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1998 DIRECTORY OF CIVILIAN PRACTITIONERS OF MILITARY LAW

Following is the 1998 directory of civilian attorneys who practice military law on a regular basis. Some of those listed may not practice before courts-martial, but will handle non-criminal military or veterans matters. NIMJ publishes this directory as a public service. Inclusion in the directory implies *no endorsement* by NIMJ or any other organization. Please advise us of any corrections or changes.

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JUDGE ADVOCATES ASSOCIATION

The Judge Advocates Association will be conducting its 1st Annual Military Administrative Law Conference on October 14-16, 1998, at the Marvin Center, George Washington University, Washington, D.C. The program is co-sponsored by GWU's National Law Center. For further information contact the JAA, 6800 Chapins Rd., Bloomsburg, PA 17815-8751, tel (717) 752-2027, fax (717) 752-2097, E-mail jaasn@sunlink.net.

JOINT SERVICE COMMITTEE

The Joint Service Committee on Military Justice will hold a public meeting on proposed changes to the *Manual for Courts-Martial* at 2:00 p.m., Wednesday, July 15, Rm. 808, 1501 Wilson Blvd., Arlington, VA 22209-2403. The proposed changes appear at 63 FED. REG. 25,835. **President Clinton** signed other changes on May 27. 63 FED. REG. 30,065.

NIMJ

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CAPITOL HILL

Senators **Sessions** and **DeWine** have introduced S. 768, the "Military and Extraterritorial Jurisdiction Act of 1999." The measure, which reflects the work of the Overseas Jurisdiction Advisory Committee to the Secretary of Defense, was referred to the Judiciary Committee, establishes court-martial jurisdiction over Department of Defense civilian employees and employees of DOD contractors who are serving with and accompanying the armed forces during contingency operations. It also establishes civilian federal jurisdiction over crimes committed outside the United States by former members of the armed forces as well as civilians employed by or accompanying the armed forces outside the United States. Anyone (other than one who is a national of or ordinarily resident in the host nation) who resides with or is a dependent of (1) a member of the armed services, or (2) a civilian employee of DOD or of a military department, or (3) a civilian employee of a DOD contractor, is deemed to be accompanying the armed forces. If the host nation has prosecuted or is prosecuting the accused, the approval of the Attorney General of the United States or the Deputy Attorney General is required before a United States civilian prosecution could proceed. Civilian trials would be held in the judicial district where the offender first appears when returned to the United States. Explanatory statements by the two sponsors appear in the April 13, 1999 *Congressional Record* at pp. S3634-36.

MOMS

We learn from the latest issue of *The Military Monitor* that MOMS is winding up its affairs. "As of the

end of 1999, MOMS will cease to operate unless members come forth to accept offices." The last meeting is currently scheduled to be held in Las Vegas on September 26-28, 1999. For further information contact **Carolyn Dock** at (301) 694-3668.

BOOKSHELF

1. Chief Judge **Walter T. Cox III**, *The Twenty-Seventh Annual Kenneth J. Hodson Lecture: Echoes and Expectations: One Judge's View*, 159 MIL. L. REV. 183 (1999). In this important speech, Chief Judge Cox supports tenure for military judges and calls for an independent judiciary along the lines he proposed at the 1993 United States Court of Appeals for the Armed Forces Judicial Conference. While urging that commanders continue to be part of the military justice system, he questions their current involvement in such functions as member selection—an involvement he describes as "difficult to explain."

2. Lt Gen **John H. Cushman**, USA (Ret), *Who Should Have Tried Captain Ashby?*, 125 NAV. INST. PROC., May 1999, at 6 (Aviano-related court-martial could have been convened by officers in the operational chain of command, but arguing that the interest in preserving good relations with Italy and other European allies and in avoiding charges of improper command influence support the operational chain of command's decision not to become involved in the court-martial process).

AMERICAN BAR ASSOCIATION

The Standing Committee on Armed Forces Law (SCAFL) met on May 1, 1999 (Law Day) at the Navy Submarine Base at Groton, CT. Among the items of most significance to M.J. Gaz. readers are the following:

The SCAFL reviewed the question of judicial review of military personnel administrative actions. There are no proposals for change pending, and the Committee will continue to monitor the issue.

The Committee is communicating with the services (most immediately the Army) on the implementation of regulations to provide counsel to military members sentenced to death who wish to seek habeas review of their convictions in federal district court. Regulations

are expected soon.

The Committee will continue to monitor plans in other services to implement judicial tenure rules similar to those recently implemented by the Army. The Army established a 3-year tenure period for military judges.

The SCAFL adopted in concept a Report and Recommendation calling for "a diverse and broadly constituted Commission to thoroughly and comprehensively review the military justice system," which has been frequently changed during its 50-year existence, and which has not been the subject of congressional hearings since 1983. The Committee will forward the recommendation to the ABA House of Delegates for consideration at the Annual Meeting in Atlanta in August 1999.

A Report and Recommendation calling for random selection of court-martial panel members was tabled pending receipt of the DOD report to Congress. DOD's report is now due on August 31, 1999. The issue is currently being reviewed by the Joint Service Committee.

The SCAFL's next meeting will be on August 7, 1999 in Atlanta. Committee meetings are open to the public. For further information contact **Stephanie Park**, ABA Staff, 312-988-5604.

The *Gazette* plans to publish in July a list of the times and locations of military-related meetings at the ABA's Annual Meeting.

LONDON

On March 31, 1999, the Court-Martial Appeal Court (in an opinion by **Burton, J.**) handed down the judgment in *R. v. Cooney*, *R. v. Allam* and *R. v. Wood*, each of which concerned the sentencing of military personnel convicted by court-martial of civilian offenses. The decision notes that loss of employment, subsidized housing, pensions, severance payments and the like was a possible but not automatic result of conviction in a civilian court. The court thought that one of the appellants might well not have lost his job following a civilian conviction, and that the other two would have been unlikely to lose their pensions, lump sum payments and/or redundancy payments. The court therefore thought that the financial consequences of dismissal from the service should be presented to the court-martial prior to sentencing. The court also commented on why sentences might differ

between civilian and military courts, and set out seven questions which courts-martial should consider when sentencing.

Gilbert Blades represented Sgt. Cooney and Cpl. Allam; **David Howell** represented Master Air Crew Wood.

For a link to the *Sunday Times's* report of the case see <www.court-martial.com>.



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EAST CAPITOL STREET

On May 17, 1999, in an opinion by Justice **Souter**, the Supreme Court unanimously reversed the decision of the Court of Appeals for the Armed Forces in *Clinton v. Goldsmith*. The decision can be accessed through the <www.court-martial.com> website.

NECROLOGY

Colonel **Cliff Dougherty**, USAF (Ret), recently passed away. Cliff was a stalwart of the Judge Advocates Association as well as the George Washington University Law School, which he served as alumni director for many years. In an email to friends, **Kevin Barry** wrote:

"It is with a sense of great loss and personal regret that I send along . . . notice about Cliff Dougherty from today's *Washington Post* Obituary Page. Cliff was my friend—and there was no greater or more faithful supporter of the military bar than he. Through three careers, he served others with faith and fortitude, and never failed to challenge and inspire us all to reach further and to work harder—always in pursuit of a goal beyond ourselves, always in support of the good of the order. Those of us who knew him are measurably better because he walked with us here; because of him and his influence, this is a better world. But then you all knew him, and you all know that. God Bless you Cliff."

NIMJ

NIMJ is very pleased to announce that **David J. Bright**, Q.C., of the Nova Scotia Bar, has been named to the Advisory Board. Mr. Bright is the first foreign member of the board.

GUEST ESSAY

Courts-Martial on Film

By Charles W. Brooks

Given the obvious appeal and dramatic structure of a court-martial, one would expect that it would have been a popular subject for film makers. In fact it has not.

The basic reason for the dearth of court-martial films is the fairly strict limitations of the genre, namely, that courtroom dramas begin with a crime and end with a trial.

Certainly, the big emotional motivations suitable for the crime (love, sex, blackmail, revenge, and money—well, maybe not money) are found in the military. But there is a greater range of plot potential on these issues in civilian life. Even for issues which are common to military and civilian society, a court martial offers fewer possibilities for dramatic action than a trial. Discrimination against homosexuals, for example, occurs both in the service and in law firms. And conceivably **Jonathan Demme's** 1993 *Philadelphia*, for which **Tom Hanks** received an Academy Award, could have been a court-martial rather than a trial of a civil complaint. But the more structured life in the military and the comparative rigidity of its rules would have made for a less compelling drama. Moreover, now that there is no longer a draft, most screen writers have never experienced military service themselves, which makes writing about it harder.

Then there is the trial. The dramatic possibilities are far more circumscribed in courts-martial than in civilian courts. Attorney behavior is different when arguing to officers than when arguing to juries. It is unlikely, for example, that **Orson Welles** would have **Clarence Darrow's** big courtroom speech to deliver in the 1959 film *Compulsion* about the Leopold and Loeb case had Leopold and Loeb been tried in a military court. Of course, defendants can be innocent in both courts. But the other stock characters in courtroom dramas are harder to reproduce in the service. One is the reckless, zealous, unscrupulous, ambitious, obsessed, or otherwise unsympathetic prosecutor. He appears, for example, in the two film versions of **Theodore Dreiser's** *An American Tragedy*, **Josef von Sternberg's** 1931 *An American Tragedy*, which concentrated on the trial, and **George Stevens'** celebrated but slower 1951 version, *A Place in the Sun*, which concentrated on the characters, and in **Mervyn LeRoy's** still-galvanizing 1937 *They Won't*

Forget, based on the Leo Frank case (in deference to the presumed demands of audience appeal at the time, the Leo Frank character is still Northern, but not Jewish). None of these prosecutors would be likely in a military court. Even less likely would be the corrupt or compromised judge of such recent films as *The Verdict* and *Presumed Innocent*. These characters also make for worse box office when they are in uniform, since while audiences will clearly believe anything about lawyers, the military in this country has generally been respected, and the audience generally expects some good guys in officers' uniforms.

The British do not have the same expectations for the British Army, which is often portrayed negatively on film. Britain being Britain, that negativism is often really about class. The expatriate American director **Joseph Losey**, for example, directed several brilliant dissections of British society in the 1960s, among them *The Servant* in 1963 and *Accident* in 1967, both written by **Harold Pinter**. In between, he made his less brilliant and more conventional 1965 *King and Country*, in which **Tom Courtney** is court-martialed and executed for desertion in World War I. There is also the 1980 *Breaker Morant*, sensitively directed by the Australian **Bruce Beresford**, and based on a true incident during the Boer War in which three Australian officers were court-martialed on trumped-up charges and executed to save the honor of British imperialism.

As *King and Country* suggests, the muse has regularly deserted directors when they made court-martial films. Courts-martial do not seem to bring out the best in film makers, even though some of the best of them have given it a try. **Otto Preminger's** 1955 *The Court-Martial of Billy Mitchell*, with **Gary Cooper** as the early proponent of air power, never really takes off and was one of the weaker efforts from Preminger's great decade that went on to such films as *Exodus* and *Anatomy of a Murder* a few years later. And in 1960, **John Ford** made a court-martial film, *Sergeant Rutledge*, with a fine performance by **Woody Strode** as an African-American cavalry officer (falsely) accused of rape and murder after the Civil War (the film is his court martial with the story told in flashbacks). Again this is an example of a film which really never comes alive and of a great director on a less than great day. Ford was clearly more comfortable with the cavalry (and **John Wayne**) on horses in Monument Valley than on chairs in a courtroom.

The two court-martial films most people probably remember are *The Caine Mutiny*, because it was memorable, and *A Few Good Men*, because it was too recent to have already been forgotten.

A Few Good Men, **Aaron Sorkin's** play-into-film directed by **Rob Reiner**, remained a play at heart and in

structure. There is an Act I mystery unraveled by the always engaging but (at least to this civilian) improbably JAG attorney **Tom Cruise** and a big Act III courtroom climax, carried off, at least while you were watching it, by **Jack Nicholson's** chewing up the courtroom with his over-the-top "you can't handle the truth" rant.

It is not clear how long *A Few Good Men* will remain on video store shelves. But there is at least one court-martial film whose place in the Classics Section of Tower Video is assured. Based on the Pulitzer Prize winning novel and play by **Herman Wouk** and directed by the rehabilitated Hollywood Ten director **Edward Dymtryk**, *The Caine Mutiny* was brought to vivid screen life in 1954 by a brilliant cast at the top of their form. **Fred MacMurray** used his patented sleazy spinelessness to great effect as Lieutenant Tom Keefer, the ultimate *Caine* mutineer, and **Jose Ferrer**, as defense counsel Lieutenant Barney Greenwald who could see beyond the adversarial system, and **Humphrey Bogart**, unforgettably acting against type as the strawberry-obsessed Captain Queeg, have never been better. (Bogart was nominated for best actor, but lost to **Marlon Brando** in *On The Waterfront*.) But beyond its numerous obvious strengths, *The Caine Mutiny* also had accuseds who were at the same time legally innocent (satisfying dramatic convention) and morally guilty (satisfying national honor), which allowed it to pass patriotic muster to popularity in the early 1950s.

Charles W. Brooks is a career Justice Department prosecutor. Before becoming an attorney, he taught film history at Harvard and Oxford Universities.

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DIRECTORY OF CIVILIAN PRACTITIONERS: UPDATE

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EAST CAPITOL STREET

On March 8, 1999, the Supreme Court granted certiorari in *Smith v. Robbins*, No. 98-1037. The Ninth Circuit affirmed a district court's finding that counsel did not comply with *Anders v. California*, 368 U.S. 738 (1967), by filing a brief that "completely failed to identify any grounds that arguably supported an appeal. Rather, it briefly summarized the procedural and historical facts of the case and requested that the state appellate court 'independently review the entire record for arguable issues.'" *Quaere*: does this case have implications for the submission of "merits" briefs in court-martial appeals?

NIMJ

We received a number of comments in response to the fine essay by **Charles W. Brooks** on "Courts-Martial on Film." Several readers suggested **Stanley Kubrick's** 1957 "Paths of Glory," which was based on a novel by **Humphrey Cobb** which, NIMJ Advisory Board member Prof. **Michael F. Noone** advises, was itself based on a real incident in World War I. Mike also suggests the 1970 made-for-television movie "The Andersonville Trial," which starred **George C. Scott**. Andersonville was a Confederate prison camp during the War Between the States. Col. **Tom Becker** mentioned as "one of the best portrayals of a court-martial" an episode in a little-known but critically acclaimed early-1980s television show called "Call to Glory." **Craig T. Nelson** played Col. Raynor Sarnac, a 1960s Air Force pilot. "In the court-martial episode, [he] was president of a GCM that tried an Air Force helicopter pilot for refusing an order to return to Soviet control a Soviet sailor who had jumped ship and tried to defect when pulled from the sea by the Air Force helicopter. [Sounds like the 1970 **Simas Kudirkas** incident described in **Algis Ruksenas, Day of Shame** (McKay 1973) □Ed.] The details were great □right down to the tacky ad hoc furnishings of the typical Air

Force courtroom of the time. There was no military judge of course but a law officer just like the UCMJ called for at the time, and the episode accurately portrayed the limited powers of the law officers in contrast to those of the court president."

THE INTERNET

1. A pr—cis of the decision of the Constitutional Court of South Africa on the legality of a ban on military unions, *South African National Defence Force Union v. Minister of Defence*, No. 27/98, is on the web at www.law.wits.ac.za/judgements/1999/sandusum.html.

2. For the anthrax controversy see www.dallasnw.quik.com/cyberella/Anthrax/Chron_Info.html.

BOOKSHELF

Prof. **Michael F. Noone** sends this interesting sighting: **Fred L. Borch III, Bolsheviks, Polar Bears, and Military Law: The Experiences of Army Lawyers in North Russia and Siberia in World War I**, PROLOGUE 30 (Fall 1998), at 180-91.

GEE, TOTO

The collateral effects of conviction by court-martial are one of the least-understood aspects of military justice. A recent illustration involves the Kansas Supreme Court's April 16, 1999 decision in *Huet-Vaughn v. Kansas State Board of Healing Arts* in the wake of *United States v. Huet-Vaughn*, 43 M.J. 105 (1995), *cert. denied*, 116 S. Ct. 922 (1996):

ABBOTT, J.: Plaintiff Yolanda Huet-Vaughn, a licensed physician, was publicly censured and assessed an administrative fine of \$5,000 by the Kansas State Board of Healing Arts (Board). That order was affirmed by the Shawnee County District Court. Plaintiff appealed and the appeal was transferred to this court pursuant to K.S.A. 20-3018(c).

Plaintiff was a Captain in the United States Army Reserve Medical Corps, and her reserve unit was ordered to active duty in response to "Operation Desert Shield." Plaintiff left her military unit without authorization to avoid deployment to the military conflict.

Plaintiff was found guilty by general court-martial of "desertion with intent to avoid hazardous duty and shirk important service." Plaintiff was initially sentenced to total forfeiture, dismissal from service, and confinement for 30 months. Confinement was reduced to 15 months. Subsequently, the Secretary of the Army remitted 7 months of confinement after plaintiff had served 240 days of her sentence.

The Board concluded in its final order that plaintiff's military conviction was a conviction for which punishment is comparable to that for a felony conviction by the State of Kansas and that plaintiff was subject to

discipline under the Kansas Healing Arts Act (Act) (K.S.A. 65-2801 *et seq.*). The Board disciplined plaintiff under K.S.A. 65-2836(c) ("The licensee has been convicted of a felony or class A misdemeanor, whether or not related to the practice of the healing arts."). The sole issue raised by plaintiff on appeal is whether her military conviction constitutes a felony within the meaning of the Act.

A number of people and organizations have joined the *amici curiae* brief. This brief primarily expresses concern for the denial of plaintiff's defense on a conscientious objector basis. The issue of plaintiff's intent and her status, or lack thereof as a conscientious objector, is not relevant to the issue presently before this court, as such matters go to the propriety of the conviction rather than to the legal consequences of the conviction.

The Board raises a jurisdictional issue. The Board contends that plaintiff acquiesced in the judgment by paying the fine imposed upon her by the Board. The Board found plaintiff violated K.S.A. 65-2836(c), and that because of that violation of the Act, plaintiff could be assessed an administrative fine in an amount not to exceed \$5,000 pursuant to K.S.A. 65-2863a. She could also be publicly censured, as provided by K.S.A. 65-2836, for the same violation (among other penalties).

We emphasize that this appeal goes solely to the violation of K.S.A. 65-2836(c) and not to the individual penalties authorized by K.S.A. 65-2863a and 65-2836. If we should agree with plaintiff that her court martial conviction and sentence are not violations of K.S.A. 65-2836(c), then *both* statutory penalties must be reversed. We believe it is important to keep this point in mind as we review the facts of this case and this court's prior decisions. . . .

Plaintiff did not apply to the Kansas Court of Appeals for a stay of the fine. Instead, she paid the fine on March 5, 1998. She did so by letter stating in pertinent part:

"While I continue to appeal your decision to fine and reprimand me for my decision, seven years ago, to not support the Persian Gulf War I have also been informed by my attorney Don Strole that you have denied deferment of the payment of the 5,000.00 dollar fine which you levied last March. I also understand that you may carry out further disciplinary action against me unless this fine is paid by March 6, 1998. For these reasons, and these reasons alone, I am making full payment of this fine today March 4, 1998. The payment of this fine is not meant in any way to concede the validity, correctness or legitimacy under the law of your disciplinary actions against me.

....

"While I will continue my legal appeal of your decision to reprimand and fine me, I hope you can agree to allow me to apply the 5000.00 dollar fine monies to these charitable medical relief and research efforts. It is, of course, your decision to either keep the fine money or waive that fine in order to allow for this humanitarian alternative. If you elect to keep these monies I will expect their return in the event that the courts overturn your decision to *reprimand and fine* me as I fully anticipate they will." (Emphasis added.)

On appeal, plaintiff was obviously attempting to overturn the violation of K.S.A. 65-2836(c), which led to her reprimand and administrative fine. She does not contend error concerning the reprimand or administrative fine, other than her contention that her court martial conviction is not a violation of K.S.A. 65-2836(c) and, therefore, she could be neither administratively fined nor reprimanded. This becomes important because the Board contends plaintiff's appeal is moot because she acquiesced in the judgment by paying the fine. . . .

In the appeal before us, plaintiff could have used the money which she used to pay the administrative fine to post a supersedeas bond. In any event, she could have applied to the Kansas Court of Appeals (the court having jurisdiction when the administrative fine was paid) for a stay under K.S.A. 60-262(b), which she could have done without cost. Plaintiff failed to request either a stay or to post a supersedeas bond from the only court having jurisdiction over her appeal. Thus, plaintiff is reduced to arguing that her attorney advised her to pay the fine. She requested a stay from the Board, and the Board informed her it had no jurisdiction to grant a stay, but it would pay the fine back if the decision was reversed on appeal.

Plaintiff, at all times, was represented by competent and experienced counsel. A majority of this court holds that plaintiff acquiesced in the judgment by paying the fine because she could have posted a supersedeas bond. In addition, although not necessary to our decision, plaintiff could have obtained a stay, in all likelihood, without having to post a supersedeas bond if she had applied to the Kansas Court of Appeals for a

stay.

Appeal dismissed.

SIX, J., dissenting: Dr. Huet-Vaughn has not acquiesced in the determination of her censure. . . The court should address the military conviction-censure issue.

LOCKETT, J., joins in the foregoing dissent.



NIMJ is a District of Columbia nonprofit corporation founded in 1991. We receive no government funding. Contributions to NIMJ are tax-deductible. Please circulate M.J. Gaz. to friends and colleagues who are interested in military justice. If you are not on the mailing list but would like to be, let us know. We welcome suggestions and information about coming events and useful web sites for inclusion in the *Gazette*.

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The Court of Appeals for the Armed Forces has added to its website an opinion digest for the 1999 Term of Court. This is a major reform, and should be welcomed by all who have been frustrated by the inadequacies of West's *Military Justice Digest*. The Court's digest may be found at this URL: www.armfor.uscourts.gov/1999Dig.htm.

The Court has also proposed changes to Rules 9(d), 30(e), 36, and 39, and the addition of a new Rule 36A. The changes affect the filing and service of pleadings, and the citation of additional authorities by analogy to FED. R. APP. P. 28(j). The full text may be found at 64 FED. REG. 35,633-34 (July 1, 1999), and online at www.freeyellow.com/members5/uppmli/fedregcaaf.html.

PROFESSIONAL MEETINGS

October promises to be a busy month for military justice mavens. In addition to the Judge Advocates Association's and ABA's Military Administrative Law Conference (Oct. 18-21) and Walter T. Cox III Military Legal History Symposium (Oct. 22), to be held at Ft. Myer's Spates Hall, the Inter-University Seminar on Armed Forces and Society will hold its biennial meeting on Oct. 22-24 at the Tremont Ho-tel, Baltimore.

Saturday, October 23, 8:30 to 10 a.m., Panel on *Crime and Punishment in the Armed Forces* chaired by NIMJ Advisory Board member **Donald N. Zillman** (University of Maine), with Advisory Board member **Michael F. Noone** (Catholic University) as discussant. Paper titles include "Soldiers' Perceptions of Leaders' Adherence to the Army Code of Service, Integrity and Morality: Active Duty, U.S. Army Reserve, and National Guard" (**Durand, Teitelbaum, Pehrson & Hawkins**), "Maintaining Discipline in Peace Operations: The Legal Quagmire for Military Contingents" (**Rowe**), "A Case for the Abolition of the American Courts-Martial System" (**Spak**), and "Phenomena of Social Path-ology in the Defense Establishments of the Central-East European States in Transition" (**Bebler**).

2:00 to 3:30 p.m., Panel on *Legal Ferment in Civil-Military Relations*, also chaired by Prof. **Zillman**. Paper titles include: "Patterns in Court-Martial Sentencing for Civilian Offenses in the United Kingdom" (**Lyon**), "Sex, Lies, and the Two Communities" (**Mazur**), "Sexual Harassment in the Armed Forces" (**Noone**), "A World-Wide Perspective on Change in Military Justice" (**Fidell**), and "The Law of Civil-Military Relations in the Twenty-First Century" (**Zillman**).

The ABA Standing Committee on Law and National Security, University of Virginia School of Law Center for National Security Law and the Duke University School of Law Center on Law, Ethics and National Security are co-sponsoring a 9th annual program

on *National Security in a Changing World* on Oct. 28-29. On the 29th, there will be a panel on *Fifty Years of Military Justice: Does the UCMJ Need to be Changed?* The moderator will be Senior Judge **Robinson O. Everett**. Panelists will be (by then) Senior Judge **Walter T. Cox III**, Maj Gen **William A. Moorman** (Judge Advocate General of the Air Force), and NIMJ President **Eugene R. Fidell**.

WASHINGTON NAVY YARD

1. The Navy's Fraternalization Policy has been revised effective May 27, 1999. See OPNAVINST 5370.2B. Items of note:

a. Personal relationships between chiefs and junior personnel assigned to the same command that are unduly familiar and do not respect differences in grade of rank are prohibited.

b. Personal relationships between recruiters and recruits/applicants that do not respect differences in grade or rank are prohibited.

c. Gambling, borrowing money, and commercial solicitations between officers and enlisted personnel, regardless of service, are prohibited.

2. The Navy has proposed revised regulations concerning professional conduct of attorneys practicing under the cognizance and supervision of the Judge Advocate General of the Navy. See 64 FED. REG. 37,473 (July 12, 1999). Comments are due by Sept. 10, 1999. Point of contact: Maj **Ed McDonnell**, USMC, (703) 604-8228.

NIMJ

Another footnote to **Charles W. Brooks**'s essay on "Courts-Martial on Film": **Mike Wims** writes that he was Chief of the Military Justice Division at Headquarters, U.S. Air Force, when the court-martial episode of the "Call to Glory" television series was being prepared. It fell to him to be technical advisor prior to the filming.

Get well wishes to NIMJ Secretary-Treasurer **Kevin J. Barry**, who is currently on the binnacle list.

BOOKSHELF

1. **Thomas P. Lowry**, *Don't Shoot That Boy!, Abraham Lincoln and Military Justice* (Savas Pub. Co. 1999).

2. **National Academy of Public Administration**, *Adapting Military Sex Crime Investigations to Changing Times* (1999): "Sex crimes and criminal sexual mis-conduct are violent, injurious acts that inflict acute physical, emotional, and psychological harm. The Panel believes they occur in the Armed Forces with unacceptable frequency. In 1997, for example, the [military criminal investigative organizations] initiated over 3,700 sex crime cases, 900 of which involved child sexual abuse, a particularly disturbing form of criminal sexual misconduct. Consequently, it is imperative that the

military be able to effectively investigate charges of criminal sexual misconduct and treat the consequences of founded allegations."

BOOK REVIEW

Captain **Jay M. Siegel**, JAGC, USNR, *Origins of the Navy Judge Advocate General's Corps: A History of Legal Administration in the United States Navy, 1775 to 1967* (GPO).

Captain Siegel's work is a valuable reference for anyone having a military law mission or interest. Its focus on the Navy and a contained group of officers provides a needed guide to how government operated in an earlier time, and tells one what to look for, and where to find contemporaneous material relating to developments in another area of government, civil or military. The basic constitutional framework has not changed all that much, and readers of today will find it worthwhile to see how things were done in a prior decade or century.

The latter part of the volume unavoidably contains details of internal conflicts of a generation ago among individual officers which some may liken to internecine warfare between warring tribes. This can be skimmed over by those who did not live through it, with the assurance of us old timers that little literal blood flowed in the scuppers and no planks were visibly walked. The remainder of the work contains collected historical material and references which, to this reviewer's knowledge, are available in no other single volume.

The central theme underlying *Origins* is the struggle of a professional group—lawyers—to obtain recognition. Possibly the Navy has lagged behind other services or possibly other services have gone too far too fast. There is a Defense-wide fault, however, that individual judge advocates of all services need and deserve a great deal more recognition by the civilian bar and judiciary. Giving the Supreme Court certiorari review authority over the Court of Appeals for the Armed Forces has sometimes worked to the detriment of judge advocates. The Solicitor General has the last word on government decisions to seek certiorari. Grants of certiorari are rare in situations in which judge advocates are likely to triumph or appear in a particularly favorable light. *United States v. Scheffer*, 140 L. Ed.2d 413 (1998), is a case in point. Air Force judge advocates did a magnificent job defending the Court of Appeals' decision that a blanket prohibition on the introduction of polygraph examination results in courts-martial violated the accused's constitutional right to present a defense. Scheffer sought to present evidence of his having "passed" a polygraph examination to rebut an attack on his credibility. In the end, of course, their efforts were not crowned with success. They gained experience which few lawyers will have over a lifetime, but the future utility of that experience within the Armed Forces (and its marketability outside) is doubtful.

To note a tiny flaw, Captain Siegel mentions the absence of Puerto Rican judge advocates. Rear Admiral **Donald Chapman** has pointed out that this is a disservice to Captain **Luis V. Castro**, who was admitted to the bar of

Puerto Rico in 1935.

Anyone writing in the military law field who wishes to know how, when and where it was done in the Navy, should have Captain Siegel's book on the ready reference shelf.

Homer A. Walkup



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On September 30, 1999, a dual ceremony was held at the United States Court of Appeals for the Armed Forces. Before a capacity crowd of hundreds, Chief Judge **Walter T. Cox III** completed his service as Chief Judge and his term on the Court, and was succeeded as Chief Judge by Judge **Susan H. Crawford**. Judge Cox will join Judge **Robinson O. Everett** as a Senior Judge and will continue to hear cases. He is also teaching two courses this semester at Duke Law School.

Among those who spoke were South Carolina's Senators **Strom Thurmond** and **Ernest Hollings**, DOD Deputy General Counsel **Douglas Dworkin**, and former Army Secretary **John Marsh**. Also in attendance were senior military lawyers and judges of the Courts of Criminal Appeals and various state and federal courts, as well as friends and family of Chief Judges Cox and Crawford.

1600 PENNSYLVANIA AVENUE, N.W.

1. On October 6, 1999, the President signed into law the National Defense Authorization Act for Fiscal Year 2000. Among the provisions of interest: §§ 511 (continuation of officers on reserve active-status list to complete disciplinary action), 577 (authority for special courts-martial to impose sentences to confinement and forfeitures of pay of up to one year), 585 (GAO study of DOD policies on protecting confidentiality of communications with professionals providing therapeutic or related services regarding sexual or domestic abuse), 591-94 (domestic violence), 629 (authorization of judge advocate continuation pay).

2. The following statement was issued by the President upon signing the October 7, 1999 changes to the *Manual for Courts-Martial*:

"I have signed an executive order amending the Manual for Courts-Martial, which sets out procedures for criminal trials in the armed forces. The amendments make a number of desirable changes to modernize the rules of evidence that apply to court-martial proceedings and to take into

account recent court decisions. These changes have been recommended by a committee of experts representing all the military services.

There are four principal changes. First, the new rules provide that evidence that a violent crime was a hate crime may be presented to the sentencing authority as an aggravating factor in the determination of the appropriate sentence. As in the case of laws that apply in civilian courts, this rule sends a strong message that violence based on hatred will not be tolerated. In particular, the rules provide that the sentencing authority may consider whether the offense was motivated by the victim's race, color, religion, national origin, ethnicity, gender, disability or sexual orientation.

Second, the rules provide special procedures for cases in which there are allegations of child abuse and children are called to testify. The new rules allow for televised testimony from a location other than the courtroom and provide for other special procedures to make it as easy as possible for children who are witnesses to testify completely and accurately. These provisions are similar to those applied in most civilian courts.

Third, the order adds a new evidentiary rule to court-martial proceedings providing that most statements to a psychotherapist are privileged. The purpose of this change is to encourage candid confidential communications between patients and mental health professionals. It is similar to a privilege that is recognized by the federal courts and courts of virtually all states. The privilege is not absolute and the exceptions make clear that communications must still be disclosed when necessary for the safety and security of military personnel and in other compelling cases."

Finally, the new rules create the offense of reckless endangerment as an additional crime under the Uniform Code of Military Justice. This offense is similar to that found in most state codes.

[Gaz. note: The full text of the *Manual* changes appears in the *Federal Register* of October 12, 1999, 64 FED. REG. 55,115. § 4 of the Executive Order prescribes the November 1, 1999 effective date of the changes. It should be carefully consulted to determine what underlying conduct and events in the legal process are covered.]

For several weeks, the popular Military Law and Justice website has been conducting a "quizlet" on whether *Manual* changes should be done through a public advisory committee. As of October 10, 1999 the survey results were as follows:

Strong Yes	28%
Yes	14%
Not sure	26%
No	11%
Strong No	21%

PROFESSIONAL MEETINGS

The detailed schedule for the 1999 Military Administrative Law Conference and Walter T. Cox III Military Legal History Symposium is online at <http://www.jaa.org/MALCweb.htm>. The cosponsors are the Judge Advocates Association, the Military Law Committee of the ABA General Practice, Solo and Small Firm Section, and the Government and Public Sector Lawyers Division of the ABA.

OTTAWA

The *Ottawa Citizen*, Sept. 4, 1999, included an article by **Mike Blanchfield** concerning allegations that the Judge Advocate General of the Canadian Forces had cautioned Canadian Forces ombudsman **André Marin** not to make more than one public statement per year. A memorandum of their Aug. 13, 1998 meeting was recently released in response to an "Access to Information" request by *Esprit de Corps* magazine. The article is online at <http://www.ottawacitizen.com/national/990904/2816328.html>.

MILES FOUNDATION

The *Gazette* recently learned of the existence of the Miles Foundation, a private nonprofit organization dedicated to education and advocacy relative to interpersonal violence associated with the military. The Foundation is planning an emergency shelter program for battered women shelters adjacent to military installations. For more information contact **Christine Hansen**, Director, The Miles Foundation, P.O. Box 934, Waterbury,

BOOKSHELF

Two interesting articles appear in the October issue of *Naval Institute Proceedings*. Commander **William J. Toti's** "The Sinking of the *Indy* [USS *Indianapolis* (CA-35)] and Responsibility of Command" discusses the court-martial of the heavy cruiser's commanding officer, Captain **Charles B. McVay III**. The other article, by retired Lieutenant Commander **Janice M. Graham**, critically reviews the "Don't Ask, Don't Tell" policy.



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Veterans Day Issue

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ANNOUNCEMENT

In the interest of economy, we would like to reduce the *Gazette's* hard copy distribution as much as possible. If you currently receive hard copy and wish to continue doing so, please send a letter or post card to that effect to National Institute of Military Justice, c/o Kevin J. Barry, 13406 Sand Rock Court, Chantilly, Virginia 20151-2472. If you have an e-mail address, please send it to us at efidell@feldesmantucker.com.

REMARKS BY THE CHIEF JUSTICE

On October 18, 1999, Chief Justice **William H. Rehnquist** addressed the International Conference on Intellectual Property Law, in Washington. Among other things, he said:

"Conferences such as this one provide great opportunities for participants to exchange ideas and experiences across national borders. In recent years, there has been an increasing recognition of the benefits of courts of one nation looking to the laws, decisions, and experiences of courts in other countries. I am seeing this in the field of constitutional law, and I believe that as more constitutional courts develop around the world we will see the courts of the United States looking more to the decisions of other nations' constitutional courts to aid in their own deliberative processes."

[*Gaznote: see Knight v. Florida*, No. 98-9741 (U.S. Nov. 8, 1999) (**Breyer**, J., dissenting from denial of certiorari) (surveying foreign precedents).]

E STREET, N.W.

On October 13, 1999, the United States Court of Appeals for the Armed Forces granted review in *United States v. New*, No. 99-640/AR, on the following issues:

WHETHER THE MILITARY JUDGE ERRED BY DENYING APPELLANT'S CAUSAL CHALLENGE AGAINST A COURT-MARTIAL MEMBER WHO PREVIOUSLY ORDERED A SUBORDINATE TO DEPLY TO MACEDONIA.

WHETHER APPELLANT'S CONSTITUTIONAL AND STATUTORY RIGHTS TO BE TRIED BY COURT-MARTIAL MEMBERS AND TO HAVE THE MEMBERS DETERMINE WHETHER THE GOVERNMENT HAS PROVED EVERY ESSENTIAL ELEMENT OF THE CHARGED OFFENSE BEYOND A REASONABLE DOUBT WERE VIOLATED BECAUSE THE MILITARY JUDGE RULED THAT THE ORDER GIVEN TO APPELLANT WAS LAWFUL WITHOUT SUBMITTING THE ISSUE TO THE MEMBERS, AND BECAUSE THE MILITARY JUDGE INSTRUCTED THE MEMBERS THAT THE ORDER WAS LAWFUL AS A MATTER OF LAW.

Congratulations to Commander **Richard W. Bagley**, JAGC, USN, on his appointment to the Court of Appeals' Rules Advisory Committee, vice Captain **Carol J. Cooper**, JAGC, USN, who has been transferred out of the Washington area.

MILITARY LAW AND JUSTICE WEBSITE

Remember the "quizlet" that the Military Law and Justice website conducted on whether *Manual* changes should be done through a public advisory committee? The final survey results were as follows:

Strong Yes	24%
Yes	17%
Not sure	19%
No	22%
Strong No	18%

AMERICAN BAR ASSOCIATION

The Standing Committee on Armed Forces Law (SCAFL) met on October 23, 1999 at Fort Myer. Among the items of most significance to *M.J. Gaz.* readers are the following:

Commission to Review UCMJ. The principal item of business was the proposed Report and Recommendation calling for "a diverse and broadly constituted Commission to thoroughly and comprehensively review the military justice system," which has been frequently changed during its 50-year existence, and which has not been the subject of congressional hearings since 1983. The Committee had withdrawn the recommendation from the House of Delegates agenda at the August meeting in Atlanta to allow further dialog with the TJAGs on the subject. Three of the five senior service attorneys were present at the meeting and spoke strongly against the recommendation, arguing that we currently have the "best system of military justice existing in the world" and that a complete review of the entire UCMJ was unnecessary, and potentially would result in recommendations which were undesirable. In addition, the TJAGs indicated their belief that there were things that could be done to address the concerns of the ABA and legal commentators, and that they could do a better job of seeking and accounting for public comments and proposals to modify the system. Specifically addressed were providing a summary of comments received and the rationale for not adopting suggested changes. One TJAG raised the possibility of expanding the Joint Services Committee, widely considered to be currently understaffed, to include voting representatives from the military judiciary and military defense bar. SCAFL decided to redraft the recommendation, and to put it on the agenda for the Committee to reconsider and discuss at the midyear meeting in February 2000 in Dallas. In the meantime, the Committee will continue the dialogue with the services on these issues.

Death Penalty Habeas Counsel. The Committee expressed its frustration at the passage of four years awaiting the services' implementation of promised regulations to provide counsel to military members sentenced to death who wish to seek habeas review of their convictions in federal district court. The Navy Department has adopted such a rule. The Air Force indicated that such rules are very close to being published, and noted the "glacial pace" of moving changes through the Pentagon.

Tenure for Military Judges. The Committee also expressed its frustration with the delay in the services implementing promised judicial tenure rules similar to those recently implemented by the Army, which established a 3-year tenure period. In a related development, DoD has appointed an *ad hoc* committee to study the issue of judicial independence (including the concept of tenure).

Joint Service Committee. The JSC representative gave a summary of recent regulatory and statutory changes. E.O. 13,140, the 1999 changes to the MCM, was signed on Oct. 6, 1999 (Oct. 12, 1999 Fed. Reg., pp. 55,115-23). Principal among the changes are the creation of a psychotherapist-patient privilege (MRE 513), rules for protecting child witnesses in domestic abuse cases (RCM 804, RCM 914A, MRE 611), the creation of a new offense of reckless endangerment (Art. 134),

and the admission of evidence during the sentencing phase of a trial that a violent crime was a hate crime (RCM 1001(b)(4)).

In addition, the recently enacted DoD Authorization Act for 2000 expands the jurisdiction of special courts-martial to a year's confinement from the current 6 months. The Committee noted that this change was effected with no opportunity for public input or participation prior to DoD requesting that statutory amendment. The TJAGS agreed that they could improve the availability of "legislative history" by making available to the Committee and the public the "section-by-section" analyses that are part of each of its requests for statutory changes to the UCMJ. They agreed to take this as an action item, and SCAFL added it to its agenda for the next meeting.

The Committee noted that the ABA in 1995 adopted a recommendation that MCM changes be promulgated with the same formality and *Federal Register* rulemaking process as are other important federal rule changes; in 1997 the ABA adopted a recommendation that MCM changes be proposed through a broadly constituted advisory committee which operated in a public forum, similar to that followed by the advisory committees proposing Federal Rules of Criminal Procedure, Evidence, etc. SCAFL member Prof. **David A. Schlueter**, Reporter for the Federal Rules of Criminal Procedure Advisory Committee, reviewed the operation of that committee, and noted that these rules were undergoing a complete review, since they had become over the years a "hodge-podge," with lots of inconsistencies (not unlike the UCMJ and MCM, similarly subject to random piecemeal changes over the years).

In addition, the representative of the DoD General Counsel provided the Committee with copies of the proposed EO on MCM changes forwarded to OMB on Oct. 18, 1999 (1998 Annual Review) which will allow for military judges to issue protective orders regarding extrajudicial statements, will expand the types of criminal dispositions by states which will be admissible as civilian convictions at courts-martial, will implement the recently authorized sentence of life-without-parole, and will give additional guidance on the offense of adultery, "official statements," and addressing victims' rights. The 1999 Annual Review is under review within the Administration. It contains changes to the MCM addressing credit card offenses as larceny, increasing from \$100 to \$500 the break point for heightened sentencing, making statements to law enforcement personnel. In addition, the JSC has under review a variety of other initiatives, including a study of Article 15, which was requested by the Code Committee.

Finally, the DOD representative provided the Committee with a copy of DoD's report on methods of selection of members to serve on courts-martial. The report was required by § 552 of the DoD Authorization Act of 1999. The major conclusions of the report are that random selection of members would not materially improve the system, and that the present system is the best available: the existing system is fair and efficient, and has worked well, and public perceptions to the contrary are inaccurate, and should be addressed through a comprehensive education process.

SCAFL's next meeting will be on February 12, 2000 in Dallas. Committee meetings are open to the public. For further information contact **Stephanie Park**, ABA Staff, 312-988-5604.

JERUSALEM

On October 14, 1999, the Supreme Court of Israel decided *Tzemach v. Minister of Defence*, Nos. 6055/95 & 7083/95. At issue was the validity of article 237A of the Military Justice Law, 1955, which prescribes the period within which a soldier under arrest must be brought before a judge. *Held*, 10-1, the statutory period (reduced from 35 days to 4 days during the pendency of the case) is invalid because it conflicts with the Basic Law of Human Dignity and Liberty. A delay of no more than 48 hours is permissible. *Compare County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (48 hours); *United States v. Rexroat*, 38 M.J. 292 (1993) (same). The decision is effective in six months. Interestingly, from a United States-law perspective, Tzemach himself was no longer in the service; the other petitioners were five military

attorneys and the Association for Civil Rights in Israel. According to a report by Ha-Aretz's Supreme Court correspondent, "this is the first time the High Court has nullified a Knesset law on grounds that it diverges from the Basic Law of Human Dignity and Liberty."

BOOKSHELF

LEXIS Publishing, P.O. Box 7587, Charlottesville, Virginia 22907-7587, has announced publication of the fifth edition of *Military Criminal Justice: Practice and Procedure*, by NIMJ Advisory Board member **David A. Schlueter**.



Please remember NIMJ as you develop your end-of-year charitable giving plan. NIMJ is a District of Columbia nonprofit corporation founded in 1991. We receive no government funding. Contributions to NIMJ are tax-deductible. Please circulate M.J. Gaz. to friends and colleagues who are interested in military justice. If you are not on the mailing list but would like to be, let us know. We welcome suggestions and information about coming events and useful web sites for inclusion in the *Gazette*.

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AMERICAN BAR ASSOCIATION

The ABA's Standing Committee on Armed Forces Law, chaired by MajGen **Keith E. Nelson**, USAF (Ret), is seeking nominations for the 2000 Military Law Writing Award. This year's award will focus on the 50th Anniversary of the Code. The award will be presented at the ABA's Annual Meeting in New York. Nominations may be made by members of the Committee, Committee advisors, including the senior service attorneys and the Commandants and faculty at the JAG Schools. If you have a suggestion, please submit it to one of the above. Further information may be obtained from **Stephanie Park**, of the ABA, at (312) 988-5604.

NIMJ strongly encourages readers to submit recommendations so that appropriate recognition can be given to those who contribute to the intellectual life of the military legal community.

WESTMINSTER

On November 18, Queen **Elizabeth II**, in her speech to Parliament, advised that the government would be seeking legislation to confer on military personnel the right to appeal summary punishments imposed by commanding officers. There will be a new Summary Appeal Court made up of an independent judge advocate and two lay service officers, who would have power to overturn but not increase sentences. A copy of the measure (The Armed Forces Discipline Bill, HL Bill 1), as introduced that day in the House of Lords, is available on the web at www.parliament.the-stationery-office.co.uk/pa/ld199900/ldbills/001/2000001.htm. Useful explanatory notes prepared by the Ministry of Defence appear at www.parliament.the-stationery-office.co.uk/pa/ld199900/ldbills/001/en/00001x--.htm. The proposals in the bill result from a review of the separate service discipline acts in light of the incorporation of certain provisions of the European Convention on Human

Rights into domestic British law under the Human Rights Act 1998, the main portions of which are expected to come into force on October 2, 2000. In addition to the new system of summary appeal courts, the bill address custody (in light of the decision of the European Court of Human Rights in *Hood v. United Kingdom*), the procedure for election of trial by court-martial, and the functions of the prosecuting authority.

AUCKLAND

The Court of Appeal of New Zealand handed down an important military decision on November 11, 1999 in *Attorney General on behalf of Royal New Zealand Navy v. Lawrence*, Nos. CA163/99, 139/99. At issue was whether an offense of rape had been condoned by the accused lieutenant commander's commanding officer so as to bar trial by court-martial. The High Court had entered a declaratory judgment for Lieut. Comdr. Lawrence; the Court of Appeal, in an opinion by **Tipping, J.**, allowed the government's appeal and set aside the lower court's judgment. The basis for the Court of Appeal's ruling was that the commanding officer could not be understood to have condoned the offense because he in fact had concluded that the allegation was not well-founded, *i.e.*, that no offense had been committed. Among other things, the Court observed: "Condonation has been a feature of military law for two centuries. Its well accepted meaning involves the very thing which Mrs **Ablett-Kerr** [counsel for Lieut. Comdr. Lawrence] suggested Parliament cannot have intended, *ie*, forgiveness of well founded allegations. While it may be very rare for a commanding officer to condone a really serious allegation which appears well founded, Parliament must be taken to have trusted commanding officers to use their power of condonation responsibly."

The opinion is online at www.brookers.co.nz/legal/judgments/default.asp?doc=1999/ca163.html.

MILITARY LAW AND JUSTICE WEBSITE

The second "quizlet" that the Military Law and Justice website conducted asked whether there should be a death penalty in the military for non-combat-related crimes. The 1578 responses received as of December 12, 1999 were as follows:

Strong No	31%
No	20%
Don't Know	10%
Yes	24%
Strong Yes	15%

BRASILIA

Those who can read Portuguese may wish to bookmark the URL for the Superior Military Court of Brazil:

<http://200.252.227.3/stm.htm>.

(Thanks to **Mike Wims** for the tip.)

NIMJ

On December 3, 1999, the NIMJ Board of Directors voted to expand the board to up to nine members. The following new directors have been unanimously elected: Dean **John S. Jenkins**, Prof. **Michael F. Noone**, Prof. **Mary M. Cheh**, and **Dwight H. Sullivan**.

MAILBAG

We received the following from a reader in the Disciplinary Barracks:

I currently receive a hard copy of the *Military Justice Gazette* and wish to continue doing so. Also, on behalf of myself and other inmates who take an active interest in understanding the military justice system, I would like to thank you and all members of NIMJ for providing an invaluable source of information as well as the comfort of knowing that the military justice

system is being monitored by an institution external to it that does not hesitate to provide well reasoned input and recommendations. Thank you!

NIMJ

Thank you for including NIMJ in your end-of-year charitable giving plan. NIMJ is a District of Columbia nonprofit corporation founded in 1991. We receive no government funding. Contributions are tax-deductible. Please circulate M.J. Gaz. to friends and colleagues who are interested in military justice. If you are not on the emailing list but would like to be, let us know. We welcome suggestions and information about coming events and useful web sites for inclusion in the *Gazette*.

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MILLENNIUM DIRECTORY OF CIVILIAN PRACTITIONERS

Following is the 2000 directory of civilian attorneys who practice military law on a regular basis. NIMJ publishes this directory as a public service. Inclusion in the directory implies *no endorsement* by NIMJ or any other organization. Please advise us of any corrections or changes.

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ABA MID-YEAR MEETING

Details on the military-related activities at the ABA's Mid-Year Meeting (Dallas, February 9-13) are available on the Judge Advocates Association's website, www.jaa.org.

NEWPORT

Thanks to **William C. Aseltine**, International Legal Education Consultant, Naval Justice School/Defense Institute of International Legal Studies, for the following:

The December 1999 issue of the *Military Justice Gazette* contained interesting articles concerning military justice cases decided in the UK and New Zealand. These and earlier articles on military justice outside the United States lead me to believe that readers might be interested in a program at the Naval Justice School specifically designed to promote comparative law scholarship in the area of military justice.

Twice a year, a group of 4 or 5 military lawyers from other countries come to the Naval Justice School to compare and contrast the U.S. military justice system with their own. During the 11-week program the participating judge advocates attend lectures offered as part of the Naval Justice School Basic Lawyer Course, Legal Officer Course and the Course on Conducting Military and Peacekeeping Operations in Accordance with the Rule of Law. They also conduct their own comparative law research working closely with staff from the Naval Justice School and the Defense Institute of International Legal Studies. The comparative process allows these students to gain insight into their own military justice system and practice and often provides them with useful models for further development.

On 17 December 1999 judge advocates representing Albania, Philippines, Ukraine and Zimbabwe graduated from the second class. The first class had two students from Thailand. It is anticipated that students from Italy, Thailand and Venezuela will attend the third class, which is scheduled to begin 1 May 2000.

Gazette readers with questions can contact me at the numbers listed below.

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CALENDAR OF EVENTS

March 6-7, Second JAA Appellate Advocacy Symposium, Catholic University School of Law

1600 PENNSYLVANIA AVENUE

NIMJ advisory board member **Ron Meister** reports that one of President **Bill Clinton's** 37 December 1999 pardons went to **Freddy Meeks**, who was among those convicted in 1944 in connection with the Port Chicago mutiny. He was represented by the firm of Morrison & Foerster. Also pardoned were **Arthur N. Evans**, convicted in 1954 of protecting and assisting an Army deserter; **Kenneth M. Kaull**, convicted in 1976 of, among other things, negligently hazarding two Navy vessels; and **Ronald M. Smith**, convicted in a 1977 Army court-martial of stealing mail.

MILES FOUNDATION

New address information about a private nonprofit organization dedicated to promoting awareness of interpersonal violence, especially as it pertains to the United States armed forces: The Miles Foundation, P.O. Box 934, Waterbury, CT 06721-0934, tel/fax (203) 270-0688, Milesfdn@aol.com or milesfd@yahoo.com. Office hours are Mon-Sat, 8:00 a.m. to 6:00 p.m. The Foundation publishes an electronic newsletter, "Across the Miles." For a free subscription, send an email request to MilesfdnMCD@aol.com. There is also an Across the Miles Listserv. To subscribe, send an email request to acrossthemiles-subscribe@onelist.com.

450 E STREET, N.W

Readers who practice before the United States Court of Appeals for the Armed Forces will be delighted to know that the Court is current in making its *Daily Journal* available on its website. It is now possible to know in real time the issues on which the Court has granted review. *Bravo!*

BOOKSHELF

(1) The fifth edition of NIMJ advisory board member **David A. Schlueter's** *Military Criminal*

Justice: Practice and Procedure (1999) (a commemorative edition recognizing the 50th anniversary of the Code) (\$110).

(2) The third edition (Lexis 1999) of *Federal Standards of Review*, by **Steven A. Childress** and **Martha S. Davis**.

(3) **Gordon N. Lederman**, *Reorganizing the Joint Chiefs of Staff: The Goldwater-Nichols Act of 1986*. Mr. Lederman, an attorney with Arnold & Porter, will discuss his book at Olsson's, Metro Center, 1200 F St., N.W., Washington, at 7:00 p.m., Wednesday, Feb. 16, 2000.



NIMJ is a District of Columbia nonprofit corporation founded in 1991. We receive no government funding. Contributions are tax-deductible. Please circulate M.J. Gaz. to friends and colleagues who are interested in military justice. If you are not on the emailing list but would like to be, let us know. We welcome suggestions and information about coming events and useful web sites for inclusion in the *Gazette*.

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"WE TOO MUST BE LIKE OTHER NATIONS" *[I SAM. 8:20]: A COMMENT*

by **Michael F. Noone**

Professor of Law, Columbus School of Law
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The recent ruling of the European Court of Justice, *Kreil v. Germany*, No. C-285/98 (Jan. 11, 2000), prohibiting discrimination against women seeking assignment to the combat arms of the Bundeswehr (as the Canadian Human Rights Commission had previously ruled with regard to the Canadian Forces, in *Gauthier v. Canadian Forces*) serves to remind us once again of the exceptional status United States jurisprudence accords our military. The European Court of Human Rights' 1999 ruling prohibiting the British forces from discriminating against homosexuals, *Lustig-Prean v. United Kingdom*, No. 31417/96 (Sept. 27, 1999), while expected—since the Court had decriminalized sodomy years ago—offers additional precedent for those seeking similar changes in U.S. law. Opponents of change point to what they portray as an unbroken line of Supreme Court decisions holding that Congress and the military, not judges, are responsible for regulating the military.

There are several reasons why the opponents of change should not be overly confident. They should recall that the Supreme Court, in *Frontiero v. Richardson*, 411 U.S. 677 (1973), ruled that congressional discrimination against military women was unconstitutional and that the Court, in *Goldman v. Weinberger*, 475 U.S. 503 (1986), upheld by a single vote the military's right to regulate religiously motivated behavior. Thus, the judicial bulwark is not as firm as traditionalists may think. Furthermore, there are other forces at work which continue to encourage judicial intervention in military personnel policy. First, commanders, in an attempt to be accommodating, may fail to enforce military standards. Captain Goldman's prior commander permitted him to wear his yarmulke. In *Johanns*, 20 M.J. 155, *cert. denied*, 106 S. Ct. (1985), which rewrote the law on fraternization, Captain Johanns had previously been authorized to date enlisted women. If commanders cannot agree, why shouldn't judges intervene? Second, articulate and respected proponents of change in the U.S. military justice system have urged that more attention be paid to foreign systems. All of these systems incorporate some version of judicial review, since they typically look on the military as simply another kind of civil service. "More attention" can easily be translated into emulation. If judicial review has been accepted by our allies, why shouldn't we accept it? Third, military policy makers have, by seeking to harmonize their norms with those of the civilian world, served to blur the distinction between the profession of arms

and a civilian job. Thus, the DoD directive governing sexual harassment is modeled on the civilian code. Military judges are to be granted fixed terms, like civilian judges. Military appeals courts look to civilian precedent to decide their courts-martial. If civilian norms are routinely applied in a military context, why aren't civilian judges qualified to review the application of those norms? Since federal judges have, in many ways, assumed the attributes of monarchs, the answer to these questions may be found in 1 *Samuel* 8:1-22. The people got what they asked for.

[*Ed. Note:* Prof. Noone is a member of NIMJ's Board of Directors. The views expressed do not necessarily represent those of NIMJ.]

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CALENDAR OF EVENTS

April 13-14, 2000: "The United States Military in The New Millennium" a conference presented by the Center on Law, Ethics and National Security, Duke University School of Law. Details: <http://lens.law.duke.edu> or call **Heather McAllister**, 919-613-7137.

ABA MID-YEAR MEETING (DALLAS)

The Judge Advocates Association along with several ABA entities sponsored an excellent program on the operation of the military justice system under hostile (*e.g.*, deployments, Desert Storm, etc.) and operational (*e.g.*, ships at sea) conditions, with presentations from each of the services. The consensus is that the UCMJ works very well in difficult circumstances such as were encountered in Desert Storm and in the various deployments (*e.g.*, Kosovo) but that improvements were nonetheless desirable and/or necessary. The program included a thought-provoking presentation by a recently retired military judge who listed some problems that merit attention: inexperience at every level (caused in part by too rapid rotation of chiefs of justice on deployments), a lack of accountability for processing delays, commanders' ignorance of the operation of the system and of their options under it ("we can't do an Art. 15 without a lawyer"), and widespread resistance to change. In his view, there was but one justification for uniformed attorneys: military justice. Another distinguished commentator reported that after 28 years in the system he still didn't understand the role of the convening authority.

The Military Law Committee (General Practice, Solo and Small Firms Section) heard reports from representatives of each Service and DOD. Congressional hearings will be held March 1 on the question of the extension of overseas jurisdiction over civilians accompanying the armed forces. DOD is supporting an expansion of jurisdiction under Title 18, U.S. Code, but not the recommendation for jurisdiction under Title 10. In addition, procedures are now being developed for forwarding capital cases to the President.

The main item of business for the Standing Committee on Armed Forces Law (SCAFL) was the proposed Report and Recommendation calling for "a diverse and broadly constituted Commission to thoroughly and comprehensively review the military justice system." MG **Walt Huffman** spoke for the TJAGs (who have resisted the Recommendation) and followed up on his comment at an earlier SCAFL meeting that other things could be done to address the concerns of the ABA and legal commentators, and that the Services could do a better job of seeking and accounting for public comments and proposals to modify the system. He reported that new Joint Services Committee procedures had been adopted, and offered details:

a. An annual call for proposals would be sent to the judiciary, trial and defense organizations, TJAG schools, etc., with an invitation in the *Federal Register* for the public to submit proposals.

b. All proposals received from other than DOD will be acknowledged in writing and placed on the agenda, to be followed ultimately by notice to the proposer of the JSC action and the reasons there-fore. [*Ed. note:* As described, this seems to go beyond the letter of the new written procedures that were distributed at the meeting, and that do not require that the proposer be notified of the *reasons* for the action, only of the action taken.]

c. The JSC will acknowledge and account for proposals and proposals will be published in the *Federal Register*. [*Ed. note:* Except for those submitted by the DOD General Counsel or the Code Committee (and presumably the public), all proposals are required by the procedures to be signed by a responsible official, and to contain "a summary of the problem, a discussion of various solutions considered in addressing the problem, and a recommended solution viewed as best suited to solve the problem." Presumably the entire proposal, including the required explanation, will be published.]

d. Comments will be summarized and an explanation of JSC action to adopt or not to adopt suggested changes, and the reasons why, will be prepared and published in the *Federal Register*.

SCAFL members commented favorably on these changes in JSC procedure. The new regulations seem in large measure to implement the ABA's 1995 recommendation for APA/*Federal Register* rulemaking for MCM changes. After further discussion, the committee voted not to forward its revised recommendation for a UCMJ Review Commission to the House of Delegates.

BOOKSHELF

The second edition of **Francis Gilligan** and NIMJ advisory board member **Frederic I. Lederer's** *Court-Martial Proce-*

dures (LEXIS 1999). The first two volumes are hardbound text; the third is softbound, with appendices, tables and indices.

The 1999 editions of the National Veterans Legal Service Program's *Veterans Benefits Manual* and *Federal Veterans Law, Rules and Regulations* are available. For further information check LEXIS's website: http://bookstore.lexis.com/bookstore/store_index

Dep't of National Defence [Can.], Minister's Monitoring Comm. on Change in the Dep't of National Defence and the Canadian Forces, *Interim and Final Reports* (1999). Chapter 6 of the Interim Report and chapter 5 of the Final Report concern military justice. Of note in the Final Report (p. 138) (*see* ABA report above) is the fact that "consideration is being given to publishing Queen's Regulations and Orders [equivalent to the *Manual for Courts-Martial*] in the Canada Gazette [equivalent to the *Federal Register*], along with other federal regulations." Consideration is also being given to publishing the QR&O on the National Defence website. The Final Report is available at: http://www.dnd.ca/menu/press/Reports/monitor_com_final/eng/cover_e.htm



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NIMJ

On March 14, 2000, NIMJ hosted a meeting with **Getachew Ayele**, Legal Adviser to the Minister of National Defence of Ethiopia. Mr. Getachew was in the United States under the auspices of the Department of State, and the meeting was arranged by the Washington Office of the Mississippi Consortium for International Development, headed by **Lezetta J. Moyer**. The discussion addressed such issues as the sources of Ethiopian military law, the use of civilian courts to try non-service-connected offenses by military personnel, the role of the military judiciary, the make-up of the ministry's legal department, the [non-] role of the civilian bar, and the effect of local culture in such matters as conscientious objection, homosexuality, and sexual offenses.

On April 1, NIMJ filed a brief *amicus curiae* in the CAAF case of *King v. Mobley*, Misc. No. 00-8007/NA. The case concerns the power of the Courts of Criminal Appeals to grant extraordinary writs before an Art. 32 investigation has been commenced and whether the case is an appropriate occasion for issuance of a writ by the Court of Appeals, in light of *Clinton v. Goldsmith*, 526 U.S. 529 (1999). (NIMJ also filed an *amicus* brief in *Goldsmith*.) At issue is whether, in a case where classified information may become pertinent, a command may require that a government-designed "security officer" attend all meetings between the accused and counsel. We will be happy to email a copy of NIMJ's brief upon request. Also appearing as an *amicus* was the National Association of Criminal Defense Lawyers.

NIMJ also has now its own website: www.nimj.org. Thanks to **Phil Cave** for making this happen. The site is still under construction, so your suggestions are welcome.

CALENDAR OF EVENTS

The Miles Foundation has issued a call for papers in connection with the conference it plans

to conduct this summer under the title "Towards Zero Tolerance: Interpersonal Violence and Military Culture." The deadline for postal receipt of abstracts is April 10; April 15 is the deadline for electronic receipt. For details, please contact The Miles Foundation, Inc., P.O. Box 934, Waterbury, CT 06721-0934, Milesfd@yahoo.com or Milesfdn@aol.com.

450 E STREET, N.W.

In the special court-martial case of *United States v. Diggs*, the accused was sentenced to a bad conduct discharge, 3 months confinement, forfeiture of \$600 pay per month for 3 months, and reduction to E-1. The offenses (which included an Art. 134 specification of being naked in another soldier's bedroom with that soldier's wife) occurred on Sept. 16, 1996. The sentence was adjudged on Jan. 24, 1997. The convening authority acted on Apr. 13, 1997. The Army Court of Criminal Appeals affirmed without opinion on July 14, 1998. The Court of Appeals granted review on Mar. 1, 1999, heard argument on Nov. 8, 1999, and decided the case, 3-2, on Feb. 23, 2000.

FEDERAL REGISTER NOTICES

The Army Board for Correction of Military Records has amended its rules. Some procedural matters will be transferred to a DA Pamphlet. The revised rules appear at 65 FED. REG. 17440 (Apr. 3, 2000).

The Joint Service Committee on Military Justice has given notice of proposed changes to the *Manual for Courts-Martial*. 65 FED. REG. 17633 (Apr. 4, 2000). Among other things, the proposed changes implement the 1999 amendment to Art. 19, UCMJ, concerning the sentencing power of special courts-martial. Comments are due no later than May 4, 2000., and should be sent to Lt Col **Thomas C. Jaster**, at (202) 767-1539. There will be a public hearing on the proposed changes on April 18, 2000, in Rm. 808, 1501 Wilson Blvd., Arlington, VA 22209-2403.

On a related point, the Army Defense Appellate Division has submitted to the Joint Service Committee a set of proposed *Manual* changes, with detailed explanations.

*DIRECTORY OF CIVILIAN
PRACTITIONERS: UPDATES*

Sampson, Kyle R., Zimmermann & Lavine, P.C., 770 South Post Oak Lane, Ste. 620, Houston, TX 77056, tel. (713) 552-0300, fax (713) 552-0746
Wells, Gilbert, fax/phone numbers are now (351 21) 929 1372

ORGANIZATIONS AND WEBSITES

A new organization has been established in connection with the anthrax controversy: The National Organization of Americans Battling Unnecessary Servicemember Endangerment (acronym "No Abuse"), Box 70186, Washington, DC 20024.

Another new entry is Citizens Against Military Injustice, whose stated mission "is to provide pertinent information, resources, help and support to all military personnel who have been charged or are about to be charged with a crime under the Military System of Justice, and to assist and provide information to inmates, loved ones and family members whose lives have been affected by the Justice System of the United States Military." The temporary site is <home1.gte.net/mdsr/cami/index.html>. For further information contact **Glen-da Ewing**, glenda@windermere.com

Interested in the case of Dr. Samuel Mudd? See <<http://geocities.com/~ewing-steel/>> and <http://svg-law.com/Mudd%20Pages.htm>. His ABCMR case has again been denied by the Army. Expect further proceedings.

PROFESSIONAL MEETINGS

The Military Law Committee of the National Association of Criminal Defense Lawyers, in conjunction with NACDL's CLE Committee, will be sponsoring a half-day CLE program for uniformed and civilian military defense counsel during NACDL's annual meeting in La Jolla, California, on Friday afternoon, August 4, 2000. Admission is not limited to NACDL members, although members

receive a reduced registration rate and military defense counsel are entitled to a special dues rate. "Prosecutors are generally not eligible to attend." For further information, contact **Donald G. Rehkopf, Jr.**, Vice Chair of the NACDL Military Law Committee, at (716) 272-0540, dolin1@netacc.net.



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

Snail-Mail Address: National Institute of Military Justice, c/o Kevin J. Barry, 13406 Sand Rock Court, Chantilly, Virginia 20151-2472. E-mail addresses: efidell@feldesmantucker.com (Eugene R. Fidell), kjbarry@erols.com (Kevin J. Barry).

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LAW DAY ISSUE

NIMJ

We are pleased to announce that Commander **Philip D. Cave**, JAGC, USN (Ret), now in private law practice, has been elected to the Board of Directors.

JOINT SERVICE COMMITTEE ON MILITARY JUSTICE

The Joint Service Committee on Military Justice met on April 18 to receive public comment on the proposed changes to the *Manual for Courts-Martial* (65 Fed. Reg. 17,633 (April 4, 2000)) to implement the increase in special court-martial jurisdiction from six months to one year enacted as part of the FY 2000 DOD Authorization Bill (§ 577). NIMJ Secretary **Kevin Barry** was the only member of the public to appear, and he and the JSC engaged in a candid dialog regarding the scope of the proposed changes, and the philosophy underlying Congress's decision to require a verbatim record for cases meeting the new (more than six months confinement or forfeitures) threshold, while not changing Article 66 appellate review jurisdiction. NIMJ looks forward to the day when other interested parties attend such public hearings, particularly those communities not represented on the JSC, and who don't otherwise have a voice in the process (*e.g.*, appellate defense counsel, appellate government counsel, military trial judges, military appellate judges, and civilian practitioners).

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

More on NACDL's military law seminar to be held in La Jolla, California, on the afternoon of August 4, 2000. Speakers will include: **Donald G. Rehkopf, Jr.**, on "Professional Responsibility and the Profession of Arms: Defense Counsel's Guide to Zealous (and Ethical) Military Representation"; **Kirk Bowden Obear** on "What to Tell the Active Duty Client About Life After the Military: The Law on Discharge Upgrades, Medical Discharges, Correction of Records, and the Like"; Judge

H.F. "Sparky" Gierke on "The U.S. Court of Appeals for the Armed Forces—A Court Equal to the Courts of Appeals for the Numbered Circuits?"; **Frank Spinner** on "Defending the Complex and High Profile Court-Martial"; and **Jack B. Zimmermann** on "The Interface Between Civilian and Military Justice: Active Duty Marine under Grand Jury Investigation in the Border Shooting Case."

Arrangements are being made for CLE credit. The seminar (\$175 fee) is open to nonmembers of NACDL. NACDL is located at 1025 Connecticut Ave., N.W., Ste. 901 Washington, DC 20036, (202) 872-8600, assist@nacdl.org, www.criminaljustice.org.

INTERNATIONAL SOCIETY FOR MILITARY LAW AND THE LAW OF WAR

The XVth International Conference of the International Society for Military Law and the Law of War will be held at the Quality Hafjell Hotel, near Lillehammer, Norway, on June 6-10, 2000. Details are available from the Society's offices in Brussels, c/o Auditorat général près la Cour militaire – Palais de Justice, B-1 000 Bruxelles, tel. +32 2 508 60 87 or +32 2 508 60 25, fax +32 2 508 60 87, soc-mil-law@skynet.be, www.soc-mil-law.org. The Society's Norwegian National Group may be reached at P.O. Box 651 Sentrum, 0106 Oslo, Norway, Genadv@c2i.net.

BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

[Following is the text of a letter sent by **Jack H. Olender**, president of the Bar Association of the District of Columbia, to Secretary of Defense **William S. Cohen**]

The Bar Association of the District of Columbia has a continuing interest in military legal issues, including the way in which the *Manual for Courts-Martial* (Manual) is amended, and the role of the Joint Service Committee on Military Justice (JSC) in that process.

Until recently the procedure for amending the Manual has been largely closed to [the] general public, except for the limited publication of proposed changes

in the Federal Register. New developments, and in particular the new internal operating regulations adopted by the JSC, appear to be setting the stage for increased involvement of the general public, and increased transparency in the way the Manual is amended.

The Bar Association of the District of Columbia notes that current versions of the Joint Service Committee regulations, operating procedures, and rules are published exclusively in internal DOD documents, and believes that publication of these procedural rules in a format readily available to the public would be a significant step towards achieving the goals of broader public participation in the process. Therefore, it is recommended that you consider amending the Manual to include an appendix on the Joint Service Committee. Such an appendix should include the regulations and procedures by which the military services and the public propose and endorse changes to the Manual, and the process by which the JSC receives, responds to, and accounts for all proposals and comments received during the process.

Your consideration and advice with respect to the foregoing is appreciated.

450 E STREET, N.W.

The Court of Appeals has scheduled oral argument in *King v. Mobley*, an All Writs Act case, for May 4, 2000, at 9:30 a.m. At 10:00 a.m. the next day there will be an observance in honor of the 50th anniversary of President **Truman's** approval of the Uniform Code of Military Justice. Details can be found at the Court's notices, www.armfor.uscourts.gov; see also www.armfor.uscourts.gov/News2.htm

The Court has scheduled a Project Outreach hearing for 11:00 a.m. on Monday, July 10, 2000, in *United States v. Chaney*, No. 00-0109/AF, at the Association of the Bar of the City of New York, 42 West 44th Street. The question presented is whether the military judge erred by granting trial counsel's peremptory challenge of the only female member, when the only stated non-gender-specific basis for challenge was that she is a nurse. Thirty minutes per side.

*DIRECTORY OF CIVILIAN
PRACTITIONERS: ADDENDA*

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Klepp, Frederick W., 402 Park Blvd., Cherry Hill, N.J. 08002, tel. (856) 663-3344 (phone), fax (856) 488-2108, klepplaw@aol.com

Tuthill, John, 3300 49th St. No., St. Petersburg, FL 33710, (727) 572-4444, fax (727) 528-4214, TuthillLaw@aol.com

READING LIST

Guy Cournoyer, of Montréal, calls our attention to an article by Major **David McNairn**, CF, *A Military Justice Primer, Part 1*, 43 Crim. L.Q. 243 (2000). The article presents a useful update on Canadian military justice, which has experienced important recent changes. *Merci*, Guy!

NIMJ

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MOVIE REVIEW

"Rules of Engagement"

Reviewed by Charles W. Brooks*

"Rules of Engagement" are the rules governing the use of force. The film asks whether too much force was used by Marine Col. **Samuel L. Jackson**. Unfortunately, it does not use a great deal of intellectual energy coming up with the answer.

Col. Jackson, on duty in the Indian Ocean, is ordered to fly into San'a, Yemen, to secure the United States Embassy, which is surrounded on the ground by an agitated mob of demonstrators and being shot at by a few snipers on a balcony across from the embassy. When he and his men arrive, the situation is rapidly deteriorating. The mob is becoming increasingly violent. The ambassador, played by the extremely versatile **Ben Kingsley**, is cowering in fear. Col. Jackson saves the ambassador. He saves the flag. When he begins taking casualties, he orders his men to open fire on the demonstrators on the ground, killing 81 and injuring a hundred. After the mission is successfully concluded, he is court-martialed for murder.

Jackson's commanding officer, visibly uncomfortable when he has to inform Jackson about the court-martial, advises him to hire a top civilian lawyer. In a sign of how far films have come from merely showing Coca-Cola cans, Washington lawyer **Bob Bennett**'s name is actually mentioned. Instead, Jackson, ever the Marine, chooses his fellow Marine, Col. **Tommy Lee Jones**. In the film's opening sequence, Jackson and Jones are together in Vietnam where Jackson saves Jones's life. Jones has also remained a Marine, but his life since then has not been a big success, what with his Vietnam injuries forcing him into an undistinguished legal track rather than a distinguished command career like his father's, and a failed marriage. Now, as he is just weeks from retiring to a life of fly-fishing by himself, Jones is asked by Jackson to defend him. Jones, whose self-esteem is about zero, is not enthusiastic, but he does owe Jackson for having saved his life.

Moviegoers will have seen much of "Rules of Engagement" before, in pieces of other films. Col. Jackson, an African American officer who has risen to an important command in the Marines, which he has made his entire life, and who remains loyal to Corps and Country in spite of the fact that they are court-martialing him unfairly, could be **Woody Strode**, Sergeant Rutledge in **John Ford**'s 1960 film. And Col. Jones, whose life, a long slow downhill slide between Vietnam and this trial, has been a major disappointment to himself and his Marine general father, but who now, in spite of himself, gets a case through which redemption will be thrust upon him, brings to mind, for example, **Paul Newman** in "The Verdict." Nor is a political court-martial a particularly original plot device, although the particular politics of this court-martial, the need for a sacrifice to our relations with an Arab ally, have a realistically contemporary tone.

Also in the film's favor is that it was directed by **William Friedkin**. Friedkin, like the two colonels, is an avatar of that era in Hollywood, which is now generally regarded as the last great era of the American film. While this film does not reach—or even attempt—the heights of his triumphs from those years, it is very competently done. The siege of the embassy, for example, with Ouarzazate in Morocco standing in for San'a and the alarmingly enthusiastic anti-American Moroccan extra demonstrators, is terrific, and

Friedkin does know how to move things along in the pretrial and court-martial sequences which make up most of the film.

Unfortunately, even with the best direction, the script does have the modern weakness of italicizing every point it makes, and generally chooses a scene where allusion would do. And the film, having pitched the Big Psychological Themes so that even the brain-dead can catch them, then fails to conclude the actual story line in what should be a quite adequate 127 minutes.

What is most disturbing about the film, though, is not that the script is unsubtle—many, if not most scripts these days are—but how unsubtle the script's point is. This is not the first film centering on a court-martial for what the French call *pour l'exemple*, that is, to make a show for others at the expense of the person being tried. Usually the decision to make an example is made by or with the active complicity of those ranking above him. But in "Rules of Engagement," the order of battle has all the soldiers, without exception, on the right side, and all the civilians, without exception, on the wrong side. All the military or ex-military, including the Marine trial counsel and even the Vietcong, do the right thing. The government civilians are uniformly odious, craven, dishonest, and shamelessly careerist, and even the non-government civilians are blindly ideological and willfully misinformed. "Rules of Engagement" stands for the proposition that Col. Jackson is absolutely correct to trust only another Marine. Countries where the military actually acts on the film's Manichean view of the world are the ones where the military stages coups to save civil society from civilian rule.

***Charles W. Brooks**, a former Assistant United States Attorney, is an attorney in the Criminal Division of the United States Department of Justice.

NIMJ

On May 15, 2000, NIMJ presented its ever-popular panel on military justice for Hill staffers: "*Basic Training: Everything You Ever Wanted to Know About Military Justice But Were Afraid to Ask.*" This year's panel consisted of **Eugene R. Fidell**, **Kevin J. Barry**, **Philip D. Cave** and **Dwight H. Sullivan**. The program is part of the National Veterans Legal Service Project's annual training and orientation, which is sponsored by the House Veterans Affairs Committee.

JOINT SERVICE COMMITTEE ON MILITARY JUSTICE

Gaz. No. 76 included an April 13, 2000 letter from **Jack H. Olender**, President of the Bar Association of the District of Columbia, to the Department of Defense concerning changes in the Joint Service Committee's procedures. DoD responded on April 19, by pointing out that the JSC regulation, DoD Directive 5500.17, is available from www.defenselink.mil, and accordingly there is no need to include it in a separate appendix to the *Manual for Courts-Martial*. However, a reference to the JSC and the directive "could be included [in the Discussion to ¶ 4 of the MCM Preamble] and will be recommended to the JSC for consideration during the next annual review. Unfortunately, the MCM (Edition 2000) is already at the printer for publication this summer. . . . The JSC internal operating

procedures are not considered appropriate as the type of rules, policies, and guidance for which the MCM and its appendices are intended. Copies will be made available to interested members of the military and general public upon request."

The website actually contains the 1996 edition of the directive, which is inconsistent with the procedures set forth in the internal JSC organization and operating procedures published in February 2000. The obsolete 1985 version of the directive is still included in the *Code of Federal Regulations*. See 32 C.F.R. § 152.2 (1999).

The remaining *Manual* changes from the 2000 Annual Review appeared in the May 15, 2000 *Federal Register*.

[Gaz. Note: Speaking of regulations, why have the other services not yet promulgated terms of office for military judges? It's been over a year since the Army did so.]

450 E STREET, N.W.

On May 2, 2000, President **Clinton** nominated **James E. Baker** of Virginia, Legal Adviser to the National Security Council, for the vacancy on the United States Court of Appeals for the Armed Forces. Mr. Baker, who served as an infantry officer in the Marine Corps, is a graduate of Yale College and Yale Law School. He will fill the seat previously held by Senior Judge **Walter T. Cox III**.

With many distinguished guests in attendance, the Court observed the Code's 50th Anniversary on May 5, 2000. Speakers included Senator **Strom Thurmond** (R-S.C.) and Court historian **Jonathan Lurie**.

Judicial Conference: June 12-13, 2000, at Catholic University of America's Columbus School of Law. Details are available from the Court. Among the speakers will be NIMJ General Counsel **Steven A. Saltzburg**, of George Washington University Law School.

HALLS OF IVY

Two familiar names are among the contributors to the *Oxford Companion to American Military History* (1999): Prof. **Jonathan Lurie** (Rutgers Univ.) wrote on the internment of enemy aliens and the UCMJ. NIMJ board of directors member Prof. **Michael F. Noone** (Catholic Univ.) wrote on the Articles of War, military courts, crimes and punishment, and citizens' rights in the military.

DIRECTORY OF CIVILIAN PRACTITIONERS: UPDATES AND ADDITIONS

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Obear, Kirk Bowden, N9661 Willow Rd., Elkhart Lake, WI 53020, tel. (920) 565-4225, fax (920) 565-4034, kirkobear@hotmail.com

ORGANIZATIONS AND WEBSITES

Citizens Against Military Injustice: www.military_injustice.org, cami98037@yahoo.com

Anthrax: www.majorbates.com. NIMJ note: this is a very impressive site, regardless of where you stand on the issue.

New organization in South Africa: "Legal Soldier," headed by **Ben Raseroka**. This organization, founded in 1999, offers legal representation to personnel of the South African National Defence Force in courts-martial, as well as an insurance arrangement to assist with legal fees.



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CAPITOL HILL

Following is the text of a letter sent to the House and Senate Armed Services Committees concerning § 544 of the Defense Authorization Bill for FY2001 as reported out by the House Committee. As passed by the House, § 544 had been modified by, among other things, turning the 20-year bar on secretarial clemency into a total ban, thus aggravating the problem addressed in the letter. **Homer E. Moyer, Jr.**, referred to in the last paragraph, is a partner in the Washington firm of Miller & Chevalier and author of the excellent treatise *Justice and the Military* (1974).

This letter is submitted on behalf of the National Institute of Military Justice. NIMJ is a nonpartisan nonprofit organization founded in 1991 for the purpose of advancing the fair administration of justice in the armed forces. Our board consists of law professors and deans and private practitioners who are expert in the areas of military justice and criminal law and procedure, with over 150 years of combined military service in all branches of the Armed Forces. Our monthly *Military Justice Gazette* is read by hundreds of military and civilian practitioners, judges, and law professors.

Our attention has been drawn to § 544 of the House Defense Authorization Bill. This provision limits the authority of the service secretaries to grant clemency to military prisoners serving sentences of confinement for life without eligibility for parole. The measure would permit that authority to be exercised only after the prisoner had served a period of confinement of not less than 20 years.

NIMJ takes no position at this time as to the need for such a limitation or what its duration should be, but we believe Congress should be aware that the measure is likely to have little if any effect, can be viewed as an erosion of civilian control, and may raise concerns under the separation of powers doctrine.

Schick v. Reed, 419 U.S. 256 (1974), arose from President **Eisenhower's** commutation of a military death sentence to life without parole. Writing for the 6-Justice majority, Chief Justice **Burger** observed (at p. 266) that "... the [pardon] power flows from the Constitution alone, and ... cannot be modified, abridged, or diminished by the Congress." Prof. **Tribe** writes: "Other than the express prohibition on pardons in cases of impeachment, the only recognized limit on the President's pardon power is that it does not include authority to pardon in anticipation of offenses ..." 1 **Laurence H. Tribe**, *American Constitutional Law* 720 (3d ed. 2000). As a result, Congress seemingly could not impose on the President a time restriction along the lines of that set forth in § 544.

Section 544 of the House bill, however, concerns only the power of the service secretaries to grant clemency. In addition to not restricting clemency which is personally granted by the President, the measure does not prevent the mitigation of a sentence to life without parole to one of life with the possibility of parole or a term of years either by military convening authorities or by the appellate military judges of the Courts of Criminal Appeals. To the extent that the secretaries' clemency authority under Art. 74, UCMJ, may be viewed as resting on or traceable to the pardon power, § 544 may be infirm. Even if that authority were viewed as having its source in legislation, erecting the proposed 20-year waiting period on its exercise in life-without-possibility-of-parole cases would still seem to violate the spirit of the Constitution, if not its letter.

In light of the fact that sentences to life without the possibility of parole remain subject to reduction—prior to the completion

of 20 years' confinement—by commanders, appellate military judges, and the President, § 544 is also likely to have less effect than its sponsor(s) intended.

Finally, by restricting the civilian service secretaries' ability to mitigate a life-without-parole sentence while leaving that power intact in the hands of uniformed officers, § 544 would appear to erode civilian control of the military justice system.

On the chance that these aspects of § 544 have not previously been focused upon, we respectfully invite them to your attention as Congress may wish to defer action on this provision until it has had an opportunity to conduct a hearing and otherwise study the matter.

NIMJ is committed to the proposition that the UCMJ should be dynamic and reflect changing conditions. Numerous changes to the UCMJ have been made in recent years (*e.g.*, the 1999 change that doubled the sentencing power of special courts-martial from six months to one year's confinement) without hearings or other public input. As a matter of policy, we strongly urge that changes to the military justice system not be made without timely opportunity for public input. Affording that opportunity will not only improve the legislative product, but also—at least as crucially—will strengthen public confidence in the administration of military justice. We would be pleased to participate in a hearing or congressionally-directed study to review § 544 and any other proposed changes to the UCMJ.

I have taken the liberty of transmitting copies of this letter to appropriate Executive Branch officials, Prof. **Tribe**, and Mr. **Moyer** (who represented Master Sergeant **Schick**).

Ed. Note: The Bar Association of the District of Columbia adopted the following resolution regarding other parts of the DOD Authorization Bill:

RESOLVED, that the Bar Association of the District of Columbia urges the Congress not to enact legislation restricting or modifying the jurisdiction of federal courts, or modifying the remedies available therein, in cases involving military selection boards, as proposed by the Department of Defense in Title V, Subtitle F (Sections 551 to 554) of the proposed DOD Authorization Act for FY 2001, which was forwarded to the Congress on March 6, 2000.

[According to the accompanying BADC Report, the principal purpose and effect of the proposed legislation is to limit federal court jurisdiction (retroactively), and thus terminate a number of pending litigation cases which have been brought challenging selection boards on constitutional and other grounds. Prospectively, the proposed legislation would effectively curtail any meaningful judicial review of future cases involving military selection boards as well. In addition to adopting its own Resolution and communicating it to the House and Senate Armed Services Committees, BADC has submitted the substance of its Resolution as a Recommendation and Report for consideration by the ABA House of Delegates at its meeting in New York in July.]

450 E STREET, N.W.

In *United States v. Lee*, No. 99-0002/AF, and *United States v. Hobson*, No. 00-0331/AF, the Court on May 23, 2000 granted review of the following question:

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN THEIR DUTY UNDER ARTICLES 66(a) AND 66(c), UCMJ, TO PROPERLY REVIEW APPELLANT'S CASE WHEN ONLY TWO JUDGES PARTICIPATED IN THE DECISION.

NIMJ will seek leave to file an *amicus curiae* brief and encourages other interested organizations to do the same.

NIMJ

On May 25, 2000, NIMJ hosted an informal meeting between Washington military law practitioners and visiting military law experts from Sweden, Chile, Thailand and Italy, accompanied by **Guy Abbate** and **Bill Aseltine**.

DIRECTORY OF CIVILIAN PRACTITIONERS: UPDATES AND ADDITIONS

Shaw, Bransford, Veilleux & Roth, tel. (202) 363-8400, sbvr@shawbransford.com, www.shawbransford.com/military.htm.

WEBSITE READING LIST

1. **Walter T. Cox III & Robinson O. Everett, Sr.**, Syllabus, Military Justice Seminar, Duke Univ. School of Law, 1999, www.law.duke.edu/curriculum/descriptions/573_01.html.

2. **Jorge Zaverucha**, Military Justice in the State of Pernambuco after the Brazilian Military Regime: An Authoritarian Legacy, darkwing.uoregon.edu/~caguirre/zaverucha.htm.

3. Parliament of Australia, Joint Standing Comm. On Foreign Affairs, Defence and Trade, *Completed Inquiry: Military Justice in the Australian Defence Force*, www.aph.gov/house/committee/jfadt/military/reptindx.htm.

4. **Andrew D. Mitchel & Tania Voon**, *Defense of the Indefensible? Reassessing the Constitutional Validity of Military Service Tribunals in Australia*, 27 Fed. L. Rev., No. 3, law.anu.edu.au/publications/flr/Vol27no3/MITCHELL-VOON.htm#P-1_0.

5. Lawyers Committee for Human Rights, President Pastana Fails to Walk the Talk on Human Rights and the Colombia Military, Feb. 4, 2000, www.lchr.org/feature/colombia/state200.htm. "The new Military Penal Code fails to give military judges adequate independence. A provision in the original legislation that would have buttressed their independence by ensuring they would not be answerable to operational commanders that might be implicated in the crimes in question was removed. Although under the new law active military personnel can no longer serve as judges in military courts, judges will nonetheless remain members of the military units subject to their jurisdiction. Military commanders of those units will continue to conduct the respective judges' performance evaluations."

STATE MILITARY JUSTICE

"An offense committed by a member of the militia, organized or

unorganized, shall be tried in civil courts and prosecuted by civil authorities except offenses of a purely military nature. This policy shall be executed and carried into effect at all times and applies to all encampments, armory drill periods, and parade periods in addition to any duty performed by the military under AS 26.05.070." Alas. Stat. § 26.05.300.



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MILITARY JUSTICE GAZETTE

Published by the

NATIONAL INSTITUTE OF MILITARY JUSTICE

No. 80

Judicial Conference Issue

June 12, 2000

JOINT SERVICE COMMITTEE ON MILITARY JUSTICE

[NIMJ has submitted the following comments to the Joint Service Committee:]

The National Institute of Military Justice (NIMJ) is a District of Columbia nonprofit corporation organized in 1991. Its overall purpose is to advance the administration of military justice in the Armed Forces of the United States. Since its inception, NIMJ has been an interested observer of the rulemaking process, and has frequently commented on proposed changes to the *Manual for Courts-Martial* (MCM). As part of our effort to foster a robust rule making process, NIMJ has announced proposed or final changes to the MCM as well as related hearings convened by the Joint Service Committee on Military Justice (JSC) through the monthly *Military Justice Gazette*. NIMJ is pleased to be able to continue to be an active participant in this important rule making process, and we appreciate the opportunity to submit these comments. We also appreciate the opportunity to submit these comments slightly beyond the "due date."

NIMJ's primary concern in past submissions has been the adequacy of the rule making process. Our 1998 submission to the JSC endorsed recent proposals of the American Bar Association and several other organizations to amend the process. NIMJ is pleased to note that earlier this year changes were made to the internal operating procedures of the JSC which appear to be responsive to some of the concerns raised by the various bar associations. Those changes should not be the end of the story.

In fact, the MCM changes currently under consideration make it clear that the opportunity for public comment, even after the recent changes to the JSC's procedures, remains of limited utility because the entire thrust of the rulemaking is to implement a statutory change already enacted by Congress. NIMJ submits that the change to the jurisdiction of special courts-martial (SPCM) effected in Section 577 of the National Defense Authorization Act for Fiscal Year 2000 (amending Article 19 of the Uniform Code of Military Justice) was the kind of major change to the military justice system that would best be accomplished *after* an open discussion and consideration by all those entities with an interest in this system. Here that statutory amendment came as a surprise to virtually all observers outside the JSC and the DOD (and perhaps the Code Committee). It was made without the benefit of hearings or other public discussion or review.

NIMJ believes that, whenever practicable, changes (particularly those as major as the SPCM jurisdiction

amendment) should be the subject of review and open discussion similar to that now being put in place for regulatory (MCM) changes to this system. NIMJ recommends that DOD examine the process by which legislative changes to the UCMJ are sought. We are fully aware of the Department's and the government's usual proprietary approach to legislative proposals, and of the normal legislative review process pursuant to OMB guidelines, and we recommend no change to that process—once initiated. We suggest, however, that DOD consider whether the military justice system, because of its nature as a system of criminal justice, as well as its effect on readiness, should be treated somewhat differently *prior* to commencing that more formal legislative review process. NIMJ thus recommends, in order to ensure that *every* change to this justice system, statutory or regulatory, is the best that can be fashioned, that the Department consider adopting a process through which *all* proposed changes are first considered in an open and public process.

Turning to the proposed changes, there appears to be some problem with the provision amending the analysis accompanying RCM 1107(e), since it refers to subsection (f)(1), for which there is no actual change. Perhaps this is a typographical error.

As a substantive matter, there appears to be an internal philosophical conflict within the various provisions of the proposed amendment, in that, for some provisions, the new language triggering action refers to punishment involving a bad conduct discharge (BCD) *or confinement or forfeitures beyond six months*, while in other provisions the new language refers to a BCD *or confinement for one year*. This tension seemingly arises from the fact that Congress only amended Article 19, and called for a verbatim (a "complete") record in any case not only where a BCD was awarded (as has long been the case), but in all those (new) SPCM cases involving confinement or forfeiture *for more than six months* as well. However, there was no accompanying change to either Article 54(c) concerning the requirements for a "complete" (verbatim) record, or to Article 66 amending the jurisdiction of the courts of criminal appeals, requiring appellate review not only of cases involving a BCD, but those (new) SPCM cases involving confinement or forfeitures for more than six months.

Incomplete legislation such as this invites confusion and threatens the harmonious operation of the Code—in this case a coherence and unity within the Code which has existed for 50 years has been upset. It appears, as buttressed by the comments of the JSC at the public hearing, that Congress intended by the amendment of Article 19 to show that more than 6 months confinement or forfeitures was serious enough to warrant a better record (*i.e.*, a complete or verba-

tim, rather than a summarized, record) for the convening authority to review. Congress should have followed through and amended the verbatim record requirements of Article 54(c) as well, so as to avoid the inconsistency which has now been created. It should also have amended Article 66, to recognize (as has been the case for 50 years) that a level of punishment requiring a verbatim record also merits requiring appellate review. This latter amendment is particularly desirable in view of other recent statutory amendments which impose or allow severe results whenever confinement exceeds six months (*e.g.*, automatic forfeitures under Article 58b; dropping from the roles under 10 U.S.C. § 1161). We therefore recommend that the Department develop follow-on proposals that would amend the verbatim record requirements and the appellate jurisdiction of the courts of criminal appeals, to include any case involving confinement (or forfeitures) for more than six months. Only then will the basic architecture of the statutory scheme be restored. Until this is done, action should be withheld on the proposed MCM changes.

NIMJ is uncomfortable with the determinations reached in the proposed amendments as to which events are triggered by a BCD or “one year confinement” (but not, for example, by 11 months confinement). In this category, for example, are the provisions for vacation of suspensions of sentence. We recommend that each of these provisions be reviewed, and that a *presumption* in favor of mandating additional protections for servicemen be imposed by triggering those additional protections for any punishment involving a BCD or confinement or forfeitures more than six months, rather than at a BCD or confinement for one year, as is currently proposed. As noted above, we also recommend that Articles 54 and 66 be amended to change the verbatim record requirements and to change the threshold for appellate review to include confinement or forfeiture for more than six months.

Finally, the Manual now clearly authorizes mitigation of a BCD to one year’s confinement. Mitigation of a discharge to a period of confinement is often correctly viewed by those forced to endure it as a harsh (and unlawful) *increase* in the severity of punishment. *See, e.g., Frazier v. McGowan*, 48 M.J. 828, 832 (C.G.Ct.Crim.App. 1998) (as an *amicus*, NIMJ “emphasized the importance of perceptions and how this particular changed sentence [BCD to one-year confinement] fuels an adverse civilian perception of the military justice system”). The amendment to the Discussion accompanying RCM 1107(d)(1) specifically authorizing the new “equivalency” (BCD to one-year confinement) is bound to be problematic. NIMJ recommends, for the overall good of the system, that the prior Discussion be retained intact.

NIMJ appreciates the opportunity to comment on these proposed changes.

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MILITARY JUSTICE GAZETTE

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No. 81

ABA Annual Meeting Issue

July 2000

GOTHAM

Thursday, July 6, 5:30 p.m., Judge Advocates Association and the Brooklyn Bar Association. At the Brooklyn Bar Association, 123 Remsen Street, Downtown Brooklyn (near Court Street and Boro Hall subway stops)

6:30 p.m., JAA Reception and Dinner, Gage and Tollner Restaurant, 372 Fulton Street, Brooklyn

Friday, July 7, 8:00 a.m.-Noon, ABA Military Law Committee (MLC) Meeting, Sheraton New York, Royal Ballroom B, 2nd Floor

1:30 p.m.-3:30 p.m., JAA/MLC/Standing Committee on Armed Forces Law (SCAFL) Program "The New Canadian Military Justice System," Speaker: BG **Jerry P.T. Pitzul**, Canadian Forces TJAG, Sheraton New York, Royal Ballroom B, 2nd Floor

3:45 p.m.- 5:30 p.m., JAA and Criminal Justice Section CLE Program: "War Crimes," Clinton Suite, 2nd Floor, Hilton New York

2:00 p.m.-4:00 p.m., JAA and Environmental Law Section CLE Program: "Interface of Environmental Laws & the Military: Compliance Issues, Operational Readiness & Impact on the Civilian Community Outside the Gate," CLE Centre-Sheraton New York Conference Room I, Lower Level

3:30 p.m.-5:30 p.m., JAA Annual Members Meeting Sheraton New York, Royal Ballroom B, Second Floor

Saturday, July 8, 9:00 a.m.-3:00 p.m., SCAFL Meeting, Park Suite 6, 5th Floor

Sunday, July 9, 9:00 a.m.-Noon, Panel Discussion, Clinton Suite, 2nd Floor, Hilton New York: "Sex and the UCMJ: 50 Years into the Modern Era of Military Justice," Maj Gen **Bill Moorman**, Prof. **David Schlueter**, Capt (ret) **Pat Gormley**, Prof. **Beth Hillman**, and LtCol (ret) **Frank Spinner**.

Monday, July 10, 11:00 a.m., U.S. Court of Appeals for the Armed Forces (Project Outreach) Hearing, *United States v. Chaney*, No. 00-0109/AF, The Great Hall, Association of the Bar of the City of New York, 42 West 44th Street. The granted issue is whether it was error to grant trial counsel's peremptory challenge of the only female member of the court-martial where the stated basis for challenge was that she is a nurse. The argument will be followed by a question-and-answer session.

CAAF JUDICIAL CONFERENCE FOLLOW-UP

Several questions were raised following the CAAF Judicial Conference regarding NIMJ's filing as an *amicus curiae* in *Clinton v. Goldsmith*, 526 U.S. 529 (1999). NIMJ's September 1998 brief supported the position of the United States and urged the Court to grant the government's certiorari petition. NIMJ took the position that CAAF had no jurisdiction to issue the writ under the circumstances presented. See *Goldsmith v. Clinton*, 48 M.J. 84 (1998). NIMJ's motion and brief are available on the web by clicking "Brief as Amicus" (supporting the United States in *Clinton v. Goldsmith*) on the NIMJ website, www.nimj.org.

This year, NIMJ filed an *amicus* brief with CAAF in *King v. Mobley*, later restyled *United States v. King*. Citing its brief in *Clinton v. Goldsmith*, NIMJ took the position that CAAF's All Writs Act jurisdiction was very broad, and clearly extended to a case where charges had not yet been referred to trial, and indeed had not yet been investigated at an Article 32 investigation. *King* involved the question of

possible government interference with the right to counsel prior to an Article 32 investigation. After hearing oral argument (carried on C-SPAN), CAAF continued its stay of the Article 32 investigation and issued an order designed to remedy the situation and to ensure that King was afforded his right to counsel. NIMJ's brief in *King* is available on the web by clicking "Brief as Amicus" in *King v. Mobley* on the NIMJ website.

AROUND THE CIRCUITS

The Eighth Circuit, citing *Clinton v. Goldsmith*, has reversed the dismissal of a § 2241 habeas corpus petition filed by a Bureau of Prisons inmate who was confined pursuant to a court-martial conviction. *Gilliam v. Bureau of Prisons*, 2000 U.S. App. LEXIS 3684 (8th Cir. 2000) (per curiam).

In *United States v. Gatlin*, No. 99-1447 (2d Cir. June 15, 2000), the Second Circuit (Cabrane, J.) held that 18 U.S.C. § 7(3), which defines the "special maritime and territorial jurisdiction of the United States," does not apply extraterritorially. The court directed its clerk to transmit copies to the House and Senate Judiciary and Armed Services Committees, noting that the much discussed overseas jurisdictional gap "may warrant further congressional scrutiny." The case is on the web at www.tourolaw.edu/2ndCircuit/June00/99-1447.html.

BOOKSHELF

The National Women's Law Center has issued an important new study, "Be All That We Can Be: Lessons from the Military for Improving Our Nation's Child Care System," analyzing the military's "remarkable transformation of its child care system." It is available on NWLC's website, www.nwlc.org. The Index and Legislative History of the UCMJ is available through www.amazon.com for \$110.

WORLD WIDE WEB

The 125-page first Annual Report of the Judge Advocate General of Canada is available at http://www.dnd.ca/jag/1_annualreport_e.html. This outstanding document is certain to contribute to improved public understanding of military justice in Can-

ada. *Bravo!* Readers should note that BG Jerry Pitzul, Canadian Forces TJAG, will speak on the report and the Canadian system on July 7 in New York City, as reported earlier in this issue. The Military Court of Lebanon also has a home page, <http://www.libancom.com.lb/clients/na-la houd/>.



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MILITARY JUSTICE GAZETTE

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August 2000

AMERICAN BAR ASSOCIATION

On July 10, the ABA House of Delegates adopted the Bar Association of the District of Columbia's Recommendation opposing DOD proposed legislation to modify judicial remedies and jurisdiction in military selection board cases. BADC's original Recommendation, reported in M.J. Gaz. 79, was amended by adding a final phrase calling for congressional hearings, and by a further provision opposing any legislation which acted retroactively to modify court jurisdiction or remedies. The ABA's Standing Committee on Armed Forces Law (SCAFL) and the Judge Advocates Association (JAA) supported the Recommendation. The full text of the proposal as adopted follows (amendments are underlined):

"RESOLVED, That the American Bar Association urges the Congress not to enact legislation restricting or modifying the jurisdiction of federal courts, or modifying the remedies available therein, in cases involving military selection boards, as proposed by the Department of Defense in Title V, Subtitle F (Sections 551 to 554) of the proposed DOD Authorization Act for FY 2001, which was forwarded to the Congress on March 6, 2000, unless and until Congress has had an opportunity to hold hearings on the proposed legislation.

"FURTHER RESOLVED, That in accordance with the goals of the American Bar Association to protect judicial independence and the rule of law, the Association urges rejection of the proposal in Section 554 of the proposed Act or any similar proposal which would apply such legislation retroactively to change the rule of decision for cases already pending in the courts of the United States."

BADC reports that the thrust of the discussions regarding the first paragraph of the Recommendation at the various meetings at the ABA in NY, and in the House of Delegates, was that military personnel are the people who go in harms way to defend rights for the rest of us, including rights of access to the federal courts and judicial remedies therein. If Congress finds it necessary to modify or limit remedies or privileges now available to these military defenders, that should only be done for a very good reason (*e.g.*, national security or good order and discipline), and it should only be

done if it is shown on the record, after hearings and a thorough review, to be the necessary and proper thing to do. BADC argued that the DOD proposal was sent to Congress without any rationale or explanation of either the evil to be remedied or the anticipated effect of the proposal, and that because of this the proposal should not be adopted until all interested viewpoints are effectively heard and Congress is able to make reasoned findings on an adequate public record.

The DOD proposal, without the retroactivity provision, is part of the Senate Bill, but was not included in the House Bill. The Conference Committee will determine whether the provisions remain in the final DOD Authorization Bill.

LETTER FROM LILLEHAMMER

The Brussels-based International Society for Military Law and the Law of War held its triennial meeting in Lillehammer, Norway, June 6th through 10th. Participants came from North and South America, including the Caribbean, Eastern and Western Europe, China, and Africa. The Committee on General Affairs submitted a provocative report on the impact on armed forces of judicial decisions involving human rights. Among the topics raised: is a sending state (*e.g.*, the U.S.) which is not a signatory to the European Convention on Human Rights required to conform its disciplinary procedures affecting its troops in the receiving state to the Convention in order to ensure that the receiving state (*e.g.*, a European NATO member) is not in breach of its obligations to protect the rights of all within its jurisdiction? The Committee for Criminology combined law and social science in its report on the etiology and prevention of violent crimes towards civil population by soldiers on peace keeping missions. The Belgian, Canadian, and Italian national groups submitted fascinating reports describing their experiences in the Congo, Rwanda, Somalia and former Yugoslavia. The Committee on History of Military Law elected to stay firmly in the present, sponsoring discussions on the impact of non-lethal weapons on the law of armed conflict and on the legality of NATO's bombing of Yugoslavia while the Committee on the Protection of Human Life in Armed Conflict discussed revision of the Geneva Convention provisions regarding civilians accompanying the forces in order to distinguish between those directly supporting hostilities and non-belligerents such

as journalists. Finally there was a general report summarizing some 30 national responses to a questionnaire seeking information on the legal problems which arise when the military is called on to support civil authorities. Conference materials will be published in the Society's *Proceedings*. Readers of the *Gazette* will be informed if, as expected, a U.S. national group is organized.

Michael F. Noone

BOOKSHELF

Tarnished Scalpels: The Court-Martials of Fifty Union Surgeons, by Drs. **Thomas P. Lowry** and **Jack D. Welch** (Stackpole Books 2000, \$24.95). Informative reviews appear in the Amazon.com listing.

INTERESTING FACT

Ever notice that the services do not agree on the burden of proof for nonjudicial punishment? The Army, unlike the others, demands proof beyond a reasonable doubt. Seems odd that there would be divergent approaches on a core issue under a single statutory provision. A good task for the Joint Service Committee to tackle?

DIRECTORY OF CIVILIAN PRACTITIONERS: ADDENDA

Clarke, Michael R., 1500 Wakarusa Dr., Ste. A, Lawrence, KS 66047, tel. (785) 832-2181, fax (785) 832-2125
Hunt, Mel, 813 Goldstream Ave., Victoria, BC, Canada V9B 2Xb, tel. (250) 478-1731, info@dinninghunter.com, www.pin.ca/military/lawyer/ (Canadian cases)

WORLD WIDE WEB

1. Defense Privacy Board, Advisory Opinion No. 32 (n.d.): "... Although courts-martial, themselves, are not 'agencies' for purposes of the Privacy Act, records of trials by courts-martial are maintained by agencies long after the courts-martial involved have been dissolved. The Privacy Act requires each agency that maintains a system of records to 'publish in the *Federal Register* upon establishment or revision a notice of the existence and character of the system of records . . . ' 5 U.S.C. § 552a(e)(4). Hence, the requirement to publish a system notice applies to systems containing courts-martial records." www.defenselink.mil/privacy/opinions/op0032.html.

2. Emperor's Hammer Articles of War. www.Emperorshammer.org/aow.htm. "Loosely adapted from the Uniform Code of Military Justice."

CODE COMMITTEE ON MILITARY JUSTICE

Prof. **Lee D. Schinasi** (University of Miami School of Law) and Hon. **Jacob Hagopian** (U.S. Magistrate Judge, D.R.I.) have been named Public Members of the Code Committee. Congratulations!



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MILITARY JUSTICE GAZETTE

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September 2000

JOINT SERVICE COMMITTEE ON MILITARY JUSTICE

[The following is the text of a letter sent to the Joint Service Committee on Military Justice by NIMJ regarding the latest proposed amendments to the *Manual for Courts-Martial*, 65 Fed. Reg. 30,964 (May 15, 2000)]

The National Institute of Military Justice (NIMJ) is a District of Columbia nonprofit corporation organized in 1991. Its overall purpose is to advance the administration of military justice in the Armed Forces of the United States. Since its inception, NIMJ has been an interested observer of the rule making process, and has frequently commented on proposed changes to the Manual for Courts-Martial (MCM). As part of our effort to foster a robust rule making process, NIMJ has announced proposed or final changes to the MCM as well as related hearings convened by the Joint Service Committee on Military Justice (JSC) through the monthly *Military Justice Gazette*. NIMJ is pleased to be able to continue to be an active participant in this important rule making process, and we appreciate the opportunity to submit these comments.

NIMJ's primary concern in past submissions has been the adequacy of the rulemaking process. Our comments today once again reflect this concern.

In February this year the Joint Service Committee (JSC) adopted new procedures to encourage public participation in the MCM rulemaking process. One of the significant changes was to issue an annual invitation to the public to submit proposals for change to the MCM for consideration by the JSC. This Federal Register notice is believed to be the first to include this invitation for the public to submit such proposals. NIMJ's concerns are with the wording of the invitation, and its implications. The following language is used:

Proposals *should* include reference to the specific provision you wish changed, a rationale for the proposed change, and specific and detailed proposed language to replace the current language. *Incomplete submissions will not be considered.*

65 Fed. Reg. at 30,965 (emphasis added).

NIMJ does not dispute the desirability, where feasible, for those making proposals to submit completed proposals with full rationales and justifications, and proposed language to implement the proposed changes. Indeed, submission of a "redlined" text, indicating all changes to the current MCM, would be a decided help to those reviewing such proposals. Accordingly, the use of the word "should" is appropriate. However, the notice then indicates that proposals without such detailed rationales or proposed language "will not be

considered." NIMJ perceives this as a provision which will have a "chilling effect" on the submission of proposals. Many individuals or organizations may well perceive problems in the current MCM, or areas in which current procedures could be improved, and wish to propose changes, without having the time or expertise to produce the kind of proposal which has long been required of members of the JSC who wish to make proposals for change. NIMJ believes that such ideas and proposals should not be discouraged. Instead, the burden should fall to the JSC, rather than to the public, to not only consider *ideas* for change which are submitted, but in addition (in the absence of specific implementing language submitted by the proposer) to take it upon itself to prepare full proposals to implement any ideas for change submitted by outside entities or persons which are deemed meritorious.

NIMJ also believes that the notice could be clarified to note that proposals from the public which are not submitted within the public comment period will still be considered, but *may not* be able to be included in the next Annual Review.

We note, for example, that one of the substantive changes appears to implement a case decided by the Court of Appeals for the Armed Forces in January, 2000. It thus appears that, at least in some cases, far less than a full Annual Review cycle is required to produce proposed changes.

Accordingly, NIMJ recommends that the JSC procedures be amended to respond to these suggestions, and that the public be notified of these change when future invitations are issued. In addition, and as previously recommended, NIMJ submits that the JSC "Internal Organization and Operating Procedures" document is not the most appropriate vehicle for promulgation of rules applicable to public participation in the MCM rulemaking process, and that these rules should be included in appropriate DOD Directives published in the Code of Federal Regulations and in the Manual for Courts-Martial. NIMJ again recommends that these procedures be suitably promulgated.

NIMJ has no comment on the substantive changes proposed in the notice, except as follows.

We note that the proposals do not necessarily include the kind of rationale which would seem to be necessary to justify a proposed change submitted by a member of the public to the JSC. Because of the lack of explanation, for example, NIMJ is unable to determine why the JSC deemed it desirable in 2000 to amend the Analysis for RCM 707(a) to specifically address a seven year old case.

We also note that the amendments to RCM 1003(b)(3) and 1107 (d)(5) seem merely to implement the recent decision in *United States v. Tualla*, 52 M.J. 228 (2000). However, that case was in large measure an interpretation of the relevant RCMs by the court. There are policy issues which undoubtedly underlie the proposed changes to the RCMs,

and those reviewing the proposals would have benefited from a discussion of the underlying concerns and the rationale adopted in reaching the changes noted. The same observation is applicable to the proposed change to RCM 701(b)(4). The absence of a fuller rationale and a more adequate indication of the problem being addressed by the changes makes meaningful comment difficult.

450 E STREET, N.W.

At this year's Judicial Conference, Senior Judge **Walter T. Cox III** announced that **Thomas Granahan**, Clerk of the United States Court of Appeals for the Armed Forces, had recently notified the Court of his decision to retire on March 3, 2001. In honoring Tom for his 19 years of dedicated service as the Court's fourth Clerk of Court and for his nearly 24 years of total service on the Court's professional staff, Judge Cox stated that, in his judgment, Tom epitomized the qualities of sound judgment, high moral character and ethical responsibility that had been highlighted by a previous Judicial Conference speaker on moral philosophy and legal ethics. Well done, Tom.

For historical interest, Tom's predecessors as Clerk of Court were **Alfred C. Proulx, Jr.** (1951-1972); **Michael W. Katen** (1972-1976); and **Francis X. Gindhart** (1977-1981).

The Office of Personnel Management's Vacancy Announcement may be found at www.usajobs.opm.gov/wfjc/jobs/BS91932.HTM, or via a link on the Court's home page. The application period closes on September 18, 2000.

JOB OPENING

The Center on Conscience and War/NISBCO, a small interfaith organization in Washington D.C. advocating on behalf of conscientious objectors, seeks an Executive Director for December 2000. For more information visit www.nisbco.org or contact **Jonathan Ogle**, c/o Westtown School, Westtown, PA 19395; (610) 399-1435, Jonathan.Ogle@westtown.edu.

NECROLOGY

NIMJ notes with sadness the death of **Carolyn Dock**. Animated initially by the need to save her son **Todd** from the death penalty, Carolyn was founder and moving force of MOMS (Members Opposed to Maltreatment of Servicemembers). She opened a new era in awareness of the needs of military prisoners and their families. A tireless worker, she never lost her inner compass, and she gained the respect of many officials in positions of responsibility for military correctional matters. She was a friend of NIMJ and we shall miss her.

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NIMJ



MILITARY JUSTICE GAZETTE

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No. 84

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September 2000

CINEMA NOTES

I SAW SHAFT SEVEN TIMES

By Ronald W. Meister

The recent re-make of the epic film *Shaft* calls to mind some of the strange things lawyers are required to do to comply with their professional obligations.

During the Vietnam War, the United States Navy decided that it would be good for morale if every sailor on active duty had a "legal check-up." No doubt as a result of my meritorious record as a JAG lieutenant in Boston, I was awarded the plum assignment of providing this service at the Naval Facility on Nantucket Island—in February. At that time of year, the base had a complement of ninety shivering sailors, most of them under twenty years old. I flew to the island to begin the principal work of "Legal Check-Up Week," writing their wills.

It was a source of not inconsiderable anxiety, among young sailors who could be sent on dangerous missions on short notice, that a legal officer had appeared suddenly to write wills for all of them. I attempted to explain that Legal Check-Up Week was merely another part of Navy routine, like watching movies about venereal disease and beating up civilians, and avidly set to the task of estate planning. Most of the interviews went something like this:

"I'm here to help you with your estate plan."

"What's that, sir?"

"It's about what's going to happen to your property when you die."

"AM I GOING TO DIE?"

"Well, yes, eventually, but I don't have any classified information about when. Why don't you tell me about what you own."

"Own a bicycle, sir."

"Good. Have you given any thought to who should inherit your bicycle when you die?"

"WHY DO YOU KEEP SAYING I'M GOING TO DIE?"

"Okay, sailor. Here's a note to your C.O. that you don't need a will just yet. Would you please send the next

man in?"

And so it went, for seven days. Most of my other services during Legal Check-Up Week were equally ineffective, except for the day I was asked to advise the Commanding Officer of his legal options in apprehending two Army deserters who were believed to have escaped to Nantucket. I facetiously asked if he could blockade the island. Taking this as a legal proposal for an actual naval operation, the C.O. mobilized his forces and smoked out the deserters. I got a letter of commendation.

Aside from the manhunt, the real entertainment at the base, which was too small to have an Officers' Club, was the nightly movie. Every Sunday, a plane arrived from the mainland with seven movies for the upcoming week. With seven movies for as many days, you might expect that the Navy's logistical coordinators could figure out an appropriate allocation per evening, but you would be wrong. Every night, they showed all seven movies—in the same order. If you wanted to see movie number four, you had to stay up until 3:00 A.M.

The week I was there, the base was featuring the Richard Roundtree Film Festival, which included *Shaft*, *Shaft's Big Score*, *Shaft Rides Again*, *Bride of Shaft*, *Shaft and Louise*, and two others I could never manage to stay awake to see. I went every night. There is nothing else to do in Nantucket in February except write wills.

Years later, having moved on professionally from not writing wills for eighteen-year-olds, I found myself picking a jury in [New York] Supreme Court in White Plains. One of the veniremen identified himself as Herbert Roundtree. I asked if he was any relation to Richard, and he said he was his father. I couldn't help myself. I blurted out, "I saw *Shaft* seven times."

Ronald W. Meister, a member of NIMJ's Advisory Board, is a partner at Cowan, Liebowitz & Latman, P.C., in New York. He also saw *The Life of Alexander Graham Bell* seven times, but that's another story.

NIMJ

On August 25, 2000, NIMJ filed a brief as *amicus curiae* in *United States v. Lee*, CAAF Dkt. No. 99-0002/AF. We took the position that when only two appellate military judges participate in a decision, the record must indicate why the third assigned judge did not participate.

We are very pleased to announce that **David P. Sheldon** has been elected to the NIMJ Advisory Board.

*DIRECTORY OF CIVILIAN
PRACTITIONERS: ADDENDA*

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RECOMMENDED READING

Gerry R. Rubin, *The Prof, the Charwoman, the TORCH Plans and the Court-Martial: Flying Officer Bentwich's Nemesis*, RUSI J. [UK], Aug. 2000, at 64.

WORLD WIDE WEB

1. The web makes it possible for military justice junkies to learn about important foreign legal developments much more promptly than ever before. For example, a three-judge panel of the Supreme Court of India, dismissing a government appeal of a decision of the Calcutta High Court, has held that "a judge-advocate appointed with the GCM should not be an officer of a rank lower than that of the officer facing trial unless the officer of such rank is not available and the opinion regarding non-availability is specifically recorded in the convening order." The decision, arising on collateral review, will not affect cases that have become final.

The court was critical of the current statutory arrangement, observing that courts-martial do not provide even a brief statement of reasons for their conclusions, even in capital cases. "This must be remedied in order to ensure that a disciplined and dedicated Indian Army did not nurse a grievance that the substance of justice and fair play is denied to it." It described the lack of direct appeal as "a glaring lacuna in a country where a counterpart civilian convict can prefer appeal after appeal to a hierarchy of courts." It also commented: "Even today the law relating to the armed forces remains static requiring changes in view [of] the apex court's observations made in 1982, the constitutional mandate and the changes effected by other democratic countries." *Union of India v. Gill*, No. 2865 of 2000 (Apr. 24, 2000), www.supremecourtsonline.com/2000/200/s00-281.htm.

2. New rules for the Air Force Court of Criminal Appeals, effective Sept. 1, 2000: www.afcca.law.af.mil.

JUDGE ADVOCATES ASSOCIATION

The JAA is sponsoring (with several bar committees) another Military Administrative Law Conference and Walter T. Cox III Military Legal History Symposium. Oct. 16-20, 2000, Spates Hall, Ft. Myer. NIMJ highly recommends this program. For full details check JAA's website, www.jaa.org.



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450 E STREET, N.W.

Congratulations to **James E. Baker** on becoming a Judge of the United States Court of Appeals for the Armed Forces. He succeeded Judge **Walter T. Cox III** on September 19.

DEPARTMENT OF STATISTICS

How many cases are submitted to the appellate courts without assigned errors? Data from the Army, Navy-Marine Corps and Air Force indicate that over half of all cases that meet the jurisdictional threshold for appellate review are submitted "on the merits." *Query*: Is review of these cases other than for sentence appropriateness a worthwhile expenditure of appellate judicial and counsel resources?

IN THE ARTICLE III COURTS

Is a conviction under Art. 112a a "serious drug offense" under the sentence-enhancement provisions of 18 U.S.C. § 924(e)? *Held*, no. *United States v. Stuckey*, No. 00-1300 (8th Cir. Aug. 9, 2000).

U.S. ARMY COURT OF CRIMINAL APPEALS

"Ten months to prepare and authenticate a 519-page record of trial is too long. A timely, complete, and accurate record of trial is a critical part of the court-martial process. Every soldier deserves a fair, impartial, and timely trial, to include the post-trial processing of his case." "Untimely post-trial processing damages the confidence of both soldiers and the public in the fairness of military justice." *Held*, confinement reduced from 8 years to 92 months, despite absence of actual prejudice. *United States v. Collazo*, No. 97-01562, 2000 CCA LEXIS 174 (ACCA July 27, 2000) (Carter, J.).

VIVE LA FRANCE

Does wearing of the uniform of the Royal Hutt River Defence Forces violate article 418 Of the French Code de Justice Militaire? No, because by definition it is neither a French uniform nor a foreign uniform, as the Principality of Hutt River (said to be a small state located about 500 km north of Perth, Australia) is not yet officially recognized by France. See <http://www.chez.com/rhrdf>.

AMERICAN BAR ASSOCIATION

The Standing Committee on Armed Forces Law will hold its Fall 2000 meeting from 10:00 a.m. to 4:00 p.m. on

Friday, December 1, at the United States Court of Appeals for the Armed Forces, 450 E Street N.W., Washington, DC. The meeting is open to the public. Items to be considered include a brainstorming session on potential items the SCAFL should study with a view to preparing Recommendations and Reports for full ABA consideration and a similar open forum on issues on which the SCAFL or the ABA can provide support to the services and the senior service lawyers. In addition, the SCAFL will review and discuss the UCMJ provision (10 USC § 942(b)(4)) which prohibits officers retired with 20 years' active service from being appointed to the Court of Appeals. A block of rooms has been reserved at the Washington Court Hotel, 525 New Jersey Ave., N.W. (1-800-321-3010; mention "ABA Armed Forces Law" for discount \$149 room rate).

IN CONGRESS

The FY2001 DOD Authorization Bill includes several provisions of interest to military justice practitioners. One limits the service secretaries' power to grant clemency to persons sentenced to life without parole. Such persons would not be eligible for secretarial clemency until they had served at least 20 years' confinement; the secretaries' power to grant clemency would be nondelegable. *Query*: Is this an unconstitutional intrusion on the clemency power? NIMJ raised this question while the bill was under consideration (see *Gaz.* No. 79); the issue is not mentioned in the Conference Report.

NEW ZEALAND

1. **Phil Cave** has called our attention to important legislation from New Zealand. In one measure, Parliament has enacted a pardon for soldiers who were executed in World War I. Pardon for Soldiers of the Great War Act 2000 029 (Sept. 15, 2000), <http://rangi.knowledge-basket.co.nz/gpacts/public/text/2000/an/029.html>. According to the preamble, in the Great War, five soldiers of the New Zealand Expeditionary Force, all of them volunteers, were executed, after trial by court-martial. One was convicted of mutiny, the others for desertion. "Their execution was not a fate that they deserved but was one that resulted from (a) the harsh discipline that was believed at the time to be required; and (b) the application of the death penalty for military offences being seen at that time as an essential part of maintaining military discipline." The Preamble adds: "The execution of those 5 soldiers brought dishonour to both the soldiers themselves and New Zealand. . . . It is now desired to remove, so far as practicable, the dishonour that the execution of those 5 soldiers brought to those soldiers and their families."

Also of interest is the International Crimes and In-

ternational Criminal Court Act 2000 026 <http://rangi.knowledge-basket.co.nz/gpacts/public/text/2000/an/026.html>, (Oct. 1, 2000). It has, as well as paving the way for New Zealand's cooperation with the ICC, filled the gaps in NZ law to the extent that any war crime recognized by the Rome Statute is now an indictable offense under NZ law. There are some overlaps—for example, a grave breach of the Geneva Conventions would be an offense against both this Act and the Geneva Conventions Act 1958.

2. The University of Waikato History Department has created "WaiMilHist," the Electronic Journal of Military History. Of note is **Cheryl Simes**, *Not Your Average Trial: The Statutory Unfairness of Courts-Martial in New Zealand*, 1 WaiMilHist, No. 2 (1998). See www.waikato.ac.nz/humanities/history/journalfolder/waimilhist2folder/.

LIGHT READING ON MILITARY JUSTICE

Kevin J. Barry, *Modernizing The Manual for Courts-Martial Rulemaking Process: A Work in Progress*, 165 Mil. L. Rev. 237 (2000)

Eugene R. Fidell, *A World-Wide Perspective on Change in Military Justice*, 48 A.F. L. Rev. 195 (2000) (originally presented at 1999 biennial meeting of Inter-University Seminar on Armed Forces and Society)

MajGen **James W. Moorman**, *Fifty Years of Military Justice: Does the Uniform Code of Military Justice Need to be Changed?*, 48 A.F. L. Rev. 185 (2000) (originally presented at 9th Annual Conference on National Security Law in a Changing World, Oct. 29, 1999)

Gerry R. Rubin, *In the Highest Degree Ominous: Hitler's Threatened Invasion and the British War Zone Courts*, in **Katherine O'Donovan & Gerry R. Rubin** (eds.), *Human Rights and Legal History: Essays for Brian Simpson* (Oxford 2000, £40). The paper appears in a Festschrift for the distinguished English legal historian, **A.W.B. Simpson**, Charles and Edith Clyne Professor of Law at the University of Michigan and author of *In the Highest Degree Odious* (Oxford 1992), a study of executive detention in Britain in World War II. Prof. Rubin discusses the emergency courts system planned by British wartime civil servants to administer swift justice to civilians had British forces been called upon to engage a Nazi invader on British soil. According to a contemporary legal periodical, the proposed scheme shifted, during the bill's parliamentary progress, from being "Courts-Martial for Civilians" to "No Courts-Martial for Civilians" to "Courts Not Quite Martial" for civilians.

U.S. DISCIPLINARY BARRACKS

Useful FAQs about the USDB have been posted on the web at <http://leav-www.army.mil/usdb/faq.htm>. For example, between 1984 and 1998, the average inmate age rose from 26.6 to 32.7, while the av-

erage sentence rose from 9 to 14.9 years. Crimes against persons account for 83% of the inmates' offense, 6% were drug crimes, and 11% were "other crimes." Comparable percentages for civilian federal inmates were 13%, 63% and 24%, respectively, and for state inmates, 46%, 31% and 23%, respectively. The 625 DB inmates included 15 women and 38 officers.



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COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE

The Uniform Code of Military Justice was approved on May 5, 1950 and took effect on May 31, 1951. In § 556 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Congress commemorated the 50th anniversary of the Code. Among other things, Congress noted that it had "enacted major revisions of the [Code] in 1968 and 1983 and, in addition, has amended the code from time to time over the years as practice under the code indicated a need for updating the substance or procedure of the law of military justice." Section 556 asks the President to issue a suitable proclamation and "calls upon the Department of Defense, the Armed Forces, and the United States Court of Appeals for the Armed Forces and interested organizations and members of the bar and the public to commemorate the occasion of [the] anniversary with ceremonies and activities befitting its importance." Believing that an integral part of those activities should be an appraisal of the current operation of the Code and an evaluation of the need for change, the National Institute of Military Justice is sponsoring a Commission on the 50th Anniversary of the Uniform Code of Military Justice, in coordination with The George Washington University Law School. The Commission consists of:

Hon. Walter T. Cox III, *Chair*
Captain Guy R. Abbate, Jr., JAGC, USN (Ret)
Professor Mary M. Cheh
Rear Admiral John S. Jenkins, JAGC, USN (Ret)
Lieutenant Colonel Frank J. Spinner, USAF (Ret)
Professor Elizabeth Lutes Hillman, *Reporter*
Kathleen A. Duignan, Esquire, *Assistant to the Chair*

The Commission's goal is to solicit from all interested parties comments and suggestions regarding the operation of the military justice system and to submit to the House and Senate Committees on Armed Services, the Secretary of Defense, the Service Secretaries, and the Code Committee the record of its proceedings, including any recommendations for change or for further consideration by the Congress and the Executive Branch.

Comments on the operation of the Code and suggestions for change should be emailed to Judge Cox at judgecox@earthlink.net no later than December 1, 2000. Attachments should be in Word format. Sample topics, which are not intended to indicate the views of the Commission, are attached. After receiving comments and suggestions, the Commission will disseminate a list of the topics received and will solicit final comments to be received by January 31, 2001.

The Commission will conduct a public hearing at The George Washington University Law School on a date to be

announced. It is anticipated that the proceedings will be televised.

Depending on the number of persons wishing to make presentations, witnesses will be afforded no less than 10 minutes to address the Commission. Those wishing to speak will be asked to submit any written materials in Word format to the Commission by a date to be announced, and to bring 15 copies with them to the hearing.

After the hearing the Commission will prepare a brief report certifying the record of its proceedings and making such comments and recommendations as it deems appropriate. The Commission's Report will be available to the public.

The Commission and Staff

Walter T. Cox III graduated from Clemson University in 1964 and the University of South Carolina School of Law in 1967. He served in the United States Army from 1964 to 1973. He was a Judge of the South Carolina Circuit Court from 1978 to 1984, serving during part of that time as an Acting Associate Justice of the Supreme Court of South Carolina. He served on the United States Court of Military Appeals and the United States Court of Appeals for the Armed Forces from 1984 to 1999, and was Chief Judge from 1995 to 1999. He has taught Military Justice at Duke University School of Law.

Guy R. Abbate, Jr. graduated from Boston College in 1968 and Suffolk Law School in 1977. He served in the United States Navy Judge Advocate General's Corps for 20 years, retiring in 1995 in the grade of Captain. Among his other assignments, he served as Director, Appellate Defense Division, Navy-Marine Appellate Review Activity from 1990 to 1992. He headed International Military Education Training at the Naval Justice School from 1992 to 1995. Since 1995, he has been a consultant to the Defense Institute of International Legal Studies and the Naval Justice School, where he is Senior Instructor in the international course "Conducting Military and Peacekeeping Operations in accordance with the Rule of Law."

Mary M. Cheh is the Elyce Zenoff Research Professor of Law at The George Washington University Law School, where she teaches Constitutional Law and Criminal Procedure. She received a B.A. from Douglas College (Rutgers University) in 1972, a J.D. from Rutgers University Law School at Newark in 1975, and an LL.M. from Harvard Law School in 1977. She has also taught at the University of California Hastings College of the Law, University of North Carolina School of Law, and other law schools. She is been a member of the Rules Advisory Committee of the United States Court of Appeals for the Armed Forces, and a director of NIMJ.

John S. Jenkins has been on the decanal staff of The George Washington University Law School since 1982, and is currently Senior Associate Dean for Administrative Affairs. He served for 28 years in the United States Navy, including service as Judge Advocate General of the Navy from 1980 to 1982. He retired with the grade of Rear Admiral. He is a director of NIMJ and since 1985 has been a member of the American Bar Association's House of Delegates as representative of the Judge Advocates Association.

Frank J. Spinner is an attorney in private practice in Fairfax, Virginia. He received his B.S. from Louisiana Tech University in 1972 and his J.D. from St. Mary's University School of Law in 1977. He retired from the United States Air Force Judge Advocate General's Department in 1994 with the grade of Lieutenant Colonel. His practice includes the representation of military personnel in court-martial trials and appeals.

Elizabeth Lutes Hillman is Assistant Professor of Law, Rutgers University School of Law at Camden and a doctoral candidate in history at Yale University. She graduated from Duke University in 1989 and from Yale Law School in 2000. She was the Reporter for the London Conference on Continuity and Change in Military Justice in 1998 and is author of *The "Good*

Soldier" Defense: Character Evidence and Military Rank at Courts-Martial, 108 YALE L.J. 879 (1999). She served in the United States Air Force from 1989 to 1996, and taught History at the United States Air Force Academy from 1994 to 1996.

Kathleen A. Duignan is the Governance Coordinator at Greenpeace U.S.A. She received her B.A. from the University of Miami in 1988 and J.D. from Brooklyn Law School in 1991. She served on active duty as a Law Specialist in the United States Coast Guard from 1992 to 1996. She was a Commissioner at the United States Court of Appeals for the Armed Forces from 1996 to 1999, and is a Lieutenant Commander in the United States Coast Guard Reserve. She was a member of the London Conference on Continuity and Change in Military Justice in 1998.

Sample Topics

1. WHEN, IF EVER, SHOULD A CIVILIAN BE SUBJECT TO TRIAL BY COURT-MARTIAL?
2. SHOULD PEACETIME COURT-MARTIAL JURISDICTION BE RESTRICTED TO OFFENSES THAT ARE SERVICE-CONNECTED?
3. SHOULD PEACETIME COURT-MARTIAL JURISDICTION IN CAPITAL CASES BE RESTRICTED TO OFFENSES THAT ARE SERVICE-CONNECTED?
4. SHOULD THE SUMMARY COURT-MARTIAL BE ABOLISHED?
5. SHOULD THE "VESSEL EXCEPTION" IN ART. 15 BE AMENDED OR REPEALED?
6. SHOULD THE REQUIREMENT FOR AN ART. 32 INVESTIGATION BE REPEALED?
7. SHOULD ART. 32 INVESTIGATING OFFICERS BE REQUIRED TO BE JUDGE ADVOCATES OR MILITARY JUDGES UNLESS PRECLUDED BY MILITARY EXIGENCY?
8. SHOULD AN ACCUSED HAVE A RIGHT TO RECORD AN ART. 32 INVESTIGATION WHEN THE CONVENING AUTHORITY DECLINES TO DETAIL A COURT REPORTER?
9. SHOULD A SEPARATE COURT-MARTIAL ADMINISTRATOR OR LOCAL CLERK OF COURT BE RESPONSIBLE FOR ALL ASPECTS OF COURT-MARTIAL MEMBER ADMINISTRATION ONCE THEY HAVE BEEN APPOINTED (I.E., TAKE THESE DUTIES AWAY FROM TRIAL COUNSEL)?
10. SHOULD COURT-MARTIAL MEMBERS BE APPOINTED BY A JURY OFFICE RATHER THAN THE CONVENING AUTHORITY?
11. SHOULD ALL FINANCIAL ASPECTS OF COURTS-MARTIAL BE CENTRALLY FUNDED FROM DOD, WITH SEPARATE FUNDING FOR TRIAL AND DEFENSE?
12. SHOULD CIVILIANS BE ELIGIBLE TO SERVE AS MILITARY JUDGES?
13. SHOULD MILITARY JUDGES HAVE FIXED TERMS OF OFFICE?
14. SHOULD SENTENCING BY MEMBERS BE ABOLISHED IN ALL CASES, OR SHOULD AN ACCUSED HAVE THE OPTION OF CHOOSING MEMBERS ON THE MERITS BUT MILITARY JUDGE ALONE FOR SENTENCING?
15. SHOULD MILITARY JUDGES HAVE SENTENCING POWER IN MEMBER CASES?
16. SHOULD MILITARY JUDGES OR MEMBERS HAVE THE POWER TO SUSPEND A SENTENCE?
17. SHOULD THE GENERAL ARTICLES BE REPEALED?
18. SHOULD ADULTERY BE AN OFFENSE UNDER THE UCMJ?
19. SHOULD SODOMY BE AN OFFENSE UNDER THE UCMJ?
20. SHOULD THE DEFENSE OF GOOD MILITARY CHARACTER BE ABOLISHED?
21. SHOULD THE FEDERAL SENTENCING GUIDELINES BE APPLIED IN COURTS-MARTIAL?
22. SHOULD THE PEACETIME MILITARY DEATH PENALTY BE ABOLISHED?
23. SHOULD A JURY OF 12 BE REQUIRED FOR CAPITAL CASES IN PEACETIME?
24. SHOULD BREAD AND WATER BE FORBIDDEN AS A PUNISHMENT?
25. SHOULD THE CONVENING AUTHORITY HAVE POWER TO DISAPPROVE A CONVICTION ON LEGAL, AS OPPOSED TO CLEMENCY GROUNDS?
26. SHOULD THE CCAS BE ABOLISHED OR THEIR FUNCTION LIMITED TO REVIEW OF SENTENCE APPROPRIATENESS?
27. SHOULD COURTS-MARTIAL BE REVIEWED BY THE CCAS ONLY IF THE ACCUSED FILES A NOTICE OF APPEAL?

28. SHOULD THE CCAS BE PERMITTED TO SIT WITH FEWER THAN THREE JUDGES PRESENT?
29. SHOULD ALL JUDGES ON A CCA PANEL BE REQUIRED TO REVIEW THE RECORD?
30. SHOULD ALL COURTS-MARTIAL BE SUBJECT TO APPEAL TO THE COURT OF APPEALS AS OF RIGHT?
31. SHOULD THE COURT OF APPEALS BE REQUIRED TO DISMISS CASES IN WHICH NO ISSUES ARE ASSIGNED?
32. SHOULD THE JURISDICTION OF THE COURT OF APPEALS BE CHANGED, AND IF SO, HOW?
33. SHOULD CERTIFICATION OF ISSUES TO THE COURT OF APPEALS BY THE JUDGE ADVOCATE GENERAL BE REPEALED IN FAVOR OF A GOVERNMENT APPEAL, EITHER AS OF RIGHT OR AT THE DISCRETION OF THE COURT OF APPEALS?
34. SHOULD THE POLITICAL BALANCE TEST FOR APPOINTMENTS TO THE COURT OF APPEALS BE REPEALED?
35. SHOULD RETIRED REGULARS BE ELIGIBLE TO SERVE ON THE COURT OF APPEALS?
36. SHOULD THERE BE A SINGLE MILITARY BAR PRESIDED OVER BY THE COURT OF APPEALS?
37. SHOULD THE COURT OF APPEALS BE RESPONSIBLE FOR REMOVAL OF MILITARY TRIAL AND APPELLATE JUDGES?
38. SHOULD THE CODE COMMITTEE BE ABOLISHED?
39. SHOULD ART. 36 RULEMAKING BE CONDUCTED BY A BROAD-BASED ADVISORY COMMITTEE WITH CIVILIAN AS WELL AS MILITARY MEMBERSHIP?
40. SHOULD THE SERVICES' LAW SCHOOLS BE CONSOLIDATED?
41. SHOULD THE SERVICES' LAW REVIEWS BE CONSOLIDATED?
42. SHOULD THE SERVICES' TRIAL DEFENSE AND/OR APPELLATE DEFENSE FUNCTIONS BE CONSOLIDATED INTO A SINGLE DEFENSE SERVICE?

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A HOLIDAY REQUEST

As you plan your end-of-the-year charitable giving, please keep NIMJ in mind. We receive no government funding. If you believe the *Gazette* and our other activities are worthwhile, please help us keep going. Your contribution is tax-deductible.

SUPREME COURT OF THE UNITED STATES

NIMJ was one of the *amici curiae* filing briefs in the Supreme Court in *Gray v. United States*, No. 00-607, a military capital case. The brief is on the web at www.nimj.org. We took no position on the proper outcome of the case, but urged the Court to grant review of one of the three questions presented in Gray's certiorari petition: whether Article 25(d)(2), under which convening authorities select court-martial members, is constitutional.

NIMJ has under consideration filing as an *amicus* in support of the petition for certiorari in *Stevenson v. United States*. In that case, the Court of Appeals for the Armed Forces, in an opinion by Judge **Andrew S. Effron**, unanimously overturned a decision of the Navy-Marine Corps Court of Criminal Appeals. That court had upheld a ruling by Navy military judge **Raymond Kreichelt** suppressing DNA evidence that was obtained by NCIS investigators who persuaded DVA medical personnel to surreptitiously take an extra blood sample from a member who was on temporary disability retirement.

CONTEST

As part of our mission to advance and improve the administration of military justice, NIMJ is ever alert to media coverage that presents a false image of military justice and its practitioners. It has been called to our attention that the *New York Law Journal*, in a recent television review, stated that the program "JAG" had "managed to inject sex appeal and excitement into a line of work—lawyering for the Armed Forces—that heretofore seemed to be lacking in both." We suspect that this description of lawyering in the Armed Forces is contrary to the experience of many of our readers. As a public service to correct the reviewer's misimpression, NIMJ is sponsoring a small contest. Contestants are invited to submit an essay of no more than 1000 words, refuting the proposition that military lawyering is devoid of sex appeal and excitement. Entries must be

submitted by December 31, 2000. The winning essay will be published in the *Gazette*, and a suitable memento will be awarded.

NIMJ

NIMJ is delighted to welcome Colonel **Alexander S. Nicholas**, USAFR (Ret) back to its Advisory Board. Alex was a founding member of the board, but left in 1998 when he was recalled to active duty for an assignment in Bosnia. [In order to preserve NIMJ's independence, no person on active duty may serve as a Director or member of the Advisory Board.] After his military tour ended in 1999, he stayed another year in Bosnia as a civilian, under a direct engagement with the Office of the High Representative (OHR), in time becoming the head of its Department for Legal Affairs. In that position he was principal legal advisor to the High Representative and his staff, both in the Balkans and internationally. He left the OHR in July of this year and resigned from his US law firm in order to accept appointment as Deputy Principal Legal Advisor to both the UN mission in East Timor and the transitional Timorese administration. Pending adoption of a constitution, under Security Council Resolution 1272, the UN mission exercises all executive and legislative authority in East Timor, including the administration of justice, and including large military and police components.

NECROLOGY

NIMJ notes with regret the death of Colonel **Walter L. Lewis**, USAF (Ret). Among other assignments, Col Lewis served on the Joint Service Committee on Military Justice and as chief of the Air Force's Military Justice Division. He was the founding chairman of the Rules Advisory Committee of the United States Court of Military Appeals, serving in that capacity for many years, and getting the Committee off to a strong start. He was a perceptive observer of the military appellate process and a consummate gentleman.

WASHINGTON

On November 22, 2000, **President Clinton** signed the Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523. The measure amends title 18 to establish federal jurisdiction over certain offenses punishable by more than a year's imprisonment committed by defined persons employed by or accompanying the armed forces overseas and by former members of the service. If the offender has been or is being prosecuted by a foreign government, the Attorney

General (or Deputy) must approve any U.S. prosecution. Watch for implementing regulations.

MEETINGS

CAMI will conduct its first Annual Spring Meeting in Leavenworth, Kansas, on May 2-5, 2001. For questions and reservations, contact **Glenda Ewing** at camj98037@yahoo.com. CAMI's web site can be found at www.militaryinjustice.org.

The Florida Bar Military Affairs Committee will conduct its 2001 Military Law and Legal Assistance Symposium on Saturday, January 20, 2001, at the BOQ Main Conference Room, NAS Jacksonville. Point of Contact: **Jennifer Wilson**, (850) 561-5811, jwilson@flabar.org.

WEBSITE OF NOTE

Vietnam Veterans of America's fine website now includes a massive and diverse collection of links about the Vietnam War and era. Highly recommended. www.vva.org/about_the_war.htm. The list was compiled by VVA General Counsel **Michael Gaffney**.

COPENHAGEN

According to the International Society for Military Law and the Law of War, the Danish Minister of Defence has established a commission to review the Military Criminal Code and the Military Administration of Justice Act, which were last reviewed in 1973. The commission includes representatives of the Ministries of Defence and Foreign Affairs, the armed forces, the JAG, the Attorney General, the universities, the Judges Association, the Bar and Law Society, the Red Cross, and the personnel organizations of the armed forces.

RECOMMENDED READING

Professor **Diane H. Mazur**: *Word Games, War Games*, 98 MICH. L. REV. 1590 (2000); *Sex and Lies: Rules of Ethics, Rules of Evidence, and Our Conflicted Views on the Significance of Honesty*, 14 NOTRE DAME J. L., ETHICS & PUB. POL'Y 679 (2000) (reviewing **Janet E. Halley**, *Don't: A Reader's Guide to the Military's Anti-Gay Policy* (1999)).

PORTSMOUTH

The *London Telegraph* reported on October 15, 2000 that the longstanding naval tradition that accused officers surrender their swords during a court-martial is under attack. In *R. v. Coulter*, the accused, represented by **Bradley Albuery**, argued that the practice violates

the European Convention on Human Rights because it degrades the defendant. In response, the presiding judge advocate ruled that *all* swords (*i.e.*, including those of the five members of the court-martial panel) would be removed from the courtroom as unnecessary encumbrances. The Chief Naval Judge Advocate later advised all judge advocates that swords should not be removed from courts-martial in the future.

BOOKSHELF

The *Manual for Courts-Martial* (2000 ed.) is available from the Government Printing Office for \$59.00. For online ordering, go to bookstore.gpo.gov/ and type "courts-martial" in the search block. Telephone orders may be placed at (202) 512-1800.

DIRECTORY OF CIVILIAN PRACTITIONERS OF MILITARY LAW: ADDENDA

Ensign, Thomas D. ("Tod"), 267 Fifth Ave., Ste. 901, New York, NY 10016, tel (212) 679-2250

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NIMJ

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Secretary-Treasurer.....Kevin J. Barry
General Counsel.....Stephen A. Saltzburg
Webmaster.....Philip D. Cave

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MILITARY JUSTICE GAZETTE

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No. 88

Happy New Year

January 2001

COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE

The Cox Commission has received scores of submissions in response to the initial announcement that appeared in *Gazette No. 86*. The Commission will release a revised list of topics for comment on February 1, 2001, and will receive comments from the public until March 1, 2001. Comments should be submitted to **Judge Walter T. Cox III** at JudgeCox@earthlink.net. A date has not yet been set for the public hearing.

NEW ZEALAND

The inaugural meeting of the Armed Forces Law Association of New Zealand (AFLANZ) was convened at *Te Taua Moana*, the Royal New Zealand Navy *Marae* at Devonport in Auckland on November 10, 2000. The convenor, Lt Cdr **Chris Griggs**, called the meeting following the enthusiastic response to a survey he conducted earlier in the year. The meeting commenced with a *powhiri* and then went on to adopt a constitution and appoint officers. The foundation committee consists of:

<i>President</i>	John Rowan QC , Wanganui
<i>Vice President</i>	Bruce Stainton , Stainton & Charles, Auckland
<i>Secretary</i>	Chris Griggs , senior lecturer in military law, Military Studies Institute
<i>Treasurer &</i>	Craig Ruane , Raymond, Donnelly & Co., Christchurch
<i>Members</i>	Steve Taylor , legal staff officer, Air Command, RNZAF Base Auckland Rod Thomas , barrister, Auckland Ernie Gartrell , barrister and solicitor, Auckland

AFLANZ was pleased to hear a very interesting description of the duties and difficulties of the legal staff officer serving with the New Zealand forces in East Timor, ably delivered by **Andrena**

Gill, legal staff officer at 2 Land Force Group, Linton Camp. The day's activities concluded with a formal dinner in honor of **Hon. Justice Penlington**'s 38 years of distinguished service to military law. The dinner was very well attended by many experienced practitioners of military law as well as some new faces, providing a wonderful opportunity to reminisce about old times and make new acquaintances. The dinner was presided over by the Deputy Judge Advocate General, **Chris Hodson QC**.

The principal objects of AFLANZ are to promote research and study of the legal issues affecting New Zealand's armed forces. AFLANZ is independent of the New Zealand Defence Force, but hopes to work in harmony with it in the years to come. AFLANZ intends to publish an annual law review and a website in due course. The next annual general meeting will be held in Christchurch in October 2001, to coincide with Law Conference 2001.

Membership in AFLANZ is automatically open to all lawyers who play or have played a direct part in the administration of military justice in New Zealand, but AFLANZ also encourages inquiries from any person who has a genuine interest in its objects, as such persons may also be admitted to membership by resolution of the committee. If you would like to participate in the activities of AFLANZ, please contact your local committee member or write to: The Secretary, Armed Forces Law Association of New Zealand, c/o Defence and Strategic Studies Programme, School of History, Philosophy and Politics, Massey University, Private Bag 11 222, Palmerston North, NZ.

[NIMJ applauds our friends in New Zealand. We hope the creation of AFLANZ will encourage friends of military law in other countries to follow suit and establish comparable organizations.]

NIMJ

For medical reasons, **Kevin J. Barry** has resigned as Secretary-Treasurer of NIMJ, a position he has held with distinction since the organization's founding in 1991. Kevin remains a mem-

ber of the Board of Directors. **Philip D. Cave**, who has been a director as well as our talented webmaster, has been elected Secretary-Treasurer. We all wish Kevin a speedy recovery.

Professors **Diane H. Mazur**, University of Florida School of Law, and **Elizabeth Lutes Hillman**, Rutgers Law School (Camden), have been elected to the NIMJ Advisory Board. Both served in the United States Air Force before becoming lawyers. Congratulations and welcome aboard.

With the National Veterans Legal Services Program, has NIMJ filed an *amicus curiae* brief in *Stevenson v. United States*. This is NIMJ's third submission to the Supreme Court. The brief has been posted on our website, www.nimj.org.

JOINT SERVICE COMMITTEE ON MILITARY JUSTICE

The December 8, 2000 *Federal Register* included the JSC's discussion of public comments on changes to the *Manual for Courts-Martial* that were proposed on May 15, 2000. 65 FED. REG. 76,998 (2000). The proposed changes would (1) add references to MIL. R. EVID. 513 (psychotherapist-patient privilege) in R.C.M. 701 (discovery); (2) clarify the analysis accompanying R.C.M. 707 (speedy trial), in light of current case law; and (3) clarify R.C.M. 1003 and 1107, governing the authority of a court-martial to adjudge and the convening authority to approve, the combination of both a fine and forfeitures at summary and special courts-martial. While concluding that the proposed amendments were appropriate, the JSC modified the analysis accompany R.C.M. 707 to more fully explain why that rule was being amended. It also announced that, in response to a comment from NIMJ, it would modify the announcement of the next cycle of proposals so that consideration of incomplete or untimely proposals from the public would not be automatically ruled out. Comments will be received at any time, but those outside the prescribed period may simply miss the current annual review cycle. The JSC rejected a suggestion that its new rules inviting public proposals be incorporated into DoD Directive 5500.17. The directive itself will, however, be published in future editions of the *Manual*. POC: Lt Col **Thomas C. Jaster**, USAF, Air Force Legal Services Agency, 112 Luke Ave., Rm. 343, Bolling AFB, DC 20332-8000, (202) 767-1539, fax (202) 404-8755.

IUS BIENNIAL MEETING

The Inter-University Seminar on Armed Forces and Society has issued a Call for Papers to be presented at the October 19-21, 2001 IUS Biennial Conference. The conference will be held, as usual, at the Tremont Plaza Hotel in Baltimore. Proposals must be received by the Conference Program Committee no later than January 15, 2001. For further information contact IUS at mpalmisano@socy.umd.edu.

WEBSITE OF NOTE

Boffo site for history buffs:

www.royalprovincial.com/military/courts/crtlist.htm

RECOMMENDED READING

Barry Werth, *A Reporter at Large: A Marine's Private War (When his daughter died after being admitted to Walter Reed hospital, a colonel demanded to know why)*, THE NEW YORKER, Dec. 18, 2000, pp. 64-77. The article concerns a pending court-martial and its medical, investigative and legal background.

BOOKSHELF

The Miles Foundation, Inc. has announced the availability of **Christine Hansen & Kate B. Summers**, *Intimate Partner Violence Associated with the Military: A Handbook for Victims* (2000, \$15). For ordering information contact **Christine Hansen** at Milesfdn@aol.com. The foundation is a private nonprofit organization dedicated to providing comprehensive services to victims of domestic violence associated with the military.



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COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE

The Cox Commission received many thoughtful submissions in response to its initial announcement in *Gazette No. 86*. The Commission's revised list of topics and invitation for comments on the final list have been posted on NIMJ's website, www.nimj.org. Final comments should be submitted to **Judge Walter T. Cox III** at JudgeCox@earthlink.net by March 1, 2001. The public hearing will be held at 10:00 a.m., Tuesday, March 13, 2001, at The George Washington University Law School, 2000 H Street, N.W., Washington, DC. Those wishing to speak should notify Judge Cox no later than March 1.

ESSAY CONTEST

Gazette No. 87 announced a contest for essays refuting the proposition that military lawyering is devoid of sex appeal and excitement. Judges for the contest were NIMJ Advisory Board member **Ronald W. Meister** and **Nancy Duff Campbell**, Co-Director of the National Women's Law Center. And the winner is Captain **Susana E. Watkins**, U.S. Army Legal Services Agency. Congratulations! She will receive a special photograph submitted by Major **Gregory W. Kruse** of the Air Force, as well as a certificate suitable for framing. All contestants will receive copies of NIMJ's widely-ignored *Guide to the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces* (9th ed. 2000). Herewith, the winning entry:

Devoid of sex appeal and excitement . . . Hogwash, I say! I left civilian practice over five years ago to join the Army JAG Corps and have loved every minute of my professional life since then. Compared to the drudgery of sitting in on countless depositions of accountants as a new attorney in civilian practice, endless hours of research and writing that you never get credit for, never ever communicating with a client, much less actually appearing before any court, I'd take military practice any 'ole day.

I cut my teeth in the vibrant atmosphere of Germany and could not have been thrown into a more happening place. Assisting young soldiers with their legal problems before their deployment to some of the most dangerous spots in the world, sometimes on just a moment's notice as the troops headed out, now that's excitement! Practicing before military court as lead counsel on a full range of cases, including contested cases before a panel (jury), involving such crimes as DUI-fatality, assault with a deadly weapon, larceny, pornography, now that is sex appeal! Being the primary legal advisor for commanders, from company level all the way up to brigade . . . what new civilian attorney can boast

such responsibility? And how about being the primary planner for celebrations involving some of the biggest names in the German Ministry of Justice, as well as in the military. Wow! Now that is sex appeal!

And to really get in on the action, how about training in waist-high snow drifts for deployment to Hungary? How about being the primary legal counsel to all military personnel deployed to Hungary? How about being a part of meetings discussing critical security issues and troop movements in the region? How about being solely responsible for an armed mission taking soldiers and an interpreter into the war-torn nation of Croatia for direct cash payment of claims to local nationals?

And stateside the action continues. How about working in the Pentagon, assisting very senior level military personnel with legal issues? How about arguing before the Army Court of Criminal Appeals or the Court of Appeals for the Armed Forces, just one step below the Supreme Court? Now that is sex appeal and excitement!

I don't know who wrote the article in the *New York Law Journal*, but I suspect that he or she has not practiced in the Army JAG Corps, or at least has not done so in a long, long while. Being an Army attorney today is anything but dull and boring!

SUSANA E. WATKINS, CPT, JA

NECROLOGY

Frank E.G. Weil, of Washington, died on January 9, 2001. He served in the federal government for 42 years, retiring as chief of the policy branch of HHS's Office of Civil Rights. A German Jewish refugee, he served in Army counter-intelligence during World War II and was an interpreter at war crimes trials. He was executive secretary of the American Veterans Committee and a long-time member of the Committee on Military and Veterans Rights of The District of Columbia Bar.

AMERICAN BAR ASSOCIATION

1. On December 1, 2000, the American Bar Association Standing Committee on Armed Forces Law met at the U.S. Court of Appeals for the Armed Forces in Washington, D.C. Two new members of SCAFL were in attendance, **Robert M. Duncan**, former Judge of the Court, and LtCol **Will Gunn**, USAF. Among the items of interest:

"Civilian" status of CAAF Judges. The Commit-

tee considered a recommendation that it work to change the present law which makes officers retired with 20 years service ineligible for appointment to CAAF (they are not considered to be "in (from) civilian life," Art. 142(b), UCMJ). After discussion, the Committee decided not to take any action on the recommendation.

Joint Service Committee. The Joint Service Committee reported on the current status of changes to the MCM and UCMJ. The changes in the Canadian military justice system which had been addressed by Canadian Forces Judge Advocate General **Jerry S.T. Pitzul** at the ABA Annual Convention in New York in July were discussed. The JSC indicated that these changes had not been formally reviewed by the JSC, but that the Canadian approach to random selection of court-martial members had been reviewed by the DOD study group which reviewed the jury selection issue, and which did not recommend any changes to the current system in use in this country.

Cox Commission. Senior Judge **Walter T. Cox III** discussed the Commission on the 50th Anniversary of the UCMJ, which he is chairing, and noted that it is an autonomous commission, sponsored by NIMJ. His target for producing a formal report is May 31, 2001, the 50th anniversary of the UCMJ's effective date.

Overseas Jurisdiction. The new statute establishing criminal jurisdiction (in federal district court) over civilians accompanying the armed forces overseas was discussed. Implementing regulations are being prepared by DOD in coordination with DOJ.

Judicial Tenure. The issue of tenure for military judges, for several years a staple of SCAFL's agenda, was discussed. The Army and the Coast Guard confirmed that regulations were in place establishing a term of years as the norm for military judges. The Navy (and Marine Corps) and the Air Force indicated that no regulation will be published, although there was a personnel policy in place which accomplished the same goal. [Ed. note: All the services had over a period of years advised the SCAFL that they were implementing regulations, and SCAFL has in the past expressed its "frustration with the delay in the services implementing promised judicial tenure rules similar to those recently implemented by the Army that established a three year tenure rule." M.J. Gaz. No. 71 (Nov. 1999).]

Writing Award. SCAFL will continue to present its annual award for the best published work dealing with military law issues.

April 2001 Meeting. The Committee's Spring Meeting will be held at the U.S. Coast Guard Academy, New London, CT, on Saturday, April 28, 2001. SCAFL meetings are open to the public and all are invited to attend.

2. The following military-related events will be held at the ABA's meeting this month in San Diego:

Thu, 15 Feb - 0800-1630 Military Administrative Law Seminar (CLE accredited) Marine Corps Recruit Depot, Bay View Restaurant, 3800 Chosin Ave., San Diego

1900 Judge Advocates Association Dinner, same place as above

Fri, 16 Feb - 0800-1200 Military Law Committee Meeting, Marriott Marina Hotel, Ballroom B, North Tower

1200-1330 Military Law Committee Lunch, Marriott Marina Hotel

1330-1400 U.S. Court of Appeals for the Armed Forces Admission Ceremony, Marriott Marina Hotel

1400-1630 Military Law Committee CLE Program "Environmental and Legal Issues Arising from Closing Military Bases (BRAC)", Marriott Marina Hotel, Ballroom A, North Tower

Sat, 17 Feb - 0800-1500 Standing Committee on Armed Forces Law, Marriott Marina Hotel, Boardroom, 3d Level, North Tower

All of these meetings are open to the public and everyone is welcome.

NATIONAL ARCHIVES

Dr. Thomas Lowry will speak on "Civil War Court-Martial Records" in the National Archives Theatre, at noon, Wednesday, February 21. Enter on Pennsylvania Avenue between 7th and 9th Sts., N.W. This event is cosponsored by the Abraham Lincoln Institute of the Mid-Atlantic. Call (202) 208-7345 for reservations.



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COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE

The Cox Commission will convene at 10:00 a.m., Tuesday, March 13, 2001, at The George Washington University Law School, 2000 H St., N.W., Washington, to hear statements from members of the public, the bar and other interested organizations. The hearing will be open to the public. The Commission has received literally hundreds of email submissions.

USS GREENEVILLE

The public has been gripped by the tragic loss of life resulting from the sinking of the *Ehime Maru* off Oahu after she was accidentally rammed by the USS *Greeneville*. NIMJ has been called on by news organizations in the United States and Japan to provide background information on Navy courts of inquiry and military justice generally. We have disseminated pertinent information by email to journalists covering this dramatic story and have posted pertinent materials on our website.

450 E STREET, N.W.

Thomas F. Granahan retires on March 1, 2001 as Clerk of the United States Court of Appeals for the Armed Forces. He is being relieved by Captain **William DeCicco**, who is retiring from the Navy. Congratulations to both of these gentlemen.

NIMJ is working with students at Yale Law School who are preparing an *amicus curiae* brief for submission to the Court of Appeals in *United States v. Butcher*, No. 00-0632/AF.

United States v. Pineda, No. 99-0915, involved a one-day judge-alone special court-martial at which the sentence was a BCD, four

months' confinement and forfeitures, and reduction to E-1. The trial was conducted on August 28, 1997; the convening authority acted on December 18, 1997; the Navy-Marine Corps Court of Criminal Appeals affirmed in an unpublished decision on May 28, 1999; review was granted on October 22, 1999; the case was heard by the Court of Appeals on February 29, 2000 and decided on January 9, 2001.

DIRECTORY OF CIVILIAN PRACTITIONERS OF MILITARY LAW: ADDENDA

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Wine, Scott, Oregon, (207) 793-8421, fax (207) 793-6654, winne@nlis.net, www.nlbbs.com/~winne/

The complete directory of civilian practitioners is available on the NIMJ website.

INTERNET ITEMS OF NOTE

Phil Cave, NIMJ's webmaster extraordinaire, notes that Royal Navy Chief Judge Advocate **Jeff Blackett** recently headed up a Rugby Football Union disciplinary panel. See **Peter Jackson**, *Guilty Johnson Faces Five Week Ban*, DAILY MAIL, rugby.thisislondon.com/dynamic/sport/top_story.html?in_review_i

d=347277&in_review_text_id=291603.

The equally vigilant **Ronald W. Meister**, a member of NIMJ's advisory board, has called our attention to a salty website, "Nautical Expressions in the Vernacular," by **Gibbons Burke**: www.io.com/gibbonsb/words.words.words.html.

A paper by Prof. **Gerry R. Rubin**, of Kent Law School, University of Canterbury, has been received in evidence by the House of Commons Select Committee on Defence, and can be accessed at www.parliament.the-stationery-office.co.uk/pa/cm200001/cmselect/cmdfence/29/29ap13.htm. Prof. Rubin's paper was originally presented at NIMJ's London Conference on Continuity and Change in Military Law, held in December 1998. [Note: plans are being made for a second international conference, to be held in Dublin on June 15 and possibly June 16, 2001. Details to follow.]

READING LIST

Volume 166 of the *Military Law Review* is now available. Of note: a review of **Gary Solis's** *Son Thang: A Military War Crime*; case notes on the Ad Hoc International War Crimes Tribunals; Captain **Gregory E. Maggs**, *Cautious Skepticism About the Benefit of Adding More Formalities to the Manual for Courts-Martial Rule-Making Process: A Response to Captain Kevin J. Barry*, and Captain **Kevin J. Barry**, *A Reply to Captain Gregory E. Maggs' "Cautious Skepticism" Regarding Recommendations to Modernize the Manual for Courts-Martial Rule-Making Process*.

The electronic version of this issue of the *Gazette* includes a paper by Captain **Abdullah Kaya** on Turkish Military Justice. Thanks very much, Captain, for your report. Readers in other countries are encouraged to submit reports on legislative and judicial developments as they arise.

By **Walter G. Sharp, Sr.**, *Jus Paciarrii: Emergent Legal Paradigms for U.N. Peace Operations in the 21st Century*, 392 pp, \$24.95, ISBN 0-9674356-0-9. For further information

contact PacriariIntlLLC@aol.com.

The Air Force has just issued a new edition of AFI 31-205, *The Air Force Corrections System*. It is available on the SAF/AAD WWW site at: <http://afpubs.hq.af.mil>.

STATE AND CITY BAR COMMITTEES ON MILITARY LAW

We are attempting to develop a list of state and city bar committees on military law. Please send details/point-of-contact if you know of any such committees.

AMERICAN BAR ASSOCIATION

The deadline for nominations for this year's Standing Committee on Armed Forces Law Writing Award is April 15, 2001. Only members of the committee, advisors, senior service attorneys, and the Commandants and faculty of the JAG Schools may formally nominate; others may suggest names to them or to staff liaison **Susan C. Koz**, ABA Headquarters, kozs@staff.abanet.org.



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COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE

The Cox Commission met on March 13 at The George Washington University Law School to receive statements from members of the public. Witnesses came from as far away as Washington State and Colorado. Among the spectators were lawyers from each of the armed services, Judge **Eugene R. Sullivan** and Senior Judge **Robinson O. Everett** of the United States Court of Appeals for the Armed Forces (Judge Everett also addressed the Commission), and **Scott Stucky**, general counsel of the Senate Armed Services Committee.

The Commission met immediately after the conclusion of the hearing to discuss the outline of its recommendations. A report is expected to be issued by May 31, which is the 50th anniversary of the effective date of the Code. Professor **Elizabeth Lutes Hillman**, Reporter to the Commission, will be preparing a draft for consideration by the members.

The evening before the hearing, the Commission and Washington-area NIMJ leaders gathered at the Cosmos Club to discuss the next day's proceedings and to honor Captain **Kevin J. Barry**, a co-founder, director, and (for 10 years) secretary-treasurer of the Institute, as well as Rear Admiral **John S. Jenkins**, who is retiring as Senior Associate Dean at George Washington. **Kevin** and his successor as secretary-treasurer (and webmeister), Commander **Philip D. Cave**, testified the next morning on behalf of the Bar Association of the District of Columbia, as did BADC President and lead-off witness **Jack Mc-Kown**.

NIMJ wishes to express sincere appreciation to The George Washington University Law School for its generous support of the Commission. On behalf of Senior Judge **Walter T. Cox III**, we would also like to thank

and congratulate all of the witnesses (as well as the many more who submitted comments but were unable to testify) for their participation in this important initiative.

USS GREENEVILLE/EHIME MARU

On March 21, 2001, the day the *Greeneville/Ehime Maru* Court of Inquiry hearing ended in Honolulu, NIMJ convened a roundtable discussion/media availability at the Army-Navy Club, in Washington. Despite less than one day's notice, the meeting attracted journalists and editors from papers in the United States and Japan. Half a dozen Washington-area NIMJ experts attended, along with invited guest Capt **Larry Seaquist**, USN (Ret), former commanding officer of USS *Iowa*, who currently heads The Strategy Group, a Washington-based nonprofit organization. Thanks to **David Sheldon** for making arrangements with the Club, and to all who were able to participate on short notice.

450 E STREET, N.W.

Gazette No. 90 recited key dates in the procedural history of *United States v. Pineda*, No. 99-0919, the implication being that the case seemed to take an unduly long time for the appellate process to run its course. The Clerk's Office has called our attention to the fact that several other key dates in the case history that were not noted in the opinion but appear in *Daily Journal* entries should also have been noted in order to convey an accurate sense of the matter, *i.e.*, (1) on September 18, 2000, the Court issued a show cause order; (2) on September 27, 2000, an answer to that order was filed, along with a government motion for leave to file an affidavit; and (3) on November 13, 2000, the Court granted that motion. See 54 M.J. 298, 299 n.1 (2001). The opinion

came down on January 9, 2001.

*DIRECTORY OF CIVILIAN PRACTITIONERS
OF MILITARY LAW: ADDENDA*

Hecker, Karen L., Feldesman, Tucker, Leifer, Fidell & Bank LLP, 2001 L Street, N.W., Washington, D.C. 20036, (202) 466-8960, fax (202) 293-8103, email khecker@feldesmantucker.com, www.feldesmantucker.com

AMERICAN BAR ASSOCIATION

The Standing Committee on Armed Forces Law will meet on April 27-28 at the United States Coast Guard Academy. The business meeting will commence at 9:00 a.m. on April 28. For further information contact the committee at (312) 988-5604, fax (312) 988-5628.

READING LIST

Read any good e-books lately? Try former Captain **Keith D. Munson** [kmunson@ggwb.com], *Mutiny in the Desert: A Novel of Murder During the Persian Gulf War*. From the blurb: "As the story develops, Colonel Moore, the ranking military lawyer, is found dead in his tent, apparently from an allergic reaction to a scorpion sting. The muffled celebration of his staff is sobered by CID Special Agent Morgan's relentless investigation of the unfortunate accident as a murder. As the investigation focuses on the JAG Office, the reader enjoys entertaining glimpses of desert life for the overstaffed and marginally appreciated combat-ready legal office. The Division Commander, General Armstrong, demands that the case be tried before the ground offensive begins. The ensuing bizarre court-martial threatens to jeopardize the Division's combat readiness as well as the universal reputation of military justice." For further information see www.ebookstand.com/books.grp/KE1102.html.

Colorado prosecutor **Mark S. Cohen** has also written a mystery e-book. The title is

The Fractal Murders, and it is available through www.southerncrossreview.org. Mark advises that the protagonist is **Pepper Keane** a former Marine Corps judge advocate turned private eye. There are passages in which Pepper makes reference—sometimes humorous—to his military service.

The Miles Foundation reports that the Interim Report of the Defense Task Force on Domestic Violence is on the web at www.dtic.mil/domesticviolence/index.htm.

1600 PENNSYLVANIA AVENUE, N.W.

Speaking of pardons, did you know that President **Bill Clinton** granted one on December 22, 2000, with respect to a 1945 Army court-martial? This one was granted to **Roscoe Crosby Blunt, Jr.**, of Shrewsbury, Mass. He had been tried for fraternizing with the enemy in that he had chatted with a German teenager while her mother was doing laundry for him and his commanding officer. According to an AP story, Mr. Blunt is less than 100% satisfied: "Frankly, I got screwed and the Army never admitted it, and they're still not admitting it! I was foolish enough to think somebody might apologize!" Inge Baumler, the young lady in question, is now 72. She says, "It is nice he has been pardoned."



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President Eugene R. Fidell
Secretary-Treasurer-Webmaster Philip D. Cave
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MILITARY JUSTICE GAZETTE

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Law Day Issue

May 2001

450 E STREET, N.W.

This year's Judicial Conference for the U.S. Court of Appeals for the Armed Forces will be held at Catholic University of America Columbus School of Law on June 13-14. For full details, consult the Court of Appeals's website, www.armfor.uscourts.gov.

The Annual Report of the Code Committee for the year ending September 30, 2000 has been released. It is not yet available on the Court's website, but should be posted soon. Lots of important data. For example, the caseload is way down. Only 753 petitions for grant of review were filed in the last Term, compared with 1813 in FY91. Also of interest: information on disciplinary action against judge advocates, and indication of the growing use of reserve officers in the military justice system.

THANKS

Many thanks to all who responded to the recent query about courts-martial involving naval commanding officers. Obviously, the *Greeneville/Ehime Maru* case has been on all of our minds over the last several months. The case is certain to be studied for many years with respect to its command-at-sea, accountability, public policy and legal aspects.

RECENT CASES

Two recent cases have come down that will be of interest to *Gazette* readers. Both were decided by the U.S. District Court for the District of Columbia. The first is Judge **Paul Friedman's** second decision in *Mudd v. Caldera*, which involves whether Dr. Mudd's conviction by military commission as an accessory to President Lincoln's assassination was valid. The first decision remanded the case to the Army BCMR; this one upholds Assistant Secretary **Patrick Henry's** final decision denying the record-correction application filed by a Mudd descendant. According to Judge Friedman, Secretary Henry could reasonably conclude that the military commission had jurisdiction. The case is likely to be appealed. Review would be *de novo*.

The second case, *McKinney v. Caldera*, Civil No. 00-728, involves an effort by former Sergeant Major of the Army **Gene C. McKinney** to secure Administrative Procedure Act review of The Judge Advocate General of the Army's action on his Art. 69 appeal. *Held*, per **Urbina**,

J., APA review is unavailable because the TJAG is not an "agency" because "it is not clear that the TJAG is vested with 'substantial independent authority,' and because such a ruling would fundamentally alter the relationship between the civilian and military courts and would, in essence, defy the presumption against civilian-court review of military-court decisions." Here again, an appeal seems likely.

CONGRESS

The Unborn Victims of Violence Act of 2001, H.R. 503, which has passed the House of Representatives, amends both 18 U.S.C. and the UCMJ. It would add a new Article 119a, Protection of Unborn Children. The principal sponsor, Rep. **Lindsay Graham**, is a former judge advocate.

DIRECTORY OF CIVILIAN PRACTITIONERS OF MILITARY LAW: ADDENDA

Neal A. Puckett, 2181 Jamieson Ave., Ste. 1505, Alexandria, VA 22314, toll-free tel. (877) 216-1016, e-mail military_justice@hotmail.com, website: www.militaryjudges.com.

NEW ZEALAND

The Armed Forces Law Association of New Zealand (AFLANZ) has established its own excellent website. See www.aflanz.org. The Association has established a New Zealand Armed Forces Law Review with a most distinguished editorial board, composed of: **John Rowan**, Q.C. (*ex officio* convenor, as President of AFLANZ); Hon. **Peter Penlington**, former permanent justice of the New Zealand High Court; Dr. **George Barton**, Q.C.; Dr. **Don Mathieson**, Q.C., editor of *Cross on Evidence* (N.Z. ed.); and Captain **Eric Deane**, RNZN (Ret), former Director of Legal Services. Best of luck in this new endeavor.

CANBERRA

The following announcement was issued on February 4, 2001:

80 000 TO TAKE PART IN MILITARY JUSTICE AWARENESS PROGRAM

More than 80 000 men and women from all ranks across the Australian Defence Force, regular and reserve, will take part in a nation-wide awareness program aimed at reinforcing the appropriate application and administration of the military justice system, the Minister Assisting the Minister for Defence, Bruce Scott announced today.

In an unprecedented move, almost 50 000 officers, sailors, soldiers and airmen and women are expected to take part in the two-hour awareness program to be held at Defence bases across Australia tomorrow morning (Monday 5 Feb). Some 30 000 Reservists will take part in the awareness program at the first available opportunity.

Mr Scott said the Federal Government had endorsed the program, which is designed to rebuild the confidence of servicemen and women in the ADF's military justice system, as well as to demonstrate to the Australian public the resolve of the ADF leadership to provide a safe and fair workplace for all ADF personnel.

"In a video address to the men and women of the Navy, Army and Air Force, the Chief of Defence Force, Admiral Chris Barrie, and the single Service Chiefs, Vice Admiral David Shackleton, Lieutenant General Peter Cosgrove and Air Marshal Errol McCormack will emphasise the requirement for members of the ADF to adhere to principles of military justice."

"Immediately following the video address by the Service Chiefs, Commanding Officers of individual ships, units and bases will conduct discussion sessions with their personnel on the issue of military justice," he said.

Commanding Officers will also discuss the existence of Equity Advisers as well as 1-800 helplines, which are designed to provide opportunities for personnel to receive advice on methods of reporting inappropriate behaviour if they do not wish to go to the direct chain of command.

Mr Scott said the awareness program will also inform service personnel of the Military Justice Audit process, headed by retired Federal Court Judge, Mr James Burchett QC, aimed at evaluating and improving the military justice system.

"All service personnel will be provided with information as to how they can contact the audit team to make individual submissions."

The audit team is looking to hear from personnel who have concern about the military justice system as well as hearing about what elements of the system is working well.

"Rough justice has no place in the ADF and I am confident that the military justice awareness program will greatly contribute to the restoration of confidence in the ability of the ADF to provide a safe and fair workplace for all personnel," Mr Scott said.

NEW DELHI

The Supreme Court of India (**Lahoti**, J.) held last month that administrative discharge action based on misconduct could be taken even though the conduct at issue could no longer be prosecuted by court-martial because of the statute of limitations. According to the opinion, as reported by **T. Padmanabha Rao** in *The Hindu*, "before any decision to initiate disciplinary action against any of the two respondents is taken, the conduct and behaviour of the respondents concerned during the 'intervening period' shall also be taken into consideration while deciding upon the desirability of proceeding further in the matter as this 'belated stage' (after over 20 years) and keeping in view, of course, the requirement of military discipline and the high traditions of the Indian Army."

READING LIST

The Interim Report of the Defense Task Force on Domestic Violence is available on the Internet at: www.dtic.mil/domesticviolence/ Report.pdf.

Domestic Violence Report (DVR), April/May 2001, has published "A Considerable Service: An Advocate's Introduction to Domestic Violence and the Military" by **Christine Hansen**, Executive Director, The Miles Foundation. DVR is published by Civic Research Institute, Inc. Information concerning copying, reprinting, distribution and adaptations may be obtained from the Civic Research Institute, Inc., (609) 683-4450, or The Miles Foundation, Inc., (203) 270-0688.

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DIRECTORY OF CIVILIAN PRACTITIONERS OF MILITARY LAW: ADDENDA

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AMERICAN BAR ASSOCIATION

On April 28, 2001, the ABA's Standing Committee on Armed Forces Law met at the U.S. Coast Guard Academy in New London, CT. Among the items of interest:

Television Documentary. The services are cooperating in the production of a two hour documentary, being prepared for the History Channel, on the military justice system. The program will focus on four particularly important courts-martial, each significant in the development of the system.

CAAF. The numbers of both petitions and oral arguments is continuing to drop, to approximately 750 and 85, respectively, projected for this year. CAAF is attempting to release a majority of its pending opinions by July this year, vice August last year and September the prior year.

Overseas Jurisdiction. Discussions are underway between the Departments of Defense, Justice and State toward implementing the Overseas Jurisdiction Act passed by the last Congress.

MCM. The draft Executive Orders resulting from the 1998 and 1999 Annual Review, and implementing the 1-year SPCM changes, which were in the White House at the end of the last administration but never signed, have

been returned for review and reworking within DOD. Under policy established in the Bush Administration, these drafts will have to be reviewed and signed off by a political appointee of this administration prior to resubmission. It is unclear whether they will now be consolidated, or will be resubmitted individually as originally drafted. The 2000 Annual Review is also now on hold. The list of some 14 items proposed for the 2001 Annual Review will appear soon in the *Federal Register*.

JAA. The Judge Advocates Association will host a dinner on June 12, the evening prior to the opening of the CAAF Judicial Conference (June 13-14) at the Army-Navy Club in Arlington, Virginia, at which it will present its annual Career Judge Advocate Awards, and will present its "Robinson O. Everett Distinguished Lifetime Service Award" to MG **Keith E. Nelson**, USAF (Ret.), Chair of both SCAFL and the ABA Military Law Committee (of the General Practice, Solo and Small Firm Section). The Walter T. Cox, III Military Legal History Symposium (held in conjunction with the JAA's Military Administrative Law Conference) this October will address the handling of the My Lai Massacre case in the context of the International Criminal Court.

12-Member Fixed Capital Court-Martial Panel Recommendation. The SCAFL and the advisors present discussed a draft Recommendation and Report being circulated by the Bar Association of the District of Columbia, which BADC is considering proposing as a Recommendation to be considered by the American Bar Association at its annual meeting in Chicago in August 2001. The proposal is to amend the MCM or the UCMJ to require that panels in capital courts-martial be fixed at twelve members. The proposal would bring the military justice system into conformity

with the universal practice in this country for capital trial juries, and would remedy perceptions of (and in BADC's view the reality of) unfairness in the current variable size panels which may be any number more than four. During a lively discussion, representatives of the DOD and several services vigorously raised a number of concerns regarding the proposal. The SCAFL had determined, prior to the meeting, to use this meeting simply as an opportunity to have an open discussion regarding the proposal, and will take it up for further consideration and a vote at its meeting in Chicago on August 4, 2001. BADC has advised that it has revised the Report to include and address most of the concerns raised at the meeting, and that the Recommendation and Report will soon be available on the BADC website, www.badc.org, by clicking on "Committees" and then on "Military Law."

Cox Commission - MLC/SCAFL Program.

General Nelson announced that the CLE program scheduled for August 3, 2001 in Chicago, will be a two-hour program by Senior Judge **Walter T. Cox, III**, discussing the Report of the Commission on the Fiftieth Anniversary of the UCMJ, which is expected to be released on or about May 31, to coincide with the 50th anniversary of the effective date of the Code.

Future Meetings. The SCAFL will meet during the ABA Annual Meeting in Chicago on Saturday August 4, 2001 from 0800-1500 at a location not yet determined. SCAFL meetings are open to the public and all are invited to attend.

RECENT EVENTS

Dr. John Buck, an Air Force physician, goes on trial this month for refusing the anthrax vaccine. *R. v. Kipling*, a Canadian case in which similar charges were thrown out by the military judge, is pending appellate review in the Court Martial Appeal Court.

SOUTH AFRICA

On March 29, 2001, the High Court (Orange Free State Div.) handed down a seminal decision in *Postane v. Minister of Defence*. At issue was whether the legislative creation of a separate Director of Military Prosecutions violated the constitutional provision for "a single prosecuting authority." *Held*, the Military Discipline Supplementary Measures Act of 1999 is unconstitutional "to the extent that it refers to the prosecutions relating to the public offences committed by the members of the [defence force] inside the territory of the Republic of South Africa." "There has been a radical break with the past. It is not business as usual any more. The military is not immunised from the democratic change. Maintaining discipline in the defence force does not justify the infringement of the rights of the soldiers, by enforcing such military discipline through an unconstitutional prosecuting structure. I am not persuaded that the director of public prosecutions, an independent prosecuting authority, is incapable of prosecuting, without undermining military discipline, delinquent soldiers who commit crimes within the national boundaries of the Republic of South Africa." The decision is subject to automatic review by the Constitutional Court.

NIMJ

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MILITARY JUSTICE GAZETTE

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Independence Day Issue

July 4, 2001

PEOPLE

At this year's Judicial Conference, the United States Court of Appeals for the Armed Forces presented its Judicial Award for Public Service to Rear Admiral **John S. Jenkins**, JAGC, USN (Ret), and Captain **Kevin J. Barry**, USCG (Ret).

Stanley T. Fuger, a retired Coast Guard law specialist and military judge, has been confirmed as a judge of the Connecticut Superior Court.

Congratulations to all!

AMERICAN BAR ASSOCIATION

As usual, there will be many military-related events at the American Bar Association's annual meeting this August in Chicago, Illinois:

Thursday, August 2, 2001

6:30 p.m. Judge Advocates Association Dinner, Chicago Athletic Association

Friday, August 3, 2001

Military Law Committee of GPSSF, Regent Room, Third Level, Fairmont Hotel

8:00 a.m. Continental Breakfast

8:30 a.m. Business Meeting

11:00 a.m. PowerPoint Presentation by NIMJ board member **Dwight H. Sullivan**, concerning the Report and Recommendation on 12-Person Capital Courts-Martial

12:00 p.m. Military Law Luncheon, Chancellor Room, Third Level, Fairmont Hotel, Speaker: Judge **James E. Baker**, United States Court of Appeals for the Armed Forces

1:30 p.m. United States Court of Appeals for the Armed Forces, Admission Ceremony, Regent Room, Third Level, Fairmont Hotel

2:00 p.m. CLE – Report on the Commission on the Fiftieth Anniversary of the Uniform Code of Military Justice, Regent Room, Third Level, Fairmont Hotel, Speaker: Senior Judge **Walter T. Cox III**, Chairman of the Cox Commission

4:30 p.m. Judge Advocates Association Meeting, Regent Room, Third Level, Fairmont Hotel

Saturday, August 4, 2001

9:00 a.m. Continental Breakfast for the Standing Committee on Armed Forces Law – Burnham Room, Third Level, West Tower, Hyatt Regency

2001 PROPOSED CHANGES TO MANUAL FOR COURTS-MARTIAL

The *Federal Register* for June 6, 2001 (Volume 66, Number 109) included notice of a new round of proposed changes to the Manual for Courts-Martial, as well as information concerning a related public meeting of the Joint Service Committee on Military Justice (JSC). The proposed changes are the 2001 draft annual review required by the MCM and DoD Directive 5500.17, Role and Responsibilities of the Joint Service Committee dated May 8, 1996. According to the notice, the proposed changes concern the rules of procedure and evidence and the punitive articles applicable in trials by court-martial.

Among the proposals is one that would emphasize that facts that increase the maximum authorized punishment must be alleged and proven beyond a reasonable doubt. *See Jones v. United States*, 526 U.S. 227 (1999); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Another, following *United States v. Marie*, 43 M.J. 35 (1995), makes it clear that a witness beyond 100 miles from the site of the investigation is not per se unavailable. In keeping with *United States v. Dies*, 45 M.J. 376 (1996), periods during which the accused is on unauthorized absence are to be treated as excludable delay for speedy trial purposes. Other changes concern the power to exclude individuals from the courtroom.

Of note, one of the proposed changes will add the DoD Directive on "The Roles and Responsibilities of the Joint Service Committee (JSC) on Military Justice," DoDD 5500.17, as Appendix 26 to the Manual.

The proposed changes have not yet been coordinated within DoD. Comments must be received

no later than August 20, 2001 for consideration by the JSC. A public meeting will be held on Thursday, July 19, 2001 at 2:00 p.m. at Rm. 808, 1501 Wilson Blvd., Arlington, VA 22209-2403. Comments should be sent to Captain **Richard M. Burke**, USMC, Military Law Branch, Judge Advocate Division, Headquarters, United States Marine Corps, Room 5E618, Washington, DC 20380-1775, tel. (703) 614-3699/4250, fax (703) 695-8350.

*DIRECTORY OF CIVILIAN PRACTITIONERS
OF MILITARY LAW: ADDENDA*

MUSE, Robert F., Stein, Mitchell & Mezines, 1100 Connecticut Ave., N.W., Suite 1100, Washington, DC 20036, tel. (202) 737-7777.

THE LAW COURTS

The Court Martial Appeal Court in London will be hearing appeals in a variety of military test cases arising from the coming into force of the Human Rights Act 1998. At issue is whether, in light of article 6 of the European Convention on Human Rights, military courts should be permitted to try criminal offenses if those courts' structure and composition are not comparable with the civil jury trial system.

"COUNTRY ROADS, TAKE ME HOME"

Recently, NIMJ was dismayed to learn that an Army enlisted man who had been apprehended as a deserter by civilian law enforcement authorities in West Virginia was held in a county jail, without judicial review, for nearly three weeks before he was turned over to military authorities. We wrote to The Judge Advocate General of the Army to express concern over this delay.

450 E STREET, N.W.

The Court of Appeals will host a symposium on "Electronic Filing of Appellate Documents" on Friday, August 17, 2001, at the courthouse. The symposium begins at 10:00 a.m. Prof. **Frederic I. Lederer**, a member of NIMJ's advisory board, and other electronic filing experts will speak. Those wishing to

attend should contact Mrs. **Sherry Arter** at (202) 761-1448 ext. 607, by August 3, 2001.

CAPITOL HILL

Once again, in conjunction with the National Veterans Legal Service Program, NIMJ presented its annual briefing for congressional staffers, "Everything You Always Wanted to Know About Military Justice (But Were Afraid to Ask)." This year's panel consisted of **Kevin J. Barry**, **Philip D. Cave**, **Dwight H. Sullivan** and **David P. Sheldon**. Some 40 Hill staffers participated.

SOUTH AFRICA

Readers will remember that in March the High Court of South Africa invalidated several provisions of the Military Discipline Supplementary Measures Act, No. 16 of 1999, on the ground that they violate the "single national prosecuting authority" clause of the 1996 Constitution. The State Attorney has filed a Notice of Appeal with the Constitutional Court, taking issue with numerous aspects of the High Court's ruling. The case is *Minister of Defence v. Potsane*, OPD Case No. 2463/2000.

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JOINT SERVICE COMMITTEE ON MILITARY JUSTICE

The Joint Service Committee on Military Justice held a public hearing on July 19, 2001, to receive comments on the 2001 Annual Review of the Manual for Courts-Martial (MCM), and the proposed changes to the MCM that were published in the *Federal Register* on June 6, 2001 (Vol. 66, No. 109, pp. 30431-37). NIMJ and the Bar Association of the District of Columbia attended.

DOD proposes to publish DOD Directive 5500.17 (1996 ed.) as an appendix to the MCM, to make the public aware of the process for amending the MCM and for receiving public input. NIMJ pointed out (as we did last year) that this directive needs to be revised and reissued because it is neither the version currently found in the CFR (which is a 1985 edition) nor does it reflect current JSC procedures, which were amended in 2000.

A proposed change to RCM 405(g)(1)(A) would make it clear that witnesses from beyond 100 miles are not automatically "unavailable" for Art. 32 investigations. We suggested that the rationale for the 100-mile rule itself should be revisited. Similarly, the 100-mile rule and the other regulations addressing the non-"reasonable availability" of military attorneys as individual military counsel (IMC) should be reconsidered, since, in some services, they virtually nullify the statutory right to IMC.

A proposed change to RCM 707(b)(3)(D) would make it clear that the 120-day speedy trial rule applies to rehearings on sentence. However, we suggested that the proposed use of an Art. 39(a) session (an RCM 803 session) as the event that stops the speedy trial clock is inappropriate and could chill defense motion practice well prior to the time of the sentencing hearing. It seems that assembly of the court or reception of evidence on the issue of sentencing would be the more appropriate event to stop the clock.

NIMJ questioned the wording of proposed RCM 916(k)(2), designed to allow evidence of partial mental responsibility on "state of mind" issues. The proposal raises a confusing issue of whether partial mental responsibility amounts to an affirmative defense. The better approach seems to be to merely make such evidence admissible whenever it is relevant to an issue before the court.

We also questioned whether the change to RCM 1107(e)(1)(B)(4) ought to specifically authorize the convening authority (CA) to reassess a sentence rather than ordering a rehearing where part of the findings have been set aside by an appellate court. Whether the CA, as the official exercising prosecutorial discretion, should any longer be viewed as an appropriate official to determine and impose an appropriate sentence is at issue. Reference was made to the rationale regarding CAs contained in the report of the Cox Commission. (DOD's General Counsel has referred the report to the JSC for consideration of possible items for a future annual review.)

Finally, NIMJ addressed ¶ 57(c)(2)(B) and the requirement that the element of the offense of materiality regarding

false testimony (Art. 131) must be sent to the members and could not be decided by the military judge in an interlocutory ruling. NIMJ suggested the JSC review other offenses which contain elements of the offense (such as "lawfulness" of orders under Art. 92; officiality of a statement under Art. 107 might be another) which have been decided in the past by the MJ, to determine if the rationale applicable to Art. 131 applies as well to other (or all) elements of the offense.

Written comments are due by August 20, 2001.

OTTAWA

The 2000-2001 Annual Report of the Judge Advocate General to the Minister of National Defence on the administration of military justice in the Canadian Forces is available online at www.dnd.ca/jag/hl_annualreporte.html#top.

LONDON

The House of Lords has granted leave to appeal in the court-martial cases of *Hastie* and *Spear*. The cases raise the question whether a permanent president of a court-martial lacks the characteristics of independence and impartiality that are required by article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

STRASBOURG

The European Court of Human Rights has scheduled *Morris v. United Kingdom* for an oral hearing on October 23, 2001. The case tests the validity of the new (post-1997) British Army court-martial system under the European Convention.

THE PENTAGON

On May 16, 2001, DOD issued a memorandum establishing policy for implementing § 5 of the DNA Analysis Backlog Elimination Act of 2000, 10 U.S.C. § 1565. DNA samples must now be collected from all armed forces members convicted of a qualifying offense (listed below) except those who are currently in Bureau of Prisons institutions or on parole under the supervision of a federal probation officer. Collection will include all military prisoners, those who are not confined but are still under military jurisdiction (*i.e.*, those on appellate leave) and those convicted in the future. The procedure extends to both general and special courts-martial. Samples will be analyzed by the Army Criminal Investigation Laboratory and then sent to the FBI for inclusion in that agency's database. There is a procedure for expungement if a conviction is overturned.

The qualifying offenses are murder, voluntary manslaughter, rape, carnal knowledge, forcible sodomy, sodomy

with a child, aggravated assault (either with a dangerous weapon or other means likely to produce grievous bodily harm, or in which such harm was intentionally inflicted), indecent assault, indecent acts with another, indecent acts with a child, indecent language to a child, pandering, prostitution involving a minor, kidnapping, robbery, burglary, housebreaking, maiming, arson, assault with intent to commit one of the following (murder, rape, involuntary manslaughter, robbery, sodomy, arson, burglary, housebreaking or any other qualifying offense), attempts to commit any of the above, conviction for any conduct similar to the above offenses, any conduct which involves sexual abuse or any sexual conduct which involves a minor when charged under Articles 134 or 133, conviction for various federal statutes under title 18 (§§ 2421, 2422, 2423, 2425, 2251, 2251A, 2252).

MILITARY JUSTICE 101

Among the offenses charged in *United States v. Nourse*, No. 01-0020 (CAAF July 17, 2001), was larceny of thousands of dollars of ponchos from the Orleans Parish (Louisiana) Criminal Sheriff's Office, at which the accused, a Marine, was a part-time employee. *Solorio v. United States*, 483 U.S. 435 (1987), aside, should larceny from a civilian law enforcement agency be prosecuted by military rather than civilian authorities? In class we will role-play, with one student taking the part of the staff judge advocate and another taking the part of the district attorney. Which jurisdiction should try the case, and why?

NIMJ'S BELIEVE IT OR NOT

The following appears in the record of trial of a Navy general court-martial tried earlier this year:

ADC: This is an earthquake.

MJ: Earthquake. Okay. Everyone should probably get under something solid. The court's in recess for an earthquake. [The court-martial recessed at 1056 hours, 28 February 2001.] [The Article 39(a) session was called to order at 1145 hours, 28 February 2001.]

MJ: The court is called to order. All parties present when the court recessed for the earthquake are again present. And the members have returned to the deliberation room. . . .

DOMESTIC VIOLENCE

The Miles Foundation will support the publication of the *Intimate Partner Violence and the Military: A Victim's Handbook* in local community versions. The small grant program will support the drafting, publication and distribution of editions containing specific information and resources within a community. The program is designed to support agencies, organizations, shelters, centers and advocates providing direct services to this special population. For example, a shelter program may include specific references to state laws, protective order application and enforcement, legal aid, law enforcement referrals, specialized services and social services information. The foundation is soliciting applications from shelters, agencies, organizations, practitioners, social service providers, healthcare provid-

ers, community groups who provide direct services to the military community. The initial letter (no more than 3 pages) should describe the applicant organization's mission; residential and nonresidential services; population served annually; demographic characteristics of the group's client population; details as to the special population (military community) served; typical/most frequent service request of the special population; and collaborative relationships or partnerships. The deadline for submissions is September 1, 2001. For additional information, contact **Kate Summers**, Advocacy Director, The Miles Foundation at (203) 270-0688 or MilesfdnADV@aol.com.

DIRECTORY OF CIVILIAN PRACTITIONERS OF MILITARY LAW: ADDENDA

FREEDUS, Matthew S., Feldesman, Tucker, Leifer, Fidell & Bank LLP, 2001 L St., N.W., 2d Floor, Washington, DC 20036, tel (202) 4660-8960, fax (202) 293-8103, e-mail: mfreedus@feldesmantucker.com

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SIEGEL, Arnon D., Robbins, Russell, Englert, Orseck & Unterreiner LLP, 1801 K St., N.W., Suite 411, Washington, DC 20006, tel (202) 775-4509, fax (202) 775-4510, e-mail: asiegel@robbinsrussell.com.



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President Eugene R. Fidell
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AMERICAN BAR ASSOCIATION

There was much of interest to the military bar at the ABA's annual meeting in Chicago. In the Military Law Committee of the General Practice, Solo, and Small Firms Section of ABA, chaired by MG **Keith Nelson**, USAF (Ret.), reports were presented by the services, the Court of Appeals, NIMJ, the JAA and the Canadian JAG. **Dwight Sullivan** discussed the Bar Association of the District of Columbia ("BADC") recommendation that capital court-martial panels be comprised of 12 members, in place of the current variable number of five or more. The MLC did not vote on the proposal or make a recommendation to the Section Council as to whether to support it in the House of Delegates.

Senior Judge **Walter T. Cox III** described the establishment, function, and recommendations of the Commission on the 50th Anniversary of the UCMJ, which he chaired and which issued its report (see www.nimj.org) in May. There followed a spirited discussion of several of the Commission's recommendations. Judge Cox indicated that the scope of the Commission's inquiry was limited (in part by resources), that the report addressed only matters on which the members were able to reach relatively swift and unanimous agreement, and that he did not consider it the "bottom-up" review which the Commission indicated the system needed.

The Standing Committee on Armed Forces Law met for the last time under the chairmanship of General Nelson. BG **John Cooke**, USA (Ret.), succeeds him. New members include **James Durant**, **Donna Bucella** and **Fletcher Handley**. The BADC recommendation was the principal item of business, generating a lively discussion, with DOD and several services taking the position that since the same recommendation had just been referred to the Joint Service Committee for review with the other Cox Commission recommendations, they should be allowed an opportunity to conduct that review and formalize a position before the matter was sent on for ABA consideration. SCAFL voted to recommend that the matter be deferred to allow DOD to study the issue, with a report due by May 2002. (The report accompanying the BADC recommendation notes that the same issue had been discussed at the April 2001 SCAFL meeting in New London, where representatives of DOD and the services voiced a number of concerns, which were then discussed in the report.)

When the 12-member recommendation came before the House of Delegates, it was presented by BADC President **J. Gordon Forester**, who concluded by pointing to the ABA slogan "Defending Liberty, Pursuing Justice" and stating that military persons are the ones who are indeed "defending liberty" and that this is a chance for the ABA to "pursue justice" on their behalf. No speaker rose in opposition, and the recom-

mendation was adopted with 94% of the votes cast in favor. [The current House of Representatives version of the FY02 DOD authorization bill requires not less than 12 members on capital courts-martial and authorizes accuseds who are tried by members to elect sentencing by the military judge.]

INTER-UNIVERSITY SEMINAR ON ARMED FORCES AND SOCIETY

This year's biennial meeting will be held at the Tremont Plaza Hotel, 222 St. Paul Place, Baltimore, on October 19-21, 2001. There will be a broad range of panels, including one on Law and Armed Forces, to be chaired by NIMJ advisory board member Professor **Diane H. Mazur** (Univ. of Florida College of Law), on Saturday, Oct. 20, 2:00 to 3:30 p.m. For further information contact **Maby Palmisano**, IUS Secretariat, Sociology Department, University of Maryland, College Park, tel (301) 405-6013, fax (301) 314-1314, mpalmisano@soc.y.umd.edu.

DEPARTMENT OF DEFENSE INSPECTOR GENERAL

The Department of Defense Inspector General's Office recently evaluated the sufficiency of subpoena power within DOD in support of general crimes investigations. After surveying the various military criminal investigative organizations, such as the Naval Criminal Investigative Service and the Air Force Office of Special Investigations, the IG reported that these organizations "lack fully effective mechanisms for compelling production of evidence in general crimes investigations." The report identified a number of circumstances where subpoena power was needed but not available and as a result some investigations were incomplete others precluded. This insufficiency exists because the services have limited subpoena power during the pre-referral stage of cases, and the DODIG rarely exercises its subpoena power unless DOD is the victim. Ultimately the report recommended additional subpoena power within the military justice system. The report is available online: www.dodig.osd.mil/dcis/cipo/reports/subpoena.pdf.

From a practice standpoint, the report does not address the fact that Article 46 of the UCMJ provides equal access to witnesses and evidence to the prosecution and defense. Therefore, it might be suggested that expansion of the government's authority to obtain evidence should come with an equivalent expansion in power for the defense. As matters stand, the defense does not have equal access, so an expansion in the government's power would further tip the scales. The government can obtain evidence without notice to the court or the defense, while the defense must make a motion to compel production (trial subpoena) which is on notice to the government. The government gets to hold its cards close to its chest, while the defense must lay its cards on the table face up. The defense can bring an

ex parte motion to compel production, but this practice is rarely done in military practice and viewed with skepticism by judges who may not have adopted that course when doing trial work. To preserve the issue for appeal, trial defense attorney can make an *ex parte* motion. This is one of those areas where military justice simply does not mirror district court practice.

Matthew S. Freedus

BOOK REVIEW: 2d Annual Report of the Judge Advocate General to the Minister of National Defence on the administration of military justice in the Canadian Forces (2001)

Reading the second annual report of the Canadian JAG, which covers 2000-2001, reminded me of Peter Ustinov's famous quip, that Toronto was New York run by the Swiss. Tidy and organized, the report – available online at www.dnd.ca/jag/jag_pdf_docs/2001annualreport_e.pdf – portrays a well-oiled and smooth-running corps with the self confidence to know what it does well and what it can do better.

Though mostly bureaucratese, the report appears to have been written (thankfully) by bureaucrats who mostly adhere to *Strunk & White*. (I read the English version; a French version is also available.) Interesting tidbits emerged as well from the interstices of the many charts and lists. Of 202 charges brought against defendants in 63 courts martial in the year between April 2000 and 2001, a full 28, or nearly 14%, involved related crimes such as “Fishing without a license,” “Possession of undersized lobster,” and “Possession of a female lobster with eggs.” (Something seems to have gone gravely wrong one day in Shearwater, Nova Scotia.) As a U.S. Army JAG officer (first in the reserves, then on active duty in the Balkans), I can tell you, at least anecdotally, that the U.S. Army JAG Corps has (forgive me) bigger fish to fry. Of the remaining offenses charged for the year in Canada, only six involved unlawful narcotics, and only three were for “sexual exploitation” and one for “sexual assault”; in the U.S. Armed Forces, sadly, those numbers are probably about average for every two weeks. Only two members of the Canadian Forces were charged with intentional violence (assault).

Part of the difference, of course, stems from the sheer massiveness of the U.S. Armed Forces and the comparatively minuscule size of the Canadian Forces and the forces' respective missions, with correspondingly dramatic differences in the sizes of the two nations' JAG Corps. The Canadian JAG Corps, says the report, is made up of 108 active duty officers and 61 reserve officers; in fiscal year 2000, the U.S. Army JAG Corps – and this is the Army alone, not the Navy, Air Force, or Marines – had more than 1400 officers on active duty alone. And consider their relative courts-martial caseload: the Canadian JAG Corps tried 63 cases during its reporting year; the U.S. Army JAG Corps tried over 1100.

But part of the contrast between the U.S. and Canadian experiences, I suspect, is due to factors other than numbers. Consider the difference between New York and Toronto, which are not that far apart in size, as well as the anecdotal differences in American and Canadian sensibilities. Surely cultural, political, sociological factors in American and Canadian have influenced the culture of their armed forces and thus their systems of

military justice. How? Why? The Canadian report does not, of course, get anywhere close to answering these interesting questions, but it raises them, and I can only hope that a hungry doctoral student may be paying attention.

Arnon D. Siegel

[*Ed. note:* The report indicates that the advisory panel on military justice consists of a superior court judge with military justice experience, senior federal and provincial Crown Counsel, and two prominent members of the defense bar. The military judges' selection committee consists of a lawyer or judge nominated by the JAG, a civilian lawyer named by the Canadian Bar Association, a civilian judge named by the Chief Military Judge, an officer in the grade of Major General or above, nominated by the Chief of Defence Staff, and a CWO or CPO First Class, also nominated by the Chief of Defence Staff.]

EUROPE

In *R. v. Williams*, the UK Court Martial Appeal Court rejected the contention that a court-martial is not an independent and impartial tribunal as guaranteed by the European Convention on Human Rights, but certified a point of law of public importance, enabling the appellants to appeal to the House of Lords. The certified point concerns whether trial by court-martial for civilian offenses is compatible with the Convention, as introduced into English law by the Human Rights Act 1998. In *Mills v. United Kingdom*, No. 35685/97 (June 5, 2001), the European Court of Human Rights found that a 1995 general court-martial, upheld by the Court Martial Appeal Court, violated the Convention's guarantee of an independent and impartial tribunal. Mills was awarded costs and expenses of £1,000.

NIMJ

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BOOKSHELF

Among the *Gazette's* summer reading was **Jack A. Bunch**, *Military Justice in the Confederate States Armies* (White Mane Books 2000, 209pp., \$29.95). With a title like this, it would be hard for anyone interested in military justice to resist acquiring this book. Unfortunately, it will leave lawyer-readers highly frustrated because it conveys only a limited and unsystematic sense of the legal issues that arose in these courts, much less of their place in the development of American military justice generally. On a brighter note, it is at least helpful to have the Confederate Articles of War and the separate statute providing for three-member standing military courts to be attached to each Army corps. The members, who received the pay of a colonel of cavalry, were presidentially-appointed, subject to the advice and consent of the Confederate Senate, and were to hold office "during the war, unless the court shall be sooner abolished by Congress."

Readers interested in foreign military justice developments will find it engrossing to read *Law Relating to the Armed Forces in India* (Universal Law Pub. Co. Pvt. Ltd., Delhi, 3d ed. 1999), by Brigadier **Nilendra Kumar**, Deputy Judge Advocate General, and **Rekha Chaturvedi**. This is an excellent reference work, with numerous helpful summaries of Indian military cases decided through April 1999. Many of the cases arose in the context of courts-martial, but a good number relate to other kinds of personnel issues. Regrettably, the book does not include an overall essay on the Indian military justice system.

Closer to home, **Randall D. Katz** has written *Friendly Fire: The Mandatory Military Anthrax Vaccination Program*, 50 DUKE L.J.

1835 (2001). It is available online at www.law.duke.edu/journals/dlj/articles/dlj50p1835.htm.

450 E STREET, N.W.

The United States Court of Appeals for the Armed Forces has issued a notice of proposed rule making for changes in Rules 13(c), 20(b)-(c), 21(b), 24, and 41(a). 66 FED. REG. 35,226 (July 3, 2001). Detailed explanations are included with the notice. Among other things, it appears that the Court will be increasing its fee for admission to the bar. Another change calls for inclusion of counsel's e-mail address in petitions for grant of review. Comments should be sent to **William A. DeCicco**, Clerk of the Court. The notice provides for a 60-day comment period (which expires **September 1**, a Saturday). The *Gazette* of course cannot speak for the Court, but it would be surprising if comments received soon thereafter were disregarded.

INTER-UNIVERSITY SEMINAR ON ARMED FORCES AND SOCIETY

Reminder: the biennial meeting will be held at the Tremont Plaza Hotel, 222 St. Paul Place, Baltimore, on October 19-21, 2001. For further information contact **Maby Palmisano**, IUS Secretariat, Sociology Department, University of Maryland, College Park, tel (301) 405-6013, fax (301) 314-1314, mpalmisano@socy.umd.edu.

NIGERIA

In *Brigadier-General Gabriel Anyankpele v. Nigerian Army*, [2000] 13 Nigerian Weekly L. Rep. 209, the Court of Appeal (Lagos Division) allowed the appeal by a Chief of Staff and Nigerian Contingent Commander for ECOMOG in Liberia from a decision of the

former Armed Forces Disciplinary Appeal Committee. The case involved charges of (1) disobedience of a general order by shipping an automobile and (2) conduct to the prejudice of good order and discipline by sending a sum of money to the commander of a unit that was investigating illegal importation of cars and sundry contraband goods. The Court of Appeal ruled, among other things, that a letter as to the dissemination of which there was no evidence did not qualify as a standing (in our parlance, general) order. It also made the following observations concerning General Anyankpele's Point 3(a) ("Whether the constitutional right of fair hearing of the appellant was not breached by the entire system by the facts that the COAS [Chief of Army Staff] who convened the GCM appointed the president and members of GCM. The Judge Advocate who sat with the GCM was also appointed by the said COAS. At the end of the proceedings, the same COAS confirmed the findings and sentence passed on the appellant. And whether the maxim that 'a man cannot be a judge in his own cause' has been violated"):

"The appellant was saying no more than that his right to fair hearing was breached. Under section 131(2) of the [Armed Forces Decree, 1993] the Chief of Army Staff was the convener of the General Court Martial set up to try the appellant; he appointed the members of GCM, the Judge Advocate. He is also the confirming authority of the judgment of the GCM. Can the appellant be reasonably expected to believe that he would have fair hearing before such a body? Can the members of the GCM themselves claim to be impartial and seen to be so? It must not be forgotten that the composition of the GCM carries with it the authority to exercise judicial powers by its members. Impartiality is the greatest attribute which any adjudicating body must always lay claim to. This means that not only must the judge not appear to favour either party he must not take sides on any political issues. . . . Even in the military, a situation where a jun-

ior officer will suddenly find himself sitting in judgment over his superior may provide him a long awaited opportunity to take vengeance over a perceived over-bearing erstwhile superior officer. This is true of any judicial body or quasi judicial body so set-up to perform judicial functions. A situation where the accusers shall be the prosecutors and the judge at the same time can never guarantee fair hearing or fair trial. Such tribunal or adjudicating body constitutes a serious infringement on the principle of natural justice which demand that party must be heard before the case against him is determined—*audi alteram partem*—that no one shall be a judge in his own cause—*nemo debet esse judex in propria causa* . . . Issue (3)(a) is therefore answered in the affirmative; right of fair hearing was breached. . . ." (citation omitted). The Court declined to address (as hypothetical) the impact of a decree promulgated after General Anyankpele's trial under which a convening authority has no power of confirmation over findings and sentences.

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JOINT SERVICE COMMITTEE ON MILITARY JUSTICE

[NIMJ sent the following letter to the Joint Service Committee on Military Justice on August 21, 2001, in response to a notice of proposed amendments to the *Manual for Courts-Martial*, 66 FED. REG. 30,431 (June 6, 2001).]

The National Institute of Military Justice (NIMJ) is a District of Columbia nonprofit corporation organized in 1991. Its overall purpose is to advance the administration of military justice in the Armed Forces of the United States. Since its inception, NIMJ has been an interested observer of the Joint Service Committee on Military Justice (JSC) and of the Manual for Courts-Martial (MCM) rulemaking process, and has regularly commented on proposed changes to the MCM. As part of our effort to foster a robust rule making process, NIMJ has helped to disseminate information about proposed or final changes to the MCM as well as related hearings convened by the JSC through the monthly *Military Justice Gazette*. NIMJ is pleased to be able to continue to be an active participant in this important process.

NIMJ's concern in several past submissions has been the adequacy of the rulemaking process. Our comments today again reflect this concern—which is largely unchanged from last year, when we wrote:

In February this year [2000] the Joint Service Committee (JSC) adopted new procedures to encourage public participation in the MCM rulemaking process. One of the significant changes was to issue an annual invitation to the public to submit proposals for change to the MCM for consideration by the JSC. This Federal Register notice is believed to be the first to include this invitation for the public to submit such proposals. NIMJ's concerns are with the wording of the invitation, and its implications. The following language is used:

Proposals *should* include reference to the specific provision you wish changed, a rationale for the proposed change, and specific and detailed proposed language to replace the current language. *Incomplete submissions will not be considered.*

65 Fed. Reg. at 30965 (emphasis added).

NIMJ does not dispute the desirability, where feasible, for those making proposals to submit completed proposals with full rationales and justifications, and proposed language to implement the proposed changes. Indeed, submission of a "redlined" text, indicating all changes to the current MCM, would be a decided help to those reviewing such proposals. Accordingly, the use of the word "should" is appropriate.

However, the notice then indicates that proposals without such detailed rationales or proposed language "will not be considered." NIMJ perceives this as a provision which will have a "chilling effect" on the submission of proposals. Many individuals or organizations may well perceive problems in the current MCM, or areas in which current procedures could be improved, and wish to propose changes, without having the time or expertise to produce the kind of proposal which has long been required of members of the JSC who wish to make proposals for change. NIMJ believes that such ideas and proposals should not be discouraged. Instead, the burden should fall to the JSC, rather than to the public, to not only consider *ideas* for change which are submitted, but in addition (in the absence of specific implementing language submitted by the proposer) to take it upon itself to prepare full proposals to implement any ideas for change submitted by outside entities or persons which are deemed meritorious.

NIMJ also believes that the notice could be clarified to note that proposals from the public which are not submitted within the public comment period will still be considered, but *may not* be able to be included in the next Annual Review.

We note, for example, that one of the substantive changes appears to implement a case decided by the Court of Appeals for the Armed Forces in January, 2000. It thus appears that, at least in some cases, far less than a full Annual Review cycle is required to produce proposed changes.

Accordingly, NIMJ recommends that the JSC procedures be amended to respond to these suggestions, and that the public be notified of these change when future invitations are issued.

NIMJ notes that the only change to the language included this year is the change to the final sentence from "Incomplete submissions will not be considered" to "Incomplete submissions *may not* be considered" (emphasis added). This is certainly an improvement. However, the failure to make the other changes we recommended leaves the impression that any submissions which do not include complete "specific and detailed language" run the risk of being disregarded. This may discourage participation by members of the public and by military personnel not associated with the JSC. Substance, rather than form, should be the JSC's watchword.

Also on the rulemaking process, last year we made the following comment:

In addition, and as previously recommended, NIMJ submits that the JSC "Internal Organization and Operating Procedures" document is not the most appropriate vehicle for promulgation of rules applicable to public participation in the MCM rulemaking process, and that these rules should be included in appropriate DOD Directives published in the Code of Federal Regulations and in the Manual for Courts-Martial. NIMJ again recommends that these procedures be suitably

promulgated.

This year the Department proposes to publish DOD Directive 5500.17 (1996 ed.) as an appendix to the MCM, to make the public aware of the process for amending the MCM and providing public input. We applaud the decision to publish rulemaking procedures in the MCM. However, as we have previously pointed out, and as was acknowledged at the public hearing on July 19, 2001, the 1996 version of this DOD Directive is neither the version currently contained in the CFR (which is the 1985 ed.), nor does it reflect current JSC procedures, which were amended in writing in the February 2000 revision to the JSC "Internal Organization and Operating Procedures." NIMJ once again urges that procedures affecting the public should be properly adopted and promulgated. The JSC internal procedures document is the only place that the current procedures under which the JSC is apparently operating are found. Promulgation in the MCM of a DOD Directive which does not conform to these procedures, and which conflicts with the earlier DOD Directive on the same subject (which, since it is published in the CFR, is the apparent current federal law on the subject), will only add confusion. The DOD Directive should be updated, and published both in the MCM and in the CFR.

Finally, with regard to the process, NIMJ continues to be concerned with the inadequacy of the Federal Register notice of proposed changes. One of our reviewers noted the extraordinary difficulty of attempting to comment on proposed changes that are published without adequate (in some cases without virtually any) discussion of what concerns motivated them, or what the intended or anticipated effect of the changes would be, and that the failure to provide a sufficient rationale for proposed changes is another barrier to public participation. In failing to publish adequate rationales, the Department falls short of the very standard it sets for submissions by the public. Notice of proposed changes should be upgraded to conform with the standards for other federal rulemaking.

NIMJ has the following comments on the substantive changes proposed in the notice. (Because of the lack of explanations noted above, NIMJ is not always able to determine why the JSC deemed the particular rule preferable to the alternatives.)

A proposed change to RCM 405(g)(1)(A) would make it clear that witnesses from beyond 100 miles are not automatically "unavailable" for Art. 32 investigations. We suggest that the rationale for the 100-mile rule itself should be revisited. Similarly, the 100-mile rule and the other regulations addressing the non-"reasonable availability" of military attorneys as individual military counsel (IMC) should be reconsidered because, in some services, such rules virtually nullify the statutory right to an IMC.

A proposed change to RCM 707(b)(3)(D) would make it clear that the 120-day speedy trial rule applies to rehearings on sentence. However, we suggest that the proposed use of an Art. 39(a) session (an RCM 803 session) as the event that stops the speedy trial clock is inappropriate and could influence defense motion practice well prior to the time of the sentencing hearing. Assembly of the court or reception of evidence on sentencing would be the more appropriate event to stop the clock. The Federal Register notice does not indicate whether other points or events were considered, and, if so, why they were rejected.

NIMJ questions the wording of proposed RCM 916(k)(2), designed to allow evidence of partial mental responsibility on "state of mind" issues. The proposal raises a confusing issue of whether partial mental responsibility amounts to an affirmative defense. Why not simply make it clear that such evidence is admissible whenever it is relevant to an issue before the court? Perhaps there is some reason for the proposed approach, but none is discussed. The final rule should disclose the rationale for retaining or changing the proposal.

NIMJ also questions whether the change to RCM 1107(e)(1)(B)(4) ought to specifically authorize the convening authori-

ty (CA) to reassess a sentence rather than ordering a rehearing, where part of the findings have been set aside by an appellate court. Whether the CA, as the official exercising prosecutorial discretion, is an appropriate official to determine and impose—in the first instance—an appropriate sentence is at issue. Does such a power derive from the same authority currently existing to "disapprove, suspend or mitigate" a sentence? It does not appear to. Can a superior court "conditionally" set aside a sentence, as was purported to be done in the cited case of *United States v. Harris*, 53 M.J. 86 (2000)? Has not the superior authority in setting aside some findings and authorizing a rehearing "as to other offenses and the sentence" (as stated in the proposed rule) at least implicitly set aside the sentence? Can a CA then "reassess" a sentence that no longer is a valid sentence? It appears that this proposed rule makes the CA the sentencing authority in the first instance, something which is clearly unauthorized under the Code. Even *Harris*, as interpreted by the two judges who concurred in the result, "appears to hold that the Court of Criminal Appeals erred by giving the convening authority an option to order a rehearing or reassess the sentence." 53 M.J. at 88 (Gierke, J. with Crawford, C.J., concurring in the result). This important issue should not be resolved *sub silentio*. In reconsidering this proposal, we recommend that the rationale contained in the Cox Commission Report recommending the removal of the CA from the role of selecting members be applied to the role of the CA in this arena also.

Finally, NIMJ notes the change to ¶ 57(c)(2)(B), and the clarification of the requirement that the element of the offense of materiality regarding false testimony (Art. 131) must be sent to the members, and cannot be decided by the military judge in an interlocutory ruling. NIMJ suggests the JSC review other offenses which contain elements of the offense (such as officiality of a statement under Art. 107) to determine if the rationale applicable to Art. 131 applies as well to other (or all) elements of the offense. We also recommend the Committee consider Article 92, and whether a regulatory clarification regarding lawfulness as an element of the offense might be appropriate. We note the recent decision in *United States v. New*, 2001 CAAF LEXIS 676, overruling years of military practice in determining that lawfulness is not an element of the offense. For many years the practice allowed the issue to be determined by the military judge as a matter of law *only* when it was "clear" that it was solely a legal issue; otherwise it was always an issue for the panel.

NIMJ appreciates the opportunity to comment on these proposed changes.



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CAPITOL HILL

[NIMJ sent the following letter on August 10, 2001.]

Hon. Bob Stump, Hon. Ike Skelton, Hon. John McHugh, Hon. Vic Snyder
Committee on Armed Services
House of Representatives

Dear Mr. Chairman and Representatives Skelton, McHugh and Snyder:

I am writing on behalf of the National Institute of Military Justice ("NIMJ") to endorse Sections 571 and 572 of Subtitle H of the Committee's markup of the FY02 National Defense Authorization Act. NIMJ is a nonprofit corporation, founded 10 years ago, that seeks to promote fairness in and public understanding of the military justice system. Our directors include law professors, private practitioners and other experts in the field, none of whom is currently on active duty, but nearly all of whom have served as active duty military lawyers, up to and including flag and general officer ranks. The Institute is independent of the government and relies exclusively on voluntary contributions for its programs.

NIMJ commends the Committee for proposing these crucially important reforms. The legislation is an outstanding example of Congress's exercise of its authority under the Constitution to make rules for the government and regulation of the land and naval forces.

Providing for 12-member capital courts-martial and allowing sentencing by military judge, at the option of the accused, even when a case is tried before members were among the recommendations of the Commission on the 50th Anniversary of the Uniform Code of Military Justice, which the Institute sponsored. I have previously sent you and the other mem-

bers of the Committee copies of the report of the Commission, which is commonly called the Cox Commission because it was chaired by Senior Judge Walter T. Cox III of the United States Court of Appeals for the Armed Forces.

NIMJ endorses these two recommendations of the Cox Commission. (Thus far, we have taken no position on the Commission's other recommendations, which would certainly be an appropriate subject for congressional hearings.)

Section 571 could be improved by deleting three words: "not less than." This would fix the number of members at 12, thus doing away with variably-sized capital court-martial panels. With the exception of the U.S. military, every death penalty jurisdiction in the Nation empanels juries of 12, no more and no less. Providing for exactly 12 members rather than not less than 12 would bring the military justice system into line with its civilian counterparts. This would also be consistent with Congress's preference that military justice procedure mirror that used in the federal district courts, *see* Uniform Code of Military Justice art. 36, 10 U.S.C. § 836, since defendants in civilian federal capital cases are entitled to a 12-member jury. *See* Fed. R. Crim. P. 23(a), 18 U.S.C. § 3593(b).

Limiting the number of members to 12 will minimize whatever additional administrative burden Section 571 might create for commands that convene capital cases, and would be consistent with a recommendation adopted by the American Bar Association House of Delegates on August 6, 2001.

The Committee is to be commended for its vision in proposing these important military justice changes, enactment of which will help foster public confidence in the fair administration of military justice.

AUCKLAND

The Armed Forces Law Association of New Zealand is holding its first annual General Meeting and Conference in Christchurch on October 3 and 4. NIMJ Director **Kevin J. Barry** plans to attend and will both represent NIMJ and present a paper on the United States military justice system and the report of the Cox Commission. His paper, along with articles from New Zealand and the United Kingdom, will be published in the inaugural issue of the *New Zealand Armed Forces Law Review*, to be published in conjunction with the Conference. Kevin has offered to carry home copies of the Law Review for any of our U.S. readers who wish to purchase one. The cost is US\$25.00 (plus US\$3.50 for postage and packaging for mailing). If you are interested, please contact Kevin at kjbarry@erols.com. To ensure availability of a copy, orders should be placed no later than September 14. For all others, or to obtain a copy directly, contact Lieutenant Commander Chris Griggs at cj.griggs@clear.net.nz.

COMING SOON

The next *Gazette* will be No. 100. This special issue will be a detailed index of all issues of the *Gazette*. In connection with our 10th anniversary (October 3, 2001), NIMJ is preparing a paperback volume of all *Gazettes* to date. A limited number of copies will be available at a modest charge. Let us know if you are interested in obtaining one.

NAME THAT MAN

What better way to kick off the new Term than with a contest? The challenge: name the town crier on our masthead. The winner will receive a free copy of the collected *Gazettes* (see above). Rules: one entry per person, must be received by e-mail no later than Sept. 24, 2001 at 11:00 a.m. The decision of the judges will be final. NIMJ officers, directors and advisors, and their families, are ineligible.

Send your entry to efidell@feldesmantucker.com.

ANNUAL CONFINEMENT REPORTS

Among the most important but rarely read documents in the military justice field are the Annual Confinement Reports (DD Form 2720) prepared by each service. According to the Army's report for 2000, for example, there were 47 officers in Army confinement facilities as of Dec. 31, 2000, 42 of whom were under sentences of one year or more. There were 489 post-trial inmates in the U.S. Disciplinary Barracks, as against a total design capacity of 1700 and total operational capacity of 1500. Fifteen parole violators had been returned, along with 2 escapees. Thirty-six confines were restored to duty. Sixty-one inmates were transferred to the Bureau of Prisons. One thousand and two confines had victim/witness notification requirements.

NIMJ

Grant Lattin has been elected to the advisory board. Welcome aboard, Grant!



NIMJ, a District of Columbia nonprofit corporation founded in 1991, receives no government funding. Please send your tax-deductible contribution to the address shown below, and circulate M.J. Gaz. to friends and colleagues. If you are not yet on the e-mail list but would like to be, let us know. Don't forget to download your free copy of the Cox Commission report from our website, www.nimj.org.

President.....Eugene R. Fidell
Secretary-Treasurer-Webmaster Philip D. Cave
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KEVIN J. BARRY



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Our Second Decade of Service

October 2001

450 E STREET, N.W.

Memorial Proceedings for Victims of the September 11, 2001 Terrorist Attack

October 3, 2001

Present:

Susan J. Crawford, *Chief Judge*

H. F. "Sparky" Gierke and **Andrew S. Effron**, *Associate Judges*

Eugene R. Sullivan, *Senior Judge*

The Court convened at 9:30 a.m.

Chief Judge Crawford: Good morning. My colleagues and I would like to take a few moments this morning to remember the victims of the September 11th terrorist attack on our nation.

That attack claimed the lives of civilians as well as members of our military. Two of the victims were former members of the Department of Defense legal community. **Ernie Willcher** was a civilian personnel attorney who worked with me in the Office of the Army General Counsel, and **Mari-Rae Sopper** was a former Navy lieutenant in the Judge Advocate General's Corps, a member of our bar, and an advocate before the Court.

This morning we remember both of these fine attorneys and the contributions that they made to our Nation.

Ernie Willcher spent 4 years on active duty in the Army and 36 years as a civilian employee in the Department of Defense. He was widely recognized in the Pentagon as a leading authority on civilian personnel law.

But I shall best remember Ernie as a gentle and warm person who was devoted to his family. I have fond memories of Ernie staying behind after we finished a meeting—staying behind to talk about civilian personnel law, but rather to compare notes about our children who are about the same age.

He was so proud of his two sons and always eager to share the important milestones in their lives—whether it was their first words, their first steps, or their first days at school. And whether it was a baseball game or a school play, he was always there for his boys.

He is survived by his wife Shirley, 20-year old son Ben, who is a college student at the University of Maryland, and 17-year old son Joel, who is a senior in high school.

I think that his wife Shirley put it best when she said recently, "that Ernie never had any doubts about working for the military," he always said "he was working for the right client, the citizens of our country."

The Court also pays tribute to the memory of former Navy Lieutenant Mari-Rae Sopper. She was an animated and zealous advocate for her clients, and her enthusiasm for her work was contagious. She made enormous contributions to

the military justice system and to the men and women of our Armed Forces.

The Court is very pleased this morning to welcome several of Lt. Sopper's Navy colleagues to join the Court in paying tribute to her memory.

At this time the Court recognizes Captain Carol Cooper.

Captain Carol Cooper: Good morning, Your Honor. May it please the Court, I am Captain Carol Cooper, Division Director of the Appellate Defense Division of the Navy-Marine Corps Appellate Review Activity. I appear before this Court this morning as the representative of the Navy Judge Advocate General, Rear Admiral Donald Guter, and the entire Navy-Marine Corps legal team to honor the memory of one of our own who lost her life in the tragedies of September 11, 2001.

Mari-Rae Sopper, a former lieutenant in the Navy Judge Advocate General's Corps, was a passenger on the plane that was hijacked and crashed into the Pentagon. While on active duty I had the pleasure of working briefly with Lieutenant Sopper when she first reported to our appellate defense division. Mari-Rae was a dedicated and zealous appellate defense counsel, who ably represented a number of clients before this Court including arguing five cases before this Court.

Lieutenant Sopper left a lasting impression in our division of what it takes to serve as an appellate attorney. As Your Honor said, she was a very animated and very enthusiastic young lady who never approached any case or helped any client with less than 100% of her efforts. Because I worked with her for only a short time, I felt her contributions could be best described by a friend and fellow advocate. So with your permission, I would request the Court recognize Lieutenant Hardy Vieux of my division with some brief remarks on her life and the loss of Mari-Rae Sopper. Thank you.

Chief Judge Crawford: Thank you. The Court is very pleased to recognize Lieutenant Vieux.

Lieutenant Hardy Vieux: "You are born and oh how you wail. Your first breathe is a scream, not timid or low but selfish and shattering with all the force of waiting nine months under water. The rest of your life should be like that—an announcement."

Good morning, Chief Judge Crawford, Judges of this Honorable Court. That quotation I just recited to you encapsulates the life of Lieutenant Mari-Rae Sopper. Her life was always an announcement.

Her enthusiasm was her chosen means of announcement. To know Mari-Rae was to know her enthusiasm and her insatiable spirit. She was in every sense of the word an advocate. First, as a trial counsel and then later as an appellate defense counsel, Mari-Rae, like so many others that preceded her, fought to ensure that the military justice system in which we operate produced fair and just results. Whether it was challenging the constitutionality of non-unanimous jury verdicts or concerning herself with the intricacies of the post-trial process, Mari-Rae would not yield in her attempts to advance her cause as well as that of her clients. She gave expression to their anguish, eloquence to their plight, dignity to their circumstance, and consideration to their contentions.

Time and again she announced that she stood for equality and would not tolerate those who sought to denigrate others on grounds of gender, race, ethnicity, or religion. She understood that the test of our time was being able to move from equality in the abstract to equality in significant results.

From lively office exchanges to participation in community activities, Mari-Rae continually reminded us that silence is acquiescence, and she could not and would not remain silent.

She upheld the high standards of service. Her commitment to the integrity of our justice system will long be remembered by all those whose lives she touched. But Mari-Rae was more than just our colleague; she was more than just a naval officer. For many of us she was a friend, for some of us she was a teacher. By example, she taught us that compassion and humility were the ways to go and in her doggedness one could sense a determination to prove wrong all those that underestimated her Herculean heart and small frame. For that was the only thing small about Mari-Rae. Her ideas were big, her aspirations were even bigger and her sense of loyalty was boundless. With her striking hair, green eyes, and unmistakable voice, Mari-Rae set about leaving her imprints on the world.

The law was her vocation, her avocation, and her true passion was gymnastics. As a former college gymnast and a coach, Mari-Rae could express her individuality in her routines while contributing to the efforts of her team.

Although today we meet because of the death of our friend, our thoughts are not on her death but on her life and of the example and guidance and profit we get from introspection about that effervescent life. And although the national tragedy of September 11th took her from us at a mere 35 years old, she lived a full life. I have but faith, for I cannot know where she may be, but I do know that wherever she is, she has announced herself. Thank you.

Chief Judge Crawford: Thank you, Lieutenant Vieux for those stirring words. And now I would like to ask that all of you join the Court in a moment of silence in tribute to the victims of the September 11th attack.

Thank you, and may God bless the victims and their families, and the United States of America.

These proceedings will be made a part of the permanent record of the Court and will be published in the *Military Justice Reporter*.

I thank you for your participation this morning.

[Chief Judge Crawford observed, in opening court at the University of Virginia School of Law on October 1:

At a time like this I am reminded of the stirring words of President John Kennedy who, nearly 40 years ago, proclaimed:

"Let every nation know, whether it wishes us well or ill, that we shall pay any price, bear any burden, meet any hardship, support any friend, oppose any foe, in order to assure the survival and success of liberty."

Those of us in this courtroom know that liberty and justice are inseparable concepts. Indeed our Pledge of Allegiance ends with the words, "with liberty and justice for all."

Throughout our history, our Armed Forces have been the defenders of our liberty and our system of justice. Those brave men and women who, day in and day out, stand in harm's way to protect our freedoms, deserve our deepest gratitude.

They also deserve the very finest system of military justice that we can provide. Our military justice system is a shining example of democracy in action. It ensures that our men and women in uniform do not forfeit their guarantees as American citizens when they enter the Armed Forces.

Our military justice system stands as a hallmark of fairness—a constant reminder that we are a nation of laws—not of men.

Let us—through our work in military justice—continue to assure that both liberty and justice abound for all. With those twin towers of liberty and justice as our bedrock—twin towers that no terrorist will ever knock down—we today begin our new Term of Court.

At its sitting on October 3, the Court of Appeals observed a moment of silence to remember the victims of the September 11 attack. In the aftermath of the attack, NIMJ received messages of solidarity from military lawyers around the world, including friends in Canada, the United Kingdom, Ireland, Norway, Italy, Turkey, Argentina, Israel, Nigeria, East Timor, and New Zealand.]

MILITARY CORRECTIONS

A FOIA request by **Philip D. Cave** to the United States Disciplinary Barracks produced the following information. Since October 1989, 2760 inmates have been released on parole. (Although statistics are unavailable for FY 1991.) Seven hundred sixty parolees had their parole suspended. That means the running of their sentence was stopped. Suspension of the running of the sentence remains in effect until parole is either reinstated or revoked. Of this number, 473 had their parole revoked. None have been/were court-martialed for any offense committed while on parole.

These statistics do not reflect statistics DoD-wide. With the increased use of other longer-term facilities besides USDB, it is quite possible that there are many others in a parole status.

NIMJ

A limited number of copies of the paperback collected Gazettes 1-100, including a detailed index, are available for \$25 (postage included). Please make your check payable to NIMJ, and send it to the address shown below.

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NIMJ

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Secretary-Treasurer-Webmaster..... Philip D. Cave
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MILITARY JUSTICE GAZETTE

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450 E STREET, N.W.

On October 22, 2001, the U.S. Court of Appeals for the Armed Forces issued changes to Rules 13(c), 20(b)-(c), 21(b), 24 and 41(a), following notice in the *Federal Register* and an opportunity for public comment. The changes are posted on the Court's website and will take effect on November 1, 2001. Note also that the fee for admission to the Court's bar will increase to \$35 on that date.

NEW ZEALAND

On October 3-4, 2001, NIMJ Director **Kevin J. Barry** attended the first annual conference of the newly established Armed Forces Law Association of New Zealand (AFLANZ) in Christchurch, NZ, during which he presented a summary of the history and operation of the U.S. military justice system, and of the report of the Cox Commission. The New Zealand military justice system shares a common UK heritage with that of the United States and other Commonwealth countries, but over time each of these systems has grown along different lines, and today they contain a remarkable variety of features. The discussion of the U.S. system and the Cox Commission recommendations stirred great interest among the military and civilian attorneys and judge advocates (court-martial trial judges) in attendance. An item of particular interest, in light of the events of September 11, was the question of the appropriate forum (*e.g.*, U.S. federal court, U.S. military tribunal, or international criminal tribunal) for trying terrorists who are apprehended.

NZ Defence Force (NZDF) attorneys have been monitoring developments in other countries, notably the UK and Canada, with great interest, as well as the Cox Commission's observations on the requirements of due process. Despite the small size of the NZDF and its regular force legal staff, which currently numbers only 11, the challenges NZ faces in many ways parallel those in the U.S. In some areas, the NZ system seems not to need further reform, and to provide a high degree of protection, ahead of the U.S. and some other systems. For ex-

ample, NZ followed the UK's 1948 Lewis Report in switching the Judge Advocate General from a uniformed officer to a senior civilian appointed by the Governor-General (the Queen's representative as Head of State in NZ). In addition, all judge advocates are appointed from a panel of civilian jurists and experienced civilian attorneys, and defense counsel are appointed from a panel of experienced civilian attorneys, all at government expense (subject to a small income-based contribution by the accused). In other areas, some NZ attorneys at the conference reported the need for substantial modification, such as removal of the convening officer (commander) from the role of selecting the members of the court (in conformance with principles announced in the European Court of Human Rights' *Findlay* decision), and providing representation for persons appearing for "summary disposal" of offenses, as has been done in Australia.

There was general agreement that the opportunity to share comparative information and insights about military justice systems face-to-face is enormously valuable. NIMJ is delighted and gratified by the warm reception afforded by AFLANZ and the NZDF. AFLANZ President **John Rowan, QC**, who is a member of the panel of judge advocates, noted the need for "interdependence" as part of the process of a maturing legal profession, and that interaction with U.S. military lawyers was highly prized. In a statement that called to mind a portion of NIMJ's own mission, he noted that AFLANZ was motivated in part by the "growing consciousness that our separate system of military justice, which sometimes sits uneasily alongside the civilian system, especially in peacetime, can benefit from continued scrutiny, public explanation and the dissemination of authoritative and reliable information to the media and decision-makers in Parliament and elsewhere."

Among those present were AFLANZ Vice President **Bruce Stainton**; Treasurer Lt Col **Craig Ruane**, RNZA, a Crown Solicitor (similar to a U.S. Attorney) and artillery officer in the Territorial Force (similar to U.S. Reserve or National Guard) (both defense counsel at courts-martial and

appeals before the Courts Martial Appeal Court (CMAC)); Cdr **Gordon Hook**, RNZN; Secretary; Lt Cdr **Chris Griggs**, RNZN; Lt Col **Steve C. Taylor**, NZALS, Dep. Dir. Personnel Law, NZDF; and Major **Andrena Gill**, NZALS.

Captain Barry also spoke at the Centre for Defence Studies, Massey University, in Palmerston North, NZ. His article on the U.S. military justice system and the Cox Commission was published in the inaugural issue of the *New Zealand Armed Forces Law Review*. NIMJ commends AFLANZ for this thoroughly excellent publication—a remarkable accomplishment for a new law association. North American readers who wish to subscribe should contact the Florida-based legal periodical distribution agent, Gaunt, Inc., at info@gaunt.com. Otherwise, information on obtaining a copy of the law review is available from Lt Cdr Griggs at cj.griggs@clear.net.nz.

INTERNATIONAL SOCIETY FOR MILITARY LAW AND LAW OF WAR

NIMJ was represented at the International Society for Military Justice and Law of War's Seminar on Military Jurisdiction, held in Rhodes, Greece, on October 10-14. One hundred twenty-five uniformed and civilian military law experts from 48 countries attended the seminar. The working sessions focused on recent major revisions in military justice systems, the basic rationale for such systems, human rights aspects of military jurisdiction, and fundamental values in military jurisdiction and military law. Numerous delegations reported recent or contemplated military justice changes. Information on the seminar and the Society's publications is available on the Society's website, <http://www.soc-mil-law.org>. U.S. participants included Col **Jeanne Rueth** and Maj **Andrew S. Williams** of the Air Force and NIMJ President **Eugene R. Fidell**. NIMJ is grateful to the Society for permitting us to participate, as well as to the Greek hosts for their extraordinary hospitality.

MILITARY CORRECTIONAL DATA

Gazette 101 included military correctional data obtained under the Freedom of Information Act. The following observations were received in response. First, it is not uncommon that parole is revoked and then immediately reinstated without a return to confinement. With a loss of street time

or the period of suspension itself, this usually means lengthier periods of post-incarceration supervision. Second, while none may have been court-martialed for offenses committed while on parole, it is important to keep in mind that some parolees have committed offenses and have been convicted by civilian authorities. Almost always that means return (at some point) to military control for completion of original sentences without credit for street time.

In addition, readers should be aware that the Department of Defense has recently adopted mandatory supervision for prisoners who are not paroled who have reached their minimum release dates. These individuals will be released and supervised by the Federal Probation Service as if on parole until the termination of their sentences to confinement. Current prisoners will be grandfathered. The so-called "SAIOP" (supervision as if on parole) will apply to prisoners whose offenses were committed after August 17, 2001. Those with less than 180 days remaining before their maximum release dates will likely be exempt (at least in the Air Force). The service Clemency and Parole Boards will have the final say as to who goes on SAIOP and who is released without supervision on their minimum release date.

NIMJ

The paperback edition of *Gazettes* 1-100, including a detailed index, is available for \$25 (postage included). Please make your check payable to NIMJ, and send it to the address shown below.



NIMJ, a District of Columbia nonprofit corporation founded in 1991, receives no government funding. Please send your tax-deductible contribution to the address shown below, and circulate M.J. Gaz. to friends and colleagues. If you are not yet on the e-mail list but would like to be, let us know. Don't forget to download your free copy of the Cox Commission report from our website, www.nimj.org.

President Eugene R. Fidell
Secretary-Treasurer-Webmaster Philip D. Cave
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MILITARY JUSTICE GAZETTE

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BINNACLE LIST

NIMJ was saddened to learn that MG **Keith Nelson**, former Air Force TJAG and current Chair of the ABA's Military Law Committee, is ill with recently-diagnosed cancer. He is being treated (outpatient) at Walter Reed Army Medical Center, and may be reached at 343 Martins Cove Road, Annapolis, MD 21401. Our best wishes and prayers are with you, Keith.

REQUEST FOR CERTIFICATION

[On Nov. 7, 2001, NIMJ sent the following letter to Maj-Gen William A. Moorman, Judge Advocate General of the Air Force, concerning *United States v. Sills*, *United States v. Nazario*, and *United States v. Riley*.]

The three cited cases, decided on 18 and 19 October, raise the issue of the authority of a court of criminal appeals to affirmatively decline to follow the frequently articulated judgment of its superior court, the Court of Appeals for the Armed Forces, and instead to render a decision in which it indicates it is following the legislative history of the Uniform Code, and earlier Supreme Court precedent.

NIMJ urges that you certify these cases for review by the Court of Appeals for the Armed Forces pursuant to the authority of Article 67(a)(2). Among the issues raised are the standard for CCA review of factual sufficiency of a conviction, and the power of the CCA to reassess a sentence after setting aside a portion of the findings, without regard to whether it can determine what sentence a court-martial would have assessed.

NIMJ believes these cases present issues of extraordinary importance which bear on the integrity of the appellate structures of the UCMJ. If a court of criminal appeals is free to decline to apply the law as pronounced by its superior court, as the Air Force Court has indicated is its prerogative, then this system of criminal justice departs from the standard applicable to appellate courts in every civilian circuit in this country.

In support of this recommendation, we offer the following background on the Air Force's longstanding leadership in working to ensure the integrity of this system. The very first case decided by the Court of Military Appeals was certified to the Court after the government prevailed before the Air Force Board of Review. *United States v. McCrary*, 1 C.M.R. 1, 2 (1951). The landmark decision of *United States v. Tempia* was another that the Judge Advocate General of the Air Force certified

after the government had prevailed before the Air Force Board. 16 U.S.C.M.A. 629, 631, 37 C.M.R. 249, 251 (1967).

In *United States v. Russett*, 40 M.J. 184, 186 (C.M.A. 1994), the Court of Military Appeals wrote, "As a supervisory court for the military criminal justice system, it is important for this Court to answer certified questions where decisions of this Court are being misinterpreted by appellate counsel and intermediate appellate courts." These cases appear to present this important question.

The Court of Appeals for the Armed Forces, in a case arising from the Air Force, has emphatically stressed the importance of intermediate military appellate courts following CAAF's precedent. In *United States v. Alberry*, 44 M.J. 226 (1996), the Court wrote, "It is trite to say that the now Court of Criminal Appeals 'is not generally free to ignore our precedent.'" *Id.* at 227-28 (quoting *United States v. Jones*, 23 M.J. 301, 302 (C.M.A. 1987)). The Court explained, "The fundamental error in the [Air Force Court's] analysis was in according the policy of stare decisis an aspect of flexibility that it does not have. 'A precedent-making decision may be overruled by the court that made it or by a court of a higher rank.' 20 AmJur2d Courts [sec.] 186 (1965). That discretion, however, does not reside in a court of a lower rank. In the absence of a superseding statute or an intervening decision of this Court or the Supreme Court of the United States, [the Court of Appeals for the Armed Forces' precedent] was absolutely binding on the Court of Criminal Appeals." 44 M.J. at 228. *See also United States v. Antonelli*, 43 M.J. 183 (1995) (chastising the Air Force Court for failing to follow the doctrine of stare decisis); *United States v. Kelly*, 45 M.J. 259, 262 (1996) (holding that Navy-Marine Corps Court of Criminal Appeals erred by prospectively overruling Booker).

In light of these precedents, and the actions of the Air Force Court in these three cases, certification of these cases is most appropriate, and in keeping with prior practice of the Air Force. We urge such action.

NIMJ President Eugene R. Fidell took no part in the NIMJ decision to submit this letter.

MORE ON CORRECTIONS

1. *Mandatory supervision.* Trial defense counsel should be aware that the Department of Defense has ordered mandatory supervision for all military inmates upon their release from confinement. *See* DoD Instruction 1325.7, ¶ 6.20. As noted in *Gazette* No. 102, this "SAIOP" (supervision as if on parole) program is only

applicable to inmates who committed their crimes after Aug. 17, 2001. Service specific implementing procedures are currently being coordinated and interim changes to the confinement regulations are expected soon.

Inmates released on mandatory supervision can be subject to parole-like conditions for the time between their minimum release date and their maximum release date. Those released at their minimum release date will have to report to a parole officer, possibly take drug or polygraph tests, and comply with various other requirements until the maximum release date. Violations of mandatory supervision will be processed in the same manner as parole violations. Military inmates in the Federal Bureau of Prisons who are given early release through good time credits may also be placed under mandatory supervision "as if on parole."

2. *Officer prisoners.* DoD Instruction 1325.7 (Aug. 17, 2001) also eliminated the mandatory classification of cadets and officers as Level III prisoners. The services have not implemented this aspect of the instruction yet. Once it is implemented, officers and cadets will be sent to confinement facilities commensurate with the length of their sentences, instead of being automatically sent to the Disciplinary Barracks at Fort Leavenworth. (Note that officers and cadets at the "DB" have not been segregated from enlisted prisoners for several years.) This may assist officer/cadet clients in having access to rehabilitation programs, which often were unavailable to them at the DB because their sentences were too short to get into and complete the programs before being eligible for parole or release.

3. *Prisoners sentenced to life without parole.* An inmate serving an approved unsuspended sentence of confinement for life without parole adjudged for an offense committed on or after Oct. 30, 2000 can only be considered for clemency after serving 20 years' confinement. The service secretary must exercise this authority personally and cannot delegate it to the Clemency and Parole Board or other authorities. (DoDI 1325.7, ¶ 6.16.1.1.) The legislation underlying this rule is the Oct. 30, 2000 amendment of UCMJ Article 74(a). NIMJ had suggested that that measure intruded improperly on the executive clemency power. *See Gazette* No. 79. The legislative history is silent on the point.

4. *Home for the holidays?* Since 1994, the service clemency and parole boards have implemented an "End-of-Year Release" policy. The policy is the subject of a Nov. 9, 1993 Memorandum of Agreement between the services. Under it, for an inmate to be eligible for release, as of Nov. 15, the convening authority must have taken action, there must be an approved sentence of a year or more, and the inmate's projected minimum release date must be between Dec. 15 and Jan. 15. There are some additional requirements as well, including no D&A action during the past year, average-or-above work reports, no outstanding forfeited or currently suspended

good conduct abatement, and parole violators must have served at least one year since return to military control.

KAREN L. HECKER

WORLD TRADE CENTER

Among those murdered in the terrorist attack on the World Trade Center was **Hagay Shefi**, youngest son of Brig. Gen. (Ret.) **Dov Shefi**, former Judge Advocate General of the IDF and General Counsel of the Israeli Ministry of Defense. Hagay was speaking at a conference on the 106th floor of the north tower. His body was one of two found the next day from that floor. An MBA, he had been president of Sungard Business Integration Inc. Earlier this year he had become co-founder and CEO of GoldTier Technologies Inc. Gen. Shefi has cautioned that the attack on the WTC, which was crowded with civilians, should not be referred to as a "tragedy;" the result may be a tragedy to every family that lost a loved one, but the world and the U.S. are faced with a Crime against Peace, a Crime against Humanity and/or a Grave War Crime, as well as a violation of American law. The civilians who, like his son, happened to be at the WTC did not simply die—they were murdered by extreme unlawful acts.

DIRECTORY OF CIVILIAN PRACTITIONERS

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NIMJ

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NIMJ

As you plan your end-of-year charitable giving, please remember NIMJ. If you would like to be added to the e-mail list, let us know. Don't forget to download your free copy of the Cox Commission report from our website, www.nimj.org.

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NECROLOGY

We report with sadness the death of Major General **James Taylor, Jr.**, USAF (Ret), former Deputy Judge Advocate General of the Air Force. After retirement he became a dean at Wake Forest University School of Law, but maintained an active interest in military justice. He was a friend of NIMJ and we are among the many who will miss him.

MILITARY COMMISSIONS WATCH

1. NIMJ is co-sponsoring an ABA program on military tribunals—"Military Commissions 101: A Preliminary Discussion"—from 5:30–7:00 p.m., Wednesday, Jan. 16, 2001, at the 9th Floor Conference Room of the ABA's Washington Office at 740 15th St., NW. The panel will be moderated by **Lynne K. Zusman** (Council Member, ABA Section of Administrative Law and Regulatory Practice), and will include NIMJ director **Kevin J. Barry** (Vice-Chair, Military Law Committee, Bar Association of the District of Columbia and former Coast Guard trial and appellate military judge); BG **John S. Cooke**, JAGC, USA (Ret) (Chair, ABA Standing Committee on Armed Forces Law); **John Flannery** (Chief of Staff and Special Counsel to Rep. Zoe Lofgren, and former Special Counsel to the Senate and House Judiciary Committees); **Ab Hamilton** (former State Department, USIA, staff member, High Commission for Germany, 1951-53, Council of Community and Democracies); Prof. **Peter Raven-Hansen** (George Washington University School of Law); and Judge **Alexander White** (Cook County Circuit Court, and former Staff Judge Advocate, U.S. Marine Corps Reserve, and Assistant Federal Defender). RSVP by Jan. 14, 2002 to the ABA's **Christopher Dyer**, fax (202) 662-1529, e-mail dyerc@staff.abanet.org, or on-line at www.abanet.org/adminlaw/tribunal.html.

2. On Dec. 6, 2001, a panel of the U.S. Court of Appeals for the District of Columbia Circuit denied a government motion in *Mudd v. White* to summarily affirm a district court decision upholding the Army's refusal to set aside the military commission that tried Dr. **Samuel Mudd**. (Dr. Mudd set **John Wilkes Booth's** broken leg after Booth assassinated President **Abraham Lincoln**.) Full briefing and oral argument will now be required. The Court of Appeals' ultimate decision may shed light on when military commissions may be employed.

CAPITOL HILL

The FY02 National Defense Authorization Act includes important amendments to the UCMJ, as well as a new provision (not reproduced here) affecting judicial review of military personnel decisions. Requiring 12-member panels in capital cases was recommended by the Cox Commission on the 50th Anniversary of the UCMJ; the new legislation calls for at least 12 members. Note also that the provision does not take effect for a year, to afford the Joint Service Committee to prepare a study of the issue. The UCMJ amendments follow:

Subtitle I—Military Justice and Legal Assistance Matters

SEC. 581. BLOOD ALCOHOL CONTENT LIMIT FOR THE OFFENSE UNDER THE UNIFORM CODE OF MILITARY JUSTICE OF DRUNKEN OPERATION OF A VEHICLE, AIRCRAFT, OR VESSEL.

Section 911 of title 10, United States Code (article 111 of the Uniform Code of Military Justice), is amended—

(1) by inserting "(a)" before "Any person";

(2) by striking "0.10 grams" the first place it appears and all that follows through "chemical analysis" and inserting "in excess of the applicable limit under subsection (b)";

and

(3) by adding at the end the following:

"(b)(1) For purposes of subsection (a), the applicable limit on the alcohol concentration in a person's blood or breath is as follows:

"(A) In the case of the operation or control of a vehicle, aircraft, or vessel in the United States, such limit is the blood alcohol content limit under the law of the State in which the conduct occurred, except as may be provided under paragraph (2) for conduct on a military installation that is in more than one State and subject to the maximum blood alcohol content limit specified in paragraph (3).

"(B) In the case of the operation or control of a vehicle, aircraft, or vessel outside the United States, the applicable blood alcohol content limit is the maximum blood alcohol content limit specified in paragraph (3) or such lower limit as the Secretary of Defense may by regulation prescribe.

"(2) In the case of a military installation that is in more than one State, if those States have different blood

alcohol content limits under their respective State laws, the Secretary may select one such blood alcohol content limit to apply uniformly on that installation.

“(3) For purposes of paragraph (1), the maximum blood alcohol content limit with respect to alcohol concentration in a person’s blood is 0.10 grams of alcohol per 100 milliliters of blood and with respect to alcohol concentration in a person’s breath is 0.10 grams of alcohol per 210 liters of breath, as shown by chemical analysis.

“(4) In this subsection:

“(A) The term ‘blood alcohol content limit’ means the maximum permissible alcohol concentration in a person’s blood or breath for purposes of operation or control of a vehicle, aircraft, or vessel.

“(B) The term ‘United States’ includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa and the term ‘State’ includes each of those jurisdictions.”

SEC. 582. REQUIREMENT THAT COURTS-MARTIAL CONSIST OF NOT LESS THAN 12 MEMBERS IN CAPITAL CASES.

(a) CLASSIFICATION OF GENERAL COURT-MARTIAL IN CAPITAL CASES.—Section 816(1)(A) of title 10, United States Code (article 16(1)(A) of the Uniform Code of Military Justice) is amended by inserting after “five members” the following: “or, in a case in which the accused may be sentenced to a penalty of death, the number of members determined under section 825a of this title (article 25a)”.

(b) NUMBER OF MEMBERS REQUIRED.—(1) Chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), is amended by inserting after section 825 (article 25) the following new section:

“§ 825a. Art. 25a. Number of members in capital cases

“In a case in which the accused may be sentenced to a penalty of death, the number of members shall be not less than 12, unless 12 members are not reasonably available because of physical conditions or military exigencies, in which case the convening authority shall specify a lesser number of members not less than five, and the court may be assembled and the trial held with not less than the number of members so specified. In such a case, the convening authority shall make a detailed written statement, to be appended to the record, stating why a greater number of members were not reasonably available.”

(2) The table of sections at the beginning of subchapter V of such chapter is amended by inserting after

the item relating to section 825 (article 25) the following new item:

“825a. 25a. Number of members in capital cases.”.

(c) ABSENT AND ADDITIONAL MEMBERS—Section 829(b) of such title (article 29 of the Uniform Code of Military Justice) is amended—

(1) by inserting “(1)” after “(b)”;

(2) by striking “five members” both places it appears and inserting “the applicable minimum number of members”; and

(3) by adding at the end the following new paragraph:

“(2) In this section, the term ‘applicable minimum number of members’ means five members or, in a case in which the death penalty may be adjudged, the number of members determined under section 825a of this title (article 25a).”.

(d) EFFECTIVE DATE—The amendments made by this section shall apply with respect to offenses committed after December 31, 2002.

NIMJ

1. NIMJ proudly announces the rollout of its revamped website. Check it out—still at www.nimj.org—on New Year’s Day. Many thanks to Phil Cave, our founding webmaster, and Jay Fidell, of Honolulu, who helped with the redesign. Tell us how you like it.

2. The paperback edition of *Gazettes* 1-100, including a detailed index, is still available for \$25. Send your check (payable to NIMJ) to Phil at the address shown below.



NIMJ receives no government funding; your donation is tax deductible. If you would like to be added to the e-mail list, let us know. Don’t forget to download your free copy of the Cox Commission report from our website, www.nimj.org.

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MILITARY JUSTICE GAZETTE

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Law Day Issue

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LONDON

[The following timely report was received from His Honour **Judge James Rant**, The Judge Advocate General of H.M. Forces.]

The European Court of Human Rights (ECHR) case of *Morris v. United Kingdom* has caused a re-think on two aspects of our procedure. The first is connected with post-trial review. Under the post-1997 arrangements, a lay board of senior officers, or delegate routinely reviews all courts-martial post-trial. These are paper reviews without a hearing, and the advice of the Judge Advocate General's Office is taken on each case. The accused may petition against finding and sentence at this stage if he wishes. The Reviewing Authority has power only to decrease sentence, and not to increase it, and can also quash convictions.

The ECHR found this procedure to be in breach of the Convention. Perhaps unsurprisingly it concluded that the machinery lacked the necessary features of a judicial tribunal, and rejected the arguments that, since it was solely to the benefit of a serviceman and was an extra safeguard, it was an "inoffensive" breach. The result will be the dismantling of the review procedure, and in future all servicemen will be routed directly to the civilian Court Martial Appeal Court in appeals against conviction and sentence, and will thus be exactly equated to a person convicted in a civilian court.

The second point, rather more controversially, was concerned with the independence of junior members of a court-martial. The ECHR found there to be insufficient guarantees against "outside" pressure. The Court noted that they were not trained in law, and the Court declared that there were no legislative or other sanctions

against interference with them as members, and thirdly took the view that they might be officially reported upon in respect of their courts-martial duties.

Many commentators think the Court fell into factual error. (1) No reports are in fact written in connection with court duties. (2) Legal training seems to be an irrelevant point if command pressure is feared. (3) There are, in fact, clear sanctions both in common law and in statute forbidding any kind of interference with a member of court-martial (for example the offence of attempting to pervert the course of justice) which could lead to severe penalties being levied on a perpetrator. However, the Services have implemented Queen's Regulations which clearly state that nothing in relation to any aspect of a court-martial member's duties during the trial should be the subject of any report, and that any attempt to interfere with a court member is regarded as a criminal offence and will be punished. Additionally, Judge Advocates give a warning at the beginning of each court-martial which includes advising a member what to do if any one makes any kind of approach. These matters may not be the last of a series of skirmishes which are taking place in Europe over the British court-martial system, but so far it is still afloat.

MILITARY COMMISSIONS WATCH

Readers of the *Gazette* will have noticed that this is the first issue we have published in some months. The reason, of course, is that we have had so much "breaking news" to impart in connection with military commissions and other contemporary issues that we have necessarily relied on email distribution of "extras" as well as postings on the website. We've had a lot of positive feedback, and think the departure from our custom was the right thing to do.

We'll continue to stay flexible as the flow of unpredictable issues and events continues, and will welcome your thoughts and suggestions.

AUCKLAND

The *New Zealand Armed Forces Law Review* is accepting articles for its 2002 issue. If you wish to make a submission or a proposal for an article, please contact Lt. Comdr. **Christopher J. Griggs**, RNZN, at christopher.griggs@nzdf.mil.nz.

NIMJ

NIMJ is pleased to announce that the Board of Directors has elected **Stephen J. Shapiro**, chair of the Committee on Military Affairs and Law of the Association of the Bar of the City of New York, to the NIMJ advisory board.

A few copies of the paperback edition of *Gazettes* 1-100, including a detailed index prepared by **Kevin J. Barry**, are still available for only \$25. Send your check (payable to NIMJ) to **Phil Cave** at the address shown below.

READING LIST

Beth Hillman, *Chains of Command: The U.S. Court-Martial Constricts the Rights of Soldiers—and That Needs to Change*, Legal Affairs, May/June 2002, pp. 50-52. "As the American version of military justice is exported around the world, it is crucial that we bring court-martial procedure into line with international norms of criminal justice."

Gerry R. Rubin, *Military Law (The Lighter Side): Homage to Theodore Ende*, British Army Rev., No. 128 (Winter 2001-02). Prof. Rubin provides the inside story on the chap behind key litigation concerning British court-martial jurisdiction following World War II. "Ende [court-martialed in 1943] in fact saved his harshest criticism for those civilian barristers and solicitors serving in the Army during

the war and who had been called upon to serve on courts-martial. These people, he complained, had absolutely no knowledge of military law even though they were knowledgeable regarding civil law; yet, he insisted, they nonetheless had unduly influenced the lay members of the court to convict the accused, which presumably meant Ende in particular."

Prof. Rubin concludes with a suggestion that homage be paid not only to the litigious Mr. Ende, but also to "his legally qualified successors who are forcing today's military lawyers to work overtime," in which spirit we refer the reader to **John Mackenzie**, *Courts-Martial: What Happens Now?*, New L.J. (Mar. 22, 2002). His conclusion:

"The system is in every way an anachronism and should go. Criminal cases proper would be passed to the civilian court system. Four hundred cases would disappear into the Crown Court structure without a ripple. A system of disciplinary tribunals would be set up under subordinate legislation or by Crown prerogative operating through Queen's Regulations. This could be implemented in a matter of days. In Germany investigation and prosecution of criminal cases would be passed to the German authorities, where they belong. Even the Military Correctional Training Centre at Colchester could be kept. All that would be required would be some deft tweaking of its regime and naming as a 'Retraining Centre.' Such a system would be outside the European Convention."

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PERSONNEL NOTES

The *Gazette* has learned that in April, the Judge Advocate General of the Canadian Forces, **Jerry S.T. Pitzul**, has been promoted to Major-General and reappointed for an additional four-year term. Hearty congratulations!

CODE COMMITTEE ON MILITARY JUSTICE

The Code Committee convened at the CAAF Courthouse in Washington, at approximately 1000 on May 16, 2002, for its annual meeting. The committee is the only body statutorily authorized to oversee the operation of the military justice system. Its mandate is set forth in Art. 146 (a), UCMJ: "Annual Survey. A committee shall meet at least annually and shall make an annual comprehensive survey of the operation of this chapter [the UCMJ]." The committee is comprised of the CAAF judges, the Judge Advocates General of the Army, Navy and Air Force, the Chief Counsel of the Coast Guard, the Staff Judge Advocate to the Commandant of the Marine Corps, and two civilian experts appointed by the Secretary of Defense for three year terms. The current public members are Senior U.S. Magistrate Judge **Jacob Hagopian** and Professor **Lee Schinasi**. This year's meeting lasted less than half an hour; no votes were taken.

After approving the minutes of its last meeting, the committee heard from Col.(sel) **Gary Sokoloski**, USMC, chair of DOD's Joint Service Committee on Military Justice, who summarized a handout that noted:

(1) the 2001 UCMJ Amendments (principally the requirement that capital courts-martial have no less than 12 members, and a report (in preparation) to Congress on the impact of permitting the accused to opt for judge-only sentencing after conviction by members); modification to Art. 111, UCMJ, wherein the BAC limit is the applicable standard for the State in which the offense occurs);

(2) promulgation of E.O. 13,262 (Apr. 11, 2002), implementing MCM changes recommended by the JSC's 1998-2000 Annual Reviews (notably, 1-year special court-martial authority and new provisions clarifying adulterous relationships subject to court-martial jurisdiction);

(3) status of the 2001 Annual Review, which had been delayed to avoid conflict with the processing of E.O. 13,262, and is now under review by the DOD Gen-

eral Counsel;

(4) 2002 Annual Review [published in the *Federal Register* on May 20, 2002] and a public hearing set for June 27, 2002;

(5) Other items reviewed during the 2002 Annual Review cycle included the DOD Domestic Violence Task Force Recommendations, the Art. 15, UCMJ, study requested several years ago by the Code Committee at the urging of then public member Prof. **Fredric I. Lederer**, and a comparison of offenses under the Rome Statute (ICC) and the UCMJ;

(6) Items under consideration for the 2003 Annual Review include items on which review continues either at the JSC or within DOD are the Recommendations of the NIMJ-sponsored Cox Commission, results of the DODIG subpoena survey, a joint command military justice review a study of the use of technology in the military justice process; and the review of sentencing credit case law.

There was some discussion of the limited capability of the JSC to review all of the issues that have been referred to it, and the unavailability of additional resources outside the JSC and its Working Group. Chief Judge **Susan J. Crawford**, who chairs the Code Committee, asked the JSC to review during the 2003 Annual Review the potential for amending the UCMJ to permit pleas of *nolo contendere*. After a brief discussion, the hardy perennial issue of appellate delay was continued until next year, pending service input. The Code Committee's next meeting will be held during the week of the 2003 CAAF Judicial Conference.

LONDON

On Friday, May 3, 2002, the UK Court-Martial Appeal Court in *R v. Skuse* (No. 2000/04690 - [2002] EWCA Crim 991 - available on the NIMJ website) looked at the system of Royal Navy (RN) courts-martial for the first time and held that, on the facts of the case, the system was compliant with Article 6(1) of the European Convention on Human Rights. *Findlay* (1996) and *Morris* (2002) were reviewed but not binding on the CMAC with respect to the convention issues given the different structure of the RN system. The principal issue in the appeal was the selection and status of the naval judge advocate (JA) - a uniformed naval officer.

RN JAs are "ticketed" by the Chief Naval Judge Advocate (CNJA), a naval barrister, and the Judge Advocate of the Fleet (JAF), a judicial appointee independent

ent of the RN, for an unspecified period of time. "Ticketing" appears to be similar to appointment to a "panel" from which trial selection is made. Trial appointments are made "in the name of the CNJA" on a rotation basis: the JA on the top of the list or panel is appointed to a court-martial after which his or her name is returned to the bottom. As names are chosen, lower names go up the list, then back to the bottom after specific appointment. Once appointed to a trial, JAs take a judicial oath and are responsible for their judicial duties to the JAF. At the time of the *Skuse* trial a "haphazard" system of professional assessment of JAs existed by the CNJA but that was abolished by the RN at the time of the appeal, perhaps realizing the dangers associated with executive professional evaluations of judicial appointees.

Despite problems with the system identified by the CMAC (no formal guarantee of security of tenure and executive assessments for promotional benefits) the court was not persuaded that the JA appointment process was flawed. A number of facts impressed the court. For instance:

- Although there was no security of tenure, there was a practice of non-removal;
- JAs were appointed from outside the accused's chain of command;
- The JAF was responsible for reviewing courts-martial within which JAs were appointed;
- JAs took a judicial oath prior to trial; and
- The particular JA in *Skuse* was due to retire within a year.

The last point, in fact, seems to have impressed the court, which likened it to the "permanent president" system (PPCM) reviewed by the same court in the *Spears* case and by the ECHR in *Morris*. A few points, however, seemed to have escaped the CMAC:

- PPCMs in *Spears* and *Morris* were an institutional regime. In *Skuse* the fact that the particular JA was personally due to retire bears no resemblance to the army's PPCM system; and
- The JAF's "review" function, which was not articulated in any great detail by the court, is arguably flawed and not a "safeguard" at all, as the JAF reviews courts-martial rulings which are provided by JAs who are responsible to him for their functions. The potential conflict issue should have been examined.

Skuse should be limited to its facts. The court itself appeared to be suggesting that when it concluded that "in the specific circumstances of the judge advocate concerned" the appeal was dismissed notwithstanding that the court also indicated that no fair minded and in-

formed observer would conclude the court was not independent and impartial. It will be interesting to see if the judgment will be appealed to the House of Lords or make its way to the ECHR, where it will no doubt receive different treatment.

Commander G.P. Hook, RNZN

DOMESTIC VIOLENCE

The Miles Foundation has announced that the second annual report of the Defense Task Force on Domestic Violence is now available in .pdf format (Adobe Acrobat reader required):

www.dtic.mil/domesticviolence/Report2-2002.pdf

READING LIST

Lara A. Ballard, *The Trial of Sergeant-Major McKinney: An After Action Report*, 3 Geo. J. Gender & L. 1 (2001). The same issue contains six other papers on gender and sexual orientation in the military.

Kevin J. Barry, *A Face Lift (and Much More) for an Aging Beauty: The Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice*, 2002 L. Rev. M.S.U.-D.C.L. 57.

Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 Green Bag 2d 249 (2002).

Eugene R. Fidell & Dwight H. Sullivan, eds., *Evolving Military Justice* (Naval Institute Press 2002).

Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 Mich. J. Int'l L. 1-29 (2001)

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NIMJ is pleased to announce publication of its *Annotated Guide to the Procedures for Trials by Military Commissions*. The publisher is LEXIS-NEXIS/Matthew Bender & Co. With a foreword by former White House Counsel **Lloyd N. Cutler**, who participated in the Nazi Saboteurs Case (*Quirin*) in 1942, the *Annotated Guide* includes rule-by-rule analyses by military law experts and a useful bibliography of the fast-growing literature on military commissions. Watch for detailed ordering information on NIMJ's website, www.nimj.org.

AMERICAN BAR ASSOCIATION

On August 9-10, various military law entities of the ABA met in Washington, DC.

One highlight of the meetings was a mock oral argument before the court on the issue of military tribunals, focusing first on whether the President could lawfully issue his November 13, 2001 Military Order establishing military commissions to try war criminals without specific authority from the Congress, and second, on whether the procedures outlined in the Secretary of Defense's March 21, 2002 Military Commission Order No. 1 meet minimal standards of due process. The consensus of the panel seemed to be in the affirmative on both questions.

Another highlight was a gala "dining out" held at the Army Navy Club on August 10 attended by a full house of 161 military and civilian guests, including among those with military affiliation two former ABA presidents.

On substantive matters, the Standing Committee on Armed Forces received a report from the Joint Service Committee on Military Justice that included notification that the annual cycle for amendment of the *Manual for Courts-Martial* would be converted to conform

to the calendar year, and that the DOD Directive governing the JSC would be modified and published in the *Federal Register*. The JSC had also conducted a study of the recommendation long made by Senior Judge **Robinson O. Everett**, and concurred in by the Cox Commission, that an accused be allowed to request sentencing by the military judge after having been found guilty by a panel. The JSC and DOD recommendation regarding the issue has been submitted to Congress, and urges that the proposal not be adopted. As reported to SCAFL, some of the bases for the recommendation are that the proposal would require changes in a number of Code provisions, would give the accused undue control over the court-martial process, and would likely increase the number of contested member trials. Although the Cox Commission was on the agenda, SCAFL decided not to further discuss any of the Commission's other recommendations.

BG **John S. Cooke**, USA (Ret) has completed his term as SCAFL Chair and will be succeeded by MAJ **James Durant**, USAF, a new member of the Committee. Other new members are **John Jay Douglas** and **Gary Anderson**, both retired Army JAGs with long service to the ABA. SCAFL noted General Cooke's distinguished service, particularly in serving on two ABA Task Forces related to the 9/11 terrorist attacks, one on military tribunals and the other on the treatment of enemy combatants.

DOMESTIC VIOLENCE IN UNIFORM

Red, White, Black and Blue: A Review of the Defense Task Force on Domestic Violence has been published in 7 Domestic Violence Rep., No. 5, at 65, 75-78 (June/July 2002). The authors are Eve, survivor of domestic violence within the military community; and Kate

Summers, Advocacy Director, The Miles Foundation, Inc. Eve also serves as a volunteer paralegal with SISU ("Survivors in Service United"). Copies and reprints may be obtained by contacting Civic Research Institute, Inc. at (609) 683-4450. Information furnished by The Miles Foundation, Inc., Newtown, CT 06470-0423, tel (203) 270-7861, email: Milesfdn@aol.com or milesfd@yahoo.com.

450 E STREET, N.W.

The Pentagon has issued a vacancy announcement for the position of Chief Deputy Clerk of the United States Court of Appeals for the Armed Forces. (By law—art. 141, UCMJ—the court is located in of the Department of Defense "for administrative purposes only.") The salary range for the advertised position is \$125,972 - \$138,200 per year. The closing date for the position is October 4, 2002. For full details, check the official announcement, for which there is a link on NIMJ's website, www.nimj.org.

SYDNEY

The Asia Pacific Centre for Military Law, a collaborative initiative of the Australian Defence Force's Defence Legal Service and the Melbourne University Law School, was officially launched at HMAS Penguin on August 8, 2002. "The APCML will operate from a military and a university node, in the cities of Sydney and Melbourne respectively. The military node will be located on an interim basis as Randwick Barracks in Sydney and the university node within the Melbourne University Law School." For full information check the website: www.apcml.org/latestnews.php. NIMJ congratulates all those responsible for this exciting development.

WELLINGTON

Speaking of the antipodes, stand by for this year's edition of the *New Zealand Armed Forces Law Review*. This edition has articles

discussing developments in the law of war following Operation Allied Force, the law of terrorism, international protection of UN peacekeepers, the New Zealand Court of Appeal's decision in the "Soldier 5" case (in which the UK Ministry of Defence attempted to ban publication of a book by a former SAS soldier), and New Zealand military law issues. There will also be a review of the House of Lords' decision in *R v Boyd*.

The law review is available in North America through Gaunt Inc., Gaunt Building, 3011 Gulf Drive, Holmes Beach, FL 34217-2199, e-mail: info@gaunt.com. The cover price for [2002] NZAFLR is US\$30. Gaunt, Inc. also holds back issues of [2001] NZAFLR for those who are interested.

[*M.J. Gaz editorial note*: last year's issue was first-rate.]

The next New Zealand Armed Forces Law Conference will be held in Wellington on October 4-5, 2002. Check out the conference information page at www.aflanz.org/conf.htm, which contains links to all the relevant information (including the registration form) plus images and impressions from the 2001 conference. The program for the 2002 conference covers a lot of ground of interest to *Gazette* readers. Thanks to **Chris Griggs** for this information. **John Rowan**, QC, serves as President of AFLANZ.

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WASHINGTON

1. Congratulations to NIMJ director **Kevin J. Barry** on being honored with the Hart T. Mankin Distinguished Service Award, presented by the United States Court of Appeals for Veterans Claims. Kevin served as Chair of the Court's Admissions and Practice Committee and has been an active participant in the process of amending the Court's rules. Prior recipients include **David B. Isbell**, of the Washington law firm of Covington & Burling, and the National Organization of Veterans Advocates.

2. Check NIMJ's website for information about an October 18, 2002 panel on National Security and Civil Liberties: One Year Later, co-sponsored by the ABA's Sections of Administrative Law and Regulatory Practice and Individual Rights and Responsibilities. Even those who have been suffering from War on Terrorism "panel fatigue" will find this one worthwhile. Panelists include Standing Committee on Armed Forces Law Chair **John S. Cooke**, DoD Deputy General Counsel (Legal Counsel) **Whit Cobb**, Georgetown Law Professor **David Cole**, the Open Society Institute's **Morton Halperin**, and others.

BEACH BLANKET BOOK REVIEWS

My summer reading season began with Colonel **Frederic L. Borch's** *Judge Advocates in Combat: Army Lawyers in Military Operations From Vietnam to Haiti* (2001), which is available from the Government Printing Office's on-line bookstore for \$44. The book surveys Army lawyers' roles in military operations from Vietnam through 1996. *Judge Advocates in Combat* discusses many of the same military operations as **Tom Clancy's** and General **Carl Stiner's** *Shadow Warriors: Inside the Special Forces* (2002), which I read

shortly before *Judge Advocates in Combat*. I recommend that approach, which provides additional context for Colonel Borch's focus on the operations' legal aspects. *Judge Advocates in Combat* certainly can't provide the same excitement as *Shadow Warriors*, nor does it try. Due to its structure, *Judge Advocates in Combat* suffers from some repetitiveness, particularly in its discussion of legal work in support of Desert Storm/Desert Shield. Nevertheless, it is an extraordinarily informative survey, tracing the evolution of military lawyers from mere military justice providers and legal assistance dispensers to integral members of the operational planning and execution team. I have already quoted from it in several discussions of legal issues arising from our response to 9-11. Reading *Judge Advocates in Combat* is an exercise in both professional military education and continuing legal study.

Richard Zack's bawdy and boisterous *The Pirate Hunter: The True Story of Captain Kidd* (2002) is more typical beach reading. *Pirate Hunter* is unabashedly revisionist. By contrasting Captain **William Kidd's** actions with those of **Robert Culliford**, who is portrayed as the true arch-pirate of the era, Zack argues for Kidd's innocence—or at worst his guilt of lesser included offenses. While Zack's obsession with lewd details sometimes annoys, the book's depictions of New York and Boston society, English politics, the pirate life, Royal Navy service, and Newgate Prison circa 1700 are all extremely engaging. The account of Kidd's trial at the Old Bailey is both fascinating and infuriating. In the end, Zack's argument for Kidd's innocence is unconvincing, though his case for unfairness at Kidd's trial is compelling.

Sixty-eight years after William Kidd first rose to prominence fighting the French for the Governor of Nevis, **Alexander Hamilton** was born on that Caribbean island. The life

that followed is of interest to any American lawyer, but especially military lawyers. Hamilton was not only a leading member of the New York bar and author of a majority of the *Federalist Papers*, but also an artillery officer, General **George Washington**'s aide-de-camp, leader of an assault at Yorktown and, from 1798 to 1800, Inspector General of the U.S. Army. **Richard Brookhiser's** *Alexander Hamilton, American* (1999), however, provides limited coverage of Hamilton's military career. Indeed, with just 217 pages of text, this slim volume's coverage of most aspects of Hamilton's life is limited at best. The result is less biography than character study. Important events in Hamilton's life—including his service as Army Inspector General—receive far more extensive treatment in **David McCullough's** biography of **John Adams** (2001) than in Brookhiser's biography of Hamilton. *Alexander Hamilton, American* tests *Washington Post* book critic **Jonathan Yardley's** support for the "notion that it is possible to deal with a large life in a relatively small space—to focus on its important events and themes rather than to bog down in meaningless quotidian detail." Jonathan Yardley, *Benjamin Franklin*, WASH. POST Book World, Sept. 15, 2002, at 2. Perhaps because the subject was less familiar to me, I found *Alexander Hamilton, American* less satisfying than Brookhiser's *Founding Father: Rediscovering George Washington* (1996).

I was far more familiar with Hamilton, however, than with the events chronicled in *The Eagle Mutiny* (2001) by **Richard Linnett** and **Roberto Loiderman**. I was previously unaware that in 1970 two merchant seaman seized control of a Military Sea Transportation Service ship carrying napalm bombs to U.S. forces in Southeast Asia and redirected the vessel to Cambodia. Linnett and Loiderman present a captivating account of the mutineers' background, their seizure of the *Columbia Eagle*—which the authors maintain is the sole "Bounty-like mutiny" in American history since 1842—and the mutiny's aftermath. While legal proceedings occupy only a few pag-

es of the book, military justice practitioners will be interested in both the mutiny itself and the resulting diplomatic wrangling.

The best—or at least the most enjoyable—book was saved for the last of my summer reading. **Jack Gieck's** *Lichfield: The U.S. Army on Trial* (1997) tells the story of court-martial arising from brutality at a U.S. Army guardhouse in England during World War II. Assuming that convicted soldiers were malingerers shirking combat duty, their jailers set out to make the guardhouse more frightening than the front. The end of the book is something of a letdown, both because—as in **Jonathan Harr's** *A Civil Action* (1995)—the events themselves were anti-climatic, and because Gieck's effort to put the Lichfield trials into a larger context of military justice reform suffers from some inaccuracies. But the first 200 pages' account of the initial Lichfield court-martial is riveting. Again like Harr's *A Civil Action*, this portion of *Lichfield* teaches trial advocacy while it entertains. Don't put this one off for next summer's beach trip; read it now.

DWIGHT H. SULLIVAN

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Happy Thanksgiving

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FROM HIGH ABOVE NIMJ PLAZA

Congratulations to **Guy Cournoyer**, of Montreal, on his recent election to the NIMJ advisory board. Guy was one of the attorneys who successfully argued *The Queen v. G  n  reux* in the Supreme Court of Canada. Bien-venu!

Dwight H. Sullivan is leaving the board of directors because he is being called to active duty. Dwight is a Lieutenant Colonel of Marines and will be working full time on the defense of a capital case on appeal. NIMJ policy, designed to ensure our independence, bars active duty personnel from serving on the board of directors and advisory board.

NIMJ's directors and advisory board members continue to contribute to the literature. **Dwight Sullivan** is among the authors of *Raising the Bar; Mitigation Specialists in Military Capital Litigation*, 12 GEO. MASON CIV. RTS. L.J. 199 (2002). Advisory board member Professor **Diane H. Mazur** (University of Florida College of Law) is author of *Rehnquist's Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law*, 77 IND. L.J. 701 (2002).

NIMJ's *Annotated Guide to Procedures for Trial by Military Commissions* (LexisNexis 2002) is now available. It includes a foreword by **Lloyd N. Cutler**, who was one of the attorneys in the case of the German Saboteurs in 1942 and later served as White House Counsel. The cost is \$39.95. 144 pp., including index, bibliography, and selected provisions of the UCMJ and MCM, as well as the text of President **George W. Bush's** Nov. 13, 2001 Military Order and Secretary of Defense **Donald H. Rumsfeld's** Mar. 21, 2002 Military Commission Order (with annotations). Details appear on the LexisNexis Matthew Bender website, <http://bookstore.lexis.com>.

The NIMJ website continues to attract a good number of "hits." We welcome noteworthy documents in digital form, and are delighted to upload those that may be of general interest. If you have been wondering why we have largely shifted to sending out e-mail announcements that documents have been uploaded, rather than circulating them as attachments to the announcement e-mail itself, the reason is that attachments can cause the entire e-mail to be blocked by screening software on government websites. They also cause congestion at the sending server. Doing it the new way is of course more cumbersome because the reader has to go to a little extra effort to access the document, but it has the advantage of making sure the e-mail gets to the maximum number of readers, and permits them, rather than NIMJ, to make the decision as to whether the document is of sufficient interest to download.

Speaking of the website, we're gearing up for a renovation. We've found lots of new websites, including several excellent foreign-language military justice sites. We'll likely provide links to some of these. If you have any suggestions for improvements in the website's contents or functionality, feel free to pass them along.

WASHINGTON, D.C.

We previously reported on Opinion No. 313 (2002), issued earlier this year by the Committee on Legal Ethics of the District of Columbia Bar. The opinion concerns whether a lawyer in private practice can represent an individual he or she previously represented while serving as a judge advocate. *See also United States v. Nguyen*, 56 M.J. 252 (C.A.A.F. 2001); *United States v. Andrews*, 21 C.M.A. 165 (1972). No. 313 is now the subject of an insightful article by the Bar's legal ethics counsel in the latest issue of *Washington Lawyer*:

Ernest T. Lindberg, *Speaking of Ethics: Representing Clients After Government Service*, 17 WASH. LAW. No. 3, at 10 (Nov. 2002). The Bar's website address is www.dcbbar.org. *Quaere*: is this ruling being taught/studied at the service law schools?

Lynom v. Widnall, Civil No. 95-233 (EGS) (D.D.C. Sept. 26, 2002), was an action for Administrative Procedure Act review of a decision of the Air Force Board for Correction of Military Records. Following a decision on the merits, plaintiff sought an award of attorneys fees and costs under the Equal Access to Justice Act, and argued for an increase in the hourly rate on the theory that the practice of military administrative law requires specialized expertise. Citing *F.J. Vollmer Co. v. Magaw*, 102 F.3d 591 (D.C. Cir. 1996), Judge **Emmet G. Sullivan** refused to allow a higher rate, noting that the plaintiff had failed to explain why the issues presented questions of law that required special knowledge or expertise. Fees and costs of \$105,378.78 were allowed nonetheless. All told, the litigation lasted over seven years. **James R. Klimaski** represented the plaintiff.

BOOKSHELF

Aspen Law & Business has published **Stephen Dycus, Arthur L. Berney, William C. Banks & Peter Raven-Hansen**, *National Security Law* (3d ed. 2002). This is an extremely worthwhile and up-to-date text. A bargain at \$70.

Rumor has it that the 2002 *Manual for Courts-Martial* has been published by the Government Printing Office. Despite this, the volume is not in fact available from GPO's North Capitol Street main bookstore, which claims that the 2000 edition is the latest one (and is out of print). Unavailability of the *Manual* to civilian would-be purchasers is a recurring problem. See M.J. Gaz. Nos. 28-29. We also understand that the Department of Defense telephone directory is no longer for sale (presumably owing to security concerns),

so hold on to your old copy.

According to the Joint Service Committee's Notice of Summary of Public Comment Received Regarding Proposed Amendments, 67 FED. REG. 68,838 (Nov. 13, 2002), three individuals and two journalists attended the JSC's June 27, 2002 public hearing, and one person representing an organization (yup, NIMJ) offered oral comments. The JSC received a single letter commenting on the proposed MCM changes. Those changes "require the convening authority to take affirmative action in referring an eligible offense for trial as a capital case; clarify rules prohibiting unreasonable multiplication of charges; provide for trial by twelve members in capital cases, where reasonably available; make a technical change substituting 'hardship duty pay' for 'foreign duty pay'; amend[] the rules and procedures applicable to sealed exhibits; explain that the military judge must determine as a matter of law whether an order is lawful [see *United States v. New*, 55 M.J. 95]; broaden[] the threat or hoax offense to include weapons of mass destruction, biological and chemical agents, and hazardous materials; and increase[] the maximum punishment for violation of the threat or hoax article." This is believed to be the first time the JSC has published a summary of comments on proposed changes, and brings the rulemaking process a step closer to the civilian model. It is also believed to be the first time notice has been given following the public comment opportunity but before final promulgation.

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NIMJ director Prof. **Michael F. Noone** (Catholic University of America, Columbus School of Law) has written the entry on "Martial law" in the *Oxford Companion to American Law* (Oxford University Press 2002), as well as *Whacking Unarmed Women: Gaps in the Law of Armed Conflict*, 9 DUKE J. OF GENDER L. & POL'Y 271 (Summer 2002); and *Applying Just War Jus in Bello Doctrine to Reprisals: An Afghan Hypothetical*, 51 CATH. U. L. REV. 27 (Fall 2001).

WASHINGTON, D.C.

The recently-signed FY2003 Defense Authorization Act includes a number of provisions of interest. For example, § 512 updates and streamlines the administration of military justice in the unfederalized National Guard. It specifies convening authorities and requires the development within a year of a model state UCMJ and MCM and its presentation to the states. Under § 563, women serving in Saudi Arabia may not be required or encouraged to wear an abaya. Section 582 requires the Secretary of Defense to conduct a study of the feasibility and desirability of consolidating the separate JAG basic courses in a single location. (Will the report have a purple cover?)

BOOKSHELF

James Rant CB QC and **Jeff Blackett**, *Courts Martial, the Disciplinary and Criminal Process in the Armed Forces* (Oxford University Press 2003), 600 pp. £75. Judge Rant is the Judge Advocate General of H.M. Forces. This will be an important addition to the growing international military law literature.

David C. Frederick, *Supreme Court*

and Appellate Advocacy: Mastering Oral Argument (Thomson-West 2003), with an Introduction by Justice **Ruth Bader Ginsburg**. Truly "must reading" for appellate government, defense, and *amicus curiae* counsel. Not bad for judges, either.

The October 2002 of the *International Review of the Red Cross*, focusing on terrorism, is available online:

www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5F89UD?OpenDocument.

COUNCIL OF EUROPE

Recommendation 1572 (2002)11: Right to association for members of the professional staff of the armed forces (adopted by the Standing Committee on behalf of the Council of Europe's Parliamentary Assembly, Sept. 3, 2002).

1. The Parliamentary Assembly recalls its Resolution **903** (1988) on the right to association for members of the professional staff of the armed forces, in which it called on all member states of the Council of Europe to grant professional members of the armed forces, under normal circumstances, the right to association, with an interdiction of the right to strike. It also recalls its Order No. **539** (1998) on monitoring of commitments as regards social rights, calling on the member states to implement the European Social Charter.

2. Freedom of association is guaranteed by Article 11 of the European Convention on Human Rights and the right to organise is a right foreseen in Article 5 of the revised European Social Charter. However, these articles are of limited scope in relation to violations of the recognition of the right of members of the armed forces to form trade unions.

Happy New Year from NIMJ

3. The Assembly observes that, notwithstanding efforts to promote the civic right to association of certain professional groups, the right to organise of members of the professional staff of the armed forces is still not recognised in all member states of the Council of Europe. Furthermore, several member states who recognise the right to organise of this professional category put severe limitations on the conditions governing it.

4. In the past years, armies from certain member states converted from a conscription system to a purely professional system. As a consequence, military personnel are becoming increasingly “regular” employees, whose employer is the Ministry of Defence, and should be fully eligible for the employees’ rights established in the European Convention on Human Rights and the European Social Charter.

5. Members of the armed forces, as “citizens in uniform”, should enjoy the full right, when the army is not in action, to establish, join and actively participate in specific associations formed to protect their professional interests within the framework of democratic institutions, while performing their service duties.

6. Military personnel should be entitled to the exercise of the same rights, including the right to join legal political parties.

7. Therefore, the Assembly recommends that the Committee of Ministers call on the governments of the member states:

i. to allow members of the armed forces and military personnel to organise themselves in representative associations with the right to negotiate on matters concerning salaries and conditions of employment;

ii. to lift the current unnecessary restrictions on the right to association for members of the armed forces;

iii. to allow members of the armed forces and military personnel to be members of legal

political parties;

iv. to incorporate these rights in the military regulations and codes of member states;

v. to examine the possibility of setting up an office of an ombudsman to whom military personnel can apply in case of labour and other service-related disputes.

8. The Assembly also calls on the Committee of Ministers to examine the possibility of revising the text of the revised European Social Charter by amending its Article 5 to read: “With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police *and the members of the armed forces* shall be determined by national laws or regulations.”

NIMJ

The year is not over quite yet! Please consider NIMJ for a last-minute charitable contribution. If you would like to be on our e-mail subscription list, just complete the subscription form on our website, www.nimj.org.

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MILITARY JUSTICE GAZETTE

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ABA

At the ABA Annual Meeting in Atlanta (August 5-10) the Standing Committee on Armed Forces Law, along with the Judge Advocates Association and the Bar Association of the District of Columbia, sponsored the following Resolution:

RESOLVED, That the American Bar Association urges the Congress to establish on the 50th Anniversary of the enactment of the Uniform Code of Military Justice (UCMJ) in 1950 a diverse and broadly constituted Commission to conduct a thorough and comprehensive review of the military justice system, with a view toward ensuring that the American system of military justice is fully capable of operating effectively and efficiently in peace and war, and is, in both appearance and reality, as fair and just a system as is feasible.

The Resolution was initially placed on the "Consent Calendar" along with other issues which appeared to be without opposition, and which did not require a debate or vote by the full House of Delegates to be adopted as ABA Policy. At the Military Law Committee meeting on August 6, however, opposition to the resolution was raised by several parties, including the Judge Advocates General and the SJA to the Commandant of the Marine Corps, all of whom were in attendance. They asked for more time to study the issue. The arguments presented were that the resolution has the potential to do more than simply to call for a review of the system to ensure it is operating as well as it can, but rather to allow for an open ended "constitutional convention" which would potentially jeopardize the entire military justice system.

At the SCAFL meeting the next day, the Committee voted to withdraw the resolution from this ABA House meeting so that an active dialog could be conducted with the services over the next

few months. SCAFL has scheduled a meeting to be held in Washington, D.C. on Saturday, October 23, 1999, to thoroughly review the issue. The meeting is open to the public, and all are welcome. Location of the meeting will be announced as soon as it is determined.

PROFESSIONAL MEETINGS

If you have not already done so, check out the JAA's home page for details on the action-packed Military Law Week programs, including the Walter T. Cox III Military Legal History Symposium to be held at Ft. Myer's Spates Hall on Friday, October 22.

BOOKSHELF

1. **Janet E. Halley**, *Don't: A Reader's Guide to the Military's Anti-Gay Policy* (Duke Univ. Press. 1999), \$14.95. For a review, see **Cass R. Sunstein**, *At Unease*, The New Republic, Sept. 6, 1999, at 41-45.

2. **Chris Madsen**, *Another Kind of Justice: Canadian Military Law from Confederation to Somalia* (Univ. of British Columbia 1999), US\$75.00. Highly recommended, this is not a book about legal doctrine, but rather a history of the institutional framework, including how Canadian military justice related to UK military justice during World Wars I and II. The author assigns some of the responsibility for recent Canadian controversies to deficiencies in military law training. One would have liked to learn more about the evolution and jurisprudence of the Court Martial Appeal Court, and perhaps the author, who teaches history at the University of Calgary, will develop this part of the story in further work.

The book pulls no punches. For example, "it was hard to see how the number of courts martial in any given year after 1992 could have possibly justified, much less sustained, an independent military judiciary in the Canadian Forces with full-time military judges. Nonetheless, the JAG office became committed to the buildup of a normal military justice apparatus, regardless of its ever increasing complexity and demands on personnel

and branch resources. Whether an independent military judiciary was an appropriate or even affordable solution to the legal challenges posed by the Charter [of Rights and Freedoms] was less important than the JAG's desire to support a separate military justice system, for which a large establishment of specialized military lawyers was required. Unwilling to concede any more authority than was absolutely necessary to the civilian judiciary, the Canadian Forces adopted a wholly extravagant and superfluous system of military trial judges for the relative size of armed forces in Canada and number of offenses brought before military courts, Prudence and practicality were sacrificed for legal meticulousness."

Prof. Madsen's conclusion argues that "[i]n terms of publicizing their work, Canadian military lawyers lag behind counterparts in other countries, especially the United States" and asks "Is a comparable institution to the National Institute of Military Justice needed in Canada? Besides obvious benefits for advanced instruction in military law, better accessibility and coverage would improve the quality and administration of Canadian military justice."

OTHER NEWS FROM CANADA

The military justice amendments in Bill C-25 became effective on September 1, 1999 and will be phased in over several months. According to the Department of National Defence, the new provisions will:

□ Clarify the roles and responsibilities of the military justice system's principal actors including the Minister of National Defence and the Judge Advocate General

□ Establish clear standards of institutional separation between the investigative, prosecutorial, defense and judicial functions

□ Abolish the death penalty and substitute life imprisonment

□ Authorize a military judge to preside over courts-martial and impose sentence

□ Authorize noncommissioned members to sit as members of court-martial panels at general and disciplinary courts-martial when the accused is a noncommissioned member

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NIMJ is a District of Columbia nonprofit corporation founded in 1991. We receive no government funding. Contributions to NIMJ are tax-deductible. Please circulate M.J. Gaz. to friends and colleagues who are interested in military justice. If you are not on the mailing list but would like to be, let us know. We welcome suggestions and information about coming events and useful web sites for inclusion in the *Gazette*.

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Veterans Day Issue

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ANNOUNCEMENT

In the interest of economy, we would like to reduce the *Gazette's* hard copy distribution as much as possible. If you currently receive hard copy and wish to continue doing so, please send a letter or post card to that effect to National Institute of Military Justice, c/o Kevin J. Barry, 13406 Sand Rock Court, Chantilly, Virginia 20151-2472. If you have an e-mail address, please send it to us at efidell@feldesmantucker.com.

REMARKS BY THE CHIEF JUSTICE

On October 18, 1999, Chief Justice **William H. Rehnquist** addressed the International Conference on Intellectual Property Law, in Washington. Among other things, he said:

"Conferences such as this one provide great opportunities for participants to exchange ideas and experiences across national borders. In recent years, there has been an increasing recognition of the benefits of courts of one nation looking to the laws, decisions, and experiences of courts in other countries. I am seeing this in the field of constitutional law, and I believe that as more constitutional courts develop around the world we will see the courts of the United States looking more to the decisions of other nations' constitutional courts to aid in their own deliberative processes."

[*Gaznote: see Knight v. Florida*, No. 98-9741 (U.S. Nov. 8, 1999) (**Breyer**, J., dissenting from denial of certiorari) (surveying foreign precedents).]

E STREET, N.W.

On October 13, 1999, the United States Court of Appeals for the Armed Forces granted review in *United States v. New*, No. 99-640/AR, on the following issues:

WHETHER THE MILITARY JUDGE ERRED BY DENYING APPELLANT'S CAUSAL CHALLENGE AGAINST A COURT-MARTIAL MEMBER WHO PREVIOUSLY ORDERED A SUBORDINATE TO DEPLY TO MACEDONIA.

WHETHER APPELLANT'S CONSTITUTIONAL AND STATUTORY RIGHTS TO BE TRIED BY COURT-MARTIAL MEMBERS AND TO HAVE THE MEMBERS DETERMINE WHETHER THE GOVERNMENT HAS PROVED EVERY ESSENTIAL ELEMENT OF THE CHARGED OFFENSE BEYOND A REASONABLE DOUBT WERE VIOLATED BECAUSE THE MILITARY JUDGE RULED THAT THE ORDER GIVEN TO APPELLANT WAS LAWFUL WITHOUT SUBMITTING THE ISSUE TO THE MEMBERS, AND BECAUSE THE MILITARY JUDGE INSTRUCTED THE MEMBERS THAT THE ORDER WAS LAWFUL AS A MATTER OF LAW.

Congratulations to Commander **Richard W. Bagley**, JAGC, USN, on his appointment to the Court of Appeals' Rules Advisory Committee, vice Captain **Carol J. Cooper**, JAGC, USN, who has been transferred out of the Washington area.

MILITARY LAW AND JUSTICE WEBSITE

Remember the "quizlet" that the Military Law and Justice website conducted on whether *Manual* changes should be done through a public advisory committee? The final survey results were as follows:

Strong Yes	24%
Yes	17%
Not sure	19%
No	22%
Strong No	18%

AMERICAN BAR ASSOCIATION

The Standing Committee on Armed Forces Law (SCAFL) met on October 23, 1999 at Fort Myer. Among the items of most significance to *M.J. Gaz.* readers are the following:

Commission to Review UCMJ. The principal item of business was the proposed Report and Recommendation calling for "a diverse and broadly constituted Commission to thoroughly and comprehensively review the military justice system," which has been frequently changed during its 50-year existence, and which has not been the subject of congressional hearings since 1983. The Committee had withdrawn the recommendation from the House of Delegates agenda at the August meeting in Atlanta to allow further dialog with the TJAGs on the subject. Three of the five senior service attorneys were present at the meeting and spoke strongly against the recommendation, arguing that we currently have the "best system of military justice existing in the world" and that a complete review of the entire UCMJ was unnecessary, and potentially would result in recommendations which were undesirable. In addition, the TJAGs indicated their belief that there were things that could be done to address the concerns of the ABA and legal commentators, and that they could do a better job of seeking and accounting for public comments and proposals to modify the system. Specifically addressed were providing a summary of comments received and the rationale for not adopting suggested changes. One TJAG raised the possibility of expanding the Joint Services Committee, widely considered to be currently understaffed, to include voting representatives from the military judiciary and military defense bar. SCAFL decided to redraft the recommendation, and to put it on the agenda for the Committee to reconsider and discuss at the midyear meeting in February 2000 in Dallas. In the meantime, the Committee will continue the dialogue with the services on these issues.

Death Penalty Habeas Counsel. The Committee expressed its frustration at the passage of four years awaiting the services' implementation of promised regulations to provide counsel to military members sentenced to death who wish to seek habeas review of their convictions in federal district court. The Navy Department has adopted such a rule. The Air Force indicated that such rules are very close to being published, and noted the "glacial pace" of moving changes through the Pentagon.

Tenure for Military Judges. The Committee also expressed its frustration with the delay in the services implementing promised judicial tenure rules similar to those recently implemented by the Army, which established a 3-year tenure period. In a related development, DoD has appointed an *ad hoc* committee to study the issue of judicial independence (including the concept of tenure).

Joint Service Committee. The JSC representative gave a summary of recent regulatory and statutory changes. E.O. 13,140, the 1999 changes to the MCM, was signed on Oct. 6, 1999 (Oct. 12, 1999 Fed. Reg., pp. 55,115-23). Principal among the changes are the creation of a psychotherapist-patient privilege (MRE 513), rules for protecting child witnesses in domestic abuse cases (RCM 804, RCM 914A, MRE 611), the creation of a new offense of reckless endangerment (Art. 134),

and the admission of evidence during the sentencing phase of a trial that a violent crime was a hate crime (RCM 1001(b)(4)).

In addition, the recently enacted DoD Authorization Act for 2000 expands the jurisdiction of special courts-martial to a year's confinement from the current 6 months. The Committee noted that this change was effected with no opportunity for public input or participation prior to DoD requesting that statutory amendment. The TJAGS agreed that they could improve the availability of "legislative history" by making available to the Committee and the public the "section-by-section" analyses that are part of each of its requests for statutory changes to the UCMJ. They agreed to take this as an action item, and SCAFL added it to its agenda for the next meeting.

The Committee noted that the ABA in 1995 adopted a recommendation that MCM changes be promulgated with the same formality and *Federal Register* rulemaking process as are other important federal rule changes; in 1997 the ABA adopted a recommendation that MCM changes be proposed through a broadly constituted advisory committee which operated in a public forum, similar to that followed by the advisory committees proposing Federal Rules of Criminal Procedure, Evidence, etc. SCAFL member Prof. **David A. Schlueter**, Reporter for the Federal Rules of Criminal Procedure Advisory Committee, reviewed the operation of that committee, and noted that these rules were undergoing a complete review, since they had become over the years a "hodge-podge," with lots of inconsistencies (not unlike the UCMJ and MCM, similarly subject to random piecemeal changes over the years).

In addition, the representative of the DoD General Counsel provided the Committee with copies of the proposed EO on MCM changes forwarded to OMB on Oct. 18, 1999 (1998 Annual Review) which will allow for military judges to issue protective orders regarding extrajudicial statements, will expand the types of criminal dispositions by states which will be admissible as civilian convictions at courts-martial, will implement the recently authorized sentence of life-without-parole, and will give additional guidance on the offense of adultery, "official statements," and addressing victims' rights. The 1999 Annual Review is under review within the Administration. It contains changes to the MCM addressing credit card offenses as larceny, increasing from \$100 to \$500 the break point for heightened sentencing, making statements to law enforcement personnel. In addition, the JSC has under review a variety of other initiatives, including a study of Article 15, which was requested by the Code Committee.

Finally, the DOD representative provided the Committee with a copy of DoD's report on methods of selection of members to serve on courts-martial. The report was required by § 552 of the DoD Authorization Act of 1999. The major conclusions of the report are that random selection of members would not materially improve the system, and that the present system is the best available: the existing system is fair and efficient, and has worked well, and public perceptions to the contrary are inaccurate, and should be addressed through a comprehensive education process.

SCAFL's next meeting will be on February 12, 2000 in Dallas. Committee meetings are open to the public. For further information contact **Stephanie Park**, ABA Staff, 312-988-5604.

JERUSALEM

On October 14, 1999, the Supreme Court of Israel decided *Tzemach v. Minister of Defence*, Nos. 6055/95 & 7083/95. At issue was the validity of article 237A of the Military Justice Law, 1955, which prescribes the period within which a soldier under arrest must be brought before a judge. *Held*, 10-1, the statutory period (reduced from 35 days to 4 days during the pendency of the case) is invalid because it conflicts with the Basic Law of Human Dignity and Liberty. A delay of no more than 48 hours is permissible. *Compare County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (48 hours); *United States v. Rexroat*, 38 M.J. 292 (1993) (same). The decision is effective in six months. Interestingly, from a United States-law perspective, Tzemach himself was no longer in the service; the other petitioners were five military

attorneys and the Association for Civil Rights in Israel. According to a report by Ha-Aretz's Supreme Court correspondent, "this is the first time the High Court has nullified a Knesset law on grounds that it diverges from the Basic Law of Human Dignity and Liberty."

BOOKSHELF

LEXIS Publishing, P.O. Box 7587, Charlottesville, Virginia 22907-7587, has announced publication of the fifth edition of *Military Criminal Justice: Practice and Procedure*, by NIMJ Advisory Board member **David A. Schlueter**.



Please remember NIMJ as you develop your end-of-year charitable giving plan. NIMJ is a District of Columbia nonprofit corporation founded in 1991. We receive no government funding. Contributions to NIMJ are tax-deductible. Please circulate M.J. Gaz. to friends and colleagues who are interested in military justice. If you are not on the mailing list but would like to be, let us know. We welcome suggestions and information about coming events and useful web sites for inclusion in the *Gazette*.

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AMERICAN BAR ASSOCIATION

The ABA's Standing Committee on Armed Forces Law, chaired by MajGen **Keith E. Nelson**, USAF (Ret), is seeking nominations for the 2000 Military Law Writing Award. This year's award will focus on the 50th Anniversary of the Code. The award will be presented at the ABA's Annual Meeting in New York. Nominations may be made by members of the Committee, Committee advisors, including the senior service attorneys and the Commandants and faculty at the JAG Schools. If you have a suggestion, please submit it to one of the above. Further information may be obtained from **Stephanie Park**, of the ABA, at (312) 988-5604.

NIMJ strongly encourages readers to submit recommendations so that appropriate recognition can be given to those who contribute to the intellectual life of the military legal community.

WESTMINSTER

On November 18, Queen **Elizabeth II**, in her speech to Parliament, advised that the government would be seeking legislation to confer on military personnel the right to appeal summary punishments imposed by commanding officers. There will be a new Summary Appeal Court made up of an independent judge advocate and two lay service officers, who would have power to overturn but not increase sentences. A copy of the measure (The Armed Forces Discipline Bill, HL Bill 1), as introduced that day in the House of Lords, is available on the web at www.parliament.the-stationery-office.co.uk/pa/ld199900/ldbills/001/2000001.htm. Useful explanatory notes prepared by the Ministry of Defence appear at www.parliament.the-stationery-office.co.uk/pa/ld199900/ldbills/001/en/00001x--.htm. The proposals in the bill result from a review of the separate service discipline acts in light of the incorporation of certain provisions of the European Convention on Human

Rights into domestic British law under the Human Rights Act 1998, the main portions of which are expected to come into force on October 2, 2000. In addition to the new system of summary appeal courts, the bill address custody (in light of the decision of the European Court of Human Rights in *Hood v. United Kingdom*), the procedure for election of trial by court-martial, and the functions of the prosecuting authority.

AUCKLAND

The Court of Appeal of New Zealand handed down an important military decision on November 11, 1999 in *Attorney General on behalf of Royal New Zealand Navy v. Lawrence*, Nos. CA163/99, 139/99. At issue was whether an offense of rape had been condoned by the accused lieutenant commander's commanding officer so as to bar trial by court-martial. The High Court had entered a declaratory judgment for Lieut. Comdr. Lawrence; the Court of Appeal, in an opinion by **Tipping, J.**, allowed the government's appeal and set aside the lower court's judgment. The basis for the Court of Appeal's ruling was that the commanding officer could not be understood to have condoned the offense because he in fact had concluded that the allegation was not well-founded, *i.e.*, that no offense had been committed. Among other things, the Court observed: "Condonation has been a feature of military law for two centuries. Its well accepted meaning involves the very thing which Mrs **Ablett-Kerr** [counsel for Lieut. Comdr. Lawrence] suggested Parliament cannot have intended, *ie*, forgiveness of well founded allegations. While it may be very rare for a commanding officer to condone a really serious allegation which appears well founded, Parliament must be taken to have trusted commanding officers to use their power of condonation responsibly."

The opinion is online at www.brookers.co.nz/legal/judgments/default.asp?doc=1999/ca163.html.

MILITARY LAW AND JUSTICE WEBSITE

The second "quizlet" that the Military Law and Justice website conducted asked whether there should be a death penalty in the military for non-combat-related crimes. The 1578 responses received as of December 12, 1999 were as follows:

Strong No	31%
No	20%
Don't Know	10%
Yes	24%
Strong Yes	15%

BRASILIA

Those who can read Portuguese may wish to bookmark the URL for the Superior Military Court of Brazil:

<http://200.252.227.3/stm.htm>.

(Thanks to **Mike Wims** for the tip.)

NIMJ

On December 3, 1999, the NIMJ Board of Directors voted to expand the board to up to nine members. The following new directors have been unanimously elected: Dean **John S. Jenkins**, Prof. **Michael F. Noone**, Prof. **Mary M. Cheh**, and **Dwight H. Sullivan**.

MAILBAG

We received the following from a reader in the Disciplinary Barracks:

I currently receive a hard copy of the *Military Justice Gazette* and wish to continue doing so. Also, on behalf of myself and other inmates who take an active interest in understanding the military justice system, I would like to thank you and all members of NIMJ for providing an invaluable source of information as well as the comfort of knowing that the military justice

system is being monitored by an institution external to it that does not hesitate to provide well reasoned input and recommendations. Thank you!



Thank you for including NIMJ in your end-of-year charitable giving plan. NIMJ is a District of Columbia nonprofit corporation founded in 1991. We receive no government funding. Contributions are tax-deductible. Please circulate M.J. Gaz. to friends and colleagues who are interested in military justice. If you are not on the emailing list but would like to be, let us know. We welcome suggestions and information about coming events and useful web sites for inclusion in the *Gazette*.

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MILLENNIUM DIRECTORY OF CIVILIAN PRACTITIONERS

Following is the 2000 directory of civilian attorneys who practice military law on a regular basis. NIMJ publishes this directory as a public service. Inclusion in the directory implies *no endorsement* by NIMJ or any other organization. Please advise us of any corrections or changes.

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ABA MID-YEAR MEETING

Details on the military-related activities at the ABA's Mid-Year Meeting (Dallas, February 9-13) are available on the Judge Advocates Association's website, www.jaa.org.

NEWPORT

Thanks to **William C. Aseltine**, International Legal Education Consultant, Naval Justice School/Defense Institute of International Legal Studies, for the following:

The December 1999 issue of the *Military Justice Gazette* contained interesting articles concerning military justice cases decided in the UK and New Zealand. These and earlier articles on military justice outside the United States lead me to believe that readers might be interested in a program at the Naval Justice School specifically designed to promote comparative law scholarship in the area of military justice.

Twice a year, a group of 4 or 5 military lawyers from other countries come to the Naval Justice School to compare and contrast the U.S. military justice system with their own. During the 11-week program the participating judge advocates attend lectures offered as part of the Naval Justice School Basic Lawyer Course, Legal Officer Course and the Course on Conducting Military and Peacekeeping Operations in Accordance with the Rule of Law. They also conduct their own comparative law research working closely with staff from the Naval Justice School and the Defense Institute of International Legal Studies. The comparative process allows these students to gain insight into their own military justice system and practice and often provides them with useful models for further development.

On 17 December 1999 judge advocates representing Albania, Philippines, Ukraine and Zimbabwe graduated from the second class. The first class had two students from Thailand. It is anticipated that students from Italy, Thailand and Venezuela will attend the third class, which is scheduled to begin 1 May 2000.

Gazette readers with questions can contact me at the numbers listed below.

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CALENDAR OF EVENTS

March 6-7, Second JAA Appellate Advocacy Symposium, Catholic University School of Law

1600 PENNSYLVANIA AVENUE

NIMJ advisory board member **Ron Meister** reports that one of President **Bill Clinton's** 37 December 1999 pardons went to **Freddy Meeks**, who was among those convicted in 1944 in connection with the Port Chicago mutiny. He was represented by the firm of Morrison & Foerster. Also pardoned were **Arthur N. Evans**, convicted in 1954 of protecting and assisting an Army deserter; **Kenneth M. Kaull**, convicted in 1976 of, among other things, negligently hazarding two Navy vessels; and **Ronald M. Smith**, convicted in a 1977 Army court-martial of stealing mail.

MILES FOUNDATION

New address information about a private nonprofit organization dedicated to promoting awareness of interpersonal violence, especially as it pertains to the United States armed forces: The Miles Foundation, P.O. Box 934, Waterbury, CT 06721-0934, tel/fax (203) 270-0688, Milesfdn@aol.com or milesfd@yahoo.com. Office hours are Mon-Sat, 8:00 a.m. to 6:00 p.m. The Foundation publishes an electronic newsletter, "Across the Miles." For a free subscription, send an email request to MilesfdnMCD@aol.com. There is also an Across the Miles Listserv. To subscribe, send an email request to acrossthemiles-subscribe@onelist.com.

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Readers who practice before the United States Court of Appeals for the Armed Forces will be delighted to know that the Court is current in making its *Daily Journal* available on its website. It is now possible to know in real time the issues on which the Court has granted review. *Bravo!*

BOOKSHELF

(1) The fifth edition of NIMJ advisory board member **David A. Schlueter's** *Military Criminal*

Justice: Practice and Procedure (1999) (a commemorative edition recognizing the 50th anniversary of the Code) (\$110).

(2) The third edition (Lexis 1999) of *Federal Standards of Review*, by **Steven A. Childress** and **Martha S. Davis**.

(3) **Gordon N. Lederman**, *Reorganizing the Joint Chiefs of Staff: The Goldwater-Nichols Act of 1986*. Mr. Lederman, an attorney with Arnold & Porter, will discuss his book at Olsson's, Metro Center, 1200 F St., N.W., Washington, at 7:00 p.m., Wednesday, Feb. 16, 2000.



NIMJ is a District of Columbia nonprofit corporation founded in 1991. We receive no government funding. Contributions are tax-deductible. Please circulate M.J. Gaz. to friends and colleagues who are interested in military justice. If you are not on the emailing list but would like to be, let us know. We welcome suggestions and information about coming events and useful web sites for inclusion in the *Gazette*.

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MILITARY JUSTICE GAZETTE

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"WE TOO MUST BE LIKE OTHER NATIONS" *[I SAM. 8:20]: A COMMENT*

by **Michael F. Noone**

Professor of Law, Columbus School of Law
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The recent ruling of the European Court of Justice, *Kreil v. Germany*, No. C-285/98 (Jan. 11, 2000), prohibiting discrimination against women seeking assignment to the combat arms of the Bundeswehr (as the Canadian Human Rights Commission had previously ruled with regard to the Canadian Forces, in *Gauthier v. Canadian Forces*) serves to remind us once again of the exceptional status United States jurisprudence accords our military. The European Court of Human Rights' 1999 ruling prohibiting the British forces from discriminating against homosexuals, *Lustig-Prean v. United Kingdom*, No. 31417/96 (Sept. 27, 1999), while expected—since the Court had decriminalized sodomy years ago—offers additional precedent for those seeking similar changes in U.S. law. Opponents of change point to what they portray as an unbroken line of Supreme Court decisions holding that Congress and the military, not judges, are responsible for regulating the military.

There are several reasons why the opponents of change should not be overly confident. They should recall that the Supreme Court, in *Frontiero v. Richardson*, 411 U.S. 677 (1973), ruled that congressional discrimination against military women was unconstitutional and that the Court, in *Goldman v. Weinberger*, 475 U.S. 503 (1986), upheld by a single vote the military's right to regulate religiously motivated behavior. Thus, the judicial bulwark is not as firm as traditionalists may think. Furthermore, there are other forces at work which continue to encourage judicial intervention in military personnel policy. First, commanders, in an attempt to be accommodating, may fail to enforce military standards. Captain Goldman's prior commander permitted him to wear his yarmulke. In *Johanns*, 20 M.J. 155, *cert. denied*, 106 S. Ct. (1985), which rewrote the law on fraternization, Captain Johanns had previously been authorized to date enlisted women. If commanders cannot agree, why shouldn't judges intervene? Second, articulate and respected proponents of change in the U.S. military justice system have urged that more attention be paid to foreign systems. All of these systems incorporate some version of judicial review, since they typically look on the military as simply another kind of civil service. "More attention" can easily be translated into emulation. If judicial review has been accepted by our allies, why shouldn't we accept it? Third, military policy makers have, by seeking to harmonize their norms with those of the civilian world, served to blur the distinction between the profession of arms

and a civilian job. Thus, the DoD directive governing sexual harassment is modeled on the civilian code. Military judges are to be granted fixed terms, like civilian judges. Military appeals courts look to civilian precedent to decide their courts-martial. If civilian norms are routinely applied in a military context, why aren't civilian judges qualified to review the application of those norms? Since federal judges have, in many ways, assumed the attributes of monarchs, the answer to these questions may be found in 1 *Samuel* 8:1-22. The people got what they asked for.

[Ed. Note: Prof. Noone is a member of NIMJ's Board of Directors. The views expressed do not necessarily represent those of NIMJ.]

DIRECTORY OF CIVILIAN PRACTITIONERS

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CALENDAR OF EVENTS

April 13-14, 2000: "The United States Military in The New Millennium" a conference presented by the Center on Law, Ethics and National Security, Duke University School of Law. Details: <http://lens.law.duke.edu> or call **Heather McAllister**, 919-613-7137.

ABA MID-YEAR MEETING (DALLAS)

The Judge Advocates Association along with several ABA entities sponsored an excellent program on the operation of the military justice system under hostile (*e.g.*, deployments, Desert Storm, etc.) and operational (*e.g.*, ships at sea) conditions, with presentations from each of the services. The consensus is that the UCMJ works very well in difficult circumstances such as were encountered in Desert Storm and in the various deployments (*e.g.*, Kosovo) but that improvements were nonetheless desirable and/or necessary. The program included a thought-provoking presentation by a recently retired military judge who listed some problems that merit attention: inexperience at every level (caused in part by too rapid rotation of chiefs of justice on deployments), a lack of accountability for processing delays, commanders' ignorance of the operation of the system and of their options under it ("we can't do an Art. 15 without a lawyer"), and widespread resistance to change. In his view, there was but one justification for uniformed attorneys: military justice. Another distinguished commentator reported that after 28 years in the system he still didn't understand the role of the convening authority.

The Military Law Committee (General Practice, Solo and Small Firms Section) heard reports from representatives of each Service and DOD. Congressional hearings will be held March 1 on the question of the extension of overseas jurisdiction over civilians accompanying the armed forces. DOD is supporting an expansion of jurisdiction under Title 18, U.S. Code, but not the recommendation for jurisdiction under Title 10. In addition, procedures are now being developed for forwarding capital cases to the President.

The main item of business for the Standing Committee on Armed Forces Law (SCAFL) was the proposed Report and Recommendation calling for "a diverse and broadly constituted Commission to thoroughly and comprehensively review the military justice system." MG **Walt Huffman** spoke for the TJAGs (who have resisted the Recommendation) and followed up on his comment at an earlier SCAFL meeting that other things could be done to address the concerns of the ABA and legal commentators, and that the Services could do a better job of seeking and accounting for public comments and proposals to modify the system. He reported that new Joint Services Committee procedures had been adopted, and offered details:

a. An annual call for proposals would be sent to the judiciary, trial and defense organizations, TJAG schools, etc., with an invitation in the *Federal Register* for the public to submit proposals.

b. All proposals received from other than DOD will be acknowledged in writing and placed on the agenda, to be followed ultimately by notice to the proposer of the JSC action and the reasons there-fore. [*Ed. note:* As described, this seems to go beyond the letter of the new written procedures that were distributed at the meeting, and that do not require that the proposer be notified of the *reasons* for the action, only of the action taken.]

c. The JSC will acknowledge and account for proposals and proposals will be published in the *Federal Register*. [*Ed. note:* Except for those submitted by the DOD General Counsel or the Code Committee (and presumably the public), all proposals are required by the procedures to be signed by a responsible official, and to contain "a summary of the problem, a discussion of various solutions considered in addressing the problem, and a recommended solution viewed as best suited to solve the problem." Presumably the entire proposal, including the required explanation, will be published.]

d. Comments will be summarized and an explanation of JSC action to adopt or not to adopt suggested changes, and the reasons why, will be prepared and published in the *Federal Register*.

SCAFL members commented favorably on these changes in JSC procedure. The new regulations seem in large measure to implement the ABA's 1995 recommendation for APA/*Federal Register* rulemaking for MCM changes. After further discussion, the committee voted not to forward its revised recommendation for a UCMJ Review Commission to the House of Delegates.

BOOKSHELF

The second edition of **Francis Gilligan** and NIMJ advisory board member **Frederic I. Lederer's** *Court-Martial Proce-*

dures (LEXIS 1999). The first two volumes are hardbound text; the third is softbound, with appendices, tables and indices.

The 1999 editions of the National Veterans Legal Service Program's *Veterans Benefits Manual* and *Federal Veterans Law, Rules and Regulations* are available. For further information check LEXIS's website: http://bookstore.lexis.com/bookstore/store_index

Dep't of National Defence [Can.], Minister's Monitoring Comm. on Change in the Dep't of National Defence and the Canadian Forces, *Interim and Final Reports* (1999). Chapter 6 of the Interim Report and chapter 5 of the Final Report concern military justice. Of note in the Final Report (p. 138) (*see* ABA report above) is the fact that "consideration is being given to publishing Queen's Regulations and Orders [equivalent to the *Manual for Courts-Martial*] in the Canada Gazette [equivalent to the *Federal Register*], along with other federal regulations." Consideration is also being given to publishing the QR&O on the National Defence website. The Final Report is available at: http://www.dnd.ca/menu/press/Reports/monitor_com_final/eng/cover_e.htm



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NIMJ

On March 14, 2000, NIMJ hosted a meeting with **Getachew Ayele**, Legal Adviser to the Minister of National Defence of Ethiopia. Mr. Getachew was in the United States under the auspices of the Department of State, and the meeting was arranged by the Washington Office of the Mississippi Consortium for International Development, headed by **Lezetta J. Moyer**. The discussion addressed such issues as the sources of Ethiopian military law, the use of civilian courts to try non-service-connected offenses by military personnel, the role of the military judiciary, the make-up of the ministry's legal department, the [non-] role of the civilian bar, and the effect of local culture in such matters as conscientious objection, homosexuality, and sexual offenses.

On April 1, NIMJ filed a brief *amicus curiae* in the CAAF case of *King v. Mobley*, Misc. No. 00-8007/NA. The case concerns the power of the Courts of Criminal Appeals to grant extraordinary writs before an Art. 32 investigation has been commenced and whether the case is an appropriate occasion for issuance of a writ by the Court of Appeals, in light of *Clinton v. Goldsmith*, 526 U.S. 529 (1999). (NIMJ also filed an *amicus* brief in *Goldsmith*.) At issue is whether, in a case where classified information may become pertinent, a command may require that a government-designed "security officer" attend all meetings between the accused and counsel. We will be happy to email a copy of NIMJ's brief upon request. Also appearing as an *amicus* was the National Association of Criminal Defense Lawyers.

NIMJ also has now its own website: www.nimj.org. Thanks to **Phil Cave** for making this happen. The site is still under construction, so your suggestions are welcome.

CALENDAR OF EVENTS

The Miles Foundation has issued a call for papers in connection with the conference it plans

to conduct this summer under the title "Towards Zero Tolerance: Interpersonal Violence and Military Culture." The deadline for postal receipt of abstracts is April 10; April 15 is the deadline for electronic receipt. For details, please contact The Miles Foundation, Inc., P.O. Box 934, Waterbury, CT 06721-0934, Milesfd@yahoo.com or Milesfdn@aol.com.

450 E STREET, N.W.

In the special court-martial case of *United States v. Diggs*, the accused was sentenced to a bad conduct discharge, 3 months confinement, forfeiture of \$600 pay per month for 3 months, and reduction to E-1. The offenses (which included an Art. 134 specification of being naked in another soldier's bedroom with that soldier's wife) occurred on Sept. 16, 1996. The sentence was adjudged on Jan. 24, 1997. The convening authority acted on Apr. 13, 1997. The Army Court of Criminal Appeals affirmed without opinion on July 14, 1998. The Court of Appeals granted review on Mar. 1, 1999, heard argument on Nov. 8, 1999, and decided the case, 3-2, on Feb. 23, 2000.

FEDERAL REGISTER NOTICES

The Army Board for Correction of Military Records has amended its rules. Some procedural matters will be transferred to a DA Pamphlet. The revised rules appear at 65 FED. REG. 17440 (Apr. 3, 2000).

The Joint Service Committee on Military Justice has given notice of proposed changes to the *Manual for Courts-Martial*. 65 FED. REG. 17633 (Apr. 4, 2000). Among other things, the proposed changes implement the 1999 amendment to Art. 19, UCMJ, concerning the sentencing power of special courts-martial. Comments are due no later than May 4, 2000., and should be sent to Lt Col **Thomas C. Jaster**, at (202) 767-1539. There will be a public hearing on the proposed changes on April 18, 2000, in Rm. 808, 1501 Wilson Blvd., Arlington, VA 22209-2403.

On a related point, the Army Defense Appellate Division has submitted to the Joint Service Committee a set of proposed *Manual* changes, with detailed explanations.

*DIRECTORY OF CIVILIAN
PRACTITIONERS: UPDATES*

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ORGANIZATIONS AND WEBSITES

A new organization has been established in connection with the anthrax controversy: The National Organization of Americans Battling Unnecessary Servicemember Endangerment (acronym "No Abuse"), Box 70186, Washington, DC 20024.

Another new entry is Citizens Against Military Injustice, whose stated mission "is to provide pertinent information, resources, help and support to all military personnel who have been charged or are about to be charged with a crime under the Military System of Justice, and to assist and provide information to inmates, loved ones and family members whose lives have been affected by the Justice System of the United States Military." The temporary site is <home1.gte.net/mdsr/cami/index.html>. For further information contact **Glen-da Ewing**, glenda@windermere.com

Interested in the case of Dr. Samuel Mudd? See <<http://geocities.com/~ewing-steel/>> and [http://svg-law.com/Mudd%20 Pages.htm](http://svg-law.com/Mudd%20Pages.htm). His ABCMR case has again been denied by the Army. Expect further proceedings.

PROFESSIONAL MEETINGS

The Military Law Committee of the National Association of Criminal Defense Lawyers, in conjunction with NACDL's CLE Committee, will be sponsoring a half-day CLE program for uniformed and civilian military defense counsel during NACDL's annual meeting in La Jolla, California, on Friday afternoon, August 4, 2000. Admission is not limited to NACDL members, although members

receive a reduced registration rate and military defense counsel are entitled to a special dues rate. "Prosecutors are generally not eligible to attend." For further information, contact **Donald G. Rehkopf, Jr.**, Vice Chair of the NACDL Military Law Committee, at (716) 272-0540, dolin1@netacc.net.



NIMJ is a District of Columbia nonprofit corporation founded in 1991. We receive no government funding. Contributions are tax-deductible. Please circulate M.J. Gaz. to friends and colleagues who are interested in military justice. If you are not on the emailing list but would like to be, let us know. We welcome suggestions and information about coming events and useful web sites for inclusion in the *Gazette*.

President Eugene R. Fidell
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LAW DAY ISSUE

NIMJ

We are pleased to announce that Commander **Philip D. Cave**, JAGC, USN (Ret), now in private law practice, has been elected to the Board of Directors.

JOINT SERVICE COMMITTEE ON MILITARY JUSTICE

The Joint Service Committee on Military Justice met on April 18 to receive public comment on the proposed changes to the *Manual for Courts-Martial* (65 Fed. Reg. 17,633 (April 4, 2000)) to implement the increase in special court-martial jurisdiction from six months to one year enacted as part of the FY 2000 DOD Authorization Bill (§ 577). NIMJ Secretary **Kevin Barry** was the only member of the public to appear, and he and the JSC engaged in a candid dialog regarding the scope of the proposed changes, and the philosophy underlying Congress's decision to require a verbatim record for cases meeting the new (more than six months confinement or forfeitures) threshold, while not changing Article 66 appellate review jurisdiction. NIMJ looks forward to the day when other interested parties attend such public hearings, particularly those communities not represented on the JSC, and who don't otherwise have a voice in the process (*e.g.*, appellate defense counsel, appellate government counsel, military trial judges, military appellate judges, and civilian practitioners).

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

More on NACDL's military law seminar to be held in La Jolla, California, on the afternoon of August 4, 2000. Speakers will include: **Donald G. Rehkopf, Jr.**, on "Professional Responsibility and the Profession of Arms: Defense Counsel's Guide to Zealous (and Ethical) Military Representation"; **Kirk Bowden Obear** on "What to Tell the Active Duty Client About Life After the Military: The Law on Discharge Upgrades, Medical Discharges, Correction of Records, and the Like"; Judge

H.F. "Sparky" Gierke on "The U.S. Court of Appeals for the Armed Forces—A Court Equal to the Courts of Appeals for the Numbered Circuits?"; **Frank Spinner** on "Defending the Complex and High Profile Court-Martial"; and **Jack B. Zimmermann** on "The Interface Between Civilian and Military Justice: Active Duty Marine under Grand Jury Investigation in the Border Shooting Case."

Arrangements are being made for CLE credit. The seminar (\$175 fee) is open to nonmembers of NACDL. NACDL is located at 1025 Connecticut Ave., N.W., Ste. 901 Washington, DC 20036, (202) 872-8600, assist@nacdl.org, www.criminaljustice.org.

INTERNATIONAL SOCIETY FOR MILITARY LAW AND THE LAW OF WAR

The XVth International Conference of the International Society for Military Law and the Law of War will be held at the Quality Hafjell Hotel, near Lillehammer, Norway, on June 6-10, 2000. Details are available from the Society's offices in Brussels, c/o Auditorat général près la Cour militaire – Palais de Justice, B-1 000 Bruxelles, tel. +32 2 508 60 87 or +32 2 508 60 25, fax +32 2 508 60 87, soc-mil-law@skynet.be, www.soc-mil-law.org. The Society's Norwegian National Group may be reached at P.O. Box 651 Sentrum, 0106 Oslo, Norway, Genadv@c2i.net.

BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

[Following is the text of a letter sent by **Jack H. Olender**, president of the Bar Association of the District of Columbia, to Secretary of Defense **William S. Cohen**]

The Bar Association of the District of Columbia has a continuing interest in military legal issues, including the way in which the *Manual for Courts-Martial* (Manual) is amended, and the role of the Joint Service Committee on Military Justice (JSC) in that process.

Until recently the procedure for amending the Manual has been largely closed to [the] general public, except for the limited publication of proposed changes

in the Federal Register. New developments, and in particular the new internal operating regulations adopted by the JSC, appear to be setting the stage for increased involvement of the general public, and increased transparency in the way the Manual is amended.

The Bar Association of the District of Columbia notes that current versions of the Joint Service Committee regulations, operating procedures, and rules are published exclusively in internal DOD documents, and believes that publication of these procedural rules in a format readily available to the public would be a significant step towards achieving the goals of broader public participation in the process. Therefore, it is recommended that you consider amending the Manual to include an appendix on the Joint Service Committee. Such an appendix should include the regulations and procedures by which the military services and the public propose and endorse changes to the Manual, and the process by which the JSC receives, responds to, and accounts for all proposals and comments received during the process.

Your consideration and advice with respect to the foregoing is appreciated.

450 E STREET, N.W.

The Court of Appeals has scheduled oral argument in *King v. Mobley*, an All Writs Act case, for May 4, 2000, at 9:30 a.m. At 10:00 a.m. the next day there will be an observance in honor of the 50th anniversary of President **Truman's** approval of the Uniform Code of Military Justice. Details can be found at the Court's notices, www.armfor.uscourts.gov; see also www.armfor.uscourts.gov/News2.htm

The Court has scheduled a Project Outreach hearing for 11:00 a.m. on Monday, July 10, 2000, in *United States v. Chaney*, No. 00-0109/AF, at the Association of the Bar of the City of New York, 42 West 44th Street. The question presented is whether the military judge erred by granting trial counsel's peremptory challenge of the only female member, when the only stated non-gender-specific basis for challenge was that she is a nurse. Thirty minutes per side.

*DIRECTORY OF CIVILIAN
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READING LIST

Guy Cournoyer, of Montréal, calls our attention to an article by Major **David McNairn**, CF, *A Military Justice Primer, Part 1*, 43 Crim. L.Q. 243 (2000). The article presents a useful update on Canadian military justice, which has experienced important recent changes. *Merci*, Guy!

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MOVIE REVIEW

"Rules of Engagement"

Reviewed by Charles W. Brooks*

"Rules of Engagement" are the rules governing the use of force. The film asks whether too much force was used by Marine Col. **Samuel L. Jackson**. Unfortunately, it does not use a great deal of intellectual energy coming up with the answer.

Col. Jackson, on duty in the Indian Ocean, is ordered to fly into San'a, Yemen, to secure the United States Embassy, which is surrounded on the ground by an agitated mob of demonstrators and being shot at by a few snipers on a balcony across from the embassy. When he and his men arrive, the situation is rapidly deteriorating. The mob is becoming increasingly violent. The ambassador, played by the extremely versatile **Ben Kingsley**, is cowering in fear. Col. Jackson saves the ambassador. He saves the flag. When he begins taking casualties, he orders his men to open fire on the demonstrators on the ground, killing 81 and injuring a hundred. After the mission is successfully concluded, he is court-martialed for murder.

Jackson's commanding officer, visibly uncomfortable when he has to inform Jackson about the court-martial, advises him to hire a top civilian lawyer. In a sign of how far films have come from merely showing Coca-Cola cans, Washington lawyer **Bob Bennett**'s name is actually mentioned. Instead, Jackson, ever the Marine, chooses his fellow Marine, Col. **Tommy Lee Jones**. In the film's opening sequence, Jackson and Jones are together in Vietnam where Jackson saves Jones's life. Jones has also remained a Marine, but his life since then has not been a big success, what with his Vietnam injuries forcing him into an undistinguished legal track rather than a distinguished command career like his father's, and a failed marriage. Now, as he is just weeks from retiring to a life of fly-fishing by himself, Jones is asked by Jackson to defend him. Jones, whose self-esteem is about zero, is not enthusiastic, but he does owe Jackson for having saved his life.

Moviegoers will have seen much of "Rules of Engagement" before, in pieces of other films. Col. Jackson, an African American officer who has risen to an important command in the Marines, which he has made his entire life, and who remains loyal to Corps and Country in spite of the fact that they are court-martialing him unfairly, could be **Woody Strode**, Sergeant Rutledge in **John Ford**'s 1960 film. And Col. Jones, whose life, a long slow downhill slide between Vietnam and this trial, has been a major disappointment to himself and his Marine general father, but who now, in spite of himself, gets a case through which redemption will be thrust upon him, brings to mind, for example, **Paul Newman** in "The Verdict." Nor is a political court-martial a particularly original plot device, although the particular politics of this court-martial, the need for a sacrifice to our relations with an Arab ally, have a realistically contemporary tone.

Also in the film's favor is that it was directed by **William Friedkin**. Friedkin, like the two colonels, is an avatar of that era in Hollywood, which is now generally regarded as the last great era of the American film. While this film does not reach—or even attempt—the heights of his triumphs from those years, it is very competently done. The siege of the embassy, for example, with Ouarzazate in Morocco standing in for San'a and the alarmingly enthusiastic anti-American Moroccan extra demonstrators, is terrific, and

Friedkin does know how to move things along in the pretrial and court-martial sequences which make up most of the film.

Unfortunately, even with the best direction, the script does have the modern weakness of italicizing every point it makes, and generally chooses a scene where allusion would do. And the film, having pitched the Big Psychological Themes so that even the brain-dead can catch them, then fails to conclude the actual story line in what should be a quite adequate 127 minutes.

What is most disturbing about the film, though, is not that the script is unsubtle—many, if not most scripts these days are—but how unsubtle the script's point is. This is not the first film centering on a court-martial for what the French call *pour l'exemple*, that is, to make a show for others at the expense of the person being tried. Usually the decision to make an example is made by or with the active complicity of those ranking above him. But in "Rules of Engagement," the order of battle has all the soldiers, without exception, on the right side, and all the civilians, without exception, on the wrong side. All the military or ex-military, including the Marine trial counsel and even the Vietcong, do the right thing. The government civilians are uniformly odious, craven, dishonest, and shamelessly careerist, and even the non-government civilians are blindly ideological and willfully misinformed. "Rules of Engagement" stands for the proposition that Col. Jackson is absolutely correct to trust only another Marine. Countries where the military actually acts on the film's Manichean view of the world are the ones where the military stages coups to save civil society from civilian rule.

***Charles W. Brooks**, a former Assistant United States Attorney, is an attorney in the Criminal Division of the United States Department of Justice.

NIMJ

On May 15, 2000, NIMJ presented its ever-popular panel on military justice for Hill staffers: "*Basic Training: Everything You Ever Wanted to Know About Military Justice But Were Afraid to Ask.*" This year's panel consisted of **Eugene R. Fidell**, **Kevin J. Barry**, **Philip D. Cave** and **Dwight H. Sullivan**. The program is part of the National Veterans Legal Service Project's annual training and orientation, which is sponsored by the House Veterans Affairs Committee.

JOINT SERVICE COMMITTEE ON MILITARY JUSTICE

Gaz. No. 76 included an April 13, 2000 letter from **Jack H. Olender**, President of the Bar Association of the District of Columbia, to the Department of Defense concerning changes in the Joint Service Committee's procedures. DoD responded on April 19, by pointing out that the JSC regulation, DoD Directive 5500.17, is available from www.defenselink.mil, and accordingly there is no need to include it in a separate appendix to the *Manual for Courts-Martial*. However, a reference to the JSC and the directive "could be included [in the Discussion to ¶ 4 of the MCM Preamble] and will be recommended to the JSC for consideration during the next annual review. Unfortunately, the MCM (Edition 2000) is already at the printer for publication this summer. . . . The JSC internal operating

procedures are not considered appropriate as the type of rules, policies, and guidance for which the MCM and its appendices are intended. Copies will be made available to interested members of the military and general public upon request."

The website actually contains the 1996 edition of the directive, which is inconsistent with the procedures set forth in the internal JSC organization and operating procedures published in February 2000. The obsolete 1985 version of the directive is still included in the *Code of Federal Regulations*. See 32 C.F.R. § 152.2 (1999).

The remaining *Manual* changes from the 2000 Annual Review appeared in the May 15, 2000 *Federal Register*.

[Gaz. Note: Speaking of regulations, why have the other services not yet promulgated terms of office for military judges? It's been over a year since the Army did so.]

450 E STREET, N.W.

On May 2, 2000, President **Clinton** nominated **James E. Baker** of Virginia, Legal Adviser to the National Security Council, for the vacancy on the United States Court of Appeals for the Armed Forces. Mr. Baker, who served as an infantry officer in the Marine Corps, is a graduate of Yale College and Yale Law School. He will fill the seat previously held by Senior Judge **Walter T. Cox III**.

With many distinguished guests in attendance, the Court observed the Code's 50th Anniversary on May 5, 2000. Speakers included Senator **Strom Thurmond** (R-S.C.) and Court historian **Jonathan Lurie**.

Judicial Conference: June 12-13, 2000, at Catholic University of America's Columbus School of Law. Details are available from the Court. Among the speakers will be NIMJ General Counsel **Steven A. Saltzburg**, of George Washington University Law School.

HALLS OF IVY

Two familiar names are among the contributors to the *Oxford Companion to American Military History* (1999): Prof. **Jonathan Lurie** (Rutgers Univ.) wrote on the internment of enemy aliens and the UCMJ. NIMJ board of directors member Prof. **Michael F. Noone** (Catholic Univ.) wrote on the Articles of War, military courts, crimes and punishment, and citizens' rights in the military.

DIRECTORY OF CIVILIAN PRACTITIONERS: UPDATES AND ADDITIONS

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ORGANIZATIONS AND WEBSITES

Citizens Against Military Injustice: www.military_injustice.org, cami98037@yahoo.com

Anthrax: www.majorbates.com. NIMJ note: this is a very impressive site, regardless of where you stand on the issue.

New organization in South Africa: "Legal Soldier," headed by **Ben Raseroka**. This organization, founded in 1999, offers legal representation to personnel of the South African National Defence Force in courts-martial, as well as an insurance arrangement to assist with legal fees.



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Secretary-Treasurer..... Kevin J. Barry
General Counsel..... Stephen A. Saltzburg

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MILITARY JUSTICE GAZETTE

Published by the

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Washington, D.C.

June 2000

CAPITOL HILL

Following is the text of a letter sent to the House and Senate Armed Services Committees concerning § 544 of the Defense Authorization Bill for FY2001 as reported out by the House Committee. As passed by the House, § 544 had been modified by, among other things, turning the 20-year bar on secretarial clemency into a total ban, thus aggravating the problem addressed in the letter. **Homer E. Moyer, Jr.**, referred to in the last paragraph, is a partner in the Washington firm of Miller & Chevalier and author of the excellent treatise *Justice and the Military* (1974).

This letter is submitted on behalf of the National Institute of Military Justice. NIMJ is a nonpartisan nonprofit organization founded in 1991 for the purpose of advancing the fair administration of justice in the armed forces. Our board consists of law professors and deans and private practitioners who are expert in the areas of military justice and criminal law and procedure, with over 150 years of combined military service in all branches of the Armed Forces. Our monthly *Military Justice Gazette* is read by hundreds of military and civilian practitioners, judges, and law professors.

Our attention has been drawn to § 544 of the House Defense Authorization Bill. This provision limits the authority of the service secretaries to grant clemency to military prisoners serving sentences of confinement for life without eligibility for parole. The measure would permit that authority to be exercised only after the prisoner had served a period of confinement of not less than 20 years.

NIMJ takes no position at this time as to the need for such a limitation or what its duration should be, but we believe Congress should be aware that the measure is likely to have little if any effect, can be viewed as an erosion of civilian control, and may raise concerns under the separation of powers doctrine.

Schick v. Reed, 419 U.S. 256 (1974), arose from President **Eisenhower's** commutation of a military death sentence to life without parole. Writing for the 6-Justice majority, Chief Justice **Burger** observed (at p. 266) that "... the [pardon] power flows from the Constitution alone, and ... cannot be modified, abridged, or diminished by the Congress." Prof. **Tribe** writes: "Other than the express prohibition on pardons in cases of impeachment, the only recognized limit on the President's pardon power is that it does not include authority to pardon in anticipation of offenses ..." 1 **Laurence H. Tribe**, *American Constitutional Law* 720 (3d ed. 2000). As a result, Congress seemingly could not impose on the President a time restriction along the lines of that set forth in § 544.

Section 544 of the House bill, however, concerns only the power of the service secretaries to grant clemency. In addition to not restricting clemency which is personally granted by the President, the measure does not prevent the mitigation of a sentence to life without parole to one of life with the possibility of parole or a term of years either by military convening authorities or by the appellate military judges of the Courts of Criminal Appeals. To the extent that the secretaries' clemency authority under Art. 74, UCMJ, may be viewed as resting on or traceable to the pardon power, § 544 may be infirm. Even if that authority were viewed as having its source in legislation, erecting the proposed 20-year waiting period on its exercise in life-without-possibility-of-parole cases would still seem to violate the spirit of the Constitution, if not its letter.

In light of the fact that sentences to life without the possibility of parole remain subject to reduction—prior to the completion

of 20 years' confinement—by commanders, appellate military judges, and the President, § 544 is also likely to have less effect than its sponsor(s) intended.

Finally, by restricting the civilian service secretaries' ability to mitigate a life-without-parole sentence while leaving that power intact in the hands of uniformed officers, § 544 would appear to erode civilian control of the military justice system.

On the chance that these aspects of § 544 have not previously been focused upon, we respectfully invite them to your attention as Congress may wish to defer action on this provision until it has had an opportunity to conduct a hearing and otherwise study the matter.

NIMJ is committed to the proposition that the UCMJ should be dynamic and reflect changing conditions. Numerous changes to the UCMJ have been made in recent years (*e.g.*, the 1999 change that doubled the sentencing power of special courts-martial from six months to one year's confinement) without hearings or other public input. As a matter of policy, we strongly urge that changes to the military justice system not be made without timely opportunity for public input. Affording that opportunity will not only improve the legislative product, but also—at least as crucially—will strengthen public confidence in the administration of military justice. We would be pleased to participate in a hearing or congressionally-directed study to review § 544 and any other proposed changes to the UCMJ.

I have taken the liberty of transmitting copies of this letter to appropriate Executive Branch officials, Prof. **Tribe**, and Mr. **Moyer** (who represented Master Sergeant **Schick**).

Ed. Note: The Bar Association of the District of Columbia adopted the following resolution regarding other parts of the DOD Authorization Bill:

RESOLVED, that the Bar Association of the District of Columbia urges the Congress not to enact legislation restricting or modifying the jurisdiction of federal courts, or modifying the remedies available therein, in cases involving military selection boards, as proposed by the Department of Defense in Title V, Subtitle F (Sections 551 to 554) of the proposed DOD Authorization Act for FY 2001, which was forwarded to the Congress on March 6, 2000.

[According to the accompanying BADC Report, the principal purpose and effect of the proposed legislation is to limit federal court jurisdiction (retroactively), and thus terminate a number of pending litigation cases which have been brought challenging selection boards on constitutional and other grounds. Prospectively, the proposed legislation would effectively curtail any meaningful judicial review of future cases involving military selection boards as well. In addition to adopting its own Resolution and communicating it to the House and Senate Armed Services Committees, BADC has submitted the substance of its Resolution as a Recommendation and Report for consideration by the ABA House of Delegates at its meeting in New York in July.]

450 E STREET, N.W.

In *United States v. Lee*, No. 99-0002/AF, and *United States v. Hobson*, No. 00-0331/AF, the Court on May 23, 2000 granted review of the following question:

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN THEIR DUTY UNDER ARTICLES 66(a) AND 66(c), UCMJ, TO PROPERLY REVIEW APPELLANT'S CASE WHEN ONLY TWO JUDGES PARTICIPATED IN THE DECISION.

NIMJ will seek leave to file an *amicus curiae* brief and encourages other interested organizations to do the same.

NIMJ

On May 25, 2000, NIMJ hosted an informal meeting between Washington military law practitioners and visiting military law experts from Sweden, Chile, Thailand and Italy, accompanied by **Guy Abbate** and **Bill Aseltine**.

DIRECTORY OF CIVILIAN PRACTITIONERS: UPDATES AND ADDITIONS

Shaw, Bransford, Veilleux & Roth, tel. (202) 363-8400, sbvr@shawbransford.com, www.shawbransford.com/military.htm.

WEBSITE READING LIST

1. **Walter T. Cox III & Robinson O. Everett, Sr.**, Syllabus, Military Justice Seminar, Duke Univ. School of Law, 1999, www.law.duke.edu/curriculum/descriptions/573_01.html.

2. **Jorge Zaverucha**, Military Justice in the State of Pernambuco after the Brazilian Military Regime: An Authoritarian Legacy, darkwing.uoregon.edu/~caguirre/zaverucha.htm.

3. Parliament of Australia, Joint Standing Comm. On Foreign Affairs, Defence and Trade, *Completed Inquiry: Military Justice in the Australian Defence Force*, www.aph.gov/house/committee/jfadt/military/reptindx.htm.

4. **Andrew D. Mitchel & Tania Voon**, *Defense of the Indefensible? Reassessing the Constitutional Validity of Military Service Tribunals in Australia*, 27 Fed. L. Rev., No. 3, law.anu.edu.au/publications/flr/Vol27no3/MITCHELL-VOON.htm#P-1_0.

5. Lawyers Committee for Human Rights, President Pastana Fails to Walk the Talk on Human Rights and the Colombia Military, Feb. 4, 2000, www.lchr.org/feature/colombia/state200.htm. "The new Military Penal Code fails to give military judges adequate independence. A provision in the original legislation that would have buttressed their independence by ensuring they would not be answerable to operational commanders that might be implicated in the crimes in question was removed. Although under the new law active military personnel can no longer serve as judges in military courts, judges will nonetheless remain members of the military units subject to their jurisdiction. Military commanders of those units will continue to conduct the respective judges' performance evaluations."

STATE MILITARY JUSTICE

"An offense committed by a member of the militia, organized or

unorganized, shall be tried in civil courts and prosecuted by civil authorities except offenses of a purely military nature. This policy shall be executed and carried into effect at all times and applies to all encampments, armory drill periods, and parade periods in addition to any duty performed by the military under AS 26.05.070." Alas. Stat. § 26.05.300.



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MILITARY JUSTICE GAZETTE

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No. 80

Judicial Conference Issue

June 12, 2000

JOINT SERVICE COMMITTEE ON MILITARY JUSTICE

[NIMJ has submitted the following comments to the Joint Service Committee:]

The National Institute of Military Justice (NIMJ) is a District of Columbia nonprofit corporation organized in 1991. Its overall purpose is to advance the administration of military justice in the Armed Forces of the United States. Since its inception, NIMJ has been an interested observer of the rulemaking process, and has frequently commented on proposed changes to the *Manual for Courts-Martial* (MCM). As part of our effort to foster a robust rule making process, NIMJ has announced proposed or final changes to the MCM as well as related hearings convened by the Joint Service Committee on Military Justice (JSC) through the monthly *Military Justice Gazette*. NIMJ is pleased to be able to continue to be an active participant in this important rule making process, and we appreciate the opportunity to submit these comments. We also appreciate the opportunity to submit these comments slightly beyond the "due date."

NIMJ's primary concern in past submissions has been the adequacy of the rule making process. Our 1998 submission to the JSC endorsed recent proposals of the American Bar Association and several other organizations to amend the process. NIMJ is pleased to note that earlier this year changes were made to the internal operating procedures of the JSC which appear to be responsive to some of the concerns raised by the various bar associations. Those changes should not be the end of the story.

In fact, the MCM changes currently under consideration make it clear that the opportunity for public comment, even after the recent changes to the JSC's procedures, remains of limited utility because the entire thrust of the rulemaking is to implement a statutory change already enacted by Congress. NIMJ submits that the change to the jurisdiction of special courts-martial (SPCM) effected in Section 577 of the National Defense Authorization Act for Fiscal Year 2000 (amending Article 19 of the Uniform Code of Military Justice) was the kind of major change to the military justice system that would best be accomplished *after* an open discussion and consideration by all those entities with an interest in this system. Here that statutory amendment came as a surprise to virtually all observers outside the JSC and the DOD (and perhaps the Code Committee). It was made without the benefit of hearings or other public discussion or review.

NIMJ believes that, whenever practicable, changes (particularly those as major as the SPCM jurisdiction

amendment) should be the subject of review and open discussion similar to that now being put in place for regulatory (MCM) changes to this system. NIMJ recommends that DOD examine the process by which legislative changes to the UCMJ are sought. We are fully aware of the Department's and the government's usual proprietary approach to legislative proposals, and of the normal legislative review process pursuant to OMB guidelines, and we recommend no change to that process—once initiated. We suggest, however, that DOD consider whether the military justice system, because of its nature as a system of criminal justice, as well as its effect on readiness, should be treated somewhat differently *prior* to commencing that more formal legislative review process. NIMJ thus recommends, in order to ensure that *every* change to this justice system, statutory or regulatory, is the best that can be fashioned, that the Department consider adopting a process through which *all* proposed changes are first considered in an open and public process.

Turning to the proposed changes, there appears to be some problem with the provision amending the analysis accompanying RCM 1107(e), since it refers to subsection (f)(1), for which there is no actual change. Perhaps this is a typographical error.

As a substantive matter, there appears to be an internal philosophical conflict within the various provisions of the proposed amendment, in that, for some provisions, the new language triggering action refers to punishment involving a bad conduct discharge (BCD) *or confinement or forfeitures beyond six months*, while in other provisions the new language refers to a BCD *or confinement for one year*. This tension seemingly arises from the fact that Congress only amended Article 19, and called for a verbatim (a "complete") record in any case not only where a BCD was awarded (as has long been the case), but in all those (new) SPCM cases involving confinement or forfeiture *for more than six months* as well. However, there was no accompanying change to either Article 54(c) concerning the requirements for a "complete" (verbatim) record, or to Article 66 amending the jurisdiction of the courts of criminal appeals, requiring appellate review not only of cases involving a BCD, but those (new) SPCM cases involving confinement or forfeitures for more than six months.

Incomplete legislation such as this invites confusion and threatens the harmonious operation of the Code—in this case a coherence and unity within the Code which has existed for 50 years has been upset. It appears, as buttressed by the comments of the JSC at the public hearing, that Congress intended by the amendment of Article 19 to show that more than 6 months confinement or forfeitures was serious enough to warrant a better record (*i.e.*, a complete or verba-

tim, rather than a summarized, record) for the convening authority to review. Congress should have followed through and amended the verbatim record requirements of Article 54(c) as well, so as to avoid the inconsistency which has now been created. It should also have amended Article 66, to recognize (as has been the case for 50 years) that a level of punishment requiring a verbatim record also merits requiring appellate review. This latter amendment is particularly desirable in view of other recent statutory amendments which impose or allow severe results whenever confinement exceeds six months (*e.g.*, automatic forfeitures under Article 58b; dropping from the roles under 10 U.S.C. § 1161). We therefore recommend that the Department develop follow-on proposals that would amend the verbatim record requirements and the appellate jurisdiction of the courts of criminal appeals, to include any case involving confinement (or forfeitures) for more than six months. Only then will the basic architecture of the statutory scheme be restored. Until this is done, action should be withheld on the proposed MCM changes.

NIMJ is uncomfortable with the determinations reached in the proposed amendments as to which events are triggered by a BCD or “one year confinement” (but not, for example, by 11 months confinement). In this category, for example, are the provisions for vacation of suspensions of sentence. We recommend that each of these provisions be reviewed, and that a *presumption* in favor of mandating additional protections for servicemen be imposed by triggering those additional protections for any punishment involving a BCD or confinement or forfeitures more than six months, rather than at a BCD or confinement for one year, as is currently proposed. As noted above, we also recommend that Articles 54 and 66 be amended to change the verbatim record requirements and to change the threshold for appellate review to include confinement or forfeiture for more than six months.

Finally, the Manual now clearly authorizes mitigation of a BCD to one year’s confinement. Mitigation of a discharge to a period of confinement is often correctly viewed by those forced to endure it as a harsh (and unlawful) *increase* in the severity of punishment. *See, e.g., Frazier v. McGowan*, 48 M.J. 828, 832 (C.G.Ct.Crim.App. 1998) (as an *amicus*, NIMJ “emphasized the importance of perceptions and how this particular changed sentence [BCD to one-year confinement] fuels an adverse civilian perception of the military justice system”). The amendment to the Discussion accompanying RCM 1107(d)(1) specifically authorizing the new “equivalency” (BCD to one-year confinement) is bound to be problematic. NIMJ recommends, for the overall good of the system, that the prior Discussion be retained intact.

NIMJ appreciates the opportunity to comment on these proposed changes.

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MILITARY JUSTICE GAZETTE

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No. 81

ABA Annual Meeting Issue

July 2000

GOTHAM

Thursday, July 6, 5:30 p.m., Judge Advocates Association and the Brooklyn Bar Association. At the Brooklyn Bar Association, 123 Remsen Street, Downtown Brooklyn (near Court Street and Boro Hall subway stops)

6:30 p.m., JAA Reception and Dinner, Gage and Tollner Restaurant, 372 Fulton Street, Brooklyn

Friday, July 7, 8:00 a.m.-Noon, ABA Military Law Committee (MLC) Meeting, Sheraton New York, Royal Ballroom B, 2nd Floor

1:30 p.m.-3:30 p.m., JAA/MLC/Standing Committee on Armed Forces Law (SCAFL) Program "The New Canadian Military Justice System," Speaker: BG **Jerry P.T. Pitzul**, Canadian Forces TJAG, Sheraton New York, Royal Ballroom B, 2nd Floor

3:45 p.m.- 5:30 p.m., JAA and Criminal Justice Section CLE Program: "War Crimes," Clinton Suite, 2nd Floor, Hilton New York

2:00 p.m.-4:00 p.m., JAA and Environmental Law Section CLE Program: "Interface of Environmental Laws & the Military: Compliance Issues, Operational Readiness & Impact on the Civilian Community Outside the Gate," CLE Centre-Sheraton New York Conference Room I, Lower Level

3:30 p.m.-5:30 p.m., JAA Annual Members Meeting Sheraton New York, Royal Ballroom B, Second Floor

Saturday, July 8, 9:00 a.m.-3:00 p.m., SCAFL Meeting, Park Suite 6, 5th Floor

Sunday, July 9, 9:00 a.m.-Noon, Panel Discussion, Clinton Suite, 2nd Floor, Hilton New York: "Sex and the UCMJ: 50 Years into the Modern Era of Military Justice," Maj Gen **Bill Moorman**, Prof. **David Schlueter**, Capt (ret) **Pat Gormley**, Prof. **Beth Hillman**, and LtCol (ret) **Frank Spinner**.

Monday, July 10, 11:00 a.m., U.S. Court of Appeals for the Armed Forces (Project Outreach) Hearing, *United States v. Chaney*, No. 00-0109/AF, The Great Hall, Association of the Bar of the City of New York, 42 West 44th Street. The granted issue is whether it was error to grant trial counsel's peremptory challenge of the only female member of the court-martial where the stated basis for challenge was that she is a nurse. The argument will be followed by a question-and-answer session.

CAAF JUDICIAL CONFERENCE FOLLOW-UP

Several questions were raised following the CAAF Judicial Conference regarding NIMJ's filing as an *amicus curiae* in *Clinton v. Goldsmith*, 526 U.S. 529 (1999). NIMJ's September 1998 brief supported the position of the United States and urged the Court to grant the government's certiorari petition. NIMJ took the position that CAAF had no jurisdiction to issue the writ under the circumstances presented. See *Goldsmith v. Clinton*, 48 M.J. 84 (1998). NIMJ's motion and brief are available on the web by clicking "Brief as Amicus" (supporting the United States in *Clinton v. Goldsmith*) on the NIMJ website, www.nimj.org.

This year, NIMJ filed an *amicus* brief with CAAF in *King v. Mobley*, later restyled *United States v. King*. Citing its brief in *Clinton v. Goldsmith*, NIMJ took the position that CAAF's All Writs Act jurisdiction was very broad, and clearly extended to a case where charges had not yet been referred to trial, and indeed had not yet been investigated at an Article 32 investigation. *King* involved the question of

possible government interference with the right to counsel prior to an Article 32 investigation. After hearing oral argument (carried on C-SPAN), CAAF continued its stay of the Article 32 investigation and issued an order designed to remedy the situation and to ensure that King was afforded his right to counsel. NIMJ's brief in *King* is available on the web by clicking "Brief as Amicus" in *King v. Mobley* on the NIMJ website.

AROUND THE CIRCUITS

The Eighth Circuit, citing *Clinton v. Goldsmith*, has reversed the dismissal of a § 2241 habeas corpus petition filed by a Bureau of Prisons inmate who was confined pursuant to a court-martial conviction. *Gilliam v. Bureau of Prisons*, 2000 U.S. App. LEXIS 3684 (8th Cir. 2000) (per curiam).

In *United States v. Gatlin*, No. 99-1447 (2d Cir. June 15, 2000), the Second Circuit (Cabranes, J.) held that 18 U.S.C. § 7(3), which defines the "special maritime and territorial jurisdiction of the United States," does not apply extraterritorially. The court directed its clerk to transmit copies to the House and Senate Judiciary and Armed Services Committees, noting that the much discussed overseas jurisdictional gap "may warrant further congressional scrutiny." The case is on the web at www.tourolaw.edu/2ndCircuit/June00/99-1447.html.

BOOKSHELF

The National Women's Law Center has issued an important new study, "Be All That We Can Be: Lessons from the Military for Improving Our Nation's Child Care System," analyzing the military's "remarkable transformation of its child care system." It is available on NWLC's website, www.nwlc.org. The Index and Legislative History of the UCMJ is available through www.amazon.com for \$110.

WORLD WIDE WEB

The 125-page first Annual Report of the Judge Advocate General of Canada is available at http://www.dnd.ca/jag/1_annualreport_e.html. This outstanding document is certain to contribute to improved public understanding of military justice in Can-

ada. *Bravo!* Readers should note that BG Jerry Pitzul, Canadian Forces TJAG, will speak on the report and the Canadian system on July 7 in New York City, as reported earlier in this issue. The Military Court of Lebanon also has a home page, <http://www.libancom.com.lb/clients/na-la houd/>.



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MILITARY JUSTICE GAZETTE

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Washington, D.C.

August 2000

AMERICAN BAR ASSOCIATION

On July 10, the ABA House of Delegates adopted the Bar Association of the District of Columbia's Recommendation opposing DOD proposed legislation to modify judicial remedies and jurisdiction in military selection board cases. BADC's original Recommendation, reported in M.J. Gaz. 79, was amended by adding a final phrase calling for congressional hearings, and by a further provision opposing any legislation which acted retroactively to modify court jurisdiction or remedies. The ABA's Standing Committee on Armed Forces Law (SCAFL) and the Judge Advocates Association (JAA) supported the Recommendation. The full text of the proposal as adopted follows (amendments are underlined):

"RESOLVED, That the American Bar Association urges the Congress not to enact legislation restricting or modifying the jurisdiction of federal courts, or modifying the remedies available therein, in cases involving military selection boards, as proposed by the Department of Defense in Title V, Subtitle F (Sections 551 to 554) of the proposed DOD Authorization Act for FY 2001, which was forwarded to the Congress on March 6, 2000, unless and until Congress has had an opportunity to hold hearings on the proposed legislation.

"FURTHER RESOLVED, That in accordance with the goals of the American Bar Association to protect judicial independence and the rule of law, the Association urges rejection of the proposal in Section 554 of the proposed Act or any similar proposal which would apply such legislation retroactively to change the rule of decision for cases already pending in the courts of the United States."

BADC reports that the thrust of the discussions regarding the first paragraph of the Recommendation at the various meetings at the ABA in NY, and in the House of Delegates, was that military personnel are the people who go in harms way to defend rights for the rest of us, including rights of access to the federal courts and judicial remedies therein. If Congress finds it necessary to modify or limit remedies or privileges now available to these military defenders, that should only be done for a very good reason (*e.g.*, national security or good order and discipline), and it should only be

done if it is shown on the record, after hearings and a thorough review, to be the necessary and proper thing to do. BADC argued that the DOD proposal was sent to Congress without any rationale or explanation of either the evil to be remedied or the anticipated effect of the proposal, and that because of this the proposal should not be adopted until all interested viewpoints are effectively heard and Congress is able to make reasoned findings on an adequate public record.

The DOD proposal, without the retroactivity provision, is part of the Senate Bill, but was not included in the House Bill. The Conference Committee will determine whether the provisions remain in the final DOD Authorization Bill.

LETTER FROM LILLEHAMMER

The Brussels-based International Society for Military Law and the Law of War held its triennial meeting in Lillehammer, Norway, June 6th through 10th. Participants came from North and South America, including the Caribbean, Eastern and Western Europe, China, and Africa. The Committee on General Affairs submitted a provocative report on the impact on armed forces of judicial decisions involving human rights. Among the topics raised: is a sending state (*e.g.*, the U.S.) which is not a signatory to the European Convention on Human Rights required to conform its disciplinary procedures affecting its troops in the receiving state to the Convention in order to ensure that the receiving state (*e.g.*, a European NATO member) is not in breach of its obligations to protect the rights of all within its jurisdiction? The Committee for Criminology combined law and social science in its report on the etiology and prevention of violent crimes towards civil population by soldiers on peace keeping missions. The Belgian, Canadian, and Italian national groups submitted fascinating reports describing their experiences in the Congo, Rwanda, Somalia and former Yugoslavia. The Committee on History of Military Law elected to stay firmly in the present, sponsoring discussions on the impact of non-lethal weapons on the law of armed conflict and on the legality of NATO's bombing of Yugoslavia while the Committee on the Protection of Human Life in Armed Conflict discussed revision of the Geneva Convention provisions regarding civilians accompanying the forces in order to distinguish between those directly supporting hostilities and non-belligerents such

as journalists. Finally there was a general report summarizing some 30 national responses to a questionnaire seeking information on the legal problems which arise when the military is called on to support civil authorities. Conference materials will be published in the Society's *Proceedings*. Readers of the *Gazette* will be informed if, as expected, a U.S. national group is organized.

Michael F. Noone

BOOKSHELF

Tarnished Scalpels: The Court-Martials of Fifty Union Surgeons, by Drs. **Thomas P. Lowry** and **Jack D. Welch** (Stackpole Books 2000, \$24.95). Informative reviews appear in the Amazon.com listing.

INTERESTING FACT

Ever notice that the services do not agree on the burden of proof for nonjudicial punishment? The Army, unlike the others, demands proof beyond a reasonable doubt. Seems odd that there would be divergent approaches on a core issue under a single statutory provision. A good task for the Joint Service Committee to tackle?

DIRECTORY OF CIVILIAN PRACTITIONERS: ADDENDA

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Hunt, Mel, 813 Goldstream Ave., Victoria, BC, Canada V9B 2Xb, tel. (250) 478-1731, info@dinninghunter.com, www.pin.ca/military/lawyer/ (Canadian cases)

WORLD WIDE WEB

1. Defense Privacy Board, Advisory Opinion No. 32 (n.d.): "... Although courts-martial, themselves, are not 'agencies' for purposes of the Privacy Act, records of trials by courts-martial are maintained by agencies long after the courts-martial involved have been dissolved. The Privacy Act requires each agency that maintains a system of records to 'publish in the *Federal Register* upon establishment or revision a notice of the existence and character of the system of records . . . ' 5 U.S.C. § 552a(e)(4). Hence, the requirement to publish a system notice applies to systems containing courts-martial records." www.defenselink.mil/privacy/opinions/op0032.html.

2. Emperor's Hammer Articles of War. www.Emperorshammer.org/aow.htm. "Loosely adapted from the Uniform Code of Military Justice."

CODE COMMITTEE ON MILITARY JUSTICE

Prof. **Lee D. Schinasi** (University of Miami School of Law) and Hon. **Jacob Hagopian** (U.S. Magistrate Judge, D.R.I.) have been named Public Members of the Code Committee. Congratulations!



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MILITARY JUSTICE GAZETTE

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September 2000

JOINT SERVICE COMMITTEE ON MILITARY JUSTICE

[The following is the text of a letter sent to the Joint Service Committee on Military Justice by NIMJ regarding the latest proposed amendments to the *Manual for Courts-Martial*, 65 Fed. Reg. 30,964 (May 15, 2000)]

The National Institute of Military Justice (NIMJ) is a District of Columbia nonprofit corporation organized in 1991. Its overall purpose is to advance the administration of military justice in the Armed Forces of the United States. Since its inception, NIMJ has been an interested observer of the rule making process, and has frequently commented on proposed changes to the Manual for Courts-Martial (MCM). As part of our effort to foster a robust rule making process, NIMJ has announced proposed or final changes to the MCM as well as related hearings convened by the Joint Service Committee on Military Justice (JSC) through the monthly *Military Justice Gazette*. NIMJ is pleased to be able to continue to be an active participant in this important rule making process, and we appreciate the opportunity to submit these comments.

NIMJ's primary concern in past submissions has been the adequacy of the rulemaking process. Our comments today once again reflect this concern.

In February this year the Joint Service Committee (JSC) adopted new procedures to encourage public participation in the MCM rulemaking process. One of the significant changes was to issue an annual invitation to the public to submit proposals for change to the MCM for consideration by the JSC. This Federal Register notice is believed to be the first to include this invitation for the public to submit such proposals. NIMJ's concerns are with the wording of the invitation, and its implications. The following language is used:

Proposals *should* include reference to the specific provision you wish changed, a rationale for the proposed change, and specific and detailed proposed language to replace the current language. *Incomplete submissions will not be considered.*

65 Fed. Reg. at 30,965 (emphasis added).

NIMJ does not dispute the desirability, where feasible, for those making proposals to submit completed proposals with full rationales and justifications, and proposed language to implement the proposed changes. Indeed, submission of a "redlined" text, indicating all changes to the current MCM, would be a decided help to those reviewing such proposals. Accordingly, the use of the word "should" is appropriate. However, the notice then indicates that proposals without such detailed rationales or proposed language "will not be

considered." NIMJ perceives this as a provision which will have a "chilling effect" on the submission of proposals. Many individuals or organizations may well perceive problems in the current MCM, or areas in which current procedures could be improved, and wish to propose changes, without having the time or expertise to produce the kind of proposal which has long been required of members of the JSC who wish to make proposals for change. NIMJ believes that such ideas and proposals should not be discouraged. Instead, the burden should fall to the JSC, rather than to the public, to not only consider *ideas* for change which are submitted, but in addition (in the absence of specific implementing language submitted by the proposer) to take it upon itself to prepare full proposals to implement any ideas for change submitted by outside entities or persons which are deemed meritorious.

NIMJ also believes that the notice could be clarified to note that proposals from the public which are not submitted within the public comment period will still be considered, but *may not* be able to be included in the next Annual Review.

We note, for example, that one of the substantive changes appears to implement a case decided by the Court of Appeals for the Armed Forces in January, 2000. It thus appears that, at least in some cases, far less than a full Annual Review cycle is required to produce proposed changes.

Accordingly, NIMJ recommends that the JSC procedures be amended to respond to these suggestions, and that the public be notified of these change when future invitations are issued. In addition, and as previously recommended, NIMJ submits that the JSC "Internal Organization and Operating Procedures" document is not the most appropriate vehicle for promulgation of rules applicable to public participation in the MCM rulemaking process, and that these rules should be included in appropriate DOD Directives published in the Code of Federal Regulations and in the Manual for Courts-Martial. NIMJ again recommends that these procedures be suitably promulgated.

NIMJ has no comment on the substantive changes proposed in the notice, except as follows.

We note that the proposals do not necessarily include the kind of rationale which would seem to be necessary to justify a proposed change submitted by a member of the public to the JSC. Because of the lack of explanation, for example, NIMJ is unable to determine why the JSC deemed it desirable in 2000 to amend the Analysis for RCM 707(a) to specifically address a seven year old case.

We also note that the amendments to RCM 1003(b)(3) and 1107 (d)(5) seem merely to implement the recent decision in *United States v. Tualla*, 52 M.J. 228 (2000). However, that case was in large measure an interpretation of the relevant RCMs by the court. There are policy issues which undoubtedly underlie the proposed changes to the RCMs,

and those reviewing the proposals would have benefited from a discussion of the underlying concerns and the rationale adopted in reaching the changes noted. The same observation is applicable to the proposed change to RCM 701(b)(4). The absence of a fuller rationale and a more adequate indication of the problem being addressed by the changes makes meaningful comment difficult.

450 E STREET, N.W.

At this year's Judicial Conference, Senior Judge **Walter T. Cox III** announced that **Thomas Granahan**, Clerk of the United States Court of Appeals for the Armed Forces, had recently notified the Court of his decision to retire on March 3, 2001. In honoring Tom for his 19 years of dedicated service as the Court's fourth Clerk of Court and for his nearly 24 years of total service on the Court's professional staff, Judge Cox stated that, in his judgment, Tom epitomized the qualities of sound judgment, high moral character and ethical responsibility that had been highlighted by a previous Judicial Conference speaker on moral philosophy and legal ethics. Well done, Tom.

For historical interest, Tom's predecessors as Clerk of Court were **Alfred C. Proulx, Jr.** (1951-1972); **Michael W. Katen** (1972-1976); and **Francis X. Gindhart** (1977-1981).

The Office of Personnel Management's Vacancy Announcement may be found at www.usajobs.opm.gov/wfjc/jobs/BS91932.HTM, or via a link on the Court's home page. The application period closes on September 18, 2000.

JOB OPENING

The Center on Conscience and War/NISBCO, a small interfaith organization in Washington D.C. advocating on behalf of conscientious objectors, seeks an Executive Director for December 2000. For more information visit www.nisbco.org or contact **Jonathan Ogle**, c/o Westtown School, Westtown, PA 19395; (610) 399-1435, Jonathan.Ogle@westtown.edu.

NECROLOGY

NIMJ notes with sadness the death of **Carolyn Dock**. Animated initially by the need to save her son **Todd** from the death penalty, Carolyn was founder and moving force of MOMS (Members Opposed to Maltreatment of Servicemembers). She opened a new era in awareness of the needs of military prisoners and their families. A tireless worker, she never lost her inner compass, and she gained the respect of many officials in positions of responsibility for military correctional matters. She was a friend of NIMJ and we shall miss her.

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NIMJ



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CINEMA NOTES

I SAW SHAFT SEVEN TIMES

By Ronald W. Meister

The recent re-make of the epic film *Shaft* calls to mind some of the strange things lawyers are required to do to comply with their professional obligations.

During the Vietnam War, the United States Navy decided that it would be good for morale if every sailor on active duty had a "legal check-up." No doubt as a result of my meritorious record as a JAG lieutenant in Boston, I was awarded the plum assignment of providing this service at the Naval Facility on Nantucket Island—in February. At that time of year, the base had a complement of ninety shivering sailors, most of them under twenty years old. I flew to the island to begin the principal work of "Legal Check-Up Week," writing their wills.

It was a source of not inconsiderable anxiety, among young sailors who could be sent on dangerous missions on short notice, that a legal officer had appeared suddenly to write wills for all of them. I attempted to explain that Legal Check-Up Week was merely another part of Navy routine, like watching movies about venereal disease and beating up civilians, and avidly set to the task of estate planning. Most of the interviews went something like this:

"I'm here to help you with your estate plan."

"What's that, sir?"

"It's about what's going to happen to your property when you die."

"AM I GOING TO DIE?"

"Well, yes, eventually, but I don't have any classified information about when. Why don't you tell me about what you own."

"Own a bicycle, sir."

"Good. Have you given any thought to who should inherit your bicycle when you die?"

"WHY DO YOU KEEP SAYING I'M GOING TO DIE?"

"Okay, sailor. Here's a note to your C.O. that you don't need a will just yet. Would you please send the next

man in?"

And so it went, for seven days. Most of my other services during Legal Check-Up Week were equally ineffective, except for the day I was asked to advise the Commanding Officer of his legal options in apprehending two Army deserters who were believed to have escaped to Nantucket. I facetiously asked if he could blockade the island. Taking this as a legal proposal for an actual naval operation, the C.O. mobilized his forces and smoked out the deserters. I got a letter of commendation.

Aside from the manhunt, the real entertainment at the base, which was too small to have an Officers' Club, was the nightly movie. Every Sunday, a plane arrived from the mainland with seven movies for the upcoming week. With seven movies for as many days, you might expect that the Navy's logistical coordinators could figure out an appropriate allocation per evening, but you would be wrong. Every night, they showed all seven movies—in the same order. If you wanted to see movie number four, you had to stay up until 3:00 A.M.

The week I was there, the base was featuring the Richard Roundtree Film Festival, which included *Shaft*, *Shaft's Big Score*, *Shaft Rides Again*, *Bride of Shaft*, *Shaft and Louise*, and two others I could never manage to stay awake to see. I went every night. There is nothing else to do in Nantucket in February except write wills.

Years later, having moved on professionally from not writing wills for eighteen-year-olds, I found myself picking a jury in [New York] Supreme Court in White Plains. One of the veniremen identified himself as Herbert Roundtree. I asked if he was any relation to Richard, and he said he was his father. I couldn't help myself. I blurted out, "I saw *Shaft* seven times."

Ronald W. Meister, a member of NIMJ's Advisory Board, is a partner at Cowan, Liebowitz & Latman, P.C., in New York. He also saw *The Life of Alexander Graham Bell* seven times, but that's another story.

NIMJ

On August 25, 2000, NIMJ filed a brief as *amicus curiae* in *United States v. Lee*, CAAF Dkt. No. 99-0002/AF. We took the position that when only two appellate military judges participate in a decision, the record must indicate why the third assigned judge did not participate.

We are very pleased to announce that **David P. Sheldon** has been elected to the NIMJ Advisory Board.

*DIRECTORY OF CIVILIAN
PRACTITIONERS: ADDENDA*

Miller, Steven L., Miller, Balis & O'Neil, 1140 19th St., N.W., Ste. 700, Washington, DC 20036, tel (202) 296-2960, fax (202) 296-0166, militarylaw@mbolaw.com, www.mbolaw.com

Partington, Earle A., Partington Foley, 1330 Pacific Tower, 1001 Bishop St., Honolulu, HI, 1 (800) 526-9500, (808) 526-9500, fax (808) 533-4588, info@partington-foley.com, www.partington-foley.com

Rubens, Jonathan, new phone: (202) 487-3633, new email: Jonathan.Rubens@Home.com

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RECOMMENDED READING

Gerry R. Rubin, *The Prof, the Charwoman, the TORCH Plans and the Court-Martial: Flying Officer Bentwich's Nemesis*, RUSI J. [UK], Aug. 2000, at 64.

WORLD WIDE WEB

1. The web makes it possible for military justice junkies to learn about important foreign legal developments much more promptly than ever before. For example, a three-judge panel of the Supreme Court of India, dismissing a government appeal of a decision of the Calcutta High Court, has held that "a judge-advocate appointed with the GCM should not be an officer of a rank lower than that of the officer facing trial unless the officer of such rank is not available and the opinion regarding non-availability is specifically recorded in the convening order." The decision, arising on collateral review, will not affect cases that have become final.

The court was critical of the current statutory arrangement, observing that courts-martial do not provide even a brief statement of reasons for their conclusions, even in capital cases. "This must be remedied in order to ensure that a disciplined and dedicated Indian Army did not nurse a grievance that the substance of justice and fair play is denied to it." It described the lack of direct appeal as "a glaring lacuna in a country where a counterpart civilian convict can prefer appeal after appeal to a hierarchy of courts." It also commented: "Even today the law relating to the armed forces remains static requiring changes in view [of] the apex court's observations made in 1982, the constitutional mandate and the changes effected by other democratic countries." *Union of India v. Gill*, No. 2865 of 2000 (Apr. 24, 2000), www.supremecourtsonline.com/2000/200/s00-281.htm.

2. New rules for the Air Force Court of Criminal Appeals, effective Sept. 1, 2000: www.afcca.law.af.mil.

JUDGE ADVOCATES ASSOCIATION

The JAA is sponsoring (with several bar committees) another Military Administrative Law Conference and Walter T. Cox III Military Legal History Symposium. Oct. 16-20, 2000, Spates Hall, Ft. Myer. NIMJ highly recommends this program. For full details check JAA's website, www.jaa.org.



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450 E STREET, N.W.

Congratulations to **James E. Baker** on becoming a Judge of the United States Court of Appeals for the Armed Forces. He succeeded Judge **Walter T. Cox III** on September 19.

DEPARTMENT OF STATISTICS

How many cases are submitted to the appellate courts without assigned errors? Data from the Army, Navy-Marine Corps and Air Force indicate that over half of all cases that meet the jurisdictional threshold for appellate review are submitted "on the merits." *Query*: Is review of these cases other than for sentence appropriateness a worthwhile expenditure of appellate judicial and counsel resources?

IN THE ARTICLE III COURTS

Is a conviction under Art. 112a a "serious drug offense" under the sentence-enhancement provisions of 18 U.S.C. § 924(e)? *Held*, no. *United States v. Stuckey*, No. 00-1300 (8th Cir. Aug. 9, 2000).

U.S. ARMY COURT OF CRIMINAL APPEALS

"Ten months to prepare and authenticate a 519-page record of trial is too long. A timely, complete, and accurate record of trial is a critical part of the court-martial process. Every soldier deserves a fair, impartial, and timely trial, to include the post-trial processing of his case." "Untimely post-trial processing damages the confidence of both soldiers and the public in the fairness of military justice." *Held*, confinement reduced from 8 years to 92 months, despite absence of actual prejudice. *United States v. Collazo*, No. 97-01562, 2000 CCA LEXIS 174 (ACCA July 27, 2000) (Carter, J.).

VIVE LA FRANCE

Does wearing of the uniform of the Royal Hutt River Defence Forces violate article 418 Of the French Code de Justice Militaire? No, because by definition it is neither a French uniform nor a foreign uniform, as the Principality of Hutt River (said to be a small state located about 500 km north of Perth, Australia) is not yet officially recognized by France. See <http://www.chez.com/rhrdf>.

AMERICAN BAR ASSOCIATION

The Standing Committee on Armed Forces Law will hold its Fall 2000 meeting from 10:00 a.m. to 4:00 p.m. on

Friday, December 1, at the United States Court of Appeals for the Armed Forces, 450 E Street N.W., Washington, DC. The meeting is open to the public. Items to be considered include a brainstorming session on potential items the SCAFL should study with a view to preparing Recommendations and Reports for full ABA consideration and a similar open forum on issues on which the SCAFL or the ABA can provide support to the services and the senior service lawyers. In addition, the SCAFL will review and discuss the UCMJ provision (10 USC § 942(b)(4)) which prohibits officers retired with 20 years' active service from being appointed to the Court of Appeals. A block of rooms has been reserved at the Washington Court Hotel, 525 New Jersey Ave., N.W. (1-800-321-3010; mention "ABA Armed Forces Law" for discount \$149 room rate).

IN CONGRESS

The FY2001 DOD Authorization Bill includes several provisions of interest to military justice practitioners. One limits the service secretaries' power to grant clemency to persons sentenced to life without parole. Such persons would not be eligible for secretarial clemency until they had served at least 20 years' confinement; the secretaries' power to grant clemency would be nondelegable. *Query*: Is this an unconstitutional intrusion on the clemency power? NIMJ raised this question while the bill was under consideration (see *Gaz.* No. 79); the issue is not mentioned in the Conference Report.

NEW ZEALAND

1. **Phil Cave** has called our attention to important legislation from New Zealand. In one measure, Parliament has enacted a pardon for soldiers who were executed in World War I. Pardon for Soldiers of the Great War Act 2000 029 (Sept. 15, 2000), <http://rangi.knowledge-basket.co.nz/gpacts/public/text/2000/an/029.html>. According to the preamble, in the Great War, five soldiers of the New Zealand Expeditionary Force, all of them volunteers, were executed, after trial by court-martial. One was convicted of mutiny, the others for desertion. "Their execution was not a fate that they deserved but was one that resulted from (a) the harsh discipline that was believed at the time to be required; and (b) the application of the death penalty for military offences being seen at that time as an essential part of maintaining military discipline." The Preamble adds: "The execution of those 5 soldiers brought dishonour to both the soldiers themselves and New Zealand. . . . It is now desired to remove, so far as practicable, the dishonour that the execution of those 5 soldiers brought to those soldiers and their families."

Also of interest is the International Crimes and In-

ternational Criminal Court Act 2000 026 <http://rangi.knowledge-basket.co.nz/gpacts/public/text/2000/an/026.html>, (Oct. 1, 2000). It has, as well as paving the way for New Zealand's cooperation with the ICC, filled the gaps in NZ law to the extent that any war crime recognized by the Rome Statute is now an indictable offense under NZ law. There are some overlaps—for example, a grave breach of the Geneva Conventions would be an offense against both this Act and the Geneva Conventions Act 1958.

2. The University of Waikato History Department has created "WaiMilHist," the Electronic Journal of Military History. Of note is **Cheryl Simes**, *Not Your Average Trial: The Statutory Unfairness of Courts-Martial in New Zealand*, 1 WaiMilHist, No. 2 (1998). See www.waikato.ac.nz/humanities/history/journalfolder/waimilhist2folder/.

LIGHT READING ON MILITARY JUSTICE

Kevin J. Barry, *Modernizing The Manual for Courts-Martial Rulemaking Process: A Work in Progress*, 165 Mil. L. Rev. 237 (2000)

Eugene R. Fidell, *A World-Wide Perspective on Change in Military Justice*, 48 A.F. L. Rev. 195 (2000) (originally presented at 1999 biennial meeting of Inter-University Seminar on Armed Forces and Society)

MajGen **James W. Moorman**, *Fifty Years of Military Justice: Does the Uniform Code of Military Justice Need to be Changed?*, 48 A.F. L. Rev. 185 (2000) (originally presented at 9th Annual Conference on National Security Law in a Changing World, Oct. 29, 1999)

Gerry R. Rubin, *In the Highest Degree Ominous: Hitler's Threatened Invasion and the British War Zone Courts*, in **Katherine O'Donovan & Gerry R. Rubin** (eds.), *Human Rights and Legal History: Essays for Brian Simpson* (Oxford 2000, £40). The paper appears in a Festschrift for the distinguished English legal historian, **A.W.B. Simpson**, Charles and Edith Clyne Professor of Law at the University of Michigan and author of *In the Highest Degree Odious* (Oxford 1992), a study of executive detention in Britain in World War II. Prof. Rubin discusses the emergency courts system planned by British wartime civil servants to administer swift justice to civilians had British forces been called upon to engage a Nazi invader on British soil. According to a contemporary legal periodical, the proposed scheme shifted, during the bill's parliamentary progress, from being "Courts-Martial for Civilians" to "No Courts-Martial for Civilians" to "Courts Not Quite Martial" for civilians.

U.S. DISCIPLINARY BARRACKS

Useful FAQs about the USDB have been posted on the web at <http://leav-www.army.mil/usdb/faq.htm>. For example, between 1984 and 1998, the average inmate age rose from 26.6 to 32.7, while the av-

erage sentence rose from 9 to 14.9 years. Crimes against persons account for 83% of the inmates' offense, 6% were drug crimes, and 11% were "other crimes." Comparable percentages for civilian federal inmates were 13%, 63% and 24%, respectively, and for state inmates, 46%, 31% and 23%, respectively. The 625 DB inmates included 15 women and 38 officers.



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COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE

The Uniform Code of Military Justice was approved on May 5, 1950 and took effect on May 31, 1951. In § 556 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Congress commemorated the 50th anniversary of the Code. Among other things, Congress noted that it had "enacted major revisions of the [Code] in 1968 and 1983 and, in addition, has amended the code from time to time over the years as practice under the code indicated a need for updating the substance or procedure of the law of military justice." Section 556 asks the President to issue a suitable proclamation and "calls upon the Department of Defense, the Armed Forces, and the United States Court of Appeals for the Armed Forces and interested organizations and members of the bar and the public to commemorate the occasion of [the] anniversary with ceremonies and activities befitting its importance." Believing that an integral part of those activities should be an appraisal of the current operation of the Code and an evaluation of the need for change, the National Institute of Military Justice is sponsoring a Commission on the 50th Anniversary of the Uniform Code of Military Justice, in coordination with The George Washington University Law School. The Commission consists of:

Hon. Walter T. Cox III, *Chair*
Captain Guy R. Abbate, Jr., JAGC, USN (Ret)
Professor Mary M. Cheh
Rear Admiral John S. Jenkins, JAGC, USN (Ret)
Lieutenant Colonel Frank J. Spinner, USAF (Ret)
Professor Elizabeth Lutes Hillman, *Reporter*
Kathleen A. Duignan, Esquire, *Assistant to the Chair*

The Commission's goal is to solicit from all interested parties comments and suggestions regarding the operation of the military justice system and to submit to the House and Senate Committees on Armed Services, the Secretary of Defense, the Service Secretaries, and the Code Committee the record of its proceedings, including any recommendations for change or for further consideration by the Congress and the Executive Branch.

Comments on the operation of the Code and suggestions for change should be emailed to Judge Cox at judgecox@earthlink.net no later than December 1, 2000. Attachments should be in Word format. Sample topics, which are not intended to indicate the views of the Commission, are attached. After receiving comments and suggestions, the Commission will disseminate a list of the topics received and will solicit final comments to be received by January 31, 2001.

The Commission will conduct a public hearing at The George Washington University Law School on a date to be

announced. It is anticipated that the proceedings will be televised.

Depending on the number of persons wishing to make presentations, witnesses will be afforded no less than 10 minutes to address the Commission. Those wishing to speak will be asked to submit any written materials in Word format to the Commission by a date to be announced, and to bring 15 copies with them to the hearing.

After the hearing the Commission will prepare a brief report certifying the record of its proceedings and making such comments and recommendations as it deems appropriate. The Commission's Report will be available to the public.

The Commission and Staff

Walter T. Cox III graduated from Clemson University in 1964 and the University of South Carolina School of Law in 1967. He served in the United States Army from 1964 to 1973. He was a Judge of the South Carolina Circuit Court from 1978 to 1984, serving during part of that time as an Acting Associate Justice of the Supreme Court of South Carolina. He served on the United States Court of Military Appeals and the United States Court of Appeals for the Armed Forces from 1984 to 1999, and was Chief Judge from 1995 to 1999. He has taught Military Justice at Duke University School of Law.

Guy R. Abbate, Jr. graduated from Boston College in 1968 and Suffolk Law School in 1977. He served in the United States Navy Judge Advocate General's Corps for 20 years, retiring in 1995 in the grade of Captain. Among his other assignments, he served as Director, Appellate Defense Division, Navy-Marine Appellate Review Activity from 1990 to 1992. He headed International Military Education Training at the Naval Justice School from 1992 to 1995. Since 1995, he has been a consultant to the Defense Institute of International Legal Studies and the Naval Justice School, where he is Senior Instructor in the international course "Conducting Military and Peacekeeping Operations in accordance with the Rule of Law."

Mary M. Cheh is the Elyce Zenoff Research Professor of Law at The George Washington University Law School, where she teaches Constitutional Law and Criminal Procedure. She received a B.A. from Douglas College (Rutgers University) in 1972, a J.D. from Rutgers University Law School at Newark in 1975, and an LL.M. from Harvard Law School in 1977. She has also taught at the University of California Hastings College of the Law, University of North Carolina School of Law, and other law schools. She is been a member of the Rules Advisory Committee of the United States Court of Appeals for the Armed Forces, and a director of NIMJ.

John S. Jenkins has been on the decanal staff of The George Washington University Law School since 1982, and is currently Senior Associate Dean for Administrative Affairs. He served for 28 years in the United States Navy, including service as Judge Advocate General of the Navy from 1980 to 1982. He retired with the grade of Rear Admiral. He is a director of NIMJ and since 1985 has been a member of the American Bar Association's House of Delegates as representative of the Judge Advocates Association.

Frank J. Spinner is an attorney in private practice in Fairfax, Virginia. He received his B.S. from Louisiana Tech University in 1972 and his J.D. from St. Mary's University School of Law in 1977. He retired from the United States Air Force Judge Advocate General's Department in 1994 with the grade of Lieutenant Colonel. His practice includes the representation of military personnel in court-martial trials and appeals.

Elizabeth Lutes Hillman is Assistant Professor of Law, Rutgers University School of Law at Camden and a doctoral candidate in history at Yale University. She graduated from Duke University in 1989 and from Yale Law School in 2000. She was the Reporter for the London Conference on Continuity and Change in Military Justice in 1998 and is author of *The "Good*

Soldier" Defense: Character Evidence and Military Rank at Courts-Martial, 108 YALE L.J. 879 (1999). She served in the United States Air Force from 1989 to 1996, and taught History at the United States Air Force Academy from 1994 to 1996.

Kathleen A. Duignan is the Governance Coordinator at Greenpeace U.S.A. She received her B.A. from the University of Miami in 1988 and J.D. from Brooklyn Law School in 1991. She served on active duty as a Law Specialist in the United States Coast Guard from 1992 to 1996. She was a Commissioner at the United States Court of Appeals for the Armed Forces from 1996 to 1999, and is a Lieutenant Commander in the United States Coast Guard Reserve. She was a member of the London Conference on Continuity and Change in Military Justice in 1998.

Sample Topics

1. WHEN, IF EVER, SHOULD A CIVILIAN BE SUBJECT TO TRIAL BY COURT-MARTIAL?
2. SHOULD PEACETIME COURT-MARTIAL JURISDICTION BE RESTRICTED TO OFFENSES THAT ARE SERVICE-CONNECTED?
3. SHOULD PEACETIME COURT-MARTIAL JURISDICTION IN CAPITAL CASES BE RESTRICTED TO OFFENSES THAT ARE SERVICE-CONNECTED?
4. SHOULD THE SUMMARY COURT-MARTIAL BE ABOLISHED?
5. SHOULD THE "VESSEL EXCEPTION" IN ART. 15 BE AMENDED OR REPEALED?
6. SHOULD THE REQUIREMENT FOR AN ART. 32 INVESTIGATION BE REPEALED?
7. SHOULD ART. 32 INVESTIGATING OFFICERS BE REQUIRED TO BE JUDGE ADVOCATES OR MILITARY JUDGES UNLESS PRECLUDED BY MILITARY EXIGENCY?
8. SHOULD AN ACCUSED HAVE A RIGHT TO RECORD AN ART. 32 INVESTIGATION WHEN THE CONVENING AUTHORITY DECLINES TO DETAIL A COURT REPORTER?
9. SHOULD A SEPARATE COURT-MARTIAL ADMINISTRATOR OR LOCAL CLERK OF COURT BE RESPONSIBLE FOR ALL ASPECTS OF COURT-MARTIAL MEMBER ADMINISTRATION ONCE THEY HAVE BEEN APPOINTED (I.E., TAKE THESE DUTIES AWAY FROM TRIAL COUNSEL)?
10. SHOULD COURT-MARTIAL MEMBERS BE APPOINTED BY A JURY OFFICE RATHER THAN THE CONVENING AUTHORITY?
11. SHOULD ALL FINANCIAL ASPECTS OF COURTS-MARTIAL BE CENTRALLY FUNDED FROM DOD, WITH SEPARATE FUNDING FOR TRIAL AND DEFENSE?
12. SHOULD CIVILIANS BE ELIGIBLE TO SERVE AS MILITARY JUDGES?
13. SHOULD MILITARY JUDGES HAVE FIXED TERMS OF OFFICE?
14. SHOULD SENTENCING BY MEMBERS BE ABOLISHED IN ALL CASES, OR SHOULD AN ACCUSED HAVE THE OPTION OF CHOOSING MEMBERS ON THE MERITS BUT MILITARY JUDGE ALONE FOR SENTENCING?
15. SHOULD MILITARY JUDGES HAVE SENTENCING POWER IN MEMBER CASES?
16. SHOULD MILITARY JUDGES OR MEMBERS HAVE THE POWER TO SUSPEND A SENTENCE?
17. SHOULD THE GENERAL ARTICLES BE REPEALED?
18. SHOULD ADULTERY BE AN OFFENSE UNDER THE UCMJ?
19. SHOULD SODOMY BE AN OFFENSE UNDER THE UCMJ?
20. SHOULD THE DEFENSE OF GOOD MILITARY CHARACTER BE ABOLISHED?
21. SHOULD THE FEDERAL SENTENCING GUIDELINES BE APPLIED IN COURTS-MARTIAL?
22. SHOULD THE PEACETIME MILITARY DEATH PENALTY BE ABOLISHED?
23. SHOULD A JURY OF 12 BE REQUIRED FOR CAPITAL CASES IN PEACETIME?
24. SHOULD BREAD AND WATER BE FORBIDDEN AS A PUNISHMENT?
25. SHOULD THE CONVENING AUTHORITY HAVE POWER TO DISAPPROVE A CONVICTION ON LEGAL, AS OPPOSED TO CLEMENCY GROUNDS?
26. SHOULD THE CCAS BE ABOLISHED OR THEIR FUNCTION LIMITED TO REVIEW OF SENTENCE APPROPRIATENESS?
27. SHOULD COURTS-MARTIAL BE REVIEWED BY THE CCAS ONLY IF THE ACCUSED FILES A NOTICE OF APPEAL?

28. SHOULD THE CCAS BE PERMITTED TO SIT WITH FEWER THAN THREE JUDGES PRESENT?
29. SHOULD ALL JUDGES ON A CCA PANEL BE REQUIRED TO REVIEW THE RECORD?
30. SHOULD ALL COURTS-MARTIAL BE SUBJECT TO APPEAL TO THE COURT OF APPEALS AS OF RIGHT?
31. SHOULD THE COURT OF APPEALS BE REQUIRED TO DISMISS CASES IN WHICH NO ISSUES ARE ASSIGNED?
32. SHOULD THE JURISDICTION OF THE COURT OF APPEALS BE CHANGED, AND IF SO, HOW?
33. SHOULD CERTIFICATION OF ISSUES TO THE COURT OF APPEALS BY THE JUDGE ADVOCATE GENERAL BE REPEALED IN FAVOR OF A GOVERNMENT APPEAL, EITHER AS OF RIGHT OR AT THE DISCRETION OF THE COURT OF APPEALS?
34. SHOULD THE POLITICAL BALANCE TEST FOR APPOINTMENTS TO THE COURT OF APPEALS BE REPEALED?
35. SHOULD RETIRED REGULARS BE ELIGIBLE TO SERVE ON THE COURT OF APPEALS?
36. SHOULD THERE BE A SINGLE MILITARY BAR PRESIDED OVER BY THE COURT OF APPEALS?
37. SHOULD THE COURT OF APPEALS BE RESPONSIBLE FOR REMOVAL OF MILITARY TRIAL AND APPELLATE JUDGES?
38. SHOULD THE CODE COMMITTEE BE ABOLISHED?
39. SHOULD ART. 36 RULEMAKING BE CONDUCTED BY A BROAD-BASED ADVISORY COMMITTEE WITH CIVILIAN AS WELL AS MILITARY MEMBERSHIP?
40. SHOULD THE SERVICES' LAW SCHOOLS BE CONSOLIDATED?
41. SHOULD THE SERVICES' LAW REVIEWS BE CONSOLIDATED?
42. SHOULD THE SERVICES' TRIAL DEFENSE AND/OR APPELLATE DEFENSE FUNCTIONS BE CONSOLIDATED INTO A SINGLE DEFENSE SERVICE?

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MILITARY JUSTICE GAZETTE

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A HOLIDAY REQUEST

As you plan your end-of-the-year charitable giving, please keep NIMJ in mind. We receive no government funding. If you believe the *Gazette* and our other activities are worthwhile, please help us keep going. Your contribution is tax-deductible.

SUPREME COURT OF THE UNITED STATES

NIMJ was one of the *amici curiae* filing briefs in the Supreme Court in *Gray v. United States*, No. 00-607, a military capital case. The brief is on the web at www.nimj.org. We took no position on the proper outcome of the case, but urged the Court to grant review of one of the three questions presented in Gray's certiorari petition: whether Article 25(d)(2), under which convening authorities select court-martial members, is constitutional.

NIMJ has under consideration filing as an *amicus* in support of the petition for certiorari in *Stevenson v. United States*. In that case, the Court of Appeals for the Armed Forces, in an opinion by Judge **Andrew S. Effron**, unanimously overturned a decision of the Navy-Marine Corps Court of Criminal Appeals. That court had upheld a ruling by Navy military judge **Raymond Kreichelt** suppressing DNA evidence that was obtained by NCIS investigators who persuaded DVA medical personnel to surreptitiously take an extra blood sample from a member who was on temporary disability retirement.

CONTEST

As part of our mission to advance and improve the administration of military justice, NIMJ is ever alert to media coverage that presents a false image of military justice and its practitioners. It has been called to our attention that the *New York Law Journal*, in a recent television review, stated that the program "JAG" had "managed to inject sex appeal and excitement into a line of work—lawyering for the Armed Forces—that heretofore seemed to be lacking in both." We suspect that this description of lawyering in the Armed Forces is contrary to the experience of many of our readers. As a public service to correct the reviewer's misimpression, NIMJ is sponsoring a small contest. Contestants are invited to submit an essay of no more than 1000 words, refuting the proposition that military lawyering is devoid of sex appeal and excitement. Entries must be

submitted by December 31, 2000. The winning essay will be published in the *Gazette*, and a suitable memento will be awarded.

NIMJ

NIMJ is delighted to welcome Colonel **Alexander S. Nicholas**, USAFR (Ret) back to its Advisory Board. Alex was a founding member of the board, but left in 1998 when he was recalled to active duty for an assignment in Bosnia. [In order to preserve NIMJ's independence, no person on active duty may serve as a Director or member of the Advisory Board.] After his military tour ended in 1999, he stayed another year in Bosnia as a civilian, under a direct engagement with the Office of the High Representative (OHR), in time becoming the head of its Department for Legal Affairs. In that position he was principal legal advisor to the High Representative and his staff, both in the Balkans and internationally. He left the OHR in July of this year and resigned from his US law firm in order to accept appointment as Deputy Principal Legal Advisor to both the UN mission in East Timor and the transitional Timorese administration. Pending adoption of a constitution, under Security Council Resolution 1272, the UN mission exercises all executive and legislative authority in East Timor, including the administration of justice, and including large military and police components.

NECROLOGY

NIMJ notes with regret the death of Colonel **Walter L. Lewis**, USAF (Ret). Among other assignments, Col Lewis served on the Joint Service Committee on Military Justice and as chief of the Air Force's Military Justice Division. He was the founding chairman of the Rules Advisory Committee of the United States Court of Military Appeals, serving in that capacity for many years, and getting the Committee off to a strong start. He was a perceptive observer of the military appellate process and a consummate gentleman.

WASHINGTON

On November 22, 2000, **President Clinton** signed the Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523. The measure amends title 18 to establish federal jurisdiction over certain offenses punishable by more than a year's imprisonment committed by defined persons employed by or accompanying the armed forces overseas and by former members of the service. If the offender has been or is being prosecuted by a foreign government, the Attorney

General (or Deputy) must approve any U.S. prosecution. Watch for implementing regulations.

MEETINGS

CAMI will conduct its first Annual Spring Meeting in Leavenworth, Kansas, on May 2-5, 2001. For questions and reservations, contact **Glenda Ewing** at camj98037@yahoo.com. CAMI's web site can be found at www.militaryinjustice.org.

The Florida Bar Military Affairs Committee will conduct its 2001 Military Law and Legal Assistance Symposium on Saturday, January 20, 2001, at the BOQ Main Conference Room, NAS Jacksonville. Point of Contact: **Jennifer Wilson**, (850) 561-5811, jwilson@flabar.org.

WEBSITE OF NOTE

Vietnam Veterans of America's fine website now includes a massive and diverse collection of links about the Vietnam War and era. Highly recommended. www.vva.org/about_the_war.htm. The list was compiled by VVA General Counsel **Michael Gaffney**.

COPENHAGEN

According to the International Society for Military Law and the Law of War, the Danish Minister of Defence has established a commission to review the Military Criminal Code and the Military Administration of Justice Act, which were last reviewed in 1973. The commission includes representatives of the Ministries of Defence and Foreign Affairs, the armed forces, the JAG, the Attorney General, the universities, the Judges Association, the Bar and Law Society, the Red Cross, and the personnel organizations of the armed forces.

RECOMMENDED READING

Professor **Diane H. Mazur**: *Word Games, War Games*, 98 MICH. L. REV. 1590 (2000); *Sex and Lies: Rules of Ethics, Rules of Evidence, and Our Conflicted Views on the Significance of Honesty*, 14 NOTRE DAME J. L., ETHICS & PUB. POL'Y 679 (2000) (reviewing **Janet E. Halley**, *Don't: A Reader's Guide to the Military's Anti-Gay Policy* (1999)).

PORTSMOUTH

The *London Telegraph* reported on October 15, 2000 that the longstanding naval tradition that accused officers surrender their swords during a court-martial is under attack. In *R. v. Coulter*, the accused, represented by **Bradley Albuery**, argued that the practice violates

the European Convention on Human Rights because it degrades the defendant. In response, the presiding judge advocate ruled that *all* swords (*i.e.*, including those of the five members of the court-martial panel) would be removed from the courtroom as unnecessary encumbrances. The Chief Naval Judge Advocate later advised all judge advocates that swords should not be removed from courts-martial in the future.

BOOKSHELF

The *Manual for Courts-Martial* (2000 ed.) is available from the Government Printing Office for \$59.00. For online ordering, go to bookstore.gpo.gov/ and type "courts-martial" in the search block. Telephone orders may be placed at (202) 512-1800.

DIRECTORY OF CIVILIAN PRACTITIONERS OF MILITARY LAW: ADDENDA

Ensign, Thomas D. ("Tod"), 267 Fifth Ave., Ste. 901, New York, NY 10016, tel (212) 679-2250

Foster Wells Solicitors, Aldershot, UK, www.foster-wells.co.uk (UK cases only)

McCormack, Greg D., Virginia Beach, VA, www.mccormackpc.com

Mustakas, George T., 150 Minorities, London EC3N 1LS, UK, tel 0207-264-2110, fax 0207-264-2107, email GMustakas@aol.com

Puckett, Neal A., 801 15th St. South, Ste. 1008, Arlington, VA 22202, tel (703) 590-0403, (877) 216-1016 (toll-free), fax (703) 418-2490, email: military_justice@hotmail.com

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Walluk, Anthony W., 110 E. Nueva, San Antonio, TX 78204, tel (210) 226-4384, (800) 982-7670 (toll-free), fax (210) 472-2346, email: awalluk@awalluk.com, www.awalluk.com

NIMJ

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General Counsel.....Stephen A. Saltzburg
Webmaster.....Philip D. Cave



MILITARY JUSTICE GAZETTE

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Happy New Year

January 2001

COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE

The Cox Commission has received scores of submissions in response to the initial announcement that appeared in *Gazette No. 86*. The Commission will release a revised list of topics for comment on February 1, 2001, and will receive comments from the public until March 1, 2001. Comments should be submitted to **Judge Walter T. Cox III** at JudgeCox@earthlink.net. A date has not yet been set for the public hearing.

NEW ZEALAND

The inaugural meeting of the Armed Forces Law Association of New Zealand (AFLANZ) was convened at *Te Taua Moana*, the Royal New Zealand Navy *Marae* at Devonport in Auckland on November 10, 2000. The convenor, Lt Cdr **Chris Griggs**, called the meeting following the enthusiastic response to a survey he conducted earlier in the year. The meeting commenced with a *powhiri* and then went on to adopt a constitution and appoint officers. The foundation committee consists of:

<i>President</i>	John Rowan QC , Wanganui
<i>Vice President</i>	Bruce Stainton , Stainton & Charles, Auckland
<i>Secretary</i>	Chris Griggs , senior lecturer in military law, Military Studies Institute
<i>Treasurer &</i>	Craig Ruane , Raymond, Donnelly & Co., Christchurch
<i>Members</i>	Steve Taylor , legal staff officer, Air Command, RNZAF Base Auckland Rod Thomas , barrister, Auckland Ernie Gartrell , barrister and solicitor, Auckland

AFLANZ was pleased to hear a very interesting description of the duties and difficulties of the legal staff officer serving with the New Zealand forces in East Timor, ably delivered by **Andrena**

Gill, legal staff officer at 2 Land Force Group, Linton Camp. The day's activities concluded with a formal dinner in honor of **Hon. Justice Penlington's** 38 years of distinguished service to military law. The dinner was very well attended by many experienced practitioners of military law as well as some new faces, providing a wonderful opportunity to reminisce about old times and make new acquaintances. The dinner was presided over by the Deputy Judge Advocate General, **Chris Hodson QC**.

The principal objects of AFLANZ are to promote research and study of the legal issues affecting New Zealand's armed forces. AFLANZ is independent of the New Zealand Defence Force, but hopes to work in harmony with it in the years to come. AFLANZ intends to publish an annual law review and a website in due course. The next annual general meeting will be held in Christchurch in October 2001, to coincide with Law Conference 2001.

Membership in AFLANZ is automatically open to all lawyers who play or have played a direct part in the administration of military justice in New Zealand, but AFLANZ also encourages inquiries from any person who has a genuine interest in its objects, as such persons may also be admitted to membership by resolution of the committee. If you would like to participate in the activities of AFLANZ, please contact your local committee member or write to: The Secretary, Armed Forces Law Association of New Zealand, c/o Defence and Strategic Studies Programme, School of History, Philosophy and Politics, Massey University, Private Bag 11 222, Palmerston North, NZ.

[NIMJ applauds our friends in New Zealand. We hope the creation of AFLANZ will encourage friends of military law in other countries to follow suit and establish comparable organizations.]

NIMJ

For medical reasons, **Kevin J. Barry** has resigned as Secretary-Treasurer of NIMJ, a position he has held with distinction since the organization's founding in 1991. Kevin remains a mem-

ber of the Board of Directors. **Philip D. Cave**, who has been a director as well as our talented webmaster, has been elected Secretary-Treasurer. We all wish Kevin a speedy recovery.

Professors **Diane H. Mazur**, University of Florida School of Law, and **Elizabeth Lutes Hillman**, Rutgers Law School (Camden), have been elected to the NIMJ Advisory Board. Both served in the United States Air Force before becoming lawyers. Congratulations and welcome aboard.

With the National Veterans Legal Services Program, has NIMJ filed an *amicus curiae* brief in *Stevenson v. United States*. This is NIMJ's third submission to the Supreme Court. The brief has been posted on our website, www.nimj.org.

JOINT SERVICE COMMITTEE ON MILITARY JUSTICE

The December 8, 2000 *Federal Register* included the JSC's discussion of public comments on changes to the *Manual for Courts-Martial* that were proposed on May 15, 2000. 65 FED. REG. 76,998 (2000). The proposed changes would (1) add references to MIL. R. EVID. 513 (psychotherapist-patient privilege) in R.C.M. 701 (discovery); (2) clarify the analysis accompanying R.C.M. 707 (speedy trial), in light of current case law; and (3) clarify R.C.M. 1003 and 1107, governing the authority of a court-martial to adjudge and the convening authority to approve, the combination of both a fine and forfeitures at summary and special courts-martial. While concluding that the proposed amendments were appropriate, the JSC modified the analysis accompany R.C.M. 707 to more fully explain why that rule was being amended. It also announced that, in response to a comment from NIMJ, it would modify the announcement of the next cycle of proposals so that consideration of incomplete or untimely proposals from the public would not be automatically ruled out. Comments will be received at any time, but those outside the prescribed period may simply miss the current annual review cycle. The JSC rejected a suggestion that its new rules inviting public proposals be incorporated into DoD Directive 5500.17. The directive itself will, however, be published in future editions of the *Manual*. POC: Lt Col **Thomas C. Jaster**, USAF, Air Force Legal Services Agency, 112 Luke Ave., Rm. 343, Bolling AFB, DC 20332-8000, (202) 767-1539, fax (202) 404-8755.

IUS BIENNIAL MEETING

The Inter-University Seminar on Armed Forces and Society has issued a Call for Papers to be presented at the October 19-21, 2001 IUS Biennial Conference. The conference will be held, as usual, at the Tremont Plaza Hotel in Baltimore. Proposals must be received by the Conference Program Committee no later than January 15, 2001. For further information contact IUS at mpalmisano@socy.umd.edu.

WEBSITE OF NOTE

Boffo site for history buffs:

www.royalprovincial.com/military/courts/crtlist.htm

RECOMMENDED READING

Barry Werth, *A Reporter at Large: A Marine's Private War (When his daughter died after being admitted to Walter Reed hospital, a colonel demanded to know why)*, THE NEW YORKER, Dec. 18, 2000, pp. 64-77. The article concerns a pending court-martial and its medical, investigative and legal background.

BOOKSHELF

The Miles Foundation, Inc. has announced the availability of **Christine Hansen & Kate B. Summers**, *Intimate Partner Violence Associated with the Military: A Handbook for Victims* (2000, \$15). For ordering information contact **Christine Hansen** at Milesfdn@aol.com. The foundation is a private nonprofit organization dedicated to providing comprehensive services to victims of domestic violence associated with the military.



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COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE

The Cox Commission received many thoughtful submissions in response to its initial announcement in *Gazette No. 86*. The Commission's revised list of topics and invitation for comments on the final list have been posted on NIMJ's website, www.nimj.org. Final comments should be submitted to **Judge Walter T. Cox III** at JudgeCox@earthlink.net by March 1, 2001. The public hearing will be held at 10:00 a.m., Tuesday, March 13, 2001, at The George Washington University Law School, 2000 H Street, N.W., Washington, DC. Those wishing to speak should notify Judge Cox no later than March 1.

ESSAY CONTEST

Gazette No. 87 announced a contest for essays refuting the proposition that military lawyering is devoid of sex appeal and excitement. Judges for the contest were NIMJ Advisory Board member **Ronald W. Meister** and **Nancy Duff Campbell**, Co-Director of the National Women's Law Center. And the winner is Captain **Susana E. Watkins**, U.S. Army Legal Services Agency. Congratulations! She will receive a special photograph submitted by Major **Gregory W. Kruse** of the Air Force, as well as a certificate suitable for framing. All contestants will receive copies of NIMJ's widely-ignored *Guide to the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces* (9th ed. 2000). Herewith, the winning entry:

Devoid of sex appeal and excitement . . . Hogwash, I say! I left civilian practice over five years ago to join the Army JAG Corps and have loved every minute of my professional life since then. Compared to the drudgery of sitting in on countless depositions of accountants as a new attorney in civilian practice, endless hours of research and writing that you never get credit for, never ever communicating with a client, much less actually appearing before any court, I'd take military practice any 'ole day.

I cut my teeth in the vibrant atmosphere of Germany and could not have been thrown into a more happening place. Assisting young soldiers with their legal problems before their deployment to some of the most dangerous spots in the world, sometimes on just a moment's notice as the troops headed out, now that's excitement! Practicing before military court as lead counsel on a full range of cases, including contested cases before a panel (jury), involving such crimes as DUI-fatality, assault with a deadly weapon, larceny, pornography, now that is sex appeal! Being the primary legal advisor for commanders, from company level all the way up to brigade . . . what new civilian attorney can boast

such responsibility? And how about being the primary planner for celebrations involving some of the biggest names in the German Ministry of Justice, as well as in the military. Wow! Now that is sex appeal!

And to really get in on the action, how about training in waist-high snow drifts for deployment to Hungary? How about being the primary legal counsel to all military personnel deployed to Hungary? How about being a part of meetings discussing critical security issues and troop movements in the region? How about being solely responsible for an armed mission taking soldiers and an interpreter into the war-torn nation of Croatia for direct cash payment of claims to local nationals?

And stateside the action continues. How about working in the Pentagon, assisting very senior level military personnel with legal issues? How about arguing before the Army Court of Criminal Appeals or the Court of Appeals for the Armed Forces, just one step below the Supreme Court? Now that is sex appeal and excitement!

I don't know who wrote the article in the *New York Law Journal*, but I suspect that he or she has not practiced in the Army JAG Corps, or at least has not done so in a long, long while. Being an Army attorney today is anything but dull and boring!

SUSANA E. WATKINS, CPT, JA

NECROLOGY

Frank E.G. Weil, of Washington, died on January 9, 2001. He served in the federal government for 42 years, retiring as chief of the policy branch of HHS's Office of Civil Rights. A German Jewish refugee, he served in Army counter-intelligence during World War II and was an interpreter at war crimes trials. He was executive secretary of the American Veterans Committee and a long-time member of the Committee on Military and Veterans Rights of The District of Columbia Bar.

AMERICAN BAR ASSOCIATION

1. On December 1, 2000, the American Bar Association Standing Committee on Armed Forces Law met at the U.S. Court of Appeals for the Armed Forces in Washington, D.C. Two new members of SCAFL were in attendance, **Robert M. Duncan**, former Judge of the Court, and LtCol **Will Gunn**, USAF. Among the items of interest:

"Civilian" status of CAAF Judges. The Commit-

tee considered a recommendation that it work to change the present law which makes officers retired with 20 years service ineligible for appointment to CAAF (they are not considered to be "in (from) civilian life," Art. 142(b), UCMJ). After discussion, the Committee decided not to take any action on the recommendation.

Joint Service Committee. The Joint Service Committee reported on the current status of changes to the MCM and UCMJ. The changes in the Canadian military justice system which had been addressed by Canadian Forces Judge Advocate General **Jerry S.T. Pitzul** at the ABA Annual Convention in New York in July were discussed. The JSC indicated that these changes had not been formally reviewed by the JSC, but that the Canadian approach to random selection of court-martial members had been reviewed by the DOD study group which reviewed the jury selection issue, and which did not recommend any changes to the current system in use in this country.

Cox Commission. Senior Judge **Walter T. Cox III** discussed the Commission on the 50th Anniversary of the UCMJ, which he is chairing, and noted that it is an autonomous commission, sponsored by NIMJ. His target for producing a formal report is May 31, 2001, the 50th anniversary of the UCMJ's effective date.

Overseas Jurisdiction. The new statute establishing criminal jurisdiction (in federal district court) over civilians accompanying the armed forces overseas was discussed. Implementing regulations are being prepared by DOD in coordination with DOJ.

Judicial Tenure. The issue of tenure for military judges, for several years a staple of SCAFL's agenda, was discussed. The Army and the Coast Guard confirmed that regulations were in place establishing a term of years as the norm for military judges. The Navy (and Marine Corps) and the Air Force indicated that no regulation will be published, although there was a personnel policy in place which accomplished the same goal. [Ed. note: All the services had over a period of years advised the SCAFL that they were implementing regulations, and SCAFL has in the past expressed its "frustration with the delay in the services implementing promised judicial tenure rules similar to those recently implemented by the Army that established a three year tenure rule." M.J. Gaz. No. 71 (Nov. 1999).]

Writing Award. SCAFL will continue to present its annual award for the best published work dealing with military law issues.

April 2001 Meeting. The Committee's Spring Meeting will be held at the U.S. Coast Guard Academy, New London, CT, on Saturday, April 28, 2001. SCAFL meetings are open to the public and all are invited to attend.

2. The following military-related events will be held at the ABA's meeting this month in San Diego:

Thu, 15 Feb - 0800-1630 Military Administrative Law Seminar (CLE accredited) Marine Corps Recruit Depot, Bay View Restaurant, 3800 Chosin Ave., San Diego

1900 Judge Advocates Association Dinner, same place as above

Fri, 16 Feb - 0800-1200 Military Law Committee Meeting, Marriott Marina Hotel, Ballroom B, North Tower

1200-1330 Military Law Committee Lunch, Marriott Marina Hotel

1330-1400 U.S. Court of Appeals for the Armed Forces Admission Ceremony, Marriott Marina Hotel

1400-1630 Military Law Committee CLE Program "Environmental and Legal Issues Arising from Closing Military Bases (BRAC)", Marriott Marina Hotel, Ballroom A, North Tower

Sat, 17 Feb - 0800-1500 Standing Committee on Armed Forces Law, Marriott Marina Hotel, Boardroom, 3d Level, North Tower

All of these meetings are open to the public and everyone is welcome.

NATIONAL ARCHIVES

Dr. Thomas Lowry will speak on "Civil War Court-Martial Records" in the National Archives Theatre, at noon, Wednesday, February 21. Enter on Pennsylvania Avenue between 7th and 9th Sts., N.W. This event is cosponsored by the Abraham Lincoln Institute of the Mid-Atlantic. Call (202) 208-7345 for reservations.



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COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE

The Cox Commission will convene at 10:00 a.m., Tuesday, March 13, 2001, at The George Washington University Law School, 2000 H St., N.W., Washington, to hear statements from members of the public, the bar and other interested organizations. The hearing will be open to the public. The Commission has received literally hundreds of email submissions.

USS GREENEVILLE

The public has been gripped by the tragic loss of life resulting from the sinking of the *Ehime Maru* off Oahu after she was accidentally rammed by the USS *Greeneville*. NIMJ has been called on by news organizations in the United States and Japan to provide background information on Navy courts of inquiry and military justice generally. We have disseminated pertinent information by email to journalists covering this dramatic story and have posted pertinent materials on our website.

450 E STREET, N.W.

Thomas F. Granahan retires on March 1, 2001 as Clerk of the United States Court of Appeals for the Armed Forces. He is being relieved by Captain **William DeCicco**, who is retiring from the Navy. Congratulations to both of these gentlemen.

NIMJ is working with students at Yale Law School who are preparing an *amicus curiae* brief for submission to the Court of Appeals in *United States v. Butcher*, No. 00-0632/AF.

United States v. Pineda, No. 99-0915, involved a one-day judge-alone special court-martial at which the sentence was a BCD, four

months' confinement and forfeitures, and reduction to E-1. The trial was conducted on August 28, 1997; the convening authority acted on December 18, 1997; the Navy-Marine Corps Court of Criminal Appeals affirmed in an unpublished decision on May 28, 1999; review was granted on October 22, 1999; the case was heard by the Court of Appeals on February 29, 2000 and decided on January 9, 2001.

DIRECTORY OF CIVILIAN PRACTITIONERS OF MILITARY LAW: ADDENDA

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The complete directory of civilian practitioners is available on the NIMJ website.

INTERNET ITEMS OF NOTE

Phil Cave, NIMJ's webmaster extraordinaire, notes that Royal Navy Chief Judge Advocate **Jeff Blackett** recently headed up a Rugby Football Union disciplinary panel. See **Peter Jackson**, *Guilty Johnson Faces Five Week Ban*, DAILY MAIL, rugby.thisislondon.com/dynamic/sport/top_story.html?in_review_i

d=347277&in_review_text_id=291603.

The equally vigilant **Ronald W. Meister**, a member of NIMJ's advisory board, has called our attention to a salty website, "Nautical Expressions in the Vernacular," by **Gibbons Burke**: www.io.com/gibbonsb/words.words.words.html.

A paper by Prof. **Gerry R. Rubin**, of Kent Law School, University of Canterbury, has been received in evidence by the House of Commons Select Committee on Defence, and can be accessed at www.parliament.the-stationery-office.co.uk/pa/cm200001/cmselect/cmdfence/29/29ap13.htm. Prof. Rubin's paper was originally presented at NIMJ's London Conference on Continuity and Change in Military Law, held in December 1998. [Note: plans are being made for a second international conference, to be held in Dublin on June 15 and possibly June 16, 2001. Details to follow.]

READING LIST

Volume 166 of the *Military Law Review* is now available. Of note: a review of **Gary Solis's** *Son Thang: A Military War Crime*; case notes on the Ad Hoc International War Crimes Tribunals; Captain **Gregory E. Maggs**, *Cautious Skepticism About the Benefit of Adding More Formalities to the Manual for Courts-Martial Rule-Making Process: A Response to Captain Kevin J. Barry*, and Captain **Kevin J. Barry**, *A Reply to Captain Gregory E. Maggs' "Cautious Skepticism" Regarding Recommendations to Modernize the Manual for Courts-Martial Rule-Making Process*.

The electronic version of this issue of the *Gazette* includes a paper by Captain **Abdullah Kaya** on Turkish Military Justice. Thanks very much, Captain, for your report. Readers in other countries are encouraged to submit reports on legislative and judicial developments as they arise.

By **Walter G. Sharp, Sr.**, *Jus Paciarrii: Emergent Legal Paradigms for U.N. Peace Operations in the 21st Century*, 392 pp, \$24.95, ISBN 0-9674356-0-9. For further information

contact PacriariIntlLLC@aol.com.

The Air Force has just issued a new edition of AFI 31-205, *The Air Force Corrections System*. It is available on the SAF/AAD WWW site at: <http://afpubs.hq.af.mil>.

STATE AND CITY BAR COMMITTEES ON MILITARY LAW

We are attempting to develop a list of state and city bar committees on military law. Please send details/point-of-contact if you know of any such committees.

AMERICAN BAR ASSOCIATION

The deadline for nominations for this year's Standing Committee on Armed Forces Law Writing Award is April 15, 2001. Only members of the committee, advisors, senior service attorneys, and the Commandants and faculty of the JAG Schools may formally nominate; others may suggest names to them or to staff liaison **Susan C. Koz**, ABA Headquarters, kozs@staff.abanet.org.



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President..... Eugene R. Fidell
Secretary-Treasurer-Webmaster..... Philip D. Cave
General Counsel Stephen A. Saltzburg

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MILITARY JUSTICE GAZETTE

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No. 91

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April 2001

COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE

The Cox Commission met on March 13 at The George Washington University Law School to receive statements from members of the public. Witnesses came from as far away as Washington State and Colorado. Among the spectators were lawyers from each of the armed services, Judge **Eugene R. Sullivan** and Senior Judge **Robinson O. Everett** of the United States Court of Appeals for the Armed Forces (Judge Everett also addressed the Commission), and **Scott Stucky**, general counsel of the Senate Armed Services Committee.

The Commission met immediately after the conclusion of the hearing to discuss the outline of its recommendations. A report is expected to be issued by May 31, which is the 50th anniversary of the effective date of the Code. Professor **Elizabeth Lutes Hillman**, Reporter to the Commission, will be preparing a draft for consideration by the members.

The evening before the hearing, the Commission and Washington-area NIMJ leaders gathered at the Cosmos Club to discuss the next day's proceedings and to honor Captain **Kevin J. Barry**, a co-founder, director, and (for 10 years) secretary-treasurer of the Institute, as well as Rear Admiral **John S. Jenkins**, who is retiring as Senior Associate Dean at George Washington. **Kevin** and his successor as secretary-treasurer (and webmeister), Commander **Philip D. Cave**, testified the next morning on behalf of the Bar Association of the District of Columbia, as did BADC President and lead-off witness **Jack Mc-Kown**.

NIMJ wishes to express sincere appreciation to The George Washington University Law School for its generous support of the Commission. On behalf of Senior Judge **Walter T. Cox III**, we would also like to thank

and congratulate all of the witnesses (as well as the many more who submitted comments but were unable to testify) for their participation in this important initiative.

USS GREENEVILLE/EHIME MARU

On March 21, 2001, the day the *Greeneville/Ehime Maru* Court of Inquiry hearing ended in Honolulu, NIMJ convened a roundtable discussion/media availability at the Army-Navy Club, in Washington. Despite less than one day's notice, the meeting attracted journalists and editors from papers in the United States and Japan. Half a dozen Washington-area NIMJ experts attended, along with invited guest Capt **Larry Seaquist**, USN (Ret), former commanding officer of USS *Iowa*, who currently heads The Strategy Group, a Washington-based nonprofit organization. Thanks to **David Sheldon** for making arrangements with the Club, and to all who were able to participate on short notice.

450 E STREET, N.W.

Gazette No. 90 recited key dates in the procedural history of *United States v. Pineda*, No. 99-0919, the implication being that the case seemed to take an unduly long time for the appellate process to run its course. The Clerk's Office has called our attention to the fact that several other key dates in the case history that were not noted in the opinion but appear in *Daily Journal* entries should also have been noted in order to convey an accurate sense of the matter, *i.e.*, (1) on September 18, 2000, the Court issued a show cause order; (2) on September 27, 2000, an answer to that order was filed, along with a government motion for leave to file an affidavit; and (3) on November 13, 2000, the Court granted that motion. See 54 M.J. 298, 299 n.1 (2001). The opinion

came down on January 9, 2001.

*DIRECTORY OF CIVILIAN PRACTITIONERS
OF MILITARY LAW: ADDENDA*

Hecker, Karen L., Feldesman, Tucker, Leifer, Fidell & Bank LLP, 2001 L Street, N.W., Washington, D.C. 20036, (202) 466-8960, fax (202) 293-8103, email khecker@feldesmantucker.com, www.feldesmantucker.com

AMERICAN BAR ASSOCIATION

The Standing Committee on Armed Forces Law will meet on April 27-28 at the United States Coast Guard Academy. The business meeting will commence at 9:00 a.m. on April 28. For further information contact the committee at (312) 988-5604, fax (312) 988-5628.

READING LIST

Read any good e-books lately? Try former Captain **Keith D. Munson** [kmunson@ggwb.com], *Mutiny in the Desert: A Novel of Murder During the Persian Gulf War*. From the blurb: "As the story develops, Colonel Moore, the ranking military lawyer, is found dead in his tent, apparently from an allergic reaction to a scorpion sting. The muffled celebration of his staff is sobered by CID Special Agent Morgan's relentless investigation of the unfortunate accident as a murder. As the investigation focuses on the JAG Office, the reader enjoys entertaining glimpses of desert life for the overstaffed and marginally appreciated combat-ready legal office. The Division Commander, General Armstrong, demands that the case be tried before the ground offensive begins. The ensuing bizarre court-martial threatens to jeopardize the Division's combat readiness as well as the universal reputation of military justice." For further information see www.ebookstand.com/books.grp/KE1102.html.

Colorado prosecutor **Mark S. Cohen** has also written a mystery e-book. The title is

The Fractal Murders, and it is available through www.southerncrossreview.org. Mark advises that the protagonist is **Pepper Keane** a former Marine Corps judge advocate turned private eye. There are passages in which Pepper makes reference—sometimes humorous—to his military service.

The Miles Foundation reports that the Interim Report of the Defense Task Force on Domestic Violence is on the web at www.dtic.mil/domesticviolence/index.htm.

1600 PENNSYLVANIA AVENUE, N.W.

Speaking of pardons, did you know that President **Bill Clinton** granted one on December 22, 2000, with respect to a 1945 Army court-martial? This one was granted to **Roscoe Crosby Blunt, Jr.**, of Shrewsbury, Mass. He had been tried for fraternizing with the enemy in that he had chatted with a German teenager while her mother was doing laundry for him and his commanding officer. According to an AP story, Mr. Blunt is less than 100% satisfied: "Frankly, I got screwed and the Army never admitted it, and they're still not admitting it! I was foolish enough to think somebody might apologize!" Inge Baumler, the young lady in question, is now 72. She says, "It is nice he has been pardoned."

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Law Day Issue

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This year's Judicial Conference for the U.S. Court of Appeals for the Armed Forces will be held at Catholic University of America Columbus School of Law on June 13-14. For full details, consult the Court of Appeals's website, www.armfor.uscourts.gov.

The Annual Report of the Code Committee for the year ending September 30, 2000 has been released. It is not yet available on the Court's website, but should be posted soon. Lots of important data. For example, the caseload is way down. Only 753 petitions for grant of review were filed in the last Term, compared with 1813 in FY91. Also of interest: information on disciplinary action against judge advocates, and indication of the growing use of reserve officers in the military justice system.

THANKS

Many thanks to all who responded to the recent query about courts-martial involving naval commanding officers. Obviously, the *Greeneville/Ehime Maru* case has been on all of our minds over the last several months. The case is certain to be studied for many years with respect to its command-at-sea, accountability, public policy and legal aspects.

RECENT CASES

Two recent cases have come down that will be of interest to *Gazette* readers. Both were decided by the U.S. District Court for the District of Columbia. The first is Judge **Paul Friedman**'s second decision in *Mudd v. Caldera*, which involves whether Dr. Mudd's conviction by military commission as an accessory to President Lincoln's assassination was valid. The first decision remanded the case to the Army BCMR; this one upholds Assistant Secretary **Patrick Henry**'s final decision denying the record-correction application filed by a Mudd descendant. According to Judge Friedman, Secretary Henry could reasonably conclude that the military commission had jurisdiction. The case is likely to be appealed. Review would be *de novo*.

The second case, *McKinney v. Caldera*, Civil No. 00-728, involves an effort by former Sergeant Major of the Army **Gene C. McKinney** to secure Administrative Procedure Act review of The Judge Advocate General of the Army's action on his Art. 69 appeal. *Held*, per **Urbina**,

J., APA review is unavailable because the TJAG is not an "agency" because "it is not clear that the TJAG is vested with 'substantial independent authority,' and because such a ruling would fundamentally alter the relationship between the civilian and military courts and would, in essence, defy the presumption against civilian-court review of military-court decisions." Here again, an appeal seems likely.

CONGRESS

The Unborn Victims of Violence Act of 2001, H.R. 503, which has passed the House of Representatives, amends both 18 U.S.C. and the UCMJ. It would add a new Article 119a, Protection of Unborn Children. The principal sponsor, Rep. **Lindsay Graham**, is a former judge advocate.

DIRECTORY OF CIVILIAN PRACTITIONERS OF MILITARY LAW: ADDENDA

Neal A. Puckett, 2181 Jamieson Ave., Ste. 1505, Alexandria, VA 22314, toll-free tel. (877) 216-1016, e-mail military_justice@hotmail.com, website: www.militaryjudges.com.

NEW ZEALAND

The Armed Forces Law Association of New Zealand (AFLANZ) has established its own excellent website. See www.aflanz.org. The Association has established a New Zealand Armed Forces Law Review with a most distinguished editorial board, composed of: **John Rowan**, Q.C. (*ex officio* convenor, as President of AFLANZ); Hon. **Peter Penlington**, former permanent justice of the New Zealand High Court; Dr. **George Barton**, Q.C.; Dr. **Don Mathieson**, Q.C., editor of *Cross on Evidence* (N.Z. ed.); and Captain **Eric Deane**, RNZN (Ret), former Director of Legal Services. Best of luck in this new endeavor.

CANBERRA

The following announcement was issued on February 4, 2001:

80 000 TO TAKE PART IN MILITARY JUSTICE AWARENESS PROGRAM

More than 80 000 men and women from all ranks across the Australian Defence Force, regular and reserve, will take part in a nation-wide awareness program aimed at reinforcing the appropriate application and administration of the military justice system, the Minister Assisting the Minister for Defence, Bruce Scott announced today.

In an unprecedented move, almost 50 000 officers, sailors, soldiers and airmen and women are expected to take part in the two-hour awareness program to be held at Defence bases across Australia tomorrow morning (Monday 5 Feb). Some 30 000 Reservists will take part in the awareness program at the first available opportunity.

Mr Scott said the Federal Government had endorsed the program, which is designed to rebuild the confidence of servicemen and women in the ADF's military justice system, as well as to demonstrate to the Australian public the resolve of the ADF leadership to provide a safe and fair workplace for all ADF personnel.

"In a video address to the men and women of the Navy, Army and Air Force, the Chief of Defence Force, Admiral Chris Barrie, and the single Service Chiefs, Vice Admiral David Shackleton, Lieutenant General Peter Cosgrove and Air Marshal Errol McCormack will emphasise the requirement for members of the ADF to adhere to principles of military justice."

"Immediately following the video address by the Service Chiefs, Commanding Officers of individual ships, units and bases will conduct discussion sessions with their personnel on the issue of military justice," he said.

Commanding Officers will also discuss the existence of Equity Advisers as well as 1-800 helplines, which are designed to provide opportunities for personnel to receive advice on methods of reporting inappropriate behaviour if they do not wish to go to the direct chain of command.

Mr Scott said the awareness program will also inform service personnel of the Military Justice Audit process, headed by retired Federal Court Judge, Mr James Burchett QC, aimed at evaluating and improving the military justice system.

"All service personnel will be provided with information as to how they can contact the audit team to make individual submissions."

The audit team is looking to hear from personnel who have concern about the military justice system as well as hearing about what elements of the system is working well.

"Rough justice has no place in the ADF and I am confident that the military justice awareness program will greatly contribute to the restoration of confidence in the ability of the ADF to provide a safe and fair workplace for all personnel," Mr Scott said.

NEW DELHI

The Supreme Court of India (**Lahoti**, J.) held last month that administrative discharge action based on misconduct could be taken even though the conduct at issue could no longer be prosecuted by court-martial because of the statute of limitations. According to the opinion, as reported by **T. Padmanabha Rao** in *The Hindu*, "before any decision to initiate disciplinary action against any of the two respondents is taken, the conduct and behaviour of the respondents concerned during the 'intervening period' shall also be taken into consideration while deciding upon the desirability of proceeding further in the matter as this 'belated stage' (after over 20 years) and keeping in view, of course, the requirement of military discipline and the high traditions of the Indian Army."

READING LIST

The Interim Report of the Defense Task Force on Domestic Violence is available on the Internet at: www.dtic.mil/domesticviolence/ Report.pdf.

Domestic Violence Report (DVR), April/May 2001, has published "A Considerable Service: An Advocate's Introduction to Domestic Violence and the Military" by **Christine Hansen**, Executive Director, The Miles Foundation. DVR is published by Civic Research Institute, Inc. Information concerning copying, reprinting, distribution and adaptations may be obtained from the Civic Research Institute, Inc., (609) 683-4450, or The Miles Foundation, Inc., (203) 270-0688.

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June 2001

DIRECTORY OF CIVILIAN PRACTITIONERS OF MILITARY LAW: ADDENDA

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AMERICAN BAR ASSOCIATION

On April 28, 2001, the ABA's Standing Committee on Armed Forces Law met at the U.S. Coast Guard Academy in New London, CT. Among the items of interest:

Television Documentary. The services are cooperating in the production of a two hour documentary, being prepared for the History Channel, on the military justice system. The program will focus on four particularly important courts-martial, each significant in the development of the system.

CAAF. The numbers of both petitions and oral arguments is continuing to drop, to approximately 750 and 85, respectively, projected for this year. CAAF is attempting to release a majority of its pending opinions by July this year, vice August last year and September the prior year.

Overseas Jurisdiction. Discussions are underway between the Departments of Defense, Justice and State toward implementing the Overseas Jurisdiction Act passed by the last Congress.

MCM. The draft Executive Orders resulting from the 1998 and 1999 Annual Review, and implementing the 1-year SPCM changes, which were in the White House at the end of the last administration but never signed, have

been returned for review and reworking within DOD. Under policy established in the Bush Administration, these drafts will have to be reviewed and signed off by a political appointee of this administration prior to resubmission. It is unclear whether they will now be consolidated, or will be resubmitted individually as originally drafted. The 2000 Annual Review is also now on hold. The list of some 14 items proposed for the 2001 Annual Review will appear soon in the *Federal Register*.

JAA. The Judge Advocates Association will host a dinner on June 12, the evening prior to the opening of the CAAF Judicial Conference (June 13-14) at the Army-Navy Club in Arlington, Virginia, at which it will present its annual Career Judge Advocate Awards, and will present its "Robinson O. Everett Distinguished Lifetime Service Award" to MG **Keith E. Nelson**, USAF (Ret.), Chair of both SCAFL and the ABA Military Law Committee (of the General Practice, Solo and Small Firm Section). The Walter T. Cox, III Military Legal History Symposium (held in conjunction with the JAA's Military Administrative Law Conference) this October will address the handling of the My Lai Massacre case in the context of the International Criminal Court.

12-Member Fixed Capital Court-Martial Panel Recommendation. The SCAFL and the advisors present discussed a draft Recommendation and Report being circulated by the Bar Association of the District of Columbia, which BADC is considering proposing as a Recommendation to be considered by the American Bar Association at its annual meeting in Chicago in August 2001. The proposal is to amend the MCM or the UCMJ to require that panels in capital courts-martial be fixed at twelve members. The proposal would bring the military justice system into conformity

with the universal practice in this country for capital trial juries, and would remedy perceptions of (and in BADC's view the reality of) unfairness in the current variable size panels which may be any number more than four. During a lively discussion, representatives of the DOD and several services vigorously raised a number of concerns regarding the proposal. The SCAFL had determined, prior to the meeting, to use this meeting simply as an opportunity to have an open discussion regarding the proposal, and will take it up for further consideration and a vote at its meeting in Chicago on August 4, 2001. BADC has advised that it has revised the Report to include and address most of the concerns raised at the meeting, and that the Recommendation and Report will soon be available on the BADC website, www.badc.org, by clicking on "Committees" and then on "Military Law."

Cox Commission - MLC/SCAFL Program.

General Nelson announced that the CLE program scheduled for August 3, 2001 in Chicago, will be a two-hour program by Senior Judge **Walter T. Cox, III**, discussing the Report of the Commission on the Fiftieth Anniversary of the UCMJ, which is expected to be released on or about May 31, to coincide with the 50th anniversary of the effective date of the Code.

Future Meetings. The SCAFL will meet during the ABA Annual Meeting in Chicago on Saturday August 4, 2001 from 0800-1500 at a location not yet determined. SCAFL meetings are open to the public and all are invited to attend.

RECENT EVENTS

Dr. John Buck, an Air Force physician, goes on trial this month for refusing the anthrax vaccine. *R. v. Kipling*, a Canadian case in which similar charges were thrown out by the military judge, is pending appellate review in the Court Martial Appeal Court.

SOUTH AFRICA

On March 29, 2001, the High Court (Orange Free State Div.) handed down a seminal decision in *Postane v. Minister of Defence*. At issue was whether the legislative creation of a separate Director of Military Prosecutions violated the constitutional provision for "a single prosecuting authority." *Held*, the Military Discipline Supplementary Measures Act of 1999 is unconstitutional "to the extent that it refers to the prosecutions relating to the public offences committed by the members of the [defence force] inside the territory of the Republic of South Africa." "There has been a radical break with the past. It is not business as usual any more. The military is not immunised from the democratic change. Maintaining discipline in the defence force does not justify the infringement of the rights of the soldiers, by enforcing such military discipline through an unconstitutional prosecuting structure. I am not persuaded that the director of public prosecutions, an independent prosecuting authority, is incapable of prosecuting, without undermining military discipline, delinquent soldiers who commit crimes within the national boundaries of the Republic of South Africa." The decision is subject to automatic review by the Constitutional Court.

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MILITARY JUSTICE GAZETTE

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Independence Day Issue

July 4, 2001

PEOPLE

At this year's Judicial Conference, the United States Court of Appeals for the Armed Forces presented its Judicial Award for Public Service to Rear Admiral **John S. Jenkins**, JAGC, USN (Ret), and Captain **Kevin J. Barry**, USCG (Ret).

Stanley T. Fuger, a retired Coast Guard law specialist and military judge, has been confirmed as a judge of the Connecticut Superior Court.

Congratulations to all!

AMERICAN BAR ASSOCIATION

As usual, there will be many military-related events at the American Bar Association's annual meeting this August in Chicago, Illinois:

Thursday, August 2, 2001

6:30 p.m. Judge Advocates Association Dinner, Chicago Athletic Association

Friday, August 3, 2001

Military Law Committee of GPSSF, Regent Room, Third Level, Fairmont Hotel

8:00 a.m. Continental Breakfast

8:30 a.m. Business Meeting

11:00 a.m. PowerPoint Presentation by NIMJ board member **Dwight H. Sullivan**, concerning the Report and Recommendation on 12-Person Capital Courts-Martial

12:00 p.m. Military Law Luncheon, Chancellor Room, Third Level, Fairmont Hotel, Speaker: Judge **James E. Baker**, United States Court of Appeals for the Armed Forces

1:30 p.m. United States Court of Appeals for the Armed Forces, Admission Ceremony, Regent Room, Third Level, Fairmont Hotel

2:00 p.m. CLE – Report on the Commission on the Fiftieth Anniversary of the Uniform Code of Military Justice, Regent Room, Third Level, Fairmont Hotel, Speaker: Senior Judge **Walter T. Cox III**, Chairman of the Cox Commission

4:30 p.m. Judge Advocates Association Meeting, Regent Room, Third Level, Fairmont Hotel

Saturday, August 4, 2001

9:00 a.m. Continental Breakfast for the Standing Committee on Armed Forces Law – Burnham Room, Third Level, West Tower, Hyatt Regency

2001 PROPOSED CHANGES TO MANUAL FOR COURTS-MARTIAL

The *Federal Register* for June 6, 2001 (Volume 66, Number 109) included notice of a new round of proposed changes to the Manual for Courts-Martial, as well as information concerning a related public meeting of the Joint Service Committee on Military Justice (JSC). The proposed changes are the 2001 draft annual review required by the MCM and DoD Directive 5500.17, Role and Responsibilities of the Joint Service Committee dated May 8, 1996. According to the notice, the proposed changes concern the rules of procedure and evidence and the punitive articles applicable in trials by court-martial.

Among the proposals is one that would emphasize that facts that increase the maximum authorized punishment must be alleged and proven beyond a reasonable doubt. *See Jones v. United States*, 526 U.S. 227 (1999); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Another, following *United States v. Marie*, 43 M.J. 35 (1995), makes it clear that a witness beyond 100 miles from the site of the investigation is not per se unavailable. In keeping with *United States v. Dies*, 45 M.J. 376 (1996), periods during which the accused is on unauthorized absence are to be treated as excludable delay for speedy trial purposes. Other changes concern the power to exclude individuals from the courtroom.

Of note, one of the proposed changes will add the DoD Directive on "The Roles and Responsibilities of the Joint Service Committee (JSC) on Military Justice," DoDD 5500.17, as Appendix 26 to the Manual.

The proposed changes have not yet been coordinated within DoD. Comments must be received

no later than August 20, 2001 for consideration by the JSC. A public meeting will be held on Thursday, July 19, 2001 at 2:00 p.m. at Rm. 808, 1501 Wilson Blvd., Arlington, VA 22209-2403. Comments should be sent to Captain **Richard M. Burke**, USMC, Military Law Branch, Judge Advocate Division, Headquarters, United States Marine Corps, Room 5E618, Washington, DC 20380-1775, tel. (703) 614-3699/4250, fax (703) 695-8350.

*DIRECTORY OF CIVILIAN PRACTITIONERS
OF MILITARY LAW: ADDENDA*

MUSE, Robert F., Stein, Mitchell & Mezines, 1100 Connecticut Ave., N.W., Suite 1100, Washington, DC 20036, tel. (202) 737-7777.

THE LAW COURTS

The Court Martial Appeal Court in London will be hearing appeals in a variety of military test cases arising from the coming into force of the Human Rights Act 1998. At issue is whether, in light of article 6 of the European Convention on Human Rights, military courts should be permitted to try criminal offenses if those courts' structure and composition are not comparable with the civil jury trial system.

"COUNTRY ROADS, TAKE ME HOME"

Recently, NIMJ was dismayed to learn that an Army enlisted man who had been apprehended as a deserter by civilian law enforcement authorities in West Virginia was held in a county jail, without judicial review, for nearly three weeks before he was turned over to military authorities. We wrote to The Judge Advocate General of the Army to express concern over this delay.

450 E STREET, N.W.

The Court of Appeals will host a symposium on "Electronic Filing of Appellate Documents" on Friday, August 17, 2001, at the courthouse. The symposium begins at 10:00 a.m. Prof. **Frederic I. Lederer**, a member of NIMJ's advisory board, and other electronic filing experts will speak. Those wishing to

attend should contact Mrs. **Sherry Arter** at (202) 761-1448 ext. 607, by August 3, 2001.

CAPITOL HILL

Once again, in conjunction with the National Veterans Legal Service Program, NIMJ presented its annual briefing for congressional staffers, "Everything You Always Wanted to Know About Military Justice (But Were Afraid to Ask)." This year's panel consisted of **Kevin J. Barry**, **Philip D. Cave**, **Dwight H. Sullivan** and **David P. Sheldon**. Some 40 Hill staffers participated.

SOUTH AFRICA

Readers will remember that in March the High Court of South Africa invalidated several provisions of the Military Discipline Supplementary Measures Act, No. 16 of 1999, on the ground that they violate the "single national prosecuting authority" clause of the 1996 Constitution. The State Attorney has filed a Notice of Appeal with the Constitutional Court, taking issue with numerous aspects of the High Court's ruling. The case is *Minister of Defence v. Potsane*, OPD Case No. 2463/2000.

NIMJ

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MILITARY JUSTICE GAZETTE

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JOINT SERVICE COMMITTEE ON MILITARY JUSTICE

The Joint Service Committee on Military Justice held a public hearing on July 19, 2001, to receive comments on the 2001 Annual Review of the Manual for Courts-Martial (MCM), and the proposed changes to the MCM that were published in the *Federal Register* on June 6, 2001 (Vol. 66, No. 109, pp. 30431-37). NIMJ and the Bar Association of the District of Columbia attended.

DOD proposes to publish DOD Directive 5500.17 (1996 ed.) as an appendix to the MCM, to make the public aware of the process for amending the MCM and for receiving public input. NIMJ pointed out (as we did last year) that this directive needs to be revised and reissued because it is neither the version currently found in the CFR (which is a 1985 edition) nor does it reflect current JSC procedures, which were amended in 2000.

A proposed change to RCM 405(g)(1)(A) would make it clear that witnesses from beyond 100 miles are not automatically "unavailable" for Art. 32 investigations. We suggested that the rationale for the 100-mile rule itself should be revisited. Similarly, the 100-mile rule and the other regulations addressing the non-"reasonable availability" of military attorneys as individual military counsel (IMC) should be reconsidered, since, in some services, they virtually nullify the statutory right to IMC.

A proposed change to RCM 707(b)(3)(D) would make it clear that the 120-day speedy trial rule applies to rehearings on sentence. However, we suggested that the proposed use of an Art. 39(a) session (an RCM 803 session) as the event that stops the speedy trial clock is inappropriate and could chill defense motion practice well prior to the time of the sentencing hearing. It seems that assembly of the court or reception of evidence on the issue of sentencing would be the more appropriate event to stop the clock.

NIMJ questioned the wording of proposed RCM 916(k)(2), designed to allow evidence of partial mental responsibility on "state of mind" issues. The proposal raises a confusing issue of whether partial mental responsibility amounts to an affirmative defense. The better approach seems to be to merely make such evidence admissible whenever it is relevant to an issue before the court.

We also questioned whether the change to RCM 1107(e)(1)(B)(4) ought to specifically authorize the convening authority (CA) to reassess a sentence rather than ordering a rehearing where part of the findings have been set aside by an appellate court. Whether the CA, as the official exercising prosecutorial discretion, should any longer be viewed as an appropriate official to determine and impose an appropriate sentence is at issue. Reference was made to the rationale regarding CAs contained in the report of the Cox Commission. (DOD's General Counsel has referred the report to the JSC for consideration of possible items for a future annual review.)

Finally, NIMJ addressed ¶ 57(c)(2)(B) and the requirement that the element of the offense of materiality regarding

false testimony (Art. 131) must be sent to the members and could not be decided by the military judge in an interlocutory ruling. NIMJ suggested the JSC review other offenses which contain elements of the offense (such as "lawfulness" of orders under Art. 92; officiality of a statement under Art. 107 might be another) which have been decided in the past by the MJ, to determine if the rationale applicable to Art. 131 applies as well to other (or all) elements of the offense.

Written comments are due by August 20, 2001.

OTTAWA

The 2000-2001 Annual Report of the Judge Advocate General to the Minister of National Defence on the administration of military justice in the Canadian Forces is available online at www.dnd.ca/jag/hl_annualreporte.html#top.

LONDON

The House of Lords has granted leave to appeal in the court-martial cases of *Hastie* and *Spear*. The cases raise the question whether a permanent president of a court-martial lacks the characteristics of independence and impartiality that are required by article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

STRASBOURG

The European Court of Human Rights has scheduled *Morris v. United Kingdom* for an oral hearing on October 23, 2001. The case tests the validity of the new (post-1997) British Army court-martial system under the European Convention.

THE PENTAGON

On May 16, 2001, DOD issued a memorandum establishing policy for implementing § 5 of the DNA Analysis Backlog Elimination Act of 2000, 10 U.S.C. § 1565. DNA samples must now be collected from all armed forces members convicted of a qualifying offense (listed below) except those who are currently in Bureau of Prisons institutions or on parole under the supervision of a federal probation officer. Collection will include all military prisoners, those who are not confined but are still under military jurisdiction (*i.e.*, those on appellate leave) and those convicted in the future. The procedure extends to both general and special courts-martial. Samples will be analyzed by the Army Criminal Investigation Laboratory and then sent to the FBI for inclusion in that agency's database. There is a procedure for expungement if a conviction is overturned.

The qualifying offenses are murder, voluntary manslaughter, rape, carnal knowledge, forcible sodomy, sodomy

with a child, aggravated assault (either with a dangerous weapon or other means likely to produce grievous bodily harm, or in which such harm was intentionally inflicted), indecent assault, indecent acts with another, indecent acts with a child, indecent language to a child, pandering, prostitution involving a minor, kidnapping, robbery, burglary, housebreaking, maiming, arson, assault with intent to commit one of the following (murder, rape, involuntary manslaughter, robbery, sodomy, arson, burglary, housebreaking or any other qualifying offense), attempts to commit any of the above, conviction for any conduct similar to the above offenses, any conduct which involves sexual abuse or any sexual conduct which involves a minor when charged under Articles 134 or 133, conviction for various federal statutes under title 18 (§§ 2421, 2422, 2423, 2425, 2251, 2251A, 2252).

MILITARY JUSTICE 101

Among the offenses charged in *United States v. Nourse*, No. 01-0020 (CAAF July 17, 2001), was larceny of thousands of dollars of ponchos from the Orleans Parish (Louisiana) Criminal Sheriff's Office, at which the accused, a Marine, was a part-time employee. *Solorio v. United States*, 483 U.S. 435 (1987), aside, should larceny from a civilian law enforcement agency be prosecuted by military rather than civilian authorities? In class we will role-play, with one student taking the part of the staff judge advocate and another taking the part of the district attorney. Which jurisdiction should try the case, and why?

NIMJ'S BELIEVE IT OR NOT

The following appears in the record of trial of a Navy general court-martial tried earlier this year:

ADC: This is an earthquake.

MJ: Earthquake. Okay. Everyone should probably get under something solid. The court's in recess for an earthquake. [The court-martial recessed at 1056 hours, 28 February 2001.] [The Article 39(a) session was called to order at 1145 hours, 28 February 2001.]

MJ: The court is called to order. All parties present when the court recessed for the earthquake are again present. And the members have returned to the deliberation room. . . .

DOMESTIC VIOLENCE

The Miles Foundation will support the publication of the *Intimate Partner Violence and the Military: A Victim's Handbook* in local community versions. The small grant program will support the drafting, publication and distribution of editions containing specific information and resources within a community. The program is designed to support agencies, organizations, shelters, centers and advocates providing direct services to this special population. For example, a shelter program may include specific references to state laws, protective order application and enforcement, legal aid, law enforcement referrals, specialized services and social services information. The foundation is soliciting applications from shelters, agencies, organizations, practitioners, social service providers, healthcare provid-

ers, community groups who provide direct services to the military community. The initial letter (no more than 3 pages) should describe the applicant organization's mission; residential and nonresidential services; population served annually; demographic characteristics of the group's client population; details as to the special population (military community) served; typical/most frequent service request of the special population; and collaborative relationships or partnerships. The deadline for submissions is September 1, 2001. For additional information, contact **Kate Summers**, Advocacy Director, The Miles Foundation at (203) 270-0688 or MilesfdnADV@aol.com.

DIRECTORY OF CIVILIAN PRACTITIONERS OF MILITARY LAW: ADDENDA

FREEDUS, Matthew S., Feldesman, Tucker, Leifer, Fidell & Bank LLP, 2001 L St., N.W., 2d Floor, Washington, DC 20036, tel (202) 4660-8960, fax (202) 293-8103, e-mail: mfreedus@feldesmantucker.com

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AMERICAN BAR ASSOCIATION

There was much of interest to the military bar at the ABA's annual meeting in Chicago. In the Military Law Committee of the General Practice, Solo, and Small Firms Section of ABA, chaired by MG **Keith Nelson**, USAF (Ret.), reports were presented by the services, the Court of Appeals, NIMJ, the JAA and the Canadian JAG. **Dwight Sullivan** discussed the Bar Association of the District of Columbia ("BADC") recommendation that capital court-martial panels be comprised of 12 members, in place of the current variable number of five or more. The MLC did not vote on the proposal or make a recommendation to the Section Council as to whether to support it in the House of Delegates.

Senior Judge **Walter T. Cox III** described the establishment, function, and recommendations of the Commission on the 50th Anniversary of the UCMJ, which he chaired and which issued its report (see www.nimj.org) in May. There followed a spirited discussion of several of the Commission's recommendations. Judge Cox indicated that the scope of the Commission's inquiry was limited (in part by resources), that the report addressed only matters on which the members were able to reach relatively swift and unanimous agreement, and that he did not consider it the "bottom-up" review which the Commission indicated the system needed.

The Standing Committee on Armed Forces Law met for the last time under the chairmanship of General Nelson. BG **John Cooke**, USA (Ret.), succeeds him. New members include **James Durant**, **Donna Bucella** and **Fletcher Handley**. The BADC recommendation was the principal item of business, generating a lively discussion, with DOD and several services taking the position that since the same recommendation had just been referred to the Joint Service Committee for review with the other Cox Commission recommendations, they should be allowed an opportunity to conduct that review and formalize a position before the matter was sent on for ABA consideration. SCAFL voted to recommend that the matter be deferred to allow DOD to study the issue, with a report due by May 2002. (The report accompanying the BADC recommendation notes that the same issue had been discussed at the April 2001 SCAFL meeting in New London, where representatives of DOD and the services voiced a number of concerns, which were then discussed in the report.)

When the 12-member recommendation came before the House of Delegates, it was presented by BADC President **J. Gordon Forester**, who concluded by pointing to the ABA slogan "Defending Liberty, Pursuing Justice" and stating that military persons are the ones who are indeed "defending liberty" and that this is a chance for the ABA to "pursue justice" on their behalf. No speaker rose in opposition, and the recom-

mendation was adopted with 94% of the votes cast in favor. [The current House of Representatives version of the FY02 DOD authorization bill requires not less than 12 members on capital courts-martial and authorizes accuseds who are tried by members to elect sentencing by the military judge.]

INTER-UNIVERSITY SEMINAR ON ARMED FORCES AND SOCIETY

This year's biennial meeting will be held at the Tremont Plaza Hotel, 222 St. Paul Place, Baltimore, on October 19-21, 2001. There will be a broad range of panels, including one on Law and Armed Forces, to be chaired by NIMJ advisory board member Professor **Diane H. Mazur** (Univ. of Florida College of Law), on Saturday, Oct. 20, 2:00 to 3:30 p.m. For further information contact **Maby Palmisano**, IUS Secretariat, Sociology Department, University of Maryland, College Park, tel (301) 405-6013, fax (301) 314-1314, mpalmisano@soc.y.umd.edu.

DEPARTMENT OF DEFENSE INSPECTOR GENERAL

The Department of Defense Inspector General's Office recently evaluated the sufficiency of subpoena power within DOD in support of general crimes investigations. After surveying the various military criminal investigative organizations, such as the Naval Criminal Investigative Service and the Air Force Office of Special Investigations, the IG reported that these organizations "lack fully effective mechanisms for compelling production of evidence in general crimes investigations." The report identified a number of circumstances where subpoena power was needed but not available and as a result some investigations were incomplete others precluded. This insufficiency exists because the services have limited subpoena power during the pre-referral stage of cases, and the DODIG rarely exercises its subpoena power unless DOD is the victim. Ultimately the report recommended additional subpoena power within the military justice system. The report is available online: www.dodig.osd.mil/dcis/cipo/reports/subpoena.pdf.

From a practice standpoint, the report does not address the fact that Article 46 of the UCMJ provides equal access to witnesses and evidence to the prosecution and defense. Therefore, it might be suggested that expansion of the government's authority to obtain evidence should come with an equivalent expansion in power for the defense. As matters stand, the defense does not have equal access, so an expansion in the government's power would further tip the scales. The government can obtain evidence without notice to the court or the defense, while the defense must make a motion to compel production (trial subpoena) which is on notice to the government. The government gets to hold its cards close to its chest, while the defense must lay its cards on the table face up. The defense can bring an

ex parte motion to compel production, but this practice is rarely done in military practice and viewed with skepticism by judges who may not have adopted that course when doing trial work. To preserve the issue for appeal, trial defense attorney can make an *ex parte* motion. This is one of those areas where military justice simply does not mirror district court practice.

Matthew S. Freedus

BOOK REVIEW: 2d Annual Report of the Judge Advocate General to the Minister of National Defence on the administration of military justice in the Canadian Forces (2001)

Reading the second annual report of the Canadian JAG, which covers 2000-2001, reminded me of Peter Ustinov's famous quip, that Toronto was New York run by the Swiss. Tidy and organized, the report – available online at www.dnd.ca/jag/jag_pdf_docs/2001annualreport_e.pdf – portrays a well-oiled and smooth-running corps with the self confidence to know what it does well and what it can do better.

Though mostly bureaucratese, the report appears to have been written (thankfully) by bureaucrats who mostly adhere to *Strunk & White*. (I read the English version; a French version is also available.) Interesting tidbits emerged as well from the interstices of the many charts and lists. Of 202 charges brought against defendants in 63 courts martial in the year between April 2000 and 2001, a full 28, or nearly 14%, involved related crimes such as “Fishing without a license,” “Possession of undersized lobster,” and “Possession of a female lobster with eggs.” (Something seems to have gone gravely wrong one day in Shearwater, Nova Scotia.) As a U.S. Army JAG officer (first in the reserves, then on active duty in the Balkans), I can tell you, at least anecdotally, that the U.S. Army JAG Corps has (forgive me) bigger fish to fry. Of the remaining offenses charged for the year in Canada, only six involved unlawful narcotics, and only three were for “sexual exploitation” and one for “sexual assault”; in the U.S. Armed Forces, sadly, those numbers are probably about average for every two weeks. Only two members of the Canadian Forces were charged with intentional violence (assault).

Part of the difference, of course, stems from the sheer massiveness of the U.S. Armed Forces and the comparatively minuscule size of the Canadian Forces and the forces' respective missions, with correspondingly dramatic differences in the sizes of the two nations' JAG Corps. The Canadian JAG Corps, says the report, is made up of 108 active duty officers and 61 reserve officers; in fiscal year 2000, the U.S. Army JAG Corps – and this is the Army alone, not the Navy, Air Force, or Marines – had more than 1400 officers on active duty alone. And consider their relative courts-martial caseload: the Canadian JAG Corps tried 63 cases during its reporting year; the U.S. Army JAG Corps tried over 1100.

But part of the contrast between the U.S. and Canadian experiences, I suspect, is due to factors other than numbers. Consider the difference between New York and Toronto, which are not that far apart in size, as well as the anecdotal differences in American and Canadian sensibilities. Surely cultural, political, sociological factors in American and Canadian have influenced the culture of their armed forces and thus their systems of

military justice. How? Why? The Canadian report does not, of course, get anywhere close to answering these interesting questions, but it raises them, and I can only hope that a hungry doctoral student may be paying attention.

Arnon D. Siegel

[*Ed. note:* The report indicates that the advisory panel on military justice consists of a superior court judge with military justice experience, senior federal and provincial Crown Counsel, and two prominent members of the defense bar. The military judges' selection committee consists of a lawyer or judge nominated by the JAG, a civilian lawyer named by the Canadian Bar Association, a civilian judge named by the Chief Military Judge, an officer in the grade of Major General or above, nominated by the Chief of Defence Staff, and a CWO or CPO First Class, also nominated by the Chief of Defence Staff.]

EUROPE

In *R. v. Williams*, the UK Court Martial Appeal Court rejected the contention that a court-martial is not an independent and impartial tribunal as guaranteed by the European Convention on Human Rights, but certified a point of law of public importance, enabling the appellants to appeal to the House of Lords. The certified point concerns whether trial by court-martial for civilian offenses is compatible with the Convention, as introduced into English law by the Human Rights Act 1998. In *Mills v. United Kingdom*, No. 35685/97 (June 5, 2001), the European Court of Human Rights found that a 1995 general court-martial, upheld by the Court Martial Appeal Court, violated the Convention's guarantee of an independent and impartial tribunal. Mills was awarded costs and expenses of £1,000.

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BOOKSHELF

Among the *Gazette's* summer reading was **Jack A. Bunch**, *Military Justice in the Confederate States Armies* (White Mane Books 2000, 209pp., \$29.95). With a title like this, it would be hard for anyone interested in military justice to resist acquiring this book. Unfortunately, it will leave lawyer-readers highly frustrated because it conveys only a limited and unsystematic sense of the legal issues that arose in these courts, much less of their place in the development of American military justice generally. On a brighter note, it is at least helpful to have the Confederate Articles of War and the separate statute providing for three-member standing military courts to be attached to each Army corps. The members, who received the pay of a colonel of cavalry, were presidentially-appointed, subject to the advice and consent of the Confederate Senate, and were to hold office "during the war, unless the court shall be sooner abolished by Congress."

Readers interested in foreign military justice developments will find it engrossing to read *Law Relating to the Armed Forces in India* (Universal Law Pub. Co. Pvt. Ltd., Delhi, 3d ed. 1999), by Brigadier **Nilendra Kumar**, Deputy Judge Advocate General, and **Rekha Chaturvedi**. This is an excellent reference work, with numerous helpful summaries of Indian military cases decided through April 1999. Many of the cases arose in the context of courts-martial, but a good number relate to other kinds of personnel issues. Regrettably, the book does not include an overall essay on the Indian military justice system.

Closer to home, **Randall D. Katz** has written *Friendly Fire: The Mandatory Military Anthrax Vaccination Program*, 50 DUKE L.J.

1835 (2001). It is available online at www.law.duke.edu/journals/dlj/articles/dlj50p1835.htm.

450 E STREET, N.W.

The United States Court of Appeals for the Armed Forces has issued a notice of proposed rule making for changes in Rules 13(c), 20(b)-(c), 21(b), 24, and 41(a). 66 FED. REG. 35,226 (July 3, 2001). Detailed explanations are included with the notice. Among other things, it appears that the Court will be increasing its fee for admission to the bar. Another change calls for inclusion of counsel's e-mail address in petitions for grant of review. Comments should be sent to **William A. DeCicco**, Clerk of the Court. The notice provides for a 60-day comment period (which expires **September 1**, a Saturday). The *Gazette* of course cannot speak for the Court, but it would be surprising if comments received soon thereafter were disregarded.

INTER-UNIVERSITY SEMINAR ON ARMED FORCES AND SOCIETY

Reminder: the biennial meeting will be held at the Tremont Plaza Hotel, 222 St. Paul Place, Baltimore, on October 19-21, 2001. For further information contact **Maby Palmisano**, IUS Secretariat, Sociology Department, University of Maryland, College Park, tel (301) 405-6013, fax (301) 314-1314, mpalmisano@socy.umd.edu.

NIGERIA

In *Brigadier-General Gabriel Anyankpele v. Nigerian Army*, [2000] 13 Nigerian Weekly L. Rep. 209, the Court of Appeal (Lagos Division) allowed the appeal by a Chief of Staff and Nigerian Contingent Commander for ECOMOG in Liberia from a decision of the

former Armed Forces Disciplinary Appeal Committee. The case involved charges of (1) disobedience of a general order by shipping an automobile and (2) conduct to the prejudice of good order and discipline by sending a sum of money to the commander of a unit that was investigating illegal importation of cars and sundry contraband goods. The Court of Appeal ruled, among other things, that a letter as to the dissemination of which there was no evidence did not qualify as a standing (in our parlance, general) order. It also made the following observations concerning General Anyankpele's Point 3(a) ("Whether the constitutional right of fair hearing of the appellant was not breached by the entire system by the facts that the COAS [Chief of Army Staff] who convened the GCM appointed the president and members of GCM. The Judge Advocate who sat with the GCM was also appointed by the said COAS. At the end of the proceedings, the same COAS confirmed the findings and sentence passed on the appellant. And whether the maxim that 'a man cannot be a judge in his own cause' has been violated"):

"The appellant was saying no more than that his right to fair hearing was breached. Under section 131(2) of the [Armed Forces Decree, 1993] the Chief of Army Staff was the convener of the General Court Martial set up to try the appellant; he appointed the members of GCM, the Judge Advocate. He is also the confirming authority of the judgment of the GCM. Can the appellant be reasonably expected to believe that he would have fair hearing before such a body? Can the members of the GCM themselves claim to be impartial and seen to be so? It must not be forgotten that the composition of the GCM carries with it the authority to exercise judicial powers by its members. Impartiality is the greatest attribute which any adjudicating body must always lay claim to. This means that not only must the judge not appear to favour either party he must not take sides on any political issues. . . . Even in the military, a situation where a jun-

ior officer will suddenly find himself sitting in judgment over his superior may provide him a long awaited opportunity to take vengeance over a perceived over-bearing erstwhile superior officer. This is true of any judicial body or quasi judicial body so set-up to perform judicial functions. A situation where the accusers shall be the prosecutors and the judge at the same time can never guarantee fair hearing or fair trial. Such tribunal or adjudicating body constitutes a serious infringement on the principle of natural justice which demand that party must be heard before the case against him is determined—*audi alteram partem*—that no one shall be a judge in his own cause—*nemo debet esse judex in propria causa* . . . Issue (3)(a) is therefore answered in the affirmative; right of fair hearing was breached. . . ." (citation omitted). The Court declined to address (as hypothetical) the impact of a decree promulgated after General Anyankpele's trial under which a convening authority has no power of confirmation over findings and sentences.

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JOINT SERVICE COMMITTEE ON MILITARY JUSTICE

[NIMJ sent the following letter to the Joint Service Committee on Military Justice on August 21, 2001, in response to a notice of proposed amendments to the *Manual for Courts-Martial*, 66 FED. REG. 30,431 (June 6, 2001).]

The National Institute of Military Justice (NIMJ) is a District of Columbia nonprofit corporation organized in 1991. Its overall purpose is to advance the administration of military justice in the Armed Forces of the United States. Since its inception, NIMJ has been an interested observer of the Joint Service Committee on Military Justice (JSC) and of the Manual for Courts-Martial (MCM) rulemaking process, and has regularly commented on proposed changes to the MCM. As part of our effort to foster a robust rule making process, NIMJ has helped to disseminate information about proposed or final changes to the MCM as well as related hearings convened by the JSC through the monthly *Military Justice Gazette*. NIMJ is pleased to be able to continue to be an active participant in this important process.

NIMJ's concern in several past submissions has been the adequacy of the rulemaking process. Our comments today again reflect this concern—which is largely unchanged from last year, when we wrote:

In February this year [2000] the Joint Service Committee (JSC) adopted new procedures to encourage public participation in the MCM rulemaking process. One of the significant changes was to issue an annual invitation to the public to submit proposals for change to the MCM for consideration by the JSC. This Federal Register notice is believed to be the first to include this invitation for the public to submit such proposals. NIMJ's concerns are with the wording of the invitation, and its implications. The following language is used:

Proposals *should* include reference to the specific provision you wish changed, a rationale for the proposed change, and specific and detailed proposed language to replace the current language. *Incomplete submissions will not be considered.*

65 Fed. Reg. at 30965 (emphasis added).

NIMJ does not dispute the desirability, where feasible, for those making proposals to submit completed proposals with full rationales and justifications, and proposed language to implement the proposed changes. Indeed, submission of a "redlined" text, indicating all changes to the current MCM, would be a decided help to those reviewing such proposals. Accordingly, the use of the word "should" is appropriate.

However, the notice then indicates that proposals without such detailed rationales or proposed language "will not be considered." NIMJ perceives this as a provision which will have a "chilling effect" on the submission of proposals. Many individuals or organizations may well perceive problems in the current MCM, or areas in which current procedures could be improved, and wish to propose changes, without having the time or expertise to produce the kind of proposal which has long been required of members of the JSC who wish to make proposals for change. NIMJ believes that such ideas and proposals should not be discouraged. Instead, the burden should fall to the JSC, rather than to the public, to not only consider *ideas* for change which are submitted, but in addition (in the absence of specific implementing language submitted by the proposer) to take it upon itself to prepare full proposals to implement any ideas for change submitted by outside entities or persons which are deemed meritorious.

NIMJ also believes that the notice could be clarified to note that proposals from the public which are not submitted within the public comment period will still be considered, but *may not* be able to be included in the next Annual Review.

We note, for example, that one of the substantive changes appears to implement a case decided by the Court of Appeals for the Armed Forces in January, 2000. It thus appears that, at least in some cases, far less than a full Annual Review cycle is required to produce proposed changes.

Accordingly, NIMJ recommends that the JSC procedures be amended to respond to these suggestions, and that the public be notified of these change when future invitations are issued.

NIMJ notes that the only change to the language included this year is the change to the final sentence from "Incomplete submissions will not be considered" to "Incomplete submissions *may not* be considered" (emphasis added). This is certainly an improvement. However, the failure to make the other changes we recommended leaves the impression that any submissions which do not include complete "specific and detailed language" run the risk of being disregarded. This may discourage participation by members of the public and by military personnel not associated with the JSC. Substance, rather than form, should be the JSC's watchword.

Also on the rulemaking process, last year we made the following comment:

In addition, and as previously recommended, NIMJ submits that the JSC "Internal Organization and Operating Procedures" document is not the most appropriate vehicle for promulgation of rules applicable to public participation in the MCM rulemaking process, and that these rules should be included in appropriate DOD Directives published in the Code of Federal Regulations and in the Manual for Courts-Martial. NIMJ again recommends that these procedures be suitably

promulgated.

This year the Department proposes to publish DOD Directive 5500.17 (1996 ed.) as an appendix to the MCM, to make the public aware of the process for amending the MCM and providing public input. We applaud the decision to publish rulemaking procedures in the MCM. However, as we have previously pointed out, and as was acknowledged at the public hearing on July 19, 2001, the 1996 version of this DOD Directive is neither the version currently contained in the CFR (which is the 1985 ed.), nor does it reflect current JSC procedures, which were amended in writing in the February 2000 revision to the JSC "Internal Organization and Operating Procedures." NIMJ once again urges that procedures affecting the public should be properly adopted and promulgated. The JSC internal procedures document is the only place that the current procedures under which the JSC is apparently operating are found. Promulgation in the MCM of a DOD Directive which does not conform to these procedures, and which conflicts with the earlier DOD Directive on the same subject (which, since it is published in the CFR, is the apparent current federal law on the subject), will only add confusion. The DOD Directive should be updated, and published both in the MCM and in the CFR.

Finally, with regard to the process, NIMJ continues to be concerned with the inadequacy of the Federal Register notice of proposed changes. One of our reviewers noted the extraordinary difficulty of attempting to comment on proposed changes that are published without adequate (in some cases without virtually any) discussion of what concerns motivated them, or what the intended or anticipated effect of the changes would be, and that the failure to provide a sufficient rationale for proposed changes is another barrier to public participation. In failing to publish adequate rationales, the Department falls short of the very standard it sets for submissions by the public. Notice of proposed changes should be upgraded to conform with the standards for other federal rulemaking.

NIMJ has the following comments on the substantive changes proposed in the notice. (Because of the lack of explanations noted above, NIMJ is not always able to determine why the JSC deemed the particular rule preferable to the alternatives.)

A proposed change to RCM 405(g)(1)(A) would make it clear that witnesses from beyond 100 miles are not automatically "unavailable" for Art. 32 investigations. We suggest that the rationale for the 100-mile rule itself should be revisited. Similarly, the 100-mile rule and the other regulations addressing the non-"reasonable availability" of military attorneys as individual military counsel (IMC) should be reconsidered because, in some services, such rules virtually nullify the statutory right to an IMC.

A proposed change to RCM 707(b)(3)(D) would make it clear that the 120-day speedy trial rule applies to rehearings on sentence. However, we suggest that the proposed use of an Art. 39(a) session (an RCM 803 session) as the event that stops the speedy trial clock is inappropriate and could influence defense motion practice well prior to the time of the sentencing hearing. Assembly of the court or reception of evidence on sentencing would be the more appropriate event to stop the clock. The Federal Register notice does not indicate whether other points or events were considered, and, if so, why they were rejected.

NIMJ questions the wording of proposed RCM 916(k)(2), designed to allow evidence of partial mental responsibility on "state of mind" issues. The proposal raises a confusing issue of whether partial mental responsibility amounts to an affirmative defense. Why not simply make it clear that such evidence is admissible whenever it is relevant to an issue before the court? Perhaps there is some reason for the proposed approach, but none is discussed. The final rule should disclose the rationale for retaining or changing the proposal.

NIMJ also questions whether the change to RCM 1107(e)(1)(B)(4) ought to specifically authorize the convening authori-

ty (CA) to reassess a sentence rather than ordering a rehearing, where part of the findings have been set aside by an appellate court. Whether the CA, as the official exercising prosecutorial discretion, is an appropriate official to determine and impose—in the first instance—an appropriate sentence is at issue. Does such a power derive from the same authority currently existing to "disapprove, suspend or mitigate" a sentence? It does not appear to. Can a superior court "conditionally" set aside a sentence, as was purported to be done in the cited case of *United States v. Harris*, 53 M.J. 86 (2000)? Has not the superior authority in setting aside some findings and authorizing a rehearing "as to other offenses and the sentence" (as stated in the proposed rule) at least implicitly set aside the sentence? Can a CA then "reassess" a sentence that no longer is a valid sentence? It appears that this proposed rule makes the CA the sentencing authority in the first instance, something which is clearly unauthorized under the Code. Even *Harris*, as interpreted by the two judges who concurred in the result, "appears to hold that the Court of Criminal Appeals erred by giving the convening authority an option to order a rehearing or reassess the sentence." 53 M.J. at 88 (Gierke, J. with Crawford, C.J., concurring in the result). This important issue should not be resolved *sub silentio*. In reconsidering this proposal, we recommend that the rationale contained in the Cox Commission Report recommending the removal of the CA from the role of selecting members be applied to the role of the CA in this arena also.

Finally, NIMJ notes the change to ¶ 57(c)(2)(B), and the clarification of the requirement that the element of the offense of materiality regarding false testimony (Art. 131) must be sent to the members, and cannot be decided by the military judge in an interlocutory ruling. NIMJ suggests the JSC review other offenses which contain elements of the offense (such as officiality of a statement under Art. 107) to determine if the rationale applicable to Art. 131 applies as well to other (or all) elements of the offense. We also recommend the Committee consider Article 92, and whether a regulatory clarification regarding lawfulness as an element of the offense might be appropriate. We note the recent decision in *United States v. New*, 2001 CAAF LEXIS 676, overruling years of military practice in determining that lawfulness is not an element of the offense. For many years the practice allowed the issue to be determined by the military judge as a matter of law *only* when it was "clear" that it was solely a legal issue; otherwise it was always an issue for the panel.

NIMJ appreciates the opportunity to comment on these proposed changes.



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CAPITOL HILL

[NIMJ sent the following letter on August 10, 2001.]

Hon. Bob Stump, Hon. Ike Skelton, Hon. John
McHugh, Hon. Vic Snyder
Committee on Armed Services
House of Representatives

Dear Mr. Chairman and Representatives Skel-
ton, McHugh and Snyder:

I am writing on behalf of the National Institute of Military Justice ("NIMJ") to endorse Sections 571 and 572 of Subtitle H of the Committee's markup of the FY02 National Defense Authorization Act. NIMJ is a nonprofit corporation, founded 10 years ago, that seeks to promote fairness in and public understanding of the military justice system. Our directors include law professors, private practitioners and other experts in the field, none of whom is currently on active duty, but nearly all of whom have served as active duty military lawyers, up to and including flag and general officer ranks. The Institute is independent of the government and relies exclusively on voluntary contributions for its programs.

NIMJ commends the Committee for proposing these crucially important reforms. The legislation is an outstanding example of Congress's exercise of its authority under the Constitution to make rules for the government and regulation of the land and naval forces.

Providing for 12-member capital courts-martial and allowing sentencing by military judge, at the option of the accused, even when a case is tried before members were among the recommendations of the Commission on the 50th Anniversary of the Uniform Code of Military Justice, which the Institute sponsored. I have previously sent you and the other mem-

bers of the Committee copies of the report of the Commission, which is commonly called the Cox Commission because it was chaired by Senior Judge Walter T. Cox III of the United States Court of Appeals for the Armed Forces.

NIMJ endorses these two recommendations of the Cox Commission. (Thus far, we have taken no position on the Commission's other recommendations, which would certainly be an appropriate subject for congressional hearings.)

Section 571 could be improved by deleting three words: "not less than." This would fix the number of members at 12, thus doing away with variably-sized capital court-martial panels. With the exception of the U.S. military, every death penalty jurisdiction in the Nation empanels juries of 12, no more and no less. Providing for exactly 12 members rather than not less than 12 would bring the military justice system into line with its civilian counterparts. This would also be consistent with Congress's preference that military justice procedure mirror that used in the federal district courts, *see* Uniform Code of Military Justice art. 36, 10 U.S.C. § 836, since defendants in civilian federal capital cases are entitled to a 12-member jury. *See* Fed. R. Crim. P. 23(a), 18 U.S.C. § 3593(b).

Limiting the number of members to 12 will minimize whatever additional administrative burden Section 571 might create for commands that convene capital cases, and would be consistent with a recommendation adopted by the American Bar Association House of Delegates on August 6, 2001.

The Committee is to be commended for its vision in proposing these important military justice changes, enactment of which will help foster public confidence in the fair administration of military justice.

AUCKLAND

The Armed Forces Law Association of New Zealand is holding its first annual General Meeting and Conference in Christchurch on October 3 and 4. NIMJ Director **Kevin J. Barry** plans to attend and will both represent NIMJ and present a paper on the United States military justice system and the report of the Cox Commission. His paper, along with articles from New Zealand and the United Kingdom, will be published in the inaugural issue of the *New Zealand Armed Forces Law Review*, to be published in conjunction with the Conference. Kevin has offered to carry home copies of the Law Review for any of our U.S. readers who wish to purchase one. The cost is US\$25.00 (plus US\$3.50 for postage and packaging for mailing). If you are interested, please contact Kevin at kjbarry@erols.com. To ensure availability of a copy, orders should be placed no later than September 14. For all others, or to obtain a copy directly, contact Lieutenant Commander Chris Griggs at cj.griggs@clear.net.nz.

COMING SOON

The next *Gazette* will be No. 100. This special issue will be a detailed index of all issues of the *Gazette*. In connection with our 10th anniversary (October 3, 2001), NIMJ is preparing a paperback volume of all *Gazettes* to date. A limited number of copies will be available at a modest charge. Let us know if you are interested in obtaining one.

NAME THAT MAN

What better way to kick off the new Term than with a contest? The challenge: name the town crier on our masthead. The winner will receive a free copy of the collected *Gazettes* (see above). Rules: one entry per person, must be received by e-mail no later than Sept. 24, 2001 at 11:00 a.m. The decision of the judges will be final. NIMJ officers, directors and advisors, and their families, are ineligible.

Send your entry to efidell@feldesmantucker.com.

ANNUAL CONFINEMENT REPORTS

Among the most important but rarely read documents in the military justice field are the Annual Confinement Reports (DD Form 2720) prepared by each service. According to the Army's report for 2000, for example, there were 47 officers in Army confinement facilities as of Dec. 31, 2000, 42 of whom were under sentences of one year or more. There were 489 post-trial inmates in the U.S. Disciplinary Barracks, as against a total design capacity of 1700 and total operational capacity of 1500. Fifteen parole violators had been returned, along with 2 escapees. Thirty-six confines were restored to duty. Sixty-one inmates were transferred to the Bureau of Prisons. One thousand and two confines had victim/witness notification requirements.

NIMJ

Grant Lattin has been elected to the advisory board. Welcome aboard, Grant!



NIMJ, a District of Columbia nonprofit corporation founded in 1991, receives no government funding. Please send your tax-deductible contribution to the address shown below, and circulate M.J. Gaz. to friends and colleagues. If you are not yet on the e-mail list but would like to be, let us know. Don't forget to download your free copy of the Cox Commission report from our website, www.nimj.org.

President.....Eugene R. Fidell
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KEVIN J. BARRY



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Our Second Decade of Service

October 2001

450 E STREET, N.W.

Memorial Proceedings for Victims of the September 11, 2001 Terrorist Attack

October 3, 2001

Present:

Susan J. Crawford, *Chief Judge*

H. F. "Sparky" Gierke and **Andrew S. Effron**, *Associate Judges*

Eugene R. Sullivan, *Senior Judge*

The Court convened at 9:30 a.m.

Chief Judge Crawford: Good morning. My colleagues and I would like to take a few moments this morning to remember the victims of the September 11th terrorist attack on our nation.

That attack claimed the lives of civilians as well as members of our military. Two of the victims were former members of the Department of Defense legal community. **Ernie Willcher** was a civilian personnel attorney who worked with me in the Office of the Army General Counsel, and **Mari-Rae Sopper** was a former Navy lieutenant in the Judge Advocate General's Corps, a member of our bar, and an advocate before the Court.

This morning we remember both of these fine attorneys and the contributions that they made to our Nation.

Ernie Willcher spent 4 years on active duty in the Army and 36 years as a civilian employee in the Department of Defense. He was widely recognized in the Pentagon as a leading authority on civilian personnel law.

But I shall best remember Ernie as a gentle and warm person who was devoted to his family. I have fond memories of Ernie staying behind after we finished a meeting—staying behind to talk about civilian personnel law, but rather to compare notes about our children who are about the same age.

He was so proud of his two sons and always eager to share the important milestones in their lives—whether it was their first words, their first steps, or their first days at school. And whether it was a baseball game or a school play, he was always there for his boys.

He is survived by his wife Shirley, 20-year old son Ben, who is a college student at the University of Maryland, and 17-year old son Joel, who is a senior in high school.

I think that his wife Shirley put it best when she said recently, "that Ernie never had any doubts about working for the military," he always said "he was working for the right client, the citizens of our country."

The Court also pays tribute to the memory of former Navy Lieutenant Mari-Rae Sopper. She was an animated and zealous advocate for her clients, and her enthusiasm for her work was contagious. She made enormous contributions to

the military justice system and to the men and women of our Armed Forces.

The Court is very pleased this morning to welcome several of Lt. Sopper's Navy colleagues to join the Court in paying tribute to her memory.

At this time the Court recognizes Captain Carol Cooper.

Captain Carol Cooper: Good morning, Your Honor. May it please the Court, I am Captain Carol Cooper, Division Director of the Appellate Defense Division of the Navy-Marine Corps Appellate Review Activity. I appear before this Court this morning as the representative of the Navy Judge Advocate General, Rear Admiral Donald Guter, and the entire Navy-Marine Corps legal team to honor the memory of one of our own who lost her life in the tragedies of September 11, 2001.

Mari-Rae Sopper, a former lieutenant in the Navy Judge Advocate General's Corps, was a passenger on the plane that was hijacked and crashed into the Pentagon. While on active duty I had the pleasure of working briefly with Lieutenant Sopper when she first reported to our appellate defense division. Mari-Rae was a dedicated and zealous appellate defense counsel, who ably represented a number of clients before this Court including arguing five cases before this Court.

Lieutenant Sopper left a lasting impression in our division of what it takes to serve as an appellate attorney. As Your Honor said, she was a very animated and very enthusiastic young lady who never approached any case or helped any client with less than 100% of her efforts. Because I worked with her for only a short time, I felt her contributions could be best described by a friend and fellow advocate. So with your permission, I would request the Court recognize Lieutenant Hardy Vieux of my division with some brief remarks on her life and the loss of Mari-Rae Sopper. Thank you.

Chief Judge Crawford: Thank you. The Court is very pleased to recognize Lieutenant Vieux.

Lieutenant Hardy Vieux: "You are born and oh how you wail. Your first breathe is a scream, not timid or low but selfish and shattering with all the force of waiting nine months under water. The rest of your life should be like that—an announcement."

Good morning, Chief Judge Crawford, Judges of this Honorable Court. That quotation I just recited to you encapsulates the life of Lieutenant Mari-Rae Sopper. Her life was always an announcement.

Her enthusiasm was her chosen means of announcement. To know Mari-Rae was to know her enthusiasm and her insatiable spirit. She was in every sense of the word an advocate. First, as a trial counsel and then later as an appellate defense counsel, Mari-Rae, like so many others that preceded her, fought to ensure that the military justice system in which we operate produced fair and just results. Whether it was challenging the constitutionality of non-unanimous jury verdicts or concerning herself with the intricacies of the post-trial process, Mari-Rae would not yield in her attempts to advance her cause as well as that of her clients. She gave expression to their anguish, eloquence to their plight, dignity to their circumstance, and consideration to their contentions.

Time and again she announced that she stood for equality and would not tolerate those who sought to denigrate others on grounds of gender, race, ethnicity, or religion. She understood that the test of our time was being able to move from equality in the abstract to equality in significant results.

From lively office exchanges to participation in community activities, Mari-Rae continually reminded us that silence is acquiescence, and she could not and would not remain silent.

She upheld the high standards of service. Her commitment to the integrity of our justice system will long be remembered by all those whose lives she touched. But Mari-Rae was more than just our colleague; she was more than just a naval officer. For many of us she was a friend, for some of us she was a teacher. By example, she taught us that compassion and humility were the ways to go and in her doggedness one could sense a determination to prove wrong all those that underestimated her Herculean heart and small frame. For that was the only thing small about Mari-Rae. Her ideas were big, her aspirations were even bigger and her sense of loyalty was boundless. With her striking hair, green eyes, and unmistakable voice, Mari-Rae set about leaving her imprints on the world.

The law was her vocation, her avocation, and her true passion was gymnastics. As a former college gymnast and a coach, Mari-Rae could express her individuality in her routines while contributing to the efforts of her team.

Although today we meet because of the death of our friend, our thoughts are not on her death but on her life and of the example and guidance and profit we get from introspection about that effervescent life. And although the national tragedy of September 11th took her from us at a mere 35 years old, she lived a full life. I have but faith, for I cannot know where she may be, but I do know that wherever she is, she has announced herself. Thank you.

Chief Judge Crawford: Thank you, Lieutenant Vieux for those stirring words. And now I would like to ask that all of you join the Court in a moment of silence in tribute to the victims of the September 11th attack.

Thank you, and may God bless the victims and their families, and the United States of America.

These proceedings will be made a part of the permanent record of the Court and will be published in the *Military Justice Reporter*.

I thank you for your participation this morning.

[Chief Judge Crawford observed, in opening court at the University of Virginia School of Law on October 1:

At a time like this I am reminded of the stirring words of President John Kennedy who, nearly 40 years ago, proclaimed:

"Let every nation know, whether it wishes us well or ill, that we shall pay any price, bear any burden, meet any hardship, support any friend, oppose any foe, in order to assure the survival and success of liberty."

Those of us in this courtroom know that liberty and justice are inseparable concepts. Indeed our Pledge of Allegiance ends with the words, "with liberty and justice for all."

Throughout our history, our Armed Forces have been the defenders of our liberty and our system of justice. Those brave men and women who, day in and day out, stand in harm's way to protect our freedoms, deserve our deepest gratitude.

They also deserve the very finest system of military justice that we can provide. Our military justice system is a shining example of democracy in action. It ensures that our men and women in uniform do not forfeit their guarantees as American citizens when they enter the Armed Forces.

Our military justice system stands as a hallmark of fairness—a constant reminder that we are a nation of laws—not of men.

Let us—through our work in military justice—continue to assure that both liberty and justice abound for all. With those twin towers of liberty and justice as our bedrock—twin towers that no terrorist will ever knock down—we today begin our new Term of Court.

At its sitting on October 3, the Court of Appeals observed a moment of silence to remember the victims of the September 11 attack. In the aftermath of the attack, NIMJ received messages of solidarity from military lawyers around the world, including friends in Canada, the United Kingdom, Ireland, Norway, Italy, Turkey, Argentina, Israel, Nigeria, East Timor, and New Zealand.]

MILITARY CORRECTIONS

A FOIA request by **Philip D. Cave** to the United States Disciplinary Barracks produced the following information. Since October 1989, 2760 inmates have been released on parole. (Although statistics are unavailable for FY 1991.) Seven hundred sixty parolees had their parole suspended. That means the running of their sentence was stopped. Suspension of the running of the sentence remains in effect until parole is either reinstated or revoked. Of this number, 473 had their parole revoked. None have been/were court-martialed for any offense committed while on parole.

These statistics do not reflect statistics DoD-wide. With the increased use of other longer-term facilities besides USDB, it is quite possible that there are many others in a parole status.

NIMJ

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DIRECTORY OF CIVILIAN PRACTITIONERS: ADDENDA

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President.....Eugene R. Fidell
Secretary-Treasurer-Webmaster..... Philip D. Cave
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On October 22, 2001, the U.S. Court of Appeals for the Armed Forces issued changes to Rules 13(c), 20(b)-(c), 21(b), 24 and 41(a), following notice in the *Federal Register* and an opportunity for public comment. The changes are posted on the Court's website and will take effect on November 1, 2001. Note also that the fee for admission to the Court's bar will increase to \$35 on that date.

NEW ZEALAND

On October 3-4, 2001, NIMJ Director **Kevin J. Barry** attended the first annual conference of the newly established Armed Forces Law Association of New Zealand (AFLANZ) in Christchurch, NZ, during which he presented a summary of the history and operation of the U.S. military justice system, and of the report of the Cox Commission. The New Zealand military justice system shares a common UK heritage with that of the United States and other Commonwealth countries, but over time each of these systems has grown along different lines, and today they contain a remarkable variety of features. The discussion of the U.S. system and the Cox Commission recommendations stirred great interest among the military and civilian attorneys and judge advocates (court-martial trial judges) in attendance. An item of particular interest, in light of the events of September 11, was the question of the appropriate forum (*e.g.*, U.S. federal court, U.S. military tribunal, or international criminal tribunal) for trying terrorists who are apprehended.

NZ Defence Force (NZDF) attorneys have been monitoring developments in other countries, notably the UK and Canada, with great interest, as well as the Cox Commission's observations on the requirements of due process. Despite the small size of the NZDF and its regular force legal staff, which currently numbers only 11, the challenges NZ faces in many ways parallel those in the U.S. In some areas, the NZ system seems not to need further reform, and to provide a high degree of protection, ahead of the U.S. and some other systems. For ex-

ample, NZ followed the UK's 1948 Lewis Report in switching the Judge Advocate General from a uniformed officer to a senior civilian appointed by the Governor-General (the Queen's representative as Head of State in NZ). In addition, all judge advocates are appointed from a panel of civilian jurists and experienced civilian attorneys, and defense counsel are appointed from a panel of experienced civilian attorneys, all at government expense (subject to a small income-based contribution by the accused). In other areas, some NZ attorneys at the conference reported the need for substantial modification, such as removal of the convening officer (commander) from the role of selecting the members of the court (in conformance with principles announced in the European Court of Human Rights' *Findlay* decision), and providing representation for persons appearing for "summary disposal" of offenses, as has been done in Australia.

There was general agreement that the opportunity to share comparative information and insights about military justice systems face-to-face is enormously valuable. NIMJ is delighted and gratified by the warm reception afforded by AFLANZ and the NZDF. AFLANZ President **John Rowan, QC**, who is a member of the panel of judge advocates, noted the need for "interdependence" as part of the process of a maturing legal profession, and that interaction with U.S. military lawyers was highly prized. In a statement that called to mind a portion of NIMJ's own mission, he noted that AFLANZ was motivated in part by the "growing consciousness that our separate system of military justice, which sometimes sits uneasily alongside the civilian system, especially in peacetime, can benefit from continued scrutiny, public explanation and the dissemination of authoritative and reliable information to the media and decision-makers in Parliament and elsewhere."

Among those present were AFLANZ Vice President **Bruce Stainton**; Treasurer Lt Col **Craig Ruane**, RNZA, a Crown Solicitor (similar to a U.S. Attorney) and artillery officer in the Territorial Force (similar to U.S. Reserve or National Guard) (both defense counsel at courts-martial and

appeals before the Courts Martial Appeal Court (CMAC)); Cdr **Gordon Hook**, RNZN; Secretary; Lt Cdr **Chris Griggs**, RNZN; Lt Col **Steve C. Taylor**, NZALS, Dep. Dir. Personnel Law, NZDF; and Major **Andrena Gill**, NZALS.

Captain Barry also spoke at the Centre for Defence Studies, Massey University, in Palmerston North, NZ. His article on the U.S. military justice system and the Cox Commission was published in the inaugural issue of the *New Zealand Armed Forces Law Review*. NIMJ commends AFLANZ for this thoroughly excellent publication—a remarkable accomplishment for a new law association. North American readers who wish to subscribe should contact the Florida-based legal periodical distribution agent, Gaunt, Inc., at info@gaunt.com. Otherwise, information on obtaining a copy of the law review is available from Lt Cdr Griggs at cj.griggs@clear.net.nz.

INTERNATIONAL SOCIETY FOR MILITARY LAW AND LAW OF WAR

NIMJ was represented at the International Society for Military Justice and Law of War's Seminar on Military Jurisdiction, held in Rhodes, Greece, on October 10-14. One hundred twenty-five uniformed and civilian military law experts from 48 countries attended the seminar. The working sessions focused on recent major revisions in military justice systems, the basic rationale for such systems, human rights aspects of military jurisdiction, and fundamental values in military jurisdiction and military law. Numerous delegations reported recent or contemplated military justice changes. Information on the seminar and the Society's publications is available on the Society's website, <http://www.soc-mil-law.org>. U.S. participants included Col **Jeanne Rueth** and Maj **Andrew S. Williams** of the Air Force and NIMJ President **Eugene R. Fidell**. NIMJ is grateful to the Society for permitting us to participate, as well as to the Greek hosts for their extraordinary hospitality.

MILITARY CORRECTIONAL DATA

Gazette 101 included military correctional data obtained under the Freedom of Information Act. The following observations were received in response. First, it is not uncommon that parole is revoked and then immediately reinstated without a return to confinement. With a loss of street time

or the period of suspension itself, this usually means lengthier periods of post-incarceration supervision. Second, while none may have been court-martialed for offenses committed while on parole, it is important to keep in mind that some parolees have committed offenses and have been convicted by civilian authorities. Almost always that means return (at some point) to military control for completion of original sentences without credit for street time.

In addition, readers should be aware that the Department of Defense has recently adopted mandatory supervision for prisoners who are not paroled who have reached their minimum release dates. These individuals will be released and supervised by the Federal Probation Service as if on parole until the termination of their sentences to confinement. Current prisoners will be grandfathered. The so-called "SAIOP" (supervision as if on parole) will apply to prisoners whose offenses were committed after August 17, 2001. Those with less than 180 days remaining before their maximum release dates will likely be exempt (at least in the Air Force). The service Clemency and Parole Boards will have the final say as to who goes on SAIOP and who is released without supervision on their minimum release date.

NIMJ

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President Eugene R. Fidell
Secretary-Treasurer-Webmaster Philip D. Cave
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BINNACLE LIST

NIMJ was saddened to learn that MG **Keith Nelson**, former Air Force TJAG and current Chair of the ABA's Military Law Committee, is ill with recently-diagnosed cancer. He is being treated (outpatient) at Walter Reed Army Medical Center, and may be reached at 343 Martins Cove Road, Annapolis, MD 21401. Our best wishes and prayers are with you, Keith.

REQUEST FOR CERTIFICATION

[On Nov. 7, 2001, NIMJ sent the following letter to Maj-Gen William A. Moorman, Judge Advocate General of the Air Force, concerning *United States v. Sills*, *United States v. Nazario*, and *United States v. Riley*.]

The three cited cases, decided on 18 and 19 October, raise the issue of the authority of a court of criminal appeals to affirmatively decline to follow the frequently articulated judgment of its superior court, the Court of Appeals for the Armed Forces, and instead to render a decision in which it indicates it is following the legislative history of the Uniform Code, and earlier Supreme Court precedent.

NIMJ urges that you certify these cases for review by the Court of Appeals for the Armed Forces pursuant to the authority of Article 67(a)(2). Among the issues raised are the standard for CCA review of factual sufficiency of a conviction, and the power of the CCA to reassess a sentence after setting aside a portion of the findings, without regard to whether it can determine what sentence a court-martial would have assessed.

NIMJ believes these cases present issues of extraordinary importance which bear on the integrity of the appellate structures of the UCMJ. If a court of criminal appeals is free to decline to apply the law as pronounced by its superior court, as the Air Force Court has indicated is its prerogative, then this system of criminal justice departs from the standard applicable to appellate courts in every civilian circuit in this country.

In support of this recommendation, we offer the following background on the Air Force's longstanding leadership in working to ensure the integrity of this system. The very first case decided by the Court of Military Appeals was certified to the Court after the government prevailed before the Air Force Board of Review. *United States v. McCrary*, 1 C.M.R. 1, 2 (1951). The landmark decision of *United States v. Tempia* was another that the Judge Advocate General of the Air Force certified

after the government had prevailed before the Air Force Board. 16 U.S.C.M.A. 629, 631, 37 C.M.R. 249, 251 (1967).

In *United States v. Russett*, 40 M.J. 184, 186 (C.M.A. 1994), the Court of Military Appeals wrote, "As a supervisory court for the military criminal justice system, it is important for this Court to answer certified questions where decisions of this Court are being misinterpreted by appellate counsel and intermediate appellate courts." These cases appear to present this important question.

The Court of Appeals for the Armed Forces, in a case arising from the Air Force, has emphatically stressed the importance of intermediate military appellate courts following CAAF's precedent. In *United States v. Alberry*, 44 M.J. 226 (1996), the Court wrote, "It is trite to say that the now Court of Criminal Appeals 'is not generally free to ignore our precedent.'" *Id.* at 227-28 (quoting *United States v. Jones*, 23 M.J. 301, 302 (C.M.A. 1987)). The Court explained, "The fundamental error in the [Air Force Court's] analysis was in according the policy of stare decisis an aspect of flexibility that it does not have. 'A precedent-making decision may be overruled by the court that made it or by a court of a higher rank.' 20 AmJur2d Courts [sec.] 186 (1965). That discretion, however, does not reside in a court of a lower rank. In the absence of a superseding statute or an intervening decision of this Court or the Supreme Court of the United States, [the Court of Appeals for the Armed Forces' precedent] was absolutely binding on the Court of Criminal Appeals." 44 M.J. at 228. *See also United States v. Antonelli*, 43 M.J. 183 (1995) (chastising the Air Force Court for failing to follow the doctrine of stare decisis); *United States v. Kelly*, 45 M.J. 259, 262 (1996) (holding that Navy-Marine Corps Court of Criminal Appeals erred by prospectively overruling Booker).

In light of these precedents, and the actions of the Air Force Court in these three cases, certification of these cases is most appropriate, and in keeping with prior practice of the Air Force. We urge such action.

NIMJ President Eugene R. Fidell took no part in the NIMJ decision to submit this letter.

MORE ON CORRECTIONS

1. *Mandatory supervision.* Trial defense counsel should be aware that the Department of Defense has ordered mandatory supervision for all military inmates upon their release from confinement. *See* DoD Instruction 1325.7, ¶ 6.20. As noted in *Gazette* No. 102, this "SAIOP" (supervision as if on parole) program is only

applicable to inmates who committed their crimes after Aug. 17, 2001. Service specific implementing procedures are currently being coordinated and interim changes to the confinement regulations are expected soon.

Inmates released on mandatory supervision can be subject to parole-like conditions for the time between their minimum release date and their maximum release date. Those released at their minimum release date will have to report to a parole officer, possibly take drug or polygraph tests, and comply with various other requirements until the maximum release date. Violations of mandatory supervision will be processed in the same manner as parole violations. Military inmates in the Federal Bureau of Prisons who are given early release through good time credits may also be placed under mandatory supervision "as if on parole."

2. *Officer prisoners.* DoD Instruction 1325.7 (Aug. 17, 2001) also eliminated the mandatory classification of cadets and officers as Level III prisoners. The services have not implemented this aspect of the instruction yet. Once it is implemented, officers and cadets will be sent to confinement facilities commensurate with the length of their sentences, instead of being automatically sent to the Disciplinary Barracks at Fort Leavenworth. (Note that officers and cadets at the "DB" have not been segregated from enlisted prisoners for several years.) This may assist officer/cadet clients in having access to rehabilitation programs, which often were unavailable to them at the DB because their sentences were too short to get into and complete the programs before being eligible for parole or release.

3. *Prisoners sentenced to life without parole.* An inmate serving an approved unsuspended sentence of confinement for life without parole adjudged for an offense committed on or after Oct. 30, 2000 can only be considered for clemency after serving 20 years' confinement. The service secretary must exercise this authority personally and cannot delegate it to the Clemency and Parole Board or other authorities. (DoDI 1325.7, ¶ 6.16.1.1.) The legislation underlying this rule is the Oct. 30, 2000 amendment of UCMJ Article 74(a). NIMJ had suggested that that measure intruded improperly on the executive clemency power. *See Gazette* No. 79. The legislative history is silent on the point.

4. *Home for the holidays?* Since 1994, the service clemency and parole boards have implemented an "End-of-Year Release" policy. The policy is the subject of a Nov. 9, 1993 Memorandum of Agreement between the services. Under it, for an inmate to be eligible for release, as of Nov. 15, the convening authority must have taken action, there must be an approved sentence of a year or more, and the inmate's projected minimum release date must be between Dec. 15 and Jan. 15. There are some additional requirements as well, including no D&A action during the past year, average-or-above work reports, no outstanding forfeited or currently suspended

good conduct abatement, and parole violators must have served at least one year since return to military control.

KAREN L. HECKER

WORLD TRADE CENTER

Among those murdered in the terrorist attack on the World Trade Center was **Hagay Shefi**, youngest son of Brig. Gen. (Ret.) **Dov Shefi**, former Judge Advocate General of the IDF and General Counsel of the Israeli Ministry of Defense. Hagay was speaking at a conference on the 106th floor of the north tower. His body was one of two found the next day from that floor. An MBA, he had been president of Sungard Business Integration Inc. Earlier this year he had become co-founder and CEO of GoldTier Technologies Inc. Gen. Shefi has cautioned that the attack on the WTC, which was crowded with civilians, should not be referred to as a "tragedy;" the result may be a tragedy to every family that lost a loved one, but the world and the U.S. are faced with a Crime against Peace, a Crime against Humanity and/or a Grave War Crime, as well as a violation of American law. The civilians who, like his son, happened to be at the WTC did not simply die—they were murdered by extreme unlawful acts.

DIRECTORY OF CIVILIAN PRACTITIONERS

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NECROLOGY

We report with sadness the death of Major General **James Taylor, Jr.**, USAF (Ret), former Deputy Judge Advocate General of the Air Force. After retirement he became a dean at Wake Forest University School of Law, but maintained an active interest in military justice. He was a friend of NIMJ and we are among the many who will miss him.

MILITARY COMMISSIONS WATCH

1. NIMJ is co-sponsoring an ABA program on military tribunals—"Military Commissions 101: A Preliminary Discussion"—from 5:30–7:00 p.m., Wednesday, Jan. 16, 2001, at the 9th Floor Conference Room of the ABA's Washington Office at 740 15th St., NW. The panel will be moderated by **Lynne K. Zusman** (Council Member, ABA Section of Administrative Law and Regulatory Practice), and will include NIMJ director **Kevin J. Barry** (Vice-Chair, Military Law Committee, Bar Association of the District of Columbia and former Coast Guard trial and appellate military judge); BG **John S. Cooke**, JAGC, USA (Ret) (Chair, ABA Standing Committee on Armed Forces Law); **John Flannery** (Chief of Staff and Special Counsel to Rep. Zoe Lofgren, and former Special Counsel to the Senate and House Judiciary Committees); **Ab Hamilton** (former State Department, USIA, staff member, High Commission for Germany, 1951-53, Council of Community and Democracies); Prof. **Peter Raven-Hansen** (George Washington University School of Law); and Judge **Alexander White** (Cook County Circuit Court, and former Staff Judge Advocate, U.S. Marine Corps Reserve, and Assistant Federal Defender). RSVP by Jan. 14, 2002 to the ABA's **Christopher Dyer**, fax (202) 662-1529, e-mail dy-erc@staff.abanet.org, or on-line at www.abanet.org/adminlaw/tribunal.html.

2. On Dec. 6, 2001, a panel of the U.S. Court of Appeals for the District of Columbia Circuit denied a government motion in *Mudd v. White* to summarily affirm a district court decision upholding the Army's refusal to set aside the military commission that tried Dr. **Samuel Mudd**. (Dr. Mudd set **John Wilkes Booth's** broken leg after Booth assassinated President **Abraham Lincoln**.) Full briefing and oral argument will now be required. The Court of Appeals' ultimate decision may shed light on when military commissions may be employed.

CAPITOL HILL

The FY02 National Defense Authorization Act includes important amendments to the UCMJ, as well as a new provision (not reproduced here) affecting judicial review of military personnel decisions. Requiring 12-member panels in capital cases was recommended by the Cox Commission on the 50th Anniversary of the UCMJ; the new legislation calls for at least 12 members. Note also that the provision does not take effect for a year, to afford the Joint Service Committee to prepare a study of the issue. The UCMJ amendments follow:

Subtitle I—Military Justice and Legal Assistance Matters

SEC. 581. BLOOD ALCOHOL CONTENT LIMIT FOR THE OFFENSE UNDER THE UNIFORM CODE OF MILITARY JUSTICE OF DRUNKEN OPERATION OF A VEHICLE, AIRCRAFT, OR VESSEL.

Section 911 of title 10, United States Code (article 111 of the Uniform Code of Military Justice), is amended—

(1) by inserting "(a)" before "Any person";

(2) by striking "0.10 grams" the first place it appears and all that follows through "chemical analysis" and inserting "in excess of the applicable limit under subsection (b)";

and

(3) by adding at the end the following:

"(b)(1) For purposes of subsection (a), the applicable limit on the alcohol concentration in a person's blood or breath is as follows:

"(A) In the case of the operation or control of a vehicle, aircraft, or vessel in the United States, such limit is the blood alcohol content limit under the law of the State in which the conduct occurred, except as may be provided under paragraph (2) for conduct on a military installation that is in more than one State and subject to the maximum blood alcohol content limit specified in paragraph (3).

"(B) In the case of the operation or control of a vehicle, aircraft, or vessel outside the United States, the applicable blood alcohol content limit is the maximum blood alcohol content limit specified in paragraph (3) or such lower limit as the Secretary of Defense may by regulation prescribe.

"(2) In the case of a military installation that is in more than one State, if those States have different blood

alcohol content limits under their respective State laws, the Secretary may select one such blood alcohol content limit to apply uniformly on that installation.

“(3) For purposes of paragraph (1), the maximum blood alcohol content limit with respect to alcohol concentration in a person’s blood is 0.10 grams of alcohol per 100 milliliters of blood and with respect to alcohol concentration in a person’s breath is 0.10 grams of alcohol per 210 liters of breath, as shown by chemical analysis.

“(4) In this subsection:

“(A) The term ‘blood alcohol content limit’ means the maximum permissible alcohol concentration in a person’s blood or breath for purposes of operation or control of a vehicle, aircraft, or vessel.

“(B) The term ‘United States’ includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa and the term ‘State’ includes each of those jurisdictions.”

SEC. 582. REQUIREMENT THAT COURTS-MARTIAL CONSIST OF NOT LESS THAN 12 MEMBERS IN CAPITAL CASES.

(a) CLASSIFICATION OF GENERAL COURT-MARTIAL IN CAPITAL CASES.—Section 816(1)(A) of title 10, United States Code (article 16(1)(A) of the Uniform Code of Military Justice) is amended by inserting after “five members” the following: “or, in a case in which the accused may be sentenced to a penalty of death, the number of members determined under section 825a of this title (article 25a)”.

(b) NUMBER OF MEMBERS REQUIRED.—(1) Chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), is amended by inserting after section 825 (article 25) the following new section:

“§ 825a. Art. 25a. Number of members in capital cases

“In a case in which the accused may be sentenced to a penalty of death, the number of members shall be not less than 12, unless 12 members are not reasonably available because of physical conditions or military exigencies, in which case the convening authority shall specify a lesser number of members not less than five, and the court may be assembled and the trial held with not less than the number of members so specified. In such a case, the convening authority shall make a detailed written statement, to be appended to the record, stating why a greater number of members were not reasonably available.”

(2) The table of sections at the beginning of subchapter V of such chapter is amended by inserting after

the item relating to section 825 (article 25) the following new item:

“825a. 25a. Number of members in capital cases.”

(c) ABSENT AND ADDITIONAL MEMBERS—Section 829(b) of such title (article 29 of the Uniform Code of Military Justice) is amended—

(1) by inserting “(1)” after “(b)”;

(2) by striking “five members” both places it appears and inserting “the applicable minimum number of members”; and

(3) by adding at the end the following new paragraph:

“(2) In this section, the term ‘applicable minimum number of members’ means five members or, in a case in which the death penalty may be adjudged, the number of members determined under section 825a of this title (article 25a).”

(d) EFFECTIVE DATE—The amendments made by this section shall apply with respect to offenses committed after December 31, 2002.

NIMJ

1. NIMJ proudly announces the rollout of its revamped website. Check it out—still at www.nimj.org—on New Year’s Day. Many thanks to Phil Cave, our founding webmaster, and Jay Fidell, of Honolulu, who helped with the redesign. Tell us how you like it.

2. The paperback edition of *Gazettes* 1-100, including a detailed index, is still available for \$25. Send your check (payable to NIMJ) to Phil at the address shown below.



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President Eugene R. Fidell
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LONDON

[The following timely report was received from His Honour **Judge James Rant**, The Judge Advocate General of H.M. Forces.]

The European Court of Human Rights (ECHR) case of *Morris v. United Kingdom* has caused a re-think on two aspects of our procedure. The first is connected with post-trial review. Under the post-1997 arrangements, a lay board of senior officers, or delegate routinely reviews all courts-martial post-trial. These are paper reviews without a hearing, and the advice of the Judge Advocate General's Office is taken on each case. The accused may petition against finding and sentence at this stage if he wishes. The Reviewing Authority has power only to decrease sentence, and not to increase it, and can also quash convictions.

The ECHR found this procedure to be in breach of the Convention. Perhaps unsurprisingly it concluded that the machinery lacked the necessary features of a judicial tribunal, and rejected the arguments that, since it was solely to the benefit of a serviceman and was an extra safeguard, it was an "inoffensive" breach. The result will be the dismantling of the review procedure, and in future all servicemen will be routed directly to the civilian Court Martial Appeal Court in appeals against conviction and sentence, and will thus be exactly equated to a person convicted in a civilian court.

The second point, rather more controversially, was concerned with the independence of junior members of a court-martial. The ECHR found there to be insufficient guarantees against "outside" pressure. The Court noted that they were not trained in law, and the Court declared that there were no legislative or other sanctions

against interference with them as members, and thirdly took the view that they might be officially reported upon in respect of their courts-martial duties.

Many commentators think the Court fell into factual error. (1) No reports are in fact written in connection with court duties. (2) Legal training seems to be an irrelevant point if command pressure is feared. (3) There are, in fact, clear sanctions both in common law and in statute forbidding any kind of interference with a member of court-martial (for example the offence of attempting to pervert the course of justice) which could lead to severe penalties being levied on a perpetrator. However, the Services have implemented Queen's Regulations which clearly state that nothing in relation to any aspect of a court-martial member's duties during the trial should be the subject of any report, and that any attempt to interfere with a court member is regarded as a criminal offence and will be punished. Additionally, Judge Advocates give a warning at the beginning of each court-martial which includes advising a member what to do if any one makes any kind of approach. These matters may not be the last of a series of skirmishes which are taking place in Europe over the British court-martial system, but so far it is still afloat.

MILITARY COMMISSIONS WATCH

Readers of the *Gazette* will have noticed that this is the first issue we have published in some months. The reason, of course, is that we have had so much "breaking news" to impart in connection with military commissions and other contemporary issues that we have necessarily relied on email distribution of "extras" as well as postings on the website. We've had a lot of positive feedback, and think the departure from our custom was the right thing to do.

We'll continue to stay flexible as the flow of unpredictable issues and events continues, and will welcome your thoughts and suggestions.

AUCKLAND

The *New Zealand Armed Forces Law Review* is accepting articles for its 2002 issue. If you wish to make a submission or a proposal for an article, please contact Lt. Comdr. **Christopher J. Griggs**, RNZN, at christopher.griggs@nzdf.mil.nz.

NIMJ

NIMJ is pleased to announce that the Board of Directors has elected **Stephen J. Shapiro**, chair of the Committee on Military Affairs and Law of the Association of the Bar of the City of New York, to the NIMJ advisory board.

A few copies of the paperback edition of *Gazettes* 1-100, including a detailed index prepared by **Kevin J. Barry**, are still available for only \$25. Send your check (payable to NIMJ) to **Phil Cave** at the address shown below.

READING LIST

Beth Hillman, *Chains of Command: The U.S. Court-Martial Constricts the Rights of Soldiers—and That Needs to Change*, Legal Affairs, May/June 2002, pp. 50-52. "As the American version of military justice is exported around the world, it is crucial that we bring court-martial procedure into line with international norms of criminal justice."

Gerry R. Rubin, *Military Law (The Lighter Side): Homage to Theodore Ende*, British Army Rev., No. 128 (Winter 2001-02). Prof. Rubin provides the inside story on the chap behind key litigation concerning British court-martial jurisdiction following World War II. "Ende [court-martialed in 1943] in fact saved his harshest criticism for those civilian barristers and solicitors serving in the Army during

the war and who had been called upon to serve on courts-martial. These people, he complained, had absolutely no knowledge of military law even though they were knowledgeable regarding civil law; yet, he insisted, they nonetheless had unduly influenced the lay members of the court to convict the accused, which presumably meant Ende in particular."

Prof. Rubin concludes with a suggestion that homage be paid not only to the litigious Mr. Ende, but also to "his legally qualified successors who are forcing today's military lawyers to work overtime," in which spirit we refer the reader to **John Mackenzie**, *Courts-Martial: What Happens Now?*, New L.J. (Mar. 22, 2002). His conclusion:

"The system is in every way an anachronism and should go. Criminal cases proper would be passed to the civilian court system. Four hundred cases would disappear into the Crown Court structure without a ripple. A system of disciplinary tribunals would be set up under subordinate legislation or by Crown prerogative operating through Queen's Regulations. This could be implemented in a matter of days. In Germany investigation and prosecution of criminal cases would be passed to the German authorities, where they belong. Even the Military Correctional Training Centre at Colchester could be kept. All that would be required would be some deft tweaking of its regime and naming as a 'Retraining Centre.' Such a system would be outside the European Convention."

NIMJ

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President Eugene R. Fidell
Secretary-Treasurer Philip D. Cave
General Counsel Stephen A. Saltzburg

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MILITARY JUSTICE GAZETTE

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PERSONNEL NOTES

The *Gazette* has learned that in April, the Judge Advocate General of the Canadian Forces, **Jerry S.T. Pitzul**, has been promoted to Major-General and reappointed for an additional four-year term. Hearty congratulations!

CODE COMMITTEE ON MILITARY JUSTICE

The Code Committee convened at the CAAF Courthouse in Washington, at approximately 1000 on May 16, 2002, for its annual meeting. The committee is the only body statutorily authorized to oversee the operation of the military justice system. Its mandate is set forth in Art. 146 (a), UCMJ: "Annual Survey. A committee shall meet at least annually and shall make an annual comprehensive survey of the operation of this chapter [the UCMJ]." The committee is comprised of the CAAF judges, the Judge Advocates General of the Army, Navy and Air Force, the Chief Counsel of the Coast Guard, the Staff Judge Advocate to the Commandant of the Marine Corps, and two civilian experts appointed by the Secretary of Defense for three year terms. The current public members are Senior U.S. Magistrate Judge **Jacob Hagopian** and Professor **Lee Schinasi**. This year's meeting lasted less than half an hour; no votes were taken.

After approving the minutes of its last meeting, the committee heard from Col.(sel) **Gary Sokoloski**, USMC, chair of DOD's Joint Service Committee on Military Justice, who summarized a handout that noted:

(1) the 2001 UCMJ Amendments (principally the requirement that capital courts-martial have no less than 12 members, and a report (in preparation) to Congress on the impact of permitting the accused to opt for judge-only sentencing after conviction by members); modification to Art. 111, UCMJ, wherein the BAC limit is the applicable standard for the State in which the offense occurs);

(2) promulgation of E.O. 13,262 (Apr. 11, 2002), implementing MCM changes recommended by the JSC's 1998-2000 Annual Reviews (notably, 1-year special court-martial authority and new provisions clarifying adulterous relationships subject to court-martial jurisdiction);

(3) status of the 2001 Annual Review, which had been delayed to avoid conflict with the processing of E.O. 13,262, and is now under review by the DOD Gen-

eral Counsel;

(4) 2002 Annual Review [published in the *Federal Register* on May 20, 2002] and a public hearing set for June 27, 2002;

(5) Other items reviewed during the 2002 Annual Review cycle included the DOD Domestic Violence Task Force Recommendations, the Art. 15, UCMJ, study requested several years ago by the Code Committee at the urging of then public member Prof. **Fredric I. Lederer**, and a comparison of offenses under the Rome Statute (ICC) and the UCMJ;

(6) Items under consideration for the 2003 Annual Review include items on which review continues either at the JSC or within DOD are the Recommendations of the NIMJ-sponsored Cox Commission, results of the DODIG subpoena survey, a joint command military justice review a study of the use of technology in the military justice process; and the review of sentencing credit case law.

There was some discussion of the limited capability of the JSC to review all of the issues that have been referred to it, and the unavailability of additional resources outside the JSC and its Working Group. Chief Judge **Susan J. Crawford**, who chairs the Code Committee, asked the JSC to review during the 2003 Annual Review the potential for amending the UCMJ to permit pleas of *nolo contendere*. After a brief discussion, the hardy perennial issue of appellate delay was continued until next year, pending service input. The Code Committee's next meeting will be held during the week of the 2003 CAAF Judicial Conference.

LONDON

On Friday, May 3, 2002, the UK Court-Martial Appeal Court in *R v. Skuse* (No. 2000/04690 - [2002] EWCA Crim 991 - available on the NIMJ website) looked at the system of Royal Navy (RN) courts-martial for the first time and held that, on the facts of the case, the system was compliant with Article 6(1) of the European Convention on Human Rights. *Findlay* (1996) and *Morris* (2002) were reviewed but not binding on the CMAC with respect to the convention issues given the different structure of the RN system. The principal issue in the appeal was the selection and status of the naval judge advocate (JA) - a uniformed naval officer.

RN JAs are "ticketed" by the Chief Naval Judge Advocate (CNJA), a naval barrister, and the Judge Advocate of the Fleet (JAF), a judicial appointee independent

ent of the RN, for an unspecified period of time. "Ticketing" appears to be similar to appointment to a "panel" from which trial selection is made. Trial appointments are made "in the name of the CNJA" on a rotation basis: the JA on the top of the list or panel is appointed to a court-martial after which his or her name is returned to the bottom. As names are chosen, lower names go up the list, then back to the bottom after specific appointment. Once appointed to a trial, JAs take a judicial oath and are responsible for their judicial duties to the JAF. At the time of the *Skuse* trial a "haphazard" system of professional assessment of JAs existed by the CNJA but that was abolished by the RN at the time of the appeal, perhaps realizing the dangers associated with executive professional evaluations of judicial appointees.

Despite problems with the system identified by the CMAC (no formal guarantee of security of tenure and executive assessments for promotional benefits) the court was not persuaded that the JA appointment process was flawed. A number of facts impressed the court. For instance:

- Although there was no security of tenure, there was a practice of non-removal;
- JAs were appointed from outside the accused's chain of command;
- The JAF was responsible for reviewing courts-martial within which JAs were appointed;
- JAs took a judicial oath prior to trial; and
- The particular JA in *Skuse* was due to retire within a year.

The last point, in fact, seems to have impressed the court, which likened it to the "permanent president" system (PPCM) reviewed by the same court in the *Spears* case and by the ECHR in *Morris*. A few points, however, seemed to have escaped the CMAC:

- PPCMs in *Spears* and *Morris* were an institutional regime. In *Skuse* the fact that the particular JA was personally due to retire bears no resemblance to the army's PPCM system; and
- The JAF's "review" function, which was not articulated in any great detail by the court, is arguably flawed and not a "safeguard" at all, as the JAF reviews courts-martial rulings which are provided by JAs who are responsible to him for their functions. The potential conflict issue should have been examined.

Skuse should be limited to its facts. The court itself appeared to be suggesting that when it concluded that "in the specific circumstances of the judge advocate concerned" the appeal was dismissed notwithstanding that the court also indicated that no fair minded and in-

formed observer would conclude the court was not independent and impartial. It will be interesting to see if the judgment will be appealed to the House of Lords or make its way to the ECHR, where it will no doubt receive different treatment.

Commander G.P. Hook, RNZN

DOMESTIC VIOLENCE

The Miles Foundation has announced that the second annual report of the Defense Task Force on Domestic Violence is now available in .pdf format (Adobe Acrobat reader required):

www.dtic.mil/domesticviolence/Report2-2002.pdf

READING LIST

Lara A. Ballard, *The Trial of Sergeant-Major McKinney: An After Action Report*, 3 Geo. J. Gender & L. 1 (2001). The same issue contains six other papers on gender and sexual orientation in the military.

Kevin J. Barry, *A Face Lift (and Much More) for an Aging Beauty: The Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice*, 2002 L. Rev. M.S.U.-D.C.L. 57.

Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 Green Bag 2d 249 (2002).

Eugene R. Fidell & Dwight H. Sullivan, eds., *Evolving Military Justice* (Naval Institute Press 2002).

Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 Mich. J. Int'l L. 1-29 (2001)

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NIMJ is pleased to announce publication of its *Annotated Guide to the Procedures for Trials by Military Commissions*. The publisher is LEXIS-NEXIS/Matthew Bender & Co. With a foreword by former White House Counsel **Lloyd N. Cutler**, who participated in the Nazi Saboteurs Case (*Quirin*) in 1942, the *Annotated Guide* includes rule-by-rule analyses by military law experts and a useful bibliography of the fast-growing literature on military commissions. Watch for detailed ordering information on NIMJ's website, www.nimj.org.

AMERICAN BAR ASSOCIATION

On August 9-10, various military law entities of the ABA met in Washington, DC.

One highlight of the meetings was a mock oral argument before the court on the issue of military tribunals, focusing first on whether the President could lawfully issue his November 13, 2001 Military Order establishing military commissions to try war criminals without specific authority from the Congress, and second, on whether the procedures outlined in the Secretary of Defense's March 21, 2002 Military Commission Order No. 1 meet minimal standards of due process. The consensus of the panel seemed to be in the affirmative on both questions.

Another highlight was a gala "dining out" held at the Army Navy Club on August 10 attended by a full house of 161 military and civilian guests, including among those with military affiliation two former ABA presidents.

On substantive matters, the Standing Committee on Armed Forces received a report from the Joint Service Committee on Military Justice that included notification that the annual cycle for amendment of the *Manual for Courts-Martial* would be converted to conform

to the calendar year, and that the DOD Directive governing the JSC would be modified and published in the *Federal Register*. The JSC had also conducted a study of the recommendation long made by Senior Judge **Robinson O. Everett**, and concurred in by the Cox Commission, that an accused be allowed to request sentencing by the military judge after having been found guilty by a panel. The JSC and DOD recommendation regarding the issue has been submitted to Congress, and urges that the proposal not be adopted. As reported to SCAFL, some of the bases for the recommendation are that the proposal would require changes in a number of Code provisions, would give the accused undue control over the court-martial process, and would likely increase the number of contested member trials. Although the Cox Commission was on the agenda, SCAFL decided not to further discuss any of the Commission's other recommendations.

BG **John S. Cooke**, USA (Ret) has completed his term as SCAFL Chair and will be succeeded by MAJ **James Durant**, USAF, a new member of the Committee. Other new members are **John Jay Douglas** and **Gary Anderson**, both retired Army JAGs with long service to the ABA. SCAFL noted General Cooke's distinguished service, particularly in serving on two ABA Task Forces related to the 9/11 terrorist attacks, one on military tribunals and the other on the treatment of enemy combatants.

DOMESTIC VIOLENCE IN UNIFORM

Red, White, Black and Blue: A Review of the Defense Task Force on Domestic Violence has been published in 7 Domestic Violence Rep., No. 5, at 65, 75-78 (June/July 2002). The authors are Eve, survivor of domestic violence within the military community; and Kate

Summers, Advocacy Director, The Miles Foundation, Inc. Eve also serves as a volunteer paralegal with SISU ("Survivors in Service United"). Copies and reprints may be obtained by contacting Civic Research Institute, Inc. at (609) 683-4450. Information furnished by The Miles Foundation, Inc., Newtown, CT 06470-0423, tel (203) 270-7861, email: Milesfdn@aol.com or milesfd@yahoo.com.

450 E STREET, N.W.

The Pentagon has issued a vacancy announcement for the position of Chief Deputy Clerk of the United States Court of Appeals for the Armed Forces. (By law—art. 141, UCMJ—the court is located in of the Department of Defense "for administrative purposes only.") The salary range for the advertised position is \$125,972 - \$138,200 per year. The closing date for the position is October 4, 2002. For full details, check the official announcement, for which there is a link on NIMJ's website, www.nimj.org.

SYDNEY

The Asia Pacific Centre for Military Law, a collaborative initiative of the Australian Defence Force's Defence Legal Service and the Melbourne University Law School, was officially launched at HMAS Penguin on August 8, 2002. "The APCML will operate from a military and a university node, in the cities of Sydney and Melbourne respectively. The military node will be located on an interim basis as Randwick Barracks in Sydney and the university node within the Melbourne University Law School." For full information check the website: www.apcml.org/latestnews.php. NIMJ congratulates all those responsible for this exciting development.

WELLINGTON

Speaking of the antipodes, stand by for this year's edition of the *New Zealand Armed Forces Law Review*. This edition has articles

discussing developments in the law of war following Operation Allied Force, the law of terrorism, international protection of UN peacekeepers, the New Zealand Court of Appeal's decision in the "Soldier 5" case (in which the UK Ministry of Defence attempted to ban publication of a book by a former SAS soldier), and New Zealand military law issues. There will also be a review of the House of Lords' decision in *R v Boyd*.

The law review is available in North America through Gaunt Inc., Gaunt Building, 3011 Gulf Drive, Holmes Beach, FL 34217-2199, e-mail: info@gaunt.com. The cover price for [2002] NZAFLR is US\$30. Gaunt, Inc. also holds back issues of [2001] NZAFLR for those who are interested.

[*M.J. Gaz editorial note*: last year's issue was first-rate.]

The next New Zealand Armed Forces Law Conference will be held in Wellington on October 4-5, 2002. Check out the conference information page at www.aflanz.org/conf.htm, which contains links to all the relevant information (including the registration form) plus images and impressions from the 2001 conference. The program for the 2002 conference covers a lot of ground of interest to *Gazette* readers. Thanks to **Chris Griggs** for this information. **John Rowan**, QC, serves as President of AFLANZ.

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WASHINGTON

1. Congratulations to NIMJ director **Kevin J. Barry** on being honored with the Hart T. Mankin Distinguished Service Award, presented by the United States Court of Appeals for Veterans Claims. Kevin served as Chair of the Court's Admissions and Practice Committee and has been an active participant in the process of amending the Court's rules. Prior recipients include **David B. Isbell**, of the Washington law firm of Covington & Burling, and the National Organization of Veterans Advocates.

2. Check NIMJ's website for information about an October 18, 2002 panel on National Security and Civil Liberties: One Year Later, co-sponsored by the ABA's Sections of Administrative Law and Regulatory Practice and Individual Rights and Responsibilities. Even those who have been suffering from War on Terrorism "panel fatigue" will find this one worthwhile. Panelists include Standing Committee on Armed Forces Law Chair **John S. Cooke**, DoD Deputy General Counsel (Legal Counsel) **Whit Cobb**, Georgetown Law Professor **David Cole**, the Open Society Institute's **Morton Halperin**, and others.

BEACH BLANKET BOOK REVIEWS

My summer reading season began with Colonel **Frederic L. Borch's** *Judge Advocates in Combat: Army Lawyers in Military Operations From Vietnam to Haiti* (2001), which is available from the Government Printing Office's on-line bookstore for \$44. The book surveys Army lawyers' roles in military operations from Vietnam through 1996. *Judge Advocates in Combat* discusses many of the same military operations as **Tom Clancy's** and General **Carl Stiner's** *Shadow Warriors: Inside the Special Forces* (2002), which I read

shortly before *Judge Advocates in Combat*. I recommend that approach, which provides additional context for Colonel Borch's focus on the operations' legal aspects. *Judge Advocates in Combat* certainly can't provide the same excitement as *Shadow Warriors*, nor does it try. Due to its structure, *Judge Advocates in Combat* suffers from some repetitiveness, particularly in its discussion of legal work in support of Desert Storm/Desert Shield. Nevertheless, it is an extraordinarily informative survey, tracing the evolution of military lawyers from mere military justice providers and legal assistance dispensers to integral members of the operational planning and execution team. I have already quoted from it in several discussions of legal issues arising from our response to 9-11. Reading *Judge Advocates in Combat* is an exercise in both professional military education and continuing legal study.

Richard Zack's bawdy and boisterous *The Pirate Hunter: The True Story of Captain Kidd* (2002) is more typical beach reading. *Pirate Hunter* is unabashedly revisionist. By contrasting Captain **William Kidd's** actions with those of **Robert Culliford**, who is portrayed as the true arch-pirate of the era, Zack argues for Kidd's innocence—or at worst his guilt of lesser included offenses. While Zack's obsession with lewd details sometimes annoys, the book's depictions of New York and Boston society, English politics, the pirate life, Royal Navy service, and Newgate Prison circa 1700 are all extremely engaging. The account of Kidd's trial at the Old Bailey is both fascinating and infuriating. In the end, Zack's argument for Kidd's innocence is unconvincing, though his case for unfairness at Kidd's trial is compelling.

Sixty-eight years after William Kidd first rose to prominence fighting the French for the Governor of Nevis, **Alexander Hamilton** was born on that Caribbean island. The life

that followed is of interest to any American lawyer, but especially military lawyers. Hamilton was not only a leading member of the New York bar and author of a majority of the *Federalist Papers*, but also an artillery officer, General **George Washington**'s aide-de-camp, leader of an assault at Yorktown and, from 1798 to 1800, Inspector General of the U.S. Army. **Richard Brookhiser's** *Alexander Hamilton, American* (1999), however, provides limited coverage of Hamilton's military career. Indeed, with just 217 pages of text, this slim volume's coverage of most aspects of Hamilton's life is limited at best. The result is less biography than character study. Important events in Hamilton's life—including his service as Army Inspector General—receive far more extensive treatment in **David McCullough's** biography of **John Adams** (2001) than in Brookhiser's biography of Hamilton. *Alexander Hamilton, American* tests *Washington Post* book critic **Jonathan Yardley's** support for the "notion that it is possible to deal with a large life in a relatively small space—to focus on its important events and themes rather than to bog down in meaningless quotidian detail." Jonathan Yardley, *Benjamin Franklin*, WASH. POST Book World, Sept. 15, 2002, at 2. Perhaps because the subject was less familiar to me, I found *Alexander Hamilton, American* less satisfying than Brookhiser's *Founding Father: Rediscovering George Washington* (1996).

I was far more familiar with Hamilton, however, than with the events chronicled in *The Eagle Mutiny* (2001) by **Richard Linnett** and **Roberto Loiderman**. I was previously unaware that in 1970 two merchant seaman seized control of a Military Sea Transportation Service ship carrying napalm bombs to U.S. forces in Southeast Asia and redirected the vessel to Cambodia. Linnett and Loiderman present a captivating account of the mutineers' background, their seizure of the *Columbia Eagle*—which the authors maintain is the sole "Bounty-like mutiny" in American history since 1842—and the mutiny's aftermath. While legal proceedings occupy only a few pag-

es of the book, military justice practitioners will be interested in both the mutiny itself and the resulting diplomatic wrangling.

The best—or at least the most enjoyable—book was saved for the last of my summer reading. **Jack Gieck's** *Lichfield: The U.S. Army on Trial* (1997) tells the story of court-martial arising from brutality at a U.S. Army guardhouse in England during World War II. Assuming that convicted soldiers were malingerers shirking combat duty, their jailers set out to make the guardhouse more frightening than the front. The end of the book is something of a letdown, both because—as in **Jonathan Harr's** *A Civil Action* (1995)—the events themselves were anti-climatic, and because Gieck's effort to put the Lichfield trials into a larger context of military justice reform suffers from some inaccuracies. But the first 200 pages' account of the initial Lichfield court-martial is riveting. Again like Harr's *A Civil Action*, this portion of *Lichfield* teaches trial advocacy while it entertains. Don't put this one off for next summer's beach trip; read it now.

DWIGHT H. SULLIVAN

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MILITARY JUSTICE GAZETTE

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Happy Thanksgiving

November 2002

FROM HIGH ABOVE NIMJ PLAZA

Congratulations to **Guy Cournoyer**, of Montreal, on his recent election to the NIMJ advisory board. Guy was one of the attorneys who successfully argued *The Queen v. G  n  reux* in the Supreme Court of Canada. Bien-venu!

Dwight H. Sullivan is leaving the board of directors because he is being called to active duty. Dwight is a Lieutenant Colonel of Marines and will be working full time on the defense of a capital case on appeal. NIMJ policy, designed to ensure our independence, bars active duty personnel from serving on the board of directors and advisory board.

NIMJ's directors and advisory board members continue to contribute to the literature. **Dwight Sullivan** is among the authors of *Raising the Bar; Mitigation Specialists in Military Capital Litigation*, 12 GEO. MASON CIV. RTS. L.J. 199 (2002). Advisory board member Professor **Diane H. Mazur** (University of Florida College of Law) is author of *Rehnquist's Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law*, 77 IND. L.J. 701 (2002).

NIMJ's *Annotated Guide to Procedures for Trial by Military Commissions* (LexisNexis 2002) is now available. It includes a foreword by **Lloyd N. Cutler**, who was one of the attorneys in the case of the German Saboteurs in 1942 and later served as White House Counsel. The cost is \$39.95. 144 pp., including index, bibliography, and selected provisions of the UCMJ and MCM, as well as the text of President **George W. Bush's** Nov. 13, 2001 Military Order and Secretary of Defense **Donald H. Rumsfeld's** Mar. 21, 2002 Military Commission Order (with annotations). Details appear on the LexisNexis Matthew Bender website, <http://bookstore.lexis.com>.

The NIMJ website continues to attract a good number of "hits." We welcome noteworthy documents in digital form, and are delighted to upload those that may be of general interest. If you have been wondering why we have largely shifted to sending out e-mail announcements that documents have been uploaded, rather than circulating them as attachments to the announcement e-mail itself, the reason is that attachments can cause the entire e-mail to be blocked by screening software on government websites. They also cause congestion at the sending server. Doing it the new way is of course more cumbersome because the reader has to go to a little extra effort to access the document, but it has the advantage of making sure the e-mail gets to the maximum number of readers, and permits them, rather than NIMJ, to make the decision as to whether the document is of sufficient interest to download.

Speaking of the website, we're gearing up for a renovation. We've found lots of new websites, including several excellent foreign-language military justice sites. We'll likely provide links to some of these. If you have any suggestions for improvements in the website's contents or functionality, feel free to pass them along.

WASHINGTON, D.C.

We previously reported on Opinion No. 313 (2002), issued earlier this year by the Committee on Legal Ethics of the District of Columbia Bar. The opinion concerns whether a lawyer in private practice can represent an individual he or she previously represented while serving as a judge advocate. *See also United States v. Nguyen*, 56 M.J. 252 (C.A.A.F. 2001); *United States v. Andrews*, 21 C.M.A. 165 (1972). No. 313 is now the subject of an insightful article by the Bar's legal ethics counsel in the latest issue of *Washington Lawyer*:

Ernest T. Lindberg, *Speaking of Ethics: Representing Clients After Government Service*, 17 WASH. LAW. No. 3, at 10 (Nov. 2002). The Bar's website address is www.dcbbar.org. *Quaere*: is this ruling being taught/studied at the service law schools?

Lynom v. Widnall, Civil No. 95-233 (EGS) (D.D.C. Sept. 26, 2002), was an action for Administrative Procedure Act review of a decision of the Air Force Board for Correction of Military Records. Following a decision on the merits, plaintiff sought an award of attorneys fees and costs under the Equal Access to Justice Act, and argued for an increase in the hourly rate on the theory that the practice of military administrative law requires specialized expertise. Citing *F.J. Vollmer Co. v. Magaw*, 102 F.3d 591 (D.C. Cir. 1996), Judge **Emmet G. Sullivan** refused to allow a higher rate, noting that the plaintiff had failed to explain why the issues presented questions of law that required special knowledge or expertise. Fees and costs of \$105,378.78 were allowed nonetheless. All told, the litigation lasted over seven years. **James R. Klimaski** represented the plaintiff.

BOOKSHELF

Aspen Law & Business has published **Stephen Dycus, Arthur L. Berney, William C. Banks & Peter Raven-Hansen**, *National Security Law* (3d ed. 2002). This is an extremely worthwhile and up-to-date text. A bargain at \$70.

Rumor has it that the 2002 *Manual for Courts-Martial* has been published by the Government Printing Office. Despite this, the volume is not in fact available from GPO's North Capitol Street main bookstore, which claims that the 2000 edition is the latest one (and is out of print). Unavailability of the *Manual* to civilian would-be purchasers is a recurring problem. See M.J. Gaz. Nos. 28-29. We also understand that the Department of Defense telephone directory is no longer for sale (presumably owing to security concerns),

so hold on to your old copy.

According to the Joint Service Committee's Notice of Summary of Public Comment Received Regarding Proposed Amendments, 67 FED. REG. 68,838 (Nov. 13, 2002), three individuals and two journalists attended the JSC's June 27, 2002 public hearing, and one person representing an organization (yup, NIMJ) offered oral comments. The JSC received a single letter commenting on the proposed MCM changes. Those changes "require the convening authority to take affirmative action in referring an eligible offense for trial as a capital case; clarify rules prohibiting unreasonable multiplication of charges; provide for trial by twelve members in capital cases, where reasonably available; make a technical change substituting 'hardship duty pay' for 'foreign duty pay'; amend[] the rules and procedures applicable to sealed exhibits; explain that the military judge must determine as a matter of law whether an order is lawful [see *United States v. New*, 55 M.J. 95]; broaden[] the threat or hoax offense to include weapons of mass destruction, biological and chemical agents, and hazardous materials; and increase[] the maximum punishment for violation of the threat or hoax article." This is believed to be the first time the JSC has published a summary of comments on proposed changes, and brings the rulemaking process a step closer to the civilian model. It is also believed to be the first time notice has been given following the public comment opportunity but before final promulgation.

NIMJ

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NIMJ

NIMJ director Prof. **Michael F. Noone** (Catholic University of America, Columbus School of Law) has written the entry on "Martial law" in the *Oxford Companion to American Law* (Oxford University Press 2002), as well as *Whacking Unarmed Women: Gaps in the Law of Armed Conflict*, 9 DUKE J. OF GENDER L. & POL'Y 271 (Summer 2002); and *Applying Just War Jus in Bello Doctrine to Reprisals: An Afghan Hypothetical*, 51 CATH. U. L. REV. 27 (Fall 2001).

WASHINGTON, D.C.

The recently-signed FY2003 Defense Authorization Act includes a number of provisions of interest. For example, § 512 updates and streamlines the administration of military justice in the unfederalized National Guard. It specifies convening authorities and requires the development within a year of a model state UCMJ and MCM and its presentation to the states. Under § 563, women serving in Saudi Arabia may not be required or encouraged to wear an abaya. Section 582 requires the Secretary of Defense to conduct a study of the feasibility and desirability of consolidating the separate JAG basic courses in a single location. (Will the report have a purple cover?)

BOOKSHELF

James Rant CB QC and **Jeff Blackett**, *Courts Martial, the Disciplinary and Criminal Process in the Armed Forces* (Oxford University Press 2003), 600 pp. £75. Judge Rant is the Judge Advocate General of H.M. Forces. This will be an important addition to the growing international military law literature.

David C. Frederick, *Supreme Court*

and Appellate Advocacy: Mastering Oral Argument (Thomson-West 2003), with an Introduction by Justice **Ruth Bader Ginsburg**. Truly "must reading" for appellate government, defense, and *amicus curiae* counsel. Not bad for judges, either.

The October 2002 of the *International Review of the Red Cross*, focusing on terrorism, is available online:

www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5F89UD?OpenDocument.

COUNCIL OF EUROPE

Recommendation 1572 (2002)11: Right to association for members of the professional staff of the armed forces (adopted by the Standing Committee on behalf of the Council of Europe's Parliamentary Assembly, Sept. 3, 2002).

1. The Parliamentary Assembly recalls its Resolution **903** (1988) on the right to association for members of the professional staff of the armed forces, in which it called on all member states of the Council of Europe to grant professional members of the armed forces, under normal circumstances, the right to association, with an interdiction of the right to strike. It also recalls its Order No. **539** (1998) on monitoring of commitments as regards social rights, calling on the member states to implement the European Social Charter.

2. Freedom of association is guaranteed by Article 11 of the European Convention on Human Rights and the right to organise is a right foreseen in Article 5 of the revised European Social Charter. However, these articles are of limited scope in relation to violations of the recognition of the right of members of the armed forces to form trade unions.

Happy New Year from NIMJ

3. The Assembly observes that, notwithstanding efforts to promote the civic right to association of certain professional groups, the right to organise of members of the professional staff of the armed forces is still not recognised in all member states of the Council of Europe. Furthermore, several member states who recognise the right to organise of this professional category put severe limitations on the conditions governing it.

4. In the past years, armies from certain member states converted from a conscription system to a purely professional system. As a consequence, military personnel are becoming increasingly “regular” employees, whose employer is the Ministry of Defence, and should be fully eligible for the employees’ rights established in the European Convention on Human Rights and the European Social Charter.

5. Members of the armed forces, as “citizens in uniform”, should enjoy the full right, when the army is not in action, to establish, join and actively participate in specific associations formed to protect their professional interests within the framework of democratic institutions, while performing their service duties.

6. Military personnel should be entitled to the exercise of the same rights, including the right to join legal political parties.

7. Therefore, the Assembly recommends that the Committee of Ministers call on the governments of the member states:

i. to allow members of the armed forces and military personnel to organise themselves in representative associations with the right to negotiate on matters concerning salaries and conditions of employment;

ii. to lift the current unnecessary restrictions on the right to association for members of the armed forces;

iii. to allow members of the armed forces and military personnel to be members of legal

political parties;

iv. to incorporate these rights in the military regulations and codes of member states;

v. to examine the possibility of setting up an office of an ombudsman to whom military personnel can apply in case of labour and other service-related disputes.

8. The Assembly also calls on the Committee of Ministers to examine the possibility of revising the text of the revised European Social Charter by amending its Article 5 to read: “With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police *and the members of the armed forces* shall be determined by national laws or regulations.”

NIMJ

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