

“A little bird told me”: *U.S. v. Finch* and the Death of the *McOmber* Rule

Major James L. Varley
Professor, Criminal Law Department
The Judge Advocate General’s Legal Center and School
Charlottesville, Virginia

*The procedural protections of the Constitution protect the guilty as well as the innocent, but it is not their objective to set the guilty free.*¹

Introduction

During the past court term, the Court of Appeals for the Armed Forces (CAAF) expressly overturned the *McOmber*² notification of counsel rule in *United States v. Finch*.³ In 1976, the Court of Military Appeals (COMA) created the *McOmber* rule which required law enforcement or disciplinary authorities to notify a represented suspect’s counsel before questioning him at any point in an investigation or criminal prosecution.⁴ Later Supreme Court and CAAF decisions interpreting a suspect’s right to counsel under the Fifth and Sixth Amendments cast a great deal of doubt on whether the *McOmber* notification of counsel rule was still good law.⁵ The *Finch* case has put that question to rest. This article traces the rise and fall of the *McOmber* notification of counsel rule by following the cases and changes to the Rules for Courts-Martial (RCM) that led to its extinguishment.

In addition to discussing the *McOmber* rule, this article reviews three other CAAF cases and one service court opinion. The first two cases, *United States v. Cohen*⁶ and *United States v. Brisbane*,⁷ examine the circumstances in which a civilian social worker and a uniformed inspector general must advise soldiers of their rights under Article 31, UCMJ. The final two cases examined in this article involve remediation efforts by trial judges in cases involving grants of de facto immunity. The first is the CAAF case of *United States v. McKeel*.⁸ In *McKeel*, the CAAF approved remedial measures taken by a military judge at trial which preserved the results of a successful prosecution. In contrast, the Air Force Court of Criminal Appeals (AFCCA) in *United States v. LeBaron*⁹ determined that the remedial measures taken by a judge at trial were insufficient and overturned the case.

The Birth, Diminishment, and Death of the *McOmber* Rule

The Birth of the McOmber Rule

Airman James E. McOmber was escorted to the security police office at Dover Air Force Base, Delaware, after implicating himself in the theft of a tape deck while being questioned at his residence.¹⁰ When he arrived at the security

¹ *Minnick v. Mississippi*, 498 U.S. 146, 166 (1990) (6-2 decision) (Scalia, J., dissenting).

² *United States v. McOmber*, 1 M.J. 380 (C.M.A. 1976).

³ 64 M.J. 118 (2006).

⁴ *McOmber*, 1 M.J. at 383.

⁵ See *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981) (holding that the Fifth Amendment requires government officials to cease questioning once a suspect has requested counsel and not reinitiate questioning “until counsel has been made available” to him); *Minnick*, 498 U.S. at 152-55 (holding that once an accused who is in custodial interrogation requests counsel, all further interrogation must cease until counsel is present regardless of whether the accused has consulted with counsel); *McNeil v. Wisconsin*, 501 U.S. 171, 178-82 (1991) (holding that an accused’s post-indictment invocation of the offense-specific Sixth Amendment right to counsel is not an automatic assertion of the non-offense-specific right to counsel under the Fifth Amendment); and *United States v. LeMasters*, 39 M.J. 490, 492-93 (C.M.A. 1994) (when a represented suspect initiates contact with military investigators and, with knowledge of his rights under Article 31, waives those rights, there is no duty to notify his counsel prior to taking his statement).

⁶ 63 M.J. 45 (2006).

⁷ 63 M.J. 106 (2006).

⁸ 63 M.J. 81 (2006).

⁹ ACM 35299, 2005 CCA LEXIS 422 (A.F. Ct. Crim. App. Dec. 23, 2005).

¹⁰ *United States v. McOmber*, 1 M.J. 380, 381 (C.M.A. 1976).

police office, Agent Caloway advised McOmber of his Article 31, UCMJ, and *Miranda* rights.¹¹ After being advised of his rights, McOmber immediately requested counsel and the interview terminated.¹² Before McOmber left, Agent Caloway helpfully provided him with the name and telephone number of the area defense counsel.¹³

After this initial interview, McOmber's defense counsel contacted Agent Caloway to discuss the case.¹⁴ Two months after this conversation with McOmber's defense counsel, Agent Caloway contacted McOmber and set up another interview.¹⁵ At this interview, which was conducted without notice to McOmber's defense counsel, Agent Caloway again advised McOmber of his Article 31, UCMJ, and *Miranda* rights.¹⁶ This time, McOmber not only waived his rights but also provided a written statement which was later offered at trial to prove his guilt.¹⁷

At trial, defense counsel objected to the admission of McOmber's statement to Agent Caloway on the grounds that the second interview "infringed upon [McOmber's] Sixth Amendment right to counsel in that Agent Caloway proceeded with the interview without first notifying his attorney and affording him an opportunity to be present."¹⁸ On appeal, as at trial, McOmber objected to the admission of his statement to Agent Caloway.¹⁹ In response to the defense allegation of error, the government appellate counsel stated "that where a criminal investigator knows of [an accused's] exercise of [his] right to counsel in defense of criminal charges, he should deal directly with counsel, not the accused on the same basis applicable to trial counsel under paragraph 44h, Manual for Courts-Martial, United States, 1969 (Rev)."²⁰ The government appellate counsel also "concede[d] that any other approach could all too easily deprive the accused of his Sixth Amendment right as enunciated in" *Massiah v. United States*.²¹ Despite conceding that Agent Caloway erred by interviewing McOmber without first notifying his counsel, the Government requested that this error be viewed as harmless because McOmber voluntarily waived his counsel's presence in response to a rights advisement that preceded the interview.²²

Despite this invitation to find harmless error, the COMA ruled that the Government had ample notice of the standard of conduct expected and that:

If the right to counsel is to retain any vitality, the focus in testing for prejudice must be readjusted where an investigator questions an accused known to be represented by counsel. We therefore hold that once an investigator is on notice that an attorney has undertaken to represent an individual in a military criminal investigation, further questioning of the accused without affording counsel reasonable opportunity to be present renders any statement obtained involuntary under Article 31(d) of the Uniform Code. This includes questioning with regard to the accused's future desires with respect to counsel as well as his right to remain silent, for a lawyer's counseling on these two matters in many instances may be the most important advice ever given his client. To permit an investigator, through whatever device, to persuade the accused to forfeit the assistance of his appointed attorney outside the presence of counsel would utterly defeat the congressional purpose of assuring military defendants effective legal representation without expense.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* In pertinent part, paragraph 44h provided: "[The trial counsel's] dealings with the defense should be through any counsel the accused may have." MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. IX, ¶ 44h (1969) (Rev.).

²¹ *McOmber*, 1 M.J. at 381-82 (citing *Massiah v. United States*, 377 U.S. 201 (1964)). In *Massiah*, the Supreme Court reviewed the admissibility of an incriminating statements provided by a post-indictment accused to an undercover informant for the Government. The Supreme Court held that the specific guarantees of the Sixth Amendment prohibit the Government from surreptitiously and deliberately eliciting incriminating statements from a post-indictment accused in the absence of counsel. *Massiah*, 377 U.S. at 206.

²² *McOmber*, 1 M.J. at 382.

Article 27, Uniform Code of Military Justice, 10 U.S.C. § 827.²³

By tying the notification to counsel requirement (i.e., the *McOmber* rule) to Article 27, UCMJ, the COMA announced that a servicemember's right to counsel extended to the right to have his counsel present at *any* interview related to a military investigation for which the counsel has undertaken representation.²⁴

The *McOmber* rule was codified into the Military Rules of Evidence (MRE) in 1994 under a "Notice to Counsel" provision in MRE 305(e).²⁵ The new MRE 305(e) stated:

When a person subject to the code who is required to give warnings under subdivision (c) intends to question an accused or person suspected of an offense and knows or reasonably should know that counsel either has been appointed for or retained by the accused or suspect with respect to that offense, the counsel must be notified of the intended interrogation and given a reasonable time in which to attend before the interrogation may proceed.²⁶

The Diminishment of the McOmber Rule

No sooner had the *McOmber* rule been written into the MRE than the case of *United States v. LeMasters*²⁷ narrowed its application. In *LeMasters*, the CAAF reviewed the application of the *McOmber* rule to a situation where a represented suspect initiates contact with law enforcement, affirmatively waives his rights against self-incrimination after an otherwise valid rights warning, and provides a statement in the absence of his detailed counsel.²⁸

On 12 May 1989, Senior Airman Stephen M. LeMasters, who was stationed in the Philippines, waived his rights and made a statement to an Air Force Office of Special Investigations (AFOSI) investigator.²⁹ Three days later, LeMasters was required to report to an Office of Special Investigations (OSI) office and speak to a special investigations agent.³⁰ Upon being advised of his Article 31, UCMJ, and *Miranda* rights, LeMasters requested an attorney and the interview terminated. Over the next several weeks, LeMasters established an attorney-client relationship with military defense counsel.³¹

On 12 July 1989, Philippine police arrested LeMasters during a "buy-bust" operation at his off-base residence which was completely independent of AFOSI's investigation.³² Upon his release from Philippine custody, an AFOSI agent instructed him to contact his attorney and, if he desired, to return to the OSI office to make a statement.³³ Beginning the next day, and at three more meetings over the next two months, LeMasters returned to the OSI office, waived his right to counsel and made statements that were later used at his court martial over defense objection.³⁴

In evaluating LeMasters's claim that his MRE 305(e) rights were violated when the police questioned him without the notification or presence of his counsel, the court reviewed both the Supreme Court case of *Edwards v. Arizona*³⁵ and the

²³ *Id.* at 383.

²⁴ *Id.* at 382-83 ("Although the question presented has certain constitutional overtones, our disposition of the matter on statutory grounds makes it unnecessary to resolve the Sixth Amendment claim." *Id.* at 382 (citations omitted)).

²⁵ MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 305(e) analysis, at A22-15 (1994) (stating that Rule 305(e) "is taken from *United States v. McOmber*, 1 M.J. 380 (C.M.A. 1976)").

²⁶ *Id.* MIL R. EVID. 305(e).

²⁷ 39 M.J. 490 (1994).

²⁸ *Id.* at 490-91.

²⁹ *Id.* at 491.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Edwards v. Arizona*, 451 U.S. 477 (1981).

language of MRE 305.³⁶ In *Edwards*, the Supreme Court ruled that an accused who invoked his right to counsel under *Miranda* could not, while in continuous police custody, be subjected to further police-initiated interrogation without his counsel being present.³⁷ The court emphasized that *Edwards* was decided five years after the *McOmber* decision and, like *McOmber*, was “designed to prevent police badgering . . . and overreaching.”³⁸

The court then turned to the text of MRE 305(e) and noted that the trigger for its protections arose when a person subject to the Code “intend[ed] to question” someone:

This language was designed to protect the right to counsel when the police initiate the interrogation. If Mil. R. Evid. 305(e) is applicable, the suspect has a right to have his counsel notified, and his counsel must be given a reasonable period of time to attend the interrogation. Here there is no evidence of police overreaching or badgering or attempting to “surreptitiously” deprive appellant of the right to counsel.³⁹

Based on the Supreme Court’s decision in *Edwards* and the wording of MRE 305(e), the court determined that notification of LeMasters’s counsel was not required because LeMasters himself initiated contact with the police and affirmatively waived his right of notice to counsel.⁴⁰ In short, the court determined that “[I]ike other Constitutional rights, a suspect may make a knowing and intelligent waiver.”⁴¹ In a footnote foreshadowing the decision in *Finch*, the *LeMasters* court stated that:

McOmber cannot reasonably be based on Article 27, Uniform Code of Military Justice, 10 USC § 827, which concerns assignment of counsel for special and general courts-martial. In *United States v. Clark*, 22 USCMA 570, 48 CMR 77 (1973), the Court held that there was no right to counsel at interrogations other than those specified in *Miranda v. Arizona* Article 27 has not changed since that decision.⁴²

In 1994, only months after the *LeMasters* decision, MRE 305(e) was rewritten and retitled “Presence of Counsel.”⁴³ This revised (and current) version of MRE 305(e) provides for only two situations in which counsel must be present, absent valid waiver: (1) custodial interrogations where the accused or suspect has already requested counsel and remained in continuous custody, and (2) post-preferral interrogation of a represented accused where the questions concern the offense or matters that were subject of the preferral of charges.⁴⁴ As the 2005 analysis of the MRE states, the 1994 Amendment “conform[ed] military practice with the Supreme Court’s decision” in questions concerning the offense or matters that were the subject of the preferral of the charges.⁴⁵ In effect, this change brought military practice into conformity with the Supreme Court’s decisions in *Minnick v. Mississippi* and *McNeil v. Wisconsin*.⁴⁶

The Death of the McOmber Rule

In the aftermath of *LeMasters* and the revised MRE 305(e), it was clear that if a represented suspect approached law enforcement and made a knowing and intelligent waiver of his right to counsel, law enforcement could interview him without first notifying his counsel. What was not entirely clear was whether the *McOmber* rule requiring notification of counsel was

³⁶ *LeMasters*, 39 M.J. at 492.

³⁷ *Edwards*, 451 U.S. at 487.

³⁸ *LeMasters*, 39 M.J. at 492 (citations omitted).

³⁹ *Id.*

⁴⁰ *Id.* at 492-93.

⁴¹ *Id.* at 493.

⁴² *Id.* at 492 n.*.

⁴³ MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 305(d) (2005) [hereinafter 2005 MCM].

⁴⁴ *Id.* MIL. R. EVID. 305(e).

⁴⁵ *Id.* MIL. R. EVID. 305(d) analysis, at A22-15 (citations omitted).

⁴⁶ *Id.* MIL. R. EVID. 305(e) analysis, at A22-15 (citing *Minnick v. Mississippi*, 458 U.S. 146 (1990); *McNeil v. Wisconsin*, 501 U.S. 171 (1991)).

still valid in cases in which law enforcement *initiated* questioning of a represented suspect. This question was answered by the CAAF during the past court term in *United States v. Finch*.⁴⁷

In the spring of 1997, Staff Sergeant James E. Finch, a United States Marine Corps recruiter, was prosecuted for a number of offenses arising from the death of a female recruit in a traffic accident.⁴⁸ The recruit was killed when her car, with Finch inside, slid off a road near a lake where they had been drinking together.⁴⁹ Prior to the day of the accident, Finch had received an order to remain away from the recruit by a superior noncommissioned officer.⁵⁰

Two months after the recruit's death, an investigating officer from Finch's higher headquarters advised Finch of his rights, which Finch waived, and obtained several statements from him regarding the circumstances surrounding the recruit's death.⁵¹ Prior to conducting this interview, the investigating officer had been informed by civilian police investigating the accident that a "hot shot lawyer" represented Finch.⁵² The investigating officer had also reviewed a litigation report that noted that Finch was represented.⁵³ In fact, not only was Finch represented by civilian defense counsel, his counsel had told the civilian police that all contact with Finch should be made through him.⁵⁴

At trial, Finch's defense counsel moved to suppress Finch's statements to the investigating officer.⁵⁵ The trial judge denied this motion.⁵⁶ Finch was subsequently convicted by a military judge of conspiracy to violate a general order, failure to obey a general order, failure to obey a lawful order, making a false official statement, and being drunk on duty. Finch was found not guilty of involuntary manslaughter.⁵⁷ On appeal, Finch claimed that the judge's failure to suppress his statements violated his right to counsel under the precedent of *United States v. McOmber*.⁵⁸

In reviewing the continued applicability of the *McOmber* rule, Judge Crawford, writing for the majority, wrote that *McOmber* "sought to fulfill the statutory purpose of Article 27 . . . in a manner consistent with parallel developments in the Supreme Court's constitutional analysis of the right to counsel . . ." ⁵⁹ The CAAF reviewed the evolution of MRE 305 in response to the Supreme Court's decisions in *Minnick*⁶⁰ and *McNeil*,⁶¹ and its own decision in *LeMasters*.⁶² The court also noted that while the President had changed the MRE since the announcement of the *McOmber* decision, "a change in a rule cannot supplant a statute including a statutorily based judicial decision."⁶³ After noting that Article 27, UCMJ, had not changed since the announcement of the *McOmber* decision, the majority declared that "*McOmber* represented an attempt to ensure that the statutory right to counsel under Article 27, UCMJ, was administered in a manner consistent with the then-current Supreme Court constitutional precedent regarding the right to counsel."⁶⁴ The majority stated that *Minnick* and *McNeil* had changed the constitutional landscape surrounding an accused's pre-preferred right to counsel and that neither the

⁴⁷ 64 M.J. 118 (2006).

⁴⁸ *Id.* at 120.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 123.

⁵² *Id.*

⁵³ *United States v. Finch*, No 200000056, 2005 CCA LEXIS 77, *24-*25 (N-M. Ct. Crim. App. Mar. 10, 2005) (unpublished).

⁵⁴ *Finch*, 64 M.J. at 123.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 119. The military judge sentenced Finch to five years confinement, reduction to pay grade E-1, and a bad-conduct discharge. *Id.*

⁵⁸ *Id.* at 123.

⁵⁹ *Id.*

⁶⁰ *Minnick v. Mississippi*, 498 U.S. 146 (1990).

⁶¹ *McNeil v. Wisconsin*, 501 U.S. 171 (1991)

⁶² *United States v. LeMasters*, 39 M.J. 490 (1994).

⁶³ *United States v. Finch*, 64 M.J. 118, 124 (2006).

⁶⁴ *Id.*

McOmber notification rule nor subsequent codification of that rule in MRE 305 was required by the Constitution.⁶⁵ Finally, the CAAF held the *McOmber* rule was essentially a windfall to the accused that was not required nor justified by the Constitution or Article 27, UCMJ.⁶⁶ With that, the *McOmber* rule died.

Pointers for Practitioners

For both government and defense counsel, the *Finch* case clarifies when a suspect or an accused is entitled to counsel under the Fifth and Sixth Amendments. In future investigations, there are only two situations in which an accused is entitled to the notification and presence of his counsel prior to law enforcement-initiated interrogations. First, absent a valid waiver, if an accused or person who is suspected of an offense is subjected to custodial interrogation and requests counsel, counsel must be present before any subsequent law enforcement-initiated custodial interrogation can continue.⁶⁷ Second, absent a valid waiver, if an accused requests counsel or has appointed or retained counsel, that counsel must be present prior to any post-preference interrogation by a person subject to the Code who initiates an interrogation for a law enforcement or disciplinary purpose *and* asks a question that concerns the offenses or matters that were the subject of the preferred charges.⁶⁸

Unfortunately for government counsel, the *Finch* decision and MRE 305(e) create some unanswered ethical dilemmas when dealing with law enforcement officials who are investigating represented suspects. What happens if law enforcement asks a government counsel, for instance a trial counsel or chief of military justice, whether it is legal for them to initiate an interrogation of a represented pre-preference suspect? Taking that example one step further, can a government trial counsel or chief of military justice advise law enforcement to engage in that activity?

Rule 4.2 (Communication with Person Represented by Counsel) of Army Regulation (AR) 27-26, *Rules of Professional Conduct for Lawyers*, states that “in representing a client, a lawyer shall not communicate about the subject of the representation with a party a lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so.”⁶⁹ Likewise, Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants) prohibits lawyers with direct supervisory authority over a nonlawyer from ordering or ratifying conduct that the lawyer himself could not engage in under the Rules of Professional Conduct.⁷⁰ In a footnote toward the end of their opinion, the *Finch* majority noted that MRE 305(e) “does not address the ethical implications of dealing with accuseds or suspects who are represented by counsel.”⁷¹

Who Must Give Article 31 Rights Warnings?

In April 2006, the CAAF released two new opinions that explore the question of a servicemember’s rights under Article 31, UCMJ during questioning by individuals whose duties are not normally associated with military law enforcement. In *United States v. Cohen*,⁷² the court determined whether an officer performing duties as an inspector general (IG) was required to read a servicemember his Article 31, UCMJ rights when questioning him about the circumstances surrounding his complaints. In *United States v. Brisbane*,⁷³ the court examined whether a suspect’s statements to a Department of Defense (DOD) Family Advocacy treatment manager should have been preceded by an Article 31 rights advisement.

⁶⁵ *Id.* at 125.

⁶⁶ *Id.*

⁶⁷ 2005 MCM, *supra* note 43, MIL. R. EVID. 305(e)(1). *See also* *Edwards v. Arizona*, 451 U.S. 477 (1981); *Arizona v. Roberson*, 486 U.S. 675 (1988). Both of these cases stand for the proposition that once a suspect in custody requests counsel, interrogation may not proceed unless counsel is present. Government officials may not reinstate custodial interrogation in the absence of counsel whether or not the accused has consulted with his attorney. *Minnick v. Mississippi*, 498 U.S. 146, 150-52 (1990). However, this rule does not forbid further interrogation if the suspect or accused initiates questioning, regardless of whether the he is in custody. *Minnick*, 498 U.S. at 154-55.

⁶⁸ 2005 MCM, *supra* note 43, MIL. R. EVID. 305(e)(2).

⁶⁹ U.S. DEP’T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS R. 4.2 (1 May 1992) [hereinafter AR 27-26].

⁷⁰ *Id.* R. 5.3.

⁷¹ *Finch*, 64 M.J. at 125 n.12.

⁷² 63 M.J. 45 (2006).

⁷³ 63 M.J. 106 (2006).

During the spring of 2000, Lieutenant Colonel (LtCol) Kluck, United States Air Force, was assigned as an IG for the 17th Training Wing at Goodfellow Air Force Base, Texas.⁷⁵ Prior to becoming an IG, LtCol Kluck had served over eighteen years as an investigator with the AFOSI.⁷⁶ On 31 May 2000, Airman First Class Alexander L. Cohen visited LtCol Kluck's office to file a complaint about the length of time it was taking to process his security clearance and the fact that he had been denied leave to visit his ill father.⁷⁷ When Cohen spoke to LtCol Kluck, he explained that he had previously been charged with rape, but that the charge had been "dropped [until] further notice."⁷⁸ Cohen told LtCol Kluck that the base staff judge advocate (SJA) office had notified him that he was a witness for an Article 32, UCMJ hearing in June, but that Cohen's defense attorney told him he would not be needed to testify. In a later meeting with LtCol Kluck, Cohen revealed that his attorney said he would not be needed for a trial until mid- to late July.⁷⁹

At some point during the course of several meetings with Cohen, LtCol Kluck asked Cohen to describe the incident that led to the "dropped" rape charge.⁸⁰ During that meeting Cohen described how he and four other trainees from Goodfellow Air Force Base, two male and two female, went to a concert in Abilene, Texas.⁸¹ After the concert, all five airmen became heavily intoxicated and checked into a hotel room.⁸² Cohen told LtCol Kluck that during the course of the evening he had photographed another male airman having intercourse with an unconscious female airman.⁸³ When LtCol Kluck asked, Cohen denied participating in any sexual acts with the female airman.⁸⁴

At trial, LtCol Kluck was allowed to testify, over defense objection and his own protestations, that Cohen had told him that he had been present during the rape of one female airman and that he had photographed the rape and helped clean the victim's clothing after the rape.⁸⁵ During the motion to suppress, LtCol Kluck explained that he had not read Cohen his Article 31 rights because Cohen had told him "he was simply a witness [to] this incident, by taking photographs."⁸⁶ Ultimately, the trial judge determined that LtCol Kluck "had no criminal investigator or disciplinary duties" and was not required to advise Cohen of his rights under Article 31.⁸⁷

The AFCCA agreed with the trial judge's assessment and held that LtCol Kluck was not required to read Cohen his Article 31 rights because, in his capacity as an IG, he "was not acting in a law enforcement or disciplinary capacity."⁸⁸ The service court also concluded that there was "no basis to conclude that the IG made promises of confidentiality such as would render [Cohen's] statements to him involuntary."⁸⁹ Finally, the service court concluded that Cohen suffered no material prejudice even if the trial judge erred because the evidence was strong enough to convict him even without using his statements to LtCol Kluck.⁹⁰

⁷⁴ 63 M.J. 45.

⁷⁵ *Id.* at 47.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* Lieutenant Colonel Kluck initially refused to testify at Cohen's trial because he believed the contents of their conversation fell within the IG privilege of confidentiality. He later testified only after he was ordered to do so by the Inspector General of the Air Force. *Id.* at n.5.

⁸⁶ *Id.*

⁸⁷ *Id.* at 51-52.

⁸⁸ *Id.* at 49 (quoting United States v. Cohen, No. 200000133, 2003 CCA LEXIS 130, at *19).

⁸⁹ *Id.*

⁹⁰ *Id.*

The CAAF began its review of Cohen’s case by announcing what it described as the four textual predicates of Article 31(b): “First, the article applies to persons subject to the UCMJ. Second and third, the article applies to interrogation or requests for any statements from ‘an accused or a person suspected of an offense.’ Fourth, the right extends to statements regarding the offense(s) of which the person is accused or suspected.”⁹¹

Since LtCol Kluck, an active duty Air Force officer with eighteen years of service, was clearly a person subject to the UCMJ, the court immediately took up the second and third textual predicates.⁹² The court observed that if Article 31(b) were “applied literally, [it could] potentially have a comprehensive and unintended reach into all aspects of military life and mission.”⁹³ The court then stated “this Court has interpreted the second textual predicates—interrogation and the taking of ‘any’ statement—in context, and in a manner consistent with Congress’ intent that the article protect the constitutional right against self-incrimination.”⁹⁴ Finally, the court pointed to the importance of analyzing “the questioner’s status and the military context in which the questioning occurs.”⁹⁵

The court observed that “when a questioner is performing a law enforcement or disciplinary investigation . . . and the person questioned is suspected of an offense, then Article 31 warnings are required.”⁹⁶ Whether a questioner is performing a law enforcement or disciplinary investigation “is determined by assessing all the facts and circumstances at the time of the interview to determine whether the military questioner was acting . . . in an official law-enforcement or disciplinary capacity.”⁹⁷ If the questioner was not acting in a law enforcement or disciplinary capacity, no warnings are generally required because “military persons not assigned to investigate offenses, do not ordinarily interrogate nor do they request statements from others accused or suspected of a crime.”⁹⁸ Likewise, that court stated that “where the questioner is acting in an unofficial capacity and the person questioned does not perceive the questioning as more than a casual conversation, [Article 31] warnings are not required.”⁹⁹

Applying the law to the facts in Cohen’s case, the court determined that the military judge erred when he allowed Cohen’s statements to LtCol Kluck to be admitted at trial.¹⁰⁰ The court found that in addition to being a person subject to the UCMJ, LtCol Kluck’s responsibilities as an IG were not exclusively administrative.¹⁰¹ Looking to the applicable Air Force instructions, the court pointed to provisions that created an express criminal exception to the standard confidentiality promised to IG complainants.¹⁰² The court also noted that the Air Force instruction “contemplates the possibility that IG investigations could transition into law enforcement or disciplinary investigations,” and that IGs were directed to consult with the SJA concerning “the need for and substance of Article 31 rights advisement.”¹⁰³

Having determined that LtCol Kluck was a person subject to the code and that he was acting in a law enforcement or disciplinary capacity, the court looked at whether LtCol Kluck should have suspected that Cohen had committed an offense.¹⁰⁴ While the court allowed that LtCol Kluck may have been entitled to consider Cohen a witness and not a suspect during their first meeting, the court stated that as soon as LtCol Kluck was aware that Cohen had previously been charged with rape, and that the charge might be reinstated, he should have reasonably suspected that Cohen may have committed an

⁹¹ *Id.*

⁹² *Id.* at 50-51.

⁹³ *Id.* at 49 (quoting *United States v. Gibson*, 14 C.M.R. 164, 170 (C.M.A. 1954)).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* (quoting *United States v. Swift*, 53 M.J. 439, 446-47 (2000)).

⁹⁷ *Id.* (quoting *Swift*, 53 M.J. at 446).

⁹⁸ *Id.* at 50 (quoting *United States v. Loukas*, 29 M.J. 385, 388 (C.M.A. 1990)).

⁹⁹ *Id.* See *United States v. Duga*, 10 M.J. 206, 210 (C.M.A. 1981) and *United States v. Loukas*, 29 M.J. 385, 388 (C.M.A. 1990).

¹⁰⁰ *Id.* at 54.

¹⁰¹ *Id.*

¹⁰² *Id.* at 51 (reviewing U.S. DEP’T OF AIR FORCE, INSTR. 90-301, INSPECTOR GENERAL COMPLAINTS para. 1.37.5.1.2 (Aug. 12, 1999) [hereinafter 1999 AFI 90-301]).

¹⁰³ *Id.* at 52 (quoting 1999 AFI 90-301, *supra* note 101, para. 2.34.6).

¹⁰⁴ *Id.* at 52-53.

offense.¹⁰⁵ In any case, the court determined that once Cohen revealed that he took photographs of the alleged rape he “should have reasonably suspected [Cohen] of the offense of indecent acts, if not complicity in the rape itself.”¹⁰⁶

Despite this finding, the court concluded that the judge’s error in admitting Cohen’s unwarned statements to LtCol Kluck did not prejudice Cohen’s trial.¹⁰⁷ The court pointed to the fact that Cohen pleaded guilty to the indecent act of photographing the rape, and that his conviction of the indecent act and indecent assault of the other victim was based upon overwhelming evidence of guilt in the form of eyewitnesses and photographic evidence.¹⁰⁸ Finally, the court noted that none of the unwarned statements that Cohen had given to LtCol Kluck implicated him in the crimes he committed against the female airmen.¹⁰⁹

Pointers for Practitioners

For practitioners, the *Cohen* case emphasizes the broad scope of Article 31’s protections for servicemembers who are, or should reasonably be, suspected of offenses. *Cohen* also demonstrates the narrowness of exceptions permitted for persons “subject to the Code” who may have “a mixed purpose” when asking servicemembers questions that may result in an incriminating response.

United States v. Brisbane¹¹⁰

In the late spring of 2001, United States Air Force Staff Sergeant Mark S. Brisbane’s eight-year-old stepdaughter asked him what she would look like when she was older.¹¹¹ The stepdaughter later testified that she intended her question to mean what she would wear when she graduated.¹¹² Brisbane later told others that he misunderstood his stepdaughter’s question as an inquiry into how his stepdaughter would physically develop.¹¹³ In response to her question, Brisbane showed her naked pictures of adult women on his home computer.¹¹⁴

The stepdaughter, whose mother was on vacation in Hawaii, told a neighbor about the photos Brisbane had shown her.¹¹⁵ The neighbor called the base Family Advocacy office to report Brisbane’s conduct.¹¹⁶ In response to this referral, the base Child Sexual Maltreatment Response Team (CSMRT) convened.¹¹⁷ The CSMRT, operating under the authority of appropriate Air Force instructions,¹¹⁸ consisted of a Family Advocacy Officer (FAO), an Air Force Office of Special Investigations (AFOSI) agent, a judge advocate (JA), and other agency representatives with child protection responsibilities.¹¹⁹ At this meeting, it was decided that Ms. Lynch, a Family Advocacy treatment manager and civilian DOD

¹⁰⁵ *Id.* at 53-54.

¹⁰⁶ *Id.* at 53.

¹⁰⁷ *Id.* at 54.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *United States v. Brisbane*, 63 M.J. 106 (2006).

¹¹¹ *Id.* at 108.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ U.S. DEP’T OF AIR FORCE, INSTR. 40-301, MEDICAL COMMAND, FAMILY ADVOCACY para. 3.2.1 (July 22, 1994) [hereinafter AFI 40-301].

¹¹⁹ *Brisbane*, 63 M.J. at 109 n.2.

Defense employee, should conduct the initial interview of Brisbane “to determine whether they had enough information to proceed.”¹²⁰

Subsequent to this meeting, Ms. Lynch interviewed the stepdaughter and Brisbane, who was directed by his command to see Ms. Lynch.¹²¹ Ms. Lynch told Brisbane that he had “limited confidentiality” during the interview but did not advise him of his Article 31 rights.¹²² Her first question to Brisbane was, “Did you do it?”¹²³ In response, Brisbane explained that he downloaded some pictures from an adult pornography site on the Internet and showed them to his stepdaughter so she would know what her physical appearance would be when she grew up.¹²⁴ At trial, Ms. Lynch informed the military judge that she did not provide Brisbane, nor anyone else that she had ever talked to, Article 31 rights advice because it was “just not part of [her] job.”¹²⁵

Ms. Lynch completed her interviews and forwarded a report to the base Family Maltreatment Case Management Team (FMCMT).¹²⁶ At about the same time, the AFOSI closed their case on Brisbane because it “lacked credible information to open a substantive investigation.”¹²⁷ In accordance with appropriate AFOSI procedures, Brisbane’s investigative file was forwarded to a “forensic science consultant” for further examination.¹²⁸ After reviewing the file, the forensic science consultant recommended that AFOSI launch a full investigation into Brisbane’s alleged misconduct.¹²⁹

Several weeks later, the FCMCT met and, according to an e-mail from the AFOSI detachment commander that was admitted at trial, additional information was provided during this meeting that “raised some concerns” with the AFOSI commander.¹³⁰ During this period of time, the AFOSI opened a criminal investigation into Brisbane’s conduct.¹³¹ Despite efforts by the defense at trial, the AFOSI detachment commander refused to admit that it was Ms. Lynch’s report that caused her to open an investigation and maintained that the investigation was opened in response to the advice of their forensic consultant.¹³²

When AFOSI agents spoke to Brisbane, approximately six weeks after Ms. Lynch’s conversation with him, he was advised of his Article 31 rights, waived them, and gave a statement.¹³³ In that statement, Brisbane calmly told investigators the same story he had previously related to Ms. Lynch.¹³⁴ At the conclusion of the interview, Brisbane agreed to take the investigators back to his on-post quarters and show them the images he had shown his daughter.¹³⁵

The investigators requested, and received, consent from Brisbane to seize his computer.¹³⁶ However, prior to seizing the computer, Brisbane accidentally opened one of the computer’s files in front of the investigators that appeared to show

¹²⁰ *Id.* at 109 & 112.

¹²¹ *Id.*

¹²² *Id.* at 109.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* “The FMCMT consists of medical, investigative, and other appropriate base and community agency representatives as determined by the FAC [Family Advocacy Committee].” AFI 40-301, *supra* note 116, para. 2.2.3.

¹²⁷ *Brisbane*, 63 M.J. at 109.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 115.

¹³³ *Id.* at 109.

¹³⁴ *Id.*

¹³⁵ *Id.* at 109-10.

¹³⁶ *Id.* at 110.

“thumbnail pictures of naked children.”¹³⁷ The investigators testified at trial that once the thumbnail pictures appeared, Brisbane’s demeanor changed from calm to very nervous.¹³⁸ Brisbane began shaking, sweating, and stammering.¹³⁹ At one point he blurted out that he “thought it was okay to have pictures of child pornography as long as it was for educational purposes.”¹⁴⁰ Later that day, Brisbane signed a confession admitting that he had child pornography on his computer.¹⁴¹

On appeal, Brisbane argued that the trial judge abused his discretion when he admitted Brisbane’s statements to Ms. Lynch in the absence of a prior warning under Article 31.¹⁴² Brisbane also argued that his subsequent statements to AFOSI investigators should have been suppressed because they were tainted by Brisbane’s earlier unwarned statement to Ms. Lynch.¹⁴³ The Government responded that Ms. Lynch was not acting as a law enforcement officer when she interviewed Brisbane, and therefore was not subject to the UCMJ’s Article 31 requirement.¹⁴⁴ The Government further argued that Brisbane’s confession to law enforcement was voluntary under all the circumstances of the case.¹⁴⁵

In examining whether Ms. Lynch was “a person subject to the code” for purposes of Article 31, the court referred to MRE 305(b)(1)’s declaration that such a person “includes a person acting as a knowing agent of a military unit or of a person subject to the code.”¹⁴⁶ The court then noted that in previous cases the court had recognized that a civilian investigator was required to comply with Article 31 only when “(1) the scope and character of the cooperative efforts demonstrate that ‘that the two investigations merged into an indivisible entity,’ and (2) when the civilian investigator acts in furtherance of any military investigation, or in any sense as an instrument of the military.”¹⁴⁷

Looking at recent cases involving applicability of Article 31 to social workers, the court turned to the cases of *United States v. Moreno*¹⁴⁸ and *United States v. Raymond*.¹⁴⁹ In *Moreno*, the court concluded that a state social worker’s investigation neither merged with the ongoing military investigation nor was the social worker acting as an agent of the military investigation.¹⁵⁰ The court based this determination on the following factors: “(1) lack of ‘communication or coordination between the two camps’; (2) the social worker ‘remained in the mode of social worker’ and (3) the social worker pursued her own ‘limited state objectives’ and cooperated with military authorities ‘only where necessary to effectuate her own goals.’”¹⁵¹

In reviewing *Raymond*, the court noted that a psychiatric social worker was found not to have acted as an instrument of law enforcement when she interviewed the appellant after he walked into her clinic without a command referral document and when she had no contact with the command either before or after the appellant’s walk-in appointment.¹⁵² The *Brisbane* court also emphasized the *Raymond* opinion’s declaration that the Army regulation dealing with child abuse, requiring cooperative effort between the military community and law enforcement, did not transform a community services program into a law enforcement program. Furthermore, it did not “render every member of the military community a criminal

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 111.

¹⁴⁷ *Id.* (quoting *United States v. Rodriguez*, 60 M.J. 239, 252 (2004)); *see also* *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992); *United States v. Quillen*, 27 M.J. 312, 314 (C.M.A. 1988).

¹⁴⁸ 36 M.J. 107 (C.M.A. 1992).

¹⁴⁹ 38 M.J. 136 (C.M.A. 1993).

¹⁵⁰ *Moreno*, 36 M.J. at 115.

¹⁵¹ *Brisbane*, 63 M.J. at 111 (quoting *Moreno*, 36 M.J. at 115).

¹⁵² *Id.*

investigator or investigative agent . . .”¹⁵³ Finally, the court pointed to *Raymond*’s announcement that “there is no historical duty of health professionals engaged in treatment to warn based on the purpose behind Article 31(b).”¹⁵⁴

Contrasting the facts of *Brisbane* with *Moreno* and *Raymond*, the court concluded that Ms. Lynch acted in furtherance of a military investigation and was a “person subject to the code” for purposes of Article 31.¹⁵⁵ Unlike *Moreno* and *Raymond*, Ms. Lynch was in contact with military law enforcement before and after her interview with Brisbane, and Brisbane only presented himself to Ms. Lynch’s office for an interview after he had been ordered to do so by his chain of command.¹⁵⁶ After identifying that Ms. Lynch was a person subject to the code, the court quickly determined that she had reasonably suspected Brisbane of an offense based on her trial testimony (during which she admitted that she had suspected him of an offense), and should have read Brisbane his Article 31 rights before questioning him.¹⁵⁷

After determining that Brisbane’s statements to Ms. Lynch should have been preceded by an Article 31 rights warning, the court turned to whether his subsequent statements to AFOSI were voluntary in the absence of a cleansing warning.¹⁵⁸ To evaluate the admissibility of a confession obtained from a suspect subsequent to an illegally obtained confession, the court looks to the totality of the circumstances.¹⁵⁹ To evaluate the admissibility of a confession obtained from a suspect who had not been properly warned of his rights, the court looked to the totality of circumstances test announced in the Supreme Court case of *Oregon v. Elstad*¹⁶⁰ and applied to the military by the COMA in *United States v. Phillips*.¹⁶¹

After affirming that the absence of a cleansing warning was not fatal, the court looked at the “classic listing of the other factors used in a voluntariness analysis”:

In determining whether a defendant’s will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account have included the youth of the accused, his lack of education, or his low intelligence, the lack of any advice to the accused of his constitutional right, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep.¹⁶²

Looking at the facts of this case, the CAAF found that Brisbane’s statements to AFOSI were voluntary under the totality of the circumstances.¹⁶³ First, Brisbane’s interview with AFOSI occurred almost six weeks after his initial interview with Ms. Lynch.¹⁶⁴ Second, Brisbane was a mature, twenty-eight-year-old staff sergeant with ten years of service in the military.¹⁶⁵ Third, the conditions of his interview were not inhumane.¹⁶⁶ The court also pointed out that at the time of his interview with AFOSI, Brisbane did not believe he had done anything criminal in showing pictures of naked adult women to

¹⁵³ *Id.* (quoting *Raymond*, 38 M.J. at 138-39).

¹⁵⁴ *Id.* (quoting *Raymond*, 38 M.J. at 140).

¹⁵⁵ *Id.* at 112-13.

¹⁵⁶ *Id.* at 113.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 114. A cleansing warning is a warning in which the “accused [is] warned that a previous statement cannot be used against him.” *United States v. Cuento*, 60 M.J. 106, 109 (2004) (quoting *United States v. Wimberly*, 36 C.M.R. 159, 165 (C.M.A. 1966)).

¹⁵⁹ *Brisbane*, 63 M.J. at 114.

¹⁶⁰ 470 U.S. 298 (1985).

¹⁶¹ *United States v. Phillips*, 32 M.J. 76, 79 (C.M.A. 1991) (holding that, “Where the earlier confession was ‘involuntary’ only because the suspect had not been properly warned of his panoply of rights to silence and counsel, the voluntariness of the second confession is determined by the totality of the circumstances. The earlier, unwarned statement is a factor in this total picture, but it does not presumptively taint the subsequent confession.”).

¹⁶² *Brisbane*, 63 M.J. at 114 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)).

¹⁶³ *Id.* at 115-16.

¹⁶⁴ *Id.* at 115.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

his stepdaughter.¹⁶⁷ Finally, the court noted that the trial testimony indicated that Brisbane was calm until he inadvertently brought up naked pictures of children on his computer.¹⁶⁸ In the end, the CAAF determined that the admission of the statements to Ms. Lynch, while error, was harmless error beyond a reasonable doubt and that the military judge did not err by admitting evidence obtained from Brisbane's computer.¹⁶⁹

Pointers for Practitioners

The *Brisbane* decision addresses the dangers of close coordination between social service officials, such as Ms. Lynch, and representatives of law enforcement and other disciplinary authorities. In recent years, the DOD has created or enhanced a number of programs designed to support victims that either require or encourage the creation of multi-disciplinary committees or interaction among social service providers and representatives of the chain of command, military law enforcement, and judge advocates.¹⁷⁰ The holding in *Brisbane* is a warning to social service providers, and their legal advisors, that they must either avoid *Brisbane*-like coordination with law enforcement and command representatives or begin giving suspected or accused servicemembers their Article 31 rights before speaking to them.

“You did what?”: De Facto Immunity and Judicial Remedial Action

In *United States v. McKeel*¹⁷¹ the CAAF determined that a purported grant of immunity relied upon by an accused may be remedied by judicial action at trial that falls short of requiring specific performance by the government. The facts of *McKeel* reveal that during an interview with an AFOSI investigator, Seaman Joshua R. McKeel admitted to various sexual acts, to include sexual intercourse, with an intoxicated female shipmate.¹⁷² During that interview, McKeel admitted that he believed the female shipmate was too intoxicated to consent to the sexual activity.¹⁷³ The AFOSI agent recorded McKeel's admissions in his notes and forwarded his investigative report to McKeel's special court-martial convening authority (SPCMCA).¹⁷⁴

The investigation landed on the desk of a chief petty officer (CPO) who served as the ship's senior enlisted person responsible for military justice matters.¹⁷⁵ The CPO contacted McKeel and proposed an agreement whereby McKeel would plead guilty to various charges, including rape, at an Article 15 proceeding and, if he waived his right to an administrative discharge board, there would be no court-martial for his misconduct.¹⁷⁶

McKeel accepted the CPO's offer, accepted Article 15 proceedings from his SPCMCA, and waived his right to an administrative discharge board.¹⁷⁷ When the SPCMCA forwarded McKeel's separation packet to the general court-martial convening authority (GCMCA), who was unaware of McKeel's "agreement" with the CPO, he disapproved the administrative separation and ordered an Article 32 investigation that ultimately led to McKeel's court-martial.¹⁷⁸

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 115-16.

¹⁶⁹ *Id.*

¹⁷⁰ Examples of these programs include the Family Advocacy Program (U.S. DEP'T OF ARMY, REG. 608-18, THE FAMILY ADVOCACY PROGRAM (30 May 2006)) and the Sexual Assault Prevention and Response Program (U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY ch. 8 (7 June 2007)).

¹⁷¹ 63 M.J. 81 (2006).

¹⁷² *Id.* at 83.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 83-84.

¹⁷⁷ *Id.* at 84. Remarkably, the SPCMCA found McKeel guilty of rape during the Article 15 proceedings and sentenced him to forty-five days restriction, forty-five days of extra duty, forfeiture of one-half pay per month for two months, and reduction from E3 to E2. *Id.*

¹⁷⁸ *Id.*

In its analysis of the *McKeel* case, the CAAF reviewed RCM 704¹⁷⁹ and the President's empowerment of GCMCAs to grant immunity.¹⁸⁰ The court also noted that RCM 704(c)(3) forbids GCMCAs from delegating the authority to grant immunity in any form.¹⁸¹ The court also stated that purported grants of immunity by unauthorized individuals are invalid, and that military judges are empowered to tailor relief to the circumstances of a particular case if: "(1) a promise of immunity was made; (2) the accused reasonably believed that a person with apparent authority to do so made the promise; and (3) the accused relied upon the promise to his or her detriment."¹⁸²

The court reiterated that the relief for promises of immunity from those having apparent, but not actual authority, to grant immunity was tied to the extent of accused's detrimental reliance upon the purported grant of immunity.¹⁸³ The court stated that "[n]ormally, detrimental reliance upon apparent authority can be remedied by measures short of a bar to prosecution, such as exclusion of evidence obtained directly or indirectly from the servicemember's reliance or precluding nonevidentiary uses of immunized statements in the decision whether to prosecute."¹⁸⁴

At trial, the defense moved to dismiss the charges because of McKeel's detrimental reliance upon the CPO's offer and McKeel's subsequent acts in compliance with the offer.¹⁸⁵ The judge declined to dismiss the charges and instead ruled that: (1) the statements McKeel made at his Article 15 proceeding could not be admitted against him at trial; (2) the trial counsel could not admit evidence of McKeel's waiver of his administrative separation board; and (3) McKeel would be entitled to *Pierce* credit for the punishment he had received at the Article 15 proceedings.¹⁸⁶

Reviewing the facts, the law, and the trial judge's remedial action, the court concluded that the trial judge took appropriate remedial actions at trial and that McKeel had not demonstrated detrimental reliance.¹⁸⁷ The court pointed out that the most damning evidence against McKeel were his admissions to the AFOSI agent whose interview with McKeel predated the purported offer of immunity by the CPO.¹⁸⁸ The court also noted that the accused's admissions to the AFOSI investigator were sufficient in themselves to cause the GCMCA to reject the proposed administrative separation and order a pretrial investigation under Article 32, UCMJ.¹⁸⁹ Finally, the court agreed with the trial counsel's argument that the Government learned nothing from McKeel's statements at his Article 15 proceeding or administrative separation paperwork that they did not already know based upon his admissions to the AFOSI agent.¹⁹⁰

In a vigorous dissent, Judge Erdmann stated that the remedial actions taken by the trial judge were not and should not have been a proper element within the court's de facto immunity analysis.¹⁹¹ In Justice Erdmann's opinion, McKeel was entitled to enforcement of the promise, and the Government was barred from bringing a subsequent prosecution against him.¹⁹² What follows in his dissent is an enlightening review of military immunity law and support for his position on de

¹⁷⁹ MCM, *supra* note 43, R.C.M. 704.

¹⁸⁰ *McKeel*, 63 M.J. at 82-83.

¹⁸¹ *Id.* at 83. Rule for Courts-Martial 704(c)(3) states the following: "The authority to grant immunity under this rule may not be delegated. The authority to grant immunity may be limited by superior authority." 2005 MCM, *supra* note 43, R.C.M. 704(c)(3).

¹⁸² *McKeel*, 63 M.J. at 83. See, e.g., *Shepardson v. Roberts*, 14 M.J. 354, 358 (C.M.A. 1983); *United States v. Caliendo*, 32 C.M.R. 405, 409 (C.M.A. 1962); *United States v. Thompsen*, 29 C.M.R. 68, 71 (C.M.A. 1960).

¹⁸³ *McKeel*, 63 M.J. at 83.

¹⁸⁴ *Id.* See *United States v. Jones*, 52 M.J. 60, 65 (1999); *United States v. Olivero*, 39 M.J. 245, 249 (C.M.A. 1994).

¹⁸⁵ *McKeel*, 63 M.J. at 82.

¹⁸⁶ *Id.* at 84. The trial counsel voluntarily agreed not to introduce evidence of McKeel's waiver and to provide him full sentencing credit for punishment received as a result of his Article 15. *Id.*

¹⁸⁷ *Id.* at 84-85.

¹⁸⁸ *Id.* at 84.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 85 (Erdmann, J., dissenting).

¹⁹² *Id.*

facto immunity analysis. Unfortunately for McKeel and other de facto immunity grantees to come, Justice Erdmann was a minority of one.¹⁹³

Pointers for Practitioners

The *McKeel* case is notable because it outlines steps, short of dismissing the case, that a military judge can take to protect an accused's rights when he receives an invalid grant of immunity from an unauthorized individual. By way of contrast, practitioners interested in reading a case about the failure of a military judge to effectively remedy a purported grant of immunity may look to the AFCCA case of *United States v. LeBaron*.¹⁹⁴

In *LeBaron*, the appellant was suspected of abusing his thirteen-year-old daughter.¹⁹⁵ Despite substantial evidence against the accused, the chain of command was still uncertain how to proceed.¹⁹⁶ Prior to making a disposition decision, the chain of command directed the appellant to a certified sex therapist. The appellant went to the sex therapist with what the trial judge determined was a misunderstanding, not amounting to de facto immunity, that he would receive no worse than Article 15 punishment if he cooperated in the interview.¹⁹⁷ When charges were later referred to court-martial, based in large measure on what the appellant revealed to the sex therapist, the trial defense counsel requested the case be dismissed.¹⁹⁸ The trial judge excluded the statements the appellant had made to the sex therapist, apparently as a matter of due process.¹⁹⁹

The service court determined that the appellant had been granted de facto immunity by his chain of command and that the trial judge's remedy of excluding the statements to the sex therapist was insufficient to remove the taint.²⁰⁰ The AFCCA determined that because the information that the accused had revealed to the sex therapist under the de facto grant of immunity "caused or played a substantial role in the preferral and referral decisions," the trial judge's remedy of simply excluding his actual statements at trial still resulted in a due process violation.²⁰¹ Accordingly, the appellant's findings and sentence were set aside.²⁰²

Conclusion

The 2006 term of the CAAF was an informative and satisfying one for practitioners interested in self-incrimination law. Thirty years after its birth, and after at least a decade of uncertainty, the notice to counsel rule first announced in *United States v. McOmber* was officially overruled. The *Finch* ruling clarified when a suspect or accused soldier has a right to counsel, and brought military practice into greater—or at least clearer—conformity with federal practice.

¹⁹³ *Id.*

¹⁹⁴ ACM 35299, 2005 CCA LEXIS 422 (A.F. Ct. Crim. App. Dec. 23, 2005).

¹⁹⁵ *Id.* at *3-*4.

¹⁹⁶ *Id.* at *4.

¹⁹⁷ *Id.* at *15.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at *22-*23.

²⁰¹ *Id.*

²⁰² *Id.* at *23.