McOmber's Obituary: Do Not Write It Quite Yet

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Introduction

You are a defense counsel and your client, Corporal Druggie, is an alleged drug-dealer. About two weeks ago, military police apprehended your client and hauled him down to the military criminal investigator's office. The special agent wanted to question Corporal Druggie about his suspected drug-dealings. The special agent read him his Article 31(b) rights[1] and informed him, under the Fifth Amendment, that he had the right to an attorney.[2] Your client requested to speak to an attorney. Corporal Druggie then contacted you. You, in turn, called the special agent regarding the case. You informed the special agent that you would be representing Corporal Druggie on the drug allegations. Several days later, the special agent discovered more evidence to implicate your client on these drug-dealing allegations. The special agent called Corporal Druggie into his office again and read him his rights. Out of confusion and contrary to your advice, Corporal Druggie waived his rights and consented to talk. He confessed.

Your client is court-martialed for, among other charges, wrongful introduction of a controlled substance with intent to distribute.[3] The government intends to introduce your client's confession in its case-in-chief.

You, as the defense counsel, want to suppress the confession. Is it possible?[4] The short answer is "yes." The special agent had an obligation to notify you that the government was going to re-interrogate your client. Your chief authority is *United States v. McOmber.*[5] This article examines why the answer is "yes," even though at first blush the notice-to-counsel requirement mandated by *McOmber* might seem dead because of the 1994 changes to the Military Rules of Evidence (MRE).

First, this article explains the *McOmber* rule's notice-to-counsel requirement. Second, it discusses this requirement's incorporation into MRE 305(e) in 1980. Third, it traces the progeny of *McOmber.* Fourth, it looks at the Supreme Court cases that led to the 1994 change of MRE 305(e). Fifth, it analyzes the President's authority under Article 36(a) of the Uniform Code of Military Justice (UCMJ) to change MRE 305(e) in 1994. The article concludes that the rule in *McOmber* still exists and our courts should preserve it.

The Rule in *McOmber*–The Notice-to-Counsel Requirement

The Court of Military Appeals (COMA) handed down *United States v. McOmber*[6] in 1976. In *McOmber*, a military criminal investigator questioned the accused about a series of related thefts. Airman McOmber, after being read his rights, requested counsel. Nearly two months later, the same investigator questioned Airman McOmber again. The investigator read Airman McOmber his Article 31(b) rights again, but this

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1. UCMJ art. 31(b) (West 1998). Article 31(b), Uniform Code of Military Justice (UCMJ), gives a soldier suspected of a violation of the UCMJ three "rights":

> No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him [1] of the nature of the accusation and [2] advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and [3] that any statement made by him may be used as evidence against him in a trial by court-martial.

Article 31(b), UCMJ. Note, however, Article 31(b) rights do not guarantee the soldier a right to counsel; that is a product of the Fifth Amendment and *Miranda v. Arizona*, 384 U.S. 436 (1966).

2. U.S. CONST. amend. V. The Fifth Amendment reads:

> No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War, or public danger; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id. The right to counsel, however, only triggers when a criminal suspect is in a "custodial" interrogation. *Miranda*, 384 U.S. at 479. *See* United States v. Tempia, 37 C.M.R. 249 (C.M.A. 1967) (holding that the principles enunciated in *Miranda* apply to the military).

3. UCMJ art. 112a (West 1998).

4. The concept for this scenario and the article was Major John Head's, Senior Defense Counsel, Fort Hood, Texas.

5. 1 M.J. 380 (C.M.A. 1976).

6. *Id.*

time Airman McOmber waived his right to silence and made a statement. The investigator, however, knew Airman McOmber had retained counsel but "did not contact Airman McOmber's attorney before proceeding."[7] At the time of the questioning, charges had not been preferred against Airman McOmber.[8] At trial, the military judge allowed the statement into evidence, over the defense's objection.[9] The question before the court was "whether an attorney once . . . retained to represent a military suspect must first be contacted by investigators who have notice of such representation when they wish to question the suspect"?[10]

The *McOmber* court answered "yes" and reversed the trial judge's decision. The COMA, in reaching its decision, opined that "[t]o permit an investigator, through whatever device, to persuade the accused to forfeit the assistance of his appointed attorney outside the presence of counsel would utterly defeat the *congressional purpose* of assuring military defendants effective legal representation without expense."[11] The court did not ground its decision in Constitutional precepts; instead, the court "dispos[ed] of the matter on statutory grounds."[12] The COMA cited Article 27 of the UCMJ as its statutory basis.[13] In other words, the court's holding springs from the UCMJ, not case law or the Constitution; *McOmber* is the court's interpretation of what the UCMJ requires.

In the following term, the COMA slightly expanded the scope of *McOmber* in *United States v. Lowry.*[14] *Lowry*, unlike *McOmber*, involved different offenses. Military investigative agents suspected Private First Class (PFC) Lowry of intentionally setting fire to "Barracks 238" and they wanted to interrogate him.[15] Before answering any questions PFC Lowry requested counsel and the interrogation was terminated. Nineteen days later, PFC Lowry was again interrogated but this time for the arson of "Barracks 230."[16] The agents knew PFC Lowry had retained counsel for the arson of Barracks 238, but they were "not here to discuss [that] arson . . . ."[17] Therefore, they never contacted the accused's attorney.

Private First Class Lowry made an incriminating statement about both barracks–230 and 238; the statement was introduced by the government at trial. He was subsequently convicted of both arsons. The Navy Court of Military Review held that the statement about Barracks 230 was inadmissible but the statement about Barracks 238 was admissible.[18] The COMA was asked to "determine if the failure to contact the appellant's counsel of the [second] interrogation . . . rendered appellant's pretrial statement involuntary as to the arson of [B]arracks 230."[19] The court held that it did.[20] The COMA broadened the scope of *McOmber*: "[a]lthough *McOmber* involves only one offense, we are unwilling to make subtle distinctions that require the separation of offenses occurring within the same general area within a short period of time."[21]

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7. *Id.* at 381.

8. Under current case law, the Sixth Amendment would never be triggered under the facts of *McOmber* because charges had not been preferred against Airman McOmber at the time of the questioning. *See* Appellant's Brief to the COMA at 2, *McOmber* (Case No. ACM 21,812, Docket No. 30,817) (on file with author). The COMA in *McOmber*, however, writes in terms of the Sixth Amendment and not about the Fifth Amendment; this case was before the Supreme Court clarified when the Sixth Amendment's right to counsel triggers. *See generally* United States v. Edwards, 451 U.S. 477 (1981) (providing a Fifth Amendment analysis); United States v. Gouveia, 467 U.S. 180 (1984) (providing a Sixth Amendment analysis).

9. Appellant's Brief to the COMA at 2, *McOmber* (Case No. ACM 21,812, Docket No. 30,817) (on file with author).

10. *McOmber*, 1 M.J. at 382.

11. *Id.* at 383 (emphasis added).

12. *Id.* at 382.

13. UCMJ art. 27 (West 1998). Article 27 requires that "defense counsel shall be detailed for each general and special court-martial." *Id.* Unfortunately, there is no relevant legislative history on Article 27 that helps further explain how the COMA concluded that the notice-to-counsel requirement springs from the Code. *See generally* H.R. REP. 491 (1949), *reprinted in* INDEX AND LEGISLATIVE HISTORY TO THE UNIFORM CODE OF MILITARY JUSTICE, 1950 (1985).

14. 2 M.J. 55 (C.M.A. 1976).

15. *Id.* at 56.

16. *Id.* at 57.

17. *Id.*

18. *Id.* The rationale for the lower court's decision, according to the COMA, was "the appellant was not advised [during the second interrogation] that he was a suspect as to any offenses other than the arson of [B]arracks 230." *Id.*

19. *Id.* at 59.

20. *Id.*

The *Lowry* court interpreted *McOmber* to hold that "once an investigator is on notice that an attorney is representing an individual in a military investigation, Article 27. . . *require[s]* that the attorney must be given an opportunity to be present during the questioning of his client."[22] The COMA unequivocally grounded the notice-to-counsel requirement in the UCMJ: "*McOmber* was predicated on an accused's statutory right to counsel as set forth in Article 27 and not the Sixth Amendment."[23]

Military Rule of Evidence 305(e) Codifying *McOmber*

In 1980, four years after *McOmber*, President Carter codified the MRE by executive order.[24] One of the codified rules was the holding in *McOmber*–Rule 305(e), Warning About Rights; Notice to Counsel.[25] Rule 305(e) was taken directly from *McOmber.* The rule stated:

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

The codified rule, however, was even broader than the court's original holding in *McOmber.* Two years before this codification, the Army Court of Military Review held in *United States v. Roy*[27] that "in the absence of bad faith a criminal investigator who [interrogated] an accused one day before the scheduled Article 32 investigation was not in violation of *McOmber* because he was unaware of the appointment of counsel."[28] But the drafters of MRE 305(e) rejected this narrow standard. The codification implemented a "knows or reasonably should know" standard.[29] In the analysis the drafters outlined factors that should be considered in determining the "reasonably should know" prong; ultimately, the "standard involved is purely an objective one."[30]

McOmber's Progeny

Shortly after the publication of MRE 305(e), the COMA, in *United States v. Dowell*,[31] applied *McOmber.* In *Dowell*, the company commander visited Private Dowell in pre-trial confinement. The commander asked Private Dowell, "Well, how is it going?"[32] Private Dowell made incriminating responses and the commander "made no effort to properly advise [Private Dowell] of his rights under Article 31."[33] The visit lasted for twenty-five minutes, fifteen minutes of which dwelled on incriminating information. The *Dowell* court held that "*any* interrogation of an accused is subject to the same requirement announced in *McOmber*–namely, that counsel must be provided an opportunity to be present."[34] The court reversed the conviction on two grounds: violation of both Private Dowell's

21. *Id.*

22. *Id.* (emphasis added).

23. *Id.* at 60.

24. Exec. Order No. 12,198, 45 Fed. Reg. 12,373 (1980), *reprinted in* 1980 U.S.C.C.A.N. 7703, 7718-19.

25. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 305(e) (1984) [hereinafter MCM], *changed by* MIL. R. EVID. 305(e) (C7, 10 Nov. 1994).

26. *Id.*

27. 4 M.J. 840 (A.C.M.R. 1978).

28. MCM, *supra* note 25, MIL. R. EVID. 305(e) analysis, app. 22, at A14.1-15, *changed by* MIL. R. EVID. 305(e) (C7, 10 Nov. 1994).

29. *Id.* at A15.

30. *Id.* The factors to consider are:

> [W]hether the interrogator knew that the person to be questioned had requested counsel; whether the interrogator knew that the person to be questioned had already been involved in a pretrial proceeding at which he would ordinarily be represented by counsel [like the facts in *Roy*]; any regulations governing the appointment of counsel; local standard operating procedures; the interrogator's military assignment and training; and the interrogator's experience in the area of military criminal procedure.

Id.

31. 10 M.J. 36 (C.M.A. 1980).

32. *Id.* at 38.

33. *Id.*

Article 31(b) rights and his protection afforded under *McOmber*.[35] The COMA further clarified *McOmber*'s ruling and from which body of law *McOmber* springs:

> [In *McOmber*] we ruled that if the right to counsel, provided in Article 27, UCMJ, 10 U.S.C. § 827, is to retain its vitality, then a military investigator who is on notice that a service member is represented by a lawyer in connection with the criminal investigation he is conducting may not question that person without affording counsel a reasonable opportunity to be present.[36]

The COMA makes it clear again that the notice-to-counsel requirement–enunciated in *McOmber* and codified in MRE 305(e)–is grounded in statute, namely, the UCMJ.[37]

The COMA did not focus again on *McOmber* until 1987 in *United States v. Roa*.[38] The *Roa* court addressed the scope of *McOmber* and MRE 305(e).[39] In *Roa*, the accused requested an attorney during an investigation. The military agent, knowing this, asked Senior Airman Roa if he would consent to a search of his storage locker; ultimately, after unsuccessfully trying to contact his lawyer, Senior Airman Roa consented. The COMA held that *McOmber* established requirements that military investigators are subject to "when they wish to *question* the suspect."[40] The court held that "questioning is far different from requesting consent to a search."[41] Thus, when the military investigator asked the accused to consent voluntarily to a search, his request did not constitute questioning and thus did not trigger *McOmber*.

To reach the result in *Roa*, Judge Cox, writing for the court, discussed an accused's Fourth, Fifth, and Sixth Amendment rights and when each is triggered.[42] The Fourth Amendment protects a soldier from "unreasonable searches and seizures" by law enforcement personnel.[43] Consent to search "hinges on whether the consent was voluntary under the totality of the circumstances."[44] The Fifth Amendment safeguards a service member against compelled self-incrimination.[45] The Fifth Amendment is triggered by custodial interrogation and "requires that when an accused invokes his right to have counsel present . . . questioning must cease 'until counsel had been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.'"[46] The Sixth Amendment provides the right to counsel during any criminal prosecution.[47] This right to counsel "becomes applicable only when the government's role shifts from investigation to accusation."[48] In *Roa*, none of these Constitutional rights were triggered by the actions of the government. Additionally, the COMA analyzed Senior Airman Roa's statutory rights separately and found that the government's conduct did not violate these rights either.

United States v. Jordan[49] highlighted another limitation on the *McOmber* rule. In *Jordan*, the accused was assigned a military counsel. But civilian investigators interrogated Airman

34. *Id.* at 41 (emphasis added).

35. *Id.* at 37.

36. *Id.* at 41.

37. *Id.*

38. 24 M.J. 297 (C.M.A. 1987).

39. Other cases arguably started to narrow *McOmber*'s reach. *See United States v. Quintana*, 5 M.J. 484 (C.M.A. 1978) (holding that *McOmber* does not apply in the absence of an attorney-client relationship); *United States v. Littlejohn*, 7 M.J. 200 (C.M.A. 1979) (holding that *McOmber* does not apply to anticipatory attorney-client relationships).

40. *Roa*, 24 M.J. at 301 (quoting United States v. McOmber, 1 M.J. 380 (1976)).

41. *Id.*

42. *Id.* at 299.

43. *Id.* at 298. The Fourth Amendment reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

U.S. CONST. amend. IV.

44. *Roa*, 24 M.J. at 298 (citing Schneckloth v. Bustimonte, 412 U.S. 218 (1973); United States v. Watson, 423 U.S. 411 (1976)).

45. *Id.* at 299 (citing Edwards v. Arizona, 451 U.S. 477 (1981)).

46. *Id.* (quoting *Edwards*, 451 U.S. at 484-85).

Jordan after he was provided counsel. The *Jordan* court found no error and upheld the military judge for allowing Airman Jordan's incriminating statements to the civilian investigators into evidence. The COMA analyzed the case under the Fifth and Sixth Amendments and not *McOmber. McOmber*, according to the *Jordan* court, never "obligated the civilian investigators to notify appellant's military counsel . . . ."[50] The civilian police were not acting as agents of the military so *McOmber* was never triggered: "it is quite obvious that, in enacting Article 27, Congress was interested in providing service members with competent and free legal representation in courts-martial."[51] In *Jordan*, the civilian investigators were questioning Airman Jordan regarding a civilian prosecution, not a court-martial.[52] Therefore, under *Jordan*, *McOmber* protection does not apply to civilian interrogators.[53]

The Court of Appeals for the Armed Forces (CAAF), formerly the COMA,[54] in the 1997 case of *United States v. Payne*,[55] further clarified how the *McOmber* rule is triggered. Staff Sergeant (SSG) Payne was accused of raping a thirteen-year-old girl at Fort Carson. He made a statement to military investigators, but denied the rape allegation.[56] Staff Sergeant Payne then consulted with an attorney, and formed an attorney-client relationship. The military investigators knew of the representation.[57] Charges were never preferred against SSG Payne and he was reassigned to Korea. His security clearance, however, remained suspended.[58]

While in Korea, SSG Payne "submitted a request for revalidation of his security clearance."[59] The Defense Investigative Service (DIS), whose mission is to conduct personnel security investigations, conducted a "subject interview" with SSG Payne.[60] The DIS special agent "had actual knowledge that [SSG Payne] had entered an attorney-client relationship with [an attorney] of the Fort Carson Trial Defense Service regarding the rape allegation."[61] Nevertheless, the DIS special agent never contacted SSG Payne's attorney. After several interviews and failing a polygraph, SSG Payne confessed to the rape.[62]

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47. *Id.* (quoting Moran v. Burbine, 475 U.S. 412, 430 (1986)). The Sixth Amendment reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

48. *Roa*, 24 M.J. at 299.

49. 29 M.J. 177 (C.M.A. 1989).

50. *Id.* at 186.

51. *Id.* at 185.

52. *Id.* "Attachment of a right to military counsel for military proceedings neither enlarges nor decreases a service member's right to counsel in civilian proceedings." *Id.*

53. *Id.* This result was foreshadowed in *United States v. McDonald*, 9 M.J. 81 (C.M.A. 1980) (declining to hold the *McOmber* rationale applicable to an independent civilian investigation into an offense unrelated to that in which the accused was represented by defense counsel). *See also* United States v. Dowell, 10 M.J. 36, 41 n.11 (C.M.A. 1980).

54. On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the names of the United States Courts of Military Review and the United States Court of Military Appeals. The new names are the United States Army Court of Criminal Appeals, the United States Air Force Court of Criminal Appeals, the United States Navy-Marine Court of Criminal Appeals, the United States Coast Guard Court of Criminal Appeals, and the United States Court of Appeals for the Armed Forces.

55. 47 M.J. 37 (1997).

56. *Id.* at 38.

57. *Id. See* Appellant's Brief to the CAAF at 2, *Payne* (Crim. App. No. 9302143, Docket No. 96-0403/AR) (on file with author).

58. *Payne*, 47 M.J. at 38.

59. *Id.*

60. *Id.*

61. Appellant's Brief to the CAAF at 2, *Payne* (Crim. App. No. 9302143, Docket No. 96-0403/AR) (on file with author).

62. *Payne*, 47 M.J. at 40.

At trial, the defense moved to suppress the confession. The defense argued that the confession, "without any attempt to contact the appellant's attorney, rendered the statement involuntary under the *McOmber* rule."[63] The military judge denied the motion. The judge ruled that the DIS special agent "was not required to notify [the military defense counsel] because [the DIS special agent] was not a person 'subject to the code' who is required to give Article 31 warnings."[64]

The CAAF agreed and affirmed the conviction.[65] The *Payne* court held that since the DIS special agent "had no duty to warn appellant of his rights under Article 31, the duty to notify counsel under . . . [*McOmber*] was not triggered."[66] If the interviewer, military or civilian, is not required to give Article 31(b) rights, then there is no duty to notify the suspect's counsel under *McOmber*.[67] Like Article 31(b) rights, *McOmber* is only triggered by an interrogator who is subject to the UCMJ.[68]

A subtle but important aspect of *Payne* is that the facts of this case gave the CAAF an excellent opportunity to overrule *McOmber.* Yet, the court chose not to take this avenue. The court could have simply overruled *McOmber* and reached the same result: the DIS special agent had no obligation to contact SSG Payne's military attorney. Instead, the court went through a tortured analysis of how DIS–an agency of the Department of Defense that conducts background investigations on military personnel and is obligated by regulation to forward criminal information to the criminal investigative arm of the Army[69]was not "acting as an instrument of the military."[70] Therefore, the DIS special agent was not subject to the UCMJ and *McOmber* was never triggered.

The court's rationale in *Payne* seems to contradict the holding in *United States v. Quillen.*[71] In *Quillen*, the court held that store detectives for the post exchange were subject to the UCMJ and required to read military suspects their Article 31(b) rights.[72] The *Quillen* court reasoned that the position of the store detective was governmental in nature and military in purpose.[73] The court held that investigators are subject to the UCMJ when they act "in furtherance of *any* military investigation, or in any sense as an instrument of the military."[74] In light of *Quillen*, the *Payne* court painstakingly explained how the DIS agents were not acting in furtherance of any military investigation or in any sense as an instrument of the military.[75]

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63. Appellant's Brief to the CAAF at 4, *Payne* (Crim. App. No. 9302143, Docket No. 96-0403/AR) (on file with author).

64. *Id. See Payne*, 47 M.J. at 42.

65. *Id.* at 44.

66. *Id.* at 43.

67. *Id*. Article 31(b) is triggered when a suspect is questioned for law enforcement or disciplinary purposes by a person subject to the UCMJ who is acting in an official capacity, and perceived as such by the suspect. From this statement of law, four questions must be analyzed to determine if Article 31(b) protections exist. First, was the person being questioned as a suspect? Second, was the suspect being questioned for law enforcement or disciplinary purposes? Third, was the person doing the questioning acting in his official capacity? And fourth, did the suspect feel like he was being questioned? *See* United States v. Shepard, 38 M.J. 408, 411 (C.M.A. 1993) (holding: (1) that a platoon sergeant's "purpose in questioning appellant was to determine the reason for his absence at formation and assess the general welfare of his family"; (2) Article 31(b), UCMJ, rights were not required; and (3) *McOmber* was never at issue in the case). *See generally* United States v. Duga, 10 M.J. 206 (C.M.A. 1981); United States v. Lonetree, 35 M.J. 396 (C.M.A. 1995); United States v. Price, 44 M.J. 430 (1996).

68. *Payne*, 47 M.J. at 43.

69. Appellant's Brief to the CAAF at 2-3, *Payne* (Crim. App. No. 9302143, Docket No. 96-0403/AR) (on file with author).

70. *Payne*, 47 M.J. at 43 (quoting United States v. Raymond, 38 M.J. 136, 139 (C.M.A. 1993)).

71. 27 M.J. 312 (C.M.A. 1988).

72. *Id.* at 314.

73. *Id.*

74. *Id.* (emphasis added) (quoting United States v. Penn, 39 C.M.R. 194, 199 (C.M.A. 1969)).

75. *Payne*, 47 M.J. at 43. The court, in an effort to establish that the DIS special agent was not acting in furtherance of any military investigation or in any sense as an instrument of the military, writes:

> In this case, the CID investigation ended before appellant's request to reinstate his security clearance. There was no ongoing CID investigation when DIS entered the picture. The DIS investigation was initiated because of appellant's request for revalidation of his security clearance, not because of a request from CID or any military authority. The record shows no cooperation or coordination between CID and DIS, beyond CID's release of its internal records. The DIS investigation had a different purpose and much broader scope, covering appellant's entire personal history to determine his suitability for a security clearance.

Id.

If the court had simply killed *McOmber*, then *Payne* would have been spared the tortured analysis. Instead, the result is that *McOmber* continues to stand. Judge Gierke, in his opinion for the court, cited *McOmber*, but never challenged its holding.[76]

Still, there are other limitations to the *McOmber* rule. A suspect can waive *McOmber*, just like Article 31(b) rights, according to *United States v. LeMasters*.[77] In *LeMaster*, the accused made an initial statement. Three days later, he was interrogated again by military investigators, and he requested counsel.[78] Several months later, Senior Airman LeMaster consented to a search of his quarters after he was arrested in connection with a "buy-bust" operation.[79] The following day, the military investigator told him "to return to the . . . office to make a statement if [he] so desired *after consulting with his attorney.*"[80] The military agent even gave Senior Airman LeMaster the defense counsel's number and name.

The following day, the accused, on his own accord, returned to the military investigator's office.[81] The agent had Senior Airman LeMaster sign a waiver that read, in part, "I understand that I am allowed to consult with my lawyer prior to being interviewed by [Air Force investigators]; however, I do not wish to talk with my lawyer or to have my lawyer with me during this interview."[82] Senior Airman LeMaster eventually gave four incriminating statements. The CAAF, in a 3-2 decision, held that *McOmber* was not violated. The court hinged its decision on the fact that "on each of the four occasions appellant voluntarily came to the investigator's office."[83] The majority focused on the accused's re-initiation and his "knowing and intelligent waiver" of his right to counsel.[84]

One point is clear from *LeMaster* and *Payne*: although both cases further limited the scope of *McOmber*, neither case overruled *McOmber*. No opinion by the CAAF has invalidated *McOmber*; *McOmber* is still binding case law.

The 1994 Change to Military Rule of Evidence 305(e)

Six months after *LeMasters*, President Clinton changed MRE 305(e) by an executive order[85] and seemingly eviscerated *McOmber*. The changed MRE 305(e) reads:

> (1) *Custodial Interrogation.* Absent a valid waiver of counsel under subdivision (g)(2)(B), when an accused or person suspected of an offense is subjected to custodial interrogation under circumstances described under subdivision (d)(1)(A) of this rule, and the accused or suspect requests counsel, counsel must be present before any subsequent custodial interrogation may proceed.
>
> (2) *Post-preferral interrogation.* Absent a valid waiver of counsel under subdivision (g)(2)(C), when an accused or person suspected of an offense is subjected to interrogation under circumstances described in subdivision (d)(1)(B) of this rule, and the accused or suspect either requests counsel or has an appointed or retained counsel, counsel must be present before any subsequent interrogation concerning that offense may proceed. [86]

In the analysis of the 1994 amendments to the *Manual*, the drafters cite two cases illustrating why MRE 305(e) was rewritten: *McNeil v. Wisconsin*[87] and *Minnick v. Mississippi*.[88] Both

76. *Id.* at 42.

77. 39 M.J. 490 (C.M.A. 1994).

78. *Id.* at 491.

79. *Id.*

80. *Id.*

81. *Id.* at 492.

82. *Id.*

83. *Id.*

84. *Id.* at 493. Like the Fifth Amendment counsel protection, *McOmber* protection can be waived by the suspect re-initiating the conversation. In a vigorous dissent, Chief Judge Sullivan argued that *McOmber* does not allow for waiver of counsel once a suspect has retained counsel. *Id.* at 495 (Sullivan, J., dissenting). The Chief Judge opined: "[T]he majority is judicially amending [MRE] 305(e) by implicitly appending the phrase 'this notification requirement applies to all police-initiated interviews but not to interviews initiated by a suspect.' I do not read into [MRE] 305(e) a condition precedent that the interrogator initiate the questioning." *Id.*

85. Exec. Order No. 12,936, 59 Fed. Reg. 59,075 (1994), *reprinted in* 1994 U.S.C.C.A.N. B88, B92.

86. MCM, *supra* note 25, MIL. R. EVID. 305(e) (C7, 10 Nov. 1994).

87. 501 U.S. 171 (1991).

cases, however, only involve the right to counsel protections under the Constitution. Neither case involves the right to counsel protected under Article 27 and *McOmber.* The analysis states that "[s]ubdivision (e) was divided into two subparagraphs to distinguish between the right to counsel rules under the Fifth and Sixth Amendments . . . ."[89] Subsection (e)(1) addresses a service member's Fifth Amendment guarantee against compelled self-incrimination while subsection (e)(2) addresses an accused's Sixth Amendment right to counsel. The change to MRE 305(e) attempts to codify *Minnick* and *McNeil*, but in doing so, ignores but never extinguishes the *McOmber* holding.

In *McNeil*, the defendant invoked his Sixth Amendment right to counsel at an arraignment.[90] He was later questioned and gave incriminating statements concerning a different offense from the offense on which he was arraigned.[91] McNeil challenged the statements. The Supreme Court, in affirming the conviction, held that the Sixth Amendment right to counsel is "offense specific."[92] If the authorities had questioned him on the offenses for which he was arraigned, the statements would have been inadmissible because the authorities violated his Sixth Amendment rights.[93] McNeil, however, was not pending judicial proceedings for the crimes about which he was questioned. For those crimes, McNeil still had his Fifth Amendment right against self-incrimination but waived that right during his custodial interrogation.[94]

In *Minnick*, the defendant, while in custody, requested counsel.[95] After an appointed counsel met with Minnick, the deputy sheriff interrogated Minnick again.[96] The deputy sheriff told the defendant that "he would 'have to talk' to [him] and that [Minnick] 'could not refuse.'"[97] Minnick never left the custody of the authorities. The Supreme Court held that under the Fifth Amendment, once a suspect requests counsel, and he remains in custody, then counsel must be present for any subsequent interrogation.[98]

What the Supreme Court has never directly addressed is whether counsel must be present for any subsequent interrogation if a suspect requests counsel, and there is a break in custody.[99] Lower courts have declined to extend the Fifth Amendment protections to non-continuous, break-in-custody cases.[100] Therefore, if a suspect is re-apprehended several days after being released (and even if he previously requested counsel while in custody), the authorities can question the suspect if he knowingly and intelligently waives his right to counsel.[101]

The CAAF has held this line, too. In *United States v. Vaughters*,[102] the accused was interrogated by military investigators on 10 February about his involvement with illegal drugs. Dur-

88. 498 U.S. 146 (1990).

89. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 305(e) analysis, app. 22, at A22-15 (1998).

90. *McNeil*, 501 U.S. at 177.

91. *Id.* at 173-74.

92. *Id.* at 175.

93. *Id.* at 179.

94. *Id.* at 178.

95. *Minnick*, 498 U.S. at 149.

96. *Id.*

97. *Id.*

98. *Id.* at 153.

99. Note, however, in *McNeil v. Mississippi*, 501 U.S. 171 (1991), Justice Scalia wrote:

> [I]f the police do subsequently initiate an encounter in the absence of counsel (*assuming there is no break in custody*), the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards.

Id. at 177 (emphasis added). Therefore, break in custody versus continuous custody has been an aspect courts have examined to see if a statement is not voluntary and contra to *United States v. Edwards*, 451 U.S. 477 (1981).

100. Elizabeth E. Levy, *Non-Continuous Custody and the Miranda-Edwards Rule: Break in Custody Severs Safeguards*, 20 N.E. J. ON CRIM. & CIV. CONFINEMENT 539, 556-57 (1994).

101. *See* United States *ex rel*. Espinoza v. Fairman, 813 F.2d 117, 124 (7th Cir. 1987); McFadden v. Garraghty, 829 F.2d 654, 660-61 (4th Cir. 1987); Dunkins v. Thigpen, 857 F.2d 394, 398 (11th Cir. 1988); United States v. Hines, 963 F.2d 255, 256-57 (9th Cir. 1992).

ing the interrogation, SSG Vaughters requested an attorney.[103] Nineteen days later, investigators from a different office called the accused down to their office to interrogate him.[104] These new investigators did not know that the accused had requested counsel. This time, however, SSG Vaughters confessed.[105] The service court held that the government-initiated "interrogation of 1 March . . . did not violate the appellant's right to counsel."[106] The CAAF agreed. Judge Sullivan, writing for the court, wrote that *Minnick* "was a continuous-custody case and did not purport to extend the *Edwards* rule to the break-in-custody situation."[107]

The following term, the CAAF again addressed a service member's Fifth Amendment rights in a break-in-custody situation. Unlike *Vaughters*, in *United States v. Faisca*,[108] the military investigator knew the accused had requested counsel at his first interrogation six months earlier. The investigator, new to the case, called the command "to ascertain whether [SSG Faisca] was represented by counsel."[109] Staff Sergeant Faisca, by coincidence, answered the telephone. The investigator asked him if he had obtained counsel. Staff Sergeant Faisca answered "unequivocally that he did not desire counsel and he had no intention of securing counsel."[110] The accused subsequently talked with the investigator and made an incriminating statement.[111] The CAAF, in a unanimous opinion, held that the investigator did not violate the Fifth Amendment: "All of these circumstances constitute an affirmative waiver."[112]

McOmber, however, was never triggered in either of these cases because the facts did not require it; in both cases, neither accused retained counsel. *McOmber* is cited in neither case, nor was it even necessary for the court to mention the *McOmber* protection.[113] If, however, the facts indicated that the military investigators knew that SSGs Vaughters and Faisca had retained counsel, the question arises: would the current state of the law still suppress their incriminating statements in light of the changes to MRE 305(e)?

As noted, the drafters of the 1994 change simply ignore the holding in *McOmber*. The drafters' analysis concedes that "*McOmber* was decided on the basis of Article 27. . . ."[114] The analysis further acknowledges that "the *McOmber* rule has been applied to claims based on violations of both the Fifth *and* Sixth Amendments."[115] Yet, the drafters fail to explore, in light of the changes, how *McOmber*'s statutory origins affect the survivability of the notice-to-counsel requirement.

McOmber is not constitutionally based. It is statutorily based and gives service members protections in addition to those guaranteed in the Constitution. According to the COMA, *McOmber* "extends the service member's right to counsel

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102. 44 M.J. 377 (1996).

103. *Id.* at 377-78.

104. *Id.* at 378.

105. *Id.*

106. United States v. Vaughters, 42 M.J. 564, 567 (A.F. Ct. Crim. App. 1995), *aff'd*, 44 M.J. 377 (1996).

107. *Vaughters*, 44 M.J. at 379. Judge Sullivan cites Justice Scalia's opinion in *McNeil v. Wisconsin*: "Dictum suggests *Edwards* not apply where there has been a 'break in custody.'" *Id. Edwards* held that when an accused has invoked his right to have counsel present during custodial interrogation, the accused may not be subjected to further interrogation by the authorities until counsel is made available. *See* United States v. Schake, 30 M.J. 314 (C.M.A. 1990) (holding that "a six-day break in custody dissolved appellant's *Edwards* claim"). For an excellent discussion of when a suspect's right to counsel under the Fifth Amendment attaches, read *United States v. Flynn*, 34 M.J. 1183 (A.F.C.M.R. 1992).

108. 46 M.J. 276 (1997).

109. *Id.* at 277.

110. *Id.*

111. *Id.* at 278.

112. *Id.*

113. Recently, the CAAF handed down *United States v. Young*, 49 M.J. 265 (1998). In this case, the accused requested an attorney. *Id*. at 266. As the military investigator was leaving the interrogation room, he 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." The accused then said: "No, I don't want a fucking lawyer"; he proceeded to make a statement. *Id.* Two days later, the accused made a second incriminating statement. As to the second statement, the court held that "after a [two] day interval and after appellant had been released from custody and was free to speak to his family and friends. This [two] day break in custody precludes any *Edwards* violation as to the second statement." *Id.* at 268. *McOmber* is never at issue in this case, however, because counsel was never retained by Sergeant Young. Therefore, there is no reason for the court to cite *McOmber.*

114. MCM, *supra* note 25, MIL. R. EVID. 305(e) analysis, app. 22, at A22-15 (C7, 10 Nov. 1994).

115. *Id.* at A22-16 (emphasis added).

beyond that provided under the Fifth and Sixth Amendments of the Constitution."[116] Under Article 27 and *McOmber*, the military investigator has to notify the service member's counsel if the investigator knows or should have known the service member retained counsel. Under a plain reading of the changed MRE 305(e), however, the military investigator is not required to notify the service member's retained counsel. If the service member waives his right to counsel under the Constitution, the military investigator may proceed with the custodial interrogation regardless of retained counsel.

As written, the changed MRE 305(e), although consistent with the Fifth and Sixth Amendment protections, throws into question "the continuing validity of *McOmber*."[117] The change appears to eliminate a service member's right in situations when a military investigator, acting under Article 31(b), knows the service member has retained counsel. The drafters of the change confuse the service member's right to counsel under the Constitution and the service member's right to have an investigator notify the service member's counsel under Article 27.

The changed MRE 305(e) is simply contrary to the dictates of Article 27 and *McOmber.* This conclusion, however, is only focusing on a plain reading of the changed rule. Neither the change nor the analysis explicitly overrules *McOmber*. Although the rule in *McOmber* has been removed from MRE 305(e), this "un-codification" does not mean that the rule in *McOmber* is dead. The changed MRE 305(e) now only delineates the service member's constitutional rights; it remains silent on the notice-to-counsel requirement that springs from the UCMJ. Therefore, defense counsel can no longer cite MRE 305(e) as authority for the notice-to-counsel requirement; instead, they must look to case law and cite *McOmber* for the same result. *McOmber* is still good law. If, on the other hand, the purpose for changing MRE 305(e) was to override the rule in *McOmber*, then the President exceeded his authority under the UCMJ.

The President's Authority under Article 36 to Overrule *McOmber*

In Article 36(a) of the UCMJ, Congress delegated to the President the following authority:

> Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.[118]

This provision is unchanged since the UCMJ in 1950 and the lineal descendent of the Article of War 38.[119] Under the UCMJ, it is the broadest authority conferred upon the President by Congress.[120] Congress intended that the President establish procedural rules for courts-martial.[121] Article 36 does not grant the President substantive rule-making authority–that takes the consent of Congress.[122] If the President acts outside his procedural powers, he violates Article 36 and the act has no effect. The appellate courts have long recognized this principle.

In *United States v. Ware*,[123] the military judge dismissed a charge on speedy-trial grounds. The convening authority, however, "reversed" the military judge's dismissal and "directed [the trial] to proceed."[124] The convening authority acted pursuant to paragraph 67f of the *Manual*.[125] Paragraph 67f provided: "the military judge . . . *will accede to the view of the convening authority.*"[126] The UCMJ, under Article 62(a),[127] however, only authorizes "the convening authority [to] return the record to the court *for reconsideration of the ruling . . . .*"[128] The *Ware* court

116. United States v. Shepard, 38 M.J. 408, 414 (C.M.A. 1993).

117. United States v. Lincoln, 40 M.J. 679, 691 n.6 (N.M.C.M.R. 1994), *set aside, in part, and aff'd, in part*, 42 M.J. 315 (C.M.A. 1995).

118. UCMJ art. 36(a) (West 1998).

119. Act of Aug. 29, 1916, ch. 418, 39 Stat. 656.

120. Eugene R. Fidell, *Judicial Review of Presidential Rulemaking Under Article 36: The Sleeping Giant Stirs*, 4 MIL. L. REP. 6049, 6050 (Oct.-Dec. 1976).

121. *Id.* at 6051. *See* Loving v. United States, 571 U.S. 748, 770 (1996). *See also* Appellant's Brief to the Supreme Court at 18, *Loving* (No. 94-1966) (on file with author).

122. According to Chief Judge Fletcher, "The language of Article 36 *confines* the President's rule-making authority thereunder to matters of trial procedure." United States v. Newcomb, 5 M.J. 4, 13 (C.M.A. 1978) (Fletcher, dissenting) (emphasis added). *See* Parker v. Levy, 417 U.S. 733 (1973). "The Court of Military Appeals has indicated its belief that Congress did not and could not empower the President to promulgate substantive rule of law for the military." *Id.* at 785 n.36.

123. 1 M.J. 282 (C.M.A. 1976).

124. *Id.* at 283.

125. MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 67f (1969) [hereinafter 1969 MANUAL].

held that the President's power to make *Manual* provisions under Article 36 is "limited to rules not contrary to or inconsistent with the UCMJ."[129] Therefore, the court had to decide whether "accede" was consistent with "reconsideration."[130] The COMA answered in the negative: "the *Manual*'s mandate to the trial judge that he accede–that is, accept reversal–is not included within and is inconsistent with the clear and plain meaning of the UCMJ's 'reconsideration' provision.'"[131] Paragraph 67f of the *Manual* was nullified and Seaman Ware's conviction was reversed.[132]

In *United States v. Frederick*,[133] the following year, the issue before the COMA was the scope of the President's rule-making powers under Article 36. In *Frederick*, the appellant was convicted of unpremeditated murder.[134] At trial, PFC Frederick's defense was lack of mental responsibility. The military judge's instructions on mental responsibility encompassed the standard set forth in the *Manual*–the *M'Naghten* standard.[135] On appeal, PFC Frederick urged the COMA to reject this standard and follow "the vast majority of the [f]ederal circuits which have adopted the definition of insanity recommended by the American Law Institute."[136] The government argued that the standard set forth in the *Manual* was "a valid exercise of the President's power to prescribe rules of procedure under Article 36 . . . ."[137] The COMA disagreed.[138] The court held:

> [T]he adoption of the standard for mental responsibility is not within the scope of the President's rulemaking powers under Article 36. Congress has adopted no such standard. Necessarily, therefore, the duty of defining this standard must be borne by the courts, which are required to determine the accused's mental responsibility.[139]

Eleven years later, the COMA again focused on the scope of the President's rule-making authority. *Ellis v. Jacob*,[140] like *Frederick*, dealt with the accused's mental responsibility. The accused, charged with unpremeditated murder, wanted to raise the incomplete defense of partial mental responsibility.[141] The interlocutory issue before the court was if the military judge erred in denying the defense from introducing expert testimony in rebuttal to the specific-intent element of "intent to kill or inflict great bodily harm."[142] The *Manual* provision relied on by the military judge was Rule for Courts-Martial (R.C.M.) 916(k)(2). This rule prohibited the defense from introducing evidence that went "to whether the accused entertained a state of mind necessary to be proven as an element of the offense."[143] The COMA looked to the UCMJ–specifically Article 50a(a), which defines mental responsibility. The court opined that "such a *Manual* provision [like R.C.M. 916(k)(2)] could only

126. *Ware*, 1 M.J. at 284 (emphasis in the original).

127. UCMJ art. 62(a) (West 1998).

128. *Ware*, 1 M.J. at 283 (emphasis in the original).

129. *Id.* at 285.

130. *Id.*

131. *Id.*

132. *Id.*

133. 3 M.J. 230 (C.M.A. 1977).

134. *Id.* at 231.

135. The *M'Naghten* standard is from English case law. M'Naghten's Case, 10 Cl. & F. 200, 8 Eng. Rep. 718 (H.L. 1843). The standard, as set forth in the *Manual*, provided that a "person is not mentally responsible in a criminal sense for an offense unless he was, at the time, so far free from mental defect, disease, or derangement as to be able concerning the particular act charged both to distinguish right from wrong and to adhere to the right." 1969 MANUAL, *supra* note 125, ¶ 120b.

136. *Frederick*, 3 M.J. at 234. The American Law Institute standard provided "a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." *Id.*

137. *Id.*

138. *Id.* at 236.

139. *Id.*

140. 26 M.J. 90 (C.M.A. 1988).

141. *Id.* at 91.

142. *Id.* at 92.

be effective if it reflected a legislative act."[144] The court concluded that Article 50a(a) "effectively demolishes the contention that Congress had a notion to preclude defendants from attacking *mens rea* with evidence to the contrary."[145] The court invalidated R.C.M. 916(k)(2) as being contrary to the dictates of the UCMJ. In other words, the *Manual* provision exceeded the President's authority under Article 36: "the President's rule-making authority does not extend to matters of substantive military criminal law."[146]

The following term the COMA grappled with the bounds of Article 36 in *United States v. Baker*.[147] In *Baker*, the panel announced an incomplete sentence—absent a dishonorable discharge. At a post-trial Article 39(a) session, with the panel present, the military judge "corrected" the error.[148] Rule for Courts-Martial 1007(b)[149] "conferred upon military judges the power to reassemble courts-martial for the correction of errors . . . ."[150] Under Article 60(e)(2)(C) of the UCMJ,[151] however, only the convening authority can "reassemble an adjourned court-martial for the purposes of correcting errors or omissions", furthermore, the correction cannot increase the severity of the sentence.[152] Rule for Courts-Martial 1007(b), a procedure prescribed by the President, conflicted with Article 60(e)(2)(C), a statute mandated by Congress. Article 60(e)(2)(C) prevailed. The *Baker* court held that once a sentence is announced and the court is adjourned, the sentence cannot be increased.[153] The court wrote: "After all, the Congress authorized the President to prescribe rules for courts-martial only so long as they were 'not . . . contrary to or inconsistent with [the UCMJ].'"[154]

In 1993, the COMA decided yet another case dealing with the President's rule-making authority: *United States v. Kossman*.[155] In *Kossman*, the military judge found that the accused spent 110 days in pretrial confinement and 102 days were chargeable to the government. The judge, relying on *United States v. Burton*,[156] granted the defense's speedy-trial motion and dismissed the charges.[157] The COMA in *Burton* created a three-month speedy-trial clock to enforce Article 10 of the UCMJ.[158] The three-month rule, *Burton*, however, had been superseded, according to the government, by the less stringent R.C.M. 707.[159] In 1991, R.C.M. 707 extended the three-month speedy-trial clock to 120 days.[160] On appeal, the government contended that the 120 days of R.C.M. 707, not the three months of *Burton*, controlled. The COMA agreed.[161] The COMA held that R.C.M. 707 was a lawful exercise of the President's power under Article 36.[162] *Burton* was not interpreting Article 10; instead, it was merely trying "to enforce it."[163]

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143. *Id.*

144. *Id.* at 93.

145. *Id.*

146. *Id.* at 92.

147. 32 M.J. 290 (C.M.A. 1991).

148. *Id.* at 291-92.

149. MCM, *supra* note 25, R.C.M. 1007(b).

150. 32 M.J. at 292.

151. UCMJ art. 60(e)(2)(C) (West 1998).

152. *Baker*, 32 M.J. at 292. The convening authority can increase the sentence if and only if "the sentence prescribed for the offense is mandatory." UCMJ art. 60(e)(2)(C).

153. *Baker*, 32 M.J. at 293.

154. *Id.* (quoting United States v. Ware, 1 M.J. 282, 285 (C.M.A. 1976)). The COMA also cited Article 36(a) as its authority. *Id.*

155. 38 M.J. 258 (C.M.A. 1993).

156. 44 C.M.R. 166 (C.M.A. 1971).

157. *Kossman*, 38 M.J. at 258.

158. UCMJ art. 10 (West 1998). Article 10 provides that when a service member is placed in pretrial confinement "immediate steps will be taken" to try him. *Id.*

159. MCM, *supra* note 25, R.C.M. 707 (C4, 27 June 1991).

160. *Id.*

161. *Kossman*, 38 M.J. at 261.

Therefore, no conflict arose between Article 10 and R.C.M. 707: "We see nothing in Article 10 that suggests that speedy-trial motions could not succeed where a period under 90 or 120 days is involved."[164] The court did note, however, that "if the requirements of Article 10 are more demanding than a presidential rule, Article 10 prevails."[165]

Unlike *Kossman*, however, no court has ever suggested that *McOmber* is merely trying to "enforce" Article 27. Instead, Article 27 is the "foundation" of *McOmber*.[166] *McOmber* interprets Article 27. The *Kossman* court, moreover, did unequivocally find that "the President cannot overrule or diminish [the court's] interpretation of a statute."[167] *Kossman* is a critical case when analyzing whether *McOmber* is dead; it crystallizes the appellate court's right to invalidate the President's exercise of power under Article 36 when an executive order attempts either to override the appellate court's interpretation of the UCMJ or to lessen the scope of the rights afforded service members by the UCMJ.

The CAAF, in 1996, suggested Article 36 as a vehicle to challenge one of the Military Rules of Evidence promulgated by the President.[168] *United States v. Scheffer* [169] involved a challenge to MRE 707, which prohibits polygraph evidence at a court-martial.[170] In a 3-2 decision, the CAAF held that MRE 707 was unconstitutional. More important from a statutory analysis, the court for the first time hinted that a particular MRE might have violated Article 36.[171] The court, however, never opined on the statutory limitations of the President's power, in part because the issue was never briefed or argued.[172] The court on this occasion assumed that the President "acted in accordance with Article 36."[173] *Scheffer* is important because it again affirms the principle that *Manual* changes by the President, to include changes to the Military Rules of Evidence, must always meet Article 36 muster and thereby not exceed Article 36 authority.

The Supreme Court reversed *Scheffer* and held that MRE 707 did not violate the Constitution.[174] But the Court never addressed whether MRE 707 violated Article 36. In his dissent, Justice Stevens raised the Article 36 issue. He wrote, "Had I been a member of [the CAAF], I would not have decided [the constitutional] question without first requiring the parties to brief and argue the antecedent question whether Rule 707 violates Article 36(a) of the [UCMJ]."[175] Justice Stevens concluded that MRE 707 did not comply with Article 36.[176]

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162. *Id.* at 260.

163. *Id.* at 261, n.2.

164. *Id.* at 261.

165. *Id.*

166. United States v. LeMasters, 39 M.J. 490, 494 (C.M.A. 1994) (Wiss, J., dissenting).

167. *Kossman*, 38 M.J. at 260-61.

168. Electronic Interview with Dwight H. Sullivan, Managing Attorney, American Civil Liberties Union of Maryland, Baltimore Office (Feb. 9, 1999) (on file with author).

169. 44 M.J. 442 (1996), *rev'd*, 118 S. Ct. 1261 (1998).

170. Military Rule of Evidence 707 provides that "[n]otwithstanding any other provision of the law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence." MCM, *supra* note 25, MIL. R. EVID. 707 (C5, 27 June 1991).

171. The CAAF did not suggest that MRE 707 lessened the scope of the rights afforded by the Code; instead the CAAF cited the "practicability" requirement under Article 36 as the pertinent limitation of the President's power. Judge Gierke, in writing the opinion of the court, opined: "It may well be that the *per se* prohibition in Mil.R.Evid. 707 is 'at odds with the 'liberal thrust' of the Federal Rules. . . .'" *Scheffer*, 44 M.J. at 444. The court noted that a majority of federal courts do not have a MRE 707-like rule and instead, use the Federal Rules of Evidence on relevance and undue prejudice (Rules 401-403). These federal rules are "virtually identical" to the equivalent military rules of evidence. Judge Gierke concluded his discussion of Article 36 by noting: "Whether the President determined that prevailing federal practice is not 'practicable' for courts-martial cannot be determined from the record before us." *Id.* at 445.

172. *Id.* at 444.

173. *Id.* at 445.

174. 118 S. Ct. 1261, 1269 (1998) (plurality opinion). The vote in *Scheffer* was 4-4-1. Eight of the Justices, however, upheld MRE 707's constitutionality.

175. *Id.* at 1270 (Stevens, J., dissenting).

176. *Id.* at 1272. Justice Stevens concluded: "[T]here is no identifiable military concern that justifies the President's promulgation of a special military rule that is more burdensome to defendants in military trials than the evidentiary rules applicable to the trials of civilians." *Id.*

The Rule in *McOmber* Lives

The military courts have uniformly held that the notice-to-counsel rule was "derived from *United States v. McOmber.*"[177] *McOmber*, in turn, was decided "on statutory grounds,"[178] Article 27 of the UCMJ. Put differently, the notice-to-counsel requirement, as articulated in *McOmber*, springs from Article 27.[179] Therefore, if the President's change to MRE 305(e) was intended to eliminate service members' rights afforded under the UCMJ by Congress, then the change is null and has no effect. Simply stated, the change to MRE 305(e) does not meet the prerequisites of Article 36—the President's 1994 executive order is inconsistent with the CAAF's interpretation of the UCMJ.

There is only one case that throws the future of *McOmber*'s statutory predicate into doubt: *United States v. LeMaster.*[180] The troubling portion of *LeMaster* is not the court's holding—the court does not tamper with the holding in *McOmber.* Instead, the troubling portion is Judge Crawford's cryptic footnote in dicta wherein she states: "*McOmber* cannot reasonably be based on Article 27 . . . ."[181] Although Judge Crawford disagreed with this long-standing approach of how the CAAF interprets Article 27, she failed to cite any authority for her proposition. Even the analysis to the changed MRE 305(e) concedes that *McOmber* is based on Article 27.[182] Judge Crawford's footnote concedes, and thereby highlights, that under current case law *McOmber* is based on Article 27.[183] Judge Crawford, "for some unstated reason," wants to kill *McOmber.*[184] No case after *LeMasters* has adopted her erosive view of a service member's rights under *McOmber* and Article 27.

Because the CAAF has consistently held that *McOmber* is statutorily based, the changed MRE 305(e), if it is intended to overrule *McOmber*, is beyond the President's procedural power under Article 36. His power is "limited to rules not contrary to or inconsistent with the [UCMJ]."[185] *McOmber* would no longer be the CAAF's "interpretation of a statute" only if the CAAF abandons its over two-decade interpretation of Article 27.[186] To date, the CAAF has not adopted this position, nor should they.

The Reason for *McOmber*

Article 27 and the resulting *McOmber* rule is one of several sources of protection afforded service members–others include Article 31(b) and the Fifth and Sixth Amendments. Unlike these constitutional protections, however, Articles 31(b) and 27 are unique to the military.[187] Both Articles, as drafted by Congress, grant military members additional protections not enjoyed by the civilian community.[188] But both protections are distinct.

The Article 31(b) protections are similar to the protections afforded a citizen under the Fifth Amendment and *Miranda v. Arizona.*[189] *Miranda*, a "prophylactic" right stemming from the

177. United States v. Fassler, 29 M.J. 193, 195 (C.M.A. 1989).

178. United States v. McOmber, 1 M.J. 380, 382 (C.M.A. 1976).

179. "*McOmber* was predicated on an accused's statutory right to counsel as set forth in Article 27. . . ." United States v. Lowry, 2 M.J. 55, 60 (C.M.A. 1976).

180. 39 M.J. 490 (C.M.A. 1994).

181. *Id.* at 492, n. *. This is only a footnote by one judge and therefore, is, at the very most, dicta. As Justice Frankfurter so aptly observed: "A footnote hardly seems to be an appropriate way of announcing a new constitutional doctrine . . . ." Kovacs v. Cooper, 336 U.S. 77, 90-91 (1949). The same holds true for changing a statutory interpretation of nearly 20 years. The CAAF has no rule of court on the precedential value of a footnote. Telephone Interview with Mr. John Cutts, Deputy Clerk of Court for the United States Court of Appeals for the Armed Forces, Washington, D.C. (Mar. 10, 1999). Common sense suggests that this footnote, in this context, reflects only one judge's interpretation and not the CAAF's opinion.

182. "*McOmber* was decided on the basis of Article 27 . . . ." MCM, *supra* note 25, MIL. R. EVID. 305(e) analysis, app. 22, at A22-15 (C7, 10 Nov. 1994). Military Rule of Evidence 305(e) was changed only six months after *LeMaster.*

183. Otherwise, Crawford's footnote in the context of *LeMaster*, where the statutory basis of *McOmber* was not even at issue, does not make sense.

184. Judge Wiss, in his dissent, refers to Judge Crawford's lack of authority as "for some unstated reason." *LeMaster*, 39 M.J. at 494 (Wiss, J., dissenting).

185. United States v. Ware, 1 M.J. 282, 285 (C.M.A. 1976).

186. United States v. Kossman, 38 M.J. 258, 261 (C.M.A. 1993).

187. Service members have additional protections, in large measure, because the law "has long recognized that the military is, by necessity, a specialized society from civilian society." Parker v. Levy, 417 U.S. 733, 743 (1973).

188. In the civilian sector, unlike the military, a mere *suspect* is not guaranteed the right to free counsel. United States v. Gouveia, 467 U.S. 180, 192 (1984) (holding that the respondent was not constitutionally entitled under the Sixth Amendment to the appointment of counsel while in administrative segregation and before any adversarial judicial proceedings had been initiated).

189. 384 U.S. 436 (1966).

Fifth Amendment, requires that a suspect who is subject to a custodial interrogation be advised that he has the three rights: the right to remain silent, the right to counsel, and the right to know that, if he should talk, his statements may be used against him.[190] A service member's protection under Article 31(b) requires that he be notified of three rights, too, before questioning: the right to know the nature of the accusation, the right to remain silent and the right to know that, if he should talk, his statement may be used against him. Both Article 31(b) and the Fifth Amendment are designed to militate against coercive pressures by the authorities.[191] As Chief Judge Everett wrote of Article 31(b) in *United States v. Armstrong*:[192]

> The purpose of Article 31(b) apparently is to provide service persons with a protection which, at the time of the Uniform Code's enactment, was almost unknown in American courts, but which was deemed necessary because of subtle pressures which existed in military service. . . . Conditioned to obey, a service person asked for a statement about an offense may feel himself to be under a special obligation to make such a statement. Moreover, he may be especially amenable to saying what he thinks his military superior wants him to say – *whether it is true or not*. Thus, the service person needs the reminder required under Article 31 to the effect that he need not be a witness against himself.[193]

In creating Article 31(b), "Congress wanted to eliminate the unique pressures of military rank and authority from military justice."[194] Thus, the courts in the Fifth Amendment and Article 31(b) context are looking at the surrounding environment to assess coercion; they are focusing on the reliability of the underlying statement.[195]

Article 27, on the other hand, functions much like the Sixth Amendment; it is, in part, "status" driven. Under the Sixth Amendment, once a suspect takes the status of a defendant "by way of formal charge, preliminary hearing, indictment, information, or arraignment," the right to counsel attaches.[196] Therefore, if the defendant is interrogated by the police after the Sixth Amendment right of counsel attaches and is invoked, the resulting statement will be suppressed.[197] The courts are not concerned with the statement's reliability like in a Fifth Amendment or Article 31(b) analysis. The Sixth Amendment focuses on mandating that police investigators go through the defendant's counsel.[198] In fact, the underlying statement could be true but its reliability is irrelevant.[199]

The same rationale holds true for an Article 27 analysis. Article 27, as interpreted by *McOmber* and its progeny, has never focused on the reliability of the underlying statement. The military courts focus on insuring that military personnel who have retained counsel are not effectively denied that right by military investigators. Article 27 makes sense in the military environment. Like Article 31(b), it protects against the dangers of the military's coercive nature by giving the service member the option of dealing with military investigators through a military defense counsel. As the COMA stated nearly thirty years ago:

> We may assume that when an accused has asserted the right to counsel at a custodial interrogation and the criminal investigator thereafter learns that the accused had obtained counsel for that purpose, he should

190. *Id.* at 467-73.

191. Minnick v. Mississippi, 498 U.S. 146, 150-51 (1990).

192. 9 M.J. 374 (C.M.A. 1980).

193. *Id.* at 378 (emphasis added).

194. Howard O. McGillin, Jr., *Article 31(b) Triggers: Re-Examining the "Officiality Doctrine,"* 150 MIL. L. REV. 1, 3 (1995).

195. Levy, *supra* note 100, at 544.

196. McNeil v. Wisconsin, 501 U.S. 171, 175 (1991) (quoting Kirby v. Illinois, 406 U.S. 682, 688-89 (1972)).

197. Michigan v. Jackson, 475 U.S. 625, 635 (1986).

198. *Id.* at 632.

199. *Id.* Justice Stevens, in writing for the Court, held:

> Indeed, after a formal accusation has been made–and a person who had previously been just a "suspect" has become an "accused" within the meaning of the Sixth Amendment–the constitutional right to the assistance of counsel *is of such importance* that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation.

Id. (emphasis added).

> deal directly with counsel, not the accused, in respect to interrogation, just as trial counsel deals with defense counsel, not the accused, after charges are referred to trial.[200]

The government must adhere to Article 27 and the burden imposed by *McOmber* is minimal. It is minimal, in large measure, because of how the military has established an elaborate defense counsel apparatus. Unlike the civilian sector, during any military criminal investigation, service members can consult with a military defense counsel whenever they wish and the services are always free.[201] On most military installations, there is an office that provides defense counsel services. Military investigators, most of whom will work on the same military installation as the suspect, know where the defense counsel work and the telephone number. Often, the investigators even know the defense counsel by name. Therefore, when a service member requests an attorney during an interrogation, the military investigator knows where the service member is going to seek counsel. It follows that if the military investigator wants to re-interrogate the service member and he knows the service member has retained a military defense counsel, then contacting the counsel to see if the service member would like to discuss the matter under investigation is easy.

As easy as it is for the government to adhere to *McOmber*, if the rule does not exist, then practically speaking, the service member's right to *effective* legal representation is severely hampered–the service member is exposed to "the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law" without the assistance of legal counsel.[202] Military investigators could ignore that a service member has retained legal counsel. Moreover, there could be a chilling effect on service members seeking the assistance of counsel. If a service member exercises his right to retain counsel but the military investigators can intentionally ignore the retained defense counsel, then the service member will have little or no confidence in the military defense bar. Even though an elaborate defense counsel apparatus exists, without *McOmber*, ultimately it is unable to help protect the service member. Worse yet, a service member will use the benefit of free counsel thinking he can deal with the military authorities through counsel; but absent *McOmber*, he cannot. Unfortunately, the right to free counsel a service member thinks he has by being in the military will be nothing more than an illusion.

Conclusion

When you, as the defense counsel, contacted the special agent to tell him that you would be representing Corporal Druggie on the drug allegations, you triggered *McOmber.* By calling Corporal Druggie into his office for a re-interrogation, the special agent had an obligation to contact you under *McOmber.* The special agent failed in his obligation. Therefore, on behalf of Corporal Druggie, your best authority to suppress the incriminating statement is *McOmber.* Your rationale is twofold. First, *McOmber* is still valid law. No court has overruled *McOmber*'s holding that a military attorney, once retained to represent a military suspect, must first be contacted by military investigators who have notice of such representation when they wish to question the suspect. Second, if the changed MRE 305(e) was designed to extinguish the rule in *McOmber*, the change is void because it violates Article 36. Under either rationale, *McOmber* still survives and the confession should be suppressed.

McOmber's obituary has yet to be written.

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200. United States v. Estep, 41 C.M.R. 201, 202 (C.M.A. 1970).

201. In the Army, the Marine Corps, and the Air Force these commands are called the Trial Defense Service; the Navy's command for defense counsel is the Naval Legal Services Command.

202. Kirby v. Illinois, 406 U.S. 682, 689 (1972).