On Watch

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Federal Court Decisions in Conscientious Objector Cases Since the Iraq War

COs winning despite military's legal advantage

By Steve Collier

This article is a brief review and analysis of reported conscientious objection (CO) federal court opinions from the commencement of the Iraq War to the present. The cases reviewed are habeas corpus cases brought after the denial of a CO claim by the military.

This article is not meant to be an exhaustive analysis or digest of the case law, but rather an effort to impart insights and suggest trends from the cases that may assist practitioners and counselors in preparing CO applications, and in litigating habeas corpus cases and appeals on behalf of conscientious objectors (COs).

The federal reported cases since the Iraq War are:

***Petition Granted*:**
Zabala v. Hagee, 2007 WL 963234 (N.D. Cal. 2007) (not reported in F.Supp)
Hanna v. Secretary of the Army, 513 F.3d 4 (1st Cir. 2008)
Watson v. Geren, 569 F.3d 115 (2nd Cir. 2009)
Martin v. Secretary of the Army, 463 F.Supp.2d 287 (2006) (Fee motion after CO application granted)

***Petition Denied*:**
Benjudah v. Harvey, 2005 WL 646073 (N.D. Cal. 2005) (not reported in F.Supp)
Jashinski v. Holcomb, 482 F.Supp.2d 785 (W.D. Texas 2006)
Rogowskyj v. Conway, 2007 WL 779390

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DADT lives on, despite 'repeal'

Justice Department appears to concede on constitutionality issue

By Jeff Lake

In the three months since the "Don't Ask Don't Tell" policy was "repealed," the policy continues. This article is a brief summary of the legal and administrative developments concerning any changes to the policy. Readers are directed to the accompanying article concerning the military's attempt at training personnel in post-DADT policy ("Military trains personnel in post-DADT policy with no policy in place").

Shortly after the "repeal," the Log Cabin Republicans, who brought suit against the policy in a Southern California federal

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(D.D.C. 2007) (not reported in F.Supp)
Kwon v. Secretary of the Army, 2007 WL 1059112 (E.D.Mich. 2007)
Aguayo v. Harvey, 476 F.3d 971 (D.C. Cir. 2007)
Boyd v. Hagee, 2008 WL 481974 (S.D. Cal. 2008) (not reported in F.Supp)
Alhassan v. Hagee, 424 F.3d 518 (7th Cir. 2008)
Kanai v. McHugh, --- F.3d ----, 2011 WL 754783 (4th Cir. 2011)(reversal of the District Court)

By this tally, the military is beating conscientious objectors by a 2-1 margin, which is not such bad odds for COs given the difficulty of winning these cases. (Non-reported cases not on this list may change the ratio.) As practitioners know, a CO needs to show that there is "no basis in fact" for the military's denial of the CO application to win a petition for habeas corpus. This standard of review of the military's denial of the claim is considered the most deferential standard of review known in law. In the four reported cases where the petition was granted, even our federal courts could not find any factual basis for the military's denial of the CO claim.

Better to be Religious Than Moral

A cursory analysis suggests that those cases where the petitioner had a religious basis for objection were more successful than objections based on non-religious moral or ethical beliefs. (Compare *Hanna v. Secretary of the Army* with *Zabala v. Hagee* with *Aguayo v. Harvey* and *Jashinski v. Holcomb.*) Part of this may be due to the requirement that for moral and ethical objections, the member has to establish that his/her beliefs have been established through the same rigor as traditional religious training. But I think a large part of it is that courts, especially conservative ones, are more solicitous to religious CO claims because they resonate with their own moral beliefs. Since in my opinion most moral/ethical beliefs flow from essentially religious roots (or both flow from the same root), tying a claim to religious teachings is always more helpful. Better to have the claim talk about petitioner's moral beliefs rooted in the Buddha or the Bible than in "The Fog of War."

Avoid Fourth or D.C. Circuits

As practitioners know, the D.C. and Fourth Circuits are conservative. *Aguayo v. Harvey* in the DC Circuit and *Kanai v. McHugh* in the 4th Circuit were two major losses at the appellate court level. *Kanai* was particularly disappointing in that it was a reversal of a District Court grant of a habeas petition. The case was factually very strong, the DACORB (Army CO Review Board) voted 3-2 to deny the claim, and the three voters against the claim referenced various impermissible and irrelevant factors in their written votes, including Kanai's reliance on civilian counsel and his participation in "aggressive" sports. One of the three voters recommended granting 1-A-O status. Yet the appellate court reversed the district court and denied the claim.

Timing retains role in denials

As much as the regulations and case law state that "timing alone" cannot be a basis for denying a claim, it continues to play a big role in denying claims. [See *Benjudah v. Harvey, Jashinski v. Holcomb, Kwon v. Secretary of the Army, Aguayo v. Harvey, Alhassan v. Hagee.*] Applications submitted after deployment or activation orders were universally denied by the courts.[1] Practitioners in the field know that timing issues are the shoals upon which CO claims founder, and recent case law bears this out.

Officers' Conclusions Cited as a Bases in Fact

Some of the opinions that denied the CO claim relied on *conclusions and opinions* of the military officers reviewing the CO application as the factual bases supporting a basis in fact determination. [See *Aguayo v. Harvey,*

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Boyd v. Hagee.] This dangerous and slippery slope should be vigorously argued against in all cases where these opinions are cited. *Hanna* and *Watson* both recite the correct basis in fact test that requires a more rigorous review by the court:

"Although [the basis in fact] standard of review is a narrow one, it is not toothless. A basis in fact will not find support in mere disbelief or surmise as to the applicant's motivation. Rather, the government must show some hard, reliable, provable facts which would provide a basis for disbelieving the applicant's sincerity, or it must show something concrete in the record which substantially blurs the picture painted by the applicant. The DACORB's reasons for its decision must be grounded in logic and a mere suspicion is an inadequate basis in fact." (internal quotes and citations omitted)

Judges Skeptical of COs Who Voluntarily Enlisted

Judges often have skepticism towards COs who voluntarily enlisted in the military. You can pretty much tell that the petitioner will lose when the court opinion opens by stating that the petitioner enlisted in the army, agreed to serve for eight years, and certified that s/he was not a conscientious objector when s/he enlisted. While some of the cases where the petition was denied appeared from the opinions to be based on weak CO claims, some were clearly very close calls or cases where the member should have won [*Jashinski v. Holcomb*, *Rogowskyj v. Conway*, *Kanai v. McHugh]*.

Practitioners can learn how to address judicial skepticism by carefully reading the opinions where petitions were granted. These opinions explain how a petitioner's beliefs changed over time from enlistment to crystallization, and sometimes explain why the member enlisted. It is of course essential for practitioners to explain how conscientious objection beliefs developed. But practitioners should not neglect explaining why the member enlisted. Often the decision to enlist comes from a sincere wish to serve, family tradition or other motives that will help put the member in an appealing light and support the claim that his/her beliefs are sincere. If the judge feels that the petitioner is struggling with the conflict between serving his/her country and following his/her sincere religious/ethical beliefs, then the common skepticism towards CO claims will be dissipated.

Endnotes

1. The only exception I know of is the unreported case *Barnes v. Hagee*, a case where I represented the petitioner. In *Rogowskyj v. Conway,* the Court denied the petition, but stated that the DACORB did not rest its decision on "suspicious" timing.

Steve Collier is an attorney in San Francisco, a member of the Military Law Task Force and the Bay Area Military Law Panel. He has litigated a number of CO cases, and represented the first CO prosecuted for resistance during the Iraq war, Stephen Funk.

Military Law Task Force

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News Briefs

NLG Convention 2011 - Save the Date

It's not too early to mark your calendar for the NLG convention, Law for the People 2011, Oct. 12 - 16 at the Crowne Plaza Hotel in Philadelphia.

MLTF's annual membership meeting will take place on the 13th; plans are in the works for training sessions, a possible CLE seminar, and plenty of socializing.

GI Rights Network Conference

GIRN's annual conference is scheduled for May 19 - 22nd in Albuquerque. Workshops (and plans for a CLE seminar) will include conscientious objection cases, the new dissent regulations, AWOL and UA policy, sexual assault cases, and other topics. For information about the conference and to register, contact Kathy Gilberd at 619-463-2369 or kathleengilberd@aol.com

NLG Tex-Oma Region

The National Lawyers Guild's TexOma Regional Conference will be held on Apr 16, 2011 at Thurgood Marshall School of Law, Houston, TX.

This year's conference theme is *Doing Justice: Representing Unpopular Clients*.

Tentative workshop topics include:

- CLE - **Police Misconduct** - Randall Kallinen, Esq.
- CLE - **GI Resister Defense** - James Branum, Esq.
- CLE - **U.S. Manipulation of International Tribunals** - Peter Erlinder, Esq.
- **Silencing Counsel: The Case Of Lynne Stewart** - Ralph Poynter
- **NLG Legal Observer Training** - Carol Sobel, Esq

Military commences training in post-DADT policy – with no policy in place

DoD relying on existing regulations, "service traditions"

BY KATHLEEN GILBERD

Report: new regulations unnecessary

In February, DoD began training programs designed to familiarize all military personnel with post-DADT policy. While it seems odd to conduct training around a policy that is not yet in place, and for which there are as yet no regulations or formal guidelines, the move fits the approach set out in DoD's November 30, 2010, "Report of the Comprehensive Review of the Issues Associated with a Repeal of "Don't Ask, Don't Tell." That report recommended use of existing regulations, UCMJ provisions, policies and service "traditions" to govern the conduct of lesbian/gay/bisexual (LGB) and straight servicemembers. (Unfortunately, DoD's de-emphasis of formal policy and regulations is not quite in keeping with the repeal legislation, which requires a formal policy. Congress determined that, before the repeal becomes effective, the President must report to Congressional defense committees, among other things, that DoD has created "the necessary policies and regulations" for repeal.)

Much of the training, including its examples and discussion of permitted and prohibited behavior, comes from the November report, so a note or two about its recommendations seem appropriate.

The DoD report concluded that new regulations would not be necessary, as existing service regulations cover most aspects of sexual conduct, and service traditions informally govern other aspects. Along the same lines, DoD stated that current complaint procedures should be used in cases of harassment or discrimination. The report did recommend that the relevant regulations and UCMJ provisions be phrased in a sexual-orientation-neutral way, and took the opportunity to suggest that Article 125 of

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court, urged the Ninth Circuit Court of Appeals to continue to hear arguments in the case. On January 28, 2011, the Ninth Circuit agreed and issued an order requiring the Justice Department to file papers stating its position. In its brief filed on February 25, 2011, the Justice Department raised procedural challenges to the proceedings below and argued that "Congress's judgment on matters respecting military affairs is entitled to judicial deference." The brief did not address the issue of the constitutionality of DADT, which the plaintiffs' attorney saw as conceding the issue. The responsive brief was due on March 28, 2011.

'Repeal' process moves at a snail's pace

On January 28, 2011, the secretary of defense issued a Memorandum for Implementation of DADT. The memo states, "Implementation will be timely, deliberate, comprehensive, and consistent with the standards of readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces." Predictably, things are moving at a snail's pace. According to the accompanying article on training, the Marine Corps intends to finish all of its training by the end of May, while the larger Army plans to conclude trainings in August. The Navy plans to have its commands trained by the end of June.

When all of these trainings are finished, according to the terms of the "repeal," the President and the Joint Chiefs have to prepare a written certification that the Pentagon has "prepared the necessary policies and regulations." As pointed out in the accompanying article, we have yet to really see these policies and regulations. The "repeal" would then take effect 60 days after transmittal of the certification.

Once again, it is important to remember that although it has been "repealed," DADT remains in full force and effect. As always, the MLTF will continue to monitor developments concerning DADT and work with our allies for a real repeal.

the UCMJ be amended in light of *Lawrence v. Texas*, 539 US 558 (2003) and *United States v. Marcum,* 60 MJ 198 (CAAF 2004) to permit consensual adult sodomy regardless of sexual orientation.

Update to 'see nothing, hear nothing' approach to complaints?

Existing regulations on sexual misconduct are not well enforced—hence the high numbers of reported cases of sexual harassment and assault, and the much higher estimates of unreported cases. If, as the report recommended, current regulations and UCMJ provisions are to be made sexual-orientation-neutral and used for incidents of LGB sexual or verbal misconduct, commands will have to decide whether to increase enforcement across the board, apply the common 'see nothing, hear nothing' attitude towards heterosexual complaints to complaints involving LGB conduct or speech, or enforce the regulations vigorously only in LGB cases.

The report recommended that LGB members facing harassment or discrimination use traditional complaint procedures, such as IG complaints and the chain of command. Article 138 redress of grievance complaints, oddly enough, received no mention, though these may be among the best remedies. Practice shows that these complaints can be effective when cases are well prepared and well documented, complainants are assisted by an attorney or other advocate, and a diligent watch is kept for retaliation. Absent such preparation and support, complaint results are unpredictable—some are taken seriously, some are lost or "round-filed," and some result in serious reprisals against the complainant.

The DoD report, while recommending that the general notions of equality and diversity embodied in the Military Equal Opportunity (MEO) program be applied to discrimination against and harassment of LGB servicemembers, did not recommend use of MEO procedures, since the MEO deals primarily with "unlawful discrimination" against protected classes (race, color, national origin, religion and gender). The report mentioned the use of MEO procedures for sexual harassment – indeed, DoD and the services specify MEO procedures for these cases – but did not explain why sexually-harassed LGB servicemembers should use different procedures.

'Tiered' training program

Training is being conducted in three "tiers": one for commanders and the most senior enlisted personnel; another for those expected to need expertise in the policy, such as chaplains, JAGs, and personnel officers; and a third for all other servicemembers. So far, each service has begun training experts or leaders. The Marine Corps intends to finish all of its training by the end of May, while the larger Army plans to conclude trainings in August. Ideally, training is done in small-group settings, using a combination of slide shows or videos with discussion of vignettes and frequently asked questions. The services acknowledge that some members may need to attend their trainings on line. DoD has indicated that discussion of personal views will not be included in the sessions.

Marine Corps experts and special staff should be trained by mid-March, after which the trainings will shift to leaders. Marine trainings include a video in which the Commandant talks about the importance of the policy and the need to implement it: "we will step out smartly to faithfully implement this new law." This is followed by vignettes or examples of acceptable and unacceptable conduct and speech, with an explanation of how each should be handled.

Training focuses on tensions

Training information released by the Navy in March shows that most sailors will attend (or view) a 1 ½ to 2 hour program, beginning with a slide show on changes required under the repeal, and following that with vignettes and common questions. It is noteworthy that sexual or affectionate conduct receives little mention, the examples focusing on tensions between straight and LGB servicemembers, concerns about benefits for same-sex couples, freedom of religion and expression for those who believe homosexuality is wrong.

The Navy material included vignettes taken from a DoD implementation plan that was released along with the November, 2010, report. In one vignette, the training evaluates the propriety of a servicemember attending a gay pride parade – the conduct is deemed acceptable, because the member is wearing civilian clothes and presumably not on duty. Another describes sailors making derogatory jokes about showering with LGB sailors; in this situation, leaders are to inform them that their behavior is "not appropriate" under general equal opportunity policies. The example is also used to explain that separate showers for straights and LGB members will not be policy, but that commands have discretion to grant separate showers to those troubled by the situation, "within unit policies if the mission is not unacceptably impacted." A vignette in which a gay sailor cannot tolerate a straight roommate parallels this – there

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will be no formal policy on berthing, and separate berthing will not be encouraged, but commands have discretion to separate dissatisfied straight and LGB roommates if it can be done "within unit policy without degrading good order and discipline within the unit."

Expression of anti-gay religious views protected

Other vignettes are used to show that those opposed to the repeal for moral or religious reasons must follow the policy; recruiters, for example, may not refuse to enlist or commission LGB applicants. Chaplains must minister to all, but another example explains that they may express religious views opposing homosexuality, even when conducting worship services. Freedom of religion and, generally, freedom of expression are emphasized for heterosexuals, so long as derogatory language is avoided. The vignettes apparently omit the ramifications of open discussion among LGB members about, for example, homophobia in the military.

While the full content of the trainings isn't available to the author, at least one vignette looks at affectionate same-sex behavior. If, like other examples, this follows the DoD training plan, it describes an innocuous incident in which two servicemembers of the same sex are seen kissing and hugging each other in a civilian shopping mall. The plan's answer, one of the shortest in all the examples used, is equally innocuous—listeners or readers are told to apply standards of conduct regarding public displays of affection in an orientation-neutral way, and to respond without regard to sexual orientation. Period.

The relatively light attention given to sexual and affectionate LGB behavior in these trainings is troubling, not because that behavior will need a great deal of governance, but because lack of clarity increases the likelihood of abuse by homophobic servicemembers and commands. Unfortunately, initial discussion suggests that many are eager to find improper behavior among LGB members and unwanted advances towards straight members. With heterosexual conduct, commands frequently interpret suspect behavior as merely casual or friendly interaction, rather than objectionable acts or statements, and decline to interpret even egregious behavior as unwanted sexual advances, harassment or assaults.

Traditionally, female complainants have had great difficulty enforcing the regulations prohibiting harassment and sexual misconduct. Given the tradition of homophobia in the service, it seems likely that the lack of clear definitions and standards will result in mistaken and, more likely, false complaints and disciplinary action against presumed sexual conduct or advances by those who are known or suspected to be LGB.

Training materials: geared for straight audience with religious bias

The military has no policy or regulations or guidelines concerning the repeal of DADT. It is not clear whether these will be developed, or whether current regulations, policies and "traditions" will be formally adopted to satisfy Congressional requirements. Without such guidance, the training materials developed so far are geared for a straight audience with a strong religious bias. It is not clear how successful such trainings will be given these obvious limitations.

DoD's Recommendations on DADT Repeal

Excerpts from the "Recommendations" section of DoD's November 30, 2010, "Report of the Comprehensive Review of the Issues Associated with a Repeal of "Don't Ask, Don't Tell." (PDF) The Recommendations section begins on page 131.

Standards of Conduct

Throughout our engagement of the force we heard Service members express concerns, in the event of a repeal of Don't Ask, Don't Tell, about standards of conduct. Most often, those concerns centered on a potential for unprofessional relationships between Service members, public displays of affection, dress and appearance, and acts of violence, harassment, or disrespect between homosexual and heterosexual Service members.

In light of these concerns, we considered whether the Department of Defense should issue revised or additional standards of conduct in the event of repeal. The military is a highly regulated environment. Service core values, customs, courtesies, and traditions define acceptable behavior. Overall, the purposes of standards of conduct are to promote good order and discipline, prohibit behavior that would bring discredit on the Military Services, and promote the customs, traditions, and decorum of the military and of individual Services. Among many other things, military standards of conduct prescribe appropriate attire and personal appearance, prohibit unprofessional relationships, address various forms of harassment and related unprofessional behavior, and provide guidelines on public displays of affection. These standards of conduct regulate many aspects of Service members' personal lives considered off-limits in civilian society. These regulations, policies, and orders are generally issued at the Service level, or by commanders.

For example, the Air Force regulates dating, courtship, and close friendships between men and women, noting that personal relationships "become matters of official concern when they adversely affect or have the reasonable potential to adversely affect the Air Force by eroding morale, discipline, respect for authority, unit cohesion, or mission accomplishment."[345] The formation of such relationships between superiors and subordinates within the same chain of command or supervision is prohibited.[346]

Depending on the severity or impact to others, violations of standards of conduct may be addressed through administrative action (e.g., counseling or formal reprimand) or discipline under the Uniform Code of Military Justice (UCMJ). Criminal acts—for example, assault, cruelty and maltreatment, or disrespect to a superior commissioned or non-commissioned officer—may be addressed through non-judicial punishment or trial by court-martial.[347]

Rules concerning public displays of affection and proper dress and appearance, meanwhile, are largely unwritten and vary by Service and across commands within Services. For example, at present, other than in the Marine Corps there are no Service-level regulations or written policies prohibiting public displays of affection. However, public displays of affection—especially while in uniform—are informally discouraged in all the Services as a matter of individual Service culture, traditions, and decorum.

We believe it is not necessary to set forth an extensive set of new or revised standards of conduct in the event of repeal. Concerns for standards in the event of repeal can be adequately addressed through training and education about how already existing standards of conduct continue to apply to *all* Service members, regardless of sexual orientation, in a post-repeal environment.

We do recommend, however, that the Department of Defense issue generalized guidance to the Services that all standards of personal and professional conduct must apply uniformly without regard to sexual orientation. We also recommend that the Department of Defense instruct the Services to review their current standards of personal and professional conduct to ensure that they are neutral in terms of sexual orientation and provide adequate guidance to the extent each Service considers appropriate on unprofessional relationships, harassment, public displays of affection, and dress and appearance. Part of the education process should include a reminder to commanders about the tools they already have in hand to remedy and punish inappropriate conduct that may arise in a post-repeal environment.

345 Department of the Air Force, AFI 36-2909, *Professional and Unprofessional Relationships*, August 13, 2004, 2, para. 1.

346 AFI 36-2909, 3, para. 3.3.

347 10 U.S.C. § 815.

Equal Opportunity

We recommend that, in a post-repeal environment, gay and lesbian Service members be treated under the same general principles of military equal opportunity policy that applies to all Service members. Under the Military Equal Opportunity program, it is DoD policy to, "promote an environment free from personal, social, or institutional barriers that prevent Service members from rising to the highest level of responsibility possible. Service members shall be evaluated only on individual merit, fitness, and capability."[352]

Hand-in-hand with military equal opportunity are Service-level policies on diversity, inclusion, and respect. These are consistent with and support basic military values of treating every military member with dignity and respect. For instance, among the facets

of the Air Force Diversity Policy is to "educate and train all personnel on the importance of diversity, including mutual respect, thus promoting an Air Force culture that values inclusion of all personnel in the Total Force…."[353] The DoD Human Goals Charter, last issued in 1998, states that the Department of Defense strives "to create an environment that values diversity and fosters mutual respect and cooperation among all persons."[354] That same year, the Secretary of Defense William Cohen issued a memorandum in which he stated: "I will not tolerate illegal discrimination against or harassment of any DoD personnel. I expect all commanders, executives, managers, and supervisors to work continuously toward establishing a climate of respect and fairness for all DoD personnel."[355]

Under the Military Equal Opportunity program, there is also a reference to "unlawful discrimination," which is defined with reference to five specified classes: race, color, religion, sex, and national origin. The DoD Military Equal Opportunity directive states, "Unlawful discrimination against persons or groups based on race, color, religion, sex or national origin is contrary to good order and discipline and is counterproductive to combat readiness and mission accomplishment. Unlawful discrimination shall not be condoned."[356] Complaints of unlawful discrimination on these bases, as well as of sexual harassment, may be handled through the resources of the Military Equal Opportunity program, or through the chain of command. These five identified classes—race, color, religion, sex, and national origin—are also the focus of diversity programs and initiatives and are tracked as an identifier in Service personnel systems based on initial and periodic inquiries of Service members.

Meanwhile, there are other prohibited practices contrary to Military Equal Opportunity policy that do not involve "unlawful discrimination" against one of the five groups identified above, or sexual harassment; those prohibited practices are addressed principally through the chain of command, and not through the resources of the Military Equal Opportunity Program.

As stated before, we believe that, to maximize the opportunities for a smooth and successful repeal, perceived "equal treatment" of all Service members is key. Throughout the force, rightly or wrongly, we heard both subtle and overt resentment toward "protected groups" of people and the possibility that gay men and lesbians could, with repeal, suddenly be elevated to a special status. For example, a common question was whether, if the law were repealed, there would be affirmative action to recruit gay men and lesbians? While much of this sentiment is based on misperceptions about equal opportunity policy, we believe that, in a new environment in which gay and lesbian Service members can be open about their orientation, they will be accepted more readily if the military community understands that they are simply being permitted equal footing with everyone else, pursuant to general principles of military equal opportunity applicable to all Service members. This is consistent with the views and aspirations we heard from current and former gay and lesbian Service members: that they are not seeking special treatment, just asking the Department of Defense to "take [the] knife out of my back," as one gay Service member put it.[357]

Therefore, in the event of repeal, we do *not* recommend that the Department of Defense place sexual orientation alongside race, color, religion, sex, and national origin as a class eligible for various diversity programs, tracking initiatives, and the Military Equal Opportunity program complaint resolution processes. Instead, the Department of Defense should make clear that sexual orientation may not, in and of itself, be a factor in accession, promotion, or other personnel decision-making. Gay and lesbian Service members, like all Service members, would be evaluated only on individual merit, fitness, and capability.

Likewise, the Department of Defense should make clear that harassment or abuse based on sexual orientation is unacceptable and that all Service members are to treat one another with dignity and respect regardless of sexual orientation. Complaints regarding discrimination, harassment, or abuse based on sexual orientation would be dealt with through existing mechanisms available for complaints not involving race, color, sex, religion, or national origin—namely, the chain of command, the Inspector General, and other means as may be determined by the Services.

348 AR 165-1, 12, para. 3-2.b(6); Department of the Air Force, AFI 52-101, *Planning and Organizing*, May 10, 2005, updated March
14, 2008, 2, para 2.1.

349 SECNAVINST 1730.7D, 5, para. 5.e.(3).

350 Department of Defense, DoDD 1304.19, *Appointment of Chaplains for the Military Departments*, June 11, 2004, 2, para. 4.2.

351 Department of Defense, DoDD 1304.28, *Guidance for the Appointment of Chaplains for the Military Departments*, June 11, 2004,
3, para. 6.1.2.

352 DoDD 1350.2, 2, para. 4.2; DoDD 1020.2, 4, paras. 3.d., 4.e.(1).

353 Department of the Air Force, AFPD 36-70, *Diversity*, October 13, 2010, 2, para. 2.2.2.

354 "Text of the DoD Human Goals Charter," U.S. Department of Defense, accessed November 21, 2010, http://www.defense.gov/
news/newsarticle.aspx?id=43191.

355 Secretary of Defense, Memorandum, "Equal Opportunity for Military and Civilian Personnel of the Department of Defense," October 14, 1998.

356 DoDD 1350.2, 2, para. 4.2.

357 Service member, Confidential Communication Mechanism, 2010

Privacy and Cohabitation

Throughout our engagements with the force, we heard a number of Service members express discomfort about sharing bathroom facilities or living quarters with someone they know to be gay or lesbian. In connection with this issue, we note that 38% of survey respondents state that they have already shared a room, berth, or field tent

with another Service member they believe to be homosexual;[366] 50% believe they have already shared bathrooms with open bay showers that were also used by a Service member they believe to be homosexual.[367]

Housing policy for the U.S. military is established through a combination of DoD and Service-level regulations; in general the Department of Defense requires Service members without dependents, in pay grades E-6 and below, to live in barracks or dormitories. These Service members, with command approval, may live off-base. Overall, approximately 24% of the active duty force resides in barracks, dorms or onboard ship.[368] This percentage varies from Service to Service: in the Air Force, the percentage is only 17%, while in the Marine Corps it is 39%.[369]

In general, DoD regulations also provide that Service members in barracks or dorms have a private bedroom and a bathroom shared by no more than one other person.[370] However, there are variances to this standard, most notably the Marine Corps, the Navy, at Service academies, and in training environments. For instance, in the Marine Corps personnel E-3 and below share a bedroom in the interest of unit cohesion.[371] Navy shipboard requirements provide that both officers and enlisted personnel occupy shared staterooms or berthing areas divided by pay grade and gender.[372] The Services require gender segregation in housing and berthing.[373]

We do *not* recommend segregated housing for gay or lesbian Service members. We believe this would do more harm than good for unit cohesion, create a climate of stigmatization and isolation, and be impossible to enforce or administer unless Service members are required to disclose their sexual orientation. On the other hand, we are sensitive to concerns expressed to us by commanders that disputes may arise between gay and straight Service members assigned to live together involving, at least to some extent, sexual orientation. Commanders should have the flexibility, on a case-by-case basis, to addresses those concerns in the interests of maintaining morale, good order, and discipline.

Accordingly, we recommend that the Department of Defense expressly prohibit berthing or billeting assignments based on sexual orientation, except that commanders should retain the authority to alter berthing or billeting assignments on an individualized, case-by-case basis, in the interest of maintaining morale, good order, and discipline, and consistent with performance of mission.

Next, a frequent concern expressed by some Service members was personal privacy in settings where they may be partially or fully unclothed in the presence of another Service member they know to be gay or lesbian—for instance, shared showering facilities or locker rooms. Likewise, military mission or training requirements may require that Service members live and work under conditions that offer limited personal privacy. Many ask whether repeal of Don't Ask, Don't Tell will require a third and possibly a fourth set of separate bathroom facilities. Meanwhile, others regard the very suggestion as offensive.

Service members consistently raised this general topic, so we are obliged to address it. Personal privacy in shared bathing situations exists to varying degrees throughout the U.S. military. The basic design standard for DoD facilities requires separate male and female showers directly adjacent to the corresponding gender's dressing and toilet areas, and include private shower/drying stalls. In other places, such as recruit training, there are shared facilities containing open bay berthing and group showers. Navy shipboard design criteria require individual stall showers,[374] while Army regulations only require separate toilet facilities for men and women, but do not establish personal privacy standards.[375]

Here again, we are convinced that separate bathroom facilities would do more harm than good to unit cohesion and would be impracticable to administer and enforce. Concerns about showers and bathrooms are based on a stereotype—that gay men and lesbians will behave in an inappropriate or predatory manner in these situations. As one gay former Service member told us, to fit in, co-exist, and conform to social norms, gay men have learned to avoid making heterosexuals feel uncomfortable or threatened in situation such as this. The reality is that people of different sexual orientation use shower and bathroom facilities together every day in hundreds of thousands of college dorms, college and high school gyms, professional sports locker rooms, police and fire stations, and athletic clubs.

Accordingly, we recommend the Department of Defense expressly prohibit the designation of separate facilities based on sexual orientation, except that commanders retain the authority to adjudicate requests for accommodation of privacy concerns on an individualized, case-by-case basis in the interest of maintaining morale, good order, and discipline, and consistent with performance of mission. It should also be recognized that commanders already have the tools—from counseling, to non-judicial punishment, to UCMJ prosecution—to deal with misbehavior in both living quarters and bathing situations, whether the person who engages in the misconduct is gay or straight.

366 See Appendix C, Question 86.
367 See Appendix C, Question 87.
368 Westat, vol. 1, Appendix F, Question 11.
369 Westat, vol. 1, Appendices S and T, Question 11.
370 U.S. Army Corps of Engineers, TI 800-01, *Design Criteria*, July 20, 1998, Table B-2.
371 Defense Manpower Data Center, *April 2007 Status of Forces Survey of Active Duty Members: Housing Briefing*, December 2007.
372 Department of the Navy, *Shipboard Habitability Design Criteria Manual*, December 1, 1955, 11, para. 3.2.3.3., 13, para. 3.2.7.2.
373 DoN, *Shipboard,* 11, para. 3.2.3.3., 13, para. 3.2.7.2
374 DoN, *Shipboard,* 18, para. 3.4.3.4.
375 TI 800-01, 15-2, para. 2.c

Full Report (PDF, Recommendations begin on p. 131.)

Accused Wikileaks Whistleblower Now Charged With Capital Offense

Bradley Manning in solitary confinement, stripped of his clothes at night

By Kathleen Gilberd

With the addition of new charges and specifications in early March, Army PFC Bradley Manning now faces the possibility of a death penalty sentence or life without possibility of parole. At the same time, the conditions of his confinement have led to growing public outrage and to a formal UCMJ Article 138 complaint by his attorney. Manning remains in solitary confinement and under suicide watch, entirely isolated from other prisoners, permitted out of his cell only once daily for an hour of "exercise," and stripped of his clothing at night.

New Charges include 'aiding the enemy'

On March 2, 2011, the convening authority (the officer with authority to convene a general court-martial) in Manning's case brought 22 additional charges and specifications under Articles 92, 104 and 134 of the UCMJ. The most serious of these, "aiding the enemy" pursuant to Article 104, carries a possible death sentence. According to an Army news release announcing the added charges, the prosecution team has informed the defense that it does not intend to recommend imposition of the death penalty to the convening authority. (The decision to seek the death penalty, however, lies entirely with the convening authority.) The release explained that the new charges were the result of continuing investigation since charges were first brought last summer, and mentioned that the investigation is still ongoing, raising the possibility of yet more charges.

While observers generally think it unlikely that a court-martial panel would impose the death penalty, the capital charge demonstrates the Army's seriousness in the case. It places additional pressure on Manning to "deal" for a lesser punishment in return for his confession and guilty plea, and tells the court-martial panel (jury) that any sentence short of the death penalty would be lenient. Even if the convening authority accepts the prosecution's recommendation, potential court-martial panelists have been given a clear message that the alleged offenses rank among the most serious of military crimes. Needless to say, the capital charge also sends a strong message to other military personnel who might consider exposing war crimes. Capital cases come the closest to civilian criminal procedure and law. The court-martial panel must include at least 12 members; theoretically, it can be larger. A finding of guilty must be unanimous and done by secret written ballot. If the panel imposes a death sentence , it must also be unanimous. Appeal to the Court of Appeals for the Armed Services is automatic. The President of the United States must approve any death sentence and sign the death warrant.

At this writing, the court-martial itself is likely to be months away. Results of a "706 board," a sanity and competency inquiry conducted under Rule 706 of the Rules for Courts-Martial (*Manual for Courts-Martial,* section II) has not yet been released. Only after the board is concluded will an Article 32 pre-trial investigation (akin to a preliminary hearing) be conducted. Manning's civilian attorney, David Coombs, estimates that the Article 32 may take place in late May or early June, which means that the court-martial is unlikely to begin before the fall.

Manning isolated, stripped, in cell 23 hours a day

Manning was placed in maximum custody and placed under a "prevention of injury" watch when he was confined over nine months ago. Early this year, he was also placed on suicide watch, apparently on the basis of rather benign remarks he made after obvious harassment by his guards. Manning is completely isolated from other prisoners—he is, in fact, the only prisoner in his cellblock—and spends 23 hours a day in his cell. He is allowed an hour of closely watched "exercise" each day. As part of the prevention of harm watch, Manning was forced to strip down to his underwear each night. In March, after learning of the capital charge and after a sarcastic remark about the utility of underwear and sandals in committing suicide, Manning was forced to sleep without any clothing at all for several days. Only after public and media outrage about his treatment was he given nightclothes—a velcroed jumpsuit for suicidal prisoners—but the other conditions of confinement remain unchanged.

David Coombs filed an Article 138 complaint with the base commander on January 19, 2011, asking that these conditions of confinement be lifted and noting that his "prevention of injury status" restrictions were contrary

to recommendations by brig and defense psychiatrists that restrictions were unnecessary. The commander denied the complaint on March 1, and the defense has since submitted a rebuttal with a personal statement by Manning. Ultimately, the base commander must forward the complaint to the Secretary of the Navy for review. According to Coombs' blog, he plans to petition the Army Court of Criminal Appeals for a writ of habeas corpus if no action is taken on review of the complaint.

Photo credit: World Can't Wait. Used with permission.

Daniel Ellsberg (left) and Ret. Col. Ann Wright (second from right) were among those arrested outside Quantico during a demonstration in support of Bradley Manning on March 20.

Confinement tantamount to torture, some say

Manning's inhumane treatment has led to complaints that Manning is being tortured, and public outrage over his confinement conditions has brought increased attention to the case as a whole. Even before the suicide watch worsened his treatment, Amnesty International in Britain took the unusual step of urging the UK government to intervene to prevent abusive treatment, as it appeared that Manning may be a dual British/US citizen.

Assistant Secretary of State for Public Affairs P.J. Crowley resigned on March 13 under heavy pressure from the administration, after telling a seminar at MIT, "What is being done to Bradley Manning is ridiculous and counterproductive and stupid on the part of the department of defense." (Crowley distinguished his objections to Manning's treatment from objection to prosecution for the alleged whistleblowing.) President Obama, on the other hand, told reporters that he had asked the Pentagon "whether or not the procedures that have been taken in terms of his confinement are appropriate and are meeting our basic standards. They assure me that they are."

Demonstrations in 30 US cities and internationally

On March 19 and 20, demonstrations and rallies were held in 30 cities around the US and internationally to protest the charges against Manning and his abusive treatment; in addition, his case was raised at national anti-war protests held on the 19th. The center point of the protests was a demonstration at the front gate at Quantico, where Manning is being held.

In advance of the demonstration, base security sent a memo to Quantico personnel warning of possible criminal activity. The memo said that there were "substantiated indications and warning of possible denial of service attacks on MCBQ by supporters of Wiki-leaks and PFC Manning. It is possible that these attacks will be timed to coincide with protest activity that is scheduled to take place in the vicinity of MCBQ on 20 Mar." In addition, the memo warned, individuals might attempt to enter the base for vandalism or to harass Marines.

Protesters treated to closed gates, MPs and five law enforcement agencies

On the 20th, about 400 demonstrators gathered outside the main gate to the base, which was closed for the occasion. MPs and local county police, joined by at least four other law enforcement agencies, appeared in full riot gear, complete with mounted troops and tactical vehicles. Needless to say, the base was not inundated with criminal activity, nor was there violence on the part of the demonstrators, though local police reported that about 35 people, including Daniel Ellsberg and former Col. Ann Wright, were arrested after an impromptu sit-in outside the gate. Before the demonstration, the Bradley Manning Support Network had requested permission from Quantico authorities for demonstrators to lay a wreath at the Iwo Jima memorial on base to honor the dead. Although the memorial is routinely open to the public, the command refused. On the 20th, protesters were told that six of them, accompanied by the media, could lay the wreath. At the last minute, however, police said the six could not enter Quantico, but must throw the wreath through the gate at the statue. The sit-in followed.

More information about the case is available at the Support Network's website, bradleymanning.org, and the Courage to Resist website, www.couragetoresist.org. His attorney posts updates on the case on his blog at armycourtmartialdefense.info.

Thanks to MLTF attorney Jim Klimaski for the information on court-martial procedures.

About the Military Law Task Force

The National Lawyers Guild's Military Law Task Force includes attorneys, legal workers, law students and "barracks lawyers" interested in draft, military and veterans issues. The Task Force publishes ***On Watch*** as well as a range of legal memoranda and other educational material; maintains a listserv for discussion among its members and a website for members, others in the legal community and the public; sponsors seminars and workshops on military law; and provides support for members on individual cases and projects.

The MLTF defends the rights of servicemembers in the United States and overseas. It supports dissent, anti-war efforts and resistance within the military, offering legal and political assistance to those who challenge oppressive military policies. Like its parent organization, the NLG, it is committed to the precept that human rights are more sacred than property rights.

The Task Force encourages comments, criticism, assistance, subscriptions and membership from Guild members and others interested in military, draft or veterans law. To join, or for more information, please check our website at www.nlgmltf.org or contact the Task Force at:

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