National Lawyers Guild Military Law Task Force

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MLTF will host a CLE on October 30, see page 25 for more info.

Appeal For Redress v.2:

SERVICEMEMBERS AND VETS WEAVE A RIBBON OF HOPE

By Chris Lombardi

"Morale is being affected," Airman Juan Bettancourt told me on June 22, 2024. He was talking about the images and videos from Gaza that flood social media, after the Israeli response to the Hamas attack of October 7, 2023. Israel's bombing campaign has so far flattened much of Gaza, killing 40,000, displacing 150,000, and leaving half a million subject to famine. "By wearing the uniform of a nation whose government is complicit in the brutal slaughter of innocent lives, I feel an overwhelming sense of embarrassment and despair," Bettancourt said. And those images and realities have spurred many military members to question their involvement in an institution that is actively supporting Israel's war.

Bettancourt and I were talking just after the launch of Appeal for Redress #2, a campaign to mobilize active-duty and reserve troops tell their members of Congress that they oppose U.S. support of Israel's current war in Gaza. At the Zoom launch on June 4, hosted by MLTF's own James Branum, Bettancourt announced that he is in the process of applying for discharge as a conscientious objector. Joining Branum and Bettancourt that day was fellow airman Larry Hebert, also pursuing a CO discharge, and the organizations s supporting them: MLTF, the Center for Conscience and War (CCW), Veterans For Peace (VFP), and About Face/Veterans Against War. Together they were taking part in peace history.

The first Appeal for Redress, in 2006, was a brainstorm of former CCW director J.E. McNeil, after she was approached by then-Navy seaman (and current *On Watch* contributor) Jonathan Wesley Hutto, joined by Army helicopter mechanic Jabbar Magruder and Liam Madden, a Marine Corps communication-specialist who'd served in Fallujah just as the United States was about to pulverize it. As they brainstormed what might a 21st-century movement look like, the three highlighted DoD Directive 1325.6 Section 3.5.1.2. That directive, "Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces," declared that troops could participate in off-base demonstrations, although not in uniform; group organizing and petitioning were still proscribed. Hutto, Madden and Magruder then met with CCW's McNeil, an attorney and MLTF member who spent her days with GI Rights Hotline calls. "How could they mobilize all the troops afraid to speak out publicly? The answer was in the Military Whistleblower Protection Act," she told me years later.

They chose the most 21st-century organizing mode then possible, an online campaign at AppealForRedress.org. The text of the Appeal was simple: "As a patriotic American proud to serve the nation in uniform, I respectfully urge my political leaders in Congress to support the prompt withdrawal of all-American military forces and bases from Iraq. Staying in Iraq will not work and is not worth the price. It is time for U.S. troops to come home."

The current campaign offers servicemembers a choice of letters, all of which begin; "I am writing with deep concern regarding the escalating violence in the occupied Palestinian territories, including the West Bank and especially Gaza," and end with "As a member of the US Armed Forces, I stand firm in my commitment to upholding the values of justice, integrity, and respect for human rights. I urge you to stand with me in calling for a ceasefire in Gaza and a renewed commitment to peace, justice, and equality for all." In between, the servicemember can choose a simple, informal approach (#1); a more formal military communication (#2); a more emotional testimony (#3), or a legal focus (#4) which goes into detail about the international-law aspects of U.S. involvement. Whatever the member chooses,

they're free to embellish or cut it down. The site then matches the member's address to the appropriate Congressional representative.

The hope of Appeal organizers is to build a bridge among servicemembers and join their struggle to other recent resignations, including two from the State Department and Army Major Harrison Mann, the latter of whom who will be a keynote speaker at the Veterans For Peace conference in August. The more public servants refuse to be complicit in what many consider war crimes, the stronger the effort. "There is so much resistance inside so many who serve," Bettancourt told me. "So much potential."

Both Bettancourt and Larry Hebert, both of whose pursuit of CO was featured on Al-Jazeera last week, told me they joined the Air Force intrigued by its official values: *Integrity. Service before self, Excellence in all you do.* Otherwise, the two couldn't appear more different on the surface. Hebert enlisted in 2019 to find financial security for his growing family; with the Afghanistan war winding down, he was happy to become trained in avionics, maintaining airplanes on a team that was, he thought, focused on defensive technologies.

Bettancourt, a Ph.D. candidate in history from Brown University, decided to enlist in 2019, to serve the country where his parents brought him when he was 10, fleeing Colombia's then-horrific violence. After he completed his coursework, at the stage when doctoral students travel, he took a leave of absence – and joined the Air Force. "I had ideas for public service, where I'd learn the ins and outs of government," he told me. "The idea of a true democracy, where progressive ideas like mine fit in every sect of society." The latter idea met reality during basic training at Lackland Air Force Base; then his desire to be a medic was squashed, shifting Betancourt into intelligence. (Like others in his specialty, he couldn't say much about his duties, but emphasized that none of it had to do with the Middle East.) Hebert's aircraft-maintenance specialty, on the other hand, included aircraft bound for Qatar.

Then came October 7, 2023, and the ensuing warfare that burst the blister of the status quo. "Everyone here is pretty plugged in," Bettancourt said. The constant stream of images and videos of the devastation snapped both into action; Bettancourt submitted paperwork to his command that if he was told to work in support of Israel, he would refuse: "I would consider it an illegal order" under international law. For Hebert, the turning point came in January, when the world heard the voice of six-year-old Hind Rajab begging the Red Crescent for help only to be stilled by a barrage of gunfire from an Israeli tank. "She looks almost just like my daughter, and that was something that was extremely hard to grasp, is that all these children that have aspirations and dreams and lives that many of us are living and want, and it's wholly unjustified to support what's happening," Hebert told NBC News in June.

A month after the child's death came that of Aaron Bushnell, which *On Watch* readers read about in our Spring issue. Both Hebert and Bettancourt were shocked by the lack of official response from the Air Force in the days that followed; "disgraceful," said Hebert. At the time, Hebert was 5000 miles away from Bushnell's Texas command, stationed in Rota, Spain as he is now. He couldn't even think about flying to Lackland AFB for the memorial service.

But Bettancourt is right there, and did attend—which only made him angrier. "There were about 100 people there—his family came, and most of his unit." But the session itself, according to Bettancourt, was a quiet PowerPoint presentation, mostly focused on suicide prevention (a crisis-level concern throughout the military, including the Air Force.[i]) "There was no mention of screens and hearts. Bettancourt then did the only thing he felt he could do - place a small Palestine flag at the room's vigil table.

Hebert then booked a flight for his next leave - to Washington, D.C. For much of April, he stood in front of the White House, with a sign: “Active-Duty Airman Will Not Eat While Gaza Starves.” His hunger strike lasted three weeks, celebrated by Code Pink and Veterans For Peace. His command’s first response was to cut short his leave and recall him to Spain. By then, however, Hebert had given notice that he was a conscientious objector.

The Center for Conscience and War has received more than 40 inquiries about applying for CO based on agony about Gaza; many have initiated the process. As is protocol under AFI 36-3203, Hebert’s command immediately deactivated him from active avionics, putting him on “floater” status with minor administrative tasks that can be considered “noncombatant.” His application – answers to required questions, with attached testimonials from peers -- was submitted in mid-June, and he’s still awaiting what comes next: the required interviews with an investigating officer, a psychiatrist, and a chaplain, all of whom will assess his stability and the sincerity of his beliefs. For Bettancourt, his command in Spain is allowing him to make compiling his CO claim his main job for a while. Overall, the whole process can take more than a year.

Other service members and veterans, eschewing the DOD-approved processes, expressed their concerns about Gaza by joining VFP or About Face. “Since October 7, 2023, over 250 veterans and active-duty members have applied to become members of About Face: Veterans Against the War,” said AF operations coordinator Shiloh Emlein. Another 100 joined after the death of Aaron Bushnell: “The whole veteran and military community was impacted by Aaron Bushnell's self-immolation, and that was reflected in our increased membership applications,” Emlein wrote over email.

I asked Emlein, a former Marine who served in Kuwait, Iraq and Afghanistan, what feels different about the newest war. They replied that the war’s ubiquity has made its enormity clear. “The world is waking up to a first-hand account of the horrors and violence of occupying forces in a way that wasn't always accessible before. It is no longer just the accounts of survivors of war and returning, dissenting soldiers that are speaking the truth; the real-time atrocities are in the palm of your hand if you are willing to bear witness. Because of this, we are seeing droves of US servicemembers also waking up to their complicity and/or direct contributions to the genocide and violence in Gaza and around the globe.”

Thus the Appeal for Redress, a way to go beyond individual CO and try to impact the decision-makers. "Too often lawmakers make war policies without hearing from the people who have to implement them,” MLTF’s James Branum points out. “This is what makes the Appeal for Redress v2 so important." I spoke briefly to Jon Hutto, who started the first Appeal, who emphasized that organizing those currently in uniform is *crucial.* After Hebert went public, Hutto wrote on Facebook: “I’m beyond moved and inspired by this current Generation of Active-Duty being Tip of the Spear in the Struggle against the ongoing Genocide of the Palestinian People.”

At press time, the Appeal’s constituent groups are brainstorming about how to spread the word. They might look to meet the benchmarks of the first: Started in October 2006, within weeks the appeal had 65 signatories; it was soon a topic in the White House briefing room.

The Appeal’s first official press conference was on Martin Luther King Day 2007, a date chosen to highlight the neglect of Katrina communities and the billions wasted on the wars. “For Dr. King, the

plight of African Americans in America was tied to the plight of the peasant in Vietnam."[1] By then, the signature count exceeded 1,000, and thirteen of the signatories had appeared on CBS' *60 Minutes*, emphasizing that most of their critics had never been in uniform.[ii]

The next morning, Hutto and co-founders traveled to D.C. to deliver those 1,000+ appeals in person. It was unseasonably warm that day, challenging for the suit-clad journalists and the wired veterans. After statements by Hutto, Appeal co-founder Liam Madden, and VFP's David Cline, the assembled vets streamed into the House and Senate offices to deliver their message.[iii] "I am here as a citizen," Magruder said into the microphone, ensuring that that word carried the appropriate weight. "I want the Congress to understand that as a citizen soldier that I have the right to [appeal] and speak out against an unjust war."

Were there any results? A week after that press conference, then-U.S. Senator Barack Obama introduced the Iraq War De-Escalation Act of 2007 (S. 433). The plan would have stopped the 2007 U.S. Troop Surge of 21,500 in Iraq, and would also have begun a phased redeployment of troops from Iraq with the goal of removing all combat forces by March 31, 2008. The bill was referred to committee and failed to become law in the 110th Congress. But the Appeal had made itself felt, not for the first time. With V2, it may become a real force.

Like the Vietnam resistance that inspired Hutto, anti-war activism's effect is sometimes hard to track. As the great Howard Zinn wrote in 1999: "Revolutionary change does not come as one cataclysmic moment (beware of such moments!) but as an endless succession of surprises, moving zigzag toward a more decent society. We don't have to engage in grand, heroic actions to participate in the process of change. Small acts, when multiplied by millions of people, can transform the world." In the case of the Appeal, MLTF can work to help reassure signatories that they're protected from retaliation; the NLG can spread the word to their communities, where reservists and ROTC students may welcome the opportunity.

Together, maybe, we can move zigzag toward a more decent society.

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[1] Courtney Mabeus Brown, "New analysis of Air Force suicides explores contributing factors.' *Air Force Times,* March 24, 2024. https://www.airforcetimes.com/news/your-air-force/2024/03/27/new-analysis-of-air-force-suicides-explores-contributing-factors/

[2] Hutto, *Antiwar Soldier*: *How to Dissent Within the U.S. Military* (Nation Books, 2008),

[3] "GIs Petition Congress to End Iraq War: More Than 1,000 Military Personnel Sign Petition Urging Withdrawal."*60 Minutes,* February 22, 2006.

DOZENS QUITTING U.S. MILITARY OVER GAZA IN PROTEST

By Mike Prysner

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The day after Aaron Bushnell put on his Air Force uniform and became the first US service member to earn the title of "Martyr" across the world, the Pentagon's press secretary was asked in the briefing room: **"Is the Secretary [of Defense] concerned that this airman's actions may indicate there's a deeper issue, maybe US military personnel being concerned about how weapons and support for Israel is being used on civilians in Gaza?"**

The brave General Pat Ryder cowered from the question with a stock "Israel has the right to defend itself" response. But maybe he didn't answer because it was too obvious: of course Bushnell was just the tip of the iceberg. It's a younger military removed from the jingoism of the 9/11 generation; where left-wing ideas are far more popular; while facilitating the most grotesque war crimes ever witnessed, everyday, which they see as they scroll TikTok from the motor pool or wherever they are hiding from their platoon leaders.

Months later, more of that iceberg has been revealed as it floats above the ocean of propaganda.

According to Maria Santelli, Executive Director of the Center on Conscience and War, since October 7 **they have helped over 40 US troops file for Conscientious Objector status who cite the US role in the Gaza genocide as their turning point.**

These are soldiers who have taken individual rebellious actions to remove themselves from participating in any way–or even wearing the uniform of Israel's biggest supporter. While CO is a right to all service members, it is a step that requires a lot of courage and resolve to take.

The number of CO applicants over Gaza through the GI Rights Hotline remains steady with soldiers who have reached their breaking point.

Santelli also reports that **a number of soldiers have called the hotline after going AWOL (Absent Without Official Leave), who report their anger over US support for Israel's massacres being the trigger.** (The Hotline does not publicize numbers of AWOL troops who reach out for help.)

Several additional troops have quit the military publicly.

On June 4 Major Harrison Mann went public that he resigned from his position in the Defense Intelligence Agency, as well as from the Army, in protest of the Gaza genocide, saying **"I'm confident saying it's certainly some measure of ethnic cleansing."** Highly inconvenient for the Pentagon, given Maj. Mann is a decorated officer, is Jewish, is a Middle East expert, and is willing to go on mainstream news shows to say his piece.

While Mann got the most coverage, he's not the only one to take public action. On March 31, Senior Airman Larry Hebert took 40 days leave from his unit based in Spain and used it to wage a hunger strike in front of the White House, holding a sign reading "Active Duty Airman Refuses To Eat While Gaza Starves."

On June 7, he dropped his paperwork filing for a Conscientious Objector discharge. When I spoke with him after filing, he told me:

"One key value they teach us in the Air Force is 'Integrity First.' They explain this as doing the right thing when nobody's watching. Today, I feel like many of us are doing the wrong thing while everyone is watching."

Filing CO status publicly is quite rare, as most opt to do it quietly to avoid reprisal. But Senior Airman Hebert is not alone in doing this.

On June 5, Senior Airman Juan Bettancourt, who is in the same unit as Aaron Bushnell, publicly announced via social media he too made the decision to file as a conscientious objector over the genocide, while backing an Appeal For Redress (which allows active-duty troops to petition Congress with their grievances).

His turning point was at Bushnell's official memorial service on Lackland Air Force Base. He left a small Palestinian flag on the vigil table, the only reference at the entire ceremony to Bushnell's cause. He told me:

"I was moved by Aaron's final message and his determination to shake us out of our comfortable lives and draw our eyes towards the atrocities happening in Gaza.

I believe it is unconscionable to expect military personnel to comply with genocide in blatant disregard for domestic, humanitarian and international laws."

It is highly significant for a US-backed operation to draw such resistance from within the ranks: the dramatic action of Bushnell, the high-profile resignation of Maj. Mann, two simultaneous public Conscientious Objector campaigns with scores of others following suit in secret.

Many others have decided to end their military careers, and join the pro-Palestine movement while they ride out the remainder of their contracts or find ways to get discharged medically.

I spoke with five of them on condition of anonymity, fearing repercussions from their command amidst a formal request from Senate Armed Services Committee for the DoD to route out left-wing "extremism" in the wake of Aaron Bushnell.

Technical Sergeant R, who has spent 16 years in the Air Force working as a loadmaster for cargo planes, told me:

"After October 7 I found out the C-17 unit I was transferring to was involved in doing cargo runs to Israel. Feeling trapped, it became very clear that I could no longer do this job."

This Tech Sergeant was able to get removed from normal duties, and is currently pursuing a discharge despite being just 3 years from retirement, telling me:

"It was very hard to make a decision with retirement being so close, but as I continued to track the situation in Gaza there was absolutely no way I could carry on."

Specialist O, who says they are one of six pro-Palestine soldiers in their unit, is an Army engineer who has attended over a dozen pro-Palestine protests and traveled hours by bus to join the "Red Line" around the White House on Saturday. They told me:

"Before October 7, I didn't think much about my position in the military. I was there solely to get an education. Being there was like working any other job. But after October 7 the prospect of being deployed increased significantly and it forced me to face the reality of what it meant to be a soldier in the Army: a pawn for US imperialism."

When I asked what they would do if they did receive those deployment orders, Specialist O replied:

"I would chain myself to a street lamp if they tried to send me anywhere!"

Corporal D, an Army tank crewman, has attended more than 15 protests against the genocide, and also taken on organizing roles in building the actions. He told me:

"These months have led me to believe that there are many in the military who feel the same way but are hesitant to speak out."

He went on to report that he knows at least five soldiers in his unit who support Palestine. Corporal D, who planned to become an officer and make a career out of the Army, now plans to be discharged this summer.

Lieutenant K, a Navy surface warfare officer, told me:

"Through my training to become an officer I have been taught about the Navy's core values and ethics. The actions my government is taking now regarding Israel and Palestine goes against every single one. Our government is complicit in genocide and it is an embarrassment to put this uniform on everyday."

Lieutenant K also initially planned to serve 20 years but has now decided not to reenlist. "Instead of taking care of the people or it's veterans, they send money for genocide and it's disgusting." He says he has several colleagues who agree with him.

Another Naval officer, Lieutenant T, told me:

"After October 7, seeing the absolutely abhorrent response from Israel and the US, I felt compelled to do something within my control even if it was as small as petitioning for designation as a conscientious objector. I could no longer hide from the reality that my employment by the Navy allowed me to benefit from the genocide of Palestinians and decided I would not participate in quelling their right to emancipation."

All this can only be just another surface layer, which gets wider the deeper you go. The sector of service members who have turned against the US/Israeli policy in a profound way is undoubtedly much bigger than we can see at the moment–one the Pentagon is no doubt aware of as well.

The more those troops are inspired to stand up, the greater the pressure on Washington to end the horror. And the protest movement can add fuel to that righteous fire.

Throughout history it has been unrest within the ranks, linked with the anti-war struggle in the broader population, that has been decisive in bringing wars to an end. It can again today.

If you are a member of the US military and want to know more about your legal rights to get out or to protest, call the *GI Rights Hotline* for 24/7 private, expert counseling at 1-877-447-4487.

You can also get more information from to *A Guide to Getting Out of the US Military Now* on the Eyes Left Podcast.

If you'd like to speak out, or need support, contact Mike at theempirefiles@gmail.com.

DISCLAIMER: The comments made by Larry Hebert, Juan Bettancourt and the five other service members are their views alone and do not reflect the Department of Defense, Air Force, Army or Navy.

STRUGGLE FOR JUSTICE FOR LGBTQ+ SERVICEMEMBERS

By Jeff Lake

In 1951, the U.S. enacted Article 125 as part of the Uniform Code of Military Justice. The Article criminalized any "unnatural carnal copulation with another person of the same or opposite sex or with an animal." A violation of Article 125 was grounds for a dishonorable discharge from the military. Military.com reports that "[t]he White House estimates that more than 100,000 service members were dismissed as a result of their sexual orientation or gender identity."

In 1993, the Clinton administration attempted to forge a compromise regarding gay and lesbian servicemembers. Commonly known as "Don't Ask Don't Tell," the new policy purported to refrain from discharging servicemembers for gay relationships as long as the servicemember stayed in the closet while serving. However, this policy was frequently violated, resulting in the discharge of an estimated 14,000 servicemembers prior to its repeal in September 2011.

As a result of these injustices, ~~a~~ several LGBTQ+ veterans filed suit in Federal Court in August 2023 alleging that their discharges and the notation of sexual orientation on their discharge forms were unlawful. They asked for the suit to receive nationwide class-action status. According to the lawsuit, "Requiring LGBTQ+ veterans to first bear the stigma and discriminatory effects of carrying indicators of sexual orientation on their DD-214s and then navigate a broken record correction process to seek resolution, violates their constitutional rights to equal protection, informational privacy, property and due process protected by the Fourteenth and Fifth Amendments to the U.S. Constitution."

After this lawsuit was filed, the Pentagon suddenly announced in September 2023 that it would begin to review discharges based on sexual orientation for the "Don't Ask Don't Tell" period - February 28, 1994 to September 20, 2011. The DoD promised to expedite these reviews and send names to the service secretaries for consideration of discharge upgrades.

On June 20, 2024, a federal court judge rejected the government's motion to dismiss the veterans' lawsuit. On June 26, 2024, President Biden issued, "A Proclamation on Granting Pardon for Certain

Violations of Article 125 Under the Uniform Code of Military Justice." A Proclamation on Granting Pardon for Certain Violations of Article 125 Under the Uniform Code of Military Justice | The White House The proclamation states, "I, Joseph R. Biden, Jr., do hereby grant a full, complete and unconditional pardon to persons convicted of unaggravated offenses based on consensual, private conduct with persons age 18 and older under former Article 125 of the Uniform Code of Military Justice (UCMJ), as previously codified at 10 U.S.C. 925, as well as attempts, conspiracies, and solicitations to commit such acts under Articles 80, 81, and 82, UCMJ, 10 U.S.C. 880, 881, 882. This proclamation applies to convictions during the period from Article 125's effective date of May 31, 1951 through the December 26, 2013, enactment of section 1707 of the National Defense Authorization Act for Fiscal Year 2014 (Public Law 113-66)." This pardon does not apply to "aggravating" conduct, which is defined in the proclamation.

The question now is how servicemembers will be able to upgrade their discharges now that they have received a pardon. Military.com reports that the administration plans to have servicemembers request and receive a certificate of pardon. The administration intends to include information on how to apply for a discharge upgrade along with the pardon form. It is unclear how these pardons will affect the pending litigation, if at all. It may well be that the if it succeeds, a court will fashion a different remedy than the pardon process.

As for the pardon process itself, it will by all accounts involve action to be taken by the servicemembers affected. Documentation in support of a discharge upgrade must be assembled and submitted. There are unanswered questions – for example whether related charges such as conduct unbecoming an officer or indecent acts will also be eligible for upgrades. There are the usual questions about the military's ability to handle large numbers of applications in a timely manner. Finally, there is a serious question about how a successor administration less sympathetic to those affected by this pardon will treat these applications.

The MLTF will continue to monitor developments in this area. We hope to provide information on the pardon and upgrade process in future issues. Please continue to subscribe to *On Watch* for information concerning this important struggle.

SIBLING RIVALRY: AIR FORCE DISCHARGE REVIEW BOARD SETTLES JOHNSON CLASS ACTION, COMPARABLE TO RECENT ARMY AND NAVAL DRB SETTLEMENTS

By Ana Maria Bondoc

On June 11, 2024, a federal district court judge in Connecticut ordered final approval of the class action settlement in *Johnson v. Kendall*. The case was the latest attempt to enforce so-called 'liberal consideration,' when certain veterans apply for discharge review in hopes of an upgrade and related relief.[1] Liberal consideration is a Department of Defense (DoD)-wide policy intended to boost success for applicants with posttraumatic stress disorder (PTSD), traumatic brain injury (TBI), or another mental condition or experience such as military sexual trauma (MST).[2] It has the potential to help correct the inequitable[3] outcome of 'bad paper' for a servicemember whose behavior change may be linked to these conditions or experiences.

As is typical for a Defendant in a settlement, the Air Force denies all charges of wrongdoing or liability in how it has been interpreting liberal consideration. However, it agreed to grant automatic reconsideration, or invite re-application, in a subset of recent applications where the Air Force Discharge Review Board (DRB) denied full relief. Thus the major provisions of the *Johnson* settlement harken to those found in its older siblings, the *Kennedy* and *Manker* class actions. To benefit from these, applicants must meet all criteria in the class definition:

- served in the post 9/11 era,
- been discharged with an administrative Other than Honorable (OTH), or General under Honorable Conditions (GEN) characterization on their DD214, *AND*
- show diagnosis, symptoms, or experiences that could implicate liberal consideration.

Instead of using the Group A and Group B designations from its sibling settlements, *Johnson* describes class members as being either part of the Automatic Reconsideration group, or the group to receive notice of reapplication rights. I will use the abbreviation, "Reapplication Group."

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[1] Its older siblings, so to speak, covered the larger branches of service. Kennedy (for Army veterans) and Manker (for Navy and Marine Corps veterans) received final approval on April 26, 2021 and February 15, 2022, respectively. *See generally* https://www.kennedysettlement.com/ *and* https://www.mankersettlement.com/ Students and volunteers through the Veterans Legal Services Clinic at Yale Law School have led the charge in all three suits.

[2] Though the earlier Carson and Hagel Memoranda heralded the concept of liberal consideration for certain discharge upgrade applications, the Kurta Memorandum offers the clearest explanation of the questions and factors involved in analyzing whether liberal consideration should apply.
For a critical analysis, see Jessica Wherry, "Kicked Out, Kick ed Out, Kicked Again: The Discharge review Boards' Illiberal Application of Liberal Consideration for Veterans with Post-Traumatic Stress Disorder," 108 CALIFORNIA LAW REVIEW 1357 (2020) *available at*
https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3339&context=facpub

[3] 32 C.F.R. § 70(c).

Automatic Reconsideration Comparison Chart

Branch	Case Name	Start Date for Prior DRB Denial	End/Effective Date
Army	Kennedy	April 17, 2011	April 26, 2021
Navy/Marine Corps	Manker	March 2, 2012	February 15, 2022
Air/Space Force	Johnson	September 13, 2015	June 11, 2024

Air Force DRB has agreed that it will decide cases from the above date ranges anew and give the relevant applications another look through the lens of liberal consideration. Like in *Kennedy* and *Manker* these reviews are automatic, meaning no action is required by the veteran. It is prudent to submit new information such as post service treatment records or an opinion letter from a psychologist.

Reapplication Group Comparison Chart

Branch	Case Name	Start Date for Prior DRB Denial	End/Effective Date
Army	Kennedy	October 7, 2001	April 16, 2011*
Navy/Marine Corps	Manker	October 7, 2001	March 1, 2012*
Air Force	Johnson	September 13, 2006	September 12, 2015*

*unless more than 15 years have passed since the date of the OTH or GEN discharge.

The settlement agreement provides the second group of class members the right to re-apply within one year of their notice, even if the member would otherwise have exhausted their eligibility to Air Force DRB. However, the fifteen year statute of limitations applicable to all DRBs,[4] is unchanged. Even if a veteran receives a notice that may seem to direct them to reapply to the ADRB, the proper board may be the higher Air Force Board for Correction of Military Records (AFBCMR).[5]

Members of the reapplication group should soon begin to receive notices of their rights under the settlement agreement. The notices will go to their last known mailing address. Since these group

[4] 10 U.S.C. § 1553(a). Contrast the unfixed, and routinely waived, statute of limitations at the Boards for Correction of Military/Naval Records. 10 U.S.C. § 1552(b). With new evidence, an applicant can indeed try, try again.

[5] For our guide on discharge upgrades including more explanation about the differences between the Boards, see https://nlgmltf.org/wp-content/uploads/2020/01/Discharge-Upgrades-2020.pdf
See also Rob Cuthbert, Alan Goldsmith, and Dana Montalto, "Intro to Discharge Upgrades with Some Intermediate Discharge Practice" (CLE Presentation at the University of Montana School of Law, March 2019) *available at* https://www.umt.edu/law/files/events/09_introduction-to-discharge-upgrades-1.pdf

members would have received their denials roughly nine to eighteen years ago, changes in address are likely. The settlement website calls for members to update their addresses in writing, by mailing a letter to the Settlement Administrator. They should reference "Johnson v. Kendall Settlement," provide the old and current mailing addresses.

Screenshot from the settlement website 1

Anything you can do…

Akin to those set forth in the Kennedy and Manker settlements, are two generally applicable improvements to which the Air Force agreed as part of the Johnson settlement. First are certain training obligations for Air Force DRB members and staff. The topics of these trainings include trauma, mental illness, and liberal consideration itself. Interestingly, Air Force DRB will also make unconscious bias training available to more of its staff. Before the settlement, it seems unconscious bias training was only for supervisors.

Second, is a set of improvements on the Air Force DRB decisional documents themselves. This will allow for greater understanding of the members' reasoning and attempts to apply liberal consideration from now on. Judicial review for abuse of discretion or arbitrary and capricious agency action will be greatly aided by more clear and detailed Board decisions.[6]

…I can do better

Innovative provisions of the Johnson settlement agreement include two trial programs set to last one year. First, is simply the opportunity for applicants to call and leave a voicemail, and be able to count on a phone response from the Air Force DRB. Currently, even email communication is limited, with this branch in particular relying heavily on its online submissions portal.

The second provision without an analog in *Kennedy* or *Manker* is an Air Force DRB medical professional who will review applications submitted after June 11, 2024. Their role is to review the application and act as an 'early warning system' of insufficient evidence. The professional sends notice to the applicant that there may be insufficient evidence of a mental health condition or MST experience that occurred during service.

CONCLUSION: TRY, TRY AGAIN

Though not identical to the *Kennedy* and *Manker* class action settlements, as expected, the *Johnson* class action settlement delivers similar wins for Air Force, and likely a few Space Force, veterans.

The key takeaway should be a new competition between the branches, to see which can show the most

[6] 5 U.S.C. § 706 (2)(A); see e.g. *Wilhelmus v. Geren*, 796 F. Supp. 2d 157, 162 (2011); *see also Villarreal-Dancy v. Dep't of the Air Force,* 633 F. Supp. 3d 19, 34 (D.D.C. 2022) (finding arbitrary and capricious action in the case of a veteran with mental health conditions and one-time drug use resulting in a Bad Conduct Discharge, because the Secretary failed to provide a reasoned explanation for overturning the Board's favorable decision).

improvement in delivering on the promise of liberal consideration, and boldly overturn unfavorable decisions that purported to apply the Carson, Hagel, and Kurta memos. These are the forgotten veterans, living with often invisible wounds of PTSD, TBI, and MST, at increased risk of experiencing homelessness, poverty, and dying by suicide. The more recently denied are set to get an automatic reconsideration, but the Reapplication Group, those denied between 2006 and 2015, will need to take the initiative to benefit from the settlement.

Advocates should help both groups identify potential evidence and submit a supplement specifically addressing the factors for liberal consideration. The supplement can be as simple as a statement in the veteran's own words, describing trauma or mental health symptoms that had their origins in service. It's a new opportunity to offer any available insight on reasons they kept silent or declined to mention them in service medical records like post-deployment or periodic health assessments. Buddy letters and character letters are welcomed by the Boards as well.

Ideally, the veteran will have received mental and behavioral health treatment in the years since their discharge. Progress notes, diagnostic evaluations, psychosocial assessments, and opinion letters from treating psychologists and therapists, would be valuable evidence to submit to supplement an automatic reconsideration or new application. Indeed, the bulk of the notices that will soon hit class members' mailboxes will attempt to convey this to class members. Trying these steps could make a big difference if the prior application consisted entirely of the form DD293, and no supporting documentation.

SELECTIVE SERVICE BILLS DEAD FOR THE YEAR IN CALIFORNIA, BUT MOVING AHEAD IN CONGRESS

By Edward Hasbrouck

A proposal to automatically register applicants for California driver's licenses with the Selective Service System for a possible military draft was pulled by its author, Sen. Bob Archuleta (D-Pico Rivera), just before a scheduled hearing on July 1 in the state Assembly Transportation Committee. That was the last scheduled meeting of that committee before the deadline for consideration of bills in this year's legislative session, so the bill is effectively dead for the year.

Like similar laws in other states, California SB-1081 faced opposition from a coalition[1] of peace, civil liberties, and immigrant rights organizations, including the MLTF[2], on both policy and fiscal grounds.

Pulling the bill before the hearing was a face-saving way for Sen. Archuleta to avoid a vote by the Transportation Committee not to advance his bill to the Assembly floor. This was at least the seventh time that similar proposals in California have been rejected, but the Selective Service System and its California state directors keep finding new sponsors to reintroduce them in the state legislature.

Meanwhile, however, a proposal to expand Selective Service registration to young women as well as young men is advancing again in Congress, along with a seductively simple-seeming but in practice unfeasible proposal to switch from the current system in which young men are required to register with the SSS to a system in which the SSS tries to identify and locate everyone eligible for a future draft and "automatically" register them based on other Federal databases from the Social Security Administration, IRS, U.S. Citizenship and Immigration Services, etc.

At press time, separate proposals were moving forward in both houses of Congress to expand and/or try to automate draft registration. As of July 5, 2024:

1. A proposal to expand the requirement to register to apply to young women as well as young men was approved by the Senate Armed Services Committee and awaits a floor vote in the Senate as part of the National Defense Appropriations Act (NDAA) for Fiscal Year 2025.
2. A proposal to automatically register young men for the draft on the basis of aggregation and matching of existing Federal databases was approved by the House of Representatives as part of its version of the NDAA.

On Friday, June 14th, both the Senate Armed Service Committee (SASC) and the full House of Representatives approved different proposals to expand and/or make it harder to avoid the requirement for men ages 18-26 to register with the Selective Service System for a possible military draft.

The proposals for changes to Selective Service registration were approved during consideration of the Senate and House versions of the NDAA, a "must-pass" annual bill that typically runs to more than a thousand pages.

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[1] "Floor Alert: NO on SB 1081 (Archuleta)", May 21, 2024, <https://hasbrouck.org/draft/SB1081-Oppose-Floor-Alert-052124.pdf>.

[2] MLTF letter, "California SB 1081 – OPPOSE (Assembly Transportation Committee)", June 21, 2024, <https://hasbrouck.org/draft/California-SB1081-ATRANS.pdf>.

The SASC approved a version of the NDAA that would expand Selective Service registration to include young women as well as young men. This version of the NDAA will now go to the floor as the starting point for consideration and approval by the full Senate.

Also on June 14th, the full House of Representatives approved a different version of the NDAA including a provision introduced at the request of the SSS by Rep. Chrissy Houlahan (D-PA) that would make Selective Service registration automatic while keeping it for men only.[3]

A House amendment[4] proposed by Rep. Warren Davidson (R-OH), a West Point graduate and Army veteran, which would have replaced the provision to make draft registration automatic with a provision to repeal the Military Selective Service Act, was not "made in order" by the Rules Committee to be considered or voted on by the full House. There was no separate House floor vote on the proposed change to Selective Service registration, only a single vote on the entirety of the NDAA as a package.[5]

The SASC markup was conducted in closed session, and only a summary of highlights of the version adopted by the SASC was released.[6] It's not clear whether the SASC version also includes the provision in the House version of the NDAA to try to make Selective Service registration "automatic" or only the provision to expand the registration requirement (with which compliance is currently low) to young women as well as young men. A spokesperson for the SASC told *The Hill* that the full text of the Senate version of the NDAA won't be released until sometime in July.

Floor amendments are still possible in the Senate before it approves its version of the NDAA. But as of now, it seems likely that competing bad proposals with respect to expansion and/or attempted enforcement through automation of Selective Service — one from the Republican-majority House to try to make it automatic, and one from the Democratic-majority Senate to expand it to women — will be included in the House and Senate versions of the NDAA and go to the eventual House-Senate conference committee to sort out in closed-door negotiations late this year, after the elections.

It's possible that either or both of these proposals are intended as "bargaining chips" intended to be withdrawn in exchange for concessions on other issues during the conference negotiations. The conference committee could include either, neither, both, or some other compromise on Selective Service in its final package of compromises, which typically are voted on and approved "en bloc" without further amendments.

Either of these misguided proposals would be the most significant change to the Military Selective Service Act since 1980. There have been no hearings, debate, or recorded vote on either of these proposals, and there appear unlikely to be any. The decision will probably be made in secret by the House-Senate conference committee for the NDAA.

Currently, most but not all male (as assigned at birth) U.S. citizens or residents are required to register with the Selective Service System (SSS) within 30 days of their 18th birthday, and report to the SSS,

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[3] See Edward Hasbrouck, "U.S. House committee proposes 'automatic' sign-up for military draft", May 23, 2024, <https://hasbrouck.org/blog/archives/002733.html>. For an analysis of Rep. Houlahan's statement defending her proposal, see Edward Hasbrouck, "Rep. Houlahan Fails To Justify Move Toward a Draft", Antiwar.com, June 29, 2024, <https://www.antiwar.com/blog/2024/06/29/rep-houlahan-fails-to-justify-move-toward-a-draft/>.

[4] *Amendment 130 to Rules Committee Print 118–36 offered by Mr. Davidson of Ohio*, available at <https://hasbrouck.org/draft/DAVIOH_130_SelectiveService.pdf>.

[5] *Roll Call 279, Bill Number: H. R. 8070*, June 14, 2024, https://clerk.house.gov/Votes/2024279.

[6] U.S. Senate Committee on Armed Services, *Fiscal Year 2025 National Defense Authorization Act Executive Summary*, June 14, 2024, https://www.armed-services.senate.gov/download/fy25-ndaa-executive-summary.pdf.

within 10 days, each time they change their address until their 26th birthday. Few young men fully comply with these requirements.[7]

Proposals to expand draft registration to women as well as men are anti-feminist[8] and militarist. They wouldn't salvage the failed system of registration of men: young women would be more likely to resist being drafted than young men have been.

Proposals to "automate" draft registration are a response to decades of failure of the current registration system, and an attempt to enable war planners to pretend that ongoing contingency planning and preparation, including Selective Service registration, makes a draft a viable policy option. The perceived availability of a draft as a "fallback" enables planning and commitments to endless, unlimited wars, without needing to consider whether young people will volunteer to fight them.

Compiling a list of potential draftees by aggregating existing Federal government databases wouldn't produce an accurate or complete list of draft-eligible individuals or of their current addresses for provable delivery (i.e. by certified letters that have to be signed for) of induction notices. But without informed Congressional opposition, hearings, or debate, the impracticality of automated draft registration based on an aggregation of other lists probably won't become apparent until long after the change in the law is enacted.[9]

"Automatic" Selective Service registration legislation would also be a privacy and data aggregation nightmare, giving the tiny, inept Selective Service System unprecedented new statutory authority to issue regulations compelling all other Federal agencies — even during "peacetime" and before an actual draft is authorized — to turn over any or all other Federal records, in bulk, that might identify or locate potential draftees.

Whether based on other existing Federal databases or on state driver's license records, "automated" registration would generate an inaccurate and incomplete list with many out-of-date addresses that omits some individuals who are required to register and includes others who are not required to register.

The National Commission on Military, National, and Public Service (NCMNPS) studied this option of "passive" registration of young people, but rejected it. An internal memo prepared by the NCMNPS research staff, and released in response to one of my FOIA requests after the NCMNPS disbanded, suggested that "The integration of one or more state/federal databases for a post-mobilization registration system would be an inherently difficult integration challenge", and that, perhaps more importantly, no current Federal database actually contains the information needed to identify all those required to register, weed out those not required to register, and deliver induction notices.[10]

Attempted "automated" draft registration would be a privacy-invasive fiasco, even if its failure might not be noticed right away.

The main effect of "automated" registration would be to eliminate noncompliance with the current registration system as a way for young people to indicate that they don't want to be drafted and would

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

[8] See "Feminists against the draft and draft registration", <https://hasbrouck.org/draft/women/feminism.html >.

[9] See Edward Hasbrouck, "A war draft today can't work. Let us count the ways.", Responsible Statecraft, June 29, 2014, <https://responsiblestatecraft.org/selective-service-draft-2668635702/>.

[10] NCMNPS, *Selective Service Stand-Alone Memo for Voting*, August 8, 2019, available at <https://hasbrouck.org/draft/FOIA/RAW-DM-SSSMemo4PreorPostMob-0703-Final.pdf#page=5>.

resist if they were actually drafted.

Proposals to try to "automate" draft registration or expand it to young women as well as young men won't stand up to serious scrutiny. Unfortunately, though, they are unlikely to be subjected to any public or Congressional scrutiny or debate if they are considered only as part of a package of hundreds of compromise amendments, adopted "en bloc", to a thousand-page "must-pass" bill.[11]

If either or both of these proposals are enacted into law, they will create the need for significant work by the MLTF to update our resources about Selective Service registration and advise potential draftees about the legal implications of the new requirements and procedures.

It's possible that all of the proposals related to Selective Service registration will be removed from the final version of the NDAA for Fiscal Year 2025 during the conference negotiations in late 2024. But these bad ideas about expanded or automated draft registration, and reliance on the perceived availability of a fallback draft to enable larger-scale military adventurism, won't go away unless and until Congress completely repeals its authorization for compulsory registration for a military draft.

Young people should continue to resist draft registration and keep the draft out of the policy arsenal of the warmongers. Allies of young people and of their resistance to the draft should lobby members of Congress who oppose endless, unlimited, undeclared wars to reintroduce and push for a vote on the Selective Service Repeal Act[12], as a standalone bill and/or as a Senate floor amendment to the NDAA.

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[11] On the Congressional and public discussion of these proposals to date, see Edward Hasbrouck, "Congress debates women and the draft, but not war and the draft", June 20, 2024, <https://hasbrouck.org/blog/archives/002735.html>.

[12] H.R. 2509 and S. 1139, 117th Congress (2021–2022), <https://www.congress.gov/bill/117th-congress/house-bill/2509>.

RULE CHANGE AFFECTS VA ELIGIBILITY FOR LESS-THAN-HONORABLY DISCHARGED SERVICEMEMBERS — KEY TAKEAWAYS AND TIPS

By Ana Maria C.B. Bondoc

Effective June 25, 2024, veterans whose DD214s bear an other-than-honorable (OTH), bad conduct discharge (BCD), or fully dishonorable (DIS) characterization may have additional arguments that they are eligible for most VA benefits, even without a military record correction or discharge upgrade. This is through the operation of the separate character of discharge (COD) rules applied by the Department of Veterans Affairs (VA).[1] After tireless years of advocacy and legal action[2], the VA has finalized its first COD rule changes since 1980.[3]

The VA is touting one long overdue change to remove "homosexual acts" as a barrier to benefits, and generally encouraging previously denied veterans to re-apply[4]. This article organizes the COD rule changes into three key takeaways. It offers tips on how to prepare a strong COD application and links to forms and resources to help ensure quality representation for this neglected veteran population.

KEY TAKEAWAYS

COMPELLING CIRCUMSTANCES ARGUMENTS WILL BE AVAILABLE TO MORE APPLICANTS

Under the prior rule, VA would entertain limited mitigation and equitable arguments. An enumerated list of factors only applied to CODs where discharge was due to prolonged AWOL, defined as an unauthorized absence of over 180 consecutive days.

The new rule contains two important changes to how VA applies the "compelling circumstances" exception. First, VA will now allow more veterans to argue that this exception fits the facts of their case. Instead of being limited only to those discharged for prolonged AWOL, it is now available to veterans

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[1] 38 C.F.R. 3.12 is regulation implementing the statutory definition of a veteran for VA benefits purposes, found at 38 U.S.C. 101(2).

[2] Swords to Plowshares, National Veterans Legal Services Program, Veterans Legal Clinic, Legal Services Center of Harvard Law School, PETITION FOR RULEMAKING (Dec. 19, 2015), *available at* https://www.regulations.gov/document/VA-2020-VBA-0018-0130
PROPOSED RULE (Jul. 10, 2020) *available at* https://www.federalregister.gov/documents/2020/07/10/2020-14559/update-and-clarify-regulatory-bars-to-benefits-based-on-character-of-discharge
PRESS RELEASE (Oct. 24, 2023) *available at* https://www.swords-to-plowshares.org/post/2023-cod-lawsuit
WRIT OF MANDAMUS (Apr. 17, 2024) *available at* https://www.nvlsp.org/images/uploads/Renewed_Mandamus_Petition_-_As_Filed_(002).pdf

[3] 89 Fed. Reg. 32361 (Apr. 26, 2024)(to be codified at 38 C.F.R. 3.12), *available at* https://www.govinfo.gov/content/pkg/FR-2024-04-26/pdf/2024-09012.pdf It remains to be seen how these change will affect processing times, but a recent average for COD review completion was 233 days. https://news.va.gov/press-room/va-secretary-press-conference-09-22-2023/

[4] Press Release, VA EXPANDS ACCESS TO CARE AND BENEFITS FOR SOME FORMER SERVICE MEMBERS WHO DID NOT RECEIVE AN HONORABLE OR GENERAL DISCHARGE (Apr. 25, 2024) *available at* https://news.va.gov/press-room/va-rule-amending-regulations-discharge-determinations/

discharged for so-called 'moral turpitude' or 'willful and persistent misconduct'. This is potentially of increased significance because historically, these have been the most problematic regulatory bars.[5] Indeed, in reviewing a prior Administrative Decision on COD, advocates are most likely to encounter either the grounds of moral turpitude or willful and persistent misconduct, or both grounds as reasoning for the VA to deny basic eligibility to a less than honorably discharged veteran.

The second change is that VA fleshed out what factors go into deciding the compelling circumstances exception.[6] Under the old rule, there were only three enumerated factors. Advocates had argued the old rule contained a non-exhaustive list, but the result was often that the VA would ignore other evidence of mitigation. Now, the list has grown to these seven:

(i) Mental or cognitive impairment at the time of the prolonged AWOL or misconduct, to include but not limited to a clinical diagnosis of (or evidence that could later be medically determined to demonstrate existence of) posttraumatic stress disorder (PTSD), depression, bipolar disorder, schizophrenia, substance use disorder, attention deficit hyperactivity disorder (ADHD), impulsive behavior, or cognitive disabilities.
(ii) Physical health, to include physical trauma and any side effects of medication.
(iii) Combat-related or overseas related hardship.
(iv) Sexual abuse/assault.
(v) Duress, coercion, or desperation.
(vi) Family obligations or comparable obligations to third parties.
(vii) Age, education, cultural background, and judgmental maturity[7] along with two factors carried over from the prior rule.

Veterans should continue to submit proof that their service was "honest, faithful, and meritorious, and of benefit to the Nation,"[8] aside from the events leading to discharge. Examples of evidence in support of this factor include the more prestigious individual decorations; outstanding performance reviews; news articles or historical accounts; and letters in support from those who served alongside the veteran. These 'buddy letters' should avoid cliché, generalization, and repetition of information that is available elsewhere. They should focus on details of specific events or attributes the author observed, which support the conclusion that the applicant served with honor. In sum, the best approach is to both review the official military personnel file (OMPF) for in-service documentation to cite in a COD application, as well as collect outside documents to bolster the argument.

Likely less impactful is the other factor carried over from the old rule: that which allows evidence of a valid legal defense going to the substance of the misconduct leading to discharge. Because a COD application may be prepared years or decades after the end of service, the passage of time will present a barrier to collecting the evidence needed to show that this factor favors the veteran. The affirmative defense will also vary depending on the specific offense. This will require understanding of the version of the Uniform Code of Military Justice (UCMJ) in effect at the time of the offense. Again, under the old

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[5] Brooker, John et. at., BEYOND 'T.B.D.': UNDERSTANDING VA'S EVALUATION OF A FORMER SERVICE-MEMBER'S BENEFIT ELIGIBILITY FOLLOWING INVOLUNTARY OR PUNITIVE DISCHARGE FROM THE ARMED FORCES (Winter 2012). Military Law Review, Volume 214, Winter 2012, *Available at* https://ssrn.com/abstract=3348508
[6] 38 C.F.R. 3.12(e).
[7] 38 C.F.R. 3.12(e)(2).
[8] 38 C.F.R. 3.12(e)(1).

rule, these two factors had only been available to those discharged for prolonged AWOL. Now, advocates should remember to consider their applicability when representing a veteran discharged for a morally turpitudinous ("felony") offense, or for willful and persistent misconduct.

LOOKBACK PERIODS TIED TO MAXIMUM PUNISHMENT UNDER THE MANUAL FOR COURTS MARTIAL

Next we take a closer look at clarifications to the 'willful and persistent misconduct' standard. In changing this rule, VA's stated intent is to bring "both objectivity and liberalization."[9] However these goals may be in tension with each other. Objectivity comes from a new requirement to consult the Manual for Courts Martial and determine the maximum imposable sentences for each instance of misconduct leading to discharge. The rule change creates an artificial lookback period to determine if multiple infractions were too close in time, and thus too "persistent," to allow basic VA eligibility.

As of the new rule's effective date of June 25, 2024, either a two-year or five-year lookback period will apply.[10] The determining factor is whether misconduct was 'minor.' This is a bright line rule tying the definition of 'minor' to the severity of the potential punishment. If the offense carried a maximum of one year's confinement, or a general court martial could have sentenced a fully dishonorable (DIS) discharge for the offense, then VA will not consider it 'minor.' This is a departure from the old version of the rule, where opposite outcomes could be equally justifiable based on the same available evidence.[11]

On the other hand, a five year lookback period applies if the maximum sentence for misconduct could have included confinement of more than one year, or a fully dishonorable (DIS) discharge. Appendix 12 of the 2024 Manual for Courts Martial, the Maximum Punishment Chart, will be a useful starting point for those contending with multiple offenses leading to discharge. After review of the OMPF, advocates should clearly indicate to the VA if enough time passed between infractions to conclusively apply the new rule in the veteran's favor.

Advocates also should review the regulatory definition of "willful misconduct"[12] intended to clarify how military line of duty determinations interact with VA determinations of service-connected disabilities and injuries. This definition is untouched by the COD rule change discussed herein. Depending on the facts of the case, it may be helpful to point out that the misconduct amounted to "mere technical violation of police regulations or ordinances."[13] Also, it can help to show misconduct was not willful in VA's sense of the word, if there was lack of "conscious wrongdoing or known prohibited action"[14], or

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[9] 89 Fed. Reg. 32361,32367.
[10] 38 C.F.R. 3.12(d)(2)(ii).
[11] Congressional Research Service, VETERANS' BENEFITS: THE IMPACT OF MILITARY DISCHARGES ON BASIC ELIGIBILITY (Mar. 6, 2015) *available at* https://crsreports.congress.gov/product/pdf/R/R43928 The Applied Example of Specialist Malone discussed in Appendix C of this report is especially informative. In the span of a few months after return from deployment as a combat medic, SPC Malone was arrested twice for driving under the influence; for assault after a bar fight; and for testing positive for marijuana. Without the bright line rule to evaluate whether this misconduct was minor, or persistent, VA had the discretion to make a favorable or unfavorable decision on his COD. Though the new rules allow for an equitable argument that these represented compelling circumstances, they would prohibit arguments that the bar did not apply in the first place.
[12] 38 CFR. 3.1(n).
[13] 38 CFR 3.1(n)(2).
[14] 38 CFR 3.1(n).

questionable knowledge of "probable consequences."[15] In-service or post-service medical treatment records, as well as lay statements and the veteran's own attestation, remain relevant pieces of evidence. This is a good segue to the below section on arguing an applicant was "insane for VA purposes" due to mental illness.

RENEWED FOCUS ON MENTAL HEATH SYMPTOMS AND DIAGNOSES, WHETHER OR NOT THEY ARE SERVICE-CONNECTED

Advocates should not shy away from the VA definition of "insanity" when representing a veteran with mental health conditions.[16] It is especially useful for establishing eligibility for benefits if service ended in a BCD or DIS, and there are in-service indications of serious mental illness, even if diagnosis and treatment did not come until after discharge. As discussed above, the new COD rules now also explicitly include the topic of mental health and traumatic experiences in expanding the compelling circumstances exception.[17]

Note, VA confirmed that "mental or cognitive impairment need not be service connected," and that the new rule's list of diagnoses is "non-exhaustive."[18] Many applicants struggle to show that their mental illness was caused or aggravated by service, due to delayed access to education, diagnosis, and treatment. The rule change should encourage advocates to attempt the mental health mitigation argument anew, especially if a COD could result in eligibility for other benefits, armed with the knowledge that service-connection is not strictly required.

CONCLUSION

We call on folks to try every avenue to help veterans access the benefits they earned through service, including taking advantage of the COD rule changes. Even if the VA previously denied them, we take hope that these modifications, which were intended to be liberalizing, will indeed result in more veterans receiving lifesaving services from which they were previously excluded. Although it seems unlikely that VA will seek rescission of eligibility and terminate services to those who won favorable CODs under the old rules, advocates should remain vigilant for any reports from veterans who may fall victim to the uncertainty that follows any rule change.

Note: Ana Maria Bondoc is grateful to the Veterans Legal Clinic, Legal Services Center of Harvard Law School; Swords to Plowshares; and the National Veterans Legal Services Program for their being the tip of the spear on this issue. Special thanks to Karon L Rowden, Director of the Texas A & M School of Law Family & Veterans Advocacy Clinic, for her input and assistance on this article.

See Appendix, next page.

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[15] 38 CFR 3.1(n)(1).

[16] 38 C.F.R. 3.354. For an in-depth analysis of the ways in which the "insanity defense" for VA purposes is distinct from any military or civilian criminal law standard, see Stone, Caleb, MAKING THE BEST FROM A MESS: MENTAL HEALTH, MISCONDUCT, AND THE "INSANITY DEFENSE" IN THE VA DISABILITY COMPENSATION SYSTEM (Spring 2022) William & Mary Law School Scholarship Repository, *available at* https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3106&context=facpubs

[17] 38 CFR 3.12(e)(2)(i), (e)(2)(iii)-(v).

[18] 89 Fed. Reg. 32361,32365. The preamble highlights personality disorder and attention deficit hyperactivity disorder (ADHD) as the main examples of conditions that may support a compelling circumstances argument, yet would not be compensable as service-connected disabilities.

APPENDIX

- Maximum Punishment Chart - beginning at page 585 of this PDF. If multiple infractions let do an OTH, BCD, or DIS, use this chart as a starting point to determine if you can defeat the new bright line rule classifying minor and non-minor offenses, and defining "persistence"

- VA form 20-10206- Freedom of Information Act (FOIA) or Privacy Act (PA) Request
  Check the first box in item 17 to request a complete copy of the veteran's claims folder, also known as their c-file. The c-file will include all evidence considered and a copy of the VA's prior Administrative Decision on COD, if any. This form is useful if you lack VBMS access or have not yet offered representation to the veteran. See also VA forms 22-21 and 22-21a

- VA form 20-0995 – Decision Review Request: Supplemental Claim
  If review of the c-file indicates a prior unfavorable decision on COD, the rule change discussed above meets the requirement of new evidence to request a decision review. Though new evidence will not be required, it is likely advisable to submit medical records or buddy letters that may have been unavailable or considered irrelevant under the old rule.

- VA form 20-0986 – Eligibility Determination for Character of Discharge (COD) Request Form
  Internally used when the Veterans Health Administration (VHA), usually a VA medical center who admitted a patient on an emergency basis, seeks confirmation from the Veterans Benefit Administration (VBA) about continuing care upon discovering the patient has a less than honorable discharge. Use and awareness of this form varies from facility to facility.

MILITARY MEDICAL MALPRACTICE UPDATE

By Jeff Lake

The attempts to address harm caused by medical malpractice in the military continue to be a dismal failure.

By way of background, until recently, servicemembers have been prevented from bringing claims against the government for injuries incurred incident to service. The case of *Feres v. U.S.* (1950) 340 U.S. 135 reasoned that to allow such lawsuits would involve "the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." This decision still stands today, and its reasoning is known at the "Feres doctrine."

In 2020, instead of passing legislation that would abolish the Feres doctrine, Congress set up an administrative process whereby those injured by medical malpractice could submit claims for compensation.

A new analysis by military.com reveals that in the four years since such claims could be submitted, the military services have received 597 claims and approved only 20, for an approval rate of just 3 percent.

In October, the DoD raised the maximum payment for non-economic damages to $750,000, up from

$600,000. Of course, this would only apply if a claim were approved.

Congress' intent to set up a quick and simple process as an alternative to litigation to get these claims resolved is clearly failing. The legislation was named after Master Sgt. Richard Stayskal. He was misdiagnosed, and his cancer was only detected in its late stages. He submitted a claim under the new system which was, as usual, denied. He submitted an appeal, which has also been denied. In a statement to military.com, his wife said the family is "moving on."

An example of how the *Feres* doctrine continues to harm servicemembers can be seen in the current case of *Carter v. USA.* In this case, Staff Sgt. Ryan Carter underwent back surgery at Walter Reed National Military Medical Center in 2018. He suffered trauma to his spinal cord and is paralyzed from the chest down with limited use of his left arm. In order to make sure he was covered by *Feres*, the Air National Guard retroactively changed Sgt. Carter's status from inactive duty to active duty as of a date shortly before the surgery.

Sgt. Carter filed suit in Federal Court under the Federal Tort Claims Act. The case was dismissed and appealed to the Fourth Circuit. In March, the Court issued a two-paragraph per curiam decision affirming the lower court's dismissal under *Feres*.

In June, Sgt. Carter filed a Petition for Writ of Certiorari with the U.S. Supreme Court.

(Case No. 23-1281.) According to the Petition, the questions presented are:

> "1. Should the *Feres* doctrine be limited and not bar tort claims brought by service members alleging medical malpractice where the service member was under no military orders, not engaged in any military mission, and whose military status was retroactively altered from inactive duty to active duty post medical malpractice?
>
> 2. Does the *Feres* doctrine conflict with the plain language of the Federal Tort Claims Act and should it be clarified, limited, or overruled?"

It remains to be seen if this Petition will be granted by the Court. Given this Court's willingness to ignore precedent, it is not out of the question that it could take these questions up.

Finally, 15 current or retired servicemembers have filed claims under the Federal Tort Claims Act against the Army and the Air Force for failing to protect them from Major Michael Stockin, who was their doctor at Joint Base Lewis McChord. Major Stockin faces 52 charges of abusive sexual contact and faces court-martial in January. Under the Act, the military has six months to investigate the claims before a lawsuit can be brought. Given the current state of the *Feres* doctrine, it seems likely that these survivors will be left with no remedy for their harms.

As always, the MLTF will continue to monitor the law in this area. Please continue to subscribe to receive updated information.

NLG CONVENTION PREVIEW

By Jeff Lake

The 2024 National Lawyers Guild Convention will be held from October 30 – November 3 in Birmingham, Alabama. This will be an in-person convention – the first since 2019. Some events will also have a virtual online attendance option.

CLE ON MILITARY RESISTANCE, CONSCIENTIOUS OBJECTION, AND THE MISSION OF MILITARY LAW

The MLTF will be sponsoring a CLE on October 30. The CLE will include six one-hour sessions, each with a different panel. It will begin with a discussion of military resistance presented by resisters; and continue with separate sessions on military policies on dissent and protest; court-martial defense for resisters; complaints and redress of grievances; conscientious objection and other discharges; and a summary including why we (attorneys and legal workers/military counselors) do military law. It is designed for beginning practitioners and counselors, but will include discussion of value to those more experienced in this work. Each session will include commentary on working with and supporting resisters, as well as legal policies. The CLE will include a virtual attendance option.

OTHER ACTIVITIES

As of this writing, the Working Group on Anti-Militarism, of which the MLTF is a part, has submitted a proposal for a workshop or panel entitled "Anatomy of War Resistance – Supporting GI Resistance and Dissent."

Also at the Convention, the MLTF will be presenting a **resolution in support of Deported Veterans**. The NLG has previously passed a resolution regarding this issue, but there is a need to revisit and update the language in light of current developments.

Finally, the MLTF will be holding its **annual meeting** during or shortly after the Convention to discuss plans for 2025.

For convention information and registration, please go to 2024 #Law4ThePeople Convention (nlg.org).

ANNOUNCEMENTS

LOOKING FOR A FEW GOOD VOLUNTEERS

The Military Law Task Force has working committees in several different programmatic areas—anti-racism; gender justice, selective service; "readiness" for future wars and, inevitably, fund-raising. Plans are in the works for a new committee on climate change and militarism. If you are interested in any of these areas and would like more information or to volunteer, please contact Kathleen Gilberd at kathleengilberd@aol.com.

MLTF MERCHANDISE!

The MLTF now has a merchandise webpage for all of your gift-shopping needs! Just go to www.zazzle.com/s/mltf and check out items with our new logo. Friends and family will surely appreciate such a thoughtful gift. You may even want to treat yourself to some of these fine products. Proceeds from sales help fund our work, so please check it out.

THEY ALSO SERVED

They Also Served—Voices of the Overseas Law Projects from the Vietnam War, an anthology edited by Howard DeNike and Judith Mirkinson, is still available at a $30 offer. (It would make an excellent stocking stuffer in December, if you're thinking ahead.) If you want to order, send a check to: Howard De Nike, 700 27th Street, San Francisco, CA 94131.

A NEW ANTI-WAR WORKING GROUP

MLTF is doing an increasing amount of work around the US's perpetual wars and pending greater wars, implementing the Contingency Plan we developed over a year ago, and expanding to broader work - it's rather hard to keep up with US militarism!

We established a Contingency Plan Committee, recently renamed the Readiness Committee (apparently by someone who has heard too much military jargon). In addition to developing legal training materials in anticipation of greater numbers of military resisters and dissenters, the committee has spearheaded our work on the Appeal for Redress, discussed above, and reached out to the Guild's International Committee to form an IC-MLTF Anti-Militarism Working Group. The Working Group will focus on educational work in the Guild, involvement in the international campaigns against US bases and NATO, and the like. If you're interested in either the committee or the working group, please contact Kathy Gilberd at kathleengilberd@aol.com.

JROTC ORGANIZING PACKET

When the New York Times printed a story on December 11, 2022, about thousands of high school students being involuntarily enrolled in JROTC, it gave counter-military activists a welcome validation of what they had been observing and struggling against for years.

Activists decided to use the opportunity to consolidate their practice: Introducing TEC-MITS--Taskforce to End Compulsory Military Training in Schools. The result is a packet which includes facts, helpful articles, research tips, suggested actions and more. The packet can be accessed at endcom.org.

Although the packet focuses on JROTC, there are many examples of the creeping militarism in US schools. Are students able to opt-out of having their contact information forwarded to the military? Are students being required to take the ASVAB (Armed Services Vocational Aptitude Battery) test? Are military recruiters allowed unfettered access to students?

Please look over the packet, and contact TEC-MITS with any questions, concerns or comments at contact@endcom.org.

About the Contributors

Ana Maria Bondoc is the Senior Staff Attorney at The Veterans Consortium Discharge Upgrade Program, sponsored by DAV Charitable Service Trust. She trains and mentors *pro bono* attorneys to represent veterans with less than honorable discharges. She is not a party or representative in the litigation discussed herein.

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

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

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

About The Military Law Task Force of the National Lawyers Guild

ON WATCH is published quarterly by the Military Law Task Force of the National Lawyers Guild. Subscriptions are free with MLTF dues ($40), or $25 annually for non-members.

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

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

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

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

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

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

www.nlgmltf.org | **facebook.com/nlgmltf**

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

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

ONLINE: Visit **nlgmltf.org/support** to make a one-time or a recurring donation.

Thank you!