The Armor: Recent Developments in Self-Incrimination Law

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Introduction

Put on the full armor of God so that you can take your stand against the devil's schemes.[1]

The original meaning of the term "chivalry" referred to the heavy cavalry of the Middle Ages, which constituted the most effective warlike force.[2] The knight, the professional soldier within the chivalry, used the lance and the sword as his principal weapons. Because his opponent used the same type of lethal weapon, the knight wore several items of body armor for protection. The armor consisted of a helmet, a shield, a breastplate, and a hauberk (a short tunic made of a mesh of interlinked metal rings).[3] Each piece of armor served a vital role in protecting the knight during battle. Without it, the knight became vulnerable to the enemy.

Like the knight's battle-armor, the law of self-incrimination contains several essential sources of protection. There is the helmet of the Sixth Amendment,[4] the shield of the Fifth Amendment,[5] the breastplate of Article 31,[6] and the hauberk of the voluntariness doctrine.[7] Each source serves a crucial role in protecting the privilege against self-incrimination.[8] When combined, these sources form the body of law referred to as the law of self-incrimination. During the 1999 term,[9] the military appellate courts decided self-incrimination issues that addressed nearly all of these important safeguards.

On the whole, the courts applied the recognized rule of law applicable to the protection. In some cases, however, the courts injected a subtle twist to a rule. Some decisions perpetuated an existing trend, and others indicated the emergence of a new development. In the end, this year produced no landmark decisions that directly redefined an aspect of self-incrimination law. This article discusses the recent cases that touch upon issues impacting most of the sources of self-incrimination protection.[10] In each area, this article briefly explains the relevant self-incrimination concepts, reviews the case or cases that touch upon the concept, and identifies any developing trends. This article will not discuss *all* the self-incrimination cases decided this term; rather, it will focus on the more significant cases. When reflecting on this term's self-incrimination cases, it becomes apparent that each source of protection provides a vital piece of the armor of self-incrimination law.

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1. *Ephesians* 6:24 (New International Version).

2. 11 THE WORLD BOOK ENCYLOPEDIA 348 (1997). The word *chivalry* comes from the Old French word *chevalerie,* meaning *horse soldiery.* The term eventually came to mean the code of behavior and ethics that knights were to follow.

3. *Id*. at 350.

4. U.S. CONST. amend. VI.

5. *Id*. amend. V.

6. UCMJ art. 31 (LEXIS 2000).

7. The voluntariness doctrine embraces the common law voluntariness, due process voluntariness, and Article 31(d). *See* Captain Frederic I. Lederer, *The Law of Confessions–The Voluntariness Doctrine*, 74 MIL. L. REV. 67 (1976) (detailing historical account of the voluntariness doctrine).

8. STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL § 3, at 121 (4th ed. 1997).

9. The 1999 term began 1 October 1998 and ended 30 September 1999.

10. All the sources of protection are addressed in this article except the Sixth Amendment. The Sixth Amendment guarantees an accused the right to counsel for his defense in all criminal prosecutions. Although an individual's exercise of his Sixth Amendment right may have the ancillary effect of invoking the privilege against self-incrimination, the trigger and scope are unique. Under the Sixth Amendment, a right to counsel is triggered by initiation of the adversarial criminal justice process. In the civilian sector, the trigger point is reached upon indictment. *See* McNeil v. Wisconsin, 501 U.S. 171 (1991). In the military, the Sixth Amendment right to counsel attaches upon preferral of charges. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 301(d)(1)(B) (1998) [hereinafter MCM]. Further, the protection is limited. It only applies to those offenses in which there are preferred charges. One of the many encounters the government may have with the accused post-preferral is an interrogation. When this occurs, the government must ensure the accused is afforded his Sixth Amendment right to counsel. This term presented no significant decisions pertaining to self-incrimination and the Sixth Amendment.

The Fifth Amendment

The most versatile piece of armor used by a knight was the shield. The shield not only provided added protection against the battle-ax and heavy battle hammer, but it also served as a stretcher in which the knight, or one of his fallen comrades, could be carried off the field when wounded.[11] Regardless of its use, the shield was vital to the knight's survival on the battlefield. Like the shield protects the knight, the Fifth Amendment provides essential protection against compelled incrimination.[12] In 1966, in *Miranda v. Arizona*,[13] the Supreme Court defined the protection when it held that prior to any custodial interrogation, the police must warn the suspect that he has a right to remain silent, to be informed that any statement made by the suspect may be used as evidence against him, and to the assistance of an attorney.[14] This Court-created warning requirement was intended to protect individuals against compelled confessions[15]—armor guaranteed by the Fifth Amendment. This year, in *United States v. Dickerson*,[16] the Fourth Circuit boldly challenged the *Miranda* decision when it determined that the admissibility of a confession in federal court should be assessed in light of a federal statute, 18 U.S.C. § 3501,[17] in lieu of the *Miranda* requirements. To appreciate *Dickerson*, one must understand the history behind the statute.

Congress enacted 18 U.S.C. § 3501 almost two years after the Supreme Court decided *Miranda*. At the time, Congress feared that the rigid mandates of *Miranda* would unfairly impede the government's ability to investigate criminal misconduct.[18] In response, Congress enacted 18 U.S.C. § 3501, a statute that adopts the voluntariness standard as the test to govern the admissibility of confessions introduced in federal courts. Under the statute, whether the police gave *Miranda* warnings is not determinative; rather, it is one factor to consider when deciding the admissibility of a confession.[19] Consequently, there could be a situation in which the police interrogate a suspect while in custody, fail to provide *Miranda* warnings, yet, based on the totality of the circumstances, obtain a voluntary confession that is admissible in court.

But why hasn't this statute consumed *Miranda*? The reason is because the Department of Justice (DOJ) believes that 18 U.S.C. § 3501 is an unconstitutional attempt by Congress to overrule *Miranda*.[20] For over thirty-three years, DOJ has refused to apply it. Despite efforts by the Supreme Court encouraging DOJ to argue the statute's validity, DOJ continues to ignore its legitimacy.[21] This year, with *Dickerson*, the Supreme Court will finally have the opportunity to either embrace or reject this statute.

In January 1997, the First Virginia Bank in Old Town, Alexandria, Virginia, was robbed.[22] A witness described the getaway car. The description matched the description of a car owned by Charles Dickerson.[23] Without providing *Miranda* warnings, Federal Bureau of Investigations agents questioned Mr. Dickerson concerning his whereabouts on the day of the robbery.[24] In response, Mr. Dickerson made several statements that implicated him in the robbery. At the district court, the trial judge suppressed the statements, finding they were made "while [Mr. Dickerson] was in police custody, in response to police interrogation, and without the necessary *Miranda* warnings."[25] Even though the court excluded the statements, it went on to find that the statements were voluntary and that the evidence found as a result of the statements was admissible.[26] The government appealed the decision to the Fourth Circuit.

The Fourth Circuit seemed anxious to address the issue of whether 18 U.S.C. § 3501 determined the admissibility of confessions in federal court vice *Miranda*.[27] First, the court determined that "the failure to deliver *Miranda* warnings is not itself a constitutional violation."[28] Then, the Fourth Circuit concluded that Congress possessed the authority to enact the statute.[29] In the end, the court of appeals found that "the admissibility of confessions in federal court is governed by 18 U.S.C.A. § 3501 (West 1985), rather than *Miranda*."[30] On 6 December 1999, the Supreme Court granted *certiorari* to decide the legality of 18 U.S.C. § 3501.[31]

If the Supreme Court affirms the *Dickerson* decision, then the federal statute will replace *Miranda* as the test to determine

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11. 11 THE WORLD BOOK ENCYLOPEDIA 348 (1997).

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

13. 348 U.S. 436 (1966). In *United States v. Tempia*, 37 C.M.R. 249 (C.M.A. 1967), the Court of Military Appeals applied *Miranda* to military interrogations.

14. *See Miranda*, 348 U.S. at 465. The Court found that in a custodial environment, police actions are inherently coercive, and therefore, police must give the suspect warnings concerning self-incrimination. The test for custody is an objective examination, from the perspective of the suspect, of whether there was a formal arrest or restraint or otherwise deprivation of freedom of action in any significant way. *Id.* at 444. *See also* Berkemer v. McCarty, 468 U.S. 420, 428 (1985); MCM, *supra* note 10, MIL. R. EVID. 305(d)(1)(A). The Supreme Court intended *Miranda* warnings 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). *Miranda*, 348 U.S. at 489. Unlike Article 31(b) warnings, the *Miranda* warnings do not require the interrogator to inform the suspect of the nature of the accusation, but *Miranda* confers a right to counsel.

15. For purposes of this article, the word "confession" includes both a confession and an admission. A confession is defined as "an acknowledgment of guilt." MCM, *supra* note 10, MIL. R. EVID. 304(c)(1). An admission is defined as "a self-incriminating statement falling short of an acknowledgment of guilt, even if it was intended by its maker to be exculpatory." *Id.* MIL. R. EVID. 304(c)(2). Military Rules of Evidence (MRE) 301-306 reflect a partial codification of the law of self-incrimination. There are no equivalent rules under the Federal Rules of Evidence.

16. 166 F.3d 677 (4th Cir. 1999), *cert. granted*, 120 S. Ct. 578 (1999).

17. 18 U.S.C.S. § 3501 (LEXIS 2000). Section 3501, titled, "Admissibility of confessions," states:

> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.
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> (b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession. The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.
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> (c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate [magistrate judge] or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: Provided, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.
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> (d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.
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> (e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

Id.

18. *Dickerson*, 166 F.3d at 690.

19. *See* 18 U.S.C.S. § 3501.

20. *Dickerson*, 166 F.3d at 682 n.16.

21. *Id.* at 681 (citing Davis v. United States, 512 U.S. 452 (1994)). In *Davis*, Justice Scalia, in a concurring opinion stated, "The United States' repeated refusal to invoke § 3501, combined with the courts' traditional (albeit merely prudential) refusal to consider arguments not raised, has caused the federal judiciary to confront a host of 'Miranda' issues that might be entirely irrelevant under federal law." *Davis*, 512 U.S. at 465.

22. *Dickerson*, 166 F.3d at 673. The amount stolen was $876.

23. *Id.*

24. *Id.*

25. *Id.* at 675.

26. *Id.* at 676.

27. *Id.* at 680. Paul Cassell, Professor, College of Law, University of Utah, brought the issue before the Fourth Circuit with an *amicus curiae* brief. The DOJ prohibited the United States Attorney's Office from supporting the federal statute. *Id.* at 681. *See* Terry Carter, *The Man Who Would Undo Miranda*, A.B.A. J. 44 (Mar. 2000).

28. *Dickerson*, 166 F.3d at 691.

29. *Id.* at 692.

30. *Id.* at 695. As the district court already determined that Mr. Dickerson's statements were voluntary, the Fourth Circuit did not order a further fact-finding inquiry.

31. Dickerson v. United States, 120 S. Ct. 578 (1999).

the admissibility of confessions in federal courts. Since the military courts are federal courts, 18 U.S.C. § 3501 would apply to the military.[32] Affirming *Dickerson* would have no immediate impact on the military, however. The President, through Military Rule of Evidence 305(d)(1)(A),[33] expressly made *Miranda* applicable to the military. As such, the additional protections under *Miranda* would remain a part of our system until the President says otherwise.

Miranda is not the only element of the Fifth Amendment breastplate; *Edwards v. Arizona*[34] is also an integral part of the armor. In *Edwards*, the Supreme Court created a second layer of protection for a person undergoing a custodial interrogation.[35] If a suspect invokes his right to counsel in response to *Miranda* warnings, not only must the questioning cease, but the police cannot obtain a valid waiver of that right until counsel has been made available or the suspect initiates further communication with the police.[36] This rule is known as the *Edwards* rule.[37]

What happens after the invocation will dictate how the government can satisfy the *Edwards* rule so police can reinitiate the interrogation? If the suspect remains in continuous custody after an invocation of counsel, counsel must be present before the police can reinitiate an interrogation.[38] If, however, the government releases the suspect from custody, and during the release the suspect has a "real opportunity to seek legal advice," then the police can reinitiate the interrogation.[39] *United States v. Mitchell*[40] and *United States v. Mosley*[41] are two recent cases in which the military courts scrutinize the government's actions to determine if it satisfied the *Edwards* rule.

The *Mitchell* case presents a scenario in which the accused invoked his Fifth Amendment right to counsel, then remained in custody. Revenge drove the accused to shoot his shipmate after a drunken night in Key West, Florida.[42] Soon after the shooting, the accused was arrested and detained, pending transportation to a confinement facility in Jacksonville, Florida. Concurrent with the arrest, the accused was advised of his rights under Article 31(b) and *Miranda*.[43] The accused requested counsel, and all questioning stopped.[44] The next day, while still in custody, members of the accused's command visited him. One of the visitors was Aviation Ordnanceman Chief (AOC) Grabiel, the leading Chief Petty Officer in the accused's direct chain of command.[45] While alone with the accused, AOC Grabiel asked him, "Was it worth it?"[46] The accused

32. *Cf.* Noyd v. Bond, 395 U.S. 683 (1969) (holding that the All Writs Act, 28 U.S.C. § 1651, a federal statute, applies to military courts); United States v. Dowty, 48 M.J. 102 (1998) (concluding that the Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422, a federal statute, applies to members of the armed forces). *But see* United States v. Longstreath, 45 M.J. 366 (1996) (equivocating on whether the Child Victims' and Child Witnesses' Rights Act applies to the military). Any application of 18 U.S.C. § 3501 to the military would have to be in accordance with Article 31. *See* UCMJ art. 31 (LEXIS 2000).

33. MCM, *supra* note 10, MIL. R. EVID. 305(d)(1)(A). This rule requires that the suspect be informed of his right to counsel when "[t]he interrogation is conducted by a person subject to the code . . . and the . . . suspect is in custody, or reasonably believe himself or herself to be in custody, or is otherwise deprived of his or her freedom of action in any significant way." *Id.*

34. 451 U.S. 477 (1981).

35. *See* Miranda v. Arizona, 384 U.S. 435 (1966). *Miranda* provides the first layer of protection.

36. McNeil v. Wisconsin, 501 U.S. 171, 177 (1991). *See* MCM, *supra* note 10, MIL. R. EVID. 305 (d)-(g).

37. *Edwards*, 451 U.S. at 484. It is important to note that the *Edwards* rule is not offense specific. *See* Arizona v. Roberson, 486 U.S. 675 (1988).

38. *McNeil*, 501 U.S. at 177; Minnick v. Mississippi, 498 U.S. 146 (1990).

39. *See* United States v. Young, 49 M.J. 265 (1998) (re-interrogating the accused after a two-day break in custody satisfied the *Edwards* rule); United States v. Faisca, 46 M.J. 276 (1997) (re-interrogating the accused after a six month break in custody was permissible); United States v. Vaughters, 44 M.J. 377 (1996) (re-interrogating the accused after being released from custody for nineteen days provided a meaningful opportunity to consult with counsel); United States v. Schake, 30 M.J. 314 (C.M.A. 1990) (re-interrogating the accused after a six day break in custody, provided a real opportunity to seek legal advice).

40. 51 M.J. 234 (1999).

41. 52 M.J. 679 (Army Ct. Crim. App. 2000). Although a case decided in the 2000 term, it is relevant and timely to the discussion of counsel availability rules presented in this article.

42. *Mitchell*, 51 M.J. at 235. The accused was upset that his shipmate hit him earlier in the evening while they fought in an alley.

43. *Id.*

44. *Id.*

45. *Id.* at 238.

46. *Id.* at 236. Evidence presented during the motion session indicated that AOC Gabriel knew the accused requested a lawyer. This fact, however, carries little weight in an *Edwards* violation determination because knowledge of a Fifth Amendment counsel invocation is imputed to all government agents. *See* Minnick v. Mississippi, 498 U.S. 146 (1990); Arizona v. Roberson, 486 U.S. 675 (1988).

responded, "The way I was raised, it was an eye for an eye. He left me in the alley."[47] At trial, the accused moved to suppress this statement.

The accused's position was that AOC Grabiel interrogated him after he invoked his right to counsel and while he remained in continuous custody.[48] This action on the part of a government agent violated the protections afforded him under *Edwards*. Therefore, the accused argued that his statement should be suppressed. The government's position was that the reason AOC Grabiel asked the question was to satisfy his personal curiosity, and not for a disciplinary or law enforcement purpose.[49] The military judge agreed with the government and denied the accused's motion. Applying the same rationale, the Navy-Marine Corps Court of Criminal Appeals, in an unpublished opinion, upheld the military judge's decision.[50] The Court of Appeals for the Armed Forces (CAAF) disagreed.

In reaching its decision to reverse the service court and set aside the findings and sentence, the CAAF accurately defined the issue as a Fifth Amendment counsel invocation question.[51] Accordingly, the court focused on the appropriate test—was the questioning part of a custodial interrogation. If it was, under *Edwards*, counsel would have to be present for the post-invocation questioning by AOC Grabiel?[52] The government argued that AOC Grabiel's questioning of the accused "was not [a] police interrogation as prohibited by *Miranda* and *Edwards*."[53] Clearly, AOC Grabiel was a non-police government agent. Regardless, the CAAF looked to the "totality of the circumstances to determine whether impermissive coercion . . . occurred or continued."[54] Applying this standard, the court determined that, under the facts of the case, "the 'inherently compelling pressures' of the initial interrogation continued to exist" during the meeting with AOC Grabiel.[55] As such, the military judge committed error in denying the accused's motion to suppress his statement to AOC Grabiel.[56]

In a strong dissent, Judge Crawford opined that the purpose of AOC Grabiel's questioning should control the analysis.[57] Based on her review of the case, AOC Grabiel questioned the accused to satisfy his personal curiosity, and not for a law enforcement or disciplinary purpose. The "purpose of the questioning" analysis is an Article 31(b) element.[58] Judge Crawford recognized this, but stated that "the purposes served by Article 31 and the *Edwards* prophylactic rule are the same, and their inquires should be as well."[59] To the majority's credit, it did not blend Article 31(b) concepts with the Fifth Amendment analysis. The court stayed in the Fifth Amendment lane of analysis and applied the applicable test to determine if the government violated the *Edwards* rule.

Mitchell reveals two important points. First, when addressing a self-incrimination issue, one must identify the applicable protection or protections involved, then apply the relevant law when analyzing each protection. Failing to categorize the analysis will result in confusion and misapplication of self-incrimination law. Second, *Mitchell* illustrates that our unique military environment can easily create circumstances where non-police government agents, like AOC Grabiel, can impact Fifth Amendment protections. Generally, *Mitchell* is a good reference when the accused requests an attorney as part of a custodial interrogation, remains in custody, then faces another interrogation.

United States v. Mosley[60] addresses a somewhat different scenario–a situation whereby the accused invokes his Fifth

47. *Mitchell*, 51 M.J. at 236.

48. *Id.* at 237.

49. *Id.*

50. *Id.* at 235.

51. *Id.* at 238.

52. *Id*. at 237. *See supra* notes 33 and 38 and accompanying text.

53. *Mitchell*, 51 M.J. at 238.

54. *Id.*

55. *Id.* at 240 (quoting United States v. Brabant, 29 M.J. 259, 263 (C.M.A. 1985)). In brief, the factors the court relied on in reaching its decision were the chain of command relationship between the accused and AOC Grabiel; the location of the meeting (a jail cell); and AOC Grabiel's knowledge of the misconduct. *Id.* at 239.

56. *Id.*

57. *Id.* at 246.

58. *Id.* at 244. *See infra* notes 100-137, and accompanying text for a discussion of Article 31(b).

59. *Mitchell*, 51 M.J. at 244.

60. 52 M.J. 679 (Army Ct. Crim. App. 2000).

Amendment right to counsel, is released from custody then encounters another interrogation. While investigating a series of seemingly unrelated barracks larcenies, Criminal Investigative Command (CID) investigators interrogated the accused in *Mosley.* During the questioning, the accused invoked his right to silence and his Fifth Amendment right to counsel.[61] The investigators released the accused from custody. Twenty hours later, two other CID agents, investigating another barracks larceny, questioned the accused as a suspect. This time, the accused waived his rights and made several incriminating statements.[62] At trial, the defense moved to suppress the statements, but the military judge denied the challenge.[63]

On appeal before the Army court, the accused again challenged the admissibility of his statements. The accused argued that CID violated the *Edwards* rule. Specifically, the accused opined that once he invoked his Fifth Amendment right to counsel during the initial interrogation, under *Edwards*, CID was prohibited from any further questioning until counsel was made available.[64] The twenty-hour break in custody was insufficient to satisfy this requirement.[65] Therefore, the military judge erred in denying his suppression motion. The Army court held otherwise. Looking at the totality of the circumstances, the Army court found that the twenty-hour break in custody afforded the accused a reasonable and real opportunity to consult with counsel.[66]

Besides shortening the required length of the break in custody,[67] *Mosley* gives practitioners clear guidance on how to address an *Edwards* challenge when there is a break in custody between the counsel invocation and a subsequent interrogation. First, the prosecution has the burden to prove, by a preponderance of the evidence, that there was a break in custody.[68] The prosecution must show that, based on the totality of the circumstances, the break in custody was not "contrived or pretextual," but was reasonable.[69] "In sum, it is a test of the quality of, rather than the quantity of, the break in custody time."[70] If the government meets this burden, then there is a presumption that during the break in custody, the accused had a reasonable or real opportunity to seek counsel.[71] The defense must overcome this presumption by presenting evidence that demonstrates "that even thought there was a break in custody, such break in custody was not a reasonable period to obtain counsel under the totality of the circumstances."[72] In *Mosley*, the Army court provides welcome clarity to an area of self-incrimination law that lacked specificity.[73]

An important aspect of the Fifth Amendment counsel invocation that cannot be overlooked is the manner in which the suspect attempts to invoke this right. The stage of the interrogation will determine the clarity with which the suspect must request counsel. During the initial waiver stage, the interrogator must seek clarification of an ambiguous request for counsel.[74] However, the Supreme Court announced in *Davis v. United States*[75]

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61. *Id.* at 681. Initially, CID suspected the accused in one of the larcenies, which led to the interrogation. The CID investigators interrogated the accused in a custodial setting. Therefore, before questioning him, they advised him of his rights under Article 31(b) and *Miranda. Id.*

62. *Id.* at 682.

63. *Id.* at 683. Once the military judge denied the defense motion to suppress the statements, the accused entered a "conditional guilty plea and providently pled to the offenses." *Id.*

64. *Id.* at 684.

65. *Id.*

66. *Id.* at 686.

67. *See supra* note 39 and accompanying text.

68. *Mosley*, 52 M.J. at 683.

69. *Id. See also* MCM, *supra* note 10, MIL. R. EVID. 305(g)(2)(B)(ii). This rule states that prosecution must "demonstrate by a preponderance of the evidence that– (ii) the accused or suspect has not continuously had his or her freedom restricted by confinement, or other means, during the period between the request for counsel and the subsequent waiver." *Id.*

70. *Mosley*, 52 M.J. at 685.

71. *Id.*

72. *Id.*

73. *See* Major Martin H. Sitler, *Silence is Golden: Recent Developments in Self-Incrimination Law*, ARMY LAW., May 1999, at 48.

74. MCM, *supra* note 10, MIL. R. EVID. 305(g)(1). This rule states: "The waiver must be made freely, knowingly, and intelligently. A written waiver is not required. The accused . . . must acknowledge affirmatively that he . . . understands the rights involved affirmatively decline the right to counsel and affirmatively consent to making a statement." *Id.*

75. 512 U.S. 452 (1994).

that, once the suspect 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* protection.[76] In two cases this year, *United States v. Henderson*[77] and *United States v. Ford*,[78] the CAAF applied the ambiguous request for counsel rule. Taken together, these cases illustrate the CAAF's broadening of this very narrow concept.

In *Henderson*, the German police apprehended the accused as a suspect in a stabbing.[79] While in custody, the German police advised the accused of his rights (under both German law and *Miranda*/Article 31(b)), obtained a waiver, and interrogated the accused.[80] The accused denied any involvement in the stabbing and eventually asked to continue the interview in the morning. The German police immediately stopped the questioning. Shortly thereafter, while the accused remained in custody, the CID observer, who was present during the initial interview, spoke to the accused in private.[81] He emphasized the importance of telling the truth and that the accused had "nothing to worry about."[82] The accused indicated he wanted to "tell the truth," but wanted to talk to a lawyer.[83] Eventually, the accused agreed to make a statement to the CID agents and talk to a lawyer in the morning. During the interrogation, the accused admitted to stabbing one of the victims.[84] At trial, the military judge denied the accused's motion to suppress the confession.

Citing *Davis*, the CAAF held that the accused's request to talk to a lawyer in the morning was an ambiguous request for counsel and did not invoke the protections of *Miranda* and *Edwards*.[85] Accordingly, the court found that the military judge did not err in admitting the accused's confession. In reaching its decision, the CAAF stated that it was "not convinced that *Edwards* applies in a situation involving [an] interrogation conducted by a foreign Government."[86] If so, the Fifth Amendment analysis would begin with the CID interview, and the initial waiver of rights to the German police would be of little value. If the interview with the German police was removed from the analysis, then the CAAF applied the ambiguous request for counsel rule to the initial waiver phase of the CID interrogation with the accused. When closely scrutinized, one could posit that *Henderson* supports an argument that the ambiguous request for counsel rule applies to the initial waiver stage of the interrogation. However, this position is contrary to the Supreme Court's holding in *Davis*.[87] Having a valid initial waiver is a prerequisite to the ambiguous request for counsel rule.[88] Without it, the rule does not apply.

Another interesting facet of *Henderson* is how the CAAF summarized its findings. The court stated that "[t]he record . . . shows no unequivocal assertion by [the accused] of his right to counsel *or silence*, which is required to invoke the *Miranda–Edwards* bright-line rule against further police interrogation or its functional equivalent."[89] As authority for this proposition, the CAAF cites *Davis*. As mentioned above, *Davis* is an invo-

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

77. 52 M.J. 14 (1999).

78. 51 M.J. 445 (1999).

79. *Henderson*, 52 M.J. at 16.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 17.

85. *Id.* at 18.

86. *Id.*

87. Davis v. United States, 512 U.S. 452, 461 (1994). In *Davis*, the Supreme Court stated that:

> A suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with the police unassisted. Although *Edwards* provides an additional protection–if a suspect subsequently requests an attorney, questioning must cease–it is one that must be affirmatively invoked by the suspect.

Id.

88. *Id.*

89. *Henderson*, 52 M.J. at 18 (emphasis added).

cation of counsel case, not an invocation of silence case.[90] Again, the CAAF seems to unintentionally expand the application of the ambiguous request for counsel rule.

In *United States v. Ford*,[91] the CAAF addressed the same issue, but with a slightly different set of facts. During a barracks inspection, members of the accused's command found an explosive device in his room.[92] Without giving warnings, an investigator questioned the accused at the barracks. When the accused "asked to have a lawyer present, or to talk to a lawyer," the investigator stopped the questioning.[93] The investigator transported the accused to the CID office and, after obtaining a waiver of rights, questioned the accused again.[94] The accused eventually gave a written confession. During the interview, however, the accused said that he did not want to talk and thought he should get a lawyer.[95] The investigator sought clarification and the accused responded that he wanted a lawyer if the investigator continued accusing him of lying.[96] After further clarification, the accused agreed to continue with the questioning.

Relying on the military judge's findings, the CAAF found that the accused did not invoke his Fifth Amendment right to counsel during the questioning at the barracks.[97] Further, the court held that the accused's comment about a lawyer during the CID office interrogation was an ambiguous request for a lawyer and did not invoke the *Miranda* or *Edwards* protections.[98] The test the court used to determine ambiguity was whether the request for counsel was "sufficiently clear that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney."[99] In *Ford*, the CAAF found the confession admissible.

In both *Henderson* and *Ford*, the CAAF relies on the ambiguous request for counsel rule to ratify the government's actions and affirm the admissibility of confessions. In doing so, at least in *Henderson*, the court arguably pushes the boundaries of the rule by hinting that it may apply to the initial waiver stage of the interrogation and to ambiguous silence invocations.

Article 31(b), Uniform Code of Military Justice (UCMJ)

The breastplate, a form-fitted steel plate that covers the chest and abdomen, protects the knight's most vital organ from attack—the heart.[100] Similarly, Article 31(b) provides the breastplate protection to guard against compelled confessions– a protection unique to the military.[101]

Since 1950, the military has enjoyed the safeguards of Article 31(b).[102] Based on the plain reading of the text, and its legislative history, Congress enacted Article 31(b) to dispel a servicemember's inherent compulsion to respond to questioning from a superior in rank or position.[103] Currently, the protections under Article 31(b) are triggered when a person who is subject to UCMJ, acting in an official capacity, and perceived as such by the suspect or accused, questions the suspect or accused for law enforcement or disciplinary purposes.[104] The

90. *Davis*, 512 U.S. at 461.

91. 51 M.J. 445 (1999).

92. *Id*. at 447.

93. *Id.*

94. *Id.* at 448.

95. *Id.*

96. *Id.* at 449.

97. *Id.* at 451. As the CAAF agreed with military judge that the accused did not invoke his right to counsel at the barracks, the court did not have to determine if the subsequent interrogation at the CID office violated *Edwards*.

98. *Id.* at 452.

99. *Id.*

100. 11 THE WORLD BOOK ENCYLOPEDIA 348 (1997).

101. *See* UCMJ art. 31(b) (LEXIS 2000). Article 31(b) states:

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

Id.

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

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

courts addressed two crucial concepts of the trigger this year: what is the requisite purpose of the questioning, and when is a person a suspect.

United States v. Bradley[105] is a case that focused on the purpose of the questioning. In early Article 31(b) jurisprudence, the analysis centered on the perception of the person being questioned, that is, the suspect or the accused, and whether he felt compelled to talk.[106] As the case law evolved, 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*[107] and *United States v. Loukas*,[108] and continues in the *Bradley* case.

The accused in *Bradley*, a cryptic linguist specialist (a specialty that requires a high-level security clearance), was suspected of raping a female member of his unit.[109] The accused's acting commanding officer (CO) learned of the allegation and the ongoing police investigation. He also knew that the police were going to question the accused about the rape.[110] Before the questioning occurred, the CO told the accused to contact him after the police finished their interrogation. The accused complied. After the accused spoke to the police, he called his CO. During the phone conversation, the CO asked the accused, "What happened?"[111] The accused responded, "I admitted to touching her without her consent."[112] The reason the CO gave for asking this question was "to inquire whether [the accused] had been arrested, charged, or accused of criminal conduct in order to determine whether [the accused's] security clearance required termination."[113]

At trial, the accused moved to suppress his statement made to the CO.[114] The military judge ruled that the question by the CO was not an interrogation, and denied the accused's motion.[115] The service court affirmed the military judge's decision.[116] The CAAF agreed, but for a different reason.

The CAAF did not determine whether the question by the CO was an interrogation; rather, the court focused on the purpose of the questioning to determine if it was for a law enforcement or disciplinary reason. First, the court acknowledged that there is a presumption that "a superior in the immediate chain of command is acting in an investigatory or disciplinary role" when questioning a subordinate about misconduct.[117] Next, the court recognized an "administrative and operational exception" that overcomes this presumption.[118] The CAAF determined

104. *See* UCMJ art. 31(b). *See also* United States v. Rogers, 47 M.J. 135 (1997) (holding that informing a suspect that he will be questioned about sexual assault includes the offense of rape). *See generally*, McGillian, *supra* note 103, at 1. Once triggered, the questioner must, as a matter of law, give the suspect or accused three warnings. These warnings are: (1) the nature of the misconduct that is the subject of the questioning, (2) the privilege to remain silent, and (3) that any statement made may be used as evidence against him.

105. 51 M.J. 437 (1999).

106. *Miranda* focuses on the environment of the questioning. If a custodial setting exists and there is going to be an interrogation, then *Miranda* warnings are required. Miranda v. Arizona, 384 U.S. 435, 436 (1966). Custody is determined from the perspective of the suspect. Would a reasonable person, similarly situated believe his freedom was significantly deprived. *See* MCM, *supra* note 10, MIL. R. EVID. 305(d)(1)(A); Stansbury v. California, 511 U.S. 318 (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.

107. 10 M.J. 206 (C.M.A. 1981). In *Duga*, The Court of Military Appeals determined that Article 31(b) only applies to situations in which, because of military rank, duty, or other similar relationship, there might be subtle pressure on a suspect to respond to an inquiry. As a result, the court set forth a two pronged test, the "*Duga* test," to determine whether the person asking the questions qualifies as a person who should provide Article 31(b) warnings. The *Duga* test is (1) was the questioner subject to the UCMJ acting in an official capacity in the inquiry, and (2) did the person questioned perceive the inquiry involved more than a casual conversation. If both prongs are satisfied, then 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 who 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 (6th ed. 1990).

108. 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. *See* 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.

109. *Bradley*, 51 M.J. at 439.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 440.

that the question by the CO fell within the administrative and operational exception. In particular, the court found that "the purpose of [the CO's] question was to determine whether charges were filed because that action would necessitate suspension of [the accused's] high-level security clearance," and not for a criminal investigation.[119] For that reason, the CAAF concluded that Article 31(b) rights were not required.[120]

The *Bradley* decision fits nicely into the trend of the CAAF's Article 31(b) jurisprudence.[121] Based on *Bradley*, in order for Article 31(b) to apply, the *primary purpose* of the questioning must be for law-enforcement or disciplinary reasons. Trial counsel should add *Bradley* to their expanding arsenal of cases that narrow the scope and application of Article 31(b).[122] Defense counsel should attempt to limit the holding in *Bradley* to the facts of the case.

The other Article 31(b) issue addressed this year was the test for determining when a person becomes a suspect. As mentioned above, a part of the Article 31(b) trigger is the condition that the person being questioned be a suspect or an accused.[123] Defining an accused is easy. An accused is a person against whom the government prefers charges.[124] Defining a suspect, however, is not as simple. In *United States v. Muirhead*,[125] the CAAF attempted to clarify this determination.

A general court-martial convicted the accused in *Muirhead* of sexually assaulting his six-year-old stepdaughter.[126] During the investigation phase, agents conducted a permissive search of the accused's house. During the search, the accused made statements about events that happened before and after the assault of his stepdaughter.[127] At trial, over defense objection, the prosecutor used these statements to provide a motive for committing the abuse.[128] The defense argued that when the agents questioned the accused during the permissive search, he was a suspect and therefore should have been informed of his rights under Article 31(b). The military judge ruled otherwise.[129]

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115. *Id.* The legal definition for an interrogation "includes any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning." MCM, *supra* note 10, MIL. R. EVID. 305(b)(2). The test is applied not from the perspective of the suspect, but rather from the interrogator's perspective, that is, did the police officer know or should he have known that his comments or actions were reasonably likely to invoke an incriminating response from the suspect. *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. *See also* United States v. Ruiz, 50 M.J. 518 (A.F. Ct. Crim. App. 1999) (holding that an Army-Air Force Exchange Service (AAFES) store detective's comment, "There seems to be some AAFES merchandise that hasn't been paid for," directed to a suspected shoplifter was not an interrogation).

116. *Bradley*, 51 M.J. at 441.

117. *Id.*

118. *Id.*

119. *Id.* at 441.

120. *Id.* at 442.

121. *See* United States v. Payne, 47 M.J. 37 (1997) (finding that Article 31(b) did not apply to questioning by agents from Defense Investigative Service); United States v. Moses, 45 M.J. 132 (1996) (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) (questioning a witness 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 not required); United States v. Bowerman, 39 M.J. 219 (C.M.A. 1994) (treating physician was not required to give Article 31(b) warnings to 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) (questioning motivated by personal curiosity does not trigger Article 31(b) warnings); United States v. Jones, 24 M.J. 367 (C.M.A. 1987) (questioning the accused for personal reasons does not trigger Article 31(b) warnings); United States v. Tanksley, 50 M.J. 609 (N.M. Ct. Crim. App. 1999) (holding that Naval Criminal Investigative Service agents were not acting for a law enforcement or disciplinary purpose when they questioned the accused as part of a security clearance investigation; therefore, Article 31(b) warnings were not required). *See* Major Walter M. Hudson, *The Fourth Amendment and Urinalysis: Facts (and More Facts) Make Cases*, ARMY LAW., May 2000, at 17, for a detailed discussion of the facts in *Tanksley.*

122. Aside from the result that Article 31(b) was not triggered, the common thread in *Payne*, *Bradley*, and *Tanksley* is that they all involve security clearance questioning. *See supra* note 121 and accompanying text.

123. UCMJ art 31(b) (LEXIS 2000). *See also supra* note 107 and accompanying text.

124. *See* BLACK'S LAW DICTIONARY 21 (6th ed. 1990).

125. 51 M.J. 94 (1999).

126. *Id.* at 95.

127. *Id.* at 96.

128. United States v. Muirhead, 48 M.J. 527, 536 (N.M. Ct. Crim. App. 1998). The motive proposed by the prosecutor was that the accused abused his stepdaughter to get even with his wife, whom he suspected of having an extra-marital affair. *Id.*

On appeal before the service court, the Navy-Marine Corps court addressed the issue of whether the accused was a suspect, and therefore should have been given Article 31(b) warnings. In a *de novo* review, the court held that the accused was not a suspect.[130] In reaching its decision, the court correctly defined the requisite suspicion for purposes of Article 31(b) as a suspicion that "has crystallized to such an extent that a general accusation of some recognizable crime can be framed."[131] Armed with this definition, the court found that the accused was not a suspect at the time of the questioning. In reaching this decision, the court placed great weight on the subjective beliefs of the agents.[132]

The CAAF disagreed with the service court's conclusion.[133] In doing so, the court emphasized that the determination of whether a person is a suspect is an objective test: "whether a reasonable person would consider someone to be a suspect under the totality of the circumstances."[134] The CAAF felt that the service court relied too "heavily on the fact that both . . . agents testified they did not consider [the accused] to be a suspect."[135] A review of the record by the CAAF led it to conclude that "a reasonable person under the circumstances would have considered [the accused] a suspect, requiring a rights' advisement pursuant to Article 31."[136]

The CAAF's decision in *Muirhead*, stressed that although the subjective views of the interrogator may be relevant, they carry little value when determining if a person is not a suspect.[137] To answer this question, one must look to the surrounding circumstances. It is important, therefore, for counsel not to base their positions on the beliefs of the investigators, but rather look to the surrounding facts to support their arguments.

The Voluntariness Doctrine

The hauberk provided the knight with the most comprehensive form of protection. It was a short tunic or shirt made of a mesh of linked chain.[138] It covered the knight's upper body and proved extremely effective against glancing blows from the enemy's swords and spears. By analogy, the voluntariness doctrine of self-incrimination provides a similar protection. This doctrine serves as a blanket protection that safeguard's against coerced confessions. The concept of voluntariness entails elements of the common law voluntariness doctrine, due process, and compliance with Article 31(b).[139] Regardless of whether *Miranda* or Article 31(b) is implicated, a confession must be voluntary to be valid; thus, a confession deemed coerced must be suppressed despite a validly obtained waiver in the first instance.[140] Generally, when determining whether a confession is voluntary, it is necessary to look to the totality of the circumstance to decide if the accused's will was overborne.[141] This term, in *United States v. Griffin*,[142] the CAAF reaffirmed the voluntariness test.

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129. *Muirhead*, 51 M.J. at 97.

130. *Murihead*, 48 M.J. at 537.

131. *Id.* at 536 (citing United States v. Haskins, 29 C.M.R. 181 (1960)). The court makes clear that a mere hunch of criminal activity is not enough to satisfy the definition of a suspect under Article 31(b).

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

133. *Muirhead*, 51 M.J. at 98. The CAAF found that the error in admitting the confession materially prejudiced the accused. The court, therefore, reversed the service court's decision, and set aside the findings and sentence. *Id.*

134. *Id.* at 96.

135. *Id.* at 97.

136. *Id.* In reaching it's decision, the CAAF considered the facts that the emergency room physician suspected sexual abuse and told the agents of his suspicions, the mother's whereabouts was unknown, and the agents searched the accused's house at 0250 hours, which was less than two hours after the physician completed his examination of the step-daughter.

137. *Id.* at 96. In some cases, the subjective beliefs of the investigator may be appropriate to consider when the investigator, in fact, believed that the person was a suspect.

138. 11 THE WORLD BOOK ENCYLOPEDIA 350 (1997).

139. Lederer, *supra* note 7, at 68. *See* UCMJ art 31(d) (LEXIS 2000). Article 31(d) states: "No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trail by court-martial." The Analysis to MRE 304 (c)(2) lists examples of involuntary statements as those resulting from: inflection of bodily harm; threats of bodily harm; imposition of confinement or deprivation of privileges; promises of immunity or clemency; and promises of reward or benefit. MCM, *supra* note 10, MIL. R. EVID. 304(c)(3) analysis, app. 22, at A22-10.

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

In 1991, the Air Force Office of Special Investigations (OSI) investigated Staff Sergeant Griffin, the accused, for possible indecent acts with his two-year old daughter.[143] Due to a lack of evidence, OSI closed the investigation. Several years later, the accused requested to update his security clearance. This involved a security investigation by the Defense Investigative Service (DIS).[144] As part of the investigation, DIS questioned the accused about the prior allegation of indecent acts. During the questioning, the accused admitted "that his daughter had touched his erect penis in the bathroom on the occasion witnessed by his wife."[145]

The defense's theory at trial was that the confession made to DIS was a coerced false confession. To support this theory, the defense proffered an expert in the area of psychology to opine that the accused was a compliant person and susceptible to suggestiveness.[146] The prosecution challenged the admissibility of this testimony. The military judge excluded the defense expert's testimony.[147] The service court upheld the military judge's ruling.[148]

On appeal before the CAAF, the accused argued that the military judge abused his discretion when he excluded the expert's testimony.[149] The court agreed with the accused that the government has the burden to show, by a preponderance of the evidence, that the confession is voluntary.[150] Further, the court acknowledged that "[t]he voluntariness of a confession is determined by examining the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation."[151] If reliable, the expert's testimony would possibly be relevant regarding the characteristics of the accused. In the end, the CAAF agreed with the military judge. The false confession expert testimony was of questionable reliability and relevance in determining whether the accused's confession was involuntary.[152]

Although not a pivotal decision that alters the voluntariness analysis, the *Griffin* case illustrates a situation in which the defense challenges the admissibility of a confession despite adherence to the procedural safeguards of Article 31(b) and *Miranda.* More importantly, *Griffin* offers reassurance that the voluntariness doctrine stands at the ready to serve as a safeguard. This case also highlights the importance of developing facts from the surrounding circumstances that support your position. Defense counsel should always consider the voluntariness doctrine as a possible theory to challenge the admissibility of a confession, even when the government satisfies the procedural protections of self-incrimination law.[153]

Miscellaneous

This section examines two self-incrimination cases that address procedural considerations vital to the admissibility of confession. Although not part of the exterior armor of self-incrimination law, the procedural requisites nonetheless supply an important safeguard. The first case, *United States v. Jones*,[154] defined what is required to have standing to challenge

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

142. 50 M.J. 278 (1999).

143. *Id.* at 279. The accused's wife initiated the investigation after she discovered that he was letting their two-year old daughter fondle his genitals.

144. *Id.*

145. *Id.* The questioning was done as part of a polygraph. Prior to the questioning, the accused waived his rights under Article 31(b).

146. *Id.* at 282.

147. *Id.* The military judge determined that the expert's testimony was not logically or legally relevant under the Supreme Court's analysis in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *See* MCM, *supra* note 10, MIL. R. EVID. 401, 403.

148. *Griffin*, 50 M.J. at 278.

149. *Id.* at 284.

150. *Id.*; *see* MCM, *supra* note 10, MIL. R. EVID. 304(e).

151. *Griffin*, 50 M.J. at 284.

152. *Id.* In affirming the service court's decision, the court found that the basis of the expert's testimony was too speculative, and his testimony "shed little light on the question of whether [the accused] was coerced to confess." *Id.* at 285.

153. *See* United States v. Campos, 48 M.J. 203 (1998) (holding that the accused's confession was voluntary despite the accused being medicated). In *Campos*, Judge Sullivan, the author of the opinion, emphasizes that there are alternate theories to challenge the voluntariness of a confession. Not only should counsel consider challenging the voluntariness of the confession, but counsel should also consider a challenge to the validity of the waiver. A failure to specify the challenge may waive the issue. *Id.* at 207.

154. 52 M.J. 60 (1999).

a confession, and the second case, *United States v. Hall*,[155] examined the scope of the corroboration rule.

In *Jones*, the accused was part of a conspiracy to submit false claims to the local finance office.[156] The government made an agreement with three of the co-conspirators (the minor offenders) so they would make statements implicating the accused.[157] The government agreed to dispose of their cases with nonjudicial punishment if they would testify against the accused.[158] The co-consipirators were under the impression that the government would eventually issue them formal grants of immunity for their testimony.[159] The co-actors received nonjudicial punishment, during which they admitted to their involvement in the conspiracy. The government, however, never issued the immunity. As a result, when it came time for them to testify at the Article 32 investigation, the co-conspirators invoked their right to silence and did not testify.[160] The government informed the three co-conspirators that, if they did not testify, it would consider court-martial action against them.[161] They agreed to testify.

At trial, the accused moved to prevent the co-conspirators from testifying, arguing that the actions of the government in dealing with the three were unlawful command actions that violated their self-incrimination protections, which resulted in a violation of due process.[162] The military judge "declined to make a final ruling unless [the co-actors] were prosecuted."[163] In the end, the three testified against the accused.[164]

The court of criminal appeals affirmed the findings and sentence, and the CAAF agreed.[165] The first issue the CAAF addressed was whether the accused had standing to challenge the self-incrimination violations against the three co-conspirators.[166] Relying on the Military Rules of Evidence and case law, the court concluded that the accused did not have standing to object to the testimony of the witnesses.[167] The court found that, if any self-incrimination violations occurred, the violations were procedural in nature and did not rise to the level of coercion and unlawful influence.[168] Had the government unlawfully coerced the statements from the co-conspirators, then the accused would have standing to challenge the statements.[169]

The CAAF's opinion in *Jones* neatly defined the rules of standing as they relate to self-incrimination violations. Without question, the accused can always challenge the admissibility of a statement he makes. However, when the challenge involves a witness statement, the court distinguished between the degree of the self-incrimination violation the government committed and the likelihood for relief. If the government fails to follow the procedural requirements when interrogating the witness, that is, fails to provide Article 31(b) and *Miranda* warnings when triggered, then the accused lacks standing to challenge the statement. If, however, the witness statement is made involuntary, that is, the product of government overreaching, then the accused has standing to challenge the admissibility of the witness's statement and, depending on how egregious the overreaching is, may obtain relief. Therefore, when making self-

155. 50 M.J. 247 (1999).

156. *Jones*, 52 M.J. at 61.

157. *Id.* at 62.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 63. The defense alleged that the government violated the co-conspirators' rights under Article 31, the Fifth Amendment, and the Sixth Amendment.

163. *Id.* at 62.

164. *Id.*

165. *Id.* at 69.

166. *Id.* at 64. The court also discussed the actions by the government to determine if they arose to unlawful command action. In this discussion, the court addressed whether the government immunized the witnesses. Acknowledging that the witnesses did not have actual immunity, the court concluded that they did have informal immunity. In reaching its decision, the court identifies the various ways in which a person can be immunized. This is a good discussion that accurately summarizes the law pertaining to immunity.

167. *Id. See* MCM, *supra* note 10, MIL. R. EVID. 301(b)(1). This rule states: "The privilege of a witness to refuse to respond to a question the answer to which may tend to incriminate the witness is a personal one that the witness may exercise or waive at the discretion of the witness." *Id.*

168. *Jones*, 52 M.J. at 64.

169. *Id.*

incrimination challenges to witness statements, counsel should look to the law of voluntariness to either support or attack the issue.[170]

A procedural safeguard unique to the law of self-incrimination that pertains to confessions made by the accused is the corroboration rule.[171] Generally, the corroboration rule requires some corroboration of a confession before the confession can be considered as evidence.[172] 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,[173] and that admissible corroborative evidence, in addition to the confession, must be presented to the trier of fact.[174] Moreover, military appellate courts have gone to great lengths to analyze the nature of corroborative evidence, ensuring that sufficient admissible evidence is considered for corroboration.[175] In *United States v. Hall*,[176] the CAAF solidified its position that admissible corroborating evidence must be introduced to the fact-finder.

During a search of Private Hall's room, the command discovered a "coffee bag containing what was later determined to be marijuana."[177] The command escorted Private Hall to the CID office where he was questioned. After waiving his Article 31(b) and *Miranda* rights, Private Hall confessed to using marijuana in March 1994.[178] During a pretrial hearing, the military judge found that the command conducted an improper search. As such, the military judge suppressed the marijuana and part

170. *See supra* notes 139, 140, and 153, and accompanying text.

171. MCM, *supra* note 10, MIL. R. EVID. 304(g) analysis, app. 22, at A22-13.

172. *Id.* MIL. R. EVID. 304(g). There are two separate aspects of MRE 304(g): (1) MRE 304(g)(2), which pertains to the military judge's determination of adequate corroboration; and (2) MRE 304(g)(1), which pertains to the introduction of corroborating evidence before the trier of fact. Specifically, MRE 304(g) 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.

173. *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").

174. *Smith*, 348 U.S. at 153; *Opper*, 348 U.S. at 93 (finding that all evidence in addition to the confession or admission must establish guilt beyond a reasonable doubt); *see* MCM, *supra* note 10, MIL. R. EVID. 304(g). Military Rule of Evidence 304(g) 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." The reference to "direct and circumstantial evidence" indicates that the corroborating evidence must be admissible. *See also* MCM, *supra* note 10, 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, MRE 304(g)(1) clearly states that 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 MRE 304(g), one can conclude that: (1) corroborating evidence must be admissible; and (2) corroborating evidence must be presented to the trier of fact.

175. *See* United States v. Duvall, 47 M.J. 189 (1997) (finding that admissible corroborating evidence must be introduced to the fact-finder); 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).

176. 50 M.J. 247 (1999).

177. *Id.* at 249.

178. *Id.*

of the confession. The portion of Private Hall's confession that the military judge did not suppress pertained to the March 1994 drug use.[179] The only evidence introduced by the government on the merits was Private Hall's confession; however, the military judge, "without objection, considered the evidence on the motion as well as the evidence introduced on the merits," when deliberating on findings.[180]

On appeal, the CAAF specified the issue of whether the military judge erred in denying the defense motion to suppress Private Hall's confession based on a lack of sufficient corroboration.[181] Relying on the evidence introduced by the prosecution during the pretrial suppression hearing, the court determined that there was adequate corroborative evidence presented to justify admissibility of the confession.[182]

The CAAF's decision in *Hall* affirms the traditional protections afforded an accused under the corroboration rule. Not only does it address the adequacy of corroborative evidence, but also it supports the requirement to introduce admissible corroborative evidence to the fact-finder. What saved the *Hall* case is the unique fact that the military judge, during the deliberation on findings, considered the evidence introduced during the pretrial phase.[183] Absent this fact, the military judge would have based the accused's conviction solely on the confession, which is improper.[184] In his concurring opinion, Judge Effron makes clear that the prosecution must present admissible corroborating evidence to the trier of fact when introducing the accused's confession–even when the fact-finder is the military judge.[185]

Conclusion

This year's self-incrimination cases present few notable developments. In most cases, the courts perpetuate an existing trend, clarify a rule of law, or apply a recognized rule of law. For example, in *United States v. Bradley*,[186] the CAAF continued to focus on the primary purpose of the questioning when triggering the protections under Article 31(b). If the purpose of the questioning is not for a law enforcement or disciplinary reason, Article 31(b) is not triggered, even when the circumstances are such that a senior questions a subordinate. Similarly, in the area of corroboration, *United States v. Hall*[187] advances the trend that the prosecution must introduce admissible corroborating evidence when also presenting the accused's confession to the fact-finder. *United States v. Muirhead*[188] illustrates the CAAF's attempt to clarify a rule of law. Specifically, the court gives unequivocal guidance that the test for determining whether a person is a suspect for purposes of Article 31(b) is an objective one. Overall, the courts make a conscientious effort to apply the relevant source of self-incrimination protection to the facts presented.

The area that presents the most remarkable developments is the Fifth Amendment. In *United States v. Henderson*,[189] the CAAF, either intentionally or unintentionally, gave counsel ammunition to broaden the application of the ambiguous request for counsel rule to silence invocations and to the initial waiver stage of the interrogation. But the case that has the potential to result in the most significant change in this source of protection in thirty years is *United States v. Dickerson*.[190] If the Supreme Court agrees with the Fourth Circuit, *Dickerson* could change the way federal investigators conduct interrogations. Although the military will initially be insulated from such a decision, it will be interesting to see what, if any, long-range effects will impact military justice. Without question, this case will be one of the most significant early Supreme Court decisions of the new century.

Regardless of the ebbs and flows of the courts' analysis and application of the protections of self-incrimination law, one

179. *Id.*

180. *Id.* The military judge found the accused guilty of the drug use.

181. *Id.* at 248.

182. *Id.* at 252. During the pretrial hearing, several witnesses testified that the accused used marijuana within months of March 1994. This was enough evidence to sufficiently corroborate the confession.

183. *Id.* Absent objection, the military judge "incorporated by reference the evidence received during the hearing on the suppression motion." *Id.*

184. *See* United States v. Duvall, 47 M.J. 189 (1997) (finding that admissible corroborating evidence must be introduced to the fact-finder).

185. *Hall*, 50 M.J. at 252.

186. 51 M.J. 437 (1999).

187. 50 M.J. at 247.

188. 51 M.J. 94 (1999).

189. 52 M.J. 14 (1999).

190. 166 F.3d 667 (4th Cir. 1999), *cert. granted*, 120 S. Ct. 578 (1999).

basic principal remains true–this body of law provides the necessary protection within the criminal justice system. Like the knight going into battle, each piece of the self-incrimination armor provides crucial protection. If one of the pieces falters, the system becomes vulnerable.