

THE REPUBLIC OF UGANDA

**In the Supreme Court of Uganda**

---

Constitutional Petition No. 18 of 2005

---

Between

THE ATTORNEY GENERAL OF UGANDA,

*Appellant-Cross-Respondent,*

and

THE UGANDA LAW SOCIETY,

*Respondent-Cross-Appellant.*

---

On Appeal from a decision of the Constitutional Court  
entered on January 31, 2006

---

MOTION OF NATIONAL INSTITUTE OF MILITARY JUSTICE  
FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*  
AND BRIEF AS *AMICUS CURIAE*

The National Institute of Military Justice (“NIMJ”), an independent not-for-profit organization incorporated in the District of Columbia, United States, respectfully moves for leave to file a brief as *amicus curiae* in the above-styled appeal.

INTEREST OF THE *AMICUS*

NIMJ was incorporated in 1991. Its purposes are to foster the fair administration of justice in the Armed Forces of the United States, and to improve public understanding of the military justice system. Its directors and advisors are experts in military law, and include attorneys who have served in uniform in several branches of the United States Armed Forces, up to and including flag and general officer grades. The directors and

officers are attorneys in private practice and law professors and deans. A number are retired judge advocates.

NIMJ regularly files briefs *amicus curiae* in the United States courts, including the Supreme Court of the United States, the United States Court of Appeals for the Armed Forces, and the United States Court of Appeals for the District of Columbia Circuit. NIMJ receives no funding from the United States or any other government.

Further information about NIMJ can be found on its website, [www.nimj.org](http://www.nimj.org).

NIMJ wishes to file an *amicus brief* in this case because certain references to United States law in three of the judgements of the Constitutional Court may reflect a mistaken or incomplete understanding of United States law. Foreign legal materials can play a useful role in informing the judicial process, but the references referred to point up the hazards of describing foreign law without complete information. NIMJ takes no position on the merits of this case and offers no opinion as to the proper construction of the governing Uganda statutes.

This is the first time NIMJ has sought leave to file a brief as an *amicus curiae* in a court other than a court of the United States. We follow foreign military justice developments with interest and were permitted to submit comments in connection with a recent review of the Canadian military justice system.

#### BRIEF AS *AMICUS CURIAE*

1. The Deputy Chief Justice, Mr. Justice Kavuma, and Mr. Justice Byamugisha all cite the *Manual for Courts-Martial, United States* (1995 ed.), at pp. 11-13, concerning who may be tried by court-martial. The current version of that *Manual* is the 2005 version. A true copy of the pertinent pages is attached to this brief.

2. United States constitutional law severely disfavors the trial of civilians by court-martial. Although the governing statute—Article 2(a) of the Uniform Code of Military Justice (“UCMJ”), 10 U.S.C. § 802(a)—purports to subject a variety of categories of civilians (*e.g.*, those serving with, employed by, or accompanying the armed forces outside the country; those at leased bases; and in time of war, those serving with or accompanying the armed forces in the field) to trial by court-martial, “[c]ourt-martial jurisdiction over civilians under the code is limited by judicial decisions.” Rule for Courts-Martial 202 (Discussion), at II-14. Thus, the Supreme Court of the United States repeatedly held that civilians are not subject to trial by court-martial in peacetime, in cases dating back nearly 50 years. Examples include *Reid v. Covert*, 354 U.S. 1 (1954) (civilian dependents; capital cases); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) (discharged soldier); *Kinsella v. Singleton*, 361 U.S. 234 (1960) (civilian dependent; non-capital case); *Grisham v. Hagan*, 361 U.S. 278 (1960) (civilian employee; capital case); *McElroy v. Guagliardo*, 361 U.S. 281 (1960) (civilian employees; non-capital cases). Efforts to prosecute various categories of civilians before courts-martial during the Vietnam War were rejected by the federal courts. *Latney v. Ignatius*, 416 F.2d 821 (D.C. Cir. 1969) (merchant mariner); *United States v. Averette*, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970) (civilian contractor employee). Congress plugged the jurisdictional gaps when it enacted the Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §§ 3261 *et seq.*, which provides for trial in the civilian federal courts in the usual manner. Unless a civilian covered by Article 2(a) were literally working side-by-side with American soldiers in an area of actual combat, trial by court-martial would

violate current constitutional doctrine in our country. Given enactment of the 2000 legislation, it is profoundly unlikely that such a trial would be attempted.

3. Article 2(a)(4) of the UCMJ, 10 U.S.C. § 802(a)(4), subjects retired regular military personnel to the UCMJ, but only if they are entitled to pay. Retired reserve personnel are also subject to trial by court-martial, but only if they receive hospitalization from an armed force. Art. 2(a)(5), 10 U.S.C. § 802(a)(5). These provisions have been upheld. *E.g., Hooper v. United States*, 9 U.S.C.M.A. 637, 26 C.M.R. 417 (1958) (retired Rear Admiral).

4. Article 2 aside, the UCMJ subjects civilians to trial by court-martial only for aiding the enemy and, in time of war, spying. Arts. 104, 106, UCMJ, 10 U.S.C. §§ 904, 906. That power has never been exercised since the UCMJ took effect in 1951. Civilians are also theoretically subject to trial by general court-martial if, according to the law of war, they are subject to trial by a military tribunal. Art. 18, UCMJ, 10 U.S.C. § 818. That power has also not been invoked since the UCMJ took effect.

\* \* \*

Leave to file the instant brief is respectfully requested. To the extent that we cite more than two authorities, leave to do so is respectfully requested in accordance with ¶ 7 of Practice Direction No. 2 of 2005.

Respectfully submitted,



Eugene R. Fidell  
President and Adjunct Professor  
National Institute of Military Justice  
4801 Massachusetts Avenue, N.W.

Washington, D.C. 20016  
Tel (202) 466-8960  
[efidell@feldesmantucker.com](mailto:efidell@feldesmantucker.com)

*Eugene R. Fidell*  
for Kathleen A. Duignan  
Executive Director  
National Institute of Military Justice  
4801 Massachusetts Avenue, N.W.  
Washington, D.C. 20016  
Tel (202) 274-4322  
[kduignan@wcl.american.edu](mailto:kduignan@wcl.american.edu)

*Eugene R. Fidell*  
for Stephen A. Saltzburg  
General Counsel  
National Institute of Military Justice  
University Professor  
The George Washington University  
School of Law  
2000 H Street, N.W.  
Washington, D.C. 20052-0001  
Tel (202) 994-7089  
[ssaltz@law.gwu.edu](mailto:ssaltz@law.gwu.edu)

*Attorneys for National Institute of  
Military Justice\**

April 11, 2006

---

\* All counsel are members of the District of Columbia Bar.