

THIRTY YEARS OF MILITARY JUSTICE:
INTRODUCTION TO SYMPOSIUM EDITION

*Rachel E. VanLandingham**

In October 2021, the [National Institute for Military Justice](#) (NIMJ), along with the Georgetown Law’s Center on National Security, National Security Law Society, Military Law Society, and Journal of National Security Law and Policy, held a [symposium](#) celebrating NIMJ’s thirty years of military justice contributions. NIMJ has long served as the only American non-profit educating the public on military justice matters. Furthermore, for thirty years-plus, it has informed military courts, and the nation’s highest court, on military law matters through its numerous amicus brief filings, submitting on behalf of both the accused as well as the government—in other words, on behalf of justice and fairness. NIMJ has also for years steadfastly sent official observers to the military commissions at Guantanamo Bay, Cuba, who have [reported](#) back to the American public on the many travesties of justice committed there in the public’s name. Finally, NIMJ has courageously highlighted the need for structural military justice [reform](#), and its expertise has been sought out by leaders on Capitol Hill and in the media as one of the few educated voices willing and able to challenge the Department of Defense’s stranglehold on military justice issues.

This anniversary symposium, thanks to the generosity and intellectual curiosity of Georgetown Law’s Center on National Security, consisted of panels of military law experts discussing various elements of the military justice system; several of these experts turned their presentations into essays for this symposium edition of the Journal of National Security Law and Policy (JNSLP). On behalf of NIMJ, I extend a sincere and special thanks to the JNSLP’s board and chief editor, Professor Todd Huntley, for sponsoring this symposium edition of this esteemed journal. The symposium also included an interview of NIMJ’s leading founding member, the expert practitioner and scholar Eugene Fidell, led by NIMJ’s vice president Professor Brenner Fissell. Remarkably, the symposium’s keynote

* Rachel E. VanLandingham, Lt Col, USAF (ret.) is President, National Institute of Military Justice and Professor of Law, Southwestern Law School, Los Angeles, California. She thanks Todd Huntley for his superb assistance regarding the symposium and its journal edition; Prof. Brenner Fissell for his dedicated efforts without which the symposium would not have occurred; and all the panelists and essayists. Finally, she thanks Senator Kirsten Gillibrand for her temerity, courage, and unflagging dedication to the women and men serving in the Armed Forces.

speaker was none other than Senator Kirsten Gillibrand (D-N.Y.), Capitol Hill's stalwart leading champion of procedural as well as substantive criminal law reform of the military justice system. Her electrifying remarks are included in the following pages.

It is apropos that NIMJ's thirty years were celebrated in the fall of 2021, when the greatest changes to the military justice system since the 1950 [enactment](#) of the Uniform Code of Military Justice ([UCMJ](#)) seemed on the near horizon (though in December 2021, much of the reform was stymied by Defense Department obstructionism supported by undemocratic political [maneuverings](#)). The central, though not only, facet of the 2021 reform initiative was the [role](#) of the military commander in military justice—with reform aimed at severely limiting their unjust power. It is important to note that this perennial [issue](#) was and is not new; commanders' stranglehold on military "justice" was the focus of congressional attention following both world wars, when wide swaths of the American (male) population encountered the military justice system and discovered it bore little resemblance to civilian criminal justice processes.

That the military's criminal prosecutorial system did not look or act like actual criminal justice systems in America prior to and during the world wars is not surprising. The U.S. military's court-martial schema (one with an [ancient lineage](#)) began life at the dawn of the colonies' revolution against King George III as a draconian disciplinary tool wielded by commanders to exact obedience and control. It was not meant to achieve justice. Frightened, conscripted teenagers were to be punished severely and summarily, per commanders' orders, out of fear that anarchic insubordination and the army's ruin would otherwise result. Procedural niceties such as defense counsel, judges, appellate review—never mind fundamental criminal law principles such as the principle of legality and double jeopardy—would stymie a commander's alleged need for swift action. Hence they were not part of military commanders' architecture of strict (and often arbitrary) behavioral control that was the court-martial system until 1950.

So despite the criminal procedure protections layered into the Constitution, plus evolving principles of constitutional criminal procedure and law, the military for well over a century and a half of this nation's existence remained a "[separate society](#)" with an archaic prosecutorial disciplinary system that was certainly not one of criminal justice. Indeed, to call the pre-UCMJ courts-martial schema a "criminal justice system" is Orwellian, revealing ignorance as well as manipulation (both rather strong hallmarks of the historical military mindset in this area). The pre-1950 courts-martial system's heart was subjective command desire, not the objective weighing of facts and evidence by independent fact finders that fair criminal justice systems are designed to achieve. Related to the 2021

reform effort with which the October 2021 NIMJ symposium coincided (an effort that aimed to largely divest commanders of their ownership of the military justice system), the pre-UCMJ court-martial structure under the hoary [Articles of War](#) (and a different but equally antiquated and unfair [system](#) for the Navy), was directly controlled by military commanders, with little procedural safeguards for accused service members. Despite the obvious systemic infirmities, a timid Congress (some things never change) split the baby in the 1950 UCMJ. Instead of creating an independent and fair criminal justice system for military members, the new military court-martial system left non-lawyer military commanders in charge of an unfair prosecutorial structure now standardized across the services. Yet the 1950 UCMJ did improve procedural fairness (an easy advancement given the lamentable starting point): this modified court-martial schema brought appellate review [boards](#); a civilian appellate court at the system's apex; a procedural prohibition against improper command influence; and other piecemeal procedural safeguards.

Yet from 1950 onward, despite the UCMJ's half-hearted efforts to downgrade the enormous command authority over courts-martial, the round peg of justice was, and is, still being shoved into a very square command hole. Non-lawyer senior commanders in the new UCMJ system [retained](#) sole authority to decide whom in their command to prosecute and for what charges, and to pick the jurors—and to approve or disapprove all findings and sentences (the latter only recently restricted). Hence the absurdity of operating a system based on an objective weighing of facts in a hierarchical, command-run military organization in which the unit commander decides who to prosecute and for what, plus selects and literally owns the jurors (that same commander can send them into combat), remains. No wonder this defective apparatus continues to produce appalling [results](#), such as court-martialing black soldiers at twice the rate of whites, with example after example of the largely white male command fraternity letting fellow commanders [off the hook](#) for serious criminality.

However, the military justice system's structural commander-related defects have come into sharper congressional focus once again. Indeed, in October 2021, when NIMJ's anniversary symposium was held and this journal edition's essays were discussed, the possibility of real change—the exorcism of commanders from much of military justice—floated in the air. After years of heightened political attention to the military's mishandling (to the point of seeming complicity) of sexual assault and harassment in the ranks—including significant lack of accountability through courts-martial and concomitant [lack of service member confidence](#) in the military justice system—Congress seemed poised to wrest ownership of the military justice system from largely unaccountable (and [largely](#)

[older than average military age, white male](#)) senior military commanders.

Senator Gillibrand had been introducing [legislation](#) since 2013 that shifted such power from commanders to military lawyers for prosecuting common law crimes, initially with little success. That bill, though a great start, was limited in that it failed to remove prosecutorial discretion from commanders for *all* serious offenses: it excluded military-unique crimes, despite the fact that the structural defects plaguing the court-martial system are just that: structural. The defects of commander-owned “justice” are not offense-specific, they are systemic. They infect the prosecution of military-unique crimes such as conduct unbecoming and disobedience as much as they do prosecution for rape—indeed, command perversions of justice are likely more likely in the handling of military-unique crimes, given military crimes’ greater discretionary aspects (the larger the discretion, the greater the [role](#) bias plays).

However, Senator Gillibrand’s annual legislation aimed at reform that was politically feasible, and therefore understandably excluded military-unique crimes from its purview. Despite re-introducing her legislation annually, it was not until Specialist Vanessa Guillen’s 2020 [murder](#) by a fellow soldier, and surrounding allegations of sexual harassment, did the Senate decide enough was enough. Senator Gillibrand’s bill finally received bipartisan support from over a majority of senators in 2021. Hence the NIMJ symposium in October 2021 was conducted with the belief that real positive change was imminent, given that sixty-six senators [supported](#) removing prosecutorial discretion from military commanders for serious common law offenses.

Unfortunately, just weeks after this NIMJ symposium, the comprehensive structural reform contained in Senator Gillibrand’s Military Justice Improvement and Increasing Prevention Act of 2021 ([MJIIPA](#)), though backed by a Senate majority, [failed](#) to survive the smoke-filled, non-democratic bargaining room that produced the Fiscal Year 2022 National Defense Authorization Act (FY22 NDAA). Instead, the Department of Defense’s much more limited proposal—one that retains commanders as convening authorities of all courts-martial, and only removes prosecutorial discretion from commanders for eleven specific offenses focused on sexual assault and domestic violence crimes—became law, thus failing once again to provide service members with a military justice system that truly is just, and failing once again to honor the sacrifices they make for our country.

The reform that was passed in FY22 NDAA creates a multi-headed, unnecessarily [complex hydra](#) of a system of military criminal prosecution, one that is frankly embarrassing for a supposed superpower. However, as halting and limited as this reform is

in the prosecutorial discretion realm, it does represent some forward progress. First, it rightly takes sentencing power away from legally untrained and uneducated juries (panels in military parlance) and vests it in military judges. As amateur as military judges are compared to Article III federal judges (they are military legal officers who merely serve limited assignments as judges, and are structurally vulnerable to command retribution once they leave their judicial assignments), at least they are more objective and experienced in sentencing than a layperson military jury. [An editorial aside: why the legislation fails to require this sentencing shift immediately, and instead gives the Department of Defense years to incorporate this change, is inexplicable: this stalling represents a pattern of obstruction and delay that has marked the Department's historic resistance to external change in the military justice arena, obstruction largely driven by the Army Judge Advocate General's Corps during past reform movements but long institutionalized Department-wide].

Second, FY22 NDAA's military justice [reform](#) removes prosecutorial discretion from military commanders for eleven offenses, and vests it in supposedly "independent" military lawyers. These "special trial counsel," led in each service by a one-star flag officer (admiral or general), will make binding prosecution decisions that the extant court-martial convening authorities (the military lacks standing courts) must implement. The new military prosecutors, instead of working for the uniformed military chain of command, will work instead for each service's civilian service secretary, a move designed to immunize prosecutorial decisions from the military chain of command. Furthermore, the universe of prosecutorial decisions vested in these new special trial counsel also include other offenses allegedly committed by the accused—even military-unique crimes.

Once this system is operational (the legislation unnecessarily gives the military years to implement this not-rocket-science change, which is simply another example of the military's obstruction, stall and delay leitmotif in the military justice arena), it is not unreasonable to think that most of the courts-martial will involve these so-called "covered offenses" that will be disposed of by a lawyer, not a commander. Hence the existence of two different decision-making chains will hopefully be revealed as not only inefficient, but deeply unfair—and finally eliminated. If better decision-making flows from legal professionals independent from the chain of command, such decision-making should include all prosecutorial decisions, and not simply those dealing with the arbitrary list of offenses produced by FY22 NDAA's sausage-making process that birthed the final Frankenstein of military justice reform legislation.

As Senator Gillibrand stated in her symposium remarks, included in this journal edition, “I also think it’s unfair to privilege one set of plaintiffs and one set of defendants over all others. You should give the same privilege to every plaintiff and every defendant. And I think it would be wise to do it as a bright line, starting today and build from there.” Time will tell if the piecemeal approach in the FY22 NDAA will eventually result in one system, the most fair and just system, for those serving this nation in uniform.

The churn of military justice reform has likely subsided for a few years, given that the wind has been taken out of the legislative sails of the sixty-six senators’ comprehensive military justice proposal. Yet many military justice legal issues, from the travesty of non-unanimous verdicts (the only U.S. jurisdiction that allows this, given that the Supreme Court found it [unconstitutional](#) for civilian courts in 2020), to grossly unfair military criminal jurisdiction over 80-year-old military retirees (the government’s [argument](#) that retirees need to uphold standards in case they are called to fight is beyond laughable), remain to be highlighted and remedied. The essays in this symposium edition shed light on some of these issues and related national security military law ones as well.

For example, in his essay *Preliminary Hearings in the United States Military*, Professor Franklin D. Rosenblatt expertly analyzes the changes wrought to what was once a robust court-martial preliminary proceeding, and adroitly asks whether the pendulum has swung perhaps too far away from necessary procedural safeguards for military accused. In their essay *Military Retiree Court-Martial Jurisdiction: Trials and Tribulations*, Philip D. Cave & Kevin M. Hagey clearly establish the statutory basis for military retiree jurisdiction and highlight non-judicial avenues for restricting it, along with providing sound normative reasons why such restrictions are appropriate. Taking a historical view, Professor Joshua Kastenberg takes critical aim at courts’ and scholars’ myopic uses of two supposed giants of military law. In *Reassessing the Ahistorical Judicial Use of William Winthrop and Frederick Bernays Wiener*, Professor Kastenberg rightly cautions against cherry-picking from these flawed scholars, noting their word should not be taken as gospel; he subtly reminds readers that critical thinking has a vital role in military law, as in all law; too often the question “why” is not asked of supposed military truths and courage needs to be mustered to counteract such unnecessary and dangerous deference.

In *Tort Remedies in Military Prisons and Brigs*, Professor Brenner M. Fissell & Max Jesse Goldberg eloquently advocate for a minority group that traditionally lacks a voice and public support—those incarcerated in military corrections facilities. They highlight the tragedy of physical and emotional abuse that goes unaccounted for within these facilities, and trace its intersection with the Supreme Court’s ill-considered and unfair *Feres*

Doctrine. They also outline a remedy – if only we had a Congress courageous enough to enact it. Finally, in *The Good Officer? Evaluating General Milley’s Constitutional Dilemma*, Professor John C. Dehn masterfully advocates for a necessity principle to govern when senior military officers should countermand plausibly lawful orders from their commander in chief. His thoughtful takedown of [critiques](#) of General Mark Milley’s conduct under the Trump Administration by the courageous whistleblower Alexander Vindman exposes both the superficiality of such critiques, as well as a larger dynamic in civil-military relations, and is well-worth the read.

In closing, I extend a warm and sincere thank you to all those who have been part of NIMJ or have supported NIMJ behind the scenes. NIMJ, as all human collectives, has endured evolutionary change over its three decades, and will continue to evolve. All who have been part of it in these thirty years have made valuable contributions to the robust organization it is today, and NIMJ would not be where it is today without them. Thank you, past presidents, past board members, past advisory members—you remain part of NIMJ.

The biggest thanks of all goes to the selfless women and men in uniform who volunteer to serve our nation, and whose sacrifices warrant the most just, fair and effective disciplinary and justice systems possible. Let us all strive together to create such systems, as there is much work remaining. Onward.