

ON WATCH

THE MILITARY LAW TASK FORCE OF THE NATIONAL LAWYERS GUILD



NON-JUDICIAL PUNISHMENT: MIDDLE GROUND BETWEEN ADMIN PROCEEDINGS AND COURTS-MARTIAL



by James M. Brantum

In this article I will be discussing an important area of the UCMJ, Article 15 (NPJ: Non-Judicial Punishment)¹. NPJ is used by commanders to deal with misconduct issues that are too serious to be dealt with using administrative corrective procedures, but are minor enough to not necessarily be appropriately handled through a full court-martial prosecution.²

While it is often neglected as area of concern by many attorneys, this is a mistake. NPJ is one of the most powerful disciplinary tools used by commands to punish servicemembers for “crimes” while avoiding a formal court-martial proceeding.³ As such, the practical ramifications for servicemembers facing NPJ can be serious.

In this article I will review the statutory and regulatory basis for NPJ and then move to a practical discussion of tactics that can be used in dealing with a possible NPJ. Much of this discussion will be relevant for all branches of the military, but I will only be discussing the branch-specific regulations of the Army. If your case involves another branch of the military, it is essential that you refer to the appropriate branch-specific regulations.

An important note – different terms are used by different branches of the military to describe NPJ. The Army and Air

Force normally refers to it as an “Article 15,” while the Marines refer to it as being “NPJ’d” or being “sent to office hours.” And the Navy and Coast Guard refer to it as “Captain’s Mast.” Since I will be focusing my attention on the use of NPJ by the Army, I will be using the terms “Article 15” and “NPJ” interchangeably in this article.⁴

I. The Role of Attorneys and GI Rights Counselors

The interplay between the roles of defense attorneys and GI rights counselors in the context of NPJ is complicated. Attorneys can give legal advice (primarily counseling servicemembers about when and if they should accept NPJ), while GI rights counselors, precluded from giving legal advice, are constrained by both law and ethical commitments to offering “non-directive counseling.”

While this article is generally directed at attorneys, GI Rights Counselors should still be aware of the basics of the law of NPJ and be able to provide servicemembers with a verbal list of their options in dealing with NPJ. Such information could prove especially valuable, because in practice, most servicemembers will get no legal advice about their pending NPJ other than a quick “Article 15 session” at the post’s military defense office. In more serious cases, a GI Rights Counselor can and should encourage a servicemember to seek individualized legal coun-

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sel from either the military defense JAG or from a qualified civilian attorney. In addition, counselors can assist servicemembers in preparing to raise issues and arguments in their NJP hearings, and are permitted to be present at hearings as “spokespersons.”

II. The Law of Non Judicial Punishment

A. UCMJ Article 15

Article 15 of the UCMJ authorizes Commanders to use the NJP process. Article 15 serves as an authorizing statute which empowers the President and the Branch secretaries to enact regulations to implement the article but by itself provides little guidance on the process. Further worth noting at the outset are the following issues:

First, with the exception of servicemembers “attached to or embarked on a vessel,” NJP cannot be imposed on a servicemember who instead demands trial by court-martial. This effectively means that NJP is theoretically a voluntary process, but is one with a significant threat attached to it. Refusing an NJP is effectively a game of bluff.

Secondly, Article 15 provides for a very limited appeal and post-hearing relief process.⁵

Lastly and most importantly, as further discussed below, an NJP does not raise future double-jeopardy concerns. Per Article 15: “The imposition and enforcement of disciplinary punishment under this article for any act or omission is not a bar to trial by court-martial for a serious crime or offense grow-

ing out of the same act or omission, and not properly punishable under this article; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.”⁶

B. Manual for Courts-Martial Part V

The primary governing procedure for NJP is found in Manual for Courts-Martial, Part V (MCM).⁷ The MCM applies to all branches of the military. Practitioners are strongly encouraged to read the MCM in its entirety, but I focus my discussion on some key points that were not discussed above in regard to Article 15.

1. NJP cannot be given for an offense for which a servicemember has already been punished; however, a subsequent court-martial for the same offense is still allowed.⁸
2. Commanders have significant discretion to decide if NJP is appropriate. Superior commanders (at least theoretically) are not supposed to interfere with the discretion of subordinate commanders in making decisions regarding NJP.⁹
3. NJP is appropriate for “minor” offenses under the UCMJ.¹⁰
4. NJPs have a two-year statute of limitations.¹¹
5. A servicemember must receive sufficient notice of a pending NJP action.¹²
6. A servicemember who fails to request a trial by court-martial waives his or her right to not be tried through NJP.¹³
7. A servicemember has the right to examine evidence, present witnesses and speak on his or her own behalf in the NJP proceeding.
8. A servicemember can have a “spokesperson” present in most NJPs; however, there is no explicit reference in the regulation to a right to have legal counsel present.
9. With the exception of the section on privilege, the rules of Military Evidence do not apply to NJP. Any “relevant matter” can be considered, as long as the accused has the chance to examine the evidence against him or her.¹⁴
10. The potential punishments that can be imposed through NJP vary widely based upon the rank of the accused and the rank of the officer who is imposing NJP.¹⁵
11. There is a limited process for suspension, mitigation, remission and setting aside of NJP.¹⁶
12. There is a very limited appeal process of NJP.¹⁷

THE MILITARY LAW TASK FORCE of THE NATIONAL LAWYERS GUILD

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C. Branch-specific regulations

My experience has been almost entirely with Army cases so I will only be discussing the branch-specific NJP regulations for the Army. Nonetheless, it is imperative that you read and understand the appropriate regulations for the service branch you are dealing with.¹⁸

AR 27-10 (Military Justice), Chapter 3¹⁹ provides the Army's regulatory framework for NJP.

Key procedural provisions of this regulation include:

1. NJP is defined as being something different than a "non-punitive," also sometimes called "corrective," action, the latter used to "correct" behavior through the loss of privileges and other minor measures. Commands are encouraged to use non-punitive measures rather than NJP for most situations.²⁰
2. NJPs are to be decided by the lowest level of a command as possible. However, since the rank of the officer conducting the NJP correlates to the maximum possible punishment, more serious cases are referred to higher levels of command.²¹
3. The issue of the record of the NJP is significant, with serious ramifications for the accused. For example, commanders are reminded that the decision to retain record of the NJP in the soldier's personnel file is "as important as the decision on whether to impose nonjudicial punishment itself."²²
4. "Minor" offenses eligible for NJP consideration generally are those that would either merit no more than a summary

court-martial or punishment of no more than one year of confinement, if a soldier demanded trial by court-martial. However, the regulation says that this provision is not "hard and fast rule."²³

5. The two-year statute of limitations for NJP does not apply for the time period when a soldier is AWOL or otherwise out of military control.²⁴
6. Commanders are required to conduct a preliminary inquiry before proceeding with NJP.²⁵
7. After conducting the preliminary investigation, a command has the option of using a "summarized" procedure for enlisted cases in which the potential punishment should not exceed "(a) Extra duties for 14 days. (b) Restriction for 14 days. (c) Oral reprimand or admonition. (d) Any combination of the above."²⁶
8. All NJP actions aside from "summarized" proceedings are to be conducted as a "formal proceeding."²⁷
9. Soldiers facing NJP must be given adequate notice and the chance to consult with legal counsel.²⁸
10. Soldiers facing NJP do not have a right to counsel at the hearing. They are, however, allowed to have a "spokeperson" speak on their behalf. The spokesperson need not be an attorney but can be.²⁹

For most soldiers the most important issue is the nature of potential punishments that can be given through an Article 15 process.

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M.L.T.F. C.L.E.

**DISCHARGE UPGRADING
& DISCHARGE REVIEW**

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

MLTF Membership Meeting & Social Hour
Time and place, TBA

More info about convention, see nlg.org/convention

National Lawyers Guild
Law for the People Convention
September 3-7, 2014
Crowne Plaza Chicago Metro

REGIONAL NEWS

The Chicago Chapter of the Military Law Task Force continues to receive calls on a regular basis from service members needing assistance. Almost all the calls to date have been for discharge upgrades.

Involuntary discharges are also a common complaint of those seeking assistance, since the number of soldiers being forced out because of crimes or misconduct has soared in the past several years as the military reduces active duty forces.

The Chicago chapter is taking an active role in facilitating a workshop at the Guild convention in September on discharge upgrades and discharge review. See promo at left.

For more info about the Chicago chapter, see nlgchicago.org/programs/mltf/

The nature of the potential punishment is not easy to predict. Generally, three factors determine the maximum sentence allowed under an Army NJP: (1) whether the NJP is “summarized” or a formal Article 15 proceeding; (2) the level of command prosecuting the matter; and (3) the rank of the accused.

The chart on this page breaks down maximum Article 15 punishments in some level of detail.³⁰

Beyond these maximum punishments, it is important to note what items are NOT on the list, namely punitive discharges. While a soldier may likely receive an administrative separation (often called “being chaptered out”) after receiving an Article 15, the discharge characterization will be no worse than an OTH (other than honorable). And most importantly, a “conviction” in an NJP proceeding is not a conviction under federal or state law.

With regard to the experience of punishment that can be imposed under NJP, in the Army, unlike other branches, is very unlikely to impose confinement (jail time) as a punishment. More likely a soldier will receive a combination of restriction to post, extra duty,³² loss of pay and loss of rank. The most serious punishment for most soldiers is the loss of pay.

III. Tactical Considerations regarding the decision to accept or not accept NJP

There are a variety of situations in which a servicemember might be facing a potential NJP. Each of these situations re-

quires a different approach. For simplicity’s sake, I will discuss some hypothetical potential situations (from the perspective of both the commander and the accused) as examples of some common scenarios in which NJP might arise.

A. Hypothetical case #1 – PVT Brown has been wrongly accused of stealing from the unit

PVT Brown was wrongfully accused of stealing equipment from the unit, when in fact the actual thief was someone else who was favored by the unit’s NCOs. The command believes that PVT Brown committed the crime but has little evidence to tie him to the theft.

Commander’s perspective: The commander needs to punish someone for the theft to avoid a loss of face and to ensure continued discipline in the unit. Since PVT Brown has had disciplinary issues before and likely is the guilty party (in the command’s eyes), the command decides to go after him. Knowing there is insufficient evidence to take this matter to trial, the command may be tempted to prosecute this matter under Article 15.

Soldier’s perspective: PVT Brown knows that he is innocent and doesn’t want to be punished for something that he didn’t do, but he might be tempted to accept the Article 15 if he fears the prospect of a court-martial.

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Maximum Punishments for NJP/Article 15 in the US Army³⁰

Type of NJP	Level of Command imposing Article 15 ³²	Rank of accused	Extra duty	Restriction	Confinement	Restricted Diet Confinement if attached/embarked on vessel	Reduction in rank	Pay forfeiture	Arrest in Quarters	Admonition/ Oral Reprimand	Possibility to combine punishments in some circumstances
Summarized	All	All	14 days	14 days	No	No	No	No	No	Yes	Yes
Formal	Company Grade	Enlisted E1-E3	14 days	14 days	7 days	3 days	One Grade	7 days pay	No	Yes	Yes
Formal	Company Grade	Enlisted E4-E6	14 days	14 days	No	No	One grade	7 days pay	No	No	Yes
Formal	Company Grade	Commissioned Officers	No	30 days	No	No	No	No	No	Yes	Yes
Formal	Field and General Grade	Enlisted E1-E3	45 days	60 days	30 days	4 days	Reduction to E-1	½ of one month's pay for 2 months			Yes
Formal	Field and General Grade	Enlisted E4-E6					For E4's: Reduction to E-1, for all others: one grade in peacetime	½ of one month's pay for 2 months			Yes
Formal	Field Grade only	Officers	No	30 days	No	No	No	No	no	Yes	Yes
Formal	Field and General Grade	Officers	No	No	No	No	No	No	yes	No	No
Formal	General officers or General Court-martial convening authorities	Officers	No	60 days	No	No	No	½ of one month's pay for 2 months	No	Yes	No

My advice to the soldier:³³ In a case like this, I would work with the client to seek to find out if the command actually has enough evidence to take this to trial. If there is insufficient evidence, I would encourage my client to decline the Article 15, knowing that the command will either drop the charges or lose in a court-martial prosecution.

B. Hypothetical case #2 – PV2 Johnson went AWOL on her second enlistment in the Army. She was gone about a year before being apprehended and returned to her unit.

1. Commander’s perspective: In this situation, a commander has a wide variety of options. S/he could prosecute the soldier for AWOL or even desertion, which would serve to deter others from going AWOL but would consume considerable time and resources. The command could ignore the offense and keep the soldier in the unit or administratively separate her. The problem with this option is that the commander may feel that s/he is sending a tacit message to other soldiers that going AWOL is not punished. So, for commanders who do not want the hassle of a court-martial but also do not want to send the message that misconduct will go unpunished, prosecuting a soldier with an Article 15 followed by an administrative separation or retention in the unit may be good option.

2. Soldier’s perspective: The soldier want consider what she wants to accomplish in the end? If the PV2 Johnson wants to remain in the Army, then a court-martial is not an option, and so negotiating with the command for either retention (without NJP) or for accepting an Article 15 may be a good.

More likely, this soldier does not want to stay in the Army and instead wants to be discharged, but with the least negative ramifications possible. If this soldier is offered an Article 15 by her command, she might want to take it, but she should seek to have at least some level of assurance that the command in-

tends to discharge her following the imposition of the Article 15.

On the other hand, if the soldier can present significant mitigating evidence to explain why such punishment is in appropriate, it may very well be possible to talk a command out of pursuing NJP or prosecution. In this case, PV2 Johnson wants out of the Army with the least punishment possible.

My advice to the soldier: Since PV2 Johnson wants out of the Army, I would contact the command directly and ask what their intentions are for her after she is given an Article 15. If they intend to chapter her out in a reasonable amount of time, I might recommend that she accept the Article 15 (but also prepare mitigation documentation to present to the command at her Article 15 hearing).

If they do not intend to discharge her, then accepting an Article 15 might be counter-productive to her goals. In such a scenario, I would spend time with the client working through what the various outcomes might be if she accepted or did not accept the Article 15.

C. Hypothetical case #3 – PFC Smith is a combat veteran with severe PTSD. His PTSD has been ignored by his unit despite his requests for help, so he began to self-medicate with marijuana. Subsequently he “popped” hot on a random drug test. PFC Smith is on his first enlistment.

Command’s perspective: The command likely see this soldier as a “s***-bag” who is using the excuse of PTSD to get out of facing the consequences of drug use. At the same time, the command is likely dealing with several other such cases and would like to avoid the hassle of a court-martial and hence offers PFC Smith an Article 15 followed by an administrative discharge for “serious misconduct.”

(Continued on page 6)

1. The *Uniform Code of Military Justice* can be found online as part of the *Manual for Courts-Martial* (2012), at www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf. Amendments were made to the UCMJ since this edition's release but have not yet been incorporated into the compiled text of the MCM.
2. Navy Legal Services, *Non Judicial Punishment*, at: jag.navy.mil/legal_services/defense_services_addendum.htm#njp
3. One commentator describes a commander's option to pursue NJP in this way: "Article 15 provides military commanders an alternative to court martial for addressing 'minor offenses.' Military legal scholars usually refer to the decision to proceed under Article 15 as a forum choice by the commander, but the subject of the Article 15 may object and demand trial by court-martial. In essence, the decision by the commander and accused to proceed under Article 15 represents a form of alternative dispute resolution. The commander agrees to lower limits on punishment, and the accused agrees to summary proceedings in which the commander will ultimately decide his responsibility for the misconduct and punishment." Marshall L. Wilde, *Incomplete Justice: Unintended consequences of military nonjudicial punishment*, A. F. L. REV. 118 (2007), at: afiag.af.mil/shared/media/document/AFD-081009-007.pdf
4. *Non-Judicial Punishment*, WIKIPE-DIA, at en.wikipedia.org/wiki/Non-judicial_punishment
5. *Uniform Code of Military Justice*, Article 15(d-e) at loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf
6. *Id.* at (f).
7. *Manual for Courts-Martial* (2012), Part V at www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf. Amendments were made to the UCMJ since this edition's release but have not yet been incorporated into the compiled text of the MCM.
8. *Id.* at (1)(f).
9. *Id.* at (1)(d).
10. *Id.* at (1)(e).
11. *Id.* at (1)(f)(4).
12. *Id.* at (4).
13. *Id.* at (4)(b).
14. *Id.* at (4)(c)(3).
15. *Id.* at (5).
16. *Id.* at (6).
17. *Id.* at (7).
18. For Air Force cases, refer to AFI 51-202, at static.e-publishing.af.mil/production/1/af_ia/publication/afi51-202/afi51-202.pdf. For Coast Guard cases, refer to *Military Justice Manual* (Command Instruction M5810.1D) Chapter 1 – Non Judicial Punishment, at uscg.mil/legal/mj/MJ_Doc/MJM113.pdf. For Navy and Marine Corps cases, see chapter 1 of the *Manual of the Judge Advocate General*, JAG INSTRUCTION 5800.7F (commonly referred to as the JAGMAN), at www.jag.navy.mil/library/instructions/jagman2012.pdf.
19. Legal Services, *Army Regulation AR*

Soldier's perspective: This is a troubling but common scenario. If PFC Smith accepts the command's desired course of action, then he would end up not only being punished for his chosen method of dealing with PTSD, but also be kicked out of the Army, likely with an OTH (other than honorable discharge), which would make it difficult (but not impossible) to get care from the VA after discharge.

On the other hand, if PFC Smith rejects the proposed Article 15, then he faces the danger of a court-martial. If convicted in a court-martial, PFC Smith would not only face jail time and other penalties on his record, but also would have a federal conviction for drug use on his record. This would bar him from receiving federal financial aid for college when he is first discharged as well as affect him negatively when it comes to employment.

My advice: The client should negotiate with the command regarding his discharge, based on the mitigating factor of the PTSD diagnosis. If it is not possible to dissuade the command from moving forward with either an Article 15 or a court-martial, then it would be best for the soldier to receive the Article 15 but then be ready to contest the planned subsequent administrative separation, possibly through the assistance of a congressional inquiry or other outside pressure on the command.

D. Hypothetical case #4 – SPC Williams was pulled over by the police on post and was found to be driving while intoxicated. He was arrested and taken to the provost marshal (police) office before being returned to his unit.

SPC Williams would greatly benefit from having his DUI be adjudicated through an Article 15 process, because there would be no collateral civilian consequences to being found guilty of DUI. Besides the penalties of the Article 15 itself, he can lose his driving privileges on post. However, he would not lose his driver's license (normally an automatic provision under state law).³⁴

Servicemembers "convicted" in an Article 15 proceeding of drug possession or domestic violence are not subjected to the possible collateral consequences of their crimes (including the right to receive federal educational aid or to own firearms), since an NJP "conviction" does not constitute a criminal conviction.

E. Case #5 – SPC Victor Agosto publicly refuses to deploy to Afghanistan. His command offers him an Article 15.

This is an actual case that I worked in 2009 at Fort Hood, Texas. Since the facts of this case were told in the press, I can speak about it in this context.³⁵

The command offered SPC Agosto an Article 15 punishment (with extra duty), but he decided to decline the Article 15 since the command refused to promise not to prosecute him in a court-martial after receiving the Article 15. The command then offered SPC Agosto a Summary Court-Martial (which caps jail time at no more than 30 days), an offer SPC Agosto accepted. Unfortunately, when the offer went up to the post general for approval, it somehow had changed from being a Summary Court-martial to a Special Court-Martial (with a cap of up to 12 months in prison). At this point SPC Agosto went to the press to tell his story, which caused the command to reconsider its decision and reinstate the prior offer of a summary court-martial. SPC Agosto received a sentence of 30 days in jail at the court-martial and then was chaptered out of the Army upon release from jail.

The significance of SPC Agosto's declining the Article 15 was that it forced the command to make a decision. It could not give this soldier extra duty and then try to force him again to deploy to Afghanistan. Instead, the command was cornered into a position of feeling like it must dispose of the case as quickly as possible via summary court-martial.

27-10 (Military Justice) ("AR-27-10"), at armypubs.army.mil/epubs/pdf/r27_10.pdf

20. AR 27-10 (3-2).

21. *Id.* at (3-5).

22. *Id.* at (3-6).

23. *Id.* at (3-9).

24. *Id.* at (3-12).

25. *Id.* at (3-14).

26. *Id.* at (3-16).

27. *Id.* at (3-17).

28. *Id.* at (3-18).

29. *Id.* at (3-18)(h).

30. This chart is adapted from the material in AR 27-10 3-16 and AR 27-10, Table 3-1.

31. Company grade is a command headed by a O-3 or below. Field grade is a command headed by an O-4 or

higher, including the battalion XO if he or she is the acting battalion commander. General grade is a command headed by a general. See *Fort Jackson Trial Defense Services*, Article 15 Information, at

jackson.armylive.dodlive.mil/staff/osja/tlds/article-15/

32. "Extra duty" for the Army normally means working a short half-shift after the regular work day, so that a soldier would stay at work until 2000 instead of going home at 1630. Extra-duty normally means only an extension of one's regular work or some other menial work assignment. By definition extra duty is not "hard labor" which can only be sentenced through a court-martial. See Joseph B. Berger, "Making Little Rocks

Out of Big Rocks: Implementing Sentences to Hard Labor Without Confinement," *The Army Lawyer* (December 2004) DA PAM 27-50-379, at loc.gov/rr/frd/Military_Law/pdf/12-2004.pdf

33. In these hypothetical situations, I am providing the advice I would give the hypothetical soldiers as an attorney. Paralegal GI Rights counselors would of course approach these situations differently, since they do not give advice but simply provide information to servicemembers on their rights. Still, I think the discussion of these hypothetical situations is helpful to GI Rights counselors in thinking through the best way to make sure that clients have all of the information they need to exercise their rights.

34. Wilde, *supra* note 3, at 132-133.

35. Dahr Jamail, "Be Bold", *Truth-Out*, July 21, 2009, at truth-out.org/archive/component/k2/item/85221:be-bold; see also Dahr Jamail, "Afghanistan War Resister to put the war on trial", *Truth-Out*, July 14, 2009, at truth-out.org/archive/component/k2/item/85106:afghanistan-war-resister-to-put-the-war-on-trial

36. The military would disagree with me on this point. Here is the advice that the Fort Jackson TDS office provides on this point:

What do I do if I'm not guilty, but I don't want to risk a court-martial?

Answer. You check the block "I do not demand court-martial..." Most people think that this is called "accepting" an

IV. The Article 15 Hearing

In theory a servicemember can accept disposition of his or her case in an Article 15 without accepting guilt,³⁶ but in reality this is not how it works. Commanders normally have made up their mind about the guilt of the accused. However, the accused does have a chance in an Article 15 hearing to present mitigating evidence to explain why his or her case merits either lesser punishment or suspended punishment (in which the sentence is suspended during a probationary period, after which any potential penalty is removed).³⁷

Given the informal nature of most Article 15 hearings (even when they are theoretically a “formal” Article 15 hearing), it is normally best for the accused to bring paper documentation of any potential evidence in his or her favor, including written statements and other documentation. The accused also can have a spokesperson speak on his or her behalf. This person could be an attorney, but also could be a GI Rights counselor, a family member or even another soldier from the unit.³⁸

Importantly, in Article 15 hearings in which a finding of guilty is made, the accused always should request that the sentence be suspended.

V. Post-Article 15 Hearing matters

Following an Article 15 hearing, a defendant has a variety of possible avenues for relief from any

adjudged sentence. While such relief is rarely sought given the relatively light punishments associated with Article 15 proceedings, requesting such relief could prove valuable, particularly for a soldier administrative discharge after serving his or her Article 15 sentence.

The avenues for relief primarily are sought through either the command that has imposed the original Article 15 sentence or the next higher level in the chain-of-command.³⁹ Forms of relief include clemency,⁴⁰ suspension,⁴¹ remission,⁴² mitigation⁴³ or “setting aside and restoration.”⁴⁴ Beyond these avenues of discretionary relief, a defendant also has the right to one appeal of the Article 15 ruling, but it must be made within five calendar days of the Article 15 hearing.⁴⁵ The appeal itself is made in writing.

Conclusion

The primary area of work in a case involving NJP is with helping a servicemember to decide if he or she should accept an NJP, and if so, under what circumstances. Certainly it makes sense for servicemembers to be ready to exercise their right to make their case to the command at the hearing and to be ready to seek post-hearing relief (and of course their one appeal). But the reality is that the NJP process is stacked against the accused, and we should not give false hope to our clients. The client has the most power before she or he says yes or no to the imposition of NJP. It is critical that we help our clients to make the most of this power. ■

ABOUT THE AUTHOR



James M. Branum has practiced military law as a civilian attorney since 2006, representing hundreds of servicemembers in a variety of areas, including court-martial defense, representation before administrative boards, conscientious objection and first amendment issues. Notable cases include those of war resisters Kimberly Rivera, Travis Bishop, Victor Agosto, Cliff Cornell and Robin Long.

Currently serving as the legal director of the Oklahoma City-based Center for Conscience in Action, he is also a past chair and current steering committee member of the Military Law Task Force of the National Lawyers Guild.

Branum has also taught several CLE seminars on military law issues and is the author of *US Army AWOL Defense: A Practice Guide and Formbook*, available from many booksellers.

Article 15. This is absolutely not true! When you decide not to demand a court-martial, what you are really deciding to do is let the commander be the jury. You are not admitting that you are guilty of anything. You can then proceed to be your own attorney and convince your commander that you are innocent. You may believe that he already thinks you're guilty, otherwise he wouldn't have offered you the Article 15 in the first place. However, you should keep two things in mind:

1. Your commander hasn't heard your side of the story yet. When he initially read you your Article 15 before he sent you to a JAG, he wasn't allowed to ask you any questions they hear the soldier's side of the story.

2. If you turn down the Article 15 and get a court-martial jury, the jury will be comprised of officers and NCOs just like your commander and first sergeant.

- Fort Jackson Trial Defense Services, *supra* note 31.

37. *Id.*

38. AR 27-10 (3-18) (h).

39. *Id.* at (3-23).

40. *Id.* at (3-23).

41. *Id.* at (3-24); see also *id.* at (3-25) for the provisions on how a suspension can be vacated.

42. *Id.* at (3-27) The most important portion of this section of the regulation is, “The death, discharge, or separation from the Service of the Soldier punished remits any unexecuted punishment. A Soldier punished under UCMJ, Art. 15

will not be held beyond the Soldier's expiration of term of service (ETS) to complete any unexecuted punishment.”

I have had one lucky case in which we knew the ETS date was rapidly approaching. We were able to have my client stall on accepting the Article 15 until a day before he was scheduled to be discharged. At that point, the command had no choice but to drop the Article 15, because otherwise any potential sentence would have been remitted by action of law under this regulation.

43. *Id.* at (3-26).

44. *Id.* at (3-28). This provision requires a showing of “clear injustice” and effectively wipes the record clean of there ever having been an Article 15.

45. *Id.* at (3-29).

WHAT'S NEW IN CONSCIENTIOUS OBJECTOR LAW?

By Deborah H. Karpatkin

The years 2005-2011 saw a number of federal court cases considering *habeas corpus* applications from military conscientious objectors. These cases were ably considered in Steve Collier's excellent article in the March 2011 issue of *On Watch*.

Today, with the military reducing its personnel and combat activity, we are, not surprisingly, seeing fewer CO applications. Indeed, we know of no reported *habeas* cases from military COs after the Fourth Circuit's decision in *Kanai v. McHugh*.¹

Nevertheless, a review of recent cases may be valuable for practitioners and counselors, in these four respects.

First, each of the four appellate CO *habeas* decisions of the Afghanistan-Iraq era – *Aguayo v. Harvey*, *Hanna v. Secretary*, *Watson v. Geren*, and *Kenai v. McHugh* (citations at endnotes 2, 7, 9, 13, respectively) – has generated some additional law. Attention to these leading CO cases offers some insight into how courts will apply their holdings in future CO litigation.

Second, recent case law offers opportunities for practitioners and counselors seeking remedies for the hardships faced by unsuccessful COs.

Third, courts continue to be unwelcoming to cases challenging selective service registration on CO grounds.

Finally, the term “conscientious objector” continues to have

legal vitality in a range of non-military CO cases, which in turn may influence the judges who decide our military CO cases.

I. What Followed From *Aguayo*, *Hanna*, *Watson*, and *Kenai*?

Aguayo, *Hanna*, *Watson*, and *Kenai* did not make materially new substantive law on the merits of CO applications, but they are likely to be reference points for future courts considering CO cases. For that reason, it is instructive to see how each case has been treated by subsequent courts.

***Aguayo v. Harvey*.**² Mr. Aguayo's *habeas* application was denied. The D.C. Circuit took the unusual step of allowing the Army to add self-serving material to the record through a supplemental memorandum, to support what would otherwise have been a record devoid of any basis-in-fact to deny Mr. Aguayo's CO application. The appellate panel also accorded the Army considerable deference for its personnel decisions.

Aguayo relied on a discovery rule allowing for an expanded record in *habeas* proceedings under 28 U.S.C. §2254, notwithstanding that Mr. Aguayo's *habeas* petition was brought under §2241, not § 2254. Moreover, in *Aguayo*, the Army's supplemental memorandum was not disclosed in “discovery” – which had not been ordered by the judge, as required in *habeas corpus* litigation – but rather was attached to its opposition papers. The *Aguayo* Court considered this “a distinction without a difference.”³ Courts in subsequent cases have permitted respondents in §2241 *habeas* proceedings to submit supplemental materials in support of their defense using the discovery rule of §2254,⁴ but the court in at least in one case denied the petitioner similar leeway.⁵

In refusing to scrutinize the Army's claimed “basis in fact” for rejecting Aguayo's CO application, the *Aguayo* Court accorded “considerable deference” to the Army's “personnel” decisions. This standard, too, has been cited approvingly in at least one subsequent CO case, and one subsequent non-CO case, both in the D.C. District Courts.⁶

***Hanna v. Secretary*.**⁷ Dr. Hanna's *habeas* petition was upheld by the First Circuit, by a 2-1 vote, rejecting the Army's claimed “basis in fact.” Hanna was cited in *Watson* and *Kanai*, and also cited in support of granting the *habeas* petition for the CO applicant in *Barnes v. Green*.⁸

***Watson v. Geren*.**⁹ Dr. Watson's *habeas* petition was upheld by the Second Circuit panel by a 2-1 vote. A judge sought en banc



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review, which was denied, over a vigorous dissent. The panel rejected the Army's request for remand for further proceedings (on an expanded record) agreeing with Dr. Watson that remand would be futile.

The Second Circuit picked up on the "futile remand" argument in a summary order issued in an immigration case, *Singh v. Holder*.¹⁰ Mr. Singh sought review of an order of removal from a decision of the Board of Immigration Appeals. The panel rejected the government's argument seeking remand, because the government had been accorded plenty of opportunity to submit additional evidence.

In support of his CO application, Dr. Watson explained that he could not treat wounded soldiers because doing so would be the functional equivalent of weaponizing human beings. In *United States v. Farhane*,¹¹ the Government cited Dr. Watson's argument against an al Qaeda doctor who was convicted in a criminal case of providing or attempting to provide "material support" to a terrorist organization. On appeal, the al Qaeda doctor argued that that as a physician, he could not have provided "training" or "material support" because his offer of medical treatment was "simply consistent with his ethical obligations as a physician." The court rejected this argument, referring to Dr. Watson's argument about treating wounded soldiers.¹² The *Farhane* precedent thus helps support claims of future CO applicants who are medical personnel.

Kanai v. McHugh.¹³ Mr. Kanai, a West Point cadet, lost his CO case in the Fourth Circuit after winning in the district court. The case made helpful law on the appropriate venue (location) for filing CO *habeas* petitions. When Mr. Kanai filed his *habeas* pe-

tition in federal court in Maryland, he was living at home in Maryland and had been relieved of active duty. The Army belatedly challenged the subject matter jurisdiction of the Maryland federal court, arguing that because Mr. Kanai did not have a Commanding Officer present in Maryland, the Maryland federal courts had no *habeas* jurisdiction. Mr. Kanai argued that the court had personal jurisdiction because he was located in Maryland, and that the Army waived its opposition to personal jurisdiction by not challenging it earlier in the case.

Where to sue is an important question for some CO applicants and others who seek *habeas* relief. While some *habeas* petitioners have an obvious district of "confinement" (e.g., a prison inmate, or a service member on active duty), others, like Mr. Kanai, do not. The *Kanai* Court rejected the Army's subject matter jurisdiction argument, agreed with Mr. Kanai that he had correctly filed his *habeas* petition in Maryland, and ruled that the Army waived any objection to on venue grounds because it failed to raise the issue in the District Court (Generally, an appellate court will not rule on an issue not raised at the trial level).

While the Army lost the jurisdiction argument, it won on the merits, persuading the Fourth Circuit that the Army CO Review Board had several bases in fact supporting the denial of CO discharge, any one of which would be sufficient to uphold its decision. Siding with the Army, the Fourth Circuit rejected the district court's findings of bias and procedural irregularities.

Kanai has not been cited by any cases for its holding on the merits of Mr. Kanai's CO application, but has been frequently cited in the Fourth Circuit for its holdings with regard to *habeas* jurisdiction and waiver.¹⁴



MARK YOUR CALENDARS FOR THESE UPCOMING EVENTS



JULY 23 - 27: Veterans for Peace Annual Convention, Asheville, NC. FMI, vfpna-tionalconvention.org

VETERAN ADVOCACY PROJECT

JULY 22: Veteran Advocacy Project CLE on Discharge Upgrades, NYU School of Law. Panel includes MLTF members David Addlestone, Kathleen Gilberd and Becca von Behren. FMI veterans@urbanjustice.org



SEPT. 3 - 7: NLG Law for the People Convention; Chicago, IL See page X for MLTF CLE and other events. FMI: nlg.org/law-people-convention

II. Remedies For a Client Wrongfully Denied CO and Facing Hardship

Civil Relief from Vietnam-Era Conviction

Herbert Erickson was denied CO status in 1968, and convicted for refusing induction. In 2010, due to changes in CO law, he was relieved of some of the consequences of that conviction.¹⁵

In 1968, after he was drafted, Mr. Erickson refused induction on the grounds that he was a non-religious CO based on personal ethical and moral beliefs. He was indicted and convicted for refusing induction. Judge Gus Solomon (D. Or.) rejected Mr. Erickson's argument that his CO claim did not need to be based on traditional "religious training and belief," and was also evidently influenced by Mr. Erickson's statement that he would resort to force to defend his family or home. Judge Solomon, known to be lenient to COs, sentenced him to three years of community service and five years' probation.¹⁶

Years passed. Mr. Erickson completed his community service, and was never again in trouble with the law. He was a beneficiary of the California In-Home Supportive Services ("IHSS") Program. In 2009, a change in California policy rendered per-

sons with felony convictions no longer eligible for the IHSS program. Mr. Erickson would be required to disclose his felony conviction and believed that he faced a loss of benefits.

Like many in our over-criminalized society, Mr. Erickson was facing re-entry barriers, as a result of his 1968 felony conviction for his CO beliefs. Mr. Erickson was included in President Carter's 1977 mass pardon of Vietnam-era draft resisters, but was still required by California authorities to report the conviction.

Mr. Erickson's plight found a sympathetic ear in Judge Anna Brown (D. Or.), who found grounds to grant a writ of *Audita Querela*¹⁷ based on changes in the law that would have provided Mr. Erickson with a defense to the crime charged against him. Judge Brown cited *Gillette v. United States*,¹⁸ recognizing non-religious COs, and also legal recognition that use of force in self-defense or defense of family was not inconsistent with a CO claim. Judge Brown also noted changes in Army regulations recognizing non-religious COs. She declined, however, to expunge his conviction.¹⁹

There is much here for practitioners and counselors. COs with records of conviction based on erroneous or obsolete legal determinations on their CO applications may be able to use the Erickson case as a model for seeking judicial relief.

Discharge Upgrade After Erroneously Denied CO Discharge

Practitioners and counselors may want to consider the availability of discharge upgrades for clients facing limited VA benefits due to erroneously denied CO applications.

In *Smith v. Marsh*,²⁰ Smith sought a declaration that the Army wrongfully denied his CO application, in violation of his consti-

tutional and regulatory rights, and a declaration that the discharge review board unlawfully refused to upgrade his discharge. The Tenth Circuit ruled that Mr. Smith's claim with regard to his CO claim was time barred, but not his claim with regard to the actions of the discharge review boards. Recent litigation is having some success in challenging the arbitrary imposition of limitation periods for Vietnam-era veterans seeking VA benefits. See, e.g., *Dolphin v. McHugh*.²¹

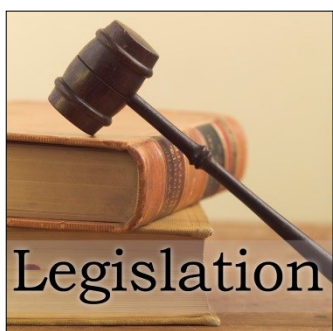
III. Conscientious Objection to Draft Registration and Opposition to Military Recruiters: Still a Challenge, But Try State and Local Law

Courts remain unfriendly to conscientious objectors who find they cannot comply with draft registration, and to those who oppose military recruiters.

First, the Supreme Court gave no comfort to the federal employees who lost their jobs because they had not registered for the draft. In *Elgin v. Department of Treasury*,²² the Supreme Court (Thomas) held that the Civil Service Reform Act and the Merit Systems Protection Board (MSPB) were the exclusive avenue for Mr. Elgin's and his colleagues' claims that their terminations were unconstitutional. Their arguments were far from the typical MSPB contentions: that being removed from their federal jobs for failing to register amounted to an unconstitutional bill of attainder, and also unconstitutionally discriminated on the basis of sex, because women were not required to register under the Military Selective Service Act.

Second, courts have not been friendly to arguments that draft registration violates the Religious Freedom Restoration Act

(Continued on page 11)



BIPARTISAN VETERANS CARE BILL PASSES HOUSE AND SENATE

As this issue of **On Watch** was being finalized, it was reported that the Senate had passed a bill designed to alleviate problems with timely access to care at VA. The House had already

passed a similar bill, and the differences between the two were expected to be reconciled quickly, and sent to President Obama, who is expected to sign it.

The Senate version would

[...] allow for the construction of 26 VA medical facilities in 18 states and provide \$500 million for hiring new VA doctors and nurses. It would also allow veterans to see private doctors if they experience long wait times or live more than 40 miles

from a VA facility, though that is a two-year trial project. Other provisions include aid to veterans who can't afford to go to college under the post-9/11 GI bill, resources for victims of military sexual assault, and updated rules to ensure that spouses of veterans killed in battle can take advantage of the post-9/11 GI bill. [Jennifer Bendery for Huffington Post]

Meanwhile, 21 Senators sent a letter to Attorney General Eric Holder asking him to start a criminal investigation of alleged problems at Department of Veterans Affairs hospitals.

Paul Rieckhoff, founder of Iraq and Afghanistan Veterans of America said, "We've been screaming from the mountaintop about these issues for a decade, but unfortunately most people weren't listening." [James Rosen and John Moritz, McClatchy DC] ■

(RFRA). In *Jacobson v. United States*,²³ Plaintiff, a Quaker, alleged that the government violated RFRA because the draft registration system didn't give him a formal mechanism for registering his conscientious objection to participation in draft registration, or retain a record of his CO beliefs. Plaintiff claimed that the very act of registering for the draft violated his religious beliefs, and that refusing to register exposed him to criminal and civil penalties, including being barred from federal student loans and grants, and federal employment.

The Selective Service told Mr. Jacobson that he could write on his registration form that he was a conscientious objector, but he rejected this, because he believed he should be permitted to "officially assert" his CO beliefs on an "official record." The case was dismissed for lack of standing, on the grounds that the Selective Service already provided registration and record-keeping measures for communicating his conscientious objector beliefs.

Mr. Jacobson was represented by the ACLU of the National Capital Area, and the ACLU went on to gain a statutory exemption for COs to the Washington, D.C. version of the "little Solomon Amendment" "motor-registration" law. Under the DC law, as enacted, a person applying to the DMV for a license can affirmatively avoid registration for the draft, through a waiver form, and will still be able to get a driver's license.²⁴

Third, in a New York case, *Macula v. Board of Education*,²⁵ an activist wanted to set up a "truth-in" table at an upstate New York high school on days when colleges and military recruiters were in the school for recruiting purposes, to provide negative information about military service. The school denied his request, and he brought a lawsuit, pro se, claiming that the denial violated his constitutional rights and was arbitrary and capricious.

He lost, both at the trial court level and on appeal. The school was not a public forum on recruiting days; it was reasonable for the school to want to avoid the disruption of his negative information; and the school was required to allow military recruiters into the school on college days in order to keep its federal funding. The appellate court approvingly cited *Rumsfeld v. Forum for Academic & Institutional Rights*²⁶ and concluded that the school's rejection of the "truth-in" table was not "arbitrary or capricious." Mr. Macula did, however, get a thoughtful dissent from one of the five judges.²⁷

Court rulings notwithstanding, local jurisdictions have created some pushback against military recruiting. For example, New York City has restricted the extent to which military recruiting can be conducted in public schools, by creating an "Opt-Out Notification" process.²⁸

IV. Conscientious Objectors in Other Contexts

Courts are increasingly familiar with the concept of "conscientious objector" in a range of contexts beyond those of a service member seeking discharge from the US military. Here are some examples:

Asylum Granted Armenian Jehovah's Witness CO. In *Davtyan v. Holder*,²⁹ an Armenian Jehovah's Witness successfully contested a Board of Immigration Appeals order affirming the denial of his asylum petition under the Convention Against Torture. Mr. Davtyan was expelled from college (he believed because of his religious beliefs) and thus no longer deferred from Armenian military service. He then came to the United States on a work and travel visa, and overstayed. In removal proceedings, he applied for asylum, arguing, inter alia, that he faced persecution on return to Armenia for refusing, based on his religious beliefs, to comply with Armenia's compulsory conscription laws. The Tenth Circuit opinion describes the difficulties faced by COs in Armenia, reversed the denial, and remanded for a further hearing.

"Seeger" Used as Reference for Sincerity of Inmate's Religious Beliefs. Similarly, courts continue to make reference to the sincerity of religious beliefs of military COs objectors in the context of individuals seeking accommodation for religious beliefs in non-military contexts. For example, in *White v. Linderman*³⁰, the pro se plaintiff, an inmate and Messianic Jew, alleged that the prison denied him a kosher diet in violation of his religious beliefs. Prison officials doubted that Messianic Jews were obliged to keep kosher. In analyzing the plaintiff's claims (and ultimately denying summary judgment to the state on whether plaintiff's was sincere in his religious beliefs, based on disputed facts), the court observed that sincerity "is, of course, a question of fact," quoting Seeger.³¹

Conscientious Objector Officers May Not Be Excluded from Court Martial Panel without some Basis. Not all COs are discharged. Some continue in military service. Such was the case for one Col. WN, who found himself serving on a court martial

New and Updated MLTF Publications

MLTF recent legal memos include:

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



panel in *United States v. Lovell*.³² Spc. Lovell faced charges for AWOL, missing movement, and desertion with intent to shirk important service. He pleaded guilty and chose an officer panel for sentencing. In voir dire, one of the panel officers, Col. WN, disclosed that he had no-weapons conscientious objector status as of 1992. Neither lawyers nor the military judge asked him any questions. The government challenged Col. WN for cause, arguing that because he was CO it would skew his view of an absence type offense involving shirking service or missing movement. Defense opposed the objection. The military judge, without explanation, granted the government's challenge.

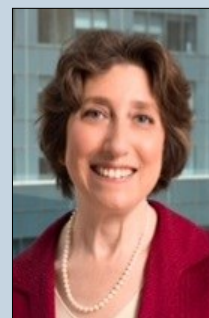
The appeals court reversed, using words reflecting positively on the military character of COs: "While this is certainly one possibility, it is equally likely that Col. WN, having gone through a rigorous conscientious objector vetting process, successfully serving over twenty years in the Army, attaining the rank of colonel, and even possibly deploying with the Army might be less favorable towards an accused who refused to follow orders and took it upon himself to absent himself from the military and not deploy." The Appeals court concluded that the military judge abused her discretion by granting the challenge for cause.

This case may be helpful for applicants seeking 1-A-0 status.

Health Care:

Hanna and other military CO cases are cited to support the arguments asserted by those seeking religious exemption from the Affordable Care Act in the *Hobby Lobby/Conestoga Wood*³³ cases currently before the United States Supreme Court. No decision has come down as of the deadline for this article. MLTF will offer an analysis of how those decisions may affect in-service and other related CO claims as soon as possible after the Supreme Court decides them.

CO habeas cases may not have been in the forefront over the last several years. But our work on behalf of COs will continue, and these cases show that the courts are continuing to pay attention to the issues of concern to our clients. ■



Deborah Karparkin is a civil rights and employment rights lawyer in New York City and a member of the Military Law Task Force. She has represented conscientious objectors since 1991 and has

litigated a number of CO cases, including *Martin v. Army*, 463 F. Supp. 2d 287 (N.D.N.Y. 2006) and, as amicus curiae, *Watson v. Geren* and *Kanai v. McHugh*, addressed in this article (see *infra*, notes 9, 13).

- 1 Research found no reported cases, and lawyers and counselors identified no unreported cases.
- 2 476 F. 3d 971 (D.C. Cir. 2007).
- 3 *Id.* at 976.
- 4 See, e.g., *Black v. Johns*, 2013 U.S. Dist. LEXIS 133492 (E.D. N. Car. 2013); *Cantu v. Fed. Bureau of Prisons*, 2012 U.S. Dist. LEXIS 184735 (S.D. Tex. 2012).
- 5 *Al Maqaleh v. Hagel*, 738 F. 3d 312, 326 (DC Cir 2013).
- 6 *Rogowskyj v. Conway*, 2007 U.S. Dist. LEXIS 17162, 2007 WL 779390 (D.D.C. Mar. 13, 2007) (denying a Marine Corps reserve enlisted member conscientious objector status); *Oppermann v. United States*, 2007 U.S. Dist. LEXIS 43270, 2007 WL 1748920 (D.D.C. June 15, 2007) (rejecting Navy officer's challenge to court martial conviction on constitutional grounds).
- 7 *Hanna v. Sec'y of the Army*, 513 F. 3d 4 (1st Cir. 2008).
- 8 2008 U.S. Dist. LEXIS 123978 (D. Alaska May 23, 2008).
- 9 *Watson v. Geren*, 569 F. 3d 115; en banc review denied, 587 F.3d 156 (2d Cir. 2009).
- 10 2014 U.S. App. LEXIS 4552.
- 11 634 F. 3d 127 (2d Cir. 2011), cert. denied sub nom. *Sabir v. United States*, 2011 U.S. LEXIS 8771 (U.S. Dec. 5, 2011).
- 12 *Id.* at 141.
- 13 638 F. 3d 251 (4th Cir. 2011).
- 14 See, e.g., *Knox v. Marion CI Dep't of Pub. Safety*, 2014 U.S. Dist. LEXIS 11727 (M.D.N.C. Jan. 30, 2014); *Ford v. United States*, 2014 U.S. Dist. LEXIS 17835 (M.D.N.C. Jan. 14, 2014).
- 15 *Erickson v. United States*, 757 F. Supp. 2d 1060 (D. Oregon 2010).
- 16 Disclosure: I was law clerk to Judge Solomon in 1980-1981. Judge Solomon was not persuaded to accept Mr. Erickson as a CO by *United States v. Seeger*, 380 U.S. 163 (1965). That may be explained by a contemporaneous newspaper article reporting Mr. Erickson stating, "I don't believe anyone has a right to make me fight a war I don't believe in," and reporting Judge Solomon's response -- that Mr. Erickson was espousing "the law of the jungle." *Eugene Register-Guard*, June 12, 1968.
- 17 *Audita Querela* ("the complaint having been heard") is an ancient writ, stemming from English common law, permitting a defendant who has had a judgment rendered against him or her to seek relief from the consequences of such a judgment where there is some new evidence or legal defense that was not previously available. Wikipedia, *Black's Law Dictionary* on Line, 2nd Ed. In the rare, appropriate case, it is still recognized in federal court under 28 U.S.C. § 1651. It is "a writ of a most remedial nature, and seems to have been invented, lest in any case there should be an oppressive defect of justice, where a party has a good defence, but by the ordinary forms of law had no opportunity to make it ..." William Blackstone, *Commentaries on the Laws of England*, volume 3, page 405.
- 18 401 U.S. 437 (1970). Of course, a better citation would have been *Welsh v. U.S.*, 398 U.S. 333 (1970).
- 19 Although the court opinion does not say so, as a matter of federal constitutional law the Presidential pardon should actually have precluded California from denying any benefits on the basis of Erickson's conviction. Effects of a Presidential Pardon, 19 Op. Off. Legal Counsel 160 (U.S. Dept. of Justice), 1995 WL 861681 (1995).
- 20 787 F. 2d 510 (10th Cir. 1986).
- 21 Dkt. no. 39, No. 12-cv-1578 (D. Conn. Feb. 4, 2014) (Motion to Dismiss denied); see <http://www.law.yale.edu/academics/17964.htm>.
- 22 132 S. Ct. 2126 (2012).
- 23 *Jacobson v. United States*, 764 F. Supp. 2d 221 (D.D.C. 2011).
- 24 D.C. Code §50-1401.01(a)(5A)(C).
- 25 75 A.D. 2d 1118, 906 N.Y.S. 2d 193 (App.Div.4th Dept. 2010). New York's highest court then imposed a penalty of costs on the petitioner for seeking to appeal further. 938 N.E.2d 1012 (N.Y. 2010).
- 26 547 U.S. 47 (2006).
- 27 Mr. Macula was not represented by counsel. COs and those opposed to military recruiting may find courts more receptive, or at least more respectful, when they are represented by skilled and sympathetic counsel.
- 28 Chancellor's Regulation A-825.
- 29 415 Fed. Appx 88 (No. 10-9534, 2011 U.S. App. LEXIS 4331) (10th Cir. 2011) (not precedential).
- 30 No. CV 11-8152-PCT-RCB (SPL), 2013 U.S. Dist. LEXIS 117853 (D. Ariz. Aug. 20, 2013).
- 31 *Supra*, note 16.
- 32 ARMY 20111006, 2014 CCA LEXIS 218 (U.S. Army Ct. Crim. App. March 31, 2014).
- 33 No. 13-356. Briefs can be found at SCOTUSblog, <http://scotusblog.com/case-files/cases/sebelius-v-hobby-lobby-stores-inc/>.

REPORT EXPOSES MISTREATMENT OF GIs BY FORT HOOD LEADERSHIP

Testimonies recount unethical health care practices, disregard of medical advice, violations of policy

This Memorial Day a national group of Iraq and Afghanistan veterans marked the solemn holiday by exposing a series of unethical healthcare practices at the largest Army post in the country, Fort Hood, that puts soldiers' lives at risk and compounds the pressure on an overwhelmed VA. Practices such as commanders, with no medical training, deploying soldiers against a doctor's orders are one of the many shocking discoveries that is revealed in the groundbreaking report '[Operation Recovery: Fort Hood Soldiers and Veterans Testify on the Right to Heal](#)' (also referred to as the Fort Hood Testimony Report).

The report is the product of months of investigation and compilation by its authors: Iraq Veterans Against the War (IVAW), Under The Hood Café and Resource Center, and Civilian Soldier Alliance. **The Military Law Task Force contributed legal support, analysis of regulations, and assistance in developing recommendations. One of the individual authors noted that the Task Force's participation was critical to the strength of the report.**

[The Fort Hood Testimony Report](#) is the result of three years of sustained outreach in the Fort Hood community, and contains 31 in-depth testimonials from Fort Hood veterans and soldiers. Additionally it has a series of findings and recommendations for the Army and Congress. This report provides a snapshot in time of a military base at the height of the deployment cycle all the way to the recent drawdown and a window into the challenges that service members face in a military that has been at war for more than a decade.

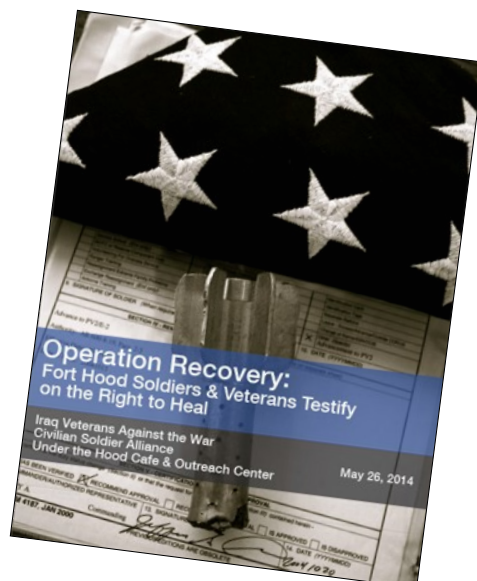


Expressing amazement at the negligent deployment practices soldiers experienced, Fort Hood Army veteran and a testifier in the report

Graphic from the [War is Trauma portfolio](#), a collection of handmade prints produced by the [Justseeds Artists' Cooperative](#) in collaboration with Iraq Veterans Against the War.

Chas Jacquier says

"Prior to going, our unit was so low in numbers that we actually took soldiers into Afghanistan who were on crutches. We're walking fifteen, twenty cliffs a day at 10,000 feet elevation through the mountains. The guy just got off crutches and you expect him to be able to do that?"



Just a few of the findings include:

- Overmedication in the form of routinely deploying service members who are prescribed with psychotropic drugs
- Aggressive disciplinary measures and discharges of soldiers since the drawdown, often for displaying symptoms of PTSD or Traumatic Brain Injury (TBI)
- An almost total lack of enforcement of base policies on stigma and respect for a doctors recommendation

This comprehensive report sheds light on the legacy of two wars characterized by multiple deployments, overmedication, a military culture that highly stigmatizes mental health care and could go far in explaining why the VA is deeply overwhelmed in processing claims and why the veteran community has such a dramatically high suicide rate.

Iraq Veterans Against the War (IVAW) is a nonprofit 501(c)(3) advocacy group of veterans and active-duty U.S. military personnel who have served since September 11, 2001 and are working to build a movement against war culture and profiteers. IVAW currently has over 2,200 members in 50 states, as well as in Canada, Europe, and Afghanistan.

The Fort Hood Testimony Report from is available at the following website with searchable sections: [forthoodtestimonies.com](#). For the Executive Summary, see [underthehood-cafe.org/2014/05/announcing-the-fort-hood-report/](#). ■

Editor's note: the bulk of this article is reproduced from a press release from the report's authors.

MILITARY SEXUAL VIOLENCE: ROOTED IN MILITARY CULTURE

Curbing Convening Authority Power to Alter Court-Martial Convictions Is No Solution, Is Insufficient and Misses the Point

By David Gespass

There is no denying that “sexual assault” (a euphemism for rape and attempted rape) is a serious problem within the military. Indeed, it has always been a problem, though it may now be more serious from the point of view of military authorities because victims, increasingly, are other members of the armed forces rather than civilians.

To date, the solutions that have been proposed are, from the military, more training and, from various civilians (most notably, New York Senator Kirsten Gillibrand), stripping convening authorities of their power to alter court-martial convictions and sentences. The former has been spectacularly unsuccessful. The latter highlights the tension between two important ends, those of protecting people from sexual violence and protecting the due process rights of individuals accused of crime.

Thus far, there has been near universal acknowledgment that the problem exists but little has been done to address, much less solve, it. Indeed, even as sexual violence appears epidemic, elected officials tie themselves in knots praising our men and women in uniform while, at the same time, condemning perpetrators of such violence yet refusing even to consider that the culture of the armed forces promotes it. This is not to say that everyone who enlists is bound to become a predator. Rather, the soil of military culture is one in which potential predators can be nourished and thrive. And our elected officials are loath to suggest such a thing for fear of being criticized as disparaging “our” troops.

It's the Culture, Stupid

Sadly, the default solution to any problem this country faces is ever more draconian punishments, including longer sentences and fewer rights for the accused. Thus, with all we hear about rapists in the military, the one answer to the problem that has been proposed and given serious consideration is taking away the power of the convening authority to overturn a court-martial conviction or reduce a sentence. And, naturally, examples are cited of truly astonishing actions by a couple of convening authorities as if such actions are the norm and that the unregulated discretion of the convening authority is the reason why rape is commonplace in the military.

I am not here arguing that the idea itself is without merit. Opponents of the proposal within the military argue that taking such discretion away from convening authorities will somehow undermine discipline and cohesion, as if letting rapists off scot-free promotes those goals. It is a bit odd to single out a single category of crime for such a structural change and, perhaps, some of the opponents are concerned that it will not stop with rape.

But whether or not the convening authority has too much discretion in the court-martial system is a question for another day, and one not necessarily related to sex crimes. Suffice it to say that some such reform may be useful if implemented as a component of a more holistic approach to the problem.

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REPORT FROM GI RIGHTS NETWORK CONFERENCE

By Kathleen Gilberd

Counselors from a dozen local GI Rights Network (GIRN) member groups, along with representatives of the three GI coffeehouses, the Civilian Medical Resources Network and Iraq Veterans Against the War met in Charlotte, NC, the weekend of May 16 for this year's GIRN conference. As always, the conference included a wide range of legal/counseling workshops and an opportunity for counselors to network and share their cases and experience.

The event included workshops on issues which have become more common in the last year or two —involuntary discharges,

discharges and medical problems for reserves and National Guard members, medical evaluation boards, and the like.

This writer led workshops on sexual assault policy, discharge upgrades, and understanding the UCMJ. I also participated in a panel on involuntary administrative discharges. Bill Galvin, from the Center on

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By itself, the proposal suffers from two weaknesses. First, it deprives the accused of a longstanding due process protection, albeit one that is afforded so infrequently that, when it is, it makes headlines. Indeed, the greater concern – and the better reason to remove prosecutions from the chain of command – is the possibility of improper command influence leading to harsher sentences.¹ Second, it will have a minimal effect on the problem so long as military culture remains unchanged.

Impact Likely Negligible

It is worth noting that almost anything can result in a criminal prosecution in the military. Things like being late for, or missing, work, cursing a supervisor or exercising one's First Amendment rights can lead to criminal charges. On the other hand, court-martial procedures provide substantial procedural protections for those accused. Prosecution witnesses are readily available to be interviewed.² Protections against self-incrimination are strict. And convening authorities have unbridled discretion to reduce or suspend sentences and set aside findings of guilt. The truth is they rarely exercise such discretion following trials. Almost invariably, they do so in fulfilling their commitments under pretrial agreements, which are nothing more than the military's form of plea bargaining.

So, regardless of its merit, the impact of the proposal to take review of sex crime convictions out of the hands of convening authorities would be, to be generous, negligible. It may well, however, lead to a more general limitation on the rights of the accused in courts-martial. But the real problem with this proposal is that it is being promoted as the means to address the epidemic rather than one reform among the many that are needed.

The Military Mission Is the Culprit

Most fundamentally, as noted, the culture of the military promotes such violence and tinkering with prosecutions will not change that culture. Consider: Relatively young men with libidos are given enormous power over subordinate troops. They are able to make individuals' lives miserable and even destroy

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Conscience and War, and Dawn Blanken, a counselor in Vermont, led two "basics" workshops for new and beginning counselors. Lenore Yarger and Steve Woolford, of Quaker House in North Carolina, led two workshops on reserve and Guard issues. These and other workshops provided a starting point for new counselors, and an overview of new issues for more experienced counselors.

A workshop led by staff from Under the Hood, Café and Resource Center, Coffee Strong/GI Voice and the Clearing Barrel coffeehouses discussed the on-going work of the coffeehouses and helped to link them with counseling support. IVAW mem-

their careers. Add to that the fact that the military mission is to fight and win wars, which is to say, rain destruction down on anyone identified as an enemy.

Recall the "Powell Doctrine" that, when the U.S. fights a war, it should utilize overwhelming force. Recall also that rape is not so much a "sex crime" as a power crime in which sex is utilized as a means of humiliation and debasement by the rapist who seeks to assert his dominance. The "Powell Doctrine" describes, on an international, rather than interpersonal, basis, precisely that objective or, in military parlance, precisely that mission.

Bars and brothels have long been staples of life adjacent to US military bases. Particularly overseas, military authorities were comfortable with, if they did not openly encourage, exploitation of indigenous populations generally and sexual exploitation of indigenous women particularly. Such attitudes have long been not just a part of, but endemic to, military culture, which always and inevitably seeks to dehumanize the "enemy."

It is easy, when one is imbued with such a doctrine, to extend it to include "allies" or even fellow members of the armed forces, which is why training has, thus far, had so little effect. Stripping convening authorities of some discretion will not change that culture any more than mandatory minimum sentences have reduced drug trafficking.

As H.L. Mencken said: "There is always a well-known solution to every human problem – neat, plausible, and wrong." Diminishing the power of the convening authority, whether for sex crimes or more generally, is certainly neat and plausible. It may even be a good idea. But it is no solution. On the contrary, as is our custom in the United States, it fails to address causes and simply attempts to increase penalties. ■

ABOUT THE AUTHOR



Following his return from a year working for the NLG's Military Law Office in Japan, David

Gespass was a founding member of the Military Law Task Force. He is the immediate past president of the NLG and a member of the editorial board of the NLG Review, where he served for five years as its editor-in-chief.

1 A recent example is the Commander-in-Chief declaring Chelsea Manning guilty long before charges were even lodged against her.

2 Ironically, the 2014 National Defense Authorization Act has placed some limits on this: victims in sexual assault cases may now decline to be interviewed by the defense without trial counsel (the prosecutor) present, and they may decline to testify at Article 32 pretrial investigations, in which case they will be deemed unavailable.

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GIRN Conference (Continued from page 14)

bers led a similar workshop outlining IVAW's work, including the (then-)pending release of a detailed Ft. Hood Report summarizing testimony about medical problems and access to health care at Ft. Hood, and a project demanding removal of all troops from Afghanistan by the end of 2014. Malachi Muncy, the director of Under the Hood, led a meeting to organize a series of know-your-rights podcasts, a prelude to a low-power FM radio station planned at the coffeehouse.

MLTF was well received at the conference, as usual. Our literature – including our new memo on [military medical policies](#), a memo on [Article 138 complaints](#), the [involuntary discharge](#) memo, an advance copy of our military sexual violence handbook and an advance copy of an article by James Branum on non-judicial punishment – were used in workshops and quickly disappeared from our literature table, along with MLTF brochures. We lacked enough Task Force members to hold a formal meeting, but had informal discussion about fund-raising and the like.

As always, networking and sharing cases with other counselors was an important part of the conference. Between workshops and in late-night parties, counselors shared their experiences with cases, new issues, the stress inherent in counseling and the joy of winning cases. MLTF member Anne Cowan, a counselor with the GI Rights group in Kansas, said, "I have found the annual conferences very helpful in a way that lasts the entire



Organizers and attendees of the 2014 GIRN annual conference in Charlotte, SC.

year until the next conference. I think it is important that I meet face to face with other counselors. Their enthusiasm and dedication is contagious. It is always reassuring to find out that I am doing a pretty good job with the counseling. But then I find out how much I have yet to learn." Anne also pointed out that wonderful food, the joy of having Quaker House children and the Center on Conscience and War dog there, and the chance to get to know each other made the conference fun.

Audio recordings of sessions on reserve structure and policy, grievance procedures and domestic violence are available — please contact the Task Force office if you would like them, or if you need copies of the MLTF materials distributed at the conference. ■

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.



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