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Minority enlistment: Barriers to separation and relief

BY EMILY GALLAGHER

In this article I discuss the issues raised by the enlistment of a 17-year-old minor in the military. I explain the process by which minors can enlist, and discuss how to advocate for the discharge of such minors based on the proposition that they are legally entitled to disaffirm their enlistment contracts before reaching the age of majority. I cover the discharge called Entry-Level Separation (ELS), which is sometimes used to discharge minors who wish to disaffirm their contracts. I also explain the problems with relying on ELS, including group pressure that prevents minors from seeking an ELS, and the discretionary nature of this discharge. In the final section I describe the barriers that have thus far prevented a judicial challenge to a minor's enlistment and possible ways they could be avoided.

Minority enlistment

Under 10 U.S.C.A. § 505, 17-year-olds can enlist in the military if they have the consent of their parents or guardians. The statute specifies,

“The Secretary concerned may accept original enlistments . . . [of] persons who are not less than seventeen years of age. However, no person under eighteen years of age may be originally enlisted without the written consent of his parent or guardian, if he has a parent or guardian entitled to his custody and control.”¹

However, minors cannot be processed into any branch of the Armed Forces if one of their parents or guardians objects to the enlistment.² On the other hand, only one parent or guardian's signature is required if only one “can be reasonably obtained,” and the affirmative consent of each parent is not required to process an enlistment.³ Instead, it is the responsibility of the objecting parent to affirmatively object to the enlistment.⁴ This objection must be made in writing within 90 days of the minor's enlistment.⁵

Because a recruiter is under no obligation to ensure that a parent who does not sign the enlistment contract does not object beyond the requirement that they provide an explanation as to why the signature cannot be “reasonably obtained,” it is quite possible for an objecting parent who is away on a trip or otherwise unavailable to miss his or her opportunity to object, due to expiration of the 90-day limitation period.

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Members of Service Women Action Network (SWAN) testify before a Senate hearing on military sexual assault in March. Photo from servicewomen.org.

Military sexual assault — It's the culture

BY KATHLEEN GILBERD

The military is once again in crisis over sexual assaults. In recent weeks, it has become more apparent than ever that the military's sexual assault policy is a failure, and that sexual assault in the services has become epidemic.

In early May, the Department of Defense (DoD) released new figures showing a significant increase in reported and unreported assaults — DoD estimates that over 26,000 service-

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Similarly, a forged parental signature will become irrelevant and the enlistment contract valid if the other parent does not discover the enlistment and object within 90 days.

Worth noting is that the 90-day period is not a waiting period during which parents who previously consented can withdraw their consent.⁶ A minor’s enlistment can only be voided if a parent objects *and* the minor enlisted without valid parental consent in the first place.⁷ Therefore, the 90-day period serves only as opportunity for an objecting parent, (whose objection would have prevented the enlistment in the first place), to step forward and voice his or her objection. Thus, 10 U.S.C.A. § 1170 is analogous to a statute of limitations after which an invalid enlistment (due to lack of parental consent) becomes valid; the defect (lack of parental consent due to an objecting parent) is waived. Because an invalid enlistment due to lack of parental consent is “waived” 90 days after enlistment, a 17-year-old who does not wish to be in the military and whose parents do not consent to his or her enlistment can still be stationed on active duty and deployed.

Military remedy

If a minor enlisted with valid parental consent and cannot therefore be discharged within 90 days of enlistment, it is possible that he or she could be granted an Entry-Level Separation (ELS), a discretionary discharge that can be granted to service members while they are in entry-level status in any branch of the Armed Forces.⁸ An enlisted person is in entry-level status for the first 180 days of active duty, including training.⁹ Entry-level status begins on day one of boot camp.

In addition to being in entry-level status, an enlisted person must be deemed unsatisfactory by his or her command in order to be given an ELS. The standards for an ELS vary slightly between branches of service. In the Air Force, for ex-

ample, a service member may be separated under an ELS “when their unsatisfactory performance or conduct shows they are not qualified to be productive members of the Air Force.”¹⁰ In the Army, an ELS may be warranted “on the grounds of unsatisfactory performance and/or unsatisfactory conduct.”¹¹ For the Coast Guard, an ELS is warranted if a service member “[d]emonstrates poor proficiency, conduct, aptitude or unsuitability for further service.”¹² The Marine Corps permits an ELS “if the member is unqualified for further service by reason of entry level performance and/or conduct.”¹³ The Navy criteria mirrors those of the Marine Corps.

In the above-cited sections of their respective separation manuals, all branches of service provide a non-exhaustive list of conduct that demonstrates, with varying degrees of specificity, unsuitability for service.¹⁴ These lists include lack of reasonable effort, lack of self-discipline, unwillingness to meet performance standards, failure to adapt to the Military environment, and minor disciplinary infractions.¹⁵

Due to the significant amount of command discretion in granting an ELS, it remains a discretionary discharge granted



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only after a service member has received a counseling statement as to his or her failure to meet service standards.¹⁶

For a 17-year-old who wants to be separated from the military, an ELS is only an option if the minor's command is convinced that s/he cannot meet service standards.¹⁷ No regulations permit a service member to be granted an ELS simply by asking for one, even if the member is 17. However, an ELS may be granted in this situation on the grounds that requesting separation shows a lack of willingness to conform to military life, a lack of self-discipline, or one of the other criteria.

However, because boot camp and basic training emphasize conformity and are notoriously difficult, commanders may be disinclined to grant an ELS to a service member requesting one. This could be due to a sense that all service members struggle in boot camp and many have a passing desire to give up. Additionally, the emphasis on conformity may deter a service member from seeking an ELS or behaving in a way that would warrant a counseling statement and ELS.

As described by an Army lieutenant colonel, "group pressures to conform are substantial, and failure to conform results in group sanction."¹⁸ Group cohesion is critical to military life, and central to cohesion is an individual's "desire to submit to group norms."¹⁹ This pressure to conform is extreme peer pressure and can prevent service members from breaking with the majority and seeking an ELS, especially when they fear that the group will be punished for their actions.

The discretionary nature of an ELS, the sense that boot camp is hard for everyone, and the emphasis on cohesion and conformity in training and military life in general can lead a 17-year-old to remain in the service beyond entry-level status and miss the opportunity to be granted an ELS.

Judicial remedy

Because an ELS is not available to every 17-year-old enlistee wishing to leave the military, some may seek to be released from their enlistment contracts through judicial process. Challenges to military enlistment are heard in federal court through a *habeas corpus* petition.²⁰

The main barrier to judicial remedy for such a minor enlistee is the mootness doctrine. Article III requires that a case or controversy exist throughout all stages of a judicial proceeding so that "the parties ... continue to have a 'personal stake in the outcome' of the lawsuit."²¹ Because a willingness to file *habeas corpus* proceeding can certainly indicate that a person "will not adapt socially or emotionally to military life," e.g. AR 635-200, 11-3a.(3)(a), such a minor will likely be discharged before the proceeding takes place. By discharging

the complaining minor, the military moots the *habeas* petition, removing the minor's stake in the outcome of the proceeding.

The legal significance of mootting the *habeas* petition is that doing so would prevent a judicial decision that a minor's enlistment contract is voidable. Thus, a minor who is interested in not only being discharged but also ensuring that other enlisted minors who change their mind are able to void their contracts may wish to proceed with his or her *habeas* petition to create precedent. To do so, the minor would have to argue that either an exception to mootness should apply or that, despite having been discharged, s/he retains a sufficient stake in the outcome of the proceeding to satisfy Article III.

Minors seeking to have their enlistment contract voided on a *habeas* petition would have to argue that they face negative consequences as a person who was discharged from the military that they would not suffer if their contract were void.²² If the minor were not given an ELS and were instead given a discharge with a character of service designation that is less than honorable, s/he could argue that such a discharge would inhibit future employment prospects.

The well-recognized exception to the mootness doctrine, for injuries that are capable of repetition but evade review, is clearly not applicable to the case of a minor wishing to void an enlistment contract, because to avail oneself of the exception, the injury must be capable of repetition *against the party seeking relief*, not just capable of repetition in general.²³ Obviously, it is extremely unlikely that a minor who enlists in the military, seeks *habeas* relief to have her contract declared voidable, voids it, would then re-enlist and again wish to void the contract. Therefore, the capable-of-repetition-yet-evading-review exception to the mootness doctrine is of no use in this situation.

Finally, if the *habeas* petition were not mooted by a subsequent discharge and was allowed to proceed, the minor could argue that he or she should be able to void the enlistment contract based on the infancy doctrine. The modern Restatement rule is that contracts made with a minor are voidable by the minor either before they reach the age of majority or within a reasonable time thereafter.²⁴ The infancy doctrine is well-accepted and widely applied as "one of the oldest and most venerable of our common law traditions."²⁵

However, the Supreme Court held 75 years ago that the infancy doctrine is not applicable to contracts relating to military service, relying on a case that is now more than 100 years old.²⁶ In *Williams*, the Court held that a minor as young as 14 can enlist in the military, and the enlistment contract is not voidable by either the minor or the minor's parents.²⁷ The Supreme Court has not considered the issue since its

decision in *Williams*, but district courts have. In *Lonchyna v. Brown*, 491 F. Supp. 1352, (N.D. Ill. 1980), the court considered whether an enlistment contract entered into by a 19-year-old in 1969 was voidable due to minority.²⁸ Finding that the minor subsequently affirmed the contract after reaching the age of 21, the court stated that “[i]t is elementary that while a minor may avoid his contracts, he must do so within a reasonable time after reaching his majority.”²⁹ The court appears to take for granted the notion that a minor may disaffirm his enlistment contract so long as he does so within a reasonable amount of time and does not reaffirm after reaching the age of majority.³⁰


The assumption made by the *Lonchyna* court is well-founded. To hold that a minor may not disaffirm their enlistment contract while still a minor or within a reasonable time after attaining the age of majority would be contrary to “elementary” contract law.³¹ It would also require a court to rely on a case holding that 14-year-olds can be bound by their enlistment contracts, which is strikingly outdated given that the statutory age for enlistment has been raised to 17.³²

The law’s concern with protecting minors from their own mistakes is well taken in the military context. As all the separation manuals for all branches of services state, “[m]ilitary service is a calling and is not like any civilian occupation.”³³ Some minors may be sufficiently mature to make the decision to sign an enlistment contract and be bound by it. For such minors, the law allows enlistment with parental consent

at the age of 17.³⁴ For other minors, the minority doctrine exists and is just as applicable to an enlistment contract as with any other contract, if not more so due to the extremely high stakes of enlistment.

Conclusion

A minor wishing to void his or her enlistment contract will likely be granted an entry-level separation before given the opportunity to challenge the contract in court using the minority doctrine. However, this does not prevent minors from being required to serve when they and their parents object, because the entry-level separation is discretionary and many minors are likely too afraid to seek one anyway.

The main barrier to a definitive determination that the infancy doctrine applies to enlistment contracts is the routine discharge of minors willing to challenge their enlistment in court, which moots their claims. This practice prevents other enlisted minors from being able to disaffirm with confidence, keeping them in service when they and their parents want them separated. 

Emily Gallagher just graduated from UC Hastings, where she volunteered for the Bay Area Military Law Panel student military counseling program. She has worked for Swords to Plowshares advocating for veterans' benefits and for the Animal Legal Defense Fund litigating on behalf of animals.

Endnotes

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| <p>1. 10 U.S.C.A. § 505.</p> <p>2. OPNAVINST 1100.4C; AFI 36-2003 (I); MCO 1100.75D; COMDTINST 1100.2E.</p> <p>3. <i>Id.</i></p> <p>4. 10 U.S.C.A. § 1170.</p> <p>5. <i>Id.</i></p> <p>6. 10 U.S.C.A. § 1170.</p> <p>7. <i>Id.</i></p> <p>8. DoD Directive 1332.14; NAVPERS 15560D; MCO P1900.16F; COMDTINST M1000.4; AR 635-200; AFI 36-3208.</p> <p>9. <i>Id.</i></p> <p>10. AFI 36-3208, 5.22.</p> <p>11. AR 635-200, 11-2.</p> <p>12. COMDTINST M1000.41.B.19.a.(1)(b).</p> <p>13. MCO P1900.16F, 6205.1.</p> | <p>14. <i>Id.</i></p> <p>15. <i>Id.</i></p> <p>16. AFI 36-3208, 5.23; AR 635-200, 11-4.1.B.19.e; MCO P1900.16F, 6205.4; NAVPERS 15560D,1.</p> <p>17. <i>Id.</i></p> <p>18. Lieutenant Colonel Robert Reilly, US Army, <i>The Darker Side of the Force: The Negative Influence of Cohesion</i>, Military Review, March-April 2001, at 58.</p> <p>19. <i>Id.</i> at 59.</p> <p>20. <i>Irby v. U.S., Dept. of Army</i>, 245 F. Supp. 2d 792, 795 (2003).</p> <p>21. <i>Lewis v. Continental Bank Corp.</i>, 494 U.S. 472, 477-478 (1990).</p> <p>22. <i>Carafas v. LaVallee</i>, 391 U.S. 234, 237 (1968).</p> <p>23. <i>Weinstein v. Bradford</i>, 423 U.S. 147, 149 (1975).</p> | <p>24. Restatement (Second) of Contracts § 14 (1981).</p> <p>25. <i>Halbman v. Lemke</i>, 99 Wis. 2d 241, 245 (1980).</p> <p>26. <i>United States v. Williams</i>, 302 U.S. 46, 48-50 (1937); <i>Morrissey v. Perry</i>, 137 U.S. 157 (1890).</p> <p>27. <i>Id.</i> at 49.</p> <p>28. <i>Id.</i> at 1353.</p> <p>29. <i>Id.</i></p> <p>30. See <i>id.</i></p> <p>31. 491 F. Supp. at 1353.</p> <p>32. 10 U.S.C.A. § 505.</p> <p>33. AFI 36-3208, 5.23.</p> <p>34. 10 U.S.C.A. § 505.</p> |
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members were assaulted in 2012, with only 3,374 of these cases reported to the military. Just as the figures were released, the Air Force was rocked by news that the head of its Sexual Assault Prevention and Response program had been arrested for sexual battery. More recently, the Sexual Assault Response Coordinator for Ft. Hood was charged with sexual assault and pandering. On May 12, the *Washington Post* published an article recounting a number of incidents of sexual misconduct and sexual assault of potential recruits by military recruiters. All of this came not long after two separate cases of officers with court-martial convening authority who, against the advice of their own attorneys, granted clemency to officers convicted of sexual assault at courts-martial. Meanwhile, at Lackland Air Force Base, the series of courts-martial continue for instructors accused of sexual misconduct with recruits. Most recently, a sergeant on staff at West Point has been accused of secretly videotaping female cadets, sometimes when they were undressed in bathrooms or showers.

Secretary of Defense Hagel and President Obama have expressed outrage at these events and promised to take aggressive action on the issue. Secretary Hagel announced the re-training and re-certification of all Sexual Assault Prevention and Response providers and all recruiters, and promised to cooperate with Congress in developing legislation to address the issue.

But DoD has not made serious efforts to identify and root out the fundamental causes of this long-standing sexual assault epidemic. The response to this and previous scandals has been to call for more training, revise regulations, establish panels to evaluate the problem, and call for yet more training. Defense personnel and other analysts stress that the problem is caused by a small number of rogue soldiers among large numbers of decent and law-abiding servicemembers and, recently, that soldiers bring coarse attitudes about sex and sexual assault into the military from the civilian world.


But those who know the military first hand see, from their own service or from providing legal assistance to servicemembers, that much of the cause of the sexual assault epidemic lies in the military's own culture – a culture that contains strong elements of sexism and tolerates sexual harassment and discrimination, giving tacit acceptance to sexual violence. Despite significant increases in the number of women in the military, it remains a strongly misogynist institution.

Starting in boot camp, young soldiers are taught combat skills and military discipline with the use of violent and dehumanizing sexual imagery. In language too graphic for this statement, they are told to equate prowess in combat with sexual prowess, and manliness with sexual conquest. The use of sexism and sexual violence as a training mechanism has proven effective

in a period where patriotism and ideas of national self-defense cannot be counted on to motivate soldiers to fight. This sexist indoctrination is reinforced in training and discipline, rituals and social life, throughout members' service, creating a masculinized camaraderie with great tolerance for – even appreciation of – sexual harassment. The DoD's recently released report on sexual assault mentions this male-dominated culture as an issue in sexual assault, but the idea is buried in the text and not pursued. Instead, the report emphasizes the need for training, command accountability, effective use of the Sexual Assault Prevention and Response program – and more training.

The use of sexism and sexual violence as a training mechanism has proven effective in a period where patriotism and ideas of national self-defense cannot be counted on to motivate soldiers to fight.

Another aspect of military culture – retaliation against whistleblowers and troublemakers – affects reporting of sexual assaults. According to DoD's own surveys, nearly half of those assaulted who did not report the offense thought they would be labeled a troublemaker for doing so. And the anecdotal experience of military attorneys and counselors shows this to be the case, as women (and men) who report assaults often find themselves the victims of command reprisals ranging from unwanted psychiatric evaluations to involuntary discharges for alleged misconduct or minor psychological problems. (Slightly more than half of those surveyed were afraid they would not be believed, and a large number feared that they would have no confidentiality if they reported.) When commands ignore complaints or retaliate against complainants, they send an implicit message that sexual harassment and assault will be tolerated.

Until these cultural factors are addressed, DoD's well-intentioned training and regulation changes can make little difference. An increased emphasis on prosecution of assaulters, changes in the court-martial system, and more training may be helpful, and may empower some survivors of sexual assault to report the crimes. But if the military does not address the basic sexism of its training and culture, these changes will do little good. Commands will continue to sidestep regulations and ignore reports, rapists will continue to think that their behavior is quietly acceptable, and the epidemic of sexual assault will continue. 

Kathleen Gilbert is the executive director of the Military Law Task Force. She is a legal worker living in San Diego.

MLTF works hand in hand with GIRN at 2013 GI Rights Network Conference

BY RENA GUAY

The 2013 GI Rights Network conference, held in Santa Cruz, CA, from March 7 through 10, once again was an opportunity to witness the strong bonds between MLTF and the network of (mostly) lay volunteers that staff the GI Rights Hotline with self-directed groups across the US.

It's always a time not just for sharing skills and knowledge, but checking in with friends and colleagues working in the broader movement for GI Rights.

MLTF Executive Director Kathy Gilberd is as invaluable to GIRN volunteers as she is to those of us in the Task Force, and the warm, grateful reception she gets from conference attendees each year is witness to this reality.

In addition to working on some element of conference planning each year, she leads or co-leads numerous workshops and sits on several panels on multiple issues. Plus, she runs the MLTF literature table, which also offers, for a modest donation, the jewelry and knitted scarves she has created throughout the year. While other MLTF members attend GIRN conferences, provide their expertise on panels, and often lead workshops, to hotline workers, Kathy is the face and voice of MLTF and they always express a great deal of regard and gratitude for her, and thus MLTF's, contributions.

According to Kathy, this year "attendees included a mix of current counselors and new ones — mostly IVAW members who attended a pre-conference basic training seminar (and most of whom will work with the Coffee Strong/GIRN group or with Bay Area GIRN). We had good attendance from MLTF attorneys and counselors, including attorneys from the Bay Area and our co-chairs from San Jose, and a couple of lawyers from the East Coast."

"While the conference had its usual wide range of training workshops, special attention was focused on involuntary discharges, medical problems, and sexual assault, issues which attendees considered particularly timely. Task Force members, sometimes along with GIRN counselors, led seven CLE workshops on Saturday — on reserve issues, AWOL policy, handling CO cases, sexual assault complaints and reprisals, non-judicial punishment and discharge upgrading. These were well received, but not successful in drawing attorneys



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Left: Kathy Gilberd and Lenore Yarger. Photo by Rena Guay.

Right: From left, Andrew Wright, Maggie Martin, Becca von Behren and Kathy Gilberd. Photo by Siri Margerin.

Task Force now full member of GIRN

On January 16, 2013, the GI Rights Network Board of Directors voted to make MLTF a full, voting member of the Network. One of GIRN's founding groups, the Task Force had been an associate (non-voting) member since the organization incorporated and established by-laws in 2009. Rena Guay will represent MLTF on the Network's formal Council of member groups.

Kathy Gilberd serves on the Board of Directors.

outside MLTF and the Network. We also had presentations on the coffeehouses, the Manning case, the Civilian Medical Resources Network, and a talk and book signing by Howard Waitzkin (who founded CMRN). "

A MLTF membership meeting was held over lunch on Saturday, with about 10 in attendance. Discussion topics included Operation Recovery and the appeal for redress, with Becca von Behren agreeing to work with IVAW to develop more ideas on how MLTF can assist the campaign. The need for all members to help with fundraising was also mentioned, with some ideas for identifying foundations and other funding sources in their local area.

Santa Cruz MLTF members Kit Anderton, Don Larkin and Dorah (Rosen) Shuey worked on logistics for the conference.

GIRN Council forms, has first meeting

The "Council" is an oversight body consisting of one representative from each of the roughly two dozen local groups that are full members of the network. While outlined in the GIRN bylaws, the Council's structure had not been fully developed until this year; it really was only functioning at the annual conference to elect the Board.

During this year's conference the Council was organized for a more sustained existence, with member representatives selected and a quarterly meeting schedule set for the next year. Now it will be able to perform another key mission: monitoring the operations of hotline nodes in a general way to pinpoint any issues as they arise.

As a recently approved full member of GIRN, the Task Force now is responsible for appointing its own representative to the Council. During the Santa Cruz conference, Rena Guay volunteered to participate in the Council meetings; at a subsequent Steering Committee meeting, she was approved as

MLTF NEWS & NOTES



Save the date for the [2013 NLG convention](#), to be held in San Juan, Puerto Rico from October 23 to 27. The Task Force is co-sponsoring a major panel discussion on US colonialism with the International Committee, and has proposed a couple of workshops, in addition to our annual MLTF meeting. More details in next issue of *On Watch*.

Resources. [The New Military Law Review, DA Pam 27-100-214](#) (volume 214, Winter 2012) is the definitive work on the relationship between "bad paper" discharges and VA benefits. 223 pages long, with another 100 pages of appendices, it is useful in helping to set up a case for VA benefits during the discharge process, and includes specific arguments to make to the VA, even in obscure cases.

Psych help. [Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition](#) (DSM-5) published by the American Psychiatric Association will be in print on May 28. Readers who want the manual are encouraged to purchase it through this link (or via the [store](#) on our website); a portion of the sale will come our way.

Revised memo. *Representing Servicemembers in Involuntary Discharge Proceedings*, an MLTF memo, has been updated. The new memo will be available in on the Task Force website in mid-June.

Operation Recovery: Readers are encouraged to check out [Iraq Veterans Against the War's Operation Recovery](#), a campaign focusing on lack of decent medical care, re-deployment of ill and injured troops, and the right to heal. OR is in need of volunteer attorneys and counselors to assist soldiers involved in the campaign. Information is available on IVAW's website. MLTF members interested in volunteering can also contact the Task Force at nlg.mltf@gmail.com or 619-463-2369.

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the MLTF representative.

Once the basic organizing tasks were taken care of, the Council got down to business and elected six board members: Kit Anderton, Dawn Blanken, Barbara Goldberg, Maria Santelli, Steve Woolford, and Chuck Vandagriff.

A staff report from MLTF Executive Director Kathy Gilberd was used in writing this article.

Rena Guay is a member of the MLTF Steering Committee. She lives in Oklahoma City.



Bradley Manning Update

Judge: 1,000 days pre-trial detention does not violate speedy-trial right

BY JEFF LAKE

Since the last issue of *On Watch*, several important developments have occurred in the Bradley Manning court-martial. This article will attempt to summarize them and set the stage for the upcoming trial proceedings.

The Manning defense filed a motion to dismiss the matter on speedy trial grounds. A ruling was pending as the last issue of *On Watch* was going to press. On February 26, 2013, Judge Denise Lind denied the motion. Glossing over the fact that Manning has been held for over 1,000 days, Judge Lind instead praised the prosecution, saying it had worked “diligently” and finding there was “good cause for the reasonable delay.”

The biggest development in the case came two days later on February 28, 2013. On that day Bradley Manning himself spoke for more than an hour. He addressed the Judge directly and detailed his actions and his motivations for taking them.

Bradley began his statement by giving a personal history of how he came to join the Army and his problems in basic training where he was almost out processed. He then detailed his work with computers in the military, giving a highly detailed account of what machines he worked with and how information was gathered and stored. He then discussed his discovery of *Wikileaks* in 2009 and how he became engaged in conversations on the site in 2010.

Manning explains motivations

Bradley then discussed his thinking in January, 2010 when he found himself on leave at his aunt’s home in Maryland. By that time he had taken information from the Army and placed it on media that he was carrying with him to the United States. He recounted his motivations as follows:

“I felt that we were risking so much for people that seemed unwilling to cooperate with us, leading to frustration and anger on both sides. I began to become depressed with the situation that we found ourselves increasingly mired in year after year. The SigActs documented this in great detail and provide a context of what we were doing on the ground. In attempting to conduct counter-terrorism or CT and counter-

insurgency COIN operations we became obsessed with capturing and killing human targets on lists and not being suspicious of and avoiding cooperation with our Host Nation partners, and ignoring the second and third order effects of accomplishing short-term goals and missions. I believe that if the general public, especially the American public, had access to the information contained within the CIDNE-I and CIDNE-A tables this could spark a domestic debate on the role of the military and our foreign policy in general as related to Iraq and Afghanistan. I also believed the detailed analysis of the data over a long period of time by different sectors of society might cause society to reevaluate the need or even the desire to even engage in counterterrorism and counterinsurgency operations that ignore the complex dynamics of the people living in the affected environment every day.”

Assault crew’s disregard for human life

Regarding the infamous video, Manning stated that he was concerned that Reuters news service had been attempting to obtain a copy of it in order to better understand how and why its reporters were killed. The military had been stonewalling Reuters’ FOIA requests for the video. In addition, Bradley was disturbed by the content on the video. He described it as follows:

“They dehumanized the individuals they were engaging and seemed to not value human life by referring to them as quote ‘dead bastards’ unquote and congratulating each other on the ability to kill in large numbers. At one point in the video there is an individual on the ground attempting to crawl to safety. The individual is seriously wounded. Instead of calling for medical attention to the location, one of the aerial weapons team crew members asks for the wounded person to pick up a weapon so that he can have a reason to engage. For me, this seems similar to a child torturing ants with a magnifying glass. While saddened by the aerial weapons team crew’s lack of concern about human life, I was disturbed by the response of the discovery of injured children at the scene. In the video, you can see a bongo truck driving up to assist the wounded individual. In response, the aerial weapons team crew assume the individuals are a threat, they repeatedly request for authorization to fire on the bongo truck and once granted they engage the vehicle at least six times. Shortly after the second engagement, a mechanized infantry unit arrives at the scene. Within minutes, the aerial weapons team crew

learns that children were in the van and despite the injuries the crew exhibits no remorse. Instead, they downplay the significance of their actions, saying quote 'Well, it's their fault bringing their kids into a battle' unquote."

Bradley then summed up his reaction to release of the video:

"I hoped that the public would be as alarmed as me about the conduct of the aerial weapons team crew members. I wanted the American public to know that not everyone in Iraq or Afghanistan are targets that need to be neutralized, but rather people who were struggling to live in the pressure cooker environment of what we call asymmetric warfare. After the release I was encouraged by the response in the media and the general public who observed the aerial weapons team video. As I hoped, others were just as troubled, if not more troubled than me by what they saw."

Diplomatic cables mostly unclassified

Finally, Manning discussed his motivation in releasing diplomatic cables to which he had access. He stated the following:

"The more I read the cables, the more I came to the conclusion that this was the type of information that should become public. I once read and used a quote on open diplomacy written after the First World War and how the world would be a better place if states would avoid making secret pacts and deals with and against each other. I thought these cables were a prime example of a need for a more open diplomacy. Given all of the Department of State cables I read, the fact that most of the cables were unclassified and that all the cables have a SIPDIS caption. I believe that the public release of these cables would not damage the United States. However, I did believe that the cables might be embarrassing since they represented very honest opinions and statements behind the backs of other nations and organizations."

Bradley recounted how he called the *Washington Post* with his information, but a reporter seemed uninterested. His call to the *New York Times* was not returned. He then turned to *Wikileaks* as his preferred method of releasing the information.

Manning pled guilty to one specification as charged and nine specifications for lesser included offenses. He pled not guilty to 12 other specifications. The plea makes him eligible for up to 20 years in prison.

Military trying to stifle the proceedings

Manning's statement was surreptitiously audio recorded and published widely on the Internet, originally by the Freedom of Press Foundation. This recording has frustrated the military, which has tried to keep the proceedings as secret as possible.

No consistent record of them is being provided, save transcriptions made by independent journalists in attendance ([Alexa O'Brien](#) most notably). A group of journalists and organizations sued the military regarding access. However, the Court of Appeals for the Armed Forces ruled 3-2 that it did not have jurisdiction to hear the matter. The Freedom of the Press Foundation is raising funds to pay for a court reporter to transcribe the upcoming trial proceedings.

On April 10, 2013, another pretrial hearing was held. At this hearing, Judge Lind ruled that the charges under the Espionage Act require the government to prove that Manning had "reason to believe" that the disclosures would cause harm to the United States. In addition, she also ruled that the government could introduce the fact that Osama bin Laden was in possession of some of the material released by Manning.

Court proceeds in secret

With the trial now scheduled for early June, the issue of secrecy will be paramount. Government prosecutors have stated that their "secret" witnesses will take up at least 30 percent of the trial. At a hearing held on May 10 regarding trial procedure, at least 90 percent of the proceedings were closed. It is hard to see how these proceedings will be even remotely fair.

Finally, in an interesting side note, on April 24, 2013, organizers with the San Francisco LGBT Pride Celebration to be held in June announced that they had selected Bradley Manning to be a Grand Marshal. SF Pride describes its grand marshals as "individuals and organizations that have made significant contributions to the lesbian, gay, bisexual, transgender community." Two days later, SF Pride Board President Lisa L. Williams announced that they had rescinded this honor. Part of the announcement read as follows:

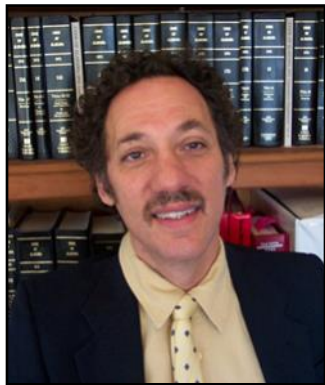
"Bradley Manning is facing the military justice system of this country. We all await the decision of that system. However, until that time, even the hint of support for actions which placed in harm's way the lives of our men and women in uniform — and countless others, military and civilian alike — will not be tolerated by the leadership of San Francisco Pride. It is, and would be, an insult to every one, gay and straight, who has ever served in the military of this country."

A protest followed and a complaint was lodged to the City of San Francisco Human Rights Commission. The MLTF was a signatory on this complaint.

Bradley Manning's court martial is set for June 3, and an MLTF member will be attending the first few days. A support rally will be held at Fort Meade on June 1. As always, information and updates can be found at www.bradleymanning.org.

Op-Ed representing the view of MLTF

Military (In)Justice: Real problems, phony answers



David Gesspass

BY DAVID GESSPASS

In the aftermath of the reports that Air Force Lt. Gen. Craig Franklin, exercising his prerogative as convening authority (CA), overturned the aggravated sexual assault (i.e. rape) [conviction of Lt. Col. James Wilkerson](#), Defense Secretary Chuck Hagel is calling for a change in the Uniform Code of

Military Justice to [remove that power](#) Hagel's initiative (if one

could call it that) fails to do anything substantive to address the real potential for abuse in the powers that inhere in the CA while depriving court martial defendants of a protection that has existed virtually since the founding of the Continental Army.

As the accused's commanding officer, the CA holds a unique place in American criminal jurisprudence and can choose to have an undue, if not determinative, influence over the outcome of a court martial. Among other powers, the CA selects the officer to conduct the Article 32 preliminary investigation, the members of the court, approves charges and specifications and designates the judge. It is hoped that these powers will be exercised neutrally, but they open the door for command influence, direct or subtle, which far more often inures to the disadvantage of an accused than the rare times that a conviction is set aside. An overhaul of the entire system, including the power of the CA to reduce sentences and reverse findings, is long overdue. Indeed, the old saying that military justice is to justice what military music is to music is attributable, in large part, to the decisive influence the CA is able to exercise. Parenthetically, the other reason the military "justice" system is so skewed, despite the substantial and extensive due process rights that an accused has, is that *everything* carries potential criminal liability. Nowhere else can someone be prosecuted, for example, for being late to work.

Given all this, It is both curious and unsettling that Hagel's **only** suggested change is one that will make conviction more certain, however slightly. Because he is focusing on that single aspect of CA power – while ignoring all those other powers that have the potential to deprive an accused of any genuine due process – the change he is proposing is both too

limited and too extensive. That is to say, this single change is dangerous and wrong by itself. It should be one part of a complete overhaul of the CA system.

It is never a good idea to make policy decisions based upon a single, aberrational event. For centuries, the authority of a commanding officer to set aside court martial findings and reduce or suspend sentences has never been questioned, nor has it caused any problems. On the contrary, it has served as a protection for members of the military accused of criminal acts. It rarely results in convictions being overturned, as it did in this case, but the rarity of that happening does not diminish its value. Indeed, the value may well be that, at least on occasion, such authority, and the knowledge that it can be exercised, insures circumspection on the parts of investigators, prosecutors and courts and scrupulousness in deciding which cases are brought and whether guilt has been proven beyond a reasonable doubt. If the price for this is a miscarriage of justice every 300 years or so, it is a small one to pay.

When I was young, I was taught that our system held it better to allow 10 guilty people to go free than one innocent person to be convicted. I fear that, in today's environment, growing numbers of people in the United States believe that convicting innocents is a fair price to pay to protect our safety. Leaving aside whether or not we are really safer if we reduce the rigor with which we approach the awful possibility of someone being imprisoned or executed, I would only note that anyone holding such a position would change it rapidly if falsely charged with a crime.

It is worth noting that a $\frac{2}{3}$ vote of the members of a court martial is sufficient to convict an accused. That is, for example, if there are six members, only four need to be convinced of guilt beyond a reasonable doubt to convict. One would think that, if two of six members were not convinced, that would be proof of the existence of reasonable doubt. Thus, the review by a CA is a means of protecting an accused's rights where unanimous verdicts are not required. So, if Hagel wants to strip the CA of the power to set aside convictions, it would seem that, at a minimum, he should also require unanimous verdicts to convict.

The proposed change, presumably suggested to address the epidemic of sexual violence in military ranks, will overwhelmingly affect those accused of other crimes without having any significant effect on the problem. The military's own statistics

indicate that most sexual assaults are unreported and most of those that are reported do not result in prosecution. On the contrary, the careers of the victims are damaged and those of the perpetrators are unaffected, if not enhanced. How this proposed change will alter that dynamic is unexplained and unexplainable. It is nothing more than a means of having the Defense Department and Congress, as is their wont, make a show of doing something, rather than actually doing the hard work of changing the military culture that is at the root of the problem.

This may be the most insidious part of the proposal. Sexual violence and rape have been a part of military culture since time immemorial. With military service being opened up to women (and, more recently, homosexuals), awareness has increased. Military and government leaders pay lip service to advocates for victims by condemning the violence. They claim that such things have no place in our armed forces, as if saying so is all that is necessary to change the deeply-ingrained culture. Now, they will be able to say they have taken concrete steps to protect rape victims. But, if the proposed change had been put in place 50 years ago, the increase in the conviction rate for crimes of sexual violence would not have been increased by a single per cent. It would have had no effect on the uncounted number of victims who were afraid to even report being raped, or those uncounted more who were belittled and despised because they did report it. None of those victims has received any redress and none in the future will, whether or not the change is implemented. Rather, we will hear solemn words of how the armed forces and Congress are not going to tolerate what they have always tolerated, and they will pat themselves on their backs and say, "Problem solved," when, in fact, it will have been swept under a rug.

On the other hand, if the change is implemented it will deprive countless accuseds of that protection. The regimentation and discipline that members of the armed forces are subject to includes any number of criminal offenses that do not exist outside the military and anything that impairs the rights of service members facing prosecution should be ingested with a large helping of skepticism so that its indigestible aspects can be regurgitated before they cause more serious maladies. So, lest we be caught in the undertow of diminution of the rights of the accused, we must say, with Frank Sinatra, that if we tinker with the CA system, it should be all, or nothing at all.

David Gespass is the immediate past president of the National Lawyers Guild and founder and steering committee member of its Military Law Task Force. This article was written for, and reflects the views of, the Task Force.

MLTF RECOGNITIONS



At the recent 2013 Summit on Military Sexual Violence hosted by the Service Women's Action Network, MLTF's Kathy Gilbert was presented with an award for "service provider of the year."

Regional Newswire

San Francisco - The Bay Area Military Law Panel has kept busy! We just completed our 3rd year of the joint training/mentoring program with the Bay Area GI Rights Network Hotline.

We know it's our third because one of our first and most committed law-student counselors started as a 1L and just graduated from UC Hastings — congratulations Emily Gallagher!

To end the semester, we had our traditional pizza dinner, attended by most members of BAMLPL, counselors from the GIRN, and six students. We discussed the semester, encouraged the students to keep working with us, and get feedback to improve our training, outreach, and scheduling.

The following week, we had a great presentation by Emily at our monthly meeting. She presented the research she had done on how contract law has been and can be applied to people who enlist as minors, and want to break the contract when they turn 18 (see cover article, this issue of *On Watch*).

There has been local controversy about Bradley Manning, who was elected as a Grand Marshal of San Francisco Gay Pride parade, but then disinvited after pressure from gay military organizations. On May 7, BAMLPL signed on to a Complaint of Unlawful Discrimination against the San Francisco Pride board of directors with the city's Human Rights Commission.

Along with individuals, five organizations endorsed the complaint, most notably the BAMLPL and MLTF. The complaint said the board had "repudiated San Francisco Pride's electoral college's selection of Bradley Manning as a 2013 grand marshal for the Pride parade." This action violated San Francisco-administrative codes, arts funding guidelines, board marshal selection policy, and board non-discrimination policy, the complaint charged.

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 *WATCH* as well as a range of legal memoranda and other educational material; maintains a listserve 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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