1956

Criminal Investigation Under Military Law

Robinson O. Everett

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Robinson O. Everett, Criminal Investigation Under Military Law, 46 J. Crim. L. Criminology & Police Sci. 707 (1955-1956)

This Criminology is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

CRIMINAL INVESTIGATION UNDER MILITARY LAW*

ROBINSON O. EVERETT

Since the termination of World War II military law, as it affects criminal investigation and military trials, has undergone a careful and systematic review and revision. As a consequence, investigations under it have different requirements than criminal investigations under state and federal law, and we feel especially privileged to present Robinson O. Everett's paper on this subject. Mr. Everett is a graduate of Harvard University where he received a Bachelor of Law degree and from 1950-51 served as an assistant professor at Duke University followed by a tour of active duty with the Air Force as a legal officer. He was subsequently appointed in October, 1953, as a Commissioner of the U. S. Court of Military Appeals, a post he held until his recent resignation to enter private law practice.—EDITOR.

Many persons who are members or employees of the Armed Services may be called upon to conduct investigations. Sometimes the investigator will be a commanding officer or first sergeant; sometimes a military or air policeman; and sometimes instead an agent of the Army's Criminal Investigation Division (CID), the Air Force Office of Special Investigations (OSI), or the Office of Naval Intelligence (ONI). Generally, but not always, the sleuth will himself be subject to the jurisdiction of courts-martial. In any event, he will be operating within a legal framework somewhat different from that within which an investigation in civilian life might be performed. This paper proposes to discuss a few especially significant rules that govern investigations under military law today.

CONFESSIONS AND ADMISSIONS

Of course—whether in military or civilian life—the investigator normally will start his inquiry by obtaining signed statements from all available witnesses. The most important group of witnesses will, of course, be persons who themselves are suspected of having committed the crime; and these persons naturally may be uncommunicative. Just as in civilian life the investigator is not permitted to batter down the suspect's reticence by “third degree” tactics—the use of brutality. Indeed, if he is a person subject to the Uniform Code of Military Justice, he could himself be tried by court-martial for use of these prohibited detection measures. Of course, any confession shown to have been obtained in such a way cannot be used in a court-martial anyway.

In addition, the military investigator must contend with the requirements of Article 31 of the Uniform Code of Military Justice.¹

This Article directs that no person subject to the Code shall interrogate or request

* This article is based upon material from Chapter 5 of Robinson O. Everett's forthcoming book, *Military Justice in the Armed Forces of the United States*, and is printed with permission of the publisher, The Military Service Publishing Company, Harrisburg, Pennsylvania.

¹ 50 USC §602.

any statement from an accused or a person suspected of an offense without telling him of the nature of the accusation, and that any statement made by him may be used as evidence against him in a trial by court-martial. Although the requirement is stated only to be applicable to persons subject to the Code, it is clear that civilian investigators, who might not be subject to the Code, must give this statutory warning if they are conducting an official investigation in behalf of the Armed Services.²

The warning required by Article 31 has precedent only in Texas law and in English practice.³ However, some civilian investigators use it frequently to avoid a subsequent complaint that a confession was made because of some promise or threat from the investigator. In military law, of course, it reduces the chance for a successful claim that the suspect made a confession because he thought he had to. Although it performs this function, some persons believe that the giving of a warning to a suspect or even to an accused should not be required. They argue that the serviceman should not be given this special protection, which puts him in a far more favorable position than a civilian suspect, at the expense possibly of handcuffing the investigator. However, the complete abolition of the requirement that military investigators warn of the right to remain silent seems unlikely. Short of complete abolition, it is doubtful that any satisfactory narrowing of the present warning requirement can be decided on.⁴

Failure to give the statutory warning to suspects required by the Uniform Code has in numerous instances led to trouble in a subsequent court-martial. High-ranking, experienced investigators, as well as novices, have upon occasion overlooked the giving of the necessary warning.⁵ Even the most minor questioning must be prefaced by the warning. In one case the investigators had entered a hut where the suspect was thought to have narcotics hidden and commenced a search of clothing there. Without giving any warning of his right to remain silent to the suspect, who happened to be present when the search started, an investigator asked him which clothing was his. In one of the garments he identified, drugs were located. Ultimately the conviction was reversed because the suspect had identified garments, upon request, without being told that he did not have to do so.⁶

Minor omissions in the warning to a suspect may sometimes not invalidate any confession later obtained. For instance, a warning sufficed when the investigator had told the suspect that anything he said might be used against him, but had failed to say "used in a court-martial."⁷ Nevertheless, the safest policy is for the investigator to read the suspect verbatim the words of Article 31(b) of the Code, wherein

² *United States v. Grisham*, 4 USCMA-694, 16 CMR 268. USCMA is the citation for the official reports of the Court of Military Appeals. CMR is the citation for reports which contain the decisions of the Court and also of the Boards of Review maintained by the Armed Services.

³ See *United States v. Gibson*, 3 USCMA 746, 754, 14 CMR 164.

⁴ Article of War 24 required that a warning be given to an "accused." This did not mean merely a person against whom a formal charge had been preferred, but it was always uncertain how much wider the term extended. Probably "suspect" has more meaning to an investigator than "accused", and the use of the former word in Article 31 may promote simplicity.

⁵ See, e.g., *United States v. Taylor*, 10 CMR 669.

⁶ *United States v. Taylor*, 5 USCMA 178, 17 CMR 178.

⁷ *United States v. O'Brien*, 3 USCMA 325, 12 CMR 81.

the requirement of a warning is set out.⁸ To facilitate this, most military investigators carry with them a card on which that Article is printed. However, even reading this aloud may not suffice as advice to a suspect. It did not for a Puerto Rican soldier who could not understand English well.⁹ To be on the safe side, the military investigator should at least ask the suspect if the latter understands what has been read to him.

Some investigators forget to tell the suspect the crime of which he is suspected. The writer recalls one instance where a military sleuth was looking for accessories to an escape. A suspect was called in and informed: "There has been an escape which we are investigating"; but he was never told: "*You* are suspected of being involved in the escape." The court-martial declined to receive in evidence the statement that was later obtained from the suspect. On some occasions, however, the Court of Military Appeals has taken a less exacting view of the type of explanation the investigator must give, and has indicated that failure to state the nature of the crime being investigated may be only a "formal and technical" error.¹⁰ Even so, it still seems that in some way the person to be interrogated must be given a definite indication of the crime of which he is suspected.

A favorite gimmick of military interrogators once was to inform a suspect that he could decline to answer any question that might incriminate him, in which event he was to indicate that he refused to answer because his reply might incriminate. By asking a number of questions and observing which ones the accused said were incriminating, the investigator could obtain good "leads." Furthermore, many persons were reluctant to say that an answer might incriminate because, as recent events outside the field of military law have demonstrated, a claim of possible self-incrimination is often, and not unnaturally, construed as an admission of guilt. Also, many suspects were unable to recognize which answers might tend to incriminate them in the hands of a clever investigator. Of course, the suspect often had the definite impression that, if he refused to answer when an answer would not incriminate him, he might be subject to all sorts of dire consequences. Naturally enough, therefore, he often resolved all doubts in favor of giving requested information.

This highly successful technique has—unhappily from the military investigator's standpoint—been declared unlawful under Article 31.¹¹ According to the Court of Military Appeals, Congress intended for a suspect to be told that he did not have to say anything *regarding* an offense of which he is suspected, whether or not he felt that an answer might incriminate him. In this respect the suspect, before trial, occupies a different position from a witness who is called to testify before a court-martial, since the latter can be compelled to answer any question except one which, on proper grounds he claims, might tend to incriminate him.¹² In view of this difference, a military investigator errs if he tells a suspect that he does not have to make

⁸ Ibid. Some investigators have the suspect read Article 31 aloud.

⁹ *United States v. Hernandez*, 4 USCMA 465, 16 CMR 39.

¹⁰ *United States v. O'Brien*, 3 USCMA 105, 11 CMR 105.

¹¹ *United States v. Williams*, 2 USCMA 430, 9 CMR 60.

¹² *United States v. Howard*, 5 USCMA 186, 17 CMR 186.

any statement that might tend to *incriminate* him. The proper advice is: "You do not have to say anything regarding the offense of which you are suspected."

If information is being sought from someone who is not a suspect, no warning is required by Article 31 or otherwise. However, "suspect" is a very broad term in military law. For instance, if it were known only that the criminal was a member of a group of persons, like a platoon or the occupants of a barracks, then everyone in that group would probably be a suspect to the extent that, before interrogation, he should be warned that he has a right to remain silent regarding the offense involved.¹³

The wording of Article 31 produced one unique contention which, if accepted, would have severely restricted undercover work by persons engaged in official military investigations. The Article purports to require a warning by *any person* subject to the Uniform Code who requests a statement from another about an offense of which the latter is suspected. However, there was no doubt that only persons engaged to some extent in an official investigation were covered by this provision; and that a soldier who, on his own, inquired of a buddy about a suspected offense would not have to give any sort of warning. But what of the undercover agent, the "plant," or the informer whose interest in another's guilt is more than personal or casual? One Judge of the Court of Military Appeals took the view that such an individual would have to give a warning before asking any question of a person who he thought might have committed the crime he was trying to learn about. Of course, if this warning had to be given—which would amount to revealing the true purpose of the undercover operative—the usefulness of such an operative would become nil. Fortunately, a majority of the Court of Military Appeals concluded that Article 31 was concerned with questioning by persons whose official positions might create strong pressure on the suspect to confess.¹⁴ In the typical undercover situation there is no pressure of this sort because the official connection of the investigator is the very thing being concealed. Since this situation did not present the dangers to which Article 31 was directed, the Court held that no warning was required.

In Federal practice a suspect does not have to be warned prior to any interrogation that he can remain silent if he so desires. If fact, even a person who has been arrested does not have to be given such a warning. However, after arrest he must be brought "without unnecessary delay" before a United States commissioner for a hearing; and at that time the commissioner informs him that he can remain silent, that anything he says may be used against him, and that he has a right to counsel.¹⁵ The military investigator, although he must give the warning to a suspect at a

¹³ Compare *United States v. Wilson*, 2 USCMA 248, 8 CMR 48. There the two accused were standing in a group of soldiers. However, they had been identified to military police as the persons who had shot a Korean. A military police sergeant approached the group and without addressing anyone by name—but looking directly at Wilson and Harvey—asked who had done the shooting. The accused admitted they had. Their statement was held to be inadmissible in a court-martial because they had not been warned of their right to say nothing about a crime of which they were suspected.

¹⁴ *United States v. Gibson*, 3 USCMA 746, 14 CMR 164. If this decision had gone the other way, the effect on military investigative agencies would probably have been well-nigh disastrous, at least as to the solving of complicated crimes.

¹⁵ Federal Rule 5 of Criminal Procedure.

much earlier stage than would be required under Federal practice, does not have to make any reference to a suspect's right of counsel as a preface for interrogating him.

As a matter of fact, it is not clear that there is any right to counsel on the part of a serviceman during the first stages of an investigation. Certainly, there is no right to be furnished free military counsel until after charges are preferred and referred either to a court-martial for trial, or—in the instance of a prospective trial by general court-martial—to an officer for a formal pretrial investigation under Article 32 of the Uniform Code.¹⁶ Each of the Armed Services have provided for legal assistance officers who aid servicemen with their legal problems. However, the regulations on legal assistance make it clear that the legal assistance officer was not intended to provide aid in connection with any matters that might later become the subject of trial by court-martial. If, before charges had been preferred and without some definite authorization to advise the suspect, an attorney in the Armed Services consulted with a suspected serviceman about a possible offense, it is not clear from the wording of the Manual for Courts-Martial that the conversation even would fall within the attorney-client privilege.¹⁷

In many areas, especially overseas, where civilian counsel are often virtually unavailable, the absence of a right to military counsel will be equivalent to having no right to counsel during the first stages of the investigation. Nor is there positive authority that a suspected serviceman must be allowed to have access to or to consult with a civilian attorney before charges have been preferred against him. If, however, a civilian lawyer came to a military installation to consult with an accused before formal charges had been preferred, it would be exceedingly risky for investigators to prevent his seeing the suspect. Even if their action would not automatically result in the exclusion from evidence of any confession or admission made later by the suspect, it would create a strong likelihood that a court would hold that the confession or admission was not voluntary, and so should be excluded.

USE OF COMPULSION TO OBTAIN EVIDENCE

According to the Manual for Courts-Martial, a suspect can be ordered to give handwriting samples or to read aloud for voice identification.¹⁸ The theory of this provision was that a person's handwriting and his way of speaking are more-or-less mechanical, and are more akin to a physical characteristic—like his color, weight, or height—than to testimony taken from him. The Court of Military Appeals took a different view and held that, in this regard, the Manual was invalid, because it conflicted with privileges guaranteed by Article 31.¹⁹ Therefore, in military law, it is illegal to order a suspect to give a handwriting sample or say something for identification.

Does the investigator have to give a suspect any warning before asking him to

¹⁶ *United States v. Moore*, 4 USCMA 482, 16 CMR 56.

¹⁷ As to this privilege, the Manual for Courts-Martial speaks of "military or civilian counsel detailed, assigned, or otherwise engaged to defend or represent an accused before a court-martial or upon review of its proceedings, or during the course of an investigation of a charge." Paragraph 151b(2).

¹⁸ Paragraph 150b.

¹⁹ *United States v. Rosato*, 3 USCMA 143, 11 CMR 143; *United States v. Eggers*, 3 USCMA 191, 11 CMR 191; *United States v. Greer*, 3 USCMA 576, 13 CMR 132.

give a handwriting or speech sample? The literal wording of Article 31(b) would suggest that no warning has to be given, unless such a sample can be considered a "statement"; and to say that a handwriting sample is a "statement" seems difficult, indeed.²⁰

While the suspect cannot be forced to give a handwriting sample, which would demand his active participation, a different rule governs certain tests which are considered to involve only passive participation. For instance, it seems clear that, under present military law, an accused can be bloodtested, whether he likes it or not—a measure valuable in investigating drunkenness.²¹ He can be finger-printed, even over his protest. Possibly, he could be given an enema for detection purposes, despite his protest. However, stomach-pumping, which has been used in investigating narcotics offenses, is beyond the pale, even though the active participation of the accused is not required for the project.²² So far as can be determined from the pertinent Supreme Court decision, the reason for forbidding such evidence is that it involves a marked intrusion on human dignity and internal privacy, as well as severe discomfort to the person stomach-pumped. Consequently, if admissible evidence is to be secured by stomach-pumping, the military investigator, like a civilian detective, must be sure that he has the suspect's consent. Normally, it will be best to secure written consent on a document which recites why the stomach-pumping is desired and that the suspect has been informed he can refuse it if he wishes.

The Armed Services, especially in the Far East, are plagued by narcotics cases. Consequently, several recent military cases have concerned investigators' taking urine samples from narcotics suspects. From these samples a trained chemist can, by well-recognized tests, establish the presence of a drug.²³ Occasionally, samples have been obtained by catheterization. Whether or not this technique involves as much physical discomfort as stomach-pumping, it may create considerable psychological tension because of the organs involved. The Court of Military Appeals has held that a suspect cannot be catheterized over his protest.²⁴ If, however, the suspect is unconscious—of course, not by reason of action on the part of military authorities—he can be catheterized without his express consent being obtained, and the urine samples secured will be admissible in evidence before a court-martial.²⁵ The distinction seems to be that a person who is unconscious—a condition which often might result from intake of narcotics—cannot be subject to the psychological tensions or pain which chiefly cause the limitations on catheterization as a detection measure. Preliminary to requesting a conscious suspect to consent to catheterization, the investigator does not have to give any warning under Article 31 that there is a

²⁰ This was the view taken by the Court of Military Appeals in the case of *United States v. Ball* (Docket No. 5874).

²¹ Compare *United States v. Williamson*, 4 USCMA 320, 15 CMR 320. However it is interesting to note that the Supreme Court recently granted review of a case involving the legality of taking blood samples over the suspect's protest. *Walton v. California*, 23 Law Week 3117, 3152 (a drunken driving prosecution). If it is held unlawful for State investigative officers to extract a blood sample by force, then the same rule will presumably be applied to the military establishment.

²² *Rochin v. California*, 342 US 165.

²³ See *United States v. Ford*, 4 USCMA 611, 16 CMR 185.

²⁴ *United States v. Williamson*, 4 USCMA 320, 15 CMR 320.

²⁵ *Idem*.

right to refuse to be catheterized.²⁶ Here too, however, he would be well-advised to get written consent on a document which recited that the suspect had freely agreed to be catheterized.

The suspect who balks at catheterization can still indirectly be forced to furnish a urine sample. The investigator or some other person of military rank superior to the suspect can require that the suspect urinate in a designated receptacle. This should not be done in the form of an order to furnish a sample, which would raise the problem of physical inability. Instead the suspect should be given an explicit order that, when next he urinates, he shall do so in a certain container. This order is not considered to require the same degree of participation by the suspect as would an order to furnish a handwriting sample. Therefore, unlike the latter, such an order is legal and will be subject to severe punishment for disobedience.²⁷ With this technique at his disposal, there is no reason why an investigator cannot ultimately obtain a urine specimen from a suspect when he has some good reason for wanting the specimen.

The possibility of an order to provide a urine specimen brings out one special advantage that a military investigator has over his colleague in civilian life. The former is free to obtain some evidence by directly ordering a military witness to provide it—the witness being subject to a penalty for not complying with the order. The civilian investigator would have to obtain court process to force the witness to furnish the desired information. How far the military investigator can go in his use of orders to secure information is not clear. Certainly he cannot order a witness who is also a suspect to make a statement about an offense of which that person is suspected. Moreover, whether or not the witness were a suspect, he would not be under a duty to obey an order to make any statement if to do so would tend to incriminate him. Also, it is not clear whether a civilian who for some reason was subject to the Uniform Code could be ordered to provide information about an offense of which he was not himself suspected, but about which it was believed he might know.²⁸ It is unlikely that any court test will soon be forthcoming to resolve the uncertainty.

LIE DETECTOR AND TRUTH SERUM

A favorite measure in seeking a confession is to request that the suspect take a lie detector test, or subject himself to a "truth serum" interview. This request must be accompanied by an Article 31 warning that the accused has a perfect right to remain silent, which includes a right to refuse the test. Of course, the suspect cannot be ordered or otherwise forced to take such a test, but his refusal to do so may cause him to be viewed with greater suspicion by the investigators. Military law reveals no reason why this point cannot be made to the suspect, or why it could not be explained to him that such tests may offer a convenient method for "clearing" himself in the investigators' eyes. If the accused does agree to take a lie detector or other

²⁶ *United States v. Booker*, 4 USCMA 335, 15 CMR 335.

²⁷ See *United States v. Barnaby*, 5 USCMA 63, 17 CMR 63.

²⁸ The Uniform Code clearly envisages that any person subject to the Code—which, of course, would include many civilians—may be under a duty to obey some military orders. See Articles 90, 92, 50 USC §§684, 686.

test, it is customary, and highly desirable, for a written consent to the test to be obtained from him.

As the military investigator may want to mention to a suspect, the results of a lie detector or "truth serum" test cannot be used as evidence in a court-martial.²⁹ In this respect military law accords with civilian precedents.³⁰ As a matter of fact, lie detectors are very popular among military investigators, especially in the Army.³¹ However, the results of these tests, while useful to the investigator in many ways, are considered too unreliable to be received in evidence before a court-martial. Also, especially in the case of "truth serum", which makes the recipient highly suggestible, the interviewer sometimes can manipulate the test quite effectively, as some countries behind the Iron Curtain have demonstrated. The success of a lie detector or "truth serum" examination may vary, too, with the health or mental condition of the suspect and the skill of the examiner.³²

Recently the Court of Military Appeals passed on an issue involving "truth serum" in disposing of a petition from a Navy lieutenant for a new trial.³³ This officer had been convicted of rape committed during a period of which, according to his trial testimony, he had no recollection because of a previous, heavy intake of alcohol. After the trial he was interviewed by a psychiatrist who pumped "truth serum" into him. The lieutenant then recited to the doctor that he remembered that the prosecutrix had been the real aggressor and, in a sense, had raped him. The psychiatrist's report of the interview, his opinion that the accused's interview was the truth, and other evidence went before the Court in support of the petition. Citing a number of court precedents and medical authorities, the Court concluded that the information brought out by the psychiatrist was not convincing enough, in light of the well-established limitations on the effectiveness of truth sera, to warrant a new trial. Thus, in military law, as in civilian, the chief present value of truth drugs like sodium pentothal, sodium amytal, and scopolamine seems to be as a psychiatrist's tool for determining an accused's sanity or investigating the validity of an amnesia claim.³⁴

²⁹ See *United States v. Bouchier*, 5 USCMA 15, 17 CMR 15; *United States v. Massey*, 5 USCMA 514, 18 CMR 138; *United States v. Pryor*, 2 CMR 365.

³⁰ The cases are collected in 23 ALR 2d 1307. In the absence of some stipulation to the contrary between the parties to a trial, results of a lie detector test, a truth serum interview, or hypnosis cannot be used for the prosecution or the defense to establish directly the guilt or innocence of the accused. If the suspect decides to make a full confession after the lie detector test is completed, the confession can be used against him even though it followed the test. This would seem to hold true even if the suspect would not have made his statement if he had never been given the test. Compare *United States v. King*, 16 CMR 858. If truth serum or hypnosis has been used, a later confession is not going to be admissible unless the court is sure that the effects of the drug or the trance have worn off. Compare *Leyra v. Denno*, 347 US 556. Therefore, a civilian or military investigator should be sure of the suspect's physical condition and should warn him specifically that he does not have to say anything. The military sleuth, to be completely safe, might well mention to the suspect that his statements while under a drug cannot be used in evidence against him.

³¹ See paragraph 68, Army Field Manual 19-20, July 1951.

³² For a good text on lie detectors see Inbau and Reid, *Lie Detection and Criminal Interrogation*, (3d Ed.).

³³ *United States v. Bouchier*, 5 USCMA 15, 17 CMR 15.

³⁴ See footnote 2 of *United States v. Bouchier*, *supra*. An interesting case in this connection is *People v. Jones*, 42 Cal. 2d 219, 266 P.2d 38 (1954). The defendant was charged with sexual offenses against his nine-year old niece. A psychiatrist was offered by the defense to testify that on the basis

RELEVANCE OF SUSPECT'S SILENCE

If a suspect is asked for a statement by an investigator, but declines to give one, that circumstance can become relevant under military law. To be sure, this silence cannot be used as the basis for an inference of the accused's guilt. If, however, the suspect is later brought to trial and gives sworn testimony in his own behalf, he can be asked why he failed to tell the same things to the investigator. The decision of the Court of Military Appeals which allows this type of questioning³⁵ accords with a recent opinion by the Court of Appeals for the District of Columbia,³⁶ and probably represents the rule that would generally be followed in Federal civilian courts. In light of this rule of military law, an investigator would seem perfectly justified in pointing out to a reticent suspect during the initial interrogation that, although he is perfectly entitled to remain silent at all times, he might well foresee that—if he is brought to trial and claims to be innocent—he may find it embarrassing if asked why he did not tell the same thing to the investigator in the first place. As the suspect should in such event also be informed by the investigator, his failure to give a statement prior to trial can never be used as positive evidence that he is guilty, but only as a reason not to accept his later statements that he is innocent.

EFFECT OF TRICKERY, CONFINEMENT, THREATS, AND PROMISES

One route to obtaining confessions or admissions is through trickery, for a statement is generally considered admissible even though it was secured from the accused

of two examinations, one of them under sodium pentothal (a truth serum), he concluded that Jones was not a sexual deviate and was "incapable of having the necessary intent to be lustive, either for himself or to satisfy the lusts of a child of nine and a half years of age." The psychiatric testimony was excluded by the trial court. The Supreme Court of California reversed and pointed out that evidence of sexual normalcy could be received. While the results of a truth serum test probably are not admissible in evidence in California to show the truth of the matters said by the patient under the influence of the drug, that does not mean that an expert cannot testify to an opinion based in part on truth serum results. There would seem no reason to believe that any different rule would exist in military law. This opens up new areas for an investigator in connection with truth serum and lie detector tests. In appropriate cases, for instance those involving sex crimes or insanity as a defense, the results of the tests can be submitted to a psychiatrist. He can then formulate an opinion about the suspect's mental condition—the opinion to be based in part at least on the test results. Probably the expert will be allowed to tell the court-martial that his opinion was in part based on these tests even though he will presumably not be permitted to give those results in detail.

³⁵ *United States v. Sims*, 5 USCMA 115, 17 CMR 115. The defense contended that it is inconsistent with the warning required by Article 31 of the Code, which states that an accused has every right to remain silent, to let his silence later be used against him in the cross-examination. The opposite view, which is the one accepted by the Court of Military Appeals, is that anyone who takes the stand can properly be asked about anything that a court-martial might reasonably find of value in assessing his truthfulness. It is human experience that someone who has a good defense to a charge against him does not usually wait until a trial to mention it to the authorities. While the accused is entitled to remain completely silent, he is not entitled to testify at a trial and have the court blocked from considering circumstances which would suggest that he was swearing to a recent fabrication. Sometimes, of course, the suspect will remain silent during an investigation on the advice of counsel or for some similar reason of caution. If this is so, he is later perfectly entitled to tell the court-martial the reason for his silence. If they believe that explanation, they may believe the rest of his testimony in spite of his previous silence. If they don't believe it, they may reason that other parts of his testimony are also false.

³⁶ *Peckham v. United States*, 210 F.2d 693 (CA DC Cir).

by a ruse. The same rule presumably applies in military law.³⁷ The only limitation is that the trick must not be one which would carry high risk of inducing a false statement by the accused. One particular deception is the use of "plants," undercover agents, or informers, which seems to have been tacitly accepted by the Court of Military Appeals.³⁸ Others include misinforming the suspect about the evidence in the investigator's hands or falsely telling him that he was noticed near the scene of the crime, that his fingerprints were found there, or that he has been "fingering" by an accomplice.

In civilian life it is not unknown for a suspect to be confined and questioned relentlessly in the hope of a confession. As the Supreme Court has acknowledged:

"... a process of interrogation can be so prolonged and unrelenting, especially when accompanied by deprivation of refreshment, rest or relief, as to accomplish extortion of an involuntary confession."

At the same time the Court noted that:

"Interrogation is not inherently coercive, as is physical violence. Interrogation does have social value in solving crime, as physical force does not."³⁹

While, so far as State court trials are concerned, the issue simply reduces to whether or not the confinement, interrogation, and other circumstances deprived the suspect of his free choice to speak or remain silent, certain additional criteria have been set out for the Federal civilian courts as to the admissibility of a confession made out-of-court by a defendant. Thus, if there has been unnecessary delay in bringing an accused before a United States Commissioner for a preliminary hearing, a statement he makes cannot be used against him later.⁴⁰

The Uniform Code prohibits the ordering of an accused into confinement except for probable cause; directs that a person ordinarily not be placed in confinement when charged only with a minor offense, like that normally tried by a summary court-martial; and states that immediate steps should be taken to investigate the charges against the accused and bring him to trial.⁴¹ The Court of Military Appeals has indicated no tendency to hold that a confession by an accused cannot be used against him if there was a failure in some way to live up to the commands of the Code concerning the confinement of an accused.⁴² As a practical matter, therefore, whatever a suspect says prior to trial can be used in evidence against him if he was given a warning under Article 31 of his right to remain silent, and if it is clear that, when he made the statement, he had "mental freedom" to choose between speaking and remaining silent. In short, possible illegality of his confinement, delays in bringing him to trial, and the like would not hinder the use of his statement if it were found that, after a fair warning of his right to say nothing, he chose to speak. How-

³⁷ Compare *United States v. Gibson*, 3 USCMA 746, 14 CMR 164, (especially footnote 2 to Judge Brosman's concurring opinion).

³⁸ *United States v. Gibson*, 3 USCMA 746, 14 CMR 164.

³⁹ *Stein v. New York*, 246 US 156, 184.

⁴⁰ *McNabb v. United States*, 318 US 332. The statement can be admitted in evidence if it was made before the delay occurred.

⁴¹ Articles 9(d), 10, 33, 50 USC §§563(d), 564, 604.

⁴² *United States v. Moore*, 4 USCMA 482, 16 CMR 56.

ever, even though the statement were used in evidence against the suspect, the persons responsible for the illegal confinement or unwarranted delays in processing his case would themselves be subject to court-martial.

So long as he does not resort to physical force or unlawful threats and promises, a military investigator, like a detective in civilian life, is entitled to try to persuade the suspect to make a complete statement. Since the average serviceman is not a hardened criminal, he is often susceptible to the plea to "own up and take his medicine"—to pay his debt to society. The young serviceman can sometimes be influenced by the appeal to show his manhood and courage by telling the truth and taking what comes. Naturally this approach is usually, and permissibly, supplemented by insistence that the evidence against the suspect is so clear that he might just as well talk, and that the investigator is just trying to tie up a few loose ends in the case. While Article 31 requires that the investigator advise the suspect at the first of the interview that anything said may later be used against him in a trial by court-martial, he is not hindered by the Code from urging: "If you don't have anything to hide, why not just make a statement and help clear this case up."

If a suspect has begun to talk but the investigator thinks he is lying, a warning can be given that false statements can be prosecuted before a court-martial.⁴³ If the suspect's previous statements have been false, probably strong pressure to tell the truth can be built up by this reminder. This pressure is one which stems from the law itself and certainly does not tend to produce an unreliable confession. Furthermore, it does not keep a suspect from remaining entirely silent in the first place. When a suspect changes his story after being warned of the penalty for false official statements, the change probably reflects a belief that by telling the truth he can prevent prosecution for the earlier false official statement. While as a practical matter this is often the case, it would, nonetheless, be improper for an investigator to promise any sort of immunity from prosecution for the false official statement.

In fact, nothing more frequently causes a confession to be kept out of evidence than a showing that it was produced by an investigator's promises of immunity. A number of borderline situations present themselves. For example, in larceny cases the investigator sometimes will assure the suspect that, if he gives back the money and makes a confession, the victim will not prefer charges. In a sense, this assurance is correct for under military law the victim of a crime is very seldom the one who prefers charges. That task is instead performed generally by the accused's commanding officer or by some other official; and despite the unwillingness of the victim, the charges can be preferred and the victim brought to trial. However, very few suspects will be aware of these subtleties. Therefore, under such circumstances, the investigator may be considered to have given the suspect a promise of immunity; and any statement made will not be admissible in evidence.⁴⁴

⁴³ *United States v. Colbert*, 2 USCMA 3, 6 CMR 3.

⁴⁴ See *United States v. Josey*, 3 USCMA 767, 14 CMR 185. In *United States v. Knooihuzen*, 16 CMR 573, an Air Police investigator was considered to have overreached in emphasizing to his suspect, a nineteen-year-old airman, that the Air Police Office would not prosecute him if he gave back the wallet. Even though it was true that the Air Police would not prefer the charges, an Air Force Board of Review thought that the suspect would interpret the investigator's assurances to mean that there would be no prosecution. Therefore, the accused's words and actions could not be used in evidence against him.

However, the investigator is given some freedom—so long as he makes sure the suspect knows that a court-martial may still be in the picture and that any statement he makes may be used against him in a trial. For instance, one case concerned a confession made after the accused's first sergeant had indicated he would recommend to the squadron commander that the matter be kept, if possible, within the squadron—which is to say that it not be referred to a court-martial.⁴⁵ Another case concerned a confession made after a battery commander had indicated to the accused that, if possible, he would try to keep the affair within the battery.⁴⁶ Both times, under the particular circumstances involved, the confessions made later to military investigators were held to have been admissible in evidence. The test used apparently was whether the assurances given by the first sergeant and battery commander respectively were so unconditional that the accused would have been induced to make untrue statements because they thought they had immunity from prosecution. This was not considered to be the case, because the accused knew that the persons who had given them the assurances did not have the final say whether or not there would be a trial.

In light of these cases, the military investigator will usually not be held to have given a promise of immunity if—before a suspect makes a statement—it is emphasized to him that the investigator does not have authority to give immunity from prosecution. Also, the investigator may want to point out that his report will go to higher military echelons, who will make the ultimate decision what to do in the case.

One pitfall for the military investigator is baited by the question: "Will it go easier for me if I make a statement?" When this question is asked, the investigator is usually about to get a confession and so must be especially careful not to taint whatever statement he may receive from the accused. With reference to the suspect's question, a complete answer would be that often an accused could not even be convicted if he did not make a confession; in other cases, the conviction might have resulted anyway and a full pretrial confession, together with cooperation with the investigator and expressions of repentance for the crime, may lead to a lighter sentence. Naturally, no sane investigator would wish to mention the first possibility; nor would he be much better off if he mentions the second to his suspect. Invariably, the defense will then claim, with good chance of success, that any confession made was the result of a promise of leniency. Consequently, the best reply for a military investigator to make to a question about the effect a confession would have on sentence is to say that no one can predict or promise what punishment a court-martial might impose if the accused is tried and convicted.

Recently, to assist in the discovery of subversives and spies, Congress has passed an immunity statute to protect from prosecution someone who, under certain limited conditions, gives testimony that might incriminate himself.⁴⁷ Various states also have provisions for granting immunity to a suspect who turns State's evidence. The Manual for Courts-Martial permits immunity from prosecution to be granted by an

⁴⁵ *United States v. Howell*, 5 USCMA 664, 18 CMR 288.

⁴⁶ *United States v. Johnson*, 5 USCMA 795, 19 CMR 91.

⁴⁷ 18 USC Supp §3486.

officer exercising general court-martial jurisdiction.⁴⁸ If the military investigator is asked by a suspect about his chance for immunity, he should make it clear that this can only be given by a high military echelon. However, the investigator will certainly not want to discourage entirely all thoughts along these lines, for in crimes like conspiracy, involving several joint offenders, the technique of "divide and conquer" is among the most valuable in the investigative arsenal. No criminal wants to become the "fall guy" for his erstwhile comrades.⁴⁹ Therefore the military investigator may, near the first of the investigation, want to explain to his suspects that *he*, the investigator, cannot personally grant immunity from prosecution, and to read them the passage from the Manual for Courts-Martial which states who can give immunity. Calling attention to the possibility of immunity, even in this indirect way, does not serve to bolster a united front among several conspirators.

EFFECT OF PREVIOUS INVOLUNTARY CONFESSION

Merely because one confession is improperly obtained does not mean that the investigator is thereafter prevented from obtaining a statement from the same suspect that can be used in a court-martial. In one case that reached the Court of Military Appeals, the accused, a suspected thief, had originally been questioned by fellow soldiers—a bayonet at his back. Finally, he admitted the crime. About ten hours later he was interrogated by a military investigator who warned him that he did not have to make any statement, and that anything he did say could be used against him. He made a second confession. The defense counsel contended that this was part of the same transaction as the extortion of the first statement. He argued that the only way an investigator could cut off the lingering effects of the bayonet-point interrogation was to warn the suspect that anything he had said previously could not be used against him if the prior statements were not made of the suspect's own free will. The Court rejected this argument and held that the second confession could be admitted in evidence.⁵⁰ Other cases take a similar position even though the suspect may have "let the cat out of the bag" by making his first involuntary statement, and though this could understandably have influenced the decision to make another statement. However, where there is any reason to believe that a previous interrogation of any type has been conducted, the military investigator—to be safe, instead of sorry—should warn the suspect along these lines: "I don't care what you may have said to somebody else about this matter we are investigating; for all I know you may not have said anything that could be used against you in a court-martial. However, anything you say to me—and I want you to speak only the truth and of your own free will—can be used in evidence against you."

⁴⁸ Paragraph 148e, page 278. See also, Guy, Grant of Immunity, JAG Journal, January 1955, page 20.

⁴⁹ Naturally, the investigator will want to interview his suspects separately to build up their mutual distrust. He may also want to mention that the other suspects may be trying to look for a scapegoat and that the person who comes forward last with an excuse may wind up taking the rap for all his partners in crime.

⁵⁰ United States v. Monge, 1 USCMA 95, 2 CMR 1. Accord: United States v. Sapp, 1 USCMA 100, 2 CMR 6. See also United States v. Dandaneau, 5 USCMA 462, 18 CMR 86 (concurring opinion); United States v. Bayer, 331 US 532.

SOME MISCELLANEOUS RULES ABOUT CONFESSIONS

Sometimes a suspect will more or less dictate a confession, but will then refuse to sign. Contrary to his possible expectations, the unsigned statement is admissible before a court-martial if the investigator can testify that it accurately records what the accused said during the interrogation.⁵¹ In fact, everything an accused says or does during the course of questioning about an offense can be used against him in a court-martial, and not merely the written statement, if any, which he signs. Moreover, under current military law the investigator can tell the court-martial what the accused said to him, even if the accused's written statement has already been received in evidence. To make the most of these rules, many military interrogators use tape recorders during an interview and retain the tape till trial and appeal are complete.

In taking a confession, it is not amiss to seek information about any offense the suspect may have committed in the past other than the one for which he is being investigated. Sometimes, of course, such information will lead to the preferring of additional charges; sometimes it will show a pattern of crimes which can, under some circumstances, be used as evidence in a court-martial.⁵² Occasionally, facts will be revealed that may be of value in cross-examining an accused who testifies in his own behalf, in refuting defense evidence of good character, or in imposing a proper sentence upon the accused. It should be noted that, in some respects, courts-martial are more liberal than Federal civilian courts in permitting the use by the prosecution of evidence of other misconduct by the accused with which he is not being charged.

STATEMENTS TO NON-MILITARY INVESTIGATORS

A civilian used by the Armed Services in an official investigation must abide by the same rules as a military investigator.⁵³ Therefore, he must give an Article 31 warning to a suspect before taking a statement. However, evidence obtained by other civilian investigators—for example, local detectives—is not subject to the same limitations. Of course, a statement secured with a rubber hose from a suspect cannot be used against him in a court-martial or any other court, no matter who obtained it. But a statement obtained by persons unconnected with the military establishment can be used against a suspect although they never gave him any warning of his right to remain silent, as would be required of the military sleuth by Article 31.⁵⁴ If a military investigator or representative is present while a statement is being taken from a serviceman by civilian investigators—for instance, state police, or Secret Service agents—special care must be observed. The presence of the military investigator may require that a warning be given the suspect of his right to remain silent if it is intended to use any statement he makes against him in a court-martial. Probably the military investigator would be under a lighter burden overseas if he were present while foreign police questioned a serviceman. Unless the military operative had

⁵¹ *United States v. Manuel*, 3 USCMA 739, 14 CMR 157.

⁵² See *Manual for Courts-Martial*, paragraph 138g; *United States v. Haimson*, 5 USCMA 208, 17 CMR 208; *United States v. Powell*, 3 USCMA 64, 11 CMR 64; *United States v. Graham*, 5 USCMA 265, 17 CMR 265.

⁵³ *United States v. Grisham*, 4 USCMA 694, 16 CMR 268.

⁵⁴ *United States v. Trojanowski*, 5 USCMA 305, 17 CMR 305.

prompted the questioning or was engaging therein himself, he would be under no duty to tell the suspect that he would not have to make any statement about any crime of which he was suspected.⁵⁵

EDITORS NOTE: Further discussion by the author of criminal investigation under military law, including the problem of search and seizure, is to appear in the March-April issue.

⁵⁵ *Idem.*; *United States v. DeLeo*, 5 USCMA 148, 17 CMR 148; *United States v. Grisham*, *supra*.