

## IDEAS &amp; ISSUES (LEGAL)

# The Lost Battalion

Courts-martial for minor offenses is a strain on precious resources

by Col Ralph F. Miller

**Y**ou are a commanding officer with special court-martial convening authority. LCpl C.I. Villian is one of yours and was never cut out to be a Marine. He made it through boot camp only because of constant supervision and positive peer pressure. He has been in trouble ever since—mostly minor infractions like short unauthorized absences—but now he has popped positive for marijuana. “That’s it!” you say. “He’s going to a special court-martial.” You have great support from the local law center, and the special court-martial is tried within 30 days of the request for legal services. The lance corporal is convicted and sentenced to 3 months confinement, reduction to E-1, and given a bad conduct discharge (BCD). You think to yourself, “Great work. That’s a good result!”

## At Square One

Not so fast. To paraphrase an old saying, this is going to hurt the Corps more than it hurts you. Why? Because Villian, in accordance with Service policy, will be placed on appellate leave upon completion of his confinement, just like every other Marine or sailor whose sentence includes a punitive discharge. Although the appellate leave policy effectively removes “problem” members from their respective commands, they remain in an active duty status and are administratively transferred to a centralized command where they are largely forgotten—in essence, the “lost battalion.”

That’s right, the Marine Corps hosts approximately 1,600, sometimes more, Marines on its rolls who have been court-martialed and are awaiting appellate review. These Marines stand no formations, perform no duty, conduct no training, go on no deployments, nor do they perform any service whatsoever to their country. Nonetheless, each member of the lost battalion has an identification card (ID) card

and is entitled to exchange and commissary privileges, Marine Corps Community Services (MCCS) benefits, GI Bill benefits, Veterans Administration loans, and medical and emergency dental care while awaiting discharge from the Marine Corps.<sup>1</sup> If this Marine dies before the completion of his appellate review, then the court-martial conviction is void ab initio (void from the beginning, as if it never happened), and his beneficiaries receive Serviceman’s Group Life Insurance (SGLI) payments, backpay at his precourt-martial pay grade (adjusted for public assistance received or money the Marine may have earned), death gratuity,

change, commissary, and GI Bill privileges. That’s right; currently it takes, on average, more than 2 years (from the date of sentencing to discharge) to complete appellate review. That time frame is in part due to delays in preparing and processing the record of trial at your command (more on that later) but also—in large part—due to the sheer volume of special courts-martial the Marine Corps tries resulting in an approved sentence that includes a punitive discharge (BCD) or 1 year or more in confinement. Those sentences trigger mandatory appellate review of the special court-martial.

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and burial. The Marine’s discharge will be administrative and characterized per his service record book without the court-martial conviction, but it will be no worse than general under honorable conditions. By the way, think back to those Marines you have ordered to the lost battalion. Did they do things like drive motorcycles without protective equipment and take foolish risks? Were they generally irresponsible and immature? They are a high-risk population.

So, Villian’s sentence might be more accurately described as 3 months confinement, reduction to E-1, a BCD, and an average of more than 2 years to get medical and emergency dental care and ex-

## What’s Next?

What was the most deterring effect of Villian’s sentence? The confinement. Typically, servicemembers who are subject to disciplinary action are most concerned about the potential confinement they stand to serve. Likewise, for the other Marines in Villian’s unit, confinement is the most palpable consequence for his crime. Ideally, in Villian’s case, he went into confinement immediately after his court-martial and was never seen at his unit again.<sup>2</sup> If his court-martial had been referred as a non-BCD special court-martial, and he was instead given an administrative discharge under other than honorable (OTH) conditions,

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he could leave the brig with a debarment order in his hand, no ID card in his wallet, and without most all of the benefits earlier described. But, as it stands, he may well decide to live just outside the back gate, use the gym, exchange, and base medical clinic, all while attending college at government expense. Private C.I. Villian was heard to say, "Thanks, LtCol Hardas."

In the aggregate, Marines and sailors on appellate leave (the vast majority are Marines), and their dependents, receive approximately \$2.4 million of purchased medical care per year—really, \$2.4 million.<sup>3</sup> That figure does not include the value of care provided to them at military facilities. Is this the punishment our convening authorities have in mind? Marines have been known to call up the Navy and Marine Corps Appellate Leave Activity (NAMALA)<sup>4</sup> asking to delay their discharges because they are close to earning a degree, having used their military education benefits. Does every Marine on appellate leave take advantage of his or her privileges? Probably not, but the number of ID card renewals by those on appellate leave indicates that their continuing active duty status is valuable to them.

Marines die while on appellate leave. Here is one example. A Marine who was convicted of drug use in 2003 was still on appellate leave when he died of a drug overdose in 2005. The conviction is null and void, and all rights and privileges must be restored. His beneficiaries will receive the SGLI payment of \$400,000; backpay, as adjusted for any earnings or public assistance received; and death gratuity. The Marine's discharge will be in accord with his service record, absent the conviction for use of drugs. A *Judge Advocate General Manual* investigation into the death is ongoing. The record of trial in this case was a mere 40 pages long, yet the convening authority did not take action until nearly 2 years after the sentence. This is not an isolated case. In 2003, 12 individuals on the rolls of NAMALA died while on appellate leave.<sup>5</sup> A number of Marines on appellate leave are seriously injured in automobile and motorcycle accidents every year before their cases can complete appellate review. The result? More paperwork and cost.

### Things Can Be Done

What can you do to reduce the size of the lost battalion? Know the second and third order effects of your decisions as a court-martial convening authority. Ensure that your staff judge advocate (SJA) provides you with the alternatives to avoid sending a Marine to the lost battalion for a 2-year tour. A special court-martial sentence that does not include a punitive discharge or a year in confinement does not trigger mandatory appellate review. A Ma-

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rine does not go to the lost battalion to await that review, and he is much sooner discharged and no longer subject to our care and responsibility.

There are other options that do not send a Marine to the lost battalion. Convening authorities should contemplate alternatives, such as the use of administrative separation in lieu of trial by court-martial, non-BCD special courts-martial, summary courts-martial, or nonjudicial punishment combined with an administrative discharge for cases where the primary goal is to punish a Marine for his transgressions and remove him from the Corps as quickly as possible. You can discuss these options with your SJA, law center, or legal service support section.

### A Speedy Review

The Marine Corps is the smallest component of the Armed Forces but does more courts-martial than the other Services—a lot more. In 2004 the Marine Corps tried 1,261 special courts-martial and 1,137 in

2005.<sup>6</sup> A significant majority of those special courts-martial are typically for relatively minor military offenses. In comparison, the Navy tried 531 special courts-martial in 2005.<sup>7</sup> For the same year, the U.S. Army tried a total of 1,500 cases, including both general and special courts-martial and other evidentiary hearings.<sup>8</sup>

Why are there so many cases for the Marines? One might argue that our demographics and need for uncompromising good order and discipline demand a high number of courts-martial and punitive discharges. However, the general deterrent value of these courts-martial is dubious: one need only look to the fact that we have a high number of special courts-martial received for review at the Navy and Marine Corps Appellate Review Activity (NAMARA) year after year.<sup>9</sup> Giving out lots of BCDs has not made and will not make our force magically more disciplined. If you cannot make a disciplined Marine out of someone with firm, fair leadership, consider making him a civilian rather than a member of the lost battalion.

I am not advocating being soft on military discipline. I am advocating being tough on those who have committed minor offenses and who don't deserve to be Marines. Take from them the benefits they would otherwise receive while on appellate leave. Do not force the Marine Corps to pay the "cost" of maintaining so many Marines as members of the lost battalion.

Of course, some offenses and offenders demand trial by court-martial in which their sentences will trigger mandatory appellate review. What can be done in these cases to reduce the size and tour length of these Marines who will be in the lost battalion? Ensure that your courts-martial are processed swiftly after the sentence is adjudged. Be cognizant of the fact that once a sentence is adjudged, the appellate courts expect and demand timely handling of the case through the appellate process.<sup>10</sup> Ensure that your SJA and law center take swift action once the record of trial is prepared. Carefully consider the clemency matters submitted by the accused and weigh the benefits of retention verses discharge and placement on appellate leave. Once you take your convening authority's action, make sure the law center makes the neces-

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sary copies and mails the record of trial to the NAMARA. Many cases end up sitting around just waiting to be mailed. The appellate courts take a very dim view of such delays and government counsel is hard pressed to explain why a case sat for weeks or months simply waiting to be mailed.

Two bad things happen when there is posttrial delay. First, the Marine is a member of the lost battalion for a longer period of time than necessary, and second, the appellate court may find the delay to be unreasonable and grant relief on the original sentence. Remember the BCD that started this whole thing? It could be disapproved after all. Here's a true example. On 18 April 2006, a Marine activity mailed two small records of trial to NAMARA that were received on 20 April 2006. In both cases, the convening authority took his action on 20 October 2005. It took 6 months to make the necessary copies and put the records in the mail. The court-martialed Marines involved never took a physical fitness test, never went to the rifle range, and never once supported the war on terrorism during those 6 months. They were, and remain, members of the lost battalion. Their ID cards are still valid, and they may use them to gain civilian employment under the guise of being dedicated Marines who are in the process of transition and completing their tours of duty. Ironically, an argument may be made that an administratively imposed discharge under OTH conditions has more immediate adverse impact than a judicially imposed BCD.

Marines who are on appellate leave are most definitely part of the Corps' tail. As we continue to modernize and transform to meet tomorrow's challenges, we must maximize the Corps' tooth and minimize the tail if we are going to be successful. As

you exercise your court-martial convening authority, do so with full knowledge and understanding of the consequences, and decide whether or not it might be better to make room for a new Marine instead of issuing orders to the lost battalion.

**Notes**

1. *Marine Corps Order 1050.16A, Appellate Leave Awaiting Punitive Separation*. Appellants are active duty Marines in a nonpay status. They retain all normal military privileges (commissary, exchange, MCCS, medical, etc.). As such, they are allowed access to all military facilities and may not be arbitrarily prevented from utilizing these. See also, "The Practical Consequences of a Court-Martial Conviction" by Maj Jeff Walker, *The Army Lawyer—DA PAM 27-50-348*, December 2001, for a detailed discussion about the consequences of a court-martial conviction.
2. If Villian was sent to pretrial confinement and his court-martial was delayed for a significant period, he quite possibly could have been released back to his unit while awaiting administrative processing for appellate leave.
3. Figures derived by Military Medical Support Office, Bureau of Medicine, from medical claims data.
4. NAMALA is the organization that has command of the lost battalion of Marines. NAMALA's mission is to administer centralized appellate leave/tracking for all Navy and Marine Corps members and members assigned to the Federal Bureau of Prisons who are awaiting appellate review, and to perform such other functions and tasks as directed.
5. Author contact with the CO, NAMALA, Washington Navy Yard, 9 November 2006.
6. Annual Report of the Code Committee on Military Justice for the period 1 October 2004 to 30 September 2005.
7. *Ibid.*
8. *Ibid.*
9. The numbers of special courts-martial received by NAMARA per year were as follows: 1,200 in 2000; 1,432 in 2001; 1,486 in 2002; 1,279 in 2003; 1,026

in 2004; and 1,359 in 2005. Statistics were taken from the NAMARA case-tracking system.


10. In an 11 May 2006 decision, the U.S. Court of Appeals for the Armed Forces established timelines for presuming the unreasonableness of a posttrial delay. The timelines include 120 days from the date of sentencing to convening authority action and 30 days from convening authority action to docketing the case with the U.S. Navy-Marine Corps Court of Criminal Appeals.

**usjmc**

*> Author's Note: The views and opinions expressed in this article are solely those of the author. This article does not purport to express the official positions of the Department of Defense, Navy Department, or Headquarters Marine Corps.*

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