Summer 2018/Published by

VETERANS AND MILITARY LAW SECTION

In This Issue

MESSAGE FROM THE CHAIR: HAIL AND FAREWELL

by Jim Richardson, Outgoing Chair

As the outgoing chair of the Veterans and Military Law Section this will be my last opportunity to communicate with you. We have accomplished much in the last two years. Our membership is up, we have a regular newsletter and are sponsoring multiple CLEs, using our Chapters and fellow sections as "force multipliers" where we lack the internal resources. (See below for future events).

On September 30, I will turn the watch over to Alan Goldsmith, my longtime friend and colleague in veterans and military affairs. As many of you know, Alan has a considerable resume both in the world of military and veterans law, as well as the Federal Bar Association. Beginning with active service in the Air Force, and going on to head the Discharge Review Section of the Board For Correction of Naval Records, he has extensive chops in the area and brings considerable experience to the position. On the FBA side Alan has been President of the Pentagon Chapter of the FBA and a long-time delegate from that chapter to the National Council. In addition, Alan has a long relationship with the Judge Advocates Association, insuring continuing cooperation between our two organizations.

Behind Alan, the Section has a deep bench. Walter Kroptavich, of the VA will be the Deputy Chair. Maura Clancy with Chisholm, Chisholm and Kilpatrick will become Secretary, and Chase Johnson, will continue his outstanding work as treasurer and financial watchdog.

We have recently revised our section by-laws to bring them into conformance with the National by-laws and constitution. The major change is that the terms of officers has increased from one year to two. This will enable the chair and his/her supporting team time to plan and implement programs and policies for your greater good…

I would be remiss if I did not

CHAIR continued on page 7

Military Justice: The New "Short-Martial"

by Gregg Curley

Historically, the Uniform Code of Military Justice has provided four forums for adjudicating misconduct: non-judicial punishment (NJP), summary court-martial, special court-martial, and general court-martial. Each forum has attendant processes and punishment caps. An NJP may not award confinement and a servicemember may refuse the forum.[1] A summary court-martial can award 30 days' confinement but may also be refused. A special court-martial can adjudge up to a year of confinement and a bad conduct discharge (BCD). A general court-martial has no limitations on punishments. One particular weakness to this construct is the summary court-martial. A line officer with no legal training is charged with upholding rules of evidence, obtaining evidence for the court, and navigating a complex legal process—a process subject to legal review—without the aid of an attorney. Given the unrealistic expectations and risk associated with this forum, contested summary courts-martial have essentially ceased to exist.

In part to fill the summary court-martial vacuum, commanders will have a fifth option on January 1, 2019. Congress created a modified special court-martial forum that is limited in scope to less serious crimes and is not authorized to award more than six months' confinement or a BCD. This forum will be judge alone and cannot be refused. Due to the shorter amount of confinement authorized, military practitioners colloquially refer to this forum as a "short-martial."

A short-martial option more closely aligns military with civilian law. The Supreme Court has recognized a distinction between "petty offenses" and "crimes" based on the amount of confinement authorized: more than six months, the offense becomes a crime and the defendant rates a jury; less than six months—as is the case in a short-martial—and no right to a jury attaches.[2]

The future impact of the short-martial is uncertain. It is anticipated that a short-martial, without the need to accommodate members,[3] will move faster, resulting in a positive and tangible impact on good order and discipline. An additional expected outcome is that fewer servicemembers will refuse NJP or summary court-martial understanding that a short-martial has appreciably changed the forum election calculus. Critics of this new forum assert that summary courts-martial and special courts-martial already provide commanders with the necessary tools for accountability. A mandatory judge-alone forum is simply an end-around an accused's right to members. Additionally, fewer members trials will limit servicemembers' familiarity with military justice. This is a drawback given that courts-martial members are future leaders and commanders. Commanders, not attorneys, are responsible for exercising prosecutorial discretion in the military. Last, since applicable rules and case law remain unchanged, there is no guarantee that a short-martial will be more expedient.

"The purpose of military law is to promote justice . . . assist in maintaining good order and discipline . . . [and to] promote efficiency and effectiveness . . ."[4] Congress has provided commanders an additional tool to assist in generating those effects. The effectiveness of this tool, the short-martial, will soon be determined.

Major Gregg Curley is a Judge Advocate in the Marine Corps. He is currently assigned as a student to the Marine Corps Command and Staff College. His previous assignment was as the Senior Trial Counsel (prosecutor) for the Marine Corps Legal Services Support Section, National Capital Region. The views expressed in this article are his own and may not reflect the official policy or position of the Marine Corps, Department of the Navy, Department of Defense, or the U.S. Government.

Endnote:

[1]Unless embarked on a ship.

[2]*See generally* Baldwin v. New York, 399 U.S. 66 (1970).

[3]The military equivalent to a jury.

[4]MANUAL FOR COURTS-MARTIAL, UNITED STATES, Preamble 3 (2016).

S. 3269 Department of Veterans Affairs Tribal Advisory Committee Act of 2018

by Carol Scott, Legislative Affairs

This bi-partisan legislation was introduced in late July by Senators Tester (D.Mt), Udall (D NM) and Sullivan (R AK) to establish an Advisory Committee that reports to Congress that would address the needs of American Indian veterans and bring those needs to the direct attention of Congress and the Secretary of Veterans Affairs. It is intended to facilitate rather than supplant the existing government to government consultation with Indian tribes and tribal organizations.

The Committee would have fifteen members drawn from the twelve Bureau of Indian Affairs (BIA) regions and four at-large members. No federal employee may be a member. The Committee is envisioned as meeting twice a year with an employee of the Office of Tribal Government Relations attending the meeting without having a vote. The members shall serve two year terms and in the instance of replacement successor members shall be appointed within 180 days.

The Committee is to meet at a minimum twice a year to advise on the improvement of services and programs to tribal veterans and to identify evolving issues of tribal veterans relevant to such services and programs. The Committee is to propose clarifications, recommendations and solutions to those issues, provide a forum for issues and proposals for change of Department regulations and policies relevant to them. Such issues are to be brought as well to the attention of tribal members and leadership in order to provide for feedback. A yearly report to the Secretary and the appropriate committees of Congress containing recommendations for administrative and legislative action is required. Also required is a written response by the Secretary to each recommendation made, which is to be submitted to the congressional committees within 90 days of the report of recommendation.

This is long overdue. The VA has, through its highly discriminatory accreditation regulations, made it nearly impossible for Tribal Veterans Service Officers to attain accreditation to directly represent veterans in their tribal communities without going through state veterans' organizations – those states that have such organizations.

The VA underserves tribal veterans with virtually every service, benefits and program to which the veterans' community at large has ready access. These omissions have been highlighted in a report by me and Paul Sullivan of Bergmann & Moore LLC which was submitted to the staff of the Senate Committees of Veterans Affairs and Indian Affairs, the House Committee of Veterans Affairs and the National Congress of American Indians (NCAI). It was the result of our trip to five reservations in South Dakota and was done at the request of the Senate Committee.

The report and the legislation were addressed in a joint meeting of staff from all of these entities with the proposal going forward for asking for a GAO report with the ultimate goal of not only the passage of this legislation but hearings regarding VA's lack of effective activities in Indian country and further legislation addressing the issues of Indian veterans. Also addressed were several omissions that the legislation should address, including funding and staffing provisions, which the attendees did not believe should be left to the Secretary, but should be directly provided for in the legislation. This legislation is a much needed first step in finally bringing to the attention of Congress the considerable needs of Indian veterans and an awareness that they serve this country in a higher proportion than any other ethnic group. It should be noted that this is a unique collaboration between two Senate committees, both of which customarily operate across the aisle with unusual input from the House Committee staff.

Changes to R.C.M. 1103A and the Appellants Access to Sealed Records

by Stephen C. Newman[1]

Executive Order 13825, which takes effect January 1, 2019, will manifest a number of changes to the Manual for Courts-Martial. One concerns access to sealed records by appellate counsel. R.C.M. 1103A addresses access to sealed exhibits, including access upon appellate review.[2] It defines those who can review such records as "reviewing and appellate authorities."

Currently, appellate counsel, including appellate defense counsel, fit within that definition. Created in 2005, R.C.M. 1103A struck a rough balance between the interest of the appellant and her counsel to see the entirety of her appellate record, including sealed records, against the legitimate interests of the Government both to prevent confusion from the disclosure of irrelevant information, and to protect the privacy interests of the parties.[3]

One common example are mental health records related to treatment received by a person who alleges sexual assault. Trial defense counsel commonly seek such records, as they may prove critical to the preparation of an effective defense. And the law provides a construct where such records may be reviewed in camera, sealed, and perhaps never disclosed to either party.[4]

Appellate defense counsel may justifiably seek to challenge the lower court's denial of access by trial defense counsel. What the court below may have determined irrelevant might be, based on information known only by the defendant and her counsel, *Brady* material. And who is in a better position to make such an evaluation except the appellant and her counsel?

As the rule is currently constructed, appellate defense counsel has access to exhibits and records sealed by the court below, within the bounds of the rules of their particular service court.[5] So the current rule, along with provisions found in the various service courts rules for practice, seem to adequately balance these two legitimate but competing interests.

But the proposed change to 1103A turns the rule on its head by removing appellate counsel from the Rule's definition of "reviewing authorities." Under the new rule, all stakeholders retain the ability to access such records except appellate counsel, who now must show "good cause" before gaining access to sealed records:

> (ii) *Sealed materials reviewed in camera but not released to trial government or defense counsel.* Materials reviewed *in camera* by a military judge, not released to trial government or defense counsel, and subsequently sealed may be examined by reviewing or appellate authorities. After examination of said materials, the reviewing or appellate authority may permit examination by appellate counsel for good cause.[5]

The text seems neutral enough. But in practice, the government won't be asking to unseal records very often. The effect will be felt more acutely by the defense, who now carries an increased burden before gaining access to what may be, in context with information known only to the defendant, potentially exculpatory information. And as the rule does not authorize an *ex parte* hearing, the defense will likely be required to lay their case out well in advance of their briefing schedule, granting a significant tactical advantage to the government.[6]

As a contributor to CAAFLog noted:

> *There is no rational justification to allow appellate military judges to review the complete record of trial but not afford a similar right to appellate counsel (who may – and often do – outrank the judges themselves). Furthermore, protective orders issued by a court of criminal appeals or by CAAF are more than adequate to protect the privacy interests of victims, witnesses, and others whose private affairs may become part of a record of trial by court-martial.*[7]

This is a fair critique. The current rule, working in conjunction with the rules for practice before the various Service Courts of Appeals, seemed like a fair balance. Given the impact this change may have on effective appellate representation it remains to be seen how it will work in application.

Endnotes:

[1]Currently Federal Public Defender, Northern District of Ohio; Colonel U.S. Marine Corps (Ret.). The views expressed in this article are mine alone. They do not reflect the official policy or position of the Administrative Office of the Courts, Defender Services, the Federal Public Defenders Office, the United States Marine Corps, The Department of the Navy, The Department of Defense, or the U.S. Government.

[2]MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1103A (2012 ed.)

R.C.M. continued on page 7

JAG Officers Must be Weary of Unlawful Command Influence: Still a Pressing Issue

by MAJ Michael R. Parker & Jonathan E. Mentesana

The job of a JAG officer can involve juggling competing interests. JAG officers are asked to be loyal soldiers, yet also be staunch advocates for the accused. As an advocate, it becomes difficult for a JAG officer to perform this duty when barricades are erected along the road to justice. One of these barricades can include Unlawful Command Influence (UCI). UCI is a form of coercion in which senior commanding officers attempt to exert pressure on parties in order to secure a particular outcome; the reasons could range from personal vendettas to political pressure. UCI presents a tricky issue for JAG officers as it can prove difficult to keep justice and politics separate.

First, in order to allege a case of UCI, the accuser must allege sufficient facts which, if true, constitute unlawful command influence. Once the accuser "has met the burden of production and proof, the burden then shifts to the Government."[1] Once shifted, UCI requires that the Government prove beyond a reasonable doubt[2] that the findings and sentence were not affected by unlawful command influence as stated in *U.S. v. Biagase*.[3] "Thus, once the issue of unlawful command influence is raised, the Government must prove beyond a reasonable doubt: (1) that the predicate facts do not exist; or (2) that the facts do not constitute unlawful command influence; or (3) that the unlawful command influence will not prejudice the proceedings or did not affect the findings and sentence."[4] Having to raise a UCI claim against a superior officer is a challenge for JAG officers as it entails challenging superior commanders; not a task many would take lightly. Making UCI allegations is serious for both the commanding officers, as well as the accuser. As a recent 2014 case illustrates, unlawful command influence is still a looming issue for JAG officers.

Military court documents show that in 2014, Senior Chief Special Warfare Operator Keith Barry was accused of rape and sexual assault of a woman. Barry had been romantically involved with this woman between 2012 and 2013. Barry was court-martialed and punished with three years of prison time and a dishonorable discharge from the Navy SEALs. Barry is fighting to overturn his conviction and restore his reputation. Barry's conviction was approved in 2015 by Rear Admiral Patrick J. Lorge. Despite the conviction, Lorge stated that he believed the conviction should have been overturned because there was insufficient evidence to support the verdict. However, Lorge declined to overturn the conviction, sighting unlawful command influence from two other admirals, Vice Admiral Nanette DeRenzi and Vice Admiral James Crawford III. As evidenced here, JAG officers can receive mixed messages from multiple superior officers, causing further confusion and raising the possibility of a UCI claim.

Based on the allegations of UCI surrounding this Barry case, Air Force Military Judge Vance H. Spath was appointed by the U.S. Court of Appeals for the Armed Forces (C.A.A.F.) to launch an investigation to determine the extent of the UCI. Because UCI is such a serious charge, it is "incumbent on the military judge to act in the spirit of the Code by avoiding even the appearance of evil in his courtroom and by establishing the confidence of the general public in the fairness of the court-martial proceedings."[5] As officers of the court, JAG officers must be vigilant to guard against any perceived improprieties because while there does have to exist more than simply "some evidence"[6] to bring a case for UCI, the threshold is fairly low as the court explains in *U.S. v. Johnston*.[7]

Spath's investigation determined that although not intentional, DeRenzi's comments to Spath concerning lax prosecution of sexual assault cases[8] in the military may have influenced Lorge's case against Barry. During this time, there were many critics calling for tougher prosecution in the military justice system. Spath further identified Crawford as another influencer on Lorge's decision, albeit this pressure was more direct than DeRenzi's. Spath determined that Crawford improperly influenced Lorge by encouraging him to convict Barry in order to show how tough the military was on sexual assault cases. Based upon his meetings with Crawford, his superior, Lorge admitted that he believed he could neither order a new trial for Barry or vacate the conviction. For JAG officers, this detail presents a difficult situation because officers must choose between justice or potential negative consequences for their careers.

Besides DeRenzi and Crawford's influence, Spath found that Lorge was also influenced by his chief legal counsel, Commander Dominic Jones, because Jones, like Crawford, advised Lorge of the political pressure resting on this case. Here is yet another superior officer attempting to exert influence over Lorge, an officer who has the ability to alter the trajectory of Lorge's career

path based on the outcome of this case. As it says in Article 37 of the UCMJ, "[n] o person … may attempt to … influence the action of a court-martial … in reaching the findings or sentence in any case..."[9] This is a situation JAG officers would rather not find themselves stuck in.

Spath's findings of UCI are being considered in Barry's appellate case, which went before the Court of Appeals for the Armed Forces on March 22, 2018, but the decision is still pending. Barry's appellate attorney, David P. Sheldon, wants Barry's full exoneration and for his client to be compensated for the years he has already spent in prison. Others are calling for Crawford's resignation based on this repeated pattern of unlawful command influence.

As the Barry case illustrates, unlawful command influence is still a looming issue for JAG officers and it will be interesting to observe how the appellate case plays out. There are some lessons to be learned from this case. First, guard against potential avenues of UCI so it never comes up as an issue. Second, avoid correspondences with superior officers who may have a perceived influence during critical times of the case unless there is a clear paper trail. Finally, continue to be an advocate first and foremost. The court in *Thomas* warned that unlawful "[c]ommand influence is the mortal enemy of military justice."[10] The relevancy of this warning to the Barry case is undeniable. In light of cases like this, JAG officers must be diligent and continue to carefully balance their dual roles as loyal soldiers and staunch advocates.

MAJ Michael Parker is the Managing Partner of Parker, LLP, Attorneys at Law in Fort Worth, Texas, and is Co-Chair of the JAG Training Academy for SGAUS. MAJ Parker is a Licensed Investigator, an IASIU Certified Insurance Fraud Investigator, and has received the FEMA Military Emergency Management Specialist Senior Certification.

Jonathan Mentesana is a recent graduate of Texas A&M University School of Law and is currently a paralegal at Parker, LLP, Attorneys at Law. Jonathan was awarded the Civilian Exceptional Service Award for his assistance at the Spring 2018 SGAUS JAG Training Program.

Endnotes:

[1]*U.S. v. Stombaugh*, 40 M.J. 208, 213-14 (C.M.A. 1994); see also U.S. v. Levite, 25 M.J. 334, 341 (C.M.A. 1987).

[2]*U.S. v. Thomas*, 22 M.J. 388, 394 (C.M.A. 1986).

[3]50 M.J. 143, 151 (C.A.A.F. 1999).

[4]*Id.*

[5]*U.S. v. Rosser*, 6 M.J. 267, 271 (C.M.A. 1979).

[6]*Biagase*, 50 M.J. at 150.

[7]39 M.J. 242, 244 (C.M.A. 1994).

[8]*U.S. v. Riesbeck*, 77 M.J. 154, 158 (C.A.A.F. 2018).

[9]10 U.S.C. § 837 (2012).

[10]Thomas, 22 M.J. at 393.

R.C.M. continued from page 4

[3]The rule was created largely due to developments in case law from the Court of Appeals for the Armed Forces (CAAF). *See, e.g., United States v. Romano*, 46 M.J. 269 (C.A.A.F. 1997); *see also United States v. Rivers*, 49 M.J. 434 (C.A.A.F. 1998).

[4]*See,* MANUAL FOR COURTS-MARTIAL, UNITED STATES, M.R.E. 513 (2012 ed.); *see also J.M. v. Payton-O'Brien*, 76 M.J. 782, (N-M. Ct. Crim. App. Jun 28, 2017).

[5]*See e.g.* U.S. DEP'T OF NAVY, NAVY AND MARINE CORPS COURT OF CRIMINAL APPEALS RULES OF PRACTICE AND PROCEDURE (Ch. 1 1) (March 23, 2018) at Rule 1.3(c).

[6]Manual for Courts-Martial; Proposed Amendments, 81 FED. REG. 85.940 (Nov. 29, 29, 2016), *available at* https://www.federalregister.gov/d/2016-28630/p-30

[7]In fact, this change bears a striking resemblance to the position taken by the Air Force Appellate Government Division in two separate 2016 petitions for extraordinary relief. *See United States, Petitioner v. United States Air Force Court of Criminal Appeals, Respondent and Jerry C. Harrison, Real Party In Interest,* No. 16-0251/AF; *see also United States, Petitioner v. United States Air Force Court of Criminal Appeals, Respondent and Cory D. Phillips, Real Party In Interest*, No. 16-0256/AF. CAAF denied both petitions. Unable to affect change through the judicial process, it appears the Joint Services Committee simply re-wrote the rule.

[8]Zachary D. Spilman, *My comment to the JSC's proposed amendments to the MCM for 2017 (and an editorial note)* CAAFLOG (February 5, 2017), http://www.caaflog.com/2017/02/05/my-comment-to-the-jscs-proposed-amendments-to-the-mcm-for-2017-and-an-editorial-note/

Chair continued from page 1

Past chair Bob DeSousa discussing issues with attendees at the Pennsylvania JAG ALL Hands conference sponsored by the Veterans and Military Law section.

specifically thank our committee chairs for their extensive and hard work. Dawn Kennedy has produced the newsletter for the last 18 months, providing a benefit to our members that had not existed for some time. Sherri Marie Karr has held the thankless job of Membership chair for about the same time. Brian Magee has been CLE chair and former Chair Carol Scott has kept us abreast of legislation. After long service, Pete Masterton stepped down as Chair of the Military Justice Committee to be ably replaced by Steve Newman. Any success that the section has enjoyed is reflective of their efforts.

We are well on our way to a busy FY 19. We will co-host a number of activities in the coming year beginning with a CLE in conjunction with John Marshall School of Law on October 25. Both former section chair, Dave Myers and I will be among the speakers. We will repeat our very successful CLE on veterans matters in conjunction with the Puerto Rico Chapter and the Federal Career Service Division in early November. That same month will bring the Jobs for JAGS program which we co-host with the Judge Advocates Assn. In March we will hold our long-planned CLE on Veterans matters in Indian Country at the University of Montana Law School. This program is the result of a diversity grant from the Foundation of the FBA, obtained by Hilary Wandler our former CLE chair and Associate Dean of the Law School. Finally, we will again co-sponsor the 11th annual Veterans Legal Assistance conference with the University of Baltimore School of Law, the Homeless Persons Representation Project of Baltimore, The Maryland Chapter of the FBA and the Veterans and Military Law Section of the Maryland State Bar Association. So once again we have a full plate of activity.

This has been a gratifying experience helping expand and revive the VMLS. As I step aside for fresh leadership, I wish all of my shipmates in this endeavor, "Fair winds and following seas."

Jim Richardson

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

The Federal Lawyer strives for diverse coverage of the federal legal profession, and your contribution is encouraged to maintain this diversity. Writer's guidelines are available online at www.fedbar.org/TFLwritersguidelines. Contact Productions Coordinator, Zebley Foster at tfl@fedbar.org or (571) 481-9126 with topic suggestions or questions.

Veterans and Military Law Section
Federal Bar Association
1220 N. Fillmore Street, Suite 444
Arlington, VA 22201

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