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United States v. Tempia: The Questionable Application of Miranda to the Military

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UNITED STATES v. TEMPIA: THE QUESTIONABLE APPLICATION OF *MIRANDA* TO THE MILITARY

I. INTRODUCTION

On June 13, 1966, in *Miranda v. Arizona*,[1] the now famous "*Miranda* rule" was enunciated by the Supreme Court:

> [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.[2]

On May 1, 1966, Airman Third Class Tempia, while visiting the base library at Dover Air Force Base, Delaware, made obscene proposals to three young girls from the doorway of the ladies "powder room." The girls left the library and subsequently returned with one of their parents and with the Air Police. After Tempia was pointed out by the girls, he complied with the Air Policemen's request "to come back to the office."

At the Air Police office, prior to any interrogation, Tempia was advised that he was suspected of taking indecent liberties with children;[3] that he had rights under article 31 of the UCMJ,[4] and was advised of these

1. 384 U.S. 436 (1966).
2. *Id.* at 444-45. See 12 VILL. L. REV. 198 (1966).
3. Under the Uniform Code of Military Justice [hereinafter cited as UCMJ], article 134, 10 U.S.C. § 934 (1964), it is a crime to take indecent liberties with females under the age of sixteen.
4. 10 U.S.C. § 831 (1964):
   (a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.
   (b) No person subject to this chapter may interrogate, or request any statement from, an accused or person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to

rights; and "that you may consult with legal counsel if you desire." When Tempia declared that "he wanted counsel," the interview was immediately terminated and he was released from custody.

Two days later Tempia was recalled to the Air Police office. At the office, prior to any interrogation, Tempia was again advised of his rights. When Tempia informed the Air Policemen that he had not yet retained legal counsel, the interview was again terminated, but an appointment with the Base Staff Judge Advocate was made for Tempia.

At the appointment, Tempia was informed by the Staff Judge Advocate: (1) that as Staff Judge Advocate, he could not accept an attorney-client relationship with Tempia, because if he did, he would be disqualified from acting in his designated capacity;[5] (2) that he would advise Tempia of his legal rights and answer any questions about those rights; (3) that the military would not make a military lawyer available to Tempia as defense counsel for the present investigation; (4) that, however, Tempia had the right to employ civilian counsel who would be entitled to appear with Tempia at the investigation, and that he would be given a reasonable time to retain such civilian counsel; (5) that Tempia had rights under article 31 of the UCMJ which were then explained by the Staff Judge Advocate; and (6) that if charges were preferred against Tempia and an article 32[6] investigation ordered, Tempia would, at that time, be furnished a military lawyer.

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make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

Although the issue was not raised, it is evident that all of the military personnel involved in *Tempia*, including the Air Policemen, were subject to the UCMJ. *See* 10 U.S.C. § 802 (1964).

5. Under the UCMJ, staff judge advocates were established in order to communicate directly with the convening authorities of courts-martial "in matters relating to the administration of military justice." 10 U.S.C. § 806(b) (1964). Therefore, it has also been provided that: "No person who has acted as member, law officer, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, or investigating officer in any case may later act as a staff judge advocate or legal officer to any reviewing authority upon the same case." 10 U.S.C. § 806(c) (1964). For a listing of convening authorities under the UCMJ, *see* 10 U.S.C. § 822 (1964).

6. UCMJ, art. 32, 10 U.S.C. § 832 (1964):

(a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.

(b) The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel. Upon his own request he shall be represented by civilian counsel if provided by him, or military counsel of his own selection if such counsel is reasonably available, or by counsel detailed by the officer exercising general court-martial jurisdiction over the command. At that investigation full opportunity shall be given to . . . the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigat-

Upon returning to the Air Police office, Tempia, for the third time, was advised of his rights by the Air Policemen. This time Tempia responded by stating that he had consulted with the Base Staff Judge Advocate and that he did not desire further counsel as "[t]hey could not help him. . . . He said, 'They didn't do me no good.' "[7] After this declaration by Tempia, the Air Policemen interrogated him, and he dictated his confession to them.

At Tempia's general court-martial,[8] which commenced on June 14, 1966, one day after the effective date of *Miranda,* his defense counsel sought to exclude the statement made by Tempia to the Air Policemen on the basis of the *Miranda* holding. The law officer,[9] however, overruled this objection and admitted the confession into evidence, and Tempia was convicted of taking indecent liberties with females under the age of sixteen. On appeal, the Court of Military Appeals[10] reversed, *holding*:

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ing officer shall examine available witnesses requested by the accused. If the charges are forwarded after the investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused.

Under the UCMJ, it is important to note that an "investigation" commences *after* a person subject to military jurisdiction has been charged with an offense against the UCMJ. Otherwise, a semantic problem might arise when placing the *Escobedo* phraseology, namely, "shifts from investigatory to the accusatory," in a military setting.

Prior to the UCMJ, the kind of investigation required by article 32 was not guaranteed to a military accused. *See* Becker v. Webster, 171 F.2d 762 (2d Cir.), *cert. denied,* 336 U.S. 968 (1949); *cf.* Humphrey v. Smith, 336 U.S. 695 (1949).

7. United States v. Tempia, No. 19,815 (U.S.C.M.A., Apr. 25, 1967) 5 [hereinafter cited as United States v. Tempia]. All citations to pages in United States v. Tempia correspond to the pages in the official opinion of the Court of Military Appeals on file in the offices of the *Villanova Law Review.*

8. In descending order of importance, the UCMJ provides for three types of courts-martial: general, special, and summary. *See* 10 U.S.C. § 816 (1964). For a brief description of the organization of each, see Comment, *Constitutional Rights of Servicemen Before Courts-Martial,* 64 COLUM. L. REV. 127, 134–37 (1964).

9. UCMJ, art. 26, 10 U.S.C. § 826 (1964):

(a) The authority convening a general court-martial shall detail as law officer thereof a commissioned officer who is a member of the bar of a Federal court or of the highest court of a State and who is certified to be qualified for such duty by the Judge Advocate General of the armed force of which he is a member. No person is eligible to act as law officer in a case if he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

(b) The law officer may not consult with the members of the court, other than on the form of the findings as provided in section 839 of this title (article 39), except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the court.

10. The Court of Military Appeals is composed of three civilians and was established by Congress in 1951. *See* 10 U.S.C. § 867 (1964). This court was originally conceived of as "a civilian 'supreme court' for the review of court-martial convictions. . . ." Walker and Niebank, *The Court of Military Appeals — Its History, Organization and Operation,* 6 VAND. L. REV. 228 (1953). Genealogically,

[The court's] roots lie in the historical development and improvement of military criminal law, a history that is marked by repeated conflicts between military commanders and interested civilians. These conflicts were, however, relatively minor altercations until the twentieth century, when large citizen armies in two World Wars brought millions of Americans, including many lawyers, into intimate contact with the court-martial system.

Id. at 229.

(1) By being "ordered to report for interrogation [accused] has . . . been *significantly deprived of his freedom of action.* Hence, . . . there was *custodial interrogation* in this case."[11]

(2) *"As accused was informed no counsel would be appointed* for him [in accordance with the language of the *Miranda* holding], it follows that the statement thereafter taken from him was inadmissible in evidence";[12]

(3) "Quite apart from the insufficiency of the warning as to accused's right to counsel, here the Government did not carry its burden [to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel], and no waiver is made out. To the contrary, it merely shows *accused's entitlement* to consult *was frustrated by the Staff Judge Advocate's* well-meant but legally improper statements";[13]

(4) "*Miranda* . . . merely prohibits the receipt in evidence of any statement taken, unless there is compliance with these constitutional standards. If the Government cannot comply with them, it need only abandon its reliance in criminal cases on the accused's statements as evidence. That is the essence of the *Miranda* holding, and it is the choice of the Government whether to pay this price *for withholding counsel at the critical moment of police interrogation.*"[14]

The court then stated that "the *principles* enunciated by the Supreme Court in *Miranda v. Arizona* . . . apply to military interrogations of criminal suspects,"[15] and that, for purposes of "the merits of the [instant] controversy,"[16] *Miranda* "explicitly and at length lays down *concrete rules* which are to govern all criminal interrogations by Federal or State authorities, *military or civilian,* if resulting statements are to be used in trials commencing on and after June 13, 1966."[17]

The purpose of this comment is to show that the broad holding of the Court of Military Appeals should have been limited to the unique facts of the case before it, that is, to situations in a military environment where the circumstances unmistakably dictate that military criminal procedure be identical to that constitutionally required in the civilian context. The reasons for urging a modification to the *Tempia* holding are found in *Miranda* itself; in express provision of the Constitution, tradition, and custom — the three sources of protection for the "rights and liberties of citizens" when the military is involved;[18] and, in the military cases before the Supreme Court which reflect the Court's recognition of the fact that criminal procedure in the military may not be identical to the procedure guaranteed to civilians. In addition, a consideration of the inherent dif-

11. United States v. Tempia, 14–15 (emphasis added).
12. *Id.* at 17 (emphasis added).
13. *Id.* at 18 (emphasis added).
14. *Id.* at 20 (emphasis added).
15. *Id.* at 2 (emphasis added).
16. *Id.* at 12.
17. *Id.* (emphasis added).
18. *See* Reid v. Covert, 354 U.S. 1, 6–7 (1957).

ferences in the two societies from which the circumstances of *Miranda* and *Tempia* originated, and the enormous practical difficulties the *Tempia* rule will precipitate, should reinforce the contention that the Court of Military Appeals should have exercised more reasoned restraint in its application of *Miranda* to the military.

II. *Tempia,* AND THE GUIDELINES NOT BEFORE THE *Miranda* COURT

As a preamble to its "briefly stated"[19] holding, the Supreme Court in *Miranda,* asserverated that: "[O]ur holding is *not an innovation* in our jurisprudence, but is an *application of principles* long recognized and applied in other settings,"[20] and that: "Our holding will be spelled out with some specificity in the pages which follow. . . ."[21] During the ensuing expatiation of the holding, and its ultimate application to the facts of the four cases before it,[22] the Court repeatedly declared that the Constitution did *"not require any specific code of procedures* for protecting the privilege against self-incrimination during custodial interrogation";[23] that the "warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibilty of any statement made by a defendant";[24] that, for the present, "unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed";[25] and that *"Congress* and the States are *free to develop their own safeguards* for the privilege, so long as they are fully as effective as those described above *in informing accused persons* of their right of silence and in affording a continuous opportunity to exercise it."[26] Hence, the *Miranda* holding,[27] by its express language and by the express language and necessary implications of the opinion in which it was delivered, was neither intended to apply to, nor was it addressed to, the military.[28]

At the conclusion of its discussion of the constitutional principles announced in *Miranda,* and prior to its application of those principles to the

19. 384 U.S. at 444.
20. *Id.* at 442 (emphasis added).
21. *Id.* at 444.
22. Three of the four cases in this composite decision — *Miranda v. Arizona, Vignera v. New York,* and *California v. Stewart* — involved state law enforcement officers; the other, *Westover v. United States,* involved the FBI.
23. 384 U.S. at 490 (emphasis added). *See, e.g., id.* at 467, 498.
24. *Id.* at 476 (emphasis added).
25. *Id.* at 467 (emphasis added).
26. *Id.* at 490 (emphasis added).
27. See p. 170 *supra.*
28. Some further indication of *Miranda*'s thrust may be derived from an examination of the case's "Appearances of Counsel." 384 U.S. at 438–39. The absence of any arguments or briefs by representatives of the military would appear to be a negative implication of the scope of the case.

four cases before it, the Court commented on existing protections on the curbs on interrogation in other jurisdictions.

> *The English procedure*[29] since 1912 under the Judges' Rule is significant. . . .
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> . . . .
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> The safeguards present under Scottish law may be even greater than in England. *Scottish* judicial decisions bar. . . . *In India,* confessions. . . . Identical provisions appear in the Evidence Ordinance of *Ceylon*. . . . *Similarly,* in our country the *Uniform Code of Military Justice* has *long provided* that no suspect may be interrogated without first being warned of his right not to make a statement and that any statement he makes may be used against him. Denial of the right to consult counsel during interrogation has also been proscribed by military tribunals.[30]

In 1951, Congress enacted the UCMJ, "the 'Bill of Rights' for America's servicemen,"[31] as a response to the experiences of men in World War II who had failed to stand mute in the face of coercion, harsh and summary justice, physical beatings, incommunicado detention, and the like.[32] In short, the raison d'etre for the UCMJ was the multiplicity of elements considered by the *Miranda* Court and thought to be violative of constitutional principles governing the rights of civilians.

The UCMJ stands as the exercise of congressional power, and article 31 represents the congressional determination of the procedure necessary to protect the privilege against self-incrimination of persons serving in the military. In *Miranda,* the Supreme Court invited Congress to enact safeguards for this privilege.[33] Manifestly, the Court was not concerned with existing legislation, article 31, other than as an exemplar, but was instead imposing restrictions on civilian law enforcement officials because of the lack of legislative activity in the civilian area under scrutiny. Hence, the Court of Military Appeals, in deciding whether full compliance with

29. For a clearer indication of the impact and influence of English Procedure on the present Supreme Court's explication of a civilian's constitutional fifth amendment rights, *see* Murphy v. Waterfront Comm'n, 378 U.S. 52, 77 (1964): "In the light of the history, policies and purposes of the privilege against self-incrimination, we now accept as correct the construction given the privilege by the English courts and by Chief Justice Marshall and Justice Holmes." This reference to the first Chief Justice of the Supreme Court is not without profound significance in a discussion of *Miranda*'s applicability to the military because of the constitutional methodology used by the present Court when it relies on "principles" and not "precedent." For the clearest example of this methodology, *see* Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (footnote added).

30. 384 U.S. at 488–89 (emphasis added). It should be noted that throughout its explication of the principles being established in *Miranda,* the Supreme Court made repeated references to People v. Dorado, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169, *cert. denied,* 381 U.S. 937 (1965), and that court's application of Escobedo v. Illinois, 378 U.S. 478 (1964). The court in *Dorado,* like the Court in *Miranda,* referred to the Military, specifically article 31 of the UCMJ, as an area with already existing safeguards for the rights that the court was considering.

31. Walsh, *Military Law: Return to Drumhead Justice?,* 42 A.B.A.J. 521 (1956).

32. *Id.* at 525. *Cf.* Miranda v. Arizona, 384 U.S. 436, 445 (1966); Reid v. Covert, 354 U.S. 1, 37 (1957).

33. *See* p. 174 *supra.*

article 31 amounted to a satisfaction of the *Miranda* prerequisites for the protection of the privilege against self-incrimination, was obliged to consider an element of federalism that was not before the *Miranda* court. By taking the *Miranda* holding as a concrete rule to be applied word by word to the military procedures followed in *Tempia,* the court was mechanically applying a formula to the exercise of congressional article I power, a process which, in such area, the Supreme Court has abjured prior to[34] and in *Miranda* itself.[35]

It is to be recalled that no such issue was before the *Miranda* Court. That Court called for effective legislation in this area, it did not pass on any then existing. Without this consideration, the Court of Military Appeal's verbatim and mechanical application of the *Miranda* holding as a formula against which military criminal procedure was to be tested on constitutional grounds appears singularly inappropriate and questionable.

III. THE CONSTITUTION, THE SUPREME COURT, AND THE MILITARY

A. Express Constitutional Provisions

The *Miranda* Court, of course, was concerned only with the rights of civilians. Therefore, in redefining the principles there enunciated in a military context, it becomes necessary to consider the express constitutional provisions which distinguish the rights of those in the military from those of ordinary citizens. Among the provisions which must be taken into account are article I, section 8, clause 14: "The *Congress* shall have Power . . . to make Rules for the Government and Regulation of the land and naval Forces"; the fifth amendment: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces, or in the militia,* when in actual service in time of war or public danger";[36] and the sixth amendment: *"In all criminal prosecutions,* the accused shall . . . have the assistance of counsel for his defence."[37]

Another constitutional distinction which must be noted is that courts-martial are convened under article I of the Constitution, the legislative article, and do not fall into the "cases and controversies"[38] categorization of article III, the constitutional provision for judicial power.[39] Inherently, then, under the constitutional scheme, courts-martial were conceived of as something apart from the customary courtroom method of administering justice. The approach taken for the "Rules" and "Regulation" of the mili-

34. *See, e.g.,* United States v. Darby, 312 U.S. 100 (1941).

35. *See* Miranda v. Arizona, 384 U.S. 436, 441–42 (1966); p. 174 *supra.*

36. The last clause in the fifth amendment, constitutionally, modifies only the word "militia." *See* Johnson v. Sayre, 158 U.S. 109 (1895).

37. Emphasis added.

38. *See, e.g.,* Muskrat v. United States, 219 U.S. 346 (1911).

39. *See, e.g.,* Anteau, *Courts-Martial and the Constitution,* 33 MARQ. L. REV. 25 (1949).

tary is necessarily political and legislative rather than legal.[40] As an exercise of congressional rule-making power, military law, as administered through the court-martial system, is comparable to other systems created by Congress for the exercise of other of its article I powers — for example, administrative law. Like administrative proceedings, courts-martial, by their very nature, are intended to be flexible[41] and are to be characterized by simplicity and common sense rather than by intricacy and artificiality.[42] Courts-martial cannot, however, be analogized too closely with other areas in which congressional article I power is exerted. For example, there is no such creature as an administrative criminal law proceeding, whereas courts-martial commonly involve criminal law and its application. There is no clear, precise dichotomy to explain the diverse elements of courts-martial, and the words "civilian" and "military" cannot be thought to carry the burden of articulating the unique position of congressional power over courts-martial vis à vis its power over, for example, the Federal Trade Commission, and the Supreme Court has recognized this peculiar position of courts-martial. But although that Court has never succeeded in packaging the differences and distinctions, its recognition of a fundamental principle of American federalism is found in the language and reasoning of the cases involving the main constitutional provisions for the military.

In *Dynes v. Hoover*,[43] the Court affirmed the conviction of a seaman for attempted desertion after he had been tried by a court-martial upon a charge of desertion. Central to the Court's reasoning that the seaman could be convicted of an offense not specifically prohibited by Naval regulations, was its declaration that:

> Courts martial derive their jurisdiction and are regulated with us by an act of Congress, in which the crimes which may be com-

40. *Cf.* Smith, *Administrative Law: A Threat to Constitutional Government*, 31 VA. L. REV. 1 (1944).

41. The significance of administrative proceedings arising under article I has not been lost by scholars of that field:

> "Cases and controversies," broadly speaking, are matters in which a court can determine with finality the rights of adverse parties by applying the law to the facts as found. Thus, the whole field of rule-making . . . is outside the constitutional competence of the courts, for rules do not determine the rights of specific litigants but, like statutes, are addressed to people generally.

J. Landis, *The Development of the Administrative Commission*, quoted in W. Gellhorn, ADMINISTRATIVE LAW CASES AND COMMENTS 14 (2d ed. 1947). *Cf.* Muskrat v. United States, 219 U.S. 346, 361 (1910):

> The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law. The exercise of this, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the Government.

42. *Cf.* K. Davis, ADMINISTRATIVE LAW 447-48 (1951).

43. 61 U.S. (20 How.) 65 (1857).

> mitted, the manner of charging the accused, and of trial, and the punishments which may be inflicted, are expressed in terms. . . . And when offences and crimes are not given in terms or by definition, the want of it may be supplied by a comprehensive enactment, such as the 32d article of the rules for the government of the navy, which means that courts martial have jurisdiction of such crimes as are not specified, but which have been recognised to be crimes and offences by the usages in the navy of all nations, and that they shall be punished according to the laws and customs of the sea.[44]

In *Ex parte Milligan*,[45] one of the "great landmarks" of the Supreme Court's history,[46] the Court upheld the denial of the right of trial by jury to men in the military. Upon the express language of the fifth amendment, the Court reasoned: "We think, therefore, that the power of Congress, in the government of the land and naval forces and of the militia, is not at all affected by the fifth or any other amendment. It is not necessary to attempt any precise definition of this power."[47]

In 1885, in *Kurtz v. Moffitt*,[48] a Court which has meant a great deal to the present Supreme Court in the area of constitutional criminal procedure,[49] held that neither a state police officer nor a private citizen could arrest and detain a deserter from the army without any warrant or military order. In reaching its decision, it was necessary for the Court to distinguish civil and military jurisdictions: "Courts martial form no part of the judicial system of the United States, and their proceedings, within the limits of their jurisdiction, cannot be controlled or revised by the civil courts,"[50] and desertion is "exclusively a military crime, triable and punishable, in time of peace, as well as in time of war, by court martial only."[51]

The line of reasoning illustrated by these cases has persisted and has influenced the outcome of modern cases involving the military,[52] and it would appear that the Court of Military Appeals should have considered, as did the Courts heretofore cited, the constitutional provisions relating to the military before extending the civilian principles of *Miranda*, verbatim, to the military.

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44. *Id.* at 82.

45. 71 U.S. (4 Wall.) 2 (1866).

46. Reid v. Covert, 354 U.S. 1, 30 (1957).

47. 71 U.S. (4 Wall.) at 138.

48. 115 U.S. 487 (1885).

49. *Compare* Mapp v. Ohio, 367 U.S. 643, 646 (1961) *with* Miranda v. Arizona, 384 U.S. 436, 459 (1966) for a consideration of the influence of Boyd v. United States, 116 U.S. 616 (1886) on modern constitutional law. The *Boyd* and *Kurtz* Courts were identical.

Since the fifth amendment privilege against self-incrimination is the heart of *Tempia*, the *Mapp* line of decisions is additionally fruitful because of the Court's concern for the interrelationship of the fourth and fifth amendments which "almost [run] into each other." Mapp v. Ohio, 367 U.S. 643, 646 (1961).

50. 115 U.S. at 500.

51. *Id.* at 501.

52. *See, e.g.*, Reid v. Covert, 354 U.S. 1, 30 (1957); Johnson v. Eisentrager, 339 U.S. 763, 783 (1950).

B. Civilian Cases Before the Supreme Court

In the 1960's, a Supreme Court "shift" occurred whereby federal civilian constitutional standards were held to be applicable in state cases. This shift began in *Mapp v. Ohio,*[53] a fourth amendment search and seizure case,[54] and was extended in *Malloy v. Hogan,*[55] a case involving the fifth amendment privilege against self-incrimination.

Other recent Supreme Court cases have also had a significant effect on state court procedure. In *Gideon v. Wainwright,*[56] a case involving "a[n indigent's] federal constitutional right to counsel in a *state court,*"[57] the Court, in holding the sixth amendment to be binding on the states, relied heavily upon the concept of "our *adversary system of criminal justice.*"[58] *Escobedo v. Illinois,*[59] in holding "inadmissible in a *state criminal trial* any incriminating statements elicited by the police during interrogation [without a warning to the accused of his right to remain silent and after a denial of the accused's request to consult with his lawyer]"[60] likewise noted "our *adversary system*"[61] as being a factor in so holding. *Malloy* rested upon "the *American system of criminal prosecution,*"[62] and *Miranda* itself was a case which raised "questions which go to the roots of American *criminal jurisprudence*: the restraints *society* must observe consistent with the Federal Constitution in prosecuting individuals for crime,"[63] and which treated "the privilege against self-incrimination — the essential mainstay of our *adversary system.*"[64]

None of the above cases involved military matters, yet in defining rights that must be accorded in state courts, it was recognized that such rights were compelled by the civilian society of which all those accused were a part and the adversary system of criminal procedure which is an indisputable component of that society. The society in which Airman Tempia was accused differed drastically from the society considered in *Miranda,* and the adversary system of criminal procedure in the military is substantially different from the system involved in *Miranda.* Thus, the *Tempia* court's interpretation of *Miranda,* and its application of that case to the military without first considering the effect that the civilian societal and adversary system elements had on the Supreme Court in deciding *Miranda,* seems to have been a questionable judicial process.

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53. 367 U.S. 643 (1961).
54. As has been noted, the search and seizure cases have not been without influence on the cases dealing with the privilege against self-incrimination. *See* note 49 *supra.*
55. 378 U.S. 1 (1964).
56. 372 U.S. 335 (1963).
57. *Id.* at 338 (emphasis added).
58. *Id.* at 344 (emphasis added).
59. 378 U.S. 478 (1964).
60. *Id.* at 479 (emphasis added).
61. *Id.* at 492 (emphasis added).
62. 378 U.S. at 7.
63. 384 U.S. at 439 (emphasis added).
64. *Id.* at 460 (emphasis added).

C. *Military Cases Before the Supreme Court*

"Military law," a phrase of art that distinguishes a particular body of law from martial law, military government, and the law of war,[65] has been described as:

> [T]he system of military justice established by Congress for the government and regulation of the armed forces of the United States, including such persons as have some connection or association with organized military units without being members of any branch of the armed services. Functional relation to the mission of the armed forces is the common factor which gives rational unity to . . . [military] jurisdiction. . . . [M]ilitary law . . . is exercised by a government in the execution of that branch of its municipal law which regulates its military establishment.[66]

In *Reeves v. Ainsworth,*[67] the Supreme Court recited what was then[68] a truism: "To those in the military or naval service of the United States the *military law* is due process."[69]

In the first case of *Reid v. Covert,*[70] the Supreme Court, on non-constitutional grounds, held that the wife of an Air Force sergeant could be tried by a United States military court martial in England, for the murder of her husband in England, and affirmed the life sentence of the wife.[71] Less than a year later, in the second *Reid v. Covert,*[72] the Supreme Court, by reaching the constitutional questions involved, reversed itself, holding that civilian dependents of members of the armed forces overseas could not be tried by court-martial, in times of peace, for capital offenses committed abroad. The constitutional question revolved about the article I power of Congress,[73] of which the Court said:

> Not only does Clause 14, by its terms, limit military jurisdiction to members of the "land and naval Forces," but Art. III, § 2 of the Fifth and Sixth Amendments require that certain express safeguards which were designed to protect persons from oppressive governmental practices, shall be given in criminal prosecutions — *safeguards, which cannot be given in a military trial.*[74]

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65. *See* J. Snedeker, MILITARY JUSTICE UNDER THE UNIFORM CODE 34–35 (1953).

66. *Id.* at 35.

67. 219 U.S. 296 (1911).

68. For a consideration of the impact and aftermath of the habeas corpus explosion on military law, *see generally* Comment, 53 CALIF. L. REV. 878, 881–82 (1965).

69. 219 U.S. at 304 (emphasis added).

70. 351 U.S. 487 (1956).

71. For a more elaborate discussion of the background of this case, *see* 1 L. Ed. 2d 1148–49 (1957).

72. 354 U.S. 1 (1957) (Black, J.) (6–2).

73. *Id.* at 19.

74. *Id.* at 22 (emphasis added).

In effect, the Court decided the constitutional question by first defining the constitutional jurisdiction of a court-martial and by then pointing out that the wife of a serviceman was outside of that jurisdiction:[75]

> It must be emphasized that every person who comes within the jurisdiction of courts-martial is subject to *military law* — law that is *substantially different from the law which governs civilian society.* Military law is, in many respects harsh law which is frequently cast in very sweeping and vague terms. It emphasizes the iron hand of discipline more than it does the even scales of justice.
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> . . . .
>
> In summary, "it still remains true that *military tribunals have not been and probably never can be* constituted in such way that they can have *the same* kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts." In part this is attributable to the inherent differences in values and attitudes that separate the military establishment from civilian society. In the military, by necessity, emphasis must be placed on the security and order of the group rather than on the value and integrity of the individual.[76]

Reid v. Covert was decided in 1957. The Supreme Court "shift" occurred in the 1960's.[77] The treatment accorded military law by the *Tempia* court makes appropriate an inquiry as to whether the constitutional principles of *Reid v. Covert* necessarily have been lost in this shift.

It is clear that there have been no military criminal law cases challenging any of the constitutional principles of *Reid.* Furthermore, one of the concurring opinions in *Gideon v. Wainwright,* a case that forms part of the meaning of *Miranda,*[78] refers to the holding of *Reid* and the impact of the latter on the rights of civilians. In 1962, Chief Justice Warren, speaking ex officio, referred to *Reid v. Covert,* as a "landmark decision" because:

> First of all, the urgency of wartime was absent. Extended analysis and deliberation on the part of the parties and the Court were possible. Secondly, while, of course, the Government rested heavily upon a claim of military necessity, that claim could not be pressed with . . . force. . . .[79]

This stability in military law, and in constitutional law affecting the military, that has prevailed since the enactment of the UCMJ, and during a turbulent period for the Supreme Court, seems to have been without influence on the *Tempia* court.

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75. In United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955), the Court had already determined that a civilian was entitled to a civilian trial.

76. 354 U.S. at 38–39 (emphasis added).

77. *See* p. 179 *supra.*

78. *See* Miranda v. Arizona, 384 U.S. 436, 472–73 (1966).

79. Warren, *The Bill of Rights and the Military,* 37 N.Y.U.L. REV. 181, 194–95 (1962).

IV. THE "APPLICATION" OF *Miranda* TO THE MILITARY

A. Military Justice and Military Society

The *system* of military justice contained in the UCMJ, derived from Congressional article I power, is aimed at a "balance of maximum military performance and maximum justice within the armed forces."[80] The UCMJ:

> [M]eant complete repudiation of a system of military justice conceived of as only an instrumentality of command; on the other hand, it negatived a system designed to be administered as the criminal is administered in a civilian criminal court. The Code contains all the criminal law and procedure governing the Army, Navy, Air Force and Coast Guard both in time of peace and in time of war.[81]

Congress, in order to effect its goal, went much further than did the fifth amendment in protecting the serviceman's rights centering on the privilege against self-incrimination.[82]

Military customs have always been a prime source of unwritten military law, and when the UCMJ was enacted, many military customs that were left unchanged by statute were adopted by Congress as part of the UCMJ.[83] One important change which the UCMJ did effect was that "*[U]nder the Uniform Code,* an accused has the right to be represented by counsel at the pretrial investigation [that is, an article 32 investigation[84]], during the trial. . . . If *he cannot procure* his own choice of counsel, *counsel will be provided for him.*"[85] Those changes to military law which were effected by the UCMJ were not universally acclaimed by those responsible for administering and implementing military law. Opponents of the changes believed that servicemen had been given unprecedented new rights and that the new safeguards established to protect those rights were incompatible with the interests and duties of the military establishment.[86] Shortly after the enactment of the UCMJ, attempts were made to restore military law to its pre-UCMJ status, but successful resistance to such attempts centered on the belief that "these new proposals would affect a man accused by the military from the *time he becomes a suspect* to the time of his last appeal, and would naturally *reduce his present rights*" and on the fact that the UCMJ contained

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80. J. Snedeker, *supra* note 65, at 4–5.

81. Morgan, *The Background of the Uniform Code of Military Justice,* 6 VAND. L. REV. 169, 174 (1953).

82. *See, e.g.,* Friendly, *The Bill of Rights As a Code of Criminal Procedure,* 53 CALIF. L. REV. 929, 942–49 (1965); Comment, *supra* note 68, at 885.

83. *See* Snedeker, *supra* note 65, at 33–34.

84. *See* p. 171 & note 6 *supra.*

85. Snedeker, *supra* note 65, at 449.

86. Walsh, *supra* note 31, at 522.

"rights given by Congress only after careful study and loud public outcry."[87]

Because military law is unique, it has not been deemed a bludgeoning of the obvious to assert that military justice is composed of two elements, namely, a *justice* element *and* a *military* element.[88] The justice element has been thought "to include those safeguards and other legal values which are a part of informed criminal law administration in the civilian community," whereas the military element comprehends "acute considerations of discipline in an abnormal social situation, *limitations* growing out of the burdens, realities and necessities of military operations, and the like."[89] Hence, the Court of Military Appeals was intended by Congress to act in a "dual capacity" so that, under principles of military criminal law, the court-martial system of justice could function efficiently and so that, concomitantly, justice would be done to both the individual accused and to the military establishment of which the accused was a part.[90]

The military society, or, as it is frequently referred to by the courts, the "military establishment,"[91] is not a free society. It is not a democratic society; for example, the "one-man one-vote" principle will never be invoked to determine representation. To the citizen of the civilian community, the military society represents an "alien societal context."[92] "Military necessity" is a phrase subject to much abuse and is often misused as a means of abusing "military law" when the target of an attack is, in reality, the law of war[93] or of an emergency situation.[94] The phrase is, however, properly denotative of a necessity[95] arising from the inherent differences between civilian and military societies.

In the area of criminal law, civilian society has been concerned with striking "a fair balance between society's need for protection against crime and the interests of suspected and accused persons, a balance based on thorough investigation of facts and consideration of the views of all parts of the spectrum."[96] Elements in the military that are generally not

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87. *Id.* at 522, 525 (emphasis added).

88. *See, e.g.,* Brosman, *Foreward to the Symposium on Military Justice, the Court: Freer than Most,* 6 VAND. L. REV. 166 (1953).

89. *Id.* at 167.

90. *See* Walker and Niebank, *The Court of Military Appeals — Its History, Organization and Operation,* 6 VAND. L. REV. 228, 239 (1953).

91. *See, e.g.,* Reid v. Covert, 354 U.S. 1, 39 (1957).

92. *See* Antieau, *Courts-Martial and the Constitution,* 33 MARQ. L. REV. 25, 32 (1949).

93. *See, e.g.,* J. SNEDEKER, *supra* note 65, at 33–36.

94. *See, e.g.,* Reid v. Covert, 354 U.S. 1, 39–40 (1957).

95. The social structure of the United States itself points to another necessity: Democracy under our Constitution calls for judicial deference to the coordinate branches of the Government and their judgment of what is essential to the protection of the Nation. . . . In our democracy it is *still* the Legislature and the elected Executive who have the primary responsibility for fashioning and executing policy consistent with the Constitution.
Warren, *supra* note 79, at 202 (emphasis added).

96. Friendly, *supra* note 82, at 929. *Compare* p. 182 *supra.* For an examination of the influence of the American Law Institute's Model Penal Code, *see* 41 ALI PROCEEDINGS 532–33 (1964).

of particular moment to a civilian community are factors such as the greatly increased possibility of witnesses being unavailable, the probability that defense counsel would be assigned elsewhere, the absence of anything comparable to bond,[97] and, in particular, the possibility of "command influence."[98] These considerations, particularly the factor pivoting on the distinct natures of the civilian and military societies, make the balance sought by the civilian community different, and "more difficult by the fact that while the military serves the vital function of preserving the existence of the nation, it is, at the same time, the one element of government that exercises a type of authority not easily assimilated in a *free society.*"[99] These differences make the implementation of constitutional principles in the armed forces inevitably different from that in civilian society, including the areas of police and investigative procedure.[100]

B. The Practicalities of Implementation

The prospective eye of the *Miranda* Court, and the source and length of time for which the evils that it was remedying had endured, deserve paramount consideration because the effect of mechanically applying the untranslated-to-military holding of *Miranda* could conceivably destroy existing exemplary safeguards for the individuals within the military *and,* at the same time, generate broad unjust effects detrimental to both the individual and to the military. Furthermore, due to the peculiar constitutional structure of military society, a society necessarily representing a true cross-section of our total society, and not just a sector of that society, it is not inconceivable that more weight could be given to the practical effect of a Court of Military Appeals' decision on individuals taken collectively, rather than on an individual considered in absolute isolation, than is merited in a civilian criminal procedure case.

If a crime occurs on a ship at sea on peacetime maneuvers, the *Tempia* decision makes investigatory procedure at sea legally uncertain for the military authorities. Suppose, as in *Tempia,* there are eyewitnesses. Should the suspect be ordered to report for questioning to an officer designated to investigate? Would such an order mark the time at which the suspect's right to counsel attaches? The question poses unique considerations alien to most civilian criminal situations: (1) At present, most ships do not carry lawyers. If they must now reverse this long tradition, is it for a judicial decision to effect such a change? And, wouldn't two lawyers now be required aboard each ship, irrespective of size, so that justice for both sides is preserved? What effects on the normal operating and administrative routines of a ship would there be by the mere presence

97. *See, e.g.,* Antieau, *supra* note 92, at 27.

98. *See, e.g.,* Reid v. Covert, 354 U.S. 1, 35 & n.65 (1957).

99. Warren, *supra* note 79, at 182 (emphasis added).

100. *See, e.g.,* Comment, *supra* note 68, at 885.

of lawyers aboard ships engaged in the "business" of preparing to fight wars?[101] Again, is this an area where judicial power should be exerted? (2) Should personnel ignore the incident until a scheduled return to port or should the ship initiate a request for permission to terminate its activities and return to port for a proper investigation? The former choice overlooks the sense of urgency and the nature of the community if it is seriously proffered as a solution, particularly if the incident is, for example a theft or a morals offense. The latter alternative clearly reflects an alternative whose very utterance suggests that such a requirement, compelled because of judicial power, is untenable. (3) Admittedly, the suspect could be detained in isolation until a normal return to port. Assuming a valid arrest could be made so that the detention escapes conversion into an unconstitutional incommunicado restraint, is such detention fair to the suspect, his shipmates, and his ship? Someone would be required to be placed as a guard over the suspect, particularly if the offense alleged is of a serious nature. What effect will this depletion of the manpower reserve have on the ship's ability to continue her mission? Or, must each ship now carry an excess of men, if possible, to provide for such contingency — and, if so, are they to be trained equivalents of Air Policemen and Air Force Base Judge Advocates? (4) Has *Tempia* effected, sub silentio, the death of the summary and special courts-martial, neither of which presently provide for lawyers? Was there reason and evidence such as existed in *Miranda* to cause such an effect? And if this is so, should this have been achieved in the manner which *Tempia* chose?

In the same vein, the *Tempia* decision affects all military services and not merely the Air Force. If the Air Force, at all of its bases having base libraries and base dependents, can comply with the decision what about the demands of the other services?

V. CONCLUSION

The *Tempia* court considered the military base library as the equivalent of a civilian library. Geographically and physically, this may be so, but, practically, and constitutionally, a significant difference arises when alleged crimes occur on federal or state territory. This is but a truism, but the principles of federalism that still have vitality have been known to cause different legal results when numbers of people have been involved.[102] The constitutional dichotomy between civilian and military may not be as neat, nor as strong, but it nonetheless exists and must be accounted for. In *Miranda,* the Court solemnly warned: "When federal officials arrest an individual, they must as always comply with the dictates of the congressional legislation and cases thereunder."[103] The ele-

101. Reid v. Covert, 354 U.S. 1, 35 (1957).

102. *Compare* Colegrove v. Green, 328 U.S. 549 (1946) *with* Baker v. Carr, 369 U.S. 186 (1962) (reapportionment).

103. 384 U.S. at 463 n.32.

ment of the UCMJ, it is submitted, involves this principle and suggests that not even the Supreme Court would mechanically apply its *Miranda* holding as a formula were it to review a case involving compliance with mandatory legislation in the field of criminal procedure.

Miranda was not a hasty decision and the focus of the Court is reasonably clear. Can the Court of Military Appeals assert this of itself in the *Tempia* case?

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