

Symposium /Conference/Webinars

12 January 2024 (1100 EST): A webinar to discuss “Morales and Brooker’s *Restoring Faith in Military Justice*.” Zoom link: <https://zoom.us/j/99400392466>. Feel free to sign in with a pseudonym.

On 16 December 2023, The University Institute of Legal Studies (UILS), Panjab University, Chandigarh, India, held a panel discussion in collaboration with the National Institute of Military Justice (NIMJ), Washington, DC, and Mississippi College School of Law's Center for International and Comparative Law, on International Humanitarian Law with a special focus on the protection of civilians in armed conflict.

Military Justice Legislation

President Joe Biden has signed into law the National Defense Authorization Act for Fiscal Year 2024.

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In contrast to the hot-button social and political issues that were left on the cutting room floor, the FY24 NDAA includes a number of important provisions relating to military justice, a subject that, in contrast, relates very directly to national defense.

Read more at Eugene R. Fidell, *The Military Justice Provisions of the National Defense Authorization Act for Fiscal Year 2024: Better Late Than Never*. Just Security, 15 December 2023. See also, Prof. Steve Vladek, *The One First “Long Read”: Congress Closes a Certiorari Loophole*. One First, 18 December 2023.

Regulations

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

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.

Academic Opportunity

The U.S. Naval Academy, Vice Admiral **James B. Stockdale** Center for Ethical Leadership has announced its search for a [Stockdale Ethics Fellow](#) for the next year. Applications due by 15 January 2024 and will continue until the position is filled.

The U.S. Naval Academy's Stockdale Center invites applications for its annual Resident Fellowship Program for academic year 2024-2025. One of the Center's premier programs is the Resident Fellowship.

The Secretary of the Navy and the Superintendent of the Naval Academy established the Center in 1998 to be a thought leader in the field of ethical military leadership and serve the Naval Academy, the Naval Service and national institutions of influence. The Center's mission is "to empower leaders to make courageous ethical decisions," and the Center accomplishes this mission through research, consultation, innovation and dissemination.

The Stockdale Center anticipates selecting up to four residential fellows, whose focus will be a weekly seminar devoted to a defense-related ethics topic. Past topics have included "The Intellectual History of the Western Just War Tradition," "Civil-Military Relations," "Comparative Warfare Ethics," "Moral Virtue and Moral Injury," "Liberal Democracy: Critics and Challenges," and "The Ethics of Future Conflict Scenarios." Fellows also have the opportunity to teach and conduct personal research in cooperation with a large department of civilian philosophers and approximately forty senior military officers who teach the Academy's required core ethics course. We encourage qualified applicants from diverse backgrounds to apply.

This is an onsite, gift-funded, federal excepted service position. Health and retirement benefits are not offered. This full-time, in-residence fellowship runs from approximately mid-August 2024 until mid-May 2025.

Military Justice

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.

International

At a recent workshop in South Africa, an initial draft of the Commonwealth Military Justice Principles was prepared by judges, legal experts, academics, and military professionals.

The [draft document](#) resulted from a series of robust online discussions, culminating in two days of meetings at the Stellenbosch Institute for Advanced Study (STIAS) in the margins of the International Military Justice Forum.

At their [meeting](#) in November 2022, Commonwealth Law Ministers charted the agenda for a Commonwealth Military Justice Transformation Project. Now, this work is being carried forward by the [Office of Civil and Criminal Justice Reform](#) at the Commonwealth Secretariat.

The objective of the transformation project is to ensure alignment with international norms and standards in military justice systems across the Commonwealth. The drafting of the Commonwealth Military Justice Principles is at the heart of those aims.

The draft principles include harmonisation with international humanitarian and human rights law, guaranteeing the proper administration of justice through an independent and impartial judiciary that is free from interference and pressure from the other branches of government. The project also aims to guarantee due process of law and equal access to justice.

Communications Division, Commonwealth Secretariat, 4 December 2023.

A noteworthy recommendation is for courts-martial only when the case has a “direct and substantial military connection.” U.S. practitioners will be familiar with the service-connection test applied in courts-martial until the U.S. Supreme Court decision in [Solorio v. United States](#), 438 U.S. 435 (1978) removed the service-connection test in favor of a status test. Solorio reversed the court’s adoption of the service-connection test in [O’Callahan v. Parker](#), 393 U.S. 822 (1968). A second principle of note is the requirement “that final judicial review and/or appeal . . . is conducted only by civilian appellate or constitutional courts.” This harkens to the ongoing debate about the limitations on U.S. Supreme Court access from a court-martial conviction. See, e.g., Fidell, Fissell, and Cave, [Equal Supreme Court Access for Military Personnel: An Overdue Reform](#). The YALE L. J. FORUM, 31 May 2021.

GMJR reports that a three-volume series on the Rome Statute and procedure and evidence in the International Criminal Court can be downloaded for free from the website of Torkel Opsahl Academic EPublisher. Look for publication Nos. 43-45.

The Coast Guard

The U.S. Coast Guard continues to receive extraordinary (and needed) attention for its handling of sexual assault cases. Current information can be found at [this link](#).

A [Coast Guard](#) review released Wednesday found that the service failed to live up to its core values when it mishandled sexual assault reports and hid results of investigations into the cases, eroding trust in leaders and causing further psychological harm to victims.

Patricia Kime, [Coast Guard Review Blasts Service for Failing to Safeguard Members from Sexual Assault, Harassment](#). Military.com, 6 December 2023.

For nearly a decade, US Coast Guard leaders have concealed a critical report that exposed racism, hazing, discrimination and sexual assault across the agency.

The 2015 “[Culture of Respect](#)” study, a copy of which was obtained by CNN, documented how employees complained of a “boys will be boys” and “I got through it so can you” culture. Many said they feared they would be ostracized and retaliated against for reporting abuse and that those who did come forward often had their complaints dismissed by supervisors.

Some of the report’s core findings mirrored those of another secret investigation into rapes and sexual assaults at the Coast Guard’s academy. The existence of that probe, which was dubbed [Operation Fouled Anchor](#) and completed in 2019, was [revealed by CNN](#) earlier this year. That investigation found that serious misconduct had been ignored and, at times, covered up by high-ranking officials, allowing alleged offenders to rise within the ranks of the Coast Guard and other military branches.

Blake Ellis and Melanie Hicken, [US Coast Guard leaders long concealed a critical report about racism, hazing and sexual misconduct](#). CNN, 30 November 2023.

State (National Guard) Military Justice

GMJR reports further developments in Wisconsin and changes to its state code on military justice matters. The [summary is here](#).

The federal National Guard Bureau completed an assessment of the Wisconsin National Guard (Guard) in 2019 that identified a number of concerns with how the Guard had handled allegations of sexual assault and sexual harassment. Under Adjutant General Paul Knapp's leadership, the Guard has been diligently working to implement the recommendations contained in that assessment. The study committee identified a number of areas in which legislation will complement the Guard's continuing efforts to ensure that the men and women who volunteer to serve our state and nation are able to do so in an environment that takes their safety seriously.

Worth a look (new and old)

Amat Khan and Eric Schmitt, [Pentagon's New Plans to Reduce Civilian Deaths Leave Questions Over Israel](#). The New York Times, 29 December 2023. Fellow Brian Finucane is mentioned.

Maria C. Lytell, Michael L. Hansen, Avery Calkins, Matthew D. Baird, Nastassia Reed, Kristin J. Leuschner, Clifford A. Grammich, [Retention of Racial-Ethnic Minorities in the Regular Army](#). Research Report, RAND Corporation, 2023.

Nfor Nfor Nde Nyambi, [The Prosecution of International Crimes Committed During Internal Armed Conflicts: Quest for Justice in Africa](#). PhD Dissertation, Dschang School of Law and Political Science, 16 July 2022.

Cheers, Phil Cave, Editor