INVOKE YOUR RIGHT TO REMAIN SILENT AFTER YOU CONFESS: SELF-REPORTING REGULATIONS AND POTENTIAL CONFLICTS WITH INTERNATIONAL LAW PROHIBITING COMPULSORY SELF-INCRIMINATION

Patrick Testa[*]

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[*]J.D. Candidate, University of Georgia School of Law, 2021. B.A. in International Affairs, University of Georgia, 2008.

I. INTRODUCTION

Protections against compulsory self-incrimination are prevalent in Western international and domestic law and norms.[1] Military servicemembers, like private citizens, are subject to those standards and protections that international and domestic law afford.[2] However, unlike in the case of private citizens, the United States government has administrative interests in knowing whether its servicemembers have been arrested or charged with a crime, including matters relating to personnel management and planning.[3] This governmental interest is the principal justification for promulgating regulations that compel servicemembers to report their own arrests and criminal charges.[4]

Due to the nature of the information that the government seeks, information that could also serve as evidence in a criminal investigation, the government's interest is inherently at odds with protections against self-incrimination.[5] Courts have recognized this tension and accounted for it by permitting self-reporting regulations on a limited basis.[6] However, United States military courts have held that for self-reporting regulations to survive scrutiny under self-incrimination protections, the regulations must be purely regulatory in nature, not punitive.[7]

This Note attempts to show that due to the challenges of properly applying military self-reporting regulations as they currently stand and the ambiguities within self-incrimination protections, these self-reporting regulations are ultimately used for punitive purposes and thus may run afoul of international and domestic self-incrimination standards.

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[1] *E.g.*, International Covenant on Civil and Political Rights, Part III, art. 14, ¶ 3, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Murray v. United Kingdom, 2007-V Eur. Ct. H.R. (1996), http://hudoc.echr.coe.int/eng?i=001-57980 (recognizing the privilege against self-incrimination under art. 6 of the European Convention on Human Rights) [hereinafter ECHR]; U.S. CONST. amend. V.

[2] *See* United States v. Serianne, 69 M.J. 8, 9 (C.A.A.F. 2010) (inferring that the self-incrimination rights under the Fifth Amendment to the U.S. Constitution apply to military members).

[3] United States v. Castillo, 74. M.J. 160, 168 (C.A.A.F. 2015) ("[T]he Navy has a legitimate administrative or regulatory interest in knowing whether sailors have been arrested by civilian authorities.").

[4] Serianne, 69 M.J. 8 at 9 (the regulatory exception applies "when the constitutional interests of the individual must be balanced with the public need and instructs that '[t]he Fifth Amendment is not violated when the Government is allowed "to gain access to items or information vested with . . . [a] public character.'"")

[5] *See, e.g., id.*

[6] *Id.*

[7] *Id.* ("The court concluded that the [regulation] was punitive rather than regulatory in nature, compelling an incriminatory testimonial communication . . . the court concluded that the Instruction could not be sustained as a regulatory exception.")

Before attending law school and writing this note, I served as an active duty officer in the United States Marine Corps for just over ten years. During my career in the Marines, I served as a pilot and legal officer, among other duties. While the hypothetical situation in this Note reflects my own military experience, the events in the hypothetical are fictitious. The opinions and conclusions I advance in this note are solely my own and do not necessarily reflect those of the Marine Corps or Navy.

A. The Hypothetical

It is 0715—7:15 AM in common parlance—on a Monday morning following a long holiday weekend. Lance Corporal Jones (Jones) waits outside the Sergeant Major's[8] office, visibly nervous. As I approach, he greets me with a sterile, "Good Morning, Sir," and continues to stare straight ahead.[9] I think nothing of it and proceed to my office, where I, a new pilot and junior officer, perform my non-flying duties as squadron legal officer. [10] The Sergeant Major arrives and beckons Jones into his office. The door shuts, and the Sergeant Major's noticeably angry voice can be heard through the walls. The door opens, Jones walks out, and the Sergeant Major informs me, as the legal officer, that Jones was arrested for driving under the influence of alcohol (DUI) while vacationing in another state.[11] Jones reported his DUI arrest to the Sergeant Major as required by applicable Navy regulations, primarily Chief of Naval Operations Instruction

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[8] A Sergeant Major is the most senior enlisted Marine in an organizational unit. *MOS 8999 Sergeant Major-First Sergeant*, MARINE CORPS COOL (last updated July 31, 2020), https://www.cool.navy.mil/usmc/enlisted/8999.htm. Generally, sergeants-major assist unit commanders in conducting disciplinary proceedings and investigations. *Id*.

[9] Military "customs and courtesies" require junior members to render "greetings of the day," among other things, when encountering members who are senior to them. *See generally Marine Corps Order 5060.20*, UNITED STATES MARINE CORPS (May 15, 2019), https://www.marines.mil/portals/1/Publications/MCO%205060.20_signed_EDD.pdf?ver=2019-06-05-103257-473 (providing a detailed description of standard Marine Corps customs, courtesies, ceremonies, and traditions). Failure to render appropriate customs and courtesies may result in prosecution under Article 92 of the Uniform Code of Military Justice (UCMJ). 10 U.S.C. § 892 (1956).

[10] A legal officer is a non-lawyer military officer who advises military commanders about legal considerations of military disciplinary proceedings and courts-martial under the UCMJ, among other things. *Naval Justice School Annual Course Catalog Fiscal Year 2020*, U.S. NAVY 32, https://www.jag.navy.mil/documents/Navy%202020%20Course%20Catalog.pdf (last visited Nov. 5, 2019). Legal officers in the Navy and Marine Corps receive approximately two weeks of formal military education and may perform their duties as a legal officer concurrently with their more traditional military duties, like being a pilot or logistician. *See id.* (inferring that legal officer training is available for military officers who have considerable experience in non-legal specialties and responsibilities that extend beyond legal affairs).

[11] DUI is punishable under Article 113, UCMJ. 10 U.S.C.A. § 913 (West 2019).

(OPNAVINST) 3120.32D.[12] The Sergeant Major assures me that after Jones made his initial statement, but before Jones told the Sergeant Major the details of his arrest, he read Jones his Article 31(b) rights.[13]

After hearing the news of Jones's DUI, the Commanding Officer—the squadron's highest-ranking officer and my boss—instructs me to draft charges against Jones for violating Article 113 of the Uniform Code of Military Justice (UCMJ), relying solely upon Jones's conversation with the Sergeant Major as evidence. Shortly after, Jones appears in a non-judicial punishment proceeding, where he is found guilty.[14] As punishment, the Commanding Officer reduces Jones's rank, deprives him of one-half his monthly salary for two months, and physically restricts Jones for thirty days.[15] Several pertinent questions present themselves: But for Jones reporting his DUI charge, would he have been punished under Article 113? Further, would Jones have been punished at all but for OPNAVINST 3120.32D, which required Jones to report his DUI arrest? What about Jones's right against self-incrimination?

B. Outline of Argument

By compelling servicemembers to self-report their civilian arrests and criminal charges, the United States military violates international law and norms that protect against compulsory self-incrimination, including the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR), and the Fifth Amendment of the U.S. Constitution. This Note will first discuss why the United States may be violating international standards regarding compulsory

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[12] *See* DEP'T OF THE NAVY, OFFICE OF THE CHIEF OF NAVAL OPERATIONS, OPNAVINST 3120.32D ¶ 5.1.6 (July 16, 2012), https://www.secnav.navy.mil/doni/Directives/03000%20Naval%20Operations%20and%20Readiness/03-100%20Naval%20Operations%20Support/3120.32D%20W%20CH-1.pdf, as amended by NAVADMIN 373/11 (8 Dec. 2011) [hereinafter OPNAVINST 3120.32D] ("Any person arrested or criminally charged by civil authorities will immediately advise their immediate commander of the fact that they were arrested or charged.").

[13] 10 U.S.C. § 831(b) (2018) ("No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.").

[14] *See id.* § 815 (authorizing military commanders to impose administrative punishment for minor offenses in lieu of trial by court-martial).

[15] *See id.* § 815(b)(2)(H) (defining sentencing limitations of non-judicial punishment). Restriction is a common punishment that is highly tailorable by a servicemember's commander and takes the form of an order from the commander to the servicemember. *See id.* § 815(b)(2)(H)(vi) (inferring that commanders may specify the limits and terms of restriction). For example, a restricted servicemember could be ordered to remain in uniform and on base at all times throughout the restriction period.

self-incrimination, including its own constitutional protections. Part II will discuss the origin of the self-reporting regulation, its evolution in response to caselaw, and its present state. Part III will then introduce applicable international law and standards and explain why domestic military law is applied to United States servicemembers in foreign states. Subsequently, Part IV will analyze the current state of the self-reporting regulation and whether or not it abides by international standards relating to compulsory self-incrimination. Part IV will also examine whether violations of international standards have any meaningful impact upon the United States military's commitment to the North Atlantic Treaty Organization (NATO) and other international organizations. Finally, Part V will conclude that self-reporting regulations, as they presently stand, threaten servicemembers' right against self-incrimination under domestic and international law, and such violations may obliquely conflict with the status of forces agreement between the United States and NATO.

II. BACKGROUND

The current form of the substantive law that creates and defines servicemembers' duty to self-report follows from (1) the promulgation of Navy regulations, (2) judicial response to those regulations, and (3) subsequent amendments of initial regulations in response to court rulings.[16] As this area of the law has evolved, servicemember self-incrimination protections embedded within the law have become considerably more robust, yet they do not afford servicemembers absolute immunity from prosecution.[17]

A. OPNAVINST 3120.32D

OPNAVINST 3120.32D is a comprehensive military order, promulgated by the Chief of Naval Operations, and internally titled "Standard Organization and Regulations of the U.S. Navy."[18] In a single paragraph, this order prescribes servicemembers' duty to self-report and self-incrimination protections surrounding that duty, consolidating nearly a decade of substantive law surrounding compulsory self-reporting.[19]

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[16] *See* discussion *infra* Section II.B. (describing the evolution of the substantive law surrounding the self-reporting requirement).

[17] *Id.* (citing in support the case of United States v. Castillo, 74 M.J. 160, 162 (C.A.A.F. 2015)).

[18] *See* generally OPNAVINST 3120.32D *supra* note 12 (illustrating the diverse topics covered by this regulation, ranging from sentry duty to sleeping arrangements, among other things).

[19] *See Castillo*, 74 M.J. at 162; *see also* discussion *infra* Section II.B. (describing the evolution of the substantive law surrounding the self-reporting requirement).

i. Duties and Justification

Paragraph 5.1.6 of the OPNAVINST 3120.32D, among other things, requires "[a]ny person arrested or criminally charged by civil authorities shall immediately advise their immediate commander of the fact that they were arrested or charged. The term arrest includes an arrest or detention, and the term charged includes the filing of criminal charges."[20] In the military, failure to follow a lawful order or regulation, including OPNAVINST 3120.32D, is punishable by law under Article 92, UCMJ.[21] Returning to our hypothetical, had Jones failed to report his DUI arrest, he could be tried at a court-martial for violating Article 92, UCMJ for failing to comply with OPNAVINST 3120.32D, a presumably lawful regulation.[22]

ii. Protections and Limitations

OPNAVINST 3120.32D does, however, provide some protections in that it limits the information self-reporting servicemembers are required to disclose to include only "the date of arrest or criminal charges, the arresting or charging authority, and the offense for which [the servicemember was] arrested or charged."[23] Additionally, OPNAVINST 3120.32D states:

> [n]o person is under a duty to disclose any of the underlying facts concerning the basis for their arrest or criminal charges . . . . Disclosure of arrest or criminal charges is not an admission of guilt and may not be used as such, nor is it intended to elicit an admission from the person self-reporting. No person subject to the UCMJ may question a person self-reporting an arrest or criminal charges regarding any aspect of the self-report, unless they first advise the person of their rights under UCMJ Article 31(b).[24]

On its face, OPNAVINST 3120.32D appears to protect servicemembers from self-incrimination by characterizing disclosure of arrest or criminal charges as "not an admission of guilt" that is not "intended to elicit an admission."[25] Moreover, the regulation appears to limit the substantive information obtained by commanders during a self-report, in turn, limiting the evidentiary value of the

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[20] OPNAVINST 3120.32D *supra* note 12, at ¶ 5.16.
[21] 10 U.S.C. § 892(1) (2018).
[22] *Id.*
[23] OPNAVINST 3120.32D *supra* note 12.
[24] *Id.*
[25] *Id.*

content of a self-report if it were permissible to use for punitive purposes.[26] Lastly, as a general limitation and possible implicit justification for flirting with compulsory self-incrimination, OPNAVINST 3120.32D's stated purpose is "to monitor and maintain the personnel readiness, welfare, safety, and deployability of the force."[27]

B. Evolution of the Law Regarding Self-Report Regulations

The constitutionality of the self-reporting regulations at issue in this note were first addressed by the U.S. Court of Appeals for the Armed Forces (C.A.A.F.) in *United States v. Serianne*, 69 M.J. 8 (C.A.A.F. 2010).[28] Though the Navy modified its self-reporting regulation in response to *Serianne*, the regulation was again challenged in *Castillo*.[29]

i. United States v. Serianne*, 69 M.J. 8 (C.A.A.F. 2010)*

In *Serianne*, C.A.A.F.[30] addressed whether the appellee, a sailor who failed to report an arrest for driving under the influence of alcohol as required by a precursor of OPNAVINST 3120.32D, OPNAVINST 5350.4C, could be punished under Article 92, UCMJ for failure to self-report.[31] At the time of appellee's charged DUI offense, paragraph 8.n. of OPNAVINST 5350.4C stated:

> [m]embers arrested for an alcohol-related offense under civil authority, which if punished under the UCMJ would result in a punishment of confinement for 1 year or more, or a punitive discharge or dismissal from the Service (e.g., DUI/DWI), shall promptly notify their [Commanding Officer]. Failure to do so may constitute an offense punishable under Article 92, UCMJ.[32]

While the court did not address the constitutionality of OPNAVINST 5350.4C, the court did address what it ultimately determined to be a conflict

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[26] *See id.* (limiting the substantive content required to be disclosed in self-reports to "the date of arrest or criminal charges, the arresting or charging authority, and the offense for which [the servicemember was] arrested/charged").

[27] *Id.*

[28] United States v. Serianne, 69 M.J. 8 (C.A.A.F. 2010).

[29] *See* discussion *infra* Sections II.B.2–3.

[30] The Court of Appeals for the Armed Forces (C.A.A.F.) "is the military's highest judicial authority before the Supreme Court." Randall Leonard & Joseph Toth, *Failure to Report: The Right Against Self-Incrimination and the Navy's Treatment of Civilian Arrests After United States v. Serianne*, 213 MIL. L. REV. 1, 17 (2012).

[31] *Serianne*, 69 M.J. at 10. In *Serianne*, "OPNAVINST 5350.4C, Drug and Alcohol Abuse Prevention and Control (Dec. 8, 2005), [w]as the source of the self-reporting duty at issue." *Id*. at 8.

[32] *Id.* at 8–9.

between OPNAVINST 5350.4C and Navy regulations of superior regulatory authority which provided protections against self-incrimination.[33] However, the C.A.A.F. did not vacate or reverse the Navy-Marine Court of Criminal Appeals (NMCCA)[34] decision; rather, it chose to avoid addressing the constitutionality of OPNAVINST 5350.4C altogether.[35]

ii. Amended Self-Report Regulations

In response to *Serianne*, the Navy amended its regulations.[36] In July 2010, the Secretary of the Navy released an All Navy (ALNAV) administrative message (ALNAV 049/10) "disseminated throughout the Navy with the subject line 'Change to U.S. Navy Regulations in light of [*United States. v. Serianne*].'"[37] ALNAV 049/10 added new language to the Navy regulations to resolve conflict addressed by C.A.A.F. in *Serianne*: the "Secretary of the Navy, Chief of Naval Operations, and Commandant of the Marine Corps may promulgate regulations or instructions that require servicemembers to report civilian arrests or filing of criminal charges if those regulations or instructions serve a regulatory or administrative purpose."[38]

In December 2011, the Chief of Naval Operations released an additional administrative message (NAVADMIN 373/11), amending OPNAVINST 3120.32C to include the following:

> Any person arrested or criminally charged by civil authorities shall immediately advise their immediate commander of the fact that they were arrested or charged. The term arrest includes an arrest or detention, and the term charged includes the filing of criminal charges. Persons are only required to disclose the date of arrest/criminal charges, the arresting/charging authority, and the offense for which they were arrested/charged. No person is under a duty to disclose any of the underlying facts concerning the basis for their arrest or criminal charges. Disclosure is

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[33] *Id.* at 10 ("In determining whether to decide the present case on constitutional or nonconstitutional grounds, we may take into account the nonconstitutional regulatory matter discussed by the court below—the relationship between the self-reporting requirement in [OPNAVINST 5350.4C] and the exclusion from self-reporting provided in Article 1137 of the United States Navy Regulations.").

[34] NMCCA is the military appellate court immediately inferior to C.A.A.F. in authority. In *Serianne*, C.A.A.F. is reviewing NMCCA's decision. *Id.*

[35] *Id*.; Leonard & Toth, *supra* note 30, at 19 ("The CAAF did not address the NMCCA's constitutional holding. Instead, it chose to avoid the constitutional question, citing the longstanding Avoidance Doctrine . . . .").

[36] United States v. Castillo, 74 M.J. 160, 162 (C.A.A.F. 2015).

[37] *Id.*

[38] *Id.*

> required to monitor and maintain the personnel readiness, welfare, safety, and deployability of the force. Disclosure of arrest/criminal charges is not an admission of guilt and may not be used as such, nor is it intended to elicit an admission from the person self-reporting. No person subject to the Uniform Code of Military Justice (UCMJ) may question a person self-reporting an arrest/criminal charges regarding any aspect of the self-report, unless they first advise the person of their rights under UCMJ Article 31(b).[39]

In addition to amending OPNAVINST 3120.32C, NAVADMIN 373/11 provided substantive and procedural guidance to military commanders relating to self-reports and disciplinary action.[40] This guidance addressed two categories of disciplinary action: (1) disciplinary action for failure to self-report an arrest or criminal charge and (2) disciplinary action for offenses underlying the self-report.[41] Of particular note, NAVADMIN 373/11 imposed additional protections for self-reporting servicemembers, directing the following:

> Commanders may impose disciplinary action for failure to self-report an arrest or criminal charges. However, when a service member does self-report pursuant to a valid self-reporting requirement, commanders will not impose disciplinary action for the underlying offense *unless such disciplinary action is based solely on evidence derived independently of the self-report*. Commanders should consult a judge advocate prior to imposing disciplinary action.[42]

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[39] U.S. NAVY, NAVADMIN 373/11, CHANGE TO U.S. NAVY REGULATIONS IN LIGHT OF U.S. V. SERIANNE ¶ 4(C) (2011), https://www.public.navy.mil/bupers-npc/reference/messages/Documents2/NAV2011/NAV11373.txt.

[40] *Id.* ¶ 6.

[41] *Id.*

[42] *Id*. ¶ 6(B) (emphasis added). NAVADMIN 373/11's recommendation that commanders consult a judge advocate, a military lawyer, is noteworthy in that it highlights the elevated complexity of imposing disciplinary action upon self-reporting servicemembers. *Cf.* 10 U.S.C. § 815 (2019) (empowering military commanders to impose nonjudicial punishment without convening a court-martial or consulting a judge advocate); DEPARTMENT OF DEFENSE, MANUAL FOR COURTS-MARTIAL pt. 5, ¶ 2 (2019) (stating no express requirement that a commander consult a judge advocate prior to initiating nonjudicial punishment proceedings); *USN/USMC Commander's Quick Reference Legal Handbook* 1, 37 (June 2020), https://www.jag.navy.mil/documents/NJS/Quickman.pdf (inferring that absent a regulation like NAVADMIN 373/11, a commander has no default requirement to consult a judge advocate prior to imposing nonjudicial punishment) ("A [commander] has broad discretion over which offenses should be handled under the provisions of [10 U.S.C. § 815] . . . . A unit's Staff Judge Advocate can assist in this determination.").

These additional self-report protections were not incorporated with the other amendments to OPNAVINST 3120.32C.[43]

iii. United States v. Castillo*, 74 M.J. 160 (C.A.A.F. 2015)*

In *United States v. Castillo*, 74 M.J. 160 (C.A.A.F. 2015), the court was again faced with a case involving a sailor who failed to report her arrest for drunk driving and was therefore accused of violating Article 92 of the UCMJ.[44] In *Castillo*, unlike *Serianne*, the post-*Serianne* amendments to Navy regulations and administrative guidance were in effect.[45] In that case, the court addressed "[w]hether the lower court improperly determined that [the] duty to self-report one's own criminal arrests found in office of the Chief of Naval Operations Instruction 3120.32C was valid despite the instruction's obvious conflict with superior authority and the Fifth Amendment."[46] After determining that the self-report regulation did not conflict with superior regulatory authority, the court turned to the question involving the Fifth Amendment privilege against self-incrimination.[47] The court asked two questions: (1) "whether the self-reporting regulation can be applied in a manner that upholds the Constitution," and (2) "whether it was so applied to Appellant."[48] The court declined to resolve "hypothetical situations designed to test the limits" of the regulation, limiting its inquiry to the application of OPNAVINST 3120.32C to the appellant.[49] After considering the regulation's safeguards against further questioning or prosecution, the court determined that the regulation did not "present[] a 'real and appreciable' hazard of self-incrimination, *where the regulation is in fact followed as drafted*."[50] Ultimately, the court held that OPNAVINST 3120.32C was "facially constitutional and authorized by U.S. Naval Regs., Article 1137."[51] In short, the court certified that the amendments to the regulation, resulting from *Serianne*, effectively cured the regulation's deficiencies.

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[43] U.S. NAVY, *supra* note 39 ¶ 1.

[44] United States v. Castillo, 74 M.J. 160, 161 (C.A.A.F. 2015).

[45] *Id*. at 162–63.

[46] *Id*. at 161.

[47] *Id*. at 165.

[48] *Id*. at 165–66.

[49] *Id*. at 166. (quoting Holder v. Humanitarian Law Project, 561 U.S. 1, 22 (2010)).

[50] *Castillo*, 74 M.J. at 166 (emphasis added) ("[A]lthough a reasonable argument exists that the compelled disclosure of an arrest by civilian authorities is testimonial and incriminating, the reporting requirement prohibits commanders from imposing disciplinary action on the basis of the underlying arrested offense, 'unless such disciplinary action is based solely on evidence derived independently of the self-report.'").

[51] *Id*. at 168.

C. Amplifying Regulations and Administrative Guidance

In addition to their initial issuance in NAVADMIN 373/11, the self-reporting protections to which the *Castillo* court referred were codified in the Navy's Judge Advocate General Instruction 5800.7F CH-2: Manual of the Judge Advocate General (JAGMAN).[52] Elaborating upon the substantive protections included in NAVADMIN 373/11, § 0108(c) of the JAGMAN further defines, among other things, what constitutes "evidence derived independently of the required self-report."[53] JAGMAN § 0108(c)(3) states:

> [i]ndependent evidence may not be derived from information received from the Service member through a required self-report. If the only reason the command knows about the arrest, charging, or conviction is the self-report, then the command does not have independent evidence *unless the [s]ervice member makes an incriminating statement after receiving notification of and waiving his or her Article 31 rights*.[54]

Section 0108 goes on to provide examples of independent evidence, but makes no further mention of incriminating statements made after Article 31 rights notification as independent evidence.[55] The italicized portion of JAGMAN § 0108(c)(3) above poses a critical question: if a servicemember is only being questioned as the result of her self-report, even if the servicemember waives her Article 31 rights and makes incriminating statements, would those statements constitute independent evidence? Though the JAGMAN is an inferior regulatory authority in comparison to OPNAVINST 3120.32D,[56] its relatively detailed explanations and concrete examples of the self-report process render it a valuable tool for military commanders and their legal teams in light of OPNAVINST 3120.32D ¶ 5.1.6's broad language.

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[52] U.S. NAVY, JAGINST 5800.7F CH-3, MANUAL OF THE JUDGE ADVOCATE GENERAL, § 0108(C) (2020), https://www.secnav.navy.mil/doni/SECNAV%20Manuals1/5800.7F%20CH-3.pdf [hereinafter *JAGMAN*]. The purpose of the JAGMAN is to "prescribe regulations implementing or supplementing certain provisions of the UCMJ or the [Manual for Courts-Martial]." *Id.* § 0101(a).

[53] *Id*. § 0108(c)(2).

[54] *Id*. § 0108(c)(3) (emphasis added).

[55] *Id*. ("Examples of independent evidence include: (a) News reports or social media; (b) Third-party reporting; (c) Unsolicited information conveyed by the arresting or charging authority; or (d) Bona fide command programs to screen for criminal information involving Service members (e.g., weekly screen of arrest records for names of command members).").

[56] The JAGMAN is promulgated by the Judge Advocate General of the Navy who is subordinate to the Chief of Naval Operations, the promulgator of OPNAVINST 3120.32D.

D. Applying the Self-Report Regulation: Decisions for Commanders and Service Members

In handling self-reports, military commanders and their legal teams[57] must consider the amalgam of legal authority[58] that has evolved since *Serianne*. Though OPNAVINST 3120.32D and the JAGMAN are intended to provide commanders with sufficient guidance for processing self-reports, it seems difficult to capture the nuanced judicial opinions within relatively short regulations. Though it may seem readily obvious that a commander should consult a judge advocate when facing complex legal issues, neither the text of OPNAVINST 3120.32D nor the JAGMAN requires commanders to consult a judge advocate when handling self-reporting cases.[59] Of the three authoritative documents in this paragraph, only NAVADMIN 373/11, a message nearly a decade old, requires commanders to consult a judge advocate prior to imposing disciplinary action in self-reporting cases.[60] Thus, it seems unlikely that a commander who is contemplating disciplinary proceedings in a self-reporting case will know she is required to consult with a judge advocate unless she or her staff is aware of NAVADMIN 373/11.

III. LAW

Unlike much of U.S. domestic law, domestic military law remains applicable in foreign states where the United States has a military presence,[61] often through a status of forces agreement (SOFA).[62] For instance, U.S. servicemembers

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[57] The sophistication of a commander's legal team varies based upon the commander's military rank and station. Practically speaking, this means that commanders, who are generally not judge advocates, may not have constant or immediate access to a military lawyer. *See generally* U.S. MARINE CORPS, MCRP 5-12D: ORGANIZATION OF MARINE CORPS FORCES 6-2 (1998), https://www.marines.mil/Portals/1/Publications/MCRP%205-12D%20Organization%20of%20Marine%20Corps%20Forces.pdf (highlighting the relative scarcity of military attorneys, known as "judge advocates," within the organizational structure of the Marine Corps).

[58] This amalgam consists of OPNAVINST3120.32D, its modifying administrative messages like ALNAV 049/10 and NAVADMIN 373/11, supplemental regulations like the JAGMAN, and caselaw.

[59] OPNAVINST 3120.32D, *supra* note 12; JAGMAN, *supra* note 52.

[60] NAVADMIN 373/11, *supra* note 39.

[61] *E.g.*, North Atlantic Treaty Organization Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, art. 7, Jun. 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S 67 ("The military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offences, including offences relating to its security, punishable by the law of the sending State, but not by the law of the receiving State.") [hereinafter *NATO SOFA*].

[62] R. CHUCK MASON, CONG. RSCH. SERV., RL7-5700, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED? 1 (2012) ("SOFAs provide for rights

serving in NATO countries may exclusively be under the jurisdiction of U.S. military law.[63] Further, in some cases where the host country and the United States exercise concurrent jurisdiction over an offense, the "military authorities of the [United States] shall have the primary right to exercise jurisdiction over a member of a force . . . ."[64] Therefore, in situations where a foreign country's laws would normally apply to civilian U.S. nationals, in the case of U.S. servicemembers, U.S. military law still applies—often exclusively. Section A will discuss two international agreements that bar compulsory self-incrimination to illustrate how OPNAVINST 3120.32D is problematic—beyond the applicability of U.S. law on foreign soil.

A. The International Covenant on Civil and Political Rights

On December 19, 1966, the United Nations General Assembly opened the International Covenant on Civil and Political Rights (ICCPR) for signature.[65] The United States signed the ICCPR on October 5, 1977 and ratified it on June 8, 1992.[66] Article 14 of the ICCPR is primarily concerned with rights and protections for persons accused of crimes and provides protections for the accused in a similar fashion to the Bill of Rights contained within the U.S. Constitution.[67] Article 14, paragraph 3(g) of the ICCPR guarantees that a person accused of a crime shall "[n]ot . . . be compelled to testify against himself or to confess guilt."[68] Thus, given the similarities in the text and structure of the ICCPR and U.S. Constitution, a violation of the Fifth Amendment of the U.S. Constitution would likely constitute a violation of Article 14 of the ICCPR, provided that the purported violator has ratified the treaty.

B. The American Convention on Human Rights

On November 22, 1969, the ACHR was adopted at the Inter-American Specialized Conference on Human Rights in San José, Costa Rica.[69] The United

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and privileges of covered individuals while in a foreign jurisdiction and address how the domestic laws of the foreign jurisdiction apply to U.S. personnel.").

[63] *Id.*

[64] NATO SOFA *supra* note 61, at art. 7.

[65] ICCPR, Dec. 16, 1966, 999 U.N.T.S. 171.

[66] *Id.*

[67] ICCPR, *supra* note 1, at Part III, art. 14 (guaranteeing that defendants are entitled to "communicate with counsel of his own choosing," to "be tried without undue delay," and to "examine, or have examined, the witnesses against him," among other guarantees); *cf.* U.S. CONST. amend. VI. (guaranteeing that defendants "have the assistance of counsel," "shall enjoy the right to a speedy and public trial," and "be confronted with the witnesses against him").

[68] ICCPR, *supra* note 1, at Part III, art. 14; *cf.* U.S. CONST. amend. V. (guaranteeing that no person "shall be compelled in any criminal case to be a witness against himself").

[69] American Convention on Human Rights: "Pact of San José, Costa Rica," Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter AHCR].

States signed, but did not ratify, the ACHR on June 1, 1977.[70] Among other things, Article 8(2)(g) of the ACHR guarantees every person, "the right not to be compelled to be a witness against himself."[71] The ACHR, similar to the Fifth and Sixth Amendments of the U.S. Constitution, provides protections for those accused of a crime, including the right "to be assisted by legal counsel" and to "examine witnesses."[72] Given the textual and structural similarities, a violation of the Fifth Amendment of the U.S. Constitution would likely constitute a violation of Article 8(2)(g) of the ACHR.

IV. APPLICATION

By examining realistic hypothetical situations similar to the hypothetical presented in the Introduction, this analysis will determine whether the OPNAVINST 3120.32D—in its current state—conflicts with the Fifth Amendment of the U.S. Constitution and thus conflicts with international self-incrimination standards. Specifically, this analysis will address two broad questions. First, this analysis will consider whether the current law is theoretically sound but sufficiently difficult to apply in practice, subjecting servicemembers who self-report—pursuant to the self-reporting regulation requirement—to an unacceptable risk of prosecution. Second, this analysis will assess whether the law in its current state, *when applied correctly*, creates unacceptable risk of prosecution to self-reporting servicemembers.

A. Difficulties in Application of Self-Report Regulations

While OPNAVINST 3120.32D's protections may be sufficient "where the regulation is in fact followed as drafted,"[73] whether the regulation is actually followed as written is a separate question.[74] In the event that OPNAVINST 3120.32D is incorrectly followed, exposing servicemembers to an unacceptable risk of self-incrimination, it is important to consider why it was followed incorrectly. If the regulation is followed incorrectly, out of bad faith or other reasons unrelated to the text of the regulation, then changes to the regulation would likely

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[70] United Nations Treaty Collection, https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800f10e1&clang=_en (last visited Sept. 16, 2020); *see also* ECHR, *supra* note 1 (recognizing a right not to incriminate oneself under the ECHR, another treaty that the United States has not ratified).

[71] AHCR, *supra* note 69, art. 8(2)(g).

[72] *Id.*; *cf.* U.S. CONST. amends. V–VI. (guaranteeing that defendants "shall [not] be compelled in any criminal case to be a witness against himself," "have the assistance of counsel," "shall enjoy the right to a speedy and public trial," and "be confronted with the witnesses against him").

[73] United States v. Castillo, 74 M.J. 160, 166 (C.A.A.F. 2015).

[74] *See id.* (inferring that misapplication of the regulation could present a "real and appreciable" hazard of self-incrimination (quoting Marchetti v. U.S., 390 U.S. 39, 48 (1968))).

have little to no effect in remedying the misapplication. Alternatively, if a servicemember of average sophistication in a leadership position, such as the legal officer in the introductory hypothetical, cannot apply the regulation as written without subjecting the self-reporting servicemember to unacceptable risk of self-incrimination, the regulation may be in conflict with self-incrimination standards similar to those adopted by the ICCPR, ECHR, and ACHR.

i. Misapplication by Commanders

Between the commander and servicemember, the commander is generally the more sophisticated of the two in terms of regulatory knowledge and access to military legal specialists.[75] Assuming that judge advocates and legal officers are aware of OPNAVINST 3120.32D, a commander will likely take appropriate action *if he consults these advisors*, given the advisors' formal education in military law. This likelihood increases, *a fortiori*, if the legal advisors in question are actual attorneys. Conversely, where a commander is faced with a self-reporting case and has no access to a legal advisor, either due to scarcity or timing,[76] the likelihood of such case being properly handled diminishes. Therefore, the propriety of a commander's handling of a self-reporting case relies largely upon the timing of the report and the commander's access to legal advice.

ii. Misapplication by the Self-Reporting Servicemember

Like the commander, the greater the servicemember's knowledge of the self-reporting regulation and his rights under the UCMJ, the more likely his self-incrimination rights will remain intact. However, the self-reporting process under the regulation may be confusing for a layperson, and perhaps even an attorney may find it difficult to ascertain where the regulation's self-incrimination protections begin and end. A layperson may not foresee that the initial, mandatory self-report *is* protected under the regulation, but that his immediate follow-up statement after being read his Article 31(b) rights *is not* protected—or is it? If the JAGMAN requires that the evidence used for disciplinary action be independent,[77] and that evidence is a voluntary statement that would not have occurred but for the self-report, does that constitute independent evidence regardless of the Article 31(b) warning? The answer to this question does not expressly appear in the JAGMAN nor in OPNAVINST 3120.32D. Given the complexity of the

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[75] *See* U.S. MARINE CORPS, *supra* note 57 (inferring that between a commander and a non-commander servicemember, a commander has more access to military legal experts).

[76] For instance, if a servicemember self-reports to an immediate supervisor after hours, the commander may not have an opportunity to seek legal advice before that supervisor reads the servicemember his Article 31(b) rights and takes a voluntary and self-incriminating statement.

[77] JAGMAN, *supra* note 52.

procedures involved in a self-report, a servicemember could easily waive his right to remain silent inadvertently. It seems counterintuitive that a servicemember *must* self-report at the outset, but after the talismanic Article 31(b) warning is given, the servicemember *must not* self-report if she wants to preserve her self-incrimination protections. Such procedures hardly guarantee any rights against self-incrimination.

B. International Ramifications

The international ramifications of OPNAVINST 3120.32D are unclear. On one hand, the NATO SOFA—the SOFA with the United States' arguably most visible alliance—is noticeably silent about self-incrimination, despite enumerating other familiar-sounding rights of the accused.[78] On the other hand, Germany, a NATO member, employs "procedures against self-incrimination [that] are equal to, or perhaps even stronger than, American standards."[79]

Moreover, all thirty NATO members[80] have agreed to be bound by the ICCPR, which prohibits compulsory self-incrimination.[81] Thus, if the NATO SOFA binds NATO members to either the member's law or its NATO host-nation's law, and all NATO members have agreed to be bound by the ICCPR, it follows that a violation of the ICCPR constitutes a violation of the NATO SOFA? The inference that a violation of a servicemember's self-incrimination rights constitutes a violation of the NATO SOFA may appear to be a stretch. However, the fact that each NATO member condemns compulsory self-incrimination via the ICCPR is in itself significant and may effectively negate the proposition that the NATO SOFA is silent about self-incrimination. Additionally, having ratified the ICCPR, the United States is bound by the ICCPR independent of any SOFA, including the NATO SOFA.

V. CONCLUSION

The U.S. military, in its promulgation of the U.S. Navy's OPNAVINST 3120.32D, risks conflict with international law and standards concerning

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[78] NATO SOFA, *supra* note 61 at § 9 (guaranteeing visiting servicemembers in a NATO member the right to "a prompt and speedy trial," "to be confronted with the witnesses against him," and "to have legal representation," among other things, but omitting protections against compulsory self-incrimination).

[79] OFFICE OF THE JUDGE ADVOCATE, HEADQUARTERS USAREUR AND 7TH ARMY, COUNTRY LAW STUDY: GERMANY 45 (2007), https://www.aepubs.eur.army.mil/Portals/18/docs/CLS-Germany.pdf; *see generally* STRAFPROZESSORDNUNG [STOP] [CODE OF CRIMINAL PROCEDURE], as amended by Article 3 of the Act of 23 April 2014, §§ 114–15, *translation at* https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html (Ger.).

[80] *NATO Member Countries*, NATO, (May 31, 2020, 1:32 PM), https://www.nato.int/cps/en/natohq/nato_countries.htm.

[81] ICCPR, Dec. 16, 1966, 999 U.N.T.S. 171.

compulsory self-incrimination. As military self-reporting regulations have evolved in response to caselaw, later iterations of self-reporting regulations—including OPNAVINST 3120.32D—have implemented protections that significantly reduce or eliminate the risk of compulsory self-incrimination *when followed as drafted*. The complexity of OPNAVINST 3120.32D, however, and the danger of its misapplication raise serious concerns about its compliance with domestic and international law, including the Fifth Amendment of the U.S. Constitution, the ICCPR, and the NATO SOFA. While the practical ramifications of OPNAVINST 3120.32D are impinging upon international law, including the NATO SOFA, they are unlikely to eclipse the importance of protecting servicemembers' Fifth Amendment rights. The near-universality of protections against self-incrimination underscore the importance of self-incrimination protections and urge further review of self-reporting regulations such as OPNAVINST 3120.32D.