



THE NIMJ GAZETTE

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New Rules

President Biden has signed an Executive Order to amend the Manual for Courts-Martial. The Federal Register entry is here pending.

On 31 July 2023, the Department of Defense (DoD) released an important [update to its Law of War Manual](#), including a revision to Section 5.4.3 (“Assessing Information in Conducting Attacks”) and a new subsection 5.5.3 titled “Feasible Precautions to Verify Whether Objects of Attack are Military Objectives.”

The Manual provides authoritative legal guidance for DoD personnel in implementing the law of war and executing military operations. It reflects America’s long and deep tradition of respect for the rule of law and the law of war. This is the third update to the Manual since it was first issued in June 2015.

Meetings and Symposia (Save the date)

1100, 8 September 2023: NIMJ (Zoom) "*The U.S. Relationship with the International Criminal Court in 2023: a NIMJ Expert Roundtable Discussion.*" The event is sold out.

6 October 2023: [NIMJ Conference](#) on Transparency in Military Justice.

Litigation

The Court of Appeals for the Armed Forces has decided [United States v. Anderson](#) and holds that a servicemember is not entitled to a unanimous vote for findings of guilty at court-martial. The 90 window to file a petition for a writ of certiorari is now on the countdown.

Larrabee continues to progress at the Supreme Court. Prof. Robert Leider of George Mason University's Antonin Scalia Law School has filed [this amicus curiae brief](#) in support of the petitioner in *Larrabee v. Del Toro* (U.S. No. 22-1082). The government has until July 7 in which to respond to the petition.

NIMJ has filed an amicus pleading in [United States v. Keago](#) at CAAF.

Reports

Report: [*U.S. Cooperation with the International Criminal Court on the Investigation and Prosecution of Atrocities in Ukraine*](#). The George Washington Univ. L. Sch. L. & Pol. Workshop, 2023. NIMJ Director Laura Dickinson co-chaired. See the Keith article supra.

Ellis, Hicken, & Ash, [*Criminal Investigation into Coast Guard Academy revealed years of sexual assault cover-ups, but findings kept secret*](#). CNN, 30 June 2023.

“Legislation”

Eugene R. Fiddell and Steve Vladeck, [*The House Closed a Key Loophole in Court-Martial Appeals; Will the Senate Follow?*](#) Just Security, 27 July 2023.

Section 541 [NDAA]—~~that~~ is welcome and long overdue. It would, for the first time, give servicemembers who have been convicted by courts-martial the same access to direct appellate review by the Supreme Court of their convictions and sentences that all other federal and state criminal defendants (including the handful convicted by the military commissions at Guantánamo) have long enjoyed. It is important that the Senate also approve this provision—and that the inevitable conference committee keep it in the final bill.

A proposal. LtCol Greg Curley, [*Exploitation*](#). 230 MIL. L. REV. 421 (2023). The author proposes the adoption of an enumerated offense under UCMJ Art. 134, which he suggests would criminalize “Precursor Behaviors to Sexual Assault.” As part of the offense, he also suggests what most of us would consider a service-connection requirement. He suggests,

Exploitation is a separate and distinct offense from a sexual assault, and both the exploitation and the consummated offense that was its object may be charged, tried, and punished. The commission of the intended offense may satisfy the intent element of the exploitation charge.

He does not address whether the offense should be labeled a lesser included offense, the potential for multiplicity questions, or whether the acts of the new offense are *res gestae* acts that may be separately punished. He does, in his proposal, make the offense a specific intent one (to which an accused’s level of intoxication may be a defense), and he does acknowledge “there will likely be constitutional challenges to the proposed crime (e.g., void for vagueness, notice, or overbreadth).”

Michael Schrama, [*Creating a Codified Legal Response to Domestic Extremism in the Ranks*](#). War on the Rocks, 19 July 2023.

Worth a look (new and old)

Meghan Tokash and Paul Grimm, [*Uniform standards needed now for sexual assault prosecution offices*](#). Air Force Time, 3 July 2023. The writers discuss that,

after five years of rigorous study, data collection, and stakeholder engagement, the Defense Advisory Committee on the Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, or DAC-IPAD, [*released a report to the secretary of defense and Congress*](#) recommending Secretary Lloyd Austin revise Appendix 2.1 of the MCM to establish uniform prosecution standards that align with the prosecution principles contained in the [*United States Justice Manual*](#).

They suggest that,

If the secretary of defense does not move swiftly, each service may create different standards governing prosecutorial decision-making. Uniform prosecution standards issued by the secretary of defense would assure service members that criminal cases are being evaluated consistently to avoid charging disparities and unfavorable trial outcomes for both victims and accused.

Andrew Greene, [*Afghanistan war crime allegations prompted US warnings about cooperation with Australia*](#). ABC News (Aust.), 31 May 2023.

The United States military warned Australia's defence chief that allegations of war crimes from Afghanistan may affect future cooperation with the SAS and Special Operations Command.

Defence chief Angus Campbell has revealed he was advised in writing about American legislation known as "Leahy law", which prohibits American forces from assisting foreign units accused of gross violations of human rights.

Adam Keith, [*Is the Pentagon Relenting?: A Close Study of Opposition to the Int'l Court's Ukraine Investigation*](#). JustSecurity, 12 July 2023.

Dick Durbin, [*Biden Must Act on Landmark UN Special Rapporteur Guantanamo Report*](#). Just Security, 17 July 2023.

The Justice for Victims of War Crimes Act was signed into law on 5 January 2023. See Adam R. Pearlman, [*The Justice for Victims of War Crimes Act \(U.S.\)*](#). Cambridge Univ. Press, 20 July 2023.

Cheers, Phil Cave, Editor