

Silence is Golden: Recent Developments in Self-Incrimination Law

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Introduction

*Don't talk unless you can improve the silence.*¹
- Laurence Coughlin

In the military, the law of self-incrimination embraces several essential sources of protection—Article 31,² the Fifth Amendment,³ the Sixth Amendment,⁴ and the voluntariness doctrine.⁵ During the 1998 term,⁶ the military appellate courts addressed self-incrimination issues that centered on each of these important safeguards. Generally, the courts applied the recognized rule of law applicable to the issue. In some cases, however, the courts injected a subtle twist to a rule, or redefined the limits of a rule. Regardless of the analysis or the rule of law applied, the result was the same—admissibility of the accused's confession⁷—except when there was silence. When the accused's decision to remain silent was introduced at trial either through intentional or unintentional acts by the trial counsel, the appellate courts consistently found error. As a result, the practical and obvious message from this year's cases is: trial counsel, do not reference the accused's silence, and defense counsel, pray your client remains silent!

The purpose of this article is to assist the military practitioner in evaluating last term's significant self-incrimination

cases. When applicable, this article highlights trends and critiques the courts' analysis. The article begins by addressing cases that define an interrogation, a concept that applies regardless of the source of protection involved. The article then focuses on Article 31(b)—the trigger and warnings relevant to this unique statute.⁸ Next, this article speaks to recent developments with invoking the Fifth Amendment right to counsel. After a discussion about several cases pertaining to the accused's exercise of silence, this article concludes by addressing the voluntariness doctrine. To assist the reader, a brief overview of the applicable rule of law relevant to the discussion is at the beginning of each section.

The Interrogation

Two sources of self-incrimination protection directly linked to an interrogation are the Fifth Amendment and Article 31(b). In 1966, with the case *Miranda v. Arizona*,⁹ the Supreme Court held that before any custodial interrogation, the police must warn the suspect that he has a right to remain silent, to be informed that any statement made may be used as evidence against him, and to the assistance of an attorney.¹⁰ This Court-created warning requirement was intended to protect persons

1. Ashley Pirovich, *Quotation Ring* (last modified Dec. 5, 1998) <<http://pirovich.com/quotes.html#>>.
2. UCMJ art. 31 (West 1999).
3. U.S. CONST. amend. V.
4. *Id.* amend. VI.
5. The voluntariness doctrine embraces common law voluntariness, due process voluntariness, and Article 31(d). See Captain Fredric I. Lederer, U.S. Army, *The Law of Confessions—The Voluntariness Doctrine*, 74 MIL. L. REV. 67 (1976) for a detailed historical account of the voluntariness doctrine.
6. The 1998 term began 1 October 1997 and ended 30 September 1998.
7. For purposes of this article, the word “confession” includes both a confession and an admission. A confession is defined as “an acknowledgment of guilt.” MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 304(c)(1) (1995) [hereinafter MCM]. An admission is defined as “a self-incriminating statement falling short of an acknowledgment of guilt, even if it was intended by its maker to be exculpatory.” *Id.* MIL. R. EVID. 304(c)(2). Military Rules of Evidence 301-306 reflect a partial codification of the law of self-incrimination. There are no equivalent rules under the Federal Rules of Evidence.
8. UCMJ art. 31(b) (West 1999). Article 31 has remained unchanged since its enactment in 1950.
9. 348 U.S. 436 (1966). In *United States v. Tempia*, 37 C.M.R. 249 (C.M.A. 1967), the Court of Military Appeals applied *Miranda* to military interrogations.
10. See *Miranda*, 348 U.S. at 465. The Court found that in a custodial environment, police actions are inherently coercive, and therefore, police must give the subject warnings concerning self-incrimination. The test for custody is an objective examination, from the perspective of the subject, of whether there was a formal arrest or restraint or otherwise deprivation of freedom of action in any significant way. *Id.* at 444. See also *Berkemer v. McCarty*, 468 U.S. 420, 428 (1985); MCM, *supra* note 7, MIL. R. EVID. 305(d)(1)(A). The *Miranda* warnings are intended to overcome the inherently coercive environment. In support of the Court's opinion that warnings are necessary, the Court referred to the military's warning requirement under Article 31(b). *Id.* at 489. Unlike Article 31(b) warnings, the *Miranda* warnings do not require the interrogator to inform the subject of the nature of the accusation, but do not confer a right to counsel.

against compelled self-incrimination—a protection guaranteed by the Fifth Amendment.¹¹

Before *Miranda*, the military had a similar warning requirement. In 1948, Article 31 was codified, and to date remains unaltered.¹² Article 31(b) requires a person subject to the code to warn a suspect or an accused of the right against self-incrimination when questioning him about criminal misconduct.¹³ Without an affirmative waiver of the rights provided by *Miranda* or Article 31(b), the government cannot question the accused about the suspected criminal misconduct.¹⁴

A common thread to both *Miranda* and Article 31(b) is “questioning” or “interrogation.” The terms are synonymous.¹⁵ The legal definition for an interrogation “includes any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning.”¹⁶ This test is applied not from the perspective of the suspect, but rather from the interrogator’s perspective, that is, did the police officer know or should he have known that his comments or

actions were reasonably likely to invoke an incriminating response from the suspect.¹⁷

Last term, two cases presented the issue of what constitutes an interrogation—*United States v. Turner*¹⁸ and *United States v. Young*.¹⁹ In *Turner*, the Army Court of Criminal Appeals decided the interrogation issue; however, in *Young*, when given an opportunity to do so, the United States Court of Appeals for the Armed Forces (CAAF) did not.

In *Turner*, a Border Patrol Agent apprehended the accused upon entering the United States from Mexico.²⁰ The arrest resulted when the agent found “four blocks of marijuana weighing a total of about twenty-three pounds” in the trunk of the car that the accused was driving.²¹ After the arrest, the agent advised the accused of his *Miranda* rights.²² The accused appeared “confused” and did not clearly waive his rights.²³ Several hours later, the agent discovered that the accused was absent without leave (AWOL) from the Army.²⁴ When the agent told the accused of his find, the accused responded emotionally and begged the agent not to return him to the military.²⁵

11. U.S. CONST. amend V. In part, the Fifth Amendment states: “nor shall [any person] be compelled in any criminal case to be a witness against himself”

12. See generally Captain Fredric I. Lederer, U.S. Army, *Rights Warnings in the Armed Services*, 72 MIL. LAW REV. 1 (1976) (providing a historical review of Article 31).

13. Article 31(b) states:

No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to 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.

UCMJ art. 31(b).

14. See MCM, *supra* note 7, MIL. R. Evid. 304(g).

15. See *id.* MIL. R. EVID. 305(b)(2).

16. *Id.*

17. See *Rhode Island v. Innis*, 446 U.S. 291 (1980). In *Innis*, the Supreme Court held that an “‘interrogation’ under *Miranda* refers . . . to express questioning, . . . [and] also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response” *Id.* at 301.

18. 48 M.J. 513 (Army Ct. Crim. App. 1998).

19. 49 M.J. 265 (1998).

20. *Turner*, 48 M.J. at 514.

21. *Id.*

22. *Id.* *Turner* did not involve Article 31(b) warnings because the border agent was not acting under the direction of the military and therefore, was not a person subject to the code. *Id.* at 515 n.1. See *United States v. Payne*, 47 M.J. 37 (1997) (finding that a defense investigative service agent who was conducting a background investigation was not acting under the direction of military authorities and was not, therefore, required to provide Article 31(b) warnings); *United States v. Moreno*, 36 M.J. 107 (C.M.A. 1992) (holding that a social services worker who had an independent duty under state law to investigate child abuse was not required to provide Article 31(b) warnings because there was no agency relationship with the military); UCMJ art. 31(b) (West 1999).

23. *Turner*, 48 M.J. at 515.

24. *Id.*

25. Specifically, the accused stated: “Please don’t do that, anything but that. You know, turn me over to the deputy, do whatever you want to do, just don’t turn me over to CID.” *Id.* at 515.

At trial, the defense challenged the introduction of the accused's reactions and comments during this exchange.²⁶ The defense argued that the agent's remark about the AWOL was an interrogation. Given that *Miranda* warnings applied, the agent could not question the accused until he obtained a valid waiver of rights. Since the accused never waived his rights, his incriminating response was inadmissible.²⁷ The military judge held, however, that the Agent's actions and comments were not an interrogation.²⁸ On review, the Army Court agreed.

In reaching its decision, the Army Court recognized that the "test to determine whether questioning or its functional equivalent is an 'interrogation' within the meaning of *Miranda*, is whether the police conduct or questioning, under the circumstances of the case, was 'reasonably likely to elicit an incriminating response from the suspect.'" ²⁹ The court concluded that telling the accused he was AWOL and would be turned over to the Army were comments regarding the nature of the evidence against him, and not comments designed to elicit an incriminating response.³⁰ In addition to the plain meaning of the stated words, the Army Court considered the intentions of the border agent. The court found that the agent did not intend to interrogate the accused; rather, he wanted to keep the accused informed.³¹ Although not controlling, the court placed great significance on the investigator's intentions. In the end, the court declared that the agent's comments were not an interrogation and the military judge did not error in admitting the accused's responses.³²

The significance of *Turner* is two-fold. First, the Army Court recognizes that an interrogator's comments about the status of the evidence against a suspect may not be an interroga-

tion. Second, the questioner's intentions are a significant factor in determining whether there is an interrogation. This was not the first time the Army Court placed great weight on the investigator's intent when determining if there was an interrogation. The investigator's intent was a controlling factor that convinced the Army Court in *United States v. Young*³³ that there was not an interrogation. The CAAF, however, did not ratify the Army Court's position.

In *Young*, the accused was apprehended as a suspect for robbery and taken to a military police station for questioning.³⁴ Before the interrogation, the investigator informed the accused of his rights under Article 31(b) and *Miranda*.³⁵ The accused initially waived his rights, but later invoked his right to counsel. Upon invocation of counsel rights, the investigator stopped questioning the accused. While leaving the interrogation room, however, the investigator turned to the accused and said: "I want you to remember me, and I want you to remember my face, and I want you to remember that I gave you a chance."³⁶ Before the investigator could leave the room, the accused told the investigator that there was something he wanted to say.³⁷ The investigator re-advised the accused of his rights. The accused waived the presence of a lawyer and confessed to the robbery.³⁸ Two days later the accused made a second, more detailed confession.

On appeal, the accused challenged the admissibility of the confessions, arguing that the investigator's comments during the first confession were comments likely to elicit an incriminating response,³⁹ and thus, was a police-initiated interrogation in violation of his counsel rights.⁴⁰ This violation made the first

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 515 (citing *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)).

30. *Turner*, 48 M.J. at 516.

31. *Id.*

32. *Id.*

33. 46 M.J. 768 (Army Ct. Crim. App. 1997) (holding that the investigator's comments, "I want you to remember me, and I want you to remember my face, and I want you to remember that I gave you a chance," were words of frustration and not designed to elicit an incriminating response).

34. *United States v. Young*, 49 M.J. 265, 266 (1998).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* See also *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

40. *Young*, 49 M.J. at 266.

confession unlawful, which then tainted the second confession.⁴¹

The Army Court focused on the admissibility of the accused's first confession. The court found that the accused unambiguously invoked his right to counsel and the *Edwards* rule applied, that is, no further questioning of the accused could occur without counsel present.⁴² The court, however, held that the investigator's comments were not designed to elicit an incriminating response and did not constitute a police-initiated interrogation in violation of *Edwards*.⁴³ Rather, the accused's confession was the result of his spontaneous re-initiation of the interrogation. Since the investigator obtained a voluntary waiver of counsel rights before the re-interrogation, the confession was admissible.⁴⁴

In determining whether the investigator re-initiated the interrogation, the Army Court applied an objective test from the perspective of the investigator.⁴⁵ Specifically, were the statements those that an investigator would, "under the circumstances, believe to be reasonably likely to convince the suspect to change his mind about wanting to consult with a lawyer?"⁴⁶ Relying heavily on the testimony of the investigator, the court held that his comments were merely words of frustration that did not equate to an interrogation.⁴⁷ Therefore, both confessions were lawful.

Before the CAAF, the defense raised the same challenge to the accused's confession. Unfortunately, the CAAF did not make a definitive finding regarding the investigator's comments. Instead, the CAAF *assumed* there was an interrogation and focused its attention on the admissibility of the accused's second confession (an issue that is discussed later in this article).⁴⁸ In the end, the court held that any error made during the interrogations was harmless. In a concurring opinion, Judge Sullivan declared that the investigator's comments "implicitly threatened" the accused for invoking his right to counsel.⁴⁹ As such, they equated to an interrogation.⁵⁰ Judge Sullivan felt it was important for the majority to decide the interrogation issue. As it stands, parting shots by an investigator after a suspect exercises his right to counsel or right to silence may be permissible. This is an open question the CAAF failed to resolve.

Triggering Article 31(b): The Casual Conversation

Similar to the purpose of *Miranda* warnings, Article 31(b) was enacted to dispel a service member's inherent compulsion to respond to questioning from a superior in either rank or position.⁵¹ On its face, the statute's meaning and application appear evident. Yet, as years pass, the scope and applicability of Article 31(b) continues to evolve.⁵² Currently, the protections under Article 31(b) are triggered when a person who is subject to the Uniform Code of Military Justice (UCMJ), acting in an official capacity, and perceived as such by the suspect or accused, questions the suspect or accused for law enforcement or disciplinary purposes.⁵³

41. *Id.*

42. *United States v. Young*, 46 M.J. 768, 769 (Army Ct. Crim. App. 1997). Sergeant Young was in continuous custody from the time he invoked counsel rights until he made his subsequent confession. The Supreme Court in *Arizona v. Edwards* held that if a subject invokes his right to counsel in response to *Miranda* warnings, the government cannot interrogate further until counsel is made available. *Arizona v. Edwards*, 451 U.S. 477, 484 (1981). Later in this article there is a brief discussion of the protections afforded under *Edwards*. See *infra* notes 97-100 and accompanying text.

43. *Id.* at 770. The court determined that the investigator's comments were a display of frustration and not designed to elicit an incriminating response.

44. *Id.* See MCM, *supra* note 7, MIL. R. EVID. 305(e)(1), 305(g)(2)(B)(i).

45. *Young*, 46 M.J. at 769 (citing *Rhode Island v. Innis*, 446 U.S. 291 (1980)).

46. *Id.*

47. *Id.* at 770.

48. *United States v. Young*, 49 M.J. 265, 267 (1998). See *infra* notes 101-111 and accompanying text for a discussion of the admissibility of Sergeant Young's second confession.

49. *Id.* at 268.

50. *Id.* Judge Sullivan states, "These were words that the police should know are reasonably likely to elicit an incriminating response from a suspect." *Id.*

51. *Miranda* focuses on the environment of the questioning. If a custodial setting in which there is going to be an interrogation, then *Miranda* warnings are required. See *Arizona v. Miranda*, 384 U.S. 435, 436 (1966). Article 31(b) provides similar warnings and is triggered by a similar environment. For some reason, however, the military courts have focused not only on the perspective of the suspect, but also on the perceptions of the questioner. See also Major Howard O. McGillin, Jr., *Article 31(b) Triggers: Re-Examining the "Officiality Doctrine,"* 150 MIL. L. REV. 1 (1995).

52. See Major Ralph H. Kohlmann, *Tales from the CAAF: The Continuing Burial of Article 31(b) and the Brooding Omnipresence of the Voluntariness Doctrine*, ARMY LAW., May 1997, at 3 (providing a scholarly analysis of 1996 self-incrimination cases).

Once triggered, the questioner must, as a matter of law, give the suspect or accused three warnings. These warnings are: (1) the nature of the misconduct that is the subject of the questioning,⁵⁴ (2) the privilege to remain silent, and (3) that any statement made may be used as evidence against him.⁵⁵ Unlike *Miranda* warnings, Article 31(b) does not provide a right to counsel.

A suggested framework for analyzing when Article 31(b) warnings are required is to address three questions: (1) who must provide the warnings, (2) when must the warnings be given, and (3) who must receive the warnings?⁵⁶ Last term, the military appellate courts addressed cases dealing with each of these questions.

The test for determining who must give the warnings is two-fold. First, the person asking the questions must be acting in an

official capacity. This means that the person must be subject to the UCMJ, and asking questions for a law enforcement or disciplinary purpose. Second, the suspect or accused—the person being questioned—must perceive the questioning as more than mere casual conversation.⁵⁷ In *United States v. White*,⁵⁸ and *United States v. Rios*,⁵⁹ the CAAF addressed the second element, that is, was the questioning perceived as more than a mere casual conversation.

In *White*, a special court-martial convicted the accused of cheating on a written promotion examination.⁶⁰ The investigation into the accused's misconduct began when the test examiner confessed to allowing the accused to review and even videotape test materials relevant to a written promotion test that the accused was required to take.⁶¹ Under the direction and monitoring of the Air Force Office of Special Investigation (OSI), the test examiner phoned the accused and conversed

53. See UCMJ art. 31(b) (West 1999). See also *United States v. Duga*, 10 M.J. 206 (C.M.A. 1981) (holding that Article 31(b) warnings are required when the questioner is acting in an official capacity and the person questioned perceives the inquiry as more than a mere casual conversation); *United States v. Loukas*, 29 M.J. 385 (C.M.A. 1990) (declaring that Article 31(b) warnings are required only when questioning is done during an official law enforcement investigation or disciplinary inquiry). See generally McGillin, *supra* note 51, at 1.

54. Two recent cases address the requirement to warn about the nature of the accusation. See *United States v. Rogers*, 47 M.J. 135 (1997) (holding that informing a suspect that he will be questioned about sexual assault includes the offense of rape); *United States v. Kelly*, 48 M.J. 677 (Army Ct. Crim. App. 1998) (advising the accused that he was going to be questioned about rape implicitly included the offense of burglary since the burglary was part of the accused's plan to commit the rape). Both cases support a trend that it takes little effort for the government to satisfy this warning. It seems that all that is required is to inform the suspect or accused of the suspected incident of misconduct, and not all the known offenses surrounding the incident.

55. See UCMJ art 31(b) (West 1999). See also *United States v. Rogers*, 47 M.J. 135, 138 (1997). Judge Crawford, writing for the majority, schematically portrays the triggering events and content of warnings for both Article 31(b) and *Miranda* as follows:

	<u>Art. 31(b)</u>	<u>Miranda</u>
Who Must Warn	Person Subject to Code	Law Enforcement Officer
Who Must be Warned	Accused or Suspect	Person Subject to Custodial Interrogation
When Warning Required	Questioning or Interrogation	Custodial Interrogation
Content of Warning	<ol style="list-style-type: none"> 1. Nature of Offense 2. Right to Silence 3. Consequences 	<ol style="list-style-type: none"> 1. Right to Silence 2. Consequences 3. Right to Counsel

Id. at 137.

56. Robert F. Maguire, *The Warning Requirement of Article 31(b): Who Must Do What To Whom and When?*, 2 MIL. L. REV. 1 (1958).

57. See *Duga*, 10 M.J. 206; *Loukas*, 29 M.J. 385. In *Duga*, The Court of Military Appeals determined that Article 31(b) only applies to situations in which, because of military rank, duty, or other similar relationship, there might be subtle pressure on a suspect to respond to an inquiry. As a result, the court set forth a two-pronged test, the “*Duga* test,” to determine whether the person asking the questions qualifies as a person who should provide Article 31(b) warnings. The *Duga* test requires that the questioner be subject to the Code and acting in an official capacity in the inquiry, and that the person questioned perceive the inquiry involved as more than a mere casual conversation. If both prongs are satisfied, then the person asking the questions must provide Article 31(b) warnings. In *Loukas*, the court narrowed the *Duga* test by holding that Article 31(b) warnings are only required when the questioning is done during an official law enforcement investigation or disciplinary inquiry. See also *United States v. Payne*, 47 M.J. 37 (1997) (holding that Defense Investigative Service agents conducting a background investigation were not engaged in law enforcement activities); *United States v. Moses*, 45 M.J. 132 (1996) (finding that NCIS agents engaged in an armed standoff with the accused were not engaged in a law enforcement or disciplinary inquiry); *United States v. Good*, 32 M.J. 105 (C.M.A. 1991) (applying an objective test to the analysis of whether questioning is part of an official law enforcement investigative or disciplinary inquiry). In short, whenever there is official questioning of a suspect or an accused for law enforcement or disciplinary purposes, Article 31(b) warnings are required.

58. 48 M.J. 251 (1998).

59. 48 M.J. 261 (1998).

60. *White*, 48 M.J. at 252.

61. *Id.* at 255. The results of the test (weighted airman promotion system test) determined if the accused would be promoted to staff sergeant.

about the cheating scheme. The test examiner did not give the accused Article 31(b) warnings before the conversation.⁶²

At trial, the defense challenged the admissibility of the accused's incriminating statements made during the telephone conversation. The defense argued that the test examiner was acting at the request of the military investigators and was, therefore, required to give Article 31(b) warnings before questioning the accused about the misconduct.⁶³ In denying the motion to suppress the statements, the military judge agreed with the defense that the test examiner was acting in an official capacity; however, the trial judge held that the accused perceived the exchange as a casual conversation. Therefore, Article 31(b) warnings were not required.⁶⁴

The CAAF agreed with the military judge's ruling. Although the accused was suspicious about the phone conversation, the court emphasized that there was no "evidence of coercion based on 'military rank, duty, or other similar relationship.'"⁶⁵ In making its determination that the conversation was a casual one, the CAAF considered the contents of the exchange, the impressions of the parties to the conversation, and the environment.⁶⁶

Two messages can be gleaned from *White*. First, a telephone conversation lacks the custodial environment that makes a questioning more than a mere casual conversation. This is not to say that a pretextual telephone call is *per se* a casual conversation. It is, however, a weighty factor. Second, the CAAF seems to focus on the "four-corners" of the conversation to determine if the exchange was casual.

The CAAF remained true to these two messages in *United States v. Rios*,⁶⁷ reaching the same conclusion as it did in *White*,

that is, that the accused perceived the phone call as casual conversation.⁶⁸ Although a similar issue was raised, the facts were somewhat different. The accused in *Rios* was suspected of sexually abusing his fourteen-year-old stepdaughter.⁶⁹ The investigative plan was to have the accused's commanding officer direct the accused to call his stepdaughter when he returned from temporary duty. The OSI agent intended to monitor the telephone conversation, hoping to gain incriminating information.⁷⁰

The accused returned as scheduled. Upon his return, he met his sister who quickly informed him that he was under investigation for sexually abusing his stepdaughter.⁷¹ An officer interrupted the greeting and told the accused to report immediately to his commanding officer, which the accused then did. His commanding officer directed him to go home and call his stepdaughter.⁷² He went to his house, but before he could call his stepdaughter, she called him and they discussed the alleged abuse. On appeal, the accused challenged the admissibility of the telephone conversation.⁷³

The defense argued that the stepdaughter was acting as an agent of the military investigators and should have provided Article 31(b) warnings before questioning the accused. The defense also contended that the accused perceived the conversation as more than a mere casual conversation.⁷⁴ This, the defense argued, was supported by the accused's belief that the conversation was formal, and by the fact that his commanding officer ordered him to call his stepdaughter. The CAAF disagreed. In denying the defense argument, the CAAF held that the telephone call lacked the element of coercion that Article 31(b) was designed to guard against.⁷⁵

62. *Id.* at 256.

63. *Id.* at 257.

64. *Id.*

65. *Id.* at 258.

66. *Id.* at 257. Even though the accused testified during the motion hearing that he believed the conversation was formal, the CAAF and the military judge believed the test examiner's version of the conversation.

67. 48 M.J. 261 (1998). Both *Rios* and *White* were decided on 13 August 1998.

68. *Id.* at 264.

69. *Id.* at 263.

70. *Id.*

71. *Id.* at 264.

72. *Id.* The accused's commanding officer told him to call his stepdaughter and also gave him a note to do the same.

73. *Id.*

74. *Id.*

In a strong dissent, Judges Effron and Sullivan opined that the commander's involvement distinguished *Rios* from similar cases. The dissent agreed that under normal circumstances, a pretextual telephone call is a legitimate investigative tool that does not require *Miranda* or Article 31(b) warnings.⁷⁶ In *Rios*, however, the commander directed the accused to make the call. This was a significant factor that rendered the conversation compelled and not casual, even though it occurred external to the conversation.⁷⁷ The majority acknowledged this fact, but seemed to focus more on the conversation itself.⁷⁸

In *Rios*, the CAAF seemed to minimize the impact of external factors to the conversation, and focused primarily on the circumstances internal to the conversation. Counsel should take this message to heart; when challenging or defending the "casual conversation prong" counsel should fully develop the facts internal to the conversation. External factors to the conversation should not be ignored, however. Although not persuasive to the majority of the court, the CAAF nevertheless *considered* the external factor of the commander's directive in *Rios*, and at least two judges found it controlling.

Triggering Article 31(b): Who is a Suspect?

The third question to answer in the analysis is who must receive the warnings? The answer is a suspect or an accused. Defining an accused is easy. An accused is a person against whom the government prefers charges.⁷⁹ Defining a suspect, however, is not as easy. The test for a suspect is whether the interrogator believes, or reasonably should believe, that the person being questioned is suspected of an offense.⁸⁰ In two recent

cases, the military appellate courts addressed the issue of when a person becomes a suspect. In both instances, the courts found the person to be a suspect.

In *United States v. Miller*,⁸¹ the CAAF declared that since the accused was not even subject to a *Terry* stop,⁸² he could not have been a suspect for purposes of Article 31(b). The accused in *Miller* was one of a group of five black male Marines who were temporarily stopped by military policemen and questioned concerning their whereabouts during the evening.⁸³ The military policemen were investigating a robbery that occurred earlier in the evening. The victims reported that five black male Marines attacked and robbed them.⁸⁴ At no time during the questioning did the military police advise the Marines of their rights under Article 31(b) or *Miranda*.⁸⁵ At trial, the prosecutor used the accused's statements to the military police to rebut an alibi defense.

The defense challenged the admissibility of the accused's statements, arguing that the military police should have given Article 31(b) warnings because the accused was a suspect.⁸⁶ Consistent with the military judge's ruling and the holding of the service appellate court, the CAAF found that the accused was not a suspect.⁸⁷ The court declared that the evidence available to the military police had not "sufficiently narrowed to make [the accused] a suspect."⁸⁸ Then, instead of applying the traditional test for a suspect as stated above, the CAAF introduced a unique twist to the analysis. The court concluded that since the military police did not have enough suspicion required for a *Terry* stop (a Fourth Amendment concept), the accused was not a suspect for purposes of Article 31(b).⁸⁹

75. *Id.*

76. *Id.* at 268.

77. *Id.* at 270.

78. *Id.* at 264. The majority gave great weight to the accused's testimony that his commanding officer's directive "was not on [his] mind during the conversation" with his stepdaughter. *Id.*

79. See BLACK'S LAW DICTIONARY 21 (5th ed. 1979).

80. See *United States v. Morris*, 13 M.J. 297 (C.M.A. 1982).

81. 48 M.J. 49 (1998).

82. See *Terry v. Ohio*, 392 U.S. 1 (1968) (holding that a stop and frisk search is permissible if the stop is temporary and justified by a reasonable suspicion that criminal activity may be afoot, and the frisk is supported by a reasonable belief that the individual being stopped is armed and presently dangerous).

83. *Miller*, 48 M.J. at 52.

84. *Id.*

85. *Id.* at 53.

86. *Id.* The defense also argued that the accused was in custody and *Miranda* warnings should have been given. With little discussion, the CAAF held that "the Fifth Amendment was not implicated, because this was not a custodial interrogation." *Id.* at 54.

87. *Id.*

88. *Id.*

Although the outcome in *Miller* is not disturbing, the court's blending of Fourth Amendment and self-incrimination analysis is somewhat confusing. One could argue that the CAAF has diluted the test for a suspect under Article 31(b) to that of a *Terry* stop. Conversely, one could argue that the government's ability to conduct a *Terry* stop has been limited to situations where the person is a suspect as defined by Article 31(b). The best advice is to dismiss the blending of protections as a deficient analogy and apply the traditional standard used to define a suspect under self-incrimination law. *United States v. Muirhead*,⁹⁰ provides such an analysis.

The accused in *Muirhead* was convicted of sexually assaulting his six-year-old stepdaughter.⁹¹ During the investigation phase, agents conducted a permissive search of the accused house. During the search, the accused made statements about events that happened before and after the assault of his stepdaughter.⁹² At trial, over a defense objection, the prosecutor used these statements to provide a motive for committing the abuse.⁹³ The defense argued that when the agents questioned the accused during the permissive search, he was a suspect and therefore, should have been informed of his rights under Article 31(b). The military judge ruled otherwise.

On appeal, the Navy-Marine Corps Court considered whether the accused was a suspect and should have been given Article 31(b) warnings. In a *de novo* review, the court held that the accused was not a suspect. In reaching its decision, the court correctly defined the requisite suspicion for purposes of Article 31(b) as a suspicion that "has crystallized to such an

extent that a general accusation of some recognizable crime can be framed."⁹⁴ Armed with this definition, the court found that the agents did not, nor reasonably should have, considered the accused a suspect.⁹⁵

Between the two cases discussed, *Muirhead* provides a clearer, more traditional application of the test defining a suspect under Article 31(b).

After an Invocation

What should the government do when a suspect invokes a right in response to an Article 31(b) or *Miranda* warning? First, the interrogation must stop immediately. What happens next depends on which source of self-incrimination law applies and what right the suspect has invoked. If the suspect invokes the right to remain silent under Article 31(b) or *Miranda*, he is entitled to a temporary respite from questioning that the government must scrupulously honor.⁹⁶ Once honored, the government may re-approach the suspect for further questioning at a later date.

If, however, the suspect invokes the right to counsel under *Miranda*, the government cannot question the suspect further unless counsel is made available, or the suspect re-initiates questioning.⁹⁷ If the government keeps the suspect in custody, the requirement to make counsel available is met when counsel is physically present at any subsequent interrogation.⁹⁸

89. *Id.* See Major Walter M. Hudson, *A Few Developments in the Fourth Amendment*, ARMY LAW., Apr. 1999, at 32 (discussing the Fourth Amendment and the impact of *Miller*).

90. 48 M.J. 527 (N.M. Ct. Crim. App. 1998).

91. *Id.* at 530.

92. *Id.* at 536.

93. *Id.* The motive proposed by the prosecutor was that the accused abused his stepdaughter to get even with his wife, whom he suspected of having an extra-marital affair. *Id.*

94. *Id.* (citing *United States v. Haskins*, 29 C.M.R. 181 (1960)). The court makes clear that a mere hunch of criminal activity is not enough to satisfy the definition of a suspect under Article 31(b).

95. *Muirhead*, 48 M.J. at 536. The factors the court considered in determining that the accused was not a suspect were the agents' beliefs that the accused was not a suspect; the accused belief that he was not a suspect; the stepdaughter's version of the abuse in which she did not implicate the accused, and the lack of other evidence incriminating the accused. *Id.*

96. See *Michigan v. Mosley*, 423 U.S. 96 (1975) (holding that a two hour respite from interrogation was enough time to honor the suspect's request to remain silent).

97. See *Edwards v. Arizona*, 451 U.S. 477 (1981). In *Edwards*, the Supreme Court created a second layer of protection for a person undergoing a custodial interrogation (*Miranda* provides the first layer of protection). If a suspect invokes his right to counsel in response to *Miranda* warnings, not only must the current questioning cease, but a valid waiver of that right cannot be established by showing only that the subject responded to further police-initiated custodial interrogation. *Id.* at 484. This precept is commonly called the *Edwards* rule. It is important to note that the *Edwards* rule is not offense specific. See *Arizona v. Roberson*, 486 U.S. 675 (1988). Further, following an initial waiver, only an unambiguous request for counsel will trigger the *Edwards* protection. *Davis v. United States*, 512 U.S. 452 (1994) (finding that the accused's comment, "Maybe I should talk to a lawyer," made after an initial valid waiver of the Fifth Amendment right to counsel, was an ambiguous request for counsel and that investigators were not required to clarify the purported request or terminate the interrogation); *United States v. Henderson*, 48 M.J. 616 (Army Ct. Crim. App. 1998) (holding that the accused's desire to give a statement now and to consult with counsel in the morning was an ambiguous re-invocation of the right against self-incrimination).

98. See *McNeil v. Wisconsin*, 501 U.S. 171 (1991); *Minnick v. Mississippi*, 498 U.S. 146 (1990).

If, however, the government releases the suspect from custody, the requirement to make counsel available is met when the suspect has a meaningful opportunity to consult with counsel during the break in custody.⁹⁹ If the suspect has this opportunity, then the government can re-interrogate the suspect without counsel present.¹⁰⁰ In *United States v. Young*,¹⁰¹ the CAAF addressed the latter scenario and shed some light on how long the break in custody should be before the government can re-initiate an interrogation.

The facts in *Young* are set forth in “The Interrogation” section of this article.¹⁰² In short, an investigator was questioning the accused about robbery when he invoked his Fifth Amendment right to counsel.¹⁰³ In response, the investigator made a comment that the CAAF *assumed* was an interrogation.¹⁰⁴ The accused made an incriminating statement and was released from custody. Two days later, the government re-interrogated the accused.¹⁰⁵ In the second statement, the accused provided a more detailed account of his criminal activity. This was the statement introduced by the prosecution during the court-martial.¹⁰⁶

The defense argued that the accused’s request for counsel during the first interrogation invoked the *Edwards* rule. As such, the government could not re-interrogate the accused until counsel was made available. Under the facts of the case, defense posited that the government did not comply with *Edwards*, and therefore both confessions were inadmissible.¹⁰⁷ The CAAF agreed with the defense that the government took

the first statement in violation of *Edwards*, but disagreed as to the second confession. Specifically, the court found that the two-day break in custody precluded an *Edwards* violation.¹⁰⁸

In reaching its decision, the court applied a unique rationale. Instead of determining if the two-day break in custody offered the accused a meaningful opportunity to consult with counsel, the CAAF emphasized that the accused was “free to speak to his family and friends” during the break.¹⁰⁹ This analysis focuses more on the break in the custodial environment than it does on the accused’s desire to deal with the police through counsel—the interest that *Edwards* was designed to protect.¹¹⁰ As written, *Young* serves as strong precedent for the government to justify an aggressive pursuit of a re-interrogation whenever there is the slightest break in custody. What cannot be ignored, however, is considerable precedent that recognizes the need for the accused to have a meaningful opportunity to seek counsel’s advice.¹¹¹

The Use of Silence

Absent a grant of immunity, all service members enjoy the privilege against self-incrimination. When exercised, that is, when one elects to remain silent when confronted with questions about criminal conduct, often, the government cannot use the silence against that person in a court-martial. There are, however, situations where the prosecution can introduce an accused’s silence to establish guilt.¹¹²

99. See *United States v. Schake*, 30 M.J. 314 (C.M.A. 1990) (re-interrogating the accused after a six-day break in custody provided a real opportunity to seek legal advice); *United States v. Vaughters*, 44 M.J. 377 (1996) (re-interrogating the accused after being released from custody for 19 days provided a meaningful opportunity to consult with counsel); *United States v. Faisca*, 46 M.J. 276 (1997) (re-interrogating the accused after a six month break in custody was permissible).

100. If the police continue the interrogation without obeying the “counsel availability rules,” statements made by the suspect are inadmissible. See MCM, *supra* note 7, MIL. R. EVID. 304(a).

101. 49 M.J. 265 (1998).

102. See *supra* notes 34-50 and accompanying text.

103. *Young*, 49 M.J. at 266.

104. *Id.* at 267. Specifically, the investigator said, “I want you to remember me, and I want you to remember my face, and I want you to remember that I gave you a chance.” *Id.* at 266.

105. *Id.* at 266.

106. *Id.*

107. *Id.* The defense also challenged the admissibility of the second confession under the theory that it was tainted by the unlawful first confession. The CAAF held that the first statement did not taint the second statement. *Id.* at 267.

108. *Id.* at 268.

109. *Id.*

110. *Arizona v. Edwards*, 451 U.S. 477, 485 (1981).

111. See generally *supra* note 99.

112. See MCM, *supra* note 7, MIL. R. EVID. 304(h)(3).

In general, the three scenarios where silence often becomes an issue are: (1) when the accused remains silent in response to questioning that occurs before the protections of *Miranda* or Article 31(b) attach, (2) when the accused invokes his right to remain silent in response to *Miranda* or Article 31(b) warnings, and (3) when the accused does not testify at trial. This year, the CAAF, and at least one of the service courts, decided cases that addressed these scenarios. As the title of this article suggests, this was one area where the courts granted the accused relief.

*United States v. Cook*¹¹³ focuses on the first scenario described above—silence in response to questioning that occurs when the protections of *Miranda* or Article 31(b) do not exist. While at a friend's house, agents from the OSI arrested Staff Sergeant Cook for raping a woman he had met the night before. He was questioned and released.¹¹⁴ A week later, Staff Sergeant Cook's friend asked him if he had been charged for rape, and whether he did it. The accused did not respond to the questions.¹¹⁵ At trial, the prosecutor introduced the accused's silence and argued that the accused's failure to respond to his friend's questions reflected a guilty mind.¹¹⁶

This case brings into question the application of Military Rule of Evidence (MRE) 304(h)(3).¹¹⁷ This rule provides that “[a] person's failure to deny an accusation of wrongdoing, [that is, silence,] concerning an offense for which . . . the person was under official investigation or was in confinement, arrest, or custody” is irrelevant.¹¹⁸ The CAAF found that the accused was the focus of an official investigation for rape. As such, any silence asserted by the accused in response to questioning about the rape was irrelevant, regardless of who was asking the questions.¹¹⁹ The court held that OSI's start of its investigation

against the accused was a defining event that triggered the protection of MRE 304(h)(3).¹²⁰

The CAAF's holding that the start of an investigation triggers the protections of MRE 304(h)(3) is welcome guidance to practitioners. What is unclear, however, is whether the accused has to have knowledge of the investigation. In *Cook*, the facts support an inference that the accused had knowledge of the investigation.¹²¹ Unfortunately, the court did not incorporate the accused's knowledge as part of its analysis. If the accused did not have knowledge of the investigation, as would be the case in an undercover investigation, the accused's silence may be relevant. If, however, the accused has knowledge of the investigation, the accused's silence may be asserted because of his understanding that he can remain silent when facing a criminal allegation, an irrelevant use of silence.¹²² Even though *Cook* provides some clarification, counsel should not overlook the accused's knowledge of the investigation, or lack thereof, when faced with a MRE 304(h)(3) situation.

United States v. Miller,¹²³ is a case that addresses the second scenario—the accused's invocation of his right to remain silence in response to *Miranda* or Article 31(b) warnings. In *Miller*, the Navy-Marine Corps Court set aside the findings and sentence because the government introduced evidence that the accused terminated an interrogation with a Naval Criminal Investigative Service (NCIS) agent.¹²⁴

At trial, in response to the prosecutor's questions, an NCIS agent testified that after informing the accused of his rights, he interrogated him concerning the sexual assault of his adopted daughter.¹²⁵ The agent stated that eventually the accused terminated the interrogation by invoking his right to silence and his

113. 48 M.J. 236 (1998).

114. *Id.* at 238.

115. *Id.* at 239.

116. *Id.* The defense did not object to the prosecutor's argument, and the military judge did not give a limiting instruction.

117. This case raises an evidentiary error and not a constitutional error. The accused was not subject to protections of Article 31(b), *Miranda*, or the Sixth Amendment. *Id.* at 240.

118. MCM, *supra* note 7, MIL. R. EVID. 304(h)(3).

119. *Cook*, 48 M.J. at 240. The CAAF declared that the error in admitting the accused's silence was not harmless, and reversed the lower court's decision. In a strong dissent, Judge Crawford and Chief Judge Cox argued that in addition to the commencement of an investigation, the questioner must be acting in an official capacity. *Id.* at 244.

120. *Id.* at 241.

121. *Id.* at 239. The OSI apprehended the accused and questioned him about the rape before his conversation with his friend.

122. *Id.* at 244.

123. 48 M.J. 811 (N.M. Ct. Crim. App. 1998).

124. *Id.* at 816.

125. *Id.* at 813.

right to counsel.¹²⁶ The defense requested that the military judge give the members a limiting instruction, informing them that they should not hold the accused's termination of the interrogation against him.¹²⁷ The military judge agreed, but decided to give the instruction later in the trial. The defense did not object. Later, the military judge instructed the members using the standard instructions, but did not give the limiting instruction.¹²⁸ The Navy-Marine Corps Court declared that the NCIS agent's testimony was inadmissible, and the military judge failed to take the action necessary to correct the error.¹²⁹

In reaching its decision, the service court relied on the recent case of *United States v. Riley*.¹³⁰ This is another case involving the courtroom and the law of self-incrimination. In reversing the Navy-Marine Corps Court of Criminal Appeals,¹³¹ the CAAF found that it was plain error for the government to introduce testimony that commented on the accused's invocation of his pretrial right to silence.¹³² In *Riley*, the accused was convicted of committing indecent acts and forcible sodomy with a ten-year-old female.¹³³ During the government's investigation, an investigator questioned the accused. Immediately after he was advised of his "military and constitutional rights," the accused elected to remain silent.¹³⁴

At trial, the government presented the members with the testimony of the investigator who questioned the accused.¹³⁵ Three times during the testimony, the investigator commented

on the accused's assertion of his right to silence.¹³⁶ There was no defense objection or cross-examination of this witness.

The Court of Criminal Appeals held that the "three-time reference to [the accused's] assertion of his right to silence was inadmissible."¹³⁷ Nevertheless, the service court determined that the error did not constitute plain error because the mistake was not preserved, that is, there was no defense objection at trial.¹³⁸ The CAAF reversed the Navy-Marine Corps Court of Criminal Appeals decision, finding that, regardless of defense objection, there was plain error. The CAAF placed great weight on two factors: (1) the investigator was the government's first witness, and therefore, his testimony "was the filter through which all the evidence was viewed by the members," and (2) the military judge did not provide a limiting instruction.¹³⁹ The court gave little, if any, consideration to defense's failure to object.

Although the facts in *Miller* are not as troublesome as the facts in *Riley*, the service court determined that the effect was the same. The obvious message one can glean from *Miller* and *Riley* is that absent corrective action, the appellate courts are likely to grant relief when the accused's reliance on his rights under *Miranda* or Article 31(b) are paraded before the court-martial. The law regarding in-court mention of the accused's election to remain silent is firmly settled. Counsel cannot do it.¹⁴⁰ The pragmatic points identified by *Miller* and *Riley* are:

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 814.

130. 47 M.J. 276 (1997).

131. *United States v. Riley*, 44 M.J. 671 (N.M. Ct. Crim. App. 1996).

132. *Riley*, 47 M.J. at 280.

133. *Id.* at 277.

134. *Id.* at 278. It is implied that the rights given were the warnings required by Article 31(b) and *Miranda*.

135. *Id.* It is unclear what probative value the investigator added to the government's case. The substance of his testimony consisted of background information about why the investigation was initiated and the attempted interview of the accused.

136. *Id.* at 278. The investigator testified that after advising the accused of his rights, he "elected to remain silent." The investigator then testified that the next day, the accused informed him (the investigator) that "based on his attorney's advice, he would elect to remain silent [and] wouldn't participate in any further interrogation." Finally, the investigator testified that the only person he interviewed in the case was the accused and "he elected to remain silent." *Id.*

137. *Id.*

138. *Id.* at 279. "To be plain, 'the error must not only be both obvious and substantial, it must also have had an unfair prejudicial impact on the jury's deliberations.'" *Id.* (quoting *United States v. Fisher*, 21 M.J. 327, 328 (C.M.A. 1986)). The plain error test is a three-part test: (1) the error must be obvious, (2) the error must be substantial, and (3) the error must actually prejudice the accused, i.e., materially prejudice the substantial rights of the accused. See UCMJ arts. 66(c), 67(c) (West 1999).

139. *Riley*, 47 M.J. at 280.

140. See MCM, *supra* note 7, MIL. R. EVID. 301(f)(3).

(1) trial counsel should prepare witnesses so they do not mention invocation of rights, (2) if a witness does, defense should object, and (3) if the first two recommendations fail, the military judge should, *sua sponte*, give a curative instruction.

The final situation to discuss is when the accused does not testify at trial. The CAAF addressed this issue when it decided *United States v. Cook*.¹⁴¹ Lance Corporal Cook was convicted of murdering his daughter.¹⁴² During the trial on the merits, he elected not to testify. In closing arguments, the prosecutor highlighted times in the trial when the accused yawned.¹⁴³ He argued that this type of demeanor is indicative of guilt.¹⁴⁴ Not only did the defense counsel not object, but he rejected the military judge's offer to instruct the member's on the accused's right not to testify.¹⁴⁵

On appeal, the defense argued that the prosecutor's argument violated the accused's "Fifth Amendment right not to testify by commenting on his failure to testify."¹⁴⁶ The CAAF agreed with the defense that the prosecutor committed error, however, the court found the error did not constitute plain error.¹⁴⁷ In reaching its decision, the CAAF recognized that "Fifth Amendment protection tends to testimonial communications."¹⁴⁸ The court determined that the accused's yawning was non-testimonial, and therefore unprotected. Even though constitutionally unprotected communication, the court held that the accused's "yawning in the courtroom [was] not relevant to the question of guilt or innocence."¹⁴⁹

141. 48 M.J. 64 (1998).

142. *Id.* at 65.

143. *Id.* The accused apparently yawned several times during the testimony of a defense expert witness who testified about the accused's sanity. The record did not reflect the yawning at the time it occurred. It is interesting to note that in a footnote, Judge Crawford hints that courts-martial will eventually be videotaped. *Id.* n.1.

144. *Id.* at 65.

145. *Id.*

146. *Id.*

147. *Id.* at 67.

148. *Id.* at 66. The court noted in dicta a number of instances of non-testimonial acts, which could be admissible or inadmissible.

149. *Id.* at 67.

150. Lederer, *supra* note 5, at 68. Article 31(d) states: "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." UCMJ art. 31(d) (West 1999).

The Analysis to MRE 304 (c)(2) lists examples of involuntary statements as those resulting from : inflection of bodily harm; threats of bodily harm; imposition of confinement or deprivation of privileges; promises of immunity or clemency; and promises of reward or benefit. MCM, *supra* note 7, MIL. R. EVID. 304(c)(3) analysis, app. 22, at A22-10.

151. *United States v. Bubonics*, 45 M.J. 93 (1996) (declaring that the "Mutt and Jeff" interrogation techniques used by the interrogators improperly coerced the accused's statement).

152. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

153. 48 M.J. 203 (1998).

154. *Id.* at 204. The accused suffered a "severe head injury, a broken neck, and spinal cord damage that resulted in a permanently paralyzed left arm." *Id.*

As illustrated in each of the above cases involving the accused's assertion of silence, the military appellate courts are very protective of the fundamental privilege we all possess. When improperly raised at trial, there is a strong presumption that absent any corrective action, the appellate courts will find error, hence the title of this article: "Silence is Golden."

Voluntariness

This article would not be complete without some discussion of the voluntariness doctrine. This firmly rooted doctrine embraces elements of the common-law voluntariness doctrine, due process, and compliance with Article 31(d).¹⁵⁰ Whether or not *Miranda* is triggered, a confession must be voluntary to be valid; thus, a confession deemed coerced must be suppressed despite an initial validly obtained waiver.¹⁵¹ Generally, when determining whether a confession is voluntary, it is necessary to look to the totality of the circumstance to decide if the accused's will was overborne.¹⁵²

Last term, in *United States v. Campos*,¹⁵³ the CAAF adopted a modified version of this test when the issue raised is a due process violation. Lance Corporal Campos was involved in a serious car accident that required a lengthy hospitalization.¹⁵⁴ While still in the hospital, NCIS agents questioned Lance Corporal Campos about suspected methamphetamine use. After

providing a written waiver of his rights under *Miranda* and Article 31(b), Campos confessed to the drug use.¹⁵⁵

At trial, the defense challenged the admissibility of the Campo's confession. The defense alleged that the NCIS agents unlawfully interrogated Campos when he was impaired by medication. When Campos was questioned, he was medicated with Tylenol 3 with codeine, a drug that can "deaden" the brain.¹⁵⁶ The defense asserted that since the NCIS agents did not consult with medical personnel at the hospital before interrogating Campos, they acted unlawfully.¹⁵⁷ As such, the confession was inadmissible.

The trial judge disagreed and ruled that the accused's confession was voluntary. In reaching his decision, the military judge considered all the circumstances surrounding the confession. In particular, the judge considered the state of mind of the accused (the affect the Tylenol 3 had on the accused), the actions and perceptions of the accused, the actions and perceptions of the NCIS agents, and the interrogation environment.¹⁵⁸ On appeal, the CAAF agreed that the confession was admissible, but applied a slightly different analysis.

The CAAF analysis was to first determine if the government overreached, if it did, then decide if the confession was voluntary.¹⁵⁹ Only after the predicate question of overreaching was answered in the affirmative, did the mental impairment of the accused become relevant.¹⁶⁰ The court found that the facts in *Campos* did not support a finding of government overreaching.¹⁶¹ Although the CAAF recognized that no further consideration of the accused's mental impairment was warranted, it

nevertheless, continued the analysis and held that the confession was voluntary despite the accused's medicated state.¹⁶²

The unique tiered analysis that the CAAF applied in *Campos* is limited to a due process challenge.¹⁶³ Challenges under Article 31(d) or challenges to the validity of the waiver of rights require courts to apply a "totality of the circumstances" analysis; this includes the accused's mental impairment.¹⁶⁴ Counsel need to understand this distinction when challenging or defending the voluntariness of the confession. When raising a due process challenge, defense counsel should also consider alternative theories of involuntariness. Prosecutors, however, should demand that defense state with specificity the theory of the voluntariness challenge.

Conclusion

Although there were no "landmark" decisions during the 1998 term, the military appellate courts authored ample opinions to make this year's self-incrimination jurisprudence engaging. Collectively, the opinions touched on all the fundamental sources of self-incrimination law. From applying the prophylactic protections established in *Miranda* to defining the triggers of Article 31(b), the courts found the means necessary to uphold the admissibility of the confession. Only when the government exploited the accused's exercise of his privilege to remain silent did the courts grant relief. Is silence the only sanctuary for self-incrimination protection in the military justice system? Clearly not; but based on this year's cases, silence is definitely golden.

155. *Id.*

156. *Id.* During the motion *in limine* to suppress the confession, defense called the accused's physician to testify about the affects that Tylenol 3 with codeine has on the brain. Even though the drug does affect the the brain, the physician opined that it would not "be sufficient to overbear one's free will to do what someone else wanted." *Id.*

157. *Id.*

158. *Id.* at 205.

159. *Id.* at 207. The CAAF cited to *Colorado v. Connelly* as the precedent that established the due process framework of analysis the court applied. *See Colorado v. Connelly*, 479 U.S. 157 (1986).

160. *Campos*, 48 M.J. at 207.

161. *Id.*

162. *Id.*

163. *Id.*

164. *See United States v. Morris*, 49 M.J. 227 (1998) (finding that an interrogator's statement that if the accused cooperated he would help him did not render his confession involuntary when considering the totality of the circumstances); *United States v. Mason*, 48 M.J. 946 (N.M. Ct. Crim. App. 1998) (applying a totality of the circumstances test, the court determined that a confession subsequent to an unlawful confession was voluntary).