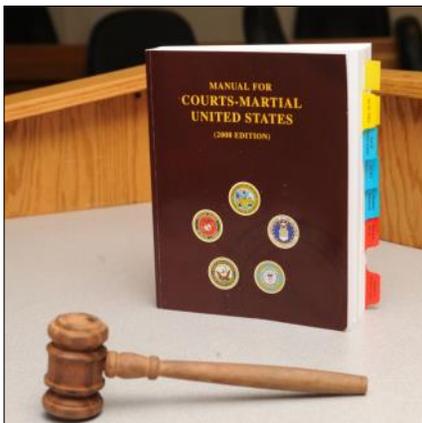


ON WATCH



THE MILITARY LAW TASK FORCE OF THE NATIONAL LAWYERS GUILD



MLTF SENDS COMMENTS TO DOD MILITARY JUSTICE REVIEW GROUP

The NLG was asked by the Department of Defense to “provide advice or recommendations to improve the military justice system” as part of a comprehensive review of the military justice system. Task Force members David Addlestone, James M. Branum, David Gespass, Jim Klimaski, Jeff Lake and Dan Mayfield crafted the reply reprinted here.

NEW YORK (June 30)— The National Lawyers Guild (NLG) today submitted comments to the Defense Department’s Military Justice Review Group as part of its comprehensive review of the military justice system. Recommendations to improve the system include eliminating the “convening authority” as the near-absolute final arbiter of what constitutes justice in a given case. The NLG also calls for eliminating criminal liability for acts that are purely military offenses, and for clarifying the effect of a conviction by summary court-martial.

incremental improvement without altering the basic inequities that lead so many to see military justice as an oxymoron, said David Gespass, NLG past president and one of the authors of the comments.

The NLG was the country’s first integrated national bar association and remains its largest human rights bar association. Its Military Law Task Force

(Continued on page 3) [U](#)



Sexual assault or sexual harassment complaints still prevent advancement

“We are gratified that this review is taking place, as changes in the court martial system are long overdue. We do not believe that anything less than a complete restructuring of the way the military handles offenses can be adequate. We have, therefore, focused on large changes, rather than the many small details that could lead to some

By Jim Klimaski

The Tailhook scandal occurred over 20 years ago. At least 83 women and seven men were identified as having been sexually assaulted at the Navy/Marine Corps

Tailhook Association Convention held in Las Vegas in September 1991. There were over 4,000 active, reserve and retired service members in attendance, including several Flag officers. What

(Continued on page 2)

SEPTEMBER 2014	IN THIS ISSUE	VOL. XXV, NO. 3
Military Justice Reform Letter	1	Regional News 7
Filing MSV complaints still ends careers	1	Amnesty Report on Civilian Deaths by US/NATO in Afghanistan 10
New MLTF Publications	2	NLG to ICC: Investigate War Crimes in Gaza 11
Discharge Upgrades 101	5	MLTF’s 2014 NLG Convention Schedule 12
News & Notes	6	

national lawyers guild
#Law4thePeople Convention
 September 3-7, 2014

Welcome, conventioners!
MLTF events, see back page

(Continued from page 1)

occurred at this gathering soon became public knowledge and calls by members of Congress for an investigation started a long battle between those in the military who wanted to sweep the matter under the rug and senior officials at the Department of Defense who wanted a thorough and complete investigation leading to changes in the military's attitude toward women in uniform. This struggle still continues with some success, but the victims of the harassment and assault continue to find themselves ostracized, their military career at an end. None of the sexual assault victims from the Tailhook scandal were able to continue their military careers.

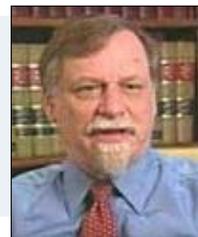
With a strong push by Congress, the various military services have begun to take a hard line on prosecuting the alleged perpetrators of sexual assault and harassment. Each service claims it has established a special teams of experienced prosecutors aided by victim witness counselors who help the complaining victim through the court martial process. But outside these legal proceedings little is done to assist the sexual assault victim should they wish to continue their military career.

Sexual assault victims find little empathy or sympathy from members of the unit, especially when the transgressor is also from the same unit. Even when the transgressor has been convicted, there is little benefit for the victim. Medical personnel — psychiatrists, psychologists and therapists try to direct the victim toward medical discharge. The command offers little assistance in normalizing the victim's situation with the unit. The services have not offered training for unit commanders and senior NCOs on handling these situations. Transfers outside of normal rotation are not easily arranged. Unless there is a genuine open slot for the sexual assault victim personnel of the gaining unit remain suspicious as to the reason for the new addition to their unit. So far the services have dealt with these transfers on an ad hoc basis with little planning and no followup. Many times the new commander is not apprised of the service members' situation and he or she volunteers the information directly. Also there are many career branches which are relatively small so that gossip and rumors will set the tone of the new unit environment for the sexual assault victim acceptance or rejection.

Sexual assault remains a major problem in the military. Concentrating on convicting and punishing the transgressor attacks only half the problem. The victim should not be forgotten once the court martial verdict is announced. ■ [i](#)

About the Author

Jim Klimaski is the principal in the law firm Klimaski and Associates, P.C. located in Washington, DC. He practices in the fields of Military Law, Employment Law, Security Clearances and Freedom of Information and Privacy Law, and currently serves on the MLTF steering committee.



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.

For membership info, see our website, or contact us using the info below.

Each issue is made available to the public on our website approximately one month after distribution to subscribers. A digital archive of back issues of this newsletter can be found on our website. See nlgmtf.org/onwatch/.

CONTACT INFO

Kathleen Gilberd, Executive Director
730 N. First Street, San Jose, CA 95112
email@nlgmtf.org; 619.463.2369

WEBSITE: NLGMLTF.ORG

ON WATCH PRODUCTION TEAM

EDITORS

Chris Ford, Kathleen Gilberd, Rena Guay, Jeff Lake

PUBLICATIONS COMMITTEE

James Branum, Chris Ford, Aaron Frishberg, Kathleen Gilberd, Rena Guay, Jeff Lake

New and Updated MLTF Publications

MLTF recent legal memos include:

- [Military Sexual Violence: A Guide to Sexual Assault and Sexual Harassment Policies in the U.S. Armed Forces](#)
- [Article 138 Complaints](#)
- [Military Medical Policies](#)
- [Representing Servicemembers in Involuntary Discharge Proceedings](#)

Find these and more at our new military law resources web page at

MILITARYLAWHELP.COM



(Continued from page 1)

(MLTF) has been defending the rights of military service members for nearly four decades and, prior to that, it had established offices in Japan and the Philippines to provide counsel to service members overseas. The MLTF has relied upon this long experience to formulate its proposals to the Military Justice Review Group. Its comments do not suggest that the court-martial system be fine-tuned; rather, they address what we see as fundamental problems that lead to a general perception of unfairness in the system as a whole, irrespective of how it may operate in any particular case.

The National Lawyers Guild believes there are two fundamental difficulties with the military criminal system as it now exists, both premised on the false belief that they are needed to maintain discipline. Notably, at the same time as defenders of the system assert the need for such discipline, they proclaim the US military as the best, most professional in history. In particular, if the men and women in uniform today are so overwhelmingly professional, well-educated and patriotic, we can be reasonably certain that they will overwhelmingly be sufficiently disciplined so as not to endanger the strength of the force.

The NLG believes these recommendations (reprinted in full in this issue, see sidebar) along with clarification regarding summary court-martial convictions would greatly improve the military justice system.

Members:

Get involved!

MLTF needs your assistance on the following program activities:

- Research/Investigation
- Publicity
- Fundraising
- Outreach
- Membership development
- Legislation/Advocacy



email@nlgmtf.org • 619.463.2369

NLG LETTER ON MILITARY JUSTICE REFORM

Thank you for inviting the National Lawyers Guild to participate in your comprehensive review of the military justice system. This letter details our recommendations to improve the system.

The National Lawyers Guild (NLG) was the country's first integrated national bar association and remains its largest human rights bar association. Its Military Law Task Force (MLTF) has been defending the rights of military service members for nearly four decades; prior to that, it had established offices in Japan and the Philippines to provide counsel to service members overseas. The MLTF has relied upon this extensive experience to formulate our proposals. We understand, and take pride in the fact, that we are not suggesting that the court-martial system be fine-tuned. Rather, we are addressing what we see as fundamental problems that lead to a general perception of unfairness in the system as a whole, irrespective of how it may operate in any particular case. These problems led, for instance, to the publication of Robert Sherrill's book, *Military Justice is to Justice as Military Music is to Music* in 1973. We hope you will agree with us that a comprehensive review of the military justice requires a comprehensive overhaul.

The National Lawyers Guild believes there are two fundamental difficulties with the military criminal system as it now exists, both premised on the false belief that they are needed to maintain discipline. Notably, at the same time as defenders of the system assert the need for such discipline, they proclaim the US military as the best, most professional in history. In particular, if the men and women in uniform today are so overwhelmingly professional, well-educated and patriotic, we can be reasonably certain that they will overwhelmingly be sufficiently disciplined so as not to endanger the strength of the force. Therefore, we are suggesting three basic changes: (1) the elimination of the "convening authority" as the near-absolute final arbiter of what constitutes justice in a given case; (2) the elimination of criminal liability for acts that are purely military offenses; and (3) the urgent need for clarification of the effect of a conviction by summary court-martial.

CONVENING AUTHORITY

Currently, the convening authority (CA) has near-absolute power over the conduct of the court-martial: the CA determines the charges to be brought, decides who is to be tried and who is not, selects the members of the court, accepts or rejects any potential plea agreement and making the initial decision on any degree of clemency after trial. This may work reasonably well in cases in which the CA exercises that authority nominally, relying on and accepting the recommendations of the staff judge advocate. But the potential for abuse is stark, and the perception of abuse is inevitable. In fact, the system only works reasonably when the CA serves as a rubber stamp and only the perception of power remains. Otherwise, fairness is lost. And even the perception of power diminishes the credibility of the system. We therefore propose:

1. Potential court members be selected at random from servicemembers (of all ranks) at the post where the trial is to take place. Both sides would get the opportunity to strike potential jurors for cause. We also suggest that

(Continued on page 4)

(Continued from page 3)

the accused have the option of a court composed of officers only, all ranks equal to, or above, that of the accused or all ranks. Regardless, the selection should be random from the entire list of qualified court members.

2. Commands should only have the power to recommend charges. Independent prosecutors would make actual charging decisions.
3. Pretrial agreements would not require approval by the CA.
4. Defendants should still enjoy multiple chances at clemency through pretrial agreements and review, but the agreements and review should be by an independent authority outside the chain of command of the accused. This could take the form of a staff judge advocate's office independent of the command. Such an office can still advise the command on other matters but would have a more traditional role of lawyer as an independent counselor and advisor.
5. Military courts should be standing courts which should not convened into existence by the same entity that makes decisions on who is prosecuted and are entirely independent. In fact, general courts-martial convictions constitute federal criminal convictions and thus military judges who hear general courts martial should go through Senate confirmation.

EXCLUSIVELY MILITARY OFFENSES

Such "offenses" as missing work, being late (AWOL, missing movement, etc.), disobeying orders, and insubordination, in any other context, are obviously not criminal offenses. Certainly, employers would have the authority to impose punishment for such offenses, but no such punishment would carry the additional potential stigma of a federal criminal conviction other than honorable discharge. There is no longer any reason, if ever there was, that these transgressions should be subject to prosecution by court-martial. If an individual commits such an offense under circumstances that actually cause injury to or endanger others, then they should be charged with such an offense. If all they do is cause the kind of disruption of routine caused by an unexcused absence from work, there is no reason for that to be deemed either criminal or quasi-criminal. Nevertheless, as federal employees, those in military service are entitled to appropriate due process before being deprived of a significant property or liberty interest.

Thus, such offenses should be dealt with administratively and with potential sanctions similar to those facing employees in civilian occupations such as demotion, loss of pay and termination. They should not be subject to incarceration.

Further, members of the military are faced with a particular conundrum when confronting an order they believe to be illegal. They have an obligation to disobey an illegal order, but doing so subjects them to discipline if whoever judging them determines that the order was legal. Clearly, this applies to those who refused to serve in Iraq, for example, because they believed the invasion was illegal.

In order to protect the interests of both the individual and the military services in regard to these offenses, we propose the following:

1. It shall be mandatory that, prior to any hearing, the individual meet with a member of Trial Defense Services or civilian counsel and be fully apprised of the rights enjoyed and potential consequences.
2. The individual shall have the right to refuse non-judicial punishment by a superior officer and demand a hearing by a tribunal independent of the chain of command. In the event separation or demotion is contemplated, such a tribunal shall be mandatory.
3. Proof of a violation shall be by clear and convincing evidence.
4. If the individual asserts the actions were taken based on the illegality of an order or that the infraction was otherwise committed so that they would not violate the law, it shall be a complete defense if it is proved by a preponderance of the evidence that the individual had a sincerely-held belief that what was being required was illegal and that there are substantial legal grounds to support that belief.
5. There shall be no grade of discharge. If an individual is separated because of a criminal conviction or because of other misbehavior, that may be reflected in the person's record, but not on the discharge papers and may be shared with potential employers with the consent of the individual. This change should not affect eligibility for veteran's benefits, which may be determined based on such objective criteria as the reason for the discharge and length and quality of service.

NEED FOR CLARIFICATION OF THE EFFECT OF A CONVICTION BY A SUMMARY COURT-MARTIAL (SCM)

The SCM was widely used before the enactment of the UCMJ. It was considered to be a criminal conviction. (One of the contributors of this comment had to, as an Air Force judge advocate, investigate an NCO accused of lying on a reenlistment when he left out a SCM conviction that occurred during World War II. It was found that the SCM was so frequent and summary that it was reasonable that he did not realize that he had a court-martial conviction.)

(Continued on page 5)

(Continued from page 4)

The UCMJ lists three types of courts-martial, the SCM being the lowest form. Proof must be beyond a reasonable doubt. Counsel is not provided; however, if an accused retains civilian counsel, we know of no instance of that counsel being excluded.

In *Middendorf v. Henry*, 425 U.S. 25 (1976), the Supreme Court held that the sixth amendment's right to counsel did not apply to the SCM type of "criminal prosecution." A discussion in the *Army Lawyer*, Jan 2014, DA PAM 27-50-488 at page 38, makes it clear that there is confusion as to the true nature of a SCM: stating that as the SCM is not a federal conviction, "[s]oldiers would have a criminal record either stating [in the FBI's Criminal Justice Information Services] 'subject found guilty by [SCM]' or 'nonjudicial disciplinary action.'" DODI 5505.11 provides for reporting adverse findings for SCM and NJP according to the above-cited article.

If the JAG Corps is confused, consider the possible reaction of a civilian court or employer to such information. And, how does a veteran with a SCM conviction answer the relevant question on a job application, summons for jury duty, or applications for various licenses? We urge clarification as to whether an adverse finding at a SCM is truly a federal criminal conviction that must be reported to the FBI and disclosed by veterans when asked about criminal convictions.

CONCLUSION

We believe these recommendations along with clarification regarding summary court-martial convictions would greatly improve the military justice system. If you have any questions concerning these recommendations, please contact us and we will be happy to answer any questions you may have.

The Task Force invites comments on these recommendations, either on the member discussion listserv, or to the executive director, and may consider some for publication in future issues of *On Watch* or on our website. ■ [f](#) [t](#)

DISCHARGE UPGRADING: AN OUTLINE FOR BEGINNERS

By Kathleen Gilbert

This outline was first published, along with an article by attorney Tom Turcotte, as Basics of Discharge Upgrading, a Military Law Task Force memo. The outline has now been updated to take into account current Discharge Review Board and Board for Correction of Military Records practices.

1. Discharge Upgrades in a Nutshell
2. Rumors
3. Preventing a Bad Discharge in the First Place
4. What the Review Boards Can Do
5. Time Limits
6. Types of Review
7. Arguments and Evidence
8. Representation
9. Resources
10. Forms

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 change 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 decision. BCMRs often accept late applications if they find it "in the interests of justice" to do so.
- 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.

(Continued on page 6)

(Continued from page 5)

ble, and should normally demand all of their rights to fight against a bad discharge while they are still in the military. If a less than honorable discharge can't be avoided, it's important to start gathering evidence in support of an upgrade even before the discharge takes place.

2. Rumors

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 obtain a discharge.
- 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 gunnery sergeant hasn't really 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 or result in an even less favorable character of discharge.
- Waiving all the rights in a discharge proceeding does not increase the chances of a good discharge unless it is part of a signed conditional waiver 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. In some cases, however, it is useful to wait a while before applying in order to build up a good civilian record.
- 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 or attorney.
- 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 argue for retention. With good of the service discharges (discharges in lieu of court-martial), and with admin discharges that can be no less than general in character, there is usually no right to a board. However, soldiers who've been in for over six years are entitled to a board no matter what

(Continued on page 7)

News

&

Notes

Send member news, resources and tips to the editors at nlg.mltf@gmail.com

Military Court Rules: LexisNexis has announced publication of the second edition of *Military Court Rules of the United States (2014)*. The volume is a project of the National Institute for Military Justice, and includes trial and appellate rules of procedure, service rules of professional responsibility and judicial conduct, and citation guides.

Defending Veterans: The National Veterans Foundation and the Veterans Defense Project have published *The Attorney's Guide to Defending Veterans in Criminal Court*. The book is available for purchase through the VDP website, veteransdefenseproject.org.

New Medical Regulations: DoD has reissued DoD Instruction 1332.18, canceling both the older version and DoD In-

struction 1332.38., along with several Memoranda and Directive-Type Memoranda. The new Instruction can be found at www.dtic.mil/whs/directives/corres/pdf/133218p.pdf. At the same time, DoD has published two volumes of a DoD Manual 1332.18, which can be found at www.dtic.mil/whs/directives/corres/pdf/133218m_vol1.pdf and www.dtic.mil/whs/directives/corres/pdf/133218m_vol2.pdf.

Spying on Lawyers: The NLG has published *Breach of Privacy: Spying on Lawyers in the United States*, by Guild researcher Traci Yoder. The booklet includes discussion of spying on the Guild's Military Law Office during the Vietnam era, and comments by MLTF members on the problem of surveillance. Copies are available for download at www.nlg.org/resource/reports.

(Continued from page 6)

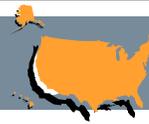
the character of discharge may be. When people aren't entitled to a board, or waive a board, they can submit written statements on their own behalf, witness statements and other evidence, and a letter or brief from their counselor or attorney arguing for a better discharge or retention. With a court-martial, 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 to waive their rights and accept discharge may want to make a record of any mitigating reasons for their action.

- GIs who decide not to challenge a bad discharge, or whose challenges aren't successful, should normally gather records and 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, 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 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, pardon or eliminate a special or general court-martial conviction.
- BCMRs can change the reason for discharge to or from medical retirement or discharge. In some cases, the BCMR will decide vets should have been medically retired as of the date of their 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, such as 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.

(Continued on page 8)



REGIONAL NEWS

Chicago MLTF

The Chicago Chapter of the Military Law Task Force continues to receive calls on a regular basis from service members needing assistance with discharge upgrades. We are also starting to notice a trend of service members being forced out for misconduct that would not have been a problem even five years ago. This trend is being driven by the military's effort to reduce the size of the armed forces. We have been told by people with 20+ years in the service that the same thing happened at the end of the Vietnam War and the 1st Gulf War. By pushing people out with bad paper the military avoids having to pay for a number of benefits.

Right now we are focusing on the NLG Convention in September and the workshop on discharge upgrades. We hope to train a few more people to assist with discharge upgrades; the need continues to grow. We have been reaching out to local veterans organizations hoping to grow an Army of volunteers that can guide service members through the upgrade process.

Submitted by Libby Frank

Bay Area Military Law Panel

One member of BAMLPL is working with the parents of a Marine at Twenty-Nine Palms who attempted suicide on base. Client has serious head injuries requiring long-term care. He jumped within an hour after meeting with a base therapist who appears to have been unaware of prior suicide attempts during enlistment. Command informed the parents that Quantico directed him to administratively discharge the client for a positive drug test the day of the jump. We are in the process of getting command to impose non-judicial punishment instead.

Another member is working with Marine in L.A. who wants to be separated after completing basic — terrified of combat, suffering panic attacks, yet not a CO. Recruiter abuse involved - lying to client and his family regarding his options and likelihood of discharge during basic. Contact with command pending, with goal of obtaining uncharacterized separation for client prior to specialized training.

Next up - GI Rights Hotline law student counselor training on either 8/29 or 9/12. If you know any law students (or non law students) in the Bay Area who may be interested in working the hotline as a counselor, please have them contact GI RIGHTS HOTLINE SF.

Submitted by Adrienne Haddad

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, in whole or 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 the time limit may be waived 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. BCMRs are more likely to accept late applications when they raise substantive issues. 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, except for the Army Board, which holds that requests for reconsideration must be made within a year of the initial denial.
- 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 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 vets. 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 Discharge Review Boards hold hearings in the Washington, DC, area, except for the Air Force, which travels to other major cities periodically. DRBs don't pay travel expenses for applicants, counsel 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 by a preponderance of evidence 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 vet's 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, nor will they contact witnesses whose names are provided by applicants. 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. BCMR cases involving the Whistleblower Protection Act give the Board broader authority to bring witnesses.

(Continued on page 9)

(Continued from page 8)

- 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). For example, vets can argue that there were mitigating circumstances surrounding the problems or misconduct that led to a bad discharge (e.g., 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, unless their cases rest on significant legal errors in the discharge. 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 dishonorable discharges, 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).

IMPORTANT: 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.
- Making sure this includes 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 the command and the testing laboratory, 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.

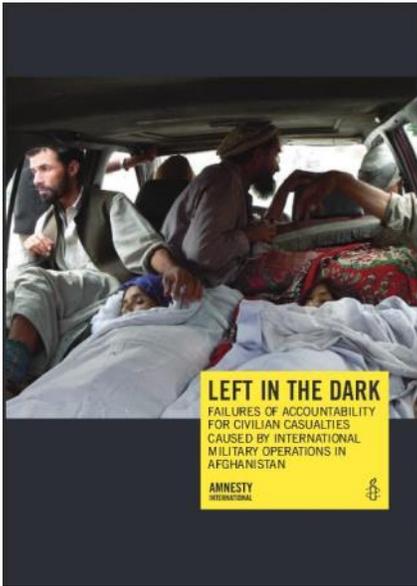
8. Representation

- 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 Upgrade Manual* from the Connecticut Veterans Legal Center can be found at ctveteranslegal.org/wp-content/uploads/2012/12/Connecticut-Veterans-Legal-Center-Discharge-Upgrade-Manual-November-20111.pdf
- *The Discharge Upgrading Manual*, while not updated since 1990, has useful information on a number of discharge upgrade issues. Regulation-based arguments and discussion should be checked against current regu-

(Continued on page 10)



AMNESTY INTERNATIONAL RELEASES REPORT ON CIVILIAN DEATHS IN AFGHANISTAN BY US/NATO FORCES

11 August 2014 - The families of thousands of Afghan civilians killed by US/NATO forces in Afghanistan have been left without justice, Amnesty International said in a new report. Focusing primarily on air strikes and night raids carried out by US forces, including Special Operations Forces, Left in

the Dark finds that even apparent war crimes have gone uninvestigated and unpunished.

Thousands of Afghans have been killed or injured by US forces since the invasion, but the victims and their families have little chance of redress. The US military justice system almost always fails to hold its soldiers accountable for unlawful killings and other abuses," said Richard Bennett, Amnesty International's Asia Pacific Director.

"None of the cases that we looked into – involving more than 140 civilian deaths – were prosecuted by the US military. Evidence of possible war crimes and unlawful killings has seemingly been ignored."

The report, which was also published in Persian and Pashto, documents in detail the failures of accountability for US military operations in Afghanistan. It calls on the Afghan government to ensure that accountability for unlawful civilian killings is guaranteed in any future bilateral security agreements signed with NATO and the United States.

Amnesty International conducted detailed investigations of 10 incidents that took place between 2009 and 2013, in which civilians were killed by US military operations. At least 140 civilians were killed in the incidents that Amnesty International investigated, including pregnant women and at least 50 children. The organization interviewed some 125 witnesses, victims and family members, including many who had never given testimony to anyone before.

Two of the case studies — involving a Special Operations Forces raid on a house in Paktia province in 2010, and enforced disappearances, torture, and killings in Nerkh and Maidan Shahr districts, Wardak province, in November 2012 to February 2013 — involve abundant and compelling evidence of war crimes. No one has been criminally prosecuted for either of the incidents.

Qandi Agha, a former detainee held by US Special Forces in Nerkh in late 2012, spoke of the daily torture sessions he endured. "Four people beat me with cables. They tied my legs together and beat the soles of my feet with a wooden stick. They punched me in the face and kicked me. They hit my head on the floor." He also said he was dunked in a barrel of water and given electrical shocks.

Agha said that both US and Afghan forces participated in the torture sessions. He also said that four of the eight prisoners

(Continued on page 11)

AMNESTY INTERNATIONAL



the Dark finds that even apparent war crimes have gone uninvestigated and unpunished.

"Thousands of Afghans have been killed or injured by US forces since the invasion, but the victims and their families have little chance of redress. The US military justice system almost always fails to hold its soldiers accountable for unlawful killings and other abuses," said Richard Bennett, Amnesty International's Asia Pacific Director.

"None of the cases that we looked into – involving more than 140 civilian deaths – were prosecuted by the US military. Evidence of possible war crimes and unlawful killings has seemingly been ignored."

The report, which was also published in Persian and Pashto, documents in detail the failures of accountability for US military operations in Afghanistan. It calls on the Afghan government to

(Continued from page 9)

lations. Find it at ctveteranslegal.org/wp-content/uploads/2012/12/MilitaryDischargeUpgrading_Ir.pdf

10. Forms

- Information about ordering military records, and the form used to order most records, Standard Form 180, are available from the National Personnel Records Center, at <http://www.archives.gov/st-louis/militarypersonnel/standard-form-180.html>
- The application form for the Discharge Review Boards, DD form 293 (PDF), can be found at www.dtic.mil/whs/directives/infomgt/forms/eforms/dd0293.pdf

- The application form for the Boards for Correction of Military/Naval Records, DD form 149 (PDF), can be found at www.dtic.mil/whs/directives/infomgt/forms/eforms/dd0149.pdf
- The forms mentioned above can also be obtained from VA regional offices. ■



ABOUT THE AUTHOR

Kathleen Gilberd is a legal worker in San Diego, working primarily in the area of discharges and discharge review. She is the executive director of the Military Law Task Force, and is on the board of directors for the national GI Rights Network.

held with him were killed while he was in US custody, including one person, Sayed Muhammed, whose killing he witnessed.

Formal criminal investigations into the killing of civilians in Afghanistan are extremely rare. Amnesty International is aware of only six cases since 2009 in which US military personnel have faced trials.

Under international humanitarian law (the laws of war), not every civilian death occurring in armed conflict implies a legal breach. Yet if civilians appear to have been killed deliberately or indiscriminately, or as part of a disproportionate attack, the incident requires a prompt, thorough and impartial inquiry. If that inquiry shows that the laws of war were violated, a prosecution should be initiated.

Of the scores of witnesses, victims and family members Amnesty International spoke to when researching this report, only two people said that they had been interviewed by US military investigators. In many of the cases covered in the report, US military or NATO spokespeople would announce that an investigation was being carried out, but would not release any further information about the progress of the investigation or its findings – leaving victims and family members in the dark.

“We urge the US military to immediately investigate all the cases documented in our report, and all other cases where civilians have been killed. The victims and their family members deserve justice,” said Richard Bennett.

The main obstacle to justice for Afghan victims and their family

members is the deeply flawed US military justice system.

Essentially a form of self-policing, the military justice system is “commander-driven” and, to a large extent, relies on soldiers’ own accounts of their actions in assessing the legality of a given operation. Lacking independent prosecutorial authorities, it expects soldiers and commanders to report potential human rights violations themselves. The conflict of interest is clear.

In the rare instances when a case actually reaches the prosecution stage, there are serious concerns about the lack of independence of US military courts. It is extremely rare that Afghans themselves are invited to testify in these cases.

“There is an urgent need to reform the US military justice system. The US should learn from other countries, many of which have made huge strides in recent years in civilianizing their military justice systems,” said Richard Bennett.

The report also documents the lack of transparency on investigations and prosecutions of unlawful killings of civilians in Afghanistan. The US military withholds overall data on accountability for civilian casualties, and rarely provides information on individual cases. The US government’s freedom of information system, meant to ensure transparency when government bodies fail to provide information, does not function effectively when civilian casualties are at issue.

Amnesty International also urges the Afghan government to immediately establish its own mechanism to investigate abuses by the Afghan National Security forces, who will assume full combat responsibility by the end of 2014. ■

NLG SEEKS INVESTIGATION INTO POTENTIAL WAR CRIMES COMMITTED BY ISRAEL AND US IN GAZA

August 22 — The National Lawyers Guild (NLG), Center for Constitutional Rights, International Association of Democratic Lawyers, Arab Lawyers Union, and American Association of Jurists sent a [letter](#) to Fatou Bensouda, Prosecutor of the International Criminal Court (ICC), urging her to initiate an investigation of war crimes, genocide, and crimes against humanity committed by Israeli leaders and aided and abetted by U.S. officials in Gaza. Under the Rome Statute, the ICC has the power to hold individuals criminally accountable for the most serious of crimes. The letter cites supporting factual allegations for each crime.

Since Israel launched Operation “Protective Edge” on July 8, 2014, more than 2,000 Palestinians have been killed,

more than 80% of whom are civilians, including more than 470 children. In addition to the shelling of schools, mosques, and UN-designated shelters, Palestinians are denied access to basic human necessities such as water, food and medicine.

The letter to the ICC quotes UN Secretary General Ban Ki-moon and High Commissioner for Human Rights, Navi Pillay, who have more than once called for accountability and justice in Gaza.

As NLG President Azadeh Shahshahani stated, “It is incumbent upon the International Criminal Court to initiate an investigation into these crimes as well as the US government’s aiding and abetting of them through its military aid.” In addition to the \$3.1 billion in annual mili-

tary aid, the letter notes that in the midst of Operation “Protective Edge,” the US has transferred \$1 billion in ammunition to Israel as well as a \$225 million payment for Israel’s Iron Dome missile defense system.

The NLG and other signatories to the letter conclude that “the initiation of an investigation would send a clear message to all involved either in committing or in aiding and abetting the aforementioned crimes that they stand to be held personally accountable for their actions. This could help end the continuing breaches of international law and end the impunity that has underpinned the ever increasing violence in the region that has caused – and continues to cause, extreme suffering to its civilian population.” ■

MLTF 2014 NLG CONVENTION EVENTS

MLTF CLE

CONTINUING LEGAL EDUCATION

DISCHARGE UPGRADING & DISCHARGE REVIEW

Thursday, Sept. 4 8:30am - 12:30pm

Cost: Attorneys \$75
Law students and legal workers \$25

National Lawyers Guild

Law for the People Convention

September 3-7, 2014

Crowne Plaza Chicago Metro

THURSDAY, 1:30 PM TO 4:00 PM

MLTF membership meeting

Partial agenda:

- Presentation on military policy and implications for MLTF's work
- Priorities and projects for the coming year
- Steering committee elections
- Finances

After the meeting we will adjourn to the hotel bar for drinks, snacks and informal conversation, 4 pm to ?.

SUNDAY, 10:45 AM TO 12:00

CLE WORKSHOP **Military Sexual Assault: Advocacy in Reporting Assaults and Countering Retaliation**

Throughout the convention, checkout the MLTF literature table for several new and updated memos, the BAMLP/MLTF training CD, and handmade crafts. All help fund MLTF programs and services.

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.

To join, or for more information, contact us by email or phone, or visit our website or social media pages.

 www.nlgmltf.org

 facebook.com/nlgmltf

 twitter.com/military_law



The Military Law Task Force

730 North First Street
San Jose, CA 95112

Phone: 619- 463-2369
E-mail: email@nlgmltf.org

PLEASE
PLACE
STAMP
HERE