MILITARY JUSTICE GAZETTE

Published Occasionally by the
NATIONAL INSTITUTE OF MILITARY JUSTICE

No. 13 *Washington, D.C.* December 1993

PROFESSIONAL READING AND MEETING

31 *Military Law and Law of War Review* (1992) has now been released by the International Society for Military Law and the Law of War, based in Brussels. Many of the articles will be of interest to *Gazette* readers. One that caught our eye was an essay on *Military Justice: Goals and Identity*, by Brigadier General **Oded Mudrik** of the Israel Defense Force, now a District Court judge in Tel Aviv. Judge Mudrik previously served as a judge on the IDF Court of Appeals. He teaches Military Justice at the law schools of Tel Aviv and Haifa Universities.

The Society's 13th Congress will be held in Austria from June 13 to 17, 1994, with the timely theme of "Military Law and the Use of Armed Forces in a Changing World Order." Further information is available from the Society: Séminaire de droit pénal militaire et de droit de la guerre, Palais de Justice - 1000 Brussels. Registrations forms are due by April 15, 1994 at the Congress Secretariat, Österreichishe Gesellschaft für Wehrrecht und humanitäres Völkerrecht, BMVL/Recht A/d, Dampfschiff-straße 2, A-1030, Wien, Austria.

SUPREME COURT

On November 1, 1993, the Supreme Court granted certiorari in *Davis v. United States*, No. 92-1949. The question presented in the six-page petition filed by **Major David S. Jonas** of the Marine Corps and **Lieutenant Franklin J. Foil** of the Navy Judge Advocate General's Corps is

> WHEN A SUSPECT MAKES AN AMBIGUOUS REQUEST FOR COUNSEL DURING A CUSTODIAL INTERROGATION, MUST THE INTERROGATOR CEASE QUESTIONING UNTIL THE SUSPECT IS PROVIDED WITH COUNSEL?

The courts have been divided on this type of issue. The case is noteworthy as only the third time the Court has granted plenary review of a decision of the Court of Military Appeals, and the first in which the issue presented was a generic one, rather than (as in *Solorio* and *Weiss*) one relating peculiarly to the military justice system.

Weiss v. United States was argued on November 3. A decision should be issued by the end of the Term, in late June 1994.

The latest issue of the *Supreme Court Historical Society Quarterly* includes a fascinating article by distinguished Washington practitioner **Bennett Boskey** on the case of the German Saboteurs, *Ex parte Quirin*, 317 U.S. 1 (1942). Mr. Boskey served as law clerk to Chief Justice **Harlan F. Stone** at the time, and discusses a controversy that emerged in the 1950s about use of internal Court documents in a *Harvard Law Review* article by Stone's biographer, **Alpheus T. Mason**. Mr. Boskey's article is of interest not only for what it tells about *Quirin*, but also in light of the recent controversy surrounding public availability of Justice Marshall's papers at the library of Congress.

LANDMARKS

Did you notice? West's *Federal Reporter* has gone into a *third* series (1 Fed.3d 1)!

E STREET

1. *Rules Advisory Committee*. The next meeting of the Rules Advisory Committee will be Wednesday, December 8, 1993. Anyone wishing to propose changes in the Court's rules should write to the Clerk of Court.

2. *C-Span Coverage*. The Court authorized C-Span to televise arguments on November 9, 1993 in the *Tailhook*-related extraordinary writ case of *Samples v. Vest*. NIMJ supplied an introduction to the broadcast.

DOD ADVISORY BOARD

Secretary Les Aspin has appointed an Advisory Board on the Investigative Capability of the Department of Defense. The Board will be chaired by Charles F.C. Ruff, of Covington & Burling. Other members include former DoD Assistant General Counsel Manuel Briskin, NIMJ President Eugene R. Fidell, U.S. District Judge Donald L. Graham (S.D. Fla.), MG (and Memphis private practitioner) Albert C. Harvey, USMCR, Judith A. Miller of Williams & Connolly, and James A. Ring, former FBI special agent and present director of investigative services at the Boston law firm of Choate, Hall & Stewart.

NEW ORGANIZATION

A new nonprofit organization, the Servicemembers Legal Defense Network (SLDN), has been established to provide emergency legal services to men and women in the military who are affected by the policy on homosexuality. For information, contact Michelle M. Benecke and C. Dixon Osburn, SLDN, P.O. Box 53013, Washington, D.C. 20009. Telephone (202) 265-8305. Fax (202) 328-0063.

NIMJ

Reinventing Military Justice. NIMJ's notice in *America Online's* Military and Veterans Club bulletin board has led to several suggestions for possible changes in the Code. Do you have any? Send them along! Try using NIMJ's e-mail address: NIMJ@aol.com.

SURFACE NAVY ASSOCIATION

On December 14 Chief Judge Eugene R. Sullivan will address the Surface Navy Association on "The Future of Military Law."

JUDGE ADVOCATES ASSOCIATION

The JAA's Fall 1993 newsletter includes an ambitious program of meetings and activities for the end of 1993 and 1994. One event that particularly caught our eye was a planned observance in memory of Nineteenth Century military justice great William Winthrop on April 15, 1994. JAA plans to visit the Colonel's grave in Washington's Rock Creek Cemetery. NIMJ salutes the JAA's leadership in fostering increased appreciation of the cultural history of the military legal profession.

FBA PENTAGON CHAPTER LUNCHEONS

☞ December 14, Hon. Drew S. Days III, Solicitor General of the United States

☞ January 11, Hon. Robert E. Wiss, Judge, U.S. Court of Military Appeals

☞ February 8, Andrew S. Effron, General Counsel, Senate Armed Services Committee

The NIMJ *National Institute of Military Justice* is a District of Columbia not-for-profit corporation. NIMJ has no dues but accepts tax-deductible contributions to cover mailing expenses. Please circulate *M.J. Gaz.* to friends and colleagues interested in military justice. Feel free to duplicate it. If you are not on the mailing list but would like to be, please let us know and we will add your name. We welcome suggestions and information about coming events for inclusion in the *Gazette*.

President ..... Eugene R. Fidell
Secretary-Treasurer..... Kevin J. Barry
General Counsel..... Steven S. Saltzburg

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MILITARY JUSTICE GAZETTE

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No. 14 | *Washington, D.C.* | January 1994

SUPREME COURT

On January 19, the Supreme Court affirmed *Weiss v. United States*, No. 92-1482. The opinion of the Court was written by Chief Justice Rehnquist. Concurring opinions were written by Justices Scalia, Souter and Ginsburg.

E STREET

1. *Watch this space.* Concurring in the result in *United States v. Dykes*, 38 M.J. 270, 274 (C.M.A. 1993), in which a *DuBay* hearing was ordered in connection with a claim of unlawful command influence, Judge Cox commented: ``Perhaps the Joint-Service Committee on Military Justice might consider how collateral attacks on courts-martial should be litigated."

2. *Interesting Order.* On December 20, 1993, the Court entered an order in *United States v. Gray*, No. 93-7001/AR, an Army capital case, directing the parties to file briefs on whether appellate defense counsel should be permitted to withdraw because of orders to a new duty station.

3. *Rules Advisory Committee.* At its meeting on December 8, 1993, the Committee voted, 6-5, to recommend that the Court adopt NIMJ's proposed rule on the dismissal of petitions for grant of review that cite no errors.
The amendments would—

(1) modify the last sentence of Rule 19(a)(4) to read as follows: ``If it appears that such petition is not in accord with Article 67, UCMJ, 10 U.S.C. § 867, or with the Court's Rules, the Court may dismiss it *sua sponte* or on motion of the United States."

(2) modify Rule 21(d) to read as follows: ``If no specific errors are assigned in the supplement to the petition, the Clerk will enter an order dismissing the case without awaiting an answer and the Court will not examine the record. In all other cases the Court may, in its discretion, examine the record for the purpose of determining whether there appears to be plain error not assigned by the appellant. The Court may then specify and grant review of any such errors as well as any assigned errors which merit review. *See* Rule 5."

(3) delete Rule 21(e), and (4) renumber Rule 21(f) as Rule 21(e).

The Rules Advisory Committee will submit memoranda setting forth majority and dissenting views to the Court. The agenda for the next meeting, on January 24, includes a Navy-Marine Corps Appellate Government proposal regarding the precedential value of summary dispositions by the Court of Military Appeals and the citation of unpublished decisions. Anyone wishing to propose changes in the Court's rules should write to Thomas F. Granahan, Clerk of the Court.

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1. *Such a Deal!* The 1994 edition of NIMJ's *Guide to the Rules of Practice and Procedure of the United States Court of Military Appeals* (C.M.A. GUIDE 5th) is available on WordPerfect 5.1 diskette for $5.00.

2. Lawrence M. Baskir, having been appointed Deputy General Counsel of the Army, has resigned from the NIMJ Advisory Board.

3. NIMJ is compiling a list of all courses currently being taught on Military Justice in civilian law schools. If you are teaching such a course or know someone who is, please let us know.

FBA PENTAGON CHAPTER LUNCHEON

☞ February 8, Andrew S. Effron, General Counsel, Senate Armed Services Committee

INTER-UNIVERSITY SEMINAR

The following is reprinted, with permission, from *The Military Correctional System: Directions for the Next Century*, a talk by MG Robert M. Carter, USA (Ret), Professor of Public Administration, University of Southern California, at the Inter-University Seminar on Armed Forces and Society 1993 meeting:

Dropping rehabilitation from the military correctional system does not mean the substitution of a correctional system which is brutal or oppressive. Indeed, to the extent that it is possible to do so, convicted military offenders still should have an opportunity to acquire attitudes and living skills that will better equip them to be productive members of civilian society upon their eventual release. That does not, however, require ``rehabilitation.'' Useful employment, appropriate discipline, relevant leisure-time activities, and responsible supervision may contribute to such civilian productivity and, to the extent that a prisoner volunteers to participate, programs of education, training, and counseling should be made available. . . .

Over the years, the United States military often has led the way for American society. Obvious examples include great advances in science and technology on earth and in space and in such social issues as the integration of the armed forces in terms of race and gender. Indeed, at that time when rehabilitation was the dominant philosophy for the operation of American correctional systems, the USDB could have served as a model. But that was several years ago and, at the present time, the long-term correctional facility at Fort Leavenworth appears to be significantly out of step with the balance of America's correctional systems. The remainder of the military correctional system—the tier one and tier two local and regional confinement facilities—appear very much on target in terms of mission; only the USDB with its dated focus on rehabilitation appears out of step.

It was noted that, at mid-1993, only one percent of the inmates at the USDB were committed for offenses which were military in nature, the others were committed for quite traditional crimes against the person and property and for drug offenses. Few of these felony offenders would be seriously considered for restoration to duty.

Noting also the current downsizing of the military, a more appropriate model for military corrections would be either a transfer of the long-term prisoners function from the USDB and DOD to the [Bureau of Prisons] or a change of mission at the USDB with the Army continuing to operate the institution. The change of mission model would include a change of emphasis from rehabilitation to the justice model which argues simply that, ``if you do the crime, you do the time.'' Relevant statutes currently authorize the service secretaries to designate as a place of confinement for military offenders either a military institution or some other under the control of the United States. There is no reason to believe that the military requirement for law, good order, and discipline would be impacted negatively by either a transfer of military prisoners to the BOP or by an operational change in philosophy at the USDB.

The conclusions which are drawn and the recommendation which are made in this paper are quite independent of the fact that the USDB is considered to be an institution which is commanded and operated by a most professional and dedicated military correctional force and that is extraordinarily well managed, efficient, and effective; it is uniquely the rehabilitation mission which is troublesome and deserves policy review.

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No. 15 | *Washington, D.C.* | February 1994

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MILITARY JUSTICE GAZETTE

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No. 16 | ***Washington, D.C.*** | **March 1994**

SUPREME COURT

1. At this writing, the Supreme Court continues to hold on its docket certiorari petitions raising the Appointment Clause (*Weiss*) issue in the context of the Coast Guard Court of Military Review. A footnote in *Weiss* had remarked that the constitutionality of the presence of civilian judges on that court was not presented in that case.

2. Oral argument in *Davis v. United States* has been scheduled for March 29 at 10:00 a.m.

E STREET

1. *Judicial Conference.* This year's Judicial Conference will be conducted on May 12-13, at the Marvin Center, The George Washington University, 800 12th Street, N.W., Washington, D.C. Detailed information and registration materials are expected to be available at the end of March. Contact: **Gail Bissi**, Deputy Conference Director, U.S. Court of Military Appeals, (202) 272-1451 ext. 605.

2. *Project Outreach.* The Court will hear *United States v. Hullett*, No. 93-0792/AR, at the United States Military Academy on March 24, 1994.

3. *Visitors from Far and Near.* On March 7, the Court will be visited by 14 military law experts from the Czech Republic, Romania and Albania. NIMJ welcomes them to Washington!

PEOPLE

President Clinton has nominated **Jamie S. Gorelick**, General Counsel of the Department of Defense, to be Deputy Attorney General.

JUDGE ADVOCATES ASSOCIATION

☞ Wednesday, March 16: Reception for General Counsels of the Military Departments, 4:00 p.m. - 6:00 p.m., Pentagon Executive Dining Room.

☞ Friday, April 15: Colonel William Winthrop luncheon and "Staff Ride." 9:30 a.m. - 2:30 p.m., Army-Navy Club.

☞ Saturday, April 30: Dinner and *Stomping at the Savoy* at the Kennedy Center, 6:00 p.m.

☞ Sunday, May 1: Law Day picnic, venue to be announced.

☞ Wednesday, May 11: Annual Awards Banquet

For details on any of these events, call the JAA at (202) 628-0979.

The JAA has also announced that it is forming an American Inn of Court, open to present or past Judge Advocates (any branch, including Reserve and National Guard personnel). Contact **LtCol Bill Colwell, USAF, (202) 767-4765**, or **Maj Karen Johnson, USAR, (202) 272-1461**.

The deadline for receipt of nominations for the Outstanding Career Armed Services Attorney Award is March 15, 1994. Nominees must be serving in the grades of O-4 or O-5 at the time of nomination and through the time of award (May 11, 1994).

AMERICAN BAR ASSOCIATION

The February 1994 *Committee Update* of the ABA General Practice Section Committee on Military Law includes useful summaries of four recent Navy professional ethics cases. In one of the cases, counsel's certification was revoked and he or she was suspended indefinitely from performing any legal function supervision of which is under the Judge Advocate General's cognizance. The basis for the action was the attorney's conviction by general court-martial for wrongfully concealing the fact that he or she shared an apartment with another servicemember who was entitled to receive BAQ and VHA.

NIMJ encourages the Judge Advocates General to disseminate information about ethics determinations as widely and as promptly as possible consistent with privacy interests.

At the ABA mid-year meeting in Kansas City, issues of ethics for military lawyers were raised and discussed at the meetings of the Standing Committees on Military law and on lawyers in the Armed Forces. The latter committee is undertaking a review of various ethical issues, including the application of Rule 1.10 of the ABA Model Rules (involving imputed disqualification) to armed forces legal offices. Presently, at least two of the services have adopted a rule which does not follow the ABA rule, and which nullifies automatic imputed disqualification within those services. Comments on any ethics issues as they affect uniformed lawyers may be addressed to the Standing Committee on Lawyers in the Armed Forces, and sent to Kevin J. Barry, a member of that committee, at the address shown below.

The Standing Committee on lawyers in the Armed Forces is also accepting nominations for a writing award for published articles that promote interests and professionalism of lawyers in the armed forces. The award consists of a certificate and $250. For information on nominations, please contact Kevin Barry.

PORT CHICAGO CASES

An earlier issue of *M.J. Gaz.* noted that Congress had directed a review of the courts-martial of 258 African-American sailors following an incident at Naval Weapons Station Port Chicago, California, during World War II. On review by the BCNR, the Navy found that there was insufficient evidence that the trials were tainted by racial prejudice or other improper factors so as to merit overturning the cases. One case was overturned in 1993; another had been overturned shortly after trial.

JOHN MARSHALL PLACE

The United States Court of Appeals for the District of Columbia Circuit will rehear *Steffan v. Aspin, en banc*, on May 11.

FEDERAL BAR ASSOCIATION

The FBA is again presenting the Robinson O. Everett Award for legal writing. Contact: Jim Richardson at the U.S. Court of Military Appeals for details.

MOMS

MOMS' Annual Conference will be held on April 21-24, 1994, at the Ramada Inn, Leavenworth, Kansas. Civilian practitioners in attendance (a/k/a Upper Missouri River Valley Bar Association) will meet at 8:00 a.m., Saturday, April 23, 1994. At the general meeting that evening, the MOMS Founder's Award will be presented to the Navy-Marine Corps Appellate Defense Division. Congratulations!

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No. 19 | *Washington, D.C.* | July 1994

SUPREME COURT

On June 24, the Supreme Court handed down the decision in *Davis v. United States*, No. 92-1949. At issue was whether police (the Naval Criminal Investigative Service) had to terminate questioning when a suspect said "Maybe I should talk to a lawyer." The Court, in an opinion by Justice O'Connor, held that the accused's statement was not a sufficiently clear assertion of the right to counsel to trigger *Edwards v. Arizona*, 451 U.S. 477 (1981). Justice Scalia concurred separately. While voting to concur, Justice Souter (writing for himself and Justices Blackmun, Stevens and Ginsburg) believed the investigators were not at liberty to disregard Davis's statement and had a duty to find out what he meant by it.

The importance of the case, from the perspective of the military justice system, is that it represents the first time the Supreme Court has taken a case from this system for the purpose of deciding a generic issue of constitutional doctrine. The military context from which *Davis* arose played no role in the Court's analysis or outcome.

E STREET

1. *Annual Report*. The FY93 Annual Report of the Code Committee is now available from the Clerk, U.S. Court of Military Appeals, 450 E Street, N.W., Washington, D.C. 20442. The statistics reflect the continuing decline in cases throughout the system. (For an interesting sidelight on the decline, see Jack Ewing, *The Lawyers Who are left Out in the Cold*, Nat'l L. J., May 30, 1994, at A10, with the telling subheadline: "Troop withdrawals from Germany leave American lawyers there with little to do".)

2. *Rules*. The Rules Advisory Committee has submitted to the Court proposed changes to eliminate the current 20-day time limit for seeking writs of *error coram nobis* and to require that counsel seeking extraordinary writs apply in the first instance to the Court of Military Review or explain why they should not have to do so. The latter proposal was prompted by a suggestion from Judge Richard M. Mollison of the Navy-Marine Corps Court of Military Review. The Committee's next meeting will be on July 21, at 9:00 a.m. Among other things, student practice rules will be considered.

3. *Judicial Conference*. The Court held its annual Judicial Conference at GWU on May 12 and 13. Among the speakers were NIMJ General Counsel Professor Steven Saltzburg and Advisory Board member Professor Frederic I. Lederer. Professor Saltzburg discussed scientific evidence, and noted a "disturbing number" of reported cases in which defense counsel did not make basic evidentiary challenges. He argued that every plain error case is a case of defense counsel not rendering the level of assistance on which the system depends in order to function properly. As a possible solution, he suggested that it might be time for the appellate courts to name names in its opinions.

NIMJ query: if the number of cases continues to decline (and therefore there is less overall experience in actually trying cases), and if the rules on waiver are invoked on a regular basis absent plain error, is it incumbent on the services to impose a practice requirement on defense counsel before permitting counsel to solo? The Air Force announced at the ABA's mid-year meeting in February that it was abandoning its requirement that junior officers serve as assistant trial counsel or special court-martial trial counsel and be recommended by a military judge and their staff judge advocate before being certified under Article 27.

One aspect of the Judicial Conference that might be improved upon is foreign involvement. Past conferences benefited from the presence of Canadian Forces judge advocates. Perhaps next year's conference could include a comparative law presentation by military lawyers

from Canada and other countries.

CIVILIAN DEFENSE BAR

Michael L. Powell, a retired Marine Corps lawyer, is assembling a directory of civilian attorneys who practice military law. He can be reached at P.O. Box 129, Mount Vernon, Virginia 22121-0129. Tel. (703) 799-4741.

NIMJ

NIMJ needs your financial support. If you read the *Gazette* and feel it serves a useful purpose, please remember to send a contribution to help cover our expenses. NIMJ receives no federal funds.

INFORMATION HIGHWAY NEWS

There are two new additions to the America Online electronic service. First, **Times News Service** and AOL have begun a Military City Online feature with many postings of interest of uniformed personnel and others who take an interest in the armed forces. AOL also has a legal Special Interest Group (legal SIG) that includes a Military law topic. The string of messages is short at the moment, but is likely to grow as more military lawyers become aware of it.

Do you know of any military law newsgroups or similar resources on the Internet? Please send details by e-mail to NIMJ@aol.com. We will pass the word in a future *Gazette*.

MILITARY LAW BOOKSHELF

1. The Summer 1994 issue of the Wake Forest Law Review is dedicated to National Security law. It includes, among other things, an essay by **Senator Sam Nunn**, Chairman of the Committee on Armed Services, on *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, and these articles: *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, by **Colonel Charles J. Dunlap, Jr., USAF**; *Gays and lesbians in the Military: A Rationally Based Solution to a Legal Rubik's Cube*, by NIMJ Advisory Board member **David A. Schlueter**; *Forums for Punishing Offenses Against the Law of Nations*, by USCMA Senior Judge **Robinson O. Everett** and **Colonel Scott L. Silliman**, Director of the Center on Law, Ethics and National Security, Duke Law School; *Presidential Preferences and Aspiring Appointees: Selections to the U.S. Court of Military Appeals 1951-1968*, by the USCMA Historian, **Professor Jonathan Lurie**; and a student Note, *The Beginning of the End for the Military's Traditional Policy on Homosexuals: Steffan v. Aspin*.

2. The July 1994 issue of *Naval Institute Proceedings* contains an article (pp. 56-59) by NIMJ Secretary-Treasurer **Captain Kevin J. Barry** on "Reinventing Military Justice."

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No. 20 | ***ABA Annual Meeting Issue*** | **August 1994**

ON THE HILL

1. The July 17, 1994 *Washington Post* and the July 18 *New York Times* included articles on the 50th anniversary of the devastating explosion at the Port Chicago naval weapons station. After the explosion, many black sailors were prosecuted when they refused to work in conditions which they believed were unsafe. In January 1994, the Navy upheld the convictions in a special review, although it found that racial discrimination had existed at Port Chicago. *See* M.J. Gaz. No. 16. According to the *Post*, Senators **Barbara Boxer** and **Dianne Feinstein** and four other legislators have asked the President to exonerate those who were convicted.

2. According to an Op-Ed piece by Representative **Maxine Waters** and psychiatrist **Jonathan Shay** in the July 30 *New York Times*, legislation is to be introduced this month to establish a procedure for automatically upgrading "bad paper" discharges for combat veterans. The authors note that current procedures can take years, while a prompt upgrade can make a substantial difference in the veteran's life.

3. Looking for some light reading for the beach? Consider the House and Senate reports on the National Defense Authorization Act for FY95, which includes much of interest to readers of *M.J. Gaz.* For example:

``The [House Committee on Armed Services] has been concerned about the organization of the military defense counsel system within the Naval legal Services Command. The Army, Air Force, and Marine Corps each have established separate commands for defense counsel. Under these arrangements, legal officers are assigned as full-time defense counsel for a tour of duty, and their annual performance evaluations are written and endorsed by officials outside the chain of command for prosecutors. Most defense counsel offices in these services are located separately from the offices of prosecuting officials.

``In contrast, in the Navy the commander of the Naval legal Services Office ordinarily writes the fitness reports for both prosecutors and defense counsel, all of whom work for that commander. Moreover, attorneys who represent individuals before courts-martial in the Navy may also be assigned unrelated duties during the course of their tour at a Naval legal Services Office. Attorneys who serve as prosecutors and defense counsel are, for the most part co-located.

``The committee believes that the separate chain of command system for defense attorneys employed by the Army, Air Force and Marines fosters an appearance of fairness and underscores the fact that defense counsel are not answerable to the officers responsible for convening the courts-martial that try their clients. The committee applauds the Navy for its recent decision to implement a Trial Services Command prototype project at Navy installations in the Southeast United States and looks forward to periodic updates on the progress of this initiative." H.R. Rep. No. 103-499 at 247-48.

For its part, the Senate Armed Services Committee recommended changing the name of the United States Court of Military Appeals to the United States Court of Appeals for the Armed Services, and changing the name of the Courts of Military Review to Courts of Military Criminal Appeals. ``The purpose of the change is to more clearly reflect the appellate judicial role of these tribunals." S. Rep. No. 103-282 at 230. The Committee also recommended enactment of a provision requiring the Secretary of the Army to review the dismissals of the first and third African-American West Point cadets, which occurred in 1874 and 1882, respectively. Based on the Secretary's review, the President would be authorized to grant posthumous commissions. *Id.* at 188. The Committee also recommended a provision directing the Defense Department to review its policy concerning personal grooming waivers for bona fide members of the Sikh religion, a fundamental precept of which is to keep all body hair intact. *Id.* at 188-89.

E STREET

The Court decided two major extraordinary writ cases on June 15. In *Garrett v. Lowe*, 39 M.J. 293 (3-2), it granted a writ of error coram nobis in a case it had affirmed in 1987. Garrett's co-accused had obtained relief in the Tenth Circuit. *Gray v. Mahoney*, 39 M.J. 299, concerned an acquitted accused's right to the return of seized property and the return to the government of copies of exhibits that had been furnished unconditionally to defense counsel. The case is noteworthy because, among other things, the Court asserted All Writs Act authority even though the court-martial, having resulted in an acquittal, could never have reached it on direct review. Inexplicably, the government did not contest the Court's jurisdiction. In a footnote, the Court seems to presage a limited reading of *In re Taylor*, 31 C.M.R. 13 (1961).

BOOK REVIEW

Two years ago, Princeton University Press published the first volume of Professor Jonathan Lurie's history of the United States Court of Military Appeals, *Arming Military Justice: The Origins of the United States Court of* Military Appeals, 1775-1950 (1992). Now that I have read it, I conclude that it should be suggested reading at all Basic Courses for new judge advocates and required reading for all those in authority within the military justice system.

Most of us who practice in this system are so involved in the day-to-day business of "doing" military law that we rarely have the luxury of stepping back to take a longer look at what we are doing, and why we do it the way we do. That may be acceptable for trial practitioners, but it is not for those who have a responsibility to lead and shape the system for the future. This group—which should extend well beyond those holding judicial office under the Code—must have the bigger picture in mind. Jonathan Lurie's book is one place to find it.

Seeking the Court's roots, Professor Lurie properly traces the overall development of American military justice. He has done remarkable original research, and his presentation of this material and his own insights allows the reader to begin to see the system in a new light. It may be that there is "nothing new under the sun," but it is fascinating to find the Court's origins and those of the entire current military justice system in 18th and 19th century events, as well as the famous Ansell-Crowder dispute during World War I. Justice is at stake, and Professor Lurie shows that the pre-Code sys-tem's ability to deliver had been uneven.

This is first class historiography. It supplies the kind of background information that is essential for those who wish to understand the current arrangements and contribute to the future development of the law. Volume I ends with enactment of the Code. Volume 2 will cover the first 40 years of the Court's history.

K.J.B.

NIMJ

The *National Institute of Military Justice* is a District of Columbia not-for-profit corporation. NIMJ has no dues but gratefully accepts tax-deductible contributions. Please circulate *M.J. Gaz.* to friends and colleagues who are interested in military justice. Feel free to duplicate it. If you are not on the mailing list but would like to be, please let us know and we will add your name. We welcome suggestions and information about coming events for inclusion in the *Gazette*.

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MILITARY JUSTICE GAZETTE

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NATIONAL INSTITUTE OF MILITARY JUSTICE

No. 21 ***Washington, D.C.*** **September 1994**

E STREET

1. Under § 924 of the National Defense Authorization Act for FY95, the name of the United States Court of Military Appeals will be changed to ``United States Court of Appeals for the Armed Forces.'' H. Rep. 103-701, 140 Cong. Rec. H8102 (daily ed. Aug. 12, 1994) (explanatory matter at H8349).

2. The digesting of decisions continues to baffle. On the positive side, West Publishing elected to digest headnote 3 in *United States v. Visser*, 40 M.J. 86 (C.M.A. 1994) (``Fourth Amendment prohibits only `meaningful interference' with person's possessory interests, not government action which is reasonable under circumstances'') not only to Military Justice key number 1076.1 but also to Searches and Seizures key number 13.1. Query: if the point is covered by Searches and Seizures key number 13.1, why even double-digest it to the Military Justice digest topic? On the other hand, in *United States v. Gray*, 40 M.J. 77 (C.M.A. 1994), decided the same day, headnote 3 (``[c]hild-victim's sexual activity with someone other than accused may be relevant to show that alleged victim had knowledge beyond her tender years before alleged encounter with accused'') was digested only to Military Justice key number 1035. Can it really be that there is no appropriate key number for this point of law in any of the non-Military Justice digest topics?

ABA ANNUAL MEETING

In early August the various ABA military law committees met during the ABA Annual Meeting in New Orleans. Each of the five services' senior attorneys present reported the effects of downsizing (AKA ``rightsizing'') within their departments, and noted the problems created by trying to do more with less. In the court-martial arena, each service reported similar experiences: many fewer courts-martial overall (*e.g.*, the Army is down to 21 military judges), and fewer NJPs as well, but more general courts-martial, and more complicated and serious cases and issues in those cases. Motion practice is up correspondingly, and records of trial are thicker. The trend presents a variety of difficulties to the services. Brigadier General **Michael Wholley** (SJA to the Commandant, USMC) spoke with feeling about one result—the problem of getting young counsel trained in an era when there are so few of the ``less important'' cases through which it was formerly possible to ``learn the rubric'' so that by the time counsel were assigned to more serious cases they could concentrate on the issues—they already knew the court routine. (*M.J. Gaz.* query: should there be a litigation specialty within the services? That question is now being asked at the highest levels.)

The efforts to overcome such problems and the attention to them by the TJAGs are noteworthy. For example, Rear Admiral **Rick Grant** reported on the ``law library in a box'' concept under which virtually all necessary research resources are made available on CD-ROM. Another initiative seeks to address the issues surrounding the current Navy Legal Service Office (NLSO) organization, which has been perceived as allowing conflicts between trial and defense counsel. The Navy is establishing a ``trial services organization'' in the southeastern United States, from Charleston through the Gulf up to Memphis. Command advice and trial counsel services will now be provided by this organization, while NLSOs will continue to provide defense services, along with legal assistance and claims. Admiral Grant reported that by keeping the NLSO, he hopes to avoid the ``burnout'' which the Navy believes could occur if it went with a sole function ``area defense counsel'' organization such as those implemented in the Army and the Air Force. This ``out of the hide'' effort will be reviewed in a year or so, and if found to meet expectations, could be extended throughout the Navy.

The services' top lawyers reported an exceptional degree of harmony and cooperation

among them, which extended as well to the various offices of general counsel.

The Standing Committees on lawyers in the Armed Forces and Military law merged at this meeting into a new Standing Committee on Armed Forces law, chaired by Commander **Eileen Riley**, JAGC, USNR. The evolution is the culmination of long controversy over the ABA's military law committee structure. Outgoing chairs of the two merged committees were Rear Admiral (retired) **John S. Jenkins** (chair of NIMJ's Advisory Board) and Major General (retired) **Keithe Nelson**.

The biggest issue affecting the military at the meeting was a recommendation before the House of Delegates which could have affected the ability of JAG recruiters to recruit at law schools. Admiral Jenkins, Judge Advocates Association delegate to the House, led a successful effort to ensure that the ability of the services to recruit would be left intact.

MILITARY JUSTICE IN MULTINATIONAL FORCES

Announcement of the formation of a multinational force to invade Haiti under U.S. leadership is the latest in a series of international cooperative military peacekeeping and peacemaking efforts. At its June 1994 meeting in Baden/Vienna, the International Society for Military law and the law of War considered the application of military law in the context of joint military forces. All of the national representatives responding to the Society's questionnaire on this topic expressed doubts that their nation would permit disciplinary authority to be exercised by a foreign commander. UN peacekeeping forces have had extremely low disciplinary rates but, when a serious offense has occurred, the national contingent's command authority determines the appropriate response. Thus, in a gold smuggling case involving soldiers from three contingents, one contingent sent the soldier home because its military and national criminal codes did not provide for extraterritorial jurisdiction; in a second contingent the accused was convicted by general court-martial and sentenced to be confined for several years; in the third, the accused was given NJP.

BOOKSHELF

An interesting recent book is Gerry E. Rubin, *Durban 1942: A British Troopship Revolt* (Hambledon Press 1992), tracing the background of a mutiny aboard the *City of Canterbury* during a layover in South Africa. The walkoff was prompted by filthy conditions aboard the vessel. Mr. Rubin identifies a number of the legal and political issues presented by the case, such as the difficulty of prosecuting mass crime, the exercise of British military justice in the Union of South Africa, the desire to achieve comparability between courts-martial in different branches of the service (British Army and RAF) but arising out of one incident, and the exercise of clemency in wartime. Many of the men who did not participate in the walkoff died or wound up being taken prisoner by the Japanese after the ship proceeded on her voyage.

RECENT SIGHTING

Observed on Massachusetts Avenue (Embassy Row) in Washington: POV with District of Columbia license plate ``AWOL.'' let us know if you've seen other military justice-related tags.

NIMJ

President ..... Eugene R. Fidell
Secretary-Treasurer..... Kevin J. Barry
General Counsel..... Steven S. Saltzburg

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MILITARY JUSTICE GAZETTE

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No. 41 *Washington, D.C.* September 1996

SUPREME COURT

Following are the Questions Presented in the certiorari petition in *Edmond v. United States*, No. 96-262:

1. Did the Court of Appeals for the Armed Forces err in concluding that judges of the military Courts of Criminal Appeals, who have expansive authority to decide questions of law and fact, most of whose decisions are never reviewed by higher authority, and who have no ``superior officer'' over them, are nonetheless inferior officers under the Appointments Clause of the Constitution?

2. If such judges are inferior officers, did the Court of Appeals err in finding the authority to appoint them in a general residual appointment authority, even though Congress has specifically provided for another method of appointment for such judges which admittedly does not satisfy the Appointments Clause?

E STREET

1. An installation ceremony will be held at 4:00 p.m., Thursday, September 25, 1996, for Judge Andrew S. Effron at the Courthouse.

2. The Court will hear oral argument on October 1, 2 and 3, November 5, 6 and 7, and December 3, 4 and 5. Among the interesting issues to be argued is, in *United States v. Edwards*, No. 96-0126/NA (set for October 2), whether the operational status of a naval vessel is irrelevant for the purpose of imposing nonjudicial punishment under Article 15, UCMJ.

3. The 1997 Judicial Conference will be held on May 8-9, 1997, at the Marvin Center, The George Washington University, Washington, D.C.

AMERICAN BAR ASSOCIATION

Two issues of interest to military law practitioners were under discussion at the ABA's Annual Meeting in Orlando, Florida. One, having to do with the provision of post-conviction counsel for military personnel under sentence of death was presented to the House of Delegates and unanimously approved. The text reads:

> ``RESOLVED, that the American Bar Association urges that military capital prisoners be provided with the same opportunity for the assistance of coiunsel in seeking federal post-conviction relief as is now provided by federal law for persons sentenced to death in the civilian courts of this country.''

The other proposal concerned the procedure employed by the Defense Department for proposing changes in the *Manual for Courts-Martial*, would have required such rulemaking to be conducted under the auspices of a committee like those responsible for recommending changes in the Federal Rules of Criminal Procedure. The views of the services and the Department of Defense General Counsel had not been received prior to the Annual Meeting, although a likely bone of contention is whether such a committee would have a majority of civilians. To permit further discussion and fine-tuning of the proposal, the Standing Committee on Armed Forces law withdrew the resolution from consideration by the House of Delegates. The matter will presumably be presented again, in revised form, at the Mid-Year Meeting to be held in San Antonio, Texas, in February 1997.

Comments or suggestions on this matter should be sent to the new chairman of the Standing Committee on Armed Forces law, Francis S. Moran, Jr., Boston Bar Association, 16 Beacon Street, Boston, Massachusetts 02108.

PRIVATE PRACTITIONERS' DIRECTORY

Please note the following additional entry to NIMJ's 1996 *Directory of Private Practitioners of Military law*:

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CODE COMMITTEE

The Code Committee on Military Justice will meet at the United States Court of Appeals for the Armed Forces at 10:00 a.m., on Monday, September 30, 1996. This meeting will be open to the public.

Secretary of Defense William J. Perry has named NIMJ advisory board member Professor Fredric I. Lederer (William & Mary) and NIMJ president Eugene R. Fidell to three-year terms as public members of the Committee.

NIMJ

1. The 1997 edition of NIMJ's *Guide to the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces* is in preparation. Please send in your suggestions.

2. Congratulations to NIMJ advisory board member Alexander S. Nicholas, of the North Carolina bar, on his promotion to Colonel in the North Carolina Air National Guard.

DEPARTMENT OF MODEST PROPOSALS

Lt Col John C. Kunich, Staff Judge Advocate, 50th Space Wing, Falcon AFB, has written an interesting op-ed piece for the September 9, 1996 *Navy [etc.] Times*, based on his article in 39 A.F.L. Rev. His proposal is that consideration be given to creating a modern ``ceremony of ignominy'' for drumming disgraced personnel out of the service. He traces the history of and current legal constraints (*e.g.*, UCMJ art. 13; Eighth Amendment) on such ceremonies, and acknowledges the public relations hazards.

MOMS

MOMS' Fall Conference will be held at the Ramada Inn, Leavenworth, Kansas, on October 10-13, 1996. Highlights will include a visit to the United States Disciplinary Barracks, a talk by the Commandant, Col Mark Nichols, and a panel discussion on parole (with Air Force and Army representatives). For further information contact Carolyn Dock, MOMS, 8285 Black Haw Court, Frederick, MD 21701.

FBA PENTAGON CHAPTER

October 8, 11:30 a.m. Ft. McNair. The guest speaker will be Michael Shaheen, Director, Office of Professional Responsibility, Department of Justice.

October 23, 4:00 p.m. Pentagon Executive Dining Room. Reception for the Judge Advocates General. Cosponsored by the Pentagon Chapter and the FBA's Litigation Section.

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MILITARY JUSTICE GAZETTE

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No. 42 *Washington, D.C.* November 1996

1996 DIRECTORY ADDENDA

Please note the following updated, corrected and additional entries for the *Directory of Private Practitioners*:

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NECROLOGY

On October 1, 1996, Colonel **Frederick Bernays Wiener** died in Phoenix, Arizona. He was 90. Colonel Weiner, nicknamed ``Fritz,'' was one of the country's leading authorities on military law. A graduate of Brown University and Harvard Law School, he had been an Assistant to the Solicitor General, an officer of the Judge Advocate General's Corps, and a private practitioner. He achieved a brilliant victory in obtaining rehearing from the Supreme Court in *Reid v. Covert*, *see* 352 U.S. 901 (1956) (mem.) (6-2, Brennan, J., not participating), and in then persuading six Justices to rule in his clients' favor, 354 U.S. 1 (1957). He wrote numerous articles and books, and had been published in, among other periodicals, the *Harvard Law Review* and the *Military Law Review*. Scrupulous in his own scholarship, he insisted on the same high standard of care from others, most notably in a seathing book review he wrote in the 1950s on another author's text on military justice. For many years he was Arizona correspondent to and one of the United States members of the Council of the Selden Society, which supports the study of English legal history.

We also announce with regret the death of **Charles T. (``Ted'') Bumer**, a distinguished military law practitioner in San Diego.

IN THE STATE COURTS

In a case of first impression for Washington State, that state's Court of Appeals has recently held, in *State v. Aronson*, 82 Wash. App. ___ (1996), that a conviction by general court-martial could be considered by a state trial court for sentencing purposes. Thirty-four years before his state trial, Aronson had been convicted by general court-martial based on a plea of guilty. The Court of Appeals held that the conviction was not, as Aronson argued, constitutionally invalid on its face. The opinion (Thompson, J.) comments:

> In the analogous situation of determining repeat o[r] habitual offender status, the state courts that have addressed the question appear to be split. However, courts that decline to consider prior military offenses do not question the *validity* of military convictions, but merely point out that military offense frequently have no civilian counterparts, or that the purposes of military justice differ from those of civilian criminal law. Courts of many other states permit use of military convictions, particularly

> when the defendant's act would have been unlawful under the forum-state's law. [Citations omitted.]

Coincidentally, the Court cited two articles by Colonel Wiener.

BOOKSHELF

The Supreme Court Historical Society has issued volume I of the *Journal of Supreme Court History, 1996*. The articles were originally presented in the Society's 1995 lecture series on the Supreme Court in World War II. Topics include ``The Court at War and the War at the Court.'' ``The Saboteurs' Case.'' ``The *Cramer* Treason Case.'' ``Justice Jackson and the Nuremberg Trials'' and ``The Supreme Court and Racial Equality during World War II.'' The articles are accompanied by a number of fascinating illustrations, including one in which one of the German saboteurs is being led by Army guards from the courtroom that was located on the fifth floor of the Justice Department. ``After his conviction and execution, Haupt was buried in a potter's field at the southern tip of the District of Columbia with his fellow saboteurs.'' The publication is available at the Supreme Court bookshop or from the Society, 111 Second Street, N.E., Washington, D.C. 20002.

CODE COMMITTEE

The Code Committee conducted a public meeting for two hours on September 30. There were only a handful of civilian or military spectators. The Committee received reports on trends in service caseloads (down but mostly leveling off) and pending legislative proposals. Public member Professor Fredric I. Lederer suggested that the Joint Service Committee be asked to look into possible changes relating to Article 15 and the independence of the military judiciary. His suggestion will be referred to the General Counsel of the Department of Defense. Judge Andrew S. Effron will head a subcommittee to consider the function of the Code Committee.

WORLD WIDE WEB

Following are some web sites of interest of *M.J. Gaz.* readers:

MOMS: http://www.idsonline.com/moms/

INTERNATIONAL SOCIETY FOR MILITARY LAW AND THE LAW OF WAR

The XIVth International Congress of the International Society for Military Law and the Law of War will be held at the War Museum, Athens, Greece, on May 10-15, 1997. The overall topic for the Congress—which is being conducted under the auspices of the Court of Military Justice of the Greek Ministry of National Defense—will be ``Investigation and Prosecution of Violations of the Law of Armed Conflicts.'' Registration forms (returnable by March 1, 1997) are available from the Society, c/o Auditorat général près la Cour militaire, Palais de Justice, Place Poelaert, 1, B-1000 Brussels, Belgium, or by fax to +(32) (2) 508.60.87.

AMERICAN BAR ASSOCIATION

FEDERAL BAR ASSOCIATION

NIMJ

Thank you, kind reader who shall go nameless, for writing: ``I enjoy your newsletters tremendously. They are a voice in the wilderness for us civilian practitioners.''

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MILITARY JUSTICE GAZETTE

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1997 DIRECTORY OF CIVILIAN PRACTITIONERS OF MILITARY LAW

Following is the 1997 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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OP-ED

Professor **Jonathan Lurie**, *Los Angeles Times*, May 21, 1997:

". . . [A]s the years pass and members of the [federal] judiciary become less and less familiar with military justice, the greater is their tendency to accept the military viewpoint without giving it the critical, dispassionate and analytical treatment appropriate to appellate jurisprudence. Moreover, lack of scholarly civilian interest in military justice is reflected by its absence from most law school curriculums or law reviews. These trends are not healthy in a society that glorifies civilian control of the military.

Military Justice is not well served under these conditions. And until the civilian bar, legal educators and the courts join in giving appropriate military justice cases the scholarly scrutiny they deserve, the situation will only get worse. Perhaps as the practitioners of military justice look for respect, they should seek it the old-fashioned way. They should earn it."

ATHENS

The International Society for Military Law and the Law of War held its XIVth Triennial Congress in Athens, May 10-15. It addressed two major themes: how nations investigate and prosecute violations of the law of armed conflict (LOAC) and application of LOAC to international peacekeeping operations. As to the first, it is clear that no nation, including the United States, has properly trained investigators. Compare German practices documented in **Alfred M. De Zaya**, *The Wehrmacht War Crimes Bureau, 1939-1945* (Univ. of Nebraska 1980). As to the second, all nations adhere to the principle that LOAC applies and design their Rules of Engagement accordingly, but some admit that the absence of a defined enemy makes it difficult, for example, to decide whether a detained rioter or thief should have the protections accorded POWs.

During informal discussions, it remained apparent that the United States military justice system is unique. The closest models are the United Kingdom and Canada. Both are busily engaged in refashioning their systems and doctrine to harmonize with civilian international human rights standards. In a future issue we hope to discuss some of the similarities and differences, *e.g.*, the British Army's Prosecution Service, which enjoys independence from ratings by individuals in the chain of command. Problems posed by sexual fraternization are not unique to the United States which, however, seems to be the only nation that criminalizes such behavior. This may be due to the fact that most foreign military justice systems are limited to purely military offenses whose peacetime sanctions are lenient by United States standards and by the fact that convictions are typically reviewed by civilian judges who do not consider the armed forces a "separate community."

Michael Noone
The Catholic University of America

NIMJ

Major **Dwight H. Sullivan**, USMCR, staff counsel for the American Civil Liberties Union of Maryland, has been named to NIMJ's Advisory Board.

NIMJ

Please e-mail us your e-mail address so we can add you to our new electronic mailing list.

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NIMJ COMMENTS ON ADULTERY UNDER THE UCMJ

[*On August 4, 1997, NIMJ submitted the following comments in response to a request from the General Counsel of the Department of Defense. The Department also solicited comments from the ABA Standing Committee on Armed Forces Law, the Judge Advocates Association, and the Servicemembers Legal Defense Network.*]

By letter dated July 3, 1997, you asked for the views of the National Institute of Military Justice (NIMJ) with respect to the current guidance on the offense of adultery, including how that guidance may be improved. NIMJ is pleased to have been afforded an opportunity to comment on this important and timely issue.

NIMJ has no magical solution or specific language to propose, and indeed, I doubt this is what you were seeking from us. What we *can* do is raise some questions for discussion within the Department and outside, with a view to determining (1) whether there is a problem, (2) if there is a problem, what its scope is, (3) what process should be employed for fixing it, and (4) at least some of the issues that ought to be taken into account in fashioning a fair, sensible and workable course of action that will maintain and improve public confidence in the administration of military justice and take appropriate account of other national policies such as those principles of federalism that generally leave domestic relations matters to the states. Because these issues fold into one another, the following discussion does not follow a rigid outline.

Should adultery be an offense under the Uniform Code of Military Justice? NIMJ has no institutional position on this fundamental issue; the views of our officers and advisory board members probably run the full gamut on the subject. Adultery is not prohibited *eo nomine* by any of the punitive articles, but rather has long been viewed as an offense under the general articles, and of course it is listed by the President in the *Manual for Courts-Martial*. The President cannot create an offense under the Code, but we see no reason he could not remove adultery from the Manual if he thought it fit to do so, directing as well that there be no prosecutions by court-martial for this crime, or, less sweepingly, that it be prosecuted only if certain defined circumstances were present. Similarly, under its authority to make rules for the government and regulation of the land and naval forces, Congress could direct that adultery not be a military crime. The matter is also of special interest to the Senate, given its confirmation responsibilities: will there be a no-adultery litmus test for promotions to flag and general officer grades or for special assignments? Which Branch should act—assuming some action is needed—is itself a substantial issue whose answer turns on the broadest considerations of national policy and the shared responsibility for national defense contemplated by the Framers of the Constitution. NIMJ claims no special expertise on how such sensitive inter-Branch issues should be resolved, but it is our view that Congress can and should be more active in the military justice area, including the regular conduct of hearings on legislative proposals relating to the Code.

Whoever makes the decision as to whether *and under what circumstances* adultery should be a military crime, that decision should not only reflect a moral judgment, the traditional functions of the criminal law, and the special purposes of military criminal justice, but should also rest on empirical data, the overall approach of American criminal law to adultery as we approach the next century, and the potential effect of decriminalization on other aspects of the overall legal/social structure of the Armed Forces of the United States. For example, given the special stresses which military service places on military families (especially in times of high tempo military operations), does it make sense to have a crime of adultery under military law even if it were not felt necessary to have such an offense in civilian criminal law? Conversely, is concern for the family truly served by criminalization, or does criminalization merely foster more lies and make healing of the family structure even harder? Does criminalization encourage or discourage reform on the part of adulterers? Disciplines other than the law must play major roles in resolving these kinds of issues. We believe, for example, that the views of clergy (uniformed and civilian) should be actively sought. We have received comments from one serving chaplain which were highly perceptive.

At common law, adultery was not a crime. *See United States v. Hickson*, 22 M.J. 146, 147 (1986). It was a federal crime when committed within the special territorial and maritime jurisdiction until 1948, *id.* at 147-48 & n.3, but it is not currently a crime under federal law except pursuant to the Assimilative Crimes Act and the UCMJ. In the same able opinion, Chief Judge Everett also wrote of having found no reported Assimilative Crimes Act prosecutions for adultery or fornication. *Id.* at 148.

As for state laws, the senior review panel will want to examine Richard A. Posner & Katharine B. Silbaugh, *A Guide to America's Sex Laws* (1996). Judge Posner and Professor Silbaugh's chapter on adultery, a copy of which is enclosed, surveys state and federal laws (but not the UCMJ) as of September 1, 1994. The states appear to be evenly divided as to whether adultery should be a crime of any kind. Of the 25 that criminalize it, 19 make it only a misdemeanor. Only a half-dozen American jurisdictions treat adultery as a felony. The authors comment (at 103):

> As with fornication, it is commonly thought that adultery charges are never prosecuted. This is true to a great extent, but exceptions persist. See, for example, *State v. Mangon*, 603 So.2d 1131 (Ala. App. 1992); *Commonwealth v. Paperiella*, 439 A.2d 827 (1982); *Commonwealth v. Stowell*, [389 Mass. 171, 449 N.E.2d 357] (1983).

The book is nonjudgmental, but the following paragraph from the introduction (at 2) is noteworthy:

> When law tracks the moral beliefs held by all of at least the vast majority of the members of a society, as is true of the laws prohibiting murder and theft, people do not have to "know" the law in order to comply with it; they have only to follow their conscience. Given the diversity of moral opinion regarding sex in the United States, conscience is not a sure guide to legality any more. *No longer is it "obvious" (if it ever was)* that sexual relations between consenting adults of the same sex is a crime, or that the age of consent to marriage should be lower for females than for males, or that marital rape is not a crime, or *that adultery and fornication are crimes*. By the same token, moral diversity in a federal system in which the regulation of some field of activity is dominated by state law (as is the case with the regulation of sex) is likely to lead to a crazy quilt of laws, and, as readers of this book will discover, has indeed done so. So far as the regulation of sexual behavior is concerned, by crossing a state boundary one may be stepping into a different moral universe. [Emphasis added.]

Congress or the President must take a hard look—informed by, among other things, public dismay over recent cases—at whether adultery should be a federal crime for military personnel. Family law is a traditional, core element of state law. *See, e.g., In re Burrus*, 136 U.S. 586, 593-94 (1890); *see also Ankenbrandt v. Richards*, 504 U.S. 689, 701-704 (1992) (reaffirming domestic relations exception to diversity jurisdiction as applied to divorce, alimony and custody orders); *Thompson v. Thompson*, 484 U.S. 174, 186-87 n.4 (1988) (referring to "longstanding tradition of reserving domestic-relations matters to the States"). The argument therefore cannot be disregarded that protection of the institution of marriage, which is certainly one of the key purposes (if not, *the* key purpose) of the criminalization of adultery, is appropriately left (in our system of federalism) to the states . . . even for military personnel. This is not to suggest that Congress could not constitutionally reach such conduct in the exercise of one or another of its grants of authority, *cf. United States v. Nichols*, 928 F. Supp. 302, 305 (S.D.N.Y. 1996) (Child Support Recovery Act of 1992; Commerce Clause) (collecting cases); 18 U.S.C. §§ 2421-22 (1994) (Mann Act), but rather, simply to raise for discussion the question whether such conduct *ought* to be federal-

ized—here, militarized—as a prudential or policy matter. *See generally* Note on Federal Jurisdiction in Matters of Domestic Relations, in Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 1330-33 (4th ed. & Supp. 1996).

In framing its recommendations, the senior review panel should secure and make available to the public data on the incidence of adultery

It is also critical to have in hand a careful analysis of the way the military justice system has actually dealt with adultery cases. NIMJ recommends that all reported appellate military cases be accessed through the available computer databases and summaries prepared according to a standard format for the five-year period from 1992 to 1996. The analysis should include such matters as: level of court-martial (general, special, summary), number of incidents of adultery, other charges presented (such as, most notably, fraternization), pay grade of the accused, circumstances by which the offenses came to official attention, pleas, and adjudged and approved sentences. Similar information should be obtained, in a format that would facilitate comparisons, for cases handled under Article 15, by administrative discharge, or by non-Article 15 censure. The criminal investigative services' records should also be examined for cases closed following investigation and without disciplinary or administrative action. Similarly, decisions of the service secretaries should be analyzed systematically to see how the secretaries' plenary power has been employed in this area.

NIMJ recommends that the senior review panel obtain and consider the laws, policies and actual practice of other democratic countries with respect to the treatment of adultery by military personnel. It is our understanding that efforts to penalize British Army personnel for adultery have been met with the observation that the Prince of Wales, who serves as Colonel of some number of regiments, appears to have admitted that he has committed adultery. We further understand that adultery is not criminalized under Israeli military law.

Assuming that military personnel policy should continue to concern itself in any way with adultery, the following questions should be addressed, whether by the senior review panel, in the subsequent public hearing, or in a congressional hearing:

1. Should adultery be a basis for discharge or compulsory retirement for those who are retirement-eligible, but not an offense under the UCMJ? If so, should the ensuing discharge be stigmatizing (general, other-than-honorable)?

2. Should adultery remain an offense but subject to prosecution only under Article 15?

3. Should attempted adultery be an offense?

4. Are there ways to channel the exercise of discretion in dealing with adultery, especially given the broad public and congressional sense that discretion has seemed to have been essentially unfettered in the past)? For example:

a. Should there be a statute of limitations for taking adverse personnel action outside the UCMJ? *I.e.*, should allegations relating to events more than *n* years in the past be disregarded for all purposes? Does the absence of an administrative statute of limitations encourage a culture of dissembling, and condemn one-time transgressors who may well have reformed and now fully honor their marital vows to a lifetime of fear and uncertainty that they may be unmasked at any moment by an individual who pursues a private vendetta that in no practical way serves the government's interests? Should there be a sanctuary arrangement for those who self-refer to military social service/family counseling programs?

b. Should there be a requirement that an individual be warned in writing to terminate an apparent adulterous relationship as a prerequisite to military criminal or administrative proceedings?

c. Should adultery be subject to military prosecution only if it is criminal under the law of the state in which it occurs? For example, assuming the discredit clause (clause 2) of Article 134 applies beyond retired enlisted personnel (who were its intended targets, *see* Homer E. Moyer, Jr., *Justice and the Military* § 5-132, at 990 (1972) (quoting The Judge Advocate General of the Army)), should the Manual (and therefore the *Benchbook*) be modified to provide that adultery will be an offense under that clause only if it is illegal in the state in which it occurs? Given the erosion of public support for the criminalization of adultery (the Army Court of Military Review suggesting that it has become "alien to the civilian's concept of criminal law," *United States v. Green*, 39 M.J. 606, 609 (A.C.M.R. 1994)), should the general UCMJ preference for not recognizing state-by-state variations in law, *see* Moyer, *supra*, § 5-162, at 1004 (quoting Felix Larkin), yield in the case of adultery? If, as we assume, that preference remains as strong as it was when the Code was enacted—and NIMJ does not believe the military offense should turn on the law of the state in which the conduct occurs—the government would be left with an all-or-nothing choice: keep adultery as an offense *wherever* it may be committed, or discard it, effectively leaving the matter to state authorities.

d. Should adultery be subject to military prosecution (or, for that matter, administrative action) only if it would be service-connected under the factors that were identified in *Relford v. Commandant*, 401 U.S. 355 (1971)? *I.e.*, should a service-connection requirement be reimposed for adultery by Manual provision or legislation as a matter of policy judgment even though the Constitution does not impose such a requirement? *See Solorio v. United States*, 483 U.S. 435 (1987). If so, should the rules be subject to *ad hoc* determination or stated with particularity in a regulation or statute? As applied to adultery, the *Relford* factors may well sweep too broadly in light of current national values, but to the extent that the broad approach of having a checklist would at least reduce the kind of broad discretion that has troubled many thoughtful observers, it merits attention. It may also be worthwhile to review the *en banc* decision of the Air Force Court of Military Review in *United States v. Johanns*, 17 M.J. 862 (A.F.C.M.R. 1983), *aff'd in part & rev'd in part*, 20 M.J. 155 (1985), *cert. denied*, 474 U.S. 850 (1985). There, the majority affirmed an officer's adultery conviction where the other party to the relationship was not only an enlisted member of the Air Force, but was married to a noncommissioned officer permanently assigned to the same base. In discussing fraternization and "conduct unbecoming," the majority held that "voluntary, private, and non-deviate" heterosexual relations between unmarried persons could not be prosecuted absent "exacerbating circumstances" such as a military relationship of command or supervision. 17 M.J. at 868-69. Of course, the more one focuses on such connections in the adultery setting, the more the offense looks like fraternization, and presumably the less the need for a separate adultery offense to remain on the books.

e. Article 134 (clause 2) requires direct prejudice to good order and discipline. To what extent will this requirement be met by the complaint of a cuckolded spouse who is not in the service? *United States v. Perez*, 33 M.J. 1050 (A.C.M.R. 1991). What if no one knew of the affair until the military made it public? Query whether the evidence in *Green* satisfied the "directness" requirement. If not, greater particularity in the Manual is indeed required. *See* ¶ 4d *supra.*

5. Should adultery be an offense only in the case of commissioned officers (*i.e.*, only under Article 133)? *Cf.* 1 Francis A. Gilligan & Fredric I. Lederer, *Court-Martial Procedure* § 3-52.20 (1991) (accused's status as officer as factor to take into account in determining disposition of charges). [In their 1995 Cumulative Supplement, Colonel Gilligan and Professor Lederer (at 11 & n.67.1) observe: "Ironically, there is significant reason to believe that flag officers (generals and admirals), and perhaps colonels and navy captains, are routinely permitted to retire when they commit offenses for which other personnel would be tried."] Should it be an offense under Article 134, but only as to noncommissioned and petty officers?

6. Should the permissible maximum punishment for adultery extend to dismissal/punitive discharge?

Finally, a word is in order on the subject of requests to retire or resign in lieu of court-martial. As you know, such requests have figured in several recent cases that have troubled many members of the public as well as Congress. They potentially distort the military criminal justice process and weaken its moral force. As a practical matter, if a command believes that the threat of a court-martial may lead to such a request, it may threaten a trial even though the offense charged may be one that is not likely to produce a dismissal, punitive discharge or confinement. The sheer possibility of the stigma of a federal conviction may lead the offender to relinquish enormously valuable—and *earned*—pension and other benefits. The effect is the imposition of draconian sanctions effectively outside the legal process and all of the military justice safeguards Congress has carefully put in place. This is not an argument against, for example, pretrial agreements. Nor is it to suggest that a "Chinese wall" must seal off military justice and administrative decision making from one another. The danger, however, of overreaching through the criminal pursuit of matters that may be marginal from the standpoint of fostering good order and discipline cannot be disregarded. Like the hardy perennial of overpleading, it detracts from the dignity and integrity of the military justice system. NIMJ recommends that the legal and practical aspects of the process be carefully examined as part and parcel of the current inquiry, and that any proposal that is issued for public comment extend to this key aspect of the recent spate of high-visibility cases.

I hope these views will be helpful to you and the senior review panel. NIMJ will carefully review any proposal the Department may frame on this important matter, and I expect that we will ask to participate in the planned public hearing. I hope that rather than simply receiving statements from concerned citizens, that hearing will encourage substantial give-and-take. Given the nature of the issues, I recommend that arrangements be made for panel presentations and that special efforts be made to enlist the active participation of law professors knowledgeable in the field of military law.

NIMJ depends on your tax-deductible contributions. If you find the *Gazette* worthwhile, please give as generously as you can. If you would like to receive the *Gazette* by e-mail, make sure to send us your address. We welcome your comments and suggestions.

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NIMJ

MILITARY JUSTICE GAZETTE

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BOOKSHELF

Son Thang: An American War Crime, by LtCol **Gary D. Solis**, USMC (Ret), (Naval Institute Press 1997), is a book to be read for education and pleasure. LtCol Solis served two Vietnam tours before going to law school and concluded his Marine Corps career by writing the official history of the Marine judge advocates in Vietnam. His latest book, about "the Corps' My Lai" is informed by those experiences. The story is enthralling at the human level and has much to teach about trial tactics and the defining role a military judge may play. Four Marines were charged. They were tried in sequence, and each case raises the suspense level another notch. **James Webb**, later Secretary of the Navy, lawyer and author, plays a significant role, as does **Oliver North**, who came back to Vietnam in order to testify for the defense. The outcome of the final case is simply amazing. Although absolutely accurate, the Marine Corps Gazette would neither review the book nor carry ads for it because it suggests that the behavior of one commander was less than exemplary. I understand it is for sale at Marine Corps and Navy Exchanges. Two thumbs up.

Michael F. Noone
Catholic University Law School

Byrne, Edward M., *Military Crimes: Desertion*, and *Military Crimes: Desertion Quickfinder* (-Lawquest Pub. Co., 5114 Althea Dr., Annandale, VA 22003-4146, 1997, $249/set)

Filbert, Brent G., and **Kaufman, Alan G**., *Naval Law: Justice and Procedure in the Sea Services* (3d ed. 1997) (Naval Institute Press, December 1997, $35)

Filbert, Brent G., *Man (and Woman) Can Live on Bread (and Water)*, Naval Institute

Gieck, Jack, *Lichfield: The U.S. Army on Trial* (University of Akron Press 1997) (World War II trial of guards for maltreatment of Army stockade prisoners)

Morris, Madeline, *By Force of Arms: Rape, War, and Military Culture*, 45 DUKE L.J. 651 (1996)

Whittingham, Richard, *Martial Justice: The Last Mass Execution in the United States* (Naval Institute Press, October 1997, $16.95) (execution of 7 German POWs at Ft. Leavenworth for murder of another POW; largest single execution in U.S. in 20th Century)

Zillman, Donald N., *Where Have All the Soldiers Gone? Observations on the Decline of Military Veterans in Government*, 49 ME. L. REV. 86 (1997)

Zillman, Donald N., *Book Review, Environmental Protection and the Mission of the Armed Forces*, 65 GEO. WASH. L. REV. 309 (1997)

INTER-UNIVERSITY SEMINAR ON ARMED FORCES AND SOCIETY

IUS's Biennial International Conference will be held October 24-26, 1997, at the Tremont Plaza Hotel, 222 St. Paul Pl., Baltimore, MD 21202. Preregistration closes on September 21, but we understand IUS will accept walk-in registrations as well. At 2:00 p.m. on Saturday, October 25, NIMJ advisory board member Dean **Don Zillman** will be the presenter for a panel on "Theory Building in Armed Forces and Society." At 10:30 a.m., on Sunday, October 26, there will be a panel on "Race and the Administration of Military Discipline," chaired by **Ronald M. Joe**, Florida A&M University. Topics to be addressed include: "Race and Procedural Justice: Administration of Courts-Martial in the U.S. Army," "Crimes and Punishment: Blacks in the Army's Criminal Justice System," and "Race and Administration of Article 15 in the Army and Air Force."

INTERNET

Proceedings, June 1997, at 76-78 (bread-and-water, said by some to be a "barbarous relic of earlier days," "remains an effective, safe, constitutional penalty")

The executive summary of the - Commission of Inquiry into misconduct by Canadian Forces airborne personnel in Somalia is now available on the Internet:

www.ingenia.com/dnd/vol0/vol0e.txt

> "Discipline, whose chief purpose is to harness the capacity of the individual to the needs of the group, is initially imposed through the rigours of training. The ultimate goal of military discipline is to lead individual soldiers to the stage where they control their own conduct and actions. The probability of success for a particular mission will vary in proportion to the extent to which there is good discipline among soldiers. In the lead-up to the deployment, as well as in Somalia itself, the state of discipline among the troops was alarmingly substandard—a condition that persisted without correction."

NIMJ

On July 10, NIMJ submitted detailed comments on the proposed MCM changes that appeared in the May 6 *Federal Register*, 62 FED. REG. 24,640. A copy is enclosed with this *Gazette*.

Advisory board member **Ronald W. Meister** has called our attention to *United States v. McAllister*, No. 96-1591 (2d Cir. July 17, 1997), holding that it was not double jeopardy for the Federal Government to prosecute a GI in district court for driving while intoxicated after Army authorities reprimanded him, reduced him from corporal to specialist, barred him from reenlisting, and suspended his driving privileges.

NIMJ

The National Institute of Military Justice is a District of Columbia not-for-profit corporation. NIMJ has no dues but we hope you will consider making a tax-deductible contribution as part of your program of charitable giving. 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*.

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

MILITARY JUSTICE GAZETTE

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E STREET

Among the issues argued in *United States v. Stockman*, No. 96-0818/MC on October 7, 1997 was "whether there is a rational basis for the distinctions among non-commissioned warrant officers, commissioned officers, and enlisted persons whereby the only non-punitive separation available to a non-commissioned warrant officer is a dishonorable discharge." This question was specified by the Court of Appeals.

The Court will hear argument on the following days in 1998: January 6, 7 and 8, February 3, 4 and 5, March 3, 4, and 31, April 1 and 2, May 12, 13 and 14, and June 2, 3 and 4. The Judicial Conference is scheduled for May 7-8. The Court's home page is www.arm-for.uscourts.gov. It's a great way to get decisions promptly and for free.

1997 CIVILIAN PRACTITIONERS' DIRECTORY: ADDENDA AND CORRECTIONS

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BOOKSHELF

Thomas R. Burns, *Aversion to Honor: A Tale of Sexual Harassment Within the Federal Government* (New Falcon Publications, Tempe, AZ) (a novel set in the Indian Health Service, told from the perspective of a member of the U.S. Public Health Service Commissioned Corps)

INTERESTING CASES

NIMJ advisory board member **Ronald W. Meister** has called to our attention the November 15, 1997 decision in *Matter of Crowley*, Civil No. 97-6547 (E.D.N.Y.). Judge **Arthur D. Spatt** ruled that Crowley, a midshipman at the U.S. Merchant Marine Academy, had a limited right to counsel in an expulsion proceeding because of the danger that he might compromise his right against self-incrimination. According to the ruling, Crowley could confer with and obtain advice from his civilian counsel, but counsel would not be permitted to participate in the hearing. The court rejected the Academy's insistence that Crowley's legal adviser be a non-lawyer member of the faculty.

In *Chandler v. United States Army*, 125 F.3d 1296 (9th Cir. 1997), the Ninth Circuit reversed a lower court's grant of summary judgment for the Army. The case involved the use of wiretap evidence in disciplinary and a-dministrative proceedings against an Army captain who was said to have had an improper personal relationship with an enlisted woman. The court held that the Army could not use the wiretap fruits and that summary judgment was improper because there were genuine issues of material fact concerning whether a second investigation relied on information obtained in

the wiretap.

The Defense Department received only a handful of substantive responses to its request for comments on current military justice guidance on adultery. [NIMJ's comments have already been circulated to *Gazette* readers; additional copies are available on request.] Several organizations noted that the time allowed for comments was too short, but said they would comment later in the process. The *Servicemembers Legal Defense Network* suggested as a "step in the right direction" that "DoD officials should decriminalize adultery and most other adult consenting sexual activities to the extent their powers permit and, where necessary, seek the assistance of Congress and the President to this end." SLDN wrote that "[t]he priority for commanders, prosecutors and investigators should be to police sexual abuse and abuse of authority, not consenting sex that involves no coercion or power relationship. This priority would allow the services to prosecute rape and undesirable relationships that truly undermine military readiness, such as those between drill sergeants and recruits. It would defuse perceptions of bias that result from the seemingly selective imposition of harsh criminal sanctions This step would make the military - justice system more consistent with public opinion and federal and state laws, where the majority of criminal statutes against consenting adult activities have been repealed and the rest are not enforced. Finally, it would allow military leaders to concentrate on their primary mission of protecting our national security interests."

The ABA's Standing Committee on Armed Forces Law submitted extensive comments. Among them: "Not all adulterous acts are violations of Article 134." "As a matter of policy, senior personnel cannot appear to engender sexual relationships with the spouses of junior personnel with impunity, and the UCMJ should be available to enforce that policy. Likewise, the Article 134 factors would be present when the adultery is linked with another offense, like fraternization." "The Committee questions whether [referring to *United States v. Green*, 39 M.J. 606 (A.C.M.R. 1994)] the mere occurrence of the act (not otherwise criminal) in the barracks, even if committed by a noncommissioned officer, should demonstrate sufficient proof of conduct to the prejudice of good order and discipline."

ADULTERY

The National Women's Law Center also submitted detailed comments. NWLC's three main recommendations were: "Adultery should be decriminalized and subject only to administrative and other noncriminal sanctions. . . . If an adulterer's conduct does not negatively affect his or her job performance or the job performance of others in the armed services, it should not be subject to criminal or noncriminal sanctions. . . . Investigators and advisors outside the chain of command should be utilized in cases involving sexual misconduct charges, such as adultery offenses, as well as in equal opportunity cases." NWLC noted that "the severe penalties for adultery under Article 134 may actually tend to discourage complaints by persons who feel that unit efficiency is being compromised by adulterous behavior, but do not feel that this effect is extreme enough to merit imposition of such harsh [criminal] penalties." "Under the Center's proposed standard, the Defense Department would expressly abandon the local law/community standards formulation used in the case law, standardizing the code of military conduct required of service members, regardless of their location."

NIMJ

On November 17, 1997, NIMJ's **Eugene R. Fidell** and **Kevin J. Barry** presented the second annual "Basic Training" on military law, as part of the National Veterans Legal Service Program's program for congressional staff. Approximately 50 Hill staffers attended. In charge of the session was NVLSP's **Ron Abrams**.

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Happy Holidays! Please consider making a tax-deductible contribution to NIMJ as part of your year-end program of charitable giving. Please also 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 wel-

come suggestions and information about coming events and useful web sites for inclusion in the *Gazette*.

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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 jaassn@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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