



ON WATCH

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Military Law Task Force of
the National Lawyers Guild

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DoD Issues New Policies To Aid Sexual Assault Victims

BY KATHLEEN GILBERD

Secretary of Defense Leon Panetta recently spoke strongly of the need to address the problem of sexual assaults in the military, noting that there were 3,191 reported sexual assaults in 2011 – but estimating that the actual number was closer to 19,000. On Jan. 18, 2012, Panetta stated that “[w]e have a moral duty to keep [servicemembers] safe from those who would attack their dignity and their honor” and promised that the changes he announced were just the first in a broad package of proposals to be made in the coming months. His statements came as part of his announcement of the latest changes to the Pentagon’s Sexual Assault Prevention and Response program (SAPR).

Included in the changes

- SAPR Victims Advocates (SAPR VAs) and Sexual Assault Response Coordinators (SARCs) who work with victims will require certification;
- SAPR will be extended to military dependents and to DoD employees and contractors when stationed overseas;
- Additional funding will be provided to train investigators and prosecutors in handling sexual assault cases;
- Retention of sexual assault records and evidence will be lengthened and standardized among the services;
 - some documents will be retained for 5 years in restricted (confidential) cases;
 - some documents will be retained for 50 years in unrestricted cases;
- an assessment of command and senior enlisted training and possible improvements will be conducted within 120 days; and
- victims who make unrestricted reports will be able to request expedited transfers from the units in which assaults occurred. (The last provision is the subject of an earlier DoD memorandum, discussed below.)

Initiatives mandated in NDAA of 2012

Ironically, it was Congress that mandated the initiatives Panetta announced – with the exception of increased

funding for legal and investigative training and the extension of some SAPR provisions to overseas DoD employees and contractors – in the National Defense Authorization Act (NDAA) for 2012. While future proposals may come from DoD’s expressed commitment to the problem – or its embarrassment over public exposure of steadily increasing assault rates – the current plans come directly from the NDAA. Under the Act:

For the first time, sexual assault victims are to be given access to legal assistance from military JAGs or civilian attorneys, and are to be advised of this by Victims Advocates or most other “first responders.” (10 USC 1565b)

(Continued next page)

Victory for Veterans with PTSD

BY JEFF LAKE

On January 5, 2012, the National Veterans Legal Services Program (NVLSP) announced that a settlement had been approved in the case of *Sabo v. United States*, U.S. Court of Claims No. 08-899 C. The settlement means that the U.S. military will pay lifetime disability retirement benefits to 1,029 veterans with PTSD who were denied these benefits upon discharge from the military following wartime service in Iraq or Afghanistan. The military initially failed to assign a 50% disability rating to these veterans, denying them disability retirement benefits. Additionally, the military agreed to increase the PTSD disability rating of another 1,066 OIF/OEF veterans. These veterans were given disability retirement benefits upon discharge, but were wrongfully denied a 50% disability rating for PTSD. They may now qualify for thousands of dollars in back pay spanning several years.

Brad Stichman, co-executive director of NVLSP, commented: “This is a happy ending to a sad chapter of mili-

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This right will be available to those who make restricted or unrestricted reports, and is extended to military dependents as well as servicemembers. Since neither SAPR VAs nor command SARCs are tasked with actual advocacy for victims, this change may provide important protections against mishandled investigations and all-too-common retaliation for reporting assaults. Legal assistance for assault victims is linked to 10 USC 1044, which states that the military “may” provide legal counsel as resources allow to assist with personal civil matters for servicemembers unable to afford private attorneys. Presumably, assistance for sexual assault victims is not intended to be discretionary. The new policy is to go into effect 180 days after the NDAA’s enactment.

Victims who make unrestricted reports will have the right to **request** expedited temporary or permanent transfer or change of duty station, “so as to reduce the possibility of retaliation against the member for reporting the sexual assault or other offense.” **Commanding officers are not required to grant these requests**, though they must grant or deny within 72 hours. Victims may request review of a denial by the first general officer or flag officer in the chain of command, whose decision must also be made within 72 hours. (10 USC 673)

The Director of the DoD SAPR office will hereafter be appointed from among general or flag officers of the services or DoD employees in a comparable senior executive service position. (10 USC 1561 note)

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tary mistreatment of those who served our country in time of war. The veterans covered by this agreement were exposed to highly traumatic events during deployment, only to return home and be shortchanged on benefits after the military found they suffered from PTSD that was so severe that they needed to be discharged.”

This case serves as a reminder, once again, of the U.S. military’s callous disregard for its veterans. It took three years of litigation just to obtain some relief for these servicemembers who have been suffering with traumatic stress. On Watch is also following the attempt to sue the Veteran’s Administration in federal court which is now pending in the Ninth Circuit.

The pleadings in this case, including the order granting final approval, can be found at www.ptsdlawsuit.com. ★

Sexual Assault Response Coordinators and Sexual Assault Victims Advocates are to be assigned to each brigade or equivalent unit of the services, although the Secretaries may increase that number as they deem appropriate. Only DoD civilian employees and members of the military may serve in these capacities, beginning October 1, 2013. **The new law also requires training and certification of all SARCs and SAPR VAs**, commensurate with the professional training available for equal opportunity advisors, also effective October 1, 2013. DoD is required to consult with experts in advocacy and sexual assault prevention and response training from outside DoD in developing certification programs.

Service-wide training and education programs for sexual assault prevention and response will be required, using programs developed in consultation with experts outside DoD, and encompassing initial entry and accession programs, annual refresher training, professional military education, peer education and all special-

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ized leadership training. First responders, including firefighters, emergency medical technicians, law enforcement officers, military criminal investigators, healthcare personnel, judge advocates and chaplains will have sexual assault response training including in their initial and recurring training.

A comprehensive policy is to be developed for the retention of evidence and records in sexual assault cases, to ensure preservation of records and evidence for periods of time that allow victims to substantiate claims for veterans benefits, support criminal or civil prosecutions, and assist in DoD record-keeping. By October 1, 2012, physical evidence shall be retained for not less than five years, and documentary evidence shall be retained for the length of time that sexual assault investigative records must be maintained. This provision also requires that court-martial records of trial be provided to sexual assault victims if they have testified during the proceedings. (10 USC 854, UCMJ Art. 54) Victims must be notified of the right to receive records of trial as soon as they are authenticated.

Not long after Secretary Panetta's statement, the Pentagon re-issued DoD Directive 6495.01, "Sexual Assault Prevention and Response (SAPR) Program," dated January 23, 2012. The revised Directive does not include most of the changes mandated by Congress or mentioned by Secretary Panetta; presumably these will be released as DoD directive-type memorandum or incorporated into a revision of the more detailed DoD Directive 6495.02, "Sexual Assault Prevention and Response Program Procedures." The new Directive 6495.01 assures that the SAPR program shall "[f]ocus on the victim and on doing what is necessary and appropriate to support victim recovery, and also, if a Service member, to support that Service member to be fully mission capable and engaged. The SAPR Program shall provide care that is gender-responsive, culturally-competent, and recovery-oriented...."

Highlights of the Directive

Highlights of the Directive, if one can call them that, include

(a) Like the NDAA, the Directive now extends sexual assault policies to "military dependents 18 years of age and older who are eligible for treatment in the military healthcare system...and who were victims of sexual assault perpetrated by someone other than a spouse or intimate partner." (Victims of domestic sexual assault are covered separately by the military's Family Advocacy Program.) In addition, DoD civilian employees and their family dependents 18 years and older are to be provided limited medical care (emergency services) and limited services of a SARC and SAPR VA while undergoing emer-

gency care, if they are stationed or performing duties outside the continental US and are eligible for treatment in military healthcare facilities. US citizen DoD contractors have similar limited coverage when they are authorized to accompany the armed forces in contingency operations outside the US. The Directive also expands the full policy to servicemembers who were victims of sexual assault prior to enlistment or commissioning.

Sexual assault cases are now to be designated as "emergency cases" requiring expedited response and medical treatment; the text notes that, "regardless of whether physical injuries are evident," these cases may involve, among other things, serious psychological injury. This section (para. 4.j.(2)) points out that victims should be treated uniformly, consistent with the military's "Victim Centered Care" policy, "regardless of their behavior because when severely traumatized, sexual assault patients may appear to be calm, indifferent, submissive, jocular, angry, emotionally distraught or even uncooperative or hostile towards those who are trying to help."

The SAPR program explicitly does "NOT provide policy for legal processes within the responsibility of the Judge Advocate General...or for criminal investigative matters assigned to the [JAG]." The DoD Inspector General is to develop and oversee policy for criminal investigation and law enforcement in sexual assault cases.

Unlike prior regulations, which specified a response time, the Directive states that "[a]n immediate, trained sexual assault response capability...shall be available for each report of sexual assault in all locations, including in deployed locations. The response time may be affected by operational necessities, but will reflect that sexual assault victims shall be treated as emergency cases."

For the first time, the Directive expressly links sexual assault reports to complaints and reports protected under the Military Whistleblower Protection Act. Para. 4.h of the Directive states that "[v]ictims of sexual assault shall be protected from coercion, retaliation, and reprisal in accordance with DoDD 7050.06," "Military Whistleblower Protection."

The Directive retains prior regulations' preference for unrestricted reporting, which allows investigation and command action. However, new language has been added which points out that unrestricted reporting may be a barrier for victims who do not desire command or law enforcement involvement; "Consequently, the DoD recognizes a fundamental need to provide a confidential disclosure vehicle via the Restricted Reporting option." **It**



remains to be seen whether victims will continue to be pressured to choose unrestricted reporting.

Para. 4.k.(e) prohibits disclosure of confidential information (made in restricted reports) by SARCs or SAPR VAs, even when a command has obtained separate evidence of an assault and initiates an independent investigation. Improper release of confidential communications or improper release of medical information may result in disciplinary action or other adverse personnel or administrative action.

To date, only one of the new provisions, on transfers of sexual assault victims, has been set out in detail. On December 16, 2011, DoD issued Directive-Type Memorandum 11-063, "Expedited Transfer of Military Service Members Who File Unrestricted Reports of Sexual Assault." While the service Secretaries are to promulgate implementing regulations, the memorandum provides considerable detail.

Presumption in favor of transfer for sexual assault victims

As noted above, victims of sexual assault do not have a right to transfer from their units, but the memo establishes "a presumption...in favor of transferring a Service member (who initiated the transfer request) following a credible report of sexual assault." A report is "credible" where there are reasonable grounds to believe that an offense constituting sexual assault has occurred. The victim may request a temporary or permanent transfer either to another unit within the command or to a duty station outside the command.

The CO, or the appropriate approving authority, is to make a credible report determination at the time the request is made "after considering the advice of the supporting judge advocate, or other legal advisor concerned, and the available evidence." Victims must be notified of this option at the time they report an assault, or as soon as practicable thereafter. As noted in the discussion of the NDAA, COs must respond to requests within 72 hours. Where transfer is granted, that process is also to be expedited. If the request is disapproved, the victim may appeal to the first flag or general officer in the command, or the civilian employee of equivalent status; this official must also act on the request within 72 hours.

Factors on which transfer decision would be based

The CO or appropriate approving authority must provide reasons and justification for a transfer or, presumably, for denial of a transfer. He or she is required to consider a number of factors, including

- the member's reasons for the request;
- potential transfer of the alleged offender rather than the victim;
- the nature and circumstances of the offense;
- whether a temporary transfer would suffice to meet the victim's and unit's needs;
- the training status of the victim;
- availability of positions in other units within the broader command;
- the potential impact on the investigation and disposition of the sexual assault case;
- the alleged offender's location and status (servicemember or civilian); and
- "other pertinent circumstances or facts."

The memorandum also directs COs to counsel the victim to ensure she or he is fully informed of reasonable foreseeable career impacts of a transfer, the potential impact on the case against the alleged offender, or other consequences of the request. Victims must also be warned that they may need to return for the prosecution of the case, should there be a prosecution.

The services are also required to promulgate regulations for members of the Reserve and National Guard. Here, "the command should allow for separate training on different weekends or times from the alleged offender or with a different unit in the home drilling location" to avoid subjecting the victim to an undue burden of transfer elsewhere. Transfer of the alleged offender is to be considered as an alternative and, "[a]t a minimum, the alleged offender's access to the Service member who made the unrestricted report shall be restricted, as appropriate."

These provisions add some important protections for sexual assault victims, but they leave in place a central problem: Commanding officers have virtually unlimited discretion in deciding whether and how to respond to reports of sexual assault – and to retaliate against victims. While the availability of military counsel (civilian counsel has always been available) will be particularly useful for victims whose cases are not properly handled, significant inroads into the problem of sexual assault can only be made if cases are handled by agencies completely separated from the victims' commands. ★

Kathleen Gilberd is a legal worker living in San Diego. She serves as Executive Director of the Military Law Task Force and has presented numerous workshops on rape and sexual assault in the military. She co-wrote, with Marjorie Cohn, the 2009 book Rules of Disengagement. Her web site is at kathleengilberd.com.

GI rights counselors see rise in CO applications

BY BILL GALVIN

Conscientious Objection calls are increasing. Every couple days the Center on Conscience and War receives a call from someone in the military who is wrestling with his or her conscience about participation in war and the military. Not all of them follow this with a CO application. Many find quicker or easier ways out – or go AWOL (UA). But many follow through with an application, and the Center gets integrally involved with the applicant as he or she goes through the process (as do other nodes of the GI Rights Hotline). While it remains true that the better an application the more likely the CO will prevail, even an excellent application is no guarantee of success.

We have seen a decrease in the percentage of applicants citing traditional religious beliefs. Many draw from a variety of religious traditions that have influenced them but they do not strictly follow any particular religion. It is as if they have come up with their own particular moral and ethical framework for evaluating the morality of war, with influences as diverse as the Old Testament, the Bhagavad-Gita, the Pope and Confucius.

Others are not religious at all, and at first seem political. While in the past political objections were usually from a leftist political analysis, recently the number of those with conservative political analysis has increased. The influence of Ron Paul's style of libertarian and economic thought comes up much more than in the past. This can present a particular challenge for the counselor as we help them understand that for their objection to qualify under US law, it must be rooted in values, not political or economic analysis. Obviously one's political analysis is usually rooted in his or her values, but sometimes helping the applicant make that connection can be difficult.

Objection directed toward the military

Another trend we're seeing in applications is anger towards the military. While many COs have legitimate grievances with how they have been treated by the military, we've been seeing applicants whose objection seems to be as much about the military culture as it is about objection to war. Their anger towards the military is integrally intertwined with their CO application. (One recent draft of an application stated quite explicitly that the war the military wages on military personnel is no different from international warfare—it's just a matter of degree.)

We still get the "Jesus says love your enemies" or "God wants us to live in peace" applications as well, but they are not the norm. And in almost every case, careful engagement by the counselor to help the applicant understand the essential elements of a CO application is essential to ensure that the applicant submits a good claim.

Need to educate the command – and some chaplains

Commands continue to be ignorant of the process. The Center advises applicants to submit a copy of the CO regulations with their application so the command can figure out what to do. It appears that processing irregularities are increasing—and sometimes significant parts of the processing must be repeated, resulting in the already lengthy processing time growing even longer. In one recent case, the applicant informed his command he was working on a CO application and he was pressured to go for a chaplain's interview before he even submitted his claim! So helping CO applicants to understand the processing and deal with and minimize these irregularities is essential.

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Historically, chaplains have been one of the biggest obstacles for COs. Besides the anti-CO bias that is often evident, we've seen well intentioned chaplains give incorrect advice because of their own ignorance of the CO process. But it really does depend on the particular chaplain. We have seen several cases this past year in which the chaplain did exactly what s/he should do – and did it well. We have even seen a case or two in which the chaplain, in his or her written report, explained the beliefs of the CO applicant better than the applicant did in the application. While I'm not sure that this could be called a trend, it is a welcome switch from the norm.

Having counsel present for the IO hearing always helps the conscientious objector. Given the fact that counselors are frequently at a distance from where the CO is stationed, this can present a problem. However, several counselors have been “present” for the interview via telephone, with some degree of success. Obviously this is not as good as being there in person — you miss being able to communicate with the CO by body language or quick whispers, but it is preferable to having no counsel at all. At minimum there is a second witness to what's happening--and the telephonic presence may prevent abuse. And having a person who is knowledgeable about CO regulations with firsthand knowledge of the IO hearing can be helpful when preparing the rebuttal when there is not a transcript.

Watch for boilerplate reasoning

IOs and commanding officers frequently recommend denial because of a misunderstanding of CO law and regulations and/or because of an obvious bias. I don't think this is a new trend, but it is a persistent problem. An accurate rebuttal, *citing regulations and/or case law when necessary*, is one of the most important parts of supporting the CO in the process. A good rebuttal, even when there is a negative recommendation, often results in a favorable outcome.

The DoD Instruction explicitly states, “The reasons for an adverse decision will be made a part of the record and will be provided to the applicant.” (*DoDI 1300.06 par. 7.7*) In recent years, far too often we have seen boilerplate reasoning, such as, “Applicant failed to demonstrate she was sincere.”

Another trend CCW has noticed is an increase in the number of denials because of “pre-existing beliefs.”

“... no member of the Armed Forces who possessed conscientious objection beliefs before entering military service is eligible for classification as a Conscientious Objector.” (*DoDI 1300.06, par. 4.1.1.*)

The applicant must show how his or her beliefs have changed, or “crystallized” since entering the military.

Addressing “pre-existing beliefs”

Army regulations explain it this way: “Applicants who held their beliefs before entry into military service, but failed to make these beliefs known, cannot be discharged or reassigned to noncombatant duty. However, those who have undergone a real change or development of belief since entry into military service . . . may be discharged or reassigned to noncombatant duty, as proper.” (*AR 600-43 •Appendix D—4e.*)

While sometimes it is easy to see how the CO Review Board concluded that beliefs were “pre-existing,” in most cases the applicant has explained in the application how and why their beliefs have changed. In our review of CO applications, we routinely look for evidence of “pre-existing” beliefs to prevent this problem. Ideally we try to get the applicant to explain what they were thinking and what they believed at the time of their enlistment in their answer to the question about how their beliefs developed. Then they can explain how and why their beliefs changed, so the difference can be readily seen by those evaluating the claim. However, even in such cases applications are sometimes denied citing “pre-existing” beliefs. So this is an area we pay particular attention to, and draw as sharp a contrast as possible between the “pre-existing” beliefs and current beliefs.

A GAO study released in 2007 reported a 53% approval rate for CO applications. Experienced counselors in the GI rights hotline network report a significantly higher approval rate. The actual rate is not known. Hopefully the information in this article will assist counselors and lawyers in assisting and representing COs so that we can make the approval rate even higher. ★

Bill Galvin is the Counseling Coordinator at the Center on Conscience and War in DC, where his most recent major project is a soon-to-be-released manual for chaplains on conscientious objection. Bill is a Vietnam-era CO who has been doing military counseling ever since then. His hobby (some say obsession) is roller coasters.



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Bradley Manning Update

The last few months have seen a significant amount of action in the PFC Bradley Manning case.

In December, the hearing officer in Manning's Article 32 hearing recommended that Manning face a court-martial. This recommendation was followed by Maj.

Gen. Michael Linnington who referred all charges to a General court-martial. On February 23rd, Manning was (finally) arraigned. Unless the court grants further prosecution delays, we currently expect the case to go to trial sometime in August.

Meanwhile, an [active campaign](#) continues to seek Bradley Manning's freedom. The Military Law Task Force is proud to be a part of this campaign.

In related news, Manning received at least two nominations for the Nobel Peace Prize, as made public by the nominating entities themselves: several members of the Icelandic Parliament and the Oklahoma Center for Conscience and Peace Research (Manning is originally from Oklahoma). ★



ADDITIONAL WEB-ONLY CONTENT:

Op-Ed: [Who is really on trial? Bradley Manning or America itself?](#)

Major changes made to DOD Instruction on protest and dissident activities

On February 22, 2012, the Department of Defense made major changes to DOD Instruction 1325.06. These changes appear to us to be part of a major military policy change that is designed to stifle and suppress a growing GI movement against the wars in the Middle East.

Some of these changes include provisions that make it easier for military commanders to place GI coffeehouses on the off-limits list, as well as other provisions that could be used to prevent GIs from being able to participate in anti-war and civil rights organizations.

For more analysis and commentary on these changes, see our web site. ★



ADDITIONAL WEB-ONLY CONTENT:

[Should we be worried about DoD changes on dissent?](#)

MLTF NEWS & NOTES

MLTF steering committee officers - When Kathleen Gilberd was appointed Executive Director last August, James M. Branum, previously serving as co-chair with Gilberd, became the sole MLTF chair. Now, Jeff Lake, an attorney in San Jose and a member of the MLTF steering committee serving as secretary, has been elected as vice-chair. The steering committee is seeking a new secretary, which should be announced shortly.

GI Rights Network Conference - The GI Rights Network will hold its annual conference from May 31-June 3 in Fayetteville, Arkansas. MLTF members are encouraged to attend. The conference will include workshops ranging from the new DoD/VA disability evaluation system to changes in sexual assault policy; CLE credit is planned for some sessions. For information or to register, contact kathleengilberd@aol.com.

Congratulations - Cheers to MLTF chair James Branum, on the occasion of his marriage to Dr. Rebecca Faulkner in December. James reports that married life agrees with him.

Veterans Benefits Manual - The National Veterans Legal Services Project has recently published the 2011 edition of its *Veterans Benefits Manual*, a comprehensive guide for attorneys and advocates handling VA and other veterans benefits cases, as well as discharge review. The manual is available from www.nvlsp.org.

G-8 Demonstrations and GIs - IVAW has put out a call to all its members to attend the NATO/G-8 demonstrations in mid-May in Chicago. MLTF has agreed to provide information and legal support for GIs and veterans attending the protests. If you would like to help, please contact kathleengilberd@aol.com.

BAMLP/MLTF Training Materials - The Bay Area Military Law Panel and MLTF are distributing a new version of the BAMLP training materials, updated as of May, 2011, and now available on CD. Along with a number of MLTF memos are discharge checklists, sample letters and forms for use in military cases, and important regs. The CD is available for \$30, and the binder plus CD for \$85 plus shipping. For ordering information, contact nlg.mltf@gmail.com.

Military Psychiatric Policies - MLTF is updating its legal memo on military psychiatric policies, and would like to hear from readers who have had recent experience with voluntary or involuntary personality disorder discharges or other designated physical and mental conditions (conditions not a disability) discharges. Readers with information to share can contact the Task Force at nlg.mltf@gmail.com or 619-463-2369.

Readers are invited to share information through this column. Items for the next issue should be sent to nlg.mltf@gmail.com.

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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