



The Newsletter of the  
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the National Lawyers Guild

# ON WATCH

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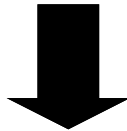
Whether a service member wants to stay in the military or is fighting to get out, eventually, that person will be a veteran, and the Department of Veterans Affairs may play a significant role in the transition from active duty to veteran status.

This article gives a very basic overview of some of the more relevant principles of VA benefits, how the VA system works and some common myths about benefit entitlement. A few “practice pointers” are included to help avoid mistakes that newly discharged people often make in their encounters with the VA.

## Common Misperceptions about the VA

We have represented veterans before the Department of Veterans Affairs (formerly, the Veterans Administration), for over 23 years. During this time we have observed that many active duty personnel and newly discharged vets often hold a great deal of misinformation about the VA that results from longstanding “military folklore,” rumors, “real life stories” about others taken out of context and half-truths gleaned from government-issued pamphlets.

One misperception we have noticed is the notion that the VA is somehow connected to the De-



# N A V I G A T I N G



partment of Defense. In reality, the VA is completely independent of the Defense Department. There are very limited areas in which the VA is bound by determinations made by the military such as the length of time served, the initial degree of impairment awarded in medical discharge cases (but the VA can increase the rating if appropriate) and basic record entries regarding awards, training, etc.

The most common misperception is that the character of discharge that a service member receives from the military (i.e. Other than Honorable, General, Dishonorable) always determines his or her eligibility for benefits from the Department of Veterans Affairs. This is not the case. For example, the VA can award basic

benefit eligibility in all cases in which a veteran received an Other than Honorable discharge or even a Bad Conduct discharge from a *special* court-martial sentence through a process called a “character of service determination.” The only characters of discharge that are complete bars to VA benefits are Bad Conduct or Dishonorable discharges given as part of the sentence of a *general* court-martial.<sup>1</sup>

### Practice Pointers:

- 1) Do not let a veteran, or soon-to-be-discharged person, assume that his or her military record will automatically disqualify or qualify him or her for VA benefits.
- 2) Advise anyone facing discharge to secure copies of all military medical and personnel records. The VA will not automatically get these

## THE VA

BY BECCA VON BEHREN



A basic guide to how the VA system works and how to get earned benefits, along with practice pointers for vets and their advocates.



records from the service branch once a claim is made, and the branch will not always keep a complete copy once the service member is separated. The VA Regional Office will order your records once you initiate a claim, but the process is slow, and it is not guaranteed that the records it receives will be as complete as the records you would receive if you requested them prior to your discharge.

**‘Basic’ and ‘Specific’ Benefit Eligibility**

Veterans are eligible for many different benefits from the VA, however the rules for eligibility depend on many different factors, and each benefit comes with its own rules for eligibility. This makes determining eligibility for benefits exceedingly difficult.

Because there are so many factors involved in determining eligibility, it helps to break the factors down into two categories: factors that determine “basic” eligibility, and factors that determine “specific” eligibility. Each benefit has basic eligibility requirements that relate to the type of discharge a veteran received and the amount of time the veteran served. If a veteran does not meet the basic eligibility requirements for a benefit, he or she cannot receive the benefit. If a veteran does meet the basic eligibility requirement, the specific eligibility requirements will determine what the exact benefit will consist of.

For example, basic eligibility for VA Non-Service Connected Pension requires that a veteran have at least 90 days of active duty service, including one day during a period of wartime. If the active duty occurred after September 7, 1980, you must have served at least 24 months or the full period that you were called up (with some exceptions). You must also be age 65 or older with limited or no income, or totally and permanently disabled.<sup>2</sup>

Specific eligibility for Non-Service Connected Pension,

meaning the exact amount of money you will receive per month, will depend on your “countable” family income and the severity of your disability.

Basic Eligibility for VA Home Loans requires an honorable or a general discharge, but the time served on active duty is dependent upon the era during which a veteran served. For example, if a veteran served during the Vietnam era, he or she is only required to have served 90 days of active duty. However, if a veteran served from August 2, 1990 to the present, he or she must have served 24 consecutive months, or the full period (at least 90 days) for which you were called or ordered to active duty.<sup>3</sup> Specific eligibility for the home loan depends on the terms involved in the sale of the home and the vet’s credit, etc.

Service-connected disability benefits are somewhat different in that basic eligibility is not affected by length of service. However, an honorable or general discharge is still required (unless the VA makes a favorable character of service determination).<sup>4</sup>

Specific eligibility for service-connected disability benefits is determined by factors such as the timing of your initial injury and the degree to which you are still disabled by that injury.

These are examples of factors affecting just three types of benefits, but they illustrate the types of factors that often combine to determine eligibility.

**Practice Pointers**

1) *Whenever someone facing discharge says that someone in a “position to know” has assured them they will receive benefits regardless of the type of discharge they are receiving, advise them that they should rely on VA source materials and not oral representations.*

**ON WATCH**

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2) Fairly comprehensive but easy-to-read materials are available on the VA's website that describe the requirements for benefits. Encourage the veteran or soon-to-be veteran to become familiar with them. (<http://benefits.va.gov/benefits/>)

### Service-Connected Disability Compensation

One of the most important benefits available to veterans who leave service with one or more disabilities is called Service-Connected Disability Compensation. Disability compensation is a tax-free benefit paid monthly to veterans who 1) have a disability that was incurred or aggravated in the line of duty in the active military, naval, or air service, and 2) is considered at least 10% disabled because of such disability.<sup>5</sup> Compensation may also be paid for disabilities that arise after military service, but are considered to be secondary to disabilities that occurred in service, or related to the circumstances of military service.<sup>6</sup>

The benefit amount is graduated on a scale from 10 percent to 100 percent in increments of 10. A veteran is assigned a rating according to the seriousness of symptoms as they affect "social and industrial adjustment." Some injuries, such as the loss of a limb, are automatically rated at a certain percentage. Other conditions are rated depending upon how disabling the symptoms of the condition are. For example, post traumatic stress disorder can be rated at 10%, 30%, 50%, 70% or 100% depending on how severe the VA determines the veteran's symptoms are.

The VA's "Schedule for Rating Disabilities" describes hundreds of conditions and their corresponding ratings. Formulae for rating conditions not included in the schedule, for rating multiple disabilities, and for additional ratings due to un-employability are also defined in the schedule.<sup>7</sup>

The severity of a veteran's disability will be determined using a "Compensation and Pension Exam," ("C&P exam") at a VA medical center. The VA physician who conducts the C&P exam will issue an exam report which, in theory, is considered along with the veteran's service medical records and any VA hospital or available outside medical records by an adjudicator at a VA Regional Office. This adjudicator will take all of the available evidence into consideration, and using the "Schedule for Rating Disabilities," determine a veteran's disability rating.

### Practice Pointers:

1) Always advise someone facing discharge with a service-connected disability claim to secure copies of all medical records. This applies whether or not a member is being considered for medical discharge or retirement. There is no guarantee that all records necessary to future resolution of a VA claim will be available.

2) Civilian medical reports are also very valuable, especially when prepared by a specialist in situations where the military refuses to treat or diagnose someone properly. The VA can rely on non-government sources of documentation and frequently does so.

3) Advise someone facing a discharge to secure statements from people he or she worked with that corroborate in detail any injury or disease observed, regardless of whether or not treatment and resulting medical evidence exists. Often, service buddies will be reluctant to provide written statements while they are still on active duty, so it is a good idea to get their "home of record" address. This way, you have a good chance of contacting his or her family and tracking down a witness statement after their duty ends.

4) Always impress upon a person about to be discharged the importance of filing a claim for service-connected disability as soon as possible after discharge. It is generally easier to prove that a disability was incurred or aggravated by service the closer you are in time to your discharge. And, in fact, some conditions have presumptive periods, such as one-year from discharge, in which a condition that manifests itself to a moderate degree is presumed service-connected.<sup>8</sup>

### Character of Service Determinations

As stated before, many VA benefits require either an Honorable or a General character of discharge for baseline eligibility. In order to become eligible for VA benefits, many veterans with disqualifying characters of discharge will apply to the military's Discharge Review Board and/or the Boards for Correction of Military Records for a discharge upgrade. However, an often-overlooked alternative to these lengthy processes is an application to the VA for a favorable character of service determination. While the VA cannot change the character of a veteran's discharge, the VA can decide to grant a veteran VA benefits in spite of a less than honorable character of discharge.

The VA is able to grant a favorable character of service determination to veterans with 'Other than Honorable' discharges and 'Bad Conduct' discharges that were given as part of the sentence of a special court martial. Unfortunately, the VA cannot grant benefits to a veteran who has a Bad Conduct discharge or a Dishonorable discharge as a result of a general court martial.

There are some other instances where VA authority to grant benefits is murky. For example, if a veteran received an 'Other than Honorable' discharge after being AWOL continuously for at least 180 days, by regulation, the veteran is ineligible for VA benefits. However, the VA may still grant a favorable character of service determination if it finds there were "compelling circumstances to warrant the prolonged unauthorized absence."<sup>9</sup>



A veteran may want to seek a character of service determination over a discharge upgrade for several reasons. While the chances of being granted a favorable character of service determination vary among different VA Regional Offices, it is safe to say that a veteran stands a much better chance of getting a favorable character of service determination than a discharge upgrade. Moreover, the time it takes for the VA Regional Office to make a character of service determination is also shorter than the time it takes the military's Discharge Review Boards or the Boards for Correction of Military Records to consider a discharge upgrade application. Finally, a favorable character of service determination can only help a later discharge upgrade case before a Correction or a Review Board.

**Practice Pointers:**

- 1) *A veteran should be encouraged to document a case for a character of service determination in the same way he or she would for a discharge upgrade case (e.g. obtain "buddy statements" before discharge, get the "home of record" address of potential witnesses and keep all service documents).*
- 2) *Remember that, currently, a veteran must have at least 24 months of continuous active duty to establish basic eligibility. If a veteran does not have this, the VA will not adjudicate the case except in service-connected disability claims, which do not have a minimum time served requirement.*
- 3) *Also, a veteran who served for more than one enlistment retains benefit eligibility when the first service period resulted in an Honorable discharge no matter what type of discharge was given for the subsequent discharge. For example, if you complete one full hitch in the military with an Honorable discharge, and re-enlist the same day, or the very next day, and your second hitch ends with a discharge that was neither Honorable nor General, you have basic eligibility for VA benefits based upon your first hitch. That is even true if your second hitch ended with a Bad Conduct or Dishonorable discharge after a court-martial.*

**Disability and Character of Service Claims Procedures**<sup>10</sup>

A disability benefits claim starts at the VA Regional Office ("VARO") nearest to the veteran. A veteran initiates a claim either by filing a VA Form 21-526EZ,<sup>11</sup> or "informally" by letter to the VARO. A veteran may also file his or her claim online using eBenefits.<sup>12</sup>

A veteran may have more than one claim at any given time, and a claim can contain any number of physical and/or mental conditions. The VA will adjudicate each separately. The claim is "developed" by an adjudicator at the VARO through acquisition of VA medical reports, service personnel and medical records, whatever evidence the

veteran submits and the results of the C&P exam. Once the development phase is complete, the adjudicator will issue an initial decision called a "Rating Decision."

If the veteran who filed the claim for service connected disability compensation has an "Other than Honorable" or "Bad Conduct" discharge, a character of service determination must be made, and a favorable determination granted, before any of the claim development process may proceed.

In order for a claim for service-connected disability compensation to be successful, a VA adjudicator must find that the veteran 1) suffered an injury during service, 2) is currently disabled, and 3) find a nexus between the in-service injury and the current disability.<sup>13</sup>

The initial "Rating Decision" should state what the VA decided and provide an explanation as to how the decision was arrived at. In reality, the Rating Decision is often nothing more than a conclusory statement that does not offer any insight into how the claim was decided.

If a veteran is dissatisfied with all or part of the Rating Decision, he or she should file a "Notice of Disagreement" within one year of the date of the Rating Decision. The Notice of Disagreement can be in any form, so long as it can reasonably be construed as such.<sup>14</sup> Once a Notice of Disagreement is filed, the VARO must prepare a "Statement of the Case" which is essentially an elaboration of the Rating Decision and is intended as a reference source for further administrative appeal to the Board of Veteran Appeals.

A veteran has 60 days from the mailing date of the Statement of the Case, or one year from the date of the initial Rating Decision – whichever is later – to file a formal appeal to the Board of Veteran Appeals ("BVA"). An appeal to the BVA is made on a VA Form 9.<sup>15</sup> A Form 9 will be attached to the Statement of the Case.

On the Form 9 the veteran can elect to have a personal hearing in front of the BVA at his or her local Regional Office or a videoconference hearing, or submit the case on the record with no hearing. Additional evidence can be submitted to the BVA at any time prior to its consideration of the case.

Additional evidence and argument also can be submitted with or after an appeal to the BVA and at any time after the initial Rating Decision in support of a "Request for Reconsideration" at the VARO level. A claim remains "open" for the VARO's reconsideration even after an ap-

peal to the BVA has been made. It is not uncommon for a Regional Office to initially deny a claim, but later grant what the veteran requested upon receiving additional medical evidence and/or a well-reasoned argument as to why the initial Rating Decision was wrong.

If a veteran disagrees with a decision made by the Board of Veterans Appeals, a final appeal to the Court of Appeals for Veterans Claims (“CAVC”) can be made. An appeal to CAVC must be made within 120 days of the mailing date of the final decision of the Board of Veterans Appeals.<sup>16</sup>

In summary, a claim starts at the VARO and can be appealed to the Board of Veteran Appeals. Throughout this process, additional evidence can be submitted and the VARO can reconsider its initial decision based on such evidence. The BVA can also consider additional evidence and argument up to the point of its final decision. Once the BVA has issued a final decision, the veteran has 120 days to appeal to the Court of Appeals for Veterans Claims but cannot count on any further evidence to be considered by the Court.

In theory, a VA claim can never die. Even after an adverse decision from CAVC, or, in the event that a deadline is missed, “new and material evidence” can “re-open” a claim.

**Representation before the VA: Sources of Help**  
Traditional veterans organizations such as Disabled American Veterans, American Legion, Military Order of the Purple Heart, etc., provide free non-lawyer representation to veterans with claims before the VA.

Some of these representatives do good work, but they are typically swamped with cases. A common complaint from veterans about the traditional organizations is that their case often gets transferred among representatives. Given that a claim can take three years or more to re-

solve, this often means a veteran’s claim can be transferred more than once. Having a case transferred several times between overworked staff does not make for the most effective representation.

The ideal situation is for a veteran to get competent free representation, but this is not usually possible. A big contributor to the problem is that attorneys are barred from collecting fees at the initial claim level, and even later in the process, fees are subject to limitations.

For veterans who are unable to obtain free, competent, legal representation, there is an excellent Practice Manual for VA Advocacy, the *Veterans Benefits Manual*. The Manual is available for order here: <http://www.nvlsp.org/store/veterans-benefits-manual-2011>.

There are also a variety of self-help materials available from Swords to Plowshares at: <http://www.swords-to-plowshares.org/guides/>.

**Practice Pointers:**

- 1) Encourage the soon-to-be or new veteran to seek help with a VA claim by shopping around. Some parts of the country still have excellent, non-traditional veterans groups, legal service organizations or volunteer Bar Association programs that provide free, quality representation before the VA.
- 2) Warn potential VA claimants that there is no guarantee they will be adequately represented by traditional organizations, and that they should expect to be very involved in their own claim if they choose to have a traditional organization as their representative.
- 3) It is crucial that a veteran keep the VA and any representative advised of his or her current address. The VA will not necessarily send correspondence to a veteran’s representative and the veteran at the same time, and a veteran’s case can be closed if the VA is unable to correspond with the veteran.
- 4) It is equally crucial that the veteran secure and keep copies of everything submitted to and received from the VA. The



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VA often loses documents, so it is imperative that you keep an organized date-stamped personal file in case the VA later claims a deadline was missed.

### Disclaimer

This article is not intended to impart specific legal advice of any sort. The workings of the VA and advocacy before it are discussed in detail in the *Veterans Benefits Manual*, mentioned above. Advocates should understand that much of what veterans perceive about VA claims is based on what they hear while in the military, and much of that may be sheer myth. We hope this article helps to identify some of the common areas in which those myths occur and gives an overview of how some of the VA claims system operates.

*Becca von Behren is a Staff Attorney at Swords to Plowshares which provides free legal assistance to veterans seeking VA benefits and military discharge upgrades. Becca is a member of the San Francisco NLG Demonstrations Committee, a member of the MLTF steering committee, and co-chair of the NLG's Queer Caucus. She previously worked as a Skadden Fellow at Disability Rights Advocates, using impact litigation and legal advocacy to ensure that Iraq and Afghanistan veterans with mental illness receive appropriate medical services and benefits.*

*This article was written as an update to an article that first appeared in the November, 1996, issue of On Watch by Tom Turcotte, then Staff Attorney and now Of Counsel at Swords to Plowshares. Tom is a long-time member of the MLTF, and one of the éminences grise of veterans advocacy.*

### Endnotes

1. 38 U.S.C. § 101(2); 38 C.F.R. § 3.12 (c)(2).
2. 38 USC § 1521.
3. 38 USC § 3702.
4. 38 USC § 1110; 38 CFR § 3.12.
5. 38 CFR § 3.4(b).
6. 38 CFR § 3.310(a).
7. 38 CFR Part IV.
8. 38 USC § 1112.
9. 38 CFR § 3.12.
10. For a complete and thorough overview of the VA claim adjudication process please reference the VA Adjudication Manual M21-IMR at [http://www.benefits.va.gov/WARMS/M21\\_Imr1.asp](http://www.benefits.va.gov/WARMS/M21_Imr1.asp).
11. Available here: [http://www.va.gov/vaforms/form\\_detail.asp?FormNo=21-526EZ](http://www.va.gov/vaforms/form_detail.asp?FormNo=21-526EZ).
12. eBenefits is available here: [www.ebenefits.va.gov/](http://www.ebenefits.va.gov/).
13. 38 CFR § 3.303.
14. VA Manual, M21-IMR, Part I, Chapter 5, Section B.
15. 38 C.F.R. § 20.202.
16. 38 U.S.C. § 7266.

## Combat-related PTSD went undiagnosed

# Vietnam-era veterans sue Army over less than honorable discharges

BY DAVE SMITH

John Shepherd saved lives during the Vietnam War when he assaulted an enemy bunker while his unit was under attack. He also witnessed tragedy unfold right before his eyes when enemy fire killed his platoon leader. These traumatic events took a toll on Mr. Shepherd. He began to struggle with post-traumatic stress and began to act out.

He refused to “go out into the field” and was eventually discharged for a “pattern of shirking.” The army characterized his discharge as undesirable, which today is the same as an “Other than Honorable” (“OTH”) discharge. At the time, medical professionals did not recognize post-traumatic stress disorder (“PTSD”). Nor was the military required, as it is today, to take PTSD into account to mitigate a service-member’s discharge.

An OTH discharge can carry significant consequences, such as preventing a veteran from obtaining disability compensation for service-related injuries, including PTSD, and may limit a veteran’s health care eligibility. The veteran may only be able to get treatment for medical conditions proven to be service-related. An OTH also taints the otherwise honorable sacrifices veterans like Mr. Shepherd have made while serving their country.

### Discharge-upgrade standards at issue

To rectify what their potentially improper OTH discharges, Mr. Shepherd and similarly-situated Vietnam veterans are suing the government over the standards the Army applies to veterans who seek to upgrade their discharge. Procedurally, veterans may apply to a discharge review board to request that their less than honorable discharge be upgraded to an honorable discharge. The military must take into account a PTSD diagnosis before awarding a service-member a less than honorable discharge.

According to the complaint filed by the Yale Veterans Legal Services Clinic, the Army fails to apply “medically appropriate standards” in considering whether PTSD mitigates a veteran’s discharge-related conduct. The complaint further alleges that the army fails to properly consider a veteran’s service-related PTSD diagnosis.

## MLTF NEWS & NOTES

**Take a letter, please** – Congratulations and thanks to Rena Guay, who has been elected Secretary for the MLTF steering committee. Rena also does the layout for *On Watch* and administers the MLTF website.

**Thanks** – MLTF is grateful to the [Resist Foundation](#) for a generous grant to assist in programmatic work.

**Bay Area News** – The Bay Area Military Law Panel co-sponsored a law student training with the local GI Rights Network group in January, attracting about 12 new law students who are signed up to counsel on the GIRN hotline. BAMLPL continues to hold monthly meetings with program topics and discussion of cases.

**Chicago MLTF** – The new Chicago MLTF chapter has started taking discharge upgrade cases, and is interested in conscientious objection and medical discharge cases. The group can be reached through the Chicago NLG office, at 312-913-0039.

**SW/Texoma Conference**—A joint NLG Regional Conference for the Southwest and Tex-Oma regional divisions will be held in Denver, CO, on March 16, at the DU Sturm College of Law. Workshops include: Incarceration, Immigration, Occupy, Radical Lawyering and Guantanamo. For more information, contact Whitney Leeds at [register.nlg.sw.texo.conf@gmail.com](mailto:register.nlg.sw.texo.conf@gmail.com). Also see this [Facebook page](#) for more about the event.

**Books and such** – If you're in the market for books, CDs and the like, MLTF encourages you to shop at Powell's Books, through the store on the Task Force website, [www.nlgmltf.org](http://www.nlgmltf.org). A percentage of all sales is contributed to the Task Force.

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If successful, the lawsuit may have broad impact for Vietnam veterans who lacked the opportunity to benefit from medical examinations that would have provided evidence that PTSD mitigated a service-member's discharge-related conduct.

### Misdiagnoses affect discharge proceedings

The lawsuit may also open the door for similar claims. To be sure, Iraq and Afghanistan veterans face similar hurdles when seeking discharge upgrades. On a systematic level, many young veterans were diagnosed with personality disorder or adjustment disorder during service but were later evaluated with combat-related PTSD.

Like Mr. Shepherd, veterans diagnosed with personality or adjustment disorder, but who were later diagnosed with PTSD after service, also lacked the opportunity to have PTSD taken into account in discharge proceedings. Even when there is a subsequent PTSD diagnosis, a veteran seeking a discharge upgrade must still overcome the presumption of regularity, an unfair consequence to an in-service misdiagnosis of personality or adjustment disorder.

### Military may misapply legal standards

Moreover, in some cases the military has misapplied legal standards in discharge and discharge upgrade proceedings by stating that even though a service-member experienced combat-related PTSD, he or she still knew right from wrong. Under the properly applied legal standard, the military is required to consider whether PTSD mitigated discharge-related misconduct, not whether PTSD excused misconduct, like an insanity defense in criminal proceedings.

Concerns also arise where Iraq and Afghanistan veterans were discharged before the military was required to provide medical exams to combat veterans in discharge proceedings. Like Mr. Shepherd, many young veterans who were subsequently diagnosed with PTSD — and discharged before January 2009 when the medical exam requirement took effect — were unable to avail themselves of required medical exams and potential mitigating evidence.

Hopefully, lawsuits like Shepherd's can shed light on the obstacles veterans face to getting back to their feet. Undoubtedly, the suit is a step in the right direction towards confronting systemic discharge-related problems in the military. For more information related to the case and to read the complaint, visit the Veterans Legal Services Clinic website, [http://www.law.yale.edu/academics/vlsc\\_shepherd.htm](http://www.law.yale.edu/academics/vlsc_shepherd.htm)

*Dave Smith is an Equal Justice Works AmeriCorps Legal Fellow at Inner City Law Center. Dave works in the Homeless Veterans Project, which aims to provide homeless and low-income veterans free legal services. The project helps veterans obtain VA benefits as a means to overcome homelessness. Dave's work also focuses on discharge upgrades. He recently helped a young Iraq Veteran obtain a discharge upgrade that eliminated a bar to VA disability compensation benefits and increased the veteran's access to health care. Prior to joining Inner City Law Center, Dave graduated from UCLA School of Law's Epstein Program in Public Interest Law and Policy. He's a member of the MLTF. A more extensive bio can be found at Inner City Law Center's website, <http://www.innercitylaw.org/staff/>*



# Women in Combat

A history of military service by women and an assessment of what lies ahead for female servicemembers

BY KATHY JOHNSON

Women served in the military since the Revolutionary War, when they worked as nurses, water bearers, cooks, laundresses and saboteurs, and they have served in some capacity ever since. In the Civil War women disguised themselves as men to serve in combat.

Several other countries already allow women to serve in combat units. For example, Denmark (1978), Norway (1984) and Sweden (1989), have given women equal opportunities to advance in the military by allowing them in combat.

The debate in the United States on whether women should be fully integrated into the armed forces originated in the 1940s and embraced women, blacks and other ethnic minorities. The debate led to allowing interracial military structures but did not provide for women in the military beyond a few positions. Pentagon policy denying women frontline combat roles, last updated in 1994, defines "direct combat" as "engaging an enemy on the ground with individual or crew-served weapons, while being exposed to hostile fire and to a high probability of direct physical contact with hostile personnel."

## Up to 230,000 posts open to women

The fear of women having to serve and die in combat positions helped defeat the Equal Rights Amendment in 1982. Despite the raising of such specters, women have frequently

found themselves in combat in Iraq and Afghanistan, where more than 130 women have died and more than 800 have been wounded. These women are not given adequate credit for their combat experience, because they are only "attached" to their unit and not assigned. Women now make up almost 15 percent of the American military and their service has made it possible for the Army to become all-volunteer.

On January 24, 2013, Defense Secretary Leon Panetta announced that the military would finally lift the ban on women serving in frontline combat roles, overturning the 1994 rule that limited the roles for women in the armed forces to units below brigade level away from direct combat. He announced the DoD's renewed commitment that "everyone is entitled to a chance" to serve his or her nation in a combat role, thereby affecting the roughly 200,000 active military personnel who are women.

The Pentagon has said Congress will have 30 days to weigh in on the decision. The military services will have until May 15 to inform Panetta of implementation plans and until January 2016 to seek exemptions. However, the military wants to move as quickly as possible, noting that 230,000 positions were now potentially open to women, including posts in elite special operations commando units such as the Navy SEALs and Delta Force. Public support for equality

Pressure for equality in the U.S. army had become more intense dur-

ing the last decade as America's "war against terrorism" developed. Public opinion polls show that a majority of Americans agree with the change in policy. For example, a nationwide Quinnipiac University poll conducted last year found that three-quarters of voters surveyed favored allowing women to serve in units engaged in close combat.

In addition, earlier-expressed fears of putting women in the trenches have been dispelled on two fronts. One, of course, is the change in the way the American public thinks about women. The other is the shortage of trenches in modern warfare and that a soldier on the front lines is not necessarily in a more dangerous position than a support worker. According to policy experts who have encouraged the military to lift the ban, much of the impetus appeared to come from Joint Chiefs, indicating that the top military leadership saw that the time had come to open up to women.

## Lawsuit may have affected change

In recent months pressure also had been building to change the policy as a result of high-profile lawsuits. In November 2012 four women soldiers sued the U.S. Department of Defense because of the inequality of constraining women from serving in the front lines.<sup>1</sup> The reasoning was that more than 280,000 US female soldiers had been sent to Iraq, Afghanistan and neighboring countries, and 152 of the 6,600 of US fatalities were women, proving that there is no real difference between front- or rear-lines once troops are deployed.

The plaintiff soldiers argue that the combat exclusion policy was unconstitutional; that it was based on outdated stereotypes of women and ignored the realities of modern warfare; that women who are serving in combat zones were denied recognition that would advance their careers;



that it violated a Supreme Court ruling against government mandated sex discrimination without extremely persuasive justification; and that the policy denied women a “core component of full citizenship.”

According to the brief, “[t]wo of the Plaintiffs were awarded the Purple Heart after being wounded while serving in combat. Two received medals in recognition of their combat service—the Air Force Combat Action Medal and the Army Combat Action Badge. One earned a Distinguished Flying Cross with a Valor Device for extraordinary achievement and heroism while engaging in direct ground fire with the enemy after being wounded when her helicopter was shot down over Afghanistan.”

One of the plaintiffs, Maj. Mary Jennings Hegar, an Air National Guard helicopter pilot, was shot down, returned fire and was wounded while on the ground in Afghanistan. She could not seek combat leadership positions because the Defense Department did not officially acknowledge her experience as combat. Although the suit makes valid arguments, it is not clear how much effect it had on the Pentagon’s decision.

### Women as 2nd-class members

The combat exclusion policy contributes to a military culture where women are considered as second-class members of the service. This sex discrimination leads to a hostile workplace for women and tolerance for sexual harassment, assault and rape.

In fact, one of the biggest dangers women in the military face is sexual attacks from male members of their own service. In 2011 there were 3,192 reported cases of sexual assault (the number unreported cases is unknown).<sup>2</sup> This is another major problem facing the military and causing it to be a target of criticism (See article by Kathy Gilbert, “Continued Public Pressure Key to Addressing Sexual Assault in the Mili-

tary” in *On Watch* issue XXIII.4). If women are officially allowed in combat and have a greater opportunity to advance in the military, it will help to change this culture and put men and women on an equal footing.

### The physical fitness excuse

There is still opposition to the change of policy based on arguments that have long been used.

One is the belief that women are not able to fulfill the required fitness standards because of their smaller size and that they do not have the same endurance as men. The new policy does not change the physical and training standards already in place, but instead requires the U.S. military to allow women the chance to meet them.

Officials said repeatedly that they would not lower the physical standards for women in rigorous combat jobs like the infantry, but they also stated they would review requirements for all the military specialties in coming months and potentially change them to keep up with, for example, advances in equipment and weaponry. “I think we all believe that there will be women who can meet those standards,” General Dempsey said.

### The unit cohesion excuse

The second reason women have been excluded from units below brigade level is the need to maintain unit cohesion, as allowing women to operate in male-dominated military roles would distract men from mission aims, because they would seek to protect women. The rule of the game was that unit cohesion, the bedrock on which performance of armies rest, has been traditionally built around male bonding. However, this has not been cited as a problem in units that have women “attached.”

In defense of the status quo, Lt. Gen. (Ret.) Jerry Boykin, Family Research Council’s executive vice president,

said that “the people making this decision are doing so as part of another social experiment.” He especially criticized the concept of placing women into Special Forces units where “living conditions are primal in many situations with no privacy for personal hygiene or normal functions.” He appears to disregard the idea that the decision to be placed in these situations should be the prerogative of the women concerned.

The prospect of women in combat has been controversial even among female troops. In the July issue of the *Marine Corps Gazette*, Marine Capt. Katie Petronio, 28, wrote a controversial article entitled, “Get Over It: We are not all created equal.” In recounting her physically debilitating experience working alongside Marine infantrymen, Petronio said she suffered a spinal injury, muscle atrophy and became infertile as a result of her seven-month deployment to Afghanistan. She argued that allowing women into the combat would result in health problems and lower unit performance. Nonetheless, as has been stated, this should be the woman’s decision to make.

*Kathy Johnson practices law in Birmingham, AL. Gespass and Johnson have a general practice with an emphasis on human and civil rights. She began practicing law with the National Lawyers Guild’s Military Law Office in Yokosuka and Okinawa, Japan in 1973. A member of its steering committee, she helped to found the Guild’s Military Law Task Force.*

### Endnotes

1. This fact apparently is making its way into public awareness. In the 2012 film *Return*, the lead character played by Linda Cardellini makes an offhand comment that the greatest danger “over there” (i.e. Iraq or Afghanistan) is being raped in a portapotty by her own fellow servicemembers.
2. Mary Jennings Hegar, Jennifer Hunt, Alexandra Zoe Bedell, Colleen Farrell and Service Women’s Action Network are the plaintiffs in *Hegar v. Panetta*, 3:12-cv-6005 (N.D. Cal. filed Nov. 27, 2012).

# 2013 National Defense Authorization Act Addresses Military Sexual Abuse and Assault

BY KATHLEEN GILBERD

On January 2, President Obama signed the National Defense Authorization Act of Fiscal Year 2013 (“NDAA”), infamous in civil rights circles because it allows indefinite detention of US citizens based on suspicions of supporting terrorism. On the other hand, this year’s NDAA contains a record number of provisions on military sexual assault which, while primarily band-aid measures, will be significant in preventing or responding to assaults. Much of the credit for these provisions goes to the Service Women’s Action Network (“SWAN”), which conducted a vigorous lobbying campaign.

One new provision, section 578, seeks to eliminate retaliatory discharges by requiring that a general or flag officer to review and concur in administrative separations of members who have made an unrestricted (non-confidential) report of sexual assault, to ensure that the discharge is not retaliatory. Review is required for any involuntary discharge occurring within one year after an unrestricted report, if the member requests review on the ground that she or he believes the discharge was retaliatory. An implementing DoD policy is to be presented to the Committees on Armed Services no later than 180 days after the date of enactment of the NDAA. The policy becomes effective on that date and will apply to members who are “proposed to be involuntarily separated from the Armed Forces on or after that date.”

## Policy to address sexual harassment

Section 579 of the Act requires DoD to establish a policy and plan for prevention and response to sexual harassment, an issue often overlooked in discussion of sexual assault. The policy must include training for all members on prevention of harassment, mechanisms for reporting harassment, a means for anonymous reports, and a mechanism for responding to incidents of harassment, “including through the prosecution of offenders.”

The Secretary of Defense must submit to the Committees on Armed Services a report setting out the policy within one year of enactment of the NDAA. While this is to be done in consultation with the services and the DOD Equal Opportunity Office, the section gives no indication of how the new program will fit with the existing policies on sexual harassment, handled through the Equal Opportunity system. The section also includes a require-

ment for DoD collection of information on substantiated incidents of sexual harassment, to be included in annual sexual assault reports.

This increased emphasis on sexual harassment, with its linkage of harassment and assault issues, represents an important step forward. Previously, only the Army had developed a joint Sexual Harassment and Assault Response and Prevention Program (SHARP), and it is to be hoped that the other services will follow suit.

## Required surveys and training

Several provisions call for increased training around sexual assault and surveys of command climate on the issue. Under section 570 of the NDAA, which amends 10 U.S.C. 481, workplace and gender relation surveys will now include sexual harassment and discrimination, and sexual assault, linking these issues in reviewing command climate problems. Section 574 requires special training for commanding officers on sexual assault.

Section 572 includes requirements of command climate assessments regarding sexual assaults when a new commander assumes command and at least annually thereafter, including an opportunity for members of the command to express their opinions “regarding the manner and extent to which their leaders, including commanders, respond to allegations of sexual assault and complaints of sexual harassment and the effectiveness of such response.” It also includes a requirement that information about resources for complaints, such as hotline numbers and websites, be posted and widely disseminated, and a requirement for a general educational campaign to notify members about their rights regarding correction of military records after any retaliation for making a report of sexual assault or sexual harassment.

## Augmented reporting required

Under section 575 the DoD will be required to include greater detail in annual reports on sexual assaults, including reasons for any dismissal of charges, character of discharge where an accused is administratively discharged or allowed to resign, any prior offense or admission to the service on a waiver for a sexual offense, branch of service of accused, involvement of alcohol in the offense, and specific punishment given at non-judicial punishments.

Reports will also be expanded to include the number of requests for transfer by victims, analysis of trends in the cases, analysis of training and response carried out by training commands, and analysis of specific factors that may have contributed to sexual assault during the year, with recommendations on ways to eliminate or reduce the incidence of those factors. These requirements will be added to annual reports beginning in 2014.

### Independent Review Panel Created

Section 576 requires the Secretary of Defense to establish an independent panel to review and assess systems used to investigate, prosecute and adjudicate adult sexual assault and related offenses. The Secretary will also set up a panel to conduct an independent review of judicial proceedings involving adult sexual assault and related offenses since the amendments to the UCMJ mandated by sec. 541 of the 2012 NDAA. Both panels are to make recommendations for improvements.

According to section 572 the DoD is to “modify its sexual assault policy” within 180 days of enactment of the NDAA by adding, among other things, a requirement that service secretaries establish a record on the disposition of all unrestricted reports of sexual assault, whether that disposition is court-martial, discharge, or any other action, and a requirement that any member convicted of a covered sexual offense who does not receive a punitive discharge at court-martial be administratively discharged.

### No enlistment waiver for sex-abuse or -assault offenders

Section 523 mandates a prohibition on enlistment waivers for felony sexual offenders, barring waivers for those convicted of felony rape, sexual abuse, sexual assault, incest or “any other sexual offense.”

Section 572 requires that records of unrestricted reports include all documentary information collected regarding the case (not just investigators’ reports), note of the punishment imposed, if any, any adverse personnel action taken, referrals for the subject of the investigation such as counseling or drug counseling. Further, disposition records must be maintained for a period of 20 years. Appropriate information from the reports is to be included in the Defense Sexual Assault Incident Database, and restricted (confidential) reports (DD form 2910) will be retained for 50 years from the date of signing or the period of time required for unrestricted reports in DTM 11-062, “Document Retention in Cases of Restricted and Unrestricted Reports of Sexual Assault,” or any successor policy, whichever is longer.

Pursuant to section 573 “special victim capabilities” are to be established in each service to investigate, prosecute and provide support for victims of child abuse, serious domestic violence, and sexual offenses. This will include special training for selected investigators from the military criminal investigative agencies, judge advocates, victim witness assistance personnel and administrative paralegal support personnel, to ensure effective worldwide response for sexual assault complaints. An initial capability is to be available within each service within one year of the enactment of the NDAA.

Section 571 of the NDAA amends 10 U.S.C. chapter 1209, section 12323 to create authority to retain reservists on active duty after assaults for line of duty (“LoD”) determination on the member’s request. Service Secretaries may order retention until completion of LoD determinations. Members are to be informed of this option as soon as practicable after they report a sexual assault.

If the member is already in reserve status and a LoD has not been completed, the member may request return to active duty until completion. The Secretary “may order” active duty in both instances. Requests must be decided within 30 days of the date they are made; if a request is denied, the member may appeal to the first general officer or flag officer in the member’s chain of command, and that appeal must be decided within 15 days of the date of appeal.

It remains to be seen how the provisions described in this article will be carried out in practice. We encourage counselors and attorneys to share their experiences with these provisions through *On Watch*.



#### ANNOUNCES

## Truth and Justice:

### The 2013 Summit on Military Sexual Violence

April 17-18th, 2013

Hyatt Regency Washington on Capitol Hill  
Washington, D.C., USA 20001

FMI: [truthandjusticesummit.org](http://truthandjusticesummit.org)

## Right to Heal Campaign

# IVAW Pushes Commander to Improve Care of Injured Soldiers

BY LUKE DANIEL

Iraq Veterans Against the War (“IVAW”) has spent the last year and a half focused on stopping the deployment of traumatized troops at Fort Hood and beyond. Our success there includes raising awareness about traumatic injuries, the right to heal from the wounds of war, and pushing the Commanding General there to improve his policies around access to care and preventing stigma.

On top of the success we had engaging the military brass, our most satisfying success was the community we grew with Under the Hood Café and our local Fort Hood chapter of IVAW. Over the course of our outreach drive we were able to hold community gatherings focused on knowing our rights and building collective power. One highlight was gathering at Under the Hood to participate in the Facebook Town Hall meeting held by General Campbell after we and our supporters demanded that he hear the concerns of the community.

### Appeal for Redress

Currently we are bringing the Appeal for Redress back to life as a national part of the Right to Heal campaign. Our campaign is expanding to include not only active duty members, protected under the US Whistleblower Act, but also veterans and people of Iraq and Afghanistan affected by the current state of US militarism.

The Appeal for Redress has been tried and tested during outreach in the San Francisco Bay Area, Joint Base Lewis McCord, and Under the Hood

Cafe at Fort Hood, TX. We are building a team that can help us use the appeal as a powerful tool for making change and putting pressure on decision makers. If you would like to help with this effort please contact us at [campaign@ivaw.org](mailto:campaign@ivaw.org).

The Right to Heal campaign brings some concrete wins that we have had in the area of care for Veterans to the work we have done with active duty service members that will tie into the release of the Appeal for Redress. The administration at the Jesse Brown VA in Chicago has already been swayed by IVAW working hand in hand with National Nurses United (NNU). After multiple sit-downs with upper management between NNU and the local VA administration we have seen improvements.

The women’s clinic changed from a shared space to a women-only location. The garments that used to fall off the patients have now been improved. A total of eight new nurses, of the 13 promised, have been hired or the positions opened in the Psyche Ward, and an additional 2 patient advocates have been hired to assist veterans navigate the VA.

Although the focus of our target was on mental health, the VA has also added nurses in many other departments, which representatives from NNU say have had a significant impact in the workplace. As a new year is upon us we are looking to increase pressure to make sure we all have a Right to Heal from these long years of war. Members in Denver, the Bay Area, and across the country are joining the effort.

**Reversing the Militarist Mindset**  
IVAW is now reaching out to work with many other grassroots organizations and are looking to expand our reach and stand in solidarity to change the current culture and reduce the militarist mindset that has become so normalized in our culture.

We will be highlighting our work with the Organization for Women’s Freedom in Iraq (“OWFI”) and the Federation of Workers’ Councils and Unions. Supported by the Center for Constitutional Rights (“CCR”) and Harvard Law Human Rights Clinic we are requesting a hearing in the Inter-American Commission on Human Rights, an international court based in San Jose, Costa Rica. We are gaining momentum as we build our human rights case, the right to heal from the trauma of war and the right to a future without war.

*Luke Daniel, a Colorado native, served in the Navy onboard the USS Theodore Roosevelt CVN-71 between September 2004 and February 2008 as a Damage Controlman. After returning home and working the corporate world, he now is active in changing America’s militarist culture through Iraq Veterans Against the War.*



**2013 Convention**  
**August 1**  
**Chicago**

More info:  
[ivaw.org/ivaw-2013-convention](http://ivaw.org/ivaw-2013-convention)

Shopping at Powell’s with this link supports MLTF





*Court Martial delayed until June*

## Judge: Conditions of Manning's Confinement Were Illegal

BY JEFF LAKE

The court-martial of Private First Class Bradley Manning has been delayed until June 2013, though his defense counsel recently succeeded in persuading the judge, Col. Denise Lind, that the conditions of his confinement were illegal. Additionally, an International Day of Action in Manning's support has been called for June 1, 2013.

This article summarizes these and other recent events in the case against Manning, who is accused of having provided WikiLeaks with thousands of military reports from Afghanistan and Iraq, and more than 250,000 diplomatic cables.

As On Watch went to press in December, 2012, hearings were being held concerning the conditions that Bradley Manning was held in prior to trial. The defense argued that the conditions were so horrendous that the only suitable remedy was dismissal of the charges. In the alternative, the defense argued that Bradley should receive 10 days credit for every day spent in illegal conditions.

PFC Manning and his defense team were legally correct that his conditions of confinement were illegal: The defense prevailed in its argument that the conditions were violations of Bradley's rights. However, the Judge held that the remedy should only be a reduction of any sentence by 112 days.

Thus, the remedy amounts to a slap on the wrist to the military. The broader message to the military by the military judge is that there will be no substantial consequences for violating the rights of military prisoners.

### **Right to speedy trial violated**

Manning and his defense team also have argued that his right to a speedy trial has been violated as he has spent close to 1,000 days imprisoned without trial. His arraignment was supposed to be in 120 days, but was not held for over 600 days.

The defense has argued that this amounts to a violation of UCMJ Article 10, which mandates that the military must be diligent in trying the accused. A violation of Article 10

with prejudice means that the charges must be dismissed. However, the military's position is that there was no violation at all, or at most the judge should dismiss the charges "without prejudice," allowing the military to refile them. The next hearing on this issue begins Feb. 26, 2013.

### **Military attempts to limit evidence**

Perhaps the most interesting developments have been the military's attempts to limit PFC Manning's evidence concerning his motives and the status of the documents in question. Regarding motive, the military's motion to bar such evidence was granted. On the other hand, the judge ruled that Bradley could introduce evidence concerning his belief that certain documents would not cause harm to national security if released publicly.

The military has also moved to bar Manning from arguing that documents should never have been designated as "classified." It is in this context that the military argued that any person could be charged with "aiding the enemy" by leaking so-called "classified" information to any journalist.

### **'Aiding the enemy' charge disputed**

This charge has provoked outrage among Journalists around the country. Such a prosecution would be unprecedented. In a Jan. 12, 2013, editorial, the Los Angeles Times called for dismissal of this charge "as excessive in the absence of evidence that Manning consciously colluded with hostile nations or terrorists." The Judge has deferred a ruling on this motion.

Finally, the court-martial of Bradley Manning has been delayed yet again. Originally scheduled for the fall of 2012, the current date is now June 3, 2013. Between now and then there are more motions to be heard concerning the evidence to be presented.

Once again, information concerning this case and information on how to support Bradley Manning can be found at [www.bradleymanning.org](http://www.bradleymanning.org). Demonstrations protesting his 1,000th day in prison were held on February 23th. June 1, 2013, has been declared an International Day of Action in support of Bradley Manning immediately prior to the beginning of court-martial proceedings.

# 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](http://www.nlgmltf.org) or contact the Task Force at:

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