

Congress of the United States
Washington, DC 20515

October 21, Year of our Lord 2019

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

Re: Investigation into the United States Army Judge Advocate General's Corps

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 conduct by, and the efficacy of, the Navy Judge Advocate General's Corps (JAG Corps). We are also encouraged by the Secretary of the Navy's recent direction that this inquiry encompasses the missions tasked to Marine Corps judge advocates, as well.

Recent experiences involving the U.S. Army JAG Corps discussed below leave 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.

Instead, what occurred can be fairly seen as Army JAG Corps turning a blind eye to the Constitution's applicability. By unfairly adopting the prosecution's post hoc litigation narratives, Army JAG Corps is protecting the Army's position rather than ensuring that the military justice process produces a constitutionally trustworthy and reliable result.

Considering 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 Lorange 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 the victims left on improvised-explosive devices. Further, the prosecution also neglected to disclose a report that Lorange's platoon was being scouted for an enemy attack (SIGACT), and that at least one enemy was killed-in-action. Lastly, prosecutors failed to disclose an aerostat (blimp) operator's film and report that Lorange'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 disregarding the Fifth Amendment and U.S. 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 Appeals'

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(Army Court) adopting in large measure the prosecution's litigation narrative over uncontested evidence Clint unearthed and produced after trial, which was initially hidden from him. The Army Court went so far as 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, then Chief Judge of the Army Court Brigadier General Joseph B. Berger, III appeared in uniform before the Center for Strategic and International Studies (CSIS) in Washington, D.C. 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, fired his rifle with his unit, killing over 200 women, children, and elderly villagers). The Chief Judge purposely misrepresented Lorance in that he took it upon himself to change the rules of engagement (ROE) in Afghanistan, 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."

As you can see, the Brigadier General'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, then-Chief Judge Berger declined.

With respect, it appears that Brigadier General Berger has violated three significant ethical canons of judicial officers according to the Code of Judicial Conduct for Army Trial and Appellate Judges, May 16, 2008. Specifically:

- 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; and
- 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

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Corps' main school at Charlottesville, Virginia, to lead the training and mentoring of new JAGs, mid-career JAGs, and civilian counsel seeking continuing legal education.

(3) Months later, Lieutenant General Charles N. Pede echoed the same misrepresentations Chief Judge Berger had publicly made on March 15, 2018 to at least one Member of the United States House of Representatives. That he did so after Lorange's defense team brought the serious false statements to the Army's attention demonstrates an unwillingness to voluntarily take corrective action and a determination to negatively predispose Lorange to any future judges who might hear his case, or thwart any attempts for the President to "disapprove the findings and the sentence." Lieutenant General Pede's comments reliably suggest that the JAG sought to put his thumb, and the weight of his senior position, on the scale of justice against Lorange and in favor of the Army. Lieutenant General Pede's conduct raises concerns about compliance with the canons of professional legal ethics and making false official statements, as well.

(4) Former Army JAG Lieutenant General Flora D. Darpino disregarded obligations to process fingerprint and mitigating DNA evidence when Lorange'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).

(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 a comrade via a negligent discharge, and twelve 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. However, trial defense counsel called none of the witnesses at the trial.

(6) *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 U.S., under alias visas coordinated with the U.S. State Department, on a commercial airline among the American flying public.

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 and which is now at the center of Bales' 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.

(7) In *United States v. Master Sergeant John Hatley*, the prosecution brought four murder charges against a soldier who served nearly 20 years in the U.S. Army with an otherwise excellent and longstanding combat and military record as a Paratrooper, Ranger, and

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Infantryman. Rising to First Sergeant and selected for promotion to Sergeant Major, Hatley was convicted by a jury of killing four detainees in a war zone in Iraq during a routine patrol in early 2007. He was convicted solely on testimony with no physical or forensic evidence, nor reports of missing persons being presented at trial. Local families reported no missing relatives and the farmer who owned the land reported nothing out of the ordinary. The prosecution sent divers into the canal to recover bodies, but none were found. Hatley has served nearly early eleven years of a 25-year sentence and seeks parole or a commutation to time-served.

(8) In United States v. Sergeant Derrick Miller, the prosecution convicted Miller of murder when he shot a hostile detainee who reached for Miller's weapon during a battlefield interrogation. Originally sentenced to life in prison for premeditated murder, his sentence was reduced to 20 years and he was paroled in May 2019 after having spent eight years in confinement in Fort Leavenworth. He currently seeks a Presidential Pardon.

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 respectfully write to request that such introspection be applied to the Army JAG Corps and offer the eight points discussed above as a beginning basis. 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 U.S. 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 these recommendations, and are available at your earliest convenience, can provide source documentation, or brief you or your officers. Thank you and we look forward to your prompt reply.

Respectfully submitted,

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Rep. Louie Gohmert
Member of Congress



Rep. Duncan Hunter
Member of Congress



Rep. Daniel Webster
Member of Congress



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