 (1972); United States v. Corson, 18 C.M.A. 34, 39 C.M.R. 34 (1968); United States v. Nowling, 9 C.M.A. 100, 25 C.M.R. 362 (1958). It has also held that no warning is required in order for evidence to be admissible if a lawful search is justified. United States v. Rehm, 19 C.M.A. 559, 42 C.M.R. 161 (1970); United States v. Cuthbert, 11 C.M.A. 272, 29 C.M.R. 88 (1960).

"statement"—a classification demanding Article 31 (b) protection. Although there is precious little to draw upon in the *Kinane* opinion in this respect,[34] and despite other possible interpretations of the holding,[35] *Kinane*

[34]*See, e.g.*, United States v. Kinane, 24 C.M.A. at 122 n.1, 51 C.M.R. 312 n.1, where the court states:

> To the extent that Detective Harris' conduct required the appellant to participate, without his consent, in the production of evidence which was self-incriminating, Harris' order was also violative of Article 31, Uniform Code of Military Justice, 10 U.S.C. § 831. (Citations omitted).

[35]One interpretation would be that absent a lawful search, an Article 31 warning is required before any *demand* is made or *order* given for the purpose of acquiring incriminating evidence. Although this is a plausible interpretation, it cannot be the one intended by COMA in *Kinane*. If this were a correct reading of *Kinane*, it seems certain that the court would have *directly* cited *Nowling, Corson,* and *Pyatt*. *See* cases and discussion cited in note 32 *supra*. All of these cases dealt with orders to servicemen to produce physical evidence which proved to be of an incriminating nature, and all held that the failure to preface this order with an Article 31 warning caused the evidence to be inadmissible at trial. Although normally there is little to draw from a court's failure to directly cite its own precedents, here it seems that the failure may at least indicate that COMA intends something different by *Kinane*.

Another reason for rejecting the proposition that absent a lawful search an Article 31 warning must be given before the production of any physical evidence is demanded lies in the fact that such an interpretation clearly flies in the face of the plain meaning of Article 31(a). The language of Article 31(a) that "[n]o person subject to this chapter may compel any person to incriminate himself . . ." leaves no room for a rule that would allow the compulsion if it was preceded by a 31(b) warning. Article 31(a) is so straight forward it precludes qualification.

Over the years, COMA has decided many cases in this area which, although probably yielding the correct result, have been founded upon faulty legal reasoning. Compounding the error has led to the present confused system of analysis. It is suggested that COMA is just now beginning to realize the extent of the previous error, and that *Kinane*, however indirectly, is the beginning of an attempt to put things back in order. The fallacy which exists is typified by the reasoning found in the cases of *Pyatt* and *Corson*. In each case COMA invalidated a demand to produce physical evidence that was followed by an act of the suspect which produced incriminating evidence. The invalidation came on the ground that the demand was not prefaced upon an Article 31 warning. *See* United States v. Pyatt, 22 C.M.A. 84, 86, 46 C.M.R. 84, 86 (1972); United States v. Corson, 18 C.M.A. 34, 37, 39 C.M.R. 34, 37 (1968). The fact that a *demand* equates to compulsion, and that *compulsion* is prohibited by Article 31(a), was completely ignored.

There is no warning of any kind which can lessen Article 31(a)'s mandate against compulsion. The warning is applicable only within the confines of Article 31(b), a section dealing exclusively with questions or requests by the investigator, not orders or demands

It is not suggested that *Pyatt* and *Corson* have been overruled by *Kinane*. Although they should be overruled, because of the confusion they have engendered, it is only asserted here that *Kinane* does not stand for the proposition that, absent a lawful search, an Article 31 warning should be given prior to a demand that a suspect produce physical evidence.

Another possible interpretation of the *Kinane* holding would be that even if a lawful search is justified, an Article 31 warning must be given to the suspect. Even though this is exactly what some of the *Cuthbert* dissenting opinion seems to suggest, this interpretation is vulnerable in several respects and therefore must also be rejected.

Nothing in *Kinane* suggests that the court intended to address the problem of a warning requirement. The question of whether or not the Article 31 warning was given to the suspect was raised, disputed by the opposing counsel, but never answered one way or the other. The clear implication of this indifference about the warning is that COMA was not referring to a violation of 31(b) when it stated that Article 31 had been violated.

Another reason to discount the intent to require a warning in connection with a lawful search lies in the fact that the Article 31 warning is generally ineffective in terms of physical objects. The Article 31 warning only informs the suspect that he need not make any incriminating "statements." With no requirement that the scope of "statement" be explained,

seems to have substantially altered the currently used "search determinative" approach.

The majority in *Kinane* says that regardless of probable cause, legal search or Article 31 warnings, no person may compel a suspect to incriminate himself. This holding is significant because COMA, over the last twenty-five years, has always rather losely referred to Article 31 as a unitary entity, while consistently focusing on the warning requirement of section 31(b) in situations such as that in *Kinane*.[36] Now, it seems that, although the court has retained its custom of referring to Article 31 as a unit, section 31 (a) is being placed in a featured role.

The basis of this belief and the background for this discussion are taken from the dissenting opinion of Judge Ferguson in *United States v. Cuthbert*.[37] In his dissent, Judge Ferguson criticized the interpretation of both the facts and the law adopted in the *Cuthbert* majority opinion. Specifically, he pointed out the majority's error in reading the case of *United States v. Nowling*[38] as standing for the proposition that a search justified by a lawful arrest made Article 31 warnings unnecessary.[39] To Judge Ferguson, the court's attention should have been directed toward an examination of what the accused had been positively required to do.[40]

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see note 31 *supra*, a suspect would normally assume that it is limited to oral utterances. So from the start, the usefulness of such a warning would be limited. *See* United States v. Nowling, 9 C.M.A. 100, 104, 25 C.M.R. 362, 366 (1958) (Latimer, J., dissenting).

Despite the questionable usefulness of the warning in this type of situation, the giving of a warning when a search is also justified would create a situation which could greatly compromise the very purpose of the warning requirement. This would occur in situations where, after receiving the warning, a suspect who knew that the term "statement" had a rather expansive definition availed himself of the right not to turn over the object. The investigator's next probable step would be to search the suspect and take the object himself — an act which could have been done at the outset because a lawful search was justified. However, the consequence of this sequence of events would run completely counter to the purposes of the warning requirement. The warning, which was intended to neutralize the coercive atmosphere of such a confrontation, would suddenly appear to be an empty promise, and the hopelessness of the situation would be compounded in the eyes of the accused. Also, rather than aiding the military police in maintaining order, the warning would become a source of many disputes between suspects and the military police. *See id.*

It seems that the preferred method of operation in situations such as this would be to require the investigator to search a suspect, when such a search was justified, and seize any object himself. Then, if the investigator deemed interrogation necessary, the Article 31 warning could be given. This would preserve both the integrity and utility of the warning requirement while at the same time affording the suspect with better protection from coerced self-incrimination.

[36]*See* note 10 *supra*. Although COMA has a long history of applying Article 31(a) in situations where a suspect has been compelled to act by a superior, *e.g.*, United States v. Ruiz, 23 C.M.A. 181, 48 C.M.R. 797 (1974); United States v. Jordan, 7 C.M.A. 452, 22 C.M.R. 242 (1957); United States v. Taylor, 5 C.M.A. 178, 17 C.M.R. 178 (1954); United States v. Eggers, 3 C.M.A. 191, 11 C.M.R. 191 (1953), it has not previously applied this section to a situation in which a physical object was the subject of the investigation.

[37]11 C.M.A. 272, 275, 29 C.M.R. 88, 91 (1960).

[38]United States v. Nowling, 9 C.M.A. 100, 25 C.M.R. 362 (1958).

[39]United States v. Cuthbert, 11 C.M.A. at 279, 29 C.M.R. at 95. *See* note 35 *supra*.

[40]11 C.M.A. at 279, 29 C.M.R. at 95.

Based upon this analysis, Judge Ferguson found *Cuthbert* to be indistinguishable from *Nowling*.[41] He categorized both incidents as simply being orders to produce incriminating evidence, given by persons in authority to subordinated suspects.[42] Without any reference to the lawfulness of a search or of the need for an Article 31 warning, Judge Ferguson gave his interpretation of Article 31 in a manner which strongly suggests that it was section (a) to which he was referring:

> However, when accused is personally required to act in the production of evidence against himself, Article 31 comes into play, and affords protection. It is to prevent such compelled affirmative incriminatory action by the accused that the Article was enacted . . . and the distinction between personal production of the contents of accused's pockets and an authorized search by a third party is clear.[43]

If it is correct to say that COMA's reliance in *Kinane* upon Ferguson's dissenting opinion from *Cuthbert* indicates that Article 31 (a) will henceforth be literally applied by the court, the *Kinane* opinion certainly leaves the underlying purpose of this change open to speculation. It is suggested that the justification for such an absolute position must lie in the court's recently heightened awareness of the possible effects that the chain-of-command might have on the criminal investigation process.

In the civilian world, the courts have determined that the *Miranda*[44] warning is a sufficient procedural safeguard to protect the right of the criminal suspect to be free from a coerced admission or confession. The *Miranda* warning is felt to strike a proper balance between the rights of the individual and the rights of society. However, this balance is upset in the military because the military's demand for obedience is unmatched in the civilian world. This obedience introduces an additional coercive factor into the investigatory process. *Kinane* represents a recognition of the fact that, in the military, despite the protective provisions of the *Miranda* and Article 31 (b) warnings, the scales are definitely weighted against the serviceman by the disciplinary factor. The court's literal application of Article 31 (a) would certainly do a great deal to compensate for this imbalance.

The procedural implementation of this new approach to the self-incrimination problem will give the clearest indication of whether service personnel have actually received any added protection. In addressing this

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[41]*Id.*

[42]*Id.*

[43]*Id.* It is asserted here that the reference in *Kinane* to the effect that "[t]he identity of the hand placed in the appellant's pocket to retrive the ID cards is not controlling," refers only to the fact that the identity of the hand will not be determinative as to whether or not a search is being conducted. United States v. Kinane, 24 C.M.A. at 122, 51 C.M.R. at 312. The identity of the hand is still very important in terms of Article 31(a) and the issue of compulsory compliance with an investigator's order.

[44]Miranda v. Arizona, 384 U.S. 436 (1966).

problem, COMA has decided that instead of attempting to trim the scales by means of some new warning requirement — perhaps because of its repeated inability to draw a firm distinction between a search and an interrogation[45] — it will opt for complete non-participation by the suspect. This means that the object of a lawful search may be seized, even if it falls within COMA's definition of "statement,"[46] and that no warning need be given to the suspect prior to such a taking. Absent a lawful search, the Article 31 warning should be given because the suspect may choose to turn over the object voluntarily. The effect of the application of Article 31 (a) is that the suspect may remain completely passive if he so chooses. Although the test continues to be "search determinative," the procedural application is altered to better protect the suspect. The line beyond which routine disciplinary responses are superceded by the protections afforded a criminal suspect is now more clearly delineated.

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[45]The precise question raised here was framed in United States v. Insani, 10 C.M.A. 519, 28 C.M.R. 85 (1959), when COMA stated:

> Where there is either interrogation or a search, the admissibility of evidence obtained therefrom is ordinarily tested by the principles applicable to the one or the other, as the case may be, but not to both.

Id. at 520, 28 C.M.R. at 86.

Although *Insani* was used to clarify a very basic problem in this regard, that a request by an investigator for permission to search a suspect is not an "interrogation" and the reply by the suspect is not a "statement," the critical problem of not being able to distinguish a search from an interrogation upon the facts of a case has been left unanswered.

Even though the *Insani* court indicated that where both a search and an interrogation would accurately characterize a confrontation, one or the other would be applied to determine the admissibility of the evidence obtained, no guidance has been given in choosing the proper characterization for a given factual setting. In fact, the court has virtually thrown its arms into the air in confusion, as evidenced by the decision in *United States v. Pyatt:*

> Whether the appellant's disclosure of the contents of his wallet be demoninated a *statement* or the result of a search is unimportant under the circumstances of this case.

22 C.M.A. at 86, 46 C.M.R. at 86.

A similar result was reached in the earlier case of United States v. Corson, 18 C.M.A. 34, 39 C.M.R. 34 (1968), where COMA expressly declined to reach the probable cause issue. The problem that comes from this type of treatment is that the field investigator is given nothing in the way of guidance. Basing decisions upon the "circumstances of this case" is a very questionable practice by COMA when the hatchet of the exclusionary rule hangs in the balance.

Perhaps a reevaluation of Judge Latimer's dissenting argument in *Nowling* could help clarify this troublesome area. He argued that a "statement" should only include within its scope those activities which require "the active and conscious use of the mental facilities in the production of evidence *not theretofore in existence.*" United States v. Nowling, 9 C.M.A. 100, 106, 25 C.M.R. 362, 368 (1958) (emphasis added). Under such a standard, intelligible gestures and identifying movements would qualify as statements, but movements to produce objects would not. This means, of course, that the seizure of all objects would have to be justified by a legal search, but such is the standard already in use. Such a standard could be easily applied in the field, and the exclusionary rule would be called upon in many fewer instances.

[46]This result is not unlike that reached in United States v. Cuthbert, 11 C.M.A. 272, 29 C.M.R. 88 (1960), and United States v. Coakley, 18 C.M.A. 511, 40 C.M.R. 223 (1969), except that in the future, the investigator, not the suspect, will personally execute the search.

On its face, this prohibition of an order to a suspect to produce evidence which could otherwise be obtained by means of a legally justified search of the accused is open to criticism as being a pro-criminal stumbling block which will needlessly impede the business of the police. However, viewed as an attempt by the court to keep the everyday workings of the military's disciplinary system demonstrably separated from the process of a criminal investigation, the court's position is more readily defensible. In order to prevent a blurring of the two systems, Article 31 (a) will be literally applied so that no suspect incriminates himself while under the mistaken belief that he must continue to comply with all orders of his superiors. Lawful search or not, the possibility of confusion in this area is so great that COMA has chosen to avoid the problem completely by making the suspect a non-participant.[47]

Required Notification of Suspect's Attorney

In *United States v. McOmber,*[48] COMA employed the exlusionary rule to effectuate its previously announced requirement that a criminal investigator must deal directly with an accused's counsel, when he has one, instead of with the accused himself.[49] The importance of this decision lies in its break with a line of cases in which the court had allowed clear violations of the Manual to be nullified by an accused's voluntary waiver of his statutory rights.[50] Each time that an investigator had circumvented the presence of counsel and had obtained incriminating evidence from an accused, COMA had affirmed the accused's conviction even though it was obtained, at least in part, in violation of the Manual.[51] Consequently, when McOmber appealed his conviction, the government conceded that the

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[47]Of course, the possibility that latent coercion will adversely affect the suspect will continue to exist so long as an officer who routinely exercises command authority over the suspect is also allowed to conduct criminal investigations.

[48]24 C.M.A. 207, 51 C.M.R. 452 (1976).

[49]The requirement that the government's trial counsel deal only with the accused's attorney, if and when he has one, is dictated by MCM ¶ 44*h*, 1969 (rev.).

The Manual is authorized by UCMJ art. 36, 10 U.S.C. § 836 (1970). It is issued as an executive order, and as such, it is entitled to be applied with the force of law. *See, e.g.,* United States v. Smith, 13 C.M.A. 105, 32 C.M.R. 105 (1962); United States v. Villasenor, 6 C.M.A. 3, 19 C.M.R. 129 (1955).

COMA has expanded upon the requirement of the Manual and has decreed that criminal investigators, like trial counsel, must deal with an accused's counsel, and not with the accused directly. *See* United States v. Estep, 19 C.M.A. 201, 202, 41 C.M.R. 201, 202 (1970).

[50]United States v. Johnson, 20 C.M.A. 320, 43 C.M.R. 160 (1971); United States v. Flack, 20 C.M.A. 201, 43 C.M.R. 41 (1970); United States v. Estep, 19 C.M.A. 201, 41 C.M.R. 201 (1970).

These cases held that an accused could voluntarily waive his right to counsel, and thus correct any error that an investigator had made by not dealing with the accused's counsel directly.

[51]*See* cases and discussion cited in note 50 *supra.*

investigator had violated paragraph 44*h* of the Manual but relied upon the court's previous pronouncements in arguing that Airman McOmber's waiver of his right to have the assistance of counsel at the interrogation had corrected any prejudicial effects of the investigator's error.[52]

In *McOmber,* the defendant was apprehended and taken to the office of the security police on suspicion of theft. There he was advised of the nature of his suspected offense, his right to remain silent, and his rights concerning counsel.[53] McOmber requested the assistance of counsel, whereupon the interrogating agent terminated the session and provided the accused with the information necessary to obtain an attorney. This was not the sequence of events in which the court found error. Rather, almost two months after McOmber's attorney had contacted the criminal investigator to discuss the issues of the case, the investigator again warned and then interrogated the accused about the previously alleged offense and other related crimes. Despite the investigator's knowledge that McOmber had an attorney, the attorney was not notified of this second interrogation until after it was completed. It was during this second interrogation that McOmber made several incriminating statements which were later used against him at trial. The investigator's "secret" interrogation forced McOmber to face his prosecutors alone and violated not only the Manual,[54] but arguably the Constitution as well.[55]

On appeal, COMA held that this action by the investigator was a violation of rights guaranteed by the Manual,[56] and as such, required that any incriminating evidence obtained thereby was to be considered *per se* involuntarily given, and thus inadmissible at trial.[57] The significance of this decision is not in the requirement that an accused's counsel be put on

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[52]24 C.M.A. at 208, 51 C.M.R. at 453.

[53]*See* UCMJ art. 31(b), 10 U.S.C. § 831 (b) (1970); Miranda v. Arizona, 384 U.S. 436 (1966); United States v. Tempia, 16 C.M.A. 629, 37 C.M.R. 249 (1967).

[54]*See* note 49 *supra.*

[55]*See, e.g.,* United States v. Wade, 388 U.S. 218, 226 (1967), where the Court states:

> [I]n addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or not, where counsel's absence might derogate from the accused's right to a fair trial.

See also Massiah v. United States, 377 U.S. 201 (1964).

[56]*See* note 49 *supra.* In doing so, COMA adhered to its practice of deciding the case, wherever possible, upon a statutory, as opposed to a constitutional, foundation. Although the court raised the possibility of a problem with the sixth amendment, it based its decision squarely and solely on paragraph 44*h* of the Manual. United States v. McOmber, 24 C.M.A. at 208, 51 C.M.R. at 453.

[57]COMA held that any statement obtained through this procedure would be considered involuntary under Article 31(d) and thus inadmissible. United States v. McOmber, 24 C.M.A. at 209, 51 C.M.R. at 454.

notice,[58] but rather, it stems from the court's decision to exclude evidence obtained by the investigator in violation of the accused's right.[59]

In announcing the holding of the court, Judge Fletcher reflected upon the inadequacy of the court's former approach to this problem.[60] With an almost audible sense of disappointment, Fletcher commented that the present case evidenced "a continuing reluctance to abide by previous guidance absent the implementation of a judicial sanction to retard future violations."[61] In an effort to protect an accused's right to have the assistance of counsel during interrogation from infringement by his questioners, the court adopted a new operational standard for situations in which an investigator questions an accused known to be represented by counsel. It held as follows:

> [O]nce an investigator is on notice that an attorney has undertaken to represent an individual in a military criminal investigation, further questioning of the accused without affording counsel reasonable opportunity to be present renders any statement obtained involuntary under Article 31 (d) of the Uniform Code. This includes questionings with regard to the accused's future desires with respect to counsel as well as his right to remain silent, for a lawyer's counseling on these two matters in many instances may be the most important advice ever given his client.[62]

It should be understood that COMA has *not* held that a suspect may not waive the right to have the presence and assistance of counsel or the right to remain silent. Rather, the courts has held only that a suspect who has at one time felt the need for help should not be placed in a situation in which he could feel compelled by those in charge of his prosecution to give up his rights. The presence of counsel is one method to insure that the

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[58]Such had been the holding of the prior cases of *Johnson, Flack* and *Estep*. *See* cases and discussion cited in note 50 *supra*.

[59]The validity of the theory which utilizes the exclusionary rule to "punish" the police in hopes of deterring violations of prisoner's rights will not be discussed here. It is enough to say that COMA's decision to employ the theory here suggests that the court has perceived a very real and very great possibility that the rights of service personnel will be infringed. Although it would probably be incorrect to classify this as a "desperate" move, it would certainly qualify as a bold step by COMA.

[60]Judge Fletcher stated that under COMA's prior case law an investigator's minimum responsibility in questioning a suspect was the same whether the suspect had an attorney or not. Both situations required only a combined *Miranda-Tempia* warning, *see* note 70 *infra*, and Article 31 warning in order to avoid the judicial application of the exclusionary rule, absent an actual showing of coercion. Consequently, there was no reason to respect a suspect's right to counsel, so long as the proper warnings were given. 24 C.M.A. at 209, 51 C.M.R. at 454.

Unfortunately, not only was the right to counsel receiving inadequate protection, but in Fletcher's estimation, the court's prior use of a voluntariness standard had tended to encourage infractions of the Manual's directive rather than to diminish them. *Id.* at 208-09, 51 C.M.R. at 453-54.

[61]United States v. McOmber, 24 C.M.A. at 208, 51 C.M.R. at 453.

[62]*Id.* at 209, 51 C.M.R. at 454.

accused does not feel "overwhelmed" by his questioners.[63] Once counsel has been notified and given a reasonable opportunity to be present, the same test of "voluntariness"[64] in the waiver of one's rights will apply as was applied prior to *McOmber.*

Admittedly, any absolute rule of exclusion is very harsh from a prosecution point of view. Nevertheless, it is apparent from the tone of the court's opinion that this measure was taken only as a last resort. It was only the continually poor performance of government investigators during this "critical stage" of the investigatory proceedings that unified this otherwise divergent court on a remedy as volatile as the exclusionary rule.[65]

Another significant aspect of this case lies in the boldness of COMA's approach to this problem in comparison to the treatment given to it by civilian courts. Although several of the circuits have issued opinions critical of the investigator's failure to notify a suspect's attorney as a denial of the accused's right to counsel, not one has found such a practice to constitute reversible error so long as the accused has been properly advised of his right to have the presence of counsel and has voluntarily elected to proceed.[66] Significantly, COMA was fully aware of the holdings of the civilian courts when it rendered the *McOmber* decision.[67] As did the *Dohle*[68] and *Kinane*[69] opinions, this decision reaffirms the Court of Military Appeals' determination to protect, and perhaps even expand, the rights guaranteed to military personnel. Here in a factual setting which

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[63]This was also the essence of the Supreme Court's reasoning in Miranda v. Arizona, 384 U.S. 436 (1966), as exemplified by the following passage:

> The presence of counsel . . . would be the adequate protective device necessary to make the process of police interrogation to conform to the dictates of the privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion.

Id. at 466.

[64]In United States v. Colbert, 2 C.M.A. 3, 6 C.M.R. 3 (1952), COMA construed the term "voluntary" to mean:

> [T]he confession must be the product of a free choice — of a will not encumbered or burdened by threats, promises, inducements, or physical or mental abuse. Moreover, the threats, promises, or inducements which may be held to have produced an involuntary confession must be of such a serious or substantial nature that they could possibly have operated to impair the defendant's freedom of will.

Id. at 7, 6 C.M.R. at 8.

The court subsequently expressed the standard as being one of "whether the accused was deprived of his mental freedom to speak or to stand mute." United States v. Josey, 3 C.M.A. 767, 775, 14 C.M.R. 185, 193 (1954). *See also* cases cited at note 50 *supra.*

[65]*See* notes 57 and 59 *supra.*

[66]*See, e.g.,* Williams v. Brewer, 509 F.2d 227 (8th Cir. 1974); United States v. Crook, 502 F.2d 1378 (3rd Cir. 1974); Moore v. Wolff, 495 F.2d 35 (8th Cir. 1974); United States v. Cobbs, 481 F.2d 196 (3rd Cir. 1973), *cert. denied,* 414 U.S. 980 (1973).

[67]24 C.M.A. at 209, 51 C.M.R. at 454 (Cook, J., concurring). A more thorough discussion of civilian courts' treatment of this problem is provided in United States v. Collier, 24 C.M.A. 183, 188 n.5, 51 C.M.R. 428, 433 n.5 (1976), a case which probably would have announced the *McOmber* test if the factual setting had been appropriate.

[68]United States v. Dohle, 24 C.M.A. 34, 51 C.M.R. 84 (1975). *See* notes 12-28, *supra,* and text accompanying.

[69]United States v. Kinane, 24 C.M.A. 120, 51 C.M.R. 310 (1976). *See* notes 29-47, *supra,* and text accompanying.

differs little from that of the civilian world, the court has shown its willingness to differ markedly with the civilian courts. This independent spirit may very well be the element for which COMA has been searching to enable it to exercise the flexibility that is demanded by the dualistic system of individual rights and military obligations encountered in the military today.

Disclosure of a Suspect's Request for Counsel

In the case of *United States v. Moore*,[70] COMA dealt with the problem of indirect erosion of a serviceman's constitutionally guaranteed right to assistance of counsel during an interrogation. In this case, COMA not only reaffirmed the serviceman's right to counsel, but more importantly, the court used *Moore* to announce a significant change in one of the standards used to determine whether alleged errors in court-martial proceedings are "harmless."

In *Moore*, the trial judge, in attempting to lay a proper foundation for the admission of evidence, questioned a criminal investigator about the facts surrounding the interrogation of the accused. As a result of these questions the court members were informed that PFC Moore had requested the assistance of an attorney after having been advised of his right thereto by the investigator.[71] Although it is well established that it is improper to reveal to the triers of fact that a suspect has availed himself of this right,[72] what has not been so firmly established is the standard against which an error of this nature should be measured in order to determine whether a conviction requires reversal.[73]

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[70]24 C.M.A. 217, 51 C.M.R. 514 (1976).

[71]*Id.* at 218, 51 C.M.R. at 515.

[72]United States v. Nees, 18 C.M.A. 29, 39 C.M.R. 29 (1968). Only since COMA's decision in United States v. Tempia, 16 C.M.A. 629, 37 C.M.R. 249 (1967), has the right to have the assistance of counsel been a required part of the pre-interrogation warning given by military police. Consequently, the court frequently cites cases involving the analagous issue of one's right to remain silent as being on point. *See, e.g.*, United States v. Stegar, 16 C.M.A. 569, 37 C.M.R. 189 (1967); United States v. Martin, 16 C.M.A. 531, 37 C.M.R. 151 (1967); United States v. Kavula, 16 C.M.A. 468, 37 C.M.R. 88 (1966); United States v. Andrews, 16 C.M.A. 20, 36 C.M.R. 176 (1966); United States v. Jones, 16 C.M.A. 22, 36 C.M.R. 178 (1966); United States v. Workman, 15 C.M.A. 228, 35 C.M.R. 200 (1965); United States v. Hickman, 10 C.M.A. 568, 28 C.M.R. 134 (1959).

[73]COMA's starting point for determining "harmless" or "prejudicial" error is UCMJ art. 59, which states:

> A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.

10 U.S.C. § 859 (a) (1975).

Although the UCMJ dictates a very strict standard before prejudicial error will be found, COMA, almost from its inception, has modified this standard to bring a broader sweep of errors within the prejudicial category. *See* United States v. Lee, 1 C.M.A. 212, 2 C.M.R. 118 (1952); United States v. Berry, 1 C.M.A. 235, 2 C.M.R. 141 (1952). *See also* Willis, *The United*

Previous decisions by COMA, relying in great part upon the UCMJ's standard for specific prejudice, had utilized a markedly different standard than that announced in *Moore*.[74] In general, these cases were decided on the basis of whether there was clear and convincing evidence in the record which was sufficient in itself to negative the "fair risk" that the court, "when faced with two inconsistent stories, had solved its dilemma by tossing into the balance the accused's pre-trial reliance upon his rights."[75] Consequently, when the other evidence was found to have left no room for the court to speculate as to the implications of guilt which might have flowed from the accused's consultation with counsel, no "fair risk" of prejudice was found to exist, and the error was "harmless."[76]

In *Moore,* the court significantly altered the nature of the presumption to be used in making this determination of prejudice, *vel non.* In reversing Moore's conviction, the court held that henceforth, "the error is not harmless unless the reviewing court can affirmatively find beyond a reasonable doubt that the error might not have contributed to the conviction."[77] In contrast to its previous standard, which had required that specific indicia of prejudice be found before an error would be considered of any consequence,[78] COMA's new standard presumes that the error is harmful, "unless an examination of the record supports the conclusion that there is no *reasonable possibility* that the error *might* have contributed to the conviction."[79] Although this is not a test which requires automatic reversal, it certainly is one which will be very difficult for the government to satisfy. If literally applied, only the barest possibility of prejudice could dictate a reversal.[80]

States Court of Military Appeals: Its Origin, Operation and Future, 55 MIL. L. REV. 39, 80-81 (1972).

The most recent standard of error used by the court is one based on the "fair risk" of prejudice to the accused. As described by one commentator, "the court looks to the whole proceeding, including the error, and determines whether or not a fair risk exists that the court-martial was influenced adversely to the accused by the error." Larkin, *When Is An Error Harmless?,* 22 JAG J. 65, 67-68 (December 1967-January 1968). *See* United States v. Martin, 16 C.M.A. 531, 37 C.M.R. 151 (1967); United States v. Jones, 16 C.M.A. 22, 36 C.M.R. 178 (1966); United States v. Workman, 15 C.M.A. 228, 35 C.M.R. 200 (1965).

[74]*See* discussion and authorities cited in note 73 *supra.*

[75]United States v. Jones, 16 C.M.A. 22, 23-24, 36 C.M.R. 178, 179-80 (1966).

[76]United States v. Workman, 15 C.M.A. 228, 235, 35 C.M.R. 200, 207 (1965).

[77]24 C.M.A. at 219, 51 C.M.R. at 516.

[78]*Id.*

[79]*Id.* (emphasis added). In emphasizing its break with the old standard, the majority opinion commented that the government had only presented evidence which indicated that specific prejudice had been searched for, but not found. This, said the court, was sufficient to sustain the government's burden of showing that it was a harmless error, because it ignored the proper emphasis. Apparently, the government should have attempted to prove that beyond all reasonable doubt the suspect would have been convicted even absent the error. This is not to say that the government should have argued that all of the other evidence proved the accused to be guilty, instead, it should have focused on proving the improbability of any other result.

[80]*See* Thompson, *Unconstitutional Search and Seizure and the Myth of Harmless Error,* 42 NOTRE DAME LAWYER 457 (1967).

In the self-incrimination and right to counsel contexts, *Moore* stands as an additional indication of COMA's desire to protect the rights of servicemen from the effects of subtle coercion. Evidence of such an intent is found in the rationale given for the holding. COMA's decision to categorize the revelation as error was "founded upon the open-eyed realization that to many, even to those who ought know better, the invocation by a suspect of his constitutional and statutory rights to silence and to counsel equates to a conclusion of guilt . . . ."[81] Apparently the court's new standard for harmless error was a calculated attempt to counter the possibility that a court's members could be persuaded by the theory that "a truly innocent accused has nothing to hide behind [the] assertion of these privileges."[82] As such, the *Moore* opinion is both a realistic attempt to deal with a widely held prejudice and an example of the lengths to which the court is willing to go in order to insure that a serviceman's court-martial is a truly objective proceeding. Although noteworthy for its treatment of the self-incrimination problem, *Moore* may also be important in terms of predicting COMA's future action.

Historically, the court has recognized three types of errors — fundamental constitutional and codal errors, constitutional errors which are not considered to be fundamental, and other errors.[83] In terms of prejudice to the accused, the first group has been considered prejudicial *per se*, and the second and third groups have been measured against various standards of reasonableness, usually expressed in terms of whether or not a "fair risk" of prejudice was caused by the error.[84]

Over the years, the first of these categories has remained relatively unchanged. The second category, that of non-fundamental constitutional errors, was changed by COMA's recent decisions in *United States v. Ward*[85] and *United States v. Starr*.[86] The Supreme Court's "harmless error" test from *Chapman v. California*[87] was utilized in these cases as a substitute for the previously used standard of a "fair risk" of prejudice. The third category, the one containing all the other errors in terms of procedure, evidence, instructions and the conduct of the parties,[88] is the category into which the *Moore* case falls.

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[81]United States v. Moore, 24 C.M.A. 217, 218, 51 C.M.R. 514, 515 (1976), *citing* Ullman v. United States, 350 U.S. 422, 426 (1956).

[82]*Id.*

[83]*See* Larkin, *When Is An Error Harmless?*, 22 JAG J. 65, 69 (December 1967-January 1968).

[84]*See id.*

[85]23 C.M.A. 572, 50 C.M.R. 837 (1975). *See* note 90 *infra.*

[86]23 C.M.A. 584, 50 C.M.R. 849 (1975). *See* note 91 *infra.*

[87]386 U.S. 18 (1967). *Chapman* was the Court's clarification and refinement of its earlier decision in Fahy v. Connecticut, 375 U.S. 85 (1963).

[88]*See* Larkin, *When Is An Error Harmless?* 22 JAG J. 65, 69 (December 1967-January 1968).

The standard announced in *Moore* is not original to that opinion. It was first employed by COMA in *United States v. Ward*,[89] but in *Ward* the holding was premised upon the finding of an error "founded solely upon the federal constitution."[90] The adoption of the *Ward* test in the *Moore* case is significant not only because of its protection of an individual's rights, but also because it is the first time that COMA has applied this very stringent standard to a non-constitutional error.[91]

The question raised by *Moore* is how far will this very strict test for harmless error be extended? More specifically, is *Moore* indicative of changes that will be made in connection with other errors falling within the third category, or is *Moore* to be limited to its facts because of their very close association with the constitutionally guaranteed right to counsel? The only indication of where *Moore* may ultimately lead comes from the opinion itself, where the court stated that "*an error of this sort* . . . must yield to the test enunciated in *Ward*."[92] The "sort" of errors this pro-serviceman test will come to include is open to speculation. Although there is some indication that this standard will not be all encompassing,[93] the court's intent in this area is far from clear. It seems possible that COMA will learn the lessons of the past[94] and will retain the "fair risk" test for the majority of errors contained in the third category. However, it is also very

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[89]23 C.M.A. 572, 50 C.M.R. 837 (1975).

[90]In *Ward*, the error at trial was the admission into evidence of certain physical evidence which had been illegally seized in violation of the accused's fourth amendment rights. In overturning the accused's conviction, COMA invalidated the trial court's "significant impact" standard for prejudice, 23 C.M.A. at 574, 50 C.M.R. at 839, and held that "before an error founded solely upon the federal constitution can be held harmless under Article 59(a), the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 23 C.M.A. at 576, 50 C.M.R. at 841.

[91]Although the *Chapman* test was applied by COMA in the case of United States v. Starr, 23 C.M.A. 584, 50 C.M.R. 849 (1975), prior to the *Moore* decision, the *Starr* case involved the admission into evidence of incriminating statements made by the accused while testifying in a hearing on a motion to surpress illegally seized evidence, and as such, it, like *Ward*, involved a constitutional error.

[92]24 C.M.A. at 218, 51 C.M.R. at 515 (emphasis added).

[93]*See, e.g.*, Wright v. United States, 24 C.M.A. 290, 52 C.M.R. 1 (1976). In *Wright*, a serviceman appealed his conviction because it became known after his conviction that the government's trial counsel was not in fact an attorney, had never graduated from an accredited law school and was not a member of any state or federal bar. COMA, in sustaining his conviction, held that despite the appellant's prosecution by an improperly qualified person, there was no specific evidence of substantial prejudice, and so the error was harmless.

[94]At the turn of the century, civilian courts were approaching the point where virtually any error at trial would provide an adequate basis for reversal of a conviction. In response to that situation, Congress passed a "federal harmless error statute" in 1919, now restated in Rule 52(a), Federal Rules of Criminal Procedure, which made all errors which did not affect the substantial rights of the parties harmless. UCMJ art. 59(a), 10 U.S.C. § 859(a), was the application of this standard to military law. Both of those Congressional acts were intended to reverse the trend toward automatic reversal by appellate courts. All agreed that a person was entitled to a fair trial, but few felt that it had to be perfect. Now, as the very strict *Chapman* test is injected into more and more factual situations, the problems faced at the turn of the century loom large again. *See* Larkin, *When Is An Error Harmless?*, 22 JAG J. 65 (December 1967-January 1968).

likely that the court will methodically increase the scope of the *Chapman* test to include all of those errors which, although not actually constitutional violations, are closely tied to the protections guaranteed to individuals by the Constitution. This result would be consistent with other recent decisions by COMA in the self-incrimination area, and yet, it would avoid the impossible problems which flow from a system that regards all errors as reversible errors.

CONCLUSION

As illustrated by the cases discussed, COMA is acutely aware of the serious problems which arise in the military in the self-incrimination area. Although not forgetting the requirements imposed by the military's disciplinary needs, the court has served notice that both the letter and the spirit of the Constitution will be followed. With increasing frequency the claim of "military necessity," commonly raised by government prosecutors to excuse questionable investigative conduct, has been more closely scrutinized and more often rejected.

COMA has transformed the military courts from a tool that could be used by the military for its own purposes, into independent tribunals of justice which stand ready to protect the rights of the individual against the pressures that are inherent in the military system. This change was neither begun nor completed during this past term; however, it may be said that COMA's recent decisions in the area of self-incrimination both reaffirm and extend the court's commitment to the protection of the individual. Perhaps of greatest significance, it is now imminently clear that the court is willing to assume the ultimate responsibility for new and unique protective measures. It appears that the court is no longer content to wait and see which direction the civilian courts will choose; COMA has elected to lead, and even contradict the civilian courts when it feels that the need to do so is great.

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