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FAILURE TO REPORT: THE RIGHT AGAINST SELF-INCRIMINATION AND THE NAVY'S TREATMENT OF CIVILIAN ARRESTS AFTER *UNITED STATES v. SERIANNE*

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"Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. . . ."

—Chief Justice Earl Warren in *Miranda v. Arizona*[1]

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This article is dedicated to the man who inspired it, LT Jentso James Hwang, Judge Advocate General's Corps, U.S. Navy. Lieutenant Hwang was the trial defense attorney

I. The Catch-92

Navy enlisted Sailor Chief Edwin Nately takes weekend leave to attend his best friend's bachelor party in Las Vegas. Chief Nately parties all weekend, casino-hopping and imbibing free drinks. He avoids the seedier elements of Vegas, but not the free drinks.

En route to the airport on Monday morning, Chief Nately is pulled over by a Las Vegas trooper, who, suspecting intoxication, asks Chief Nately to step out of his vehicle. Chief Nately is tired, but he does not feel drunk. He agrees to a roadside sobriety test and performs well, but recalling advice from an old lawyer-friend, he refuses a roadside breathalyzer test. Based in large part on this refusal, the trooper arrests Chief Nately on suspicion of Driving Under the Influence (DUI).[2]

Back at the station, his blood-alcohol content (BAC) is tested. He blows a .05, below the *per se* unlawful level in Nevada.[3] Nevertheless, Chief Nately is booked for DUI, and later released to his friends on bond.

Chief Nately returns to his homeport scared. He knows the case against him is weak, but he also knows that his exoneration will not come cheaply. He will likely have to fly back to Nevada to face trial, and he will have to hire an attorney to represent him at that trial. Moreover, Chief Nately fears the impact his arrest will have on his career. Although he is not versed in the legion of Navy regulations, he is familiar with Article 92 of the Uniform Code of Military Justice (UCMJ)—Failure to Obey Order or Regulation.[4] He also knows that under Article 92 he has a duty to report his Vegas arrest to his chain of command.[5]

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for the article's title character, Chief David Serianne. Lieutenant Hwang's vision and advocacy saved Chief Serianne's career and—as this article hopes to display—reshaped Fifth Amendment jurisprudence in the Navy. Lieutenant Hwang died unexpectedly in July 2011. In his career, LT Hwang provided legal representation to hundreds of Sailors and Marines, served bravely in Operation Iraqi Freedom, and mentored one of this article's authors. It is inadequate—to say the least—that LT Hwang's name appears in this article as a mere footnote; to the authors, his legacy is anything but.

[1] 384 U.S. 436, 443 (1966) (quoting Weems v. United States, 217 U.S. 349, 373 (1910)).

[2] NEV. REV. STAT. §§ 484C.010–484C.150 (2011).

[3] *Id.* Like other states, Nevada deems a Blood Alcohol Content (BAC) of .08 or above unlawful. A BAC below that level, however, may still be unlawful if other circumstances indicate to the arresting officer that the suspect is intoxicated.

[4] UCMJ art. 92 (2012).

[5] Article 92, Uniform Code of Military Justice imposes a general duty to obey lawful orders, not a duty to report arrests. This specific duty was ordered, formerly, in

But Chief Nately has bigger problems. His report could inform the Navy of a possible infraction they otherwise knew nothing about and lead to a second charge under the UCMJ for the same offense.[6] In short, Chief Nately's weekend adventure ends not only in arrest, but with a precarious choice: come clean to his command and invite a second prosecution for the same offense; or he can roll the dice and keep quiet. The latter choice, and therefore the arrest, could avoid detection altogether. But if it does not, his silence violates Article 92 of the UCMJ. On top of his legal predicament in Nevada, Chief Nately could face a court-martial for DUI and Failure to Report.

Chief Nately faces this dilemma brazenly. Again recalling some old advice, he resolves that "it is better to die on one's feet than live on one's knees."[7] Chief Nately lets what happened in Vegas stay in Vegas.

This article explores Chief Nately's catch-22. It will first bring the Nately hypothetical to life by recounting the case of *United States v. Serianne*, in which a Navy Chief was similarly arrested by civilian police and, after failing to notify his chain of command, was charged under the UCMJ for DUI and Article 92. Part II of the article will discuss the case and its treatment in the military appellate courts. Part III will briefly examine the scope of the self-incrimination clause in the military context, the duty to report crimes in the military, and that duty as it applied in *Serianne*. Part IV will address the Chief of Naval Operations' (CNO's) response to the *Serianne* case, specifically his decision to reinstitute a new version of the order—albeit in a different Navy Instruction—after the Navy's appellate court declared the order unconstitutional. The article then focuses on this reinstituted order and concludes in Part V that it, too, is unconstitutional.

OPNAVINST 5350.4D and now in OPNAVINST 3120.32C. The order has undergone various iterations, which this article will address.

[6] The military's jurisdiction to charge crimes under the UCMJ rests in the status of the servicemember. Nothing precludes the Navy or any other service from charging the same offense as a state does, provided the conduct is criminal under the UCMJ. *See* UCMJ art. 2; *see also* Solorio v. United States, 483 U.S. 435, 439–40 (1987).

[7] JOSEPH HELLER, CATCH-22 248 (Simon & Schuster) (1961). Chief Nately is a fictional character used to make a nonfictional illustration. Chief Nately's wisdom is borrowed from his fictional namesake, *Catch-22*'s Lieutenant Nately, a naïve Air Corps officer who, in Joseph Heller's classic novel, represents American optimism. Lieutenant Nately proudly professes this wisdom to an old drunkard in a bar only to be corrected by the amused old man: "'But I'm afraid you have it backward. It is better to *live* on one's feet than die on one's knees. That is the way the saying goes.'"

II. *Serianne*

In 2009, Aviation Electrician Chief David Serianne was arrested by Maryland State Police on suspicion of DUI. Three days later his chain of command learned of his arrest by searching arrest records online.[8] Charges against Chief Serianne were referred to special court-martial for the following offenses: UCMJ Article 111—Drunken Operation of a Vehicle; and dereliction of duty under Article, 92, UCMJ for failing to report his arrest as required by Navy Instruction 5350.4C (the "Serianne Instruction").[9]

Chief Serianne moved to dismiss his Article 92 charge on the grounds that the instruction ordering him to report his alcohol-related arrest violated his right against compulsory self-incrimination under the Fifth Amendment to the U.S. Constitution. The instruction requiring Chief Serianne to report his arrest was one of six orders instructing Sailors to report or disclose arrests in various contexts.[10] Thus, when Chief Serianne challenged the constitutionality of his instruction, much was at stake for the Navy's leadership. Few in the Navy's legal community, if they even knew about it, thought the motion would succeed. But it did.[11]

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[8] The authors learned this information from Chief Serianne's defense counsel, LT Hwang.

[9] OFFICE OF THE CHIEF OF NAVAL OPERATIONS, DRUG AND ALCOHOL ABUSE PREVENTION AND CONTROL, OPNAVINST 5350.4C ¶ 8r (4 June 2009) [hereinafter OPNAVINST 5350.4C].

[10] OFFICE OF THE CHIEF OF NAVAL OPERATIONS, STANDARD ORGANIZATION AND REGULATIONS OF THE NAVY, OPNAVINST 3120.32C (16 June 2011); OFFICE OF THE CHIEF OF NAVAL OPERATIONS, NAVY CAREER INTERMISSION PILOT PROGRAM GUIDELINES, OPNAVINST 1330.2A (30 Aug. 2010); OFFICE OF THE CHIEF OF NAVAL OPERATIONS, SUITABILITY SCREENING FOR OVERSEAS AND REMOTE DUTY ASSIGNMENT, OPNAVINST 1300.14D (9 Apr. 2007); OFFICE OF THE CHIEF OF NAVAL OPERATIONS, APPLICATION FOR FEDERAL ATTENDANCE AT THE FEDERAL BUREAU OF INVESTIGATION NATIONAL ACADEMY, OPNAVINST 1500.64C (6 Jan. 2004); OFFICE OF THE CHIEF OF NAVAL OPERATIONS, POLICY AND PROCEDURES FOR CONDUCTING HIGH RISK TRAINING, OPNAVINST 1500.75B (4 Mar. 2010).

[11] United States v. Serianne, 68 M.J. 580, 581 (N-M. Ct. Crim. App. 2010), *aff'd on other grounds*, 69 M.J. 8 (C.A.A.F. 2010).

A. *Serianne* at the Navy-Marine Corps Court of Criminal Appeals

After the military judge dismissed Chief Serianne's Article 92 charge, the government filed and was granted an interlocutory appeal before the Navy-Marine Corps Court of Criminal Appeals (NMCCA).[12]

1. The Self-Incrimination Clause

"No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."[13] This clause from the Fifth Amendment was the basis for the government's appeal. The NMCCA was asked to determine whether Chief Serianne's duty to report his own arrest violated the clause. The order creating his duty was contained in a Navy-wide instruction entitled "Drug and Alcohol Abuse Prevention and Control" (i.e., the Serianne Instruction), which ordered the following:

> All personnel are responsible for their personal decisions relating to drug and alcohol use. . . . Members arrested for an alcohol-related offense under civil authority, which if punished under the UCMJ would result in punishment of confinement for 1 year or more, or a punitive discharge or dismissal from the Service (e.g. DUI/DWI), shall promptly notify their [Commanding Officer]. Failure to do so may constitute an offense punishable under UCMJ Article 92, UCMJ.[14]

The NMCCA first noted that this challenge was the first of its kind to come before it. It therefore relied heavily on Supreme Court precedent in reaching its findings. To qualify for Fifth Amendment protection, according to this precedent, a communication "must be testimonial, incriminating, and compelled."[15]

The NMCCA spent little time addressing the compulsory component of the alcohol abuse instruction; [16] it was a standing order to all sailors,

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[12] *Id*.
[13] U.S. CONST. amend V.
[14] OPNAVINST 5350.4C, *supra* note 9, ¶ 8n, *quoted in Serianne*, 68 M.J. at 581.
[15] *Serianne*, 68 M.J. at 581 (quoting Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177, 189 (2004)).
[16] The Navy, like its uniformed brethren, promulgates directives that govern virtually every facet of Navy life. Navy regulations are the principal regulatory apparatus of the

and by its terms failure to comply with it constituted a criminal offense. The court's decision would turn on whether the mere report of arrest, absent other information, qualified as both testimonial and incriminating. The court, following Supreme Court precedent, identified testimonial communication as one that "explicitly or implicitly relates a factual assertion or discloses information."[17] Interpreting this broadly, the court concluded, "[t]here are very few instances in which a verbal statement, either oral or written, will not convey or assert facts. The vast majority of statements will be testimonial."[18] Communicating a civilian arrest to a command—even the simple fact that an arrest took place—constituted a testimonial communication.[19]

The NMCCA then turned to the harder issue: whether the communication was incriminating. The court quoted Supreme Court authority to the effect that, for a statement to be incriminatory, it must pose "a real danger of legal detriment,"[20] one that is "real and appreciable" rather than "of an imaginary and unsubstantial character."[21] With this guidance, the court turned to military cases that examined orders requiring servicemembers to report the crimes of others. Briefly, these cases established that servicemembers could be required to report crimes generally, but could not be required to report crimes they themselves were involved in. These cases adopted the Supreme Court standard laid out in *United States v. Kastigar*, which held that the right against self-incrimination "'protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to evidence that might be so used' against the declarant."[22]

The NMCCA applied this standard and found that it was reasonable for Chief Serianne to believe that reporting his own arrest would lead his command to discover evidence that could be used in a prosecution against him—evidence that had already been gathered by the Maryland

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Navy. Countless other directives, such as OPNAV instructions or personnel manuals, address more specific topics. The Drug and Alcohol Abuse Prevention Instruction, which this article will refer to as the "Serianne Instruction," is one such instruction.

[17] *Serianne*, 68 M.J. at 581–82 (citing Doe v. United States, 487 U.S. 201, 210 (1988)).

[18] *Id.* at 582 (quoting *Doe*, 487 U.S. at 213).

[19] *Id*. (finding no difference between an oral or written conveyance of that fact: "We see no basis, however, to distinguish between the testimonial aspect of an oral versus written notification of one's arrest and, in the context of OPNAVINST 5350.4C, both are testimonial.").

[20] *Id*. (quoting Rogers v. United States, 340 U.S. 367, 372–73 (1951)).

[21] *Id.*

[22] *Id.* at 583 (quoting Kastigar v. United States, 406 U.S. 441, 445 (1972)).

State Police when he was arrested. The required disclosure was therefore incriminating. Since it was also compelled and testimonial, it fell within the Fifth Amendment protection against self-incrimination.

At the Government's urging, the court considered whether the "regulatory exception" should apply to the Serianne Instruction's reporting requirement.[23] This exception—usually called the "required records exception"—softens self-incrimination protection when the government requires "items or information" for a legitimate administrative purpose.[24] The NMCCA concluded that an order concerning drunk driving—an activity "widely prohibited under both [military] and state law"[25]—which authorizes commanders to take punitive action against those who fail to comply with it, is "decidedly punitive," not merely administrative.[26] The regulatory exception did not apply.

2. Conflicting Regulation

Finally, the court noted that the Serianne Instruction conflicted with a superior order, Navy Regulation Section 1137,[27] which requires Sailors to report criminal offenses that come under their observation except when they themselves are criminally involved in the offense.[28] This "valid and permissible" regulation,[29] which the court described as "superior competent authority," contradicted the Serianne Instruction.[30]

However, the NMCCA ultimately based its ruling on constitutional grounds, holding that "[i]n requiring the disclosure of a servicemember's arrest for driving under the influence . . . OPNAVINST 5350.4C compels an incriminatory [and] testimonial communication for which no

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[23] *Id*.
[24] *Id*. (citing United States v. Swift, 53 M.J. 439, 453 (C.A.A.F. 2000)). According to the Navy-Marine Corps Court of Criminal Appeals (NMCCA), the term "required records exception" is used when the information when the information sought is documentary rather than verbal, which is a more frequent occurrence in the case law.
[25] *Id*. (quoting Marchetti v. United States, 390 U.S. 39, 44 (1968)).
[26] *Id*.
[27] *Id*. at 584–85.
[28] *Id*.; UNITED STATES NAVY REGULATIONS sec. 1137 (Sept. 14, 1990).
[29] *Serianne*, 68 M.J. at 584–85 (quoting Bland v. United States, 39 M.J. 921, 923 (N.M.C.M.R. 1994)).
[30] *Id.* at 584.

exception exists."[31] Having invalidated the order, the court affirmed the dismissal of Chief Serianne's dereliction charge.

B. *Serianne* at the Court of Appeals for the Armed Forces

The government pursued its appeal in the Court of Appeals for the Armed Forces (CAAF). That court sidestepped the constitutional question. Instead, it decided the case exclusively on the superior, conflicting regulation mentioned by the NMCCA.[32] The CAAF agreed with the NMCCA's assessment of the regulations, namely that the order contained in the Serianne Instruction conflicted with Navy Regulation 1137, a permissible regulation with a reporting exception.[33] Therefore, the court held, the subordinate Serianne Instruction could not provide a legal basis for holding Chief Serianne criminally liable.[34]

The CAAF affirmed both lower courts and held the order in the Serianne Instruction invalid.[35] But its terse opinion[36] left unanswered the question of how it would rule on the constitutionality of the Navy's many reporting requirements. By failing to deal squarely with the constitutional question, the CAAF, wittingly or not, invited the order's eventual resuscitation.

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[31] *Id.* at 585. The published majority opinion, written by Judge Perlak, was joined by six other judges. The two remaining judges, including Chief Judge Geiser, filed separate opinions, concurring only in the result, not the rationale.

[32] *Id*. ("[W]e may take into account the nonconstitutional regulatory matter discussed by the court below—the relationship between the self-reporting requirement in the Instruction and the exclusion from self-reporting provided in Article 1137 of the United States Navy Regulations.") (citing Justice Brandeis's concurring opinion in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 347 (1936)) (noting that courts may avoid a constitutional question before it "if there is also present some other ground upon which the case may be disposed of").

[33] *Serianne*, 69 M.J. at 11 ("The lower court's description of Article 1137 as 'superior competent authority' is consistent with Article 0103 of the United States Navy Regulations, which states that the United States Navy Regulations serve as 'the principal regulatory document of the Department of the Navy,' and specifically states that '[o]ther directives issued within the Department of the Navy shall not conflict with, alter or amend any provision of Navy Regulations.'")

[34] *Id*.

[35] *Id*.

[36] With a summary of facts and procedural history, the opinion was barely four pages long.

C. The *Serianne* Aftermath

The *Serianne* decisions caused a stir in the Navy's legal community. The Navy's Judge Advocate General, the chief legal advisor to the Secretary of the Navy and CNO, publicly commented on the case's impact: "This is going to change the way we do business."[37]

And for a time it did. After the CAAF's ruling, the Secretary of the Navy revised the Navy Regulations in a message titled "Change to U.S. Navy Regulations in light of U.S. v. Serianne." The change required Sailors to report all civilian criminal *convictions*, not arrests.[38] As Navy Regulations are the principal regulatory document of the Navy, the amendment to those regulations superseded any instruction containing orders to report arrests**.** Indeed, it appeared to change the way the Navy was going to do business.[39]

But the change also authorized the Chief of Naval Operations and Commandant of the Marine Corps to "promulgate regulations or instructions that require servicemembers to report civilian arrests…if those regulations or instructions serve a regulatory or administrative purpose."[40] This provision would later serve as justification for a revised order from the CNO to report not just alcohol-related arrests, but all civilian arrests—but this time with an assertion that it was needed for administrative purposes.[41]

Meanwhile, the CAAF's *Serianne* opinion failed to answer the constitutional questions the NMCCA grappled with—namely, whether

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[37] *See* Andrew Tilghman, *Court Rejects Rule Forcing Sailors to Report DWIs*, NAVY TIMES, December 7, 2009, *available at* http://www.navytimes.com/news/2009/12/navy_dwi_ruling_120709w/.

[38] SEC'Y OF THE U.S. NAVY, ALNAV 047/10, CHANGE TO U.S. NAVY REGULATIONS IN LIGHT OF U.S. V. SERIANNE (2010) [hereinafter ALNAV 047/10], *available at* http://www.public.navy.mil/BUPERSNPC/REFERENCE/MESSAGES/ALNAVS/Pages/ALNAV2010.aspx. This message amended Article 1137 of the Navy Regulations. U.S. DEP'T OF NAVY, U.S. REGULATIONS 1990 § 1137 (Sept. 14, 1990). The Navy regulations were published in 1990. They have not undergone a wholesale revision since. Instead, updates are announced piecemeal—alongside other administrative matters—via Navy messages, which are then stored in an online database.

[39] United States v. Serianne, 69 M.J. 8, 11 (C.A.A.F. 2010) (quoting U.S. NAVY REGULATIONS art. 0103 (1990)).

[40] ALNAV 047/10, *supra* note 38.

[41] CHIEF OF NAVAL OPERATIONS, NAVADMIN 373/11, CHANGE TO U.S. NAVY REGULATIONS IN LIGHT OF U.S. V. SERIANNE (2011). *See infra* Part IV (providing further discussion).

self-reporting an arrest is an incriminatory statement implicating the Fifth Amendment, or, if it is, whether the regulatory exception applies. It failed to provide parameters for similar orders to report civilian arrests, which the amended Navy regulation authorized. As a consequence, the CNO's revised order, issued just fourteen months after *Serianne*, would suffer from the same infirmities as the Serianne Instruction, if not more. This article examines those infirmities. In order to do so, we must briefly revisit the self-incrimination clause.

III. The Self-Incrimination Clause Revisited

"[H]e puts not off the citizen when he enters camp; but it is because he is a citizen, and would wish to continue so, that he makes himself for a while a soldier."

—William Blackstone in *Commentaries on the Laws of England*, 1765[42]

A. The Scope of the Clause in the Civilian Context

In 1769, Sir William Blackstone noted that it was an established rule of the common-law of England that "no man shall be bound to accuse himself; and his fault was not to be wrung out of himself, but rather to be discovered by other means, and other men."[43] This simple principle represented a powerful check on both state and ecclesiastical power over the individual.[44] The Declaration of Rights of the Virginia Constitution, the oldest in the United States, included a protection that no "man…be compelled to give evidence against himself."[45] In fact, of the eight states to have Bills of Rights pre-dating the Constitution, each contained a self-incrimination clause.[46] The prevailing understanding at the time of the

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[42] 1 WILLIAM BLACKSTONE, COMMENTARIES *408 (1765).
[43] 4 WILLIAM BLACKSTONE, COMMENTARIES *293 (1769).
[44] *See* Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a "Trial Right" in* Chavez v. Martinez, 70 TENN. L. REV. 987, 1001 (2003) (tracing the history of the privilege against self-accusation, dating back to an era when common law courts issued writs to prevent inquisitorial interrogation in the ecclesiastical courts, and when it was used to combat abuses of the infamous Court of Star Chamber).
[45] LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 406 (Ivan R. Dee ed., 1999).
[46] *Id*. These bills of rights omitted the now-sanctified freedoms of speech, assembly, and petition, as well as the right to habeas corpus, grand jury proceedings, and counsel. *Id.* at 409.

founding was that such rights were essential to free citizens who would not be subject to criminal charges absent a substantial accusation alleging a specific crime and presented by a complainant or prosecutor with personal knowledge and sufficient evidence.[47]

The purpose was twofold: to prohibit baseless, open ended investigations; and to ensure that the government did not effectively deputize the suspect by compelling him to provide evidence against himself. Additionally, the Founders wanted to limit the ability of legislatures to relax common-law criminal procedure standards,[48] which were broadly understood to relate to the total enterprise of criminal justice, not only to trial.[49]

In fact, the right against self-incrimination was recognized even in instances where a person was not the subject of a criminal trial. Chief Justice John Marshall ruled that a witness at the criminal trial of another person was not bound to answer a question if it was possible that such testimony might "criminate" the witness.[50] Significantly, Marshall noted that the determination as to whether a statement may be incriminating "must rest with himself, who alone can tell what it would be, to answer the question or not."[51] In subsequent years, the Supreme Court has recognized the right as applying to a host of areas beyond criminal trials, to include police interrogations,[52] grand jury proceedings,[53] bankruptcy proceedings,[54] congressional investigations,[55] state statutory inquiries,[56]

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[47] *Id.* at 1002 (arguing that the framers intended to "preserve the accusatory character of common-law procedure," which required the complainant to swear to personal knowledge of the crime before an arrest warrant could be issued, and to bring evidence to convince a grand jury of the "apparent truth" of the accusation before a trial could take place).

[48] *Id*. at 1007.

[49] *Id.* at 999–1000.

[50] United States v. Burr, 25 F. Cas. 38, 39–40 (C.C.D. Va. 1807).

[51] *Id.*

[52] According to Davies, *supra* note 44, at 1000, "the Framers did not address how the right would apply to police interrogation because there was no such thing as police interrogation during the framing era; indeed, there were no police officers as we now understand that term." The Supreme Court has interpreted the right as applying to police interrogations, most famously in *Miranda v. Arizona*. 384 U.S. 436, 467 (1966).

[53] Counselman v. Hitchcock, 142 U.S. 547, 559 (1892), *superseded by statute in irrelevant part as recognized in* Kastigar v. United States, 406 U.S. 441, 453–54 (1972).

[54] McCarthy v. Arndstein, 26 U.S. 34, 40–41 (1924) ("The government insists, broadly, that the constitutional privilege against self-incrimination does not apply in any civil proceeding. The contrary must be accepted as settled . . . [The government] claims that the constitutional privilege does not relieve a bankrupt from the duty to give information

and juvenile proceedings.[57] In each of these contexts, the right applies to prevent compelled statements that might be used later in a criminal proceeding.[58]

B. The Scope of the Clause in the Military Context

The right against self-incrimination under the Fifth Amendment applies with full force to servicemembers.[59] As noted by the Court of Military Appeals (the CAAF's precursor) ("COMA"), the privilege was extended at the courts-martial of British spy Major John André in 1780, eleven years before the Bill of Rights was ratified, and Commodore James Barron in 1808. It was also referred to in the 1786 version of the Articles of War, which required the trial judge advocate to object to "any question to the prisoner, the answer to which might tend to criminate himself."[60] It has since been supplemented by Congress by Article 31 of the Uniform Code of Military Justice, which provides even broader protections.[61] This protection is a marked contrast to other constitutional

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which is sought for the purpose of discovering his estate . . . [T]he constitutional prohibition of compulsory self-incrimination has not been so limited.").

[55] Watkins v. United States, 354 U.S. 178, 188 (1957).

[56] Malloy v. Hogan, 378 U.S. 1, 3, 11 (1964).

[57] *In re* Gault, 387 U.S. 1, 55 (1967).

[58] *See* Michigan v. Tucker, 417 U.S. 433, 440–41 (1974) (citing *Counselman*, *McCarthy*, *Gault*, and *Malloy*). The Court has held, however, that the right does not extend to certain non-criminal proceedings, such as involuntary psychiatric commitment. Allend v. Illinois, 478 U.S. 264, 372–73 (1986).

[59] *See* United States v. Tempia, 37 C.M.R. 249, 253–54 (1967) (holding that rights warnings under *Miranda* are required for military as well as civilian interrogations).

[60] *Id.* at 634 (citing WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 196–97, 972–73 (2d ed. 1920)).

[61] United States v. Lewis, 12 M.J. 205, 207 (C.M.A. 1982) (noting that protections of Article 31 are broader than those provided under the Fifth Amendment). Article 31 provides that "[n]o person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him," and that "[n]o person subject to this chapter may interrogate, or request any statement from . . . a person suspected of an offense without [a rights warning]"; and "[n]o statement obtained from any person in violation of this article . . . may be received in evidence against him in a trial by court-martial." 10 U.S.C. § 831 (2012). The rights warning requirement of Article 31 is not limited to custodial interrogations by law enforcement. The military appellate courts have taken a very broad view of what "interrogation" means and when a statement has been "obtained" for purposes of this article. United States v. Borodzik, 44 C.M.R. 149, 151 (C.M.A. 1971) ("When conversation is designed to elicit a response from a suspect, it is interrogation, regardless of the subtlety of the approach."); *see also* United States v. Dowell, 10 M.J. 36, 40 (C.M.A. 1980) ("When one takes action which foreseeably will induce the making of a statement and a statement does result, we

rights, notably those secured by the First and Fourth Amendments, which Congress and the courts view as applying more narrowly to servicemembers than to their civilian counterparts.[62]

1. Duty to Report Crimes

When military regulations have required a servicemember to report offenses in which the servicemember was not personally involved, military courts have upheld those regulations and criminal liability based on failure to obey them. In *United States v. Heyward*, the COMA upheld the validity of an Air Force Instruction requiring servicemembers to report occasions on which they witnessed others using drugs.[63] Similarly, in *United States v. Medley*, the same court recognized a general duty by military leaders to report blatant criminal conduct of their subordinates.[64] In both cases, the court exempted those instances in which the witness was an accessory or principal to the illegal activity; in such cases, the right against compelled self-incrimination excuses non-compliance with the duty to report.[65]

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conclude that the statement has been 'obtained' for purposes of Article 31."). These extra protections are designed to counteract "the subtle pressures which exist[] in military society," where, conditioned to obey, "a serviceperson asked for a statement about an offense may feel himself under a special obligation to make such a statement." United States v. Armstrong, 9 M.J. 374, 378 (1980).

[62] *See* United States v. McCarthy, 38 M.J. 398, 401 (C.M.A. 1993) (discussing reduced expectation of privacy, and thus reduced protection against searches and seizures, in military barracks); 10 U.S.C. § 888 (2012) (forbidding commissioned officers to express contempt towards designated public officials); *but see* H.F. Gierke, *The Use of Article III Case Law in Military Jurisprudence*, ARMY LAW., Aug. 2005, at 25, 35 (pointing out that the Court of Appeals for the Armed Forces (CAAF) applies the Bill of Rights will full force to servicemembers absent "a specific exemption for the military justice system or some demonstrated military necessity that would require a different rule," and arguing that the CAAF in general "more readily recognizes servicemembers' constitutional rights than does the Supreme Court") (internal quotes omitted) (Judge Gierke was then Chief Judge of the CAAF).

[63] United States v. Heyward, 22 M.J. 35, 36–37 (C.M.A. 1986) ("In attempting to maintain high standards of health, morale, and fitness for duty, it is entirely reasonable for the Air Force to impose upon its members a special duty to report drug abuse").

[64] United States v. Medley, 33 M.J. 75, 77 (1991) ("We have never intimated that it is lawful or excusable for a person in a position of military leadership to consciously ignore the blatant criminal conduct of subordinates. This classic duty not to tolerate malfeasance cuts to the very core of military leadership and responsibility").

[65] *Heyward*, 22 M.J. at 37; *Medley*, 33 M.J. at 76.

In so holding, military courts recognize self-incrimination as the touchstone for testing orders to report crimes. The right against self-incrimination does not restrict orders to report behavior so long as the order does not potentially implicate criminal charges. For example, when Marines stationed at the U.S. Embassy in Moscow were required by order to report all contacts with local nationals, a Marine who had contact with Soviets was still criminally liable for failing to report those contacts—because the contacts were not in themselves criminal.[66] Courts specifically focus on the subject of the disclosure to determine whether it potentially subjects the servicemember to criminal charges. If it does, then the servicemember is excused from the duty to report. Suppose, for example, that a servicemember witnesses a series of criminal offenses that are related to other offenses in which he personally participates. The military courts have held that the duty to report extends only to those offenses for which the servicemember has no criminal liability.[67] The operative inquiry, then, is about the subject of the compelled statement. If it brings the servicemember himself within the ambit of the UCMJ, it is incriminatory and may not be compelled.

2. The NMCCA's Serianne *Opinion*

The NMCCA followed this broad line of cases in recognizing that the touchstone inquiry in *Serianne* was whether the Serianne Instruction imposed a duty to report self-incriminating information. The duty to report alcohol-related offenses, unlike the duty to report minor contacts with foreign nationals, required "incriminatory" statements, statements that posed "a real danger of legal detriment" to the servicemember who

[66] United States v. Kelliher, 35 M.J. 320, 322 (C.M.A. 1992). Close contact (or "fraternizing") with Soviet nationals was forbidden, so that a failure to report such contact would fall within the right against self-incrimination; but the accused in that case had failed to report his initial, casual contacts, which were not in themselves criminal, so that he could properly be convicted for failing to report them. *Id.*

[67] *Medley*, 33 M.J. at 76–77 (accused was present at parties where drugs were used by servicemembers and sometimes used them herself; she was excused from reporting drug use only on the occasions where she herself used them, notwithstanding her fear that other persons would retaliate by reporting her own use); *but see* United States v. Brunton, 24 M.J. 566, 571 (N.M.C.M.R. 1987) (court dismissed "failure to report" specification for an incident of drug distribution because, while the accused did not distribute drugs himself on that occasion, he was allegedly involved in a conspiracy to distribute with the person who did, so that reporting the distribution would tend to incriminate him for that conspiracy).

self-reported to his command.[68] This was true even if the statements, standing alone, were not sufficient to support a conviction, but merely "furnish[ed] a link in the chain of evidence needed to prosecute [an individual] for a federal crime."[69] The NMCCA rightly dismissed the government's argument that the existence of a public arrest record nullified the incriminating nature of the disclosure, stating that the determination of "whether a disclosure would be 'incriminatory' has never been made dependent on an assessment of the information possessed by the Government at the time of the interrogation."[70] Furthermore, the court quoted the Supreme Court as having identified the Fifth Amendment right against self-incrimination as being designed to "spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense…."[71] The court found that the Serianne Instruction compelled an accused to reveal just such facts.[72]

In finding that the duty to report an arrest violated the constitutional rights of servicemembers, the NMCCA was not going out on a limb, but was acting within a broad current of military jurisprudence. Neither written orders nor unwritten rules and customs can impose upon servicemembers a duty to report their own criminal offenses.[73] In

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[68] 68 M.J. 580, 582 (N-M. Ct. Crim. App. 2010) (quoting Rogers v. United States, 340 U.S. 367, 372–73 (1951)).
[69] *Id*. (quoting Hoffman v. United States, 341 U.S. 479, 486 (1951)).
[70] *Id*. (quoting Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 81 (1965)).
[71] *Id.* (quoting Doe v. United States, 487 U.S. 201, 213 (1988)).
[72] *Id*.
[73] Thus, in *United States v. Dupree*, 24 M.J. 319, 321 (C.M.A. 1987), cited in *Serianne*, 68 M.J. at 583, a noncommissioned officer (NCO) took two prisoners off base, where he drank liquor with them and they used marijuana. He pleaded guilty to dereliction of duty in part for failing to report their drug use, the dereliction being based on his duties as an NCO rather than any specific regulatory reporting requirement. However, the COMA held that this conviction could not be sustained on these grounds, because his failure to report this drug use was "inextricably intertwined" with the crimes of taking the prisoners off base and drinking with them, so that he could not report one without implicitly reporting the others. (The Air Force Court of Military Review afterwards sustained the dereliction conviction on other grounds, because the accused had failed to *prevent* the marijuana use. United States v. Dupree, 25 M.J. 659, 662 (A.F.C.M.R. 1987)). However, in *United States v. Bland*, the Navy-Marine Court of Military Review upheld a failure-to-report conviction when the accused had committed one crime (an assault) with other persons, whom he later saw driving a stolen car and attempting to steal from two automated teller machines. The car and the card they attempted to use to take the money were both stolen from the man the accused had helped assault; nonetheless, the court upheld his duty to report these other crimes. "Appellant could have disclosed to proper authorities what he saw and heard regarding the theft of the car and the attempted thefts of currency without incriminating himself in the assault." The others might have

Serianne, the NMCCA recognized that within the ambit of potential UCMJ charges, the duty to report an arrest for drunk driving was no less repugnant to the constitutional rights of servicemembers than a duty to report other criminal behavior. In striking down such an order, the NMCCA merely recognized the robust protections afforded to servicemembers against self-incrimination. In short, the NMCCA was right to declare the Serianne Instruction unconstitutional.

IV. The Catch-92 Returns: "Affirmed on Other Grounds" and the Regulatory Exception

In December 2011, the CNO promulgated a new general order to all Sailors to report not just alcohol-related arrests, but any civilian arrest. The current order is OPNAVINST 3120.32D (the "Revised Order"). In pertinent part it reads as follows:

> Any person arrested or criminally charged by civil authorities shall immediately advise their immediate commander of the fact that they were arrested or charged. The term arrest includes an arrest or detention, and the term charged includes the filing of criminal charges. Persons are only required to disclose the date of arrest/criminal charges, the arresting/charging authority, and the offense for which they were arrested/charged. No person is under a duty to disclose any of the underlying facts concerning the basis for their arrest or criminal charges. Disclosure of the arrest is required to monitor and maintain the personnel readiness, welfare, safety, and deployability of the force . . . .[74]

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afterwards reported the assault, but in the court's words, "it was most likely that the reporting of the assault would have come from persons other than the appellant"—so his privilege against self-incrimination was not implicated. United States v. Bland, 39 M.J. 921, 924 (N.M.C.M.R. 1994).

[74] OFFICE OF THE CHIEF OF NAVAL OPERATIONS, OPNAVINST 3120.32D ¶ 5.1.6 (16 July 2011), as amended by NAVADMIN 373/11 (8 Dec. 2011) [hereinafter OPNAVINST 3120.32D ¶ 5.1.6] (as amended by NAVADMIN 373/11).

In a section on disciplinary action, the CNO authorized commanders to impose discipline on personnel who fail to comply with the order.[75] This includes a criminal charge under Article 92.

In a tacit acknowledgment of the NMCCA's *Serianne* opinion, the CNO implemented additional changes to the regulations. First, he invalidated the Serianne Instruction. Second, in keeping with the Secretary of the Navy's new exception,[76] the CNO justified the new requirement as "required to monitor and maintain the personnel readiness, welfare, safety, and deployability of the force." And third, he emphasized that no person reporting an arrest under the Revised Order is required to disclose the facts surrounding the arrest, but just the date, charges, and arresting authority.

This acknowledgment, however, was a mere tip of the cap; the revised order followed the CAAF's *Serianne* decision but not the NMCCA's. Despite the "regulatory" language, the Revised Order is still an order to report civilian arrests, and failure to comply with it is a criminal offense. It imposes the same duty, with the same consequences, that the NMCCA identified as compelled, testimonial, and incriminating in *Serianne*.

The CAAF, however, did not rule that the Serianne Instruction was unconstitutional, but that it conflicted with another regulation. As CAAF is the military's highest judicial authority before the Supreme Court, perhaps the CNO interpreted the CAAF's ruling as nullifying the NMCCA's constitutional one. Alternatively, perhaps the CNO believed the new "regulatory" language in the Revised Order qualified it for the regulatory exception and thus satisfied the Fifth Amendment. These are the only plausible justifications for the Revised Order, which otherwise bears a striking resemblance to the Serianne Instruction. For the reasons that follow, these justifications fail.

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[75] *Id*. intro., para. 4, at I (Rules printed in uppercase italics, as section 5.1.6 is: "are regulatory general order. . . . Penalties for their violation include the full range of statutory and regulatory sanctions, including the Uniform Code of Military Justice (UCMJ)").

[76] ALNAV 047/10, *supra* note 38 (allowing the Chief of Naval Operations (CNO) to promulgate regulations or instructions requiring self-reporting "if those regulations or instructions serve a regulatory or administrative purpose").

A. The NMCCA's Constitutional Holding Remains Intact

It is axiomatic that military appellate courts have the power and the duty to rule on constitutional questions to protect the rights of servicemembers.[77] It is equally well established that published decisions of the Navy-Marine Court of Criminal Appeals are precedential for Navy and Marine courts-martial,[78] and that a case affirmed or even reversed "on other grounds" is still valid authority for those parts of the opinion that remain undisturbed by the higher court.[79] That is why such cases are frequently cited as persuasive authority by the Supreme Court[80] and as persuasive or even binding authority by the military appellate courts.[81]

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[77] *See* Schlesinger v. Counselman, 420 U.S. 738, 758 (1975); Burns v. Wilson, 346 U.S. 137, 142 (1953); United States v. Tempia, 37 C.M.R. 249, 253–54 (C.M.A. 1967); United States v. Bowles, 1 C.M.R. 474, 477 (N.B.R. 1951).

[78] NAVY-MARINE CT. CRIM. APP. R. PRAC. & P. 18.1(a) (2011) ("Published opinions [of the Navy-Marine Court of Criminal Appeals] serve as precedent providing the rationale of the Court's decision to . . . military practitioners, and judicial authorities."); 20 AM. JUR. 2D *Courts* § 142 (1962) (appellate court's decision generally has *stare decisis* effect on a court of lower rank); 21 C.J.S. 2D *Courts* § 209 (1936) (decision of an intermediate appellate court is "the law of the jurisdiction" until reversed or overruled).

[79] "A decision may be *reversed* on other grounds, but a decision that has been *vacated* has no precedential authority whatsoever." Durning v. Citibank, 950 F.2d 1419, 1424 n.2 (9th Cir. 1991) (this distinction would be meaningless if reversal or affirmance on other grounds destroyed the precedential value of the rest of the holding); *see also* Charles A. Sullivan, *On Vacation*, 43 HOUS. L. REV. 1143, 1145–48 (2006) (suggesting that even cases vacated "on other grounds" are gaining precedential value in federal court).

[80] *See, e.g.*, Nat'l Archives and Records Admin. v. Favish, 541 U.S. 157, 171 (2004) (citing Katz v. Nat'l Archives and Records Admin., 862 F.Supp. 476 (D.D.C. 1994), *aff'd on other grounds*, 68 F.3d 1438 (C.A.D.C. 1995)); Ingalls Shipbuilding, Inc. v. Dir., Off. of Workers' Comp. Programs, 519 U.S. 248, 266 (1997) (citing Pittson Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 43 n.5 (2nd Cir. 1976), *aff'd on other grounds*, 432 U.S. 249 (1977)); Rapanos v. United States, 547 U.S. 715, 744 (2006) (citing Daque v. Burlington, 935 F.2d 1343, 1354–55 (2nd Cir. 1991), *rev'd on other grounds*, 505 U.S. 557 (1992)).

[81] *See, e.g.*, United States v. Kreutzer, 59 M.J. 773, 776 (A. Ct. Crim. App. 2004) (citing United States v. Loving, 41 M.J. 213, 250 (C.A.A.F. 1994), *aff'd on other grounds*, 517 U.S. 748 (1996)); United States v. Earls, No. 34840, 2003 WL 1792556, at *2 (A.F. Ct. Crim. App. Mar. 24, 2003) (citing United States v. Edmond, 41 M.J. 419, 420 (C.A.A.F. 1995), *aff'd on other grounds*, 520 U.S. 651 (1997)); United States v. Butz, No. 200000790, 2002 WL 31729507, at *2 (N-M. Ct. Crim. App. Dec. 5, 2002) (citing United States v. Solorio, 21 M.J. 251, 255–56 (C.M.A. 1986), *aff'd on other grounds*, 483 U.S. 437 (1987)); United States v. Matthews, 68 M.J. 29, 38 (C.A.A.F. 2009) (citing Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982), *rev'd on other grounds*, 466 U.S. 668 (1984)); United States v. Swift, 53 M.J. 439, 446 (C.A.A.F. 2000) (citing United States v. Davis, 36 M.J. 337 (C.M.A. 1993), *aff'd on other grounds*, 512 U.S. 452 (1994)).

The CAAF did not address the NMCCA's constitutional holding. Instead, it chose to avoid the constitutional question, citing the longstanding Avoidance Doctrine,[82] which holds that courts "ought not to pass on the questions of constitutionality . . . unless such adjudication is unavoidable."[83] Though this doctrine has been attacked by legal theorists for decades,[84] the CAAF properly adhered to precedent by deciding the case on a regulatory conflict rather than the constitutional question. The CNO may have interpreted the CAAF's constitutional silence as a repudiation of the NMCCA's holding, thereby justifying the Revised Order. If so, his reliance was improper.

The CAAF affirmed the NMCCA "without reaching the constitutional questions."[85] It neither vacated nor reversed the NMCCA's holding, which found the Serianne Instruction unconstitutional. The NMCCA's holding, therefore, is binding law, leaving the regulatory exception as the only remaining justification for the Revised Order. This justification fails.

B. The Regulatory Exception

The movie producer Samuel Goldwyn is said to have told his writers, "Give me the same thing, just make it different." The CNO did something similar in the aftermath of *Serianne.* The result was a new order that, though packaged in regulatory language, reinstituted the same duty the court had declared unconstitutional.

The Revised Order attempts to justify the duty under the judicially recognized "regulatory exception" to the Fifth Amendment. Traditionally known as the "required records exception," the exception allows the government "to gain access to items or information vested with [a]

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[82] United States v. Serianne, 69 M.J. 8, 10–11 (C.A.A.F. 2010).
[83] Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944).
[84] *See* William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 852 (2001). Professor Kelley and other legal scholars criticize the avoidance doctrine on a number of grounds. One such ground is that in the name of Separation of Powers, courts in fact undermine that principle by forcing lawmakers to guess—rather than know—the constitutional limits of their law or regulation. The revised order in the wake of *Serianne*, the authors believe, exemplifies the problem they identify. *See also* Brian C. Murchison, *Interpretation and Independence: How Judges Use the Avoidance Canon in Separation of Powers Cases*, 30 GA. L. REV. 85 (1995).
[85] *Serianne*, 69 M.J. at 11.

public character," such as bookkeeping and business records.[86] In proper circumstances, servicemembers may be required to produce information under the exception.

For example, in *United States v. Swift*, the accused had apparently contracted a bigamous marriage. His First Sergeant questioned him about his divorce (without a rights warning) and ordered him to produce his divorce decree. He produced a false one. The CAAF held that the questioning was unlawful—but that the fake divorce decree was admissible under the required records exception.[87] In doing so, the court established a three-part test for the exception:

> (1) The requirement that [the records] be kept "must be essentially regulatory"; (2) the records must be the "kind which the regulated party has customarily kept"; and (3) the records themselves must be either public documents or "have assumed 'public aspects' which render them at least analogous to public documents."[88]

The court found that Swift's alleged "divorce decree" fit the test because regulations required such documents "to establish and update military records supporting spousal eligibility for government benefits," and indeed he had presented it to the personnel office for this purpose; also, the document was public and of a kind typically kept by the Air Force.[89]

1. Application to the Revised Order

The Revised Order, by contrast, fails the first element of the test. It contains language obviously designed to bring it within the exception, stating that its purpose is to "monitor and maintain the personnel readiness, welfare, safety, and deployability of the force."[90] But this

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[86] United States v. Serianne, 68 M.J. 580, 584 (N-M. Ct. Crim. App. 2009) (citing United States v. Oxfort, 44 M.J. 337, 340–41 (C.A.A.F. 1996), California v. Byers, 402 U.S. 424, 427–28 (1971)). According to the *Serianne* court, the term "required records exception" is used when the disclosures are in the form of documents, and the term "regulatory exception" is used otherwise. *Serianne*, 68 M.J. at 584.

[87] The fake decree was additionally admissible because the accused had voluntarily produced it (and presented it at the installation personnel office) *before* his first sergeant ordered him to bring it. United States v. Swift, 53 M.J. 439, 453 (C.A.A.F. 2000).

[88] *Id.* (citing Grosso v. United States, 390 U.S. 62, 67–68 (1968)).

[89] *Id.* at 453–54.

[90] OPNAVINST 3120.32D, *supra* note 74, ¶ 5.1.6.

language is simply a more developed version of the "military exigencies" argument that failed to persuade the NMCCA in *Serianne*.[91] It does not change the nature of the reporting requirement, or the consequences of reporting.

In *United States v. Williams*,[92] the COMA set forth the standard for determining whether a regulation is "primarily regulatory" (and thus whether it meets the first part of the test for the required records exception established in *Swift*):

> First, we must consider whether the reporting requirement occurs in an area "permeated with criminal statutes" or in an area "essentially noncriminal and regulatory." Second, we must consider whether the reporting requirement focuses on a "highly selective group inherently suspect of criminal activity" or on the public in general. Finally, we must determine whether compliance would force an individual to provide information that "would surely prove a significant 'link in a chain' of evidence tending to establish his guilt." Upon considering these factors, a court may conclude that the particular disclosures required under a regulatory or statutory scheme are inevitably self-incriminating. Stated otherwise, we must determine whether the disclosure requirement . . . requires an "inherently risky" disclosure of an "inherently illegal activity."[93]

The Revised Order fails all three parts of this standard. The NMCCA concluded that the Serianne Instruction was "decidedly punitive" because it "promotes the traditional aims of punishment—retribution and deterrence."[94] In expanding the order beyond alcohol-related offenses to include all criminal offenses, the Revised Order promotes the same aims and is decidedly more punitive than the one it replaced. An order to report only alcohol-related arrests could arguably be justified as providing the Navy with information it needed to rehabilitate Sailors

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[91] *Serianne*, 68 M.J. at 585. "We are likewise not persuaded by the Government's argument that 'military exigencies' exist to uphold the otherwise unconstitutional disclosure requirement of [the Serianne Instruction]."
[92] 29 M.J. 112 (C.M.A. 1989).
[93] *Id.* at 115–16 (quoting United States v. Williams, 27 M.J. 710, 717 (A.C.M.R. 1988)) (internal citations omitted).
[94] *Serianne*, 68 M.J. at 584.

with alcohol problems (and might even have had that effect if the reporting Sailors had been immunized from UCMJ action). An order to report *all* arrests, without immunization, is about punishment, not rehabilitation.

The fact that a Sailor could be tried at court-martial for the underlying offenses places the Revised Order squarely within the punitive ambit, irrespective of other measures the government may have at its disposal. It is insufficient for the government merely to state a regulatory purpose. The gravamen is potential UCMJ charges. And the revised order compels servicemembers to report arrests by authorizing prosecution for *failing* to do so, while subjecting them to possible prosecution for *having* done so.[95]

Having found the Serianne Instruction punitive, the NMCCA did not consider the second part of the standard described in *Williams*. If it had, the court could not have found a more "highly selective group inherently suspect of criminal activity" than a class of persons recently arrested by other sovereigns. While the Revised Order may apply equally to all Sailors, the key distinction is that the duty to report is imposed solely on

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[95] The revised order contains supplemental guidance on disciplinary action, which instructs commanders to impose disciplinary action for the reported offense only if based "on evidence derived independently of the self-report." OPNAVINST 3120.32D ¶ 5.1.6, *supra* note 74. Opponents to this article's thesis could read this guidance to create a de facto testimonial immunity, prohibiting any subsequent use of the disclosure, however remote. If these critics are right, then the disclosure ceases to be incriminating and thus the Fifth Amendment is not violated.

A few considerations refute this argument. First, the independently derived language is contained in supplemental guidance, not in the order itself, so its weight is unclear (and untested in the military courts). Second, and more important, the language of the actual order belies such a reading. The order prohibits investigators from questioning self-reporting servicemembers "unless they first advise the person of their rights under UCMJ article 31(b)." Yet that subsequent interrogation would undoubtedly derive *directly from* the disclosure. And third, the implications of such a reading are simply unconscionable. According to this reading, a Sailor may very well preclude his own prosecution under the military justice system—no matter how heinous the allegation—so long as the Sailor is the first to notify his commander of his arrest. In such a scenario, the commander would be left to hope—barred from so little as making a phone call—that investigators, military or civilian, "independently" notify him of potential misconduct.

In any event, this is the debate that proves the point. Both the NMCCA and the CAAF, per Supreme Court guidance, measure incrimination on the "reasonable belief [that the disclosure] could be used in a criminal prosecution or could lead to evidence that might be so used." Kastigar v. United States, 406 U.S. 441, 444–45 (1972). If practitioners can debate whether supplemental guidance contained in an order amounts to immunity, it is reasonable for a self-reporting servicemember to believe that it does not.

a class of persons who have been arrested or criminally charged. By definition, this group is "inherently suspect of criminal activity"—if they were not suspected, they would not have been arrested or charged.

As to the third part, the NMCCA did consider whether the required information would provide a significant "link in the chain" to establish the suspect's guilt. It held that "it was reasonable for [Chief Serianne] to believe that the reporting of his own arrest would lead to further disclosure of incriminating evidence…and would not only provide a link in the chain of an investigation but more probably cause the initiation of a criminal investigation by the Navy into his conduct."[96] The Revised Order fails this consideration in much the same way. Stated most simply, the duty to report exists precisely because arrests are not automatically reported to military authorities. If they were, the duty would be an unnecessary formality. Reporting an arrest allows a command to obtain police reports, witness statements, and all other evidence gathered by the arresting authority. For obvious reasons, this evidence cannot be obtained without knowledge of the arrest. The compelled report provides the command with the first link in the chain that leads to a finding of guilty.

2. Additional Language

As noted above, the Revised Order includes new language to try to squeeze it into the regulatory exception: "No person is under a duty to disclose any of the underlying facts concerning the basis for their arrest or criminal charges. Disclosure of the arrest is required to monitor and maintain the personnel readiness, welfare, safety, and deployability of the force."[97] Despite this language, nothing in the substance of the Revised Order renders it a better fit for the exception. Calling the revised order "regulatory" does not make it so. The Revised Order expands the duty to report arrests and allows commanders to impose the same consequences for failing to comply.

By its terms, the Revised Order requires Sailors to disclose only their arrests, not underlying facts. But this, too, is a distinction without a difference. The Serianne Instruction did not require the disclosure of underlying facts either. The NMCCA did not consider underlying facts in

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[96] *Serianne*, 68 M.J. at 583 (citing Marchetti v. United States, 390 U.S. 39, 48 (1968)).
[97] OPNAVINST 3120.32D, *supra* note 74, ¶ 5.1.6.

invalidating that Instruction. It based its holding on the fact that, in reporting his arrest, Chief Serianne would cause the Navy to initiate an investigation into the conduct that led to his arrest, which in turn could lead to his conviction. The same is true of the Revised Order. In short, if the Serianne Instruction did not qualify for the regulatory exception, nothing about the Revised Order qualifies it.[98]

3. Earlier Examples

It is instructive to compare the Revised Order with those that have been found to qualify for the regulatory exception. In *United States v. Oxfort*, the CAAF upheld a federal statute that required unauthorized possessors of classified material to surrender the material to specified officials,[99] even if such surrender suggested they had committed a crime by wrongfully obtaining the material. In doing so, the court noted that classified records are documents that must, by their nature, be handled in a certain manner. Such documents rightly belong to the government, which can dictate the terms of their possession and use. The court analogized the requirement to that of bankrupt companies forced to surrender their accountants' books by subpoena—even though these books might contain incriminating information. "The question is not of testimony but of surrender—not of compelling the bankrupt to be a witness against himself . . . but of compelling him to yield possession of property he is no longer entitled to keep."[100]

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[98] The operative thesis of this article is that the Revised Order is unconstitutional because the NMCCA's holding is still good law and because the Revised Order does not qualify for the regulatory exception. Beyond the scope of this article but still worthy of consideration is whether the CNO has, in fact, eliminated the regulatory conflict relied upon by the CAAF. Navy Regulation 1137 still excepts Sailors from self-reporting orders "when such person are themselves already criminally involved in such offenses at the time such offenses first come under their observation." Absent removal of this language, it is difficult to argue that 1137 does not excuse servicemembers from reporting arrests as required by the Revised Order, especially in light of the fact that both the NMCCA and the CAAF said it did in *Serianne*. Therefore, the Revised Order, instead of eliminating the conflicting regulations, may have merely shifted the conflict to a different location.

[99] 44 M.J. 337, 343 (C.A.A.F. 1996). The statute at issue in *Oxfort* was 18 U.S.C. § 793(e) (2012), which provides that anyone in unauthorized possession of a classified document or information who willfully fails to deliver it to an official entitled to receive it is guilty of an offense.

[100] *Oxfort*, 44 M.J. at 340–41 (quoting *In re* Harris, 221 U.S. 274, 279 (1911)).

The court also found that the simple act of handing over classified documents was not "testimonial" because the statute did not require the individual to relate a factual assertion or disclose information of an incriminating kind.[101] The person turning over information might have acquired it lawfully or unlawfully, but the requirement to turn it in did not by its nature require him to reveal anything incriminating.

The *Oxfort* rationale does not apply to the Revised Order, which requires the suspect to provide information that he is perfectly entitled to keep to himself, that is always testimonial, and always incriminating—since it always links him to a real or suspected crime.

In *United States v. Williams*,[102] the COMA upheld a U.S. Forces-Korea regulation, which covered possession of high-value items such as videocassette recorders and television sets, against a constitutional challenge. The regulation required, in part, the following:

> Upon request of the unit commander, military law enforcement personnel, or responsible officer, [personnel will] present valid and bona fide information or documentation showing the continued possession or lawful disposition . . . of any controlled item . . . regardless of where or how acquired, brought into the [Republic of Korea] duty-free or acquired in the [Republic of Korea] without payment of duty or tax.[103]

The regulation was admittedly aimed at suppressing unlawful activity—black marketing. The court nonetheless found the regulation constitutional. It was regulatory in nature: it required servicemembers to keep records to prove their compliance with an overall scheme to regulate *lawful* transactions, and on certain occasions to surrender those records. It did not focus solely on criminal suspects, but rather on all persons who took advantage of the opportunity to acquire duty-free items in Korea. "Merely engaging in the transactions subject to the disclosure requirement will not necessarily result in a criminal prosecution because the [Status of Forces Agreement] explicitly permits the tax-free transfer of goods between persons qualifying for the exemption. . . ." Furthermore, since the act of buying and transferring items duty-free was

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[101] *Id.* at 340.
[102] 29 M.J. 112 (C.M.A. 1989).
[103] *Id.* at 114.

not inherently criminal, the required disclosures would not "in the usual circumstance provide the government with a significant link in a chain of evidence tending to establish guilt." Even a failure to disclose, for example, while violating the regulation, might indicate a lost record as opposed to a black market transaction.[104]

But even this regulation was ruled unconstitutional as applied in *United States v. Lee*.[105] In that case, the Military Police learned that the accused had purchased a number of high-value items, and (per their standard procedures) sent a letter asking his commander to require him to produce proof that he had the items or had transferred them lawfully. The commander, who did not suspect the accused of wrongdoing, complied. The accused did not produce the proof, and he was charged with failing to do so.[106] The COMA held that, since the Military Police suspected him of a crime ("regardless of the euphemisms employed at trial to mollify this reality"), they could not evade the requirements of the Fifth Amendment and Article 31, UCMJ, by using the regulation and a non-suspicious commander to question the suspect with no rights warning.[107] The regulation on its face did not violate the servicemember's privilege against self-incrimination, but the "targeted" use of it did.

The Revised Order, by contrast, is unconstitutional with respect to everyone. It does not regulate a lawful activity, but requires disclosures of suspected unlawful activity. It is focused solely on criminal suspects. It is targeted by its very nature on persons suspected of crimes. And the "euphemisms" employed in the Order cannot withstand this reality.

V. Conclusion

The right not to accuse oneself was recognized at common law, under most state constitutions, and even at court-martial, before the drafting of the federal Constitution. This early exaltation, admittedly, does little to clarify the contemporary construction of the self-incrimination clause. It does, however, demonstrate that the clause

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[104] *Id.* at 116 (quoting *with approval* United States v. Williams, 27 M.J. 710, 717–18 (A.C.M.R. 1988)).
[105] 25 M.J. 457 (C.M.A. 1988). *Lee* was decided before *Williams* but did not reach the facial constitutionality of the regulation.
[106] *Id.* at 458–59.
[107] *Id.* at 460–61.

occupies a rooted place in American jurisprudence that ought to be treated with solemnity.

The Supreme Court did no less when it decided *Miranda v. Arizona*. In deciding that case, the Court recognized its duty to combat against too "narrow and restrictive construction[s]," for if it failed to do so, constitutional rights "would have little value and be converted by precedent into impotent and lifeless formulas."[108] The Court traced the history of the self-incrimination clause, from its analogue in the biblical era,[109] to its use as a rule of evidence in the English common law,[110] to its "impregnability of a constitutional amendment" in this country.[111] With this evolution in mind, the Court issued its own order and implemented perhaps the most renowned warning label in American legal history.

The Supreme Court in *Miranda* explicitly ordered only courts below it, but its opinion has served ever since as guidance to every police officer in the United States, whether city, county, state, federal, or military—all of whom are executive officers like the CNO. The CNO should be similarly instructed by the NMCCA's *Serianne* opinion on the unconstitutionality of orders like the Serianne Instruction. The CAAF's affirmation of *Serianne* on other grounds does not vitiate the NMCCA's constitutional holding, but leaves it intact as the law. Under that law, the CNO's Revised Order suffers from the same deficiencies as the one it replaced. It ought to be rescinded.

The authors of this article are mindful of the CNO's primary duty to maintain readiness of the fleet. Reporting requirements can certainly be linked to this duty. But the CNO has many administrative tools and commanders may mete punishment or use administrative actions to ensure readiness without depriving Sailors of their right against self-incrimination. The Fifth Amendment protects the criminally accused. With the Revised Order, the CNO extended that protection to all Sailors who, like Nately and Serianne, choose not to report their own arrests.

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[108] Miranda v. Arizona, 384 U.S. 436, 442 (1966) (quoting Weems v. United States, 217 U.S. at 373 (1910)).
[109] *Id*. at 458. More accurately, the earliest known recognition of a right or privilege against self-incrimination is the Talmud, a compilation of ancient oral teachings based on the five books of Moses. *See* LEVY, *supra* note 45, at 433.
[110] *Miranda*, 384 U.S. at 458.
[111] *Id*. at 442 (quoting Brown v. Walker, 217 U.S. 591, 597 (1896)).

Two years after the Supreme Court issued its order in *Miranda*, constitutional scholar Leonard W. Levy published *Origins of the Fifth Amendment*, an exhaustive history of the right against self-incrimination for which he was later awarded the Pulitzer Prize. He concluded that "[a]bove all, the Fifth Amendment reflected [the Founders'] judgment that in a free society, based on respect for the individual, the determination of guilt or innocence by just procedures, in which the accused made no unwilling contribution to his conviction, was more important than punishing the guilty."[112] Stated differently, whether guilty or not, no Sailor should be subject to a Catch-92. Certainly not after Chief Serianne was.

[112] LEVY, *supra* note 45, at 432.