



THE NIMJ GAZETTE

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Rulemaking

Under Rule 1102, Military Rules of Evidence, any changes to the Federal Rules of Evidence will take effect for courts-martial 18 months “after the effective date of such amendments.” Here is a [link](#) to proposed changes to Fed. R. Evid. 611, 613, 801, 803, and 1006. The earlier change to Fed. R. Evid. 801 has caused consternation in interpretation.

Reports

Two interim reports from law student observers in the *Al Nashiri* prosecution are available [here](#).

[Civilian Harm Mitigation and Response Action Plan \(CHMR-AP\)](#), issued by DoD on August 25, 2022.

Other litigation

The Court of Appeals for the Ninth Circuit has affirmed the lower court’s finding that a claim under the FTCA is not *Feres* barred when the claim relates to a sexual assault committed by a servicemember against a servicemember. See [Spletsoser v. Hyten](#). The issue arose when the Government argued for a dismissal of the case because it was *Feres* barred. The 9th helpfully rehearses the *Feres* cases. The court concludes a sexual assault is not incident to service because an “alleged sexual assault [could] not conceivably serve any military purpose.”

The COVID vaccine mandate continues to be a legal issue. At least one Army officer was convicted at court-martial for refusal, and a Marine Corps court-martial is pending. See [here](#). In federal courts, various refusers seek relief (some have gained class-action status). See [here](#) for a recent one involving the Marine Corps. With that in mind, see Brian P. Elliot and Steven Chambers, [A historical analysis of vaccine mandates in the United States military and its application to the COVID-19 vaccine mandate](#). VACCINE.2022.08.017. Epub ahead of print. PMID: PMC9376337.

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.

At CAAFlog we have posted about the newest CAAF decision in [*Sigrah*](#). The court decides (perhaps temporarily) how prejudice is analyzed when the Government fails to provide statements under R.C.M. 914 (a military version of the Jencks Act). The separate concurring opinions written by Chief Judge Ohlson and Judge Maggs may be of more interest. They call for change. Interestingly, a change has been proposed since 2020 but not yet adopted by the President in an executive order.

Worth a look (new and old)

Vianna Davila, Lexi Churchill and Ren Larson, [*Twice Accused of Sexual Assault, He Was Let Go by Army Commanders. He Attacked Again*](#). ProPublica, August 9, 2022.

Rachel VanLandingham, [*Ordering Injustice: Congress, Command Corruption of Courts-Martial, and the Constitution*](#). 49 HOFSTRA L. REV. 211 (2020).

CARRIELYN D. GUYMON, Ed. [DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW](#). Office of the Legal Advisor, U. S. Department of State 2021.

ORIN S. KERR, [COMPUTER CRIME LAW](#) (Introduction) 5th ed. 2022.

The book covers every aspect of crime in the digital age. Topics range from computer fraud laws and international computer crimes to Internet surveillance laws and the Fourth Amendment. It is part traditional casebook, part treatise. It both explains the law and presents many new and important questions of law that courts are only now beginning to consider. The book is suited either for a 3-credit course or a 2-credit seminar. It will appeal both to criminal law and procedure professors and those interested in cyberlaw or law and technology. No advanced knowledge of computers and the Internet is required or assumed.

Saira Mohamed, [*Abuse by Authority: The Hidden Harms of Illegal Orders*](#). 107 IOWA L. REV. 2183 (2022).

History

Noah Reisman, [*The Royal Australian Navy and court martial for homosexuality*](#). 42 J. INT' L. MIL. HIST. & HISTORIOGRAPHY 46 (2021).

Cheers, Phil Cave, Editor