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Reappraising the Legality of Post-trial Interviews

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Enshrined by custom, the peculiar institution of the post-trial interview is coming under new attack.[1] Originally designed primarily as a device to secure clemency information for

the convening authority subsequent to sentencing by a general court-martial, the practice consists of an interview of the newly sentenced accused by either the staff judge advocate or, more usually, a member of the SJA's staff. At the interview information is sought regarding the accused's perception of his recent trial and sentence, whether the accused was satisfied with his trial defense counsel, and any information which might be helpful in the preparation of the post trial review and its sentencing recommendations.[2] Despite its possible beneficial effects, the post-trial interview closely approximates a minefield: with some luck the accused may make it to the other side alive and well—perhaps even in a slightly better tactical position. But with a misstatement the accused may hit a mine—reveal some past criminal act or negative attitude[3]—which may destroy him.[4] It is this very chance for disaster which has brought the post trial interview to the attention of the Court of Military Appeals.

The origins of the post-trial interview are unclear. At one time it appears to have been supported, encouraged, and perhaps even required by both Air Force and Army policy.[5] At present, however, there does not appear to be any statutory or regulatory requirement for post-trial interviews in the Army. Indeed some Army commands are known to have abandoned them completely. Perhaps as a result of this lack of a regulatory requirement, the procedure used to conduct post-trial interviews appear to vary by location. While the Air Force and some Army commands utilize privacy act statements,[6] including the statement that the interview is voluntary, most commands do not warn the interviewee of his right to have counsel present or of his rights under Article 31 of the UCMJ.[7] At some posts, counsel may attend the interview but customarily choose not to do so,[8] and in at least one case the refusal of an accused to make a statement at the post-trial interview was included in the post-trial review.[9] As a result, the key legal issues involved in an appraisal of the post-trial interview are the application of the right against self-incrimination and the right to counsel at the post-trial interview.

The application of the right against self-incrimination at the post-trial interview is far from a simple matter, and there is a surprising lack of cases dealing with the point at which a convicted defendant loses his privilege. However, what precedent does exist appears to support the proposition that a convicted defendant retains his privilege not only through sentencing but until completion of the appellate process.[10] In short, for self-incrimination purposes the "trial" continues until finality attaches. This should be particularly true for military proceedings because in the most fundamental sense, the actual trial of a court-martial is not complete until the convening authority has taken action on the trial court's "recommendations." [11] Further, Article 31(a)'s language[12] prohibits compulsory self-incrimination without reference to trial. The accused at a post-trial interview is in a position in which anything he says may supply material that would support not only the trial court's sentence but also its findings-which remain to be approved. Thus, it appears clear that the accused retains his right against self-incrimination in the military *at least*[13] until the convening authority has acted. Consequently the application of the Article 31(b) warning requirements must be considered. The few cases dealing with the application of Article 31(b) warnings to the post-trial interview unanimously hold it inapplicable although perhaps desirable.[15] The rationale used by the courts, however, is questionable at best, as the courts appear to be saying that an accused who is warned of his right to remain silent might choose to exercise it and thus frustrate the purpose of the interview.[16] This is akin to saying that the fifth amendment right against self-incrimination should be inapplicable to trials because it might interfere with the defendant's right to be convicted and rehabilitated. Dismissing then the few precedents in the area, one must reevaluate Article 31(b)'s application. By its very language, it would appear to apply to a post-trial interview, unless one can presume

that the basic right against self-incrimination under Article 31 has already terminated, a conclusion rejected above. While the Court of Military Appeals has in the past held Article 31(b)'s warning requirements inapplicable to the court-martial trial proceeding,[17] the reasoning involved, suspect in any event in the light of recent judicial developments, is distinguishable inasmuch as it emphasizes doubts as to the propriety of either defense counsel or trial counsel warning a witness of his rights and thereby frustrating the presentation of evidence. [18] While the "post-trial" interview is in fact part of the trial of the accused, it is a distinct part of trial which lacks both the problems and protections afforded by the judicial phase which is carefully guided by a trial judge. While the Article 31(d) exclusionary rule excludes evidence taken in violation of either Article 31 or the voluntariness doctrine from "trial by court-martial," even if the exclusion is inapplicable to post-trial reviews (a doubtful conclusion) the remainder of Article 31 renders warnings mandatory. Just because a criminal act—in this case a breach of the warning requirements—may not suppress evidence does not render the act any less illegal. It has also been argued[19] that recent Supreme Court decisions limiting prisoners' rights in the area of self-incrimination dispose of post-trial interview complaints. However, even if constitutional decision can be equated with interpretation of the military's statutory privilege, that position ignores the fact that the major precedents involved deals with convicted prisoners whose appeals have been concluded and who are subjected to an "administrative" proceeding. The conclusion one reaches, then, is that Article 31(b) is fully applicable to the post-trial interview, and that accused persons must be advised of their right to remain silent, and that anything said may be used against them at trial by court-martial.

Current post-trial interview litigation emphasizes failure to warn the defendant of his right to counsel. Indeed, in one case, *United States v. Simpson*,[21] the Army Court of Military Review, considering itself bound by *United States v. McOmber*,[22] found that the failure to notify defense counsel of the forthcoming interview to be error.[23] In view of the unique nature of the court-martial proceeding, as discussed above, *McOmber* and any civilian cases dealing with the application of *Miranda v. Arizona* to post-trial matters are really irrelevant. The post-trial interview is taking place as a *part* of the court-martial proceeding—the post-trial review. Consequently the basic right to counsel under both Article 27 of the UCMJ[24] and the sixth amendment require that counsel be present or that the Supreme Court's standards for appearing pro se[25] be met. Even if "post-trial" proceedings are not a basic part of a court-martial, *McOmber*, by extending the statutory right to counsel to pre-trial proceedings,[26] would surely extend it to such a "critical stage" as the post-trial interview.

The post-trial interviewee would thus appear to be entitled to both the right to silence and the right to counsel and to be warned of those rights. This conclusion could well doom most post-trial interviews. But, why should they be continued in any event? Military law has changed drastically since post-trial interview began. Defense counsel must now scrutinize the post-trial review,[27] and defense representation must continue until conclusion of all proceedings without hiatus.[28] Surely defense counsel not only can but ethically *must* bring forth any clemency information not within the record of trial, and counsel can always *request* a post-trial interview. Adverse material may well be eliminated in this fashion, but shouldn't the convening authority's action be taken on the record of trial in any event? What then would be eliminated—only the questionable ability of a member of the SJA office to judge demeanor without the need of visiting the court-room, and the possibility of the accused raising a claim of inadequacy of counsel. Yet, civilian defendants denied the comfort of a post-trial interview and seeking to challenge their attorney's representation do not appear hesitant to do so regardless of circumstances, and they do so without

the added protections given by the Defense Appellate Division.

In summary, the post-trial interview is of questionable legality within its current procedural context, of little practical value to the accused, a waste of vitally needed legal resources, and an unnecessary source of litigation. Staff judge advocates would do well to abolish it before the Court of Military Appeals does so.

Notes

1. *See e.g.* United States v. Lanzer, 3 M.J. 60 n. 6 (C.M.A. 1977) in which Chief Judge Fletcher stated: "As should be evident from the body of this decision we have doubts as to the vitality of post-trial interviews, especially those in which the accused does not have benefit of counsel. Our disposition of this case makes it unnecessary to address this precise issue, and we will reserve judgment until the proper case." The court seems to have found the proper case in United States v. Kelly, *position for review granted*, 3 M.J. 87 (C.M.A. 1977) in which the court agreed to determine whether a post-trial interview held in the absence of counsel and which yielded adverse material was a denial of due process.

2. The day to day post-trial interview appears often to be merely a ritualistic gesture more likely to yield advance matter than important clemency material. It may however provide a helpful defense to trial defense counsel whose services are praised at the interview but attacked later.

3. There are numerous cases in which the interview yielded damaging material. *See e.g.* United States v. Foer, SPCM 12265, *appeal pending* [at trial, Foer stated that he wanted to "stay in the service," while at the post-trial interview he stated that he did not want to return to duty.]; United States v. Albert, 31 C.M.R. 326 (A.B.R. 1961) [accused confessed at the post-trial interview to an unrelated larceny which was then commented upon in the post-trial review].

4. In one sense, of course, the post-trial action of the convening authority cannot hurt the accused because the convening authority cannot approve a sentence greater than that adjudged by the trial court. However this view is to ignore reality as sentences are frequently if not almost always modified by the convening authority or by the Courts of Review. Thus, it can be presumed that there is usually a sentence which the accused would have received, lesser in degree than the one given by the court, but for consideration of adverse material given at the post-trial interview.

5. *See e.g.* United States v. Clisson, 5 C.M.A. 277, 281, 17 C.M.R. 277, 281 (1954) [referring to Air Force regulations requiring post-trial interviews]; United States v. Fleming, 9 C.M.R. 502, 505–06 (A.B.R. 1953).

6. The Air Force has promulgated a model privacy act statement for post-trial interviews and some Army commands are using privacy act statements. See *e.g.* Reply to the Assignment of Errors at 2, United States v. Foer, SPCM 12265, appeal pending [Fort Carson].

7. 10 U.S.C. § 831 (1970). Many commands do in one respect or another tell the accused that participation in the post-trial interview is voluntary. Compliance with Article 31(b)'s warning requirements is virtually unknown, however.

8. *cf.* Reply to the Assignment of Errors at 2, *United States v. Foer, supra* note 6.

9. Assignment of Error and Brief on Behalf of Appellant at 2, United States v. Minor, CM 434910, *appeal pending*. In view of the fact that neither counsel nor judge may comment on the silence of the accused at trial, affirmative reference in the post-trial review to the fact that the accused remained silent on advice of counsel, as was the case in *Minor*, would seem highly questionable under both Article 31 and the fifth amendment. Certainly it presents a classic dilemma to the accused who is afraid to participate for fear of revealing incriminating materials.

10. *See* Goodrich, *The Effect of a Guilty Plea on the Right Against Self-Incrimination and Its Effect on Requested Testimony* (Mar. 1977) (unpublished paper submitted in partial satisfaction of the diploma requirements of the 25th Advanced Class, The Judge Advocate General's School, U.S. Army) citing State v. Johnson, 77 Idaho 1, 287 P.2d 425 (1955), *cert. denied*, 350 U.S. 1007 (1956) [privilege intact until completion of appeals since the pending appeal could result in a new trial]; People v. Den Uyl, 318 Mich. 645, 29 N.W.2d 284 (1947) [appellate process prevented infringement of the privilege until completion]; In re Bando, 20 F.R.D. 610 (D.C. N.Y. 1957), *rev'd on other grounds*, United States v. Miranti, 253 F.2d 135 (2d Cir. 1958), Annot., 9 A.L.R. 3d 1003 (1966) [conviction had been affirmed but defendant was preparing to seek a writ of certiorari; held that mere preparation of a writ is insufficient to continue the privilege]. *See also* MCCORMICK ON EVIDENCE § 121 (2d ed. 1972); *cf.* United States v. Wilson, 488 F.2d 1231, 1233 n. 3 (2d Cir. 1973) *rev'd on other grounds*, 421 U.S. 309 (1974). *Contra*, Knox v. State, 234 Md. 203, 198 A.2d 285 (1964).

It is interesting to note the recent decision of the Pennsylvania Supreme Court in Commonwealth v. Rogers, 21 Crim. L. Rep. (BNA) 2195 (Pa. Apr. 28, 1977) in which the court held that even post appeal collateral relief may occasionally justify a defendant in exercising his privilege and refusing to testify at trial. The trial judge in such a case, said the court, must determine

whether the witness has "reasonable cause to apprehend danger of self-incrimination." In *Rogers*, the court was faced with the question of whether a defendant was improperly denied his right to full cross examination when the witness, a convicted co-participant in a robbery-murder, exercised his privilege to remain silent.

11. The court-martial is not yet identical with civilian trials. Regardless of the merits of its present format and procedure, the court-martial is still a creature of command not yet fully divorced from its history. Despite the important consequences of completion of the court phase of a trial, both findings and sentence are virtually advisory recommendations (recommendations, whether as to findings or sentence, which can be completely ignored by the convening authority so long as his action is favorable to the accused) until acted upon by the convening authority. Historically, courts-martial were simply extensions of the commander, and even today for purposes of finality, the trial is merely an introduction to the commander's action. *See e.g.* United States v. Occhi, 25 C.M.A. Adv. Sh. 93, 96, 54 C.M.R. Adv. Sh. 93, 96 (1977) [Judge Cook stating that "The Court recently held . . . [that] the legal effect of a court-martial depends upon the action of the convening authority rather than that of the trial court."]. *But see* Judge Perry dissenting in part, 54 C.M.R. Adv. Sh. at 99.

12. 10 U.S.C. § 831(a) (1970): "No person subject to this chapter may compel any person to incriminate himself or to answer any questions the answer to which may tend to incriminate him."

13. Under the precedents and analysis discussed in note 10, *supra*, most general and some special courts-martial will not be final until after completion of the automatic appeal to the Court of Military Review and perhaps until the running of any time allowed for further appeal to the Court of Military Appeals.

14. *See* United States v. Albert, 31 C.M.R. 326 (A.B.R. 1961); United States v. Powell, 26 C.M.R. 521 (A.B.R. 1958); United States v. Fleming, 9 C.M.R. 502 (A.B.R. 1953). *See also* United States v. Simpson, SPCM 11744 (A.C.M.R. 14 Apr. 1977).

15. United States v. Powell, 26 C.M.R. 521, 526 (A.B.R. 1958) [". . . we think that it would be preferable to give such a [Article 31] warning routinely if only to avoid any question of unfair treatment."]

16. United States v. Fleming, 9 C.M.R. 502, 506 (A.B.R. 1953).

17. United States v. Howard, 5 C.M.A. 186, 17 C.M.R. 186 (1954); *but see* MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev. ed.), ¶ 140*a*(2), indicating that the trial judge may warn a witness of his rights if he begins to incriminate himself.

18. The Court's reasoning in *United States v. Howard*, 5 C.M.A. 186, 17 C.M.R. 186 (1954), was questionable when it was decided and is long overdue for reappraisal. One would think that a prosecutor might have an ethical duty to warn a government witness of his rights. In any event a trial judge, no longer a "mere referee," can certainly be called upon to do so—a possibility apparently not considered by the 1954 Court. Further, if one is to be concerned with considerations of "efficiency" alone, the MANUAL FOR COURTS-MARTIAL's discretionary warning requirement, *see* note 17, *supra*, a quasi-legislative judgement, would seem to destroy the issue.

19. Reply to the Assignment of Errors at 3, United States v. Foer, SPCM 12265, *appeal pending*, citing Baxter v. Palmigiano, 425 U.S. 308 (1976), a prison disciplinary proceeding.

20. Respect for the principles behind Article 31 might transmute the warning to indicate that statements might be used against the accused in later proceedings of this trial as well as other proceedings. In United States v. Fleming, 9 C.M.R. 502, 507 (A.B.R. 1953), the court restricted later use of evidence given during a post-trial interview to proceedings involving the same offenses for which he had been sentenced. While Article 31(b) normally requires that a suspect be warned of the offenses of which he is suspected, there is authority to dispense with that part of the warning when it is clear that the accused knows the nature of the accusation, United States v. Nitschke, 12 C.M.A. 489, 31 C.M.R. 75 (1961), and surely the post-trial interviewee knows the nature of the offenses involved.

21. *See* note 14, *supra*.

22. 24 C.M.A. 207, 51 C.M.R. 452 (1976) [hereinafter cited as *McOmber*]. In *McOmber*, the court held that a suspect or accused known to be represented by counsel cannot be interrogated pre-trial unless counsel is notified of the interrogation and given a reasonable opportunity to be present.

23. However, the court found the error to be non-prejudicial.

24. 10 U.S.C. § 827 (1970). It is important to note the emphasis that the Court of Military Appeals has placed on continuing representation of the accused "post-trial" and during the appellate process. United States v. Palenius, 25 C.M.A. Adv. Sh. 222, 229–31, 54 C.M.R. Adv. Sh. 549, 556–59 (1977). Counsel may have an ethical duty to attend post-trial interviews as well as a legal right to do so.

25. Faretta v. California, 422 U.S. 806 (1975).

26. The statutory basis of *McOmber* is questionable at best. *Compare McOmber with* United States v. Clark, 22 C.M.A. 570, 48 C.M.R. 77 (1974). However, the case is now a major precedent and its reasoning would appear to apply at least in part to "post-trial" proceedings if one accepts the proposition that modification of findings

and sentence are neither infrequent nor purely gratuitous in our system. In any event, United States v. Palenius, 25 C.M.A. Adv. Sh. 222, 229–31, 54 C.M.R. Adv. Sh. 549, 556–59 (1977), requiring that there be no hiatus in representation, would appear determinative.

27. United States v. Goode, 23 C.M.A. 367, 50 C.M.R. 1 (1975).

28. United States v. Palenius, 25 C.M.A. Adv. Sh. 222, 229–31, 54, C.M.R. Adv. Sh. 549, 556–59 (1977).