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MILITARY LAW TASK FORCE

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The Military Law Task Force has been asked by Vets for Peace, the GI Rights Hotline member organizations and counseling groups, and Military Families Speak Out (as well as other anti-war organizations) to re-publish "Hold Onto Your Humanity." The 6,000 copies were originally distributed to GIs in the U.S., Europe, Iraq, Afghanistan and Kuwait. They went fast and there are no more available. We need \$1,000 to re-print this booklet. If you can donate, please do. Send checks to the MLTF at 318 Ortega Street, San Francisco, CA 94122.

Thank you.

On Watch is an electronic newsletter, although some MLTF members, libraries and institutions request and receive written copies. This issue is emailed in "Page Layout" form in order to have Kathy Gilbert's and Steve Collier's article, *A DECADE OF DON'T ASK DON'T TELL: THE MILITARY'S POLICY ON HOMOSEXUALS IN THE SERVICE*, appear with the footnotes at the bottom of the page.

On Watch
Editor -- Kathleen Gilberd

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MILITARY PSYCHIATRIC POLICIES

This article was written by Kathleen Gilberd

This article is the first in a series on the military's medical and administrative policies on psychiatric conditions. It includes a summary of the diagnostic and classification system used by the military and discussion of psychiatric criteria for medical discharge or retirement and administrative discharges. Future articles will discuss documentation and procedures in administrative and medical cases, rights of servicemembers who seek psychiatric evaluation and treatment or are subjected to involuntary evaluation or treatment, use of psychiatric evidence in involuntary discharge proceedings, psychiatric defenses in courts-martial and competency issues. Along the

way, each article will offer some practical counseling suggestions for attorneys and counselors handling these cases.

Readers who trained or work with CCCO's excellent manual, Helping Out: A Guide to Military Discharges and GI Rights, should note that this article discusses a number of changes in the service regulations regarding the Department of Defense (DoD) discharge category of Other Designated Physical and Mental Conditions, made since the manual was published. Because of this, each service's criteria for this administrative discharge are discussed in tedious detail below, including non-psychiatric conditions.

In the course of this article, the author repeats the language of the military regulations without criticism of the psychiatric model and assumptions that they use. Task Force members more knowledgeable about the problems of psychiatric medicine in this country have been asked to comment on these issues as they affect military counseling in the next issue of On Watch.

During the course of the war in Iraq, counselors and attorneys have seen increasing numbers of clients with psychological problems. In many cases, their conditions have been ignored by their commands. All too often, soldiers with serious depression or other disorders, sometimes just beginning trials of anti-depressants or other psychiatric medications, are deployed to combat zones without adequate psychiatric evaluation or support. A recent study of increased suicide rates in Iraq cited, among other reasons, difficulties in obtaining psychiatric assistance, anti-depressants and sleeping pills in the field. Soldiers facing activation or deployment, and servicemembers in general, often receive little or no attention to obvious psychiatric problems, while many soldiers returning from combat with symptoms of post-traumatic stress disorder (PTSD) or depression are similarly ignored. In some cases, soldiers disclosing psychiatric problems or showing symptoms of them have been accused of malingering or cowardice. Finally, the common military practice of subjecting whistleblowers and dissenters to involuntary psychiatric evaluation and treatment continues, despite regulations designed to protect against such retaliatory action. Given these problems, a clear understanding of the military's psychiatric policies is essential for military counseling and the practice of military law.

Preliminary Warnings

The need for counseling and legal assistance in this area is increased by the military's tendency to misdiagnose and underdiagnose psychiatric conditions which might warrant discharge or retirement, or require treatment to prevent suicide or other harm. Observers have long noticed a tendency among military psychiatrists and psychologists to misdiagnose serious disorders such as major depression or schizophrenia (which may warrant medical retirement with a disability pension) as personality disorders (which warrant only administrative discharge without disability compensation from the military or the VA), or as adjustment disorders (which in the past were not grounds for

discharge at all). This is not intended as a criticism of all military psychiatrists, but is a pattern that often requires increased assistance from counselors or attorneys.

In almost all cases involving military psychiatric issues, it is valuable for members to obtain an independent civilian evaluation, preferably at the outset of the case. This allows clients and counselor or attorney to weigh options before raising any issues with the military, and to consider the accuracy of military diagnoses. While the military is not bound by civilian reports, they can assist servicemembers in gaining access to military psychiatrists, and can be persuasive with commands, medical officers and military psychiatrists. Another advantage of civilian evaluations is that unhelpful reports need not be presented to the command or military doctors.

The absence of confidentiality in the military medical system deserves special emphasis. Soldiers and sailors often assume that their discussions with doctors and other mental health professionals will remain private. Unfortunately, reports of evaluations and treatment are routinely available to commands and may be used in virtually all military administrative and disciplinary proceedings. Statements or misstatements in psychiatric reports can lead to accusations of fraudulent enlistment (as for concealment of pre-enlistment psychiatric treatment), accusations of malingering or making false statements, and disciplinary action or involuntary discharge for violation of military regulations or the UCMJ. For example, soldiers who reveal their homosexuality to military psychiatrists normally face involuntary discharge for homosexual conduct. In one Navy case, statements made during a psychiatric evaluation were treated as threats against superior officers, leading to court-martial and a bad conduct discharge.

In working with military clients, it is important to discuss the impact of psychiatric diagnoses and discharges on military service and civilian careers. Soldiers and sailors sometimes find that commands view emotional distress as an indication of weakness and unreliability. This may affect performance evaluations, promotions, desirable assignments and career prospects. In addition, information or misinformation about psychiatric problems often becomes a matter of common knowledge within commands. Informal harassment of members with obvious emotional problems or with known psychiatric diagnoses is widespread; such abuse is, of course, all the more difficult to handle when members are trying to cope with emotional distress in the first place.

While military records are considered private outside the military setting, and are unavailable to civilians and to many government agencies, nothing prevents potential employers from asking job applicants about military service and medical history, then requiring applicants to authorize release of records to the employer. Veterans are routinely asked to provide copies of their DD-214 discharge documents when applying for jobs. Even if this does not lead to requests for medical records, the DD-214 can be problematic in itself. When a DD-214 notes medical discharge or retirement, the diagnosis is not normally given, but employers can be expected to ask. In personality disorder discharges, those words are normally used as the narrative reason for discharge on the form.

Diagnosis and Classification of Psychiatric Conditions

Military policies regarding psychiatric conditions are based on standards and diagnoses adopted by the American Psychiatric Association (APA), and reflect the views and assumptions of the mainstream psychiatric establishment in this country. Non-traditional psychiatric diagnoses and therapy are normally treated with contempt. The military uses the classifications, definitions and criteria set out in the Diagnostic and Statistical Manual of Mental Disorders of the APA, Fourth Edition (DSM-IV). This manual attempts to define individual psychiatric disorders, listing specific symptoms and criteria for each, with sometimes detailed discussion of conditions which may be related to or mistaken for others. DSM-IV also attempts to consider gender, racial and cultural differences which may affect diagnosis, including behavior which may be entirely appropriate in one culture or religion and considered symptoms of illness in another.

A few military regulations, which have not been recently updated, refer to prior versions of the DSM, usually DSM-III or DSM-III-R (revised), but military evaluations and decisions should be based on DSM-IV. Some of the changes from III-R to IV are significant. For example, under DSM-III and III-R, one of the most commonly diagnosed personality disorders in the military was passive aggressive personality disorder. DSM-IV relegates it to “Criteria Sets and Axes Provided for Further Study.” Servicemembers with symptoms of the old passive-aggressive personality disorder should now be diagnosed with personality disorder not otherwise specified (NOS), often considered a catch-all for atypical personality disorders or conditions that don’t meet all of the criteria for any specific personality disorder.

Changes have also been made in the criteria for PTSD. Unlike III-R, DSM-IV does not require that the stressor which gives rise to the disorder be “outside the range of normal human experience,” since that was determined to be “unreliable and inaccurate.” DSM-IV requires instead that the person’s response to the stressor “must involve intense fear, helplessness, or horror.” This gives greater latitude in the range and type of traumatic experience required for a diagnosis of PTSD; in the past, individuals traumatized by more common but equally horrible experiences faced problems in establishing the diagnosis.

DSM-IV, like its predecessors, uses “Axes” to divide groupings of mental, medical and social problems, and military psychiatric reports should use this system. Axis I is used to report the vast majority of psychiatric conditions, from schizophrenia and PTSD to short-term adjustment disorders and sleep disorders. Axis II includes personality disorders and mental retardation. Diagnoses given under these two Axes are usually described as mild, moderate or severe. Axis III is used for physical illnesses and injuries; Axis IV for psychosocial and environmental issues such as occupational problems or problems with the legal system; and Axis V for a global assessment of functioning on a scale of 1 to 100. Military psychiatric evaluations normally include

diagnoses, or a notation that there is no diagnosis, under Axes I and II, but do not always include Axes III to IV.

Under this classification system, a military psychiatric report might include the following:

- Diagnosis:
- Axis I: Adjustment disorder with depressed mood
 - Axis II: Narcissistic personality disorder, severe
- Or
- Axis I: Post-traumatic stress disorder
R/O major depressive disorder
 - Axis II: Diagnosis deferred
- Or
- Axis I: No diagnosis
 - Axis II: Obsessive-compulsive personality disorder

DSM-IV suggests that some diagnostic decisions be deferred when a serious and acute disorder makes evaluation of other conditions difficult. Personality disorder diagnoses are sometimes deferred when a serious Axis I disorder requires immediate treatment, and considered later when the other disorder becomes stable or remits. A R/O, or rule out, diagnosis is provisional, usually a doctor's initial guess but occasionally a final diagnosis after hospitalization or treatment.

DSM-IV describes the criteria, course, associated features and specific cultural, age and gender features of disorders, their prevalence, and differential diagnoses for each listed disorder. This provides the mental health practitioner and the military counselor or attorney with an important tool for gauging the validity and significance of particular diagnoses. This is not to suggest that counselors and attorneys should second-guess psychiatrists and attempt to make diagnoses, but rather that they can assist clients in considering whether to question a diagnosis, obtain independent evaluations, and deciding whether to seek or object to a discharge based on the diagnosis. By way of example, these efforts can help clients discover whether the diagnosis of an adjustment disorder with depressed mood is a misdiagnosis of a much more serious major depressive disorder, whether a diagnosis of schizophrenia is actually a less serious schizoid personality disorder, or whether a diagnosis of personality disorder not otherwise specified may be based solely on religious or political differences with military policies and practices.

In the military's scheme of things, serious Axis I disorders may be grounds for medical discharge or retirement, usually depending on their severity and amenability to treatment. The personality disorders of Axis II, considered less serious and almost impossible to cure may be grounds for administrative discharge, but not medical discharge or retirement. Short-term or less serious Axis I conditions have not been grounds for administrative or medical discharge, largely because they are expected to have less effect on performance of duties and to improve with time or treatment.

However, commanders have discretion to discharge soldiers and sailors on the basis of these less significant conditions while they are in entry-level status (the first 180 days of active duty service). This is often done under the very broad discharge category of Entry Level Performance and Conduct. Some of the conditions may be grounds for discharge for failure to meet enlistment medical standards, if discovered in the first months of service. In addition, the various services have expanded and revised the DoD discharge of Other Designated Physical and Mental Conditions (ODPMC) to include some of these diagnoses, with variation from service to service.

Criteria for Disability Discharge and Retirement

Medical disability separations may result from serious Axis I disorders, such as major depressive disorders or PTSD. In very general terms, these warrant discharge or retirement if they are severe enough to interfere significantly with performance of duties, require continuing psychiatric support, seriously endanger the servicemember's health or well-being, or prejudice the best interests of the government.

The controlling regulation is DoD Instruction 1332.38; guidelines for psychiatric conditions warranting discharge or retirement are contained in Enclosure 4., section 13, and include the following general categories:

- Disorders with psychotic features (delusions or prominent hallucinations);
- Affective disorders (mood disorders);
- Anxiety, somatoform dissociative [sic] disorders (neurotic disorders);
- Organic mental disorders;
- Eating disorders.

The DSM-IV lists specific disorders in each of these categories. For example, anxiety disorders include panic disorder, obsessive-compulsive disorder, PTSD, generalized anxiety disorder and several others.

The Instruction, like the implementing service regulations, requires consideration of the illness' effects on members' functioning; in most cases, merely having a condition listed in the regulation is not a basis for separation. Each category includes an explanation of the severity, lack of response to treatment and/or other factor(s) to be considered in determining whether members should be separated. With psychotic disorders, even a single episode may warrant separation, while affective disorders such as depression warrant disability processing "[w]hen the persistence or recurrence of symptoms requires extended or recurrent hospitalization, or the need for continuing psychiatric support." (E4.13.3) For anxiety disorders such as PTSD, separation is considered "[w]hen symptoms are persistent, recurrent, unresponsive to treatment, require continuing psychiatric support, and/or are severe enough to interfere with satisfactory duty performance." (E4.13.4) These are fairly loose measurements, and the Instruction is designed to allow some medical discretion in disability decisions.

The DoD Instruction specifically excludes “personality, sexual, or factitious disorders, disorders of impulse control not elsewhere classified, adjustment disorders, substance-related disorders, mental retardation (primary) or learning disabilities” as grounds for medical processing, noting that these may be the basis for administrative separation. (E4.13.1.4)

The service regulations include Army Regulation (AR) 40-501, Secretary of the Navy Instruction (SECNAVINST) 1850.4E, which covers the Marine Corps as well as the Navy, and Air Force Instruction (AFI) 36-2902. These regulations occasionally differ from the DoD Instruction in language, usually about severity and the like, so that it is always worth reviewing both the Instruction and the service regulation when considering individual cases.

The increased use of anti-depressants and other medications for psychiatric conditions has affected the military’s handling of these cases. Servicemembers are frequently given medication (not always accompanied by therapy) in an effort to stabilize or improve the condition and permit retention in the service. Refusing psychiatric medication can be very difficult, as a practical matter, and may affect entitlement to disability benefits or even the reason for discharge. Under current wartime conditions, monitoring of medication use is often sporadic at best, making it difficult to determine whether there is really sufficient improvement to retain a servicemember, or whether side-effects may exacerbate the psychiatric condition or create other medical problems.

When medical problems are noticed within the first few months of service, soldiers and sailors are sometimes discharged with abbreviated medical proceedings under the medical standards for enlistment or procurement. These are generally stricter than retention standards, so that members with less serious disorders may obtain discharge much more easily at the beginning of their enlistment.

Criteria for Administrative Discharges

In the very old days, prior to 1982, less serious psychiatric conditions could lead to discharge for Unsuitability, a catch-all which included personality disorders, inability to adapt to military life, performance problems, etc. In 1982, DoD overhauled its administrative discharge system and added, under Convenience of the Government discharges, the new category of ODPMC. Along with Unsatisfactory Performance and Entry Level Performance and Conduct discharges, this replaced the old category of Unsuitability in all of the services. DoD 1332.14, Encl. (3), Part E3.A1.1.3.4.8) allows discharge for:

“other designated physical or mental conditions, not amounting to Disability...that potentially interfere with assignment to or performance of duty.... Such conditions may include but are not limited to chronic seasickness, enuresis, and personality disorder.”

This DoD category has remained unchanged since 1982, but the individual services have made a number of changes. Most have designated personality disorder as a separate discharge category and all have added various other grounds for this discharge.

Personality disorder discharges:

Personality disorders continue to be a common reason for discharge. DSM-IV describes the disorder as:

“an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual’s culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment.”

They are considered conditions of character or personality rather than mood or cognition, extremely resistant to treatment, and likely to cause difficulties in occupational functioning and interpersonal interactions. The DSM currently lists ten specific personality disorders in addition to personality disorder not otherwise specified. A diagnosis of personality disorder is insufficient without the specific type.

The DoD Directive states that:

“separation on the basis of a personality disorder is authorized only if a diagnosis by a psychiatrist or psychologist, completed in accordance with procedures established by the military Department concerned, concludes that the disorder is so severe that the member’s ability to function effectively in the military environment is significantly impaired.” (Enc. 3, Part E3.A1.1.3.4.8.3)

Under this requirement, an opinion about severity and interference must be made by a military psychiatrist or psychologist. A commander’s conclusion that the condition is so severe that it interferes with duty is insufficient, and in fact is not required in the Directive. A psychiatrist’s opinion that a personality disorder is severe should not require discharge unless he or she finds that this severity causes interference with performance. These points are sometimes lost on military psychiatrists and commands.

The Army has placed personality disorders in a separate discharge section, AR 635-200, Chapter 5, Section 5-13. The regulation gives a detailed explanation of personality disorders, and distinguishes combat exhaustion and other “acute situational maladjustments,” which are not bases for this discharge. The requirement of a psychiatric opinion on severity and interference with duty parallels the DoD language. There is no stated requirement for other evidence of performance problems.

Navy and Marine Corps standards are found in SECNAVINST 1910.4B, but the services tend to rely on their individual regulations in discharge proceedings. Navy commands use Naval Military Personnel Manual (MILPERSMAN) Section 1910-122 for personality disorders. This section does not follow the DoD and SECNAV Instruction

carefully on the requirement of severity. Section 1910-122, Para. 2.a, is vague, so that it is not clear that the determination must come from a mental health professional rather than the command. Para. 6.b states that discharge processing is appropriate when a mental health practitioner makes the required determination about severity and impairment (6.b.(1)) or “where there is documented evidence that the diagnosed personality disorder interferes with the member’s performance of duty (6.b.(2)).” Subsection (1) states that the psychiatric evaluation is for command use in determining the proper course of action, and is not in itself justification for discharge. Subsection (2) does not make any reference to severity at all. Since this is not in keeping with the controlling DoD Directive and Navy Instruction, it raises useful arguments for sailors whose diagnoses are “light” and who wish to be retained as well as those whose doctors diagnose disorders so severe that ability to function effectively is significantly impaired, but whose commands wish to retain them because of prior good performance.

The Marine Corps has also separated personality disorder discharge from other conditions, in Marine Corps Separation and Retirement Manual (MARCORSEPMAN) Section 6203.3. This more closely matches the language of the DoD Directive, but requires two forms of documentation: a psychiatrist’s or psychologist’s opinion that “the disorder is so severe that the Marine’s ability to function effectively in the military environment is significantly impaired” and “written nonmedical evidence....to show specific examples of how the Marine is unable to function in the Marine Corps.” (6203.3.b.(2))

The Air Force has come up with its own grouping of discharge categories. AFI 36-3208, Section 5.11 includes a discharge category of Conditions that Interfere with Military Service. Subsection 5.11.9 lists mental disorders, and 5.11.9.1 covers personality disorders. The Air Force makes the need for a psychiatric finding on severity quite clear for personality disorders and the other mental disorders in 5.11.9, but normally requires other evidence of performance problems:

“This [psychiatric or psychological] report must state that the member’s ability to function effectively in the military environment is significantly prepared. This report may not be used as, or substituted for, the explanation of the adverse effect of the condition on assignment or duty performance.”

The Air Force stands alone in requiring some oversight where commands fail to act on appropriate psychiatric findings about personality disorders or other mental disorders:

“When a psychiatrist or psychologist confirms a diagnosis of a mental disorder, under paragraph 5.11.1 [sic], that is so severe that the member’s ability to function effectively in the military environment is impaired and the commander chooses not to initiate separation action, the commander must have that decision reviewed by the discharge authority.” (Section 5.11)

Although the DoD Directive makes no mention of this, the services generally omit or simply ignore requirements of actual interference with performance, or counseling regarding performance, where mental health professionals conclude that the personality disorder is a danger to the member or others.

Many observers believe that personality disorders are diagnosed too frequently in the military. The diagnosis may be made when more serious disorders are missed, when command exaggerates performance and behavioral problems in referrals to psychiatrists, when servicemembers' anger and frustration with the military are mistaken for the disorders, or when psychiatrists use the category to help soldiers get out or make soldiers go away.

For servicemembers seeking discharge, this is sometimes a convenient option, often requiring less time and documentation than, for example, conscientious objection or family hardship. At the same time, counselors and attorneys should assist clients in determining whether they are comfortable with the presence of a psychiatric diagnosis in their records, the possible effects on employment, and the absence of medical benefits for the condition.

The other designated conditions:

DoD 1332.14 gives the services discretion to make their own additions to ODPMC, and all have done so. Because a number of changes and additions have been made since Helping Out was published, they are listed here in detail, including those which are not psychiatric in nature. The most recent and notable changes have occurred in the Navy, which in September, 2004, expanded its list of other conditions from six to twenty five. All of the services except the Marine Corps have added specific psychiatric conditions which were not previously grounds for discharge, and the Marine Corps has recently added general phrasing which may be a prelude to such additions.

These changes may be in part a reflection of psychiatry's and society's increasing attention to psychiatric conditions such as sleep disorders, learning disorders, adjustment disorders, etc. To some extent, they may be a response to successful challenges to military attempts to discharge members for personality disorders on the basis of entirely different disorders and conditions which did not warrant this discharge. The changes certainly give commands greater latitude in eliminating problem soldiers or sailors. At the same time, strict language about interference with performance allows commands to retain many members with these conditions so long as they can be made to do their jobs.

AR 635-200, Chapter 5, part 5-17, covers other designated physical or mental conditions, separate from personality disorders and from conditions which would have precluded enlistment. They may include but are not limited to:

- (1) Chronic airsickness.
- (2) Chronic seasickness.

- (3) Enuresis.
- (4) Sleepwalking.
- (5) Dyslexia.
- (6) Severe nightmares.
- (7) Claustrophobia.
- (8) Other disorders manifesting disturbances of perception, thinking, emotional control or behavior sufficiently severe that the soldier's ability to effectively perform military duties is significantly impaired."

A medical or mental status evaluation is required in each of these conditions. This may suffice for the "documentation confirming the existence" of the condition, required by 5-17.b. Only conditions in item (8) require a showing of severity. In all other cases, it seems to be sufficient for commanders and separation authorities to determine that the condition "potentially interferes with assignment to or performance of duty." Even in item (8), there is no requirement that the opinion about severity be made by a doctor, psychologist, or commander.

MILPERSMAN 1910-120 was revised effective 23 September 2004 as part of Change 8 to the Manual. It now includes a number of new conditions (parentheses below are from the text; brackets show this author's comments):

- (1) Enuresis (bedwetting). [listed in the prior version]
- (2) Sleepwalking and/or somnambulism. [treated as one condition in the prior version]
- (3) Dyslexia and other learning disorders.
- (4) Attention deficit hyperactivity disorder.
- (5) Stammering or stuttering.
- (6) Incapacitating fear of flying confirmed by psychiatric evaluation.
- (7) Airsickness, motion sickness, and/or travel sickness. [prior version had only the first two]
- (8) Phobic fear of air, sea, and submarine modes of transportation.
- (9) Uncomplicated alcoholism or other substance use disorder. [unless other sections are revised, this will be available in addition to drug or alcohol rehab failure and misconduct/drug abuse]
- (10) Personality disorders (not meeting criteria to justify separation under MILPERSMAN 1910-122). [there no specific requirement of severity]
- (11) Mental retardation.
- (12) Adjustment disorder.
- (13) Impulse control disorders.
- (14) Sexual gender and identity disorders paraphilias. [sic] [in the past these were processed under the Secretarial plenary authority of the Best Interests of the Service discharge, where they were not specifically listed]
- (15) Factitious disorders. [intentional manifestation of physical or psychological signs or symptoms in order to assume the sick role—not for purposes of malingering or other gain]

- (16) Obesity. [listed elsewhere in the prior version]
- (17) Overheight [in the prior version]
- (18) Pseudofolliculitis barbae of the face and/or neck. [an inflammation of the beard follicles caused by ingrown hairs, usually preventing shaving; found most often among African-American men]
- (19) Medical contraindication to the administration of required immunizations.
- (20) Significant allergic reaction to stinging insect venom. [prior version just mentioned allergies]
- (21) Unsanitary habits. [venerable Navy euphemism for repeated venereal disease, not recently in the regs]
- (22) Certain anemias – in the absence of unfitting sequelae—including G6PD deficiency, other inherited anemia trait, and Von Willebrand’s Disease.
- (23) Allergy to uniform clothing or wool. [prior version mentioned only allergies]
- (24) Long sleeper syndrome.
- (25) Hyperlipidemia. [excess lipids in the blood]

Anorexia and bulimia nervosa, eating disorders mentioned in the prior version, have been removed, but are found in the SECNAV Instruction on medical standards for retention, as in the DoD Instruction.

The MILPERSMAN does not require that these conditions be diagnosed as so severe as to interfere with performance of duties, but only that they “affect potential for continued naval service” and “impair a member’s performance.” (para. 2.a) However, discharges are not to be approved unless there is documentation from a medical officer that the condition prevents members from completing their service, even in another job or location. In member-initiated discharges, there must also be a showing that all medical avenues of relief have been exhausted.

The Marine Corps has recently renamed this discharge category. MARCORSEPMAN 6203.2 was titled Physical Conditions Not a Disability; and is now simply Conditions Not a Disability. No specific psychiatric conditions are listed. The general language now mentions physical “or mental” conditions which are apparently beyond the members’ control but do not constitute a disability. The language here is very general, not tied to psychiatric diagnosis or to a specific determination that the condition is so severe as to interfere with effective functioning. The only listed conditions are:

- (1) Obesity, where due to pathological factors, not of a temporary nature, and apparently beyond the Marine’s control.
- (2) Bed wetting (enuresis)
- (3) Sleepwalking
- (4) Chronic air sickness
- (5) Chronic motion sickness
- (6) Pseudofolliculitis barbae
- (7) Allergy, including but not limited to allergy to clothing, boots, bedding and bee stings, or illness such as asthma or hay fever

- (8) Disqualifying height “when, after a proper enlistment, a Marine cannot be assigned duties appropriate to grade and MOS due to increased height.”
[Commands are encouraged to explore reassignment options in these cases.]
- (9) “Any additional physical condition which interferes with duty, as determined by the commanding officer and medical officer, that is not considered a physical disability.”

Although no specific mental conditions have been added, and the language of item (9) has not been expanded to include mental conditions in general, the change in title and introductory language raise the possibility that other conditions may be added in the future.

Unlike 6203.3, personality disorders, 6303.2 does not discuss non-medical documentation of the effect on performance.

Interestingly, MARCORSEPMAN 6203.2.b lists another Condition Not a Disability, refusal of medical treatment, when the refusal interferes with duty. The language is fairly complex, allowing for several different approaches to discharge, depending in part on the reasonableness of the refusal. This reason for discharge is distinguished from refusal of inoculations, which may be a basis for disciplinary action and/or misconduct discharge.

The Air Force combines personality disorder and other conditions in AFI 36-3208, section 5-11, Conditions that Interfere with Military Service. Reasons for discharge include:

- 5.11.1 Enuresis, if there is no underlying pathology.
- 5.11.2 Sleepwalking.
- 5.11.3 Dyslexia.
- 5.11.4 Severe nightmares
- 5.11.5 Stammering or stuttering of such a degree that the airman is normally unable to communicate adequately.
- 5.11.6 Incapacitating fear of flying confirmed by a psychiatric evaluation.
- 5.11.7 Airsickness.
- 5.11.8 Claustrophobia
- 5.11.9 Mental disorders. ...
 - 5.11.9.1 Personality disorders.
 - 5.11.9.2 Disruptive behavior disorders.
 - 5.11.9.3 Impulse control disorders.
 - 5.11.9.4 Other disorders, as defined in DSM-IV that interfere with duty performance and are not within the purview of the medical disability process.
- 5.11.10 Transgender or gender identity disorder of adolescence or adulthood, nontranssexual type.
- 5.11.11

Discharge for any of these conditions normally requires a commander's determination that the condition interferes with assignment or duty performance and, with the exception of enuresis and sleepwalking, an explanation of adverse, an explanation of why the condition interferes. This must be supported by documentation, though there is no general explanation of the type of documentation. Presumably medical diagnoses or assessments would be needed for some of the conditions. The subcategory of mental disorders also requires a psychiatrist's or psychologist's report confirming the diagnosis and stating that the disorder is so severe as to significantly impair the member's effective functioning in the military environment, expanding this requirement to mental conditions other than personality disorders. (5.11.9) It is noteworthy that transsexualism and gender identity disorder are not subsumed under the mental disorders. They require psychiatric or psychological confirmation, but no medical opinion about "severity." Section 5.11's introductory paragraph also states that psychiatric reports may not be used as or substituted for an explanation of the condition's adverse effect on assignment or performance.

The expansion of these categories give all of the services except the Marine Corps wide latitude in discharge servicemembers with conditions which may not be severe in themselves, but which interfere with duty performance. In addition to increased numbers of specified conditions, the Air Force and Army allow discharge for unspecified mental conditions which meet the overall criteria for effect on performance. The Navy reg makes it clear that conditions warranting discharge are not limited to those listed.

Perhaps the most striking development is the inclusion of adjustment disorders, which are considered transient and usually responsive to therapy. While impact on performance or potential performance must still be shown, this basis for discharge in the Navy and Air Force (and the possibility of its use under the broad language about psychiatric disorders in the Army regulations) may allow discharge for many who would not otherwise be eligible. In addition, this and other relatively mild psychiatric diagnoses may carry less social stigma than diagnoses of personality disorders or more serious Axis I disorders.

Discussion with other counselors and with attorneys suggests that many of these conditions are seldom used. While this may be in part a matter of the number of people affected by such conditions, it seems likely that some of this is a matter of unfamiliarity. Commands are often unaware of the possibility of discharge on new grounds or on grounds not in use for some time. Servicemembers are less likely than their commands to know the details of the regs and the specific conditions warranting discharge. In addition, the less common grounds for discharge are not widely known among military counselors and civilian or military attorneys, so that they are not always mentioned in the course of discharge counseling, or argued as a basis for discharge when diagnosed. Because this is a significant area in which military regulations and practice appear to be changing, readers are encouraged to assist in gathering and sharing information about the availability and use of these discharges through the Military Law Task Force and the GI Rights Network.

The author would like to thank the counselors and attorneys in the MLTF and the GI Rights Network who responded to requests for information about treatment of clients with psychiatric conditions, and those who do not yet know that they will be asked to write further articles in this series.

COMMAND RESPONSIBILITY: PLAYING POLITICS WITH TORTURE

By Marjorie Cohn

t r u t h o u t | Perspective, Sunday 29 August 2004

As George W. Bush prepares to take center stage at Madison Square Garden, two reports released in tandem purport to represent thorough investigations of the 'abuses' at Abu Ghraib prison in Iraq.

The near-simultaneous publication of the Schlesinger Report and the Fay Report is not coincidental. Following Senator John McCain's admonition when the Abu Ghraib scandal broke back in April, the Bush administration wants to get all the bad news out now, so it will be overshadowed by the Grand Ol' Party in New York next week.

The 'Independent' Panel to Review Department of Defense Operations, aka the Schelsinger Report, was prepared by a team Donald Rumsfeld selected from his own Defense Policy Board. Not surprisingly, it stops short of pointing the finger at the Secretary of Defense, or the President.

An Army panel headed by Maj. Gen. George R. Fay likewise accepts at face value Rumsfeld's denial that he had any knowledge of the atrocities perpetrated by Americans against Iraqis.

After all, as Rumsfeld claimed Thursday, "if you are in Washington, D.C., you can't know what's going on in the midnight shift in one of those many prisons around the world." The Secretary evidently hasn't heard of telephones, faxes or email.

Rumsfeld hadn't even read the reports - or even the executive summaries - when he denied in a radio interview in Phoenix that abuses took place during interrogations at Abu Ghraib: "I have not seen anything thus far that says that the people abused were abused in the process of interrogating them or for interrogation purposes."

In fact, the Fay report found that 13 of the 44 instances of abuse took place during interrogations. And Rumsfeld would only have had to read the first paragraph of the Schlesinger report, which says: "We do know that some of the egregious abuses at Abu Ghraib which were not photographed did occur during interrogation sessions and that abuses during interrogation sessions occurred elsewhere."

Nevertheless, the reports read like an apologia for the mistreatment: the prison was understaffed, personnel were not well-trained and lacked discipline, and they were under pressure to get information in the Global War on Terror. Yet only one-third of the documented atrocities took place during interrogations. And they don't remind us that, according to the Red Cross, 70 to 90 percent of those held at Abu Ghraib were there by mistake.

Neither report discusses the well-established doctrine of "command responsibility." Where a commander, even a commander-in-chief, knew or should have known about misbehavior committed by his inferiors, and the commander fails to stop or prevent it, he is just as liable as the soldier who committed the offense.

So the question is whether Rumsfeld or Bush should have known about the unleashing of dogs on two juveniles to see if they would defecate on themselves, the rape of a young screaming prisoner, or the man the CIA killed and left dead in the shower for others to smuggle out on ice as if he were still alive. Should the Secretary and the President have known that forced nudity around Abu Ghraib was commonplace?

The Schlesinger report adopts the well-worn adage that good news travels up the chain of command, but bad news does not. The suggested fix: Rummie needs a better pipeline.

Newly leaked secret portions of the Fay report confirm that Lt.Gen. Ricardo S. Sanchez "approved the use in Iraq of some severe interrogation practices intended to be limited to captives held in Guantanamo Bay, Cuba, and Afghanistan."

The Schlesinger report uncritically agrees with Bush's decision that the Geneva Conventions don't apply to al Qaeda and Taliban prisoners; therefore, severe treatment was permissible in Gitmo and Afghanistan.

But unfortunately, according to the report, the Gitmo and Afghanistan practices somehow "migrated" with the interrogators to Iraq, where prisoners should have been protected by Geneva.

Missing from the analysis is a reminder that Geneva requires a competent tribunal - not George W. Bush - to decide whether a prisoner falls under the Geneva Convention on the protection of prisoners of war. Even if the prisoners at Gitmo and Afghanistan are not POW's, they are still entitled to humane treatment under Geneva.

Even more forceful interrogation practices conducted by the CIA provided a role model for soldiers and civilians at Abu Ghraib. Although alluded to in the Fay report, the CIA insists on keeping secret the document that served as a template for unauthorized interrogation practices.

Although 44 allegations of brutality are chronicled in the Fay report, there is no thorough discussion of why many of them may actually amount to torture, not simply "abuse." In

fact, the executive summary classifies rape as "abuse," even though it is well-accepted that rape constitutes torture. Yet Fay used the 't' word at a Pentagon news conference. He admitted to reporters: 'there were a few instances when torture was being used.'

The Schlesinger report, again walking in lockstep with the Bush administration, slams the venerable International Committee of the Red Cross for saying Bush's classification of prisoners as 'unlawful combatants' violates the Geneva conventions.

While concluding the Secretary of Defense had no knowledge of the abuses, the Schlesinger report accuses the Pentagon's top civilian and military leadership of failing to exercise sufficient oversight and permitting conditions that led to the abuses. Rumsfeld's reversals of interrogation policy, according to the report, created confusion about which techniques could be used on prisoners in Iraq.

A major omission in the reports is mention of the effect of the 'legal' memos prepared by the Defense and Justice Departments that justify the use of torture during interrogations. Under U.S. law, torture is never permitted, even in wartime. Yet the memos advise Bush and Rumsfeld how they can avoid prosecution under the federal torture statute. This advice should surely figure in to a discussion of whether our leaders should have known what was happening on their watch.

Indeed, more than 300 lawyers, retired judges, and law professors, including a former FBI director and an ex-Attorney General, seven past presidents of the American Bar Association, and this writer, signed a statement denouncing the memos, which, we wrote, "ignore and misinterpret the U.S. Constitution and laws, international treaties and rules of international law." The statement condemns the most senior lawyers in the DOJ, DOD, White House, and Cheney's office, who "have sought to justify actions that violate the most basic rights of all human beings."

Even the conservative American Bar Association criticized what it called "a widespread pattern of abusive detention methods." Those abuses, according to the ABA, "feed terrorism by painting the United States as an arrogant nation above the law."

In July, Brig. Gen. Janis Karpinski, part of the command structure at Abu Ghraib, alleged that Rumsfeld personally approved the transfer of harsher interrogation methods from Guantanamo to Iraq, a charge the Defense Secretary denied.

Karpinski also told the BBC she met an Israeli who worked at a secret intelligence center in Baghdad. The Israeli government has denied that charge, as well as FBI allegations yesterday that Larry Franklin, an Israeli spy in Undersecretary of Defense for Policy Douglas Feith's office, supplied Israel with classified documents including secret White House policy deliberations on Iran. Before the war, Feith set up a special intelligence unit to link Iraq with Al Qaeda. Franklin also has ties with Deputy Defense Secretary Paul Wolfowitz, architect

of Bush's Iraq policy. The FBI's new bombshell may lead to evidence of Israel's undue influence on Bush's Iraq - and Iran - policy.

It's secrecy as usual in the Bush administration.

A recent editorial in The New York Times about the Schlesinger and Fay reports found it "pretty obvious that Mr. Rumsfeld's panel - two former secretaries of defense, a retired general and a former Republican congresswoman - was not going to produce a clear-eyed assessment of responsibility." But the Times went on to say: 'the two reports do make it starkly evident that President Bush's political decision to declare the war over far too prematurely and Mr. Rumsfeld's subsequent bungling of the occupation set the stage for the prison abuses.'

John Kerry has called on Donald Rumsfeld to resign, but added, "The buck doesn't stop at the Pentagon." James R. Schlesinger, a former defense secretary in two Republican administrations, had his marching orders, however. Rumsfeld's resignation, Schlesinger told the media, would only help our enemies. Remember that when the photographs came to light last spring, Bush declared Rumsfeld was 'the best secretary of defense the United States has ever had.'

The dots are all there to connect up the chain of command to the top. Next week, we will see more smoke and mirrors as the GOP launches its Texas sweetheart toward the White House once again. There will be additional studies of the "abuses" at Abu Ghraib. What is less certain is whether the Commander-in-Chief and his Secretary of Defense will be held accountable for a war that never should have been, and a policy that led to the torture of so many prisoners.

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A Decade of Don't Ask Don't Tell:

The Military's Policy on Homosexuals in the Service

By Kathy Gilbert and Steve Collier

Ten Years of Discrimination

When it was first enacted in 1994, the “Don’t Ask, Don’t Tell” (DADT) policy on homosexuality in the military was lauded by the Clinton administration as a liberalization of the military’s policies towards lesbian and gay service members. Congressional and military leaders acknowledged for the first time that lesbians, gays and bisexuals serve our nation honorably, and that sexual orientation is no longer a bar to military service.

Has the policy proven to be as enlightened as its authors suggested? The clear answer is no. From 1994 when the policy was first implemented through 2001, discharges of lesbian, gay, and bisexual service members have steadily increased to more than double, from 617 to 1273. 2002 saw the first drop in discharges from the year before, but gays were discharged 906 times,¹ still much higher than the 617 discharged during 1994, the first year of the policy. More than 9,000 Americans have been discharged since 1993 because of “Don’t Ask, Don’t Tell,” at a cost of more than a quarter billion dollars in taxpayer money.²

The policy often undermines important national security objectives. For example, in the summer of 2002, the Army discharged seven linguists, all trained in Arabic, for being gay. They did so despite a critical shortage of Arabic specialists, and despite their importance to the so-called “War on Terrorism” in the Middle East.

Women have been consistently discharged at a rate nearly twice their presence in the service. In 2002, thirty-six percent of the Army’s discharges under “Don’t Ask, Don’t Tell” were women, while women comprise only 15% of the Army’s total force strength. In the Coast Guard, 34% of the discharges were women, while 7% of the force is women. Similarly, in the Air Force 34% of the “Don’t Ask, Don’t Tell” discharges were women, while women only comprise 19% of the Air Force’s total strength. In the Marine Corps, 27% of the “Don’t Ask, Don’t Tell” discharges were women, compared to their being 6% of the Corps. African American women were discharged at almost three times their presence in the military. Latina and other women of color were also discharged at a disproportionate rate.³

The military is the largest employer in the United States, with approximately 2.5 million members on active duty and in the reserves. The military is also the largest employer of youth in our country, with more than one million of the active and reserve population between the ages of 18 and 25. In fiscal year 2001 young adults comprised approximately 42% of the armed forces. Yet they comprised 90% of the Marine Corps and Navy and 79% of the Coast Guard gay discharges.⁴ Shamefully, the U.S. military is the only major institution in the country that requires the firing of openly gay employees solely based upon their sexual orientation.

This memo provides an overview of the policy and discusses its implementation.

Discussion is divided into sections on the basic discharge policy, exceptions to the policy,

¹ Traditionally during times of war there is a decrease in the number of discharges for homosexuality.

² SLDN, “Conduct Unbecoming, The Ninth Annual Report of Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass.” (March 25, 2003)

³ *Id.*

⁴ *Id.*

characterization of discharges, enlistment policy, investigations and command inquiries, and anti-gay harassment.

Overview of the Discharge Policy

The policy on homosexuality is based on the Congressional “Policy Concerning Homosexuality in the Armed Forces,” a number of regulations issued by the Department of Defense, and regulations of the various services.⁵ UCMJ provisions on sodomy, indecent acts, fraternization, and similar “offenses,” although on their face applying to heterosexuals as well as homosexuals, are typically charged against gay service members and should also be consulted.

10 USC 1177 articulates the rationale for the policy in a set of 15 Congressional findings, designed to strengthen arguments for exclusion of lesbians and gay men. They include detailed language about the special role of the military, the differences which must exist between the military and civilian communities, and the critical importance of unit cohesion, “the bonds of trust . . . that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members.” They conclude with the finding that:

“The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.”

The major change that DADT made over the previous policy was to purport to exclude people from the military for homosexual conduct rather than status. The regulations state

⁵ Department of Defense policies were promulgated on December 22, 1993. The basic discharge policy was added to DoD Directive 1332.14, “Enlisted Administrative Separations,” and the parallel officer regulation, DoD Directive 1332.30, “Separation of Regular Commissioned Officers.” Army regulations are

explicitly that homosexual orientation is a personal and private matter and not a bar to enlistment or continued service. However, the policy has so significantly expanded the definition of homosexual conduct that the distinction between conduct and orientation is virtually eliminated. The true distinction is not between a gay service member's status and conduct, but between the member being openly gay and in the closet. Under the new policy, conduct includes "a statement by the Service member that demonstrates a propensity or intent to engage in homosexual acts,"⁶ as well as homosexual acts and homosexual marriages or attempted marriages.

The federal Courts of Appeals have uniformly upheld DADT against constitutional and other challenges by lesbian and gay service members, citing the unique character of military service and court deference towards the executive branch in areas of national defense. See *Holmes v. California National Guard*, 124 F.3d 1126 (9th Cir. 1997).⁷

[1] Statements as conduct.

The central premise of the policy is that statements about one's sexual orientation are presumptive evidence of sexual conduct, and thus a basis for rejection or discharge from the military. Statements include not only comments such as "I am gay," but also statements that "a reasonable person would understand to demonstrate a propensity or intent to engage in" homosexual acts, regardless of the speaker's subjective meaning.⁸

contained in AR 600-20 (general), AR 635-200 (Personnel), AR 195-2 (criminal investigations), and AR 380-67 (security clearances).

⁶ DoD Dir. 1332.14.E2.1.7

⁷ However, the Ninth Circuit Court of Appeals in *Hensala v. Dept. of the Air Force*, 343 F.3d 951 (9th Cir. 2003) suggested that the Supreme Court decision in *Lawrence v. Texas*, 123 S.Ct. 2472 (2003) decriminalizing sodomy may impliedly overrule *Holmes*.

⁸ DoD Dir. 1332.14.E2.1.16 defines a statement to include "language or behavior that a reasonable person would believe intends to convey the statement that a person engages in or has a propensity or intent to engage in homosexual acts."

Statements about sexual orientation create a rebuttable presumption that the service member engages in homosexual acts or has a propensity or intent to do so.⁹ Service members may try to rebut the presumption, by providing evidence that they do not engage in such acts, do not intend to do so, and have no propensity to do so. Propensity is defined as “more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.”¹⁰ While this language offers a limited exception to mandatory discharge, it has been difficult to rebut the presumption in practice.

[2] Homosexual Acts.

Service members may be discharged for engage in, attempting or soliciting homosexual acts. The policy defines acts as “any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purposes of satisfying sexual desires,”¹¹ and “any bodily contact that a reasonable person would understand to demonstrate a propensity or intent to engage in an act.”¹²

Under either definition, kisses, hugs and other affectionate behavior are grounds for discharge. Under the second definition, the actor’s sexual orientation or interest is immaterial; all that matters is the perception of a “reasonable person.” Women and others who are socialized to believe that same-sex physical affection is appropriate run the risk

⁹ Some portions of the regulations, however, refer to statements which indicate a propensity or intent as a basis for discharge, suggesting that not all statements are conduct-laden. This definition has been raised by some servicemembers in discharge proceedings, so far without success.

¹⁰ DoD Dir. 1332.14.E2.1.10

¹¹ DoD Dir. 1332.14.E2.1.6.1

¹² DoD Dir. 1332.14.E2.1.6.2

of engaging in homosexual acts even if their intent is entirely platonic and their orientation entirely heterosexual.

[3] Marriages.

The policy requires discharge of persons who marry or attempt to marry persons of the same sex. While this basis for discharge has never occurred to the writers' knowledge, one may see some discharges for same-sex marriage given the current gains made by the lesbian and gay community for marriage equality.

[4] Exceptions to Mandatory Discharge.

There are several limited exceptions to mandatory discharge under the current policy.

Retention is possible in cases based solely on statements about sexual orientation if the service member successfully rebuts the presumption of a propensity or intent to engage in acts. Factors to be considered in determining whether a service member has successfully rebutted the presumption include:

- “(a) whether the member has engaged in homosexual acts;
- (b) the member's credibility;
- (c) testimony from others about the member's past conduct, character, and credibility;
- (d) the nature and circumstances of the member's statement;
- (e) any other evidence relevant to whether the member is likely to engage in homosexual acts.”¹³

The regulation notes that “some or all” of the factors may be considered, and that the list is not meant to be exhaustive. Generally the member must convince the command that he/she is celibate in order to remain in the service.

Where acts, attempts or solicitations are alleged, a service member may be retained if there are approved findings that:

¹³ DoD Dir. 1332.14.E3.A1.1.8.1.2.2

- “(a) Such acts are a departure from the member’s usual and customary behavior;
- (b) Such acts under all the circumstances are unlikely to recur;
- (c) Such acts were not accomplished by use of force, coercion, or intimidation;
- (d) Under the particular circumstances of the case, the member’s continued presence in the Armed Forces is consistent with the interest of the Armed Forces in proper discipline, good order, and morale; and
- (e) The member does not have a propensity or intent to engage in homosexual acts.”¹⁴

Service members may also be retained in the following circumstances:

- (a) the member engaged in acts, made statements, or married or attempted to marry a person known to be of the same biological sex for the purpose of avoiding or terminating military service; and
- (b) Separation of the member would not be in the best interest of the Armed Forces.”¹⁵

[5] Character of discharge.

Discharges for statements or gay marriages are normally honorable or general, depending on the member’s overall record of service. An other than honorable (OTH) discharge is warranted where homosexual acts are accomplished, attempted or solicited under the following circumstances:

- (1) By using force, coercion, or intimidation;
- (2) with a person under 16 years of age;
- (3) with a subordinate in circumstances that violate customary military superior-subordinate relationships;

¹⁴ DoD Dir. 1332.14.E3.A1.1.8.1.2. This “gay for a day” defense recognizes the fluidity of sexuality and orientation, and undermines as well the underpinnings of the policy: that persons who engage in homosexual acts “would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.” 10 USC 1177.

¹⁵ DoD Dir. 1332.14.E3.A1.1.8.4.7.2. This exception is yet another example of the hypocrisy of the policy. If persons who engage in homosexual acts are detrimental to the good order and discipline of the armed forces, then how could retention of someone who engaged in such acts for the express purpose of seeking discharge be in the best interest of the armed forces? The policy’s answer is that the member is not really gay, but is just trying to get out of his/her service contract. But being gay is not a bar to service

- (4) Openly in public view;
- (5) For compensation;
- (6) Aboard a military vessel or aircraft; or
- (7) In another location subject to military control under aggravating circumstances noted in the finding that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.¹⁶

While sexual acts under some of these circumstances would warrant OTH discharge in a heterosexual context, readers should bear in mind that a hug at an off-base gathering, an attempt to touch dance in a gay bar, or a solicitation to kiss in the barracks can all result in an OTH separation.

Recruiters and officials at Military Entrance Processing Stations (MEPS) were required to stop asking recruits about sexual orientation on January 23, 1993, so that fraudulent enlistment is not a problem in most cases.

Some commands are unwilling to give lesbians and gay men honorable discharges. The Army and Air Force occasionally characterize discharges as general without any legal basis where the member's overall record clearly required an honorable discharge. All of the services occasionally demonstrate this tendency in cases involving officers. The Navy and Marine Corps frequently try to award an other than honorable discharge by "dual processing" the member for homosexuality and another applicable reason for discharge which warrants OTH discharge-- usually discharge by reason of misconduct. This often

under the policy. Homosexual acts are a bar. If acts, not orientation, are the reason for discharge, then the reason why the member engaged in the act is irrelevant.

¹⁶ DoD Dir. 1332.14.E3.A1.1.8.3

involves searching the member's record for an incident of misconduct which would not otherwise have led to discharge, such as a two-year old civilian conviction for drunk driving, or even disciplining the member for a homosexual act and then "dual processing" him or her for homosexuality and misconduct based on commission of a serious offense (the homosexual act).

Enlistment Policy

The DODT policy includes standards for enlistment and procurement of a commission.¹⁷

These standards permit lesbians, gay men and bisexuals who do not reveal their sexual orientation to enlist.

As with the discharge regulations, sexual orientation is considered a private and personal matter, and not a bar to entry into the service. Homosexual conduct is a basis for rejection of new recruits, and is defined to include homosexual acts, marriages or attempted marriages, or statements which demonstrate a propensity to engage in homosexual acts.

Recruits can no longer be questioned about their sexual orientation, and the question has been removed from enlistment forms. Additionally, they cannot be questioned about prior sexual conduct, unless there is independent evidence of conduct or they volunteer information about their sexual orientation. All recruits should be told about the military's policy on homosexuality as part of the entrance process, but with many recruitment policies, this is frequently overlooked by recruiters.

If recruits state that they are homosexual, they should be given an opportunity to rebut the presumption of a propensity to engage in homosexual acts. However, the regulation

¹⁷ DoD Dir. 1304.26.E1.2.8 "Qualification standards for Enlistment, Appointment and Induction." The Directive applies to initial entry into the regular and reserve forces, reenlistment, applicants for the Reserve Officer Training Corps (ROTC), the military academies, and other special officer procurement programs.

contains no special procedures for this. Recruits who have engaged in homosexual acts may attempt to prove that the act is a departure from their normal behavior, and do not have a propensity to engage in homosexual acts.¹⁸

Inquiries and Investigations

The policy incorporates two types of inquiry into allegations of homosexual conduct-- formal investigations by the military investigative agencies, such as the Naval Criminal Investigative Agency, and informal fact finding inquiries by local commands. The former are theoretically to be reserved for cases involving non-consensual acts, fraternization between ranks, and similar aggravated acts. (Most such acts would be criminal offenses if the context were heterosexual.) The policy claims to limit investigations and prevent full-scale witch-hunts. While full-scale investigations may be waning, an advocacy group monitoring the policy finds that the number of investigations of gay service members in violation of the policy rose from 65 since enactment in 1994 to 471 in 1999.¹⁹

[1] Traditional Problems.

Witch-hunts, or mass investigations of allegedly lesbian or gay service members, have been a long-standing tradition in the military. In the past, commands responded to allegations with vigorous and often humiliating investigations. Command investigators, or agents of military investigative services, routinely interrogated suspects and fellow service members at length. Suspects were commonly threatened with exposure to friends and family, with disciplinary action, or with bad discharges. Requests for counsel were frequently ignored. Telephone surveillance and interception of mail were not unheard of.

¹⁸ DoD Dir. 1304.26.E1.2.8.2.1. The exception is identical to that for administrative discharges.

¹⁹ SLDN, "Conduct Unbecoming, The Ninth Annual Report of Don't Ask, Don't Tell, Don't Pursue, Don't Harass." (March 25, 2003)

Women, particularly women in traditionally male rates and MOS's, were the most common targets of witch-hunts.

It appears that the policy has been successful in discouraging full-scale investigations of units and vessels in order to discharge lesbian and gay members. While investigations to determine homosexual orientation and conduct continue in unacceptable numbers, the large-scale abuses appear to be a thing of the past.

[2] Formal Investigations

The policy limits the circumstances under which investigative agencies will be asked to investigate cases of homosexual conduct, and to ensure that the investigations do not turn into sweeping witch-hunts. The regulation²⁰ shows that investigative agencies still have broad discretion to investigate cases as they wish. In practice, formal investigations involving statements about sexual orientation are rare, but investigations of alleged homosexual acts are still a problem.

The DoD Instruction states that no investigative agency “shall conduct an investigation solely to determine whether a Service member is a heterosexual, homosexual or bisexual.”²¹ The Instruction also directs that, in most cases, the investigative agency will not initiate a criminal investigation into private, consensual homosexual conduct where such conduct is the sole offense involved.²²

The regulation excludes from an investigative agency's purview private, consensual, homosexual conduct by categorizing this conduct as “sexual misconduct,” and excluding

²⁰ DoD Instructions 5505.8, “Investigations of Sexual Misconduct By Defense Criminal Investigative Organizations and other DoD law Enforcement Organizations.”

²¹ DoD Instructions 5505.8(4)

²² DoD Instructions 5505.8.4 and 5505.8.6

sexual conduct involving force, intimidation, abuse of rank, etc., which would warrant the agency's investigation.

“Sexual misconduct” is defined as:

“A sexual act or acts in violation of [the Uniform Code of Military Justice] that occur between consenting adults, in private, whether on or off a military installation. It does not include any sexual act or acts that involve allegations of force, coercion, or intimidation; abuse of position or rank; persons under the age of 16; or conduct that relates directly to applicable security standards for access to classified information.”²³

Where the agency learns of this so-called “sexual misconduct,” it should refer the matter to the commander of the member involved, who may then request a criminal investigation by the investigative agency if he or she feels there is credible evidence of sexual misconduct and that the referral is appropriate.²⁴

The Instruction also notes that the investigative agency should independently evaluate requests for investigation made by commanders, and may reject a request where it lacks credible information of sexual misconduct or is not in keeping with policy.

The policy generally encourages administrative discharge proceedings rather than criminal proceedings, and command-level fact-finding inquiries rather than formal investigation. However, commanders remain free to refer the matter right back to the investigative agency. In addition, the Instruction permits investigative agencies to

²³ DoD Instructions 5505.8.E1.1.5

²⁴ DoD Instructions 5505.8.6.2.1. Credible information is defined here and elsewhere in the policy as “information, considered in light of its source and all attendant circumstances, that supports a reasonable belief that a Service member has engaged in sexual misconduct. Credible information consists of articulable facts, not just a belief or suspicion.” DoD Instructions 5505.8E1.1.2.

investigate service members without a command request, if the Director, Commander or Principal Deputy of the agency determines that there is credible information of sexual misconduct and that the investigation is “an appropriate use of investigative resources.”²⁵

Agency investigations of homosexual acts under the policy continue.

In reality, investigations have seldom been formally predicated on sexual orientation alone in recent years. Since the agencies are primarily responsible for inquiry into criminal behavior, they normally claim to premise investigations on criminal activity even when sexual orientation alone is at issue. Investigative agencies have sometimes been quite creative in finding a reasonable basis to believe acts have occurred even where the evidence first presented gave no indication of acts. In theory, commanders with the power to refer, and investigative agencies, should not conclude that statements about sexual orientation warrant investigation and in practice such investigations are now quite uncommon. Under most circumstances, statements do not violate the UCMJ and are therefore beyond the scope of agency investigation. They do not fit the definition of sexual misconduct in the Instruction. However, since statements are presumptively a form of homosexual conduct under the policy, statements may always form the basis for an investigation into suspected acts.

The limitations on agency-initiated investigations raise other problems. While investigators should not normally initiate investigations in the absence of a command referral, they can still do so. However, the decision will rest with upper-level investigators and the decision-makers must weigh the credibility of the information and investigative resources when making a decision.

²⁵ DoD Instructions 5505.8.6.3. The Instruction offers no guidance about evaluation of appropriate

“Investigations shall be limited to the factual circumstances directly relevant to the specific allegations.”²⁶ Hypothetical examples included in DoD training materials suggest, for example, that investigators inquiring about a specific act of consensual sodomy should not ask suspects to name other sexual partners with whom they may have had sex at other times. Similarly, if investigators find a list purporting to name homosexuals in the military, in the course of investigation of a specific act of “misconduct,” they are not to track down and investigate these individuals absent information linking them to an apparent violation of the UCMJ. The “directly relevant” requirement places important limitations on witch-hunt-style investigations.

Investigative agencies must make preliminary inquiries to determine how to respond to any information they receive. This gives investigators an opportunity to search for evidence warranting discharge or disciplinary action, before determining whether the matter warrants investigation without a command referral.

Unlike DoD 1332.14, this Instruction does not prohibit investigators from asking service members their sexual orientation. Since the prohibition appears elsewhere,²⁷ investigative agencies may argue that the question may be asked if they determine it is relevant to an investigation of homosexual conduct.

[3] Informal Fact-Finding Inquiries

uses of resources; this provision appears to be entirely discretionary.

²⁶ DoD Inst. 5505.8.6.4.

²⁷ DoD Dir. 1332.14.E3.A4.4.3, for example, states that “[c]ommanders or appointed inquiry officials shall not ask, and members shall not be required to reveal, whether a member is heterosexual, homosexual or bisexual. However, upon receipt of credible information of homosexual conduct . . . commanders or appointed inquiry officials may ask members if they engaged in such conduct. . . . Nothing in this provision precludes questioning a member about any information provided by the member in the course of the fact-finding inquiry or any related proceeding, nor does it provide the member with any basis

Informal command-level investigations of homosexuality have long been common in the military, and the DADT policy gives them primary importance. The discharge regulation states that “[i]nformal fact-finding inquiries...are the preferred method of addressing homosexual conduct.”²⁸ Although the regulation does not require fact-finding inquiries, they are discussed as an integral part of the discharge process, and some commands treat them as a requirement.

Fact-finding inquiries may be conducted by a commander or his or her appointee whenever he or she receives credible information that there is a basis for discharge. DoD Dir. 1332.14.E3.A4.3.1 provides more detail than DoD Inst. 5505.8 on credible evidence. It explains that credible evidence does not exist when an individual is merely suspected of conduct; when the only information is the opinion of others about a member’s sexual orientation; where the inquiry “would be based on rumor, suspicion, or capricious claims concerning a member’s sexual orientation;” or where the only information is associational activity. The directive also lists examples of credible information:

- “1. A reliable person states that he or she observed or heard a Service member engaging in homosexual acts, or saying that he or she is a homosexual or bisexual or is married to a member of the same sex; or
2. A reliable person states that he or she heard, observed, or discovered a member make a spoken or written statement that a reasonable person would believe was intended to convey the fact that he or she engages in or has a propensity or intent to engage in homosexual acts; or

for challenging the validity of any proceeding or the use of any evidence, including a statement by the member, in any proceeding.”

²⁸ DoD Dir. 1332.14, E3.A4.4

3. A reliable person states that he or she observed behavior that amounts to a non-verbal statement by a member that he or she is a homosexual or bisexual--i.e., behavior that a reasonable person would believe intended to convey the statement that the member engages in or has a propensity or intent to engage in homosexual acts.” DoD Dir. 1332.14, E3.A4.3.4.

In a corollary to the ‘direct relevance’ requirement in agency investigations, inquiry officers must be able to “clearly and specifically explain which grounds for separation he or she is attempting to verify and how the information being collected relates to those specific separation grounds” at any point during the inquiry.²⁹

The regulations place some limitations on the type of questions which may be asked during inquiries. As with investigative agency actions, “[i]nquiries shall be limited to the factual circumstances directly relevant to the specific allegations.”³⁰ Local commands are even less likely than investigators to understand and follow this requirement. The policy specifically prohibits inquiry officers from asking or requiring service members to reveal their sexual orientation, unless the commander has credible information that the member engages in homosexual conduct or has a propensity to engage in such conduct.³¹

So ironically an inquiry officer may not ask, “are you gay?” but may ask, “have you told X you are gay?”

The guidelines for fact-finding inquiries require that members be advised of DoD policy on homosexual conduct before being questioned, and also require that the commander

²⁹ DoD Dir. 1332.14, E3.A4.4.4

³⁰ DoD Dir. 1332.14, E3.A4.1.3

³¹ DoD Dir. 1332.14, E3.A4.4.3

advise the member of his/her rights against self-incrimination under Art. 31 of the UCMJ “if applicable.”³² The vesting of discretion in the command to determine in what situations the right against self-incrimination is “applicable” risks abuse, as commanders wanting information will rarely view the right to refuse to answer their questions as “applicable.” However, “sodomy” (UCMJ Art. 125) and “indecent act with another” (UCMJ Art. 134) are criminal offenses, and the advisement should always be given as any questioning can lead to self-incrimination under these two articles.³³ It is unlikely that a soldier, when confronted by his/her commander conducting an inquiry into homosexual acts, will assert the privilege against self-incrimination and refuse to answer the commanders questions, especially when ordered to do so. It is therefore extremely important that attorneys advise members to refuse to answer inquiries and to insist on asserting their Art. 31 rights.

In the past five years, commands have been instructed to rely on their staff judge advocates in conducting investigations into homosexual acts. Local staff judge advocates are instructed to consult with senior legal officers at higher headquarters prior to the initiation of an investigation.³⁴ However, the responsibility for determining whether credible information exists that the member has engaged in homosexual acts or has a propensity to do so remains with the commander.³⁵ Fact-finding inquiries continue to pose serious problems for suspected lesbians and gay men. As noted above, some continue to ask suspected gay members for their sexual orientation despite the prohibition against doing so. However, many commands declined

³² *Id.*

³³ It is doubtful that the crime of sodomy as defined under Art. 125 could withstand a constitutional challenge after *Lawrence v. Texas*, 123 S.Ct. 2472 (2003).

³⁴ Memo from Undersecretary of Defense Rudy DeLeon, “Implementation of Recommendations Concerning Homosexual Conduct Policy” (August 12, 1999).

³⁵ *Id.*

to investigate voluntary admissions of homosexuality, and a “do nothing” approach is not uncommon.

Harassment

In 1999, PFC Barry Winchell was murdered by fellow soldiers at Fort Campbell, Kentucky because he was perceived to be gay. In the wake of this murder, the Department of Defense issued new guidance on prohibiting anti-gay harassment. The Pentagon Inspector General then did a survey on anti-gay harassment, finding it was widespread.

The Inspector General’s Survey of military personnel found that 80 percent of respondents stated they had heard offensive speech, derogatory names, jokes, or remarks about homosexuals in the last 12 months. Eighty-five percent believed such comments were tolerated to some extent. Thirty-seven percent of the service members responded that they had witnessed or experienced an event or behavior toward a service member that they considered to be harassment based on perceived homosexuality. About 5 percent believed that harassment based on perceived homosexuality was tolerated by someone in their chain of command, and 10 percent believed it was tolerated by other unit members.³⁶

Overall, 97 percent of the respondents believed they had at least some understanding of the homosexual conduct policy, although approximately 57 percent stated they had not had training on the policy.³⁷

In response to the report, the Pentagon formed a working group which issued a 13-point action plan to address anti-gay harassment which the services were then directed to implement.³⁸

Since President Bush took office, this anti-harassment action plan has not been implemented. The Department of Defense has failed to issue a single Department wide directive on harassment as required by the plan. The directive was to “make clear that mistreatment, harassment, and inappropriate comments or gestures, including that based on sexual orientation, are not acceptable.”³⁹

³⁶ DoD Inspector General, Report on the Military Environment With Respect to the Homosexual Conduct Policy (Report No. D-2000-101)(March 16, 2000)

³⁷ *Id.*

³⁸ Department of Defense Working Group, *Anti-Harassment Action Plan* (Jul. 21, 2000)

³⁹ *Id.*

Defense Department instructions mandate that a commander who receives a report of ant-gay harassment should not view this information by itself as credible information justifying an inquiry or investigation into the sexual orientation of the threatened member under DADT. The report of harassment should not prompt an investigation and the command should not solicit information regarding the member's sexual orientation or conduct.⁴⁰ Service members should be able to report crimes free from harm or reprisal or inadequate governmental response.⁴¹ While these instructions look great on paper, they are often violated in practice. However a good advocate for the member can use them to persuade a command not to initiate an inquiry against the member based upon a complaint of harassment.

Resources

Readers representing military clients are encouraged to keep in touch with the organizations monitoring the policy, including the National Lawyers Guild's Military Law Task Force (1168 Union Street, suite 201, San Diego, CA 92101; 619-233-1701); LAMBDA Legal Defense And Education Fund (660 Broadway, 12th Floor, New York, NY 10012; 212-995-8585); the Servicemembers Legal Defense Network, P.O. Box 53013, Washington, DC 20009; 202-328-3244); and the American civil Liberties Union's Lesbian and Gay Rights Project (123 43rd Street, New York, NY 10036; 212-944-9800).

STOP-LOSS

[This article is written by **From The Wilderness'** military affairs editor Stan Goff, who is the author of what many regard as the best book available on these issues, *Full Spectrum Disorder: The Military in the New American Century*. In this FTW exclusive, Goff interviews **Luke Hiken** of the National Lawyers Guild on the currently unfolding lawsuit

⁴⁰ Memo from Undersecretary of Defense Edwin Dorn, "Guidelines for Investigating Threats Against Service Members Based Upon Alleged Homosexuality." (March 24, 1997); Memo from Undersecretary of Defense Rudy DeLeon, "Guidelines for Investigating Threats Against or Harassment of Service Members Based on Alleged Homosexuality." (August 12, 1999)

⁴¹ *Id.*

against the United States government over the Department of Defense "Stop Loss" policy.]

NOTE: The first plaintiff in the Stop Loss lawsuit is filing as John Doe, thereby remaining anonymous. The views expressed in this interview are not those of John Doe, but of the National Lawyers Guild Military Law Task Force.

STOP LOSS

Stan Goff (to Luke Hiken): You are one of the attorneys with the National Lawyers Guild Military Law Task Force (MLTF) pursuing a lawsuit against the Department of Defense for its Stop Loss policy. This is a policy that involuntarily extends service members on active duty beyond their separation dates. Can you briefly explain how the Guild's Military Law Task Force (MLTF) became involved in this lawsuit?

Luke Hiken: Due to the thousands of calls coming into the Military Law Task Force and GI Rights Hotline dealing specifically with Stop Loss, we asked two San Francisco lawyers, Mike Sorgen and his associate, Joshua Sondheimer, to file a law suit against Stop Loss in the Northern District of California.

We had talked to organizations dealing directly with GIs and their families, including those in the Bring Them Home Now! campaign, Veterans for Peace, Military Families Speak Out, Central Committee for Conscientious Objectors, Iraqi Veterans Against the War, and all felt that the lawsuit was a priority.

I am on the Steering Committee of the MLTF, but in this case I'm only working in an advisory capacity with Michael Sorgen and Josh Sondheimer, who are the lead attorneys in the case.

We got together to discuss ways in which to challenge the Bush administration's illegal war against the people of Iraq. There were so many different abuses involved in this war (for example, the lies and deception about WMD's; the reasons for being there in the first place; the multiple international law violations taking place there every day, etc.), that we hardly knew where to start. We recognized that no single lawsuit could prevent the horrendous loss of life to both the Iraqis and the Americans taking place there. But considering its impact on the average GI, we felt that the most despicable abuse of authority by the President was his implementation of the so-called "Stop Loss" policy announced at the beginning of the war.

Under Stop Loss, soldiers who had already served their complete term of duty could be held over in the combat zones for a period of months or even years beyond their normal separation date. Not only were the soldiers never warned of this possibility at the time they enlisted, but it was being imposed on those who had already risked their lives in this unjustified war for at least one tour of duty.

SG: Would you describe how this lawsuit was developed? Who is currently involved? How did you initiate the search for a plaintiff, and will there be more plaintiffs?

LH: The history of Stop Loss is set forth in the pleadings filed in the John Doe case, and I won't go into it here. (Those pleadings can be viewed at the following website: www.sorgen.net). As we started researching the history of Stop Loss, we realized that it was nothing short of a back-door draft. Instead of being up front with GIs at the time they enlisted, and pointing out that the enlistment contract had a clause suggesting that the government could change the conditions of their service whenever the President decided he wanted them to stay in, the government allowed GIs to enlist with the expectation that they could leave the service when their estimated date of separation arrived. Needless to say, the thousands of servicemen and women who have been subjected to Stop Loss orders, were shocked and angry at having been tricked into endless military servitude by an unappreciative and arrogant government. While the numbers are hard to determine at this time due to government lies and obfuscation, the MLTF estimates the numbers of GIs affected by Stop Loss to be in the tens of thousands. Government, military, and media estimates have ranged from 10,000 to 200,000.

We, and the GI Rights Hotline [800 394-9544] were receiving so many calls each week from GIs and family members who were outraged at the impact that Stop Loss was having on their families that choosing a plaintiff was just a matter of waiting for someone eligible and willing to take the government on in such an important action. GIs who have attempted to speak out about this war know the pressures that can be brought to bear on them for complaining publicly. It took a courageous individual to actually come forward and publicly take a stand against this abuse.

SG: What are the key legal issues involved in this lawsuit, and do they have important statutory and precedential implications?

LH: The implications of the lawsuit are profound. The suit challenges the right of the President to initiate Stop Loss in the absence of a Congressional declaration of war. Since all of our recent wars have been fought as a result of Presidential fiat, and none has been fought as a result of a Congressional Declaration, this is an important point.

Secondly, the lawsuit alleges that the recruiters are lying to those signing up for the military by pretending that they are only serving for a limited period of time, as set forth in the enlistment contract. They don't point out the fine print that suggests that under certain circumstances (national emergency, etc.) the president can unilaterally extend their terms of service. Thus, we argue, they have been virtually tricked into signing on a dotted line, with no real knowledge of what rights they have given up.

Thirdly, the suit argues that the President can't merely apply Stop Loss to any war he feels like fighting, but can only do so in the case of national emergency, or threat to national security. Of the 19 individuals responsible for 9/11, 15 were Saudis, and none were Iraqis. There were no weapons of mass destruction in Iraq, and no threat whatsoever to this country from the Iraqi people. More importantly, once we had deposed Hussein,

and set up our own puppet government, there was certainly no threat to our national security from that country. Therefore, what possible excuse could the President have to execute Stop Loss orders on GIs fighting in Iraq? Since the foundational basis for Stop Loss orders didn't exist, the President could not simply conjure them up because he felt like it.

The lawsuit also has some technical constitutional challenges based upon executive power and the unlawful delegation of authority, but I'll leave those esoteric arguments for those who want to sift through the pleadings.

SG: It seems you and fellow attorneys in the Guild see this as part of a larger strategy against the deepening militarization of US foreign policy. If so, how does the Stop Loss suit fit in with the other dimensions of that strategy?

LH: There is no question but that Stop Loss is just one of many abuses being imposed upon the American people, and the people of the world. The Pentagon reports that the U.S. owns or rents military bases in 130 countries and that there are more than 6,000 military installations in the United States alone. (This is a gross underestimate of U.S. bases overseas because it fails to include installations in such places as Kosovo, Bosnia, Iraq and Afghanistan, and secret installations in Israel, Australia and England, among others.) In short, we have taken upon ourselves the mantle of empire. It is up to the American people to elect someone who will at least give lip service to principles of international law and the protection of human rights at home and abroad.

In the meantime, challenges such as our lawsuit against Stop Loss; defending GIs who speak out against the murder of civilians or prisoners of war; and international efforts to find peaceful solutions to the world's problems, are all goals pursued by progressive organizations. The warlike stance of our government is a reflection of its control by corporate interests who benefit (i.e. profit) from our seizure of foreign lands and assets worldwide. Very few Americans at the lower end of the economic spectrum actually benefit from the riches and wealth we steal throughout the world, yet the Bush-controlled media has persuaded significant numbers of Americans that these wars are in their interest. The deceptions and fear campaigns perpetrated by this government are so transparent that many Americans are left speechless and frozen. It's crucial that at a time like this people of integrity and heart step forward to fight power with truth.

SG: You referred earlier to Stop Loss as a backdoor draft. Do you think either the Bush administration or the Kerry group will resume direct conscription? Why or why not?

LH: The U.S. can't continue to act as the world's police department without conscripting more bodies. Where are they going to find their cannon fodder - from prisons? From domestic police departments? You know that the George Bushes and Dick Cheneys of the world will never set foot in a battle zone. It will be the honest, sincere, young working class and minority youth who will face the enemies of our empire on battlefields abroad.

Rumsfeld's theories about the RMA (Revolution in Military Affairs) [are] a gross miscalculation. How can retired General Tommy Franks possibly answer, as he did in an interview on national television about his book, *American Soldier*, when asked why the U.S. military wasn't prepared for a guerilla resistance and war in Iraq, "[We] didn't know what was going to happen"? Having an overall plan is the cornerstone of all military strategy since Sun Tzu wrote about its importance in the *Art of War* over 2000 years ago.

Rumsfeld's "smart" bombs and missiles have turned out to be no smarter than the fools who built them (80% of the "smart" bombs dropped on Baghdad missed their targets). His "shock and awe" tactics were about as effective at covering the Iraqi people into submission as Nixon's "Vietnamization" theory was at defeating Ho Chi Minh. And, the theoretical savings in tax dollars to the American people by fighting this highly mobile and technological netwar has resulted in the greatest tax deficit ever facing the American people.

As those who've served in the military know, especially if they did so during wartime, you can't control another country while you are hiding in the basement of the White House. Likewise, the U.S. will not be able to subjugate 25 million Iraqis and prevent them from realizing their own sovereignty and dignity with 160,000 troops. That is the same ratio of citizens to police in New York City.

The current establishment in Washington doesn't yet seem to understand the desirability of joining the world's nations in seeking mutually acceptable solutions to conflict, and instead see themselves as messengers of God in a crusade to obtain everybody else's national resources. The outcome of this aggressive policy is obvious if Bush wants to "win" this war. Since the U.S. cannot win a guerilla war by saturation bombing or an unacceptable full-fledged nuclear war, more American troops will be required.

SG: Has the National Lawyers Guild Military Law Task Force become involved in other issues related to recruitment and retention in the military? Specifically, I'm thinking about access afforded military recruiters to student contact information in any school receiving monies under the Elementary and Secondary Education Act of 1965 (ESEA).

LH: The MLTF and other committees of the NLG have been working for years with other groups and organizations trying to limit the Pentagon's impact upon our lives and educational systems. The COMD, AFSC, CCCO, CCW and a host of other groups have consistently opposed the military's attempts to militarize civilian institutions and educational facilities. The Solomon Amendments and current threats to withhold federal funding from institutions that don't cooperate with military recruiters are just two examples of coercive tactics undertaken by the government to persuade young, poor, and predominantly disadvantaged youth to enter "voluntarily" into the military. By destroying the economy and de-funding educational institutions, the government virtually assures itself that many young people will have few if any alternatives to military service, if they want to have a decent income and livelihood. We all have to work together to turn this "poverty draft" around, by ensuring meaningful jobs and opportunities to those graduating from our high schools.

SG: How do you anticipate the Stop Loss suit will unfold? What are the steps we can expect, what are the big outstanding questions, what are the potential show-stoppers, and what do the judges look like that are likely to hear this?

LH: The suit is clearly not going to end in the lower courts. The government has been using and abusing Stop Loss for a long time, and until some principled court steps up and insists upon constitutional limitations for its implementation, these problems will continue to exist. This case is just the first shot in what we anticipate to be similar challenges throughout the nation. So many civilian families have been "militarized" by this policy that there are literally thousands who are ready to step up and speak out against it. If our suit doesn't resolve the question favorably, it will be up to the next plaintiffs to find a more creative and effective means of opposing this abuse. One thing is certain, though, and that is that we will eventually strip the emperor of his unilateral powers, and steer this nation into the sort of democracy we deserve and expect.

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War Crimes

By Marjorie Cohn

(truthout / Perspective, Thursday, 13 May 2004)

Trying to quell the growing firestorm last week, Defense Secretary Donald Rumsfeld told reporters, "My impression is that what has been charged thus far is abuse, which I believe, technically, is different from torture." Rumsfeld said he hadn't had a chance to finish reading Army Major General Antonio Taguba's report, which was completed two and a half months ago.

Torture at Abu Ghraib

Rumsfeld apparently hadn't gotten to the part of the report that described the "sodomizing of a detainee with a chemical light and perhaps a broomstick," as well as "positioning a naked detainee on a box with a sandbag on his head, and attaching wires to his fingers, toes and penis to simulate electric torture," and "using military working dogs (without muzzles) ... biting and severely injuring a detainee."

This conduct does amount to torture under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which occurs when a public official or one acting in an official capacity intentionally inflicts, instigates or consents to

the infliction of severe pain or suffering on a person for the purpose of obtaining information or a confession. Torture is never permitted, even in times of war.

Evidently Rumsfeld also hasn't had time to read this treaty, which the United States has ratified and thus is part of the law of the land under our Constitution.

When Rumsfeld parsed his technical distinction between abuse and torture, he probably hadn't yet seen the videotapes, which purportedly show U.S. soldiers having [presumably nonconsensual] sex with an Iraqi woman prisoner, troops nearly beating a prisoner to death, and rapes of young boys by Iraqi guards at Abu Ghraib prison. These would also qualify as torture.

Torture is a crime under federal law. When a U.S. national conspires, attempts, or commits torture outside of the United States, he can be sentenced to 20 years in prison. If his victim dies, the perpetrator can receive life in prison or the death penalty.

Other acts chronicled in the Taguba report, such as forcing groups of male detainees to masturbate themselves while being filmed, and holding a naked detainee by a dog chain or strap around his neck, would, at a minimum, amount to inhuman treatment. While testifying before the Senate Armed Services Committee on Friday, Rumsfeld admitted that some of the photographs that hadn't been made public depicted "sadistic, cruel and inhuman" behavior.

Many of the findings in the Taguba report are confirmed in the newly released report of the International Committee of the Red Cross, which also found systemic abuse of security detainees at Abu Ghraib. Shockingly, the Red Cross reports that 70 to 90 percent of detainees in Iraq were arrested by mistake. The Red Cross characterized some of the interrogation tactics as "tantamount to torture."

Torture and Inhuman Treatment are War Crimes

Both torture and inhuman treatment are considered war crimes under the Geneva Convention, another treaty the United States has ratified. The War Crimes Act of 1996 provides that military or civilian U.S. nationals could receive life in prison, or the death penalty if a victim dies. There is evidence that at least one Iraqi died while being interrogated at Abu Ghraib.

These atrocities are not, as the Bush administration would like us to believe, confined to the Abu Ghraib prison or even to Iraq. According to the Taguba report, Major General Geoffrey D. Miller, the Commander at the Guantanamo prison, was sent to Iraq late last year "to review current Iraqi Theater ability to rapidly exploit internees for actionable intelligence." Miller used Guantanamo interrogation procedures as baselines.

A prisoner released from Guantanamo told Amnesty International that the interrogations there "were like torture." Australian lawyer Richard Bourke reported on ABC Radio that one of the Guantanamo detainees "had described being taken out and tied to a post and

having rubber bullets fired at them. They were being made to kneel cruciform in the sun until they collapsed."

Torture has also been used in Afghanistan. In December 2002, the documentary "Massacre in Afghanistan" was broadcast on German television. An Afghan soldier recounted being ordered by an American commander to fire shots into the closed containers which transported prisoners. Some died from suffocation; others were dumped in the desert, shot and left to be eaten by dogs, as 30 to 40 American soldiers watched.

A week after the documentary aired, the Washington Post reported that "stress and duress" tactics were used on prisoners interrogated at the U.S.-occupied Bagram air base in Afghanistan. The U.S. military admitted that two prisoners were victims of homicide.

Rumsfeld Pans Geneva

When Rumsfeld decided the Third Geneva Convention didn't apply to the prisoners at Guantanamo or Afghanistan, after unilaterally declaring they weren't prisoners of war, he sent an implicit message to future American interrogators in Iraq that detainees need not be treated humanely.

Rumsfeld presumably overlooked the Fourth Geneva Convention, which protects civilians in time of war. It prohibits the use of physical or moral coercion to obtain information from them.

War Crimes Up the Chain of Command

Only seven U.S. soldiers have been charged with crimes at Abu Ghraib under the Uniform Code of Military Justice. None of the military or civilian (i.e., mercenary) personnel has yet been charged with war crimes under U.S. civilian law.

The influential Army Times implicates both Gen. Richard Myers, chairman of the joint Chiefs, and Rumsfeld in the Iraqi prison scandal. It states that the responsibility "extends all the way up the chain of command to the highest reaches of the military hierarchy and its civilian leadership."

In its report, the Red Cross described physical and psychological coercion by interrogators which "appeared to be part of the standard operating procedures used by military intelligence personnel." The myriad photographs confirm that the perpetrators felt they had nothing to hide from their superiors.

Even though Taguba and Stephen A. Cambone, undersecretary of defense for intelligence, disagree about whether military intelligence or military police were in charge of interrogations at the Abu Ghraib prison, the well-established doctrine of command responsibility supports criminal liability for those who knew or should have known of the misconduct, yet failed to stop or prevent it.

Rumsfeld's involvement in setting policy for Guantanamo Bay is instructive here. Twenty of the most egregious interrogation techniques used at Guantanamo, which Human Rights Watch describes as "cruel and inhumane," were "approved at the highest levels of the Pentagon and the Justice Department," including Rumsfeld, according to the Washington Post.

In the words of the Army Times, "This was not just a failure of leadership at the local command level. This was a failure that ran straight to the top. Accountability here is essential - even if it means relieving top leaders from duty in a time of war."

Policymakers must be held accountable. All those in the chain of command should be investigated, and war crimes prosecutions initiated of the responsible military and civilian personnel.

Donald Rumsfeld should not only be relieved of his duties as Secretary of Defense. He must also be investigated for war crimes.

Marjorie Cohn, a contributing editor to truthout.org, is a professor at Thomas Jefferson School of Law, executive vice president of the National Lawyers Guild, and the U.S. representative to the executive committee of the American Association of Jurists.

Hell No, We Won't Stay *Military Reservist Resistance Grows*

Marti Hiken & Kathleen Gilberd

My husband wants out, says Martha. "That's all there is to it. If they won't let him out, he'll go AWOL."

This is a common complaint that military counselors and lawyers hear from GIs, their families and friends. Although the Department of Defense reports that only about 700 GIs have gone absent without leave (AWOL) since the beginning of the current war in Iraq, those involved in counseling and representing GIs know that the number is in the thousands. Dissatisfaction and objection among US troops in this current war has increased steadily, reflected in growing numbers of GI's seeking discharge or going AWOL. In response, a national network of military counselors formed the GI Rights Hotline to offer information and guidance about discharges, GI rights, and similar issues.

Members of the Hotline include the Central Committee for Conscientious Objectors, the National Lawyers Guild's Military Law Task Force (MLTF), the Center on Conscience and War (formerly NISBCO), Quakerhouse, and other local and regional counseling groups. The Hotline was formed in the mid-1990s in response to the changing nature of the US military and its creation of easily-activated military bases throughout the world.

It took peace and anti-war activists six years to organize a resistance to the Vietnam War. During Gulf War I, it took six weeks before we had the military counseling centers up and running. When this Gulf War began in 2002, we were already prepared.

In 2003, the GI Rights Hotline received 30,000 calls. About 15% of those were from GIs seeking Conscientious Objector claims; 30% were from AWOLs; and the rest ran the gamut from discharge information to Post Traumatic Stress Syndrome (PTSS). This year the calls are coming in at a rate of 3,000-4,000 per month, not including calls directly to member organizations of the GI Rights Hotline.

Sample Calls for Counseling

To better understand the nature of our work, it is useful to review the kinds of calls one member group of the Hotline—the Military Law Task Force—receive on a typical day.

For example, a military counselor in Northern California called seeking the name of a lawyer in Kansas. Apparently, MPs and sheriffs in Kansas have found it their duty to seek out AWOL GIs, capture them, stick them in jail, beat them brutally and then ship them back to their units. Presently 25,000 Marines serve in Iraq, and the number going AWOL continues to climb.

A second call follows almost immediately and concerns another Marine, this one AWOL and suicidal in Iowa. Although his psychologist told the soldier's commanding officer that the soldier intends to kill himself if he has to go back, the commander says he wants him to return immediately, saying he'll deal with the problem. The counselor says they need a lawyer in Iowa and San Diego. Fortunately, we locate a MLTF lawyer in Iowa and a good counseling group with legal support in San Diego.

The next phone call is from a GI in Alaska who wants to know if Canada is an option. He's received deployment papers for Iraq. He is connected to a MLTF member in Alaska.

The MLTF received a call from the wife of a reservist just back from Iraq. She reported that her husband suddenly charged into their bedroom thinking that his wife was an Iraqi about to shoot him. Apparently he suffered from PTSS, which can be suffered for years when soldier's brutal memories are triggered. She was asking us what she should do about it.

Additional calls sought information about disability, AWOL concerns, draft resistance and conscientious objection. There are days in which MLTF receives one telephone call every 15 to 20 minutes.

Reservists and Families Speak Out

Staff Sergeant Camilo Mejia is the first soldier known to be tried for desertion after service in combat in the current Iraqi conflict. Although he sought status as a conscientious objector, Camilo was found guilty and sentenced to a year in the brig. In his CO application, he described the conditions of detention and treatment of Iraqi prisoners, including instances where soldiers were directed to "break the detainees' resolve." He also described witnessing the killing of civilians, including children.

Nancy Lessin, the founder of Military Family Speaks Out, and a member of the Bring Them Home Now! Campaign, called the MLTF because Camilo is being moved to Fort Sill, Oklahoma. It's an isolated area, offering little protection for a GI resister. We contacted an NLG lawyer and law students in Oklahoma City.

We called Camilo's family to give them the names of the Oklahoma contacts and then began to coordinate the support system for Camilo before he arrives at Ft. Sill.

Because Camilo is a Costa Rican citizen, born in Nicaragua, we must also call immigration defense lawyers to find out about Camilo's deportability. He has a green card and is a permanent resident.

Factors Behind Military Resistance

Camilo's case is perhaps the most reported, but it is far from isolated. The increasing opposition to the US war in Iraq by military personnel arises from many factors, including:

- Access to information critical of the invasion and occupation, including analysis about finding no weapons of mass destruction or evidence of imminent threat;
- Mistreatment of Iraqi civilians and damage to basic living structures;
- Mistreatment of US forces by an overzealous and war-thirsty administration.

As in the past, many GI's have come to oppose the war in Iraq as a result of their own experiences in it. Men and women deployed to Iraq are reminded daily that they are viewed as part of an army of occupation. Images of US forces as "liberators" have long passed, replaced by graffiti, rocks and bombs intended to repel an unwelcome occupier.

Military personnel also have access to information that contradicts their original marching orders. Mainstream news sources report that no WMDs have been found, despite earlier administration claims. And although the Bush administration has carefully hidden military coffins from media scrutiny, these personnel know the toll this action is taking on the lives, limbs and minds of their fellow soldiers.

News of brutality towards Iraqi citizens and torture of prisoners has shaken many soldiers who previously supported the vision of this war offered by their leaders, despite the incredible barrage of racist ideology and images presented by the Pentagon and American news media.

Other soldiers and sailors have come to question military policy through mistreatment and mismanagement of its own troops. Current military strategy—including commitments to long-term occupations with over 311,000 publicly acknowledged servicemembers deployed in over 120 countries—has led to "manpower" problems and forced troops into lengthy and unwanted duty. "Stop loss" policies allow the military to retain soldiers beyond their regular discharge dates (although early discharges, such as conscientious objection, are generally unaffected). Tours of duty in Iraq are longer than anticipated, and the military has departed from past practice by ordering many combat troops into second and even third tours in combat zones.

Reservists, who reasonably expected that they would be used as reserve forces, have found themselves an integral part of the war from the outset. National Guard members who, with equal reason, thought they had enlisted to help disaster victims or maintain order at home, have been activated and deployed to Iraq.

The Department of Defense reports that 40% of the fighting force in Iraq is comprised of reserve forces. This is not only a "backdoor draft," it is also a "senior draft." Reservists tend to be older and have established positions in their communities. As a result of this war, some are losing their businesses. Their families are forced into poverty. Children haven't seen their parent(s) for months. Tens of thousands become "militarized" by this war.

Another result of mass deployments and the senior draft has been the military's failure to recognize personal, medical and family problems that make activation or deployment a crisis for many servicemembers and their families. Military counseling groups report that many clients are being sent to

Iraq with serious physical or psychiatric problems. For many, this lack of concern for their health, safety and families has led to questions about broader policies and the war itself.

Massive deployments, poor planning, and lack of concern for the troops creates logistical problems as well. Equipment does not always follow the troops; even basic supplies may be inadequate; medical care is unreliable in many areas. When the Army recently examined the disproportionate number of suicides among soldiers in Iraq, it found that insufficient mental health personnel and spotty distribution of anti-depressant medications were a significant parts of the problem.

At the same time, the problems of the first Gulf War—use of depleted uranium in tanks and shells and use of questionable vaccines, for example—have not been corrected, so that soldiers face the same likelihood of Gulf War syndrome or undiagnosed physical and neurological problems.

Individual and Collective Dissent

The result of all this is greatly increased frustration and anger within the military. Counselors and attorneys are hearing from growing numbers of conscientious objectors. While public resisters are few, the number of soldiers and sailors going AWOL or seeking discharge continues to grow. Large numbers of GI's have spoken to reporters or sent home letters expressing their disagreement with the war or their frustration over the conditions in which they are forced to live and fight. To read the latest letters from GIs, go to the websites of Veterans for Peace (www.veteransforpeace.org) or Military Families Speak Out (www.mfso.org).

In many cases, soldiers demonstrate resistance individually rather than in collective action. This is in large part the result of the military's capacity for harsh retaliation and its frequent refusal to respect these civil liberties available to soldiers. The possibilities of private, and sometimes anonymous complaints and protest over the internet are conducive to individual dissent.

Dissent is still of great value, and it is paralleled by a more collective effort of the families of soldiers who serve or have died in Iraq. For example, Military Families Speak Out has educated many soldiers and civilians about the reality of the war. Over time, collective opposition within the military seems increasingly likely, if it is provided the legal and political support of the anti-war movement. Counseling and educational efforts are essential for servicemembers who are otherwise isolated and vulnerable within the military.

Despite the many challenges faced by networks that counsel soldiers and sailors, these groups continue to educate and guide questioning military personnel through a difficult process. For many military counselors and attorneys, educational work with GI's, counseling, and support for resistance within the military remain an integral part of anti-war efforts. Soldiers and sailors who speak out against the war or resist combat service are a potent symbol of opposition to the war. Those who seek discharge or go AWOL are a growing obstacle to the military's smooth functioning.

Marti Hiken and Kathleen Gilberd are co-chairs of the Military Law Task Force of the National Lawyers Guild. Gilberd also works with San Diego Military Counseling Project. Both groups received grants from RESIST. For more information, contact MLTF, 318 Ortega Street, San Francisco, CA 94122, www.nlg.org/mltf.

DISCHARGE UPGRADING--AN OUTLINE FOR BEGINNERS

(1) DISCHARGE UPGRADES IN A NUTSHELL

- Veterans can apply to upgrade less than honorable discharges and to change the reason or basis for discharges. Each service has a Discharge Review Board (DRB) which can upgrade general, other than honorable and special court-martial bad conduct discharges (BCDs), and can also discharges to or from uncharacterized entry level separations (ELs). DRBs can also change the reason for discharge.

- Each branch also has a Board for Correction of Military (or Naval) Records (BCMR) which can consider "appeals" of bad DRB decisions, upgrade discharges given by general courts-martial, change discharges to or from medical retirement or discharge, change reenlistment codes, reinstate people in the military (this is rarely done) and make many other changes in military records.

- Vets can apply to the DRBs at any time up to 15 years from the date of discharge. They can apply to the BCMRs up to three years from the date of discharge or from the date of a bad DRB decisions. BCMRs often accept late applications.

- There are no automatic upgrades, and upgrades aren't easy to get. People who don't want to live with a less than honorable discharge should talk with a counselor or attorney before discharge if at all possible, and should normally demand all of their rights to fight against a bad discharge while they are still in the military. If the bad discharge can't be avoided, it's important to start gathering evidence in support of an upgrade even before the discharge takes place.

(2) The military is full of rumors about discharges and discharge upgrades. They are almost always wrong:

- Going AWOL or UA is not the only way to get out.

- Getting a bad discharge is not the only way to get out.

- Getting a good (fill-in-the-blank type of) discharge is not impossible, and the gunny hasn't seen 50 of them turned down just at this command!

- Fighting for a good discharge when the command recommends a bad one does not take forever.

- Waiving all the rights in a discharge proceeding does not increase the chances of a good discharge unless it is part of a signed agreement.

- Discharges do not upgrade automatically after six months.

- Discharges do not upgrade automatically.

- Upgrades are not a piece of cake. It is almost never enough just to fill out an application form and send it in.

- Upgrades are not impossible to get.

- There is no need to wait six months, two years, or any minimum amount of time before applying to a DRB or BCMR. The only important dates involve the maximum time--15 years for DRBs, three for BCMRs--within which to apply.

- Staying out of trouble after discharge is not enough to get an upgrade.

(3) PREVENTING A BAD DISCHARGE IN THE FIRST PLACE

- Usually the best way to avoid a less than honorable discharge is to fight it before it takes place. This is an important issue to discuss with a military counselor.

- Many GIs feel that it's worth a bad discharge to get out, and that it won't affect them much. Of course the decision is theirs. But before they act on those ideas, it's important that they have information about the effects of bad discharges on veterans benefits and employment, that they know about alternative discharges that won't have those effects, and that they know the rumors about automatic and easy upgrades are false.

- Fighting a bad discharge for reasons like misconduct usually means demanding the right to an administrative discharge board hearing, where GIs can argue for a better character of discharge and/or against the command's reason for discharge. With GOS discharges (discharges in lieu of court-martial), and with admin discharges that can be no less than general, there is usually no right to a board. However, soldiers who've been in for over six years, and those accused of homosexual conduct, are entitled to a board no matter what the character of discharge may be. When people aren't entitled to a board or waive a board, they can submit written statements on their own behalf, witness statements and other evidence, and a letter or brief from their counselor or attorney arguing for a better discharge. With a court-martial, fighting the discharge means working closely with military and/or civilian defense counsel and, if there is a conviction, with appellate counsel.

- GIs who decide not to challenge a bad discharge beforehand, or whose challenges aren't successful, should normally start gathering evidence before they get out, to be used in a later upgrade application.

(4) WHAT THE REVIEW BOARDS CAN DO

- DRBs can upgrade general discharges to honorable; upgrade OTH discharges to honorable or general; upgrade BCDs from special courts-martial to honorable, general or OTH; and change discharges to or from ELS. They cannot overturn or pardon or eliminate a court-martial conviction.

- DRBs can change the reason or basis for discharge, as from misconduct to convenience of the government, but can't change discharges to or from medical disability discharge or retirement.

- DRBs can't change reenlistment codes or reinstate people in the service.

- BCMRs can do all the things DRBs can do, and can consider "appeals" from DRB denials or partial denials.

- BCMRs can upgrade discharges awarded by general courts-martial, and can upgrade special-court BCDs if a DRB refuses to do so. BCMRs cannot overturn or pardon or eliminate a special or general court-martial conviction.

- BCMRs can change the reason for discharge to or from medical disability retirement or discharge. In some cases, the BCMR will decide a vet should have been medically retired as of the date of his or her discharge, resulting in a disability pension retroactive to that date.

- BCMRs can reinstate people in the military, though they rarely do this. They can change military records to show that applicants served to the end of their term of service, and can change reenlistment codes to permit vets to reenlist if they meet other reenlistment criteria (age, etc.).

- BCMRs can eliminate the results of disciplinary actions, like fines or reductions in rank, can change or remove bad performance evaluations or "counseling entries," can take incorrect diagnoses out of medical records, and can make many other changes in service records. Because of these broad powers, GI's may wish to apply to the BCMRs to clean up problems in their records which might later lead to a problem discharge, affect promotion, etc.

(5) TIME LIMITS

- There is no minimum time that vets must wait before applying for an upgrade.

- But the DRBs will sometimes recommend that vets wait a few years before applying, to build up a good civilian record. *The wisdom of this depends entirely on the facts and issues in an individual case, and on the vets' needs.*

- Vets can apply to the DRBs at any time up to 15 years from the date of the discharge. In a court-martial case, the discharge becomes final after post-trial procedures and appeals are over, not at the time of sentencing. DRBs will not accept late applications.

- Vets can apply to the BCMRs at any time within three years from the date of the "error or injustice" in their record, or three years from the date of discharge. Three years after discharge is acceptable even if the error or injustice occurred some time before the

discharge. Vets can also apply to the BCMRs within three years of the date they are turned down, or turned down in part, by the DRBs.

- The BCMRs will often accept late applications if the vet can show a good reason for the delay, though the Boards are not required to take late claims. The BCMR rules say that they may waive the time limit when it is "in the interests of justice," which often means the vet had not been informed of his right to apply for an upgrade, had serious medical or psychiatric problems that kept her from applying before, etc. Vets who failed to apply to the DRBs within 15 years of discharge may still find the BCMRs willing to hear their cases.

- If vets are eligible to ask for a second DRB review (see part 6), they must do so within 15 years of the date of discharge. There is no specific time limit for reapplications to the BCMRs.

- GIs and vets should know that discharge review cases tend to take many months. Time varies depending on the complexity of the case, whether or not the case involves a hearing, and the particular board involved.

(6) TYPES OF REVIEW

- DRBs hold documentary reviews and personal appearance (hearing) reviews. Vets can have both if they take them in that order and stay within the 15-year deadline.

- In documentary reviews, DRBs look at vets' personnel and medical records and any arguments and evidence submitted by the vet. The Boards usually don't look at court-martial records of trial, just at the charges and results. Vets can be represented by an attorney or counselor.

- With personal appearances, DRBs look at the same records, evidence and arguments. Vets can testify, bring witnesses, and be represented by an attorney or counselor. (When vets testify under oath, the board members can question them; some vets prefer to make unsworn statements to avoid this. It's a tactical decision best made with the help of a counselor or attorney.)

- The Navy/Marine Corps DRB has hearings only in Washington now; the other services occasionally send DRBs to a few major cities around the country. DRBs don't pay travel expenses for applicants or witnesses.

- Vets can request hearings before the BCMRs, but the Boards seldom grant them. Vets have no right to a hearing except in cases brought under the Military Whistleblower Protection Act.

- BCMR hearings are held only in Washington.

- Veterans can ask the BCMRs to reconsider their cases on the basis of new material

evidence. This evidence should have been unavailable at the time of the first application, should relate to a substantive issue in the case, and should not just duplicate evidence submitted in the earlier application.

(7) ARGUMENTS AND EVIDENCE

- The DRBs and BCMRs start with a legal presumption that discharges are fair and legal, and that military officials act properly. Vets have the burden of proving that their discharges should be changed.

- The proceedings are considered 'non-adversarial,' with no attorney representing the military's 'side,' but board members may be critical and sometimes suspicious. The rules of evidence don't apply, though vets and their representatives can object to offensive questions, unnecessary invasions of their privacy, and questions that simply aren't relevant to the case.

- The DRBs and BCMRs do not normally make any independent investigations. There are a few exceptions: the boards will sometimes check to see if an applicant with a BCD has a later civilian conviction, the BCMRs may ask for advisory opinions from OJAG, the service's medical or personnel experts, and on very rare occasions from the vets' old command. More investigation may be proper in Military Whistleblower Protection Act cases.

- The DRBs and BCMRs have no subpoena power and will not order military witnesses to attend. Bringing witnesses is the job of the applicants, so that in many cases they must rely on written statements or letters rather than live testimony. Again, BCMR cases involving the Whistleblower Protection Act give the Board broader authority to bring witnesses.

- With admin discharges, the Boards will consider arguments that discharges were unfair ("inequitable" to the DRBs, "unjust" to the BCMRs) or illegal ("improper" to the DRBs, "erroneous" to the BCMRs). Vets can argue that there were mitigating circumstances surrounding the problems or misconduct that led to a bad discharge (for instance, that undiagnosed medical problems kept them from performing duties properly), an "equity": or "justice" issue. They can also argue that the command or the service failed to follow its discharge regs, federal law, or constitutional requirements in discharge proceedings, a "propriety" or "error" issue.

- In these admin cases, good conduct after discharge is not a separate reason for an upgrade. It should be considered as it reflects on the vets' character or actions before discharge. However, the Boards are often quite impressed by good conduct, charitable activities, an impressive career, etc., after discharge.

- On the other hand, bad conduct after discharge can bias the Boards against an applicant. For example, applications mailed from prison may be received with some skepticism-- people in military or civilian prisons should generally be encouraged to apply after they

are released unless they face a Board deadline. Statements or evidence of bad behavior after discharge may reduce the Boards' sympathy for applicants, unless they are presented as part and parcel of the problems leading to discharge--problems overcome through rehab or good efforts and followed by outstanding conduct and character.

- With punitive discharges (BCDs and DDs, or dismissals for officers) the Boards will upgrade only on the basis of clemency. The means showing rehabilitation and excellent conduct after the offense(s) and especially after discharge. In addition, it can help to show extenuating or mitigating circumstances relating to the offense(s).

!! It is virtually always helpful to begin gathering documentation and evidence for discharge upgrades during the discharge process and right after discharge, even if vets don't plan to request an upgrade soon. Since evidence, records and witnesses can get lost, this task shouldn't be put off. It can include:

- Getting a complete copy of military personnel records, outpatient medical records, and any in-patient hospital records.

- Getting a complete copy of the "discharge packet" sent to the separation authority.

- Getting a complete copy of all files kept by their civilian and/or military attorneys.

- Getting copies of complete NCIS, OSI, CID or DIS records if an investigation was made.

- Getting all of the documentation on any positive urinalysis test (the order authorizing the test, the chain of custody document, message traffic between command and lab, and actual test results). GIs or vets can also request retesting of the original "sample" at a civilian lab. Samples and documents are not kept permanently, so requests should be made quickly.

- Asking for letters from fellow soldiers who are aware of good character, mitigating circumstances surrounding misconduct, innocence of alleged misconduct, command bias, etc.

- Getting permanent addresses for fellow soldiers who may not be willing to provide statements now, but could be asked again after they're out.

- Getting letters or permanent addresses from civilian friends, neighbors, etc., with similar knowledge.

- Obtaining at least one civilian medical or psychiatric evaluation if medical or psychiatric issues exist but were not well documented in military records.

(8) REPRESENTATION

- It is almost always helpful to have representation in discharge upgrade cases. An attorney or counselor can help to evaluate the case, develop equity and propriety arguments, assist in gathering and evaluating evidence, write a legal brief discussing the case and issues, and represent vets during hearings.

- If this level of representation isn't possible, it is helpful for vets to read over the regs governing the Boards and literature from civilian sources. It is also very helpful to have an attorney or counselor look over the regs, records and evidence, and help vets develop arguments.

- Vets should bear in mind that anything they say or submit to the Board can be considered, and will become a part of their permanent military record, so that it would be available to the Boards in any future application. A poorly prepared application can sometimes work against vets in further "appeals" or new applications.

(9) Resources

- The Discharge Upgrading Manual and its 1990 supplement are available from the National Veterans Legal Services Program, 2001 S Street, NW, Suite 610, Washington, DC 20009, 202-656-8305, ext. 105; their web site is <http://www.NVLSP.ORG>.

- The Self-Help Guide for Discharge Upgrading, produced by the Veterans Education Project and the National Veterans Legal Services Program, is now available from the Military Law Task Force (MLTF), 1168 Union Street, Ste. 302, San Diego, CA 92101, 619-233-1701, kathleengilberd@aol.com.

- The Basics of Discharge Upgrading by Tom Turcotte appeared in the Spring, 2003, issue of the MLTF's newsletter, On Watch.

Military Law Task Force Report to the July, 2004 NEC

Membership and Communications: The Military Law Task Force of the National Lawyers Guild currently has over 120 members, thanks in part to the membership renewal campaign undertaken in the past few months by co-chair Marti Hiken. Marti Hiken, in San Francisco, and are other co-chair, Kathy Gilberd, bases in San Diego, are both legal workers. They, and 11 other members, (unfortunately, overwhelmingly white male attorneys) constitute our steering committee. We maintain a membership listserv, and a separate steering committee listserv that allows the steering committee to have frank consultations on sensitive issues.

We publish the very substantive newsletter, "On Watch," available to all Task Force members on-line, and expect within the month to publish our third issue since resuming

publication, featuring a detailed article on "Don't Ask-Don't Tell" and an article on psychiatric issues in military counseling.

Counseling: The Task Force is receiving a growing number of calls from service members and their families, as well as counselors and attorneys. Both are getting co-chairs, requests for direct counseling, referrals to attorneys or back-up in handling military cases. In response, we have expanded our list of attorneys, law students and counselors outside the MLTF to find referrals and recruit and train new members to assist service members.

Litigation: Task Force member Steve Collier represented Marine Cpl. Stephen Funk in the criminal prosecution he faced for refusing to deploy to Iraq. Task Force members also offered political support in the trial of national guard Sgt. Mejia, who turned himself in after staying off base without leave rather than return to Iraq, where he had witnessed U.S. war crimes.

Task Force members have been doing research on a legal theory to permit a lawsuit on the U.S. military's "stop-loss" policies under which active-duty enlistments have been extended and GI's prevented from leaving the military at the end of their terms of service.

Publications and training materials: We've updated our website, which is visited by lots of GIs, counselors and legal professionals.

We are preparing a training videotape for counselors and attorneys new to military law issues, and plan to follow it up with shorter videotapes on advanced topics, such as courts-martial, litigation of conscientious objector claims, psychiatric discharges, and VA matters.

The Task Force will be presenting a workshop at the Birmingham convention. Kathy Gilberd and Marti Hiken have an article coming out in the next Resist newsletter.

Work with other organizations: We are working with NCBL to develop a counter-recruitment campaign focused on communities of color and using the resources of NCBL members to educate students about the military.

We provide support to Veterans for Peace, Military Families Speak Out, and the Bring Them Home Now campaign. (MLTF co-chair Marti Hiken is on the coordinating committee of "Bring Them Home Now").

We also provide legal and other support to the GI Rights Network and its hotline, in the forms of back-up and "buddying" for new counselors and more attorney referrals. In addition, many of our members are on the "Helping Out" listserv of the national GI Rights network and hotline, (1-800-FYI GI 95). Media work: Marti and Luke Hiken have been doing radio show interviews in the Bay area. Jim Klimaski appeared on a television interview in D.C. Other Task Force members have been contacted or interviewed by broadcast and print journalists.

Special Acknowledgements: The Task Force wishes to thank the National Office staff for the great help we have received whenever we have asked for assistance. We also wish to acknowledge the anonymous donor of the generous grant of twenty-five thousand dollars to the Task Force, which has enabled us to continue our work.

Announcements

- ? GI Hotline: 800-394-9544
- ? The Stop Loss Pleadings can be found at www.sorgen.net

TRAINING DVDs:

- ? **Training Session I** (DVD) -- available for \$20. It is a beginning overview of military law. The presenters are Luke Hiken, Teresa Panepinto, Steve Collier, Jana Carter, and Mark Vermuellen.
- ? **Training Session II** (DVD) -- sponsored by CCCO in March of 2004. The speakers are Luke and Marti Hiken. It covers "When a Counselor should refer cases to a lawyer," Article 138s, appeals and many other issues. It is available from the MLTF, 318 Ortega Street, SF, CA 94122 for \$25.

ABOUT THE MILITARY LAW TASK FORCE

The NLG 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*, produces interim mailings on legal and political issues for Task Force members, sponsors seminars and workshops on draft, military and veterans law, produces educational materials on these issues, and provides support for members on particular cases or projects.

One-by-One the MLTF gets soldiers out of the military and keeps them away from Iraq. We ask that you pass this newsletter to others in the NLG. We hope that every NLG member takes one GI case. Countless American, Afghanistan and Iraqi lives are saved this way!

The Task Force encourages comments, criticisms, assistance and membership from Guild members and others interested in military, draft or veterans law. If you would like to become a member of the Task Force, or simply want more information about our work, please write the Task Force or call us at 619-233-1701 or 415-566-3732.
