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UNDERSTANDING AND DEALING WITH DEFENSES, MITIGATION, EXTENUATION AND AGGRAVATION FOR US MILITARY ABSENCE OFFENSES - PART 2

BY JAMES M. BRANUM

EDITED BY RENA GUAY AND JEFF LAKE

Introduction

In Part 1 of this article [*On Watch Vol. XXIX, No. 1 – Spring 2018*], I discussed the first and most important part of DMEA (Defenses, Mitigation, Extenuation and Aggravation) evidence for US military absence cases (UCMJ Articles 85-87¹): Defenses. It is most important because the existence of a valid defense can stop a potential conviction cold in its tracks; since a defense exists, the alleged crime is no longer a crime.

Here, in part 2, I will be discussing how a defense attorney can effectively use the remaining parts of DMEA evidence, working primarily with the definitions and procedures outlined in the RCM (Rules for Court-Martial).² But before moving on, I should briefly discuss a few factors that might on first glance appear to be defenses, but in fact are not.³

1. What is not a defense (but might still be good extenuating or mitigating evidence)

Not all is bad news for defendants with these not-defenses, as each of these factors can still be used as mitigation and/or extenuation.

a. Ignorance of mistake of law

This provision is found under RCM 916(I)(1): “Ignorance or mistake of law, including general orders or regulations, ordinarily is not a defense,” which of course is less than clear, thanks to one key word, “ordinarily,” which leaves open the question --- why might ignorance or mistake of law be a defense.

One portion of the discussion for this rule does provide some help to a certain kind of absence case:

“... On the other hand, if the accused had an actual but mistaken belief that the order was unlawful, this would not be a defense because the accused's mistake was as to the order itself, and not as to a separate nonpenal law. ... ”

¹ The UCMJ is contained in Appendix 2 of the Manual for Courts-Martial. The 2016 edition can be found at: <https://archive.org/details/ManualForCourtMartial2016>

² The RCM is contained in part II of the Manual for Courts-Martial. The 2016 edition can be found at: <https://archive.org/details/ManualForCourtMartial2016>

³ RCM 916 (I) “Not Defenses Generally”, on page II-119 in the Manual for Courts-Martial.

In practical terms, a servicemember who believed a war was illegal under international law and consequently missed a movement to deploy, would be facing a difficult choice. If the servicemember obeyed the order to deploy, he or she might later be found guilty of a war crime, however if the servicemember refuses to obey the order to deploy, he or she would only have a defense to the crime of missing movement *if* the illegality of the war was later shown to be actually illegal *or* possibly if an “authorized official” stated that the war was in fact illegal. Without either the determination of the war being illegal by a court (likely the court-martial prosecution of the servicemember in question) or a general or other high official stating that the war was illegal, the servicemember would not be protected.

To state it in another way, a servicemember who decides to disobey an illegal order has to be able to not only accurately understand the law but also predict how future courts may rule on the law, which is a terrible set of choices.

b. Conscientious objection

Conscientious objection, while not mentioned in RCM 916 (I) as being “not a defense,” has been shown in case law⁴ to not be a valid defense to an absence offense. But if the claim of conscientious objection is sincere, it may be serve as good mitigation or extenuation.

c. Voluntary intoxication

The only context where this might be an issue would be if a servicemember was too intoxicated to be able to make it to morning formation. RCM 916 (I)(2) makes it clear that if a servicemember voluntarily became too intoxicated to fulfill a duty to be at a certain place at a certain time, then the servicemember is still responsible for their absence. However, the state of intoxication might be a relevant factor to argue whether an intent element was satisfied or not. For example, a servicemember who stated while intoxicated that he planned to run away and never go back, might be able to successfully argue that this statement shouldn’t be used to prove the required intent element for desertion, since he would not have made such a statement if he was not intoxicated.

2. MEA - Definitions

a. Mitigation defined

RCM 1001 (c)(1)(B) states:

Matter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency. It includes the fact that nonjudicial punishment under Article 15 has been imposed for an offense growing out of the same act or omission that constitutes the offense of which the accused has been found guilty, particular acts of good conduct or bravery and evidence of the reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other trait that is desirable in a servicemember.

Mitigation is broadly defined here and includes any relevant factors that can help to convince a

⁴ Cole v. Spear, 747 F.2d 217 (4th Cir. 1984), Jones v. Mundy, 792 F.Supp. 1009 (E.D.N.C.,1992), U.S. v. Johnson, 45 M.J. 88 (U.S. Armed Forces, 1996).

decision-maker to give less punishment, which can include factors such as prior mistreatment by a command, prior punishment for the same offense (i.e. non-judicial punishment or even corrective training), but also positive past records of service and behavior.

Often closely related to the issue of mitigation is the idea of “rehabilitative potential,” which oddly enough RCM 1001 (b)(5) says is part of the government’s appropriate sentencing case, however, I believe this kind of evidence is more often very useful for the defense. In my experience, some prosecutors have objected to my introduction of this kind of evidence (when not done in rebuttal of previous prosecution evidence on this point, which otherwise would be clearly admissible under RCM 1001 [c] [1]), but I have been successful in arguing that this kind of evidence is within the domain of what the sentencing decision-making will be considering, and hence is relevant.

RCM 1001 (b)(5) states that:

Rehabilitative potential refers to the accused’s potential to be restored, through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive place in society.

(A) In general. The trial counsel may present, by testimony or oral deposition in accordance with R.C.M. 702(g)(1), evidence in the form of opinions concerning the accused’s previous performance as a servicemember and potential for rehabilitation.

(B) Foundation for opinion. The witness or deponent providing opinion evidence regarding the accused’s rehabilitative potential must possess sufficient information and knowledge about the accused to offer a rationally-based opinion that is helpful to the sentencing authority. Relevant information and knowledge include, but are not limited to, information and knowledge about the accused’s character, performance of duty, moral fiber, determination to be rehabilitated, and nature and severity of the offense or offenses.

For the defense, the arguments for rehabilitative potential will focus on (1) why confinement in military prison often makes it harder for a defendant to be restored “to a useful and constructive place in society,” and (2) what resources a defendant will have upon likely discharge from the military, including ties of family and friendship, job prospects and vocational or educational possibilities. The defense can argue that a punitive discharge will hurt a servicemember’s rehabilitative potential, since it will keep him or her from accessing necessary services, but this argument is more often most compelling for defendants who are also combat veterans.

b. Extenuation defined

RCM 1001 (c)(1)(A) states:

Matter in extenuation of an offense serves to explain the circumstances surrounding the commission of an offense, including those reasons for committing the offense which do not constitute a legal justification or excuse.

Extenuation and mitigation are often confused (and frankly this distinction isn’t completely essential to understand, since both are admissible by the defense for sentencing purposes), but I think the easiest way to distinguish them is to understand that extenuation always touches on the offense itself in some way (including the context of the offense, the reasons the offense itself was

committed, etc.) while mitigation can but doesn't have to touch on the offense itself, but must have some kind of relevance on the issue of an appropriate punishment.

c. Aggravation defined

RCM 1001 (c)(1)(B) states that:

The trial counsel⁵ may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense. In addition, evidence in aggravation may include evidence that the accused intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person. Except in capital cases a written or oral deposition taken in accordance with R.C.M. 702 is admissible in aggravation.

At first glance, the definition of "aggravating circumstances" seems very broad, but on second reading, several key words stand out, including "directly relating to or resulting from the offenses..." as well as "directly and immediately resulting from the accused's offenses." These two phrases serve as important limiting factors on aggravation, since the prosecution must be able to demonstrate that the desired aggravation evidence is actually directly related or resulting from the offense, when more often this evidence can only be shown to be indirectly related to the offense in question.

3. MEA - Contexts of Use

a. The pre-trial context

The real decision-maker is the convening authority (the level of the command that can choose to proceed with a court-martial or agree to alternative disposition of a case). The prosecution will primarily argue three things to make their case for why a particular case should be prosecuted: (1) how strong is the prosecution's case (or to say it another way, how likely would a conviction be if the defendant pleads not-guilty and a trial is held on the merits), (2) how serious is the crime in question, and (3) what kind and degree of aggravating factors are present in the case.

For the defense, the arguments used to seek a favorable outcome with the convening authority will be: (1) how weak is the government's case (or how likely is it, that the prosecution will not meet their burden of proof if this goes to trial), (2) if aggravating factors are present in the case, can they be explained away by putting them in a different context, and (3) what kind and degree of mitigating and extenuating evidence is in the case.

In this pre-trial stage, the convening authority will rarely hear from the defense attorney directly, which makes the presentation of paper documentation essential. But also, since this stage is by its nature pre-trial, it enables defense attorneys to use a broad range of tools to seek to persuade a

⁵ The term "trial counsel" is another term for military prosecutor.

convening authority to not “go for blood,” which can include the creative use of congressional inquiries and the use of the press to put political pressure on the command. Often this results in a delicate dance, to show sufficient legal aggression to convince a commander of the seriousness of the situation but without insulting or offending the decision-maker. I find it best to not overplay my case, but instead to focus on how a prosecution is not in the best interest of the command and the military as a whole.

It is important to note that evidence and statements made through counsel in the context of pre-trial negotiation are not later admissible in court, merely by being offered as part of negotiations⁶ but can be used, if necessary, for impeachment purposes.

b. The pre-sentencing context

After a defendant has been convicted in a court-martial (either by way of a guilty plea or after losing in a trial on the merits), the court-martial moves into the pre-sentencing hearing.

Unlike the fairly loose way that MEA evidence might be used in the pre-trial context, the boundaries of what can be presented in the pre-sentencing hearing is bound by the provisions of RCM 1001, most notably the definitions of mitigation, extenuation and aggravation discussed above. The specifics of these boundary lines have changed a great deal through the history of US military law, but, at present, the prosecution is provided with a very narrow set of factors that can be introduced as aggravating evidence, while the defense is provided with a very broad range of factors that can be used for M&E purposes. As defense attorneys, our job is to defend our favored position by objecting to prosecution evidence that falls outside the bounds of appropriate prosecution sentencing evidence, but, at the same time, be ready to defend ourselves against prosecution objections as to the relevance of our M&E evidence.

For defense objections to prosecution evidence, our primary tool is to object on the grounds of relevance. Unless the aggravation evidence is **directly related to or resulting** from the offense, it isn't relevant, and as for negative evidence of rehabilitative potential, our best tool is to object based on whether the prosecution's witnesses actually have a valid and rational basis for their opinions.

With regard to defending against prosecution objections to defense evidence, here are some thoughts on how to deal with some of the more common prosecution objections:

Relevance – The best way to respond to this objection is to refer to the provisions of RCM 1001 (as discussed above) to show that the desired evidence is “of consequence” with regards to the question of an appropriate sentence,⁷ ideally with an argument with some degree of specificity.

“Needlessly presenting cumulative evidence”⁸ – The challenge here is that frequently a defendant may have multiple supporters in their unit or multiple family members and friends, all of whom have positive testimony to give. But according to RCM 403, we can encounter difficulties with cumulative

⁶ See MRE 410 (found in part III of the Manual for Courts-Martial). As a matter of routine course, I always cite MRE 410 when providing material to a commander when seeking alternatives to court-martial prosecution.

⁷ MRE 401 (b)

⁸ Military Rule of Evidence 403, in the Manual for Courts-Martial

testimony if these witnesses are essentially repeating previous witnesses. The first way to deal with this objection is to prevent it from arising in the first place, by finding obvious ways to ensure that each witness has unique bits of the story to testify about. But these attempts at defusing this objection may not always be successful, which is why it is important for defense attorneys to be sure that their strongest witnesses on a particular issue testify first.

Improper opinion evidence – Some prosecutors will seek to object to opinion testimony by defense witnesses based on MRE 701. However, these objections are rarely pertinent in a pre-sentencing context, as long as the testimony touches on an appropriate issue of concern for the question of an appropriate sentence, such as the question of rehabilitative potential. Often it is necessary to point out that opinion testimony that might be inappropriate in a trial on the merits is relevant for sentencing purposes.

Improper attempts at argument – This comes up most often in the context of the defendant’s unsworn statement as part of a pre-sentencing hearing,⁹ but in most cases the defendant is allowed some degree of latitude to cross this line.¹⁰

As for other witnesses, it is all a matter of how the question is worded. An improper question such as “Sergeant, what sentence do you think the court should give to Private Doe?” might instead be reworded to be, “What do you think of Private Doe’s rehabilitative potential after the Army?” and then “What would help Private Doe to succeed in successfully entering into civilian life?”

4. MEA — common examples in absence offense cases

a. Examples of aggravation

The most common aggravating factors for absence cases include: (1) the length of absence, (2) whether or not a deployment was missed during the absence, and (3) whether the absence was ended voluntarily or not. These factors often bleed into issues that constitute elements of the crime itself, but often work in unexpected ways, especially with the length of the absence. While theoretically a very long absence (10+ years) should merit a longer sentence, often it can be effective to argue that none of the defendant's peers in the unit are in the same unit and/or even still in the military, hence there is no need for the command to “send a message” to other servicemembers who are considering going AWOL.

Less common, but sometimes more dangerous, aggravating factors can come into play for servicemembers who left their unit due to political reasons or due to issues of conscience, as well as for servicemembers who not only left their unit but also the United States. One notable concern in such cases is to determine whether the defendant has been quoted in the press or has made other statements (particularly on social media) while absent.

⁹ See RCM 1001 (c)(2)

¹⁰ According to the discussion section for RCM 1001 (c)(2): “An unsworn statement ordinarily should not include what is properly argument, but inclusion of such matter by the accused when personally making an oral statement normally should not be grounds for stopping the statement.”

Aggravation can take surprising, yet still admissible forms. In the case of *United States v. Robin Long*¹¹ the prosecution provided evidence that that the defendant appeared on a television program during his time of absence; speaking against the Iraq war but also being shown with a full beard. As civilian defense counsel in this case, I was later surprised to hear, in the prosecutor's closing arguments, that the defendant's beard was the most offensive factor in his television appearance (rather than his statements of opposition to the Iraq war). This is a good example of how seemingly benign cultural factors (as seen from civilian eyes) may be in fact turn out to be genuine aggravating factors in a military context.

Many prosecutors will also seek to introduce evidence of other bad conduct by the accused, including acts taken prior to the absence, during the absence or after the defendant's return to military control. Such bad conduct might include: (1) behavioral issues in the unit, (2) drug or alcohol abuse, (3) not paying child support, (4) spousal abuse or abandonment, and (5) civilian criminal issues. It is important for defense attorneys to be prepared for such evidence by thoroughly investigating their client's case, in the hopes that either the evidence can be excluded or, alternatively, can be explained and put into a better context. But at the same time, we sometimes get lucky and encounter prosecutors who do not do their job, often failing to even do a basic Google search on the client's name.

b. Examples of mitigation (including rehabilitative potential)

Anything and everything, if relevant, can be brought in as mitigation. The key is to be creative and to have the necessary evidence to make the case, remembering that for contexts of pre-trial negotiations and post-trial clemency that the evidence needs to be primarily in written form, while most of the evidence in the context of a pre-sentencing hearing needs to come in by way of witness testimony.

Some of the best examples of mitigation include:

1. Good service record of the defendant — This can be either mundane (i.e. the accused was on time to work, wore the proper uniform, had a good attitude, etc.), exemplary (the defendant volunteered for extra duty assignments, did volunteer work on post, etc.), or even outstanding (the defendant has a medal after saving the life of someone in the unit in combat). This kind of evidence can come in by way of the ERB (enlisted record brief), certificates, commendations, etc., but also by way of witness testimony.
2. The lack of negative history of the defendant in other settings, including during the absence — if the servicemember held down a job, took care of sick family member, etc. This is relevant.
3. The fact that the defendant had effectively been previously punished for the same offense, including through NJP (non-judicial punishment), corrective training or through illegal pre-trial punishment (which also may be a relevant motion for relief pre-trial). PTC (pre-trial confinement) can also be raised as an issue of mitigation, since time spent in a rough county jail is often much harder time than that spent in a brig.

¹¹ Fort Carson Court-martial, 2008

4. Rehabilitative potential — Since one of the purposes of sentencing is rehabilitation of the offender, it can be appropriate to provide evidence of why extended confinement and/or a punitive discharge could impair the defendant's long-term prospects of successfully re-entering into society. This evidence can often be brought in via the testimony of family members, friends, clergy and others who can testify as to the defendant's resources and support following release from the military.

c. Examples of extenuation

Since extenuation deals with the context and circumstances of the offense itself, very often extenuation for absence offenses deals with the reason(s) that the defendant left in the first place. The challenge for the defense is that some reasons for departure might have been good reasons for the defendant but may not be reasons that would be sympathetic to a military judge or a court-martial panel. It's critical to consider carefully the extenuation evidence to present.

Some of the more common reasons that servicemembers leave their unit include: (1) family hardship (sick or dying family members, etc.), (2) physical medical issues that are not being given proper treatment by a command, (3) mental health issues that have not received proper attention or concern by the command (including issues stemming from trauma such as post-traumatic stress disorder and traumatic brain injury, as well as developmental and/or chronic mental health issues such as depression, anxiety, bipolar disorder, autism spectrum, etc.), (4) discriminatory treatment and hazing, and (5) sexual harassment and trauma. These common reasons for absence can be very compelling and sympathetic to decision-makers, however, the defendant will ideally need to show that they sought help from appropriate channels (i.e. the commander's open-door policy, IG, chaplain, etc.) and was rebuffed. Often defendants made some attempts to seek help but these attempts were not well documented or the defendant may have given up prematurely, so finding ways to explain why the servicemember made the choices they made (including emphasizing issues of age, immaturity, etc.) can be appropriate.

Sometimes servicemembers have less-than-sympathetic reasons for their absence including financial hardships (many commanders and military judges feel that they are underpaid, so they may have little sympathy for someone who left their unit due to financial hardships) or just general feelings of injustice, such as when a servicemember decides to leave after they discovered that their recruiter had lied to them by promising they would get a particular job or duty station, or even never be deployed. These cases are tricky because the decision-makers in cases (commanders in the pre-trial and post-trial clemency contexts, military judges and/or court-martial panels in the pre-sentencing context) are fully and personally invested in the military apparatus themselves. Even if they are aware of the fact that military recruiters may exaggerate or even lie, these decision-makers likely believe that these lies were for the servicemember's own good. Generally, I have found it best to instead find a different way to frame these cases, emphasizing a defendant's good faith effort to be a good member of the military but showing how that maturity/mental health issues, etc. made it difficult for the servicemember to succeed and contributed to their decision to leave their unit.

One of the most difficult factors to use for extenuation is in cases of servicemembers who deliberately choose to commit an absence offense due to issues of conscience and/or political objection to the military and/or war itself. Generally, I have not found these arguments to be ones that a decision-maker in the military context will find to be sympathetic. However, I have had clients

who have desired to use their court-martial hearing as a tool for sharing their views to the public and to the military itself. As an attorney, I think it is essential in these cases to ensure that our clients are fully informed about the ramifications of such a position. Some conscientious/political objectors who have this information, chose to find other ways to present their case that they can live with (i.e. emphasizing related issues such as mental health instead of their issues of conscience or politics) in the hopes that it will yield a better outcome¹². Other conscientious/political objectors choose to not go the safe route and instead use their trials as part of their way of sharing their message. These kinds of cases are incredibly challenging and also rewarding for attorneys, but the intricacies and ethical issues at stake require more space than is allotted for this article.

For all forms of extenuation, it is always important to think through how to present the evidence. Written documentation to prove key points is always good (especially for the pre-trial negotiations and for post-trial clemency) but humanizing the case is essential too. Pictures can often be very helpful, especially in cases of family hardship. Finally, compelling and even emotional testimony by those whose lives were either positively helped by the defendant's time of absence and/or those whose lives will be hurt by a defendant being given a long prison sentence is very effective.¹³

CONCLUSION

There is so much more that could be said on the topic of DMEA evidence, but I want to leave you with this advice: DMEA evidence is what will win or lose absence cases. Our clients depend on us digging in deep and being ready to make their case at every stage of the case.

James M. Branum has practiced military defense law since 2006, both in solo practice and through his work as legal director of the Oklahoma City-based Center for Conscience in Action. He is a past Co-Chair of the Military Law Task Force of the National Lawyers Guild and is the author of the book 'US Army AWOL: A Practice Guide and Form Book.' He lives in Oklahoma City with his wife, son, and two delightful dogs. His website can be found at www.jmbranum.com.

¹² For those who are motivated by issues of politics/conscience but who do not want to take the full risks of using their trials as a platform for their views, it can be a comfort for them to know that after trial they can speak out in other ways, even from prison itself. Even military prisoners have some degree of protected free speech rights.

¹³ In one case, as part of a post-trial clemency request, I submitted hand-written letters from a defendant's young children who missed their mother, who was in the brig. One of the letters was just a few words, written in crayon.

OPPORTUNITY FOR INCREASED DISCHARGE REVIEW FAIRNESS AND TRANSPARENCY UNDER REVIEW BOARD SUPPLEMENTAL GUIDANCE

BY LIAM MCGIVERN

Over the past few years, the Department of Defense has issued three memoranda which, in combination, have the potential to remake the discharge review process for former service members of all eras from an opaque, arbitrary, and unfair ordeal to one in which mental health conditions and physical, mental, and emotional trauma are properly considered as mitigating factors to misconduct. Together, these three memos provide a relatively detailed analytical framework for the boards for correction of military records (BCMRs) and discharge review boards (DRBs) to follow in deciding applications for discharge review involving PTSD, other mental health conditions, TBI, sexual assault, and sexual harassment, while still maintaining the discretionary nature of the boards' equitable discharge review authority. However, it remains to be seen whether the BCMRs and DRBs will ultimately embrace the letter and spirit of this new guidance or resist the new review structure placed upon them.

BCMR AND DRB STANDARDS OF REVIEW

As those of us who represent former service members before the BCMRs and DRBs know, the boards hold the discretionary aspect of their equitable discharge review authority and mandate dearly. Historically, in most cases the boards exercise their discretion to deny applications for discharge review rather than to approve them.

As provided in regulation, "the primary function of the DRB is to exercise its discretion on issues of equity by reviewing the individual merits of each application on a case-by-case basis." 32 C.F.R. § 70.9 (b)(1)(i). DRB regulations provide factors which board members should consider in exercising discretion on equity issues raised by an applicant, such as combat service, wounds received in action, awards and decorations, overall capability to serve, among other factors. *See* 32 C.F.R. § 70.9 (c). However, the guidance contained in DRB regulations is a listing of factors rather than a framework for conducting a thorough and meaningful analysis. *See* 32 C.F.R. § 70.9 (c)(3). This lack of detailed guidance has led to inconsistent outcomes for discharge review applicants, with DRB decisional documents providing little or no explanation for the ways in which the evidence of record did, or did not, support a change to the applicant's discharge status.

Regulations afford the BCMRs even less guidance in terms of deciding discharge review applications. The BCMRs' mandate is to "review all applications that are properly before them to determine the existence of error or injustice," without any further guidance or instruction as to what constitutes an "error or injustice." 32 C.F.R. § 581.3(a)(4)(i). The BCMRs are required to grant relief "if persuaded that material error or injustice exists" and "sufficient evidence exists on the record," but "deny applications when the error or injustice is not adequately supported by the evidence." 32 C.F.R. 581.3(a)(4)(ii), (iv). The regulations do not provide the BCMRs with guidance on the meaning of "sufficient evidence" or "adequately supported by the evidence." Unlike the DRBs, the BCMRs are not provided factors to consider in determining whether to grant an application for discharge review. As with the DRBs, relevant regulations do not provide an adequate framework for the BCMRs in their review of applications for discharge review to provide consistent and thoughtful decisions, instead

allowing the BCMRs an incredible degree of discretion. These problems are compounded by the boards' position that their decisions are non-precedential in nature, leaving applicants unable to rely upon past decisions to guide them in their own applications.

With these broad mandates and lack of meaningful guidance, it's easy to see why the discharge review decisions issued by the DRBs and BCMRs of each of the respective military branches lack consistency.

HAGEL MEMO

A first step towards establishing a uniform framework for consideration of applications for discharge review in certain limited cases occurred with the September 3, 2014, release of a *Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder* by then Secretary of Defense Chuck Hagel. (Available at <http://www.secnav.navy.mil/mra/bcncr/Documents/HagelMemo.pdf>.) Known as the "Hagel Memo," the supplemental guidance was intended to "ensure consistency" between each military branch's BCMR in the consideration of applications for discharge review in cases in which PTSD or "related conditions" are potential mitigating factors to misconduct. The Hagel Memo provides the BCMRs guidance in three areas – "Medical Guidance," "Consideration of Mitigating Factors," and "Procedures."

Under the Hagel Memo's "Medical Guidance" provisions, BCMRs are instructed to provide "liberal consideration" to an applicant's in-service medical records "which document one or more symptoms which meet the diagnostic criteria of Post-Traumatic Stress Disorder (PTSD) or related conditions," and "liberal consideration to a finding that PTSD existed at the time of service" when such in-service records exist. Additionally, the BCMRs are to provide "special consideration" to Department of Veterans Affairs (VA) diagnoses and determinations that a former service member's diagnosed PTSD is connected to his or her service, and "liberal consideration" to the diagnoses of civilian providers when the medical records "contain narratives that support symptomology at the time of service," or when "any other evidence" "may reasonably indicate" that the condition existed at the time of discharge and may have mitigated the misconduct of record. The Hagel Memo does not explain the meaning of the terms "liberal consideration" and "special consideration," leaving it to each branch's BCMR to reach its own interpretation of those terms.

The Hagel Memo's "Consideration of Mitigating Factors" provisions instruct the BCMRs that when the evidence of record shows that a condition, such as PTSD, could "reasonably be determined to have existed at the time of discharge" then it "will be considered to have existed at the time of discharge." In cases where the evidence shows that PTSD or a "related condition" existed at the time of discharge, the Hagel Memo instructs the BCMRs to "carefully weigh" evidence of such a condition as a "potential mitigating factor" and a "causative factor" to misconduct which led to an "under other than honorable conditions characterization of service." The Hagel Memo cautions, however, that "PTSD is not likely a cause of premeditated misconduct."

Finally, the Hagel Memo's "Procedures" provisions provide for the waiver of the BCMRs' three-year time limit for filing an application for discharge review and for "timely consideration" of applications. The Hagel Memo also allows the BCMRs to obtain advisory opinions from Department of Defense mental healthcare professionals or physicians to assist the BCMRs in their consideration of applications for discharge review which include PTSD and "related conditions" as potential mitigating factors.

While the Hagel Memo represented an improvement from the BCMRs' broad discretion to correct an "error or injustice" in deciding applications for discharge review, its scope is relatively limited and it lacks substantive depth. The Hagel Memo applied only to the BCMRs, not the DRBs, and only in the review of applications for discharge review which alleged PTSD or "related conditions." While not explicit, some language in the Hagel Memo could be interpreted to limit its scope only to discharges "under other than honorable conditions," potentially leaving those with an "under honorable conditions (general)" discharge unable to benefit from the guidance.

In terms of substance, the Hagel Memo provided the BCMRs with amorphous instructions to provide "liberal consideration" and "special consideration" to certain types of evidence, but failed to provide an analytical framework for deciding discharge review applications. The Hagel Memo does not explain which conditions are considered "related" to PTSD, leaving it to the BCMR's discretion to make that determination.

CARSON MEMO

On February 24, 2016, Acting Principal Deputy Under Secretary of Defense Brad Carson issued a second memo, *Consideration of Discharge Upgrade Requests Pursuant to Supplemental Guidance to Military Boards for Correction of Military/Naval Records (BCMRS/BCNR) by Veterans Claiming Post Traumatic Stress Disorder (PTSD) or Traumatic Brain Injury (TBI)* ("Carson Memo"). (Available at https://www.defense.gov/Portals/1/Documents/pubs/Consideration_on_Discharge_Upgrade_Requests.pdf.) The Carson Memo makes clear that traumatic brain injury (TBI) is a "related condition" under the Hagel Memo, thus requiring the BCMRs to provide "liberal consideration" and "special consideration" in cases where TBI is a potential mitigating factor to misconduct. The Carson Memo also requires the BCMRs to provide de novo reconsideration of any previously denied applications for discharge review by the DRBs or BCMRs.

Following the Carson Memo, the DRBs still fell outside the scope of either new guidance, and the only conditions explicitly covered by the memos were PTSD and TBI.

KURTA MEMO

A more detailed framework arrived on August 25, 2017, with the release of a third memo, issued by the Office of the Under Secretary of Defense, *Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of Their Discharge Due to Mental Health Conditions, Sexual Assault, and Sexual Harassment*. (Available at <https://www.defense.gov/Portals/1/Documents/pubs/Clarifying-Guidance-to-Military-Discharge-Review-Boards.pdf>.) Known as the "Kurta Memo," this third guidance greatly expands the scope of the Hagel Memo and Carson Memo. Under the Kurta Memo, the new supplemental guidance contained in the three memos applies, for the first time, to both the DRBs and BCMRs in their consideration of discharge review applications. The Kurta Memo also expands the meaning of PTSD and "related conditions" to include "mental health conditions," "sexual assault," and "sexual harassment," in addition to TBI. This expansion under the Kurta Memo is a dramatic and important addition to the types of cases subject to new discharge review guidance.

The Kurta Memo clarifies for the DRBs and BCMRs what types of documents and information outside of an applicant's service record will be considered as evidence in applicable cases. After describing what are already standard types and sources of evidence, including Department of Defense forms, law enforcement documents, medical records, and statements from family members, friends, and

clergy, the memo goes on to include “changes in behavior; requests for transfer to another military duty assignment; deterioration in performance; inability to conform their conduct to the expectations of a military environment; substance abuse; episodes of depression; panic attacks or anxiety without an identifiable cause; unexplained economic or social behavior changes; relationship issues; or sexual dysfunction” as evidence on which applicants may rely to prove the presence of a condition or that an experience occurred. The Kurta Memo instructs the BCMRs and DRBs that an applicant’s oral or written testimony, on its own, “may establish the existence of a condition or experience, that the condition or experience existed during or was aggravated by military service, and that the condition or experience excuses or mitigates the discharge.”

The Kurta Memo goes so far as to state that evidence of misconduct itself may be considered as evidence of an underlying mental health condition, PTSD, TBI, or an experience of sexual assault or sexual harassment.

In addition, the Kurta Memo provides the BCMRs and DRBs with a detailed, step-by-step framework for the boards to rely on as they consider applications for discharge review. Rather than relying upon the incredible degree of discretion which comes from the DRB regulations’ simple listing of factors, and the BCMRs broad mandate to correct “errors or injustice,” the boards now have an analytical framework which they must follow in considering discharge upgrade applications.

The Kurta Memo provides the DRBs and BCMRs with series of questions to answer in deciding applications for discharge review, including “was there a condition or experience?”, “did the condition exist/occur during military service?”, does the condition/experience excuse or mitigate the discharge?”, and “does the condition/experience outweigh the discharge?” The Kurta Memo provides guidance to the boards in answering each of these questions to help ensure fairness and consistency between the boards.

Additionally, the Kurta Memo provides a thorough definition of the Hagel Memo’s “liberal consideration” standard, including eleven separate and non-exhaustive factors for the boards to consider, touching on evidentiary standards, favorable presumptions, and decisional standards.

The Kurta Memo’s “liberal consideration” provisions instruct the BCMRs and DRBs to apply a relaxed burden of proof to applications involving mental health conditions, PTSD, TBI, and sexual trauma when the discharge occurred during a time when these conditions “were far less understood than they are today.” This would include misconduct related to PTSD and other combat trauma during times when these conditions were less well understood and fewer procedural protections were in place to ensure fair treatment of wounded service members. Specific to sexual trauma and harassment, the memo instructs the boards to apply a lower evidentiary burden “for injustices committed years ago when there is now restricted reporting, heightened protection for victims, greater support available for victims and witnesses, and more extensive training on sexual assault and sexual harassment.” In terms of evidence required to prove an applicant’s case, the Kurta Memo instructs that the boards should not “condition relief on the existence of evidence that would be unreasonable or unlikely [to exist] under the specific circumstances of the case,” and states that those applicants with mental health conditions, PTSD, or TBI, and who experienced sexual trauma “may have difficulty presenting a thorough appeal for relief because of how the asserted condition or experience has impacted the veteran’s life.”

Apart from these lowered evidentiary standards, the Kurta Memo’s clarification of the term “liberal

consideration” includes presumptions about the ways in which mental health conditions, PTSD, TBI, and sexual trauma affect service members. The memo states that “mental health conditions, including PTSD; TBI; sexual assault; and sexual harassment impact veterans in many intimate ways, are often undiagnosed or diagnosed years after, and are frequently unreported,” and that these conditions “inherently affect one’s behavior and choices causing veterans to think and behave differently than one might otherwise have expected.” With this new guidance, individual applicants discharged due to misconduct which is connected to these conditions and experiences should receive the benefit of the doubt that their misconduct stems from their conditions or experiences without having to provide evidence of the same.

The Kurta Memo’s “liberal consideration” provisions also provide the BCMRs and DRBs with guidance in determining whether a change to an applicant’s discharge is warranted. The memo states plainly that “an Honorable discharge characterization does not require flawless military service.” The Kurta Memo instructs the boards to consider the misconduct associated with an applicant’s discharge under current, contemporary standards for conduct, providing that “the relative severity of misconduct can change over time,” and pointing specifically to marijuana use, which “is now legal in some states and it may be viewed, in the context of mitigating evidence, as less severe than it was decades ago.” (The “decades ago” language is problematic given that some post-9/11 combat veterans were discharged following a single incident of marijuana use.) The Kurta Memo makes clear that “liberal consideration” “does not mandate an upgrade,” but that “relief may be appropriate for minor misconduct.” However, the Kurta Memo does not clarify the meaning of “minor misconduct,” leaving the door open to a restrictive interpretation of the standards under which relief should be granted.

CONCLUSION - POTENTIAL FOR INCREASED FAIRNESS AND TRANSPARENCY

The discharge review framework provided in the Kurta Memo offers hope that applicants to the BCMRs and DRBs who allege mental health, PTSD, TBI, and sexual trauma mitigation will enjoy a greater degree of fairness and transparency in the consideration of their applications. Pre-Kurta Memo, with the nearly unfettered discretion afforded the boards under federal regulations, decisional documents often amounted to little more than a bare recitation of the issues raised by an applicant and a statement that relief was not warranted without any further explanation or justification. With the Kurta Memo’s relatively detailed framework, the BCMRs and DRBs should engage in a more thorough and substantive analysis of the ways in which relief is, or is not, warranted under the new guidance and the evidence presented. This will not only benefit individual applicants as their cases are considered, it will also require the boards to consider cases in a more uniform and fair manner.

Liam McGivern is a Staff Attorney with Coast to Coast Legal Aid in Broward County Florida, where he directs the firm’s Supportive Services for Veteran Families (SSVF) project. After graduating from the University of Miami School of Law magna cum laude in 2012, Liam began work on behalf of low-income and homeless former service members with less-than-honorable discharges in Miami, Florida. Liam’s professional work also includes enforcing federal and local civil rights laws for the City of Seattle.

COMMISSION ON SELECTIVE SERVICE HOLDS HEARINGS

BY JUDY SOMBERG

A federal commission studying what should be done about the draft, draft registration, the Selective Service System, and compulsory service held a somewhat bizarre, poorly advertised hearing recently in Boston. The hearing – except for the presence of a few outspoken folks – focused solely on how to promote public service and not at all on the draft. However, the “National Commission on Military, National, and Public Service”, appointed by Obama and the then Congress, was in fact charged with studying and reporting on, “The need for a military selective service process, including the continuing need for a mechanism to draft large numbers of replacement combat troops; ...” and, “the feasibility... of modifying the military selective service process in order to obtain... individuals with ... medical, dental, and nursing skills, language skills, cyber skills, and science, technology, engineering, and mathematics (STEM) skills... without regard to age or sex.”

A panel of academics from the Harvard Kennedy School and Suffolk University spoke on the history of civic engagement and the benefits of public service. When the floor was opened to the public, most who spoke were young people who had participated in some type of public service program and spoke of the benefits to themselves and of such programs. (How were they recruited to come?)

There were a handful of us who came because we were concerned about the draft and military service in general. Edward Hasbrouck, one of the few people actually prosecuted for failing to register (by US Attorney Robert Mueller!), and who served 4 ½ months in a federal prison camp in the '80s, spoke about his prosecution and of the widespread noncompliance and lack of enforcement, which continues to today. Neil Berman, an attorney and member of the Military Law Task Force of the National Lawyers Guild, spoke about his experience counseling those with military law problems. He pointed out that those who call in to their hotline come from Fall River, New Bedford, Lawrence and other low-income communities. He said what we have now is a “poverty draft”, although we don’t actually have a draft!

The opening of all military assignments to women in December 2015 eliminated the basis in military policy for requiring men but not women to register with the Selective Service System for a possible draft. If Congress takes no action, pending court cases are likely to produce a ruling that male-only draft registration is unconstitutional. Thus the Commission will have to make a recommendation about the draft, and not just about how to expand “public service”.

For some resources about why the draft is bad and how to oppose it, see Edward Hasbrouck’s blog at www.resisters.info.

I encourage all to submit their comments on draft registration and the draft and whether to expand it or eliminate it. You can submit comments, identified by Docket No. 05-2018-01, by any of the following methods:

Email: national.commission.on.service.info@mail.mil. Be sure to include the docket number in the subject line of the message.

Website: www.inspire2serve.gov/content/share-your-thoughts. Follow the instructions on the page to submit a comment and include the docket number in your comment.

Mail: National Commission on Military, National, and Public Service, Attn: RFI
COMMENT—Docket 05-2018-01, 2530 Crystal Drive, Suite 1000, Room 1029 Arlington,
VA 22202.

The Commission is also planning hearings in the following cities (for locations and time check inspire2serve.gov/news-events)

- 26-27 June 2018: Iowa City, IA
- 26 June 2018: Vinton, IA
- 28 June 2018: Chicago IL. Kennedy-King College, U Bldg. 815 W. 63rd St. 6:30-8:30 pm
- 19-20 July 2018: Waco, TX
- 16-17 August 2018: Memphis, TN
- 19-21 September 2018: Los Angeles, CA

Judy Somberg is an attorney trying to retire from her community practice in Cambridge, MA. She is a long-time NLG member, having served in many capacities including on the Mass Chapter board, as Regional VP, National VP, Executive VP, and on the NLG Foundation board. She is currently co-chair of the NLG International Committee Task Force on the Americas.

TRANSGENDER SERVICE BAN – CONTINUING ATTEMPTS TO DISCRIMINATE

BY JEFF LAKE

As discussed in the previous issue of On Watch, the President is attempting to ban military service for transgender individuals. These attempts are continuing despite repeated injunctions issued by courts throughout the country blocking such a ban.

On March 23, 2018, the President issued a memorandum regarding military service by transgender individuals. This memorandum stated that he revoked his memorandum of August 25, 2017. Instead, the President referred to a new memorandum prepared by the Secretary of Defense in consultation with the Secretary of Homeland Security.

Documents obtained in discovery reveal that this new memorandum was the product of 13 meetings. An analysis of the documents by ThinkProgress shows that several groups of medical experts agreed that allowing service by transgender people was the correct decision. However, later in the proceedings, Robert Wilkie took over the leadership of the group. He had previously worked for Senator Thom Tillis who supported the North Carolina law HB2 allowing discrimination against transgender people. Sure enough, on January 11, 2018 Wilkie issued a memo to the Secretary of Defense recommending a transgender ban on military service. Wilkie has now been nominated to be the Secretary of Veterans Affairs.

It should be noted that Vice President Mike Pence also convened his own “working group” made up of anti-LGBTQ activists. This group apparently influenced the final memo prepared by the Secretary of Defense.

The current policy, as outlined in the memo, is to ban transgender people from enlisting in the military and to discharge those who attempt to transition while in the military. The memo does not adopt a policy of discharging those now serving who do not transition. This appears to be a concession that the courts would never allow such discharges after allowing transgender people to sign up and serve in the first place.

The justifications for the policy are as flimsy as those which have been litigated before and they are not new. They are the same old “undermine readiness” and “negative budgetary impact” arguments. These arguments have been undermined by the experience of transgender soldiers and sailors and by studies commissioned by the Pentagon itself. For example, as reported by Slate, a recent study by the New England Journal of Medicine found that a transgender servicemember costs the military roughly 22 cents per month in medical costs.

As of this writing, the injunctions issued nationwide as discussed in the last issue of On Watch remain in effect. On April 20, 2018 the administration filed a motion to dissolve the injunction issued by the U.S. District Court for the District of Columbia. On May 11th, the Plaintiffs responded by filing a cross-motion for summary judgment as well as a motion in opposition to the defendant’s motion to dissolve the injunction. The District Court’s ruling is pending. On June 15, 2018, the District Court in Seattle denied the administration’s request to stay the preliminary injunction issued there in December pending appeal. The court stated, “The status quo shall remain ‘steady as she goes’ and the preliminary injunction shall remain in full force and effect nationwide.”

As always, the editors of On Watch will continue to follow the progress of this issue in the courts and will provide an update in our next issue.

REPORT: GI RIGHTS NETWORK ANNUAL MEETING

BY ANNE COWAN

The [GI Rights Network](#) held its annual conference at Stony Point, NY, on May 3-6, 2018. There were attendees from North Carolina, California, Kansas, Oklahoma, New York and Illinois. Through the use of Zoom others attended from Illinois, Alaska and Washington, DC.

As always, there was a good exchange of experiences and information so that everyone came away with new information and ideas. Presentations included the topics of citizenship through the military, medical cases in the Reserve, Article 138 complaints, use of Civilian Medical Resource Network (CMRN), defenses and mitigation in absence offenses, and the new regulations on harassment and hazing. There was also a lively discussion of general problems with the Health Care system in the US with Howard Waitzken, Director of the CMRN and author of his new book, *Health Care Under the Knife*.

The discussion of the GI Rights Network structure revolved around the need for new counselors and adding mental health workers to CMRN. Because of the time needed to train and the commitment

called for, the lack of newly trained counselors is understandable but must be addressed. The CMRN has had to put a moratorium on new cases for two short periods in the past 12 months due to overload of the cases for the certified therapists. The CMRN is trying out use of promotora system - that is, using Intake volunteers to follow up with the evaluations, working side by side with certified therapists.

Two widely discussed workshops were on the topics of new regulations for harassment, most notably DODI 1020.03, and a presentation by Margaret Stock on the issue of citizenship through the military. The first presentation examined possible improvements in response to harassment, and the other in a decrease in services and options for non-citizen servicemembers.

Kathy Gilberd led the workshop on the new response to harassment, bullying, hazing and retaliation/reprisals in DODI 1020.03. This is recent enough that the real effects are yet to be seen but the Instruction contains new and broader definitions of the terms. Citing this Instruction can be useful even though its discussion of complaints and procedures is vague. It is clearly stated that the DOD will not tolerate any activities described in the Instruction, but DoD leaves it to each branch of service to create its own implementation. It is not yet known what military staff will be designated to receive harassment complaints and oversee their processing. The regulation gives paths to reporting problems and states that the complainant is to be given all options and be given support while taking action.

Margaret Stock, an immigration lawyer from Alaska, presented the latest information on the ability to obtain citizenship by being a member of the military. In the past this was a reasonable option for many non-citizens. Citizenship was often granted to Green Card holders as soon as basic training was initiated. As of October 13, 2017, the situation changed drastically. Now it is more difficult for a Green Card holder to enlist and almost impossible for that person to be granted citizenship in less than a ten year period. The new directions have caused much confusion at all levels, especially among Green Card holders. There have been cases of military Green Card holders being deported for any court martial. The actual enlistment of a non-citizen now goes through longer background checks. Right now there is a 10 year backlog for these checks. The result has been a decrease in immigrants in the military, increase drop-out rate of immigrants and the military not being seen as a career option.

The Military Accession Vital to the National Interest program (MAVNI) has been discontinued. All the above changes will add to the problems of military recruitment. Stock stated the 80% of enlistment-age citizens are not qualified due to lack of fitness, drug use, use of ritalin etc.

Today it is a more secure route to seek citizenship prior to enlisting instead of through military service. This is an area where recruiters may not have the up-to-date information.

Two points among the Hotline counselors were noted. One is that many hotline cases are now being addressed with two counselors working together, due to the complexity of many of the cases. The other is the increased extent and intensity with which the Hotline counselors become involved in these complex cases.

Anne Cowan is a retired physical therapist from Manhattan, Kansas. A member of MLTF, she has been a GIRN counselor for 10 years and Intake Worker for CMRN for four years.

OPINION: USE OF THE MILITARY IN THE AGE OF TRUMP

BY DAVID GESPASS

This op-ed reflects the view of its author only. We welcome responses, and other opinion and news analysis submissions, for future issues of On Watch.

Those on what is viewed by the bourgeois media today as the “left” (I hasten to note that I do not include the real anti-imperialist left in this category), with their other complaints, worry that the Trump presidency may get the US into war. This they contrast with the enlightened and experienced leadership that Hillary Clinton offered. Such leadership, presumably, would have safeguarded US security interests around the world without the war mongering and saber rattling that have distinguished Trump. I am not so sure. Trump’s presidency has been characterized, thus far with far more saber rattling than actual war mongering or fighting.

Of course, Trump is mercurial, unpredictable and (despite his protestation otherwise) unstable. Still, one must at least question the hypothesis that Clinton would have avoided US military entanglements that Trump threatens. Teddy Roosevelt exhorted those in power to speak softly and carry a big stick, but Trump takes a different tack. He is full of bombast and threats, has stocked his administration with former military officers, but has not really used US military power very much. In fact, there have been only two notable interventions, both in Syria, both in response to use of chemical weapons. Parenthetically, Republicans, after opposing any use of force by Obama after a chemical weapon attack there during his presidency, have lauded Trump for his limited salvos. These attacks on a sovereign nation were generally deemed as “presidential,” despite their not being endorsed by the Security Council and thus being illegal. Both were limited, neither did very much damage and neither seemed to have any permanent, or even temporary, effect on Assad.

While Trump has famously wondered why we have nuclear weapons if we are unwilling to use them and warned Kim Jong Un about the size and capability of his “button,” his exercise of US military force has been limited. Contrast this with Clinton, who never met a crisis anywhere in the world that she thought could not be fixed, or at least made less critical, by US military force. She was among the most hawkish members of the Obama cabinet. She supported the invasion of Iraq as a senator (admittedly, so did almost the entire Senate, but some learned from their folly). She was evidently happy as Secretary of State with drone strikes against Al Qaeda inside Pakistan, although she had warned about consequences for such actions earlier. She supported the “surge” in Afghanistan in 2009. She advocated for “regime change” in Libya in 2011 (as did Trump). That same year she endorsed the assassination of Osama bin Laden despite the consequential damage to US-Pakistan relations.

Clinton has a track record. It advocates not just for a robust military force, but for its being used over and over. After more than a year, we cannot say that Trump’s track record indicates anything much and certainly shows no propensity to use military force so routinely. Indeed, Trump has threatened NATO members with the US not honoring its commitments to them if they don’t pony up their fair share of the costs of the alliance.

On the other hand, Trump has called for an enormous increase in the Defense Department’s budget. It would appear that, true to his core beliefs, he is more interested in giving “defense” contractors lucrative contracts and further enriching them than he is in actually deploying force. Certainly, he would love to use troops at the Mexican border which, as vicious, unnecessary and despicable as it is, at least has the “virtue” of being inside the continental US. But fight wars in the Middle East, Asia or

around the world? Not so much. It appears that, for Trump, the business of the military is business, not war-fighting.

As I write the final draft of this commentary, news of the agreement signed by Trump and Kim Jong Un is all over NPR and Facebook. Months ago, everyone was afraid the conflict between the two was going to lead to World War III, yet they now stand before the world as collaborators on the brink of an historic peace agreement. Perhaps it is the nature of our times and the bombast that passes for news reporting these days, but one must ask whether the fears expressed during the “Little Rocket Man” era and the hope expressed today were two sides of the same hyperbolic coin. There is a long road to be traversed between signing a one-page document and insuring peace on the Korean peninsula, but at least a step has been taken, one it is hard to imagine Clinton taking.

Recent events around Korea are instructive. Chuck Schumer and other ranking Democrats have expressed concern that Trump will concede too much to the DPRK. Evidently, the positions are flipped from the Obama administration’s negotiation of the Iran nuclear deal, when Republicans railed about Iran’s dishonesty and how much was conceded for the agreement. Now, the Democratic leadership is worried that having an actual peace agreement, rather than a mere armistice, is a danger to world peace and security. One almost gets the feeling that the party not in power feels obligated not to support any agreement the party in power makes that has the potential of reducing tension in the world.

As for the Middle East, Trump appears to have concluded that ISIS is no more and the need for American war-fighting there, or at least the need for overt US troop deployment, has passed. Again, that could change overnight. DJT is nothing if not whimsical.

As noted, Trump is entirely unpredictable, and this entire analysis could literally blow up at the drop of an insult, but there is no *evidence* it will. Nor is there any evidence that the Trump administration has any definite or clear policy on the use of military force. On the other hand (and here I contradict my general thesis), he has surrounded himself with the most hawkish advisers he could find. John Bolton and Mike Pompeo have no qualms about delivering death and destruction on enemies, real or perceived. Every new appointment is another shift to the view that US military force is the panacea for the world’s problems. Still, that has not yet been the outcome.

The question the American electorate faced in 2016, in regard to US military policy, was whether to opt for the devil it knew or the devil it didn’t. It chose the latter and nearly a year-and-a-half into the Trump administration, it still does not know. But, at least in this narrow area, one could argue that Donald J. Trump has so far been not a pleasant surprise to the anti-imperialist left in this country – he is an unrepentant, vocal and strident US imperialist – but perhaps a bit of a relief. On second thought, it is not so much “relief” because we never know what he is going to do next, but there has been a slight respite from the continual deployments, drone attacks and targeted killings that marked the Obama administration and the Clinton State Department. As with any administration in my lifetime, we should prepare for and expect the worst and take some solace when something not bad, or even somewhat good, happens. And we should never, ever, stop resisting US imperial policies, whether military or otherwise.

David Gespass is an attorney in private practice in Birmingham, Alabama. He is a former president of the National Lawyers Guild, and currently a member of the Military Law Task Force steering committee.

OBITUARY: JEFFREY SEGAL

The MLTF is saddened to announce the death of long-time Task Force member Jeff Segal. A long-time Guild activist, Jeff joined the Task Force steering committee during the 1980's, serving as our treasurer for many years. He brought keen political insights and a strong class perspective to our work, and he will be greatly missed. The following obituary was written by Jeff's friends and family.



LOUISVILLE, KY – Jeffrey “Jeff” Segal, 76, passed away at his home on April 9, 2018. Friends and family remember Jeff as compassionate, open-hearted, smart, good-humored, funny, a magnet for children, a sweet soul, a good teacher, a writer, a wonderful godfather, a plant lover, a singer along with the oldies station. He was a progressive advocate, a collector of books/written words of the movement, an activist and informal mentor in left-wing politics, and a dedicated union leader. He shared history about Jewish people, had an unrelenting passion for social and economic justice, kept his eye on the big picture as well as important details, gave up his liberty to protest the draft and the Vietnam War, was a quiet force at times, and a warrior in the struggle at others. On LinkedIn, Jeff simply characterized himself as a “lefty lawyer.”

Jeff was preceded in death by his mother, Mildred Lavin Segal, and his father, Max Segal, who were living in Los Gatos, CA when they died. Jeff is survived by his two brothers, Perry Segal, of San Jose, CA, and Alan K. Segal and husband, Jerry Solomon, of Santa Cruz, CA. Jeff's family always supported his political activities and respected his ongoing activism for social justice.

Born on June 25, 1941, in Chicago, IL, Jeff graduated from Roosevelt University in Chicago, IL with his B.S. in Political Science in 1964. He held various positions with the Student Senate including president and treasurer, and with The Roosevelt Torch student newspaper and the Free Press. He also was very involved in campus work on civil liberties, student rights, and anti-war activities. His activism included the Students for a Democratic Society (SDS) and, according to a Facebook friend, Jeff was a key writer of the Port Huron Statement, the basis for SDS, and the founder of its Berkeley chapter.

In 1967, Jeff was involved in SDS' “Stop The Draft Week” in Oakland, CA. A non-violent sit-in resulted in 123 arrests, police violence, ten thousand demonstrators, and the closing of the federal induction center for most of a day. Although many people had planned the week, the local district attorney indicted the leaders he believed were the most militant. Jeff and six other organizers were chosen and charged with conspiracy to commit misdemeanors, a felony. Known thereafter as the “Oakland 7,” they faced an 11-week trial which ended with the jury completely acquitting them.

Although escaping incarceration that time, Jeff continued to oppose the Vietnam War and the draft. Refusing to go to Canada either, he was convicted in the late 1960s and served 27 months in a federal prison for draft resistance. Upon his release, Jeff went to law school to begin his long legal career championing labor rights and justice for disadvantaged people. Jeff received his J.D. from Rutgers University School of Law in Newark, NJ in 1977. It was there that he became active in the National Lawyers Guild. He was on the Steering Committee of NLG's Military Law Task Force for many years.

In 1978, Jeff became a founding member of the National Organization of Legal Services Workers (NOLSW), UAW Local 2320. He wrote NOLSW's original constitution and bylaws, and chaired the founding convention. He served in numerous positions nationally, regionally and locally over the course of more than 30 years of active membership. Jeff served as an officer including chairperson, secretary, and treasurer in two local bargaining units. He was a member of numerous bargaining teams, handled grievances, organized local activities and actions, lobbied for increased funding for Legal Services, and served as chief of the trustees in the national organization. Jeff was the vice president of NOLSW's Southeast Region for more than 20 years and continued as an active member of NOLSW/UAW Local 2320 as a retiree.

Jeff came to Louisville in 1981 to work as a staff attorney in the Community Development Unit at the Legal Aid Society. While there, he served many years as president of the local Legal Aid Workers Union (LAWU). Jeff helped many organizations during his years at Legal Aid and after his retirement in 2008. He wrote constitutions for some, by-laws, applications for 501(c) 3 status, and served on the boards of many of them. The breadth of the causes Jeff supported with his legal expertise and time reflect the life he lived. Though by no means all, among them were Artswatch, CHOICES, Kentucky Coalition to Abolish the Death Penalty, La Casita, Louisville Hispanic Latino Coalition, the neighborhood association at The Villages where he lived, and Portland Museum.

A memorial and reception will be held Sat., July 7, 2-4 p.m., at the Louisville Urban League, 1535 W. Broadway. We will comfort each other, share stories, and at 2:30 p.m. jointly honor Jeff and his remarkable life. Memorial gifts may be made to a charity or organization that honors what Jeff meant to you. For more information, see Jeff's Facebook page at facebook.com/jeffrey.segal.71.

THE MILITARY LAW TASK FORCE of THE NATIONAL LAWYERS GUILD

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

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

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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 interests.

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

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HOW TO DONATE

Your donations help with the ongoing work of the Military Law Task Force in providing information, support, legal assistance and resources to lawyers, legal workers, GIs and veterans.

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Send a check or money order to **MLTF, 730 N. First Street, San Jose, CA 95112**

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Thank you!