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United States v. McOmber, A Brief Critique

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The facts of *United States v. McOmber*¹ are simple. Airman McOmber was implicated in the theft of a tape deck and given his Article 31(b)-*Miranda* warnings by an Agent C.

McOmber requested counsel and was referred to the area defense counsel. Two months later (and after McOmber's defense counsel had discussed the case with the agent) the same agent interviewed McOmber about the tape deck theft and other thefts. Completely warned, McOmber made an incriminating written statement. The agent did not give notice to McOmber's attorney. The Court of Military Appeals, per Chief Judge Fletcher, held "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."² It should be noted that the Government had conceded that the defense counsel should have been notified but had argued that the failure to do so was not prejudicial.

At its best, *McOmber* is a long delayed decision limiting the possibility of police circumvention of the rights to counsel given by *Miranda v. Arizona*³ and *Massiah v. United States*.⁴ At its worst, the opinion appears analytically unsound and may suggest unnecessarily a major change in military criminal law. The dilemma is caused by Judge Fletcher's attempt to avoid coming to grips with the constitutional issue, relying instead "on statutory grounds,"⁵ grounds which I suggest are questionable at best.

Courts across the United States have failed to definitively decide the issue that faced the Court of Military Appeals.⁶ The positions have ranged from that taken by past military decisions, allowing questioning with full warnings and waiver but without notification to counsel,⁷ to the New York rule that prevents waiver without the physical presence of the attorney whose presence is to be waived.⁸ Notification to counsel has been defended as necessary to ensure full compliance with the Supreme Court's decisions in *Miranda* and *Massiah* and to prevent subtle coercion to waive counsel rights. The problem with *McOmber* is not in its ultimate holding but in its rationale. Indeed the members of the Court have indicated unhappiness with the prior notification rule for some years.⁹

Chief Judge Fletcher desired to avoid the sixth amendment constitutional issue—a desire particularly appropriate in light of the Supreme Court's recent decision in *Middendorf v. Henry*.¹⁰ Accordingly he based his holding that notification was required on Article 27 of the Uniform Code of Military Justice, 10 U.S.C. § 827 (1970). The primary difficulty is that Article 27 deals with assignment of counsel for special and general courts-martial—or in short for purposes of trial. The Court of Military Appeals expressly held in *United States v. Clark*¹¹ that there is no right to counsel at interrogations other than the right specified in *Miranda*. Where then does this notification provision come from? It is well and good to find that, once counsel is assigned, effective assistance of counsel requires notification of interrogations. However, is that required when counsel are assigned *despite* Article 27 rather than because of Article 27?

The Court of Military Appeals held in 1973 in *United States v. Clark*¹¹ that *United States v. Tempia*¹² had incorporated into military law only the minimum requirements of *Miranda* and that paragraph 140(a) (2) of the MANUAL FOR COURTS-MARTIAL, despite its apparent clear meaning, could not be interpreted to give any greater rights. The only reference of note to rights to counsel at interrogations in the Manual is paragraph 140(a) (2), and Judge Darden's opinion presents the strong inference that no statutory right to counsel at interrogations exist—such a right coming only from *Miranda*. How can Article 27 affect the issue? The Court seems to be saying that effective assistance of counsel at trial requires effective assistance of counsel at an interrogation. This is surely reasonable but can this be said when there is ordinarily no general statutory right to counsel at interrogations? The reader of *McOmber* would be tempted to conclude that the source of the new notification provision is either based in paragraph 140(a) (2) or in the constitutional provisions giving rise to *Miranda* or *Massiah*. Yet, the opinion denies these possibilities.

McOmber leaves the reader in mystery. Chief Judge Fletcher states that a statement obtained in violation of the new notification provision will

result in the statement obtained being excluded pursuant to Article 31 (d) which includes statements obtained in violation of Article 31 (which fails to mention counsel at all) "or through the use of coercion, unlawful influence, or unlawful inducement."¹³ Does failure to notify constitute coercion or unlawful influence? Such a conclusion seems difficult to draw although exclusion could easily be dictated by *Miranda* or *Mas-siah*.

Because of the unusual phrasing of the *McOmber* opinion—an opinion that certainly appears correct in terms of result—more legal questions may have been created than have been resolved. As it is difficult to find the source of the statutory right that Chief Judge Fletcher makes use of, it may be that the Court has now found a new right to counsel at interrogations. If so, this new right may be grounded in Article 27, or, unlikely as it seems,¹⁴ in Article 31, or in the court's supervisory power over military justice—exercised perhaps to make Articles 27 and 31 truly meaningful. In view of this lack of clarity we can only hope for later cases to resolve this perplexing question.

Notes

1. No. 30, 817 (U.S.C.M.A. 2 April 1976) hereinafter cited as *McOmber*.

2. *Id.* at 6.
3. 384 U.S. 436 (1966) hereinafter cited as *Miranda*.
4. 377 U.S. 201 (1963) hereinafter cited as *Massiah*.
5. *McOmber* at 4-5.
6. *See e.g.*, *United States v. Zamora*, 460 F.2d 1272 (9th Cir.) *cert. denied*, 409 U.S. 881 (1972) and *United States v. Springer*, 460 F.2d 1344 (7th Cir.) *cert. denied*, 409 U.S. 873 (1972).
7. *See e.g.*, *United States v. Flack*, 20 U.S.C.M.A. 201, 43 C.M.R. 41 (1970); *United States v. Robinson*, 49 C.M.R. 183 (ACMR 1974).
8. *People v. Arthur*, 22 N.Y. 2d 325, 292 N.Y.S. 2d 663, 239 N.E. 2d 537 (1968).
9. *See e.g.*, Judge Ferguson's opinion in *United States v. Johnson*, 20 U.S.C.M.A. 320, 43 C.M.R. 160, 164-65 (1971) [opinion relying upon *MANUAL FOR COURTS-MARTIAL*, 1969 (Rev. ed.), para. 44h]; *United States v. Estep*, 19 U.S.C.M.A. 201, 41 C.M.R. 201 (1970).
10. 47 L. Ed. 2d 556 (1976). This case was published in full at 74-6 *JUDGE ADVOCATE LEGAL SERVICE* 19 (DA Pam 27-76-4, 1976).
11. 22 U.S.C.M.A. 570, 48 C.M.R. 77 (1973).
12. 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).
13. Uniform Code of Military Justice, art. 31(d), 10 U.S.C. § 831(d) (1970).
14. *See generally*, Lederer, *Rights Warnings in the Military*, 72 *MIL. L. REV.* 1 (1976).