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ANNOUNCEMENT

2019 GI Rights Network Conference

The national GI Rights Network has scheduled its next annual conference to be held from Thursday, May 16, 2019, through Sunday, May 19, at the Cenacle Retreat and Conference Center in Chicago. It will begin with a welcoming session on Thursday evening, and run through noon on Sunday. Agenda planning is just beginning, and ideas for workshops are welcome. Readers who are interested in attending should contact Kathy Gilberd at 619-463-2369 or email@nlgmltf.org for more information and registration forms.

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DEPLOYED TO THE BORDER:
A TEST OF CONSCIENCE FOR SERVICE MEMBERS

BY JAMES M. BRANUM

Critical legal information for US servicemembers concerned about the legality of orders to deploy to the US-Mexico border

The Trump Administration’s political stunt of trying to block asylum seekers from reaching the United States, even if it requires the use of force, raises serious legal and ethical questions for military servicemembers deployed for “support operations” at the border.

The Military Law Task Force of the National Lawyers Guild shares the concerns of organizations such as Veterans For Peace, Courage to Resist, and others, that US servicemembers are being given illegal orders. We are also troubled about the lack of effective legal alternatives for service members dealing with possible illegal orders and believe it is essential that members of the military are fully informed about their rights and responsibilities under the law. In this memorandum, we will discuss briefly some of the legal challenges that a servicemember might face when deciding whether to disobey a possibly illegal order.

The Definition of an Unlawful Order

UCMJ Article 92 states that:

Any person subject to this chapter who—

(1) violates or fails to obey any lawful general order or regulation;

(2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or

(3) is derelict in the performance of his duties; shall be punished as a court-martial may direct.¹

Article 92 says that a servicemember has an obligation to obey lawful orders or regulations, but it does not define what “lawful” means, Part IV of the Rules for Court-Martial² (Punitive Articles)

¹ Uniform Code of Military Justice (2016), Article 92, online at archive.org/details/ManualForCourtMartial2016/page/n501

² The Manual for Courts-Martial provide regulatory interpretation for the statutory provisions of the UCMJ.
paragraph 16 (c)(1)(c), gives us this definition of what a lawful order would be:

*Lawfulness. A general order or regulation is lawful unless it is contrary to the Constitution, the laws of the United States, or lawful superior orders or for some other reason is beyond the authority of the official issuing it. See the discussion of lawfulness in paragraph 14c(2)(a).*

Who can make the judgment call as to what is and isn’t “lawful”? Moving on to paragraph 14c(2)(a) of Part IV of the RCM, we are provided some troubling guidance:

(a) Lawfulness of the order.

(i) Inference of lawfulness. An order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate. This inference does not apply to a patently illegal order, such as one that directs the commission of a crime.

(ii) Determination of lawfulness. The lawfulness of an order is a question of law to be determined by the military judge.

(iii) Authority of issuing officer. The commissioned officer issuing the order must have authority to give such an order. Authorization may be based on law, regulation, or custom of the service.

(iv) Relationship to military duty. The order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service. The order may not, without such a valid military purpose, interfere with private rights or personal affairs. However, the dictates of a person’s conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order. Disobedience of an order which has for its sole object the attainment of some private end, or which is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under this article.

(v) Relationship to statutory or constitutional rights. The order must

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This RCM provision leaves a servicemember with a terrible set of choices. A servicemember can refuse to obey an order due to the servicemember’s belief that the order is an “unlawful” order, however, the servicemember takes this choice at his or her own peril, since the final decision of lawfulness can only be decided by a military judge in a court-martial.

The question of the legality of military deployments to the border

The question of the legality of border deployments has already been discussed at length by law professor Marjorie Cohn in “Why the deployment of active duty troops to the border is illegal?” (Truth-Out November 19, 2018),5 in which she primarily discussed the federal statutory ban on the use of the military to enforce civilian laws6 as well as the 1951 Refugee Convention 7requirement that all people who arrive in the United States have the right to apply for asylum.

Other legal issues have arisen since Cohn’s article was released, most notably the Trump administration’s attempt to circumvent the limitations of the Posse Comitatus Act by way of a so-called “Cabinet Order” that claims to give troops the authorization to use lethal force,8 “a move that legal experts have cautioned may run afoul of the Posse Comitatus Act” noted the not-so-radical outlet Military Times.9

Also on November 25, US Customs and Border Patrol agents fired tear gas canisters on civilians (including children) who were on the Mexican side of the border.10 While these attacks were not made by military personnel, the incident highlights the increasing likelihood that deployed US troops might be ordered to participate in similar situations (using either less-lethal kinds of weapons such as tear gas or live fire). Indiscriminate attacks by military forces on civilian populations are banned under Protocol I of the Geneva Convention, however, the United States is not yet a signatory to protocol I,11 so its applicability to the current situation is in question, however, the use of chemical weapons (including tear gas) by military forces is banned under the 1993 Chemical Weapons

5 Cohn, Marjorie “Trump’s Military Deployment to the Mexican Border is Illegal” (Truth-Out.org Nov. 19, 2018) truthout.org/articles/trumps-military-deployment-to-the-us-mexico-border-is-illegal/
6 For a summary of the 1878 Posse Comitatus Act see wikipedia.org/wiki/Posse_Comitatus_Act
7 1951 Refugee Convention online with commentary at www.unhcr.org/uk/1951-refugee-convention.html
8 Morgan, J.C. “Don’t worry, the military at the border is ignoring the White House” (Inquisitr.com Nov. 22, 2018) online at inquisitr.com/5173802/dont-worry-the-military-at-the-border-is-ignoring-the-white-house/
11 For summary of Protocol I, see https://en.wikipedia.org/wiki/Protocol_I
Convention (of which the USA is a signatory), which would mean that any use of chemical weapons (including tear gas) would be a violation of federal law (by way of the US Constitution treaty clause).

What should servicemembers do?

There is no easy or unambiguous answer. Servicemembers who choose to disobey orders to deploy to the border may face serious consequences, acting “at their own peril” that their judgment of the unlawfulness of the orders will in fact be affirmed by a military judge if they are forced to stand trial, yet those who chose to take this course will be freed from possible future prosecutions for the commission of violations of federal and/or international law, as well as the personal guilt of having participated in an immoral action in support of a racist imperial regime.

Servicemembers who choose to obey orders to deploy to the border will not be facing punishment in the short-term, but may find themselves placed in terrible situations that will test their personal conscience and may lead to future prosecution for the commission of federal and/or international law, as well as the high likelihood of suffering possible moral trauma and PTSD as a long term consequence of their actions.

Options to avoid a deployment may be available, including finding medical, family hardship or other grounds that might show that a servicemember is not capable of being deployed and/or is eligible for a discharge. But these alternate paths to avoid deployment may be limited due to the suddenness of the deployment.

And it must be mentioned that military servicemembers do have the right to report possible illegal orders through the use of (1) a congressional inquiry, (2) filing an IG (Inspector General) complaint, or (3) the UCMJ Article 138 process. And of course servicemembers enjoy first amendment protections for their speech to the public, subject to some restrictions based on military regulations and case law.

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13 For discussion on the protected nature of communications between servicemembers and US Congressional offices, see Von Behren, Becca “Servicemembers rights under Military Whistleblowers Protection Act” (NLGMLTF.org 2013) online at nlgmltf.org/military-law/2013/servicemember-rights-under-military-whistleblowers-protection-act/

14 See “Grievances: Inspector General Complaints” (GI Rights Network Website) online at girightshotline.org/en/military-knowledge-base/topic/grievances-inspector-general-complaints


The Military Law Task Force wants servicemembers to be fully informed as they make these serious choices and urge anyone who might be facing a future deployment to call us for referral to a civilian attorney to discuss your options. Many of our member lawyers will be willing to do an initial pro-bono (free) consultation, and if additional legal defense assistance is needed organizations like Courage to Resist, About Face Veterans Against the War and Veterans for Peace stand ready to help raise needed funds.

For ways you can help distribute this information to servicemembers, see our website. For more information and resources, please visit:

- nlgmltf.org
- couragetoressist.org
- aboutfaceveterans.org
- veteransforpeace.org
- girightshotline.org (1-877-447-4487)

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MILITARY EQUAL OPPORTUNITY POLICIES

BY AARON FRISHERBERG

EDITOR’S NOTE: This is the first of a two-part review of Military Equal Opportunity Policies. Part 2 – a discussion of the Air Force policies - will appear in the next issue of On Watch.

The Department of Defense Directive on Military Equal Opportunity (MEO) Program, is found at DoD 1350.2. It is chock full of aspirational goals, e.g., “[p]roviding primary training for all DoD military and civilian personnel assigned to EO, EEO, and human relations programs on the prevention of sexual harassment and participation in extremist activities...” 5.2.1.1.

Therefore, to get an idea how it is supposed to work, it is necessary to turn to the service regulations, for nuts and bolts details of how violations of equal opportunity policy are to be complained of, investigated, and processed. Please read the section on the Army regulations as a point of reference before looking at the discussion of regulations for other branches of the armed services.

Neither the DoD regulation, nor most of the services' regulations, mention discrimination based on disability with respect to service members. In this respect, the regulations, other than those of the Air Force, are several decades behind the definitions of discrimination and reasonable accommodation which reflect Congress's enactment and the Supreme Court's and lower courts' articulation of the obligation not to discriminate and to permit reasonable accommodations when these accommodations are not an undue hardship.

As will be seen in the second part of this article, the US Air Force is alone in making its regulations
harmonize with the Rehabilitation Act of 1973, and the Americans with Disabilities Act as amended. Although the ADA does not apply directly to federal entities, the Rehabilitation Act was amended by the ADA requirement that it be interpreted to require Rehabilitation Act protections to be no less than those of the ADA. The Rehabilitation Act does apply to federal as well as private entities. The armed forces’ silence in their regulations is therefore not a statement that they are not required to comply with the Rehabilitation Act. These regulations simply substitute silence on disability discrimination for outright defiance of the law.

ARMY REGULATIONS

The Army regulations are found in Army Regulation 600-20, which include at Chapter 6, The Equal Opportunity Program in the Army, at Chapter 7, Prevention of Sexual Harassment, and at Chapter 8, Sexual Assault Prevention and Response Program.

Chapter 6, at pages 56-57, assign to the installation commander the task of maintaining EO assistance lines which will provide procedural information on the filing of EO complaints. Unit commanders, upon receipt of an EO complaint, are to process it in accordance with Appendix D to AR 600-20. This is most likely a typo, because it is Appendix C which is entitled “Equal opportunity/Sexual Harassment Complaint Processing System,” while Appendix D is the “Command Climate Survey.”

A part of Appendix C addresses equal access to off-base facilities, and directs that for installations both in the United States, where the Civil Rights Act of 1964 controls, and outside the United States, commanders make off-limits to Army personnel facilities that exclude persons on the basis of gender, race, color, national origin, or religion except that bona fide private clubs may be exclusive by reason of their appropriate membership. AR 600-20 6-8.

Army personnel are prohibited from participating in extremist organizations which promote illegal discrimination based on race, color, gender, national origin, or religion. AR 600-20, 4-12 a.

Appendix C-1 provides for informal complaints, those in which the complainant does not wish to file a written complaint, to be resolved at the lowest possible level. through discussion, problem identification, and clarification of the issues. The regulation, at p. 57, provides that EO complaints should be taken in person when possible; Appendix C recommends that anyone working on an informal complaint should prepare a memorandum of record.

Formal complaints must ordinarily be filed within 60 days of the incident complained of.

A commanding officer who receives an EO complaint is to investigate it, appoint someone to investigate it, or depending on its magnitude, ask someone of higher rank to appoint someone to conduct the investigation. AR 600-20, C-4 b. When a complaint has been referred by someone of higher rank, upon the completion of an investigation it will be returned to the referring officer with the findings. Unless the referring officer has reserved the right of final disposition, the case will be disposed of at the lowest level having authority consistent with the gravity of the case. AR 600-20, 5-8, b 1.

The regulation makes reference to the Military Whistleblower Protection Act as protecting an EO
A soldier who is the victim of reprisal or retaliation should report it to the Department of Defense Inspector General. AR 600-12, 5-12 e. Commanders and supervisors are forbidden from initiating any type of discipline or adverse action against an individual because the individual registered a complaint, except that making knowingly false statements is potentially subject to court-martial or other disciplinary measures. AR 600-20, 5-8-c and d.

Legal assistance may be provided to soldiers who believe they have been denied federally protected rights. However, if appearance in court or other legal action beyond the legal assistance officer is required, the only authority of the legal assistance officer is to report the matter to the Judge Advocate General for possible referral to the Department of Justice. AR 600-20, 6-13. Considering the rarity of Justice Department intervention in private civil rights suit, this amounts to no court remedy at all. Considering, too, that the Feres doctrine would bar any court remedy against the Army for discrimination, the principle incentive for challenging discrimination, a damages remedy, is removed from the reach of soldiers.

NAVY REGULATIONS

The US Navy’s Equal Opportunity policies and practices are found in a 43-page compendium at OPNAVINST 5354-1F. Although it is only a subjective impression of the two sources, this reader of the Army’s and Navy’s expressions of their respective commitments to equal opportunity decidedly favors the Navy’s. As an example, the Navy states unequivocally and forthrightly:

Discrimination based on sexual orientation is unacceptable and shall be dealt with through command or inspector general channels. OPNAVINST 5354-1F, 6-c.

Neither the Department of Defense Regulations nor the Army regulations give such a firm statement of protection against sexual orientation discrimination. If such a statement was intended by either the D. o. D. or the Army, it is buried in verbiage delineating the EO responsibilities of each level of officer.

The Navy, like the Army, prohibits reprisal for making an EO complaint, and like the Army, there is a gaping hole in the protection offered, by including at the same place an exception for a complainant who “has [k]nowingly made a false accusation of unlawful discrimination or S[exual] H[arassment]. OPNAVINST 5334-1F, 6-f. As the country recently learned during the Senate hearings on the fitness of Judge Brett Kavanaugh, what is a knowingly false accusation of behavior beyond the pale can vary greatly with the eye of the beholder. The difference between an anti-reprisal policy with and without the risk of backfiring on the accuser is vast.

Elsewhere in the Navy regulation, in one of the passages delineating the level of command at which tasks are distributed, is a list of the responsibilities of Commanders, Commanding Officers, and Officers in Charge.

It is at this level that the Navy requires officers to insure the confidentiality and anonymity of surveys, interviews, focus groups, and the like. OPNAVINST 5334-1F, 7-k-(11).
But what the Navy giveth, the Navy taketh away. For in the next line of the same paragraph, the exception is made for “comments that are in violation of the UCMJ.” So Navy personnel should feel that their freedom to speak freely about EO matters is confidential and anonymous, except when it isn’t.

Like the Army, the Navy provides by regulation for an appeal which may be brought by either the claimed victim of a violation of equal opportunity policy, or by the alleged offender.

Appended to the Navy regulations is a virtual how-to-do-it manual, “Navy Guidelines for Submitting, Handling and Reporting Equal Opportunity (EO)/Sexual Harassment (SH) Complaints”. It expresses a strong preference for addressing complaints through the informal complaint method over the formal complaint method. OPNAVINST 5334-1F, General Guidelines, 1. b.

It also designates the chain of command as the “primary and preferred” channel for identifying and correcting discriminatory practices. id. 1.a.

Among the actions for informally resolving a complaint is “(1) Address the concerns verbally or in writing with the persons demonstrating the behavior.” Like the Army, the Navy would prefer to expunge discriminatory behavior one bigot at a time. Fortunately, servicemembers are not required to use this method.

**MARINE CORPS**

The United States Marine Corps Equal Opportunity Manual provides the comprehensive view of how the Marine Corps addresses discrimination and sexual harassment. The purpose of the Manual, in its own words, is to “incorporate equal opportunity (EO) into the Marine Corps’ ethos and leadership philosophy.” 0001.

The manual is silent on disability discrimination. The policy of the Marines is to “provide EO for all military members without regard to age, color, gender, race, religion or national origin, consistent with the law, regulations and requirements for physical and mental abilities.” Emphasis supplied.

The Marine Corps regulations not only do not mention disability among the prohibited discriminations. They create an implicit tolerance of disability discrimination by adding to the list of forbidden discriminations, e.g., sex, race, etc., the qualifier that discrimination consists of taking into account factors other than "physical and mental abilities." A clearer invitation could hardly be fashioned to ignore any requirement that persons not be discriminated against because of perceived or actual disabilities that do not seriously limit their ability to serve.

The Marine Corps is the only branch of service where EO issues are not processed separately by an EO office, but rather through the chain of command. 2001.

Any naive perception of welcoming of discrimination complaints is chilled by the caveat that “[w]ilfully submitting false allegations is a violation of U.S. Navy Regulations and is punishable under the UCMJ.”
Off-base housing for Marines and their families is a critical factor in the quality of life of Marines and their families who live off base. The Corps’ remedies for housing discrimination is therefore too little, too late.

Recalling that the locating of military bases in their districts has been one of the accomplishments of generations of southern Congress members, the Marines’ approach to the integration of off-base housing is weak tea indeed.

The installation commander is to establish and maintain a working relationship with community councils or civilian community leaders to address instances and/or patterns of alleged discriminatory practices, and develop recommendations toward resolving those problems. 2014.3.a.

Recalling that during the civil rights era, citizens’ councils were among the local bulwarks of segregation, it is not difficult to imagine working relationships between installation commanders and local community leaders which leave in place patterns of racially segregated off-base housing of Marines.

While this is not the sole method by which the installation commander is to address discriminatory housing policies, among those that are also on the list of the commander’s duties is to “[e]nsure that military personnel are advised of :(1) [t]he right to initiate civil suits against discriminatory establishments,” 2014.3.c. (1).

In other words, you’re on your own.

“The DON [Department of the Navy] policy prohibits Marine Corp units or Marine Corps-sponsored organizations from using the facilities of organizations having discriminatory membership policies. 2015.1.” So far, so good. But the regulation continues: “[h]owever, membership and participation in such organizations or clubs by Marines as private citizens may be permitted as long as such participation is not contrary to good order and discipline.” 2015.1, id. What membership in discriminatory clubs and associations is not contrary to good order and discipline is in the eye of the beholder.

The regulation provides for EO complaints to be processed as an informal or formal complaint, at the choice of the complainant. 5002.

In addition, several alternative methods of filing a complaint are set out, including a Request Mast, 5003.1; Article 138, UCMJ, complaint, 5003.2; Navy Regulation Article 1150, a complaint against any other superior in rank or command, 5003.3; and communication with the Inspector General of the Navy’s Inspector General for Marine Corps matters. 5003.4.

Since every complaint lodged by a Marine is to be resolved through the chain of command, the Marine with an EO problem is well-advised to see what he or she can do to remedy their situation without resort to official channels.

Aaron David Frishberg is a lawyer in private practice in New York. He has been a member of the Military Law Task Force for at least three decades, and has served on its steering committee for many years. He continues to learn on the job how different military justice is from justice, He has never served in any of the armed services, and vows that he never will.
NEW NAVY POLICY ON ‘OTHER DESIGNATED PHYSICAL AND MENTAL CONDITIONS’

BY KATHLEEN GILBERD

On November 9, the Navy made revisions to the Naval Military Personnel Manual (MILPERSMAN). Perhaps the most important of these is the replacement of MILPERSMAN 1910-120 (Conditions Not a Disability, formerly Other Designated Physical and Mental Conditions (ODPMC)) and 1910-122 (Personality Disorder) with a new discharge section, 1900-120 (Convenience of the Government— Medical Conditions Not Amounting to a Disability (CnD)). The new section covers personality disorders, once the military’s preferred way to eliminate ill or “troublesome” personnel, and adjustment disorders, which have taken personality disorder’s place as an easy way to discharge those personnel, as well as a broad range of relatively minor physical or psychological conditions. 1910-120 applies to both officers and enlisted personnel, and allows for member-initiated discharges as well as command-initiated separations.

While there are some significant changes, the broad criteria for the enlisted discharge remain the same. Officers, who had no corresponding discharge section, now have standards and criteria similar to those for enlisted personnel. Procedures, on the other hand, are significantly different than in the prior policies.

The policy section of 1900-120 states that “medical conditions interfering with a member’s performance of duty, but not specifically listed as compensable under the veterans affairs schedule for rating disabilities [38 CFR 4.129], may be eligible for separation for conditions not amounting to a disability (CnD).” This allows for administrative discharge for illnesses or injuries that do not rise to the level of “unfitting” and so do not require medical discharge or retirement, and accompanying benefits, through the Disability Evaluation System (DES).

To warrant separation, the CnD must lead to “a diagnosis by an authorized mental health provider, as defined in [DoD Instruction 6490.04] and the American Psychiatric Association, “Diagnostic and Statistical Manual of Mental Disorders,” [which] concludes that the disorder does not constitute a disability, and is so severe that the member’s ability to function in the military environment is significantly impaired.” Unlike the old 1910-120, the new section does not list examples of covered conditions, except to mention in passing personality disorders and adjustment disorders, asthma and allergies. Presumably doctors and commands can refer to the lengthy, but not inclusive, list in the Navy’s medical standards, set out in SECNAVINST 1850.4E, Enclosure 8. The emphasis on the Diagnostic and Statistical Manual and mental health providers suggests that the Navy sees this section primarily as a discharge for non-unfitting psychological disorders, though the SECNAVINST 1850.4E list includes a number of physical conditions as well.

Three elements of the criteria for CnD discharge remain the same as the old sections. First, there must be an effect on performance of duties; the mere presence of a covered condition is not sufficient. Second, the performance problems must be caused by the medical condition, not other factors. Third, the medical condition must be severe. In the past, commands have not always adhered to these requirements, relying on a diagnosis alone where there are no effects on performance, or
ignoring other, non-medical reasons for performance problems, such as retaliation for sexual harassment complaints or whistleblowing.

Under the prior sections, discharge could not be accomplished until the member had been counseled formally and given an opportunity to overcome deficiencies; the section on ODPMC specifically emphasized the effect on duty performance over the actual medical condition. CnD still requires formal counseling and an opportunity to overcome deficiencies in most cases. However, the new section now allows for discharge without that opportunity where the medical condition precludes the member from overcoming the deficiency (here asthma and allergies are mentioned as examples). Section 1.c states that “[c]ommanding officers (CO), based on a written opinion of appropriate medical providers, will determine if the condition warrants an opportunity to overcome the medical condition and the resulting negative impact on performance.”

As written, this allows for considerable subjectivity on the part of CO’s and doctors, and may lead to determinations that even the most temporary conditions cannot be overcome. The provision is not in keeping with Defense Department policy, set out in DoD 1332.14, Encl. 3.a.(8).(a).1, which requires counseling and an opportunity to overcome deficiencies in all cases. (Enclosure 4 of the Instruction states at part b.(3), however, that “An alleged or established inadequacy in previous rehabilitative efforts does not provide a legal bar to separation,” though this section does not define “previous.”) It remains to be seen how the Navy will respond to challenges based on this possible contradiction with the controlling policy.

If the medical condition does not preclude improvement, counseling provisions are similar to those in the prior reg. Section g(1), discussing command-initiated discharges, states that involuntary discharges cannot be initiated until the member has been notified formally with a NAVPERS 1070/613 counseling entry, or a commissioned officer has been formally counseled about performance deficiencies and advised of medical resources that may assist in retention, if applicable. The section goes on to state that “[t]he CO must provide reasonable time to the Service member to overcome deficiencies as reflected in appropriate counseling or personnel records….Documentation will include history from supervisors, peers and other as necessary to establish that the behavior is persistent, interferes with assignment to or performance of duty and has continued after the member was counseled and afforded an opportunity to overcome the deficiencies.” Navy commands, often in a hurry to process this discharge, have been known to counsel only days or hours before initiating discharge under the old provisions. It’s not clear that the new section will command greater compliance.

In a change from prior policy, the new reg requires that medical officer recommendations for CnD discharge must be endorsed by a medical evaluation board appointed by the Bureau of Medicine and Surgery (BUMED). Where the diagnosis is chronic adjustment disorder, the member must be specifically evaluated for referral to the Disability Evaluation System for medical discharge or retirement. If a member is found fit for duty by a Physical Evaluation Board (PEB), and found not to be world-wide assignable through a medical assignment screening, 1900-120 may not be used as the basis for separation without approval by the Secretary of Defense. Non-deployable HIV-positive personnel are not covered by this policy, but by SECNAVINST 5300.30E.

In addition, review by a flag medical officer is now required when (1) personality disorder is the basis for the proposed separation, (2) the member has more than four years of service, 3) the member has deployed to an imminent danger pay area within the last 24 months, or (4) the member has ever
completed or flagged to complete a post-deployment health assessment. All but the third of these provisions are new.

1900-120 also requires that, for members serving in or who have served in imminent danger pay areas, a diagnosis of a mental health condition not constituting a disability must be corroborated by a peer or higher-level mental health provider and endorsed by a full MEB prior to separation. PTSD and other co-morbidity must be considered. If the DES finds the member unfit for duty, he or she cannot be administratively discharged for CnD if service-related PTSD, another trauma related disorder, or any condition that may trigger the protections of the VA Schedule for Rating Disabilities is also diagnosed.

In involuntary discharge cases, if a board hearing is required and requested, 1900-120 presents the member with a new problem. Note 2 to the new section states, “[t]he board may not disregard or change the approved diagnosis of a medical officer. Members may introduce evidence as to the impact that such a diagnosis may have on their potential for productive future naval service.” The reg does not indicate the point at which a diagnosis is “approved,” though agreement by all required medical personnel or boards is the likely meaning. This can cause serious problems where military doctors simply agree with each other despite evidence that, for example, anxiety disorder is the cause of the symptoms ascribed to a personality disorder.

Commands are to forward their discharge recommendations to the Commander, Navy Medicine East or West, as appropriate, for endorsement. Where the member is assigned to a Marine Corps activity, the recommendation is to be forwarded to the Director of Health Services/Medical Officer of the Marine Corps.

Separation authorities vary. The CO of Navy Recruit Training Command is the separation authority for recruits. Where a member is diagnosed with PTSD or TBI, the Chief of Naval Personnel or higher authority serves as separation authority. For all other enlisted personnel, the separation authority is the first flag officer in the member’s chain of command. For all commissioned officers, the separation authority and show cause authority are listed in DoD 1332.30 and SECNAVINST 1920.6C.—the show cause authority is the Chief of Naval Personnel, and the separation authority is the Assistant Secretary of the Navy (Manpower and Reserve Affairs), by delegation from the Secretary of the Navy.

As noted, this discharge may also be requested by the servicemember. Here, the member’s request may be made only after the development of medical documentation that all medical avenues of relief have been exhausted. A military doctor’s recommendation for separation is required, while counseling and an opportunity to overcome deficiencies are not. The new section provides a form letter for the discharge request, and the reg does not require formal notification of discharge proceedings or a statement of awareness/waiver of rights form. If the requesting member is an officer, an unqualified resignation request must also be included in the discharge packet, and the request is sent via both the CO and the first flag officer in the chain of command. The CO’s recommendation must verify some of the information provided by the member, and explain why the medical condition leaves the member “incapable of completing obligated service in any capacity.”

The reg implies, but does not specifically say, that the CO must process each request and submit it to the separation authority. This writer expects that some commands will refuse to make a recommendation and merely ignore the request, requiring a complaint or outside assistance to ensure processing.
The various Navy changes to this discharge offer additional protections to members who have been misdiagnosed with minor physical or mental conditions, and who seek to be retained or medically retired. Since the decline of personality disorder discharge as the method of choice for ridding the service of ill, troublesome or otherwise nonconformist sailors, ODPMC for adjustment disorders has taken its place. The multiple levels of review now required will make the discharge more cumbersome for commands, creating time in which challenges to the diagnosis (board requirements not withstanding) and allegations of performance problems may be raised. For members seeking to use CnD as a voluntary discharge, the additional layers of review may pose problems as well. In either case, assistance from counselors and attorneys may be essential in forcing the Navy to handle this discharge properly.

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**ARMS CAPTAIN UNDER SCRUTINY FOR TWEETING FACTS ABOUT U.S. MILITARY**

*BY COURAGE TO RESIST  SEPTEMBER 9, 2018*

("This war economy is hurting all of us except those profiting."

With that, and similar posts on social media, US Army Capt. Brittany DeBarros has gotten the attention of the Pentagon. The *Army Times* recently declared, “An Army Reserve psychological operations officer is on day seven of 14-day orders, according to her Twitter account, and she’s taking the opportunity to let the internet know she does not approve of the Defense Department.” All this attention for sharing basic facts about our country’s endless wars, and the impact those are having both abroad and at home.

Brittany first started posting a series of simple graphic messages on July 14. The first one read, “I’m on Army Orders for the next 14 Days and there’s not much I can do about that. WHAT I CAN DO is schedule daily posts in my absence with facts about the horror being carried out by our war machine for profit.” It was accompanied by a graphic with the text “At the current rate, the US drops a bomb every 12 minutes.”

A couple of days later, she declared, “For years the executive branch has run wild warmongering while congress stands by. Greed fueled violence. Racist, Islamophobic fueled SILENCE. It’s on us to dismantle and our own liberation depends on it.”

After the Army announced that they were investigating her, she shared, “In case anyone is confused, these are my personal views and I don’t speak in an official capacity for the DOD.”

Brittany addressed her motivations on social media, explaining, “Two headlines within the last week: ‘White House: US Can’t Afford Veterans’ Health Care Without Cuts.’ and ‘House Passes $717 Billion Defense Bill.’ So tell me again how it’s against the Army Values for me to point out this charade?”
And how I’m hurting my soldiers by refusing to be quiet about the fact that we have endless dollars to send them to war but suddenly are broke when they need care? I call b.s.”

This is the second time in so many months that she has caught the Pentagon’s attention. Brittany was also threatened with reprisal after giving a speech at the Poor People’s Campaign rally in Washington DC in June. At that time, she responded:

“In the Army, we are taught that our core values must be Loyalty. Duty. Respect. Selfless service. Honor. Integrity. Personal courage.

So, you tell me... Am I LOYAL if I say nothing while a wealthy few pay our politicians to disregard the Constitution I swore to protect so they can make a killing off of killing?

Am I a DUTIFUL leader if I stand by while the young soldiers for whose lives I’m responsible are sent to kill and die in illegal wars based on lies?

Am I RESPECTFUL of this uniform we wear if I am silent about the atrocities it’s being used to carry out?

Am I SELFLESS in my SERVICE if I fall in line and stay quiet simply to avoid risk to myself and my career?

Am I HONORABLE if I’m more concerned about what’s popular or acceptable than about what’s right?

Am I living with INTEGRITY if I say ‘I’ll do the right thing later when it won’t cost me so much’?

And where is my PERSONAL COURAGE if, in the face of repression and threats, I cower and back down, especially when so many before me have sacrificed so much for the
very freedom I am exercising?

So if what I’ve been saying is somehow doing wrong by the military, the mistake they
made was commissioning a leader that takes these values seriously. Leaders of
conscience have a moral obligation to speak up #GIResistance #CourageToResist”

Brittany has continued to post new graphics and commentary. Follow her on Twitter @brittdobarros

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UPDATE ON MILITARY TRANSGENDER POLICY

BY JEFF LAKE

As previously noted in On Watch, on July 26, 2017, President Donald J. Trump announced on Twitter that “the United States Government will not accept or allow transgender individuals to serve in any capacity in the U.S. Military.”

Following this, a Presidential Memorandum and DoD Implementing Memorandum were issued. The presidential memorandum and the DoD implementing memorandum basically prohibited the accession of transgender recruits and stated that medical treatment would only be provided until March, 2018.

The policy was immediately subject to court challenge across the county. On August 28, 2017, the ACLU filed suit in Maryland. (Stone v. Trump.) GLAD and NCLR filed suit in Washington, D.C. (Doe v. Trump.) Equality California, joined by NCLR and GLAD, filed suit in California. (Stockman v. Trump.) Finally, the Lambda Legal and OutServe-SLDN filed suit in federal court in Seattle. (Karnoski v. Trump.)

All of these cases resulted in preliminary injunctions against the transgender policy. In the cases in D.C. and Maryland, the D.C. and Fourth Circuit Court of Appeals denied the Trump Administration’s appeals. As of this writing, all of the injunctions issued nationwide remain in effect.

On March 23, 2018, the President issued another memorandum regarding military service by transgender individuals. This memorandum stated that he revoked his previous 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.

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 Justice Department in the Seattle case has moved to dissolve the injunctions issued there. Arguments in that case were heard at the Ninth Circuit on October 10, 2018. Two of the three judges on the panel seemed receptive to the DOJ’s arguments that the new policies were constitutional. They likened the situation to the Muslim ban which was revised and ultimately upheld in the Supreme Court. They seemed to imply that the District Court did not give sufficient weight to the administration’s justifications for the current policy. If the Ninth Circuit ultimately dissolves the injunction, there are still other injunctions in place. There are also discovery issues that remain to be litigated.

On November 23, 2018, the day after Thanksgiving, the Justice Department attempted to short-circuit the litigation by filing a Petition for a Writ of Certiorari Before Judgment in the United States Supreme Court. The writ is asking the Supreme Court to immediately take up three cases where courts have issued nationwide injunctions against the transgender ban, including the one in Seattle. The position asserted by the Justice Department is that the court should take the cases to “ensure an adequate vehicle for the timely and definitive resolution of this overall dispute.”

Organizations representing the Plaintiffs in the cases were quick to condemn the action by the Justice Department. Lambda Legal counsel Peter Renn said, “This highly unusual step is wildly premature and inappropriate, both because there is no final judgment in the case, and because even the preliminary issue on appeal has not yet been decided. It seems the Trump administration can’t wait to discriminate. Yet again, the Trump administration flouts established norms and procedures. There is no valid reason to jump the line now and seek U.S. Supreme Court review before the appellate courts have even ruled on the preliminary issues before them.”

As this issue goes to press, on December 13, 2018 the Solicitor General asked Justices Kagan and Roberts to stay the nationwide injunctions now in place. This request will most likely be referred to the entire court for consideration.

The NLG Military Law Task Force will continue to monitor the developments concerning this issue. Interested persons should join the Task Force to receive the latest updates.

Jeff Lake is an attorney with Carpenter and Mayfield in San Jose, CA. He is the Chair of the MLTF.

2018 NLG CONVENTION REPORT

BY JEFF LAKE

The National Lawyers Guild held its 81st convention in Portland, Oregon on October 31 - November 4, 2018. The Military Law Task Force participated in multiple ways throughout this convention.

The MLTF co-sponsored a workshop with the International Committee entitled “Blood Money: Profiteering Off Death and Violence in a Militarized America.” The workshop began with a presentation by MLTF Treasurer Libby Frank on counter-recruitment. She spoke about the many
ways that military recruiters are in schools across the country. She then highlighted ways that communities are resisting the presence of the military and fighting for equal access in the schools. Finally, she closed with mentioning resources such as nnomy.org and projectyano.org where people can find information regarding counter recruitment.

Teressa Raiford from Don’t Shoot Portland then spoke about the challenges organizers face in combatting police violence in their communities. She mentioned the insidious tactics the police use under the guise of “community policing” which is in essence a way to collect data and control the population. As she put it, “We are not the problem.”

Finally, James Branum from the MLTF spoke about militarization of law enforcement. He observed that the gun industry and the pervasive use of violent images in media and entertainment contribute to a culture of violence in the U.S. James closed by noting the class basis of those who enlist in the military and ultimately become veterans. He pointed out that veterans have more unemployment and less income than the general population.

This workshop was well attended, and the feedback was good. Following the workshop, it is clear that there is interest in adding counter-recruitment work to the MLTF agenda.

Following the workshop, the MLTF held its annual meeting. The format for the meeting was lunch at a nearby restaurant. Due to the logistics of the site, the gathering turned into conversations between long-time MLTF members and newer convention attendees interested in our work. Hopefully those who attended the meeting will continue to participate and join the MLTF as we continue our work in the new year.

A new feature of the convention this year was the “Reproductive Justice Cocktail Hour.” Representatives from various committees of the NLG spoke regarding issues related to reproductive rights. Kathleen Gilberd, Executive Director of the MLTF, spoke about how this issue affects those in the military.

Throughout the convention, the MLTF staffed a well-stocked literature table filled with our publications. Despite being located in a less traveled area of the convention hotel, MLTF members were able to speak with a number of people. Several people expressed interest in continuing to receive information regarding our work.

Finally, during the convention the National Immigration Project, International Committee and Mass Defense Committee put together plans to form a joint committee to do work around the caravan(s) now located in Mexico. After the convention, the MLTF joined and is now working with this joint committee. Read the Nov. 20 press release: “NLG & Al Otro Lado Mobilizing Legal Support for Central American Refugee Caravan at Mexico-US Border.”
**MEMBER NEWS**

**HUMAN RIGHTS AWARD FOR CO WORK**

James M. Branum, who has been a member of MLTF since law school, and has previously served as Chair, was awarded an Oklahoma Human Rights Award on Dec. 8 at the State Capitol. The award is sponsored by the Oklahoma Universal Human Rights Alliance and the Oklahoma City chapter of the United Nations Association. The award specifically credited James’s work helping conscientious objectors leave the military.

In his speech, James said:

> My work has primarily been in fighting for the fair treatment of all who serve --- which includes combat veterans struggling with the demons of PTSD, women and People of Color who have faced discrimination, and most significantly to me --- those who have had a change of heart regarding the morality of military service. [...] The Universal Declaration of Human Rights Article 18’s (protection of the right to change one's mind about an issue of conscience) has been honored, imperfectly, throughout our nation's history. Today the right to change one's mind is recognized by federal statute and military regulations, but as always, the struggle in the law is in the execution --- how does our society implement and live out these high ideals?

He also thanked his fellow lawyers and legal workers in the NLG “who taught me how to be a lawyer for the oppressed.”

On November 5, James gave a workshop at Solespace in Oakland entitled “Military law for civilian attorneys and advocates.” It was hosted by Courage to Resist and co-sponsored by the Bay Area Military Law Panel of the National Lawyers Guild.

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Send news reports and announcements to the On Watch editors at editors@militarylawtaskforce.org.
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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