National Lawyers Guild Military Law Task Force

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ON WATCH

Critical Perspectives on Military Law

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RIDING 2024'S ANTI-WAR WAVE

By Chris Lombardi

Along with the masses demonstrating worldwide against Israel's wars, the movement includes a growing amount of veterans and military personnel—and former employees of the State Department and other federal agencies.

Such resistance is critical to any nonviolent revolution, says Erica Chenoweth, author of *Why Civil Resistance Works*. Chenoweth describes such "defections" as critical to any hope of real change; " nonviolent campaigns [can] create or exploit cracks within the regime's pillars of support (economic elites, business elites, security forces, state media and civilian bureaucrats)." Those defections are happening in real time, among military personnel and federal agencies.

At press time, Lebanon war flashes were overshadowing the Gaza conflict. But the responses from both military and civilian enforcers came in the aftermath of October 7, 2023, when Hamas brutalized Israeli civilians and the Netanyahu government responded by nearly destroying Gaza. Dozens have contacted the Center on Conscience and War seeking discharge based on US support for Israel's war; a number of them were part of the launch of the second Appeal for Redress (as described in the spring issue of On Watch). The Appeal then held a more international press conference, one that included members of Combatants for Peace: both ex-Hamas fighter Ahmed Helou and former IDF special forces officer Eli Hanan. At the press conference Hanan praised CFP's "way of nonviolence, the way of solidarity. the way of joint struggle against the occupation and against injustice." Both were congratulated by Veterans for Peace' Mike Ferner, a Vietnam-era conscientious objector who also praised "all the US active-duty CO applicants here."

I first learned about CFP from Stephen Eagle Funk, one of the founders of Iraq Veterans Against War (now About Face), nearly 20 years ago; those connections are just now being rediscovered, according to About Face's Shiloh Emelein. And About Face's recent convention included both members of the 9/11-era cohort and many of the hundreds who joined recently, most of them passionate about Israel/Palestine.

Veterans for Peace, which still hosts the Appeal, is a key forum for the new resisters; its summer conference was keynoted by Major Harrison Mann, whose public resignation from the Defense Intelligence Agency made him the summer's media darling. Mann's resignation was first posted on LinkedIn, the social-media platform that also hosted the declaration of State Department official Josh Paul. Paul, whose job at State included oversight of arms transfers to U.S. allies, was contacted by hundreds of other federal employees who were contemplating doing the same. Thus was born Service in Dissent, a joint statement by those who had resigned, issued on July 4, 2024. Its text may sound familiar to MLTF: "Each of us has had our own experience of the cascading failures of process, leadership, and decision-making that have characterized this Administration's intransigent response to this continuing calamity. Taken together, these paint a picture of an overlapping and systemic set of problems in this Administration's policy approach, and a series of warnings that have gone unheeded…" Those of us who remember the statements of the Vietnam-era "Brass Lambs" might hear history rhyming.

Josh Paul connected me to the July 17 webinar Voices of Conscience, where he spoke along with a fascinating mosaic of voices. These included Interior's Lily Greenberg, the first Jewish political appointee to resign in protest of US policy in Gaza; State's Annabelle Sheline, formerly a Foreign Affairs Officer at

the U.S. Department of State's Bureau of Democracy, Human Rights, and Labor's Office of Near Eastern Affairs; Tariq Habash, former policy advisor in the U.S. Department of Education's Office of Planning, Evaluation and Policy Development; and former military including Master Sergeant Mohammed Abu Hashem and Harrison Mann.

Mann spoke presciently about the Lebanon front, a conflict that "threatens to draw in the United States and put US forces, bases, embassies, and troops in the region at risk when we become a target because we look like we're a direct participant in that conflict." As things have evolved, many of the "Voices of Conscience" have become press contacts for mass-media stories while Feds United for Peace, which has openly joined Gaza protests since December, has called on the DOD IG to better investigate whether arms transfers to Israel are in violation of the Leahy Act.

"Challenging or disobeying orders is abnormal behavior for members of security forces," Erica Chenoweth noted in International Security in 2008. Nonetheless, "security force defections make nonviolent campaigns forty-six times more likely to succeed than nonviolent campaigns where defections do not occur." In that article, Chenoweth is talking mostly about defections much larger than what I've described above: "large-scale, systematic breakdowns in the execution of a regime's orders." One example she uses is Myanmar, where bureaucrats in 1988 gave room for mass protests, and even (as Gene Sharp noted) "some air force soldiers broke ranks to join the protests."

At press time, both Appeal and Service in Dissent are relatively small in membership; Congress and the Pentagon appear to barely know they're there. Support from MLTF, and the NLG overall, feels necessary to make those voices into a large-scale movement. Defections are necessary to turn discontent into a revolution; our work can help bring that day closer. ■

U.S. MILITARISM IS A LEADING CAUSE OF THE CLIMATE CATASTROPHE

By Marjorie Cohn

Editor's Note: This article was originally published by Truthout and is used by permission. US Militarism Is a Leading Cause of the Climate Catastrophe | Truthout

This week marks 23 years since George W. Bush declared a U.S.-led "war on terror" and the people of Afghanistan and Iraq are still suffering its consequences.

After the U.S. invaded Iraq, an estimated half a million Iraqis were killed and at least 9.2 million were displaced. From 2003-2011, more than 4.7 million Iraqis suffered from moderate to severe food insecurity. Over 243,000 people have been killed in the Afghanistan/Pakistan war zone since 2001, more than 70,000 of them civilians. Between 4.5 and 4.6 million people have died in the post-9/11 wars.

The U.S.'s "war on terror" also escalated the climate catastrophe, resulting in local water shortages and extreme weather crises that are only getting worse. In 2022, Afghanistan had its worst drought in 30 years and it is facing a third consecutive year of drought. "The war has exacerbated climate change impacts," Noor Ahmad Akhundzadah, a professor of hydrology at Kabul University, told the *New York Times*.

Meanwhile in the current moment, U.S. military assistance to Israel's genocidal campaign is also intensifying the climate crisis.

As we look back across more than two decades of the "war on terror," it is clear that many lives will be saved if we can bring a halt to U.S. military interventions throughout the world and simultaneously target the U.S. military's catastrophic contributions to the climate crisis that threaten us all.

"The U.S. military is the single largest institutional consumer of fossil fuels in the world," Taylor Smith-Hams, U.S. senior organizer at 350.org, a global climate justice organization, said at a workshop on the Impact of Current Wars on Climate Crisis at the Veterans For Peace (VFP) Convention on August 17. "Militarism and war are key drivers of the climate crisis," she added, citing fighter jets, warships and the U.S.'s massive constellation of military bases throughout the world.

CLIMATE EFFECTS OF THE "WAR ON TERROR"

On September 11, 2001, 19 men committed suicide and took roughly 3,000 people with them by flying two airliners into the World Trade Center, one into the Pentagon and one into a field in Pennsylvania. None of the hijackers hailed from Afghanistan or Iraq; 15 came from Saudi Arabia. Nevertheless, the Bush administration illegally invaded Afghanistan and Iraq and overthrew their governments, then killed, injured and tortured nearly three-quarters of a million of their people.

Beyond the terrible death tolls in both countries, a lesser known consequence of the "war on terror" was the exacerbation of the climate catastrophe, both in the countries targeted by the war and globally.

Since the 1997 Kyoto Protocol excluded military emissions from the counting of national emissions figures, U.S. military emissions are significantly undercounted. Although militaries are a significant source of carbon emissions, little is understood about their carbon footprint.

One of the first studies to expose direct and indirect military emissions as a result of combat was conducted by Benjamin Neimark, Oliver Belcher, Kirsti Ashworth and Reuben Larbi. They examined the use of concrete "blast walls" by U.S. forces in Baghdad, Iraq, from 2003-2008, the first five years of Bush's "Operation Iraqi Freedom," to measure the carbon footprint of the war. Concrete walls and barriers were also used in U.S. counterinsurgency operations in Kandahar and Kabul, Afghanistan, from 2008-2012 during "Operation Enduring Freedom." (Although these two wars did not bring freedom, their effects on the climate crisis are enduring.)

While occupying Baghdad, the U.S. military erected hundreds of miles of blast walls in order to control the urban population pursuant to its counterinsurgency strategy. "Effective weaponisation of concrete has an extraordinary carbon footprint," Neimark, Belcher, Ashworth and Larbi wrote. "The large carbon footprint comes mainly from the amount of heat and energy in cement production, the main ingredient in concrete."

The logistical movement of troops, convoys, weapons, supplies and equipment, as well as firepower itself, carry a direct carbon cost. Jet propulsion fuel for fighter jets is a major culprit. U.S. military fuel use is "one of the largest single institutional carbon polluters in modern history," the researchers wrote. But the indirect emissions in blast walls that result from the concrete supply chains that furnish the U.S. military are also substantial, Neimark and his coauthors argue.

"Parts of Afghanistan have warmed twice as much as the global average" *New York Times* international climate reporter Somini Sengupta wrote in 2021, and the war has intensified the impact of climate change.

Afghanistan ranks in the top 10 countries undergoing extreme weather conditions, including droughts, storms and avalanches, the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) reported a year ago. Afghanistan ranks fourth among countries with the highest risk of a crisis and eighth on the Notre Dame Global Adaptation Index of nations most vulnerable and least prepared to deal with climate change.

The story of what happened in Afghanistan provides a chilling example of the long-term consequences of war on climate change. Decades from now, Gaza, which was already vulnerable to the climate crisis before October 7, 2023, will invariably suffer increased climate effects from Israel's current genocidal campaign. "Climate consequences including sea level rise, drought and extreme heat were already threatening water supplies and food security in Palestine," Nina Lakhani wrote in a January article in *The Guardian.* "The environmental situation in Gaza is now catastrophic."

EMISSIONS FROM U.S.-AIDED ISRAELI GENOCIDE HAVE "IMMENSE" EFFECT ON CLIMATE CRISIS

Israel's ongoing genocide in Gaza has killed at least 41,000 Palestinian people, and likely many more. During the first two months of Israel's genocidal campaign, emissions that warmed the planet exceeded the annual carbon footprint of over 20 of the world's most climate-vulnerable countries, according to a study by Benjamin Neimark, Patrick Bigger, Frederick Otu-Larbi and Reuben Larbi. Roughly 281,000 metric tons of war-related carbon dioxide were emitted in the first two months of the war following October 7, 2023. More than 99 percent of these emissions resulted from Israel's bombing campaign and ground invasion of Gaza and U.S. supply flights to Israel. The climate cost was equivalent to the burning of at least 150,000 tons of coal. Almost half of the emissions were caused by U.S. cargo planes flying military supplies to Israel. Hamas rockets fired into Israel accounted for the equivalent of 300 tons of coal, an indicator of the asymmetry of Israel's war on Palestine.

"The role of the US in the human and environmental destruction of Gaza cannot be overstated," said Patrick Bigger, coauthor of the study and research director at the thinktank Climate + Community Project (CCP). During the VFP workshop, Bigger called it an "environmental Nakba."

David Boyd, UN special rapporteur for human rights and the environment, said, "This research helps us understand the immense magnitude of military emissions — from preparing for war, carrying out war and rebuilding after war. Armed conflict pushes humanity even closer to the precipice of climate catastrophe, and is an idiotic way to spend our shrinking carbon budget."

"From an ecological perspective, there is no such thing as an 'effective' or 'green' technology or military," Neimark, Belcher, Ashworth and Larbi, coauthors of the concrete blast wall study, found. While Israel touts itself as a global leader in climate change adaptation and mitigation, it is actually engaged in "greenwashing" — misleading marketing practices to make policies appear more environmentally friendly. Indeed, "Israel's green technologies are fundamentally structured by the Zionist project of appropriating Palestinian lands," Sara Salazar Hughes, Stepha Velednitsky and Amelia Arden Green argue in their 2022 article, "Greenwashing in Palestine/Israel: Settler colonialism and environmental injustice in the age of climate catastrophe."

Israel's systems of waste management, renewable energy and agricultural technologies ("agritech") are actually mechanisms for appropriation and dispossession of Palestinian territory, according to Hughes, Velednitsky and Green. Although Israel promotes itself as a responsible steward of Palestinian lands, "Israeli sustainability sustains settler colonialism."

"Climate crisis in Palestine cannot be detached from the Israeli occupation. The brutal and extensively documented apartheid regime that Israel imposes and maintains over Palestinians is fundamentally incompatible with the tenets of climate justice," Patrick Bigger, Batul Hassan, Salma Elmallah, Seth J. Prins, J. Mijin Cha, Malini Ranganathan, Thomas M. Hanna, Daniel Aldana Cohen and Johanna Bozuwa wrote for the think tank CCP.

Bigger and his coauthors cite Israel's settler-colonial campaign to replace native olive groves with nonnative plants that reduce biodiversity, increase susceptibility to fire and put unsustainable pressure on natural resources. Palestinians, they write, are much more vulnerable than Israelis to the effects of climate change. "While Palestinians are displaced to support Israel's renewable energy industry, Palestinian solar projects are destroyed as 'illegal constructions,' having failed to secure permits from Israeli authorities."

As the largest provider of military hardware to the Israeli regime, the U.S. government is "directly complicit" in Israel's genocide, ethnic cleansing and apartheid. "An immediate, permanent ceasefire and the end of US funding for Israeli apartheid and occupation is needed to halt the ongoing violence and address the driving forces of climate breakdown in Palestine," Bigger and coauthors wrote.

About 20 percent of the U.S. military's annual operational emissions is devoted to protecting fossil fuel interests in the Gulf, which is warming twice as rapidly as the rest of the world, according to Neta Crawford, author of *The Pentagon, Climate Change and War*. Nevertheless, the U.S. and other NATO countries are largely concerned with climate change as a national security threat. They don't focus on their contributions to it.

"Here in the U.S., our government continues to dump enormous amounts of money into death and destruction at home and around the world, while cutting social programs and refusing to adequately contribute to international climate finance commitments, always with the excuse that there isn't enough money," Smith-Hams said at the VFP workshop.

Our anti-militarism work should target the U.S. military's devastating contributions to the climate crisis. Our future depends on it. ■

For more information, see the Climate Crisis & Militarism Project of Veterans For Peace.

FIGHTING INVOLUNTARY DISCHARGE FOR 'CONDITION NOT A DISABILITY'

By Kathleen Gilberd

What was once Unsuitability Discharge is now called Conditions and Circumstances not Constituting a Physical or Mental Disability by the Department of Defense (DoD), having graduated from the name of Other Designated Physical or Mental Conditions. This administrative discharge is intended, at least in theory, to separate servicemembers who have medical or psychological conditions such as adjustment disorders or personality disorders, not serious enough for disability retirement but making performance of duties difficult. (For convenience, this article refers to it as Condition not a Disability, or CnD.)

Whatever the name, this has long been the military's preferred way to discharge people it wanted to get rid of, but who didn't have the courtesy to get into legal trouble and merit misconduct discharge. Such personnel include those with serious medical or psychological conditions who should instead be medically retired, a more cumbersome process for the command and the military medical system. They also include nonconformists, whistleblowers, dissidents and other troublemakers, as well as people who just don't suit their commands. In recent years, it has often been used as retaliation against personnel who report sexual assault or sexual harassment. At the same time, servicemembers who want out of the military often seek discharge through these provisions.

While CnD discharge provides a relatively easy way out for many military personnel, the discharge is not always wanted. Very commonly, servicemembers suspect--and independent doctors agree--that the diagnoses used for this discharge mask or are misdiagnoses of post-traumatic stress disorder (PTSD), major depressive disorder, anxiety disorder, or other more serious conditions. Since this discharge is administrative, it means less work for doctors, and commands often believe it means less work for them. Challenging an involuntary CnD separation may be essential to referral to the military's integrated disability evaluation system (IDES) and consequent medical retirement.

In other cases, personnel simply do not want to be involuntarily separated—perhaps because they are nearing retirement (which does not normally vest prior to 20 years of service), because they are concerned about the discharge's effect on career plans, or simply because they don't want to be forced out on the military's terms. In many cases, servicemembers realize that the discharge is actually retaliatory, and so oppose it as a matter of principle.

This article focuses on common legal and medical problems in involuntary CnD discharges, with suggestions for arguments in involuntary cases. Since adjustment disorder has become the most common basis for CnD, it will be used as an example here.

A LITTLE HISTORY

Some of us remember administrative discharges for Unsuitability, for servicemembers who had minor psychological problems (personality disorder was the go-to diagnosis then), conditions such as sleepwalking or enuresis, or simply a noticeable inability to adapt to military life. When critics discovered that some commands were 'diagnosing' personality disorders for this discharge without any input from medical providers, the regs were amended to require that there be medical diagnoses to support unsuitability discharges based on psychiatric conditions. Under current policy, all CnD discharges must be based on an opinion by a military medical provider.

In 1982, in a sweeping revision to administrative discharge regulations, DoD discarded Unsuitability and replaced it in part with Other Designated Physical or Mental Conditions (ODPMC). Non-medical problems causing poor performance were assigned to a new Unsatisfactory Performance discharge category, though it is not commonly used. Later, DoD changed ODPMC to CnD, and then to Conditions and Circumstances not Constituting a Physical or Mental Disability.

The services produced regulations with differing lists of conditions qualifying for ODPMC discharge, though all included personality disorders. That diagnosis remained the most common basis for this discharge for some years.

More recently, however, the public and Congress became aware that personality disorder diagnoses were frequently given where more serious conditions existed, most commonly PTSD for servicemembers who had served in combat. This meant the loss of military retirement pensions, and often VA pensions and healthcare benefits.

Congress responded to this trend by requiring medical review of personality disorder diagnoses when discharge was at issue. Psychiatric recommendations for discharge using this diagnosis had to be reviewed by medical peers and then by the service's Surgeon General's office for personnel who had been stationed in hazardous duty pay areas (combat zones) within the previous two years. Later, this review requirement was extended to personnel who had made unrestricted reports of sexual assault.

The additional medical review requirements made personality disorder discharges cumbersome for military doctors and commands. Within a matter of months of Congress' action, military health care personnel discovered that most of their patients did not have personality disorders after all—instead they had adjustment disorders, one of the other mental conditions which warranted CnD discharge. Congress eventually required additional medical review for all mental health conditions used for this discharge, particularly for those who had served in combat areas or had been the victims of military sexual trauma. At that point, rather than find yet another diagnosis that was somehow outside the broad scope of Congress' mandate, the military medical system stuck with adjustment disorders and made efforts to streamline the necessary review. Adjustment disorder now appears to be the most common basis for CnD discharge.

THE REGULATIONS

The controlling regulation for this discharge is DoD Instruction 1332.14; CnD discharge is covered in Encl. 3, Section 3.a.(8), as one of the Convenience of the Government discharges. The service regulations include the basic provisions of the Instruction but differ from each other and sometimes from the DoD Instruction, occasionally in important respects. It is important for advocates to review both the applicable service reg and the Instruction when beginning work on a CnD case.

Army policy is found in AR 635-200, section 5-14. The Army has retained the older name of Other Designated Physical or Mental Conditions, though it uses Condition, Not a Disability as the narrative reason for discharge on DD-214 forms. The Navy provisions can be found in section 1900-120 of the Naval Military Personnel Manual (MILPERSMAN), called Separation by Convenience of the Government—Medical Conditions Not Amounting to a Disability. Marine Corps policy is contained in Marine Corps Separation and Retirement Manual (MARCORSEPMAN) section 6203.2, Condition Not a Disability. The Air Force uses Department of the Air Force Instruction (DAFI) 36-3211, section 7.11, called Conditions that Interfere with Military Service.

ADJUSTMENT DISORDERS

As noted above, adjustment disorder appears to be the most common diagnosis utilized for this discharge. Statistical information on diagnoses is not available, but anecdotal experience would suggest that this is now an extremely common condition throughout the military.

The definition of and criteria for adjustment disorders are set out in the *Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association, Fifth Edition Text Revision (DSM-5-TR)*, which DoD 1332.14 and other DoD policies require military mental health providers to use. The DSM states in part:

Adjustment Disorders Diagnostic Criteria

A. The development of emotional or behavioral symptoms in response to an identifiable stressor(s) occurring within 3 months of the onset of the stressor(s).

B. These symptoms or behaviors are clinically significant, as evidenced by one or both of the following:

   1. Marked distress that is out of proportion to the severity or intensity of the stressor, taking into account the external context and the cultural factors that might influence symptom severity and presentation.

   2. Significant impairment in social, occupational, or other important areas of functioning.

C. The stress-related disturbance does not meet the criteria for another mental disorder and is not merely an exacerbation of a preexisting mental disorder.

D. The symptoms do not represent normal bereavement and are not better explained by prolonged grief disorder.

E. Once the stressor or its consequences have terminated, the symptoms do not persist for more than an additional 6 months.

Specify whether

F43.21 With depressed mood: Low mood, tearfulness, or feelings of hopelessness are predominant.

F43.22 With anxiety: Nervousness, worry, jitteriness, or separation anxiety is predominant.

F43.23 With mixed anxiety and depressed mood: A combination of depression and anxiety is predominant.

F43.24 With disturbance of conduct: Disturbance of conduct is predominant.

F43.25 With mixed disturbance of emotions and conduct: Both emotional symptoms (e.g., depression, anxiety) and a disturbance of conduct are predominant.

F43.20 Unspecified: For maladaptive reactions that are not classified as one of the specific subtypes of adjustment disorder.

Specify if:

Acute: This specifier can be used to indicate persistence of symptoms for less than 6 months.

Persistent (chronic): This specifier can be used to indicate persistence of symptoms for 6 months or longer. By definition, symptoms cannot persist for more than 6 months after the termination of the stressor or its consequences. The persistent specifier therefore applies when the duration of the disturbance is longer than 6 months in response to a chronic stressor or to a stressor that has enduring consequences.

In this writer's opinion, adjustment disorder is a rather strange condition on which to base administrative discharge. The disorder is by definition of less than six months duration. As noted in the DSM, an adjustment disorder lasting longer than that is a separate condition - a chronic adjustment disorder. Under current military policy, the latter diagnosis is grounds for disability processing and not appropriate for administrative discharge; surprisingly enough, it is not commonly diagnosed, even for servicemembers who have exhibited psychological problems for long periods of time.

In addition, an adjustment disorder is often amenable to treatment, unlike the military's former go-to diagnosis of personality disorder. Given DoD's "investment" in training and maintaining personnel, and its current difficulties with recruitment and retention, it makes little sense, on its face, to discharge servicemembers who, even without treatment, can be expected to return to full duty in a relatively short time. (It does, however, fit well with this author's cynical view that the discharge is a way to get rid of unwanted or troublemaking personnel.)

The Army, alone of the services, mentions the distinction between chronic and other adjustment disorders in its administrative discharge regulation. It is also alone in requiring treatment prior to discharge. (AR 635-200, Section 5-14.a.(6).) Discharge is only appropriate if performance deficiencies persist despite treatment, or the member refuses treatment.

As noted above, military health professionals are required to adhere to the DSM. Nonetheless, it is not uncommon to find adjustment disorder diagnoses where the patient does not meet the diagnostic criteria, or where doctors exaggerate or occasionally invent symptoms to attempt to meet those criteria. Medical recommendations for discharge should be read carefully, reviewed by servicemembers for accuracy, and always compared to the DSM.

The *DSM-5-TR* points out in its "Differential Diagnosis" section that symptoms of other conditions are sometimes attributes of adjustment disorder. At the same time, it notes other diagnostic conditions that should be considered instead of or in addition to adjustment disorder. These include major depressive disorder, posttraumatic stress disorder and acute stress disorder, personality disorder, bereavement, psychological factors affecting other medical conditions and normative stress disorder. Some of these conditions may be grounds for disability proceedings and medical retirement, while others are not a basis for separation at all.

In a section on "Comorbidity," *DSM-5-TR* notes that adjustment disorder

> "can accompany most mental disorders and any medical condition. The diagnostic workup should not stop at adjustment disorder unless no other condition is found."

ADJUSTMENT DISORDER-BASED DISCHARGES ARE ABOUT PERFORMANCE

Normally, the mere existence of an adjustment disorder or other mental health condition is not grounds for CnD discharge. Rather, it is the effect on performance of duties that provides the basis for separation. DoD 1332.14, Encl. 3, section 3.a.(8).(c).1 states that the mental health professional's diagnosis must find "that the disorder is so severe that the member's ability to function effectively in the military environment is significantly impaired." The service regulations are in accord and also require that commands find a link between mental health problems and performance.

The disorder's effect on functioning cannot be assumed. The following section of the Instruction, (c).1.b, states that discharge is only authorized when such deficiencies exist and are clearly documented:

Observed behavior of specific deficiencies should be documented in appropriate counseling or personnel records. Documentation will include history from supervisors, peers, and others, as necessary to establish that the behavior is persistent, interferes with assignment to or performance of duty, and has continued after the enlisted Service member was counseled and afforded an opportunity to overcome the deficiencies.

Again, the service regulations are all in accord.

The effect on performance must be emphasized in the commander's recommendation for discharge; the mental health provider's conclusion, while essential, is not sufficient.

The military's problem here is that personnel who develop conditions like adjustment disorders, often in response to the stresses and oppressive nature of military life, don't always have deficiencies in performance. Commands have been known to solve this problem by inventing or exaggerating deficiencies or, occasionally, by ignoring that requirement of the regulations (though separation authorities will sometimes reject discharge recommendations lacking this documentation).

Members may seek mental health treatment on their own but may also be referred by their commands when performance problems become apparent, members behave oddly, or commands invent problems. Where mental health evaluations are command-initiated, the commander, command medical officer, or another official generally provides a written referral for the mental health provider which explains the need for an evaluation. Commands have been known to be quite creative in describing alleged problems, odd behavior and performance deficiencies, and mental health providers are more likely to believe the command referral than patients' statements. Needless to say, this can have a significant affect the doctor's description of problems and diagnosis.

SPECIAL REVIEW FOR VETERANS OF COMBAT AND SURVIVORS OF SEXUAL ASSAULT

After considerable public outcry about under-diagnosis or misdiagnosis of PTSD, depression and other serious conditions as personality disorders and then adjustment disorders, DoD was compelled to provide extra review in cases involving combat veterans and, later, survivors of sexual assault. DoD 1332.14, Section 3.(c) now states:

"4. For enlisted Service members who have served or are currently serving in imminent danger pay areas, a diagnosis of personality disorder or other mental disorder not constituting a physical disability will:

a. Be supported by a peer or higher-level mental health professional

b. Be endorsed by the Surgeon General of the Military Department concerned

c. Address post-traumatic stress disorder (PTSD) and other mental illness comorbidity. Unless found fit for duty by the disability evaluation system, a separation for a mental disorder not constituting a physical disability is not authorized if service-related PTSD is also diagnosed.

5. For enlisted Service members who have made an unrestricted report of sexual assault or who have self-disclosed that they are the victim of a sex-related offense, an intimate partner violence-related offense, or a spousal-abuse offense during service, a diagnosis of a mental health condition not constituting a physical disability will be corroborated by a peer or higher-level mental health professional and endorsed by the Surgeon General of the Military Department concerned."

Previous versions of this Instruction included a time limit, so that the special review provisions applied only to personnel who had served in a combat area or been sexually assaulted within 24 months of initiation of discharge proceedings. Now, however, the time limit has been removed.

This Instruction is, of course, controlling, and service regulations are generally in accord. Some require a greater amount of review than DoD. But some differences in the regulation limit the rights of members facing discharge, and there it is important to point out that the DoD policy must be followed. See DAFI 36-3211, Sections 3.30 and 3.29; MILPERSMAN 1900-120, Section 1.i and Note 1; AR 635-200, Chapter 5-14.e and 5-14,*l*.(1) and (2); and MARCORSEPMAN 6203.2.b.(1) and (2).

COUNSELING AND REHABILITATION

The regulations require in most cases that members diagnosed with adjustment disorder being considered for discharge must be provided counseling and an opportunity to overcome deficiencies prior to the initiation of discharge proceedings.

Some exceptions exist for conditions where deficiencies cannot be overcome. Most services do not define this, though MILPERSMAN 1900-120.c lists asthma or allergies as examples. In some of the regulations, to avoid rehabilitation, the medical professional must opine that members' conditions are such that deficiencies will inevitably continue, so that counseling and an opportunity to overcome deficiencies are unnecessary. The commander makes the final decision about waiving rehabilitation, based on the doctor's recommendation.

It is worth noting that "counseling" in this context is nothing like the counseling one would expect in a civilian workplace setting or with a medical provider. Counseling here means that a command representative tells members what they are doing wrong, where he or she what must be done to correct it, and where they can find assistance. Usually this involves a lot of yelling. This counseling is accompanied by a formal written chit explaining the problems, expected corrective action and available support. In some cases, commands erroneously counsel members that they must overcome the psychological disorder, rather than deficiencies in performance.

Counseled members are told to sign an acknowledgement of receipt of the counseling, though they may refuse to do so. The form also has a section for members to state whether or not they wish to rebut the counseling, often wise for those who intend to challenge the discharge.

Following the counseling, members must be given an opportunity to overcome the deficiencies noted in the counseling statement (this is usually extended to include any other deficiencies the command can

find, whether or not mentioned in the counseling). DoD 1332.14 simply says that members must be given "an opportunity" to overcome problems. AR 635-200 requires that the command afford members "ample opportunity." The Navy requires that they be given a "reasonable" opportunity, and the Air Force uses the DoD language. But the Marine Corps, being the Marine Corps, looks at this from a different perspective, saying at MARCORSEPMAN 6203.2.c:

Some conditions may warrant that the Marine be provided a reasonable opportunity to correct any performance deficiencies prior to the initiation of administrative separation; and commanding officers, with the advice of appropriate medical providers, will make these determinations. In such cases, paragraph 6105 requires counseling and a reasonable opportunity to correct deficiencies, and failure to take corrective action must be documented. The opportunity to correct deficiencies need not extend for a protracted observation period. At any time after formal counseling, Marines repeating or continuing behaviors that interfere with the performance of their duties or disrupt the good order and discipline of their unit may be processed for administrative separation.

Commands sometimes have problems finding continuing deficiencies. Exaggeration or creation of performance problems is not uncommon, and some commands, besides those in the Marine Corps, assume that a single slip in performance, or a symptom of the medical condition that have nothing to do with performance of duties, are enough to show that rehabilitation has failed.

CND DISCHARGE PROCESS

The discharge process is handled under the Notification Procedure (DoD 1332.14, Encl. 5) rather than the Administrative Discharge Board Procedure, so that members generally have fewer rights and opportunities to challenge the discharge.

This process begins when members are given written notice that they are being considered for discharge. The notice must state the reason for discharge, the regulation governing that reason and, significantly, the specific circumstances on which the discharge is based. Commands often fail to include this last requirement, leaving the member s unaware or unsure of what they may have done wrong and rendering the notice defective, in this writer's view. In other cases, commands will list the psychiatric disorder as the specific circumstance, failing to notify members of defects in performance. The notice must also state the least favorable character of discharge which may be given, and the character which the commander will recommend.

In addition, the notice sets out the rights available to members. These normally include the right to consult with military counsel, to bring in civilian counsel at their own expense, to see the documents to be provided to the separation authority supporting the discharge, to make a statement on their own behalf, or to waive all of these rights. Only servicemembers with six years or more of service may demand an administrative discharge board hearing to challenge this discharge. (The Air Force extends this right to non-commissioned officers.) On the notification, or a separate document presented at the same time, members can initial the rights they elect.

Command representatives have been known to encourage members to waive their rights, saying, for example, that they would risk a worse discharge, that the process would be slowed down by weeks or months, or that in the speaker's 30 years of experience demanding rights has never made any difference. Needless to say, waiving rights saves the command some work, but has virtually no advantage for members and may work to their disadvantage if there are any grounds to challenge the discharge.

CONSULTING MILITARY COUNSEL

The regulations state only that members have the right to consult military counsel, but do not say that they are entitled to full representation by a JAG. (In the case of a member entitled to a board, JAG counsel is assigned to provide full representation.) Many JAGs consider this a hard limit on the assistance they may offer. However, even military counsel who provide no more than a consultation or two may be very helpful in identifying problems in the discharge proceedings and advising members about the content of their statements.

Some JAGs go beyond such bare-bones consultation and may assist in gathering and reviewing documentation to support retention, writing or reviewing members' statements, or even negotiating with the command about the wisdom of pursuing the discharge.

Many enlisted personnel are distrustful of JAG counsel and prefer to avoid them. However, even if the member chooses to work with civilian counsel, talking with a defense or personal representation JAG can be very useful. JAGs tend to know the commands in their area and so have an idea of what arguments do and don't have an impact. Similarly, they may be familiar with local command interpretation of the discharge procedures and what procedural steps commands are likely to skip.

If they are willing, JAGs can talk with potential witnesses about letters of support or letters challenging performance allegations. The trend is for JAGs to give members a template or checklist of things witnesses should include in general support statements. More personalized statements are usually much more helpful, and JAGs can provide specific information or areas of discussion that will be most helpful in statements. Sometimes members will have difficulty accessing higher-ranking witnesses, find them intimidating and uncooperative, or run into a witness's assumption that discharge is a foregone conclusion, so statements are a waste of time. JAGs are more likely to get around these problems and elicit statements from other officers.

CIVILIAN COUNSEL AND COUNSELORS

Civilian advocates can play a larger role in these proceedings--particularly larger than JAGs who believe their only obligation is to meet with members and advise them of available rights. In some cases, it is useful for civilian counsel to speak directly with commanding officers or their staff judge advocates or legal officers about the wisdom of pursuing the discharge. Where there are significant questions about the validity of the diagnosis, the presence of other diagnoses requiring disability proceedings, etc., commands can sometimes be persuaded to back away from administrative discharge.

Civilian counsel can also be extremely helpful in crafting statements opposing the discharge, as discussed below. While JAGs will occasionally write or edit statements, they seldom look at these as legal briefs, and so may fail to discuss medical issues, factual errors or failures to follow the regulations that could invalidate the discharge process or, at a minimum, require command to start over and do it right.

OBTAINING DOCUMENTS TO BE FORWARDED TO THE SEPARATION AUTHORITY

This is a pretty basic right for members who wish to challenge their discharge, yet commands frequently ignore it entirely or provide documentation only after the discharge packet has been forwarded to the separation authority for a final decision. When this occurs, members have no way to know what the separation authority will see, exactly what performance is at issue and what commanders will say in their discharge recommendation. This severely limits members' and advocates' ability to craft useful statements.

If the documents are not provided early in the process, members or counsel should consider a written request for the documents before the deadline for submission of the statement. If this is ignored or denied, it is worth noting that fact in the statement, with an additional request for immediate discovery and an opportunity to amend the statement when the documents are provided.

On occasion, commanding officers will write an "endorsement" to address members' statements, sometimes adding alleged additional performance deficiencies or opinions about the adjustment disorder. It may be useful to include a request for any endorsement or other subsequently added documentation, and an opportunity to respond.

SUBMITTING A STATEMENT

The common wisdom is that military commands and separation authorities give little or no attention to written statements opposing discharge. This writer hopes that statements with substantive legal and factual arguments may receive more attention. A note that statements have been copied to a Member of Congress and/or a civilian advocacy group may also help in this respect. And, of course, where members are unsuccessful in preventing the discharge, statements create an important paper trail for discharge review.

In most cases, statements must be submitted within two working days of receipt of the notification of discharge, seriously limiting the member's or counsel's ability to put together anything substantive.

When statements are limited in this way, clients and counsel may lose a valuable opportunity to raise legal issues about notice and the right to respond, deficiencies in the psychological evaluation and recommendation for discharge, mischaracterization of behavior treated as deficiencies, and failure to follow some of the very specific requirements of the regulations. Where possible, it is important to begin preparation of statements and gathering of documentation before notification. (Members are generally told they are facing discharge well before they are formally notified. A psychiatrist's or psychologist's recommendation for discharge is usually a good starting point.)

In some cases, commands will offer additional time to prepare statements, an offer which should be documented if at all possible. Where commands are not helpful, counsel or clients can make a written request for an extension of time, noting the complexity of the case, the need to allow independent experts to prepare reports, and/or difficulties in contacting witnesses. Where such requests fail, the requests and reasons should be included in the statement, along with a request to amend the statement when additional evidence becomes available.

Experienced civilian attorneys or counselors can turn a mere "statement in his or her own behalf" into a legal brief raising regulatory and constitutional issues, discussing flaws in the diagnosis and alleged performance problems, inadequacy of counseling and rehabilitation, etc. This can be accompanied by members' more personal statements, statements from coworkers and superiors discrediting the diagnosis and the (hopefully enumerated) performance deficiencies, and civilian psychological reports giving a correct diagnosis (if any exist) and pointing out flaws in the military medical report and the command recommendation. Character letters are valuable, particularly if they address and dispute the alleged performance difficulties or symptoms ascribed to members by military doctors.

ADMINISTRATIVE DISCHARGE BOARD HEARINGS

As noted above, servicemembers are entitled to a hearing before an administrative discharge board for this discharge only if they have served for six years or, in the Air Force, are non-commissioned officers.

Board hearings create a stronger possibility of retention, so that members opposing CnD discharge should almost never waive the right to a hearing if it is available.

Interestingly, the Navy has created an unusual impediment for administrative boards in these cases. Note 2 to MILPERSMAN 1900-120 states that:

Per MILPERSMAN 1910-514 and 1611-010, if an administrative board or [officer] board of inquiry is required…the board may not disregard or change the approved diagnosis of a medical officer.

At first glance, this might seem an insurmountable problem. However, the section does not prevent the board from also considering other diagnoses of more serious conditions made by other military or civilian mental health professionals. It does not prevent evidence and argument that the "approved diagnosis" is not severe enough or does not interfere with performance enough to warrant separation. One could also argue that the provision is not in keeping with the DoD Instruction, which places no such limits on boards. And counsel could also argue, simply as a matter of common sense, that a sloppy, biased or obviously incorrect military report should not trigger this provision—presumably the Navy does not ask board members to accept false diagnoses.

CHALLENGING THE DIAGNOSIS

As noted above, comparison of military psychiatric reports to the DSM may provide significant arguments against the discharge, demonstrate the need for further psychiatric evaluation to rule out more serious disorders, or show that the medical provider has not accurately described symptoms, behavior or history.

Military patients are entitled to a second opinion through the military's health care system. While these can be useful, there is a tendency for military psychiatrists and psychologists to support each others' diagnoses, creating the risk of two separate reports diagnosing adjustment disorder.

If at all possible, independent civilian evaluations should be obtained. While commands and separation authorities generally give civilian psychiatric or psychological reports less credence than evaluations by military doctors, they can have some influence. A good *curriculum vitae* can be helpful in this regard, particularly if the expert has past military or VA experience or has done extensive work with military or veteran patients.

These reports can sometimes be useful in persuading military doctors to take a closer look at cases, particularly when the civilian evaluator points out inconsistencies or other problems in the military evaluation or makes diagnoses of more serious psychological problems requiring IDES processing. Occasionally, civilian evaluations can affect the command's decision to proceed with a discharge because of problems in the military report.

Even without a second opinion, servicemembers and counsel or counselor can challenge the diagnosis in members' written statements. It is worth looking at the command referral to the military psychologist or psychiatrist, if there is one, and review the military evaluation itself for factual errors, exaggeration of performance or other problems, misstatements about the members' history, misstatements about symptoms, and the like. If possible, these can be backed up with documentary evidence from members' records or statements from individuals who know them, showing, for example, that the member doesn't isolate herself and avoid social contact, that she has not spoken repeatedly about suicide or that he never appeared sad or tearful.

It is useful to look at the DSM's section on differential diagnoses for adjustment disorders, to see what other conditions should have been considered and/or may be masked by the adjustment disorder. In addition, it is worth taking a look at the DSM criteria for adjustment disorder, to see if the military doctor correctly found enough criteria to make the diagnosis.

In the Army, under chapter 5-14.d of the regulation, the mental health provider is required to document the applicable diagnostic criteria in his or her report:

"the specific diagnostic criteria for the condition used as the basis for the Soldier's separation action in accordance with the most current edition of the Diagnostic and Statistical Manual of Mental Disorders. A statement indicating that the Soldier's disorder is of sufficient severity to interfere with the Soldier's ability to function in the military must be included. The diagnosis must be established by a privileged mental health provider as defined in DoDI 6490.04. The installation director of psychological health or designee will corroborate the diagnosis and sign the DA Form 3822 (Report of Mental Status Evaluation)."

Other service regulations do not require discussion of criteria, but counsel can certainly argue that such discussion is essential to a thorough report, and/or that the criteria were not discussed because they did not match members' symptoms.

While most military medical discharge recommendations follow specific templates conforming to the discharge regulations, reports can be attacked if they fail to link the disorder to performance deficiencies or to state the is so severe that it causes substantial impairment in performance.

Occasionally military health care providers allow racial or gender discrimination or other improper considerations to taint their conclusions. This is not always easy to prove, as the clearest indications of bias show up in patient interviews, tending to be masked in reports. However, the DSM includes some discussion of biases and cultural issues that should be considered in evaluations, and these can be useful if, for example, evaluators treat culturally appropriate behavior as symptoms.

CHALLENGING THE DISCHARGE PROCESS

Flaws in the notification procedure used for CnD are common. On occasion the notification and statement of awareness/waiver of rights form do not list all of the rights available in the discharge proceeding. Although it is rare, members are sometimes not advised of the right to consult military counsel, or the command ignores the demand to see counsel and rushes the rest of the procedure through without any opportunity to see a JAG.

More commonly, notifications fail to provide adequate notice of the basis for the proposed discharge. The DoD Instruction requires that members be notified of the basis and specific circumstances warranting discharge, yet performance problems and, occasionally, the alleged diagnosis, may be missing from notifications. Members in this situation will have trouble crafting an adequate response, not knowing what problems they supposedly have. In some cases, where more than one diagnosis has been made, members may be unaware of that basis for discharge, and so have difficulty pointing out flaws in the diagnosis at issue. Needless to say, this does not meet the notice requirements of the DoD or service regulations, nor constitutional requirements.

When such errors are pointed out, commands could simply start the process over with a new notification. Discharge isn't prevented, but members and advocates gain additional time to prepare a

statement, gather documentation, and seek expert opinions. (It is sometimes tempting not to raise this issue, leaving it for an argument in later discharge review. However, the Discharge Review Boards and Boards for Correction are likely to claim that the error should have been raised in the discharge proceedings, and that the failure to do so waives the issue on review.)

As noted above, members are not always given the documents to be forwarded to the discharge authority until after that has already been done, making it impossible, for example, to raise errors or factual mistakes in the command recommendation for separation, to object to inclusion of material from a prior period of enlistment, etc. The problem, and its violation of regulations and due process, should be addressed in members' statements.

CHALLENGING ALLEGED PERFORMANCE PROBLEMS

Since the discharge must be based on problems in performance or conduct, and since commands sometimes ignore this requirement, members and counsel may want to discuss prior good performance in their statements and support that with documentation—good performance evaluations, commendations or letters of appreciation, and letters from current and former coworkers and superiors about the quality of the members' work.

When there are real performance or conduct problems in members' records, it may be that they are attributable to something other than an adjustment disorder. Some problems are more easily linked to serious conditions such as PTSD or depression (and here expert opinion on the relationship of performance and other medical condition is important). Where there were changes in performance after a triggering event such as sexual assault or a PTSD stressor, earlier indicia of good performance would be particularly important.

Sometimes real performance problems, or problems invented by superiors, are linked to retaliation for whistleblowing, reporting sexual assaults or sexual harassment, or other proper complaints by members. If retaliatory intent can be shown, members may be protected under the Military Whistleblower Protection Act and implementing regulations, though proving such intent can be difficult. And sometimes alleged performance problems are created or exaggerated due to racism, sexual discrimination, or superiors' personal dislike for members. Again, showing intent may be difficult, though patterns of racist or sexist behavior in the unit, damning "command climate surveys," or biased statements by the superiors may be raised as arguments.

Where members are challenging administrative discharge in order to argue for referral to IDES, careful thought must be given to challenging performance problems. In some cases, it may be important to acknowledge the problems but argue and document their relation to a medically unfitting condition rather than adjustment disorder. If members are too successful in challenging allegations of performance problems, the command may try to use this in order to claim that the member is fit for duty and should not be medically retired.

CHALLENGING INADEQUATE COUNSELING AND REHABILITATION

Only in rare circumstances may commands ignore the counseling and rehabilitation requirements contained in the DoD Instruction and all service regulations. In the great majority of cases, members must be given formal written counseling, as described above, and then provided an opportunity to overcome deficiencies. This can be difficult when, as often happens, the counseling form references only diagnoses, omitting mention of any performance problems (sometimes for the simple reason that there are no performance problems). Rebutting inadequate, unclear or inaccurate counseling statements may

be useful. This should not be done on the spot, as the counseling officers may demand, but rather prepared later with the assistance of counsel or counselor and should be emphasized in members' statements.

Commands sometimes ignore, or conceivably misunderstand, this requirement and initiate discharge proceedings only a few days after counseling, so that there is no opportunity to overcome problems or demonstrate good performance. They may also ignore the requirement that post-counseling performance problems be documented and submitted with discharge packets. And, in some cases, they may allege performance problems that have no basis in reality. Again, commands can cure such errors by backing up and starting over, but this gives members the opportunity to present further good performance. Members and counsel may also make the argument that the command is biased and seeking discharge without regard to the regs, is unfamiliar with the requirements of the regs and hence the criteria for discharge, or that the command is acting out of malice. Here, too, detailed discussion in members' statements is important.

Rehabilitation should sometimes include transfer to another unit. Failure to provide it is particularly important, and can be an effective argument, when a mental health provider has pointed to a stressor or other problem in members' workplaces as a cause or exacerbation of the disorders.

As noted above, on occasion commands fail to forward members' statements and documentation to the separation authority along with the rest of the discharge packet. This would not necessarily be apparent from documents provided to members. Diligent JAGs and civilian counsel are well advised to check with the separation authority's Staff Judge Advocate to ensure that the packet is complete. This also provides an opportunity to request any command endorsement or other documents added to the discharge packet after the members' statement.

CONCLUSION

The CnD discharge is problematic – perhaps mostly so when it involves the diagnoses of "adjustment disorder." The discharge process itself is tricky and may involve multiple medical and/or psychological diagnoses. As discussed, there is a role for civilian counsel and counselors to assist servicemembers going through the process. The MLTF stands ready to provide referrals and to provide advice for those working on these cases. As always, please maintain your membership with the MLTF and look for updates in future issues of *On Watch* concerning this discharge and others as circumstances warrant. ■

MILITARY ANTI-EXTREMISM REGULATIONS UPDATE

By Chris Lombardi

New, tighter anti-extremism regulations were recently issued by both the Army and the Marine Corps, urging commands to immediately alert superiors about any reports of extremist or gang activity, and laying out explicit disciplinary options against such activity.

CONTEXT: FLASHBACK 2021

Both Army Directive 2024-07 (Handling Protest, Extremist, and Criminal Gang Activities) and the Corps' MARADMIN 385/24, refer directly to the 2021 National Defense Authorization Act. Following the December Instruction 1325.06, "Handling Dissident and Protest Activities Among Members of the Armed Forces," the 2021 NDAA mandated that "the Secretary of Defense shall establish policies, processes, tracking mechanisms, standard across the covered Armed Forces, and Reporting Requirements for Supremacist, Extremist, and gang activity." And as Jeff Lake noted here in early 2022, that NDAA also contemplated new UCMJ charges:

> Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report containing such recommendations as the Secretary considers appropriate with respect to the establishment of a separate punitive article in chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), on violent extremism."

That NDAA also gave DOD's Inspector General responsibility for keeping track of it all, with a section on "Inspector General oversight of diversity and inclusion in Department of Defense; supremacist, extremist, or criminal gang activity in the Armed Forces." That included mandatory reports on identified violators of 1325.06, many of which we've covered in *On Watch.*

WHY NOW?

In December 2023, DOD IG's report included "investigated 183 allegations of extremist activity among service members in the past year, including 78 cases of troops advocating for the overthrow of the U.S. government… That's 37 more cases of than in 2022, which was the first year the IG issued a report on the subject." And that report was before signs the problem is getting worse:

- Airman Jack Teixeira, convicted last spring of leaking classified information on Discord, was twice denied a gun permit after making violent, racist threats; that Discord server was among the "Distributed Hate Networks" documented by researchers in 2021.
- *Stars and Stripes* reported that the Institute of Defense Analysis found "the system of granting security clearances to personnel is "outdated and inadequate" and if it is not updated, the Pentagon "remains at risk of unknowingly permitting persons who may have engaged in violent extremist conduct to enter and encumber privileged positions as civilian employees or contractors in the military community."
- We the Veterans, along with the University of Maryland and DHS' National Consortium for the Study of Terrorism and Responses to Terrorism—better known as START-- issued a pre-election briefing on domestic extremism that found that "military veterans in the anti-government movement have been connected to a disproportionate number of mass casualty plots and

attacks.[1]" and that " the rate of military service among anti-government extremists was more than four times the national average of military service in the adult population, which is estimated at 6 percent.

- START told *The War Horse* that "people in the military community who have committed criminal extremist acts tend to favor white supremacist and anti-government rhetoric," adding that "far-right extremists generally are significantly more likely to enact violence than those on the far left."

It's not hard to see why "anti-government extremists" is distinguished from "white supremacists" in START's report; backlash has been fierce against anti-racist efforts. And we've reported in *On Watch* about how backlash prevented any anti-racism language from being included in successive NDAAs. But it couldn't stop the military bureaucracy from following the orders it was given in 2021, in its slow relentless fashion. Thus the new regulations issued in the summer of 2024.

THE NEW REGS ARE LARGELY ABOUT *WHEN* AND *HOW* TO RESPOND TO REPORTS OF EXTREMISM

Army. The Army memo of June 2024 regs start with a long list of prohibited activities, including attending meetings of extremist groups, fundraising, "Advocating widespread unlawful discrimination based on race, color, national origin, religion, sex (including pregnancy), gender identity, or sexual orientation" and "Engaging in electronic and cyber activities regarding extremist activities, or groups" including likes and reposts..

What should commanders do when alerted to such behavior? For starters, "Commanders will report all allegations of active participation in extremist activities to USACID, U.S. Army Counterintelligence Command, the servicing legal advisor or Staff Judge Advocate, and the servicing IG" and "will report all allegations that a Soldier has actively participated in extremist activities to their servicing Army IG office, including follow-up information as required." If the allegations are confirmed, options include court-martial, separation in lieu of, and report to law enforcement. Significantly, "Commanders will ensure that a Soldier's permanent record in the Army Military Human Resource Record (AMHRR) is annotated for Soldiers who receive a court-martial conviction, nonjudicial punishment, or GO memorandum of reprimand for actively participating in extremist activities." MLTF members have observed that even an administrative command can end an officer's career; it's still significant for enlisted personnel, says the Army's Commander's Legal Handbook. This attention to the paper trail is shared by the Marine Corps reg, below.

Marines. The MARADMIN largely consists of reporting requirements for commands, under the direction of Marine Corps Operations Center (MCOC). The reg even specifies a Virginia phone number commands must call "within 30 minutes of being informed of an alleged extremism or gang activity incident to provide an initial voice notification." Even that initial notification must include whether the concern is gang behavior or extremism, and if the latter whether based on race, religion or gender. That initial report determines "the alleged event which might trip a Commandant's Critical Information Requirement (CCIR) and therefore create a more stringent reporting timeline." Otherwise, the

[1] Michael Jensen, Sheehan Kane, and Elena Akers, PIRUS: Mass Casualty Extremist Offenders with U.S. Military Backgrounds (College Park, MD: START, 2023), https://www.start.umd.edu/publication/pirus-mass-casualty-extremist-offenders-us-military-backgrounds.

requirement flips to three days, after which NCIS takes over. Only after the investigation is the JAG Corps informed of the findings and the disposition, ranging from no action to adjudication and separation.

It's hard to know whether the new regulations will spark similar backlash as the other responses to the 2021 NDAA. But I like to think of them as a flashback to the rare moment when the military felt obliged to take racist extremists seriously. ■

RECENT DEVELOPMENTS IN MINOR'S ENLISTMENT CASES

By Matthew Rinaldi

The Military Law Task Force continues to work obtaining discharges for 17 year old recruits who are certain they made a mistake when they enlisted in the military.

While such cases come to us all year, the majority of 17 year olds who want a discharge contact us in May and June, usually when they are graduating from high school and face the reality of life in the military. This past summer we had important help from two law student interns who were also helping the San Francisco Bay Area chapter of the NLG.

One case involved a young woman who was still 17 but already in uniform at Fort Jackson. The recruit was alarmed by the reality of life in the military and desperately wanted to go home. A discussion with the mother revealed that the birth father, who still had parental rights, had not given consent to their daughter's enlistment. Pursuant to 10 USC 1170 such an enlistment is void, so long as the non-consenting parent objects within 90 days of the enlistment. Often it is impossible to find a non-consenting parent within that short time span. However, in this case the father lived close to the home of the recruit and, when contacted, quickly objected to the enlistment.

Because the young recruit was already in the service, we contacted Fort Jackson JAG, and found that the JAG office took the position that only the recruiting officer could initiate discharge proceedings. When contacted, the recruiter refused, insisting that it was now the responsibility of JAG at Fort Jackson. This puzzle was solved by reaching out to command above the recruiter as well as by reaching out to the civilian liaison of the recruit's member of Congress. The recruiter's commanding officer quickly realized that there could be serious negative repercussions for local recruiting efforts if discharge was delayed, and within days the young woman was discharged and was home.

A second case involved a high school student who had enlisted in the Army National Guard of his state. Within days the recruit realized that, for him, this was a terrible mistake. When the recruit initially sought to void the enlistment, arrest was threatened. After our legal team contacted the recruiter who regularly worked the high school, he was willing to allow a discharge, he insisted that the high school student first attend a meeting to allow the military one last chance to change the recruit's mind.

One of our interns had a relative in that state who was also a pastor, and she went to the meeting wearing her collar. The recruit wore a T shirt to the meeting with the words "Jesus Loves You."

The initial result was disturbing. The recruiter was not at the meeting, only superior officers, and the

meeting ended badly. The promise of a discharge was discarded, and the high school recruiter was ordered to cease any further communication with our legal team. Again, the solution was approaching the National Guard JAG with an accurate account of what had occurred. It was quickly realized that threatening the recruit with arrest, or worse actually arresting the recruit as AWOL, would not help with further high school recruiting. The result again was an almost immediate discharge.

The benefit of working with law student interns was enormous. This work will continue as we move forward. ■

PORT CHICAGO – NAVY EXONERATION IS NO SUBSTITUTE FOR JUSTICE

By Jeff Lake

On July 17, 2024, Secretary of the Navy Carlos Del Toro exonerated 256 defendants convicted in the 1944 Port Chicago General and Summary Courts-martial. This was the 80th anniversary of the explosion at Port Chicago which killed 320 and injured 390 others.

Port Chicago in California was used during World War II to load ammunition onto ships headed for the Pacific Theater. Working conditions were intolerable, and safety provisions lacking. Not surprisingly, the Navy decided that they would assign Black sailors to do the loading. Port Chicago was strictly segregated and there was no opportunity for advancement for Black sailors. In 1943 they wrote a letter to a local attorney asking for assistance. The letter stated, "We the Negro sailors of the Naval Enlisted Barracks of Port Chicago, California are waiting for a new deal. Will we wait in vain?"

The men were given no training on how to load ammunition. Junior officers placed bets on how fast ammunition could be loaded – an obvious safety hazard. Winches used for loading we often in need of repair. The International Longshore and Warehouse Union offered to train the sailors but was refused by the Navy.

On July 13, 1944, the Liberty Ship SS E.A. Bryan docked at the pier loaded with fuel oil. Ammunition began to be loaded on to the ship. Another newly built ship, the SS Quinault Victory, was also at the pier with a partial load of fuel oil. Finally, a Coast Guard fire barge was also docked at the pier.

On July 17, 1944, at 10:18 P.M., a massive explosion occurred at Port Chicago. A fireball three miles in diameter was seen. The explosion measured 3.4 on the Richter scale. The event accounted for 15% of all black casualties in World War II.

Following the explosion, sailors began to ask for a 30 day "survivor's leave" which was available to those whose shipmates or friends had died. None were granted, except for white officers.

A Board of Inquiry was convened on July 21, 1944, but was not completed until August 29, 1944. In the meantime, on August 9, 1944, 328 sailors were told to resume loading ammunition. Understandably, they refused, as the conditions at the port had not changed. Eventually, 70 sailors agreed to resume loading, leaving 258 who continued to hold out. Finally, under threats of disciplinary action, 208 resumed work. However, despite this, the Navy subsequently convicted all 208 sailors at a summary (now special) court-

martial for disobeying orders. Each received a bad conduct discharge and forfeiture of three months' pay.

The remaining 50 were charged with mutiny. They were tried at a mass public general court-martial. Thurgood Marshall, then chief counsel for the NAACP, came and observed some of the trial. He then held a press conference calling on the government to investigate the conditions that led to the explosion and the unfair and unequal treatment being given to the Port Chicago 50.

Each of the 50 were convicted and sentenced to a Dishonorable Discharge, fifteen years confinement at hard labor, reduction in rate to E-1 and total forfeitures of their pay. Thurgood Marshall filed an appeal with the Judge Advocate General of the Navy on behalf of all 50 sailors. The Secretary of the Navy ordered that the courts-martial reconvene, however it simply reaffirmed the original sentences.

Shortly after the war was over in 1946, the Navy released 47 of the 50 and sent them to the Pacific Theater. Most were given discharges "under honorable conditions." One month after the release, the Navy announced that it was ending racial segregation. Two years later, the other branches of the U.S. military followed.

Now, after eighty years, with all those who were harmed long dead, the Navy has issued its exoneration. Secretary Del Toro's statement reads, "The Port Chicago 50, and the hundreds who stood with them, may not be with us today, but their story lives on, a testament to the enduring power of courage and the unwavering pursuit of justice. They stand as a beacon of hope, forever reminding us that even in the face of overwhelming odds, the fight for what's right can and will prevail."

The Port Chicago case is just one of many injustices in the long history of military abuse of people of color which continues today.

On September 21, 2024, the Navy issued the first of two apologies to the Lingit (aka Tlingit) community of what is now Alaska. The Navy attacked this community in Kake in 1869 and in Angoon in 1882. A Navy spokesperson stated that the "pain and suffering of the Tlingit people warrants these long overdue apologies." The Department of Interior granted a $90,000 settlement to Angoon in 1973. The village president of Kake told the Washington Post that local leaders have yet to decide whether they will accept the Navy's apology, noting there are additional needs they would like the federal government to address. According to the Post, U.S. Army officials are in talks with local leaders in the Lingit village of Wrangell to make "a meaningful and appropriate apology" for an attack in 1869.

What would really be meaningful and appropriate is if instead of apologies and exonerations, the U.S. military addressed the problem of racism within the institution. As the MLTF statement on military racism points out, the U.S. military has a history of racism since it was established. A culture of racism is embedded within the U.S. military and attempts to address it have been inconsistent and ineffective. The MLTF and its allies are proud to carry on the true legacy of the Port Chicago 50 and all those harmed by the racist practices of the military by working to end racism within the institution and to oppose the racist foreign policy that the military is tasked with enforcing. We do agree with Secretary Del Toro that, in the face of overwhelming odds, the fight for what is right can and will prevail. We urge all who agree to join the MLTF Anti-Racism Subcommittee and to work for real change, not apologies. ■

MLTF CLE AT NLG CONVENTION

The National Lawyers Guild will host its annual convention on October 30 – November 3, 2024 in Birmingham Alabama. For details go to www.nlg.org/convention/.

As part of the Convention, the MLTF will be sponsoring a day-long CLE on the issues of **Military Resistance and Protest, Anti-Imperialism, and Legal Support for Military Resistance.**

The CLE will include six one-hour sessions, each with a different panel. It will begin with a discussion of military resistance 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.

This CLE will be happening in-person at the NLG National Convention on October 30, 2024 from 9 am-4 pm Central Time (with a lunch break from 12-1 pm), as well as live via zoom. The programming will also be available in recorded/on-demand format beginning on November 1.

More details. To register, please click here.

ANNOUNCEMENTS

CONSCIENTIOUS OBJECTORS & WAR IN GAZA DISCUSSION WITH CCW

On October 19, the GI Rights Hotline is inviting interested people to participate in an online discussion of the experience of conscientious objectors and the current war in Gaza. Bill Galvin of the Center on Conscience and War will look at the ways that the war is affecting military participants in the United States and their concerns regarding the possibility of being ordered to take part in the government's response to the war. Some current or recently discharged military members will discuss their personal experience with this.

The discussion will start at 12:00pm EDT/9:00am PDT on Zoom. Anyone interested in participating is welcome to join the session. Please share this with anyone who might be interested. Join Zoom meeting here (Meeting ID: 839 705 9146/Passcode: 102464).

TRAUMATIC STRESS STUDY

The Public Narrative and Traumatic Stress Study is recruiting participants that experienced sexual assault while serving in the US Military to share their perception and experience of public narrative. Public narratives are reflected in the stories attached to the social, cultural, and structural systems greater than the individual and are communicated through social norms, descriptions, beliefs, and law or policy. The study aims to understand the relationship between public narrative and traumatic stress and if a change in public narrative can result in improved outcomes for individuals and communities

experiencing traumatic stress. Research activities include a survey and interview and take approximately 1.5 hours. Research participants can participate virtually and will be compensated $45 for their time. To sign-up visit: https://redcap.link/NarrativeTrauma or reach out to Mary O'Brien McAdaragh (mcada049@umn.edu). For more information visit www.narrativeandtrauma.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.

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 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.

MLTF MERCHANDISE!

The MLTF now has a merchandise webpage for all of your gift-shopping needs! Just go to http://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.

ABOUT THE AUTHORS

Marjorie Cohn is professor emerita at Thomas Jefferson School of Law, dean of the People's Academy of International Law and past president of the National Lawyers Guild. She sits on the national advisory boards of Assange Defense and Veterans For Peace. A member of the bureau of the International Association of Democratic Lawyers**,** she is the U.S. representative to the continental advisory council of the Association of American Jurists. Her books include *Drones and Targeted Killing: Legal, Moral and Geopolitical Issues*. She is a member of the Military Law Task Force.

Kathleen Gilberd is Executive Director of the Military Law Task Force. She is a legal worker in San Diego, California.

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. She is a member of the MLTF Steering Committee.

Matthew Rinaldi is an attorney in the San Franciso Bay Area. He is a member of the MLTF Steering Committee.

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!