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Re: Legal Exposure of Veterans Who Testify at Public Forums to Expose War Crimes Activity in Iraq and Afghanistan

You asked that I write a preliminary memorandum addressing the possible legal consequences to veterans who testify in a public forum about war crimes activity in Iraq and Afghanistan.

This memorandum addresses the possibility of veterans being called to active duty by military authorities for investigation and prosecution for war crimes activity, and addresses other concerns as well. One consequence of testifying is the possibility of being tried in federal civilian court under the War Crimes Act of 1996, Title 18, U.S. Code, Section 2441. That Act provides that a person who commits a war crime while a member of the Armed Forces of the United States can be tried in civilian federal court and if convicted “shall be fined ... or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.”

General Considerations

By use of the term “veteran” in this memorandum, I mean a person who has been discharged from active duty military service and is no longer on active duty. A veteran may or may not have continued ties to the military.

As to what constitutes a war crime, the text to turn to is U.S. Army Field Manual 27-10, The Law of Land Warfare, which is widely available on the internet. In addition the War Crimes

Act of 1996 defines war crimes in the context of the Geneva Conventions of 1949 and other conventions. The Act prohibits torture, cruel and inhuman treatment, murder, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, and other acts.

When a veteran testifies at a public tribunal about what occurred in combat in Iraq or Afghanistan, that person cannot be told with any certainty that he or she will suffer no legal consequences. The veteran is subject to subpoena, and as such can be subpoenaed to testify as a witness in a civilian or military trial. A veteran who admits to acts prohibited under international law also takes the risk of being prosecuted for war crimes in civilian federal court. As explained below, a veteran who is a member of a Reserve component may be involuntarily called to active duty under certain circumstances for purpose of investigation and trial.

Under law there is usually a difference between being a witness to war crimes and being a participant in war crimes activity. However, a person subject to the Uniform Code of Military Justice who testifies about war crimes activity may place themselves in jeopardy for offenses that may not be readily apparent, such as dereliction of duty, conduct to the prejudice of good order and discipline, and violations of orders or regulations. Under Article 92, UCMJ, a person subject to the Code can be tried and convicted for violating a general order or regulation even though the person did not have knowledge of the order or regulation or intend to violate it.

Determining a Veteran's Status Under the Law

In order to determine his or her legal status, a veteran should review his or her enlistment agreement; any discharge papers, including the DD Form 214 (Certificate of Release or Discharge From Active Duty); and any discharge orders. The veteran should also review any order that brought him or her onto active duty and on assignment to Iraq or Afghanistan. The DD Form 214 should specify the date upon which the veteran's reserve and military service obligation ends.

There exists considerable confusion in this area, however, because of Stop Loss policies and the Pentagon having taken an expansive view of reserve obligations. I have seen DD Form 214s that have entries of all "0"s in the spaces provided on the form for the year, month, and day that a reserve obligation ends.

A case that pertains to officers is illustrative. In Parrish v. Brownlee, 335 F. Supp. 2d 661 (E.D. N.C. 2004), a federal district court in North Carolina ruled that an officer was still a member of the Individual Ready Reserve and therefore subject to involuntary activation even though the officer's Military Service Obligation of eight years had expired. The district court found that the officer had voluntarily remained in the Individual Ready Reserve past his Military Service Obligation (MSO) date because the officer had not resigned after his eight year term of active duty service and reserve service.

In 2005 the Department of Defense issued a DOD Directive which correctly provides that an officer who wants to remain in the Individual Ready Reserve who has fulfilled his Military Service Obligation must affirmatively take action to remain in the IRR. Department of

Defense Directive 1235.13, Management of the Individual Ready Reserve (IRR) and the Inactive National Guard (ING), July 16 2005, para. 4.5, provides as follows:

Officers who have fulfilled their MSO [Military Service Obligation] and have not taken action to elect to remain in the IRR [Individual Ready Reserve] shall be advised of the requirement to remove them from the military. The military departments shall remove those officers from the military within 2 years after fulfillment of the officer's MSO unless they positively elect to remain in the IRR past their MSO.

Civilian Ex-Servicemembers

If a veteran and the military have severed all ties, that veteran is a civilian and is not subject to court-martial jurisdiction. This was decided by the Supreme Court in 1955. United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955). In Toth v. Quarles the Supreme Court held that it was contrary to the U.S. Constitution for the military to try a civilian ex-servicemember and held that Congress has no power to subject civilian ex-servicemembers to trial by court-martial. Civilian ex-servicemembers, like other civilians, are entitled to the benefit of the constitutional safeguards afforded those tried in civilian federal courts.

On September 12, 2007 a former Marine sergeant, charged in federal court in Riverside, California, pleaded not guilty for his alleged role in the killing of eight unarmed Iraqi prisoners in Fallujah in November 2004. According to published reports he was charged in federal civilian court because he was no longer a Marine. Furthermore, a former Army private was charged in civilian court in Kentucky for allegedly raping and murdering a 14-year-old Iraqi girl, then killing members of her family. He faces a possible death sentence. Both cases are pending at this time.

Persons Subject to the UCMJ

Article 2 (a), UCMJ, lists the categories of persons who are subject to the UCMJ. Article 2, UCMJ may be found on the internet as Article 2, UCMJ, or as Title 10, U.S. Code, Section 802. Categories of persons subject to the UCMJ include: members of a Reserve component while on inactive duty training; persons awaiting discharge from the military service (such as a person on excess leave, pending appeal of a court-martial conviction; a person on terminal leave; or a person otherwise awaiting discharge). Under Article 2 persons who are hospitalized in a military hospital, and retirees are also subject to the UCMJ.

The military has investigated, charged, and tried several active duty Marines and soldiers for murder and other violations of the Uniform Code of Military Justice (UCMJ) pertaining to activities during the wars in Afghanistan and Iraq.

Members of the Individual Ready Reserve (IRR) and other Reservists

Iraqi Veterans Against the War and others may be interested in knowing whether the military can lawfully, involuntarily order to active duty a veteran who is a member of the Individual Ready Reserve (IRR) or other Reserve components.

The rules and regulations for activation from the Individual Ready Reserve and other Reserve components are highly technical. In part, rules for activation turn on whether the former servicemember and member of the Reserve was on active duty as a reservist or in a regular component. Second, the military's purpose in activating the reservist is also relevant.

- a. Involuntary activation for purpose of active duty in time of war or national emergency.

The Individual Ready Reserve (IRR) is “a manpower pool consisting of individuals who have had training and have previously served in the active forces or in the Selected Reserve.” DOD Directive 1235.13, Management of the Individual Ready Reserve (IRR) and the Inactive National Guard (July 16, 2005), para. 3.2. The IRR consists of people who must fulfill their Military Service Obligation (MSO), members fulfilling a service obligation incurred via contract, and those who have fulfilled their MSO and who voluntarily remain in the IRR. The IRR also includes some personnel who are participating in officer training programs or in the Armed Forces Health Professions Financial Assistance Programs. DOD Directive 1235.13, para. 3.2.

A veteran who is a member of a Reserve component, including the Individual Ready Reserve, is subject to recall to active duty in time of war or national emergency “without the consent of the persons affected ... for the duration of the war or emergency and for six months thereafter.” 10 U.S. Code Section 12301(a). A member of the Ready Reserve is subject to recall to active duty involuntarily in time of war or national emergency “for not more than 24 consecutive months”. 10 U.S.C. Sec. 12302(a). See also DOD Directive 1235.13.

A concern is that a reservist who testifies about participation in war crimes activity may be activated involuntarily seemingly for the purpose of serving “in time of war or national emergency” but actually as pretext for having spoken publicly about war crimes. Such illegal activation orders could be contested within the military and then in federal court. Title 10 U.S. Code Sec. 12302(b) provides for fair treatment between members of the Ready Reserve and it would be patently unfair and punitive to activate a person for exercising his or her rights under the First Amendment.

- b. Involuntary activation for purpose of investigation and trial.

The law provides for involuntary activation of reservists under certain circumstances for purpose of investigation and trial under the Uniform Code of Military Justice.

1. Testimony by a reservist about events that occurred while the reservist was on active duty as a reservist.

Article 2(d), UCMJ, Title 10, U.S. Code, Section 802(d), was enacted in 1986. This section of Article 2 provides that a reservist can be involuntarily ordered to active duty for purpose of investigation and trial with respect to an offense committed while the member was “on active duty”.

A question that has been addressed by the courts is whether “on active duty” in Article 2 refers only to active duty as a reservist, or whether “on active duty” also means a term of service as a regular.

There appears to be agreement between a high-level civilian federal court and the military appellate courts that “on active duty” in Article 2 includes active duty as a reservist.; Murphy v. Dalton, 81 F.3d 343 (3rd Cir. 1996). Lawrence v. Maksym, 58 M. J. 808 (N.M.Ct.Crim.App. 2003); Willenbring v. Neurauter, 49 MJ 152, 161 (CAAF 1998)

Therefore, a reservist who testifies about participation in war crimes that occurred during a period of active duty as a reservist, is taking the risk that he or she may be called to active duty involuntarily by military authorities for purpose of investigation, and if the investigation so warrants, for trial.

2. Testimony by a reservist about events that occurred while the reservist was on active duty as a member of the regular component.

The U.S. Court of Appeals for the Armed Forces has taken the position that a reservist can be called involuntarily to active duty for purpose of investigation and trial for events that occurred during a period of as a reservist *or as a regular*. Willenbring v. Neurauter, 48 MJ 152 (CAAF 1998).

However, the U.S. Court of Appeals for the Third Circuit held that a reservist can only be called involuntarily for purpose of investigation and trial for events that occurred during a period of active duty service as a reservist. Murphy v. Dalton, 81 F.3d 343 (3rd Cir. 1996).

The legal arguments against involuntary activation of a reservist for investigation and trial for offenses allegedly committed while on active duty in a regular component are premised on a Supreme Court case decided in 1949. The Supreme Court ruled in 1949 that an active duty member of the military may not be prosecuted for alleged crimes which occurred during a prior enlistment. United States v. Ex rel. Hirshberg v. Cooke, 336 U.S. 210 (1949). The Supreme Court pointed out that at least since 1863 the “Congress did act on the implicit assumption that without a grant of congressional authority military courts were without power to try discharged or dismissed soldiers for any offense committed while in the service.” 336 U.S. at 215.

The law has changed considerably since 1949, and exceptions to the Hirshberg doctrine have become law. However, insofar as members of the Reserve who have been discharged from a regular component is concerned, the U.S. Court of Appeals for the Third Circuit held in 1996 that Hirshberg is still good law. Murphy v. Dalton, 81 F.3d 343 (3rd Cir. 1996). In Murphy, a Marine Corps captain had been discharged from active duty and was a member of the active

Reserve. He was involuntarily activated and court-martialed for offenses that occurred during his active duty in the Regular Marine Corps. He was convicted. He brought a lawsuit in civilian federal court to vacate his court-martial conviction and for other relief. He argued that the Marine Corps had no jurisdiction to try him because the alleged offenses did not occur while he was on active duty in the Reserve but instead occurred while he was on active duty in a prior term of service in the Regular component. The Third Circuit engaged in a lengthy, detailed analysis, including revisiting the Supreme Court decision in Hirshberg, the legislative history of Articles 2 and 3 of the UCMJ, and a dissection of a military court opinion¹ that had ruled against Captain Murphy. The U.S. Court of Appeals for the Third Circuit ruled in Captain Murphy's favor, finding, among other things, that his Honorable Discharge was significant under law, and that the Marine Corps did not have jurisdiction in view of the Hirshberg decision of the Supreme Court and the legislative history of Articles 2 and 3, UCMJ.

This means that according to the Third Circuit it would be illegal for a veteran who is a member of the Reserve, and holds a discharge from the Regular military service, to be activated for purpose of investigation and trial pertaining to events that occurred during the regular term of service. That veteran would have strong legal precedent and arguments to contest activation orders brought for purpose of investigation and trial for offenses that allegedly occurred during a prior term of active duty service in the Regular component. While no one can guarantee the outcome of litigation, the precedent on the side of the veteran would be significant.

In ruling in Captain Murphy's favor the Third Circuit carefully analyzed Articles 2 and 3 of the UCMJ. Article 2 (d), UCMJ, provides that reservists may be involuntarily called to active duty for purpose of Article 32, UCMJ, investigation and trial by court-martial under certain conditions:

A member of a reserve component who is not on active duty and who is made the subject of proceedings under section 815 (article 15) or section 830 (article 30) with respect to an offense against this chapter [the Uniform Code of Military Justice] may be ordered to active duty involuntarily for the purpose of—

- (A) an investigation under section 832 of this title (article 32);
- (B) trial by court-martial; or
- (C) nonjudicial punishment under section 815 of this title (article 15).

¹ In Murphy v. Garrett, 29 MJ 469 (CMA 1990) the U.S. Court of Military Appeals (now called the U.S. Court of Appeals for the Armed Forces) had held against Captain Murphy. The court found that "The fact that [Captain Murphy's] regular service was terminated by the issuance of an Honorable Discharge and that his Reserve service commences upon the simultaneous issuance of a new commission does not divest his armed force of jurisdiction." 29 MJ at 471 [footnotes omitted].

Article 2(d) provides that a member of a reserve component may not be ordered to active duty except with respect to an offense committed while the member was—

(A) on active duty; or

(B) on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service.

The U.S. Court of Appeals for the Third Circuit analyzed the meaning of “on active duty” in the provision quoted above. The Third Circuit held that “on active duty” refers to *active duty as a reservist*, not to active duty in a regular component in a prior enlistment. In other words, the U.S. Court of Appeals for the Third Circuit held that a reservist can only be called to active duty for investigation and trial for offenses that occurred on active duty in the Reserve rather than for offenses that allegedly occurred on active duty in a Regular component during a prior enlistment².

However, in Willenbring v. Neurauter, 48 MJ 152 (CAAF 1998), the U.S. Court of Appeals for the Armed Forces stood by its analysis in Murphy v. Garrett, 29 MJ 469 (CMA 1990) and rejected the reasoning of the U.S. Court of Appeals for the Third Circuit in Murphy v. Dalton, 81 F.3d 343 (3rd Cir. 1996).

Thus, in the military court system whether a reservist served on active duty as a reservist or as a regular is not material for purpose of activation of a reservist under Article 2(d).

3. Testimony by a reservist about events that occurred while a member of the Army National Guard of the United States or the Air National Guard of the United States on inactive duty training when in the Federal service.

Under Article 2(d) (B), quoted above, a reservist who testifies about events that took place during a term of inactive duty training in the Army National Guard or the Air National Guard when in Federal service can be called to active duty for purpose of investigation and trial.

Other Considerations

² In Lawrence v. Maksym, 58 M .J. 808 ((N.M.Ct.Crim.App. 2003) the Navy Court of Criminal Appeals denied a petition for an extraordinary writ brought by a Reserve Marine Corps Major. The Major sought extraordinary relief to prohibit his court-martial from proceeding. The Navy Court held that because the Reserve Major had allegedly committed offenses during active duty *in the Reserve* that his request for a writ should be denied. The court found that in that case “...there has been no change in status, other than from active reserve duty to inactive reserve duty.” 58 M.J. at 812.

A veteran who testifies should be aware that a person who admits to participation in war crimes may subject him or herself to prosecution in civilian federal district court or to prosecution before an international tribunal.

Since persons who may be testifying may be relatively young and may have held low-ranking positions in combat in Iraq or Afghanistan, it should be pointed out that international law recognizes that it is those persons who occupy the highest levels of leadership, including generals and high-ranking civilian authority, who bear the greatest responsibility under international law for complicity in committing war crimes. International law recognizes that if at the time that a person participated in war crimes the person lacked "moral certainty" that what he or she was doing was a war crime, the person is less responsible than those persons at the highest levels of authority who have the knowledge, judgment and experience to know that what they are doing is committing war crimes.

To the best of my knowledge, there were no prosecutions of Vietnam veterans who had served in Vietnam and then testified publicly about war crimes policy. Nor was anyone who spoke publicly at a forum to my knowledge subpoenaed to testify at someone else's trial.

However, the Army routinely sent CID agents to visit each witness who testified at public hearings about war crimes they had witnessed or participated in. Organizers like Tod Ensign advised these veterans not to cooperate with these agents by giving statements or "naming names." Instead, they were urged to tell the agents that their purpose in testifying was to expose the underlying *policies of the war*--which were conceived and directed from the highest levels of the civilian and military leadership.

Another important difference between the two wars may be that by the time Vietnam veterans began testifying in March 1970, the Vietnam war was widely discredited. Even the Nixon Administration claimed that it had a "plan" to end the war. The current war is quite different in that the Bush Administration still actively defends it and might well find it useful to political purposes to go after veterans who talk publicly about war crimes they witnessed or participated in.

Remember that it was only after U.S. Rep. John Murtha (D-PA) publicly criticized the Marines for not aggressively prosecuting those involved in the killings at Haditha that the Corps filed criminal charges against some of the low ranking participants.

Whether the government would activate veterans with ties to the military who speak at a public forum; or whether the government would prosecute veterans in federal civilian court; or whether the government would not prosecute anyone at all, is anyone's guess at this time. What will happen is largely dependent upon factors that are unknown at this time, including the substance and impact of veterans' public testimony.

Some laws have changed or have been enacted since the 1970's, and the political climate is different from what it was in 1970. Veterans who testify today should know that there are risks to testifying publicly about war crimes they witnessed or participated in.