Widening the Door: Recent Developments in Self-Incrimination Law

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Introduction

Open confession is good for the soul[1]
—*Scottish Proverb*

There is nothing better than a good confession.[2] All of us at some point in our lives have harbored guilt and, when given the opportunity on our own terms to exorcise the evil feeling, have confessed. Afterwards, we felt relief and peace. From a prosecutor's perspective, there is nothing more exhilarating than presenting the court-martial panel with the accused's confession—words of guilt straight from the accused's mouth. The prosecutor sits back, watches the members read the confession, and waits for their reaction. Each member slowly looks up from the document and glares at the accused, who is fidgeting nervously in his seat. To experience this joy, however, the government must obey the rules of self-incrimination.[3]

From a defense perspective, there is nothing more *relieving* than *suppressing* the client's confession. The defense counsel zealously challenges the admissibility of the statement through pointed cross-examination of the investigator. He delightedly watches the investigator squirm on the witness stand as he highlights the government's failures. Then, the defense counsel triumphantly hears the military judge utter the word "granted" in response to the defense motion to suppress the confession, and counsel breathes a sigh of relief. Regardless of their positions, either prosecution or defense, military practitioners must be cognizant of self-incrimination law.

This year's self-incrimination cases, none of which are landmark decisions, either affirm an existing trend in the law or clarify a difference of interpretation among the appellate courts. Regardless of the overall impact, the specific outcome is often the same: the confession is admitted. This trend is similar to years past.[4]

This article first addresses developments relevant to Article 31(b):[5] the CAAF's continuing interment of this statute and the tolerance afforded an investigator who recites its warning requirements. After a brief discussion of the *Miranda* trigger[6] (specifically custody), the focus of this article shifts to recent cases evoking ambiguous and unambiguous requests for counsel. Finally, this article reviews cases which concern trial tactics relating to self-incrimination: the application of the corroboration rule and the effect of mentioning at trial that the accused has invoked the privilege against self-incrimination. Unfortunately, the opinions in some cases present an incomplete analysis. This article attempts to highlight such deficiencies, critique the courts' analyses, and assist the military practitioner in evaluating the aftermath of these cases.

Article 31(b): The Primary Purpose Test

Since 1950, the text of Article 31(b) has not changed. On its face, the meaning appears evident. Based on the plain reading of the text and its legislative history, Congress enacted Article 31(b) to dispel a service member's inherent compulsion to respond to questioning from a superior in either rank or posi-

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1. Dictionary of Quotations 120 (Bergen Evans ed., 1978).

2. 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).

3. *See generally id.* Mil. R. Evid. 304, 305.

4. *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 (analyzing 1996 self-incrimination cases).

5. UCMJ art. 31(b) (West 1995). Article 31 has remained unchanged since its enactment in 1950. Article 31(b) provides:

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

Id.

6. *Miranda* warnings are triggered by custodial interrogation. Miranda v. Arizona, 384 U.S. 435, 467-73 (1966).

tion.[7] Yet, as years pass, the scope and applicability of Article 31(b) continues to evolve. No longer is the analysis focused on the perception of the person being questioned, the suspect or the accused.[8] Rather, the focus has shifted to the perceptions of the interrogator. From the interrogator's perspective, what was the purpose of the questioning? This trend began with *United States v. Duga*[9] and *United States v. Loukas*[10] and continues in the recent case of *United States v. Payne.*[11]

In 1991, the U.S. Army Criminal Investigation Command (CID) investigated Staff Sergeant Payne, an intelligence analyst possessing a security clearance, for raping a thirteen-year-old girl.[12] Payne denied the rape and, after consulting military counsel, refused to take a government-requested polygraph. Payne eventually was transferred to a new duty station, and the investigation went stagnant. As a result of the investigation, however, Payne's command suspended his security clearance. Once at his new duty station, Payne requested a revalidation of his security clearance. The Defense Investigative Service (DIS)[13] conducted the follow-up security investigation.[14]

The DIS considered the prior rape investigation an unresolved issue affecting security clearance approval. Therefore, the DIS launched its own investigation into the alleged rape. After exhausting other leads, the DIS decided to interview Payne, and Payne agreed to the interview and a polygraph.[15] In one of the interviews, Payne told the DIS that military counsel represented him during the earlier CID investigation. The DIS did not ask if military counsel still represented him, and they did not notify counsel about the questioning. After a series of interviews and polygraphs, Payne confessed to the rape.[16] He was later convicted at a general court-martial.[17]

On appeal, Payne argued that the military judge erred by denying the defense motion to suppress the confession. Specifically, the defense reasoned that the confession should be suppressed because the DIS did not notify Payne's counsel before interrogating him about the rape, as was required by the version of Military Rule of Evidence (MRE) 305(e) in effect when Payne was tried.[18] Under this version of MRE 305(e), if the accused was represented by counsel, investigators were required to notify counsel before conducting an interrogation.[19] This rule, however, only applied to situations in which Article 31(b) warnings were required. The defense argued that Article 31(b) warnings applied, and, therefore, counsel should have been notified.[20] The defense counsel argued further that, since counsel was not notified, the statement was inadmissible.

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7. *See* Major Howard O. McGillin, Jr., *Article 31(b) Triggers: Re-Examining the "Officiality Doctrine*,*"* 150 MIL. L. REV. 1 (1995).

8. *Miranda* focuses on the environment of the questioning. If it is a custodial setting in which there is going to be an interrogation, *Miranda* warnings are required. *Miranda*, 384 U.S. at 436. Custody is determined from the perspective of the suspect. The question is whether a reasonable person, similarly situated, would believe that his freedom was significantly deprived. *See* MCM, *supra* note 2, MIL. R. EVID. 305(d)(1)(A); Stansbury v. California, 114 S. Ct. 1526 (1994). The focus is on the perception of the reasonable suspect. 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.

9. 10 M.J. 206 (C.M.A. 1981). In *Duga*, the Court of Military Appeals determined that Article 31(b) applies only 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 to determine whether the person who is asking the questions qualifies as a person who should provide Article 31(b) warnings. The *Duga* test is: (1) was the questioner subject to the UCMJ and acting in an official capacity in the inquiry; and (2) did the person whom was being questioned perceive that the inquiry involved more than a casual conversation. *Id.* If both prongs are satisfied, the person asking the questions must provide Article 31(b) warnings.

This, however, is not the end of the Article 31(b) analysis. It is also necessary to determine if there is "questioning" of a "suspect or an accused." Questioning refers to any words or actions by the questioner that he should know are reasonably likely to elicit an incriminating response. Rhode Island v. Innis, 446 U.S. 291 (1980); United States v. Byers, 26 M.J. 132 (C.M.A. 1988). A suspect is a person whom the questioner believes or reasonably should believe committed an offense. United States v. Morris, 13 M.J. 297 (C.M.A. 1982). An accused is a person against whom a charge has been preferred. BLACK'S LAW DICTIONARY 21 (5th ed. 1979).

10. 29 M.J. 385 (C.M.A. 1990). 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. *Id. See also* 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. *See also supra* note 9 and accompanying text.

11. 47 M.J. 37 (1997).

12. *Id.* at 38.

13. *Id.* at 43. The DIS is a civilian agency outside the Department of the Army, but part of the Department of Defense.

14. The primary mission of the DIS is to conduct personnel security investigations. Its mission does not include law enforcement. Nevertheless, DIS agents are required to report information regarding crimes to law enforcement agencies. *Id.* at 38.

15. *Id.*

16. On the day of the confession, DIS agents advised Payne of his rights under the Privacy Act, his right to remain silent, and his right to counsel. *Id.* at 39.

17. Payne was convicted of rape and sentenced to a dishonorable discharge, confinement for 10 years, total forfeitures, and reduction to the lowest enlisted grade. *Id.* at 38.

The CAAF disagreed. The court determined that the counsel notification rule under MRE 305(e) did not apply, because Article 31(b) was inapplicable.[21] First, the CAAF reasoned that the DIS agents were not persons "subject to the code," since they were not "employed by or acting under the direction of military authorities."[22] Since the DIS agents were not subject to the code, they were not bound by Article 31(b). Second, assuming that the DIS agents were subject to the code, the court found that they were "not acting in a law enforcement or disciplinary capacity and, thus [were] not required to give Article 31(b) warnings."[23] In reaching this point, the court looked to the primary mission or purpose of the DIS questioning. The articulated purpose was a personnel security investigation.[24] The duty to disclose incriminating information to law-enforcement officials was merely incidental and was not the primary purpose of the questioning.

The *Payne* decision fits nicely into the trend of the CAAF's Article 31(b) jurisprudence.[25] Based on *Payne*, the *primary purpose* of the questioning must be for law-enforcement or disciplinary reasons before Article 31(b) will apply. Trial counsel should add *Payne* to their expanding arsenal of cases which narrow the scope and application of Article 31(b).[26] Defense counsel should attempt to limit the holding in *Payne* to the facts of the case.

Does "Sexual Assault" Mean "Rape"?

Once Article 31(b) is triggered, the questioner must, as a matter of law, provide the suspect or accused three warnings.[27] They are: (1) the nature of the misconduct that is the subject of the questioning, (2) the privilege to remain silent, and (3) that any statement made may be used as evidence against him.[28] There has been little appellate focus on the meaning and scope of these three warnings. That changed this year, at least with regard to the first warning—the nature of the accusation.

In *United States v. Rogers*,[29] the CAAF held that informing a suspect that he was being questioned for sexual assault provided adequate notice of the offense of rape.[30] In reaching its holding, the court gave guidance on how to determine whether the requirement for this warning has been satisfied.

The accused in *Rogers* was suspected of sexually assaulting a woman and raping his sister.[31] A military investigator questioned the accused. Before questioning, however, the investi-

18. *Id.* at 39. The version of Military Rule Evidence 305(e) in effect when Payne was tried provided:

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

MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 305(e) (1984). Effective 9 December 1994, Military Rule of Evidence 305(e) was amended by deleting the notice requirement to defense counsel. *See* MCM, *supra* note 2, MIL. R. EVID. 305(d), (e).

19. This rule was taken from *United States v. McComber*, 1 M.J. 380 (C.M.A. 1976).

20. *Payne*, 47 M.J. at 41.

21. *Id.* at 43.

22. *Id*. In reaching the conclusion that the DIS was not acting under the direction of military authorities, the court considered the following: (1) there was no ongoing CID investigation; (2) the DIS investigation was initiated at the request of the accused; (3) the DIS worked under the supervision of a separate command; and (4) the DIS investigation was not undertaken for the purpose of investigating a crime. *Id.*

23. *Id.* at 43.

24. *Id.* at 38.

25. *See* United States v. Loukas, 29 M.J. 385 (C.M.A. 1990); United States v. Duga, 10 M.J. 206 (C.M.A. 1981). *See also supra* notes 9-10 and accompanying text.

26. *See* United States v. Moses, 45 M.J. 132 (1996) (holding that questioning the accused while investigators were engaged in an armed standoff was not for law enforcement or disciplinary purposes); United States v. Bell, 44 M.J. 403 (1996) (holding that questioning a witness who was testifying in an Article 32(b) investigation was not for disciplinary or law enforcement purposes; rather, the questioning was for judicial purposes, and therefore, Article 31(b) warnings were not required); United States v. Bowerman, 39 M.J. 219 (C.M.A. 1994) (holding that a treating physician was not required to give Article 31(b) warnings to the accused when questioning him about a child's injuries, even though the doctor believed child abuse was a distinct possibility); United States v. Pittman, 36 M.J. 404 (C.M.A. 1993) (holding that questioning which was motivated by personal curiosity does not trigger Article 31(b) warnings); United States v. Jones, 24 M.J. 367 (C.M.A. 1987) (holding that questioning the accused for personal reasons does not trigger Article 31(b) warnings).

27. *See Loukas*, 29 M.J. 385; *Duga*, 10 M.J. 206. *See also supra* notes 9-10 and accompanying text. Article 31(b) is a statutory procedural rule. Article 98 is a punitive article, which makes a knowing and intentional failure to comply with procedural rules a criminal offense. UCMJ art. 98 (West 1995).

28. UCMJ art. 31(b).

29. 47 M.J. 135 (1997).

gator advised the accused of his rights under Article 31(b) and *Miranda*.[32] Regarding Article 31(b) warnings, the investigator informed the accused that "he was suspected of 'sexual assault.'"[33] The accused waived his rights and consented to an interview.

First, the investigator questioned the accused about the sexual assault. After about one and one-half hours of questioning, the accused made a statement. The investigator then questioned the accused about an unrelated matter.[34] After this, the investigator said: "I need you to tell me what happened with your sister."[35] Upon returning from a short break, the investigator questioned the accused, and the accused eventually admitted to the rape of his sister. At no time during the interview did the investigator say that he was going to question the accused about "rape."

On appeal, the accused argued that his statements regarding the rape of his sister were inadmissible because he was not properly advised of the nature of the offense as required by Article 31(b).[36] The CAAF held otherwise. The court found that, based on the totality of the circumstances, the accused was "adequately advised of the nature of the accusation."[37] In reaching its conclusion, the court emphasized that the purpose of this warning requirement is merely to orient the accused to the alleged misconduct that is the subject of the interrogation.[38] It is not necessary to spell out in detail the suspected offense. The crux of Article 31(b) warnings is to inform the suspect that there is no obligation to make a statement, not to inform him with specificity of the nature of the offense.[39]

From the facts in *Rogers*, it is fair to say that "sexual assault" encompasses the offense of "rape." This case gives practitioners the sense that not much is needed to satisfy the "nature of the offense" warning requirement under Article 31(b). The CAAF holding, however, is not novel; it just reaffirms precedent. Nevertheless, practitioners can take away from *Rogers* the lesson that the obligation to inform a suspect or accused of the nature of the offense, however slight, still exists.

Reaffirming the Definition of Custody

In 1966, with the case *Miranda v. Arizona*,[40] the Supreme Court held that, prior to any custodial interrogation, a subject must be warned that he has a right: (1) to remain silent, (2) to be informed that any statement made may be used as evidence against him, and (3) to the presence of an attorney.[41] In 1967,

30. *Id.* at 138. Judge Crawford, writing for the majority, schematically portrays the triggering events and content of warnings for both Article 31(b) and *Miranda* as follows:

	Art. 31 (b)	Miranda
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	1. Nature of Offense	1. Right to Silence
	2. Right to Silence	2. Consequences
	3. Consequences	3. Right to Counsel

Id. at 137.

31. *Id.* at 135. The accused's sister reported the rape when she discovered that the other woman reported the sexual assault. The rape occurred four years before the sexual assault.

32. *Id.* at 136.

33. *Id.*

34. *Id.* The investigator questioned the accused about an incident that occurred in Turkey, but which was never charged.

35. *Id.*

36. *Id.* at 135.

37. *Id.* at 138.

38. *Id.* at 137 (citing United States v. Rice, 29 C.M.R. 340 (C.M.A. 1960)).

39. *Id.* (citing United States v. O'Brien, 11 C.M.R. 105 (C.M.A. 1953)).

40. 348 U.S. 436 (1966).

the Court of Military Appeals applied *Miranda* to military interrogations in *United States v. Tempia*.[42]

The trigger for *Miranda* warnings is custodial interrogation.[43] 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.[44] The subjective views harbored by either the interrogating officer or the person being questioned are irrelevant.[45] Early this year, in *United States v. Miller*,[46] the CAAF reaffirmed the test for custody under *Miranda.*

In *Miller*, the accused was suspected of abusing his fiancé.[47] A civilian investigator called the accused and invited him to the station house to discuss the alleged assault.[48] Within minutes, the accused arrived. The investigator cordially invited the accused inside the station house and escorted him to an interview room.[49] No warnings were given. The investigator told the accused about the reported abuse and then asked the accused for his side of the story.[50] In response, the accused made some incriminating statements. At trial, the defense moved to suppress the statements, arguing that the accused was in custody when the questioning occurred and that the investigator should have advised the accused of his rights under *Miranda.* The military judge denied the defense motion, ruling that *Miranda* warnings were not required because the accused was not in custody.[51] The accused was convicted of assault, in addition to other offenses. The Army Court of Criminal Appeals affirmed the conviction.[52]

Before the CAAF, the accused again argued that *Miranda* warnings were triggered because he was subject to a custodial interrogation.[53] The court held, however, that the accused was not in custody, because "a reasonable person would have felt that he was at liberty to terminate the interrogation and leave."[54] In reaching this conclusion, the CAAF weighed heavily the fact that the investigator was "very cordial during the entire interview."[55] Of little significance, however, was the accused's subjective belief that he was not free to leave the station house.

Miller reaffirms the test for custody as it applies to *Miranda.* The unique aspect of the decision is the application of the "mixed question of law and fact" standard of appellate review.[56] From a practitioner's perspective, *Miller* identifies several fac-

41. *Id.* 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 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. Article 31(b) warnings, however, do not confer a right to counsel. *See supra* note 30.

42. 37 C.M.R. 249 (C.M.A. 1967).

43. *Miranda*, 384 U.S. at 444.

44. *Id. See* Berkemer v. McCarty, 468 U.S. 420, 428 (1985); MCM, *supra* note 2, MIL. R. EVID. 305(d)(1)(A). *See also supra* note 8 and accompanying text.

45. Stansbury v. California, 114 S. Ct. 1526 (1994).

46. 46 M.J. 80 (1997).

47. *Id.* at 81.

48. *Id.* Officer Greathouse, employed by the Marina Department of Public Safety, was a California certified police officer and a California certified fire fighter. In addition, he had arrest power on the day he questioned the accused. *Id.* at 82.

49. *Id.* The station house was always locked from the outside. You could, however, exit the building without having the doors unlocked. The interview room could be locked from the inside, but, on the day of the questioning, the door was unlocked.

50. *Id.*

51. *Id.* at 83.

52. *Id.* at 81. On 18 May 1995, the Army Court of Criminal Appeals affirmed the findings and the approved sentence without opinion.

53. *Id.* at 84.

54. *Id.* at 85 (citing the recent case of Thompson v. Keohane, 116 S. Ct. 457, 460 (1995), in which the Supreme Court held that the "in-custody" determination is a mixed question of law and fact: (1) what were the circumstances surrounding the interrogation (fact issue)? and (2) would a reasonable person have felt that he was not at liberty to terminate the interrogation and leave (law issue)?).

55. *Id.* at 83. Factors the court considered in deciding the issue of custody were: (1) the officer (in uniform and armed) *invited* the accused to come to the station; (2) within five minutes, the accused arrived at the station; (3) the door to the station house was locked, so the officer let the accused inside (the door automatically locks to prevent entrance, not exit); (4) they went to an interview room (8'x10' and no windows); (5) the officer did not tell the accused that he was free to leave (but the accused never asked); and (6) the officer was very cordial during the entire interview. *Id.*

56. *Id.* at 84 (quoting *Thompson*, 116 S. Ct. at 465). *See supra* note 54 and accompanying text.

tors to consider when determining custody. A notable factor to focus on is the attitude of the investigator. If possible, trial counsel should portray the questioner as cordial and pleasant, whereas defense counsel should characterize him as obnoxious and overbearing. As illustrated in *Miller*, the interrogator's attitude is significant when deciding custody.

What is an Ambiguous Request for Counsel?

In *Edwards v. Arizona*,[57] the Supreme Court created a second layer of protection.[58] If a subject 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.[59] Having expressed a desire to deal with the police only through counsel, a person is not subject to further interrogation until counsel is made available,[60] unless the subject initiates further communication with the police.[61] Further, in *Davis v. United States*,[62] the Supreme Court determined that if a subject initially waives his *Miranda* rights and agrees to a custodial interrogation without the assistance of counsel, only an unambiguous request for counsel will trigger the *Edwards* requirement.[63]

In *United States v. Nadel*,[64] the Navy-Marine Corps Court of Criminal Appeals considered whether a purported request for counsel was ambiguous. Sergeant Nadel was suspected of indecent assault and oral sodomy.[65] After obtaining a valid waiver of rights under Article 31(b) and *Miranda*, investigators interrogated Nadel about the suspected misconduct. During the questioning, Nadel indicated that "he would not like to discuss oral sodomy without first getting advice from a lawyer."[66] The interrogation continued, but Nadel was not questioned about the sodomy offense. Nadel eventually confessed to the indecent assault. At trial and on appeal, Nadel argued that he was denied "the exercise of his right to counsel" and that his confession was, therefore, inadmissible.[67]

The Navy-Marine Corps court disagreed. The court held that Nadel's "reference to a lawyer was only in relation to questioning about oral sodomy."[68] The court found that "[t]his was not a clear assertion of the right to have counsel present during the interview, especially since no questions were asked about oral sodomy."[69] Since Nadel did not invoke his right to counsel, the investigators did not have to stop questioning, and the confession was admissible. This result is not troubling, but the court's analysis is.

Applying the service court's rationale, the message to practitioners is that whenever a suspect makes an offense-specific request for counsel when being questioned about several offenses, the request is ambiguous. This guidance is wrong. In *McNeil v. Wisconsin*,[70] the Supreme Court clearly stated that

57. 451 U.S. 477 (1981).

58. *See* Miranda v. Arizona, 384 U.S. 435 (1966). *Miranda* provides the first layer of protection. *See also supra* note 8 and accompanying text.

59. *Edwards*, 451 U.S. 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).

60. *Edwards*, 451 U.S. at 485. If the subject remains in continuous custody after invocation of the right to counsel, counsel must be present before police can reinitiate an interrogation. McNeil v. Wisconsin, 501 U.S. 171 (1991); Minnick v. Mississippi, 498 U.S. 146 (1990). If, however, the subject is released from custody subsequent to requesting counsel, and the subject has a "real opportunity to seek legal advice" during the release, the government can reinitiate the interrogation. *See* United States v. Faisca, 46 M.J. 276 (1997) (holding that re-interrogating the accused after a six-month break in custody was permissible); United States v. Vaughters, 44 M.J. 377 (1996) (holding that re-interrogating the accused after being released from custody for 19 days provided a meaningful opportunity to consult with counsel); United States v. Schake, 30 M.J. 314 (C.M.A. 1990) (holding that re-interrogating the accused after a six-day break in custody provided a real opportunity to seek legal advice).

61. *See McNeil*, 501 U.S. at 177. *See also* MCM, *supra* note 2, Mil. R. Evid. 305(d)-(g).

62. 512 U.S. 452 (1994).

63. *Id.* Following an initial waiver, the accused told investigators, "Maybe I should talk to a lawyer." *Id*. The Supreme Court held that this was an ambiguous request for counsel and that investigators were not required to clarify the purported request or to terminate the interrogation. *Id.*

64. 46 M.J. 682 (N.M. Ct. Crim. App. 1997).

65. *Id.* at 686.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*, *citing* Davis v. United States, 512 U.S. 452 (1994).

70. 501 U.S. 171 (1991).

"[o]nce a suspect invokes the *Miranda* right to counsel for interrogation regarding one offense, he may not be reapproached regarding any offense unless counsel is present."[71] Nadel made a clear request for the assistance of counsel regarding sodomy; therefore, the *Edwards* rule would preclude questioning on any other criminal offense.

Further, the Navy-Marine Corps Court of Criminal Appeals emphasized that the investigators honored Nadel's request not to question him about the sodomy offense without counsel.[72] However, applying the Supreme Court's holding in *Davis*, if Nadel's request for counsel was truly ambiguous, the investigators could have talked to Nadel about sodomy.[73] If the investigators had questioned Nadel about sodomy, the court probably would have reached a contrary conclusion.

The *Nadel* court could have applied a different analysis and still reached the same result. Assume that Nadel did invoke his right to counsel and that the *Edwards* rule applied. The investigators could not question Nadel about any offense unless counsel was made available or Nadel re-initiated the interrogation.[74] Under the facts, it appears that Nadel re-initiated the interrogation, but only to the indecent assault offense.[75] In regards to the sodomy offense, Nadel intended to remain silent. Since there was a re-initiation by Nadel, the *Edwards* rule was overcome, and the confession is admissible. This suggested analysis accounts for Supreme Court precedent, yet reaches the same result as the appeals court.[76]

Counsel should skeptically rely on the *Nadel* holding. The court's analysis is incomplete and confusing. It is doubtful that the Navy-Marine Corps court intended to ignore longstanding Supreme Court precedent. One can only hope that the CAAF will review *Nadel* and clarify its rationale.

After Invocation of Counsel Rights

Questioning must stop when a suspect unequivocally invokes counsel rights during a custodial interrogation.[77] If the police continue the interrogation, however, statements made by the accused are inadmissible.[78] In *United States v. Young*,[79] the Army Court of Criminal Appeals faced this scenario.

In *Young*, the accused was apprehended as a suspect in a robbery and was taken to a military police station for questioning.[80] Prior to the interrogation, the investigator informed the accused of his rights under Article 31(b) and *Miranda*.[81] 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."[82] Before the investigator left the room, the accused "told him to stop and that there was something he wanted to say."[83] The investigator re-advised the accused of his rights. The accused clearly indicated that he did not want to speak to a lawyer, and he later confessed.[84] On appeal, the accused challenged the admissibility of the confession, arguing that the investigator's comments were comments likely to elicit an incriminating response[85] and that they were, therefore, a police-initiated interrogation, in violation of Young's counsel rights.[86]

71. *Id.* at 177.

72. *Nadel*, 46 M.J. at 686.

73. *Davis*, 512 U.S. 452.

74. *See McNeil*, 501 U.S. 171; Edwards v. Arizona, 451 U.S. 484, 485 (1981). *See also supra* note 60 and accompanying text.

75. *Nadel*, 46 M.J. at 686.

76. Additional facts would be required to develop this analysis fully. For example, after requesting counsel, was Nadel re-advised of his rights before being questioned about the indecent assault offense? *See* Oregon v. Bradshaw, 462 U.S. 1039 (1983) (holding that, if initiation by the accused is found, a separate inquiry must be made as to whether, on the totality of the circumstances, the accused voluntarily waived his rights).

77. *Edwards*, 451 U.S. at 485. If a subject invokes his right to counsel in response to *Miranda* warnings, the questioning must cease.

78. *Davis*, 512 U.S. at 459. *See* MCM, *supra* note 2, MIL. R. EVID. 304(a).

79. 46 M.J. 768 (Army Ct. Crim. App. 1997).

80. *Id.* at 768.

81. *Id.*

82. *Id.* at 769.

83. *Id.*

84. *Id.*

The Army court found that the accused unambiguously invoked his right to counsel and that the *Edwards* rule applied—the investigator could not question the accused further without counsel present.[87] 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.*[88] 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 prior to the re-interrogation, the confession was admissible.[89]

In determining whether the investigator re-initiated the interrogation, the Army court applied an objective test from the perspective of the investigator.[90] 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?"[91] Applying the facts to the test, the court held that the comments from the investigator did not equate to an interrogation.[92]

The court's finding in *Young* is disturbing. When inflection and body language are added to the investigator's comments, it is hard to imagine that the accused would not be intimidated. Further, it is unrealistic to think that the investigator did not hope that the accused would talk. *Young* sends a dangerous message to investigators: when a suspect invokes counsel rights, it is OK to display frustration. Government counsel should caution investigators not to follow the example of *Young*.[93]

Demystifying the Corroboration Requirement in Military Practice

In *United States v. Duvall*,[94] the CAAF reversed the United States Air Force Court of Criminal Appeals' interpretation[95] of MRE 304(g),[96] commonly called the corroboration rule.[97] Generally, the corroboration rule requires some corroboration of a confession before the confession can be considered as evidence.[98] The Air Force court's interpretation of this rule permitted the fact finder to convict an accused based solely on his confession.[99] The only precondition required was that the military judge find, as a matter of law, sufficient corroboration to admit the confession into evidence.[100] If this determination was made during a preliminary hearing,[101] the corroborating evidence could exceed the scope of admissible evidence.[102] If the military judge determined that there was sufficient corroboration to admit the confession, the service court concluded that there was no requirement for the prosecution to present any further corroborative evidence to the trier of fact.[103] Therefore, under these circumstances, the only evidence the prosecution needed to present to the fact-finder was the confession. If the confession satisfied all of the elements of the offense alleged, the trier of fact could convict the accused based solely on the confession.

The CAAF recognized that the Air Force court's interpretation of the corroboration rule significantly deviated from precedent.[104] Early in confession jurisprudence, the Supreme Court proclaimed that the "concept of justice" cannot support a conviction based solely on an out of court confession[105] and that admissible corroborative evidence, in addition to the confession, must be presented to the trier of fact.[106] Moreover, military appellate courts have gone to great lengths to analyze the nature of corroborative evidence to ensure that sufficient *admissible* evidence is considered for corroboration.[107]

The facts in *United States v. Duvall* reflect a scenario commonly encountered by military practitioners,[108] a situation

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85. *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.

86. *Young*, 46 M.J. at 768.

87. *Id.* at 769. Sergeant Young was in continuous custody from the time he invoked counsel rights until he made his subsequent confession.

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

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

90. *Young*, 46 M.J. at 769 (citing *Innis*, 446 U.S. 291).

91. *Id.*

92. *Id.* at 770.

93. *Id.* at 770 n.2. The court opined that intentional use of comments similar to those used in *Young* as an "'investigative technique' constitutes police misconduct." *Id*. It will be interesting to see if the court's cautionary comments provide adequate deterrence against investigator misconduct in similar circumstances.

94. 47 M.J. 189 (1997).

95. United States v. Duvall, 44 M.J. 501 (A.F. Ct. Crim. App. 1996). Judge Morgan delivered the opinion of the court, in which Senior Judge Schreier concurred. Senior Judge Pearson dissented.

where the only admissible evidence of drug use is the accused's confession. In *Duvall*, Airman First Class (A1C) Gregory Duvall provided to criminal investigators a sworn, written confession that he smoked marijuana at his residence with A1C McKague.[109] Airman First Class McKague also admitted to smoking marijuana with the accused; however, his admission was not to criminal investigators. McKague confessed to a superior, Senior Airman (SrA) Brents.[110] At Duvall's trial, A1C

96. MCM, *supra* note 2, MIL. R. EVID. 304(g). There are two separate aspects of Military Rule of Evidence 304(g): (1) MIL. R. EVID. 304(g)(2), which pertains to the military judge's determination of adequate corroboration and (2) MIL. R. EVID. 304(g)(1), which pertains to the introduction of corroborating evidence before the trier of fact. Specifically, the rule states:

> (g) *Corroboration.* An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth. Other uncorroborated confessions or admissions of the accused that would themselves require corroboration may not be used to supply this independent evidence. If the independent evidence raises an inference of the truth of some but not all of the essential facts admitted, then the confession or admission may be considered as evidence against the accused only with respect to those essential facts stated in the confession or admission that are corroborated by the independent evidence. Corroboration is not required for a statement made by the accused before the court by which the accused is being tried, for statements made prior to or contemporaneously with the act, or for statements offered under a rule of evidence other than that pertaining to the admissibility of admissions or confessions.
> (1) *Quantum of evidence needed.* The independent evidence necessary to establish corroboration need not be sufficient of itself to establish beyond a reasonable doubt the truth of facts stated in the admission or confession. The independent evidence need raise only an inference of the truth of the essential facts admitted. The amount and type of evidence introduced as corroboration is a factor to be considered by the trier of fact in determining the weight, if any, to be given to the admission or confession.
> (2) *Procedure.* The military judge alone shall determine when adequate evidence of corroboration has been received. Corroborating evidence usually is to be introduced before the admission or confession is introduced, but the military judge may admit evidence subject to later corroboration.

Id.

97. *Id.* MIL. R. EVID. 304(g) analysis, app. 22, at A22-13.

98. *Id.* MIL. R. EVID. 304(g).

99. *Duvall*, 44 M.J. at 505. The court held that the military judge is solely responsible for determining the admissibility of a confession based on sufficient corroboration, and in making this decision, the military judge can consider inadmissible evidence. Therefore, if all that exists is inadmissible corroborative evidence, but the military judge finds it sufficient enough to corroborate the confession, the only available admissible evidence to present to the trier of fact is the confession itself. Consequently, the effect of the court's holding is the approval of a conviction based solely on a confession.

100. *Id.* at 504.

101. UCMJ art. 39(a) (West 1995). An Article 39(a) session is a court session without the presence of the members for purposes of arraignment, receiving pleas and forum, hearing and ruling on motions, and performing any other procedural functions. The persons typically present are the accused, defense counsel, trial counsel, the court reporter, and the military judge.

102. *Duvall*, 44 M.J. at 505.

103. *Id.*

104. United States v. Duvall, 47 M.J. 189, 192 (1997).

105. *See* Opper v. United States, 348 U.S. 84 (1954) (holding that the corroboration rule applies to admissions in addition to confessions and that the government must "introduce substantial independent evidence which would tend to establish the trustworthiness of the statement"). *See also* Smith v. United States, 348 U.S. 147 (1954) (emphasizing the general rule that "an accused may not be convicted on his own uncorroborated confession").

106. *Opper*, 348 U.S. at 93 (finding that all evidence in addition to the confession or admission must establish guilt beyond a reasonable doubt); *Smith*, 348 U.S. at 153.

107. *See* United States v. Cotrill, 45 M.J. 485 (1997) (finding that the accused's pretrial statements were sufficiently corroborated); United States v. Faciane, 44 M.J. 399 (C.M.A. 1994) (looking to the admissible corroborating evidence to determine if sufficient corroboration exists); United States v. Rounds, 30 M.J. 76 (C.M.A. 1990) (focusing on the admissibility of the corroborating evidence and whether it adequately corroborates the confession).

108. *See generally Rounds*, 30 M.J. 76; United States v. Melvin, 26 M.J. 145 (C.M.A. 1988); United States v. Howe, 37 M.J. 1062 (N.M.C.M.R. 1993); United States v. Baker, 33 M.J. 788 (A.F.C.M.R. 1991).

109. *Duvall*, 47 M.J. at 190 (1997). Airman First Class Duvall was charged with wrongful use of marijuana and LSD in addition to wrongful distribution of marijuana. He was acquitted of using LSD and distributing marijuana, but the court-martial convicted him of using marijuana. *Id*. The only evidence presented to the court-martial members regarding the marijuana use was the accused's confession. Duvall was sentenced to a bad-conduct discharge and reduction to the grade of airman basic. *Id*.

110. *Id.*

McKague invoked his privilege against self-incrimination and was deemed unavailable to testify.[111] Consequently, the only evidence available to corroborate the accused's confession was the hearsay testimony of SrA Brents.

In an Article 39(a) session, the military judge heard SrA Brents' testimony about what A1C McKague told him. The defense objected to this testimony. The military judge ruled that although the statement was inadmissible evidence, he could nevertheless consider it on the issue of corroboration.[112] He further ruled that SrA Brents' hearsay testimony provided sufficient corroboration and admitted the confession into evidence.[113]

As a result of the military judge's ruling, the accused's sworn, written confession was the only evidence the prosecution presented. The defense quickly moved for a finding of not guilty,[114] "arguing there was no evidence *before the members* to corroborate the confession."[115] The military judge denied the defense's motion, stating, "[c]orroboration is an issue for the judge."[116] Subsequently, based on the confession alone, the members convicted the accused of drug use. On review, the Air Force Court of Criminal Appeals focused on two issues: (1) whether there was sufficient evidence to corroborate the accused's confession and (2) whether the military judge could admit a confession based upon inadmissible corroborating evidence.[117] The majority of the court answered both of these issues in the affirmative.

The CAAF disagreed and set aside the conviction.[118] The issue before the CAAF was whether the corroboration rule permits an accused to be convicted based solely on a confession.[119] In finding that corroborating evidence must be introduced to the fact-finder, the CAAF relied on *United States v. Faciane*,[120] a case which cuts hard against the service court's position.[121] In *Faciane*, the Court of Military Appeals focused on the admissibility and sufficiency of the corroborating evidence presented during trial.[122] The *Faciane* court first determined that the corroborative evidence was inadmissible hearsay.[123] Excluding the inadmissible corroborative evidence from the sufficiency analysis, the court concluded that the remaining admissible evidence was insufficient to corroborate the confession.[124]

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111. United States v. Duvall, 44 M.J. 501, 502 (A.F. Ct. Crim. App. 1996). Although the commanding general and the U.S. Attorney granted A1C McKague immunity from federal prosecution, the local district attorney refused to grant state immunity. Consequently, when A1C McKague took the stand during an Article 39(a) session to testify about his drug use with the accused, A1C McKague invoked his privilege against self-incrimination. As a result, the military judge determined that A1C McKague was unavailable.

112. *Duvall*, 47 M.J. at 190. At first, the military judge did not rule on the admissibility of SrA Brents' testimony. He opined that corroborative evidence did not have to be admissible in order to provide a valid basis for the military judge to determine admissibility of the confession. *Id*. However, when the prosecution requested to also present SrA Brents' testimony to the members, the military judge was forced to rule on the admissibility of the corroborative statement. Although the military judge found the statement to be admissible under Military Rule of Evidence 804(b)(3) (statement against interest), he ultimately determined that the statement was inadmissible under Military Rule of Evidence 403 (more prejudicial than probative). *Id*. As a result, the prosecution could not present the corroborating evidence to the members.

113. *Id.*

114. MCM, *supra* note 2, R.C.M. 917.

115. *Duvall*, 44 M.J. at 506.

116. *Id.*

117. *Id.* at 502.

118. *Duvall*, 47 M.J. at 192.

119. *Id.* at 189.

120. 40 M.J. 399 (C.M.A. 1994).

121. *Duvall*, 47 M.J. at 192.

122. *Faciane*, 40 M.J. at 402-04. In *Faciane*, the accused was charged with committing indecent acts upon his three-year-old daughter. The accused pleaded not guilty and elected to be tried by military judge alone. The prosecution introduced the accused's confession and other testimonial evidence which was intended to corroborate the confession. The military judge admitted the corroborative evidence and found sufficient corroboration of the confession. On appeal, the Court of Military Appeals held that some of the evidence relied on by the military judge to corroborate the confession was inadmissible. *Id*. The court found that the remaining admissible evidence was insufficient to adequately corroborate the confession, and therefore, the confession should not have been admitted as evidence. *Id*. It is important to note from the opinion that the court makes no distinction between the type of corroborative evidence that the military judge can consider for admissibility of the confession and the type of corroborative evidence that can be presented to the trier of fact. It is clear, however, that the corroborative evidence must be independently admissible.

123. *Id.* at 403.

124. *Id.*

In a strong dissent, Judge Sullivan agreed with the service court's analysis. He argued that, under MRE 104(a), the military judge "is not bound by the rules of evidence except those with respect to privilege."[125] According to Judge Sullivan, considering together MRE 304(g) and MRE 104(a), the military judge could consider inadmissible corroborating evidence when making a preliminary ruling regarding the admissibility of a confession.[126] If the confession is corroborated and voluntary, it could be introduced to the fact-finder on the issue of guilt or innocence.[127]

The majority, however, recognized that the service court in *Duvall* ignored the plain language of MRE 304(g)[128] and the myriad judicial precedents that address the corroboration rule.[129] Both sources establish that the corroboration rule has two distinct parts: (1) a determination by the military judge that the confession is admissible based on adequate corroboration and (2) a determination by the trier of fact that the corroborating evidence and the confession establish beyond a reasonable doubt that the accused committed the offense.[130] The Air Force court truncated the corroboration rule analysis by ignoring the second part. The CAAF emphasized that the "role of the members in deciding what weight to give a confession would be undermined if the corroborating evidence were produced only at an out-of-court session under Article 39(a)."[131]

Duvall affirms the traditional protection afforded to an accused under the corroboration rule. The court mandates that the prosecution present admissible corroborating evidence to the trier of fact when introducing the accused's confession. The Air Force court's significant departure from the traditional application of the corroboration rule required the CAAF to resolve the issue to ensure the rule's uniform application. The message is now clear: to convict using an out-of-court statement from the accused, the fact-finder must base its decision on a corroborated confession—that is, a confession plus corroborative evidence. To satisfy this requirement, the government must introduce *admissible* corroborative evidence.

Mention of Silence at Trial

Another recent case involving the courtroom and the law of self-incrimination is *United States v. Riley.*[132] In reversing the Navy-Marine Corps Court of Criminal Appeals,[133] 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.[134] In *Riley*, the accused was convicted of committing indecent acts and forcible sodomy with a ten-year-old female.[135] 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.[136] At trial, the government presented to the members the testimony of the investigator who ques-

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125. *Duvall*, 47 M.J. at 193 (Sullivan, J., dissenting) (quoting MCM, *supra* note 2, Mil. R. Evid. 104(a)).

126. *Id.*

127. *Id*.

128. MCM, *supra* note 2, Mil. R. Evid. 304(g). The rule states that "[a]n admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth." *Id.* The reference to "direct and circumstantial evidence" indicates that the corroborating evidence must be admissible. *See id*. R.C.M. 918(c) (identifying direct and circumstantial evidence as the type of admissible evidence the trier of fact must consider when reaching a finding). Additionally, corroborating evidence must be considered by the trier of fact "in determining the weight, if any, to be given to the admission or confession." *Id*. Mil. R. Evid. 304(g)(1). Since the corroborating evidence must be presented to the trier of fact, it must therefore be admissible evidence. Consequently, based on the plain language of Military Rule of Evidence 304(g), one can conclude that: (1) corroborating evidence must be admissible and (2) corroborating evidence must be presented to the trier of fact.

129. *See generally* Opper v. United States, 348 U.S. 84 (1954); Smith v. United States, 348 U.S. 147 (1954); United States v. Faciane, 40 M.J. 399 (C.M.A. 1994); United States v. Rounds, 30 M.J. 76 (C.M.A. 1990); United States v. Martindale, 30 M.J. 172 (C.M.A. 1990); United States v. Melvin, 26 M.J. 145 (C.M.A. 1988); United States v. Seigle, 47 C.M.R. 340 (C.M.A. 1973); United States v. Howe, 37 M.J. 1062 (N.M.C.M.R. 1993); United States v. Harjak, 33 M.J. 577 (N.M.C.M.R. 1991); United States v. Baker, 33 M.J. 788 (A.F.C.M.R. 1991). *See also* Wade R. Curtis, *Military Rule of Evidence 304(g)—The Corroboration Rule*, Army Law., July 1987, at 35.

130. MCM, *supra* note 2, Mil. R. Evid. 304(g)(1), (2); *Faciane*, 40 M.J. at 402; *Martindale*, 30 M.J. at 175; *Melvin*, 26 M.J. at 146; *Harjak*, 33 M.J. at 583.

131. United States v. Duvall, 47 M.J. 189, 192 (1997).

132. 47 M.J 276 (1997).

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

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

135. *Id.* at 277.

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

tioned the accused.[137] Three times during the testimony, the investigator commented on the accused's assertion of his right to silence.[138] There was no defense objection or cross-examination of the investigator.

The Navy-Marine Corps Court of Criminal Appeals held that the "three-time reference to [the accused's] assertion of his right to silence was inadmissible."[139] Nevertheless, the service court determined that the error did not constitute plain error because the mistake was not preserved because the defense did not object at trial.[140]

The CAAF reversed the Navy-Marine Corps court's decision, finding that, regardless of the absence 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.[141] The court gave little, if any, consideration to the defense's failure to object.

Riley presents three notable points: 1) trial counsel should prepare witnesses so that they do not mention invocation of rights; 2) if a witness does mention invocation of rights, the defense should object; and 3) if the first two recommendations fail, the military judge should, sua sponte, give a curative instruction. The result in *Riley* is not disturbing. After all, the law regarding in-court mention of the accused's election to remain silent is firmly settled. You cannot do it.[142] The plain error analysis applicable to appellate review, however, does not apply a bright-line rule. The outcome is fact determinative. In *Riley*, the CAAF decided that the facts dictated a finding of plain error.

Conclusion

In reviewing this year's self-incrimination cases, a trend becomes apparent: the challenged confessions were deemed admissible. Right or wrong, the military courts widened the door of admissibility. From reaffirming the definition of custody to applying the primary purpose test to Article 31(b), the proclivity was to admit confessions. Even when the courts reviewed ambiguous and unambiguous counsel invocation cases, the result was admissibility. Only in the area of corroboration did the CAAF put its foot down and set aside a conviction based on a confession. In some cases, the facts clearly supported admission, but in other cases, the outcome was not as obvious. Regardless of the outcome, this year's self-incrimination cases equip military practitioners with new and creative approaches to employ when addressing self-incrimination issues.

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137. *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.

138. *Id.* at 278. The investigator testified that after advising the accused of his rights, the accused "elected to remain silent." *Id.* 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." *Id.* Finally, the investigator testified that the only person he interviewed in the case was the accused, and "he elected to remain silent." *Id.*

139. *Id.*

140. *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 has three parts: (1) the error must be obvious, (2) the error must be substantial, and (3) the error must actually prejudice the accused (in other words, it must materially prejudice the substantial rights of the accused). *See* UCMJ arts. 66(c), 67(c) (West 1995).

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

142. *See* MCM, *supra* note 2, MIL. R. EVID. 301(f)(3).