



ON WATCH

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THE STRUGGLE AGAINST RACISM WITHIN THE UNITED STATES MILITARY - A LIVED EXPERIENCE

By Jonathan W. Hutto, Sr.

In the aftermath of the failed coup by Trump supporters to halt the National Electoral process in early January 2021, many concerned Americans and laypersons throughout the world were first exposed to the entrenched racist and fascist elements within the United States Military. For me, it served as a very grim reminder of my experiences as an enlisted sailor aboard the USS Theodore Roosevelt (CVN-71) where my dignity, self-respect and ultimately my very life was at stake. It took every inch of organizing skill I had learned as a young activist coupled with raw courage to survive an oppressive environment intent on choking out every ounce of humanity from my unconquerable soul.

In the Spring of 2008, my book *Anti-War Soldier*, was published through [Nation Books](#). It was the direct result of having successfully organized against racism and for peace from within the ranks of the United States Military as an enlisted sailor from late July 2004-to early Sept 2008. It was in *Anti-War Soldier* I gave readers a glimpse into those foundational experiences that made it absolutely impossible for me to internalize oppression — a necessity for ascending the military ranks. Born into Atlanta Georgia's black middle class in the late 1970's post the Civil Rights Movement, luminaries such as the late Julian Bond, John Lewis, Hank Aaron and Hosea Williams had a profound eternal impact upon my young life. As a survivor of divorce and childhood trauma, my loyalty and commitment to those on the margins of society was cemented during those middle school and teenage years where our family (mother, late brother and myself) moved on average once a year until I entered Howard University as a Freshman in the fall of 1995. It was at Howard, under the tutelage of the late SNCC Veteran Lawrence Guyot, I found and embraced my calling as a [Human Rights struggler](#).

I enlisted within the United States Navy January 2004 a year after having survived racism and xenophobia as a [young staffer](#) for Amnesty International USA (AIUSA). I arrived on-board the aircraft carrier USS Theodore Roosevelt (TR) on July 26th 2004 after having completed both a nine-week boot camp in Great Lakes Illinois and 13-weeks of Apprentice School at Fort Meade Maryland to learn my job of Naval Photography. At the time, the carrier was undergoing a required 11-month shipyard rehabilitation in Portsmouth, Virginia in preparation for a six month deployment at sea scheduled for the fall of 2005. Given my experience at Fort Meade which I documented in *Anti-War Soldier*, I joined the ship with a distrusting disposition towards the chain of command and the Navy in general. My first day at the ship's photo-lab foreshadowed the struggles that lay ahead.

The problem began with a white sailor named Seaman Michael Cole, from upstate New York. Upon observing me for roughly ten minutes without me having said a word, he bluntly stated, "You're one of those real black people, huh." Though initially shocked, I eventually came to understand what he meant. Cole was an overt racist who openly referred to Dr. Martin Luther King as a "Coon," whilst praising Adolf Hitler and performing Nazi salutes. What was most disheartening wasn't the attitude of Cole and his supporting cast of fellow racist white shipmate friends, but the internalized oppression displayed by black sailors — a couple of whom would either ignore Cole or uncomfortably laugh along with him. I, on the other hand, let Cole know from day-one that his racist disposition and attitude wouldn't stand with me. From that day on, in the eyes of Cole & Company, including their senior defenders, I became Public Enemy Number One.

Cole and his posse were protected by the most reactionary fascist-minded individual I have ever interfaced with in my life: Petty Officer First Class (E6) James Foehl. He talked down to everyone, barked and shouted orders, mistreated workers and ran the shop with an iron fist — a real tyrant. On only my third day in the photo-lab, he remarked that my photography was the worst he had ever seen in his life. By December of that year during a counseling session, on my fifth request for paper during the meeting to write my response, which is a sailor's right to do, Foehl slammed a piece of white typing paper on the table in front of me in a very threatening manner.

I would eventually take this oppressive E6 to the Equal Opportunity Office in December of 2004. EO Advisors within the Naval Chain of Command is one of the lasting reforms of the late Chief of Naval Operations (CNO) Admiral Elmo Zumwalt, implemented in the early 1970's in response to the racial strife within the service during his tenure. The ship was in the holiday stand down period which means half the boat is on rotational leave. Everyone on the ship is assigned to a duty section. The duty section runs the boat when everyone else is on leave or liberty. During this time, our chain of command was allowing the off-going duty section — those folks coming off a duty day — to leave early the following day. Well, when my time came to leave early, my LPO attempted to leave me at work and allow the other members of my duty section to go home early. I was allowed to leave an hour after my shipmates from my duty section were allowed to go. I raised the issue with my Chain of Command and was told to write down what had taken place. Once I presented to my chain what took place in writing, that I was unfairly targeted by this LPO, they rejected my analysis and told me I misinterpreted what had happened. I took the issue to the Equal Opportunity Advisor on the ship, an E8 which is a career enlisted person. He told me to send him a letter and he would call a meeting together of all parties involved and resolve the issue.

At this point, the Department Leading Petty Officer, an E9 (Master-Chief) got involved and wanted to resolve the issue. I remember a few things about this meeting. First, it was very intense. As we started the meeting and I was talking, I remember him telling me I was to address him as Master-Chief before I began every sentence. When I finished telling him my position he told me that much of the problem dealt with me and not the LPO, that I was new to the Navy and I needed to learn the Navy culture and ways of doing things before reporting an LPO to EO.

After the meeting with the E9, I continued to push the issue until it was finally resolved. The resolution was Foehl admitting he had been wrong to me in this situation and that he would treat me and others fairly. I did not know from that point on, I was to be heavily monitored. What I did was considered outside of the Navy culture and standards. Foehl's attitude rapidly turned towards driving me out of the Navy. The retaliation for taking the chain of command to EO was being punished severely for missing a duty day due to inclement weather.

In early January 2005, I traveled to DC for the weekend to attend my son's birthday party. While there, a snowstorm hit, preventing me from returning to the ship by the 0700 curfew on Monday morning. A sailor is usually protected in such a situation, so long as he or she promptly alerts the chain of command to describe the mitigating circumstances. However, this courtesy was not extended to me. Upon my return, I was hurriedly brought into a hostility-filled meeting with Foehl and both the divisional chief and senior chief petty officer. I instinctively knew something bad was about to happen, so I requested the presence of Chris Mason — a fellow black seaman — to serve as my witness. Senior Chief Kevin Mills denied my request, stating that Foehl and Chief Ernest Frazier would serve as my witnesses. I stood firm against Mills' declaration, stating their loyalty was to the upper chain of command and not the "deck-plate" (junior enlisted) sailors. As soon as

I stated this, I was dismissed from the meeting and officially written up by Mills on a “Report of Offense,” which was forwarded to the Legal Department for further corrective action.

A week later I was brought before the draconian Disciplinary Review Board (DRB). It was here I would come to know the real Navy, live and uncensored. Forced to do multiple parade-ground marching-style “facing movements” before a board composed of high-ranking chief petty officers, I was then screamed at repeatedly. One grisly-looking white male master chief even began banging on the table and threatening to “kick my ass.” A black female chief asked if I had ever heard of “Hallmark” because next time I better send a card and forget about my son’s party. This was a multi-racial board led by a white female command master chief named Beth Lambert. She was the senior enlisted sailor on the ship, ranking just below the carrier’s Executive officer and Commanding officer (CO). She recommended that since I’d not been contrite before this inquisition, I should go before an Executive Officer (XO) Inquiry, the final step before Captain’s Mast — convened by the ship’s CO.

At this point, I’d had enough of the Navy. The institutional harassment which followed more than solidified that verdict. After the DRB, I was sent to stand at the rigid position of attention in the photo-lab awaiting my Seabag Inspection (ensuring I had all required uniforms and clothing). I remember the black Chief Petty Officer Ernest Frazier attempting to counsel me saying, “Hutto, try not to talk with your hands when asked questions.” I had never been so humiliated at any point in my life. Upon Frazier walking away, after having stood at attention for 30 plus minutes, I looked around the corner and seeing no one there made a swift dash for the berthing space where sailors sleep. I grabbed whatever few articles I could within a five-minute time-frame and then quickly made my way to the quarterdeck (where sailors check in and off the ship) where I was saluted off and immediately jumped in a cab heading to Enterprise Rent-A-Car. I didn’t know exactly where I was going, but I knew *I would not be returning to the United States Navy*. At that moment I was going AWOL.

I made several calls as I drove towards Washington D.C., one of which was to Dr. Rodney Green, an economics professor at Howard University. Drafted into the Army upon graduating from Yale in 1969, Rod had been foundational to my political development. I’d participated in my first agitational demonstration alongside him and the International Committee Against Racism during my freshman year in Spring 1996, held outside the residence of House Speaker Newt Gingrich. Now Rod invited me over to his home the next morning for a chat and chew.

I was unprepared for the advice imparted upon me. Rod believed my going AWOL was both ill-advised and harmful to my future. From his experience organizing against the Vietnam War from inside the Army, Rod believed my actions went against the principle of building working class solidarity and cohesion amongst the enlisted “grunts.” Rod’s most striking assertion was that a number of my fellow sailors probably felt much as I did but expressed their unhappiness differently. He challenged me not only to report back aboard ship and accept whatever punishment I had coming, but to slowly yet gradually pace myself--thereby building the deeper relationships and support needed to challenge the chain of command more collectively in the future.

I returned to the ship after 42 hours of Unauthorized Absence. Upon entering the quarterdeck I was escorted to security to give a urine sample for a drug-test. There I was advised to provide a written statement and waive my right to an attorney — I declined to do either. The Admin Departmental Officer Lieutenant Commander Roddy was unfavorable and biased towards me throughout this process due to my activist history. I had a chance to read my file before it went to the Executive Officer. Roddy wrote

that I was intimidating people based on my history of having worked for the ACLU, a history I am quite proud of. Reading Roddy's comments I thought to myself, "Is this the same Departmental Officer who took immense pride in telling me in our initial welcome aboard meeting that he was from Forsyth County, Georgia?" As documented by Patrick Phillips in his book *"Blood At the Root: A Racial Cleansing in America."* Forsyth is a county that excommunicated Blacks at gunpoint in 1912, stealing their land and thereby becoming a Sundown - no Blacks allowed after dark — Whites Only County for many decades, right up to my teenage years in fact. It was a 1987 Civil Rights March, the largest in Georgia's history, led by the late Rev. Hosea Williams, one of Dr. King's lieutenants in the Southern Christian Leadership Conference (SCLC) that finally began to re-open the County to Blacks.

Two weeks after my encounter with Roddy, I stood at the XO's (the ship's second-in-command) Inquiry as both CMC Lambert and the XO himself, Captain David Pine, admonished me for behavior unbecoming a sailor. Outwardly my emotions expressed remorse, but in reality this masked a deep burning desire for restorative justice. Pine, believing I was "trainable," decided against escalating my discipline to a Captain's Mast and instead assigned me extra military instruction (EMI) to be overseen by the despotic Foehl. This EMI would last nearly a month, and involved my staying after work for hours each evening, shining brass, stripping and waxing the photo-lab deck, scrubbing ladder wells, cleaning deck drains, or whatever other needed physical task was assigned to me in the shop. It was very humbling work yet the entire time I heeded my mentor Rod's advice and kept my eye on the ball.

On September 1st 2005 our ship departed for a six-month deployment at sea, just two days after Hurricane Katrina had slammed into the Gulf Coast. I remember a number of sailors from the region desperately trying to figure out the whereabouts of loved ones, but being unsuccessful due to at-sea obligations. Simply put, once forward-deployed, the Navy's mission is always: MISSION FIRST--over everything, including one's immediate family.

During the deployment I worked as a photojournalist in the Public Affairs Office (PAO), writing stories for the ship's internal newspaper. The assignment kept me constantly on the move, learning new aspects of the ship-- including the system of transporting bombs from the lower decks to the flight deck, plus the intricate system of ensuring the carrier's jets receive clean fuel. We averaged 25 days consistently out to sea before docking in a port and enjoying liberty (time off the ship within a host city). While in port, I volunteered my photo services for Community Relations (Comrel) Projects between the ship and various organizations within the foreign host cities. The most memorable Comrel involved volunteering at a home for abandoned African immigrant youth in Naples, Italy, a project I wrote a story on for the ship's paper. I still remember the ship's chaplain advising me not to focus on the root causes of the youth abandonment I'd just witnessed, but rather to solely report on what the U.S. Navy was doing to help them. My personal favorite port visit was Dubai in the United Arab Emirates. We docked four times in Dubai spending Christmas Day there.

January 10, 2006 — some four months into the deployment — is a day that will always live in infamy for me. That night, I visited the photo-lab to inquire about the joint Syracuse University-Military Photo-Journalism program. In the midst of a conversation with the lead petty officer (PO) Mathew Bash--in the company of two other white male PO's — one, Eben Boothby, reached on top of the vent duct and pulled down a hangman's noose. I vividly recall all three of them having smirks on their faces with Boothby holding his crotch. I was beyond shocked both by Boothby's actions and the non-response of both Petty Officers Bash and Randall Damm. When I told Boothby to remove the noose, he remarked that a black Quarter-Master colleague of mine could use a lynching as well.

I stormed out of the photo-lab in utter disgust. Two hours later I sent an email to Bash, Damm and Boothby demanding an apology and acknowledgement of wrong-doing. Within the message, I attempted appealing to their humanity, giving them some history on the potent and explosive legacy of lynching in America and the need for them not to view it as a subject of humor. The next morning I went to the photo-lab at 6:30 A.M. and retrieved the hangman's noose, which was still tied on top of the vent duct. I wasn't prepared for the level of emotion jolting through my body as I untied the noose. I remember the tears becoming almost uncontrollable. While taking the noose upstairs to my locker, Lithographer Second Class (LI2) Karen James, the night shift supervisor, saw me and asked if I was okay. I responded that I was, but deep down inside I was quite shaken by it all — as the images of so many being killed this way went through my mind, and knowing that there'd been no real retribution and/or reparation for these heinous crimes until this very day.

It was evident the next day, upon seeing the smirk still on Boothby's face, that no apology was forthcoming. At this point, I decided enough was enough. I had already alerted my immediate chain of command six months earlier, during the evaluation process of the existing oppressive culture within our work space. The evaluation process is where sailors give input on a "Brag Sheet" and are assessed by their divisional chain of commands and ranked according to performance. During this process sailors are asked to express their thoughts on improving their immediate work center, which I was candidly critical about in terms of the prevailing racist and xenophobic culture, and acts against other shipmates. I described an environment where sexist and racist remarks were constantly made to males and females, including references to the Ku Klux Klan. Instead of investigating my complaints, the senior chief PO, one Eric Sesit, told me during this process that not only was I the problem, but in fact I was the racist.

Based on the disposition of my shop chain of command, I decided to press my experiences and complaint forward via a letter to the entire Administrative Department (our ship was organized into Departments, the Media Division was within the Admin Department) chain of command, including the CMC and the ship's Equal Opportunity Advisor. I knew the Naval ethos was to handle situations at the lowest level, which to me equated to sweeping situations under the rug and preventing the chain of command and junior petty officers from being held accountable. I was determined this would not happen in this case.

Before composing my letter, I consulted with Petty Officer Chris Mason and Seaman Javier Capella — a native of Puerto Rico who had been mocked and jeered by other White petty officers due to his accent and being Muslim — both of whom strongly endorsed my proposed action. In a clandestine manner, I entered the Public Affairs Office (PAO) shortly after midnight on January 12th to compose my letter while reading Claude McKay's "If We Must Die" a militant response to the race riots of 1919 sparked by black veterans demanding racial justice upon coming home to the United States at the end of World War I. I clicked "Send" on the desktop at 3:00 A.M. By 7:00 A.M. that morning, a full Equal Opportunity Investigation had been initiated.

The morning of January 12th, the EO Advisor had me sign paperwork which included designating Chris Mason as my advocate within this process. Subsequently, Boothby designated the lead black male PO in the shop, Reginald Buggs, to act as his advocate. My most salient memory of Buggs, along with him advocating for Boothby, was his nearly physically attacking me in the photo-lab one day due to my resisting his hoodlum-like assault on my character. On the surface, Buggs serving as an advocate for an overtly racist white PO seems absurd — but in reality it is far less so. Internalizing oppression is all but a requirement for African-Americans to successfully ascend the Navy's ranks, and ultimately across the

military's various services. As a postscript, Reginald Buggs retired as a Master-Chief, the Navy's highest enlisted rank.

A dental officer led the EO Investigation and used a divisional wide survey to assess my allegations. Surprisingly, nearly one-third of the shop affirmed that an oppressive culture did in fact exist. Those that stepped forward represented a cross-section of the shop. In terms of race and gender, we had three black males (including myself), one Latino male, one white female and two white males. The support of the lone female, LI2 James, was foreshadowed by her expressing empathy towards me the early morning after the incident when I had the noose in my hand. James was previously the victim of having misogynistic pictures of her plastered on the back wall of the photo-lab — which the shop chain of command clearly ignored.

The Investigating Officer ruled in my favor and Boothby was charged with violation of Article 92 (Failure to Obey Order of Regulation) of the Uniform Code of Military Justice (UCMJ) and Article 134 (Known as the "Catch All" for offenses not directly prescribed). Bash was charged in Violation of Article 92 for witnessing the incident and not doing anything about it. The case proceeded to the Executive Officer's (XO) Inquiry which is a step before Captain's Mast – non-judicial punishment. Unlike a year earlier, this time around my immediate chain of command were the ones pressed against the wall. Rod's advice to be patient, build collective solidarity, and "dig deeper" had paid off.

The proceeding XO Inquiry would be unconventional for everyone involved. Not only were the perpetrator and lead petty officer being held accountable but also the divisional chain of command as well. Right before the inquiry, Senior Chief Sesit asked me to bring him the noose to present at the hearing. Sesit was attempting to present himself as my advocate. I was about to retrieve it but stopped midway and decided not to, even though I was clearly violating an order. This was the same senior-chief who told me six months earlier that I was the "racist" in the shop. Therefore I decided not to give him the noose. I put it in a brown paper bag and placed it on Executive Officer Bruce Lindsey's desk right before the hearing. When Sesit saw me again before the hearing, he asked me for the noose and I told him I have given it to the Executive Officer because I did not trust him or any level of my Chain of Command to defend and stand with me. My fear was that Sesit could have discarded the noose and have used the impunity implicit within the Chain of Command to challenge its existence during the XO.

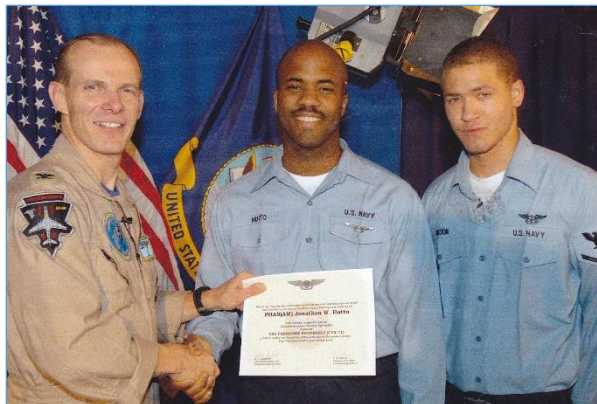
The hearing started with XO Lindsey asking the lone First Class Petty Officer, Fernando Allen of Panama, about the "grab-ass" in the shop. In his survey, Allen noted how junior petty officers would violate and grab the private parts of the more junior sailors. Allen stood firm, highlighting the concern and need for accountability. Lindsey then asked who else in the shop knew about the noose. Upon Petty Officers Damm and Joshua Kelsey raising their hands, Lindsey charged them on site for violating the UCMJ stating they would be held accountable for not reporting their prior knowledge to the chain of command. Both Boothby and Bash pleaded guilty to their charges. Lindsey tore into both of them, letting them know how their behavior compromised "our" fight against terrorism and isolated members of our team. At one point, the CMC Beth Lambert pulled the noose out of the bag with tears flowing down her face, screaming that this does not represent the naval core values of Honor, Courage and Commitment. She then looked at me, smiling, stating that she and I could go out and burn the noose together.

Lindsey and Lambert also tore into Sesit and Chief Ernest Frazier, highlighting that both of them, one Jewish American and the other African American, should have instinctively been responsive to the

situation in the shop. Lindsey decided to send both Boothby and Bash to a Captain's Mast. The recommended punishment for Boothby was reduction in rank, sixty days of restriction to the ship, and two months on half-pay. Bash was recommended for a letter of reprimand and reduction in rank.

Immediately following the XO's Inquiry, before the case proceeded to Captain's Mast, Sesit and Frazier attempted to present me with two disciplinary

counseling records which I viewed as retaliatory in nature. One counseling was for supposed improper circumvention of the chain of command by writing my letter that triggered the EO investigation, and not addressing the situation directly within my shop. The second counseling was for failure to give my Senior Chief the noose before the XO Inquiry. I refused to sign either record and wrote a rebuttal to the lead First Class PO, Sonia Moore. I stated that Basic Military Requirements states a sailor has the right to seek higher authority if the immediate chain of command does not provide proper redress in an adverse situation. As for refusal to give the Senior Chief the noose, I viewed it as an unjust order and refused to sign that counseling record too.



Hutto, Captain J.R Haley and Petty Officer Chris Mason.

On March 2nd 2006, nine days before the end of our seaborne deployment, the Captain held Mast for my chain of command and all the sailors within the division that had filled out the EO surveys. This hearing was much different in tone than the XO Inquiry. Captain J.R. Haley was a lot milder than the Executive Officer, asking my chain of command how they felt about the perpetrator. They spoke favorably of Boothby, stating he had been doing great work since the incident. I was taken aback by both the lenient demeanor of Captain Haley and by Sesit and Frazier defending Boothby.

Haley in return punished Boothby with 30 days of restriction to the ship (30 less than what the XO recommended), reduction in rank to E-2 (which inevitably pushed Boothby out of the Navy, not due to his racist infraction but to "Higher Tenure," a policy mandating sailors must make and maintain rank within a given time period to sustain their naval careers) and forfeiture of \$751.00 pay per month for two months. However, Boothby's forfeiture of pay was suspended by Haley for six months to give Boothby an incentive not to commit any further misconduct. Bash was given an oral reprimand, reduction in rank to E-4, and forfeiture of \$400.00 pay per month for one month. Haley, however, also suspended both Bash's reduction in rank and forfeiture of pay for a period of 6-months to give Bash the same incentive as Boothby. Haley suspending punishment proved vital for Bash advancing to the level of Senior Chief Petty Officer (E8) years after his dereliction of duty. Following his discharge from the Navy, Boothby went on to serve as a Photographer within the enlisted ranks of the United States Army, rising to the rank of Sergeant.

Given the severity of the offense, I viewed Haley's Captain's Mast as merely a slap on the wrist for both Bash and Boothby. After thinking for a couple of days after the Mast and talking it over with my supportive shipmates (Mason and Capella) I decided to appeal the results of the Captain's Mast to higher authority on three counts:

- I believed the punishment was inadequate and did not represent the Navy's purported "zero-tolerance" policy in terms of Racism and Xenophobia. I felt the punishment was adequate for general derelict behavior but not something of this magnitude. I believed Bash and Boothby's actions were Court Martial worthy offenses, which carried potentially steeper maximum punishments.
- Sesit lied during the investigatory process, stating I had never told him of the situation in the shop, even though I told him six months prior to the incident. I believed he should be held accountable for lying to an investigatory officer.
- I was denied a copy of the investigatory file in the case. I filed a Freedom of Information Act request (FOIA) to retrieve the file.

Once our ship pulled back in port I did research to strengthen my appeal and came across the Center on Conscience and War. It was on their website that I learned every member of the military could contact their member of Congress. In the spirit of causing some of the "Good Trouble" he famously urged, I contacted the late civil rights icon, Congressman John Lewis' office in the 5th Congressional District of Georgia, where my parents resided. His caseworker, Ms. Tuere Butler was very responsive. I forwarded her a privacy release form, which allowed the Congressman to inquire into my case. He wrote a letter to the Navy regarding my concerns and the Navy responded to him on April 19th (my 29th birthday) stating, in essence, that they had done all they were going to do and thanking the Congressman for his concerns. However, by the Navy responding to Lewis about my concerns, it made the case one of public record which, I consider an eternal victory for this present and future generations of enlisted military personnel likely to encounter racism and xenophobia within the ranks-- as they will need a mechanism through which to organize and resist.

I both reaffirmed and internalized new organizing principles based on the struggle I waged against racism and all forms of oppression during my tenure onboard the USS Theodore Roosevelt. It is my hope these principles can be utilized and enhanced by freedom seeking enlisted military personnel going forward:

Once you decide to go to Equal Opportunity, you must be determined to go all the way fully embracing all the sacrifices (to include psychological and physical pain) along with retaliation sure to come your way from your immediate Chain of Command. There's no turning back, you will be negatively targeted by your Chain of Command. The Chain will present themselves as your advocates which is not true. The Chain of Command is an extension of Command-Military and State Authority which in the United States is antithetical to Anti-Racism and Anti-Oppression.

Find a strategic way to engage your entire Chain of Command and NOT solely your division and shop to minimize Racism-Oppression being swept under the rug. Keeping the Racism-Xenophobia solely within your shop ensures that it is never addressed by the command's broader leadership.

It's imperative you be a squared away soldier, marine, sailor etc.

Your immediate colleagues will not support you if you're performing subpar and failing to fully engage the oppressive work environment as they are. In order to build solidarity, you must fully embrace "The Suck."

It's best to be embedded within your command for at least a year, at most two years to obtain best results filing a complaint. Best to build collectively to the degree that you can to minimize isolation. The strength of the internal process comes from other personnel validating oppressive conditions.

Outside Support is Imperative from Veteran Peace Organizations and/or Veterans of Movement work within the ranks. Absent outside support from a key veteran of the Vietnam GI Movement, I would have remained AWOL until this very day.

Build Clandestine Support within — don't be out front until you're ready. Building internal support is connected to being a squared enlisted grunt which endears your colleagues to you going forward.

Distinction must be made between a Hate Crime and Discrimination.

A Hate Crime is a heinous act against a person's identity committed by an individual or group of perpetrators. Discrimination is based on how authorities with State Power treat persons within the letter of the law. One of the few if not only errors I made in waging the struggle against the Hangman's Noose is my reference to the act within my initial letter to the Chain of Command as "Racist Intimidation" and not a "Hate Crime." This proved pivotal due to the Chain of Command stating to Congressman John Lewis that lower level Petty Officers were guilty of discrimination when it was my shop's Chain of Command that had discriminated against me which was ultimately backed up by Naval Authority in their refusal to hold Senior Chief Eric Sesit accountable for lying to the Investigatory Officer during the investigation. The lower level Petty Officer (Boothby) committed a Hate Crime against me by pulling out the Hangman's Noose. The Navy discriminated against me for not holding the perpetrator along with the Senior Petty Officer present (Bash) fully accountable to the maximum extent of Military Authority. To my knowledge, the Military does not have a defined definition of what constitutes a Hate Crime.

Leverage your Congressional Member ONLY after you have totally exhausted the Internal Command Process. Congressmembers have no Power to force the Military to act. The purpose of leveraging your Member of Congress has less to do with bringing about justice and more to do with placing your case within the public sphere to educate, teach and train others on how to obtain leverage. Utilize this process to bring potential accountability upon the Military.

Eternal love and Mad Respect to GI Movement Veteran Rodney Green, drafted out of Yale University in 1969, for pushing me back to the ship in January of 2005. I was Honorably Discharged from the United States Navy August 16th 2011 after 7 years, 7 months and 1 day of Active Duty service.

I'm still PRESSING EVER ONWARD.

ASSISTING SERVICEMEMBERS WITH MILITARY EQUAL OPPORTUNITY COMPLAINTS – PART 3, RETALIATION

By Kathleen Gilbert

Retaliation can be an extremely serious problem for servicemembers who file Military Equal Opportunity (MEO) or other complaints. It is widely known that personnel who make MEO complaints are often thought of by superiors and some co-workers as troublemakers and “whistleblowers,” disloyal to their unit and deserving of harassment. The likelihood of retaliation is very often the reason that people decline to make even informal or low-level complaints.

Sometimes retaliation takes official form, as when a complainant is denied a promotion or a coveted assignment, receives an adverse performance evaluation or is command-referred for a mental health evaluation, all things that can derail a military career or lead to an unfavorable involuntary discharge. At other times retaliation involves verbal or physical harassment from the offender, his or her friends, or other servicemembers who feel that anyone making a complaint is disloyal and probably lying. On occasion, retaliation can involve threats of violence or death, or even physical assaults.

The problem is so widespread that it is discussed in the DoD’s MEO Instruction and all of the service regulations on MEO and, of course, in the regulations governing Inspector General (IG) handling of retaliation complaints. While the reality is that the provisions in the regs are not always helpful, retaliation can often be prevented or halted with careful preparation and supportive legal assistance.

DEFINITIONS AND POLICY

The prohibition on retaliation is grounded in federal law. 10 USC 1034, *Protected communications; prohibition of retaliatory personnel actions* (commonly called the Military Whistleblower Protection Act) [10 U.S. Code § 1034 - Protected communications; prohibition of retaliatory personnel actions | U.S. Code | US Law | LII / Legal Information Institute \(cornell.edu\)](#), prohibits retaliation and reprisals for making a protected communication. While “protected communication” traditionally meant only communication with a Member of Congress or an IG, the definition has been broadened over time. The Act now states at section (b) that:

- (1) No person may take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal against a member of the armed forces for making or preparing or being perceived as making or preparing —
 - (A) a communication to a Member of Congress or an [Inspector General](#) that (under subsection (a)) may not be restricted;
 - (B) a communication that is described in subsection (c)(2) and that is made (or prepared to be made) to —
 - (i) a Member of Congress;
 - (ii) an [Inspector General](#) (as defined in subsection (j)) or any other [Inspector General](#) appointed under chapter 4 of title 5;

- (iii) a member of a Department of Defense audit, inspection, investigation, or law enforcement organization;
- (iv) any person or organization in the chain of command;
- (v) a court-martial proceeding; or
- (vi) any other person or organization designated pursuant to regulations or other established administrative procedures for such communications; or
- (C) testimony, or otherwise participating in or assisting in an investigation or proceeding related to a communication under subparagraph (A) or (B), or filing, causing to be filed, participating in, or otherwise assisting in an action brought under this section.

Under this definition, an MEO complaint is clearly a protected communication.

The Act describes retaliation and reprisal in terms of personnel actions, but defines that fairly broadly. Section (b)(2)(A) states:

The actions considered for purposes of this section to be a personnel action prohibited by this subsection shall include any action prohibited by paragraph (1), including any of the following:

- (i) The threat to take any unfavorable action.
- (ii) The withholding, or threat to withhold, any favorable action.
- (iii) The making of, or threat to make, a significant change in the duties or responsibilities of a member of the armed forces not commensurate with the member's grade.
- (iv) The failure of a superior to respond to any retaliatory action or harassment (of which the superior had actual knowledge) taken by one or more subordinates against a member.
- (v) The conducting of a [retaliatory investigation](#) of a member.
- (B) In this paragraph, the term "[retaliatory investigation](#)" means an investigation requested, directed, initiated, or conducted for the primary purpose of punishing, harassing, or ostracizing a member of the armed forces for making a protected communication.

Thus the Act takes into account harassment and even ostracization as parts of retaliation, and dictates the commander's responsibility to prevent or stop such action.

DoD Directive 7050.06, *Military Whistleblower Protection*, [DoDD 4050.06, "Military Whistleblower Protection," Effective April 17, 2015, incorporating Change 1 on October 12, 2021 \(dodig.mil\)](#), expands the definition of prohibited personnel action even further in its glossary by including retaliatory command-directed referrals for mental health evaluations, a not-uncommon tactic in these cases.

While MEO officials and commanding officers can play significant roles in halting retaliation, complaints to the DoD or service IG are the preferred method under the regs for challenging retaliatory behavior. DoD 7050.06 includes some discussion of procedures for IG processing and investigation of retaliation complaints; more detailed discussion can be found in DoD Instruction 7050.09, [DoDI 7050.09, "Uniform Standards for Evaluating and Investigating Military Reprisal or Restriction Complaints," Effective October 12, 2021 \(whs.mil\)](#). Information can also be found on the IG website, at [Home \(dodig.mil\)](#), particularly under "Whistleblower and DoD Hotline." Our *On Watch* article on whistleblower protection can be found in the winter 2023 issue, at [MLTF On Watch 2023.1 34.1.pdf](#) .

Complaints of retaliation are to be submitted to an IG within one year of the retaliation. However, the IG receiving a “late” complaint may consider it if there are “compelling reasons or circumstances,” as where the complainant was actively misled about his or her rights, was prevented “in some extraordinary way” from exercising those rights, or timely filed the same complaint with the wrong agency. (DoD 7050.06, Section 3.f.)

The DoD IG evaluates complaints submitted directly to it “to determine if there is sufficient evidence to warrant an investigation.” Within 60 days, the DoD IG must close the complaint, initiate an investigation or ask the service IG to initiate an investigation. The investigation of a complaint should be completed within 180 days of initiation, though there are procedures for obtaining additional time. The DoD IG office also reviews complaint evaluation determinations recommended by service IGs if the latter find the complaint is not supported by the evidence and should be closed. (Enclosure 2.1.a.)

After investigating a complaint or reviewing a service IG’s investigation, the DoD IG reports findings to the Undersecretary of Defense for Personnel and Readiness, the Service Secretary and the complainant. The Secretaries may take action or direct the CO to take action. Where adverse personnel action, denial of positive personnel action or other retaliatory adverse entries in the complainant’s military record are involved, the IG often recommends that the case be referred to the service’s Board for Correction of Military/Naval Records. The IG process is slow but, informally, the existence of an IG complaint or investigation may cause commands to treat retaliation more seriously and provide protection to the client.

The regs require that the MEO official and/or commanding officer (CO) advise a complainant about his or her options regarding retaliation, with emphasis on making complaints to the DoD or service IG. In addition to IG complaints, a complainant should be able to seek direct assistance from the MEO official or CO when retaliation occurs, though not all the service regs are entirely clear on this. The services vary in their description of the MEO official’s and command’s responsibilities, but all require some level of assistance. See AR 600-20, section 6-7I; DAFI 36-2710, Section 4.31; OPNAVINST 5354.1H, Chapter 6.3; and MCO 5354.1F, part 4.c.

In general, COs can determine that an IG complaint is the proper remedy for retaliation, can conduct a command investigation and take corrective action, or can refer the matter to the service’s Military Criminal Investigative Organization if there has been a violation of the UCMJ. The complainant is not, however, bound by the CO’s opinion or actions, and may choose complaint mechanisms as he or she sees fit.

While retaliation has not commonly been the subject of disciplinary action, this may change to some extent with the addition of the new Article 132 of the UCMJ, [10 U.S. Code § 932 - Art. 132. Retaliation | U.S. Code | US Law | LII / Legal Information Institute \(cornell.edu\)](#). Article 132 prohibits reprisals for protected communications, so that a person may be criminally charged if he or she “wrongfully takes or threatens to take an adverse personnel action against any person; or wrongfully withholds or threatens to withhold a favorable personnel action with respect to any person.” This language is considerably narrower than that given in the Act or the DoD whistleblower Directive. The *Manual for Courts-Martial’s* explanation of Article 132 defines personnel action:

For purposes of this offense, “personnel action” means any action taken on a Servicemember that affects, or has the potential to affect, that Servicemember’s current position or career, including promotion, disciplinary or other corrective action, transfer or reassignment, performance evaluations, decisions concerning pay, benefits, awards, or training, relief and removal, separation, discharge, referral for mental health evaluations, and any other personnel actions as defined by law or regulation, such as 5 U.S.C. § 2302 and DoD Directive 7050.06 (17 April 2015)

The offense requires a specific intent to retaliate for making a protected communication.

In addition, some retaliation is punishable under other UCMJ provisions. It sometimes rises to the level of cruelty or maltreatment of a subordinate, punishable under Article 93, or assault, punishable under Article 120, for example, or constitutes failure to obey an order or regulation, punishable under Article 92.

While all of this looks good on paper, it doesn’t always work. IG investigations can be cursory or biased, can take a great deal of time, and sometimes ignore witnesses or allegations in the complaint. COs and MEO personnel may choose to disbelieve or ignore complaints of retaliation or urge that they be resolved at the lowest level, as by pressuring the complainant to talk to the retaliator(s) or have a friend do so. MCIOs sometimes treat a victim as an offender, or simply disbelieve them. To make these processes work, advance preparation and legal support are extremely important.

ADVANCE PREPARATION

A client and counselor or attorney should have a serious discussion about the possibility of retaliation and the best ways to respond to it, preferably before beginning the MEO complaint process. It’s important for the client to know what he or she may be facing and to plan some strategies and tactics for responding. Setting up a basic plan to respond to retaliation in advance can avoid last-minute floundering and reassure the client that he or she is not entirely vulnerable.

It’s helpful to discuss the means the client wishes to use to document and challenge any harassment or other retaliation — choosing one or more of the available options, running from an IG complaint to less formal complaints to the CO and MEO, an Article 138 complaint, a separate MEO complaint for harassment, a Congressional inquiry, etc. For the last of these, advance contact with the Congress member’s office can be useful. The remaining sections of this article can provide an outline for discussion and planning.

Also in advance, client and/or counsel may speak or write directly to the CO or other command elements to discuss how the latter will respond if retaliation occurs and to mention how counsel will respond. While it’s usually unwise for the servicemember to threaten further complaints in advance of retaliation, no such caution applies to an attorney or counselor.

Of course, client and counsel should ensure counsel will be reachable and available to assist, or that back-up legal assistance will be available, once the MEO complaint is filed.

On the possibility that retaliation may involve threats of harm, client and counsel can discuss an emergency plan, with safe spaces such as a chaplain's office, use of the command's open door policy, communication with higher levels of command, the MEOs office, and/or friends who can provide physical and emotional support and if necessary a place to stay when off duty. While no reputable attorney or counselor would encourage a client to go AWOL or UA, some have been known to point out that such an offense is not as bad an option as risking one's life.

DOCUMENTING RETALIATION

As with the MEO complaint itself, the rules of evidence don't apply, so that the client can be creative in documenting retaliatory statements and actions. It helps to keep a journal discussing each incident, noting witnesses to the incident (friendly or otherwise) and making particular note of any statements that show retaliatory intent. If possible, the client may want to bring a friend, that is, a friendly potential witness, along when he or she is likely to encounter the retaliator. Any physical or electronic evidence should be preserved — preferably with a second copy kept in counsel's hands. If a retaliator is not violent, it may be possible for the client, with a friendly witness around the corner, to ask the retaliator why he or she is harassing the complainant. In some cases, the client may want to initiate an email exchange along those lines.

The client may also document other misconduct, particularly MEO violations or retaliation against other personnel, or other instances of harassment by the retaliator(s), to show a pattern of behavior and help to demonstrate retaliatory intent. Where a complainant is facing retaliation, it is also possible that known witnesses to the MEO violation, or even the MEO official, may also face retaliation. Checking on and documenting this is useful. It may also be helpful to obtain recent Command Climate Assessments to see if MEO violations, retaliatory behavior or command tolerance of harassment are problems at the command.

Finally, counsel or counselor may choose to draft a letter to the CO to be used if retaliation begins, outlining the legal prohibition on such conduct and the command's responsibility to protect the victim and stop and/or punish the behavior, with a reminder of counsel's likely response.

STOPPING RETALIATION

If retaliation occurs, it's useful at the very start for client and counselor to revisit their initial discussions of preparation. The client may wish to reconsider the type(s) of complaint procedures that best address the nature of the retaliation, and how aggressive his or her response should be. A discussion of counsel's or counselor's role may be useful, along with consideration of the kinds of outside support that might be helpful.

Generally, it is wise to report retaliation to the MEO and CO immediately, and to file an IG complaint, preferably with a copy to a Congress member noted in the complaint. After counsel has reviewed it, the documentation gathered by the client should be attached to each report or complaint. If UCMJ violations have occurred, and the command does not take prompt disciplinary action, client and counsel may want to report the behavior directly to the service's MCIO. In all of these cases, follow-up is

important to make sure the complaint is being acted on. Retaliation should also be documented in the client's initial MEO complaint form.

Counsel or counselor, rather than the client, may also point out to the CO that failure to stop the retaliation and punish the retaliator(s) could lead to unpleasant intervention. It may be useful to explain that counsel will have to consider an Article 138 complaint (in this writer's experience, the threat of a 138 is often more effective than the complaint itself); that there are advocacy organizations that would want to weigh in on the issue; or that a reporter has somehow heard about the case and wants to talk to the client and CO — all things that the client would, of course, prefer to avoid, but that counsel may have to advise, or counselor may have to recommend, if the command cannot solve the problem.

Complaints of retaliation cannot be made directly by third parties, but others in the command can let the CO know that they are troubled by the retaliation and that it is adversely affecting the unit's morale. Those who have witnessed the retaliation may want to communicate with the Congress member to whom the client has complained, urging swift protective action. And generally making noise about the problem within the unit can let the command know that the client is not alone, and that morale really is being affected in a way that might adversely affect the CO.

Despite all the limitations of the *Feres* doctrine, servicemembers can file suit in federal court to force their commands, or other military elements, to follow the law and regulations. See *Cushing v. Tetter*, [Cushing v. Tetter, 478 F. Supp. 960 | Casetext Search + Citator](#), and the MLTF's discussion of the case at [Cushing v. Tetter:\[1\] Still a Good Tool in the Box — Military Law Task Force \(nlgmltf.org\)](#).

Should the CO or the IG claim that there is not sufficient evidence of retaliatory intent, the client may wish to consider other complaint alternatives. Harassment or bullying, covered in DoD Instruction 1020.03, *Harassment Prevention and Response in the Armed Forces*, are grounds for a separate MEO or other complaint, where such intent need not be shown. A complaint under Article 138 of the UCMJ may be made against the CO for failing to stop the harassment or bullying, again without any need to show retaliatory motives. In addition, the client and counsel may request a meeting with the CO's superior commanding officer to ask for help.

SUPPORTING THE CLIENT

The process of making an MEO complaint can be very stressful, and facing retaliation invariably increases that stress. If counsel or counselor cannot for any reason provide emotional support, it is helpful to look for support from civilian community or advocacy organizations. If the stress becomes great, assistance from a civilian psychologist or therapist should be considered. (Going to a military therapist in this situation may be a two-edged sword, since the command often has proper or improper access to these records and may use them as evidence that the complainant is unstable and unreliable.)

It's important that civilian and military friends of the complainant have his or her back in this situation. In some cases, it helps to choose a very reliable 'battle buddy' to stay with the complainant as much as possible, particularly when the retaliator(s) may be nearby.

CONCLUSION

The point of all this is that complainants are better protected against retaliation if they do not have to face it alone. Legal and political support in making an IG or other complaint and in pressing the command to help can make a considerable difference in the success of complaints and in the client's well-being.

MILITARY LAW TASK FORCE STATEMENT

THE PHILADELPHIA 15 GAIN JUSTICE, BUT STILL MORE TO DO ABOUT MILITARY RACISM

The Military Law Task Force congratulates the families of the Philadelphia 15 in their victory against an 80-year-old injustice. On June 16, [the U.S. Navy announced](#) a "correction to the records" of 15 former sailors who'd been immediately discharged in 1940 after they [exercised their free speech rights and told the press](#) about racial and other injustice aboard their ship, the U.S.S. *Philadelphia*. The "Undesirable" discharge issued to the 15, the equivalent of today's OTH (Other Than Honorable) discharge, precluded them from veterans' benefits or even treatment at VA hospitals--though at the time, the 15 wrote that any punishment "could not possibly surpass the mental cruelty inflicted upon us on this ship."

The sailors, who'd enlisted as part of the "Double V for Victory" campaign-- against fascism abroad and racism at home-- wrote to the *Pittsburgh Courier* that instead of being trained like any other sailor, they'd been quickly trained as "messmen" and ordered to clean up after white sailors and officers. In their letter of October 5, 1940, they added that they "sincerely hope to discourage any other colored troops from joining the Navy and making the same mistake we did. All they would become is sea-going bell hops, chambermaids and dishwashers." As the *New York Times* noted [in its coverage of the Navy's "correction"](#), the unjust discharges were but one instance of numerous anti-Black actions by the military during the "Good War," World War II.

As an organization acutely aware of the U.S. military's [long history of white supremacy](#), MLTF applauds the work of Larry Ponder, whose father and uncle were among the 15, and who mounted an appeal to get all the discharges upgraded. We also applaud attorney [Elizabeth Kristen](#), who before she assisted the Ponder family [helped 96-year old Nelson Henry Jr, secure an honorable discharge](#) to replace the discriminatory "blue" one he received in 1945 along with 48,000 other Army vets, most of them Black.

The Military Law Task Force decries the continuing use by the armed services of Other Than Honorable, Bad Conduct and Dishonorable discharges to retaliate against non-white and other dissenting members of the military. We also decry the continuing injustice, as yet unrectified, of the mutiny charges of [fifty African-American members or the Navy at Port Chicago](#) who refused to unload munitions in dangerous conditions.

THE BRANDON ACT – INCREASED ACCESS TO MENTAL HEALTH EVALUATIONS

By Kathleen Gilbert

In June of 2018, 21-year old Brandon Caserta, a sailor at Naval Air Station Norfolk, committed suicide. His family told reporters that he wrote to them saying he was constantly bullied and hazed by other sailors, and that he had informed his command he was depressed, but received no help. The family and supporters pressed for legislation that would make it easier for servicemembers to obtain mental health treatment.

This resulted in the Brandon Act, which was adopted in 2021 as part of the 2022 National Defense Authorization Act. The Brandon Act requires that the services provide a mental health evaluation if a servicemember reports a problem or seeks help through his command, but also allows members to seek help confidentially outside of their command.

More than a year passed. The Department of Defense (DoD) said that it was trying to find the best ways to put the Act into effect. Meanwhile, suicides continue to be a serious problem in the services. Small clusters of “unrelated” suicides occurred at a Navy base and aboard an aircraft carrier docked for maintenance. The Army expressed concern about its suicide rates, but as of this writing has still not promulgated a promised policy on suicide prevention.

Finally, on May 5, the Department of Defense (DoD) issued a policy in keeping with the Brandon Act: [Directive-type Memorandum 23-005, "Self-Initiated Referral Process for Mental Health Evaluations of Service Members," May 5, 2023 \(whs.mil\)](#) . According to the Memorandum (DTM), it must be incorporated into DoD Instruction 6490.04, “Mental Health Evaluations of Members of the Military Services,” then allowing the Memorandum to expire effective May 5, 2024.

The policy section of the Memorandum states that:

Service members can initiate a referral process for an MHE [mental health evaluation] through a commanding officer or supervisor who is in a grade above E-5 on any basis, at any time, and in any environment.

The DoD fosters a culture of support to create an environment that promotes help-seeking behaviors and reduces the stigma for help-seeking in the provision of mental health care.

Service member patient rights and confidentiality are protected as much as possible, in accordance with requirements for confidentiality of health information pursuant to Public Law 104-191 (also known and referred to in this DTM as the “Health Insurance Portability and Accountability Act of 1996”), applicable privacy laws, and DoD privacy regulations, including DoDI 5400.11, DoD 5400.11-R, DoD Manual 6025.18, and DoDI 6490.08.

Attachment 3, Section 1.a clarifies this:

a. Service members:

(1) May request a referral for any reason or on any basis including, but not limited to, personal distress, personal concerns, and trouble performing duties and functioning in activities valued by the Service member that may be attributable to possible changes in mental health. Service members are not required to provide a reason or basis to request and receive a referral.

(2) May request a referral at any time and in any environment including, but not limited to:

(a) The continental United States;

(b) Outside of the continental United States;

(c) In a deployed setting;

(d) Whether or not in a duty status as a member of the Selected Reserve;

(e) Assigned to a temporary duty station; or

(f) On leave.

(3) May initiate a referral for an MHE by requesting such a referral from their commanding officer or supervisor who is in a grade above E-5.

(4) Will report mental health issues pursuant to DoDI 6025.19

(5) May request an MHE referral from their commanding officer or supervisor, who is in a grade above E-5, in response to a sexual assault. If the member discloses that the request for referral is in response to a sexual assault, the commanding officer or supervisor will follow the procedures in Volume 1 of DoDI 6495.02 in addition to referring the Service member to a mental health provider

Thus servicemembers do not have to reveal the reasons for their request for a mental health evaluation to the command, and the DTM should make it easier to obtain mental health care. Unfortunately, many servicemembers will be unaware of this provision, as will many commanders and supervisors. Their natural tendency to want to know more may lead to intrusive questions and pressure. And the promised protections of confidentiality are limited. Servicemembers who are armed with a copy of the Memorandum will be better situated to demand their rights.

Enclosure 3 also requires that, upon receiving requests for referrals, COs or supervisors must arrange for a mental health evaluation "as soon as practicable." Hopefully this will offer a way around the sometimes month- or months-long wait for a behavioral health appointment.

Enclosure 3, Section 1.b. (2).(d) requires commanding officers or supervisors to provide special precautions if they determine that servicemembers are exhibiting dangerous behavior. In such cases, the COs' first priority must be to ensure precautions are taken to protect the members and others before the evaluation (including an escort to the behavioral health office). In addition, "[i]f the Service member is exhibiting dangerous behavior, owing to concern of potential or imminent danger to self or

others, the commanding officer or supervisor will follow safety and communication procedures for an emergency evaluation in accordance with DoDI 6490.04 [Mental Health Evaluations of Members of the Military Services].”

COs and supervisors are also required to reduce stigma for these referrals by treating them “in a manner similar to referrals for other medical services, to the maximum extent practicable.”

While the DTM can be very useful for members who are blocked from access to mental health care by members of their command or “screening” medics or corpsmen, the fact remains that nothing in any of the regulations prevents members from making their own appointment with a mental health provider, going directly to a behavioral health facility or, if in crisis, to an emergency room. Of course, as noted above, the wait time for appointments (outside of emergency room visits) can be lengthy, and many servicemembers are told they can’t make their own appointments, or that they have to go through the corpsman or medic or primary care doctor, or that they need permission from their sergeant or chief. And, indeed, senior enlisted often tell servicemembers that they cannot go to behavioral health without their permission. While untrue, these means of blocking appointments cause many servicemembers to back away, and the DTM will prove very helpful in these cases — if the member is aware of it

Subsection c of the DTM requires that mental health providers:

- (1) Administer an MHE as soon as possible and, when practical, provide the necessary care as clinically indicated following communication with the commanding officer or supervisor consistent with DoDI 6490.08 and this DTM.
- (2) Follow all appropriate guidance in accordance with requirements for the confidentiality of health information pursuant to the Health Insurance Portability Accountability Act of 1996, DoDIs 6025.18 and 6490.08, DoD Manual 6025.18, and applicable privacy laws and associated DoD guidance. Disclosures to command are limited to:
 - (a) Confirming that the MHE was provided pursuant to the referral.
 - (b) A disclosure authorized by DoDI 6490.08.
 - (c) Any other disclosure for which the Service member provided authorization in accordance with DoD Manual 6025.18.

and that they:

- (5) Assess the Service member’s medical readiness for duty with specific consideration for mental health, risk of harm to self or others, symptom severity, prognosis for return to duty, and risk of decompensation, aggravation, or further injury if participation in occupational activities continues. When a behavioral health profile is warranted, mental health providers will write it in accordance with the appropriate documentation and guidance.

Confidentiality of the DTM’s process for requesting help and resulting mental health evaluations are complicated. COs and supervisors are to give the health care provider the members’ names and contact information, information about the reasons the servicemember requested the referral *if voluntarily given by the member*, and “additional information that may be relevant and necessary to the health and

welfare of the Service member or mission accomplishment.” (Attachment 3, Section 1.b.(2).(b)) While the same section tells COs or supervisors to “protect Service members’ privacy to the extent possible,” this provision gives COs or supervisors wide latitude in determining what information is “relevant and necessary.”

According to Attachment 3, Section 1.b.(5) of the DTM. COs or supervisors may not “request information from a mental health provider regarding the results of the MHE except for information that may be disclosed to command in accordance with this DTM or DoDI 6490.08 [Command Notification Requirements to Dispel Stigma in Providing Mental Health Care to Service Members].”

A look at DoD 6490.08 shows that there are many circumstances under which health care providers are to release information to COs. Enclosure 2, Section 1.b of the Instruction requires disclosure where, among other things, the healthcare provider believes the member poses a serious risk of harm to him/her self or to others; poses a serious risk of harm to the mission (here the Instruction notes that “[s]uch serious risk may include disorders that significantly impact impulsivity, insight, reliability, and judgment”); or has an acute medical condition that interferes with his or her duty;

In addition, the provider must release information to the CO when the examination was a command-directed mental health evaluation pursuant to DoD Directive 6490.1 or where there are:

other special circumstances in which proper execution of the military mission outweighs the interests served by avoiding notification as determined on a case-by-case basis by a health care provider (or other authorized official of the medical treatment facility involved) at the O-6 level or equivalent level or above or a commanding officer at the O-6 level or above.

These exceptions are sufficiently broad and subjective that disclosure of mental health information would be permitted for a wide range of diagnoses or symptoms. Health care providers are to give the minimum information required to meet the purpose of the disclosure. The Instruction notes that this generally includes the diagnosis, description of proposed treatment, impact on duty or mission, recommended restrictions on duty or applicable duty limitations, prognosis, and danger of harm to self or others, as well as ways the command can support or assist treatment. While this may exclude some discussion of symptoms, it still allows broad disclosure of the servicemember’s situation.

The Instruction does require, at Enclosure 2, Section 3, that COs protect the member’s privacy, and that “[i]nformation provided shall be restricted to personnel with a specific need to know, that is, access to the information must be necessary for the conduct of official duties.”

Another disclosure and confidentiality problem may be found in DoD Instruction 6025.19, “Individual Medical Readiness Program,” with which the Directive-Type Memorandum requires compliance.

Section 1.2.b of this Instruction states that individual medical readiness is, among other things, a responsibility of all individual servicemembers, who must “report medical issues (including physical, dental and mental/behavioral health) that may affect their readiness to deploy, ability to perform their assigned mission, or fitness for retention in military service to their chain of command.”

The Instruction’s Section 4.d requires that during each military periodic health assessment, servicemembers are informed of:

the requirement to report significant health information to their chain of command and facilitate disclosure of significant health information by any non-DoD healthcare provider to a MHS DoD healthcare provider, and ensure compliance with such. All Service members will disclose to their MHS DoD healthcare provider and to their command all medical encounters (including encounters for physical, dental, and mental/behavioral health) with a non-DoD healthcare provider that would directly impact the Service member's IMR status and will provide releases of information as necessary to facilitate receipt of medical documents from such encounters for entry into their military medical record.

The Brandon Act and the DTM may prove to be very useful for members whose access to mental health care is improperly blocked by command or "screening" medical personnel. At the same time, it is important that they understand the limitations on confidentiality and the fact that efforts to provide confidentiality and de-stigmatize requests for help and subsequent treatment may still lead to fairly broad knowledge within their commands and the possibility of harassment. Counselors and attorneys may help to prevent this by ensuring that clients have copies of the DTM and/or by communicating with COs or supervisors about its provisions and the statutory requirements underlying it. Should improper disclosures to and within the command occur, or should members face harassment, outside legal assistance may stem this through communication with the command or, if necessary, complaints under Article 138 of the UCMJ or other complaint provisions. (For example, harassment is now grounds for a complaint through the Military Equal Opportunity system or to an Inspector General.)

ARMY ISSUES NEW CO REGULATION

By Bill Galvin and Maria Santelli

On March 22, 2023, the Army issued a new conscientious objector (CO) regulation, AR 600-43, *Conscientious Objection*. The Army calls it a "major revision," and technically that is true because the regulation itself is much shorter. The reason for this is that much of what used to be detailed in AR 600-43 is now found in a new document, DA Pamphlet 600-46.

According to AR 25-30, Army Regulations (ARs) are "directives" that establish policy and implement the law. Department of the Army Pamphlets (DA Pams) are "instructional publications," which typically provide "guidance" and information on procedures "needed to carry out policies prescribed in ARs." DA Pam 600-46, titled *Processing Applicants for Conscientious Objection*, was released February 22, 2023, and is now where the counseling statements and the actual application that a CO must fill out are located. Though the presentation of the information has changed, little in the way of policy or procedure has actually been altered. A main concern is that applicants are made aware of *both* the AR and the DA Pam. If they are not aware of both and how they work together to advise a CO applicant and their command, it is likely their application will be insufficient, and their process will be significantly delayed or not moved forward at all. As counsel and counselors, we must be sure that our clients are aware of and have access to both publications.

There are a couple of other significant changes in addition to the splitting of the regulation into two different documents. Perhaps the most consequential among them is that the Army has eliminated the last three essay questions in the CO application. This revision parallels the change that the DOD made in its most recent revision of the DOD Instruction on CO (DODI 1300.06, 2017). Readers of *On Watch* may recall that when the DOD issued a new instruction on conscientious objection, it removed half of the essay questions that CO applicants were required to answer – going from six to three. Since then, the Air Force, Coast Guard, and Navy all have issued new Instructions and Manuals that still include all six questions. The Army is the first branch to adopt the truncated DOD list of essay questions. This new, shorter essay section excludes important questions about evidence, possibly making the burden of proof on the applicant a bit more difficult to meet, particularly without proper counsel or guidance.

The questions Army applicants are no longer required to answer are

- An explanation as to the circumstances, if any, under which the applicant believes in the use of force, and to what extent, under any foreseeable circumstances.
- An explanation as to how the applicant’s daily lifestyle has changed as a result of their beliefs and what future actions they plan to continue to support their beliefs.
- An explanation as to what in the applicant’s opinion most conspicuously demonstrates the consistency and depth of their beliefs that gave rise to their claim.

The three questions that remain are

c. A description or explanation of:

(1) The nature of the belief that requires the applicant to seek separation from military service or assignment to noncombatant training and duty for reasons of conscience.

(2) How the applicant beliefs changed or developed to include an explanation as to what factors (how, when, and from whom or from what source training was received or belief acquired) caused the change in or development of conscientious objector beliefs.

(3) When these beliefs became incompatible with military service or combatant duties, and why. (DA Pam 600-46, p. 20).

Conscientious objectors have the burden of establishing by “clear and convincing evidence” that they qualify for CO status under the law. By asking only questions about what an applicant believes and how those beliefs developed and crystallized, while eliminating the questions asking about evidence, this new regulation could set COs up for failure. The time a CO spends drafting their application — their written testimony — allows them to think deeply about how their conscience is guiding them and helps prepare them for the rest of the process, specifically the times they will need to present their oral testimony: in the interview with a chaplain and in their hearing with the Investigating Officer (IO). In order to ensure the CO is thoroughly prepared for what’s ahead of them, the Center on Conscience & War advises Army COs to still provide written answers to all six questions, and we do so in a way that still maintains the proper formatting of the application, as found in Appendix B of DA Pam 600-46. The three missing questions can be added back in, and actually fit quite well, under letter *f* of the application, “Any other relevant items that the applicant desires to submit in support of the application.” A CO’s thoughtful answers to those three questions couldn’t be more “relevant.”

DETERMINING SINCERITY

The previous regulation had a two-page section titled **Policy** (para. 1-6), which explained what qualifies and does not qualify as CO, with more than half of that section outlining criteria by which to determine an applicant's sincerity. This section includes important guidance on how to evaluate a CO's beliefs, such as

- "The term "religious training and/or belief" may include solely moral or ethical beliefs even though the applicant may not characterize these beliefs as "religious" in the traditional sense, or may expressly characterize them as not religious."
- "Care must be exercised not to deny the existence of beliefs simply because those beliefs are incompatible with one's own. Church membership or adherence to certain theological tenets are not required to warrant separation or assignment to noncombatant training and service."
- "Sincerity is determined by an impartial evaluation of each person's thinking and living in totality, past and present. . . This requires that the investigating officer conduct a careful examination of the applicant's conduct and the outward manifestation of the applicant's asserted beliefs, and that each reviewing official closely examine the application and supporting documentation."

Paragraph 1-6 in the new regulation is now titled **Determining Conscientious Objector Status**. It contains some identical information about what does and does not qualify for CO classification, but the extensive discussion about determining sincerity is no longer in the AR. That section has been moved to DA Pam 600-46, paragraph 2-4 **Interviewing Applicants**, and while it's pretty much word for word from the previous AR, a sloppy cut-and-paste makes the section appear to speak almost exclusively to the chaplain interview, except for the last section, which addresses the psychological evaluation. The detail in this section is important information for *everyone* tasked with evaluating a CO application to understand and follow, not just the chaplain. We certainly hope and expect that a CO's command, and particularly their IO will not only "study the applicable ARs," as they are directed to do by the DA Pam, para 2-5 c. (2), but also familiarize themselves thoroughly with the DA Pam, as well.

"INTERNAL CONTROLS"

Before the 2019 revision of the AR, the Army CO regulation actually included a "Checklist for Processing Conscientious Objector Applications" as an appendix, right behind the application. The checklist was composed of 26 detailed questions that walked the command through the steps of the process that they are responsible for carrying out at the local level, right through to when the application package is forwarded to Headquarters Department of the Army (HQDA). When the 2019 revision was released, this section was still included in its entirety, though it was renamed "Internal Controls." We still referred to it as a checklist and advised our clients to refer to the list when talking with their commands. In this latest revision, there is a section in the AR, Appendix B, called Internal Control Evaluation. Although the stated purpose of the section is to serve as a guide, and not to "cover all controls," its brief section of ten "test questions" eliminates many of the procedural details that were the most helpful parts of the previous regulations.

One cannot help but wonder about the motivations behind providing *fewer* helpful details in revised and updated policy and procedures documents. As always, our experience as counselors must fill in these gaps left by the DOD and DA, to ensure our clients have the tools and information they need to achieve successful outcomes.

MILITARY ‘DIVERSITY, EQUITY AND INCLUSION’ – MORE PERCEPTION THAN REALITY

By Chris Lombardi

“It’s ironic,” Maj. Alan Kennedy told me on June 1, 2023. “All we got out of it is a handful of renamed military bases.” By “we” Kennedy meant those opposing racist extremism in the military, including the Black Lives Matter protests that [first brought Kennedy to MLTF](#).

And by “it” Kennedy meant the changes promised by the Pentagon after the national response to the murder of George Floyd.

If only the military were nearly as “woke” as Congress thinks it is.

As this article was going to press, the House Armed Services Committee completed its [first draft of the 2024 NDAA](#) – featuring amendments designed to undermine the Pentagon’s Diversity, Equity and Inclusion (DEI) initiatives. As [the *Military Times*’ Rebecca Kheel](#), notes, while Congress seeks to remove what HASC calls Biden’s ‘radical race ideology,’ there’s little DEI in evidence: frankly, Kheel adds, “there have been no substantial changes to diversity training in the military since the start of the administration.”

Much of the Pentagon’s most visible DEI efforts date to 2020, the [year then-Captain Alan Kennedy was tear-gassed in Denver](#) as he participated in the national response to the police killing of George Floyd and [was disciplined for writing an op-ed about it](#). “2020 initiated a rash of talk about diversity in the military,” Kennedy told me in a recent interview.

The military has had a long and rocky history of dealing with racism and extremism (as I [described last year for *On Watch*](#)). That history has often included similar initiatives, including the substantial Military Equal Opportunity program that Kathleen Gilberd describes in this issue. As Task and Purpose noted last year, “The Pentagon didn’t order service members to reject [supremacist organizations](#) until 1986, nearly a decade after more than a dozen Marines belonging to [the Ku Klux Klan](#) had freely [handed out](#) leaflets on base for a [white supremacist group](#) with a long, violent history of terrorizing minorities.”

Forty years later, the Center for Strategic and International Studies found a recent increase in the percentage of domestic terrorist plots and attacks perpetrated by active-duty and reserve personnel with 37 percent of lone-wolf attacks perpetrated by either such figures or recent veterans. In 2021 CSIS’ Seth Jones cited Army Private Ethan Melzer, arrested in June 2020 after leaking sensitive information to the [Order of the Nine Angles](#) (O9A), an explicitly Satanic neo-Nazi and white supremacist organization, hoping to induce the Order to massacre Melzer’s own unit. Jones also mentioned the [Capitol insurrection of January 6, 2021](#), many of whose perpetrators carried Confederate battle flags into the Senate Office Building and over 15 percent of whom had military affiliations.

While the raw numbers of military-affiliated perpetrators may be small, the effects can magnify given the military’s special tools. MA National Guard airman Jack Teixeira, currently being court-martialed for leaking intelligence files to his Discord server, was reportedly hoping to impress a much-larger Discord community called [Thug Shaker Central](#), which featured Nazi imagery in its celebration of gun culture.

The Countering Extremist Activity Working Group, convened by SecDef Austin in early 2021, made some specific recommendations on training:

- Create an annual, stand-alone, computer-based Joint Force “extremist activity”
- Require “in-person discussions about extremist activity in periodic training addressing unit climate and culture”
- Counter-extremist activity training “tailored for Senior Enlisted Leaders (SELs), law enforcement, recruiters, and legal advisors.”

Many of these recommendations were included in the 2022 NDAA, only to be removed from the 2023 version. Which, if any, were actually implemented? What is DEI trying to accomplish, and are any of its initiatives making a difference for servicemembers facing racism in the ranks? What are the actual levels of the latter?

Trying to get answers to any of that is tricky. The Freedom of Information Act seems of little help: a recent MLTF request for recent data on discrimination yielded an unwieldy spreadsheet redacted for members’ privacy, which came with this proviso: “As of FY 2020, this section is no longer required to be completed by the Services.” Meanwhile, when the nonprofit [American Oversight](#) submitted a FOIA [asking for data about white-supremacist troops](#), the resultant flood included investigations going back as far as 1998, when Timothy McVeigh was still alive, and a probe of Klan activity on the U.S.S. Theodore Roosevelt in 2008, which provides context and verification for Jonathan Hutto’s account in this issue of *On Watch*.

One could write another article exploring the data revealed by American Oversight – about the 2005 “Hammerskin” white power rally in Florida, about white sailors protesting that a Black man had been elected their Commander-in-Chief, or about the National Guardsmen in Binghamton/Ithaca, historically Klan country, discharged between 2021-22, one telling investigators that he was a member of the [III% movement](#). But none of that data comes close to our task here: has ODEI actually implemented its anti-extremism training?

According to Pentagon spokesperson Sabrina Singh, training is the one thing the DoD has actually completed, “implemented across the Department.” Asked in a May press conference: “Where do the department's efforts related to extremism stand?”, Singh added that the Pentagon was still getting started on the other recommendations from the working group, which “include military justice and policy, support an oversight of insider threat program, investigative processes and screenings capability, and education and training.” None of which will even get started if the Congressional revolt above comes through. But is there really an active, dynamic anti-extremism program anywhere in the Department of Defense? What exactly has been implemented?

According to Major Alan Kennedy — who gained his current rank in 2022, after the Army [overturned its own reprimand](#) for his 2020 editorial – DoD hasn’t gotten much past that first recommendation, or the “stand-alone, computer-based” training module. That model was much in evidence at the now-famous “stand down” mandated after January 6.

These stand-down slides, now available online from [DoD](#), [the Army](#), and the [Marines](#), start by emphasizing the meaning of the oath troops take, going on to declare that “actively espousing

ideologies that encourage discrimination, hate, and harassment against others” violates the oath and “will not be tolerated.” Impermissible behaviors include liking and sharing extremist materials posted in social media, and the slides include case studies of such behavior. All of which feels promising, but less so if you envision those phrases droned by a Colonel to a roomful of servicemembers. The PowerPoint refers to “small group discussions,” but pandemic protocols rendered most of the trainings fully remote, with troops logging into Zoom and commanders going through the talking points in turn — all ending with the need to report extremist behavior to the commander.

Troops [surveyed by Military Times](#) were similarly unimpressed. One lieutenant from Naval Air Station Jacksonville, called its script forced, adding that the leadership was “reluctant to have in-depth discussions, brushing off questions, or just moving the conversation to the next topic. It was very surface-level, without significant substance.”

Kennedy adds that the same goes for Equal Opportunity training, mostly limited to *here's your EO coordinator. If you've been discriminated against, talk to this person, call this number.* “They don't talk about racism. They don't talk about systemic racism, structural racism. So I think there may be more of a perception that the military does this than a reality.”

What about the small-group discussions on extremism recommended by the Pentagon? MLTF member Ana Maria Bondoc, who recently surveyed the terrain at Fort Bragg (now Liberty), said that depends on soldiers' installation and unit. “There were some group discussions attempted in response to George Floyd's killing, which did not continue after a few months. More formal trainings occur as part of in-processing, specialized schools, or leadership training.” Bondoc notes that some of the latter have included discussions of “[implicit bias](#)” also known as “unconscious bias.” Bondoc also pointed to extensive PowerPoint [sessions from the MEO Program](#), as well as the more interactive 30-minute scenario videos shown on [Eric Washington's YouTube](#) channel. Bondoc is a member of MLTF's Anti-Racism Committee, which will continue to seek further details on the military's training efforts.

Meanwhile, the realities of military racism remain. In June 2023, a Pentagon review surfaced [about inequities in military justice](#), showing prejudicial behavior by commanders and supervisory personnel contributed to the fact that Black personnel are 2.2 times more likely to face court-martial and conviction. [The August 2022 report](#), from the Internal Review Team on Racial Disparities in the Investigative and Military Justice Systems, touted its 18 recommendations, most of them focused on — wait for it! — better training.

For now, at least, there's a handful of renamed bases. Those bases still named for Confederate figures, 158 years after the Civil War ended, were highlighted by members of Congress in 2020, trying to sort out how to respond what felt to many, including [then-Captain Kennedy](#) a transformative moment. As a result, Fort Polk is now Fort Johnson, replacing the name of a [Confederate general](#) who fought against the United States throughout the Civil War with that of William Henry Johnson, decorated for World War I service with the Harlem Hellfighters, while Fort Bragg is now Fort Liberty and Fort Hood renamed Fort Cavazos. Those changes, said AM Bondoc, seem at the new Fort Liberty to be mostly on the surface: “Although there's a lot of press coverage about it, most signage hasn't changed in Fayetteville, NC. In everyday conversations/emails etc., the old names are still commonplace.” Meanwhile, some of the Republican politicians who oppose DEI are also pledging to reverse those base re-namings, returning them to the names of White men who fought a traitorous war because they didn't see Black people as humans.

The need to replace those base names could have been grist for those “small-group discussions” promised by the Pentagon years ago. But that would require commands to be serious about fighting racism in the military, at least as serious as the [1971 Defense Race Relations Institute](#), called by historians “the most progressive and forward-looking race relations experiment in existence.” Instead, it seems, we have the slapdash PowerPoint trainings described above, which may disappear thanks to the 2024 NDAA.

Full disclosure: the author of this article is also on MLTF’s anti-racism subcommittee, and we will continue to search for details on what training looks like on the ground. Our upcoming CLE on September 13, 2023, will feature both Alan Kennedy and Jonathan Hutto, who can be our Virgils as we descend to the military’s underworld. Meanwhile, we continue to serve clients in real time, with resources and support in their own fights against military racism. If you’re interested in the anti-racism subcommittee, please contact the author at chrisaintmarchin@protonmail.com.

MLTF STANDS IN DEFENSE OF MILITARY RELIGIOUS FREEDOM FOUNDATION AGAINST ATTACK BY HOUSE REPUBLICANS

The Military Law Task Force of the National Lawyers Guild is a legal advocate, a watchdog of often-oppressive military personnel policies, and a resource for the movement for social justice for servicemembers and veterans. National in scope, the Task Force is composed of attorneys, legal workers and “barracks lawyers” working to protect the rights of military personnel.

The MLTF is outraged at the recent attempt by the U.S. House of Representatives to restrict access to the Military Religious Freedom Foundation. For almost 20 years the Foundation has been providing counsel to military servicemembers regarding their right to be free from religious coercion and from discrimination during their service. The Foundation has assisted over 84,000 active duty, veteran and civilian personnel in the U.S. military. Recently, the U.S. House Armed Services Committee passed an amendment to the 2024 National Defense Authorization Act (NDAA) which bars the use of funds “to communicate with the Military Religious Freedom Foundation”, or to “take any action or make any decision” regarding a matter raised by the MRFF.

This amendment is a substantial assault on the ability of servicemembers to obtain assistance and advocacy during their service. It is clearly an unconstitutional denial of the free speech rights of servicemembers. Finally, it is an attack on servicemembers who observe minority faiths or even no religious faith and are discriminated against during their service. The MLTF joins with the MRFF and its allies in calling for this amendment to be defeated by the Congress and for the rights of servicemembers in the area of religious faith to be fully protected.

ANNOUNCEMENTS

MLTF Military Anti-Racism Subcommittee Needs You

The Task Force's Military Anti-Racism Subcommittee monitors DoD action and inaction on racism and extremism through Freedom of Information Act requests, the military press and interviews with servicemembers and veterans. The Subcommittee, produces legal and educational memos on these issues, and plans leaflets and self-help guides designed for military personnel. The Subcommittee is planning a CLE webinar on military racism, Military Equal Opportunity complaints and alternative complaint procedures on September 13, at 10 am pacific time/1 pm eastern time. If you're interested in these issues and would like more information about its work or the CLE, contact Kathleen Gilberd at kathleengilberd@aol.com.

ABOUT THE CONTRIBUTORS

Kathleen Gilberd is a legal worker in San Diego, handling discharge review and military administrative law cases. She is the executive director of the Military Law Task Force and a member of the board of directors of the GI Rights Network.

Jonathan W. Hutto, Sr., is an anti-oppression community organizer and author who has made substantial contributions within both non-profits and grassroots organizations for over a quarter century. Jonathan embraced his calling as an Undergraduate Student at Howard University in the late 1990's. In 2006, as an enlisted member of the United States Navy, he co-founded the Appeal For Redress from the Iraq War, which was awarded the 2007 Letelier Moffitt Human Rights Award from the Institute for Policy Studies. He can be reached at jonathanhutto99@gmail.com

Chris Lombardi is a former staff member with the Central Committee for Conscientious Objectors, and has been writing about war and peace for more than 20 years. Her work has appeared in The Nation, Guernica, the Philadelphia Inquirer, ABA Journal, and at WHY.org. The author of *I Ain't Marching Anymore: Dissenters, Deserters, and Objectors to America's Wars* (The New Press), she lives in Philadelphia. She is currently on the steering committee of the Military Law Task Force.

Bill Galvin is the counseling coordinator at the Center on Conscience & War.

Maria Santelli has been the executive director of the Center on Conscience & War since 2011.

Editorial/Production: Kathleen Gilberd, Rena Guay, and Jeff Lake edited this issue.

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Editors: Kathleen Gilberd, Rena Guay and Jeff Lake.

CONTACT

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

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

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

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

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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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