

On Watch



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Military Law Task Force of
the National Lawyers Guild

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DOING YOUR FIRST COURT-MARTIAL *A Progressive Lawyer's Dive into the Belly of the Beast*

By Steve Collier - If you could develop a litigation strategy to stop the war in Iraq, would you be the first attorney to sign onto the pleadings? If you could fight militarism with a brilliant closing argument, would you take that case?

I would venture to say that most progressive attorneys who oppose the government's actions in the Middle East would gladly use their skills to slow the seemingly endless war that darkens our lives and shames our nation. If you desire to do more than protest and vote, you would do well to consider representing a military resister in a court-martial. While you and your client may not stop the war, you may prevent another casualty and raise the consciousness of many in the process.

I did my first court-martial representing Stephen Funk, the first public conscientious objector to the war in Iraq. After refusing to deploy to Iraq, Stephen turned himself into the Marines, and his objection made headlines throughout the world. The Marines charged him with desertion in time of war.

I had never done a court-martial. I had never even tried a criminal case, although I had tried many civil jury trials. I learned that you don't have to be an expert in military law to do a court-martial. You only need to prepare well, possess decent trial advocacy skills, and believe in what you are doing.

While this article cannot prepare you substantively for your first court-martial, it seeks to offer you guidelines to successfully represent a military resister. In doing so, you will be bringing a progressive voice into the biggest belly of the biggest beast, the U.S. military.

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Read *On Watch* online at www.NLGMLTF.org



I. Study the Substantive and Procedural Law

Any good trial attorney can defend a client in a court-martial. While civilian attorneys may think that military law and practice are foreign and unknown, rules that are easily learned lay out the particulars. First, there is a manual that tells you how to do a court-martial – the *Manual for Courts-Martial*. The Manual contains the substantive law, the Uniform Code of Military Justice (UCMJ), and procedural Rules for Courts-Martial (RCM). The accompanying article by Jim Klimaski also provides a good overview of military law.

By reading the Manual, you can learn how a court-martial will be tried. For example, the RCM include actual scripts of trial proceedings that the trial counsel (prosecutor) will use and read from during the proceeding. There are also Uniform Rules of Procedure established by the military courts for each branch of service, which are also available online. Most helpful are links to various military law materials at the MLTF website, www.nlgmltf.org.

In reviewing the Manual, I learned that court-martial procedure was very similar to that in civilian criminal practice, with just some different jargon. Similarities include the right to appointed military counsel to represent the accused, pre-trial conferences, (RCM 802), preliminary hearings (Art. 32), very broad pre-trial discovery rights, pre-trial motions to dismiss, rules of evidence similar to the federal rules, production of evidence and witnesses for the defense by the military, right against self-incrimination, right to confront witnesses and right to a speedy trial.

Some salient differences are that military law criminalizes certain conduct that would not be a crime in the civilian context. For example, Lt. Wadata is being prosecuted under Article 133, “Conduct Unbecoming and Officer and a Gentleman,” for speaking out against the Iraq War, which would be protected speech under the First Amendment if spoken by a civilian. Also, consensual sodomy is still a crime in the military, even though the

U.S. Supreme Court ruled civilian criminal statutes prohibiting such activity unconstitutional in *Lawrence v. Texas*, 539 U.S. 558 (2003).

Another difference is the role the accused’s command plays in the proceedings. The command convenes the court, the command is the prosecutor, and the command appoints the members to the jury pool. Therefore, the danger of improper command influence is always in the background of any case, especially in a case regarding a military resister.

In the Funk court-martial, the Marine Reserve Command issued a memo to all its battalions stating that, unlike for those who “honorably serve” in the Iraq war, all conscientious objectors who resist deployment would be prosecuted by the command headquarters itself. Furthermore, the top-ranking officer in the initial jury pool was the commander who sent out this memo! Fortunately, the case law on improper command influence in court-martial proceedings is fairly strong, and the judge granted in part my motion to dismiss the proceedings based on that theory. While he did not dismiss the charges, he did order that the command be removed from the case and a different chain of command take its place.

2. Get Help from Others

Another interesting aspect of courts-martial is that the accused has a right to counsel appointed by the military (called area defense counsel), but can choose civilian counsel, or be represented by both. My client chose me to be lead counsel and kept area defense counsel as associate counsel. Area defense counsel at Marine Reserves headquarters were professional attorneys who were either committed defense attorneys or who planned, after completing their military service, to practice as civilian criminal defense attorneys.

Area defense counsel helped me as a non-military attorney, offering his expertise in the law and regarding the command and base operations, in deci-

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phering military jargon and acronyms, and in jury selection, reading medals and markings on the members' uniforms to determine if they had combat experience, special force involvement, or other information that would suggest a bias against a conscientious objector. Area defense counsel was invaluable in helping me learn information that an outsider would not know.

If resisters have a right to defense counsel appointed by the military, why is it important to have outside civilian counsel represent them? First, not all area defense counsel are skilled, and much fewer are committed to your client's goals of resistance and objection to war. Moreover, in a higher profile case with political implications, it is unlikely that a career military defense counsel would be willing to stick his/her neck out and file motions challenging the command for unlawful influence, for example, when that counsel must continue to work with that command structure in other cases. Lastly, progressive civilian counsel may have access to resources and a willingness to use them, such as media and expert witness, that area defense counsel would not have. For example, I used a progressive "peace priest" to testify about my client's religious objection to war. In the Pablo Paredes' court-martial, noted international law scholar and NLG President Marjorie Cohn testified as an expert witness.

In addition, when doing your first court-martial, get help from the progressive community. I asked Luke Hiken, an experienced military lawyer, to advise me on legal strategy. We developed a support committee of former conscientious objectors, who handled legal research, media outreach, and fundraising for a defense fund. All these efforts were essential to our success and well executed. We had forty-seven media outlets throughout the world cover my client's surrender to the Marines and statement of resistance, and the fundraising made it possible for me to attend the trial and preliminary hearings at Marines Headquarters in New Orleans. The committee also provided strong moral support for my client during this difficult and stressful experience.

Take joy in the important work you and your client will do to resist war

You may not succeed in getting an acquittal for your client in his or her court-martial. However, we did succeed in getting a lighter sentence than that which the trial counsel and the military judge thought was likely. Moreover, the media attention and publicity around my client's objection to the war likely helped dissuade others from joining the military.

And while my client was serving his time in the brig, he met other GIs who had returned from Iraq and regretted the war and the destruction it caused. That may have been his greatest vindication. It served to remind me that the main thing we can do to stop war is to change people's consciousness, one individual at a time.

Steve Collier is a San Francisco attorney and member of the National Lawyers Guild Military Law Task Force.

The Manual for Courts-Martial (2005 Ed.) can be downloaded on line at <http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf>, or ordered from the U.S. Government Printing Office. It can also be found on the MLTF website at www.nlgmltf.org.

MILITARY LAW SEMINARS

Would you like to arrange a seminar on military law and counseling or conscientious objection in your area? The MLTF can provide speakers and resources for day-long or half-day seminars on these issues: an overview of military law, with emphasis on discharges, handling AWOL cases, and dissent, or habeas corpus petitions in conscientious objection cases. Both sessions can be geared for law students and counselors as well as attorneys. For more information, contact Marti Hiken at 415-566-3732.



An Overview

Understanding Military Criminal Law

by **James R. Klimaski**—Military criminal law reflects the constraints of military service. Although service members enjoy basic constitutional rights, they are also subject to restraints the military believes necessary for discipline and achieving a cohesive fighting force. The military member agrees to these strictures when s/he signs the enlistment contract of service. Once the contract is in effect – which occurs when the individual takes the formal oath of office – the service member cannot simply quit. Conversely, the military cannot simply dismiss the member. Military service is not a civilian job, i.e., employment-at-will or employment contract.

The Military operates under the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 801, *et. seq.*, rather than civilian criminal statutes. The UCMJ criminalizes acts that are not crimes in the civilian context. For example, concerning the service contract, the UCMJ outlaws desertion, absence without leave (AWOL) and missing movement, which means failing to report when one's unit is deployed, under orders, to another location. To ensure orderly operations and secure the chain of command, the UCMJ also criminalizes disruptive actions such as insubordination, or failure to follow orders or regulations. There are a few limits on free speech, but the military's efforts to restrain all speech have failed.

Additionally, the military proscribes private individual behavior such as fraternization between service members of different ranks, adultery and sodomy. Military sodomy laws have so far withstood *Lawrence v. Texas*, 539 U.S. 558 (2003), in which the U.S. Supreme Court found civilian anti-sodomy laws unconstitutional.

Further, the military asserts jurisdiction over service members for bad behavior while on leave or out of uniform. Finally, the UCMJ contains a catch-

all provision, Article 134, criminalizing acts that discredit the military and are prejudicial to good order and discipline.

The military enforces the UCMJ through a multi-tiered system of forums, ranging from non-judicial punishment to the general court-martial, a proceeding akin to a civilian felony criminal trial with judge and jury. The UCMJ contains provisions describing both non-judicial and judicial punishments. The service member's Commander, the Convening Authority, decides whether to prosecute the case, determines the forum, appoints the jury panel and ultimately approves any adjudged punishment.

Article 15: Punishment Not a Criminal Conviction, But Can Result in Criminal Arrest Record

Article 15 of the UCMJ codifies non-judicial punishments. An example of an act subject to an Article 15 is reporting late to an assignment or work. The closest civilian comparison is a minor traffic offense. In a civilian setting, a hearing examiner would adjudicate such minor infractions. In the military, however, the service member's commanding officer serves as the hearing examiner. Punishment under Article 15 is not a criminal conviction.

Even so, the military sometimes reports Article 15 arrests to the Federal Bureau of Investigation. As a result, years later the former service member discovers that she or he has a criminal arrest record for something that may not even be a criminal offense and for which the service member was found not guilty. The military does not have a formal process to expunge arrests, as do civilian courts.

Because Article 15 punishment is "non-judicial," the service member may appeal the decision only to his or her next higher Commander. The military's formal criminal appeals system does not include jurisdiction over Article 15 punishments.

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Courts-Martial: The Military's Formal Criminal Adjudication

Courts-martial constitute the military's formal criminal adjudication. There are three court-martial levels: (1) the lowest, summary court-martial; (2) special court-martial; and (3) the highest, general court-martial. Conviction in either a special or general court-martial constitutes a federal criminal conviction.

A summary court-martial, a procedure the military rarely uses, is more formal than an Article 15, but the punishment is not a criminal conviction. One individual, not the service member's commanding officer and usually a military lawyer, presides over a summary court-martial and acts as prosecutor, judge and jury. The military does not provide the service member with military counsel for a summary court-martial. The service member, however, may bring a representative, including a civilian attorney, to defend him or her.

The principal difference between a special court-martial and a general court-martial is the level of punishment each can impose. Special courts-martial convictions essentially constitute misdemeanors. Such a conviction carries no more than a one-year confinement, reduction in rank, pay forfeiture and a Bad Conduct Discharge, even when the offense authorizes a higher maximum punishment.

A general court-martial, however, may impose confinement up to the offense's maximum sentence, including life imprisonment or the death penalty. No service member has been put to death since 1961, although since then general courts-martial have handed down several death sentences.

CO's Substantial Powers Over Courts Martial Open to Serious Abuse

The commanding officer, having general court-martial Convening Authority, chooses the level of court-martial and the make-up of the jury. These

powers are open to serious abuse. The Manual for Courts-Martial (MCM), the rules or procedure for courts-martial, limits the Convening Authority's power to affect the court-martial's outcome. A Presidential Executive Order, the MCM undergoes revision at least every other year. The President must formally approve the changes.

After preferring the charges, the Commander selects an Article 32 investigating officer. This investigator gathers the facts of the case and recommends whether the charge merits a general court-martial. The Commander can accept or reject the investigator's recommendation without explanation. If the Commander refers the matter to either a special or general court-martial, she or he selects the jury (court panel) whose members must be of equal or greater rank than the accused. An enlisted service member can require that at least one-third of the panel member come from the enlisted ranks. Military courts tolerate liberal voir dire, permitting peremptory challenges and those for cause.

To Decrease Command Influence, Defense Bar and Judiciary Are Independent

To decrease command influence, every service has an independent defense bar and judiciary. The independent trial defense service details a defense lawyer to the defendant (the "accused," in military parlance), who does not have to pay for this representation. The accused may request a specific military lawyer for his/her defense and has the right to hire a civilian lawyer at her or his own expense. The Chief Judge of the trial judiciary for each service branch appoints a military judge to a case.

The court-martial generally follows the Federal Rules of Evidence. Trial procedures are similar to those in civilian courts. The jury's decision, however, need not be unanimous, except for sentencing in a capital punishment case. The Convening Authority reviews any conviction after the trial and may grant clemency or otherwise lower the sentence. If the sentence consists of a punitive dis-

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charge and/or one year of confinement, the case is automatically appealed to the Court of Criminal Appeals for the respective service. These judges are military officers.

The United States Court of Appeals for the Armed Forces (CAAF) provides a second appeal level. The judges are civilians whom the President has nominated and the Senate has confirmed. The final resort is to appeal through a petition for certiorari to the United States Supreme Court.

The military operates under its own criminal laws and procedures. Any unfairness stems from those who control the proceedings.

James Klimaski is a member of the NLG Military Law Task Force Steering Committee and a long time military law practitioner

Judge Declares Mistrial in Watada Case

ThankyouLT.org, February 7, 2007 - Court-martial proceedings were abruptly halted today, when the military judge nullified the Stipulation of Facts and, over the objection of Lt. Watada's defense attorney, granted the prosecution's motion for a mistrial.

The army has announced March 19, 2007, as the new trial date.

Following is the statement presented by Lt. Watada's attorney, Eric Seitz, at the press conference held after the mistrial was declared.

"First I want you to understand that a mistrial in a case of this significance is a very rare occurrence, And when it happens, it has potentially very significant effects. In this case, it is my professional opinion that Lt. Watada cannot be tried again because of the effect of double jeopardy.

"As you all know, we did not consent to a mistrial. We did not ask for a mistrial. We did nothing to warrant a

mistrial. The judge made all of his rulings himself or based upon motions by the government.

"Once jeopardy has attached – and it clearly did attach in this case, when the jury panel was sworn in and when the first witness testified -- the protection against double jeopardy applies as a constitutional matter.

"And there may be arguments that could be made by the government to get around that, and we will probably have a lively discussion of it. But the first motion we file when they attempt to bring this case back will be a motion to dismiss with prejudice, based upon double jeopardy.

"And if that motion is not granted, we will immediately make an interlocutory appeal, because we believe that even the military appellate courts will agree with us that the circumstances under which the judge acted today were an abuse of his discretion, and that there was no justification whatsoever either for the subject inquiry to be brought up in the manner in which it was; for the additional inquiry of Lt. Watada in which he elicited statements which he then purported to utilize to criticize and withdraw the Stipulation of Facts to which the government and the defense had agreed last week, when two of the charges were dismissed in return for our agreement that we would stipulate to facts to avoid the necessity for reporters to testify.

"The case is now back in a posture that it was in some weeks or months ago, and I do not believe it will ever be resurrected or ever can be resurrected.

"Our hope at this point is that the army will realize that this case is a hopeless mess, that this has not been created by the defense. The defense has been very consistent in the positions, in the arguments that we've taken. Lt. Watada has been extremely consistent in his arguments and his claims. And therefore, we are now in a position because of the government and rulings by the court that we think are erroneous, we will have the consequence of ending these proceedings altogether."

**Support Lt. Watada
www.ThankYouLT.org**



MLTF ANNOUNCEMENTS

Regional Training Workshop for Volunteers

GI Rights Hotline

April 20 – 22 - Oklahoma City

Led by trainers from National Lawyers Guild Military Law Task Force

Friday, April 20, 7 pm

Panel Discussion - Considering War and Personal Conscience

(required for trainees; open to the general public)

Mayflower Congregational Church, 3901 NW 63rd St, OKC

Saturday, April 21, 9 am – 6 pm and

Sunday, April 22, Noon – 6 pm

Training sessions at Oklahoma City University School of Law - Walker Center, 2501 N. Blackwelder, OKC

About the trainers...

Louis “Luke” Hiken

Luke graduated from UC Berkeley in 1965 and Boalt Hall School of Law in 1968. As an undergraduate, he was a draft counselor with the SDS anti-draft union, and later with the UC Berkeley draft counseling office, which was run out of the Student Union building on campus. Upon graduating from law school, and clerking for the Federal District Court in Hawaii, Hiken accepted a Reginald Heber Smith Fellowship to work in Seaside, California. While there, he began representing anti-war GIs stationed at Fort Ord, California, and helped establish the Military Law Project in Monterey. He has represented GIs in courts-martial, administrative discharge hearings, and federal court proceedings for the last 30 years and has been a member of the Steering Committee of the MLTF since the 1970s.

He is currently a supervising attorney with the California Appellate Project, assisting in the defense of death penalty cases pending before the California Supreme Court.

Marti Hiken

A civilian military counselor and legal worker, Marti is currently co-chair of the MLTF. She and Luke directed the Military Law Project in Monterey in 1971 and published *Fight Back -- A Manual for Dis-*

charge. Previously, she was the associate director at the Institute for Public Accuracy. She was also the director of the NLG Prison Law Project with Rose Braz, and chaired the NLG Native Committee in the early 1970s. She has had many fiction and non-fiction articles published over the years.

James Branum

Though he only became a lawyer in 2006, James Branum has an intensive background in military legal issues. As a student at Oklahoma City University Law School, he co-founded a chapter of the National Lawyers Guild, and now serves on NLG's MLTF's national steering committee and as NLG Texoma Region vice-president. He co-founded Oklahoma Committee for Conscientious Objectors in 2004 and has served as co-chair of the group since that time. He has established a practice based in Oklahoma City (GIRightslawyer.com) providing assistance to servicemembers who are seeking a discharge from the U.S. military or who need who need legal counsel when facing a Court Martial, Article 15 or Article 32 hearing.

Cost and reservations

\$25 – 100, sliding scale based on ability to pay. Does not include meals or accommodations. Scholarships are available; call (405) 615-2700. See reverse of this flier for registration form, or go to okobjector.org/hotline. Participation is limited, please register early to insure a spot. Participants from out of state are welcome. We encourage workshop content and materials to be used for similar services in other communities. For lodging options, see web site or call (405) 615-2700.

For more information or to register go to: www.okobjector.org

About the Military Law Task Force

The National Lawyers Guild's Military Law Task Force includes attorneys, legal workers, law students and "barracks lawyers" interested in draft, military and veterans issues. The Task Force publishes *On Watch* as well as a range of legal memoranda and other educational material; maintains a listserv for discussion among its members and a website for members, others in the legal community and the public; sponsors seminars and workshops on military law; and provides support for members on individual cases and projects..

The MLTF defends the rights of servicemembers in the United States and overseas. It supports dissent, anti-war efforts and resistance within the military, offering legal and political assistance to those who challenge oppressive military policies. Like its parent organization, the NLG, it is committed to the precept that human rights are more valuable than property rights. The Task Force encourages comments, criticism, assistance, subscriptions and membership from Guild members and others interested in military, draft or veterans law. To join, or for more information, please contact the Task Force at:

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