



THE NIMJ GAZETTE

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Rulemaking

NIMJ has recommended changes to UCMJ art. 31 and Mil. R. Evid. 305 to the DoD Joint Service Committee on Military Justice (JSC). The recommendations are [here](#), and a discussion by the Board is [here](#).

As we know, JSC rulemaking is opaque. NIMJ has submitted a letter to the DoD General Counsel about the general lack of transparency—[here](#). You will not find publicly available status or legislative history for rule proposals. Most of you will find a Federal Register call for public comment on rules to be forwarded to the President for adoption. Those wishing to propose Manual or evidence rule changes may do so at this [link](#). (If you have a proposed change you think NIMJ might support, let us know at admin@nimj.org. This JSC lack of transparency is part of NIMJ's concern about a general lack of transparency in courts-martial and appeals. And, it appears a DoD unwillingness to comply with Congress's intent when passing UCMJ art 140a (stand by for more on this) (Note. NIMJ has been advised that JSC has no public database of information, but the information is available through FOIA.). *See also*,

a. Reporters Committee for Freedom of the Press to Hon. Caroline D. Kress, "[Request for access to court records in *United States v. Mays* and corrected guidance interpreting Article 140a, UCMJ.](#)" Mays faces court-martial for alleged arson leading to the USS BONHOMME RICHARD shipboard fire.

b. As the Bonhomme Richard trial is underway, ProPublica has filed a lawsuit regarding denying access to ongoing filings in the *Mays* case. [ProPublica v. Butler, et. al.](#) ProPublica also mentions the NIMJ letter in their filing. We are advised that there was a status hearing 29 September 2022 and that the Government is required to file a response by 6 October with a plaintiff's reply due 11 October 2022.

Reports

[BEYOND GUANTÁNAMO: RESTORING THE RULE OF LAW TO THE LAW OF WAR.](#) Center for Ethics and the Rule of Law, Univ. Penn. 2022. The Working Group Chairs were Prof. Claire Finkelstein and Harvey Rishikoff (Former CA for the Military Commissions).

Noteworthy Cases

1. CAAF has decided *United States v. Richard*, a case about good order and discipline and UCMJ art. 134(1), (2) generally. One commenter suggests that,

The Court spends a large section of the 15-page decision, as does Judge Maggs' concurrence, discussing the definition, or lack thereof, of the phrase prejudicial to good order and discipline. "The Government's expansive view of the scope of conduct that is 'to the prejudice of good order and discipline'- essentially that any misconduct that has a nexus to the military qualifies- suggests that it might be necessary for us to better define such conduct, something that would be well within this Court's authority to do so." Id. After going through some history, the Court settles on the definition given by Colonel William Winthrop in 1895: "The misconduct must be activity against 'good order' which affects the 'condition of tranquility, security, and good government of the military service.'"

At [CAAFlog](#), we have a short piece on the case. In particular, "Some years ago, Air Force Colonel Jeremy Weber turned a thesis into a law review article about good order and discipline. Jeremy S. Weber, [Whatever Happened to Military Good Order and Discipline](#). 66 CLEVE. ST. L. REV. 123 (2017)."

2. NIMJ has discussed state criminal jurisdiction over crimes committed on a military base over the years. Division One of the Arizona Court of Appeals has brought an interesting spin on the question. In [Arizona v. Cardwell](#), a Marine was convicted of serious offenses in MCAS Yuma base housing. His prosecution began at court-martial, but that existed only until the military judge suppressed statements to NCIS. The court-martial charges were dismissed, and the state took up the case.

¶19 Cardwell contends the State's prosecution of his crime violated Arizona's separation-of-powers doctrine. In support, he cites a 2005 "Law Enforcement Agreement and Understanding" ("Agreement") between Yuma Base and Yuma County and City that authorized military authorities to investigate and prosecute serious felonies committed on the base, arguing the county attorney's prosecution invaded the military's jurisdiction. We review *de novo* whether "the State of Arizona has jurisdiction concurrent with the United States[.]

¶20 The State of Arizona generally has jurisdiction to prosecute crimes committed within its territorial borders. Once the State carries its "initial burden of proving that the offense occurred within this state[.]" the burden shifts to the defendant to prove the federal government possesses exclusive jurisdiction over the charged offense. "The federal government can acquire exclusive jurisdiction over state land in any one of three ways: (1) by purchase of land from a state, (2) by a cession of jurisdiction to the United States by a state after statehood, or (3) by an affirmation of exclusive jurisdiction to the United States prior to a state's admission to the Union." "The United States also acquires

exclusive jurisdiction over land located within the boundaries of a state to which the United States holds title where there is a cession of jurisdiction by the state *and* an acceptance of jurisdiction by the United States."

(Edited for length and citations omitted.) Cardwell loses. Initially (note to defense counsel), he waived the issue. Until (note to prosecutor) the state resurrected the issue in a reply brief. (Cardwell also argued for suppression of his statements because of Article 31(b). He didn't fare well with that, the court, distinguishing Article 31, applies *Miranda* jurisprudence.)

Worth a look (new and old)

1. [*Civilian Harm Mitigation and Response Action Plan \(CHMR-AP\)*](#). Department of Defense, August 25, 2022.

2. Esti Tambay and Sarah Yagar, [*Finally, a Better U.S. War Crimes Bill. Now What?*](#) Lawfare, September 21, 2022.

2. [*Report of the Working Group on the use of mercenaries*](#). U.N. Office of Human Rights, U.N. Human Rights Special Procedures (2022).

3. Gene Fidell at [GMJR](#) brings us several items about military justice and Ukraine.

a. The Vienna-based [European Law Institute's](#) Access to Justice in Eastern Europe has posted Oksana Kaplina, Serhii Kravtsov & Olena Leyba, [*Military Justice in Ukraine: Renaissance During Wartime*](#). Aug. 15, 2022.

b. Andrii Niebytov, Valeriy Matviychuk, Oleksandr Mykytchyk & Oksana Slavna, [*Military Justice of Ukraine: Problems of Determining the Bodies that Govern the Construction of its System*](#). Aug 15, 2022. These are among the valuable articles in the AJEE Journal's Issue [3/2022](#).

c. Daniela Cotelea, Alberto Pineda Alcántara, Cristina Tempera, Medeleine Brach, Cedric Foisseau & Giuseppe A. Ira, [*The Role of Military Courts Across Europe: A Comparative Understanding of Military Justice Systems*](#). FINABEL -- European Army Interoperability Center 2021. FINABEL's website can be found [here](#).

Cheers, Phil Cave, Editor