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Tempia, Turner, McOmber and the Military Rules of Evidence: A Right to Counsel Trio with the New Look

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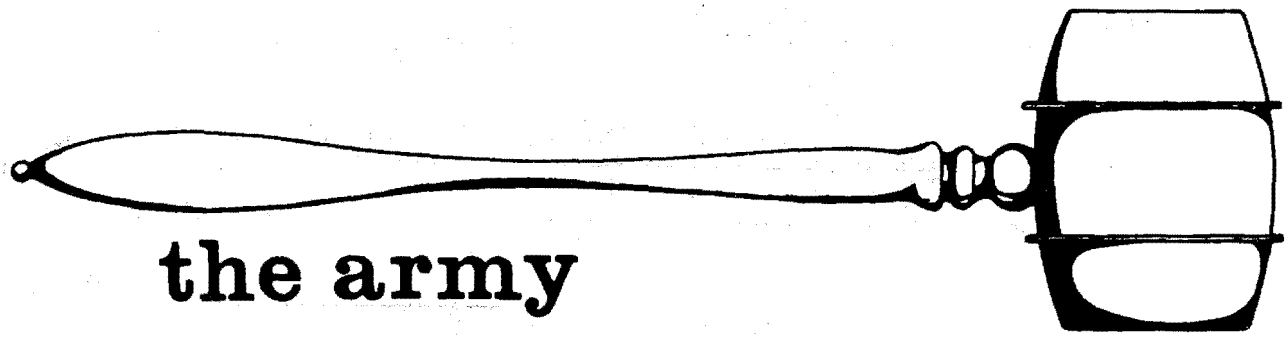

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Several significant developments in the law of military interrogations warrant an examination of a military suspect's rights to counsel. First, a series of Court of Military Appeals decisions within the last year or so have either clarified or expanded military case law on military interrogations. Secondly, and most important, the pending new Military Rules of Evidence[1] will implement a large amount of military case law, in some instances alter existing law and on the whole more closely align the military interrogation practices with prevailing civilian rules. Analysis of these developments will center on the three key facets of the service member's right to counsel at military interrogations:

—Fifth Amendment Rights: The *Miranda-Tempia* Right to Counsel Warnings;

—Sixth Amendment Rights: Right to Consult with Counsel During Interrogations; and

—Article 27, U.C.M.J. Rights: Notice to Suspect's Counsel of Pending Interrogation.

At least one of the foregoing rights will raise its head at any given interrogation. And al-

though occasionally, two or more will be raised in any given interrogation case, each will be here treated separately. Likewise, counsel who are faced with litigating the admissibility of an accused's statement should initially approach the right to counsel issues separately, beginning with an analysis of the applicable right to counsel warnings. It is that facet to which we first turn.

I. THE RIGHT TO COUNSEL WARNINGS

The fifth amendment right to remain silent serves as the keystone for the rights warnings requirements mandated by the Supreme Court in *Miranda v. Arizona.*[2] Citing numerous works, statistics, and plain common sense, the Court recognized the vital need for insuring the option for a suspect to either remain silent or to make a voluntary statement. In particular, the police station interrogation was all too often equated with coercion, deception, and intimidation. Resisting arguments that police functions would be fatally undermined, the Court mandated the now familiar *Miranda* warnings.[3] Despite efforts to modify *Miranda* through judicial and legislative[4] channels, the case stands. More important is that the application of the *Miranda* warnings stands and is applicable to military interrogations through the Court of Military Appeals' decision in *United States v. Tempia.*[5] The present-day applicability of the *Miranda-Tempia* decisions to military interrogations centers on a number of recurring issues:

—Delineating who must give the warnings;

—The definition of "custodial interrogation"

—The scope of the right to "counsel";

—Waiver of the right to counsel; and

—The *Miranda* exclusionary rule.

The following discussion will in turn center on each of these issues with attention being given to recent case law and the pending rules changes in the *Manual for Courts-Martial.* We first address the question of who must give the right to counsel, the *Miranda-Tempia,* warnings.

A. Who Is Required to Give the *Miranda-Tempia* Warnings?

The *Miranda* decision requires that the counsel warnings be given by law enforcement officers.[6] The 1969 *Manual for Courts-Martial*

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provision noted that the Article 31(b) warnings[7] and the right to counsel warnings were to be given by persons "subject to the code or acting as an instrument of such a person or a unit of the armed force."[8]

The new Military Rules of Evidence provision on this point also links the *Miranda* warnings with Article 31(b) warnings, and states that the right to counsel warnings must be given by persons subject to the Uniform Code of Military Justice.[9] By definition, those persons knowingly acting as an "agent of a military unit or of a person subject to the Uniform Code of Military Justice" must also give the *Miranda* warnings.[10]

The linkage between Article 31(b) warnings and the Miranda warnings is not new to military case law which in the past has often rested upon the Article 31(b) "persons subject to the Code" language in determining who must give the *Miranda* warnings.[11] However, it is clear that not *everyone* subject to the Code need give *Miranda* warnings—only those acting in either an official capacity[12] or those in a position of authority[13] over the suspect and then only when the suspect is in "custody."

Civilian investigators questioning a service member are of course bound by the *Miranda* requirements but foreign investigators are not necessarily so bound. A recent example of this was presented in *United States v. Jones*[14] where German law enforcement agents interrogated the accused "for the benefit of the German Government."[15] His statements to the foreign police were admitted into evidence at his court-martial over the defense objection that no proper *Miranda* warnings had been given. The Court of Military Appeals held that the German interrogators were not required to give any *Miranda* warnings because under the facts presented they had not acted as "instrumentalities" of military authorities.[16] Had military investigators played an active role in the interrogation or had the Germans conducted the interrogation at the request of military authorities, the accused's argument would have no doubt prevailed.[17]

Another permutation of the question of who must give the warnings relates to the oft-used police tactic of using informants or police in an undercover capacity to elicit incriminating evidence from suspects. Absent possible sixth amendment problems, civilian courts generally have little problem in relieving the questioners from giving the *Miranda* warnings; if not for policy reasons, at least for the reason that most of the undercover activity is not "custodial."[18] To date, the military courts, with only a few exceptions,[19] have not required warnings. Here too, the military courts have compared the Article 31(b) warnings with the *Miranda* warnings. If the military interrogator need not give warnings under Article 31, no *Miranda* warnings are required.[20]

The practice of using informants was recently examined in *United States v. Kirby*[21] where Air Force OSI agents used the volunteered services of the accused's roommate to recover some stolen property. The Court of Military Appeals could find no requirement to warn and noted that the informant who volunteered his services had not acted in an official capacity although the OSI office was aware that he would attempt to obtain the contraband. The court specifically declined to set out a "comprehensive statement of the precise characteristics of officiality where the other party is not a person known to the accused as a law enforcement officer or a superior."[22]

However, Rule 312(d)(1)(B), discussed in the next section, requires that undercover agents or informants must give right to counsel warnings if the suspect has been charged or is in some form of pretrial restraint.

B. Custodial Interrogations

Once the initial question of deciding "who" must give the *Miranda* warnings is settled, the issue of "when" the warnings must be given may be addressed. That issue may be further reduced to two points: The definition of "custody" and the definition of "interrogation."

First, as to the element of custody, the *Miranda* warnings, according the the Supreme Court, were required when questioning was initiated by law enforcement officers after a person was taken in custody or otherwise deprived of his freedom of action in any significant way.[23] The new provision in the Military Rules of Evidence, Rule 305(d)(1), states that counsel warnings are required when:

> *(A) . . . [T]he accused or suspect is in custody, could reasonably believe himself or herself to be in custody, or is otherwise deprived of his or her freedom of action in any significant way; or*
>
> *(B) The interrogation is conducted by a person subject to the Uniform Code of Military Justice acting in a law enforcement capacity, or an agent of such a person, the interrogation is conducted subsequent to preferral or charges or the imposition of pretrail restraint under paragraph 20 of this Manual, and the interrogation concerns the offenses or matters that were the subject of the preferral of charges or were the cause of the imposition of pretrial restraint.*[24]

Note that this provision expands the requirement of warnings to situations which may not necessarily be "custodial" but occur after preferral of charges or pretrial restraint. Determining whether the suspect has been charged or is in restraint should provide no problems. Unfortunately for the practitioner, few hard and fast rules apply in defining "custody." An imprisoned suspect has normally been considered to be in custody[25] but not all police-station interrogations are custodial.[26] Conversely, not all interrogations conducted in the surroundings familiar to the suspect are necessarily non-custodial.[27]

While the Supreme Court is apparently limiting those situations which might normally be considered custodial[28] the military courts do not reveal an eagerness to so reduce the impact of *Miranda*. That is probably true in part to the recognition by the courts of the subtle, inherent coerciveness, that of necessity exists in the military.[29] But again, not all military interrogations are custodial nor does the superior-subordinate relationship between interrogator and suspect necessarily in and of itself require a finding of custody.[30]

To meet the task of determining whether the suspect was in custody, the various state, federal, and military courts have relied on several different tests: the subjective intent of the questioner, the subjective intent of the suspect, and an objective test.[31] Application of either of the first two obviously presents a possibility for judicial swearing contests. The objective test, applied by at least one federal circuit court[32] and apparently adopted in a military decision, *United States v. Temperley*,[33] has apparently been incorporated in large part in the new military evidence rules.[34] The new military test, a hybrid of sorts, requires at least some consideration of the circumstances of the interrogation through the eyes of the suspect. The intent of the interrogator is apparently not a factor under the new rule.

The second portion of the inquiry of when the warnings are required turns on the definition of "interrogation." *Miranda* speaks simply in terms of "questioning" although more recent Supreme Court decisions have expanded the requirement to those situations where the interrogators engaged in conversations designed to elicit incriminating information. A striking example of this is the now well-recognized conversation, the "Christian Burial Speech," initiated by the detective in *Brewer v. Williams*.[35] The military courts have likewise adopted a broader application of "interrogation" to include conversations or discussions. In *United States v. Borodzik*,[36] for example, the Court of Military Appeals indicated that:

> When conversation is designed to elicit a response from a suspect, it is interrogation, regardless of the subtlety of the approach.[37]

A fascinating example of the "subtle" approach occurred in *United States v. Fox*[38] where the interrogator stopped to chat with the suspect. He engaged him in a two-hour long "cat-and mouse" game—a game successfully thwarted by the mouse, according to the court. Ironically,

after the so-called chat had ended, the suspect voluntarily implicated himself.[39] The court sustained the conviction but cautioned against such police practices.

The broader definitional approach to interrogation has been incorporated in the new Military Rules of Evidence. Rule 305(b)(2) provides:

> *"Interrogation" includes any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning.*

Left for further litigation is the question of whether military interrogators must give *Miranda* warnings prior to asking what are typically characterized as threshold or pedigree questioning. The civilian courts have generally recognized no such requirement[40] but in those military cases where, for example, the suspect's identity was in issue, failure to give the *Miranda* warnings was fatal.[41] However, where identity is not in issue or where the individual is not a suspect, the courts will not normally require the *Miranda* warnings.[42]

Still exempt from *Miranda-Tempia* warnings are the spontaneous or volunteered statements from the suspect.[43] And interrogations which are affected only by the Article 31(a) privilege against self-incrimination do not include a right to counsel.[44]

C. The Right to "Counsel"

The Supreme Court language in *Miranda* required that a suspect receive warnings advising him of the right to the presence of an attorney, either retained or appointed. Other language indicated that denial of counsel based on indigency would not be "supportable by reason or logic."[45] The Court noted:

> In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him.[46]

The Court of Military Appeals in *Tempia*, emphasized the foregoing language noting that for service members being interrogated, indigency could not serve as a bar to the right to counsel under *Miranda*.[47] *Tempia*, in applying *Miranda* to military interrogations, neither expanded nor contracted the *Miranda* rights.

However, in the 1969 *Manual for Courts-Martial* the framers expanded the *Miranda* rights for service members to include either a civilian counsel or appointed military counsel. No showing of indigency was required.[48] Subsequent military rights-warnings cards[49] and waiver certificates[50] broadened the *Manual* rights by informing the military suspects of the additional right to individual military counsel if reasonably available.

The new Military Rules of Evidence change this. First, as to the indigency language, the Court of Military Appeals had in two decisions, *United States v. Clark*[51] and *United States v. Hofbauer*,[52] held that because *Tempia* was used only to apply *Miranda*, the 1969 *Manual* language was too broad. A service member was entitled to appointed counsel only if, in *Miranda's* image, he could not afford a civilian counsel. But the indigency issue has apparently now shifted back to favoring the 1969 *Manual* language. Rule 305(d)(2), provides:

> Counsel. *When a person entitled to counsel under this rule requests counsel, a judge advocate or law specialist within the meaning of Article 1 or an individual certified in accordance with Article 27(b) shall be provided by the United States at no expense to the person and* without regard to the person's indigency *or lack thereof before the interrogation may proceed* [emphasis added].

The apparent intent of the drafters was to overrule *Clark* and *Hofbauer*. A military suspect is, under the new rules, entitled to appointed military counsel regardless of indigency.

The second major issue regarding limitations of the military suspect's right to counsel is whether the suspect should be entitled to an individually requested military counsel. The

new rules again make a change. A military suspect, under the new rules, *will not* be entitled to an individually requested military counsel at an interrogation. Even with this new limitation the military suspect's right to counself will remain broader than his civilian counterpart's right. In theory, at least, the civilian suspect must make some indication of indigency before receiving an appointed counsel. The military suspect may receive a military counsel by simply so indicating to his interrogators.

D. Invoking the Right—Waiving the Right

The preceding sections centered on delineation of the *Miranda-Tempia* rights warnings. Once the warnings are given to the military suspect a series of new issues arise. We turn first to the situation where the suspect requests to see counsel. Several options are available to the interrogators.

First, they may decide to either allow the suspect to arrange for counsel or they may themselves contact an attorney for the purpose of advising the suspect. If they decide not to allow the suspect to contact an attorney, then they may either release him or hold him for a reasonable time while continuing their investigation.[53] They may not, however, continue to question the suspect.[54]

Should the suspect indicate a willingness to forego the services of an attorney, then the interrogators may continue their questioning. The burden of establishing a voluntary waiver of the right to counsel rests on the Government. Although a written waiver is not a prerequisite to admissibility of a military suspect's statements under the new rules, the existence of such certainly assists the prosecutor in meeting his burden.[55] The suspect's "silence" when asked whether he wishes to see counsel does not in itself establish a waiver.[56] If the suspect does not decline affirmatively the right to counsel, the prosecutor must establish the waiver by a preponderance of the evidence.[57]

Some special problems are present for the Government if the suspect's statements were made *after* he initially indicated a desire to see a counsel. Although language in *Miranda* seems to prohibit any so-called follow-up questioning (or conversation designed to elicit a response) later Supreme Court decisions apparently make allowance for it. For example, in *Michigan v. Mosely*[58] the court stated that if a statement is later obtained the test to be applied is whether the suspect's rights to cut off questioning have been "scrupulously honored."[59] The Court of Military Appeals has followed suit in several recent cases. In *United States v. Hill*,[60] the court allowed for subsequent questioning but found no waiver under the facts presented. But in *United States v. Quintana*[61] the Government was able to sustain its burden of showing waiver, which in the court's estimation is very heavy when the statement follows an invocation of the *Miranda-Tempia* rights. Under law, there is no *per se* exclusion of those later statements.[62]

The "subsequent statement" scenario occurs in a variety of situations. Most arise in the hours or days following the invocation. Typically, the investigators follow up with an inquiry as to whether the suspect has in fact seen or spoken with a lawyer or if he has changed his mind. Most military courts recognize the validity of such a procedure.[63] A related point here, and discussed more fully in later sections, is that if the investigators know that the suspect is represented by counsel, notice must be given to that counsel of any further questioning.

E. Effect of Incomplete Warnings: The *Miranda* Exclusionary Rule

To give meaning to its mandate, the Supreme Court in *Miranda* set out its exclusionary rule:

> The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.[64]

The military adopted the foregoing rule in the 1969 *Manual for Courts-Martial.*[65] But as in other areas of *Miranda,*[66] the Supreme Court has liberalized its application of *Miranda.* In *Harris v. New York,*[67] the court ruled that incomplete or erroneous *Miranda* warnings could nonetheless be used to impeach the accused's testimony. The *Harris* rule, however, was specifically rejected by the Court of Military Appeals in *United States v. Jordon.*[68] The court noted that the Supreme Court's decision in *Harris* would determine the issue it it turned solely on constitutional construction. However, the court continued, the 1969 *Manual* proscription had the force of law, under congressional delegation of power to the President, and would apply until changed. It has been changed.

The new Military Rules of Evidence now bring the military exclusionary rule more in line with current civilian practice. The applicable rule, Rule 304(b), allows statements obtained after faulty *Miranda* warnings to be used for impeachment.[69] Whether faulty *Miranda* warnings in a military interrogation will void any other derivative evidence is still undecided. The Supreme Court has not allowed *Harris*-type statements to serve as a valid basis for probable cause to search.[70] Note that not all defective *Miranda* warnings are necessarily fatal. Although an investigator's mistakes in giving the Article 31(b) warnings almost always call for the exclusion of any resulting statements,[71] there are several military cases which allow for "substantial compliance" in giving the right to counsel warnings. For example, in *United States v. Wilcox*[72] the investigator told the suspect that he had a right to individual military counsel at his own expense. The court noted that the advice was clearly wrong but that substantial compliance coupled with a lack of prejudice satisfied foundational requirements for the admissibility of the suspect's statements. Now, of course, even those warnings not substantially complying with *Miranda* may be used for at least impeachment.

F. Summary

The new Military Rules of Evidence obviously impact on application of the fifth amendment protections, the *Miranda-Tempia* warnings, to military interrogations. It is in this area that counsel can expect to see more conformity with civilian practice and should therefore find civilian precedent helpful in litigating the matter. Particular note should be paid to those rules which clarify and expand the definition of "custodial interrogation,"[73] establish new limits on the suspect's choice of counsel,[74] and adopt the Supreme Court's decision in *Harris v. New York.*[75] Having examined the circumstances of the interrogation to determine if *Miranda-Tempia* is applicable, counsel should next turn to consider whether any sixth amendment issues are involved.

II. THE SIXTH AMENDMENT RIGHT TO COUNSEL AT INTERROGATIONS

It is in the area of the military's application of the sixth amendment that we see the greatest expansion of the suspect's right to counsel at a military interrogation and at the same time the greatest potential for uncertainty. The seminal case is *Escobedo v. Illinois*[76]—a precursor to *Miranda.* In *Escobedo* the accused's request to see his defense counsel had been improperly thwarted by interrogators. But even absent a request from the suspect to see his counsel, sixth amendment rights may be violated. Two Supreme Court decisions, *Massiah v. United States*[77] and *Brewer v. Williams*[78] are prime examples. In *Massiah* the accused, after arraignment, was questioned by a bugged informant with his counsel present. His sixth amendment right to counsel, said the court, had been violated. A similar result occurred in *Brewer* where, after arraignment, the accused was engaged in "conversation" by a detective;[79] the court found no waiver of the accused's sixth amendment rights.[80] In neither case did the accused request to see counsel, yet the sixth amendment right to counsel was improperly denied.

The military courts, relying on *Escobedo* and its progeny have in the past generally followed the Supreme Court's rule. But in *United States v. Turner*,[81] the Court of Military Appeals, broadened the sixth amendment protections to include an accused who had not requested to see his attorney and who was not aware that an attorney had unsuccessfully attempted to see him prior to the interrogation.

After being released to military investigators by state authorities, Private Shawn Turner was placed in an interrogation room. In a neighboring office, a civilian attorney indicated to the investigators that he represented Turner on some other matters and considered himself counsel for Turner "generally"; his request to see Turner was denied. The subsequent interrogation did not include advice to Turner of the availability of an attorney. He waived his rights and confessed. The Army Court of Military Review found no denial of the accused's rights to counsel[82] but the Court of Military Appeals reversed, incorporating the dissenting opinion of the lower court's decision.[83]

The court noted that the civilian attorney's announcement that he represented the accused was sufficient for the investigators to have assumed that he in fact was the accused's attorney. Citing several state decisions, and relying principally on *People v. Donovan*,[84] the court held that the investigators' blockade had frustrated the accused's sixth amendment rights to counsel. In effect, a military suspect's counsel may now invoke the "right to see counsel."

At face value, *Turner* mandates a rule not yet required by any Supreme Court opinion.[85] The decision's full impact is yet to be seen. As a practical matter, when investigators are confronted by an "attorney" for the suspect, a few questions of the visitor may reveal whether in fact a relationship approximating an attorney-client relationship in fact exists with the suspect.[86]

Note that Rule 305(d)(1)(A), discussed earlier,[87] requires that counsel warnings be given at any interrogations conducted after the suspect is under restraint or charges have been preferred. This may solve in part any future *Turner*-type problems related to determining when the right to counsel attaches. It is safe to conclude that upon the occurrence of either of the foregoing events, both of the applicable fifth and sixth amendment rights will be triggered for military interrogations.[88]

Our discussion to this stage has centered on two constitutionally-based protections. We turn now to the third and final facet, a notice requirement that rests not on the Constitution, but rather on the Uniform Code of Military Justice.

III. NOTICE TO COUNSEL OF INTERROGATION

The third and final "right" to counsel, a notice requirement, rests in part on a perceived need to prevent law enforcement officials from depriving a suspect of applicable fifth and sixth amendment rights. Simply put, if the suspect has an attorney, the interrogators must give notice to that attorney of any proposed interrogations. This third "right," however, finds no consistent or clear application in the civilian courts. Unless sixth amendment rights are involved, that is, the right to counsel has attached, civilian courts will generally allow questioning of the suspect without prior notice to his counsel.[89] Clearly, a different rule applies to military interrogations.

The military's notice requirement is grounded in the Court of Military Appeals decision in *United States v. McOmber*.[90] Chief Judge Fletcher, writing for the court, noted that the leanings of the court had been toward a notice rule and stated:

> If the right to counsel is to retain any vitality, the focus in testing for prejudice must be 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 rea-

sonable opportunity to be present renders any statement obtained involuntary under Article 31(d) of the Uniform Code.[91]

The rational for the rule was derived from Article 27 of the Uniform Code of Military Justice—not the sixth amendment.

McOmber in laying a broader, more protective statutory right to counsel, did not answer the question of whether notice was required if a different offense was later discovered and the investigators wished to renew questioning of the suspect. Nor did it answer a key issue of whether the questioning agent needed "actual" notice that an acused was represented by counsel. Each question has since been addressed by the court.

A. Interrogation for Different Offense

Apparently, if the offenses under investigation are in any way related, McOmber will apply. For example, in *United States v. Lowry,*[92] both interrogations dealt with the accused's possible role in the arson of several buildings. Although each interrogation dealt with different buildings, the court was unwilling to make "subtle distinctions" that require the separation of offense occurring within the same general area within a short period of time.[93] Recently, in *United States v. Littlejohn,*[94] the court held that no notice was required where the offenses in question were committed within two days of each other but involved distinct and unrelated matters.[95]

The important point here is the "subtle distinction" proscription in *Lowry, supra.* If the offenses are not clearly distinct and unrelated, the prudent investigator should give the *McOmber* notice to the suspect's counsel. That assumes of course that the investigator has notice that a defense counsel is representing the suspect. Despite its holding in *Littlejohn,* the court will continue to closely examine the investigator's actions and motives. If bad faith in apparent, there should be no doubt that the court will refuse to make "subtle" distinctions.

B. "Notice" of Representation by Counsel

Recall that the *McOmber* notice is required where an investigator is on notice that an attorney has undertaken to represent an individual in a military criminal investigation. A number of decisions from both the Court of Military Appeals and the various service appellate courts have concluded that in the absence of bad faith, investigators will only be required to give the *McOmber* notice if they have actual knowledege that the suspect is represented. In *United States v. Harris,*[96] the Court of Military Appeals declined to extend *McOmber's* mandate to include a requirement that the investigators inquire of the suspect whether an attorney-client relationship exists. And in *United States v. Littlejohn, supra,* the court rejected the defense argument that *McOmber* notice should have been given to the defense counsel who would have inevitably represented the accused. The *McOmber* rule, according to the court is not concerned with probable representation but rather with "an existing attorney-client relationship."[97] Again, this area is suspect; in both cases the court was persuaded by the reasonableness of the investigator's actions. Evidence of bad faith could easily change the results reached in those cases.[98]

Rule 305(e) of the new Military Rules of Evidence includes a *McOmber* notice requirement:

> Notice to Counsel. *When a person subject to the Uniform Code of Military Justice 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.*

Note that this new rule expands the *McOmber* rule beyond the limits set by *Littlejohn* and *Harris, supra.*[99] Whether the investigator knows or should know of an existing attorney-

client relationship will obviously depend on the factors surrounding each interrogation.[100]

One defense method of short-circuiting claims of investigator ignorance might be for defense counsel to formally advise law enforcement personnel of his or her role as the accused's attorney.[101] The potential impact of this new rule probably requires that the farsighted investigator simply ask the suspect if an attornet has been appointed or retained. The investigator surely runs the risk of the suspect answering in the affirmative and invoking his right to counsel but the benefits of clearing the air and avoiding a possible *McOmber* notice problem must not be overlooked.

IV. CONCLUSION

In litigating the various issues associated with this aspect of military interrogations, counsel should resist the urge to rush into an analysis which treats only the broader, more confusing, issue of "right to counsel." Each particular "right" should first be examined separately. In any case in which an interrogation of the accused is in issue, counsel should apply a six-step analysis:

First, were right to counsel warnings required either by case law or the new rules of evidence?

Second, if the accused gave a statement without requesting counsel, is there evidence of a valid waiver of the right to counsel?

Third, if the accused gave a statement after initially requesting counsel, is there evidence to sustain the government's heavy burden of showing a valid waiver?

Fourth, if there was no compliance with the requirements to give the applicable right to counsel warnings, is the statement otherwise voluntary and therefore admissible for impeachment purposes under the new rules?

Fifth, did the accused's counsel at any time prior to, or during the interrogation, unsuccessfully attempt to see the accused? If so, there may be a sixth amendment issue.

Sixth, was the interrogator required to give McOmber *notice to counsel? If notice was given, was the counsel given a reasonable opportunity to be present?*

Counsel's analysis should begin, but in no way end with these six issues. They should be used as primary tools for focusing on the key areas. Each inquiry should then be further subjected to detailed analysis using applicable case law and the new rules as a template for specifically framing the issues to be litigated. In summary, particular attention should be paid to the major innovations in the Military Rules of Evidence which:

1. **Expand the right to counsel warnings to interrogations not necessarily custodial but occurring after charges are preferred or pretrial restraint imposed;**[102]
2. **Adopt the Supreme Court decision in *Harris v. New York*;**[103]
3. **Limit the suspect's right to individually requested military counsel;**[104]
4. **Expand the *McOmber* notice requirement to cases where the investigator reasonably should know that counsel has been retained or appointed.**[105]

These recent changes reflect a somewhat spirited growth of the rights to counsel at military interrogations and so mark a major step in the development of military criminal law. The potential for litigating right to counsel issues is ripe and the new Military Rules of evidence and recent case law insure ample opportunity for litigation.

FOOTNOTES

[1] The new Rules, approved by President Carter on 12 March 1980, will replace existing Chapter 27 of the *Manual for Courts-Martial,* United States (1969 Rev. ed.) [hereinafter cited as MCM, 1969]. The rules will be effective on 1 September 1980 and are hereinafter cited as M.R.E.

[2] 384 U.S. 436 (1966).

[3] For a discussion of the *Miranda* decision and its impact, *see* Lederer, *Miranda v. Arizona—The Law Today*, 78 Mil. L. Rev. 197 (1977). *See also* Chyette, *The Right to Counsel in Police Interrogation Cases: Miranda and Williams*, 12 U. of Mich. L. Rev. 112 (1978); Dorris, *The Declining Miranda Doctrine: The Supreme Court's Development of Miranda Issues*, 36 Wash. and Lee L. Rev. 259 (1979); Sunderland, *Self-Incrimination and Constitutional Principle: Miranda v. Arizona and Beyond*, 15 Wake Forest L. Rev. 171 (1979).

[4] *See* 18 U.S.C. § 3501 (1970), The "Post-Miranda Act" or the "Anti-Miranda Act" which was enacted as part of the Omnibus Crime Control and Safe Streets Act of 1968. Pub. L. No. 90–351, 82 Stat. 197.

[5] 16 C.M.A. 629, 37 C.M.R. 249 (1967).

[6] 384 U.S. at 444.

[7] The Article 31(b) warnings, the military's statutory warnings, do not provide a right to counsel warning. They are separately required although the 31(b) warnings and the *Miranda* right to counsel warnings are almost always given contemporaneously. Most military cases thus merge discussion of both.

[8] MCM, 1969, para. 140*a*(2).

[9] Rule 305(d), M.R.E.

[10] Rule 305(b)(1), M.R.E.

[11] *E.g.*, a company commander. *See* United States v. Jordon, 20 C.M.A. 614, 44 C.M.R. 44 (1971).

[12] MCM, 169, para. 140*a*(2).

[13] The Court of Military Appeals has required the Article 31(b) warnings, and by implication the *Miranda-Tempia* warnings of those questioners in a position of authority over the suspect. *See, e.g.*, United States v. Dohle, 1 M.J. 223 (C.M.A. 1975).

[14] 6 M.J. 226 (C.M.A. 1978).

[15] 6 M.J. at 227. The offenses occurred in the civilian community at the Federal Republic of Germany and the victim was a Turkish national residing in Germany.

[16] 6 M.J. at 229. *See also* United States v. Mundt, 508 F.2d 904, 906 (10th Cir. 1974); *cert. denied*, 421 U.S. 949 (1975); United States v. Kilday, 481 U.S. 655 (5th Cir. 1973).

[17] Mere presence of an American agent is insufficient to invoke *Miranda*. United States v. Welch, 455 F.2d 211 (2d Cir. 1972). And furnishing information which results in interrogation is insufficient to warrant *Miranda* warnings. United States v. Chavarria, 443 F.2d 904 (9th Cir. 1971).

[18] *See, e.g.*, Hoffa v. United States, 385 U.S. 293 (1966); *cf.* Massiah v. United States, 377 U.S. 201 (1964).

[19] *See, e.g.*, United States v. Johnstone, 5 M.J. 744 (A.F.C.M.R. 1978), *pet. granted*, 6 M.J. 145 (1978) on other issues. The Court was satisfied that the questioning by the informant was "official." The *Miranda-Tempia* warnings were not addressed; obviously under the facts the questioning was not custodial.

[20] The situation may of course arise where an interrogator not subject to the Code and not acting as an agent of the military is not required to give Article 31(b) warnings, but will be required to give a military suspect, in custody, the *Miranda* warnings.

[21] 8 M.J. 8 (C.M.A. 1979).

[22] 8 M.J. at 11 (C.M.A. 1979).

[23] 384 U.S. 436, 444 (1966).

[24] Rule 305(d)(1) M.R.E. This rule is apparently intended in part to codify Brewer v. Williams, 430 U.S. 387 (1977) and Massiah v. United States, 377 U.S. 201 (1964).

[25] *See, e.g.*, Mathis v. United States, 391 U.S. 1 (1968). Rule 305(d)(1)(A) does not really change this. The major change lies in requiring the *Miranda-Tempia* warnings after preferral of charges.

[26] Oregon v. Mathiason, 429 U.S. 492 (1977); Barfield v. Alabama, 522 F.2d 1114 (5th Cir. 1977) (murder suspect was "free" to leave); United States v. Gustafson, 17 C.M.A. 150, 37 C.M.R. 414 (1967) (suspect free to leave at any time, not under arrest).

[27] Orozco v. Texas, 394 U.S. 324 (1969) (suspect not free to leave his own room at 4 A.M.).

[28] *See, e.g.*, Oregon v. Mathiason, *supra* note 26.

[29] In United States v. Tempia, 16 C.M.A. 629, 37 C.M.R. 249 (1969) the court noted that:

> In the military, unlike civil life, a suspect may be required to report and submit to questioning quite without regard to warrants or other legal process. It ignores the realities of that situation to say that one ordered to appear for interrogation has not been significantly deprived of his freedom of action.

37 C.M.R. at 256.

[30] United States v. Jordon, 20 C.M.A. 614, 44 C.M.R. (1971). The issue of rank difference or position of authority may of course require Article 31(b) warnings. *See* United States v. Dohle, 1 M.J. 223 (C.M.A. 1975) where the court noted that "[i]ndeed, in the military setting in which we operate, which depends for its very existence upon superior-subordinate relationships, we must recognize that the position of the questioner, regardless of his motives, may be the moving factor in an accused's or suspect's decision to speak.

[31] *See* Lederer, *Miranda*, *supra* note 3 at 130.

[32] United States v. Hall, 421 F.2d 540 (2d Cir. 1969), *cert. denied*, 397 U.S. 990 (1971).

[33] 22 C.M.A. 384, 47 C.M.R. 235 (1973).

[34] Rule 305(d)(1)(A) M.R.E., note 24, *supra* and accompanying text.

[35] 430 U.S. 387 (1977).

[36] 21 C.M.A. 95, 44 C.M.R. 149 (1971).

[37] 44 C.M.R. at 151. Investigators had indirectly questioned the suspect via his wife.

[38] 8 M.J. 526 (A.C.M.R. 1979), *pet. granted*, 8 M.J. 220 (C.M.A. 1980).

[39] After they had ended their discussion the accused walked the agent to his car and after some further talk, implicated himself. The agent responded by telling the accused, "Remember, I have not asked you any questions pertaining to the case. I cannot do that." 8 M.J. at 528.

[40] Note that the Supreme Court in *Miranda* stated that "[g]eneral on-the-scene questioning as to facts, surrounding a crime or other general questioning of citizens in the fact finding process is not affected by our holding," 384 U.S. at 477.

[41] *See, e.g.*, United States v. Phifer, 18 C.M.A. 508, 40 C.M.R. 220 (1969); United States v. Allison, 40 C.M.R. 602 (A.B.R. 1969). *But see* United States v. Butler, 39 C.M.R. 563 (A.B.R. 1968).

[42] United States v. Ballard, 39 C.M.R. 563 (A.B.R. 1968).

[43] *See, e.g.*, United States v. Frederick, 7. M.J. 791 (N.C.M.R. 1979); United States v. Willeford, 5 M.J. 634 (A.F.C.M.R. 1978).

[44] Rule 305 (d)(1), M.R.E.

[45] 384 U.S. at 472.

[46] *Id.*

[47] 37 C.M.R. at 258.

[48] MCM, 1969, para. 140*a*(2).

[49] Department of the Army Rights Warnings Card, GTA 19-6-2.

[50] DA Form 3881, Rights Warnings/Waiver Certificate.

[51] 22 C.M.A. 570, 48 C.M.R. 77 (1974).

[52] 5 M.J. 409 (C.M.A. 1978).

[53] *See* United States v. Hill, 5 M.J. 114, 116-118 (C.M.A. 1978) (Fletcher, C. J., dissenting) for discussion of options available to the investigators.

[54] Rule 305(f), M.R.E. restates present law. But it leaves open the question of when, if at all, questioning may later be resumed.

[55] Rule 305(g)(1), M.R.E. provides:

> (g) Waiver. (1) General rule. *After receiving applicable warnings under this rule, a person may waive the rights described therein and in rule 301 and make a statement. The waiver must be made freely, knowingly, and intelligently.*
>
> *A written waiver is not required. The accused or suspect must acknowledge affirmatively that he or she understands the rights involved, affirmatively decline the right to counsel and affirmatively consent to making a statement.*

See North Carolina v. Butler, __ U.S. __ (1979). And a statement will not be involuntary if given by a suspect who was aware of his rights and intentionally frustrated diligent attempts to give the necessary warnings. United States v. Sikorski, 21 C.M.A. 345, 45 C.M.R. 119 (1972).

[56] United States v. Long, 37 C.M.R. 696 (A.B.R. 1967).

[57] Rule 305(g)(2), M.R.E.

[58] 423 U.S. 96 (1975).

[59] 423 U.S. at 104.

[60] 5 M.J. 114 (C.M.A. 1978).

[61] 5 M.J. 484 (C.M.A. 1978).

[62] The Court of Military Appeals in *Hill*, *supra* note 60 at 115 noted that the *per se* rule had apparently been rejected in Brewer v. Williams, 430 U.S. 387 (1977).

[63] *See, e.g.*, United States v. Hill, *supra* note 60 and United States v. Quintana, *supra* note 61.

[64] 384 U.S. at 444.

[65] MCM, 1969, para. 140*a*(2).

[66] For example, it is generally considered that the Court has whittled away at the "custody" requirement. Oregon v. Mathiason, 429 U.S. 492 (1977); Beckwith v. United States, 425 U.S. 341 (1976). *See generally* Dorris, *The Declining Miranda Doctrine: The Supreme Court's Development of Miranda Issues*, 36 Wash. and Lee L. Rev. 259 (1979).

[67] 401 U.S. 222 (1971).

[68] 20 C.M.A. 614, 44 C.M.R. 44 (1971). *See also* United States v. Girard, 23 C.M.A. 263, 49 C.M.R. 438 (1975).

[69] The new rule follows Harris v. New York, 401 U.S. 222 (1971).

[70] Massachusetts v. White, 47 L.W. 4066 (12 Dec. 1978).

[71] *See, e.g.,* United States v. Willeford, 5 M.J. (A.F.C.M.R. 1978) (failure to adequately advise of offense in question rendered statements faulty and therefore inadmissible). Rule 304(b) *supra* note 69 and accompanying text does not change this law. A statement obtained in violation of Article 31(b) is inadmissible for all purposes.

[72] 3 M.J. 863 (A.C.M.R. 1977).

[73] Rule 305(d)(1), M.R.E.

[74] Rule 305(d)(2), M.R.E.

[75] Rule 304(b), M.R.E.

[76] 387 U.S. 478 (1964).

[77] 377 U.S. 201 (1964).

[78] 430 U.S. 387 (1977).

[79] The Court found the conversation to be in fact an interrogation. *See also* note 35 *supra* and accompanying text.

[80] The decision has prompted a number of indepth articles on the subject of applicable fifth and sixth amendment rights of interrogators. *See, e.g.,* Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is "Interrogation"? When Does it Matter?,* 67 Geo. L. J. 1 (1978); Kamisar, *Foreword: Brewer v. Williams—A Hard Look at a Discomfiting Record,* 66 Geo. L. J. 209 (1977).

[81] 5 M.J. 148 (C.M.A. 1978).

[82] 3 M.J. 566 (A.C.M.R. 1977).

[83] 3 M.J. 572-75 (A.C.M.R. 1977) (Costello J. dissenting).

[84] 13 N.Y. 2d 148, 243 N.Y.S. 2d 841, 193 N.E. 2d 628 (1963) (improper denial of sixth amendment right to counsel to allow interrogation to continue after accused, a lawyer retained by him, or his family request an opportunity to confer).

[85] The Supreme Court generally adheres to the commencement of formal adversary proceedings as the triggering element of the availability of the sixth amendment right to counsel. *See, e.g.,* Brewer v. Williams, 430 U.S. 387 (1977) (interrogation after arraignment); Massiah v. United States, 377 U.S. 201 (1964) (interrogation after arraignment). *See generally* Cooper, *The Sixth Amendment and Military Criminal Law: Constitutional Protections and Beyond,* 84 Mil. L. Rev. 41 (1979).

[86] *Turner* does not allow an "interloper" to invoke the suspect's sixth amendment rights, nor would it allow a counsel who will perhaps inevitably represent the suspect, to invoke the right. *Turner* should be limited to those situations where an attorney-client relationship exists.

[87] *See* note 24 *supra* and accompanying text.

[88] Under the new rules, Turner arguably could have received right to counsel warnings because he was under pretrial restraint. The new rules do not further define "pretrial restraint."

[89] *See, e.g.,* United States v. Newell, 578 F.2d 827 (9th Cir. 1978) (good discussion comparing civilian and military notice rules); United States v. Cobbs, 481 F.2d 196 (3rd Cir. 1973), *cert denied,* 414 U.S. 980 (1973); United States v. Wolff, 495 F.2d 35 (8th Cir. 1974).

[90] 1 M.J. 380 (C.M.A. 1976). For some initial impressions of the decision *see,* Lederer, *United States v. McOmber, A Brief Critque,* The Army Lawyner, Jun. 1976, at 5.

[91] 1 M.J. at 383.

[92] 2 M.J. 55 (C.M.A. 1976).

[93] 2 M.J. at 59.

[94] 7 M.J. 200 (C.M.A. 1979).

[95] *See also* United States v. Harris, 7 M.J. 154 (C.M.A. 1979) where the court required no notice where first interrogation involved unrelated civilian offenses.

[96] 7 M.J. 154 (C.M.A. 1979).

[97] 7 M.J. at 203.

[98] Indeed, Chief Judge Fletcher's dissent in *Littlejohn* rested on what he perceived to be the surreptitious activities of the investigator. The investigator's call to the staff judge advocate was not, in his view, for the good faith purpose of determining the status of an attorney-client relationship but rather an effort to avoid calling the defense counsel. 7 M.J. at 203–204.

[99] *See* United States v. Roy, 4 M.J. 840 (A.C.M.R. 1978) where the investigator did not give the *McOmber* notice before interrogating the suspect just one day before the Article 32 investigation was to begin. Most would agree that a military investigator knows, or should know, that by the time court-martial charges have reached that stage the accused has a defense counsel.

[100] Factors which might be considered include:

a. Whether the interrogator knew that the person to be questioned had requested counsel;

b. Whether the interrogator knew that the person to be questioned had already been involved in a pretrial proceeding at which he would be ordinarily represented by counsel;

c. Local standard operating procedures;

d. The interrogator's military assignment and training; and

e. The interrogator's experience in the area of military criminal procedure.

[101] For a sample written notice which counsel could use, *see* 10 The Advocate 194-196 (1978).

[102] Rule 305(d)(1)(A), M.R.E.

[103] Rule 304(b), M.R.E.

[104] Rule 305(d)(2), M.R.E.

[105] Rule 305(e), M.R.E.

The Impact of Article 82 of Protocol I to The 1949 Geneva Conventions on the Organization and Operation of a Division SJA Office

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Currently, the State Department is reviewing and drafting comments to the Protocols to the 1949 Geneva Conventions. The purpose of this Article is to determine what impact Article 82 of Protocol I to the 1949 Geneva Conventions [1] may have on the operation of a Division SJA Office if they are adopted. The effect of Article 82 clearly depends on the interpretation of the Article. A narrow reading would require no change in peace or war. A reading with a view toward its spirit and underlying rationale may well require action by both the SJA and the Division Commander. The starting point of the analysis must begin with the origin of the Protocol.

Origin of the Protocol

In 1971 the International Committee of the Red Cross (ICRC) invited a group of governmental experts on various aspects of the Law of War to Geneva to consider modifications to the Geneva Conventions of 1949.[2] Experts, representing over 70 countries, met from 1971 to 1973 and submitted proposed texts of two new protocols to the ICRC. Beginning in 1974, four diplomatic conferences were held. On 10 June 1977, in the final act of the conferences, two proposed protocols were signed.

Protocol I modernizes of the law of international armed conflicts with specific sections dealing with such topics as medical aircraft, works and installations containing dangerous forces, and repression of breaches of the protocol. Protocol II expands on the third article common to all the 1949 Geneva conventions. This concerned conflicts not of an international nature. The specific concern of this paper is Article 82 of Protocol I—Legal Advsors in Armed Forces. This article requires legal advisors to be available to give advice to military commanders on the application of the Conventions and the Protocols and to give advice on instruction to be given to members of the Armed Forces.

The committee of experts and the diplomatic conference both recognized that the law of war would be more effectively observed if a legal advisor were available to commanders. This is an implicit recognition that the law of war as stated in both the Geneva and Hague conventions is becoming more detailed and specific over a broad range of topics. Requiring a legal advisor would be a natural consequence of the increased complexity of the law.

It is also a recognition that the commanders are responsible for their actions as professional soldiers. They are presumed to know the law and will be held accountable for their actions whether they have had any specific training in the law of war or not.

Analysis of the Language of Article 82

In order to evaluate the impact of Article 82 one must look closely to the language of the article and note what it states and perhaps just as significantly, what it does not state.

In 1973 the draft text from the governmental experts (then Art. 71) stated