

Commentary

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The Power to Compel: Is the Ability to Subpoena Evidence a Toothless Right in Military Courts-Martial? The Potential Impact of *United States v. Harding*

THE AIR FORCE ACADEMY scandal has not only attracted the unwanted scrutiny of members of Congress, the media, and the public, it has also demonstrated the limits of judicial enforcement of orders to compel a witness to produce documents pursuant to a lawful subpoena.

In *United States v. Harding*, a case recently decided by the U.S. Court of Appeals for the Armed Forces,¹ the court enforced the power of the military judge to lawfully order the production and in camera review of counseling records under Rule 513 of the Military Rules of Evidence.² The order was issued to counter the refusal of Jennifer Bier, a civilian therapist, to produce the alleged victim's mental health records. As a result, protracted litigation occurred in military courts, in the U.S. District Court for the District of Colorado, and in the Tenth Circuit Court of Appeals. The military trial judge ordered the United States to compel the production of the records, if need be by having federal marshals arrest and detain Bier. In this showdown, the United States balked. The U.S. Marshals' Service refused to enforce the military judge's order with the same vigor as it would have done for a U.S. attorney. The records have not been produced to date, and the case has been pending in a state of legal limbo for more than three years.

This case has been a disgraceful example of the failure of the United States to enforce a military judge's lawful order. The ability to subpoena a person at a court-martial is a toothless right if the United States fails to uphold a lawful order issued by a military judge. Not only could the impact of the *Harding* case limit service members' rights to a fair trial, but it could also eviscerate the legitimacy of the military trial judiciary. If the actions arising from the litigation in *Harding* are permitted to run their course, military courts may effectively lack the capacity to compel production of constitutionally required evidence.

The Facts

In April 2004, the government initially charged First Lt. Joseph J. Harding, U.S. Air Force Reserve (USAFR), following an investigation that lasted more than one year. The principal charge alleged that Lt. Harding had raped and sodomized a former cadet, referred to as JNB in the case, in August 2000. JNB did not make these allegations until August 2002.³

After three hearings that were held pursuant to Article 32 of Uniform Code of Military Justice (UCMJ),⁴ the Air Force referred charges against Lt. Harding on Sept. 7, 2004. Pretrial hearings were convened, and motions were heard starting Nov. 22, 2004. The case involved numerous discovery issues, which eventually led to collateral litigation in federal district and circuit courts. During a June 2005 Article 39(a) session, the military judge was faced with an issue involving the putative rape victim's counselor, Jennifer Bier. Despite having been served with three subpoenas and a warrant for attachment, Bier refused to turn over the records of her counseling sessions with the alleged victim, JNB.

Meanwhile, Bier filed a request for a temporary restraining order and a writ of prohibition to preclude enforcement of the warrant of attachment in U.S. district court. On June 9, 2005, that court denied her motion, and Bier immediately appealed to the U.S. Court of Appeals for the Tenth Circuit. After first issuing an immediate stay pending a response from the United States, the Tenth Circuit ultimately lifted the stay and denied Bier's appeal on June 16, 2005.

U.S. marshals then confronted Bier on June 21, 2005, pursuant to the warrant of attachment, and asked her to produce the records. Bier again refused and the marshals failed to take her into custody. The Air Force requested that the military judge stay the trial involving the first charge, but the military judge denied that request.

On June 24, 2005, after conducting an extensive hearing, the military judge abated⁵ the court-martial proceedings on the first charge and effectively continued the trial until the records in question were made available for in camera inspection. The military judge made this decision based on his conclusion that Bier's

records met the standard for being material to the defense, because the records contained significant information regarding JNB's counseling sessions and probably contained information that would have been critical to her credibility and Lt. Harding's defense. Because the records were of such central importance to a critical issue in the case (the credibility of JNB), the military judge deemed that their production to the court for in camera review was essential to a fair trial. There was no adequate substitute for the records; therefore, the military judge abated the proceedings as to the first charge until his order was enforced. Finding that the second charge (the allegation relating to the second putative victim, referred to as JMM) was not affected by his ruling as to the first charge, the military judge severed the second charge and ordered that allegation to proceed to trial. That charge was ultimately dismissed by the convening authority.

The following day, the Air Force obtained a stay in order to seek a petition for extraordinary relief and a related Article 62, UCMJ, appeal.⁶ But because the government had improperly brought the appeal, the case was remanded to the trial judge for further proceedings so that the United States could ostensibly enforce the military judge's lawful order.

The Power of a Military Court-Martial to Compel

Under Rule for Courts-Martial 701(a), the government must provide the defense with information in its possession that is material to the defense counsel's preparation or that reasonably tends to negate the guilt of the accused, reduce the degree of guilt of the accused, or reduce the punishment (including a victim impact statement). Manual for Courts-Martial (2005 ed.), Rule for Courts-Martial 701(a) (hereinafter referred to as R.C.M.). Moreover, under *Brady v. Maryland*, 373 U.S. 83 (1963), the government's independent obligation to disclose evidence favorable to the defense includes not only exculpatory evidence but also evidence that might be used to impeach government witnesses. *Strickler v. Greene*, 527 U.S. 263 (1999). Impeachment evidence may include specific instances of a witness's conduct that are indicative of credibility or tendency to be truthful; evidence in the form of opinion or reputation as to the witness's capacity for truthfulness; prior inconsistent statements; information that suggests bias; and evidence that goes to the ability of a witness to perceive, remember, and accurately relate events. *United States v. Bagley*, 473 U.S. 667 (1985); *United States v. Romero*, 46 M.J. 269 (C.A.A.F. 1997); *United States v. Reece*, 25 M.J. 93, 95 (C.M.A. 1987). There is a preference in the military for liberal discovery and an attendant low threshold for production. *Reece*, 25 M.J. at 95. The liberal discovery standard given in R.C.M. 701 also includes disclosure of information, including reports of physical or mental examinations, that is material to the preparation of the defense. "The only restrictions placed upon the liberal discov-

ery of documentary evidence by the accused are that the evidence must be 'relevant and necessary' to the subject matter of the inquiry and the request must be reasonable. R.C.M. 703(f)(1) and (f)(4)(C)." *Reece*, 25 M.J. at 95; see also *United States v. Briggs*, 48 M.J. 143 (1998); *United States v. Branoff*, 34 M.J. 612, 622 n.19 (A.F.C.M.R. 1992) (*rev'd on other grounds*).

Under R.C.M. 701(f), a caveat is placed on the release of materials at the discovery stage, whereby any evidence protected from disclosure by the Military Rules of Evidence does not need to be disclosed until there is compliance with the requirements of the relevant Military Rule of Evidence (M.R.E.). M.R.E. 513 provides a limited privilege to a patient to refuse to disclose a confidential communication between that patient and a psychotherapist, if the communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition. M.R.E. 513(a).

M.R.E. 513 contemplates in camera review of the records prior to a determination regarding "production" or "admissibility." The in camera review requirement is designed to balance the alleged victim's privacy against constitutional protections that allow those charged with sexual offenses to mount an adequate defense. M.R.E. 513(e)(1) assigns responsibility only to a military judge to make a production or admissibility assessment. This provision comports with the preference in military practice for in camera inspections in such circumstances. *United States v. Briggs*, 48 M.J. 143, 145 (1998); *United States v. Romano*, 46 M.J. 269, 276 (1997); see also *United States v. Alperin*, 128 F. Supp. 2d 1251, 1255 (D. Cal. 2001) (consistent with practice in federal district court). Furthermore, without access to these types of records for in camera review prior to making a ruling, the court would be forced to make an uninformed decision.

The design set up within M.R.E. 513 to afford such protection to the patient sets up a three-step process. First, the documents sought are provided to the court in sealed condition by the records custodian. *United States v. Briggs*, 48 M.J. 143, 145 (1998). Once the records are produced, they are then made available for in camera review prior to rendering a "production" decision, as contemplated by M.R.E. 513(e)(3).⁷ Second, a hearing must be held in order for the court to determine whether the records will be provided to the requesting party. Third, if the records are produced and provided to the requesting party, there is no guarantee that they will be admissible at trial; the party seeking admission of the records at trial must demonstrate their relevance and overall admissibility at a separate hearing conducted according to admissibility standards. This latter assessment is related to rules regarding relevancy and prejudicial effect, M.R.E. 401, 402, and 403, rather than the more le-

nient R.C.M. 701 discovery requirements at play in the “production” decision.

In order to begin the review process, a subpoena must be issued in accordance with the Rule for Courts-Martial 703(e)(2)(A); *United States v. Hinton*, 21 M.J. 267, 271 (C.M.A. 1986); *United States v. Williams*, 23 M.J. 724, 726 (A.F.C.M.R. 1986). A military court may issue subpoenas not just to military members; civilians are without question subject to subpoena by court-martial. The subpoena must state the title of the proceeding and may command the person to whom it is directed to produce documents designated therein at the proceeding, *or at an earlier time for inspection by the parties*. R.C.M. 703(e)(2)(B). The subpoena must be served within the United States. R.C.M. 703(e)(2)(E)(i). If a person who has been issued a subpoena requests relief on grounds that compliance is unreasonable or oppressive, the military judge may direct that the subpoena be modified or withdrawn. R.C.M. 703 (e)(2)(F).

If an individual fails to comply with the military judge’s order, a military judge should then issue a warrant of attachment. “A warrant of attachment may be issued only upon probable cause to believe that the witness was duly served with a subpoena, that the subpoena was issued in accordance with these rules, that appropriate fees and mileage were tendered to the witness, that the witness is material, that the witness refused or willfully neglected to appear at the time and place specified on the subpoena, and that no valid excuse reasonably appears for the witness’ failure to appear.” R.C.M. 703(e)(2)(G)(ii).

The discussion included in R.C.M. 703 further cautions that a warrant of attachment is a legal order:

Subpoenas issued under R.C.M. 703 are Federal process and a person not subject to the code may be prosecuted in a Federal civilian court under Article 47 for failure to comply with a subpoena issued in compliance with this rule and formally served. Failing to comply with such a subpoena is a felony offense, and may result in a fine or imprisonment, or both, at the discretion of the district court. The different purposes of the warrant of attachment and criminal complaint under Article 47 should be borne in mind. The warrant of attachment, available without the intervention of civilian judicial proceedings, has as its purpose the obtaining of the witness’ presence, testimony, or documents. The criminal complaint, prosecuted through the civilian Federal courts, has as its purpose punishment for failing to comply with process issued by military authority. It serves to vindicate the military interest in obtaining compliance with its lawful process.

R.C.M. 703(e)(2)(G)(i), Discussion.

In the *Harding* case, when lawfully ordered, the therapist, Jennifer Bier, refused to produce the records that had been subpoenaed and sought intervention by the federal courts. The U.S. District Court for the District of Colorado and the Tenth Circuit Court of Appeals both upheld the legality and enforceability of the military judge’s ruling. Even after exhausting her judicial remedies, Bier ignored the subpoena. Despite Bier’s abject failure to heed judicial authority, the United States inexplicably failed to enforce the subpoena through the warrant of attachment. In so doing, the Air Force and the U.S. Department of Justice have undercut the judicial authority of military courts-martial.

As the U.S. Court of Appeals for the Armed Forces correctly concluded,

The responsibility for enforcing the warrant of attachment rests with officers of the Executive Branch. The rulings of the military judge in the present case demonstrate that he is prepared to move forward with the trial if and when the warrant is executed. Under these circumstances, the Government appeal was not authorized under Article 62, UCMJ, and the court below could not have provided the relief requested by the Government under Article 62, UCMJ, regardless of the timing of the Government’s filing. Accordingly, we answer the certified question by holding that the Court of Criminal Appeals properly dismissed the Government’s appeal. *United States v. Harding*, 63 M.J. 65 (C.A.A.F. 2006).

The Court of Appeals for the Armed Forces has given those representing the United States one last chance to enforce the authority of a military judge. Without further action, the stage will be set to gut the ability of a military court to issue meaningful subpoenas or warrants of attachment. But it is a sad day for justice indeed when the U.S. Air Force fails to ensure that other offices in the government’s executive branch recognize the lawful authority of a military judge to enforce his or her order through proper legal channels. Allowing the results that have ensued thus far in this case to remain as they are renders the military subpoena meaningless — a true paper tiger. Judges’ orders should not be reduced to engraved invitations, and the military justice system should not be a second-class citizen to other systems of justice in the United States.

Conclusion

There are only two potential remedies for ensuring that a subpoena issued by a military judge receives equal status to those issued by other authorities within the civilian federal legal system. Either the

executive branch, through the U.S. Marshals' Service, must enforce the military judge's orders with the same standards of vigor with which subpoenas issued by civilian officials are enforced, or the military justice system requires reform that will empower the military judge to exercise authority more directly over civilian witnesses and documents.

If left unchecked, the potential impact today of *Harding* threatens the very real autonomy of military judges. Unless the United States reverses itself and enforces a lawful order issued by a military judge, the legitimacy of the military justice system will be undermined. The *Harding* case could ultimately subvert the very legitimacy of the military trial bench and threaten service members' right to a fair trial. This would be a perverse result given the trial judge's sound reasoning in this case. Our brave men and women deserve a first-rate system of justice that guarantees the right to a fair trial. **TFL**

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Endnotes

¹Before the U.S. Court of Appeals for the Armed Forces, the judge advocate general of the Air Force challenged the Court of Criminal Appeals' dismissal of the government's appeal, because it had failed to file the record of trial in a timely manner. The Court of Appeals for the Armed Forces ultimately ruled that the government's appeal was not authorized. *United States v. Harding*, 63 M.J. 65 (C.A.A.F. 2006).

²Military practice differs slightly from federal civilian practice in that the military system provides more specifically for some privileges. Rule 513 of the Military Rules of Evidence is a rule of privilege that provides protections for the patient-psychotherapist relationship. The rule, however, also balances the considerations involved and allows exceptions, one of which is allowing disclosure when "admission or disclosure of a communication is constitutionally required." Military Rule of Evidence 513(d)(8). In order to balance the interests involved, Rule 513(e) also provides for procedures that allow for examination of potentially relevant records in an in camera pro-

ceeding conducted by the military judge.

³Another female cadet also alleged that Lt. Harding had indecently assaulted her in 1999. That charge was dismissed with prejudice.

⁴An Article 32 hearing is analogous to a grand jury proceeding in the civilian criminal system. There are, however, some notable differences between an Article 32 investigation and a grand jury proceeding; for instance, the hearing is generally open to the public and press and the accused has the right to be present at the hearing, is represented by counsel, and can cross-examine witnesses and present his own evidence; the proceeding can also be used as a vehicle for discovery. Article 32, UCMJ, 10 U.S.C. § 832; see, for example, *ABC Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997).

⁵The proceedings are abated when they are stayed for a period of time to allow one of the parties, in this case the government, to comply with a court's order. Abatement allows enough time for reasonable compliance. But there is a point at which a court can dismiss the proceedings, presumably with prejudice, if the issue becomes intractable. Dismissal is reserved for cases in which this remedy would serve the interests of justice.

⁶Article 62 of the UCMJ provides for appeals by the United States. Art. 62, UCMJ, 10 U.S.C. § 862.

⁷While there is no per se rule in military courts-martial requiring any defense burden to show that the records should be released for in camera review under M.R.E. 513, some states have required such a showing under similar situations. See, for example, *State of Oregon v. Henry Roger Bassine*, 188 Ore. App. 228, 71 P.3d 72 (Ore. Ct. App. 2003), in which the court suggested that no showing is required if the materials are discoverable, and, if not discoverable (that is, outside of state control), only a showing that they "might" yield evidence that an exception to nondisclosure exists. *Bassine*, 71 P.3d at 75. Wisconsin employs a higher standard for a defendant to secure the court's in camera review. The defendant must make a preliminary showing that the sought-after evidence is material to his or her defense. *Wisconsin v. Green*, 253 Wis.2d 356, 372, 646 N.W.2d 298 (Wis. 2002).