

NATIONAL INSTITUTE OF MILITARY JUSTICE

SUMMARY OF ACTIVITIES
1991-1999

AND

FUTURE PLANS

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Introduction

In the wake of Operations Desert Shield and Desert Storm and the more recent United Nations peacekeeping mission in Bosnia, national attention is focused on the Armed Services of the United States more sharply than at any time since the Vietnam War. A string of disciplinary cases, in turn, has caused a remarkable increase in public interest in the administration of military justice. "Tail-hook," "Aberdeen Proving Ground," as well as individual military defendants have, at least for the moment, become household terms. Americans with no particular connection to the Armed Forces find themselves engaged as never before by issues of fair treatment of military personnel, including matters as arcane as whether and when adultery ought to be a military crime. These are amazing developments from the perspective of those who have concerned themselves with military justice over the years. They represent an important challenge to the country, the legal profession, and the media.

In the absence of conscription, there is ordinarily little public interest in military personnel matters, but the Gulf War, with its massive call-up of Reservists and extraordinary media coverage, drew new attention to the military. Among the issues that generated interest are whether minorities bore an excessive share of the risk of harm and what the role of women should be in the military.

At the same time, with the collapse of many dictatorships around the world, a number of countries are rethinking their basic political arrangements. One element of that process is likely to concern the framework for ensuring civilian control of the military and preserving good order and discipline among forces that are likely to find it difficult to adjust to new and less prominent roles in the life of their nation. International military exchanges focused specifically on military justice are an area in which the United States is playing a useful, yet relatively unintrusive, role for these emerging democracies.

National Defense is about weapons, but even more, it is about people. And perhaps the central feature of the military personnel system is the existence of a separate system of criminal and administrative justice. Nearly 50 years have elapsed since Congress created the present military justice system. Experience gained since the Uniform Code of Military Justice (UCMJ) went into effect in 1951 suggests that the public interest will be served by the active involvement of a nongovernmental organization in the military justice system. The **National Institute of Military Justice** (NIMJ) was established in 1991 to meet that need.

Over 1,000,000 men and women are on active duty in the Armed Services. They—as well as the hundreds of thousands of drilling Reservists—are subject to a complex set of laws and regulations that necessarily govern their conduct far more closely than is true of private citizens. Those laws include criminal and quasi-criminal sanctions (under the Uniform Code of Military Justice and the *Manual for Courts-Martial*) as well as a broad range of formal and informal administrative proceedings. The administrative proceedings cannot lead to imprisonment or criminal conviction, but can still have very serious consequences, such as loss of disability compensation, deprivation of security clearances, or

administrative discharge.

Military justice is a complete system of criminal sanctions and procedures analogous to those found in every state. It includes prosecutors, defense counsel, judges, trial and appellate courts, and correctional institutions. Unlike its civilian counterparts, this system provides free counsel as a matter of right even for defendants who can afford to pay an attorney. Convictions in serious cases are potentially subject to review by the Supreme Court of the United States. Sentences in courts-martial can be as severe as life imprisonment and the death penalty.

It is impossible to directly compare the quality of justice dispensed in the military with that available in the civilian sector because "quality of justice" is simply too elusive a concept and because some of the offenses known to military law—such as disrespect to superiors or disobedience of orders—have no direct counterpart in civilian criminal law. Many of the basic elements of fair play and due process are present in the military justice system, although there are areas in which improvement is needed. In addition, data-gathering in the military justice system appears not to be on a par with other criminal justice systems in the United States. NIMJ seeks to buttress the legal process currently in place, provide a constructive additional perspective, and draw attention to issues that might otherwise be overlooked.

1. *What does NIMJ do, and how does it do it?* NIMJ's overall purpose is to advance the administration of military justice within the Armed Services of the United States. To achieve this goal, it is available to

foster coordination and cooperation between military and civilian practitioners and among the

various Armed Services

appear as a friend of the court in cases involving issues of military law

cooperate with individuals, agencies and organizations involved in the study or administration of military justice in other countries

work with military lawyers to fashion litigation and appellate strategies

work with the news media to ensure proper, balanced, and accurate coverage of newsworthy events in military justice, in order to improve public understanding of this important, specialized and little-known field of the law

encourage, conduct and cooperate with studies relating to judicial administration, criminal justice and correctional practices within the military
furnish general backup legal assistance to civilian and military defense counsel in courts-martial and appeals and collateral litigation

The issues with which NIMJ concerns itself involve the basic goals of fairness and sound administration within the military justice system. Some NIMJ activities may have the immediate or apparent effect of assisting the military defense bar, while others will seem to serve prosecution interests. We reserve the right to "call" the issues as we see them in light of our overall purpose, regardless of which side of the prosecution/defense line that may seem to place us on in any particular context. In addition, NIMJ's activities at times are

more institutionally-oriented, with neither the defense nor the prosecution deriving any parochial advantage.

While NIMJ's primary focus is on the UCMJ and military criminal justice, that system cannot be viewed in isolation from the administrative measures that are available to military commanders as a matter of discretion. For this reason, NIMJ's Board of Directors decided in 1997 not to confine our activities to criminal matters, but to include within our area of interest both the administrative discharge process and record-correction system.

A detailed summary of NIMJ's activities since its establishment in 1991 follows this Introduction. These activities have been conducted without paid staff and on an extraordinarily modest budget.

2. Does NIMJ's work duplicate that of other organizations?

No. Many of the institutions that promote robust discourse in American life today do not function with respect to the military justice system: prior to the recent (and continuing) spate of high-profile cases, the media took little interest in military justice in the absence of a crisis; those most directly affected are barred from political activity and in any event Congress ordinarily has too many other important matters competing for its attention; the Federal Courts take an unusually deferential attitude when reviewing military cases; sustained academic interest is sparse; unions are outlawed; there is no functioning unified military bar.

A special need therefore exists for an effective, professional, public-interest group focused on the military justice system and related aspects of the administrative discharge system. Some established organizations, such as the NAACP Legal Defense and Educational Fund, Inc. and American Civil Liberties Union, appear in occasional cases of interest from the standpoint of their institutional concerns, but their efforts—though often productive—remain sporadic. These groups rely heavily on volunteers and are not in a position, singly or together, to keep pace with the functioning of the military justice system as a whole.

Military correctional programs have historically had very little outside scrutiny. The National Prison Project has been a useful resource, but its main thrust has necessarily been elsewhere. One volunteer group, M.O.M.S., Inc. ("Members Opposed to Maltreatment of Service Members"), has become a focal point for families of incarcerated personnel. The interest M.O.M.S. has generated in military corrections, and its ability to gain the ear of military corrections officials, confirms the need for NIMJ's broader approach.

With the exception of occasional involvement by the Vietnam Veterans of America, veterans' service organizations have played virtually no role in military justice in recent years. A few law school appellate advocacy programs have become involved in submission of *amicus curiae* briefs to the civilian United States Court of Appeals for the Armed Forces, but their efforts, again, are sporadic and not oriented to broader issues of administration or policy arising outside the litigation context.

Established entities with functions analogous to NIMJ's, such as the National Institute of Justice, the State Justice Institute, the Federal Judicial Center, the Vera Institute of Justice or the National Legal Aid and Defenders Association, have no responsibility for or expertise in military justice.

The organized bar has a number of military-oriented committees, but these lack either the resources or the charter, or both, to undertake the kinds of projects that are needed. In addition, bar association internal procedures often make it too cumbersome for committees to take positions on an expedited basis, as is typically necessary when issues reach a critical phase in the judicial, administrative or legislative processes. Clearance requirements can be a major impediment to preparing "friend of the court" briefs on a tight schedule. In some cases, bar committees may not be entirely independent of the Armed Services because of the heavy involvement of active duty personnel or drilling Reservists. NIMJ is not a bar association and does not compete with any organization for members or resources. We maintain close relations with established organizations such as the Judge Advocates Association and the American Bar Association's Standing Committee on Armed Forces Law.

The Department of Defense has a Joint-Service Committee

on Military Justice. The Committee has no members from the private sector, and its key work is conducted away from public view, with the exception of proposed changes to the *Manual for Courts-Martial*, notice of which is published in the *Federal Register*. In 1997, the American Bar Association recommended that the rule making process for courts-martial rely on broad-based committees such as those employed by the Supreme Court under the Rules Enabling Act. At its meeting of June 3, 1997, NIMJ's Board of Directors voted to support this ABA initiative.

The appellate defense units in each of the Armed Services remain *seriously* under-strength. They lack the resources that need to be dedicated to longer-range projects such as proposing or commenting on regulations or legislation, the development of coordinated litigation strategies, or the preparation of more than an occasional *amicus* brief. Service defense lawyers are generally barred from participation in litigation in the federal courts, even though military-related cases frequently end up in the civilian courts.

Of particular concern is the fact that military appellate prosecutors have the incalculable advantage of access to the Solicitor General's Office at the Department of Justice in shaping Supreme Court strategy. Their defense counterparts must fend for themselves and learn the sensitive work of Supreme Court litigation through a process of trial and error.

Finally, despite the outreach efforts of the civilian United States Court of Appeals for the Armed Forces, there are substantial limits on what the Court and others who are officially responsible for administration of the military justice system can do to foster public understanding and facilitate intelligent coverage of newsworthy military justice matters by the media. NIMJ provides

the media with needed background information so the public and Congress can be fully informed about this highly specialized, relatively isolated, but critical part of the American legal system.

3. *What is the relationship between NIMJ and the Armed Forces?* NIMJ is entirely independent of the Armed Forces. Relations with the services and the Department of Defense have been excellent from the beginning.

Historically, the prevailing management view within the Armed Forces was that the military justice system functions best without outside interference. While there is still room for progress, that basic institutional stance may be changing. For example, the Department of Defense now publishes notice of proposed changes to the *Manual for Courts-Martial* in the *Federal Register*. It also embraced the addition of civilians to the "Code Committee on Military Justice," a statutory oversight body that had long consisted of only the Judge Advocates General and the Judges of the United States Court of Appeals for the Armed Forces.

Many military lawyers and others involved with military justice recognize that the system can suffer from insularity and that an outside perspective is useful and can serve the public interest if presented in a constructive fashion rather than as an exercise in polemics or knee-jerk reactions. For example, the Rules Advisory Committee created by the predecessor of the United States Court of Appeals for the Armed Forces over 15 years ago has included civilian members from the beginning. The Court has at times also relied on an *ad hoc* "Court Committee" of distinguished civilian academicians and others to advise it on possible systemic changes. The last report of the Court Committee, issued in 1989, sparked discussion of important changes in the military appellate process.

A current issue involves modernization of the digesting system for military case law, so that military cases will be headnoted to the same digest topics as are used for decisions of other courts on generic points of law. NIMJ's Board of Directors voted on June 3, 1997 to support this reform.

In 1997, the Department of Defense proactively sought NIMJ's views on the hot-button issue of the treatment of adultery under current military law regulations. Our submissions on this and other topics have been welcomed as constructive contributions to official decision making.

Based on these and similar encouraging developments, NIMJ looks forward to continuing its constructive interaction with the Department of Defense and the Armed Forces in the future.

4. *What is NIMJ's legal and tax status?* NIMJ is a District of Columbia nonprofit corporation established in 1991. Contributions are deductible from federal income tax under § 501(c)(3) of the Internal Revenue Code.

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Summary of Activities

1991-1999

Since its incorporation in 1991, NIMJ has undertaken a variety of initiatives in keeping with its overall goals of advancing the administration of military justice within the Armed Services of the United States and fostering improved public understanding of the military justice system.

Publications

In 1992, NIMJ began publishing a two-page monthly newsletter called the *Military Justice Gazette*. Over 50 issues have been published thus far. The hard-copy circulation is approximately 200. Since 1994, the *Gazette* has been available online through America Online's Legal Information Network and, more recently, the Army Times's Military City Online. NIMJ makes the *Gazette* available for free. In 1997, we instituted an email list for dissemination of the *Gazette* and occasional news flashes of interest to *Gazette* readers and members of the news media.

Since 1996, the *Gazette* has included an annual "Directory of Civilian Practitioners of Military Law." The list currently includes over 100 private practitioners.

Since 1992, NIMJ has also published an annually-updated edition of the *Guide to the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces*. This is made available without charge to military appellate practitioners and the Court itself in a limited number of copies. It is also available for free from AOL's Military City Online, from which over 200 copies have been downloaded. A diskette version is available in WordPerfect 5.1

format.

NIMJ is listed in Military City Online's "White Pages." The *Military Justice Gazette* and other NIMJ materials are available online through the excellent private "Military Law and Justice" website <www.court-martial.com>. We intend in due course to establish a website of our own.

Congressional Hearings

NIMJ has appeared several times at congressional hearings, including hearings on war booty (1993) and on gays and lesbians in the military (1993). We have also been consulted informally by congressional staff. In addition, in 1996 and 1997, NIMJ presented its "Boot Camp" introductory program on military justice for congressional staff ("Everything You Ever Wanted to Know About Military Justice, But Were Afraid to Ask") in conjunction with the popular annual training program conducted by the National Veterans Legal Service Program. In February 1998, NIMJ co-sponsored a well-attended panel discussion on the question "Can You Get a Fair Trial in the Military?" at the Rayburn House Office Building.

Over the years, several NIMJ officers and advisory board members have served in their individual capacities as members of the statutory Code Committee on Military Justice, by appointment of the Secretary of Defense.

Rule Making Proceedings

NIMJ has participated in several rule making proceedings relating to military justice. For example, in 1992, we submitted a

petition for rule making to the United States Court of Military Appeals (predecessor to the United States Court of Appeals for the Armed Forces) regarding the disposition of cases in which no issues were presented by the appellant. We also submitted detailed comments concerning the 1997 proposals for changes in the *Manual for Courts-Martial*, and were among those organizations asked by the Defense Department to comment in 1997 on current military justice policy on adultery. NIMJ has been among the few organizations to regularly attend the public hearings conducted by the Joint-Service Committee on Military Justice, which is responsible for proposing changes to the *Manual for Courts-Martial*.

***Amicus Curiae* Briefs**

NIMJ has filed *amicus curiae* briefs in the Supreme Court of the United States, the United States Court of Appeals for the Armed Forces and other appellate courts in the military justice system. At issue in *Fletcher v. Covington*, 42 M.J. 116, 215 (1995) (mem.), was whether the Court of Appeals had jurisdiction under the All Writs Act to review the withdrawal of charges from a court-martial. *United States v. Kelly*, 45 M.J. 259 (1996), involved the use of summary courts-martial at which the accused had not been represented by counsel as matter in aggravation. In *ABC, Inc. v. Powell*, 47 M.J. 80 (1997) (mem.), the issue was whether it was proper to exclude the public and the media from the preliminary investigation of charges against the senior enlisted member of the Army. *Frazier v. McGowan*, Misc. No. 1-98 (C.G.Ct.Crim.App. 1998), concerned the power of a convening authority to commute a punitive discharge into a period of confinement. In *Goldsmith v. Clinton*, U.S. No. 98-347, the Supreme Court was called upon to address the scope of the Court of Appeals' authority under the All Writs Act.

NIMJ also assists attorneys handling military law cases in the Supreme Court of the United States and the Court of Appeals for the Armed Forces. This assistance includes consultation on strategy, review of briefs, and participation in moot courts.

Conferences and Training Programs

In addition to the "Boot Camp" training programs and panel discussion referred to above, NIMJ conducted two instructional programs, both in 1995. These were a *Program on Extraordinary Writ Practice*, geared to appellate practitioners of military law, held at the courthouse of the United States Court of Appeals for the Armed Forces, and a *Program on Civilian Instruction in Military Law*, for past, present and future teachers of military law at civilian law school, held at (and with the cooperation of) The Judge Advocate General's School of the Army, in Charlottesville, Virginia.

London Conference

In December 1998, NIMJ sponsored an international conference on "Continuity and Change in Military Justice." Over 30 practitioners and scholars of military justice from the United States, United Kingdom, Republic of Ireland, and Canada came together at the Royal Air Force Club in London for a day of discussion and debate. Several major themes resonated throughout the conference's six panels and informal conversation about current trends and issues in military justice. The process and ramifications of the civilianization of military law, the proper scope of civilian review of military tribunal's decisions, the effects of reform on military effectiveness, the possibility of an increasing disconnect between military and civilian societies, the treatment of sex and gender-related misconduct under military law, and the potential

avenues for civilian involvement in military-legal affairs occupied lawyers from both sides of the Atlantic.

None of the participants represented any governmental agency or institution. The views expressed were solely their own.

Opening Remarks

Eugene R. Fidell (President, NIMJ) convened the conference early on Saturday morning, welcoming participants to London and reviewing the day's agenda. Opening with a narrative of Darwin's voyage on HMS *Beagle*, Mr. Fidell compared the development of separate systems of military justice to the independent evolution of life on the islands of the Galapagos archipelago. Hoping to engender a spirit of inquiry and exploration across national borders, Mr. Fidell highlighted the conference's goal of promoting international interaction and understanding among lawyers involved in military justice. In light of recent reforms and the increasing frequency of multi-national missions around the globe, this appears an auspicious moment for the start of greater international cooperation in the common arena of military justice.

Session 1: Country Reports on Current Issues

Professor Donald N. Zillman (University of Maine Law School, U.S.) opened the first session by noting the diverse areas of law and legal thought that come under the broad rubric of military justice. He identified four factors that bear on the study of law in the armed forces:

- 1) the prominence of sex in military crime and punishment;

- 2) the progressive civilianization of military legal standards;
- 3) the imperfect nature of civilian criminal justice, and the significance of the military as an alternate model of justice;
- 4) the increasing isolation of military v. civilian societies, among lawmakers, social and cultural elites, and scholars, as well as in the demographic base of servicemembers.

Brigadier Tom Glynn (U.K.) followed Professor Zillman's introduction with a focus on the current difficulties of British military law. He pointed toward the "tremendous civilian influence on military-legal matters" and the lack of military experience among civilian judges who review court-martial as major hurdles to maintaining a working system of military law. Apart from functional viability, Brigadier Glynn expressed concern about basic issues of legal authority, such as whether a civilian appeal court should be able to quash any sentence of dismissal from Her Majesty's forces and thereby return a servicemember to duty. The European Court of Human Rights' decision in *Findlay v. United Kingdom* has placed military lawyers in the difficult position of being forced to reorganize under the gaze of outsiders, including those with political causes.

Professor Gary D. Solis (U.S. Military Academy, West Point, N.Y.) addressed current issues in American military law, leaving the issue of criminal adultery to other panelists. He identified six issues of "significant current interest" in U.S. military law, including:

- 1) unlawful command influence in court-martial

panel selection;

2) the admissibility of polygraph results;

3) the ongoing litigation surrounding Sergeant Major of the Army McKinney's court-martial for sexual harassment;

- 4) "the fine line between inspection and search;"
- 5) the upcoming trial of the Marine Corps flyers whose EA-6B severed the cable that sent 20 civilians to their death near Aviano, Italy; and
- 6) the possibility of the first execution under the military death penalty since 1961.

David J. Bright, Q.C. (Boyne Clarke, Halifax, Canada), highlighted current issues while providing an overview of military justice in Canada. As one of only two civilian barristers who routinely represent defendants at courts-martial, Mr. Bright described a flexible, responsive system of military justice under the combined authority of the National Defense Act and the criminal law. The regular force of approximately 65,000 servicemembers and a small reserve force are subject to military law, resulting in about 100 courts-martial each year. In addition to JAG-supervised general courts-martial—decided by five-officer panels—and disciplinary courts-martial, two additional types of courts-martial are permitted: bench trials of servicemembers, termed "standing courts-martial," and "special general courts-martial," which may try civilians who accompany active-duty forces. Each type of court-martial is automatically subject to civilian review. Following U.S. military law, crimes need not be service-connected to be subject to court-martial, although unlike the U.S., there is no death penalty available at court-martial.

Current problems involve Quebec and its French civil code (as only two bilingual judges sit on the Canadian military bench), the ongoing integration of women and a "zero tolerance" policy toward sexual harassment that has diminished morale, and rising media

interest in military-legal proceedings such as the much-publicized murder in Somalia. The question of judicial independence became a paramount concern with the *Lauzon* case, which deemed standing courts-martial unconstitutional but granted the military a year to reform the system of judging. Mr. Bright explained that the Canadian *Charter of Rights and Freedoms* will continue to affect Canadian military law, which has been forced to civilianize some legal standards. Sexual orientation is no longer a source of official discrimination, and few problems have resulted from the change in the policy concerning homosexuality, though Mr. Bright noted that some senior servicemembers are very intolerant of openly gay servicemembers. General courts-martial use a computer-generated method to ensure random selection of panel members, although Mr. Bright suggested that servicewomen appear more frequently on panels for sex-related cases than other types of crimes, reflecting the larger concern with the Canadian authorities' tendency to promote "political correctness" at the expense of procedural fairness. A final issue related to the role of civilian attorneys in courts-martial is a recent indication that the government may no longer cover expenses incurred in hiring experts for trial if the accused elects a civilian as counsel.

Captain Gerard Humphreys, B.L. (Dublin, Ireland), delivered the final country report, describing the Irish system of military law as a hybrid of the British and American systems, with problems similar to those mentioned by the other presenters. Approximately 12,000 Irish serve in the military, both within the country and abroad, the latter through nearly continuous involvement in peacekeeping missions. Unlike members of Ireland's police forces, servicemembers must sue in order to receive benefits if injured. An "explosion of litigation" over the duty of care owed soldiers by their military superiors has erupted, explained Capt. Humphreys. Questions about how to compensate soldiers injured while serving

under United Nations commanders, how the legal concepts of duty of care and assumption of risk apply to service outside state boundaries, and how to handle changes in soldiers' operational chains of command have yet to be fully litigated.

After the initial presentations, a lively discussion over the current state of military law, particularly in the United Kingdom, ensued. John Mackenzie, Esq. (U.K.), observed that a "mad scramble" to meet the requirements of the European Convention on Human Rights was underway, and that potentially huge financial losses loomed for the British military. British military officials' control over the structural composition of courts-martial has been weakened by the decisions of international courts, a blow to the authority and independence of serving officers. Apart from changes in the military's criminal law, challenges to past dismissals for homosexuality, to violations of employment rights, and to racial and sexual discrimination are now actionable. How (and whether) the current system of British military law can survive the changes wrought by a smaller force and the intervention of international tribunals remains to be seen. Other topics addressed during the discussion included the scope of the Irish military's civil liability, the U.S. Congress' tasking of the Joint Service Committee on Military Justice to study the question of court-martial member selection, the U.S. Supreme Court's sweeping deference to the American military, and whether resistance to legal reforms from within military institutions stems from concerns about military effectiveness or adherence to dated models of coercive discipline.

**Session 2: Changing Composition of the Armed Force:
Consequences for Military Justice**

Professor Michael F. Noone, Jr. (Catholic University Law

School, Washington, D.C.) described shifts in the composition of the U.S. armed forces, assessing their impact on the military justice system. Noting remarkable continuity between modern American military law and the eighteenth-century articles of war, Professor Noone outlined how the contemporary force structure differs from the U.S. armed forces pre-1950, when the Uniform Code of Military Justice was implemented. Professor Noone reviewed four areas of importance:

- 1) The effects of "the shift from conscription to an all-volunteer force," including the consequences for the rates of court-martial, the need for uniformed lawyers, the extent of procedural protections required for a non-conscript force, the limitations on rehabilitating servicemembers, and the doubtful efficacy of summary punishment;
- 2) Increased numbers of servicewomen and issues of sex crimes and equality, including date rape, fraternization, the relationship between consent and hierarchies of rank, and the prosecution of sexual harassment;
- 3) The impact of the larger percentage of married servicemembers (twice as many soldiers are married as are single) on both desirable punishment options for offenders with family obligations and the "long term consequences of mixed gender deployment;"
- 4) Rising deployment rates along with "increased reliance on civilian and reserve components" and the problems of exerting jurisdiction over civilians accompanying military forces, especially overseas,

and over inactive reservists for offenses that may have been committed during active-duty stints.

Professor Noone noted that criminal law has become an ever smaller part of a military lawyer's duties and wondered if the drop in total force size and court-martial rate requires a closer look at the number of uniformed attorneys. He also pointed out the decreasing salience of rehabilitation as a goal for servicemembers whose careers are virtually ended by even one incident of minor misconduct. Professor Noone closed by commenting on the increasing number of civilian attorneys who serve as counsel in military cases and the absence of effective sanctions or other disciplinary action available against such counsel under the Uniform Code, which assumes all counsel to be military.

Discussion centered on the links between criminal and administrative systems of discipline and the "growth industry" surrounding redress of grievances from both administrative sanction and criminal punishment. The collateral consequences of administrative action rival criminal conviction in some instances, yet the process often resembles an employment tribunal more than a criminal trial. British observers expressed widely divergent views on whether meaningful judicial review of administrative decisions was available. U.S. practitioners discussed the political considerations that have directly affected review of high-profile cases, the most notable the Senate Armed Services Committee's decision to hold up promotions of Navy officers until each promotable individual was confirmed "not present" at the 1991 Tailhook debacle.

Session 3: Legal and Disciplinary Issues in Humanitarian and Peacekeeping Operations

Professor Peter J. Rowe (Department of Law, University of Lancaster, U.K.) examined the disciplinary aspects of peacekeeping and humanitarian operations, both now-common modes of intervention by military forces. Although maintaining order and discipline among troops engaged in peacekeeping operations is made easier by the absence of combat-related stress, other complications abound. Revisions in the mandates that govern peacekeeping operations make the responsibilities of deployed troops fluid. The concerns raised by the *Rockwood* case in the U.S. point to the political difficulties of limiting the scope of servicemembers' duties in host nations. Conflicts between national and international laws, complex rules of engagement, and the doubtful applicability of the Geneva Conventions to situations in which no armed conflict exist make the legal terrain of humanitarian operations difficult to navigate. In Canada, the 1993 Somalia operation raised these issues after a servicemember was charged in the death of a young boy. Whether lethal force is available in the protection of equipment and supplies, whether the rules of engagement constitute an order² and whether that order may be overridden by a superior's verbal order, and how the various laws of states sending troops interact with the law of the host government were each critical legal questions that had to be addressed. Professor Rowe concluded by remarking that the law has been slow to catch up to the changing factual circumstances of these new military missions.

Professor Mark J. Osiel (University of Iowa Law School, U.S.) then turned to the roles of JAG officers and commanders, using the perspectives of legal ethics and military sociology to assess this unique lawyer/client relationship. He explained the difficulties of negotiating a legal relationship in which the client (the military commander) may not know when legal advice is needed, and the lawyer (JAG officer) may not be able to provide the clear, unambiguous

counsel desired by the commanding officer. For this system to function effectively, military attorneys must be responsive to the operational needs of the commanders they serve, and commanders must become smarter legal consumers. Professor Osiel suggested that a business counsel model may be appropriate. He also commented on the importance of recruiting lawyers, suggesting that the JAG corps must convince prospective military lawyers of their crucial role in the administration of military justice in order to compete for the best students.

Colonel Anthony S. Paphiti ((British) Army Prosecuting Service (Germany)) followed Professors Rowe and Osiel with a review of his experiences as legal advisor during the United Nations' effort to bring peace and stability to the Balkans. Colonel Paphiti noted that disciplinary problems were fewer because of the absence of alcohol and women near the front lines, but that issues of deciding which law governed were difficult to resolve. Before the operation, NATO military attorneys anticipated and worked out many of the legal issues they would later face, but they could not fully resolve the difficulty of operating in the murky legal waters of "peace support operations," a mission in the midst of the spectrum between peacekeeping and humanitarian efforts. Because the United Nations mandate was very general, it was of little help in addressing specific legal issues, and the presence of only a titular government in Bosnia was a major difficulty. Colonel Paphiti identified the following issues as particularly significant in his experience:

- 1) Whether military commanders could exercise jurisdiction over civilians accompanying the NATO forces in respect of criminal offenses alleged against them;

- 2) How to ensure freedom of movement for troops across borders of different factions (for instance, avoiding the payment of exorbitant taxes on humanitarian supplies);
- 3) How to gain the advantage of and enforce political agreements in an atmosphere of almost no useful communication;
- 4) Whether Status of Forces Agreements are necessary in Peace Enforcement;
- 5) The rules of engagement flexibility required for PSO;
- 6) Whether those taken into custody for civilian crimes constituted "prisoners of war" (they were generally treated at the minimum standard required under the Geneva Conventions);
- 7) How to clarify competing legal definitions of self defense under various domestic and military law;
- 8) How to position troops from different participating nations in the field, given that certain countries' units would come to the defense of only specified other troops, only in limited circumstances, or not at all;

9) Whether riot gas could be used—not allowed under the Geneva Conventions, but available under some domestic laws;

10) How to coordinate advice among the JAGs from different countries (the British and U.S. Marine Corps JAG advised French and German commanders as well as their own chain of command).

During the discussion, Mr. Fidell queried the speakers and other participants about whether peacekeeping operations posed distinctive morale and disciplinary problems as compared to more traditional warfighting missions. While the legal issues involving discipline of troops are more complex and the conflicts of laws issues often novel, most agreed that commanders face the same types of disciplinary challenges as commanding officers during wartime or long deployments. Professor Solis noted that two U.S. generals were prosecuted for smuggling automatic weapons after returning from peacekeeping missions, and Colonel Paphiti confirmed that the rules of engagement and legal protocols developed addressed the issue of war booty.

Session 4: Modalities of Change in Military Justice

Professor Gerry R. Rubin (Kent Law School, Canterbury, U.K.) mapped out a framework for understanding peacetime change in military, focusing on the evolution of military law in the United Kingdom. He stressed the distinctive requirements of military discipline within the context of broader shifts in society, including an emphasis on individual rights, the equality of women, and the rights of homosexuals. Using a series of diagrams to model exogenous and

endogenous peacetime change in military law, Professor Rubin set out short-, middle-, and long-term factors that influence changes in military justice. He argued that internally motivated changes (endogenous) are more readily accepted than externally imposed reforms, but that such exogenous reforms are nonetheless a legitimate path to reform for military law in a democratic society. Professor Rubin also highlighted the tensions between military and democratic values, explaining that civil society seems to require that the military both accept civilian values and reflect the demographics of society, despite the unique goals of the armed forces.

Captain Feargal Kavanagh, B.L. (Dublin, Ireland), followed with an Irish perspective on changes in military law. Capt. Kavanagh explained that the relatively small size of the Irish defense force provides little experience for military lawyers, judges, and court-martial panel members, and also provokes little external pressure for change. Few fresh ideas come from within the system, and the decreasing number of courts-martial creates the potential for the quality of military justice to suffer as a result of such inexperience. Irish military lawyers spend increasing amounts of time on personnel issues and operational matters rather than criminal justice, much like JAGs in other military-legal corps. Capt. Kavanagh noted that the Irish Judge Advocate General is a civilian appointed by the government, but that courts-martial are presided over by deputy JAGs, or in-house military lawyers, who advise on legal matters but do not decide them. Capt. Kavanagh identified three problems ripe for reform in the current system:

- 1) The court-martial members are both judge and jury, deciding all matters of law as well as fact;
- 2) Command influence is apparent in the selection of members; and

3) The redundancy of keeping a civilian JAG when all courts-martial are automatically appealed to a court-martial appeals court.

Capt. Kavanagh also noted that although Ireland signed the European Convention on Human Rights, it is not part of Irish domestic law. This is part of the reason that there is no Irish corollary to the *Findlay* decision.

Dwight H. Sullivan (Managing Attorney, American Civil Liberties Union, Baltimore, Maryland) spoke to the process of change in U.S. military law, applying some aspects of Professor Rubin's model to the American experience. Mr. Sullivan described a system subject to little internal pressure for change yet insulated from external pressure by the Supreme Court's deference and lack of congressional interest. The last time a Supreme Court decision affected the operation of military law was *United States v. Matthews*, a 1983 opinion freeing seven servicemembers from death row because of inadequacies in the military death penalty procedures. Since then, the Court has continued an "extremely deferential standard" for reviewing constitutional issues in military justice. Because the Uniform Code of Military Justice does not undergo periodic review, Congress has adopted major revisions only twice, in 1968 and 1983, since the Code's enactment nearly fifty years ago. Legislation affecting military justice has only a small civilian constituency, and because the Department of Defense controls the internal process of suggesting changes to military law, public participation in matters of military justice is rare and generally ineffectual, such as in the staged hearing that accompanied the adoption of the current "don't ask/don't tell" policy on homosexuality in the military. Mr. Sullivan noted that

civilian involvement in the reform of military law has stronger advocates now than in the past (most notably in the creation of NIMJ), but that interested non-servicemembers must wait for belated responses to their efforts such as the U.S. Army's current proposal for adopting judicial tenure nearly a decade after the issue was raised through the efforts of civilian litigators.

During the discussion, participants questioned the distinction between endogenous and exogenous change, and raised the issue of the proper amount of civilian oversight of military justice. Mr. Fidell noted that the absence of unions, lack of legislative oversight, limited media interest in non-sex scandal military-legal matters, and lack of sustained academic interest permit U.S. military justice to operate without the kinds of scrutiny found in other areas of governmental activity. Mr. Fidell suggested that the media could serve as an effective agent of change by raising the level of public understanding.

Session 5: Virtual Military Justice

Commander Philip D. Cave (U.S.) distributed floppy disks and instructions to all participants to further the goal of making web-based data on military justice broadly accessible. Commander Cave described the information currently available on web servers in the U.S., cataloging the differing levels of interest in web resources. He identified several barriers to the goal of a more transparent set of web resources related to military justice, including limits on personnel support and funding, and special military security concerns.

Colonel Paphiti picked up the issue of Internet security, addressing concerns about email communication, the availability of encryption software, and the use of digital signatures for

authentication. He explained that the British legal services have very little data accessible on the web, and described aspirations for a single, global military justice web site that would serve as a focal point for the international community, with links to national web pages devoted to military law.

Session 6: Y2000 Military Justice Conference

Mr. Fidell closed the proceedings by asking for input on future conference plans. He noted that many participants had already registered their approval of the current conference and expressed hope for a sequel in the near term. Some recommended that NIMJ develop an international counterpart; others wished to add more countries to the list of participants, broadening the base of national experience to include such countries as France, Germany, and Luxembourg. Irish Judge Advocate General Donagh McDonagh suggested that a conference was needed on each of the day's panels, raising the possibility of a narrowing the scope of future efforts to enable more detailed discussion and comparison. The search for common ground among the different military laws that govern national forces, particularly those conducting peacekeeping actions in the Balkans, was identified as a key objective of a future conference.

NIMJ wishes to extend heartfelt thanks to Elizabeth Lutes Hillman, Rapporteur, for preparation of the conference report.

Participants

The list of attendees and their affiliation (for identification purposes only) follows.

Canada

David J. Bright, QC, Boyne Clark, Nova Scotia

Ireland

Barry Bowman, Solicitor, Dublin

Ciaran Craven, Barrister, Dublin

Capt Gerard Humphreys, Barrister, Dublin

Capt Feargal Kavanagh, Barrister, Dublin

Donagh McDonagh, Barrister, The Judge Advocate General
of Ireland

Geri Silke, Barrister, Galway

United Kingdom

Gilbert S. Blades, Solicitor, Lincoln

Air Commodore Richard A. Charles, RAF, Deputy Director
of RAF Legal Services

Brigadier Tom Glynn, Brigadier Prosecutions,
Army Prosecuting Authority

Lieutenant Colonel Roger A. Lewis, OBE,
Army Prosecuting Authority (UK)

Ann Lyon, Lecturer in Law, De Montfort University,
Leicester

John Mackenzie, Solicitor, Sheratte, Caleb & Co., London

David Meltzer, Research Assistant, Department of Law,
University of Kent at Canterbury

Colonel Anthony S. Paphiti, Colonel Prosecutions,
Army Prosecuting Authority (Ger.)

Major General A.P.V. Rogers, OBE, (Ret), former Director,
Army Legal Services

Prof. Peter J. Rowe, Department of Law,
Lancaster University

Prof. Gerry R. Rubin, Department of Law,
University of Kent at Canterbury
Martin Thomas, QC, OBE, The Lord Thomas of Gresford,
London
Robert Whitaker, Research Assistant, Department of Law,
University of Kent at Canterbury

United States

Philip D. Cave, CDR, JAGC, U.S. Navy
Kathleen A. Duignan, U.S. Court of Appeals
for the Armed Forces
Eugene R. Fidell, Feldesman, Tucker, Leifer, Fidell
& Bank LLP, and President, National Institute of
Military Justice
Elizabeth Lutes Hillman, Student, Yale Law School, and
Rapporteur
Ronald W. Meister, Cowan, Liebowitz & Latman, P.C.,
New York
Prof. Michael F. Noone, Col, USAF (Ret), Catholic
University of America Law School
Prof. Mark J. Osiel, University of Iowa Law School
Gary D. Solis, LtCol, USMC (Ret), Prof of Law,
U.S. Military Academy
Dwight H. Sullivan, Managing Attorney, ACLU of Maryland
Hon. Eugene R. Sullivan III, Judge,
U.S. Court of Appeals for the Armed Forces
Prof. Donald N. Zillman, University of Maine Law School

Media Resource

Since 1996, public interest in military justice has been

unusually high as a result of a series of cases that have received sustained media attention. NIMJ has been concerned that few in the media have personal experience with the military, and hence, that there was a danger that the public would be misinformed. Particularly because serving military personnel may not be in a position to comment on pending cases, we have been increasingly looked to as an independent, knowledgeable resource for the print and electronic news media, both on background and for attribution.

Among the newspapers and magazines that have quoted NIMJ officers and advisors are *The New York Times*, *Washington Post*, *Washington Times*, *International Herald-Tribune*, *Boston Globe*, *Los Angeles Times*, *USA Today*, *Albuquerque Journal*, *Arizona Republic*, *Austin American-Statesman*, *Baltimore Sun*, *Bloomington [Ill.] Pantagraph*, *Buffalo News*, *Chicago Tribune*, *Christian Science Monitor*, *Cleveland Plain Dealer*, *[New Bern] Sun Journal*, *The [New York] Daily News*, *Dallas Morning News*, *Dayton Daily News*, *Des Moines Register*, *Florida Times-Union*, *Memphis Commercial Appeal*, *Miami Herald*, *Orange County Register*, *Ottawa Citizen*, *Palm Beach Post*, *Philadelphia Inquirer*, *Pittsburgh Post-Gazette*, *Rocky Mountain News*, *Sacramento Bee*, *San Diego Union-Tribune*, *Seattle Times*, *Tampa Tribune*, *Times-Picayune*, *Virginian-Pilot*, *Tacoma Ranger*, *Army Times*, *Legal Times*, *Stars & Stripes*, *George*, *People*, *Congressional Quarterly*, *National Journal*, and *American Journalism Review*. News services such as the Associated Press, Cox, Gannett, Hearst, Knight-Ridder, Reuters, and Scripps Howard have also quoted NIMJ officers and advisors. Our officers and advisors have appeared on many national and local television and radio programs, including National Public Radio's *All Things Considered* and *Rivera Live*, *The Diane Rehm Show*, CNN's news, *Burden of Proof*, and *Cochran & Co.*, C-Span, *Prime Time Live*, *Impact*, *Talkback Live* and *Burden of Proof*, ABC's *Good Morning America* and *Nightline*, NBC's *Today*, *Dateline News* and *Nightly News*, MSNBC, Fox News Channel, Fox 5 [WTTG] Television News, CBS's *News Up to the Minute*, WCBS Radio [New York], Radio America's *Dateline Washington*, the Canadian Broadcasting Company, and the BBC.

NIMJ's availability as a resource, as limited by our refusal to take sides on the merits of specific prosecutions, permits us to make a credible contribution to public understanding.

Bar and Scholarly Activities

NIMJ officers and advisors play active roles in bar and scholarly activities relating to military justice. In addition to working closely with the Judge Advocates Association and concerned sections and committees of the American Bar Association, they have contributed to the professional literature including published treatises and articles in periodicals such as *Naval Institute Proceedings*, *Military Law Review*, *Naval Law Review*, *Maine Law Review*, *Wake Forest Law Review*, *George Washington Law Review*, and *William & Mary Bill of Rights Journal*. NIMJ advisors, several of whom are law professors and deans, maintain active contact with the International Society for Military Criminal Law and the Law of War (based in Brussels) as well as the Inter-University Seminar on Armed Forces and Society.

Membership and Funding

NIMJ is not a membership organization and hence raises no money through dues. There is an advisory board composed of distinguished private practitioners and law professors and deans who, like the officers and directors, serve without compensation. The advisory board reflects the broad spectrum of informed opinion on military justice issues. Members of the advisory board have served in each branch of the Armed Forces.

NIMJ receives no financial assistance from the government. Contributions to NIMJ are deductible under § 501(c)(3) of the Internal Revenue Code. We received a helpful start-up foundation grant and believe we our sustained record of activities as well as our future plans, discussed below, justify substantial institutional philanthropic support.

Future Plans

Activities

NIMJ's goals for the future are realistic and achievable. We plan to continue the recurring programs noted above, including publication of the *Military Justice Gazette* and *Rules Guide*. We also hope to conduct a regular *Program on Civilian Instruction in Military Law* and to offer additional training programs both for military law practitioners and congressional staff.

More ambitiously, we believe more aggressive use of the Internet will be critical to our future programs. Creation of a high-quality home page with appropriate links to other military law websites is a high priority.

Two other key areas that warrant action are liaison with foreign practitioners and experts in military law and fostering increased course offerings in military justice by American law schools. American military justice would be enriched by comparative law studies. We also have much of value to share with other countries, particularly the emerging democracies. International seminars on comparative military justice such as the one we conducted in London in 1998, would serve both of these objectives. We are laying the groundwork for a global conference in the near term.

On a related point, it would be extremely desirable to be able to access foreign periodicals (both online and in hard copy) on a regular basis in order to monitor important military justice developments overseas and keep readers of the *Gazette* informed. This requires both research staff and funding for costly computerized research.

It is unhealthy, in a democratic society, for the military criminal justice system to be unknown territory to the civilian bench and bar, as is increasingly the case in the United States. More law schools would offer courses in military justice if there were a commercially-available textbook. NIMJ is superbly positioned to assist in or undertake such a project using valuable existing materials, including the *Sourcebook on Contemporary Comparative Military Justice* that was prepared in connection with our 1998 London Conference, as a starting point.

University Affiliation

NIMJ's center of gravity is in Washington, D.C., a city blessed with a number of highly-regarded law schools. As we move into a new range of activities and the likely need for staff, research facilities, and a serious Internet presence, affiliation with one of these law schools becomes increasingly appropriate. We plan to explore this as a high priority.

Funding

NIMJ recognizes that its plans, while modest, will require funding at a level far in excess of what it has been able to raise through voluntary contributions by individuals. This will be true even after a law school affiliation has been created, as any university will properly insist that an affiliated organization assume

responsibility for its own core expenses. Government funding is unavailable from the Legal Services Corporation, and our area of interest lies outside the ambit of other federal grant-making agencies such as the State Justice Institute. Moreover, government funding could raise a question about NIMJ's independence.

For these reasons, NIMJ intends to aggressively pursue foundation support both for specific programs and for ongoing costs.

Directors*

Eugene R. Fidell, *Chairman*
Partner
Feldesman, Tucker, Leifer, Fidell & Bank LLP
Washington, D.C.

Kevin J. Barry
Private Practice
Chantilly, Virginia

Stephen A. Saltzburg
Howrey Professor of Trial Advocacy,
Litigation and Professional Responsibility
The George Washington University Law School
Washington, D.C.

Officers

Eugene R. Fidell, *President*
Kevin J. Barry, *Secretary-Treasurer*
Stephen A. Saltzburg, *General Counsel*

* Affiliations are indicated only for the purpose of identification.

Advisory Board

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Associate Dean for Administrative Affairs
and Professorial Lecturer in Law
The George Washington University Law School
Washington, D.C.

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Partner
Brahms & Duxbury
Carlsbad, California

David J. Bright, Q.C.
Partner
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Alexander S. Nicholas
Partner
Womble Carlyle Sandridge & Rice PLLC
Winston-Salem, North Carolina
[On leave for active duty in Croatia, 1998-99]

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Professor of Law
St. Mary's University School of Law
San Antonio, Texas

Dwight H. Sullivan
Managing Attorney, Baltimore Office
American Civil Liberties Union of Maryland
Baltimore, Maryland

Donald N. Zillman
Dean and Edward Godfrey Professor of Law
University of Maine School of Law
Portland, Maine

Articles of Incorporation

OF

NATIONAL INSTITUTE OF MILITARY JUSTICE

To: Department of Consumer and Regulatory Affairs
Washington, D.C.

We, the undersigned natural persons of the age of twenty-one (21) years or more, acting as incorporators of a corporation, adopt the following Articles of Incorporation of such corporation pursuant to the District of Columbia Nonprofit Corporation Act:

FIRST: The name of the corporation is:

National Institute of Military Justice

SECOND: The term of the corporation shall be perpetual.

THIRD: The corporation is organized and operated exclusively for charitable and educational purposes within the meaning of § 501(c)(3) of the Internal Revenue Code of 1986 (or the corresponding provision of any future United States Internal Revenue law) with the purpose of advancing the administration of military justice within the Armed Services of the United States. In furtherance of this purpose, the corporation shall:

(a) organize and participate in discussions, lectures, training programs and meetings; conduct, sponsor, encourage and coordinate research; respond to media inquiries; and initiate and comment on

proposals for rule making;

(b) foster coordination and cooperation between military and civilian practitioners and among the various Armed Services;

(c) appear as a friend of the court in cases involving issues of military law;

(d) cooperate with individuals, agencies and organizations involved in the study or administration of military justice in other countries;

(e) receive and allocate contributions, within the discretion of the Board of Directors, to any organization organized and operated exclusively for charitable or educational purposes within the meaning of § 501(c)(3) of the Internal Revenue Code of 1986 (or the corresponding provisions of any future United States Internal Revenue law); and

(f) perform any other activities or services necessary or convenient to carry out such purpose, to the extent permitted by § 501(c)(3) of the Internal Revenue Code of 1986 (or the corresponding provision of any future United States Internal Revenue law).

FOURTH: The corporation shall have no members.

FIFTH: The manner by which directors shall be elected or appointed shall be as provided in the bylaws. The number of the directors shall be fixed in the bylaws, except that there shall not be

less than three (3) in number.

SIXTH: The corporation shall serve as a nonprofit corporation in furtherance of the purpose hereinabove stated, and shall have the power to solicit, accept and receive funds from any person, organization, or other entity, including but not limited to other charitable or educational organizations, profit-making corporations, and individuals.

Consistent with the purpose hereinabove stated, the corporation may exercise all powers available to corporations under the District of Columbia Nonprofit Corporation Act, subject to the restrictions, if any, contained in these Articles of Incorporation and the corporation's bylaws, including full power and authority to take and hold by bequest, devise, gift, grant, purchase, lease, or otherwise any property real, personal, tangible or intangible, or any undivided interests therein, without limitation as to amount or value, to sell, convey or otherwise dispose of any such property and to invest, reinvest, or deal with the principal or income thereof in such manner as, in the judgment of the directors, will best promote the purposes of the corporation, *provided* that no part of the net earnings of the corporation shall inure to the benefit of any director or officer of the corporation, or to any individual (except that reasonable compensation may be paid for services rendered to or for the corporation in effecting one or more of its purposes), and no director or officer of the corporation, or any individual shall be entitled to share in the distribution of any corporate assets upon dissolution of the corporation.

The corporation shall have no power to declare dividends.

No substantial part of the activities of the corporation shall consist of carrying on propaganda, or otherwise attempting to

influence legislation, and the corporation shall not in any manner participate in or intervene in (including the publication or distribution of statements) any political campaign on behalf of any candidate for public office.

Notwithstanding any other provision of these Articles of Incorporation, the corporation shall exercise only such powers and shall conduct or carry on only such activities as are consistent with the exempt status of organizations described in § 501(c)(3) of the Internal Revenue Code of 1986 (or the corresponding provision of any future United States Internal Revenue law) and the regulations thereunder (as they now exist or as they may hereafter be amended), contributions to which are deductible for federal income tax purposes.

Upon the dissolution or termination of the corporation or the winding up of its affairs, the remaining assets of the corporation shall be distributed exclusively to charitable, religious, scientific, literary, or educational organizations which then qualify as exempt organizations under the provisions of § 501(c)(3) of the Internal Revenue Code of 1986 (or the corresponding provision of any future United States Internal Revenue law) and the regulations thereunder (as they now exist or as they may hereafter be amended) which are organized and operated for a purpose that is, in the discretion of the Board of Directors, found to be consistent with that of the corporation.

If the corporation shall during any period be treated as a private foundation as defined in § 509 of the Internal Revenue Code of 1986 (or the corresponding provision of any future United States Internal Revenue law), it shall during any such period:

- (a) distribute its income for each taxable year at such

time and in such manner as not to become subject to the tax on undistributed income imposed by § 4942 of the Internal Revenue Code (or the corresponding provision of any future United States Internal Revenue law);

(b) not engage in any act of self-dealing as defined in § 4941(d) of the Internal Revenue Code (or the corresponding provision of any future United States Internal Revenue law);

(c) not retain any excess business holdings as defined in § 4943(c) of the Internal Revenue Code (or the corresponding provision of any future United States Internal Revenue law);

(d) not make any investments in such manner as to subject it to the tax under § 4944 of the Internal Revenue Code (or the corresponding provision of any future United States Internal Revenue law); and

(e) not make any taxable expenditures as defined in § 4945(d) of the Internal Revenue Code (or the corresponding provision of any future United States Internal Revenue law).

SEVENTH: The address, including street and number, of the corporation's initial registered office is 2001 L Street, N.W., Suite 300, Washington, D.C. 20036, and the name of the initial registered agent at such address is Jonathan M. Dana.

EIGHTH: The number of directors constituting the initial Board of Directors is three and the names and addresses of the

persons who are to serve as the initial directors until the first annual meeting or until their successors have been elected and qualified are:

Eugene R. Fidell
5410 Spangler Avenue
Bethesda, Maryland 20816

Kevin J. Barry
13406 Sand Rock Court
Chantilly, Virginia 22021

Stephen A. Saltzburg
720 20th Street, N.W.
Washington, D.C. 20052

NINTH: The name and address, including street and number, of each of the incorporators of the corporation, each of whom is over the age of 21, is:

Eugene R. Fidell
5410 Spangler Avenue
Bethesda, Maryland 20816

Kevin J. Barry
13406 Sand Rock Court
Chantilly, Virginia 22021

Stephen A. Saltzburg
720 20th Street, N.W.
Washington, D.C. 20052

IN WITNESS WHEREOF, the incorporators have signed these Articles of Incorporation this 2nd day of October, 1991.

(SIGNED)
Eugene R. Fidell

(SIGNED)
Kevin J. Barry

(SIGNED)

Stephen A. Saltzburg

I certify that on the 2d day of October, 1991, Eugene R. Fidell and Kevin J. Barry personally appeared before me, signed the foregoing Articles of Incorporation, and stated under oath that the statements contained therein are true.

[SEAL]

(SIGNED) _____

Sheila J. Wilson

Notary Public

My commission expires

Feb. 28, 1995

I certify that on the 2d day of October, 1991, Stephen A. Saltzburg personally appeared before me, signed the foregoing Articles of Incorporation, and stated under oath that the statements contained therein are true.

[SEAL]

(SIGNED)

Norma S. Lamont

Notary Public

My commission expires

June 14, 1993

Bylaws

OF

NATIONAL INSTITUTE OF MILITARY JUSTICE
A District of Columbia Nonprofit Corporation

Article I

Name

The name of the corporation is National Institute of Military Justice.

Article II

Purposes of the Corporation

Section 1. The corporation has been organized to operate exclusively for charitable and educational purposes within the meaning of § 501(c)(3) of the Internal Revenue Code of 1986 (or the corresponding provision of any future United States Internal Revenue law) for the purpose of advancing the administration of military justice within the Armed Services of the United States. In furtherance of that purpose, the corporation may undertake such activities as are authorized by its Articles of Incorporation and the laws of the District of Columbia to the extent permitted by § 501(c)(3) of the Internal Revenue Code of 1986 (or corresponding provision of any future United States Internal Revenue law) including, but not limited to:

(a) organize and participate in discussions, lectures, training programs and meetings; conduct, sponsor, encourage and coordinate research; respond to media inquiries; initiate and comment on proposals for rule making;

(b) foster coordination and cooperation between military and civilian practitioners and among the various Armed Services;

(c) appear as a friend of the court in cases involving issues of military law;

(d) cooperate with individuals, agencies and organizations involved in the study or administration of military justice in other countries;

(e) receive and allocate contributions, within the discretion of the Board of Directors, to any organization organized and operated exclusively for charitable or educational purposes within the meaning of § 501(c)(3) of the Internal Revenue Code of 1986 (or the corresponding provisions of any future United States Internal Revenue law); and

(f) perform any other activities or services necessary or convenient to carry out such purpose, to the extent permitted by § 501(c)(3) of the Internal Revenue Code of 1986 (or the corresponding provision of any future United States Internal Revenue law).

Section 2. The corporation shall not participate in, or

intervene in (including the publishing or distributing of statements) any political campaign on behalf of any candidate for public office. No substantial part of the activities of the corporation shall consist of carrying on propaganda, or otherwise attempting to influence legislation, except to the extent permitted by law for nonprofit tax-exempt organizations.

Section 3. Notwithstanding any provision in these bylaws or in the corporation's Articles of Incorporation, the corporation shall not carry on any activities not permitted to be carried on by an organization exempt from Federal income tax under § 501(a) of the Internal Revenue Code of 1986 as an organization described in § 501(c)(3) of such Code (or the corresponding provisions of any future United States Internal Revenue law).

Section 4. No officer, director, or employee of, or member of a committee of or person connected with, the corporation, or any other private individual, shall receive at any time any of the net earnings or pecuniary profits from the operations of the corporation; provided, that this shall not prevent the payment to any such person of such reasonable compensation for services rendered to or for the corporation in effecting any of its purposes as shall be fixed by the Board of Directors (other than to officers or directors for services in their capacities as such); and no such person or persons shall be entitled to share in the distribution of any of the corporate assets upon the dissolution of the corporation. All directors and officers of the corporation shall be deemed to have expressly consented and agreed that, upon such dissolution or winding up of the affairs of the corporation, after all debts have been satisfied, such assets then remaining in the hands of the Board of Directors shall be distributed, transferred, conveyed, delivered and paid over, in such amounts as the Board of Directors may determine or as may be determined by a court of competent

jurisdiction upon application of the Board of Directors, exclusively to charitable, religious, scientific, literary or educational organizations which would then qualify under the provisions of § 501(c)(3) of the Internal Revenue Code of 1986 and its regulations as they may exist or as they may hereafter be amended, provided, however, that the purpose of any such organization must be found, in the discretion of the Board of Directors, to be consistent with the purposes of the corporation.

Section 5. In the event of termination, dissolution, or winding-up of the corporation, in any manner or for any reason whatsoever, its remaining assets, if any, shall be distributed to (and only to) one or more organizations described in § 501(c)(3) of the Internal Revenue Code of 1986, as amended (or the corresponding provisions of any future United States Internal Revenue law).

Section 6. The powers and purposes of the corporation shall at all times be so construed and limited to enable the corporation to qualify as a nonprofit corporation organized and existing under District of Columbia law.

Article III

Offices and Registered Agent

Section 1. Offices. The corporation shall continuously maintain in the District of Columbia a registered office at such place as may be designated by the Board of Directors. The principal office of the corporation shall be in Washington, D.C. The corporation may have such other offices either within or without Washington, D.C. as the Board of Directors may from time to time determine.

Section 2. Agent. The corporation shall continuously maintain within the District of Columbia a registered agent, who shall be designated by the Board of Directors.

Section 3. Changes. Any change in the registered office or registered agent of the corporation shall be accomplished in compliance with the District of Columbia Nonprofit Corporation Act and as provided in these bylaws.

Article IV

Board of Directors

Section 1. General Powers and Duties. The affairs and property of the corporation shall be managed, controlled and directed by a Board of Directors. The Board of Directors shall have, and may exercise, any and all powers provided in the Articles of Incorporation or the District of Columbia Nonprofit Corporation Act which are necessary or convenient to carry out the purposes of the corporation.

Section 2. Composition of the Board of Directors.

(a) The number of directors constituting the Board of Directors shall be fixed by resolution of the Board of Directors, but shall not be less than three.

(b) Any vacancy in the Board of Directors, including a vacancy caused by the expiration of a director's term or by an increase in the number of directors comprising the Board, shall be filled by the affirmative vote or a majority of the remaining directors in office, even though less than a quorum.

(c) A director may resign at any time by giving notice thereof in writing to the Chairman.

(d) A director may be removed, with or without cause, by a majority vote of the other directors in office.

(e) The Board of Directors, at its first regular meeting, and from time to time thereafter, shall elect, by majority vote, one director as Chairman, and may elect one director as Vice-Chairman, each to serve at the pleasure of the Board. The Chairman of the Board of Directors shall preside at all meetings of the Board of Directors at which he or she is present, and shall perform such other duties as may be required of him or her by the Board of Directors. The Vice-Chairman of the Board of Directors shall, in the absence of the Chairman, preside at its meetings and shall perform such other duties as may be required of him or her by the Board of Directors.

Section 3. Meetings of the Board of Directors.

(a) Regular meetings of the Board of Directors shall be held at least once each year. Special meetings shall be called at the discretion of the Chairman, at the request of one-third of the

directors in office, or at the request of the President. The last regular meeting of the Board of Directors in each fiscal year shall constitute its annual meeting.

(b) The time and place of all meetings of the Board of Directors shall be designated by the Chairman. The meetings may be held within or without the District of Columbia.

(c) At least ten days' notice shall be given to each director of a regular meeting of the Board of Directors. A special meeting of the Board of Directors may be held upon notice of five days. Notice of a meeting of the Board of Directors shall specify the date, time, and place of the meeting, but, except as provided in Article IX of these bylaws, need not specify the purpose for the meeting or the business to be conducted. Notice must be either delivered personally to each director or mailed (including the sending of a telegram) to his or her business address. If such notice is given by mail, it shall be deemed delivered when deposited in the United States mail properly addressed and with postage prepaid thereon. If such notice is given by telegram, it shall be deemed delivered when the content of the telegram is delivered to the telegraph company. Notwithstanding the foregoing, a director may waive notice of any regular or special meeting of the Board of Directors by written statement filed with the Board of Directors, or by oral statement at any such meeting. Attendance at a meeting of the Board of Directors shall also constitute a waiver of notice, except where a director states that he or she is attending for the purpose of objecting to the conduct of business on the ground that the meeting was not lawfully called or convened.

(d) One-third of the number of directors as fixed pursuant to these bylaws shall constitute a quorum for the transaction of business at any meeting of the Board of Directors, except that if a

quorum is not present at a meeting, a majority of the directors present may adjourn the meeting to another time, without further notice.

(e) Except as otherwise provided by law, the Articles of Incorporation, or these bylaws, all matters before the Board of Directors shall be decided by a majority vote of the directors present at a meeting at which a quorum exists.

(f) Any action required or permitted to be taken at any meeting of the Board of Directors may be taken without a meeting if the text of the resolution or matter agreed upon is sent to all the directors in office and all the directors in office consent to such action in writing, setting forth the action taken. Such consent in writing shall have the same force and effect as a vote of the Board of Directors at a meeting and may be described as such in any document executed by the corporation.

(g) Any or all directors may participate in a meeting of the Board of Directors, or a committee of the Board of Directors, by means of conference telephone or by any means of communication by which all persons participating in the meeting are able to hear one another, and such participation shall constitute presence in person at the meeting.

Article V

Committees

The Board of Directors may create committee(s) consisting of directors or other persons, which committee(s) shall have such authority as the Board of Directors may by law and these bylaws direct.

Article VI

Officers

Section 1. The officers of the corporation shall be a President, a Secretary-Treasurer, a General Counsel and such other offices as may from time to time be deemed advisable by the Board of Directors. Officers shall be chosen by the Board of Directors. Officers may, but need not, be directors. One person may hold more than one office, except that the same person may not serve as both President and Secretary-Treasurer.

Section 2. All officers of the corporation shall hold office for such terms and shall exercise such powers, perform such other duties and receive such compensation as shall be determined from time to time by the Board of Directors.

Section 3. The officers of the corporation shall hold office until their successors are chosen and qualified. Any officer of the corporation may be removed at any time by a majority of the directors in office. Any vacancy occurring in any office of the corporation may be filled by the Board of Directors.

Section 4. The President, Secretary-Treasurer, General Counsel and such other officers as may be authorized by the Board of Directors may enter into and execute on behalf of the corporation contracts, leases, debt obligations and all other forms of agreements or instruments, whether under seal or otherwise, permitted by law, the Articles of Incorporation and these bylaws except where such documents are required by law to be otherwise signed and executed, or where the signing and execution thereof shall be exclusively delegated to some other officer or agent of the

corporation.

Section 5. The duties and powers of the officers of the corporation shall be as provided in these bylaws, or as provided pursuant to these bylaws or (except to the extent they are inconsistent with these bylaws or with any provision made pursuant hereto) shall be those customarily exercised by corporate officers holding such offices.

Section 6. The President. The President shall be the chief operating officer of the corporation and, subject to the control of the Board of Directors, shall perform all duties customary to that office and shall supervise and control all of the affairs of the corporation in accordance with any policies and directive approved by the Board of Directors. The President shall have the power to change the registered agent and registered office of the corporation.

Section 7. The Secretary-Treasurer. The Secretary-Treasurer shall be responsible for keeping an accurate record of the proceedings of all meetings of the Board of Directors, and such other actions of the corporation as the Board of Directors shall direct. He or she shall give or cause to be given all notices in accordance with these bylaws or as required by law, and, in general, perform all duties customary to the office of secretary. The Secretary-Treasurer shall have custody of the corporate seal of the corporation and he or she, or some designated assistant, shall have authority to affix the same to any instrument requiring it and, when so affixed, it may be attested by his or her signature or by the signature of such assistant secretary. The Board of Directors may give authority to any officer to affix the seal of the corporation and to attest the affixing by his or her signature.

The Secretary-Treasurer shall also perform all duties customary to the office of treasurer, shall have the custody of and be responsible for all corporate funds and securities and shall keep full and accurate accounts of receipts and disbursements in the books of the corporation. He or she shall deposit or cause to be deposited all monies or other valuable effects in the name of the corporation in such depositories as shall be selected by the Board of Directors. The Secretary-Treasurer shall disburse the funds of the corporation as may be ordered by the Board of Directors, or its delegate, taking proper vouchers for such disbursements, and shall render an account of all his or her transactions and of the financial condition of the corporation to the President and the Board of Directors at its regular meetings or when the Board of Directors so requires.

Section 8. The General Counsel. The General Counsel shall be the corporation's principal legal advisor.

Article VII

Indemnification

Section 1. Unless expressly prohibited by law, the corporation shall indemnify any person made a party to an action, suit or proceeding (whether civil, criminal, administrative or investigative) by reason of the fact that such person is or was a director, officer, employee or agent of the corporation or serves or served any other enterprise at the request of the corporation, against all expenses (including attorneys' fees), judgments, fines and amounts paid or to be paid in settlement incurred in connection with such action, suit or proceeding, except in relation to matters as to which he or she shall be adjudged in such action, suit or proceeding to be liable for gross negligence or misconduct in the performance of a duty.

Article VIII

Miscellaneous Provisions

Section 1. Seal. The seal of the corporation shall be circular in form and shall have inscribed thereon the words: "National Institute of Military Justice," "District of Columbia," and "Corporate Seal".

Section 2. Checks. All checks, drafts, or other orders for the payment of money shall be signed by such officer or officers or such other person or persons as the Board of Directors may from time to time designate.

Section 3. Fiscal Year. The fiscal year of the corporation shall be determined by resolution of the Board of Directors.

Article IX

Amendments

Section 1. Amendment of Bylaws. These bylaws may be altered, amended or repealed, or new bylaws may be adopted, at any meeting of the Board of Directors, by a vote of a majority of the directors in office, if at least ten days' written notice is given of the intention to take such action at such meeting.

Section 2. Amendment of Articles of Incorporation. The Articles of Incorporation may be altered or amended, or new Articles adopted, at any meeting of the Board of Directors, by a vote of a majority of the directors in office, if at least ten days' written notice is given of the intention to take such action at such meeting.

(SIGNED)
Eugene R. Fidell

(SIGNED)
Kevin J. Barry

(SIGNED)
Stephen A. Saltzburg

Dated: October 2, 1991