



ON WATCH

Critical Perspectives
on Military Law

Winter 2016

Vol. XXVII No. 1

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WOMEN IN COMBAT

A historical and political analysis of "change" in the U.S. Armed Forces

BY KATHY JOHNSON AND DAVID GESPASS

Despite dramatic changes in social mores and subsequent legislative reforms, capitalism generally, and the U.S. version in particular, has shown a remarkable ability to adapt and morph in the interest of self-preservation. Sometimes, the changes lead to more openness and democratic rights. Other times, they increase repression or deception. At all times, they are intended to insure that the rich stay rich and get richer, sometimes by increasing the income of U.S. workers (generally at the expense of others around the world), more recently by concentrating ever-greater wealth into fewer and fewer hands.

The U.S. capitalist class weathered the anger and ferment of the Great Depression by accepting, often kicking and screaming, New Deal reforms. Of course, World War II, which united many against fascism and helped “revive” the U.S. economy, played a part as well. Capitalists then survived the Civil Rights Movement with various reforms that allowed a small number of African-Americans to climb the economic ladder while leaving the bulk still with the lowest-paying, most dangerous jobs. It had no problem with women’s demands for equality, as ever-greater numbers received advanced and professional degrees while most women’s pay continued to lag behind that of men. So, too, have big corporations embraced domestic partners, implemented anti-discrimination policies and flown rainbow flags in support of the LGBTQ community, positioning themselves as bastions of progress at a time when workers’ wages are stagnant, if not falling, while CEO’s incomes soar.

No one should underestimate or demean the significance of these changes. We will never go back to the days of segregation and, the 2016 Republican presidential primary campaign notwithstanding, the worst forms of overt racism. Women will no longer be confined to the home and dependence on men. Sexual minorities will not retreat back into the closet. But, with it all, the reign of capital has remained steadfast.

The U.S. military has been a prominent part of this faux progress and the chicanery behind it. When Harry Truman issued Executive Order 9981 in 1948, intended to integrate the armed forces, white officers protested, openly and anonymously. In fact, real integration was not accomplished until the Korean War when the need for more troops became manifest. Yet, it did take place, well before integration in civilian society, at least in the South (if not before integration of major league baseball). Since then, the military has been hailed as being in the vanguard of the fight for equality, and African-Americans and other poor people of color are encouraged to join because, presumably, the U.S. military is a complete meritocracy where people can reach their full potential and rise to the highest ranks including (viz. Colin Powell) Chairman (sic) of the Joint Chiefs of Staff.

The truth is, it must be said, more nuanced. While it is undoubtedly true that people of color can advance far up the ranks, particularly as an increasing proportion of members are people of color sucked into defending U.S. imperialism, racism has hardly been excised from the military forces. Nevertheless, it is beyond dispute that integration of military forces was a significant step in securing greater equality for African-Americans in the U.S.

So, too, with gays and lesbians. While Bill Clinton hinted at ending the ban on their service, he was preempted by Colin Powell, who predicted that such a step would undermine the “good order and discipline” the military craves. The result was the notorious “Don’t Ask, Don’t Tell” policy that kept gay and lesbian members closeted but, at the same time, gave them a simple means to get discharged by acknowledging they could no longer keep from being open about their sexual preferences. A generation later, DADT was repealed and, without difficulty, gay and lesbian troops were also integrated into the military. This time, the military forces were a little later to the party than they were over racial integration, but they once again placed themselves in the position of portraying military service as a means for all to “defend the country” when, in reality, it was a means to defend U.S. transnational corporations. Still, it cannot be gainsaid that full integration of gays and lesbians into the military was a great step towards equality.

Women have fought in the US military since the American Revolution. Despite this history the 1994 Combat Exclusion Policy officially prevented women from being assigned to ground combat.

Then the recent wars in Iraq and Afghanistan rendered this policy not only obsolete but contrary to what was happening on the ground. Women conducted operations where the potential for engagement in direct ground combat was present, and the situation required every soldier regardless of gender to be ready for combat. Since women were not officially in combat the combat exclusion policy did not reflect the current situation in war. It legalized sex discrimination and helped foster a toxic hostile work environment in which sexual harassment and sexual assault has been allowed to thrive. The combat exclusion policy barred them from serving in assignments that would advance their careers.

On December 3, 2015, Defense Secretary Ash Carter announced that all U.S. military combat positions are open to women. According to Carter the decision allows women to fill about 220,000 jobs that they have been excluded from. He stated, "This means that as long as they qualify and meet the standards, women will now be able to contribute to our mission in ways they could not before. They'll be able to drive tanks, give orders, lead infantry soldiers into combat."

This follows on the heels of the first women who became Navy SEALs and is being promoted as another step towards equality, enabling women to rise to the top ranks of the military services, without being hampered by never having been in combat.

This is a change similar to the "change" allowing lesbians, gays and bisexuals to serve openly. No one doubts that gays and lesbians had long served with distinction. Depending on the particular command, such service was more or less open. Similarly, women have fought in the U.S. military in every major conflict since the American Revolution. The aforementioned 1994 Combat Exclusion Policy was the last official policy barring women from assignments which exposed them to ground combat. The wars in Iraq and Afghanistan have made the policy obsolete.

Commanders on the ground have conducted operations on asymmetric battlefields where the potential for engagement in direct ground combat is ever-present, and the absence of a clear line between enemy and friendly territory means that every soldier regardless of gender must be combat-ready. In fact, in Iraq and Afghanistan, U.S. service women have regularly participated in ground combat as members of what the military calls Forward Support Companies (FSCs), Lioness Teams, Cultural Support Teams (CSTs) and Female Engagement Teams (FETs), making the 1994 policy meaningless for all practical purposes, a fact that the media have been trumpeting regularly.

This latest change has some distinctive features. Women have been fighting for equality for a long time and the "women's liberation" movement of the 1970's has already won many victories. It is also true that women are, on average, shorter and lighter than men. For that reason, height and weight qualifications for jobs such as police officer or firefighter were found to violate women's rights to equal employment opportunity since they were unrelated to the actual physical demands of the jobs. So long as someone could carry the equipment, climb the ladders, rescue people from burning buildings and carry out the other requirements, it made no difference if she was 5'10" and 175 pounds or 5'2" and 120.

Notably, one of the questions posed to the women's movement during the Vietnam War was whether women wanted to be subject to the draft. The question seems dated now, but just a few decades ago, the idea of women being drafted was almost laughable and the response from most feminists was not that they wanted to be subject to the draft, but that the equality they sought

would not allow anyone to be drafted. And one reason the Equal Rights Amendment never became part of the Constitution was the fear that it would mean full integration of women into the armed forces and lead to women dying in combat. Needless to say, women did not require full integration in order to die in Iraq and Afghanistan.

Opposition among male troops to women serving on a basis of equality recapitulated the opposition to African-Americans and gays, albeit with a specific focus on women's biology. So, many men said, they are not strong enough or they would not be able to handle the strain or their periods would interfere with doing their jobs or they will get pregnant and leave. There was always, as well, the old reliable plaint that their presence would undermine cohesion and morale. These predictions are reminiscent of those that were made about women in the work force generally when Title VII was first enacted and have long since been proven false in other contexts.

Thus, the announced change in policy for women really does little more than say that the military is now going to comply with the requirements of Title VII that other employers, both public and private, have been subject to for decades. Yet it, too, has its duality. While it is perhaps long overdue – even longer overdue than scrapping of DADT for full equality – it is a welcome acknowledgment that women should not be constrained by their gender but only by their ability to do a job. At the same time, it means that women will now, as African-Americans and gays before them, be able to serve U.S. imperialism on a more equal basis.

The change will certainly not eliminate the problem of sexual assault in the military. That problem (the term “problem” is really a euphemism for something else, perhaps “scourge” or “epidemic”) is a reflection of military culture, just as much as is racism. Phil Ochs, in “Cops of the World,” sang:

We're hairy and horny and ready to shack
And we don't care if you're yellow or black
So take off your clothes and lay down on your back
'Cause we're the cops of the world, boys,
We're the cops of the world

And therein lies the essence of all these “advances” in the military services. They all serve the end of advancing U.S. imperial interests and those interests consign the great majorities of women, people of color, LGBTQ people and, indeed, all the poor, exploited and oppressed, to subjects to kneel at the feet of U.S. transnational corporations. While we can applaud the gains that are made, we can never lose sight of the reasons for such concessions, nor can we lose sight of the fact that the mission of the U.S. military, however egalitarian it becomes internally, is to capitalize, as it were, on divisions among the poor and oppressed. Its mission, and thus its culture, is anti-egalitarian and anti-liberation. None of these advances can be any more than partial and incomplete and “service” in the U.S. fighting forces will never be in defense of liberty without a fundamental change in this country.

Kathy Johnson and David Gespass are founding members of the MLTF and currently serve on the Steering Committee.

MILITARY SEXUAL ASSAULT POLICY UPDATES

BY KATHLEEN GILBERD

The recently-enacted 2016 National Defense Authorization Act (NDAA; Public Law 114-92) includes a number of new policy provisions on military sexual assault, most of them designed to facilitate changes made in prior Authorization Acts.

Section 531 of the 2016 NDAA expands and details a victim's right to submit a petition for a writ of mandamus to the military Court of Criminal Appeals (CCA). The section amends Article 6b, subsection E, of the UCMJ to allow such a petition when the victim believes rights afforded under the following are violated during a preliminary hearing (Art. 32) or court-martial:

- Art. 6, UCMJ (which includes other victim's rights provisions)
- Art. 32, UCMJ
- Military Rule of Evidence (MRE) 412, which concerns admission of evidence of a victim's sexual background
- MRE 513, regarding the psychotherapist-patient privilege
- MRE 514, regarding the victim advocate-victim privilege
- MRE 615, covering exclusion of witnesses

Further, if the victim of an offense under the UCMJ is subject to an order to submit to a deposition, notwithstanding his or her availability to testify at court-martial, the victim may petition the CCA for a writ of mandamus to quash the order.

These petitions for writ of mandamus are to be forwarded directly to CCA by procedures to be prescribed by the President, and "to the extent practicable, shall have priority over all other proceedings before the court."

Section 532 of the NDAA amends 10 USC 1044e(a)(2) to allow civilian employees of the Department of Defense (DoD) who are not eligible for military legal assistance under 1044(a)(7) access to military Special Victims Counsel (SVC) if they are victims of a sex-related offense.

Section 533 amends 10 USC 1044e(b) to expand the services available to military sexual assault victims from SVCs. Under the new provision (a new paragraph (9)), SVCs may provide legal consultations and assistance with "any complaint against the Government," including matters under review by an Inspector General and equal opportunity complaints. SVCs may also assist in making requests to the Government, including FOIA requests, as well as "any correspondence or other communication with Congress." It's worth noting that under the first form of assistance,

MLTF RESOURCES ON MILITARY SEXUAL VIOLENCE

MLTF has an extensive guide to Military Sexual Violence available on our website.

The MSV Guide was published in 2014 (prior to the changes noted in this article, but will soon be updated to reflect them). Currently only in digital format, once updated, it will be available in print, in limited quantities (unless additional funding can be obtained.) We are grateful to the National Lawyers Guild Foundation for the funding that made this production possible.

Visit militarylawhelp.org to find this and other material on GI rights and military law.

If after reading our documents, you still need legal counsel to address your issue, please call us for a referral.

counsel could aid in preparing and submitting complaints under Article 138 of the UCMJ, often an effective tool against command harassment or inaction.

Section 534 requires timely notice to victims of sex-related offenses of the availability of SVC assistance, by adding a new paragraph (2) to 10 USC 1044(e)(f). Except in exigent circumstances defined by the Secretary of Defense (and the Secretary of the Department in which the Coast Guard is operating), victims shall be notified of the right to SVC prior to any interviews by military criminal investigators or trial counsel (prosecutors), and prior to requests for statements from the victim about the offense. Under current regulations, victims should be notified of this right at the time they are presented with the right to make a restricted (confidential) or unrestricted report.

Section 535 requires improvements in the SVC program, including establishment of baseline training requirements for SVCs, assignment of SVCs to locations maximizing the opportunity for in-person communication with clients, establishment of effective means of communication for situations in which in-person communication is not feasible, and creation and use of performance standards to measure effectiveness of the SVC program and client satisfaction with the program.

Section 536 amends 10 USC 1565b(b) by adding a new paragraph (3) to provide additional confidentiality for those making restricted (confidential) reports of sexual assaults. In states requiring reporting of the names of sexual assault victims or alleged offenders to the state or local law enforcement, those local provisions would not apply unless necessary to “prevent or mitigate a serious and imminent threat to the health or safety of an individual.” “State” in this section includes the District of Columbia, Puerto Rico, the Northern Mariana Islands and territories or possessions of the US.

Section 538 is designed to improve prevention of and response to sexual assaults with male victims. The Secretary of Defense and service Secretaries are mandated to develop a plan to improve work in this area. The plan must ensure that the issue is directly and more comprehensively included in sexual assault training, including “how certain behavior and activities, such as hazing, can constitute a sexual assault.” The plan must also include methods to evaluate differences in the medical and mental health-care needs of male and female victims, and the best treatment regimens for those needs. In addition, the plan must have “data-driven decision making” to improve prevention and response programs; goals for the program; information about victimization of men to be included in awareness materials and communication with servicemembers; and guidance for medical and mental health providers, among others, on gender-specific distinctions in sexual assault cases and appropriate care regimens.

Section 539 requires the Secretary of Defense to develop a strategy to prevent retaliation (to be defined by DoD) against servicemembers who report sex-related offenses or intervene on behalf of victims. The strategy is to include, at a minimum, bystander intervention programs that emphasize the importance of guarding against retaliation; DoD and service policies to protect victims and interveners; and additional training for commanders on ways to eliminate beliefs and attitudes that lead to retaliation.

Section 540 requires the service Secretaries to provide regular sexual assault prevention and response training to all commanders of Senior ROTC units, as well as professors of military science, senior military instructors, and civilian administrators and instructors of Senior ROTC.

Section 541 will require retention of all investigative records regarding sexual assault cases for 50 years; this had been required for some investigative records by the 2012 NDAA, but the current section expands it to all elements of investigative files. The provision takes effect no later than 180 days from the enactment of the 2016 NDAA.

Under **Section 542**, the Comptroller General is mandated to submit a report to Congress on Army National Guard and Army Reserve handling of assault cases. The report will examine the extent to which the Guard and Reserve have appropriate sexual assault policies in place and provide medical and mental health care to victims of assaults. It will also determine the extent to which Reserve and Guard service may pose challenges to prevention of and response to sexual assault. The Comptroller General's office is authorized to prepare further reports on these issues as it deems appropriate.

Section 543 requires the Secretary of Defense to examine and streamline policies for implementing changes to the UCMJ, and ensure that legal guidance on such changes is published as soon as practicable.

Section 544 will modify Rule 104 of the Rules for Courts-Martial to ensure that SVCs do not receive less favorable evaluations or ratings because of zeal with which they represent victim clients. This provision will go into effect no later than 180 days after enactment of the NDAA.

Section 545 orders the President to modify Rule 304(c) of the Military Rules of Evidence to conform to rules governing admissibility of corroboration of confessions and admissions in federal court criminal cases, to the extent he "considers practicable." This will make it easier to introduce confessions in courts-martial, though the specifics remain to be seen.

Meanwhile, DoD has updated its sexual assault regulations to incorporate provisions of some prior NDAA's — not all of which had made their way into DoD memoranda and policy statements — as well as recommendations from the Comptroller General, defense task forces, the services and, according to DoD, survivors of sexual assault. DoD Directive 6495.01 was re-issued in early 2015, and the more comprehensive and detailed DoD Instruction 6495.02, incorporating change 2, was re-issued effective July 7, 2015. The instruction supersedes a number of memoranda and policy statements on which advocates have relied, incorporating them into a single document. It includes, for example, prohibition of retaliation not only against victims but also against others who report assaults or intervene to prevent the victims. It codifies the expedited transfer policy for victims of sexual assault, clarifies restricted and unrestricted reporting options and exceptions to restricted reports, and emphasizes training and command responsibility.

As policies change and are clarified, DoD and the services are not proving adept at keeping up to date. Particularly in the field, many new provisions are still unknown or ill-understood, leaving it to Sexual Assault Response Coordinators and Sexual Assault Victims Advocates to try to make sure commands understand and implement Sexual Assault Prevention and Response policies. If this writer's experience is indicative, there remains a great deal of distance between the written policies and practice in the field. Advocates and attorneys, armed with the NDAA and the new instruction, can play an important role in forcing commands to follow their own rules.

Kathleen Gilbert, a legal worker in San Diego, is executive director of MLTF.

WHEN THE MOTHER'S MILITARY STATUS PUNISHES THE CHILD

Supreme Court Watch on the *Feres* Doctrine and the *Ortiz* Case

BY DEBORAH H. KARPATKIN

According to a recent decision by the Tenth Circuit in *Ortiz v. U.S. ex rel. Evans Army Community Hosp.*,¹ the child of a servicemember mother injured in utero can't bring her own claim for injury under the FTCA because of the *Feres* doctrine. The *Ortiz* case is now before the Supreme Court on a petition for certiorari. This article gives a brief overview of the case and the issues before the Court – it is not intended to be a comprehensive discussion of the *Feres* doctrine and cases.

What is the *Feres* doctrine?

First, some legal background. The *Feres* doctrine is not legislation – it is a creation of the Supreme Court. In *Feres v. United States*,² the Supreme Court adopted an exception to the FTCA's broad waiver of sovereign immunity, and barred active duty military personnel from bringing claims against the government for their **own injuries** arising out of activity incident to service. This included derivative claims: *Feres* was brought by the widow of a serviceman, for wrongful death caused by negligence incident to his service.

Since 1950, the *Feres* doctrine has grown and evolved in various directions, as different courts have adopted conflicting rulings. And, there are various rationales – sometimes called “special factors” – to explain the doctrine: “(1) the distinctly federal nature of the relationship between the government and members of the armed forces; (2) the availability of alternative compensation systems [e.g., Veterans Benefits]; and (3) the fear of damaging the military disciplinary structure.”³ But not all courts follow these rationales, and some are no longer controlling.⁴ With regard to the “military discipline” factor, especially for medical malpractice in the prenatal/labor/delivery context, the Sixth Circuit recognized that this “clearly cannot be said to invite judicial interference in ‘sensitive military affairs’”.⁵

Many courts agree that the *Feres* doctrine forces unfair results. But, as Supreme Court doctrine, courts follow it, albeit with great reluctance. In dismissing cases under the *Feres* doctrine, courts note that it has been “criticized by countless courts and commentators across the judicial spectrum;”⁶ criticize “the inequitable extension of this doctrine to a range of situations that seem

¹ 786 F. 3d 817 (10th Cir. 2015).

² 340 U.S. 135 (1950).

³ *Ortiz*, 786 F. 3d at 821.

⁴ See, e.g., *United States v. Shearer*, 473 U.S. 52, 58 n. 4 (1985); *Brooks v. United States*, 337 U.S. 49, 53 (1949); *Taber v. Maine*, 67 F. 3d 1029, 1038 (2d Cir. 1995).

⁵ *Brown v. United States*, 462 F. 3d 609, 615 (6th Cir. 2006).

⁶ *Ritchie v. United States*, 733 F. 3d 871, 874 (9th Cir. 2013).

far removed from the doctrine’s original purposes;”⁷ and describe “the injustice of the result but ... nevertheless ... have no legal authority, as an intermediate appellate court, to decide the case differently.”⁸

Feres is at its most unfair when it applies to the claims of third parties – like the Ortiz baby, here. For that, we have what is called the “genesis doctrine” to thank. To what extent does the third party claim have its genesis in a claim that the service member could have brought? While the *Feres* doctrine started with third-party claims, the genesis doctrine became Supreme Court law in *Stencel Aero Engineering Corp. v. United States*. In that case, a third-party indemnity action was unavailable “for essentially the same reasons that the direct action by [the serviceman] is barred by *Feres*.”⁹

Some background on the *Ortiz* case.¹⁰

Captain Heather Ortiz was an active duty officer in the Air Force, and was admitted to Evans Army Community Hospital in Colorado to deliver Baby I.O. by C-Section. Her records showed she was allergic to Zantac, but she was given it anyway, and then given Benedryl to prevent an allergic reaction, which caused her blood pressure to drop. The fetal heart monitor showed distress, but there was no timely response by hospital personnel. Baby I.O. suffered a lack of oxygen, and was born with a severe permanent brain injury.

Captain Ortiz’ husband George Ortiz, as parent of I.O., brought a lawsuit against the United States seeking compensation under the FTCA. The United States moved to dismiss for lack of subject matter jurisdiction, claiming the *Feres* doctrine barred I.O.’s claims.

The *Feres* doctrine applies here, the Tenth Circuit ruled, because the injuries to the civilian baby were sustained “incident to [her mother’s military] service.”

The Tenth Circuit concluded that under the genesis test, Baby I.O.’s claims had their genesis in her military mother, because her mother also sustained injury. Applying this injury-focused approach, the Tenth Circuit barred Baby I.O.’s claim: “The plain fact is that Captain Ortiz’s service-related injury [the wrongfully administered medication] led to an injury to her civilian daughter.”¹¹

But not all courts apply the genesis test to in utero claims. The Fourth Circuit rejected application of the genesis test to in utero injuries because the newborn’s “injury did not derive from any injury suffered by a service member, but was caused when the government breached an affirmative duty of care owed directly to him.”¹² The Eighth Circuit and Eleventh Circuit similarly allowed in utero injuries to proceed, despite *Feres*.¹³

⁷ *Costo v. United States*, 248 F. 3d 863, 869 (9th Cir. 2001).

⁸ *Hinkie v. United States*, 715 F. 2d 96, 97 (3d Cir. 1983).

⁹ 431 U.S. 666, 673 (1977).

¹⁰ Facts are based the *Ortiz* decision and the Petition for Certiorari,

<https://assets.documentcloud.org/documents/2461131/ortiz-cert-petition-101315.pdf>.

¹¹ *Ortiz*, 786 F. 3d at 832.

¹² *Romero v. United States*, 954 F. 2d 223, 226 (4th Cir. 1992).

¹³ *Mossow v. United States*, 987 F. 2d 1365 (8th Cir. 1993); *Del Rio v. United States*, 833 F. 2d 282 (11th Cir.

The certiorari petition: questions before the Supreme Court.

The Petition offers the Court two questions:

Given the split in the circuits, should *Feres* be expanded to bar a child's birth-injury claim, when government negligence injures the child of an active-duty mother?

Does treating birth-injury claims of the children of active-duty mothers differently than the children of active-duty military fathers constitute unconstitutional gender discrimination?

At least one amicus brief (the California Women's Law Center and Veterans Legal Institute) has directly raised a third question: should *Feres v. United States* be overturned?

The gender discrimination issue.

While challenges to *Feres* have been around for a while, the gender discrimination aspect of the *Ortiz* case is new, and was not addressed by the Tenth Circuit.

As argued in the petition for certiorari: "The mere fact that a father's military service confers family access to a military hospital has never been enough to invoke *Feres* to bar a child's birth injury claim. But because I.O. was injured minutes before delivery with an active-duty mother, she was denied any remedy for her severe injuries." The petition continues: "Thus, I.O.'s eligibility to bring a claim turns on the gender of her active-duty parent, even if the medical treatment that resulted in the injury was negligent in precisely the same manner."¹⁴

The petition cites to *Frontiero v. Richardson*, where the Supreme Court invalidated a law allowing male members of the Air Force to claim their wives as dependents, and thus get housing and medical benefits, but denying the same benefits to the husbands of female active duty members without proof that their husbands were financially dependent.¹⁵ Justice Ruth Bader Ginsberg, then Director of the ACLU Women's Rights Project, submitted an amicus brief on behalf of the service member. The petition also cites to *Reed v. Reed*, another Ginsburg case from her ACLU days.¹⁶

Some amici focus on the gender discrimination issue, arguing that the *Feres* doctrine, as applied here, is "a system that single[s] out the civilian children of servicewomen for adverse treatment [and] discriminates against women who serve in the armed forces,"¹⁷ and "disadvantages women who choose to serve."¹⁸

1987).

¹⁴ Petition for Certiorari at 25.

¹⁵ 411 U.S. 677 (1973).

¹⁶ 404 U.S. 71, 76-77 (1971).

¹⁷ Amicus brief of Professors Alex Stein and Dov Fox at 9-10, <http://blogs.harvard.edu/billofhealth/files/2015/11/OrtizAmicusSteinFox.pdf>.

¹⁸ Amicus brief of California Women's Law Center and Veterans Legal Institute at 21, <http://cwlc.org/web/wp-content/uploads/2015/11/Ortiz-Amicus.pdf>.

Will the Supreme Court grant certiorari? When will we know?

Legal interest in the case has been substantial, with many amicus briefs filed to date, in support of petitioner; more can be anticipated when the government's brief is filed.¹⁹

And, heightened by the *Ortiz* certiorari petition, the *Feres* doctrine has received renewed attention from scholars and practitioners.²⁰ There's even a Facebook page: "Repeal the *Feres* Doctrine."²¹

Are there four votes to grant certiorari? Petitioner may feel confident of at least two, maybe three*. Justice Scalia issued a "vociferous critique" of the *Feres* doctrine in *United States v. Johnson*, stating that *Feres* "was wrongly decided and heartily deserves the widespread, almost universal criticism it has received."²² More recently, Justice Thomas dissented from the denial of certiorari in a *Feres* doctrine case, writing that "at a bare minimum, it should be reconsidered."²³ The discrimination claims, invoking *Frontiero* and *Reed*, may get Justice Ginsburg's vote.

As for timing: the government's response to the petition was due on January 19, 2016. Any reply is due within 10 days. Additional amicus briefs may be filed. When all briefs are submitted, the case will go into the Court's certiorari review process, where, at some point, the Court will issue an order either granting or denying the petition. If the petition is granted, then a schedule will be set for submission of briefs and oral arguments on the merits of the case; substantial amicus participation can be anticipated.

Look for an update in a forthcoming issue of *On Watch*.

Deborah Karpatkin is a civil rights and employment rights lawyer in New York City and a member of the MLTF. She has represented military conscientious objectors since 1991 and also represents service members seeking discharge upgrades, and employees in civilian workplaces. She is also as a member of the NYC Bar Association's Military Law and Sex and Law Committees.

* This article was written prior to Justice Scalia's death on February 13.

¹⁹ Supreme Court Docket Report, <http://www.supremecourt.gov/search.aspx?filename=/docketfiles/15-488.htm>, (last visited 1/11/16).

²⁰ See, e.g., <http://www.sfnr.com/sfnr-writes/articles/unfair-claims-standard-injured-babies-born-military-moms-should-go> (last visited 1/11/16).

²¹ <https://www.facebook.com/Repeal-The-Feres-DoctrineLaw-148270125245857/> (last visited 1/11/16); http://www.huffingtonpost.com/dov-fox/reproductive-malpractice-and-the-us-military_b_7706980.html (last visited 1/11/16). Of course, much writing and scholarship preceded the *Ortiz* case. See, e.g., Mia Donnelly, Note,

Fighting Feres: Creating a VA Benefits Program for the Children of Servicemembers Injured by Parental Exposure, 83 Geo. Wash. L. Rev. 67 (2015), <http://www.gwlr.org/wp-content/uploads/2015/05/83-Geo-Wash-L-Rev-647.pdf>.

²² *Ortiz*, 786 F. 3d at 822; *United States v. Johnson*, 481 U.S. 681, 700 (Scalia, J. dissenting)

²³ *Lanus v. United States*, 133 S. Ct. 2731, 2732, 186 L. Ed. 2d 934 (2013) (Thomas, J. dissenting from the denial of certiorari)

THE MILITARY AFTER DADT

BY JEFF LAKE

As this article is being written, the military's policy of "Don't Ask, Don't Tell" seems like a relic from the distant past. It has now been over five years since the repeal of the policy, so an update does not appear to be necessary. However, issues remain concerning the participation and inclusion of LGBT people in the military. This article will summarize these issues and explore the possibilities going forward.

MARRIAGE RECOGNITION

In the years following the repeal of DADT there was quite a lot of confusion regarding the status of same-sex partners of military personnel. This issue was resolved somewhat with the Supreme Court decision in June, 2013 striking down the so-called "Defense of Marriage Act." By September, 2013, the Department of Defense began extending benefits to the partners of same-sex servicemembers. However, questions remained concerning what marriages to recognize as same-sex marriage was limited to a small number of states. Thankfully, these questions were put to rest last summer with the latest Supreme Court decision striking down restrictions on same-sex marriage throughout the nation. It now seems that the confusion over what marriages to recognize is now over and that same-sex partners will now receive the same benefits as all other partners of military personnel.

NON-DISCRIMINATION

Up until recently, discrimination based on sexual orientation was not covered by the military's equal opportunity policy. Instead, complaints had to be made to an inspector general. In June, 2015, Defense Secretary Ash Carter personally appeared at the Pentagon's Gay, Lesbian, Bisexual and Transgender Pride event. At the event he announced a change of policy stating that complaints about discrimination based on sexual orientation would now be investigated by the Military Equal Opportunity program – the same program that covers all other allegations of discrimination. Carter stated, "Discrimination of any kind has no place in America's armed forces." As discussed below, there is still blatant discrimination against transgender members of the armed forces, so Carter's pronouncement is not exactly a reality at this time.

DISCHARGE UPGRADES

A lingering issue from the days of "Don't Ask, Don't Tell" is the issue of servicemembers who were discharged based on sexual orientation. Many veterans received discharges that were other than "honorable." Of course, this can be the basis for denial of federal benefits and can hinder employment opportunities. In July, 2013, the "Restore Honor to Service Members Act" was introduced in the House of Representatives. This bill would do a number of things. First, it requires military record corrections boards or discharge review boards to review discharges of anyone who was discharged due to their sexual orientation. The discharge characterization would be changed if there were no "aggravating circumstances" such as misconduct. Second, the bill directs the Secretary of each military branch to review discharges between World War II and September 2011 based on sexual orientation and to take

testimony from those who experienced discrimination and were discharged during this period. Third, it requires the reissuance of specified records and discharge forms so as to not reflect the sexual orientation of the servicemember. Finally, it amends the Uniform Code of Military Justice to remove the offense of sodomy as defined as unnatural carnal copulation with another person of the same or opposite sex.

This bill died in the House. However, the bill was reintroduced on July 15, 2015. It now has 113 co-sponsors. However, since 109 of these are Democrats, it is highly unlikely that this bill will come to a vote in the House. Thus, these needed changes to address the injustices that occurred under DADT will have to wait for a more enlightened Congress.

CONSENSUAL SODOMY

Changes have been made to remove the criminalization of “sodomy” between consenting adults under the Uniform Code of Military Justice. In December, 2013, Congress made changes to Article 125 of the UCMJ. Prior to the changes, the article was as follows: “Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy.” With the changes, the section now states: “Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex by unlawful force or without the consent of the other person is guilty of forcible sodomy and shall be punished as a court-martial may direct.” The changes make clear that the crime is now about force and non-consent. The reference to sex with an animal has now been moved to section (b) of the Article.

The “Restore Honor to Service Members Act” would remove the words “of the same or opposite sex.” This bill was written before the changes discussed above. It seems as if the intent was to limit the crime of “sodomy” to sex with animals.

HIV DISCRIMINATION

There are many issues involving servicemembers living with HIV. Two of the most discriminatory practices of the military concerning HIV are criminal prosecutions and the issuance of “safe sex” orders.

Regarding prosecutions, there is an ongoing practice of charging servicemembers with HIV with aggravated assault under UCMJ Article 128. In their letter to the Pentagon concerning UCMJ reform, the Center for HIV Law and Policy summed up the problems with this practice as follows:

“Bringing attempted murder and aggravated assault charges against servicemembers living with HIV reflects outdated and erroneous beliefs and misconceptions about the routes, risks, and consequences of HIV transmission. The legal standards applied in HIV criminalization cases regarding intent and harm deviate from generally accepted criminal law principles, and reflect long-outdated attitudes about HIV and servicemembers living with HIV. Prosecutions involving allegations of non-disclosure, exposure, or transmission of HIV conflict with public health priorities and violate basic principles of justice. Punishments imposed for non-disclosure of HIV status, exposure or transmission of HIV are grossly out of proportion to the actual harm inflicted, and reinforce the fear and stigma associated with HIV.”

Clearly, the prosecution of servicemembers living with HIV for assault needs to be stopped and the UCMJ should include a clear statement that HIV cannot be used to trigger a charge for assault under Article 128.

The other issue of “safe sex” orders has similar problems. There are cases where military prosecutors have charged servicemembers with violating or disobeying a “safe sex” order under UCMJ Articles 90 or 92. Again, as pointed out by the CHLP, these orders “may at times prohibit conduct that is scientifically and medically safe.” In addition, “safe sex” orders “implicate Constitutional privacy rights affirmed in *Lawrence v. Texas* 539 U.S. 558, 578 (2003).” The CHLP has urged the DOD “to issue a universal sexual health guidance to all servicemembers regardless of HIV status, consistent with that provided through the Centers for Disease Control and Prevention, addressing the prevention and diagnosis of all sexually transmitted infections and risks, including HIV.”

These and the many other issues concerning servicemembers with HIV show that there is need for serious reform in the military’s approach to sex, sexuality and sexual health.

TRANSGENDER SERVICE

The Department of Defense currently bans transgender people from military service. There are an estimated 15,000 transgender servicemembers at this time. Perhaps recognizing this problem, the services have recently changed the way they handle questions concerning transgender people. In July, the Pentagon announced that it would begin a review of transgender service. Most importantly, Secretary Carter stated that the review would be conducted under the presumption that the policy would be changed. Following this, both the Army and the Navy issued directives requiring that any transgender discharges to be handled by top-level authorities in charge of personnel matters rather than mid-level officers. The Air Force stated that transgender servicemembers would not be discharged unless there was some kind of problem that interfered with deployment or performance. The transgender policy review is expected to be completed by the end of January, 2016. Any change in policy is expected to be announced in the spring.

CONCLUSION

Much has changed since I began writing articles on Don’t Ask, Don’t Tell many years ago. The policy has since been repealed. Same-sex partners of servicemembers have now begun to be treated as other partners in terms of military benefits. The ban on transgender service seems to be about to go the way of DADT. The gains in terms of equality for all those who serve in the military have been enormous under the Obama administration. However, as stated elsewhere in this issue of *On Watch*, no matter how egalitarian the military becomes internally, we must not lose sight of the fact that its current mission is anti-egalitarian and anti-liberation. Now that the military is practically open to all who wish to “serve”, those contemplating such service should seriously consider who they would be serving and what that service would mean to those around the world struggling for independence and self-determination.

Jeff Lake is Chair of the MLTF Steering Committee.

ANNOUNCEMENTS

GI Rights Network Conference. The GI Rights Network will hold its annual conference in San Francisco on the weekend of May 27 to 30. Information about the agenda, housing, registration, etc., will be available shortly. In order to get an idea of how many people will be there, we're asking folks to RSVP now, by contacting MLTF at email@nlgmtf.org. For more information about GIRN, visit girightshotline.org

THE MILITARY LAW TASK FORCE of THE NATIONAL LAWYERS GUILD

ON WATCH is published quarterly by the Military Law Task Force of the National Lawyers Guild. Subscriptions are free with MLTF dues (\$25), or \$20 annually for non-members.

We welcome comments, criticism, assistance from Guild members, subscribers and others interested in military, draft or veterans law.

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

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

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