



THE NIMJ GAZETTE

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Symposium /Conference/Webinars

12 January 2024, NIMJ hosted a webinar to discuss “Morales and Brooker’s [*Restoring Faith in Military Justice*](#).” Look for future webinars on current subjects.

Old and New

Dwight H. Sullivan, [*The First Uniformed Judge Advocate General of the Navy: A Distinguished Marine Felled by Mental Illness*](#). 69 NAVAL L. REV. 1 (2023).

Ridley McLean, [*Historical Sketch of Military Law*](#). 8 J. CRIM. L. & CRIMINOLOGY 27 (1917).

Edward F. Sherman, [*The Civilization of Military Law*](#). 22 MAINE L. REV. 3 (1970).

Trent Kubasiak, [*The Office of Special Trial Counsel is Dead, Long Live OSTC*](#). CAAFlog, 23 January 2024. In Dwight Sullivan’s article, he notes that in 1870 the U.S. Department of Justice was created, “That act changed the title of the “solicitor and naval judge advocate-general” to “naval solicitor” and transferred the post to the Department of Justice[,]” although not for long as history has shown. Sullivan at 30.

Military Justice

[Manual for Courts-Martial \(United States\) 2024](#). We have this edition and other helpful links at [CAAFlog](#).

Each of the Service’s Office of Special Trial Counsel is now formally up and running. See, e.g., Lolita C. Baldor, [*In a major change, independent lawyers will now prosecute cases of sexual assault in the military*](#). A.P., 28 December 2023; Brad Dress, [*Independent lawyers now in charge of prosecuting major US military crimes*](#). The Hill, 28 December 2023; DoD briefing Transcript, [*Offices of The Special Trial Counsel Background Interviews on Reforms to Improve the Prosecution Of Sexual Assault and Other Serious Criminal Offenses in The Department of Defense*](#). 21 December 2023.

For those of us who advocated for and worked for most changes, this news is good. However, there has been a setback in the Army because the Lead Special Trial Counsel was fired. See, e.g., Lolita C. Baldor, [*Lawyer picked as Army’s first top sexual assault prosecutor fired*](#). Army Times, 5 December 2023.

The Military Justice Review Panel has submitted an Assessment of [Article 32, UCMJ, Preliminary Hearings](#). Essentially, they conclude that “

the parties’ inability to conduct discovery and the advisory nature of the probable cause determination have rendered the Article 32 process of little use to the government, defense, and referral authorities. Few preliminary hearings involve live witness testimony, thereby forcing preliminary hearing officers to rely on little more than recorded statements and investigative summaries. Moreover, the government may refer charges to court-martial regardless of whether the preliminary hearing officer finds probable cause. As a result, the preliminary hearing no longer fulfills its fundamental screening purpose and is of minimal benefit.

The Panel recommends considering several changes.

- Bringing back some amount of discovery.
- That the Preliminary Hearing Officer should be a Military Judge (likely similar to the function performed by a Magistrate Judge in federal court).
- Consider whether no probable cause findings should be a bar to referral, with some exceptions (which could be similar to how a U.S. Attorney might proceed under the DoDJ Justice Manual provisions). The panel did note a lack of consensus on this issue.

The Court of Appeals for the Armed Forces (CAAF) has issued one opinion since 1 October, in [United States v. Brown](#). Based on the current list of cases granted and those scheduled for oral argument, the court is on track for 27 or so opinions. The current number can change as new petitions arrive. It will be interesting to see how many deal with the intricacies of the various Frankensteinian changes to the UCMJ over recent years—and the ways technology underlies a crime. For example, in *Brown*, the chief judge begins,

Sometimes a seemingly simple statute can be devilishly difficult to interpret. As reflected by the various opinions in this case, that certainly is true with Article 91(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 891(3) (2018), which prohibits disrespect towards a warrant, noncommissioned, or petty officer. Nonetheless, this case resolves two key points. First, a majority of this Court holds that an accused servicemember can be convicted under Article 91(3) even if his or her disrespectful conduct occurs outside the physical presence of the victim. Importantly, that means that disrespectful language or behavior towards a warrant, noncommissioned, or petty officer can be criminally *actionable even when it is remotely conveyed using a digital device such*

as a smartphone and even when the disrespectful language or behavior is conveyed via social media.

Gene Fidell has also written about the difficulties of charging an offense [because of the date of the offense](#) or some other factor.

Reports

Butler, et. al., [*Envisioning a New Racial Grievance Reporting and Redress System for the United States Military*](#). Research Report, RAND Corporation 2024.

The research reported here was conducted as part of a RAND Project AIR FORCE (PAF) initiative to support DEI within the Department of the Air Force. Oversight of the initiative was provided by Ray Conley, with research concept formulation funding provided by the Department of the Air Force for PAF-wide research. It was conducted within the Workforce, Development, and Health Program of RAND Project AIR FORCE as part of a fiscal year 2021 project, “Envisioning a New Racial Grievance Reporting and Redress System for the U.S. Military.”

Guantanamo

GMJR alert: Global Military Justice Reform contributor (and University of Texas law professor) Steve Vladeck has a terrific review of the 22-year-long, sorry tale of Guantánamo-related litigation [here](#) on One First, his Supreme Court-focused substack. Plus, **Carol Rosenberg** and **Marisa Schwartz Taylor** had [this](#) richly illustrated story last week in *The New York Times* about Guantánamo and its "Camp Justice."

International

GMJR alert: The February 16, 2023 report by **the UN** Secretary-General to the General Assembly on measures for protection from sexual exploitation and abuse can be found [here](#). Supplemental information on allegations during 2022 can be found [here](#). There were 58 allegations of sexual exploitation or abuse by military personnel in 2022, up from 52 the previous year. In 2021, a contingent from the UN Multidimensional Integrated Stabilization Mission in the Central African Republic was repatriated due to misconduct.

Manuel J. Ventura, [*Time for the ICC Office of the Prosecutor to Invoke Article 19\(3\) of the Rome Statute \(1998\): The International Criminal Court’s jurisdiction in the Situation in the Philippines*](#). OpinioJuris, 24 January 2024.

Tomaso Falchetta, [*The Draft UN Cybercrime Treaty is Overbroad and Falls Short on Human Rights Protection*](#). JustSecurity, 22 January 2024.

Michael D. Meier, [*The Principle of Proportionality in the DoD Law of War Manual*](#). JustSecurity, 18 January 2024.

Gaiane Nuridzhanian and Carrie McDougall, [*On Double Jeopardy, the ICC, and the Special Tribunal for the Crime of Aggression*](#). JustSecurity, 18 January 2024.

DoD Instruction 3000.17, [*Civilian Harm Mitigation and Response*](#). 21 December 2023. “The Defense Department instruction comes in response to a series of high-profile instances of U.S. military operations killing civilians in recent years. Among other changes, it directs senior DOD civilian and military leaders to each identify a senior official or flag officer to lead their organization’s efforts related to mitigating civilian harm, with the aim of embedding the new ethos across the department and geographic combatant commands.” Lara Seligman, [*Pentagon releases sweeping guidance on reducing civilian harm*](#). Politico, 21 December 2023.

Cheers, Phil Cave, Editor