Bless Me Father For I Have Sinned: A Year in Self-Incrimination Law

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Introduction

Mark Twain once said, "Supposing is good, but finding out is better."[1] While this maxim may be true regarding most aspects of life, it falls short when applied to the law. Regarding the law of self-incrimination, finding out is not only better than supposing, it is essential because of the adverse consequences that can occur when law enforcement officials and trial participants do not learn and heed the rules. These adverse consequences can destroy a government's carefully crafted case and have conclusive effects on a trial's outcome. For a defense counsel, failure to identify and address self-incrimination issues can result in injustice for their clients, followed by claims of ineffective assistance of counsel. Finally, military judges who either miss such issues or misapply the law run the risk of reversal on appeal.

To understand and apply this year's court opinions, the practitioner must first have a rudimentary knowledge of the complex area of self-incrimination law. This complexity stems from the fact that self-incrimination encompasses four separate sources of law. Each source of law requires distinct triggering events before its protections apply. Each source offers different procedural safeguards and remedies for non-compliance. Failure to understand these basic distinctions will cause a practitioner to miss the significance of—or misapply—a case's holding.

This article first overviews self-incrimination law to give the reader a basic mental framework, and to give the new judicial opinions their proper context. The article then proceeds to review five of the more significant cases the Court of Appeals for the Armed Forces (CAAF) decided during the past year. Of these five cases, one case addresses the voluntariness doctrine, two cases address the issue of who must read Article 31(b) rights warnings, one case addresses both of these previously mentioned sources of law, and the last case centers around mentioning the accused's silence at trial. Of the three cases that address Article 31, two of them cover new ground regarding who must read these warnings; one case deals with a chaplain, and the other deals with a legal assistance attorney. Although these cases differ as to the source of law applied, as well as when the issue arose during the interrogation process, all of them contain important lessons for practitioners.

Self-Incrimination Law

The body of law known as self-incrimination law encompasses the Fifth Amendment,[2] the Sixth Amendment,[3] and the voluntariness doctrine.[4] These protections are common to both the civilian and military communities. The statutory protections of Article 31, Uniform Code of Military Justice (UCMJ), however, are unique to the military.[5]

Fifth Amendment & Miranda

Of these four sources of self-incrimination law, the Fifth Amendment probably enjoys the greatest name recognition. Although the Fifth Amendment has been in existence since the inception of the Constitution, its familiar procedural protections did not come into existence until 1966, with the release of the landmark case of *Miranda v. Arizona*.[6] The goal of *Miranda* was to establish procedural safeguards to protect individuals from the compulsion to confess in the inherently coercive environment of a police-dominated, incommunicado interrogation. Therefore, the triggering event for the application of *Miranda*'s protections is the onset of a "custodial interrogation."[7] Once *Miranda* is triggered, police must inform the subject of his rights (1) to remain silent, (2) to be informed that any statement he makes may be used as evidence against him, and (3) to the

1. Mark Twain, in MARK TWAIN IN ERUPTION (Bernard DeVoto ed., 1940).

2. U.S. CONST. amend. V. The Fifth Amendment states, in part, that "no person . . . shall be compelled in any criminal case to be a witness against himself." *Id.*

3. *Id*. amend VI. The Sixth Amendment states, in part, that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." *Id.*

4. The concept of voluntariness entails elements of the voluntariness doctrine, due process, and compliance with Article 31(d), UCMJ. *See* Captain Frederic I. Lederer, *The Law of Confessions: The Voluntariness Doctrine*, 74 MIL. L. REV. 67 (1976) [hereinafter Lederer, *Voluntariness Doctrine*].

5. UCMJ art. 31 (2002).

6. 384 U.S. 436 (1966).

7. *Id*. at 444.

presence of an attorney during the questioning.[8] In 1967, the Court of Military Appeals (COMA) ruled that *Miranda*'s protections also apply to military interrogations.[9]

Sixth Amendment

Like *Miranda*, the Sixth Amendment provides the right to the assistance of counsel. Although *Miranda* provides counsel to assist an individual during exposure to the coercive environment of a custodial interrogation, the Sixth Amendment provides a defendant with the assistance of counsel for his defense in a criminal prosecution. The right to counsel under the Sixth Amendment, therefore, is triggered by the initiation of the adversarial criminal justice process. In the civilian sector, indictment triggers this right.[10] In the military, the preferral of charges triggers this right.[11]

Article 31

Long before civilians enjoyed the protections of *Miranda*, members of the armed forces benefited from the procedural safeguards of Article 31(b).[12] Congress enacted Article 31 with the hope that it would work to dispel service members' inherent compulsion to respond to questioning from superiors in rank or position.[13] Throughout the years, the triggering requirements for Article 31(b) rights have been influenced not only by the plain text of the statute and legislative intent, but also by evolving judicial interpretations.[14] What has emerged is that when a suspect or an accused is questioned by a person subject to the UCMJ who is acting in an official capacity for law enforcement or disciplinary purposes—and is perceived as such by the suspect or accused—the questioner must read the suspect his Article 31(b) rights. These warnings include the right (1) to be informed of the nature of the accusation, (2) to remain silent, and (3) to be informed that any statement made may be used as evidence against the declarant.[15] While the rights of Article 31(b) and *Miranda* are similar, a quick comparison between the two highlights key differences. First, *Miranda* gives an individual the right to counsel, whereas Article 31(b) does not. Conversely, Article 31(b) requires that the individual be informed of the accusation against him, whereas there is no similar requirement under *Miranda*.[16]

Voluntariness Doctrine

The oldest source of self-incrimination law is the voluntariness doctrine. Its adoption and application predates procedural safeguards against involuntary confessions by well over two hundred years.[17] The goal of the voluntariness doctrine is to prevent the use of coerced confessions at trial because such confessions are considered so fundamentally unreliable that their underlying truthfulness is called into question. The concept of voluntariness encompasses elements of the common law voluntariness doctrine, due process, and compliance with Article 31(d).[18] Under this doctrine, even a confession that was secured in compliance with required procedural safeguards might still be suppressed if it is deemed to be involuntary. In determining whether a confession is voluntary, a court will examine the "totality of the circumstances" surrounding the confession to determine whether the accused's "will was overborne" and his "capacity for self-determination critically

8. *Id*. at 465.

9. United States v. Tempia, 37 C.M.R. 249 (C.M.A. 1967).

10. *See* McNeil v. Wisconsin, 501 U.S. 171, 175 (1991) ("The Sixth Amendment right . . . does not attach until a prosecution is commenced, that is, 'at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'") (quoting United States v. Gouveia, 467 U.S. 180, 188 (1984); Kirby v. Illinois, 406 U.S. 682, 689 (1972)).

11. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 305(d)(1)(B) (2002) [hereinafter MCM].

12. The UCMJ was enacted in 1950, whereas the Supreme Court did not decide *Miranda* until 1966. *See generally* Captain Frederic I. Lederer, *Rights Warnings in the Armed Services*, 72 MIL. L. REV. 1 (1976).

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

14. *Id*.

15. UCMJ art 31(b) (2002). 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.

16. *See id*.; *cf.* Miranda v. Arizona, 384 U.S. 436 (1966).

17. *See* Lederer, *Voluntariness Doctrine*, *supra* note 4, at 72.

impaired," or instead, whether the confession was the "product of an essentially free and unconstrained choice by its maker."[19]

Voluntariness Doctrine Cases

The CAAF applied the voluntariness doctrine in two cases during the past year, reaching different results in each. In *United States v. Benner*,[20] the appellant was convicted of sodomy and indecent acts with his four-year-old stepdaughter while his wife was in the hospital. The daughter told both her grandmother and her mother about the incident. When confronted by his wife, the appellant admitted to the incident. Thereafter, both his stepdaughter and wife left the appellant's quarters and moved in with the grandmother. At the urging of the grandmother and his wife, the appellant eventually sought counseling from a chaplain.[21]

During the initial counseling session, the appellant admitted to an inappropriate relationship with his stepdaughter. At the conclusion of this session, the chaplain informed the appellant that he might have an obligation to report the incident to the authorities. The next day, the chaplain contacted the Army Family Advocacy office, which erroneously informed him that he was required to report the child abuse. The chaplain relayed this information to the appellant, after which the appellant admitted even more details of the incident to him. The chaplain encouraged the appellant to turn himself in instead of having the chaplain do it. To make the decision easier, the chaplain agreed to accompany the appellant to the military police (MP) station. The chaplain testified that the appellant was initially hesitant to go, and had he not agreed to escort the appellant, he doubted if the appellant would have turned himself in.[22] The chaplain then escorted the appellant to the MP station and informed the MPs that the appellant was there to make a statement regarding his "improper relationship with his stepdaughter."[23] Two Criminal Investigation Division (CID) agents arrived about an hour later, advised the appellant of his right against self-incrimination,[24] obtained a waiver, and interviewed him. The CID agents, however, did not provide him any "cleansing" warnings regarding his earlier admissions to the chaplain. The appellant eventually gave the CID agents a six-page handwritten confession.[25]

After reviewing the applicable law in the area of confidentiality between a chaplain and a penitent, including case law,[26] statutory law,[27] and relevant service regulations,[28] the CAAF concluded that the chaplain had violated his obligation of confidentiality when he informed the MP office of appellant's misconduct.[29] The CAAF also held that when the chaplain informed the appellant that he was obligated to report the misconduct to the authorities, he effectively abandoned his role as a chaplain and was instead "act[ing] solely as an Army officer."[30] Having abandoned his clerical role, he was then obligated to read the appellant his Article 31(b) warnings before questioning him further.[31]

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18. *See id*. Article 31(d), UCMJ, provides that "[n]o 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 trial by court-martial." UCMJ art. 31. The analysis to Military Rule of Evidence (MRE) 304(c)(2) lists examples of involuntary statements as those resulting from coercion, unlawful influence, and unlawful inducement, including infliction of bodily harm; deprivation of food, sleep, or adequate clothing; threats of bodily harm; confinement or deprivation of privileges for refusing to make a statement, or threats thereof; promises of immunity or clemency; promises of reward or benefit; or threats of disadvantage. MCM, *supra* note 11, MIL. R. EVID. 304(c)(2) analysis, at A22-10.

19. Culombe v. Connecticut, 367 U.S. 568, 602 (1961).

20. 57 M.J. 210 (2002).

21. *Id*. at 211.

22. *Id*.

23. *Id*. at 212.

24. *Id*. These rights included those under the Fifth Amendment, Article 31(b), UCMJ, and MRE 305(d). *Id.*

25. *Id*. at 212.

26. *See* Trammel v. United States, 445 U.S. 40, 51 (1980) ("[I]t recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return.").

27. *See* MCM, *supra* note 11, MIL. R. EVID. 503 ("A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman or to a clergyman's assistant, if such communication is made either as a formal act of religion or as a matter of conscience.").

28. *See* U.S. DEP'T OF ARMY, REG. 165-1, CHAPLAIN ACTIVITIES IN THE UNITED STATES ARMY para. 4-4 (26 May 2000); U.S. DEP'T OF ARMY, REG. 608-18, THE FAMILY ADVOCACY PROGRAM para. 3-8 (1 Sept. 1995).

29. *Benner*, 57 M.J. at 212.

30. *Id*. at 214.

31. *Id*.

The CAAF then focused its attention on the issue of whether the appellant's subsequent confession to CID was voluntary. The court noted that as part of the rights warnings given to the appellant, the CID informed him that he was suspected of "indecent assault."[32] At this point, the appellant would have known that the chaplain betrayed his confidences and that he would have faced a "Hobson's choice"[33] of either confessing or having the chaplain reveal his earlier disclosures. Unfortunately for the appellant, the CID agents did not alleviate his predicament by providing him a cleansing warning before taking his statement. If the CID agents had informed the appellant the confession he made to the chaplain could not be used against him, he would have had the opportunity to consider whether his secrets were still protected, and whether he truly wanted to speak with the CID agents.[34]

The CAAF determined that the appellant was never truly given the choice of not testifying against himself. The court was unwilling to rule that the appellant had made his confession voluntarily. Instead, the court found the appellant's "will [had been] overborne and his capacity for self-determination [had been] critically impaired."[35] As such, it felt that allowing the appellant's confession to be used against him would offend due process.[36]

In a lone dissent, Chief Judge Crawford argued that the appellant's motivation for confessing to the CID agents had little to do with the chaplain's threatened disclosure and more to do with the urgings of his wife and his desire to reunite with his family.[37] Her opinion argued that, absent improper coercion, duress, or inducement, such moral and psychological pressures do not render the confession involuntary.[38] Regarding the chaplain's disclosure to the CID agents, Chief Judge Crawford felt that there was no evidence in the record that the interrogators used it as leverage to secure a statement from the appellant. Chief Judge Crawford concluded her dissent with a passionate attack on the majority, citing the detrimental psychological impact a retrial would have on the victims.[39]

The other case in which the CAAF applied the voluntariness doctrine during the past year was *United States v. Ellis*.[40] The victim in *Ellis* was Timmy, the appellant's two-and-a-half-year-old son. The appellant had recently gained custody of Timmy and his older sister from their mother, the appellant's ex-wife. Both children moved in with the appellant, his current wife, and their five other children. Timmy and his sister's transition into the appellant's family was a difficult one, so much so that the appellant asked the state to take custody of them both. A couple of months after this request, but before the state made a decision, the appellant's wife brought Timmy to the hospital emergency room unconscious. Four days later, Timmy died from blunt force trauma to the head.[41]

After reviewing the results of the autopsy, civilian investigators suspected that Timmy's death resulted from child abuse. The appellant and his wife voluntarily agreed to be questioned by state medical and law enforcement officials at the local sheriff's office. Based on these interviews, detectives determined that Timmy was in the sole care of the appellant and his wife before his death, and that their explanation for the cause of the injury was inconsistent with the autopsy's findings. At this point, detectives decided to conduct separate accusatory interviews of the appellant and his wife. The detectives read both of them their *Miranda* rights, which they waived. During their separate interrogations, detectives told both the appellant and his wife that there was enough evidence to arrest each of them. They were also told if they were both arrested, the state would take away their other six children and put them in foster care.[42] Upon their request, the appellant and his wife were allowed to meet together in private for fifteen minutes. After this meeting, the appellant talked with detectives about the stress Timmy and his sister's behavioral problems had caused the family. The appellant stated that dealing with Timmy was particularly diffi-

32. *Id*. at 213.

33. RANDOM HOUSE COLLEGE DICTIONARY 630 (rev. ed. 1982) ("The choice of taking either that which is offered or nothing; the absence of a real choice."). The expression is derived from Thomas Hobson (1544-1631) of Cambridge, England, who rented horses and gave his customers only one choice, that of the horse nearest the stable door. *Id*.

34. *Benner*, 57 M.J. at 213.

35. *Id*. (quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961)).

36. *Id*.

37. *Id*. at 214-18.

38. *Id*. at 217.

39. *Id*. at 218.

40. 57 M.J. 357 (2002).

41. *Id*. at 376-77.

42. *Id*. at 377.

cult. He then confessed to slamming his son's head on the ground on two successive days, once for defecating in his pants and another for not eating his meal.[43]

In examining the voluntariness of the appellant's confession, the CAAF first cited Congress's implementation of the Fifth Amendment in the military, specifically Article 31(d).[44] The court then looked at the totality of the circumstances surrounding the confession, including the characteristics of the appellant and the details of the interrogation.[45] In examining the characteristics of the appellant, the CAAF noted that he was a twenty-seven year-old Petty Officer Second Class (E-5), a high school graduate, and in the "upper mental group" of Navy classifications.[46] Additionally, there was no evidence that he suffered from a psychological handicap at the time of questioning that would have impaired his decision-making process.[47]

In scrutinizing the conditions of the appellant's interrogation, the CAAF pointed to the fact that the detectives did not use threats or physical abuse. Additionally, the questioning did not continue for an excessive amount of time, and did not involve incommunicado detention or prolonged isolation. The court also noted that the detectives did not use the appellant's wife as a government tool to induce him to confess.[48]

Finally, the court concluded that although the detective's statement regarding the possible removal of the appellant's children may have contributed to his motivation to confess, "the mere existence of a causal connection [did] not transform appellant's otherwise voluntary confession into an involuntary one."[49] Examining all of these facts together, the court felt that the circumstances of the appellant's confession were not "so inherently coercive as to overcome the appellant's will to resist."[50]

In a concurring opinion, Judge Baker agreed with the majority's conclusion that under the totality of the circumstances, the appellant's confession was voluntary. He expressed concern, however, over the inherently coercive effect of threatening parents with the deprivation of their children to secure a confession. Judge Baker cautioned both law enforcement officials and courts to view confessions secured under such circumstances with "heightened sensitivity" to insure their validity.[51]

In a lone dissent, Judge Effron noted that the appellant's criminal case was originally brought in state court, where his confession was suppressed at trial, and that a state appellate court affirmed this decision on appeal.[52] After examining all of the circumstances surrounding the appellant's confession, Judge Effron felt that it was a very close call whether the appellant confessed because he was guilty, or because he wanted to exonerate his wife so that his children could remain with their mother.[53] Ultimately, however, the fact that this questionable confession had an interlocking connection with critical physical evidence lost by the government,[54] and the fact that the prosecution argued the importance of this connection in their case, led Judge Effron to conclude that the military judge's failure to take corrective action was not harmless beyond a reasonable doubt.[55]

After examining *Ellis* and *Benner* together, counsel will better understand the breadth of the voluntariness doctrine. The CAAF, in determining whether the appellant in *Ellis* had made a voluntary confession, applied the "totality of the circumstances" test in a traditional manner—by looking at the individual characteristics of the accused along with the circumstances of the interrogation.[56] *Benner*, however, presented the CAAF with a unique set of facts with which to apply the voluntariness doctrine. The majority spent little time examining the individ-

43. *Id*. at 378.

44. *See* UCMJ art. 31(d) (2002); *supra* note 18 and accompanying text.

45. *Ellis*, 57 M.J. at 378.

46. *Id*. at 379.

47. *Id*.; *see also* United States v. Bubonics, 45 M.J. 93 (1996); United States v. Martinez, 38 M.J. 82, 84 (C.M.A. 1993).

48. *Ellis*, 57 M.J. at 379.

49. *Id*.

50. *Id*.

51. *Id*. at 384.

52. *Id*. at 387.

53. *Id*. at 391.

54. *Id*. at 389. The state medical examiner's office lost the victim's brain and its meninges when the laboratory moved to a new location. *Id*.

55. *Id*. at 393.

56. *See* United States v. Bubonics, 45 M.J. 93 (1996).

ual characteristics of Sergeant Benner or the circumstances of his actual interrogation. Instead, the court focused primarily on the Hobson's choice that confronted him before his confession. These two cases, when read together, should encourage defense counsel to examine *all* of the circumstances surrounding their clients' confessions carefully, including those leading up to the actual taking of the confession, to determine if a particular client's "will [was] overborne and his capacity for self-determination [was] critically impaired" at any stage of the interrogation process.[57]

Article 31(b) Cases

Legal Assistance Attorney

While *Benner* addressed the circumstances under which a chaplain must read a penitent his rights, in *United States v. Guyton-Bhatt*,[58] the CAAF examined the circumstances under which a legal assistance attorney must read an individual his rights when pursuing a matter for a client. In *Guyton-Bhatt*, the appellant, a captain and psychologist, agreed to buy a 1986 Jaguar from Sergeant First Class R. The appellant took possession of the vehicle after she made an initial payment of $500, with an agreement to pay the balance in installments. After the appellant missed several payments, Sergeant First Class R asked her to sign a promissory note. The appellant agreed, but unilaterally amended the document to indicate that payments would not begin until two months later.[59]

When the appellant again failed to make the scheduled payments, Sergeant First Class R requested and received a copy of the executed promissory note from the appellant. Before giving Sergeant First Class R a copy of the promissory note, however, the appellant once again unilaterally changed the payment due date, pushing it back another three months. The appellant again failed to make any payments on the vehicle, including on the newly amended due date.[60] After receiving none of the promised payments and learning that the vehicle had been abandoned on the side of the road, Sergeant First Class R took the promissory note to a legal assistance officer for advice. After examining the altered payment date on the promissory note, the legal assistance officer consulted the *Manual for Courts-Martial* (*MCM*) and determined that the appellant had committed the crime of forgery. He contacted the appellant in an attempt to resolve the dispute between her and his client, Sergeant First Class R. During the conversation, the appellant admitted buying the car and owing Sergeant First Class R money for nearly a year. She stated, however, that she was not going to make any payments because "you couldn't get blood from a stone."[61] At some point during the conversation, the legal assistance officer determined that the best way to help his client was to pursue criminal action, rather than civil action, against the appellant. To initiate a criminal action, the legal assistance attorney contacted the trial counsel for the appellant's unit and informed him of the matter. Additionally, he had Sergeant First Class R follow up on the progress of the criminal action once it had begun. At no time did the legal assistance officer read the appellant her rights against self-incrimination under Article 31(b).[62]

In a cursory discussion, the majority opinion sought to distinguish this case from the litany of cases the service court cited that held that certain individuals are exempt from the requirement to read Article 31(b) rights.[63] The CAAF focused on the fact that before calling the appellant, the legal assistance attorney had concluded that the appellant had committed the crime of forgery based on his examination of the promissory note and his research of the *MCM*. Additionally, the legal assistance attorney decided that the best way to help his client was to pursue a criminal action rather than a civil action. Finally, when the legal assistance attorney contacted the appellant, he used the authority of his position when he questioned her. As such, the CAAF concluded that the legal assistance attorney was

57. *Id*. at 94.

58. 56 M.J. 484 (2002).

59. *Id*. at 485.

60. *Id*.

61. *Id*. at 486.

62. *Id*.

63. *Id.* (citing United States v. Guyton-Bhatt, 54 M.J. 796, 802 (Army Ct. Crim. App. 2001)). Certain persons are exempt from the Article 31, UCMJ, warning requirement, when they ask questions for specific purposes:

> (1) a military doctor, psychiatric social worker, or nurse prior to asking questions of a patient for medical diagnosis or treatment; (2) an in-flight aircraft crew chief prior to questioning, for operational reasons, an irrational crewman about possible drug use; (3) military pay officials questioning a servicemember about a pay or allowance entitlement; or (4) a negotiator trying to end an armed standoff, provided the discussion was truly designed to end the standoff, rather than to obtain incriminating statements to be used against the suspect at trial. However, military appellate courts have also held that military defense counsel may not deliberately seek incriminating answers from a suspect unrepresented by counsel without first giving Article 31, UCMJ, rights warnings.

Id.

"acting as an investigator in pursuing this criminal action" and was therefore required to give the appellant Article 31(b) warnings before questioning her.[64] Although the court found error, it determined that the error was harmless because nearly all the information about which the legal assistance attorney testified was also admitted into evidence through independent sources.[65]

Senior Judge Sullivan, who concurred in the result, disagreed with the majority on its conclusion that the legal assistance attorney should have read the appellant her Article 31(b) rights. In applying the analysis established under *United States v. Loukas*,[66] Judge Sullivan concluded that the legal assistance attorney's primary motivation for calling the appellant was to try and get her to pay his client, not for law enforcement or disciplinary purposes.[67]

The CAAF's opinion in *Guyton-Bhatt* is significant, not because of what standard the court applied—or how it applied it—but to whom the CAAF applied it. In *Guyton-Bhatt*, the CAAF applied its traditional standard for determining who must give Article 31(b) warnings, but applied it in a unique situation. Traditionally, the courts have scrutinized the conduct of law enforcement officials and those in the suspect's chain of command to determine whether Article 31(b) warnings were required. Although the courts have occasionally ventured beyond this core group in their analysis, *Guyton-Bhatt* represents the first case in which a court scrutinized the conduct and motives of a legal assistance attorney. With the release of *Guyton-Bhatt* and *Benner*, legal assistance attorneys and chaplains now join the long list of professions to which the court has applied the Article 31(b) warning requirement.[68] Reading these two cases together, it should be clear that no profession is too sacrosanct to be immune from the CAAF's scrutiny. Although an individual's duty position may give counsel insight into his motives for questioning someone, it is only one of the factors courts will consider. When faced with a rights warnings issue, counsel should not be lured into focusing primarily on the questioner's duty position, but should instead look to the underlying motives of the questioner.

Although the CAAF remained true to stare decisis in *Guyton-Bhatt* and *Benner*, these opinions further entrench a faulty paradigm of legal analysis the court began adopting years ago.[69] The application of this flawed analysis has led the court to decide cases in a manner that often conflicts with the underlying goal of Article 31. Much like its successor, *Miranda*, the original goal of Article 31(b) was to create a procedural mechanism that would serve to dispel service members' inherent compulsion to respond to questioning from superiors in rank or position.[70] The genesis for this inherent compulsion to respond arises from the unique nature of military service, which trains service members to respond instinctively to all questions and commands of their superiors without considering their constitutional rights against self-incrimination.[71] While the Supreme Court has successfully kept the focus on the suspect's perspective when determining the existence and level of coercion in an interrogation setting, over the years, the CAAF and its predecessor, the Court of Military Appeals (COMA), have gradually shifted the focus to the motives of the questioner, and have examined the perceptions of the suspect only sporadically.[72]

The analysis in *Guyton-Bhatt* and *Benner* continues the court's trend toward focusing on the motives of the questioner to the exclusion of examining the suspect's perspective. Although the legal assistance attorney in *Guyton-Bhatt* may have been motivated by a law enforcement or disciplinary purpose during his questioning of the appellant, it is difficult to support the position that the legal assistance attorney's rank or duty position caused the appellant to feel a "presumptive coercion" from the former's telephonic questioning.[73] The appellant in *Guyton-Bhatt* was a captain; the legal assistance attorney was only a first lieutenant. Additionally, the legal assistance

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64. *Id*. at 487.

65. *Id*.

66. 29 M.J. 385 (C.M.A. 1990). The Court of Military Appeals (COMA) adopted both an "official questioning" test and a "position of authority" test in *United States v. Duga* to narrow the broad "person subject to this chapter" language of Article 31, UCMJ. United States v. Duga, 10 M.J. 206 (C.M.A. 1981). The second part of the test focused on whether the person being questioned perceived the questioning as official in nature, as opposed to being motivated by personal curiosity. In *Loukas*, the court further narrowed the "official questioning" prong of the two-part test in *Duga* to include only those situations "when questioning is done during an official law-enforcement investigation or disciplinary inquiry." *Loukas*, 29 M.J. at 387. Courts have continued to apply the *Duga-Loukas* test over the years, but have often placed more emphasis on the "law enforcement or disciplinary purpose" of the questions than to the perceptions of the suspect. *See* Major Ralph H. Kohlmann, *Are You Ready for Some Changes? Five Fresh Views of the Fifth Amendment*, ARMY LAW., Mar. 1996; Major Ralph H. Kohlmann, *Tales from the CAAF: The Continuing Burial of Article 31(b) and the Brooding Omnipresence of the Voluntariness Doctrine*, ARMY LAW., May 1997.

67. *Guyton-Bhatt*, 56 M.J. at 488.

68. *See generally supra* note 63 and accompanying text.

69. *See generally* McGillin, *supra* note 13.

70. The *Miranda* decision sought to put a procedural safeguard in place that would counter the inherently coercive environment of a police-dominated, incommunicado interrogation. In determining whether an interrogation environment is inherently coercive, courts must look at the circumstances from the perspective of the suspect. *See* Illinois v. Perkins, 496 U.S. 292, 296 (1990).

71. United States v. Franklin, 8 C.M.R. 513, 517 (C.M.A. 1952); *see also* United States v. Gibson, 14 C.M.R. 164 (C.M.A. 1954).

attorney, who worked at the Office of the Staff Judge Advocate, did not hold a position of command or supervisory authority over the appellant, a psychologist working at the installation's hospital.[74]

Likewise, the court in *Benner* never addressed the appellant's perception as the chaplain was questioning him. Although the chaplain in *Benner* outranked the accused, he did not hold a command or supervisory position over him. Additionally, it was the appellant who approached the chaplain for counseling, not the chaplain who approached the appellant to interrogate him as part of a criminal investigation. Finally, there is nothing in the record that indicates that the chaplain's manner of questioning or the content of his questions would have led the appellant to believe the chaplain was motivated by an official law enforcement or disciplinary purpose. On the contrary, after the appellant made his admissions of misconduct, the chaplain talked to the appellant about "the issue of forgiveness, of forgiving himself, [and] that [confessing] may be a step in helping him deal with that."[75] Given these facts, it is most likely that the appellant perceived the chaplain's questions as motivated solely by a Christian-based desire to help him with his personal situation. It is difficult to conclude that the appellant felt any sense of compulsion to answer the chaplain's questions, or that he needed the chaplain to read him his Article 31(b) rights to dispel any such compulsion.

Interrogations

In *United States v. Pinson*,[76] the CAAF addressed the issue of when foreign police are required to give military suspects Article 31(b) warnings. At the appellant's first trial, the victim, an Icelandic national named Helga, testified that her earlier accusations against the appellant for assault and property damage were false. About two months later, Helga told the Icelandic police that the appellant had beaten and threatened her into recanting her allegations in court. Based on Helga's disclosure, the Icelandic police and the Naval Criminal Investigative Service (NCIS) opened separate investigations.[77]

As part of their investigation, the Icelandic police wanted to interrogate the appellant. They gave the appellant's name to NCIS agents and asked them to produce him for questioning. When the appellant arrived at the Naval Security building, the Icelandic authorities arrested him. Before they questioned him, the Icelandic authorities advised the appellant of his right to an attorney and his right to remain silent under Icelandic law, but they did not advise him of his rights under Article 31(b). The appellant asked to speak to an attorney, and the Icelandic authorities ceased questioning him at that time. When the appellant eventually conferred with an Icelandic attorney, the attorney informed him that under Icelandic law, a court could draw a negative inference if he chose to invoke his right to remain silent. Subsequently, the appellant decided to submit to questioning by Icelandic police, during which he made several incriminating admissions.[78]

Although a treaty between the United States and Iceland called for mutual cooperation in criminal investigations, the CAAF held that the Icelandic police were not required to read the appellant his Article 31(b) rights, since at no time were they "acting under the control or at the direction of the Naval investigators."[79] In support of its holding, the court noted that the Icelandic police did not speak with any NCIS agents before questioning the appellant, nor did they ask NCIS for any information or leads when conducting their investigation. The only assistance NCIS gave Icelandic authorities was in producing

72. United States v. Pittman, 36 M.J. 404 (C.M.A. 1993) (holding that accused's section leader and friend, motivated by personal curiosity, did not need to give Article 31, UCMJ, warnings); United States v. Bowerman, 39 M.J. 219 (C.M.A. 1994) (holding that an Army doctor was not required to inform the accused of his Article 31(b), UCMJ, rights when questioning him about a child's injuries; the purpose of the questions was for medical treatment of the patient); United States v. Moses, 45 M.J. 132 (1996) (holding that Naval Criminal Investigative Service (NCIS) agents engaged in an armed standoff with the accused were not engaged in a law enforcement or disciplinary inquiry when they asked the accused what weapons he had inside the house; the questions were considered negotiations designed to bring criminal conduct to a peaceful end); United States v. Payne, 47 M.J. 37 (1997) (holding that Defense Investigative Service (DIS) agents conducting a background investigation were not engaged in law enforcement activities); United States v. Bradley, 51 M.J. 437 (1999) (holding that a commander was not required to give Article 31(b), UCMJ, warnings before questioning his soldier about whether the soldier had been charged with criminal conduct; his "administrative and operational" purpose was to determine whether the accused's security clearance should be terminated rather than for a law enforcement or disciplinary purpose); United States v. Smith, 56 M.J. 653 (Army Ct. Crim. App. 2001) (holding that the president of a prison's Unscheduled Reclassification Board was not required to read Article 31(b), UCMJ, rights to an inmate before asking him if he would like to make a statement about his recent escape; the purpose of the board was to determine whether to tighten the inmate's custody classification).

73. United States v. Gibson, 14 C.M.R. 164, 173 (C.M.A. 1954) (Brossman, J., concurring) (reasoning that Article 31(b) warnings were implemented "to provide a counteragent for possible intangible 'presumptive coercion,' implicit in military rank and discipline").

74. United States v. Guyton-Bhatt, 56 M.J. 484, 486 (2002).

75. United States v. Benner, 57 M.J. 210, 211 (2002).

76. 56 M.J. 489 (2002).

77. *Id*. at 490.

78. *Id*.

79. *Id*. at 494.

the appellant and help in locating another American witness. Likewise, NCIS agents never asked the Icelandic authorities to gather specific evidence or to ask the appellant specific questions to assist in the military investigation. Based on these facts, the court held the NCIS agents had not "participated" in the Icelandic investigation within the meaning of Military Rule of Evidence (MRE) 305(h)(2),[80] and affirmed the lower court's decision.[81]

The result of this case is not surprising in light of other cases in which the CAAF has considered foreign interrogations of military personnel.[82] Although *Pinson* does not expand the circumstances under which foreign police may question military personnel without reading them their Article 31(b) rights, it can serve as another authoritative arrow in the quiver of a trial counsel who faces a motion to suppress an accused's statement taken by foreign investigators.

Mentioning the Accused's Silence at Trial

In *United States v. Alameda*,[83] the CAAF considered the admissibility of testimony addressing the appellant's silence during his apprehension by law enforcement officials and the appropriateness of the trial counsel's comments on this silence in his closing argument.[84] The charges in *Alameda* stemmed from two separate incidents between the appellant and his wife. The appellant had a long history of verbally and physically abusing his wife. During one of these incidents, the appellant got angry with his wife after discovering an E-mail from one of her male high school friends, who wanted to visit her. In an angry tirade, the appellant knocked the computer off the table, smashed the telephone as his wife attempted to call for help, shoved and punched her, and threatened to kill her. She was eventually able to report the incident to the base security forces. When the appellant's commander learned of the incident, he ordered the appellant to move out of the family quarters and to have no contact with his family unless it was pre-arranged.[85]

Despite this no-contact order, the appellant went to his quarters and confronted his wife. Upon seeing her husband, Mrs. Alameda became hysterical and tried to move away from him. The appellant continued to follow her around the quarters and tried to prevent her from screaming for help by covering her mouth and pinching her nose with his hands. The appellant then attempted to suffocate his wife by placing a plastic garbage bag over her head. During the struggle, she was able to break free and fled into the bedroom. As the appellant followed his wife, she stated she would do whatever he wanted her to do and asked that they go back to the living room to talk things out.[86] When he turned to go into the living room, Mrs. Alameda closed and locked the bedroom door behind him. She then crawled out of the window and ran across the street to the neighbor's house, where she called for help.[87]

Technical Sergeant (TSgt.) Moody of the Base Security Force responded to the scene and spoke with Mrs. Alameda about the incident. He had responded to a previous domestic incident involving the Alamedas and could recognize the appellant. Based on a description of the appellant's van, TSgt. Moody began searching the base for the appellant. He eventually located the appellant's van in the base's dormitory area and saw the appellant sitting on the dormitory stairs talking with another individual. TSgt. Moody approached the appellant and asked him if he was Airman Alameda. When the appellant responded that he was, TSgt. Moody asked the other individual to move away and asked the appellant for his identification card. After the appellant produced his card as requested, TSgt. Moody confirmed his identification and informed the appellant that he was being apprehended for an "alleged assault."[88]

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80. MCM, *supra* note 11, MIL. R. EVID. 305(h)(2). This rule states:

> *Foreign interrogations*. Neither warnings under subdivisions (c) or (d), nor notice to counsel under subdivision (e) are required during an interrogation conducted abroad by officials of a foreign government or their agents unless such interrogation is conducted, instigated, or participated in by military personnel or their agents or by those officials or agents listed in subdivision (h)(1).

Id.

81. *Pinson*, 56 M.J. at 490.

82. United States v. French, 38 M.J. 420 (C.M.A. 1993). The accused was questioned by British police in the presence of his first sergeant and an Air Force Office of Special Investigations (AFOSI) agent. Despite the AFOSI agent's knowledge of the investigation, his presence during the interview, his comment during the interview that it would be better for the accused to remain silent than to continue lying, and a British policeman's brief use of AFOSI agent's handcuffs during the arrest, the "participation" of U.S. military officials did not reach the level which would require Article 31, UCMJ, and *Miranda* warnings by British officials. *Id.*

83. 57 M.J. 190 (2002).

84. *Id*. at 192 n.1.

85. *Id*. at 192.

86. *Id*. at 193.

87. *Id*. at 193-94.

At trial, the prosecution elicited testimony from TSgt. Moody that during the apprehension, the appellant never asked any questions about why he was being apprehended and that he showed little emotion, but instead just stared straight ahead. The military judge repeatedly overruled the defense counsel's objections to this testimony. In his closing argument, the trial counsel directed the panel's attention to TSgt. Moody's testimony about the appellant's lack of reaction when questioned during his arrest. The trial counsel argued that this silence showed the appellant's consciousness of guilt. In response to the defense counsel's timely objections to this line of argument, the military judge merely reiterated his earlier instructions to the members that they could not hold the accused's *failure to testify* against him.[89]

In its analysis of this case, the CAAF first addressed the issue of defense waiver. On this issue, the court found the defense's objections to the relevance of TSgt. Moody's testimony were enough to preserve the issue. Furthermore, any confusion over the basis for the defense's objections was the fault of the military judge, who summarily overruled these objections without requiring either side to articulate a theory for exclusion or admissibility of this testimony. Additionally, the defense's objections to the trial counsel's closing argument were also enough to preserve that issue.[90]

The court next turned its attention to the relevance of TSgt. Moody's testimony. The CAAF noted that because the appellant had a history of domestic violence, including an assault incident two weeks before the attempted murder incident, his failure to deny one or more of these alleged assaults to TSgt. Moody did not support an inference of guilt and was therefore not relevant. Additionally, even if it did constitute some sort of admission, it would only be an admission to an alleged assault and not to attempted premeditated murder.[91]

Having decided that the military judge erred by admitting evidence of the appellant's silence, the CAAF then addressed the trial counsel's use of it in his closing argument as evidence of the appellant's guilt. The court identified this case as one involving post-apprehension, pre-*Miranda* silence. They noted that the federal circuit courts make a distinction between pre-arrest versus post-arrest silence, and that the majority of courts considering pre-arrest silence cases have concluded that its use as substantive evidence of guilt violates the Fifth Amendment.[92] Additionally, MRE 304(h)(3) makes no distinction between pre-arrest and post-arrest silence, but applies any time a person is either under official investigation or is in confinement, arrest, or custody.[93]

Based on MRE 304(h)(3) and the weight of federal circuit court authority, the CAAF found that the military judge committed "constitutional error" when he admitted evidence of the appellant's post-apprehension silence as evidence of guilt and then allowed the trial counsel to use it in his closing argument. Having found error, the CAAF then focused on the military judge's attempt at crafting a curative instruction for the members.[94]

The court found that each time the defense objected to the trial counsel's closing argument, the military judge's instructions merely reemphasized that the accused was not obligated to take the stand in his defense *at trial*. The military judge never gave the panel members an instruction warning them not to draw any adverse inference from the appellant's silence *during apprehension*. The CAAF felt that these instructions were not only "off the mark," but may have actually exacerbated the problem by suggesting by omission that the members *could* draw an adverse inference from appellant's silence during apprehension.[95]

In deciding whether the military judge's error was harmless, the court looked at the cumulative effect of the admission of the pre-arrest silence evidence, the trial counsel's improper argument, the military judge's erroneous instructions, and the physical evidence suppressed by the service court.[96] The CAAF ultimately could not be satisfied beyond a reasonable doubt that the panel would have convicted the appellant of attempted pre-

88. *Id*. at 194.

89. *Id*. at 194-95.

90. *Id*. at 197-98.

91. *Id*. at 198.

92. *Id*. at 198-99 (citing United States v. Velarde-Gomez, 269 F.3d 1023, 1028 (9th Cir. 2001); Combs v. Coyle, 205 F.3d 269, 282-83 (6th Cir. 2000); United States v. Burson, 952 F.2d 1196, 1201 (10th Cir. 1991); Coppola v. Powell, 878 F.2d 1562, 1565 (1st Cir. 1989); United States *ex rel*. Savory v. Lane, 832 F.2d 1011, 1017 (7th Cir. 1987).

93. MCM, *supra* note 11, MIL. R. EVID. 304(h)(3) ("A person's failure to deny an accusation of wrongdoing concerning an offense for which at the time of the alleged failure the person was under official investigation or was in confinement, arrest, or custody does not support an inference of an admission of the truth of the accusation."). Furthermore, the military justice system differs from the civilian justice system in that the *Miranda* right is triggered by custodial interrogation, whereas the Article 31, UCMJ, right is triggered by questioning by a person subject to the code. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966); *cf*. UCMJ art. 31 (2002).

94. *Alameda*, 57 M.J. at 199.

95. *Id*. The military judge informed the members that the appellant had "no obligation to make any statement *during the trial in his defense*" and that "nothing will be held against this accused because he did not say anything in his defense." *Id*.

meditated murder or its lesser-included offenses absent this improper evidence. The court reversed the case on the charge of attempted premeditated murder and remanded it to the service court to consider, in light of the CAAF's ruling, whether these errors were harmless beyond a reasonable doubt as to the lesser-included offenses that did not contain the element of premeditation or intent to kill.[97]

In a separate opinion, Judge Effron agreed with the majority's reversal of the attempted premeditated murder charge, but felt that the majority's opinion did not go far enough. He was not satisfied that the cumulative effect of the errors was harmless with respect to the lesser-included offenses as well.[98]

In the lone dissent, Judge Crawford felt the defense waived the issue at trial because its objections were "off the mark."[99] She also felt that the appellant's pre-arrest, pre-*Miranda* warning silence was not protected by either Article 31(b) or the Fifth Amendment because the appellant's act of staring ahead silently when confronted by TSgt. Moody was neither testimonial nor communicative in nature.[100] Finally, Judge Crawford argued that even if there was error that had not been waived, the error was harmless because the other evidence was overwhelming that the appellant intended to kill his wife.[101]

All parties to a court-martial should heed the lessons of *Alameda* and its predecessors in the area of mentioning the accused's silence at trial.[102] Trial counsel should not only avoid any mention of the accused's silence at trial, they should also prepare their witnesses not to mention it. Defense counsel must remember that they carry the burden to object to this type of testimony at trial.[103] When they object, defense counsel should articulate the basis for their objections with specificity to insure that they do not waive issues for appeal.[104] Defense counsel should never rely on appellate courts to find plain error to preserve their clients' legal issues. Finally, military judges should be ready to provide curative or limiting instructions sua sponte when necessary. Military judges must craft such instructions in a manner that fits the needs of the individual situation. Merely reading instructions from the *Military Judges' Benchbook*[105] without an intellectual evaluation of those instructions' appropriateness may lead to other instructions that fail to save a case from reversal on appeal.[106]

Conclusion

The CAAF's decisions during the past year give practitioners a good sense of the critical need to understand the law of self-incrimination. Trial counsel should not only commit the lessons of these cases to memory; they should also teach them to the law enforcement officials with whom they work, to protect the validity of confessions during the investigation stage. Defense counsel should gain a better understanding of the various sources of law that protect their clients' rights against self-incrimination. This understanding should not only assist defense counsel in identifying potential violations of these rights, but will help them articulate reasons to suppress their clients' statements, and to preserve their objections for appellate review. Finally, military judges must understand these issues so that they can rule correctly on motions and objections, or intervene sua sponte, if necessary. The failure of counsel and military judges to understand these lessons may result in reversal on

96. *Id*. The Air Force Court of Criminal Appeals had ruled that the trial court erred when it admitted masking tape, latex gloves, and a utility knife as evidence to show "some sort of a plan or premeditation" by the appellant. *Id*. at 195.

97. *Id*. at 201.

98. *Id*. at 202.

99. *Id*. at 205-06. The defense objections during TSgt. Moody's testimony included relevance, speculation, and "asked-and-answered." The defense counsel never objected to the evidence based on the protections of Article 31, UCMJ, the Fifth Amendment, or MRE 304(h)(3). *Id*.

100. *Id*. at 208.

101. *Id*. at 208-09.

102. *See, e.g.*, United States v. Cook, 48 M.J. 236 (1998). After being apprehended and questioned by AFOSI investigators about a rape allegation, the accused went to a friend's house. The friend asked the accused if he committed the rape. The accused did not respond. At trial, the prosecution introduced this evidence and argued that the accused's failure to deny the allegation indicated guilt. *Id*. at 238-39. The CAAF held that this evidence was irrelevant under MRE 304(h)(3), even when the one asking the questions was a friend who was inquiring out of personal curiosity. The court also held that the start of the AFOSI investigation was the triggering event for the MRE 304(h)(3) protections. *Id*. at 240. In *United States v. Riley*, 47 M.J. 276 (1997), the CAAF reversed for plain error in a case in which an investigator testified regarding the accused's invocation of his privilege against self-incrimination during questioning, the defense counsel did not object, and the military judge failed to give a limiting instruction. *Id*.

103. MCM, *supra* note 11, MIL. R. EVID. 304(d)(2)(a).

104. *Id.* MIL. R. EVID. 304(d)(3).

105. U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK (1 Apr. 2001).

106. *See generally* Major Martin H. Sitler, *Silence Is Golden: Recent Developments in Self-Incrimination Law,* ARMY LAW., May 1999, at 40.

appeal. Worse yet, it could result in injustice to the accused, and to the military justice system.