



# ON WATCH

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## 2011 convention highlights Guild involvement in new global activism

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MLTF steering committee member Reber Boult talks with Venezuelan CNE President, Tibisay Lucena, who spoke at the 2011 NLG convention about her country's electoral process.

BY REBER BOULT

Members of the National Lawyers Guild assembled in Philadelphia from October 13 to 16, 2011, for the annual convention, called "Law for the People." The hundreds of members and speakers at the convention showed that the NLG is still alive and kicking here in the 21<sup>st</sup> Century.

One of the speakers, Harold Jordan of Philadelphia, who has attended over a dozen of its conventions, remarked that "Militarism is not going away. Events like this are needed for continuity in fighting it." There was so much going on that your reporter could only cover a small part of it (especially as he was charged with putting on one of the many workshops). But here are some samples and examples of the myriad activities.

### Countering Racism

A panel titled *Islamophobia: The New McCarthyism* was fascinating. It's especially fascinating that it was moderated by a Guild Vice President who works in Atlanta for the American Civil Liberties Union (ACLU). No big deal there, but she was born in Iran and was one of the candidates for president of the Guild. Her name is Azadeh Shahshani.

These panelists, mostly women of Arab, Iranian, or South Asian background, told the audience of the campaigns by the FBI, CIA, state legislatures, local police, and private funders, abetted by some court decisions, to stir up prejudice against Muslims. The agencies had, for example, sent an informer, whose mission was to incite violence, into a mosque. They equipped the informer

## DADT: Recent developments

Repeal just part of struggle for full equality

BY JEFF LAKE

The U.S. Military's "Don't Ask, Don't Tell" (DADT) policy ended by operation of law on September 20, 2011. Following the end of the policy, legal advocates are continuing to press for full equality for gay and lesbian service-members. This article will summarize recent developments in this area.

The case of the *Log Cabin Republicans v. Gates* challenging DADT resulted in a worldwide injunction against DADT and has been on appeal at the Ninth Circuit since the fall of 2010. Arguments were held in September concerning whether or not the lawsuit should continue. On September 29, 2011, a per curiam opinion was issued holding that the case is now

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with a camera in his shirt button and a concealed microphone on his key chain (he'd "misplaced" his keys and they'd be turned in to the Imam's office where they'd record religious interactions).

One panelist, Nina Farnia (also of Iranian heritage), a San Francisco lawyer who has handled wide ranging cases involving discrimination against women (including by Wal-Mart) and Muslims, took issue with the title of the panel. She cautioned that we shouldn't be calling it "Islamophobia"; it's simply "racism and white supremacy." Using that clumsy term, she feels, obscures that, reaffirms whiteness as a dominant value, and opens the way for the racists to further pervert Dr. King's call for a degree of color blindness.

A prominent example of racist state politicians straight out stirring up prejudice is all the foofaraw about Sharia law. Actually Sharia requires Muslims to abide by the laws of the country where they live, so what's all the fuss about? It's racism, of course. Another example: the FBI hires private contractors to teach a false and derogatory description of Islam to its agents and local police.

The panel didn't even deign to bring up dealing with the racist canard that it can't be racism because Arab is a language group and Muslim is a religion so no race is involved. If one wants to waste time on such things, your reporter suggests, consistently with the writings of a professor, that if it feels and smells like racism, that's what it is.

### **CR Workshop**

We can't leave out the workshop put together by Kathy Gilberd, Executive Director of the Guild's Military Law Task Force, and your reporter, Reber Boult, a person with major roots in Nashville. It was titled *Countering Mili-*

*tary Recruitment* and featured panelists discussing what one might say to a person thinking about signing up for the military, getting into classrooms to say it, facilitating enforcement of laws that allow opting out of taking military tests and being recruited, enforcement of treaties designed to keep 17-year-olds from being soldiers, and the general militarization of society.

Military recruiters have largely unfettered access to high schools (but use most of that access in low income neighborhoods) and a lot of teachers display recruiting posters and other military exhortations in their classrooms. Students also get large doses of recruitment from the mass media. But often people and materials opposing recruitment are excluded. (See the article on this topic in this issue of *On Watch*.) We live in a barrage of pro-military urgings and there's little in the way of social movement to counterbalance that like there was when the "GI Movement" contributed greatly to ending the war against Vietnam. A salvo in that barrage is the pervasive use of that linguistic carryover from World War II -- referring to the military as "service" and thanking military members for their service to our country when, in fact, it's detrimental to the country and only "serves" the imperial designs of those who are making big money from it.

### **Labor and economic justice concerns**

Several panels dealt with labor issues. There was focus on the significantly successful attacks on labor unions in the last several decades, which has substantially accelerating recently. The billing for one panel said this looks like it's leading to "an economic system that provides super profits for the richest of the rich while providing only unemployment, foreclosures and declining incomes to the rest of us." This panel's members all had union connections and, but for the moderator, were African American or Latino.

## **ON WATCH**

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Panelist Roger Toussaint congratulated the Occupy Wall Street movement with a reference to Frederick Douglass. (The Occupy Philly tent city was on the concrete plaza in front of City Hall, a few blocks away. A number of the conventioneers went and checked it out and several of them joined its march through downtown.) He likened this year's attack on public employee unions to stripping the wiring and plumbing from the houses of our democracy. He said organized labor is in deep trouble in this country and that's partly its leaders' fault, here in this time when the attack from management is so severe. For example, even before the recent assault by Midwestern Republican governors, union negotiators damaged solidarity by routinely acquiescing to two-tier classifications of employees. He mentioned some larger issues where some labor leaders have been missing the train: Although the environment will be one of the defining issues of this Century, like civil rights was previously, climate change legislation would have succeeded in Congress if labor had pushed it and, even worse, labor has actually supported the pipeline from Canada to Texas to transport (or leak) super dirty Canadian tar sands oil for export from the U.S. Many leaders have undermined labor's strength by being resistant to helping immigrants, most recently by not strongly opposing the present spate of laws criminalizing immigrants.

Apropos of the narrow focus in this country, where organized labor is not doing well, panelist Priscilla Gonzalez cited writer Bill Fletcher's account of what a South African said. In essence that was "In the U.S., unions represent the interests of their members; in South Africa, unions represent the interests of the entire working class."

A good many other ideas were mentioned by members of this panel. An expanding source of jobs, and so an organizing opportunity, is the increased need for currently scarce elder-care workers as the baby boomers become geriatric. Making these into good jobs, making the care affordable to the consumers, putting in a career ladder and, where needed, a path to citizenship, are goals. The right is pushing for privatization of government activity. It's propagating fear. Some unions and other organizations are cultivating links with community organizations and creating community workers' rights boards to expose companies' injustices to workers.

Another labor panel highlighted organized labor's difficulties in Colombia and México (which happen to be the two major Latin American countries with governments most closely aligned with the U.S. government). Colombia is a huge civil liberties disaster, with 60,000 to 250,000 labor people dead or disappeared in recent years. The problems have accelerated in the last couple of years, simultaneous

with a flood of announcements that the problems are over. In México, PAN (the most conservative of the political parties) presidents of the past few years have done some serious, illegal, and dishonest union busting, especially in public utilities and mining.

The many other panels and workshops included more on racism (one of them presented by The United People of Color Caucus (TUPOCC), another on military issues, more on international law, several on issues particularly affecting immigrants (especially the state laws criminalizing immigrants), energy (nuclear and hydrocarbon) including its relation to climate, defending people prosecuted for expressive activity, decolonization of indigenous America, issues gay people face, surveillance and spying, the expanding prison population, opening a law practice, what lawyers might be able to do about the economic crisis, police misconduct cases, and low power FM radio licenses. An official of the Venezuelan government spoke to one of the sessions. She discussed her government's successful program to get more people to vote. She left it to others to point out the irony that while Venezuela is expanding voter participation, the U.S. is suppressing it.

#### NLG notables seen, heard and remembered

Here are a few of the many interesting people seen there. Ann Fagan Ginger, the matriarch of the Guild , with it since its early days, was hawking information on one of her specialties: how to use international agreements to protect people in this country. John Brittain had worked on civil rights cases in Mississippi in the 60s, starting while still a law student; he went on to become a law professor and President of the Guild. Kent Spriggs of Tallahassee, Florida, also represented civil rights workers in 60s Mississippi and has represented numerous plaintiffs in major employment discrimination cases. Mary Howell has long been New Orleans' go-to lawyer for civil rights. Bruce Ellison of Rapid City, South Dakota, does the heavy lifting on politically difficult Indian cases, including that of Leonard Peltier. Luis Enriquez "Lucho" Ramirez of México, head of the Latin American Labor Lawyers Association pointed out that global capitalism is in crisis; he advocated a 20 point program of labor rights proposed by his Association. Roger Toussaint, International Vice President of the Transport Workers Union of America, started out as a cleaner with the New York City Transit Authority. David Kairys of Philadelphia, a legal scholar of first magnitude, came to sign and sell one of his books, *Philadelphia Freedom, Memoir of a Civil Rights Lawyer* (and donate part of the proceeds to the Guild). George Ware, a consumer of Guild lawyers' services in Nashville and elsewhere during his time as one of the Student Non-Violent Coordinating Committee's (SNCC) most articulate advocates for black power, dropped in.

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## MLTF membership meets in Philadelphia

BY KATHLEEN GILBERD

The Military Law Task Force held its annual membership meeting during the convention, to discuss future priorities and other Task Force business. About 20 members and guests from around the country listened to a discussion on the implications of perpetual war for our work, led by David Gespass. David pointed out that we need to do our best to make sense of the trajectory of the anti-war movement in light of on-going warfare, and help to turn it into organized resistance that can change the dynamics of our society.

This was followed by a discussion of Task Force programmatic work, leading to a consensus that our main priority for the coming year will be providing legal support for GI organizing efforts. Suggestions for work under that priority ranged from support for military resisters, dissidents and conscientious objectors to support for Iraq Vets Against the War's Operation Recovery (focusing on the military's failure to treat ill and injured servicemembers), from challenges to sexual harassment and sexual assault to assistance for GI coffeehouses. At the same time, the meeting made it clear that support for GI organizing would not preclude work outside that priority area.

The meeting developed a number of suggestions for Task Force work in general—improving the website, collaborating on projects with the International Committee, doing more media work, publication of a membership directory, etc.

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Leonard Weinglass, who died of a rapidly aggressive cancer in March of this year, was memorialized at the convention. According to people he represented and lawyers who worked with him, he was the greatest movement lawyer of the 20<sup>th</sup> Century. His friend, Michael Steven Smith, eulogized:

Len was not a sixties radical. He was something more unusual. He was a fifties radical. He developed his values, his critical thinking and worldview at a time when non-conforming was rare. He told a newspaper interviewer ... in 1980 that '... I don't believe capitalism is now compatible with democracy. ... I want to spend my time defending people who have committed their time to progressive change.' ★

*Reber Boult is an attorney in Albuquerque, NM, and a member of the MLTF steering committee.*

Steering Committee elections were held, adding two new members to the Committee — Karen Detamore (an attorney in Philadelphia and a long-time MLTF member) and Rena Guay (a legal worker in Oklahoma City, a more recent member of the Task Force, and the production editor for *On Watch*). Jeff Lake, Jeffrey Segal, James Branum and Kathy Gilberd were re-elected, Kathy explaining that she would no longer serve as co-chair, since she is now the Task Force's part time executive director. (Other Steering Committee members, not up for re-election this year, include Dan Mayfield, Aaron Frishberg, Reber Boult, Kathy Johnson and David Gespass [emeritus].)

A discussion on fund-raising was spirited. The meeting agreed that we should develop a monthly donor program (which can be done on our website with PayPal), increase outreach to other activist communities for financial support, and continue work currently being done on foundation fund-raising. Plans were made for a fund-raising brochure, and attendees were encouraged to contribute recipes and time to a cookbook fund-raising project. ★

*Kathy Gilberd is a legal worker in San Diego and serves as executive director of MLTF.*

**Top and bottom:** MLTF membership meeting. **Middle:** MLTF Workshop on counter-recruiting with panel members Oskar Castro, Maria Santelli and Reber Boult.



*Photos by James Branum*



## Using federal courts in representing military personnel

*Editor's Note: The Guild's MLTF sponsored a half-day workshop at the Philadelphia NLG Convention entitled "Using Federal Courts in Representing Military Personnel." The workshop covered such topics as the breadth of federal court jurisdiction over the military, the standards of review, when it is necessary to exhaust administrative remedies, and review by the U.S. District Courts and U.S. Court of Federal Claims. Jim Klimaski and Lynn Miller from his law firm presented this section of the program. The second part of the program, concerning the use of habeas corpus, particularly in reference to conscientious objectors, was presented by Peter Goldberger. The workshop ended with a question and answer period which expanded upon information in the formal presentation. The following article discusses some major points presented at the workshop.*

BY JIM KLIMASKI

Federal courts are not foreclosed to active duty service members. The earliest reported case goes back to 1806. See *Wise v. Withers*, 3 Cranch 331. Since the end of World War II the Supreme court has frequently reaffirmed the right of service members to access Federal courts. See *Orloff v. Willoughby*, 345 U.S. 83 (1953), Doctor challenged induction into the Army due to failure to commission him as an officer; *Brown v. Wilson*, 346 U.S. 137 (1953), Service member has right to petition for writ of habeas corpus challenging court martial conviction; *Brown v. Glines*, 444 U.S. 348 (1980), Service member challenge to base rule requiring commander's approval before circulating a petition to Congress.

However, this right of access has its limitations. See *Chappell v. Wallace*, 462 U.S. 296 (1983), which barred enlisted military personnel from suing their commanding officer for money damages for alleged Constitutional violations. The Court compared this to actions under the Federal Tort claims Act which the Court had previously barred to service members in *Feres v. United States*, 340 U.S. 135 (1950).

In setting the standard for judicial review of an action by a service member most circuits have followed the case of *Mindes v. Seaman*, 453 F.2d 197 (5<sup>th</sup> Cir. 1971). The other circuits follow the guidelines set by the 3<sup>rd</sup> Circuit in *Dillard v. Brown*, 652 F.2d 316 (1981). In analyzing the right to access, the courts

first determine if there is an allegation of a deprivation of a constitutional right or violation of applicable statute or service regulation. If so then the court moves on to a determination as to whether or not any appropriate administrative measures have been exhausted. Once past those hurdles, the court will "weigh the nature and strength of the challenge to the military determination, the potential injury to the plaintiff if review is refused, the type and degree of anticipated interference with the military function and the extent to which military discretion or expertise is involved in the challenged decision."

Most Federal cases where the plaintiff is a service member come before the court as a review of some administrative board decision such as those from the Boards for Correction of Military Records. The District court will apply an "arbitrary and capricious" standard of review as they are usually brought to the court under the Administrative Procedures Act. See *Kries v. Sec'y of the Air Force*, 866 F.2d 1508 (D.C. Cir 1989). Otherwise the military case would be brought to the U.S. Court of Federal Claims under the provisions of the Tucker Act or the Military Pay Act when the monetary claim is in excess of \$10,000. ★

*James Klimaski is a member of the NLG Military Law Task Force Steering Committee and a long time military law practitioner.*

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## DADT repeal and discharge review

BY KATHLEEN GILBERD

On Sept. 20, 2011, as the Don't Ask, Don't Tell (DADT) repeal went into effect, the Department of Defense issued a policy memo to provide guidance for the services' discharge review boards (DRBs) and Boards for Correction of Military/Naval Records (BCMRs). The Memo, "Correction of Military Records Following Repeal of Section 654 of Title 10, United States Code," sets out policy for consideration of DADT (and in some cases its predecessor policies) cases. It has not yet been incorporated into DRB or BCMR regulations.

To begin with, the repeal "will be considered a sufficient basis" to support reconsideration for applicants discharged under DADT or its predecessors. DRB and BCMR applicants will not be required to produce new material evidence or arguments in order to obtain a new review if they were discharged for homosexual conduct.

The memo states that, for servicemembers discharged under DADT or prior policies, the DRBs "shall normally" grant requests to change the narrative reason for discharge from homosexual conduct or the like to "Secretarial Authority." DRBs shall also recharacterize discharges as honorable and/or change reenlistment codes to RE IJ. (This despite the fact that DRBs are not empowered to change reenlistment codes!) These actions are authorized if (1) the discharge is based solely on DADT or a predecessor policy and (2) there are "no aggravating factors in the record, such as misconduct." While applications are to be reviewed on a case-by-case basis, the memo adds that honorable or general discharges should "normally be considered" an indication that there are no aggravating factors.

It remains to be seen how the DRBs will interpret this. The memo might be read as an acknowledgement that many servicemembers received a general characterization merely because homosexual conduct was the reason for discharge, not because their records warranted such characterization. It might be read as authority to deny changes of characterization if the specific aggravating circumstances warranting other than honorable discharge under DADT and its immediate predecessor are present in the record. The memo's wording may well encourage the DRBs to search applicants' records for any indications of misconduct, whether or not related to homosexual conduct and whether or not made the subject of findings. (DADT aggravating circumstances in-

cluded homosexual acts with a minor; with a subordinate in circumstances violating fraternization policies; for compensation; with force, intimidation or coercion; aboard a military ship or aircraft; or in other locations under military control when privacy was not assured. Under DADT and the policy immediately prior to it, specific findings of aggravating circumstances were required for an other-than-honorable discharge, though separation authorities and review boards often ignored that requirement.)

Where there are multiple reasons for discharge, the DRBs will apply existing policy to the other reasons—thus someone dual-processed for DADT and misconduct would be able to change the misconduct discharge only under traditional propriety and equity reasons.

Regarding the BCMRs, the memo says that : "it is DoD policy that broad, retroactive correction of records from applicants discharged under DADT are not warranted. Although DADT is repealed effective September 20, 2011, it was the law and reflected the view of Congress during the period that it was law.

"Similarly, DoD regulations implementing various aspects of DADT were valid regulations during that same period. Thus, a DADT discharge should not by itself be considered to constitute an error or injustice that would invalidate an otherwise proper action taken pursuant to DADT and applicable DoD policy."

The point of this, the memo makes clear, is that correction to show continued service, restoration in grade or position, credit for time lost or increase in separation pay would not normally be appropriate. On the other hand, repeal "may be a relevant factor" in considering requests to change the narrative reason for discharges, requests to recharacterize discharges as honorable and/or requests to change RE codes.

The memo notes that these restrictions on BCMR action do not prevent correction of records when DADT discharge was erroneous or unjust as applied to an individual servicemember.

The DoD memo also refers to an earlier DoD memorandum on "Repeal of DADT and Future Impact on Policy" dated January 28, 2011. The latter memo offered prospective policy guidance on, among other things, re-entry

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## Counter-recruiting and militarism in the schools

BY MICHAEL DEDRICK

*Editor's Note: The following article continues the discussion of counter-recruitment highlighted in the last issue of On Watch. The author recounts his experience in dealing with the schools in the Puget Sound area of Washington State and suggests strategies for keeping military recruiters away from high school students.*

It would be difficult to overstate the invasive and corrosive effects of militarism in our schools. While there has been progress in challenging the rise of militarism in schools in particular, and society in general, the likelihood of any change in the influence of the military in schools will be severely compromised unless more informed and committed people and resources are dedicated to the effort.

This is an effort that should be a priority for all activists and progressives (to say nothing of the rest of the country) because of its overwhelming

relevance to society. One of the main points of counter-recruiting is that informed citizens will choose options other than militarism and war. This is critical because the funding of our huge military and our wars are at the expense of health care, education, affordable housing, renewable energy and transportation infrastructure. Additionally, the human cost of war, with its deaths and wounds both psychic and physical, cannot be absent from any discussion of militarism and counter-recruiting. Indeed, the absence of any acknowledgement and discussion of these costs is a prime example of militarism in this country.

Past efforts in counter-recruiting have tried (with some success) to educate and inform students of their rights under No Child Left Behind (Opt out), DEP, the facts of JROTC, ASVAB testing (option 8) and the realities of military life and war. Many dedicated and resourceful people have worked to change this culture of militarism, but the facts of unemployment have

into the service and claims for compensation.

The January memo stated that veterans with DADT discharges will be evaluated for reenlistment according to the same criteria and service requirements applicable to all other prior-service members. No preferential treatment will be accorded to those with DADT discharges. Recruiting commands will continue to consider prior service performance and disciplinary records on suitability for reenlistment. The services "will" waive RE codes based on DADT, and then process applicants on a case-by-case basis, without considering the reason for discharge to the detriment of the applicants. "For example, former Service members who were separated with an honorable discharge (or an uncharacterized discharge for those occurring during initial training)" and whose separation code reflects DADT discharge "shall be considered for re-entry according to the most favorable reentry classification."

As in the September memo, the January memo states that DoD will not authorize compensation of any type, including retroactive full separation pay, for those separated under DADT. ★

driven students into the military, and enlistment quotas have been met. Current American foreign policy which relies on available and uninformed children to fuel its military adventures continues.

This is not to belittle the efforts of the people who have worked so long and hard in this effort, but the work of a relatively small number of activists with very limited resources needs a more focused approach.

Future efforts in counter recruiting/militarism will have to include schools as more pro-active participants in informing students of their rights (see above). Overworked and under staffed school officials should not be seen as antagonists in this issue. Often school districts are ignorant of the requirements of NCLB, the DEP, and ASVAB options, and counter recruiters can act as allies and collaborators in written guidelines which would be made available on school web sites. This will make the informational policies permanent, and policies once enshrined tend to stay that way. This is most useful in district wide rules, rather than individual schools. Further, studies that tackle the topics of war, peace and militarism need to be included as part of the curriculum.

Schools can be approached using arguments that they have an ethical and educational mandate to inform their students, some of whom may soon be literally in a life or death situation. Schools should be reminded that the purpose of a public education is to teach the values of non-violence in conflict resolution and independent thinking. These are critical points. Additionally, counter-recruiters are not in the business of providing alternative "service" or job options to the poverty draft. That is the duty and task of the government. What activists can do is make the ethical and moral points

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## Medical administrative discharges: More review = less discharges

BY KATHLEEN GILBERD

On September 30, 2011, the Department of Defense published a revision to DoD Instruction 1332.14, "Enlisted Administrative Separations." While the most widely-noted part of this revision was the removal of Don't Ask, Don't Tell policy, DoD also made several other changes of importance to servicemembers facing administrative discharge. The revision was made effective immediately.

The first change, in Encl. 2, part 2.c.(5). (b).1-3, was mandated by 10 USC 1177<sup>1</sup>. It requires special medical examination of all servicemembers being administra-

tively discharged "under a characterization other than Honorable" if (1) the member had been deployed overseas to a contingency operation during the previous 24 months, (2) he or she had been diagnosed with Post-Traumatic Stress Disorder (PTSD) or Traumatic Brain Injury (TBI) by a physician, psychiatrist or psychologist or "reasonably alleges the influence of PTSD or TBI based on deployed service to a contingency operation" in the same timeframe and (3) he or she is not being separated by court-martial or other proceedings conducted pursuant to the UCMJ. The purpose of the examinations is to assess

whether PTSD or TBI constitute matters in extenuation of the reason for discharge. Examinations for PTSD must be performed by clinical psychologists or psychiatrists; those for TBI must be done by physicians, psychiatrists, psychologists or other appropriate health care professionals. Members so evaluated may not be separated until the results of the examinations have been reviewed by the officials who are responsible for evaluating, reviewing and authorizing their discharges.

The change is not a model of clarity. To begin with, it does not specify what fact or action the 24 months must proceed—the incident(s) of misconduct on which a discharge is to be based, the notification of discharge proceedings, the diagnosis or assertion of PTSD or TBI, or some other point in a discharge proceeding. Nor

about enlisting for bonuses and employment (mercenaries), and by "serving", supporting foreign wars and invasions. These moral/ethical issues cannot be avoided nor should be avoided when talking to schools. A critical point in the militarism of schools, and a point that the NLG Military Law Task Force should continue to be aware of is the opt-out provision of the No Child Left Behind Act (NCLB) which requires schools to hand over student contact information to recruiters unless students or parents sign an opt out form.

In 2010, representatives of Veterans For Peace, Washington Truth in Recruiting, and the GI Rights Hot Line contacted the commanders of the Air Force, Navy, Army and Marine Corps recruiting offices in the Puget Sound area of Washington state via certified mail, email and phone calls, and asked for some clarification on the "opt out" provisions of the NCLB.

Our concerns were that students who did not opt out in their first year of high school (freshman or 1<sup>st</sup> year middle school) were permanently enrolled in recruiter data bases, and that any attempt to opt out in later years was pointless since their original contact information was not deleted. Our questions were made in a clear and unambiguous manner. Two of the commands did not respond. The Navy and Army responded evasively and would not confirm that they deleted student information when a later opt out request was made and provided no proof of any deletions. The stonewalling from the recruiters confirmed our original assump-

tions that student information once recorded is not deleted. There was and is substantial anecdotal information that precipitated these concerns. There have been long-standing and recurring complaints from students and parents that even when they have signed opt out forms, recruiters persist in harassing students for enlistment purposes. It seems clear that recruiters are not in compliance with the NCLB. When WATIR and VFP brought this to the attention of the Seattle School district, they said once signed, an opt out form was no longer their responsibility. This makes the school district an accomplice to recruiter fraud.

A simple solution for school districts would be to target incoming freshman and give them an opportunity to opt out. Those that do so would then never have given any information to recruiters and would presumably not be in any data base derived from NCLB. This would show that schools acknowledge the problem and have made a good faith effort to comply with the provisions of the NCLB and would presumably mitigate any legal claims of misadministration on the part of the district.

We all need to be more involved in schools. The Vietnam generation of activists did not follow through with any real challenge to militarism, but there is a new awareness of militarism, thanks to ten years of war and renewed activism around the critical issue of counter-recruitment. ★

*Michael Dedrick is a member of Washington Truth in Recruiting and Veterans for Peace*

is it clear whether commands (or perhaps medical personnel) are free to determine that a servicemember's assertion of PTSD or TBI is or is not reasonable. In addition, the wording about characterization, taken directly from 10 USC 1177, is just odd enough that it might refer to general characterization or entry level separation, though commands are likely to apply the provisions only to other than honorable discharges. The language of the change does not make clear whether the exclusion of "proceedings pursuant to" the UCMJ includes administrative discharges in lieu of court-martial, though that is its likely intent.

It is noteworthy that this change deals only with extenuation in the administrative discharge, and does not suggest that members whose PTSD or TBI was the primary cause of misconduct should be evaluated for medical discharge or retirement. **Members with severe PTSD or TBI will in all likelihood need to challenge their proposed administrative discharge successfully in order to become eligible for medical discharge or retirement proceedings.**

Other changes appear in Encl. 3, part 3.a.(8), covering Other Designated Physical and Mental Conditions (ODPMC). Previously, this section

included, but was not limited to, chronic seasickness or airsickness, enuresis, and personality disorder. Those conditions have been replaced by, but are not limited to, the conditions and circumstances listed in DoD 1332.38, "Physical Disability Evaluation," Encl. 5, para. E5.I.3: enuresis; sleepwalking and/or somnambulism; dyslexia and other learning disorders; attention deficit hyperactivity disorder; stammering or stuttering; incapacitating fear of flying; airsickness or motion and/or travel sickness; phobic fear of air, sea and submarine modes of transportation; certain mental disorders including uncomplicated alcoholism or other substance use disorders, personality disorders, mental retardation, adjustment disorders, impulse control disorders, sexual gender and identity disorders including sexual dysfunctions and paraphilic, and factitious disorders; obesity; overheight; pseudofolliculitis barbae of the face and/or neck; medical contraindication to the administration of required immunizations; significant allergic reaction to stinging insect venom; unsanitary habits including repeated venereal disease infections; certain anemias (in the absence of unfitting sequelae) including G6PD deficiency, other inherited anemia trait, and Von Willebrand's Disease; allergy to uniformed clothing; and homosexuality<sup>2</sup>.

The most significant change to ODPMC discharges appears in para. 8. (c), which was changed in 2008 to add the requirement of corroboration in a second evaluation by a peer or higher-level mental health professional and review by the service surgeon general for those diagnosed with a personality disorder during or after service in an imminent danger pay area. (See *On Watch*, January/February 2009.) Such special treatment will now apply not only to personality disorders, but also to any "other mental condition not considered a disability," that is, any mental condition which would fall under ODPMC.

When additional review was added for personality disorder discharges, the number of these discharges dropped dramatically—mental health professionals became more careful in their evaluations, and commands showed little enthusiasm for a discharge requiring additional layers of review. At the same time, ODMPC discharges for such minor problems as adjustment disorders increased, becoming a handy catch-all for commands and medical personnel unable or unwilling to recognize conditions that warranted medical discharge or retirement. The *Army Times* pointed out that ODPMC discharges rose from 1,453 in 2006 to 2,747 in 2008 and to 3,844 in 2009.



## MILITARY LAW TRAINING MATERIALS

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A second change to ODPMC discharge appears to be a response to misuse of ODPMC discharge for members who have been found physically fit by a Physical Evaluation Board. Para. 8.(a) now states that:

"[T]he Secretary concerned may not authorize involuntary separation based on a determination that the member is unsuitable for deployment or worldwide assignment because of a medical condition if a Physical Evaluation Board has determined the member to be fit for duty for the same medical condition, unless the administrative separation is approved by the Secretary of Defense. If the Secretary concerned has reason to believe the medical condition considered by the Physical Evaluation Board renders the member unsuitable for continued military service, the Secretary concerned may direct the Physical Evaluation Board to reevaluate the member. If, based on re-evaluation by a Physical Evaluation Board, a member is determined to be unfit...the member may be retired or separated for physical disability..."

In addition, this change prohibits denial of reenlistment on the basis of the same condition for which a Physical Evaluation Board has found a member fit for duty.

Unfortunately, this rather stringent provision does not help servicemembers who are discharged for ODPMC before their cases have been referred to the PEB, or even to a Medical Evaluation Board, either because of underdiagnosis or misdiagnosis, or because of the very slow process by which medical evaluation boards are initiated.

Once these new changes work their way down to the services and local commands, it is likely that ODPMC discharges based on minor mental conditions will decrease as well. Hopefully, this will increase the number of cases appropriately referred for medical evaluation boards. Unfortunately, it is also possible that commands will turn to other administrative discharge categories such as misconduct and unsatisfactory perform-

ance to rid themselves of troublemakers and members whose medical physical or mental conditions warrant medical discharge or retirement.

*On Watch* encourages readers to monitor the implementation of these changes and to ensure that they are not ignored by commands and separation authorities. ★

### Endnotes

1. This change was first issued as a DoD Directive-Type Memorandum on August 2, 2010 (see *On Watch*, Summer 2010). It was cancelled on its normal six-month expiration date, although it had not yet been incorporated into DoD or service regulations. Even now, after its addition to DoD 1332.14, it is not clear that local commands are uniformly aware of the new provisions.
2. Readers may remember that there was strong criticism of this inclusion of homosexuality in a listing of medical conditions about six years ago. DoD responded not by removing the category, as it should do now that Don't Ask, Don't Tell has been repealed, but by titling this a list of conditions and "circumstances."

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moot due to the repeal of DADT. The opinion went out of its way to completely erase any prior holding in the case whatsoever. In the words of the court:

"Because Log Cabin has stated its intention to use the district court's judgment collaterally, we will be clear: It may not. Nor may its members or anyone else. We vacate the district court's judgment, injunction, opinions, orders and factual findings – indeed, all of its past rulings – to clear the path for any future litigation. Those now-void legal rulings and factual findings have no precedential, preclusive, or binding effect."

This opinion became final on November 18, 2011.

With the repeal of DADT, the struggle for full equality continues. According to the Servicemembers Legal Defense Network, the next goals for the movement are:

1. An executive order prohibiting discrimination and harassment on the basis of sexual orientation and gender identity;
2. Benefit and family support parity for legally married gay

and lesbian servicemembers;

3. Discharge upgrades for those discharged under DADT;
4. Re-enlistment equality for those who wish to rejoin the military;
5. Open transgender service.

The issue of benefits for married partners is already the subject of lawsuits by SLDN and others. These suits attack the legitimacy of the so-called "Defense of Marriage Act" which bars federal benefits from being paid to same-sex partners.

Another issue being litigated is the right to full separation pay for those discharged for "homosexuality." The military's regulations state the separation pay can be reduced based on this discharge. The regulation was instituted in 1991, prior to DADT. The ACLU filed a class-action lawsuit on this issue last year. On October 18, 2011 U.S. Court of Claims Judge Christine Odell Cook Miller rejected the government's motion to dismiss the case. Briefing on the plaintiffs' motion to certify the class is pending.

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Regarding discharge upgrades and re-entry, the Pentagon issued a memo on the day DADT was repealed cautioning against major changes. For example, the Service BCM/NR's are warned that "it is DoD policy that broad, retroactive corrections of records from applicants discharged under DADT are not warranted." As for re-enlistment, the memo states, "remedies such as correcting a record to reflect continued service with no discharge, restoration to a previous grade or position, credit for time lost, or an increase from no separation pay to half or full separation pay or from half separation to full separation pay, would not normally be appropriate." These issues are ripe for challenge, as indeed the separation pay issue is already in the courts as mentioned earlier. For more information regarding discharge review issues, see the companion article by Kathleen Gilberd in this issue of *On Watch*.

Recently, the top officer in the Marine Corps, General James F. Amos gave an interview to the Associated Press. Commenting on the repeal of DADT, General Amos now says that he is "very pleased with how it has gone." Last December the General had said the repeal of DADT "has strong potential for disruption at the small unit level." So, as are most in the military, General Amos is falling in line.

Finally, House Republicans have passed a provision in the 2012 defense authorization bill that would prohibit military chaplains from performing same-sex marriages. The Senate on November 30, 2011, passed its version, whereby chaplains can choose whether or not to perform same-sex marriages.

The MLTF will continue to follow these issues and cases and will report on them in *On Watch* as new developments warrant. ★

*Jeff Lake, an attorney in San Jose, California, is a member of the MLTF Steering Committee and an On Watch editor.*

## Veteran's case ruling to be reheard

The last issue of *On Watch* contained an article on a recent victory for veterans in the Ninth Circuit Court of Appeal. The court found that the plaintiffs/veterans could indeed sue the VA in federal court and be granted remedies against the VA by the courts.

The Obama administration has asked for a rehearing of this case by an en banc panel of the Ninth Circuit. On November 16, 2011, the request was granted. Arguments will be heard in December. The MLTF will monitor this case and report developments in *On Watch*. ★

## MLTF NEWS & NOTES

*On Watch* has begun a new "news and notes" column for reports and notes about cases, policy changes, military trends, MLTF members' activities, and the like. Readers are invited to share information through this column. Items for the next issue should be sent to [nlg.mltf@gmail.com](mailto:nlg.mltf@gmail.com)

**Right to Protest** - On November 15, 2011 the Bay Area Military Law Panel, with IVAW and the GIRN, gave a training on the rights of service members and veterans to protest. The event was sparked by the shooting-by-tear gas canister of IVAW member Scott Olsen. Three members of IVAW spoke about their efforts at Occupy Oakland and the shooting of Olsen. BAMILP presented on the legal issues and Elizabeth Stinson appeared via Skype to talk about PTSD. Over 40 people attended the meeting.

**Congrats** - Congratulations to new MLTF member and long-time military counselor Lori Hurlebaus, who has been hired as the new director of Under the Hood Coffeehouse in Killeen, Texas.

**Transitions** - Long-time MLTF member JE McNeil has finished ten years as executive director of the Center on Conscience and War, and is now studying for a master's degree in conflict transformation at Eastern Mennonite University. JE's new office number is 202-256-7441. Maria Santelli, formerly of the GI Rights Network affiliate in Albuquerque, has been selected as the new executive director at CCW. Good wishes to both.

**More on the Right to Protest** - MLTF chairman James Branum has produced a concise know-your-rights guide for GI's participating in 99% Occupations or other protest activities. It's available on the MLTF website.

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

**Military Psychiatric Policies** - Kathy Gilberd is updating the MLTF's legal memo on military psychiatric policies, and would like to speak to readers who have had recent experience with voluntary or involuntary personality disorder discharges or other designated physical and mental conditions (conditions not a disability) discharges. She can be reached at [nlg.mltf@gmail.com](mailto:nlg.mltf@gmail.com) or 619-463-2369.

# ABOUT THE MILITARY LAW TASK FORCE

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

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

The Task Force encourages comments, criticism, assistance, subscriptions and membership from Guild members and others interested in military, draft or veterans law. To join, or for more information, please check our website at [www.nlgmltf.org](http://www.nlgmltf.org) or contact the Task Force at:

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