

International and Operational Law

Revised *Manual for Military Commissions* Released

On 27 April 2010, the Department of Defense issued a new *Manual for Military Commissions (MMC)*.¹ The *MMC*, which establishes the rules of evidence and procedure for military commissions, is adapted from the *Manual for Courts-Martial (MCM)* and applies to trials by military commission. The procedures for military commissions are based on the procedures for trial by general courts-martial under the Uniform Code of Military Justice (UCMJ);² however, while the judicial construction and application of the UCMJ are considered instructive, they “are not of their own force binding on military commissions.”³

The rules of evidence and procedure enumerated in the *MMC* depart from those specified in the *MCM* in several important ways. For example, the *MMC* allows for the admission of certain hearsay evidence “not otherwise admissible under the rules of evidence applicable in trial by general courts-martial.”⁴ These differences “reflect the [Secretary of Defense’s] determinations that departures are required by the unique circumstances of the conduct of military and intelligence operations during hostilities or practical need consistent with chapter 47A, title 10, United States Code.”⁵ Notably, the evidentiary and procedural rules of military commissions extend to accused individuals “all the judicial guarantees which are recognized as indispensable by civilized peoples as required by Common Article 3 of the Geneva Conventions of 1949.”⁶

The *MMC* is divided into four parts: (1) Preamble, (2) Rules of Military Commissions (R.M.C.), (3) Military Commission Rules of Evidence (Mil. Comm. R. Evid.), and (4) Crimes and Elements. The 2010 *MMC* replaces the 2006 edition and implements title 10, chapter 47A, of the U.S. Code, as amended by the Military Commissions Act of 2009.⁷—Captain Ronald T. P. Alcalá.

¹ MANUAL FOR MILITARY COMMISSIONS, UNITED STATES (2010) [hereinafter *MMC*].

² *Id.* pt. I, ¶ 1(a); *id.* R.M.C. 102(b).

³ *Id.* pt. I, ¶ 1(a).

⁴ *Id.* MIL. COMM. R. EVID. 803.

⁵ *Id.* pt. I, ¶ 2.

⁶ *Id.*

⁷ *Id.* pt. I.

Criminal Law

*Berghuis v. Thompkins*⁸: Silence Does Not Invoke the Right to Remain Silent

The Supreme Court recently decided its third *Miranda* case in just over three months. On 23 February, the Court decided in *Florida v. Powell*⁹ that the *Miranda* warnings given by law enforcement did not have to specifically advise a suspect of the right to have an attorney present during questioning, as long as the suspect was “reasonably conveyed” that right. On 24 February, the Court decided in *Maryland v. Shatzer*¹⁰ that the *Edwards*¹¹ bar had a fourteen-day temporal limit. Finally, in *Berghuis v. Thompkins*,¹² the Court held that a suspect must affirmatively invoke his right to remain silent; mere silence alone will not automatically invoke the right.

A brief summary of the facts is important to understand the holding in *Thompkins*. The defendant, Van Chester Thompkins, was suspected of a drive-by shooting in Southfield, Michigan, that resulted in the death of one victim and the serious injury of another victim who later recovered and testified against him at trial. Thompkins fled after the shooting and was arrested almost a year later in Ohio. Southfield police traveled to Ohio to interrogate Thompkins. The interrogation began at about 1:30 p.m. and lasted for about three hours. Thompkins was read his *Miranda*¹³ rights but declined to sign the form to demonstrate that he understood those rights. A police officer testified at the suppression hearing that Thompkins verbally confirmed he understood his rights; while at trial, the same officer stated that he could not remember whether he asked Thompkins verbally if he understood his rights. At no point did Thompkins invoke his right to silence or his right to counsel. However, he remained mostly silent during the interrogation. He did respond on several occasions with “yeah,” “no,” or “I don’t know.”¹⁴ He also stated that he “didn’t want a peppermint” that he was offered and that the chair he was

⁸ No. 08-1470, 2010 WL 2160784 (June 1, 2010).

⁹ 130 S.Ct. 1195 (2010). See Major Andrew D. Flor, *Florida v. Powell: The Further Erosion of Miranda Rights*, ARMY LAW., Feb. 2010, at 3 (providing a more thorough review of this case).

¹⁰ 130 S.Ct. 1213 (2010). See Major Andrew D. Flor, *Maryland v. Shatzer: Fourteen-Day Limitation on the Edwards Bar*, ARMY LAW., Feb. 2010, at 2 (providing a more thorough review of this case).

¹¹ *Edwards v. Arizona*, 451 U.S. 477 (1981).

¹² *Thompkins*, 2010 WL 2160784.

¹³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁴ *Thompkins*, 2010 WL 2160784, at *4.

“sitting in was hard.”¹⁵ Towards the end of the interrogation, the officer asked Thompkins if he believed in God. Thompkins began to tear up and said “Yes.” The officer asked if Thompkins prayed to God. Thompkins responded “Yes.” The officer then asked, “Do you pray to God to forgive you for shooting that boy down?”¹⁶ Thompkins responded “Yes” and looked away. Despite this admission, Thompkins refused to make a written confession, and the interrogation ended fifteen minutes after that.

At trial, this statement was introduced after a failed motion to suppress. Thompkins argued that he had invoked his Fifth Amendment right to remain silent, that he had not waived his right to remain silent, and that the statements were involuntary. The trial court denied the motion.¹⁷ Thompkins was convicted and sentenced to life without parole. Direct appeals were exhausted, and then Thompkins filed a federal writ of habeas corpus action. The district court denied the writ, but the U.S. Court of Appeals for the Sixth Circuit reversed. They held that while *North Carolina v. Butler*¹⁸ established that a waiver of the right to remain silent need not be express, in this case, Thompkins did not waive his right to remain silent. His “persistent silence for nearly three hours in response to questioning and repeated invitations to tell his side of the story offered a clear and unequivocal message to the officers: Thompkins did not wish to waive his rights.”¹⁹ The Supreme Court granted certiorari and reversed.

Justice Kennedy, writing for a 5-4 majority,²⁰ held that “a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police.”²¹ This holding brought the right to remain silent in line with the right to counsel. In *Davis v. United States*, the Court held that a suspect must “unambiguously” invoke the right to counsel.²² Prior to *Thompkins*, the Court

had “not yet stated whether an invocation of the right to remain silent can be ambiguous or equivocal.”²³ In *Thompkins*, Justice Kennedy put that notion to rest, because “there is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel issue in *Davis*.”²⁴

Practitioners should keep in mind three key points about this case. First, in the military context, Military Rule of Evidence (MRE) 305(g)(1) requires the accused to “affirmatively decline the right to counsel and *affirmatively consent* to making a statement.”²⁵ There are no cases interpreting this provision as it applies to the right to remain silent.²⁶ Because of this lack of case law, it is unclear whether a military *Thompkins* scenario could satisfy the affirmative consent requirement of MRE 305(g)(1). Arguably, it would not. However, with regards to the right to counsel, MRE 305(g)(2)(A) allows the Government to demonstrate, by a preponderance of the evidence, that the accused has waived the right to counsel even without an affirmative declination.²⁷ There is no counterpart to that rule for the affirmative consent requirement related to the right to remain silent. As a result, it will be difficult for counsel to argue that anything other than a clearly expressed affirmative consent will constitute waiver of the right to remain silent.²⁸

Second, even though this case brings the right to remain silent more in line with the right to counsel, there are still differences between the two rights. For example, when an accused invokes his right to remain silent, he is only entitled to a temporary respite from interrogation;²⁹ when an accused invokes his right to counsel, he is entitled to a complete break from interrogation until counsel is present, or he is released from custody.³⁰ Knowing which right the accused has invoked is still important when deciding what can happen next in the interrogation process.

¹⁵ *Id.*

¹⁶ *Id.* at *5.

¹⁷ There was an additional issue in the case that did not bear on the *Miranda* holding. Thompkins alleged that his defense counsel was ineffective for failing to object to the prosecution’s argument on his co-defendant’s trial result and for not requesting a limiting instruction regarding the outcome of that trial. *Id.* at *14. The Court denied relief on the ineffective assistance of counsel claim. *Id.* at *15. The dissent did not even comment on this issue. *Id.* at *15–27 (Sotomayor, J., dissenting).

¹⁸ 441 U.S. 369 (1979).

¹⁹ *Thompkins*, 2010 WL 2160784, at *6 (quoting *Thompkins v. Berghuis*, 547 F.3d 572, 588 (6th Cir. 2008)).

²⁰ He was joined by C.J. Roberts, J. Scalia, J. Thomas, and J. Alito. Justice Sotomayor filed a dissenting opinion, in which J. Stevens, J. Ginsburg, and J. Breyer joined.

²¹ *Thompkins*, 2010 WL 2160784, at *14.

²² 512 U.S. 452 (1994). *Davis* was a military case that made it to the Supreme Court. *Id.* at 454.

²³ *Thompkins*, 2010 WL 2160784, at *8.

²⁴ *Id.*

²⁵ MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 305(g)(1) (2008) [hereinafter MCM] (emphasis added).

²⁶ However, there is a case that analyzes these provisions with respect to the right to counsel. See *United States v. Vangelisti*, 30 M.J. 234 (C.M.A. 1990).

²⁷ MCM, *supra* note 25, MIL. R. EVID. 305(g)(2)(A).

²⁸ Military practitioners should also keep in mind that *Thompkins* applies only to *Miranda* rights. It does not change the application of Uniform Code of Military Justice, Article 31. See UCMJ art. 31 (2008).

²⁹ See *Michigan v. Mosley*, 423 U.S. 96 (1975).

³⁰ See *Edwards v. Arizona*, 451 U.S. 477 (1981).

Third, the three *Miranda* cases this term have all reduced the level of protection provided by *Miranda*. In *Powell*, the Court refused to require specificity in the *Miranda* warnings given;³¹ in *Shatzer*, the Court refused an invitation to allow the *Edwards* bar to last indefinitely;³² and, in *Thompkins*, the Court refused to allow silence to become a de facto invocation of the right to remain silent.³³ While this may seem to be a disturbing trend, there is a

common theme to these three cases. While *Miranda* was a “constitutional rule,”³⁴ these cases show that the Court will not elevate form over substance. Instead, the Court will look to the rationale behind *Miranda*—the prevention of oppressive police dominated interrogation³⁵—more than the specific words, phrases, or procedures followed by law enforcement.—Major Andrew Flor.

³¹ 130 S.Ct. 1195 (2010).

³² 130 S.Ct. 1213 (2010).

³³ *Berghuis v. Thompkins*, No. 08-1470, 2010 WL 2160784 (June 1, 2010).

³⁴ See *Dickerson v. United States*, 530 U.S. 428 (2000).

³⁵ See *Miranda v. Arizona*, 384 U.S. 436, 445 (1966).