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2019 UCMJ CHANGES – A SUMMARY

BY JAMES M. BRANUM

In this article, I will be providing a short summary of what I think are the most important changes of the historic 2019 revision of the UCMJ. This treatment will not be exhaustive but will instead serve as a starting point for further study, with a focus on those provisions that will be of most interest to defense lawyers. The changes will be discussed in the order that they are found in the UCMJ.¹

UCMJ ARTICLE 2 – CLARITY ON WHEN A RESERVIST IS SUBJECT TO THE UCMJ

The changes to Article 2 help to clarify what had been a muddy issue: when does the UCMJ apply to a reservist?

The new article 2 states that reservists are subject to the UCMJ during the duration of not only their annual training but also during drill weekends, which includes not only their “on-duty” time but also time spent traveling on orders to and from drills and also time “off-duty” but during the drill weekend.

UCMJ ARTICLE 10 – PRETRIAL CONFINEMENT

The new version of this article clarifies that commanders wanting to place a military defendant in PTC (pre-trial confinement) must fulfill certain immediate steps at the time of arrest or confinement:

- (1) Notify the defendant as to the specific offence that is alleged, and
- (2) Try the defendant in a court-martial or release them from confinement.

This chapter does not provide a strict definition of what “immediate” means, but instead states that the President shall enact regulations to ensure the prompt forwarding of charges and specifications.²

The chapter also states that PTC is inappropriate for offenses that would normally be tried by a summary court-martial.

ARTICLE 15 – NO MORE BREAD AND WATER AS A PUNISHMENT

The old Naval Punishment of “bread and water” rations has been removed as a possible punishment in NJP (Non-Judicial punishment).

Unfortunately, the provision that allows for a servicemember to be later tried at a court-martial for

¹ The 2019 Revised edition of the UCMJ can be found at:

<https://jsc.defense.gov/Portals/99/Documents/Appendix%20%20-%20Uniform%20Code%20of%20Military%20Justice.pdf?ver=2018-12-06-123439-990>

It is also contained as an appendix in the 2019 version of the MCM (Manual for Courts-Martial)

² The changed regulatory guidance (in the Manual for Court-Martials, DOD regulations and branch-specific regulations will be examined in a future article.

the same offense that he or she was previously punished for, in an NJP action, is still in place.

UCMJ ARTICLE 16 (B)-(C) – SIZE OF JURY PANELS IS CODIFIED

Under the 2019 UCMJ, the size of jury panels is as follows:

Court-Martial Type	Size of Jury Panel	Number required to convict ³
General (capital)	12 ⁴	Unanimous for the death penalty, 9 for lesser punishments.
General, non-capital	8	6
General, no panel	Judge alone	n/a – judge alone
Special CM (not bench)	4	3
Special CM (bench)	Judge alone	n/a – Judge alone
Summary CM	No panel or jury, only a hearing officer	n/a – hearing officer alone

UCMJ ARTICLE 16 (C)(2)(A) AND UCMJ ARTICLE 19 (B) - SPECIAL COURT-MARTIAL BENCH TRIAL

This provision is one of the most innovative of the UCMJ changes, in that it has created a new type of court-martial, what some are calling a “Special Court-Martial Bench Trial.” This new method of court-martial is held in front of a judge alone (with no panel members present) but has a sentence cap of: (1) no more than six months of confinement, (2) no more than six months of pay forfeiture, and (3) no power to give a punitive discharge.

In many ways, the SPCM bench trial process seems like a hybrid between a summary court-martial (with its very low sentence caps and no discharge as a punishment, but few procedural protections) and a traditional special court-martial (with higher potential punishments but more procedural protections). However, unlike the Summary Court-Martial, the SPCM bench trial does count as a federal criminal conviction. Also, the SPCM bench trial cannot be declined by the defendant.

UCMJ ARTICLE 32 – CHANGES TO PRELIMINARY HEARINGS

Article 32 hearings have a bigger role to play under the new UCMJ, as the hearing officer is now required to issue a detailed report immediately after the hearing is complete. Defendants and alleged victims also now have a right to submit to the convening authority anything that is seen as relevant after a preliminary hearing is held.

UCMJ ARTICLE 53A – CHANGES TO PRE TRIAL AGREEMENTS

Under the previous version of the UCMJ, PTA’s (pre-trial agreements, aka “plea deals”) often set a maximum cap on a potential sentence that could be given by a judge. Under the new UCMJ, PTA’s

³ See UCMJ Article 52 (a)(3).

⁴ The provision for capitol cases is found at UCMJ Article 25a.

can also include minimum sentences (such as “no sentence shall be adjudged that will provide less than six months of confinement”).

UCMJ ARTICLE 93A – ENHANCED PROTECTIONS OF MILITARY RECRUITS AND TRAINEES

This new article in the UCMJ is one of several articles that creates a new offense, instead of being covered under a more general provision (such as article 92, failure to obey a regulation”). The offense is designed to protect servicemembers from being preyed upon by recruiters, drill sergeants or other individuals in “positions of special trust,” which effectively puts this situation in the territory of being somewhat akin to statutory rape, in which the consent (or lack thereof) by the protected party is irrelevant, given the coercive power structure in place.

Of course, the test of this article will be whether it will actually be enforced or whether its enforcement will be selective in nature.

UCMJ ARTICLE 120 – RAPE AND SEXUAL ASSAULT

Article 120 has been rewritten, most notably in establishing that in “mistake of age” cases, the defense only exists if the defendant could not have known the victim’s age.⁵

UCMJ ARTICLE 121A – FRAUDULENT USE OF CREDIT/DEBIT CARDS, ETC.

Article 121a is another new provision in the UCMJ, designed to ensure that conduct previously (and sometimes ambiguously) covered under more general provisions, is specifically and clearly prohibited. The article bars the fraudulent use of credit cards, debit cards and other similar mechanisms (presumably to cover future changes in technology such as cell phone payment apps, etc.), with the essential element now being the intent to defraud rather than being successful in stealing from the government.

The penalties for these offenses (found in the Punitive articles section of the MCM, in section IV) have also been significantly increased with a maximum penalty of 15 years of confinement if the theft is over \$1,000.

From a defense perspective, I am deeply troubled by the level of penalty for what is a low threshold, which will likely lead to much higher military prison populations.

UCMJ ARTICLE 123 -COMPUTER RELATED CRIMES

This is another new UCMJ article that intends to define in the UCMJ an offense that was previously covered by the general (and often ambiguous) articles. Offenses include unauthorized use to obtain classified or sensitive information, as well as uploading a virus or other program that with the intent to damage a network.

The most concerning aspect of this article (as it is implemented under the punitive articles section of the MCM), is that a servicemember who wrongfully accesses classified information (such as evidence of war crimes committed by US troops) could face five years in prison while a servicemember who

⁵ The issue regarding mistake of age cases is discussed in this article <https://www.militarytimes.com/news/your-army/2019/01/15/heres-what-you-need-to-know-about-the-biggest-update-to-ucmj-in-decades/>

actually distributes such information (even if to a reporter) could face up to ten years of confinement. The consequences of whistleblowing are much more dire under the new UCMJ.

UCMJ ARTICLE 128 – ASSAULT

Some of the changes in this article include a broadening of “aggravated assault” to include more types of harms (including domestic violence), but also to use a more inclusive definition of the term “dangerous weapon.” Under the new definition, a dangerous weapon no longer must be *likely* to produce death or grievous bodily harm, but rather must only *be capable* of producing such harm, which means (according to the comments on the Article in the punitive articles section of the MCM) that even one’s own body might be considered to be a dangerous weapon in some circumstances.

UCMJ ARTICLE 128 B – DOMESTIC VIOLENCE

This is a new provision of the UCMJ, which unfortunately does not yet have explanatory commentary or discussion in the MCM’s punitive article section.⁶

UCM ARTICLE 129 – BURGLARY AND UNLAWFUL ENTERING

This provision no longer refers to “housebreaking” but rather uses a broader definition of burglary that no longer requires that the building in question to be a “dwelling” or requires that the wrongful entering must happen at night.

Please note that the numbering of this article has been changed (previously found under Article 130).

ARTICLE 130 - STALKING

Another of the renumbered articles, this article has been expanded to include all forms of cyberstalking.

ARTICLE 132- A BAN ON RETALIATION

This is a new article in the UCMJ, which if properly enforced, has the power to radically change the culture of the military. Under this article, a servicemember can be punished for misusing their authority to retaliate against a person for making a complaint or reporting a crime. Such misuse of authority can include not only more aggressive actions, but also actions such as giving a whistleblower unnecessary “corrective training” or taking an adverse personnel action against a whistleblower.

Also, notably, it is now illegal to discourage someone from making a complaint or reporting a crime.

Being a cynic, I don’t think that NCO’s will quit telling their lower enlisted underlings to “keep it in the house,” but I do think that blatant retaliation may become less common, assuming that commanders and prosecution JAGs take this article seriously. The challenge will be in proving retaliatory intent.

I do see significant opportunities to use Article 132 as grounds for complaints under UCMJ Article 138, which might help to persuade recalcitrant convening authorities to pursue charges against

⁶ UCMJ Article 128b can be found in appendix 3 of the MCM but is not at this time discussed in the Manual for Court-Martial “punitive articles” section in part IV of the manual. See Part IV-124 of the MCM.

abusive commanders and NCOs.

ARTICLE 134 – GENERAL/CATCH-ALL PROVISION

The general “catch-all” provision has been significantly narrowed in scope, with many offenses previously prosecuted now being addressed by separate UCMJ provisions, including:

- Assault with intent to commit specific offenses, see Article 128c.
- Breaking medical quarantine, see Article 84.
- Bribery and graft, see Article 124a and 124b.
- Burning (property) with intent to defraud, see Article 126c.
- Child endangerment, see Article 119b.
- Communicating threats, see Article 115.
- Drinking liquor with a prisoner, see Article 96b.
- Fleeing the scene of an accident, see Article 111.
- Impersonating an officer, warrant officer, NCO, agent or official, see Article 106.
- Kidnapping, see Article 125.
- Obstructing justice, see Article 131b.
- Wearing unauthorized uniform items, see Article 106a.
- Willfully discharging a firearm to endanger a human life,⁷ see Article 114b.

Unfortunately, the interpretive language for Article 134 (found in the Manual for Courts-Martial Part IV – Punitive Articles) continues to go far beyond the statutory language found in the actual UCMJ article. It continues to treat certain acts (which in many cases are not criminal in a civilian context) as being crimes under Article 134, most notably the rewritten adultery provision (now called “extramarital sexual conduct”) which now prohibits not only vaginal sexual intercourse, but also anal and oral sex. With regards to extra-marital sexual conduct, the new revisions have added a defense to this offense for servicemembers who are legally separated from their spouse.⁸

The following chart will help to unpack this provision:

Martial Status of Sexual Partner #1	Marital Status of Sexual Partner #2	Is it a crime for these two people to have sex while in the military?
Married to someone else and living with them	Not married	Yes
Married to someone else but not living with them, but also not legally separated	Not Married	Yes
Married to someone else but legally separated from spouse	Not Married	No
Married to someone else but legally separated from spouse	Married but not legally separated	Yes

⁷Obviously not including the human lives that the military wants its members to kill.

⁸ The complexities of what is and is not a “legal separation” is found in state law. In many states a “legal separation” is as difficult to get as a traditional divorce.

Article 134 also was clarified to conform with the Military Extraterritorial Act, which serves to punish servicemembers for non-capital violations of the UCMJ that are committed outside the United States.

OTHER CHANGES, REFERENCED BY THE UCMJ BUT FOUND IN THE RCM (RULES FOR COURT-MARTIAL)

RCM 1106 - POST-TRIAL MATTERS SUBMITTED BY THE DEFENDANT

Another renumbered provision (previously this was found at RCM 1105), the right of the defendant to present matters to the convening authority after trial has been preserved but with some changes. Most importantly, it allows a defendant to submit written matters for consideration very quickly (within 10 days for general CM, 7 days for a special CM) rather than having to wait for the final record of trial to be complete (which at many posts took 4-6 months).

RCM 1106A – POST-TRIAL MATTERS SUBMITTED BY A CRIME VICTIM

This new provision allows for crime victims (defined as “an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty”) or their legal representative to submit post-trial matters alongside those of the defendant. Defendants can submit matters in rebuttal to matters submitted by the crime victim, but victims do not have the right to rebut post-trial matters submitted by the defendant.

CONCLUSION

The above discussion is a starting point for future study, as I have not dealt with some of the changes in the UCMJ including new provisions for investigative subpoenas, new provisions banning “revenge porn” and the wearing of medals that one hasn’t been awarded, changes to the legal BAC (blood alcohol concentration) to be universally .08, and multiple provisions allowing for an expanded role for alleged victims in a court-martial.

Judging the merits of the 2019 UCMJ revision is difficult at this moment, as many offenses being currently tried are for crimes that are alleged to have been committed prior to the adoption of the current UCMJ. At first glance, defense counsel have many things to be happy about including the higher number of panel members required for a conviction, a faster post-trial process, and Article 132’s ban on retaliation.

However, there is plenty to be concerned about as well, including the expanded role for alleged victims, the redefinition of adultery to include more kinds of sexual practices, and the continuation of the use of general/catch-all provisions to make certain kinds of conduct criminal (by way of interpretative commentary in the MCM) rather than in clear Congressionally approved statutory language.

And lastly - I cannot help but complain about the excessive renumbering of provisions in the UCMJ and MCM, which will lead to confusion for years to come.

SOURCES

Sources used for the preparation of this guide:

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James M. Branum has practiced military law as a civilian solo attorney since 2006. He is a member of the steering committee of the Military Law Task Force of the National Lawyers Guild and is currently serving as a minister of The Objector Church, a religious humanist interfaith community. He is based out of Oklahoma City and his website can be found at www.JMBranum.com.

MILITARY PATIENTS' RIGHTS

BY KATHLEEN GILBERD

Counselors and attorneys hear many accounts about denial of military medical care and inadequate care—soldiers whose serious health problems are never evaluated, incorrectly diagnosed, or mistreated. Servicemembers generally feel they have little recourse when denied care or given inadequate care. But Department of Defense policies provide some protection of patients' rights which can be valuable in challenging denial of access to medical care or quality of care. Unfortunately, these policies are largely unknown to servicemembers and their commands, and often to military medical personnel as well.

One of the central pieces of the policies is [DoD Instruction 6000.14, "DoD Patient Bill of Rights and Responsibilities in the Military Health Care System \(MHS\),"](#) promulgated on September 26, 2011, and incorporating Change 1 of October 3, 2013. It cancels a former version of the reg, and is designed to implement the civilian "Consumer Bill of Rights and Responsibilities" issued by the President's Advisory Commission on Consumer Protection and Quality in the Health Care Industry in November of 1997.

In its policy summary, the Instruction states that:

"MHS patients have explicit rights about information disclosure; choice of providers; health plans; access to emergency services; participation in treatment decisions; respect and nondiscrimination; privacy and security of personally identifiable information (PII), complaints, and appeals; as well as specific responsibilities to participate in their own health decisions." (DoD 6000.14, para. 4.a)

To this writer's knowledge, the individual services do not have parallel regulations, though some rights are covered in service regulations on medical care and the disability evaluation system or, in some services, discharge regulations. Some bases and medical facilities have created their own bill of rights documents, sometimes incorporating parts of the DoD Instruction and occasionally expanding on it. For example, some Army base policies require that commands follow the recommendations of medical profiles for duty limitations, which are otherwise not binding.

Among the most significant rights in the DoD Instruction are:

1. ACCESS TO MEDICAL CARE AND EXPLANATIONS OF CARE

Enclosure 2 to the Instruction states, at part 1.a, that patients have the right to quality care and treatment, including access to specialty care. This right is apparently limited to care "that is consistent with available resources and generally accepted standards." As readers probably know, GI's are often denied access to care by their commands (commonly by senior enlisted personnel) or by medics/corpsmen. Citing to the Instruction's summary and this subsection may be helpful in cutting through such denials.

Enclosure 3, part b, requires that each MTF/DTF (medical treatment facility/dental treatment facility) "provide beneficiaries with the right to a choice of healthcare providers that is sufficient to ensure access to appropriate, high-quality healthcare." That section also says that beneficiaries will "be assigned or allowed to select" a primary care manager, suggesting that there is no guarantee a

requested doctor will be assigned.

While military health care personnel are usually willing to discuss diagnoses, etc., their willingness to ensure patients can understand their terminology is sometimes limited. Part 1.c of Enclosure 2 states that patients are entitled to an explanation of their diagnosis, treatment, procedures and prognosis in “easily understandable terms.” For vulnerable patients, whose capacity for decision-making may be affected by their medical condition, the information should be given to a designated representative.

2. PRIVACY AND SECURITY OF HEALTH INFORMATION

Military medical facilities are required to “provide MHS beneficiaries with the right to communicate with healthcare providers in confidence, to have the privacy and security of their protected health information maintained to review and copy their own medical records, and to request amendments to their records.” (Enclosure 3, part 2.f) These important rights are subject to exceptions covered in DoD 605.18-R, DoD 8500.2, and the DoD “Medical Management Guide,” and will be discussed in detail in the next issue of On Watch. It is worth noting that medical personnel and commands frequently ignore these rights.

3. DISCRIMINATION

The Instruction requires that all care be respectful, considerate, and free from discrimination, stating that the military health system “does not discriminate in the delivery of healthcare services or in information and enrollment practices based on race, ethnicity, national origin, religion, sex, age, mental or physical disability, genetic information, sexual orientation, or source of payment.” Enclosure 3, part 2.e. Presumably the internal and external complaint procedures discussed below could be used for discrimination complaints.

4. SECOND OPINIONS

The right to a second opinion is not discussed specifically in the Instruction, though it is arguably implicit, and most medical treatment facilities accept it as a right. The difficulty here is that a second military evaluator is often swayed by the opinion of the first, so that obtaining a second military opinion may simply reinforce the original diagnosis or proposal for treatment. Some counselors and attorneys recommend an independent civilian evaluation (as through the Civilian Medical Resources Network, or CMRN) either before or instead of a second military opinion. While this has little official weight with the military, a well-thought-out civilian evaluation may affect the opinion of the second military evaluator or, in some cases, that of the first.

5. INFORMED CONSENT AND REFUSAL OF TREATMENT

At part 1.c of Enclosure 2, the Instruction sets out patients’ right to “any and all necessary information in non-clinical terms to make knowledgeable decisions on consent or refusal of treatment...” Enclosure 3, part 2.d, requires that medical treatment facilities ensure patients “have the right and opportunity to participate fully in all decisions related to their healthcare, subject to readiness requirements for active duty Service members.” Here, too, facilities are required to provide information in easily understood terms. Enclosure 3, part 2.d.(1).(a) requires that healthcare providers discuss all treatment options with patients, “including the option of no treatment at all...” And part 2.d.(1).(g) states specifically that mentally competent patients must be given the opportunity to refuse treatment. However, part 2.d concludes with a warning that active-duty

members' rights under this part are "subject to responsibilities of the member to comply with Service requirements for military readiness and [the UCMJ]." While there is no discussion of such readiness requirements, military courts have held that they include vaccinations.

Military physicians tend to know that patients may refuse courses of treatment, but they do not always convey this information to patients, and sometimes press for their preferred treatment as the only, or only safe, course. Where patients refuse treatment, they run the risk that it will affect their doctors' assessment of their cases or inclination to refer cases to medical evaluation boards. Commands may not be knowledgeable about the right to refuse treatment, so that GI's are occasionally ordered to undergo a particular course of treatment. Some practitioners encourage clients to set out in writing the reasons for their objections to particular treatments, and to make these writings a part of their medical records.

The section of the Instruction covering the "responsibilities" of patients requires them, among other things, to cooperate with treatment plans. However, this section also states that failure to follow patient responsibilities does not warrant withholding of medical treatment.

It's worth noting that the right to refuse treatment may nonetheless have administrative or even disciplinary effects. The Navy's Manual of the Medical Department, which covers treatment of both sailors and Marines, states at article 18-22 that medical treatment will not be performed on a mentally competent member who does not consent to a recommended procedure. In these cases, a medical board must be convened and its results forwarded to a Physical Evaluation Board to determine if the refusal was reasonable. The Manual notes that an unreasonable refusal could result in denial of VA and Social Security Administration treatment for the condition involved.

The Marine Corps allows for administrative discharge where the refusal of treatment interferes with Marines' duty. Convenience of the government discharge is permitted for reasonable treatment refusals, at commanders' discretion, under Marine Corps Separation and Retirement Manual para. 6203.7. Discharge here would most likely fall under the category of physical condition not a disability. If a physical evaluation board review determines that refusals are unreasonable or involve intentional misconduct or willful neglect, Marines may face separation for unsatisfactory performance under para. 6206 or for misconduct under para. 6210. Administrative reduction in rank is also permitted for unreasonable refusal.

Army commanders are provided guidance for treatment refusals in AR 600-20, section 5-4. This lists a number of situations in which treatment may not be refused, ranging from vaccinations to emergency medical care required to save the member's life, health or fitness for duty. Where members refuse treatment not covered in section 5-4, medical boards must be conducted to determine the need and risks of the proposed treatment, whether the treatment will enable the member to return to duty, and whether the refusal is reasonable or unreasonable. If the medical boards find the treatment appropriate, and the members still refuse, cases are referred to the Army Surgeon General for approval or disapproval. If the Surgeon General approves the board's findings, and the members continue to refuse, their cases will be referred to their special court-martial convening authorities, who will formally order the members to submit to the treatment. If the members continue to refuse at this point, commands may take disciplinary action or process the members for administrative separation. (Special consideration is given to members who refuse treatment for religious reasons.)

6. GRIEVANCES

Few servicemembers know that they can file grievances about refusal of access to military medical care or the course of that care. Some know that larger medical facilities have ombudsmen, and that some of them will advocate aggressively for patients, but rights beyond that are largely unknown. DoD 6000.14, however, sets the right to file grievances out clearly at Enclosure 2, part 1.g:

“Patients have the right to make recommendations, ask questions, or file complaints to the MTF/DTF Patient Relations Representative or to the Patient Relations Office. If concerns are not adequately resolved, patients have the right to contact The Joint Commission at 1-800-994-6610.”

Enclosure 3, part 2.g, covers the medical system’s responsibilities for patient complaints and appeals. Facilities are required to maintain a “rigorous” system of internal review and an independent system of external review, though these are not discussed in any detail in the Instruction except for denial of services.

COMPLAINTS OUTSIDE THE BOX

While the DoD Instruction mentions internal and external grievance procedures, these are by no means the only methods available to aggrieved patients. In some cases, military physicians may be asked to intervene when problems arise with other physicians involved in a case. While military medical professionals are not known for strong advocacy for patients, the DoD Instruction does state that the medical health system “shall not penalize or seek retribution against” health care workers who advocate for their patients. Encl. 3. part 2.d.(3).

In some cases, inquiries to health care providers or the commanders of medical treatment facilities by counselors or attorneys may be useful. Warnings about the possibility of formal complaints may sometimes be as useful as the complaints would be.

Complaints under Article 138 of the UCMJ cannot be used for grievances against personnel outside a member’s chain of command, and so do not normally apply to health care personnel. The Navy, however, allows for an exception to this under Navy Regulation 1150. This reg utilizes procedures quite similar to Article 138’s, covered in chapter 3 of the Manual of the Judge Advocate General (JAGMAN).

Although servicemembers should not ‘jump the chain of command’ with complaints made directly to the service’s Surgeon General, nothing prevents an attorney, counselor or family member from bringing inadequate treatment to a Surgeon General’s attention. Congressional inquiries, if framed so that the Member of Congress is asked to raise specific questions or requests, can also be helpful.

CONCLUSION

DoD policies provide some protections of patients’ rights and attorneys and counselors should be aware of these policies. As always in the military, the policies are only as good as those who are supposed to carry them out. Assertiveness when receiving medical care is important and the ability to cite the military’s own policies is a key part of that advocacy. Grievances and other complaints are available and servicemembers need to be aware of these.

The next issue of On Watch will address the important issues concerning privacy and security of health information in the military.

Kathleen Gilberd is a legal worker in San Diego, focusing on administrative discharges and discharge review, and is the executive director of the MLTF.

TRANSGENDER BAN UPDATE

BY JEFF LAKE

Since the last issue of On Watch, several developments have occurred regarding the President's attempt to ban military service by transgender people.

In July, 2019, Representative Jackie Speier introduced an amendment to the National Defense Authorization Act. This amendment states that qualifications for military service may not include "any criteria relating to the race, color, national origin, religion, or sex (including gender identity or sexual orientation) of an individual." This amendment has now passed the House of Representatives, with 10 Republicans joining the Democrats. This amendment now proceeds to the Senate.

During the debate on the amendment, Jennifer Levi of GLBTQ Legal Advocates and Defenders and Shannon Minter of the National Center for Lesbian Rights published an editorial titled: "Reversing Trump's Transgender Military Ban Will Make Us Stronger." GLAD released a statement that concluded, "Military leaders and the American people see this ban for what it is – baseless discrimination that weakens our military." NCLR's statement concluded, "Allowing transgender people to serve on equal terms in our nation's military will only make our military and our nation stronger." These statements have stirred some controversy among progressives. While progressives support inclusion of all and oppose discrimination, the argument that the U.S. should have a strong military is not an effective progressive argument against the transgender ban. It seems this tension between these two positions will continue going forward.

The summer of 2019 has also seen two confirmation hearings for nominees for Chair of the Joint Chiefs of Staff and Chief of Naval Operations. In connection with his hearing, General Mark Milley stated that he was "not aware of significant impacts to unit readiness based on transgender persons serving in the Army." He also stated that "any reduction in fully deployable service members that meet all medical standards would presumably have a detrimental effect on readiness." Similarly, Vice Admiral Mike Gilday in his written comments for confirmation stated, "I am unaware of negative impacts on unit or overall Navy readiness as a result of transgender individuals serving in their preferred gender." Thus, the military's top commanders have undermined the stated rationale for the military transgender ban.

Finally, on August 20, 2019, the U.S. District Court in Maryland issued its decision concerning motions filed by both the plaintiffs and defendants in the case of *Stone v. Trump* brought by the ACLU.

The District Court Judge was clear that he felt there was a significant distinction between the ban that was announced in 2017 and the current Implementation Plan. He stated, “Thus, while the Implementation Plan bars many transgender individuals from military service, it is not the blanket transgender service ban set forth in the August 2017 Memorandum. Thus, the court concludes that Defendants have established a significant change in the factual circumstances.”

After making this conclusion, the court went on to dismiss all claims regarding the August 2017 ban as moot.

After finding the claims regarding the prior ban moot, the court went on to dismiss all Current Service Members from the lawsuit, except one. Thus, Brock Stone and by association the ACLU, have been dismissed from the lawsuit. However, the court found that all Prospective Service Members do have standing to sue over the Implementation Plan. The court presented a lengthy analysis of its reasoning concerning Current Service Members’ standing to sue such that it seems unlikely that the court’s ruling could be subject to a successful appeal by the DoD.

As to the one remaining Current Service Member, the court found that he has undergone transition-related surgery and is currently eligible for a commission. The Implementation Plan would bar such a commission. Thus, the court found that he “establishes an injury in fact sufficient to give him standing to challenge the Implementation Plan.”

Finally, the court addressed the Defendants’ motion to dismiss. The court denied the motion, stating, “the Court concludes that Plaintiffs plausibly allege that the Implementation Plan violates (the) Equal Protection component of the Fifth Amendment’s Due Process Clause.” The court also concluded that the Plaintiffs’ claims warranted heightened scrutiny, “with the appropriate level of deference to the military’s evaluation of the evidence underlying the Implementation Plan.” However, the court warned, “the level of deference to which Defendants are entitled in this case remains to be seen.”

The court found for the Defendants that the Plaintiffs did not adequately allege a substantive due process claim. The court dismissed this claim, but did so without prejudice.

Thus, the lawsuit will continue on with challenges to the Implementation Plan announced in April. Discovery is continuing, so it is not clear when the case will proceed to trial.

As always, the MLTF will continue to follow developments regarding this issue. Please subscribe to On Watch to learn about the latest news and court rulings.

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

Book Review

THE DEBACLE IN VIETNAM INFORMS TODAY'S COSTLY MILITARISM

BY CHRIS FORD

Editor's Note: This review examines John Ketwig's latest book. His previous book was the much acclaimed ...and a hard rain fell: A GI's True Story of the War in Vietnam.

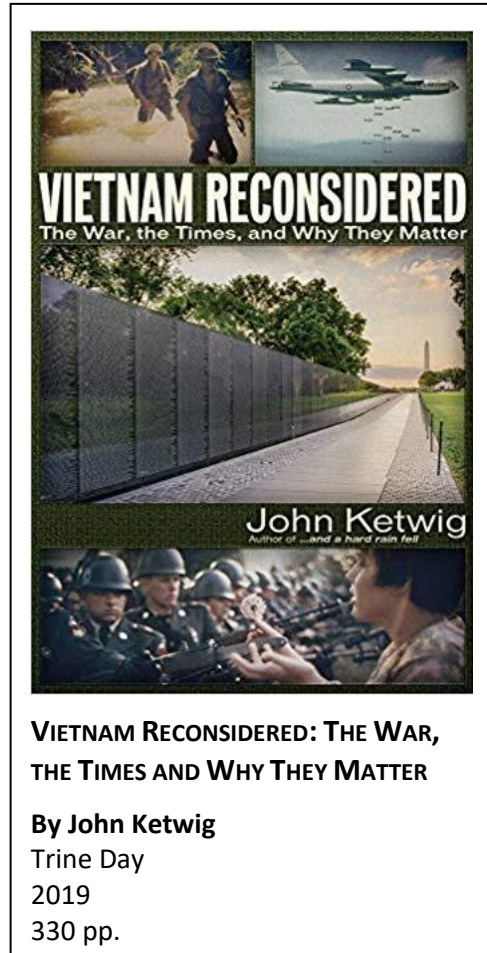
"Vietnam! The word carries a dark, heavy stigma," intones author John Ketwig, whose information-packed volume, *Vietnam Reconsidered: The War, the Times and Why They Matter*, was released this year. The book, says Ketwig, "is guided by the belief that war is the most abhorrent and despicable behavior of all human endeavors, and it should not be glorified."

An admitted "angry, bitter" Vietnam veteran, Ketwig defines war "as the complete breakdown of all things civilized, and the utter failure of human beings to respect each other," and "the surrender to the hopeless." The war in Vietnam "and the truths it exposed," he writes, "are enormously important to the America our kids will inherit."

WIDE-RANGING VOLUME

America unequivocally lost the Vietnam war (and Southeast Asia lost 3.5 - 5 million of its people, mostly civilians, to horrific deaths), prompting top military, government, business and media officials – or "the Establishment," in the parlance of the Vietnam era – to cry "never again." But these economically and politically dominant members of society did not seek an end to brutal, unjust and pointless warfare; they demanded "never again" to honest, realistic news coverage that presents war as the utter horror it is. Thus, in the wake of Vietnam, the government, hand-in-hand with rogue "intelligence" agencies, war profiteers, arms merchants and mercenary firms, has relentlessly marketed the nation's war efforts, no matter how fruitless or costly; has hidden or lost many trillions in costs; and has strenuously attacked and sought to discredit opponents of war.

Ketwig's book focuses on the horrors of war and its aftermath – including the tragic fact that as a result of his exposure as a Vietnam soldier to a toxic "defoliant" known as Agent Orange, which the U.S. military liberally sprayed all over South Vietnam during the war, Ketwig lost his only son when the child was just 14 days of age. The book also focuses on the press coverage and protest during the



**VIETNAM RECONSIDERED: THE WAR,
THE TIMES AND WHY THEY MATTER**

By John Ketwig

Trine Day

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330 pp.

war; government propaganda; and the corruption on an almost unimaginable scale during the war and, especially, in today's Pentagon which has allowed literally trillions of dollars to slip through its fingers and into unknown hands.

However, the book also touches on such 20th century and Cold War issues as the Berlin Airlift, the space race, the draft, the Veterans Administration, the assassinations of John F. Kennedy, Martin Luther King and Robert Kennedy, the predominate culture of the 1960s, the Vietnam war's carnage and injustices, and military corruption and fraud. It also examines the destructive and sometimes long-delayed effects of PTSD and the mental picture of Vietnam veterans. At a time when PTSD was not part of the national lexicon, family members observed that their Vietnam veteran loved ones had "changed" as a result of the war.

Importantly, the book also discusses what Ketwig calls "the Myth," which he describes as "a vast disinformation campaign to make the American public feel guilty for 'mistreating' Vietnam veterans when they came home." The reality, he suggests, is that the raw deal Vietnam soldiers and veterans received was from their own government, which had lied to and maltreated them and had forced them to take part in a barbaric and pointless war. Vietnam vets "were ignored, ostracized, or scapegoated, perhaps more within the military than in civilian life," he writes.

YANKED FROM A 'COLORFUL WORLD'

For those who did not experience the era, the 1960s offered the average American a far rosier economic picture than is available today. The U.S. enjoyed the longest uninterrupted period of economic expansion in its history, benefiting from massive government investment during the 1950s in the Interstate Highway system, the GI bill, the Apollo space program, primary and secondary education and, of course, DARPA, which gave rise to such 21st century standbys as GPS, the Internet and voice-to-text technology. California's visionary governor from 1959-1967, Edmund G. "Pat" Brown, left the state that now is home to one in eight Americans with 1,000 miles of new freeways; a massive system of dams, canals and pipelines that brought water from the state's rainy north to its sunny, economically booming south; and a greatly expanded, world-class university system.

Public college during the 1960s was all but tuition-free, healthcare was a minor household budget item, and housing was more affordable, especially along the coasts. In short, a middle-class life was available even to those with only a high school diploma, and it was an era of what Ketwig calls "stubborn optimism." Seventy percent of the nation's growth occurred in the car-centric suburbs, and the easy availability to baby boom teenagers of cars – which they "strained their wallets" to make "fast and loud" – gave them "access to all manner of exciting events that no previous generation had ever known."

Before he received "the letter" from the draft board, Ketwig, holder of no more than a high school diploma, drove a Thunderbird, with its "most luxurious and sporty interior," had a good job learning a trade, played drums in a band and enjoyed an "extremely fast-paced and fun" life. "We had come of age surrounded by vivid colors and an all-American atmosphere of freedoms expressed as irreverent, defiant adolescent rebellion," he writes.

However, as soon as he opened the letter, his world collapsed. His band didn't need him, he couldn't find a date on Saturday night, and he could not attain a deferral from the war, because his employer did not want to do the paperwork to make him an apprentice, and he could not afford college. "We were taken against our will, yanked away from our affluent and colorful worlds, our long hair was

unceremoniously sheared, and our colorful mod Carnaby Street-inspired clothes were stripped from us," he writes. "To be snatched away from all that, to be assigned a baggy uniform of olive drab and to find ourselves seeking cover in the Vietnamese mud while bullets shrieked overhead" was traumatic.

THE CARNAGE IN VIETNAM

The Vietnam Veterans Memorial in Washington, D.C. displays 58,315 names of Americans missing or killed in the Vietnam war. About 153,000 Americans were injured, among whom about 23,000 returned home "100% disabled." At least 10,000 lost one or more limbs – more than in WWII and the Korean war combined, according to Ketwig's book.

Beyond the 3.5 to 5 million lives lost among the Vietnamese, Laotians and Cambodians as a result of the U.S.'s military efforts between 1964 and 1975, between 1 and 2.5 million South Vietnamese were sent to "re-education camps," at which an estimated 165,000 died; between 50,000 and 250,000 were executed; and the UN estimated 200,000 and 400,000 refugees seeking to escape by boat (and called "boat people") died at sea, "with other estimates much higher," according to Ketwig. Unexploded ordinance has killed another 42,000 since the war.

But it is suicide of Vietnam war veterans, which Ketwig calls "the ultimate expression of PTSD," that is the ongoing, tragic legacy of the Vietnam war, with one veteran taking his life *every hour*, and 10 survivors of suicide attempts for each one who ends his life. There also are "trip-wire vets," men who are reclusive, living in remote, hand-built cabins and out of touch with everyone, including their families.

As has been reported in *On Watch*, suicide in the military remains a serious problem. Ketwig relates the story of an acquaintance whose son deployed to Iraq with eight other men from a small, rural community. A year and a half after their return, four of the nine had committed suicide.

THE CRUELTY OF THE MILITARY

Ketwig suggests that while the military effort in Vietnam failed, the war served the Pentagon's underlying purpose, which was to test weapons systems and military methods. The U.S. military dropped more bombs on southeast Asia during the Vietnam war than in all of WWII. Between 1965 and 1967 alone, the U.S. dropped 1.5 million bombs on New Mexico-size Vietnam, "including a substantial portion on South Vietnam, our supposed ally and an impoverished, agricultural society," Ketwig writes.

Among the items the Pentagon "tested" on the Vietnamese were cluster bombs that threw up to 600 "bomblets" up to 30 feet in every direction, each filled with "ragged metal ball bearings or other shrapnel scientifically designed to impose the maximum damage to the human body," including "razor sharp plastic slivers [that] would not show up in an X-ray."¹

The U.S. also "tested" white phosphorous in Vietnam. This substance ignites at 86 degrees but burns at about 10,000 degrees and is difficult to extinguish. "The sight of a human body burned by white

¹ Ketwig notes that in 1784 British Royal Artillery Lieutenant Henry Shrapnel came up with the idea of loading ordnance with small, jagged pieces of metal to create an anti-personnel device. P292

phosphorous is not easily consigned to memory,” Ketwig explains. Direct skin contact leads to thermal and chemical burns, and particles of the substance can enter the body through burns or other wounds “and continue to damage tissues” and produce corrosive phosphoric acids.² As the Washington Post reported, when white phosphorous “comes in contact with flesh, it can maim and kill by burning to the bone.”³

White phosphorous was banned as a chemical weapon in the 1980 Convention on Conventional Weapons. The U.S. was not among the 80 nations to sign this agreement, and it used white phosphorous against Iraqis in retaliation for the killing of four Blackwater mercenaries in Fallujah, Iraq, in 2005.⁴ The U.S. also reportedly used white phosphorous in Syria as recently as 2017.⁵

The military additionally poisoned Vietnamese croplands with Agent Orange – which contains Dioxin, said to be the most toxic substance on Earth, and the effects of which are showing up in the grandchildren of those exposed in Vietnam – and “consumed [them] in flaming infernos of napalm.” Ketwig writes. The National Academy of Sciences reported in 1974 that the use of herbicides such as Agent Orange in Vietnam had done damage to the nation’s ecology that could last up to 100 years, he reports.

The M-16 assault rifles that the U.S. military “tested” in Vietnam used a type of bullet designed “to tumble so that, on contact with any part of a human body, it would cause maximum damage,” according to Ketwig. Assault rifles “in wide use by civilians in America today utilize the same technology,” he notes.

And the military was not exactly kind to its Vietnam soldiers. Basic training “was traumatic,” and “[f]rom the very start, the things I saw and experienced in basic training then in Vietnam devastated my heart and soul,” Ketwig writes. Ripped from his comfortable, affluent life, the GI suddenly “found himself on the other side of the planet scared to death and struggling just to survive. His life had become a terrifying, surreal nightmare, and he was hopelessly trapped by an enormous, all-powerful, uncaring and often immoral system.”

THE PRESS AND PROPAGANDA

The Vietnam War was the first to be brought into American living rooms on color television. Weekly news magazines also brought home vivid war imagery. For example, LIFE magazine ran an article in June 1969 entitled, “The Faces of the American Dead in Vietnam: One Week’s Toll,” complete with

² *White Phosphorous Fact Sheet*, FEDERATION OF AMERICAN SCIENTISTS, <https://fas.org/programs/bio/factsheets/whitephosphorusfactsheet.html>

³ Thomas Gibbons-Neff, *U.S.-led forces appear to be using white phosphorous in populated areas in Iraq and Syria*, WASHINGTON POST, Jan. 9, 2017, <https://www.washingtonpost.com/news/checkpoint/wp/2017/06/09/u-s-led-forces-appear-to-be-using-white-phosphorous-in-populated-areas-in-iraq-and-syria/>

⁴ The National Lawyer Guild’s Military Law Task Force, in a Freedom of Information Act lawsuit against the U.S. Department of Defense, noted that “U.S. Military personnel taking part in the siege [on Fallujah] were criticized for targeting and killing civilians; blocking access to hospitals; intentionally firing on ambulances; and using chemical weapons against the civilian population, including white phosphorus.” Dkt. no. 20, *Hiken v. Dept. of Defense*, 06-cv-2812, at 11 (filed April 25, 2006) (citing *US Used White Phosphorus in Iraq*, BBC News, November 16, 2005, http://news.bbc.co.uk/2/hi/middle_east/4440664.stm).

⁵ Gibbons-Neff, *supra*, note 5.

the face of a deceased “boy next door” on the cover.⁶

“Inside, across 10 funereal pages, LIFE published picture after picture and name after name of 242 young men killed in seven days halfway around the world ‘in connection with the conflict in Vietnam.’”⁷ Time further reports, “To no one’s surprise, the public’s response was immediate, and visceral,” and while some condemned the effort as supporting the anti-war protesters, “others – perhaps the vast majority – were quietly and disconsolately devastated.”⁸ Ketwig reports that 63 journalists were killed reporting from Vietnam. These, perhaps, should be seen as the true heroes of the Vietnam war.

PROTESTERS AND THEIR PERSECUTION

Protest during the Vietnam era is legendary. One 1967 anti-war protest that drew 50,000 to 100,000 people generated a famous photograph of a woman placing a flower into the barrel of a soldier’s rifle, which became a symbol of the use of the military to silence the Establishment’s critics. In just one weekend in May 1970, 4 million Americans took to the streets to protest the war (at a time when the population of the U.S.A. was just 205 million).

Additionally, Ketwig notes that for the first time, active duty soldiers joined veterans to protest the war in which they served at a march in San Francisco during October 1968. Further, the generation that grew up free and defiant could not be completely contained even in the military. By 1972, 25% of all Americans in uniform either deserted, were AWOL, refused orders or were openly mutinous, according to Ketwig.

The Establishment busied itself painting the opposition as “Communists” – just as the G.W. Bush administration and other government officials in the first years of the current century painted opponents to its pro-war policies as “terrorists.”⁹ President Johnson “committed a massive force of government, military, and intelligence forces against the unruly crowd of American Citizens attempting to exercise their constitutional right of Freedom of Speech,” Ketwig states.

The Nixon Administration stepped up the game by creating “contingency plans to deal with future demonstrations” in Washington D.C., with the ability to mobilize a military force “equal to one-fifth of the size of the U.S. Army presence in Vietnam”; escalated the use of surveillance, infiltrators, phone taps, meeting disruptions, and people trained to instigate illegal activities by anti-war groups; and “compiled computer files on 18,000 ‘enemies,’ including members of Congress and civic leaders,” according to Ketwig.

⁶ Ben Cosgrove, *Faces of the American Dead in Vietnam: One Week’s Toll*, TIME, May 15, 2014, <https://time.com/3485726/faces-of-the-american-dead-in-vietnam-one-weeks-toll-june-1969/>

⁷ *Id.*

⁸ *Id.*

⁹ A California Department of Justice spokesperson in 2003 told the San Francisco Chronicle, “You can almost argue that a protest against [the so-called war against terrorism] is a terrorist act.” Chris Ford, *Reclaiming the Public Forum: Courts Must Stand Firm Against Government Efforts to Displace Dissidence*, 2 TENN. J. LAW & POL’Y 146, 175 n.114 (2006).

PENTAGON WASTE, CORRUPTION AND FRAUD

News reports cited by Ketwig show that trillions of dollars in Pentagon spending has gone unaccounted for, so as to make the days of \$37 screws, \$435 claw hammers, \$640 toilet seats, \$2,228 monkey wrenches, \$7,600 coffee pots and \$74,165 aluminum ladders of the 1980s Pentagon spending overruns¹⁰ appear paltry by comparison.

In one shocking example, up to more than \$18 billion in American \$100 bills – enough to fill 21 C-130 cargo planes! – were unloaded in Baghdad, Iraq, in May 2004 and “just disappeared,” according to Ketwig. “The US has audited the money three times, but has still not been able to say exactly where it went.”¹¹ Taking a position that simply cannot pass the laugh test, “Pentagon officials have contended for the last six years that they could account for the money if given enough time to track down the records.”¹²

On September 10, 2001 former defense secretary Donald Rumsfeld announced at a press conference that “we cannot track \$2.3 trillion” in Pentagon transactions, at a time when the Pentagon’s budget was about \$313 billion.¹³ The next day, the 9/11 attacks wiped this massive revelation of fraud off the front page, and there has been no follow-up or effort to find the missing money.¹⁴

The Nation news magazine describes a process called “nippering,” in which the Pentagon shifts money from its congressionally authorized purpose to a different purpose, and when done multiple times the funds can become virtually untraceable.¹⁵ As cited by Ketwig, the U.S. Army in 2015, when its allocation from Congress was \$122 billion, spent \$6.5 trillion (yes, trillion with a “t”) in unaccounted funds.¹⁶ The Treasury Department gave the Army a “cash deposit” of nearly \$800 billion that same year – an amount larger than the Pentagon’s entire military appropriation for the year, Ketwig reports. He adds that 16,500 documents and records “disappeared from the Defense Department Reporting System” in the third quarter of 2015, “with no explanation of why they were removed or where they went.”

Overall, the Pentagon engaged in \$21 trillion in transactions “between 1998 and 2015 [that] could not be traced, documented, or explained,” according to Michigan State University professor Mark Skidmore, who reviewed DoD financial records with two graduate students.¹⁷

The national debt – which was less than \$1 trillion when Reagan, a supposed fiscal conservative, took

¹⁰ Jack Smith, *\$37 screws, a \$7,622 coffee maker, \$640 toilet seats: suppliers to our military just won't be oversold*, LOS ANGELES TIMES, July 30, 1986, <https://www.latimes.com/archives/la-xpm-1986-07-30-vw-18804-story.html>.

¹¹ *Missing Iraq cash 'as high as \$18bn'*, ALJAZEERA, June 19, 2011, <https://www.aljazeera.com/news/middleeast/2011/06/201161962910765678.html>.

¹² *Id.*

¹³ Dave Lindorff, *Exclusive: The Pentagon's Massive Accounting Fraud exposed*, THE NATION, Nov. 27, 2018, <https://www.thenation.com/article/pentagon-audit-budget-fraud/>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Lindorff, *supra*, note 24.

office but had nearly tripled to \$2.857 trillion when he left – reached \$22 trillion in February 2019, with a “defense” budget of nearly \$1 trillion for the year. “Is this an ironic coincidence or what?” Ketwig queries rhetorically. “The national debt is at \$21.8 trillion [as of January 2019], and the Pentagon can’t tell us where \$21 trillion of its funds have gone.” Ketwig further notes that just the interest on the national debt, \$67 billion, equals Russia’s military expenditures for the year. It is almost farcical that in light of the reported waste, fraud and apparent “loss” of so much money by the Pentagon, West Point announced a few years ago that it was discontinuing its ethics classes, according to Ketwig.

CONCLUSION

In his Introduction, Ketwig says his book “contains many suggestions, a mosaic of historical fragments arranged to create an overall picture, colorful and heavy as chips of stone.” This description is accurate, given the wide range of topics and organization of the material. And while the volume is filled with statistical and historic information; anecdotes from Ketwig’s own experiences and those of other vets and their family members; and historical background, it also includes the author’s own strongly held opinions that the nation’s spiraling militarism is dangerous, wasteful, cruel, costly, harmful and unjustified, and it grossly distorts economic and political choices.

“I love to imagine an America with universal healthcare, pothole-free super highways, the best educational system in the world, a thriving economy that rewards everyone proportionate to what they produce, but takes care of our disadvantaged and affords them the very finest quality of life,” Ketwig writes, but the war economy precludes such choices. He also warns that the CIA and NSA’s covert army of more than 70,000 “guerilla warriors” has become “a rogue 4th branch of government, unelected, and defiantly resistant to any oversight, much less checks and balances.”

A recurring theme in Ketwig’s book is the frustrating reality that the architects of Vietnam managed to escape any responsibility for their actions, and he wonders whether the public can overcome the CIA, NSA and the federal government’s 15 other “intelligence” agencies; defense companies; mercenary firms; “and all the other rogue entities profiting from the destruction and death that we export in unthinkable quantities” – i.e., what he calls, accurately, “the military-industrial-political juggernaut.”

“The voice of the people was choked with tear gas in the shadows of the monuments to our founding fathers [during the Vietnam era], and the flag-draped coffins came home by the thousands for no good reason,” Ketwig writes. The American people, he opines, “learned nothing” from Vietnam, because “the profiteers, bureaucrats, and crooks learned how to perfect their scams and increase their dirty profits while generation after generation of soldiers and civilians bleed and die.” Thus, as in the Vietnam era, “we don’t know why our young people are at war, and we don’t know where trillions of dollars are disappearing to.” He urges the reader to “investigate, read and comprehend, and discuss these issues, and consider what kind of country you want the United States of America to be in forty years when our grandchildren inherit what we build for them today.”

Chris Ford, a former newspaper reporter and editor, is an attorney licensed in California and Arizona whose practice focuses on civil appellate and trial-level litigation.

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Editors: Kathleen Gilberd, Rena Guay and Jeff Lake.

CONTACT

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

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