



# ON WATCH

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### **NEW! ONLINE TRAINING SERIES**

#### **Advocacy & Activism through Military Law**

MLTF announces a new two-track series of monthly online trainings (live and recorded) intended to provide a full introduction/refresher on military law.

**CLE track:** 1.5 hours of continuing legal education each month (accreditation for CA, NY and OK pending)

**Activist track:** monthly workshops for progressive organizers working in a military context.

See page 27 for more details.

# 2022 NDAA INCLUDES CHANGES TO UCMJ

**By Jeff Lake**

On December 27, 2021, President Biden signed the [latest National Defense Authorization Act \(NDAA\)](#). This Act included significant changes to the Uniform Code of Military Justice (UCMJ) and other areas of the military justice system which may be of interest to readers of *On Watch*.

## **SPECIAL TRIAL COUNSEL**

Perhaps the most important change to the UCMJ is the creation of a “Special Trial Counsel.” Each branch of the U.S. Military is now required to create an Office of the Special Trial Counsel who reports directly to each Service Secretary. This requirement is supposed to take place within 2 years.

The Special Trial Counsel is “independent of the military chains of command of both the victims and those accused of covered offenses.” The Special Trial Counsel has authority over the following offenses:

- Wrongful broadcast or distribution of intimate visual images (Article 117a)
- Murder (Article 118)
- Manslaughter (Article 119)
- Rape and Sexual Assault (Article 120)
- Rape and Sexual Assault of a Child (Article 120b)
- Other Sexual Misconduct (Article 120c)
- Kidnapping (Article 125)
- Domestic Violence (Article 128b)
- Stalking (Article 130)
- Retaliation (Article 132)
- Child Pornography (Covered by Article 134)
- Conspiracy to commit any of the above offenses (Article 81)
- Solicitation to commit any of the above offenses (Article 82)
- Attempt to commit any of the above offenses (Article 80)

The new Special Trial Counsel has the power to request or waive a preliminary hearing (Article 32) and to refer matters for general or special courts-martial (Articles 22(b) and 23(b)). A referral to a general or special court-martial for trial of charges and specifications over which a special trial counsel exercises authority may only be made “(1) by a special trial counsel, subject to a special trial counsel’s written determination accompanying the referral that (A) each specification under a charge alleges an offense under this chapter; (B) there is probable cause to believe that the accused committed the offense charged; and (C) a court martial would have jurisdiction over the accused and the offense.” (Article 34).

The Special Counsel has the power to enter into plea agreements. The Article now states: “With respect to charges and specifications over which a special trial counsel exercises authority pursuant to section 824a of this title (article 24a), a plea agreement under this section may only be entered into between a special trial counsel and the accused. Such agreement shall be subject to the same limitations and conditions applicable to other plea agreements under this section.” (Article 53a).

This idea of a Special Trial Counsel has been controversial and has been proposed for many years before finally securing Congressional passage in 2021. Obviously, it remains to be seen if this change will result in meaningful accountability and consequences for those who commit the covered offenses in the military.

## **SEXUAL ASSAULT**

The U.S. Military continues to be unable to respond effectively to acts of sexual assault within its ranks. The 2020 NDAA includes the following changes to address this problem:

Each Secretary of a military department may establish one or more civilian position within each office of the Special Victims' Counsel "(1) to provide support to Special Victims' Counsel, including legal, paralegal and administrative support; and (2) to ensure the continuity of legal services and preservation of institutional knowledge in the provision of victim legal services notwithstanding transitions in the military personnel assigned to offices of the Special Victims' Counsel." I believe this is an admission on the part of Congress and the military that the SVC offices are not effective due in part to high turnover in the offices.

The DoD Safe Helpline is now "authorized to provide crisis intervention and support and to perform the intake of official reports of sexual assault from eligible adult sexual assault victims who contact the DoD Safe Helpline." The staff is supposed to have "specialized training and appropriate certification to support eligible adult sexual assault victims." Time will tell if this happens and if this method of reporting is effective.

There is now a new right for a victim of an offense, including survivors of sexual assault, "to be informed in a timely manner of any plea agreement, separation-in-lieu-of-trial agreement or non-prosecution agreement relating to the offense, unless providing such information would jeopardize a law enforcement proceeding or would violate the privacy concerns of an individual other than the accused." (Article 6b(a)).

As this is the NDAA, there are new reports to be generated. One requires a study on "the feasibility and advisability of creating a military occupational specialty for Sexual Assault Response Coordinators." This report is due in 180 days with a briefing to follow 30 days thereafter. A briefing to the Armed Services Committees of Congress is required "on the status of the implementation of the recommendations set forth in the report of the Independent Review Commission on Sexual Assault in the Military" dated July 2, 2021. This briefing is to be held not later than 180 days from the enactment of the NDAA. Finally, the DoD is supposed to now track allegations of retaliation, including "(1) that such an allegation has been reported and by whom; (2) the date of the report; (3) the nature of the allegation and the name of the person or persons alleged to have engaged in such retaliation; (4) the Department of Defense component or other entity responsible for the investigation of or inquiry into the allegation; (5) the entry of findings; (6) referral of such findings to a decisionmaker for review and action as appropriate; (7) the outcome of final action; and (8) any other element of information pertaining to the allegation determined appropriate by the Secretary or the head of the component designated by the Secretary." Whether any of this reporting, briefing and tracking will have any benefit at all remains to be seen.

## **SEXUAL HARASSMENT**

The NDAA contains a provision which criminalizes sexual harassment. The new offense will contain the following elements:

- (1) that the accused knowingly made sexual advances, demands or requests for sexual favors, or knowingly engaged in other conduct of a sexual nature;
- (2) that such conduct was unwelcome;
- (3) that, under the circumstances, such conduct –
  - (A) would cause a reasonable person to believe, and a certain person did believe, that submission to such conduct would be made, either explicitly or implicitly, a term or condition of that person’s job, pay, career, benefits or entitlements; or
  - (B) would cause a reasonable person to believe, and a certain person did believe, that submission to, or rejection of, such conduct would be used as a basis for decisions affecting that person’s job, pay, career, benefits or entitlements; or
  - (C) was so severe, repetitive, or pervasive that a reasonable person would perceive, and a certain person did perceive, an intimidating, hostile, or offensive working environment; and
- (4) that, under the circumstances, the conduct of the accused was –
  - (A) to the prejudice of good order and discipline in the armed forces;
  - (B) of a nature to bring discredit upon the armed forces; or
  - (C) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

Regulations establishing this offense are to be prescribed not later than 30 days after the enactment of the NDAA. It remains to be seen if there will be prosecutions for sexual harassment in the years ahead.

In addition, there is supposed to be independent investigations of complaints of sexual harassment beginning in 2024. As provided for in the NDAA, a commanding officer shall forward sexual harassment complaints “to an independent investigator within 72 hours after receipt of the complaint and shall further (1) forward the formal complaint or a detailed description of the allegation to the next superior officer in the chain of command who is authorized to convene a general court-martial; and (2) advise the complainant of the commencement of the investigation.” The investigation is to be completed not later than 14 days after the date on which the investigation is commenced “to the extent practicable.” A final report is supposed to be submitted to the superior officer with court-martial authority within 20 days after the investigation is commenced or every 14 days thereafter until the investigation is completed. Again, this is all supposed to happen beginning two years from now.

## **SENTENCING REFORM**

An interesting new feature included in the NDAA is the requirement to create regulations “establishing sentencing parameters and sentencing criteria related to offenses under the UCMJ.” These are due in two years. There are to be no fewer than 5 and no more than 12 offense categories. There is supposed to be a delineated sentencing range for an offense that is appropriate for a typical violation of the offense. The parameters shall delineate the confinement range for each offense category by setting an upper and lower confinement limit.

With this being the military, there is to be established a “Military Sentencing Parameters and Criteria Board” composed of the 4 chief trial judges of the military branches and the Coast Guard. There can also be 3 or 4 non-voting members as designated by the Chief Judge of the Court of Appeals for the Armed Forces, the Chairman of the Joint Chiefs of Staff, the General Counsel of the DoD and the Secretary of Defense.

In addition, sentencing is now to be handled by the military judge alone except in capital cases. In those cases, the members shall determine “whether the sentence for that offense shall be death or life in prison without eligibility for parole; or whether the matter shall be returned to the military judge for determination of a lesser punishment.” The military judge of a general or special court-martial shall accept a plea agreement EXCEPT when “the military judge determines that the proposed sentence is plainly unreasonable.” When parameters are established, the military judge “shall sentence the accused for the offense within the applicable parameter.” If the sentence is outside the parameter, “the military judge shall include in the record a written statement of the factual basis for the sentence.” If the accused is being sentenced to confinement for more than one offense, “the military judge shall specify whether the terms of confinement are to run consecutively or concurrently.”

The goal of these reforms is obviously to make sentences as uniform as possible throughout the U.S. Military. The reforms are not due for 2 more years (at least) so it will be some time before there is data to confirm whether this goal is being achieved.

### **RACIAL DISPARITY IN THE MILITARY JUSTICE SYSTEM**

Included in the NDAA is a requirement that “Each Secretary of a military department shall conduct an assessment of racial disparity in military justice and discipline process and military personnel policies, as they pertain to minority populations.” This assessment must be followed by a report containing the results of the assessment and “recommendations for statutory or regulatory changes as the Secretary concerned determines appropriate.” It will be interesting to see what these reports reveal.

In addition, each Secretary is supposed to provide an annual report to the Secretary of Defense on “racial, ethnic, and sex demographics in the military justice system during the preceding year.” These reports are supposed to contain statistics on the number of offenses reported, the number that in which administrative action was imposed, non-judicial punishment was imposed, charges were preferred, charges were referred to court-martial. If referred to court-martial, the report is to contain the numbers which resulted in conviction and which resulted in acquittal.

If these reports are indeed generated, include accurate statistics and made available, they could be helpful in tracking racial disparities in the military “justice” system. However, tracking these disparities is clearly not enough and elimination should obviously be the goal.

### **UCMJ CRIME OF EXTREMISM**

Given the recent change to the DoD Instruction on extremist activities in the military (see article in this issue of *On Watch*) it is interesting to note that the NDAA contains the following provision:

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.

It will be interesting to see if the Pentagon takes Congress up on this offer or whether it will simply choose to continue to refuse to address this issue directly. A punitive article enforced by an independent trial counsel could have some effect on reducing extremists and extremist activity in the U.S. Military.

## **MILITARY CRIMINAL INVESTIGATIVE ORGANIZATIONS**

In the aftermath of the botched investigation of the death of Vanessa Guillen and other failures exposed at Fort Hood, Congress is now mandating that the military address the inadequacies of its criminal investigative organizations.

Within the year, each Secretary is supposed to complete an evaluation of these organizations and set out “a proposal for reforming such organization to ensure that the organization effectively meets the demand for complex investigations and other emerging mission requirements.” No later than two years from now, each Secretary is supposed to come up with an implementation plan for the proposals for reform.

Of note is that the Army’s implementation plan is singled out in particular. In the NDAA, Congress specifies that the Army’s plan must provide, “an explanation of how the plan will address the findings of the report of the Fort Hood Independent Review Committee, dated November 6, 2020 . . .”

An analysis of the Independent Review Committee’s report can be found on the MLTF website: [Fort Hood: A Toxic Culture - Military Law Task Force \(nlgmltf.org\)](https://nlgmltf.org) The Committee found a “toxic culture” at Fort Hood. Whether the Army can effectively reform its criminal investigative organization without addressing this culture of toxicity is highly questionable.

## **RICHARD GERE ACT**

Finally, Congress has revised Article 133 of the UCMJ – conduct unbecoming an officer and a gentleman. The words “and a gentleman” have now been removed.

## **CONCLUSION**

Through the NDAA, Congress had recognized the myriad of problems found in the military “justice” system. Authority has now been taken away from commanders in serious criminal matters because that authority prevented accountability in many cases. The problems of sexual assault and sexual harassment still have not been dealt with effectively. Sentencing is uneven and thus unfair. There are huge racial disparities regarding who gets prosecuted and how. The military’s criminal investigation organizations are dysfunctional. All in all, the NDAA amounts to a damning indictment of a system that cannot be reformed to provide justice.

# CONGRESS PUNTS DECISION ON DRAFT REGISTRATION

By Edward Hasbrouck

Congress has once again deferred making a decision as to whether to finally end draft registration or to expand it to include young women as well as young men.

## WHAT HAPPENED WITH SELECTIVE SERVICE AND THE FISCAL YEAR 2022 NDAA?

The final version of this year's this year's annual National Defense [sic] Authorization Act (NDAA)<sup>1</sup> approved by Congress on December 14th and signed into law on December 27th by President Biden<sup>2</sup> makes no change to the provisions of the Military Selective Service Act (MSSA) which authorize the President to order men, but not women, to register with the Selective Service System (SSS) for a possible military draft. This leaves the current Selective Service registration and address reporting requirements (applicable to young men but not women) in effect, and the issue unresolved.

Earlier this year, both the House and Senate Armed Services Committees voted, without debate or hearings on Selective Service, to recommend that the Fiscal Year 2022 NDAA include a section that would have expanded draft registration to women.<sup>3</sup> A version of the NDAA including this provision was approved by the full House of Representatives (without a floor vote on any of the proposed amendments related to Selective Service), and was on the verge of approval in the Senate.<sup>4</sup>

However, in the face of a deadlock in the Senate over this and other provisions of the NDAA, House and Senate leaders worked out a back-room package of compromises that included removing the section of the FY 2022 NDAA that would have expanded draft registration to women.<sup>5</sup>

The only provisions related to Selective Service that remain in the final version of the NDAA order more studies and reports to Congress by the Department of Defense about Selective Service and mobilization options.<sup>6</sup> This tends to confirm that Congress has merely punted, not abandoned the question, and expects to revisit it.

Democrats may hope to bring the future of Selective Service up again in 2022, while they still narrowly control the House and Senate. Republicans may prefer to put it off until in 2023, when they expect to

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1 S. 1605, National Defense Authorization Act for Fiscal Year 2022, <<https://www.congress.gov/bill/117th-congress/senate-bill/1605>>.

2 "Statement by the President on S. 1605, the National Defense Authorization Act for Fiscal Year 2022", December 27, 2021, <<https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/27/statement-by-the-president-on-s-1605-the-national-defense-authorization-act-for-fiscal-year-2022/>>.

3 Edward Hasbrouck, "Armed Services Committees vote to make women register for the draft:", *On Watch*, Fall 2021. The section of the version of the NDAA approved by the House that would have expanded Selective Service to women is available at <<https://hasbrouck.org/draft/BILLS-117-HR4350-H001085-Amdt-835.pdf>>.

4 Edward Hasbrouck, "U.S. Senate prepares to expand Selective Service to women as well as men", November 14, 2021, <<https://hasbrouck.org/blog/archives/002624.html>>.

5 Connor O'Brien, "Lawmakers drop proposal to add women to the draft as defense bill headaches mount", *Politico*, December 6, 2021, <<https://www.politico.com/news/2021/12/06/ndaa-women-draft-dropped-523829>>.

6 See excerpts from the NDAA related to Selective Service at <<https://hasbrouck.org/draft/FY2022-NDAA-SSS.pdf>>. The entire NDAA as enacted is available at <<https://www.congress.gov/117/bills/s1605/BILLS-117s1605enr.pdf>>.

have regained control of Congress. Both Rep. Jackie Speier (D-San Mateo, CA), Chair of the Military Personnel Subcommittee of the House Armed Services Committee and a leading proponent of expanding Selective Service to women, and Rep. Peter DeFazio (D-OR), the leading sponsor in the House of the Selective Service Repeal Act, have announced that they don't plan to run for reelection in 2022, which may influence whether this is considered before or after the 2022 elections. But the issue won't go away.

### **WHERE DOES THIS LEAVE DRAFT REGISTRATION AND CONTINGENCY PLANNING FOR A DRAFT?**

A proclamation by President Jimmy Carter, issued in 1980, requires men to register with the SSS within 30 days of their 18th birthday, and report to the SSS, within 10 days, every time they change their address until their 26th birthday.<sup>7</sup> Few young men fully or voluntarily comply<sup>8</sup>, and enforcement was abandoned in failure decades ago<sup>9</sup>, but this Presidential order and the law authorizing it remain on the books. Congress and military planners continue to pretend that a draft based on the current incomplete and inaccurate Selective Service registration database remains a realistic “fallback” option for the Pentagon.

### **WHAT'S ON THE TABLE FOR CONGRESS IN 2022-2023?**

There are three main options on the table, with a fourth as a wild card. Congress could decide to:

1. Maintain the status quo, requiring men but not women to register for the draft, at least unless and until another lawsuit<sup>10</sup> works its way up to the Supreme Court, the Supreme Court chooses to hear it, and the Court rules that requiring men but not women to register is unconstitutional. This is the option preferred by many pro-war sexists, but some of them are wavering: Nakedly sexist legal obligations and criminal penalties are just too obviously discriminatory to defend forever.
2. Attempt to expand Selective Service registration and contingency planning for a draft to women as well as men. This seemed an obvious and relatively easy way out for many liberals and moderates, but support for this option also appears to be softening in the face of objections both practical (few men comply with the registration and address reporting requirements, and there is no plan for how to force unwilling women to comply) and political (members of Congress, including the “liberals” who have been leading the push to expand registration, don't really want to be held accountable at the polls for making martyrs of young women who refuse to register for the draft, as will be necessary if any attempt is made to enforce an expanded registration requirement).

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7 Proclamation 4771, Registration Under the Military Selective Service Act, July 2, 1980,

<<https://www.archives.gov/federal-register/codification/proclamations/04771.html>>.

8 Edward Hasbrouck, “Compliance, noncompliance, and enforcement of Selective Service registration”,

<<https://hasbrouck.org/draft/compliance.html>>.

9 Steven Nelson, “Gender-Neutral Draft Registration Would Create Millions of Female Felons”, U.S. News & World Report, May 3, 2016, <<https://www.usnews.com/news/articles/2016-05-03/gender-neutral-draft-registration-would-create-millions-of-female-felons>>.

10 See list of Supreme Court cases related to Selective Service since 1980 at

<<https://hasbrouck.org/draft/litigation.html>>.



3. Repeal the MSSA entirely and end draft registration.<sup>11</sup> This option is winning increasing and bipartisan support from those whose first choice is one of the options above, but who see this as the second-best alternative. Repealing the President’s authority to order *anyone* to register for a possible draft, and ending contingency planning for a (male-only) draft, is the only way to end the naked sexism of the current male-only draft registration requirement without threatening to “Draft Our Daughters” (and without having to try to enforce draft registration or its expansion to women as well as men).
4. Suspend draft registration and put the SSS into standby as it was from 1975-1980.<sup>12</sup> This is almost nobody’s first preference, but might be put forward as a compromise. There’s a complication, though: if the SSS is to continue contingency planning for a draft, even on a “standby” basis, Congress will need to decide whether those plans and preparations should be for a draft of men only or of both men and women. So repeal of the MSSA (the third option above) may actually be the most widely acceptable compromise.

Congress doesn’t make multiple-choice decisions by ranked-choice voting, so the outcome may depend on how the questions are presented.

### HOW WILL CONGRESS HANDLE THIS ISSUE IN 2022-2023?

In response to the Congressional leadership compromise over this year’s NDAA, which punts this decision into 2022 or 2023, there has been talk from all sides of the possibility of hearings and consideration of legislation on Selective Service through standalone bills rather than as part of the NDAA. Standalone bills either to repeal the Military Selective Service Act<sup>13</sup> or expand it to women<sup>14</sup> are already pending in Congress, although none of them have received a hearing.

Following enactment of the NDAA, Sen. Kirsten Gillibrand (D-NY), one of the leading advocates on the Senate Armed Service Committee for expanding draft registration to women, told NPR that “she’ll continue to pursue ‘all legislative routes to implement this policy’ through annual defense spending or a standalone bill.”<sup>15</sup>

That same day, Elaine Donnelly of the pro-military Center for Military Readiness, an outspoken opponent of expanding draft registration to women, wrote that, “Next time, any proposal regarding Selective Service should be debated in the open, after full hearings with independent witnesses, in a stand-alone bill in regular order.”<sup>16</sup>

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11 Edward Hasbrouck, “Repeal Selective Service Registration!”, <<https://hasbrouck.org/draft/repeal.html>>.

12 Edward Hasbrouck, “Put the Selective Service System into ‘Standby!’”, <<https://hasbrouck.org/draft/standby.html>>.

13 Selective Service Repeal Act of 2021, H.R. 2509 / S. 1139, <<https://www.congress.gov/bill/117th-congress/house-bill/2509>>, <<https://www.congress.gov/bill/117th-congress/senate-bill/1139>>. Other pending bills lacking some of the desirable provisions of the Selective Service Repeal Act, especially its preemption of state collateral sanctions for nonregistration with the Selective Service System, include H.R. 5867, H.R. 5868, and H.R. 6091.

14 Inspire to Serve Act of 2021, H.R. 3000, <<https://www.congress.gov/bill/117th-congress/house-bill/3000>>.

15 Desiree D'Iorio, “Despite a defeat in Congress, advocates say they'll keep pushing for women to register for the draft”, December 14, 2021, <<https://americanhomefront.wunc.org/news/2021-12-14/despite-a-defeat-in-congress-advocates-say-theyll-keep-pushing-for-women-to-register-for-the-draft>>.

16 “Senate Drops Bipartisan Plan To Draft Women After Constituent Outcry”, The Federalist, December 14,

These are positive developments for opponents of the draft and draft registration. Hearings on standalone bills make repeal of Selective Service more likely than consideration of the issue as part of the massive multi-issue NDAA without separate hearings on Selective Service.

A coalition of anti-war and anti-draft activists has already called on Congress “to give this issue the full consideration it warrants, by holding a full and fair hearing on this issue that considers both policy options before Congress — either ending Selective Service registration or expanding it to women — and that hears from witnesses in support of each of those options.”<sup>17</sup>

Consideration of standalone legislation on Selective Service, rather than bundling this issue into a future year’s NDAA, would allow for more thorough debate. It would also force members of Congress to go on record, for the first time in years, with a separate roll-call vote on this issue. Some members of both the House<sup>18</sup> and the Senate<sup>19</sup> voted against the entire 2,000+ page NDAA, but none of those votes could be attributed specifically to what the bill did or didn’t say about Selective Service. Most members of Congress have yet to take any public position with respect to Selective Service — and don’t want to, fearing that whatever they do will anger some of their constituents. That fear is, to some degree, well founded. But support for a draft is quite weak, and ending draft registration entirely (“Door Number 3”) may be the position that will prompt the least backlash from voters.

Hearings are also likely to shift the debate in favor of ending draft registration, as long as independent witnesses supporting both repeal and expansion of Selective Service are invited to testify. The Selective Service emperor has no clothes. When even the former Director of the Selective Service System has [testified](#) that [noncompliance](#) has made the Selective Service database so incomplete and inaccurate as to be “less than useless” for an actual draft<sup>20</sup>, it should be clear that the Potemkin “mobilization capability” purportedly provided by draft registration will not withstand critical scrutiny. Any full and fair hearing will call attention to the possibility of repeal and further expose the failure of draft registration, the impossibility of enforcing it, and the pointlessness of continuing it — much less trying to expand it to women.

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2021, <<https://thefederalist.com/2021/12/14/senate-drops-bipartisan-plan-to-draft-women-after-constituent-outcry/>>.

17 Open letter to the House Armed Services Committee, 11 March 2021, <<https://hasbrouck.org/draft/NCMNPS/full-fair-hearing.html>>

18 Roll Call 405, Bill Number: S. 1605, December 7, 2021, <<https://clerk.house.gov/Votes/2021405>>.

19 Roll Call on Motion to Concur in the House Amendment to S. 1605, December 15, 2021, <[https://www.senate.gov/legislative/LIS/roll\\_call\\_votes/vote1171/vote\\_117\\_1\\_00499.htm](https://www.senate.gov/legislative/LIS/roll_call_votes/vote1171/vote_117_1_00499.htm)>.

20 Testimony of Dr. Bernard Rostker before the National Commission on Military, National, and Public Service, April 24, 2019. Transcript: <<https://hasbrouck.org/draft/FOIA/NCMNPS-Transcript-24APR2019pm.pdf>>. Video: <<https://www.c-span.org/video/?c4932215/user-clip-current-system-registration-useless>>. See additional background and references in Edward Hasbrouck, “Former Director of Selective Service says it’s time to end draft registration”, April 28, 2019, <<https://hasbrouck.org/blog/archives/002344.html>>.

## MEANWHILE, IN STATE LEGISLATURES

Such limited compliance with the registration requirement as the Selective Service System currently obtains depends almost entirely on state laws that link Selective Service registration to issuance of drivers' licenses.<sup>21</sup> This is true for young men today, and will also be true for young women if the registration requirement is expanded. These state drivers' license laws have become even more critical since the requirement to register with the SSS in order to be eligible for Federal student aid was ended by Congress a year ago<sup>22</sup> and that change took effect in August of this year.<sup>23</sup>

The problem for the SSS is that (1) not all states have such laws (populous states with no such laws include California, Pennsylvania, New Jersey, Massachusetts, and Oregon), (2) in most of the states that do have such laws, they use gendered language that makes them apply only to men, and will be vulnerable to challenge, unless amended state by state to apply also to women, if Federal law is changed to require women as well as men to register with the SSS, and (3) many of the same state legislators who were most willing to sue their state motor vehicle codes to sign up young men for the draft may be least willing to use those same laws to force young women to sign up to be drafted (a problem that was anticipated by the National Commission on Military, National, and Public Service (NCMNPS) in closed-door discussions disclosed only long afterward in response to my Freedom Of Information Act requests<sup>24</sup>).

So the highest current priority for the SSS, consistent with the longstanding [state lobbying program](#) disclosed in response to another FOIA request<sup>25</sup>, is to persuade state legislators (1) to enact such laws in states without them (a bill for this purpose is already pending in Massachusetts<sup>26</sup>), and (2) to amend gendered state laws linking Selective Service registration to drivers' licenses to use non-gendered language, so that they will remain valid if Selective Service registration is expanded to women.

This ongoing state-by-state legislative activity will continue in parallel with the ongoing Congressional

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21 Edward Hasbrouck, "State laws on Selective Service registration and drivers' licenses", <<https://hasbrouck.org/draft/state.html>>. The best available state by state summary of these laws is "State Laws & Regulations on Selective Service / Military Draft Registration," Center on Conscience & War, <<https://centeronconscience.org/draft-registration-by-state/>>, but this is not necessarily complete or up to date.

22 The change was part of the FAFSA Simplification Act, which was included in the Consolidated Appropriations Act, 2021. See Edward Hasbrouck, "Solomon Amendment' linking student aid to draft registration repealed", December 29, 2020, <<https://hasbrouck.org/blog/archives/002573.html>>.

23 Edward Hasbrouck, "Draft registration requirement for Federal student aid to be ended soon", June 11, 2021, <<https://hasbrouck.org/blog/archives/002613.html>>.

24 See, "NCMNPS internal meetings, deliberations, and decisions," <<https://hasbrouck.org/draft/NCMNPS/meetings.html>>, and minutes of April 2019 NCMNPS meeting released in response to my FOIA request, <[https://hasbrouck.org/draft/FOIA/NcoS\\_Minutes\\_2019\\_APRIL\\_FINAL.pdf](https://hasbrouck.org/draft/FOIA/NcoS_Minutes_2019_APRIL_FINAL.pdf)>. Those records of the NCMNPS that weren't destroyed by the NCMNPS before it disbanded were transferred to the National Archives and Records Administration (NARA), but NARA contends that they are not subject to FOIA and need not be preserved. Litigation against NARA under FOIA and the Federal Records Act for preservation and disclosure of records of the NCMNPS is currently in mediation. See *Hasbrouck v. NARA*, No. 1:21-cv-00444, U.S. District Court for the District of Columbia (filed February 21, 2021), <<https://hasbrouck.org/draft/NCMNPS/nara-lawsuit.html>>.

25 SSS Directive 600-31, Registration Improvement Plan FY 2014, <[https://www.governmentattic.org/10docs/3SSSdirectives\\_1999\\_2005\\_2014.pdf](https://www.governmentattic.org/10docs/3SSSdirectives_1999_2005_2014.pdf)>.

26 Bill H. 4263 / S. 2585, "An Act to ensure benefits through enhanced Selective Service registration", <<https://malegislature.gov/Bills/192/H4263/>>, <<https://malegislature.gov/Bills/192/S2585>>.

debate over whether to end draft registration or try to expand it to women. These debates about use of state laws to get young people to register for the draft are not a mere footnote to the Congressional debate about Federal law: If states won't use their drivers' license laws to pressure young people to register, the Federal government — which abandoned enforcement of the criminal penalties for refusal to register with Selective Service decades ago — has no “plan B” for enforcement of registration.

Some states may choose to repeal their state laws linking drivers' licenses or other state programs to Selective Service registration, rather than expand them to apply to women as well as men. California recently set a good example by repealing, rather than expanding, the state law which had required men to register with the SSS to be eligible to state Cal Grants for higher education.<sup>27</sup>

Monitoring and opposing proposals in their state legislatures for new or expanded linkages between drivers' licenses and draft registration, and working to repeal existing state laws related to Selective Service to preempt any attempt to expand them, should be a priority this year for opponents of the draft and draft registration.

An initial task that could be started now would be to survey current state, District of Columbia, and territorial laws related to Selective Service, including those related to drivers licenses, state student aid, admission to state universities, state government employment, etc. What collateral sanctions do they impose in each jurisdiction? Are they opt in (you can check a box to register with the SSS when you apply for a drivers' license), opt out (you are registered with the SSS when you apply for a drivers' license, unless you check a box to opt out), or mandatory (you have no choice, but must consent to being registered with the SSS in order to apply for a drivers' license)? Do they use gendered (“all male persons”) or non-gendered (“all persons required to register with the SSS”) language?

Such a research project would be valuable to state-level activists and might well lead to a publishable law review article. Monitoring the text and status of state and territorial legislative proposals, to alert lobbyists and activists in the respective states, would be a valuable year-long project well suited for a law student or small groups of students or other legal researchers.

## **WHAT ELSE CAN OPPONENTS OF THE DRAFT AND DRAFT REGISTRATION DO NOW?**

Don't wait. The time to organize against the draft and draft registration is now.<sup>28</sup>

Consciousness raising is the first step. Spread the word to everyone you know, especially young women. Most people have no idea that there is ongoing planning and preparation for military conscription in the U.S., that ten thousand members of draft boards covering every county in the U.S. have been appointed and trained to administer a future draft<sup>29</sup>, that applicants for learners' permits or drivers' licenses as young as 15 years old in some states are being signed up to kill or be killed on command (notwithstanding U.S. government crocodile tears about conscription of “child soldiers” in *other* countries), or that Congress is on the verge of a decision as to whether to end all of this or to try to expand it to young women as well as young men.

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27 “Draft Registration No Longer Required for College Aid in California,” Rick Jahnkow, *Draft NOtices*, San Diego Committee Opposed to Militarism and the Draft (COMD), <<http://comdsd.org/index.php/articles-archive/256-draft-registration-no-longer-required-for-college-aid-in-california>>.

28 See ideas for anti-draft organizing and activism at <<https://hasbrouck.org/draft/organize.html>>.

29 See list of all draft board members released in response to FOIA request, March 2021, at <<https://hasbrouck.org/draft/draft-board.html>>.

Urge your state legislators to repeal, not expand, state laws linking Selective Service registration to drivers' licenses. Urge your U.S. Representative and U.S. Senators to (1) co-sponsor the Selective Service Repeal Act (H.R. 2509 / S. 1139) and (2) push for full and fair hearings on this bill, with independent nongovernmental witnesses, in the House and Senate Armed Services Committees.<sup>30</sup> It's especially critical to get members of both Armed Services Committees to support this bill and the call for a full hearing on it, which member of either Armed Service Committee has yet done.

Put Representatives and Senators on the spot by asking questions at town halls and other events: Do they believe that young women (or young men) who refuse to agree to fight any future war that not enough people are willing to volunteer to fight should be put in prison? If not, why aren't they a co-sponsor of, and calling for a hearing on, the Selective Service Repeal Act? Don't let them off with a facile answer of "Because equality". As opponents of draft registration including MLTF Executive Director Kathy Gilberd, MLTF member Edward Hasbrouck, and others said in a joint letter to Congress earlier this year, "Expanding draft registration to women would bring about a semblance of equality in war (although women in the military would likely still be subject to disproportionate sexual harassment and abuse). Ending draft registration would bring about real equality in peace and freedom."<sup>31</sup>

Let members of Congress know that you and other MLTF and NLG members support and will defend young men who refuse to register for the draft and young women who will do likewise.

Draftees and their families, friends, and lovers are expected to complain about the draft. Members of Congress don't care if people complain to Congress or "protest" the draft, as long as young people *submit*.<sup>32</sup>

But in deciding whether they can get away with expanding draft registration to women, members of Congress will be influenced, perhaps decisively, by indications of the likely scale of noncompliance by young people, and of support for it by older allies. The fact that most noncompliance with draft registration is closeted and invisible makes it easy to ignore. There's a symbiosis between closeted spontaneous mass noncompliance and smaller numbers of public resisters.<sup>33</sup>

For the inevitability of widespread noncompliance — and of an embarrassing (for the government) fiasco of ineffective show trials in a futile attempt at selective enforcement as an intimidation tactic — to be recognized and taken into consideration by Congress, some young women will have to come out about their refusal to register, or their intention to resist if ordered to register, as I and some other young men did in the 1980s before the government abandoned enforcement of the law requiring registration.<sup>34</sup>

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30 See phone script for calls to Congress at <<https://www.afsc.org/resource/tell-congress-end-selective-service-requirement-everyone>> and form to send e-mail messages at <<https://www.codepink.org/nodraft2021>>.

31 Open letter to the House Armed Services Committee, 11 March 2021, <<https://hasbrouck.org/draft/NCMNPS/full-fair-hearing.html>>.

32 See, for example, the excerpt from the SSS readiness plan with guidance to public affairs staff on "disruptive events" at <<https://hasbrouck.org/draft/SSS-public-affairs-procedures.pdf>> (which includes advice to SSS staff to recruit ROTC professors to spy on anti-draft activists on local campuses).

33 See discussion and links in blog post, "Public vs. Quiet Resistance", National War Tax Resistance Coordinating Committee, October 10, 2018, <<https://nwtrcc.org/2018/10/10/public-vs-quiet-resistance/>>.

34 Edward Hasbrouck, "History of Draft Registration and Draft Resistance Since 1980", <<https://hasbrouck.org/draft/background.html#history>>

The most effective way to influence Congress may be for young people to speak out publicly about their intention not to register voluntarily for the draft. Even if they don't make a public commitment to illegal resistance, they can make clear that they won't go voluntarily or without a fight in court and in the court of public opinion. MLTF members can make clear that we will support and defend them. Young women who don't want to fight for Trumpian fascism or against whomever the present or a future Commander-In-Chief proclaims to be an enemy will make sympathetic defendants.

Regardless of whether you hold yourself out as a "draft counselor" (I don't – I'm an advocate who doesn't pretend to neutrality on this issue), young people are likely to look to MLTF members for information about their options, their legal rights, and the legal implications of their choices.<sup>35</sup>

Make the government work. Advise young people who don't want to be drafted, or who aren't certain they would be willing to submit to induction, not to sign for any letters or talk to the SSS or FBI.<sup>36</sup> Remind them that anything they say can and will be used against them. Advise them not to register with the SSS unless and until they have to do so for some other government program, the FBI tracks them down and personally serves them with provable notice to register (as was done with a handful of the "most vocal" nonregistrants in the 1980s before the Department of Justice gave up on criminal enforcement), or they are approaching their 26th birthday<sup>37</sup> and almost out of draft age.

Spread the word that knowledge and willfulness are explicit elements of any violation of the MSSA, and help young people understand what that means. Most people who haven't registered with the SSS have not actually violated the MSSA, because they lack the requisite specific intent. Actual knowledge of the requirement or order alleged to have been violated will be the most difficult element to prove if a defendant has not incriminated themselves and exercises their right to remain silent.

Older allies, including lawyers and legal workers, can provide counseling resources and advice about this and other issues to help young people understand the Selective Service maze and inform their choices. More importantly, older allies can help make young people aware of the potential power of draft registration resistance as direct action by young people that can help remove the draft from the arsenal of war planning and protect us all against larger, longer, less popular wars. As older allies, we can provide solidarity and support to young people in their resistance, and amplify their voices.

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35 Edward Hasbrouck, "Draft Counseling and Decisions about Selective Service: Resources and advice for draft counselors and counsees", <<https://hasbrouck.org/draft/counseling.html>>; "Deciding whether or not to register with the Selective Service System: Options to consider and reasons some people choose each of these options", <<https://hasbrouck.org/draft/options.html>>; and "Flowcharts of draft registration and Selective Service procedures and choices", <<https://hasbrouck.org/draft/media/flowcharts.html>>.

36 Edward Hasbrouck, "Advice about Selective Service registration: I don't want to be drafted. What should I do?", <<https://hasbrouck.org/draft/advice.html>>.

37 Edward Hasbrouck, "Decisions about Selective Service to make before your 26th birthday", <<https://hasbrouck.org/draft/26.html>>.

# DEPARTMENT OF DEFENSE ISSUES REVISED INSTRUCTION ON EXTREMISM – MLTF RESPONDS

**By Jeff Lake**

After years of promising to address racism and extremist activity within its ranks, the Department of Defense finally revised its Instruction supposedly addressing these issues.

On December 20, 2021, five days before Christmas, the Pentagon released a revised version of Instruction Number 1325.06 with the subject: “Handling Protest, Extremist, and Criminal Gang Activities Among Members of the Armed Forces.” The Secretary of Defense also issued an accompanying memorandum and published a report from the Countering Extremist Activity Working Group.

Under the revised Instruction, members of the military are “prohibited from actively participating in extremist activities.” The term “extremist activities” is defined as “Advocating or engaging in unlawful force, unlawful violence, or other illegal means to deprive individuals of their rights . . .” In addition, it covers “Advocating or engaging in unlawful force of violence to achieve goals that are political, religious, discriminatory or ideological in nature.” Prohibited activities also include supporting terrorism, supporting the overthrow of the government and disrupting military activities. Finally, extremist activities also include “Advocating widespread unlawful discrimination based on race, color, national origin, religion, sex (including pregnancy), gender identity, or sexual orientation.”

The major revision in the instruction is the definition of “Active Participation.” This is now defined as follows:

- (a) Advocating or engaging in the use or threat of unlawful force or violence in support of extremist activities.
- (b) Advocating for, or providing material support or resources to, individuals or organizations that promote or threaten the unlawful use of force or violence in support of extremist activities, with the intent to support such promotion or threats.
- (c) Knowingly communicating information that compromises the operational security of any military organization or mission, in support of extremist activities.
- (d) Recruiting or training others to engage in extremist activities.
- (e) Fundraising for, or making personal contributions through donations of any kind (including but not limited to the solicitation, collection; or payment of fees or dues) to, a group or organization that engages in extremist activities, with the intent to support those activities.
- (f) Creating, organizing, or taking a leadership role in a group or organization that engages in or advocates for extremist activities, with knowledge of those activities.
- (g) Actively demonstrating or rallying in support of extremist activities (but not merely observing such demonstrations or rallies as a spectator).
- (h) Attending a meeting or activity with the knowledge that the meeting or activity involves extremist activities, with the intent to support those activities:
  - (1) When the nature of the meeting or activity constitutes a breach of law and order;
  - (2) When a reasonable person would determine the meeting or activity is likely to result in violence; or

- (3) In violation of off-limits sanctions or other lawful orders.
  - (i) Distributing literature or other promotional materials, on or off a military installation, the primary purpose and content of which is to advocate for extremist activities, with the intent to promote that advocacy.
  - (j) Knowingly receiving material support or resources from a person or organization that advocates or actively participates in extremist activities with the intent to use the material support or resources in support of extremist activities.
  - (k) When using a government communications system and with the intent to support extremist activities, knowingly accessing internet web sites or other materials that promote or advocate extremist activities.
    - (1) Knowingly displaying paraphernalia, words, or symbols in support of extremist activities or in support of groups or organizations that support extremist activities, such as flags, clothing, tattoos, and bumper stickers, whether on or off a military installation.
  - (m) Engaging in electronic and cyber activities regarding extremist activities, or groups that support extremist activities - including posting, liking, sharing, re-tweeting, or otherwise distributing content - when such action is taken with the intent to promote or otherwise endorse extremist activities. Military personnel are responsible for the content they publish on all personal and public Internet domains, including social media sites, blogs, websites, and applications.
  - (n) Knowingly taking any other action in support of, or engaging in, extremist activities, when such conduct is prejudicial to good order and discipline or is service-discrediting.

Under the Instruction, the responsibility to prohibit servicemembers from active participation falls entirely on commanders. This includes the authority “to order Service members not to participate in activities that are contrary to the good order and discipline of the unit . . .” The Instruction states: “Commanders may, as appropriate, pursue adverse administrative action in addition to or in lieu of punitive action in response to a Service member’s active participation in extremist activities, pursuant to military service regulations and other existing authorities.” It goes on to say, “Commanders should remain alert for signs of future extremist activities.”

Notably, the Instruction still includes the word “Protest” as the first word in the subject line. It allows commanders to order servicemembers not to participate in activities as stated above. This could easily be applied to political protests that the commander does not agree with. The Instruction retains prior language about prohibiting participation in off-post demonstrations where “violence is likely to result.” This language has already been used to prosecute a servicemember who participated in a Black Lives Matter protest where the police initiated violence. (See [Lawsuit prompts modification of DoD dissent instruction relating to National Guard - Military Law Task Force \(nlgmltf.org\)](https://www.nlgmltf.org) )

Following the announcement of the revised instruction, the MLTF published the following response:

After months of delay and empty promises, the Department of Defense has finally adopted an expanded policy on extremist activity in the military. The Military Law Task Force of the National Lawyers Guild is disappointed that the DoD has once again failed to protect military personnel from violence and harassment. DoD Instruction 1325.06



effective 12/20/2021 fails to mention “racism” or “white supremacy” but instead defines extremist activities as “to deprive individuals of their rights” and “advocating widespread unlawful discrimination based on race . . .”

The new instruction places the onus of detection and enforcement on commanders. While there are reporting requirements for local commands, it’s not clear the commander must report if she or he doesn’t think active participation or real extremism is occurring. This will make for uneven enforcement, and allow commanders with extremist sympathies to avoid action.

In addition, the instruction retains the highly problematic language that members of the Armed Forces are prohibited from participating in demonstrations where “violence is the likely result.” This language has been used to attempt to discipline those who have participated in Black Lives Matter protests. This looks suspiciously like something designed to target progressives rather than white supremacists.

All in all, the instruction amounts to only a small improvement in the military’s attempt to eliminate racism within its ranks. Much more is needed if the military is indeed serious about this goal.

According to a report by the Associated Press, the DoD sought the expertise of the Southern Poverty Law Center and other civil rights organizations, academics and others in drafting the Instruction. These groups are hoping to continue to push the Pentagon to take meaningful action to address the problem of racism and extremist activity in the U.S. Military.

The MLTF will continue to monitor the implementation of the directives contained in the Instruction and will report on future revisions as they occur.

# NLG CONVENTION REPORT

**By Jeff Lake**

The annual National Lawyers Guild Convention was held virtually during the week of October 11, 2021.

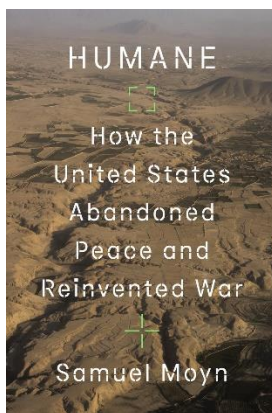
The MLTF participated in the convention by presenting two CLE programs. The first program was entitled “An Introduction to Military Law for Leftist Lawyers.” The second program was entitled “Defending military servicemembers who want to participate in Black Lives Matter and other movements against oppression.” James Branum from the MLTF was the lead presenter for these programs and they were well-attended. During the break, MLTF Chair Jeff Lake discussed the history and current activities of the MLTF and encouraged NLG members to join.

Following the formal convention, the MLTF held its annual meeting also virtually. MLTF Steering Committee members discussed the work of the subcommittees and priorities for the coming year. At the conclusion of the meeting, elections to the Steering Committee were held. Four new members were elected who will bring new ideas and energy to the MLTF in the coming year.

## Book Review

### IS THE CONDUCT OF WAR EVER HUMANE?

**By Chris Ford**



**Title:** Humane: How the United States Abandoned Peace and Reinvented War

**Author:** Samuel Moyn

**Publisher:** Farrar, Straus and Giroux, New York

**Publication Date:** 2021

325 pp (400 pp including endnotes and index)

In the pre-dawn hours of July 19, 2016, U.S. Special Forces reported bombing three ISIS staging areas and killing 85 fighters. Instead, according to a New York Times article citing “a hidden Pentagon archive,” they killed more than 120 villagers in Tokhar, Syria, including farmers and their families and others in houses far from the front line “who sought nighttime sanctuary from bombing and gunfire.”<sup>1</sup> Months earlier U.S. forces struck what they thought was an ISIS “defensive fighting position” in Ramadi, Iraq, instead killing a child.<sup>2</sup> And in 2017 a U.S. war plane bombed a car carrying not a bomb, as had been thought, but a couple and their two children fleeing nearby fighting, killing the family and three other civilians.<sup>3</sup>

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<sup>1</sup> Azmat Kahn, *US air war in Mideast behind thousands of civilian casualties*, NEW YORK TIMES (republished in SANTA ROSA PRESS DEMOCRAT), Dec. 19, 2021, at B1.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

Deployment of “light-footprint” Special Forces and “no-footprint” armed drones and resort to assassination – rebranded as “targeted killing” – appear to be the U.S. military’s 21st century answer to the question raised by Yale law and history professor Samuel Moyn in his recently published book, *Humane: How the United States Abandoned Peace and Reinvented War*: Do efforts to create international law principles to make war more “humane” constitute a preferable alternative to ending war altogether, if the latter objective is to be deemed not possible?

Moyn’s detailed and informative work of nonfiction catalogs efforts by Western powers from the 19th century to the present to end war altogether or, on the conclusion that such objective is impossible to achieve, to make war more “humane.” Moyn, a contributor to the *New York Times* and *Washington Post*, reiterates throughout the book that the increasing focus on the latter objective over time has corresponded with a diminution of hope for and efforts to achieve the former.

One result of this decades-long trend is that “[t]he American way of war is more and more defined by a new complete immunity from harm for one side and unprecedented care when it comes to killing people on the other,” Moyn writes. “America’s ‘forever war,’” Moyn adds, presaging a dystopian future for people in nations that Washington policymakers wish to control in service of domestic political or economic objectives, “shows for the first time that war – for all its sickening violence – can be transmuted into a system of humane control.”

On the other hand, as Moyn’s book and newspaper headlines appearing with near-daily frequency make clear, use of the term “humane” to describe U.S. military methods in armed conflict at best generates cognitive dissonance. *Humane* itself acknowledges that such methods are anything but humane.

#### **“INDIAN COUNTRY” SIGNIFIES RACE WAR**

*Humane* catalogs efforts going back almost 200 years to “civilize” war but notes that in earlier times the greater focus was on peace. For example, peace movements were strong in the U.S. during 19th century (except during the Civil War), and Moyn quotes Prussian nobleman Carl von Clausewitz in 1832 as casting doubt on the concept of making war more humane, because it would be “futile – even wrong – to try to shut one’s eyes to what war really is from sheer distress at its brutality.”

Nonetheless, efforts to make war more “humane” commenced in earnest in Geneva during the 1860s. However, Moyn notes that European powers limited these nascent efforts at “humanizing” war to white-on-white conflicts, abandoning any pretensions of “humanizing” war during anti-insurgency campaigns in their colonies against people of color. This practice continued well into the 20th century. For example, Spain dropped poison-gas bombs on the Rifian population in Morocco, justified because while the Rifians “came of a white race,” such racial character had been “corrupted” by intermarriage with Semitic invaders. Italy used gas-poisoned bombs in Ethiopia as late as the 1930s, Moyn notes.

The term “Indian country,” a reference to the kind of no-holds-barred warfare visited by European settlers and later the U.S. military on Native Americans, developed as shorthand for white-on-nonwhite warfare, and, ultimately, for the attitudes of some in military leadership toward their enemies. Thus, Moyn describes the U.S. military’s take-no-prisoners battles against Japan in World War II as “Indian country’ all over again” – as was the imprisonment (a practice sanitized with the term “internment”) in the U.S. during WWII of Americans of Japanese, but not of German, descent.

Likewise, the U.S. military’s “old-style fighting” in Korea was “more comparable to that of our own Indian frontier days than to a modern war,” and in Vietnam race was such a significant factor “in the

killing of enemies and mistreatment of civilians” that any lingering racism within the military “paled beside the extraordinary radicalization of the enemy,” Moyn writes.

Moyn points out that in the current century, law professor John Yoo, author of the G.W. Bush administration’s much-maligned “Torture Memos,” embraced the “Indian country” theme by arguing that Geneva protections did not apply to dealings with Taliban fighters because they were not sufficiently civilized to be party to international agreements. In essence, Yoo’s position was that the unlawful tactics of the so-called war on terror were warranted because it was just another “Indian war.” Moyn further suggests that Obama’s intensifying of war in Afghanistan similarly reeked of “colonial-era counterinsurgency strategies.”

## **MILITARY PREROGATIVES OVERWHELM EARLY 20TH CENTURY PEACE MOVEMENTS**

The dawn of the 20th century brought strengthened advocacy for peace, rather than merely making war more “humane.” Moyn recounts the argument of British naval leader John Arbuthnot at the Hague: “The humanization of war! You might as well talk about humanizing Hell!” Moyn additionally offers an impassioned quote from Black intellectual W.E.B. Du Bois: “I believe that armies and navies are at bottom the tinsel and braggadocio of oppression and wrong....”

Peace movements in the U.S. gained such strength in the early 1900s that President Woodrow Wilson, unable to countenance them, infamously dispatched his attorney general, A. Mitchell Palmer, to round up, detain and interrogate 10,000 lawfully resident foreign nationals based solely on their political views, even though not one of them was shown to pose a threat to the nation.<sup>4</sup> The “Palmer raids” resulted in the deportation of more than 500 of those permanent residents.<sup>5</sup>

Efforts to achieve peace, rather than to make war more “humane,” still were popular during the Vietnam War era. Thus, the U.S. public’s aversion to the My Lai massacre in 1968 helped end the Vietnam war. However, this response would mark the demise of such efforts in the U.S., as the military-industrial complex would turn to marketing war in part by selling its weapons as more precise and therefore more humane, as well as employing public-relations campaigns to distract from opposition to war by urging the public to “support our troops.”

The late 20th century also saw increased prevalence of international human rights law concepts applied to the conduct of war. For example, while the use of torture is nothing new – in the Philippines in 1902 the U.S. military applied a so-called “water cure,” or waterboarding in today’s parlance – Moyn notes that by the issue of torture “rose to the top of the list of immoral and even illegal acts” in the years leading up to 9/11, even if the issue of whether engaging in warfare was lawful “fell off the list, and no one complained.”

## **NOT SO HUMANE**

Moyn suggests that political leaders in the wake of 9/11 became less concerned with the legality of going to war, and while war supposedly was becoming humane, it also seemed “more and more outrageous over time.” For example, a June 2004 FBI report listed abuses by U.S. military personnel or

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<sup>4</sup> Chris Ford, *Fear of a Blackened Planet: Pressured by the War on Terror, Courts Ignore the Erosion of the Attorney-Client Privilege and Effective Assistance of Counsel in 28 C.F.R. § 501.3(d) Cases*, 12 WASH. & LEE J. CIVIL RIGHTS AND SOC. JUSTICE 51, 73 (2006).

<sup>5</sup> *Id.*

mercenaries “in America’s archipelago of military prisons from Cuba to the Middle East, such as ‘strangulation, beatings, placement of lighted cigarettes into detainees’ ear openings and unauthorized interrogations.”<sup>6</sup>

The U.S. held as many as 9,000 people in prisons outside the U.S., not including those who were “rendered,” or kidnapped and taken “to third-party governments who then act[ed] as subcontractors for Washington, enabling the U.S. to effectively torture detainees while technically denying that it carries out torture.”<sup>7</sup> Meanwhile, in the U.S., “[i]n the eyes of some, the War on Terrorism might better [have been] named the War on Civil Liberties.”<sup>8</sup> For example, the Patriot Act gave the attorney general “carte blanche” to seize computer, phone, mail, business and medical records with no notice simply by alleging and interest in national security.<sup>9</sup>

*Humane* reviews the G.W. Bush and Obama presidencies in depth, noting that Obama continued Bush’s war policy largely intact. An ACLU representative referred to such policy as the “Bush-Obama doctrine,” earning from Obama “a stony gaze, broken only by a surly glare.” Obama administration lawyers, according to Moyn, appeared to take the legal gymnastics required to justify America’s forever wars to new heights, conjuring such terms as “elongated imminence” to stretch the time frame for which self-defense is justified in the face of imminent attack and extending war-making not only to nonstate actors such as Al Qaeda, but against “associated forces,” generating what Moyn calls “an astonishing license to kill.”

Obama also expanded reliance on assassinations, increasingly normalized after national “enthusiasm” for the extrajudicial killing in 2011 of Osama bin Laden. This reliance on assassination was expanded to what only could be described as mass murder, marketed to the public as “signature strikes,” that permitted U.S. forces to kill any “males of fighting age.” With the ISIS flare-up in 2013, military brass apparently had given up altogether on avoiding civilian casualties, instead addressing themselves to the question of “how much [civilian] harm was too much.” They went so far as to enumerate a “non-combatant casualty cut-off value” as a threshold for determining whether to call an airstrike, according to Moyn.

In a moment of self-reflection quoted by Moyn, Obama said in a 2020 memoir that he “wanted somehow to save” anti-American foreign youth who turned to violence, to “send them to school, give them a trade, drain them of the hate that had been filling their heads. And yet the world they were part of, and the machinery I commanded, more often had me killing them instead.”

Though published after Trump left office, *Humane* devotes few pages to the real estate mogul and former reality-TV host, observing that his staunch opposition to the war in Iraq was popular with voters, though Moyn views Trump’s campaign comment that “torture works” as “scandalous.” In office Trump began pulling out of unwinnable heavy-foot wars while further increasing reliance on light-footprint and drone warfare, “striking boldly when he deemed it necessary for the purposes of global control.” Despite Trump’s “Indian country”-style enthusiasm for war against nonwhites, Moyn observes that he

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<sup>6</sup> *Id.* at 59 n.42 (citing Richard A. Serrano, *FBI Agents Complained of Prisoner Abuse, Records Say*, L.A. TIMES, Dec. 21, 2004, at A1).

<sup>7</sup> *Id.* (quoting *They Beat Me From All Sides*, GUARDIAN UNLIMITED, Jan. 14, 2005) (internal quotation marks omitted).

<sup>8</sup> *Id.* at 57.

<sup>9</sup> *Id.* at 59 n.41 (quoting Elaine Cassel, THE WAR ON CIVIL LIBERTIES: HOW BUSH AND ASHCROFT HAVE DISMANTLED THE BILL OF RIGHTS 5 (2004)).

was “locked into” the so-called humane war of his predecessors “to a remarkable and surprising extent.”

### **HUMANE’S STRENGTHS AND WEAKNESSES**

This book is thoroughly reported but makes somewhat heavy going for the reader. A page-turner it is not. In the first portions of the book the chronology is not linear, which some readers may find burdensome, though toward the end of the book the information is laid out chronologically. Depending on the reader’s tastes, the focus on the work of inside-the-beltway figures in more recent administrations may seem excessive.

Moyn is published in mass-media outlets like the New York Times and Washington Post, but whatever newspaper-writer flourishes he attempts to make his highly informative book more readable fall well short of making it a compelling read. Instead, they highlight the usual arrogance and faux breeziness typical of East Coast mass-media journalists. Like many in the journalism trade, he dutifully parrots government marketing terms instead of respecting the reader by using plain English. For example, though he recognizes that “targeted killing” is a sanitized term for “assassination,” he rarely uses the latter term. He also resorts to such old standbys as “collateral harm” instead of civilian or non-combatant casualty.

Moyn’s repeated reference of modern warfare as “humane” becomes troubling as one reads through the book. The war-making methods developed by the U.S. military for purposes of plausible legality and to avoid public opprobrium as described in the book are not at all “humane.” He may do so as an attempt at journalistic neutrality, though he eventually concedes that “the idea of more humane war can obscure the residual violence that it still involves.”

Finally, *Humane* offers zero analysis of the military-industrial complex’s profit prerogative as a driver of the forever-war policy for which “humane” war-making provides cover. While he does make cursory reference to “trade in U.S.-made arms that others use to kill and maim around the world,” the author does not make any effort to connect the dots between the economically powerful and politically connected business interests that have a stake in the perpetuation of warfare, no matter the cost to the targets of the military’s activities or an ever-increasingly taxed, surveilled and repressed citizenry at home, and the sale of such warfare to the public as “humane.” On the other hand, to his credit, Moyn does reference concerns, relevant today, raised by Greek historian Thucydides that Athens was expanding its empire, bringing “tyranny abroad and eventually tyranny at home.”

The latest and most alarming trend in military circles is to develop machines with so-called artificial intelligence that decide with no human guidance who shall die in combat. Moyn calls this trend the “fever dream of the future of war.” Clearly, those promoting such machines were not weaned on Arnold Schwarzenegger’s Terminator movies, or they might not be so enthusiastic about handing life-or-death decision-making off to robots, now known as “slaughterbots.” Although the future Moyn briefly references makes the world depicted in the 1982 film classic Blade Runner seem like resort living by comparison, he scarcely addresses the even more alarming eventuality when potential or actual enemies obtain this same technology, which is certain to happen.

### **CONCLUSION**

Moyn notes that as the government relies on “elastic definitions” of combatants, U.S. drones have been patrolling the skies and inflicting terror for more than a decade on a “poor remote tribal region” of Pakistan known as Waziristan. These drone attacks have produced civilian casualties in the thousands – the government undercounts those fatalities – leaving the lives of survivors “rent to shreds.”

Predictably, populations in regions controlled by U.S. drones suffer PTSD-like symptoms and are left to live in permanent fear of a drone strike or “that the Special Forces will stop by.”

Moyn opines that people living in such regions face a “humbling new form of permanent subjugation” at the hands of the U.S. military and its automated weaponry. *Humane* discusses Russian author Leo Tolstoy as a stalwart for ending, not “humanizing,” war. Considering that the legacy of “humanizing” armed-conflict methods is “not eternal peace, but endless control,” Moyn queries, as did Tolstoy, whether “humane” war ultimately might serve simply as a method to enslave others.

One need not read *Humane* to reach the conclusion that applying the term “humane” to the U.S. war methods in the current century is a cruel joke or to conclude that Washington – where politicians, echoed by the mass media, cry “deficit!,” “national debt!” or “inflation!” when the president presents a social spending package yet pass a military budget that is four times as expensive with nary a peep – is interested in giving peace a chance. However, *Humane* is worth a read for those seeking a thorough recounting of the rise to prominence over the past two centuries of the concept of “humanized” war as a highly profitable, if not so humane, obstacle to the more challenging task of achieving peace.

## Analysis

# US MILITARY POLICY - 'THE OZYMANDIAS MOMENT'

By David Gespass

The United States is having its Ozymandias moment.<sup>1</sup> Or decade. Its decline may be swift or slow, but it is sure. More precisely, US imperialism and the transnational corporate interests it represents, is having that moment. So, when I say "US" in this piece, bear in mind it is shorthand and not referring to all the poor, working and exploited people in the country, but only to its rulers. Shelley's sonnet observes that the great works of that "king of kings" were laid in ruins in the desert, with the sands stretching far away. Thus it has been with all empires. They at first appear mighty and invincible and proclaim they will last forever but, sooner or later, their power erodes and disappears. The sun has long since set on the British empire. There still remain things built by Rome, but the empire is no more. Russia is far diminished from the time when the Soviet Union was one of the world's two "superpowers," but more on that later.

Too often, we use terms without explaining or defining them assuming everyone knows what we are talking about. So, before turning to US imperialism and its Ozymandias moment, it would be wise to explain just how I see imperialism. While capitalism has evolved and adapted over the centuries, its fundamental character has not changed. It is an economic system where wealth and power are based upon what one owns and is able to sell at a profit to others. The main way to profit is by exploiting workers and expanding markets. Early on, expanding markets meant "finding new" lands, notably the Americas, where the capitalist classes of various countries staked claims. But inevitably there came a time when there were no lands that could be claimed, at least not in this world. That is the basis of Trump's Space Force, to claim space, the asteroid belt, the moon and, later on perhaps, Mars for the US. Notably, the Biden administration has continued and embraced the Space Force.

But, at least until the moon can be mined for resources, the main capitalist contention is the exploitation of economically "undeveloped" countries. They used to be colonies, "owned" by one

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<sup>1</sup> *Ozymandias* by Percy Bysshe Shelley should serve as an admonition to all rulers and countries who think their power is perpetual:

I met a traveller from an antique land,  
Who said—"Two vast and trunkless legs of stone  
Stand in the desert. . . . Near them, on the sand,  
Half sunk a shattered visage lies, whose frown,  
And wrinkled lip, and sneer of cold command,  
Tell that its sculptor well those passions read  
Which yet survive, stamped on these lifeless things,  
The hand that mocked them, and the heart that fed;  
And on the pedestal, these words appear:  
My name is Ozymandias, King of Kings;  
Look on my Works, ye Mighty, and despair!  
Nothing beside remains. Round the decay  
Of that colossal Wreck, boundless and bare  
The lone and level sands stretch far away."



capitalist country or another. The age of imperialism arose when the only way for rising capitalist countries to increase their power, markets and areas to exploit was to redivide the colonies. But the colonies had something to say about their being owned. Revolutions in the 1950s and 1960s led to many former colonies becoming politically independent. They remained, however, economically dependent and exploited. We are now in the age of neo-colonialism, where imperial powers rule by economic control rather than direct political control. That is what is behind China's Belt and Road Initiative, seeking to dominate by expanding economic power. And, as much as US leaders argue that China's blandishments and loans cloak nefarious motives while the US offers mutual benefits, the truth remains that both the US and China are imperial powers whose goals are selfish. China is seeking to redivide the world to its benefit and the US is clinging to its waning economic power.

Not so long ago, school children were taught that the US never lost a war, even if there was some dispute about the War of 1812. Vietnam changed that and, despite its defeat of the mighty island nation of Granada – which had been independent of British rule for nearly ten years – and its 100,000 or so people, there is no evidence of another US war-winning streak. Its wars last longer and the outcomes are the antithesis of triumphant. Building nations in our neo-liberal image has not worked out in Iraq or, now, Afghanistan. The US didn't "lose" in Libya, it just left it in wreckage. Still, as its economic power declines relative to the rest of the world and, most significantly, China, the US is forced to rely more and more on military power to cling to its international dominance. If past is prologue, it will be a bloody and losing battle.

The US's principal designated "enemies" on the international stage today are Russia and China. Each presents its own challenge to US preeminence. Russia had its Ozymandias moment from 1988 to 1991 when the Soviet Union collapsed, yet it still dreams of dominating as it did in the past. China, on the other hand, is a rising power, with ever-expanding economic influence and growing military power. It is the real threat to replace US imperial hegemony.

Vladimir Putin has played a relatively weak hand well, relying on the military power of the former Soviet Union to make up for its dwindling economic strength and political influence. The US, on the other hand, has likely bungled relations with post-Soviet Russia by expanding NATO and converting it from an anti-Soviet alliance balanced by the Warsaw Pact to an anti-Russia alliance. Putin's persistent response has been military threat, as is seen now with its troop build-up on Ukraine's border, or actual military force with the invasion and annexation of Crimea. He has also provided enough support for Belorussian dictator Alexander Lukashenko to allow him to hold on to power despite overwhelming popular opposition.

Putin's goal appears to be to maintain a Russian sphere of influence close to its borders and he is relying on the lack of US desire to commit troops and resources in opposition. Thus, his demand that NATO commit to Ukraine not becoming a member. If Ukraine joined, NATO countries would be treaty-bound to respond to military threats from Russia. It is not at all clear the US would want to do so, but the uncertainty restrains both countries as they play a dangerous game of chicken.

All this could have been avoided if the US had not been so vainglorious at the demise of the Soviet Union. Jack Matlock, who was the US ambassador to the Soviet Union before it collapsed and a member of Ronald Reagan's National Security Council (no left-wing radical he), argued unsuccessfully against such posturing by the US and the policies that flowed from it. He pointed out that Russia's perspective has been ignored by the US, from its expansion of NATO, to its support of revolutions in Ukraine and Georgia and the evident double standard applied to it. For example, the US hailed Maidan revolution in

Ukraine that deposed its elected president, Viktor Yanukovich. Putin saw it, not unreasonably, as an illegal coup. But, beyond that, the US complained that the invasion of Crimea was a violation of Ukraine's borders, but saw no problem with that when it came to Kosovo. Matlock has a blog, has appeared on "Democracy Now" and frequently expresses his views on the failures of US diplomacy vis-à-vis Russia. A brief exposition of his views can be found at <https://octavianreport.com/article/jack-matlock-on-russia-and-the-u-s-reagan-and-putin/5/>.

But the conflict with Russia is still between two fading imperial powers, with Russia somewhat more faded. The real threat to US dominance is China, which has concentrated more on economic than military growth. The US, by contrast, as its economic power has declined, has relied more heavily on military force. That is a losing game since the cost of maintaining sufficient military power to dominate the world means its economic might will decline more rapidly. From the perspective of imperialism, the choice is to lose economic power faster and threaten its enemies militarily, or to try to keep economic pace and more rapidly lose military power. Added to this is the fact that the US, despite having the most powerful armed force in world history, seems unable to win wars any more, at least not without causing such destruction that it will leave its target without anything to exploit. Of course, imperialism can never contemplate cooperation and sharing, it is driven to conquest, dominance and exploitation. We have reached a stage in human development where cooperation and sharing is the only logical choice, but the logic of imperialism demands otherwise.

That leaves the US in a conundrum. As much as it claims that China's trade deals are unfair and exploitative, which they are, its arguments fall on skeptical, if not deaf, ears from those who have been the targets of US foreign policy for decades. US economic policy has never been benevolent or interested in bettering others. Even the Marshall Plan, which most "experts" claim saved Europe, was designed to profit US corporations. See "The Age of Imperialism: the Economics of US Foreign Policy" by Harry Magdoff for a complete exposition. That is not to say that Europe did not derive some benefit from post-WWII foreign policy, only that its intent and principal effect was to bolster the US economy and develop markets for it.

But I digress. The critical point is that the US now finds itself in a position that is so uncomfortable as to be untenable. It cannot fight wars or unleash its nuclear power without destroying markets it wants and needs. Ultimately it cannot compete economically with China. It is reduced to bluster, threats and bullying. Its military remains deployed around the world, but more and more as a symbol of past glory and less and less able to assert its will through force. Yet, that is now its primary means of clinging to power. It is a cornered animal, still dangerous, even deadly, but ultimately doomed.

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The series is being planned and organized by MLTF member James M. Branum, who has defended military servicemembers in courts-martial and administrative proceedings since 2006.

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To find out more, including costs, registration, etc. visit [militarylawhelp.com/training](https://militarylawhelp.com/training)

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## THE MILITARY LAW TASK FORCE OF THE NATIONAL LAWYERS GUILD

**ON WATCH** is published quarterly by the Military Law Task Force of the National Lawyers Guild. Subscriptions are free with MLTF dues (\$25), or \$20 annually for non-members.

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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.*

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