For several years, the CAAFlog blog (CAAFlog.com), which is co-sponsored by the National Institute of Military Justice, has presented an annual end-of-the-year review of the top 10 military justice stories. For the convenience of readers who may not see the blog regularly, we present the 2012 report. Links to sources can be found on the website. Very minor editing has been performed to correct typographical errors and clarify a few of the numerous acronyms. We have not outed any of the posters or commenters who insist on using pseudonyms or posting anonymously. Except for the curtain-raiser, the stories appear here in descending order (1 to 10); as originally posted, the order was reversed.

TOP 10 MILITARY JUSTICE STORIES OF 2012

Curtain-Raiser

The 12 Days of Top-10 Lists — or Something Like That

Dwight Sullivan

December 22, 2012

There are high winds lashing Casa CAAFlog today, with the possibility of resulting power outages. But if the electricity stays on and I don't encounter unexpected demands on my time later today, this evening we'll start our annual top-10 list of the military justice stories of the year.

This CAAFlog end o' year tradition traces its roots to New Year's Eve 2007, when we ran a contest to name

the military justice story of the year. Frequent CAAFlog commenter JO'C won.

The next year, for reasons that remain shrouded in mystery, some of us thought it would be a good idea to come up with a whole top-10 list of military justice stories of the year. We named the legal aftermath of the Haditha incident the 2008 military justice story of the year.

By 2010, the end o' year top-10 list had become CAAFlog's version of the fruitcake: a holiday season tradition devoid of joy that persists based solely on a sense of duty. 2010□s military justice story of the year was the debate over whether the military justice system can function in a combat environment.

Last year offered a stripped-down version of the NIMJblog-CAAFlog top-10 list, with the 10 items crammed into 7 posts. The number one military justice story of 2011 was "Sex, Crimes and UCMJ."

This year, we plan to return to a full 10-post format (actually, a 13-post format if we count the No Man's call for nominations, Zack's honorable mentions, and this post.) As Zack previously mentioned, we had a spirited debate about which stories should (and shouldn't) make the top-10 list. Ultimately, our Top-10 Czar — the No Man — ended the controversy by Czarist decree. We plan to bring you the full results between now and sometime around New Year's Day.

1

The Politicization of the Military's Response to Sexual Assaults

Dwight Sullivan

January 1, 2013

The word "politicization" sounds pejorative. Merriam-Webster gives us this definition of "politicize": "to give a political tone or character to." But our Constitution gives the authority to regulate the land and naval forces to Congress — a body comprised of (gasp) highly successful politicians. Politicians are supposed to control the military justice system, subject to the system of checks and balances that the Constitution's framers adopted to promote sound decision making. And while there is plenty of room for debate over the optimal response to sexual assaults in the military, no one can seriously doubt that it is a real problem.

But politics shouldn't affect the outcome of particular cases. In the Anglo-American legal tradition, that's the antithesis of justice, which is to be rendered by neutral, dispassionate actors. Themis's blindfold is supposed to prevent her from seeing political pressures, among other potentially distorting considerations.

With those dueling considerations in mind, let's turn to our number one military justice story of the year: the politicization of the military's response to sexual assaults.

In January 2012, the film *The Invisible War* debuted at the Sundance Film Festival. We've discussed the film at length on this blog. I've been critical of the film, but I hope even its admirers would admit that it doesn't take a journalistic approach to the issue of sexual assault in the military. Rather, it presents information to advance the thesis that the military (including the military justice system) fundamentally mishandles sexual assaults in the military and that one solution is to take the power to deal with sexual assaults away from military com-

manders. The film ignores any evidence inconsistent with its thesis. As an example, the film prominently features former Marine 1stLt Ariana Klay, described by the film's website as "a Marine who served in Iraq before being raped by a senior officer and his friend, then threatened with death." But the Marine captain who was tried for raping her was acquitted of that charge. Yet the film takes it as a given that the court-martial reached an incorrect result and that she was raped. Consider the difference between these two approaches: A. 1stLt Klay said that a Marine captain raped her. A military judge found the captain not guilty of that charge. B. A Marine captain raped 1stLt Klay. A military judge found the captain not guilty of that charge. A sound journalistic approach would take the former approach. Yet the *Invisible War* takes the latter approach, even though its filmmakers couldn't have known the truth or falsity of 1stLt Klay's allegations. A balanced approach would have at least discussed the evidence that led the military judge to acquit 1stLt Kaye's alleged rapist. Yet that perspective appeared nowhere in the film.

There's a word for the selective presentation of information to advance a political goal: propaganda. The film's writer and director, Kirby Dick, doesn't even attempt to hide his intent to use the film to advance a political goal. He told a reporter: "We made the film to help change policy." You might not change policy by presenting a balanced or accurate picture.

But if *The Invisible War* is propaganda, it's been effective propaganda. In April 2012, Secretary of Defense Leon Panetta announced that the power to dispose of sexual assault allegations would be restricted to at least special court-martial convening authorities who were O-6s or above. Secretary Panetta reportedly told one of the *Invis-*

ible War's executive producers that watching the film was partly responsible for his adoption of the new policy. But Kirby Dick isn't satisfied with that change. An article from *The Wrap* provides this quotation: "By moving the decision up but leaving it in the chain of command, a lot of the problems that you get at the unit commander level still exist," Dick said. "They might be somewhat mitigated, but they're still definitely there in terms of conflict of interest. The decision absolutely must be moved outside the chain of command, to an independent arbiter who has no relationship to the perpetrator or to the victim." He continued: "There would certainly be benefits to moving it outside the military, but given where the military is right now, I don't think we can really achieve that at this point," Dick said. "What is achievable is to take it outside of the chain of command, but leave it in the military justice system."

Dick explained that effective change depended on influencing the members of the Joint Chiefs of Staff. Again, from *The Wrap* article:

> "It's the joint chiefs of staff who have to take on this issue." The joint chiefs, he added, are aware of the problem. "I don't know how much I can say about this," he said, "but several members of the joint chiefs have seen the film. We know for a fact. At the very minimum, several members of the joint chiefs."

Which brings us to the actions by one of those members of Joint Chiefs of Staff — the Commandant of the Marine Corps.

This year, General Amos toured Marine Corps bases around the world to talk to officers and staff NCOs about responding to sexual assault cases. His words were blunt.

And they referred to the politicization of the issue. In his Heritage Brief delivered at Parris Island, the Commandant told the officers and staff NCOs in his audience that he had just met with five members of Congress at breakfast at his home and two of them walked out, saying they didn't trust the Marine Corps to fix its sexual assault problem. The Commandant mentioned five bills pending in Congress, one of which would completely remove convening authorities from the sexual assault referral process because Congress has "no confidence" in the Marine Corps' "ability or willingness to do anything about" sexual assaults itself. He said the bill would take control from Marine Corps commanders and give it to the Department of Justice. He told his audience that he assured one of the members of Congress at his home: "I am the Commandant of the Marine Corps and I am telling you we are going to fix it. I'm sick of it; we're fixing it." He then told the officer and staff NCOs in his audience:

> This past year, we had 348 sexual assaults in 2011 and you go – males in here, I know exactly what you're thinking – well, it's not true. It's buyer's remorse, they got a little bit liquored up and ended up in the rack with a corporal, woke up the next morning, pants were down, what the hell happened? Buyer's remorse. Bullshit. I know fact. I know fact from fiction. The fact of the matter is: 80 percent of those are legitimate sexual assault.
>
> . . . .
>
> So let's do "Math for Marines" for a second. I said I had 348 sexual assaults that were reported last year. Across the nation, the experts – I'm not talking about some expert you don't care about,

> I'm talking about somebody that would actually have credibility with everybody in this auditorium – say that sexual assault is underreported by a factor of at least two. Could be three [or] four. I personally believe it is at least two . . . could very well be three times.

He continued, "[W]hy would we, as Marines, allow ten percent, six percent, five percent of our population of female Marines – why would we allow that to happen? And the answer is, we shouldn't and we won't. We are going to fix this. . . . It is a scar on the United States Marine Corps. I'm ashamed of it. And I am going to convince you that it's real. . . . And if you do not believe in the statistics, just hang with me, because I am going to make a believer out of you, because it is real."

In discussing the fix for the problem, the Commandant told his audience:

> We have a problem with accountability. I see it across the Marine Corps. I see it in the Boards of Inquiry, they come in, their results, and we have got an officer that has done something absolutely disgraceful and heinous and the board – he goes to – he goes to a court-martial and he goes before a board of colonels and we elect to retain him. Why? Do I need this captain? Do I need this major? I don't. Why would I want to retain someone like that?
>
> I see the same thing with staff NCOs. You go before a board and the board sits around, "milk of human kindness" and misguided loyalty and says this is a good staff sergeant, this is a good gunny, he has got 17 years in, no mind the fact that he was sleeping with a corporal and he's married.

> We already took him, we already hammered him, he has a letter of reprimand, let's keep him. Why? There is a lack of accountability that just befuddles me with the commanding officers and the senior enlisted. And I will tell you that. I am very, very disappointed.

He continued in a similar vein: "I see this stuff in courts-martial, I see it in the behavior, I just – for the life of me I can't figure out why we have become so ecumenical? Why we have become so soft? Where we're gonna keep a sergeant that absolutely doesn't belong in the United States Marine Corps. Why would we need to do that? The answer is: we don't."

He admonished his audience: "I want the staff NCOs in here and I want the officers in here, the commanding officers, and the sergeants major to take a hard look at how we're doing business. If you got a Marine that is not acting right, you've got a Marine that deserves to leave the Corps, then get rid of them. It's as simple as that." In a predictable result of the speeches, many Marines detailed to serve as court-martial members echoed portions of the Commandant's remarks during voir dire. And at that point, the threat emerged that the politicization of sexual assault cases would affect the just determination of individual cases. That's when the Navy-Marine Corps judiciary rose to the occasion. In one of the first (and possibly THE first) courts-martial in which the issue of the Commandant's Heritage Brief was raised, Judge Palmer ruled that the defense had not even crossed the "some evidence" threshold to shift the burden to the government to either disprove the existence of actual or apparent UCI [Unlawful Command Influence] or to show that it wouldn't have a prejudicial effect. The accused's defense counsel filed a petition for extraordinary relief. NMCCA

then ordered the proceedings stayed and issued a show cause order. *United States v. Howell*, No. NMCCA 201200265 (N-M. Ct. Crim. App. June 14, 2012). The military judge ended up leaving the bench while the case was stayed, for reasons we discussed previously on this list. And in one of the military justice highlights of the year, Navy-Marine Corps Trial Judiciary Chief Judge Daniel J. Daugherty ruled in another case that the Commandant of the Marine Corps' remarks had resulted in apparent unlawful command influence. While litigation continues over whether the remedial measures have been sufficient, the swift response by both the Navy-Marine Corps trial and appellate bench to the threat to fairness caused by the Commandant's remarks certainly helped to protect the system's fairness.

2012 ended with Congress passing new measures dealing with sexual assault in the military. On 30 December, the NDAA containing these measures was presented to the President, who is expected to sign it. In that bill, Congress requires the creation of hand-picked, specially trained, and certified "special victim" units of investigators, judge advocates, and victim witness assistance personnel for the prosecution of child abuse, serious domestic violence, and sexual offenses. And the bill will establish two panels to study further possible reforms to the military justice system's handling of sexual assault cases. The panels are directed to study the impact of SECDEF's April 2012 policy change limiting the authority to dispose of sexual assault cases and to consider the strengths and weaknesses of proposals to take prosecutorial discretion away from military convening authorities in sexual assault cases. With further reforms — including the MCM's provisions executing the Article 120 amendments that took effect on 28 June 2012 — still to be implemented and

these new studies still to be written, this likely won't be the last year that the military's response to sexual assault cases appears in our top-10 list of military justice stories of the year. For 2012, it's number one.

Comments

OPLAW-LCDR says:

January 1, 2013 at 5:56 pm

Forgive me if this was discussed when the film first came out, but I was out of the loop then.

Something we all tend to forget in the MILJUST system is the fact that our system floats on a sea of statutes and case law that few of us know or understand. For example, I know that when I was at NJS, no one ever mentioned the fact that ADSEP is built upon and subject to the requirements of the Administrative Procedure Act (trying to avoid a rabbit hole here).

This concept of getting the commanders out of the decision maker seat has a massive, hidden trap. The UCMJ creates an Article I court system. The US [Supreme Court] has stated numerous times that Article I courts are only permitted when they serve a particular purpose and are not simply a way to avoid Article III protections. For the court-martial system, that purpose is the maintenance of good order and discipline in combat units. That's why our statutes discuss conduct prejudicial to good order and discipline, and not acts against the peace and dignity of the people (the usual reason for criminal prosecution in civilian courts). This is what gives us the limitations on Article III rights that we all know and deal with in the MILJUST system.

If there were a change that removed the commanders from the control of courts-martial – any courts-martial – then that underpinning is removed too. At that point, a successful challenge could be made to the whole of the MILJUST system, as the purpose of good order and discipline is no longer being served; it has been converted to one of simple retributive justice, just like the US Attorneys handle every day.

The result: Article III protections apply, probably in every case, because we couldn't operate a separate system for sexual assault. Thus, no more CA's or CA's selecting panels, no more Article 15, and no

more Military Judges, just to name a few. Also, no more Article 66 review, no more clemency, and no more Trial Counsel having to do all the legwork. It wouldn't be easy for anyone. It might even end the need for judge advocates as we know them.

Doomsday scenario? Maybe. But I've seen many times when changes were made to something in the name of "progress" or "improvement" that suffered from the law of unintended consequences. Secondary and tertiary effects are a killer.

Of course, this also gives a nuclear scenario for our friends in appellate defense. Have at it.

Gene Fidell says:

January 1, 2013 at 7:16 pm

With respect, OP, an Art. I military justice system would easily survive a transfer of the power to decide who gets prosecuted from commanders to a director of military prosecutions (not just for sexual assaults but for everything).

Beyond Art. III, such a change would hardly be the end of the world: ask the UK, Canada, Australia, New Zealand, Ireland, South Africa, Israel, Brazil.

OPLAW-LCDR says:

January 1, 2013 at 7:40 pm

Gene, respectfully, the UK has no written Constitution, the next four use the Westminster system (same result), and the last three all have constitutions that don't create the Art I/Art III dichotomy. This is a problem created by our Constitutional structure. Given the US [Supreme Court]'s habit of protecting the jurisdiction of the federal courts, even in the face of legislation that purports to limit it (see the Guantanamo cases), somehow I suspect as US Attorney for the military – whether uniformed or civilian – would take us out of the Art I purpose. Not to mention the fact it creates a mess for readiness (taking control of all sorts of issues from commanders and putting lawyers in charge), as well as creating someone who could easily become a Zampolit. Bad move.

Who knows? What I do know is it would be dangerous, shortsighted, and unnecessary

Don Rehkopf says:

January 1, 2013 at 7:46 pm

"Reforms" are like flags. They point in whatever direction the political wind is blowing from!

Any actual sexual assault is one too many, but for those of you who were around for the fallout from the 1991 Tailhook fiasco, we all know that when reported properly an investigation generally follows. The Air Force has (and continues to have) problems with it fighter-pilot fraternity, the Command Barstoolers Association.Thus, in an effort to appear "fair," we have the latest reincarnation of the Kelly Flinn affair:

http://www.wral.com/news/local/story/130213/

http://www.wral.com/news/local/story/131645/

Anyone who has been in the criminal trenches, military or civilian, for any length of time, also knows that "false rape" cases exist and make it to court now and then. But a properly conducted Art. 32 investigation, with competent counsel on both sides, provides a far superior factual basis to make the decision on whether or not to prosecute a given case than does the normal civilian, one-sided grand jury.

If military justice is indeed about "good order and discipline" then those people who make false sexual assault allegations should be prosecuted to preserve such "good order and discipline" – lying within the military hierarchy vitiates the trust and cohesiveness necessary to any unit's proper mission accomplishment. Yet, that simply is not done, so as not to "chill" the complaints that are presumably bona fide. Hogwash – lying is lying and actual victims have no need to lie or to think no one will take them seriously. One only has to look at the amount of money being thrown at this to know that any remote possibility of a claim not being investigated is zero.

Gene Fidell says:

January 1, 2013 at 7:53 pm

OP, having a director of military prosecutions would work no change in the purpose of the military justice system, much less "take us out of the Art. I purpose." Now that I've looked up Zampolit on wikipedia, I'm afraid I see no basis for the reference.

OPLAW-LCDR says:

January 1, 2013 at 8:09 pm

Gene, the reference is to an officer who has control over the unit commander, just like a Zampolit did, with the attendant destruction of readiness. For instance, right now, commanders decide how witnesses are produced. Could this person order a ship into port because it was necessary for a case? How about order witnesses from a deployed unit be returned to CONUS for hearings? Its custom made to destroy a unit's combat ability and readiness, not to mention telling every officer that they are not trusted. Bad, bad idea.

I agree with Don. Every case I have ever seen has been investigated, and there is no excuse for not addressing false allegations equally. Col Sullivan's comment about Themis and the blindfold is well taken.

Gene Fidell says:

January 1, 2013 at 8:31 pm

OP, I doubt the directors of military prosecution (or commanders) in the perfectly sensible democratic countries I listed would agree that they are in any way like political commissars. Doesn't your argument also imply that we should turn back the hands of the clock and jettison our 40+ years of experience with a military trial bench?

OPLAW-LCDR says:

January 1, 2013 at 9:12 pm

Gene, I don't think my argument does, but I'll bet my paycheck that the next argument from the people advancing this idea will be to take the MJ's away too. As serving officers, they "obviously" can't be trusted to judge fairly in sexual assault cases. A "not guilty" verdict is proof that the system doesn't work, don't you know?

We have a nasty habit of politicizing things in this country. Just because other countries had more sense not to abuse military prosecutions doesn't mean that something similar wouldn't be abused here. I for one would never want to risk it.

I think I've beaten this to death. I give you the last word.

Gene Fidell says:

January 1, 2013 at 9:32 pm

Happy New Year.

k fischer says:

January 2, 2013 at 9:55 am

This politicization issue can be addressed by two recent posts on CAAFLOG: the 2012 measures taken as referenced in this post and the Military Service Academy report for 2011-2012 found at http://www.sapr.mil/media/pdf/reports/FINAL_APY_11-12_MSA_Report.pdf

The 2012 measure requires studies and review panels on specific cases of sexual assault, but we could start by conducting a study on the MSA report for 2011-12.

The MSA report states there were 80 reported assault, 42 of which were unrestricted and 38 that were restricted. Of those 42 unrestricted reports, 40 had investigations which closed involving 39 subjects. (1 report involved one subject and two victims.) By the end of the year, there were 34 outcomes for the 39 subjects. Of those 34, there were merely 8 courts-martial and 3 adverse administrative actions for sexual offenses.

This is a paltry 23% prosecution rate. If you read the case notes for the spreadsheets starting at page 62, it makes you wonder how on earth any of these cases were dismissed.

So, why wait? It appears they could do a study similar to that done by Dr. Charles MacDowell or Dr. Eugene Kanin to determine if these cases fit their false allegation model. It would be nice if the SAPR report could adequately explain why no action was taken on 23 of the 34 sexual offenses that were reported in which the Government could

do something about. It seems that the answer would be either (1) the cases had no merit, or (2) the MSA's are sweeping sexual assault offenses under the rug.

Lieber says:

January 2, 2013 at 12:34 pm

Don Rehkopf, "One only has to look at the amount of money being thrown at this to know that any remote possibility of a claim not being investigated, is zero." Nope. It still happens. All it takes is for a company commander not to report it up in compliance with the withholding policy. Still happens (heck, it happened in the Fort Jackson case just this past year…and I know of others). The four-stars can set DOD policies all they want but that doesn't necessarily change things at the company or platoon level.

OPLAW-LCDR: "For instance, right now, commanders decide how witnesses are produced. Could this person order a ship into port because it was necessary for a case? How about order witnesses from a deployed unit be returned to CONUS for hearings?"

Huh? This happens all the time. That person is called a military judge. Judge Advocates deal with deployed witness issues all the time: you've got a convening authority on one hand, and then deployed witnesses who belong to someone else who has no interest in the court-martial…the current system is rife with such issues.

2

The Major Nidal Hasan Court-Martial

Mike "No Man" Navarre

December 30, 2012

As I mentioned last night, #2 overlaps with #9 on this year's list and has previously appeared on our end of the year retrospective. Way back in 2010 we speculated that:

> It is difficult to imagine how this case will not become the next capital court-martial, which will also raise all of the old issues with capital cases in the military–inadequate funding, inexperienced counsel (though Maj. Hasan currently has experienced civilian counsel and the TC is very experienced), and general views on the death penalty in America. Methinks this isn't the last Top 10 list that will feature this story.

That year we made the Ft. Hood shootings the #1 military justice story of 2010. At the time we also probably should have warned everyone that it would take more than two years to even get the case into a courtroom.

What we couldn't have planned for was a nearly six month delay in the case while many fine jurists debated the length of MAJ Hasan's facial hair. What began as a request to depart from grooming standards, and finally resulted in a CAAF opinion that dismissed the military judge for conflict of interest reasons, wound up right where it started, but with a new military judge. The new judge, COL Tara Osborn, ruled that MAJ Hasan can attend trial, if he wishes, with his beard.

Aside from Beard-gate, actual progress was being made in the court-martial, including potential members' questionnaires and discussion of motions regarding pretrial publicity and MAJ Hasan's ability to get a fair trial and fair treatment from the convening authority. But, alas, Beard-gate consumed the better part of the last half of 2012 and now the trial looks to be set for . . . sometime after mid-March according to the Ft. Hood docket.

Will there be more fascinating discussion of grooming standards at trial? Probably. Will 2013 finally see a trial on charges for the most notorious shooting of fellow

servicemembers in the collective conscience of our nation? Hopefully. This is a military capital case so rushing into this thing isn't necessary, though a little forward progress would be nice. I mean this was the same year that two capital courts-martial became non-capital cases after successful appeals and primarily because of rulings that always struck me as expedient but not particularly wise (though I am a tad biased). As with #3, I see this one appearing at least one more time on our Top 10 list, though that's not exactly going out on a limb in this case.

Comments

[Admiral Sir] Cloudesley Shovell says:

December 30, 2012 at 6:58 pm

This should have been the top mil[itary] jus[tice] story of 2010, which is when the trial should have been. It might well have made the list in 2011 as well, when CAAF reviewed the case on appeal.

As it is, this case may take more time to get to trial than it took the United States to defeat the Empire of Japan in WWII. Sigh.

SFC V says:

December 30, 2012 at 7:25 pm

If Texas had tried him he would probably be close to exhausting all his appeals by now as it is we will probably wait another 20 years before ACCA issues an opinion on his appeal.

This is a case where the government could probably give the defense much of what they want and still get a conviction and death sentence. If I were the trial counsel I would probably approach the defense and see if I could just agree to any of their demands regarding evidence, members, and other motions. If you give the defense what they ask for they can't appeal the issue and you get to take the high road by bending over backwards to accommodate the defense.

Mike "No Man" Navarre says:

December 30, 2012 at 10:01 pm

I can't speak for how things have gone in the *Hasan* case, but sadly that has not been the attitude in cases where a death sentence at a court-martial seems nearly impossible NOT to achieve. We'll see here. The latest fiasco was a purely military judge driven exercise, which is what has always boggled my mind.

3

The Continuing PFC Bradley Manning and Wiki[shhh] Spectacle

Mike "No Man" Navarre

December 30, 2012

Numbers 2 and 3 on our list have multiple things in common, including overlap with both #9 on this year's list and being on previous year's lists. And while the Kabul Klipper thought the *Manning* case wasn't news last year (though I did), it was certainly this year. To recap:

- Manning was nominated for the Nobel Peace Prize.
- A writ was filed in his case by CCR to get access to the court-martial and classified material (wait, isn't that what got Manning in trouble?).
- Julian Assange (founder of Wiki[shhh]) called for Manning's release because unlike himself he feels Manning is not a criminal (that's a little joke, he is innocent until proven guilty . . . in most countries).
- The UN Special Rapporteur on Torture called Manning's conditions of confinement torture and asked for, but was denied, unmonitored access to Manning.
- And Manning's counsel held a bake sale (ok, not actually a bake sale, though baked goods were available) to raise money for his defense.

So a big news year . . . oh wait, I almost forgot, stuff actually happened in his court-martial too!!!

Charges were referred, including aiding the enemy charges.

- The military judge denied a motion to dismiss the aiding the enemy charges.
- His counsel filed another motion to dismiss, this one 117-pages.
- Manning's offer to plead to some of the charges was given the green light.
- And the court held a week long hearing on the somewhat surprising conditions of Manning's initial pre-trial confinement at Marine Corps Brig Quantico.

It has been a busy year for PFC Manning. And with a trial date set for mid-March (so says LA Times), I would not be surprised if the case ends up on another Top 10 list next year. Stay tuned, the next scheduled session is an Art. 39(a) session on Jan. 8, 2013 at Ft. Meade. Maybe we'll find out the result of the unlawful pre-trial confinement motion, which I think could be an interesting legal decision rather than just a media spectacle.

4

Mental Health and Disease

Zachary Spilman

December 28, 2012

Our #4 military justice story of 2012 takes us to a darker side of military justice. Mental health issues, particularly suicide and post-traumatic stress disorder, played a prominent role in the major military justice topics of this past year. Here are the wavetops:

First, in April, a petition for certiorari was filed in *Miranda v. United States*, No. 11-1237, on the following question:

> Are post-traumatic stress disorder and bi-polar disorder substantial questions that a military judge must consider before accepting a service-member's guilty plea, when those disorders may have contributed to the charged misconduct?

The petition drew two amicus briefs, from the National Institute of Military Justice and from the National Veterans Foundation, but the Supreme Court denied the petition in May. After the denial, the case was profiled in the New York Times in a piece written by a former Marine judge advocate.

Next, in August, the DoD's General Counsel directed the Joint Service Committee on Military Justice to consider amendments to the Manual for Courts-Martial to address suicide and attempted suicide in the context of the offenses of malingering in violation of Article 115, and self-injury without intent to avoid service in violation of Article 134.

Then, in November, CAAF heard oral argument in *United States v. Caldwell*, No. 12-0353/MC, on the following issue:

> Whether, as a matter of law, a bona fide suicide attempt is punishable as self-injury under Article 134.

During the oral argument, Pvt Caldwell's counsel argued: "If [Caldwell] had succeeded, like 3,000 service members have in the past decade, he would have been treated like his service was honorable, his family would have received a letter of condolence from the president

and his death would have been considered in the line of duty. Because he failed, he was prosecuted."

And finally, two ongoing capital courts-martial involve significant mental health issues: The prosecution of SSGT Bales for the March shooting deaths of 17 Afghan civilians involves an "unspecified mental disorder," and the prosecution of SGT Russell for the 2009 shooting deaths of five servicemembers at a combat stress center at Camp Liberty near Baghdad involves significant litigation of his ongoing mental health treatment. Additionally, while mental health issues haven't yet impacted the capital court-martial prosecution of MAJ Hasan for the 2009 shooting attack at Fort Hood, it's a fair assumption that they will.

Odds are that the aperture on this issue will only broaden in the new year. We'll keep watching.

And for any readers who feel like you need help, it's out there.

Comments

Mike "No Man" Navarre says:

December 30, 2012 at 1:44 am

I like Zee's last link. Here are a few other resources for counsel who think they have a client with issues in this area:

VA's suicide help line.

Have them talk to their chaplain.

5

Senior Officer Misconduct

Mike "No Man" Navarre

December 28, 2012

We may have to start treating it as un-newsworthy that senior military officers are getting into high-profile legal trouble as this story makes our Top 10 list again. Last year we called #7 on our list "DoN Leadership Challenges (XO Movie Night)." This year, all the services get to share in the glory. It is hard to even list all of the cases this year, but here are a few of the notable ones:

BGEN Jeffrey Sinclair – His unforgettable charges include forcible sodomy and a host of other charges including violation of a direct order to stay away from the woman he allegedly assaulted.

General Ward – The AFRICOM commander was reported to have misused his government travel card and committed other offenses involving misuse of his position and government money. SecDef ultimately retired him as a three-star lieutenant general and forced him to repay the government $82,000 (sadly we never covered General Ward's case).

Removals for cause galore – Rear Adm. Charles M. Gaouette (STENNIS BatGru Commander) headlined the group of Navy COs and Commanders removed for cause. Stripes even started an honor roll of the Navy commanders relieved in 2012, which as of Dec. 13, 2012 listed 25 DoN COs relieved of their duties.

And others that were criticized but not punished – *E.g.* Commander, Missile Defense Agency (leadership by "blowtorch and pliers").

And, to cap it all, the most famous reindeer of them all gets busted for an extra-marital affair, albeit after retiring from service. And while General (Ret.) Petraeus is unlikely to face court-martial, his mistress' emails en-

snared Marine General John Allen in the mess and led to investigation of his emails.

All this led the Pentagon to review the standards it has for senior officers, who can hopefully clean up their act for next year. Since we are in the news business, we sort of hope that New Year's resolution gets broken so we can report on the carnage next year.

Comments

Guest says:

December 28, 2012 at 5:01 pm

CAAFlog seems to have overlooked the court-martial conviction of BG Roger Duff this past summer: 60 days confinement and a dismissal for a badges/tabs case, including false official statements on how BG Duff earned his false Purple Heart on a Special Forces mission in Iraq (that also never happened).

Great job by the team at MDW [Military District of Washington] in the prosecution.

Mike "No Man" Navarre says:

December 28, 2012 at 5:13 pm

Agreed Guest, but so did the rest of the media until the BGEN Sinclair case. I can't find a single report on a major media outlet from June/July 2012–when the charges came down and dismissal imposed. Maybe I am just Google search engine challenged. But certainly worthy of adding to the list.

6

The Commissions

Jason Grover

December 26, 2012

The [Military] Commissions continue to be newsworthy and rate a position in our Top Ten list. If for no other reason than they exist and continue to draw a large number of judge advocates as advisors to the Convening Authority, as prosecutors and defense counsel, and as judges. This year saw several significant items involving the Commissions.

Many will remember Matt Diaz, a former Navy Lieutenant Commander accused of mishandling classified information by sending information to a journalist. This fall, he lost his fight for his law license before the Kansas Supreme Court.

In *United States v. Hamdan*, the D.C. Circuit Court of Appeals vacated Hamdan's conviction for material support of terrorism. The case was the first post-trial appeal that the Court of Military Commission Review had completed.

The 9/11 Conspirators cases and the Al Nashiri USS COLE bomber case continue to march along. The motions hearings have covered classification reviews, defense victim-witness liaisons, transcription of 802 conferences, and the judge's stock market losses. Several hearings have taken place without the accused; Judge Pohl ruling that the accused's right to be present can be waived. One interesting issue that was unresolved this year was whether the procedures to screen detainees' mail interfered with attorney-client communication. In September, the government lost a related attempt to impose restrictions on habeas counsels' access to detainees. Just over a week ago, DOJ filed an unopposed motion to voluntarily dismiss its appeal of Judge Lamberth's order.

NIMJBlog-CAAFlog's coverage of the Commissions was greatly enhanced this year by volunteers who ob-

served the proceedings. Kieran Doyle covered hearings in mid-October and Professor David Glazier covered the arraignments of KSM and the 9/11 Conspirators.

The Commissions march on and with them many judge advocates. And I predict that they will be on our Top Ten military justice stories of 2013 as well. Either because they have ended or simply because they continue to march on.

Comments

Ama Goste says:

December 27, 2012 at 8:04 am

The youngest GTMO prisoner went back to Canada this year also.

http://articles.washingtonpost.com/2012-09-29/world/35495498_1_1st-class-christopher-speer-youngest-guantanamo-canada

7

Ali and The Long Arm of the UCMJ

Zachary Spilman

December 25, 2012

> This case presents important questions concerning allocation of the judicial power of the United States, between Article III courts and Article I courts-martial, to try civilians for criminal offenses. Mr. Ali is the first, and only, full-fledged civilian to be subjected to trial by court-martial by the United States since at least 1970.

So begins the listing of the reasons the writ should be granted in the Petition for a Writ of Certiorari in the case of *Ali v. United States*. Alaa Mohammad Ali, a dual Canadian-Iraqi national accompanying U.S. forces in Iraq

as a contract linguist in 2008, was convicted in June of that year by a military judge sitting as a general court-martial, pursuant to his pleas in accordance with a pretrial agreement, of making a false official statement, wrongful appropriation, and wrongfully endeavoring to impede an investigation, in violation of Articles 107, 121, and 134, UCMJ. He was sentenced to confinement for five months, but pursuant to the pretrial agreement only a sentence of time served (115 days) was approved by the convening authority. Throughout this experience, Mr. Ali was a "full-fledged civilian" whose prosecution was based on the provision of Article 2, UCMJ, that extends jurisdiction to:

> In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field.

Article 2(a)(10). Similar extensions to persons "serving with" the armed forces long-predate the UCMJ. The British Articles of War of 1765 and the American Articles of War of 1775 included similar language. But prior to 2006, Article 2(a)(10) applied only "in time of war," and caselaw interpreted this to require a formally declared war. Congress then struck out "war" following "In time of" and inserted "declared war or a contingency operation" (Pub. L. 109-364, § 552). "Unfortunately there is virtually no legislative history in the Congressional Record that explains the congressional intent for including the amended language." *United States v. Ali*, 71 M.J. 256, 262 n.9 (C.A.A.F. 2012).

But the lack of congressional explanation didn't deter the Army from commencing the general court-martial prosecution of Mr. Ali, nor the Judge Advocate General of the Army from referring the case to the Army Court of

Criminal Appeals for review under Article 69, UCMJ, nor the ACCA from affirming the conviction, nor CAAF from granting review and itself affirming the conviction. Rather, from the beginning this case looked like a deliberate effort to test the new language of Article 2: The Army could have fired Mr. Ali, but chose to prosecute him instead (for relatively minor offenses); the case was referred to a general court-martial, guaranteeing automatic review by the JAG under Article 69(a) (who could then forward the case to the ACCA under Article 69(d)); the military judge denied Mr. Ali's motion to dismiss on jurisdictional grounds; both the ACCA and CAAF denied trial-level petitions for extraordinary relief; and the press was involved from the beginning.

At the end of that history is Judge Erdmann's narrowly-tailored majority opinion. He relied on the absence of an Article III alternative to court-martial prosecution of Mr. Ali (as the Military Extraterritorial Jurisdiction Act (18 U.S.C. §§ 3261-3267) does not extend to citizens of the host country), and he did "not reach the question of the constitutionality of court-martial jurisdiction over a noncitizen who is not also a host-country national." *Ali*, 71 M.J. at 207 n.28. He also found that Article 2(a)(10) was not unconstitutional as-applied to Mr. Ali, particularly because "whatever [constitutional] rights [Mr. Ali] had were met through the court-martial process." *Ali*, 71 M.J. at 268.

Unsurprisingly, these decisions are at the heart of the petition for certiorari, and as settled as the constitutionality of trial by court-martial for a civilian might be, it could soon become very unsettled.

In the aftermath of the trial, Mr. Ali's case made #2 on our Top 10 list for 2008. But two years later the debate

over whether the military justice system can function in a combat environment (at all) took the #1 slot on our Top 10 list for 2010. Now those questions combine, as the case of Mr. Ali returns as the #7 military justice story of 2012, and as we await the input – if any – of the Supreme Court.

8

A Tough Year for Military Judges

Dwight Sullivan

December 24, 2012

On the third day of this list, my CAAFlog gave to me, a *Partington* in D.D.C.

Just kidding. The case of *Partington v. Houck*, 840 F. Supp. 2d 236 (D.D.C. 2012), currently pending decision by the D.C. Circuit, didn't make our top-10 list. But I couldn't resist that little seasonal ditty. On to the real number 8:

On the third day of this list, my CAAFlog gave to me, a bad year for the trial judiciary.

2012 certainly saw some triumphant moments for the military trial judiciary — probably none brighter than Navy-Marine Corps Trial Judiciary Chief Judge Daugherty's ruling that the Commandant of the Marine Corps had made remarks creating the appearance of unlawful command influence, which will be discussed later in the top-10 list. But the military trial judiciary also experienced some setbacks this year.

One major setback for a military judge was self-inflicted. As NMCCA explained in an unpublished opin-

ion, on 21 June 2012, Marine trial judge Robert G. Palmer "spoke for two hours to five junior Marine Corps officers providing professional military education (PME) regarding the practice of military justice. These officers were law students assigned to various Marine Corps legal offices to work with judge advocates and participate in legal training during their summer recess from law school; some were working for defense, and some for the Government." *United States v. Sanders*, No. NMCCA 201200202, 2012 WL 5492306, at *1 (N-M. Ct. Crim. App. Nov. 13, 2012) (footnotes omitted). NMCCA describes Judge Palmer's comments to the summer funners:

> During the PME, the military judge made various statements not in keeping with standards of judicial decorum. Two of the law students in attendance were concerned with the military judge's comments and prepared statements reporting that the military judge referred to defendants as "scumbags," made statements that Congress and the Commandant of the Marine Corps wanted more convictions, and that trial counsel should assume the defendant is guilty. Moreover, pertinent to the facts of this appeal, one law student wrote that the military judge, "said that if you are trial council [*sic*] and prosecuting a child pornography defendent [*sic*] and he gets off because of your incompetence you will go to hell;" but further adds that "I think he was trying to be humorous with this comment because he chuckled when he said it."

Id. (internal citation omitted).

NMCCA concluded that a "reasonable person made aware of the . . . comments by the military judge . . . may

well conclude that they are indicative of bias since they depart from the neutral and detached posture that trial judges must always maintain." *Id*. at *2.

While NMCCA declined to grant relief in at least two cases over which Judge Palmer presided before making his comments, *see id*.; *United States v. Pearce*, No. NMCCA 201100110, 2012 WL 5944996 (N-M. Ct. Crim. App. Nov. 28, 2012), it emphasized that "the military judge's comments were error and evidence of an apparent bias." *Sanders*, 2012 WL 5492306, at *3. The court added, "Other appellants remain free to show a prejudicial nexus to their own case." *Id*. Regardless of whether such a nexus is demonstrated in any future case, LtCol Palmer has already left the bench.

The next grim development for military trial judges wasn't self-inflicted. In the disturbing case of *United States v. Salyer*, No. NMCCA 201200145 (N-M. Ct. Crim. App. Oct. 23, 2012), trial counsel somehow accessed the military judge's personnel file in an attempt to support grounds for a causal challenge. But rather than express outrage or dismay over such a privacy violation, NMCCA appeared to congratulate the government over it, noting that the government had verified the age of the military judge's wife at the time of their marriage before "commencing its voir dire into how that fact might have influenced LtCol MDM's pretrial ruling on the definition of a minor." *Salyer*, No. NMCCA 201200145, slip op. at 9. The means by which the prosecution verified that fact was obtaining the military judge's service record and copying a portion of it. *See id*. at 3. According to the appellant's brief in the case, the military justice officer accessed the military judge's personnel record without the military judge's consent and without establishing any authority to do so. I'm not sure whether trial judges should be more

alarmed by a military justice officer's ability and willingness to access a military judge's service record or the Navy-Marine Corps Court's apparent lack of concern over such an action. As I previously asked:

> Does anyone think that an AUSA could acquire a United States District Court judge's OPM file to leaf through looking for something to support a causal challenge without notice to or permission from the U.S. District Court judge? How do we think a U.S District Court judge would react if such a thing happened? How do we think the legal community would react?

I might add to those questions, how would a federal circuit court respond?

Then came December's disqualification of Judge Gross from the Hasan case. We'll discuss that incident at greater length later in the top-10 list. But CAAF's verdict was harsh: the military judge's handling of the case could lead a reasonable observer to conclude "that the military judge had allowed the proceedings to become a duel of wills between himself and Appellant rather than an adjudication of the serious offenses with which Appellant is charged." Particularly bizarre was the military judge's order to the defense counsel to "[g]et someone over to the courtroom immediately" to clean the deliberation room latrine, in which the military judge found "what appeared to be feces spread out on the floor." According to a subsequent motion by the defense, "Department of Emergency Services (DES) personnel determined that the substance on the floor was in fact mud tracked in by a DES guard."

Of course, the *Hasan* writ dealt with only one judge and his handling of only one case. As we previously noted (and will note again later in the top-10 list), military

judges did much this past year to add to the luster of the trial bench. But having a military judge removed from the most highly visible case in the military justice system is a black eye for the trial judiciary. And it wasn't a lone rebuke, as demonstrated by NMCCA's *Pearce* and *Sanders* decisions. Nor can it help military judges' morale that open season has been declared for prosecutors' access to their personnel records. All of this leads us to name trial judges' tough year as one of 2012's top military justice stories.

9

2012's Robust Writ Practice

Dwight Sullivan

December 23, 2012

One role of the annual top-10 list is to look back over the year and connect the dots. Sometimes a trend is more visible based on a 12-month retrospective than it is over the day-to-day course of the year. Such is the case with 2012 and the military appellate courts' robust exercise of their extraordinary writ jurisdiction.

2012 began with a writ. On 3 January 2012 — the first day that CAAF was open for business this year — it issued a writ of habeas corpus ordering Technical Sergeant Brissette's immediate release from confinement. *In re Brissette*, 71 M.J. 91 (C.A.A.F. 2012). TSgt Brissette had previously been convicted of a contested Article 134 offense without a terminal element. He began to serve his sentence, which included a BCD and confinement for 13 months. But after CAAF issued its opinion in *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), the military judge set aside the conviction and dismissed the charges

in a post-trial Article 39(a) session. The government appealed under Article 62; TSgt Brissette remained confined due to the automatic stay of the military judge's order that results from the filing of an Article 62 appeal. CAAF denied a petition for extraordinary relief from TSgt Brissette challenging his confinement while AFCCA considered the Article 62 appeal. *In re Brissette*, 71 M.J. 1 (C.A.A.F. 2011). But even after AFCCA ruled for TSgt Brissette on 19 December 2011, the government refused to release him from confinement. TSgt Brissette's counsel initially filed a habeas petition with AFCCA on 20 December 2011. Two days later, he filed a habeas petition with CAAF as well. CAAF ordered the government to show cause why it shouldn't order TSgt Brissette's release from confinement. Then, on 3 January 2012, CAAF did just that.

While CAAF would deny more petitions for extraordinary relief in 2012 than it would grant — and while it displayed initial reluctance to become involved in some of the cases in which it ultimately granted extraordinary relief — CAAF was willing, when necessary, to reach down to lower levels of the military justice system to make rudder adjustments while the case remained underway below. It appears that when CAAF sees a case heading for the rocks, it's willing to accept a party's invitation to briefly take the conn to put the case on a safe course, then return the wheel to the lower court. This trend is beneficial to the military justice system as a whole — it's the proverbial ounce of prevention that spares the need for a pound of cure. But it's all the more remarkable given the small number of non-trailer cases that CAAF has chosen to review on direct appeal in recent years. And it's even more remarkable since, due to the failed Ohlson nomination, CAAF continues to function as

a four-judge court. *See In re September 2012 Term of Court*, 71 M.J. 392 (C.A.A.F. 2012). While Chief Judge Baker has sometimes brought a senior judge onboard to help the court decide a pending extraordinary writ case, CAAF's initial decision to entertain a writ requires at least 3 out of 4 votes. TSgt Brissette isn't the only petitioner to surmount that hurdle during 2012.

In June 2012, after previously denying another petition for extraordinary relief arising from the case, CAAF stayed Article 32 proceedings in a potentially capital Air Force case. *Holsey v. United States*, 71 M.J. 330 (C.A.A.F. 2012) [insert familiar disclosure here]. Holsey had submitted requests for IMCs with capital experience, yet the investigating officer indicated that he would proceed with the 32 before those requests had been acted upon. Eight days later, CAAF lifted the stay, but "contingent on the convening authority's ruling on all currently pending requests for individual military counsel." *Holsey v. United States*, 71 M.J. 333 (C.A.A.F. 2012).

On 15 August, after having previously rejecting another petition for extraordinary relief arising from the case, CAAF stayed proceedings in *Hasan* — a case we'll be looking at in greater depth later in the top-10 list. *Hasan v. Gross*, 71 M.J. 382 (C.A.A.F. 2012). On 27 August, CAAF kicked the case back to the trial judge, but directed that no order to forcibly shave MAJ Hasan could be executed until MAJ Hasan had the opportunity to seek extraordinary relief from ACCA.

On 31 August, the Navy-Marine Corps Court issued a writ of mandamus directing that the charges and specifications in an ongoing case be dismissed on personal jurisdiction grounds because the accused had been validly discharged and did not thereafter voluntarily submit to

military jurisdiction. *Lawanson v. United States*, No. NMCCA 20100187 (N-M. Ct. Crim. App. Aug. 31, 2012). CAAF would later reject the government's efforts to overturn that writ. *United States v. Lawanson*, __ M.J. __, No. 13-8007/NA (C.A.A.F. Oct. 26, 2012).

On 18 September, CAAF issued a show cause order arising from a claim of inordinate appellate delay in an Air Force case. *Merritt v. United States*, 71 M.J. 402 (C.A.A.F. 2012). While CAAF would later deny that petition for extraordinary relief, it granted a similar petition in *Carter v. United States*, __ M.J. __, No. 13-8006/AF (C.A.A.F. Nov. 27, 2012), ordering AFCCA to either decide the case within 45 days or explain why it needed more time. Continuing the trend from earlier in the year, CAAF had denied an earlier petition by Carter seeking similar relief. *Carter v. United States*, 71 M.J. 362 (C.A.A.F. July 13, 2012).

In October, CAAF heard oral argument in an extraordinary relief case dealing with media access to court records in the *Manning* court-martial case, followed by an order directing additional briefing. *Center for Constitutional Rights, et al. v. United States*, No. 12-8027/AR.

CAAF issued its most significant writ of the year on 3 December, when it ordered Judge Gross's removal from the *Hasan* case. *Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012). That immediately resolved one issue that could have hung up a direct appeal later — and subsequently eliminated another potential appellate issue when Judge Gross's replacement — Judge Osborn — ruled that MAJ Hasan could keep his beard for his trial.

CAAF's extraordinary writ practice this year — while robust — occurred only reluctantly, usually after it had previously denied another request for extraordinary

relief in the same case. The writs also shared another common feature — they had the apparent effect of making the military justice system function more smoothly while removing appellate issues that could have disturbed the cases' outcome later. We'll be watching to see whether CAAF takes a similar approach to its extraordinary relief practice in 2013.

Comments

Dew_Process says:

December 24, 2012 at 5:11 pm

CAAF wouldn't have to worry quite as much about "writ practice" if some of the other players did their part to remember that the second word in "military justice" is "justice," not convictions.

10

The *Parker* and *Walker* Cases' Denouement

Dwight Sullivan

December 23, 2012

The *Parker* and *Walker* cases are the naval justice system's version of Dickens' fictitious *Jarndyce v. Jarndyce*: innumerable young judge advocates have entered appearances in the cases; innumerable old judge advocates have withdrawn from them.

Between the time the two senseless and tragic murders were committed and the cases' completion of direct appeal, a judge advocate could have entered active duty and qualified for retirement.

LCpl Wade Walker and LCpl Kenneth Parker were each convicted of two premeditated murders at two sepa-

rate courts-martial held at Camp Lejeune in July 1993. Both were sentenced to death.

Both cases languished on appeal for extended periods. And both appeals finally ended this year. NMCCA first decided the *Walker* case in 2008 — 15 years after the court-martial. *United States v. Walker*, 66 M.J. 721 (N-M. Ct. Crim. App. 2008). NMCCA set aside one of the two premeditated murder convictions as well as the sentence and authorized a rehearing on both. Neither side appealed further. The government retried Walker on the set-aside premed murder charge and sought death a second time. While the members reconvicted Walker of the premed murder, they adjudged a life sentence. (Col John Baker, our very own Jason "Super" Grover, and Capt Kelly Repair litigated the rehearing brilliantly on Walker's behalf.) But while all of that activity was occurring in the Walker case, for various reasons the Parker case remained stalled.

Finally, on 12 April 2012, NMCCA heard oral argument in Parker. Little more than four months later, NMCCA issued its opinion. *United States v. Parker*, 71 M.J. 594 (N-M. Ct. Crim. App. 2012). Senior Judge Maksym wrote for a unanimous panel. NMCCA not only set aside one of the two murder convictions, but did so on legal insufficiency grounds, among other bases, effectively insulating the decision from CAAF review. NMCCA then reassessed the sentence, replacing death with confinement for life, total forfeiture of pay and allowances, reduction to E-1, and a DD. The standard of review for reassessments would have made it difficult for the government to overturn that decision by taking the case to CAAF. Ultimately, neither side even tried. No one moved for reconsideration en banc and there was no request for further review by CAAF. Both sides could live with

NMCCA's outcome — literally, in the case of the defense. The opinion seemed designed to bring the case to an end. And both sides seemed relieved to let it. No more judge advocates would have to litigate the military's version of *Jarndyce v. Jarndyce*.

But while *Parker* ended with a bang, *Walker* finally ended with a whimper. Walker's life sentence upon his rehearing brought the case within NMCCA's jurisdiction a second time. This time, NMCCA criticized the remedy that NMCCA itself had ordered in the initial appeal and knocked one of the premeditated murder convictions down to unpremeditated murder. *United States v. Walker*, 71 M.J. 523 (C.A.A.F. 2012). Senior Judge Carberry wrote for a unanimous panel. Noting that the other premeditated murder conviction carried a mandatory minimum of confinement for life, NMCCA affirmed the life sentence and other punishments that the members adjudged upon retrial.

But the original prosecutors in the case hadn't been content with two premeditated murder charges; in this capital case, they also charged the accused with, among other offenses, adultery. That, of course, gave rise to a *Fosler* challenge. So the final ruling in the military's *Jarndyce v. Jarndyce* was a CAAF summary disposition setting aside two Article 134 convictions — one for adultery — in what had formerly been a capital case. *United States v. Walker*, 71 M.J. 363 (C.A.A.F. 2012) (summary disposition).

Parker is also significant because it resulted in the removal of the last Marine from military death row. When Parker left the SHU, there was no Marine under a sentence of death for the first time since 1987. No member of the Department of the Navy has been executed

since 1849 and no Marine since at 1817. Given the pace at which capital cases proceed through the military justice system, it will likely be decades before that streak comes to an end.

NMCCA, for bringing the long-running *Parker* case to a close that both sides were content with, you've earned a spot in the top-10 military justice stories of the year.