August 27, 2019

The Honorable Ryan D. McCarthy
Secretary of the Army
101 Army Pentagon
Washington, D.C. 20310

Re: Investigation into the US Army Judge Advocate General's Corps (JAG Corps)

Dear Secretary McCarthy:

We are following with great interest the decision by the Chief of Naval Operations to order the Vice Chief of Naval Operations to examine the operations conducted by and the efficacy of the Navy JAG Corps. We are also encouraged by the Secretary of the Navy's recent direction that the inquiry encompass the missions tasked to Marine Corps judge advocates as well.

As former Army, Navy, and Air Force Judge Advocates as well as Justice Department and private practice attorneys, our recent experiences involving the Army JAG Corps discussed briefly below left us with the impression that investigators, prosecutors, and trial and appellate judges took active steps to avoid application of the Constitution on fundamental issues. With respect, we believe this is more than a mere disagreement as to the application of the Constitution among peers.

Instead, what occurred can be fairly seen as Army Judge Advocates turning a blind eye to the Constitution's applicability to unfairly adopt the prosecution's *post hoc* litigation narratives to protect the Army rather than ensure that the military justice process produces a constitutionally trustworthy and reliable result.

In light of the cases and issues noted below, we write to respectfully request that you follow the Secretary of the Navy's lead and direct a similar investigation into the Army JAG Corps. In support, please consider the following:

(1) In *Clint Lorance v. Commandant, United States Disciplinary Barracks*, Case Number 18-3297 (D. Kansas December 18, 2018), the prosecution claimed Afghans killed during a combat patrol in Kandahar, Afghanistan were "civilians" but failed to disclose or produce fingerprint and DNA evidence victims left on improvised-explosive devices. The prosecution also failed to disclose a report that Lorance's platoon was being scouted for an enemy attack or ambush (SIGACT), and that at least one enemy was killed-in-action. Further, prosecutors failed to disclose an aerostat (blimp) operator's film and report that Lorance's platoon was being scouted by three dismounted fighting aged males armed with AK-47 assault rifles.

This case is an example of Army prosecutors disobeying the Fifth Amendment and US Supreme Court caselaw that compels a prosecutor to disclose exonerating and mitigating evidence favorable to the defense. This case also represents the Army Court of Criminal

26 South 3rd Street, Number 68
Geneva, Illinois 60134 USA
T: (708) 468-8155
F: (708) 781-9693
www.lawyersdefendingwarriors.com

Appeals' (Army Court) adopting in large measure the prosecution's litigation narrative over uncontested evidence Lorance unearthed and produced after trial, which was initially hidden from him. The Army Court went so far to call the American biometrics identification system "an abyss" noting that a prosecutor is not obligated to run what can be seen as a simple "Google" search to identify local national victims in a double murder and attempted murder prosecution.

(2) On March 5, 2018, Brigadier General Joseph B. Berger, III appeared in uniform before the Center for Strategic and International Studies in Washington DC to discuss the 50th anniversary of the *My Lai* Massacre. The sitting Chief Judge made public comments about Lorance as a "bad apple" who wanted to fight the war his own way, and likened Lorance to First Lieutenant William Calley of the *My Lai* Massacre, (Calley, unlike Lorance, actually fired his rifle and he and his unit killed over 200 women, children, and elderly villagers). The Chief Judge misrepresented that Lorance took it upon himself and changed the rules of engagement (ROE) in Afghanistan to fire on motorcycles on site, even though the jury found Lorance not guilty of that offense. Specifically, the Chief Judge wrongly informed the audience the following:

> Clint Lorance was a very aggressive Lieutenant, who had his own ideas about how the war in Afghanistan should be being fought. Those ideas were not in align with the rules of engagement. And that's the fundamental fact that starts us off the trail here. And off the rails. Lorance gives his Soldiers guidance that is not in accordance with the ROE. Motorcycles are allowed to be engaged on sight - that's the guidance given. Not a lawful order, but his Soldiers don't necessarily know that, because a change to the ROE would logically come through the chain of command.

The Chief Judge's comments to the public ignored entirely that Lorance had been acquitted of ordering his soldiers to fire on any motorcycle on sight. When the Lorance defense team asked Brigadier General Berger to take corrective action, Chief Judge Berger declined. You can view Brigadier General Berger's misrepresentations at https://www.youtube.com/watch?v=Nu8ODkvwZpg.

With respect, it appears that Chief Judge Berger has violated three significant ethical canons of judicial officers. *See Code of Judicial Conduct for Army Trial and Appellate Judges*, May 16, 2018 (*e.g.*, Canon One: "A Judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety;" Canon Two (calling for impartiality); Canon Three (extrajudicial activities shall not conflict with judicial obligations). As an attorney, Brigadier General Berger's conduct raises concerns about his compliance with the ethical canons of conduct for lawyers, and as an officer, about making false official statements. Yet, the Army recently assigned him to serve as Commandant of the Army JAG Corps' main school at Charlottesville, Virginia – that is, to lead the training and mentoring of new JAGs, mid-career JAGs, and civilian counsel seeking continuing legal education.

(3) Lieutenant General Charles N. Pede echoed the same misrepresentations Chief Judge Berger had publicly made on March 15, 2018, months later to at least one Member of the United

States House of Representatives. That he did so after Lorance's defense team brought the serious misstatements to the Army's attention demonstrates an unwillingness to voluntarily take corrective action and a determination to poison the well against Lorance for any future judges who might hear his case, or thwart any attempts for the President to "disapprove the findings and the sentence." His comments reliably suggest that the Judge Advocate General sought to put his thumb and the weight of his senior position on the scale against Lorance and in favor of the Army, defending a desired outcome as opposed to ensuring the integrity of the military justice process.

A reasonable inference is that the Chief Judge and the Judge Advocate General compared notes to refuse to correct the record and instead, perpetuate misstatements to defend the Army rather than protect the uprightness of the Army's justice system. Lieutenant General Pede's conduct raises concerns about compliance with the canons of professional legal ethics and making false official statements.

(4) Former Army Judge Advocate General Lieutenant General Flora D. Darpino apparently disregarded obligations to process fingerprint and exonerating and mitigating DNA evidence when Lorance's appellate defense team brought it to her and other Army lawyers, against Army Regulation 27-26, *Rules of Professional Conduct for Lawyers*, June 28, 2018, ¶ 3.8(g)(1)(2) and (3) and ¶ 3.8(h) (*e.g.*, when an Army lawyer learns of new, credible, and material evidence or information creating a reasonable likelihood that a convicted accused did not commit an offense of which the accused was convicted at court-martial, the Army lawyer shall disclose that evidence to the accused, make reasonable efforts to cause an investigation, and seek to remedy the conviction).

(5) In *Jeffrey T. Page v. Commandant, United States Disciplinary Barracks*, Case Number 19-3020 (D. Kansas February 11, 2019), the Army Court refused to disapprove a murder conviction to a lesser manslaughter conviction where a soldier shot his buddy via a negligent discharge, and where 12 witnesses who knew both the accused and the victim testified under oath at a pretrial hearing with a verbatim transcript that the accused had no specific intent to kill - but trial defense counsel called none of the witnesses at trial.

This case represents the Army Court's taking active steps to ignore the importance of the Sixth Amendment right to effective assistance of counsel and Supreme Court caselaw interpreting that right. Surely, any soldier on trial would have wanted 12 witnesses to swear that he had no intent to kill during a negligent discharge, but the Army Court unreasonably concluded no legal error, let alone an error of constitutional magnitude.

(6) In *Anthony V. Santucci v. Commandant, United States Disciplinary Barracks*, Case Number 19-3116 (D. Kansas June 28, 2019), the Army Court affirmed sexual assault convictions, even though the trial judge refused to give the jury a mistake-of-fact instruction, to which accused was entitled. The testimony adduced at trial demonstrated that the victim wanted to have sex. The jury members were entitled to know that they could consider this in weighing the defendant's guilt or innocence, but the trial judge refused. Moreover, the trial judge – an Army judge advocate -- instructed the jury that it could find sexually assaultive intent by preponderance of the evidence rather than by proof beyond a reasonable doubt.

This case brings to light substantial constitutional errors the trial judge made that deprived Santucci of a fair trial. The jury never knew that if Santucci reasonably and objectively believed that the women he met in a bar and who asked him to go home and "play" with her (among other evidence of willingness and consent), the jury could find him not guilty. Additionally, the trial judge diluted the standard of proof from beyond a reasonable doubt to a preponderance of evidence. These are fundamental legal errors of a constitutional magnitude.

(7) *Robert Bales v. Commandant, United States Disciplinary Barracks*, Case Number 19-3112 (D. Kansas June 24, 2019, is a case that arises from what has been described as the "Kandahar massacre," in which Army Staff Sergeant Bales killed sixteen Afghans in March 2012. Though touted as a successful prosecution, the Army flew known terrorist bombmakers into the United States, under alias visas coordinated with the U.S. State Department, on a commercial airline among the American flying public, and held them out to the jury as "gardeners." Also, the prosecutors did not disclose to an independent board convened to determine whether Staff Sergeant Bales was mentally fit to stand trial, that the defendant had taken, at the Army's direction, Lariam, an anti-malarial drug now known to produce long-term psychotic effects, which is now at the center of Bales's challenge to his convictions and sentence.

To seek the death penalty without a complete review of mental health records to coerce a guilty plea can be fairly seen not only as irresponsible, but also prosecutorial misconduct, especially when the prosecution worked closely with the State Department to fly enemy bombmakers into the United States and bring them into the military courtroom without disclosing who they really were.

(8) In *Claiborne v. Army*, Case Number 18-36023, set for oral argument in December 2019 in Seattle, Washington before the United States Court of Appeals for the Ninth Circuit, the Secretary, unilaterally and without congressional mandate, created a policy that required the initiation of separation proceedings against any soldier who had been convicted of a sexual assault, ***at any time***, even if that soldier had already been the subject of separation proceedings in the past – something far more expansive than the limited grant of power Congress provided the Secretary in the NDAA of 2013. By unilaterally and unlawfully expanding the reach of his grant of authority, the Secretary disregarded the Constitution and the Administrative Procedure Act to revive a matter that had already been finalized 10 years prior.

As applied to Claiborne, the Secretary's new policy resulted in the Army's looking to conduct that occurred a decade in the past, which had been the subject of not only judicial proceedings, but also administrative separation proceedings, and that had ultimately been resolved in Claiborne's favor, his retention on active duty, and the Army's twice promoting him. The Secretary then reversed that outcome to Claiborne's detriment, depriving him and his family of retired pay and medical care for life, goals Claiborne spent 19 years and 7 months, including substantial time in combat, pursuing.

This case reveals that Army Judge Advocates errantly believe that the Secretary's plenary authority found at AR 635-200, ¶ 5-3 is beyond review and unlimited, such that the Secretary can

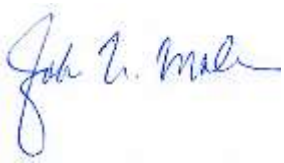
create a rationalization for discharging a proven combat veteran with a contract for 20 years of service a mere 7 months before retirement eligibility based on a "demonstrated proclivity" for misconduct, where without a shadow of a doubt, there was but once occurrence which had been finalized judicially and administratively 10 years prior.

(9) In *United States v. Captain Richard M. Camacho*, presently before the United States Supreme Court upon a Petition for Certiorari, Captain Camacho challenges the application of the Army's Sexual Harassment Assault Response and Prevention Program (SHARP) to his case. Specifically, he alleges that the SHARP Program, which has the laudable goals of reducing and preventing sexual assault, reversed the constitutional presumption of innocence, diluted the "guilty beyond a reasonable doubt" standard of proof in criminal prosecutions, violated Fundamental Due Process, disregarded the Sixth Amendment's guaranty of a full and fair trial, and that the role of special victim legal counsel unlawfully obstructs access to witnesses and evidence.

To summarize, the Secretary of the Navy has taken the morally courageous and righteous step of recognizing that there are improvements that need to be made within the Navy and Marine Corps legal community. We write to request, respectfully, that such introspection be applied to the Army JAG Corps. We do not in any way question the patriotism, loyalty, or ability of the officers who serve as Army judge advocates. We merely believe, based on decades of experience and the recent cases described above, that our community can do better to serve our young Soldiers, combat leaders, and the US Constitution. They deserve the very best, and a comprehensive review along the lines of which was ordered by the Secretary of the Navy is in order to ensure that the military justice process produces trustworthy, reliable, and constitutionally-compliant results.

We would welcome the opportunity to discuss this recommendation, and are available at your convenience, can provide source documentation, or brief you or your officers. Thank you and we look forward to your reply.

Sincerely,



JOHN N. MAHER
MAHER LEGAL SERVICES PC

cc: Kevin J. Mikolashek (former US Army)
David Bolgiano (former US Army Force
Donald M. Brown (former US Navy)