



# ON WATCH

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## Contents

FORCED ENROLLMENT IN JROTC IN CHICAGO'S SCHOOLS.....	2
AIR FORCE ISSUES NEW CO DISCHARGE REGULATIONS.....	3
2022 MLTF MEMBERSHIP MEETING, ELECTIONS.....	6
THREATENING LETTERS FROM THE SELECTIVE SERVICE SYSTEM .....	7
MILITARY MEDICAL MALPRACTICE CLAIMS .....	19
GI RIGHTS NETWORK ANNUAL CONFERENCE .....	22
AN INSIDER'S VIEW OF THE SELECTIVE SERVICE SYSTEM.....	24
ANNOUNCEMENTS .....	25
ABOUT THE CONTRIBUTORS.....	25
ABOUT THE MILITARY LAW TASK FORCE OF THE NATIONAL LAWYERS GUILD .....	26

### **MLTF's Advocacy & Activism Through Military Law training program continues**

Defending AWOL servicemembers – a day of CLE programming

October 25, starting at 8 AM Pacific/11 AM Eastern

Live via Zoom, available later upon demand. FMI [nlgmtf.org/training/](https://nlgmtf.org/training/).

# FORCED ENROLLMENT IN JROTC IN CHICAGO'S SCHOOLS

By Libby Frank

In a city struggling with a reputation for outsized violence, one of the ironies is that its public school system has easily the largest military presence of any big city school system.

The Chicago Public School (CPS) system has six military academies, one military academy within a school, plus 37 additional high schools with a Junior Reserve Officers' Training Corps (JROTC) program. Chicago has 7,213 young men and women (2021/2022 school year) enrolled in JROTC between the military academies and JROTC programs.

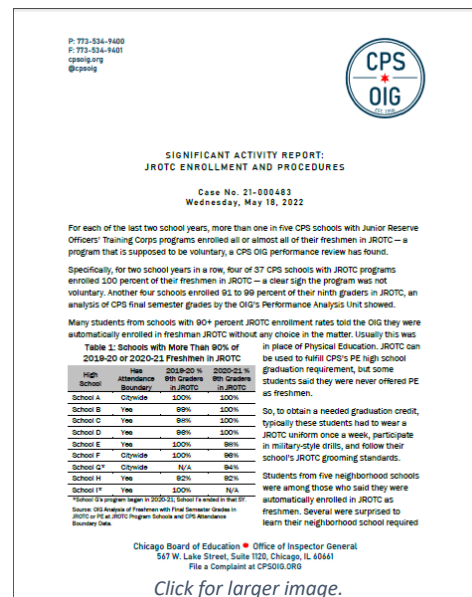
By comparison, New York, with a population more than three times that of Chicago, has less than half as many high schools with JROTC programs. Even San Diego, a city noted for its military families and seven military bases in and around the city, has just one-third the number of JROTC programs that Chicago has – 13 programs as compared to Chicago's 37.

Yet for all the news stories on the city's often troubled school system, its military programs fly under the radar. All four branches of the armed forces have military academies in the Chicago Public Schools. The JROTC budget for 2022 was around \$16 million. One of the most egregious practices has been the involuntary enrollment of incoming ninth grade students in JROTC. The practice has gone on for years. Students earn their physical education credit which is required for graduation and the school can avoid hiring a physical education teacher. I became aware of the practice in 2016.

The practice continued year after year. I FOIA'd the JROTC enrollment data every year and compared it to the enrollment by school and invariably there would be schools in which it was clear all incoming freshmen were being placed in JROTC. At Manley High School, for example, there were 22 students recorded as in the 9<sup>th</sup> grade, 19 of whom were in JROTC. At Bowen High School, 54 students were in 9<sup>th</sup> grade and 50 were in JROTC. And so on. For the 2021/2022 school year there were five high schools that involuntarily enrolled students in JROTC.

Between 2016 and 2022 I wrote letters, spoke at school board meetings, was interviewed by several reporters, met with CPS officials and even the head of JROTC who told me that even though they don't advocate enrolling students involuntarily in JROTC it "technically" wasn't against their rules. I created a petition drive signed by 15 community organizations in Chicago calling for the cessation of the practice. Meanwhile, in 2021, an independent journalist that I had spoken with previously, published an article about JROTC in "Chalkbeat", a nonprofit news organization reporting on education. It prompted an investigation by the CPS Office of Inspector General (OIG).

And then, finally, in May of 2022 the OIG published a "[significant activity report](#)" in which they called out the practice and recommended changes to the program. I was unable to find out who filed the complaint or who or what prompted the



OIG investigation. I was told the information was confidential. The report and any future updates can be found at [cpsoig.org/](http://cpsoig.org/)

Although eliminating the practice is a welcome change, very little is being done to replace JROTC. With the evisceration of arts, sports and other extracurricular activities at most CPS schools over the past few decades, JROTC programs are popular with many of the students who participate in them, in part due to there being so few alternatives. But it's an alternative that comes with an implicit political message – given the heavy targeting of overwhelmingly minority CPS students for recruitment, it's a message that the U.S. military and its wars should be staffed by poorer and darker young men and women.

Rather than enjoy the robust extracurricular activities and curricula found in Chicago's wealthier and whiter suburbs, CPS students facing violence in their neighborhoods are in turn steered into careers where exposure to violence is an ever-present threat.

Bottom line – in a City facing budget crises at every turn, throwing money at under-enrolled JROTC programs is waste that our under-resourced public schools can ill afford. JROTC is military training and arguably does not belong in a city already plagued with violence. Instead our students need, much more than their suburban counterparts, curricula and extracurricular programs that give them real choices and opportunities to stop cycles of poverty and violence.

## AIR FORCE ISSUES NEW CO DISCHARGE REGULATIONS

**By Bill Galvin**

On June 24, 2022 the Air Force issued new discharge regulations. AFI 36-3204, *Procedures for Applying as a Conscientious Objector* was subsumed into the 500+ page *Military Separations* instruction, DAFI 36-3211. While most of what pertains to conscientious objectors can be found in chapter 29, there are references to conscientious objectors throughout the instruction, and some of those remote passages can affect the processing of conscientious objector (CO) applications.

The new instruction leaves the conscientious objector process essentially the same: most of the wording in the new instruction is identical to the old or just slightly reworded, and the new wording is clearer in most cases. But there are some noteworthy differences. For example, the Secretary of the AF is now the final decision authority for *all* CO applications, not just officers, as was the case in the past. DAFI 36-3211 explicitly states that it covers the Space Force as well as the Air Force.

While COs have always had to demonstrate their sincerity by “clear and convincing evidence”, the revised instruction adds a “note” clarifying the meaning of the standard: “Clear and convincing evidence is evidence indicating the thing to be proven is highly probable or reasonably certain. It is that level of proof which lies between proof by a preponderance of the evidence and proof beyond a reasonable doubt” (para. 29.1.2).

The new instruction also adds this “note:” “An applicant’s willingness to bear arms in exclusively noncombatant or non-lethal contexts does not invalidate the applicant’s claims or render the application insincere. An applicant’s willingness to bear arms to protect themselves or family members

does not invalidate the service member's claims or render the application insincere. An applicant's willingness to bear arms **in first-person shooter video games** shall be weighed against other relevant evidence" (para. 29.1.2.4). [Emphasis added.]

When we counsel COs about the kinds of evidence they can cite to support the sincerity and depth of their beliefs, we ask them about various life choices, including their feelings about violent video games. Many COs will report developing an aversion to such games, while others perceive no connection at all between their beliefs against *actual* violence vs. their enjoyment of *fictional* violence taking place in a virtual world. It could be that this reference to video games was added to the instruction because the AF has seen this topic discussed in a number of CO applications. For whatever reason it now appears, the suggestion that bearing arms in a fictional world might be evidence of insincerity, while willingness to use actual violence against real people in certain circumstances "does not render the application insincere" is just plain backwards. But what can we expect from the organization that brought us [Jesus loves Nukes](#). "

Also new to the instruction, commands may now stop processing a CO application if the applicant is AWOL or if disciplinary action has been initiated against the applicant (para. 29.2.4). The previous instruction explicitly said "Do not stop processing applications" of those who are AWOL, although it did require that the person should not be discharged until all disciplinary actions have been resolved.

In the guidelines for approving or disapproving applications, the new instruction adds, "When evaluating the applicant's sincerity, it is appropriate to consider the stated opinions of individuals who interviewed the applicant as well" (para. 29.4.2.4.1). In other words, the opinions of others who may dislike the CO or disagree with their perspective are now given official weight according to the new CO instruction.

Concerning the psychiatric evaluation, the previous instruction simply said if a psychiatrist is not available, a psychologist may conduct the interview, and the report should discuss any psychiatric disorder that would warrant treatment or disposition through medical channels. The new instruction allows "an appropriately credentialed mental health professional, such as a clinical psychologist, psychiatrist, licensed clinical social worker, or psychiatric advanced practice registered nurse" to fill this role (para. 2.4.11). The new instruction underscores the purpose of the psych eval: "This review is solely to ensure no other more appropriate administrative discharge under mental health is warranted" (para. 29.2.8.2).

Many of the changes affect 1-A-O conscientious objectors, those seeking to be reclassified as non-combatants who still wish to remain in the Air Force. New wording specifies that those applying for 1-O status (discharge) should not be classified 1-A-O, and vice versa (para. 29.3.2.9.5.4.)

The instruction now requires the commander of those applying for 1-A-O to "include a recommendation on whether or not it is in the best interest of the Air Force to retain a member seeking assignment to training or non-combatant duties if the applicant is ultimately classified as a 1-A-O conscientious objector" (para. 29.2.12). And para. 29.1.4 also requires assignment and classification offices to "provide the final approving authority information about the health, status, and duties of the applicant's current, proposed, potential career fields and potential non-combatant duties in support of a recommendation for retention or discharge of an applicant seeking classification as a 1-A-O conscientious objector. For ANG or ARC applicants, the recommendation of NGB, HQ AFRC, or HQ ARPC will include a similar analysis of the applicant's current and proposed potential career fields and non-combatant duties."

The new instruction explicitly states that those applying for 1-A-O status who have less than 2 years remaining in their obligation, if approved, will normally be discharged (para 29.1.3.3). The instruction also specifies that someone who is classified as 1-A-O may serve a maximum of 3 years (para. 29.5.2.2). One new addition here is particularly problematic: “To approve an assignment to noncombatant training and service based on conscientious objection (1-A-O), the reviewing authorities must find that an applicant’s personal beliefs are **purely moral or ethical in source or content**, and occupy to the service member a place parallel to that filled by more traditional religious convictions to object to participation as a combatant in war in any form; but whose convictions are such as to permit military service in a non-combatant status” (paragraph 29.4.2.2.). [Emphasis added.] This new directive would deny a 1-A-O application if there is a religious component to the applicant’s beliefs. This contradicts the DOD Instruction and US law, which clearly state that CO beliefs can be religious, ethical or moral, with ethical and moral being a Supreme Court interpretation of what constitutes religious. It also contradicts this DAFI itself, which in an earlier paragraph says the applicant must demonstrate that their belief “is due to sincerely held moral, ethical, **or religious beliefs, or a combination of such beliefs**” (para. 29.1.2.3.). [Emphasis added.]

The new instruction fails to correct a harmful oversight from the previous CO Instruction, stating that those “assigned to the individual ready reserve (IRR) who are non-participating cannot claim or request conscientious objector status” (para. 2.1.8.3). Similar wording was in the 2017 version of the CO instruction and is in violation of DODI 1300.06, para. 1.2.a. which states, “A Service **member** may be granted an administrative separation, or restriction of military duties, due to conscientious objection before completing his or her obligated term of service. . . .” [Emphasis Added.] Individuals in the IRR are, indeed, “members,” though most will have completed their active service obligation and are simply waiting out their statutory (minimum eight-year) obligation. Being prevented from applying for discharge at this point in their service generally will not cause hardship for many of these folks. Importantly, however, for the people whom this oversight does dismiss, the harm can be substantial. For example, Jehovah’s Witnesses are not allowed to become full members of the church as long as they are in the military. For them, being unable to be officially discharged from even the IRR as COs prevents their full involvement in their church and is a violation of their first amendment freedom of religion. Also, people who are in the Health Professions Scholarship Program (HPSP) can also be in the nonparticipating IRR while attending medical school or finishing their medical training as interns and residents. Their beliefs can crystallize before they have even begun their active service.

CCW has worked with COs who are affected by this. When we questioned this under the previous instructions, we were told that their thinking was that since those in the IRR really had no active obligation it didn’t matter, and that they hadn’t thought about people in the HPSP. The DoD representative we spoke with acknowledged that this was an oversight and told us it would be fixed when the instructions were revised. Since 2017, COs stuck in this position had to seek official waivers from Air Force Personnel Command to be able to apply. The new instruction in fact, did not correct the oversight; instead, it made it *even more difficult* for a member of the non-participating IRR to apply for CO status.

If you are familiar with Air Force instructions, you probably noticed that in recent years, throughout the instruction, in parentheses you often find T-0, T-1, T-2 or T-3. As explained in AFI 33-360 these refer to Tier Waiver Authorities—the level at which someone is authorized to waive that particular requirement of an instruction. In this new instruction, the waiver authority for COs in the non-participating IRR is T-0, which means no one in the Air Force can authorize a waiver. The authority is higher, meaning only the DoD, Congress or the President has waiver authority.

The questions that a CO must answer in the application are essentially the same as in the earlier instructions, with two notable exceptions. The 2017 instruction included additional questions for 1-A-O applicants about why they want to stay in and how doing so would not negatively affect the Air Force. The questions are the same in the new instruction, but they have been reformatted to more clearly distinguish that they are for 1-A-O applicants, and not all applicants. Finally, in the section of the application that addresses “Participation in Organizations,” the previous instruction made specific reference to religious sects or organizations only. The new instruction is more inclusive, asking for “A statement as to whether applicant is a member of a religious organization, or an organization that advocates moral or ethical beliefs, or practices a particular tradition” (A2.4.2.).

Overall the process remains largely unchanged. Why the Air Force decided to fold the CO instruction into a 500-page catch-all discharges instruction, with guidance for the CO process sprinkled throughout several other sections is anyone’s guess. The focus on limiting 1-A-O (non-combatant COs) seems to reflect a general dislike of COs and a desire perhaps to get rid of them. And so much of the instruction continues to be focused on questioning the sincerity of COs. My guess is it’s tied in with the military’s general duplicity when it comes to COs: On the one hand, the culture of the military wants to pretend that nobody really believes war is wrong—it’s just something someone makes up to get out of their responsibilities. Yet at the same time, the military knows, from its own research, that except for psychopaths, people have an aversion to killing other people. That’s why they put them through the training they do. So when military officials have to address conscientious objection, they really don’t seem to have a handle on the truth.

## 2022 MLTF MEMBERSHIP MEETING, ELECTIONS

MLTF will hold its annual membership meeting as part of the NLG's 2022 virtual convention in October. Friends of the Task Force (new and old) are also welcome.

We'll meet via Zoom on **Monday, October 24, at 9:00 a.m. Pacific/Noon Eastern.**

We hope the Guild will include Zoom information in its other publicity for the plenary sessions held on the 22nd and 23rd, and we'll have an announcement on our MLTF listserv. But you can also contact Jeff Lake at [jeff@carpenterandmayfield.com](mailto:jeff@carpenterandmayfield.com) for that information. For general information about the virtual convention, visit [nlg.org/convention](http://nlg.org/convention)

We have a fresh new “virtual literature table” on our website at [nlgmltf.org/virtual-literature-table/](http://nlgmltf.org/virtual-literature-table/)

### AGENDA

The meeting will discuss the Task Force's current work and plans/priorities for 2023. If we have a quorum, we'll also hold elections for Steering Committee members. (If there's not a quorum, we'll conduct the elections online within 45 days after the meeting). Feel free to nominate a colleague, or yourself!

# THREATENING LETTERS FROM THE SELECTIVE SERVICE SYSTEM

By Edward Hasbrouck

One of the most common reasons for a prospective draftee (or their parent, family member, friend, or lover) to seek advice from a draft counselor or Selective Service lawyer is that they have received a letter from the Selective Service System (SSS) threatening possible prosecution for failure to register with the SSS as required by the Military Selective Service Act (MSSA).<sup>1</sup>

These letters raise issues that could become even more important in the future, depending on the outcome of current debates in Congress.<sup>2</sup> In 2016 and again in 2021, Congress came close to approving legislation to expand the requirement to register with the Selective Service System for a possible military draft to include young women as well as young men. The version of the annual Fiscal Year 2023 National Defense [sic] Authorization Act (NDAA) currently pending in the Senate would expand the MSSA to apply to women as well as men. Even though the House version of the bill includes no provisions related to Selective Service, provisions based on the Senate version (or other compromises) could be included in the conference committee's compromise package. An alternative bill endorsed by the MLTF, the Selective Service Repeal Act (H.R. 2509 / S. 1139) has yet to receive a hearing or consideration in either the House or Senate Armed Services Committee.<sup>3</sup>

If the requirement to register with the SSS is extended to include young women as well as young men, it is inevitable that some women will resist openly, and many more will quietly ignore the registration requirement. And public attention to the expansion of registration to women is likely to bring more attention to the ongoing lack of compliance by young men with the requirement to register and report address changes to the SSS.<sup>4</sup> In the face of a crisis of credibility for the registration scheme due to visible mass noncompliance, the first response of the SSS is likely to be an attempt to intimidate nonregistrants through threats of prosecution. Selective Service lawyers, legal workers, and draft counselors need to be prepared for an upsurge in requests for counseling and advice prompted by these threats.

To whom are threatening letters sent? What do they say? How credible are these threats of prosecution? And what advice should Selective Service lawyers give to recipients of these letters? This article reviews what is known about these letters and suggests advice about whether or not to respond.

## WHY DOES THE SELECTIVE SERVICE SYSTEM SEND LETTERS THREATENING PROSECUTION?

Knowing and willful failure by any male (as assigned at birth) U.S. resident age 18-26 to register with or report any change of address to the SSS is a Federal felony pursuant to 50 U.S. Code § 3811. However, nobody has been indicted for any violation of this statute since 1986, and since 1988 the Department of

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1 For some of the other events that typically prompt individuals to seek draft counseling or advice concerning Selective service law, see Edward Hasbrouck, "Draft Counseling and Decisions about Selective Service", <<https://hasbrouck.org/draft/counseling.html>>.

2 See Edward Hasbrouck, "What's happening with women and draft registration (Selective Service)?", last modified July 27, 2022, <<https://hasbrouck.org/draft/women/happening.html>>.

3 See letter to the House Armed Services Committee co-signed by MLTF Executive Director Kathleen Gilberd, March 21, 2021, <<https://hasbrouck.org/draft/NCMNPS/full-fair-hearing.html>>.

4 Edward Hasbrouck, "Compliance, noncompliance, and enforcement of Selective Service registration", <<https://hasbrouck.org/draft/compliance.html>>.

Justice has suspended all investigations or prosecutions of suspected nonregistrants.<sup>5</sup>

Registration with the SSS used to be a condition for Federal student aid, but that requirement ended in 2021, and the questions about Selective Service registration are to be removed from the FAFSA student aid form by 2023.<sup>6</sup> The data matching agreement between the SSS and the Department of Education expired on July 2, 2022.<sup>7</sup> “Effective July 1, 2022, applicants will no longer be able to register with Selective Service System via the FAFSA.”<sup>8</sup> Notably, California, which used to require registration with the SSS for state student aid, repealed that requirement in 2021 to align California law with the revised Federal student aid law.<sup>9</sup>

Selective Service registration is a condition for Federal government jobs, and many states have laws that make registration a condition for state government jobs, state student aid, or other state programs. But not all states have such laws, and not all draft-age men go to college, apply for state student aid, or plan to work for Federal, state, or local government agencies.

In the absence of enforcement of the potential criminal penalties for nonregistration, the SSS relies *primarily* on laws in many states that require draft-age men to register with the SSS in order to obtain a drivers’ license, or make registration with the SSS automatic or the default for draft-age men applying for driver’s licenses, to generate most of the registrations that the SSS receives.<sup>10</sup>

But not all states have laws like this. Populous states that don’t link driver’s licenses to Selective Service registration include California, Oregon, Pennsylvania, New Jersey, and Massachusetts.

### Where does this leave the SSS?

In states that don’t link driver’s licenses to Selective Service registration, and for those young people who don’t have driver’s licenses (long common among people of all ages who grew up and live in New

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5 Edward Hasbrouck, “Prosecutions of Draft Registration Resisters”, <https://hasbrouck.org/draft/prosecutions.html>. On the decision in 1988 by the Department of Justice to suspend prosecutions of nonregistrants, see the interviews with current and former SSS officials in Steven Nelson, “Gender-Neutral Draft Registration Would Create Millions of Female Felons”, U.S. News & World Report, May 3, 2016, <https://www.usnews.com/news/articles/2016-05-03/gender-neutral-draft-registration-would-create-millions-of-female-felons>.

6 Edward Hasbrouck, “‘Solomon Amendment’ linking student aid to draft registration repealed”, December 29, 2020, <https://hasbrouck.org/blog/archives/002573.html>.

7 SSS letter to Edward Hasbrouck in response to FOIA request 22-45, August 17, 2022, <https://hasbrouck.org/draft/FOIA/SSS-FOIA-response-17AUG2022.pdf>.

8 Selective Service System, “Report on Review of Processes and Procedures Employed by Agencies for Appeals by Individuals Denied Federal Benefits for Failing to Register with Selective Service System, FY2022 NDAA, Section 529A”, July 28, 2022, <https://www.sss.gov/wp-content/uploads/2022/08/FY2022-NDAA-SEC.-529a-7-28-2022.pdf>.

9 Rick Jahnkow, “Draft Registration No Longer Required for College Aid in California”, Draft Notices (newsletter of the San Diego Committee Opposed to Militarism and the Draft), September 25, 2021, <http://comdsd.org/index.php/articles-archive/256-draft-registration-no-longer-required-for-college-aid-in-california>

10 Edward Hasbrouck, “State laws on Selective Service registration and drivers' licenses”, <https://hasbrouck.org/draft/state.html>.



York and some other cities<sup>11</sup>, and a growing percentage among young adults nationally<sup>12</sup>), the SSS relies *primarily* on threatening letters to intimidate young men into registering.

These letters are purely a scare tactic. They are *threatening* letters – largely empty threats – not *warning* letters. They are *not* intended or currently used for investigation or prosecution of possible criminal violations of the Military Selective Service Act. But responses to these letters could be used as evidence against nonregistrants if prosecutions resumed.

### **WHO GETS LETTERS THREATENING PROSECUTION FOR FAILURE TO REGISTER WITH THE SSS?**

The SSS obtains lists from other government agencies and commercial data brokers of names and addresses that might correspond to individuals subject to the requirement to register with the SSS. Those lists are matched against the SSS database of registrants to generate targeted mailing lists of possible nonregistrants. Threatening letters are then mailed to these names and addresses.

These activities appear to be subject to both the Privacy Act and the Computer Matching Act. But the SSS has not promulgated a System of Records Notice pursuant to the Privacy Act for a database of possible nonregistrants or a mailing list for threatening letters, or a notice pursuant to the Data Matching Act for any of these data matching programs.

Concerns about noncompliance with the Data Matching Act have been raised with the SSS since at least 2004, but have yet to be addressed.<sup>13</sup> In August 2022, in response to a FOIA request, the SSS said it could find no records of any of the reports, notices, or assessments required by the Data Matching Act, and no records of any meetings of the Data Integrity Board responsible for reviewing all such agreements.<sup>14</sup> Neither the Privacy Act nor the Data Matching Act creates a private right of action for violations of these notice and assessments requirements. So we don't know as much about these data matching programs as we are entitled by law to know.<sup>15</sup>

Information from commercial data brokers is notoriously unreliable, as is “matching” of lists which may have variations in names, spellings, addresses, etc. even for the same person. Recipients of letters from the SSS threatening prosecution for failure to register have included, *inter alia*, women, seniors, dead

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11 “New York City has more able-bodied, non-licensed... adults than anywhere in the United States.... In this city, approximately 25 percent of the inhabitants possess a driver's license.” Michael Powell, “Licensed to Drive? Fuhgeddaboutit!”, Washington Post, August 19, 2003, <<https://www.washingtonpost.com/archive/politics/2003/08/19/licensed-to-drive-fuhgeddaboutit/8d262853-5324-425a-84de-50b6af984710/>>.

12 Michael Sivak and Brandon Schoettle, “Recent decreases in the proportion of persons with a driver's license across all age groups”, University of Michigan Transportation Research Institute, January 2016, <<http://websites.umich.edu/~umtriswt/PDF/UMTRI-2016-4.pdf>>.

13 See joint comments of the Electronic Privacy Information Center, Privacy Journal, Consumer Action, Privacy Rights Now Coalition, Privacy Rights Clearinghouse, American Association of University Professors, and the World Privacy Forum, Re: Selective Service and Department of Education Data Matching Agreement, December 21, 2004, <<https://archive.epic.org/privacy/student/sssdatabmatch.html>>.

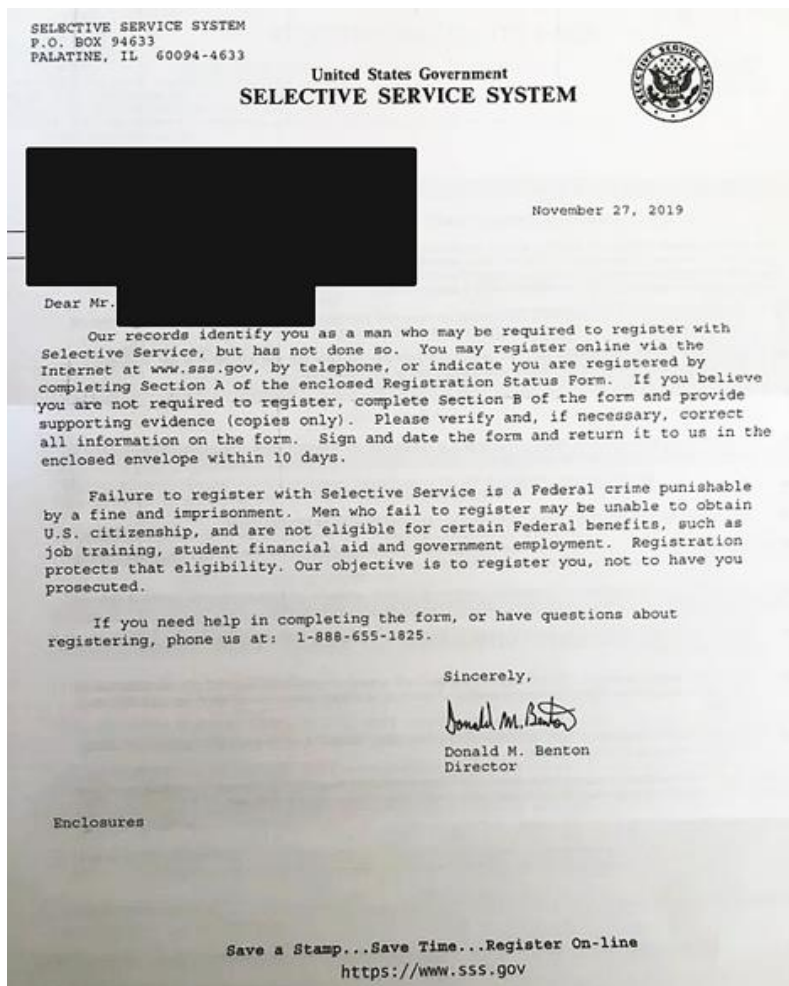
14 SSS letter to Edward Hasbrouck in response to FOIA request 22-45, August 17, 2022, <<https://hasbrouck.org/draft/FOIA/SSS-FOIA-response-17AUG2022.pdf>>.

15 See the discussion of Privacy Act and Data Matching Act requirements applicable to the SSS in Edward Hasbrouck, “The Privacy Act and the Selective Service System”, On Watch, vol. 33, No. 2, Spring 2022, also available at <<https://hasbrouck.org/draft/privacy-act.html>>.

people, people who were not required to register, nonexistent people, pets, and cartoon characters. The SSS sent a letter to Disneyland threatening Mickey Mouse with prosecution for failure to register,<sup>16</sup> even though the SSS had already received multiple registrations for Mickey Mouse.<sup>17</sup>

### WHAT DO THESE LETTERS FROM THE SSS SAY?

Below is a typical example of the first letter sent by the SSS to a name and address generated by this data matching program:<sup>18</sup>



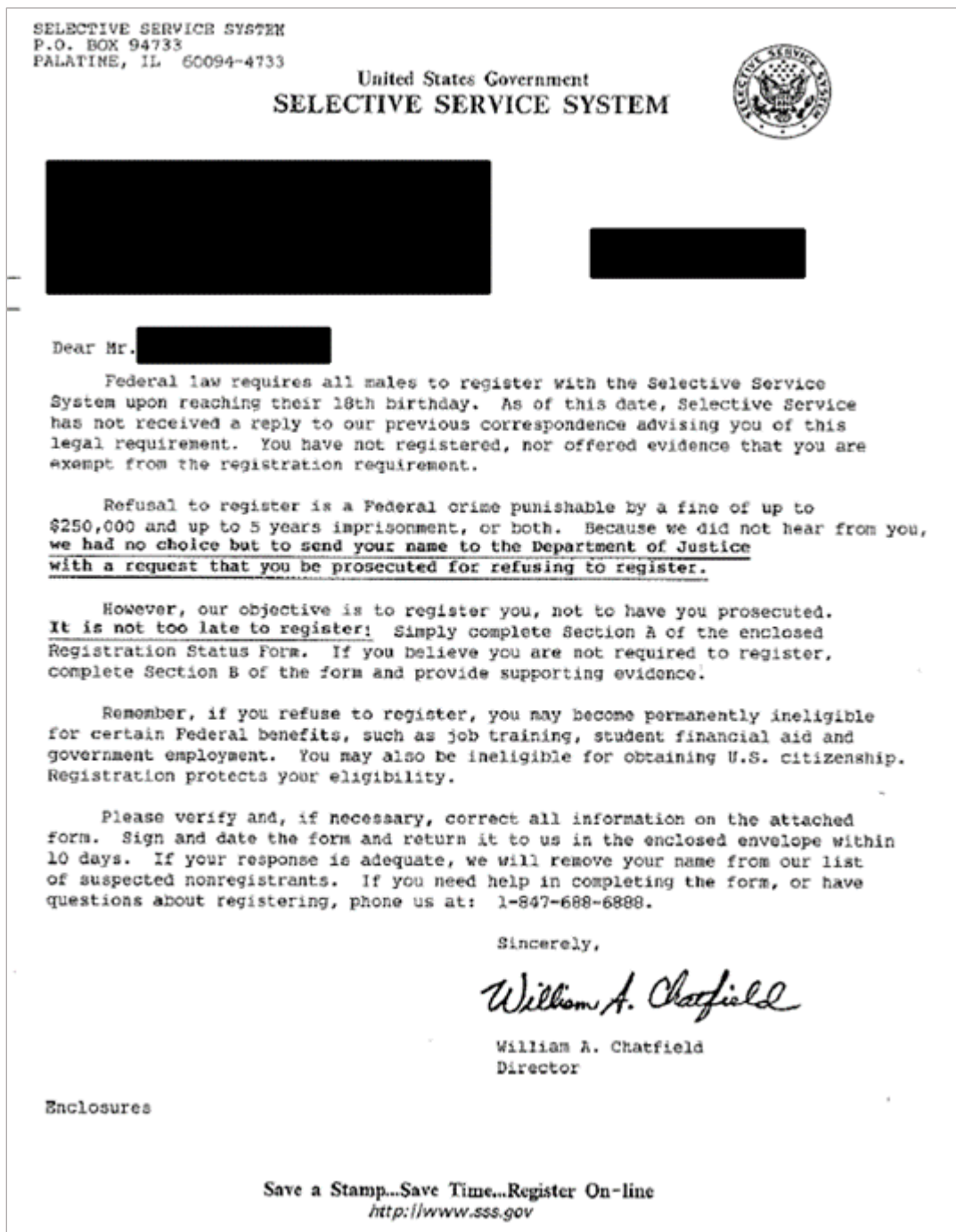
[Click for larger image](#)

16 Joan Hanauer, "Draft Mickey?", UPI, December 30, 1980, <https://www.upi.com/Archives/1980/12/30/DRAFT-MICKEY/9617347000400/>.

17 "The sample did find six cards listing Jimmy Carter as the registrant, two for Mickey Mouse, one for Ronald Reagan and one each for Senator Jesse Helms, Republican of North Carolina, Speaker of the House Thomas P. O'Neill of Massachusetts, and Susan Ford, daughter of former President Ford. Two other cards listed Mr. Rostker [Director of the SSS] as the registrant." Richard Halloran, "Draft registration to begin new round", New York Times, January 4, 1981, <https://www.nytimes.com/1981/01/04/us/draft-registration-to-begin-new-round.html>.

18 Available for download at <https://hasbrouck.org/draft/threatening-letter1-2019-redacted.png>.

Some (unknown) amount of time later, if the SSS still hasn't matched a recipient of this first letter to a registration, the SSS sends a second letter similar to the one below:<sup>19</sup>



[Click for larger image.](#)

19 Available for download at <https://hasbrouck.org/draft/threatening-letter2-2007-redacted.png>. See also another version of a similar letter at <https://i.redd.it/6iqkzo8q3hl01.jpg>.

The SSS has described the sequential sending of these two letters as follows:

[T]he agency continued direct mailings targeted to young men who did not register and turned 19 years old in CY 2016. The first such mailing is a reminder of men’s civic obligation to register with Selective Service; the second mailing is sent when there is no response to the first mailing. The second mailing highlights the legal consequences and informs the man that his name will be added to a database maintained by the Department of Justice.<sup>20</sup>

### **WHAT HAPPENS TO PEOPLE WHO DON’T RESPOND TO THESE THREATENING LETTERS?**

The SSS has described its procedures for following up on these letters as follows:

[I]f a man fails to register or fails to provide evidence that he is exempt from the registration requirement after receiving Selective Service reminder and/or compliance mailings, his name is referred to the Department of Justice (DoJ) as required by the Military Selective Service Act. In FY 2018, 112,051 names and addresses of suspected violators were provided to DoJ. The Department of Justice will determine the requirement to investigate and/or prosecute an individual’s failure to register.<sup>21</sup>

It’s crucial to recognize that these “referrals” to the DoJ by the SSS are *not* made for the purpose of investigation, prosecution, or any other action by the DoJ. Recipients should not panic.

Millions of names of possible nonregistrants (who may or may not exist or have ever existed, may or may not have been required to register, and may or may not have already registered) have been referred to the DoJ by the SSS since 1988. *None* of them have been investigated or prosecuted.

Despite the statement by the SSS that “The Department of Justice will determine the requirement to investigate and/or prosecute an individual’s failure to register”, nobody at the DoJ has actually been assigned to, or made any plans for, enforcement of the Military Selective Service Act.

In March 2019, as the National Commission on Military, National, and Public Service<sup>22</sup> (NCMNPS) prepared for its formal public hearings on Selective Service in April 2019<sup>23</sup>, NCMNPS staff contacted the DoJ regarding enforcement of draft registration.

According to the minutes of the closed-door NCMNPS meeting, which were withheld by the NCMNPS in violation of the Freedom Of Information Act (FOIA), and released only in 2021 by the National Archives and Records Administration after the NCMNPS was disbanded:

Dr. Rough [NCMNPS Director of Research] noted that Ed Hasbrouck will be a panelist and will speak to issues regarding the Department of Justice (DOJ) and enforcement of draft

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20 Selective Service System, “Annual Report to the Congress of the United States, Fiscal Year 2017”, <<https://www.sss.gov/wp-content/uploads/2020/03/Annual-Report-2017.pdf>>.

21 Selective Service System, “Annual Report to the Congress of the United States, Fiscal Year 2018”, <<https://www.sss.gov/wp-content/uploads/2020/03/Annual-Report-2018.pdf>>.

22 For more on the NCMNPS, see <<https://hasbrouck.org/draft/NCMNPS/>>.

23 See testimony of Edward Hasbrouck to the NCMNPS, April 25, 2019, <<https://hasbrouck.org/blog/archives/002342.html>>.

registration requirements. Mr. Lekas [NCMNPS General Counsel] said his team had reached out to the appropriate office within DOJ and was informed that they do not set the policy for enforcing draft registration and has been unable to locate any current guidance from DOJ that does address this issue.<sup>24</sup>

There is no evidence that this has changed. As of August 2021, the SSS said it was unable to find any records of “communications by the SSS to the DOJ since 2010 concerning actions to be considered or taken with respect to possible violations of the Military Selective Service Act.”<sup>25</sup>

The SSS knows that the DoJ has no Selective Service enforcement plan, assigned staff, or budget, and will not investigate or prosecute any of the names referred by the SSS as possible nonregistrants. The *only* reason for these “referrals” by the SSS to the DoJ is to enhance the scariness of the threatening letters sent by the SSS, by enabling the SSS to claim – truthfully but misleadingly – that those who do not register (or provide evidence of their innocence) will be “referred to the Department of Justice” for investigation and prosecution.

Curiously, the number of names referred by the SSS to the DoJ, which had been a regular feature of SSS annual reports for many years, has not been included in those reports since FY 2018.

We can only speculate as to why the number of referrals has not been included in more recent SSS annual reports. Perhaps the discrepancy between the number of referrals (more than a hundred thousand in most years) and the number of prosecutions (zero) was calling attention to the emptiness of SSS threats.

More recent figures were, however, disclosed in response to a FOIA request in August 2022:<sup>26</sup>

- FY 2010: 145,429 suspected violators
- FY 2011: 117,020 suspected violators
- FY 2012: 101,355 suspected violators
- FY 2013: 35,669 suspected violators
- FY 2014: 295,416 suspected violators
- FY 2015: 146,997 suspected violators
- FY 2016: 169,939 suspected violators
- FY 2017: 184,051 suspected violators
- FY 2018: 112,051 suspected violators
- FY 2019: 129,053 suspected violators
- FY 2020: 117,288 suspected violators
- FY 2021: 238,679 suspected violators

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24 National Commission on Military, National, and Public Service, “Minutes of March 2019 Commission Meeting”, <[https://hasbrouck.org/draft/FOIA/NcoS\\_Minutes\\_2019\\_MARCH\\_FINAL.pdf](https://hasbrouck.org/draft/FOIA/NcoS_Minutes_2019_MARCH_FINAL.pdf)>.

25 SSS letter to Edward Hasbrouck in response to FOIA request 22-45, August 17, 2022, <<https://hasbrouck.org/draft/FOIA/SSS-FOIA-response-17AUG2022.pdf>>.

26 SSS letter to Edward Hasbrouck in response to FOIA request 22-45, August 17, 2022, <<https://hasbrouck.org/draft/FOIA/SSS-FOIA-response-17AUG2022.pdf>>.

It's unclear to what extent the year-to-year variations in these numbers reflect actual variations in noncompliance, and to what extent they reflect variations in data matching activities.

It's likely that the number of nonregistrants will increase dramatically beginning in FY 2024, after the questions about Selective Service registration have been removed from the FAFSA student aid form.

If the SSS procedures for sending threatening letters and making referrals to the DoJ, and the percentage of recipients who do not register in response to these letters, continue unchanged, the increase in the number of nonregistrants is likely to mean a proportionate (and embarrassing to the SSS) increase in the number of letters sent by the SSS and in referrals by the SSS to the DoJ.

The law does not require potential registrants to accept, sign for, open, or read any letters from the SSS. So far as I can tell, there is no statutory or regulatory obligation for anyone to acknowledge, answer, or provide evidence (such as of having already registered, or of not being required to register) in response to any of these letters from the SSS.

Responding to a threatening letter from the SSS is *not* a way to make a claim for exemption, deferral, or classification as a conscientious objector, or to indicate the intent to do so if called to report for induction. There is a way to make a record with the SSS of such a claim, even before the SSS wants to consider it, but that involves a different procedure pursuant to the Privacy Act.<sup>27</sup>

### **DOES A LETTER FROM THE SSS MEAN THAT THE RECIPIENT HAS TO REGISTER OR WILL BE PROSECUTED?**

No. Letters from the SSS may prompt people to think about whether they want to register or what they want to do about draft registration, if they haven't done so already. But receiving one of these letters is not, in and of itself, a good reason to register or change one's relationship to the SSS.

Getting one of these letters from the SSS does not mean that the recipient has been targeted for prosecution or is the subject of an investigation, or that they will be if they don't respond to the letter.

These letters are mass-produced and auto-generated by the hundreds of thousands every year. The SSS doesn't really know whether the names and addresses to which they are sent are valid or correspond to people who are supposed to register. These letters can be ignored with impunity.

Ordinary letters that don't have to be signed for provide no proof of delivery, and thus are of minimal if any value in court as evidence that anyone received or read them. It's perfectly legal to throw these letters away unopened and unread. There are no adverse consequences to not acknowledging or responding to letters from the SSS, other than possible sending of follow-up letters and (largely symbolic) referrals of names and addresses to the DoJ.

Those subject to registration have the same options regardless of whether they receive any of these letters from the SSS.<sup>28</sup> If they are concerned about the collateral consequences of nonregistration, they

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27 See Edward Hasbrouck, "The Privacy Act and the Selective Service System", *On Watch*, vol. 33, No. 2, Spring 2022, also available at <<https://hasbrouck.org/draft/privacy-act.html>>.

28 Edward Hasbrouck, "Deciding whether or not to register with the Selective Service System: Options to consider, and reasons some people choose each of these options", <<https://hasbrouck.org/draft/options.html>>.

can wait to wait to register until just before their 26th birthday, and register then.<sup>29</sup> This minimizes the time that a person is at risk of being drafted, while preserving lifetime eligibility for government jobs and all other Federal and state programs.

### **WHAT ARE THE RISKS OF RESPONDING TO MESSAGES FROM THE SSS?**

The general advice of criminal defense attorneys should be the same in Selective Service cases as in any others: “Exercise your right to remain silent. Don’t talk to the SSS, the police, the FBI, or the prosecutor. Say nothing and sign nothing without first consulting a qualified lawyer.”

In general, recipients who want to minimize their risk of prosecution, or of conviction if prosecuted, should not acknowledge or respond to threatening letters from the SSS, for the same reasons they should not talk to police or other law enforcement officers or agencies.

Anything a recipient of one of these letters says in response can be recorded, passed on to the Department of Justice, and used against them and/or others at any time in the future, including in the event of activation of a draft and/or resumption of prosecutions of nonregistrants.

Regardless of what, if anything, is said, *any* acknowledgment or response to one of these letters by a recipient will (1) make it more likely that they will be selected for prosecution if prosecutions of nonregistrants resume, and (2) provide evidence of receipt of the letter and thus of knowledge of the obligation to register, which is an element of the criminal offense.

All criminal violations of the Military Selective Service Act (50 U.S. Code § 3811) include a specific intent element of actual knowledge of the law. As this pertains to registration, “One who fails to register must ‘knowingly’ do so before he is guilty of an offense.” (U.S. v. Gary John Eklund, 733 F.2d 1287, 8th Cir. 1984). At trial, the government has the burden of proving actual knowledge by the defendant that they were legally required to register.

Any acknowledgment of receipt of one of these letters or of any other notice of the obligation to register provides incriminating evidence of this essential element of a criminal offense.

It is and will remain true that, as the Department of Justice lawyer in charge of Selective Service prosecution policy stated in 1982, “The total number of nonregistrants will doubtless remain very high when measured against the Department’s prosecutive resources.... We first would have to accept the simple fact that, although some persons will be prosecuted, there will be others who are neither registered nor prosecuted.” (David J. Kline, Legal Advisor, memo over the signature of Lawrence Lippe, Chief of the General Litigation and Legal Advice Section of the Criminal Division, to Assistant Attorney General D. Lowell Jensen, January 11, January 1982.)<sup>30</sup>

Prosecutors will have to choose which suspected nonregistrants to investigate and prosecute.<sup>31</sup>

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29 Edward Hasbrouck, “Decisions about Selective Service to make before your 26th birthday”, <<https://hasbrouck.org/draft/26.html>>.

30 Released on discovery in *U.S. v. Wayte*; quoted and discussed in written comments of Edward Hasbrouck to the National Commission on Military, National, and Public Service, NCMNPS Docket 05-2018-01, April 19, 2018, <<https://hasbrouck.org/draft/Hasbrouck-NCMNPS-19APR2018.pdf>>.

31 For more on the Selective Service registration enforcement options considered by the government in the

“Knowledge” is likely to be the most difficult element of the offense for the government to establish at trial. And developing evidence of the defendant’s actual knowledge of their legal duties is likely to be the most resource-intensive aspect of the government’s investigation and trial preparation. In the absence of a confession or self-incriminating admissions of knowledge by the defendant, the government would have to show that the defendant was notified of their duty to register, and still didn’t register after being provably notified. This is what was done in the cases of nonregistrants who were investigated for possible prosecution in the 1980s. Proof of notice of the law, and thus of the defendant’s knowledge of the law, was provided by signatures on the return receipts for certified letters, by the testimony of FBI agents who interviewed nonregistrants, and by nonregistrants’ incriminating admissions in letters to the government, press releases, and public statements.

The government’s procedure for developing evidence of specific intent (knowledge and willfulness) was described in a July 9, 1982, communication to United States Attorneys from the Justice Department, which “requires that United States Attorneys notify non-registrants by registered mail that, unless they register within a specified time, prosecutions will be considered. In most instances we anticipate that Federal Bureau of Investigation agents will also interview alleged non-registrants prior to the initiation of prosecutions. Nevertheless, if a non-registrant registers prior to indictment, no further prosecutive action will be taken. The policy is designed to ensure that the refusal to register is willful.” (Memo from Dept. of Justice headquarters to all U.S. Attorneys, quoted in the U.S. District Court decision in *U.S. v. Eklund*, 551 F. Supp. 964, S.D. Iowa 1982.)

For these reasons, investigating and prosecuting only those who have already made incriminating admissions of knowledge of their duty to register – including admissions in the form of acknowledgments of receipt of warning letters or other notices from the SSS – will remain the path of least resistance for the government in the exercise of prosecutorial discretion, just as it was central to the government’s selection of nonregistrants to prosecute in the 1980s.

Some young people, of course, choose to take the risk of “coming out” publicly as knowing and willful nonregistrants or violators of the address update requirement. But they should know that those who acknowledge or respond in any way to any letter or other message from the SSS make it (1) more likely that they will be prosecuted if prosecutions of nonregistrants resume, and (2) more likely that they will be convicted (if they persist in nonregistration) if they are prosecuted.

Whether or not to speak publicly or tell the government about the choice not to register for the draft is a separate decision from whether or not to register. Lawyers, legal workers, and draft counselors should not try to make either of these decisions for their clients.

Some opponents of the draft have argued that openly declared resistance is the only politically or ethically correct mode of noncompliance with the law. Conversely, others have argued that the duty of a dissident is to make it as difficult as possible for the government to capture, convict, or imprison them, and/or that those who make their resistance public are seeking martyrdom, facilitating government repression, and contributing to the diversion of scarce movement resources to legal and prison support. Some have tried to distinguish the morality and/or political appropriateness of “draft resistance” from “draft evasion”. I think that both public and private nonregistration, draft resistance and draft evasion,

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1980s, including the possibility of prosecutions for aid, abetment, counseling, and/or conspiracy, and how and why the government chose to exercise its prosecutorial discretion in the way it did, see Edward Hasbrouck, “National Resistance ‘Conspiracy’?”, July 4, 1984, <<https://hasbrouck.org/draft/National-Resistance-Conspiracy-1984.pdf>>.



are legitimate and often effective tactics of nonviolent mass direct action. Whatever choices they think they might personally make if threatened by a draft, draft counselors and draft lawyers should be prepared to advise and assist both draft resisters and draft evaders, including young people who know that they don't want to be drafted but aren't sure whether they want to resist openly.

"Language like 'self-incrimination' is... dependent on one's perspective. Telling the US I wouldn't be participating in preparations for nuclear war, or assisting in invading Latin America never felt like I was incriminating myself. I realize prosecutors see this differently," says Michael Wehle, who wrote to the SSS in 1983, in response to a threatening letter, informing the SSS of his refusal to register – and was never prosecuted.<sup>32</sup>

Open resistance can help end draft registration and the threat of anyone being drafted. But there is safety in silence. Closeted resistance is the safest choice for an individual who doesn't want to be drafted, prosecuted, or imprisoned.<sup>33</sup>

Given the necessity for the government to establish the defendant's knowledge of the law to obtain a conviction, the risk of criminal sanctions for "closeted" nonregistration is minimal (although even those nonregistrants who have remained silent about their resistance can be subjected to extrajudicial collateral sanctions such as lifetime ineligibility for Federal jobs). Even if the government were to decide to prosecute some nonregistrants, after a hiatus of more than 35 years, almost all of the risk of prosecution would fall on those who have "come out" publicly as nonregistrants.

The risk of new prosecutions for nonregistration appears to remain very low. But recipients of letters from the SSS who don't want to who take on increased risk should exercise their right to remain silent. Don't communicate with the SSS in any way.

#### **WHAT ABOUT REGISTERED OR CERTIFIED LETTERS THAT YOU HAVE TO SIGN FOR?**

Don't sign for any letters from the Selective Service System, FBI, U.S. Attorney, or Department of Justice. Anyone who receives such a letter should decline to accept it and contact an attorney. Anyone aware of such a letter related to Selective Service should also notify the NLG Military Law Task Force.

Sending certified or registered letters is expensive and labor-intensive. The only reason to send such letters is to obtain proof of delivery, i.e. incriminating evidence of the recipient's knowledge of the law.

Return receipts for certified letters from the SSS and/or Department of Justice were introduced in the trials of nonregistrants in the 1980s as evidence of knowledge of the duty to register.

Recipients of threatening letters don't always remember whether they had to sign for them. But so far as I can tell, no registered or certified threatening letters have been sent by the SSS since 1988. Any such letter would be an indication of a significant change in decades-old policy and a possible move to resume investigation and prosecution of selected nonregistrants.

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32 Michael Wehle on Twitter, <<https://twitter.com/mlwehle/status/1554301581776011265>>. See copy of letter at <<https://twitter.com/mlwehle/status/1554187161200623617>>.

33 See Edward Hasbrouck, "Public vs. Quiet Resistance: 'Coming out' or remaining closeted about not having registered for the draft", <<https://hasbrouck.org/draft/public-private.html>>.

## WHAT ABOUT E-MAIL MESSAGES, TEXT MESSAGES, OR MESSAGES ON SOCIAL MEDIA?

Don't open any e-mail messages that claim to be from the SSS, FBI, or Department of Justice (DOJ). Delete any such messages *unopened*, and mark them as spam.

E-mail messages can, and often do (although I don't know if the SSS has used this technique) include invisible tracking tags that provide the sender with evidence of whether they have been opened, and thus could provide incriminating evidence of knowledge of the registration requirement – just like signing for a certified letter. E-mail service providers can usually, in response to a subpoena, provide the government with records of whether messages have been opened and viewed.

There are good reasons not to believe that any e-mail or text messages purporting to be from the SSS, FBI, or DOJ are genuine, and not to believe anything they say. Deleting them unread and marking them as spam helps provide evidence that you did not, in fact, believe them.

Pretending to be from the SSS, FBI, or DOJ is an effective way for scammers to “phish” for personal information to use for identity theft or other fraudulent schemes. Spam claiming to be from the FBI is especially common.

The DOJ itself has warned the public about threatening spam claiming to be from the DOJ or other Federal agencies, and has advised recipients to delete these messages unopened:

The Department of Justice has recently become aware of fraudulent spam e-mail messages claiming to be from DOJ.... THESE E-MAIL MESSAGES ARE A HOAX. DO NOT RESPOND. The Department of Justice did not send these unsolicited email messages — and would not send such messages to the public via email. Similar hoaxes have been recently perpetrated in the names of various governmental entities.... Email users should be especially wary of unsolicited warning messages that purport to come from U.S. governmental agencies directing them to... provide sensitive personal information. These spam email messages are bogus and should be immediately deleted. Computers may be put at risk simply by an attempt to examine these messages for signs of fraud. Do not open any attachment to such messages. Delete the e-mail. Empty the deleted items folder.”<sup>34</sup>

With specific reference to messages about the draft, the U.S. Army Recruiting Command has warned that any “texts, phone calls, or direct messages about a military draft” are “not real at all.”<sup>35</sup> In ignoring any such messages, and deleting them unread, recipients are reasonably relying on official government notices, advisories, and recommendations.

Criminal defense lawyers' and draft counselors' advice to recipients of threatening letters from the SSS should be: “Unless you have decided to resist openly, don't talk to the police. Don't talk to the FBI. Don't talk to the SSS. Anything you say can be used against you.”

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34 Department of Justice, “Justice Department Alerts Public About Fraudulent Spam E-mail. Justice Department Urges Public Not to Respond to E-mail,” press release, June 27, 2007, <<https://www.ic3.gov/Media/PDF/Y2007/PSA070627.pdf>>.

35 Federal Communications Commission, “Army, Selective Service Warn of Bogus Texts”, January 9, 2020, <<https://www.fcc.gov/army-selective-service-warn-bogus-texts>>.

# MILITARY MEDICAL MALPRACTICE CLAIMS

**By Jeff Lake**

*Editor's note: This article is based on a presentation given at the Veterans Legal Assistance Conference and Training sponsored by the Maryland Pro Bono Resource Center. The author is grateful to the panelists – Bradley Richardson, Defense Health Agency; Linda Blauhut, Paralyzed Veterans of America; Julie Glover, GloverLuck LLP – who have provided the content for this article.*

In my last article on this topic, published in the September 2021 issue of *On Watch*, I discussed the then new rules for submitting claims for personal injury or death caused by a DoD health care provided in certain military medical facilities. In this article, I will discuss developments concerning this area, as well as claims submitted to the Veteran's Administration and claims under the Federal Tort Claims Act.

## MILITARY MALPRACTICE CLAIMS

Claims submitted for personal injury or death are now being received and the military is issuing adjudications and settlements using the procedures I discussed in my previous article. This is all being done pursuant to the interim final rule found at 32 CFR Part 45. The final rule was published on August 26, 2022 and goes into effect on September 26, 2022. The rule can be found here:

<https://www.federalregister.gov/documents/2022/08/26/2022-18314/medical-malpractice-claims-by-members-of-the-uniformed-services>

Changes from the interim rule include:

- 1) An increase in the cap on noneconomic (pain and suffering) damages from \$500,000 to \$600,000;
- 2) A new requirement for DoD to provide claimants with: (a) a meaningful basis for an offer of settlement; or (b) a meaningful explanation for the denial of a claim the includes the specific basis for the denial; and
- 3) Extended timelines for claimants to submit information in support of their claims and to file an administrative appeal. For example, claimants had 30 days to cure a deficiency with their claim and now will have 90 days.

The MLTF will continue to follow the implementation of this rule by the various branches of the military. It will be interesting to see how many claims are actually made and how much will be paid to the servicemembers or their families.

## VA MEDICAL MALPRACTICE CLAIMS

VA Medical Malpractice Claims are handled pursuant to 38 U.S.C. § 1151. The procedures are detailed in 38 CFR § 3.361. In order to be eligible, a death or additional disability must be caused by hospital care or medical or surgical treatment, or examination furnished by a VA employee or in a VA facility. The disability or death must be the result of carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on the part of the VA or an event not reasonably foreseeable. Benefits are also available if the disability or death was caused by Vocational Rehabilitation or Compensated Work Therapy.

## CAUSATION ISSUES

In terms of practicality, the VA has established strict rules concerning causation. The rule states that “To establish causation, the evidence must show that the hospital care, medical or surgical treatment, or examination resulted in the veteran’s additional disability or death. Merely showing that a veteran received care, treatment, or examination and that the veteran has an additional disability or died does not establish cause.” 38 CFR 3.361 (c)(1). The rule is clear that continuance or “natural progress” of a disease or injury also does not establish causation, “unless the VA’s failure to timely diagnose and properly treat the disease or injury proximately caused the continuance or natural progress.” 38 CFR 3.361(c)(2).

For proximate cause cases, “it must be shown that the hospital care, medical or surgical treatment, or examination caused the veteran’s additional disability or death (as explained in paragraph (c) of this section; and (i) VA failed to exercise the degree of care that would be expected of a reasonable health care provider; or (ii) VA furnished the hospital care, medical or surgical treatment, or examination without the veteran’s or, in appropriate cases, the veteran’s representative’s informed consent. To determine whether there was informed consent, VA will consider whether the health care providers substantially complied with the requirements of § 17.32 of this chapter.” 38 CFR 3.361(d)(1).

Regarding what claims are “not reasonably foreseeable” is defined as “based on what a reasonable health care provider would have foreseen. The event need not be completely unforeseeable or unimaginable but must be one that a reasonable health care provider would not have considered to be an ordinary risk of the treatment provided. In determining whether an event was reasonably foreseeable, VA will consider whether the risk of that event was the type of risk that a reasonable health care provider would have disclosed in connection with the informed consent procedures of § 17.32 of this chapter.” 38 CFR 3.361(d)(2).

## IMPEDIMENTS TO LITIGATION

Obviously, to prove the elements here of what a “reasonable” practitioner would disclose and what degree of care a “reasonable” health care provider would provide requires expert opinion. The average veteran, much less a veteran suffering from medical injury will probably not be able to afford an expert.

This is compounded by the fact that claims are subject to a contingency fee agreement – usually for 20-30% of back pay. In addition, practitioners in the field report that they receive no cooperation from the VA, especially the VHA. They are unlikely to settle as well.

The issues of what is a VA facility and who is a VA provider are not at all clear. A lot of care is provided in facilities and by providers who a veteran may think are part of the VA but legally are not.

Finally, the chances of successfully pursuing an appeal are not great. Again, practitioners report that the Court of Appeals for Veterans Claims has been restrictive. Getting to a Federal Circuit is theoretically possible, but extremely expensive and time consuming. For examples of successful appeals, see *Viegas v. Shinseki* 705 F.3d 1374 (Fed. Cir. 2013) and *Ollis v. Shulkin* 857 F.3d 1338 (Fed.Cir. 2017).

## FEDERAL TORT CLAIMS ACT

Under the Federal Tort Claims Act (FTCA), veterans and their families can bring a tort claim based on a negligent or wrongful act or omission of an employee of the Department of Veterans Affairs acting

within the scope of his or her employment. The FTCA does not create a new cause of action – it waives the United States’ sovereign immunity from claims that exist under state tort law. Thus, the law of the case will be controlled by tort law in the state where the claim is filed.

### **ADMINISTRATIVE CLAIM**

As actions under the FTCA are claims against a federal department, they start with a claim filed administratively with the VA. The claim must include: 1) detailed allegations; 2) a specific sum requested; and 3) signature of the appropriate claimant. Standard Form 95 [SF-95.pdf \(va.gov\)](#) is suggested but not required.

After the claimant has filed an administrative claim with the VA, the claimant must wait at least six months for a response or non-response from the VA. If in the six month period, the VA denies the claim, does not respond, or offers an unsatisfactory settlement, the claimant can file a FTCA in an appropriate U.S. District Court within 6 months from the actual or constructive denial by the VA.

### **FEDERAL COURT CLAIM**

If the claimant wishes to proceed to federal court, venue is proper in either (a) “the judicial district where the plaintiff resides” or (b) the judicial district “wherein the act or omission complained of occurred.” 28 U.S.C. § 1402(b).

Under the FTCA, compensatory damages are the only damages recoverable. Injunctions, attorney’s fees and punitive damages are expressly prohibited. The amount recoverable is unlimited, but as stated above, may be limited by applicable state law.

Unlike claims under 38 U.S.C. § 1151 discussed above, an FTCA claim can be filed when ANY employee of the VA acts negligently and causes injury. For example, a claim could be brought if a janitor at the VAMC leaves the floor wet and the claimant slips and falls. The FTCA requires the plaintiff to prove their case with a preponderance of the evidence.

The FTCA caps attorney’s fees at 20% of recovery for administrative claims and 25% of recovery for a litigated claim. In many cases, it may simply not be economically worthwhile to bring these claims. Frankly, in most cases an attorney risks losing more than they would earn at both the administrative and court levels. Veterans need high damages in order to make these cases economically feasible.

### **CONCLUSION**

There is now a possible remedy for those injured by medical malpractice while in the military or while receiving VA care. As noted above, there are significant obstacles to recovery. The MLTF will continue to follow developments in this area and report on them in future issues of *On Watch*.

# GI RIGHTS NETWORK ANNUAL CONFERENCE

**By Anne Cowan**

The virtual annual conference for the GIRN was held July 22-24, 2022. Five interesting and informative presentations were made and are reviewed below. These included:

- Equal Opportunity Grievances by Jonathan Hutto
- CMRN by Howard Waitzkin
- Moral Injury by Joanna Nunez
- Filing grievances by Bill Galvin, Steve Woolford and Tori Bateman
- Panel of three veterans awarded CO status working with GIRN

**Jonathon Hutto** is a Navy veteran of the Iraq Afghanistan wars, the author of *Anti-War Soldier* and a long time organizer. His presentation focused on use of Equal Opportunity (EO) complaints involving racism, both systemic and personal. He feels that dealing with the EO process is effective only if the member “goes all in” with their actions. The member must understand that the chain of command rarely advocates for the sailor and “will try to crush you and your efforts at every level”. Most successful filings come from members who have spent some time in the military, developed support within their unit, and who have some support from outside groups. Having a good record helps. He was the ‘blue jacket’ for his unit and this helped his case. His wording was to be ‘squared away’ with the Navy. The goal of an EO filing is to instigate an investigation.

In this presentation Kathy Gilberd agreed with the need to be bold and her words were to go in with ‘all guns blazing’ and a massive amount of documentation. She also suggested that the written documentation be sent to several outside organizations (ACLU, NAACP, Atty General, Congressperson, etc) which could be helpful for future actions.

**Howard Waitzkin**, the founder and director of the *Civilian Medical Resource Network*, presented information and an update on the status and process used in the CMRN. CMRN provides medical and mental health evaluations by telemedicine with clients referred by the GIRN. His talk concentrated on the content and use of the evaluation from CMRN versus the information that can be provided by the GI Rights Hotline. And how best to approach the recommendations for a discharge. He also announced the new part time staff member, Kyle Toon. He will be replacing longtime coordinator Laura Muncy.

**Bill Galvin, Steve Woolford and Tori Bateman** presented information on addressing grievances. Galvin explained how the Article 138 can be used for a wide variety of grievances. A 138 is useful for filing a grievance against the lowest level commissioned or warrant officer in the member’s COC, who has the authority to solve the grievance. This can be a problem of the officer not following regulations or with them abusing/misusing their authority and can be a problem of commission or omission on the part of the officer. It cannot be used for A 15 cases or with situations which are still in the normal military processing.

The first step in filing an A 138 is a letter of Redress which states the problem and solution and gives the officer an opportunity to resolve this without a further filing of the complete A 138. Galvin has had good outcomes with just this first step. If the Letter of Redress does not lead to a resolution, the A 138 is filed. This is a serious step which eventually goes to the Secretary of the military branch. Each branch has some specific rules which need to be considered when using the A 138.

Galvin noted that the Navy and Marines have the regulation 1150 option for grievances outside the COC such as against the doctors. [JAGAINST 5800.7D MANUAL OF THE JUDGE ADVOCATE GENERAL \(JAGMAN\) \(usslibertyveterans.org\)](https://usslibertyveterans.org)

Woolford discussed grievance options in addition to the A 138. He often starts with a Memo approach. It is less adversarial and uses wording that suggests that the officer and the member can work together to solve the problem. This can work well especially if the member is squared away within his/her unit. He noted that GIRN counselors are available to help edit any filing.

Tori Bateman works with a new program of the American Friends Service Committee, which addresses recruiter abuse. The end goal of the project is to diminish this abuse but is starting the project by documenting stories. She related many stories that they have received and would welcome stories of recruiter abuse of any kind. The information can be found or stories reported at [www.afsc.org/hotline](http://www.afsc.org/hotline) or by calling (202) 483-5370.

**Joanna Nunez**, a Licensed Clinical Social worker and author of *Finding Peace with PTSD*, works with the Quaker House in Fayetteville, NC. Her presentation centered on the differences between PTSD and Moral Injury. Science continues to unfold the nature of these conditions but it has been shown by MRI that PTSD is activated in the amygdala portion of the brain and Moral Injury creates changes in the Precuneus portion. Treatments for these conditions are evolving and there is much erroneous or outdated information on the Internet. Although there is often an overlap, it is important to discern the difference in each case: PTSD involves an overreaction to a stimulus (hyperarousal), which after being set off can remain active for hours or even days. The reaction, once elicited cannot be controlled by the individual.

Moral Injury is an after effect of having committed actions which are not in line with the person's values. This can result in distrusting any authority, or blaming the self. This condition is memory based and when activated can exist for a week or more. Moral Injury exists in many non-military situations including actions of first responders, health care workers and refugees where someone needs to make a decision about who dies and who survives.

Nunez noted that treatment for these cases vary but are often limited by number of treatments allowed by Insurance – military or civilian.

## **CO PANEL**

Three veterans who worked with GIRN and received CO discharges presented their individual cases.

David received his discharge as he graduated from West Point and is now in graduate school, preparing his thesis on "CO Objectives in the Cold War."

Travis was deployed twice as a sailor and is now in college studying philosophy and political science.

Ashton is a Marine veteran of 17 years who worked in drone signal intelligence. She is now in school and plans on teaching.

Each veteran talked about events that brought about their CO decision and the difficulties of reentering civilian life as a CO. Each has experienced some negative response from family or friends. Steve Woolford noted that he sees CO applicants as being idealistic and strong willed and should be proud to have stood up for their beliefs.

# AN INSIDER'S VIEW OF THE SELECTIVE SERVICE SYSTEM

By Anonymous

I joined the Selective Service (i.e. Draft) Board in 2009. I met someone who was on the board, and they told me they were looking for more volunteers. I was interviewed in my local library by a Coast Guard veteran and I was selected to serve.

I think you can sum up Selective Service as follows: A solution looking for a problem.

As board members we are responsible for determining the classification status of men seeking deferments, exemptions, or postponements. Our training as board members involved yearly sessions at which we tackled possible scenarios. I remember one case in particular. A young rabbi was seeking a religious exemption, but he was not currently affiliated with a synagogue and so, according to the rules, was not eligible.

In time the yearly meetings became completing an online course. We were told it was for budgeting reasons. And then eventually that stopped. I periodically get an email to check to make sure I'm still around.

A lot of money is spent to support a system that will likely never be used. Last fiscal year it was \$26 million which was a little over \$1 million less than fiscal year 2020. The largest part of the budget went to salaries. The SSS has a very large bureaucracy - approximately 120 full-time employees to support its National Headquarters, three regional headquarters, and a Data Management Center. The Agency also has up to 56 state directors, part-time employees representing the 50 states, Guam, the Northern Mariana Islands, Puerto Rico, the U.S. Virgin Islands, the District of Columbia, and New York City. A lot of time and expense seems to be spent on accolades for employees simply doing their job - e.g. employee of the month, employee of the quarter, runner-up employee of the quarter, promotions, honorary awards, group awards, etc. Even board members get certificates for every 5 years of service.

By way of example of how behind the times they are, they still push board members to visit post offices to make sure Selective Service enrollment forms are available. They even have a form specifically to report our findings. As most of you know, in all but a few states (CA, PA, MA, NE, AK, NJ, VT, WY and OR) you are automatically registered for Selective Service when you get your driver's license. They claim over 90% of the eligible population is registered. In any case, they aren't going to pick up a form at the post office and mail it in.

The annual report to Congress for fiscal year 2021 outlined a number of improvements. They improved the data management system; tested the lottery system; executed limited local board mobilization exercises; and used address verification services to test all addresses for accuracy.

They also developed a social media campaign, targeting areas with historically low registration rates. I'll end by linking to an example of one of their videos. Our tax dollars at work! [Be the Man!](#)



## ANNOUNCEMENTS

### ANNUAL MEETING

See [page 6](#) for info about MLTF's Annual Membership Meeting on October 24.

### MLTF TRAINING RESOURCES EXPANDED AND UPDATED

Howard De Nike and Judith Mirkinson, the co-editors of *They Also Served: Voices of the Overseas Law Projects from the Vietnam War*, have announced the up-coming publication of this volume (256 pages) chronicling the history of the NLG's Military Law Offices in Okinawa, the Philippines, and Japan (among other such efforts by allied organizations) between 1970 and 1974.

Contributions by Guild lawyers Barbara Dudley, Dan Siegel, Eric Seitz, Alan Ramo, and attorneys from the Lawyers Military Defense Committee (Saigon and West Germany) are included, along with those of representatives of the Pacific Counseling Service. Look for a review of the book in an upcoming issue of On Watch.

For further information or to purchase the book for \$30, contact Nike and Mirkinson through the MLTF.

## ABOUT THE CONTRIBUTORS

**Anne Cowan** is a retired physical therapist living in Manhattan, Kansas. She was a lay counselor for the GI Rights Network for 15 years and does Intake interviews with the Civilian Medical Resource Network.

**Libby Frank** is an anti-war activist living in Chicago. She has been involved in counter recruitment activities since the Iraq war. She helped found Northwest Suburban Peace and Education Project and has worked with AFSC's Truth in Recruitment project and the Chicago chapter of Veterans for Peace Demilitarization project. She is a member of the MLTF Steering Committee.

**Bill Galvin** is Counseling Coordinator with the Center on Conscience & War in Washington, DC, and serves on the board of directors of the GI Rights Network.

**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.

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

**Editorial/Production:** Kathleen Gilbert, Rena Guay, and Jeff Lake edited this issue. Digital production by Rena Guay.

## 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/](http://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.*

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### HOW TO DONATE

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

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