belief would not necessarily destroy an adequate prior warning unless it had been somehow made known to the interrogator.

6. Hypothetical problems. *a.* When the accused was apprehended as a suspected deserter, the military police without prior warning, asked him his name. His reply is offered in evidence to prove his identity at his trial for desertion. Is it admissible over the defense objection that it was obtained in violation of Article 31?

b. A Staff Judge Advocate directs one of his assistants to submit a draft of a certain legal memorandum no later than a given date. On the day following the due date, the SJA sends for the assistant and without any warning asks him why he had not submitted it on time. The subsequent trial of the assistant for failure to obey an order results largely from his reply that "I just didn't feel like doing it and don't intend to do so." Is this reply admissible over the objection that Article 31 was violated?

c. The accused is suspected of being the individual who assaulted another soldier with his fists at a Service Club and ran away leaving the victim unconscious. The investigator knows that the victim has died from a blow on the head sustained when he was knocked down. This fact is unknown to the suspect. The investigator informs the suspect that they are seeking information about "the fist fight." Is the resulting statement of the accused admissible, over objection, at his subsequent trial for homicide?

d. As the investigator begins to read Article 31 to the suspect, a JAGC officer, the latter interrupts him with the remark "I know all about that." There is no further warning other than to tell the suspect the nature of the matter under investigation. Has the suspect been warned in accordance with Article 31?

e. The investigator commences his interrogation of the suspect without giving any warning and does not warn him until after he has made several incriminating admissions. However, only those statements made by the suspect after he has been warned are offered and received in evidence. Has there been a violation of Article 31?

CHAPTER XI

INADMISSIBILITY OF EVIDENCE OBTAINED IN VIOLATION OF ARTICLE 31

Reference. Art. 31, UCMJ; Par. 140*a*, MCM.

1. General. Article 31*d* renders inadmissible in evidence any "statement" obtained in violation of either the law of confessions or Article 31*b*. For this purpose the term "statement" includes any evidence which is obtained in violation of Article 31. It will be recalled that the law of the confessions requires a causal connection between the improper pressures and the statement whereas the absence of the required warning renders the evidence inadmissible, irrespective of causation. The exclusionary rule also raises the collateral matters of the evidentiary significance of an accused remaining silent or refusing to make a statement and the admissibility of evidence obtained as a result of evidence which is itself inadmissible under Article 31.

2. The inadmissibility of statements. *a. General.* The provision of Article 31(*d*) that improperly obtained statements may not "be received in evidence against him in a trial by court-martial" is plain and unambiguous. It forbids any use whatsoever against the maker at *his trial.* It does not forbid use for administrative purposes of otherwise credible statements.

Illustrative cases.

(1) *United States v. Pedersen*, 2 USCMA 263, 8 CMR 63 (1953). A statement which is obtained in violation of Article 31*b* may not be used as a prior inconsistent statement to impeach an accused who takes the stand as a witness in his own behalf.

(2) *United States v. Moreno*, 10 USCMA 406, 409, 27 CMR 480, 483 (1959). While attempting to impeach the accused as a witness it would be improper to cross-examine him as to whether he had "confessed" to having committed a certain crime, unless the confession upon which the question was based had been made voluntarily.

(3) ACM 5538, *Perdue*, 6 CMR 696 (1952), *pet. denied*, 2 USCMA 685, 7 CMR 84 (1953). Article 31*d* is not violated when the *defense* puts in evidence an otherwise inadmissible statement of the accused.

(4) NCM 276, *Yuille*, 14 CMR 450 (1953). The inclusion of an inadmissible statement in the report of a pretrial investi-

gation is not within the proscription against the use of the statement as evidence in a trial.

(5) *JAGA 1960/3923, 7 Apr 60.* The mere fact that a statement has been obtained in violation of Article 31 does not make it inadmissible in proceedings to reduce its maker for inefficiency. "The reference in . . . [regulations] to use of certain rules of evidence in administrative proceedings as prescribed for trials by courts-martial is not an injunction to apply these rules literally. Rather, it is an attempt to assist in determining the 'best evidence' for consideration, and thereby raise the level of evidence which is received by a board or investigating officer."

(6) *Bong Youn Choy v. Barber*, 279 F. 2d 642 (9th Cir. 1960). Immigration and Naturalization Service investigators induced X to sign an admission to membership in the Communist party by telling him that unless he did so he would be tried for perjury and deported. This admission was clearly involuntary and its subsequent use as a basis for the issuance of a deportation order against X was violative of due process.

b. False official statements. Paragraph 140*a*, MCM, provides that in a prosecution in which the making of a false statement is an element, the fact that the statement was "unwarned" will not render it inadmissible. This provision has been held to be violative of Article 31.

United States v. Price, 7 USCMA 590, 592, 23 CMR 54, 56 (1957). It is error not to permit the defense to establish that the false official statement which the accused is charged with making was obtained without a proper preliminary warning. "The difficulty here results from the language employed by paragraph 140*a* of the Manual which appears to limit the application of Article 31 by excepting certain types of cases from its operation. There is no correlation between the protection of Article 31 and making a false official statement. Insofar as we can determine there are no Article 107 exceptions to Article 31. If a person is a suspect or accused, he must be warned in accordance with Article 31(*b*) before he can be questioned. The fact that the statement or answer requested is an official statement within the meaning of Article 107 does not restrict the protections of Article 31. . . . Article 31 is relevant to *all* pretrial statements obtained in violation of its terms."

3. Evidence of accused's silence. *a. Inference of guilt.* Inasmuch as Article 31 expressly recognizes the right of a person accused or suspected of an offense to say nothing whatsoever when interrogated about such offense, public policy requires that he be permitted to exercise this right without having his conduct in so doing being construed in any manner as an admission of guilt on his part. How-

ever, where the circumstances are such as to indicate quite clearly that the subject is not availing himself of his Article 31 privilege, as, for example, when he is having a conversation with a friend on a purely personal basis, the rule of policy does not prohibit drawing a *logical* inference of guilt from his failure to deny an accusation.

Illustrative cases.

(1) *United States v. Kowert*, 7 USCMA 678, 682, 23 CMR 142, 146 (1957). Where a prosecution witness, while testifying as to incriminating statements made by the accused during an investigation, repeated the entire conversation, including the fact that the accused had invoked the protection of Article 31 with reference to certain stated questions, the admission of this latter testimony was prejudicial error because ". . . the accused's reliance upon his rights under Article 31 could be erroneously interpreted by the court members as constituting an admission of guilt."

(2) *United States v. Hickman*, 10 USCMA 568, 28 CMR 134 (1959). In a prosecution for assault upon a superior warrant officer, evidence that immediately after the assault when the squadron commander came on the scene and asked the accused "what seemed to be the matter," the latter replied "under Article 31, he didn't have any statement to make" could not be used as tending to show the accused's guilty knowledge of the status of his victim.

(3) *Travis v. United States*, 247 F. 2d 130 (10th Cir. 1957). In a trial of a labor union official for falsely swearing to nonmembership in the Communist party, it was reversible error to permit cross-examination of defense character witnesses as to their knowledge of the defendant having invoked the Fifth Amendment when questioned by a Senate Committee as to his Communist Party affiliation. The invocation of the Fifth Amendment does not indicate any defect of character of the person doing so. Any legitimate probative value of the cross-examination is far outweighed by its probable wrongful impact upon the jury.

(4) *United States v. Armstrong*, 4 USCMA 248, 252, 15 CMR 248, 252 (1954). A guard walking his post discovered the accused, a personal friend, in a boiler room under circumstances indicating that the latter might have broken into a post exchange on the guard's post. The guard asked the friend why he had done this and the latter remained silent. Later that night the guard, upon returning to the barracks which they both occupied, awoke the accused and asked him the same question. The accused said nothing but turned

over and went to sleep. "The Government has attempted to rely on this conduct [in the boiler room] as constituting an admission by silence. Yet in this connection, the Manual for Courts-Martial emphasizes that, 'mere silence on the part of an accused when questioned as to his supposed offense is not to be treated as a confession.' Paragraph 140*a*. Indeed any other rule would violate the manifest policy of Article 31 of the Code, supra, for—if incriminated by reliance on his right to remain silent—an accused would indirectly be compelled to speak." However, the guard was not conducting an official investigation and ". . . we believe that a court-martial might reasonably have inferred that accused, were he innocent, would forthwith have denied the accusation implicit in the remark of his friend. . . . To us no similar inference seems available with respect to the accused's silence when Evans [the guard] awakened him in their barracks near two o'clock a.m. and inquired of the housebreaking." At such a time and under such circumstances taciturnity would be the rule rather than the exception.

b. To impeach testimony of accused.

(1) *General.* The testimony of any witness, including an accused, can be impeached by showing prior conduct on his part inconsistent with his testimony. In such a case the prior conduct is not used to create any inference as to the true facts of the case but merely to cast doubt on the credibility of the testimony. Therefore, when pretrial silence on the part of the accused is shown as evidence of such prior conduct the court is not being asked to draw any inference of guilt therefrom and the prohibitory rule mentioned above does not apply. The waiver of Article 31*a* (or the Fifth Amendment) made by the accused when he elects to take the stand is deemed sufficient to justify admitting this evidence for the limited purpose of impeachment and assuming that the court members will follow the law officer's instructions not to consider it as evidence of guilt. However, it is essential to the use of evidence of pretrial silence for impeachment purposes, that it *clearly appear to be inconsistent with the accused's testimony.* In most situations a claim of privilege would not, in and of itself, be so inconsistent. This mode of impeachment should be used with great caution because an improper reference by the prosecution to the accused's pre-trial silence normally will lead to a mistrial or reversal. It must also be remembered that impeachment by a showing of prior inconsistent conduct must be preceded by cross-examination of the witness on the matter in order that he

may have the opportunity to deny or explain such conduct. (See chapter XXXV, *infra.*)

(2) *Federal law.*

(*a*) *Raffel v. United States*, 271 U.S. 494, 497 (1926). When, at a rehearing, the defendant testifies and denies making an incriminating statement put in evidence by the prosecution he may be cross-examined as to his reasons for not so testifying at the former trial. "The immunity from giving testimony is one which the defendant may waive by offering himself as a witness. . . . When he takes the stand in his own behalf, he does so as any other witness, and he may be cross-examined as to the facts in issue. . . . [H]e may be examined for the purpose of impeaching his credibility. . . . His failure to deny or explain evidence of incriminating circumstances, of which he may have knowledge, may be the basis of adverse inference and the jury may be so instructed. . . . His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing. . . . If, therefore, the questions asked of the defendant were logically relevant, and competent . . . they were proper questions, unless there is some rule of policy in the law of evidence which requires their exclusion. . . . [W]e do not think the questions asked of him were irrelevant or incompetent. For if the cross-examination had revealed that the real reason for the defendant's failure to contradict the Government's testimony at the first trial was a lack of faith in the truth of probability of his own story, his answers would have a bearing on his credibility and on the truth of his own testimony in chief. It is elementary that a witness, who upon direct examination, denies making statements relevant to the issue, may be cross-examined with respect to conduct on his part inconsistent with this denial. . . . The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf, and not for those who do. There is a sound policy in requiring the accused who offers himself as a witness to do so without reservation as does any other witness. We can discern nothing in the policy of the law against self-incrimination which would require the extension of immunity to any trial or to any tribunal other than that in which the defendant preserves it by refusing to testify."

(*b*) *Peckham v. United States*, 210 F. 2d 693 (C.A.D.C. 1953). The defendant, when arrested, was asked some

questions by a policeman concerning an abortion upon a named person and remained silent. During the subsequent trial for criminal abortion the defendant denied complicity. The *Raffel* case was cited to uphold the cross-examination of the defendant as to his pretrial silence.

(*c*) *Gruenwald v. United States*, 353 U.S. 391 (1957). Where the defendant testified and denied guilt it was reversible error to permit cross-examination establishing that he had invoked the Fifth Amendment before the grand jury since it also appeared that he consistently asserted his innocence before the grand jury, stating that he was invoking his privilege solely on the advice of counsel. These additional circumstances indicate that his pretrial conduct was not inconsistent with his testimony as a witness.

(*d*) *Stewart* v. *United States*, 366 U.S. 1 (1961). At the third trial of a felony-murder the defense raised a serious issue as to the defendant's sanity. The defendant took the stand and his attorney asked him only a few simple questions not bearing on the merits of the case, such as, "Who is your lawyer?" and "Do you know you are charged with first degree murder?" The defendant's replies were "gibberish without meaning." On cross-examination, the prosecutor attempted to demonstrate that the defendant was feigning a mental weakness and included in his questions reference to the two prior trials and defendant's silence thereat. These remarks were improper and require reversal. ". . . [I]n no case has this Court intimated that there is such a basic inconsistency between silence at one trial and taking the stand at a subsequent trial that the fact of prior silence can be used to impeach any testimony which a defendant elects to give at a later trial." The *Raffel* case involved a situation where the pre-trial silence clearly was inconsistent with specific testimony given by the defendant. *Gruenwald*, on the other hand, involved no such inconsistency and it was held that the prior silence could not be used to attack the defendant's *general credibility*. Herein, defendant gave no specific testimony as to which his prior silence was inconsistent and the attempted impeachment must be viewed as an improper attack on his general credibility.

(3) *Military law.*

(*a*) *United States v. Sims*, 5 USCMA 115, 120, 17 CMR 115, 120, (1954). The accused, charged with barracks larceny testified on direct examination that, although he had found a sum of money in the barracks, he had not told the

investigators about it when questioned shortly after the theft because they had not told him the amount of money involved and, for this reason, he did not then realize that it was the missing money which he had found. In closing argument trial counsel contended that the accused would not have remained silent when questioned if his reason were true. "Quite obviously, the accused sought to justify his silence, in positive terms, as part of his own case. Having done so, it was certainly not improper for trial counsel to make fair comment on the adverse inferences that could reasonably be drawn from the accused's testimony. . . . The facts in this case closely parallel those in *Peckham v. United States* . . ." wherein it was held that by taking the stand as a witness the accused waives all privileges under the Fifth Amendment.

(*b*) *United States v. Brooks*, 12 USCMA 423, 31 CMR 9 (1961). In a rape prosecution the defense was that the accused had paid the alleged victim in advance for her services as a prostitute but had changed his mind for good cause after she partially disrobed and demanded the return of his money. When she refused to return it he slapped her and took the money by force from within her brassiere, tearing her clothes in the process. After the accused testified to the foregoing, trial counsel cross-examined him as to why he had refused to make a statement when interrogated concerning the incident. Trial counsel earlier had improperly established this refusal during his presentation of the prosecution case and all references thereto had been stricken from the record at that time. The cross-examination was improper and violated the principles announced in *Gruenwald* and *Stewart* by the Supreme Court. (Per Ferguson, J. The only other member of the Court, Quinn, C. J., concurred in the result.)

(*c*) ACM 10655, *Narens*, 20 CMR 655, 673 (1955), *remanded on other grounds*, 7 USCMA 176, 21 CMR 302 (1956). When an accused attacks the admissibility of his pretrial statements by testifying that he made them in reliance upon promises of immunity and confidentiality the prosecution may, in rebuttal, offer the testimony of the investigator that the accused, after stating that another soldier had participated in the offense, assault by prisoners upon a stockade guard, refused to answer a question as to who had struck the second blow. This testimony is relevant to the issue of whether the accused was, as he claimed, misled

into making his statements and the law officer's instruction that the pretrial silence could not be considered as an admission of guilt removed any possibility of improper use by the court.

(*d*) ACM 11609, *Cloyd*, 21 CMR 795 (1956). An accused, charged with wrongful possession of marihuana, who takes the stand and denies guilt can be *cross-examined* concerning his silence when the investigator searched his clothing and found the marihuana. Under existing federal law, although an accused's pretrial silence cannot be treated as an admission of guilt, if he takes the stand he may be cross-examined as to his former silence insofar as it affects his credibility as a witness and the trial counsel may make fair comment on this matter in argument so long as he does not attempt to erect an incriminating admission in the guise of a purported attack on credibility. Furthermore, the law officer is not bound to instruct *sua sponte* on the limited purpose for which the evidence is admitted.

(*e*) ACM 14909, *F. D. Cloyd*, 25 CMR 908, 914 (1958). It is reversible error for the prosecution, under the guise of attempting to impeach the credibility of the accused who had testified in his own behalf and denied guilt, to prove by independent evidence that the accused had refused to submit to a polygraph examination during the investigation of the offense charged. "Cross-examination to impeach a witness must be probative on the issue of credibility. Prior silence, or the asserting of a claim of privilege, is not, irrespective of the circumstances, a prior inconsistent statement. Before such can be offered in evidence it must be shown by proper foundation that the prior silence or claim of privilege is inconsistent with the testimony of the accused. Simply invoking the claim of privilege is consistent with innocence and does not imply any guilt which would be at all inconsistent with later protection or indications of innocence. For this reason, in so far as *Cloyd*, *supra* [ACM 11609] may stand for the proposition that in all cases it is proper to cross-examine the accused as to why he had remained silent, or why he had not propounded his story at a former time, we decline to follow it. We agree, however, that when the silence of the accused is *properly* before the court, counsel may comment on this in final argument . . . the accused . . . was under official investigation and had an absolute right to invoke his privilege . . . of course, when the accused took the stand he was subject to impeachment like any other witness. We

find nothing inconsistent between his testimony and the refusal to be examined with the aid of a polygraph. Had he testified that he had been ready and willing to submit to examination by polygraph, the situation would have been decidedly different. It would appear that the only case in which the prosecution may mention such a test in connection with the accused would be where the accused himself has first raised the issue. There are many reasons entirely consistent with the hypothesis of innocence as to why a man may not wish to submit to examination with the aid of a 'lie detector.' The courts have long recognized that the results of such tests are not reliable vanes of truth, but, because of a multitude of variable factors, often give false readings. The accused had a right to invoke his privilege, and the fact that he did so should not be turned against him unless he himself has opened the law by taking an inconsistent position."

(*f*) ACM 11836, *Lenart*, 21 CMR, 904 (1956). A showing by the prosecution that the accused, charged with forgery, refused to talk when questioned as to his negotiating the spurious check is not cured by the accused's *subsequent* testimony denying guilt. Evidence brought out prior to the accused becoming a witness cannot be justified as an attack on his credibility and there is a fair inference that trial counsel attempted to use the disputed evidence to establish guilt.

4. Evidence obtained through inadmissible statements. *a. Evidence discovered through statements.* Paragraph 140*a*, MCM, provides that the mere circumstance that information which leads to the discovery of pertinent facts is furnished by an inadmissible statement does not require the exclusion of evidence of such facts. Under this rule, however, the statement may not be used to identify or otherwise lay the foundation for the admission of this evidence. The subject MCM provision was approved by the Court of Military Appeals in the *Fair* case, *infra*. However, several years later, the *Haynes* case, *infra*, gave rise to the possibility that "the fruit of the poisonous tree" doctrine, as developed with respect to evidence obtained as the result of illegal searches and seizures and wiretapping (see par. 8, ch. XXXII, *infra*) may also be applied by the Court with respect to evidence obtained or discovered as a result of confession or admission obtained in violation of Article 31.

(1) *United States v. Fair*, 2 USCMA 521, 529, 10 CMR 19, 27 (1953). The contention of the accused that he was coerced into divulging the location of the murder weapon would not, even if true, render the gun inadmissible. "We may also

note that, even if the admission as to the location of the lethal weapon be deemed involuntary, this would still not be a bar to the admission of the gun itself in evidence. Manual for Courts-Martial, paragraph 140*a*." (Opinion of Quinn, C. J.)

(2) *United States v. Taylor*, 5 USCMA 178, 17 CMR 178 (1954). Where an accused is asked, without any Article 31*b* warning, to point out his clothing, his act in so doing may not be used to show his ownership of the clothes in which marihuana cigarettes were found. The cigarettes may be admissible but the statement is not.

(3) *United States v. Haynes*, 9 USCMA 792, 27 CMR 60 (1958). In a prosecution for sodomy and extortion the defense was denied the opportunity to show that the Government's knowledge of the existence of the offenses charged and the identity of the prosecution witnesses, the co-actors in these offenses who had been promised immunity in exchange for their testimony, had been discovered *solely* as a result of statements made by the accused while submitting to a polygraph examination administered to determine his fitness for a higher security clearance and that the examination had been conducted with the understanding that the results thereof would remain confidential.

Opinion of Ferguson, J. The findings of guilty are disapproved and a rehearing may be ordered. "Obviously, accused's statements would be inadmissible in evidence because of the alleged promises of confidentiality. . . . However the Government chose to rest its case upon the testimony of witnesses whom the defense argued were procured through such statements. The ramifications of permitting the use of evidence under these circumstances are dire in the extreme. It would in effect be permitting the Government to do indirectly what is forbidden by Article 31(*a*) . . . to do directly. If such receive our sanction there would be nothing to prevent Government agents from procuring information—such as the identity of hostile witnesses, or the location of incriminating property—from the accused by the use of force or other unlawful means, and then simply rest the prosecution's case upon the evidence procured through those statements without introducing the statements themselves into evidence at all. Under the present state of the record, we find the convicting evidence inadmissible. While the issues in the cases from which we quote, infra, were not precisely the same as in the present case, the underlying judicial principle is identical." (At p. 794, 62.) [Judge Ferguson then quoted from Federal

cases dealing with entrapment, illegal search and seizure, and wiretapping.] "We further find that accused's substantial rights were prejudiced by the court's refusal to allow the defense to develop its contention that the prosecution's case saw its inception in the accused's alleged statements to Government interrogators." (At p. 795, 63.) "Our dictum in *United States v. Fair* . . . to the effect that even if the admission as to the location of a lethal weapon be deemed involuntary, the gun itself would be admissible in evidence, is not controlling and does not express a sound legal principle. Likewise, paragraph 140*a* of the Manual for Courts-Martial, United States, 1951, is declared incorrect insofar as it states that evidence found by means of an inadmissible confession or admission is itself admissible." (At 6, 796, 64.)

Quinn, C.J. concurs in the *result* (i.e., reversal) reached by Judge Ferguson and expresses no opinion on the case.

Dissenting opinion of Latimer, J. "I am not so willing as my associates to hold that the Chief Judge's language in *United States v. Fair* . . . does not announce a good principle of law. . . . The rule overthrown in this instance has been supported by the great weight of authority from the early common law until the present time. As a matter of interest, my attention has not been called to a single jurisdiction which rejects the rule and, if the reader is interested in researching the problem, I am convinced he will look in vain for any authority which goes as far as the present decision." (At p. 797, 65.) "The public is entitled to have its rights considered and a widespread application of the present rule would very effectively hamper the prosecution of an admitted offender. This case offers a concrete example of how justice might be defeated. The evidence which convicted this accused was supplied by witnesses, including a victim of his extortions, whose only connection with the alleged confession was that their identity was thereby established. If, because the Government first learned their names through the accused, their testimony is not usable, then so far as I am presently able to visualize a rehearing, the victim of a most atrocious extortion scheme must forever remain silent. It thus appears to me the Court goes too far for, unless it can now be shown that the Government was aware of the plan being operated by the accused and the identity of his victims and confederates before he made his statements, there is no way to escape the taint. That concept necessarily follows because, regardless of any subsequent development, it can always be asserted that when the principal actors were identified by the accused, the

knowledge acquired by the Government made independent identification an impossibility." (At p. 798, 66.)

b. Effect upon subsequent statements. In *United States v. Spero* (supra, chapter IX, paragraph 6*b*), the Court of Military Appeals held that under Article 31 the sole test of admissibility of any statement is whether it is voluntary and was preceded by a proper warning, if one was required. The existence of a prior, inadmissible statement, whether involuntary or unwarned, is merely a circumstance to be considered in determining the *voluntariness* of the one now offered.

c. Use as basis for opinion testimony.

United States v. Baker, 11 USCMA 313, 315, 29 CMR 129, 131 (1960). A medical diagnosis of an accused which is based upon statements made by him under such circumstances as to be inadmissible under Article 31, is itself inadmissible.

5. Hypothetical problems. *a.* Several personal checks of Second Lieutenant A, used by him to pay some outstanding debts of his unit Welfare Fund, were dishonored by the bank upon which they were drawn. The payees complained to The Adjutant General and the latter forwarded the complaints to the post commander for appropriate action. The latter indorsed the correspondence through command channels to A, informing him of his Article 31 rights and inviting an explanation. A replied by indorsement to the effect that the checks were dishonored because his account was temporarily overdrawn through no fault of his own. A's regimental commander refused to accept this indorsement, stating that A must furnish a more specific explanation. A then prepared a new indorsement stating that his account was depleted without his knowledge because of a certain check drawn by his wife. The last statement can be proved to be untrue. Can A be tried for making a false statement? (Assuming that his statement is "official" within the meaning of Article 107.) (See ACM 8193, *Torbett*, 17 CMR 650, 658 (1954).)

b. An accused is informed that he is suspected of a certain killing and is otherwise informed of his rights under Article 31. He is asked and answers several preliminary, non-incriminating questions. He is then asked if he was near a certain place on the post at a certain time and answers, "Oh, no. That's where that guy was killed. I'll claim my rights on that one." Is evidence of this statement by the accused admissible at his subsequent trial for murder?

c. The accused elects to take the stand and testifies that he didn't commit the offenses charged. He is subjected to severe cross-examination during which his attention is invited to the testimony of the prosecution witnesses who allegedly saw him commit the offenses and is asked if he cares to comment on their testimony. He replies that they have lied. On *redirect*, when asked by defense counsel if he has testified truthfully, he replies that he has and,

furthermore, that he has always proclaimed his innocence when questioned about these acts. Trial counsel, on re-cross, attempts to question the accused about his making an admission of guilt to a military investigator early in the case. Trial counsel concedes that this admission was obtained in violation of Article 31*b*. Should the law officer permit this cross-examination? (See *Walder v. U.S.*, par. 9*b*(3), Ch. XXXII, *infra*.)

d. The accused, a young trainee, is interrogated by his company commander without any prior warning of his rights. The accused is, however, aware of the Fifth Amendment, and early in the interrogation said, "I want to take the Fifth Amendment, sir." The CO replies, "You'll get no Fifth Amendment here. Now answer my questions or I'll have you breaking rocks for six months." The accused then makes what amounts to a full confession in response to the questions put to him. The CO has the confession typed in narrative form and gives it to the accused. At this time he warns him in great detail of his Article 31 rights, informs him specifically that he need not sign the written statement and concludes by giving him "a few days" to think it over. The accused is then dismissed and performs normal duties for the next three days at the end of which he delivers the signed confession to the CO. When the prosecution offers the written statement, the defense objects and establishes the foregoing. How should the law officer rule?

CHAPTER XII

THE FOUNDATION FOR ADMISSIBILITY OF STATEMENTS

References. Pars. 140*a*, 57*g*(2), MCM.

1. General. *Paragraph 140a, MCM.* "The admissibility of a confession of the accused must be established by an affirmative showing that it was voluntary, unless the defense expressly consents to the omission of such a showing, but an admission of the accused may be introduced without such preliminary proof if there is no indication that it was involuntary."

The term "voluntary" as used in this provision includes the concept of compliance with Article 31*b* as well as the concept of factual voluntariness.

2. The confession-admission dichotomy. *a. General.* The above-quoted provision of the Manual purports to accord separate treatment to confessions and admissions and it is only in this area that any distinction between the two has practical significance. The Manual also provides that "a confession is an acknowledgment of guilt, whereas an admission is a self-incriminating statement falling short of an admission of guilt." A more helpful formulation might be: Any incriminating statement which is not a confession is an admission. Listed below are some examples of what have been held to be admissions.

(1) ACM 11674, *Copeland*, 21 CMR 838 (1956). In a rape case, a statement admitting to having had sexual relations with the alleged victim.

(2) *United States* v. *Seymour*, 3 USCMA 401, 12 CMR 157 (1953). In a narcotics possession case, a statement by the accused, when apprehended in a police raid on a suspected narcotics outlet, that he was there "to get a fix."

(3) *United States* v. *Fair*, 2 USCMA 521, 10 CMR 19 (1953). In a premeditated murder case, a statement as to where the accused had concealed the fatal weapon.

(4) ACM S-6031, *Ketchum*, 10 CMR 930 (1953), *pet. denied*, 3 USCMA 823, 11 CMR 248 (1953). In a case involving larceny of clothing, a statement that clothes found in the accused's locker did not belong to him.

(5) CM 360823, *Price*, 9 CMR 442 (1953), *pet. denied*, 3 USCMA 817, 11 CMR 248 (1953). In a narcotics possession

case, informing the investigators where they could find the accused's clothes (in which narcotics were found).

b. Exculpatory statements. Any statement of the accused, however exculpatory in its terms, when offered by the prosecution is an "admission" for the purpose of requiring that a proper foundation for admissibility be laid.

United States v. Kelley, 7 USCMA 584, 23 CMR 48 (1957). A completely exculpatory statement by the accused, used by the prosecution to attack the credibility of the accused as a witness, is an "admission" within the meaning of Article 31.

3. What constitutes an "indication" of involuntariness? *a. General.* When an "admission" is offered, the prosecution is not required to make an affirmative showing of non-violation of Article 31 unless an "indication" of involuntariness is raised by the evidence before the court. A naked objection by defense counsel is not sufficient nor is his assertion that it is inadmissible. However, the evidence need not be introduced by the defense. The evidence offered by the prosecution to establish the foundation for admissibility may itself contain the necessary "indication" of involuntariness.

b. Illustrative cases.

(1) *United States v. Davis*, 10 USCMA 624, 628, 28 CMR 190, 194 (1959). An "indication" of involuntariness ". . . must rest on some evidence, some fact or circumstance suggesting a possible violation of Article 31." The mere fact that defense counsel contends that the statement is inadmissible is not sufficient. (Per Latimer, J. The other members expressed no opinion on this point.)

(2) *United States v. Fair*, 2 USCMA 521, 529, 10 CMR 19, 27 (1953). The law officer undoubtedly had in mind the provision of the Manual that in the absence of an indication of involuntariness an "admission" may be received without preliminary proof of voluntariness ". . . when he ruled that the burden of showing involuntariness rested on defense. While the law officer's ruling may be ambiguous, it may be construed as saying nothing more than the Manual." (Opinion of Quinn, C. J.)

(3) *United States v. Seymour*, 3 USCMA 401, 404, 12 CMR 157, 160 (1953). When the evidence offered by the prosecution in showing an "admission" of the accused is *silent* as to whether or not he had been warned of his rights, there is no "indication" that the statement was unwarned. "Here the record is silent on the question, so far as express verbiage is concerned, and the effect of the entire testimony is as consistent with the presence of warning as with its absence."

(4) *United States v. Kelley*, 7 USCMA 584, 588, 23 CMR 48, 52 (1957). When the testimony of the individual who interrogated the accused and thereby obtained an "admission" is completely silent on the presence or absence of a warning but the surrounding circumstances indicate that the testimony was probably complete in the sense that the witness related everything that happened, there is a showing that the statement is unwarned. "When during a trial—whether an admission or confession—it is prefectly obvious that a statement has been secured in violation of Article 31, it should not be admitted."

(5) *United States v. Josey*, 3 USCMA 767, 773, 14 CMR 185, 191 (1954). When, in attempting to show that the accused had made restitution to the victim of the alleged barracks theft, the prosecution also showed that the victim had made a promise to try to have any charges dropped, the evidence raised a sufficient indication of involuntariness to require further proof by the prosecution. "Thus, it is unnecessary that we determine, finally, whether the questioned interview resulted in a confession or an admission. If the latter, then an indication of voluntariness was present and a foundation of voluntariness and warning was required. If the former, then such a foundation was demanded in any event."

4. Responsibility for deciding voluntariness. *a. General.* Paragraph 140*a*, MCM, clearly purports to make the ruling of the law officer on the admissibility of a statement inconclusive in the sense that the court members must, despite his ruling, redetermine the issue and reject the statement completely if they do not agree with his ruling. However, prior to the *Jones* case, *infra*, the Court of Military Appeals had held that the ruling of the law officer in this regard was final and binding upon the members of the court-martial. In the *Jones* case, the Court expressly adopted the MCM provision and its necessary corollary that where an issue of voluntariness is raised, the court members *must* be instructed as to their duty to determine the issue. Furthermore, a finding by the court members of voluntariness does not preclude consideration of the circumstances surrounding the making of the statement for the purpose of assessing its truthfulness.

Illustrative cases.

(1) *United States v. Dykes*, 5 USCMA 735, 745, 19 CMR 31, 41 (1955). The law officer rules finally on the issue of voluntariness as well as admissibility. The court is not free to thereafter reject the statement as being involuntary except to the extent that involuntariness may destroy its trustworthiness and the law officer should so instruct the court.

The function of the court "is simply to determine—in light of all the evidence bearing on involuntariness—what weight, if any, should be awarded the statement. We must emphasize that any interpretation of the Manual which authorized court members to extend their action beyond that function would be invalid as conflicting with the Uniform Code." (Overruled by *Jones, infra.*)

(2) *United States v. Jones*, 7 USCMA 623, 626, 23 CMR 87, 90 (1957). The law officer erred in instructing the court that it was to pass upon only the weight and credibility of a confession. However, the error was not prejudicial since the instructions had been expressly requested by the defense. "In order to insure that there be no question of the present court's position, and to clarify a situation which has apparently caused some confusion, we specifically approve the Manual coverage. . . . Which restates the prevailing federal rule . . . when the evidence of voluntariness is conflicting, it is for the court members to make the final determination. . . . It appears clear that in a majority of Federal jurisdictions—although the jury does not pass on admissibility of evidence—the latter must nevertheless reject a confession in toto if it disagrees with the judge's original admissibility determination of voluntariness."

(3) *United States v. Powell*, 8 USCMA 381, 385, 24 CMR 191, 195 (1957). The case of *United States v. Jones*, held that the court must pass upon whether a confession was the product of illegal coercion. The same principle applies to the warning requirement. "If an issue is raised concerning whether or not a statement was taken in violation of Article 31, supra, the court-martial must be advised it may only give weight to the statement if it first finds that it was made in accordance with the provisions of the Article."

(4) *United States v. Bruce*, 9 USCMA 362, 364, 26 CMR 142, 144 (1958). " . . . where an issue of voluntariness is raised, the law officer must advise the court members they may only determine the weight and credibility of the confession, if they have first found it was voluntarily made. If on the other hand, they arrive at the conclusion the statement was involuntary—even though completely trustworthy—they *must* reject it entirely and accord it no weight whatsoever. Here, the law officer correctly informed the court it could consider the statement as evidence if it was determined to be voluntary. He erred, however, when he advised 'you *may* refuse to consider it as evidence if you determine that it was involuntarily made.' . . . The use of the word 'may' instead of 'must' was

reasonably capable of misleading the court members into believing it was discretionary with them whether or not consideration should be given the statement in the event they determined it to have been involuntarily made."

(5) *United States v. McQuaid*, 9 USCMA 563, 567, 26 CMR 343, 347 (1958). Even though the accused's testimony does not as a matter of law raise an issue as to the voluntariness of his confession, the court nevertheless may be instructed that it may consider his testimony as bearing on its truthfulness. "A confession can be voluntary and yet not truthful. . . . There are circumstances which do not affect the voluntariness of a pretrial statement but can affect its truthfulness. . . . The court-martial may always consider what weight it wishes to give to matters in evidence when deliberating upon the accused's guilt or innocence. In that respect, a confession is no different from other evidence. The court-martial could, therefore, consider whether the accused's purported pangs of conscience were of a nature to lead him to lie about his participation in the offense charged."

b. Instructions to the court. The instructions to the court must be sufficient to apprise the court members of the legal principles involved in passing on the issue of admissibility. When there exist possible misconceptions by the court members as to the legality of matters occurring during the interrogation, the law officer has the duty of informing them correctly as to the legality of these matters.

Illustrative case.

United States v. Acfalle, 12 USCMA 465, 469, 31 CMR 51, 55 (1961). Where the evidence indicated that accused's confession may have been induced by his having been improperly held incommunicado and transferred from Guam to Japan solely to isolate him for interrogation purposes, the law officer erred in not informing the court that such measures were improper. "The law officer's advice consists of no more than a bare recital of the conclusions which the court members must reach before the confessions could be considered. Only at one place did he refer to the question whether accused possessed mental freedom during his interrogation, but even then, he did not relate that inquiry to the facts before the court-martial. . . . [Our approval of the instructions given in *Jones, supra*, did not mean] that a bald recital of these abstract propositions of law would suffice to advise a military jury of its duty. In many cases, it undoubtedly will, for the accused's contentions of involuntariness normally relate to whether he was properly warned or acted as a result of unlawful inducements or promises. . . . When, however, the question involves whether the accused was deprived of his volition to speak or remain

silent by the use of measures which to the military court member, might bear some semblance of legality, the facts before the court-martial must be related to the legal principles involved in such a manner that the members are clearly made aware of the need for their consideration of each such circumstance."

c. The standard of persuasion. The voluntariness of a proffered statement must be established beyond a reasonable doubt and not merely by a preponderance of the evidence.

Illustrative case.

United States v. Odenweller, 13 USCMA 71, 74, 32 CMR 71, 74 (1962). "Voluntariness, like trustworthiness, is a factual question . . . Once determined to be voluntary, a confession is deemed the highest order of proof . . . It is such an important factor in evidence that the basis for its consideration should be measured by the same standard applicable to other factual determinations in criminal cases, the establishment of which, indeed, so frequently depend upon its contents. And for this reason, the Federal courts have adopted the sound rule that the United States must prove voluntariness beyond a reasonable doubt . . . We likewise conclude that voluntariness is required to be established beyond a reasonable doubt, and when that issue or one relating to denial of counsel is submitted to a military jury, it should be so informed." (Per Ferguson, J., and Kilday, J., Quinn, C. J. dissenting.)

d. Determination by individual court members required.

United States v. Rice, 11 USCMA 524, 526, 29 CMR 340, 342 (1960). It is improper to instruct the court members that they shall determine the voluntariness of a confession by a majority vote. ". . . a disputed question as to compliance with the provisions of Article 31 must be decided by each member, in his own deliberation."

5. Methods of proof. *a. By the prosecution.* The foundation for the admissibility of a statement may be established by any competent evidence. The absence of compulsion or improper inducement may be established by showing the circumstances under which the statement was obtained; compliance with Article 31*b* can be established by showing that the requisite warning was given or that one was not required. Paragraph 140*a*, MCM provides that a sufficient foundation also can be laid by introducing a declaration of the accused to the effect that he has been warned of his rights and that his statement was made of his own free will provided that the declaration is itself shown to be voluntary if there is a contrary indication. Furthermore, a statement contained in the proffered confession or admission may be treated as such a declaration in the absence of any evidence of improper influence or a violation of Article 31*b*. (*United States v. Davis*, 10 USCMA 624, 28 CMR 190 (1959).)

b. By the defense.

(1) *General.* The defense can contest admissibility by cross-examination of prosecution witnesses on this issue and by offering any competent evidence relevant thereto.

(2) *Right of the accused to testify.* The accused can elect to take the stand as a witness for the limited purpose of testifying as to the circumstances under which his statement was obtained and if he so limits his direct testimony he may not be cross-examined on the truth or falsity of the statement or any other issue outside the scope of his direct testimony other than matters pertaining to his credibility. (As to scope of cross-examination see paragraph 7*c*(3), Chapter XXXVII, *infra.*)

(3) *Out-of-court hearings.* Although paragraph 57*g*(2), MCM, purports to provide that "there is no requirement that the law officer conduct any hearings out of the presence of" the court, the accused nevertheless has the right to present evidence as to the admissibility of a statement at such a closed hearing. He may also elect to accept as final an adverse ruling on admissibility rendered by the law officer after such a hearing and not present the evidence to the court. In such a case, however, there is then no factual issue to be resolved by the court. Furthermore, the defense has the right to require that the prosecution evidence on the issue of voluntariness be presented at an out-of-court hearing and that the law officer make his ruling on admissibility at such a hearing with the result that if the law officer should exclude the contested statement, no mention of its existence would reach the court.

Illustrative cases.

(*a*) *United States v. Cooper*, 2 USCMA 233, 237, 8 CMR 133, 137 (1953). When, at the request of defense counsel, the law officer conducted an out-of-court hearing at which the defense presented evidence as to the voluntariness of the accused's statement, the law officer did not err in not, *sua sponte*, having the evidence presented to the members of the court when it reconvened. "Undoubtedly, also, he [the accused] had the right—as exercised here—to have appropriate evidence received by the law officer outside the presence and hearing of the court for the purpose of enabling that functionary to make his preliminary determination of the question of admissibility. And, finally, he surely had the right—had he wished to exercise it—to have the evidence produced during the out-of-court hear-

ing fully brought before the court on reconvening. However, it may be asked, was the law officer here—under the circumstances of this case—under a duty to bring that evidence before the court without request by defense counsel? We think not. . . . Our conclusion, therefore is that the right to have [this] evidence . . . presented to the court was expressly waived."

(*b*) *United States v. Dioario*, 8 USCMA 353, 359, 24 CMR 163, 169 (1957). At the request of defense counsel, the law officer held an out-of-court hearing at which the accused testified that he made the statement because of an improper inducement, *viz.*, to drop a possible sodomy charge, if he admitted to the robbery. After an adverse ruling by the law officer, the defense presented evidence to the court as to possible coercion arising out of prolonged confinement and interrogation but not as to the alleged inducement. The law officer's failure to instruct the court that it must reject the statement if it found it to be involuntary was not error since on the whole record there was no issue of involuntariness. The accused's testimony at the closed hearing eliminates any possibility that the statement was caused by the alleged coercion. Furthermore, since the defense elected not to present the issue of inducement to the court, the accused cannot complain that the court did not pass upon it. The issue of voluntariness ". . . was raised only in the out-of-court hearing. We are thus presented with a novel situation. Taken as a whole, the testimony on the issue raises only one question, namely, improper inducement. When split into two parts and considered separately, it can be said to raise also an issue as to coercion. Under the circumstances of this case, however, we cannot allow such fragmentation of the evidence. . . . It is, of course, possible to raise several objections to the admissibility of a confession. Some of the grounds may be presented to the law officer in an out-of-court hearing, and others may be presented to the court members. The division may be founded upon the accused desire to keep evidence material to the issue of voluntariness, but of possible disadvantage to him, away from the court members. However, that situation is not before us. The accused made a single issue on the voluntariness of his confession, and the evidence on that issue must be considered as an entity. . . . [D]efense counsel insisted on presenting the evidence in an out-of-court hearing. Had he not again

tendered the issue to the court-martial, he could not on appeal maintain that he had been deprived of his right to have the court members pass on the voluntariness of his confession. . . . The accused did not do that. But he did not offer the really significant part of the evidence because he believed that it might be harmful to him. He now desires to convert his own maneuver to avoid harm into prejudicial error. This we cannot permit."

(*c*) *United States v. Cates*, 9 USCMA 480, 482, 26 CMR 260, 262 (1958). When the prosecution offered a confession of the accused the defense obtained an out-of-court hearing at which he requested that the law officer then hear *all* of the evidence bearing on voluntariness and make his ruling. The request was based upon the expressed desire to avoid making the court aware of even the existence of the confession, if possible. The law officer stated that the prosecution could lay its foundation in open court. The defense then made an offer of proof of matters allegedly showing involuntariness. The prosecution presented its evidence in open court, the defense objected on the grounds of the prior offer of proof, and the law officer admitted the confession into evidence. "There are some decisions to the effect that the failure to hold the preliminary hearing outside the hearing of the jury is not prejudicial if the evidence is sufficient to support the trial judge's ruling admitting the pretrial statement into evidence. . . . But the later and better rule is that the duty to hold such a hearing is mandatory and the refusal to hold it when requested is reversible error. . . . Consequently, we are of the opinion that the law officer's refusal to accord accused the requested out-of-court hearing on the question of the admissibility of his pretrial statement was prejudicial error."

(*d*) *United States v. Aau*, 12 USCMA 332, 30 CMR 332 (1961). At the request of the defense the law officer held an out-of-court hearing on the admissibility of accused's confession. After hearing the evidence on both sides, he ruled in favor of the prosecution. When the court reopened the law officer read to the court the testimony taken at the closed hearing. The defense not only did not object to this procedure but actually participated therein and thereby waived any error which was committed.

6. Hypothetical problem. At the request of the defense, the prosecution evidence that a confession of the accused was obtained after he had been properly warned of its rights and was not the product of any improper influence or coercion is heard at an out-of-court hearing.

The defense offers no contrary evidence. The law officer rules that the confession is admissible. When the court reopens the trial counsel calls to the stand the agent who took the statement and begins to again show compliance with Article 31. The defense counsel objects that he does not wish to have the issue resubmitted to the court-martial. The trial counsel replies that he desires to show the court-martial the manner in which the statement was obtained as bearing on the weight to be accorded thereto. How should the law officer rule?

CHAPTER XIII

THE PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION

References. Article 31, UCMJ; Pars. 149(1), 150*b*, MCM.

1. General. Article 31*a* of the Code is at least the analogue of the Fifth Amendment. "Undoubtedly, it was the intent of Congress in this division of the Article to secure to persons subject to the Code the same rights secured to those of the civilian community under the Fifth Amendment to the Constitution of the United States—no more and no less." *United States v. Eggers*, 3 USCMA 191, 195, 11 CMR 191, 195 (1953). Article 31*a*, therefore, is of importance in two major areas. It controls both the testimonial privileges of witnesses before courts-martial and the right of individuals not to be compelled to produce or create evidence to be used against them. In general, it may be said that Federal case law prevails in both of these areas, and, in the absence of a decision by the Court of Military Appeals on a specific issue, recourse must be had to the Federal cases. In connection with the production or creation of evidence it is important to recognize that Article 31*a* is concerned soley with the admissibility of the physical evidence itself and not with any statements, explicit or otherwise, arising out of the act of the subject in producing or creating the evidence. Such statements are controlled by the law of confessions, chapter IX, *supra*.

2. Production of evidence. *a. General.* The Manual is silent with regard to the question of whether an accused can be compelled to produce items of physical evidence, as opposed to exposing his body or creating or assisting in the creation of evidence. However, there is no doubt that the principles applied in the federal courts are controlling in this area. It is somewhat difficult to isolate the Fifth Amendment principles here involved because the federal decisions in this area frequently link the Fourth and Fifth Amendment. This arises from the fact that search and seizure principles could easily be circumvented if investigators could lawfully order a suspect to produce an item which would not be subject to a lawful search and seizure. However, whatever the Constitutional basis, the law is clear that an accused cannot be compelled to produce and deliver to the authorities items which are sought solely for use as evidence against him. The only exception is found in those situations where there is a pre-existing legal duty on the accused's part, irrespective of the

investigation or the prosecution, to surrender the items upon proper demand.

Illustrative cases.

(1) *Boyd v. United States*, 116 U.S. 616 (1885). In a suit for forfeiture of property for acts of fraud against the Government under the customs laws, a court order compelling defendants to produce an invoice for the subject property is the equivalent of an unreasonable search and seizure and compulsory self-incrimination in violation of the Fourth and Fifth Amendments.

(2) *Gouled v. United States*, 255 U.S. 298 (1921). A search warrant which purports to authorize the search and seizure of certain documents of purely evidentiary value (not the instrumentalities or fruits of the crime) violates the Fourth and Fifth Amendments and the subsequent seizure of the documents is illegal.

(3) *McKnight v. United States*, 115 Fed. 972 (1902). It is violative of the Fifth Amendment for the judge to require the prosecution to make a demand upon the defendant in open court for the production of the original of a document known to be in the latter's possession as a condition precedent to allowing the prosecution to use a copy of the document.

b. Legal duty to produce.

(1) *Wilson v. United States*, 221 U.S. 361 (1911). A person who has rightful custody or possession of a public record or official document cannot refuse to produce it in response to a subpoena issued by a grand jury even though it contains matter which tends to incriminate him. He has voluntarily assumed a duty which exists independently of any possible incrimination and which overrides any claim of privilege. In assuming custody he has accepted the obligation to permit inspection of the record.

(2) *United States v. Austin-Bagley Corp.*, 31 F. 2d 229 (1929). In an action against a corporation, a corporate official may be required not only to produce corporation records for use as evidence but also to authenticate them by his testimony even though the matters contained therein tend to incriminate him personally.

(3) *United States v. White*, 322 U.S. 694 (1944). The president of an unincorporated labor union can be compelled to produce the union records before a grand jury over his claim of the Fifth Amendment. The privilege protects only those documents which are the private property of the person claiming it or at least are in his possession in a purely personal capacity.

(4) *Shapiro v. United States*, 335 U.S. 1 (1948). Where rules promulgated under the Emergency Price Control Act required records of sales and purchases to be kept and to be open to inspection by the Government, the Fifth Amendment is not violated by the compulsory production of such records.

(5) *United States v. Haskins*, 11 USCMA 365, 370, 29 CMR 181, 186 (1960). It is not violative of Article 31 for an officer with supervisory responsibility for a certain fund to order the custodian of the fund to turn over to him the fund records after the custodian had been relieved from responsibility for the fund, even though the custodian was in confinement under charges of having embezzled from another fund and presumably had hidden the missing records. "It ought to be considered hornbook law that a custodian of public monies has a duty to account for funds coming into his possession, and to account means to show properly all receipts and expenditures. . . . It is to be remembered that under law there is no privilege against production such as exists to private papers. . . . It would indeed be strange law to hold that this accused could escape being compelled to produce corporate books and records because they were hidden by him from a successor-employee. . . . As civilian authorities indicate, books and records of a corporation can be subpoenaed even though they incriminate the custodian, and that is a form of compulsion. In the service, an order to produce records of public funds by one in authority might be considered a form of coercion but, under military law, such an order is legal." (Per Latimer, J., with Quinn, C.J., concurring. Ferguson, J., in dissent would hold that since the accused had been relieved as custodian of the fund, he no longer held the records in a "representative capacity" and they were not then in his custody or under his control.")

(6) ACM 16360, *O'Neal*, 28 CMR 834, 840 (1959). A fund custodian, suspected of embezzlement, may lawfully be ordered to open the combination safe in which the records of the fund were kept. However, his action in complying with the order could not be used as an admission by conduct that he knew the combination of the safe. Where a suspect has a pre-existing legal obligation to surrender an item upon proper demand he has no legal right to refuse to do so. Thus, a guard who is suspected of leaving his post can be required to surrender the orders for his post and an individual suspected of having wrongfully discharged his issue weapon can be required to turn it in. "The order to the accused to open the safe was no more than a requirement that he do what his

duties required—make available the contents for inspection and audit. Further, the safe and the contents were alike government property and the accused had no right to withhold them. In consequence, the order to perform the act was legal and Article 31 did not afford the accused any right to refrain from obeying it."

(7) *United States v. Smith*, 9 USCMA 20, 23, 26 CMR 20, 23 (1958). It is a violation of Article 92, UCMJ, to fail to comply with a regulation issued by Headquarters, United States Army in Europe, requiring the operator of any privately owned motor vehicle to report any of certain types of accidents in which he may be involved. There is ample authority for the proposition that the privilege against compelling self-incrimination can be limited by the voluntary entry of an individual upon activities subject to Governmental control. "It may be that if the Government attempts to use any information contained in a report in a subsequent criminal prosecution—a matter which we do not decide—an objection based on the privilege extended by Article 31 would be appropriate. However, it is obvious that the Government here could not use any such evidence against this accused for he failed to submit any report." (Per Latimer, J., & Quinn C. J. Ferguson, J. concurs but expresses the opinion that any report submitted under the regulation would be inadmissible against the accused.)

3. Creation of evidence. *a. General.* Under this heading is considered the question of what can an accused person or a suspect be required to do, *i.e.*, what acts can he be compelled to perform himself or submit to having done to him by others. It will be noted that those acts which are compellable all have two common denominators. They all are acts such that if the subject did not choose to cooperate he could be made to perform them, willy nilly, without violating "due process." Furthermore, none of them involves the obtaining of information from the mind of the suspect. In other words they are not "testimonial utterances" which are described in paragraph 150*b*, MCM, as follows:

> This prohibition against compelling a person to give evidence against himself relates only to the use of compulsion in obtaining from him a verbal or other communication in which he expresses his knowledge of a matter and does not forbid compelling him to exhibit his body or other physical characteristics as evidence when such evidence is material.

b. Illustrative cases.

(1) *Fitting clothes. Holt v. United States*, 218 U.S. 245 (1910). During a murder investigation a suspect can be forced to put on a coat to determine if it fits him, and a witness to the

involuntary fitting can testify thereto at the subsequent trial of the suspect.

(2) *Inspection of the person. United States v. Morse*, 9 USCMA 799, 802, 27 CMR 67, 70 (1958). Article 31 does not prohibit the examination without the accused's consent of his hands or the clothes he is wearing for the purpose of locating traces of certain powder with which the place of the suspected larceny had been dusted. "There is no error in the hand examination. Visual inspection of the person of an accused does not violate any constitutional right or any provision of Article 31. . . . Such inspection does not require the accused to say anything or to produce evidence against himself. . . . To observe that which is open and patent in either sunlight or artificial light is not a search. Nor, we may add, is it a statement within the meaning of Article 31. The visual inspection of the glove also did not violate any of the accused's rights. Clothing worn by an accused at the time he is questioned in connection with an offense is certainly open to view . . . it does not constitute an unlawful search to look at outer garments worn by an accused; nor does it trespass upon his privacy to view such outer clothing with the aid of a particular kind of light." However, the evidence concerning the gloves would be inadmissible if the accused had been compelled to bring them in for examination.

(3) *Taking fingerprints.* CM 403092, *Bartlett*, 28 CMR 589, 590 (1959). Article 31 does not forbid taking the fingerprints of a suspect. " . . . the making of a fingerprint necessitates no action on the part of the suspect. All that is required of him is passive, relaxed submission to the manipulation of his fingers while these are brought in contact, first with the ink and then with the paper. Aside from the slight bodily contact involved in the process, there is little essential difference between photographing a suspect and taking his fingerprints."

(4) *Handwriting.*

(*a*) *United States v. Rosato*, 3 USCMA 143, 146, 11 CMR 143, 146 (1953). An order compelling a soldier, suspected of an offense, to print the alphabet is illegal and so much of paragraph 150*b*, MCM, as purports to authorize compulsory creation of handwriting exemplars is contrary to Article 31*a*. "While these officials could seek to enlist the aid of the suspect, after proper warning, they could not lawfully compel him to furnish the one evidentiary fact without which the suspected document would be meaning-

less. Certain it is, that if law enforcement officials may not lawfully compel the production of self-incriminating evidence then in existence, as in *Boyd* v. *United States*, *supra*, a fortiori, these same officials may not lawfully compel an individual to compose and deliver such evidence. The compulsory production of a handwriting specimen goes far beyond the taking of a fingerprint, placing a foot in a track, and examination for scars, forcibly shaving a man or trimming his hair, requiring him to grow a beard, or try on a garment. Such instances do not involve an affirmative conscious act on the part of the individual affected by the demand. Whereas the printing of the alphabet involves a conscious exercise of both mind and body, an affirmative action."

(*b*) *United States v. Eggers*, 3 USCMA 191, 11 CMR 191 (1953). Samples of the accused's handwriting taken from him involuntarily and before trial are inadmissible as evidence under Article 31.

(5) *Voice specimens.* *United States v. Greer*, 3 USCMA 576, 13 CMR 132 (1953). So much of paragraph 150*b*, MCM, as purports to say that an accused can be compelled to speak words for purposes of voice identification is in conflict with Article 31 and is incorrect. Speaking words requires the exercise of both mental and physical faculties and, according to the standards laid down in *United States* v. *Rosato*, is protected by Article 31*a*.

(6) *Stomach contents.* *Rochin v. California*, 342 U.S. 165 (1952). It is violative of due process to permit the use in evidence of capsules containing morphine removed from the defendant's stomach by use of a forcibly administered emetic.

(7) *Urine.* The following cases illustrate the development of the law concerning the obtaining of urine specimens from accused persons *for investigative purposes.* It is essential to an understanding of the problems here involved to be aware of the fact that what the investigators are seeking is the obtaining of the specimen at a certain time and in a certain container and that this can be accomplished only by catheterization or by the *active* cooperation of the accused.

(*a*) *United States v. Williamson*, 4 USCMA 320, 15 CMR 320 (1954). It is not violative of either Article 31 or due process to catheterize an unconscious suspect who has been found in a deep coma. (Per Judges Latimer and Brosman.) Chief Judge Quinn would hold such conduct "prohibited not only by the Fifth Amendment . . . and by the

provisions of the Uniform Code of Military Justice, but by natural and divine law as well." (At p. 334.)

(*b*) *United States v. Booker*, 4 USCMA 335, 15 CMR 337 (1954). A catheterization performed with the active cooperation of the suspect after he had been unable to void urine when requested to do so is not forbidden by the Code.

(*c*) *United States v. Barnaby*, 5 USCMA 63, 17 CMR 63 (1954). Evidence obtained as a result of the accused's compliance with an order to furnish urine during an investigation is admissible and was not obtained through compulsory self-incrimination, there being no "testimonial utterance." (*Per* Judges Latimer and Brosman.) Chief Judge Quinn, in dissent, mentions those acts which the accused can be required to perform or submit to and states ". . . that such instances do not involve an affirmatively conscious act on the part of the individual affected by the demand. A further distinguishing element is the fact that should the individual refuse to comply with the order reasonable force only would be required to accomplish the objective." (At p. 65.)

(*d*) *United States v. Jones*, 5 USCMA 537, 18 CMR 611 (1955). Catheterization of a suspect over his protests is violative of due process and fundamental decency. (*Per* Judges Quinn and Brosman.) Judge Latimer would find neither compulsory self-incrimination nor brutality in catheterization under proper medical conditions.

(*e*) *United States v. Jordan*, 7 USCMA 452, 22 CMR 242 (1957). An order to a suspect to furnish a urine specimen is illegal. (*Per* Judges Quinn and Ferguson.) *Quinn*—". . . a urine specimen obtained from a person by force or threat, or the unauthorized intrusion of an instrument in his body, for use against him in a criminal proceeding is inadmissible. . . . [T]he force of a military order by a superior officer is one of the strongest known to military law. We hold, therefore, that the order here was illegal. To the extent that *United States v. Barnaby*, *supra*, is inconsistent with this decision, I would overrule it. However, Judge Ferguson, who joins me in the result in this case, does not choose to go that far." (At p. 455, 245.) *Ferguson*—The subject order is violative of Article 31*a* which is not limited to "testimonial utterances" but embraces all evidence which is incriminating. A reappraisal of *Barnaby* is not here required since the instance case is not concerned with the admissibility of evidence. *Latimer* (in dissent)—If the order is illegal, evidence obtained as

a result thereof would necessarily be obtained by compulsion. Therefore, the majority opinion necessarily overturns the principles handed down in *Barnaby*.

(*f*) *United States v. Forslund*, 10 USCMA 8, 9, 27 CMR 82, 83 (1958). The accused, suspected of narcotics use, was unable to comply with an order of his superior officer to furnish urine specimens and, therefore, was placed in a detention cell and informed that he could not have "latrine privileges" until he complied. During the ensuing night and early morning, he supplied three specimens. The results of the urinalysis of these specimens was inadmissible. It is unnecessary to decide whether the accused's fear of catheterization was an additional influence since ". . . the illegal order alone provides us with the compulsion, even without the possibility of a fear of catheterization or the confinement present in this case. . . . Here, [unlike *Jordan*] the question of admissibility is specifically raised and we have no hesitation in finding that where evidence is secured in violation of any of the provisions of Article 31, supra, it is inadmissible. To hold otherwise would effectively deprive Article 31 of its force and make of it a hollow gesture. Nor can we condone in any manner the use by the military of orders held by this Court to be illegal."

(8) *Blood.*

(*a*) *Breithaupt v. Abram*, 352 U.S. 432 (1957). It is not violative of due process to convict a defendant upon evidence obtained as a result of having a blood specimen withdrawn from the unconscious defendant by a doctor under established medical conditions. This situation does not present the due process factors found in *Rochin v. California*.

(*b*) *United States v. Musguire*, 9 USCMA 67, 69, 25 CMR 329, 331 (1958). An individual cannot be punished under Article 90, UCMJ, for disobedience of an order to remove his shirt and submit to a blood test. An order is not "lawful" in the sense of Article 90 unless it relates to a military duty. Article 31 operates to relieve a suspect of any duty to do or say anything concerning the offense under investigation. "It is evident that it is not the 'duty' of a person to assist in the production of evidence which may convict him of a crime."* *Breithaupt v. Abram* was concerned solely with Fourteenth Amendment due process

and not with the admissibility of evidence in the Federal Courts.

*At this point, the majority opinion written by Quinn, C.J. inserted the following footnote. "Apart from the question of Constitutional admissibility, whether there are other valid means of obtaining a sample of the accused's blood for use as evidence is another matter. See dissenting opinion of Chief Judge Quinn in *United States v. Barnaby*, 5 USCMA 63, 65, 17 CMR 63, 65 [*supra*]."

Note: Musquire holds *only* that the accused cannot be prosecuted for disobeying the order to cooperate in permitting a sample of his blood to be taken. The opinion does not purport to deal with the *admissibility* of a blood specimen obtained in compliance with such an order. However, the footnote quoted above is relevant to this issue. Therein, Chief Judge Quinn refers to his dissent in *Barnaby* wherein he referred to situations where "reasonable force only" would be required to attain the desired end should the suspect refuse to comply with the order. This may mean that although an order to a suspect to furnish any evidence does not relate to a "military duty" within the rationale of *Musguire* and, hence, is "illegal" *for purposes of prosecution for disobedience*, it does not necessarily follow that compliance with such an order results in the evidence thereby obtained being inadmissible. The admissibility of the evidence may turn on whether it could have been obtained lawfully if the suspect had not chosen to comply with the order. Under this rationale, urine obtained as the result of compliance with an order is rendered inadmissible not by the "illegality" of the order but because the only other method of obtaining the specimen, i.e. compulsory catheterization, violates due process. Similarly, fingerprints obtained by compliance with an order would be admissible, despite the fact that the accused had no duty to obtain the order, because they could have been obtained by "reasonable force" had the subject chosen not to cooperate. In other words, the compulsion inherent in the order is viewed as reasonable or unreasonable force depending upon whether the physical force needed to obtain the evidence from an unwilling suspect would be reasonable or unreasonable under due process principles. The ultimate question with regard to the admissibility of a blood specimen obtained as the result of compliance with an order given to the suspect would be whether the taking of blood without the consent of the individual violates due process. *Breithaupt v. Abrams* would be relevant to this issue.

(*c*) *United States v. Hill*, 12 USCMA 9, 10, 30 CMR 9, 10 (1960). "An order to provide a sample of blood for clinical purposes is valid. *United States v. Baker*, 11 USCMA 313, 29 CMR 129; cf *United States v. Musguire*, 9 USCMA 67, 25 CMR 329." (This *dictum* appears in a majority opinion written by Quinn, C.J., and concurred in by Ferguson, J., which upheld the admissibility of the blood specimen concerned on the ground that the accused had furnished it voluntarily.)

4. The meaning of "compulsion." *a. General.* The term "compulsion" with reference to Article 31*a* has the same meaning as "coercion" in Article 31*b*. Whether or not a given item of evidence has been compelled is a question of fact to be determined in light of all the surrounding circumstances. (See paragraph 5, chapter IX, supra.)

Illustrative cases.

(1) *United States v. Brown*, 7 USCMA 251, 260 22 CMR 41, 50 (1956). When the accused was apprehended on suspicion of having made obscene telephone calls and, upon request, spoke certain words over the telephone to the recipient of the calls for purposes of voice identification, the fact that he did so "reluctantly" does not necessarily mean that his compliance was involuntarily. ". . . consent given in the face of an order from a superior may as easily be viewed as coerced as in the case of 'consent' to a search and seizure. . . . However, this record fails to show that accused was cowed by the fact that one of his apprehenders was a superior noncommissioned officer or because they were officials of the military police system. He was no newcomer to the service, being a sergeant with over eight years' experience in military police work. At all times he showed an awareness of his rights, and indeed, vehemently insisted, at the time of his apprehension, that he knew them and intended to rely upon them. Under these circumstances we simply have no cause to conclude that the evidence of voice identification was the product of coercion arising out of the relative rank, or assignment of the participants."

(2) *United States v. McClung*, 11 USCMA 754, 29 CMR 570 (1960). The accused was found unconscious in his barracks latrine with an eyedropper in one hand and a hypodermic needle in the other. He was taken to the hospital where the doctor aroused him by slapping his face and, in the presence of a CID agent who had been summoned by the doctor, asked him for a urine specimen. The accused was able to void only after drinking "eight or ten glasses of water." Meanwhile

he had lapsed into unconsciousness several times. The holding in *Forslund*, subparagraph 3*b*(6)(*f*), *supra*, ". . . and, indeed, Article 31 itself, is rendered meaningless if a urine sample may properly be obtained by 'request' from one whose physical state is such that he is unable properly to evaluate the desires of a commissioned officer and to make a knowing election concerning the 'asking' for the sample. In short, a semi-conscious accused is in no condition voluntarily to respond to an inquiry whether he is willing to furnish evidence against himself . . . we hardly think it likely that McClung possessed the ability to understand the 'request' of his superior and voluntarily to consent to furnish the specimen."

b. Inducements. Although Article 31*a* speaks only of compulsion and the only mention of inducements in the entire Article is contained in Article 31*d* which, by its terms, is expressly limited to "statements," the Court of Military Appeals has indicated that "improper inducement" is to be equated to "compulsion" for the purpose of passing upon the admissibility of items of physical evidence of a nature such as to be protected by Article 31*a*.

Illustrative case.

United States v. Minnifield, 9 USCMA 373, 378, 26 CMR 153, 158 (1958). Where the accused upon the request of criminal investigators and after being specifically advised that he was not obliged to furnish handwriting specimens did so in reliance upon a promise that he would be tried by special court-martial (he was tried by general court-martial) if he cooperated, the promise of leniency raised an issue as to whether the specimens were obtained by an improper inducement. "To exclude exemplars from the thrust of Article 31 because they do not literally constitute 'statements' represents a flimsy and artificial technicality which isolates a single word from an entire concept. . . . We would imagine that but slight inconveniences would be occasioned by requiring military law enforcement officers, before enlisting an accused's aid in obtaining incriminating samples of his handwriting, to warn him of his rights and at the same time refrain from tempting him with improper inducements in order to obtain such evidence." *Note:* The Court expressly reversed the holding in *United States v. Ball*, 6 USCMA 100, 19 CMR 226 (1955), that a handwriting specimen was admissible even though obtained throught a promise not to prosecute. For a fuller excerpt from *United States v. Minnifield*, see paragraph 4*c*, chapter X, *supra*.

5. Raising the issue at trial. The issue of compulsory self-incrimination normally is raised in two types of situations. In one, the trial counsel has in his possession evidence which the defense claims was obtained in violation of Article 31*a*, and is, therefore, in-

admissible. In the other, the issue arises when an effort is made during the course of the trial to compel the accused, or a witness, to produce certain evidence or to compel any witness to testify as to matters which may incriminate him.

6. Evidence already obtained. *a. From the accused.* In paragraph 4, chapter XII, *supra*, the import of the provision of paragraph 140*a*, MCM, that the law officer's ruling on the admissibility of statements is not conclusive was discussed. There is no similar provision in the Manual requiring the court members to pass upon the "voluntariness" of the accused's production of evidence and it would seem that the admissibility of such evidence is a purely interlocutory matter for the final decision of the law officer. However, in the *Minnifield* case, *infra*, the Court of Military Appeals held that a handwriting specimen is a "statement" for Article 31 purposes and that the members of the court must pass upon its voluntariness in like manner as any other statement. If the *Minnifield* case extends to all acts of the accused which he cannot lawfully be compelled to perform (see discussion in paragraph 4*c*, chapter X, *supra*) then whenever an issue is raised as to whether such acts were performed voluntarily, the issue must be submitted to the members of the court. However, the law officer would still be required to make a final ruling as to whether the act which produced the evidence was one which the accused could lawfully be compelled to perform. It would only be *after* he had made a ruling that the act was protected by Article 31*a* that the issue of involuntariness would come into play.

Illustrative case.

United States v. Minnifield, 9 USCMA 373, 378, 26 CMR 353, 358 (1958). "The accused concedes that he was warned; however, he contends that the exemplar, as well as the statements, resulted from improper inducements. From this circumstance, he argues that the issue of voluntariness as to the exemplars should have been submitted to the court-martial for its consideration in the same manner as the statements. This very same argument was made before the board of review which disposed of the accused's contention in the following manner: '. . . we find no way in which the issue of voluntariness would touch upon the trustworthiness of a handwriting exemplar as it does that of a confession.' While we appreciate the fact that the issue of voluntariness does not touch upon the trustworthiness of the exemplar, we believe this presents the question in too narrow a fashion. The real issue is simply whether or not a court-martial should be permitted to consider a handwriting specimen which it determines was involuntarily obtained. . . . We specifically hold that an accused's handwriting exemplar is equated to a 'statement' as that term is found in Article 31. . . . When an issue of involuntariness is raised . . . it

must be submitted under proper instructions to the court-martial for its consideration. Here the law officer erred in not submitting that issue to the court."

b. From a third party. As will be seen in paragraph 7*b*, *infra*, the accused has no standing to complain that the rights of another person under Article 31 have been violated.

7. The privilege of a witness. *a. General.* A witness, upon his claim of privilege, will not be required to answer any question the answer to which might tend to incriminate him with respect to violations of federal or military criminal law unless he has waived his privilege against self-incrimination as to the matter covered by the particular question or unless his being tried for the offense with respect to which he asserts the privilege is legally barred. A witness who has voluntarily testified to an incriminating matter thereby waives his privilege as to such matter. However, he may nevertheless assert his privilege as to questions which would *further* incriminate him. Furthermore, this waiver is binding only in the same proceeding in which the testimony is given and does not foreclose a subsequent claim of privilege in an independent proceeding such as a rehearing or new trial.

Illustrative cases.

(1) *United States v. Murphy*, 7 USCMA 32, 37, 21 CMR 158, 163 (1956). In a trial held in Japan, a Japanese witness could not properly claim a privilege based on the possibility that answers to certain questions would incriminate him under Japanese criminal law and the law officer was correct in ordering him to answer the questions. "We, therefore, conclude that the privilege against self-incrimination, granted by Article 31, like that granted by the Fifth Amendment, extends only to 'a reasonable fear of prosecution' under the laws of the United States. (Per Latimer, J., Quinn, C. J., concurs on the ground that the accused cannot complain of a violation of the privilege of a witness but reserves judgment on the application of the general rule to a situation where the Government, by treaty or administrative agreement, has the authority to compel a foreign national to appear and testify at a court-martial held abroad. "Perhaps the general rule is as indicated in the principle opinion . . . but it may not apply in certain situations." (At p. 38, 164.) Ferguson, J. did not participate in the case.)

(2) *United States v. Weisman*, 111 F. 2d 260, 262 (2d Cir. 1940). "Obviously a witness may not be compelled to do no more than show that the answer is likely to be dangerous to him, else he will be forced to disclose the very facts which the

privilege protects. Logically, indeed, he is boxed in a paradox, for he must prove the criminatory character of what it is his privilege to suppress just because it is criminatory. The only practicable solution is to be content with the door's being set a little ajar and while at times it permits the suppression of competent evidence, nothing better is available."

(3) *Rogers v. United States*, 340 U.S. 367, 374 (1951). Once a witness makes voluntary disclosure of an incriminating fact, the privilege is gone as to anything which is proper cross-examination as to that fact, but the cross-examiner may not, over a claim of privilege, call for anything that would further incriminate the witness. "Admittedly, petitioner had already 'waived' her privilege of silence when she freely answered incriminating questions relating to her connection with the Communist Party. But when petitioner was asked to furnish the name of the person to whom she turned her Party records, the court was required to determine, as it must whenever the privilege is claimed, whether the question presented a reasonable danger of further crimination in light of all the circumstances, including any previous disclosures. As to each question to which a claim of privilege is directed, the court must determine whether the answer to that particular question would subject the witness to a 'real danger' of further crimination."

(4) *Brown v. United States*, 359 U.S. 41 (1959). The conferring of statutory immunity from federal prosecution as to matters concerning which a witness testifies before a federal grand jury denies the witness the right to claim privilege before that body and he can be held in criminal contempt for persistent refusal to answer the questions put to him.

(5) In *re Neff*, 206 F. 2d 149, 152 (3d Cir. 1953). Since a grand jury hearing "is a proceeding which is wholly separate and distinct from, and of a different nature than, the subsequent trial of the defendant," the giving of testimony before the grand jury does not bar a valid claim of privilege by the same witness at a subsequent trial. "It is settled by the overwhelming weight of authority that a person who has waived his privilege of silence in one trial or proceeding is not estopped to assert it as to the same matter in a subsequent trial or proceeding. The privilege attaches to the witness in each particular case in which he may be called on to testify, and whether or not he may claim it is to be determined without reference to what he said when testifying as a witness on some other trial, or on a former trial of the same

case, and without reference to his declarations at some other time or place."

b. The accused's rights as to the witness' privilege. The privilege is personal to the witness and may not be asserted by anyone else, including the accused and his counsel. It must be noted that a denial of the privilege, however improper, cannot prejudice the accused since the only result is to place relevant and otherwise competent testimony before the court. However, an improper sustaining of a claim of privilege asserted by a witness while under examination by the defense can be erroneous as to the accused to the extent that he is thereby deprived of his right to present competent testimony to the court.

Illustrative Cases.

(1) *United States v. Murphy*, 7 USCMA 32, 38, 21 CMR 158, 164 (1956). The accused has no standing to complain of a violation of a witness' privilege against compulsory self-incrimination. The privilege does not inure to the benefit of either party to the litigation but is personal to the witness. "In every instance where the privilege is operative, a witness has the personal choice of either answering the question put to him or exercising the option which the law gives him to refuse to respond . . . . But that is a matter between the witness and the court, as representative of the sovereignty which called it into being. The accused, as a party, does not have the right to demand that the witness be reminded of his right to remain silent, nor does he possess the right to assert the privilege for the witness . . . It necessarily follows that the accused may not complain if the law officer coerces a witness to testify against him, by erroneously refusing to recognize a proper claim of this privilege."

(2) *United States v. Ballard*, 8 USCMA 561, 566, 25 CMR 65, 70 (1958). In a rape prosecution the law officer repeatedly advised the victim and three defense witnesses of their privilege while the defense was attempting to establish the prior lack of chastity of the victim and refused to so advise prosecution witnesses. Whether or not to advise witnesses of the privilege is within the sound discretion of the law officer. "But hypersensitivity to the possibility that a witness is not aware of his privilege against self-incrimination should not result in a law officer monitoring each question and by repeated warnings shutting off the search for the truth. Obviously, if he errs and orders the witness to supply relevant evidence, albeit incriminating, the accused cannot complain, for he is not the beneficiary of the privilege, and the evidence produced against him has some probative value. In that instance the error

legally prejudices the witness not the opposing party. But if the law officer favors the witness and keeps evidence out of the record, the accused is denied the benefit of testimony which might assist the court-martial in ascertaining the truth. For that reason, a law officer should not interpose repeated warnings unless the witness gives clear indications that he does not understand the advice previously given. It is fairly obvious that implicit in a warning is a suggestion not to answer and to reiterate a prompting once given is to destroy the balance between the protection of the witness on the one hand, and the necessity of getting at the truth on the other . . . . While we have no disposition to discourage law officers from protecting (sic) uniformed witnesses of their privilege to refuse to answer incriminating questions, we believe . . . the law officer, in effect, exercised the privilege for the witness. He thus unnecessarily interferred with the production of relevant evidence and turned an option into a prohibition. This was erroneous and prejudicial to the accused."

c. Improper use of claim of privilege. As a matter of law, no inference may be drawn from the fact that a witness exercises his privilege against compulsory self-incrimination. Therefore, it is improper for counsel to call a witness to the stand for the *sole* purpose of informing the court of the claim of privilege.

Illustrative cases.

(1) *United States v. Maloney*, 262 F. 2d 535 (2d Cir. 1959). It is improper for the prosecutor to call a witness to the stand if the prosecutor knows that the witness (an accomplice of the defendant) will claim his privilege. There is a real danger that the jury will draw the logical, although illegal, inference from the claim, that the witness is guilty of the misconduct indicated by the questioning and this results in the witness having given information to the jury while at the same time not being subject to cross-examination thereon. The jury must always be instructed to disregard the claim of privilege but the cautionary instruction may not be sufficient to cure the harm. If the defense should attempt in argument or otherwise to have the jury draw an inference adverse to the prosecution from the failure to call a witness, the prosecutor is then free to have the witness claim his privilege on the stand in order to remove such inference.

(2) *United States v. Tucker*, 267 F. 2d 212 (3d Cir. 1959). At a new trial, it is improper for the prosecution to call a witness who claimed his privilege at the original hearing unless

there is good reason to believe that the witness has changed his mind in the interim and is now willing to testify.

(3) *United States v. Bolden*, 11 USCMA 182, 184, 28 CMR 406, 408 (1960). When an accomplice to the larceny charged was called as a prosecution witness, defense counsel objected that trial counsel knew the witness would claim his privilege. Trial counsel admitted that the witness' counsel had informed him that the witness had been advised as to his rights. The witness took the stand and, despite his repeated claim of privilege as to all facts material to the larceny, the trial counsel continued to question him with the result that the record showed that out of 46 questions, 17 required the witness to claim his privilege or explain the claim. "At the outset we reject the Government's argument that trial counsel's conduct was not erroneous because he did not 'know' that Lyons would not testify. While his initial disclaimer might have some validity, his 'ignorance' was quickly dispelled by the witness . . . we agree . . . that the continued questioning of the witness and the repeated claim of privilege was erroneous. . . . the great weight of authority is to the effect that no unfavorable inference is to be drawn from a witness' claim of the privilege against self-incrimination . . . . If no adverse inference is to be drawn . . . it follows that the extended interrogation of such a witness, knowing he will repeatedly claim his privilege, is even more to be condemned. . . . Parenthetically, we note the entire controversy could have been avoided had counsel and the law officer questioned the witness himself in the out-of-court hearing to determine whether he intended to avail himself of his obvious right not to testify." When a witness does claim his privilege on the stand "it is incumbent upon the law officer in every case to inform the jurors they will not draw any such inferences."

8. The accused as a witness. *a. General.* The accused has the right to remain completely silent at his trial and cannot be compelled to take the stand as a witness against himself. However, this right does not permit him to elect to testify on his own behalf and then assert the privilege to prevent cross-examination on his testimony. By taking the stand he is deemed to have waived his privilege as to those matters covered by his own testimony. However, his privilege remains as to other matters. The extent to which the accused may be cross-examined is covered in paragraph 7, chapter XXXVII, *infra*.

Illustrative case.

Brown v. United States, 356 U.S. 148, 156 (1958). A respondent in a denaturalization proceeding who voluntarily testifies in her own behalf and denies any communist activities during the ten year period preceding her naturalization may be held in criminal contempt for refusing on cross-examination, to testify as to whether she had been a member of the Communist Party during such period. ". . . when a witness voluntarily testifies, the privilege against self-incrimination is amply respected without need of accepting testimony freed from the antiseptic test of the adversary process. The witness himself, certainly if he is a party, determines the area of disclosure and therefore of inquiry. Such a witness has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness, not to testify at all. He cannot reasonably claim that the Fifth Amendment gives him not only this choice but, if he elects to testify, an immunity from cross-examination on the matter he has himself put in dispute. It would make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell . . . . The interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination. Petitioner, as a party to the suit, was a voluntary witness. She could not take the stand to testify in her own behalf and also claim the right to be free from cross-examination on matters raised by her own testimony on direct examination."

b. Testimonial disclosures. Unless the accused has elected to take the stand, any attempt whatsoever to extract evidentiary information from him violates his right to remain completely silent.

Illustrative case.

United States v. Phillips, 2 USCMA 534, 10 CMR 32 (1953). In an assault prosecution where ownership of a certain knife was at issue, the law officer violated the accused's right to remain silent when, after the trial counsel dictated a description of the exhibit for the record, the law officer asked the accused, who had not taken the stand, "Does that describe your knife?"

c. Non-testimonial disclosures. The accused's privilege against compulsory self-incrimination protects him from being required to do at his trial anything that would be forbidden prior thereto such as submitting handwriting exemplars or producing incriminating documents. However, by taking the stand and testifying he waives his

privilege and thereafter cannot invoke the privilege as to matters relevant to the issues covered by his voluntary direct testimony.

Illustrative cases.

(1) *United States v. Mullaney*, 32 Fed. 370 (1887). In a forgery case, the defendant by electing to take the stand as a witness and deny guilt waived his Fifth Amendment rights and, on cross-examination, he could be compelled to prepare and submit handwriting exemplars of the allegedly forged names.

(2) *United States v. Eggers*, 3 USCMA 191, 195, 11 CMR 191, 195 (1953). An accused who takes the witness stand can be required, on cross-examination, to furnish samples of his handwriting. "In that situation, of course, the defendant had waived his privilege by taking the stand."

9. Hypothetical problems. *a.* The accused was suspected of having made certain obscene telephone calls. His company commander summoned him to the orderly room, and read Article 31 to him. The CO then told the accused that he was suspected of having made certain obscene calls and asked him if he understood his rights. The accused replied, "I guess so." The CO then requested him to speak certain words over the telephone. The accused complied and his voice was identified by the recipient of the subject calls. Is this evidence admissible?

b. The accused's commanding officer is conducting a lawful search of the lockers in the barracks. The accused's locker is locked and the accused is ordered to produce the key thereto. He does so and incriminating evidence is found in the locker. At the trial his defense counsel contends that this evidence was obtained by compelling the accused to incriminate himself and is inadmissible. How should the law officer rule?

c. A narcotics suspect refuses to furnish a sample of his urine when requested to do so.

(1) During the subsequent interrogation he requests permission to visit the latrine and is taken to a small cubicle containing no plumbing fixtures whatsoever and a small bucket. He urinates therein. Is the result of the urinalysis of this specimen admissible over defense objection?

(2) The suspect is ordered to urinate in a specimen bottle and does so. The urinalysis of this specimen discloses traces of morphine. Subsequently, after being given a proper warning under Article 31, he is confronted with the results of the test and told that he might as well confess since they "have him cold anyhow." Is his resulting confession admissible over defense objection?

d. The military police receive an anonymous phone call informing them that a group of drug addicts are having a party in an empty

warehouse on the post. They descend upon the warehouse and find the accused lying on the floor in a semi-conscious condition and take him to the hospital where they ask the doctor to take a specimen of urine and safeguard it as evidence. The accused is still semi-conscious and gives incoherent replies to all questions. He is catheterized while two aid men hold him down forcibly. During the procedure, he groans and struggles. The doctor testifies that in his opinion the obtaining of a urine specimen was essential so that he could identify the cause of the accused's condition and be able to treat it properly. Are the results of the urinalysis of the specimen admissible, over defense counsel's invocation of Article 31*a* and 31*b*, at the accused's subsequent trial for wrongful use of narcotics?

CHAPTER XIV

APPELLATE REVIEW OF ARTICLE 31 VIOLATIONS

References. Art. 59(*a*), UCMJ; Par. 87*c*, MCM.

1. General. Since the beginning of the Code a majority of the Court of Military Appeals has held that the use of evidence obtained in violation of the accused's rights under Article 31 constitutes "general prejudice," *i.e.*, that the violation of such a fundamental right requires reversal irrespective of any showing that the inadmissible evidence actually did affect the outcome of the trial. Therefore, it is immaterial that the competent evidence of guilt *aliunde* the inadmissible evidence is "compelling" or "overwhelming." The only exception to this general rule exists where the record shows what amounts to a waiver by the accused of the improper use of the evidence. However, the failure to lay a proper foundation for the use of evidence protected by Article 31 is not deemed the equivalent of a showing of a violation of the Article and such a failure may be tested for "specific prejudice."

2. General prejudice.

Illustrative cases.

a. United States v. Wilson, 2 USCMA 248, 255, 8 CMR 48, 55 (1953). The use of a confession obtained without the requisite preliminary warning necessitates reversal. " . . . there is an abridgment of the policy underlying the Article which must—we think—be regarded as 'so overwhelmingly important in the scheme of military justice as to elevate it to the level of a creative and indwelling principle.' . . . To put the matter otherwise, we must and do regard a departure from the clear mandate of the Article as generally and inherently prejudicial."

b. United States v. Greer, 3 USCMA 576, 579, 13 CMR 132, 135 (1953). It is reversible error to compel an accused to speak at his trial for the purpose of voice identification. "The accused was deprived of a right secured by the Constitution of the United States and the Uniform Code of Military Justice. Material prejudice resulted as a matter of law."

c. United States v. Taylor, 5 USCMA 178, 183, 17 CMR 178, 183 (1954). When an unwarned admission of an accused is admitted in evidence, reversal is required despite the presence in the record of an extrajudicial complete confession and ample evidence of the corpus

delicti. ". . . [W]e [have] ruled that 'Our general premise must certainly be that a violation of the accused's privilege against self-incrimination will necessitate reversal regardless of the presence of compelling evidence of guilt.' Although we spoke there of the privilege against self-incrimination, we find no basis for distinction in the circumstance that we are here met by the violation of another provision of Article 31. . . . Given the very nature of the thinking beyond the notion of general prejudice—its ideal core—it must be apparent that no place may be found within it for the compelling evidence rule."

d. United States vs. Williams, 8 USCMA 443, 445, 24 CMR 253, 255 (1957). Judge Ferguson joins Chief Judge Quinn in applying the doctrine of general prejudice to Article 31 violations. "Over the years, we have consistently reiterated this principle; we have refused to uphold a conviction based upon evidence obtained and admitted in violation of the Article; and we have consistently declined to weigh the other evidence of guilt for the purpose of affirming a conviction. . . . Time and experience have served to emphasize the fundamental correctness of our position."

3. Specific prejudice. *a. Waiver through failure to object.*

(1) *United States v. Fisher*, 4 USCMA 152, 156, 15 CMR 152, 156 (1954). The presence in the record of compelling evidence of guilt permits affirmance despite the use by the prosecution of an unwarned admission made by the accused, when no objection was raised at the time such evidence was offered. "On the record, we conclude that the accused's failure to object to the admission of the pretrial statements obtained from him without the warning required by Article 31 precludes him from urging the error on appeal as a ground for reversal. However, we wish to make it clear that this rule is not inflexible. Certainly, we will consider error in the admission of a pretrial statement obtained in violation of Article 31, even in the absence of objection or a motion to strike if the error results in depriving the accused of a fair trial or produces a manifest miscarriage of justice."

(2) *United States v. Dial*, 9 USCMA 700, 704, 26 CMR 480, 484 (1958). The fact that an Article 31*b* warning failed to include any reference to the accused's right to remain silent can be waived by a failure to object on this ground to the receipt of his statement in evidence. "Accused was represented by certified counsel, and there was no question raised about the completeness of the warning. Furthermore, the statement made was merly cumulative of the relevant and undisputed testimony, and its reception could not work 'a manifest miscarriage of justice.' The doctrine of waiver is, therefore, applicable. . . . In this case, had objection made on the ground

of inadequacy of warning, the prosecution might have produced additional evidence to overcome the deficiency."

(3) *United States v. Kelley*, 7 USCMA 584, 23 CMR 48 (1957). In a special court-martial where the defense counsel is not a qualified attorney, the failure to object to the use of an unwarned admission of the accused is not a waiver of the violation and reversal is required.

(4) *United States v. Kowert*, 7 USCMA 678, 682, 23 CMR 142, 146 (1957). A prosecution witness testified as to the results of an interrogation of the accused by him after a proper warning. Without any objection by the defense, he testified as to several incriminating admissions made by the accused as to two of the three offenses charged and that the accused availed himself of his rights under Article 31 when questioned as to the third offense. This latter offense was vigorously contested by the defense and the prosecution evidence was not compelling as to it. "The Government contends that because the accused did not object at the trial to the inadmissible evidence, he cannot now complain. . . . The error, however, relates to the only real issue in the case, and it would be manifestly unjust if we applied the ordinary rule of waiver.

b. Waiver through defense evidence.

(1) *United States v. Hatchett*, 2 USCMA 482, 487, 9 CMR 112, 117 (1953). Any error committed by the law officer in questioning the accused on the merits of the case when the latter had taken the stand for a limited purpose was cured by the accused subsequently taking the stand and by his testimony making a judicial confession of guilt. ". . . it would be ridiculous to reverse a case because evidence was placed in the record by the Government prior to the time the accused voluntarily and judicially confessed to the same state of facts. . . . [T]he right not to be required to incriminate oneself is a privilege which must be claimed or waived. Valuable as it may be, its violation can be cured by the voluntary act of the person injured."

(2) *United States v. Trojanowski*, 5 USCMA 305, 313, 17 CMR 305, 313 (1954). The presence in the record of a coerced confession, extracted by force from the accused by the victim of his barracks larceny, does not require reversal where the accused elects to take the witness stand and offers testimony amounting to a judicial confession of guilt. ". . . if an accused judicially admits his guilt of an offense by voluntarily testifying on the witness stand to facts which otherwise

might not have been admissible, he cannot complain that he has been unjustly dealt with."

(3) *United States v. Fisher*, 7 USCMA 270, 277, 22 CMR 60, 67 (1958). "There is a generally accepted rule of law to the effect that where a defendant objects to the introduction of evidence which is admitted, and afterwards introduces the same evidence himself, the admission of the testimony over his objection is not grounds for reversal, though the ruling was erroneous and the evidence incompetent or improper. . . . The board of review seems to have concluded that it did not apply because the admission of the exhibit in evidence compelled the accused to venture into an unwanted field. It may well be that if an accused is forced to dispute or explain testimony improperly admitted in evidence, he can complain on appeal that he has been prejudiced, but if he merely corroborates the Government's testimony or, as here, goes further and places before the court-martial even more damaging information on the same subject matter, he has lost his right to complain about the harm done his cause. An accused may be compelled to answer or explain incompetent evidence and thus be forced into a compromising position, but he is not required to prove the same facts he complains about."

c. Failure to lay foundation.

(1) *United States v. Josey*, 3 USCMA 767, 14 CMR 185 (1954). The failure of the prosecution to comply with the procedural requirements of the Manual with reference to showing that a statement has been obtained in compliance with Article 31 is not to be equated to a showing that the statement is "involuntary" and, therefore, does not require the invocation of the doctrine of general prejudice. This failure to lay the necessary foundation is error but it may be tested for specific prejudicial effect.

(2) *United States v. Shaw*, 9 USCMA 267, 270, 26 CMR 47, 50 (1958). Assuming *ad arguendo* that a doctor must give an Article 31 warning before examining an accused to determine his mental competency at the time of the alleged offense, the failure of the defense counsel to object to the doctor's testimony as to statements made to him by the accused is a waiver of the failure to show that such a warning was given. "The doctor's testimony does not indicate that the accused was not advised of his rights under Article 31. Had there been an objection to his testimony on that ground, the prosecution might well have been able to show that the advice was in fact given. Under the circumstances, the accused's failure to object constitutes a waiver."

4. Effect of striking inadmissible evidence. *a. General.* If evidence inadmissible under Article 31 is put before the court before it becomes apparent that it is so inadmissible or if, though not received in evidence, the court otherwise becomes aware of it, an instruction by the law officer to disregard the evidence may or may not remove any prejudice. In either case, the record will be examined very closely to determine whether the inadmissible evidence affected the outcome of the trial.

b. Illustrative cases.

(1) *United States v. O'Briski*, 2 USCMA 361, 363, 8 CMR 161, 163 (1953). The prosecution showed that certain prosecution witnesses had been threatened with physical harm but failed to connect the threats with the accused. The law officer struck this evidence from the record and instructed the court to disregard it. "We must acknowledge in all fairness that the damaging effect of evidence improperly received may not be cured—always and wholly—by an order directing that it be expunged from the record and disregarded. At the same time, we cannot ignore the fact that sound judicial administration requires that the lion's share of such errors be regarded as fully reparable through proper instructions. Improper examination on the part of trial counsel which is persistent and contumacious, and which permeates a record, is, of course, a horse of another color. But that is not this case. . . . [W]e fairly believe that considering the instructions of the law officer here, and placing the challenged testimony in its proper place in the total complex of evidence presented in this voluminous record of trial—there was no fair risk of material prejudice to the accused."

(2) *United States v. Jackson*, 3 USCMA 646, 651, 14 CMR 64, 69 (1954). Where a court member asked an accused who was on the stand to testify only as to the manner in which his confession was obtained, an improper question on the merits of the case and received an answer thereto, the error was cured by the instructions of the law officer. "The transcript shows the accused answered before the question was completed and before the law officer could advise him not to answer. Defense counsel made no objection, but this could have been because the law officer, acting promptly and with finality, struck the question and the answer from the record. In addition he informed the court-martial members in no uncertain terms that the question itself was improper and directed them to disregard the entire exchange. Presumptively, they followed this direction. . . . It is true that the damaging effect of a particular type of evidence improperly

received may not always be cured by a direction such as the one here given. But as we view the incident and its background, the exchange did not involve inflammatory, degrading, or disgracing evidence, and bad faith on the part of the member is not intimated."

(3) *United States v. Harris*, 8 USCMA 199, 200, 24 CMR 9, 10 (1957). In a desertion case a witness testified that the accused had admitted that "he was not coming back to the Navy." Thereafter, it appeared that the accused had not been properly warned. The law officer denied the motion of the defense for a mistrial but struck the evidence and directed the court to disregard it. " . . . the only issue in the case was the accused's intention to remain away permanently. Aside from the accused's pretrial statement, the evidence on that issue was meager. With his statement before the court members, there could be no doubt as to the findings. Under these circumstances it was impossible to wipe out the harm already done. We hold, therefore, that the law officer erred in denying the motion for a mistrial."

5. Improper instructions on issue of voluntariness. *a.* Where the law officer improperly instructs the court as to their function in passing on the issue of voluntariness, the error will be tested for specific prejudice.

b. Illustrative cases.

(1) *United States v. Jones*, 7 USCMA 623, 629, 23 CMR 87, 93 (1957). The failure of the law officer to instruct the court that it must reject the confession if it was involuntary was not reversible error where the instruction, as given, was specifically requested by defense counsel. "The defense counsel may not at the trial request an instruction and thereafter claim on appeal that he was prejudiced by the law officer's acquiescence in that same request. . . . [I]n view of all the circumstances . . . we cannot conclude that the rights of the accused were prejudiced in this case."

(2) *United States v. Schwed*, 8 USCMA 305, 24 CMR 115 (1957). Where the Government's case is based substantially upon the accused's confession it is reversible error for the law officer to instruct the court that it will consider the evidence of voluntariness only insofar as it affects the credibility and weight to be accorded the confession.

(3) *United States v. Dicario*, 8 USCMA 353, 24 CMR 163 (1957). An erroneous instruction as to the effect to be accorded by the court to evidence of voluntariness does not require reversal where no substantial factual issue as to voluntariness was raised by the evidence presented to the court.