



# THE NIMJ GAZETTE

No. 118—June 1, 2022

## Events

The Board of Directors quarterly meeting will be held in Washington, DC, on June 17, 2022.

NIMJ has issued a [Policy Statement on the Disqualification of Certain Reservists from Serving as Judges](#). See *United States v. King*, No. ACM 39583, 2021 CCA LEXIS 415 (A. F. Ct. Crim. App. Aug. 16, 2021) (memorandum op.), at 16, petition granted No. 22-0008/AF, 2022 CAAF LEXIS 227 (C.A.A.F. Mar. 22, 2022). The granted issue relates to the excusal of a member and is not related to the judge's recusal.

June 17, 2022. The University of Baltimore will hold a [Veterans Legal Assistance and Training Conference](#). A focus will be on issues related to administrative discharges. Here is a link to the conference site for information and registration.

## Call for People

NIMJ submits amicus briefs as one of our activities. In the past year, the amicus committee has authored amicus briefs in the military appellate courts, two federal circuits, and the International Criminal Court. We welcome more writers. If you are interested in joining an amicus writing team or have ideas for an amicus brief, please contact NIMJ GC Frank Rosenblatt at [frosenblatt@mc.edu](mailto:frosenblatt@mc.edu).

## Litigation

The Court of Appeals for the Armed Forces has granted NIMJ amicus status and accepted the brief in *United States v. Rudometkin*, ARMY 20180058, 2021 CCA LEXIS 596 (A. Ct. Crim. App. Nov. 9, 2021) (memorandum op.).

## Other litigation

The Court of Appeals for the Armed Forces (CAAF) issued a decision in [United States v. Horne](#), this month.

Prior to the trial in this sexual assault case, a trial counsel and a special victim's counsel (SVC) took actions to dissuade the Air Force Office of Special Investigation (AFOSI) from interviewing a witness whom the trial counsel believed might provide exculpatory evidence. Appellant contends that these actions constituted apparent unlawful command

influence. He, therefore, asks that we set aside the findings and sentence adjudged by the court-martial and dismiss with prejudice the sole charge and specification in this case. [W]e granted review of the assigned issue of “[w]hether the conduct of the trial counsel and special victim’s counsel created an intolerable strain on the public’s perception of the military justice system.” After careful consideration of the record and the arguments of the parties, we conclude the Government has demonstrated beyond a reasonable doubt that the answer is no. Accordingly, the Appellant is entitled to no relief under our precedents.

More [here at CAAFlog](#). Feel free to comment there. The Court also decided *Tate*, a relatively unusual situation where “the first day of Appellant’s sentencing hearing, the court’s recording device failed, resulting in there being no verbatim transcript for most of the day’s proceedings.” What then should a military judge do: declare a mistrial, or reconstruct the prior proceedings, or start “anew.” The judge in the case “neither started anew nor performed one of the other two judicially approved remedies.” Result, a do over.

*In re Kawai*, The Air Force Court of Criminal Appeals disposed of an interesting prose writ asking for compassionate release from confinement partly relying on the First Step Act. The court held it had no jurisdiction (as had CAAF last year).

After two years, the Navy-Marine Corps Court of Criminal Appeals has decided, en banc, to reverse a previously published decision and says, “We now hold that indecent conduct “in the presence of a child” does *not* require that the child be aware of the indecent conduct committed in his or her presence for an accused to be guilty of sexual abuse of a child.” See *United States v. Tabor*, \_\_ M.J. \_\_ (N-M. Ct. Crim. App. 2022). Read *United Schmidt*, 80 M.J. 586 (N-M. Ct. Crim. App. 2020), aff’d 82 M.J. 68 (C.A.A.F. [Feb] 2022), and you will see NMCCA is probably on firm ground with the current makeup of CAAF.

### **Worth a look (new and old)**

Claire Simmons (Univ. of Essex), [Book Note](#), J. OF PEACE RESEARCH, on Kyle, Brett J., and Andrew G. Reitter, [Military Courts, Civil-Military Relations, and the Legal Battle for Democracy](#). Routledge, 2021.

Rory G. Fowler, [Some Observations on ‘Military Justice’ at Summary Trial](#). May 25, 2022.

Todd Lopez, [Review Board Gives Vets Another Chance to Upgrade Discharge Characterization](#). DoD News, May 31, 2022. Note that in adding another layer of bureaucracy, only those discharged after December 20, 2019 are eligible. See the [DARB website here](#).

Ryan Goodman and Gordon Dunbar, with their second article in a series about the [DoD Law of War Manual](#) (2016), titled [Defense Dept Law of War Manual and Its Unintended Readings: On Civilians Assuming Risk](#). JustSecurity, May 13, 2022.

For those following the Baghuz airstrike there are two articles reporting that investigators find no violation of the laws of war or deliberately causing civilian casualties. Lolita C. Baldor, [Review finds US troops didn't violate law in Syria airstrike](#). Associated Press, May 17, 2022; Travis Tritten, [Pentagon Finds No Fault in Syria Airstrike that Killed Women and Children](#). Military.com, May 17, 2022.

Hugo Slim, [Review of Preparing for War: The Making of the Geneva Conventions](#). Just Security, May 16, 2022. “Boyd van Dijk has written a superb political and legal history of the making of the four Geneva Conventions of 1949.”