The *Miranda* Paradox, and Recent Developments in the Law of Self-Incrimination

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A paradox is "any person, thing, or situation exhibiting an apparently self-contradictory nature."[1] "So foul and fair a day I have not seen,"[2] and "It was the best of times. It was the worst of times,"[3] are two famous literary paradoxes. Although the tension of two or more contradictory states of being makes for good literature, it is to be avoided in the law. This past year in *Dickerson v. United States*,[4] the United States Supreme Court dealt with a long-simmering paradox in the area of self-incrimination law. Unfortunately, even after the decision, the contradiction remains.

The self-incrimination paradox addressed in *Dickerson* would be more easily diagrammed than described, since it involves the Fifth Amendment, Fourteenth Amendment, the authority of Congress, and the authority of the Court itself. The core contradiction to be resolved was how *Miranda v. Arizona*[5] can be a constitutional decision when a violation of the Miranda safeguards is not necessarily a violation of the Constitution. The resolution of this issue could have been dramatic. If the Court had concluded that *Miranda* was not a constitutional decision then Congress would have the power to overrule the procedural safeguards established in the case.[6] Even more significant, if *Miranda* was not a constitutional decision then states would not have to follow it.[7] On the other hand, if *Miranda* was a constitutional decision, then all the cases in which the Supreme Court has described the *Miranda* safeguards as "prophylactic"[8] would seem to be in error, and an unwarned statement could not be used for any purpose.

After a discussion of the Court's opinion in *Dickerson*, this article will review two other important self-incrimination cases decided by the Supreme Court this past year: *United States v. Hubbell*,[9] and *Portuondo v. Agard.*[10] The article will then turn to a review of two significant self-incrimination decisions issued by The Court of Appeals for the Armed Forces (CAAF): *United States v. Ruiz*[11] and *United States v. Swift.*[12]

The Supreme Court

The *Dickerson* case contained a perfect set of facts and circumstances to bring th contradiction in the *Miranda* line of cases to a head. On 27 January 1997, the First Virginia Bank in Alexandria, Virginia, was robbed.[13] An eyewitness to the robbery told Federal Bureau of Investigation (FBI) agents the license number of the getaway car. The car was registered to

1. RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 1406 (2nd ed. 1998).

2. WILLIAM SHAKESPEARE, MACBETH, act 1, sc. 3.

3. CHARLES DICKENS, A TALE OF TWO CITIES 1 (Andrew Sanders, ed., Oxford Univ. Press 1988).

4. 530 U.S. 428 (2000).

5. Miranda v. Arizona, 384 U.S. 436, 499 (1965).

6. *Dickerson*, 530 U.S. at 437.

7. *Id.* at 437. *Miranda v. Arizona* is applicable to state court proceedings through the incorporation doctrine. The incorporation doctrine makes certain rights under the U.S. Constitution applicable to the states through the Fourteenth Amendment. One of the federal rights made applicable to state court proceedings is the Fifth Amendment right against self-incrimination. If *Miranda* was not interpreting the Fifth Amendment (or another right incorporated to the state), then the Supreme Court could not mandate that the states follow it.

8. Michigan v. Tucker, 417 U.S. 433 (1974).

9. 530 U.S. 27 (2000).

10. 529 U.S. 61 (2000).

11. 54 M.J. 138 (2000).

12. 53 M.J. 439 (2000).

13. United States v. Dickerson, 166 F.3d 667, 673 (4th Cir. 1999).

Charles Thomas Dickerson.[14] An FBI agent went to Dickerson's apartment and asked if he would come to the FBI field office for an interview. Dickerson agreed. While at the office, the agent was able to secure a search warrant for Dickerson's apartment. The agent informed Dickerson that agents were about to search his apartment. At that point, Dickerson said he wanted to make a statement. In the statement he admitted to driving the getaway car in the robbery.[15]

Dickerson was indicted for bank robbery, conspiracy and using a firearm during a violent crime.[16] Prior to trial, Dickerson's attorney moved to have his statement suppressed because the FBI agent who took the statement failed to advise Dickerson of his *Miranda* warnings.[17] The trial court granted the motion to suppress. The court also found, however, that the statement was voluntary. Because the statement was voluntary, any derivative evidence obtained as a result of the statement was admissible. In response to the district court suppressing Dickerson's statement, the government filed an interlocutory appeal to the United States Court of Appeals for the Fourth Circuit.[18] Although the Fourth Circuit agreed with the district court that Dickerson had not been informed of his *Miranda* warnings prior to making an in-custody statement, it still reversed the lower court.[19] The Fourth Circuit held that since Dickerson's confession was voluntary it was admissible. It based this conclusion on the language of 18 U.S.C. § 3501, which states that "a confession . . . shall be admissible in evidence if it is voluntarily given,"[20] and held that this statute had overruled *Miranda.* Also, 18 U.S.C. § 3501, and not *Miranda*, governed the admissibility of all confessions in federal court (whether custodial or not).[21]

Title 18 U.S.C. § 3501 is not a new statute. It was passed in 1968, and there is little debate over its purpose. It is generally accepted that the statute was intended to overrule *Miranda*.[22] The issue that has been in doubt for some time is whether Congress had the authority to enact such a statute. The reason doubt has lingered is because the Department of Justice (DOJ) has avoided relying on the statute in its briefs or arguments.[23] The DOJ's reluctance has been due, at least in part, to a belief that 18 U.S.C. § 3501 is not constitutional.[24] The DOJ's position was made clear in 1997, when then Attorney General Janet Reno asserted in a letter to Congress that the statute was unconstitutional.[25] Government attorneys did not even use 18 U.S.C. § 3501 in their argument to the Fourth Circuit Court in *Dickerson*. The court raised the applicability of the statute on its own.

The Fourth Circuit began its analysis by discussing the circumstances that would permit Congress to pass legislation overruling a holding of the Supreme Court. The Court stated that Congress was unable to supercede a decision of the Supreme Court where the Supreme Court was "construing the Constitution,"[26] but that Congress could overrule "judicially created rules of evidence and procedure that are not required by the Constitution."[27] Thus, "[w]hether Congress had the authority to enact § 3501 turn[ed] on whether the rule set forth by the Supreme Court in Miranda [was] required by the Constitution."[28] The Fourth Circuit concluded it was not.[29]

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14. *Id.*

15. *Id.*

16. Dickerson v. United States, 530 U.S. 428, 432 (2000).

17. *Id.*

18. *Id.*

19. *Dickerson*, 166 F.3d at 695.

20. *Id.* at 671 (citing 18 U.S.C. § 3501(a) (2000)).

21. *Id.*

22. *Id.* at 686; *see also Dickerson*, 530 U.S. at 436; Yale Kamisar, *Can (Did) Congress "Overule" Miranda?*, 85 CORNELL L. REV. 883, 886 (May 2000).

23. *Dickerson*, 166 F. 3d at 672.

24. The DOJ's position was made clear in 1997, when then Attorney General Janet Reno asserted in a letter to Congress that the statute was unconstitutional. Letter from Janet Reno, United States Attorney General, to United States Congress (Sept. 10, 1997). *See Dickerson*, 166 F. 3d at 672.

25. *Dickerson*, 166 F. 3d at 672.

26. *Id.* at 687.

27. *Id.*

28. *Id.*

29. *Id.*

The Fourth Circuit relied on the fact that in the sixty-page Miranda decision the Supreme Court never referred to the warnings as a constitutional right. Instead, the Court always described the warnings as procedural safeguards. The Fourth Circuit also cited to the passage in *Miranda* where the Supreme Court invited Congress and the state legislatures to create their own procedural safeguards to protect the privilege against self-incrimination.[30]

The court then examined the long string of Supreme Court cases decided after *Miranda* that have described the procedural safeguards established in *Miranda* as "prophylactic."[31] In particular, the court discussed *Harris v. New York*,[32] *Michigan v. Tucker*,[33] and *New York v. Quarles*.[34] In each of these cases, the Supreme Court drew a distinction between a violation of the Constitution and a violation of the procedural safeguards established in *Miranda.* In *Harris v. New York*, the Supreme Court ruled that a statement taken in violation of *Miranda* could nevertheless be used to cross-examine a defendant.[35] In *Michigan v. Tucker*, the court ruled that derivative evidence obtained from an unwarned statement could be used against an accused.[36] In *New York v. Quarles*, the court recognized an emergency exception to the requirement to provide *Miranda* warnings to a suspect.[37] In both *Tucker* and *Quarles*, the court stated that a violation of *Miranda* was not necessarily a violation of the Constitution.[38] After reviewing these cases, the Fourth Circuit concluded that the *Miranda* warnings were not constitutionally required. Since *Miranda* was not a constitutional interpretation, Congress had the authority to overrule it "pursuant to its authority to prescribe the rules of procedure and evidence in the federal courts."[39]

In a relatively short seven-to-two opinion, the Supreme Court rejected the Fourth Circuit's conclusion that Congress had the authority to supersede *Miranda*.[40] The majority agreed with the Fourth Circuit that "[the] case turns on whether the *Miranda* Court announced a constitutional rule or merely exercised its supervisory authority to regulate evidence in the absence of congressional direction."[411] The majority, however, concluded that *Miranda* was a constitutional decision.[42]

Justice Rehnquist, writing for the majority, focused his analysis on the *Miranda* decision itself. The two most powerful points made by the majority were, first, *Miranda* has always applied to the states, so it must have been a constitutional decision; and, second, several passages in *Miranda* make it clear that the case was announcing a constitutional rule.[43] The majority's first point is perhaps its strongest. Justice Rehnquist argued that *Miranda* must have been a constitutional decision because it has always been applicable to state court proceedings. The only time the Supreme Court is permitted to dictate rules to state courts is when it is interpreting the U.S. Constitution.[44] In *Smith v. Phillips*, the Court reiterated that "[f]ederal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension."[45] As the Court stated in *Cupp v. Naughten*, "[b]efore a federal court may overturn a conviction resulting from a state court . . . it must be established not merely that the [state's action] is undesirable, erroneous, or even 'uni-

30. *Id.*

31. *Id.* at 672.

32. 401 U.S. 222 (1971).

33. 417 U.S. 433 (1974).

34. 467 U.S. 649 (1984).

35. 401 U.S. at 226.

36. 417 U.S. at 444.

37. 467 U.S. at 654.

38. *Id*. at 649; *Tucker*, 417 U.S. at 444.

39. United States v. Dickerson, 166 F.3d 667, 691 (4th Cir. 1999).

40. Dickerson v. United States, 530 U.S. 428, 432 (2000).

41. *Id.* at 437.

42. *Id.* at 438.

43. *Id.*

44. *Id.* at 439.

45. 455 U.S. 209, 211 (1981) (quoted in *Dickerson*, 530 U.S. at 438).

versally condemned' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment."[46] Of the four cases reversed by the Supreme Court in the *Miranda* decision, three of the cases involved state judicial proceedings.[47]

The other argument made by the majority was that the *Miranda* decision itself "is replete with statements indicating that the majority thought it was announcing a constitutional rule."[48] The majority in *Dickerson* provided eight quotes from *Miranda* supporting the position that *Miranda* was a constitutional decision.[49] The most powerful of these quotes was one in which the *Miranda* court explained why they had granted certiorari in the case: "We grant certiorari . . . to explore some facets of the problems . . . of applying the privilege against self-incrimination to in-custody interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow."[50]

After discussing the *Miranda* decision, Justice Rehnquist turned to the various cases that have established exceptions to the *Miranda* doctrine. As discussed earlier, the Fourth Circuit opinion was at its most convincing when it discussed these cases. The majority "concede[d] that there is language in some of our opinions [specifically citing *New York v. Quarles* and *Harris v. New York*] that supports the view taken by [the Fourth Circuit]."[51] However, Justice Rehnquist went on to state, "These decisions illustrate the principle—not that *Miranda* is not a constitutional rule—but that no constitutional rule is immutable."[52]

The majority's opinion is at its weakest in this section. Although Justice Rehnquist makes reference to *New York v. Quarles* and *Harris v. New York*, he failed to discuss these cases in any depth. The majority neither discusses nor explains the language in *Quarles* and *Michigan v. Tucker,* which states that "the prophylactic *Miranda* warnings . . . are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected."[53] The majority simply states that *Quarles*, *Tucker*, *Harris,* and similar decisions, are examples of the Court applying a general rule to specific circumstances, and that "the sort of modifications represented by these cases are as much a part of constitutional law as the original decision."[54]

Justice Rehnquist concludes the majority opinion with a brief discussion of the reasons behind their refusal to overrule *Miranda*.[55] The chief reason offered was that of *stare decisis.* Although the majority specifically refused to agree with the reasoning or results of *Miranda,* it did not find an adequate reason for overruling it. According to Justice Rehnquist "*Miranda* has become embedded in routine police practice to the point the warnings have become a part of our national culture."[56] Additionally, the majority seems to say that *Miranda* actually benefits law enforcement by providing a bright-line rule that is more easily applied than the totality of the circumstances test for voluntariness.[57]

Justices Thomas and Scalia dissented in *Dickerson*, with Justice Scalia writing the dissenting opinion. The dissent presents an extremely effective counter argument to the majority. Justice Scalia argues that *Miranda* was a constitutional decision but later cases effectively overruled the constitutional underpinnings of the original opinion. By arriving at this conclusion, the dissent agrees with the majority's strongest point, that *Miranda* was a constitutional decision. The dissent then attacks the majority's weakest point, those cases subsequent to *Miranda* that describe the *Miranda* warnings as prophylactic.

Although Justice Scalia clearly believes that the *Miranda* decision was misguided from its inception, by conceding that it was a constitutional decision he gains an enormous tactical advantage for the dissent. No time or credibility is wasted arguing against the majority's strongest point. Instead the dissent is

46. 414 U.S. 141, 146 (1973). *See also Phillips*, 455 U.S. at 221.

47. Miranda v. Arizona, 384 U.S. 436, 499 (1965).

48. *Dickerson*, 530 U.S. at 439.

49. *Id.* at 440.

50. *Miranda*, 384 U.S. at 441-42.

51. *Dickerson*, 530 U.S. at 438.

52. *Id.* at 441.

53. New York v. Quarles, 467 U.S. 649, 654 (1983); *see also* Michigan v. Tucker, 417 U.S. 433, 444 (1974).

54. *Dickerson*, 530 U.S. at 441.

55. *Id.* at 443.

56. *Id.*

57. *Id.*

able to devote most of its energy toward the majority's weakest point—those cases in which the Supreme Court has held a violation of *Miranda* is not a violation of the Constitution. The dissent ends its discussion of these cases by stating, "It is simply no longer possible for the Court to conclude, even if it wanted to, that a violation of *Miranda*'s rules is a violation of the Constitution."[58]

The dissent goes on to counter the majority's *stare decisis* argument, but the heart of the dissent lies in the argument that the Supreme Court overruled the constitutional basis of *Miranda* years ago. The dissent concludes by describing the majority opinion as a monument to "judicial arrogance,"[59] arguing that the majority has "impose[d] extra-constitutional constraints upon Congress and the States."[60]

Despite the majority's failure in *Dickerson* to resolve the contradiction in the *Miranda* line of cases, it did resolve other important issues. First and foremost, *Dickerson* announces in no uncertain terms that *Miranda* and its progeny still apply to the federal and state courts. The Court finally resolves the question of whether 18 U.S.C. § 3501 is constitutional—it is not. *Dickerson* also reaffirms all the cases that have carved out exceptions to *Miranda*. It seems unlikely that the Supreme Court will resolve the paradox that has developed in the *Miranda* line of cases anytime soon. First, a majority of the Court apparently does not feel there is a contradiction. Second, to resolve the contradiction, one way or another, would change the law of self-incrimination in a way which a majority of the court is unwilling to do.

The Supreme Court decided two other important self-incrimination cases this past term, *United States v. Hubbell*[61] and *Portuondo v. Agard*.[62] *Hubbell* discusses the extent to which producing documents is protected by the Fifth Amendment, in particular when those documents are produced pursuant to a grant of immunity.[63] *Agard* addresses whether it is appropriate during argument for a prosecutor to call the jury's attention to the fact that the accused has had the opportunity to watch all other witnesses testify before testifying himself.[64] Both cases evaluate whether the government attorneys in the case violated the Fifth Amendment rights of an accused. In *Hubbell*, the Court found prosecutors did, while in *Agard* the prosecutor did not. Both cases provide greater clarity on the range of permissible conduct under the Fifth Amendment and are important, particularly to prosecutors. *Hubbell* is a valuable reminder of the risks inherent in granting immunity. *Agard* arguably places another arrow in the prosecutor's quiver.

In *Hubbell*, the Supreme Court was asked to answer questions that cut to the core of what is protected by of the privilege against self-incrimination. In August 1994, Webster L. Hubbell was ensnared in the highly publicized Whitewater Development Corporation scandal. Ultimately, Hubbell was prosecuted for mail fraud and tax evasion by the Office of the Independent Counsel. Hubbell entered into a plea arrangement.[65] In exchange for pleading guilty and fully cooperating with the independent counsel's office, Hubbell received twenty-one months in prison.

While Hubbell was still in confinement, he received a subpoena duces tecum. The subpoena required the production of eleven categories of documents for a grand jury.[66] The documents were apparently requested to insure that Hubbell had fulfilled his obligation under the plea agreement.[67] At the grand jury investigation, Hubbell invoked his Fifth Amendment privilege. Hubbell refused to produce or confirm possession of documents conforming to the subpoena. The independent counsel's office secured immunity for Hubbell in accordance with 18 U.S.C. § 6003(a) and gave him a district court order directing him to produce the documents. Hubbell produced 13,120 pages of documents in response to the subpoena. The independent counsel's office took the information provided by Hubbell and used it to proceed with a second prosecution of Hubbell for tax crimes and mail and wire fraud.[68]

The district court dismissed the independent counsel's indictment. According to the court, the government's whole

58. *Id.* at 444 (Scalia, J., and Thomas, J., dissenting).

59. *Id.* at 465.

60. *Id.*

61. 530 U.S. 27 (2000).

62. 529 U.S. 61 (2000).

63. *Hubbell*, 530 U.S. at 29.

64. *Agard*, 529 U.S. at 63.

65. *Hubbell*, 530 U.S. at 30.

66. *Id.* at 31.

67. *Id.*

68. *Id.*

case was based on or derived from the documents Hubbell produced in response to the grant of immunity.[69] The district court concluded that Hubbell's act of turning over the documents described in the subpoena was testimonial and thus was protected by the Fifth Amendment and the grant of immunity. The court of appeals initially returned the case to the district court but ultimately affirmed the dismissal. The Supreme Court granted certiorari to determine the scope of the immunity granted and its effect on how the independent counsel's office could use the documents Hubbell produced.

In an eight to one decision, the Supreme Court affirmed the appellate court and district court rulings dismissing the case. The majority began its analysis by examining the scope of the privilege against self-incrimination. The Court pointed out that the term "privilege against self-incrimination" is an overly broad description of the constitutional rights contained in the Fifth Amendment. An individual's Fifth Amendment right regarding self-incrimination actually only protects that individual from being "compelled in any criminal case to be a witness against himself."[70] The term "witness" has a very specific meaning in the context of the Fifth Amendment: an individual is a "witness" only when he engages in communication which is "testimonial in character."[71]

The Supreme Court has decided a number of cases that address the distinction between conduct that is testimonial and communicative and that which is not. Testimonial or communicative conduct must convey, either expressly or impliedly, factual assertions or beliefs. Thus, the government can require an individual to engage in a host of activities that are incriminating while not in violation of that individual's rights under the Fifth Amendment. The *Hubbell* Court cites to cases in which individuals were required to provide handwriting exemplars,[72] blood samples,[73] or recordings of their voice without violating their privilege against self-incrimination.[74] In particular, the Court focused on a case decided in 1976, *United States v. Fisher*.[75] In *Fisher*, the Supreme Court determined that requiring an individual to turn over accounting documents used to prepare tax returns did not violate the Fifth Amendment. The *Fisher* Court concluded that the documents themselves were not protected. They were not protected because they were prepared voluntarily, long before any prosecution against *Fisher* was being considered. The Court then held that the act of turning the documents over was not protected either. In order for a physical act to be protected by the Fifth Amendment, it must be testimonial or communicative in nature. The Court reasoned that Fisher's act was not testimonial because it conveyed no factual information that the government did not already have. According to the Court, "The existence and location of the papers . . . [were] a forgone conclusion and the taxpayer adds little to nothing to the sum total of the Government's information."[76]

The Court in *Hubbell*, as in *Fisher*, concluded that the Fifth Amendment did not protect the documents Hubbell produced.[77] Just as in *Fisher*, the documents in *Hubbell* were prepared voluntarily. The majority then turned to the issue of whether the act of turning the documents over was protected. The Court concluded it was.[78] According to the Court, the facts in *Hubbell* were clearly distinguishable from *Fisher.* In *Fisher*, the government knew through independent sources the location, content, and authenticity of the documents they were seeking.[79] In *Hubbell*, the independent counsel's office had no knowledge of the existence, location, or authenticity of the 13,120 pages of documents it received from Hubbell. The district court called the independent counsel's subpoena "the quintessential fishing expedition,"[80] and the Supreme Court added that the "fishing expedition did produce fish, but not the one that the Independent Counsel expected to hook."[81] The Court went on to say,

69. United States v. Hubbell, 11 F. Supp. 2d 25, 33-37 (D.C. Cir. 1998).

70. U.S. CONST. amend. V.

71. *Hubbell*, 530 U.S. at 34.

72. Gilbert v. California, 388 U.S. 263 (1967).

73. Schmerber v. California, 384 U.S. 757 (1966).

74. United States v. Wade, 388 U.S. 218 (1967).

75. Fisher v. United States, 425 U.S. 391 (1976).

76. *Id.* at 411.

77. *Hubbell*, 530 U.S. at 36.

78. *Id.* at 43.

79. *Fisher*, 425 U.S. at 411.

80. United States v. Hubbell, 11 F. Supp. 2d 25, 33-37 (D.C. Cir. 1998).

81. *Hubbell*, 530 U.S. at 42.

"It is abundantly clear that the testimonial aspect of respondent's act of producing subpoenaed documents was the first step in a chain of evidence that led to this prosecution."[82]

After concluding that Hubbell's act of producing the documents was testimonial, the majority went on to hold that neither the documents nor any evidence derived from the documents could be used against Hubbell. The Court pointed out that under both 18 U.S.C. § 6002 and the Fifth Amendment, the government cannot use evidence obtained through or derived from, a grant of immunity for a later prosecution of the immunized individual.[83] In fact, 18 U.S.C. § 6002 expressly prohibits the use of testimony compelled pursuant to a grant of immunity under § 6003 or any information derived from such testimony, in a later prosecution. The burden of establishing that the evidence used in a case was not derived from immunized testimony falls on the government. The government must establish "that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."[84] The independent counsel's office could not meet this burden and so the Court affirmed the dismissal of the government's case.

The *Hubbell* case is valuable in many respects. First, the case reminds prosecutors in all jurisdictions to be cautious when granting immunity. All the potential ramifications of a grant of immunity should be examined. If prosecutors seek to try an individual after granting him immunity, they will bear the burden of establishing the legitimacy and independence of their evidence. Next, *Hubbell* highlights the dramatic effect a violation of the Fifth Amendment can have on a prosecution. A violation of the Fifth Amendment will result in the compelled testimony being excluded, along with any derivative evidence.[85] This is distinct from the *Miranda-Tucker* line of cases. Under *Miranda-Tucker* a violation of the requirement to inform a suspect of their *Miranda* warnings may result in only the unwarned statements being excluded.[86] Finally, *Hubbell* is a valuable review of the boundaries of the Fifth Amendment privilege against self-incrimination, and a reminder that the privilege against self-incrimination is not as broad as the title implies. The right to not be compelled to be a witness against oneself only protects testimonial or communicative conduct. It is important to recognize that Hubbell's Fifth Amendment right against self-incrimination was not violated by the independent counsel's office taking the documents that were later used in the government's prosecution. The violation in this case occurred only when the independent counsel's office compelled Hubbell to engage in the testimonial act of finding documents that were responsive to the subpoena and turning those documents over.

In *Hubbell*, the Supreme Court provides greater clarity in an area of the Fifth Amendment that sorely needed it. Although it is hard to envision the Court concluding that the independent counsel's office had behaved properly, the holding in *Fisher* left some doubts. *Hubbell* leaves no doubt that the government's conduct was impermissible. While *Hubbell* has clarified what the government may not do, *Portuondo v. Agard*[87] has clarified what prosecutors can do.

In *Portuondo v. Agard*, the defendant, Ray Agard, was charged with multiple specifications of sodomy, assault, and weapons violations.[88] Agard was alleged to have assaulted, sodomized, and raped Nessa Winder, and threatened both Ms. Winder and a friend of hers with a handgun. Agard testified at trial, claiming he had consensual intercourse with Ms. Winder and she had made up the rape, sodomy, and weapons allegations because Agard hit her after an argument.[89] The case turned on who was more credible, Ms. Winder and her friend, or Agard. During closing argument the prosecutor stated:

> You know ladies and gentlemen, unlike all the other witnesses in this case the defendant has a benefit and the benefit that he has, unlike all other witnesses, is he gets to sit here and listen to the testimony of all the other witnesses before he testifies . . . . That gives you a big advantage, doesn't it. You get to sit here and think what am I going to say and how am I going to say it? How am I going to fit it into the evidence . . . . He's a smart man. I never said he was stupid . . . . He used everything to his advantage.[90]

82. *Id.*

83. *Id*. at 39.

84. *Id.* at 40; *see also* Kastigar v. United States, 406 U.S. 441, 460 (1972).

85. *Hubbell*, 530 U.S. at 43.

86. Michigan v. Tucker, 417 U.S. 433, 444 (1974).

87. 529 U.S. 61 (2000).

88. *Id.* at 63.

89. *Id.*

90. *Id.*

Agard was convicted of one of the sodomy specifications and two of the weapons violations.

After the government's argument, Agard's defense attorney objected. The defense claimed Agard's Sixth Amendment right to confront witnesses against him had been infringed upon.[91] The trial court disagreed. The case was appealed through the New York appellate courts and the federal district court with no relief being granted.[92] On appeal, Agard alleged a violation of both his Fifth and Sixth Amendment rights. It was not until the case reached the Second Circuit Court of Appeals that Agard was successful in claiming that his Fifth and Sixth Amendment rights had been violated. The Circuit Court also found a violation of Agard's Fourteenth Amendment rights.[93]

In a seven-to-two decision, the Supreme Court reversed the Second Circuit. The majority held that the prosecutor's comments were not a constitutional violation but, rather, were a fair comment on the defendant's credibility.[94] *Agard* presents a unique Fifth Amendment issue. Generally, when a defendant claims there has been a violation of his Fifth Amendment rights it is because the government has compelled the defendant to be a witness against himself. In this case, the defendant claimed that the government violated his Fifth Amendment rights by commenting on freely given testimony. Agard also claimed a violation of his Sixth Amendment right to confront witnesses against him. Agard alleged that the government infringed on his Fifth and Sixth Amendment rights by attacking his exercise of these rights in closing argument. This case highlights the inherent tension created when a defendant takes the stand. This tension exists between protecting the constitutional rights of the defendant and treating a testifying defendant like any other witness. Often these two objectives are at odds. In this case, the majority resolved this tension in favor of treating the defendant like any other witness.

The majority opinion rested on two positions. First, there is no precedent to support Agard's claim that his Fifth, Sixth, and Fourteenth Amendment rights were violated. Second, there is precedent to support the permissibility of the prosecutor's comments. Justice Scalia, writing for the majority, argued that the prosecutor in this case did nothing more than comment on the credibility of Agard's in-court testimony. The comment is permissible and is in accordance with Supreme Court precedent that states, "when [a defendant] assumes the role of a witness, the rules that generally apply to other witnesses—rules that serve the truth-seeking function of the trial—are generally applicable to him as well."[95]

The majority's first position is divided into two sections. The first section examines whether there is any historical foundation for Agard's claim. After a brief discussion of the history of a defendant's right to testify and a prosecutor's right to comment on that testimony, the majority concluded that "the respondent's claims have no historical foundation, neither in 1791, when the Bill of Rights was adopted, nor in 1868 when, according to our jurisprudence, the Fourteenth Amendment extended the strictures of the Fifth and Sixth Amendments to the States."[96] The second section of the majority's first position is devoted to analyzing the Court's holding in *Griffin v. California*.[97] Both the dissent and Agard relied heavily on *Griffin* to support their position that the prosecutor violated the respondent's constitutional rights. Justice Scalia stated simply, "That case [Griffin] is a poor analogue."[98]

In *Griffin*, the defendant was charged with murdering a young woman. There were no eyewitnesses, and the defendant did not testify during the findings phase of his trial.[99] During the government's closing, the prosecutor argued:

> The defendant certainly knows whether Essie Mae had this beat up appearance at the time he left her apartment . . . . He would know how she got down to the alley. He would know how the blood got on the bottom of the concrete steps . . . . He would know whether he beat her or mistreated her . . . . These things he has not seen fit to take the stand and deny or explain . . . . Essie Mae is dead, she can't tell you her side of the story. The defendant won't.[100]

After closing arguments, the judge instructed the jury that:

91. *Id*. at 64.

92. *Id*. at 65.

93. Agard v. Portuondo, 117 F.3d 696 (1997).

94. 529 U.S. at 73.

95. *Id*. at 69 (quoting Perry v. Leeke, 488 U.S. 272, 282 (1989)).

96. *Id*. at 65.

97. 380 U.S. 609 (1965).

98. *Agard*, 529 U.S. at 67.

99. *Griffin*, 380 U.S. at 609.

> if he [the defendant] does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable."[101]

The Court in *Griffin* concluded that both the prosecutor's argument and the judge's instruction violated the defendant's Fifth Amendment rights. The majority stated, "comment[ing] on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice . . . which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly."[102]

Justice Scalia argued that *Griffin* is a poor analogue because *Griffin* forbids prosecutors and judges from encouraging juries to do what they are not permitted to do, while the prosecutor in *Agard* suggested that the jury do what it is entitled to do.[103] According to the majority, *Griffin* prohibits a judge or prosecutor from encouraging the jury to use the fact that the accused did not testify against him. This is impermissible because "[t]he defendant's right to hold the prosecution to proving its case without his assistance is not to be impaired by the jury's counting the defendant's silence against him."[104] The majority then contends that the prosecutor's conduct in *Agard* is nothing like that of the prosecutor in *Griffin*. The prosecutor in *Agard* was encouraging the jury to weigh the defendant's credibility based on his opportunity to tailor his testimony. This conduct is permissible because the jury is entitled and expected to judge the credibility of the testifying defendant just as they would any other witness. Justice Scalia also argued that to forbid the jury from considering the defendant's opportunity to tailor his testimony would be requiring the jurors to ignore a "natural and irresistible" conclusion.[105]

The second argument the majority relied on is that there is ample Supreme Court precedent to support the constitutionality of the prosecutor's comments in this case. The majority contends "the prosecutor's comments in this case . . . concerned respondent's credibility as a witness, and were therefore in accord with our longstanding rule that when a defendant takes the stand, 'his credibility may be impeached and his testimony assailed like that of any other witness.'"[106] Besides citing cases that support treating an accused like any other witness for impeachment,[107] the majority also cited to *Brooks v. Tennessee*.[108] In *Brooks*, the Supreme Court addressed a Tennessee statute that required a criminal defendant to testify at the outset of the defense case. The primary purpose of the statute was to avoid defendants tailoring their testimony.[109] The Court struck down that statute as unconstitutional. According to Justice Scalia, the *Brooks* Court suggests that the solution to defendants tailoring their testimony is the adversarial system itself which, "reposes judgement of the credibility of all witnesses in the jury." Justice Scalia went on to write, "The adversary system surely envisions—indeed, it requires—that the prosecutor be allowed to bring to the jury's attention the danger that the Court was aware of."[110]

Justice Stevens and Justice Breyer concurred with the majority but disagreed with Justice Scalia's "implicit endorsement of [the prosecutor's] summation."[111] Justice Stevens, who wrote the concurrence, felt that the prosecutor's argument "demeaned" the adversarial process, "violated" our system's respect for an individual's dignity, and "ignored" our "presumption of innocence that survives until a guilty verdict is returned."[112] Although the concurrence believed the prosecutor's argument should survive constitutional scrutiny, it suggests that in the future trial judges should either prevent such

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100. *Id.* at 610-11.

101. *Id.*

102. *Id.* at 614.

103. *Agard*, 529 U.S. at 67.

104. *Id.*

105. *Id.* at 68.

106. *Id.* at 69.

107. Perry v. Leeke, 488 U.S. 272 (1989); Brown v. United States, 356 U.S. 148 (1958); Reagan v. United States, 157 U.S. 301 (1895).

108. 406 U.S. 605 (1972).

109. *Id.* at 607.

110. *Agard*, 529 U.S. at 70.

111. *Id.* at 76 (Stevens, J., and Breyer, J., concurring).

arguments or instruct the jury on the necessity of the defendant's attendance at trial.

Justice Souter joined Justice Ginsburg in her dissent. The dissent contended that the majority transformed "a defendant's presence at trial from a Sixth Amendment right into an automatic burden on his credibility."[113] Surprisingly, the dissent's position is not as contrary to the majority as the above quote implies. Although the dissenting Justices believed that commenting on a defendant's opportunity to tailor testimony does place some burden on the defendant's constitutional rights, under the correct circumstances, such a burden is permissible. According to the dissent, burdening a defendant's Sixth Amendment confrontation right is permissible where the truth-seeking function of the trial demands it. The disagreement between the majority and dissent relates to the timing of the prosecutor's attack in *Agard*, rather than the attack itself.

The prosecutor in *Agard* made her allegation of testimony tailoring in her closing argument. The dissent notes that by waiting until summation the prosecutor prevented Agard from answering her allegation.[114] If the prosecutor had alleged that Agard tailored his testimony during cross-examination or rebuttal, Agard could have offered evidence to rebut the allegation. Justice Ginsburg argued that allowing this kind of a generalized allegation of testimony-tailoring in the government's summation does not further the truth-seeking function of the trial, and thus is impermissible.[115]

Agard resolves a substantial controversy that has existed in Fifth and Sixth Amendment law since *Griffin v. California*. Several state and federal courts have addressed the question raised in *Agard* with divergent results. The Court of Appeals for the Armed Forces (CAAF) dealt with this issue in *United States v. Carpenter*[116] and was unable to give clear guidance. In *Carpenter*, the CAAF refused to rule on whether the trial counsel's comments referring to the accused's opportunity to tailor his testimony were error, but they did write that "the prosecutor in [the] case was treading on dangerous ground."[117] Part of the reason the CAAF concluded the trial counsel was making a dangerous argument was because of a lack of consensus among the various state and federal courts which have addressed this question. The majority in *Agard* provides a clear unambiguous statement that "comment[ing] upon the fact that a defendant's presence in the courtroom provides him a unique opportunity to tailor his testimony is appropriate—and indeed . . . sometimes essential—to the central function of the trial, which is to discover the truth."[118]

The CAAF

Just as the Supreme Court decided several cases this past year that have advanced the law of self-incrimination, so has the CAAF. While the Supreme Court's decisions touched on a wide variety of self-incrimination issues, the CAAF cases generally focused on one area of self-incrimination law, Article 31 of the Uniform Code of Military Justice.[119] Two cases this past year, *United States v. Ruiz*[120] and *United States v. Swift*,[121] were particularly significant. In both cases, the CAAF provided greater definition to critical questions regarding Article 31. *United States v. Ruiz* focused on the definition of an interrogation and the point at which making a statement to a suspect becomes an interrogation. *Swift* discusses the distinction between questioning for a law enforcement or disciplinary purpose and questioning for an administrative purpose. *Swift* also addresses the use the government may make of a statement taken in violation of Article 31 and the application of the testimonial acts doctrine to Article 31.

United States v. Ruiz is the more controversial of the two cases dealing with Article 31. Certainly, within the court, it was the most controversial with Judges Effron and Sullivan dissenting.[122] In *Ruiz*, the CAAF had to resolve whether an interrogation had taken place. There is little disagreement between the dissent and majority about the law or the facts of this case. The disagreement seems to be one of perception. The

112. *Id.*

113. *Id.* (Ginsburg, J., and Souter, J., dissenting).

114. *Id.* at 79.

115. *Id.* at 77.

116. United States v. Carpenter, 51 M.J. 393 (1999).

117. *Id.* at 397.

118. *Agard*, 529 U.S. at 73.

119. UCMJ art. 31 (2000).

120. 54 M.J. 138 (2000).

121. 53 M.J. 439 (2000).

122. 54 M.J. at 145 (Effron, J., and Sullivan, J., dissenting).

majority felt the conduct in this case was not an interrogation,[123] while the dissent could see it as nothing but an interrogation.[124]

Senior Airman Roy Ruiz was convicted of a larceny at the Army and Air Force Exchange Services (AAFES) and was sentenced to a bad conduct discharge, confinement for two months, and reduction to the grade of E1.[125] The charge resulted from an incident at the Fitzsimmons Garrison Post Exchange (PX). On 23 November 1996, the AAFES store detectives witnessed Ruiz behaving suspiciously. After Ruiz left the PX, store detectives followed him to the parking lot. One of the detectives, Jean Rodarte, asked Ruiz if he would be willing to come back to the PX office. Ruiz agreed. Once in the PX office, Ms. Rodarte said to Ruiz, "There seems to be some AAFES merchandise that hasn't been paid for."[126] Ruiz responded, "Yes." He then pulled out a receiver, compact disk, and some razors and placed the items on the desk. Ruiz then said, "You got me."[127]

Before trial, Ruiz's defense counsel moved to suppress Ruiz's statement to Ms. Rodarte. The defense argued that the statement was the product of an unlawful interrogation because Ruiz was not read his Article 31 rights before being questioned by Ms. Rodarte. After a hearing in which the government presented evidence to establish the admissibility of Ruiz's statement, the military judge denied the defense motion to suppress concluding that Ms. Rodarte's statement regarding AAFES merchandise was not an interrogation.[128]

The CAAF reviewed the judge's decision de novo.[129] Judge Everett, writing for the majority, held that Ms. Rodarte was not conducting an interrogation when she spoke to Ruiz.[130] Before arriving at this conclusion, the majority acknowledged that an "interrogation involves more than merely putting questions to an individual."[131] Judge Everett cites to *Brewer v. Williams*[132] and the Military Rules of Evidence (MRE) in his discussion of the definition of interrogation.[133] According to the majority, the definition of interrogation under MRE 305(b)(2) is purposely broad "to thwart 'attempts to circumvent warnings requirements through subtle conversations.'"[134] However, Ms. Rodarte's conduct did not fall within this broad definition. Instead, the majority concluded that Ms. Rodarte was doing nothing more than informing Ruiz why he had been stopped and asked to return to the PX office.[135] The majority cites to several cases that have held that informing an individual of the reason for his detention or the crime of which he is suspected need not be preceded by an Article 31 rights advisement.[136]

Judge Sullivan and Judge Effron dissented in separate opinions. Judge Sullivan also joined in Judge Effron's dissent. Both judges were unconvinced that Ms. Rodarte's statement was intended to merely inform Ruiz why he had been asked to return to the PX office. Judge Sullivan and Judge Effron cite to Ms. Rodarte's testimony during the motion hearing to support their conclusion that her statement to Ruiz was designed to illicit an incriminating response. Ms. Rodarte testified that she was trained not to ask questions of a suspect but instead was to say, "there appears to be some AFFES merchandize that has not been paid for."[137] Ms. Rodarte understood that the purpose of this policy was to preclude the need to give suspects a rights advisement. Also, when Ms. Rodarte was asked whether she was expecting to get a response to her statement, she said she hoped for a response. Finally, Ms. Rodarte said the statement she directed at Ruiz was intended to give him "a chance to vol-

123. *Id.* at 142.

124. *Id.* at 148 (Effron, J., and Sullivan, J., dissenting).

125. *Id.* at 139.

126. *Id.* at 140.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id*. at 141.

131. *Id.*

132. 430 U.S. 387 (1977).

133. *Ruiz*, 54 M.J. at 141.

134. *Id.*

135. *Id.* at 142.

136. *Id.*

137. *Id.* at 145, 147 (Effron, J., and Sullivan, J., dissenting).

untarily place it [the stolen merchandise] on the desk if . . . [he] wanted to."[138] Based on Ms. Rodarte's testimony, and the circumstances under which Ms. Rodarte made her statement to Ruiz, Judges Effron and Sullivan concluded that an interrogation did occur. Both dissents also go on to specifically find prejudice resulting from the error of admitting Ruiz's unwarned statement.[139]

Ruiz is a frustrating opinion. It is difficult to understand how the majority concluded that Ms. Rodarte did not engage in the functional equivalent of an interrogation. The majority's holding that Ms. Rodarte was merely informing Ruiz why she stopped him seems to fly in the face of Ms. Rodarte's testimony and common sense. At no point did the majority cite to any evidence that Ms. Rodarte's statement was intended to inform Ruiz of why he was stopped. The dissents, on the other hand, cited to Ms. Rodarte's own testimony where she specifically stated that she hoped Ruiz would respond to her statement, and the purpose of her statement was to give Ruiz the opportunity to turn over the items he had stolen.

Although the ultimate holding of the majority opinion is dissatisfying, the analysis of the issue and the statement of the law are extremely helpful. The majority made it clear that, despite the court's holding in the case, government representatives cannot avoid warning requirements by simply turning their questions into statements. Judge Everett wrote, "[MRE] 305(b)(2) . . . was purposely drafted in a broad fashion to thwart 'attempts to circumvent warnings requirements through subtle conversation.'"[140] Also, the majority reaffirmed the holding in *United States v. Quillen*,[141] which requires AFFES store detectives to provide Article 31 warnings when questioning a military suspect.

Although *Swift* is not as controversial as *Ruiz*, it is at least as significant. *Swift* addresses two important Article 31 issues, and one combination Article 31 and Fifth Amendment issue. First, the CAAF addressed the distinction between questioning a soldier for a disciplinary or law enforcement purpose and for an administrative purpose. Second, the court examined when a statement taken in violation of Article 31 can be used as the basis for a false official statement charge. Finally, the CAAF resolved whether the respondent's act of turning over a divorce decree was a testimonial act.

Staff Sergeant (SSG) John Swift was convicted at a general court-martial for making false official statements, writing bad checks, bigamy, and impeding an investigation.[142] He was sentenced to a bad conduct discharge and reduction to E1. The case against Swift began with a phone call. On 8 March 1996, Swift's company commander, Captain Myatt, received a telephone call from Swift's wife (the first Mrs. Swift).[143] The first Mrs. Swift told Captain Myatt that she had just received a phone call from a woman claiming to be SSG Swift's present wife (the second Mrs. Swift). The second Mrs. Swift told the first Mrs. Swift that the first Mrs. Swift was no longer married to SSG Swift. She also told the first Mrs. Swift that she possessed a divorce decree from Pike County, Kentucky, that showed that the first Mrs. Swift and SSG Swift were divorced in 1994. The first Mrs. Swift told Captain Myatt that, to her knowledge, she was still married to SSG Swift, even though they had been separated since before 1994. The first Mrs. Swift also told Captain Myatt that she had contacted the Pike County Courthouse and learned that there was no divorce decree involving her and SSG Swift on file.[144]

After talking with the first Mrs. Swift, Captain Myatt informed his first sergeant, Master Sergeant (MSgt) Vernoski, of the phone call. The commander and first sergeant reviewed Swift's emergency data card and Defense Eligibility Enrollment Reporting System (DEERS).[145] Swift's emergency data card listed the first Mrs. Swift as the respondent's current wife. The DEERS, however, showed Swift had disenrolled the first Mrs. Swift in 1994 and enrolled the second Mrs. Swift at the same time. The DEERS personnel told Captain Myatt and MSgt Vernoski that Swift would have had to show a divorce decree to have the first Mrs. Swift removed from the DEERS. Next, the commander and first sergeant visited the base legal office and spoke with the chief of criminal law regarding the potential bigamy charge.[146] Captain Myatt and MSgt Vernoski decided to confront Swift about the situation.

Before the first sergeant met with Swift, he received a phone call from the first Mrs. Swift. She reiterated to him what she

138. *Id.* at 147.

139. *Id.* at 145, 147.

140. *Id.* at 141.

141. 27 M.J. 312 (1988).

142. United States v. Swift, 53 M.J. 439, 441 (2000).

143. *Id.*

144. *Id.* at 442.

145. *Id.*

146. *Id.*

had already told the company commander. Master Sergeant Vernoski then looked up bigamy in the *Manual for Courts-Martial* to verify the elements of the offense and maximum sentence.[147] Next, the first sergeant called Swift in to his office. Swift was not advised of his rights under Article 31, although he was told of the accusations that the first Mrs. Swift had been making. Swift told his first sergeant that he had been divorced in 1994, and gave the name of the attorney who handled the divorce. Swift claimed the first Mrs. Swift was just trying to make trouble for him. Master Sergeant Vernoski told SSG Swift that the first Mrs. Swift could make trouble for him and showed Swift the maximum punishment for bigamy.[148] The meeting ended with MSgt Vernoski directing SSG Swift to give him a copy of his divorce decree. Several days after being told to produce the divorce decree, Swift gave the first sergeant what he claimed was his divorce decree. The decree did not have the first Mrs. Swift's signature on it, and it contained several typographical errors and misspellings.[149] Additionally, the divorce decree stated it was on file at Pike County Courthouse in Kentucky. A call to the Pike County clerk's office verified that there was no such divorce decree filed with that court. Swift was charged with two false official statements, one obstruction of an investigation charge, bigamy, and two unrelated bad check specifications. At trial, Swift moved to suppress all statements made to MSgt Vernoski based on a violation of Article 31.[150] The military judge denied the motion, concluding "there was insufficient circumstances that caused or reasonably should have caused Sergeant Vernoski to suspect the accused of the criminal offense of bigamy."[151]

At the CAAF, the majority began its analysis with a discussion of the history and application of Article 31. The court described the unique aspects of the military that make Article 31 necessary to insure soldiers' rights against self-incrimination are protected.[152] Judge Effron, writing for the majority, focused on the inherent compulsion on soldiers to answer the questions of those superior in rank, and the "special feature of military life . . . [that causes] the blending of administrative and law enforcement roles in the performance of official duties."[153] According to the majority, these two features of military life make Article 31 necessary. A soldier may answer questions asked by his superior under the presumption that he must answer the question or that the question was asked for an administrative purpose when it is actually part of a criminal investigation.

The CAAF has established a two-tier analysis for determining whether Article 31 warnings are necessary. First, was the person being questioned a suspect at the time of questioning, and second, was the person asking the questions part of an official law enforcement or disciplinary investigation.[154] To answer the first question, the court must consider "all the facts and circumstances at the time of the interview to determine whether the military questioner believed or reasonably should have believed that the service member committed an offense."[155] To answer the second question, the court must assess "all the facts and circumstances at the time of the interview to determine whether the military questioner was acting or could reasonably be considered to be acting in an official law-enforcement or disciplinary capacity."[156] Additionally, the CAAF has established that questions will be presumed to be for a disciplinary purpose when the questioner is senior to the suspect and also is in the suspect's chain of command.[157]

After laying this foundation for its analysis, the majority took up the issue of whether SSG Swift was a suspect at the time MSgt Vernoski questioned him. Despite recognizing the administrative role a first sergeant plays in dependent entitlements, the majority ruled that MSgt Vernoski's questioning was for a disciplinary or law enforcement purpose. Judge Effron was able to cite a half-page worth of facts and circumstances that gave MSgt Vernoski "good reason to suspect [the] appellant of bigamy."[158] So, even before the majority applies the command presumption rule, the court found that "MSgt Ver-

147. *Id.* at 443.

148. *Id.*

149. *Id.*

150. *Id.* at 444.

151. *Id.*

152. *Id.* at 445.

153. *Id.*

154. *Swift*, 53 M.J. at 446; United States v. Moses, 45 M.J. 132 (1996).

155. *Swift*, 53 M.J. at 446; United States v. Good, 32 M.J. 105, 108 (C.M.A. 1991).

156. *Swift*, 53 M.J. at 446; United States v. Davis, 36 M.J. 337, 340 (C.M.A. 1993).

157. *Swift*, 53 M.J. at 446.

158. *Id.* at 447.

noski 'reasonably should have believed' that appellant was a suspect . . . prior to this interrogation."[159] Apparently for good measure, the majority examined whether the command presumption rule should apply in this case. After a brief restatement of the facts in the case, the majority concluded: "As a matter of law the Government failed to rebut the strong presumption that MSgt. Vernoski's interrogation was part of an investigation that included disciplinary purposes."[160] Thus, the majority found that the military judge erred in ruling that Article 31 warnings were not required in this case.

Next, the majority addressed the government's use of Swift's unwarned statements as the basis of its false official statement charges. Once again the court reviewed the history of Article 31, and also examined applicable MREs to determine what use can be made of an unwarned statement. The majority recognized two such situations. First, on cross-examination of a testifying accused, and second, in a later prosecution of the accused for perjury. The hallmarks of these two exceptions are that "the accused is the gatekeeper as to the admission of the unwarned statement and . . . only an inconsistent or perjurous statement by an accused who testifies at trial opens the gate."[161] The majority concluded that an unwarned statement can only be used as the basis of a false official statement charge where "the accused has opened the door to consideration of the unwarned statement by his or her in-court testimony."[162] In *Swift*, the accused never testified. Thus, the government was not permitted to use Swift's statements as the basis of a false official statement charge.

Practitioners should make a special note of this portion of the *Swift* ruling. The CAAF has clarified an ambiguity that exists in MRE 304(b)(1). Military Rule of Evidence 304(b)(1) describes the exceptions to the general rule that statements taken in violation of Article 31 are inadmissible at trial. Military Rule of Evidence 304(b)(1) states in part:

> Where the statement is involuntary only in terms of noncompliance with the requirements of Mil. R. Evid. 305(c) or 305(f) . . . 305(e) and 305(g), this rule does not prohibit use of the statement . . . in a later prosecution against the accused for perjury, false swearing, or the making of a false official statement.[163]

Swift clarifies that the government may only use a statement taken in violation of Article 31 in a later prosecution when the accused has taken the stand in an earlier prosecution. Practitioners may want to pen a change in their *Manuals for Courts-Martial* to highlight this clarification. Such a change might be: this rule does not prohibit use of the statement . . . in a later prosecution against the accused for perjury, false swearing, or the making of a false official statement, *provided the accused has testified at an earlier trial regarding the content of the statement.*

The third issue addressed in *Swift* was whether Swift's Fifth Amendment or Article 31 rights were violated when MSgt Vernoski demanded that Swift produce his divorce decree. In addressing this issue, the CAAF engaged in an analysis very similar to that of the United States Supreme Court in *United States v. Hubbell*, relying on *Hubbell* as precedent in its decision.[164] The CAAF ultimately concluded that Swift's Fifth Amendment and Article 31 rights were not violated by his first sergeant requiring him to turn over his divorce decree. *Swift* is an excellent juxtaposition to *Hubbell.* Because the CAAF decided that Swift's divorce decree was not taken in violation of his rights, the CAAF was required to go into greater detail than the *Hubbell* Court on certain aspects of this issue. The CAAF divided its analysis into two parts, first addressing the decree itself and then the act of turning it over to MSgt Vernoski.

The CAAF concluded that the divorce decree and its contents were not protected by the Fifth Amendment or Article 31. Like the Supreme Court in *Hubbell*, the CAAF focused on whether the content of the divorce decree was voluntarily prepared before Swift was required to produce the document. The court found that it was, and concluded that "the documents 'could not be said to contain compelled testimonial evidence.'"[165]

Next, the court addressed whether the act of turning over the divorce decree was testimonial. The CAAF does an excellent job of mustering the facts to support why the act of turning over the divorce decree was not testimonial, but the analysis is lacking detail. As discussed in *Hubbell* and *Fisher*, where the existence and location of a document is a "foregone conclusion," the act of turning over the document is not testimonial. In *Swift*, MSgt Vernoski knew of the existence and the location of the

159. *Id.*

160. *Id.* at 448.

161. *Id.* at 450.

162. *Id.* at 451.

163. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 305(b)(1) (2000).

164. *Swift*, 53 M.J. at 452.

165. *Id.* at 453 (quoting United States v. Hubbell, 530 U.S. 27, 35 (2000) (quoting Fischer v. United States, 425 U.S. 391, 409-10 (1976))).

divorce decree. Because Swift's act of turning over the decree would add "little or nothing to the sum total of the Government's information"[166] it was not testimonial.

The CAAF goes on to state that even if Swift's act of turning over the divorce decree was testimonial it would fall into the required records exception to the Fifth Amendment and Article 31.[167] Under the required records exception, "[i]f the Government requires the documents to be kept for a legitimate administrative purpose, neither the content nor the act of production of these documents are protected by the Fifth Amendment."[168] The required records exception has also been applied to Article 31.[169] To be a required record the document must have a public aspect and the requirement to keep the record must be regulatory. Also, the record must be the kind of record that the regulated party has customarily kept. The CAAF had little trouble determining that Swift's divorce decree met the elements of a required record.

The *Swift* decision is three holdings in one. The case reminds trial counsel and chiefs of criminal law to be vigilant when advising company commanders and first sergeants. A well-placed caution given by the chief of criminal law in this case could have avoided the violation of Swift's Article 31 rights. The case also provides valuable clarification regarding what use may be made of statements taken in violation of Article 31. Defense counsel must insure that if their client takes the stand after giving an unwarned statement, they are aware of the risk that the unwarned statement can be used on cross-examination and for a possible later prosecution for perjury. Finally, *Swift,* like *Hubbell*, is another valuable case in the area of document production and the Fifth Amendment. Both cases assist practitioners in understanding when the act of producing a document is, and is not, protected by the Fifth Amendment.

Conclusion

The Supreme Court and the CAAF have provided practitioners with a clearer picture of how the privilege against self-incrimination is to be interpreted and applied. Decisions like *Agard*, *Hubbell*, and *Swift* have resolved vexing self-incrimination issues. Even *Dickerson* and *Ruiz,* although not completely satisfying opinions, are nonetheless valuable. In *Dickerson,* the Supreme Court removed any question as to *Miranda's* present viability. In *Ruiz,* the CAAF clearly states that "attempts to circumvent warning requirements through subtle conversations"[170] is no more permissible under Article 31 than it would be under the Fifth Amendment.

166. *Hubbell,* 530 U.S. at 44; *Fisher,* 425 U.S. at 411.

167. *Swift,* 53 M.J. at 453.

168. *Id.*

169. *Id.*

170. United States v. Ruiz, 54 M.J. 138, 141 (2000).