Two Worlds Colliding: Silence Evidence and Article 31(b), Uniform Code of Military Justice (UCMJ)

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If I speak, I am condemned. If I stay silent, I am damned.[1]

I. Introduction

Genovevo Salinas probably believed he had the right to remain silent. He also probably believed that if he did make a statement, it could be used against him later in court. After all, "virtually every schoolboy is familiar with the concept, if not the language of the Fifth Amendment." [1] So when investigators inquired whether shell casings found at a murder crime scene would match to his shotgun, he did not answer. [2] He fell silent. When prosecutors later argued this fact in court, Salinas objected, contending that using his silence against him violated his Fifth Amendment rights.[3] His petition was unsuccessful, and evidence of his silence contributed to his conviction and 20-year sentence.[4] In this instance the lesson appears to be anything you say, *or don't say*, can be used against you in a court of law.

Such was the holding of the Supreme Court in *Salinas v. Texas*. The decision, issued in 2013, was relatively unnoticed, overshadowed by other cases dealing with politically charged issues like the Defense of Marriage Act and Proposition 8. [5] Some commentators claimed the decision "profoundly changed the law of self-incrimination,"[6] because it proclaimed silence in response to police questioning occurring *before* advisement of *Miranda* rights can be used against a defendant later in court.[7] The Supreme Court in *Salinas* pointed out that "popular misconceptions notwithstanding, the Fifth Amendment . . . does not establish an unqualified 'right to remain silent.'"[8] The amendment states that one cannot "be compelled in any criminal case to be a witness against himself,"[9] but it does not say that you have the right to remain silent. So for criminal law practitioners, *Salinas* drives the point home that to invoke Fifth Amendment rights, you had better open your mouth and say so.

While civilian practitioners wrestle with the implications of *Salinas*, there are also many lessons to be drawn from the decision for military practitioners. Much like those involved in the *Salinas* case, those involved in military justice practice must understand the interaction between self-incrimination law and evidence regarding the invocation of the right to remain silent derived from such scenarios.[10] Granted, the *Salinas* decision may not directly apply to the military setting, because the threshold for rights advisement in the military (being suspected of an offense) is fundamentally different than it is for civilian cases (custodial interrogation).[11] Nevertheless, *Salinas* provides military justice practitioners some valuable takeaways regarding self-incrimination and the ability of the government to present evidence surrounding the invocation of the right to remain silent. First, self-incrimination law and the triggers for Article 31(b) rights advisement are constantly evolving,[12] and situations where Article 31(b) rights are required are not

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[1] LES MISERABLES, 10TH ANNIVERSARY CONCERT, Track 9 (First Night/Red Ink Records 2009).

[1] Michigan v. Tucker, 417 U.S. 433, 439 (1974).

[2] Genovevo Salinas v. Texas, 133 S.Ct. 2174, 2178 (2013).

[3] *Id.*

[4] *Id.*

[5] Steven R. Shapiro, *ACLU Summary of the 2012 Supreme Court Term*, https://www.aclu.org/sites/default/files /field_document/summ-12-mem.pdf (last visited May 12, 2015).

[6] Neal Davis & Dick DeGuerin, *Cover Story: Silence Is No Longer Golden: How Lawyers Must Now Advise Suspects in Light of* Salinas v. Texas, 38 CHAMPION 16, Jan/Feb 2014.

[7] *Salinas*, 133 S. Ct. at 2174.

[8] *Id.* at 2188 (quoting Minnesota v. Murphy, 465 U.S. 420, 427-28 (1984)).

[9] U.S. CONST. amend. V.

[10] In discussing evidence derived from scenarios where the accused is invoking the right to remain silent, this article will mainly focus on two resulting types of evidence: first, evidence that the accused remained silent in response to questioning; second, evidence that the accused invoked that right in the first place. While these may be used interchangeably, the point is to address the ability of government counsel to introduce evidence or comment on the accused's silence or invocation of the right to remain silent.

[11] *Compare* UCMJ art. 31(b) (2012) (rights advisement required when suspected of an offense), *with* Miranda v. Arizona, 384 U.S. 436 (1966) (rights advisement usually triggered during custodial interrogation).

[12] *See, e.g.*, United States v. Jones, 73 M.J. 357 (C.A.A.F. 2014) ("We now expressly reject the second, subjective prong of that test [that triggered Article 31, UCMJ warnings], which has been eroded by more recent cases articulating an objective test."); Major Ralph H. Kohlmann, *Tales from the CAAF: The Continuing Burial of Article 31(b) and the Brooding Omnipresence of the Voluntariness Doctrine*, 3 ARMY LAW., May 1997 ("The words in the statute are the same. The Constitution upon which the statute is based is the same. But the scope and applicability of Article 31(b) continues to change before our very eyes.").

as clear as the statutory language might suggest. Second, the right to remain silent is not self-executing; it must be affirmatively invoked to claim its protections.[13] Third, while evidence of the accused's invocation of rights and subsequent silence is generally protected, it is not untouchable and may be used by the government in certain scenarios. It is important for practitioners to understand how a *Salinas*-like scenario could present itself in the military, and how evidence derived from such circumstances may or may not be used in courts-martial.

II. Salinas v. Texas

A. Facts of the Case

In early 1993, a police investigation regarding the murder of two brothers in their Houston residence led investigators to Genovevo Salinas's home.[14] During the course of questioning, he agreed to hand over his shotgun and voluntarily accompany the investigators to the police station for additional questioning.[15] While at the station, Salinas was cooperative and answered a number of questions. But at one point during the interview the police asked him whether the shotgun he had given to the police would match the shell casings recovered at the crime scene.[16] Salinas did not answer.[17] Instead, he "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, clenched his hands in his lap, [and] began to tighten up."[18] After a period of silence, the investigators continued asking questions related to other issues, which Salinas answered.[19]

At trial, Salinas elected not to testify and objected to the government's use of his silence in response to the officer's questions.[20] To obtain a conviction, prosecutors used his silence in response to the question about his shotgun as substantive evidence of his guilt.[21] Both of the Texas appellate courts affirmed the conviction, after which the Supreme Court granted certiorari in order to resolve a dispute over "whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a noncustodial police interview as a part of [the government's] case in chief."[22] Ultimately, the Supreme Court never addressed this question, finding instead that Salinas never properly invoked the privilege during his interview with investigators.[23] The Court emphasized that it "has long held that a witness who 'desires the protection of the privilege . . . must claim it' at the time he relies on it."[24]

B. Lessons from the Decision for Military Justice

While there are many interesting aspects of the Supreme Court's decision that would benefit judge advocates, three bear mentioning. They involve (1) the circumstances of Salinas's interview with police, (2) whether he properly invoked or exercised his right to remain silent, and (3) whether the government could later use his silence against him at trial. An understanding of how the Supreme Court handled these issues informs the analysis of how the principles can be applied to similar situations in the military.

The first issue that warrants discussion is whether the circumstances of the police interview required rights advisement.[25] The Court pointed out that it was not custodial, stating that "it is undisputed that his interview with police was voluntary."[26] Because Salinas willingly participated in the interview at the police station, this "place[d] petitioner's situation outside the scope of *Miranda* . . . [where] governmental coercion prevented defendants from voluntarily invoking the privilege."[27] This determination is significant, because had the interrogation been custodial, *Miranda* rights would have been required and Salinas would not have needed to expressly invoke the privilege.[28]

While the question was a simple one here, what if the parties had not agreed the interview was voluntary? The dissent highlighted some important facts, stating that investigators took Salinas to the police station as a potential suspect in a criminal investigation, placed him in an interview room, and asked him questions.[29] In the dissent's eyes, these facts give rise to a "reasonable inference that Salinas's silence [in response to certain questions] derived from an exercise of his Fifth Amendment rights."[30] In

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[13] United States v. Traum, 60 M.J. 226, 230 (C.A.A.F. 2004).

[14] *Salinas*, 133 S. Ct. at 2178 (2013).

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.* at 2179.

[23] *Id.*

[24] *Id.* at 2179 (quoting Minnesota v. Murphy, 465 U.S. 420, 427 (1984)).

[25] *Id.* at 2180.

[26] *Id.*

[27] *Id.* The Court here explained that custodial interrogations are inherently coercive, such that even if he did not expressly invoke his rights, Salinas still did not voluntarily forgo his privilege against self-incrimination. *Id.*

[28] *Id.*

[29] *Id.* at 2185.

[30] *Id.* at 2189. The dissent's point here is not to suggest that this was a custodial interrogation. The parties to the case agreed it was not. Their point was that the circumstances of the interview should factor into the

highlighting such facts, the dissent highlights the fact that the triggers for rights advisement under the Fifth Amendment are not always clear.

Second, the Court highlighted the idea that in noncustodial interrogations, suspects must properly invoke their Fifth Amendment rights.[31] The Court, citing precedent, stated that "a suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege."[32] The right to remain silent is not unqualified, said the Court, and "a witness' constitutional right to refuse to answer questions depends on his reasons for doing so, and courts need to know those reasons."[33] The dissent countered by claiming that circumstances can give rise to an inference that an accused's silence rests upon his claim of Fifth Amendment privilege.[34] It argued "[T]his Court, more than half a century ago, explained that 'no ritualistic formula is necessary in order to invoke the privilege'" and that "[c]ircumstances, not a defendant's statement, tie the defendant's silence to the right."[35] Although the majority carried the day, four justices in the dissent emphasized an important interplay between invocation of Fifth Amendment rights and the admissibility of silence evidence that may flow from that decision.[36]

Finally, one of the principal questions presented to the Court was whether the government could use Salinas's silence against him.[37] The Court initially granted certiorari because of a disagreement in the circuits regarding the ability of the prosecution to introduce evidence of the defendant's pre-arrest or pre-rights advisement silence.[38] With its Fifth Amendment implications, the parties to the case agreed this was an "extremely important" and "frequently recurring" question.[39] Ultimately, the Court did not address this question in its opinion, determining the right against self-incrimination was never properly invoked in the first place.[40] Nonetheless, *Salinas* highlights an important principle regarding the admissibility of silence evidence in certain pre-trial situations, both before and after rights advisement.

Each of the above lessons from the *Salinas* case corresponds to an area of military justice practice ripe for examination. A closer look at each area shows that, as in *Salinas*, when rights advisement is required, what constitutes invocation of the right to remain silent, and whether one's silence is admissible as evidence are often subject to debate. Thus, it is incumbent upon military justice practitioners to understand some basic principles of the law so that evidence of the accused's silence or invocation of rights can be handled appropriately.

III. Lesson One: Article 31(b) Rights Advisement

One lesson from the *Salinas* decision is that situations requiring rights advisement are not always clear. This is certainly the case in the military, where the law on Article 31(b), Uniform Code of Military Justice (UCMJ) and self-incrimination is constantly changing.[41] While the statutory language appears clear on its face, the purpose of Article 31(b), together with court interpretation of the statute, demonstrates the decision to administer Article 31(b) rights is often difficult.

A. Statutory Language

Article 31(b) provides:

> 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.[42]

A plain reading of the rule seems to offer clarity about when rights must be administered. The language demonstrates that no person subject to the UCMJ may question an accused or suspect without first informing them of their rights under

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analysis of whether the accused's silence constituted an invocation of the right to remain silent. In other words, the circumstances may give rise to an inference that Salinas's silence amounted to an invocation of his constitutional rights. *Id.*

[31] *Id.* at 2178.

[32] *Id.* at 2182.

[33] *Id.* at 2183.

[34] *Id.* at 2190.

[35] *Id.* at 2186 (quoting Quinn v. United States, 349 U.S. 155, 164 (1955)).

[36] *Id.* at 2185.

[37] *Id.* at 2179.

[38] *Id. See, e.g.*, United States v. Moore, 104 F. 3d 377 (D.C. Cir. 1997) (finding prosecution could not use the defendant's post-arrest, pre-*Miranda* silence as evidence of guilt, as a defendant who remains silent after arrest but before interrogation "must be treated as having asserted" his Fifth Amendment rights); United States v. Rivera, 944 F.2d 1563, 1568 (11th Cir. 1991) (stating that the government is allowed to comment on a defendant's pre- or post-arrest silence that occurs prior to being issued *Miranda* warnings).

[39] Reply Brief for Petitioner at 5, Salinas v. Texas, 133 S. Ct. 2174 (2013) (No. 12-246). While the case here dealt with pre-*Miranda* silence, the point is that it raises questions about the use of silence evidence both before and after rights advisement.

[40] *Salinas*, 133 S. Ct. at 2178.

[41] *Supra* note 12.

[42] UCMJ art. 31(b).

Article 31(b). This reading suggests if there is a suspect or an accused, and someone in the military is going to question that person, rights notification is required.

Further analysis of the rule demonstrates that application of Article 31(b) is not as straightforward as the text suggests. First, the purpose of the rule was not to apply to all situations where one military member questions another.[43] Even though Congress intentionally provided members of the military with a broader warning requirement than what is required in a civilian setting, Congress did not intend a "literal application of [this] provision."[44] Instead, the phrase "interrogate, or request any statement" places a restrictive element on the "person subject to the code" that might be doing the questioning.[45] As a result, Article 31(b) is applicable to those individuals who question suspects or conduct interrogations as part of their official duties.[46]

Second, the administration of justice and discipline in the military is often a blend of judicial as well as administrative measures.[47] Consequently, Article 31(b) is not intended to apply to all such scenarios. The case of *United States v. Swift* hinged upon this very question, as the court had to determine whether a Master Sergeant was involved in an administrative or disciplinary function in his questioning of a junior Soldier.[48] The court in *Swift* highlighted the idea that leaders in the military have unique responsibilities not only for the good order and discipline of the unit, but also for the "health, welfare, and morale" of subordinates and their families.[49] Thus, any interpretation of Article 31(b) needs to recognize such differences. This also means part of the analysis about when to administer Article 31(b) rights includes asking if the questioner is acting in an administrative or disciplinary capacity.[50] Not all situations will require rights advisement.

Third, application of Article 31(b) is not straightforward because it operates in a unique environment that demands a liberal reading of the rule. Such a reading is consistent with the special environment in which military investigations take place. Because of the importance of rank, discipline, and obedience to orders, "the mere asking of a question under certain circumstances is the equivalent of a command."[51] A command or order in the military demands immediate action, or at least an immediate response, a reality often at odds with the constitutional right to silence. So Article 31(b) is intended to provide members of the armed forces with the assurance that the requirement to obey and respond "does not apply in a situation when the privilege against self-incrimination may be invoked."[52]

While servicemembers need special protection in situations where they are subjected to questioning, it is evident a strict interpretation of Article 31(b) is not intended. Case law has confirmed this, and demonstrated that the triggers for Article 31(b) rights are subject to interpretation. This determination will have a significant impact on the accused's exercise of those rights, and potentially on the use of any silence evidence that might result from questioning. Two examples illustrate this point.

B. *United States v. Loukas*

In *United States v. Loukas*, the accused was on temporary duty from his base in North Carolina, assisting as loadmaster on a flight from Florida to Bolivia.[53] The accused showed up two hours late for departure, and several hours into the flight, he began hallucinating and behaving in an irrational manner.[54] His behavior was reported to the crew chief, Staff Sergeant (SSgt) Dryer, who went to the back of the plane and questioned the accused about his behavior and whether he had ingested any drugs.[55] Staff Sergeant Dryer testified that he questioned the accused out of concern for the safety of the aircraft and flight crew.[56] The accused eventually relented, and answered he had used cocaine the night before.[57]

The initial reaction to the scenario presented in *Loukas* would make one think Article 31(b) rights should have been administered. After all, a person subject to the UCMJ (the crew chief) questioned a fellow servicemember (the accused) about potential misconduct. Staff Sergeant Dryer's questions about what the accused ingested suggest he "suspected" Loukas of some wrongdoing.[58] The lower courts agreed with this interpretation, finding SSgt Dryer should have administered Article 31(b) rights prior to

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[43] United States v. Duga, 10 M.J. 206, 209 (C.M.R. 1981).

[44] *Id.*

[45] *Id.* (quoting United States v. Gibson, 14 C.M.R. 164, 170 (1954)).

[46] *Id.* at 208.

[47] United States v. Swift, 53 M.J. 439, 445 (C.A.A.F. 2000).

[48] *Id.* at 447. ("These circumstances underscore that this was more than simply visiting the legal office to discuss an administrative matter. Master Sergeant Vernoski and Captain Myatt had good reason to suspect appellant . . . at that time.")

[49] *Id.* at 446.

[50] *Id.* ("In some circumstances there is likely to be a mixed purpose, and the matter must be resolved on a case-by-case basis.").

[51] *Duga*, 10 M.J. at 209.

[52] *Swift*, 53 M.J. at 445.

[53] United States v. Loukas, 29 M.J. 385, 386 (C.M.A. 1990).

[54] *Id.*

[55] *Id.*

[56] *Id.* at 387.

[57] *Id.* at 386.

[58] *Id.*

questioning.[59] The Court of Military Appeals, however, disagreed, finding SSgt Dryer's questioning "was limited to that required to fulfill his operational responsibilities."[60] Essentially, the court found that SSgt Dryer's questions were not part of "a law enforcement or disciplinary investigation," a prerequisite for the administration of Article 31(b) rights.[61]

The dissent argued this interpretation unnecessarily narrowed the standard for administration of Article 31(b).[62] The dissent reasoned the standard set forth in *United States v. Duga* was whether the questioner was acting in an official or a personal capacity.[63] The standard used by the court in *Loukas* is even narrower, based on whether the questioning is performed as part of an official or disciplinary inquiry. The difference is subtle, yet significant, as one focuses on the *status* of the questioner while the other on the *purpose* behind the questions posed. This distinction clearly demonstrates some of the disagreement surrounding the trigger for Article 31(b) rights advisement.[64] While the courts may feel they have articulated a standard, such clarity has not existed in practice.[65]

C. *United States v. Jones*

The trigger for Article 31(b) was also at issue in a case recently decided by the Court of Appeals for the Armed Forces (CAAF) in *United States v. Jones.* In *Jones*, Specialist (SPC) Ellis, an infantryman by trade, was serving as a military police (MP) augmentee.[66] He was given on-the-job training, informed he could only perform MP functions with his partner present, and specifically told he was not an MP while off-duty.[67] One day while on duty, SPC Ellis and his partner responded to the scene of an armed robbery.[68] When provided with a description of the assailants, SPC Ellis immediately suspected his colleagues, because ten days earlier, they had solicited his participation in the same crime.[69] Later, while again off-duty, SPC Ellis confronted and questioned his colleagues, who admitted to perpetrating the crime.[70] Specialist Ellis immediately reported this news, and made a sworn statement to investigators two days later.[71]

Defense counsel sought to suppress appellant's statement, claiming that SPC Ellis failed to administer Article 31(b) rights.[72] The military judge admitted the statement over defense objection, and the United States Army Court of Criminal Appeals (ACCA) found no error.[73] In affirming the ACCA decision, the CAAF focused on whether SPC Ellis "interrogated or requested any statement from" the appellant.[74] The appellant argued that SPC Ellis was involved in the investigation and his questioning was part of his official duties as a MP augmentee.[75] While such facts seemed to favor the appellant, the court conducted a two-part analysis to determine that SPC Ellis *did not* interrogate the appellant.[76] First, the court found Ellis was in an off-duty status, was not with his MP partner, was not allowed to perform MP functions, was not acting in a law enforcement capacity, and had no disciplinary relationship with the appellant.[77] Second, the court determined a "reasonable person in appellant's position could not consider SPC Ellis to be acting in an official law enforcement or disciplinary capacity."[78] Thus, the test articulated by the court was (1) whether the person doing the questioning was acting in an official capacity or out of personal motivation;

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[59] *Id.* at 387.

[60] *Id.* at 388.

[61] *Id.* at 387.

[62] *Id.* at 394.

[63] *Id.*

[64] *Id*. The dissent here also pointed out that the approach adopted by the court in *Loukas*, with the focus on the purpose behind the questions, may not be in line with the intent of Article 31(b). After all, 31(b) was intended to protect military members from the inherently coercive and intimidating structure that exists in the military. With the focus taken away from the person doing the questioning, what does this do to "the subtle pressure[s] on a suspect to respond" to questions? *Id.* (citing United States v. Duga, 10 M.J. 206, 210 (C.M.A. 1981)).

[65] Some may argue that the case of *United States v. Jones*, which reiterated the two-part test for Article 31, UCMJ rights advisement includes whether questioner was acting in official capacity and whether a reasonable person would believe the questioner to be acting in an official capacity clarified the standard. 73 M.J. 357 (C.A.A.F. 2014). This is debatable, as *Jones* memorialized a trend toward the objective standard that was already appearing in case law. Ultimately, whether or not *Jones* clarified the standard remains to be seen, and the larger point remains that Article 31(b) law remains fluid and evolving.

[66] *Jones*, 73 M.J. at 359.

[67] *Id*.

[68] *Id*.

[69] *Id*.

[70] *Id*.

[71] *Id*. at 360.

[72] *Id*.

[73] United States v. Jones, No. Army 20110679, slip at 1 (Army Ct. Crim. App. July 31, 2013).

[74] *Jones*, 73 M.J. at 362. The court acknowledged that this was really the only question at issue, as Specialist (SPC) Ellis clearly was subject to the code, suspected appellant of a crime, and asked him questions related to the crime at issue.

[75] *Id*. at 362.

[76] *Id*.

[77] *Id*.

[78] *Id.* Appellant and his associate in this case were both Military Police (MP) and understood the limited authority associated with being an augmentee. Furthermore, the court noted the appellant locked the door when SPC Ellis, in an off-duty status, questioned him about the crime.

and (2) whether a reasonable person would consider the questioner to be acting in an official law enforcement or disciplinary capacity.[79]

In articulating this two-part test, the court changed the Article 31(b) analysis. In *United States v. Duga*, the court stated that the second prong was "whether the person questioned perceived that the inquiry involved more than a casual conversation."[80] Now after *Jones*, the subjective belief of the person questioned no longer controls. In determining whether Article 31(b) rights are required, the second element is now an objective one. Strict application of the language of Article 31(b) arguably would have led to the suppression of the statement in *Jones*. But one can see from *Jones* and *Loukas* that strict interpretation is not the standard, and scenarios challenging the application of Article 31(b) continue to arise.

IV. Lesson Two: Invocation of the Right to Remain Silent

Another lesson from the *Salinas* decision is that one must unequivocally invoke the right to remain silent in order to benefit from its constitutional protections. This was a significant aspect of the case, as it precluded the Court from deciding whether the interrogation was custodial and whether Salinas's silence could be used in court.[81] With the custodial interrogation question conceded, one of the focal points became whether Salinas's silence in response to questioning constituted an "exercise" of his right to remain silent.[82] For the military practitioner, this aspect of the case raises two potential issues. First, what is necessary to "invoke" the right to remain silent in the military? Second, what about selective invocation, where an accused answers some questions, but refuses to answer others?[83]

A. Exercising the Right to Remain Silent

The Military Rules of Evidence (MREs) offer little guidance on what it means to "exercise" or "invoke" the right to remain silent. Military Rule of Evidence 305 discusses rights warnings, and defines "interrogation," "custodial interrogation," and "person subject to the code," but offers no guidance on what it means to "exercise" one's rights.[84] This is true both in the context of the right to remain silent and the right to counsel.[85] The rules do explain that "if a person chooses to exercise the privilege against self-incrimination, questioning must cease immediately."[86] Thus, what "exercise" means becomes a critical determination.

With the absence of guidance in the language of Article 31, the courts have been left to interpret what is required to exercise one's right against self-incrimination. Courts have determined that in order to invoke the protections of the Fifth Amendment, one's invocation must be unequivocal.[87] The Supreme Court discussed this standard in the case of *Berghuis v. Thompkins*, finding that three hours of silence in the face of police questioning did not constitute an invocation of the right to silence.[88] In this 2010 case, the Court discussed what is required to "exercise" one's right, pointing out that "the Court has not yet stated whether an invocation of the right to remain silent can be ambiguous or equivocal."[89] But the Court concluded there is no reason exercising one's Fifth Amendment right to silence should differ from the long-established requirement to unambiguously and unequivocally invoke one's Sixth Amendment right to counsel.[90]

This requirement does not demand particular words or actions. It simply requires the unequivocal invocation of the right. In the military case of *United States v. Traum*, the appellant was brought in for questioning by Air Force investigators regarding her infant daughter's death.[91] When asked to take a polygraph examination, the appellant initially declined, but later agreed to talk with investigators and subsequently confessed to the killing.[92] Prior to trial, the appellant claimed her initial response to investigators constituted an unequivocal "exercise" of her Fifth Amendment right to remain silent, and should have been honored.[93] The court disagreed, finding her response did not "foreclose the possibility" that she was willing to discuss other aspects of the case or submit to a polygraph exam.[94]

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[79] *Id.* at 361-62.

[80] *Duga*, 10 M.J. at 210.

[81] *Salinas*, 133 S. Ct. at 2178. Both parties conceded that Salinas was not subjected to custodial interrogation. *Id.*

[82] *Id.* at 2179.

[83] Stephen Rushin, *Rethinking Miranda: The Post-Arrest Right to Silence*, 99 CAL. L. REV. 151 (2011) (defining selective invocation "as the ability of a suspect to exercise her right to silence on a question-to-question basis after an earlier waiver of *Miranda* rights").

[84] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL R. EVID. 305(b)(1)-(3)(2012) [hereinafter MCM].

[85] MCM, *supra* note 84, MIL R. EVID. 305(c)(4).

[86] *Id*.

[87] United States v. Traum, 60 M.J. 226 (C.A.A.F. 2004).

[88] Berghuis v. Thompkins, 560 U.S. 370 (2010).

[89] *Id.* at 381.

[90] *Id.* at 380-81 ("There is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel.").

[91] *Traum*, 60 M.J. at 227.

[92] *Id.* at 228. Specifically, Appellant stated "she did not want to talk about the details of the night of 20/21 December 1998." *Id.*

[93] *Id.* at 229. Appellant claimed that her initial refusal to participate in the polygraph and not wanting to discuss the details of that night were an invocation of her right to remain silent. *Id.*

[94] *Id.* at 230.

Even though invocation of the right can be done "in any manner," the court found that "invocation must be unequivocal before all questioning must stop."[95]

While the courts in both *Thompkins* and *Traum* state that invocation of the right must be unequivocal, the door is left open as to the manner in which the right may be exercised. According to *Thompkins*, as well as *Salinas*, silence in the face of questioning by authorities is an equivocal response. Consequently, silence alone is insufficient to indicate one's intention to exercise the right to remain silent. As a result, in both cases, evidence derived from official questioning was admissible against the accused. It is clear that what it means to "exercise" the right is a critical determination, and the facts and circumstances surrounding invocation of the right to remain silent are frequently ripe for litigation.

B. Selective Invocation

In addition to the question of what it means to exercise one's right to remain silent, there is also the issue of selective invocation, where an accused or suspect affirmatively chooses to answer some questions, but not answer others.[96] This particular scenario was at issue in the *Salinas* decision, as Salinas began answering questions posed by police, remained silent in response to some questions, and then proceeded to answer others.[97] The federal circuits are currently divided about how to handle selective invocation, and the issue has not been definitively addressed in the military court system. Nonetheless, this scenario should be easier to handle in military practice, as the MREs seem to contemplate a situation where an accused will answer some questions and not others. Even so, selective invocation presents another area where silence evidence could become an issue later at trial.

While selective invocation has proven to be a divisive issue in the federal circuits, it is really selective invocation *after* a valid rights waiver that is the decisive issue.[98] For selective invocation, there is a fundamental difference between situations where rights have not yet been administered and those where rights have been administered, and then affirmatively waived. Before the administration of rights under *Miranda* or Article 31(b), the issue is whether rights notification is even required, and whether Fifth Amendment rights have been invoked at all. Such was the case in *Salinas*. If rights have not been administered or exercised, then there is really no right to selectively invoke.

Where rights notifications have been administered, and voluntarily waived, the question then becomes whether, and how, one can re-invoke the constitutional right to silence. Many federal and state courts are currently divided about this very issue.[99] Generally, the Fifth, Seventh, and Eighth Circuits have held that once a suspect waives the Fifth Amendment right to silence, subsequent invocations of the right can be used as substantive evidence later at trial.[100] In *United States v. Burns*, the Eighth Circuit stated that "where the accused initially waives his or her right to remain silent and agrees to questioning, but 'subsequently refuses to answer further questions, the prosecution may note the refusal because it now constitutes part of an otherwise admissible conversation.'"[101] In these circuits, suspects may re-invoke their right to silence, but such re-invocation is not constitutionally protected.[102]

Other jurisdictions have recognized a constitutionally protected right to selectively invoke the right to remain silent.[103] The First, Fourth, Ninth, and Tenth Circuits all determined that suspects may invoke their right to remain silent after a rights waiver without having that decision be used against them later at trial.[104] These courts find that *Miranda* warnings inform suspects who have the right not to answer questions posed to them.[105] Because knowledge of that right comes from the government, one cannot be punished later for the decision to exercise that right.[106] It

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[95] *Id.*

[96] *See* Rushin, *supra* note 83 (offering one definition of selective invocation). *See also* Gerardo Schiano, *"You Have the Right to Remain Selectively Silent": The Impractical Effect of Selective Invocation of the Right to Remain Silent*, 38 N.E. J. ON CRIM. & CIV. CON. 177 (Winter 2012) (calling same practice "selective silence").

[97] *Salinas*, 133 S. Ct. at 2178. While the facts raise the question of selective invocation, this was not an issue discussed in the decision itself because (1) both parties to the case agreed that Salinas was not subjected to custodial interrogation, and (2) the court determined that Salinas never properly invoked his right to remain silent. *Id.*

[98] *See, e.g.*, United States v. Caruto, 532 F.3d 822 (9th Cir. 2008) (discussing invocation of *Miranda* rights in a situation where person being questioned has received and waived their rights, begins answering questions, and then re-invokes his rights).

[99] *See* Rushin, *supra* note 83, at 163-67.

[100] *Id.* at 163-65.

[101] United States v. Burns, 276 F.3d 439, 442 (8th Cir. 2002) (quoting United States v. Harris, 956 F.2d 177, 181 (8th Cir. 1992)).

[102] Rushin, *supra* note 83, at 163-67. *Rushin* explained that even where there is general agreement that an accused has no constitutionally protected right to selective invocation, there is still disagreement on how an unprotected right to re-invoke can be exercised. For example, some courts find that a suspect may completely invoke the right to silence after waiver and end all questioning, but may not selectively invoke on a question-by-question basis. *Id.*

[103] *Id.* at 166.

[104] *Id.*

[105] United States v. Ghiz, 491 F.2d 599, 600 (4th Cir. 1974).

[106] *Id. See also* United States v. Canterbury, 985 F.2d 483 (10th Cir. 1993) (discussing the unfairness of informing defendant of right to remain silent and then asking for negative inference to be drawn from that silence); United States v. Lorenzo, 570 F.2d 294 (9th Cir. 1978) (discussing selective invocation in terms of whether waiver of one's rights under *Miranda* is revocable); Egger v. United States, 509 F.2d 745 (9th Cir. 1975)

bears mentioning that where courts have allowed this constitutionally protected right to selective invocation, the requirement to unambiguously invoke the right has been stringently enforced.[107]

The debate over whether there is a constitutionally recognized right to selective invocation has yet to resolve itself in the military court system. Nonetheless, the MREs provide guidance that is without an equivalent in the Federal Rules. This additional guidance contemplates protection for those servicemembers who choose to answer some questions, and not answer others.

Military Rule of Evidence 301(f)(2), entitled *Pretrial Invocation Not Admissible*, states:

> The fact that an accused during official questioning and in exercise of rights under the Fifth Amendment to the United States Constitution or Article 31 remained silent, refused to answer a certain question, requested counsel, or requested that the questioning be terminated, is not admissible against the accused.[108]

A reading of the rule suggests that the military emerges on the same side as the First, Fourth, Ninth, and Tenth Circuits; an accused has the ability to selectively invoke Fifth Amendment rights without fear of that decision being used against him later. The rule states that during questioning *and* in reliance on either the Constitution or Article 31, an accused can decide which questions he does and does not want to answer. And since the rule states this can occur during official questioning, it is likely that this scenario will arise after the notification of rights.[109] Furthermore, the "refused to answer a certain question" language suggests this can be done on a question-by-question basis. This is similar to what federal courts have held, that when suspects rely upon the government's assertion that they have a certain right, a decision to exercise that right cannot be used against them later.[110] Allowing for selective invocation also squares with the rationale behind Article 31(b): protection from the coercive nature of an authoritarian military environment. Article 31(b) was intended to provide military personnel with the assurance that the duty to obey and follow orders is not applicable to official questioning where incriminating responses may result.[111] To state that military personnel cannot re-invoke their right to remain silent after a valid waiver would seem to be at odds with that intent.

There is a strong argument that the Military Rules of Evidence ensure that an accused has the right to selectively invoke his rights under the Fifth Amendment. However, the issue has not been litigated in the military court system. Given the split in the federal courts and the compelling arguments on both sides,[112] selective invocation is an issue judge advocates should be prepared to address in the future.

V. Lesson Three: Use of Silence Evidence at Trial

Having addressed the state of self-incrimination law in the military, as well as uncertainties surrounding the exercise of the right to remain silent, it is evident that there are many scenarios where silence evidence could potentially become an issue at trial. An understanding of this area of the law can be a valuable tool for trial and defense counsel alike, especially considering the general conception that evidence of the accused's silence is untouchable.[113] The accused's silence is often constitutionally protected, but the *Salinas* decision demonstrated this is not always the case. A closer analysis shows there are circumstances where evidence of the accused's silence is probably inadmissible, and other scenarios where evidence of the accused's silence is likely admissible.

A. Silence Evidence Generally

Evidence of an accused's silence is generally protected because it is tied to the exercise of a constitutional right. The right of an accused to decide to invoke constitutional rights, without later consequences, was one of the clear lessons drawn from the Supreme Court's decision in *Miranda v. Arizona*.[114] The Court in *Miranda* stated, "[I]t is impermissible to penalize an individual for exercising his

(recognizing a right of selective waiver of Fifth Amendment right to silence).

[107] *See, e.g.*, *Lorenzo*, 570 F.2d at 298 (discussing intermittent silences after waiver of *Miranda* rights).

[108] MCM *supra* note 84, MIL R. EVID. 301(f)(2).

[109] It is difficult to imagine scenarios where one would be subjected to official questioning without having been notified of one's rights under Article 31(b). This is the thrust of the cases mentioned in section IV, *supra*. While the case law addressing Article 31(b) may be constantly developing, it is clear that official questioning requires advisement of rights under 31(b), and thus the language of the rule here suggests the accused can selectively invoke after that rights advisement has occurred. *See supra* Section IV.

[110] *See supra* note 106. Arguably, this was also the reasoning of the Supreme Court in *Miranda v. Arizona*, where the court stated, "[T]he warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it." 384 U.S. at 468.

[111] *Swift*, 53 M.J. at 445.

[112] Although the MREs language seems clear, MRE 301(f)(2) also states that an accused must "exercise" the right. Mere silence in the face of questioning will not be sufficient to selectively invoke the right to remain silent. If an accused does wish to selectively invoke, this must be done unambiguously or the individual being questioned runs the risk his or her silence may be admissible in court. *See Traum*, 60 M.J. at 227-30.

[113] *See generally* United States v. Hale, 422 U.S. 171, 180 (1975) ("Not only is evidence of silence at the time of arrest generally not very probative . . . but it also has a significant potential for prejudice.").

[114] *Miranda*, 384 U.S. at 467-68.

Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation."[115] This point was highlighted later by the Supreme Court in *Doyle v. Ohio*, where the Court stated, "[W]hile it is true *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings."[116] To allow the government to use the resulting silence places the accused in an impossible situation,[117] and violates due process.[118] Military courts have followed this reasoning, finding it impermissible for the government to comment on the defendant's invocation of his Fifth Amendment rights. Most recently in *United States v. Carrasquillo,* the CAAF highlighted a long line of cases holding that "an accused's pretrial reliance upon his rights under . . . Article 31, when interrogated concerning an offense of which he is suspected, may not be paraded before a court-martial."[119]

B. Silence Evidence Likely Inadmissible

Given these constitutional protections, clearly there are certain situations where evidence of the accused's silence is inadmissible. One such circumstance is during custodial interrogations or similar scenarios. Custodial interrogations are inherently coercive, and a suspect involved in such a circumstance need not expressly invoke Fifth Amendment rights.[120] Even when the suspect is not in custody, it may still amount to a situation where his or her "will was overborne and . . . capacity for self-determination was critically impaired."[121] Statements in such scenarios are involuntary, and evidence derived from them (with or without rights advisement) are inadmissible.[122]

The same is true where rights should have been administered, but were not. This happened in *United States v. Noel*, where appellant was stopped at an airport in Thailand when a drug-sniffing dog alerted on a wooden elephant he was carrying.[123] The elephant was seized, and Air Force personnel drilled a hole in the side, revealing a green, leafy substance that tested positive for marijuana.[124] At his trial, the prosecutor and panel members asked questions of the appellant regarding why he chose not to say anything (1) when the elephant was being examined; or (2) after notification of Article 31(b) rights.[125] The court found error, stating that appellant's silence "flowed from his rights under Article 31, UCMJ and the Fifth Amendment.[126]

Second, after rights are properly administered, it is unlikely in the military that the accused's subsequent silence can be used against him in court. This is most likely the case even where there has been a valid waiver of rights. Such a situation would fall under the purview of MRE 301(f)(2).[127] In *United States v. Whitney*, the military court system addressed the use of silence evidence that arose from a waiver of Article 31(b) rights.[128] In *Whitney*, the appellant was accused of numerous sexual offenses, and during the investigation waived his Article 31(b) rights and participated in an interview with an agent from the Air Force Office of Special Investigations (AFOSI).[129] That agent later testified at trial, commenting on the accused's silence in response to an accusation he had been less than truthful.[130] The court commented that such evidence is a "violation of Rule 301(f)(3) and . . . an error of constitutional proportion."[131]

C. Silence Evidence Likely Admissible

There are scenarios where evidence of the accused's silence will likely be admissible. Even though *Doyle v. Ohio* established the constitutionally protected nature of the right to remain silent, as is often the case there are

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[115] *Id.* at 468, n. 37.

[116] Doyle v. Ohio, 426 U.S. 610, 618 (1976).

[117] *Salinas*, 133 S. Ct. at 2186 (explaining that to permit a prosecutor to comment on the defendant's silence would force him to choose between making a statement that may reveal prejudicial information, or remaining silent, which a prosecutor may then use to show consciousness of guilt).

[118] *Salinas*, 133 S. Ct. at 2182, n. 3.

[119] U.S. v. Carasquillo, 72 M.J. 850, 855 (2013) (citing U.S. v. Brooks, 12 U.S.C.M.A. 423, 425-26 (C.M.A. 1961)).

[120] *Salinas*, 133 S. Ct. at 2180.

[121] *See* United States v. Chatfield, 67 M.J. 432 (C.A.A.F. 2009) (quoting United States v. Bubonics, 45 M.J. 93, 95 (C.A.A.F. 1996).).

[122] MCM, *supra* note 84, MIL R. EVID. 304(a)-(b). In stating that "an involuntary statement from the accused, or any evidence derived therefrom, is inadmissible at trial," the MRE precludes the admission of silence evidence in circumstances where a statement would be involuntary. *Id.*

[123] United States v. Noel, 3 M.J. 328, 329 (C.M.A. 1977). The court said he was a "suspect" at this point, and should have been administered Article 31 rights. *Id.*

[124] *Id.* The court opined that appellant should have had his rights read to him before this happened. *Id.*

[125] *Id.*

[126] *Id.* at 330-31. The court in *Noel* also refused to allow evidence of the appellant's silence *prior* to rights advisement, when he stood mute while Air Force personnel inspected the elephant. It reasoned Air Force investigators failed to administer Article 31 rights at the proper time, when appellant was initially stopped. *Id.*

[127] *See* MCM, *supra* note 84, Pt. IV.

[128] United States v. Whitney, 55 M.J. 413 (C.A.A.F. 2001).

[129] *Id.* at 414.

[130] *Id.* at 415.

[131] *Id.* at 416. The rule referenced here 301(f)(3) is the same as 301(f)(2) in the current edition of the Military Rules of Evidence. The court in this case, while finding error, found no prejudice because of a timely objection by defense counsel and curative instruction by the military judge.

exceptions.[132] The first is in a *Salinas*-type scenario where the accused is not in a situation that amounts to custodial interrogation, has yet to be issued 31(b) warnings, and has not unequivocally invoked his Fifth Amendment rights. Admittedly, this could be rare in the military, as Article 31(b) seems to err on the side of rights advisement and because of the presumption that questioning by a superior in the chain of command constitutes official questioning.[133] However, as the *Swift* case noted, the military discipline is often a blend of law enforcement, operational, and administrative functions.[134] Conceivably situations may arise where the questioning is administrative, a servicemember remains silent, and the case later converts from an administrative to judicial matter. Or consider a *Loukas*-type fact pattern, where the questioning arose from "operational responsibilities."[135] What if the Air Force personnel in *Noel* immediately asked about the elephant, prior to the dog alerting? It appears the most likely scenario for silence being admissible would be evidence resulting from questioning where Article 31(b) rights were not required, which as has been shown, is often not an easy determination to make.

Secondly, evidence of the accused's silence is admissible where the defense team or the accused opens the door. The Supreme Court stated in *Walder v. United States* that "the availability of an objection to the affirmative use of improper evidence does not provide the defendant "with a shield against contradiction of his untruths."[136] Thus, where a defendant "testifies to an exculpatory version of events and claims to have told the police the same version upon arrest," the government is allowed to raise his or her silence or invocation of constitutional rights on cross-examination. This is only fair, as the government needs to "vigorously cross-examine a defendant . . . to ensure that defendants do not frustrate the truth seeking function of a trial."[137] In *United States v. Robinson*, the Supreme Court addressed a scenario where the defense attorney made invocation of rights an integral part of the trial strategy.[138] Responding to a claim that the accused was never given a chance to tell his story, the government was allowed to comment on the defendant's invocation of the right to silence as a "fair response" to the defense argument.[139] This was also the case in *United States v. Gilley*, where the accused's invocation of his Sixth Amendment right to counsel was repeatedly referenced during trial and closing arguments.[140] The court found that defense counsel employed a strategy that elicited testimony regarding his client's invocation of his constitutional rights, thus opening the door for silence evidence and comment by the government.[141] In addition to these cases, there are certain other scenarios where evidence of the accused's silence resulting from an invocation of constitutional rights is admissible. Understanding such circumstances will help military counsel more comfortably handle evidence that is usually heavily shrouded in constitutional protection.

VI. Conclusion

So what if the defendant in *Salinas* had been Private First Class (PFC) Salinas, and the investigators members of the Army Criminal Investigation Command (CID)? If this were the case, the outcome likely would have been different, because once CID personnel began questioning PFC Salinas, he would have been entitled to notification of his rights under Article 31(b). If PFC Salinas decided to remain silent in answering certain questions, his silence would likely have been covered by MRE 301(f)(2), which provides him the right to refuse "to answer a certain question."[142]

Despite the likelihood of a different outcome in the military, *Salinas v. Texas* is still a valuable case for judge advocates. The decision helps military lawyers think about important aspects of military criminal law, especially when rights advisement is required under Article 31(b) and how an accused or suspect can properly exercise both Article 31(b) and Fifth Amendment rights. As is evident from the case law, each of these areas is a constant source of litigation, presenting both pitfalls and opportunities for trial and defense counsel.

Perhaps more importantly, *Salinas v. Texas* serves as a primer for judge advocates on how the advisement and invocation of Article 31(b) rights bears on the admissibility of silence evidence. In *Salinas*, the interplay between the

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[132] *See Carrasquillo*, 72 M.J at 854-55 (discussing exceptions to general rule against prosecutorial comment on the accused's silence).

[133] *Swift*, 53 M.J. at 446 ("Questioning by a military superior in the chain of command will 'normally be presumed to be for disciplinary purposes.'" (quoting U.S. v. Good, 32 M.J. 105 (C.M.A. 1991))). *See also supra* discussion Part V.B., United States v. Noel, 3 M.J. 328 (C.M.A. 1977). In *Noel*, the court addressed the use of pre-arrest silence and post-arrest silence. *Id.* The case is an example of how rare it may be to have a situation where questions are asked, but rights advisement is not required.

[134] *Id.* at 445.

[135] *Loukas*, 29 M.J. at 389. In this case the questioning was from a person superior in rank, but was conducted out of concern for the well-being of the aircraft and crew on board.

[136] Walder v. United States, 347 U.S. 62, 65 (1954).

[137] *Id.*

[138] United States v. Robinson, 485 U.S. 25, 28 (1988). Several times during closing argument, defense counsel argued that the government did not allow the accused, who did not testify, to explain his side of the story.

[139] *Id.* at 32. The Supreme Court agreed with the basic rationale of the trial court, which found that while "the Fifth Amendment ties the [g]overnment's hands . . . [it] is not putting you into a boxing match with your hands tied behind your back and allowing [the defendant] to punch you in the face." *Id.* at 28.

[140] United States v. Gilley, 56 M.J. 113, 116-18 (C.A.A.F. 2001).

[141] *Id.* at 122-23.

[142] MCM, *supra* note 84, MIL R. EVID. 301(f)(2).

invocation (or lack thereof) of one's right to silence, and the silence that flowed from the invocation had significant consequences. For judge advocates, the decision raised important questions about the reach of the Fifth Amendment, Article 31(b), selective invocation,[143] and ultimately the availability of silence evidence later at trial. The discussion of these aspects of the law can help military justice practitioners realize that evidence of the accused's silence is not untouchable, as is often believed to be the case. So it is evident from *Salinas v. Texas* that a suspect's decision to speak or stay silent still has major consequences, consequences that may or may not condemn that person later at trial. It is incumbent upon the military justice practitioner to know when and how that can happen.

[143] This remains a question ripe for examination in a military justice context. For example, what would result if an accused waives his Article 31(b) rights, agrees to answer questions, and then remains silent in response to a particular question *without* unambiguously invoking his right to remain silent? Does the initial waiver cover the entire conversation, of which the silence is merely a part? Or is silence in response to official questioning *per se* covered by MRE 301(f)(2)?