

FOIA MARKER

This is not a textual record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

Collection/Record Group: Clinton Presidential Records

Subgroup/Office of Origin: Counsel Office

Series/Staff Member: General Files

Subseries:

OA/ID Number: 12203

FolderID:

Folder Title:

Counsel 1993-95 Gays in the Military [1]

Stack:

S

Row:

117

Section:

3

Shelf:

9

Position:

2

6041 17
ML

The Supreme Court yesterday declined to review the first constitutional challenge to the "don't ask, don't tell" policy to reach the Court. The Court's action, taken without comment, left standing the decision of the en banc Court of Appeals for the Fourth Circuit sustaining the discharge of a Navy pilot. The pilot, Paul Thomasson, had sent letters to four admirals announcing "I am gay." After receiving an honorable discharge, Thomasson brought suit, principally under the First Amendment, challenging the part of the policy establishing a rebuttable presumption that a person who makes such statements has engaged or will engage in homosexual acts. Thomasson did not challenge the part of the policy making a service member who has engaged in homosexual acts subject to discharge. The Solicitor General's Office filed a brief in the Supreme Court urging it to decline review of Thomasson's case.

OK
Thomasson

Tack —

Kathy asked me to write this for the road memo to the President. She thought you might want to see it before I send it on to John Angell. I think the deadline is 3:50.

Ellen

GAY

THE WHITE HOUSE

WASHINGTON

August 3, 1996

MEMORANDUM FOR JACK QUINN
KATHY WALLMAN

FROM: ELENA KAGAN *EK*

SUBJECT: GAY AND LESBIAN ISSUES

Handwritten notes:
Elena
Jack
Kathy
Patsy
Neil

1. Don't Ask, Don't Tell

An official investigation at Hickam Air Force Base, which may constitute a violation of the Administration's Don't Ask, Don't Tell Policy, is provoking much comment within the gay and lesbian community (see attached article from the Washington Blade).

The investigation apparently began when DOD lawyers entered into a pre-trial agreement with Airman Bryan Harris, pursuant to which he pleaded guilty to sodomy in exchange for the dismissal of a charge of sexual assault. One provision of the agreement called for Harris "to testify truthfully and completely in any subsequent courts-martial or administrative action regarding my knowledge of all military personnel . . . who have committed acts of sodomy." After entering into the agreement, Harris provided investigators with the names of seventeen servicemembers -- among them five air force members, serving at Hickam -- with whom he said he had engaged in sexual relations.

Immediately upon receiving this list, Air Force lawyers ordered the interrogation of each of the five Air Force members named. In addition, lawyers questioned co-workers of one of the named persons, asking for example whether anyone had reason to believe that he "doesn't like girls" and whether anyone had seen him "hug, kiss, or hold hands with another man."

As a result of these interrogations, one of the named persons has taken an honorable discharge and two others are likewise attempting to withdraw from the Service. Air Force officers recently questioned the discharged servicemember -- in what appears from his account to be a highly offensive and threatening manner (see attached memo) -- about his relations with another of the named servicemembers.

In the last couple of months, the Servicemembers Legal Defense Network (SLDN) has written Deputy Secretary White and General John Lorber, Commander of the Pacific Air Forces, without receiving any response. In addition, Rep. Neil Abercrombie (D-HI) and Patsy Mink (D-HI) wrote Secretary of the Air Force Sheila Widnall, but did not get a reply; Mink also recently sent a letter to Secretary Perry. Finally, Sen. Akaka has not received

a reply to a letter he wrote to the Air Force Legislative Liaison. The SLDN has reported on all of this to Richard Socarides.

The Don't Ask, Don't Tell Policy states that "inquiries shall be limited to the factual circumstances directly relevant to the specific allegations." Of course we do not know all the facts, but it may be that the Air Force's decision to ask Airman Harris for a list of persons unconnected to the charge brought against him -- and its subsequent investigation of those persons -- violates this policy.

I will call Judy Miller on Monday and let you know what she says. Richard would like some combination of you, me, and Kathy to meet with the SLDN on this matter. Although we should wait to hear what Judy says, I tend to think this is a good suggestion.

2. Same-Sex Marriage Bill -- Part One

Richard also suggests that we change our talking points on gay marriage. I am attaching the current version, as well as the alternative version he offers. The alternative version was e-mailed to you, but I don't know whether you ever saw it. (I got my copy from Richard). It is, as you will see, much softer in tone, combining recent statements made by George, Mike McCurry, and a recent SAP in a manner that tends to cloak the President's opposition to same-sex marriage. I suspect we should leave this to the communications people; let me know if you think differently.

3. Same-Sex Marriage Bill -- Part Two

As you know, the Senate may take up the Same-Sex Marriage bill in September. Senators Kennedy, Lieberman, and Jeffords already have indicated that they will attempt to add to it the bill now pending to forbid workplace discrimination against gays and lesbians. They also may attempt, as a kind of second effort, to add a proposal criminalizing bias-motivated violence resulting in death or bodily injury, which would cover violence based on race, color, national origin, religion, or sexual orientation. Sen. Kennedy has prepared this proposal as a piece of freestanding legislation, but has not yet introduced it.

Sen. Kennedy has written to the Attorney General asking for DOJ's views on the bill. According to Richard, someone at the White House (but he's not sure who) asked DOJ not to answer it. Richard thinks that some in the White House are concerned that if we endorse the legislation on bias-motivated violence and it then figures prominently in the attempt to bring down the Same-Sex Marriage Act, we will open ourselves to a charge of trying to derail the Marriage Act. Do you know anything about this?

Mr. Jim not at all
aware we've issued
instructions on the hate
crime issue.

GRMS IN
MILITARY

THE WHITE HOUSE

h
Em

From: Richard Socarides
Special Assistant to
the Deputy Chief of Staff
456-6247

Date:

To:

Jack Quinn

☒ For your information

☐ As you requested

☐ For your approval

☐ Please call me re: attached

☐ For your comments

Remarks:

NATION

Quarrels delay Citadel case

3 women expected to enroll next week

CHARLESTON, S.C. (AP) — A federal judge, bristling at what he called petty squabbling, sent lawyers to a room yesterday to hammer out differences over a Citadel plan to admit female cadets.

At least three women are expected to enroll next week, but lawyers who challenged the all-male policy object to a plan that would put latches only on women's rooms and require pregnant cadets to leave school.

"Anything that sets female cadets apart is a source of concern," U.S. Justice Department lawyer Michael Maurer told U.S. District Judge C. Weston Houck. "Put latches on all the doors."

But Judge Houck did not want to rule on such details.

"I don't think I should meddle with an institution that's already run by professionals," he said. "I don't plan to micromanage what goes on."

The lawyers met behind closed doors for more than four hours after the judge told them "I want to know how petty your differences are."

The three women will be the first to enroll since the college changed its all-male policy in June, two days after the U.S. Supreme Court ruled a similar all-male policy at Virginia Military Institute was unconstitutional.

Judge Houck said he wants the women treated the same as men except when differences must be considered in providing privacy for bathing and dressing.

The women's attorneys contend that forcing pregnant cadets to leave school violates federal civil rights laws. They said pregnancy must be treated as a temporary disability.

Judge Houck also refused yesterday to vacate his 1994 order in Shannon Faulkner's case declaring The Citadel's all-male policy unconstitutional. That means the judge retains oversight for admitting women.

"That order is the link between this case and VMI," Judge Houck said. "This case is not mooted, it continues. There are many issues to be decided."



Air Force Maj. Debra Meeks leaves a general court-martial hearing at Lackland Air Force Base in San Antonio.

Lawyer cites 'don't ask' policy at USAF major's court-martial

19-year veteran denies lesbian affair with civilian accuser

SAN ANTONIO (AP) — Sodomy charges against an Air Force major accused of having a lesbian affair should be dismissed, her attorney said yesterday, accusing the military of violating its "don't ask, don't tell, don't pursue" policy.

Defense lawyer Peter Held repeatedly accused the Air Force of engaging in selective prosecution of Maj. Debra Meeks, who is being court-martialed on a charge of violating a military code against "unnatural" sex.

Prosecutors said Maj. Meeks violated the code by having an affair with a woman, a charge she denies. A 19-year veteran, Maj. Meeks faces discharge, loss of retirement benefits and eight years in jail if convicted.

"But because the sodomy code applies to heterosexuals as well as homosexuals, Maj. Meeks' attorneys want to ask if married couples have ever been prosecuted."

"We want to see if the government goes into the bedroom," said Mr. Held.

Prosecutors said there have been five cases of consensual heterosexual sodomy prosecuted at

Lackland since 1994.

The defense claims that if the military code were applied fairly, there would be a lot more prosecutions, even of married men and women, under such a broad definition of sodomy.

The judge, Lt. Col. Mary Boone, did not immediately rule on the defense motions.

Aside from denying the affair took place, Maj. Meeks' attorneys argue that the prosecution is prohibited under the Clinton administration's 1993 policy allowing homosexuals to serve in the military as long as they do not have sex with service members and keep their sexual orientation and conduct private.

Maj. Meeks, 41, denies the affair and says she has never disclosed her sexual orientation to superiors.

"Here is Major Meeks, who has served her country for more than two decades honorably and with distinction, and what's the purpose of having a military if not to see to it that the rights of all Americans, including their rights to privacy in these most intimate matters, are

protected?" defense lawyer Michael Tigar said.

The case arose out of a 1994 assault charge brought against Maj. Meeks by civilian Pamela Dillard. When Maj. Meeks refused to plead guilty to the accusation in military court, Miss Dillard told authorities the two were lovers.

Mr. Tigar described Miss Dillard as "angry, vindictive, hateful and indeed delusional."

He claimed Miss Dillard is acting out a "dependency fantasy" and asked the court to appoint a psychiatrist to evaluate her and a diary she kept. The diary includes such entries as "my heart belongs to no one" and "she's tempting me to do something to hurt her."

Prosecutors objected, saying the case is not about Miss Dillard's mental health. They also denied Mr. Tigar's charge that the Air Force pursued the sodomy allegations in violation of its "don't ask, don't tell" policy when it reopened the assault investigation to include the homosexual-conduct charge.

The court-martial is expected to continue today.

Ohio court state v religious

Second win

By Carol Innerst
THE WASHINGTON TIMES

The Ohio Court of Appeals yesterday refused to halt a program that allows low-income students in Cleveland to attend religious schools.

The one-sentence ruling from the three-judge panel rejecting an injunction by teachers unions is the second victory for school officials in as many weeks.

"It's a tremendous blow," said Clint Bolick, a senior counsel and litigation director at the Institute for Justice, representing Cleveland families whose children have received state vouchers to be in their new schools when they open next week.

Last week, Judge Lisa McKeague of the Franklin County Court of Common Pleas upheld the constitutionality of the contested choice law that allows tax "scholarships" at private religious schools.

Scholarships awarded by lottery after the state got applications for what was to be vouchers worth \$2,250 each.

The case has pitted the state against the 2.2 million-member American Federation of Teachers and the 900,000-member American Civil Liberties Union against the state of Ohio. The Washington-based Institute for Justice, representing families, is suing to escape from failing city public schools.

The next level of appeal is the Ohio Supreme Court.

Meanwhile, a new study by the state's first-in-the-school-choice program yesterday confirmed the program's benefits of schools that include secular schools.

Inner-city elementary schools that participated in that study did better on math and tests after four years than schools who stayed in public schools. Ninety-seven percent of the students were black or Hispanic.

"The study confirms what we've argued for years, that when parents are allowed to move their children to the best fit for their school that best fits their

Arkansas won't pay for abortion

American scene

Catholic bishops call for halt to fighting

Air Force Major's Case Revives 'Don't Ask, Don't Tell' Debate

By The New York Times

SAN ANTONIO, Aug. 8 — After 23 years in the Air Force, Maj. Debra L. Meeks was looking forward to retirement last day was to have been Feb. 28 and she had planned to enroll in cooking school.

Her culinary aspirations may have to wait. On Monday, Major Meeks, 41, will face a general court martial at Lackland Air Force Base here on charges of sodomy and conduct unbecoming an officer. Major Meeks's rekindle the debate over the Pentagon's "don't ask, don't tell" policy on homosexuality, in effect 1994.

The charges against Major Meeks, filed on Feb. 8, allege that she committed sodomy over a two-year period with Pamela J. Dillard, an adult civilian who says she was Major Meeks's lover. Ms. Dillard also says Major Meeks threatened her with a gun in September 1994; that alleged action led to the charge of conduct unbecoming an officer.

Major Meeks is being represented by Michael Tigar, a professor at the University of Texas Law School and one of the lead defense lawyers in the Oklahoma City bombing case, and Peter Held, a San Antonio lawyer who spent 18 years in the Air Force

as a judge advocate.

Irene Witt, a spokeswoman for Lackland Air Force Base, said Major Meeks was the only person Lackland had prosecuted for homosexual conduct over the past three years.

Under the "don't ask, don't tell" policy, homosexuals are allowed to serve in the military but must keep their homosexuality private. Commanders are permitted to initiate investigations of homosexual activity only after they receive evidence that such activity has occurred.

Lawrence Korb, who was Assistant Secretary of Defense under President Ronald Reagan and is now a

senior fellow at the Brookings Institution, said the charges against Major Meeks showed that the policy had not been accepted by many in the armed forces. "It seems they don't like gays in their midst and they will do anything to get them out of their way," Mr. Korb said.

Major Meeks, who is from Phenix City, Ala., enlisted in the Air Force in 1974. She spent two years as an airman and later joined the Reserve Officer Training Corps to pursue a college degree. After graduating from Troy State University in Alabama, she was gradually promoted up the ranks. Major Meeks, who has

worked in personnel for most of her career, has never had any disciplinary citations.

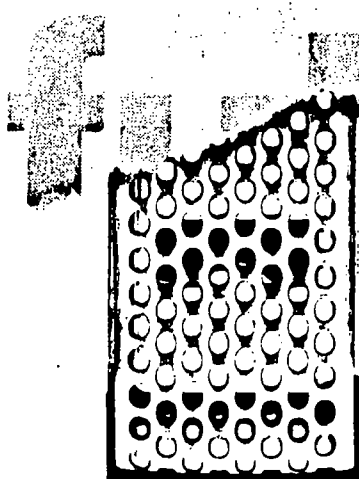
During an interview at Mr. Held's office, the soft-spoken officer refused to say whether she is gay and asserted that the charges against her were false. But she did express disappointment with her fellow officers for pursuing the investigation. "I feel sorry for a couple of folks who felt it necessary to be this type of vindictive," she said. "But you can't get angry about things you can't change. I have no control over other people's attitudes and prejudices."

If convicted of both charges, Major Meeks could be dismissed from the Air Force, sentenced to a maximum of eight years in military prison and

forced to forfeit her pension and all military benefits. Her pension was to pay her \$1,800 per month.

Major Meeks will be prosecuted under the sodomy provision of the Uniform Code of Military Justice, the regulations that govern all military personnel.

The statute is broadly written. It says that any person who engages in "unnatural carnal copulation with another person of the same or opposite sex" is guilty of sodomy. Mr. Korb said the language could pose a problem. If the statute were read literally, Mr. Korb said, "we wouldn't have too many people left in the force. We'd probably have the chaplains and that would be it."



for newest collection.



GEORGETOWN UNIVERSITY LAW CENTER

Federal Legislation Clinic

Judith C. Areen
Dean
Chai R. Feldblum
Director
R. Scott Foster
Deputy Director
David P. Rapallo
Teaching Fellow
Kristen Ebeler Fennel
Executive Assistant

Timothy M. Westmoreland
Senior Policy Fellow
Ralph G. Neas
Visiting Professor

July 29, 1996

Jack
Dear Friends and Colleagues --

My article on sexual orientation and morality was recently published, and before these lazy summer days are over and you no longer need beach reading (right), I thought you might enjoy reading the article.

For the non-lawyers among you (yes, I actually hope many non-lawyers read this!), you may want to skim Part II, which is heavy on the law, and just read Part III. For the lawyers among you who are sick of equal protection law, you may want to skim Part II as well.

I'd love to hear any responses you have to the piece, particularly to Part III. I keep bumping up against the fact, in my political life, that advocates for gay equality (including myself) never talk explicitly about morality. But I'm beginning to come out of the closet about it and to start talking -- and I'd love to hear your reaction to it!

Enjoy the remaining days of summer ...

Best wishes,

Chai
Chai Feldblum

*Jack--
I hope you don't
mind - I plan to call
you in a few days
to talk about the gay
military cases. I'm looking
for a way for the Supreme
Court to deny cert in the gay
case (currently on appeal).*

*Thornson
cert in some later
case. We'll talk!
-Chai*

Clinton Presidential Records Digital Records Marker

This is not a presidential record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

This marker identifies the place of a publication.

Publications have not been scanned in their entirety for the purpose of digitization. To see the full publication please search online or visit the Clinton Presidential Library's Research Room.

UNIVERSITY OF PITTSBURGH LAW REVIEW

Sexual Orientation, Morality, and the Law:
Devlin Revisited

Chai R. Feldblum

VOLUME 57

WINTER 1996

ISSUE 2

CAMS IN
MILITARY

September 5, 1995

Jonathan M. Bowie
Skadden, Arps, Slate, Meagher & Flom
919 Third Avenue
New York, New York 10022-3897

Dear Mr. Bowie:

I am in receipt of your recent letter. I understand that you have contacted Judy Miller, General Counsel at the Department of Defense and David Ogden at the Department of Justice. They are the appropriate officials and I am sure we will keep informed from them.

Very truly yours,

Abner J. Mikva
Counsel to the President

cc: Judy Miller
David Ogden

SKADDEN, ARPS, SLATE, MEAGHER & FLOM

919 THIRD AVENUE
NEW YORK 10022-3897
—
(212) 735-3000
FAX: (212) 735-2000

BOSTON
CHICAGO
HOUSTON
LOS ANGELES
NEWARK
SAN FRANCISCO
WASHINGTON, D.C.
WILMINGTON

—
BEIJING
BRUSSELS
BUDAPEST
FRANKFURT
HONG KONG
LONDON
MOSCOW
PARIS
PRAGUE
SYDNEY
TOKYO
TORONTO

August 21, 1995

The Honorable Abner J. Mikva
Counsel to the President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. Mikva:

One of the issues discussed at your meeting in June with representatives of the Servicemembers Legal Defense Network was the military's policy of denying assistance of counsel to military suspects prior to their being charged. Enclosed is a letter that describes this policy and its unconstitutional effects in greater detail.

In essence, several branches of the military have adopted an official policy of denying assistance of counsel to criminal suspects prior to and during custodial interrogation. This policy appears to be a blatant violation of the Supreme Court's Miranda decision as well as a fundamental unfairness in the system. In addition, the policy appears to raise an untenable ethical dilemma for defense counsel in that they are permitted to "consult" with, but not represent, or even enter into, an attorney-client relationship with the suspect.

We became aware of this issue in the context of an actual court-martial in Okinawa, which will shortly go up on appeal. The issues presented will be heard in the courts, but we believe these issues could be better dealt with in a systemic way at the administrative level.

The particular case in which the issue arose occurred in the context of an investigation into the sexual orientation of a Marine, but this issue has no

The Honorable Abner J. Mikva
August 21, 1995
Page 2

less meaning for all servicemembers. We do not believe there are any political aspects to this issue.

We respectfully request that an attorney in your office coordinate a review of this issue with lawyers from the Justice Department and the Department of Defense.

We have discussed this issue at length with other firms and lawyers active in the military area, a number of whom will send supporting letters separately.

Should you or your assistants wish to discuss this issue, please telephone me (619) 756-3899, Tony Clark (302) 651-3080 or Herbert Mondros (302) 651-3159.

Very truly yours,

Jonathan M. Bowie

Jonathan M. Bowie
Skadden, Arps, Slate, Meagher & Flom

cc w/ enclosures:

Judith Miller, General Counsel, Department of Defense
David W. Ogden, Associate Deputy Attorney General,
Department of Justice
Marsha Scott, Deputy Assistant to the President for
Political Affairs

SKADDEN, ARPS, SLATE, MEAGHER & FLOM

919 THIRD AVENUE

NEW YORK 10022-3897

(212) 735-3000

FAX: (212) 735-2000

BOSTON
CHICAGO
HOUSTON
LOS ANGELES
NEWARK
SAN FRANCISCO
WASHINGTON, D.C.
WILMINGTON

BEIJING
BRUSSELS
BUDAPEST
FRANKFURT
HONG KONG
LONDON
MOSCOW
PARIS
PRAGUE
SYDNEY
TOKYO
TORONTO

August 21, 1995

The Honorable Abner J. Mikva
Counsel to the President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Re: Official Military Policy
Of Denying Criminal Suspects
Their Right To Counsel

Dear Mr. Mikva:

As a follow-up to your meeting in June with the directors of the Servicemembers Legal Defense Network, we are writing to apprise you of an official policy of the United States Marine Corps which we believe conflicts with the requirements of the Fifth Amendment and Miranda and results in the widespread denial of the right to counsel to Marines in Okinawa who are suspects in criminal investigations. Similar policies are in effect elsewhere in the Marine Corps and in other branches of the service.

We request that your office designate officials in each of the Justice Department and the Department of Defense to examine and respond to this issue.

The Policy is contained in Legal Service Support Section ("LSSS") Memorandum 2-93 issued by the Officer in Charge of LSSS, 3rd Force Service Support Group, FMPAC on August 24, 1993 to all LSSS offices and Judge Advocates on Okinawa (the "Memorandum"). A copy of the Memorandum is enclosed herewith. The Memorandum is intended to promulgate policies and procedures for, among other things, the provision of advice by defense counsel. Memorandum, § 1. In pertinent part, the Memorandum instructs Senior Defense Counsel ("SDC") as to the circumstances in which defense counsel may be assigned to represent a Marine who is under criminal investigation. Section 5 of the Memorandum provides:

The Honorable Abner J. Mikva
August 21, 1995
Page 2

Counsel should normally be detailed:

- a. As soon as practicable after preferral of charges against the accused....
- b. Within 10 days after an accused is placed in pretrial confinement, regardless of whether or not charges are preferred or whether the accused has been released from pretrial confinement by the initial review officer.

Memorandum, § 5. Additionally, section 7 of the Memorandum states:

Reference (c) [JAGINST 5803.1] provides that judge advocates will not establish an attorney-client relationship with an individual unless detailed, assigned, or otherwise authorized to represent that individual by competent authority. Accordingly, defense counsel should not enter into attorney-client relationships [with criminal suspects] unless specifically detailed or assigned by the SDC in accordance with this memorandum or specifically authorized to do so by the OIC, LSSS.

Memorandum, § 7.

The effect of these provisions is to prohibit defense counsel from representing Marines who are subjected to custodial interrogation by military investigative authorities unless one of the limited circumstances under section 5 applies, or the OIC, LSSS authorizes assignment of counsel in a specific case.

The consequence of the policy is to effectively preclude Marines on Okinawa who are subjected to custodial interrogation by military criminal investigators from obtaining the advice of counsel until after they have been charged. It is here that the Memorandum -- and the policy it embodies -- conflicts with the Fifth Amendment to the United States Constitution and the cases interpreting it. Specifically, Miranda v. Arizona, 384

The Honorable Abner J. Mikva
August 21, 1995
Page 3

U.S. 436 (1966), requires that every criminal suspect who is subjected to custodial interrogation by law enforcement agents be advised of the right to be represented by counsel, appointed, if necessary, and to have that counsel present during interrogation. This right applies both before and after formal charges are lodged, see Patterson v. Illinois, 487 U.S. 285, 294 (1988), and is fully applicable to servicemembers subject to military criminal investigations. United States v. Tempia, 37 C.M.R. 249 (1967).

Marine Corps criminal investigators on Okinawa purport to comply with Miranda and Tempia by administering the Miranda warnings and having suspects read and sign the Navy's standard Military Suspect's Acknowledgment and Waiver of Rights Form before commencing interrogations. That form states, in pertinent part:

I have ... been advised that:

- (3) I have the right to consult with a lawyer prior to any questioning. This lawyer may be a civilian lawyer retained by me at no cost to the United States, a military lawyer appointed to act as my counsel at no cost to me or both;
- (4) I have the right to have my retained civilian lawyer and/or appointed military lawyer present during this interview.

OPNAV 5527/3 (12-82).

These warnings do not satisfy the mandates of Miranda and Tempia, however, because the policy set forth in the Memorandum effectively precludes Marines subjected to custodial interrogation from consulting in any meaningful way with a military attorney. The additional fact, that there are no non-military American lawyers practicing criminal law on the island of Okinawa, obviously prevents Marines from retaining such a lawyer prior to or during questioning. At the same time, the availability of retainable civilian counsel would not remedy the policy's unconstitutional restraints on the appointment of military counsel.

The Honorable Abner J. Mikva
August 21, 1995
Page 4

In short, the effect of the policy is to render the above-cited Miranda warnings untruthful and deceptive. Under Miranda and Tempia, Marines under custodial interrogation have the right to be represented by an attorney prior to and during questioning. Under the policy set forth in the Memorandum, they do not.

In their attempt to sidestep the unconstitutionality of the policy, military law enforcement authorities have contended that, in situations in which the suspect has confessed after signing the Acknowledgment of Rights and Waiver Form, there is no illegal denial of counsel since the suspect has "waived" that right. The flaw in this argument is clear: While Miranda recognizes that suspects might waive their right to counsel, for such a waiver to be effective, it must be knowing and voluntary. 384 U.S. at 444. No such waiver is possible, however, where the statement of "rights" is false due to an official policy which denies counsel.

The impact of the policy is perhaps best depicted in the recent testimony of the Senior Defense Counsel on Okinawa. The SDC admitted that, notwithstanding the statement of rights administered to Marine Corps suspects prior to custodial interrogation, the military, under the auspices of the Memorandum, routinely denies such suspects appointed counsel prior to and during interrogations. As the SDC also testified, the results of this official policy are astounding: During a recent eight-month period, military suspects made incriminating statements to criminal investigators in 90% of the cases in which formal charges were ultimately preferred. In 95% of those cases, the military suspects eventually entered guilty pleas. Thus, in practice, the policy ensures that a suspect will not be provided with counsel until after he or she has made an incriminating statement. While the policy may be explained by a desire for prosecutorial efficiency, this affords no excuse for wholesale constitutional violations.

It is unthinkable that Marines suspected of crimes on Okinawa cannot obtain representation by defense counsel until after they are charged or have languished in the brig for up to 10 days, regardless of whether charges have been preferred. See Memorandum, § 7(a) &

The Honorable Abner J. Mikva
August 21, 1995
Page 5

(b). Many Marines on Okinawa are young enlisted personnel, unsophisticated in legal matters. They serve in a closed community, thousands of miles from home and without the support of family, friends and counsellors. In the military context, where the refusal to obey a lawful order is itself grounds for criminal charges, a suspect who has been ordered to appear before criminal investigators may well believe that, notwithstanding the Miranda warnings, he has been ordered to make a statement in response to investigators' inquiries. See Tempia, 37 C.M.R. at 256.

While the most serious impact of the Memorandum is upon the constitutional rights of Marine suspects, the policy also leaves Judge Advocates assigned to defense counsel details with an unacceptable dilemma. This dilemma arises from the interpretation of the policy that would permit defense counsel to consult with a suspect prior to the preferral of charges, but without forming an attorney-client relationship. See Memorandum, §§ 5, 7; Enclosure 2 to the Memorandum. Such "consultation" would clearly require defense counsel to advise the suspect that, there is no attorney-client relationship between them, and that therefore, the suspect should not discuss any aspect of the case with counsel. Worse, absent an attorney-client relationship, a consulting attorney may be compelled to testify as to any admissions made by the suspect during the consultation. In this situation, the attorney would be forced to violate his sworn duty as a lawyer in order to uphold his sworn duty as an officer. In this context it is doubtful whether any meaningful advice could be conveyed during a consultation other than a reiteration of the Miranda rights.

The glaring problems presented by the policy set forth in the Memorandum constitute a gross violation of servicemembers' constitutional rights and a fundamental injustice. Moreover, the existence of such a policy threatens to undermine the validity of hundreds, perhaps thousands, of criminal convictions where incriminating statements made by the accused servicemembers during custodial interrogations have been admitted into evidence or used to obtain guilty pleas.

The Honorable Abner J. Mikva
August 21, 1995
Page 6

We respectfully suggest that this serious situation warrants further investigation and intervention to (i) eliminate all offending denial-of-counsel policies wherever they may exist, and (ii) provide explicit guidance to the services on the proper implementation of military suspect's Fifth Amendment rights.

Should you or your assistants wish to discuss this issue, please telephone me (619) 756-3899, Tony Clark (302) 651-3080 or Herbert Mondros (302) 651-3159.

Respectfully,

Jonathan M. Bowie

Jonathan M. Bowie
Skadden, Arps, Slate, Meagher & Flom



UNITED STATES MARINE CORPS
LEGAL SERVICE SUPPORT SECTION
3D FORCE SERVICE SUPPORT GROUP, FMFPAC
UNIT 3M77
FPO AF 96604-6477

5800
17:LAO
24 Aug 93

LEGAL SERVICE SUPPORT SECTION POLICY MEMORANDUM 2-93

From: Officer in Charge, Legal Service Support Section

Subj: DETAILING COUNSEL, REQUESTS FOR INDIVIDUAL MILITARY COUNSEL (IMC), DETAILING COUNSEL FOR RESPONDENT FOR ADMINISTRATIVE DISCHARGE BOARDS, AND PROVIDING LEGAL ADVICE BY DEFENSE COUNSEL

Ref: (a) JAGMAN
(b) MARCORSEPMAN
(c) JAGINST 5803.1

Encl: (1) Request for IMC format
(2) Services provided by Defense Counsel

1. PURPOSE. To promulgate policies and procedures for the detailing of trial and defense counsel for courts-martial, acting on requests for IMC, assigning counsel to represent respondents before administrative discharge board proceedings, and providing legal advice by defense counsel per the references.

2. CANCELLATION. Officer in Charge, Legal Service Support Section, memorandum 5800 LSSS:A.01 of 15 February 1991.

3. BACKGROUND. Section 0130b(1) of reference (a) provides authority for the Officer in Charge, Legal Service Support Section (OIC, LSSS), to detail trial and defense counsel for courts-martial conducted by LSSS personnel.

4. DELEGATION OF AUTHORITY.

a. Trial Counsel. Per section 0130b(1) of reference (a), the Officers in Charge of each Legal Service Support Team (LSST), are delegated the authority to detail trial counsel in courts-martial tried by that LSST.

b. Defense Counsel. Per section 0130b(1) of reference (a), the Senior Defense Counsel (SDC) is delegated the authority to detail defense counsel in courts-martial and other proceedings where defense counsel are required to be detailed. Counsel will not be detailed to summary courts-martial.

5. DETAILING DEFENSE COUNSEL. The SDC will detail defense counsel to accused/respondents after consideration of the accused's assigned unit, complexity of the case, possible conflicts of interest, prior establishment of an attorney-client relationship or other factors deemed appropriate to the SDC. Counsel should normally be detailed:

Subj: DETAILING COUNSEL, REQUESTS FOR INDIVIDUAL MILITARY COUNSEL (IMC), DETAILING COUNSEL FOR RESPONDENT FOR ADMINISTRATIVE DISCHARGE BOARDS, AND PROVIDING LEGAL ADVICE BY DEFENSE COUNSEL

a. As soon as practicable after preferral of charges against an accused. The SDC should also be given the pretrial package from the trial counsel at the same time.

b. Within 10 days after an accused is placed in pretrial confinement, regardless of whether or not charges are preferred or whether the accused has been released from pretrial confinement by the initial review officer;

c. After a respondent has exercised his right to have the case presented before an administrative discharge board and receipt of the administrative discharge package.

6. REQUESTS FOR INDIVIDUAL MILITARY COUNSEL. Requests for Individual Military Counsel (IMC) will be submitted in writing by the accused or the detailed defense counsel utilizing the format of enclosure (1). Action on all IMC requests will be made in accordance with section 0131 of reference (a).

7. DEFENSE COUNSEL PROVIDING LEGAL ADVICE. Reference (c) provides that judge advocates will not establish an attorney-client relationship with an individual unless detailed, assigned, or otherwise authorized to represent that individual by competent authority. Accordingly, defense counsel should not enter into attorney-client relationships unless specifically detailed or assigned by the SDC in accordance with this memorandum or specifically authorized to do so by the OIC, LSSS. Other than in cases of regularly scheduled counseling sessions (e.g. providing legal advice on nonjudicial punishment, involuntary administrative discharges or Article 31, Uniform Code of Military Justice counseling), defense counsel will provide legal advice not requiring an attorney-client relationship to individuals only when authorized to do so at the request of the individual's unit or other competent authority and with approval of either the SDC, OIC, LSST or OIC, LSSS. Enclosure (2) provides information with regard to advice and assistance normally provided by defense counsel.

8. ACTION.

a. Team OIC's. Ensure that the pretrial package is provided to the SDC and that trial counsel are detailed to courts-martial.

b. Military Justice Officer/AOIC, LSSS. Ensure that trial counsel are appointed as recorders for administrative discharge boards as soon as practicable after receipt of the board package from the Administrative Law Officer.

Subj: DETAILING COUNSEL, REQUESTS FOR INDIVIDUAL MILITARY COUNSEL (IMC), DETAILING COUNSEL FOR RESPONDENT FOR ADMINISTRATIVE DISCHARGE BOARDS, AND PROVIDING LEGAL ADVICE BY DEFENSE COUNSEL

c. Administrative Law Officer. Ensure that copies of all administrative discharge packages that require a board are provided to the SDC and Military Justice Officer.

d. SDC.

(1) Detail defense counsel, counsel for the respondent, and process requests for IMC according to the policy established herein.

(2) Ensure that the necessary counseling required by the policies established herein is accomplished.

(3) Ensure that legal advice provided by defense counsel is accomplished per the policies established herein and as provided in enclosure (2).



W. F. WARRINER

DISTRIBUTION:

CO, HqSvcBn, 3d FSSG

RDC

SJA, III MEF/3dMarDiv

SJA, 1stMAW

SJA, 3d FSSG

SJA, MCB CamBut

OIC, LSST Hansen

OIC, LSST Foster

OIC, LSST Kinser

~~SDC~~

All judge advocates of the LSSS

AdminLawO

5810
17:SDC

(date)

From: (Accused)
To: (Convening Authority)
Via: (Trial Counsel)

Subj: REQUEST FOR INDIVIDUAL MILITARY COUNSEL

Ref: (a) MCM, 1984, R.C.M. 506(b)
(b) JAGMAN 0131a

1. In accordance with references (a) and (b), I hereby request that _____ be appointed my individual military counsel for my pending _____ court-martial/article 32 pretrial investigation. I do/do not request that my detailed defense counsel remain on the case.

2. This request is submitted in accordance with the advice I received concerning my rights to counsel as explained to me by detailed defense counsel, _____.

3. I have a/have no prior attorney-client relationship with the requested attorney.

4. Trial is presently scheduled for _____.

5. The charge(s) are:

6. Special qualifications of requested counsel, if any, that are relevant to particular case _____.

7. If this request is denied, it is requested that I be informed of the reasons for denial.

(SIGNATURE OF ACCUSED)

Copy to:
Trial Counsel

SERVICES PROVIDED BY DEFENSE COUNSEL

<u>FUNCTION</u>	<u>REPRESENTATION</u>	<u>CONSULTATION ONLY</u>	<u>SPECIAL INSTRUCTIONS</u>
-GCM	Yes	NA	Note 1
-Art 32 Inves	Yes	NA	Note 1
-SPCM	Yes	NA	Note 1
-SCM	No	Yes	Note 3
-Pretrial Cnft	Yes	NA	Note 2
-Advice prior to NJP	No	Yes	See JAG- MAN 0109(a)
-NJP Personal Rep	No	No	
-Interrogation pursuant to MRE 305	No	Yes	Note 3 limitation unless counsel has been assigned to represent the individ- ual at a SPCM or GCM
-NC&PB Documents	No	Yes	
-Polygraph Exam	No	Yes	Note 3 limitation unless coun- sel has been assigned to represent the individual at a SPCM or GCM
-Vacation Proceedings	Yes	NA	
-AdminDischg Advice	No	Yes	Note 3
-AdminDisch Bd Rep	Yes	NA	Note 1
-Board of Inquiry	Yes	N/A	Note 1
-Art 138, UCMJ			
complaints	No	No	
-Request Mast	No	No	
-Turnover to civilian authorities	No	No	
-Admin determinations regarding loss/damage/ destruction of Govt property	No	Yes	Note 3 See MCO P4400.150

-Field Flt Perf Bd	No	No	
-BCNR/BCNR/DisReviewBd			
petition	No	Yes	Note 4
-Special Selection Bds	No	No	
-Medical Bd	No	Yes	
-Admin Reduction Bd	No	Yes	Note 3

-Traffic Court	No	No
-Eviction Hearings	No	No
-Civilian Civil and		
Criminal Matters	No	No
-Federal Employees	No	No
-Legal Assistance		
conflicts	No	Yes
-Requests for legal		
advice	NA	No

Note 1: Formation of attorney-client relationships and representation is authorized only after the request for legal service has been received and assignment has been made by SDC.

Note 2: Prisoners will be informed representation is limited only to pretrial confinement proceedings before charges are preferred R.C.M. 305(f) of reference (c).

Note 3: Clients will be informed scope of services is limited to consultation on authorized matters only.

Note 4: Defense counsel will not be assigned to assist Marines, officer or enlisted, in preparing or drafting petitions. Once the Marine has drafted the petition, defense counsel may be consulted to review the petition prior to submission.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM

919 THIRD AVENUE
NEW YORK 10022-3897
—
(212) 735-3000
FAX: (212) 735-2000

BOSTON
CHICAGO
HOUSTON
LOS ANGELES
NEWARK
SAN FRANCISCO
WASHINGTON, D.C.
WILMINGTON
—
BEIJING
BRUSSELS
BUDAPEST
FRANKFURT
HONG KONG
LONDON
MOSCOW
PARIS
PRAGUE
SYDNEY
TOKYO
TORONTO

August 21, 1995

The Honorable Abner J. Mikva
Counsel to the President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. Mikva:

One of the issues discussed at your meeting in June with representatives of the Servicemembers Legal Defense Network was the military's policy of denying assistance of counsel to military suspects prior to their being charged. Enclosed is a letter that describes this policy and its unconstitutional effects in greater detail.

In essence, several branches of the military have adopted an official policy of denying assistance of counsel to criminal suspects prior to and during custodial interrogation. This policy appears to be a blatant violation of the Supreme Court's Miranda decision as well as a fundamental unfairness in the system. In addition, the policy appears to raise an untenable ethical dilemma for defense counsel in that they are permitted to "consult" with, but not represent, or even enter into, an attorney-client relationship with the suspect.

We became aware of this issue in the context of an actual court-martial in Okinawa, which will shortly go up on appeal. The issues presented will be heard in the courts, but we believe these issues could be better dealt with in a systemic way at the administrative level.

The particular case in which the issue arose occurred in the context of an investigation into the sexual orientation of a Marine, but this issue has no

The Honorable Abner J. Mikva
August 21, 1995
Page 2

less meaning for all servicemembers. We do not believe there are any political aspects to this issue.

We respectfully request that an attorney in your office coordinate a review of this issue with lawyers from the Justice Department and the Department of Defense.

We have discussed this issue at length with other firms and lawyers active in the military area, a number of whom will send supporting letters separately.

Should you or your assistants wish to discuss this issue, please telephone me (619) 756-3899, Tony Clark (302) 651-3080 or Herbert Mondros (302) 651-3159.

Very truly yours,

Jonathan M. Bowie

Jonathan M. Bowie
Skadden, Arps, Slate, Meagher & Flom

cc w/ enclosures:

Judith Miller, General Counsel, Department of Defense
David W. Ogden, Associate Deputy Attorney General,
Department of Justice
Marsha Scott, Deputy Assistant to the President for
Political Affairs

SKADDEN, ARPS, SLATE, MEAGHER & FLOM

919 THIRD AVENUE
NEW YORK 10022-3897

(212) 735-3000
FAX: (212) 735-2000

BOSTON
CHICAGO
HOUSTON
LOS ANGELES
NEWARK
SAN FRANCISCO
WASHINGTON, D.C.
WILMINGTON

BEIJING
BRUSSELS
BUDAPEST
FRANKFURT
HONG KONG
LONDON
MOSCOW
PARIS
PRAGUE
SYDNEY
TOKYO
TORONTO

August 21, 1995

The Honorable Abner J. Mikva
Counsel to the President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Re: Official Military Policy
Of Denying Criminal Suspects
Their Right To Counsel

Dear Mr. Mikva:

As a follow-up to your meeting in June with the directors of the Servicemembers Legal Defense Network, we are writing to apprise you of an official policy of the United States Marine Corps which we believe conflicts with the requirements of the Fifth Amendment and Miranda and results in the widespread denial of the right to counsel to Marines in Okinawa who are suspects in criminal investigations. Similar policies are in effect elsewhere in the Marine Corps and in other branches of the service.

We request that your office designate officials in each of the Justice Department and the Department of Defense to examine and respond to this issue.

The Policy is contained in Legal Service Support Section ("LSSS") Memorandum 2-93 issued by the Officer in Charge of LSSS, 3rd Force Service Support Group, FMPAC on August 24, 1993 to all LSSS offices and Judge Advocates on Okinawa (the "Memorandum"). A copy of the Memorandum is enclosed herewith. The Memorandum is intended to promulgate policies and procedures for, among other things, the provision of advice by defense counsel. Memorandum, § 1. In pertinent part, the Memorandum instructs Senior Defense Counsel ("SDC") as to the circumstances in which defense counsel may be assigned to represent a Marine who is under criminal investigation. Section 5 of the Memorandum provides:

The Honorable Abner J. Mikva
August 21, 1995
Page 2

Counsel should normally be detailed:

- a. As soon as practicable after preferral of charges against the accused....
- b. Within 10 days after an accused is placed in pretrial confinement, regardless of whether or not charges are preferred or whether the accused has been released from pretrial confinement by the initial review officer.

Memorandum, § 5. Additionally, section 7 of the Memorandum states:

Reference (c) [JAGINST 5803.1] provides that judge advocates will not establish an attorney-client relationship with an individual unless detailed, assigned, or otherwise authorized to represent that individual by competent authority. Accordingly, defense counsel should not enter into attorney-client relationships [with criminal suspects] unless specifically detailed or assigned by the SDC in accordance with this memorandum or specifically authorized to do so by the OIC, LSSS.

Memorandum, § 7.

The effect of these provisions is to prohibit defense counsel from representing Marines who are subjected to custodial interrogation by military investigative authorities unless one of the limited circumstances under section 5 applies, or the OIC, LSSS authorizes assignment of counsel in a specific case.

The consequence of the policy is to effectively preclude Marines on Okinawa who are subjected to custodial interrogation by military criminal investigators from obtaining the advice of counsel until after they have been charged. It is here that the Memorandum -- and the policy it embodies -- conflicts with the Fifth Amendment to the United States Constitution and the cases interpreting it. Specifically, Miranda v. Arizona, 384

The Honorable Abner J. Mikva
August 21, 1995
Page 3

U.S. 436 (1966), requires that every criminal suspect who is subjected to custodial interrogation by law enforcement agents be advised of the right to be represented by counsel, appointed, if necessary, and to have that counsel present during interrogation. This right applies both before and after formal charges are lodged, see Patterson v. Illinois, 487 U.S. 285, 294 (1988), and is fully applicable to servicemembers subject to military criminal investigations. United States v. Tempia, 37 C.M.R. 249 (1967).

Marine Corps criminal investigators on Okinawa purport to comply with Miranda and Tempia by administering the Miranda warnings and having suspects read and sign the Navy's standard Military Suspect's Acknowledgment and Waiver of Rights Form before commencing interrogations. That form states, in pertinent part:

I have ... been advised that:

- (3) I have the right to consult with a lawyer prior to any questioning. This lawyer may be a civilian lawyer retained by me at no cost to the United States, a military lawyer appointed to act as my counsel at no cost to me or both;
- (4) I have the right to have my retained civilian lawyer and/or appointed military lawyer present during this interview.

OPNAV 5527/3 (12-82).

These warnings do not satisfy the mandates of Miranda and Tempia, however, because the policy set forth in the Memorandum effectively precludes Marines subjected to custodial interrogation from consulting in any meaningful way with a military attorney. The additional fact, that there are no non-military American lawyers practicing criminal law on the island of Okinawa, obviously prevents Marines from retaining such a lawyer prior to or during questioning. At the same time, the availability of retainable civilian counsel would not remedy the policy's unconstitutional restraints on the appointment of military counsel.

The Honorable Abner J. Mikva
August 21, 1995
Page 4

In short, the effect of the policy is to render the above-cited Miranda warnings untruthful and deceptive. Under Miranda and Tempia, Marines under custodial interrogation have the right to be represented by an attorney prior to and during questioning. Under the policy set forth in the Memorandum, they do not.

In their attempt to sidestep the unconstitutionality of the policy, military law enforcement authorities have contended that, in situations in which the suspect has confessed after signing the Acknowledgment of Rights and Waiver Form, there is no illegal denial of counsel since the suspect has "waived" that right. The flaw in this argument is clear: While Miranda recognizes that suspects might waive their right to counsel, for such a waiver to be effective, it must be knowing and voluntary. 384 U.S. at 444. No such waiver is possible, however, where the statement of "rights" is false due to an official policy which denies counsel.

The impact of the policy is perhaps best depicted in the recent testimony of the Senior Defense Counsel on Okinawa. The SDC admitted that, notwithstanding the statement of rights administered to Marine Corps suspects prior to custodial interrogation, the military, under the auspices of the Memorandum, routinely denies such suspects appointed counsel prior to and during interrogations. As the SDC also testified, the results of this official policy are astounding: During a recent eight-month period, military suspects made incriminating statements to criminal investigators in 90% of the cases in which formal charges were ultimately preferred. In 95% of those cases, the military suspects eventually entered guilty pleas. Thus, in practice, the policy ensures that a suspect will not be provided with counsel until after he or she has made an incriminating statement. While the policy may be explained by a desire for prosecutorial efficiency, this affords no excuse for wholesale constitutional violations.

It is unthinkable that Marines suspected of crimes on Okinawa cannot obtain representation by defense counsel until after they are charged or have languished in the brig for up to 10 days, regardless of whether charges have been preferred. See Memorandum, § 7(a) &

The Honorable Abner J. Mikva
August 21, 1995
Page 5

(b). Many Marines on Okinawa are young enlisted personnel, unsophisticated in legal matters. They serve in a closed community, thousands of miles from home and without the support of family, friends and counsellors. In the military context, where the refusal to obey a lawful order is itself grounds for criminal charges, a suspect who has been ordered to appear before criminal investigators may well believe that, notwithstanding the Miranda warnings, he has been ordered to make a statement in response to investigators' inquiries. See Tempia, 37 C.M.R. at 256.

While the most serious impact of the Memorandum is upon the constitutional rights of Marine suspects, the policy also leaves Judge Advocates assigned to defense counsel details with an unacceptable dilemma. This dilemma arises from the interpretation of the policy that would permit defense counsel to consult with a suspect prior to the preferral of charges, but without forming an attorney-client relationship. See Memorandum, §§ 5, 7; Enclosure 2 to the Memorandum. Such "consultation" would clearly require defense counsel to advise the suspect that, there is no attorney-client relationship between them, and that therefore, the suspect should not discuss any aspect of the case with counsel. Worse, absent an attorney-client relationship, a consulting attorney may be compelled to testify as to any admissions made by the suspect during the consultation. In this situation, the attorney would be forced to violate his sworn duty as a lawyer in order to uphold his sworn duty as an officer. In this context it is doubtful whether any meaningful advice could be conveyed during a consultation other than a reiteration of the Miranda rights.

The glaring problems presented by the policy set forth in the Memorandum constitute a gross violation of servicemembers' constitutional rights and a fundamental injustice. Moreover, the existence of such a policy threatens to undermine the validity of hundreds, perhaps thousands, of criminal convictions where incriminating statements made by the accused servicemembers during custodial interrogations have been admitted into evidence or used to obtain guilty pleas.

The Honorable Abner J. Mikva
August 21, 1995
Page 6

We respectfully suggest that this serious situation warrants further investigation and intervention to (i) eliminate all offending denial-of-counsel policies wherever they may exist, and (ii) provide explicit guidance to the services on the proper implementation of military suspect's Fifth Amendment rights.

Should you or your assistants wish to discuss this issue, please telephone me (619) 756-3899, Tony Clark (302) 651-3080 or Herbert Mondros (302) 651-3159.

Respectfully,

A handwritten signature in cursive script that reads "Jonathan M. Bowie".

Jonathan M. Bowie
Skadden, Arps, Slate, Meagher & Flom



UNITED STATES MARINE CORPS
LEGAL SERVICE SUPPORT SECTION
10 FORCE SERVICE SUPPORT GROUP, FMFPAC
UNIT 36477
FPO AP 96604-6477

5800
17:LAO
24 Aug 93

LEGAL SERVICE SUPPORT SECTION POLICY MEMORANDUM 2-93

From: Officer in Charge, Legal Service Support Section

Subj: DETAILING COUNSEL, REQUESTS FOR INDIVIDUAL MILITARY COUNSEL (IMC), DETAILING COUNSEL FOR RESPONDENT FOR ADMINISTRATIVE DISCHARGE BOARDS, AND PROVIDING LEGAL ADVICE BY DEFENSE COUNSEL

Ref: (a) JAGMAN
(b) MARCORSEPMAN
(c) JAGINST 5803.1

Encl: (1) Request for IMC format
(2) Services provided by Defense Counsel

1. PURPOSE. To promulgate policies and procedures for the detailing of trial and defense counsel for courts-martial, acting on requests for IMC, assigning counsel to represent respondents before administrative discharge board proceedings, and providing legal advice by defense counsel per the references.

2. CANCELLATION. Officer in Charge, Legal Service Support Section, memorandum 5800 LSSS:A.01 of 15 February 1991.

3. BACKGROUND. Section 0130b(1) of reference (a) provides authority for the Officer in Charge, Legal Service Support Section (OIC, LSSS), to detail trial and defense counsel for courts-martial conducted by LSSS personnel.

4. DELEGATION OF AUTHORITY.

a. Trial Counsel. Per section 0130b(1) of reference (a), the Officers in Charge of each Legal Service Support Team (LSST), are delegated the authority to detail trial counsel in courts-martial tried by that LSST.

b. Defense Counsel. Per section 0130b(1) of reference (a), the Senior Defense Counsel (SDC) is delegated the authority to detail defense counsel in courts-martial and other proceedings where defense counsel are required to be detailed. Counsel will not be detailed to summary courts-martial.

5. DETAILING DEFENSE COUNSEL. The SDC will detail defense counsel to accused/respondents after consideration of the accused's assigned unit, complexity of the case, possible conflicts of interest, prior establishment of an attorney-client relationship or other factors deemed appropriate to the SDC. Counsel should normally be detailed:

Subj: DETAILING COUNSEL, REQUESTS FOR INDIVIDUAL MILITARY COUNSEL (IMC), DETAILING COUNSEL FOR RESPONDENT FOR ADMINISTRATIVE DISCHARGE BOARDS, AND PROVIDING LEGAL ADVICE BY DEFENSE COUNSEL

a. As soon as practicable after preferral of charges against an accused. The SDC should also be given the pretrial package from the trial counsel at the same time.

b. Within 10 days after an accused is placed in pretrial confinement, regardless of whether or not charges are preferred or whether the accused has been released from pretrial confinement by the initial review officer;

c. After a respondent has exercised his right to have the case presented before an administrative discharge board and receipt of the administrative discharge package.

6. REQUESTS FOR INDIVIDUAL MILITARY COUNSEL. Requests for Individual Military Counsel (IMC) will be submitted in writing by the accused or the detailed defense counsel utilizing the format of enclosure (1). Action on all IMC requests will be made in accordance with section 0131 of reference (a).

7. DEFENSE COUNSEL PROVIDING LEGAL ADVICE. Reference (c) provides that judge advocates will not establish an attorney-client relationship with an individual unless detailed, assigned, or otherwise authorized to represent that individual by competent authority. Accordingly, defense counsel should not enter into attorney-client relationships unless specifically detailed or assigned by the SDC in accordance with this memorandum or specifically authorized to do so by the OIC, LSSS. Other than in cases of regularly scheduled counseling sessions (e.g. providing legal advice on nonjudicial punishment, involuntary administrative discharges or Article 31, Uniform Code of Military Justice counseling), defense counsel will provide legal advice not requiring an attorney-client relationship to individuals only when authorized to do so at the request of the individual's unit or other competent authority and with approval of either the SDC, OIC, LSST or OIC, LSSS. Enclosure (2) provides information with regard to advice and assistance normally provided by defense counsel.

8. ACTION.

a. Team OIC's. Ensure that the pretrial package is provided to the SDC and that trial counsel are detailed to courts-martial.

b. Military Justice Officer/AOIC, LSSS. Ensure that trial counsel are appointed as recorders for administrative discharge boards as soon as practicable after receipt of the board package from the Administrative Law Officer.

Subj: DETAILING COUNSEL, REQUESTS FOR INDIVIDUAL MILITARY COUNSEL (IMC), DETAILING COUNSEL FOR RESPONDENT FOR ADMINISTRATIVE DISCHARGE BOARDS, AND PROVIDING LEGAL ADVICE BY DEFENSE COUNSEL

c. Administrative Law Officer. Ensure that copies of all administrative discharge packages that require a board are provided to the SDC and Military Justice Officer.

d. SDC.

(1) Detail defense counsel, counsel for the respondent, and process requests for IMC according to the policy established herein.

(2) Ensure that the necessary counseling required by the policies established herein is accomplished.

(3) Ensure that legal advice provided by defense counsel is accomplished per the policies established herein and as provided in enclosure (2).


W. F. WARRINER

DISTRIBUTION:

CO, HqSvcBn, 3d FSSG

RDC

SJA, III MEF/3dMarDiv

SJA, 1stMAW

SJA, 3d FSSG

SJA, MCB CamBut

OIC, LSST Hansen

OIC, LSST Foster

OIC, LSST Kinser

SDC

All judge advocates of the LSSS
AdminLawO

5810
17:SDC

(date)

From: (Accused)
To: (Convening Authority)
Via: (Trial Counsel)

Subj: REQUEST FOR INDIVIDUAL MILITARY COUNSEL

Ref: (a) MCM, 1984, R.C.M. 506(b)
(b) JAGMAN 0131a

1. In accordance with references (a) and (b), I hereby request that _____ be appointed my individual military counsel for my pending _____ court-martial/article 32 pretrial investigation. I do/do not request that my detailed defense counsel remain on the case.
2. This request is submitted in accordance with the advice I received concerning my rights to counsel as explained to me by detailed defense counsel, _____.
3. I have a/have no prior attorney-client relationship with the requested attorney.
4. Trial is presently scheduled for _____.
5. The charge(s) are:

6. Special qualifications of requested counsel, if any, that are relevant to particular case _____.
7. If this request is denied, it is requested that I be informed of the reasons for denial.

(SIGNATURE OF ACCUSED)

Copy to:
Trial Counsel

SERVICES PROVIDED BY DEFENSE COUNSEL

<u>FUNCTION</u>	<u>REPRESENTATION</u>	<u>CONSULTATION ONLY</u>	<u>SPECIAL INSTRUCTIONS</u>
-GCM	Yes	NA	Note 1
-Art 32 Inves	Yes	NA	Note 1
-SPCM	Yes	NA	Note 1
-SCM	No	Yes	Note 3
-Pretrial Cnft	Yes	NA	Note 2
-Advice prior to NJP	No	Yes	See JAG- MAN 0109(a)
-NJP Personal Rep	No	No	
-Interrogation pursuant to MRE 305	No	Yes	Note 3 limitation unless counsel has been assigned to represent the individ- ual at a SPCM or GCM
-NC&PB Documents	No	Yes	
-Polygraph Exam	No	Yes	Note 3 limitation unless coun- sel has been assigned to represent the individual at a SPCM or GCM
-Vacation Proceedings	Yes	NA	
-AdminDischg Advice	No	Yes	Note 3
-AdminDisch Bd Rep	Yes	NA	Note 1
-Board of Inquiry	Yes	N/A	Note 1
-Art 138, UCMJ			
complaints	No	No	
-Request Mast	No	No	
-Turnover to civilian authorities	No	No	
-Admin determinations regarding loss/damage/ destruction of Govt property	No	Yes	Note 3 See MCO P4400.150

-Field Flt Perf Bd	No	No	
-BCNR/BCNR/DisReviewBd petition	No	Yes	Note 4
-Special Selection Bds	No	No	
-Medical Bd	No	Yes	
-Admin Reduction Bd	No	Yes	Note 3

-Traffic Court	No	No
-Eviction Hearings	No	No
-Civilian Civil and Criminal Matters	No	No
-Federal Employees	No	No
-Legal Assistance conflicts	No	Yes
-Requests for legal advice	NA	No

Note 1: Formation of attorney-client relationships and representation is authorized only after the request for legal service has been received and assignment has been made by SDC.

Note 2: Prisoners will be informed representation is limited only to pretrial confinement proceedings before charges are preferred R.C.M. 305(f) of reference (c).

Note 3: Clients will be informed scope of services is limited to consultation on authorized matters only.

Note 4: Defense counsel will not be assigned to assist Marines, officer or enlisted, in preparing or drafting petitions. Once the Marine has drafted the petition, defense counsel may be consulted to review the petition prior to submission.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM

919 THIRD AVENUE
NEW YORK 10022-3897

(212) 735-3000
FAX: (212) 735-2000

BOSTON
CHICAGO
HOUSTON
LOS ANGELES
NEWARK
SAN FRANCISCO
WASHINGTON, D.C.
WILMINGTON

BEIJING
BRUSSELS
BUDAPEST
FRANKFURT
HONG KONG
LONDON
MOSCOW
PARIS
PRAGUE
SYDNEY
TOKYO
TORONTO

August 21, 1995

The Honorable Abner J. Mikva
Counsel to the President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. Mikva:

One of the issues discussed at your meeting in June with representatives of the Servicemembers Legal Defense Network was the military's policy of denying assistance of counsel to military suspects prior to their being charged. Enclosed is a letter that describes this policy and its unconstitutional effects in greater detail.

In essence, several branches of the military have adopted an official policy of denying assistance of counsel to criminal suspects prior to and during custodial interrogation. This policy appears to be a blatant violation of the Supreme Court's Miranda decision as well as a fundamental unfairness in the system. In addition, the policy appears to raise an untenable ethical dilemma for defense counsel in that they are permitted to "consult" with, but not represent, or even enter into, an attorney-client relationship with the suspect.

We became aware of this issue in the context of an actual court-martial in Okinawa, which will shortly go up on appeal. The issues presented will be heard in the courts, but we believe these issues could be better dealt with in a systemic way at the administrative level.

The particular case in which the issue arose occurred in the context of an investigation into the sexual orientation of a Marine, but this issue has no

The Honorable Abner J. Mikva
August 21, 1995
Page 2

less meaning for all servicemembers. We do not believe there are any political aspects to this issue.

We respectfully request that an attorney in your office coordinate a review of this issue with lawyers from the Justice Department and the Department of Defense.

We have discussed this issue at length with other firms and lawyers active in the military area, a number of whom will send supporting letters separately.

Should you or your assistants wish to discuss this issue, please telephone me (619) 756-3899, Tony Clark (302) 651-3080 or Herbert Mondros (302) 651-3159.

Very truly yours,

Jonathan M. Bowie

Jonathan M. Bowie
Skadden, Arps, Slate, Meagher & Flom

cc w/ enclosures:

Judith Miller, General Counsel, Department of Defense
David W. Ogden, Associate Deputy Attorney General,
Department of Justice
Marsha Scott, Deputy Assistant to the President for
Political Affairs

SKADDEN, ARPS, SLATE, MEAGHER & FLOM

919 THIRD AVENUE
NEW YORK 10022-3897
—
(212) 735-3000
FAX: (212) 735-2000

BOSTON
CHICAGO
HOUSTON
LOS ANGELES
NEWARK
SAN FRANCISCO
WASHINGTON, D.C.
WILMINGTON
—
BEIJING
BRUSSELS
BUDAPEST
FRANKFURT
HONG KONG
LONDON
MOSCOW
PARIS
PRAGUE
SYDNEY
TOKYO
TORONTO

August 21, 1995

The Honorable Abner J. Mikva
Counsel to the President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Re: Official Military Policy
Of Denying Criminal Suspects
Their Right To Counsel

Dear Mr. Mikva:

As a follow-up to your meeting in June with the directors of the Servicemembers Legal Defense Network, we are writing to apprise you of an official policy of the United States Marine Corps which we believe conflicts with the requirements of the Fifth Amendment and Miranda and results in the widespread denial of the right to counsel to Marines in Okinawa who are suspects in criminal investigations. Similar policies are in effect elsewhere in the Marine Corps and in other branches of the service.

We request that your office designate officials in each of the Justice Department and the Department of Defense to examine and respond to this issue.

The Policy is contained in Legal Service Support Section ("LSSS") Memorandum 2-93 issued by the Officer in Charge of LSSS, 3rd Force Service Support Group, FMPAC on August 24, 1993 to all LSSS offices and Judge Advocates on Okinawa (the "Memorandum"). A copy of the Memorandum is enclosed herewith. The Memorandum is intended to promulgate policies and procedures for, among other things, the provision of advice by defense counsel. Memorandum, § 1. In pertinent part, the Memorandum instructs Senior Defense Counsel ("SDC") as to the circumstances in which defense counsel may be assigned to represent a Marine who is under criminal investigation. Section 5 of the Memorandum provides:

The Honorable Abner J. Mikva
August 21, 1995
Page 2

Counsel should normally be detailed:

- a. As soon as practicable after preferral of charges against the accused....
- b. Within 10 days after an accused is placed in pretrial confinement, regardless of whether or not charges are preferred or whether the accused has been released from pretrial confinement by the initial review officer.

Memorandum, § 5. Additionally, section 7 of the Memorandum states:

Reference (c) [JAGINST 5803.1] provides that judge advocates will not establish an attorney-client relationship with an individual unless detailed, assigned, or otherwise authorized to represent that individual by competent authority. Accordingly, defense counsel should not enter into attorney-client relationships [with criminal suspects] unless specifically detailed or assigned by the SDC in accordance with this memorandum or specifically authorized to do so by the OIC, LSSS.

Memorandum, § 7.

The effect of these provisions is to prohibit defense counsel from representing Marines who are subjected to custodial interrogation by military investigative authorities unless one of the limited circumstances under section 5 applies, or the OIC, LSSS authorizes assignment of counsel in a specific case.

The consequence of the policy is to effectively preclude Marines on Okinawa who are subjected to custodial interrogation by military criminal investigators from obtaining the advice of counsel until after they have been charged. It is here that the Memorandum -- and the policy it embodies -- conflicts with the Fifth Amendment to the United States Constitution and the cases interpreting it. Specifically, Miranda v. Arizona, 384

The Honorable Abner J. Mikva
August 21, 1995
Page 3

U.S. 436 (1966), requires that every criminal suspect who is subjected to custodial interrogation by law enforcement agents be advised of the right to be represented by counsel, appointed, if necessary, and to have that counsel present during interrogation. This right applies both before and after formal charges are lodged, see Patterson v. Illinois, 487 U.S. 285, 294 (1988), and is fully applicable to servicemembers subject to military criminal investigations. United States v. Tempia, 37 C.M.R. 249 (1967).

Marine Corps criminal investigators on Okinawa purport to comply with Miranda and Tempia by administering the Miranda warnings and having suspects read and sign the Navy's standard Military Suspect's Acknowledgment and Waiver of Rights Form before commencing interrogations. That form states, in pertinent part:

I have ... been advised that:

- (3) I have the right to consult with a lawyer prior to any questioning. This lawyer may be a civilian lawyer retained by me at no cost to the United States, a military lawyer appointed to act as my counsel at no cost to me or both;
- (4) I have the right to have my retained civilian lawyer and/or appointed military lawyer present during this interview.

OPNAV 5527/3 (12-82).

These warnings do not satisfy the mandates of Miranda and Tempia, however, because the policy set forth in the Memorandum effectively precludes Marines subjected to custodial interrogation from consulting in any meaningful way with a military attorney. The additional fact, that there are no non-military American lawyers practicing criminal law on the island of Okinawa, obviously prevents Marines from retaining such a lawyer prior to or during questioning. At the same time, the availability of retainable civilian counsel would not remedy the policy's unconstitutional restraints on the appointment of military counsel.

The Honorable Abner J. Mikva
August 21, 1995
Page 4

In short, the effect of the policy is to render the above-cited Miranda warnings untruthful and deceptive. Under Miranda and Tempia, Marines under custodial interrogation have the right to be represented by an attorney prior to and during questioning. Under the policy set forth in the Memorandum, they do not.

In their attempt to sidestep the unconstitutionality of the policy, military law enforcement authorities have contended that, in situations in which the suspect has confessed after signing the Acknowledgment of Rights and Waiver Form, there is no illegal denial of counsel since the suspect has "waived" that right. The flaw in this argument is clear: While Miranda recognizes that suspects might waive their right to counsel, for such a waiver to be effective, it must be knowing and voluntary. 384 U.S. at 444. No such waiver is possible, however, where the statement of "rights" is false due to an official policy which denies counsel.

The impact of the policy is perhaps best depicted in the recent testimony of the Senior Defense Counsel on Okinawa. The SDC admitted that, notwithstanding the statement of rights administered to Marine Corps suspects prior to custodial interrogation, the military, under the auspices of the Memorandum, routinely denies such suspects appointed counsel prior to and during interrogations. As the SDC also testified, the results of this official policy are astounding: During a recent eight-month period, military suspects made incriminating statements to criminal investigators in 90% of the cases in which formal charges were ultimately preferred. In 95% of those cases, the military suspects eventually entered guilty pleas. Thus, in practice, the policy ensures that a suspect will not be provided with counsel until after he or she has made an incriminating statement. While the policy may be explained by a desire for prosecutorial efficiency, this affords no excuse for wholesale constitutional violations.

It is unthinkable that Marines suspected of crimes on Okinawa cannot obtain representation by defense counsel until after they are charged or have languished in the brig for up to 10 days, regardless of whether charges have been preferred. See Memorandum, § 7(a) &

The Honorable Abner J. Mikva
August 21, 1995
Page 5

(b). Many Marines on Okinawa are young enlisted personnel, unsophisticated in legal matters. They serve in a closed community, thousands of miles from home and without the support of family, friends and counsellors. In the military context, where the refusal to obey a lawful order is itself grounds for criminal charges, a suspect who has been ordered to appear before criminal investigators may well believe that, notwithstanding the Miranda warnings, he has been ordered to make a statement in response to investigators' inquiries. See Tempia, 37 C.M.R. at 256.

While the most serious impact of the Memorandum is upon the constitutional rights of Marine suspects, the policy also leaves Judge Advocates assigned to defense counsel details with an unacceptable dilemma. This dilemma arises from the interpretation of the policy that would permit defense counsel to consult with a suspect prior to the preferral of charges, but without forming an attorney-client relationship. See Memorandum, §§ 5, 7; Enclosure 2 to the Memorandum. Such "consultation" would clearly require defense counsel to advise the suspect that, there is no attorney-client relationship between them, and that therefore, the suspect should not discuss any aspect of the case with counsel. Worse, absent an attorney-client relationship, a consulting attorney may be compelled to testify as to any admissions made by the suspect during the consultation. In this situation, the attorney would be forced to violate his sworn duty as a lawyer in order to uphold his sworn duty as an officer. In this context it is doubtful whether any meaningful advice could be conveyed during a consultation other than a reiteration of the Miranda rights.

The glaring problems presented by the policy set forth in the Memorandum constitute a gross violation of servicemembers' constitutional rights and a fundamental injustice. Moreover, the existence of such a policy threatens to undermine the validity of hundreds, perhaps thousands, of criminal convictions where incriminating statements made by the accused servicemembers during custodial interrogations have been admitted into evidence or used to obtain guilty pleas.

The Honorable Abner J. Mikva
August 21, 1995
Page 6

We respectfully suggest that this serious situation warrants further investigation and intervention to (i) eliminate all offending denial-of-counsel policies wherever they may exist, and (ii) provide explicit guidance to the services on the proper implementation of military suspect's Fifth Amendment rights.

Should you or your assistants wish to discuss this issue, please telephone me (619) 756-3899, Tony Clark (302) 651-3080 or Herbert Mondros (302) 651-3159.

Respectfully,

A handwritten signature in cursive script that reads "Jonathan M. Bowie".

Jonathan M. Bowie
Skadden, Arps, Slate, Meagher & Flom



UNITED STATES MARINE CORPS
LEGAL SERVICE SUPPORT SECTION
3D FORCE SERVICE SUPPORT GROUP, FMFPAC
UNIT 38477
FPO AP 96604-6477

5800
17:LAO
24 Aug 93

LEGAL SERVICE SUPPORT SECTION POLICY MEMORANDUM 2-93

From: Officer in Charge, Legal Service Support Section

Subj: DETAILING COUNSEL, REQUESTS FOR INDIVIDUAL MILITARY COUNSEL (IMC), DETAILING COUNSEL FOR RESPONDENT FOR ADMINISTRATIVE DISCHARGE BOARDS, AND PROVIDING LEGAL ADVICE BY DEFENSE COUNSEL

Ref: (a) JAGMAN
(b) MARCORSEPMAN
(c) JAGINST 5803.1

Encl: (1) Request for IMC format
(2) Services provided by Defense Counsel

1. PURPOSE. To promulgate policies and procedures for the detailing of trial and defense counsel for courts-martial, acting on requests for IMC, assigning counsel to represent respondents before administrative discharge board proceedings, and providing legal advice by defense counsel per the references.
2. CANCELLATION. Officer in Charge, Legal Service Support Section, memorandum 5800 LSSS:A.01 of 15 February 1991.
3. BACKGROUND. Section 0130b(1) of reference (a) provides authority for the Officer in Charge, Legal Service Support Section (OIC, LSSS), to detail trial and defense counsel for courts-martial conducted by LSSS personnel.
4. DELEGATION OF AUTHORITY.
 - a. Trial Counsel. Per section 0130b(1) of reference (a), the Officers in Charge of each Legal Service Support Team (LSST), are delegated the authority to detail trial counsel in courts-martial tried by that LSST.
 - b. Defense Counsel. Per section 0130b(1) of reference (a), the Senior Defense Counsel (SDC) is delegated the authority to detail defense counsel in courts-martial and other proceedings where defense counsel are required to be detailed. Counsel will not be detailed to summary courts-martial.
5. DETAILING DEFENSE COUNSEL. The SDC will detail defense counsel to accused/respondents after consideration of the accused's assigned unit, complexity of the case, possible conflicts of interest, prior establishment of an attorney-client relationship or other factors deemed appropriate to the SDC. Counsel should normally be detailed:

Subj: DETAILING COUNSEL, REQUESTS FOR INDIVIDUAL MILITARY COUNSEL (IMC), DETAILING COUNSEL FOR RESPONDENT FOR ADMINISTRATIVE DISCHARGE BOARDS, AND PROVIDING LEGAL ADVICE BY DEFENSE COUNSEL

a. As soon as practicable after preferral of charges against an accused. The SDC should also be given the pretrial package from the trial counsel at the same time.

b. Within 10 days after an accused is placed in pretrial confinement, regardless of whether or not charges are preferred or whether the accused has been released from pretrial confinement by the initial review officer;

c. After a respondent has exercised his right to have the case presented before an administrative discharge board and receipt of the administrative discharge package.

6. REQUESTS FOR INDIVIDUAL MILITARY COUNSEL. Requests for Individual Military Counsel (IMC) will be submitted in writing by the accused or the detailed defense counsel utilizing the format of enclosure (1). Action on all IMC requests will be made in accordance with section 0131 of reference (a).

7. DEFENSE COUNSEL PROVIDING LEGAL ADVICE. Reference (c) provides that judge advocates will not establish an attorney-client relationship with an individual unless detailed, assigned, or otherwise authorized to represent that individual by competent authority. Accordingly, defense counsel should not enter into attorney-client relationships unless specifically detailed or assigned by the SDC in accordance with this memorandum or specifically authorized to do so by the OIC, LSSS. Other than in cases of regularly scheduled counseling sessions (e.g. providing legal advice on nonjudicial punishment, involuntary administrative discharges or Article 31, Uniform Code of Military Justice counseling), defense counsel will provide legal advice not requiring an attorney-client relationship to individuals only when authorized to do so at the request of the individual's unit or other competent authority and with approval of either the SDC, OIC, LSST or OIC, LSSS. Enclosure (2) provides information with regard to advice and assistance normally provided by defense counsel.

8. ACTION.

a. Team OIC's. Ensure that the pretrial package is provided to the SDC and that trial counsel are detailed to courts-martial.

b. Military Justice Officer/AOIC, LSSS. Ensure that trial counsel are appointed as recorders for administrative discharge boards as soon as practicable after receipt of the board package from the Administrative Law Officer.

Subj: DETAILING COUNSEL, REQUESTS FOR INDIVIDUAL MILITARY COUNSEL (IMC), DETAILING COUNSEL FOR RESPONDENT FOR ADMINISTRATIVE DISCHARGE BOARDS, AND PROVIDING LEGAL ADVICE BY DEFENSE COUNSEL

c. Administrative Law Officer. Ensure that copies of all administrative discharge packages that require a board are provided to the SDC and Military Justice Officer.

d. SDC.

(1) Detail defense counsel, counsel for the respondent, and process requests for IMC according to the policy established herein.

(2) Ensure that the necessary counseling required by the policies established herein is accomplished.

(3) Ensure that legal advice provided by defense counsel is accomplished per the policies established herein and as provided in enclosure (2).


W. F. WARRINER

DISTRIBUTION:

CO, HqSvcBn, 3d FSSG

RDC

SJA, III MEF/3dMarDiv

SJA, 1stMAW

SJA, 3d FSSG

SJA, MCB CamBut

OIC, LSST Hansen

OIC, LSST Foster

OIC, LSST Kinser

~~SDC~~

All judge advocates of the LSSS
AdminLawO

5810
17:SDC

(date)

From: (Accused)
To: (Convening Authority)
Via: (Trial Counsel)

Subj: REQUEST FOR INDIVIDUAL MILITARY COUNSEL

Ref: (a) MCM, 1984, R.C.M. 506(b)
(b) JAGMAN 0131a

1. In accordance with references (a) and (b), I hereby request that _____ be appointed my individual military counsel for my pending _____ court-martial/article 32 pretrial investigation. I do/do not request that my detailed defense counsel remain on the case.

2. This request is submitted in accordance with the advice I received concerning my rights to counsel as explained to me by detailed defense counsel, _____.

3. I have a/have no prior attorney-client relationship with the requested attorney.

4. Trial is presently scheduled for _____.

5. The charge(s) are:

6. Special qualifications of requested counsel, if any, that are relevant to particular case _____.

7. If this request is denied, it is requested that I be informed of the reasons for denial.

(SIGNATURE OF ACCUSED)

Copy to:
Trial Counsel

SERVICES PROVIDED BY DEFENSE COUNSEL

<u>FUNCTION</u>	<u>REPRESENTATION</u>	<u>CONSULTATION ONLY</u>	<u>SPECIAL INSTRUCTIONS</u>
-GCM	Yes	NA	Note 1
-Art 32 Inves	Yes	NA	Note 1
-SPCM	Yes	NA	Note 1
-SCM	No	Yes	Note 3
-Pretrial Cnft	Yes	NA	Note 2
-Advice prior to NJP	No	Yes	See JAG- MAN 0109(a)
-NJP Personal Rep	No	No	
-Interrogation pursuant to MRE 305	No	Yes	Note 3 limitation unless counsel has been assigned to represent the individ- ual at a SPCM or GCM
-NC&PB Documents	No	Yes	
-Polygraph Exam	No	Yes	Note 3 limitation unless coun- sel has been assigned to represent the individual at a SPCM or GCM
-Vacation Proceedings	Yes	NA	
-AdminDischg Advice	No	Yes	Note 3
-AdminDisch Bd Rep	Yes	NA	Note 1
-Board of Inquiry	Yes	N/A	Note 1
-Art 138, UCMJ			
complaints	No	No	
-Request Mast	No	No	
-Turnover to civilian authorities	No	No	
-Admin determinations regarding loss/damage/ destruction of Govt property	No	Yes	Note 3 See MCO P4400.150

-Field Flt Perf Bd	No	No	
-BCNR/BCNR/DisReviewBd petition	No	Yes	Note 4
-Special Selection Bds	No	No	
-Medical Bd	No	Yes	
-Admin Reduction Bd	No	Yes	Note 3

-Traffic Court	No	No
-Eviction Hearings	No	No
-Civilian Civil and Criminal Matters	No	No
-Federal Employees	No	No
-Legal Assistance conflicts	No	Yes
-Requests for legal advice	NA	No

Note 1: Formation of attorney-client relationships and representation is authorized only after the request for legal service has been received and assignment has been made by SDC.

Note 2: Prisoners will be informed representation is limited only to pretrial confinement proceedings before charges are preferred R.C.M. 305(f) of reference (c).

Note 3: Clients will be informed scope of services is limited to consultation on authorized matters only.

Note 4: Defense counsel will not be assigned to assist Marines, officer or enlisted, in preparing or drafting petitions. Once the Marine has drafted the petition, defense counsel may be consulted to review the petition prior to submission.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM

919 THIRD AVENUE
NEW YORK 10022-3897
—
(212) 735-3000
FAX: (212) 735-2000

BOSTON
CHICAGO
HOUSTON
LOS ANGELES
NEWARK
SAN FRANCISCO
WASHINGTON, D.C.
WILMINGTON

—
BEIJING
BRUSSELS
BUDAPEST
FRANKFURT
HONG KONG
LONDON
MOSCOW
PARIS
PRAGUE
SYDNEY
TOKYO
TORONTO

August 21, 1995

The Honorable Abner J. Mikva
Counsel to the President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. Mikva:

One of the issues discussed at your meeting in June with representatives of the Servicemembers Legal Defense Network was the military's policy of denying assistance of counsel to military suspects prior to their being charged. Enclosed is a letter that describes this policy and its unconstitutional effects in greater detail.

In essence, several branches of the military have adopted an official policy of denying assistance of counsel to criminal suspects prior to and during custodial interrogation. This policy appears to be a blatant violation of the Supreme Court's Miranda decision as well as a fundamental unfairness in the system. In addition, the policy appears to raise an untenable ethical dilemma for defense counsel in that they are permitted to "consult" with, but not represent, or even enter into, an attorney-client relationship with the suspect.

We became aware of this issue in the context of an actual court-martial in Okinawa, which will shortly go up on appeal. The issues presented will be heard in the courts, but we believe these issues could be better dealt with in a systemic way at the administrative level.

The particular case in which the issue arose occurred in the context of an investigation into the sexual orientation of a Marine, but this issue has no

The Honorable Abner J. Mikva
August 21, 1995
Page 2

less meaning for all servicemembers. We do not believe there are any political aspects to this issue.

We respectfully request that an attorney in your office coordinate a review of this issue with lawyers from the Justice Department and the Department of Defense.

We have discussed this issue at length with other firms and lawyers active in the military area, a number of whom will send supporting letters separately.

Should you or your assistants wish to discuss this issue, please telephone me (619) 756-3899, Tony Clark (302) 651-3080 or Herbert Mondros (302) 651-3159.

Very truly yours,

Jonathan M. Bowie

Jonathan M. Bowie
Skadden, Arps, Slate, Meagher & Flom

cc w/ enclosures:

Judith Miller, General Counsel, Department of Defense
David W. Ogden, Associate Deputy Attorney General,
Department of Justice
Marsha Scott, Deputy Assistant to the President for
Political Affairs

SKADDEN, ARPS, SLATE, MEAGHER & FLOM

919 THIRD AVENUE
NEW YORK 10022-3897
—
(212) 735-3000
FAX: (212) 735-2000

BOSTON
CHICAGO
HOUSTON
LOS ANGELES
NEWARK
SAN FRANCISCO
WASHINGTON, D.C.
WILMINGTON
—
BEIJING
BRUSSELS
BUDAPEST
FRANKFURT
HONG KONG
LONDON
MOSCOW
PARIS
PRAGUE
SYDNEY
TOKYO
TORONTO

August 21, 1995

The Honorable Abner J. Mikva
Counsel to the President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Re: Official Military Policy
Of Denying Criminal Suspects
Their Right To Counsel

Dear Mr. Mikva:

As a follow-up to your meeting in June with the directors of the Servicemembers Legal Defense Network, we are writing to apprise you of an official policy of the United States Marine Corps which we believe conflicts with the requirements of the Fifth Amendment and Miranda and results in the widespread denial of the right to counsel to Marines in Okinawa who are suspects in criminal investigations. Similar policies are in effect elsewhere in the Marine Corps and in other branches of the service.

We request that your office designate officials in each of the Justice Department and the Department of Defense to examine and respond to this issue.

The Policy is contained in Legal Service Support Section ("LSSS") Memorandum 2-93 issued by the Officer in Charge of LSSS, 3rd Force Service Support Group, FMPAC on August 24, 1993 to all LSSS offices and Judge Advocates on Okinawa (the "Memorandum"). A copy of the Memorandum is enclosed herewith. The Memorandum is intended to promulgate policies and procedures for, among other things, the provision of advice by defense counsel. Memorandum, § 1. In pertinent part, the Memorandum instructs Senior Defense Counsel ("SDC") as to the circumstances in which defense counsel may be assigned to represent a Marine who is under criminal investigation. Section 5 of the Memorandum provides:

The Honorable Abner J. Mikva
August 21, 1995
Page 2

Counsel should normally be detailed:

- a. As soon as practicable after preferral of charges against the accused....
- b. Within 10 days after an accused is placed in pretrial confinement, regardless of whether or not charges are preferred or whether the accused has been released from pretrial confinement by the initial review officer.

Memorandum, § 5. Additionally, section 7 of the Memorandum states:

Reference (c) [JAGINST 5803.1] provides that judge advocates will not establish an attorney-client relationship with an individual unless detailed, assigned, or otherwise authorized to represent that individual by competent authority. Accordingly, defense counsel should not enter into attorney-client relationships [with criminal suspects] unless specifically detailed or assigned by the SDC in accordance with this memorandum or specifically authorized to do so by the OIC, LSSS.

Memorandum, § 7.

The effect of these provisions is to prohibit defense counsel from representing Marines who are subjected to custodial interrogation by military investigative authorities unless one of the limited circumstances under section 5 applies, or the OIC, LSSS authorizes assignment of counsel in a specific case.

The consequence of the policy is to effectively preclude Marines on Okinawa who are subjected to custodial interrogation by military criminal investigators from obtaining the advice of counsel until after they have been charged. It is here that the Memorandum -- and the policy it embodies -- conflicts with the Fifth Amendment to the United States Constitution and the cases interpreting it. Specifically, Miranda v. Arizona, 384

The Honorable Abner J. Mikva
August 21, 1995
Page 3

U.S. 436 (1966), requires that every criminal suspect who is subjected to custodial interrogation by law enforcement agents be advised of the right to be represented by counsel, appointed, if necessary, and to have that counsel present during interrogation. This right applies both before and after formal charges are lodged, see Patterson v. Illinois, 487 U.S. 285, 294 (1988), and is fully applicable to servicemembers subject to military criminal investigations. United States v. Tempia, 37 C.M.R. 249 (1967).

Marine Corps criminal investigators on Okinawa purport to comply with Miranda and Tempia by administering the Miranda warnings and having suspects read and sign the Navy's standard Military Suspect's Acknowledgment and Waiver of Rights Form before commencing interrogations. That form states, in pertinent part:

I have ... been advised that:

- (3) I have the right to consult with a lawyer prior to any questioning. This lawyer may be a civilian lawyer retained by me at no cost to the United States, a military lawyer appointed to act as my counsel at no cost to me or both;
- (4) I have the right to have my retained civilian lawyer and/or appointed military lawyer present during this interview.

OPNAV 5527/3 (12-82).

These warnings do not satisfy the mandates of Miranda and Tempia, however, because the policy set forth in the Memorandum effectively precludes Marines subjected to custodial interrogation from consulting in any meaningful way with a military attorney. The additional fact, that there are no non-military American lawyers practicing criminal law on the island of Okinawa, obviously prevents Marines from retaining such a lawyer prior to or during questioning. At the same time, the availability of retainable civilian counsel would not remedy the policy's unconstitutional restraints on the appointment of military counsel.

The Honorable Abner J. Mikva
August 21, 1995
Page 4

In short, the effect of the policy is to render the above-cited Miranda warnings untruthful and deceptive. Under Miranda and Tempia, Marines under custodial interrogation have the right to be represented by an attorney prior to and during questioning. Under the policy set forth in the Memorandum, they do not.

In their attempt to sidestep the unconstitutionality of the policy, military law enforcement authorities have contended that, in situations in which the suspect has confessed after signing the Acknowledgment of Rights and Waiver Form, there is no illegal denial of counsel since the suspect has "waived" that right. The flaw in this argument is clear: While Miranda recognizes that suspects might waive their right to counsel, for such a waiver to be effective, it must be knowing and voluntary. 384 U.S. at 444. No such waiver is possible, however, where the statement of "rights" is false due to an official policy which denies counsel.

The impact of the policy is perhaps best depicted in the recent testimony of the Senior Defense Counsel on Okinawa. The SDC admitted that, notwithstanding the statement of rights administered to Marine Corps suspects prior to custodial interrogation, the military, under the auspices of the Memorandum, routinely denies such suspects appointed counsel prior to and during interrogations. As the SDC also testified, the results of this official policy are astounding: During a recent eight-month period, military suspects made incriminating statements to criminal investigators in 90% of the cases in which formal charges were ultimately preferred. In 95% of those cases, the military suspects eventually entered guilty pleas. Thus, in practice, the policy ensures that a suspect will not be provided with counsel until after he or she has made an incriminating statement. While the policy may be explained by a desire for prosecutorial efficiency, this affords no excuse for wholesale constitutional violations.

It is unthinkable that Marines suspected of crimes on Okinawa cannot obtain representation by defense counsel until after they are charged or have languished in the brig for up to 10 days, regardless of whether charges have been preferred. See Memorandum, § 7(a) &

The Honorable Abner J. Mikva
August 21, 1995
Page 5

(b). Many Marines on Okinawa are young enlisted personnel, unsophisticated in legal matters. They serve in a closed community, thousands of miles from home and without the support of family, friends and counsellors. In the military context, where the refusal to obey a lawful order is itself grounds for criminal charges, a suspect who has been ordered to appear before criminal investigators may well believe that, notwithstanding the Miranda warnings, he has been ordered to make a statement in response to investigators' inquiries. See Tempia, 37 C.M.R. at 256.

While the most serious impact of the Memorandum is upon the constitutional rights of Marine suspects, the policy also leaves Judge Advocates assigned to defense counsel details with an unacceptable dilemma. This dilemma arises from the interpretation of the policy that would permit defense counsel to consult with a suspect prior to the preferral of charges, but without forming an attorney-client relationship. See Memorandum, §§ 5, 7; Enclosure 2 to the Memorandum. Such "consultation" would clearly require defense counsel to advise the suspect that, there is no attorney-client relationship between them, and that therefore, the suspect should not discuss any aspect of the case with counsel. Worse, absent an attorney-client relationship, a consulting attorney may be compelled to testify as to any admissions made by the suspect during the consultation. In this situation, the attorney would be forced to violate his sworn duty as a lawyer in order to uphold his sworn duty as an officer. In this context it is doubtful whether any meaningful advice could be conveyed during a consultation other than a reiteration of the Miranda rights.

The glaring problems presented by the policy set forth in the Memorandum constitute a gross violation of servicemembers' constitutional rights and a fundamental injustice. Moreover, the existence of such a policy threatens to undermine the validity of hundreds, perhaps thousands, of criminal convictions where incriminating statements made by the accused servicemembers during custodial interrogations have been admitted into evidence or used to obtain guilty pleas.

The Honorable Abner J. Mikva
August 21, 1995
Page 6

We respectfully suggest that this serious situation warrants further investigation and intervention to (i) eliminate all offending denial-of-counsel policies wherever they may exist, and (ii) provide explicit guidance to the services on the proper implementation of military suspect's Fifth Amendment rights.

Should you or your assistants wish to discuss this issue, please telephone me (619) 756-3899, Tony Clark (302) 651-3080 or Herbert Mondros (302) 651-3159.

Respectfully,

Jonathan M. Bowie

Jonathan M. Bowie
Skadden, Arps, Slate, Meagher & Flom



UNITED STATES MARINE CORPS
LEGAL SERVICE SUPPORT SECTION
3D FORCE SERVICE SUPPORT GROUP, FMFPAC
UNIT 38477
FPO AP 96604-6477

5800
17:LAO
24 Aug 93

LEGAL SERVICE SUPPORT SECTION POLICY MEMORANDUM 2-93

From: Officer in Charge, Legal Service Support Section

Subj: DETAILING COUNSEL, REQUESTS FOR INDIVIDUAL MILITARY COUNSEL (IMC), DETAILING COUNSEL FOR RESPONDENT FOR ADMINISTRATIVE DISCHARGE BOARDS, AND PROVIDING LEGAL ADVICE BY DEFENSE COUNSEL

Ref: (a) JAGMAN
(b) MARCORSEPMAN
(c) JAGINST 5803.1

Encl: (1) Request for IMC format
(2) Services provided by Defense Counsel

1. PURPOSE. To promulgate policies and procedures for the detailing of trial and defense counsel for courts-martial, acting on requests for IMC, assigning counsel to represent respondents before administrative discharge board proceedings, and providing legal advice by defense counsel per the references.

2. CANCELLATION. Officer in Charge, Legal Service Support Section, memorandum 5800 LSSS:A.01 of 15 February 1991.

3. BACKGROUND. Section 0130b(1) of reference (a) provides authority for the Officer in Charge, Legal Service Support Section (OIC, LSSS), to detail trial and defense counsel for courts-martial conducted by LSSS personnel.

4. DELEGATION OF AUTHORITY.

a. Trial Counsel. Per section 0130b(1) of reference (a), the Officers in Charge of each Legal Service Support Team (LSST), are delegated the authority to detail trial counsel in courts-martial tried by that LSST.

b. Defense Counsel. Per section 0130b(1) of reference (a), the Senior Defense Counsel (SDC) is delegated the authority to detail defense counsel in courts-martial and other proceedings where defense counsel are required to be detailed. Counsel will not be detailed to summary courts-martial.

5. DETAILING DEFENSE COUNSEL. The SDC will detail defense counsel to accused/respondents after consideration of the accused's assigned unit, complexity of the case, possible conflicts of interest, prior establishment of an attorney-client relationship or other factors deemed appropriate to the SDC. Counsel should normally be detailed:

Subj: DETAILING COUNSEL, REQUESTS FOR INDIVIDUAL MILITARY COUNSEL (IMC), DETAILING COUNSEL FOR RESPONDENT FOR ADMINISTRATIVE DISCHARGE BOARDS, AND PROVIDING LEGAL ADVICE BY DEFENSE COUNSEL

a. As soon as practicable after preferral of charges against an accused. The SDC should also be given the pretrial package from the trial counsel at the same time.

b. Within 10 days after an accused is placed in pretrial confinement, regardless of whether or not charges are preferred or whether the accused has been released from pretrial confinement by the initial review officer;

c. After a respondent has exercised his right to have the case presented before an administrative discharge board and receipt of the administrative discharge package.

6. REQUESTS FOR INDIVIDUAL MILITARY COUNSEL. Requests for Individual Military Counsel (IMC) will be submitted in writing by the accused or the detailed defense counsel utilizing the format of enclosure (1). Action on all IMC requests will be made in accordance with section 0131 of reference (a).

7. DEFENSE COUNSEL PROVIDING LEGAL ADVICE. Reference (c) provides that judge advocates will not establish an attorney-client relationship with an individual unless detailed, assigned, or otherwise authorized to represent that individual by competent authority. Accordingly, defense counsel should not enter into attorney-client relationships unless specifically detailed or assigned by the SDC in accordance with this memorandum or specifically authorized to do so by the OIC, LSST. Other than in cases of regularly scheduled counseling sessions (e.g. providing legal advice on nonjudicial punishment, involuntary administrative discharges or Article 31, Uniform Code of Military Justice counseling), defense counsel will provide legal advice not requiring an attorney-client relationship to individuals only when authorized to do so at the request of the individual's unit or other competent authority and with approval of either the SDC, OIC, LSST or OIC, LSST. Enclosure (2) provides information with regard to advice and assistance normally provided by defense counsel.

8. ACTION.

a. Team OIC's. Ensure that the pretrial package is provided to the SDC and that trial counsel are detailed to courts-martial.

b. Military Justice Officer/AOIC, LSST. Ensure that trial counsel are appointed as recorders for administrative discharge boards as soon as practicable after receipt of the board package from the Administrative Law Officer.

Subj: DETAILING COUNSEL, REQUESTS FOR INDIVIDUAL MILITARY COUNSEL (IMC), DETAILING COUNSEL FOR RESPONDENT FOR ADMINISTRATIVE DISCHARGE BOARDS, AND PROVIDING LEGAL ADVICE BY DEFENSE COUNSEL

c. Administrative Law Officer. Ensure that copies of all administrative discharge packages that require a board are provided to the SDC and Military Justice Officer.

d. SDC.

(1) Detail defense counsel, counsel for the respondent, and process requests for IMC according to the policy established herein.

(2) Ensure that the necessary counseling required by the policies established herein is accomplished.

(3) Ensure that legal advice provided by defense counsel is accomplished per the policies established herein and as provided in enclosure (2).


W. F. WARRINER

DISTRIBUTION:

CO, HqSvcBn, 3d FSSG

RDC

SJA, III MEF/3dMarDiv

SJA, 1stMAW

SJA, 3d FSSG

SJA, MCB CamBut

OIC, LSST Hansen

OIC, LSST Foster

OIC, LSST Kinser

~~SDC~~

All judge advocates of the LSSS
AdminLawO

5810
17:SDC

(date)

From: (Accused)
To: (Convening Authority)
Via: (Trial Counsel)

Subj: REQUEST FOR INDIVIDUAL MILITARY COUNSEL

Ref: (a) MCM, 1984, R.C.M. 506(b)
(b) JAGMAN 0131a

1. In accordance with references (a) and (b), I hereby request that _____ be appointed my individual military counsel for my pending _____ court-martial/article 32 pretrial investigation. I do/do not request that my detailed defense counsel remain on the case.
2. This request is submitted in accordance with the advice I received concerning my rights to counsel as explained to me by detailed defense counsel, _____.
3. I have a/have no prior attorney-client relationship with the requested attorney.
4. Trial is presently scheduled for _____.
5. The charge(s) are:

6. Special qualifications of requested counsel, if any, that are relevant to particular case _____.
7. If this request is denied, it is requested that I be informed of the reasons for denial.

(SIGNATURE OF ACCUSED)

Copy to:
Trial Counsel

SERVICES PROVIDED BY DEFENSE COUNSEL

<u>FUNCTION</u>	<u>REPRESENTATION</u>	<u>CONSULTATION ONLY</u>	<u>SPECIAL INSTRUCTIONS</u>
-GCM	Yes	NA	Note 1
-Art 32 Inves	Yes	NA	Note 1
-SPCM	Yes	NA	Note 1
-SCM	No	Yes	Note 3
-Pretrial Cnft	Yes	NA	Note 2
-Advice prior to NJP	No	Yes	See JAG- MAN 0109(a)
-NJP Personal Rep	No	No	
-Interrogation pursuant to MRE 305	No	Yes	Note 3 limitation unless counsel has been assigned to represent the individ- ual at a SPCM or GCM
-NC&PB Documents	No	Yes	
-Polygraph Exam	No	Yes	Note 3 limitation unless coun- sel has been assigned to represent the individual at a SPCM or GCM
-Vacation Proceedings	Yes	NA	
-AdminDischg Advice	No	Yes	Note 3
-AdminDisch Bd Rep	Yes	NA	Note 1
-Board of Inquiry	Yes	N/A	Note 1
-Art 138, UCMJ complaints	No	No	
-Request Mast	No	No	
-Turnover to civilian authorities	No	No	
-Admin determinations regarding loss/damage/ destruction of Govt property	No	Yes	Note 3 See MCO P4400.150

-Field Flt Perf Bd	No	No	
-BCNR/BCNR/DisReviewBd			
petition	No	Yes	Note 4
-Special Selection Bds	No	No	
-Medical Bd	No	Yes	
-Admin Reduction Bd	No	Yes	Note 3

-Traffic Court	No	No
-Eviction Hearings	No	No
-Civilian Civil and		
Criminal Matters	No	No
-Federal Employees	No	No
-Legal Assistance		
conflicts	No	Yes
-Requests for legal		
advice	NA	No

Note 1: Formation of attorney-client relationships and representation is authorized only after the request for legal service has been received and assignment has been made by SDC.

Note 2: Prisoners will be informed representation is limited only to pretrial confinement proceedings before charges are preferred R.C.M. 305(f) of reference (c).

Note 3: Clients will be informed scope of services is limited to consultation on authorized matters only.

Note 4: Defense counsel will not be assigned to assist Marines, officer or enlisted, in preparing or drafting petitions. Once the Marine has drafted the petition, defense counsel may be consulted to review the petition prior to submission.

COVINGTON & BURLING

1201 PENNSYLVANIA AVENUE, N.W.

P.O. BOX 7566

WASHINGTON, D.C. 20044-7566

(202) 662-6000

TELEFAX: (202) 662-6291

TELEX: 89-593 (COVLING WSH)

CABLE: COVLING

LECONFIELD HOUSE

CURZON STREET

LONDON W1Y 8AS

ENGLAND

TELEPHONE: 071-495-5655

TELEFAX: 071-495-3101

BRUSSELS CORRESPONDENT OFFICE

44 AVENUE DES ARTS

BRUSSELS 1040 BELGIUM

TELEPHONE 32-2-512-9890

TELEFAX 32-2-502-1598

DAVID B. ISBELL

DIRECT DIAL NUMBER

(202) 662-5518

August 25, 1995

The Honorable Abner J. Mikva
Counsel to the President
of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. Mikva:

We understand that you have received, or will shortly receive, a letter from the law firm of Skadden, Arps, Slate, Meagher & Flom, calling attention to a practice of the Marine Corps on Okinawa, and apparently of the Marine Corps elsewhere and of the other services as well, with respect to denial of counsel to servicemembers who are subjected to custodial interrogation. The circumstances described in the Skadden Arps letter would appear to involve a serious denial of fundamental constitutionally protected rights, and a serious breach of the military's obligation to its servicemembers. We join, therefore, in the recommendation that you initiate appropriate inquiry into the matter.

Respectfully submitted,



David B. Isbell



John Vanderstar

IN THE
SUPREME COURT OF THE UNITED STATES 94-5185 C J EDWARDS IN U S
IN UNITED STATES COURT APPEALS DISTRICT COLUMBIA CIRCUIT

FILED 92-8028
UNITED STATES COURT APPEALS FIRST CIRCUIT BOSTON MASS
CA 95-7177 EN BANC U S COURT APPEALS THIRD CIRCUIT

CA NINTH CIR 92-80210 MAY 14 (1995) CA FIFTH CIR CIV 92-3133

USA -EX -BART VETTER G MOORE AT
US-PRISON-ALLENWOOD PA
VERSUS

ESQ. MS RENO US ATTORNEY GENERAL
ET AL U S DEPT: OF JUSTICE ET AL
ET AL MRS HAWK DIRECTOR FEDERAL
BUREAU OF PRISONS ET AL

GOVERNMENT OF THE UNITED STATES ET AL)
MR HOLLAND WARDEN US PRISON ALLENWOOD)
PA, ET AL COMM OF MASSACHUSETTS ET AL)

) CA 94-5185 C JUDGE MR EDWARDS
) US COURT APP DIST COLUMBIA

) ALIAS BRIEF- IN RE DECOY INVEIGLED

) CROSS WRIT OF ERROR CORAM NOBIS

) PETITION FOR INJUNCTIVE HABEAS

) CORPUS-AND MANDAMUS- RELIEF

SEE PAGE (2) ATTACHED A 24 YEAR EXTORTION OF
ACCESS TO THE USDC DIST MASS:BY JUDICIAL DURESS
OF HABEAS CORPUS-US MAGISTRATE MR COHEN -
IN CITE 674 F. SUPP 57-58 (1987) J YOUNG IN MOORE V MASS

SEE PAGE (2) ATTACHED
NO ACCESS IS ALLOWED TO DISTRICT COURT) REFUSED TO DOCKET TRANSFERRED
US FIRST CIRCUIT HABEAS CORPUS AND STILL BAR ENJOIN ME FROM COURT

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-8022

VETTER MOORE

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

ORDER OF COURT

Entered: April 6, 1994

Upon examination of petitioner's document praying for relief
under 22 U.S.C. 2255, the same is hereby transferred to the United
States District Court for the District of Massachusetts.

2

SUPREME COURT OF THE UNITED STATES 94-5185 C J EDWARDS IN U S

IN UNITED STATES COURT APPEALS DISTRICT COLUMBIA CIRCUIT

FILED 92-8028

UNITED STATES COURT APPEALS FIRST CIRCUIT BOSTON MASS

CA 95-7177 EN BANC U S COURT APPEALS THIRD CIRCUIT

CA NINTH CIR 92-80210

MAY 14 (1995)

CA FIFTH CIR CIV 92-3133

USA -EX -DARTE VETTER G MOORE AT

US-PRISON-ALLENWOOD PA

VERSUS

ESQ. MS RENO US ATTORNEY GENERAL

U S DEPT. OF JUSTICE ET AL

) CA 94-5185 C JUDGE MR EDWARDS
) US COURT APP DIST COLUMBIA
)
) ALIAS BRIEF- IN RE DECOY INVEIGLED
)
) CROSS WRIT OF ERROR CORAM NOBIS
)
 UNITED STATES DISTRICT COURT
 DISTRICT OF MASSACHUSETTS

Magistrate's Docket No.
 95-M0003-LPC

UNITED STATES OF AMERICA

v.

VETTER G. MOORE

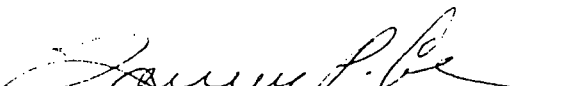
ORDER

March 29, 1995

COHEN, M.J.

The above-named Vetter G. Moore has mailed directly to this court what appears to be a motion to vacate under the provisions of 28 U.S.C. § 2255. This is the second such pleading directly mailed to this court by Moore in the past month - and Moore has filed this most recent petition under a docket number assigned by this court in rejecting his earlier pleading.

pleading is accordingly ordered returned to Moore, and Moore shall not mail any further pleadings directly to this court.


 UNITED STATES MAGISTRATE JUDGE

in the

SUPREME COURT OF THE UNITED STATES
MAY IOTH (1995) TERM

MR PRESIDENT OF USA MR CLINTON US SENATOR MR HELMS MR SPECTER MRS BRAUN

U. S.A. EX REL VETTER G MOORE PRO SE)
AT US PRISON ALLENWOOD PENNSYLVANIA)
VERSUS)

UNITED STATES OF AMERICA GOVERNMENT)
ET AL)
COMMONWEALTH OF MASSACHUSETTS ET AL)
RENO ATTORNEY GENERAL OF USA)
HASHBAGER ATTORNEY GENERAL OF MASS:)

CIV 95

COMPLAINT DECOY -INVEIGLE-KIDNAPPED

EMERGENCY INTERLOCUTORY (CROSS)

APPEAL FOR MANDAMUS INJUNCTION AND
EXPRESSELY FOR HABEAS

CORPUS AD SUBJICIENDUM RECIPIENDUM

✓ FILED 94-5185 U. S. CT: APP DIST COLUMBIA
✓ FILED 95-7177 US CT APPEAL THIRD CIR
✓ FILED 92-3133 US FIFTH CIR
✓ FILED 95-56494-92-80210 US CT APP NINTH CIR
✓ FILED 92-8028 US FIRST CIRCUIT

NOTE (VINDICTIVELY ENHANCED
UNDER 188SCA 922-924 (WHEN)
NO PRIOR CONVICTION-EXIST

28 USCA 1257-1251-2350 US SUPREME COURT
JURISDICTION FOR EMERGENCY REVIEW TO ISSUE

MOORE, Vetter
aka: Henry Brown
11/8/37, 11/8/38, 11/3/38

PRIOR RECORD:

PAGE: 4

DATE:

OFFENSE:

COURT:

DISPO:

11/27/90

Poss. to Distr.
Class B
(case of 10/19/90)

Boston
Municipal

2/22/91 remand
back

Poss. to Distr.
Class B
(case of 10/19/90)

Boston
Municipal

same

4/18/91

Poss. Class B

Dorchester
District

4/30/91 FJ

4/30/91

Poss. to Distr.
Class B
(case of 4/18/91)

Boston
Municipal

Warr.

6/11/91

Poss. Class B

Boston
District

Warr, 9/16/91
wdn, 9/26/91,
1/21/92

9/16/91

Traffick. Contr.
Subs.

Boston
District

9/26/91, dism
& indicted

Poss. Ammunition

Boston
District

same

(1) 18 USCA 1506 ALTERED COURT RECORD FALSIFIED INDICTMENT

BACKGROUND OF CASE

PRO SE (SOLE) COUNSLER OF RECORD PETITIONER VETTER G MOORE
IS A CITIZEN OF THE USA AN BOSTON MASSACHUSETTS PRESENTLY DETAINED
(WITHOUT BEING INDICTED) AT US PRISON ALLENWOOD PA:

(2) NATURE OF INDICTMENTLESS CONVICTION

IN THE U S GOVERNMENT SUCCESSIVE PROSECUTION AN CONVICTION

----- OFF-----

MASSACHUSETTS NOTORIOUS (FICTICIOUS (ONE DAY AFTER ARREST INDICTMENT)

(3) --- SPECIFICS-----

PETITIONER IN A WARRENTLESS ARREST ON SEPT 15TH (1991) AT BOSTON
(FICTICIOUSLY INDICTED ON SEPT 18TH (1991) IE SEPT 15 (1991) WAS ON
SUNDAY 18 USCA 1512-1513-1515 MISLEADING CONFINDMENT

thus A FAKE FICTICIOUS ONE DAY AFTER ARREST
FALSIFIED INDICTMENT BRAZENLY CONCOCTED (WITHIN)
(ONE DAY AFTER ACTUAL ARREST) IS KIDNAPPING PER SE

I 18 USCA 1201(a)-1512-1513

THE FEDERAL GOVERNMENT

VINDICTIVELY USED (THIS SAME EXACT) FALSIFIED MASSACHUSETTS INDICTMENT
TO INVEIGLE DECOY

PETITIONER AT FEDERAL COURT IN ITS SUCCESSIVE
PROSECUTION IN FEDEAL COURT SAME EVIDENCE USED
AT STATE COURT: USED MALICIOUS IN FEDERAL COURT

(6) VINDICTIVELY PROSECUTED IN FEDERAL COURT AS A JOHN DOE PERSON
IS DECOY INVEIGLE AN KIDNAPPING BY THE UNITED STATES

RELIEF REQUESTED

IN CIV 92-8028 US FIRST CIRCUIT
A HABEAS CORPUS TRANSFERRED IN AUG 24 (1992) BE ENFORCED BY MANDAMUS
IN 94-5185 US CHIEF CIR JUDGE MR EDWARDS CHIEF JUSTICE MR REHNQUIST USA
GRANK INJUNCTION MANDAMUS RELIEF: TO ENFORCE HABEAS CORPUS RELIEF
94-5185 AT U S COURT APPEAL DIST COLUMBIA CIR

VETTER G MOORE US PRISON
SERVICE BY PRE PAID CERTIFIED MAIL ALLENWOOD PA 18778
28 USCA 1746 I V G MOORE SWEAR I HAVE

BY PRE PAID CERTIFIED MAIL COPIES UPON

(1) US ATTORNEY MR STERN DIST MASS US ATTORNEY WASH D C

(2) US SOLICITOR MR DAY II-US ATTORNEY GENERAL MRS RENO

(3) USDC JUDGE MR YOUNG AN MAGISTRATE COHEN USDC DIST MASS BOSTON

PHOTOCOPY
PRESERVATION

RECEIVED

MAY 18 1995

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

1:--94-CIV_00489
2 CIV 94-

APRIL 14 (1994) TERM

IN CHAMBER D C JUDGE MR RAMBO CHIEF US ATTORNEY OFFICE AN F B I PA
VETTER G MOORE PETITIONER PRO SE 18 USC 1513(1)(2) DECOY, KIDNAPPED,
VERSUS
WARDEN US PRISON ALLENWOOD) IN RE DOCUMENTARY EVIDENCE ATTACHED
PENNSYLVANIA ET AL)

ET AL UNITED STATES OF AMERICA) ORIGINAL MOTION FOR WRIT OF HABEAS CORPUS
ET AL ATTORNEY GENERAL OF U.S.A) AND MANDAMUS RELIEF, IN WEDDING CASE
ET AL USDC JUDGES MIDDLE DIST PA) 483 F. 2D 1131-1137-CA 6TH (1973)- CITED AT
SECRETARY US TREASURY DEPT et al) 414 US 1157-39- L ED 2D 109-94- SCT 914 (197

CONVICTION OBTAINED BY PERJURY
USC 1001-1621 INTER ALIA

PETITIONER PRESENT (ON PAGE (3) EVIDENCE DOCUMENTATED FALSE ARREST
AND EXCLUSIVELY (ARGUMENT BY PRO SE COUNSEL) OF A FAKE ONE DAY AFTER ARREST
DICTMENT CONCOCTED: ARGUED VIGROUSLY

SPECIFICALLY PRO SE COUNSEL MADE THE A T F
FIRE ARM AGENT ADMIT HE (DID) NOT SIGN AFFIDAVIT)

MR. MOORE: Complete version. It has three more,

pages. I got 50 of them and I give them to you, so what you
saying?

Q Is that your affidavit there? Is that your signature?

Is that your signature?

A Yes, it is. PERJURY

Q Is that your signature there?

A No, it is not. PERJURY

Q Then how did I get two affidavits, one of them signed and
one is unsigned by you?

THE COURT: I don't know how the witness can answer
that, because he didn't give it to you, as I understand it.

MR. MOORE: Then someone sent it to me, but I don't
know who.

THE WITNESS: Your Honor, I --

THE COURT: Do you wish the affidavit marked into
evidence?

MR. MOORE: Yes, I do.

THE COURT: Where is what I understand to be an
entire copy? If you would show it to the witness, please, and
ask him if that is his affidavit?

Q Is that your affidavit unsigned? And one signed?

MR. MOORE: I want both of them entered into