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March 24, 2018

Via Electronic Mail

Brigadier General Joseph Berger
Commander, U.S. Army Legal Services Agency/
Chief Judge, U.S. Army Court for Criminal Appeals
Fort Belvoir, Virginia

Re: Comments Regarding First Lieutenant (1LT) Clint A. Lorance Delivered to an Audience before the Center for Security and International Studies (CSIS) on March 15, 2018 and Publicly Available Online

Dear General Berger:

We represent 1LT Lorance and write to respectfully address your recent comments before the CSIS. Before doing, so, however, please allow us to congratulate you on the progress the Army Judge Advocate General's Corps has made since My Lai, which is by any measure, remarkable in making our Army stronger. Each of the signatories to this letter has been involved in the process of improving the international and operational law training the JAG Corps has provided regarding the use of force in combat, and, it has been our great pleasure to be a part of that tradition of excellence.

As you know 1LT Lorance stands convicted of two specifications of murder and one specification of attempted murder for his having ordered fire during a combat patrol in a combat zone. As discussed more fully below, we believe and the facts and law bear out, that Clint is confined at the U.S. Disciplinary Barracks for doing exactly what we – as Army Judge Advocates – trained him to do: protect his people and bring them home.

The comments you publicly made at the CSIS suggest that your briefing officers, like the Army Court of Criminal Appeals, did not appreciate that the panel ***acquitted*** 1LT Lorance of changing the rules of engagement.

It is for this incorrect assertion, the need for corrective action, and the necessity to ensure that legal advice to Army and Executive Branch leaders is accurate that we primarily write. We do not seek to defame or denigrate those prosecutors who may have briefed you about this matter, but rather to correct the record regarding what occurred that day and respectfully solicit your assistance to take corrective action. That is, we appeal to your sense of duty, honor, and integrity to seek your help in seeing that justice is done.

Transcribed from the video publicly available on the CSIS website, your remarks included the following:

> The reality is that we are an Army of human beings, and we are an Army that reflects the society that in which each of comes from. And so guess what? We get bad apples from time to time and we

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> do not always weed them out in enough time. So you can take a case like First Lieutenant Clint Lorance. So I will take you to June 2012 in Afghanistan. First Lieutenant Clint Lorance comes down from the staff to take over a Platoon. Clint Lorance was a very aggressive Lieutenant, who had his own ideas about how the war in Afghanistan should be being fought. Those ideas were not in align with the rules of engagement. And that's the fundamental fact that starts us off the trail here. And off the rails. Lorance gives his Soldiers guidance that is not in accordance with the ROE. "Motorcycles are allowed to be engaged on site"; that's the guidance given. Not a lawful order, but his Soldiers don't necessarily know that, because a change to the ROE would logically come through the chain of command. What the Soldiers did know, was their rules. If they don't witness a hostile act, or hostile intent, then it's not a lawful target. And so when Lorance tells a Soldier to go ahead and engage a motorcycle, that Soldier does, fortunately he misses. But when he tells another Soldier in a turret … with a turrret-mounted weapon, to engage the same motorcycle, that Soldier is more successful, and kills two of the three riders on that motorcycle. And then the cover-up begins. Lorance tells the Soldiers what not to report back to headquarters. Lorance lies about where the sound of gunfire came from. But a young Soldier is the one who immediately goes back to the company commander and reports this. And within a pretty quick turn, First Lieutenant Lorance is convicted of murder, and sentenced to twenty years.

With respect, we believe there are several statements necessitating correction.

First, the jury acquitted 1LT Lorance of changing the ROE. Your comments that he did took it upon himself as a "bad apple" to change the ROE are inconsistent with the panel's findings on this point. To portray 1LT Lorance like this is an "unfair prosecutorial blow."

Second, and equally troublesome, is that the Army Court of Criminal Appeals in its June 2017 decision said the same thing - that 1LT Lorance changed the ROE to engage motorcycles on sight. The Army Court took a position totally at odds with the jury's determination on the same point. Consequently, the Army Court erred by depriving 1LT Lorance of meaningful appellate review when it premised its affirmance on an incorrect understanding of the trial court's findings. The Army Court's errant finding and your public comments perpetuating that error are not only unfairly prejudicial to 1LT Lorance, but also to the Army JAG Corps' reputation as fair-dealing "straight shooters."

Third, the record demonstrates that there were three men of apparent Afghan descent riding back-to-back on a single motorcycle at an excessive rate of speed toward First Platoon's exposed route of march through a minefield. The trial transcript, and the Article 32(b) testimony,

demonstrate that Private First Class (PFC) Skelton, standing on a grape berm in file above 1LT Lorance, observed what he perceived as a hostile threat and fired his rifle, as he testified, in compliance with the ROE. Stated differently, PFC Skelton testified that he fired to protect his unit and himself in compliance with the ROE, which authorized self-defense and unit self-defense:

> Q. It was your obligation, as you saw it, to say to Soldiers that the motorcycle was possibly threatening because of the potential threat it represented, correct?
>
> A. We have the right to protect ANA and coalition forces, yes.
>
> Q. And at the time that you fired, you believed that's what you were doing; you were protecting friendly forces, both American and ANA.
>
> A. Based on -- based on ROE and my quick threat analysis of what could happen, yes.
>
> Q. Yes. So this I'll ask you, okay. Based on what you had available to you, you saw this as a threat and you felt an obligation as an American Soldier to protect friendly forces, American and ANA, correct?
>
> A. Yes.

(R. at 585-586).

ROE compliance cannot be murder or attempted murder. Only after PFC Skelton fired his rifle while perceiving the threat, did 1LT Lorance, who never fired his rifle, radio a gun truck to engage the target that PFC Skelton identified as a threat to the Platoon. Five witnesses testified that the fatal rounds were fired "three seconds," "a few seconds," "five seconds," "10 seconds" and "20 – 30 seconds," after PFC Skelton fired the initial volley at the three riders. (R. at 384; 497; 501; 655; 658; 675).

It is a patent mis-statement of fact that 1LT Lorance told any of his Soldiers that they may fire on any motorcycle. A motorcycle with three military-aged men bearing down on a Platoon working through a minefield, behind a minesweeper, exposed in a single file route of march unable to fully maneuver due to IEDs, is a threat that can be met with lethal force, especially where First Platoon had sustained four previous casualties, to include the previous Platoon Leader on the very same patrol route. Prior and subsequent motorcycle SVBIED attacks have demonstrated this with deadly consequence to American forces, *i.e.,* six Airman at Bagram in December 2015 who did not fire at a motorcycle that approached their patrol and detonated, killing all.

Accordingly, your statement that, "Lorance tells a Soldier to go ahead and engage a motorcycle, that Soldier does, fortunately he misses," is at-odds with the trial transcript and PFC Skelton's Article 32(b) sworn testimony.

Fourth, it is worth noting that after 1LT Lorance's court-martial, his new legal team uncovered biometric evidence that demonstrates conclusively that the men on the motorcycle were, in fact, bomb-makers. In other words, their fingerprints and/or DNA were found on IEDs and matched to the riders and other local-nationals engaged on the field that day. Surely, ROE compliance authorizing lethal force that killed the enemy cannot be murder or attempted murder.

Although 1LT Lorance was not aware of the biometrics when he gave the order to his overwatch gun truck after PFC Skelton engaged the riders, the biometric evidence is still very much important to the chain-of-command's disciplinary decisions, legal advice given at the time of preferral and referral, admissible at trial to rebut the prosecution's claim that the riders were civilian casualties, and surely as mitigation on sentencing.[1]

What is more, a panel of 82nd Airborne Officers surely would have considered the fact that the enemy was killed exonerating or at the very least, mitigating. Yet, the prosecution neither disclosed the evidence per *Brady* and rule for courts-martial 701(a)(6), or, produced it in response to defense written discovery which sought criminal or violent history of all local-nationals on the field that day.

Fifth, PFC Skelton's ROE-compliant decision to fire coupled with 1LT Lorance's motivation to protect his Platoon demonstrates to us that their instincts were right when they perceived the men encroaching on their position as a threat, especially given that the Platoon continued patrol after having engaged the three riders, engaged other local-nationals, killed two, and wounded a third (also biometrically linked to IEDs), before returning to their Strong Point. *Wolfound* transmissions confirmed hostile intent in connection with the second engagement on the patrol.

Stated more simply, 1LT Lorance's Platoon killed the bad guys. They followed the ROE and did precisely what this country sent 1LT Lorance to do when it deployed him to Afghanistan and ordered him to lead paratroopers on combat patrols in a combat zone where the Platoon recently suffered four casualties. Yet the prosecutors were allowed to tell the jury that the dead men were civilian casualties, painting 1LT Lorance as a bad-actor.

Sixth, the fact that the Army Court of Criminal Appeals too declined to appreciate this significant *Brady* issue – and, indeed, declined to grant our request for oral argument– is of particular concern, heightened by the fact that the Judge who authored the opinion never deployed, retired after issuing the opinion, and your public comments which echo the Army Court's incorrect opinion.

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[1] The Army Court's decision noted that no theory of admissibility authorized introduction of the biometric information into evidence. We respectfully disagree. Surely the biometric evidence is admissible to directly rebut the prosecution's statements that the local-nationals were civilian casualties and during sentencing as mitigation.

Seventh, your comments concerning a "cover-up" raise two important points that, in fairness, went unaddressed. Clint made the false report to headquarters because he became scared when he saw that the riders had neither weapons nor VBIEDs. And, making a false report to headquarters is neither murder nor attempted murder justifying a 20-year sentence to confinement and the ineradicable stigma of murder and attempted murder convictions.

The bottom line: ROE compliance (PFC Skelton) coupled with killing the enemy (biometrics attached to the record of trial and the basis for our motion for a new trial) cannot be murder or attempted murder – which is the situation now before us. But, Sir, there is something you, as a leader of character and honor sworn to uphold our highest traditions, can do about this.

This case is presently before the Secretary of the Army for action after the Court of Appeals for the Armed Forces declined to grant 1LT Lorance's petition for review. We attach Clint's CAAF Supplement for your review. If the Army's legal advice, and if the facts provided to the Secretary of the Army are in line with the comments you stated publicly on March 15, 2018, senior Army civilian leaders will be mis-informed, and an injustice will be perpetuated. Additionally, 1LT Lorance has a request for Executive clemency pending before the Justice Department's Office of Pardon Attorney. If the Army provides to that office a factual narrative that is similar to the statements you made publicly on March 15, 2018, another legal error will be made, and there will be a grave injustice to an American Soldier and we believe, to the Army JAG Corps' reputation as "doing the right thing" and "speaking truth to power."

1LT Lorance's team consists of former Army Judge Advocates who have served in the Balkans and in Southwest Asia. We purposefully determined to bring this matter to your attention, rather than the CSIS or any other public forum, to ideally join ranks to right these wrongs, abide by the Constitution, serve the military justice system, and the Army JAG Corps.

For these reasons, we respectfully request, at a minimum:1) that a copy of this letter be provided to the Secretary of the Army before he acts on 1LT Lorance's case, and that any recommendation Army attorneys have made to the Secretary of the Army reflect the factual statements made above; 2) that it be delivered to the U.S Department of Justice Office of the Pardon Attorney on behalf of the Army; 3) that the legal recommendation be to disapprove the findings and the sentence; or 4) in the alternative, grant 1LT Lorance's petition for a new trial.

In writing this letter, we do not intend to insinuate that you were untruthful in any respect. We do not question your credibility, or your dedication to the Army and this country. But the comments you made regarding 1LT Lorance raise serious concerns that those who have briefed you on the case did not convey to you an accurate picture of the court-martial findings and facts surrounding the event that occurred in July 2012.

The undersigned and the entire defense team are available to discuss the matter at your convenience and would welcome the opportunity to meet in person.

Respectfully,

// signed //

JOHN N. MAHER

cc: Kevin J. Mikolashek, Esquire
Michael P. May, Esquire
David Bolgiano, Esquire

Encl. CAAF Supplement