



VETERANS AND MILITARY LAW SECTION

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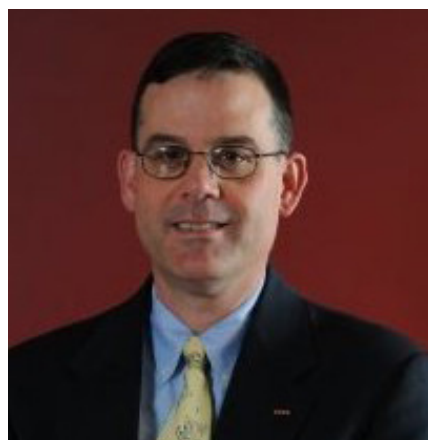
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MESSAGE FROM THE CHAIR: HAIL AND FAREWELL

by Jim Richardson, Incoming Chair and Robert J. DeSousa, Outgoing Chair



Farewell: Over the last two years we've accomplished quite a lot in the veterans and military law section. We've grown our membership to almost 200 members. A 40% increase in membership!! I ask each

of you to go through your contacts and ask someone to join our section. Please take a minute to do this—forward themn our Newsletter and ask them to join!!!

We do a lot of great work and I'd like to see us continue to grow. We have also put on numerous veteran related continuing education events

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Picture of five officers of the veterans and military law section at the national convention: Jim Richardson and Alan Goldsmith, Carol Wild Scott, Robert DeSousa and Frank McGovern



Military Issues Proposed Manual Changes

by R. Peter Masterton, Chair, Military Justice Subcommittee

The Joint Service Committee on Military Justice¹ has issued a proposed Executive Order containing changes to the Manual for Courts-Martial that will correspond to the changes mandated by the Military Justice Act of 2016. The changes were published in the Federal Register on July 11, 2017.² The proposed Executive Order fulfills the requirement of the Military Justice Act of 2016 to “proscribe regulations implementing the changes” made by the Act.³

The Military Justice Act of 2017 gave the President the authority to designate its effective date. Pursuant to that authority the proposed Executive Order makes the Act itself effective on January 1, 2019.⁴

The Act changes most articles in the Uniform Code of Military Justice and adds a number of new articles. Some of the changes are minor technical amendments; others are major. For example, the Act moves many offenses currently defined in the catch-all provisions of Article 134 to specific punitive articles.⁵ The Act also contains a number of major changes to pretrial and post-trial procedure to include changing

the number of members (jurors) in special and general courts-martial to a fixed number of four and eight, respectively,⁶ increasing the vote required for conviction and sentencing to three quarters of the members (jurors),⁷ creating a new judge-alone special court-martial⁸ and allowing the accused to ask the judge to conduct sentencing, even if the accused elected trial by members (jury) on the merits.⁹

Endnotes:

¹The Joint Service Committee is an inter-agency, group of judge advocates and advisors created in 1972 with the mission of proposing updates to the Uniform Code of Military Justice and the Manual for Courts-Martial. More information can be found on their web site at <http://jsc.defense.gov/>.

²The Federal Register publication can be found on the Internet at <https://www.federalregister.gov/documents/2017/07/11/2017-14447/proposed-amendments-to-the-manual-for-courts-martial-united-states-2016-ed>.

³The Act itself can be found on the Internet

at <https://www.congress.gov/bill/114th-congress/senate-bill/2943?q=%7B%22search%22%3A%5B%22national+defense+authorization+act+2017%22%5D%7D&r=>.

⁴The actual changes to the Manual for Courts-Martial can be found at <https://www.regulations.gov/docket?D=DOD-2017-OS-0032>

⁵For example, the offense of kidnapping, which is currently defined under UCMJ art. 134 (2016), will be defined by UCMJ art. 125 (effective 1 Jan. 2019).

⁶See UCMJ art. 16 (effective 1 Jan. 2019) and Rule for Courts-Martial 501 (effective 1 Jan. 2019).

⁷See UCMJ art 52 (effective 1 Jan. 2019) and Rule for Courts-Martial 921(c)(2) and 1006(d)(4)(B) (effective 1 Jan. 2019).

⁸See UCMJ art. 16(c)(2)(A) (effective 1 Jan. 2019) and Rule for Courts-Martial 501(a)(2)(D) (effective 1 Jan. 2019).

⁹See UCMJ art. 25(d)(1) (effective 1 Jan. 2019) and Rule for Courts-Martial 1002(d)(2) (effective 1 Jan. 2019)

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including our conference in San Juan, Puerto Rico.

We are regularly in the FBA's E-newsletter pointing out Veteran's issues. We have put out this as a regular newsletter which has helped to inform our members and we regularly post our events

on our website. It's been a great two year ride and I look forward to working in an executive fashion with our incoming chairman James Richardson to help bring our section to the next level. I hope to see you at FBA events!

Jim Richardson

Incoming Chair of Veterans and Military Law Section of the Federal Bar Association PLEASE JOIN the Veteran's and Military Law Section at: www.fedbar.org/Veterans

Robert J. DeSousa

Past National President, Outgoing Chair of Veterans and Military Law Section of the Federal Bar Association PLEASE JOIN the Veteran's and Military Law Section at: www.fedbar.org/Veterans

Reversal in Military's Transgender Policy

by R. Peter Masterton, *Military Justice Subcommittee Chair*

On July 26, 2017, President Trump announced via Twitter that he was reversing the current military transgender policy, established by the Obama administration. In three Tweets the President stated that “After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow...Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming...victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you.”¹

President Obama's Secretary of Defense, Ashton Carter, lifted the ban on the open service of transgender troops in June of 2016. Carter's policy did not immediately allow transgender recruits to enlist in the military, but he directed the military to develop policies to allow this by July 1, 2017.² On 30 June 2017, President Trump's Secretary of Defense, James Mattis, delayed that change by six months, stating that he was reviewing the Pentagon's transgender policy.³

On August 25, 2017, President Trump issued formal guidance on his reversal. In a memorandum addressed to the Secretary of Defense and the Secretary of Homeland Security the President ordered a return to the “longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016 . . .” The President's memorandum stated that “the previous Administration failed to identify a sufficient basis to conclude that terminating the Departments' longstanding policy and practice would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources . . .” The memorandum ordered the military to “maintain the currently effective policy [prohibiting] accession of transgender individuals into military service beyond

January 1, 2018, until such time as the Secretary of Defense . . . provides a recommendation to the contrary that I find convincing.” It also ordered the military to “halt all use of [military] resources to fund sex reassignment surgical procedures for military personnel, except to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex.”⁴

In a statement issued shortly after President Trump's memorandum was signed, Secretary Mattis stated that he would carry out the policy directive and “develop a study and implementation plan.”⁵ It is unclear precisely how this policy change will affect transgender troops who currently serve in the military (estimated between 2,000 and 11,000).⁶

Endnotes:

¹The President's Twitter messages are available at <https://twitter.com/realdonaldtrump>.

²Memorandum from Sec'y of Defense, to Sec'ys of Military Dep'ts et al, subject: Directive-type Memorandum (CTM) 16-005, “Military Service of Transgender Service Members” (30 Jun 2017), available at <https://www.defense.gov/>. See also Dep't of Defense Inst. 1300.28, In-Service Transition for Transgender Service Members (30 Jun 2016).

³Statement by Chief Pentagon Spokesperson Dana W. White on Transgender Accessions, Release No: NR-250-17 (30 Jun 2017), available at <https://www.defense.gov/>.

⁴Presidential Memorandum for the Sec'y of Defense and the Sec'y of Homeland Security, subject: Military Service by Transgender Individuals (25 Aug. 2017), available at <https://www.whitehouse.gov/the-press-office/2017/08/25/presidential-memorandum-secretary-defense-and-secretary-homeland>.

⁵Statement by Sec'y of Defense Jim Mattis on Military Service by Transgender Individuals, Release No: NR-312-17 (29 Aug 2017).

⁶Julie Hirschfeld Davis & Helene Cooper, Trump Says Transgender People Will Not Be Allowed in the Military, *New York Times*, (26 Jul. 2017), available at <https://www.nytimes.com/2017/07/26/us/politics/trump-transgender-military.html>.



Widener Law Commonwealth invites you to attend
the 2017 Widener Law Commonwealth Veterans Day
Ceremony on

Friday, November 10

*A CLE starts at 11 AM and will go 1.5 hours. The
Ceremony will begin immediately after the CLE*

**Widener Law
Commonwealth**



President Announces Nominees for three Vacancies on CVAC

On June 7, 2017 the President announced three nominees to fill vacancies on the Court of Appeals for Veterans Claims. Several seats have been vacant for some time and others are scheduled to become empty in the coming months. The nominees are Michael P. Allen, Amanda Meredith, and Joseph L Toth.

Professor Allen is a Professor of Law and director of the Veterans Law Institute at Stetson College of the Law in Gulfport Florida. Before joining the faculty at Stetson, Prof. Allen was a trial attorney with the firm of Ropes and Gray, in Boston, MA.

Amanda Meredith is presently deputy staff director and general counsel for the Senate

Committee on Veterans Affairs. Prior to her service on the staff of the Committee, she served as the director of the Task Force for Backlog Reduction for the CVAC and the Board of Veterans Appeals.

Joseph Toth is veteran of active duty with the Navy Judge Advocate General Corps. In 2011 he served as a field officer in the Rule of Law Task Force in Afghanistan with the 10th Mountain Division of the U.S. Army. Mr. Toth also served as Senior Defense counsel in Pearl Harbor Harbor, and clerked for the Hon. Danial Manion. In addition he has served as a federal defender in Milwaukee, Wisconsin. ●

A Law Student's Perspective on the VMLS Conference

by Ramon Mercado



In April, the Federal Bar Association's Veterans and Military Law Section and the Federal Bar Association's Puerto Rico Chapter hosted the first annual Veterans and Military Law Conference. Both the Veterans and Military Law Section and the Federal Litigation Section offered scholarships to attend this event. I was selected as one of the few law students to attend, and am very grateful to Past National FBA President Robert DeSousa and the Federal Bar Association's Federal Litigation Section for this opportunity.

I am a third-year law student and the President of the Veteran Law Group at the Alexander Blewett III School of Law at the University of Montana. During my second year of law school, I took a Veterans Law course taught by Professor Hillary Wandler, an FBA Member; therefore, I had a basic understanding of the nuances of Military Law. My goals during this conference were to get a better understanding of Military Law from different experts in the field, understand their day-to-day challenges, and provide UM Law with some feedback on how to improve their Veterans Law course.

The course began with an introduction

by Mr. DeSousa and Mariano Mier-Romeu, President of the FBA Puerto Rico Chapter followed by Robert Chisholm's (Chisholm, Chisholm & Kilpatrick) very thorough presentation titled "Veterans Administration 101." Mr. Chisholm's presentation covered everything regarding the process of appealing disability claims through the Veterans Benefits Administration, the importance of deadlines in the process, the procedure of appealing in the judicial system, and future changes in the VA. After comparing all the information from this presentation with my notes from my previous Veterans Law course, I can attest that any practicing attorney who listened to Mr. Chisholm's presentation will be more than prepared to help any veteran that walks into their office and help with any issues regarding VA disability claims. Mr. Chisholm's expertise and eagerness to answer questions from the audience provided for a phenomenal learning experience.

The second presentation was an ethics panel comprised of: Past National FBA President Jim Richardson (James Richardson, ESQ.), David Myers (The Veterans Consortium Pro Bono Program), VMLS Board Member Deborah Mitchell (Grossman Law Firm, LLC), and Robert Chisholm. During this section, all panelists shared their personal experiences regarding ethics violations, primarily concerning communication issues with veterans. All panelists listed competence, communication, counseling, and compassion as the key elements for success when working on Veteran Law cases. Mrs. Mitchell expanded on the challenges in communication with sexual trauma victims and cultural competence—knowing your clients' history. This section of the conference got most of my attention since I recently completed my ethics course this semester. I am now more aware of the uniqueness of Veteran clients and understand Mrs. Mitchell's phrase "5% of your cases are 95% of

your problems."

The third and last section of the conference was presented by Jim Richardson on discharge upgrades. In addition to explaining in detail the discharge upgrade procedure, Mr. Richardson stressed the importance of these types of cases in the veteran community. While I have not yet been exposed to a discharge upgrade case, I am aware of a number of cases in which UM Law's Veterans Advocacy Clinic is involved and know of the importance and impact of such cases to the client. Additionally, when compared with the information I have learned previously, Mr. Richardson's presentation is equally if not more thorough than anything I have seen before.

Last but not least, I would like to thank PR State Senator Luz Arce Ferrer for her presence at this event. I had the opportunity to have a brief chat with her during one of the breaks between sessions. She expressed to me her concerns regarding veterans' issues in Puerto Rico and the lack of access to justice for local veterans. I truly appreciated hearing that Veterans Law was one of the top issues in her agenda for this term.

While I cannot speak on behalf of the entire audience, I can state that this event is something everyone in the legal community who is interested in taking veterans' benefits cases must attend. The event was a total success and I look forward to attending next year! ●

Fixing the Frozen Benefit Award, Part 3

by Mark E. Sullivan

[Parts 1 and 2 of this article covered the new rule for division of military retired pay (as of 12/23/16), and strategies for the former spouse.]

How to “Even Out” the Pension Division

The next five methods are not true adjustments to the pension division to make it numerically the same as that which results from the time rule. They will, however, help in ameliorating the result of the “frozen benefit division” for John Doe (the ex-husband of Commander Mary Doe).

Unequal Share of Pension.

In states where the court has a degree of flexibility in how much of a marital or community property asset to award the non-employee spouse, John’s attorney can ask the court to award a share to him that is larger than the usual “50% of the marital share” portion. Thus the order could be framed in terms of “70% of the marital share of Mary Doe’s military retired pay,” which would leave John with a larger share than he could receive through frozen benefit analysis. Have a financial expert help to estimate the monetary loss for the FS, so that a set-off can be calculated.

Fixed Percentage Award.

Another alternative, when the laws of a state have not been adjusted to provide for a denominator of the marital fraction which ends on the date of the divorce, is to have the court award to John Doe, the non-military spouse, a fixed percentage of the military retired pay while Mary is still serving. So, for example, if the property division order occurred when the parties had been married for 10 years of the 20 that Mary had already served, John would be awarded half of 50% (i.e., $\frac{1}{2} \times 10/20$), or 25% of the frozen benefit. If the fixed percentage approach were not employed and Mary served for a total of 30 years, then John would still receive 50% of the frozen benefit times the marital fraction. However, at that time

the marital fraction would be 10/30, or 33%, and John’s share would be 16.5%, rather than 25%. Fixing the percentage at the same time as the benefit is fixed is one way of “retaining value” for John’s pension-share award.

Present Value.

In addition to the future division of retired pay, state laws also recognize a second method of dividing pensions, the “present value offset.” This analyzes the present value of a series of money payments over the lifetime of the servicemember (SM); these are, of course, her retired pay. The present value of this retired pay is the amount that can be used for a trade or an offset, allowing the SM to keep her pension intact. This is beneficial for the parties since it results in a complete present accounting and division, not the postponement of property division until retirement.

Present Value and Payments.

The present value of a military pension can be a pretty large figure in some cases. When this happens, the court may need to do a partial setoff for the marital value of another asset awarded to the FS, with the remainder to be made up in periodic payments. Thus, if the present value of CDR Mary Doe’s retired pay were \$400,000 and the marital component were \$300,000, then the court might set off the pension, awarded to Mary, by granting sole ownership to John of marital assets worth \$200,000. To complete the equation, the court could order Mary to pay \$100,000 to John by making annual payments of \$20,000 for five years.

The Western Gambit.

In several jurisdictions (mostly western states), the court may order the SM to begin present payments to the nonmilitary spouse as soon as the SM is eligible to retire and receive monthly payments. This is so whether the military member has actually retired or not.

The seminal case is *In re Marriage of Luciano*, in which the judge ordered pension-share payments for the wife to begin when the SM-husband retired from the Air Force. The California Court of Appeals reversed, stating that it would be unfair to postpone payment to the ex-wife since that would give the SM the power to determine when she received her own property. The proper order for the judge to issue would state that the former wife is the one who has the choice as to when to start receiving her share of the pension. This election may be made at any time after the pension is matured, through a motion filed by the nonemployee spouse. The Court stated that, if the motion is made before retired pay starts, this constitutes an irrevocable election to give up increased payments in the future which might accrue due to increased age, longer service and a higher salary.

Nothing in the frozen benefit rule blocks or bars this “western gambit,” as illustrated by the Luciano case.

Final Notes

Other methods and strategies exist for obtaining a “fair deal” (or perhaps a “fairer deal,” in John’s view) regarding division of military retirement benefits. These would include requiring the SM to pay the full cost of the Survivor Benefit Plan, or valuing the SM’s military medical coverage and placing that as an asset in the SM’s share of marital or community property. These do not involve a larger portion of the pension; rather, they focus on other benefits which may be valued and allocated in the property division process.

All of the above methods should be considered by the former spouse’s lawyer. And this should be done in consultation with an expert in dividing military retired pay, so as to choose the best alternatives to the frozen benefit approach imposed by NDAA 17.

These rules and requirements, strategies and suggestions may not apply to everyone. There are certainly variations among the states

as to what may be done in the area of division of retired pay. Be sure to understand the law and the cases. Consult an expert in your state and contact a specialist in military pension division whenever possible – even if it’s in another state! You can’t ask too many questions or know too much in this area. “One size” does not fit all! ●

**Mr. Sullivan is a retired Army JAG colonel and author of The Military Divorce Handbook. He practices family law with Sullivan*

& Tanner, P.A. in Raleigh, N.C. and works with attorneys nationwide as a consultant on military divorce issues and in drafting military pension division orders. He can be reached at 919-832-8507 and mark.sullivan@ncfamilylaw.com.



The Federal Bar Association and Military Law Section is inviting all
VMLS members to support the

50th Anniversary of the Vietnam War Commemoration

and their

Oral History Project

Please visit www.vietnamwar50th.com for more information.

If your organization wants to become a commemorative partner, please go to http://www.vietnamwar50th.com/commemorative_partners/commemorative_partner_program/

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The views expressed herein do not necessarily represent those of the FBA. Send all articles or other contributions to Raymond J. Toney at rjtoncy@militarylawpro.com. Yanissa Pérez de León, managing editor.

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