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MLTF NOW HAS A NEW LOGO AND MERCH!

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

HOW CONGRESS' BIG MILITARY BILL DANCES WITH ITS CULTURE-WAR FEARS

By Chris Lombardi

Three years ago, in the aftermath of the Capitol insurrection, the military was rolling out diversity and ant-extremism measures – many of them begun after the national reckoning sparked by the police murder of George Floyd. Then-new Secretary of Defense Lloyd Austin told the *New York Times,* "Diversity, equity and inclusion is important to this military now and it will be important in the future."

But this year's National Defense Appropriations Act—which, as *Stars and Stripes* noted, "avoids controversial culture war issues that threatened to derail the legislation"-- still reads like a slap in Austin's face, by downsizing the Pentagon's already-modest measures to fight racism and extremism.

It's true that right-wing members of Congress didn't get all they wanted from the bill: military travel assistance for abortion care stayed in effect, and so did transgender personnel's access to health care. And as *On Watch's* own Kathleen Gilberd notes below (page 4), this NDAA continues the progress made in 2022, implementing that bill's establishment of a civilian Special Trials Counsel for crimes related to sexual harassment, and adds requirements for "monitoring and reporting of sexual assault and harassment in JROTC" (the Junior Reserve Officers Training Corps).

But there's one place right-wingers in Congress appear to have succeeded in this NDAA: having decried Defense's modest diversity initiatives, they have managed to take action against the terms they feared most.

PRONOUNS

- If they couldn't take away women's autonomy or transgender troops' health care, the drafters of the NDAA can at least protect themselves from having to think about pronouns. Section 522: "The Secretary of Defense may not require or prohibit a member of the armed forces or a civilian employee of the Department of Defense to identify the gender or personal pronouns of such member or employee in any official correspondence of the Department." This feels equally targeted at Gen Z troops, who are comfortable with pronoun talk, and any remaining gender-equality provisions.

- Soon after, Section 529b puts into law that the military's a meritocracy: "A military accession or a promotion in the Department of Defense shall be based on individual merit and demonstrated performance."

DIVERSITY, EQUITY AND INCLUSION

- In Section 579, the bill prohibits any funding for "the Department of Defense Countering Extremism Working Group established by the Secretary of Defense memorandum on April 9, 2021." That particular group, in its December 2021 report, declared its tasks 'completed' and used the past tense to describe itself, making this provision both meaningless and a smoke signal for any future programs.

- Similarly, Congress appears suspicious of the relatively new Defense Advisory Committee on Diversity and Inclusion (DACODAI), requiring by May 2024 a report on the committee's membership, how they were recruited, and how it can "comprise points of view that are 'fairly balanced'." Looking at the current membership, most of them veterans and including at least one Fortune 500 CEO, it's not easy to sort out what the Armed Services Committees are worried about, outside of hating the group's very name. DEI – the acronym for Diversity, Equity and Inclusion – has recently been the target of smear campaigns, including the one that forced the Black president of Harvard University to resign.

- If they couldn't get *all* diversity efforts to shut down, the NDAA authors could stop them from growing: Section 1101 bars new hires and imposes a pay cap for all positions concerned with DEI, whether developing new policy, conducting trainings, or bringing in allies to improve such policy.

CRITICAL RACE THEORY

If DEI has long terrified right-wing legislators, so has the phrase "critical race theory" (CRT). The theory, an academic framework meant for use in law school and graduate school, is defined by scholar Derrick Bell as arguing that "historical patterns of racism are ingrained in law and other modern institutions. The theory says that racism is a systemic problem, not only a matter of individual bigotry. These systems can be legal, political, economic: CRT offers tools for analyzing their effects. But any thought that the term "racism" can be applied beyond individual Klansmen has sparked so much anger that CRT has been banned in school districts across the country – and now, the U.S. military.

- Section 576, entitled "Prohibition on the Use of Federal Funds to Endorse Critical Race Theory," bans the use of CRT in any educational measures or schools operated by DOD. The legislation defines CRT this way: the theory that individuals, by virtue of race, ethnicity, color, or national origin, bear collective guilt and are inherently responsible for actions committed in the past by other individuals of such race, ethnicity, color, or national origin." And therefore shouldn't be required to learn about them either?
- In any event, the legislation adds that they don't mean to infringe on instructors' "institutional autonomy or academic freedom" as they choose what to present to students. And more crucially, "Nothing in this paragraph shall be construed to prohibit the required collection or reporting of demographic information by the Department of Defense." Such collection is *mandated* elsewhere in the NDAA, in the sections on recruitment and on choosing military contractors, and accepted as necessary in the real world.

There's still lots else of concern in the 3000-page bill, including what I think of as "the science fiction section," with guidelines for electronic warfare and AI and an expansion of the Space Force. And at least one-third of this NDAA seems about operating DOD as a business - one that sells arms to other countries and promotes partnerships with private corporations, from startups to hedge funds and billionaires like Elon Musk. It all "makes President Eisenhower's warning about the military-industrial complex seem quaint," Senator Elizabeth Warren told the *New York Times.* Both of the above could be other articles, perhaps by a financial journalist who can detect how much of it is real and how much is wishful thinking.

Overall, this NDAA appears to have dodged the "culture war" grenades thrown its way, while DoD can go forward with business as usual. As a group dedicated to monitoring that "business as usual," the MLTF can keep watching, learning and reporting.

2024 NDAA PERSONNEL PROVISIONS

By Kathleen Gilberd

The 2024 National Defense Authorization Act (NDAA) has now been passed by Congress and signed into law by President Biden. It was the subject of intense debate within Congress and considerable concern among the public, as the House version contained a number of provisions designed to rein in a "woke" Department of Defense (DoD) and undo personnel rights on issues ranging from reproductive rights to transgender medical care. (See Chris Lombardi's article in this issue of *On Watch* on the attacks on diversity, equity and inclusion (DEI) policies.) Perhaps in part because such provisions were the center of discussion, the 2024 NDAA contains fewer provisions requiring reforms addressing problems of military personnel than we have seen in previous years.

The Senate version contained virtually none of the House's conservative efforts, and in the subsequent Conference Committee negotiations, the more worrisome House sections were essentially discarded, in at least one case being replaced by its opposite.

This article discusses some of the personnel provisions of the NDAA, though it is by no means comprehensive. Readers with a great deal of patience may want to review the Act and the Conference Committee's comments at FY24 NDAA Conference Report - FINAL.pdf (house.gov).

RECRUITMENT

This year's Act came after media reports and Congressional hearings on dismal military recruitment figures, on the one hand, and media exposés about sexual misconduct by recruiters and JROTC instructors, on the other. This led Congress to craft some provisions designed to assist recruiting efforts, loosen recruitment standards and offer pre-boot-camp training to recruits who would otherwise not meet accession standards. At the same time, other NDAA provisions require monitoring and reporting of sexual assault and harassment in JROTC.

Some portions of the Act are designed to limit schools' possible recalcitrance in assisting recruiters. Section 541 of the NDAA is meant to increase recruiters' access to high school students, amending 10 USC 503(c) to require that schools "shall provide to military recruiters access to career fairs or similar events upon a request made by military recruiters for recruiting purposes," within 60 days of recruiters' requests. The Secretary of Defense is to report to Congress annually on all denials of such requests. This would appear to require schools to grant recruiters access to all such events, though this writer is not aware of denials of participation.

Section 543 will affect recruiters' access to student information at institutions of higher learning. 10 USC 983(b), which requires schools to grant recruiters' requests for students' contact information, is amended by adding "which information shall be made available not later than the 60th day following the date of a request."

Under Section 548, the military will set up a "demonstration program" not later than August 1 of 2025, in which each service will establish an Enlisted Training Corps program at selected community or junior colleges "introducing students to the military, and preparing selected students for enlisted service…." Financial assistance, which may include tuition, living expenses, a stipend "or other payment" may be available to enrollees who sign a written agreement to enlist in the active component of the service upon graduation or disenrollment from the college. Section 548 also sets out curriculum requirements.

Among other things, students will be taught the benefits of military service, military “customs and courtesies,” physical fitness and military ethics. The demonstration program will conclude by September 30, 2030. Assuming the project is successful, we should expect to see ROTC-like programs at junior colleges, recruiting for enlisted personnel rather than officers, and we should expect a general increase in recruiters’ presence on those campuses.

Section 549 requires annual Congressional briefings on military recruitment at secondary schools and community colleges, beginning by the end of 2024 and continuing through 2028. DoD is to provide data on numbers of schools and recruiters involved, the number of recruits “obtained,” and demographic analysis of these recruits, including race, ethnicity and gender.

JUNIOR AND SENIOR ROTC PROGRAMS

Section 551 expands JROTC training programs, amending 10 USC 2031 . It shifts responsibility for promulgation of JROTC regulations from the President to the Secretary of Defense and requires the Secretary to “establish and support” no less than 3,400 JROTC units and no more than 4,000. These figures apply unless the Secretary does not receive a sufficient number of requests for units, or the Secretary determines during a time of national emergency that funding should be allocated elsewhere.

Section 552 requires memoranda of understanding (MOUs) between service Secretaries and high schools with JROTC units; the Secretary of Defense is to establish regulations regarding such memoranda. Under these MOUs, schools must notify the military department of any allegations of misconduct, including sexual misconduct and harassment, against a paid instructor within 48 hours of learning of the allegation. A certification process for instructors, including appropriate background checks, will also be required, as will processes for oversight and instruction, a process for military inspections of JROTC units at least once every four years and prior to setting up a new unit, and a requirement that each school certifies it has created a means for students to report violations of their rights under title IX of the Education Amendments of 1972 (20 USC 1681 et seq.) and title VI of the Civil Rights Act of 1964 (42 USC 2000d et seq.), including the right not to be discriminated or retaliated against for reporting violations. The MOUs must also ensure that students receive training in these rights, reporting processes, etc.

MOUs created under Section 552 will also require each school to demonstrate that it “has developed processes to ensure that each student enrolled in a unit under this section has done so voluntarily….” Mandatory placement of students in JROTC classes as a form of “physical education,” had become a problem in a number of school districts, as discussed in the Fall 2023 issue of *On Watch.* Work around this issue by counter-recruitment groups and especially the *New York Times’* exposé of the problem led to an important victory here, though it remains to be seen if schools and JROTC programs will attempt to get around the requirement.

10 USC 2031 is also amended by Section 555 of the NDAA, intended to punish JROTC units which fail to comply with MOUs or any other provisions of 2031. It includes provisions allowing the Secretary of Defense to suspend or place on probation any JROTC unit that fails to meet its requirements. Probationary periods may last up to three years. If, following the probationary period, a JROTC unit is still out of compliance, and the Secretary of the service concerned determines that suspension is needed to “mitigate program deficiencies or to protect the safety of program participants,” the Secretary of Defense may suspend the unit. DoD must provide congressional reports on actions of probation or suspension one year after enactment of the NDAA and then annually for four years.

Rick Jahnkow, an organizer for the Project on Youth and Non-Military Opportunities in San Diego, writes that:

> While there are good reasons to be disappointed in the way enforcement of the NDAAs JROTC provisions were, essentially, made discretionary, the kind of language that was included is a significant departure from the unquestioning, favorable treatment given to JROTC in the past. The mere presence of the MOU just might be enough to give local activists the organizing leverage to convince school districts to intensify their regulation of the program, including ending involuntary enrollments.

He added:

> The overall effect of organizing around the MOU could be fewer students in the [JROTC] program, which, in turn, can force the removal of JROTC units for failing to meet the program's required minimum enrollment of at least 100 students or 10% of the total student body.

Section 556 of the NDAA requires DoD to give Congress annual reports on allegations of sexual misconduct in JROTC programs, through another amendment to 10 USC 2031. The Secretary must submit a first report by March 31 of 2024, and then annually through March 31 of 2029. The reports are to cover allegations of sexual misconduct, sexual harassment and sex discrimination in JROTC units, including the numbers of such reports, the number investigated, the outcome of investigations and a breakdown of cases by location. Similarly, DoD must report acts of violence, including sexual abuse or harassment by instructors against students. The reports must also provide explanations of the steps DoD has taken to "mitigate" sexual misconduct and harassment.

Lest we forget national security, Section 554 prohibits JROTC units at any school "owned, operated or controlled by the Chinese Communist Party."

ACCESSIONS

Under Section 542, test score requirements for enlistment are subject to change. In the past, 10 USC 520(a) required that recruits whose score on the Armed Forces Qualification Test were at or above the tenth percentile and below the thirty-first percentile could not make up more than 20% of the total number of persons enlisted for active duty other than active duty for training for reservists. The NDAA appears to tighten that, saying that such recruits may not comprise more than 4% of enlistments, but allows the service Secretaries to ask the Secretary of Defense to authorize up to 20%

The "Future Servicemember Prepaaratory Course," designed to aid recruits who cannot meet physical or intellectual standards for enlistment, is covered in Section 546. Service Secretaries are to establish preparatory courses when recruits covered under 10 USC 520 exceed 10 percent of the number originally enlisted in a fiscal year. Courses shall be "designed to improve the physical and aptitude qualifications" of recruits. Potential recruits are to attend such courses if they score less than the 31st percentile on the Armed Forces Qualification Test, and to graduate must achieve a score at least 10 points higher than their last pre-course score. If recruits fail to graduate the course within 180 days of enlistment, they will be separated from the service. The services must report on the structure, functioning and results of established courses to Congress for each fiscal year. This section has a sunset clause, expiring on September 30, 2028.

Unfortunately, the NDAA Section provides no clarity on the status of participants in the courses. This writer has been unable to locate regulations or other policies governing the exiting preparatory courses, and it is not entirely clear whether recruits in the program are in the Delayed Entry Program (and therefore in the Individual Ready Reserve), whether they have actually entered active duty, or whether they are in some other military status while in the course.

Section 545 offers “improvements to medical standards for accession to certain armed forces.” Within one year of enactment of the NDAA, and once four years thereafter, DoD must conduct an assessment of the prescribed accession medical standards and medical screening methods required for officers and enlisted personnel. The assessments will be used to update standards and processes “as may be necessary.” At the same time, DoD is to “take such steps as may be necessary to improve” waiver processes for recruits who fail to meet medical standards. The results are to be reported to the Secretary of Defense along with recommendations for possible legislative action for further improvements. The section provides no requirements or suggestions for waiver process improvements. Despite statements about its careful screening and rigid standards, DoD appears interested in relaxing standards or easing waiver eligibility in order to address its current recruiting problems.

Section 547 sets up a three-year pilot program for cardiac screening of accessions. The pilot program will begin no later than September 30, 2024, and will involve mandatory electrocardiogram testing of all new recruits. The purpose of the pilot is to determine costs and benefits of screening and to develop appropriate ways to assess long-term implications of test results on military service. The DoD will also consult with cardiologists to develop clinical practice guidelines for “cardiac screening, diagnosis, and treatment.” Following the pilot program, the House and Senate Armed Services Committees are to be briefed in detail on the program’s results including, for example, the rate of significant cardiac issues found, disaggregated by service, race and gender.

COVID VACCINATION REFUSALS

The new NDAA gives considerable attention to the situation of servicemembers discharged for refusing COVID vaccinations, though some Sections simply restate existing discharge review policy.

Section 526 of the Act deals with reinstatement of certain veterans who were discharged for refusal to take COVID vaccinations, which the military has previously resisted. Personnel who were discharged solely for refusing vaccination, and who had submitted requests for religious, medical or administrative exemption, may request reinstatement within two years of their involuntary discharge. The service Secretaries are to consider their requests for reinstatement at the same grade or rank they held at the time of discharge. The period between separation and reinstatement will be considered a period of “inactivation” per 10 USC 710, subsection (b), subparagraphs (B) through (D) of paragraph (2) of subsection (f), paragraph (4) of subsection (f). 4, and subsection (g). The NDAA section contains no criteria or standards for the Secretaries’ consideration, apparently leaving decisions entirely to the military’s discretion.

Under Section 528, the Secretary of Defense must notify affected veterans of the right to request reinstatement under “the current established process” for reinstatement. Again, the process is not described, though current procedures would take such cases to the Boards for Correction of Military/Naval Records and would allow review of those cases within three years.

Section 527 mandates review of the characterization of discharges based solely on refusal of COVID

vaccinations, upon request of the veteran. Reference to 10 USC 1553 in this section presumably means that the cases should be heard by the services' Discharge Review Boards, though it is conceivable that separate boards would be established. Again, Section 527 does not set out standards for review of these cases, nor does it require that upgrades be granted. If the DRBs are the intended forum, this section appears to add nothing to these veterans' existing rights to consideration by the DRB.

Section 725 requires a study and report on medical problems developed by servicemembers after COVID vaccinations, evaluating members who are on active duty a year after receiving the first dose of a COVID vaccine. The study would look for adverse conditions or events developed after vaccination, even if not attributed to the vaccine. Within a year of enactment of the NDAA, DoD is to report the results of the initial study to the House and Senate Committees on Armed Services, with similar reports required for the following four years.

LEGAL PROVISIONS

Section 531 includes technical and conforming amendments to the UCMJ. Among other provisions, it covers the authority of the new Special Trial Counsel over some offenses committed before the effective date of the military justice reforms required by the 2022 NDAA. Special Trial Counsel (the new category of independent prosecutors established to remove convening authority from commanders) may at their "sole and exclusive discretion," exercise authority over offenses under UCMJ articles 117a (wrongful broadcast or distribution of intimate visual images), 118 (murder), 119 (manslaughter), 120 rape and sexual assault generally), 120b (rape and sexual assault of a child), 120c (other sexual misconduct), 128b (domestic violence), or child pornography punishable under article 134, that occurred on or before December 27, 2023, as well as offenses under article 125 (kidnapping), 130 (stalking) or 132 (retaliation) that occurred on or after January 1, 2019, and before December 28, 2023. Also covered are offenses under article 120a (mails: deposit of obscene matter), article 125 alleging nonconsensual sodomy, or the standalone offense of kidnapping punishable under article 134 occurring before January 1, 2019, conspiracy to commit any of the above offenses punishable under article 81, solicitation to commit these offenses as punishable under article 82 and attempt to commit such offenses as punishable under article 80.

This Section also amends UCMJ article 128b to include "dating partner" as well as "intimate partner" for domestic violence offenses. The definition of "dating partner" is taken from Article 130, as amended in this NDAA Section:

"The term 'dating partner', in the case of a specific person, means a person who is or has been in a social relationship of a romantic or intimate nature with such specific person based on a consideration of—

"(A) the length of the relationship;

''(B) the type of relationship;

''(C) the frequency of interaction between the persons involved in the relationship; and

''(D) the extent of physical intimacy or sexual contact between the persons involved in the relationship.''

With Section 533 of the Act, Supreme Court review may now be available to appellants in whose cases the US Court of Appeals for the Armed Forces refused to grant petitions for review; this is accomplished

by amendments to 28 USC 1259 and 10 USC 867a(a) (Article 67a of the UCMJ). In the latter, the NDAA provision strikes language that prohibited Supreme Court review of a petition for a writ of certiorari where USCAAF refused to grant a petition for review. This change will take effect one year from enactment of the NDAA "and shall apply with respect to any action of the United States Court of Appeals for the Armed Forces in granting or refusing to grant a petition for review submitted to such Court for the first time on or after such effective date." This will not apply to petitions submitted to USCAAF before the effective date of the amendment if that court has not taken action by that date. USCAAF decisions before the effective date are "final and conclusive." This significant change has long been sought by military defense/appellate counsel, as the prior rule greatly limited appellate rights of military personnel.

Section 536 mandates a study on the requirement of unanimous votes for findings in special and general courts-martial. The Secretary of Defense is to conduct a study on the feasibility and advisability of unanimous votes of guilty, not guilty or not guilty by reason of lack of mental responsibility. Within one year of enactment of the NDAA, the Secretary is to present the House and Senate Armed Services Committees with the results of the study. Regardless of those results, the Secretary is also required to present the Committees with draft legislation requiring unanimous verdicts for findings and providing that the accused may be re-tried for the same offense if the first trial does not reach a unanimous decision. Further, the Secretary must present the Committees with information on the "milestones" necessary to allow enactment of that legislation by the end of 2027.

Finally, Section 537 requires a study on the feasibility and advisability of requiring that Sexual Assault Victim Advocates (also called Victim Advocates) be from outside the victim's chain of command, and the effects of such a change on sexual assault prevention and response programs. The Secretary must report on this study to Congress within a year of enactment of the NDAA.

MEDICAL PROVISIONS

Section 705 of the Act clarifies previous legislation, the Brandon Act, that allowed servicemembers to request and obtain psychiatric evaluations privately through their commanders or supervisors, discussed in the summer, 2023, issue of *On Watch*. That legislation did not include reserve personnel. Section 705 amends 10 USC 1090b(e) by adding that the provisions apply to "(A) a member on active duty for a period of longer than 30 days;" or "(B) a member of the Selected Reserve in a duty status."

As noted in Jeff Lake's article on military medical malpractice claims in this issue of *On Watch*, Section 713 of the NDAA adds a requirement of written reasons for denial of malpractice claims. 10 USC 2733a is amended with the addition of a new paragraph:

"(f) JUSTIFICATION OF DENIAL.—If a claim under this section is denied, the Secretary of Defense shall provide the claimant with detailed reasoning justifying the denial of the claim, including— (1) copies of any written reports prepared by any expert upon which the denial is based; and (2) all records and documents relied upon in preparing such written reports, other than medical quality assurance records (as such term is defined in 10 section 1102 of this title).''

Given recent studies showing the possible efficacy of some psychedelic drugs in treatment of post-traumatic stress disorder and traumatic brain injuries, Section 723 of the NDAA authorizes DoD funding of research through clinical trials for servicemembers with PTSD or TBI, using covered drugs. These include 3,4-Methylenedioxy-methamphetamine (commonly known as ''MDMA''), Psilocybin, Ibogaine,

5-Methoxy-N,N-dimethyltryptamine (commonly known as ‘‘5-MeO-DMT’’), and “qualified plant-based alternative therapies .” Within 180 days, the Secretary of Defense is to designate a lead administrator to carry out the program, which may be conducted in cooperation with other federal or state agencies or academic institutions. Finally, the Secretary is to report back to Congress about this program within one year of the NDAA’s enactment.

COMPLAINTS AGAINST PUBLIC DISPLAYS OR EXPRESSION OF RELIGION

MLTF has been following attempts to limit or halt the work of the Military Religious Freedom Foundation, which has successfully represented numerous servicemembers in complaints about on-base or otherwise official expressions of right-wing Christian doctrine, discrimination against other faiths and forced participation in religious activities. (See the Summer, 2023, issue of *On Watch.*) Rep. Mike Turner responded to MRFF’s work with an amendment to the House version of the NDAA, Section 1045, prohibiting the Department of Defense from utilizing any funds for communication with the Foundation or its leadership, or for action on any of its complaints, without specific approval of the Secretary of Defense. This is the first legislation of which this writer is aware that targets by name a specific organization assisting servicemembers, raising the specter that other GI rights groups might face similar attacks.

The Senate, on the other hand, included no similar language in its version of the Act. Instead, it included Section 1049, requiring the Secretary of Defense to “prescribe regulations establishing a procedure for the timely determination of certain complaints or requests by private entities that concern a public display or public expression of religion on Department property.” This provision was retained by the conference committee, which excluded the House language. Under Section 1049, the Secretary of Defense has 180 days from enactment of the NDAA to promulgate regulations with procedures for handling such complaints or requests made by individuals or groups other than servicemembers, civilian DoD employees or DoD contractors. The regulations are to require officials who receive complaints to forward them to the official authorized to act on them--the service Secretary, the head of the Defense Agency or the Department of Defense Field Activity concerned--who must act on the complaints within 30 days of receipt. He or she is to consult with designated chaplaincy and legal personnel in considering the complaint. There appears to be no further military review of those decisions. The MRFF is hopeful that this will expedite complaints and allow denials of complaints to be taken to federal court rather than going through a lengthy appellate process. They are also amused that Rep. Turner was, in their words, “[h]oisted with his own petard.”

CONCLUSION

As always, it remains to be seen whether and how these provisions will be implemented by the Department of Defense, and what actual changes they will accomplish. MLTF will continue to monitor the implementation of such legislation and encourages our readers to share with *On Watch* their or their clients’ experiences with the new policies. As we have noted in the past, implementation of reforms is often entirely dependent on the actions of and pressure from servicemembers and their advocates.

THE NEW MANUAL FOR COURTS-MARTIAL AND YOU: A SHORT SUMMARY OF THE IMPORTANT CHANGES[1]

By Ryan Gunderman

The third substantial change to the Uniform Code of Military Justice in the last decade is finally here. As of December 28, 2023, the rules and regulations codifying the requirements of the FY22 NDAA took hold and a new edition of the Manual for Courts Martial (MCM) is forthcoming. The three annexes of Executive Order 14103 are 223 pages long and include everything from formatting changes to completely altering the jurisdiction of commanders over certain offenses. What follows below is a review of the critical changes going forward as well as some commentary on how some of these rules interact. This will not be a comprehensive list of every change listed in the Executive Order; the intent of this is to provide a quick guide to the major changes practitioners will want to be aware of going into 2024 and beyond.

Key notes for those who may be less familiar with the rules promulgated in the MCM: these rules are the executive branch's and the military's best attempt to operationalize the legislation passed by Congress. If there is a question about the function or purpose of a rule, or a change to a rule, practitioners must look to the related legislation. For these changes, the National Defense Authorization Acts for fiscal years 2022 and 2023 are central and must be read alongside 10 U.S.C. §§ 801-946. For those who would like a more in depth discussion of the statutes and the legislative history of the NDAA's, the author recommends (but does not necessarily endorse) "Transforming Military Justice: The 2022 and 2023 National Defense Authorization Acts" by David A. Schlueter and Lisa Schenck.[2]

PART I PREAMBLE

The primary change to the preamble of the Manual for Courts Martial is the addition of a paragraph describing the "Evolving Military Justice System." Though the preamble does not constitute any form of binding law, the language of the new paragraph 4 reflects the executive branch acknowledging the civilianization of courts-martial:

> "The military operates a modern criminal justice system that recognizes and protects the rights of both the victims of alleged offenses and those accused of offenses. The continuous evolution of the military justice system has progressed through statutes, Executive Orders, regulations, and judicial interpretations."[3]

In a similar vein, paragraph 3 now places "good order and discipline" as the fourth in order of priority for the purposes of the UCMJ, behind 1) promoting justice; 2) deterring misconduct; and 3) facilitating appropriate accountability. Though promoting justice was already the first purpose, moving good order

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[1] The views expressed in this article are the author's and do not reflect the views of the Department of the Army or the Department of Defense.

[2] David Schlueter, Lisa Schenck, *Transforming Military Justice: The 2022 and 2023 National Defense Authorization Acts*, 231 Mil. Law Rev. 1 (2023)

[3]As many have acknowledged in the last 5 years, *Ortiz v. United States* is the most recent and the closest the Supreme Court of the United States has come to saying that the UCMJ comports with a civilian conception of a criminal legal system.

and discipline down the list cuts against the long-held belief that such an end was the center of gravity for the UCMJ.

PART II RULES OF COURTS-MARTIAL

A. The Office of The Special Trial Counsel

The bulk of the changes to the MCM are in the Rules for Courts Martial and relate to the creation of the Office of the Special Trial Counsel (OSTC).[4] The OSTC in every jurisdiction now has prosecutorial discretion over the following "covered" offenses:

Article 117a (Wrongful Broadcast or Distribution of Intimate Visual Images);
Article 118 (Murder);
Article 119 (Manslaughter);
Article 120 (Rape and Sexual Assault Generally);
Article 120b (Rape and Sexual Assault of a Child);
Article 120c (Other Sexual Misconduct);
Article 125 (Kidnapping);
Article 128b (Domestic Violence);
Article 130 (Stalking);
Article 132 (Retaliation);
Article 134 (Child Pornography);
Article 80 (Attempt to commit one of the foregoing offenses);
Article 81 (Conspiracy to commit one of the foregoing offenses);
Article 82 (Solicitation to commit one of the foregoing offenses).[5]

Soldiers charged with these offenses will no longer be subject to the discretion of a commander but rather a uniformed prosecutor (the STC) working outside the chain of command of a general court-martial convening authority. The STC will have the exclusive ability to take a charge from preferral to referral to court-martial and must be the first to consider disposition over the alleged offenses. Should the STC decline to move forward with a general court-martial (called deferral), the commander will still have the ability to inflict non-judicial and administrative punishments.[6]

The STC may also exercise jurisdiction over "related offenses" and "known offenses." At time of writing, the discretion to categorize misconduct as a "covered," "related," or "known" offense falls to the STC.[7] "Related" offenses do not have to be committed by the individual who committed the "covered"

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[4] Practitioners may hear this acronym pronounced at "OH-stick."
[5] National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, sec. 533(a), 135 Stat. 1541, 1692 (2021); Exec. Order No. 14103, annex 2, § 2, 88 Fed. Reg. 50607 (July 28, 2023)
[6] *Id.*, sec.531(c)(5), 135 Stat. 1541, 1692 (2021). The author recognizes that the Army's stance on administrative remedies is that they are not "punishments" because they are not punitive in nature. It is well beyond the scope of this article to discuss the nature of an administrative separation, bar from further service, or administrative flagging but it is important to note that these remain within the gambit of a commander to impose upon a servicemember for suspected misconduct.
[7] *See supra* fn 3.

offense and–as it appears in RCM 303A(d)–"known" offenses are not required to have a nexus to the alleged covered offense other than being committed by the accused.

Additionally, the new R.C.M. 303 does not permit commanders to initiate commander inquiries into the 14 above offenses. Commanders must hand off the investigation to the special trial counsel who will then work with CID and MPI. Commanders still hold authority to order pretrial confinement but must notify the special trial counsel.

To make this new dynamic clearer, consider the following: SPC Nicks and CPT Lee are accused of violating the UCMJ. The STC believes SPC Nicks committed a kidnapping and CPT Lee stole a vehicle to assist in the kidnapping. In the course of the investigation, the STC also finds that SPC Nicks disobeyed a direct order from their Battalion Commander for something completely unrelated to the kidnapping and the vehicle theft. The STC has jurisdiction over the kidnapping as a "covered" offense. CPT Lee's vehicle theft could be a "related" offense as it has some nexus to the "covered" offense. The "related" offense gives the STC a jurisdictional hook over SPC Nicks to prosecute them for disobeying a direct order.

There are some obvious remaining questions about the STC's jurisdiction that still need to be worked out. The first concerns the matter of commanders to resolve misconduct on which STC has deferred. Servicemembers will still be allowed to turn down non-judicial punishment and request a court-martial for "covered" offenses if the STC defers. However, the GCMCA will not be able to take the matter to a court-martial. This will either 1) create a procedural stalemate, 2) require the GCMCA to refer the charges as something other than one of the "covered" offenses, 3) force the command to administer non-judicial punishment for a different offense, or 4) force the STC to take a case to court-martial that they have already independently declined to prosecute.

The other problem is one of defining the STC's jurisdiction. In the example above, prosecuting CPT Lee's vehicle theft turns on whether the theft was actually related to the covered offense. If CPT Lee wanted to object to such a finding, it is not clear what kind of objection that may be and what kind of harm CPT Lee would have to articulate. We know that the STC exercising jurisdiction means that the court-martial convening authority cannot exercise all the options normally allowed to them. We know that the STC will be the one leading the investigation into any allegations of "covered" offenses; the STC can plea bargain with the accused and make agreements that are binding on the convening authority. We *don't know* if the STC is necessarily a distinct jurisdiction from the GCMCA. The STC does not have the power to convene the court-martial; they still must rely on the GCMCA to resource the court-martial and form the panel. However, should the STC erroneously exercise jurisdiction over a charge, that would contravene the default jurisdiction held by the GCMCA. Congress may not care about this problem as they handed the STC a seemingly plenary power to determine "related" and "known" offenses, but there is no way a STC could point to any misconduct within their jurisdiction and call it a "related" or "known" offense. Until case law develops on the idea, the field is open for practitioners to challenge.

B. Randomization for Assembly of The Court-Martial Panel

The changes to the assembly of the general courts-martial panels are more straightforward. In the past, the GCMCA could direct exactly who will be available for a court-martial voir dire. The changes to R.C.M. 911 require that selection to be random, specifically by having the military judge assign numbers to everyone who is available in the jurisdiction. In other words, the GCMCA will still select the venire but the military judge will randomize who actually appears for voir dire. From there, voir dire continues as

normal.

C. Sentencing Reform

Practitioners should also be aware that sentencing will no longer be done by the military panel members, except in capital cases. Going forward, all sentencing will be done by the military judge who will follow the sentencing guidelines prescribed in the new Appendices 12B and 12C. The guidelines break offenses into 6 categories with prescribed minimums and maximums, category 1 being the least punitive and category 6 offenses resulting in life imprisonment. The purpose of the sentencing reform is to better reflect the federal sentencing system. There won't be a one to one reflection because of a few key differences: the lack of probation in the military and the fact that many accused servicemembers are first time offenders for the purposes of courts-martial. At the appellate level, the CCA's will now be permitted to hear appeals from the Government if the sentence violates the sentencing parameters set forth in Article 56(c) or is plainly unreasonable.[8]

PART III MILITARY RULES OF EVIDENCE

The Military Rules of Evidence have two changes of which practitioners should be aware. The first is the requirement that trial counsel must provide notice of 404(b) evidence rather than only providing notice upon request of defense. Such notice must be in writing before trial or, if noticed at trial, the government must provide good cause.

The second change is more a suite of changes regarding electronic evidence. M.R.E.'s 315(b)(3), 902(13), and 902(14) deal with obtaining and certifying electronic records. 315(b)(3) specifies what a "warrant for wire or electronic communications" means and specifies that such a warrant must follow the requirements of 18 U.S.C. §2703.[9] R.C.M. 902(13) and (14) permit authentication of either certified data or certified records by a "qualified person." Where 315(b)(3) is likely just an MCM codification of already existing law, the new authentication rules seem to be a way to reduce the burden of introducing digital and electronic evidence to the court.

PART IV PUNITIVE ARTICLES

The major change to the punitive articles of the MCM is the introduction of a new Article 134 variant: sexual harassment. This change is not in Executive Order 14103 published in August 2023 but was published in Executive Order 14062 in January 2022:
(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 certain person did believe, that submission

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[8] The RCM's nor the NDAA's describe what constitutes plainly unreasonable.
[9] Specifically, the rule names subsections (a), (b)(1)(A), and (c)(1)(A). This statute requires "disclosure by a provider of electronic communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less" pursuant to a warrant.

to such conduct would be made, either explicitly or implicitly, a term or condition of that person’s job, pay, career, benefits, or entitlements;
(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
In January 2025, this offense will fall under the sole jurisdiction of the OSTC.

One final notable change to the M.C.M. is the standard for nonjudicial punishment. Previously, a commander had to come to proof beyond a reasonable doubt to punish a soldier under Article 15. The standard is now the preponderance of the evidence. While this does lower the threshold for imposing punishment on servicemembers, it also removes the preclusive effect that Article 15’s can have on administrative separation boards. Representatives of the commander can no longer use the finding of guilt at an Article 15 as persuasive for a finding at an administrative separation board.

Editors Note: The author has provided, and we are hosting online, a chart of the recent changes to the MCM to assist practitioners in this area.

FROM BITTER LEMONS, A FEW DROPS OF LEMONADE?

RECENT SUPREME COURT CASES AND IMPACT ON MILITARY CONSCIENTIOUS OBJECTORS

By Deborah H. Karpatkin

In recent Terms, the Supreme Court took away the constitutional right to abortion. It invalidated race-based admissions programs in higher education. It diminished LGBTQ rights and signaled its readiness to continue to do so. For civil rights advocates, and for our clients, none of this good news.

It's been a long time since the Supreme Court ruled explicitly on the rights of military conscientious objectors. Even lower court decisions are relatively few and far between.[1] But SCOTUS' continuing erosion of civil rights is taking place in the context of enhanced SCOTUS (and lower court) protection for religious rights. And these recent SCOTUS cases offer some insight and perspective on legal doctrines applicable to military COs.

This article considers four recent SCOTUS cases (and their progeny) in the context of military CO jurisprudence. *Bostock v. Clayton County* – and lower courts applying *Bostock* -- signal a possible doctrinal shift on the application of the Religious Freedom Restoration Act (RFRA) to military COs. *Groff v. DeJoy* and *303 Creative v. Eleni* illustrate a judicial trend towards greater accommodation for religious beliefs. And *Students for Free Admissions v. Harvard* may open up the enduring question of deference to military decision-making in the context of individual constitutional rights.

RFRA? The Religious Freedom Restoration Act (RFRA) has been a focus of thought for many of us who represent military COs.[2] In that context, this article considers the follow-on from *Bostock v. Clayton County*,[3] where the Supreme Court had the opportunity to consider (but did not decide) whether the RFRA would exempt a religious employer from the requirements of Title VII, which forbids workplace discrimination on the basis of, *inter alia*, sex, to the extent such requirements conflicted with the employer's religious beliefs.

A quick refresher on RFRA. Congress enacted RFRA in 1993 to override Supreme Court law narrowly interpreting the Free Exercise Clause of the First Amendment and reinstating previous Supreme Court law calling for a "compelling interest/least restrictive means" test. Accordingly, RFRA requires exceptions for religious objectors to laws that on their face are "neutral toward religion" but nevertheless burden the religious exercise of some of those subject to those laws. RFRA thus mandates that if a person's religious freedom is burdened by a federal law that is facially neutral towards religion, the government must prove that the burden is both "in furtherance of a compelling governmental interest" and also "the least restrictive means of

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[1] *See, e.g.* Karpatkin, "What's New in Conscientious Objector Law?, in *On Watch,* June 2014, https://nlgmltf.org/military-law/2014/whats-new-in-conscientious-objector-law/

[2] *See, e.g.,* Karpatkin and Goldberger, "Hobby Lobby and the Religious Freedom Restoration Act: New Arguments for Military Conscientious Objectors?" in *On Watch*, Spring 2016, https://nlgmltf.org/military-law/2016/hobby-lobby-and-the-religious-freedom-restoration-act-new-arguments-for-military-conscientious-objectors1/"

[3] *Bostock v. Clayton County*, 590 U.S. __, 140 S. Ct. 1731, 207 L. Ed. 2nd 218 (2020).

furthering that compelling governmental interest."[4] If the Government fails to meet this burden, the individual is entitled to an exemption from what the federal law would otherwise require.

RFRA could make a legally significant difference for CO applicants. Advocates for COs could argue that the arduous CO application process significantly burdens the exercise of CO applicants' beliefs, for example, by requiring proof of the depth and sincerity of their CO beliefs by "clear and convincing evidence." The military would then have to show that the arduous and burdensome CO process for CO recognition was both "in furtherance of a compelling government interest" and was "the least restrictive means" of furthering that interest.

Lessening hostility to religious beliefs? Accommodation of religious (and moral and philosophical) beliefs is the goal of those seeking military CO status, and last Term SCOTUS issued two decisions favoring religious accommodation in the workplace, and in public accommodations. In *Groff v. DeJoy*,[5] the Supreme Court held that the United States Post Office was required by Title VII's statutory prohibition of workplace religious discrimination to accommodate Mr. Groff's Sabbath observance with a "no-Sundays" work schedule. The Court articulated a religion-friendly legal standard in assessing what kinds of religious accommodation would be unduly burdensome on an employer. And in *303 Creative v. Elenis,*[6] SCOTUS privileged the religious beliefs of a business owner over LGBTQ public accommodation rights.

Different rules for the military? Practitioners challenging military rules that burden religious practice have been forced to contend with the significant deference courts have granted to the military, an issue that will be part of any RFRA argument wielded by CO applicants. *Students for Fair Admissions v. Harvard*,[7] last Term's momentous decision barring race-based college admissions under the Equal Protection Clause, raised (but did not answer) the question whether the military academies should be subject to the same constitutional standard. But that question is squarely presented by SFFA's continued attack on race-based admissions, now focused on the military academies.

I. RFRA as a Remedy: What follows *Bostock v. Clayton County*?

Bostock held that Title VII of the Civil Rights Act of 1964's prohibition of workplace discrimination because of, inter alia, sex, should be read to include a prohibition on discrimination on the basis of sexual orientation or identity. Resolving a split in the circuits, *Bostock* held that Title VII barred discrimination against an employee or applicant who identifies as homosexual or transgender.

Bostock consolidated three cases, each raising the issue of whether workplace discrimination based on sexual orientation or transgender status constituted sex discrimination under Title VII. For the purposes of this article, we focus on one of the three, *EEOC v. Harris Funeral Homes*, because in the lower courts, it explicitly raised the RFRA defense in the context of LGBTQ rights.

Aimee Stevens worked as a funeral director for Harris Funeral Homes. For most of her employment, she identified and dressed as a man. The funeral home fired her soon after she informed them that she was transitioning to female and would now follow its dress code for female funeral directors.

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[4] 42 U.S.C. §2000bb-1(a)-(b).
[5] *Groff v. DeJoy*, 600 U.S. 447 (2023)
[6] *303 Creative LLC v. Elenis,* 143 S. Ct. 2298 (2023).
[7] *Students for Fair Admissions v. Harvard*, 600 U.S. 181 (2023).

Ms. Stevens filed a Charge of Discrimination with the EEOC, and the EEOC brought a lawsuit on her behalf, on the grounds that firing Ms. Stevens because of her transgender status was sex discrimination in violation of Title VII.

Harris Funeral Home argued that the EEOC's enforcement of Title VII for Ms. Stevens violated the religious beliefs of its owners,[8] contrary to the requirements of RFRA. The District Court granted summary judgment for the Funeral Home, accepting its argument that Title VII's "basis of sex" prohibition did not apply here, because enforcing Title VII against the funeral home would violate its rights under RFRA. [9]

The Sixth Circuit reversed on both arguments, holding, with respect to the RFRA argument, that the Funeral Home had not established that applying Title VII's proscriptions against sex discrimination to it would substantially burden the owner's religious exercise, and even if had established that, the EEOC established that enforcing Title VII is the least restrictive means of furthering the government's compelling interest in protecting Ms. Stevens from workplace discrimination.[10]

Harris Funeral Home did not ask SCOTUS to decide the RFRA question, and for that reason it was not before the Supreme Court for consideration in *Bostock*. Nevertheless, the Court went out of its way to address the RFRA question, acknowledging that some "employers fear that complying with Title VII's requirement in cases like [*Bostock*] may require some employers to violate their religious convictions." The Court agreed that it, too, was "deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society.[11]"

Regarding RFRA, the court theorized that it "operates as a kind of super statute, displacing the normal operation of other federal laws." As such, "it might supersede Title VII's commands in appropriate cases.[12]"

In a tone of regret, the Court noted that "these doctrines protecting religious liberty interact with Title VII are questions for future cases," where "other employers in other cases may raise free exercise arguments that merit careful consideration." The Court continued, "None of the employers before us today represent in this Court that compliance with Title VII will infringe their own religious liberties in any way.[13]"

RFRA, Post-Bostock: Braidwood Mgmt. v. EEOC

Other employers have indeed accepted the Court's invitation to resist *Bostock* by asserting religious liberty rights under RFRA. At least one of those cases has reached a Circuit panel.

In *Braidwood Mgmt v. EEOC*, two Texas employers – Braidwood Management Inc. and Bear Creek Bible Church –with remarkable audacity, sued the EEOC affirmatively. They claimed that the mere existence of *Bostock* and the EEOC's enforcement guidance on workplace rights for LGBTQ persons impermissibly burdened their religious beliefs in violation of RFRA.

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[8] *Burwell v. Hobby Lobby Stores*, Inc., 573 U.S. 682 (2014) held that RFRA's protection of "persons" included private not for profit businesses.
[9] *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc*., 201 F. Supp. 3d 837 (E.D. Mich. 2016).
[10] *EEOC v. R.G. and G.R. Harris Funeral Homes, Inc*. 884 F.3d 560 (6th Cir. 2018).
[11] *Bostock*, 140 S. Ct. at 1753-54.
[12] Id. at 1754.
[13] Id.

Both plaintiffs alleged that they operated their workplaces in accordance with their Christian beliefs. Braidwood required employees to dress and use the restrooms of their biological sex. Bear Creek claimed that it would not hire LGBTQ persons, and that it would fire any employee who enters into a homosexual marriage.

Notably, there was no record of any asserted claim of discrimination by any individual employee or applicant on account of LGBTQ status against either plaintiff, and no expressed intention of the EEOC to bring any affirmative claim against either plaintiff.

Notwithstanding the absence of any actual claim of discrimination from an employee, or enforcement by the EEOC, Braidwood persuaded a panel of the Fifth Circuit to pick up the RFRA breadcrumb dropped by SCOTUS. The panel noted that SCOTUS had "punted on how religious liberties would be affected by its ruling and the practical scope of the Title VII protections afforded by *Bostock*," and "gave little guidance to how courts should apply [RFRA] defenses and exemptions to religious employers."[14]

The panel ruled: "RFRA requires that Braidwood, on an individual level, be exempted from Title VII because compliance with Title VII post-Bostock would substantially burden its ability to operate per its religious beliefs about homosexual and transgender conduct." Moreover, it ruled, "the EEOC wholly fails to carry its burden to show that it has a compelling interest in refusing Braidwood an exemption, even post-*Bostock*."[15]

Whether via this case or another, it is reasonable to anticipate that the Supreme Court will be interested in hearing a free exercise post-*Bostock* case, which, as the Court said in *Bostock*, will merit "careful consideration."

Military COVID Vaccine Mandates and RFRA. During the COVID pandemic, the military issued a COVID vaccine mandate, and some service members brought lawsuits challenging the mandate (and the non-granting of religious exemptions) on RFRA grounds. As the Secretary of Defense has now rescinded the COVID vaccine mandate, these cases are now moot.[16] However, the RFRA arguments were not dismissed out of hand in the lower courts. In *Colonel Fin. Mgmt. Officer v. Austin*, a class action brought in the Middle District of Florida against the Marine Corps vaccine mandate, the district court granted the class plaintiffs a preliminary injunction, noting: "This action — an action by a class comprising Marines who harbor a religious objection to receiving the COVID-19 vaccine — addresses only the contention that unifies the class: whether in late 2021 and throughout 2022 and before ordering Marines to accept a vaccination religiously repugnant (to the class) the Marine Corps asked the questions that RFRA demands and answered those questions in the manner — that is, "to the person" — that RFRA demands. Because the record reveals the substantial likelihood of a systemic failure by the Marine Corps to discharge the obligations established by RFRA, a class wide preliminary injunction is warranted to preserve the status quo, to permit the full development of the record without prejudice to the plaintiffs, and to permit both a trial and a detailed, fact-based resolution of the controlling issues of fact and law."[17]

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[14] *Braidwood Mgmt v. EEOC*, 70 F 4th 914, 918 (5th Circuit 2023).
[15] *Id*. at 937.
[16] *Creaghan v. Austin*, 217 L.Ed.2d 24 (U.S. 2023).
[17] *Colonel Fin. Mgmt. Officer v. Austin*, 622 F. Supp. 3d 1187, 1195 (M.D. Fla. 2022).

II. Growing Accommodation for Religious Belief: *Groff v. DeJoy*, and *303 Creative LLC v. Elenis*

CO applicants have historically faced significant challenges in gaining recognition and accommodation for their religious (or moral or philosophical) beliefs. Two SCOTUS cases from the 2022-2023 Term signal growing deference for religious beliefs, suggesting that the challenge may be getting a bit easier.

Groff v. DeJoy clarified the legal standard employers are required to follow to accommodate religious practice in the workplace.[18] Groff, an evangelical Christian, worked for the US Postal Service as a mail deliverer. He asked for a work schedule that would not schedule him for work on Sundays, to accommodate his religious beliefs. This became problematical when the USPS took on Sunday deliveries for Amazon. USPS decided that it could not accommodate Groff's religious beliefs without unduly burdening other employees (who would have to work more Sundays in his stead) and disciplined him for failing to work on Sundays. Groff resigned and sued.

Before *Groff*, practitioners and courts looked to the SCOTUS ruling in *TWA v. Hardison,*[19] a 1977 Title VII case which held that requiring employers to bear "more than a de minimis cost" to provide religious accommodation to workers would be an "undue hardship" and would thus not violate Title VII. Relying on the "more than a de minimis cost" language, some employers claimed (and some courts agreed) that accommodating time off for religious observance would be an "undue hardship" and thus, denying the accommodation would not violate Title VII.

Groff held that an employer denying religious accommodation must show that the burden of granting the accommodation would result in substantial increased costs in relation to the conduct of its particular business. In so holding, the Court made clear that applying this standard in any particular workplace would be context-specific – but to meet the "undue hardship standard, an employer would need to show something more than just the fact that other workers would have to take on additional overtime.

303 Creative v. Elenis is a First Amendment free speech case. The Court ruled in favor of the 303 Creative, a graphics design business, whose owner claimed that due to her religious beliefs she would not want to create websites with content that "contradicts biblical truth," which, according to her religious beliefs, included websites celebrating LGBTQ marriages. She filed a lawsuit seeking an injunction to prevent the state of Colorado from enforcing its public accommodation law to force her to do so. SCOTUS ruled in her favor.

While doctrinally treated as a First Amendment/compelled speech case, notably the plaintiff's protected speech was religious in nature. She refused to produce graphics content that "contradicts biblical truth." Her beliefs that reject same-sex marriage reflect a "sincere religious conviction." She does not want to produce commercial content that is "inconsistent with her religious commitments," and Colorado seeks to force her to speak about "a question of …religious significance."

In an eloquent dissent, Justice Sotomayor noted with dismay that this outcome of this case privileged business owners' religious rights over LGBTQ public accommodation rights. She reminded us that just five years previously, in *Masterpiece Cakeshop Ltd v. Colorado Civil Rights Commission*, SCOTUS recognized the "general rule that religious and philosophical objections to gay marriage do not allow

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[18] *Groff v. DeJoy*, 600 U.S. 447, 143 S. Ct. 2279 (2023).
[19] *TWA v. Hardison*, 432 U.S. 63 (1977).

business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."[20]

303 Creative and *Groff* together signal a growing SCOTUS trend: a majority of the justices will rule in favor of those who want to work, and to run their business, in ways that are consistent with their religious beliefs -- even when the asserted religious beliefs harm the civil rights and workplace rights of others. Could this trend be helpful to military CO applicants?

III. The Military's "Potentially Distinct Interests": Will that Change?

The Supreme Court has consistently deferred to military judgment, even where an individual has asserted a constitutional right. For example, In *Goldman v. Weinberger*,[21], the Supreme Court deferred to military judgment about dress codes and declined to recognize an Air Force doctor's First Amendment claim to be allowed to wear a yarmulke. In *Rostker v. Goldberg*[22], the Supreme Court upheld legislation limiting the military draft to men, declining to recognize a constitutional sex discrimination claim. And while there have been more recent constitutional challenges to the all-male draft registration,[23] the Court has to date declined to reconsider that decision.[24]

In last Term's decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*,[25] which rejected race-based college admissions systems in general, the Court noted in Footnote 4 that their decision applied only to civilian institutions, and further noted the "potentially distinct interests that military academies may present."

In response, the same plaintiff organization, Students for Fair Admissions, focusing on the "potential" opportunity in Footnote 4, filed lawsuits against the U.S. Naval Academy, and West Point, claiming, as in the *Harvard* case, that the military service academies' race-conscious admissions practices violated the Fifth Amendment. The pleadings track the *SFFA v. Harvard* decision.[26] These lawsuits, which were filed only in the last several months, are working their way through the district courts.

In the case against the Naval Academy, the federal district court in Maryland denied plaintiffs' motion for a preliminary injunction from the bench on December 14, 2023, and issued its opinion on December 20, 2023, interpreting Footnote 4 as "suggest[ing] that compelling government interests may justify affirmative action at military academies," and noting "judicial reluctance to intrude upon the authority of the Executive in military and national affairs" and "the explicit caveat in footnote 4 of *Harvard*." [27]

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[20] *303 Creative*, *id*. at 2322 (Sotomayor, J., dissenting).
[21] *Goldman v. Weinberger*, 475 U.S. 503(1986).
[22] *Rostker v. Goldberg*, 453 U.S. 57, 101 S. Ct. 2646 (1981)
[23] *Nat'l Coal. for Men v. Selective Serv. Sys*., 969 F.3d 546 (5th Cir. 2020)
[24] *Nat'l Coal. for Men v. Selective Serv. Sys.,* 141 S. Ct. 1815 (2021) See also https://nlgmltf.org/military-law/2019/the-end-of-male-only-draft-registration/
[25] *Students for Fair Admissions v; Harvard*, 600 U.S. 181, 143 S. Ct. 2141 (2023)
[26] https://www.documentcloud.org/documents/23999421-sffa-v-west-point#document.

[27] *Students for Fair Admissions v. United States Naval Acad.,* Civil Action No. RDB-23-2699, 2023 U.S. Dist. LEXIS 226340 (D. Md. Dec. 20, 2023) at *33-34.

Similarly, in the case against West Point, the federal district court in the Southern District of New York also denied plaintiffs' motion for a preliminary injunction, in an opinion issued on January 3, 2024. In so ruling, the court concluded that SFFA did not show a likelihood of success on the merits, given the compelling governmental interests, focusing similarly on "the Supreme Court's instruction to give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."[28] Like the Naval Academy case, the court concluded: "West Point is due more deference than were the private and public universities in Harvard" – again citing to the "explicit caveat" in Footnote 4.

SFFA and its supporters are pushing an aggressive agenda to dismantle race-based admissions in higher education, and, beyond that, to attacks on a wide range of diversity programs.[29] It would not be surprising to see one or more of these cases before the Supreme Court.

Concluding Thoughts

The cases discussed in this article, taken together, reflect a greater readiness by the Supreme Court – and in some cases, the lower courts - to privilege religious beliefs over other civil rights in a range of circumstances. While troubling – to say the least – for many reasons, they may signal that courts may be more open to RFRA arguments asserted on behalf of military conscientious objectors.

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[28] *Students for Fair Admissions v. United States Military Acad. at W. Point*, No. 23-CV-08262 (PMH), 2024 U.S. Dist. LEXIS 2222 (S.D.N.Y. Jan. 3, 2024) at *30-31.

[29] See, for example, the litigation program of SFFA's ally, The American Alliance for Equal Rights. https://americanallianceforequalrights.org/our-cases/

ANNUAL "DEFENSE" BILL LEAVES SELECTIVE SERVICE IN LIMBO

By Edward Hasbrouck

On Friday, December 22, 2023, President Biden signed the National Defense Authorization Act (NDAA) for the Federal government's 2024 fiscal year into law.

The signing of the annual NDAA has often been an occasion for pomp and publicity, but this year it was done with no public ceremony and the tersest possible statement from the White House[1], on a date chosen to minimize news coverage and public notice.

Notably, this year's NDAA as enacted[2] makes no mention whatsoever of the Selective Service System.[3]

Unfortunately, this doesn't mean that funding for Selective Service has been cut: Despite the fact that the sole function of the Selective Service System is to plan and be prepared to start drafting people into the military whenever Congress and the President so order, the SSS is a nominally civilian agency funded separately from the "defense" budget.

What the silence of the NDAA on the subject of Selective Service does mean is that the future of the draft and draft registration[4] remains in limbo.

In recent years, Congress has considered both amendments to the NDAA and free-standing bills that would have expanded draft registration to young women[5] as well as young men or, alternatively, would have repealed the Military Selective Service Act, abolished the SSS, and ended draft registration.

In 2016[6], 2021[7], and again in 2022[8], Congress came close to expanding draft registration to women. In each of those years, at least one house of Congress included a provision to expand draft registration to women in its version of the annual NDAA, but that provision was removed in the final stages of closed-door House-Senate conference negotiations.

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[1] Statement from President Joe Biden on H.R. 2670, National Defense Authorization Act for Fiscal Year 2024 , December 22, 2023, <https://www.whitehouse.gov/briefing-room/statements-releases/2023/12/22/statement-from-president-joe-biden-on-h-r-2670-national-defense-authorization-act-for-fiscal-year-2024/>.

[2] H.R.2670 - National Defense Authorization Act for Fiscal Year 2024, <https://www.congress.gov/bill/118th-congress/house-bill/2670>.

[3] See, "What is the Selective Service System?", <https://hasbrouck.org/draft/advice/selective-service.html>.

[4] See, "FAQ: Frequently asked questions about the Selective Service System and the military draft (required military service)", <https://hasbrouck.org/draft/advice/SSS-FAQ.html>, and version in Spanish at <https://hasbrouck.org/draft/espanol/SSS-FAQ-ES.html>.

[5] See, "What's happening with women and draft registration ("Selective Service")?", <https://hasbrouck.org/draft/women/happening.html>.

[6] Edward Hasbrouck, "Senate approves "Defense" bill including expansion of draft registration to women", June 14, 2016, <https://hasbrouck.org/blog/archives/002262.html>.

[7] Edward Hasbrouck, "Congress punts decision on draft registration into 2022 or 2023", December 27, 2021,<https://hasbrouck.org/blog/archives/002636.html>.

[8] Edward Hasbrouck, "Congress again backs away from expansion of draft registration", December 7, 2022, <https://hasbrouck.org/blog/archives/002671.html>.

This year, neither expansion nor repeal of Selective Service was seriously considered, and no provisions related to Selective Service made it into either the House or the Senate version of the NDAA or the final conference compromise enacted and signed into law.

That means men (as assigned at birth) are still supposed to register with the Selective Service System within a month of their 18th birthday and report to the SSS each time they change their mailing address until their 26th birthday.

Few young men comply with this law[9], of course, but as long as the law remains on the books and the Selective Service keeps up a facade of "readiness" to start a draft on demand, war planners can pretend that conscription is available as a "fallback" if recruiting falls short. With a draft in their back pocket, they don't have to consider whether enough people will volunteer to fight larger, longer wars in more places around the world. The existence of draft registration, contingency planning for a draft, and perceived availability of an on-demand draft are critical enablers of planning for war without limits.[10] With war clouds on the horizon, ending draft registration remains as important as ever.

Proposals to expand draft registration to young women aren't going to go away until Congress decides either to expand draft registration to women or to end it entirely.

A proposal to end draft registration was introduced in the House this year[11], but despite a confusingly similar title it was a much weaker bill with much less support than the Selective Service Repeal Act[12] that was introduced with bipartisan support in both the House and Senate[13] in 2019[14] and again in 2021[15].

The key difference between the earlier bipartisan House-Senate bill and the latest House bill is that the earlier bill included provisions to end all sanctions against those who never registered with the SSS.

The more recent, narrower bill would end draft registration but would allow both Federal and state governments to continue to impose lifetime administrative sanctions, such as ineligibility for government jobs, on those who didn't register while registration was in effect. As I pointed out in a meeting with the National Commission on Military, National, and Public Service in 2019, if Congress wants to put draft registration behind it, it needs to put an end to all of the Federal and state penalties for past nonregistration.[16]

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

[10] See, "Would a draft make war less likely? No."<https://hasbrouck.org/draft/reasons/deterrence.html>.

[11] H.R.6100 - Military Selective Service Repeal Act of 2023, <https://www.congress.gov/bill/118th-congress/house-bill/6100>.

[12] H.R.2509 - Selective Service Repeal Act of 2021 (identical to S.1139), <https://www.congress.gov/bill/117th-congress/house-bill/2509/>.

[13] See joint letter to the House Armed Services Committee from Republican and Democratic Senators and Representatives, July 21, 2021 <https://hasbrouck.org/draft/HASC-letter-23JUL2021.pdf>

[14] Edward Hasbrouck, "Bill introduced to end draft registration", December 20, 2019, <https://hasbrouck.org/blog/archives/002363.html>.

[15] Press release, "Wyden, Paul, DeFazio, Davis Introduce Bipartisan Bill to Abolish the Selective Service", April 14, 2021, <https://www.wyden.senate.gov/news/press-releases/wyden-paul-defazio-davis-introduce-bipartisan-bill-to-abolish-the-selective-service>.

[16] Edward Hasbrouck, "Statement for conference call with anti-war organizations and members of the National

This makes it critical for opponents of the draft to get a member of the U.S. House or Senate to reintroduce the 2019/2021 Selective Service Repeal Act in the current Congress, and get commitments from Congressional candidates to sponsor and push for a vote on this bill.[17]

Meanwhile, as a result of legislation which was enacted three years ago[18] but which provided for delayed implementation, all of the questions about Selective Service registration were removed from the FAFSA Federal student financial aid form starting with the current 2023-2024 school year. It's important to get out the word that the law has changed and young men no longer have to register for the draft in order to be eligible for Federal student aid, although draft registration is still a condition of eligibility for state financial aid and/or admission to state colleges and universities in some states.[19]

The de-linking of draft registration and Federal student aid is further reducing the already low rate of compliance with the registration law. Even the SSS, which counts as "in compliance" anyone who ever registers at any address, regardless of whether they have a current address on file at which they could be served with an induction order, admits that compliance is likely to fall even further now that the questions about draft registration have been removed from the FAFSA form:

> "The CY 2022 national registration rate for men aged 18 to 25 was 84 percent. This was a five percent decrease from CY 2021, largely driven by the loss of the requirement for a man to register with SSS to receive Federal student aid and the removal of the option to registration [sic] on the Free Application for Federal Student Aid (FAFSA) form, which are both outcomes of the passage of the FAFSA Simplification Act in 2020. Since this method of registration historically accounted for up to 20 percent of all annual registrations, SSS expects the national registration rate to further decrease."[20]

Compliance rates officially reported by the SSS have fallen to 75% in California, 68% in Oregon, 58% in Massachusetts, and 50% in the District of Columbia.[21]

With draft registration no longer required for Federal student aid, compliance depends almost entirely on laws in some states that automatically register applicants for drivers licenses with Selective Service.[22] The highest current priority for the SSS is to get laws like this passed in states where draft registration isn't linked to drivers licenses, including California, Massachusetts, New Jersey, Pennsylvania, and Oregon. A high priority for opponents of the draft should be to oppose these proposals and to lobby

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Commission on Military, National, and Public Service (NCMNPS)", November 13, 2019, <https://hasbrouck.org/draft/Hasbrouck-NCMNPS-13NOV2019.pdf>.

[17] See, "Repeal Selective Service Registration!", <https://hasbrouck.org/draft/repeal.html>.

[18] Edward Hasbrouck, "'Solomon Amendment' linking student aid to draft registration repealed", December 29, 2020, <https://hasbrouck.org/blog/archives/002573.html>.

[19] See new explainer, "Selective Service and Student Aid", <https://hasbrouck.org/draft/advice/student-aid.html>.

[20] Selective Service System, "Annual Report to Congress for Calendar Year 2022", <https://www.sss.gov/wp-content/uploads/2023/09/Annual-Report-2022-Digital.pdf>.

[21] Selective Service System, "Registration Compliance Data by States, Territories, and the District of Columbia: CY 2022", <https://www.sss.gov/registration-compliance-data/>.

[22] See, "State laws on Selective Service registration and drivers' licenses", <https://hasbrouck.org/draft/advice/state.html>. A project on the agenda of the MLTF is to research a comprehensive index by state of these and other state laws pertaining to Selective Service registration and higher education, government employment, and other programs.

legislators in other states to remove the linkages to Selective Service registration in their driver's license laws.

The current stalemate on the draft in Congress is nothing new. The 43 years (and counting) since 1980 of draft registration in the USA, and of resistance to it, are a substantial fraction of the long history of the draft and draft resistance in the USA. Yet the history of the draft, draft registration, and draft resistance since 1980[23] is often omitted from what are misrepresented as "comprehensive" histories of conscription in the USA, either because this period is "too recent" or because "there is no draft". Neither of these, however, is a valid argument for historical blindness or amnesia.

As the South African philosopher of social organization and social change Rick Turner observed in his treatise on participatory democracy, *The Eye of the Needle,* "History is not something that has just come to an end and is certainly not something that came to an end fifty years ago."[24]

The history of planning and preparation for a draft, and of resistance to it, when induction orders are not being issued, is as much a part of the history of the draft as the history of planning and preparation for nuclear war, and of resistance to it, during times when orders to launch a nuclear attack have not been issued, are a part of the history of nuclear warfare and of anti-nuclear activism. But draft registration, like nuclear warheads that have been deployed but not yet exploded, remains an element of ongoing war preparations that is too often both out of sight and out of mind.

I'm an activist and a legal worker, not a historian, but I've been doing what I can to preserve that history for whatever value it may have to future generations of draft resisters, whatever their reasons for resistance and whatever choices[25] they make.

I've recently acquired a second-hand high-speed scanner, which has enabled me to start posting more lengthy documents from my personal archives including trial transcripts, court pleadings, FBI files, public statements, posters, and photos from some of the "show-trial" prosecutions of draft registration resisters in the 1980s.[26] These include extensive materials about my own prosecution[27], but perhaps the most historically significant and revealing collection I've posted relates to the case of the "Boston 18"[28], who were arrested at a sit-in inside the main Post Office and draft registration site (which was also, coincidentally, the Federal courthouse) in downtown Boston during the mass registration week in January 1981 for men born in 1962.

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[23] For an introduction to this history, see Edward Hasbrouck, "The History of Draft Registration and Draft Resistance Since 1980", <https://hasbrouck.org/draft/background.html>.

[24] Richard Turner, "The Eye of the Needle: Towards Participatory Democracy in South Africa", 1973, reissued with a new preface and afterword, 2015, Seagull Books, Kolkata, India (distributed in the U.S. by the University of Chicago Press), <https://www.amazon.com/Eye-Needle-Towards-Participatory-Democracy/dp/0857422375>; also available in the South African History Online (SAHO) collection, <https://www.sahistory.org.za/archive/eye-needle-rick-turner>.

[25] See, "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/advice/options.html>.

[26] See overview and links to detail pages about specific cases at <https://hasbrouck.org/draft/prosecutions/>.

[27] "The United States vs. Edward Hasbrouck", <https://hasbrouck.org/draft/prosecutions/us-vs-hasbrouck.html>.

[28] "The Boston 18", <https://hasbrouck.org/draft/prosecutions/Boston18.html>.

The Boston 18 eventually spent thirty days each in Federal prisons — an unusually harsh sentence for a simple sit-in.

Expert witnesses at the trial of the Boston 18 included Howard Zinn, Noam Chomsky, and the feminist scholar-activists Karen Lindsey (one of the principal spokespeople for the Women Opposed to Registration and the Draft) and Linda Gordon. But what I think is most interesting about the records of the case is the testimony of the defendants themselves. It provides a rare, possibly unique, look into the character and politics of the diverse community of allies who supported the young men who were being ordered to sign their lives over to the government and the military. Draft resistance was never limited to men of draft age.

In addition to historical material, I've added more advice and resources for young people who don't want to be drafted[29], more information about the diversity of reasons to resist draft registration[30], and an improved sitemap and outline that I hope will make my site easier to explore.[31] Some URLs have changed, but I've tried to redirect all the old URLs to the new pages. Please let me know if you come across broken links or navigation problems.

I've got more boxes in my basement to deal with, including more files about draft resistance organizing and activism that the FBI and the Bureau of Prisons released in response to my FOIA requests. If you have documents, photos, etc. about draft resistance since 1980 that you'd like scanned or think belong on my Web site or with the collection I've deposited and am continuing to add to in the Swarthmore College Peace Collection[32], please get in touch.

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[29] "Advice about Selective Service registration", <https://hasbrouck.org/draft/advice/>.
[30] See the survey of reasons to resist the draft and draft registration, "Why do we oppose the draft and draft registration ("Selective Service")?", <https://hasbrouck.org/draft/reasons/why.html>.
[31] "Index of all pages on Resisters.info", <https://hasbrouck.org/draft/sitemap.html>.
[32] "Edward Hasbrouck Collected Papers ", Swarthmore College Peace Collection, <https://archives.tricolib.brynmawr.edu/resources/scpc-cdg-a-hasbrouck_edward>.

MILITARY MEDICAL MALPRACTICE UPDATE

By Jeff Lake

There have been some noteworthy events related to medical malpractice claims by servicemembers since my article in the last issue of *On Watch*.

In November, the Military Times published an article on the case of Maria Martinez, a specialist at Fort Bliss, Texas. Ms. Martinez went to military health care providers in January, 2019 and requested a medical screening for breast cancer due to her family history and having the BRCA2 gene mutation. The Defense Department's TRICARE health insurance denied her request for a screening three times. By October, she was in the emergency room on post with severe shortness of breath. Sure enough, she had advanced breast cancer. She died in December, 2021.

In November, 2021, Ms. Martinez filed a medical malpractice claim under the military's new administrative claims procedure that I have discussed in *On Watch.* As I reported in the last issue, according to the Army, Navy and Air Force, 502 medical malpractice claims have been filed. Only 17 have resulted in financial payments to survivors. 134 claims have been denied and are closed. The others, 351 claims, are under or eligible for appeal or have been withdrawn. As could be expected, Ms. Martinez's claim was denied – on the grounds that the statute of limitations had run one month earlier.

The family filed a lawsuit in federal court. The military moved to dismiss on the grounds that such suits were not allowed and that the statute of limitations had run. The court denied the motion to dismiss. The court found that since there was an allegation that Ms. Martinez had been denied due process, federal judicial review was available. As to the statute of limitations, the court found that the Service Members Civil Relief Act tolls the statute while someone is serving in the military. If this ruling is allowed to stand, it will expand the window for servicemembers to file these claims. However, the chances of prevailing on them are still very small.

Given the abysmal track record of the administrative medical malpractice claims system, Congress has made a small change to it. The new NDAA for 2024 adds the following provision to Title 10 Section 2733a of the United States Code as follows:

> "(f) JUSTIFICATION OF DENIAL. If a claim under this section is denied, the Secretary of Defense shall provide the claimant with detailed reasoning justifying the denial of the claim, including –
>
> (1) copies of an written reports prepared by any expert upon which denial is based; and
>
> (2) all records and documents relied upon in preparing such written reports, other than medical quality assurance records (as such term is defined in section 1102 of this title)."

Under 32 CFR § 842.42 appeals under the current system are decided by the original settlement authority. Only where the settlement authority does not reach a final agreement on an appeal is it sent to the next higher settlement authority. Needless to say, this is hardly an independent appellate review panel. One wonders if this new tweak in the NDAA is designed to simply try and console the overwhelming number of complainants who are being denied their claims under the system and to possibly discourage them from using the meager appellate process provided for.

As always, the MLTF will continue to monitor developments in this area and report them in *On Watch*. Please keep your membership current to receive future issues.

MLTF ANNUAL MEETING REPORT

By Jeff Lake

The MLTF held its annual membership meeting on November 13, 2023, following the NLG Convention Plenary sessions on November 11-12. All of these meetings were conducted through Zoom as the Guild has not yet resumed meeting in person.

Following introductions, members of the various MLTF subcommittees presented reports on their work as follows:

Gender Justice Committee: Kathy Gilberd reported that the committee is working with a law student and a paralegal intern to update a self-help guide on sexual assault and sexual harassment. The paralegal is working on a legal memo on ways to challenge retaliation for making sexual assault reports. The committee plans a CLE program for next year. They crafted, and the Task Force steering committee approved, a statement on gender justice issues to be posted on the website. Chris Lombardi is monitoring the pending National Defense Authorization Act for issues affecting transsexual troops, reproductive rights and Dobbs issues. (For more information or to volunteer for this committee, contact Kathy at kathleengilberd@aol.com.)

Military Antiracism Committee: Ana Maria Bondoc and I reported that the committee is updating materials, including a comprehensive memo on racism and extremism. The committee wrote articles for the Spring *On Watch* issue focused on the topic and presented a MCLE program. They are researching the extent of the problem, including Aaron Frishberg's submission of FOIA requests to the services for more information. The committee has reached out to other organizations to coordinate work. They are drafting leaflets for service members on Article 138 complaints for redress of grievance and on Military Equal Opportunity complaints. (For information or to volunteer, contact me at jefflakejd@gmail.com.)

Selective Service Committee: Libby Frank reported there was a bill introduced by Rep. Pat Herring in October to eliminate Selective Service. He's a Freedom Caucus member from Pennsylvania. No action has been taken on it to date. (For more information or to volunteer, contact Edward Hasbrouck at edward@hasbrouck.org.)

CLE Committee. James Branum reported on the steady programming of high quality CLE programs this year. He welcomes suggestions for 2024 topics. (To offer suggestions or to join the committee, contact James at jmbzine@gmail.com.)

Readiness Committee. The MLTF wants to prepare now in advance of the need for immediate action in a military crisis. Libby Frank reported that this committee is focused on preparation for the eventuality of a huge war. She and Kathy Gilberd prepared an ambitious readiness plan which includes response to service members' expected resistance to deployment and combat. In 2024 they plan to a) develop training materials for use when war occurs and b) draft a legal and political educational position statement for the Guild and our allies. They intend to educate Guild members about the topic and the importance of securing the legal rights of service members. The MLTF seeks to educate Guild members about why these military-related issues matter from a leftist perspective. (For more information or to join the committee, contact Libby at libbyfrank49@gmail.com.)

Fundraising: James Branum reported on the Fall fundraising campaign. He plans to crowd source fund annually. Help is always needed in this area. (To join the committee, contact Kathy at kathleengilberd@aol.com.)

On Watch and other Publications. I reported on the types of articles written for *On Watch*. Readers are welcome to submit articles, and to update legal memos and previously published articles. If you are interested in a topic or you want to write an article, contact me. Written material is posted on the MLTF website. NLG - Military Law Task Force (nlgmltf.org)

Miscellaneous plans for 2024: The attendees discussed plans to develop greater awareness of moral injury and military suicides, and legislative work tracking legislation to keep our constituency aware of legislation.

Election for Steering Committee. The Bylaws provide for election of the Steering Committee at the Annual Meeting. There was not a quorum for an election at this meeting, which means it will be an online election. Jeff Lake, Aaron Frishberg, Libby Frank and James Branum's terms end this year. They were nominated for new terms.

There is a lot of work to be done in 2024. Please assist the MLTF in any way you can, either with your time or through a monetary donation. We look forward to seeing you at the annual meeting in 2024!

MLTF SUBMITS ANTIWAR RESOLUTION TO NLG

Editor's Note: This Resolution was submitted to the National Lawyers Guild for adoption during the 2003 NLG Convention. Following the Convention, it was approved by the NLG Membership. Implementation of this Resolution falls to the MLTF and other Endorsers. Along with Contingency Planning, the Resolution will guide the work of the MLTF during 2024. If readers are interested, please contact Kathleen Gilberd to assist us with this vital work.

RESOLUTION OPPOSING PERPETUAL WAR

Proposed by the NLG Military Law Task Force

WHEREAS, the United States has approximately 750 military bases in approximately 81 countries around the world.

WHEREAS, the United States has intervened militarily in other countries approximately 200 times since 1950, including 27 attempts at regime change.

WHEREAS, the United States public military budget for 2023 was over 816 billion dollars.

WHEREAS, the clear pattern of US military support for foreign regimes and armed presence or intervention in other countries is one of protection of US economic and political interests.

WHEREAS, the American people are kept largely unaware of this wide-flung military empire and its purposes and, when the public does become aware of the conflicts, they are falsely given to understand that our country acts only in the interests of freedom and democracy.

WHEREAS, the US's military presence and warfare abroad, often under the guise of training and advising local military forces, serves to prop up a number of dictatorial and repressive regimes.

WHEREAS, such US military presence and action abroad have created a state of perpetual war, to the detriment of independent nations, progressive movements and indigenous populations around the world.

WHEREAS, against this backdrop of ongoing warfare the US government and the interests it serves are also preparing for the very real possibility of "great power" war(s) with international rivals.

WHEREAS, the state of perpetual was and the likelihood of great power war are adverse to the interests of the American people or those of US military personnel.

WHEREAS, the US military seeks to address this problem and motivate servicemembers to fight in unwanted and unjust wars through military training and a military culture that glorify violence and warfare, equate military prowess with sexual prowess and sexual violence, and objectify potential "enemies" by painting them as subhuman and "other," often doing so by singling out as targets of harassment and other mistreatment servicemembers of color as well as those who appear weak or simply different, all with the result that people of color, women and non-binary servicemembers face harsh treatment and abuse in the armed forces.

WHEREAS, the Department of Defense's own reports reveal that 8,942 service members reported they were sexually assaulted in 2022, and that as of 2023, in 9 of the last 10 reporting years, total sexual assaults in the military have increased each year, while sexual harassment is growing at a similar rate

WHEREAS, a GAO report released in May 2019 found evidence that black and Hispanic troops were more likely than their white peers to be investigated by military commanders and tried in courts-martial, but not any more likely to be found guilty.

WHEREAS, in 2019 the number of discrimination complaints which the military officially substantiated was 6% in the Navy, 18% in the Air Force and 35% in the Army. According to the AP, surveys taken on aircraft carriers in 2019 showed that nearly 1 in 4 sailors said they could not use their chain of command to report incidents of racism without fear of retaliation or reprisal, and that 4 out of every 10 said discipline was unfairly administered.

WHEREAS, a 2020 Military Times poll found that 57% of servicemembers of color said they had witnessed incidents of racism or racist ideology , yet there is no specific prohibition against hate crimes in the military justice system.

WHEREAS, the U.S. military is a significant contributor to climate change. If it were a nation state, it would be the 47th largest emitter of greenhouse gases in the world. Total emissions from war-related activity in Iraq, Afghanistan, Pakistan and Syria are estimated to be more than 400 million metric tons of carbon dioxide alone.

WHEREAS, The Selective Service System continues to attempt to register all young men in the United States for induction into the military, and the U.S. Congress is considering expanding this registration requirement to women.

WHEREAS, the United States has increased hostilities in the Pacific region and is committed to military intervention in Taiwan against China.

THEREFORE, be it resolved that the National Lawyers Guild calls for an end to

U.S. policy of preparing for and fighting perpetual wars around the world. The National Lawyers Guild will educate its members on the dangers this policy poses to peoples around the world and in the U.S.

AND BE IT FURTHER RESOLVED that the Guild, through its Military Law Task Force, will seek to educate Guild members, committees and other entities, as well as Guild allies and the public, about these issues and encourage Guild entities and members to take part in campaigns to stop the U.S. military from fighting perpetual wars around the world.

IMPLEMENTATION by the NLG Military Law Task Force and other endorsers

CONTACT PERSON:
Kathleen Gilberd   kathleengilberd@aol.com

PRESENTERS AT PLENARY SESSIONS:
Kathy Gilberd, MLTF Executive Director

Jeff Lake, MLTF Chair

Submitted by:

The Military Law Task Force of the National Lawyers Guild
The International Committee of the National Lawyers Guild
The Environmental Justice Committee of the National Lawyers Guild
Kathleen Gilberd, Executive Director of the Military Law Task Force
Jeff Lake, Chair of the Military Law Task Force

WHY WE DO MILITARY LAW

Editor's Note: Practitioners in the MLTF were asked to submit short descriptions of why they do military law. The Editors present these here in hopes that On Watch readers will be inspired to begin or continue practice in this area.

ATTORNEY DAN MAYFIELD IN SAN JOSE:

I do Military Law and in particular discharge upgrade work because I see it as part of the class struggle. That is to say that I see the work as empowering those who because of their race, sex, sexual orientation or class have been denied their rightful military benefits.

We know that "Bad Paper" discharges, and in particular administrative Other Than Honorable (OTH) discharges have historically been used in used in a racist and sexist way. We know that an OTH means that the veteran does not (in most cases) have access to VA hospitals, or money for continued education, special consideration for home loans, or Veteran's Points on civil service exams.

Upgrading a discharge from an OTH (or even a Bad Conduct Discharge or Dishonorable Discharge) can be a life changing experience for many veterans. I am honored to be part of this service of the MLTF.

ATTORNEY JANE KAPLAN IN BERKELEY:

I like representing active-duty service members who enlist expecting a rewarding experience and later come to understand that, in reality, that they won't even be treated fairly. These clients are alone and most are without resources. There is satisfaction in helping people trapped in an unjust military system which would rather treat them abusively and without respect than grant the rights they're entitled to.

ATTORNEY JAMES BRANUM IN OKLAHOMA CITY:

I first encountered military law during law school. I had seen a family member struggle with an issue in the military which led him (and indirectly me) to the work of the GI Rights hotline, who connected me with the MLTF. It was through the MLTF that I got my initial training while in law school and much of my mentoring and support during my early years of practicing military law.

I've now been practicing military law for 17 years. The work is draining and often not paid well (many of my clients are low-paid junior enlisted troops), but I keep doing it because I've seen the ways that this work can transform lives and whittle down the walls of injustice and oppression. So many broader issues (poverty, racism, sexism, homophobia, etc.) are impacted by military law, but these issues are dealt with in the context of the lives of individual servicemembers. This calls to mind the teachings of two of my heroes of spiritually-based activism, Dorothy Day and Peter Maurin (the founders of the Catholic Worker movement). They both argued for an approach called "personalism" that focuses on the experience and life of the individual and their humanity, in seeking to fix societal injustice. Doing military law feels a lot like their vision, because while we might be going up against the system itself, we are doing so on behalf of individuals whose voices need to be heard.

LEGAL WORKER KATHY GILBERD IN SAN DIEGO

I began doing military law and organizing because I was tricked. It's just a summer job; they said, we'll pay you, and in the fall you'll be done. Right. I think Support Our Soldiers actually paid me for one

month, and at the end of the summer everyone else was leaving, so what could I do? And of course by then I was hooked—by the GI movement folks I met, by the military's abuse of its people, and by the critical role that the GI anti-war movement was playing in challenging the war in Indochina. So I stayed.

Over the years, I've had the honor of helping to provide legal and political support to military resisters; draft registration resisters; victims of the military's homophobic policies, victims of its early HIV policies; women challenging sexual harassment and sexual assault, Black Marines fighting back against white extremism (remember the Pendleton 14?); and individual soldiers and sailors trying to get out of a horrible system. These people built important political campaigns and movements that forced some significant changes in the military, often building towards changes in the civilian world. They played a significant role in forcing an end to the Indochina war, and for a number of years they held the US back from Vietnam-style interventionist wars.

It's really meaningful to assist those who are harmed, often almost destroyed, by the military system that promised them honor and benefits. And that assistance can put small wrenches in the gears of the military's system. On a broader level, helping servicemembers to speak out about and challenge injustice, both individually and collectively, and helping them to oppose the wars they are ordered to fight, is anti-oppression and anti-war work at its most rewarding.

ATTORNEY JEFF LAKE IN SAN JOSE:

I have always been an anti-war activist and see my work with the MLTF as part of that work. War and preparation for war harms everyone – civilians and enlisted personnel alike. The work is especially rewarding when someone is discharged from the military with as few collateral consequences as possible or someone considering joining the military is convinced not to join. It is exciting to work with allies, whether they are counter-recruiters, military counselors and lawyers or veterans who are now anti-war activists. We all have a role to play and together we can effectively oppose the imperialist mission of the U.S. military and create a more just and peaceful world for all peoples.

ATTORNEY DAVID GESPASS IN FAIRHOPE, AL:

The US military is, not exactly literally but far more than figuratively, the point of the spear of US imperialism. Indeed, it is pretty much the whole spear, with some 750 bases in 80 countries around the world, with missiles and planes that can travel across continents and with ships patrolling the world's oceans.

As US economic power declines and it more and more resorts to military might to maintain its preeminence, it is inevitable that increasing numbers will be disillusioned or grievously injured, discarded and facing a Department of Veterans Affairs that does not deliver what they need and were promised. Greater discontent, as it has in the past, will lead to resistance. While it famously happened in Vietnam, it has been true throughout US history. Soldiers refused to invade the Soviet Union after World War I and a powerful Back Home movement limited US imperial aims after World War II. Just as lawyers were needed to defend labor rights in 1937 when the Lawyers Guild was formed, just as they were needed to defend Freedom Riders and protesters in the Jim Crow South in the 1950's and 60's, just as they were needed for gay rights activists after the Stonewall rebellion, just as they were needed to protect the Occupy Movement and just as they were needed when Black Lives Matter and the protests over George Floyd's torture and murder roiled the country, they will be needed to defend courageous GI's who refuse illegal orders and who resist being pawns as the US imperial forces vainly fight to keep their power.

ABOUT THE CONTRIBUTORS

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

Ryan Gunderman is a 2023 law school graduate of Harvard Law School and is currently serving as a captain in the United States Army Judge Advocate General's Corps. He has a passion for criminal defense and restorative justice and has spent the last three years serving low income defendants in the Boston area. He also worked extensively with the Transformational Prison Project, a restorative justice project in Massachusetts led by formerly incarcerated individuals. Ryan is currently stationed at Fort Shafter in Hawaii.

Edward Hasbrouck is a legal worker in San Francisco with the Identity Project (PapersPlease.org). He has been a member of the NLG and the MLTF since the early 1980s, when he was an organizer with the National Resistance Committee and co-editor of Resistance News. He publishes a Web site about the draft, draft registration, draft resistance, and the Selective Service System at Resisters.info.

Deborah Karpatkin is a civil rights and employment rights lawyer in NYC and a Friend of the Military Law Task Force. She has represented conscientious objectors since 1991, and has litigated a number of CO cases, including Martin v. Army 463 F. Supp. 2d 287 (N.D.N.Y. 2006) and, as amicus curiae, Watson v. Geren and Kanai v. McHugh. She also represents veterans seeking discharge upgrades. She is a Vice President of the National Employment Lawyers Association (NELA), and teaches employment discrimination law at Touro Law School.

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THE MILITARY LAW TASK FORCE OF THE NATIONAL LAWYERS GUILD

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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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