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STUDY GROUP ON ENDING *FERES*

AN INVITATION FROM THE EDITORS

The *Feres* doctrine has been a SCOTUS-created exception to the Federal Tort Claims Act first enunciated in a case where the plaintiff, a member of the U.S. military, attempted to bring suit against the U.S. military for money damages. (See *Feres v. U.S.* 340 U.S. 135 (1950).) *Feres* was reinforced by *Wallace v. Chappel*, which rejected an attempt by African-American members of the military to create an equal protection exception to the *Feres* doctrine.

However, in a recent case, a dissent from the denial of certiorari by Justice Thomas, suggested that the wall of *Feres* may no longer be impregnable. Justice Ginsberg would have granted the petition. (See *Daniel v. U.S.* - decided May 20, 2019.)

The Military Law Task Force Steering Committee recently agreed to form a study group to examine strategies for creating breaches in the *Feres* wall.

For further information on joining this study group, contact Kathy Gilbert, Executive Director of the Military Law Task Force, email@nlgmltf.org, or Aaron David Frishberg, Esq., lawyerADF@aol.com.

MILITARY EQUAL OPPORTUNITY POLICY – AIR FORCE REGULATIONS

BY AARON FRISHBERG

Editor's Note: This is the second part of a two-part review of Military Equal Opportunity policies. The first part appeared in the Winter, 2018, issue of On Watch.

The Air Force EO provisions are contained in Air Force Instruction 36-2706. The regulation is marked on the front page with the imprimatur, "By Order of the Secretary of the Air Force", and lest there be any doubt, the bold heading, "COMPLIANCE WITH THIS PUBLICATION IS MANDATORY." The subject of the Instruction is "Equal Opportunity Program, Military and Civilian."

With one distressing exception, this regulation is head and shoulders above the regulations of the other branches of the armed services in their successful aspiration to provide a watertight seal to equal opportunity to members of the Air Force and to civilian employees and contractors, so that any discrimination that occurs is a result of not following the regulation, not its porous ability to allow discrimination to take place in its interstices.

The distressing exception, found at 3.33.3, bears immediate attention: The regulation instructs EO officers:

The EO office must immediately refer all allegations of homosexual conduct or perceived or alleged discrimination based on sexual orientation to the alleged offender's military commander for action. See AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers, attachment 2* and AFI 36-3208, *Administrative Separation of Airmen, attachment 4*. Such issues are not within the authority of the Air Force EO program.

It is true that the date of the Instruction is October 5, 2010, and that a lot of water has flowed under that bridge in the intervening years. Nonetheless, the regulation remains in force, and any custom that has developed of taking a less tolerant approach to sexual orientation-based harassment and discrimination is subject to change at the behest of the Commander-in-Chief, a known homophobe.

With that glaring exception, as noted above, the Air Force regulation is an example of what the other branches of the armed services could have done if someone with the authority to fashion EO regulations had thought out carefully how they could be made effective.

AF136-2706 begins with a declaration of Air Force policy of zero tolerance for unlawful discrimination or harassment, including sexual harassment of any kind. 1.1.

That declaration is amplified by the statement that it is "against Air Force policy for any Airman, military or civilian, to unlawfully discriminate against, harass, intimidate or threaten another Airman on the basis of race, color, religion, sex, national origin, age, disability, reprisal, or genetic information." 1.1.1.

The same subpart of the regulatory paragraph goes on to define unlawful harassment to include "unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature particularly when submission to such conduct is made directly or indirectly as a term or

condition of employment, and/or when submission to or rejection of such conduct is used as a basis for an employment decision affecting the person.” 1.1.1, *id.* The same paragraph continues by defining “[u]nlawful harassment” to also include “creating an intimidating, hostile working environment for another person on the basis of race, color, religion, sex, national origin, age, disability, or genetic information,” and it goes on to state that the use of disparaging terms with respect to these identifying conditions “contributes to a hostile work environment and must not be tolerated.” 1.1.1, , *id.*

The following paragraph declares that while the operational language of the Air Force is English, commanders, supervisors and managers at all levels must not require use of English for personal communications which are unrelated to official duties. 1.1.2.

A RIGHT WITHOUT A REMEDY

The policy discussed above placing sexual orientation discrimination off-limits to EO officers is slightly mitigated by the paragraph on harassment based on sexual orientation, which states that while not within the purview of Title VII, (presumably referring to the employment Title of the Civil Rights Act of 1964), the Air Force’s goal of maintaining a harassment-free environment for its military members and civilian employees also includes harassment based on sexual orientation. 1.1.3. This is called recognizing a right without a remedy. In place of a remedy, the regulation notes that sexual orientation harassment by military personnel may be punishable under UCMJ, Article 92, and should be addressed through command channels. 1.1.3, *id.*

Early in the Instruction, the EO office makes its first appearance. 1.4.1. The EO office, and the EO officer, will be seen to play a central role in Air Force implementation of the Instruction.

Helpful in finding one’s way through the Instruction is the Table of Contents found at the beginning of the Instruction, on pages 3-10. Also helpful is the list of abbreviations and acronyms beginning at page 135. The Air Force believes in using acronyms for as many functions as possible, and its policy may be impenetrable except to telepaths without this list.

BUCK STOPS WITH BASE COMMANDER

The Installation commander is responsible for the military and civilian personnel under his or her command. This individual is responsible for the EO complaint and ADR (Alternative Dispute Resolutions) programs under his or her command. 1.19. This is where the buck stops. The installation commander is charged with the responsibility, *inter alia*, to appoint the EO director and ensure adequate staffing of the EO office, 1.19.1; to ensure prompt processing of EO complaints, 1.19.3; to encourage informal resolutions of EO complaints, *id.*; to ensure that Air Force employees and management provide full cooperation to EO officials, 1.19.4, to accept and dismiss complaints in total or in part as warranted, 1.19.5; to ensure that Air Force and EEOC decisions or orders are fully and promptly implemented, 1.19.7; to provide for an environment free from unlawful discrimination and sexual harassment, 1.19.9; to ensure subordinate commanders appoint an EO specialist to serve as subject matter expert on all inquiries, 1.19.15; and to decide first level appeals on formal military EO cases involving unlawful discrimination or sexual harassment, 1.19.16.

No other branch of the Armed Forces has regulations that so clearly delineate an ultimate responsibility on the base commander level for the implementation of anti-discrimination policies. Rather, the tendency in the other branches of the armed forces is to spread responsibility among several layers of the military hierarchy so that no one individual is held to ultimate responsibility at the base level, and there is every opportunity for EO complaints to fall through the cracks.

EO DIRECTOR'S RESPONSIBILITIES

The Director of Equal Opportunity is the officer who implements the EO program at the base level and reports to the base commander. 1.20. Again, there is a single individual charged with overall responsibility for carrying out EO laws and policy and who is accountable for any failure to do so. 1.20. The EO Director either doubles as or works with the Alternative Dispute Resolution manager to make available ADR concerning EO complaints. 1.20.12.

The EO Director also is responsible for notifying complainants of class complaints of the procedures for class complaints and mixed complaints. 1.20.22. No other branch of the armed services even acknowledges in its regulations the existence of class complaints, let alone making someone responsible for complainants being advised of the procedures to be followed in utilizing this closely guarded secret procedural remedy for class wide discrimination issues.

Civilian complaints are evaluated by the installation commander or his or her delegated representative, the vice-commander or EO director for determination or dismissal. 1.20.21. The EO director is not permitted to decide on dismissal or determination on any case in which she or he participated as a counselor. 1.20.21.

Reporting directly to the EO Director are EO specialists. 1.21. The duties of the EO specialist are laid out in a page and one-half list containing twenty-six paragraphs. No attempt will be made to summarize these duties, except to note that the EO specialist is to maintain a neutral position, 1.21.1, and to serve as subject matter experts, 1.21.17, and interfaces with all levels of installation personnel. The next, lowest level of position within the EO office is the EO counselor, who is to maintain a neutral position and whose duties primarily consist of advising complainants and potential complainants of their rights and options. 1.22.1, 1.22, *passim*.

UNIT COMMANDER'S RESPONSIBILITIES

The unit commander is charged with responsibility to provide an environment free from unlawful discrimination and sexual harassment. 1.23.1; to ensure that all allegations of unlawful discrimination and sexual harassment are thoroughly investigated, 1.23.2; to inform unit members of their right to file EO complaints, 1.23.3; and to inform unit members through briefings and supplemental EO policy guidance that the Air Force will not tolerate unlawful discrimination and sexual harassment. Commanders and supervisors will take appropriate disciplinary and corrective action when unlawful discrimination or sexual harassment occurs, 1.23.4, 1.23.5; to ensure that every effort is made when a formal complaint is filed with the EO office to protect the complainant's identity, 1.23.6; to inform alleged offenders in that they are the subject of a formal EO complaint, to provide them with only the general nature of the EO-related allegations filed against them and to ensure that the alleged offender is cautioned against taking reprisals or other retaliatory actions 1.23.7; to inform the alleged

offender when the case against him or her is closed and of the right to appeal the outcome in the case, 1.23.8; and to investigate allegations of unlawful discrimination or sexual harassment, when the military complainant has elected not to file an unlawful discrimination complaint with the EO office.1.23.9. The same duties fall upon a geographically separated unit commander. 1.24.

AIR FORCE EXCLUSIVE: JA ADVICE IN EO MATTERS

Although various federal statutes involving discrimination provide for the payment of compensatory damages and attorney fees by the United States including in cases brought against the United States, including the military, the Air Force is the only branch of the service to involve the Judge Advocate in advising on and settling such claims brought by civilians against the military. It is to be hoped that the involvement of Judge Advocate professional attorneys who have the confidence of the base commander has led and will lead to more realistic negotiations with the Air Force by civilian claimants with discrimination or sexual harassment claims.

The installation staff judge advocate provides legal advice on formal EO unlawful discrimination and sexual harassment complaints, 1.25; conducts a legal sufficiency review memorandum on all formal military EO complaints on whether a preponderance of the credible evidence supports a violation of the EO policy, 1.25.1; provides legal advice to the installation commander on informal civilian complaints and dispute resolution matters, 1.25.2; reviews initial interview outlines/questions drafted by the EO office and provides recommendations and feedback for formal EO cases, 1.25.3; reviews for legal compliance in the informal process, resolutions/settlement agreements, reviews claims for compensatory damages and attorney fees, 1.25.4; and advises the installation/center commander (director) on the amounts to be paid and negotiates fee agreements with opposing parties. *Id.*

ADDITIONAL AIR FORCE EXCLUSIVES

The Air Force is also the only branch of the service that addresses the coverage of National Guard members and Reservists who have been activated. 1.27, 1.29.

The Air Force also is unique among the Armed Services in addressing the availability of Freedom of Information Act/ Privacy Act provisions when records are requested of the EEO office. 1.39.

Unlike the Army and Navy, which encourage the complainant to seek resolution with the offending party, the Air Force encourages one-on-one addressing of the issue by commanders, first sergeants and supervisors only when the complainant has not filed a military complaint with the EO office. 3.2.1.

The Air Force is alone among the service branches to address incidents of discriminatory acts of personal affront or injury based on bigotry, what in the civilian world would be called hate crimes.

The Air Force provides for the investigation of an EO military formal complaint even when the assistance of the EO office on another installation is required. For example, an EO investigator will conduct interviews of subjects on another air base, to be returned to the EO office at the installation where the complaint was received. 1.47.1.

Additionally, Civilian informal Equal Employment Opportunity complaints that require assistance from the EO office in processing a complaint are likewise dealt with by a paragraph of the Instruction. 1.47.2. Such provisions are not so remarkable for what they include as they are for the fact that these relatively rare occurrences are addressed by regulation, suggesting that someone in authority has made serious efforts to provide a seamless Instruction which will address a multitude of “What if...” questions.

The Instruction provides, in a three-page, 25-paragraph chapter on the use of Alternative Dispute Resolution, modalities to swiftly address and resolve EO issues when the complainant is willing to engage in mediation or similar modalities. 2.1, 2.2. Chapter 3 of the Instruction consists of a 23-page series of numbered paragraphs on Military Equal Opportunity (MEO) Assistance and Complaint Processing, followed by a three-page chart which summarizes the directives on this subject. The chapter commences with methods of conducting informal assistance.

If the command has already worked issues falling under the purview of the EO office, the EO office will accept the complaint for processing only with the concurrence of the installation commander. 3.2.2. The EO specialist provides subject matter expertise on commander-initiated investigations when they fall within the purview of the EO office. 3.3. Processing of Informal military complaints within the scope of the EO office has the objective of attempting resolution at the lowest possible level. 3.4., 3.5.

Only members of the military, their families, and retirees may file military informal EO complaints. 3.6. Moreover, EO specialists will not accept military informal complaints if their concern is related to their off-base or DoD civilian employment. 3.7. There is no time limit for the filing informal complaints. 3.8. However, if an informal complaint is being filed more than 60 days after the alleged offense, the Installation Commander would need to waive the 60-day limit for good cause. 3.8.1.

LIMITS ON CONFIDENTIALITY

Complainants will be advised that the EO office does not have the privilege of confidentiality with respect to allegations of unlawful discrimination and will be directed to report to the Inspector General any form of reprisal. 3.9.2., 3.9.4. The same limitations as are enumerated above for the who and what of informal complaints apply to formal complaints, except that a formal complaint ordinarily must be filed within 60 days of the conduct complained of. 3.14, 3.15, 3.16, 3.17.

If the EO office investigation of allegations in a formal complaint finds that a preponderance of the credible evidence indicates that an EO violation has occurred, the complaint and findings will be forwarded to the judge advocate for review of its legal sufficiency, and if found sufficient, the complaint clarification report will be forwarded to the offender’s commander for review/action and to the complainant’s commander for review. The report must contain sufficient information to enable the commander to take action to eliminate unlawful discrimination or sexual harassment. 3.20.9. The commander must provide the EO office with a summary of any action taken. *Id.*

In all cases, the EO office of the complainant must follow up to ensure reprisal has not occurred. In substantiated cases, the EO office will conduct follow-up to ensure the offender has stopped the acts of unlawful discrimination or sexual harassment. 3.20.14.

Air Force members (but not their families or retirees) may appeal an EO finding with which they disagree to the next administrative review level, which for installation based conduct is the installation commander. 3.38.1. Appeals from an unsatisfactory appeal decision can be made to the next highest level. 3.38.1.9.

Claims of reprisal should be filed with the installation Inspector General. 3.40.

A list of military EO complaint processing responsibilities is summarized in a three-page table. Table 3.1.

CIVILIAN COMPLAINTS USUALLY GO TO EEOC

Chapter 4, spanning 16 pages, is exclusively dedicated to the processing of civilian EO complaints. Of interest to the civil rights bar, this chapter is beyond the scope of an article delineating the manner in which each branch of the armed services addresses EO complaints filed by members of that branch of the service.

For present purposes, it should be sufficient to state that the vast majority of EO claims involving civilians will be equal employment opportunity complaints. These complaints are processed internally by the Air Force, as are complaints based on employment discrimination or sexual harassment in other branches of the service.

Like civilian complaints of discrimination in employment, these will require administrative exhaustion before the EEOC. The salient difference between complaints against federal employers, including the armed services, and EEOC proceedings which are processed administratively against non-federal employers, is that the EEOC has no power in non-federal employment cases to take any steps beyond mediating between the parties, and issuing a “right to sue” letter if that mediation is unsuccessful. For federal government employees, including those employed by the Air Force or another branch of the armed services, the EEOC holds a fact-finding hearing and has the power to find in favor of the complainant and order a remedy against the government. Should a finding of discrimination not issue, the civilian employee is still entitled to commence an employment discrimination suit in federal court.

EO OFFICE “CLARIFIES” EOTIS

A short chapter of the Instruction, Chapter 5, running to three pages, addresses Equal Opportunity and Treatment Incidents (“EOTIs”). These incidents are defined as overt adverse acts occurring on or off base motivated by or having an overtone based on race, color, national origin, religion, or sex that involve a member of the Air Force, a family member, or a retiree. 5.1.

EOTIs are classified as minor, serious, or major incident, based on the number of individuals involved, the extent of physical injuries or property loss, or in the instance of major incidents, the activities of groups supporting supremacist causes, advocating the use or threat of violence, and the like. 5.2. The EO office is responsible for “clarifying” EOTIs, the Air Force’s term for investigating them, and reporting its findings to the appropriate Air Force higher headquarters for monitoring of and involvement in corrective action. 5.4, 5.5, 5.6.

DISABILITY DISCRIMINATION

The next chapter of the Instruction, Chapter 6, is devoted to the obligation to reasonably accommodate a disability, and the limits of that obligation. It cites to the Rehabilitation Act, as amended by the Americans with Disabilities Act and the amendments to that act as the source of the disability accommodation. 6.1.

This chapter, only three pages long, presents in synopsis form the law of disability discrimination, reasonable accommodation, the interactive process between the Air Force and the disabled individual, the limitation on reasonable accommodation based on undue hardship, and the rights and limits of requesting medical documentation. Chapter 6, *passim*. Whoever wrote the Air Force's guide to disability discrimination has a better grasp of the legal principles involved than do some federal court judges.

No other branch of the armed services includes anything in its regulations to illuminate the "Thou shalt not" of disability discrimination, which because of the obligation of reasonable accommodation is more complex than simply forbidding less favorable treatment to persons with disabilities compared to the treatment afforded others.

The Air Force includes a chapter on equal opportunity operations in the deployed environment. This chiefly consists of ensuring that there are adequately trained EO specialists, and an adequately trained EO director. Chapter 7, *passim*.

The Air Force devotes chapter 8 to settlement agreements. Civilians who file complaints against the Air Force, unlike Air Force members, are able to seek redress in the form of money damages for discriminatory conduct. This chapter sets out guidelines for settling discrimination claims, and the level of the settlor for the Air Force, and compliance by the Air Force. It should be required reading for attorneys representing civilian employees in EO suits against the Air Force.

The Air Force includes in the Instruction a chapter on the congressional act, "The No FEAR Act", which protects the complainants in anti-discrimination complaints and whistleblower actions. Chapter 11, *passim*. No other branch of the armed services so much as mentions this reinforcement to anti-reprisal provisions of EO law.

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DEPARTMENT OF DEFENSE REPORT ON MILITARY SEXUAL ASSAULT

BY KATHLEEN GILBERD

On May 2, 2019 the Department of Defense (DoD) released its congressionally-mandated report on sexual assault in the military for fiscal year 2018. The executive summary and introduction are available at nlgmltf.org/military-law/2019/military-annual-report-sexual-assault/. While the report praised existing practices to prevent sexual assault and discussed plans for additional actions in 2019, the data gathered in the report paints a bleak picture. Sexual assaults have risen significantly in number, prosecution of assaulters is limited, with fewer courts-martial, and retaliation against those who report assaults remains a serious problem.

The report relied extensively on a bi-annual “scientific survey” of approximately 100,000 military personnel. This showed a significant increase in sexual assaults of younger women (aged 17 to 24) from the last survey conducted in 2016, although the figures for male service members remained about the same. According to the survey, about 6.2 percent of servicewomen, or about 13,000 women, were assaulted in fiscal year 2018, compared to 4.3 percent in 2016.

The numbers of women who reported sexual assaults to military officials, however, remained about the same as in the previous survey, with an estimated one in three members reporting their assaults.

“MILITARY CLIMATE” FACTORS

The report acknowledged that “military climate” factors affected sexual assault rates, a relatively recent understanding for DoD. Servicemembers who faced sexual harassment, sexual discrimination or hostility in the workplace had an increased likelihood of sexual assault—women who experienced sexual harassment were found to be three times more likely than average to experience assaults, and men who experienced sexual harassment were twelve times more likely to be assaulted. The report also found that members who experienced incidents of sexual harassment had increased significantly—from 21.4 percent in 2016 to 24.2 percent in 2018.

According to the report, policy and training changes are planned to address retaliation. Yet prior changes to regulations have not reduced retaliation or provided real redress to its victims. Military culture continues to denigrate servicewomen in general and remains skeptical of harassment and assault reports. Many commands turn a blind eye to reports of retaliation, assuming that they are exaggerated or that there are other, legitimate reasons for actions which women merely perceive as reprisals.

REPORTING ISSUES

Military policy permits sexual assault survivors to make restricted (anonymous) or unrestricted reports of sexual assault. In the latter case, both the survivor and accused perpetrator are identified to the commanding officer and investigative agencies. In fiscal year 2018, 2,366 members made restricted reports, though 548 of those later converted to unrestricted reports, allowing, among

other things, prosecution of the assaulters. According to the report, one change to this reporting system will take place in 2019. A “Catch a Serial Offender Program” is to be launched in the summer, allowing members making restricted reports to provide information about the assaulter and assault confidentially. Should investigators find a match to other assaults, the restricted reporter will be notified and offered the option to convert to an unrestricted report to allow prosecution for that offense.

In fiscal 2018, the military found sufficient evidence to take some form of disciplinary action against 65 percent of unrestricted (or converted) cases. According to the report, just under three percent of reported cases were unfounded, with evidence showing that the crime did not occur or that the accused did not commit it. This figure is significantly different than the common military belief that women, in particular, frequently make false reports.

DISCIPLINARY ACTIONS AND OUTCOMES – NUMBER OF COURTS-MARTIAL IS LOW

Appendix B to the report gave some details of disciplinary actions and outcomes. The statistics are difficult to align, since some court-martial proceedings were begun but not completed in fiscal 2018, some cases were outside military jurisdiction and/or prosecuted by civilian authorities, and some survivors declined to take part in prosecutions. The report looked at the 668 cases in which court-martial charges were preferred in 2018, 482 of which were completed. Of these, 18 percent had charges dismissed prior to trial, and 34 percent resulted in acquittal on all charges. 203 accused were convicted of at least one charge at trial; only 67 percent of these received punitive discharges. (However, DoD policy requires administrative separation proceedings for assaulters who are convicted but not sentenced to a punitive discharge).

An additional 267 cases were handled at non-judicial punishment under Article 15 of the UCMJ. In 74 of these cases the non-judicial punishment was subsequently used as a basis for administrative discharge. Additional cases were subject to discharge proceedings without any disciplinary proceedings at all. In total, 108 members were administratively separated for charges relating to assaults (another 10 cases were pending when the report was written). Only 48 of these individuals received other than honorable discharges.

While it is difficult to correlate substantiated reports with disciplinary action, it is obvious that the number of courts-martial is low, particularly given that less than three percent of reports were determined to be unfounded by commands. Many commands continue to find ways to avoid or limit prosecutions, and some practitioners have noted a “backlash” effect in which court-martial panels are overly skeptical of assault charges. The former problem is the primary reason that legislation removing the convening authority from commands has been repeatedly proposed.

RETALIATION REMAINS A SERIOUS PROBLEM

In the last few years, the military has recognized — or been required by Congress to recognize — that retaliation for sexual assault complaints is a serious problem. The report states that research “continues to find that some Service members experience unhelpful reactions and negative outcomes” after reporting assaults. Specifically mentioned are “social exclusion,” career disruption and unfavorable personnel actions. These problems continue to plague reporters despite recent

changes to military regulations intended to prohibit and penalize reprisals. The 2018 survey found that about 43 percent of women who reported assaults “perceived negative experiences associated with reporting sexual assault,” and 21 percent perceived such experiences that met DoD’s definition of retaliatory behaviors (actions consistent with efforts to deter reporting or assisting in prosecution of the assaulters).

The report claimed that those who reported assaults felt a good degree of confidence in the personnel assigned to provide support and the military’s handling of cases, with over 70 percent of reporters expressing satisfaction. Reporters felt less satisfaction — less than 50 percent—for the behavior of superiors in the chain of command, military law enforcement, and the DoD Safe Helpline.

While Special Victims Counsel (military attorneys assigned to assist assault survivors) can be very helpful in retaliation cases, many of them consider this outside their purview. Victims Advocates and Sexual Assault Response Coordinators (SARCs) are sometimes supportive when retaliation occurs, though their authority is limited. More useful solutions to these problems have been support from independent attorneys, advocates, and organizations such as Service Women’s Action Network (SWAN), Protect Our Defenders, and the Task Force.

For more information, the memo *Challenging Military Sexual Violence* is available on the MLTF website - nlgmtf.org/military-law-library/publications/memos/military-sexual-violence/

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TRANSGENDER BAN UPDATE, JUNE 14, 2019

BY JEFF LAKE

The spring of 2019 has seen the implementation of the ban on military service by transgender individuals. What started as a tweet by President Trump in 2017 has now come to be official U.S. military policy. That policy is being challenged and cases are working their way through the courts.

The Pentagon issued a memorandum on March 12, 2019, outlining the transgender ban policy. This memorandum went into effect on April 12, and is effective for one year. The Pentagon tried to sell the idea that the policy was not a ban. Instead, it explained that it simply states that all persons must meet the “standards associated with their biological sex.” Under the policy, “a history of cross-sex hormone therapy or a history of sex reassignment or genital reconstruction surgery is disqualifying.” In other words, transgender people can serve as long as they are not transgender. However, as observers had predicted, the policy does not make those who are already serving in their preferred gender subject to discharge and they can continue to serve.

The policy has been roundly criticized by human rights groups and by a wide variety of current and former servicemembers. The President of the American Medical Association issued the following statement: “The AMA has said repeatedly that there is no medically valid reason – including a diagnosis of gender dysphoria – to exclude transgender individuals from military service.” Since the announcement of the policy, the National Guard units of six states – California, Colorado, Nevada,

New Mexico, Oregon and Washington have announced that they will not comply with the ban.

On June 14, 2019, the Ninth Circuit filed its decision regarding the case from Washington State. The Court, as expected, dissolved the injunction against the ban. However, somewhat surprisingly, the court also ordered the District Court to again examine an injunction using the standard it adopted during the DADT litigation. The court stated: “We conclude that the 2018 Policy on its face treats transgender persons differently than other persons, and consequently something more than rational basis but less than strict scrutiny applies.” The court went on to say: “Defendants bear the burden of establishing that they reasonably determined the policy ‘significantly furthers’ the government’s important interests, and that is not a trivial burden.” It remains to be seen if this test will be applied to the other cases now pending and how it will affect the Washington case on remand.

So, at this time, the ban is in effect. Lawsuits challenging it and legislation removing it remain pending. The MLTF will continue to follow developments regarding this issue. Please subscribe to *On Watch* and check our website at nlgmtg.org to learn about the latest news and court rulings.

Jeff Lake is Chair of the NLG Military Law Task Force. He is in private practice in San Jose, California.

EX-DIRECTOR OF SELECTIVE SERVICE CALLS FOR END TO DRAFT REGISTRATION

BY EDWARD HASBROUCK

Most reporters covering a federal committee reconsidering the draft ignored this headline news, focusing instead on the issue of whether to expand the draft to include women

In what could, and perhaps should, be the beginning of the end for [draft registration](#), a former director of the Selective Service System [told](#) a federal commission this week that the program he helped create and once ran is no longer working, that the database of registrants has become so hopelessly incomplete and inaccurate that it could not be used for a military draft that could be enforced or would stand up to due process and fairness challenges, and that it can and should be shut down entirely rather than expanded to include to women.

As Director of Selective Service from 1979-1981, Dr. Bernard Rostker brought the Selective Service System out of “deep standby” and managed the startup of the currently ongoing registration scheme and the initial mass registration of five million young men for a possible military draft.

On Wednesday, 24 April 2019, Dr. Rostker was seated in front of the [National Commission on Military, National, and Public Service](#) (NCMNPS) at the opposite end of the witness table from the current director of Selective Service, Donald M. Benton, an early Trump supporter and state campaign chair with no relevant experience or apparent qualifications for the Selective Service job and who was appointed to the position as a political sinecure.

Rostker is [no friend of draft resisters](#), according to Alex Reyes, one of my comrades in resistance and Rostker’s nemesis as [Washington, DC, representative and spokesperson](#) for the [National Resistance](#)

[Committee](#) and probably among those who were investigated and considered for prosecution in the early 1980s for conspiracy and advocacy of draft resistance. Rostker started his career as an economist, and his [message](#) to the [NCMNPS](#) was neither partisan nor anti-draft, but pragmatic and businesslike:

“As I have argued in [my recent paper](#) the current system of registration does not provide a comprehensive nor an accurate data base upon which to implement conscription. It systematically lacks large segments of the eligible male population and for those that are included, the currency of information contained is questionable....

The most recent [district court ruling finding the unconstitutionality of a male only draft](#) also is not an endorsement for registering or conscripting women.... I cannot think of a more divisive issue than the [conscription of women](#), an issue that clearly does not need to be addressed at this time given that a return to a draft is so unlikely. This is a “fight” we really don't need to have. It is a “fight” that can and should be put off.... If this means that at this time the MSSA [Military Selective Service Act] needs to be repealed, so be it....

In fact, a pre-mobilization draft only existed after World War II and impacted the conflicts in Korea and Vietnam. In Vietnam it proved so divisive that it was replaced by an all-volunteer force we have today. A more correct reading of history shows that we have engaged in active military conflict numerous times since 1973 without the “help” of the Selective Service System, including the longest military conflict in our history. There are many reasons why we have been able to do so which negates the need for conscription. Most significant is the change in military technology which makes the need for a mass of untrained manpower, the very thing the draft provides, unnecessary and actually a burden. Today the Army does not need and cannot absorb the mass of untrained and unskilled men, and potentially women, the draft would provide. If history tells us anything, it is that when we have needed to build a mass Army, as we did for World War I and World War II, there was sufficient time to develop a new Selective Service System from scratch.... So, my bottom line is there is no need to continue to register people for a draft that will not come; no need to fight the battle over registering women, and no military need to retain the MSSA.”

Rostker has made similar statements before, including in an [interview in 2017](#) that I quoted in my own [written statement](#) to the NCMNPS, and in a [2018 paper](#), but not with quite such a blunt recommendation for repeal of the law authorizing a president to order young men to register for a draft. While I disagree fundamentally with Rostker about whether a draft is a good idea in the first place, he made many of the same main points in his [testimony](#) on that Wednesday afternoon ([video archive of panel with Rostker on C-SPAN](#)) as [I did on Thursday morning](#) as part of the [next panel of expert witnesses](#) to be called before the NCMNPS ([video archive of panel with me and Diane Randall on C-SPAN](#)).

It is not every day that the former head of a federal agency tells his successor, live on C-SPAN, that the agency they have both directed is no longer able to accomplish its purpose and should be shut down. But few journalists sat through all of the [two days of hearings on Selective Service before the](#)

[NCMNPS](#) this week, and most of those who dropped in or tuned to C-SPAN for portions of the hearings were focused on whether draft registration should be extended to women rather than whether it should continue at all. So far as I can tell, Rostker's testimony – clearly the headline news not just of this week's hearings but of all of the [two years of activities of the NCMNPS to date](#) – has been reported only in [Paul Jacob's This Is Common Sense](#) column.

It was not made public until after the hearings, but the NCMNPS also received a [letter](#) earlier in April 2019 from Rep. Peter DeFazio (D-OR), who was one of the sponsors of a [bill introduced in 2016](#) to repeal authority for draft registration. "I strongly urge members of this Commission to recommend disbanding the SSS altogether," Rep. DeFazio [wrote](#). The only other official submission to the NCMNPS from a member of Congress disclosed to date is from Rep. Gwen Moore (D-WI), the sponsor of a [bill introduced in 2017](#) to require the Selective Service System to allow registrants to indicate, at the time of registration, their intent to seek classification as conscientious objectors if and when they are ordered to report for induction into the military.

The [Thursday morning panel](#), which included [Diane Randall of the Friends Committee on National Legislation](#) (FCNL) as well as myself, represents the first time in [almost 40 years](#) that draft resisters or conscientious objectors have been invited to tell Congress or a federal commission publicly what we think should be done about draft registration. More testimony in support of ending draft registration, rather than trying to expand it to women, was offered during the public comment periods following questioning of each of the [panels of invited witnesses](#) during the two days of hearings this week.

Additional witnesses who testified in favor of ending draft registration included [Paul Jacob](#) (like me, one of the [20 nonregistrants who were prosecuted in the 1980s](#) before the Justice Department realized that show trials of activists were encouraging more resistance); Executive Director Maria Santelli, Counseling Director Bill Galvin, and staff attorney Iman Hassan of the [Center on Conscience and War](#); Ari Standish and Callum Standish from Pacific Yearly Meeting of Friends; Kate Connell from [Truth in Recruitment](#) and the Santa Barbara Meeting of Friends; [Chris Kearns-McCoy](#) of FCNL; Kindra Bradley, executive director of [Quaker House](#); Jim Fussell; and others including other men who have not registered when they were supposed to do so. With the inclusion of these witnesses, the NCMNPS was confronted face-to-face, for the first time, by young people whom the DOJ would have to prosecute if the federal government tried to enforce the current draft registration requirement or expand it to include women.

The report of the NCMNPS, including a yes-or-no recommendation on whether draft registration should be continued (and if so, a separate yes-or-no recommendation on whether it should be extended to young women as well as young men) is due in March 2020. Congress will probably take up the issue in 2021, after the 2020 elections and after the government has exhausted its appeals of the [court ruling](#) that the current registration requirement for men is unconstitutional.

Dr. Rostker's recommendations make it more likely that the commission, forced to choose, will recommend ending draft registration, and that Congress *might* act on that recommendation. But the manner in which registration is ended, and the extent to which it will continue to have collateral consequences for nonregistrants, will depend on our anti-draft activism and lobbying. It remains possible that Congress will choose to do nothing and allow draft registration to be ended by court order, as the least politically risky path among an [array of unpalatable options](#) with respect to Selective Service. As I noted in my [testimony](#), "While I and other opponents of registration and the

draft would welcome this outcome, it would... lead to expensive, confusing, and prolonged federal and state litigation and uncertainty as to which administrative penalties would still apply to those who had previously not registered.... Congress [should] enact legislation for an orderly shutdown of the Selective Service System, expungement of registration records, repeal of Federal criminal and administrative sanctions for past nonregistration, and preemption of any state sanctions for nonregistration.” Preemption of state sanctions against nonregistrants is the key element missing from all of the recent [proposals for legislation](#) to end draft registration, and is unlikely to be included in any new bill unless it becomes a focus of concerted lobbying, starting with the submission to the NCMNPS and Congress of model legislation including a provision preempting state sanctions for nonregistration. The last chance for in-person submissions and verbal testimony before the NCMNPS will take place at the Commission’s final [public hearing](#) at the FDR Presidential Library in Hyde Park, NY, on 20 June 2019. Written submissions by e-mail to “info@inspire2serve.gov,” mentioning “Docket No. 05-2018-01” in the subject line of the e-mail message, will be accepted through 31 December 2019.

Edward Hasbrouck is a legal worker in San Francisco with the Identity Project (PapersPlease.org). He has been a member of the NLG and the MLTF since the early 1980s, when he was an organizer with the National Resistance Committee and co-editor of Resistance News. He publishes a Web site about the draft, draft registration, draft resistance, and the Selective Service System at Resisters.info.

Editor’s note for those reading a hard copy: Hyperlinks in this article can be accessed via the online version on Ed’s blog at hasbrouck.org/blog/archives/002344.html . Ed will continue to update this story in subsequent posts, also on that blog.

2019 GIRN CONFERENCE REPORT

BY JAMES M. BRANUM

The Military Law Task Force has played a key role with the GI Rights Network (GIRN) since its early days, providing assistance for counselors seeking attorney referrals but also providing training and resources to the lay counselors of the network.

At the 2019 GIRN conference, held from May 16 through 19 in Chicago, the MLTF was well represented with several MLTF members in attendance, and three presenting workshops: myself, Jim Klimaski and Dawn Blanken.

Participants included representatives from almost all of the member nodes of the network, as well as many allied groups including the Civilian Medical Resources Network (CMRN) and Veterans for Peace.

The conference primarily consisted of participatory workshops for continuing education of counselors, but networking is also a vital component of every GIRN conference. Highlights include:

- **“Grievances for Dummies”** - This was discussion led by Steve Woolford, Leonore Yarger and Dawn Blanken on some of the ways that servicemembers can raise grievances with their commands and outside parties including through the use of Article 138 complaints, IG complaints, congressional inquiries, as well as less formal methods of addressing problems. Much of this workshop focused on how experiences of racial and gender-based discrimination can be addressed.
- **2019 Changes to the UMCJ and its effect on GI Rights counselors** - This discussion, led by MLTF member attorneys Jim Klimaski and myself, discussed the historic 2019 changes to the UCMJ, which included some major new (but untested) provisions that protect servicemembers from retaliation. The workshop emphasized the need to further study these changes but also to observe how these changes may end up actually functioning.
- **Servicemembers with undisclosed pre-existing conditions** - Due to the widespread practice of military recruiters telling their recruits to conceal pre-existing physical and mental health issues, this topic has become very relevant. This discussion was led by Dawn Blanken.
- **How to help servicemembers on the autism spectrum** - I spoke about the need for a deeper understanding of the autism spectrum (including the concepts of understanding autism through either the mental illness model versus the neurodiversity model), and the reasons why many autistic people are not diagnosed until adulthood, which means that some autistic young adults end up being able to enlist in the military in good faith, yet later have serious problems coping with the unique nature of military life, and how GI Rights counselors and attorneys can effectively advocate on their behalf.
- **CMRN Update** - This workshop, led by Laura Muncy and Howard Waitzkin discussed the work of CMRN and best practices for GI Rights counselors who are seeking the assistance of CMRN on a case, most often in getting psychological evaluations completed.
- **Refusal to Train** - Leonore Yarger and Steve Woolford led a lively discussion on the oft-discussed but seldom understood concept of “refusal to train” as a method of forcing a command to grant a military discharge.
- **An update on GI Resistance** - I led a discussion on the current state of GI Resistance and the movement that supports it (including the work of Courage to Resist, About Face, Veterans for Peace and others) which morphed into a discussion on outreach (both for GIRN and the GI Resistance movement) and future plans for GIRN to more fully engage in social media outreach.
- **Officer Cases** - Steve Woolford and Leonore Yarger led a workshop on the intricacies and differences of officer cases as compared to cases of enlisted personnel.
- **Racism in the Military** - Probably the highlight of the conference was a presentation by Natasha Erskine on her experiences with racism and bias during her 20 year career in the US

Air Force, as well as the widespread prevalence of racism and bias at all levels of the US Armed Force, and the role of militarism itself in propping up our nation's continued practice of white supremacy.

- **Case studies** - The conference allocated several blocks of time to discuss hypotheticals and past cases, allowing counselors to share how they handled cases and asking for input on what should have been done differently.

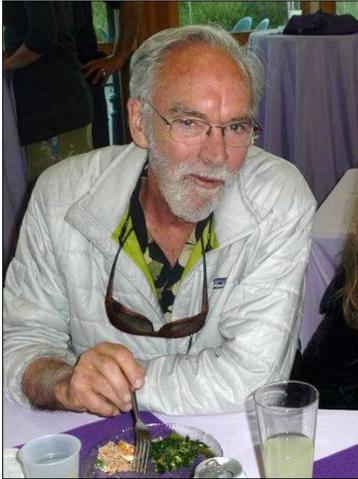
I came away from the conference encouraged by the quality of care provided by this generation of GIRN counselors, but also concerned that, should a major war be initiated by President Trump, the need for GIRN's services could easily stretch beyond current capacity. This is why I would urge all MTLF members to get plugged into the work of the network when possible. Local nodes of the network are often looking for new GI Rights counselors, but the network also needs attorneys for cases to be referred to. Some of these referrals are done directly by individual counselors and nodes but more often callers are directed to the MLTF itself, so attorneys who are willing to take these cases should be in touch with our executive director, Kathy Gilberd. She of course will need your contact information but also information on what kinds of cases you might be able to take (i.e. do you only take cases in a certain locale, only cases from a particular branch of the military).

The [GI Rights Hotline](http://girightshotline.org) <girightshotline.org> is a free, independent provider of accurate, helpful counseling and information on military discharges, AWOL and UA, and GI Rights. It is staffed by trained, volunteer counselors working through member nodes located across the country. Those seeking assistance can call 1-877-447-4487. MLTF members wishing to join or assist GIRN can contact Kathleen Gilberd, MLTF Executive Director, at email@nlgmltf.org.

James M. Branum is an Oklahoma City-based attorney who primarily practices military criminal defense law, with a special focus on US Army absence offences, as well as clients facing consequences for resisting war. He is a member of the MLTF steering committee. He is the author of US Army AWOL: A Practice Guide and Form Book, which will soon be out in a new edition. See jmbranum.com/.



Photo from the 2019 GIRN Conference by James Branum.



OBITUARY: KIT ANDERTON

Note from the Editors: We are saddened to report that longtime MLTF member and GI Rights Hotline counselor Kit Anderton passed away in March. Kit made Santa Cruz his home and was a founding member of the hotline node there, as well as a volunteer with local peace and justice organizations and civic bodies. He wrote several articles for *On Watch*, including an extensive analysis of the military's then-new Integrated Disability Evaluation System (IDES) in 2012. He will be missed.

The following obituary was published in the *Santa Cruz Sentinel* on Apr. 4, 2019

KIT ANDERTON, AUGUST 17, 1944 - MARCH 30, 2019

Kit Anderton died gracefully just as he wished in his home, supported by his children and close friends. He has lived in Santa Cruz county since 1980 and spent the summers of his childhood riding horses through these hills from his grandparents' place, Hidden Hill Ranch.

Founding owner of Woodstove and Sun, he was an inspiration and role model to those who worked with him and demonstrated that revolutionary practices such as profit sharing do work. A self-proclaimed introvert, he will be remembered as a community builder who gave of himself where he saw need. He served on the Santa Cruz City School Board as well as the boards of Delta School, Resource Center for Nonviolence, Ecology Action, Cultural Council, KUSP, and the Youth Soccer League.

Kit valued meeting and working with people more than any title and could be found coaching Little League and soccer, serving Thanksgiving dinner at Second Harvest Food Bank, and walking precincts for the Democratic Party. He took great pleasure in consciousness expanding conversation with those in his writing salon, book group, bridge club, drawing and marimba classes. His commitment to peace was at the heart of all he did from being a conscientious objector in the 1960s to his recent work advising GIs of their rights. Kit was an educator and lifelong learner who loved to glean from history how to create a finer future.

He is survived by his children Lilith and Luke, his granddaughter Marley, as well as family and countless friends near and far to whom he was fiercely loyal.

Kit's life will be celebrated on Hidden Hill Ranch at 2PM on May 25.

THE MILITARY LAW TASK FORCE of THE NATIONAL LAWYERS GUILD

ON WATCH is published quarterly by the Military Law Task Force of the National Lawyers Guild. Subscriptions are free with MLTF dues (\$25), or \$20 annually for non-members.

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

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

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

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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.

www.nlgmtf.org | facebook.com/nlgmtf | twitter.com/military_law

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.

SNAIL MAIL

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

ONLINE

Visit nlgmtf.org/support to use the Paypal buttons to make a one-time or a recurring donation. *No Paypal account is necessary.*

Thank you!

