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The Viability of *United States v. McOmber*: Are Notice to Counsel Requirements Dead or Alive?

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Introduction

You are the Chief of Military Justice for the 83d Airplane Division. As you dig through your in-box one sunny day, you realize that you have some vital post-trial documents that you must serve on defense counsel immediately. You gather these documents together (along with some certificates of service) and stroll over to the local trial defense service (TDS) office. Once there, you see several soldiers reclining on the couch in the office waiting room. You recognize one of them as Sergeant (SGT) Rock, a soldier who works in your battalion personnel action center (PAC). After saying hello and thinking no further, you stride into the office of the senior defense counsel and serve the post-trial documents.

A few days pass and you receive a call from one of the post Criminal Investigation Command (hereinafter CID) agents, Special Agent (SA) Simone. He asks to come over to your office to brief you on some new cases and request some titling opinions. As he reads through his case list, he comes to a new barracks larceny case on none other than (you guessed it) SGT Rock. As he sets out the evidence, SA Simone tells you that he has already interviewed SGT Rock. He states that he considers SGT Rock a suspect in the case. Special Agent Simone tells you that he placed SGT Rock in custody and read him his Fifth Amendment rights against self-incrimination using a DA Form 3881, Rights Warning Procedure/Waiver Certificate.[1] Special Agent Simone tells you that after carefully reading and then indicating that he understood the DA Form 3881, SGT Rock invoked his right to counsel and refused to provide any oral or written statement. Special Agent Simone states that he then released SGT Rock from custody. He asks if you see any problems with the case since he wants to interview SGT Rock again. You reflect back on your many years of legal training and criminal practice and cannot think of anything wrong other than your chance encounter with SGT Rock in the TDS office a few days ago. You tell SA Simone you do not think there is a problem, but you will contact him tomorrow to discuss the case further.

After SA Simone leaves, you ponder the Fifth Amendment right to counsel and other related topics and decide to call your old friend Major (MAJ) Max Righteous, the senior defense counsel, to see if SGT Rock consulted counsel. You wonder if you have been overly cautious and whether the old notice to counsel rule,[2] the requirement to notify the suspect's defense counsel of the interrogation, even exists in any context today. You think about both the legal and ethical implications of the notice to counsel rule and how the rule may apply to your case. With these thoughts in mind, this article explores the notice to counsel rule.[3]

In *United States v. McOmber*,[4] the Court of Military Appeals (COMA) established a bright-line rule regarding notice to counsel. Soon thereafter, Military Rule of Evidence (MRE) 305(e)[5] codified that rule as follows:

> When a person subject to the code who is required to give warnings under subdivision (c) intends to question an accused or person suspected of an offense and knows or reasonably should know that counsel either has been appointed for or retained by the accused or suspect with respect to that offense, the

1. U.S. DEP'T OF ARMY, FORM 3881, RIGHTS WARNING PROCEDURE/WAIVER CERTIFICATE (Nov. 1989) [hereinafter DA Form 3881]. Investigators use DA Form 3881 to advise soldiers suspected of a Uniform Code of Military Justice (UCMJ) offense of their rights against self-incrimination. The form incorporates rights protected by Article 31, UCMJ, and *Miranda v. Arizona*, 384 U.S. 436 (1966). In *United States v. Tempia*, 37 C.M.R. 249 (C.M.A. 1967), the Court of Military Appeals (COMA) applied *Miranda* to military investigations. Using DA Form 3881, the investigator advises the soldier of the right to remain silent and that anything the soldier says can be used against him in a criminal trial. The investigator further advises the soldier of the right to counsel in context of custodial interrogation. The soldier may complete the waiver portion of the form and agree to discuss the offense(s) under investigation and make a statement without talking to a lawyer first and without having a lawyer present with him. Alternatively, the soldier may complete the non-waiver portion of the form and indicate that he wants a lawyer and does not want to submit to questioning or say anything. The investigator must ensure that the soldier clearly understands these rights before proceeding with any questioning and cannot question a soldier who invokes these rights.

2. Military Rule of Evidence (MRE) 305(e) contained the notice to counsel rule. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 305(e) (1984) [hereinafter 1984 MCM]. The 1994 amendments to the *MCM* deleted the notice to counsel provisions of MRE 305(e).

3. The ethical implications of the notice to counsel rule impact upon its application in practice. As such, the article will briefly address this aspect of the rule.

4. 1 M.J. 380 (C.M.A. 1976).

5. 1984 MCM, *supra* note 2, MIL. R. EVID. 305(e).

> counsel must be notified of the intended interrogation and given a reasonable time in which to attend before the interrogation may proceed.[6]

Any statement obtained in violation of MRE 305(e) was involuntary and therefore, inadmissible under MRE 304.[7]

While no military court has overruled the *McOmber* case, the military has abandoned the notice to counsel requirement. In 1994, an amendment to MRE 305(e) deleted any reference to notice to counsel.[8] This amendment responded to the Supreme Court's decisions in *Minnick v. Mississippi* [9] and *McNeil v. Wisconsin*.[10] This article considers these cases and their relevance to the notice to counsel requirements.[11] This article also analyzes the viability of the *McOmber* notice to counsel requirements considering recent military decisions.[12]

In addition, this article considers the ethical implications of the demise of *McOmber.* Even if a reasonable practitioner concludes that notice to counsel requirements no longer exist, the practitioner must also consider the ramifications of the government directly communicating with a represented party.[13] The "government" here means either military investigators or the trial counsel acting through the military investigator. Trial counsel must consider the guidelines contained in their service's rules of professional responsibility and their state bar rules.

This article concludes that *McOmber* notice to counsel requirements are no longer legally viable. While no military court has directly overruled *McOmber*, the 1994 amendments to the MREs and the United States Court of Appeals for the Armed Forces (CAAF)[14] non-application of the requirements since these amendments have rendered *McOmber* legally dead. Although the notice to counsel rule is legally dead, ethical rules may still require applying it in certain circumstances.

Background

The McOmber *Rule*

The COMA decision in *McOmber* issued a warning order to all criminal investigators who wished to question an accused once the investigator was on notice that legal counsel represented the accused. In *McOmber,* Air Force investigators initially advised Airman McOmber of his *Miranda* rights concerning a larceny allegation.[15] McOmber immediately requested counsel. Investigators terminated the interview and provided McOmber with the name and telephone number of the area defense counsel.[16] Two months later, after investigators knew that counsel represented McOmber, they contacted McOmber again and interviewed him concerning the original larceny offense and nine related larcenies.[17] McOmber's counsel was not present during the interview, and investigators did not contact his counsel before proceeding. After a rights warning and waiver, McOmber confessed to the larceny.[18] The gov-

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6. *Id.*

7. Military Rule of Evidence 304(a) stated: "Except as provided in subsection (b), an involuntary statement or any derivative evidence therefrom may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection to the evidence under this rule." 1984 MCM, *supra* note 2, MIL. R. EVID. 304(a).

8. Effective 9 December 1994, Military Rule of Evidence 305(e) was amended by deleting the notice requirement to defense counsel. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 305(e) (1998) [hereinafter MCM].

9. 498 U.S. 146 (1990).

10. 501 U.S. 171 (1991).

11. The drafter's analysis to the 1994 amendments to MRE 305(e) and 305(g) discusses these cases in detail. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 305 analysis, app. 22, at A22-15 (1994).

12. This article discusses several recent military cases in detail. *See* United States v. Schake, 30 M.J. 314 (C.M.A. 1990); United States v. LeMasters, 39 M.J. 490 (C.M.A. 1994); United States v. Vaughters, 44 M.J. 377 (1996); United States v. Faisca, 46 M.J. 276 (1997); United States v. Payne, 47 M.J. 37 (1997); United States v. Young, 49 M.J. 265 (1998).

13. U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, app. B, Rule 4.2 (1 May 1992) [hereinafter AR 27-26].

14. Regarding case citations, the reader should further note that on 5 November 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the names of the United States Courts of Military Review and the United States Court of Military Appeals. The new names are the United States Courts of Criminal Appeals and the United States Court of Appeals for the Armed Forces, respectively. For the purposes of this article, the name of the court at the time that a particular case was decided is the name that will be used in referring to that decision. *See* United States v. Sanders, 41 M.J. 485 n.1 (1995).

15. United States v. McOmber, 1 M.J. 380, 381 (C.M.A. 1976).

16. *Id.*

17. *Id.*

ernment used the confession against McOmber in his court-martial.

On appeal before the COMA, the court held:

> If the right to counsel is to retain any viability, the focus in testing for prejudice must by readjusted where an investigator questions an accused known to be represented by counsel. We therefore hold that once an investigator is on notice that an attorney has undertaken to represent an individual in a military criminal investigation, further questioning of the accused without affording counsel reasonable opportunity to be present renders any statement obtained involuntary under Article 31(d) of the Uniform Code.[19]

In reversing the ruling of the Air Force Court of Military Review, the COMA did not resolve McOmber's Sixth Amendment claim. The COMA did not base its opinion specifically on the Fifth Amendment right to counsel either. Instead of using a constitutional basis to overrule the lower court, the COMA used a statutory basis. The court cited Article 27, Uniform Code of Military Justice (UCMJ).[20] It stated that "to permit an investigator, through whatever device, to persuade the accused to forfeit the assistance of his appointed attorney outside the presence of counsel would utterly defeat the congressional purpose of assuring military defendants effective legal representation without expense" under Article 27.[21]

Military Rule of Evidence 305

Airman McOmber won a great victory that day when the COMA ruled that the trial judge erred in admitting his confession into evidence. Shortly thereafter, MRE 305(e) codified the notice to counsel requirements under *McOmber*.[22] These requirements remained in effect until the 1994 amendments to MRE 305(e) removed them from the rule.[23]

The pre-1994 MRE 305(e) afforded the suspect even more deference than required by the *McOmber* decision. Under MRE 305(e), interrogators who intended to question a suspect or accused had to meet a standard of "knew or should have known" regarding the appointment or retention of counsel by the suspect or accused.[24] In reality, however, military courts imposed a less onerous "bad faith" standard upon military investigators. In *United States v. Roy*,[25] the Army court held that in the absence of bad faith, a criminal investigator who interviewed the accused one day before the scheduled Article 32 investigation did not violate *McOmber* because he was unaware of the appointment of counsel.[26] Military courts developed an elaborate set of factors to analyze whether an interrogator reasonably should have known that an individual had counsel for purposes of the notice to counsel rule.[27]

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18. *Id*. Airman McOmber's trial defense counsel made a timely objection to the admission of this confession, but the military judge overruled this objection. On appeal to the U.S. Air Force Court of Military Review, Airman McOmber contended that the second interview infringed upon his Sixth Amendment right to counsel because investigators interviewed him without first notifying his attorney and affording him a right to have his attorney present. The Air Force Court of Military Review ruled against the accused and in favor of the government regarding this contention. At the time of the second interview, the government had not yet preferred charges against McOmber and his Sixth Amendment right to counsel had not yet attached. United States v. McOmber, 51 C.M.R. 762 (A.F.C.M.R. 1975).

19. *McOmber*, 1 M.J. at 383.

20. UCMJ art. 27 (1998).

21. *McOmber*, 1 M.J. at 383.

22. 1984 MCM, *supra* note 2, MIL. R. EVID. 305(e).

23. *Id*.

24. *Id*.

25. 4 M.J. 840 (A.C.M.R. 1978).

26. *Id*. at 841. The court's decision focused on whether the criminal investigator knew that Roy had counsel. The court could have (but did not) focus upon the 6th Amendment right to counsel. Presumably, if Roy's Article 32 investigation was scheduled for the next day, then the government must have preferred charges before the interview occurred. Had the court employed a 6th Amendment analysis, then a *McOmber*-type of analysis would have been unnecessary.

27. The drafter's analysis to MRE 305(e) lists these factors for consideration:

> Whether the interrogator knew that the person to be questioned had requested counsel; Whether the interrogator knew that the person to be questioned had already been involved in a pretrial proceeding at which he would ordinarily be represented by counsel; Any regulations governing the appointment of counsel; Local standard operating procedures; The interrogator's military assignment and training; and The interrogator's experience in the area of military criminal procedure.

1984 MCM, *supra* note 2, MIL. R. EVID. 305 analysis, app. 22, at A22-15.

The notice to counsel rule under the pre-1994 MRE 305(e) had no civilian equivalent either in the Federal Rules of Evidence or in case law. Despite this, military courts followed the *McOmber* decision and enforced the pre-1994 MRE 305(e) notice to counsel provisions for several years. It was not until the Supreme Court took a closer look at the right to counsel that the military eventually abandoned the rule. This article next considers Supreme Court decisions that are responsible for the demise of the notice to counsel rule and the 1994 revisions to MRE 305(e) and 305(g).

United States Supreme Court Decisions

There are no United States Supreme Court decisions directly addressing the notice to counsel requirement set forth in the *McOmber* decision. There are, however, three pivotal Supreme Court decisions that affected the notice to counsel requirement.[28] The drafter's analysis to 1994 amendments to MRE 305(e) and 305(g) specifically discusses and analyzes the cases considered below.[29]

The first case is *Edwards v. Arizona*.[30] This case considers invoking the Fifth Amendment (*Miranda*) right to counsel.[31] Under *Edwards*, when a subject invokes his right to counsel in response to a *Miranda* warning, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.[32] Once the suspect expresses his desire to deal with police through counsel, the interrogator cannot proceed until he makes counsel available to him.[33]

The only exception to this per se rule occurs when the accused himself initiates further communication, exchanges, or conversations with the police.[34] The *Edwards* rule, by design, prevents police badgering of an accused and also applies to police-initiated custodial interrogation relating to a separate investigation.[35] Although *McOmber* was decided before *Edwards*, *McOmber*'s rigid notice to counsel requirement certainly contemplates situations where police badgering of a suspect to give a statement without his attorney present would overcome the will of the accused and render the invoking of the right to counsel ineffective.

In the second case, *Minnick v. Mississippi*,[36] the Supreme Court established a firm rule regarding requests for counsel when a suspect is in continuous custody. Under *Minnick*, in cases of continuous custody, when a suspect requests counsel, interrogation must cease, and law enforcement officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney.[37] Further, under *Minnick*, an accused or suspect can waive his Fifth Amendment right to counsel, after having previously exercised that right at an earlier custodial interrogation, by initiating the subsequent interrogation leading to the waiver.[38]

In 1994, military practice conformed to the *Minnick* decision with an amendment to MRE 305(g) by adding subsection 2(B)(i) and deleting any reference to the notice to counsel requirement. Military Rule of Evidence 305(g) allows for waiver of the right to counsel during custodial interrogation upon evidence that the suspect or accused initiated the communication leading to the waiver.[39] At the same time, an amendment to MRE 305(e) deleted *McOmber*'s notice to counsel rule. The pre-1994 rule was inconsistent with the *Minnick* decision.

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28. *See* Edwards v. Arizona, 451 U.S. 477 (1981); Minnick v. Mississippi, 498 U.S. 146 (1990); McNeil v. Wisconsin, 501 U.S. 171 (1991). This article will consider each case's relationship with and application to the notice to counsel rule.

29. 1984 MCM, *supra* note 2, MIL. R. EVID. 305 analysis, app. 22, at A22-15, 16.

30. 451 U.S. 477 (1981).

31. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court held that before any custodial interrogation, a subject must be warned that he has a right: (1) to remain silent, (2) to be informed that any statement made may be used as evidence against him, and (3) to the presence of an attorney. In *United States v. Tempia*, 37 C.M.R. 249 (C.M.A. 1967), the COMA applied *Miranda* to military interrogations. The requirement for *Miranda* warnings is triggered by initiating of custodial interrogation. Under MRE 305(d)(1)(A), a person is in custody if he is taken into custody or otherwise deprived of his freedom in any significant way. Custody is evaluated based on an objective test from the perspective of a "reasonable" subject. MCM, *supra* note 8, MIL. R. EVID. 305(d)(1)(A).

32. *Edwards*, 451 U.S. at 484-85.

33. *Id*.

34. *Id*.

35. *See* Arizona v. Roberson, 486 U.S. 675, 679 (1988).

36. 498 U.S. 146 (1990).

37. *Id*. at 154.

38. *Id*. at 156.

Although the COMA based its decision in the *McOmber* case on Article 27 of the UCMJ, Airman McOmber alleged violations of his Sixth Amendment right to counsel. While the COMA deftly avoided the Sixth Amendment issue,[40] the court extensively analyzed the Fifth Amendment right to counsel. In the *Minnick* case, the Supreme Court established strict protection of a suspect's Fifth Amendment right to counsel when the suspect requests counsel while in continuous custody.[41] Under *Minnick*, however, a suspect or an accused can waive his Fifth Amendment right to counsel even after having previously exercised that right at an earlier custodial interrogation.[42] To do so, the suspect must initiate the subsequent interrogation leading to the waiver.[43] Under the old *McOmber*-based rule, such a waiver would have been virtually impossible absent notice to (and arguably consent of) the suspect's counsel.

In the final case, *McNeil v. Wisconsin*,[44] the Supreme Court considered both the Fifth and Sixth Amendment right to counsel. The Court drew a firm distinction between these two rights. In that case, McNeil's counsel argued that the triggering of his Sixth Amendment right to counsel upon counsel representing him at a bail hearing, implicitly triggered his Fifth Amendment right to counsel when police interrogated him in custody concerning unrelated offenses.[45] The Supreme Court disagreed.[46] The majority stated that a person cannot "invoke his *Miranda* rights anticipatorily, in a context other than "custodial interrogation"–which a preliminary hearing will not always, or even usually, involve."[47]

The Court also distinguished the protections of these rights. The Fifth Amendment protects a suspect from police overreaching during a custodial interrogation.[48] Under the Sixth Amendment, an accused is entitled to representation at critical confrontations with the government after initiating adversary proceedings.[49] Here, the right attached during McNeil's bail hearing where counsel represented him. The Sixth Amendment right is specific to those offenses charged.[50] McNeil waived his Fifth Amendment right to counsel concerning the second set of allegations.[51] The Sixth Amendment request for counsel at the bail hearing was not a Fifth Amendment invocation of the right to counsel on the unrelated charges under any strained interpretation. Moreover, the Sixth Amendment right to counsel, which attached during the bail hearing on the unrelated charge, had no effect on the second set of allegations.[52]

Additionally, the *McNeil* decision also provided critical guidance concerning the situation when a suspect asserts the Fifth Amendment right to counsel while in continuous custody. The majority stated:

> If the police do subsequently initiate an encounter in the absence of counsel (*assuming there has been no break in custody*), the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would

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39. Military Rule of Evidence 305(g)(2)(B)(i) now reads:

> (B) If an accused or suspect interrogated under circumstances described in subdivision (d)(1)(A) requests counsel, any subsequent waiver of the right to counsel obtained during a custodial interrogation concerning the same or different offenses is invalid unless the prosecution can demonstrate by a preponderance of evidence that–
>
> (1) the accused or suspect initiated the communication leading to the waiver; . . . .

MCM, *supra* note 8, MIL. R. EVID. 305 (g)(2)(B)(i). This change became effective 9 December 1994.

40. *McOmber*, 1 M.J. at 380, 382.

41. *Minnick*, 498 U.S. at 154.

42. *Id*. at 154-55.

43. *Id*.

44. 501 U.S. 171 (1991).

45. *Id*. at 174-75.

46. *Id*. at 175.

47. *Id*. at 182.

48. *Id*. at 176.

49. McNeil v. Wisconsin, 501 U.S. 171, 175 (1991). In the military, the right attaches upon preferral of charges. MCM, *supra* note 8, MIL. R. EVID. 305(e)(2) (1998).

50. *McNeil*, 501 U.S. at 175.

51. *Id*. at 174.

52. *Id*. at 176.

> be considered voluntary under traditional standards. This is "designed to prevent police from badgering a defendant into waiving his previously asserted Miranda rights" . . .[53]

The parenthetical language cited above is highly relevant to military practice. The 1994 amendment to MRE 305(g) reflects its significance. The amendment added subsection (g)(2)(B)(ii).[54] Under the new rule, when the request for counsel and waiver occur when the suspect or accused is subject to continuous custody a coercive atmosphere is presumed, which invalidates a subsequent waiver of counsel rights.[55] Under this rule, however, the prosecution can overcome the presumption when there is a significant break in custody following the invocation of the right to counsel dissipating the taint of the coercive atmosphere.[56] Analysis of the adequacy of the break in custody and subsequent waiver of the right to counsel is fact specific.[57]

The Supreme Court's decision in *McNeil* further obviates the need for the *McOmber* rule by stating that a person cannot invoke his *Miranda* rights preemptively in situations other than a custodial interrogation.[58] This language, if read in conjunction with the Court's dicta concerning the effect of a break in custody on the right to counsel,[59] emphasizes the need to analyze the factual situation when a suspect asserts the right to counsel. A significant break in custody sufficiently dissipates the coercive atmosphere. If the suspect makes a knowing and conscious decision to waive the right to counsel after a significant break in custody, his right to counsel is not violated.[60] Given the protections concerning the right to counsel afforded a suspect under *Minnick* and *McNeil*, the ironclad notice to counsel rule in *McOmber* is not needed.[61] The military cases that interpret the 1994 changes to MRE 305 in light of the *Minnick* and *McNeil* decisions turn primarily upon the free and conscious decisions of the suspect concerning his Fifth Amendment right to counsel. Although these cases embrace *McOmber*-like scenarios, the military courts fail to employ a *McOmber*-type analysis, thus ignoring the notice to counsel rule.

Several recent military cases have considered the suspect's right to counsel as addressed in the *Edwards*, *Minnick*, and *McNeil* cases. These cases also embrace situations in which the *McOmber* notice to counsel rule should apply, but *United States v. Schake*[62] represents the first case in the military court's transition away from *McOmber.* Although *Schake* raises a notice to counsel issue, the COMA ignored the issue. The court, however, considered a difficult factual scenario in which there is a

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53. *Id.* at 177 (citations omitted) (emphasis added).

54. Military Rule of Evidence 305 (g)(2)(B)(ii) reads:

> (B) If an accused or suspect interrogated under circumstances described in subdivision (d)(1)(A) requests counsel, any subsequent waiver of the right to counsel obtained during a custodial interrogation concerning the same or different offense is invalid unless the prosecution can demonstrate by a preponderance of evidence that – . . .
>
> (ii) the accused or suspect has not continuously had his or her freedom restricted by confinement, or other means, during the period between the request for counsel and the subsequent waiver.

MCM, *supra* note 8, MIL. R. EVID. 305(g)(2)(B)(ii). This change became effective 9 December 1994.

55. *Id.*

56. MCM, *supra* note 8, MIL. R. EVID. 305 analysis, app. 22, at A22-16.

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

58. *McNeil*, 501 U.S. at 182.

59. *Id.* at 177.

60. *Id.*

61. No military court has yet overruled the *McOmber* decision. The 1994 amendment to MRE 305(e) removed the notice to counsel requirement. Telephone Interview with LTC(P) Borch, Staff Judge Advocate, Fort Gordon, Georgia (January 5, 1999) (regarding his role in the revision of MRE 305). In 1994, LTC Borch served on the committee responsible for revisions to the *MCM*. Lieutenant Colonel Borch stated that the committee intended to correct many deficiencies in the 300 series of the MREs. The amendment to MRE 305 deleting the notice to counsel requirement merely brought the rule in line with cases like *McNeil, Minnick,* and *Schake* (discussed below). Lieutenant Colonel Borch noted that there is not (nor was there ever) an equivalent of the *McOmber* rule in the federal system. This article analyzes these ethical considerations concerning the government's contact with represented parties in a later discussion. *Id.*

62. 30 M.J. 314 (C.M.A. 1990). *McNeil* was decided in 1991. *Schake*, therefore, did not apply the *McNeil* break in custody analysis.

break in custody after a suspect invokes the Fifth Amendment right to counsel.

In the case, Air Force Office of Special Investigations (OSI) interviewed Specialist (SPC) Schake on 18 September 1997 concerning an arson.[63] During the interview, SPC Schake requested to see a lawyer.[64] At the time, counsel represented SPC Schake on unrelated charges.[65] The OSI released SPC Schake from the police station and allowed him unrestricted freedom of movement from 18-24 September 1987 (six days).[66] On the latter date, Schake voluntarily submitted to a polygraph examination that resulted in a confession.[67] In a post-polygraph statement to OSI, SPC Schake incriminated himself concerning one of the arson charges.[68] The court notes that "when he returned to the station on [24 September] 1987, [he] was fully advised of his *Miranda-Tempia* rights, as well as his right to refuse to take the polygraph examination."[69] During this re-interrogation, Schake received a complete rights advisement.[70]

The COMA held that the six-day break in continuous custody dissolved Schake's claim of an *Edwards* violation.[71] The court noted that Schake "was actually represented by counsel on another charge at the time of his release, and it cannot otherwise be said that his release did not provide him a real opportunity to seek legal advice."[72] In essence, the court held that the "counsel made available" requirement of *Edwards*, triggered when a suspect invokes his right to counsel in response to a custodial interrogation, is satisfied when there is a significant break in custody and the suspect has a meaningful opportunity to consult with counsel.[73]

In the *Schake* decision, the COMA could have, but did not, apply *McOmber.* The court offered no guidance regarding the notice to counsel rule. The court's dispositive focus in the case is on the passage of six days "between his unwarned interview and his ultimate admission, during which time [Schake] was completely free to acquire new counsel for the arson charge or consult with the counsel then representing him on the other alleged offense."[74] While the court did not explicitly eliminate the notice to counsel rule in *Schake*, it limited the rule's applicability. The most liberal reading of *Schake* would, at a minimum, limit *McOmber*'s application to interrogations by law enforcement concerning offenses directly related to the suspect's previous representation by counsel.[75]

The court's failure to apply the notice to counsel rule in the *Schake* case is significant. *Schake* foreshadows the demise of the *McOmber* rule. Specialist Schake had counsel on unrelated charges before his admissions concerning the arson charges during his post–polygraph interview on 24 September 1987.[76] While his trial defense counsel raised the issue of whether the polygrapher knew that SPC Schake had counsel,[77] the COMA did not focus on this issue in rendering its decision. While the COMA could have addressed the notice to counsel rule, it did not. Instead, the COMA noted that SPC Schake's six-day break in custody (between 18 and 24 September 1987) dissolved any claim of an *Edwards*-type violation.[78] Further, the COMA

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63. *Id*. at 315.

64. *Id*.

65. *Id*.

66. *Id*. at 319.

67. *Id.* at 315-16.

68. *Id*. at 316.

69. *Id*. at 319. Schake agreed to take the polygraph on 18 September 1987. As noted, the OSI advised Schake on 24 September 1987 that he was not then required to submit to the polygraph examination which was about to be given to him. The facts do not unequivocally state whether Schake or the OSI initiated the 24 September meeting.

70. *Id*.

71. *Id*.

72. *Id.* at 320.

73. *Id*. at 319.

74. *Id*.

75. This interpretation of the *McOmber* rule is consistent with the COMA's later decision in *United States v. LeMasters*, 39 M.J. 490 (1994). A full discussion of the *LeMasters* case follows.

76. *Schake*, 30 M.J. at 315-16.

77. *Id*. at 316.

skirted the notice to counsel issue by stating that SPC Schake "was actually represented by counsel on another charge at the time of his release, and it cannot otherwise be said that his release did not provide him a real opportunity to seek legal advice."[79] While *McOmber*-type issues abound in the *Schake* case (as noted above), the majority's silence concerning these issues is deafening and a strong indication that the *McOmber* rule would soon be dead.

Until the line of cases beginning with *United States v. Schake*, military courts rigidly enforced the notice to counsel requirements of *McOmber* rule.[80] The courts strictly construed the requirements and deemed any statement obtained in violation of pre-1994 MRE 305(e) involuntary and inadmissible under MRE 304.[81] The notice to counsel provision was viewed as non-waivable until the COMA's 1994 decision in *United States v. LeMasters*.[82]

In *LeMasters*, Air Force OSI suspected Senior Airman LeMasters of drug-related misconduct. Upon questioning by OSI on 15 May 1989, LeMasters requested an attorney and the OSI terminated the interview.[83] On 5 July 1989, LeMasters visited the office of the area defense counsel. He later entered into an attorney-client relationship with Major Dent.[84] From 15 May until 14 July 1989, no investigator attempted to interview LeMasters again.[85] On 12 July 1989, Philippine Narcotics Command (NARCOM) apprehended LeMasters at his off-post residence and kept him in custody until 13 July 1989.[86] On that date, NARCOM released LeMasters to the OSI. On 13 July 1989, before LeMasters left the OSI office, an OSI agent instructed him "to contact Major Dent and to return to the OSI office to make a statement if appellant so desired *after consulting with his attorney*."[87] On 14 July and 2, 3, and 11 October 1989, LeMasters contacted the OSI and gave statements. On each occasion, he did not request counsel.[88] Here, LeMasters initiated contact with the OSI. In *LeMasters*, the court held that the *McOmber* rule, by design, protects the right to counsel when the police initiate the interrogation.[89] Accordingly, if the suspect initiates contact, and the prosecution can show that the suspect was aware of his right to have counsel notified and present, but that he affirmatively waived those rights, then the court can find a valid waiver.[90]

The court noted that both the *McOmber* and *Edwards* rules are "designed to prevent police badgering."[91] The pre-1994 MRE 305(e), in effect at the time of the *LeMasters* decision, protected the right to counsel when the police initiate the interrogation. In *LeMasters*, there was no evidence of police overreaching, badgering, or attempting to deprive LeMasters of his right to counsel. LeMasters was aware of his right to have his counsel notified and present at his interrogation.[92] He waived that right on four separate occasions.[93] The COMA stated, "We reject the idea that there is an indelible right of notice to counsel under [MRE]. 305(e). Like other Constitutional rights, a suspect may make a knowing and intelligent waiver."[94] The court found a valid waiver in the *LeMasters* case. Although the decision of the court preceded the 1994 amendments to the *Manual for Courts-Martial*, it is consistent with the revisions to MRE

78. *Id*. at 319.

79. *Id*.

80. 1984 MCM, *supra* note 2, MIL. R. EVID. 305(e).

81. 1984 MCM, *supra* note 2, MIL. R. EVID. 304. A non-exhaustive list of cases in which the COMA discussed and applied the *McOmber* rule includes United States v. McDonald, 9 M.J. (C.M.A. 1980); United States v. Muldoon, 10 M.J. 254 (C.M.A. 1981); United States v. Sauer, 15 M.J. 113 (C.M.A. 1983); United States v. Roa, 24 M.J. 297 (C.M.A. 1987); United States v. King, 30 M.J. 59 (C.M.A. 1990).

82. 39 M.J. 490 (C.M.A. 1994).

83. *Id*. at 491.

84. *Id*.

85. *Id*.

86. *Id*.

87. *Id*. at 490 (emphasis added).

88. *Id*.

89. *Id*. at 492.

90. *Id*. at 492-93.

91. *Id*.

92. *Id*.

93. *Id*.

305(g) adding subsection 2(B)(i) which allows for waiver of the right to counsel during custodial interrogation upon evidence that the suspect or accused initiated the communication leading to the waiver.[95]

Although the COMA did not overrule *McOmber* in the *LeMasters* decision, it diluted its impact and foreshadowed the demise of the notice to counsel rule. The court distinguished the factual scenario in *LeMasters* from that contained in *McOmber*.[96] In *LeMasters*, unlike *McOmber*, the OSI did not attempt any subterfuge to deprive LeMasters of the assistance of counsel by failing to notify his counsel of questioning. LeMasters waived his right to counsel four times by a knowing and conscious decision on each occasion. The protections of the pre-1994 MRE 305(e) triggered when an investigator initiated interrogation of someone.[97] On 14 July and 2, 3, and 14 October 1989, LeMasters voluntarily returned to the OSI office. On the latter three occasions, LeMasters himself contacted the OSI and gave statements without requesting counsel.[98] LeMasters affirmatively waived his right to notice to counsel when he initiated contact with the OSI.[99]

United States v. Vaughters[100] addresses a similar scenario and further supports *McOmber*'s demise. On 10 February 1993, Air Force security police interviewed Staff Sergeant (SSgt) Vaughters about his involvement with illegal drugs.[101] Staff Sergeant Vaughters invoked his Fifth Amendment right to counsel. The security police released SSgt Vaughters from custody. On 1 March 1993, after SSgt Vaughters tested positive for the presence of cocaine during a urinalysis, Air Force OSI called him to their office for an interview.[102] The OSI did not know that SSgt Vaughters had previously invoked his right to counsel. The OSI advised SSgt Vaughters of his rights to remain silent and to have an attorney.[103] He waived those rights and agreed to an interview. Staff Sergeant Vaughters then admitted to using cocaine at a local nightclub.[104] The government later used this statement against SSgt Vaughters in his court-martial. The CAAF considered SSgt Vaughters's case based upon his contention that the Air Force Court of Criminal Appeals erred when it ruled that his confession was admissible when the OSI agents reinitiated a custodial interrogation after SSgt Vaughters had requested counsel.[105] The CAAF concluded that the lower court did not err in holding that his confession was admissible.[106]

In its decision, the CAAF did not address the notice to counsel issue directly. Instead, the court focused upon the nineteen-day break in custody between SSgt Vaughters' first interview (and invocation of the right to counsel) and the second interview during which he confessed to using cocaine.[107] The CAAF cited the service court's opinion in which it noted that during the nineteen day period, SSgt Vaughters suffered no police badgering.[108] The court further noted that SSgt Vaughters had previously sought advice from a military defense counsel regarding nonjudicial punishment and that he did not contact any attorney for assistance regarding the drug allegation.[109] Therefore, the CAAF found no *Edwards* violation.[110] The court agreed with the Air Force Court of Criminal Appeals

94. *Id*. at 493.

95. MCM, *supra* note 8, MIL. R. EVID 305(g)(2)(B)(i).

96. *LeMasters*, 39 M.J. at 492-93.

97. 1984 MCM, *supra* note 2, MIL. R. EVID. 305(e).

98. United States v. LeMasters, 39 M.J. 490, 491 (C.M.A. 1994).

99. *Id*. at 492.

100. 44 M.J. 377 (1996).

101. *Id.*

102. *Id*. at 378.

103. *Id.*

104. *Id.*

105. *Id.* at 377.

106. *Id.*

107. *Id.* at 378.

108. *Id.*

109. *Id*.

110. *Id.* at 379.

that "custodial interrogation may be reinitiated without counsel being present where a suspect had been released from custody for [nineteen] days, provided a meaningful opportunity to consult with counsel, and subsequently waived his right to counsel."[111]

Like *Schake*, the CAAF's focus was on the Fifth Amendment right to counsel. In a case that would seemingly trigger a *McOmber* discussion, the court again remained silent lending further support to the proposition that the *McOmber* rule is no longer valid. It is interesting to note that during their 1 March 1993 interview of SSgt Vaughters, the OSI neither knew nor asked him whether he previously invoked his right to counsel. The CAAF did not address this fact in its decision. Instead, the court focused on the break in custody issue to dispose of the case.[112] The CAAF's failure in this case to mention the notice to counsel rule indicates further the rule's death–at least where the suspect has a significant break in custody coupled with the opportunity to consult with counsel.[113]

In *United States v. Faisca*,[114] the CAAF again addressed the effect of a break in custody upon the exercise of the Fifth Amendment right to counsel. During a CID custodial interrogation concerning the theft of government property, the accused invoked his Fifth Amendment right to counsel.[115] The CID agents conducting the interrogation immediately ceased their questioning. The following day, Staff Sergeant (SSG) Faisca "consulted with a military attorney who advised him that he could and should contact the attorney if he were approached for further questioning."[116] Six months later, a different CID agent initiated contact with SSG Faisca and arranged for another interrogation. During the later interrogation, the accused affirmatively waived his self-incrimination rights and made a statement.[117] The court found no *Edwards* violation since the accused unequivocally waived his right to counsel after a break in custody of more than six months.[118]

The CAAF noted that the CID agent's "reinitiation of contact [with SSG Faisca] was not made because of an attempt to circumvent the Fifth or Sixth Amendments, but rather was undertaken in an effort to learn if appellant had sought or retained counsel and, if so, counsel's identity."[119] Staff Sergeant Faisca was not in custody when the agent requested the information about his counsel. Consequently, the encounter had no pressures associated with a custodial interrogation.[120] Staff Sergeant Faisca told the CID agent that he neither had nor wanted counsel.[121] He subsequently met the agent at the CID office. After receiving proper Article 31(b), UCMJ, and *Miranda* warnings, SSG Faisca "affirmatively waived his Fifth and Sixth Amendment rights and made [a] statement."[122] The CAAF noted that "all of these circumstances constitute an affirmative waiver under [MRE] 305(g)(1), [MCM]."[123]

The CAAF's focus in this case upon a significant break in custody and SSG Faisca's affirmative waiver of the right to counsel, again undercuts the viability of the notice to counsel requirement in at least the context of the factual scenario that existed here. The court, at a minimum, could have discussed applying of the *McOmber* rule in SSG Faisca's case due to his invoking the right to counsel during his first interrogation. The CAAF did not discuss the notice to counsel rule or cite the *McOmber* decision. This provides further support for the

111. *Id.*

112. *Id*. at 379, 380.

113. An alternate explanation is that the notice to counsel requirement simply is not applicable in this case since Vaughters' earlier representation by counsel related to nonjudicial punishment and not the drug charges which were the subject of his interrogation and subsequent court-martial. *See* discussion *supra* notes 75-76 and accompanying text regarding the *Schake* and *LeMasters* cases.

114. 46 M.J. 276 (1997).

115. *Id*. at 277.

116. *Id*.

117. *Id*.

118. *Id.*

119. *Id*. at 278.

120. *Id.*

121. *Id.* at 277.

122. *Id.*

123. *Id*. at 278. In a footnote to this passage, the CAAF highlighted the 1994 amendment to the *MCM* that removed the notice to counsel provision contained in MRE 305(e). The new version of MRE 305(e) had not taken effect at the time of SSG Faisca's trial in August 1994. Thus, the implication exists that if the CAAF had believed the old notice to counsel provision of MRE 305(e) should have been applied here, then the court would have done so. The CAAF deftly avoided any direct ruling concerning the viability of the notice to counsel rule.

observation and conclusion that the CAAF has consistently refused to apply *McOmber* since the 1994 changes to MRE 305.

Recently, in *United States v. Payne*,[124] the CAAF turned its attention to the issue of notice to counsel. It reached the issue under a unique set of facts. In 1991, the CID investigated SSG Payne, a military intelligence analyst, for the rape of a thirteen-year old girl.[125] Payne denied the rape and, after consulting military counsel (CPT Hanchey), refused to take a government-requested polygraph. The CID did not resolve the investigation, and SSG Payne departed five months later for another assignment in Korea.[126] Payne then requested reinstatement of his security clearance. The Defense Investigative Service (DIS) initiated a personal security investigation regarding SSG Payne's request.[127] During the investigation, SSG Payne agreed to take a polygraph examination. After a series of interviews and polygraphs, Payne confessed to the rape.[128] A general court-martial later convicted SSG Payne of the rape.[129]

It is significant that during his questioning by the DIS, SSG Payne informed the investigators that military counsel represented him during the earlier CID investigation. The DIS did not ask SSG Payne if military counsel still represented him, and they did not notify counsel about the questioning. On appeal, SSG Payne alleged a violation of the notice to counsel protection of the pre-1994 MRE 305(e) which was in effect at the time of Payne's trial.[130] This rule, however, only applied to situations in which Article 31(b) warnings were required. The court determined that the notice to counsel rule did not apply here because Article 31(b) did not apply.[131] The court noted that the DIS agents were not subject to the Code and that Article 31(b) did not bind them.[132] The court found that since the DIS:

> [H]ad no duty to warn appellant of his rights under Article 31, the duty to notify counsel under [MRE] 305(e) was not triggered. Accordingly, we need not decide whether [Captain] Hanchey was still appellant's counsel or whether SA Gillespie knew or reasonably should have known that [Captain] Hanchey was appellant's counsel. Likewise, we need not decide whether the [twenty-] month break in custody and [two] reassignments were a sufficient hiatus to obviate the requirement to contact [Captain] Hanchey.[133]

The CAAF cleverly avoided a ruling on the *McOmber* notice to counsel requirement by finding it inapplicable in this case. The court's focus, instead, was on SSG Payne's voluntary polygraph examination. Further, the court noted that the DIS advised Payne of his rights under the Privacy Act, the Fifth Amendment and Article 31, and *Miranda*; and, he waived them. Based on these facts, the court found SSG Payne's confession to the rape voluntary.[134] Although this case lends minimal support to *McOmber*'s continued viability, it emphasizes that the court applied the pre-1994 version of MRE 305.

The most recent CAAF decision impacting upon notice to counsel is *United States v. Young*.[135] Immediately following an unambiguous request for counsel, the investigator, prior to

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124. 47 M.J. 37 (1997).

125. *Id.* at 38.

126. *Id.*

127. *Id.*

128. Staff Sergeant Payne objected to the use of the term "rape" in his written statement to the DIS polygrapher, SA Gillespie. Staff Sergeant Payne, however, did admit the elements of the rape offense in his written statement to SA Gillespie. He admitted that his victim resisted when he tried to remove her shorts. Staff Sergeant Payne stated that "she was still fighting me when I got on top of her and put my penis in her vagina." *Id.* at 40.

129. *Id.* at 37.

130. *Id.* at 41.

131. *Id.* The CAAF noted that "the military judge denied the motion to suppress on the ground that SA Gillespie [the DIS polygrapher] was not required to notify Captain Hanchey because she was not a person subject to the code" who is required to give Article 31 warnings." *Id.* at 42. The CAAF held that the military judge did not err in his decision. The CAAF also dismissed SSG Payne's argument that SA Gillespie's acts were in some way in furtherance of a military investigation.

132. *Id.* at 43.

133. *Id. See* United States v. Vaughters, 44 M.J. 377, 378 (1996) (holding that the right to counsel was not violated by police-initiated questioning after a nineteen-day break in custody).

134. Judge Sullivan's concurring opinion indicated that *McOmber* has not lost all utility for CAAF. Judge Sullivan stated: "Finally, the decision of this [c]ourt in *United States v. McOmber*, *supra*, does not render appellant's confession inadmissible. *See* United States v. LeMasters, 39 M.J. 490 (CMA 1994). This [c]ourt has not chosen to expand *McOmber* to situations where the accused voluntarily initiates further questioning without his counsel being present." United States v. Payne, 47 M.J. 37, 44-45 (1997).

135. 49 M.J. 265 (1998).

leaving the interrogation room, told the accused, Sergeant (SGT) Young: "I want you to remember me, and I want you to remember my face, and I want you to remember that I gave you a chance."[136] As the investigator exited the room, the accused indicated he wanted to talk and confessed to participating in a robbery.[137] The service court held that the investigator did not intend to elicit an incriminating response and did not improperly reinitiate interrogation in violation of *Edwards*.[138] The accused's statements were the result of his spontaneously reinitiating the interrogation.

Two days after his first statement, SGT Young returned to the military police station. After a proper rights advisement, SGT Young waived his rights and provided a second confession.[139] The court found no *Edwards* violation regarding either statement.[140] The court noted that:

> Appellant's second statement, which was far more damaging than the first, was made after a two-day interval and after appellant had been released from custody and was free to speak with his family and friends. This two-day break in custody precludes an *Edwards* violation as to the second statement.[141]

The CAAF again failed to reach the issue of notice to counsel. In fact, there is no indication in the facts of the case that SGT Young even sought counsel. The court indicated that the mere release from custody is enough to satisfy counsel requirements under *Edwards*. The court's silence about the *McOmber* rule further indicates that the notice to counsel rule is no longer applicable where there is a break in custody coupled with the reasonable opportunity to seek counsel.

The *McOmber* Notice to Counsel Rule is Legally Dead

Several factors lead to the conclusion that the *McOmber* notice to counsel requirement is dead.[142] The first factor is the cumulative effect of appellate decisions, both military and Supreme Court, which ignore a notice to counsel rule. Next, the 1994 amendments to MRE 305(e) and MRE 305(g) implemented the Supreme Court's decisions in the *Minnick* and *McNeil* cases, and eliminated any notice to counsel requirement.

By implication, the CAAF has eliminated the notice to counsel requirement. In *United States v. LeMasters*,[143] the court noted that the pre-1994 MRE 305(e), in effect at the time of its decision, protected the right to counsel when the police initiate the interrogation.[144] The court rejected the "indelible right" to notice to counsel under MRE 305(e) particularly as in the *LeMasters* case where the suspect re-initiates contact and waives that right.[145] The court's decision in *LeMasters* is consistent with the 1994 amendment to MRE 305(e)[146] that removed the notice to counsel requirement and the 1994 change to MRE 305(g) that added subsection (2)(B)(i).[147] The new rule provides that an accused or suspect can validly waive his Fifth Amendment right to counsel, after having previously exercised that right at an earlier custodial interrogation, by initiating the subsequent interrogation leading to the waiver.[148] The CAAF precisely applied the principles of this rule in the *LeMasters* case.[149]

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136. *Id.* at 266.

137. *Id.*

138. *Id.* The CAAF noted that the military judge found the CID agent made his statement as a "parting shot" by a "frustrated" investigator. The court went on to say "even assuming that the judge's findings are clearly erroneous, we hold that appellant was not prejudiced." *Id.* at 267. The CAAF, in essence, treated the comments as if they were an interrogation.

139. *Id.* at 266.

140. *Id.* at 267-68.

141. *Id.* at 268. *Edwards* does not apply when there has been a break in custody which affords the suspect an opportunity to seek counsel. *See* United States v. Vaughters, 44 M.J. 377 (1996).

142. It is significant to note the *McOmber* rule died progressively and not as the result of any one case or statutory amendment.

143. 39 M.J. 490 (C.M.A. 1994).

144. *Id.* at 492.

145. *Id.* at 493.

146. MCM, *supra* note 8, MIL. R. EVID. 305(e).

147. MCM, *supra* note 8, MIL. R. EVID. 305(g)(2)(B)(i).

148. In the drafter's analysis of the 1994 amendment to MRE 305(g), which added subsection (2)(B)(i), the drafters noted that the addition conformed military practice with the Supreme Court's decision in *Minnick v Mississippi*, 498 U.S. 146 (1990). 1984 MCM, *supra* note 2, MIL. R. EVID. 305 analysis, app. 22, at A22-16.

Additionally, the 1994 change of subsection (2)(B)(ii)[150] to MRE 305(g) does not bode well for the future of the notice to counsel requirement. That subsection "establishes a presumption that a coercive atmosphere exists that invalidates a subsequent waiver of counsel rights when the request for counsel and subsequent waiver occur while the accused or suspect is in continuous custody."[151] Under a line of cases starting with *United States v. Schake*,[152] military courts recognized that the presumption can be overcome when it is shown that a break in custody occurred that sufficiently dissipated the coercive atmosphere. The courts recognize no specific time limit but instead focus on how the break in custody allows the suspect to seek the assistance of counsel.[153] In *United States v. Young*,[154] the CAAF considered a two-day break in custody after invocation to consult with "friends and family" adequate, and found the suspect's subsequent waiver of the right to counsel valid even though investigators did not attempt to notify counsel.[155]

The courts also analyze how the break in custody vitiates the coercive atmosphere and police badgering contemplated by the Supreme Court in the *Edwards* case.[156] In *United States v. LeMasters*, the COMA noted that both the *McOmber* and *Edwards* rules are "designed to prevent police badgering."[157] In the *Minnick* case, the Supreme Court determined that the Fifth Amendment right to counsel protected by *Edwards* requires that when a suspect in custody requests counsel, interrogation shall not proceed until counsel is actually present.[158] Government officials may not reinitiate custodial interrogation in the absence of counsel whether or not the accused has consulted with his attorney.[159]

This does not apply, however, when the suspect or accused initiates re-interrogation regardless of whether the accused is in custody.[160] Consider a military scenario where there is a break in custody, the suspect has had a meaningful opportunity to consult with counsel, the suspect reinitiates contact with law enforcement, subsequently waives his rights and makes an incriminating statement. In this scenario, the notice to counsel rule serves no valid purpose because the suspect knowingly and consciously waives his Fifth Amendment right to counsel and voluntarily provides a statement. The police do not badger the suspect in this situation. The suspect simply decides to give a statement to the police without assistance of counsel and under no coercion or duress.

The source of military courts' reluctance to find an *Edwards* violation of the right to counsel[161] where there is a break in continuous custody appears to be dicta language in the Supreme Court's opinion in *McNeil v. Wisconsin*.[162] The Supreme Court focused on the situation where a suspect is subject to continu-

149. The actions of Senior Airman LeMasters mirror those contemplated in the post-1994 MRE 305(g)(2)(B)(ii). LeMasters invoked his Fifth Amendment right to counsel upon initial questioning by the OSI. He later initiated contact with and gave statements to investigators, after waiving his rights, on four separate occasions. United States v. LeMasters, 39 M.J. 490, 491-92 (C.M.A 1994).

150. MCM, *supra* note 8, MIL. R. EVID. 305(g)(2)(B)(ii).

151. 1984 MCM, *supra* note 2, MIL. R. EVID. 305 analysis, app. 22, at A22-16.

152. 30 M.J. 314 (C.M.A. 1990).

153. The CAAF considers the effect of a break in custody upon the waiver of the Fifth Amendment right to counsel in several cases. *See* United States v. Vaughters, 44 M.J. 377 (1996); United States v. Faisca, 46 M.J. 276 (1997); United States v. Young, 49 M.J. 265 (1998). *See* discussion *supra* note 57.

154. 49 M.J. 265 (1998).

155. *Id.* at 268.

156. Edwards v. Arizona, 451 U.S. 477 (1981).

157. United States v. LeMasters, 39 M.J. 490, 492 (C.M.A. 1994).

158. Minnick v. Mississippi, 498 U.S. 146, 154 (1990).

159. *Id.* at 150-52.

160. *Id.* at 154-55.

161. Under *Arizona v. Roberson*, 486 U.S. 675 (1988), the *Edwards* rule is not offense-specific. Once a suspect invokes the *Miranda* right to counsel for interrogation regarding one offense, investigators may not reapproach him regarding any offense unless counsel is present. *Id*. at 677-78.

The Sixth Amendment right to counsel, however, is offense specific. Military Rule of Evidence 305(e)(2) applies the Sixth Amendment right to counsel to military practice. MCM, *supra* note 8, MIL. R. EVID. 305(e)(2). In the context of military law, the Sixth Amendment right to counsel normally attaches when the government prefers charges. Under MRE 305(e)(2), when a suspect or accused is subjected to interrogation, and the suspect or accused either requests counsel or has an appointed or retained counsel, counsel must be present before any subsequent interrogation concerning that offense may proceed. *Id*. Thus, the Sixth Amendment requires notice to counsel in this situation. Under *McNeil v. Wisconsin*, 501 U.S. 171 (1991), the Fifth Amendment right to counsel cannot be inferred from the suspect invoking the Sixth Amendment right. *Id*. at 180. The *McOmber* notice to counsel rule becomes an issue when there is a break in custody after a suspect asserts his Fifth Amendment right to counsel.

ous custody after an initial invocation of the right to counsel. The Supreme Court intended to protect a suspect in continuous custody where police initiate contact with him.[163] In this situation, even after a voluntary waiver and statement by the suspect, the suspect's statement would still be inadmissible as substantive evidence. Implicitly, the Supreme Court did not intend that a suspect receive this same protection when there is a break in custody.[164]

The drafter's analysis of the 1994 amendments to MRE 305(g) that added subsection (2)(B)(ii) specifically cites the *McNeil* case.[165] In *United States v. Vaughters*, the CAAF stated that *Minnick* "was a continuous custody case and did not purport to extend the *Edwards* rule to the break-in-custody situation."[166] In doing so, the court referred to *McNeil* and stated parenthetically that *McNeil* "dictum suggests *Edwards* not apply when there has been a break in custody."[167]

The 1994 amendment to MRE 305(e) deleted the notice to counsel requirement. The additions to MRE 305(g), which conformed military practice to the Supreme Court's decisions in the *Minnick* and *McNeil* cases, essentially made the *McOmber* irrelevant. Moreover, military courts have supported this position by failing to apply *McOmber* to situations that clearly warrant the analysis. Military Rule of Evidence 305(g) contemplates the situation where, after the suspect invokes the right to counsel, the suspect either reinitiates contact with the police or there is a significant break in custody.

While not inconceivable that the notice to counsel requirement could be applied in the situation of police-initiated interrogation of a suspect during a period of continuous custody, there are no reported military cases addressing this kind of scenario. Presumably, the suspect has other protections in this kind of situation. Military Rule of Evidence 305(g)(2)(B)(ii),[168] based on the Supreme Court's decision in *McNeil*,[169] would protect a military suspect by requiring counsel to be present before the interrogation could proceed.

Military case law applying *Minnick* to suspect-initiated interrogations and waiver of the right to counsel, and *McNeil* to waivers of the right after a break in continuous custody, has sounded the death knell for the *McOmber* notice to counsel rule. The CAAF has been virtually silent regarding the *McOmber* rule. The need for the rule no longer exists today as it did when the COMA decided *McOmber* and later when the President created the MRE 305(e) notice to counsel provision. Interestingly, the *McOmber* decision predated even the Supreme Court's decision in *Edwards v. Arizona*.[170] Both the Supreme Court and military courts have clearly defined the Fifth and Sixth Amendment right to counsel. The Supreme Court's decisions in the *Minnick* and *McNeil* cases clarified any remaining ambiguities about the right to counsel.

The military followed suit quickly by amending MRE 305 to bring the rule in line with pertinent Supreme Court cases. The 1994 amendments to MRE 305(g) added subsections (2)(B)(i) and (ii) signaled the death of the *McOmber* rule. The amendments are the direct result of *Minnick* and *McNeil*, which recognized protections under the Fifth Amendment that have overshadowed *McOmber*. Military courts have followed Supreme Court precedent and the changes to MRE 305. The CAAF's failure to either raise or apply *McOmber* in appropriate cases strongly suggests that the *McOmber* rule is no longer a legal requirement. Until further notice from the CAAF, the notice to counsel requirement appears dead.

Is the Notice to Counsel Rule Really Dead?

The notice to counsel requirement may be a dead legal issue, but it is not a dead ethical issue.[171] In virtually every factual

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162. The Court wrote:

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

McNeil, 501 U.S. at 177. The parenthetical dicta focuses upon a break in custody situation.

163. *Id.*

164. *Id.*

165. 1984 MCM, *supra* note 2, MIL. R. EVID. 305 analysis, app. 22, at A22-16.

166. United States v. Vaughters, 44 M.J. 377, 379 (1996).

167. *Id.*

168. MCM, *supra* note 8, MIL. R. EVID. 305(g)(2)(B)(ii).

169. McNeil v. Wisconsin, 501 U.S. 171, 177 (1991).

170. The COMA decided *McOmber* in 1976. United States v. McOmber, 1 M.J. 380 (C.M.A. 1976). The Supreme Court decided *Edwards* in 1981. Edwards v. Arizona, 451 U.S. 477 (1981).

scenario, there is no legal requirement for investigators to notify a suspect's counsel before questioning.[172] Investigators, trial counsel, and defense counsel must be concerned, however, about the ethical issue of a government representative communicating with a service member who is represented by a defense counsel. *Army Regulation (AR) 27-26, Rules of Professional Conduct for Lawyers*, offers guidance about communicating with a person who has representation by counsel.[173] In particular, Rule 4.2 states: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."[174] This rule applies to the situation where a trial counsel *knows* that defense counsel represents a suspect and the trial counsel wishes to communicate with the suspect. Presumably, the rule also applies when an investigator wishes to question a suspect at the direction of the trial counsel.

No military cases or professional responsibility opinions have addressed this type of situation since the 1994 amendment to MRE 305(e) removed the notice to counsel requirement.[175] A wily defense counsel would further complicate the situation by informing the trial counsel and military investigators that they can only communicate with his client through the defense counsel. Rule 4.2 does not address the legal concerns surrounding the admissibility of a confession, that is situations where a suspect initiates contact with an investigator or when a significant break in custody occurs after a suspect invokes the right to counsel.

Practical counsel will view Rule 4.2 as an ethical guidepost and not a straightjacket. An obvious reading of the rule makes it improper for a trial counsel to deal directly with a represented suspect particularly if the defense counsel has instructed him not to do so.[176] Regarding military investigators, military courts place no specific prohibition on the questioning of suspects who initiate contact with the investigator. Further, military courts place few restrictions on investigators questioning a suspect after there has been a significant break in custody after the suspect invokes the Fifth Amendment right to counsel. Determining the propriety of an investigator questioning a suspect in this situation would be fact specific and focused on whether the suspect voluntarily waived his rights and voluntarily provided a statement.[177] Further, the determination would be based upon whether the suspect had a meaningful opportunity to consult with counsel during the break in custody. Whether the suspect actually sought the advice of counsel during the break in custody is another relevant factor in the determination. Purported ethical violations by an investigator in this situation would not affect the legal admissibility of the suspect's statement unless the investigator either violated the suspect's due process rights or extracted an involuntary statement from the suspect.[178] An investigator, however, cannot do what ethical rules would prohibit a prosecutor from doing. Clearly, a trial counsel violates Rule 4.2 if he advises an investigator to question a suspect who he knows is represented by counsel.[179]

Precise answers do not exist regarding every ethical question concerning communication with a represented party. While a prosecutor cannot communicate with a suspect who he knows has counsel, the situation is considerably less clear when an investigator, acting on his own, communicates with such a suspect. When faced with this ethical quandary, a trial counsel should first consult his own supervisory chain of command. If no adequate solution results, the trial counsel should consult

171. Telephone Interview with Mr. Dean S. Eveland, Professional Conduct Branch, United States Army Standards of Conduct Office (Jan. 4, 1999) [hereinafter Eveland Interview]. Mr. Eveland's candid comments concerning legal ethics and the notice to counsel rule provided valuable insight on this topic.

172. Investigators must still exercise care regarding notice to counsel in a continuous custody situation. Investigators should seek further guidance from the trial counsel before proceeding with questioning in this situation. *See* MCM, *supra* note 8, MIL. R. EVID. 305(g).

173. AR 27-26, *supra* note 13, app. B, Rule 4.2.

174. *Id.*

175. Civilian cases in this area provide no uniform guidance concerning an appropriate remedy when a prosecutor violates Rule 4.2. An egregious violation of Rule 4.2 may warrant suppression of a suspect's admission or confession. *See* State v. Miller, No. C4-98-635 (Minn. Ct. App. Nov. 17, 1998) (currently on appeal to the Minnesota Supreme Court). *See also* Illinois v. Olivera, 246 Ill. App. 3d 921 (1993). In this case, an Illinois appellate court considered a situation in which an Assistant State's Attorney interviewed a defendant without his counsel present. The court stated that "common civility" dictates that a prosecutor should call a defendant's lawyer when he knows the defendant has retained counsel. Inexplicably, however, the court found nothing in the ethical rules prohibiting a prosecutor from questioning a defendant that he believes has intelligently waived his right to counsel.

176. Eveland Interview, *supra* note 171. Mr. Eveland opined that a violation of Rule 4.2 would occur if a trial counsel contacted a suspect he knew was represented by defense counsel without notice to (and permission of) the suspect's counsel.

177. Military Rule of Evidence 304(c)(3) governs the voluntariness of confessions. Under this Rule, "a statement is 'involuntary' if it is obtained in violation of the self-incrimination clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement." MCM, *supra* note 8, MIL. R. EVID. 304(c)(3). Official coercion is a necessary element in showing a violation of due process. *See* Colorado v. Connelly, 497 U.S. 157 (1986); United States v. Campos, 48 M.J. 203 (1998).

178. UCMJ art. 31(d) (West 1998). *See* United States v. Campos, 48 M.J. 203 (1998).

179. AR 27-26, *supra* note 13, app. B, Rule 4.2.

with his state bar professional responsibility committee for further advice. Trial counsel must exercise great caution in this area since violating ethical rules may invite collateral attacks (through motions or otherwise) questioning the legal admissibility of a confession or admission.

The defense counsel must always be wary of the issue and should raise it in any motion to suppress a statement by his client, if applicable. Defense counsel could raise ethical violations in several different ways by alleging: (1) a violation of *McOmber*, (2) an effect on the statement's voluntariness, or (3) a violation of accused's due process rights. By doing so, the defense counsel preserves the issue for appeal and avoids a complaint for ineffective assistance of counsel by failing to raise the issue.

Conclusion

Consider again this article's opening hypothetical case of SGT Rock and SA Simone. The facts of the case are important in determining the correct course of action. First, recall that as the Chief of Military Justice, you observed SGT Rock at the local TDS office before your meeting with SA Simone. Special Agent Simone then briefed you that he had interviewed SGT Rock as a suspect in a barracks larceny case. He properly advised SGT Rock of his rights against self-incrimination before asking any questions about the allegation and SGT Rock invoked those rights without providing any written or oral statement. Recall that, based on his investigation, SA Simone considers SGT Rock a likely suspect in the case. He wants your astute and legally correct opinion on whether he can re-interrogate SGT Rock.

Legally, the investigator has no requirement to notify counsel. As discussed in this article, while military courts have not directly overruled *McOmber*, several factors lead to the conclusion that it is invalid. These factors include: (1) the 1994 amendment to MRE 305(e) eliminating the notice to counsel rule, (2) the lack of either Supreme Court or other federal court recognition of the notice to counsel rule, and (3) the military court's silence regarding *McOmber* since the 1994 amendments to MRE 305(e).

Although you are satisfied that there are no legal concerns, you are not yet comfortable with advising SA Simone to re-interview SGT Rock. You consider *AR 27-26, Rules for Professional Conduct for Lawyers*, and the guidance offered in Rule 4.2, Communication with Person Represented by Counsel.[180] Because you are not certain whether SGT Rock has defense counsel, you decide that the best course of action is to call MAJ Max Righteous, the senior defense counsel. Major Righteous tells you that SGT Rock is represented.

After due consideration of the matter, you telephone SA Simone and tell him not to interview SGT Rock at this time. You advise him to continue to work on physical evidence and witness interviews but not to re-interview SGT Rock. You tell him to inform you immediately if SGT Rock makes any contact with him. You are convinced that you gave SA Simone sound advice based upon both your legal research and ethical instincts.

180. *Id.*

McOmber's Obituary: Do Not Write It Quite Yet

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Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6. *Id.*

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

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

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

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

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7. *Id.* at 381.

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

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

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

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

12. *Id.* at 382.

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

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

15. *Id.* at 56.

16. *Id.* at 57.

17. *Id.*

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

19. *Id.* at 59.

20. *Id.*

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

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

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

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

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

McOmber's Progeny

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

21. *Id.*

22. *Id.* (emphasis added).

23. *Id.* at 60.

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

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

26. *Id.*

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

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

29. *Id.* at A15.

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

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

Id.

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

32. *Id.* at 38.

33. *Id.*

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

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

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

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

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

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

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

35. *Id.* at 37.

36. *Id.* at 41.

37. *Id.*

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

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

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

41. *Id.*

42. *Id.* at 299.

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

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

U.S. CONST. amend. IV.

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

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

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

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

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

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

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

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

U.S. CONST. amend. VI.

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

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

50. *Id.* at 186.

51. *Id.* at 185.

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

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

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

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

56. *Id.* at 38.

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

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

59. *Id.*

60. *Id.*

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

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

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

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

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

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

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

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

65. *Id.* at 44.

66. *Id.* at 43.

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

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

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

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

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

72. *Id.* at 314.

73. *Id.*

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

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

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

Id.

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

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

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

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

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

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

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

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

76. *Id.* at 42.

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

78. *Id.* at 491.

79. *Id.*

80. *Id.*

81. *Id.* at 492.

82. *Id.*

83. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

91. *Id.* at 173-74.

92. *Id.* at 175.

93. *Id.* at 179.

94. *Id.* at 178.

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

96. *Id.*

97. *Id.*

98. *Id.* at 153.

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

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

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

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

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

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

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

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

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

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

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

103. *Id.* at 377-78.

104. *Id.* at 378.

105. *Id.*

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

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

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

109. *Id.* at 277.

110. *Id.*

111. *Id.* at 278.

112. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

124. *Id.* at 283.

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

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

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

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

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

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

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

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

129. *Id.* at 285.

130. *Id.*

131. *Id.*

132. *Id.*

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

134. *Id.* at 231.

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

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

137. *Id.*

138. *Id.* at 236.

139. *Id.*

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

141. *Id.* at 91.

142. *Id.* at 92.

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

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

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

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143. *Id.*

144. *Id.* at 93.

145. *Id.*

146. *Id.* at 92.

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

148. *Id.* at 291-92.

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

150. 32 M.J. at 292.

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

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

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

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

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

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

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

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

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

160. *Id.*

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

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

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

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

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

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162. *Id.* at 260.

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

164. *Id.* at 261.

165. *Id.*

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

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

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

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

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

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

172. *Id.* at 444.

173. *Id.* at 445.

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

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

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

The Rule in *McOmber* Lives

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

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

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

The Reason for *McOmber*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

190. *Id.* at 467-73.

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

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

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

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

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

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

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

198. *Id.* at 632.

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

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

Id. (emphasis added).

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

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

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

Conclusion

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

McOmber's obituary has yet to be written.

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

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

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

Consumer Law Notes

Federal Trade Commission's Helpline and Consumer Sentinel Database

The Federal Trade Commission (FTC) recently opened a toll-free consumer helpline at 1-877-FTC-HELP (1-877-382-4357). Federal Trade Commission counselors are available, 0900 to 2000 hours (Eastern Standard Time) to take consumer complaints and to answer consumer questions. The complaint information is added to the Consumer Sentinel database.[1] The military legal community needs to encourage its clients to use the helpline, while military attorneys must make use of Consumer Sentinel to help enforce consumer protection laws and regulations. Soldiers are often the prime targets of unscrupulous merchants that do not comply with the consumer protection laws. Judge advocate legal assistance practitioners should add the FTC's helpline information to their installation's "Preventive Law Program," which will benefit the military community as a whole.

Legal offices that are members of the FTC's Consumer Sentinel database system receive additional benefits. In addition to accessing and adding to the national consumer complaint database, legal offices that are members of the Consumer Sentinel database also receive "Consumer Sentinel Updates" and the FTC's *FraudBusters*[2] newsletter. These FTC resources are invaluable resources for consumer law and protection information. Major Jones.

Think Barracks Theft – Federal Trade Commission Help for the Victim

In October, Congress passed the Identity Theft and Assumption Deterrence Act of 1998.[3] This amendment of 18 U.S.C. § 1028, makes it easier to prosecute a soldier who steals and uses another soldier's identification cards, credit or debit cards, or electronic or telecommunications identification information.[4] In a recent *FraudBusters* article, the FTC opined that the Act potentially encompasses a broad range of conduct–from unauthorized use of another's credit cards to "cloning" of cellular telephones.[5]

While the criminal provisions of the Act are useful to military and civilian prosecutors, the Act's provisions regarding the role of the FTC are of the greatest benefit to the military legal assistance community, its clients, and victims of such thefts or crimes. For example, in April 1999, the FTC issued "Identity Crisis . . . What to Do If Your Identity is Stolen." This FTC publication provides an overview of what to do to aid victims of identity theft–the unauthorized use of a person's checks, credit cards, debit cards, or telephone calling card. Additionally, the FTC has a web site at <http://www.consumer.gov/idtheft>, which contains various identity theft related materials, including information on preventing and recovering from identity theft, applicable federal credit laws, and an online complaint form.[6] Major Jones.

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1. The Consumer Sentinel is a consumer protection sharing project run by the Federal Trade Commission. Army attorneys can gain access by filing an application through their Staff Judge Advocate for approval by the Chief, Legal Assistance Policy Division, Office of The Judge Advocate General. *See* Information Paper, Legal Assistance Policy Division, subject: Participation in the Federal Trade Commission's Consumer Sentinel (15 Mar. 1999). Contact the Legal Assistance Policy Division for a copy of the information paper or for an application.

2. *FraudBusters* is the newsletter of Consumer Sentinel, a partnership of the FTC and the National Association of Attorney Generals. *FraudBusters* is published quarterly for Consumer Sentinel members.

3. Beth Grossman & Steven Futrowsky, *Law Enforcers Take on Identity Theft*, 4 FRAUDBUSTERS, Summer 1999, at 1, 7, 11.

4. 18 U.S.C. § 1028 was amended to make it a criminal offense for anyone who: "knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of federal law, or that constitutes a felony under applicable state or local law." 18 U.S.C.A. § 1028(a)(7) (West 1999).

5. Grossman & Futrowsky, *supra* note 3, at 7.

6. *Id.* at 11. For more information about the FTC's Identity Theft Program, contact Ms. Beth Grossman of the FTC at bgrossman@ftc.gov or (202) 326-3019.

Environmental Law Division Notes

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the Environmental Law Division Bulletin, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes its bulletin electronically in the environmental files area of the Legal Automated Army-Wide Systems Bulletin Board Service. The latest issue, volume 6, number 7, is reproduced in part below.

EPA Publishes Consolidated Rules of Practice

On 23 July 1999, the EPA published its new Consolidated Rules of Practice (CROP), in Federal Register volume 64, number 141. The rules become effective 23 August 1999. The new CROP includes expanded procedural rules to include certain permit revocation, termination, and suspension actions, and new rules for administrative proceedings not governed by Section 554 of the Administrative Procedure Act.[1] The rules are important guidance for those environmental law specialists who anticipate practice before an administrative law judge. Major Cotell.

Underground Storage Tank Update

This spring Underground Storage Tanks (UST) issues have been at the forefront. Most of the issues have been resolved favorably to the Army and other federal agencies contesting UST fines from the EPA. Whether this trend will continue in the future, however, remains to be seen.

In April, the Navy contested a UST fine at the Oceana Naval Air Station before the Chief, Environmental Protection Agency (EPA) Administrative Law Judge.[2] Although the Navy had some factual defenses concerning the violations, the primary defense concerned the lack of legal authority for the EPA to impose fines on another federal agency for UST violations. The Chief, Administrative Law Judge heard the arguments and reserved her decision for a later date.

In the meantime, on 16 April 1999, the Office of the Secretary of Defense Office of General Counsel sent a formal request to the Department of Justice (DOJ) Office of Legal Counsel requesting resolution of the dispute between the executive agencies.[3] The letter urged that Congress had made no "clear statement" that it intended one executive agency be able to fine another for UST violations. The "clear statement" standard had been articulated by the DOJ in an earlier opinion[4] regarding the Clean Air Act and was determined to be the standard applicable for deciding the authority to fine.

At the time of the letter to the DOJ, another UST case involving Walter Reed Army Medical Center (WRAMC) was pending before the same Chief, Administrative Law Judge, and was scheduled for a hearing on 18 May 1999.[5] Before the hearing, the Office of the Secretary of Defense requested that all military agencies with UST cases pending should request stays of proceedings to allow time for the DOJ to render an opinion. Walter Reed Army Medical Center requested the stay and, surprisingly, EPA concurred.[6] According to the EPA counsel at the WRAMC hearing, the EPA had been requested by the DOJ to concur in all motions to stay UST proceedings. Shortly after the WRAMC stay was granted, the Navy requested a stay of the penalty portion of the forthcoming opinion of the Chief, Administrative Law Judge, in its case. The EPA agreed to the stay, and it was granted.[7]

Approximately a year before both the *WRAMC* and *Oceana* cases, the Air Force had UST cases pending at both Tinker[8] and

1. 5 U.S.C.A. § 500 (West 1999).

2. Oceana Naval Air Station, EPA Docket No. RCRA-III-9006-062.

3. Letter from General Counsel of the Department of Defense to Office of Legal Counsel, United States Department of Justice, subject: Constitutional and Statutory Validity of Administrative Assessment of Fines Against Federal Facilities Under Sections 6001, 9001, 9006, and 9007 of the Solid Waste Disposal Act for Alleged Violations Relating to Underground Storage Tanks (Apr. 16, 1999).

4. Memorandum from Dawn E. Johnson, Acting Assistant Attorney General, Office of Legal Counsel, subject: Administrative Assessment of Civil Penalties Against Federal Facilities Under the Clean Air Act (July 16, 1997).

5. Walter Reed Army Medical Center, EPA Docket No. RCRA-III-9006-052, and 9006-054.

6. In the matter of: U.S. Department of the Army, Walter Reed Army Medical Center, Summary of Pre-hearing Conference and Order Granting Motion For Accelerated Decision As To Liability and Granting Request for Stay of Proceedings As To Penalty Issues, EPA Docket No. RCRA-III-9006-052 at 2.

7. Oceana Naval Air Station, EPA Docket No. RCRA-III-9006-062.

8. Tinker Air Force Base, EPA Docket No. UST6-98-002-AO-1.

Barksdale[9] Air Force bases. In both cases the Air Force submitted motions to dismiss based on the authority to fine issue. For almost a year, the cases were awaiting decision by the administrative law judge. When the Office of the Secretary of Defense Office of General Counsel sent the letter to the DOJ Office of Legal Counsel, Barksdale requested a stay similar to the requests in the *WRAMC* and *Oceana* cases. However, before Tinker could request a stay, the administrative law judge promptly rendered a surprising opinion. The opinion upheld the Office of the Secretary of Defense position on fines between agencies. The administrative law judge concluded that "Congress has not expressed an intent . . . to subject a [f]ederal agency to assessment of punitive penalties by the EPA for past or existing violations of UST requirements."[10]

The decision in the *Tinker* case has given an unexpected boost to the Office of the Secretary of Defense's chances of having a positive result from the Office of Legal Counsel opinion. Now, if the Office of Legal Counsel should uphold an authority of the EPA to fine another federal agency, it will be necessary to rebut not only the arguments of the Office of the Secretary of Defense Office of General Counsel letter, but those of the EPA's own administrative law judge as well. On the other hand, however, most of the rationale put forward in the Office of the Secretary of Defense's letter and the admlinistrative law judge's opinion are the same, and the Office of Legal Counsel is committed to neither.

The Office of Legal Counsel opinion was expected in July. The month has come and gone and, as of yet, no opinion. In fact, the EPA has not yet issued comments on the Office of the Secretary of Defense request, which are required before Office of Legal Counsel renders an opinion. Accordingly, it may be quite a while before an opinion is issued.

In the meantime, the EPA appears to be unimpressed by the administrative law judge opinion. On 1 July 1999, the EPA issued a $259,960 UST fine to Fort Drum, New York. It is expected that EPA will concur in a request to stay proceedings in this case. That EPA is continuing to issue fines indicates, however, that they anticipate a positive result from the Office of Legal Counsel.

For installations facing potential UST fines, the guidance from ELD remains the same. The EPA has no authority to impose the fines and they should not be paid. Likewise no Supplemental Environmental Projects or other settlement arrangements should be made in lieu of such fines. This remains the guidance until Office of Legal Counsel renders an opinion. Major Cotell.

Under What Authority Do Federal Facilities Perform CERCLA Cleanups?

In *Fort Ord Toxics Project v. California Environmental Protection Agency*[11] the United States Court of Appeals for the Ninth Circuit is currently deciding whether Section 120 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) [12] provides an independent authority for cleanups of federal facilities. The case involves the cleanup at the former Fort Ord, California.

The former Fort Ord is on the National Priorities List.[13] The Army was conducting a CERCLA cleanup that involved moving remediated sand from beach firing ranges to layer a landfill prior to capping. To do this, the Army designated the landfill as a corrective action management unit[14] after coordination with the California Environmental Protection Agency. The Fort Ord Toxics Project (FOTP) sued the California Environmental Protection Agency in state court for an alleged failure to analyze the designation of the corrective action management unit under the California Environmental Quality Act.[15] The FOTP named the Army as a party to the suit and sought to enjoin the Army from executing its proposed cleanup plan.

The Army immediately removed this challenge to U.S. District Court,[16] and in accordance with CERCLA Section 113(h)[17]

9. Barksdale Air Force Base, EPA Docket No. UST6-98-002-AO-1.

10. Tinker Air Force Base, EPA Docket No. UST6-98-002-AO-1, at 26.

11. Fort Ord Toxics Project v. California Environmental Protection Agency, No. 98-16100 (9th Cir., July 22, 1999).

12. 42 U.S.C.A. § 9620 (West 1999).

13. The National Priorities List is the prioritized list of sites needing cleanup, updated annually, called for in accordance with CERCLA § 105(a)(8)(B). *See* 42 U.S.C.A. § 9605(a)(8)(B) (West 1999).

14. California state law generally prohibits land disposal of all hazardous waste. The state, however, permits the designation of a corrective action management unit into which certain untreated hazardous waste as part of an overall remedy, as a variance from the general prohibition. CAL. CODE REGS. tit. § 66264.552(a)(1) (1998).

15. CAL. PUB. RES. CODE §§ 21000–21178.1 (1998). The California Environmental Quality Act Section 21080(a) requires an analysis of all discretionary projects carried out or approved by public agencies.

16. The basis for the Army's removal was 28 U.S.C.A. § 1442(a) (West 1999), which permits removal to federal court whenever the United States, its agencies or officers are sued in state court.

17. 42 U.S.C.A. § 9613(h) (West 1999).

sought to have it dismissed. Section 113(h) of CERCLA provides:

> No [f]ederal court shall have jurisdiction under [f]ederal law . . . or under state law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial actions selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title . . . .

The FOTP responded that cleanup activities on federal facilities are selected under CERCLA Section 120 and not Section 104.[18] The FOTP argued that the Army could not avail itself of CERCLA Section 113(h), which was limited to actions taken under Section 104 or ordered under Section 106.

The FOTP argued that remedies on federal facilities are not selected under Section 104, but under Section 120(e)(4)(A)[19] of CERCLA. This section, entitled "Contents of Agreement," states that "[e]ach interagency agreement under this subsection shall include, but shall not be limited to, each of the following: [a] review of alternative remedial actions and selection of a remedial action by the head of the relevant agency . . . ." The FOTP argued that Congress passed CERCLA Section 120 in 1986 to create a special program to address hazardous substance remediation at federal facilities. This separate program, reasoned FOTP, was created in response to concerns both about the magnitude of toxic waste at these sites and about the lack of attention this problem was receiving under CERCLA. Excluding Section 120 cleanups from the jurisdictional bar contained in Section 113(h) was, therefore, consistent with Congress's efforts to enhance public oversight of federal facility cleanups. In further support of its position, FOTP pointed out that other sections of CERCLA, such as Section 113(g), distinguish between Sections 104 and 120.[20]

Unlike FOTP, which relied strictly on statutory interpretation, the Army noted that a number of courts rejected the issue of Section 120 making the cleanup of federal facilities outside the reach of Section 113(h).[21] The Army argued that FOTP's interpretation was directly at odds with the judicially recognized purpose of Section 113(h)–to expedite cleanups by insulating them from judicial review until they have been implemented.

The district court found that the cleanup was selected under Section 104 as delegated to the Secretary of Defense and that Section 120 "establishes a specific procedure for identifying and responding to potentially dangerous hazardous waste sites at federal facilities."[22] The court agreed with the Army's position and held that *Werlein v. United States* correctly decided that Section 120 "provides a road map for the application of CERCLA." The court rejected FOTP's position that *Werlein* was wrongly decided.[23] The court also rejected FOTP's reliance on CERCLA Section 113(g) as misplaced. The court stated that because this section contained references to both Sections 104 and 120, it was not dispositive. To the contrary, the court found the reference in this section to the President taking action as supporting the Army's case.[24] Finally, the court rejected FOTP's reliance on *United States v. Allied Signal Corporation*[25] for the proposition that Section 120 governed federal facility cleanups, because it did not directly address the issue of whether Congress, in enacting Section 120, intended to by-pass the President.[26]

The FOTP appealed the district court's order, arguing that the lower court erred in not finding that Section 120 was a separate authority for remedy selection. The FOTP argued that by creating Section 120, Congress moved the authority for the selection of remedial action from Section 104 to Section 120 to prevent the President from delegating authority to select a remedy. Further, FOTP argued that the language and structure of CERCLA demonstrates a clear distinction between actions taken under CERCLA Section 120 and those taken under Section 104. The Army reiterated its successful district court posi-

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18. The FOTP also claimed that CERCLA Section 113(h) does not bar challenges brought under state laws such as California Environmental Quality Act that are not applicable or relevant and appropriate requirements, and if it does, this challenge must be remanded to state court.

19. 42 U.S.C.A. § 9620(e)(4)(A).

20. 42 U.S.C.A. § 9613(g)(1) distinguishes between investigations under Sections 104 and 120.

21. *See* Werlein v. United States, 746 F. Supp 887, 892 (D. Minn. 1992); Hearts of America Northwest v. Westinghouse Hanford Co., 820 F. Supp. 1265, 1279 (W.D. Wash. 1993), *vacated in part*, 793 F. Supp. 898 (D. Minn. 1992). *See also* Worldworks, Inc. v. United States Army, 22 F. Supp. 2d 104, n.6 (D. Co. 1998).

22. Order Granting Motion for Judgment on the Pleadings and Denying Motion for Summary Judgment and for Remand, Fort Ord Toxics Project v. California Environmental Protection Agency, No. C-97-20681, May 11, 1998, at 8.

23. *Id.* at 10.

24. *Id.*

25. 736 F. Supp. 1553 (N.D. Cal. 1990).

26. Order Granting Motion for Judgment on the Pleadings and Denying Motion for Summary Judgment and for Remand, No. C-97-20681, at 12.

tion. Oral argument took place on 22 May 1999, and a decision is pending. Mr. Lewis.

United States Court of Appeals for the Sixth Circuit Renders Bizarre Decision on Clean Air Act Fines

The long awaited Clean Air Act (CAA)[27] sovereign immunity case at Milan Army Ammunition Plant has finally been decided. On 22 July 1999, the United States Court of Appeals for the Sixth Circuit decided that the CAA allows states to impose and to collect civil penalties from federal facilities.[28] Tennessee had fined Milan $2500 for violating the Tennessee Air Quality Act.[29] The provision in the CAA that Tennessee relied upon to fine Milan was almost identical to a provision in the Clean Water Act (CWA)[30] that the United States Supreme Court had ruled does not permit states to fine federal facilities. For this reason, the Army contested the fine but nevertheless lost in federal district court. The Army appealed. The Sixth Circuit, however, affirmed the lower court ruling holding that the CAA differed sufficiently from the CWA to permit states to fine federal facilities. The Sixth Circuit relied upon an unknown "state suit" provision within the CAA section 304(e) to find a waiver. This decision will embolden states in their efforts to regulate and to fine Department of Defense (DOD) activities. The Army will seek DOD support for appealing this decision to the United States Supreme Court.

In the meantime, for all Army installations outside of the Sixth Circuit, the guidance from ELD remains the same. Sovereign immunity has not been waived for the Clean Air Act. No fines should be paid and no supplemental environmental projects or other settlements should be negotiated in lieu of such fines. Installations within the Sixth Circuit should consult ELD on all CAA fines. Mr. Lewis.

27. 42 U.S.C.A §§ 7410-7642 (West 1999).

28. United States v. Tennessee Air Pollution Control Board, No. 97-5715, 1999 U.S. App. LEXIS (6th Cir. June 22, 1999).

29. T.C.A. § 68-201-101 (West 1999).

30. 33 U.S.C.A. §§ 1251-1387 (West 1999).

Claims Report

United States Army Claims Service

Personnel Claims Note

Reengineering Update

The military has a number of projects designed to revise or "reengineer" the way personal property is shipped. The Army is testing a program in Georgia, in which a single contractor, Cendent Mobility, is providing a package of relocation services, including shipping household goods and settling claims, to soldiers departing Hunter Army Airfield. The Military Traffic Management Command (MTMC) is testing a similar program in Florida, South Carolina, and North Carolina in which a number of contractors are shipping household goods from a number of Army, Navy, Air Force, and Marine Corps installations. The Navy is testing a program under which sailors are permitted to make their own shipping arrangements.[1] This note provides an update on each of these programs.

The Army program at Hunter Army Airfield began in July 1997. Army officials at the Office of the Deputy Chief of Staff for Logistics have hailed this program as a success, citing an eleven percent increase in customer satisfaction and an average claims settlement time of nine days. However, the General Accounting Office has not endorsed these findings and the moving industry has expressed reservations about the program's effectiveness.[2] Plans are currently underway to expand this program to other locations within the continental United States, including Air Force, Navy, and Marine Corps installations.[3] This expansion will not occur until next year, at the earliest.

The MTMC program began in January 1999 and covers fifty percent of the household goods shipments from North Carolina, South Carolina, and Florida. A total of forty-one contractors are currently participating in this program and, as of 25 March 1999, these contractors had accepted 1457 shipments.[4] It is far too early to tell how successful the program will be.

The Navy program, dubbed the Sailor Assisted Move or "SAM" program, applies only to shipments originating from Puget Sound, Washington; San Diego, California; Norfolk, Virginia; and New London, Connecticut. The Navy reports that 133 sailors took advantage of this program in 1998. Customer satisfaction with this program is reported to be very high.[5] Since sailors make their own shipping arrangements, the Navy has taken the position that their claims offices will not compensate sailors for damage or loss resulting from these moves.

It is still too early to tell whether any of the military's household goods reengineering efforts will ultimately be successful. It is too early to evaluate the success of the claims aspects of these programs. Field claims personnel should look for future updates on these programs in *The Army Lawyer* and the JAGCNet (Lotus Notes) system. Lieutenant Colonel Masterton.

Tort Claims Note

In-Scope Privately Owned Vehicle (POV) Collisions

Using a POV for official business by service members and government employees is a frequent occurrence. Where the use is properly authorized by a supervisor, and the United States Attorney determines the user to be acting within the scope of employment, the user is immunized for any civil tort action, either at state or federal levels.[6] This has been the law since the passage of the so-called Driver's Act in 1961.[7]

Simply stated, the exclusive remedy for a civil tort action for an in-scope driver in the United States, its territories, and possessions is against the United States under the Federal Tort Claims Act (FTCA).[8] In *Kee v. United States*,[9] the Ninth Circuit held that a release in full of all parties signed by the injured parties after payment of the user-government employee's policy limits by the liability carrier did not release the United States. The court held this, despite the argument that Arizona law would release the employer under similar circumstances. The

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1. *See generally* Lieutenant Colonel R. Peter Masterton, *Reengineering Household Goods Shipments: Personnel Claims Implications*, ARMY LAW., Nov. 1997, at 15.

2. Scott Michael, *Hearing on DOD Full Service Moving Project*, GOV'T TRAFFIC NEWS, Apr. 22, 1999, at 1.

3. Lisa Roberts, Office of the Deputy Chief of Staff of Logistics, briefing on transportation policy (Jan. 12, 1999).

4. Scott Michael, *Re-engineering News*, GOV'T TRAFFIC NEWS, Apr. 22, 1999, at 3.

5. Scott Michael, *Navy Test (SAM)*, GOV'T TRAFFIC NEWS, Apr. 22, 1999, at 3.

6. 28 U.S.C.A. § 2679(b)(1) (West 1999).

7. Pub. L. No. 87-258, 75 Stat. 539 (1961). On November 18, 1988, the Westfall Act expanded immunity to include all in-scope conduct. *See* Pub. L. No. 100-694, 102 Stat. 4564 (1988).

court held Arizona law inapplicable, as it does not consider a situation in which the employee is immune.[10] The Fourth Circuit reached a similar conclusion in *Garrett v. Jeffcoat*, holding that a release in South Carolina did not release the United States due to the immunity clause.[11]

Underlying the state rule that a general release releases both the employer and the employee is the legal principle that an employer may seek indemnity against the employee. This is not true under federal tort law, as the United States may not seek indemnity from its employees.[12] Does this lead to the premise that, where the immunized government employee's liability carrier settles with the injured party, the carrier then may seek indemnity from the United States? In *United States Automobile Association v. United States*,[13] the court held that neither the United States Automobile Association nor the employee was entitled to indemnity because FTCA procedures were not followed; the case was never removed to federal court and the injured party never made an administrative claim against the United States.

When the liability carrier pays a portion of the damages and the injured party seeks further relief from the United States under the FTCA, the United States is entitled to an offset, as the injured party is entitled to only one full recovery.[14] The United States may additionally seek contribution from its employee's liability carrier on the basis that it authorized the use of the POV and paid the employee for mileage.[15] Contribution may be sought even where the liability policy contains an exclusionary clause.[16] Such a clause must be valid under the law of the state in which the insurance contract was entered. The clause may be invalid if it is too vague or ambiguous,[17] or the clause may be in violation of public policy.[18] In *New Hampshire Insurance Co. v. United States*,[19] the United States recovered the policy limits, plus interest, where the insurer tried to conceal that the United States was an additional named insured.

The U.S. Army Claims Service's (USARCS) policy is to compensate injured parties for the full extent of their injuries if the United States is liable. Where a release has been obtained from the United States employee's carrier in exchange for benefits which only partially compensate the injured party, any administrative claim should not be denied solely on the basis of the release. Additional compensation necessary for adequate recovery of all compensable damages should be paid. However, where the injured party has only sought recovery against the United States, and scope of employment has been established, a copy of the employee's POV policy should be obtained. A mirror copy of the file will be forwarded to USARCS in each case to determine whether contribution will be sought against the carrier in question.[20] Mr. Rouse.

Winners of 1998 Award for Excellence in Claims

This past June, the U.S. Army Claims Service announced the winners of the 1998 Judge Advocate General's Award for Excellence in Claims. This is the first year that the Claims Service has held a competition for this award. Thirty-five claims

8. The use of a POV for official business outside the United States can give rise to a claim under a Status of Forces Agreement (SOFA); the Foreign Claims Act, 10 U.S.C. A. § 2734 (West 1999); or the Military Claims Act, 10 U.S.C.A. § 2733 (West 1999). Whether the user can be sued individually turns on his status, that is, an applicable SOFA may prohibit the enforcement of a judgment or the user may have diplomatic immunity.

9. 168 F.3d 1133 (9th Cir. 1999).

10. The Tenth Circuit Court rejected the holding of *Kee v. United States* in *Scoggins v. United States*, 444 F.2d 74 (10th Cir. 1971) (holding that covenant not to sue was upheld under Oklahoma law as under the FTCA; the United States is sued as though it were a private person under state law).

11. 483 F.2d 590 (4th Cir. 1973). *Accord* Bienville Parish Police Jury v. United States Postal Service, 8 F. Supp. 2d 563 (W.D. La. 1998).

12. United States v. Gilman, 347 U.S. 507 (1954).

13. 105 F.3d 185 (4th Cir. 1997).

14. Branch v. United States, 979 F.2d 180 (2nd Cir. 1963); Kassman v. American Unv., 546 F.2d 1029 (D.C. Cir. 1976); Dickun v. United States, 490 F. Supp. 136 (W.D. Pa. 1980); Collins v. United States, 708 F.2d 499 (10th Cir. 1983).

15. *See* Patterson v. United States, 233 F. Supp. 447 (E.D. Tenn. 1964); Government Employees Ins. Co. v. United States, 349 F.2d 83, 84 (10th Cir. 1965); United States v. Myers, 363 F.2d 615, 617 (5th Cir. 1966); Harleyville Ins. Co. v. United States, 363 F. Supp. 176, 177 (E.D. Pa. 1973). *See also* Rowley v. United States, 146 F. Supp. 295 (D. Utah 1956); Irvin v. United States, 148 F. Supp. 25 (D. S.D. 1957); Grant v. United States, 271 F.2d 651 (2d Cir. 1959). *See generally* Major Kee & Lieutenant Colonel Jennings, *Exclusion of Government Driver from Private Insurance Coverage*, ARMY LAW., Dec. 1996, at 34.

16. Such a clause excludes application of benefits where the FTCA provides a remedy.

17. Ogina v. Rodrigues, 799 F. Supp. 626 (M.D. La. 1992); Comes v. United States, 918 F. Supp. 382 (M.D. Ga. 1996); Lentz v. United States, 921 F. Supp. 628 (N.D. Iowa 1996).

18. Reeves v. Miller, 418 So. 2d 1050 (Fla. App. 1982).

19. No. 95-55245, U.S. App. Lexis 28171 (9th Cir. Aug. 2, 1996).

20. U. S. DEP'T OF ARMY, REG. 27-20, CLAIMS, para. 2-27 (31 Dec. 1997). *See* Kee & Jennings, *supra* note 15.

offices submitted applications for the award, out of a total of over 150 offices eligible. The following nine offices were winners:

Eisenhower Medical Center, Fort Gordon, Georgia
White Sands Missile Range, New Mexico
Fort Riley, Kansas
Fort Knox, Kentucky
Fort Leavenworth, Kansas
Fort Monmouth, New Jersey
Northern Law Center, Belgium
Fort Bliss, Texas
Fort Sam Houston, Texas

The award required offices to provide outstanding services in a number of areas, including tort, personnel, affirmative, and disaster claims. Among other things, the award required offices to process claims promptly and fairly, coordinate claims issues with other organizations on post, publicize claims issues, and send claims professionals to appropriate training. The criteria for this award were extremely demanding, resulting in only nine offices winning the award. The number of winners may increase in the future as more offices comply with the award criteria, and improve the quality of claims services everywhere. Lieutenant Colonel Masterton.

CLAMO Report

Center for Law and Military Operations (CLAMO),
The Judge Advocate General's School

Domestic Operational Law

Homeland Defense, Asymmetric Means, Wildcard Scenarios, Information Warfare, Defense Threat Reduction Agency, RAID Teams, Agro-Terror, Weapons of Mass Terror–are these familiar terms? They are to the Center for Law and Military Operation's first Director for Domestic Operational Law.[1] Domestic Operational Law might be defined as that body of domestic, foreign, and international law that directly affects the conduct of domestic operations–operations conducted within United States' territory, waters, and contiguous zones.

Generally, domestic operations fall into three categories: military support to civil authorities (for example disaster relief), military support to law enforcement (for example civil disturbances, counterdrug operations), and military support to terrorism response (to include those involving weapons of mass destruction and other emerging threats). The need and demand for military preparation, planning, and involvement in these areas is great. The legal issues are numerous and complex. They range from adjudicating expenditures in disaster relief operations to use of force rules for armed federal troops assisting counterdrug operations in the state of Texas as part of Joint Task Force 6. The laws governing what the military can and cannot do vary greatly depending on where the operation is being conducted, what state or federal agencies are participating, and what type of military forces–National Guard, Reserve, Active Component, or some combination–are participating. The importance of the "Total Army"–understanding and integrating the roles of the National Guard, Reserve, and Active Component forces–is heightened in Domestic Operations.[2] For example, in a disaster relief operation, it may not be desirable to order Guard units to active federal service because they would lose authority to perform law enforcement functions.

The Center's new Directorate for Domestic Operational Law will extend the Center's mission to examine legal issues that arise during all phases of military operations and to devise training and resource strategies for addressing those issues in the domestic arena. For the present, this Directorate will complete the Total Army circle. In the near future, it will serve as the JAG Corps' focal point for domestic initiatives, training, and operational support. Major Randolph.

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1. Lieutenant Colonel Gordon W. Schukei reported to the Center for Law and Military Operations on 2 August 1999 pursuant to an agreement by Lieutenant General Russell C. Davis, United States Air Force, Chief, National Guard Bureau, with Major General Walter B. Huffman, The Judge Advocate General. Lieutenant Colonel Schukei is Active Guard, previously served as the Active Guard/Reserve (AGR) Staff Judge Advocate Officer at Headquarters, State Area Command, Wyoming Army National Guard, and should be the Center's Director for Domestic Operational Law for three years. Lieutenant Colonel Schukei and the Center may be contacted at (804) 244-6278 or Gordon.Schukei@hqda.army.mil.

2. *See generally* Department of Defense Plan for Integrating National Guard and Reserve Component Support for Response to Attacks Using Weapons of Mass Destruction (Jan. 1998) http://www.defenselink.mil/pubs/wmdresponse/; The Reserve Component Employment Study 2005 (RCE-05) (June 11, 1999) <http://www.defenselink.mil/pubs/rces2005_072299.html>, <http://www.defenselink.mil/pubs/rces2005_072299.pdf>. In many cases the Reserve Component (RC) is particularly well-suited to homeland defense missions because the RC infrastructure exists throughout all 50 states, and RC units are already quite familiar with disaster response requirements, a significant component of the homeland defense mission.

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army, (TJAGSA) is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are nonunit reservists, through the United States Army Personnel Center (ARPERCEN), ATTN: ARPC-ZJA-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—181

Course Name—133d Contract Attorneys Course 5F-F10

Course Number—133d Contract Attorney's Course 5F-F10

Class Number—133d Contract Attorney's Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen, showing by-name reservations.

The Judge Advocate General's School is an approved sponsor of CLE courses in all states which require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, MN, MS, MO, MT, NV, NC, ND, NH, OH, OK, OR, PA, RH, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule

1999

September 1999

8-10 September	1999 USAREUR Legal Assistance CLE (5F-F23E).
13-17 September	1999 USAREUR Administrative Law CLE (5F-F24E).
13-24 September	12th Criminal Law Advocacy Course (5F-F34).

October 1999

4-8 October	1999 JAG Annual CLE Workshop (5F-JAG).
4-15 October	150th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
15 October-22 December	150th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
~~12-15 October~~	~~72nd Law of War Workshop (5F-F42).~~

Note: The 72nd Law of War Workshop course has been cancelled. The 73rd Law of War Workshop is the next scheduled course from 7-11 February 2000.

18-22 October	45th Legal Assistance Course (5F-F23).
25-29 October	55th Fiscal Law Course (5F-F12).

November 1999

1-5 November	156th Senior Officers Legal Orientation Course (5F-F1).
15-19 November	23rd Criminal Law New Developments Course (5F-F35).
15-19 November	53rd Federal Labor Relations Course (5F-F22).
29 November-3 December	157th Senior Officers Legal Orientation Course (5F-F1).
29 November-3 December	1999 USAREUR Operational Law CLE (5F-F47E).

December 1999

6-10 December	1999 USAREUR Criminal Law Advocacy CLE (5F-F35E).
6-10 December	1999 Government Contract Law Symposium (5F-F11).
13-17 December	3rd Tax Law for Attorneys Course (5F-F28).

2000

January 2000

4-7 January	2000 USAREUR Tax CLE (5F-F28E).
10 January-29 February	1st Court Reporter Course (512-71DC5).
9-21 January	2000 JAOAC (Phase II) (5F-F55).

Note: See paragraph 5 below for adjusted JAOAC suspense dates. The course was scheduled originally for 10-21 January 2000.

10-14 January	2000 USAREUR Contract and Fiscal Law CLE (5F-F15E).
10-14 January	2000 PACOM Tax CLE (5F-F28P).
10-28 January	151st Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
18-21 January	2000 Hawaii Tax Course (5F-F28H).
26-28 January	6th RC General Officers Legal Orientation Course (5F-F3).
28 January-7 April	151st Offier Basic Course (Phase II, TJAGSA) (5-27-C20).
31 January-4 February	158th Senior Officers Legal Orientation Course (5F-F1).

February 2000

7-11 February	73rd Law of War Workshop (5F-F42).
7-11 February	2000 Maxwell AFB Fiscal Law Course (5F-F13A).
14-18 February	24th Administrative Law for Military Installations Course (5F-F24).
28 February-10 March	33rd Operational Law Seminar (5F-F47).
28 February-10 March	144th Contract Attorneys Course (5F-F10).

March 2000

13-17 March	46th Legal Assistance Course (5F-F23).
20-24 March	3rd Contract Litigation Course (5F-F102).
20-31 March	13th Criminal Law Advocacy Course (5F-F34).
27-31 March	159th Senior Officers Legal Orientation Course (5F-F1).

April 2000

10-14 April	2nd Basics for Ethics Counselors Workshop (5F-F202).
10-14 April	11th Law for Legal NCOs Course (512-71D/20/30).
12-14 April	2nd Advanced Ethics Counselors Workshop (5F-F203).
17-20 April	2000 Reserve Component Judge Advocate Workshop (5F-F56).

May 2000

1-5 May	56th Fiscal Law Course (5F-F12).
1-19 May	43rd Military Judge Course (5F-F33).
8-12 May	57th Fiscal Law Course (5F-F12).
31 May-2 June	4th Procurement Fraud Course (5F-F101).

June 2000

5-9 June	3rd National Security Crime & Intelligence Law Workshop (5F-F401).
5-9 June	160th Senior Officers Legal Orientation Course (5F-F1).
5-14 June	7th JA Warrant Officer Basic Course (7A-550A0).
5-16 June	5th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
12-16 June	30th Staff Judge Advocate Course (5F-F52).
19-23 June	4th Chief Legal NCO Course (512-71D-CLNCO)
19-23 June	11th Senior Legal NCO Management Course (512-71D/40/50).
19-30 June	5th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
26-28 June	Career Services Directors Conference.

26 June- 14 July	152d Basic Course (Phase I, Fort Lee) (5-27-C20).

July 2000

5-7 July	Professional Recruiting Training Seminar.
10-11 July	31st Methods of Instruction Course (Phase I) (5F-F70).
10-14 July-	11th Legal Administrators Course (7A-550A1).
10-14 July	74th Law of War Workshop (5F-F42).
14 July- 22 September	152d Basic Course (Phase II, TJAGSA) (5-27-C20).
17 July- 1 September	2d Court Reporter Course (512-71DC5).
31 July- 11 August	145th Contract Attorneys Course (5F-F10).

August 2000

7-11 August	18th Federal Litigation Course (5F-F29).
14 -18 August	161st Senior Officers Legal Orientation Course (5F-F1).
14 August- 24 May 2001	49th Graduate Course (5-27-C22).
21-25 August	6th Military Justice Managers Course (5F-F31).
21 August- 1 September	34th Operational Law Seminar (5F-F47).

September 2000

6-8 September	2000 USAREUR Legal Assistance CLE (5F-F23E).
11-15 September	2000 USAREUR Administrative Law CLE (5F-F24E).
11-22 September	14th Criminal Law Advocacy Course (5F-F34).
25 September- 13 October	153d Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
27-28 September	31st Methods of Instruction (Phase II) (5F-F70).

October 2000

2 October- 21 November	3d Court Reporter Course (512-71DC5).
9-6 October	2000 JAG Annual CLE Workshop (5F-JAG).
23-27 October	47th Legal Assistance Course (5F-F23).
13 October- 22 December	153d Officer Basic Course (Phase II, (TJAGSA) (5-27-C20).
30 October- 3 November	58th Fiscal Law Course (5F-F12).
30 October- 3 November	162d Senior Officers Legal Orientation Course (5F-F1).

November 2000

13-17 November	24th Criminal Law New Developments Course (5F-F35).
13-17 November	54th Federal Labor Relations Course (5F-F22).
27 November- 1 December	163d Senior Officers Legal Orientation Course (5F-F1).
27 November- 1 December	2000 USAREUR Operational Law CLE (5F-F47E).

December 2000

4-8 December	2000 Government Contract Law Symposium (5F-F11).
4-8 December	2000 USAREUR Criminal Law Advocacy CLE (5F-F35E).
11-15 December	4th Tax Law for Attorneys Course (5F-F28).

2001

January 2001

2-5 January	2001 USAREUR Tax CLE (5F-F28E).
7-19 January	2001 JAOAC (Phase II) (5F-F55).
8-12 January	2001 PACOM Tax CLE (5F-F28P).
8-12 January	2001 USAREUR Contract & Fiscal Law CLE (5F-F15E).
8-26 January	154th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
8 January-27 February	4th Court Reporter Course (512-71DC5).
16-19 January	2001 Hawaii Tax Course (5F-F28H).
24-26 January	7th RC General Officers Legal Orientation Course (5F-F3).
26 January-6 April	154th Basic Course (Phase II, TJAGSA) (5-27-C20).
29 January-2 February	164th Senior Officers Legal Orientation Course (5F-F1).

February 2001

5-9 February	75th Law of War Workshop (5F-F42).
5-9 February	2001 Maxwell AFB Fiscal Law Course (5F-F13A).
12-16 February	25th Admin Law for Military Installations Course (5F-F24).
26 February-9 March	35th Operational Law Seminar (5F-F47).
26 February-9 March	146th Contract Attorneys Course (5F-F10).

March 2001

12-16 March	48th Legal Assistance Course (5F-F23).
19-30 March	15th Criminal Law Advocacy Course (5F-F34).
26-30 March	3d Advanced Contract Law Course (5F-F103).
26-30 March	165th Senior Officers Legal Orientation Course (5F-F1).

April 2001

16-20 April	3d Basics for Ethics Counselors Workshop (5F-F202).
16-20 April	12th Law for Legal NCOs Course (512-71D/20/30).
18-20 April	3d Advanced Ethics Counselors Workshop (5F-F203).
23-26 April	2001 Reserve Component Judge Advocate Workshop (5F-F56).
29 April-4 May	59th Fiscal Law Course (5F-F12).
30 April-18 May	44th Military Judge Course (5F-F33).

May 2001

7-11 May	60th Fiscal Law Course (5F-F12).

June 2001

4-8 June	4th National Security Crime & Intelligence Law Workshop (5F-F401).
4-8 June	166th Senior Officers Legal Orientation Course (5F-F1).
4 June - 13 July	8th JA Warrant Officer Basic Course (7A-550A0).
4-15 June	6th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
11-15 June	31st Staff Judge Advocate Course (5F-F52).
18-22 June	5th Chief Legal NCO Course (512-71D-CLNCO).
18-22 June	12th Senior Legal NCO Management Course (512-71D/40/50).
18-29 June	6th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).

25-27 June	Career Services Directors Conference.

July 2001

2-4 July	Professional Recruiting Training Seminar.
2-20 July	155th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
8-13 July	12th Legal Administrators Course (7A-550A1).
9-10 July	32d Methods of Instruction Course (Phase II) (5F-F70).
16-20 July	76th Law of War Workshop (5F-F42).
20 July-28 September	155th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

3. Civilian-Sponsored CLE Courses

3 September ICLE	Criminal Law 5th/6th Amendments Clayton College and State University Morrow, Georgia
9 September ICLE	U.S. Supreme Court Update Sheraton Buckhead Hotel Atlanta, Georgia

For further information on civilian courses in your area, please contact one of the institutions listed below:

AAJE:	American Academy of Judicial Education 1613 15th Street, Suite C Tuscaloosa, AL 35404 (205) 391-9055
ABA:	American Bar Association 750 North Lake Shore Drive Chicago, IL 60611 (312) 988-6200
AGACL:	Association of Government Attorneys in Capital Litigation Arizona Attorney General's Office ATTN: Jan Dyer 1275 West Washington Phoenix, AZ 85007 (602) 542-8552
ALIABA:	American Law Institute-American Bar Association Committee on Continuing Professional Education 4025 Chestnut Street Philadelphia, PA 19104-3099 (800) CLE-NEWS or (215) 243-1600
ASLM:	American Society of Law and Medicine Boston University School of Law 765 Commonwealth Avenue Boston, MA 02215 (617) 262-4990
CCEB:	Continuing Education of the Bar University of California Extension 2300 Shattuck Avenue Berkeley, CA 94704 (510) 642-3973
CLA:	Computer Law Association, Inc. 3028 Javier Road, Suite 500E Fairfax, VA 22031 (703) 560-7747
CLESN:	CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662
ESI:	Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3202 (703) 379-2900
FBA:	Federal Bar Association 1815 H Street, NW, Suite 408 Washington, DC 20006-3697 (202) 638-0252
FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250

GWU: Government Contracts Program
The George Washington University
National Law Center
2020 K Street, NW, Room 2107
Washington, DC 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510
(800) 727-1227

LSU: Louisiana State University
Center on Continuing Professional
Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MICLE: Michigan Institute of Continuing Legal
Education
1020 Greene Street
Ann Arbor, MI 48109-1444
(313) 764-0533
(800) 922-6516

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

NCDA: National College of District Attorneys
University of Houston Law Center
4800 Calhoun Street
Houston, TX 77204-6380
(713) 747-NCDA

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 in (MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers'
Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

PLI: Practicing Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas School of
Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905.

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

State	Local Official	CLE Requirements
Alabama**	Administrative Assistant for Programs AL State Bar 415 Dexter Ave. Montgomery, AL 36104 (334) 269-1515	-Twelve hours per year. -Military attorneys are exempt but must declare exemption. -Reporting date: 31 December.
Arizona	Administrator State Bar of AZ 111 W. Monroe St. Ste. 1800 Phoenix, AZ 85003-1742 (602) 340-7322	-Fifteen hours per year; three hours must be in legal ethics. -Reporting date: 15 September.

Arkansas	Director of Professional Programs Supreme Court of AR Justice Building 625 Marshall Little Rock, AR 72201 (501) 374-1853	-Twelve hours per year, one hour must be in legal ethics. -Reporting date: 30 June.
California*	Director Office of Certification The State Bar of CA 100 Van Ness Ave. 28th Floor San Francisco, CA 94102 (415) 241-2117	-Thirty-six hours over 3 year period. Eight hours must be in legal ethics or law practice management, at least four hours of which must be in legal ethics; one hour must be on prevention, detection and treatment of substance abuse/emotional distress; one hour on elimination of bias in the legal profession. -Full-time U.S. Government employees are exempt from compliance. -Reporting date: 1 February.
Colorado	Executive Director CO Supreme Court Board of CLE & Judicial Education 600 17th St., Ste., #520S Denver, CO 80202 (303) 893-8094	-Forty-five hours over three year period; seven hours must be in legal ethics. -Reporting date: Anytime within three-year period.
Delaware	Executive Director Commission on CLE 200 W. 9th St. Ste. 300-B Wilmington, DE 19801 (302) 577-7040	-Thirty hours over a two-year period; three hours must be in ethics, and a minimum of two hours, and a maximum of six hours, in professionalism. -Reporting date: 31 July.
Florida**	Course Approval Specialist Legal Specialization and Education The FL Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5842	-Thirty hours over a three year period, five hours must be in legal ethics, professionalism, or substance abuse. -Active duty military attorneys, and out-of-state attorneys are exempt. -Reporting date: Every three years during month designated by the Bar.
Georgia	GA Commission on Continuing Lawyer Competency 800 The Hurt Bldg. 50 Hurt Plaza Atlanta, GA 30303 (404) 527-8710	-Twelve hours per year, including one hour in legal ethics, one hour professionalism and three hours trial practice. -Out-of-state attorneys exempt. -Reporting date: 31 January
Idaho	Membership Administrator ID State Bar P.O. Box 895 Boise, ID 83701-0895 (208) 334-4500	-Thirty hours over a three year period; two hours must be in legal ethics. -Reporting date: Every third year determined by year of admission.
Indiana	Executive Director IN Commission for CLE Merchants Plaza 115 W. Washington St. South Tower #1065 Indianapolis, IN 46204-3417 (317) 232-1943	-Thirty-six hours over a three year period. (minimum of six hours per year); of which three hours must be legal ethics over three years. -Reporting date: 31 December.
Iowa	Executive Director Commission on Continuing Legal Education State Capitol Des Moines, IA 50319 (515) 246-8076	-Fifteen hours per year; two hours in legal ethics every two years. -Reporting date: 1 March.
Kansas	Executive Director CLE Commission 400 S. Kansas Ave. Suite 202 Topeka, KS 66603 (913) 357-6510	-Twelve hours per year; two hours must be in legal ethics. -Attorneys not practicing in Kansas are exempt. -Reporting date: Thirty days after CLE program.
Kentucky	Director for CLE KY Bar Association 514 W. Main St. Frankfort, KY 40601-1883 (502) 564-3795	-Twelve and one-half hours per year; two hours must be in legal ethics; mandatory new lawyer skills training to be taken within twelve months of admissions. -Reporting date: June 30.
Louisiana**	MCLE Administrator LA State Bar Association 601 St. Charles Ave. New Orleans, LA 70130 (504) 528-9154	-Fifteen hours per year; one hour must be in legal ethics and one hour of professionalism every year. -Attorneys who reside out-of-state and do not practice in state are exempt. -Reporting date: 31 January.

Minnesota	Director MN State Board of CLE 25 Constitution Ave. Ste. 110 St. Paul, MN 55155 (612) 297-1800	-Forty-five hours over a three-year period. Three hours must be in ethics, two hours in elimination of bias. -Reporting date: 30 August.
Mississippi**	CLE Administrator MS Commission on CLE P.O. Box 369 Jackson, MS 39205-0369 (601) 354-6056	-Twelve hours per year; one hour must be in legal ethics, professional responsibility, or malpractice prevention. -Military attorneys are exempt. -Reporting date: 31 July.
Missouri	Director of Programs P.O. Box 119 326 Monroe Jefferson City, MO 65102 (573) 635-4128	-Fifteen hours per year; three hours must be in legal ethics every three years. -Attorneys practicing out-of-state are exempt but must claim exemption. -Reporting date: Report period is 1 July - 30 June. Report must be filed by 31 July.
Montana	MCLE Administrator MT Board of CLE P.O. Box 577 Helena, MT 59624 (406) 442-7660, ext. 5	-Fifteen hours per year. -Reporting date: 1 March
Nevada	Executive Director Board of CLE 295 Holcomb Ave. Ste. 2 Reno, NV 89502 (702) 329-4443	Twelve hours per year; two hours must be in legal ethics and professional conduct. -Reporting date: 1 March.
New Hampshire**	Registrar NH MCLE Board 112 Pleasant St. Concord, NH 03301 (603) 224-6942	-Twelve hours per year; two hours must be in ethics, professionalism, substance abuse, prevention of malpractice or attorney-client dispute; six hours must come from attendance at live programs out of the office, as a student. -Reporting date: Report period is 1 July - 30 June. Report must be filed by 31 July.
New Mexico	MCLE Administrator P.O. Box 25883 Albuquerque, NM 87125 (505) 797-6015	-Fifteen hours per year; one hour must be in legal ethics. -Reporting date: 31 March.
New York*	Counsel The NY State Continuing Legal Education Board 25 Beaver Street, Room 888 New York, NY 10004	-Newly admitted: sixteen credits each year over a two-year period following admission to the NY Bar; three credits in Ethics, six credits in Skills; seven credits in Professional Practice/Practice Management each year. -Experienced attorneys: Twelve credits in any category, if registering in 2000; twenty-four credits (four in Ethics) within biennial registration period, if registering in 2001 and thereafter. -Full-time active members of the U.S. Armed Forces are exempt from compliance. -Reporting date: every two years within thirty days after the attorney's birthday.
North Carolina**	Associate Director Board of CLE 208 Fayetteville Street Mall P.O. Box 26148 Raleigh, NC 26148 (919) 733-0123	-Twelve hours per year; two hours must be in legal ethics; Special three hours (minimum) ethics course every three years; nine of twelve hours per year in practical skills during first three years of admission. -Active duty military attorneys and out-of-state attorneys are exempt, but must declare exemption. -Reporting date: 28 February.
North Dakota	Secretary-Treasurer ND CLE Commission P.O. Box 2136 Bismarck, ND 58502 (701) 255-1404	-Forty-five hours over three year period; three hours must be in legal ethics. -Reporting date: Reporting period ends 30 June. Report must be received by 31 July.
Ohio*	Secretary of the Supreme Court Commission on CLE 30 E. Broad St. Second Floor Columbus, OH 43266-0419 (614) 644-5470	-Twenty-four hours every two years including one hour ethics, one hour professionalism and thirty minutes substance abuse. -Active duty military attorneys are exempt. -Reporting date: every two years by 31 January.

Oklahoma**	MCLE Administrator OK State Bar P.O. Box 53036 Oklahoma City, OK 73152 (405) 524-2365	-Twelve hours per year; one hour must be in ethics. -Active duty military attorneys are exempt. -Reporting date: 15 February.
Oregon	MCLE Administrator OR State Bar 5200 S.W. Meadows Rd. P.O. Box 1689 Lake Oswego, OR 97035-0889 (503) 620-0222, ext. 368	-Forty-five hours over three year period; six hours must be in ethics. -Reporting date: Compliance report filed every three years.
Pennsylvania**	Administrator PA CLE Board 5035 Ritter Rd. Ste. 500 P.O. Box 869 Mechanicsburg, PA 17055 (717) 795-2139 (800) 497-2253	-Twelve hours per year, one hour must be in legal ethics, professionalism, or substance abuse. -Active duty military attorneys outside the state of PA defer their requirement. -Reporting date: annual deadlines: Group 1-30 Apr Group 2-31 Aug Group 3-31 Dec
Rhode Island	Executive Director MCLE Commission 250 Benefit St. Providence, RI 02903 (401) 222-4942	-Ten hours each year; two hours must be in legal ethics. -Active duty military attorneys are exempt. -Reporting date: 30 June.
South Carolina**	Executive Director Commission on CLE and Specialization P.O. Box 2138 Columbia, SC 29202 (803) 799-5578	-Fourteen hours per year; two hours must be in legal ethics/professional responsibility. -Active duty military attorneys are exempt. -Reporting date: 15 January.
Tennessee*	Executive Director TN Commission on CLE and Specialization 511 Union St. #1630 Nashville, TN 37219 (615) 741-3096	-Fifteen hours per year; three hours must be in legal ethics/professionalism. -Nonresidents, not practicing in the state, are exempt. -Reporting date: 1 March.
Texas	Director of MCLE State Bar of TX P.O. Box 13007 Austin, TX 78711-3007 (512) 463-1463, ext. 2106	-Fifteen hours per year; three hours must be in legal ethics. -Full-time law school faculty are exempt. -Reporting date: Last day of birth month each year.
Utah	MCLE Board Administrator UT Law and Justice Center 645 S. 200 East Ste. 312 Salt Lake City, UT 84111-3834 (801) 531-9095	-Twenty-four hours, plus three hours in legal ethics every two years. -non-residents if not practicing in state. -Reporting date: 31 December (end of assigned two-year compliance period.
Vermont	Directors, MCLE Board 109 State St. Montpelier, VT 05609-0702 (802) 828-3281	-Twenty hours over two year period. -Reporting date: 15 July.
Virginia	Director of MCLE VA State Bar 8th and Main Bldg. 707 E. Main St. Ste. 1500 Richmond, VA 23219-2803 (804) 775-0578	-Twelve hours per year; two hours must be in legal ethics. -Reporting date: 30 June.
Washington	Executive Secretary WA State Board of CLE 2101 Fourth Ave., FL4 Seattle, WA 98121-2330 (206) 727-8202	-Forty-five hours over a three-year period including six hours ehtics. -Reporting date: 31 January.
West Virginia	Mandatory CLE Coordinator MCLE Coordinator WV State MCLE Commission 2006 Kanawha Blvd., East Charleston, WV 25311-2204 (304) 558-7992	-Twenty-four hours over two year period; three hours must be in legal ethics and/or office management. -Active members not practicing in West Virginia are exempt. -Reporting date: Reporting period ends on 30 June every two years. Report must be filed by 31 July.
Wisconsin*	Supreme Court of Wisconsin Board of Bar Examiners Suite 715, Tenney Bldg. 110 East Main Street Madison, WI 53703-3328 (608) 266-9760	-Thirty hours over two year period; three hours must be in legal ethics. -Active members not practicing in Wisconsin are exempt. -Reporting date: Reporting period ends 31 December every two years. Report must be received by 1 February.

Wyoming	CLE Program Analyst WY State Board of CLE WY State Bar P.O. Box 109 Cheyenne, WY 82003-0109 (307) 632-3737	-Fifteen hours per year. -Reporting date: 30 January.

* Military exempt (exemption must be declared with state)
**Must declare exemption.

5. Phase I (Correspondence Phase), RC-JAOAC Deadline

All students currently enrolled in the RC-JAOAC Phase I (Correspondence Phase), who desire to attend Phase II (Resident Phase) at The Judge Advocate General's School (TJAGSA) this coming 9-21 January 2000, must submit all Phase I requirements to the Non-Resident Instruction Branch, TJAGSA, for grading with a postmark or electronic transmission date-time-group ***NLT 2400, 1 November 1999***. This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

If you have to retake any subcourse examinations or "re-do" any writing exercises, you must submit them to the Non-Resident Instruction Branch, TJAGSA for grading with a postmark or electronic transmission date-time-group ***NLT 2400, 30 November 1999***. Examinations and writing exercises will be expeditiously returned to students to allow them to meet this suspense. Students who fail to complete Phase I correspondence courses and writing exercises by these deadlines, will not be allowed to enroll for Phase II (Resident Phase), RC-JAOAC, 9-21 January 2000.

If you have any further questions, contact LTC Paul Conrad, JAOAC Course Manager, (800) 552-3978, extension 357, or e-mail <conrape@hqda.army.mil>. LTC Goetzke.

Current Materials of Interest

1. TJAGSA Materials Available through the Defense Technical Information Center (DTIC)

Each year The Judge Advocate General's School, U.S. Army (TJAGSA), publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of $25 per profile. Contact DTIC at (703) 767-9052, (DSN) 427-9052 or <www.dtic.mil/dtic/current.html>.

Prices for the reports fall into one of the following four categories, depending on the number of pages: $7, $12, $42, and $122. The Defense Technical Information Center also supplies reports in electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at <http://www.dtic.mil> to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

AD A301096	Government Contract Law Deskbook, vol. 1, JA-501-1-95 (631 pgs).
AD A301095	Government Contract Law Deskbook, vol. 2, JA-501-2-95 (503 pgs).
AD A265777	Fiscal Law Course Deskbook, JA-506-93 (471 pgs).

Legal Assistance

AD A345826	Soldiers' and Sailors' Civil Relief Act Guide, JA-260-98 (226 pgs).
AD A333321	Real Property Guide—Legal Assistance, JA-261-93 (180 pgs).
AD A326002	Wills Guide, JA-262-97 (150 pgs).
AD A346757	Family Law Guide, JA 263-98 (140 pgs).
AD A353921	Consumer Law Guide, JA 265-98 (440 pgs).
AD A345749	Uniformed Services Worldwide Legal Assistance Directory, JA-267-98 (48 pgs).
AD A332897	Tax Information Series, JA 269-99 (156 pgs).
AD A350513	The Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I, June 1998, 219 pages.

AD A350514	The Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II, June 1998, 223 pages.
AD A329216	Legal Assistance Office Administration Guide, JA 271-97 (206 pgs).
AD A276984	Deployment Guide, JA-272-94 (452 pgs).
AD A360704	Uniformed Services Former Spouses' Protection Act, JA 274-99 (84 pgs).
AD A326316	Model Income Tax Assistance Guide, JA 275-97 (106 pgs).
AD A282033	Preventive Law, JA-276-94 (221 pgs).

Administrative and Civil Law

AD A351829	Defensive Federal Litigation, JA-200-98 (658 pgs).
AD A327379	Military Personnel Law, JA 215-97 (174 pgs).
AD A255346	Reports of Survey and Line of Duty Determinations, JA-231-92 (90 pgs).
AD A347157	Environmental Law Deskbook, JA-234-98 (424 pgs).
AD A338817	Government Information Practices, JA-235-98 (326 pgs).
*AD A362338	Federal Tort Claims Act, JA 241-99 (91 pgs).
AD A332865	AR 15-6 Investigations, JA-281-97 (40 pgs).

Labor Law

AD A350510	The Law of Federal Employment, JA-210-98 (226 pgs).
AD A360707	The Law of Federal Labor-Management Relations, JA-211-99 (316 pgs).

Legal Research and Communications

AD A332958	Military Citation, Sixth Edition, JAGS-DD-97 (31 pgs).

Criminal Law

AD A302672	Unauthorized Absences Programmed Text, JA-301-95 (80 pgs).
AD A274407	Trial Counsel and Defense Counsel Handbook, JA-310-95 (390 pgs).
AD A302312	Senior Officer Legal Orientation, JA-320-95 (297 pgs).
AD A302445	Nonjudicial Punishment, JA-330-93 (40 pgs).
AD A302674	Crimes and Defenses Deskbook, JA-337-94 (297 pgs).
AD A274413	United States Attorney Prosecutions, JA-338-93 (194 pgs).

International and Operational Law

AD A352284	Operational Law Handbook, JA-422-93 (281 pgs).

Reserve Affairs

AD A345797	Reserve Component JAGC Personnel Policies Handbook, JAGS-GRA-98 (55 pgs).

The following United States Army Criminal Investigation Division Command publication is also available through the DTIC:

AD A145966	Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations, USACIDC Pam 195-8 (250 pgs).

* Indicates new publication or revised edition.

2. Regulations and Pamphlets

a. The following provides information on how to obtain Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.

(1) The United States Army Publications Distribution Center (USAPDC) at St. Louis, Missouri, stocks and distributes Department of the Army publications and blank forms that have Army-wide use. Contact the USAPDC at the following address:

Commander
U.S. Army Publications
Distribution Center

1655 Woodson Road
St. Louis, MO 63114-6181
Telephone (314) 263-7305, ext. 268

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program*, paragraph 12-7c (28 February 1989), is provided to assist Active, Reserve, and National Guard units.

b. The units below are authorized [to have] publications accounts with the USAPDC.

(1) *Active Army*.

(a) *Units organized under a Personnel and Administrative Center (PAC)*. A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their Deputy Chief of Staff for Information Management (DCSIM) or DOIM (Director of Information Management), as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in *DA Pam 25-33, The Standard Army Publications (STARPUBS) Revision of the DA 12-Series Forms, Usage and Procedures (1 June 1988)*.

(b) *Units not organized under a PAC*. Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their DCSIM or DOIM, as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(c) *Staff sections of Field Operating Agencies (FOAs), Major Commands (MACOMs), installations, and combat divisions*. These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (b) above.

(2) *Army Reserve National Guard (ARNG) units that are company size to State adjutants general*. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their State adjutants general to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(3) *United States Army Reserve (USAR) units that are company size and above and staff sections from division level and above*. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and CONUSA to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(4) *Reserve Officer Training Corps (ROTC) Elements*. To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and Training and Doctrine Command (TRADOC) DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

Units not described above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-LM, Alexandria, VA 22331-0302.

c. Specific instructions for establishing initial distribution requirements appear in *DA Pam 25-33*.

If your unit does not have a copy of DA Pam 25-33, you may request one by calling the St. Louis USAPDC at (314) 263-7305, extension 268.

(1) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(2) Units that require publications that are not on their initial distribution list can requisition publications using the Defense Data Network (DDN), the Telephone Order Publications System (TOPS), the World Wide Web (WWW), or the Bulletin Board Services (BBS).

(3) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161. You may reach this office at (703) 487-4684 or 1-800-553-6487.

(4) Air Force, Navy, and Marine Corps judge advocates can request up to ten copies of DA Pamphlets by writing to USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

3. The Legal Automation Army-Wide System Bulletin Board Service

a. The Legal Automation Army-Wide System (LAAWS) operates an electronic on-line information service (often referred to as a BBS, Bulletin Board Service) primarily dedicated to serving the Army legal community, while also providing Department of Defense (DOD) wide access. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

(1) Access to the LAAWS On-Line Information Service (OIS) is currently restricted to the following individuals (who can sign on by dialing commercial (703) 704-3322 or DSN 656-3322 or by using the Internet Protocol address 160.147.194.11 or Domain Names jagc.army.mil):

(a) Active Army, Reserve, or National Guard (NG) judge advocates,

(b) Active, Reserve, or NG Army Legal Administrators and enlisted personnel (MOS 71D);

(c) Civilian attorneys employed by the Department of the Army,

(d) Civilian legal support staff employed by the Army Judge Advocate General's Corps;

(e) Attorneys (military or civilian) employed by certain supported DOD agencies (e.g., DLA, CHAMPUS, DISA, Headquarters Services Washington),

(f) All DOD personnel dealing with military legal issues;

(g) Individuals with approved, written exceptions to the access policy.

(2) Requests for exceptions to the access policy should be submitted to:

LAAWS Project Office
ATTN: LAAWS BBS Sysops
10109 Gridley Road
Fort Belvoir, VA 22060-5861

c. Telecommunications setups are as follows:

(1) The telecommunications configuration for terminal mode is: 1200 to 28,800 baud; parity none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. Terminal mode is a text mode which is seen in any communications application other than World Group Manager.

(2) The telecommunications configuration for World Group Manager is:

Modem setup: 1200 to 28,800 baud
(9600 or more recommended)

Novell LAN setup: Server = LAAWSBBS
(Available in NCR only)

TELNET setup: Host = 160.147.194.11
(PC must have Internet capability)

(3) The telecommunications for TELNET/Internet access for users not using World Group Manager is:

IP Address = 160.147.194.11

Host Name = jagc.army.mil

After signing on, the system greets the user with an opening menu. Users need only choose menu options to access and download desired publications. The system will require new users to answer a series of questions which are required for daily use and statistics of the LAAWS OIS. Once users have completed the initial questionnaire, they are required to answer one of two questionnaires to upgrade their access levels. There is one for attorneys and one for legal support staff. Once these questionnaires are fully completed, the user's access is immediately increased. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS OIS.

d. Instructions for Downloading Files from the LAAWS OIS.

(1) Terminal Users

(a) Log onto the OIS using Procomm Plus, Enable, or some other communications application with the communications configuration outlined in paragraph c1 or c3.

(b) If you have never downloaded before, you will need the file decompression utility program that the LAAWS OIS uses to facilitate rapid transfer over the phone lines. This program is known as PKUNZIP. To download it onto your hard drive take the following actions:

(1) From the Main (Top) menu, choose "L" for File Libraries. Press Enter.

(2) Choose "S" to select a library. Hit Enter.

(3) Type "NEWUSERS" to select the NEWUSERS file library. Press Enter.

(4) Choose "F" to find the file you are looking for. Press Enter.

(5) Choose "F" to sort by file name. Press Enter.

(6) Press Enter to start at the beginning of the list, and Enter again to search the current (NEWUSER) library.

(7) Scroll down the list until the file you want to download is highlighted (in this case PKZ110.EXE) or press the letter to the left of the file name. If your file is not on the screen, press Control and N together and release them to see the next screen.

(8) Once your file is highlighted, press Control and D together to download the highlighted file.

(9) You will be given a chance to choose the download protocol. If you are using a 2400 - 4800 baud modem, choose option "1". If you are using a 9600 baud or faster modem, you may choose "Z" for ZMODEM. Your software may not have ZMODEM available to it. If not, you can use YMODEM. If no other options work for you, XMODEM is your last hope.

(10) The next step will depend on your software. If you are using a DOS version of Procomm, you will hit the "Page Down" key, then select the protocol again, followed by a file name. Other software varies.

(11) Once you have completed all the necessary steps to download, your computer and the BBS take over until the file is on your hard disk. Once the transfer is complete, the software will let you know in its own special way.

(2) Client Server Users.

(a) Log onto the BBS.

(b) Click on the "Files" button.

(c) Click on the button with the icon of the diskettes and a magnifying glass.

(d) You will get a screen to set up the options by which you may scan the file libraries.

(e) Press the "Clear" button.

(f) Scroll down the list of libraries until you see the NEWUSERS library.

(g) Click in the box next to the NEWUSERS library. An "X" should appear.

(h) Click on the "List Files" button.

(i) When the list of files appears, highlight the file you are looking for (in this case PKZ110.EXE).

(j) Click on the "Download" button.

(k) Choose the directory you want the file to be transferred to by clicking on it in the window with the list of directories (this works the same as any other Windows application). Then select "Download Now."

(l) From here your computer takes over.

(m) You can continue working in World Group while the file downloads.

(3) Follow the above list of directions to download any files from the OIS, substituting the appropriate file name where applicable.

e. To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and change into the directory where you downloaded PKZ110.EXE. Then type PKZ110. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression or decompression utilities used by the LAAWS OIS. You will need to move or copy these files into the DOS directory if you want to use them anywhere outside of the directory you are currently in (unless that happens to be the DOS directory or root directory). Once you have decompressed the PKZ110 file, you can use PKUNZIP by typing PKUNZIP <filename> at the C:\> prompt.

4. TJAGSA Publications Available Through the LAAWS BBS

The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (note that the date UPLOADED is the month and year the file was made available on the BBS; publication date is available within each publication):

FILE NAME	UPLOADED	DESCRIPTION
3MJM.EXE	January 1998	3d Criminal Law Military Justice Managers Deskbook.
4ETHICS.EXE	January 1998	4th Ethics Counselors Workshop, October 1997.
8CLAC.EXE	September 1997	8th Criminal Law Advocacy Course Deskbook, September 1997.
21IND.EXE	January 1998	21st Criminal Law New Developments Deskbook.
22ALMI.EXE	March 1998	22d Administrative Law for Military Installations, March 1998.
42LA_V1.EXE	June 1998	42d Legal Assistance Course (Main Volume), February 1998.
42LA_V2.EXE	June 1998	42d Legal Assistance Course (Tax Volume-Minus Chapter M), February 1998.

42LA_V3.EXE	June 1998	42d Legal Assistance Course (Tax Volume-Chapter M), February 1998.
46GC.EXE	January 1998	46th Graduate Course Criminal Law Deskbook.
51FLR.EXE	January 1998	51st Federal Labor Relations Deskbook, November 1997.
96-TAX.EXE	March 1997	1996 AF All States Income Tax Guide
97CLE-1.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.
97CLE-2.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.
97CLE-3.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.
97CLE-4.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.
97CLE-5.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.
97JAOACA.EXE	September 1997	1997 Judge Advocate Officer Advanced Course, August 1997.
97JAOACB.EXE	September 1997	1997 Judge Advocate Officer Advanced Course, August 1997.
97JAOACC.EXE	September 1997	1997 Judge Advocate Officer Advanced Course, August 1997.
98JAOACA.EXE	March 1998	1998 JA Officer Advanced Course, Contract Law, January 1998.
98JAOACB.EXE	March 1998	1998 JA Officer Advanced Course, International and Operational Law, January 1998.
98JAOACC.EXE	March 1998	1998 JA Officer Advanced Course, Criminal Law, January 1998.
98JAOACD.EXE	March 1998	1998 JA Officer Advanced Course, Administrative and Civil Law, January, 1998.
137_CAC.ZIP	November 1996	Contract Attorneys 1996 Course Deskbook, August 1996.
145BC.EXE	January 1998	145th Basic Course Criminal Law Deskbook.
ADCNSCS.EXE	March 1997	Criminal law, National Security Crimes, February 1997.
ALAW.ZIP	June 1990	*The Army Lawyer*/*Military Law Review* Database ENABLE 2.15. Updated through the 1989 *The Army Lawyer* Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
BULLETIN.ZIP	May 1997	Current list of educational television programs maintained in the video information library at TJAGSA and actual class instructions presented at the school (in Word 6.0, May 1997).
CLAC.EXE	March 1997	Criminal Law Advocacy Course Deskbook, April 1997.
CACVOL1.EXE	July 1997	Contract Attorneys Course, July 1997.
CACVOL2.EXE	July 1997	Contract Attorneys Course, July 1997.
EVIDENCE.EXE	March 1997	Criminal Law, 45th Grad Crs Advanced Evidence, March 1997.

FLC_96.ZIP	November 1996	1996 Fiscal Law Course Deskbook, November 1996.
FSO201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.
JA200.EXE	January 1998	Defensive Federal Litigation, August 1997.
JA210.EXE	August 1998	Law of Federal Employment, July 1998.
JA211.EXE	January 1998	Law of Federal Labor-Management Relations, January 1998.
JA215.EXE	January 1998	Military Personnel Law Deskbook, June 1997.
JA221.EXE	September 1996	Law of Military Installations (LOMI), September 1996.
JA230.EXE	January 1998	Morale, Welfare, Recreation Operations, August 1996.
JA231.ZIP	January 1996	Reports of Survey and Line of Duty Determinations—Programmed Instruction, September 1992 in ASCII text.
JA234.EXE	June 1998	Environmental Law Deskbook, June 1998.
JA235.EXE	March 1998	Government Information Practices, March 1998.
JA241.EXE	May 1998	Federal Tort Claims Act, April 1998.
JA250.EXE	May 1998	Readings in Hospital Law.
JA260.EXE	May 1998	Soldiers' and Sailors' Civil Relief Act Guide, April 1998.
JA261.EXE	January 1998	Real Property Guide, December 1997.
JA262.EXE	January 1998	Legal Assistance Wills Guide, June 1997.
JA263.EXE	June 1998	Legal Assistance Family Law Guide, May 1998.
JA265.EXE	September 1998	Legal Assistance Consumer Law Guide, September 1998.
JA267.EXE	June 1998	Uniformed Services Worldwide Legal Assistance Office Directory, May 1998.
JA269.DOC	March 1998	1997 Tax Information Series (Word 97).
JA269(1).DOC	March 1998	1997 Tax Information Series (Word 6).
JA270.EXE	August 1998	Veterans' Reemployment Rights Law Guide, June 1998.
JA271.EXE	January 1998	Legal Assistance Office Administration Guide, August 1997.
JA272.ZIP	January 1996	Legal Assistance Deployment Guide, February 1994.
JA274.ZIP	August 1996	Uniformed Services Former Spouses' Protection Act Outline and References, June 1996.
JA275.EXE	June 1998	Model Income Tax Assistance Guide, June 1998.
JA276.ZIP	January 1996	Preventive Law Series, June 1994.
JA281.EXE	January 1998	AR 15-6 Investigations, December 1997.
JA280P1.EXE	September 1998	Administrative & Civil Law Basic Course Handbook, LOMI, September 1998.

JA280P2.EXE	September 1998	Administrative & Civil Law Basic Course Handbook, Claims, August 1998.
JA280P3.EXE	September 1998	Administrative & Civil Law Basic Course Handbook, Personnel Law, August 1998.
JA280P4.EXE	September 1998	Administrative & Civil Law Basic Course Handbook, Legal Assistance, August 1998.
JA280P5.EXE	September 1998	Administrative & Civil Law Basic Course Handbook, Reference, August 1998.
JA285V1.EXE	June 1998	Senior Officers Legal Orientation Deskbook (Volume I), June 1998.
JA285V2.EXE	June 1998	Senior Officers Legal Orientation Deskbook (Volume II), June 1998.
JA301.ZIP	January 1996	Unauthorized Absence Programmed Text, August 1995.
JA310.ZIP	January 1996	Trial Counsel and Defense Counsel Handbook, May 1996.
JA320.ZIP	January 1996	Senior Officer's Legal Orientation Text, November 1995.
JA330.ZIP	January 1996	Nonjudicial Punishment Programmed Text, August 1995.
JA337.ZIP	January 1996	Crimes and Defenses Deskbook, July 1994.
JAGBKPT1.ASC	January 1996	JAG Book, Part 1, November 1994.
JAGBKPT2.ASC	January 1996	JAG Book, Part 2, November 1994.
JAGBKPT3.ASC	January 1996	JAG Book, Part 3, November 1994.
JAGBKPT4.ASC	January 1996	JAG Book, Part 4, November 1994.
NEW DEV.EXE	March 1997	Criminal Law New Developments Course Deskbook, November 1996.
OPLAW97.EXE	May 1997	Operational Law Handbook 1997.
RCGOLO.EXE	January 1998	Reserve Component General Officer Legal Orientation Course, January 1998.
RCJAINFO.EXE	June 1998	Reserve Orientation for Judge Advocates, May 1998.
TAXBOOK1.EXE	March 1998	1997 Tax CLE, Part 1.
TAXBOOK2.EXE	January 1998	1997 Tax CLE, Part 2.
TAXBOOK3.EXE	January 1998	1997 Tax CLE, Part 3.
TAXBOOK4.EXE	January 1998	1997 Tax CLE, Part 4.
TJAG-145.DOC	January 1998	TJAGSA Correspondence Course Enrollment Application, October 1997.
WRD97CNV.EXE	June 1998	Word 97 Converter

Reserve and National Guard organizations without organic computer telecommunications capabilities and individual mobilization augmentees (IMA) having bona fide military needs for these publications may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International and Operational Law; or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781.

Requests must be accompanied by one 5 1/4 inch or 3 1/2 inch blank, formatted diskette for each file. Additionally, requests from IMAs must contain a statement verifying the need for the requested publications (purposes related to their military practice of law).

Questions or suggestions on the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge

Advocate General's School, Legal Research and Communications Department, ATTN: JAGS-ADL-P, Charlottesville, Virginia 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, SGT Michael Hiner, Commercial (703) 704-3307, DSN 656-3307, or at the following address:

LAAWS Project Office
ATTN: LAAWS BBS SysOps
10109 Gridley Road
Fort Belvoir, VA 22060-5861

5. Articles

The following information may be useful to judge advocates:

Jodi L. Nelson, *The Lautenberg Amendment: An Essential Tool for Combating Domestic Violence*, 75 N.D. L. REV. (1999).

Kelly Gaines Stoner, *The Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA)—A Metamorphosis of the Uniform Child Custody Jurisdiction (UCCJA)*, 75 N.D. L. REV. 301 (1999).

6. TJAGSA Legal Technology Management Office (LTMO)

The Judge Advocate General's School, United States Army, continues to improve capabilities for faculty and staff. We have installed new projectors in the primary classrooms and Pentium PCs in the computer learning center. We have also completed the transition to Win95 and Lotus Notes. We have migrated to Microsoft Office 97 throughout the school.

The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by calling the LTMO.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or use our toll free number, 800-552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Information Management Office at extension 378. Mr. Al Costa.

7. The Army Law Library Service

With the closure and realignment of many Army installations, the Army Law Library Service (ALLS) has become the point of contact for redistribution of materials purchased by ALLS which are contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures.

Law librarians having resources purchased by ALLS which are available for redistribution should contact Ms. Nelda Lull, JAGS-DDS, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.