



ON WATCH

Critical Perspectives
on Military Law

Winter 2023

Vol. XXXIV No. 1

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THE 2023 NDAA: MILITARY PERSONNEL PROVISIONS

By Chris Lombardi

It's a now-annual ritual for many of us: seeing what gets actually included in Congress' year-end, must-pass omnibus military spending bill, after all the horse-trading is done. In the last few years, NDAs have included landmark military justice reforms and efforts to try to address racism and white supremacy, the latter creating massive backlash from conservative lawmakers including former president Trump. So what's in this year's package, named for one of the sources of that backlash, James Mountain Inhofe?

Yes, it's the James M. Inhofe National Defense Authorization Act of 2023. Each year someone gets their name planted on the bill, just as they're about to leave Congress; last year it was Texas Rep Mac Thornberry, who'd decided in 2020 to stop fighting off MAGA challengers and was replaced by Ronny Jackson, former White House physician during the Trump Administration. Thornberry, born in 1958, was a spring chicken compared to the 88-year-old Oklahoma Senator whose name adorns this year's bill.

So what's *in* this 787-page compilation? Most famously, a reversal on the mandate for the COVID vaccine, though none of the other *dozens* of vaccines required by the military are mentioned, and a pay bump for military personnel of 4.6. Also making headlines was this, 150+ years too late: "The President is authorized to appoint Ulysses S. Grant posthumously to the grade of General of the Armies of the United States."

This year's NDAA also contained, besides the now-customary dizzying number of required studies and briefings, a handful of quite concrete changes for the daily life of military personnel.

THE BEST GOOD NEWS: MILITARY JUSTICE IMPROVED, STARTING IN 2024

As we've long covered in *ON WATCH*, the military justice system hasn't looked just at all for many servicemembers subject to abuse. Until the 2022 NDAA, commanders had complete authority over the jurisprudence concerning sexual harassment and assault. The result of that was visible in the recent Netflix documentary *I Am Vanessa Guillen*, about the Army private who died in 2020 and whose family led a movement to press for changes in the system. Asked how that system decreases the prospect of justice, MLTF Executive Director Kathleen Gilberd made a list: "Assault survivors not believed or taken seriously. Commanders and convening authorities being biased around the issue or tending to favor 'buddies' accused of assault. Commanders sending cases to non-judicial punishment or lower special courts-martial. Too many buying into the lie that women, in particular, make sexual assault accusations to avoid transfer, get away from units they don't like or for other personal reasons." The only way out, many of us believed, was to place these cases - the convening authority, the prosecutorial jurisdiction - in the office of an *independent* office for investigation and jurisprudence.

June 2021 saw the introduction of the Vanessa Guillén Military Justice Improvement and Increasing Prevention Act (HR4104), which included many long-sought changes to the way the Department of Defense handles cases of sexual harassment, sexual assault, and domestic violence. While the legislation was first blocked in the Senate by then-Senator Inhofe, much of the Guillen Act was incorporated into the 2022 NDAA, most notably a brand-new department known as the Office of Special Trial Counsel, its staff empowered to call for general courts-martial.

Other provisions of that NDAA were based on the 80 recommendations of the Independent Review Commission on Sexual Violence in the Military, including hiring professionals to staff all sexual assault prevention and response offices, rather than servicemembers in a collateral duty, and a new evaluation

field that requires raters to describe how a servicemember upholds the principles of “Sexual Assault Prevention and Response.”

An entire bureaucracy on matters usually tagged as SHARP - Sexual Harassment and Assault Response and Prevention - has arisen in response, but until now commanders retained the ultimate authority over how such offenses are handled. Now, the services are given two years to build their Special Trial Counsel offices, and until 2028 to fulfill *all* of the provisions of the 2022 NDAA. That slow-walking appears to have contributed to a *worsening* of the problem, in the spring of 2022, [Military Times reported](#) that “Not only is unwanted sexual contact rising, but fewer people are opting to report it and fewer perpetrators are being legally punished.” The legislators who’d gotten the Guillen Act to passage therefore worked hard on successor bills that were then absorbed into the 2023 NDAA. [This long list of changes](#) are included in Title V of the NDAA, “Military Personnel Policy,” Subtitle E—Military Justice and Other Legal Matters.

Taken together with the establishment of the Office of Special Trial Counsel in each Service Secretariat, the combined 2022 and 2023 NDAAs greatly reduce the role of defendants’ commanders in the conducting of Courts-Martial for military defendants accused of certain crimes under the Uniform Code of Military Justice.

In accordance with last year’s bill, the decision to refer certain charges to Court-Martial will be made by the Special Trial Counsel instead of the defendant’s commander beginning in January 2024. And this year’s bill transfers additional duties from the defendant’s commander to the Special Trial Counsel. These include decisions on grants of immunity, the hiring of expert witnesses and the taking of depositions.

Additionally, the defendant’s commander will no longer name the members of the court-martial panels/juries. Whenever possible, the panel members will be chosen randomly. Commanders will retain the authority they need to maintain the good order and discipline of their units, but authority for adjudicating many felony-level crimes—including sexual assault—will transfer to the Special Trial Counsel.”

The office will be the decision-maker on whether to file charges on 11 crimes: murder, manslaughter, rape, sexual assault, rape of a child, sexual assault of a child, other sexual misconduct, kidnapping, domestic violence, stalking, retaliation, child pornography and nonconsensual pornography. All four services have already selected officers to build their STC divisions.

The deadline for completing the transition to STCs is the end of 2023. If the services comply, the volume of investigations may finally increase. MLTF will be watching closely, and may need to develop new lines of communication with these offices.

Speaking of which, civilian counsel are acknowledged explicitly in this same title: Section 549B and C orders DoD to develop a policy about information-sharing with outside counsel, taking into account privacy concerns and the requirements of the UCMJ. Section 549 specifically names, but does *not* forbid, the sharing of forensic and biometric information. In addition, “Not later than one year after the date of the enactment of this Act, the Secretary of Defense, acting through the head of the Sexual Assault Prevention and Response Office of the Department of Defense, shall ensure that information on the availability of legal resources from civilian legal service organizations is distributed to military-connected sexual assault victims in an organized and consistent manner.” Which civilian legal organizations will participate is not specified.

BAD NEWS: WHAT'S ALL THAT ABOUT DIVERSITY?

Two years ago, [our NDAA summary](#) noted changes in the wake of the “national reckoning on race” that followed the May 2020 police killing of George Floyd. Its first main section was entitled “Diversity, Military Racism and White Supremacy,” and included provisions establishing DOD’s Chief Diversity Officer, ensuring racial equity in recruitment and promotions, and the renaming of former Confederate bases. Its multiple sections required that diversity and inclusion be accounted for at every level, from contracting to special forces. Those provisions sparked a backlash among Republicans on the Senate Armed Services Committee, who in November 2021 [denounced it as “too woke”](#) in a statement from Senator Inhofe’s office. Nonetheless, the 2022 NDAA tried to build on that process, requiring each Service Secretary to conduct ongoing diversity, equity, and inclusion (DEI) training programs, including training on racism, discrimination, harassment, reprisal, and more.

By comparison, the Inhofe NDAA has relatively minimal mention of diversity, except in supply chains and procurement. And most critical: the NDAA attempts to [reverse the tentative steps](#) the Pentagon has taken against white-supremacist extremism following January 6, 2021, when some soldiers and veterans marched on the Capitol with Confederate flags. In its cover letter for the Senate markup, the committee “issued nonbinding language calling for an “immediate” halt to Pentagon counter-extremism programs,” and the final draft *cuts* provisions passed by the House Armed Services Committee, which would have required the services to collect and report on “the threat posed by groups such as domestic terrorists, criminal gangs and organizations committed to advancing white supremacy or antisemitism.” Language about the influence of *foreign* terrorism remains in the bill, but any intention to address domestic terrorism has been eliminated.

But hey, Ulysses Grant has been promoted to general! That was about as anti-racist as the Inhofe bill was about to get.

GOOD NEWS, PART II: MILITARY SOCIALISM TWEAKED

Military members want to know what they’re entitled to? A little more, after this NDAA. Headlines about military families struggling to feed their kids may have shamed lawmakers into providing more than the much-ballyhooed 4.6 percent pay raise.

- **Basic Needs Allowance.** Active-duty servicemembers with dependents, whose gross household income falls below 150% of federal poverty guidelines, will soon be able to apply for a Basic Needs Allowance, or BNA. The BNA would increase paychecks to aid military families in need, though with a complex application process that counts much other aid (e.g. housing allowances or the WIC food aid program) as income that might disqualify otherwise-eligible personnel.
- **Parental Leave and Child Care.** The long-sought 12 weeks of parental leave are scheduled to kick in, as promised in the 2022 NDAA. Previously, services varied as to how long parents could take off; now, across DoD it’s a standard 12 weeks after the birth or adoption of a child. NDAA [also authorizes the building of 7 new Child Development Centers and a pilot program](#) to underwrite childcare expenses.
- **Mental Health Parity.** [Alaska Senator Lisa Murkowski](#) lauded inclusion in the NDAA of her Guarding Mental Health Act, which requires the Coast Guard (USCG) to achieve parity with the policies of the Department of Defense, allowing members to seek treatment for mental and behavioral health challenges without automatically being processed for discharge.

- **Military Children.** Requires a pilot program to hire special educator inclusion coordinators at Child Development Centers with high populations of military children enrolled in the Exceptional Family Member program.
- **Forever Chemicals Need Studying.** Years of efforts to focus attention on what some call “forever chemicals” in military water sources have led to Subtitle D of Section III, Operations and Maintenance: *Treatment of Perfluoroalkyl Substances and Polyfluoroalkyl Substances*. From Sec. 341 to 347, NDAA authorizes funding for multiple studies on the effects of PFAS and one on uses in which such substances are still needed. Also, in Sec. 343. Prizes for development of non-PFAS-containing turnout gear.”

WHAT ABOUT WAR AND PEACE, ANYWAY?

As an appropriations bill, the NDAA’s scope spans the globe, with sections for everywhere the military has a presence from the Middle East to Southeast Asia. Fleets and facilities are reauthorized, multiple studies commissioned including of the effects of military justice reform. But you have to really squint to find evidence of the U.S. military’s actual activities. You have to go to Article X, General Provisions, which first authorizes anti-drug policing in Colombia and about 10 plans for naval shipyards. After all that naval modification comes Subtitle D, Counterterrorism.

But the entirety of the Counterterrorism subtitle, from Section 1031 to 1033. is some variation on this: “Extension of prohibition on use of funds to close or relinquish control of United States Naval Station, Guantanamo Bay, Cuba. “Or to move detainees “to certain countries” including the United States, or to modify any US prison facilities to enable the detention of prisoners transferred from Gitmo. These are all existing prohibitions, just extended here. The rest of what the United States does in the face of terrorism seems embedded in the military firmament, 20+ years after September 11, 2001.

This NDAA does acknowledge the blowback from U.S. action against suspected terrorists abroad - specifically, the daily airstrikes against suspected hostiles. Section 1065, under Reports, authorizes the creation of a Civilian Protection Center of Excellence (CPCoE), to serve as the focal point for matters related to civilian casualties and other forms of civilian harm resulting from U.S. military operations, and to institutionalize and advance efforts to prevent, mitigate, and respond to civilian harm.

The NDAA also updates requirements to the annual report on civilian casualties in connection with U.S. military operations, to include further information that can help illuminate the different accounting of civilian harm documented by DoD and civil society organizations. The authorized funding level is a mere \$25 million, which might not seem to be adequate to “address civilian harm” in all U.S. operations. But it’s a start, and MLTF might want to monitor the development of this CoE. Who’s providing that “further information?” Could NLG members seek to be part of the process?

As Kathleen Gilberd noted in the 2021 NDAA summary linked above, the NDAA is so brimming with commitments that half our job in the MLTF is to look for concrete demonstration of these commitments, and any unintended consequences. We can also support those speaking out about what’s missing. ■

ASSISTING SERVICEMEMBERS WITH MILITARY EQUAL OPPORTUNITY COMPLAINTS – PART 1

By Kathleen Gilberd

This is the first of a two-part article on Military Equal Opportunity (MEO) complaints, focusing on whether or not to use the MEO process, preparation of documentation and other evidence for MEO complaints, and submission of complaints. The second part, discussing the investigation process, appeals and retaliation, will appear in the Spring 2023 *On Watch*.

BY WAY OF BACKGROUND

The Department of Defense prohibits a number of forms of discrimination and violations of equal opportunity in DoD Instruction 1350.02, last revised on September 4, 2020, [DoDI 1350.02, "DoD Military Equal Opportunity Program," September 4, 2020 \(whs.mil\)](#). That revision made important changes to prior policy, which were discussed in the Winter, 2020, issue of *On Watch*, [On Watch 31.4 Winter 2020 - Military Law Task Force \(nlgmltf.org\)](#), from which this article borrows heavily. While the DoD Instruction is controlling, it is also important to become familiar with the service regulations on MEO standards and procedures. These include Army Regulation (AR) 600-20, [ARN30074-AR 600-20-000-WEB-1.pdf \(army.mil\)](#); Chief of Naval Operations Instruction (OPNAVINST) 5354.1H, [5354.1H.pdf \(navy.mil\)](#); Marine Corps Order (MCO) P5354.1F, [MCO 5354.1F.pdf \(marines.mil\)](#); and Air Force Instruction (AFI) 36-2706, [afi36-2706 ic-1.pdf](#). Only the Army and Marine Corps have updated their regulations since the DoD Instruction was published.

The current Instruction defines prohibited discrimination as “[d]iscrimination, including disparate treatment, of an individual or group on the basis of race, color, national origin, religion, sex (including pregnancy), gender identity, or sexual orientation that is not otherwise authorized by law or regulation and detracts from military readiness.” Sexual harassment is included as prohibited conduct, as are bullying and harassment not based on gender.

WHETHER OR NOT TO MAKE MEO COMPLAINTS

Military policy prefers that complaints about racial and gender discrimination and other covered discrimination be handled informally or resolved through the MEO system. Yet servicemembers are, by and large, extremely skeptical of MEO complaints, in part because they are so often unsuccessful, and in part because retaliation is a real problem for people who make these complaints.

Before submitting MEO complaints, it is important to discuss the pros and cons of these complaints with clients. In some cases, military personnel may prefer to use other complaint mechanisms, such as Congressional inquiries or Article 138, UCMJ, complaints, though commands may try to force such complaints into the MEO system.

Complainants have slightly greater control over the 138 process. While 138’s should not be used when other complaint procedures (such as MEO complaints) are available for a particular wrong, members may try to use the former or submit both simultaneously. It is possible to include some non-discriminatory wrongs along with discrimination in a 138 or to couch it entirely in non-discriminatory terms. (138 complaints are discussed in some detail in a slightly dated MLTF memo, [Article 138 Complaints: Servicemembers' Tool for Redress - Military Law Task Force \(nlgmltf.org\)](#)). Requests for Congressional assistance may be used instead of or in addition to MEO complaints, as well. While some Congressional offices will be satisfied with the military’s very common initial response that ‘there isn’t

any problem,' more sympathetic offices can be persuaded to look beyond that. In addition, there are no time limits on Congressional complaints, while both MEO and Article 138 complaints must be filed relatively soon after the discrimination occurs. Anonymous MEO complaints may also be considered, as they are specifically permitted under the Instruction. These must have sufficient facts to allow investigation; use of witness statements may be more concerning as named witnesses may be pressured to reveal the complainants' names. The use of attorneys to present anonymous complaints allows for requests for follow-up notifications of investigation of complaints, results, and the like to be made to the attorneys.

Where clients are concerned about "making waves" by filing a complaint, it may be appropriate to consider less formal methods, such as verbal complaints to lower levels of command, or informal (usually verbal) MEO complaints. Traditionally, DoD and service regulations encouraged victims of discrimination to resolve matters without any complaint, at the lowest possible level of command by, for example, raising the issue with their immediate superior rather than using MEO procedures. This low-key approach is not given such stress in the current Instruction, though servicemembers are encouraged to address discrimination or harassment with informal rather than formal MEO complaints. And while such informal complaints (usually verbal rather than written) are recommended in the Instruction (part 4.1), it gives real emphasis to formal MEO complaints.

Informal complaints may be useful where servicemembers do not want to be seen as causing trouble or be labelled as troublemakers, though any complaint runs that risk. If the command is supportive, such informal complaints may be effective, though they don't always receive real attention. Formal complaints are considered more serious, provide more rights for complainants, but also increase the likelihood that complainants will be viewed as whistleblowers or troublemakers. Counselors and attorneys generally tend to favor formal MEO complaints, particularly in cases where the command does not appear sympathetic at the outset.

Speaking privately with a commanding officer instead of making a complaint may be effective if the CO is decent. In some cases, a letter from counsel or counselor to the commanding officer, expressing the hope that the matter may be resolved without a formal MEO complaint, may get the command's attention without as much risk of retaliation. It's important to bear in mind that clients are more likely than counsel or counselors to know how various complaint methods would be viewed by their commands.

As part of this discussion, it is important to help clients determine if they are particularly vulnerable to retaliatory adverse action. By way of example, with members who have medical or mental health issues documented in their military medical records, a discussion of possibly unwanted involuntary discharge proceedings is warranted. Similarly, members who have had any disciplinary actions or even counseling entries in their records need to make sure that involuntary discharge for misconduct or unsatisfactory performance will not be an issue. Where past disciplinary action or counseling were themselves part of the discrimination, this can be added to the complaint, making it a little harder for commands to use them as bases for discharge. The difficulty here is proving that an "appropriate" discharge proceeding is retaliatory, rather than simply concurrent, and documentation to support this argument should be gathered before proceeding with complaints.

But it is also worth pointing out to clients that the current Instruction offers some protection against retaliation, though this is vaguely stated, and that greater protection against retaliation is available under the Military Whistleblower Protection Act, 10 USC 1034, [10 U.S. Code § 1034 - Protected communications; prohibition of retaliatory personnel actions | U.S. Code | US Law | LII / Legal Information Institute \(cornell.edu\)](#), and DoD Directive 7050.06, [DoDD 7050.06, "Military Whistleblower Protection," April 17, 2015, Incorporating Change 1 October 12, 2021 \(whs.mil\)](#). In addition, complaints

made with legal assistance and/or other outside support are somewhat more likely to avoid retaliation. (Challenging retaliation will be discussed in Part 2 of this article.)

While clients' skepticism of MEO complaints is certainly valid and deserving of respect, this writer suggests that MEO complaints may be made more effective than the MEO system contemplates, forcing commands to acknowledge and respond to discrimination and harassment. While opinions may vary significantly on the ability to make these complaints work, this article offers ways to assist servicemembers in improving their effectiveness.

WITNESSES AND DOCUMENTATION

Complainants often simply name potential witnesses in the complaint, on the assumption that the investigating officer assigned to the case will interview them. This is not always the case. Investigating officers will sometimes ignore some or all listed witnesses, and in some cases will fail even to interview the complainant. It is not uncommon for the investigating officer to interview superiors in the command in addition or instead, and perhaps interview friends of the member against whom the complaint is made, with the result that some investigations make a record of problems or misconduct of the complainants rather than looking into the complaints.

To prevent this, it is often helpful for the complainants, with the help of counsel, to obtain written statements from witnesses to submit with the complaint. Statements made under oath or under penalty of perjury reduce the possibility that witnesses will be pressured by the MEO Officer or command to change or retract their statements. If the command attempts to pressure witnesses, counsel or independent private investigators to interview the witnesses about such intimidation and amends the complaint with the interviews or reserve them for any appeal.

Needless to say, potential witnesses may feel fearful of pressure or retaliation and so hesitate to make statements. In such cases, it is sometimes necessary to use anonymous statements, though here it is particularly important to have the statements made under oath or penalty of perjury. Witnesses who are no longer attached to the command are more likely to feel comfortable making statements about the facts of the complaints or prior misconduct or discrimination by the offenders.

Some creativity is in order in considering other evidence to support complaints. Since these are not judicial procedures, of course, rules of evidence do not apply. Second-hand statements can be submitted; evidence that the persons complained of committed other wrongs (whether or not they involved discrimination) may be used; and statements showing discrimination against others are particularly useful. Offensive emails, notes or graphics made by offenders are also helpful. Investigators should consider contemporaneous writings by complainants, whether in the form of diary entries, letters or emails to family or friends, or the like. Statement from family and friends with whom complainants have discussed the discrimination may also be useful. It is useful for complainants to maintain a journal during the MEO process as well, in order to document on-going discrimination, improprieties by the MEO Officer and any retaliation; this may be submitted as amendments to complaints or used in appeals or retaliation complaints.

Along with the complaints, counsel or counselor may want to submit a legal brief. This provides an opportunity to recite the rights of complainants and the information MEO Officers must provide them. A brief can also cite appropriate portions of the service regulation, as well as the controlling DoD Instruction. In addition, it may be useful to cite provisions of recent National Defense Authorization Acts which have not yet been incorporated into the regulations. While bringing the regs and NDAA sections to the investigating officers' and commands' attention is important, perhaps the most valuable aspect of a brief is making it clear to the command that the complainant has legal assistance.

While the Instruction and service regulations do not suggest it, complainants may want to request discovery of documents helpful to their case: any other MEO complaints made against the offender, command climate assessments if these are not available, command reports on numbers of MEO complaints and their resolution, and even disciplinary records of the offender. It may be useful to cite the Freedom of Information Act in requesting these materials. Where these are made available, the complaints may be amended to include deficiencies in training or command climate in the areas of discrimination alleged. Commands are quite likely to refuse such discovery requests, with little or no authority for doing so, in which case the denial could be included in any appeal.

SUBMITTING FORMAL COMPLAINTS

Formal complaints are presented to commands' Military Equal Opportunity Officers. They are not normally officers, and while trained in MEO procedures, they may have this as collateral duty rather than primary duty. Some MEO Officers are committed to the program and may be very helpful, while others are more supportive of the command than complainants.

With formal complaints, MEO Officers frequently propose that complainants simply tell them what the problem is, and that the Officers write the complaints; in the alternative, MEO Officers may ask the complainants to write out their complaints on the spot. Both methods often lead to weak or inaccurate complaints. A better approach is for complainants and their attorney or counselor to write out formal complaints beforehand and present them in final form to the MEO Officers. If the Officers try to reject this, add to it or claims that it is deficient and cannot be submitted, complainants may ask where in the DoD Instruction or service reg this is authorized, which will likely result in acceptance of the complaints

In many cases, it is difficult to show that adverse action and the like are the results of discriminatory motive. Where racial or gender discrimination are difficult to prove, it can be helpful to argue bullying or general harassment as an alternative or additional basis for the complaints.

Finally, it is useful to note at the end of the complaints, as "cc," that copies have been sent to the complainant's member of Congress and/or Senator, and to the ACLU, MLTF, NAACP, and/or similar organizations.

CONCLUSION

There are a number of issues to think about with regard to MEO complaints. This starts with whether to file a complaint at all, and then what type of complaint and which process to use. Finally, there is the content of the complaint and what witness statements and documentation should be presented. Hopefully this article will help attorneys and counselors to prepare the most helpful and effective documents to address and resolve MEO problems. Issues regarding the investigation process, appeals and retaliation, will appear in the Spring 2023 *On Watch* so please join the MLTF or subscribe to get this important information. ■

MLTF FACT SHEET: SERVICEMEMBER RIGHTS UNDER THE MILITARY WHISTLEBLOWER PROTECTION ACT

by Becca Von Behren

Updated December 2022 by Aaron Frishberg

The Military Whistleblowers Protection Act of 1968, as amended, [10 U.S. Code § 1034 - Protected communications; prohibition of retaliatory personnel actions | U.S. Code | US Law | LII / Legal Information Institute \(cornell.edu\)](#), provides protection of many lawful communications by members of the US Armed Forces. In response to the MWPA, the Department of Defense (DoD) issued DoD Directive 7050.06, [DoDD 7050.06, "Military Whistleblower Protection," April 17, 2015, Incorporating Change 1 October 12, 2021 \(whs.mil\)](#), and DoD Instruction 7050.09, [DoDI 7050.09, "Uniform Standards for Evaluating and Investigating Military Reprisal or Restriction Complaints," Effective October 12, 2021 \(whs.mil\)](#), making the Act official DoD policy.

In order to assist servicemembers in understanding their rights under this law, MLTF has prepared the following fact sheet. It will also be available formatted for download and printing in PDF. Readers are welcome to share this document, and to contact us with any questions they may have.

WHAT IS THE MILITARY WHISTLEBLOWER PROTECTION ACT?

The Military Whistleblower Protection Act (MWPA) was created by Congress in 1989, and has since been expanded by amendments. The Act does two important things:

1. It states that no person may restrict a member of the Armed Forces from making a lawful communication with a Member of Congress or an Inspector General (IG), and
2. It protects military members from retaliation by other members if they make disclosures of certain wrongdoing (including violation of military regulations) to a Member of Congress or an IG, a member of a Department of Defense audit, inspection, investigation or law enforcement organization, any person or organization in the chain of command, a court martial proceeding or any other person designated by the regulations or other established administrative procedures for such communications or any other person to whom communications are protected.

WHAT KIND OF COMMUNICATION IS PROTECTED UNDER THE ACT?

“Protected communication” is “any lawful communication” made to one of the people listed in the Act. DoDD 7050.06, Enclosure 2, defines “protected communication” further by stating that the communication must be:

1. made to a Member of Congress; an IG; a member of a DoD audit, inspection or investigation; a law enforcement organization; any person or organization in the chain of command; or any other person designated pursuant to regulations or other established administrative procedures to receive such communication, and
2. the member of the Armed Forces must reasonably believe the information communicated evidences a violation of law or regulation, including a law or regulation prohibiting sexual harassment or unlawful discrimination, gross mismanagement, a gross waste of funds or other resources, an abuse of authority, a substantial and specific danger to public health or safety, or a threat by another member of the Armed Forces or employee of the Federal Government that indicates a determination or intent to kill or cause serious bodily injury to members of the armed forces or civilians or damage to military, federal, or civilian property. While some of these

are related to waste and fraud, the inclusion of “violation of law or regulation” expands it to include a great many areas of misconduct and inappropriate actions.

It is assumed that the term “lawful” means that the communication must be lawful under the Uniform Code of Military Justice (UCMJ) and lawful within the civilian meaning of the term. Examples of unlawful speech under the UCMJ are provoking or reproachful words, words that express an intent to wrongfully injure a person, property, or the reputation of another person, and disrespectful words toward a superior commissioned officer. Examples of civilian unlawful speech would be threats against the President, threatening terrorism against the United States, and defamation.

DoD Instruction 6495.02 Volume 3. Sexual Assault Prevention and Response: Retaliation Response for Adult Sexual Assault Cases makes clear that not only a whistle blower who reports sexual assault, but a witness, a bystander who intervened, a sexual assault response coordinator, a sexual assault prevention response victim advocate, and other individuals associated with a sexual assault incident should be protected in communicating without fear of retaliation.

WHY IS THE MILITARY WHISTLEBLOWERS PROTECTION ACT IMPORTANT?

People in the military do not have the same First Amendment rights as civilians do. DoD Instruction 1325.06, [DoDI 1325.06, Handling Protest, Extremist, and Criminal Gang Activities Among Members of the Armed Forces, November 27, 2009, Change 2 Effective December 20, 2021 \(whs.mil\)](#), addresses dissent and protest among the members of the Armed Forces. It states that a “servicemember’s right of expression should be reserved to the maximum extent possible.” However, this is limited in the sense that the servicemember’s speech must be “consistent with good order and discipline” and must not conflict with “national security.” The Instruction also states that no commander should be indifferent to speech that “if allowed to proceed unchecked, would destroy the effectiveness of his or her unit.” The Instruction leaves it in the hands of the “calm and prudent:” commander to determine what speech does or does not conflict with “national security” and what speech would harm the effectiveness of a unit.

Essentially, DoDI 1325.06 leaves the question of what free speech rights a servicemember has almost entirely up to his or her individual command. The Instruction can result in command determinations that are inconsistent, often based on preference, and sometimes on prejudice. While some servicemembers are able to speak more freely because DoDI 1325.06 gives so much power to command discretion, others are subjected to higher levels of punishment and retaliation for speech that should be protected. Fortunately, the MWPA prohibits any restriction on lawful communications to a Member of Congress or an IG, and also prohibits retaliation for such communications made to others named in the Act.

WHAT KIND OF RETALIATION DOES THE ACT PROTECT ME FROM?

Under DoD Directive 7050.06 no person is allowed to take any unfavorable personnel action, or withhold any favorable personnel action, because a servicemember lawfully communicated with or prepared to communicate with a person named in the MWPA. In fact, no person is even allowed to make threats to take unfavorable personnel actions or withhold favorable personnel actions.

The Directive defines personnel actions as any action that “affects, or has the potential to affect, that military member’s current position or career.” The Directive lists the following actions as examples: refusal to give a promotion; a disciplinary or other corrective action; a transfer or reassignment; a bad performance evaluation; a decision on pay, benefits, awards, or training; referring someone for a mental health evaluation; and assigning any significant changes in duties or responsibilities that are consistent with the military member’s pay grade.

The regulation doesn't specifically mention bullying or harassment that don't fall under personnel actions. A member can argue in the complaint that harassment such as intimidation, threats, name-calling, etc., "affects or has the potential to affect that military member's current position or career" in keeping with the Directive. Instead or in addition, the member can file a separate Military Equal Opportunity Complaint, which specifically mentions harassment.

WHAT SHOULD A SERVICEMEMBER DO IF HE OR SHE IS RETALIATED AGAINST FOR WHISTLEBLOWING?

Although the MWPA states that "members of the Armed Forces shall be free from reprisal for making or preparing to make a protected communication," the Act standing alone does not prevent your command from retaliating. What the Act does is establish a complaint and investigation process for a servicemember who is retaliated against after whistleblowing. Complaints should be made within one year of the time the member became aware of the retaliation, or it will not ordinarily be investigated.

There are several ways a servicemember can file a complaint against retaliation. To do so, the member must be able to show evidence that he or she:

1. made a "protected communication" to someone named in the MVGPA, and
2. that the official who engaged in the retaliatory act against the member knew of his or her protected communication, and
3. that there was an actual adverse or unfavorable personnel action taken or threatened, or that a positive personnel action was withheld, after the official became aware of the protected communication.

Before a complaint is filed, the member should be sure that it is well organized and is accompanied by strong supporting documentation, if at all possible. In preparation, the servicemember should download the information available in PDF on the military whistleblowers complaint website: [Hotline \(dodig.mil\)](https://www.dodig.mil). It is useful to read both the MWPA and the DoD regulations, as well as service-specific regulations. It is also very helpful to work with a military law attorney or military counselor in preparing and submitting the reprisal complaint and supporting documentation. (The discussion of evidence and documentation in the Military Equal Opportunity Complaints article in this issue of On Watch makes a number of suggestions for types of evidence, which are best gathered beforehand and submitted with the complaint.)

Once the member is prepared to prove all three elements, he or she has several options for reporting. Whistleblower complaints can be filed:

- online at <https://www.dodig.mil/recwri/> or
- by mailing the complaint packet to
Defense Hotline,
The Pentagon,
Washington, DC 20301-1900 or
- by telephoning the Hotline at 1-800-424-9098 or
- by faxing 703 604 8567.

For TOP SECRET complaints, a member can file via the Joint worldwide Intelligence

For classified complaints up to SECRET, you can file on SIPR at <http://dodig.smil.mihotline>, Communications System (JWICS) at <http://wodig.ic.gov/hotline/index.html>.

Another resource for servicemembers considering filing under the MWPA is the Whistleblower Protection Ombudsman. The Military Whistleblower Protection Enhancement Act, passed in 2012,

requires the DoD to designate Military Whistleblower Protection Ombudsmen (MWPOs) WHPOs 1) educate agency employees about prohibitions on retaliation for protected disclosures, 2) educate servicemembers who have made or are contemplating making a protected disclosure about the rights and remedies against retaliation for protected disclosures. A servicemember can e-mail the WHPO directly from this webpage: <http://www.dodig.mil/programs/whistleblower>.

WHAT HAPPENS AFTER A REPRISAL COMPLAINT IS FILED?

Once the member has filed a complaint, he or she will be contacted by a member of the office of the IG who will explain how an investigation will be conducted, and who will conduct it. The purpose of the investigation is to determine whether the evidence proves four key questions. The first three questions are the questions the member had to answer in the complaint. The fourth question is, “does the evidence establish that the personnel action would have been taken, withheld, or threatened if the protected communication had not been made?”

The investigator should research all pertinent laws, rules and regulations that apply to the retaliatory action under review, and collect as many relevant documents as possible. The investigator should also identify and interview all key witnesses, usually beginning by interviewing the servicemember who initiated the complaint. During the interview, the member will have the opportunity to help identify witnesses and answer any questions the investigator may have. He or she may be interviewed again later if the investigator has further questions. It is worth noting, however, that investigations are not always done properly, and some IG investigators may show favoritism towards the command.

Once the investigator has examined all laws, documentation, and witness testimony, he or she will write a report analyzing the evidence. All conclusions are to be based on the evidentiary standard of “preponderance of the evidence.” This means that the investigator will give greater weight to evidence he or she finds most credible, and will use that evidence to determine whether it is ‘more probable than not’ that the four components of the reprisal complaint are true. The report will usually conclude with recommendations for resolution.

Once the investigator has completed the report, the member should receive a copy, which may be redacted. Another copy of the report will be submitted to the IG.

At the same time, if the IG believes the underlying complaint made by the servicemember was inadequate or biased, the IG investigator should re-examine the original complaint.

If the member believes the investigation was inadequate or biased, he or she may request that the DoD IG reconsider the case. Normally, the IG will then ask for a review by the Board for Correction of Military Records (BCMR). The BCMR may allow a hearing to examine and cross-examine witnesses, take depositions, and generally engage in more thorough examination of the case than would occur in other BCMR cases. The member may be represented here by civilian counsel and, in some cases, by military counsel (a JAG).

If the investigation is considered competent, the Secretary (which is the Secretary of Defense for all branches except the Coast Guard in which case it is the Secretary of Homeland Security) will issue a final decision based on the member’s complaint and the investigation report.

WHAT HAPPENS IF THE SECRETARY AGREES THAT RETALIATION OCCURRED?

The Secretary will correct whatever effects the retaliatory action had on the member’s personnel record. The Secretary may also take disciplinary action against the individual who committed the retaliatory action. However, disciplinary action is not required. If the member is not satisfied with how

the matter was handled, he or she may submit a request for review to the Secretary of Defense. The Secretary of Defense will make a decision to either uphold or overturn the decision and actions of the Secretary of the respective military department within 90 days after the member requested a review. The Secretary of Defense's decision is final. ■

REVIEW OF THE ABA MANUAL ON DISCHARGE UPGRADES

By Ana Maria Bondoc, Esq.

INTRODUCTION

I highly recommend the American Bar Association's [Military Discharge Upgrade Legal Practice Manual](#) to new and seasoned advocates preparing applications to the Discharge Review Boards and the Boards for Correction. Veterans with an other than fully honorable discharge face a myriad of stumbling blocks preventing access to the benefits they are meant to earn through their service. Tangible examples of benefits lost include healthcare, housing, and education supported by the Department of Veterans Affairs.¹ Add to it the incalculable loss of honor and pride at being told that one is "not a veteran" or that one's service "doesn't count." In discharge upgrade work, the stakes are high- especially for the most vulnerable. This Manual is poised to help address the shortage² of knowledgeable advocates and competent discharge upgrade legal services.

USEFUL FEATURES FOR ALL LEVELS OF FAMILIARITY

Helpful for civilians like myself, the Manual discusses unit structure and chain of command to orient the discussion in an accessible way. The authors identify concepts that can apply uniformly, such how the experience of a junior enlisted member differs from that of a commissioned officer. Then the authors dive deeper to point out when different terminology or traditions between the various branches of service can start to affect the analysis. This provides insight into what words to use and how to build trust when interviewing potential clients. In preparing for a personal appearance hearing (PAH) before a

¹ Although the VA applies the definitions at 38 C.F.R. §§ 3.12 and 3.354, with a separate process for adjudicating character of discharge for VA purposes, it is an incomplete remedy for several reasons. First, the VA has broad discretion and a high rate of denial. See John Brooker et al., Beyond "T.B.D.": Understanding VA's Evaluation of a Former Servicemember's Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces, 214 Mil. L. Rev. 1 (2012), available at <https://ssrn.com/abstract=3348508> Second, the VA lacks the power to make changes on a DD214. Third, the VA character of discharge process cannot restore eligibility to education benefits under the various G.I. Bills, which require a fully Honorable discharge. See Chapters 33 and 35 of 10 U.S.C. Part IV of the Manual provides an overview of VA character of discharge as an "alternate path," but advocates should note that

² Homeless veterans consistently identify discharge upgrade assistance among their highest unmet needs. See CHALENG Fact Sheet (April 2022), available at https://www.va.gov/HOMELESS/docs/challeng/CHALENG_2022_Fact_Sheet.pdf. Perhaps in partial response, the VA included discharge upgrade legal assistance in the recent rules governing the new Legal Services for Homeless Veterans and Veterans At-Risk for Homelessness Grant Program. See <https://www.federalregister.gov/documents/2022/06/01/2022-10930/legal-services-for-homeless-veterans-and-veterans-at-risk-for-homelessness-grant-program>

Discharge Review Board, Part III Chapter 7.6. is invaluable along with review of these introductory sections in Part I Chapter 1.

By defining specific types of discharge upgrade cases, the Manual provides structure that will prove useful for any advocate screening cases for merit. The specified types are:

- Mental Health;
- Military Sexual Trauma;
- Condition not a Disability (Personality and Adjustment Disorders);
- Discrimination-Based Discharges;
- LGBTQ Veterans;
- Medical Separations and Retirements;
- Alcohol and Drug Use Separations;
- Entry Level/Uncharacterized Discharges, Defective Enlistments;
- National Guard and Reserve;
- Discharge Status and Immigration Concerns; and
- Special Vietnam-Era Review Programs.

After identifying the type of case, the advocate then is equipped to hone arguments with the most potential by referring to that topic in the Manual. Part III, Chapters 8, 9, and 12 are particularly helpful to those providing pro bono services through The Veterans Consortium Discharge Upgrade Program.³

For someone who knows the basics, and is perhaps already familiar with the [Task Force's content](#) and recent policy guidance such as the [Kurta](#) and [Wilkie](#) memoranda, the Manual offers practical guidance for how to build stronger cases. It contains a comprehensive "how to" with tips on gathering documentation and evidence in support. Of particular interest are the various appendices collecting contact information, sample document requests, law, policy, and more.

For experienced practitioners, I encourage review of Part II, Chapter 7 "Final Steps" for a set of discharge upgrade best practices. It is a fruitful exercise to compare what we are already doing against what more we could do. In addition, those who have tangled with the notoriously unorganized and unsearchable [Reading Rooms](#) will appreciate the citations to particularly helpful past Board decisions which appear as footnotes throughout the Manual. From facilitating a fresh look at strategy in preparing for hearings, to weighing preparation of both an application for VA character of discharge application and discharge upgrade simultaneously, the resources collected in the Manual will be useful to those with a few years' experience or more in this line of work.

CONCLUSION

I welcome present and future discharge upgrade advocates to consider the new Manual as their go-to source of information and guidance on the topic. Along with continued collaboration in this community, it is a resource to help ensure a high quality of applications and more life-changing wins for veterans with an other than fully honorable discharge. ■

³ These chapters are on point given our current criteria of serving veterans with Post Traumatic Stress Disorder (PTSD), Military Sexual Trauma (MST) Traumatic Brain Injury (TBI), Don't Ask, Don't Tell and Anti-LGBTQIA+ policies affecting their discharge. See <https://www.vetsprobono.org/legal-help/>

MLTF 2022 ANNUAL MEETING AND 2023 PRIORITIES

By Jeff Lake

On October 24, 2022, following the NLG Convention, the Military Law Task Force held its annual meeting. This article will summarize the discussion and outline priorities for the coming year.

The meeting focused on the committee work happening within the MLTF. Members of the committees spoke about the work they are doing and what they saw as priorities in the future.

Edward Hasbrouck discussed the work of the Selective Service Committee. At the time, the Congress was considering expanding draft registration to women or abolishing draft registration altogether. As it turned out, Congress took no action on draft registration. Looking forward, the committee needs to prepare for a possible expansion of draft registration to women and to prepare resources and information for counselors in the future. Edward noted that a draft counseling network is non-existent at this time. In addition, a majority of states require proof of draft registration in order to obtain a driver's license. This is a live issue in several states and the committee is monitoring the pending legislation. Finally, there is a new section on the MLTF website devoted to Selective Service issues, and members are encouraged to visit and review the materials there.

Kathleen Gilberd discussed the work of the Anti-Racism Subcommittee. The committee is monitoring what DoD is doing in this area. It also provides training support to counselors working with servicemembers who have been victims of discrimination. The committee is developing self-help materials as well. There is a statement regarding racism in the military posted on the MLTF website. The committee will be working on a CLE on this topic and publishing articles in On Watch on aspects of this work.

Kathy also discussed the work of the Gender Justice Committee. This committee is working on updating its previously-issued materials for survivors of sexual assault or harassment and for those who have been subjected to retaliation for speaking out against this conduct. The committee is looking to hire someone to update its brochure and self-help guide – those interested should contact Kathy at kathleengilberd@aol.com. It also assists all who have been the subject of unequal treatment in the military based on gender and those who have experienced discrimination in health care treatment. This committee is also working on a CLE hopefully to be presented this year.

James Branum discussed the work of the CLE committee. The committee presented two CLEs last year on the topics of Anti-Imperialisms and Ethics. The next CLE is expected to be a day-long presentation on AWOL issues along with folks from CCW. Presenters and content are always needed – please contact James at jmbzine@gmail.com if you wish to help the committee with future presentations.

I discussed the work of the Publications committee. This committee is always looking for authors to write articles for our newsletter – On Watch—and to prepare or update memos on topics related to military law. This is a great way for students to get published!

Libby Frank discussed the work of our new Development committee. The committee has developed a mission statement for the MLTF and an updated logo. The committee is also working on a redesign of the MLTF website that should be completed in 2023.

An election for Steering Committee members was held. Dan Mayfield and Jim Klimaski were re-elected. Anyone interested in serving on the Steering Committee should contact me.

In terms of priorities other than committee work, there was a proposal to start a committee looking into

military suicides and moral injuries. This is an important issue that does not get the attention that it deserves. If you are interested in this work, please contact me at JeffLakeJD@gmail.com. There was also a discussion of DEP discharge work and countering boot camp assistance programs which purport to help people entering the military. Finally, there was discussion of forming a group to monitor the military's activities around the world.

There is a lot of work to do in the new year. Please join us if you can with your time, your ideas, your words or your money so that we can be as effective as possible. ■

CIVILIAN MEDICAL RESOURCE NETWORK

By Anne Cowan

The Civilian Medical Resource Network (CMRN) is a non-profit program which addresses unmet medical and mental health needs of military personnel. The program, founded by Dr. Howard Waitzkin in 2005, accepts referrals from GI Rights Hotline counselors when it is seen that the military person is not receiving sufficient help in the military structure. The need may be an initial evaluation which has been denied by the military, a second opinion, or a letter of support for a prior diagnosis. In more acute cases there can be an ongoing clinical interaction. Many cases are suicidal and those result in daily contact until the situation is under supervision of a mental health professional.

The program consists of volunteer MDs, mental health professionals and Intake workers. CMRN has one part time paid coordinator. After an extensive Intake interview, a professional mental health worker does an evaluation by telemedicine. The resulting evaluation is then sent to the client, who will work with their GI Hotline counselor for its use.

CMRN affiliates with University of New Mexico for collection and analysis of data for future use. Along with MLTF, CMRN partners with About Face, Resist and Courage to Resist.

All services are Free. Right now there is a need for additional professional mental health workers. Please reach out to CMRN. Waitzkin@unm.edu or check the website: <https://civilianmedicalresources.net> ■

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Editorial/Production: Kathleen Gilberd, 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/.

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The National Lawyers Guild's Military Law Task Force includes attorneys, legal workers, law students and "barracks lawyers" interested in draft, military and veterans issues. The Task Force publishes On Watch as well as a range of legal memoranda and other educational material; maintains a listserv for discussion among its members and a website for members, others in the legal community and the public; sponsors seminars and workshops on military law; and provides support for members on individual cases and projects.

The MLTF defends the rights of servicemembers in the United States and overseas. It supports dissent, anti-war efforts and resistance within the military, offering legal and political assistance to those who challenge oppressive military policies. Like its parent organization, the NLG, it is committed to the precept that human rights are more sacred than property interests.

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

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

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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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