



THE NIMJ GAZETTE

No. 121—August 1, 2022

People

NIMJ welcomes Jake Dianno to the team. He is a rising 2L at Villanova who is involved in their Veterans Clinic. He will extern with us for the semester beginning in August.

CAAFlog has a post about the [status of Tia Johnson's nomination](#) to be the fifth judge of the Court of Appeals for the Armed Forces.

Legislation

A press release alerts us to several proposals for the NDAA FY 2023, which could affect military justice. One addresses Supreme Court access (something NIMJ has long advocated for) and unanimous verdicts. A third addresses a suspect's records (and their removal) when “[the]Service member is subject to non-judicial punishment for the offense to which the record pertains; or is pardoned for the offense to which the record pertains.” You can find the House Armed Services Committee actions [here](#).

Reports

The International Commission of Jurists has issued a new legal briefing, [*Entrenching the Rule of Law in Libya: Security Sector's Accountability Through Civil Control and Oversight*](#) (July 2022). Section five discusses the need to exclude military court jurisdiction over crimes under international law with helpful references to domestic and international sources. (Courtesy of GMJR.)

In October 2021, the Navy [released the report](#) into the catastrophic fire on board USS BONHOMME RICHARD. As a result, we now have [news of adverse administrative actions](#) against leadership and others for their actions—or failure to act—in fighting the fire. In addition, Seaman Ryan S. Mayes remains [pending court-martial](#) for allegedly starting the fire. A trial is currently set for September 2022.

Other litigation

The Court of Appeals for the District of Columbia has reversed the district court decision in [Larrabee v. Del Toro](#) by a 2-1 vote. Supremes next? Judge Rao begins,

Steven Larrabee, a member of the Fleet Marine Corps Reserve, pleaded guilty at a court-martial to the sexual assault of a civilian. In this collateral challenge to his sentence, Larrabee argues that the statutory

grant of military jurisdiction over Fleet Marine Reservists exceeds Congress' authority to "make Rules for the Government and Regulation of the land and naval Forces," U.S. CONST. art. I, § 8, cl. 14 ("Make Rules Clause"), and that his "case[]" did not "aris[e] in the land and naval forces," *id.* amend. V ("Grand Jury Clause"). The district court held for Larrabee. We now reverse.

In *United States v. Pritchard (Military Judge) & Dial (RPI)*, The ACCA granted the Government's writ petition to set aside the ruling of Military Judge Pritchard. On July 13, 2022, CAAF received a writ-appeal petition styled [*Dial v. United States & Pritchard*](#). [Read all about it here](#). CAAF also has accepted the brief of the National Association of Criminal Defense Lawyers as amicus.

Another case of note is [*United States v. Johnson*](#), a case about civilian jail conditions for Air Force members in pre- or post-conviction confinement. Both the Air Force Court of Criminal Appeals and the Court of Appeals for the Armed Forces opinions raise serious questions about the Air Force's regular use of civilian confinement facilities, which allegedly have deplorable conditions. Readers of prior opinions (many referenced in *Johnson*) will realize that the problem seems to have been ongoing for a long time. But the Air Force does nothing about it. The *Johnson* litigation essentially asks if there is a systemic, deliberate indifference by AF leadership which should result in reduced sentences.

Worth a look (new and old)

22 [*Journal of Appellate Practice and Process*](#) (No. 2). July 18, 2022.

- Foreword: [*Words Matter*](#), by Tessa L. Dysart
- [*All Mixed Up About Statutes: Distinguishing Interpretation From Application*](#), by Hon. Randall H. Warner
- [*Dictionary Diving in the Courts: A Shaky Grab for Ordinary Meaning*](#), by Joseph Kimble
- [*Bracton's Warning and Hamilton's Reassurance*](#), by Hon. D. Arthur Kelsey
- [*Supplementing Supplemental Briefing*](#), by Ziv Schwartz
- Book Review: [*Principles of Appellate Litigation: A Guide to Modern Practice*](#), by Raffi Melkonian

Diane Marie Amman, [*Ukraine Settlement Options Paper: Children*](#). Ukraine Peace Settlement Project, Lauterpacht Centre for International Law, June 2022.

Matt Montazzoli, [*Lessons for Legal Advisors from the Brereton Report. Article of War*](#), Lieber Institute. January 19, 2021.

Peter E. Bushell, [*The Charge of Command Responsibility: An Examination of Command Responsibility in the Post-World War II War Crime Trials of Axis Powers.*](#) Thesis, May 2022.

Ana Srovin Coralli, [*A Word on Criminal Omission and its Prominence in International Criminal Law.*](#) OpinioJuris, July 26, 2022.

Carpenter, Eric R., Gonzalez, Ingrid, Garcia, Stephanie, Odom, Gabriel J., [*The effect of changing the military's sexual assault laws on law enforcement investigative findings in the U.S. Army.*](#) 46 L & HUMAN BEHAV. 313 (2022).

Cheers, Phil Cave, Editor