

CENTER FOR CAPITAL LITIGATION
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May 30, 2003

Major General Thomas J. Romig,
The Judge Advocate General of the Army
2200 Army Pentagon
Washington, D.C. 20310-2200

Re: Private Dwight J. Loving – U.S. Army Death Sentenced Inmate

Dear Sir:

Please find enclosed a request for commutation of Private Dwight J. Loving's death sentence imposed by Army court-martial in April 1989. I was advised by your staff that this case would be forwarded to the Secretary of the Army after April 14, 2003, but have received no further communication so I am assuming that you have not yet forwarded this case with your recommendation under Article 71, U.C.M.J. This submission should be considered in place of the prior request for commutation submitted to the Judge Advocate General on September 10, 1998.

Please be advised that Loving objects to any action to complete the review required by Article 71(a) of the Uniform Code of Military Justice, because there is no established procedure or policy for the processing of military capital cases once they are final. There does not appear to be any established process for the Article 71 review other than Rule for Courts-Martial 1204, which simply directs The Judge Advocate General to "forward the case to the President."

Rule 1204 is inadequate standing alone to establish proper procedure for the processing of a capital case. Specifically, the following issues must be resolved prior to any action on this matter:

- What is the role of the Secretary of the Army?
- Will the matter be routed through the Secretary of Defense?
- Will the matter be routed through the Parole Attorney at the Department of Justice as has been done in the past?
- What will be sent forward and in what form?
- Will counsel for the death-sentenced inmate be afforded an opportunity to review recommendations and respond at each level of review? Or will Loving continue to be denied the opportunity to see and respond to recommendations?

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None of these issues has been resolved as yet or, at least if they have, these issues have been resolved in secretive proceedings unbeknownst to Loving's counsel.

As counsel for Loving, the lack of an established procedure is troubling at best. How are we to prepare a timely and appropriate submission for the person or persons who will review and make a recommendation at each level of the process when we have no idea what the process is, what the time requirements for submissions are, or even who will be making recommendations to the President? As counsel for a death-sentenced inmate, we obviously believe that these issues must be resolved in order for us to adequately represent Loving. Likewise, we believe that these issues must be resolved in order for you, the Secretary of the Army, and the President to have sufficient information to make a rational and informed decision in this life or death matter.

The lack of established procedure also has ramifications beyond this case. The most significant issue, which will affect every Article 71(a) review throughout the Department of Defense, is the failure to either publish an established policy or establish rules for this process as required by the Freedom of Information Act. Specifically, 5 U.S.C. § 552(a)(1) (formerly the Administrative Procedures Act) specifically mandates publication of substantive procedures.

The Department of the Army has published and established rules in effect for the pretrial, trial, appeal, confinement, and execution phases of capital cases, but none for the Presidential review, which is so critical. We, therefore, submit that no action can be taken until the Department of Defense (and the Department of the Army) have properly established regulations and procedures for the Article 71(a) review. Specifically, the agency must "separately state and currently publish in the Federal Register" all "rules of procedures." Until these requirements are met and Loving has "actual and timely notice" of the review process, he may not "be adversely affected" by the Article 71(a) review process. In other words, no approval action can be taken until appropriate procedural provisions have been established and published.

In sum, Loving objects to these procedures as a violation of his right to due process, which is applicable to executive and administrative procedures. Conducting this review of the first military capital case to reach the Presidential review in more than forty years in secret is not warranted and will greatly diminish this country's faith in the system.

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Please do not hesitate to contact me if you have any questions regarding this matter or if I can provide you with any additional information.

Sincerely,

Teresa L. Norris

cc: Colonel Robert D. Teetsel,
Army Defense Appellate Division
Private Dwight J. Loving