



VETERANS AND MILITARY LAW SECTION

In This Issue

02

Report of the Legislative Committee

03

Judicial Proceedings Panel

04

Military Justice Review Group

06

*"Fairness for Veterans Act:"
Hope For Vets With PTS/TBI and Bad
Discharges*

07

*VMLS To Coordinate The Federal
Lawyer Issue On Veterans and Military
Law Matters*

08

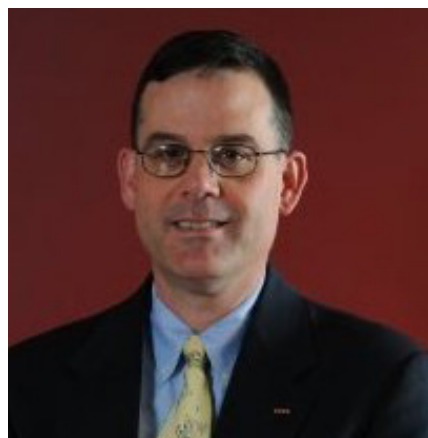
*Department of Defense Expands Guid-
ance for Veterans Seeking Discharge
Upgrades in PTSD-related Cases*

10

*Member Highlight: Rear Admiral (Ret.)
Gerald E. Gilberts*

MESSAGE FROM THE CHAIR

by Robert J. DeSousa



This is an exciting time to be a member of the Veterans and Military Law section of Federal Bar Association. We have a leadership team of deputy chair Frank McGovern, Past National President James Richardson and Committee Chairs; Secretary Alan Goldsmith, Treasurer Chase Johnson, Membership Chair Ray Bily, Legislative Chair Carol Scott; CLE & Programs Chair Hillary Wandler, Military Justice Chair Peter Masterton and Communications Chair Raymond J. Toney. Each of them has five or six additional members actively working on their committees. This is an engagement of almost 15 percent of our total membership working on projects and committees. Each member of our section can be as active as they desire. Moreover, the VMLS has set a firm set of goals for the next two years.

First, we want to double our membership to 300 members. We have already grown the membership 15 percent since the Federal Bar year began. Each of you can ask a fellow FBA Member to join—it is only an additional \$20! You don't have to practice in the veteran and military law sector to support us! Many people ask how they can support veterans or those in uniform and this is one way they can! Ask a friend to join the FBA and our section today!

Second, we are committed to communication, and this newsletter is step one. Additionally, we heard from many of you at our open member telephone conference which was held on March 15!

Last, we are continuing our excellent educational programs. Join us at our upcoming CLEs and at national meetings. We are looking forward to working together with all of you in the upcoming year.

Robert J. DeSousa

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

Report of the Legislative Committee

by Carol Wild Scott

The Legislative Committee is engaged on several fronts both on the Hill and with the Agency. The past few weeks have seen meetings with Rep. Walz' staff—once with John Wells, a new addition to the Committee, on the issues of the Blue Water Act, and the Toxic Exposure Act. The House Committee reported favorably on the Toxic Exposure Act last week. This was emphasized during the Vietnam Veterans of America legislative presentation on March 3, 2016. The second meeting addressed the issue of requiring Title V certification as ALJs for hearing officers at the Board of Veterans Appeals, currently designated as “Veterans Law Judges.” We re-visited the ongoing refusal of Veterans Affairs (VA) to acknowledge the science in the Blue Water Act. Further discussion addressed the refusal of VA to publish the proposed regulations providing for certification of Tribal Veterans Service Officers (TVSOs) on the same basis as State Veterans Service Officers. VA has since published a Notice of Tribal Consultation on this topic, proposing to place TVSO certification under the authority of State Veterans Service Officers organizations, in derogation of any concept of sovereignty.

We have also met with Leader Pelosi's staff on the inclusion of the Federal Bar Association as a stakeholder in the upcoming semi-annual roundtable that she and Rep. Walz conduct annually. The issue for that meeting was the crisis of Indian veterans who are members of tribal communities without adequate, culturally competent representation and a near total absence of culturally competent mental health assessment or treatment.

Veterans Health Administration (VHA) Veterans Service Officers (VSOs) and Veterans Benefits Administration (VBA) briefings have been held in the last several weeks as well. VHA continues to struggle with the CHOICE implementation and bringing their middle management at the medical centers and the satellite clinics (CBOCs) on board. They have also proposed a three tier formulary

with increased co-pays at all levels and a heavy shift to the use of generics. This is packaged as an attempt to encourage use of the VA by competing with Walmart pricing. The problem is the reliance on generics and imposing heavier costs on the lower tier veterans,

VBA is the source of a great many critical issues. As the VA shifts to heavy reliance on electronic claims, electronic records and the streamlining of appeals, they are systematically excluding the private bar from participation. Attorneys are either barred or access to the new PIV cards made impossibly expensive and complex. This is a new universal electronic access card without which all access is denied after March 2016. They are scrambling to get all VSOs and state & county VSOs fingerprinted and photographed and into the system by that date. The only part of the system to which attorneys had access (SEP), is now closed to them. This issue is the subject of ongoing litigation.

The guise of all this is “security” with background checks, despite the fact that every attorney with a license has been printed and background checked as a pre-requisite to bar admission. This also fails to take into consideration the fact that many members of the private bar have military backgrounds, often with significantly high clearances. VA cannot trust those records, I am told. This is an issue that will be submitted to the Government Relations Committee (GRC) for the legislative agenda.

The evisceration of the appeals process by VA is the other issue to be submitted to the GRC. The proposal to “streamline” the appeals process by eliminating several stages and permitting appeal of the rating decision as written with no new submission of evidence to the Board cannot be permitted to go unchallenged. VA has issued a new Notice of Disagreement form which further relegates that critical step in challenging an inadequate rating decision to checking the box with no space for stated objection or argument. The veteran is told that if he/she opts for evidence or argument it will just take longer;

if they opt for the totally electronic review with no evidence and no hearing the decision will be within weeks. With 50 percent of the rating decision appealed being remanded by the Board and 70 percent of those denials by the Board that are appealed to the Court containing error, this does not bode well for the veterans. In the coming months we will push for hearings before both HVAC and SVAC on the steady erosion of the right to counsel involved in all these efforts and on the negative effect on the right of the veterans to be heard.

We have been meeting with the leadership of the National Congress of the American Indian on issues of prime concern to Indian veterans. At the top of their legislative agenda is the publication of the TVSO regulations. The obdurate response of VA leadership to the issue is being pursued on legislative and political fronts. The issue of Veterans Courts in Indian country is also being pursued. There is now one such Court in the tribal court of the Hopi Nation in Arizona, led by two tribal court judges—one a VN Marine veteran and the other a VN Air Force veteran. We shall again have a table for the Section at the Indian Law Conference, having for the fourteenth year been denied a breakout session on Veterans Courts (with those two judges as panelists) on the grounds that it did not fit the topic du jour. Even though they are having a panel on the Tribal Law & Order Act. The Section provided nearly an hour of testimony to the TLOA Commission several years ago on the need for Veterans Courts. There may be an opportunity to present for a second time on this topic to the National Association of Tribal Court Judges at Palm Springs in October. The paucity of adequate, culturally competent health care, mental health treatment and assessment and total lack of such in representation and advocacy for benefits for Indian veterans has long been priority for the Section. ●

Respectfully submitted,
Carol Wild Scott

Judicial Proceedings Panel

by R. Peter Masterton, Chair, Military Justice Subcommittee

In June 2014 the Secretary of Defense established the Judicial Proceedings Panel at the direction of the U.S. Congress. The Secretary tasked the panel to conduct an independent review of military sexual assault laws and procedures. The panel began holding public meetings in 2014, examining a wide array of topics related to its mission.

The panel is made up of five distinguished legal experts. The panel chair, Hon. Elizabeth Holtzman, is a former Congresswoman from New York and a graduate of Harvard Law School. The second panel member, Hon. Barbara Jones, is a former judge in the U.S. District Court for the Southern District of New York. The third panel member, Mr. Victor Stone, is a victim's attorney at the Maryland Crime Victims Resource Center, Inc., and formerly worked in the Criminal Division of the U.S. Department of Justice. The fourth panel member, Professor Thomas W. Taylor, teaches at Duke University's Sanford School of Public Policy, is a retired judge advocate and served in the Senior Executive Service at the Army General Counsel's office. The fifth panel member, Vice Admiral (Retired) Patricia A. Trace, is the Vice President of Homeland Security and Defense for HP Enterprise Services.

The panel has examined a number of issues related to military sexual assaults, to include revision of military punitive articles (particularly Article 120 of the Uniform Code of Military Justice), victim privacy (to include the rape shield law and psychotherapist-patient privilege), victim access to information, appointment of special counsel for victims, compensation and restitution for victims, retaliation against victims, and court-martial trends and analysis.

The panel issued a report on Feb. 1, 2016 on restitution and compensation for military adult sexual assault crimes.

Among other things, the panel proposed creation of a new Department of Defense compensation program for crime victims. The panel recommended that the new program be made available to victims who were assaulted after October 2005, when restricted reporting became available. The panel also recommended modification of the Rules for Courts-Martial to provide victims the right to be heard by the convening authority (the senior military officer who sends cases to trial) before he or she approves a pretrial agreement. In addition, the panel recommended additional training be provided to military lawyers and victim assistance personnel on the use of restitution in pretrial agreements.

On Feb. 4, 2016, the panel issued a report on Article 120 of the UCMJ, the military statute defining rape and sexual assault. In this area, the panel was assisted by a subcommittee composed of distinguished members of the legal community, to include law school deans, former senior judge advocates and experts in criminal and sex assault law. The panel's report, which was based largely on the subcommittee's work, included the following recommendations:

1. The panel recommended that Congress amend the definition of "consent" in Article 120(g)(8) of the Uniform Code of Military Justice. The panel determined that the current definition of "consent" under Article 120 is "confusing and retains vestiges of outdated rape laws." Prior to 2007, the offense of rape under Article 120 required sexual intercourse by "force and without consent." While the 2007 and 2012 revisions of Article 120 eliminated this definition, the term "consent" still appeared in Article 120. For example, the current version of Article 120 defines sexual assault to include, among other

things, committing a sexual act on a victim that is "incapable of consenting" due to a number of specified factors. The panel recommended that the current definition of "consent" be changed to clarify that a lack of resistance by a victim does not, in itself, constitute consent.

2. The panel recommended that the President amend the Manual for Courts-Martial to specifically allow consent to be raised either as an attack on the government's proof of an offense or as part of a clearly delineated mistake of fact defense. As mentioned above, the current version of Article 120 eliminated consent as part of the definition of rape. However, consent is still part of the definition (and thus an element) of several delineated Article 120 offenses. One example is sexual assault upon a person "incapable of consenting" due to impairment, mental disease or physical disability. In addition, case law has recognized mistake of fact as to consent as an affirmative defense to many crimes under Article 120. Currently, the Manual for Courts-Martial does not provide sufficient clarity regarding these issues.

3. The panel recommended that Article 120 should contain a definition of the term "incapable of consenting." As mentioned above, one form of sexual assault contains this term. The term is also contained in the definition of one form of abusive sexual contact. The subcommittee recommended that both Article 120 and the Manual for Courts-Martial contain guidance explaining that a totality of the circumstances test applies when determining whether a victim was incapable of consenting.

4. The panel recommended that the term "bodily harm" in Article 120 should be clarified by replacing it with the language

“without the consent of the other person.” One form of sexual assault under the current version of Article 120 makes it a crime to commit a sexual act upon another person by causing bodily harm to that other person (Article 120(b)(1)(B)). Case law has attempted to clarify the term “bodily harm” in this context to require a lack of consent by the victim. The subcommittee recommended that this concept be made explicit in the statute.

5. The panel recommended that the definitions of the terms “sexual act” and “sexual contact” be clarified. The current version of Article 120 defines rape and sexual assault as requiring a “sexual act.” The panel recommended that the definition of sexual act be modified so that penetration and contact are addressed in separate subsections. The current version of Article 120 defines aggravated sexual contact and abusive sexual contact as

requiring “sexual contact.” The panel recommended that the definition of sexual contact include the use of an object.

6. The subcommittee recommended a new subsection of Article 120 be created to address sexual assault and abusive sexual contact when an accused has abused a position of authority. While the current version of Article 120 allows prosecutors to charge coercive sexual misconduct, there are some environments, such as entry-level training, that involve subtle forms of coercion not properly covered by the Article. The subcommittee recommended creating a new portion of the statute (Article 120(b)(1)(E)) to create an additional theory of liability for sexual assault or abusive sexual contact where the accused has abused his or her position, rank, or authority.

On Feb. 11, 2016 the committee issued a report on retaliation related to sexual

assault offenses. The panel expressed concern about the lack of data in this area and issued a number of recommendations to improve the military policies for reporting retaliation against sex assault victims. The panel recommended that, while victims should be provided multiple channels for reporting retaliation, that the service sexual assault response coordinator serve as a single point of contact to collect and monitor these reports. The panel recommended implementation of a standardized form to report retaliation and a means of tracking retaliation complaint beyond the installation level. In addition, the panel recommended that commanders take further action to address retaliation in their ranks.

The panel continues to hold public hearings examining military sexual assault laws and procedures. Additional information can be found at the panel’s web site: <http://jpp.whs.mil>. ●

Military Justice Review Group

by R. Peter Masterton, Chair, Military Justice Subcommittee

In October 2013, at the behest of senior leaders from all of the military services, the Secretary of Defense formed the Military Justice Review Group. The group was led by the former Chief Judge of the United States Court of Appeals for the Armed Forces, the Honorable Andrew S. Effron. Each of the services detailed a number of talented judge advocates to the group, which was tasked with a wide-ranging review of the Uniform Code of Military Justice, the basic statute that defines military criminal offenses and procedures. The group was also tasked with considering the recommendations of the Judicial Proceedings Panel, a congressionally-mandated organization tasked with reviewing military sex assault laws.

On Dec. 28, 2015, the recommendations

of the Military Justice Review Group were formally forwarded to Congress. The recommendations, which include a proposed act revising the Uniform Code of Military Justice (UCMJ), constitute the most comprehensive revision of military criminal law since 1983. The recommendations include 37 additions to the UCMJ and significant amendments to 68 other current provisions in the code.

Among other things, the recommendations (Section 504 of the proposed act) would establish selection criteria for military judges and mandate tour lengths. Currently, Article 26 of the UCMJ states that the service Judge Advocates General must certify military judges as “qualified for duty” The amendment would require that they be certified as

“qualified, by reason of education, training, experience, and judicial temperament, for duty as a military judge.” The amendment would also require that “assignments of military judges . . . shall be for appropriate minimum periods, subject to such exceptions as may be authorized.” Although regulatory tour lengths for military judges already exist (see, for example, Army Regulation 27-10, Military Justice, dated October 3, 2011, establishing a three-year tenure for most Army judges), this requirement would become statutory.

The recommendations (Section 602 of the proposed act) would create a new article of the UCMJ (Article 30a) authorizing military judges to handle specified legal issues prior to referral. Currently, a military

judge can only call court into session and issue rulings after a case has been referred to trial (UCMJ Article 39). The new provision would enable the judge to handle specific issues earlier in the proceedings. The analysis issued by the Review Group explains that the new section could allow the judge to rule on search authorizations, requests for mental competency evaluations, requests for individual military defense counsel, requests for depositions and subpoenas, review of pretrial confinement determinations, and enforcing victims' rights in pretrial proceedings. In addition, the recommendations (Section 507 of the proposed act) would allow a military magistrate to conduct these pre-referral hearings.

The recommendations (Section 403 of the proposed act) would establish a military judge-alone special court-martial with confinement limited to a maximum of six months and no punitive discharge. This is a significant change to current practice, which gives the accused a right to a jury trial (trial by military members) at all special courts-martial (UCMJ Article 29(c)). The recommendations would also permit military magistrates to serve as the judge in such special courts-martial.

The recommendations (Section 604 of the proposed act) would require the Secretary of Defense to issue "non-binding guidance regarding factors that commanders, convening authorities, staff judge advocates, and judge advocates should take into account

when exercising their duties with respect to disposition of charges and specifications in the interest of justice and discipline" The analysis issued by the Review Group explains that this guidance would "draw upon the Principles of Federal Prosecution in the United States Attorneys' Manual, with appropriate modifications to reflect the unique purposes and requirements of military law." No such guidance currently exists.

The recommendations (Section 708 of the proposed act) would expand the authority to issue military subpoenas. For example, it would amend Article 46 of the UCMJ to authorize an "investigative subpoena" to be issued before referral of charges if a general court-martial convening authority has authorized a trial counsel to do so.

The recommendations (Section 506 of the proposed act) would standardize the number of jurors (military members) in a court-martial. The current version of Article 29 of the UCMJ requires at least five jurors in a general court-martial and at least three jurors in a special court-martial, but allows for more jurors to be detailed to the case. The proposal would change these numbers by requiring the military judge to impanel eight jurors in a general court-martial and four jurors in a special court-martial. Any additional jurors would be excused at that point, although the recommendation allows alternate members to be impaneled as well. The recommendations (Section 715 of the proposed act) would also change the voting percentage to convict in

non-capital cases to 75 percent. Currently, a two-thirds vote is required for a conviction (Article 52(a)(2), UCMJ).

The recommendations (Section 505 of the proposed act) require "learned" defense counsel in capital trials. The proposed act would amend Article 27 of the UCMJ to add language requiring that "[t]o the greatest extent practicable, in any capital case, at least one defense counsel shall . . . be learned in the law applicable to such cases." The proposal would authorize hiring civilian counsel to fill this role, if necessary. The analysis issued by the Review Group explains that this language reflects the "standard applicable in capital cases tried in the Article III courts and before military commissions."

The recommendations (Section 801 of the proposed act) would significantly change current military sentencing procedures by requiring the military judge to adjudge all sentences. Under current procedures, if the accused is tried by a jury, the jury determines the sentence (see Articles 51(a) and 56, UCMJ). The recommendation would completely revise Article 56 of the UCMJ to give military judges the authority to impose sentences in non-capital cases using specified sentencing "parameters" and "criteria." The "parameters" would be a "delineated sentencing range for an offense that is appropriate for a typical violation of the offense" based on the severity of the offense, the federal sentencing guidelines and military-specific sentencing categories. Judges could impose a sentence outside

Military Justice Subcommittee

R. Peter Masterton Chair, Military Justice Subcommittee

The Military Justice Subcommittee of the Veteran's and Military Law Section focuses on practical and legal issues in military criminal law. This is a fast-evolving area, as Congress and the media focuses on military sex assault and other issues.

Two different organizations were recently formed to conduct an independent review of military justice. The Judicial Proceedings Panel, whose formation was mandated by Congress in 2014, has focused on military sexual assault laws and procedures. The Military Justice Review Group, formed by the Secretary of Defense in 2013, conducted a more wide-ranging review of the Uniform Code of Military Justice. Short articles on both of these organizations are contained in this newsletter.

This is an exciting time for military justice practitioners. Public scrutiny and major changes in the law have made this a "hot" area, both for military attorneys and private practitioners. Those interested in joining our subcommittee should contact Pete Masterton at petemasterton@hotmail.com for additional information.

a parameter based upon specific findings warranting a deviation. A special board would be created to create the parameters. Criteria are “factors concerning available punishments that may aid the military judge in determining an appropriate sentence when there is no applicable sentencing parameter for a specific offense.” The recommendations would also require the military judge to sentence the accused separately for each offense he or she is convicted of. Under current practice, the accused receives a single sentence for all offenses of which he or she is convicted (see Article 56, UCMJ and Rule for Court-Martial 1006).

The recommendations contain substantial revisions to the punitive articles of the UCMJ. Many of the punitive articles would be renumbered, to more closely group

related offenses. Many offenses currently contained in Article 134 (the catch-all provision prohibiting conduct that is prejudicial to good order and discipline or service discrediting) would be moved to other portions of the UCMJ. These offenses would be given specific statutory definitions, rather than simply being defined by the President in the Manual for Courts-Martial. For example, the offense of false swearing would be moved from Article 134 and added to Article 107 (currently the provision prohibiting false official statements). The new offense of false swearing in Article 107 would no longer contain the terminal element of Article 134 (prejudice to good order and discipline or service discrediting conduct). (See Section 1019 of the proposed act.)

The recommendations (Section 1030 of the

proposed act.) would change the definition of “sexual act” in Article 120 of the UCMJ, the military statute prohibiting rape and sexual assault. The new definition would align the definition with federal civilian criminal law.

The recommendations would also create some completely new offenses. The new offenses include Article 93a, prohibited activities with military recruits and trainees (see Section 1010 of the proposed act), Article 121a, fraudulent use of credit and debit cards (see Section 1032 of the proposed act), Article 123, offense concerning government computers (see Section 1036 of the proposed act) and Article 132, retaliation (see Section 1050 of the proposed act).

The entire report is available at www.dod.gov/dodgc/njrg.html. ●

“Fairness for Veterans Act:” Hope For Vets With PTS/TBI and Bad Discharges

*by Commander John Wells, U.S. Navy (Ret.), Attorney at Law and Exec. Dir.,
Military Veterans Advocacy.*

Since 2001, an estimated 30,000 military members have been discharged because of service connected mental health issues such as Post Traumatic Stress (PTS) and Traumatic Brain Injury (TBI). Unfortunately, many of these discharges did not reflect the PTS or TBI, but were based on alleged “personality disorders.” Since personality disorders are not compensable, the military members were being sent back to civilian life with no VA benefits or the possibility of service connected treatment.

A personality disorder diagnosis normally requires extensive psychological testing. In most cases, these combat veterans were being discharged on the basis of a single interview. Once discharged, military correction boards take a “hands off” approach and refused to correct records.

As a result of this scandal, Congress took action. The 2010 National Defense Authorization Act, PL 111-84 § 512, required a PTS evaluation for everyone deployed in overseas contingency operations. (Codified at 10 U.S.C. § 1177). It also required priority treatment for discharge reviews involving PTS. (Codified as 10 U.S.C. § 1553(d)).

Unfortunately, DOD, in an effort many characterized as a force reduction measure, turned to the administrative separation process to quickly discharge victims of PTS/TBI for minor misconduct. Many victims self-treat PTS/TBI through alcohol or other substance abuse. This leads to minor misconduct that can be the basis for separation under the “pattern of misconduct” provisions of

DOD Instruction 1332.14. The physical and mental symptoms generated by the service-connected TBI/PTS are often a factor in causing the victim to run afoul of minor military offenses such as substance abuse, driving under the influence and such subjective violations as disrespect, insubordination and failure to promptly carry out an order. Some people were processed for showing up a few minutes late to morning formation twice within a year. Using the “pattern of misconduct” provisions of the separations regulations, many of these heroes were separated with other than honorable discharges.

Senators Gary Peters [D MI] and Steve Daines [R MT], have introduced the “Fairness for Veterans” Act, S 1567, to combat this latest tragedy. Although

it does not interfere with the separation processing, the bill will address medical evidence reviews in the case of: (1) a former member of the Armed Forces who was deployed in a contingency operation and subsequently diagnosed as suffering from post-traumatic stress disorder or traumatic brain injury as a consequence of such deployment, or (2) a former member whose application for relief from the terms of his or her military discharge is based in whole or in part on matters relating to post-traumatic stress disorder or traumatic brain injury related to combat or military sexual trauma.

The Fairness for Veterans Act will modify 10 U.S.C. § 1553 to require discharge upgrade boards to favorably review and consider medical evidence from the VA or a civilian health care provider presented by the former member. The bill will actually create a rebuttable presumption in favor of the former member that PTS or TBI materially contributed to the circumstances resulting in the discharge of a lesser characterization than he would normally have earned.

A companion bill is expected to be introduced in the House of Representatives shortly.

The bill is a good start but Congress needs

to delve deeper into the administrative system. The entire process weighs heavily against the service member and too many good people are improperly discharged for a failure in leadership or as a reduction in force. The military correction boards fail to provide the equitable relief intended by Congress when they were established. Instead they have become apologists for the services who routinely reject meritorious cases for record correction

Our military heroes deserve better than a less than honorable separation for service connected PTS. Please call on Congress to quickly pass the Fairness for Veterans Act. ●

CLE Subcommittee

The CLE Subcommittee of the Veteran's and Military Law Section plans, coordinates, and extends the Section's sponsorship to continuing legal education programs exploring legal issues for Veterans and active military personnel. We are planning several events over the next two years and reaching out to FBA Sections and Chapters to partner in and sponsor additional CLE programs of interest to members. Our goals are to raise awareness of critical legal issues for active military personnel and Veterans, further best practices in advocating for active military personnel and Veterans, and participate in efforts to honor individuals who are serving or have served in the military. In achieving these goals, we hope to engage attorneys in both the public and private sector.

Those who have ideas for CLE programming or who are interested in joining our subcommittee should contact Hillary Wandler at hillary.wandler@umontana.edu for additional information.

VMLS To Coordinate *The Federal Lawyer* Issue On Veterans and Military Law Matters

by Raymond J. Toney, Attorney and Counselor at Law, Chair, Communications Committee

The Veterans and Military Law Section is very pleased to announce that the Spring 2017 edition of *The Federal Lawyer* will focus on legal and other developments falling within the broad mandate of the VMLS. This is an exciting opportunity for the VMLS, to be coordinated by the Communications Committee. A call for articles will issue

shortly with guidelines for authors and suggested topics. Ideally, articles will address topics within the areas of (1) military criminal justice, (2) military administrative law, (3) veterans affairs, (4) National Guard and Reserve Component affairs, and (5) legislative proposals and developments.

This is an outstanding opportunity for

VMLS members and others to publish high quality articles and essays that inform and educate the broader FBA membership, which includes members of the federal judiciary. For more information contact the Communications Committee Chair, Raymond J. Toney, at rjtoney@militarylawpro.com, 435-787-6366. ●

Department of Defense Expands Guidance for Veterans Seeking Discharge Upgrades in PTSD-related Cases

by Brian D. Schenk, Attorney at Law, Member, Communications Committee

On Feb. 24, 2016, Acting Principal Deputy Under Secretary of Defense Brad Carson issued a memorandum to the secretaries of the military departments that substantially augmented previous guidance on how military record-correction and discharge review boards address applications by Veterans claiming PTSD or related conditions.

In September 2014, the Secretary of Defense Chuck Hagel directed the boards to give “liberal consideration” to various forms of evidence for petitions seeking

discharge upgrades based on claims that PTSD and PTSD-related disorders existed at the time of discharge and otherwise mitigate the severity of any underlying misconduct that may have led to an adverse discharge. The guidance also directed the boards to liberally waive their applicable statutory time limitations and give timely consideration to subject applications.

With a stated purpose to “re-new and redouble” the policy goals articulated in Secretary Hagel’s memorandum, Acting

Secretary Carson has now mandated that the boards to waive the applicable time limitations in all subject petitions. But more importantly, he has directed the boards to afford *de novo* review of petitions decided before Secretary Hagel’s September 2014 guidance went into effect. Thus, the likely hundreds—if not thousands—of applicants whose petitions were denied before September 2014 can now reapply for discharge upgrades under more favorable conditions. The new guidance is provided below. ●

VMLS Co-Sponsors CLE on Military Sexual Assault

The Veterans Association, Mitchell Hamline School of Law, and the Veterans and Military Law Section are co-hosting a Continuing Legal Education symposium in St. Paul, MN, on April 12, addressing sexual assault in the military. We will be offering 6 total CLE credits for this all day event. We believe this will be a very powerful CLE focused on an epidemic that is rampant in the military through looking at the “life cycle” of a survivor from the crime, to the prosecution, to remedies such as the boards for the correction of military records and the VA rating process. We will have several nationally known attorneys presenting including the President of Protect our Defenders, a founding member of the National Organization of Veteran Advocates, a Senior Counsel from Human Rights Watch, among others. The cost will be \$125 for regular attorneys and \$100 for military and veterans. Please use the code VETERANS to receive the discount. The Mitchell Hamline CLE web address is mitchellhamline.edu/news/cle-lectures-and-conferences.

The Federal Bar Association Annual Meeting and Convention

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PRINCIPAL DEPUTY UNDER SECRETARY OF DEFENSE

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FEB 24 2016

PERSONNEL AND
READINESS

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS

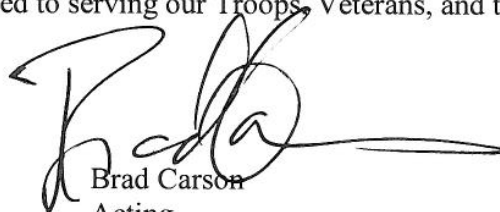
SUBJECT: Consideration of Discharge Upgrade Requests Pursuant to Supplemental Guidance to Military Boards for Correction of Military/Naval Records (BCMRs/BCNR) by Veterans Claiming Post Traumatic Stress Disorder (PTSD) or Traumatic Brain Injury (TBI)

On September 3, 2014, the Secretary of Defense issued Supplemental Guidance to Military Boards of Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming PTSD or related conditions, such as TBI. The Department has implemented this robust guidance in comprehensive and coordinated fashion, thereby easing the burden on Veterans seeking redress while simultaneously ensuring fair and consistent results in these difficult cases.

This guidance remains exceptionally important, and we must renew and re-double our efforts to ensure that all Veterans who have sacrificed so much in service to our great Nation receive all of the benefits that the Supplemental Guidance may afford. Accordingly, the BCMRs/BCNR will waive, if it is applicable and bars consideration of cases, the imposition of the statute of limitation. Fairness and equity demand, in cases of such magnitude, that a Veteran's petition receives full and fair review, even if brought outside of the time limit.

Similarly, cases considered previously, either by Discharge Review Boards, or by BCMRs or the BCNR, but without benefit of the application of the Supplemental Guidance, shall be, upon petition, granted de novo review utilizing the Supplemental Guidance.

The Department remains committed to serving our Troops, Veterans, and their families, with justice, equity and compassion.



Brad Carson
Acting

Communications Committee

The Communications Committee of the VMLS is charged with compiling and disseminating information that is relevant to the mandate of the VMLS and that reflects the activities of the section. In addition to this newsletter, the first in two years, the committee has sought and obtained permission to coordinate a VMLS-centric issue of *The Federal Lawyer* for Spring 2017.

There is a compelling need for a robust VMLS. If you are not a member already, please consider joining. To join the Communications Committee, please contact the Chair, Raymond J. Toney, at rjtoney@militarylawpro.com or 435-787-6366. We would love to have you onboard!

Rear Admiral (Ret.) Gerald E. Gilbert

by Michael O'Brien, Partner, Oliver, Price & Rhodes, and Captain, JAG Corps, PAARNG

From the high seas to the courtroom, to the halls of one of the nation's most prestigious law firms, Rear Admiral (Ret.) Gerald E. Gilbert has led a life of service, accomplishment and adventure.

Gilbert spent his childhood in Royal Oak, Michigan, where he graduated from Royal Oak High School in 1951. After high school, Gilbert attended Denison University and graduated in 1955. Gilbert was commissioned as an officer in the United States Naval Reserve in 1956, and, upon completion of active duty service, Gilbert enrolled at the School of Law of the University of Virginia in the fall of 1959. After graduating from UVA Law School in the spring of 1962, Gilbert held several positions in government, including as Assistant United States Attorney in Washington, D.C., where he remained until 1965, when he left to serve in the General Counsel's Office of the U.S. Department of Commerce. In 1968, Gilbert joined the Washington, D.C. law firm of Hogan and Hartson (now HoganLovells) where he remained until his retirement in 2008. During forty years at Hogan and Hartson, Gilbert initiated the firm's food and drug practice and international trade practice, and served as a member of the firm's Executive Committee and the Managing Partner of the Virginia office.

Throughout his professional career Gilbert also remained active in the Naval Reserve JAG Corps wherein he rose to

the rank of Rear Admiral Upper Half and attained the position of Senior Officer of the nearly 1,500 officer Navy Reserve JAG Corps.

Gilbert credits the Federal Bar Association as a strong asset in his practice and in furthering his legal career, both military and civilian, and as the "professional association most relevant to my everyday practice." Gilbert notes that the FBA "is the only national legal association that focuses primarily on federal matters. Uniquely it involves active participation and integration from all aspects of the profession, including active judges and magistrates. It is also one of the best bargains in the legal profession. I would encourage any young lawyer to become involved in the FBA."

Family, Interests and Passions:

Admiral Gilbert has been married to the former Juliana Hauser since 1957, and together they have two children and four grandchildren. Gilbert continues to serve as an active investor in the Forest Carbon Offset Company, a concern focused on reducing deforestation. He enjoys golf, cheering on the Washington Capitals and spending time with friends and family at his family beach house in Bethany Beach, DE.

Awards and Commendations:

Admiral Gilbert served as President of the Federal Bar Association from 1985-1986, President of the Federal Bar



Building Corporation Board and President of the Judge Advocates Association. In the course of his professional and military career, Gilbert has received the Legion of Merit, the Federal Bar Association Earl Kintner Award, the Distinguished Service Award of the International Hardwood Products Association, the Denison University Alumni Citation. In addition, he was named class officer of the 1962 Class at UVA Law School and selected to the Royal Oak High School Hall of Fame in 2014. ●

After Action Report—JAG Officer Exchange, Vilnius, Lithuania, 12-19 September, 2015

by Frank J. McGovern, LTC, Staff Judge Advocate, PAARNG, VMLS Vice-Chair

1. Accomplishments (Event Summary)

DAY 1: Discussed Rules of Engagement and Rules for Use of Force

DAY 2: Discussed investigations—15-6, FLIPLs, LOD

DAY 3: Discussed Administrative Law Topics and Claims

DAY 4: Met with Legal Department at Ministry of Defense in Vilnius

DAY 5 : Informal Day

2. Lessons Learned

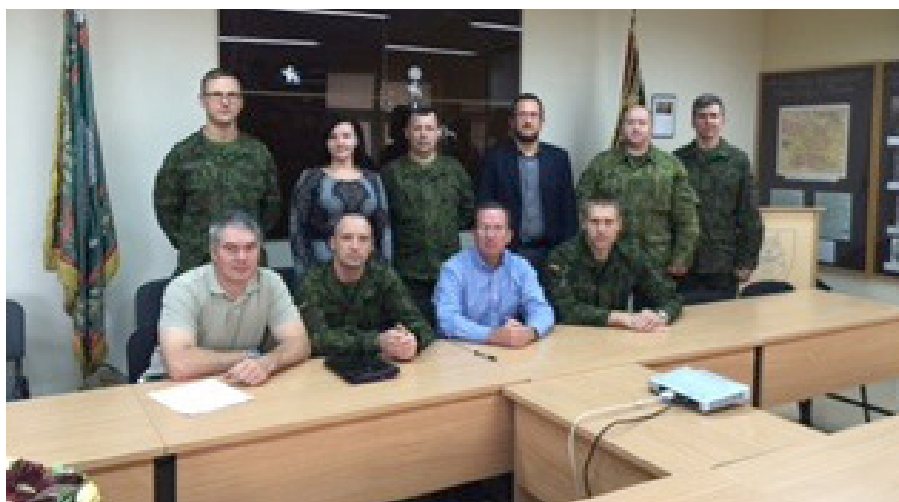
(Areas of Improvement)—Measured against the objectives of this event.

I met with all 25 attorneys in the Legal Department to discuss various legal issues. Attorneys were primarily military from the Land Forces but also Navy and Air Force and one civilian. There was also one attorney from the Volunteer Forces in attendance.

They have no paralegals in the military. Land Forces has one Brigade and they are working on establishing another Brigade. Two attorneys are assigned to a Brigade. The Brigade is based in Rukla and that is where I spent my first three days. They have no military courts and all their cases are tried in civilian courts. A problem is that civilian attorneys and Judges do not understand the military. There is no specific military lawyer training. There is no where that Legal Advisors go for training after law school. One of the Legal Advisors is going to the Naval Justice School in Newport, RI in October for a ten week course.

3. Recommendations/Way Ahead

Continue the JAG officer exchange. Other



ways that we can better exchange practices:

- 1.) Send an attorney to work in their Brigade with the Brigade Legal Advisors for a week or two.
- 2.) Send an attorney to work on a specific issue with their Lithuanian counterpart. For example, they really want help working on their own domestic use of force regulations and law. However, they were very interested in how we do investigations, 15-6.
- 3.) See if we could send an attorney from Lithuania to Army JAG school for a short course, i.e., operational law course, administrative law course.
- 4.) Work with them on setting up Administrative Separation Boards as an alternative to going through civilian courts.

Possible new training events from AAR comments

4. Event Photos and PAO Documentation
See photo above.

5. Purpose/Content (Event Concept)

Share best practices and professional development methods from recent ISAF and other operational theaters. As a result, Lithuania will have increased its ability to successfully operate JAG officers in a multi-national environment.

6. Areas of Success

Measured against the objectives of this event.

- Meeting with Lithuania Legal Advisors and establishing dialogue.
- Instructing on Rules for Use of Force and how we handle in the USA
- Instructing on how the Army does investigations ●

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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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