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Article 31(b) Triggers - The COMA Misfires

A Thesis
Presented To
The Judge Advocate General's School
United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

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United States Army

42d JUDGE ADVOCATE GRADUATE COURSE

March 1994

Article 31(b) Triggers - The COMA Misfires

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ABSTRACT: Article 31(b) of the Uniform Code of Military Justice (UCMJ) predates the United States Supreme Court decision in *Miranda v. Arizona* by fifteen years. Both serve, however, as guardians of the Fifth Amendment privilege against self-incrimination. In *Miranda* and its progeny, the Supreme Court laid down a series of objective measures for the triggering events of custody and interrogation. In contrast, throughout the history of the UCMJ, the United States Court of Military Appeals (COMA) has struggled to develop and maintain a coherent analysis of the triggering events for Article 31(b). The current test is known as the officiality test.

This thesis asserts that the officiality test used by the COMA is improper for two reasons. First, it fails in its attempt to apply *Miranda* law and reasoning to the military situation. Second, it fails to insulate service persons from the evils of unlawful influence of rank in an interrogation environment. This thesis proposes a new synthesis of *Miranda* concerns with the special emphasis of the UCMJ, eliminating unlawful influence. A central feature of the synthesis is the employment of objective criteria measuring the existence of government induced military power disparity. Use of the objective criteria will provide adequate protection to suspects as well as clearly inform investigators of their obligations to warn.

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I. Introduction

> 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...[1]

Article 31(b) of the Uniform Code of Military Justice (UCMJ) is beautiful in its simplicity. Yet, as recently as September 1993, the United States Court of Military Appeals (COMA) held that the Article just does not mean what it says.[2] According to the COMA, Article 31(b) means:

> No person subject to this chapter except medical personnel[3] and persons acting out of purely personal curiosity[4], but including post exchange detectives[5] and possibly state and foreign social workers[6] and police who have a congruent investigation[7], may interrogate, for purposes of criminal, or quasi-criminal civil, prosecution clearly contemplated at the time of interrogation[8], or may request any statement from an accused or a person suspected, both objectively or subjectively[9], of an offense, only if the person being questioned is aware that the person asking the questions is acting in a law enforcement or disciplinary fashion[10], without first informing him...

Legitimate reasons exist to narrow the, perhaps, overly broad, statutory language of Article 31. Among other reasons, they exist primarily because the UCMJ is but one tool in a commander's disciplinary and leadership arsenal.[11] The problem in applying Article 31(b) is one of line drawing - when is the commander, or any leader in the armed forces, using his or her disciplinary tools and when is he or she merely exercising one of the many command or leadership prerogatives? More important to this analysis, however, is the question, how do we expect the service person under scrutiny to know the difference?

Throughout the history of Article 31(b), the COMA has struggled with these core issues. Increasingly, the analysis has become more tangled and confusing. The primary reason for this has been the reluctance of the COMA to apply, properly, the principles underlying Supreme Court law from *Miranda v. Arizona*[12] to cases arising under the UCMJ.[13]

The Supreme Court drew the line for law enforcement officials in *Miranda*.[14] In that case, the Court decided that the average United States citizen does not know he or she has certain constitutional rights when confronted by the police.[15] Congress made a similar decision in 1949 in creating Article 31(b) as part of the UCMJ.[16] However, Congress had an additional motive in 1949 that the Supreme Court did not have in *Miranda*. Congress wanted to eliminate the unique pressures of military rank and

authority from military justice.[17]

Miranda states that the police may not conduct a custodial interrogation without first informing the individual of his or her right to remain silent and avoid self-incrimination.[18] Several triggers exist. The questions must come from someone in law enforcement.[19] They must occur in a custodial setting.[20] Finally, the questioner must be asking questions designed to elicit incriminating information.[21]

On its face, in contrast, Article 31(b) requires any person subject to the UCMJ, to advise a suspect of their rights before questioning them.[22] Article 31(b) does not require custody or a specific police relationship.[23] The only triggers are a relationship to the UCMJ and suspicion of involvement in a crime.

Applied literally, the Article could result in some unique and, perhaps, absurd situations. Consider a barracks incident in which Soldier *A* suspects his roommate, Soldier *B*, of stealing *A*'s wallet. A plain text reading of Article 31(b) would require Soldier *A* to read Soldier *B* his rights before asking if *B*, in fact, stole *A's* wallet. Assume, of course, that *A* has some rational subjective and objective basis to suspect *B* actually took the wallet.

The COMA would not require *A* to read *B* his rights.[24] Unless

there is some special duty or rank relationship between *A* and *B*, the COMA is unwilling to apply the strict terms of Article 31(b).[25] Of course, under *Miranda*, a court would reach the same result if *A* and *B* were civilian roommates. No court would require one friend to read another his or her rights. The Supreme Court reaches this conclusion through the rules it created in *Miranda* and the cases that followed it. Article 31(b) is a creature of Congress.[26] It predated the *Miranda* requirements by fifteen years.[27] The COMA reaches its conclusion in the military through a tortured analysis that denies the basic roots of Article 31(b), common with *Miranda*, the Fifth Amendment of the United States Constitution.[28]

When the COMA came into existence in 1950, there was no *Miranda*. Therefore, the COMA had the opportunity to develop its own unique case law. In 1966, however, the Supreme Court handed down the *Miranda* decision. The COMA should have responded with a shift in Article 31 law, but declined to do so. Instead, the COMA has misapplied *Miranda* principles and successively narrowed the application of Article 31(b).[29] This thesis seeks to demonstrate the problems inherent in the current interpretation of the Uniform Code provision by the COMA. It presents a proposed alternative analysis mirroring the *Miranda* rules.

To date, the COMA has been reluctant to apply *Miranda* policies to Article 31 situations.[30] Part of this reluctance

comes, no doubt, from a well founded principle of interpreting and applying statutory law rather than reaching a constitutional question. More of it may come from the COMA's desire to follow its own body of law rather than draw from the Constitution directly. The product, however, is a test that may have inadvertently narrowed Article 31(b) applicability beyond the range permitted by *Miranda*.[31]

To analyze Article 31(b) in this light, we must review both its history, and the history of Fifth Amendment law under *Miranda*. In this regard, this thesis will first review the historical antecedents of the *Miranda* rules. It will then analyze *Miranda* itself to reveal why the Supreme Court took the bold step of judicially legislating a set of police practices. A review of the history after *Miranda* will focus on the tests the Supreme Court has applied to the trigger elements, custody,[32] and police interrogation.[33] Finally, the history will analyze the one clear exception to the *Miranda* rules, the "public safety" exception under *New York v. Quarles*.

This thesis will then analyze the development of Article 31(b). It will initially review the military antecedents to Article 31(b) and the scant legislative history surrounding Article 31(b). It will then turn to an analysis of the COMA treatment of Article 31(b). Before *Miranda*,[34] the COMA operated in *terra incognita* and was free to develop case law that was

unique in American law. After *Miranda*, the COMA had the opportunity to merge Article 31(b) law with *Miranda* to create a simple, coherent, body of rights warning law in the military. In *United States v. Tempia*, the COMA appeared to move in that direction. However, it soon turned to an alternate analysis.

That alternate analysis is the current COMA test for Article 31(b) triggering situations. The test originated in *United States v. Duga*.[35] It is commonly referred to as the "officiality" test. Since *Duga*, the COMA has consistently narrowed the officiality test and consequently the scope of Article 31(b). The COMA followed this treatment in *United States v. Jones*,[36] *United States v. Quillen*,[37] and *United States v. Loukas*.[38] This review of Article 31(b) law will focus solely on the trigger elements regarding who must warn and the officiality test. It will then propose a new test for applying Article 31.[39] The new test will seek to harmonize the policies behind Article 31(b) with those of *Miranda*.

II. The Law of Miranda v. Arizona

A. Introduction

One could debate the *Miranda* opinion, however, at this juncture, nearly thirty years after its rendition, such a debate would only serve sophistic purposes. It is a fact of American legal culture that is generally accepted. If nothing else, the

warnings have certainly become a fixture in most crime dramatizations![40] Debating, however, whether we should have a *Miranda* ruling is not useful.[41] It is the law and it serves a distinct constitutional purpose of protecting the rights in Fifth Amendment.[42]

In the years since the decision, the Supreme Court has whittled away at the fringes of *Miranda*, and even created one or, perhaps, two exceptions.[43] They have never attacked the core value of the decision and the warnings, that of protecting the privilege against compelled self incrimination.[44]

At the time of *Miranda*, however, many did debate its necessity and there were predictions of dire consequences for law enforcement.[45] The Supreme Court majority opinion did not try to state that it was merely applying old law. It admitted that the procedural safeguard of the warning was a creation of the Court.[46] The key to the opinion, however, was why the Supreme Court thought such a warning necessary.

1966 was, of course, not the first time the Court had analyzed the issue of compelled self-incrimination. The *Miranda* decision recites a brief history of the Court's treatment of the rights embodied in the Fifth Amendment.[47]

Understanding the history before *Miranda* is significant

because it also reflects the legal background against which Article 31 was created.

B. History

1. Early Common Law.--The early history of the privilege against self incrimination is cloudy. Legal historians and theorists have debated the exact origins of the privilege for years. Fortunately, for the purpose of this thesis, only a brief outline is necessary. Some trace the privilege as far back as Biblical times.[48] Others claim that it arose as a result of the practices of medieval ecclesiastical courts.[49] Under the ecclesiastic system, for example, an accused could be forced to testify under oath. The judges could ask questions about the accused's involvement with the alleged offense.[50] Early English law courts followed the same procedure in criminal proceedings.[51] This practice changed, however, in 1648 as a result of an act of Parliament.[52] The reform, however, only applied to trial procedure and did not extend outside the court room to police practices.[53] Early American law drew on the English tradition.

Wigmore cites four distinct periods in the development of the American law of confessions. First he cites the age before 1750, in which confessions were readily accepted. Second was a period in the latter half of the 18th century. In this period some confessions were rejected because of their untrustworthiness. The third period is the 19th century, in

which courts went to extremes in rejecting confessions. The last period is the 20th century in which courts applied constitutional principles to the law of confessions.[54] The last stage is our concern.

2. Constitutional Development.--In its first confessions case, the Supreme Court adopted the common law rule of voluntariness as the federal standard.[55] Under the common law rule, a confession that was not obtained voluntarily was excluded. This exclusion was not a result of a constitutional provision, but was rather an evidentiary rule founded on a simple premise. A confession that is coerced is likely also to be inaccurate. Therefore, an involuntary confession was deemed incompetent or weak evidence.[56]

In *Bram v. United States*, the Supreme Court tied the evidentiary privilege to the constitutional privilege.[57] In *Bram*, the Court ruled that custody was one factor, of many, to consider in determining if the confession was voluntary, and therefore, admissible.[58] The Court pointed out that this was not the rule in all states.[59] The Court refused, however, to impose any rule on the states requiring compliance with its holding under the Fifth Amendment.

In *Bram* the Court suppressed a confession given to a police officer while the suspect was in custody.[60] The police officer

had Bram stripped and isolated in an interrogation room.[61] The officer confronted Bram with the allegations of another accused that Bram had committed a murder. The Court found that "[a] plainer violation as well of the letter as of the spirit of the constitutional immunity could scarcely be conceived of."[62] Therefore, for United States *federal* courts, the Fifth Amendment privilege was tied to the voluntariness of the confession.

The Supreme Court did not adopt the same rule for state trials until 1964. Rather, beginning in 1936 with *Brown v. Mississippi*,[63] the Court examined the police conduct to determine if it violated the due process clause of the Fourteenth Amendment.[64] Under this analysis, the test was whether the conduct of the police was so shocking as to give rise to concerns about the fairness of the proceeding in its entirety.[65] The Court followed this course until the 1964 case of *Malloy v. Hogan*.[66] In *Malloy*, the Court held that state and federal cases would follow the same analysis. The Court formally incorporated the Fifth Amendment privilege against self incrimination into the Fourteenth Amendment.[67]

The analytical approach after *Malloy* was supposed to follow the federal standard of voluntariness.[68] Starting with *Bram*, the Court had measured voluntariness by analyzing the totality of the circumstances surrounding the questioning. More importantly, starting in *Bram*, the Court attempted to quantify the degree of

psychological pressure necessary to break down the will of the suspect. In *Bram* the Court stated, "the result was to place upon his mind the fear that, if he remained silent, it would be considered an admission of guilt."[69] It quoted a contemporaneous text on criminal law that stated, "[t]he law cannot measure the force of the influence used, or decide upon its effect on the prisoner, and therefore excludes the declaration if any influence has been exerted."[70] The Court refused to single out, however, any single fact from the circumstances surrounding the confession that would result in a finding of involuntariness. Rather they stated that the sum of the facts, taken as a whole, led to the conclusion.[71]

Thus the Court employed a test from *Bram* through *Malloy* that focused on the totality of the circumstances surrounding the confession. If voluntary, the confession was admissible. If involuntary, the confession was not admissible as violative of the privilege against self incrimination in the Fifth Amendment. In each case, the Court had to conclude whether the specific facts of the case led to a conclusion, as a matter of constitutional law, that the confession was coerced.

C. Miranda v. Arizona

The use of the totality analysis ended only two years after *Malloy* with the *Miranda* decision. In *Miranda*, the Court abandoned the *ad hoc* analytical process it had followed in both

the due process and voluntariness inquiries with a constitutional presumption. The Court refused to entertain evidence of subjective voluntariness. Instead, it concluded that certain circumstances led to a presumption of involuntariness. Only a series of prophylactic warnings would remove that presumption.

The *Miranda* decision began with a review of the history described above. It then shifted to a review of a variety of police texts describing police interrogation techniques. The Court found these texts useful because they described subtle psychological techniques of extracting confessions.[72] The Court noted that the police had progressed from overt torture like that found in *Brown* to more subtle forms of compulsion.

The majority found that these techniques were carefully created to destroy the will of the individual to remain silent.[73] Reviewing the recent *Malloy*[74] and *Escobedo*[75] cases, the court stated, "[t]he entire thrust of police interrogation there, as in all the cases today, was to put the defendant in such an emotional state as to impair his capacity for rational judgment."[76] The Court concluded that the only effective counterbalance to this coercion was a warning requirement. The critical trigger, however, was custodial interrogation.

Why then is a custodial interrogation necessary for rendering a rights warning? The Court noted that since the

1930's the police had no-doubt reduced their reliance on the third degree.[77] The modern practice was a psychological approach, specifically designed to break down the resistance of a person to confess. It stated, "this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition."[78] The police texts the Court reviewed, specifically encouraged isolation of a suspect, hence custody. The whole goal, the texts suggested, was to place the police at a psychological advantage over the suspect. They noted, "[h]e [the questioner] must dominate his subject and overwhelm him with his inexorable will to obtain the truth."[79]

The Court took these texts as representative samples from which to derive a clear picture of police practice.[80] The Court concluded by stating, "that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner."[81] Furthermore, the Court reasoned, *custodial* interrogation is likely to wear down the will of the individual.[82] The Court concluded "[t]he current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles -- that the individual may not be compelled to incriminate himself."[83]

Thus, the Court's psychological analysis followed closely the approach it began in *Bram*. Instead of measuring the

conditions surrounding the interrogation, however, the Court drew a line at a simple combination of elements. Police conduct amounting to interrogation in a custodial environment would give rise to a constitutional presumption of coercion.[84] The Court seemed to abandon the due process and voluntariness *ad hoc* approaches forever. Henceforth, the Fifth Amendment would be protected not only at trial, but by special police procedures attendant to custodial interrogation.

The Fifth Amendment itself, then, is the fundamental basis of the special treatment the Court would give to custodial interrogation. Having thus established the policy supporting the warning requirement, the Court turned its attention to the procedures necessary to combat the presumed coercion. At the outset, the Court made it clear that the states were free to adopt any procedure more strict than those in *Miranda*.[85] Equally clear, however, were the rules the Court would apply to analysis of all future confessions.

Significantly, the Court announced that it would refuse to analyze whether the individual did know, or *should have* already known of, the right to remain silent.[86] The Court cut off, therefore, any attempt to prove that the individual had either a subjective or objective knowledge of his or her rights. The Court reached this conclusion by balancing the Fifth Amendment right against the newly imposed requirement to issue the

warnings. It concluded that the right was so fundamental, and the warnings so easy to render, that it would not consider any allegation of prior knowledge on the part of the suspect.[87]

The Court identified another important reason for the warnings that bears some analysis. As an initial matter, it concluded that custodial interrogation was the start of the adversarial process.[88] It noted, however, that the suspect may not be aware that he or she was now engaged in an adversarial proceeding.[89] Once again, reliance on the police texts gave the Court some support for this approach. The Court concluded that the warnings served to announce the commencement of the adversarial process. The warnings would put the suspect on notice that the interrogator may not have the best interests of the suspect at heart, no matter what protestations to that effect the interrogator may make! [90]

Therefore the warnings serve two purposes. First, they act as a prophylactic against all forms of police coercion. Second they put the individual on notice that he or she is now participating in the adversary system, not just a generalized search for information about a crime.

With the purpose of the warnings established, the Court turned in future opinions to defining the exact requirements triggering the warnings. Later it established the precise

meaning of "custody" and "interrogation." In both cases, the Court would adopt an objective test for analyzing the trigger, relying on the importance of the constitutional principle at stake.[91] Finally, in establishing the one true exception to the *Miranda* rule, the "public safety exception," the Court would also employ an objective analysis.

The concept of due process voluntariness would not, however, be forever banished from Supreme Court jurisprudence. The *Miranda* prophylactic only serves as a gate-keeper. In later years, the Court would identify situations in which the police, having issued the warnings, would still conduct themselves in a manner that violated due process. In addition, due process would continue to function as a final guardian against government overreaching. The Court would take great pains, however, throughout most of its cases, to separate the due process analysis from the *Miranda* prophylactic.

It is appropriate, therefore to turn to a review of the law surrounding the *Miranda* triggers, the exception to the *Miranda* exclusionary rule and to the split between due process and *Miranda* law.

D. The Custody Trigger

The first of the *Miranda* triggers is that the individual must be actually in custody. The test the Court has applied in

every circumstance has been whether the individual was actually under formal arrest or had his or her freedom restricted in a fashion that was the functional equivalent of arrest.[92]

The Court has addressed the issue several times since 1966. As will be discussed below, with regard to interrogation, a range of possible circumstances exist describing custody. Certainly at one end is a situation in which the police formally tell an individual that he or she is under arrest, place the suspect in hand-irons and transport the suspect to the police station. There can be little doubt that not only the suspect, but virtually anyone observing the situation would conclude it represented custody.[93] The problem is the other end of the spectrum. Specifically, what combination of more subtle police actions will constitute custody. More importantly, for *Miranda* purposes, what police actions will create the inherently coercive atmosphere necessitating the *Miranda* warnings?[94] To answer this question, the Supreme Court has examined several factual situations. Two cases arising from traffic stops for the offense of driving under the influence (DUI) display the test the Court employs.

In 1984 the Court decided *Berkemer v. McCarty*.[95] The case came up as a *habeas* appeal from a state court conviction for DUI.[96] The Supreme Court held that the *Miranda* warnings were required for both misdemeanor and felony arrests.[97] More

importantly, the Court clarified the actions that indicated the beginning of custody.[98]

An Ohio state patrolman stopped Richard McCarty for suspicion of driving while intoxicated. At the stop, the officer asked McCarty to get out of the vehicle. Noting the difficulty that McCarty had, the officer concluded almost immediately that he would arrest McCarty for DUI. The officer continued, however, to conduct the normal roadside procedure including field sobriety tests. He asked the respondent whether he had been using any intoxicants. McCarty responded that he had drunk two beers and smoked several marijuana joints. The officer then formally placed McCarty under arrest and transported him to the police station. At the station the policeman continued to question the respondent about both drinking and smoking marijuana. Most significantly, at no point in the entire procedure did anyone inform McCarty of his rights.[99]

The Supreme Court held that all of the statements taken after McCarty was placed under formal arrest should be suppressed under *Miranda*.[100] McCarty, however, also had asked the Supreme Court to suppress every statement made to the police during the traffic stop.[101] The Supreme Court denied this request and held that a traffic stop did not necessarily constitute custody.[102]

The Court first returned to *Miranda* and focused on the

purpose of the warnings. It noted the warnings were designed to counteract the pressures, inherent in a custodial setting, impairing the free exercise of the privilege against self incrimination. The Court found that two features of a traffic stop mitigate the concerns in *Miranda*.[103] First the Court found that these stops were presumptively temporary and brief. Drivers expect that they will only have to wait for a few moments, perhaps answer a few questions, and then depart on their way (perhaps with a ticket). The Court contrasted this with the longer station house interrogation which may end only when the police get the "right" answers.[104]

The Court also found that the overall situation at the roadside diminished the coercive atmosphere.[105] It recognized that the driver was not free to go until the officer released him or her.[106] In addition, the Court found there was some degree of pressure resulting from the contact with an armed officer of the law.[107] However, the Court found that the public setting at the roadside severely diminished these pressures. It reasoned that a public setting was likely to *prevent* a police officer from overreaching in their attempt to extract incriminating statements by any form of coercion.[108]

The Court focused its analysis on the factors reasonably known to the suspect. All factors noted above are the Court's observations of the circumstances surrounding a roadside stop.

The point of view in the analysis, however, is the perception of the suspect.[109] Most notably, the Court specifically rejected evidence that the police officer had decided almost immediately that he was going to arrest McCarty.[110] The critical fact to the Court was that the officer never communicated this intent to McCarty until later in the procedure.[111] The Court concluded, "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."[112]

The Supreme Court refused to look at the subjective reasons for action, or the subjective intent of the parties.[113] Beyond the cloak of simply protecting the Fifth Amendment privilege, the Court noted "an objective reasonable man test is appropriate because, unlike a subjective test, it is not solely dependent either on the self-serving declarations of the police officers or the defendant...."[114] In addition, earlier in the opinion, the Court noted that the rules established in *Miranda* have the added beauty of keeping courts out of a case-by-case determination of the voluntariness of the confession based on the totality of the circumstances.[115] This beauty also relieves the police from the burden of determining the frailties or sensitivities of every person they question. If the Court were to impose a subjective test the police would have to inquire into the person's subjective feelings and sensitivities before every confession.[116] Conversely, the Court would have to analyze every police officer's motives and opinions of the circumstances surrounding

the interrogation. The lack of precision in applying such a test was one of the reasons the Court adopted *Miranda*.[117]

The Court revisited the custody issue in a strikingly similar factual context in 1988 in *Pennsylvania v. Bruder*.[118] There the Court found that the procedures of the roadside stop and the field sobriety tests were not conducted in a custodial setting.[119] In a critical footnote, the majority held that they still refused to consider the suspect's *subjective* appraisal that he or she was in custody based on one or more of the factors the court analyzed as relevant in *McCarty*.[120] Specifically, the Court held that, while it might view a prolonged detention as evidence that the suspect was in custody, the subjective perception of the suspect in that situation is irrelevant.[121]

E. The Interrogation Trigger

Custody, of course is not enough to trigger *Miranda*. As the Supreme Court said in *Rhode Island v. Innis*,[122] it is the unique interplay of custody and interrogation that calls for the prophylactic of the warnings.[123] Although recognizing this interplay, and its effect on the psyche of the suspect, the Court refuses to delve into that psyche beyond the level of the reasonable man.[124] Therefore, as with custody, the Court only analyzes objective factors defining the limits of "interrogation."

The Court's definition of interrogation has developed since *Miranda*, but, as with the custody trigger, has remained tied to an objective analysis of the police actions, not the subjective beliefs of the parties.[125] The Court's current definition is questioning initiated by law enforcement officers after a person is placed in custody.[126] The Court has noted that this definition, derived from *Miranda* itself, is susceptible to a full range of interpretation. It is possible to interpret this to include only explicit question and answer sessions.[127] The Court however, eschewed this literal analysis and focused on whether the police words or actions were reasonably likely to elicit an incriminating response. The Court has sought to narrow its focus on the objective facts of a case and avoid any plunge into actual beliefs or emotions.[128]

The Court first addressed interrogation directly in *Innis*.[129] In that case, the defense sought to suppress certain admissions made by the suspect, while riding in a police car, after being placed under arrest as a murder suspect.[130] The issue for the Court was whether the statements the policemen, allegedly made to each other while riding with the suspect in the car, constituted interrogation.[131] The Court ultimately held that the statements were not interrogation.[132] The Court applied an objective analysis of the circumstances in reaching this conclusion.

Innis was a suspect in the robbery and shotgun murder of a

taxi driver. The police arrested Innis and read him his rights under *Miranda*. Innis asked for a lawyer. The police then placed the suspect in the back seat of a police sedan. Three officers drove Innis to the police station. Their captain ordered the officers not to question, intimidate or coerce Innis in any way, while driving to the station.

On the way to the station, one of the officers remarked to the other that he hoped none of the children in the area would find the murder weapon, a shotgun, and harm themselves with it. Apparently, there was a school for the handicapped in the vicinity. One of the other officers responded in a similar fashion. These two officers continued this conversation for several minutes. Innis then interrupted them and told them to turn the car around. He offered to show them where the gun was located. After returning to the scene of the arrest, the police captain again read Innis his *Miranda* rights. Innis responded that he understood the rights but wanted to help the police find the gun because of the children in the area. He then led the police to the gun.[133]

After his conviction for murder, Innis appealed to the Rhode Island Supreme Court. That court held that the police violated Innis' rights by interrogating him after he had invoked the right to an attorney. The court found that he had been subject to subtle coercion that was the "substantial equivalent" of

interrogation under *Miranda*.[134] The United States Supreme Court disagreed.

The Court began by reviewing the definition of interrogation in *Miranda* itself. The Court noted that its definition might lead to a narrow analysis. *Miranda* "might suggest that the...rules were to apply only to those police interrogation practices that involve express questioning of a defendant while in custody."[135] The Court rejected this literal approach, focusing instead on what it termed the "interrogation environment."[136] In this regard, the Court reviewed the various police practices that it had discussed in the *Miranda* opinion. It noted that, in *Miranda*, it had paid special attention to the "psychological ploys" the police used to encourage a confession. It concluded "these techniques of persuasion, no less than express questioning, were thought, in a custodial setting, to amount to interrogation."[137]

The Court held "the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.[138] Express questioning is, of course, relatively easy to define. The problem remaining was the meaning of the "functional equivalent." To resolve this issue, the Court again looked to *Miranda* to determine the appropriate test.

The Court concluded that the test must be an objective one, based on the perceptions of a suspect.[139] The Court refused to analyze subjective police motives or subjective perceptions by the suspect. Rather, it would focus on the objective outcome that the words or actions of the police would be likely to produce.[140] Specifically, the Court held that any words or conduct that the police should reasonably know would produce an incriminating response from the suspect is the "functional equivalent" of interrogation.[141] The Court stated further that it was unwilling to make the police, and hence society, bear the burden of the "unforeseeable" results of all police words or actions around a suspect. Therefore, only the actions that an officer "should have known" would produce the incriminating response would constitute interrogation.[142]

Applied to the facts of *Innis*, the Court held that the police conversation was not an interrogation.[143] The Court found that the conversation "consisted of no more than a few off hand remarks."[144] Furthermore the Court said "the officers should not have known that it was reasonably likely that Innis would so respond."[145] Two of the dissenters in the case disagreed with this factual finding of the Court. They agreed, however, that the objective test that the Court announced was the correct analysis to apply to this *Miranda* situation.[146]

The Court continued, then, to apply only objective analyses

to the *Miranda* triggers.

F. The Public Safety Exception

The Supreme Court detoured from the narrow *Miranda* path in *New York v. Quarles*.[147] In that case, the Court created the so-called "public safety" exception to the *Miranda* exclusionary rule. The Court held that it was permissible to admit a suspect's coerced statement if the purpose of the coercion was to protect society from some objective threat.[148] In creating the exception, the Court struck a hard blow at the theoretical underpinnings of *Miranda*. Although it did not explicitly overturn *Miranda*, it did assault some of the case's core principles. The treatment of the core principles reveals the exact parameters of the Fifth Amendment privilege today. Unfortunately, the Court also removed, for a while, a substantial degree of doctrinal clarity that had existed in *Miranda* law.[149]

As a rule of criminal police procedure, the Supreme Court's actions in *Quarles* parallel some of the fundamental difficulties the COMA has had with Article 31 law. In both cases the courts have faced hard cases and made bad, or at best, very cloudy, law. To its credit, however, the Supreme Court retained an "objective test" for its analysis of the safety exception.[150] Unfortunately, the Court's "objective test" focused on the perceptions of the police or, perhaps, of society, and not the suspect.[151]

The facts of *Quarles* are important to an understanding of the case. The suspect had fled from the scene of an alleged rape. The victim informed the police that Quarles was armed with a gun. The police followed Quarles into a nearby supermarket. The police entered the store, but the suspect ran away from them when they attempted to apprehend him. The police gave chase through the store, losing sight of the suspect for some moments. One policeman, Officer Kraft, eventually located the suspect and ordered him to place his hands over his head.[152]

The officer frisked Quarles and discovered that he was wearing a shoulder holster. The holster, however, was empty. The officer then asked the suspect where the gun was. Quarles nodded in the direction of a stack of boxes and said, "the gun is over there."[153] The police retrieved the gun. At trial on a weapons possession charge, the state sought to introduce both the statement of the suspect and the weapon.[154] The trial court and all New York appellate courts excluded the evidence as violations of the accused's rights under *Miranda*.[155]

The Supreme Court majority very carefully dissected *Miranda*. It ruled that technical *Miranda* violations did not always rise to the level of compelled testimony that must be suppressed as violating the Fifth Amendment.[156] Although the Court recognized that the accused was in custody, it focused its inquiry on whether the confession was compelled in the sense of the "station

house" confessions proscribed in *Miranda*.[157]

The majority concluded that the confession was compelled, but for acceptable, limited reasons, was admissible.[158] It reached this conclusion by reasoning that the majority in *Miranda* was willing to accept certain social costs as a result of the warning requirement. The Court concluded that the cost the *Miranda* Court had been willing to bear was the loss of the confession at trial.[159] The Court distinguished that cost from the social cost that might have occurred had the gun not been found. In a footnote, the Court noted there was no evidence of actual coercion.[160] This was a startling appeal back to pre-*Miranda* due process analysis. In fact, this cut the core from *Miranda* by stating a confession was *not* presumptively involuntary without the warnings. It is consistent, however, with the remainder of the majority's analytical approach because of the Court's focus on the police officers rather than the suspect.

The Court recognized that police officers are, and have been, affected by the ruling in *Miranda*.[161] It accepted that, as a result of *Miranda*, a police officer might have to decide whether to issue the warning and, potentially, still the suspect's tongue, or ask the question and risk suppression at trial.[162] The Court held that police should not have to make that sort of cost-benefit analysis in the fast moving arrest scenario. Instead, the Court relaxed the prescriptive rule of *Miranda* in

situations presenting a safety risk to either the police officer or society as a whole.[163] The Court continued, however, to apply an objective standard to determining whether the exception applied. Most significantly, the Court rejected the notion that the policeman's subjective intent was relevant. Indeed, the Court noted that one of the likely reasons for the question was to gather evidence.[164] This reason, however, was not an objective indicator of a threat to public safety.

The Court's "public safety" exception in *Quarles* has received considerable criticism[165] beginning with a sharp dissent. The dissent by Justice Marshall and the concurring opinion by Justice O'Connor both attack the Court's reasoning and application of *Miranda*. A common point is that the new decision eliminated the clarity of the *Miranda* opinion.[166] Justice O'Connor wrote,"[t]he end result will be a finespun new doctrine on public safety exigencies incident to custodial interrogation, complete with the hair-splitting distinctions that currently plague our Fourth Amendment jurisprudence."[167] Both the concurrence and the dissent also found that the clarity of *Miranda* was one of its "core virtues."[168] The *Quarles* court abandoned that virtue in pursuit of what it saw as a higher societal goal.

The majority's support for a cost-benefit analysis approach is the greatest point cited as error by the concurrence and the

dissent. Again Justice O'Connor wrote:

> The critical question *Miranda* addresses is who shall bear the cost of securing the public safety when such questions are asked and answered: the defendant or the state. *Miranda*, for better or worse, found the resolution of that question implicit in the prohibition against compulsory self-incrimination and placed the burden on the State.[169]

The dissent went further and criticized the majority's objective test.[170] The dissent asserted that the majority's test was, in fact, a subterfuge for inquiry into the subjective intent of the arresting officer.[171] There is a considerable air of truth in this assertion, especially given the facts related by the dissent. Apparently, Officer Kraft testified that the situation was under control when he asked where the gun was located.[172] Furthermore, the accused had already been "reduced to a condition of physical powerlessness."[173] The majority's suggestions of threats to public safety were not supported by facts of record. There was no one in the store except store employees as the arrest occurred after midnight.[174] Furthermore, while the majority suggested an accomplice could have come across the weapon, there is no accomplice even suggested in the record![175]

Another criticism of the decision is the appeal to the older

due-process analysis.[176] Recall that under that analysis, the Court looked at all of the surrounding circumstances to determine if a confession was voluntary. One of the keys of *Miranda* was that the Court refused to continue this analysis. Instead the *Miranda* Court substituted a constitutional presumption of coerced custodial interrogation.[177] The majority in *Quarles* agreed that the accused was in custody, yet still found that the confession was not actually coerced.[178] More disturbing, however, is the suggestion that coercion is desireable in order to protect public safety.[179] In stark contrast to *Miranda*, the majority found the confession admissible simply *because* it was vital to public safety.[180] Therefore, for the majority, there is an acceptable level of governmental coercion.

While the majority did weaken the protection of *Miranda*, it did, at least, maintain a facially objective approach to the analysis. The weakness of the decision, however, is that it focused, for the first time, away from the perceptions of the accused.[181] All prior *Miranda* interpretations had concerned themselves solely with the psychological pressure on the accused. In *Quarles*, the Court, for the first time, gave weight to the cost or pressure on society caused by the *Miranda* warnings. With this decision, the Court seemed to begin a retreat down a very slippery slope away from the full protection afforded by *Miranda*.

G. Miranda Today

In 1993, the Supreme Court gave back a little of what it took in the *Quarles* decision and rendered some additional clarity to the *Miranda* rules. In *Withrow v. Williams*[182] the Court established an analytical framework that again separated the due process analysis from the *Miranda* presumption.[183] Although the case is not specifically a *Miranda* case, the holding should apply to future situations.

The case arose as a *habeas corpus* appeal from a circuit court. The issue the petitioner raised was a violation of *Miranda* by the state criminal court.[184] The federal district court, however, found a due process violation on its own motion and granted the *habeas* relief. The Supreme Court held that the district court properly entertained the *Miranda* issue raised by the petitioner, but had improperly ruled on the involuntariness issue without a hearing.[185] Most importantly to the issue of the *Miranda* triggers, the Court held that, while *Miranda* and the due process analysis both protect the Fifth Amendment, they do so in different fashions.[186] The Court returned to a pre-*Quarles* posture, setting up the *Miranda* warnings as a constitutional prophylactic. Therefore, it returned to two distinct analyses. Absent the *Miranda* warnings, required by the custody and interrogation interaction, the Court would suppress a confession. Other police conduct, however, issued after the warnings, or actions by non-police agents, may give rise to a due process voluntariness issue. It appears, therefore, that the Court has

backed away, at least to some extent, from applying a totality of the circumstances and the connected due process analysis to pure *Miranda* litigation.[187]

This separation is important as it mirrors one of the problems of the COMA's analyses in Article 31 situations. According to *Withrow*, arguably every confession case may contain issues regarding both the warning requirement and the voluntariness requirement. There is a different test, however, depending on the specific issue raised. In the UCMJ, this division of issues is found in two separate sections of Article 31. Article 31(b), the subject of this thesis, contains the warning requirement.[188] Article 31(d), on the other hand, contains the voluntariness requirement.[189] At present, both the Supreme Court and the UCMJ separates them; so should the COMA.

III. Article 31(b)

A. Legislative History

The legislative history of the UCMJ does not provide significant background about the purposes behind Article 31(b). The UCMJ itself grew out of an initiative by Secretary of Defense Forrestal to create a uniform military judicial code.[190] One of the primary forces driving this development was the creation of the Department of Defense. With the new cabinet agency over the Army, Navy and the new Air Force, and with the "discovery" of

joint operations during WW II, a joint service judicial code became a practical idea.[191]

Secretary Forrestal appointed a committee, chaired by Professor Edmund Morgan of Harvard University, to prepare the new Uniform Code proposal. The committee consisted of several working members.[192] Perhaps most prominent among those members was Felix Larkin of the Office of General Counsel of the Secretary of Defense.[193] It was Mr. Larkin who eventually provided, substantially, all of the testimony before Congress regarding Article 31. Mr. Larkin's uncontradicted testimony is almost the only legislative history surrounding the Congressional intent of Article 31.[194] This fact is particularly interesting considering the strength with which the COMA argues the clarity of legislative intent in its pronouncements regarding Article 31.[195]

Article 31's precursors were Article of War 24 (hereinafter AW 24) and Article 42(a) of the Articles of Governance of the Navy. In creating Article 31(b), the code committee explicitly extended the coverage of AW 24. AW 24 had itself been revised and extended, just one year earlier, by the 1948 Elston Act.[196] AW 24's evolution into Article 31 is a remarkable story.

Prior to 1917, military law had no rights warning requirement whatsoever. The 1920 Manual for Courts-Martial

suggested that an investigator inform a soldier of his rights before questioning.[197] The 1948 Elston Act changed this suggestion to a duty.[198] The warning, however, only applied to an accused. The use of the term "accused" is significant, for it generally indicates a person who had already been charged. As such, the soldier was formally engaged in a phase of the trial process. Indeed, in the hearings on the Elston Act, Congress expressed an explicit intent that service persons on trial should enjoy the same rights as civilians then enjoyed.[199]

The code provision drafted by the UCMJ committee expanded upon the protection that existed under the Elston Act.[200] It explicitly extended the privilege against self incrimination outside the court-room to persons who were merely "suspects."[201] It continued the requirement of the 1948 Elston act, establishing a duty of the person obtaining the statement to advise about the right to remain silent.[202]

Unfortunately, while making these momentous changes, neither Congress nor the committee explained the broad sweep of the language they used in the Article. Sadly, the testimony on Article 31 fits into 10 pages of the House Record.[203] Over half of that volume concerns Article 31(c), not Article 31(b).[204] In explaining why the committee created Article 31(c), however, Felix Larkin ended up explaining Article 31(b).

The congressmen were experiencing considerable difficulty deciding what a "degrading" question was under the proposed Article 31(c). The colloquy that ensued between Larkin and Members of the House sub-committee is instructive of the clear purpose and policy behind the counterpart, Article 31(b):

> Mr. Elston. I think it gives too much protection. It enables the guilty person to escape.
> Mr. Larkin. Well *in the same way* providing an obligation to inform him before he speaks is *more than the usual protection*.
> Mr. Brooks. You mean the *constitutional provision*?
> Mr. Larkin. So far as *incrimination* is concerned.
> Mr. Elston. That is all right. That is up above.
> Mr. Larkin. That is right.
> Mr. Elston. *That is subsection (b)*. That is perfectly all right.[emphasis added][205]

This discussion reveals that both Mr. Larkin and the committee viewed the warning requirement of subsection (b) as guaranteeing the constitutional right.[206] The constitutional right was the "usual protection."[207] The warning requirement, however, was more than the usual protection. It was an additional safeguard above the requirements of the constitution. It was grounded, however, in the constitutional right.

Another portion of the hearings provides some additional insight into the purpose of the Article. It is the only guidance that exists about the context in which Congress and the Committee perceived the rights warning would become relevant.

The first portion of Article 31 changed the existing law and took Article 31 out of a unique court-martial context.[208] Article 31(b) applied to suspects. AW 24 only applied to the accused.[209] The change in terminology made it clear that the privilege was no longer tied solely to court, but extended well into the investigatory phase of a case.[210] An issue arose during the hearings, however, regarding the limits of the extension.[211] The hypothetical posed above, of the soldier with a stolen wallet and his roommate, illustrates a possible worst case scenario. The following colloquy shows that both the Congressmen and the committee envisioned only an official investigatory setting:

> Mr. Brooks. How would a person know he was suspected of an offense?
> Mr. Larkin. Well, after an offense has been committed a number of persons who are suspected might be brought in for questioning none of whom have been accused because the evidence is not complete enough to indicate who the perpetrator may be.
> Mr. Brooks. But you can't interrogate him without first informing him of the nature of the accusation.

Mr. Larkin. That is right. You would have to tell him that the crime of larceny has been committed, for instance. You could say that this is an inquiry in connection with it and that you intend to ask him questions about it, but that he should be informed that he does not have to make any statement about it. All that does is broaden the protection against self-incrimination so that whether a person is actually the accused and you attempt to interrogate him or whether you just don't know who the accused is and there are five or six people whom you suspect they are all protected.[212]

Note the language that both Mr. Brooks and Mr. Larkin used. They employed terms such as "offense," "brought in for questioning," "evidence," "inquiry," and "accused." These are all terms that, at least, strongly *imply* an official criminal investigation into a person's conduct.[213] The discussion that came just a few moments later confirms the official criminal nature of the inquiry:

Mr DeGraffenreid. As I understand it Mr. Larkin, is this what you have on your mind: Say a crime is committed and several people are suspected but no one has been arrested.
Mr. Larkin. Yes

Mr. DeGraffenreid. You bring them in before they have been arrested.[214]

These words all imply some degree of superior authority. The UCMJ vests arrest authority only in persons of higher rank, or those in military police roles. In addition, a soldier might "investigate" his or her buddy; he or she may even conduct an "inquiry." It stretches Congressional intent beyond all reason, however, to suggest that they would go further and "arrest" that buddy *absent* some sort of official relationship between the two.

The House committee made only one change to the Article as submitted.[215] There are other references to the Article in various comments submitted to Congress.[216] They do not, however, shed any additional light on the scope of the Article other than that it was intended to expand upon AW 24. The new Court of Military Appeals would have to flesh out the Article in its practice.

B. Early Developments at the COMA

The COMA first addressed the meaning of Article 31 in its decision in *United States v. Wilson and Harvey*.[217] Barely two years after the effective date of the UCMJ, the COMA held that Article 31(b) was as plain as any legislation could be.[218] It applied a simple analysis, looking first to Article 2, UCMJ, then

without further elaboration, at whether the accused was a suspect.[219] It found the Article applied and suppressed the admission. In doing so, it created an interesting precedent.

The case arose from a prosecution for premeditated murder in Korea. A military policeman (MP) responded to the report of a murder. Some Koreans pointed out a group of soldiers standing around a fire. They said that the persons who shot the victim were in that group. The MP walked up to the group, looked directly at Wilson and Harvey and asked who had done the shooting.[220] Wilson and Harvey responded that they had shot the man. At no time did the MP read them their rights under Article 31(b) or AW 24.[221]

First the COMA had to differentiate between an admission and a confession.[222] Recall that in 1951, the voluntariness doctrine was a central feature of American federal confession jurisprudence. Under this doctrine, the prosecution had the burden of showing the voluntariness of a confession. The defense, however, had the burden of showing the *involuntariness* of an admission. Most notable in this regard, the court found that "there is not a scintilla of evidence in the record to indicate that these admissions were not in fact voluntary."[223] This was, however, with both AW 24 and Article 31(b), not the end of the analysis. The court correctly noted that voluntariness was separate from the warning provision of Article 31(b).

The court concluded that Article 31(b) applied to this case.[224] It reached this conclusion by a plain text reading of the relevant provisions of Articles 31(b) and (d). It then said, "[t]hose provisions are as plain and unequivocal as legislation can be."[225] The court's only analysis was to consider whether the MP was a person subject to the code and whether the accused's were suspects.[226] The court concluded that the MP was covered by Article 2, UCMJ. It then stated without further elaboration that the appellant's were both suspects. The court, therefore, concluded that Article 31(b) applied.[227]

After making these conclusions, the court justified its departure from prior law by discussing the legislative history of the Article. It cited the House reports and simply noted that the Article was designed to protect not only the accused, but also suspects.[228] Furthermore, the court declared that it would support the protection that Congress gave to soldiers in extending the right.[229] In a back-handed slap at Congress, however, the court stated "[i]t is, of course, beyond the purview of this Court to pass on the soundness of the policy reflected in those portions of Article 31, supra, which extend the provisions of its comparable predecessor, Article of War 24...."[230]

Having concluded that the admission was improperly admitted, the court then addressed the issue of whether it had to reverse

the murder conviction. Here the court decided that the "element of officiality" surrounding the admission was more than just a naked violation of Article 31(b).[231] As such, the violation struck at the very core of the policy behind Article 31(b) and was, as a result, inherently prejudicial. Finally, the court noted that its decision conformed with prior decisions of the courts and boards implementing AW 24. This part of the decision, however, is the only part that mentions the official nature of the interrogation.[232] Considering future COMA cases, this decision is startling.

The dissent by Judge Latimer was a taste of later COMA law.[233] It flatly rejected the plain meaning approach that the majority took in applying the Article.[234] It suggested, instead, a three part analysis to determine if an individual must read a suspect his or her rights.[235]

Judge Latimer agreed that Congress intended to extend AW 24. He believed, however, that the Article was not intended to extend so far as to prevent all "legitimate inquiries."[236] Although Judge Latimer did not cite the House hearing testimony of Felix Larkin, he analyzed the words used in Article 31(b) in a similar fashion.[237] He noted that a suspect must be told of the nature of the accusation. Without any knowledge about a crime, an investigator would have difficulty informing the suspect anything about the crime. Judge Latimer would, therefore, place some

threshold limits on the necessity of rendering the rights warnings.[238]

In exploring these limits, Judge Latimer suggested a three part test. First, the party asking the questions should occupy some official position in relation to crime detection or law enforcement. Second, there must be some sort of official investigation underway. Finally, the facts must be developed sufficiently that the questioner has reasonable grounds to suspect a person of the offense.[239] This analysis became the core of COMA's later development of the "officiality" test.

C. The Officiality Test

1. United States v. Gibson.--The COMA returned to the issue just one year later in the case of *United States v. Gibson*[240] and rendered an opinion almost totally opposite to *Wilson and Harvey*. In *Gibson*, the court found an excuse to expand upon the clear legislative intent and restrict the application of the Article. Citing "judicial discretion,"[241] the COMA denied application of Article 31(b) to situations "wholly unrelated to the reasons for its creation."[242]

The decision in *Gibson* is correct, but only as applied to the facts of the case, and when considered against the greater landscape of constitutional confession law existing in 1954. It would also probably be correct if decided today under *Miranda*

law.[243] The problem with the decision, and the rationale the COMA employed, is that both went too far. The analysis the court used gave too much latitude to future courts at the expense of the rights protected by Article 31(b).

Gibson was a suspect in the larceny of money from coin vending machines at Fort Sill, OK. He was a member of a guard detail at the motor pool where the vending machines were located. Shortly after the larceny, Gibson's superiors found out that he had a large number of coins in his possession. He was placed in pretrial confinement. The police placed another soldier in the cell with Gibson. This other soldier was a reliable jailhouse informant. During their time together, the other soldier succeeded in securing an admission from Gibson that he had stolen the money. The other soldier, of course, never read Gibson his rights under Article 31(b).[244]

The COMA upheld *Gibson* and ruled that Article 31(b) warnings were not required.[245] The court, however, divided sharply over the rationale supporting the decision.

Judge Quinn, the Chief Judge, authored the opinion of the court. His analysis focused heavily on elements surrounding the voluntariness of the confession.[246] On appeal, the court accepted that the accused was *subjectively unaware* that the cell mate was working for the police when he questioned Gibson. Chief Judge

Quinn took the fact that they were co-equals and did a detailed analysis of military involuntariness.[247] Citing a decision of the Board of Review of Review from 1947,[248] Chief Judge Quinn noted the important place that disparity of rank held in military confession law.[249] In that case, the board implied a *presumption* of involuntariness when a person of higher rank obtained a confession from a subordinate.[250] Chief Judge Quinn extrapolated the principle and found there was no rank coercion placed on Gibson.[251] His cell mate was merely another soldier in the same circumstances.

Chief Judge Quinn also placed considerable reliance on the testimony given Congress at the time of the 1948 Elston Act.[252] There he noted that rank was not the only coercive factor that concerned Congress. He stated that Congress adopted a view from civilian jurisprudence that the confession had to occur as a result of some official action.[253] He, believed, therefore, the 1948 modifications went beyond rank to include all official inquiries.[254] He concluded, however, that Congress did not intend to extend the Article beyond the scope of "official" interrogation.[255] He reached this conclusion despite the stated intent of the Comment to Article 31(b), to have Article 31(b) extend the privilege of AW 24.

This analysis is suspect. Judge Latimer, concurring with the result, noted some of the problems. In a somewhat confusing

assertion, however, he stated that the language of Article 31(b) was so simple as to defy any need for judicial interpretation.[256] As a general principle of statutory construction, he is indeed correct. He abandoned this position almost immediately, however, by adopting the test he proposed in *Wilson*.[257] Applying his *Wilson* "officiality test", he concluded the confession was admissible.

Applying his test, Judge Latimer found two of his three conditions lacking. First, the cell mate held no official position relative to the investigation.[258] He refused to adopt the rule of agency from civil law. Second, he found that the investigation had not focused on Gibson as a suspect in this crime.[259] Apparently the only basis for the pretrial confinement was that Gibson had abandoned his guard post.[260] For these reasons, Judge Latimer concurred in the result of admitting the confession.[261] Neither of the other two judges agreed with his analysis.[262]

Judge Latimer had other major disputes, however, with the Chief Judge. His primary disagreement presaged Supreme Court law many years later. Judge Latimer pointed out that Article 31(b) and Article 31(d) contain two separate provisions governing confessions.[263] Article 31(d) holds that a confession must be suppressed if it is obtained *either* after failing to issue the Article 31(b) warnings *or* as a result of coercion or improper

influence.[264] Thus his analysis split the two provisions into separate analytical paths. One could, he believed, admit a confession only if it was obtained *both* after warnings *and* without coercion.[265]

Judge Latimer also presaged the *Miranda* decision when he stated that he believed the warnings existed to neutralize the coercive environment that *always* exists between superiors and subordinates in the military.[266] Officiality, as he perceived it, arises from the specific words of the code, "suspect" and "nature of the accusation." He found therefore that Congress only intend the Article to apply in situations of official criminal inquiry, not casual interchanges.[267]

Another defect exists in Chief Judge Quinn's decision. His legal analysis of the history of AW 24 and Article 31(b) is seriously flawed. He places considerable reliance on a 1947 Board of Review decision about the failure to warn, *United States v. Rodriguez*.[268] This reliance is logically fatal. The decision not only preceded the UCMJ, it also preceded the Elston Act changes to AW 24 in 1948. The 1920 Manual for Courts-Martial, effective in 1948, contained *no* mandatory warning requirement.[269] Rather, it *suggested* that investigators inform the accused of his right to remain silent. Recognizing that the federal touchstone of admissibility from 1920 to 1949 was voluntariness, a warning was some evidence of that fact, but was not conclusive.[270]

However, the Elston Act and the 1949 Manual created a *duty* to warn the accused of the rights.[271] Thus when the *Rodriguez* board ruled on the warnings, it was not bound by the mandatory language of either AW 24 or Article 31(b).

Chief Judge Quinn's analysis becomes further strained when one considers that the analysis of the Morgan draft and the House reports on Article 31(b) both state that it was intended to *extend* the provisions of AW 24.[272] Thus, Chief Judge Quinn's reliance on a 1947 holding, twice removed by statutory modification, from the statute he was interpreting, is suspect at best. Given, however, the state of Fifth Amendment law in the rest of the nation, the decision is not that surprising. Voluntariness was the central issue in determining admissibility. The only other U.S. jurisdiction that had a statutory warning requirement was Texas. It only used the warning as evidence of voluntariness.[273] The COMA thus refused to take the lead among American criminal courts in guarding suspect's rights.

The COMA majority, instead, placed greater importance on not interfering with the efficient administration of justice.[274] In *Gibson*, the court presented several arguments supporting its analysis that implied Congress did not intend Article 31(b) to hamstring police investigations. Specifically, the court stated that the use of informers was a practice that was accepted by civilians.[275] The court reasoned that since Congress had not

disapproved of informers, or written any provision concerning them into the UCMJ, it must have approved of their use.[276] Congress may well have approved of their use, but the court abused Congressional intent with its reasoning. Determining what Congress meant by what it never considered is the most speculative of legislative analyses.

Among other arguments, the court noted that nothing in the history of Article 31(b) "calls for a conclusion at variance with the results obtaining in civilian jurisdictions."[277] This, of course, ignores the fact that no civilian jurisdiction, save Texas, had any warning requirement. In addition, it ignores the Congressional record that, in other contexts, the court found so convincing. When pointedly asked if there was any warning requirement in civil law, Felix Larkin responded he knew of none.[278] The clear import of what Congress did, when it created Article 31(b), is that the Article was intended to be a sharp departure from "the normal protection" provided by any other civilian criminal court. The COMA failed to give substance to this departure, finding instead, that since Congress did not disapprove of informers, it must have approved.

2. Officiality Spins out of Control.--Over the next several years, the COMA continued to give great weight to police practices, often directly reducing the rights of military suspects. Thus by 1960, in *United States v. Vail and Brazier*,

the court reached a conclusion that would have shocked the *Miranda* Supreme Court.

In *Vail and Brazier*, the COMA held that an officer, making an arrest of a suspect, caught "red-handed" in larceny could ask, at gun-point, where the stolen property was located.[279] While the Supreme Court would reach a somewhat similar conclusion in *Quarles* many years later, the rationale of the courts would differ greatly.[280]

In *Vail and Brazier*, Air Force Security Police had information that a group of airmen were going to attempt to steal weapons from a warehouse on base. The Provost Marshal, a major, and several Security Policemen surrounded the warehouse in a stakeout. Soon they observed the two accused enter the warehouse and then come out loaded-down with weapons. The police lost sight of the two accused. The Provost Marshall decided to move in for the arrest. He caught Vail and Brazier and told them to spread eagle on the ground. He then fired his pistol in the air to summon the other police. After that, he asked Vail and Brazier where the stolen guns were located. He never read them their rights.

The COMA held that this was permissible. The court reasoned that the suspects had been caught "red-handed." Furthermore, the questioning was not part of the interrogation, rather a normal

part of the arrest procedure.[281] The court reasoned that since the suspects clearly knew what they were suspected of, that Article 31(b) was inapplicable.

Even Judge Latimer concurred in this result. His three part officiality test allowed such a result.[282] The policeman was not conducting an official investigation when he asked for the incriminating response. In addition, he was not "interrogating" the accused. He reached this conclusion by reasoning that the policeman had not thought out the question.[283] Rather, the policeman was reacting to the situation and attempting to prevent the weapons from falling into foreign hands.

In light of *Miranda*, six years later, the result of this trial is patently not the law today. It displays, however, the flexibility and potential for abuse in the original "officiality" test. The test clearly cannot protect the core concern of the *Miranda* Court, the elimination of the inherently coercive atmosphere of custodial interrogation. The test also fails, coincidentally, to protect the core concern of Congress in creating the UCMJ, the elimination of military rank and discipline from the administration of justice.

3. The Opportunity of United States v. Tempia.--The opportunity for COMA to return Article 31(b) to its rightful place came in 1967 with the case of *United States v. Tempia*.[284]

By 1966, the COMA had decided numerous Article 31(b) cases and had narrowed the law to the point described above. The Supreme Court's decision in *Miranda* should have placed the COMA on a new course. Indeed, the decision in *Tempia* appeared to take that new course. The COMA recognized it would have to re-examine its own decisions about the Fifth Amendment and Article 31(b) in light of *Miranda*.[285] Unfortunately, *Tempia* itself did not provide any new guidance on Article 31(b) and the rights warning triggers. Its central focus was the right to counsel and the military's procedures for producing counsel. Nevertheless, aspects of the court's holdings are relevant to the Fifth Amendment aspects of Article 31(b).

As an initial matter, the COMA rejected, any notion that the Constitution did not apply to service persons.[286] It held that service persons enjoy full constitutional rights except in those limited areas that the Constitution itself directly contradicts such treatment.[287] Moreover, the court found that it was bound by Supreme Court precedent in the area of constitutional rights.[288] It then sought to determine if Airman Tempia's rights were violated even though the military had followed Article 31.

One of the court's first conclusions about Tempia is that he had been subject to a custodial interrogation.[289] He had been arrested and then released to seek consultation with a lawyer. The court found that his summons back to the police station

constituted custody.[290] It noted "[h]ad he not obeyed, he would have undoubtedly subjected himself to being penalized for a failure to repair."[291] This of course, was a violation of a punitive article of the UCMJ. The court continued, "[i]t ignores the realities of the situation to say that one ordered to appear for interrogation has not been significantly deprived of his freedom."[292]

The remainder of the decision deals primarily with the right to counsel aspects of *Miranda*. Within that framework, the court did engage in a broader philosophical debate over the difference between Article 31 and the *Miranda* rule. At issue was the significance of the Supreme Court's approval of Article 31 in *Miranda*. Chief Judge Quinn, in dissent, stated that since the Supreme Court had approved of Article 31, the COMA need not alter any of its case law to respond to *Miranda*.[293] The remaining two judges disagreed, holding that the Supreme Court required a minimum provision of counsel in every case.[294] The Air Force had provided Tempia access to the Staff Judge Advocate, not a defense counsel. The COMA held this was not the sort of independent lawyer that the Supreme Court required. Consequently, it held that Article 31 was not as broad as the *Miranda* ruling, at least as far as the right to counsel was concerned.[295]

Of course, the issue of the full scope of Fifth Amendment rights as protected by Article 31(b) was not squarely before the

court. The dissent noted, however, that Article 31 existed to preserve the rights of the Fifth Amendment in the unique military context.[296] The specific issue that *Tempia* turned on was the warning that he was entitled to speak to an attorney either retained or provided.[297] It did not address the *Miranda* triggers, other than custody, in a unique military setting.

4. Position of Authority Test - United States v. Dohle.-- The COMA's first major shift in Article 31(b) jurisprudence came in 1975 with the case of *United States v. Dohle*.[298] In that case, the COMA adopted a test known as the "position of authority" test. Unfortunately, that test was short lived, for the COMA rejected it in 1981 in favor of the "officiality" test of *Duga v. United States*.[299]

Dohle was suspected of stealing some weapons from the unit armsroom. When questioned by the police, he invoked his rights to silence and counsel under Article 31(b) and *Miranda-Tempia*. A good friend of the accused, Sergeant Prosser, was detailed to guard him. While performing this duty, Prosser asked Dohle about the theft. Dohle admitted to the theft. The prosection admitted this statement at trial.[300]

The COMA overturned the conviction, holding that Sergeant Prosser should have read Dohle his rights under Article 31(b). The court rejected the prior test that the COMA had been

applying, in favor of an objective test focusing on the perceptions of the accused.[301] The court rejected any subjective inquiry into the motives of the questioner due to the possibility of multiple motives.[302] Instead, the court adopted a focus on the military relationship between the two parties as the relevant focus.[303] Finally, echoing *Miranda*, the court held that it was the suspect's state of mind that was central to Article 31 (b) protection.[304]

However, the application of principles setting *Miranda* law parallel to Article 31 was the broadest given at any time in Article 31's history. What followed from the COMA was a return to a narrow scope of rights.[305]

IV. The Current Test from *United States v. Duga*

A. United States v. Duga

The COMA's next major case addressing the Article 31(b) triggers came in 1981 in *United States v. Duga*.[306] The COMA held that questioning of a suspect by a person not acting in an official capacity did not require Article 31(b) warnings.[307] On its facts, viewed against most of Article 31(b) precedent, and against *Miranda*, *Duga* was decided correctly. The problem, however, is that, once again, its language went too far in explaining the concept of "officiality."

Airman Dennis Duga was a member of the military police security squadron at Lowry Air Force Base. In the summer of 1978 the Office of Special Investigations (OSI) began an investigation into the larceny of a canoe from the base recreation services department. OSI called in one of Duga's friends, Airman Byers, for an interview. During the interview, OSI asked Byers if Duga had anything to do with the larceny. Byers allegedly told OSI everything he knew; OSI released him. At the end of the interview, OSI asked Byers to let them know if he received any more information about the theft.[308]

Byers was also a member of the security police squadron. He and Duga had been roommates and had seen each other socially on several occasions. Both were Airmen First Class.[309] A few days after the interview, Byers encountered Duga at the gate to the base. Byers was on duty as a Security Policeman at the time. During the conversation, Byers asked Duga about OSI's investigation. Duga told Byers that OSI was looking for something in his, Duga's, truck. Duga later admitted that it was a stolen canoe. Two days later Byers again talked to Duga about the larceny. This time the conversation occurred in the dormitory with number of other persons present. Byers later reported the statements to OSI. At no time did Byers read Duga his Article 31(b) rights.[310]

Byers testified during a suppression motion that he acted

out of his own curiosity.[311] The military judge refused to suppress the statements.[312] Duga was convicted of larceny largely on the basis of Byers' testimony.[313]

The COMA began by noting that, applied literally, Article 31(b) would require Byers to read Duga his rights. The court recalled its precedent in both *Wilson and Harvey* and *Gibson* and echoed the rationale that it had a "duty to see to it that such rights are not extended beyond the reasonable intendment of the code at the expense of substantial justice and on grounds that are fanciful or insubstantial."[314]

The court then proposed to apply reasoning almost perfectly mirroring *Miranda* law to the Article 31(b) scenario.[315] Unfortunately, the court did not follow the reasoning to its logical conclusion. First, the court noted that the purpose of the Article was to safeguard the Fifth Amendment.[316] In this regard, the court noted, as has the Supreme Court, that the Article is not itself a right. Rather, it is a guardian or prophylactic protective measure of a greater principle.[317] Second, the court noted the special psychological conditioning that is a part of military indoctrination. Quoting from a prior case of *United States v. Armstrong*[318], the court noted:

> Conditioned to obey, a serviceperson asked for a statement about an offense may feel himself to be under

> a special obligation to make such a statement. Moreover, he may be especially amenable to saying what he thinks his military superior wants him to say-whether it is true or not. Thus, the serviceperson needs the reminder required under Article 31 to the effect that he need not be a witness against himself.[319]

The court's final appeal to *Miranda* rationale came in the form of a paraphrase of the Supreme Court majority opinion in *Innis*:

> The concern of the [Congress] in [enacting Article 31(b)] was that the 'interrogation environment' created by the interplay of interrogation and [military relationships] would 'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self incrimination" contained in Article 31(a) of the Uniform Code of Military Justice.[320]

The court concluded, therefore, that the Article only applied when rank or duty position exerted subtle pressure on the suspect to respond.[321] The court determined that the means to analyze these conditions was to inquire into the motivation of the questioner and the perceptions of the suspect.[322] Unfortunately, this test does not follow *Miranda* principles.

Under *Miranda* law, the only relevant inquiry is into the reasonable perceptions of the suspect! In a cryptic footnote, the court distinguished and, indeed, rejected its "position of authority" test from *Dohle*, finding that it simply did not apply in Duga's situation.[323]

In order to apply their new rule to the facts of *Duga*, the court reviewed the evidence in the case. It noted that Duga did not choose to testify on the suppression motion and that only Byers' side was heard. The court stated that it would accept, as uncontroverted, that Duga and Byers were friends, that they were in the same unit and most significantly that they were only speaking as friends when Duga confessed.[324] The court concluded from this evidence that Byers was genuinely acting out of personal curiosity. Therefore it upheld the finding of a lack of officiality. These factual findings are, of course all focused on the perceptions of Byers, not Duga.

The court continued and found there was no possible way it could conclude that Duga perceived the conversation as anything other than casual talk between friends.[325] It noted that Duga "boasted" of his criminal achievements and of his plans to hide his van from OSI. As a result of this boasting, the COMA concluded that Duga did not perceive Byers as an agent seeking a criminal confession.[326] Moreover, the court found there was no subtle coercion at work. In this regard it found it significant

that Duga was a security policeman and that Byers stated that Duga outranked him.[327] In a footnote, the court found it somewhat significant that the accused stated he knew his *Miranda* rights.[328]

In a related motion at trial, Duga had apparently sought to exclude certain statements made to a civilian police officer as violating his *Miranda* rights.[329] The COMA noted that, in support of this motion, Duga admitted he knew of his rights and that he carried a rights warning card. The court concluded "the appellant knew that, if he did not want to, he did not have to answer any of Byers' questions."[330]

There is, perhaps, comfort for the COMA in the factual finding that Duga knew of his *Miranda* rights. Unfortunately, *Miranda* itself explicitly held that such an inquiry was irrelevant. Indeed, this was just the sort of "voluntariness" inquiry that the Supreme Court eliminated with the *Miranda* ruling.[331] Thus the military courts considered evidence that, in the *Miranda* inquiry, is constitutionally infirm. In deciding *Duga*, the COMA tried to mirror *Miranda* rationale, but missed the mark.

This is not to say that the decision in *Duga* is wrong. It is wrong *only* because of the reasoning the COMA supplied. The court set out on a correct analytical path, but made several illogical detours. The detours resulted from the COMA's failure

to cut loose first from due-process voluntariness law[332] and secondly from an inexact application of the ruling in *Miranda*[333] and its progeny..

The court noted first that Article 31(b) serves as a shield to the Fifth Amendment.[334] This is correct from both a legislative history[335] standpoint and from the *Miranda* decision itself.[336] It then noted that as a "guardian," Article 31(b) is distinct from the right embodied in the Fifth Amendment.[337] Once again, this is a correct statement of the law. The Supreme Court makes the same distinction in dividing cases that show warning violations from those showing due process violations.[338]

The court's detour from *Miranda* law occurred when it applied its second point of reasoning to the facts. The court invoked the Supreme Court's *Innis* decision and paraphrased it to apply to Article 31(b). Recall that the issue in *Innis* was whether the police had actually interrogated Innis.[339] The Supreme Court's language, that the COMA appeared to graft onto Article 31(b), related to the central feature of *Miranda*, the dual triggering events of custody and interrogation.[340] The *Innis* court adopted what has been called a "synergistic"[341] approach to *Miranda*. This approach holds that the special psychological situation *Miranda* and its progeny seek to defuse is created by the unique interplay of custody and interrogation.[342] In *Duga*, the COMA sought to take the same approach in applying Article 31.

The court's approach in the paraphrase replaced "custody" in the *Innis* decision with "military relationships." In theory, this is an attractive concept. Unfortunately, the court did not complete their analysis in a manner consistent with *Miranda-Innis*.

The attractive nature of this approach comes from the discussions both courts use regarding psychological pressures. The Supreme Court in *Miranda* and its progeny, consistently speaks of the subtle psychological pressures resulting from the combination of custody and interrogation.[343] Furthermore, in *Miranda*, the Court reviewed police practices and found that the police regularly took advantage of the pressures of custody and used them to produce the confession.[344] Thus, for the Court, custodial interrogation presented a compelling situation arising from unique *government created* control and domination over the suspect.

The same government domination and control exists inherently in certain military situations.[345] Respect, obedience and, arguably fear, of superior authority is a fundamental part of the military indoctrination process.[346] A functioning military cannot achieve its fundamental goal of winning war without inculcating a degree of unquestioning obedience in its soldiers, sailors, marines and airmen.[347] Indeed, the UCMJ itself contains the

disciplinary tools allowing a commander to compel obedience. Within limits, the power is absolute. A commander could order a subordinate to complete a task that could, in combat, result in the death of the subordinate.[348] In time of war, failure to obey the legitimate order of a superior officer can result in the death penalty![349] Furthermore, training on the UCMJ is, by operation of Article 137 of the code, a fundamental part of every basic training curriculum in the United States Armed Forces.[350] Thus, the military itself desires, and indeed demands, a degree of psychological pressure simply not found in the civilian world.[351] It does this through legal indoctrination on the very subject the COMA replaced the *Miranda* word "custody" with - "military relationships."[352] For it is the relation of senior to subordinate[353], of officer to enlisted[354], of sergeant to private[355] that the UCMJ enforces with the rule of law and the iron hand of discipline. It is the inculcation of a rigid rank and duty structure that fundamentally serves the goals of the country in raising and maintaining an Army.[356] It is also this necessary evil, of the influence of rank, that the UCMJ sought to exclude from the justice, rendered as discipline, under the code.[357]

The COMA was arguably correct in paraphrasing *Innis*. It simply did not follow the logical reasoning employed in the paraphrase to a proper legal conclusion. Military relationships coupled with interrogation are a valid and total surrogate for the *Miranda* synergy of custody and interrogation. The logic the

court applies fails at this point, for either Article 31(b) parallels *Miranda* or it does not. One should not accept the central premise of *Miranda*, designed to stand as a guardian of a fundamental, enunciated, constitutional right and not coincidentally accept the test the Supreme Court establishes to measure adherence to that right. For, as the COMA has done, subverting the test inevitably threatens the protection the warnings seek to provide and strikes at the Fifth Amendment right itself.

The COMA's analysis also fails to track *Miranda's* abandonment of the due process - voluntariness tests. The Supreme Court has consistently divided issues of "voluntariness" from issues of warnings.[358] In addition, it has always measured the application of the *Miranda* triggers using purely objective criteria.[359] The COMA errs when it engages in any subjective analysis of the Article 31(b) triggers. Therefore, it erred in its attempted application of *Miranda* rationale to *Duga*. If it had properly applied *Miranda* principles, it would have achieved the correct result *for* the correct reasons.

If the COMA had properly applied *Miranda* rationale, it still should have admitted the statements Duga made to Byers. As an initial matter, *Miranda*, in its purest sense, does not apply to Duga's situation. While Byers was probably trying to obtain incriminating information from Duga, Duga was never in custody.

Furthermore, the Supreme Court has never held that a private individual engaged in a casual conversation has any reason for concern about the Fifth Amendment.[360] The Supreme Court's concern is the governmental creation of an inherently coercive environment.[361] They measure the existence of that environment by objective factors.

In *Duga*, there is no objective evidence of a government induced coercive environment. Therefore, Duga could not have reasonably perceived this environment. Recall, under *Miranda*, it is the reasonable objective perception of the accused,[362] not the police officers, that governs the analysis.[363] Duga encountered Byers at the gate where Byers was on duty. There is nothing to suggest that Byers detained Duga for "interrogation."[364] The conversation would apparently be viewed as reasonably nothing more than two friends talking.[365] Furthermore, there are no signs of a significant military relationship between the two. They were members of the same unit and may have shared some degree of comraderie,[366] but there is no evidence that this created a special "weakness" that the authorities were trying to exploit.[367] The two were of, at least, the same rank, although at one point in the decision, it appears that Byers actually was junior to Duga.[368] Therefore, there is no implied or explicit rank authority of Byers over Duga.

The only possible military relationship that could possibly,

reasonably, exert any pressure on Duga was the special authority of military police.[369] With the possible exception that Byers was probably in uniform and perhaps armed, there is nothing in the decision to intimate that this relationship could have had any coercive effect on Duga.[370] Furthermore, the encounter took place in an area that was not selected, apparently, by the government. Further, it was, in all probability, open to public view.[371] In conclusion, there was nothing about the arrangement that invoked any governmental control, either in a police context or in a military relationship context. Reversing the *Miranda* analysis, there was no inherently coercive environment to be countered,[372] consequently, there was no need for the *Miranda* warnings.

One can conclude, then, that the Article 31(b) warnings in *Duga* were not absolutely necessary. If, as the COMA states, the stated trigger of Article 2 jurisdiction is without content in Article 31(b), one must draw the line for rights warnings at some other place. Because of the strong evidence that the Article was only intended to address the coercion in truly "official" inquiries, it makes sense to adopt a rule that at least parallels the *Miranda* rule. Indeed, *Miranda* itself stated that the states could provide an alternative providing the same protection.[373] Furthermore, the *Miranda* Court gave approval to, at least, part of the UCMJ approach.[374] One cannot go below the *Miranda* floor without running afoul of the Court's interpretation. In *Duga*, the court set up a logical construct that suggested it would draw

the "officiality" line at *Miranda* law. Thus, once it established that line, it should have gone no further in relaxing the warning triggers. Unfortunately, the logic the court applied, outlined above, established precedent that has resulted in crossing the *Miranda* policy line. The cases that followed *Duga* show how far beyond that line the COMA has gone.[375]

B. United States v. Jones

On of the most disturbing factual situations after *Duga* was the case of *United States v. Jones*.[376] The COMA upheld a confession rendered by an accused, in hand-cuffs, to a superior noncommissioned officer, without Article 31(b) warnings.[377] The court came to this conclusion holding that it was not an official interrogation.[378]

Private First Class Christopher Jones was a suspect in the attempted murder of one Corporal Guyton. CID interviewed him and, after reading him his rights, obtained a confession. There was no issue that this confession was taken either in violation of Article 31(b) or involuntarily.[379]

Jones entered pretrial confinement. Later he was escorted to his regular unit area. There he encountered Staff Sergeant Dudley. Sergeant Dudley had previously served as Jones' platoon sergeant. When they met in the unit orderly room, Jones was wearing hand-cuffs. In addition, the COMA noted that Dudley was

wearing his rank insignia.[380]

Dudley testified that he wanted to talk to Jones because he had heard that Jones was "after" another member of Dudley's unit, a soldier named Felton.[381] He further testified that he did not read Jones his rights because he assumed that since the accused was in hand-cuffs "all of that had been taken care of."[382] Dudley asked Jones why he had shot Corporal Guyton. Jones responded that he had not intended to shoot Guyton; he meant to hit Felton.[383] Jones sought to have this admission suppressed at trial.[384]

The trial court, relying on *Duga*, held that Sergeant Dudley was acting purely out of personal curiosity.[385] Dudley had testified that no one had assigned him to investigate the case and that this session was really "informal counseling."[386] The trial court found that Jones could have perceived the interrogation as official.[387] The trial court held, however, that *Duga* required both prongs of the officiality test.[388] The COMA upheld this ruling, quoting the following language from *Duga* and *Gibson*. "[I]t is necessary to determine whether (1) a questioner subject to the Code was acting in an official capacity in his inquiry or only had a personal motivation; and (2) whether the person questioned perceived that the inquiry involved more than a casual conversation."[389]

The COMA and the trial court concluded therefore that since Sergeant Dudley was not actually conducting an official inquiry, the first prong of *Duga* had failed. Therefore, there was no reason to read Jones his Article 31 rights.[390]

Chief Judge Everett, the author of the *Duga* opinion, concurred in the decision but wrote separately to address the issue of *Duga's* second prong. Chief Judge Everett suggested that the objective perception prong of *Duga* could mandate the exclusion of the statement.[391] He felt, however, that the actual language of Article 31(b) suggested a different approach. He suggested that the Article itself targets the behavior of interrogators and not suspects.[392] Persons engaged in purely casual conversation are not acting as interrogators. Therefore, he concluded that Article 31(d) only called for suppression of statements taken in violation of Article 31(b). Since he defined a casual conversation out of the scope of Article 31(b), he found no violation.[393] Consequently, he believed that analysis of the interrogator's conduct was central to Article 31.

The court's analysis has several logical flaws, particularly considering *Duga*'s application of *Miranda* law. The flaws in the case go even further than *Duga*. The confession obtained by Sergeant Dudley may have violated *Miranda* itself.[394]

The COMA failed, however, to apply *Duga* correctly. In

reaching the conclusion in *Duga* that "officiality" was required, the COMA noted the similarity of *Miranda* and Article 31 law. As posited above, "custody" in a traditional *Miranda* analysis can be replaced with "military relationships" in the Article 31 context. In *Jones*, the COMA echoed this, stating,

> Because of the effect of superior rank upon one subject to military law, merely asking a question under certain circumstances may be equivalent to a command. The *Duga* decision was an attempt to safeguard servicemembers from compulsory self-incrimination, coercion, and command influence. The uniqueness of the military justice system demands that such subtle pressures as rank, duty, or other similar relationships be purged from the interrogation process.[395]

The court concluded, however, that it would only purge these improper influences when they were *intentionally* created *by* the government in the setting of an "official" investigation.[396] The court refused to give substantial weight to the possible perception of the soldier.

In denying this perception, the court denies the entire purpose of Article 31(b). True, as Chief Judge Everett notes, the rule is written in terms of the conduct of the interrogator. It is, however, the soldier's right against self-incrimination

that is being protected.[397] The Supreme Court has noted that it is the cumulative effect of government pressures on the suspect that calls for the *Miranda* warnings as a prophylactic.[398] The COMA finds the pressures present, but denies the privilege to the service person on the grounds that the questioner was not acting in an official capacity.[399] The COMA errs by drawing the definition of official capacity too narrowly in the military context.

The COMA also failed to give weight to Dudley's purpose. What was the motivation of Sergeant Dudley in asking Jones the questions? It was for an official purpose.[400] The court concluded, however, that Dudley was just acting out of personal interest. This finding defies Dudley's own testimony! First, note that Dudley stated he was conducting "informal counseling." "Counseling" in the military context is something done by superiors.[401] It is a regular occurrence and indeed, something expected of noncommissioned officers.[402] Second, Dudley said he wanted to ask Jones questions because he had heard rumors that Jones was going to do something to Felton. Felton was a member of Dudley's unit. As such, Dudley has both a legal responsibility to Felton as well as a leadership responsibility.[403] Dudley felt prompted to talk to Jones because Dudley had heard that Jones was going "after" Felton and "that he was gonna get even with ... [Felton] or something to that effect."[404] It is crystal clear that, even if he did not care

what Jones had done to Guyton, Dudley wanted to know about threats to Felton. Finally, the official nature of the inquiry is cemented by Dudley's admission that he thought it was alright to question Jones because someone had already read Jones his rights. Therefore Dudley knew he was attempting to elicit incriminating information from a suspect of a crime. He may not have been a police officer, but he perceived his own role in the military as requiring the questioning after a proper rights advisement. Even if he was not seeking information about Guyton, he was seeking information about another violation of the UCMJ - communicating a threat to Felton.[405]

Analysis of the objective perceptions of Jones should have led the court to conclude that Dudley should have read him his rights. Jones was wearing hand-cuffs. He was clearly in custody, albeit not Dudley's direct custody. Both he and Dudley were wearing their uniforms, displaying their relative position in the military hierarchy. Dudley had served as Jones direct military superior in the past. They were both members of the same military organization. Furthermore, as discussed above, the questions all related to Dudley's role as Felton's superior. Most significantly, every one of these factors relates directly to the military relationship between the two. It is a relationship marked by the dominance of the sergeant over the private.[406] It is a relationship that, by law, requires respect and obedience by Jones to Dudley.[407] It is the exact relationship

that causes the greatest problems in the UCMJ - the dominance of rank in the administration of justice.[408] It is the very relationship that the UCMJ as a whole and Article 31(b) as a part, sought to eliminate from the military justice system.[409] Unfortunately, the COMA has successfully defined the relationship out of the equation under the guise of subjective officiality.

Worse, however, is the COMA's sanction of a clear *Miranda* violation. It is clear that Jones was in custody. Thus the first prong of *Miranda* existed. More importantly, however, Dudley asked questions specifically designed to elicit an incriminating response - thus interrogation.[410] As discussed above, the only purpose for the questioning was for Dudley to gather information about a threat, by Jones, against a member of Dudley's unit.

One could argue that this was not a *Miranda* violation because Dudley was not a policeman.[411] This argument ignores, however, the special law enforcement role that all officers and noncommissioned officers play in the UCMJ.[412] For, under the UCMJ all significant decisions regarding disposition of a criminal case are made by command, not legal personnel.

The distinction of private from official action is important because of similar distinctions made by civil courts. One of the persons the civil courts have never required to read rights are

private store detectives.[413] The courts have consistently ruled that these detectives are private agents unrelated to a government function. Thus, the courts distinguish the pressures inherent from governmental custodial interrogation from private interrogation. The COMA has had considerable difficulty finding that same line. As the officiality doctrine spun on, however, the line became more and more blurred.

C. United States v. Quillen

In 1988, the COMA decided another case further confusing the Article 31(b) issue. In *Quillen*[414], the COMA held that a civilian post exchange security guard was required to advise a soldier-suspect of Article 31(b) rights before questioning him.[415]

Army Specialist Quillen employed a carefully crafted plan to shoplift from the McChord Air Force Base Post Exchange. He selected a video tape and carefully attached a security sticker to it before attempting to depart the store. Unfortunately for him, a store detective observed him. This detective, Mrs. Holmes, was a civilian employee of the Army and Air Force Exchange Service. She was specifically employed as a store detective.[416]

Mrs. Holmes observed Quillen mark the video tape with the security tape. She observed, however, that he had used the wrong color tape for that day. After he left the store without paying,

she stopped him, displayed her credentials, and asked for his military identification card. She and an associate then escorted him to the exchange manager's office. She then asked him if he had a receipt for the tape.[417] Quillen stated that he had bought the tape but had lost his receipt.[418] Mrs. Holmes then conducted a check of the video department to see if such a tape had been purchased that day. Determining that none had been purchased, she turned Quillen over to the military police.[419]

At no time did Mrs. Holmes read Quillen his rights.[420] At trial, Quillen sought to have his statements suppressed as a violation of Article 31(b). The military judge, following *Duga*, found that Mrs. Holmes was not conducting an official investigation and that she was not acting as part of the commander's punitive or disciplinary power.[421] Since the situation failed to satisfy the first prong of *Duga*, the court admitted the statement.[422]

The COMA reversed this finding and held that Mrs. Holmes was conducting an official investigation.[423] As an initial matter, the court reasoned that the exchange service was an instrumentality of the military under the control of the base commander.[424] In addition, the court found that the exchange was under military control because it was required to file reports of crime with base military authorities.[425] Consequently, the court ruled that Mrs. Holmes was an integral part of the command's

discipline effort and was "not engaged on a frolic of her own."[426] These conclusions added a new turn to the *Duga* test. Now it appeared the court would determine if the individual *should have* believed they were conducting an official investigation.[427] Since she should have believed she was conducting an official investigation, the issue remained whether Quillen perceived it as such.[428]

The court then concluded Quillen could have perceived the interview as "official."[429] The court found that Mrs. Holmes' display of her credentials and the routine she employed in the detention were "anything but casual."[430] Finally, in analyzing Quillen's objective perception of his situation, the court gave great significance to the removal of the accused to the manager's office. Thus the court held that the second prong of *Duga* was satisfied. It concluded therefore that Mrs. Holmes, a civilian, should have read Quillen his Article 31 rights.

Thus, the COMA appeared to turn away somewhat from *Duga*. By focusing on the "reasonable" detective, the COMA appeared to retreat from the purely subjective approach of *Duga* and *Jones*. Unfortunately for Article 31 law, the decision is somewhat more difficult to apply.

First, as Judge Cox noted in dissent, the decision abandons the special role of Article 31.[431] The Article, he reasoned,

counteracts the effect of superior rank or position.[432] The examination by the store detective did not, apparently, bring rank or position into the equation at all. Mrs. Holmes was a civilian.[433] She identified herself as a member of exchange security and according to exchange policy was not acting as a law enforcement agent.[434] She had no statutory or regulatory law enforcement function.[435] In fact, exchange regulations specifically forbade her from issuing *Miranda* warnings![436] Furthermore she had no authority to forcibly detain anyone.[437] Judge Cox concluded that the majority had expanded Article 31's scope beyond that envisioned by Congress.[438]

The decision also reveals another of *Duga's* inherent weaknesses. *Duga* focuses initially on the subjective intent of the questioner.[439] If, and only if, the questioner believed that he or she was conducting an official investigation, would the court reach the second stage of the analysis, the objective perception of the suspect. Here, Mrs. Holmes did not, herself, believe that she was conducting an official investigation. The trial judge found she was performing a function unrelated to the commander's disciplinary power.[440] She was not acting on a personal whim, but neither was she, per se, representing the commander's punitive authority.[441]

The trial court's analysis was fair considering both *Duga* and *Jones*. Recall that Sergeant Dudley in *Jones* was engaged in

only "informal counseling."[442] His role was found by the court to be unrelated to the prosecution of Jones for shooting at Guyton. Similarly, Mrs. Holmes role in *Quillen* fulfilled an official function. She had a regulatory "mission" of protecting store property.[443] It is apparent, however, from the trial court's ruling that she did not perceive herself as part of the commander's disciplinary machinery.[444]

This shows the danger of the first prong of the *Duga* analysis to both the government and possible defendants. Since the issue of "officiality" rests, in part, on the individual's perception[445] of their role in the disciplinary system, *Duga* would inevitably lead to substantial uncertainty over the issue of who must warn. In addition, as the Supreme Court pointed out in *Berkemer*, a subjective approach is full of opportunity for perjured testimony, or at best, well coached testimony, about one's perception of roles.[446]

This danger is not substantially mitigated by the majority's apparent addition of an objective analysis. Since the majority did not do away with the subjective prong of *Duga*[447], the trial court will still be required to take evidence from the questioner about his or her perception of their role. The trial court will then face the prospect of attempting to separate the objective reality from the perception of the questioner.

D. United States v. Loukas

The COMA again addressed the issue of "officiality" in *United States v. Loukas*.[448] As presented, the case asked the COMA to apply the public safety exception of *Miranda-Quarles* to the military.[449] The court did not take this option, choosing instead to define, further, the nature of an official inquiry.[450] In doing so, it further narrowed the scope of official questioning to only law enforcement or disciplinary investigations.

Airman Loukas was a member of a C-130 crew. During a long flight his supervisor, Staff Sergeant Dryer, noticed that Loukas was acting in an irrational manner. Apparently, Loukas was hallucinating. Among other observations, the crew testified that Loukas began speaking to persons who were not there. Loukas also surrendered his loaded pistol to another crew member stating he did not want it. Dryer confronted Loukas and asked him if he had taken any drugs. Loukas replied that he had taken some cocaine the night before. At the end of the flight Loukas was questioned by another crew member, Captain Cottom. He again admitted to drug use. Neither Staff Sergeant Dryer nor Captain Cottom read Loukas his Article 31(b) rights.[451]

The Air Force Court of Military Review held that, under *Duga*, Staff Sergeant Dryer should have read Loukas his rights.[452] It made a factual finding that Dryer was not acting out of pure curiosity.[453] The Air Force Court then applied the "public

safety" exception of *Quarles* and allowed the statement to be admitted.[454]

The COMA reversed both of these rulings by finding that *Duga* did not require a rights warning.[455] Since no warning was required, there was no need to apply the "public safety" exception.[456] The ruling that *Duga* did not require a warning resulted in a further narrowing of the "officiality" test.

The COMA held that *Duga* only applied to cases of official law-enforcement or disciplinary investigations.[457] In its holding, the COMA reviewed the entire history of Article 31(b) development.[458] It did so with a somewhat revisionist eye towards that history.

The court first reviewed *Gibson*. It quoted language from the opinion of the court that focused on the meaning of the words in Article 31(b).[459] It correctly noted that words such as "interrogate" or "request a statement", not to mention "suspect" do implicate a criminal investigation.[460] It went further and quoted a somewhat more troubling conclusion from *Gibson*. The court said, "military persons not assigned to investigate offenses, do not ordinarily interrogate nor do they request statements from others accused or suspected of crime."[461] It is interesting to note the origin of this conclusion. In *Loukas*, the COMA cites to *Gibson* and *Wilson and Harvey* as the origin of

this conclusion. In fact, it comes from *Gibson* directly. In *Gibson*, the court made this statement citing to *Wilson and Harvey*.[462] *Wilson and Harvey* contains no such direct assertion. Recall, the holding of *Wilson and Harvey*. In that case, the COMA held that Article 31(b) was as clear as it could be.[463] A court need not inquire further than Article 2, UCMJ, to determine if the questioner had to issue the warnings of Article 31(b).[464] The only mention of military duty roles in *Wilson and Harvey* is that a military policeman did conduct an unwarned interrogation of the suspects. The COMA's conclusion in *Gibson* that *Wilson and Harvey* stands for a broad proposition that only military police conduct criminal investigations was ill considered at best. Moreover, it contradicts the overall spirit of the UCMJ.

The problems with *Loukas* go much deeper than questionable citation. The case attempts to strip Article 31(b) of any meaningful content in the special military environment. The UCMJ is, as stated above, a discipline system regulated by principles of justice. It defines the relative power and roles of the members of the Armed Forces. In contains both provisions particular to law enforcement actions by police authorities[465] and law enforcement duties and functions for command personnel.[466] It is difficult to adopt COMA's perception of a minimal role of command personnel in law enforcement and disciplinary functions given the scope of the punitive articles of the code. Indeed those articles themselves address both common law crimes and

unique military offenses.[467] Furthermore, the reality of military life dictates an inherent law enforcement role for every military supervisor.[468] The COMA's conclusion that command personnel rarely conduct criminal investigations is highly suspect and particularly dangerous to the policies behind both the UCMJ in general, and Article 31(b) specifically.

The court's analysis continued on this tenuous path during the rest of its review of history. It adopted Judge Latimer's *dissenting* opinion in *Wilson and Harvey* and *concurrence* in *Gibson* as a further basis for holding that the questioner had to have a law enforcement role in the "official" questioning.[469] In adopting this standard, COMA was, in effect, overruling a significant part of its precedent and further narrowing Article 31's scope. The COMA was deeply divided in *Gibson*. Judge Brosman was sharply critical of Judge Latimer's concurring opinion and rejected his notion of "officiality."[470] For the COMA to now adopt it as the law is a questionable application of precedent.

A more disturbing departure from precedent is the importance that the COMA placed on the rationale in *Duga*. In *Duga*, Chief Judge Everett noted that Airman Byers was not acting as an agent of OSI in asking Duga questions about the crime.[471] If the court had found a true agency relationship, it would have never reached the greater issue of Byers' personal role as a person subject to

the code conducting an investigation.[472] Thus, as in *Quillen*, the COMA confused Article 31 agency law with a pure analysis of who must warn.

Judge Cox, concurring in the result, reiterated adherence to the subjective approach of *Duga* when he stated, "it is obvious that the last thing in their minds is the possibility of a criminal prosecution somewhere down the line."[473] Therefore, Judge Cox found that this situation was non-interrogational and therefore did not implicate Article 31 at all.[474]

Chief Judge Everett, the author of *Duga*, dissented sharply from the court's holding in *Loukas*. He also reviewed the history of Article 31's development and concluded that there were two poles in Article 31. He said:

> At one extreme-- where warnings clearly are required--is a situation in which a law-enforcement agent questions the accused as a suspect; at the other extreme--where warnings clearly are not required--is a situation in which a close friend is engaged in a personal conversation with the accused as a friend, without regard to any military relationship between the two of them. In the middle are all the other myriad situations in which, until now, the question to be answered has been, simply: Was a questioner acting in

line of duty in an official capacity on behalf of the Service?[475]

Thus Chief Judge Everett held to a broader interpretation not tied to law enforcement functions. He further noted the very difficulty set out above - the special function of Article 31(b) in the military setting.[476] He quoted language from the concurring opinion in another precedent Article 31 case, *United States v. Seay*[477], in which Judge Ferguson stated:

> In the military, unlike civilian society, the exact relationship at any given moment between the ordinary soldier and other service personnel in authority (i.e., commissioned and noncommissioned officers) often is unclear. In the civilian experience, it is unlikely that anyone to whom Miranda [citation omitted] might apply would question someone else other than in the former's official capacity--that is, as a law enforcement officer.
>
> However, in the military a company commander may advise or question a member of his command for any of a number of different legitimate reasons, only one of which might relate to a criminal offense. Thus, to simplify matters, and in recognition of the superior/subordinate atmosphere inherent in the military [but] not present in the civilian structure, the requirement is broader

in the former than in the latter.[478]

This statement cuts to the heart of the issue and also identifies the problem that exists even with Chief Judge Everett's - *Duga* - subjective approach. The problem is a combination of training and role perception. It may not always be clear to a service person when his or her commander is wearing their caring, nurturing, paternal command "hat" and when they are wearing their police "hat." Some of the facts in *Loukas* that were compelling to the majority display this split.[479] The court concluded that Sergeant Dryer was concerned about Loukas' health and the welfare of the other members of the crew when he asked Loukas if he had been using drugs.[480] Concurring, Judge Cox found that, quite possibly, Sergeant Dryer was concerned about whether the accused needed immediate medical treatment.[481]

Neither addresses, however, the fact that this same Sergeant is also, quite probably, responsible for ensuring that Loukas kept his dormitory room in order, made all of his assigned duty formations[482] and participated in mandatory urinalysis.[483] This same individual, at once honestly acting in Loukas benefit, also has substantial duties, with relation to Loukas, that are arguably *not* in Loukas' best interests. Loukas was a junior enlisted soldier. Dryer was his supervisor and superior non-commissioned officer.[484] Loukas had a duty to obey Dryer's orders.[485]

These orders themselves are the core concern that the COMA has, rightly, with Article 31(b). It has repeatedly stated that questions from a superior can, in the military context, carry the weight of commands.[486] The court has, in *Duga*'s second prong, considered the possibility that the service person may reasonably perceive an otherwise innocent question as an order to respond. It has failed, however, through its persistent adherence to an analysis of the role of the questioner, to give substance to the right that belongs to the service person.

Even if the COMA need not follow *Miranda* law directly in applying Article 31(b), prudential reasons call for such an approach. Rejection of a subjective prong under *Duga* would free the court from the possibility of perjured or coached testimony by government witnesses.[487] In addition, it would make application of the Article that much simpler. It would accomplish this by freeing the COMA and the Courts of Military Review from an endless plunge into the voluntariness of the confession where this is not an issue. In *Miranda*, the Supreme Court in essence threw up its hands in disgust at the body of due process and voluntariness law and created a constitutional presumption of involuntariness.[488] The *Miranda* warnings were created as a simple prophylactic measure countering the presumptive coercive nature of custodial interrogation.

With similar bold stroke, the COMA could free itself and all of its subordinate courts from an endless inquiry into both the voluntariness of the confession and the perceived role of the questioner. Unfortunately, in *Loukas*, the court narrowed its approach and denied more service members the protection of Article 31(b). As a result, the court would find itself analyzing the role and the specific mission of the questioner more and more.

V. A New Test

The court should adopt a different approach to Article 31(b) cases. This approach can, and should, be more consistent with the true policy behind the Article 31(b) protection and the UCMJ itself - discipline in a just environment.[489] A proper test will focus on the objective perceptions of the service member being questioned in the same fashion as *Dohle*. Thus it would return Article 31(b) to a point where, as *Miranda* law does for civilians, the Article will stand a true guardian of the constitutional right against compelled self incrimination.

A proper analysis of a given situation will address the objective perceptions of the serviceperson being questioned.[490] Thus the test will eliminate the possibility of deception or coaching by the government or the defense of their own witnesses. Since it will focus only on the objective factors found in a

given scenario, testimony as to the subjective impressions of both the questioner and the suspect will be irrelevant.[491] Thus the test will avoid any appeal to emotion or false perception.

What factors should the court examine? The COMA's prior decisions largely answer this question. The issue is what indicia of military superiority are present in the scenario presented. The court has long held that rank and official position may give rise to an assumption by service persons that a question is a command.[492] Furthermore, it is the military relationships between service persons that form the core elements of the UCMJ as a unique military justice system as opposed to simply a federalized state criminal code.[493] Therefore, viewed as a unitized whole, the UCMJ, both the punitive articles and the procedural ones give guidance about the proper test of Article 31 applicability.

The court should examine then such factors as the rank of the questioner and the suspect. In this regard it will be relevant to inquire whether the questioner was wearing his or her uniform or had otherwise indicated to the suspect what rank they held.[494] If the questioner is a civilian law enforcement agent working in the Department of Defense, it will be relevant to inquire whether he informed the suspect of his or her affiliation with the military. The UCMJ grants certain persons authority over other service persons solely by virtue of their rank or

position.[495] Thus a senior of any rank may properly order a subordinate to stand-fast and respond to inquiries.[496] Similarly, a military policeman, in the performance of duty, may properly require a senior to similarly stand-fast and respond to inquiries related to that duty.[497] Therefore, the only relevant inquiry would be whether a reasonable service person would perceive the presence of military power in the encounter.[498]

A clear benefit of this new test will be simplicity in administering it.[499] Questioners will know, with precision, whether they hold a position of military superiority. Moreover, they will be on notice of the obligation to warn. Personnel being questioned will also be on notice that they have a privilege not to answer.

In the military this truly is a unique privilege. In normal discourse between a senior and subordinate, the military superior may compel responses. A subordinate who refuses to respond runs the risk of violating a punitive article of the UCMJ.[500] While it is axiomatic that a service person is privileged to disobey truly illegal orders, the burden is on the service person to distinguish the legal from the illegal.

Assuming, *arguendo*, that an order to incriminate oneself is illegal, the suspect service person is privileged to disobey it. The COMA's current analysis, in contrast with the new test,

requires the suspect to analyze whether the questioner is acting as an official interrogator or is just a curious superior. Thus, the court asks the service person to instantaneously analyze the legal ramifications of both his or her role and that of the senior before answering the question.[501]

Focusing, instead on the perceptions of the suspect will cure this dilemma. The suspect will be informed of the privilege not to answer certain questions. Furthermore, the new test will place the legal burden on the military superior and the government, not on the suspect. It seems logical that, if the government vests the superior with rank and authority sufficient to order the subordinate into battle, it should also trust him or her to use that rank only in furtherance of government objectives.[502] The leader is "on-duty" 24 hours a day. Unless that leader clearly divests himself or herself of their rank and authority, the subordinate must comply with all of the orders of the superior.[503] The burden should be on that leader not to abuse his or her position of authority by engaging in frolics of their own,[504] in pursuit of criminal information from subordinates.

Simplicity in the rights warning triggers will do away with the current hair-splitting analysis of roles and perceptions. It will replace it with an objective test focusing on the central policy behind both Article 31(b) and the UCMJ.

The Supreme Court held in *Miranda* and its progeny that government creation of a coercive environment for confessions violates the Fifth Amendment privilege.[505] It has declined to extend that presumption beyond the boundaries of custodial interrogation because of the unique psychological pressures inherent in that environment. More importantly, the Supreme Court has steadfastly refused to consider the subjective beliefs of either the questioner or the accused.[506] The COMA should follow this lead.

Criticism of the *Dohle* test, however, could also be leveled at this new test.[507] One possible weakness in the new test is that it penalizes the government in situations in which the government was not truly involved.[508] This criticism, however, begs the question. The focus under *Miranda* was the government creation an inherently coercive environment. If military relationships combine with interrogation to create a similar coercive environment, the government is still the cause of the coercive environment. It is the government that created the military relationship. Consequently, it is the government that must bear the burden of the impact of that relationship on members of the armed forces. To assert that the government should not bear the burden of the rules it creates defies the essential nature of constitutional rights. In granting the privilege against self-incrimination, the government clearly denied itself the quickest way to a conviction. The government

created the rank and discipline structure that regulates military relationships. It therefore, must bear the burden of corresponding legal handicaps attendant to that grant of power.

Another criticism is that the individual who asks the question may be acting out of personal curiosity.[509] Consequently, it is posed, why should the government bear the burden of casual inquiries? As above, this criticism fails to account for the inherent presence of the government in any relationship between military persons of unequal rank or authority. As stated initially in this thesis, the problem is one of line-drawing. How does one distinguish the casual from the official and the voluntary from the coerced? In the *Miranda* case law, the Supreme Court holds the government responsible for the actions of its officers, the police. Arguably, a policeman who interrogates a suspect without the *Miranda* warnings is violating their training as an officer. They may also be violating departmental policy regarding interrogations. Therefore, in one sense, the police officer is acting outside the scope of accepted police practice. The Court refuses to exonerate the government for the actions of this officer because it was the state or federal government that granted the officer the authority he later *abused*. Thus the criticism of the test can turn on itself. There is no rational reason why the courts should excuse the frolics and abuses of military superiors who, out of *personal curiosity*, seek to extract confessions. While

they may not believe they are acting for an official purpose, this fact is indistinguishable to the suspect. If Article 31(b) is to have any value as part of the UCMJ, it must protect service personnel from the unlawful use of rank to extract confessions, even when, and, perhaps most importantly, when that rank is being abused.

Article 31(b) was created by Congress as part of a unitized military justice code that created a new environment for discipline in the military untainted by rank and improper influence. Rank and position are both products of governmental appointment.[510] Upon swearing to uphold the Constitution and the Uniform Code, every service member becomes a part of a military system that creates, as an integral part of its structure, psychological domination, by those empowered by the government with superior rank or position. It is impossible to sever this domination from relationships on an *ad hoc* basis. It is this unique psychological coercion, so desireable and necessary in a command environment, that Article 31(b) seeks to eliminate from the justice function. The right belongs to the serviceperson. He or she is the potential target of the influence of rank that is absolutely necessary in every other facet of military life. Correspondingly, the burden of the consequences of rank and authority should rest on the government. The COMA should return Article 31(b) analysis to the serviceperson's perspective - the very perspective it was designed to protect.

A return to this perspective would not, necessarily result in a different outcome in quite a few of the Article 31 cases.[511] It would, however, result in a briefer analysis and a policy approach consistent with both the remainder of the code and the greater body of constitutional jurisprudence under *Miranda*.

VI. Conclusion

Discipline and obedience are the glue that hold a military force together. Over a century ago General Schofield addressed the Corps of Cadets at West Point and said, "[t]he discipline which makes the soldiers of a free country reliable in battle is not to be gained by harsh and tyrannical treatment. On the contrary, such treatment is far more likely to destroy than to make an Army."[512] Article 31(b) reflects this same philosophy.

American military justice is a careful compromise between the dictates of discipline and obedience, and the strictures of constitutional law. The UCMJ, as a unified whole, accepts, endorses, and empowers a military that places one free American citizen under the control of another. It empowers that senior citizen to order the junior to fight, suffer and if necessary, die. That same UCMJ seeks to insulate the administration of justice from that brutal but necessary power.

Article 31(b) stands as the guardian of the citizen soldier's right not to incriminate himself. It is *the soldier's* psyche that it protects. It is *the soldier's* will that it shields. Time has long passed when the military courts should give any consideration whatsoever to the thoughts, motivations or concerns of the questioner. The COMA can, and should, act to restore the balance to military law that Article 31(b) established in 1951.

ENDNOTES

1. UCMJ art. 31(b) (1988).

2. In 1993, in United States v. Raymond, the COMA held that a civilian social worker, employed by the Army, did not have to advise a soldier of his rights before a social work inquiry into allegations of child abuse. 38 M.J. 136, 140 (C.M.A. 1993). The court reaffirmed that military medical personnel generally conduct their inquiries for the benefit of the soldier, not law enforcement. Furthermore, in this case, the interview was not part of a greater investigation by the Criminal Investigation Division against this soldier. *Id.* at 138.

3. *See, e.g.*, United States v. Fisher, 44 C.M.R. 277 (C.M.A. 1972) and United States v. Baker, 29 C.M.R. 129 (C.M.A. 1960)(medical personnel need not issue rights warnings).

4. *See* United States v. Duga, 10 M.J. 206 (C.M.A. 1981). *See infra* text accompanying notes 306-74.

5. *See* United States v. Quillen, 27 M.J. 312 (C.M.A. 1988). *See also infra* text accompanying notes 414-47.

6. *See* United States v. Moreno, 36 M.J. 107 (C.M.A. 1992). Moreno was interviewed by a Texas state social worker. The

interview occurred by appointment and off-post. The interviewer worked for the social services department and had no apparent (or sub-rosa) connection to the military. *Id.* at 115-17. Texas and Fort Bliss had a memorandum of understanding that allowed Texas social work personnel to investigate child abuse cases on-base. *Id.* at 116. The COMA held that since the social worker was not functioning as part of the military investigation, she had no reason to read Moreno his rights. *Id.* at 117.

7. *See* United States v. Lonetree, 35 M.J. 396 (C.M.A. 1992) *cert. denied*, 113 S. Ct. 1813 (1993). In *Lonetree*, the court held that, as a matter of law, Government civilian agents, need not read a service member his rights if they are not engaged in a *criminal* investigation that has merged with an on-going military *criminal* investigation. *Id.* at 403-405. Lonetree had served as part of the Marine security detachment at the U.S. embassy in Moscow. He had engaged, over time, in a relationship with Soviet nationals who were, in fact, KGB operatives. His actions seriously compromised security at the embassy. His activities came to light when Lonetree voluntarily approached a civilian U.S. intelligence agent at the Vienna embassy where he had been reassigned. In a series of interviews with these agents, known as the "Johns," Lonetree revealed the full scope of his illegal activities. These intelligence agents were neither members of the military nor affiliated with military law enforcement. *Id.* at 399. Reviewing the case on appeal, the COMA held that the

agents were not acting as agents of the military nor had their investigation merged into an indivisible entity with the military criminal investigation. *Id.* at 405.

8. *See* United States v. Loukas, 29 M.J. 385 (C.M.A. 1990). *See also infra* text accompanying notes 448-88.

9. *See generally*, United States v. Morris, 13 M.J. 297 (C.M.A. 1982). This thesis does not specifically examine the suspect trigger of Article 31(b). The test the COMA employs is a combination objective-subjective approach. The test to determine whether a person is a suspect is whether considering all of the facts and circumstances at the time of the interview, the government interrogator believed or should have believed that the one interrogated committed an offense. *Id.* at 298.

10. *See* United States v. Duga, 10 M.J. 206, 210 (C.M.A. 1981).

11. Military Commanders have a full range of disciplinary power available to them. The Uniform Code of Military Justice is a codification of criminal and non-judicial disciplinary actions. *See generally*, UCMJ art. 15 (1988), and UCMJ arts. 78-134 (1988). *See also, e.g.*, DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE, PRACTICE AND PROCEDURE § 8-1 (3d ed. 1992)(discussing range of options). Commanders may also discipline service persons using

administrative reprimands and formal and informal counseling. *See, e.g.*, 1 FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE §§ 3-20.00 - 3-22.20 (1991). Commanders may also recommend discharge from the service with a less than honorable discharge as a punitive action. *Id.*

12. 384 U.S. 436 (1966).

13. *See generally infra* text accompanying notes 306-74.

14. 384 U.S. at 444.

15. *See generally, Miranda,* 384 U.S. at 445.

16. *See generally infra* text accompanying notes 200-16.

17. *See* ROBINSON O. EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES, 10-15 (1956); and *infra* text accompanying notes 491-504. *See also,* Edmund Morgan, *The Background of the Uniform Code of Military Justice,* 6 VAND. L. REV. 169 (1952).

18. *Miranda,* 384 U.S. at 444.

19. *Miranda* requires governmental action to implicate the Fifth Amendment. For this reason, private persons are not required to issue the warnings. *See* CHARLES H. WHITEBREAD AND

CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE, § 16.05 (1986). The central premise of *Miranda* is that custodial interrogation by law enforcement creates an inherently coercive atmosphere. This atmosphere is not present when a private individual asks questions, even if the suspect is not totally free to go. *See* Ariz. v. Mauro, 481 U.S. 520 (1987) (Conversation between suspect and spouse not custodial interrogation). *See also infra* text accompanying notes 74-91.

20. *Miranda*, 384 U.S. at 444. *See also* Berkemer v. McCarty, 468 U.S. 420, 421-22 (1984); *infra* text accompanying notes 92-121. Such an environment is one in which the subject of the questioning is not free to leave. *See generally infra*, text accompanying notes 92-121.

21. *See* R.I. v. Innis, 446 U.S. 291, 300-301 (1980). *See also infra* text accompanying notes 122-46.

22. *See* United States v. Wilson & Harvey, 8 C.M.R. 48 (C.M.A. 1953)

23. *See generally infra* text accompanying notes 224-26.

24. *See generally infra* text accompanying notes 233-67.

25. *See, e.g.*, United States v. Jones, 24 M.J. 367 (C.M.A. 1987).

26. Congress created the UCMJ under its Constitutional authority to establish rules for the armed forces. U.S. CONST. art. I, § 8, cl. 13.

27. Congress enacted the UCMJ and the President signed the legislation in 1950. Uniform Code of Military Justice, ch. 169, 64 Stat. 107 (1950)(codified now as 10 U.S.C. §§ 801-946 (1988). It became effective on May 31, 1951. *See* United States v. Wilson & Harvey, 8 C.M.R. 48, 54 (C.M.A. 1953). The Supreme Court decided *Miranda* on June 13, 1966. 384 U.S. 436.

28. *See generally infra* text accompanying notes 83-85 and 205-207.

29. *See* Jeffrey L. Caddell, *Article 31(b) Warnings Revisited: The COMA Does A Double Take*, ARMY LAW., Sep. 1993 14, 16. *See generally infra* text accompanying notes 217-488.

30. *See, e.g.*, United States v. Loukas, 29 M.J. 385 (C.M.A 1990)(the COMA refuses to apply public safety exception of *Miranda*)

31. *Contra* Stanley T. Fuger, *Military Justice, Variations on a Theme*, 66 CONN.B.J. 197 (1992)(Mr. Fuger asserts the COMA protects all Constitutional rights fully).

32. *See infra* text accompanying notes 92-121.

33. *See infra* text accompanying notes 122-46.

34. The history of the Uniform Code and of Article 31 provides some insight into the purpose, intent and meaning of the warning requirement. It is not, however, dispositive. An outstanding Article by MAJ (then CPT) Manuel Supervielle, in the Military Law Review some years ago amply describes the historical antecedents of Article 31. Manuel E.F. Supervielle, *Article 31(b): Who Should Be Required to Give Warnings?*, 123 MIL. L. REV. 151 (1989).

35. 10 M.J. 206 (C.M.A. 1981).

36. 24 M.J. 367 (C.M.A. 1987).

37. 27 M.J. 312 (C.M.A. 1988).

38. 29 M.J. 385 (C.M.A. 1990).

39. *See infra* text accompanying notes 489-511.

40. *See, e.g.*, DRAGNET (Universal 1987). "Miranda's story spawned an ongoing controversy familiar to anyone who has watched a television "cop" throw a television criminal against a studio wall and read four well-known warnings from a card while handcuffing the "bad guy" for the trip downtown. The so-called Miranda rights are the only legal doctrine accessible through an intellectual diet limited to prime-time television. Few cases have triggered as expansive a collection of case law and scholarly commentary, not to mention barroom, streetcorner, and living-room discourse." Daniel Yeager, *Rethinking Custodial Interrogation*, 28 AM. CRIM. L.REV. 1 (1990)

41. *See Quarles*, 467 U.S. 649, 660 (O'Connor, J. dissenting). *See also* R.I. v. Innis, 446 U.S. 291, 304 (Burger, C.J. concurring).

42. *Quarles*, 467 U.S. at 654. *See also* Fuger, *supra* note 31 at 207.

43. *Id.* at 655. *Quarles* created the so-called "public safety" exception. Another doctrine referred to as the "attenuation of taint" doctrine is found in Oregon v. Elstad, 470 U.S. 298 (1985). It applies to the use of subsequent confessions obtained after a failure to issue the rights warnings. It

creates a limit to the scope of the *Miranda* exclusionary rule. *Elstad*, 470 U.S. at 318. This rule is not the focus of this thesis since it deals with events significantly after the initial interview.

44. *See generally infra* text accompanying notes 92-121, 122-46.

45. *See, e.g., Miranda*, 384 U.S. at 504 (Harlan, J., dissenting).

46. *Miranda*, 384 U.S. at 488-89. The only warning precedents were found in British, Indian and American Military law. *Id. But see Id.* at 442 (holding is not an innovation).

47. *See generally Miranda*, 384 at 442-44, 461-65.

48. *See* MCCORMICK ON EVIDENCE § 114 (Edward W. Cleary ed., 3d ed. 1984).

49. *See generally*, 8 WIGMORE, EVIDENCE § 2250 (John T. McNaughton rev. 1961). *See also generally*, Edmund Morgan, *The Privilege Against Self Incrimination*, 34 MINN. L.REV. 1 (1949).

50. *See* MCCORMICK, *supra* note 48, § 114.

51. *Id.*

52. *Id.* Parliament acted in response to the plea of John Lilburn to have his sentence overturned because of a compelled confession before the Star Chamber. *Id.*

53. *Id.* McCormick cites a considerable debate between Wigmore and other legal historians. *Id.* This debate would continue through to include the Supreme Court in *Miranda* itself.

54. 3 WIGMORE, EVIDENCE § 817 (James H. Chadbourn ed.,1970).

55. Hopt v. Utah, 110 U.S. 574, 585 (1884) *overruled by* Malloy v. Hogan, 378 U.S. 1 (1964). *See also* MCCORMICK, *supra* note 48 § 147.

56. The Supreme Court presents a treatise-like explanation of both the common law and constitutional history of the law of confessions in Bram v. United States, 168 U.S. 532, 541-61 (1897). *But see*, 8 WIGMORE, *supra* note 49 §252 (Wigmore cites 12 possible policies behind the privilege under both common law and the Constitution).

57. "In criminal trials, in the courts of the United States, wherever a question arises whether a confession is

incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the constitution of the United States commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'" *Bram*, 168 U.S. at 542.

58. *Id.* at 558.

59. The Court pointed out that in some states, notably Texas, the accused could only make a confession before a magistrate after being advised of the right to remain silent. *Id.* Other states had no such requirements and freely admitted statements made to police officers while in custody. *Id.* at 558-61.

60. *Id.* at 565.

61. The specific crime was murder on board an American ship at sea. *Id.* at 534-36. The crew suspected Bram of the crime based on the allegations of another suspect. When the ship docked at Halifax, Nova Scotia, Bram was turned over to Canadian authorities, who conducted an investigation. At trial, the United States sought, successfully, to introduce a confession to the Canadian investigator. *Id.* at 538-44.

62. *Id.* at 564.

63. 297 U.S. 278 (1936). The facts of *Brown* are truly shocking. The accused were described as "ignorant negroes." *Id.* at 281. As the title notes, they were convicted of the crime of murder in Mississippi. The sole evidence against them was the confessions extracted from them by torture. *Id.* at 279. The case is a mockery of justice. The murder occurred on 30 March 1934. The accused were indicted on 4 April 1934 and by 6 April 1934 had been convicted and sentenced to death. Each of the accused testified to the hanging and beating that resulted in the confession to the crime. In a surprising development, the sheriff's deputy and two other persons who participated in the beating, all testified that they had, in fact, beaten the accused. *Id.* at 279-84. The trial court and all state appellate courts denied their appeals to have the confessions suppressed. The Supreme Court reversed the conviction but specifically declined to do so on the basis of the Fifth Amendment. *Id.* at 285. In *Brown*, the court tied the Fifth Amendment privilege to actual testimony in court by the accused. *Id.* The Court's decision rested instead on due process. *Id.* at 285-87.

64. *See* MCCORMICK, *supra* note 48 § 147. *See also* WIGMORE, *supra* note 54 § 822(c). Wigmore states that these cases were stated in very general terms. As a result, there was no occasion for the courts to discuss the untrustworthiness rationale. *Id.*

Wigmore further asserts that historically there has been no connection whatsoever between the constitutional doctrine and the common law rule of confessions. *Id.* For this thesis, however, such a distinction is not necessary. What is relevant is the state of federal law during the period 1900-1951.

65. *Brown*, 297 U.S. at 278, 286-87. The *Brown* court did not use the term "shocking," rather, the Court stated that the beatings which the accused received that produced the confessions were so fundamentally unfair that the entire proceeding against them was "a mere pretense of a trial and rendered the conviction and sentence wholly void." *Id.* at 286. The term "shocking" comes from Rochin v. California, 342 U.S. 165, 172 (1952) *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961). *Rochin* actually was a search and seizure case, but the Court reached its conclusion suppressing the evidence by analogizing the state of compelled confession law. The Court said,"[u]se of involuntary confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency." *Id.* at 173.

66. 378 U.S. 1, 8-9 (1964). At least one commentator has called *Malloy's* merger of the due process analysis with a Fifth

Amendment analysis a "shotgun wedding." Lawrence Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L.J. 449, 465 (1964).

67. 378 U.S. at 6-7.

68. *Id.* at 7.

69. Bram v. United States, 168 U.S. 532, 562 (1897).

70. *Bram*, 168 U.S. at 565 (quoting RUSSELL ON CRIMES)

71. *Id.* at 564-65.

72. *Miranda*, 384 U.S. at 448-49.

73. *See generally* 384 U.S. at 445-58.

74. Malloy v. Hogan, 378 U.S. 1 (1964). *Malloy* applied the protection of the Fifth Amendment to the states where previously only due process had controlled. *See* 3 WIGMORE, *supra* note 54, § 823.

75. Escobedo v. Ill., 378 U.S. 478 (1964) *partially overruled by* Miranda v. Ariz. 384 U.S. 436 (1966), extended the Sixth Amendment right to counsel to pre-trial proceedings. The

Court used the same approach in *Miranda* and concluded that as a result of the manner in which police conduct their interrogations, the adversarial process has commenced and the Fifth Amendment was implicated. The Court held that rights to counsel found in *Escobedo* and the right to silence from *Malloy* are meaningless at trial unless protected from police over-reaching during the investigation phase. *Miranda*, 384 U.S. at 466.

76. *Miranda*, 384 U.S. at 465.

77. *Id.* at 447.

78. Blackburn v. Alabama, 361 U.S. 199, 206 (1960). The *Miranda* psychological analysis is critical because it relates closely to the analysis the COMA uses in Article 31 cases. 384 U.S. at 448. *See also infra* text accompanying notes 306-409.

79. *Miranda*, 384 U.S. 451 (quoting O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION, 112 (1956).

80. *Miranda*, 384 U.S. at 455.

81. *Id.* at 457.

82. *Id.*

83. *Id.* at 457-58.

84. *Id.* at 444.

85. *Id.* at 467.

86. *Id.* at 468. The Court stated:

> The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.

Id. at 468-69.

87. *Id.* The Court balanced the fundamental right against what it viewed as a simple procedure. It is interesting to note that the only United States precedent the Court found for the warnings was the UCMJ. *See Id.* at 489.

88. *Miranda*, 384 U.S. 466.

89. *Id.* at 469.

90. *Id.* "[H]e is not in the presence of persons acting in his interest." *Id.*

91. *See generally infra* text accompanying notes 92-121 (custody) and notes 122-46 (interrogation).

92. *See* Berkemer v. McCarty, 468 U.S. 420, 428 (quoting *Miranda*, 384 U.S. at 444).

93. *See Berkemer*, 468 U.S. at 434.

94. *Miranda*, 384 U.S. at 465; *Berkemer*, 468 U.S. at 437.

95. 468 U.S. 420 (1985).

96. *Id.* at 424.

97. *Id.* at 434.

98. *Id.*

99. *Id.* at 423-24.

100. *Id.* at 434-35.

101. *Id.* at 435 and n.22.

102. *Id.* at 441-42.

103. Fidelity to the doctrine announced in Miranda requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated. Thus, we must decide whether a traffic stop exerts upon a detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights. *Id.* at 437.

104. *Id.* at 437-38.

105. Second, circumstances associated with

> the typical traffic stop are not such that the motorist feels completely at the mercy of the police. To be sure, the aura of authority surrounding an armed, uniformed officer and the knowledge that the officer has some discretion in deciding whether to issue a citation, in combination, exert some pressure on the detainee to respond to questions. But other aspects of the situation substantially offset these forces.

Id. at 438.

106. *Id.* at 437-38.

107. *Id.* at 438.

108. The Court believed that a public setting was less police dominated. *Id.* at 438. The Court compared the roadside stop with the so-called "Terry" stop under Fourth Amendment law. The Court noted that it did not require warnings in Terry stops, finding that environment was comparatively non-threatening. *Id.* In *Terry*, the Court held that a policeman with reasonable suspicion that an individual is engaged in criminal activity may stop that individual for a brief time period and ask him or her a limited number of questions. The police officer may also conduct a brief "pat-down" of the individual to ensure he or she is not carrying a dangerous weapon. The policeman need not have

suspicion mounting to "probable cause" for an arrest or search. *See generally* Terry v. Ohio, 392 U.S. 1 (1968).

109. *Berkemer*, 468 U.S. at 442.

110. *Id.* at 441-42.

111. *Id.* at 443.

112. *Id.* at 443.

113. *Id.*

114. *Id.* at 442, n.35.

115. *Id.* at 430.

116. It is axiomatic that the accused at trial usually has the greatest incentive to lie. Therefore, it seems difficult to accept an accused's subjective perception as a reliable source of facts for a Constitutional inquiry.

117. *Id.* at 430. Later Court rulings, notably, *Quarles*, would criticize any retreat from this simplicity. *See generally infra* text accompanying notes 165-81.

118. 488 U.S. 9 (1988)(*per curiam*).

119. *Id.* at 11.

120. *Id.* at 11 n.2.

121. *Id.*

122. 446 U.S. 291 (1980).

123. *Id.* at 299. One writer suggests that the Supreme Court lifted this idea from the writings of Professor Kamisar. "Although the word 'interplay' did not appear in Miranda, the concept was gleaned from it in Rhode Island v. Innis, presumably after the justices or their law clerks read Professor Kamisar's 1978 article on interrogation, where the term first appeared." YEAGER, *supra* note 40 at 1. *See also*, Yale Kamisar, *Brewer v. Williams, Massiah and Miranda: What Is "Interrogation"? When Does It Matter?*, YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 139 (1980).

124. *See Innis*, 446 U.S. at 301-302.

125. *See, e.g.*, Pa. v. Muniz, 496 U.S. 582 (1990). In *Muniz* the Court addressed the issue of interrogation in terms of the type of response demanded by an explicit question. Thus, a

policeman's request for otherwise innocuous personal data can become a request for incriminating evidence.

126. *Innis*, 446 U.S. at 298 (citing *Miranda*, 384 U.S. at 444).

127. *Innis*, 446 U.S. at 298.

128. *Id.* at 302.

129. *Id.* at 298.

130. *Id.*

131. *Id.*

132. *Id.* at 303.

133. *Id.* at 293-95.

134. *Id.* at 296. The Supreme Court noted that the state supreme court had relied on the case of Brewer v. Williams, 430 U.S. 387 (1977). That case is distinguishable on its facts from *Innis*. In *Brewer*, the police engaged in explicit, pointed, questioning in the form of the now-famous "Christian Burial Speech." 430 U.S. at 392. *See* WHITEBREAD AND SLOBOGIN, *supra* note

18, § 16.08(b). This speech was targeted at a known sensitivity of the accused. *Brewer*, 430 U.S. at 392.

135. *Innis*, 446 U.S. at 298.

136. *Id.* at 299.

137. *Id.*

138. *Id.* at 300.

139. *Id.* at 301.

140. *Id.*

That is to say, the term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against

coercive police practices, without regard to objective proof of the underlying intent of the police.

Id. at 310.

141. *Id.* at 302.

142. *Id.* at 301-302. Contrast the facts with Brewer v. Williams in which the police knew of a special sensitivity of the accused. 430 U.S. 387 (1977).

143. *Innis*, 446 U.S at 302.

144. *Id.* at 303.

145. *Id.*

146. *Id.* at 305 (Marshall, J. dissenting).

147. 467 U.S. 649 (1984).

148. *Id.* at 651.

149. The majority acknowledged they were reducing the doctrinal clarity. They accepted that police would be able, instead, to rely on their instinct. *Id.* at 658.

150. *Id.* at 655-57. The Court refused to consider the "unverifiable motives" of the police. *Id.* at 656.

151. *See infra* text accompanying notes 158-65.

152. *Quarles*, 467 U.S. 651-52. At this point Quarles was certainly in custody. *Id.* at 653. *See also* Berkemer v. McCarty, 468 U.S. 420, 443 (1984).

153. *Quarles*, 467 U.S. at 652.

154. *Id.*

155. *Id.* at 651-53.

156. *Id.* at 653-56. There was no claim of "actual" compulsion. *Id.* at 655-56.

157. 467 U.S. at 654 and nn. 3,4. (Court concluded it had the power to relax the judicial strictures of *Miranda* and attempts to tie that case to station house setting only)

158. 467 U.S. at 657-58

159. *Id.* at 657.

160. 467 U.S. at 655 n.5.

161. *Id.* at 657-58.

162. *Id.*

163. *Id.*

164. *Id.* at 655-57 " Undoubtedly most police officers, if placed in Officer Kraft's position, would act out of a host of different, instinctive, and largely unverifiable motives -- their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect." *Id.* at 656.

165. *See generally*, Daniel Yeager, Note, *The Public Safety Exception to Miranda Careening Through the Lower Courts*, 40 FLA. L.REV. 989 (1989).

166. 467 U.S. at 644 (O'Connor, J. concurring); 467 U.S. at 678 (Marshall, J. dissenting).

167. Quarles at 467 U.S. at 663-64.

168. The term "core virtues of simplicity" in *Miranda* usage actually comes from an opinion by then Justice Rehnquist. Fare v. Michael C., 439 U.S. 1310, 1314 (1984) Rehnquist J. in

chambers)(cited in *Quarles*, 467 U.S. at 664 (O'Connor, J. concurring).

169. *Quarles*, 467 U.S. at 664.

170. *Id.* at 676.

171. *Id.*

172. *Id.* The lower courts had made specific factual findings that there were no exigent circumstances. *Id.*

173. *Id.* at 675.

174. *Id.* at 676.

175. There was never any hint of an accomplice in the case. The rape prosecutrix apparently only alleged one assailant - Quarles. *Id.* at 651. Thus the Supreme Court's fear of another one is made from whole cloth.

176. *Id.* at 680-81.

177. This is the presumption the majority attempts to reject. *See supra* note 174. *See also Quarles*, 467 U.S. at 683-

84. (Marshall, J. dissenting)(Court created a constitutional presumption in *Miranda*).

178. 467 U.S. at 654-55.

179. The court implies this by admitting that the *Miranda* warnings may well have silenced the suspect. 467 U.S. at 657. "In such a situation, if the police are required to recite the familiar Miranda warnings before asking the whereabouts of the gun, suspects in Quarles' position might well be deterred from responding. Procedural safeguards which deter a suspect from responding were deemed acceptable in Miranda ..." *Id.*

180. 467 U.S. at 657.

181. The Court acknowledged that it was allowing the police to follow *their* natural instincts. 467 U.S. at 659. All prior *Miranda* decisions had focused exclusively on reasonable reactions of suspects to a given set of circumstances. *See supra* text accompanying notes 113-17, 139-46.

182. 113 S. Ct. 1745 (1993).

183. *Compare* 113 S Ct. at 1751 (due process analysis) *with* 113 S. Ct. at 1752 (Origin and distinct place of *Miranda* relative to Fifth Amendment).

184. 113 S. Ct. at 1749.

185. *Id.* at 1755-56.

186. *Id.* at 1754-55. "We thus fail to see how abdicating *Miranda's* bright-line (or, at least, brighter-line) rules in favor of an exhaustive totality-of-the circumstances approach on habeas would do much of anything to lighten the burdens placed on busy federal courts." *Id.* at 1754.

187. Justice O'Connor, concurring in part and dissenting in part, expressed discomfort with this move. She did however, confirm that the critical analysis under *Miranda* is whether the individual is in custody and whether they are being interrogated. 113 S. Ct. at 1759, 1764 (O'Connor,J. dissenting in part and concurring in part) She would use these as pieces of a totality of the circumstances test rather than as triggers resulting in a constitutional presumption of coercion. This would have the effect of returning Fifth Amendment law to pre-*Miranda* days when the warnings were but one of a number of factors the courts used to analyze a confession. *See generally* Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedures, in* CRIMINAL JUSTICE IN OUR TIME 1, 47-49 (Howard ed. 1965) (cited in 3 WIGMORE, *supra* note 54 § 823 n.5).

188. UCMJ Art. 31(b) (1988).

189. UCMJ art. 31(d) (1988). "No statement obtained from any person in violation of this article, or through use of coercion, unlawful influence, or unlawful inducement may be received against him in trial by court-martial." *Id.*

190. *See, e.g.*, 1 JOHNATHAN LURIE, ARMING MILITARY JUSTICE, THE ORIGINS OF THE UNITED STATES COURT OF MILITARY APPEALS, 1775-1950, 150-54 (1992).

191. *See, e.g.*, EVERETT, *supra* note 16, at 8-9.

192. The working group consisted of Felix Larkin, Assistant General Counsel of the Department of Defense, COL John P. Dinsmore, Office of Legislative and Liaison Division, Department of the Army, LTC John M Pitzer, Office of the Judge Advocate General, Department of the Army, COL John E. Curry, Office of the Judge Advocate General, Department of the Navy, COL Stewart S. Maxey, Office of the Judge Advocate General, Department of the Air Force, and Commander Halmar J. Webb, Legislative Counsel - Coast Guard, Department of the Treasury. Uniform Code of Military Justice, Text References and Commentary based on the Report of the Committee on a Uniform Code of Military Justice to the Secretary of Defense i-ii (1950) [hereinafter Morgan Draft].

193. *Id.*

194. General Green, The Judge Advocate General of the U.S. Army testified that in his opinion Article 31, as proposed, abridged the protection of Article of War 24. *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 260-61 (1949) [hereinafter UCMJ Hearings]. He also expressed concern that a confession to a civilian policeman would still be admissible. *Id.* at 265. COL Melvin Maas, national president of the Marine Corps Reserve Association testified that Article 31 should be limited to assertions of Constitutional rights. *Id.* at 712. The statement of Robert L'Heureaux, Chief Counsel of the Senate Banking Committee indicates he believes that Article 31 may allow for admission of evidence that Article of War 24 would not. *Id.* at 816.

195. *See, e.g.*, United States v. Duga, 10 M.J. 206, 208 (C.M.A. 1981) and United States v. Gibson 14 C.M.R. 164, 170 (C.M.A. 1954).

196. *See* Supervielle, *supra* note 16 at 176.

197. Compare the language of paragraph 225(b) of the Manual for Courts Martial (1921) with the language of the Elston Act. From 1921 through 1949, the Manual stated:

Considering the relation that exists between officers and enlisted men and between an investigating officer and a person whose conduct is being investigated, *it devolves upon an investigating officer, or other military superior, to warn the person investigated* [emphasis added] that he need not answer any question that might tend to incriminate him.

MANUAL FOR COURTS-MARTIAL, United States, ¶ 22*j* (rev. ed. 1921).

198. Article of War 24 was changed to read:

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

Act of June 24, 1948, ch. 625 § 214, 61 Stat. 628, 631.

199. UCMJ Hearings, *supra* note 194, at 2044.

200. *See* Commentary to Article 31, Morgan Draft, *supra* note 192, at 47.

201. *Id.*

202. *Id. See also*, Supervielle, *supra* note 34, at 176.

203. UCMJ Hearings, *supra* note 194, at 984-86, 988-91.

204. *Id.* at 986.

205. *Id.*

206. *Id.*

207. *Id.*

208. *See* Commentary, Article 31, Morgan Draft, *supra* note 192, at 47.

209. *Id.*

210. UCMJ Hearings, *supra* note 194, at 988.

211. *Id.* at 984-85, 991-93.

212. *Id.* at 990.

213. *See* John B. McDaniel, *Article 31(b) and the Defense Counsel Interview*, ARMY LAW., May 1990 9 n.4.

214. UCMJ Hearings, *supra* note 194 at 990.

215. They removed the words "at all" from the phrase "he does not have to make any statement at all." *Id.* at 992.

216. *See supra* note 194.

217. 8 C.M.R. 48 (1953).

218. "Those provisions [Articles 31(b),(d)] are as plain and unequivocal as legislation can be." *Id.* at 55.

219. *Id.*

220. The facts of the situation mirror the scenario envisioned by Felix Larkin in his Congressional testimony. *See supra* text accompanying note 212.

221. This investigation occurred some 51 days before the effective date of the code. The accused were arraigned after the effective date, consequently the code applied to them. *Id.* at 54-56.

222. *Id.* at 54.

223. *Id.* at 54.

224. *Id.*

225. *Id.* at 55

226. *Id.*

227. *Id.*

228. *Id.* at 54

229. *Id.*

230. *Id.*

231. The court specifically used the phrase "element of officiality." *Id.* at 55.

232. The Supreme Court adopted a harmless error analysis for coerced confessions in Ariz. v. Fulminante, 499 U.S. 279, 306-312 (1991). It is not clear whether this will apply directly to *Miranda* situations. Since *Miranda* is a sub-set of the world of coerced confessions, arguably it should.

233. *See infra* text accompanying notes 254-299. *See also* Supervielle, *supra* note 34, at 197.

234. 8 C.M.R. at 60 (Latimer, J. dissenting). He said:

> [T]he section cannot be construed to apply to every person who happens to be asked a question concerning an offense possibly committed by him nor to every person subject to the Code who interrogates another. Congress undoubtedly intended to enlarge the provisions of Article of War 24, supra, but I do not believe it intended to go so far as to prevent all legitimate inquiries.

Id.

235. *Id.* at 61

236. *Id.* at 60

237. Compare 8 C.M.R. at 61 with the history described *supra* at notes 212-216.

238. 8 C.M.R. at 61.

239. *Id.* *See also*, Supervielle, *supra* note 34, at 195.

240. 14 C.M.R. 164 (C.M.A. 1954)

241. *Id.* at 170.

242. *Id.*

243. *See generally* Ariz. v. Fulminante, 499 U.S. 279 (1991) (Court does not disapprove of jailhouse informants, but does submit confessions to a due process-voluntariness inquiry); Ill. v. Perkins, 496 U.S. 292, 296 (1990)(*Miranda* only applies when the concerns expressed therein are present - coercive atmosphere; coercion measured from perspective of suspect). *See also*, Kuhlman v. Wilson, 477 U.S. 436 (1986) and Hoffa v. United States, 385 U.S. 293, 304 (1966)(approves use of informant).

244. 14 C.M.R. at 168.

245. *Id.* at 171.

246. *See Id.* at 168-69.

247. *Id.* at 169-70.

248. United States v. Rodriguez, 69 B.R. 289 (B.R. 1947).

249. *Gibson*, 14 C.M.R. at 169-70.

250. *Rodriguez*, 69 B.R. at 292.

251. Ferguson was a private first class. Gibson was a private. 14 C.M.R. at 164, 170.

252. 14 C.M.R. at 170.

253. *Id.*

254. *Id.* The exact testimony the Chief Judge cited was:

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

Id. at 170. Note, however, AW 24 only applies to the accused. *See supra* note 198. As such, people actually conducting official duties with an accused would be more limited. Suspect is a broader term.

255. 14 C.M.R. at 171.

256. Judge Latimer sought to distinguish the majority's voluntariness inquiry. He first asserted the distinct difference between Article 31(b) - warnings and Article 31(d) involuntariness by noting the plain language differences. 14 C.M.R. at 178 (Latimer, J. concurring in the result). "The subject of that subsection [Article 31(b)] is failure to warn and that alone. There is no hint that coercion is hidden in the background." *Id.*

257. 14 C.M.R. at 181. There is of course a problem with this plain text approach. Judge Latimer accepts some of the phrases of Article 31(b) as plain and others as requiring interpretation. He admits in the next stage of his analysis that the Article is not clear on *who* must warn. *Id.*

258. 14 C.M.R. at 181-82.

259. *Id.* The focus of Ferguson's question was not the offense under investigation. He simply asked Gibson why he was in jail again. *Id.*

260. *Id.* at 181.

261. *Id.*

262. Judge Brosman notes the positions of both the Chief Judge and Judge Latimer. He agreed with the approach of the Chief Judge, but wrote separately to state his views. Thus the court was actually split three ways. *Id.* at 171-72. He severely criticizes Judge Latimer's approach. *Id.* at 171-75.

263. *Id.* at 177-78.

264. "That provision [Article 31(d)] is in the alternative and suggests it is severable into two parts, namely (1) a statement obtained in violation of this Article (sub-section (*b*), failure to warn), and (2) a statement obtained by the use of coercion, unlawful influence or unlawful inducement." *Id.* at 178.

265. *Id.* He proposed a five step analysis. *Id.*

266. *Id.* at 178. "Of course it can be said that Congress was aware that in the military a superior officer of noncommissioned officer, merely by virtue of his office, exercises influence over a serviceman and, therefore compulsion is always present." *Id.*

267. Congress could not have intended Article 31(*b*) to cover casual conversation, because the language used compels the conclusion that the interrogator is pursuing some official inquiry as he must know that the person to whom he is talking is suspected of a crime; he must inform him of the nature of the accusation; and he must explain to him that what he says may be used against him in a court-martial.

Id. at 181

268. 14 C.M.R. at 169 citing to United States v. Rodriguez, 69 B.R. 289 (B.R. 1947).

269. *See supra* note 217.

270. *See Rodriguez*, 69 B.R. at 292.

271. *See supra* note 218.

272. *See supra* note 210. *See also*, UCMJ Hearings, *supra* note 194, at 984.

273. *See Gibson*, 14 C.M.R. at 173 (Brosman, J. Concurring)

274. *Id.* at 170. This reflects the same shifting of values that the Supreme Court applied in its *Quarles* decision when it

elevated public safety over the privilege against self-incrimination.

275. *Id.* at 171.

276. *Id.*

277. *Id.*

278. *See* UCMJ Hearings, *supra* note 194, at 984-85.

279. United States v. Vail & Brazier, 28 C.M.R. 358 (C.M.A. 1960).

280. *Id.* at 136.

281. *Id.*

282. *Id.* (Latimer, J. concurring)

283. *Id.*

284. 37 C.M.R. 249 (C.M.A. 1967).

285. *Id.* at 251-60.

286. *Id.* at 253. In one of, perhaps, its most famous pronouncements, the COMA said:

> The time is long since past - as, indeed, the United States recognizes-when this Court will lend an attentive ear to the argument that members of the armed services are, by reason of their status, *ipso facto* deprived of all protection of the Bill of Rights.

Id. at 253.

287. *Id.* at 254.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.* at 256.

292. *Id.*

293. *Id.* at 263 (Quinn, C.J., dissenting).

294. *Id.* at 259-60.

295. Article 31 does not inform the suspect that he or she has a right to their own defense counsel free of charge during the investigation. UCMJ art. 31(b)(1988). The Air Force provided Tempia with access to the base Staff Judge Advocate, the principal legal advisor to the person who could eventually convene a court martial to try Tempia. *See* UCMJ art. 34 (1988). This was not an independent lawyer of the sort contemplated under *Miranda*. *Tempia*, 37 C.M.R. at 257-59.

296. 37 C.M.R. at 263 (Quinn, C.J., dissenting)

297. 38 C.M.R. at 259-60.

298. 1 M.J. 223 (C.M.A. 1975).

299. 10 M.J. 206 (C.M.A. 1981).

300. *Dohle*, 1 M.J. at 224.

301. *Id.* at 225-26.

302. *Id.* at 226.

303. *Id.*

304. *Id.*

305. One can only speculate whether the Supreme Court knew what the COMA had done to Article 31(b) since its inception. Taken on its face, Article 31(b) appears to offer greater protection than afforded by *Miranda*. It does not appear to require custody, only questioning coupled with suspicion. It is not tied to police action at all. Rather, on its face, it applies uniformly to all persons subject to the UCMJ. It requires a recitation of the general nature of the offence. *Miranda* only requires the warning with no orientation as to the offense under investigation. One can only speculate at this point whether the Justices were aware that the COMA had, a full six years before *Miranda*, refused to render the protection of Article 31(b) in a classic *Miranda* situation. *See* United States v. Vail and Brazier, 28 C.M.R. 358 (C.M.A. 1960). Given the activist attitudes of the Supreme Court in *Miranda*, one cannot necessarily conclude that while approving of Article 31, the Court would have approved of the result in *Vail and Brazier*. Arguably, the "approbation" of the military procedure resulted from an, understandable, misapprehension that the law was being applied the way it was written. Sadly that was not the case and has not been the case since *Tempia*.

306. *Id.*

307. *Id.* at 210.

308. *Id.* at 207.

309. It is not altogether clear exactly what the rank structure was between Duga and Byers. At one point in the opinion, the COMA states that they were the same rank. The case style states that Duga was an Airman First Class. 10 M.J. at 206. Later it refers to Byers as "Airman." *Id.* at 207. At another point it indicates that Duga outranked Byers. *Id.* at 212.

310. *Id.*

311. *Id.* at 207-208.

312. *Id.* at 208.

313. *Id.*

314. *Id.* at 209.

315. *See generally supra* text accompanying notes 69-103.

316. *Id.*

317. *Id.* (citing United States v. Gibson, 14 C.M.R. 164, 170 (1954)(Brosman, J. concurring))

318. 9 M.J. 374 (C.M.A. 1980).

319. *Armstrong*, 9 M.J. at 378 (quoted in *Duga*, 10 M.J. at 209-210).

320. *Duga*, 10 M.J. at 210. *Cf.* R.I. v. Innis, 446 U.S. 291, 298-99 (1980).

321. *Duga*, 10 M.J. at 210.

322. *Id.* "Accordingly, in each case it is necessary to determine whether (1) a questioner subject to the Code was acting in an official capacity in his inquiry or only had a personal motivation; and(2) whether the person questioned perceived that the inquiry involved more than a casual conversation." *Id.*

323. This particular conclusion is somewhat startling as the *Dohle* test would not have excluded Duga's statement. The footnote in *Duga* that discards the *Dohle* test states that the test asks whether Duga perceived a position of authority in Byers and whether the questioning was part of an on-going investigation. *Id.* at 210 n.6. In the footnote, the court states that the *Dohle* test has these two prongs. Further, it

states that the second prong comes from the case of United States v. Kirby, 8 M.J. 8 (C.M.A 1979). *Kirby* does not clearly establish this second alleged prong of *Dohle* although it does show a deeply divided court that was beginning to draw the concept of officiality back into the Article 31(b) equation as early as 1979. *See Kirby*, 8 M.J. at 8.

324. *Id.* at 211.

325. *Id.* at 211.

326. *Id.*

327. *Id.* at 212.

328. *Id.* at 212 n.8.

329. *Id.*

330. *Id.*

331. In *Miranda* the Court held:

[W]e will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessment of the knowledge the defendant possessed, based on information as to his

> age, education, intelligence or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact. More important, whatever the background of the person being interrogated, a warning at the time of interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.

Miranda v. Ariz., 384 U.S. 436, 468-69 (1966).

332. Compare the Supreme Court's division of the two bodies of law in Withrow v. Williams, 113 S. Ct. 1745 (1993) and *Miranda*, 384 U.S. 436 (1966) with that of the COMA.

333. *See infra* text accompanying notes 339-57.

334. *Duga*, 10 M.J. at 209.

335. *See supra* text accompanying note 205.

336. The *Miranda* court pointed to Article 31(b) as an example of a United States warning requirement that *apparently* supported the Fifth Amendment. *See Miranda*, 384 U.S. at 489.

337. *See, e.g.*, Withrow v. Williams, 113 S. Ct. 1745, 1751-53 (1993).

338. *Id.* at 1754.

339. *See generally supra* text accompanying notes 122-46.

340. R.I. v. Innis, 446 U.S. 291 (1980).

341. *See* Yeager, *supra* note 40 at 1.

342. *Id.*

343. *See, e.g.*, Miranda v. Ariz., 384 U.S. 436, 464-65 (1966), R.I. v. Innis, 446 U.S. 291, 299 (1980).

344. *Miranda*, 384 U.S. at 449-450.

345. *See* United States v. Armstrong, 9 M.J. 374, 378 (C.M.A. 1980).

346. *See* NICO KEIJZER, MILITARY OBEDIENCE 40-41 (1978).

347. *See, e.g.*, T.R. FEHRENBACH, THIS KIND OF WAR 5-6, 426-43 (1962). Indeed, the author of *Duga*, Chief Judge Everett, found this same coercion present in most military situations. He did so however, in a book he wrote years before he was elevated to the COMA.

> [A R]ecruit may readily infer that, unless he does not make a statement, he will go to the guardhouse for an extended period of time. The net effect may be that he will feel as much under compulsion to make some sort of statement as if he had been ordered to do so, or threatened with punishment or a beating if he did not do so...The pressure to confess is something built up entirely in [the] Recruit's mind, operating in light of certain fundamental military doctrines.

EVERETT, *supra* note 17 at 76.

348. UCMJ Articles 90 and 91 give officers and noncommissioned officers (respectively) the legal power to compel obedience. In peace time, the maximum punishment for disobedience is five years for violation of an officer's order and 1 year for violation of a noncommissioned officer's order. MANUAL FOR COURTS-MARTIAL, United States, ¶¶14(e)(2), 15(e)(5) (1984)[hereinafter MCM].

349. MCM, *supra* note 348 ¶15(e)(3).

350. UCMJ art. 137 (1988). "[Various articles, to include all of the punitive articles] shall be carefully explained to each enlisted member at the time of his entrance on active duty, or within six days thereafter." *Id.* According to General George S. Patton, Jr., military discipline is an intrinsic part of

military training. Discipline must be "so ingrained that it is stronger than the excitement of battle or the fear of death." George S. Patton, Jr., quoted in EDGAR F. PURYEAR, NINETEEN STARS 254 (Presidio, 1992)(1971).

351. *See, e.g.*, KEIJZER, *supra* note 346 at 46-47. "For example, in the confusion of combat, the need for coordination is felt at every level. To give as much stability as possible in that confusion, hierarchical organizations form a suitable instrument, as it always indicates the superior as the one who should take the lead." *Id.* at 47. *See also*, *Id.* at 49, 55.

352. KEIJZER, *supra* note 346, at 56, 62-3.

353. Articles 88-94 of the UCMJ enforce the military structure by force of law. Article 88 makes officer's criminally liable for uttering contemptuous words against various enumerated civilian political superiors. UCMJ art. 88 (1988). Article 89 makes disrespect by anyone subject to the code towards any superior officer a crime. *Id.* art. 89. Articles 90 and 91 give orders the power of law. *See supra* note 348. Article 93 acts as a counterbalance, prohibiting cruelty or mistreatment of subordinates. Thus it helps strike the balance between absolute obedience and inhumane treatment. UCMJ art. 93 (1988). Article 94 makes mutiny a crime. It defines mutiny as any attempt to "usurp or override lawful military authority." *Id.* art. 94.

354. UCMJ arts. 90, 92 (1988).

355. *Id.* arts. 91, 92.

356. KEIJZER, *supra* note 346 at 31.

> Combat is not a contest between individuals. It is a whole made up of many parts...The whole of military activity must therefore relate directly or indirectly to the engagement. The end for which a soldier is recruited, clothed, armed and trained, the whole object of his sleeping, eating, drinking and marching *is simply that he should fight* at the right place and at the right time.

CARL VON CLAUSEWITZ, ON WAR, 95 (Michael Howard and Peter Paret, ed's and trans., Presidio Press 1984)(1832).

357. *See* UCMJ art. 37 (1988). *See also*, EVERETT, *supra* note 17, at 11.

358. *See* Withrow v. Williams, 113 S.Ct. 1745, 1752-53. *But see*, Quarles v. New York, 467 U.S. 649 (1984).

359. *See supra* text accompanying notes 92-121, 122-46.

360. The Supreme Court has always required Governmental action, sometimes referred to somewhat inaccurately as "state action." *See* WHITEBREAD AND SLOBOGIN, *supra* note 19 § 15.05.

361. *See* R.I. v. Innis, 446 U.S. 291, 299 (1980).

362. *See Innis*, 446 U.S. at 301. *Cf. Quarles*, 467 U.S. at 656.

363. *Innis*, 446 U.S. at 301.

364. Nothing in the record as reported by the COMA suggests that Byers ever stopped Duga as part of his gate security duty. To the contrary, the impression one gets from COMA's relation of the facts is that Duga stopped at the gate to talk to his friend. *See* United States v. Duga, 10 M.J. 206 (C.M.A. 1981)

365. *See Duga*, 10 M.J. at 208.

366. Comraderie is a factor in social control. It may even play a more important role for service persons than it does for civilians. *See generally* KEIJZER, *supra* note 346 at 53-56.

367. The Air Force court found that OSI did not use Byers to question Duga. *Duga*, 10 M.J. at 208.

368. *Duga*, 10 M.J. at 212.

369. Under the UCMJ, a military policeman may apprehend any person subject to the code. MCM, *supra* note 348, R.C.M. 302(d).

370. All of the facts indicate that Byers was not exercising his authority as a military policeman. *See Duga*, 10 M.J. 206.

371. Compare this with the factual scenario in Berkemer v. McCarty, 468 U.S. 420 (1984). There the Court held that even a formal traffic stop for questioning by a policeman was not necessarily custody, partially *because of* the public setting. *Id.* at 438.

372. *See* Miranda v. Ariz., 384 U.S. 436, 467 (1966).

373. *Id.*

374. *Id.* at 489.

375. *Accord*, Supervielle, *supra* note 194 at 213 (MAJ Supervielle approves of Judge Latimer's officiality test but disapproves of *Duga's* officiality test as tipping the scales in favor of the government).

376. 24 M.J. 367. (C.M.A. 1987).

377. *Id.* at 369.

378. *Id.*

379. *Id.* at 367.

380. *Id.* at 367-68.

381. *Id.* at 368.

382. *Id.*

383. *Id.*

384. *Id.* at 367.

385. *Id.* at 368.

386. *Id.* at 368. Counseling, both formal and informal, is an important part o military leadership. *See, e.g.*, FREDERICK W. TIMMERMAN, JR. THE UNIT LEADER AS COUNSELOR, A STUDY OF ORGANIZATIONAL LEADERSHIP 431 (Associates of the USMA Dep't of Social Sciences, eds. 1976).

387. *Jones*, 24 M.J. at 368. The military judge found "that although Sergeant Dudley was motivated by his personal curiosity,...[his actions] could and probably would have ... appeared to the accused,...[as though Sergeant Dudley] was acting in an official capacity." *Id.* at 368.

388. *Jones*, 24 M.J. at 368.

389. *Id.*

390. *Id.* at 368-69.

391. *Id.* at 69 (Everett, C.J., concurring).

392. *Id.*

393. *Id.*

394. *See supra* text accompanying notes 84-87.

395. *Jones*, 24 M.J. at 368-69.

396. *Id.* at 369.

397. The Fifth Amendment is a personal right. *See, e.g.*,

Rakas v. Ill., 439 U.S. 128, 140 n.8 (1978), Couch v. United States, 409 U.S. 322, 327-28 (1973).

398. *See* Miranda v. Ariz., 384 U.S. 436, 454 (1966); *see also*, R.I. v. Innis, 446 U.S. 291, 298-300 (1980).

399. *Jones*, 24 M.J. at 369.

400. "Counseling is a basic responsibility of every *leader* [emphasis added] and an important part of taking care of the troops. DEP'T OF ARMY, FIELD MANUAL 22-101, LEADERSHIP COUNSELING 2 (1985)[hereinafter FM 22-101]. *See also* DEP'T OF ARMY FIELD MANUAL 22-100, MILITARY LEADERSHIP 247-50 (1983)[hereinafter FM 22-100].

401. *See generally* FM 22-101, *supra* note 400.

402. *See generally*, FM 22-100, *supra* note 400.

403. DEP'T OF ARMY, REG. 600-20, PERSONNEL - GENERAL, ARMY COMMAND POLICY, para. 2-1. (30 Mar 82). "The chain of command assists commanders at all levels to achieve their primary responsibility of accomplishing the unit's assigned mission while caring for personnel and equipment in their charge. *Id.* at para. 2-1a. "Commanders are responsible for everything their command does or fails to do." *Id.* at para. 2-1b.

404. *Jones* 24 M.J. at 368.

405. UCMJ art. 134 (1988). (Communicating a threat).

406. Article 91 of the UCMJ establishes the legal authority of the noncommissioned officer. UCMJ art 91 (1988). *See also supra* note 348.

407. *Id.*

408. *See* UCMJ, art. 37 (1988).

409. *Id.*

410. *See supra* notes 122 - 146 for a discussion of the Supreme Court triggers for interrogation under *Miranda*.

411. The Supreme Court has generally not required private persons to give a rights advisement. It distinguishes the persons, however, by the role they play in the Government or criminal justice system. *See, e.g.*, Ariz. v. Mauro, 481 U.S. 520 (1987) (taping a conversation between suspect and spouse not custodial interrogation - spouse not an agent of law enforcement); Mathis v. United States, 391, U.S. 1 (1968) (Court rejects notion that *Miranda* only applies to police. Tax

Investigator for IRS was conducting custodial interrogation because the investigation *could* result in criminal prosecution).

412. Indeed, while every person subject to the code may prefer charges, UCMJ art. 30 (1988); MCM, *supra* note 348, R.C.M. 307(a), it is traditionally, in the Army, the role of the immediate unit commander. In addition, it is a line officer that investigates the charges, UCMJ art. 32 (1988) and line commanders that forward the charges and convene courts-martial, MCM, *supra* note 348, R.C.M. 402-407. Thus the unit leaders play a role in the military justice system that is normally reserved to prosecutors and full-time police functionaries in the civilian world.

413. *See, e.g., In re* Deborah C., 635 P.2d 446, 450 and n.4 (1981).

414. 27 M.J. 312 (C.M.A. 1988).

415. *Id.* at 315.

416. *Id.* at 313.

417. *Id.*

418. *Id.*

419. *Id.*

420. *Id.*

421. *Id.* at 313-14.

422. *Id.*

423. *Id.* at 315.

424. *Id.* at 314. The court reached this conclusion by noting a 1942 case that held that post exchanges were instrumentalities of the Government. Standard Oil Co. v. Johnson, 316 U.S. 481 (1942)(cited in *Quillen*, 27 M.J. at 314.

425. *Quillen*, 27 M.J. at 315. Likewise, private store detectives have no authority to initiate prosecution for shoplififtng. They must file charges with the local district attorney. *See also*, MCM 1984, *supra* note 348, MIL. R. EVID. 305(b)(1) and drafters analysis (warnings must be given by persons *knowingly* acting as Government agents).

426. *Quillen*, 27 M.J. at 315.

427. Mrs. Holmes apparently believed what the Regulation told her - that she was not acting in a law enforcement capacity. *See Quillen*, 27 M.J. at 315, n.5 (she subjectively did not believe she was conducting an official investigation). *Id.* at 315. The COMA found, on their review of the facts - as a matter of law, that contrary to her belief, she was engaged in an official investigation. *Id.* Thus the COMA added a "reasonable person" objective prong without explicitly saying so. The court would recognize this prong later in the case of United States v. Good, 32 M.J. 105 (C.M.A. 1991).

428. *Quillen*, 27 M.J. at 315.

429. *Id.*

430. *Id.*

431. *Id.* at 316 (Cox, J. dissenting).

432. *Id.*

433. *Id.* at 314.

434. *Id.* at 315.

435. *Id.* at 316 n.5.

436. *Id.*

437. *Id.* at 316. *See also*, MCM, *supra* note 348, R.C.M. 302.

438. 27 M.J. at 316.

439. United States v. Duga, 10 M.J. 206, 210 (C.M.A. 1981).

440. *Quillen*, 27 M.J. at 313-14.

441. *Id.* *See also supra* note 437.

442. United States v. Jones, 27 M.J. 367, 368 (C.M.A. 1987).

443. *Quillen*, 27 M.J. at 314-15.

444. *Id.* at 313-14.

445. United States v. Duga, 10 M.J. 206, 210 (C.M.A. 1981).

446. Berkemer v. McCarty, 468 U.S. 420, 442 n.35 (1984).

447. *See Quillen*, 27 M.J. at 312.

448. 29 M.J. 385 (C.M.A. 1990).

449. *Id.* at 386.

450. *Id.*

451. *Id.* at 386-87.

452. *Id.*

453. *Id.* at 387. *See also* Caddell, *supra* note 29 at 17.

454. *Id.*

455. *Id.*

456. *Id.* at 389-90. In addition, COMA tried to divorce Article 31 form *Miranda* law entirely. *See Id.*

457. *Id.* at 387

458. *Id.*

459. *Id.* at 387-88.

460. *Id.*

461. *Id.* at 388 (quoting from United States v. Wilson and Harvey, 8 C.M.R. 48 (C.M.A. 1953).

462. United States v. Gibson, 14 C.M.R. 164, 170 (C.M.A. 1954).

463. United States v. Wilson and Harvey, 8 C.M.R. 48, 55 (C.M.A. 1953).

464. *Id.*

465. *See, e.g.,* MCM, *supra* note 348, R.C.M. 302 and UCMJ art. 96 (1988)(Releasing a prisoner without proper authority), UCMJ art. 97 (1988)(unlawful detention).

466. *See* UCMJ art. 15 (1988) (Commander's non-judicial punishment), *Id.* arts. 22-24 (Commander's power to convene courts-martial), *Id.* art. 32 (Commander must direct investigation of charges by impartial officer before referral of charges to general court-martial). Indeed, no trial counsel (prosector) or military policeman may cause a case to be tried without the action of the appropriate convening authority. *Id.* arts. 22-24.

467. The military can prosecute for a number of traditional crimes such as murder, UCMJ art. 118 (1988), rape, *Id.* art. 120, larceny, *Id.* art. 121. Many peculiar military offenses are also included such as absent without leave, *Id.* art. 86, unlawfully compelling a subordinate to surrender, *Id.* art. 100, improper use of a countersign, *Id.* art. 101, and missing movement, *Id.* art. 87.

468. The person most likely to notice, report and initially investigate disobedience is the person disobeyed. It is axiomatic in the military that when superior is disobeyed, he or she is the one who attempts first to carry the full force of the order into effect by reminding the subordinate of the power of the superior to compel obedience. It is common military experience that rarely, if ever, are the military police called in to investigate the disobedience of orders. The same is tue of the initial stages of investigation for absence without leave under UCMJ art. 86 (1988). In this author's 17 year military experience, it is the unit noncommissioned officers that first attempt to locate the missing soldiers.

469. United States v. Loukas, 29 M.J. 385, 388 (1990).

470. *See* United States v. Gibson, 14 C.M.R. 171-75 (C.M.A 1954)(Brosman, J. concurring).

471. United States v. Duga, 10 M.J. 206, 208 (C.M.A 1981).

472. *See, e.g.*, United States v. Penn, 39 C.M.R. 194, 198-99 (C.M.A. 1969)(civilian investigators not acting as agents of the military need not read rights warnings under Article 31(b).

473. United States v. Loukas, 29 M.J. 385, 390 (C.M.A. 1990)(Cox, J. concurring).

474. *Id.* at 390-91 (Cox, J. concurring). This points out another weakness in the COMA's approach. Under *Miranda*, the subjective belief of the examiner is irrelevant to the question of whether there was "interrogation." The focus in *Miranda* is solely on the suspect. *See supra* text accompanying notes 122 - 46.

475. *Id.* at 393 (Everett, C.J. dissenting).

476. *Id.* at 393-94.

477. 1 M.J. 201 (C.M.A. 1975).

478. *Seay*, 1 M.J. at 206 (quoted in *Loukas*, 29 M.J. at 393-94).

479. *See Loukas*, 29 M.J. at 389.

480. Id.

481. *Id.* at 391 (Cox, J. concurring).

482. *See* UCMJ art. 8 (1988).

483. *See* MCM, *supra* note 348, MIL.R.EVID. 313 (Inspections and Inventories in the Armed Forces). *See also* United States v. Murphy, 28 M.J. 758 (A.F.C.M.R. 1989)(Upheld Air Force urinalysis as a routine command function).

484. As such their relationship is governed by UCMJ art. 91 (1988).

485. *Id.*

486. United States v. Gibson, 14 C.M.R. 164, 170 (C.M.A. 1954).

487. *See supra* text accompanying notes 92-121.

488. Miranda v. Ariz., 384 U.S. 436, 444, 468 (1966).

489. *See* LURIE, *supra* note 190 at 142-43, 190-92.

490. The test will focus only on the last prong of the test in United States v. Duga, 10 M.J. 206, 210 (C.M.A. 1981).

491. This will mirror the *Miranda* approach, 384 U.S. at 468.

492. United States v. Gibson, 14 C.M.R. 164, 170 (C.M.A. 1954).

493. *See generally supra* text accompanying notes 346-57. *See also Duga*, 10 M.J. at 210.

494. The COMA has always been careful to point out the relative ranks of the parties in its Article 31(b) cases. With the exception of United States v. Gibson, 14 C.M.R. 164, 168 (C.M.A. 1954), and United States v. Duga, 10 M.J. 206, 207-209 (C.M.A. 1981), the questioner has always outranked the suspect. In United States v. Wilson and Harvey, 8 C.M.R. 48, 54 (C.M.A 1953), for example, the MP was both a sergeant, the military superior of the suspects, and a military policeman with special police authority. Both the MP and the soldiers were, presumably, wearing their rank, thus displaying the source and weight of their military authority. In United States v. Vail and Brazier, 28 C.M.R. 358, 359 (C.M.A. 1960) there was gross disparity in

power between the Provost Marshal, a Major, and the Airmen. In addition, there was a disparity based on the special police powers of the Provost Marshal.

495. *See supra* note 395.

496. UCMJ arts. 90, 91 (1988).

497. MCM, *supra* note 348, R.C.M. 302, UCMJ art. 91 (1988). Time in service is probably not a critical factor. The UCMJ, Article 137, requires special training early in the service person's career. Thus, only members of the armed forces with less than 6 days of service are likely to be *totally* ignorant of both the legal authority of their superiors and the UCMJ. UCMJ art. 137 (1988).

498. At first blush this would seen to be an attempt to revive the *Dohle* test. *See* United States v. Dohle, 1 M.J. 223 (C.M.A. 1975). That test, however, was short-lived because the COMA added a second element requiring an official purpose behind the questioning. *See* United States v. Kirby, 8 M.J. 8 (C.M.A. 1979). *See also* United States v. Duga, 10 M.J. 206, 210 n.6. (C.M.A. 1981)(footnote distinguishes *Duga* from *Dohle* by stating that the prerequisites of *Dohle* were not met. 10 M.J. at 210 n.6. *But see supra* note 323.

499. *But see*, Supervielle, *supra* note 194 at 212-13. MAJ Supervielle finds the *Dohle* test simple but believes it punishes the government for private action. *Id.* at 211.

500. Orders are presumed legal. *See, e.g.*, Unger v. Zemniak, 27 M.J. 349 (C.M.A. 1989)(order to produce urine specimen not unreasonable). *See also* United States v. Ravenal, 26 M.J. 344, 349 n.3. (C.M.A. 1988)(soldier may easily confuse question with order). *See generally*, SCHLUETER, *supra* note 11 § 2-4(A).

501. This deliberation cuts against all norms of the nature of military service and or Armies. "An Army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right of command in the officer, or the duty of obedience in the soldier." *In re* Grimley, 137 U.S. 147, 153 (1890). *See also* Parker v. Levy, 417 U.S. 733, 743-44 (1974)(duty of officer to obey order to combat zone without questioning validity of war).

502. *See, e.g.*, Richard T. DeGeorge, *A Code of Ethics for Officers, in* MILITARY ETHICS 13, 23-25 (National Defense University Press, 1987)(officers should never order another to commit an immoral act - officers are always responsible for the actions of subordinates).

503. *See, e.g.*, United States v. Collier, 27 M.J. 806 (A.C.M.R. 1988) *rev'd on other grounds*, 29 M.J. 365 (C.M.A. 1990).

504. This is a paraphrase of the COMA's language regarding the actions of the post exchange detective in United States v. Quillen. 27 M.J. 312, 315 (C.M.A. 1988).

505. Miranda v. Ariz., 384 U.S. 436, 467 (1966).

506. *See generally supra* text accompanying notes 113-17, 139-46.

507. *See* Supervielle, *supra* note 194, at 211.

508. *Id.*

509. *Id.* at 211-12. MAJ Supervielle argues that there is no benefit from punishing the government through exclusion of evidence if there is no government questioning. *Id.* He also argues that such a rule would prevent a senior from counseling a subordinate for non-law enforcement or disciplinary reasons. *Id.* Counseling, however, is different from interrogation or questioning. A senior may counsel without asking any questions or in any way attempting to extract information. There is a gulf of difference between saying to a subordinate, "don't do it

again," and saying "why did you do it." Legitimate counseling can avoid interrogation.

510. UCMJ arts. 90, 91 (1988).

511. One reason that the results would be no different comes from a new approach by both the Supreme Court and the COMA to rights cases. For several years now it has been possible to retain a conviction even over a rights abridgement if that error was harmless beyond a reasonable doubt. *See* Ariz. v. Fulminante, 499 U.S. 279 (1991)(Court holds that coerced confession subject to harmless error rule; however, this case is not a *Miranda* case). *See also* United States v. Moreno, 36 M.J. 107, 121 (C.M.A. 1992)(in dicta, harmless error analysis applied to assumed Article 31 error). Therefore, in cases such as United States v. Vail and Brazier, the court could admit (wrongly) the confession but still convict the accused. The admission of the confession was harmless beyond a reasonable doubt. The court stated unequivocally that the suspects were observed "red-handed" in the process of a burglary. The testimony of the observers alone provided proof beyond a reasonable doubt of the theft. The Manual for Courts-Martial lists the elements for larceny. The accused must take an item from the possession of another. The property must be of some value. The property must belong to some person. The property must be taken with the intent to deprive the rightful owner of its use and benefit. MCM, *supra* note 348,

¶¶ 46(b)(1)(a)-(d). All of the facts necessary to find these elements were already known to the police before the questioning. *See Vail and Brazier*, 28 C.M.R. at 358-59.

512. BUGLE NOTES 39 (Zach Smith, ed. 1977).