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NEW ARMY CO REGULATIONS

BY BILL GALVIN

For the first time in 13 years, the Army issued new conscientious objector (CO) regulations (AR 600-43) on May 16, 2019. While the CO administrative process remains basically the same, the revised wording is in many ways clearer than the previous version of the regulation. Minor changes in procedures reflect electronic transfer of documents in the digital age. At several points throughout the regulation, “During conscription” has been added to sections relating to the Selective Service System. There also are some significant changes.

The regulation now begins with an expanded section delineating responsibilities. The Assistant Secretary of the Army (Manpower and Reserve Affairs) is named as responsible for developing “policies and criteria to classify and process” conscientious objector (CO) applicants, and the Deputy Assistant Secretary of the Army (Review Boards) is named as presiding over the CO Review Board. The President of the CO Review Board is directed to “ensure the board members review applications without bias or prejudice.” The Deputy Chief of Staff has the responsibility to “develop policies which define the use and assignment of noncombatant conscientious objectors (1-A-O) when such Soldiers serve in the Army.”

While internal memos obtained by CCW and MLTF cooperating attorneys in 2013 explained this, the regulation now reflects the role of the Deputy Assistant Secretary of the Army as the final authority on all 1-O applications for discharge and 1-A-O noncombat applications that were not approved at the command level. While applications continue to be forwarded through normal command channels, paragraph 2-8 of the new regulation provides new addresses for reserve commands. The previous regulation repeatedly referred to Headquarters (HQDA) or the Department of the Army CO Review Board (DACORB). The new regulation routinely uses ARBA – the Army Review Boards Agency, which includes DACORB.

The updated regulation contains additional information about determining sincerity of the applicant. In paragraph 1-6, Policy, it states that the Investigating Officer (IO) should explore the applicant’s general demeanor, conduct and behavior, and the “rigor of their studies” before and after crystallization. “The application should contain enough evidence to validate the asserted beliefs of the applicant, including any change or crystallization in beliefs. Failure to adequately demonstrate or substantiate that their asserted beliefs govern the applicant’s actions in word and deed will result in denial of the application” (Para. 1-6.a(7)(a)).

The Policy section also contains a more extensive discussion of religious training and belief, explaining that ethical and moral beliefs qualify, “even though the applicant may not characterize these beliefs as ‘religious’ in the traditional sense, or may expressly characterize them as not religious” (para 1-6.b). These words are not new to the regulation. In the previous version, they were in the definition of “Religious training and belief.” The list of definitions was at the very end of the regulation, after the appendices. It is good that this explanation was moved to a place of prominence in the regulation.

While COs previously were required to reimburse the government for unearned money and educational costs they received, the regulation now requires notification of this as part of the early processing, similar to the counseling about potential loss of veteran’s benefits, and creates a new
form letter, “Statement of Understanding, Recoupment of Unearned Benefits” (Fig. 2-4).

The regulation now allows warrant officers (WO—3 or above) to be appointed as Investigating Officers. Previously only commissioned officers (O-3 and above) could be assigned as IOs.

Concerning the written summary of IO hearings that must be prepared by the IO, the previous version of the regulations stipulated, “The investigating officer’s version is final as to the record of the testimony of the witnesses.” That is deleted from the new version.

Paragraph 2-6.d says, “The SJA will make a recommendation for disposition of the case.” The 2006 version of the regulation included this additional detail: “…supported by reasons. The use of only the term ‘legally sufficient’ does not fulfill this requirement. Comments by judge advocates below the GCMCA level are gratuitous but, if made, will be addressed by higher headquarters when a conflicting recommendation is made.” It is unclear why this was deleted from the new regulation or what impact it will ultimately have.

The new regulation adds some details about the assignments of 1-A-O conscientious objectors. For enlisted COs, “Defensive training, such as unarmed defense, passage through minefields, search of casualties for booby traps, and disarming of booby traps found on causalties may be offered to 1-A-O noncombatant Soldiers. Service aboard an armed ship or aircraft or in a combat zone will not be considered to be combatant duty unless the individual concerned is personally and directly involved in the operation of weapons. Excluding noncombatant duties and training, conscientious objectors are not allowed to avoid hazardous duties that may be part of the mission of the unit to which assigned. They are subject to Army regulations and directives, including those on training and discipline. They are available for worldwide assignments” (para. 3-1.b(1)(a)). Most of this detail was not in the previous version of the regulation. However, that version referred to a different reg (AR 614-200) that had similar wording. But according to AR 614-200 the minefield/booby trap training would only be offered “if a conscientious objector so requests.”

The guidance continues for officers: “Officers designated as conscientious objectors, noncombatant 1-A-O, will be managed and assigned on a case by case basis. Generally, those in combat arms branches will be involuntarily branch transferred to a noncombat arms branch. This policy should not be construed to require automatic reclassification into an U.S. Army Medical Department specialty” (para. 3-1.b(1)(b)).

The new regulation also adds the following paragraphs in reference to 1-A-O conscientious objectors:

(c) Deployment and/or assignment to hostile fire areas. Deployment or assignment to hostile fire areas must be shared equally by all Soldiers, except that noncombatant 1-A-O Soldiers will not be required to bear arms or be trained in the bearing of arms.

(d) Leadership positions and assignments. The needs of the Army drive all assignments. Noncombatant Soldiers (1-A-O) should not expect the full range of assignment options. Since unit and individual readiness is paramount, Soldiers of leadership rank should not be placed in positions where their noncombatant status may detract from their ability to train and lead Soldiers.
During times of conscription, when someone has served less than 180 days, the General Court Martial Convening Authority is required to notify Selective Service of their discharge (par. 3-2), presumably so they could be ordered to perform alternative service. While those so discharged were always subject to potentially being drafted into alternative service, the requirement for the GCMCA to notify Selective Service of their discharge is new.

Considering the bias that is often directed toward COs, it is significant that the new regulation has added these words: “In and of itself, an application for conscientious objector status does not constitute misconduct, and the act of applying for conscientious objector status will not be used as a basis for a general (under honorable conditions) discharge” (par. 3-4.a). We have indeed seen in the past COs threatened with less than fully honorable characterizations, so this addition is a good reminder to commands and COs that even soldiers are entitled to exercise freedom of conscience.

The questions one must answer to apply for CO status are essentially the same, except applicants are now required to provide their DOD ID number instead of their Social Security number. Although the latest update of the Department of Defense Instruction (DODI 1300.06) made in 2017 now only lists three essay questions related to ‘training and belief’ in the written application, the army (and all other branches as of this time) still requires the full six essay questions in the written application. A couple of the questions have been slightly reworded, and the order has been changed to be consistent with other branches of the military. The changes are minor, arguably make some questions more clear, and reflect a more inclusive attitude on the part of the army (for example, “church” has been replaced with “religious organization” in several places.)

There are some changes in the Informal Guide for the Investigating Officer, Appendix C in the new regulation. Most significantly, this instruction to the IO has been deleted: “Question the sincerity of the applicant if an applicant has delayed for a significant period of time after the crystallization of his or her beliefs to submit an application.” The previous version of the Guide also included language instructing that the IO “must attempt” to discern whether someone had a sudden crystallization, or whether their beliefs evolved gradually, and if so, when, where and under what circumstances. This has also been deleted.

The Guide now includes the following: “b. In attempting to determine whether a conscientious objection to participation in war or combat is founded upon religious training and belief, as defined above, the proper scope of inquiry is whether the applicant holds the asserted beliefs and whether they are the product of a conscious thought process resulting in such a conviction as to allow the person no choice but to act in accordance with them. Beliefs can be deeply held even though they lack sophistication. Care must be taken to avoid the inference that an applicant who lacks sufficient insight or knowledge to express their beliefs clearly does not hold the beliefs, or that they are not “religious” in origin or held with the strength of traditional religious convictions.” Like the new wording in the Policy section, these words were previously in the definition of “Religious training and belief.”(They were actually in parentheses at the end of the definition.) Hopefully by moving this language to the Guide for the IO, it will have more prominence and hopefully greater influence.

In the previous regulation, Appendix C was a “Suggested Checklist for Processing CO Applications.” That has been replaced with an “Internal Control Evaluation,” now Appendix D, which is virtually identical to the previous “Checklist.”

A number of typos that persisted through several revisions of the regulation over the years have
been corrected in this update. Yet, for some inexplicable reason, a couple of new typos now appear in the Statement of Understanding (figure 2-6) that were not in that Statement in the previous regulation (figure 2-5).

Overall the new regulation is similar to the previous version, and as was noted at the beginning, the processing for COs is essentially the same. It does seem that this version offers a slight improvement.

MILITARY PATIENTS’ PRIVACY RIGHTS

BY KATHLEEN GILBERD

Privacy and confidentiality of military medical records and information have long been of concern to servicemembers and those who assist them. For decades, records of medical evaluation and treatment were easily available to commanding officers and others in a patient’s command. Since many commands consider medical problems a weakness, malingering or cowardice, and since diagnoses of medical problems have often been used against whistleblowers and those seen as troublemakers, this posed many problems.

In the last couple of decades, however, total command access to medical records and information has given way to some limited confidentiality, and to an understanding that the Privacy Act and HIPAA have application to the military. Those of us trained in military law some years ago may not be familiar with more recent regulations and policies. Many commands are unfamiliar with or resentful of these changes. It is not uncommon for sergeants to demand to see medical records and for commanders to assume they should have full access to medical files.

In the last issue of *On Watch*, this writer discussed DoD Instruction 6000.14, the “DoD Patient Bill of Rights and Responsibilities,” and noted briefly that the Instruction allows military members to “communicate with healthcare providers in confidence” and “have the privacy and security of their protected health information maintained,” subject to restrictions in other regulations. (Encl. 3, part 2.f) That Instruction also outlines the right to “reasonable safeguards for the confidentiality, integrity, and availability of their protected health information, and similar rights for other PII [Protected Identifiable Information], in electronic, written, and spoken form.” (Encl. 2, part 1.c) This article discusses those privacy rights in more detail, with an emphasis on information concerning mental health.

HIPAA AND PRIVACY RIGHTS

the Act and other federal rules.

But HIPAA and privacy rights are still limited in the military. The Instruction also states that DoD and business associates:

Must, as authorized by and consistent with the procedures pursuant to DoDM 6025.18, ensure the availability to appropriate command authorities of health information concerning military personnel necessary to ensure the proper execution of the military mission. In doing so, DoD covered entities and business associates must follow the policies regarding mandatory and prohibited release of PHI [individually identifiable health information] pursuant to DoD Instruction 6490.08 to dispel stigma associated with seeking mental health services, substance misuse education services, or both. (Section 1.2.a.(3))

When medical information is released, covered individuals (except inmates) should have the right to notification of the release, with an explanation of their rights and the releasing entity’s obligations; the releasing health care provider or facility must make a good faith effort to obtain acknowledgement of receipt. Members may authorize the release of information, under part 4.2 of the Manual; part 4.3 covers their right to object to disclosures. There are, of course, exceptions for such things as emergency circumstances, and part 4.4 sets out additional situations for unauthorized disclosure, including some releases to public health authorities, some releases concerning victims of abuse, neglect or domestic violence, releases for judicial and administrative proceedings, etc.

Under part 5.2 of DoD 6025.18, an individual may request restrictions on permitted use and disclosure of records. The covered entity, however, has discretion to deny the request. If the entity agrees to the restriction, it may not violate the agreement except in cases where emergency treatment is required and the restricted information is needed in that treatment. Requests for restriction should be submitted to the person or office obliged to comply with the restriction.

HANDLING BREACHES OF PRIVACY

The DoD Manual sets out requirements for DoD entities where a breach of confidentiality has occurred. All breaches must be reported to the Defense Health Agency [DHA] Privacy Office within 24 hours of discovery, and the entity must also follow other “breach response and reporting requirements” described in Part 6-2.b.(1) of the Manual. The health care provider or entity must conduct an assessment of the nature of the breach, determine whether it is also a breach under Health and Human Services [HHS] provisions, and decide what notification is required and what mitigation or response is needed. The DHA Privacy Office reviews this assessment and makes a final determination on it. Normally, notification of the individual whose privacy is breached must be written, in plain language, and include a brief description of what happened and when, when it was discovered, what type of health information was involved, and any steps the person should take to protect himself or herself from harm due to the breach. The notification must also describe what is being done to investigate the breach, mitigate any harm it caused, and protect against future breaches. Delays in notification may be permitted when investigating law enforcement personnel tell the DoD entity that notification would impede investigation or harm national security. Where the DHA Privacy Office determines that the breach qualifies as an HHS breach, it must report that fact directly to the secretary of HHS, with a copy to the affected DoD entity.

Readers may be surprised to learn of these provisions, since they are frequently unknown to or ignored by providers and medical clinics. Where clients are willing, pressing for enforcement may be
an important lesson to military health entities.

CONSIDERATIONS FOR MENTAL HEALTH RECORDS AND INFORMATION

The privacy and confidentiality of mental health records pose some of the most serious problems for servicemembers. The military itself acknowledges that there is a considerable stigma attached to seeking mental health care or having a mental health condition. When commands learn of either, members may face serious harassment, formal and/or informal discrimination, and real damage to their careers. By way of a painful example of harassment, a command at Camp Pendleton used to require its members to hand carry a chit to and from any mental health appointment; the chit was attached to a teddy bear. (This practice stopped when Navy Times learned of and publicized the behavior.)

In addition to the regulations discussed above, releases of mental health information by health care providers and facilities to command personnel are covered in DoD Instruction 6490.08 of August 17, 2013, “Command Notification Requirements to Dispel Stigma in Providing Mental Health Care to Service Members” 
(https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/649008p.pdf). This Instruction applies to mental health evaluations and treatments requested by members or referred by other medical care providers, as well as voluntarily-sought drug and alcohol abuse education (as distinguished from mandatory treatment). It does not apply to command-directed mental health evaluations [CDEs], which are covered in DoD Instruction 6490.04 and have the effect of an order. The command notification Instruction gives some emphasis to the need to avoid stigma. It makes a general statement that healthcare providers will not notify commands of mental health evaluations or treatment except in specific circumstances. (Enc. 2, part 1.a) The Instruction requires commanders to protect the privacy of information and restrict it to those with a need to know, i.e., “access to the information must be necessary to the conduct of official duties.” (Encl. 2, part 3) The vagueness of the language here is worth noting.

Unfortunately, DoD 6490.08 contains more exceptions than privacy requirements; these are covered in Encl. 2, part 1.b. Healthcare providers should notify commanders when evaluation or treatment shows a serious risk of harm to self or others, or to a specific military operational mission (here the instruction notes that the risk would include disorders significantly affecting impulsivity, insight, reliability or judgment); a significant risk to mission accomplishment for special personnel such as members of the Personnel Reliability Program; provision of inpatient care (as admission or discharge are considered “critical points in treatment”); acute medical condition interfering with duty or acute medical retreatment that impairs ability to perform assigned duties; entrance into or discharge from substance abuse treatment programs, whether inpatient or outpatient; command-directed evaluations; or “other special circumstances in which proper execution of the military mission outweighs the interests served by avoiding notification” in the opinion of a healthcare provider or other authorized medical official at the O-6 level or above. This writer is hard-pressed to think of more than a few conditions which cannot be shoe-horned into one of these exceptions, though challenges to the release of information may be possible with outside psychiatric and legal advocacy.

Fortunately, health care providers are instructed to provide commands with the minimal amount of information needed to meet the purpose of the disclosure. This would include the diagnosis, description of planned treatment, impact on duty or mission, recommended duty restrictions or limitations, prognosis, implications for safety of the member or others, and “ways the command can support or assist the Service member’s treatment.” (Encl. 2, part 1.c)
Army policy on privacy of medical information is generally in accord, offering detailed opportunities to release information to non-medical personnel. AR 40-66, of June 17, 2008 (with Rapid Action Revision of January 4, 2010), “Medical Record Administration and Health Care Documentation” (https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/r40_66.pdf), refers to DoD regs allowing military personnel with an official need to know to have access to a member’s records for specific purposes. (Chapter 2, part 2-4) These include, among other things, release for judicial or administrative proceedings, to avert a serious threat to health or safety, to determine fitness for duty or for any particular mission or assignment. Medical professionals are permitted to release rather general medical profiles to commands, and to release minimum necessary information to avoid a “serious and imminent threat to health or safety of a person, such as suicide, homicide, or other violent action.” (Chapter 2, part 2-4.a.(2).a)

SPECIAL RULES FOR SUBSTANCE USE DISORDER RECORDS

There are special provisions for confidentiality of substance abuse disorder records made by federally assisted substance use disorder programs; these are set out in 42 CFR Part 2. Where those rules apply to private health information of a DoD covered entity, the entity must follow both sets of rules. If one set prohibits a release, and the other does not, the prohibition applies. The DoD regulation distinguishes confidential records of substance abuse “education” from records made when a member has entered or been discharged from an inpatient or outpatient treatment program. (DoD 6490.08, Encl. 2, part 1.a and 1.b.(7))

OBTAINING MEDICAL RECORDS

Traditionally, obtaining copies of one’s own medical records has been a hit or miss proposition. Some servicemembers requesting their records from medical clinics have been told (usually by clerks, medics or corpsmen) that they are not entitled to their own records, though in other cases the records are released without difficulty. New measures for viewing one’s medical records electronically are now in place (though these are beyond this writer’s Luddite understanding).

DoD regulations are clear that members have the right to see and obtain copies of their medical records; this is set out in the DoD Manual, part 5-3, and elsewhere. Records should normally be provided within 30 days of a request, with a possible extension of 30 days if the initial deadline cannot be met; in such cases, the facility or provider must explain the reasons for the delay to the requester. Where servicemembers encounter difficulties or refusals of records requests, or with large medical facilities, it is sometimes advantageous to request the records with DD Form 2870, “Authorization for Disclosure of Medical or Dental Information,” This form is HIPAA-compliant, and sufficiently official that it is usually treated with respect by record-holders.

Some grounds exist for denial of requests, such as psychotherapy notes; information “compiled in reasonable anticipation of, or for use in,” litigation or administrative action; some quality assurance information; inmates’ PHI if the information would jeopardize health, rehabilitation, etc., of the requester or others; research treatment records while the research is ongoing; records denied under exceptions to the Privacy Act, such as classified records and certain investigative material; and records where confidentiality has been promised to a non-health-care worker and the release would likely identify him or her. Some other records may be denied, but with the right to have them reviewed by an independent DoD health care provider.

The Army affirms DoD’s requirement that members have access to their records in AR 40-66 at
Chapter 2, part 2-3.a, which requires that requested records be made available to the member within 30 days. Requests must be in writing, and may use the same DD Form 2870; if the form is not available, the member may submit a letter describing the records or information. The reg notes that, if a physician or dentist feels the information could adversely affect the patient’s physical, behavioral or emotional help, the member may be required to name a medical professional to receive the records. The Civilian Medical Resources Network may be helpful in these cases.

**COMPLAINTS**

The military purports to take violation of confidentiality and privacy rights seriously. Military personnel who violate these rights may be subject to disciplinary or administrative action, with other sanctions available for DoD civilian employees and contractors.

When a member feels that these rights have been violated, the DoD Manual sets out remedies, though these are not the only ones available. Part 7.2.a of the Manual states that the member may file a HIPAA complaint with the DoD entity involved, with the DHA Privacy Office, or with HHS. The Defense Health Agency has an obligation to make sure that information on how to file HIPAA complaints is available to military personnel. Health and Human Services HIPAA complaint forms may be found on the HHS website.

DoD entities receiving HIPAA complaints from HHS are required to send them to the DHA Privacy Office within five days of receipt, along with any relevant documentation. (Part 7-2.a.(2).(b)) That office serves as the liaison for all HIPAA complaints against DoD agencies or offices which are submitted through HHS. When the DHA Privacy Office receives a complaint from an individual or from HHS, it must “initiate, coordinate and monitor” an investigation and assign an investigation suspense date.

Once a DoD covered entity has finished its own investigation, it must forward the report of investigation to the local HIPAA privacy officer, who in turn sends it to the DHA Privacy Office for review. When the investigation is considered complete, that office provides the complaint resolution to HHS or the individual. The Manual also notes that a member may make a complaint directly to HHS under 45 CFR 160.306. (The regs are not clear on whether the member may make separate complaints to both DoD and HHS.)

The DoD Manual also states that a covered entity may not “intimidate, threaten, coerce, discriminate against, or take other retaliatory action” against one who files a HHS complaint, or testifies or assists in an investigation, hearing etc., regarding compliance, or in good faith opposes an act or practice made unlawful by the Manual. (Here, the manner of opposition must be reasonable and must not itself involve any improper disclosure of PHI.) (Part 7.2.b)

AR 40-66, at part 2-3, outlines complaint mechanisms for Army personnel:

“ (j) Individuals may file a complaint when they believe that PHI relating to them has been used or disclosed improperly; that an employee has improperly handled the information; that they have wrongfully been denied access to or opportunity to amend the information; or that the entity’s notice does not accurately reflect its information practices. All such complaints must be in writing.

“(k) The Freedom of Information Act/Privacy Official is the primary point of contact for
individuals to file complaints pursuant to this policy.

“(l) As stated in the NOPP, individuals may also complain to the HHS if they believe their privacy rights have been violated. If an individual chooses to file a complaint with HHS, the complaint must—1. Be filed in writing, either on paper or electronically; 2. Name the entity that is the subject of the complaint and describe the actions that have allegedly been violations of the privacy standards; and 3. Be filed within 180 days of when the complainant knew or should have known that the violation occurred.

“(m) All workforce members are prohibited from retaliating against individuals filing a complaint or requiring individuals to waive their rights to file a complaint with the HHS as a condition of the provision of treatment, payment, enrollment, or eligibility for benefits.”

It is noteworthy that, under the DoD Manual, part 5.5, an individual has the right to an accounting of disclosures of PHI for six years preceding the request. This sounds promising, but the section includes a number of exclusions, such as disclosure to carry out treatment, payment and healthcare operations, to persons involved in the individual’s care or other notice purposes provided in paragraph 4.3; for national security or intelligence purposes, incident to a disclosure otherwise permitted or required by the Manual per paragraph 4.5.d.

Unfortunately, the regs do not discuss any complaint procedures other than HIPAA-type complaints to DoD or HHS. Where a member wishes the matter to be kept as private as possible, a request must or use of the commander’s open-door policy may be used to ask a commanding officer to deal with the offender and perhaps reinforce the general need for privacy of medical information. Discussion with medical facility ombudsmen may also be helpful. If non-medical command personnel in the member’s command are responsible for the improper release, a complaint under Article 138 of the UCMJ may be appropriate. Particularly if the complaint involves medical personnel, the 138 may be rejected on the grounds that another appeal/complaint procedure is available, though this may still be worth a try. (A discussion of Article 138 complaints is available on the MLTF website at https://nlgmltf.org/military-law-library/publications/memos/article-138/) Congressional inquiries can be helpful, particularly if the Congressional office is given information about the military’s privacy policies. Complaints to an Inspector General may also be appropriate, particularly if the member feels that the breach of privacy was a reprisal for whistleblowing or another protected communication, or if he or she faces reprisals for the complaint itself.

The medical privacy regs are not helpful about the relief which may be sought, aside from mentioning “mitigation” and making it clear that an offender may be subjected to disciplinary or administrative action. But what of the servicemember whose co-workers or superiors are now aware of his or her medical or psychological condition? In an HIV breach of privacy case some years ago, the member asked for a public apology during formation from the offender, as well as a full-command briefing on medical privacy and on the realities and stereotypes about HIV. Remedies of this sort may be very helpful, though they cannot undo the disclosure. Where private information has become too widespread, nothing prevents a member from requesting a transfer to another unit or command. When approaching these cases, it is important to help the member think about the remedies that would be most helpful.
WHEN RESERVISTS LIVE DISTANT FROM THEIR UNIT (UPDATE)

Regulations defining reasonable commuting distance for reservists have changed.

BY BILL GALVIN

The Spring 2019 issue of On Watch (Vol. XXX No. 1) included an article about assisting reservists who live distant from their unit when their commanders insist they travel an unreasonable distance to attend drills. When reservists move outside of a reasonable commuting distance to their drilling location, they should be transferred to a unit that is within commuting distance of where they now live, or, if that is not possible, transferred to the IRR. Since that article was published, 32 CFR 100.6, which defined reasonable commuting distance as 100 miles (or in some cases 50 miles) has been rescinded. While the DoD and each branch of the military still have regulations about commuting distance, that distance is no longer clearly defined in the DoD regulation.

The regulation states, “The Secretary concerned or the Commandant of the USCG may determine commuting area in accordance with the Joint Travel Regulations (Reference (v)), taking into consideration modes of travel, local traffic conditions, weather, and safety of the members.” (DODI 1215.13.) This appears to give the command some wiggle room, and experience suggests that commands will take advantage of that. While it was often a struggle to get commanders to follow the law when it was clearly defined (100 miles), we anticipate even greater problems getting commands to comply with this new undefined standard.

The Joint Travel Regulations dated Dec. 1, 2019 state, “The DoD installation, base, or senior commanders must establish, in a written directive, the local area. . . The ‘local area’ is defined as the area within the PDS [Permanent Duty Station] limits and the metropolitan area around the PDS served by the local public transit systems; the local commuting area as determined by the AO [Approving Official] or local Service or DoD Agency; and the separate cities, towns, or installations among which the public commutes on a daily basis. An arbitrary distance radius must not be defined for the local commuting area.” (JTR paragraph 0206).

This new standard might actually be better than the old standard. Few metropolitan areas served by public transit extend as far as 100 miles. And concerning “separate cities, towns, or installations among which the public commutes on a daily basis” traveling 100 miles, or even 50 miles is not the norm in most places. So the commuting areas that commands must establish should be less than the previous commuting distance of 100 miles if the commands follow the regulations.

What does this mean for counselors? The advice in the previous article still holds: When someone moves, they should notify their chain of command in writing. If they’ve moved outside of a reasonable commuting distance, they should request that they be transferred to a unit that is within reasonable commuting distance. If the command gives their usual excuses for not following the regulations, push back!

Since the Joint Travel Regulations state that the command “must establish, in a written directive, the local area” ask for a copy of the directive. It is likely that there will not be a written directive, so insisting that the command follow the regulations, with the threat of a congressional or 138...
complaint may convince the command to do the right thing.

Counselors should be aware that the branch regulations for the Army, Navy and Coast Guard still define the commuting distance as 50/100 miles so that can still be used at this time. The Marines recently changed the commuting distance to 150 miles. However, since the JTR states, “An arbitrary distance radius must not be defined for the local commuting area” those regulations may change soon.

Find the new Joint Travel Regulations at https://www.defensetravel.dod.mil/Docs/perdiem/JTR.pdf

POLICY GUIDANCE FOR DISCHARGE REVIEW BOARDS ANDBOARDS FOR CORRECTION

BY KATHLEEN GILBERD

Recent memoranda from the Department of Defense have provided helpful guidance to the services’ review boards, raising the possibility of better outcomes for veterans with less than honorable discharges. Two of these, the Hagel and Kurta memos, were discussed in the Summer 2018 issue of On Watch <https://nlgmilft.org/on-watch/>. Between them, the memos offered “liberal consideration” to applicants affected by Post Traumatic Stress Disorder (PTSD) and other mental health conditions, by traumatic brain injury (TBI) and by sexual assault or sexual harassment.


The Wilkie cover memo emphasizes clemency, mentioning the country’s increasing attention to pardons for criminal convictions and “second chances” for those convicted of crimes. It notes the need for more guidance on clemency upgrades of court-martial discharges (bad conduct and dishonorable discharges as well as officer dismissals) as a matter of fundamental fairness. The attachment to the cover memo, however, extends this concept of clemency and fairness to less-than-honorable administrative discharges (general and other than honorable discharges), framing its provisions as affecting relief based on equity (for Discharge Review Boards), justice (for Boards for Correction) and clemency (for both sets of boards in court-martial cases). Taken in conjunction with the Hagel and Kurta memos, it may provide for much greater relief for “bad paper” veterans. While it seems to emphasize upgrades of discharges, paragraph 4 of the attachment notes that in addition to court-martial discharge upgrades, “it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.” This could include changes in the narrative reason for discharge, as from misconduct to secretarial plenary authority, and possibly justice changes from administrative or court-martial discharge to medical retirement. It remains to be seen how the boards will handle requests for changes other than upgrades.

The memo is framed in terms of guidance. The attachment specifically notes that each case should be
examined on its own merits, and that the application of the memo’s principles is within the boards’ sound discretion. (Para. 5.)

Wilkie sets out twelve principles for consideration in clemency, equity or justice claims. Some of these restate or parallel existing standards or trends used by the boards. For example, evidence from outside a veteran’s service record may be considered in support of relief, as has long been the case. Military policy changes which would now be reasonably expected to allow a better outcome may be considered, long used as a “current standards” basis for an upgrade. And a veteran’s sworn statement or sworn testimony may be used to establish a fact; the boards have long accepted this in principle, though not often in practice.

But a number of the principles are new. “[C]haracter and rehabilitation should weigh more heavily than achievement alone,” so that outstanding academic or career achievement are not necessary to prove real rehabilitation. Along with this, “[i]t is consistent with military custom to honor sacrifices and achievements, to punish only to the extent necessary, to rehabilitate to the greatest extent possible, and to favor second chances in situations in which individuals have paid for their misdeeds.” (Para. 6.a.) While the boards have occasionally concluded that some veterans have paid a heavy price for less than honorable discharges, the idea of second chances is new and somewhat surprising.

The memo emphasizes that flawless service is not necessary to warrant an honorable discharge, a matter which the boards have often ignored. It notes that views of the relative severity of different acts of misconduct may change over time, thus changing the weight of misconduct when the boards consider mitigation. Marijuana use and its legality in some states is given as an example here. The memo also notes that relief is generally more appropriate for nonviolent offenses.

Para. 6.h clarifies consideration of mental health conditions, TBI and sexual assault or sexual harassment in equity/justice issues: “Requests for relief based in whole or in part on a mental health condition, including Post-Traumatic Stress Disorder (PTSD); Traumatic Brain Injury (TBI); or a sexual assault or sexual harassment experience, should be considered for relief on equitable, injustice, or clemency grounds whenever there is insufficient evidence to warrant relief for an error or impropriety.” (Error/impropriety refers to consideration of violations of military regulations or law, or Constitutional provisions, as opposed to matters of fairness.) In this writer’s experience, boards have tended to lean towards equity/justice considerations when they are unwilling to admit that, for example, commands have violated regulations, but para. 6.h gives this real emphasis.

In a change from prior practice, Wilkie suggests that the boards consider “uniformity and unfair disparities in punishments” as grounds for relief. In the past, the boards have generally held that individual cases warranted disparate punishment, so that unequal treatment of similar offenses was normally rejected as an argument for upgrades.

The final principle (Para. 6.l) notes that upgrades and changes in reason for discharge based on equity, justice, or clemency “normally” should not result in benefits such as separation pay, retroactive promotions, or payment of past medical expenses that would have been available had the revised character of or reason for discharge been given. There is no mention of medical pensions in cases where medically unfit members have been discharged for misconduct.

In addition to these principles, the memo sets out a number of factors to consider in equity, justice and clemency requests. These include candor; whether punishment, including collateral effects, was too harsh; aggravating and mitigating facts “related to the record or punishment;” positive or
negative post-conviction conduct; severity of misconduct; length of time since discharge; “acceptance of responsibility, remorse or atonement;” the degree to which the relief is “necessary for the applicant;” his or her character and reputation; critical illness; old age; “meritorious service in government or other endeavors;” rehabilitation; the availability of other remedies; job history; youthful indiscretion as a cause of the misconduct; character references; letters of recommendation; whether an official with appropriate oversight opines that relief is warranted; and victim support for or opposition to relief.

Although some of these factors have been considerations in the past, they were not given significant emphasis in regulations governing discharge review, and many of them are new. They open significant areas for argument, and among other things suggest that documentation and issues regarding post-service rehabilitation, conduct, and problems such as illness or age, will deserve more attention than in the past.

Although the Wilkie memo presents guidance rather than binding requirements, it offers a good deal of hope for veterans, including those whose cases may already have been denied. As always, development of in-service and post-service evidence can play a critical role in these cases, and use of the specific types of evidence and assertions raised in the Wilkie memo may be of great help.

The Task Force hopes to monitor implementation of the Wilkie memo, as well as the Kurta and Hagel memos, and would appreciate thoughts and observations from readers handling discharge review cases. While the memos offer the boards an opportunity to improve veterans’ chances of upgrades and other changes in discharges, it may well be that encouragement or pressure from advocates will be important.

**OPINION: PRESIDENT TRUMP AND MILITARY ACCOUNTABILITY**

**BY DAVID GESPASS**

Donald Trump has put the issue of battlefield criminal behavior squarely before the world with his pardons of 1st Lt. Clint Lorance and Maj. Matthew Golsteyn and his insuring that Chief Edward Gallagher will retire as a SEAL. It appears that Trump’s decisions were based purely on politics (he is hoping all three will campaign for him in 2020) and many of the comments about the actions, while conceding the president has the authority to so act, question the avoidance of going through appropriate channels. Both sides of this debate, however, are focused on insuring the US military remains the world’s preeminent fighting force.

Defenders of the actions argue that Lorance, Golsteyn and Gallagher did not commit “war crimes,” which imply mass murder (see [https://www.foxnews.com/opinion/donald-trump-clemency-clint-lorance-matthew-golsteyn-and-chief-edward-gallagher-are-not-war-criminals](https://www.foxnews.com/opinion/donald-trump-clemency-clint-lorance-matthew-golsteyn-and-chief-edward-gallagher-are-not-war-criminals)), but made split-second battlefield decisions and that second-guessing them hamstrings the ability of “our” warriors to fight. Others simply argue that the duty of the military is to kill people and members should not be prosecuted for doing so. Much of the criticism is that the president should not be involved in individual cases, particularly when doing so disrupts to ordinary chain of command.
There has also been criticism that Trump’s actions cede the supposed “moral high ground” that the US enjoys (see https://www.washingtonpost.com/politics/2019/11/17/trumps-pardon-two-former-army-officers-has-sparked-new-controversy-heres-why/). In light of the threat to arrest members of the International Court of Justice who prosecute US citizens, one might question whether the US does enjoy such status, but that is a bit beside the point.

Trump’s actions are not entirely unprecedented. Richard Nixon released Lt. William Calley from prison and allowed him to serve his sentence in relative freedom on a military base. Calley, it should be recalled, was convicted of mass murder. At the same time, Nixon did not issue a pardon and Calley remained convicted. This distinction is, at best, one of degree.

What is perhaps most significant about the entire debate is the presumption – sometimes implicit and often explicit – that the United States is autonomous and fully capable of determining how best to discipline, or not, its troops. The concept of “American exceptionalism” that all embrace is that the US need not answer to any authority but its own. That was why it refused to ratify the Rome treaty and does not consent to the jurisdiction of the International Criminal Court (ICC). That is why it forced other countries to agree not to allow US nationals to be taken into custody to face charges before the ICC. It is worth recalling that the ICC can only exercise jurisdiction when a particular country is unwilling or unable to prosecute crimes constituting violation of human rights or humanitarian law, particularly including crimes for violations of the law of war. If it were not clear before, Donald Trump has confirmed that the US is unwilling to hold its military accountable and refuses to allow anyone else to do so. With troops stationed around the world, with drones capable of attacking remotely anywhere in the world, and with its forces actively fighting in several countries, American exceptionalism is starkly revealed as American impunity and any claim it makes that others are violating human rights and international law rings as hollow as a church bell without a clapper.

FREE RESOURCES ON MILITARY LAW

Thanks to Global Military Justice Reform for information about the following books:

*The Military Commander and the Law* (2019) comes from the US Air Force Judge Advocate General’s School and is designed as both as a commanders’ course book and a reference guide for commanders in the field. There’s no charge for the book. It is available here. <airuniversity.af.edu/AUPress/Display/Article/1812408/the-military-commander-and-the-law/>

*USN/USMC Commander’s Quick Reference Legal Handbook (QUICKMAN)) (2018)* is published by the Naval Justice School, and is also free. You can find it here. <jag.navy.mil/documents/NJS/Quickman.pdf>

*Criminal Law Deskbook: Practicing Military Justice* (2019) comes from the Army’s Criminal Law Department at the Judge Advocate General’s Legal Center and School. It is designed for attorneys rather than commanders, and is free. Find it at this link. <tjaglcspublic.army.mil/documents/27431/37163/Criminal+Law+Deskbook+2019/>
BOOK REVIEW

WAGING PEACE IN VIETNAM: U.S. SOLDIERS AND VETERANS WHO OPPOSED THE WAR

BY MATTHEW RINALDI

Waging Peace is a recent addition to the struggle over how our culture remembers the experience of U.S. veterans of the war in Vietnam.

Among those of us who were involved in the G.I. anti-war movement during those years, there is consensus that, as the war dragged on, there was widespread disaffection within the ranks of the U.S. military. The oft-quoted words of Col Robert Heinl in the 1971 Armed Forces Journal describes the reality we saw:

“By every conceivable indicator, our army that now remains in Vietnam is in a state approaching collapse, with individual units avoiding or having refused combat, murdering their officers and non-commissioned officers, drug ridden, and dispirited where not near mutinous.

Elsewhere than Vietnam, the situation is nearly as serious. Sedition, coupled with disaffection within the ranks, and externally fomented with an audacity and intensity previously inconceivable, infests the Armed Services.”

Many tens of thousands of G.I.s were radicalized. Over 25,000 joined Vietnam Veterans Against the War (VVAW), which continued long after the war had ended. VVAW fought to have PTSD recognized as a service-related injury and to prevent further wars of U.S. aggression.

Most veterans of the later years of the war leaned left and were sought after by peace groups and radical organizations. Hal Muskat, a Vietnam veteran who was an organizer at Fort Knox, remembers participating in the veterans’ contingent of an anti-war march and being swamped by people trying to hand him leaflets.

Yet there is a counter-narrative being pushed by the right wing in the U.S. Apparently sparked by the three Rambo movies made during the Reagan presidency, Sylvester Stallone as Rambo angrily rants about being spat upon when he returns from Vietnam. The narrative which has been built is that civilians, particularly those in the peace movement, were disrespectful of returning vets, mistreated them, insulted them and made their lives difficult.

This has built into a crescendo since 9/11. Now we live in an era of hyper-patriotism, where U.S. flags are everywhere and service members are all transformed into heroes and heroines, whenever and however they performed their service. The notion seems to be that any disrespect for the flag or
our country’s overseas wars is an echo of the “disrespectful” peaceniks from the sixties and seventies.

Efforts to portray the real disaffection of Vietnam era troops began with the publication of *The New Soldier* in 1971 by John Kerry and VVAW. It contained moving and at times heartbreaking photos of Vietnam vets fresh from the war, many of them already discharged, wearing beards, long hair and ragged clothing. This was followed by my long, very detailed and frankly boring piece “*Olive Drab Rebels*,” printed by 1974 by Radical America and reprinted in 2002 by Antagonism Press (available online at https://libcom.org/library/olive-drab-rebels-military-organising-vietnam-rinaldi). This was followed by David Cortright’s classic book on the topic, *Soldiers in Revolt*, in 1975.

The most useful work is the film *Sir! No Sir!* produced by David Zeiger. It offers an intimate look at the organizers and activists in the military, shatters Rambo’s spitting fiction and is extremely useful as a teaching tool. There followed *Dangerous Grounds* by David Parsons in 2017, perhaps the most detailed and accurate account of organizing efforts involving active duty soldiers, veterans and civilian coffeehouses at Fort Lewis, Fort Hood and Fort Jackson. (See our review of Dangerous Grounds in On Watch in 2017 for a full history of the G.I. movement.)

Where does *Waging Peace* fit in? The book is coffee-table size and priced accordingly - $65 in hardcover and $35 in paper. With 239 pages of text and graphics, the potential is enormous. Growing out of an exhibit the authors put together in Vietnam, the book could have been deeply moving. Instead, it feels thrown together and jumbled. It has no center or consistent theme.

Some of the omissions are troubling. There were some serious problems at the coffee house at Fort Jackson, where one activist, Lenny Cohen, was sentenced to three years in jail for disturbing the peace. Not mentioned. Wade Carson, a Vietnam combat vet, led a rebellion at the Fort Lewis stockade. Not mentioned. Yet an article on the problems military deserters faced in getting to Canada is introduced by a civilian who thinks he would have deserted, until he takes us step by step through his pre-induction physical, which he failed. Poor choices when you have 239 pages available.

Some omissions are clearly political. Left wing parties sent a few hundred comrades into the military as organizers, yet no mention is made of that fact. Dennis Mora of the Fort Hood Three was in the Communist Party, Howard Petrick and Andrew Pulley at Fort Jackson were in the Socialist Workers Party, and Andy Stapp joined the Workers World Party. Progressive Labor had members throughout bases stateside. They are erased, the same way the recent PBS/Ken Burns series on the war erased G.I. resistance entirely.

There are also some great essays in *Waging Peace*. Major Hugh Thompson intervened to save lives at the My Lai massacre. The *L.A. Times* calls him “the forgotten hero.” Though he passed away in 2006, *Waging Peace* carries his story through an essay written after he was interviewed. Flying above the massacre in a helicopter, Major Thompson states:

> We were seeing bodies everywhere. At first, we didn’t know what was going on. And we surely couldn’t believe our own people would do this. Then it finally sank in – U.S. soldiers were killing unarmed civilians.

Major Thompson landed the helicopter and with the help of Larry Colburn, his gunner, and Glenn Andreotta, his crew chief, they literally threatened to turn their guns on U.S. soldiers if the killing did not stop. The massacre ended immediately. *Waging Peace* correctly calls all three men heroes.
Lt. Susan Schnall is recognized for flying a Navy plane over San Francisco and dropping anti-war leaflets. Dr. Howard Levy is recognized for refusing to train Green Berets. Essays by Paul Cox, Dave Kline and Carl Dix are very moving. And Kelly Dougherty brings us to the present by writing about the sexual harassment she regularly faced in today’s modern military, which she calls out for its misogynistic culture. She also highlights some of the regular abuses of civilians she witnessed during her deployment. Her unit protected trucks used by military contractors when the trucks broke down, and destroyed the trucks’ contents when they could not be salvaged:

Sitting in a Humvee turret pointing an automatic machine gun at bewildered kids while we burned food didn’t quite match the image of heroism that military mythology seeks to evoke.

She became one of the founders of Iraq Veterans Against the War, writing, “I believe that veterans have incredible power to create change by using our experience and perspective to challenge the narratives that perpetuate the violence and injustice of war and militarism.” These essays are an important addition to the history of the U.S. military.

Sadly, the graphics in the book are often badly handled. Many of the photographs of veterans are tiny, some 2½ inches by 3½ inches, so small that you get no feeling for the person depicted. Many leaflets are printed at one-quarter of their original size and thus are literally unreadable - a serious graphic mistake.

Yet *Waging Peace* is an addition to the work designed to ensure that G.I. resistance to the Vietnam War is not erased from our cultural memory. This book is good. It could have been great.

**MEMBER NEWS**

2019 NLG CONVENTION REPORT

BY JEFF LAKE

The 82nd National Lawyers Guild Convention met in Durham, North Carolina on October 16-20, 2019. The Military Law Task Force met for breakfast and discussed current events, the need to publicize our work and ideas to recruit new members.

Following the meeting, MLTF Chair Jeff Lake spoke at the Plenary Session concerning a resolution presented by the MLTF to the membership for voting. The text of the resolution can be found at https://www.nlg.org/wp-content/uploads/2019/10/MLTF-Resolution.pdf. Following the presentations, a brief period of questions and answers was held. The resolution seemed to be well received by NLG members in the room, but actual voting is occurring online after the convention.
During the convention, ideas for collaboration between the International Committee and the MLTF were discussed. These included the formation of a possible Peace and Disarmament Group within the NLG which would also include the environmental devastation linked to imperialism and the actions of the U.S. military.

As always, the convention provided moments of hope and inspiration as progressive lawyers and activists shared their stories of successful activism and strategies for change.

The MLTF expects to have a presence again at the next convention in 2020. Members are encouraged to attend and participate in this exciting event.

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ABOUT THE CONTRIBUTORS

**Bill Galvin** is a Vietnam-era conscientious objector and has been working to support conscientious objectors since the early 1970s. He currently serves as Counseling Director for the Center on Conscience and War.

**David Gespass** is a co-founder of MLTF and has formerly served both a member of the NLG Military Law Task Force Steering Committee and president of the National Lawyers Guild.

**Kathleen Gilberd** is a legal worker in San Diego who works in the areas of discharge review and military administrative law. She is the executive director of the Military Law Task Force.

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

**Matthew Rinaldi** worked at the anti-war coffeehouse at Fort Lewis from 1969 to 1971 and was on the staff of the USSF from 1971 to 1973. He became an attorney in 1983 and is currently on the MLTF steering committee.
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 nlgmltf.org/onwatch/.

Editors: Kathleen Gilberd, Rena Guay and Jeff Lake.

CONTACT
Kathleen Gilberd, Executive Director
730 N. First Street, San Jose, CA 95112
email@nlgmltf.org; 619.463.2369

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

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