Right to Counsel: Miranda and the Military

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On June 10, 1966, the United States Supreme Court decided *Miranda v. Arizona*.¹ Although the results of this decision were explosive, the holding of the Court was not surprising in light of other recent Supreme Court decisions. Chief Justice Warren, speaking for the majority, set out in detail "the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime."² Just as explosive in military law and more surprising was the decision of the United States Court of Military Appeals in *United States v. Tempia*,³ which applied the principles of *Miranda* to the military. Just 1 year earlier, Chief Judge Quinn, in *United States v. Wimberly*, stated:

> We are not persuaded, however, that the right to counsel must be extended to include the investigative processes. Nothing in the Uniform Code or in the decisions of this court, and nothing in our experience with military methods of interrogation, indicate that the only feasible way to give maximum effect to the Constitutional right to the assistance of counsel is that the accused have counsel beside him during police questioning.⁴

In considering the effect of the *Miranda* decision on the military, it will be necessary to consider the history of the right to counsel in the military, the *Miranda* and *Tempia* decisions, and some of the later cases that have applied the *Miranda* doctrine to military prosecutions. Some problems caused by *Miranda* peculiar to the military will also be explored.

**History**

In 1950, the Uniform Code of Military Justice⁵ was enacted to prevent many of the unjust results evident in the system of military justice. The Code was created to lessen the influence of the commander and to insure the accused safeguards which had previously been denied.⁶ Under article 31, which is still in existence, no person can be compelled to incriminate himself.⁷ Before any statement may be taken, the interrogator must also inform the accused of the nature of the accusation and his right to remain silent.⁸ If this warning is not given, any statement made by the accused is inadmissible as evidence.⁹ Since the enactment of article 31 of the Code, its standards have been as strict as those advocated in *Miranda* and

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² Id. at 439.
⁵ 10 U.S.C. §§ 801-940 (1964) [hereinafter referred to in text as the Code].
its requirements were not changed by that decision or the Tempia decision.

The importance of Miranda to the military is in the area of right to counsel. Prior to that decision, the Code was the guideline for the military courts. Article 27 of the Code provides that legal counsel will represent the accused at a general court-martial. Right to counsel is extended by article 32 to the pre-trial investigation leading to a general court-martial. This right is available to all military personnel, not just to the indigent. With few exceptions, legal counsel is not provided at special or summary courts-martial though legal counsel can be retained by the accused at his expense. But legal counsel is provided at every step of appellate review.

Though the Code in its inception left many questions unanswered as to right to counsel, it was considerably ahead of most of its civilian counterparts. Because of this, the United States Court of

10 10 U.S.C. § 827(a) (1964). Three types of military courts were established by the Code: the general court-martial, the special court-martial, and the summary court-martial. 10 U.S.C. § 816 (1964). The general court-martial is similar to a civilian trial court with power to try felonies. A legally trained law officer sits as judge and passes on questions of law. At the conclusion of the trial, he instructs the board or members of the court on the law of the particular case. A board of officers are the fact-finders and are not legally trained. The accused is represented by legal counsel, either appointed or retained. Trial counsel (prosecuting attorney) is also legally qualified. The board itself in proper cases can even invoke the death penalty.

The special court-martial does not have a law officer, but the president of the board, who is not legally qualified, has power to rule on objections. Counsel for the accused is usually not legally trained though the accused can retain a civilian attorney at his own expense. This "court" has power to try any person subject to the Code for any noncapital offense made punishable by the Code. It cannot adjudge the death penalty, dishonorable discharge, dismissal, confinement in excess of 6 months, etc.

Summary courts-martial are even more limited since the nonlegal one-man "judge" represents both the Government and the accused. Some military personnel such as officers cannot even be tried at a summary court-martial. Though an accused can retain his own legal counsel, this is infrequently done. The defendant may refuse a summary court-martial and request trial by special court-martial. Because of the nonadversary nature of the proceeding and few safeguards, the court is strictly limited as to the punishment that can be given. See generally Manual for Courts-Martial, United States (1951).

11 10 U.S.C. § 832(b) (1964). No charge is referred to a general court-martial unless there is a thorough and impartial investigation. This investigation has become known as the article 32 investigation. The investigating officer is not generally a legal officer but he is usually a major or above. He cannot have prior knowledge of the case. At the article 32 investigation, the accused is entitled to counsel and he or his counsel can question witnesses called by the investigating officer. This procedure is not to be confused with preliminary police investigation, but is usually conducted after this preliminary evidence has been reviewed and the field of suspects narrowed. See Manual for Courts-Martial, United States § 34, at 44 (1951).

12 There is no requirement under the Code that the accused be indigent before counsel will be appointed. See 10 U.S.C. § 832 (1964).


Military Appeals had little civilian or military precedent to follow. Many problems arose that simply could not be answered by reference to older cases. One of the first problems that was not clearly answered by the Code was whether right to counsel at the article 32 investigation meant right to legal counsel or merely the right to "any officer not disqualified by reason of prior participation in the same case." The problem was laid to rest in United States v. Tomaszewski. The question raised was exactly in point, i.e. whether counsel at an article 32 hearing has to be "a lawyer in the professional sense." Since the pre-trial investigation was required only for a charge referred to general court-martial, the court concluded that it was judicial in nature. Therefore, legal counsel had to be provided at this stage as well as at the trial. Often, it would be useless to require legal counsel at trial, but nonlegal counsel during the pre-trial investigation. The need for counsel at this stage is self-evident since the accused has the opportunity to question witnesses, to answer questions, and to set up a defense. The importance of having qualified counsel during the pre-trial preparation of a case is vividly illustrated in Powell v. Alabama. The Supreme Court there concluded that even the most intelligent layman could not properly prepare his case. It stated: "He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him."

The next problem that had to be answered was whether professional counsel, either retained or appointed, had to be provided prior to the article 32 investigation. Though the Code did not specifically authorize counsel prior to the investigation, it did not prohibit it. In United States v. Gunnels, the accused refused to make any statements until he could consult with counsel. Though he was allowed to contact an assistant staff judge advocate, he was told that military counsel could not be made available at the interrogation stage. The judge advocate did not inform Gunnels that he could be represented by his own counsel. After the "consultation," the accused made an inculpatory statement that was introduced at his general court-martial. The defense attorney objected to the admissibility of this statement, but the motion was overruled. On review, the court of military appeals agreed that military counsel need not be assigned during the investigative stage. However, the court held this did not prevent a person suspected of a crime from consulting with counsel; and if the staff judge advocate or his agent is consulted, he is obligated to give the accused correct advice. The court emphasized that the position of the staff judge advocate

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15 MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 6a, at 9 (1951).
17 Id. at 268, 24 C.M.R. at 78.
18 Id. at 269, 24 C.M.R. at 79.
19 Id.
20 287 U.S. 45 (1932).
21 Id. at 69.
23 Id. at 134, 23 C.M.R. at 358.
24 Id.
is not as a partial member of the commander's staff but as "an impartial adviser to both the Government and the accused." Since the judge advocate misled Gunnels as to the extent of his rights, the court reversed the conviction. The court then cited *In re Groban* in support of its view that the accused has the right to have his own counsel present during the interrogation. That case, according to the court in *Gunnels*, had stood for the proposition that due process is denied "if a person suspected of a crime is deprived of the assistance of his own counsel at a 'secret inquisition' by law enforcement agents."

*Gunnels* seemed to have answered the question whether retained counsel could be present during interrogation, but this conclusion was refuted by the same court in *United States v. Melville*. It held that *Gunnels* only decided that a person has the right to consult counsel. However, *Melville* is clearly a misstatement of the case. The failure to advise the accused of his right to have retained counsel present during the interrogation was the reason the advice was considered inadequate. Chief Judge Quinn had stated for the majority in *Gunnels*:

> It seems to us to be a relatively simple matter to advise an uninformed and unknowing accused that, while he has no right to appointed military counsel, he does have a right to obtain legal advice and a right to have his counsel present with him during an interrogation by a law enforcement agency.

In *Melville*, counsel of the accused was excluded from the interrogation, and the court refused to decide the issue which was seemingly answered in *Gunnels*. The court simply concluded that the accused was not prejudiced by the exclusion of counsel. If the accused was prejudiced, the decision suggests that the conviction would have been reversed. It is difficult to see how the denial of counsel at any stage would not be harmful or prejudicial to the accused. Once again, the rationale of *Tomaszewski* is highly convincing in that counsel is needed at every step in the proceeding. One author, in analyzing the *Melville* case, concluded that the court based its decision on a "volunteered statement not extracted by interrogation." This would explain the apparent inconsistency in *Gunnels* and *Melville*, and also the inconsistent statement in the latter case that: "We do not, however, wish to be understood in

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25 Id. (emphasis added).
26 Id.
27 352 U.S. 330 (1957). This case involved investigation of a fire. The petitioners refused to answer questions without counsel and they were placed in jail. The Supreme Court held that since it was an administrative hearing, there was no right or need for counsel. Six of the nine justices were of the opinion that a person suspected of a crime had the right to his own counsel at a secret inquisition. *Id.* at 337, 352, 353.
30 *Id.* at 600, 25 C.M.R. at 104.
33 *Id.*
34 See text accompanying notes 16-19 *supra*.
any manner as placing our approval on the practice of excluding the presence of individually retained counsel from an interrogation prior to the preferral of charges.\textsuperscript{36}

In \textit{United States v. Cadman}\textsuperscript{37} and \textit{United States v. Slamski},\textsuperscript{38} the court continued its apparent regression. In the first case, the accused was apprehended while attempting to break into the base exchange. At the air police office, the investigator advised the accused of his rights under article 31. Cadman expressed his desire to consult with counsel and the interview was terminated. Though counsel was never provided, the accused was subjected to further questioning. On the third encounter with the investigator, the accused answered incriminating questions that were used at trial. The court of military appeals concluded that there was no error in the admission of the statement, accepting the interrogator's explanation that the expressed desire of Cadman was "a mere preference, not a request for counsel."\textsuperscript{39} Judge Ferguson concurred on the basis that the use of the statements was not prejudicial, but he felt an accused need not ask for legal counsel "in the terms of technical nicety in order to be afforded this fundamental right."\textsuperscript{40} The decision placed a further burden on the accused by requiring him to make clear to the interrogator that he is requesting legal counsel and not merely showing a desire for counsel.

The accused, in \textit{United States v. Slamski}, requested a legal officer.\textsuperscript{41} Slamski was allowed to see the staff judge advocate who incorrectly informed him that he could not advise the accused as his attorney. At this time, the accused did not make any statement. The next day, Slamski was taken to the staff judge advocate's office, and upon being confronted with the attorney, he stated, "Sir, I took $70, but I didn't take all of the money."\textsuperscript{42} This inculpatory statement was successfully introduced at trial over the objection that the attorney-client privilege applied. The conviction was not reversed even though the court of military appeals concluded that the staff judge advocate had probably misadvised the accused.\textsuperscript{43} The court held that Slamski was not harmed by the oversight.\textsuperscript{44} After all, he was only convicted. In a vigorous dissent, Judge Ferguson concluded that \textit{Gunnels} would require reversal of the conviction since Slamski was not properly advised.\textsuperscript{45} He stated: "[W]e are dealing with an accused's right to consult with an attorney at a time when he is suspected of a serious criminal offense. This is a basic constitutional right. [cases cited] ... Its denial violates the requirements of due process. \textit{United States v. Gunnels, supra.}"\textsuperscript{46}

\textsuperscript{36} 8 U.S.C.M.A. at 600, 25 C.M.R. at 104.
\textsuperscript{39} 10 U.S.C.M.A. at 223, 27 C.M.R. at 297.
\textsuperscript{41} 11 U.S.C.M.A. at 74, 28 C.M.R. at 298.
\textsuperscript{42} Id. at 76, 28 C.M.R. at 300.
\textsuperscript{43} Id. at 77, 28 C.M.R. at 301.
\textsuperscript{44} Id. at 78, 28 C.M.R. at 302.
\textsuperscript{45} Id. at 80, 28 C.M.R. at 304.
\textsuperscript{46} Id. at 79-80, 28 C.M.R. at 303-04.
The accused also should have been entitled to rely on the attorney-client privilege in light of Gunnels. As stated in that case, the staff judge advocate cannot merely represent the government. Before the judge advocate can properly advise, he must be aware of the factual situation, and the accused must be given the opportunity to consult freely with him. If the attorney-client privilege is denied, this right to consult is merely illusory.

Although Gunnels had made a significant impact on military law, its importance was diminished by such decisions as Cadman and Slamski. Further development in the area of right to counsel in the military had to wait until the United States Supreme Court returned its decision in Escobedo v. Illinois.

In Escobedo v. Illinois, the Supreme Court held that statements made by the accused during interrogation were improperly admitted as evidence. The conviction was reversed. Justice Goldberg, speaking for the majority, adopted the rationale of Powell v. Alabama in holding that “[t]he ‘guiding hand of counsel’ was essential to advise petitioner [Escobedo] of his rights in this delicate situation.” The Court, through Justice Goldberg, set out standards that had to be observed in criminal prosecutions. It stated:

We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied “the Assistance of Counsel”... and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.

The first important question that confronted the courts applying the Escobedo rule was what factors were to be used to determine when the investigation began to “focus” on the accused. Even the later Miranda decision has not completely answered this question though new terminology has replaced the word “focus.” The second question was whether it was necessary for the accused to request counsel before the Escobedo standards had to be applied. Courts soon recognized that this fundamental right should not depend on whether the accused realized that he could request counsel. After all, the necessity for such standards is based on the premise that the layman is not experienced in law, and is incapable of properly asserting his legal rights.

49 Id. at 492.
50 Id. at 486.
51 Id. at 490-91 (emphasis added).
53 In Miranda, the Supreme Court held that a warning is required if the accused is subjected to “custodial interrogation.” 384 U.S. at 444.
In light of *United States v. Clay*, the Escobedo decision seemed binding on the court of military appeals. In the *Clay* case, the court indicated that it would give the same legal effect to "rights granted by Congress to military personnel as do civilian courts to those granted to civilians by the Constitution or by other federal statutes." Since right to counsel had been granted to military personnel by Congress, the legal effect of Escobedo should have been applied by the military court.

The policy advocated in *Clay* was not followed, however, for the court of military appeals declared its independence of the Supreme Court in *United States v. Wimberley*. The court virtually refused to follow the determination of the Supreme Court as to what right to counsel means. Chief Judge Quinn, speaking for a unanimous court, stated the court had not been persuaded by Escobedo or counsel's argument "that the right to counsel must be extended to include the investigative processes." The court expressed its belief that other methods could effectively protect the accused and "give maximum effect to the Constitutional right to the assistance of counsel." *Wimberley*, of course, can be distinguished from Escobedo since the accused had not requested counsel. Even if an attorney had been requested, his exclusion from the interrogation would not have brought reversal. The accused's only right, according to the reasoning of the court, was the right to consult with his requested counsel. The confusion of the court continued until the Supreme Court decided *Miranda v. Arizona*.

**Miranda and Tempia**

In *Miranda v. Arizona*, the petitioner did not request counsel during interrogation. Two hours after the questioning began, he made a written confession. The Supreme Court reversed the conviction holding: "[I]t is clear that Miranda was not in any way apprised of his right to consult with an attorney and to have one present during the interrogation, nor was his right not to be compelled to incriminate himself effectively protected in any manner." It also reaffirmed Escobedo indicating that the decision in that case did not depend upon the mere fact that Escobedo had requested counsel. Chief Justice Warren, speaking for the majority, set out the standards that must be observed by society in the prosecution of crime. He stated:

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57 1 U.S.C.M.A. at 77, 1 C.M.R. at 77.
59 Id. at 10, 36 C.M.R. at 166.
60 Id.
61 Id.
63 Id.
64 Id. at 492.
65 Id.
66 Id. at 442.
67 Id. at 444-45.
As for the procedural safeguards to be employed, unless other fully effective means are devised... the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning.

Unless the Government can show to the court that it has used these "procedural safeguards," it cannot use any statement "stemming from custodial interrogation of the defendant." The burden is not on the accused, but on the Government to affirmatively show that the standards have been met. The Court in Miranda did allow other effective safeguards to be used as long as they fully protect the accused, but this would place an even greater burden on the prosecutor to prove that his nonadjudicated procedure complied with the requirements set out by the Supreme Court.

The Court created a new test to apply in determining when these safeguards would be required. In Escobedo, the warning was not necessary until the investigation had "focused" on the accused. Miranda requires a warning if the accused is subjected to "custodial interrogation." The Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Subsequent cases have shown that the Miranda test has not eliminated the difficulties apparent in the Escobedo test. Courts still have difficulty in determining whether the accused in each case was significantly deprived of his freedom of action. But the test has made it apparent that counsel must be provided at the earliest possible moment.

The principles and problems raised by Miranda apparently applied only to civilian courts, but on April 25, 1967, the Wimberley decision was overruled by the United States Court of Military Appeals. In a two-to-one decision, the court, in United States v. Tempia, held that the principles of Miranda apply to the military. Tempia had been taken into custody for questioning and advised of his rights under article 31. In addition, he was advised he could consult counsel and upon his request for counsel the interview was terminated. After the second encounter with the investigating officer, the accused met with the staff judge advocate. Though the
judge advocate advised Tempia as an "impartial arbiter," he stated that he could neither accept the accused as a client nor appoint counsel until charges were preferred. The accused confessed because counsel "didn't do me no good." The accused was convicted of indecent liberties with females. The warning was held insufficient under the standards set out by the Miranda decision and the court of military appeals reversed the conviction.

The first argument against applying the Miranda doctrine to the military was made in an amicus curiae brief by the Judge Advocate General of the Navy. He argued that military law was not affected by the constitutional limitations applicable to civilian law. Judge Ferguson, speaking for the majority in Tempia, quickly discarded this argument stating: "The time is long since past . . . 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 protections of the Bill of Rights." United States v. Jacoby was cited for the same proposition that servicemen are entitled to protections established by the Bill of Rights, "except those which are expressly or by necessary implication inapplicable." The court

79 Id. at 632, 37 C.M.R. at 252.
80 Id.
81 Id. at 640, 37 C.M.R. at 260.
82 Id. at 633, 37 C.M.R. at 252. The argument made by the Judge Advocate General of the Navy received some support recently in Comment, United States v. Tempia: The Questionable Application of Miranda to the Military, 13 VILL. L. REV. 170 (1967). The author suggested that because of the dichotomy between the military and civilian legal systems, the Constitutional safeguards guaranteed to civilians cannot be given to military defendants. To support this proposition, the author cited Reid v. Covert, 354 U.S. 1 (1957). In Reid, the wife of a member of the armed services was convicted by a court-martial of a capital crime. The Supreme Court concluded that since there was no trial by jury and few Bill of Rights' protections afforded civilians by the Constitution in a court-martial, it did not have jurisdiction. Id. at 16. In Black's discussion, though dictum, he did use loose language explaining that the fifth and sixth amendment safeguards "cannot be given in a military trial." Id. at 22. This, Black stated, is because, "In the military, by necessity, emphasis must be placed on the security and order of the group rather than on the value and integrity of the individual." Id. at 39. It is difficult to understand how right to counsel will defeat this security. But Black also carefully noted: "As yet it has not been clearly settled to what extent the Bill of Rights and other protective parts of the Constitution apply to Military trials." Id. at 37.

Black did not wish to prevent the amelioration of the military legal system, but he simply recognized the embryonic nature of military law. He was more concerned with reversing the conviction of the petitioner than undertaking the job of revising military justice, a job which he was unauthorized to undertake. In support of his conclusion, Black merely attempted to show the defects in the system. He did recognize that vast improvements had been made in the field of military law emphasizing that these changes were due to the courts-martial incorporating "more and more" civilian court methods. Id. at 37. The Supreme Court did not and could not prohibit the results reached in Tempia.

85 Id. at 430-31, 29 C.M.R. at 246-47.
further supported in a 1953 Supreme Court decision, *Burns v. Wilson.* Judge Ferguson stated: "The impact of *Burns v. Wilson,* . . . then, is of an unequivocal holding by the Supreme Court that the protections of the Constitution are available to servicemen in military trials." The holding in *Burns* was not unequivocal; nevertheless, the Supreme Court did hold that the civilian courts must determine if the military had given fair consideration to any claim by an accused that his constitutional rights had been violated. The court of military appeals then held that since the Supreme Court determines the extent of these Constitutional rights, its views on these issues are binding on the military. Therefore, since the *Miranda* decision was based on protections of the Constitution, its principles are applicable to the military.

Judge Ferguson then quoted the *Miranda* standards holding that these must be observed in a military proceeding. He held that the advice as to counsel did not meet the procedural safeguards required by *Miranda* since the accused was not informed that counsel would be appointed. Tempia was merely advised that counsel could be retained. The Government argued that even if the standards applied, the accused was not significantly deprived of his freedom since he was already under the control of the military. The court disregarded this argument stating: "It ignores the realities of that situation to say that one ordered to appear for interrogation has not been significantly deprived of his freedom of action." Though military personnel are under the control of their commanding officer, they are not subject to indiscriminate interrogation or arrest, and to order one to appear for interrogation is certainly a deprivation of his freedom of movement.

The Government also argued that counsel could not be provided at government expense since it would be contrary to the intent of Congress. This also was rejected by the court:

Undoubtedly, Congress provides funds for the payment of defense counsel but we know of no prohibition . . . against such being made available to the accused when he is initially interrogated . . . by police officers. Indeed, the impact of *Miranda* upon the administration of military justice should be far less than that in comparable civilian jurisdictions.

The court of military appeals indicated that even if Congress did not intend to provide funds for this purpose, the Government would have to use the alternate procedure, i.e. disregard any evidence gathered during the pre-trial interrogation.

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88 346 U.S. at 144. See generally Gallagher v. Quinn, 363 F.2d 301 (D.C. Cir. 1966).
90 Id. at 636, 37 C.M.R. at 258.
91 Id. at 637, 37 C.M.R. at 257.
94 Id.
95 Id. at 639, 37 C.M.R. at 259. Tempia, according to one writer, will require a lawyer on every ship. Comment, *United States v. Tempia: The Questionable Application of Miranda to the Military,* 13 VILL. L. REV. 170, 184
In conclusion, the court reiterated the effect of its decision:

Now, the accused must have a lawyer; before, he need not have been given one; now, he must be warned of his right to counsel; before, he need not be so warned; and, now, finally, he will receive effective legal advice not only as to what he can do, but also what he should do.\footnote{6}

With the Tempia decision, military law was finally in line with civilian law in the area of right to counsel.

The Aftermath

Following Tempia, the court of military appeals was faced with the problem of applying the Miranda-Tempia standards to actual factual situations. In United States v. Burns,\footnote{97} the court reversed the conviction on the ground that the defendant was told only that he was entitled to "consult with legal counsel" if he so desired. Since the facts in Burns were similar to those in Tempia, the case needs little discussion.

An interesting factual situation was present in United States v. McCauley.\footnote{98} The defendant had failed to report to Quantico, Virginia and remained in San Diego until he was picked up by civilian police on an unrelated charge. An FBI agent, suspecting the accused of desertion, interrogated McCauley in the San Diego jail. The agent warned him that he had the right to talk to a lawyer of his choice or anyone else. The accused was not told that he had the right to a retained or appointed lawyer present at the interrogation. As a result of this interview, inculpatory statements were obtained and successfully introduced at McCauley's trial.

Clearly, the warning in McCauley was improper in light of the Miranda-Tempia standards. However, the Government argued that since the accused had not been taken into custody by the FBI agent or otherwise deprived of his freedom of movement in any significant manner, the warning was not necessary. Chief Judge Quinn agreed with this contention, stating that the jail was the sentenced prisoner's "place of abode."\footnote{99} The Chief Judge stated that there was no more restraint or psychological pressure in jail than in one's own home.\footnote{100}

The majority of the court disagreed with Chief Judge Quinn and reversed the conviction.\footnote{101} In a well supported decision, Judge Kilday concluded that the Miranda-Tempia test is compulsion, not coercion.\footnote{102}

As stated in Tempia, the cost of added counsel is not a valid argument for denying procedural safeguards. 16 U.S.C.M.A. at 638, 37 C.M.R. at 258. But ships generally travel in a fleet and legal counsel can be easily obtained. Even if counsel could not be provided, the investigators would simply have to disregard any statement by the accused unless waiver could be shown. This would not prevent investigation of the offense. Id. at 639, 37 C.M.R. at 259.

\footnote{96} 16 U.S.C.M.A. at 640, 37 C.M.R. at 260.
\footnote{98} 17 U.S.C.M.A. 81, 37 C.M.R. 345 (1967).
\footnote{99} Id. at 86, 37 C.M.R. at 350 (dissent).
\footnote{100} Id.
\footnote{101} Id. at 85, 37 C.M.R. at 349.
\footnote{102} Id. at 84, 37 C.M.R. at 349. Judge Kilday cited People v. Allen, 50
He held for the majority that "compulsion is inherent in custodial surroundings" and therefore the Miranda-Tempia warning was necessary. Though the court's reasoning is excellent, its result could have been reached merely by reference to the Miranda decision. The Miranda definition of "custodial interrogation" encompasses the instant case since McCauley was subject to "questioning initiated by law enforcement officers" after he had "been taken into custody." Chief Justice Warren had stated in Miranda that in each of the cases being considered "the defendant was questioned . . . in a room in which he was cut off from the outside world." Certainly, McCauley was "cut off" and he shared other salient features evident in Miranda, i.e. "incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights." The danger of private interrogation that Miranda sought to eliminate was present in McCauley making it necessary to reverse the conviction.

In United States v. Ballard, an Air Force policeman was engaged in routine patrol. One of the areas of his patrol was the base equipment manufacturing office. He noticed a private vehicle parked behind the building and saw someone receive a box from another in the building. The box was placed in the private automobile. The policeman asked the occupant of the vehicle whether or not he worked in the building, and the latter responded, "Give me a break." The policeman then requested his identification and the occupant answered, "How much is it worth to you? Fifty dollars if you let me go." At this point, the accused was advised of his rights but his prior statements were successfully introduced at trial over defense counsel's objection. It was shown at trial that authorized persons could remove tools from the building and therefore the questioning was mere routine and not an interrogation. This view

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Misc. 2d 897, 272 N.Y.S.2d 249 (Sup. Ct. 1966), in support of his conclusion that the Miranda-Tempia test is compulsion, not coercion. In Allen, the defendant had been questioned in his home by a policeman. Though there was no formal arrest, the policeman testified that he would not have allowed Allen to leave the room. No coercive pressure was evident. The judge still held that since no warning had been given, the inculpatory statements were inadmissible as evidence. He based his decision on the fact that the new standard under Miranda is compulsion, not coercion. Id. at 903, 272 N.Y.S.2d at 255. In his analysis of Miranda, he emphasized that there was no proof of coercion. The mere fact that Miranda was in custody and deprived of his freedom of action was considered decisive. Though the judge in Allen could not point to a "precise dictionary meaning" of the word compulsion, he stated: "'Compulsion' under the Fifth Amendment and its State counterpart does not have its precise dictionary meaning. It has no relationship to 'coercion' and is applicable in many settings not related to any 'critical stage.' Compulsion is simply questioning in any setting . . . where a criminal fact may be elicited." Id. (footnotes omitted). Certainly McCauley was subjected to questioning in the hope of eliciting a criminal fact.

105 Id. at 445.
106 Id.
107 Id. at 97, 37 C.M.R. at 361.
108 Id.
was adopted by the court of military appeals. The court upheld the conviction stating: “Not every routine or administrative check by a policeman of a serviceman’s identification must be preceded by Article 31 warning... [T]his was not an interrogation within the contemplation of United States v. Tempia...”. The rationale of the holding was that the questioning “was not designed, nor geared, to elicit a statement of incrimination.”

It is true that the danger in Miranda and Tempia was not apparent in Ballard since there was no secret interrogation “in a police-dominated atmosphere.” But as soon as the defendant stated, “Give me a break,” the routine nature of the questioning had changed. At this time, the policeman must have been aware that the accused was attempting to conceal some illegal act. The policeman should then have warned the accused of his rights. But this places an unreasonable burden on the individual policeman to know in every situation at what precise point the warning must be given. Since there was no psychological pressure or the same degree of compulsion as in previously discussed cases, the result seems to be proper.

In another interesting case, United States v. Hinkson, an informer had procured incriminating evidence from the accused while the latter was waiting to be interrogated. Relying on Massiah v. United States, Hinkson’s counsel contended that since the informer was a “de facto agent” of the police, he had to warn the accused of his rights. Since no warning was given, the defense counsel concluded that the inculpatory statements should be inadmissible as evidence. Massiah had held only that after indictment a defendant cannot be subjected to secret interrogation either by police or by an agent cooperating with them. Hinkson had not even been questioned. But since the inculpatory statements had been procured by an agent of the police at the police station, there was some basis under Tempia for the defense counsel’s objection to their admissibility. The majority of the court of military appeals did not accept this argument. Chief Judge Quinn, speaking for the court, held: “The fact that the conversation took place in the waiting room of a police station does not cloak it with a constitutional immunity greater than that present in other public places.” The basis of the court’s holding was that there was no element of custodial coercion. The Chief Judge had eliminated the McCauley test of whether there was compulsion present.

In a dissenting opinion in Hinkson, Judge Ferguson recognized the importance of the informer in solving crimes, but reasonably concluded that the “mask of the informer... must be laid aside at

110 Id. at 98, 37 C.M.R. at 362.
111 Id.
112 Id. at 99, 37 C.M.R. at 363.
117 377 U.S. at 207.
119 Id.
the door of the police station." He further stated that:

The substance of [Chief Judge Quinn's] position seems to be that if a military policeman openly announces himself as such, after the suspect's arrest, he must advise the accused of his rights and see that they are protected. But, if he pins his badge to his underwear, carefully conceals his identity as a cop, and approaches the accused on an histrionic basis, he is, by reason of his acting ability excused from complying with the mandate of Congress.

Though Judge Ferguson overstated his position, his point is well taken, especially in light of the unusual facts in the instant case. The line must be drawn at some point, and that line has been drawn by the Miranda-Tempia decisions. Using the Miranda standards, Tempia held that military personnel ordered to report for interrogation are significantly deprived of freedom of movement. Therefore, the warning was required and the testimony extracted by the agent of the police should have been excluded.

Waiver and Retroactivity of Tempia

After Tempia, the court of military appeals also had to consider both the question of retroactivity of the decision and waiver of one's rights. United States v. Swift reiterated the holding in Tempia that its doctrine is retroactive only to the date of the Miranda decision. The defendant Swift had been convicted of murder in a trial occurring prior to the Miranda decision. The warning was not in accordance with the Miranda-Tempia standards, but was in accordance with the Wimberley standards. The court upheld the conviction.

As to the waiver of the constitutional safeguards, the guidelines seemed to be clearly set out in Tempia and Miranda. Both cases held that the defendant may waive his rights if "the waiver is made voluntarily, knowingly and intelligently." The two cases placed a heavy burden on the Government to show that the defendant was warned of his right to counsel and the right against self-incrimination if the accused confessed without an attorney. However, in United States v. Hardy, the Government attempted to argue that the actual burden of proving that a statement was made in a Miranda-Tempia situation was upon the defendant. The court of military appeals correctly rejected this contention stating:

What is involved here is not judicial supervision of rules of evidence, but constitutional rights of an accused. The Government has the burden of proving that an accused or suspect was not deprived of, or denied, the right of counsel when asked to make a statement.

This is the only plausible conclusion since the Government is in

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120 Id. at 129, 37 C.M.R. at 393.
121 Id. at 131, 37 C.M.R. at 395.
124 Id. at 231, 38 C.M.R. at 29.
125 Id. at 235, 38 C.M.R. at 33.
129 Id. at 102, 37 C.M.R. at 366.
control of the facts and circumstances of the arrest and questioning of the accused. The burden could seldom be met by the accused since witnesses friendly to him are usually not present during the interrogation.

Special and Summary Courts-Martial

One of the most important questions that remains is whether a defendant involved in a special or summary court-martial should be represented by counsel. The Tempia decision created an anomaly in the military judicial system. As stated earlier, it requires that an accused be provided with counsel as soon as he is deprived of "his freedom of action in any significant way." Hence, under this doctrine, the accused must be given this right to counsel during "custodial interrogation" even if he is later tried at a special or summary court-martial. But unless he is tried in a general court-martial, he is not entitled at trial to legally qualified counsel. Therefore, he is given the right to professional counsel before trial but not at trial. This procedure is untenable in light of both Tempia and Miranda.

Prior to United States v. Tempia, three federal district courts had considered whether the sixth amendment of the United States Constitution requires the appointment of legal counsel to represent military personnel before special courts-martial. In In re Stapley, the accused was charged with a serious crime, but was represented at a special court-martial by nonlegal counsel. He was convicted and petitioned for a writ of habeas corpus. The district court granted the writ stating as a conclusion of law that:

"The Sixth Amendment to the Constitution of the United States applies to proceedings before special courts-martial in the military service, as far as concerns the right to the assistance of counsel on the part of the accused, particularly where the charges are substantial or involve moral turpitude or may result in a substantial deprivation of liberty."

The judge refused to decide if legal counsel need be provided in every special court-martial, but he emphasized that though the military exigency may limit the right to counsel, "such exigency often renders constitutional protection all the more indispensable."

In Le Ballister v. Warden, the petitioner had been previously convicted in a special court-martial for absence without leave. The court considered the fact that the petitioner was well educated and had not requested civilian counsel as significant in its determination. The writ was denied on the basis that the accused was not entitled as a matter of right under the sixth amendment to representation by legal counsel. The judge distinguished In re Stapley since Stapley was charged with a more serious crime. But an AWOL

132 Id. at 320.
133 Id.
135 Id. at 352.
136 Id.
conviction can result in "a substantial deprivation of liberty." The court concluded that the accused's right to be represented "springs" from the action of Congress, not the sixth amendment. Congress, however, cannot act contrary to the constitutional amendments even though it has authority under article I of the Constitution "To make Rules for the Government and Regulation of the land and naval Forces."

The same result as in Le Ballister was reached in Kennedy v. Commandant. The court concluded that Congress has "an overriding power" in the area of military justice. It suggested that the only way military personnel could be granted right to counsel at special courts-martial would be by an act of Congress.

The conclusion in Stapley is the only possible result even though the two later cases refused to follow the decision. The Tempia doctrine disallows any other interpretation as to whether the sixth amendment applies to the military. The Stapley conclusion must be reached even if the crime is not serious if the accused is to have "effective legal advice" as advocated in Tempia. It is difficult to consider any crime minor if the accused is subject to incarceration, and attending consequences in his future life.

The argument that the cost and number of additional judge advocates would be exorbitant as brought out in Tempia should not prevent the protection of the accused's rights. But this problem may be alleviated to a large degree. One solution to this problem is to certify attorneys not members of the Judge Advocate General's Corps for special court-martial duty. Many civilian lawyers fulfill their military obligation by serving in other branches. This is due both to the shorter period of time required in other branches and the limited number of openings in the Judge Advocate General's Corps. The attorney could be given a short period of training in military justice at his basic branch school, and still fulfill his regular duties once he is assigned. The number of special courts-martial is relatively small as illustrated in a recent survey. The average

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138 247 F. Supp. at 352.
140 Id. at 969.
141 16 U.S.C.M.A. at 640, 37 C.M.R. at 260. It has been argued that since courts-martial are not truly adversary proceedings, the Miranda-Tempia doctrine is not necessary. Comment, United States v. Tempia: The Questionable Application of Miranda to the Military, 13 VILL. L. REV. 170, 179 (1967). This argument can be made at the summary court-martial level and in a sense at the special court-martial level since counsel is not generally legally-trained counsel. But this is not a reason for denying procedural safeguards. If anything, more safeguards are required in such a proceeding since an accused is generally not capable of defending himself. Counsel is certainly needed at every step of the proceeding. It cannot be successfully argued that the defendant will not be prejudiced without counsel. At the general court-martial level, the adversary nature of the proceeding cannot be doubted. Both trial counsel and defense counsel are legally qualified. A law officer, sitting as judge, rules on points of law and instructs the members of the court.
special court-martial rate according to the survey was 2.04 per 1,000 military personnel during the first quarter of 1967.\textsuperscript{143} The largest number of trials were held within the continental United States\textsuperscript{144} which would allow the greatest number of non-judge advocate attorneys to remain within the United States. This practice would not only eliminate vast expense to the Government, but it would enable the accused to be given the necessary procedural safeguards.

Summary courts-martial should be eliminated from the military judicial system. The one-man court does not provide necessary procedural safeguards since the "judge" is not trained in military law.\textsuperscript{145} Counsel is also not provided which is contrary to the dictates of Tempia. This, of course, would mean more pressure on the non-judge advocate attorneys if the practice outlined above were adopted, but heavier allowance could be placed upon nonjudicial punishment under article 15 of the Code.\textsuperscript{146} The accused can refuse such punishment and request a court-martial if he so desires. He can also consult with counsel before he makes his choice. If he accepts the nonjudicial punishment, he is only subjected to a small fine or limited restriction. The accused is not subjected to the stigma of having a court-martial conviction since the article 15 punishment is not usually made a permanent part of the accused's records. It is of importance to the military not only in retaining discipline, but also in preventing incarceration of important military personnel for minor infringements of regulations. Of course, nonjudicial punishment is not offered to those suspected of serious crime.

Conclusion

United States v. Tempia makes applicable the fifth and sixth amendments of the United States Constitution to the military by incorporating the principles of Miranda. But the reasoning of the court of military appeals makes it clear that all constitutional rights granted to civilians as interpreted by the Supreme Court will be granted to military personnel unless the exigencies of the situation prevent such application. Even in the latter case, it seems the court will place a heavy burden on the Government to show that under the circumstances the rights must be denied. The Tempia decision has almost eliminated the gap between military and civilian law, and future cases should eliminate the gap completely.

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